Florida Supreme Court Ruling to Have Big Impact on Duty to Defend Construction Cases

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By **Elizabeth B. Ferguson**| January 4, 2018

A recent case out of the Florida Supreme Court will likely have a big impact on the duty of insurers to defend Florida construction cases.

The case, *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company* arises out of a declaratory judgment action filed in the Southern District of Florida: Case No.: SC16-1420 (Fla. 2017).

Altman Contractors, Inc. served as the general contractor on a high-rise condominium project. Crum & Forster Specialty Insurance Company insured Altman during the project under a series of commercial general liability policies.

From April 2012 to November 2012, Altman received multiple notices of construction defects under Chapter 558, Florida Statutes, following completion of the project. Included in the Chapter 558 Notices, the owner claimed property damage to the building. Chapter 558 lays out a process for the resolution of construction defect claims prior to litigation and is in fact a condition precedent to filing suit on such claims in Florida.

In January 2013, Altman tendered to Crum for defense and indemnity of the 558 Notices. Crum denied, arguing the 558 Notices were not a "suit" as defined in the policies. Altman then hired its own counsel to defend the 558 Notices. In May 2013, Altman received a supplemental 558 Notice, bringing the total number of construction defects claimed to over 800.

In August 2013, Crum hired counsel to defend Altman against the claims under a Reservation of Rights, maintaining the position that the Chapter 558 Notices were not a "suit" under the policy. Altman objected to the counsel assigned by Crum and requested its existing counsel be hired to continue to defend the claims. Altman also demanded Crum reimburse it for the fees incurred since tendering to Crum in January 2013 and Crum denied Altman's requests. Eventually, Altman resolved the claims without Crum's involvement and prior to suit being filed.

After settling the claims, Altman filed a declaratory judgment against Crum in the Southern District of Florida on the issue of Crum's duty to defend and indemnity to Altman. The Southern District sided with Crum, ruling that the Chapter 558 Notices did not meet the definition of "civil proceeding" under the policies and therefore granted Crum's summary judgment.

Altman then appealed to the Eleventh Circuit, who certified the following question: Is the notice and repair process set forth in chapter 558, Florida Statutes, a "suit" within the meaning of the commercial general liability policy issued Crum & Forster to Altman.

Policy Language

The Crum & Forster policy language stated, "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."

The policy further defined "suit" as "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged."

The policy language defining "suit" included:

1. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
2. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Court's Decision

The Florida Supreme Court's review of the Chapter 558 process found it did not qualify as a "civil proceeding" under the policy, arguing participation was not mandatory and there was no adjudication. However, it ruled the Chapter 558 process does qualify as a form of "alternative dispute resolution," noting the Chapter 558 process was intended to allow the parties a chance to reach a settlement or perform repairs in lieu of a lawsuit. And, as a form of "alternative dispute resolution," the Florida Supreme Court held the Chapter 558 process meets the definition of a "suit" under the policies.

In light of the question presented, the Supreme Court did not have to go the next step to the issue of whether the Chapter 558 Notices specifically trigger the duty to defend and indemnify under the policy. But, as the Supreme Court ruled the Chapter 558 Notice was a "suit" under the policy, we can expect the *Altman* ruling to be cited in every demand for defense and indemnity from insureds moving forward.

Justice C. Alan Lawson also issued a separate opinion, concurring in part and dissenting in part that requires note.

Looking back at the policy, Lawson notes the duty to defend only arises as to "suits" for "bodily injury" or "property damage," but there is no duty to defend suits for "which this insurance does not apply." Arguing construction defects are not covered by the policy, it is Lawson's opinion there would not be a duty to defend the Chapter 558 Notices. Although he does concede that in the Chapter 558 Notices in the instant matter, the owner included claims for "property damage to the building" which would arguably be covered.

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