CONSTRUCTive Talk

VOL. III ISSUE III
2017

Construction Law Committee Newsletter, a committee of the Florida Bar Real Property, Probate & Trust Law Section

Scott Pence
Tampa
Chair

Reese J. Henderson, Jr.
Jacksonville
Vice Chair

Neal Sivyer
Tampa
Vice Chair

INSIDE THIS ISSUE:

Chapter 558 Process Labeled "Alternative Dispute Resolution" By Florida's Supreme Court

By: Brett J. Moritz, Esq., Lee Hernandez Landrum Garofolo, Miami, FL

The Florida Supreme Court recently issued a landmark ruling for the construction world. After a long wait for many in the construction and insurance industries, the Florida Supreme Court issued its ruling on December 14, 2017 in *Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company*, No. SC16-1420, 2017 WL 6379535 (Fla. Dec. 14, 2017). Essentially, the Court found that the Chapter 558 process outlined within the Florida Statutes qualifies as an "alternative dispute resolution" as it concerns the Crum & Forster insurance policies at issue. This ultimately means that Crum & Forster may have had a duty to defend Altman during the Chapter 558 process.

The case involved Altman Contractors, Inc. ("Altman"), a general contractor assigned to a condominium project located in Broward County. Altman's commercial general liability insurer was Crum & Forster, and the applicable policies ran from 2005 to 2012. The relevant policy provision provided that the insurer had "the right and duty to defend the insured against any 'suit' seeking those damages." The policy went on to define "suit" as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and ad-

(Continued on page 2)

Editor's Corner

Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tbench@rumberger.com or tderr@rumberger.com

Chapter 558 Process Labeled "Alternative Dispute Resolution" By Florida's Supreme Court

(Continued from page 1)

vertising 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.

While the policy provided the above-specifications as to the intended meaning of "suit," it did not go any further in defining the additional terms employed, namely the terms "civil proceeding" and "alternative dispute resolution." This is of particular importance as it provided the Court the latitude to issue its own interpretations.

"While the policy... [defined] "suit," it did not go any further in defining the additional terms employed, namely the terms "civil proceeding" and "alternative dispute resolution.'"

The Condominium Association served Altman with several Chapter 558 Notices of Claim following construction. As a result, Altman notified Crum & Forster and demanded that Crum & Forster defend Altman pursuant to the insurance policies.[1] However, Crum & Forster denied Altman's demand on the grounds that such Notices of Claim were not "suits" under the policies. Ultimately, Altman settled the claims without any lawsuits. However, Altman filed a declaratory action against Crum & Forster in the Southern District of Florida for its refusal to defend and indemnify Altman in response to the Chapter 558 Notices of Claim.[2] The Southern District found no duty to defend, holding that the Chapter 558 notices were not "suits" within the meaning of the policies, and entered summary judgment in favor of Crum & Forster. Altman appealed to the 11th Circuit.

The 11th Circuit certified the question to the Florida Supreme Court whether a Chapter 558 proceeding constitutes a suit as defined under the Crum & Forster commercial general liability policies.[3] It should be noted that the Court did not address whether or not Crum & Forster consented to the Chapter 558 process, which is required under the policy. Justice Lewis' concurrence is particularly telling on this issue because he writes specifically to emphasize that the ruling in the opinion is a narrowly tailored one that is limited in application to the particular facts and question at issue.

The Court's first task was to determine if the Chapter 558 process constitutes as "civil proceeding." In doing so, the Court relied on the Black's Law Dictionary definition of civil proceeding, which characterizes it as a binding proceeding requiring participation of all parties. Accordingly, it was determined that

(Continued on page 3)

Chapter 558 Process Labeled "Alternative Dispute Resolution" By Florida's Supreme Court

(Continued from page 2)

"The Court took special notice of the legislative findings regarding the Chapter 558 process wherein the legislature termed the process an alternative method to resolve construction disputes."

the Chapter 558 process does not constitute a civil proceeding because the recipient under Chapter 558 may choose not to respond to the Notice of Claim. Thus, the recipient's participation in the Chapter 558 process is neither mandatory nor binding.

The Court then looked at whether the Chapter 558 process constituted an "alternative dispute resolution." Alternative dispute resolution is generally defined as a "procedure for settling a dispute by means other than litigation."[4] Taking this definition into account, the Court ruled that the Chapter 558 process is a form of alternative dispute resolution. The Court took special notice of the legislative findings regarding the Chapter 558 process wherein the legislature termed the process an alternative method to resolve construction disputes.[5]

This decision from the Florida Supreme Court could represent a large shift as to the timing for an insurer to defend its insured. Where previously the insurer was required to defend an insured for a traditional lawsuit, depending upon the language of an applicable insurance policy, the requirement may now begin with the receipt of a Chapter 558 Notice of Claim. However, the Court declined to rule whether the insurer had consented to the insured's participation in the Chapter 558 process. This requirement of consent by the insured has the potential to frustrate the Chapter 558 because it leaves the decision of participation solely to the insurer. It appears this ruling may be the first step for a second and equally important ruling where the Court must interpret the consent requirement for the insurer as it relates to the participation by the insured in the Florida Chapter 558 process.

[1] Crum & Forster later agreed to provide a defense for the Chapter 558 Notices of Claim, but Altman rejected Crum & Forster's counsel. Crum & Forster also denied Altman's request to pay fees associated with defending the Chapter 558 Notices of Claim from the beginning.

[2] *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 124 F. Supp. 3d 1272 (S.D. Fla. 2015).

[3] *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318 (11th Cir. 2016).

[4] *See* Black's Law Dictionary 91 (9th ed. 2009).

[5] Fla. Stat. §§ 558.001, 558.004.

Case Law Update

- ***Lexon Insurance Co. v. Coco of Cape Coral, LLC***, 42 Fla. L. Weekly D2521a (Fla. 2d DCA November 29, 2017).

Trial court entered final judgment for Coco in Coco's action for breach of $7.7 million in surety bond in connection with the development of a subdivision in Cape Coral. Lexon Insurance appealed, asserting that Coco's action was barred by the 5 year statute of limitations because suit was filed more than 5 years after the general contractor had abandoned the project. The trial court had rejected Lexon's argument, instead holding that a surety bond is a form of insurance policy, and therefore a surety bond is breached when "the wrongful denial of the claim occurs…" The appellate court agreed with Lexon and reversed, holding that, while a surety bond is indeed a type of insurance, the liability of the surety is based on the liability of the principle, and therefore the default of the principle general contractor on the project gave rise to the claim against Lexon. Therefore, the statute of limitation began to run on the bond claim when the general contractor abandoned the project, and thereby breached the bond.

- ***Fist Construction, Inc. v. Obando***, 42 Fla. L. Weekly D2501b (Fla. 3rd DCA November 29, 2017).

Obando was hired by a foreman and supervisor for Fist Construction as an independent contractor to provide labor on a residential project on which Fist was a roofing subsubcontractor. Obando alleged that he was hurt on the job, and made claims for workers' compensation benefits against the general contractor and the prime roofing subcontractor that had hired Fist, but not against Fist. Both the general contractor and the prime roofing contractor denied benefits, asserting that Obando was not an employee of either of them at the time of the accident. Obando then filed a tort suit against the GC, prime roofing subcontractor, Fist and others. Several months later, an attorney for the prime roofing subcontractor contacted Fist's comp carrier and notified an adjuster of Obando's injury. Obando initially denied any knowledge of Fist Construction, having only dealt with Fist's foreman, and the owner of Fist denied any knowledge of or employment of Obando. Obando nevertheless submitted a petition for comp benefits to Fist's carrier, which was accepted by the carrier. Fist asserted workers' compensation immunity to Obando's tort action, which was rejected on cross motions for summary judgment by the trial court, and Fist appealed. The appellate court reversed, holding that Fist was not precluded from claiming workers' compensation immunity by its initial denial that Obando was its employee, or the initial denials by the GC and the prime roofing subcontractor. The court explained that "an initial denial of liability or benefits does not automatically estop an employer from asserting workers' compensation immunity."

- ***Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,*** 42 Fla. L. Weekly S960b (Fla. December 14, 2017).

The Florida Supreme Court, on a question certified to it by the United States District Court of Appeals for the Eleventh Circuit, held that the notice and repair process set forth in Florida Statutes Chapter 558 is a "suit" within the meaning of a CGL policy which defined "suit" to include any "alternative dispute resolution proceeding." The CGL policy at issue imposed upon Crum & Forster a duty to defend a "suit," potentially imposing such a duty on Crum & Forster in connection with the Chapter 558 process. The Court refrained from finding such a duty in this case, however, because the policy imposed the duty to defend alternative dispute resolution proceedings only when entered into with the consent of Crum & Forster, and the consent issue was not within the question certified to the Court. The case was accordingly remanded to the 11th Circuit.

Interested in joining the Construction Law Committee?
It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.

2. Join the Real Property Probate and Trust Law Section.

3. Email Scott Pence at spence@carltonfields.com advising you would like to join the CLC and provide your contact information.

Submissions:

Do you have an article, case update, or topic you would like to see in CONSTRUCTive Talk? Submit your article, note, or idea to: tbench@rumberger.com or tderr@rumberger.com

Editor's Corner:

Timothy N. Bench
Orlando
Editor

Tyler J. Derr
Tampa
Assistant Editor

Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@carltonfields.com)
ADR - Deborah Mastin (deboarhmastin@gmail.com)
Certification Exam - Alex Espino (aespino@tevtlaw.com)
Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)
CLE Subcommittee - Randy Dow (rdow@boydjen.com) and Scott Lehman (slehman@eisenberglehman.com)
Construction Law Institute - Sanjay Kurian (skurian@bplegal.com)
Construction Litigation - Neal Sivyer (nsivyer@sbwlegal.com)
Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dssattorneys.com)
Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)
Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)
Legislative Subcommittee - Sanjay Kurian (skurian@bplegal.com) and Sean Mickley (smickley@gouldcooksey.com)
Membership Subcommittee - David Zulian (dazulian@napleslaw.com)
Newsletter - Tim Bench (tbench@rumberger.com) and Tyler Derr (tderr@rumberger.com)
Publications Subcommittee - Brett Henson (bhenson@slk-law.com) and Kellie Humphries (khumphries@gunster.com)
Small Business Programs - Lisa Colon-Heron (lcheron@smithcurrie.com)
Website Subcommittee - Brent Zimmerman (bzimmerman@jimersoncobb.com)

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Events

January 17-19, 2018
ABA Forum on Construction Law
Mid-Winter Meeting
Subcontractors, Subconsultants, Suppliers—Oh My…
Sanibel Harbour Marriott Resort & Spa
Ft. Myers, Florida

March 8-10, 2018
Construction Law Institute and Construction Law Certification Review Course
JW Marriot Orlando Grande Lakes
Orlando, Florida