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Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.: Balancing the Interests Surrounding Potential Insurance Coverage for Chapter 558 Notices of Claim

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Overview of *Altman*

- Chapter 558 notices of claim of construction defects
- Notice to CGL carrier forwarding 558 notices and demanding defense
- Carrier declines, because no “suit” has been filed

Overview of *Altman* (cont.)

- Altman settles with condo association
- Altman brings a declaratory judgment action seeking declaration the 558 notice was a “suit” for which Crum & Forster owed a defense under the policy

What is Chapter 558?

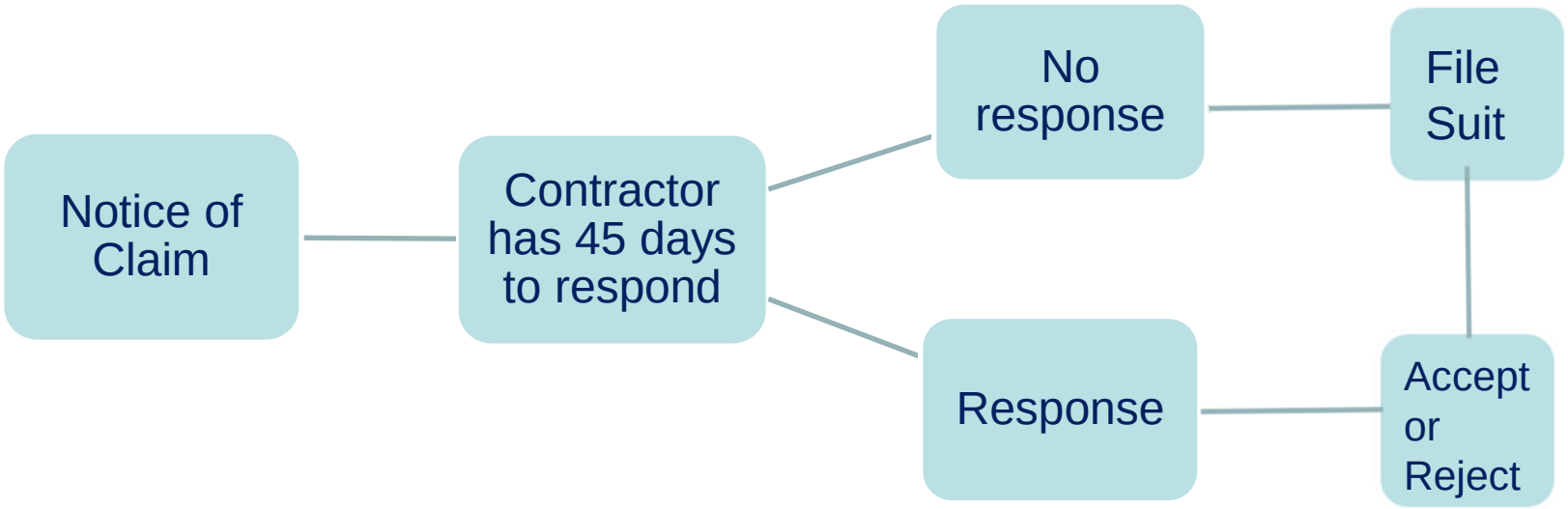
- Legislative Findings and Declaration:
  - The Legislature finds that it is beneficial to have an *alternative method* to resolve construction disputes that would reduce the need for litigation . . . . An *effective alternative dispute resolution mechanism* in certain construction defect matters should involve the claimant filing a *notice of claim* with the contractor . . . that the claimant asserts is responsible for the defect, and should provide the contractor . . . with an *opportunity to resolve the claim* without resort to further legal process.

  § 558.001, Florida Statutes (2012) (emphasis added).

What is Chapter 558? (cont.)

- Procedure:
  - Claimant serves written notice of claim on contractor
  - Contractor may inspect, but has 45 days to respond
  - From there . . .

Chapter 558 Process



Chapter 558 Response

- Options
  - Deny claim
  - Written offer of remedy
  - Written offer of monetary payment
  - Written offer of repairs and payment
- Any written offers "will not obligate the person's insurer". § 558.004(5)(b)-(c), Fla. Stat. (2012).

Chapter 558 Process

- Further option: offer of settlement by monetary payment to be determined by person's insurer within 30 days after service of written notice of claim, which shall occur at the same time written response is served on claimant

§ 558.004(5)(e), Fla. Stat. (2012).

Chapter 558 Process

- Important disclaimer:
  - ". . . However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, **shall not constitute a claim for insurance purposes**. . . ."

§ 558.004(13), Fla. Stat. (2012) (emphasis added).

Summary of Altman

- Sapphire Ft. Lauderdale Condo Ass'n, a high-rise, serves multiple notices of claim in April – November 2012
- Altman waits until January 2013 to notify Crum & Forster
- Crum & Forster declines Altman's demand, asserting there is no "suit"
- Crum & Forster later retains counsel under a reservation of rights
- Altman settles with Sapphire without Crum & Forster

Summary of Altman (cont.)

- Altman files a declaratory judgment action in U.S. District Court, seeking declaration:
  - Crum & Forster owed a duty to defend and indemnify under its CGL policies against Sapphire's notices of claim
  - Altman was entitled to recovery of its attorney's fees and costs incurred responding to Sapphire's notices

Summary of Altman

- District Court: policy is clear and unambiguous and a 558 notice of claim is not a "suit" within the policy's definition
- Eleventh Circuit was "not so sure"
- Certified question: "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]?"

Altman's CGL Policies

1. Issued between February 1, 2005 and February 1, 2012
2. Written on two forms:
    a. CG 00 01 10 01
    b. CG 00 01 12 04
3. Material terms of policies were identical

Altman's CGL Policies

- Insuring agreement:
  - "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**. . . . We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." (Emphasis added)

Altman's CGL Policies

- Notice obligations (Section IV, paragraph 2.b. & c.):
  - If "suit" is brought, insured must notify insurer "as soon as practicable"
  - Must send "written notice" of "suit"
  - Must "immediately" send copies of any demands, notices, summonses or legal papers received
- Voluntary payments (Section IV, paragraph 2.d.):
  - Insured will not, *except at insured's own cost*, voluntarily make a payment, assume any obligation or incur any expense without insurer's consent

Definition of "Suit"

- Section V, paragraph 18:
  - "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**.

Altman's Argument

- 558 Notice of Claim is a "Civil Proceeding":
  - Notice of claim is part of the lawsuit process – i.e., must be sent before suit is filed
  - Chapter 558 "creates a detailed and multi-step process that the parties are [required] to engage in before filing a lawsuit."
  - Chapter 558 is a "mandatory" process
  - As a result, it is "inextricably intertwined" with construction defect litigation

Altman's Argument (cont.)

- Even if the Chapter 558 process is considered "alternative dispute resolution", the definition of "suit" is broad an includes various forms of ADR
- List of ADR in subsections a. and b. is not exclusive
- "Includes" actually means "includes, but is not limited to" the forms of ADR listed in the policy definition
- Made analogy to California's Clarendon process and Colorado's "CDARA" process, both of which were determined to be a "civil proceeding"

Altman's Argument (cont.)

- If Crum & Forster's argument plausible, then policy is ambiguous and should be construed in favor of coverage
- Coverage consistent with legislative intent to reduce the need for litigation
  - Without coverage, many contractors lack financial resources needed to resolve 558 claims
  - Will instead invite lawsuits in order to obtain coverage

Crum & Forster's Argument

- 558 process mostly about repairs to defective construction
    - Defective garage door opener example
- 558 enacted "to give construction trades the opportunity to fix deficiencies in their work" rather than litigate
- 558 creates a "collaborative process"
- "Civil proceeding" contemplates a judicial hearing (cites *Black's Law Dictionary definition*)

Crum & Forster's Argument (cont.)

- 558 process also does not fit definition of "alternative dispute resolution proceeding":
  - "Proceeding" means a "procedural means for seeking redress from a tribunal or agency."
  - 558 process provides for no tribunal or other forum for adjudicating rights and remedies
  - Thus, it is not a "proceeding"

Crum & Forster's Argument (cont.)

- Even if it is an ADR "proceeding", 558 is not one for "covered damages"
  - 558 process seeks repairs, not damages
  - No mechanism in statute for a determination of "damages"
  - Thus, nothing for liability insurer to "defend" since insured cannot be held legally obligated to pay damages under 558 process

Crum & Forster's Argument (cont.)

- Disagrees with Altman that absence of coverage will disincent contractors from participating in 558 process
  - Cites Altman's own experience
- Forced coverage will lead to more disputes and more coverage litigation
  - Cites Colorado's "skyrocketing insurance costs" after insurers forced to defend CDARA proceedings

Supreme Court's Decision

- 558 process not a "civil proceeding":
  - Cites *Raymond James* decision and dictionary definitions of "proceeding" as -
    - "Any procedural means for seeking redress from a tribunal or agency", or
    - "[A] particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations."
  - 558 is a "voluntary dispute resolution mechanism" that places no obligation on the insured to participate
  - 558 does not employ an "adjudicatory body"

Supreme Court's Decision (cont.)

- Round One: Score for Crum & Forster. Court agrees -
  - there is nothing "mandatory" about 558 process
  - that "civil proceeding" contemplates an adjudicative process
  - 558 is not adjudicative
- What about the rest of the definition of "suit"?
  - Altman: 558 just another form of ADR not listed, but covered ("includes, but is not limited to")
  - Crum & Forster: 558 not an ADR "proceeding" because there is no tribunal and no adjudication of damages

Supreme Court's Decision (cont.)

- Court looks to "plain meaning" of policy
  - *Black's Law Dictionary* defines "alternative dispute resolution" as "[a] procedure for settling a dispute by means other than litigation."
  - 558 process fits this definition:
    - Designed to encourage settlement of construction defect claims
    - Legislature described Chapter 558 as "[a]n effective alternative dispute resolution mechanism"
  - 558 process encompasses damages claims:
    - "Claimant" is one maintaining a "claim for damages."
    - Notice must describe damage or loss resulting from defect

Two Partial Dissents

- Pariente – Majority opinion does not go far enough
  - Would find policy ambiguous and construe in favor of coverage
  - Requiring insurer's consent leaves insured "at the mercy of the insurer"
- Lawson – 558 notice is not a "suit" under the policy
  - 558 not intended to put insurers on the hook for pre-suit costs for uncovered construction defects
  - Statute directs contractors to respond to 558 notices without involving their insurers

Analysis

- Is this a insurance policy interpretation case or a statutory interpretation case?
- Majority frames it as an insurance policy interpretation case
  - Is there more going on under the surface?

Analysis (cont.)

- Court relies in its analysis on how the Legislature describes Chapter 558 in its findings and declaration: an "alternative dispute resolution mechanism"
- Without saying so, the Court is looking to the Legislature's *intent* in passing Chapter 558
- However, what about the other indicia of the Legislature's intent?

Analysis (cont.)

- 558.004(13) says furnishing a copy to the contractor's insurer "shall not constitute a claim for insurance purposes"
- Surely this is relevant to the issue of intent?
- Majority opinion never mentions this or any other provisions in 558.004 addressing insurance

Analysis (cont.)

- Justice Polston adheres to “plain language” doctrine in construing statutes
- However, Justice Lawson also looks to the “plain language” and sees a “very carefully drafted” statute designed to address uncovered construction defects and exclude “secondary claims” for personal injury or property damage that are typically covered
- Majority’s analysis does not answer Justice Lawson’s critique – it does not address 558.004 at all

Analysis (cont.)

- Majority opinion ignores “elementary principle” of statutory construction:
  - “significance and effect must be given to every word, phrase, sentence, and part of a statute, if possible, and words in a statute should not be construed as mere surplusage.”
- Also principle that specific statutory provisions prevail over more general provisions

Analysis (cont.)

- Insurance Policy Interpretation
  - Fairly persuasive
  - “Any other” should mean “any other”
  - Declined invitations to strain text to reach the result preferred by one or the other party
  - Not referenced, but commentary in Annotated ISO CGL Policy indicates subsection b. was added in 1988 to encourage use of ADR “to help control legal costs associated with liability insurance claims.”

Implications of *Altman*

- Issue answered: "Is a 558 notice a 'suit'?"
- New question(s):
  - Is insured now obligated to notify insurer of 558 notices under "duty to notify" provisions of policy?
  - If so, did insured provide timely notice?
  - Did insurer consent to insured's participation?
  - Did insured make uncovered "voluntary payments" to resolve claim?

Implications of *Altman*

- No "insurance crisis" is likely
  - Insurer consent required
  - May respond under a reservation of rights
  - Many 558 notices go nowhere
  - May endorse future policies to exclude or limit coverage for 558 notices

Implications of *Altman*

- Other dire consequences predicted:
  - Negative effect on contractors' loss runs
    - Unsettled because majority opinion does not address "claim" versus "suit"
  - Hardship for subcontractors due to "Additional Insured" demands on their insurance policies
    - Why didn't Altman tender to its subs?

Questions?

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