Florida Supreme Court Finds That Florida's Chapter 558 Process Constitutes a "suit" Under the Terms & Definitions of a Commercial General Liability Policy.

ALTMAN CONTRACTORS, INC., Appellant,
v.
CRUM & FORSTER SPECIALTY INSURANCE COMPANY, Appellee.

No. SC16-1420.

Supreme Court of Florida.

Decided December 14, 2017.

The subject of whether Florida Statute Chapter 558 notices trigger the duty to defend under commercial general liability policies in Florida has been the subject of much debate and litigation. However, a decision rendered by the Florida Supreme Court in the case of Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company is sending chills up the spines of Commercial General Liability Insurance carriers writing such coverage in Florida. On December 14, 2017, the Florida Supreme Court issued an opinion finding that a Florida Chapter 558 notice may be deemed a form of "alternative dispute resolution," and as such would be considered a "suit" under the terms and definitions of the Crum & Forster policy.

This case stems from the construction of a condominium, following which Altman, the general contractor, received over 800 construction defect claims and 558 notices. Compliance with Florida Chapter 558 is a prerequisite to filing litigation in Florida for construction defects. Essentially, in order to pursue litigation, a claimant must send written notice to the intended defendant providing notice of the claim, as well as an opportunity to repair or settle the claim, without the need for litigation.

Crum & Forster denied Altman's demand for defense and indemnification, asserting the argument that a 558 notice does not constitute a "suit" under the terms of the policies issued, and as such, the duty to defend was not triggered. Altman retained counsel to defend the 558 notices, and ultimately settled all

of the claims without any ensuing litigation, thereafter seeking reimbursement of its fees and costs from Crum & Forster.

Again, Crum & Forster denied the demand. Altman then filed a declaratory judgment action in the United States District Court for the Southern District of Florida, seeking a declaration that Crum & Forster owed a duty to defend and to indemnify Altman under the policy. In that matter, Altman moved for partial summary judgment on the issue of whether the duty to defend was triggered when Altman demanded a defense to the 558 notices. Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 124 F. Supp. 3d 1272, 1275 (S.D. Fla. 2015). The motion was denied by the Federal District Court, and summary judgment was granted in favor of Crum & Forster.

Altman appealed the decision to the United States Circuit Court of Appeals for the Eleventh Circuit, and the Eleventh Circuit certified the following question to be decided by the Florida Supreme Court: "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 by Crum & Forster to Altman?"

The Crum & Forster policy provided in pertinent part:

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 defined the term "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; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

The Court reasoned that subparagraph (b) of the policy broadens the definition of "suit" to "include "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." Looking at the plain meaning of "alternative dispute resolution" as defined in Black's Law Dictionary; it means "[a] procedure for settling a dispute by means other than litigation."

They reasoned that Chapter 558 is a statutorily required pre-suit process aimed to encourage settlement of construction defects claims without resorting to litigation, and found the process to be comparable to mediation. Further, the 558 process provides for a claim for damages, as would be required under subparagraph (b) of the policy.

The Court specifically started their analysis by stating "Whether C&F has a duty to defend Altman during the chapter 558 process is determined by whether the process is a "suit" as defined by the policy." But then the court returned to the policy language, i.e., "any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." So, the Court stated that the insured must "submit" and the insurer must "consent" for there to be a duty to defend. Those questions were disputed facts in this case, and also not part of the certified question. Thus, the Supremes stopped there, leaving open the questions of whether "submit" means as little as inspecting or whether it means conducting repairs, and under what circumstances an insurer should "consent."

Given the determination that the 558 process does constitute a "suit" under the terms of the Crum & Forster policy, it follows then that a very strong argument can be made that the duty to defend would be triggered in certain cases.

Based on the analysis used in this opinion, we expect that we can anticipate an increase in filings of declaratory judgment matters in the coming months.

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