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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: SC16-1420
L.T. Case No.: 15-12816

Altman Contractors, Inc.,

Appellant

v.

Crum & Forster Specialty Insurance Company,

Appellee

On Certified Question from the United States Court of Appeals
for the Eleventh Circuit

**REPLY BRIEF ON THE MERITS**
**OF APPELLANT, ALTMAN CONTRACTORS, INC.**

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## PRELIMINARY STATEMENT

In this Brief, record citations are to Appellant's Appendix filed on October 12, 2016, with its Initial Brief on the Merits. Citations beginning with "DE" refer to the documents filed with the District Court below. Citations beginning with "CA" refer to documents filed in the U.S. Court of Appeals for the Eleventh Circuit.

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# ARGUMENT

## I. Both the Statutory Scheme of Chapter 558 and the Policy Language Support a Determination that the Chapter 558 Process is a Civil Proceeding and, therefore, a Suit under the Policies

### A. The Chapter 558 Process is a Civil Proceeding because it is a Required Part of Construction Defect Litigation and it is Tied Directly to Any Litigation that Follows the Process

C&F's arguments mischaracterize the Chapter 558 Process and attempt to position it as a voluntary process, wholly separate from the litigation that may follow, and that the parties may supposedly participate in at their choosing.[1] To the contrary, Chapter 558 is a mandatory dispute resolution process that also serves as the first step in any construction defect litigation.

The Florida legislature created a detailed and mandatory statutory scheme, designed not only to facilitate the repair of defects and settlement of claims (thereby reducing litigation), but to function as the gateway to the courthouse if the dispute remains unresolved. The statute itself describes a detailed, thorough, and compulsory process, mandated by the legislature, which the parties are required to

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[1] *See e.g.* Answer Br. at 13, Answer Br. at 14-15, and Answer Br. at 21 (claiming that it is "entirely up to the contractor if it wishes to engage" in the process and that it can ignore its statutory obligations if it "does not desire to participate"). C&F wrongly asserted that Chapter 558 requires nothing more than the service of a notice before filing suit: "[t]he ***only*** mandatory condition precedent […] is that the claimant must serve a written 558 ***notice*** on the contractor." (Answer Br. at 21, emphasis original.)

engage in.[2] C&F asks this Court to ignore the foregoing mandatory process and render Chapter 558 largely meaningless and optional. But, the legislature chose to include mandatory language in the statute. By way of example: "[a] claimant ***may not*** file an action subject to this chapter without first complying with the requirements of this chapter" (§558.003, Fla. Stat., emphasis added).[3] This mandatory language should not be ignored.[4]

C&F then attempts to support its argument with a tortured interpretation of § 558.004(6), which provides that if the contractor disputes the claim or does not respond within the time provided, "the claimant may, without further notice,

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[2] This includes, but is not limited to: service by the owner of a detailed notice of claim (§ 558.004(1)); inspection of the alleged defects and a detailed procedure for destructive testing (§ 558.004(2)); written notice by the contractor to its subcontractors and suppliers who must then serve a written response (§ 558.004(4)); a written response by the contractor (§ 558.004(5)(a)-(e)); a written response from the owner accepting or rejecting the settlement offer § 558.004(7); and provisions for the manner in which repairs are to be made § 558.004(8)).

[3] *See also* 558.004(5): the contractor "must serve a written response to the claimant"; and 558.004(4) stating that a subcontractor or supplier who receives a notice of claim "must serve a written response to the person who served a copy of the notice of claim."

[4] Courts in Florida find that the words "must" and "shall" connote that a statute is mandatory and requires strict compliance. *See Chalfonte Condo. Apt. Ass'n, Inc. v. QBE Ins. Corp.*, 526 F. Supp. 2d 1251, 1256 (S.D. Fla. 2007) ("it is clear that the legislature, by using mandatory language, intended for the statute to be strictly complied with"); *see also In re Tennyson*, 611 F.3d 873, 877 (11th Cir. 2010) ("the use of the word 'shall' 'normally creates an obligation impervious to judicial discretion'").

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proceed with an action against that person for the claim." (*See* Answer Br. at 21.) The purpose of § 558.004(6) is to protect the right of the owner to have its day in Court in the event that the contractor ignores the statute's mandate. It is not an invitation for the contractor to disregard its statutory obligations, as C&F wrongly argued.

C&F wrongly asserted that Chapter 558 is not tied to the litigation because the adjudication of liability for money damages occurs after the Chapter 558 process. (*See* Answer Br. at 15.) There is no support for the assertion that the adjudication of damages is the appropriate litmus test. Chapter 558 contains numerous provisions that apply directly to the subsequent litigation. *See e.g.* § 558.003, Fla. Stat.; § 558.00(2), Fla. Stat.; § 558.004(8), Fla. Stat.; § 558.004(9), Fla. Stat; § 558.004(10); and § 558.004(15), Fla. Stat. [5] Of course, the claimant may proceed to litigate ***only*** those construction defect claims "that were noticed and for which the claimant has complied with this chapter." § 558.004(11). This, standing alone, ties the 558 Process to the subsequent litigation. *See Clarendon*

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[5] The 2015 amendments to Chapter 558 further demonstrate that the process is tied to the subsequent litigation by acknowledging the process as "confidential settlement negotiations" (§ 558.001, Fla. Stat. (2015)) and by allowing a party to claim privilege over documents (§ 558.004(15), Fla. Stat. (2015) ("[a] party may assert any claim of privilege recognized under the laws of this state")). Thus, the legislature has sought to increase the protections available to the parties in subsequent litigation.

*Am. Ins. Co. v. StarNet Ins. Co.*, 113 Cal. Rptr. 3d 585, 592 (Cal. Ct. App. 2010), review granted, 117 Cal. Rptr. 3d 613 (Cal. 2010), review dismissed, 121 Cal. Rptr. 3d 879 (Cal. 2011) (construing California's Calderon Act and finding that it is a suit under identical policy language).

C&F urged this Court to reject the reasoning of *Clarendon* and attempted to distinguish the Calderon Act from Chapter 558 on the basis that Chapter 558 does not provide for a dispute resolution facilitator and that it does not bind the parties to any settlement amount. (*See* Answer Br. at 26.) C&F's arguments incorrectly overstate both the binding effects of the Calderon process and the differences between the Calderon Act and Chapter 558. Although the Calderon Act requires the parties to select a "facilitator" and participate in a "dispute resolution process," the facilitator has no authority to make any kind of ruling or render any decision, and nothing in the Calderon Act requires the parties to reach any settlement. *See* Cal. Civ. Code § 1375(q). The Calderon Act simply calls for a non-binding facilitated mediation. If no settlement is reached, the owner files suit.[6]

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[6] *See* Cal. Civ. Code § 1375.05(a) ("if the parties have not settled the matter, the association or its assignee may file a complaint in the superior court in the county in which the project is located"). Much like Chapter 558, the Calderon Act "encourages settlement by providing a procedure to lead the parties to the waters of compromise; it does not make them drink." *Hebden v. Roy A. Kunnemann Const., Inc.*, 2 So. 3d 417, 419 (Fla. 4th DCA 2009) (construing Chapter 558 and finding

Further, the *Clarendon* court noted only two respects in which the Calderon process binds the parties. First, the statute allows for inspection and testing of the project and provides that a party who received prior notice of the inspection and testing may not perform *additional* testing. *See* Cal. Civ. Code § 1375.05(c). Second, "[a]ny subcontractor or design professional who had notice of the facilitated dispute resolution conducted under Section 1375 but failed to attend or attended without settlement authority, shall be bound by the *amount* of any settlement reached in the facilitated dispute resolution." Cal. Civ. Code § 1375.05(d) (emphasis added). Although the party who failed to appear at the mediation cannot dispute the total *amount* of the settlement reached at the mediation, that party may nonetheless "introduce evidence as to the allocation of the settlement." *Id.* [7] Thus, the consequences of these provisions and their "binding" nature are, in fact, limited with very minimal practical impact (if any) and, contrary to C&F's argument do not meaningfully distinguish it from Chapter 558. Similarly, the Colorado Court of Appeals in *Melssen v. Auto-Owners, Ins.*, 285 P.3d 328 (Colo. Ct. App. 2012) found that Colorado's pre-lawsuit notice and

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that claimants did not waive their right to set-off by rejecting contractor's offer to repair).

[7] For further clarity, the statute provides that "[t]he binding effect of this subdivision shall in no way diminish or reduce a nonsettling subcontractor or design professional's right to defend itself or assert all available defenses relevant to its liability in any subsequent trial." *Id*

repair process is an "alternative dispute resolution proceeding" under policy language identical to that in the subject Policies.

**B. C&F May Not Limit the Broad Definition of Suit**

The policies define the term "suit" broadly, as a "civil proceeding", which is not specifically defined anywhere in the Policies. Rather the Policies provide a non-exhaustive list of examples of the types of civil proceedings covered. According to C&F, the term civil proceeding "obviously refers to a lawsuit over which a judge presides." (Answer Br. at 16.) This assertion is entirely unsupported by the actual language of the Policies, which does not state anything remotely close to this purported requirement, let alone make it "obvious." This is a limitation that C&F is now attempting to impose. Nothing prevented C&F from defining these operative terms more narrowly in the Policies. C&F cannot now rewrite the Policies. [8]

In support of its attempt to impose a narrow definition of civil proceeding, C&F urges this court to apply the definition of civil proceeding contained in the

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[8] This court has held that "when an insurer fails to define a term in a policy, … the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *State Farm First & Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998), *quoting State Comprehensive Health Ass'n v. Carmichael*, 706 So.2d 319, 320 (Fla. 4th DCA 1997).

10th edition of *Black's Law Dictionary* (hereinafter "*Black's*").[9] This definition was not in use when the Policies were in effect so it cannot be argued that the parties entered into the Policies with this definition in mind. Moreover, the 9th edition of *Black's* was the edition relied upon by this Court in determining the definition of proceeding in *Raymond James Fin. Serv., Inc. v. Phillips*, 126 So. 3d 186, 190-91 (Fla. 2013) (concluding that "[w]hereas civil actions may be limited to court cases, a proceeding is clearly broader in scope"). Consequently, there is no basis for applying the definition of "civil proceeding" set forth in the 10th edition of *Black's* to the definition of these Policies, nor does C&F provide one. Further, even if this Court were to adopt the definition offered in the 10the edition of *Black's*, Chapter 558 would nonetheless be a suit. As already noted herein and in ACI's Initial Brief, the Chapter 558 process is directly tied to and inextricably intertwined with any construction defect litigation. Thus, it fits within the definition of civil proceeding in *Black's* 10th edition.

C&F then argued that the Chapter 558 process does not fall within subcategory (b) of the definition of suit which includes any other ADR proceeding to which the insured submits with C&F's consent. (*See* Answer Br. at 18.) As

[9] Defining "civil proceeding" as "[a] judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in a dispute between litigants in a matter relating to torts, contracts, property, or family rights." *Black's Law Dictionary* (10th ed. 2014) 300.

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already noted by ACI in its Initial Brief, the term "suit" in the Policies is broad and includes various forms of ADR including, but not limited to, the two specific types listed in the policies.[10] Chapter 558 is a type of ADR proceeding that falls within the broad definition of "suit," but it is not one of the types that require C&F's consent because it is not voluntary on the part of the insured.

C&F incorrectly claimed that in order for a process to constitute a proceeding, it must include a tribunal or agency to provide redress. (*See* Answer Br. at 18.). For this proposition, C&F relies on a portion of the definition in *Black's* 9th edition, but ignores where this edition of *Black's* further defines "proceeding" as including, *inter alia*, "[a]n act or step that is part of a larger action" and provides that "[i]t is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action […].'" *Black's Law Dictionary* 1324 (9th ed. 2009) (quoting Edwin E. Bryant, *The Law of Pleading Under Codes of Civil Procedure 3-4* (2d ed. 1899)).

Additionally, this Court in *Raymond James* cited *Merriam-Webster's Dictionary of Law* (hereinafter "*Merriam-Webster's*"), which broadly defines a "proceeding" as "'a particular step or series of steps in the enforcement,

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[10] *See Alligator Enterprises, Inc. v. General Agent's Ins. Co.*, 773 So. 2d 94, 95 (Fla. 5th DCA 2000) (noting that "includes" is "used most appropriately before an incomplete list of components").

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adjudication, or administration of rights, remedies, or regulations.'" *Raymond James*, 126 So. 3d at 190, n. 4 (quoting *Merriam-Webster's Dictionary of Law* 387 (1996)). C&F argues that Chapter 558 does not fall within this definition because "it does not provide for the enforcement, adjudication, or administration of any rights, remedies, laws, or regulations." (Answer Br. at 18.) To the contrary, Chapter 558 is the sole means by which a claimant may enforce its right to recover for construction defects. § 558.001, Fla. Stat.[11]

C&F next argues, without support, that Chapter 558 does not fall within the definition of suit because it does not seek damages. According to C&F, the "process addresses ***repairs***, not damages." (Answer Br. at 19.) This assertion is somewhat surprising since repair of the alleged defects is clearly not the only means of resolving the dispute, and the statute has numerous provisions addressing money damages.[12] C&F then asserts that because Chapter 558 does not provide for "a binding determination of damages against the insured" it cannot be considered a proceeding under the policies. (Answer Br. at 19.) This argument lacks support and

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[11] Further, a contractor who is sued for construction defects may enforce its right to engage in the settlement process by moving for a stay of litigation until the process is complete. § 558.003, Fla. Stat.

[12] The statute defines a claimant as one asserting a "claim for damages" (§ 558.002(1)); the notice of claim must state the "damage or loss resulting from the defect" (§ 558.004(1)); and allows the contractor to "compromise and settle the claim" by making "monetary payment" (§ 558.004(5)).

is likewise surprising given that one of the most common forms of ADR (which per the Policies is a proceeding) is mediation, which does not necessarily result in a binding determination of damages against any party. Thus, C&F's argument on this point is in conflict with the terms of its own Policies and should be disregarded.

As already noted, Chapter 558 is a form of ADR within the meaning of the Policies that did not require C&F's consent because it is compulsory for contractors. However, to the extent that Chapter 558 falls under subcategory (b) of the policy definition of suit, C&F's argument that its appointment of counsel for ACI did not constitute consent and "did not transform the Chapter 558 notice and opportunity to repair process into a 'suit'" misses the mark. (Answer Br. at 28.) The Chapter 558 Process is a "suit" because it is a "civil proceeding", and more specifically, a form of ADR. The appointment of counsel did not transform the nature of the process; rather, it demonstrates C&F's consent to ACI's participation in the process as an ADR proceeding. After C&F learned of the Chapter 558 Notices and ACI's participation in the process, not only did C&F fail to object, it appointed counsel. Moreover, as recognized by the *Melssen* court, "consent may also be deemed implied or an insurer may waive a consent requirement in a policy." *Melssen*, 285 P.3d at 334. C&F impliedly consented or waived consent when it issued the policies to an insured subject to the Chapter 558 Process.

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Although ACI believes that the Chapter 558 process clearly falls within the broad definition of suit under the Policies, at best C&F's arguments could evidence an ambiguity, in which case this Court should construe the Policies liberally in favor of the insured. *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) (hereinafter "*Anderson*").

C&F wrongly asserted that "given the dearth of relevant Florida authority on the question" the Eleventh Circuit "simply deferred the question to this Court". (Answer Br. at 30.) In addressing the issue of possible ambiguity, the Eleventh Circuit stated, "[h]ere, there are reasonable arguments presented by both sides as to whether the Chapter 558 process constitutes a 'suit' or 'civil proceeding' within the meaning of the CGL policies issued by C&F." (CA 6 at 14-15.) If the relevant provisions are susceptible to more than one reasonable interpretation, as acknowledged by the Eleventh Circuit, an insurance policy is considered ambiguous. *See e.g.*, *Anderson*, 756 So. 2d at 34. Likewise, "where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer." *CTC Development*, 720 So. at 1076. If this Court finds the policy terms at issue susceptible to more than one interpretation, it should interpret them in favor of the insured and answer the Certified Question in the affirmative.

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## II. C&F Failed to Offer Compelling Public Policy Arguments

One of the stated policy goals of Chapter 558 is to "reduce the need for litigation" of construction defect claims. § 558.001, Fla. Stat. Although it may initially seem counterintuitive to say that having insurers defend contractors with attorneys during the Chapter 558 process is a means of avoiding litigation, a better understanding of the process may assist to explain the dynamic. The process is almost always initiated when the developer or condominium association engages lawyers (often working on a contingency basis), as well as consultants who specialize in conducting forensic analyses of buildings. Those lawyers and consultants generate lengthy and detailed reports of alleged defects, often containing hundreds (if not more) items.[13] There now exists a cottage industry of attorneys and consultants specializing in pursuing claims for construction defects. In order to effectively respond to the notice and participate in the Chapter 558 process, contractors need counsel and consultants, including engineers and architects. This can be costly, and without the financial assistance of the carriers, many contractors will be unable to effectively respond or choose not to because after the 558 Process is complete and the lawsuit filed they will have insurance for legal and consulting fees. C&F's argument creates an alternative incentive to force these claims into litigation. This will make the 558 Process less effective and work

[13] The engineering report in the instant case contained 792 line items of alleged defects. (DE 26-4 at 6-91.)

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opposite the stated goal of avoiding litigation. Insurer participation in the 558 Process will result in more settlements and fewer lawsuits. C&F wrongly focuses on the cost of insurance. While keeping premiums down is good for insureds, that is not a stated purpose of Chapter 558. But, an increase in the number of settlements through the 558 Process would actually bring down the cost of insurance premiums. Providing contractors the financial resources to retain lawyers and consultants to guide them through the process increases the likelihood of settlements, reduces lawsuits, and reduces premiums. This is why many carriers in Florida provide a defense through the 558 Process. It makes good business sense. The policy of Chapter 558 is bolstered by providing contractors and other respondents access to a defense from their carriers.

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C&F devoted a significant portion of its public policy argument to discussing the 2010 amendments to CDARA[14], whereby the Colorado Legislature required insurers to defend contractors through the pre-lawsuit notice and repair process. C&F wrongly ignored the fact that the CDARA amendments were part of the newly enacted Construction Professional Commercial Liability Insurance Act (hereinafter, the "Act") that also required carriers to defend the subsequent

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[14] "CDARA" refers to the Construction Defect Action Reform Act, which is Colorado's notice and repair statute.

construction defect lawsuit. Thus, this was a significant change in the law.[15] C&F cannot legitimately compare the impact of the Act and the amendments to CDARA to what would happen in Florida if this Court required carriers to defend contractors through the 558 Process. Prior holdings of this Court already clarified that contractors are entitled to a defense and coverage for construction defects in the subsequent lawsuit. Thus, what happened in Colorado is not a fair analogy in the first instance. Despite this, C&F wrongly claimed that when the Colorado Legislature required insurers to defend contractors in the notice and repair process, it caused an increase in construction costs, which negatively impacted the production of affordable housing. (See Answer Br. at 36.) This is a gross mischaracterization of the law and its effect and, as stated, an unfair analogy because the change in the law at the time of the amendment to CDARA did not deal solely with the pre-lawsuit notice and repair statute.

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[15] The Act was in response to *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.,* 205 P.3d 529 (Colo. App. 2009), holding that faulty workmanship does not constitute an "occurrence" and, hence, that construction defect claims generally do not fall within a general liability policy's insuring agreement. Insurance carriers in Colorado began to "deny any duty to defend or indemnify Colorado construction professionals against claims arising from construction-related defects." Ronald M. Sandgrund & Scott F. Sullan, H.B. 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims, 39-AUG Colo. Law. 89, 90 (2010).

Further, C&F relied upon a study commissioned by the Denver Regional Council of Governments titled "Final Report of the Denver Metro Area housing Diversity Study."[16] The study concluded that after the passage of the Act, a number of carriers had left the state, which resulted in higher premiums. Significantly, the study did not conclude that the alleged higher premiums were specifically the result of insurer coverage for the pre-lawsuit notice and repair process. Rather, the alleged increased costs were attributed to construction defects liability generally, including litigation, making what happened in Colorado an unfair comparison and in most respects irrelevant to the issue presented here (as stated above). The study fails to cite any data to support its conclusions and instead relies upon interviews with insurance brokers. Further, the study has been subsequently criticized, whicdh C&F failed to mention.[17] Thus, the study cited by C&F fails to support its public policy argument.

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[16] Econ. & Planning Sys., Inc., Denver Metro Area Housing Diversity Study, Denver Region Council of Gov't 38 (Oct. 29, 2013), https://www.drcog.org/documents/123065-Report%20102913_Final.pdf.

[17] *See* Pacey Economics, Inc., Housing Market Analysis: Supply and Demand, 2, 28 (Jan. 6, 2015) (stating "we […] must strongly disagree with the EPS findings that construction defect liability issues stemming from the statute is the root cause for the lack of condominium construction in the Denver area urban centers" and that "the information upon which EPS formed its conclusion is painfully weak and inappropriate as it is based on a limited number of subjective interviews") http://www.buildourhomesright.com/wp-content/uploads/2015/01/Housing-Market- Analysis-1-6-15-Not-Embargoed.pdf.

## CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court answer the Certified Question in the affirmative.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to counsel of record identified below by e-mail via the Florida Courts e-filing Portal on January 20, 2017.

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