Case Alert

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Florida Supreme Court: Notice of Right to Repair is a CGL "Suit," SDV Amicus Brief Supports Decision

Construction policyholders in Florida have been given substantial ammunition to compel general liability insurers to provide a defense against pre-suit accusations of defective work. Florida is one of approximately thirty (30) states that require property owners to serve contractors with notice and an opportunity to repair construction defects before filing suit. Only a few states have addressed whether a CGL policy should provide a defense for similar processes. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, decided late in December by the Florida Supreme Court, acknowledged that the 558 process is a "suit," thus impeding insurers from refusing a defense during this notice period.

Section 558.004(1), Florida Statutes (2012) requires a property owner alleging construction defects to serve a written notice to repair on the contractor before filing an action in court. Altman Contractors built a condominium in Broward County, Florida. In 2012, the condominium owners alleged defects in accordance with Section 558. Altman demanded that its general liability carrier, Crum & Forster, defend and indemnify it against the 558 notices. Crum & Forster denied coverage, claiming that 558 notices are not a "suit" as defined by the policy.

Altman filed suit in the United States Court for the District of Southern Florida, seeking a declaration that Crum & Foster had a duty to defend. The District Court initially granted summary judgment in Crum & Forster's favor, but Altman appealed to the Eleventh Circuit, which certified the following question to the Florida Supreme Court:

> Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a 'suit' within the meaning of the CGL policies issued by [Crum & Forster] to [Altman Contractors, Inc.]?"

The ISO standard CGL policy defines "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.

Using Black's Law Dictionary to construe the "plain meaning of the policy's terms," the Court held that "alternative dispute resolution" means "[a] procedure for settling a dispute by means other than litigation." Because the 558 notice-to-repair procedure is an "alternative dispute resolution proceeding," it is therefore, a "suit," "the same as a mediation would be." The Court remanded the case to the Eleventh Circuit to determine whether Crum & Forster had consented to Altman's participation in the 558 process in accordance with subparagraph b.

On this last point, Crum & Forster (and its supporting amici) argued that the consent obligation should be interpreted to allow insurance companies unfettered discretion to deny the defense of a 558 proceeding. SDV and United Policyholders attacked this aggressive position head-on, urging that such a rule would effectively cede resolution of the question to the carrier, which could then unilaterally determine whether the 558 process were a "suit" merely by giving or withholding its consent.

By remanding the case on the consent issue, the Court reminded insurers that the consent provision is not a get-out-of-jail-free card.

This ruling is a definitive victory for construction policyholders in Florida. The Court has conclusively determined that the 558 process is a "suit." "Suits" require a defense. While there may yet be debate, from case to case, about the import of the consent requirement, it should do little to undermine a policyholder's ability to secure that defense. In Florida, contractual consent may not be unreasonably withheld. Thus, if it is reasonable for the policyholder to engage in the 558 process, then a defense should be forthcoming. Moreover, the Court's remand means that any insurer who denies a defense because of the consent provision will bear the burden of proving that the contractor's decision to engage in 558 was unreasonable – a customarily challenging threshold to meet.

For more information on the implications of the *Altman* decision, please call Greg Podolak at 239-315-4215.