Builder Gets Help In Fla. Defect Notice Coverage Battle

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A bevy of construction trade organizations and a nonprofit policyholder advocacy group urged the Florida Supreme Court on Monday to rule that a construction defect claim notice constitutes a suit triggering an insurer's defense obligations, throwing their support behind a building contractor in its coverage dispute with Crum & Forster.

In separate amicus briefs, the nonprofit United Policyholders and five building trade groups, including the National Association of Home Builders and the Construction Association of South Florida, said the Florida justices should adopt Altman Contractors Inc.'s interpretation of language in its C&F commercial general liability policies and rule that a construction defect notice issued under Chapter 558 of the Florida Statutes equates to a suit.

Altman is seeking to reverse a Florida federal court's ruling that C&F doesn't have to cover its costs to defend against a slew of notices under Chapter 558, which provides for a presuit proceeding through which a property owner can assert a claim for construction defects against a contractor. The case came to the Florida Supreme Court in August via a certified question from an Eleventh Circuit panel.

The building groups warned in their amicus brief that a ruling that the Chapter 558 process is not a suit will dissuade policyholders in the construction industry, as well as their insurers, from trying to resolve disputes over alleged defects out of court.

"Carriers have no obligation to participate in the 558 process if they have no contractual duty to do so," the groups' attorneys wrote. "Policyholders will contest or not respond to 558 notices compelling the claimant to file a lawsuit — triggering the duty to defend."

Altman's dispute with C&F dates to April 2012, when the Sapphire Fort Lauderdale Condominium

Association served Altman with a notice of claim under Chapter 558, alleging defects and deficiencies in a condominium project's construction, according to court documents. The association sent three additional notices over the following year.

Beginning in January 2013, the contractor demanded that C&F defend and indemnify it under the policies for its costs to investigate and defend the notices of claim, according to court papers.

C&F denied that it had a duty to defend because the case was "not in suit," but it hired a law firm to represent Altman in preparing its response to the Chapter 558 notice. Altman averred that the insurer's selection of counsel was "not satisfactory" and sought reimbursement for the fees and expenses it had paid to its hand-picked attorneys, but C&F refused that request, according to court documents.

Altman filed suit in August 2013 in Florida federal court, seeking an order that the insurer must defend and indemnify it and cover its attorneys' fees and costs. U.S. District Judge Kenneth A. Marra granted C&F's motion for summary judgment in June 2015, holding that "nothing about" the Chapter 558 process satisfies the legal definition of a civil proceeding, and that it therefore doesn't constitute a suit triggering an insurer's duty to defend.

However, an Eleventh Circuit panel said in an August opinion that it was "not as sure" as the district court that the terms "suit" and "civil proceeding" are unambiguous as used in the C&F policies. The panel concluded that the highest court in the Sunshine State needed to decide the issue.

Writing in support of Altman, the building trade groups said that a 2015 amendment to Chapter 558 is evidence of the Florida Legislature's intent for insurers to "meaningfully participate" in the notice and repair process administered under the statute. The amendment states that Chapter 558 is intended to provide building professionals and their insurers an opportunity to resolve construction defect disputes through confidential settlement negotiations.

"This new language confirms the Legislature's intent to have both respondent and the respondent's carrier involved in the process," the trade groups argued. "Holding a 558 notice does not trigger a carrier's duty to defend would discourage the carrier from participating in the 558 process contrary to the expressed intent of the Legislature."

United Policyholders, meanwhile, said in its brief that the Florida Supreme Court should accept Altman's

position because modern CGL policies were designed as a “broad coverage instrument” that would offer companies coverage for a litany of prelitigation proceedings like the Chapter 558 process.

According to the nonprofit, the term “civil proceeding” in the C&F policies’ definition of a suit is ambiguous, and it must therefore be construed in the “broadest possible manner to effect the greatest extent of coverage.”

Nothing in the policy language suggests that a civil proceeding can only be arbitration or an alternative dispute resolution proceeding to which the insurer consents, United Policyholders said. But even if that were the case, C&F and other insurers shouldn’t be able to limit the scope of their policies’ definition of a suit merely by withholding consent for policyholders’ settlements under Chapter 558, according to the nonprofit.

“Allowing this would permit the insurance company to hold a critical term of its contract with the policyholder in abeyance to be determined at its own discretion,” United Policyholders argued.

The building groups are represented by Mark A. Boyle, Molly Chafe Brockmeyer and Alexander A. Brockmeyer of Boyle & Leonard PA, and Christine A. Gudaitis and Ashley B. Jordan of Ver Ploeg & Lumpkin PA.

United Policyholders is represented by Gregory D. Podolak of Saxe Doernberger & Vita PC.

Altman is represented by Adam P. Handfinger and Meredith N. Reynolds of Peckar & Abramson PC.

Crum & Forster is represented by Kimberly A. Ashby of Foley & Lardner LLP and Holly S. Harvey of Clyde & Co.

The case is Altman Contractors Inc. v. Crum & Forster Specialty Insurance Co., case number 16-1420, in the Florida Supreme Court.