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Florida Supreme Court Weighs in on CGL Carriers' Duty to Defend Chapter 558 Claims

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Since its enactment in 2003, Chapter 558, Florida Statutes (commonly referred to as Florida's notice and opportunity to cure provision) has governed the pre-suit notice and opportunity to repair process between owners, designers, contractors, and subcontractors involved in construction defect claims. Although the statute speaks primarily to the obligations of these parties, Commercial General Liability ("CGL") insurers also play an integral role in the resolution of such claims. While CGL insurers ordinarily monitor, and will sometimes agree to settle 558 claims pre-suit, until recently, Florida law was silent as to whether insurers had an obligation to defend their insureds during the 558 process. In the absence of a legal duty to defend, CGL insurers routinely denied their insured's requests for defense counsel during the 558 process. However, more recently, the Florida legislature amended Chapter 558 in an effort to, among other things, include CGL insurers in the pre-suit 558 process.

On December 14, 2017, the Florida Supreme Court issued its ruling in Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company, which considered whether CGL insurers owe a duty to defend pre-suit claims pursuant to Chapter 558.[1] Florida law now holds that under the terms of a standard CGL policy, an insurer who consents to its insured's participation in the 558 process owes a duty to defend to the insured.

The general contractor in Altman built a high rise condominium project in South Florida. Following completion of the project, the condominium association served multiple Chapter 558 notices during a 7 month period, in which it identified approximately 800 construction defects. At least 16 defects resulted in damage to other property. The contractor tendered defense and indemnity to its insurer during the 558 process. The carrier denied coverage on the grounds that a Chapter 558 notice did not constitute a "suit" which triggered coverage under the policy. While the insurer eventually accepted the contractor's tender of defense during the pendency of the 558 claim, it did so under a reservation of rights. Ultimately, the contractor settled the association's 558 claim without a contribution from its CGL carrier. The contractor then filed suit against its insurer to recover the legal fees and indemnity costs it incurred as a result of the 558 claim.

A federal trial judge considered whether a 558 notice triggered a CGL insurer's defense obligations pursuant to the terms of the policy.[2] The court began by recognizing the unique nature of Fla. Stat. §558.004(13), which states that the ***provision*** of a 558 notice to an insurer does not constitute a claim for insurance purposes. Consequently, the court held that while an insured's furnishing of a notice to its insurer does not constitute a claim, the contents of the notice may constitute a claim which triggers an insurer's defense and indemnity obligations.

The court went on to examine the terms of the contractor's CGL policy, and more specifically, whether a 558 claim constitutes a "suit" which triggers the insurer's defense and indemnity obligations. The policies at issue provided that the insurer had "the right and duty to defend the insured against any 'suit' seeking […] damages." The policies 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. '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 contractor argued that the 558 notices at issue were tantamount to a "suit," because the Chapter 558 requires such notice before suit can be filed. The trial court rejected this argument, and construed Chapter 558's notice and opportunity to repair provisions as a dispute resolution ***mechanism***, rather than proceeding. In doing so, it held the insurer had no duty to defend its insured's 558 claim.

The contractor appealed to the 11th Circuit Court of Appeals, which, like the trial judge, agreed that the express language of Chapter 558 does exclude a 558 claim as triggering occurrence under a CGL policy.[3] Unlike the trial court, however, the appeals court expressed uncertainty as to whether the CGL policy terms "suit" and "civil proceeding" were in fact unambiguous. It expressed further concern regarding the competing practical and public policy implications its ruling would have on CGL policyholders and insurers. A finding that insurers have no duty to defend during the 558 process would make it more likely that a 558 notice recipient would allow claims to go into suit to trigger coverage. Such a practice would undercut the legislative purpose of promoting early and efficient dispute resolution. In contrast, imposition of a duty to defend during the 558 process could result in an increase in insurance premiums for insureds, or "overlawyered" claims. Ultimately, the 11th Circuit was unwilling to resolve the issue of whether coverage existed under the CGL policy, and requested the Florida Supreme Court weigh in on the issue.

In its opinion, the Florida Supreme Court agreed that Fla. Stat. §558.004(13) does not exclude pre-suit claims from the category of occurrences which trigger coverage. It further agreed that Chapter 558 claims do not constitute a "civil proceeding" which would give rise to coverage under subsection (a), above. However, it found that 558 notices meet the definition of a "suit" as set forth in subsection (b), which includes an "alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." It reasoned that a 558 notice qualifies as an "alternative dispute resolution proceeding," based upon statutory language which describes the 558 process as both an "alternative dispute resolution mechanism" and an "alternative method to resolve construction disputes." Such claims are, by statutory definition, "claims for damages." Thus, the court held that Chapter 558 claims meet the definition of a "suit" which can trigger coverage under the terms of a CGL policy. The Court declined to rule on the disputed issue of whether the contractor obtained its insurer's "consent" to participate in the 558 process as further required by subsection (b).

The holding in Altman will undoubtedly impact the manner in which CGL policyholders and their insurers handle 558 claims. Contractors, subcontractors, and other industry professionals who receive a 558 notice may now tender defense to their carriers during the 558 process with the expectation that their carriers will have a defense obligation. As alluded to in the Florida Supreme Court's opinion, for a 558 notice to constitute a claim, the CGL policyholder must also seek consent of its insurer to participate in the 558 process.

This "consent" requirement may result in a tension between an insured's obligations under Chapter 558, and the insurer's right to approve its insured's participation in the 558 process. Although there is some concern that policyholders may be left "at the mercy of the insurer," there are some practical and legal reasons why an insurer might consent. First, it is usually to the insurer's benefit to participate in the 558 process, as it allows for an early evaluation of the insured's potential liability and damages exposure. Second, the 558 process provides an early opportunity for insureds to mitigate damages. Because carriers owe common law and statutory duties of good faith to their insureds, an insurer's refusal to consent to the 558 process may deprive its insured of this ability, thereby exposing the insurer to potential bad faith liability.

In sum, the Altman decision is a significant ruling for construction industry professionals who wish to recover the legal fees and costs associated with 558 claims. For policyholders who elect to tender 558 claims to their insurers, care should be taken to obtain the insurer's consent upon receipt of a 558 notice to ensure coverage is triggered.

If you have questions regarding insurance coverage of Chapter 558 claims, please contact Brett Henson at 941-364-2752 or email him at bhenson@slk-law.com.

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[1] Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 2017 WL 6379535 (Fla. 2017)

[2] Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 124 F. Supp. 3d 1272 (S.D. Fla. 2015)

[3] Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 832 F.3d 1318, 1319 (11th Cir. 2016).