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Altman's Aftermath: Reaction to The Recent Interpretation of Florida's Right to Repair Law

I. Florida Statute Chapter 558 Notice of Claim Role Play

Considering the recent opinion issued by the Florida Supreme Court, what should a Florida insured do upon receipt of a Florida Statute Chapter 558 Notice of Claim? The insured needs to be cognizant of and familiar with the applicable insurance policy. Does the insurer have a duty to defend this pre-suit process? The answer is, per usual, it depends. In *Altman*, the Court held that while the chapter 558 process is not a "suit" under the policy provision defining "suit" as "a civil proceeding," it is an "alternative dispute resolution proceeding" as included in the policy's definition of "suit" to which the insurer's consent is required to invoke the insurer's duty to defend the insured.

II. *Altman* history

Let's start with the facts.

The trial court in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co*., 124 F.Supp.3d 1272 (S.D. Fla. 2015), recounts the facts as follows:

Altman Contractors, Inc. was the general contractor for the construction of the Sapphire Condominium, a high-rise residential condominium in Broward County, Florida. Altman carried insurance applicable to this project with Defendant Crum & Forster Specialty Insurance Company. The Condominium Association served Altman with multiple Notices of Claim pursuant to Chapter 558 of the Florida statutes. The first of these Notices was served on or about April 10, 2012. Supplemental Notices were sent on May 8, 2012, November 15, 2012, and May 28, 2013. These Notices together alleged over 800 construction defects in the Condominium. Crum & Forster did not dispute that at least some of the claimed defects may constitute covered property damage under the policies.

Crum & Forster issued a total of seven Commercial General Liability policies for Altman with effective dates from February 1, 2005 through February 1, 2012. The first policy was written on Insurance Services Office (ISO) form CG 00 01 10 01, while the remaining policies were written on ISO form CG 00 01 12 04. The relevant provisions of the policies were all identical and included the insuring agreement (Section I, paragraph 1.a.), the duties in the event of occurrence, offense, claim or suit (Section IV, paragraph 2.a.) and the definition of a "suit" (Section V, paragraph 18). The insuring agreement provides, in relevant part, as follows:

> We will pay those sums which 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 these 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.

In in the policy, "suit" is defined 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.

On or about January 14, 2013, Altman sent a demand letter to Crum & Forster notifying it of the Condominium's November 15, 2012 claims. Altman demanded that Crum & Forster defense and indemnification. Crum & Forster denied that it had a duty to defend Altman because the case was "not in suit". On August 5, 2013, while asserting that it was not waiving this position, Crum & Forster advised ACI that it was exercising its discretion to participate in the response to the 558 Notice, and that it had hired the law firm Cole, Scott & Kissane to "participate" in the preparation of Altman's response. ACI objected to Crum & Forster's selection of this law firm and demanded that the counsel that had been defending it up until that time be permitted by Crum & Forster to continue the defense. Altman also requested to be reimbursed for the fees and expenses that it had incurred from the time it placed Crum & Forster on notice of the 558 Notice. Crum & Forster refused both requests. Altman ended up settling all of Sapphire's construction defect claims without any lawsuit being filed and without Crum & Forster's participation. The Southern District granted Crum & Forster's Motion for Summary Judgment and found that the Notice of Claim was not a "suit" under Altman's policy.

The Certified Question.

On appeal to the 11th Circuit, United States Court of Appeals, the Court held that certification was appropriate on a question of first impression as to whether the Florida Statute Chapter 558 Notice and Repair process for resolving construction disputes was a "suit" within the meaning of Commercial General Liability policies. *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, 832 F.3d 1318 (11th Cir. 2016).

The Florida Supreme Court reviewed the following (slightly rephrased) question of law:

> 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?

Seemingly relying upon dictionary definitions and Florida Statute Section 558.001, the Majority answered the question in the affirmative and held that while the chapter 558 pre-suit process is not a "suit" under the policy provision defining "suit" as "a civil proceeding," it is an "alternative dispute resolution proceeding" as included in the policy's definition of "suit" to which the insurer's consent is required to invoke the insurer's duty to defend the insured.

The Court did not address whether, in this case, Crum & Forster consented to Altman's participation in the chapter 558 process, thereby giving rise to its duty to defend, because it was outside of the scope of the certified question and an issue of fact disputed by the parties. *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, 232 So.3d 273 (Fla. 2017).

I concur, I dissent.

The *Altman* decision was a far cry from unanimous for the Florida Supreme Court. Justice Lewis, concurring, agreed with the majority, but indicated that "the initial question that must be answered is whether the Commercial General Liability Policy covers the chapter 558, Florida Statutes, notices of claim at issue in this case." Additionally, he stated that "it is important to determine the scope of an insurance company's duty to defend under Florida law when there may be claims that are both within and beyond coverage" of the policy.

Justice Pariente, concurring in part and dissenting in part, appeared to be on the insured's side. She agreed with the majority in "that the chapter 558 process can be considered an 'alternative dispute resolution proceeding,'" however, disagrees with the majority's narrow construction of the "policy to relieve the insurer of its duty to defend the insured in the chapter 558 process absent the insurer's consent to the insured's participation in the mandatory pre-suit process." She continues stating that she "would construe the policy language broadly in favor of coverage, as our precedent directs" and considers "the chapter 558 process to be a 'civil proceeding' within the policy's definition of 'suit.'"

On the other hand, Justice Lawson, concurring in part and dissenting in part, seemed in line with the insurers. He agreed that the chapter 558 process is not a civil proceeding within the meaning of Crum & Forster's policy, but disagrees with the majority's conclusion that the chapter 558 process is an "alternative dispute resolution proceeding" under the policy. He relies, among other sections, upon Florida Statute Section 558.004(13) which states that the 558 notices "shall not constitute a claim for insurance purposes." He believes "the statute not only prohibits the claimant's chapter 558 notice from acting as an insurance claim, but expressly directs the contractor to respond to the notice without involving its insurer and to send notice of any covered claim only after it has analyzed the notice, exchanged information, and fashioned its response."

Remanded.

In an opinion issued January 26, 2018 the Court of Appeals, Eleventh Circuit, held that the pre-suit process under Florida Statute was a "suit" to which the insurer's consent was required to invoke the insurer's duty to defend. Accordingly, the Eleventh Circuit reversed the summary judgment in favor of Crum & Forster Specialty, vacated the final judgment and remanded the matter back to the district court for further proceedings. *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, 880 F.3d 1300 (11th Cir. 2018).

III. Recap of Florida Statute Chapter 558

To understand the legislature's intent, you need to start by looking to Section 558.001, which states:

> 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.

Florida Statute Section 558.004 describes the detailed notice and opportunity to repair process. The process is initiated with the "claimant," defined exclusively as an owner or owner's association, serving a "written notice of claim" on the contractor, subcontractor, supplier, design professional, etc. Pursuant to applicable version of Chapter 558 in *Altman*, the notice of claim was to "describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known." *See* § 558.004(1) Florida Statutes (2012).

The contractor can respond to claimant's notice with an offer to repair or of monetary compensation (or both) within a certain timeframe. *See id.* § 558.004(5). If the contractor disputes the claim or chooses not to respond to the claimant, after expiration of the timeframe the claimant may, without further notice, proceed with an action against the contractor. *See id*. § 558.004(6). Providing a copy of the notice of claim to the insurer expressly, "shall not constitute a claim for insurance purposes." *See id*. § 558.004(13).

A look at other states' notice and repair processes.

***Hawaii*:**

Hawaii's notice and repair law differs from Florida. The Hawaii statue states, in relevant part: "The notice of claim shall not constitute a claim under any applicable insurance policy and shall not give rise to a duty of any insurer to provide a defense under any applicable insurance policy unless and until the process … is completed." Haw. Rev. Stat. § 672E-3(a).

***Nevada*:**

The Tenth Circuit in *The Cincinnati Ins. Co. v. AMSCO Windows,* 593 Fed. Appx. 802 (10 Cir.2014), held that Nevada's pre-suit procedure for a property owner to assert a claim for the construction defects against a contractor was not a "suit" for purposes of a general liability insurance policy containing language like that at issue in *Altman*, because noncompliance does not result in any adverse judgment or obligation but rather imposes limited consequences in subsequent litigation.

The Court noted that the consequences to a contractor of noncompliance "although serious, are not parallel to the often case-determinative consequences of noncompliance in the context of lawsuits or mandatory arbitrations." *Id.* The Tenth Circuit concluded by noting that even if they could consider the pre-litigation process to be a civil proceeding, it would be an alternative dispute resolution proceeding as to which the policy would require consent, which had not been given. *Id*. at 811.

***Colorado*:**

In *Melssen v. Auto–Owners Insurance Company,* 285 P.3d 328 (Colo.Ct.App.2012), the Colorado Court of Appeals held, as a matter of law, that the Colorado Defect Action Reform Act (CDARA), section 13–20–803.5, C.R.S. 2011, constituted an alternative dispute resolution proceeding under the applicable policy, which was similar to the policy in *Altman*. The Court in *Melssen* relied upon a definition in *Black's Law Dictionary* of "alternative dispute resolution proceeding" as "a procedure for settling a dispute by means other than litigation, such as arbitration or mediation." *Id.* at 334.

***California*:**

The Court in *Clarendon America Ins. Co. v. StarNet Ins. Co.,* 113 Cal.Rptr.3d 585 (4th Dist.Ct.App., Div.3, Cal.2011), held that California's Calderon Act, Civil Code section 1375 *et seq.,* is a "civil proceeding" covered by an insurance policy.

IV. Expected reactions from Insurance Industry

Looking back at Justice Lawson's dissent, there is statutory language the majority in the Florida Supreme Court did not take into consideration, § 558.004(13) for instance. Crum & Forster took issue with Altman's argument that a lack of coverage in these instances would deter contractors from participating in the 558 process. Crum & Forster argued that Altman resolved over 800 alleged deficiencies on its own without insurer participation.

Florida insureds should expect insurance policies issued to Florida insureds to change, including new endorsements, revised definitions of "suit" and potentially higher premiums. Some insurers may leave Florida. Crum & Forster cited the experience of Colorado after the Construction Defect Action Reform Act was amended to expressly provide that an insurer's duty to defend was triggered by receiving a copy of a notice of claim. According to a study cited by Crum & Forster in papers filed with the Court, approximately one dozen insurance carriers left Colorado after the legislation passed and brokers cited the new legislation as the reason.

Crum & Forster also argued that requiring insurers to defend 558 notices would lead to more disputes between insurers and insureds and more coverage lawsuits, inevitably leading to increasing premiums and decreased availability of liability coverage for contractors.

V. *Altman* from the Insured's perspective

Justice Pariente's was seemingly sympathetic to the Florida insureds. Justice Pariente states that with the consent requirement, "insureds are at the mercy of the insurer who has complete power to decide if and when to participate in the mandatory chapter 558 process." Further, she discusses that "an insured has an incentive to not participate in the chapter 558 process and instead opt out of the chapter 558 process in favor of subjecting itself to a lawsuit, which would undoubtedly constitute a 'suit' that invokes the insurer's duty to defend." The Florida insured will likely argue that these disincentives undermine the Legislature's intent in enacting chapter 558.

Insured strategies to avoid claims.

Quality control throughout construction is of course helpful, but never foolproof. Active insureds know the importance of evaluating and handling warranty claims post-certificate of occupancy as efficiently as possible. Unfortunately, in this climate, contractors, subcontractors, design professionals, etc. can seemingly do everything right throughout the design and construction process, but still be on the receiving end of a Chapter 558 Notice of Claim. Staying informed about policy language, while maintaining open lines of communication with insurers, is critical for Florida insureds.

A chapter 558 pre-suit process success story.

A Condominium Association issued a chapter 558 notice, including a 300+ line spreadsheet of alleged deficiencies, to a large General Contractor prior to filing a lawsuit related to the 30-story building in downtown Miami.

The insurer was notified by the General Contractor and subcontractors and tradesmen were issued flow-down notices of this claim. The insurer provided a defense. Experts were retained by the contractor team and site inspections were conducted. A line-by-line response was issued by the General Contractor to the Association. After a somewhat volatile pre-suit mediation and continuing negotiations, the matter was settled in full and no lawsuit was ever filed. It took the cooperation of the insured (agreeing to repair various defects) and the insurer (providing a defense and part of the settlement funds). All parties, while each unhappy in having to compromise, were happy avoid multiple years of litigation.