Chapter 558's Notice of Claim Procedure – It May Trigger a Duty to Defend Under Your CGL Policy

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The Florida Supreme Court recently answered a question that will impact for some time construction defect claims and those insurers called upon to defend them. In the case styled *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, 42 Fla. L. Weekly S960b, the Florida Supreme Court ruled that the pre-suit notice and repair process set forth in Chapter 558, Florida Statutes, is a "suit" within the meaning of a commercial general liability policy Crum & Forster ("C&F") issued to Altman Contractors.

Altman was the general contractor on a condominium project. After construction, the condominium association ("Association") served Altman Contractors with several pre-suit Chapter 558 notices of claim alleging construction defects. Altman demanded that its insurer, C&F, defend and indemnify Altman against the Association's claims. C&F denied Altman's demands. Without C&F's involvement, and before a lawsuit was filed, Altman settled the Association's claims. Altman then filed a declaratory judgment action against C&F seeking a declaration that C&F had a duty to defend and indemnify Altman against the Association's notices and claims. A federal district court and the Eleventh Circuit Court of Appeals each considered whether C&F had such a duty, with the Eleventh Circuit ultimately certifying the following question to the Florida Supreme Court:

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 C&F to Altman?

Based upon the C&F policy's definition of "suit," and the language and purpose of Chapter 558, the Florida Supreme Court answered this certified question in the affirmative. The supreme court held that the Chapter 558 process is an "alternative dispute resolution proceeding" encompassed within the C&F policy's definition of "suit." This definition reads in full:

"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:

1. *An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or*
2. *Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.*

In analyzing this language, the Florida Supreme Court first concluded that the Chapter 558 process is not a "civil proceeding" covered under the policy's primary definition of "suit." However, the supreme court found that the Chapter 558 process fell within subparagraph (b), applicable to any "alternative dispute resolution proceeding." Therefore, the court reasoned, the Chapter 558 process in which Altman participated was a "suit" under C&F's policy.

The supreme court did not go so far as to find that C&F had a duty in this case to defend and indemnify Altman against the Association's Chapter 558 notices. As the Court explained, to establish such a duty Altman had to prove, pursuant to subparagraph (b) above, that C&F consented to Altman's submission to the Chapter 558 process. This issue presented a disputed question of fact that the supreme court could not resolve.

While the Florida Supreme Court's ruling in this case may be limited to the specific terms of the insurance policy involved, the reasoning and analysis the supreme court employed is likely to have wide-ranging impacts upon construction defect litigation. The supreme court's holding also raises a number of questions which Florida courts likely will address in the future. For example, does the "eight corners rule" that determines whether an insurer has a duty to defend a civil lawsuit now apply to Chapter 558 notices? Similarly, how much information must a Chapter 558 notice contain to trigger an insurer's duty to defend? Further, must an insurer's consent to the Chapter 558 process be in writing or does any participation in or monitoring of the process establish the consent required to trigger an insurer's duty to defend? Will

the consent requirement become an impediment to the Chapter 558 process, or encourage policyholders to refrain from participating in the 558 process if their insurers withhold consent? Our attorneys at Paskert Divers Thompson are available to discuss these issues, and we welcome any questions or comments you may have.