Notice Of A Claim Pursuant To Florida's Pre-Suit Notice Of Construction Defect Statute, Chapter 558, May Trigger An Insurer's Duty To Defend

By Wm. Cary Wright, Esq., Jaret J. Fuente, Esq., and Michael G. Rothfeldt, Esq.,
Carlton Fields, Tampa, Florida

Commercial general liability (CGL) insurance policies are necessary for construction projects of all types. General contractors routinely require through their subcontract agreements that their subcontractors obtain CGL insurance policies, and that those policies specifically include the general contractor as a named additional insured, in part, so that if a construction defect-related dispute arises regarding a subcontractor's work on a project, the general contractor is afforded a legal defense in connection with, and is otherwise insured against, claims made in connection with such a dispute. This sort of insurance coverage arrangement is particularly important if a subcontractor is no longer in business at the time a claim is made regarding its work on a project. Notwithstanding such insurance, however, contractors and insurers often have different views on what exactly triggers an insurer's duty to defend.

Chapter 558, Florida Statutes

Chapter 558, Florida Statutes, is a pre-suit mechanism to resolve construction defect disputes by requiring claimants to furnish contractors with notice and opportunity to repair specified defects. Specifically, Chapter 558 provides that a claimant, as defined in the statute, "may not file an action … without first complying with the requirements" of Chapter 558.[1] It also provides a very detailed pre-suit "notice and opportunity to repair" process that must be followed before filing an action alleging a construction defect, as defined in the statute.[2] The Florida Legislature has described Chapter 558 as an "alternative dispute resolution mechanism."[3]

Recipients of Chapter 558 notices of construction defect claims typically immediately notify the relevant contractors, subcontractors, suppliers, or design professionals, as well as their CGL carriers. Such notification is intended to trigger, and typically does trigger, a pre-suit investigation that often includes hiring counsel, experts, and consultants, which can be costly. Often, this process results in a dispute between a recipient of a Chapter 558 notice of claim and the insurance carriers notified with regard to who must pay those pre-suit investigation costs.

Insureds typically expect a legal defense upon receipt of a Chapter 558 notice of construction defect and its tender to the insurer. Insurers often decline to provide a legal defense before a lawsuit is filed. Therein lies the dispute that was at issue in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*[4]

Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.

Altman involved a dispute between the general contractor for the construction of a high-rise condominium in South Florida (Altman Contractors) and its CGL insurer (Crum & Forster).[5] The condominium served Altman with notices of claim pursuant to Chapter 558, covering more than 800 construction defects at the condominium. Altman, in turn, notified Crum & Forster and demanded, pursuant to the CGL policy, a defense and indemnification. Crum & Forster denied that the notices invoked a duty to defend, arguing the notices did not constitute a "suit" as defined in the policy.

Crum & Forster insured Altman through seven consecutive one-year CGL policies in effect from February 1, 2006 through February 1, 2012. The policy language at issue provided:

> 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.
>
> "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:

continued, page 52

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.[6]

That policy language is identical to the standard Insurance Services Offices (ISO) form policy language. The policy did not further define "civil proceeding" or "alternative dispute resolution proceeding" as used within its definition of "suit." Nor does the standard ISO form.

The condominium subsequently served Altman with a supplemental Chapter 558 notice claiming additional defects and demanding that Altman take all measures necessary to correct them.[7] By then, Altman had hired its own counsel. Altman forwarded the supplemental Chapter 558 notice to Crum & Forster and again requested a legal defense. Crum & Forster maintained its position, but engaged counsel to defend Altman under a reservation of rights in anticipation of litigation.[8] Altman objected to the selection of counsel, demanded its original counsel be permitted to continue providing its defense, and requested reimbursement of fees and expenses incurred since the time it provided notice of the claim.[9] Crum & Forster denied Altman's requests, Altman settled the claims without Crum & Forster's involvement, and Altman then filed a declaratory judgment action in the Southern District of Florida, seeking a declaration that Crum & Forster owed it a duty to defend and indemnify.[10]

The Southern District ruled that the condominium's written notices of claim pursuant to Chapter 558 did not trigger a duty to defend because the Chapter 558 process did not constitute a "suit" as defined in the policy, and it entered summary judgment in Crum & Forster's favor.[11]

Altman appealed to the Eleventh Circuit, and argued that the Chapter 558 process meets the policy's definition of "suit" because it is a "civil proceeding" or "proceeding," as defined by *Black's Law Dictionary* and *Merriam-Webster's Dictionary of Law*, and that even if it is not, it nonetheless constitutes an "alternative dispute resolution proceeding," and is therefore a "suit" as defined in the policy.[12] Altman further argued that without the benefit of insurer participation and defense during the Chapter 558 process, policyholders may decline to participate in that process and even invite litigation in order to trigger insurer participation, thereby undermining the intent of Chapter 558.[13]

In response, Crum & Forster argued that imposing a duty to defend "during the Chapter 558 process will fuel an insurance crisis in the State by dramatically increasing the cost of insurance to those in the construction trade and limiting its availability."[14] The American Insurance Association and Florida Insurance Council, in their *amici curiae* brief in support of Crum & Forster, argued that if insurers must appoint contractor counsel at the Chapter 558 stage, claimants are likely to retain counsel as well, and once they do, their legal fees will make it more difficult to settle cases, thereby frustrating the intent of Chapter 558.

Recognizing "the possible policy implications with respect to this question of first impression," the Eleventh Circuit certified the following question to the Florida Supreme Court:

> *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 Crum & Forster to Altman Contractors?*[15]

The Florida Supreme Court recently answered that question in the affirmative in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*[16] In doing so, the Court explained that whether Crum & Forster has a duty to defend during the Chapter 558 process is determined by whether the process is a "suit" as defined by the policy.[17] The court noted that at the time of the condominium's Chapter 558 notices, Fla. Stat. § 558.001 (2012), provided:

> 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*.[18]

As did the Southern District, the Florida Supreme Court looked to the definition of "proceeding" as defined by *Black's Law Dictionary* (9th ed. 2009) ("any procedural means for seeking redress from a tribunal or agency") and *Merriam-Webster's Dictionary of Law* (1996) ("a particular step … in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations"), and as set forth in the court's decision in *Raymond James Financial Services, Inc. v. Phillips*.[19] But the court also noted that the term "civil proceeding" was added to the 2014 version of *Black's Law Dictionary*, which defined the term to mean "a judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies…."[20]

The Court noted that the Crum & Forster policy at issue initially defines "suit" as a type of "civil proceeding" and found that the Chapter 558 process is not a "civil proceeding" under the terms of the policy, or pursuant to the foregoing definitions, because a Chapter 558 notice recipient's participation in the Chapter 558 process is "not mandatory or adjudicative."[21] A recipient may choose to not respond and thereby force a claimant to file suit. A recipient has no obligation to participate in the Chapter 558 process.

continued, page 53

The Court further noted that the Chapter 558 framework has never been anything other than a voluntary dispute resolution mechanism on the part of the insured. It does not take place in a Court of law or employ any type of adjudicatory body. Nor does it produce legally binding results. Rather, it "sets forth a presuit process whereby a claim may be resolved solely by the parties through a negotiated settlement or voluntary repairs without ever filing suit."[22]

However, the Court noted that subparagraph (b) of the Crum & Forster policy at issue broadened 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."[23] Relying again on *Black's Law Dictionary*, the Court noted that "alternative dispute resolution" is defined to mean "[a] procedure for settling a dispute by means other than litigation."[24]

Regardless of what happens on remand,* Altman *will have implications for all involved in construction disputes where CGL insurance is involved.

The Court concluded that Chapter 558 falls within that definition as a statutorily required pre-suit process aimed at encouraging claimants and insureds to settle construction defect claims without resorting to litigation, and in doing so noted that the Legislature explicitly described Chapter 558 as "'[a]n effective alternative dispute resolution mechanism.'"[25] The Court also found that Chapter 558 provides for damages as required by the policy's definition of "suit" because it defines a "claimant" as one asserting "a claim for damages," requires that a notice of claim provide a description of the damage or loss alleged, and includes a "monetary payment" as a potential resolution of a claim.[26] Thus, the Court held that the Chapter 558 process fell within the policy's definition of "suit."

As a result, in answering the certified question in the affirmative, the Florida Supreme Court held that the notice and repair process set forth in Chapter 558 constitutes a "suit" within the meaning of the Crum & Forster policy at issue. Although not a "civil proceeding," the Chapter 558 pre-suit process is included in the policy's definition of "suit" as an "alternative dispute resolution proceeding" to which the insurer's consent is required to invoke the insurer's duty to defend the insured.[27]

The Court expressly declined to determine whether Crum & Forster *consented*, as required by the policy, to Altman's participation in the Chapter 558 process.[28] The Court noted that the issue of consent was "outside the scope of the certified question and an issue of fact disputed by the parties," and remanded the case to the Eleventh Circuit for further proceedings.[29]

On remand, the Eleventh Circuit recently reversed the Southern District's grant of summary judgment in Crum & Forster's favor, vacated the final judgment, and remanded the case to the Southern District for further proceedings.[30] Regardless of what happens on remand, *Altman* will have implications for all involved in construction disputes where CGL insurance is involved.

***Altman's* Implications for Contractors and Insurers**

Altman could result in a decrease in the number of disputes about an insurer's obligation to provide legal counsel in connection with the Chapter 558 notice and opportunity to repair process, which would benefit contractors. That, of course, would only occur where policies contain the broader definition of "suit" as an "alternative dispute resolution" as in *Altman*. That is likely, given that the standard ISO policy contains that broader definition of "suit."

However, the standard ISO policy also requires insurer consent to participate in the Chapter 558 process as a pre-requisite to triggering its duty to defend. Because the Florida Supreme Court did not address consent in *Altman*, it is presently unclear how courts will interpret that issue. For now, contractors and other policyholders would be wise to review their policies to determine whether they are the standard ISO policy or otherwise broadly define "suit" so that it fits within the Florida Supreme Court's analysis in *Altman*, and also to request insurer consent to participate in the Chapter 558 process.

Altman could also result in increased costs and decreased availability of CGL coverage in the construction industry, as the American Insurance Association and Florida Insurance Council posited in their *amici curiae* brief in support of Crum & Forster. It is also possible that the insurance industry could modify policy language to either include the Chapter 558 pre-suit process within the insurer's duty to defend for an additional premium, or to expressly exclude it. This is precisely what happened in the wake of the Florida Supreme Court's decision in *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*,[31] regarding the "your work" exclusion in CGL policies, where insurance carriers modified to reduce coverage.

Legislative Possibilities

The Florida Legislature could also address *Altman* by amending Chapter 558 to clarify its interaction with CGL insurance, or to otherwise address the public policy issues identified in the Eleventh Circuit's initial opinion certifying the question to the Florida Supreme Court. In light of the unresolved issue of insurer consent to participation in the Chapter 558 process, the Legislature could also amend the statute to address consent. For now, however, it seems settled that a Chapter 558 notice of claim is a "suit" as defined in the standard ISO policy. Time will tell whether "consent" will become a new issue. AL

continued, page 54


J. FUENTE1

Jaret Fuente *is a shareholder at Carlton Fields in Tampa. He represents businesses and professionals in commercial disputes, class actions, and tort litigation in the construction, development, products manufacturing, and real estate industries. He represents builders, contractors, and developers in breach of contract, construction defect, mold, and building product-related claims. He is certified as a Circuit Civil Mediator by the Florida Supreme Court and as a mediator by the United States District Court for the Middle District of Florida.*


M. ROTHFELDT

Michael Rothfeldt's *practice focuses on construction and commercial litigation. Mr. Rothfeldt has experience resolving complex contract disputes, construction defect claims, lien and bond disputes, and regulatory compliance, particularly regarding the licensing of contractors, real estate agents, architects, and interior designers.*

Mr. Rothfeldt co-chairs the Articles Subcommittee of the Construction Law Section for the Hillsborough County Bar Association, and was named a JD Supra Readers' Choice Top Author for 2016. He also provides pro bono legal work for Crossroads Florida Kids and Habitat for Humanity.


C. WRIGHT

Wm. Cary Wright *is a shareholder and Co-Chair of Carlton Fields' Construction Practice Group. He has extensive experience representing clients in construction disputes, including construction claims, water intrusion and sick-building syndrome issues; construction liens; insurance coverage matters; risk management; and bond claims. Such engagements have involved bridges, convention centers, high-rise condominiums, highways, hospitals, stadiums and hotels. Mr. Wright also has substantial experience in contract drafting and contract review including the preparation of owner-contractor agreements and contractor-subcontractor agreements. Cary is Co-Editor-in-Chief of the ActionLine.*

Endnotes

1 Fla. Stat. § 558.003. Should a claimant file a lawsuit alleging a construction defect prior to complying with the Chapter 558 process, the court shall stay the action, upon timely motion by a party to the suit, until the claimant complies. *See id.*

2 Fla. Stat. § 558.004.

3 Fla. Stat. § 558.001 (2015).

4 124 F.Supp.3d 1272 (S.D. Fla 2015).

5 *Id.* at 1274-75.

6 *Id.* at 1278-79.

7 *Id.* at 1274.

8 *Id.* at 1274-75.

9 *Id.* at 1275.

10 *Id.*

11 *See id.* at 1281.

12 *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318, 1323-1324 (11th Cir. 2016).

13 This view was shared by Altman's *amici curiae*, the Construction Association of South Florida, the Leading Builders of America, and the South Florida Associated General Contractors. *See id.* at 1326.

14 *Id.*

15 *Id.* at 1326.

16 No. SC16-1420, 2017 WL 6379535 (Fla. Dec. 14, 2017).

17 *Id.* at *2.

18 *Id.* (quoting Fla. Stat. § 558.001 (2006)).

19 *Cf. id.* at *4 (quoting Raymond James Financial Services, Inc. v. Phillips, 126 So. 3d 186, 190 (Fla. 2013) (internal quotation marks and citations omitted)); with Altman, 124 F.Supp. at 1281.

20 *Altman*, 2017 WL 6379535 at *4.

21 *Id.*

22 *Id.*

23 *Id.* at *5.

24 *Id.*

25 *Id.* (quoting Fla. Stat. § 558.001).

26 *Id.*

27 *Id.*

28 *Id.* at **1, 4 and 5. Interestingly, the Southern District expressly declined to adopt this interpretation of "civil proceeding" as requiring insurer consent by virtue of being an alternative dispute proceeding, as stated in dicta in *The Cincinnati Ins. Co. v. AMSCO Windows*, 593 Fed. Appx. 802, 811 (10th Cir. 2014). *See Altman,* 124 F.Supp.3d at 1281-1282.

29 *Id.* at *5.

30 *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 15-12816, 2018 WL 560523 (11th Cir. Jan. 26, 2018).

31 979 So. 2d 871, 874-75 (Fla. 2007) (holding that a "post-1986 standard form [CGL] policy with products completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work," provided that the policy contains the subcontractors exception to the "your work" exclusion).