

Supreme Court's Latest Construction Defect Decision and Its Impact on Construction Insurance Claims

Commentary by David B. Haber, Frank Soto and Brett Silverberg | January 16, 2018



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The issue of whether a 558 notice serves as a “claim” under a commercial general liability (CGL) policy, such as the one issued by Crum & Forster Specialty Ins. Co. (C&F) in *Altman Contractors v. Crum & Forster Specialty Insurance*, No. SC16-1420, 2017 WL 6379535 (Fla. Dec. 14, 2017), has finally been resolved and construction defect claimants can expect earlier participation from their carriers.

Prior to the *Altman* decision, homeowners and/or condominium associations were frustrated during the Chapter 558 process after sending a notice of claim because insured construction parties could not get insurers to become involved in pre-suit negotiations. Such a result was antithetical to the purpose of Chapter 558—which was instituted specifically to streamline the construction defect claims process and encourage early alternative dispute resolution.

In *Altman*, the following question was presented 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 CGL policy issued by the insurer, C&F, to the general contractor, Altman Contractors, Inc. (Altman)?” The Florida Supreme Court recently answered in the affirmative and held that the notice process set forth in Chapter 558 does indeed constitute a “suit” within the meaning of the CGL policy at issue—which in turn means that insurance carriers can no longer sit back following receipt of a 558 notice and must instead take an active role earlier in the process.

‘Duty to Defend’

The *Altman* case stems from defects in the construction of Sapphire Condominium, a high-rise residential condominium in Broward County. C&F insured Altman for the Sapphire project through a policy that provided, in pertinent part, as follows: “[w]e 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.” Altman sought a declaratory judgment that C&F owed it a duty to defend and indemnify as part of the Chapter 558 pre-suit process to resolve claims for construction defects, and that C&F breached the liability insurance policy by refusing to initially defend Altman in the suit against Sapphire. C&F denied that Sapphire’s 558 notices invoked its duty to defend Altman under the policy because the notices did not constitute a “suit.” Notwithstanding, the Florida Supreme Court held that the Chapter 558 process is included in the policy’s definition of “suit” as an “alternative dispute resolution proceeding.”

The insurance policy at issue in *Altman* is a standard commercial general liability policy and as such it is likely to have a profound impact on future Chapter 558 construction defect litigation. Accordingly, defense carriers are more likely to be engaged in construction disputes, particularly during the pre-suit stage after a Chapter 558 notice is received—or at least they should in light of this decision. As such, the 558 process, unlike in many past years, is now likely to encourage the claimant and insured to attempt to settle construction defect claims prior to expending time and resources litigating those claims. Such a notion is consistent with the legislature’s aim in creating Chapter 558 as an effective alternative dispute resolution mechanism, intended to curb construction defect litigation.

In light of the foregoing, it is imperative that individual homeowners, homeowner associations and/or condominium associations, along with their experts, prepare detailed inspection reports that set forth the various construction defects affecting their property, what resulting damage is occurring as a result of those defects, the locations of the defects throughout the property, and determine compliance with the applicable building code, plans and specifications. By virtue of more detailed reports in compliance with the requirements of Chapter 558, it seemingly becomes more likely that construction defect disputes will result in settlements at an earlier stage—thereby

saving the parties exorbitant amounts of money that otherwise would be expended in litigation.

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