# Commentary

## Tailoring A New 'Suit': Examining An Insurer's Duty To Defend 'Suits' In Light Of Changing Policy Language

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### I. Introduction

A standard commercial general liability (CGL) insurance policy provides a policyholder with indemnity coverage for damages caused by bodily injury, property damage, and personal and advertising injuries subject to certain obligations and limitations. The CGL policy also provides the policyholder with equally important defense coverage, which typically requires the insurance company to defend the insured against certain legal proceedings and pay defense costs outside the limits of the insurance policy. The breadth and scope of the insurer's defense obligation is a highly contested area of disagreement between policyholders and insurers and one that generates a sizable amount of the insurance coverage litigation filed each year. One such area of disagreement, which is the focus of this article, is whether an insurer is obligated to provide a defense to an insured (e.g. retain and pay defense counsel costs and expenses) when traditional litigation has not actually been commenced against an insured.

The current version of the standard CGL policy form obligates insurers to defend "suits" filed against insureds. Historically, coverage disputes between insureds and their insurers have involved the determination of what constitutes a "suit" in the context of environmental regulatory claims in policies that did not contain a definition of the term "suit." Although the issue of what constitutes a "suit" in the context of environmental claims has become less prevalent due to the inclusion of the modern pollution exclusions, the issue continues to be important – particularly in the context of the enactment of procedural mechanisms to reduce the volume of litigation in the construction and product defect arena. For example, several states have enacted "Right to Repair" statutes requiring homeowners to comply with certain "pre-litigation" procedures before filing a lawsuit against a homebuilder.[1] The issue of whether an insurer is required to defend a homebuilder-insured during this "pre-litigation" process is highly contested.

As discussed in detail below, the answer to the question of what constitutes a "suit" often depends upon the nature of the adversarial procedure but is (and should always be) based upon the policy language governing the insurer's defense obligations. As a result, insureds and insurers need to closely analyze the policy language relating to defense obligations, as well as case law interpreting such language, in order to properly and

sufficiently evaluate whether the dispute at issue gives rise to a duty to defend. The provisions contained in standard CGL insurance policies governing an insurer's duty to defend have changed through the years and it is essential that insurers are cognizant of these changes and the impacts they may have on their defense obligations.

## II. The Key Policy Provisions

Under the insuring agreement of Coverage A contained in pre-1986 CGL policies, the policy obligates the insurer to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. In addition, the insuring agreement provides that the insurer will defend the insured against any suit seeking those damages. Prior to 1986, the term "suit" was not defined in the ISO form CGL policy which, as discussed in more detail below, has given rise to highly contested coverage litigation and a vast array of differing approaches taken by numerous courts throughout the county. The inconsistency and uncertainty in approaches taken by courts between and within the states ultimately led to changes in the standard policy form. The changes are discussed in detail below.

## III. Absence Of A Definition Of The Term "Suit" Leads To Various Interpretations

A "suit" is generally understood to mean a civil proceeding or some type of court-related action. Black's Law Dictionary defines the term "suit" as "[a]ny proceeding by a party or parties against another in a court of law."[2] Policyholders have taken the position that "suit" should be applied broadly to capture a multitude of different legal or adversarial proceedings. In contrast, insurers have traditionally applied a more narrow interpretation to the definition consistent with the definition set forth in Black's Law Dictionary. The absence of a definition has resulted in a split in authority as to what constitutes a "suit." Coverage disputes have arisen, and continue to arise, (particularly in the environmental coverage context with respect to requests by state and federal regulatory authorities for insureds to investigate and clean-up contaminated properties) as to whether adversarial actions short of litigation give rise to an insurer's duty to defend. More recently, the issue has arisen in construction defect "pre-litigation" procedures mandated by state statutes.

Some state courts have found in favor of policyholders and have applied a broad interpretation of the term "suit." Adopting such an approach has expanded insurers' defense obligations by focusing on the nature of the proceeding in which a claim for damages against an insured is made. Many courts around the United States have adopted this broad approach and have concluded that all types of coercive administrative actions constitute "suits" giving rise to insurers' defense obligations under CGL policies. These courts reason that an insured that is being 'proceeded against,' albeit in a non-traditional fashion, is no less entitled to a defense than its insured contemporaries who are legally attacked in a more conventional manner.[3] The Supreme Court of North Carolina, for example, has noted that so-called "compliance orders," although not issued by a court, are in fact "an attempt by the State to 'gain an end by legal process.'"[4] Similarly, the Alabama Supreme Court has determined that the authority invested in the EPA in issuing letters to potentially responsible parties ("PRP") for environmental pollution, is almost absolute, and allows the EPA to issue severe penalties for failure to cooperate.[5] According to the Alabama Supreme Court, a decision by the EPA to designate an insured as a PRP cannot on any practical level be understood as anything less that the initiation of a "legal action" constituting a "suit" within the contemplation of a CGL policy.[6] Courts in a number of other jurisdictions have likewise adopted this approach.[7]

In contrast, courts in a number of other jurisdictions have adopted a more traditional meaning of the term "suit" and found in favor of insurers, thereby limiting the term to mean only a formal complaint filed in a court of law.[8] The basis for such rulings is often times premised upon the dictionary definition of "suit" that refers to "court proceedings" or the ordinary understanding of the term. By way of example, the California Supreme Court has concluded that the word "suit" means a civil action commenced by filing a complaint and, as a result, a PRP letter would not fall within that definition.[9] Likewise, the Illinois Supreme Court has held that the word "suit" is clear and unambiguous.[10] According to Illinois' highest court, the "primary attribute of a suit is that the parties to the action are involved in actual court proceedings."[11] Further, the Illinois Supreme Court explained that the word "suit" required an action in a court of law based upon a four corners analysis – analyzing the allegations of a complaint with that of the policy to determine an insurer's duty to

defend.[12] Based on this analysis, a duty to defend extends only to suits, not to allegations, accusations or claims which have not been embodied within the context of a complaint filed in a court of law.[13]

## IV. Defining The Term "Suit" In CGL Policies

In 1986, the Insurance Services Office, Inc. (ISO) modified the standard CGL policy form and added a definition for the term "suit" to that form.[14] The original draft did not define the term "suit," but rather only stated what it included, *i.e.,* arbitration proceedings.[15] Because this approach still required a reader to use the "plain meaning" or to refer to the dictionary to determine what besides arbitrations were included, the first sentence of the definition was added in the final version to read as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury," or "advertising injury' to which this insurance applies are alleged. Suit includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.[16]

In 1988, the second paragraph (b.) of the "suit" definition was added, with an apparent intent to be more inclusive alterative dispute resolution techniques.

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury," or "advertising injury' to which this insurance applies are alleged. Suit includes
>
> a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.[17]

Finally, in 1996, a further revision was made to the definition by broadening the application of the arbitration and dispute resolution forums to apply to "any insured" not just the named insured (previous versions of the definition referred to only "you" in the definition – a term that includes only those entities that qualify as Named Insureds).[18] The post-1996 policy form defines the term "suit" as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury," or "advertising injury' to which this insurance applies are alleged. Suit includes
>
> **a.** An arbitration proceeding in which such damages are claimed and to which the insured must submit or do submit with our consent; or
>
> **b.** Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.[19]

This change in wording from "you" to "any insured" clarifies that the term "suit" encompasses the requisite proceeding filed against any entity that qualifies as an insured under the policy (e.g. additional insureds, insureds, etc.) and not just proceedings commenced against Named Insureds.

## V. Coverage Disputes Over "Suits" Involving Post-1986 Policy Language

Despite adding a definition of the term "suit" that limits the term to several, specific enumerated circumstances, policyholders nevertheless challenge the meaning and scope of the term "suit." The challenges come in various forms. One line of attack utilized by insureds is a challenge to the terms contained within the definition and the argument that the phrases "civil proceeding" and "other alternative dispute resolution proceeding" are not defined in the policy and, thus, are subject to broad interpretation in favor of the policyholder. A second basis used by policyholders is to simply ignore the addition of a definition of the term "suit" and, instead, rely on precedent interpreting pre-1986 policy language in an attempt to circumvent the clearly defined policy term. Both of these scenarios are discussed below.

### A. A "Suit" As A Civil Proceeding

With respect to the former argument, the inclusion of the term "civil proceeding" was intended to limit an

insurer's defense obligation to only *civil* lawsuits. The Rhode Island Supreme Court expounded upon this intent by finding that a felony conviction following a jury trial which resulted in a civil judgment for liability did not transform an involuntary manslaughter prosecution into a civil proceeding so as to trigger an insurer's duty to defend.[20] In *Derderian v. Essex Ins. Co,* one hundred people perished in a fire that occurred at a nightclub, which was co-owned by Michael and Jeffrey Derderian.[21] A grand jury returned separate criminal indictments against both Derderians.[22] The Derderians demanded that their insurer afford them a defense against the criminal prosecutions arising from the grand jury indictments because, pursuant to Rhode Island law, any indictment would lead to a civil judgment for liability and damages.[23] The policy defined "suit" to mean "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged."[24] The Rhode Island Supreme Court first noted that the criminal indictment did not comport with the term "suit" as it was defined in the policy and, as such, it refused to interpret the word more broadly.[25] The court then explained that the statute known as the "Victim's Bill of Rights" was not intended to be transformed from a criminal prosecution into a civil proceeding.[26] According to the court, the "Victims' Bill of Rights" was intended to ensure that all victims were treated with respect and receive financial compensation for their losses and that the statute is merely a procedural mechanism to conclusively establish the liability of the definition for personal injury.[27] The court, therefore, held that no duty to defend under the policy existed.[28]

The term "civil proceeding" has also been limited in the context of certain construction defect claims. In *Cincinnati Insurance Co. v. AMSCO Windows,* the policyholder, who manufactured windows used in homes, was sued for defective products that allegedly caused property damage.[29] Some of the homeowners' claims were brought under a state statutory "pre-litigation" provision that governed homeowner construction defect cases.[30] According to the statute, before a claimant pursues a construction defect claim in a judicial proceeding, a detailed written notice must be provided, affording the opportunity to inspect and repair the damage.[31] At the conclusion of the pre-litigation process, any unresolved claims may proceed to state court.[32] Some of the homeowners' claims developed into a civil lawsuit, whereas other remained in the pre-suit phase.[33] The policyholder tendered a claim for defense to its insurer, but the insurer refused to defend and filed a declaratory judgment action.[34] The policy defined "suit" as a "civil proceeding in which money damages because of . . . 'property damage' . . . to which this **insurance** applies are alleged."[35] The trial court determined that the insurer had a duty to defend only those claims in active litigation and not the statutory pre-litigation claims.[36] On appeal, the policyholder argued that the statutory pre-litigation process was equivalent to a "civil proceeding" and required a defense. The court looked to the statute for guidance on the issue.[37] According to the court, while the statute mandates participation, noncompliance with the statute does not result in any adverse judgment or obligation.[38] In other words, a party who fails to comply with the provisions of the statute faced limited consequences, which are not parallel to the case-determinative consequences of noncompliance in the context of lawsuits or mandatory arbitrations.[39]

Similarly, in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* a Florida federal court determined that a construction defect notice did not constitute a "suit."[40] In that case, Altman Contractors, Inc. (ACI) was the general contractor for a high-rise condominium.[41] The Condominium served ACI with a Notice of Claim and Supplemental Notices of Claim pursuant to Chapter 558 of the Florida statutes, which provides a pre-suit procedure for a property owner to assert a claim for construction defects against a contractor.[42] ACI demanded that its insurer Crum & Forster defend and indemnify it relative to the claims.[43] Although Crum & Forster hired a law firm to participate in the response to the notice, Crum & Forster denied ACI's request to select its own counsel and denied ACI's request to be reimbursed for the fees and expenses it incurred prior to retention of counsel by Crum & Forster.[44] ACI filed suit seeking a declaration that Crum & Forster had a duty to defend and indemnify it against the 588 Notice.[45] The policy defined "suit" to include a civil proceeding, a term that was not further defined in the policy.[46] The court therefore turned to the dictionary definition of "civil proceeding," which defined 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."[47] According to the court, nothing about the Chapter 558 process satisfied the definition.[48] The court further noted that for something to be a "civil proceeding," pursuant to the definition, there must be some forum and some decision maker involved.[49] The Legislature described Chapter 558 as a "mechanism," not a "proceeding."[50] Since the Court concluded that the Chapter 558 mechanism did not constitute a "civil proceeding" it also could not constitute an alternative dispute resolution "proceeding" and therefore did not constitute a "suit" under the Crum & Forster policy.[51] The Court, therefore, determined that Crum & Forster had no obligation under the terms of the insurance policies at issue to defend or indemnify ACI relative thereto, and that Crum & Forster did not breach the terms of the policies as a matter of law.[52]

The ruling in *Altman* was subsequently appealed to the United States Court of Appeals for the Eleventh Circuit. On August 2, 2016, the Eighth Circuit determined that both Crum & Forster and ACI had reasonable interpretations of the term "suit," but certification of the issue to the Florida Supreme Court was appropriate given the policy implications with respect to the question of first impression.[53] The Eleventh Circuit certified the following question:

> Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI?[54]

The Florida Supreme has not yet ruled on the question presented.

The holdings and rationale of *AMSCO* and *Altman Contractors* demonstrate a court's willingness to assess and evaluate the meaning and intent of certain statutes that establish various pre-litigation measures to determine whether these measures result in an adverse judgment or obligation so as to potentially qualify as a "suit" as that term is now defined in CGL policies. The decisions also demonstrate the willingness of courts to examine the definition of the term "suit" to determine whether these pre-litigation procedures fall within the "civil proceeding" component of the definition.

### B. A "Suit" As "Other Alternative Dispute Resolution Proceedings"

The post-1996 definition of the term "suit" specifies that it includes not only civil proceedings but also mandatory arbitration proceedings (or arbitration proceedings consented to by the insurer) and "any other alternative dispute resolution proceeding consented to by the insurer." The first scenario is fairly straight forward and would involve situations in which an insured is compelled to arbitrate a matter pursuant to a mandatory arbitration provision or a voluntary arbitration proceeding consented to by the insurer. The second scenario is a bit different. Creative insureds seeking a defense in non-litigation or non-arbitration scenarios have argued that the term "other alternative dispute resolution proceedings" broadly encompasses situations involving such activities as formal and informal settlement discussions and/or mediation sessions with adverse parties when the discussions or voluntary mediation sessions are undertaken with the assistance of attorneys for the disputing parties.

The definition, however, makes clear that "suit" must involve some type of civil proceeding (the term is defined as "a civil *proceeding*" . . . including "an arbitration *proceeding*" or "any other alternative dispute resolution *proceeding*."). The term "proceeding" in this context connotes some form of legal action involving a third party. By way of example, Maryland Rule 17-102 defines the term "alternative dispute resolution" as "the process of resolving matters in pending litigation through arbitration, mediation, neutral case evaluation, neutral factfinding, settlement conference, or a combination of those processes."[55] In the scenario described above, no such proceeding/procedure had been commenced against the insured. Simple settlement discussions and/or voluntary mediation sessions with claimants, thus, fall outside the scenarios addressed in the definition. Moreover, it does not appear as though any court has adopted such a strained interpretation of this provision.

In addition, requiring an insurer to provide a defense to an insured for something short of an actual legal proceeding conflates the difference between the term "claim" and "suit, which courts have correctly noted are treated differently under the standard CGL policy. By way of example, the notice conditions contained in the standard CGL policy distinguish the term "claim" and "suit." In this regard, the notice conditions contained in

the standard CGL policy contain the following or substantially similar provision.

> **2. Duties In the Event If Occurrence, Offense, Claim or Suit**
>
> **a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
>
> (1) How, when and where the "occurrence" or offense took place;
>
> (2) The names and addresses of any injured persons and witnesses; and
>
> (3) The nature and location of an injury or damage arising out of the "occurrence" or offense.
>
> **b.** If a claim is made or "suit" is brought against any insured, you must:
>
> (1) Immediately record the specifics of the claim or "suit" and the date received; and
>
> (2) Notify us as soon as practicable.
>
> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> **c.** You and any other involved insured must:
>
> (1) Immediately send us copies of ay demands, notices, summonses or legal papers in connection with the claim or "suit";
>
> (2) Authorize us to obtain records and other information;
>
> (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit";
>
> * * *

In addressing the use of the terms "claim" and "suit" in CGL policies, the United States District Court for the Southern District of New York recognized the distinctions between cases involving claims and settlement demands in the absence of litigation – which do not give rise to a duty to defend – and those involving litigation – where courts held that a duty to defend existed.[56] As noted by the *Hester* Court, adopting the position that demands for damages made by a claimant constitute a "suit" would render meaningless any distinction between "claims" and "suits" even though the policy uses those terms differently.[57] As explained by the *Hester* Court:

> A claim, then, is not the equivalent of a suit. The two create entirely different rights and obligations in both parties to the insured contract . . . Provision of notice of a claim triggers the insurance company's obligation to *investigate* the claim, not to *defend* or reimburse funds for any and all actions the insured takes in response to the claim.[58]

The policies at issue in *Hester* involved the standard CGL policy provisions, which provide that claims and suits are treated differently, giving rise to different obligations on the part of both parties.[59] Thus, it is clear that the term "any other alternative dispute resolution proceeding" means more than demands for damages or settlement discussions and, instead, involves some type of legal *proceeding* undertaken against the insured with the insurer's consent. Otherwise, the phrase amounts to little more than a "claim," a term which the standard CGL policy distinguishes from the term "suit."

Not all courts, however, have agreed that pre-litigation claims fall outside the term "other alternative dispute resolution proceedings." For example, a Colorado appellate court determined that pre-litigation for construction defects claims constitute "alternative dispute resolution proceedings" within the post-1988 definition of "suit." In *Melssen v. Auto-Owners, Inc. Co.*, homeowners filed a notice of claim in accordance with the Colorado Defect Action Reform Act (CDARA) against their homebuilder for certain defects to their home.[60] The homebuilder tendered the claim to its insurer, who initially took no position regarding coverage, did not inspect the property, or become actively involved in adjusting the claim. The insurer eventually denied the claim.[61] A lawsuit for breach of contract was filed against the insurer, who argued that the notice of claim did not constitute a "suit."[62] The Court, however, disagreed finding that not only did

the notice of claim constitute "a civil proceeding", the notice of claim also constituted an "alternative dispute resolution proceeding."[63] In so holding, the Court explained that according to *Black's Law Dictionary,* "alternative dispute resolution proceedings" are procedures "for settling a dispute by means other than litigation, such as arbitration or mediation."[64] The Court looked to the CDARA notice of claim statute, which requires the homeowner to serve the written notice to allow the construction professional to inspect the property and agree to resolve the claim by paying a sum or remedy the defect; if the construction professional rejects the offer, only then may the homeowner bring an action.[65] The Court also looked to the intent of the statute, which was to "encourage [ ] resolution of potential defect claims before suit is filed" and to "establish *procedures* that facilitate out-of-court- resolution of construction defect claim (emphasis added)."[66] Based on the language and purpose of the statute, the Court concluded that the CDARA notice of claim process constituted an alternative dispute resolution proceeding.[67] As far as consent, a requirement needed if the proceeding is deemed to be an "alternative dispute resolution proceeding," the Court concluded that there was sufficient evidence in the record to raise a question of fact for the jury whether the insurer impliedly consented to the insurers' notice of claim process.[68]

### C. Policyholders Ignore The Definition Of The Term "Suit" And Inappropriately Rely On Case Law Involving Broad Duty To Defend Rulings Involving Pre-1986 Policy Language

In an effort to broaden the duty to defend in CGL policies that define the term "suit," policyholders have also been seen to ignore the definition of the term "suit" and simply rely on prior case law in which the term "suit" was undefined and, as a result, interpreted broadly in favor of the insured.

By way of example, several New York cases have interpreted the term "suit" broadly to include coercive demands for money that do not require a formal lawsuit in court. In *Hartog Rahal P'ship v. Am. Motorists Ins. Co.*, the court, citing to *Carpentier* (a New York appellate case) and *Jamestown Plastics, Inc.,* (a New York federal case), found that "New York law . . . permits a demand letter to serve as the functional equivalent of a 'suit' for these purposes where the claimant against an insured assumes a coercive adversarial posture and threatens the insured with probable and imminent financial consequences."[69] The United States District Court for the Southern District of New York recognized in *Hester*, supra, however, the distinctions between cases where the term "suit" was defined and those involving claims and settlement demands in the absence of litigation where the policy did not define the term "suit" as was the case in the *Hartog* and *Jamestown Plastics, Inc.* cases.[70]

In *Hester*, the insured argued that his insurer had a duty to defend and was obligated to reimburse him for attorney's fees and litigation expenses he incurred in proceeding with proactive litigation against the sender of a demand letter relating to his use of a trademark.[71] The policy at issue obligated the insurer to defend "suits" and the policy contained the post-1986 definition of the term "suit." The insured, relying on prior New York law interpreting "suit" when the term was undefined, argued that a "demand for damages is the equivalent of a 'suit' triggering an insurer's duty to defend under New York law."[72] The *Hester* Court rejected this argument and noted that "the Court can find no authority for such a broad proposition and one that would rewrite unambiguous language in most every insurance contract." In so holding, the Court noted that:

> The relevant Policy language is clear and unambiguous. It requires that Navigators "defend the insured against any 'suit' seeking [ ] damages." . . . A "suit" is a "civil proceeding in which damages . . . are alleged." . . . The Cease & Desist Letter, however, is not a "civil proceeding," and therefore not a "suit." Because the Policy requires defense of "the insured against any 'suit,'" and because the Cease & Desist Letter is not a "suit," Navigators was not obligated to begin any defense of Hester upon his receipt of the Cease & Desist Letter.[73]

The Court further noted:

> While the cases cited by Hester surely stand for the proposition that certain demand letters *can* trigger duty to defend obligations, none states a rule that private parties' threatening letters are 'suits' for purposes of liability insurance.[74]

In addition, the *Hester* Court addressed the cases where "the courts [were] faced with a series of increasingly hostile letters coming from the government" (e.g. *Carpentier*) or, alternatively, a "private party's demand letter . . . relat[ing] to conduct for which an insured already faced class action lawsuits 'around the country.'" (*Hartog*).[75] The *Hester* Court refused to adopt the insured's interpretation because "[t]hese extreme circumstances are not present in this case" and, as such, "the cases cited by [the insured] simply do not compel a result in which the Court rewrites unambiguous contract language."[76]

Other courts have similarly found that the post-1986 definition of "suit" is plain and unambiguous. For example, in *Hardesty Builders, Inc. v. Mid-Continent Cas. Co.,* the United States District Court for the Southern District of Texas determined that the filing of a State Sponsored Inspection Requisite for a claim of construction defect did not constitute a "suit" under the post-1996 definition.[77] In that case, a homebuilder received complaints of various defects in a renovation/-remodel project.[78] The homeowners filed a request to initiate the Texas Residential Construction Commission's State Sponsored Inspection Process ("SIRP").[79] The final appellate ruling in the SIRP determined the presence of construction defects in the homebuilders' work.[80] The homebuilder tendered this claim to his insurer, Midcontinent, who denied coverage. Among various coverage arguments, the homebuilder claimed that the SIRP constituted a "suit" triggering the duty to defend.[81] The Court disagreed, finding that the definition of "suit" was clear and unambiguous.[82] The Court explained that an SIRP was not a "civil proceeding . . . in which damages are alleged" or an "arbitration proceeding in which such damages are claimed."[83] The purpose of a SIRP was "to oversee the registration of homes, homebuilders, and remodelers; to administer a state-sponsored inspection and dispute resolution process; and to cerate limited statutory warranties and building and performance standards."[84] The Court looked to the relevant Texas statute setting forth the procedure and intent of SIRPs.[85] According to the statute, the filing of a State Sponsored Inspection Request is a "prerequisite" to bringing an action for damage or other relief, and the inspectors may not include payment of any monetary consideration.[86] The Court determined that the SIRP did not have the same procedural or monetary consequences as a court ruling or a settlement agreement.[87] The Court further noted that a SIRP would, at best, fall under the "any other dispute resolution proceeding in which such damages are claimed."[88] However, for that provision to trigger a duty to defend, the insured must submit with the insurer's consent, which the homebuilder, in the case, failed to obtain.[89]

## VI. Case Law Addressing "Suit" In Pre-1986 Policies Is Irrelevant When Determining An Insurer's Obligation Under CGL Policies That Define The Term "Suit"

The issue of whether government enforcement actions that occur outside a court constitute a "suit" has always been (and continues to be) a contentious issue between policyholders and insurers. In 2015, the Texas Supreme Court ruled administrative proceedings initiated by a government "Potentially Responsible Party" ("PRP") notice are "suits" that give rise to the insurer's duty to defend. In *McGinnes Industrial Maintenance Corporation v. The Phoenix Insurance Co.,* the insured received a letter from the EPA stating that it was a PRP for environmental contamination at a site located in Pasadena, Texas.[90] The insured requested a defense from its insurers, but the insurers denied coverage on the basis that the PRP was not a "suit."[91] The court noted that at least thirteen states have sided with policyholders in finding that PRP letters do constitute "suits" and give rise to an insurer's defense obligation.[92] Accordingly, the Texas Supreme Court held that EPA enforcement proceeding are "suits" within the meaning of policies requiring insures to defend any suit against an insured.[93]

Similarly, and more recently, a New Jersey superior court found that a PRP notice letter constituted a "suit" that triggers coverage under CGL policies. In *Cooper Industries, LLC v. Employers Ins. of Wausau, et al.,* the insured also received a General Notice Letter naming it as a "potentially responsible party" for environmental contamination of the Lower-Passaic River Site.[94] The insured sought coverage, including a defense, from its insurer, OneBeacon. OneBeacon refused to provide a defense. In the declaratory judgment action, OneBeacon urged the court to follow a "plain meaning" approach to the term "suit" in that the term could only mean a civil action commenced by filing a complaint. The court, however, disagreed citing to *McGinnes* and noting that a PRP that fails to cooperate with a PRP letter faces the potential of contempt proceeding, fines and treble damages. It is the "coercive

nature of CERCLA" that the court focused on, stating that if the insured failed to take action it would have been subject to strict joint and several liability and other potential damages.

Although the *McGinnes* and *Cooper* rulings would appear to be a victory for policyholders, both rulings were based on the earlier (30-plus years old) version of the CGL policy that *did not* define the term "suit." Similarly, the thirteen cases cited by the Texas Supreme Court and the twenty-one cases cited by the New Jersey Superior Court in support of their holding that a PRP notice constitutes a "suit" also involved scenarios where the term "suit" was not defined. The fact that the CGL policy did not define the term "suit" was not specifically discussed in the Texas Supreme Court case and one must look to the question certified by the United States Court of Appeals for the Fifth Circuit to determine that the term was not defined in the policies at issue in the case. Likewise, there is no specific statement by the New Jersey Court that the term "suit" is not defined in the policies at issue in the *Cooper* case.

Policyholders may, therefore, cite to the *McGinnes* and *Cooper* decisions (and others) to assert that all policies – even those post-1986 – require an insurer to defend policyholders against PRP notices and similar adversarial situations given that the court failed to clearly state that its ruling was issued in the context of policies that did not define the term "suit." Such assertions are incorrect, based on the more limiting language used in the post-1986 ISO form and the fact that the policies involve different policy language, which clearly limits an insurer's defense obligation to civil proceedings, ADR procedures entered into with the insurer's consent or mandatory arbitration proceedings. Thus, insureds and insurers must be cognizant that the case law relied upon by policyholders to support a broad interpretation of the term "suit" may be based upon cases in which the term was undefined. Recognizing this caveat may also require insureds and insurers to look to the lower court decisions (and exhibits to corresponding briefs) to determine whether the term "suit" was actually defined in the policies at issue. This is particularly the case if the decision relied upon is silent on the issue. Being aware of these arguments, and researching lower court decisions, could prevent a court from wrongly applying case law involving pre-1986 policy language to determine an insurer's defense obligations under policies that contain a definition of the term "suit."

## VII. Conclusion

In conclusion, the type and purpose of an adversarial procedure, along with the policy language, governs whether situations short of actual litigation constitute a "suit" so as to give rise to an insurer's duty to defend. Given the evolution of the term "suit" and the variation in policy language involving this term, insurers and insureds must be mindful of the changes in policy language and the potential impacts those changes may have on the duty to defend. Parties to the insurance policies must, therefore, closely examine the circumstances for which a defense is being sought, the policy language regarding their duty to defend, as well as case law interpreting such language to adequately assess whether the situation at issue gives rise to a defense obligation on the part of the insurer.

## Endnotes

1. *See* Ariz. Rev. Stat. Ann. § 12-1361; Cal. Civ. Code §§ 895-945; Col. Rev. Stat. §§13–20–801to 808; Fla. Stat. §§ 558.001 to 558.004; Nev.Rev.Stat. §§ 40.600 to 40.695; Tex. Prop. Code Ann. §§ 27.001 to 27.007; Wash. Rev. Code Ann. §§ 64.50.005 to 64.50.060.

2. *Black's Law Dictionary* (10th ed. 2014).

3. *See Continental Cas. Co. v. Cole,* 809 F.2d 891, 898 (D.C.Cir. 1987).

4. *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.,* 326 N.C. 133, 154, 388 S.E.2d 557, 570 (1990). *See also Sch. Dist. No. 1 v. Mission Ins. Co.,* 58 Or.App. 692, 703, 650 P.2d 929 (Ct. of Appeals of Oregon 1982) ("Suits" include administrative proceedings and do not have to take place in court).

5. *Travelers Cas. Co. and Sur. Co. v. Alabama Gas Corp.,* 117 So. 3d 695, 708 (Ala. 2012).

6. *Id.*

7. *See Hazen Paper Co. v. U.S. Fid. & Guar. Co.,* 407 Mass. 689, 696, 555 N.E.2d 576 (1990) (finding that a letter from the EPA notifying a "potentially responsible party" of potential CERCLA damage was "substantially equivalent to the commencement of a lawsuit"); *Carpentier v. Hanover Ins. Co.,* 670 N.Y.S.2d 540, 542 248 A.D.2d 579 (App. Div. 2nd Dept. 1998) (holding that an EPA letter demanding payment and giving the insured an opportunity to be heard at a conference with EPA counsel constituted a suit, as the government "assumed a coercive, adversarial posture and threatened the [insured] with probably and imminent financial consequences"). *See Compass Ins. Co. v. City of Littleton,* 984 P.2d 606, 622 (Colo. 1999) (en banc); *R.T. Vanderbilt Co. v. Cont'l Cas. Co.,* 273 Conn. 448, 870 A.2d 1048, 1058–1060 (2005); *A.Y. McDonald Indus. v. Ins. Co. of N. Am.,* 475 N.W.2d 607, 627–629 (Iowa 1991); *Aetna Cas. & Sur. Co. v. Commonwealth,* 179 S.W.3d 830, 836–38 (Ky. 2005); *Mich. Millers Mut. Ins. Co. v. Bronson Plating Co.,* 445 Mich. 558, 519 N.W.2d 864, 868–70 (1994), *abrogated in part by Wilkie v. Auto–Owners Ins. Co.,* 469 Mich. 41, 664 N.W.2d 776 (2003); *SCSC Corp. v. Allied Mut. Ins. Co.,* 536 N.W.2d 305, 315 (Minn. 1995) (finding duty to defend applies in administrative action by the Minnesota Pollution Control Agency), *overruled on other grounds by Bahr v. Boise Cascade Corp.,* 766 N.W.2d 910 (Minn. 2009); *Dutton–Lainson Co. v. Cont'l Ins. Co.,* 279 Neb. 365, 778 N.W.2d 433, 446–49 (2010); *Coakley v. Me. Bonding & Cas. Co.,* 136 N.H. 402, 618 A.2d 777, 786–88 (1992); *C.D. Spangler Constr.,* supra.; *State v. CNA Ins. Cos.,* 172 Vt. 318, 779 A.2d 662, 667 (2001); *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau,* 264 Wis.2d 60, 665 N.W.2d 257, 263–64 (2003).

8. *See Harleysville Mut. Ins. Co. v. Sussex Cty., Del.,* 831 F. Supp. 1111, 1131-32 (D. Del. 1993), *aff'd* 46 F.3d 1116 (3d Cir. 1994) (holding that PRP letters do not constitute a "suit" and, therefore, the insurers do not have a duty to defend the insured against CERCLA proceeding brought by the EPA to investigate and control release of pollutants); *Detrex Chem. Indus. Inc. v. Employers Ins. of Wausau,* 681 F. Supp. 438, 446 (N.D. Ohio 1987) (holding that PRP letters are not attributable to a suit); *Gull Industries, Inc. v. State Farm Fire and Cas. Co.,* 181 Wash.App. 463, 477-78, 326 P.3d 782, 785 (2014) (letter from Department of Energy acknowledging receipt of insured gas station owner's notice that his property was contaminated and that it intended to pursue an independent voluntary cleanup was not the functional equivalent of a suit, as the letter did not warn of any consequences that might attach to failure to adhere to those requirements).

9. *Foster-Gardner v. National Union Fire Ins. Co.,* 18 Cal. 4th 857, 959 P.2d 265 (1998) *Cf. Ameron Int'd Corp. v. Ins. Co. of the State of Pa.*, 50 Cal.4th 1370, 242 P.3d 1020 (2010) (holding that a federal administrative adjudicative proceeding that went on for twenty days, was commenced by a written complaint, and involved the presentation of sworn testimony and evidence was a "suit" for purposes of an insurer's duty to defend).

10. *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.,* 166 Ill.2d 520, 655 N.E.2d 842, 847 (1995).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* IRMI.com – ISO CGL Policy Definitions – "Suit.".

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Derderian v. Essex Ins. Co.,* 44 A.3d 122 (R.I. 2012).

21. *Id.* at 124.

22. *Id.*

23. *Id.* at 125-26.

24. *Id.* at 127.

25. *Id.* at 128.

26. *Id.* at 129.

27. *Id.*

28. *Id.*

29. 593 Fed. Appx. 802, 804 (10th Cir. 2014) (applying Utah law).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 805.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 809.

38. *Id.* at 810-11.

39. *Id.*

40. 124 F. Supp.3d 1272, 1274 (S.D. Fla. 2015).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1279.

47. *Id.*

48. *Id.*

49. *Id.* at 1280.

50. *Id.* at 1281.

51. *Id.*

52. *Id.* at 1282.

53. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2016 WL 4087782 *6, — F.3d — (11th Cir. Aug. 2, 2016).

54. *Id.*

55. Md. R. 17-102(d).

56. *Hester v. Navigators Ins. Co.*, 917 F. Supp.2d 290 (S.D.N.Y. 2013).

57. *Id.* at 298.

58. *Id.*

59. Pursuant to the notice provision of the policy, the insured is required to notify the insurer of any "claim" as soon as practicable after the claim arises; the insurer may, at its discretion, investigate and settle "any claim or suit"; the insurer is obligated to defend an insured against any covered "suit.".

60. 285 P.3d 328, 332 (Colo.Ct.App. 2012).

61. *Id.*

62. *Id.* at 333-34.

63. *Id.* at 334.

64. *Id.*

65. *Id.* at 334-35.

66. *Id.* at 335.

67. *Id.*

68. *Id.*

69. 359 F. Supp. 2d 331, 332 (S.D.N.Y. 2005), citing *Carpentier v. Hanover Ins. Co.*, 670 N.Y.S 2d 540, 248 A.D.2d 579 (N.Y. App. Div. 1998), and *Jamestown Plastics, Inc. v. Travelers Indem. Co.*, No. 97-CV-0373E(M), 1997 WL 800870 (W.D.N.Y. Dec. 30, 1997).

70. *Hester*, 917 F. Supp.2d at 290.

71. *Id.* at 292.

72. Id. at 297.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. 2010 WL 5146597 *1 (S.D.Tex. 2010).

78. *Id.*

79. *Id.*

80. *Id.* at 2.

81. *Id.* at 7.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* 7-8.

87. *Id.* at 8.

88. *Id.*

89. *Id.*

90. 477 S.W.3d 786 (Tex. 2015).

91. *Id.* at 790.

92. *Id.* at 793.

93. *Id.* at 794.

94. Docket No. L-9284-11, 2016 WL 4544857 (Sup. Ct. N.J. Aug. 30, 2016). ■