CARLTON FIELDS

Altman Contractors v. Crum & Forster: Florida Supreme Court Answers the 11th Circuit's Certified Question in the Affirmative

December 20, 2017

In *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318 (11th Cir. 2016), 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?*" The Florida Supreme Court has now answered in the affirmative in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. SC16-1420, 2017 WL 6379535 (Fla. Dec. 14, 2017). Altman was the general contractor for the construction of a high-rise condominium in South Florida. Crum & Forster insured Altman. 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:
>
> 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 policy did not further define "civil proceeding" or "alternative dispute resolution proceeding" as used within its definition of "suit." The condominium served Altman with notices of claim pursuant to Chapter 558, Florida Statutes, covering more than 800 construction defects at the condominium. Altman, in turn, notified Crum & Forster and demanded, pursuant to the policy, a defense and indemnification. Crum & Forster denied the notices invoked the duty to defend reasoning that the notices did not constitute a "suit." The condominium subsequently served Altman with a supplement claiming additional defects and demanding that Altman take all measures necessary to correct the defects. Crum & Forster maintained its position, but hired counsel to defend Altman under a reservation of rights in anticipation of litigation. Altman objected to the selection of counsel, demanded its original counsel, and requested reimbursement of fees and expenses incurred since the time it provided notice of the claim. Crum & Forster denied Altman's requests, Altman settled the claims without Crum & Forster's involvement, and then Altman 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. The Southern District determined 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 entered summary judgment in Crum & Forster's favor. *See Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 124 F. Supp. 3d 1272 (S.D. Fla. 2015). 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. 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. Crum & Forster 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. The American Insurance Association and Florida Insurance Council, in support of Crum & Forster, 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. The Eleventh Circuit certified the question above to the Florida Supreme Court. In answering the certified question in the affirmative, the Florida Supreme 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. The Court noted that at the time of the condominium's notice, section 558.001, Florida Statutes, 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.

(Emphasis added.) The Court noted that the policy 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 because a notice of claim recipient's participation in the Chapter 558 process is not mandatory or adjudicative. A recipient may choose to not respond and thereby force a claimant to file suit. 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 of voluntary repairs without ever filing suit. However, the court noted that the policy 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" and that, pursuant to Black's Law Dictionary, "alternative dispute resolution" means "[a] procedure for settling a dispute by means other than litigation." The court found that Chapter 558 falls within that definition as a statutorily required presuit process aimed to encourage 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." The court further 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. As a result, the Florida Supreme Court answered the certified question in the affirmative and 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 and that, although it is not a "civil proceeding," it 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. The court remanded the case to the Eleventh Circuit for further proceedings.

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