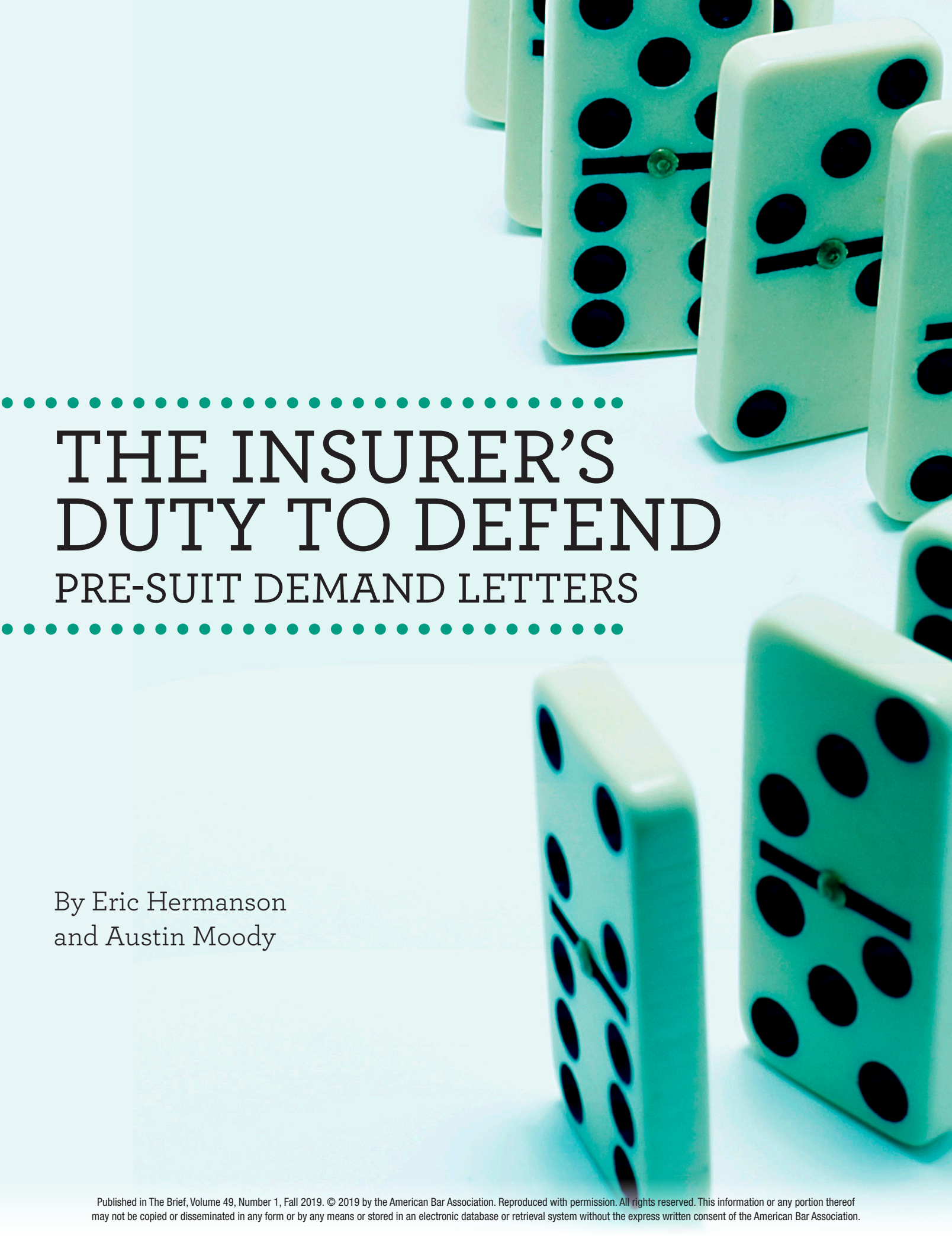

THE INSURER'S DUTY TO DEFEND

PRE-SUIT DEMAND LETTERS

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Commercial general liability (CGL) policies typically require an insurer to defend any "suit" that seeks potentially covered "damages" that the insured may be "legally obligated to pay." This seems simple enough.

But can an insurer ever have any obligations to its insured *before* a suit is filed? In particular, can an insurer ever have obligations to defend a pre-suit demand against a claimant? The answer is less straightforward than it seems.

RECENT, CONFLICTING CASE RESULTS

Consider two recent cases, decided a few years apart by federal courts in Massachusetts. These cases present the paradoxical situation of two courts applying the same policy language to the same type of statutory pre-suit demand and arriving at seemingly divergent conclusions.

***Cytosol*: duty to defend.** In *Cytosol Laboratories, Inc. v. Federal Insurance Co.*,[1] a seller of recalled products (AMT) served the manufacturer (Cytosol) with a pre-suit demand as required by Massachusetts General Laws, chapter 93A (known colloquially as "Chapter 93A"). Under the Massachusetts statute, plaintiffs are required to send such a letter at least 30 days before bringing suit for "unfair or deceptive acts or practices in the conduct of any trade or commerce."[2] The purpose of the demand letter requirement is to avoid unnecessary litigation by giving the recipient the opportunity to respond with a reasonable settlement offer; if the recipient does not make a "reasonable offer of settlement," it becomes liable for treble damages and attorney fees.[3]

Cytosol forwarded the letter to its insurer (Federal). It asked that Federal "attempt to resolve these claims without AMT filing suit."[4] Federal declined. It argued, among other things, that the demand letter did not trigger a duty to defend and that no duty was owed until litigation actually was initiated against the insured. Cytosol sued.

The court disagreed with Federal's position that the demand letter did not trigger a duty. It found

> the filing of a formal lawsuit is not always required to trigger a duty to defend. "[W]here an insured's failure to respond adequately to a pre-suit letter would significantly affect the insured's ability to defend itself in a subsequent action arising out of the same subject matter and is substantially equivalent to the commencement of a lawsuit,' the letter may be sufficient to invoke the insurer's defense obligations to the insured."[5]

TIP
Learn to how to respond to a pre-suit demand for a defense and recognize when the duty to defend could be triggered.

Insurers took note. Although the *Cytosol* court ultimately found no coverage, many read the case to mean that an insurer should step up and appoint defense counsel in response to pre-suit demand letters (at least in Massachusetts).

***Sanders*: no duty to defend.** Then, a few years later, a different district court—and the U.S. Court of Appeals for the First Circuit—reached a very different result.

The facts of *Sanders v. Phoenix Insurance Co.*[6] are somewhat lurid. A divorce attorney (Doe) had an intimate relationship with a client (Sanders). The client committed suicide. Sanders's estate (Estate) blamed Doe for the death.

As in *Cytosol*, the claimant served a pre-suit demand under Chapter 93A. Doe forwarded the letter to his professional liability carrier, which declined to defend. Fearing reputational damage if his name was "exposed in public court documents," Doe entered into settlement discussions with the Estate.[7] Eventually, Doe resolved the case without suit being filed. Doe agreed with the Estate to a negotiated sum of damages—$500,000—and, as part of the resolution, assigned the Estate his rights against the insurer with respect to its failure to defend or indemnify him.

The insurer argued successfully before the district court that, notwithstanding *Cytosol*, Doe had no such rights under Massachusetts law. And the First Circuit agreed, affirming the insurer's viewpoint:

> [T]he Policy . . . provides that it must only furnish counsel to defend the insured in the face of a suit. . . . [The insurer] has no obligation to provide a defense in the absence of a suit.[8]

Because Sanders's claim was resolved prior to litigation, the courts found, Doe's policy was not triggered, and no defense obligation arose.

THE CGL "SUIT" REQUIREMENT

Standard policy language. The standard CGL policy insuring agreement, Form CG 00 01 12 07,[9] begins as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. . . .[10]

The policy defines *suit* as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," or "personal and 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 does submit with our consent;
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent[.][11]

In the environmental context, the term *suit* also has been extended to certain administrative cleanup orders, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) potentially responsible party (PRP) notices, and administrative proceedings, which courts view as "sufficiently coercive and adversarial in nature to constitute a 'suit' within the meaning of the CGL policy."[12]

Insureds: pre-suit duties and obligations. Most policies contain language that requires insureds to notify their insurers, not only of suits that have been filed against them, but also of claims that could result in suits.[13] Indeed, most standard-form CGL policies go even further: they require insureds to notify their insurers "as soon as practicable of an 'occurrence' or an offense which may result in a claim."[14]

Along similar lines, most CGL policies have policy language that bars an insured from agreeing to settle a claim prior to suit without giving notice and getting the insurer's consent: "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent."[15]

These pre-suit provisions serve several purposes. One purpose is

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to allow insurers the opportunity, if they choose, to investigate, to involve themselves in the resolution of claims that may lead to suits under a policy, and to take steps that will resolve or minimize the insurers' (and the insureds') potential liability even before suit is filed.[16]

If an insured fails to notify timely its insurer of a suit, claim, or occurrence, most jurisdictions allow the insurer to deny coverage as long as the insurer can show that it was prejudiced by the omission.[17] If an insured undertakes defense, incurs costs, and settles without obtaining the insurer's consent, most jurisdictions find that the carrier is not liable for the costs of the settlement into which the insured has voluntarily entered.[18]

Insurers: no pre-suit duties or obligations. The same is not necessarily true for insurers. As a general rule, the language of the policy does not expressly require an insurer to become involved with a claim until a suit is filed. In some cases, of course, insurers will waive this protection and will choose to become involved. They will see their interests as aligned with the interests of their insureds, and they will want to take steps—even before suit is filed—to head off a larger future liability that may be covered under the policy.

But there are also cases where insurers properly resist such involvement:

- In some cases, the insurer may think that the demand letter is simply a bluff and no covered suit will result if the claimant simply is left alone. In these cases, the insurer may prefer to hang back and wait to see if the claimant's pre-suit demand actually ripens into litigation. Indeed, in some of these cases, the insurer may be concerned that its involvement would be counterproductive, signaling the possibility of available money and encouraging claimants (who otherwise might be inclined simply to let a matter drop) to take further steps against the insured.
- In some cases, the insurer may question whether a threatened claim is going to be covered and whether a defense obligation ultimately will be owed under the policy. In states that follow a "four corners" rule, this question can be resolved only through close examination of a complaint, arbitration demand, or other formal pleading.[19] In these cases, the insurer may feel it is unable to respond to a pre-suit demand until a pleading is on file, so the defense obligation can be evaluated more closely.
- In some cases, insurers may suspect collusion or improper conduct involving a claimant or insured. In these cases, too, the insurer may not want to respond to a pre-suit demand and may prefer to wait until a complaint is on file. Because attorneys may face sanctions for filing a false, exaggerated, or improper pleading, the requirement of a formal pleading, i.e., a suit, serves as a safeguard and may operate to weed out frivolous or collusive claims.
- Finally, in some cases, the insurer's own business considerations will come into play. For example, if an insurer has reinsured a particular risk, the insurer may be concerned that a pre-suit payment, in contravention of the language of its policy, will be deemed "voluntary" by reinsurers and will not be recoverable under the applicable certificate or treaty.

CASES WHERE COURTS HAVE IMPOSED PRE-SUIT DUTIES ARE TROUBLING TO THE EXTENT THAT THEY FAIL TO TAKE APPROPRIATE ACCOUNT OF POLICY LANGUAGE AND BUSINESS AND LEGAL CONSIDERATIONS UNDERLYING THE SUIT REQUIREMENT.

Each of these represent legitimate concerns from an insurer's standpoint. And each of these concerns is served by (and reflected in) the policy language, which imposes on the insurer a right and duty to defend only against suits that seek covered damages.

CASES IMPOSING OBLIGATIONS

Despite the general lack of pre-suit duties and obligations imposed on insurers, there are some cases, like *Cytosol*, where courts have departed from the rule and have required insurers to step up and assume responsibility for pre-suit demands prior to commencement of a suit. The cases are troubling to the extent that they fail to take appropriate account of the policy language and the business and legal

considerations underlying the suit requirement.

The cases fall into several broad categories: cases treating pre-suit demands as sufficiently coercive to qualify as suits, cases treating pre-suit demands as a form of ADR, and cases treating pre-suit demands as costs recoverable in anticipation of litigation.

Sufficiently coercive to qualify as suits. One line of cases involves statutory pre-suit demands that a claimant is required by law to serve before the claimant is allowed to proceed to suit. In some jurisdictions, the recipients of these demands may face significant coercive consequences—analogous to a kind of default judgment—if they fail to respond properly.

The court in *Cytosol* apparently saw AMT's Chapter 93A demand letter this way because a defendant who gets such a letter and fails to make a reasonable offer of settlement may be liable for enhanced penalties, including treble damages and attorney fees. Given these consequences, the court in *Cytosol* suggested, it made no sense for an insurer to hold off involvement, or for a court to strictly apply policy language limiting an insurer's obligations until an actual suit was filed. (Of course, the First Circuit in *Sanders* later disagreed.)

Another relevant example is presented by the "right to repair" statutes that many states have enacted in the context of construction-defect litigation.[20] These laws usually require a claimant to notify a contractor of alleged defects, and follow certain procedural requirements, before bringing suit. The contractor then has the opportunity to respond and repair the defect if it chooses. If the contractor (or its insurer) fails to respond, consequences may follow.[21]

Some courts treat these statutorily mandated pre-suit repair demands as coercive and analogize them to PRP notices or other communications by environmental regulators or administrative agencies.[22] Indeed, some states require insurers to take this view. The Nevada right to repair statute (known colloquially as "Chapter 40") contains an express provision stating that an insurer "[m]ust treat the claim as if a civil action has been brought against the contractor" and "[m]ust provide coverage to the extent available under the policy of insurance as if a civil action has been brought against the contractor."[23] Likewise, California's right to repair statute (known colloquially as "SB800") states that a pre-suit notice "shall have the same force and effect as a notice of commencement of a legal proceeding."[24] Relying on that provision, most California courts have found SB800 notices to trigger an insurer's duty to defend.[25]

But the question of defense presents a closer call when there is no statutory language mandating that insurers treat the notice as a suit. Thus, for example, in *Cincinnati Insurance Co. v. AMSCO Windows*,[26] the U.S. Court of Appeals for the Tenth Circuit, applying Utah law, found that notice under Nevada's right to repair statute did not qualify as a suit and did not trigger an obligation to defend. It noted that "noncompliance [with the Chapter 40 civil pre-litigation process] does not result in any adverse judgment or obligation but rather imposes limited consequences in subsequent litigation."[27] Furthermore, the court noted,

> parties who fail to comply with Chapter 40 face only limited consequences when a claimant's action eventually proceeds to state court. For example, under § 40.650, if a contractor or supplier fails to send a written response to a claimant—responding to each alleged construction defect and stating whether he has elected to repair the defect, offer monetary compensation, or disclaim liability for the defect—then Chapter 40's limitations on damages and defenses to liability in subsequent lawsuits are nullified. If a contractor or supplier fails to appear in mediation or refuses to mediate in "good faith," the mediator may choose to issue a report that is admissible in subsequent litigation.
>
> These results, although serious, are not parallel to the often case-determinative consequences of noncompliance in the context of lawsuits or mandatory arbitrations. Indeed, there are instances when a cost-benefit analysis would lead a contractor to "opt[] not to exercise its opportunity to repair" and encourage the claimant to commence litigation.[28]

The same might be said of insurers. In some instances, a cost-benefit analysis may lead an insurer to appoint counsel and represent the insured through the pre-litigation process. But in other cases, an insurer may prefer to decline defense and leave to its insured the question of how to respond to a pre-suit repair demand, i.e., whether to offer repairs of the issues that the claimant is alleging. This is particularly true if the claim mostly seems to involve faulty work or other matters that are excluded from coverage under the insurer's policy.

In the latter cases, the insurer should be able to rely on its policy language. It should be able to decline defense until the contractor has finished any repairs it chooses to make and until the claimant has narrowed and focused the remaining claims, reducing those remaining claims to a defined form, i.e., a litigation complaint or arbitration demand.

Form of ADR. In a second line of cases, courts have found a duty to defend triggered by a demand

letter under right to repair statutes on the basis that the statutory pre-suit process is, in effect, a form of alternative dispute resolution.

For example, in *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Co.*,[29] the Florida Supreme Court addressed the statutory right to repair process set out in Chapter 558. The court in *Altman* began by noting that the CGL definition of *suit* means "civil proceeding" but also includes arbitration proceedings and "[a]ny other alternative dispute resolution proceeding in which [covered] damages are claimed and to which the insured submits with our consent."[30]

Addressing the first part of this definition, the court found that the term *civil proceeding* most naturally meant

> [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 law.[31]

Accordingly, the court found that a Chapter 558 pre-suit repair process was not a "civil proceeding under the policy terms because the recipient's participation in the chapter 558 settlement process is not mandatory or adjudicative."[32]

Nonetheless, the court found that the Chapter 558 pre-suit process fell within the second part of the CGL policy definition, i.e., "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." The court noted, in particular, the legislative history of the right to repair statute, which included the following legislative findings and declaration:

> 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, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process.[33]

Applying this reasoning, the court found that a pre-suit demand might trigger a duty to defend but was subject to the further requirement that the insured must "submit [to the process] with [the insurer's] consent."[34]

This part of the court's holding is important. Although an insurer in Florida may have an obligation to defend an insured throughout the Chapter 558 pre-suit process if the insurer consents, an insurer can avoid this obligation by clearly informing its insured that it does not consent to do so. This outcome is more or less consistent with the terms of the insurer's policy, and it strikes an appropriate balance of interests—that is, allowing, but not requiring, insurers to participate in the pre-suit claims-resolution process.[35]

Costs recoverable in anticipation of litigation. A third, and the most troubling, line of cases arises in the context of pre-suit demands that trigger coverage under multiple policies. In these cases, it sometimes will happen that one insurer—but not the other—agrees to undertake defense on a voluntary basis, despite the absence of clear policy language requiring it to do so. Some time later, after suit is filed, the first insurer may seek recovery from the second insurer for the defense costs that it has incurred, including the costs that it incurred in voluntarily responding to the pre-suit demand. In these circumstances, some courts have granted the first carrier, i.e., the defending insurer, a right to obtain reimbursement from the second carrier, i.e., the carrier that chose to hold off defense in accordance with its policy language.

THE MOST TROUBLING LINE OF CASES ARISES IN THE CONTEXT OF PRE-SUIT DEMANDS THAT TRIGGER COVERAGE UNDER MULTIPLE POLICIES.

Consider, for example, *Liberty Mutual Insurance Co. v. Continental Casualty Co.*[36] An insured (Robertson) installed glass panels in the John Hancock Tower in Boston. The panels failed. Some glass panels blew out and shattered on the streets below. The owner notified Robertson that it viewed Robertson's work as defective. Robertson, in turn, notified its carriers. It told them that it planned to tender any claims that might be filed as a result of the problem. Nonetheless, it continued to work with the owner of the building to try to fix the problem, and it entered into a tolling agreement, which delayed by several years the filing of any suits.

During this period, one of Robertson's carriers (Liberty) appointed

counsel, who assisted Robertson in its negotiations with the owner and in preparing anticipatory defenses. A second carrier (Continental) took a harder line. Relying on its policy language, it told Robertson that it had no legal obligation to defend against the owner's pre-suit demand, although it "promis[ed] that [it] would live up to the obligations of its policy if and when a third-party claim for injuries and property damage were presented."[37]

Several years later, the tolling agreement expired, and litigation ensued. Continental reviewed the complaints that had been filed against Robertson. After doing so, it determined that no defense was owed.

Robertson and Liberty challenged Continental's position as to defense and ultimately prevailed.[38] At this point, a second action became necessary—to evaluate the exact amount of the fees that Continental would have to reimburse. Liberty, as Robertson's assignee, argued that Continental should be liable for all costs, including the "defense" costs that Liberty incurred prior to the filing of the complaint. Continental, in response, argued that its duty to defend was triggered only by the filing of a complaint. It said it should be liable only for reimbursing the costs that Liberty incurred after that point.

The court rejected Continental's position and found Liberty's pre-litigation costs to be recoverable "in the circumstances of this particular case":

> The extent of the window problem was so great that it was almost certain that a suit would be filed. Indeed, [the parties] entered into an agreement to delay the filing of any suits until after further efforts were made to solve the immediate problems posed by the defective curtain wall. Without this agreement, the suit would have been filed much sooner. . . . [Moreover,] both the exhibits and the testimony of witnesses strongly suggest that most, if not all, of the pre-suit services would have been performed after suit was filed had they not been performed before and that . . . [the insured] had little choice but to retain counsel and prepare to defend itself when it did. Under these particular circumstances, we conclude that it was not error to allow the jury to evaluate the pre-suit services and charges for their reasonableness.[39]

The court's ruling is odd as it is seemingly contrary to the language of the Continental policy. In fact, as the court itself noted in an earlier part of the decision,

> [t]he mere fact a claim has been asserted against the insured does not impose any duty of "defense" upon the insurer, since until an action has been brought against the insured there is by definition no claim against which the insurer is required to defend.[40]

For a second example of the same curious reasoning, consider *Arch Insurance Co. v. Scottsdale Insurance Co.*[41] In this case, a crane collapsed during construction of a tower in Bellevue, Washington. The general contractor (LCL) notified its carrier (Arch) of the accident and the likelihood of litigation. Arch appointed counsel and undertook various pre-suit expenses: "storing the remains of the crane, retaining experts to examine the crane in preparation for litigation, making efforts to settle, and advocating for LCL during investigations."[42] Arch also tendered the defense to the crane operator's insurer (Scottsdale) because LCL was an additional insured on that policy. Scottsdale declined to defend, on various grounds.

THESE KINDS OF RULINGS ARE SEEN AS A REFLECTION OF COURTS' PERCEIVED EQUITABLE POWER "TO DO JUSTICE" AND AS A FUNCTIONALIST DISTASTE FOR STRICT VIEWS OF COVERAGE.

In the ensuing coverage litigation, the court determined that Scottsdale had, in fact, owed LCL a defense. It then found that the duty extended to the pre-suit costs that Arch had incurred:

> Having found that LCL is an additional insured with respect to the Scottsdale policy, the Court now turns to the scope of fees and costs that Arch may recover. Scottsdale argues that pre-suit costs are not recoverable because Scottsdale is not responsible for expenses that were incurred by LCL or Arch prior to the filing of the first suit. . . . However, there is no authority to support this proposition. The duty to defend is broad and encompasses those expenses that are reasonably related to the defense of a covered claim. . . . [Moreover,] "[n]o right of allocation exists for the defense of non-covered claims that are 'reasonably related' to the defense of covered claims." . . . Therefore, where the duty to

> defend necessarily encompasses certain pre-suit expenses, those expenses will not be allocated as distinct.
> The issue of whether costs are reasonably related to the defense of covered claims is a factual inquiry. . . . Arch has explained that its pre-litigation costs were incurred in storing the remains of the crane, retaining experts to examine the crane in preparation for litigation, making efforts to settle, and advocating for LCL during investigations. . . . Scottsdale does not plead sufficient evidence to raise an issue of fact as to whether the pre-suit costs were reasonably related to the defense of covered claims.[43]

These kinds of rulings are troubling. They are hard to justify under the language of the insurance contracts at issue. They are seen most naturally as a reflection of courts' perceived equitable power "to do justice"[44] and as a functionalist distaste for strict views of coverage. Where two carriers have responded to a claim—one has taken a strict view of its policy obligations, and the other has taken a looser view (i.e., a view more generous to the interests of the insured)—courts may feel pressure to punish the stricter insurer, incentivize the less strict approach, and not leave the more "generous" insurer with a disproportionate share of liability.

But this kind of reasoning—based on loose notions of the insurers' respective "generosity"—is simplistic and naive. Two insurers, each having the right (but not the duty) to voluntarily defend an insured against a pre-suit demand, may permissibly reach different decisions on whether to do so. Each has a perfect right to reach that decision on its own. And the insurers may have different, but perfectly legitimate, business reasons for reaching different results on that question. Perhaps one insurer, but not the other, charges low up-front premiums, with the implicit understanding that claims tendered under its policy will be subject to more demanding scrutiny. Perhaps one insurer, but not the other, has an ongoing business relationship with the insured and hopes through its generosity to curry favor and earn renewal premiums. Perhaps one insurer, but not the other, is facing regulatory scrutiny in the jurisdiction where the claim occurs and hopes (through a voluntary assumption of the insured's defense) to create goodwill and avoid negative publicity. These are, of course, only a few of many plausible scenarios.

In such circumstances, courts do no justice by overriding the insurers' clear policy language and imposing duties not inherent in the policy. Quite the contrary: These expansive judicial interpretations introduce uncertainty of outcome and cause insurers to assume obligations that their policies were not priced to cover. Taken to its logical conclusion, the result of this judicially created uncertainty is that insurers are forced to raise prices for all insureds; and some insureds, in turn, may be forced to self-insure or drop out of the market altogether, reducing the efficacy of insurance markets to evaluate and pool risks efficiently.

CONCLUSION

Policyholders are required to provide prompt notice not only of suits but also of claims, occurrences, and circumstances that may lead to suits. Insurers, in contrast, generally have no obligation to defend under their policy until an actual suit is filed.

In some cases—where insurers view their interests as aligned with their insureds—insurers may agree voluntarily to assist a policyholder in responding to a pre-suit demand. But in other cases, the insurer may choose not to do so. Both choices are valid. Both choices, in different circumstances, may serve legitimate business, legal, and economic objectives.

There is also a small class of cases in which courts have departed from the general duty-to-defend principle and have imposed an obligation on insurers to pay pre-suit defense costs even though the insurer is unwilling to do so. These cases are troubling to the extent that they fail to take account of the language of the insurer's policy or the assumptions on which it was issued and priced. ■

NOTES

1. 536 F. Supp. 2d 80 (D. Mass. 2008).
2. Mass. Gen. Laws ch. 93A, § 2(a) (LexisNexis, Lexis Advance through chapter 69 of the 2019 legislative session).
3. *Id.* §§ 9, 11.
4. *Cytosol*, 536 F. Supp. 2d at 85.
5. *Id.* (quoting Zecco, Inc. v. Travelers, 938 F. Supp. 65, 67 (D. Mass. 1996) (quoting Hazen Paper Co. v. U.S. Fid. & Guar. Co., 407 Mass. 689, 555 N.E.2d 576, 581 (1990))); *see, e.g.*, Liberty Mut. Ins. Co. v. Black & Decker Corp., 2005 WL 102964, at *4, 2005 U.S. Dist. LEXIS 659, at *10 (D. Mass. Jan. 13, 2005).
6. 843 F.3d 37 (1st Cir. 2017).
7. *Id.* at 46.
8. *Id.* at 43.
9. This article focuses on language used in the insuring agreement of ISO CGL policy forms. However, in some contexts—for example, where insureds assume liability through captives or specialized risk-retention groups—policies may be drafted more broadly to avoid the "suit" requirement and *legally obligated to pay* language.
10. Insur. Servs. Office, Commercial General Liability Form CG 00 01 12 07, § I(1)(a) (2006).
11. *Id.* § V(18)(a)–(b).

12. Town of Windsor, Vt. v. Hartford Accident & Indem. Co., 885 F. Supp. 666, 669 (1995) (citing Vill. of Morrisville Water & Light Dep't v. U.S. Fid. & Guar. Co., 775 F. Supp. 718, 732–33 (D. Vt. 1991)). Although jurisdictions are split on this issue, the majority appear to hold that PRP letters, environmental cleanup notices, and related administrative proceedings can trigger a CGL insurer's duty to defend, even in the absence of a lawsuit. Sometimes, these courts reach these rulings by finding that the term *suit* is ambiguous. *See, e.g.*, *Morrisville*, 775 F. Supp. 718. More often, these courts focus on the "coercive" nature of such environmental demands and the severe legal consequences to an insured if it fails to respond. *See, e.g.*, Hazen Paper Co. v. U.S. Fid. & Guar. Co., 407 Mass. 689, 697, 555 N.E.2d 576, 581–82 (1990). A minority of courts still find no duty to defend—taking a literal view of *suit* to mean an actual, filed lawsuit or arbitration proceeding. *See, e.g.*, Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 959 P.2d 265 (Cal. 1998); Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754 (6th Cir. 1992); Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co., 166 Ill. 2d 520, 532 (1995).

13. The following language is typical:

> 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 must
> (1)Immediately send us copies of any demands, notices, summonses, or legal papers received 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"; and
> (4)Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

See, e.g., W. Am. Ins. Co. v. Yorkville Nat'l Bank, 238 Ill. 2d 177, 193, 345 Ill. Dec. 445, 455, 939 N.E.2d 288, 298 (2010).

14. ISO CGL form CG 00 01 04 13, for example, states as follows:

> 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 any injury or damage arising out of the "occurrence" or offense.

Insur. Servs. Office, Commercial General Liability Form CG 00 01 04 13, § IV(2)(a) (2012).

15. *See, e.g.*, EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1115 (11th Cir. 2017).

16. Of course, that is not the only purpose. In many cases, even if an insurer chooses not to involve itself directly in a pre-suit claim or occurrence, the insurer may have an interest in knowing what has happened. Even if a claim or occurrence has not yet ripened into a formal suit requiring defense, it may represent a change in an insured's potential financial exposure and, thus, in the insurer's litigation risk, which the insurer may need to consider in deciding whether to renew or continue coverage or impose additional protective terms. *See generally* Michael Rothschild & Joseph Steiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. Econ. 629 (1976).

17. *See, e.g.*, Sherwood Brands, Inc. v. Great Am. Ins. Co., 13 A.3d 1268, 1270 (Md. 2011); Stresscon Corp. v. Travelers Prop. Cas. Co. of Am., 2013 COA 131, ¶ 26 (Colo. App. 2013); Ansul, Inc. v. Emp'rs Ins. Co., 2012 WI App 135, ¶ 24 (Wis. Ct. App. 2012). In a few jurisdictions, lack of timely notice is a valid coverage defense, regardless of prejudice. *See, e.g.*, Travelers Indem. Co. of Ill. v. United Food & Commercial Workers Int'l Union, 770 A.2d 978, 991 (D.C. 2001); Fireman's Fund Ins. Co. v. Care Mgmt., 361 Ark. 800 (Ark. 2010). In other jurisdictions, prejudice may be considered only if the insured has a reasonable justification for the delay. *See* Cty. Mut. Ins. Co. v. Livorsi Marine, Inc., 856 N.E.2d 338 (Ill. 2006).

18. *See, e.g.*, *EmbroidMe.com, Inc.*, 845 F.3d at 1115. In a minority of jurisdictions, courts focus on whether the insurer was prejudiced by the insured's voluntary settlement. *See, e.g.*, Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co., 236 P.3d 421, 428 (Ariz. Ct. App. 2010).

19. *See, e.g.*, Jones v. Fla. Guar. Ass'n, Inc., 908 So. 2d 435 (Fla. 2005); Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Co., 908 A.2d 888 (Pa. 2006).

20. *See, e.g.*, Alaska Stat. §§ 09.45.881–09.45.899 (2016); Ariz. Rev. Stat. §§ 12-1361 to 12-1366 (LexisNexis 2016); Cal. Civ. Code §§ 895–945.5 (Deering 2016); Colo. Rev. Stat. §§13-20-802 to 13-20-807 (2016); Fla. Stat. §§ 558.001–558.005 (2016); Nev. Rev. Stat. §§ 40.600–40.695 (2015);

Tex. Prop. Code Ann. §§ 27.001–27.007 (West 2016).

21. Florida Statutes § 558.004 et seq., known colloquially as "Chapter 558," is representative. Chapter 558 requires the claimant to "serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable" before filing suit. The respondent, in turn, must serve a written response that offers to (1) "remedy the alleged construction defect at no cost to the claimant," (2) "compromise and settle the claim by monetary payment," or (3) "compromise and settle the claim by a combination of repairs and monetary payment." The respondent also may respond with a statement disputing the claim or informing the claimant that any monetary payment will be determined by the recipient's insurer. Fla. Stat. § 558.004(5)(a)–(e) (LexisNexis, Lexis Advance through the 2019 session of the Florida legislature).

22. *See, e.g.*, Clarendon Am. Ins. Co. v. StarNet Ins. Co., 113 Cal. Rptr. 3d 585 (Cal. Ct. App. 2011), *rev. dismissed*, 248 P.3d 191 (Cal. 2011) (determining that Calderon Notice constituted a suit under CGL policy); Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 67 A.3d 961 (Conn. 2013) (citing R.T. Vanderbilt Co. v. Cont'l Cas. Co., 870 A.2d 1048 (2005), and analogizing construction claimant's pre-suit demand letter to PRP letter). Note, however, that post-*Vanderbilt* Connecticut courts have limited *Vanderbilt to* PRP letters:

> The Court [in *Vanderbilt*] emphasized that the letter was more than just the type of demand letter the Plaintiff claims here is sufficient to constitute an "action" within the meaning of the policy. The Court stated: "We emphasize that our determination in the present matter is predicated on CERCLA's extremely burdensome provisions and the immediate legal consequences that arise upon the receipt of a PRP letter. Thus, we find that the consequences of the receipt of the EPA letter are so substantially equivalent to the commencement of a lawsuit that a duty to defend arises immediately. The EPA letter was not the equivalent of a conventional demand letter. . . ."

Riggs v. Standard Fire Ins. Co., 2006 Conn. Super. LEXIS 407. Given this later authority, at least one federal court has opined that *Capstone* is distinguishable and is not good law where PRP letters are not involved. Aztec Abstract & Title Ins., Inc. v. Maxum Specialty Grp., 302 F. Supp. 3d 1274 (N.M. 2018).

23. Nev. Rev. Stat. § 40.649 (LexisNexis, Lexis Advance through the 2018 session of the Nevada legislature). However, this provision applies only to policies issued in Nevada and governed by Nevada law. Cincinnati Ins. Co. v. AMSCO Windows, 921 F. Supp. 2d 1226 (D. Utah 2013), *aff'd*, 593 F. App'x 802 (10th Cir. 2014).

24. Cal. Civ. Code §§ 895 et seq. (Deering, Lexis Advance through the 2019 regular session of the California legislature) (known colloquially as "SB800").

25. *See, e.g.*, D.R. Horton L.A. Holding Co., Inc. v. Am. Safety Indem. Co., 2012 U.S. Dist. LEXIS 1881 (S.D. Cal. Jan. 5, 2012).

26. 593 F. App'x 802 (10th Cir. 2014).

27. *Id.* at 809.

28. *Id.* at 809–10 (citations and quotations omitted).

29. 232 So. 3d 273 (Fla. 2017).

30. *Id.* at 275.

31. *Id.* at 278 (quoting *Civil Proceeding*, Black's Law Dictionary 300 (10th ed. 2014)).

32. *Id.*

33. *Id.* at 276 (emphasis added).

34. *Id.* at 279.

35. Of course, an insurer who does not consent to participate in a statutory pre-suit process must make its position clear. A failure to address this issue clearly and unequivocally, in the insurer's initial declination correspondence, may be held to have waived the insurer's rights. *See, e.g.*, Melssen v. Auto-Owners Ins. Co., 285 P.3d 328 (Colo. App. 2012) (finding pre-suit notice under Colorado Defect Action Reform Act constituted a suit because it amounted to alternative dispute resolution, subject to insurer's right to consent, but going on to find that insurer waived rights through silence: "Auto-Owners impliedly consented to the CDARA notice of claim process under the policy because the claims adjuster knew of, and did not object to, the Melssens' intention to investigate the Holleys' property damage claim and pursue settlement discussions with them.").

36. 771 F.2d 579 (1st Cir. 1985).

37. *Id.* at 580.

38. Cont'l Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 156 (1984).

39. *Liberty*, 771 F.2d at 586.

40. *Id.* at 583 (citing 14 George J. Couch, Cyclopedia on Insurance § 51:43, at 457 (1982)). Interestingly, a few years later, Liberty Mutual itself found occasion to distinguish the ruling in *Liberty*: it argued that *Liberty*'s holding was fact-specific and should not require defense of pre-suit demand letters following a gas line explosion involving its insured. Bay State Gas Co. v. Robert J. Devereaux Corp., 30 Mass. L. Rep. 349, at *20–22 (2012) (noting fact-specific nature of the *Liberty* holding and questioning whether *Liberty* is still good law).

41. 2010 U.S. Dist. LEXIS 115256 (W.D. Wash. 2010).

42. *Id.* at *12.

43. *Id.* at *11–12 (citations omitted).

44. For a recent summary of the origin and development of equitable principles and the historically broad discretion claimed by courts of equity to rewrite documents and "do justice in individual cases based on . . . personal notions of fairness," see Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. Rev. 217 (2019).