



# The Duty to Defend under Chapter 558

A Look at the Pending Florida Supreme Court case of  
*Altman Contractors, Inc. v. Crum & Forster Specialty  
Insurance Co.*

## "Notice and Opportunity to Repair" Statutes:

- Required before filing suit for a construction defect
- Owner must notify builder of alleged defect
- Builder has the opportunity to inspect the defect
- Builder may dispute the claim or offer to settle by repair or payment
- Goal is to resolve construction defect disputes without litigation
- Enacted in more than 30 states

## *Altman Contractors v. Crum & Forster* – Procedural History:

- Contractor received notice of a claim under Chapter 558
- Contractor demanded defense and indemnity for responding to the notice of claim
- Carrier denied obligation to defend and indemnify
- Contractor filed suit against carrier in the Southern District of Florida
- District Court entered summary judgment in favor of carrier
- Contractor appealed to 11th Circuit
- 11th Circuit submitted a certified question to the Florida Supreme Court
- Oral argument held and parties await ruling

# The Sapphire Condominium



## Relevant Facts:

- Altman served as the general contractor for the Sapphire Condominium, a high-end ocean-front residential condominium development located in Fort Lauderdale and consisting of two high-rise towers with 172 units
- April 2012, counsel for The Sapphire Condominium Association begins serving Notices of Claim on Altman
- The Notices of Claim include engineering reports detailing nearly 800 alleged line item defects
- Altman conducts an investigation and subsequently notifies its insurance carrier, Crum & Forster, and demands a defense and indemnity for the Chapter 558 process
- Crum & Forster refuses asserting that it has no duty to defend and indemnify because no lawsuit had been filed
- At its own expense, Altman engages consultants and attorneys to investigate the claims and negotiate settlement
- Altman's efforts eventually result in settlement of all the Association's claims

### Relevant Facts (continued):

- In August 2013, (8 months after Altman's initial demand), Crum & Forster changes its position and appoints counsel
- Notwithstanding the appointment of counsel, Crum & Forster refuses to reimburse Altman for the legal and consulting fees it incurred
- At this point, Altman initiates the instant lawsuit against Crum & Forster

## The Policy Language:

Crum & Forster has the “duty to defend the insured against any ‘suit’”

“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.

**558.001 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* as well as protect the rights of property owners. An effective *alternative dispute resolution mechanism* in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional, with an opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process.

(Emphasis added.)



## Overview of Chapter 558 Process:

- Party claiming a construction defect (typically the owner) must serve the responsible party (typically, the contractor) with written notice detailing the alleged defects, at least sixty days before filing suit or 120 days in the case of an association representing more than 20 parcels. *See* § 558.004(1), Fla. Stat.
- Contractor may then notify the parties that it believes may be responsible for the defects—typically subcontractors and suppliers. *See* § 558.004(3), Fla. Stat.
- All notified parties are given an opportunity to inspect the alleged defects and conduct destructive testing, if needed. *See* § 558.004(2) and (3), Fla. Stat.

## Overview of Chapter 558 Process (continued):

- All the responding parties are required to provide the owner with a written response in which they:
  - Offer to repair some or all of the alleged defects or make monetary payment or some combination of the two;
  - Dispute the claim and refuse to settle; or
  - State that the party's insurer will make a determination as to the monetary payment.

*See § 558.004(4) and (5), Fla. Stat.*

- If dispute remains unresolved or if contractor fails to respond to the notice within the time specified, owner may “proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter [...]” § 558.004(7) and (11), Fla. Stat.

## The Certified Question:

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 C&F to ACI?

## Authorities Relied upon by Altman:

- *Raymond James Financial Services v. Phillips*, 126 So. 3d 186 (Fla. 2013) (analyzed term "proceeding" and stated that "[w]hereas civil actions may be limited to court cases, a proceeding is clearly broader in scope")
- *Black's Law Dictionary*, 9th ed. (2010), defines proceeding as, *inter alia*, "[a]n act or step that is part of a larger action"
- *Merriam-Webster's Dictionary of Law* defines a proceeding as "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, or regulations."
- *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. Ct. App. 2012) (finding that Colorado's notice and repair statute, known as CDARA, was both a "civil proceeding" and an "alternative dispute resolution proceeding" under the policy language)

## § 558.004(15), Fla. Stat.

Upon request, the claimant and any person served with notice pursuant to subsection (1) shall exchange, within 30 days after service of a written request, which request must cite this subsection and include an offer to pay the reasonable costs of reproduction, any design plans, specifications, and as-built plans; any documents detailing the design drawings or specifications; photographs, videos, and expert reports that describe any defect upon which the claim is made; subcontracts; and purchase orders for the work that is claimed defective or any part of such materials. **In the event of subsequent litigation, any party who failed to provide the requested materials shall be subject to such sanctions as the court may impose for a discovery violation.** Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

(Emphasis added.)

## **"Civil Proceeding" under Black's Law Dictionary, 10th ed. (2014)**

"A judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in disputes between litigants in a matter relating to torts, contracts, property, or family law."

If you have question or would like to discuss this case further, please contact me:

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