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Construction Defects Insurance

This "Suit" Is Defective: Examining An Insurer's Duty To Defend Pre-Litigation "Right To Repair" Construction Defect Claims

by
Christopher P. Ferragamo
and
Alexis P. Joachim

Jackson & Campbell
Washington D.C.

A commentary article reprinted from the November 2016 issue of Mealey's Litigation Report: Construction Defects Insurance

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Commentary

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[Editor's Note: Christopher P. Ferragamo is a Director at the law firm of Jackson & Campbell, P.C. in Washington, D.C. Alexis P. Joachim is a Senior Counsel at the law firm of Jackson & Campbell, P.C. Mr. Ferragamo and Ms. Joachim concentrate their practice on insurance coverage litigation and on providing coverage advice in the areas of professional liability, complex casualty, automobile, construction defect, environmental and toxic tort insurance issues. Mr. Ferragamo can be contacted at cferragamo@jackscamp.com. Ms. Joachim can be contacted at ajoachim@jackscamp.com. The opinions expressed in this commentary are not necessarily those of their firm or its clients. Any commentary or opinions do not reflect the opinions of Jackson & Campbell, P.C. or LexisNexis® Mealey Publications™. *Replies to this commentary are welcome.]*

I. Introduction

A standard commercial general liability (CGL) insurance policy typically provides a policyholder with both defense coverage (which requires the insurance company to defend the insured against certain legal proceedings and pay defense costs outside the limits of the insurance policy) and indemnity coverage for damages caused by bodily injury, property damage, and personal and advertising injuries subject to certain obligations and limitations. The breadth and scope of the insurer's defense obligation is an 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. With the enactment of "Right to Repair" statutes in thirty-two states – which require homeowners to comply with certain "pre-litigation" measures before filing a lawsuit against a homebuilder – the issue over an insurer's obligation to defend a homebuilder-insured during this "pre-litigation" process has become a focal point of disputes between insureds and their insurers.

As discussed in detail below, whether these pre-litigation processes constitute a "suit" depends upon the language and purpose of the "right to repair" statutes 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, the pre-litigation measure at issue, and the case law addressing the scope of an insurer's duty to defend in such situations. As discussed below, courts have reached different conclusions as to the scope of an insurer's defense obligations depending upon the language and objective of the various "Right to Repair" statutes at issue.

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 approaches taken by numerous courts throughout the country. 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."[1] Some 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 "plain meaning" interpretation to the definition consistent with the definition set forth in Black's Law Dictionary. The absence of a definition of the term "suit" in early CGL policies resulted in a split in authority as to what constitutes a "suit." Coverage disputes have arisen, and continue to arise, (particularly in the construction defect coverage context) with respect to whether adversarial actions short of litigation give rise to an insurer's duty to defend even though the term "suit" is now defined in standard CGL policies.

Some state courts have found in favor of policyholders and have applied a broad interpretation of the term "suit."[2] 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. 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 sued in a more conventional manner.[3] 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.[4] 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.

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.[5] The original draft did not define the term "suit", but rather only stated what it included, *i.e.,* arbitration proceedings.[6] 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.[7]

In 1988, the second paragraph (b.) of the "suit" definition was added, with an apparent intent to be more inclusive of 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.[8]

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).[9] 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.[10]

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. States' Enactment of Pre-Litigation "Right to Repair" Statutes

At least thirty-two states have enacted legislation requiring homeowners to notify builders of potential construction defects and provide the builders with an opportunity to correct the defect before the homeowner initiates litigation.[11] The intent of these "right to repair" statutes is to reduce litigation and protect the property owners' rights, as well as potentially limit issues for litigation.

Generally, "right to repair" statutes set forth certain procedural requirements which a homeowner must follow prior to filing a civil action in court. More specifically, the homeowner must notify the builder of an alleged defect within a specified time after discovering the defect; although, in most states, failure to comply with this requirement does not bar the claimant from still sending a notice. Notable requirements by the builder include: (1) responding to the claimant within a specified time, (2) the right to inspect the property and notify subcontractors of the defect, (3) conducting destructive testing, if necessary, and/or (4) offering to repair the alleged deficiency, settle the claim, or deny the claim. Many states, however, allow the homeowner to reject the builder's offer, thus converting an opportunity for resolution into a mere hurdle to the homeowner filing a civil action. Further, some statutes are limited in scope and only apply to certain types of construction and/or defects.

Despite the statutes' intent to limit litigation, the timeframes set out by the statutes often require quick action and are therefore practically unattainable by either the homeowner or the builder. The stakes can be raised where compliance with the statute is mandatory (leading to an adverse judgment against the builder) or where the procedure conducted pursuant to the statute is complicated. All insureds should provide timely and proper claims notice to their insurer when such a proceeding is instituted. Claims representatives will investigate, evaluate and attempt to resolve the claims, including input on the right to repair statute and procedure.

Each state has characterized their "right to repair" statutes differently. By way of example, the Florida Legislature characterizes "right to repair" statutes as follows:

> The Legislature finds that it is beneficial to have an *alternative method* to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners. An effective *alternative dispute resolution mechanism* in certain construction defect matters should involve the claimant filing a notice of claim with the contractor . . . that the claimant asserts is responsible for the defect, and should provide the contractor . . . and the insurer of the contractor . . . with an opportunity to *resolve the claim through confidential settlement negotiations* without resort to further legal process (emphasis added).[12]

In contrast, the California "right to repair" statute specifically states that the claimant's notice to the builder:

> . . .shall have the same force and effect as a notice of commencement of a *legal proceeding* (emphasis added). [13]

VI. "Right to Repair" Statutes and "Suits" Involving Post-1986 Policy Language

Sometimes insureds demand that the insurance company hire a lawyer to defend the builder during these "right to repair" pre-litigation processes. Lawyers can be expensive, and the knowledgeable claims person may not be as well known or accessible as an outside lawyer. Because the answer found in the plain language may be that there is no entitlement to counsel at the insurer's expense, some policyholders challenge the meaning and scope of the term "suit." Such challenges include the insurer's defense obligations with respect to pre-litigation measures set forth in "right to repair" statutes.

The challenges come in various forms. One line of attack utilized by insureds is a challenge to the terms contained within the definition. That argument asserts 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 some policyholders is to simply ignore the addition of a definition of the term "suit" and, instead, rely on case law interpreting pre-1986 policy language in an attempt to circumvent the clearly defined policy term. Both of these scenarios are discussed below.

A. "Right to Repair" Statutes as Civil Proceedings

With respect to the former argument, the inclusion of the term "civil proceeding" was intended to limit an insurer's obligation to pay for a lawyer to only civil *proceedings*, as compared to pre-litigation "right to repair" statutory proceedings. By way of example, the United States Court of Appeals for the Tenth Circuit, in *Cincinnati Insurance Co. v. AMSCO Windows,* determined whether Nevada's "right to repair" statute was a "suit." In that case, the policyholder, which manufactured windows used in homes, was sued for defective products that allegedly caused property damage.[14] Some of the homeowners' claims were brought under a state statutory "pre-litigation" provision that governed homeowner construction defect cases.[15] According to the Nevada 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.[16] At the conclusion of the pre-litigation process, any unresolved claims may proceed to state court.[17] Some of the homeowners' claims developed into a civil lawsuit, whereas others remained in the pre-suit phase.[18] The policyholder tendered a claim for defense (i.e. "hire me a lawyer") to its insurer, but the insurer refused to defend and filed a declaratory judgment action.[19]

The policy defined "suit" as a "civil proceeding in which money damages because of . . . 'property damage' . . . to which this insurance applies are alleged."[20] 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.[21] 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.[22] According to the court, while the statute mandates participation, noncompliance does not result in any adverse judgment.[23] 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.[24] In *dicta,* the court noted that the Nevada "right to repair" statute would be an "alternative dispute resolution" as to which the policy required the insurer's consent, and which had not been given.

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." [25] In that case, Altman Contractors, Inc. (ACI) was the general contractor for a high-rise condominium.[26] 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.[27] ACI demanded that its insurer Crum & Forster defend and indemnify it relative to the claims.[28] 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.[29]

ACI filed suit seeking a declaration that Crum & Forster had a duty to defend and indemnify it against the 588 Notice.[30] The policy defined "suit" to include a

civil proceeding, a term that was not further defined in the policy.[31] 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."[32] According to the court, nothing about the Chapter 558 process satisfied the definition.[33] 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.[34] The Legislature described Chapter 558 as a "mechanism," not a "proceeding."[35] 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.[36] The court was quick to distinguish the *dicta* set forth in *AMSCO, supra,* as inconsistent with the court's view of the definition of civil proceeding.[37] 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.[38]

The ruling in *Altman* was subsequently appealed to the United States Court of Appeals for the Eleventh Circuit. On August 2, 2016, the Eleventh 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.[39] 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?[40]

The Florida Supreme Court has accepted the certified question and the parties are currently submitting briefs on the issue.

Not all courts, however, have found that procedural measures in "right to repair" statutes do not equate to a "civil proceeding." By way of example, in *Clarendon America Ins. Co. v. StarNet Ins. Co.,* a California appellate court determined that a "Notice of Commencement of Legal Proceedings" served pursuant to California section 1375 et seq. (now repealed) constituted a "suit" under a CGL policy.[41] In that case, a homeowners association presented its residential developer with a notice of commencement of legal proceedings (Calderon Notice) that set forth a list of alleged construction defects.[42] The developer sought coverage under several of its subcontractors' CGL policies.[43] The court first looked to the purpose of the Calderon Act, which was to encourage settlement of construction and design defect disputed and to discourage unnecessary litigation.[44] In addition to notifying the builder of the defects and the builder responding to these claims, the parties were required to select a dispute resolution facilitator to "preside over the mandatory resolution process."[45] The final event, pursuant to the statute, was a "[f]acilitated dispute resolution of the claim, with all parties, including peripheral parties, as appropriate, and insurers, if any, present and having settlement authority."[46] According to the court, the Calderon Process was more than just a pre-litigation alternative dispute resolution requirement, as the procedures undertaken during the process and the results of the process were incorporated into and became part of the post-complaint litigation.[47] Furthermore, if timely notice was received of any testing and inspection, no additional inspection or testing was allowed during the actual litigation.[48] The Court, therefore, determined that the Calderon Process was an integral part of the litigation process because of the application and legal effect described in the Act and therefore constituted a "suit" for purposes of an insurer's duty to defend.[49]

Similarly, in *D.R. Horton Los Angeles Holding Co., Inc. v. American Safety Indem. Co.*, the United States District Court for the Southern District of California determined that California's current "right to repair" statute, Cal. Civ. Code 910, required an insurer to defend the policyholder at the time the defect notice was sent to the builder.[50] The focus of the Court's holding was on the language of the statute, which stated that it "shall have the same force and effect as a notice of commencement of a legal proceeding."[51]

The holdings and rationale of *AMSCO, Altman Contractors, Clarendon,* and *D.R. Horton* reflect courts' focus on whether a "right to repair" statute results in

an adverse judgment or obligation so as to potentially qualify as a "suit" as that term is now defined in CGL policies.

B. "Right to Repair" Statutes 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 straightforward 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. Some "right to repair" statutes allow parties to engage in voluntary arbitration, which may be a suitable avenue to resolve the dispute with the insurers consent.

The second scenario is a bit different. 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.

With the enactment of the "right to repair" statutes, policyholders have argued that the pre-litigation mechanism is an "alternative dispute resolution proceeding." The Florida District Court, however, in *Altman, supra,* was quick to disagree with such an argument.[52] The court focused on the fact that the Legislature described the Florida statute as a "mechanism" not a "proceeding."[53] The policy definition 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 *Altman* court explained that the term "proceeding" in this context connotes some form of legal action involving a third party and that Chapter 558 provides for no procedure that results in a decision or delineation of private rights and remedies.[54] Furthermore, even if the pre-litigation process of the "right to repair" statutes are viewed as "alternative dispute resolution proceedings," consent by the insurer is required, as noted in *dicta* by the *AMSCO* court; without consent by the insurer, the insurer has no obligation to defend.

In addition, requiring an insurer to hire a lawyer for 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 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.[55] 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.[56] 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.[57]

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."

Like courts interpreting the "civil proceeding" aspect of the "suit" definition, not all courts agree that pre-litigation claims fall outside the term "other alternative dispute resolution proceedings." For example, a Colorado appellate court determined that Colorado "right to repair" statute constitutes "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.[58] 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.[59] A lawsuit for breach of contract was filed against the insurer, who argued that the notice of claim did not constitute a "suit."[60] 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."[61] 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."[62] 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.[63]

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)."[64] The intent, however, was set forth in a previous court ruling describing the "right to repair" statute, rather than articulated by the Legislature in the statute itself.[65] 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.[66] 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.[67]

C. Policyholders May 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. Although none of the insureds in the above-referenced cases advanced this argument, given the use of "right to repair" statutes, policyholders may use cases analyzing the undefined term "suit" to develop a broader interpretation of the term. For example, in *Hester, supra,* the Court recognized the distinction 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 such, case law interpreting the term "suit" when the term was not defined in the policy should have no place in determining whether pre-litigation measures undertaken pursuant to "right to repair" statutes give rise to an insurer's duty to defend.

VII. CONCLUSION

In conclusion, the language and intent of "right to repair" statutes, along with the policy language, governs whether pre-litigation mechanisms for construction defect claims 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, policyholders and insurers must be mindful of the changes in policy language and the potential impacts those changes may have on the duty to defend. Policyholders and insurers must, therefore, closely examine the statute at issue, the policy language regarding the duty to defend, as well as case law interpreting such language to adequately assess whether a particular pre-litigation measure involving a construction defect claim gives rise to a defense obligation on the part of the insurer.

Endnotes

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

2. *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).

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

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

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

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Alaska Stat. §§ 09.10.054, AS 09.45.881 - 09.45.899; Ariz. Rev. Stat. §§ 12-552, 12-1361 - 12-1366; Cal. Civ. Code 895 - 945.5; Colo. Rev. Stat. §§ 13-20-801 - 13-20-808; F.S.A. §§558.001 - 558.005; Ga. Code §§8-2-35 - 8-2-43; Haw. Rev. Stat. §§ 672E-1 - 672E-13; Idaho Code §§ 6-2501 - 6-2504; Ind. Code §§ 32-27-3-1 -3-27-3-14; Kan. Stat. §§ 60-4701 - 60-4710; Ky. Rev. Stat. §§ 411.250 - 411.266; La. Rev. Stat. 9:3141 -9:3150; Minn. Stat. §§ 327A.01 - 327A.08; Miss. Code. §§ 83-58-1 – 83-58-17; Mo. Rev. Stat. §§ 436.350 - 436.365; Mont. Code §§ 70-19-426 - 70-19-428; Nev. Stat. §§ 40.600 - 40.695; N.H. Rev. Stat. §§359-G:1 – 359-G:8; N.Y. Gen. Bus. Law §777-a and CPLR 214-d; N.D. Cent. Code § 43-07-26; Ohio Rev. Code §§ 1312.01 – 1312.08; Okla. Stat. tit. 15 §§ 765.5 – 771; Or. Rev. Stat. §§ 701.560 - 701.600; S.C. Code §§40-59-810 – 40-59-860; S.D. Codified Laws §§ 21-1-15 - 21-1-16; Tenn. Code §§ 66-36-101 – 66-36-103; Tex. Prop. Code Ann. §§ 27.001 -27.007; Vt. Stat. tit. 27A, § 3-124 ;VA Code § 55-70.1; Wash. Rev. Code §§ 64.50.005 - 64.50.060; W. Va. Code §§21-11A-1 – 21-11A-17; W. Va. Code §§21-11A-1 – 21-11A-17.

12. F.S.A. § 558.001.

13. Cal. Civ. Code § 910.

14. 593 Fed. Appx. 802, 804 (10th Cir. 2014) (applying Utah law).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 805.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 809.

23. *Id.* at 810-11.

24. *Id.*

25. 124 F. Supp.3d 1272, 1274 (S.D. Fla. 2015).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1279.

32. *Id.*

33. *Id.*

34. *Id.* at 1280.

35. *Id.* at 1281.

36. *Id.*

37. *Id.* at 1282.

38. *Id.*

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

40. *Id.*

41. 113 Cal.Rptr.3d 585 (4th Dist. Ct. App., Div.3, Cal.2011); 117 Cal.Rptr.3d 613, 614, 242 P.3d 67 (Cal.2010) (granting the petition for review but deferring the matter pending the disposition of *Ameron Int'l Corp. v. Ins. Co. of the State of Penn.,* 50 Cal.4th 1370, 118 Cal.Rptr.3d 95, 242 P.3d 1020 (Cal.2010)), *Clarendon Am. Ins. Co. v. Starnet Ins. Co.,* 121 Cal.Rptr.3d 879, 879, 248 P.3d 191 (Cal.2011) (dismissing review).

42. *Id.* at 587.

43. *Id.*

44. *Id.* at 589.

45. *Id.*

46. *Id.*

47. *Id.* at 592.

48. *Id.*

49. *Id.* at 592-93.

50. 2012 WL 33070 *19 (S.D. Cal. 2012).

51. *Id.*

52. *Altman,* 124 F. Supp 3d 1281.

53. *Id.*

54. *Id.*

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

56. *Id.* at 298.

57. *Id.* 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."

58. 285 P.3d 328, 332 (Colo.Ct.App. 2012).

59. *Id.*

60. *Id.* at 333-34.

61. *Id.* at 334.

62. *Id.*

63. *Id.* at 334-35.

64. *Id.* at 335.

65. *Id.*

66. *Id.*

67. *Id.* ■

MEALEY'S LITIGATION REPORT: CONSTRUCTION DEFECTS INSURANCE
edited by Shawn Rice
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1550-2910