

ELEVENTH CIRCUIT CERTIFIES QUESTION TO FSC IN *ALTMAN V. CRUM*

Construction Law Section

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Just over a year ago, in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 124 F. Supp. 3d 1272 (S.D. Fla. 2015), a district court in the Southern District of Florida determined that a condominium's written notices of construction defect claims, served on its general contractor under Chapter 558, Florida Statutes, did not trigger a duty to defend on the part of the general contractor's insurer, Crum & Forster. Crum & Forster's policies stated that it would defend against any "suit" seeking certain damages. "Suit" was defined as a "civil proceeding," including an "arbitration proceeding" or "any other dispute resolution proceeding" in which certain damages are claimed. The district court ruled that Crum & Forster had no duty to defend as a matter of law because the Chapter 558 process did not constitute a "suit." (See Michael G. Rothfeldt, *A Defect without a Defense - Chapter 558 and CGL Policies*, Lawyer (Hillsborough County Bar Association), Sept. - Oct. 2015, pg. 31.)

The general contractor, Altman Contractors, Inc., appealed the district court's order to the Court of Appeals, arguing that the Chapter 558 process meets the

policies' 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 it argued, even if it is not, the Chapter 558 process nonetheless constitutes a "suit" because it is an "alternative dispute resolution proceeding."

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

Crum & Forster, on the other hand, argued that imposing a duty to defend during the Chapter 558 process will fuel an insurance crisis by dramatically increasing the cost of insurance, and limiting its availability. *Id.* Crum & Foster's position was supported by the American Insurance Association



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and Florida Insurance Council, which argued that if insurers must appoint 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. *Id.*

"Confronted with a question intersecting state insurance

law and a state statute for which there is no guidance from Florida courts," and given such practical and policy implications, 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?"* *Id.* At the time of this article, briefing is

underway before the Florida Supreme Court. Stay tuned.



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