ALTMAN CONTRACTORS, INC. v. CRUM & FORSTER SPECIALTY INSURANCE COMPANY: BALANCING THE INTEREST SURROUNDING POTENTIAL INSURANCE COVERAGE FOR CHAPTER 558 NOTICES OF CLAIM

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Chapter 558, Florida Statutes was enacted by the legislature in 2003 to provide "an alternative method to resolve construction disputes" between owners and contractors. Chapter 558 requires a "claimant" to serve a "written notice of claim" on the contractor describing, in reasonable detail, the nature of any construction defects, the resulting damage (if known) and the location of each defect. Last December, in the case of *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2017 WL 6379535 (Fla. Dec. 14, 2017), the Florida Supreme Court addressed for the first time whether a "written notice of claim" constitutes a "suit" within the meaning of a commercial general liability (CGL) insurance policy issued to a general contractor. This article will examine the interplay between the notice and opportunity to repair process embodied in Chapter 558 and the duty to provide a defense to "suits" as defined in standard CGL policies that are widely sold to general contractors and others in the construction industry. This articles summarizes the parties' positions, the competing policy considerations and the Supreme Court's ultimate ruling. The article then examines the Court's decision, the policy points the court left unanswered, and considers the potential follow-on effects of the *Altman* decision on how insurance carriers and their insureds will deal with construction defect (CD) claims pre-suit in the future.

I Brief Overview of Chapter 558 Notice and Opportunity to Repair Process

The Florida legislature's stated goal in enacting Chapter 558 was to provide an "alternative method" to resolve construction disputes that would " reduce the need for

litigation as well as protect the rights of property owners." *See* §558.001, Florida Statutes (2012). Chapter 558 was designed to provide written notice to the contractor, subcontractor, supplier or design professional of an alleged defect in design or construction and "an opportunity to resolve the claim without resort to further legal process." *See id.* The process starts with the "claimant", defined exclusively as an owner or owner's association, serving a "written notice of claim" on the contractor, subcontractor, supplier or design professional.[1] Under the version of Chapter 558 in effect at the time of the events in *Altman*, the notice of claim was required to "describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known." *See* §558.004(1), Florida Statutes (2012).[2]

Service of the notice of claim starts the clock on a period of time of either 60 or 120 days in length[3] during which the claimant is obligated to await the contractor's response to the notice of claim. If the contractor does not respond within 45 days after service of the notice of claim (or within 75 days in the case of an association representing more than 20 parcels), the claimant may then immediately file suit against the contractor for the defects described in the notice of claim. If the contractor does respond and makes any kind of offer – whether repairs or payment of monetary compensation (or both) – the

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1 For ease of reference, this article will refer exclusively to "contractor" when referring to the party to whom a notice of claim is sent.

2 The Statute was amended in 2015 to read: "The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. Based upon at least visual inspection by the claimant or its agents, the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden. The claimant has no obligation to perform destructive or other testing for purposes of this notice." *See* §558.004(1)(b), Florida Statutes (2017).

3 The period is 120 days in cases involving an association representing more than 20 parcels. *See* §558.004(1), Florida Statutes (2012).

claimant must accept or reject the offer before filing suit against the contractor. Failure to do so may result in an order staying the action until the claimant complies. *See* §558.004(7), Florida Statutes. Service of the notice of claim tolls the applicable statute of limitations for a period of 90 days (or 120 days as applicable) after service of the notice of claim unless the claimant accepts the contractor's offer, in which case the statute of limitations is tolled until 30 days after the end of the period for the contractor's performance of repairs or payment under the offer. *See id.* §558.004(10).

If the contractor elects to respond to the written notice of claim and offers to settle with monetary compensation, repairs, or both, the offer "will not obligate the [contractor's] insurer." *See id.* §558.004(5)(b) & (c). Alternatively, the contractor may, as part of its offer, provide a copy of the written notice of claim to its insurer with an offer of payment of whatever monetary compensation the contractor's insurer determines to offer, if any. *See id.* §558.004(4)(e). However, providing a copy of the notice of claim to the insurer expressly "shall not constitute a claim for insurance purposes." *See id.* §558.004(13).[4]

Chapter 558 obligates the parties to exchange pre-suit, upon request, certain specified documents, including any design plans, specifications, subcontracts and purchase orders. Failure to produce the specified requested documents pre-suit may be sanctioned in the same way as a discovery violation by the court in any subsequent litigation. *See id.* §558.004(15).

II **Brief Summary of the Facts of the Altman Case**

Between April and November 2012, the Sapphire Fort Lauderdale Condominium Association, Inc. ("Sapphire") served Altman Contractors, Inc. ("Altman") with multiple

[4] This provision was amended in 2015 to add " unless the terms of the policy specify otherwise."

Chapter 558 notices of claim which together claimed over 800 construction defects in the Sapphire condominium. On January 14, 2013, Altman notified Crum & Forster of Sapphire's claims and demanded that C&F defend and indemnify Altman as to Sapphire's claims under the terms of seven insurance policies issued by Crum & Forster to Altman over the affected years. Crum & Forster declined Altman's demand on the basis that the notices did not constitute a "suit" under the policies. Faced with Crum & Forster's refusal, Altman retained its own counsel to defend the notices of claim.

Subsequently, on August 5, 2013, Crum & Forster, while maintaining its position that the notices of claim did not invoke its duty to defend Altman, nevertheless hired counsel to defend Sapphire's claims. Crum & Forster did so under a reservation of rights, with the explanation that it was retaining counsel in anticipation that Sapphire may file a litigation. Altman objected to Crum & Forster's selection of counsel and demanded that its original counsel be paid to continue with the defense. Altman further requested reimbursement from Crum & Forster for the fees and expenses it had previously incurred since it provided notice of Sapphire's notices of claim. Crum & Forster denied Altman's requests.

Altman ended up settling all of Sapphire's construction defect claims without any lawsuit being filed and without Crum & Forster's participation. Altman then filed a declaratory judgment action in the United States District Court for the Southern District of Florida seeking a declaration that Crum & Forster owed a duty to defend and indemnify to Altman under its CGL policies, and seeking reimbursement for its fees and costs incurred defending Sapphire's claims. The district court resolved the case on summary judgment in favor of Crum & Forster, finding the association's notices of claim were not a "suit" under

the policies. Altman then appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit heard oral argument, and then certified the following question to the Florida Supreme Court:

> Is the notice and repair process set forth Chapter 558, Florida Statutes, a "suit" within the meaning of the commercial general liability policy issued by [Crum & Forster] to [Altman]?

Altman Contractors, Inc. v. Crum & Forster Specialty Insurance Company, 832 F.3d. 1318, 1326 (11th Cir. 2016).

III. Altman's Policies With Crum & Forster

Crum & Forster issued a total of seven CGL policies for Altman with effective dates from February 1, 2005 through February 1, 2012. The first policy was written on Insurance Services Office (ISO) form CG 00 01 10 01, while the remaining policies were written on ISO form CG 00 01 12 04. The relevant provisions of the policies were all identical and included the insuring agreement (Section I, paragraph 1.a.), the duties in the event of occurrence, offense, claim or suit (Section IV, paragraph 2.a.) and the definition of a "suit" (Section V, paragraph 18).

The insuring agreement provides, in relevant part, as follows:

> 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. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or 'property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Regarding duties of the insured in the event of a claim or "suit", the policy form provides:

> b. If a claim is made or "suit" is brought against any insured, you must:
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> (1) Immediately record the specifics of the claim or "suit" and the date received; and
> (2) Notify us as soon as practicable.
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> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
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> c. You and any other insured must:
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> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
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> . . .
>
> d. No insured will, *except at that insured's own cost*, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Finally, while the term "claim" is not defined in the policy, "suit" is defined as follows:

> "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:
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> a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
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> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

As it happens, the court's decision in *Altman* turns almost exclusively on its construction of the above definition of the term "suit." The definition of "suit", though, is problematic from the standpoint of Altman because a "civil proceeding" alleging "damages" seems to contemplate some sort of process, be it an arbitration or court proceeding, which results in an award of damages. On the other hand, if the notice of claim falls within the portion of the definition that "includes" the described "any other

alternative dispute resolution proceeding", then the insured must ask for the insurer's consent to participate if it wants its defense costs and settlement costs to be covered.

The definition is also problematic from Crum & Forster's perspective because "any other alternative dispute resolution proceeding" is clearly written very broadly. Yet, to concede that a notice of claim initiates a process falling under subsection b. of the definition of "suit" puts the insurer in the awkward position of having to grant or withhold consent to the insured's participation in the process, with the attendant fact questions bound to arise in individual cases. In Crum & Forster's case, it was precisely these kind of fact questions that led to the case being returned to the Eleventh Circuit and then remanded back to the District Court to resolve whether Crum & Forster had consented to Altman's participation.

IV. Altman's Position before the Supreme Court

Altman's unmistakable goal in its brief was a ruling that a Chapter 558 notice of claim is always a "suit" under a standard form CGL policy, with or without the insurer's consent. This is apparent because Altman's brief went to great lengths to argue that the Chapter 558 process fits the definition of "suit" but not subsection b.

Altman's first position was that, because a Chapter 558 notice of claim must be sent before filing suit, it is necessarily part of the lawsuit process. According to Altman, Chapter 558 "creates a detailed and multi-step process that the parties are [required] to engage in before filing a lawsuit."[5] Altman relied specifically on the Florida Supreme Court's decision in *Raymond James Fin. Serv., Inc. v. Phillips*, 126 So.3d 186 (Fla. 2013), which relied in part on a dictionary definition of the word "process" as "a particular step or

[5] Initial Brief on the Merits of Appellant, Altman Contractors, Inc. ("Altman Brief") at 16.

series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations." According to Altman, the Chapter 558 process fit this definition because it is a mandatory process in the sense that a claimant must send the notice of claim as a condition precedent to filing suit; and the party receiving the notice "must" serve a written response to the claim under the express terms of the statute, even though the statute attaches no penalty to a failure to serve a written response. According to Altman, "[t]he absence of specific penalties for non-compliance does not make the requirements of Chapter 558 any less mandatory."[6] The mandatory nature of the Chapter 558 process and the fact it is a prelude to litigation, in Altman's view, make it "inextricably intertwined" with construction litigation as it is "a particular step or series of steps" a claimant must follow to pursue a construction defect claim. The essence of this argument was that the Chapter 558 process is not an *alternative* to litigation, but a first step in pursuing litigation.[7]

Altman's second argument was that, even if the Chapter 558 process is considered "alternative dispute resolution", the definition of "suit" is sufficiently broad that it includes "various forms" of ADR. Nothing in the policy, according to Altman, indicates that the list in the policy (in subparagraphs a. and b.) is intended to be exclusive. The word "includes" in the policy actually means "includes, but is not limited to" the forms of ADR expressly listed.[8] Thus, the Chapter 558 process is simply another form of ADR covered by the definition of "suit." In making this case, Altman relied on a case out of Colorado interpreting the same policy language which held that Colorado's "CDARA" process

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6 *Id.* at 22.

7 *Id.* at 17.

8 *Id.* at 23.

(which has some similarities to Florida's Chapter 558 process) was both a "civil proceeding" and an ADR process to which the insurer had consented.[9]

Altman's final argument was that, if the court was not convinced of its other arguments, and found Crum & Forster's argument plausible, then that was evidence that the policy was ambiguous and should be construed liberally in favor of coverage. Altman argued that, to hold otherwise would simply encourage contractors "to invite lawsuits to be filed in order to receive insurance coverage."[10] This is because many in the construction industry lack the financial resources to participate in the Chapter 558 process without the benefit of insurance coverage. Thus, the availability of insurance coverage promotes the Legislature's stated goals in enacting Chapter 558 by providing the parties the financial resources needed to avoid bringing the dispute to court.

V. Crum & Forster's Position before the Supreme Court

At the polar opposite of Altman's argument was Crum & Forster's position that a Chapter 558 notice of claim is *never* a "suit" for coverage purposes. Crum & Forster characterized the Chapter 558 process as mostly about repairs of defective construction, including such mundane things as "replacing a non-functioning garage door opener or broken roof tiles on a single family house."[11] In Crum & Forster's view, the Florida Legislature enacted Chapter 558 to "give construction trades the opportunity to fix deficiencies in their work" rather than litigate over it.[12] What was created is a "collaborative process" rather than an adversarial proceeding. The Legislature deliberately

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9 *See id.* at 24-26 (citing *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 334-35 (Colo. App. 2012)).

10 *Id.* at 31.

11 Answer Brief on the Merits of Appellee, Crum & Forster Specialty Ins. Co. ("C&F Brief") at 14.

12 *Id.*

stopped short of requiring insurer participation, as evidenced by, for example, the provision in Chapter 558 that providing a copy of the 558 notice of claim to a contractor's insurer, as permitted by the statute, does not constitute a claim for insurance purposes. This evidenced the Legislature's intent to permit, but not require, insurer participation in the Chapter 558 process.

Crum & Forster also argued that the Chapter 558 "notice and repair process" does not fit the policy's definition of "suit" because "suit" means a "civil proceeding" under the policy's definition. Even though "civil proceeding" itself is not defined in the policy, *Black's Law Dictionary* nevertheless defines "civil proceeding" as a "judicial hearing" involving disputes between litigants, the purpose of which is "to decide or delineate private rights and remedies."[13] Because the Chapter 558 process clearly is not a "lawsuit", it is therefore not a "civil proceeding." Crum & Forster acknowledged that the policy broadens the definition of "suit" to include the two types of "alternative dispute resolution proceeding" identified in subparagraphs a. and b. of the definition of "suit." Nevertheless, it maintained that the Chapter 558 process satisfies neither prong of this definition. The Chapter 558 process clearly does not require arbitration, but rather is a *condition precedent* to arbitration under the express terms of the statute.[14] Moreover, the process does not satisfy the definition of ADR as defined in subparagraph b. because, under another dictionary definition cited by the court in *Raymond James*, a proceeding means "[a]ny procedural means for seeking redress from a tribunal or agency."[15] Chapter 558, of course,

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13 *Id.* at 16-17 (quoting *Black's Law Dictionary* 300 (10th ed. 2014)).

14 The statute defines "action" as including "any civil action *or arbitration proceeding* for damages[.]" *See* § 558.002(1), Florida Statutes (emphasis added).

15 C&F Brief at 18 (citing *Raymond James*, 126 So.3d at 190).

provides for no tribunal, agency or any other forum for adjudication of rights or remedies. So it is not an alternative dispute resolution *proceeding* in the policy's meaning since it is not a proceeding as commonly understood.

Crum & Forster also argued that the Chapter 558 process is not an "alternative dispute resolution proceeding" under subparagraph b. because, even if it is a "proceeding", it is not one seeking covered damages. Instead, Chapter 558 is addressed to seeking repairs, not damages. There is simply no mechanism created by Chapter 558 to make a determination of damages against an insured that it would be legally obligated to pay. As such, there is nothing for the liability insurer to "defend" because the Chapter 558 process will never end in a verdict or judgment for damages that would be covered under the policy.[16]

The insurer took issue with Altman's argument that a lack of coverage would deter contractors from participating in the Chapter 558 process. Crum & Forster argued that Altman's own experience belied that claim, as Altman ended up resolving over 800 defect claims on its own and without Crum & Forster's participation.[17] Conversely, Crum & Forster urged that requiring insurers to defend 558 notices would lead to more disputes between insurers and insureds and more coverage lawsuits, and would inevitably lead to increasing premiums and decreased availability of liability coverage for contractors.[18] It cited the experience of Colorado after its CDARA legislation was amended to expressly provide that an insurer's duty to defend was triggered by receiving a copy of a CDARA notice of claim. According to a study cited by Crum & Forster, approximately one dozen

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16 *Id.* at 19.

17 *Id.* at 32.

18 *Id.* at 35.

insurance carriers left the state after passage of this legislation, and the legislation was cited by insurance brokers as the reason. Crum & Forster claimed this led to an affordable housing shortfall in Colorado due to builders' fears of lawsuits and "skyrocketing insurance costs."[19]

VI. The Supreme Court's Decision

Justice Polston's majority opinion framed the issue before the Court as one of insurance policy interpretation, and noted the Court's rule of interpretation that insurance contracts are to be construed according to their plain language. The opinion then provides an overview of the Chapter 558 process as embodied in the statute in effect in 2012 when Altman received Sapphire's first notice of claim.[20] The Court did not comment directly on the Legislature's intent in enacting Chapter 558, but did quote the legislative findings and declaration contained in § 558.001. In doing so, the majority opinion emphasized the references in § 558.001 to "an alternative method to resolve construction disputes" and to providing an "alternative dispute resolution mechanism" for construction defect matters.[21]

The opinion then undertook an analysis of "suit" as defined in the applicable policies. The Court first analyzed whether the 558 process fits the portion of the definition referencing a "civil proceeding." The majority opinion cited *Raymond James* and the two definitions of the word "proceeding" cited in that opinion: the first (from *Black's Law Dictionary* (9th ed. 2009)) defining a "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency"; and the second (from *Merriam-Webster's Dictionary of*

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19 *Id.* at 36-37.

20 The court referenced the 2015 amendments to § 558.001 in a footnote, but did not expressly rely upon them. *See Altman*, 2017 WL 6379535, at *3 n.2.

21 *Id.* at *3.

Law (1996)) defining a proceeding as "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations."[22] The Court also referenced the definition of "civil proceeding" contained in the Tenth Edition of *Black's Law Dictionary* which references a judicial hearing, session or lawsuit.[23] From these definitions, the Court concluded that the Chapter 558 process cannot be considered a "civil proceeding." As the majority opinion explains:

> [C]hapter 558 does not place any obligation on the insured to participate in the chapter 558 process. The chapter 558 framework has never been anything other than a voluntary dispute resolution mechanism on the part of the insured, despite its requirement that the claimant serve the insured with a notice before initiating a lawsuit. Further, the chapter 558 process does not take place in a court of law or employ any type of adjudicatory body. Nor does the chapter 558 process produce legally binding results. Rather chapter 558 sets forth a presuit process whereby the claim may be resolved solely by the parties through a negotiated settlement or voluntary repairs without ever filing a lawsuit. Therefore, the chapter 558 process is not a "civil proceeding" within the policy definition of "suit."

See Altman, 2017 WL 6379535, at *4.

Thus, the Court agreed with Crum & Forster to the extent that it found there was nothing "mandatory" about the Chapter 558 process, as argued by Altman, at least from the standpoint of the insured. The Court also agreed with Crum & Forster that a "civil proceeding" contemplated an adjudicative process, which is noticeably absent from the Chapter 558 process. However, the Court's opinion did not stop there.

The majority opinion then noted that the policy broadened the definition of "suit" to include "[a]ny other alternative dispute resolution proceeding in which such damages

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22 *Id.* at *4.

23 The full definition reads as follows: "A judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in a dispute between litigants in a matter relating to torts, contracts, property, or family law." *Black's Law Dictionary*, 300 (10th ed. 2014).

are claimed and to which the insured submits with our consent."[24] To find the "plain meaning" of these terms of the policy, the Court looked once again to *Black's Law Dictionary*, this time for a definition of the term "alternative dispute resolution", and found the following definition: "[a] procedure for settling a dispute by means other than litigation."[25] The Court found the Chapter 558 process fell within this definition as a presuit process designed to encourage claimants and contractors to settle claims for construction defects without having to litigate. Indeed, the Legislature itself had described Chapter 558 as "[a]n effective alternative dispute resolution mechanism[.]"[26]

Having concluded that the Chapter 558 process is an "alternative dispute resolution proceeding" within the "plain meaning" of subsection b., the Court further found that the Chapter 558 process also satisfied the requirement that it contain a claim for "such damages" as are covered under the policy. The opinion noted that a "claimant" is defined in the statute as one maintaining a "claim for damages."[27] The Court also noted the statute's requirement that a written notice of claim describe the damage or loss resulting from the alleged defect, if known. Finally, the opinion notes that a "monetary payment" is included as a potential resolution to a construction defect claim. Thus, Chapter 558 contemplates claims for damages as required by the definition of "suit" contained in subsection b.

The majority opinion also noted the requirement that, to be covered under subsection b., the insurer must consent to the insured's submission to the alternative

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24 *Altman*, 2017 WL 6379535, at *5.

25 *Id.* (quoting *Black's Law Dictionary* 91 (9th ed. 2009)).

26 *Id.* (quoting § 558.001, Florida Statutes (emphasis added by the Court)).

27 *Id.* (quoting § 558.002(3)).

dispute resolution proceeding. However, the Court did not address whether Crum & Forster consented to Altman's participation in the Chapter 558 process initiated by Sapphire, noting it was outside the scope of the certified question and was an issue of fact in dispute between the parties.[28]

VII. Analysis

The Altman decision is unusual in that it involves a question of insurance contract interpretation that intersects with a question of statutory interpretation. Determining what is a "suit" for purposes of the insurance policy, given its broad inclusion of "civil proceedings" (and not merely civil "actions"), arbitration proceedings, and "any other alternative dispute resolution proceeding", and whether the Chapter 558 process qualifies as a "suit", necessarily requires an examination of what, exactly, the Legislature intended to create when it enacted Chapter 558. Is it merely designed to "give construction trades the opportunity to fix deficiencies in their work" as Crum & Forster would have it, or did the Legislature intend something more, and did it intend for insurance companies to participate?

Almost from the beginning,[29] Chapter 558 has addressed the interplay of the Chapter 558 process with potential insurance coverage. As noted in Section I above, the statute provides that any offers made by a contractor in response to a written notice of claim do not obligate the contractor's insurer, and further provides that furnishing a copy of a notice of claim to a contractor's insurer "shall not constitute a claim for insurance

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[28] Upon receiving the Florida Supreme Court's answer to the certified question, the Eleventh Circuit vacated the final summary judgment previously entered in favor of Crum & Forster and remanded the case back to the District Court for further findings, presumably including the issue of Crum & Forster's consent. *See Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2018 WL 560523, at *1 (11th Cir. January 26, 2018).

[29] The provisions in Chapter 558 relating to insurers were added as part of the 2004 amendments.

purposes." §558.004(13), Florida Statutes. Yet, remarkably, the majority opinion never mentions these provisions of Chapter 558. Instead, the Court simply takes at face value the description in the legislative findings and declaration in §558.001 of the process created as an "alternative dispute resolution mechanism" and, comparing this to the *Black's Law Dictionary* definition of "alternative dispute resolution" as a "procedure for settling a dispute by means other than litigation", concludes that the Chapter 558 process is an alternative dispute resolution proceeding within the "plain meaning" of the policy.

Setting aside for the moment the policy interpretation question, it is apparent that, in interpreting Chapter 558, the majority opinion, without saying so, applied the Court's maxim that "[w]here a statute's language is plain and unambiguous, its plain meaning will control and further statutory construction is not necessary."[30] Yet this approach, which gives controlling weight to the legislative findings and declaration, without even *considering* the contrary indications of legislative intent contained in the very same statute, would appear to violate the Court's "elementary principle of statutory construction" that "significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."[31] The majority opinion, while adopting a straightforward interpretation of the statute based on words actually used by the Legislature, which is consistent with the "plain meaning rule",[32] nevertheless offers no rationale for relying almost exclusively on the words

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30 *Petty v. Florida Ins. Guar. Ass'n*, 80 So.3d 313, 316 n.2 (Fla. 2012) (Polston, J.). That the Court considered the Legislature's intent in enacting Chapter 558 in deciding the coverage issue is made plain by the majority opinion's reference to how the Legislature "explicitly described chapter 558." *Altman*, 2017 WL 6379535, at *5.

31 *Mendenhall v. State*, 48 So.3d 740, 749 (Fla. 2010) (*per curiam* opinion joined by Justice Polston).

32 *See, e.g., Mendenhall*, 48 So.3d at 48 (stating "legislative intent is determined primarily from the statute's text.").

contained in the statute's legislative intent and declaration provision without any consideration given to the *rest of* the words in the statute, notably those in § 558.004, which specifically address the interplay of the Chapter 558 process with insurance. Indeed, in his dissent, after reciting the provisions of § 558.004 relating to insurers and insurance, Justice Lawson offers his own competing interpretation of the "plain language" of Chapter 558:

> In other words, the statute not only prohibits the claimant's chapter 558 notice from acting as an insurance claim, but expressly directs the contractor to respond to the notice without involving its insurer and to send notice of any covered claim only after it has analyzed the notice, exchanged information, and fashioned its response—at the end of the chapter 558 process. To me, this reflects the Legislature's understanding that the singular type of claim for which it was establishing this process—a construction defect claim—does not generally involve insurance. And, in light of this understanding, the Legislature very carefully drafted the statute so as to exclude from the chapter 558 process secondary claims for personal injury or property damage caused by a construction defect (to which insurance would typically apply). Therefore, the majority construes the statute as applying to a type of claim that *the plain language of the statute* excludes from the chapter 558 process.

Altman, 2017 WL 6379535, at *10 (emphasis added) (Lawson, J.). The majority opinion offers no answer to Justice Lawson's points here.

Arguably, the Court's reliance on the legislative findings and declaration violates the maxim that *specific* statutory provisions covering a subject prevail over a more general statutory provision covering the same and other subjects in general terms.[33] To be fair, § 558.004 states that furnishing a notice of claim under 558 is not a "claim" for insurance purposes, and does not directly address whether furnishing the notice is a "suit", which is a different term in the policy with its own definition (the term "claim" being undefined in the

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[33] *See id.* at 48 (quoting *McDonald v. State*, 957 So.2d 605, 610 (Fla. 2007)).

policy). But for purposes of furnishing guidance to lower courts and litigants, it is remarkable that the Court held that a written notice of claim under Chapter 558 is a "suit" under a standard form CGL insurance policy without squaring that result with the statute's textual command that a 558 notice is not a "claim" and, therefore, arguably not even eligible to be considered a "suit."[34]

Turning to the insurance policy interpretation question, if one accepts the Court's premise that "any other alternative dispute resolution proceeding" is plainly broad enough to encompass the "alternative dispute resolution mechanism" nominally created by Chapter 558, then the rest of the Court's analysis is unremarkable. Indeed, the Court's construction requires the least tortured reading of the policy's definition of "suit". "Any other" ADR proceeding more persuasively means "any other" ADR proceeding rather than "any other" except an unwritten list of other forms of proceedings which, depending on whether you are reading Altman's or Crum & Forster's *amici's* brief, would either be covered or excluded ADR proceedings.[35] That the Court declined all invitations to strain the text to reach an all-or-nothing result is commendable. Moreover, although not relied upon by the Court, the Court's construction seems to fit with what was intended when the Insurance Services Office (ISO) added subsection b. to the policy definition as part of the 1988

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[34] For instance, subsection b. encompasses alternative dispute resolution proceedings in which covered damages "are claimed." Although not clear, it is arguably consistent with how the policy is written to construe a "suit" as a "claim" that is asserted in a judicial, arbitral or "other" alternative dispute resolution proceeding. Under that construction, if a Chapter 558 notice is not a *claim* for insurance purposes, then *ipso facto* it cannot be a "suit."

[35] In particular, Altman argued the definition of suit is broad and "includes, but is not limited to" the types of ADR listed in subsections a. and b. *See* Altman Brief at 23. *Amici* American Insurance Association, conversely, argued that, if Chapter 558 is mandatory on the insured as urged by Altman, then it would fall outside the types of ADR listed in the definition. *See* Brief of *Amici Curiae* American Insurance Association, et al. ("AIA Brief"), at 7-8.

revision.[36] Justice Pariente's lament in her partial dissent that, by requiring the insurer's consent to participation in the Chapter 558 process, subsection b. "leaves the insured at the mercy of the insurer"[37] provides no reason to override the express terms of the policy as written. Even she concedes that "the chapter 558 process can certainly be considered an "alternative dispute resolution proceeding" under subparagraph (b) of the policy's definition of "suit[.]"[38] Under the Court's longstanding jurisprudence regarding construction of insurance policies, and in absence of any plausible argument that subsection b. is ambiguous, that should end the inquiry.[39]

VIII. Implications for Insurers and Policyholders Facing 558 Notices

The first potential impact from *Altman*, now that the Supreme Court has answered the certified question in the affirmative, concerns the duties of insureds under their CGL policies toward the insurer. If a Chapter 558 notice of claim is a "suit" for purposes of a CGL policy, is the insured now obligated to notify its insurer whenever it receives a 558 notice of claim? The answer is not clear from the Court's decision, and a wrong guess by

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36 According to *amicus curiae* United Policyholders, subsection b. was added by the ISO to the definition of the term "suit" in the 1988 revision "at the urging of industry groups to 'encourag[e] the use of alternative dispute resolution (ADR) proceedings to help control the legal costs associated with liability insurance claims.'" *United Policyholders Amicus Curiae Brief in Support of Altman Contractors, Inc.* at 11 (quoting *Annotated ISO CGL Policy* at 28 (International Risk Management Institute, Inc. 2016)).

37 *Altman*, 2017 WL 6379535, at *9 (Pariente, J.).

38 *Id.*

39 Justice Pariente argues for application of the maxim that "ambiguous policy language [should] be construed broadly in favor of providing coverage to the insured[.]" *See id.* However, her opinion fails to make a case that the policy provisions are, in fact, ambiguous. Instead, she relies on policy arguments raised by certain *amicus curiae* that an insured would be incentivized to not participate in the Chapter 558 process and instead invite a lawsuit in order to invoke the duty to defend. *See id.* However, Florida Supreme Court precedent is clear that, in order to apply the rule of construing ambiguities in insurance contracts against insurers, the provision must actually *be* ambiguous. *See Garcia v. Federal Ins. Co.*, 969 So.2d 288, 291 (Fla. 2007). If the policy is clear and unambiguous, it should be enforced in accordance with its terms. *Id.*

an insured could result in a loss of coverage, if it is later found the insured was obligated to provide notice to its insurer and failed to do so until after suit was filed.

Assuming an insured provides notice of receipt of a 558 claim, the immediate impact of the *Altman* decision is to shift the terms of the debate from whether a Chapter 558 notice of claim could *ever* constitute a suit for insurance purposes to whether: (a) the insured provided timely notice to the insurer of the written notice of claim; (b) the insurer consented (expressly or by implication) to the insured's participation in the Chapter 558 process; and (c) the insured made voluntary payments to resolve the claim for which there is no coverage under the policy. Given the facts in the *Altman* case, it seems likely Crum & Forster will contest all three.

First, Altman waited several months after receiving its first Chapter 558 notice from Sapphire to notify Crum & Forster and demand a defense. This arguably does not satisfy its obligation under its policies to notify Crum & Forster "immediately" or "as soon as practicable" of the written notices of claim. Second, the *Altman* decision itself reflects the dispute between the parties over whether Crum & Forster consented to Altman's participation in the 558 process. Finally, the policy provides that Altman, except at its own cost, will not "voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [Crum & Forster's] consent." Arguably, this is exactly what Altman did when it settled with Sapphire without Crum & Forster's participation. However, Altman may be expected to argue that Crum & Forster waived this provision when it breached its duty to defend. All of these issues likely will be re-litigated before the District Court as a result of the Eleventh Circuit's remand, and will likely be litigated in

future cases when the insurer withholds its consent and the policyholder settles the defect claims without the insurer's participation.

Despite this, the *Altman* decision should not result in ruinous liability for defense costs for responding to Chapter 558 notices for at least two reasons, one short-term and the other long-term. The short-term reason is that, even if the insured provides timely notice, insurer consent is still required. Although there is some risk of a later finding of waiver or estoppel, insurers will doubtless adopt standard practices for responding to Chapter 558 notices much like they have already done in responding to lawsuits under a reservation of rights. Many Chapter 558 notices may result in the insurer retaining defense counsel to defend the notice under a reservation of rights, but little else after that, as many contractors will elect not to respond to Chapter 558 notices when it is clear they have no plausible liability for the claimed defects or when the claimed defects are resolved through repairs. Moreover, Chapter 558 has been on the books for nearly 15 years, and insurers already have considerable experience dealing with written notices of claim in those instances where they decide to become engaged pre-suit.

The long-term reason, of course, is that insurers ultimately control the terms of the policies they write. If the exposure created by the *Altman* decision is deemed too great, then much like the industry has done with respect to pollution and mold claims, insurers have the ability to draft restrictive endorsements either completely excluding or severely limiting coverage of defenses costs for Chapter 558 proceedings. There need not be any "insurance crisis" under these circumstances.

From the standpoint of insureds, prompt notice to the insurer will be paramount as well as follow-up to obtain (or create a record of attempting to obtain) the insurer's

position on whether it will consent to the insured's participation in the Chapter 558 process. As predicted by one *amicus curiae*, this may also result in more demands by contractors on the policies of their subcontractors pursuant to their "additional insured" status under their subcontractors' policies.[40] However things develop, coverage for Chapter 558 defenses costs should become more available to insureds, if somewhat unevenly.

Another possibility raised by an *amicus curiae* supporting Crum & Forster's position is that a holding that a Chapter 558 notice is a "suit" may result in contractors' loss runs being affected negatively.[41] Indeed, if insureds begin routinely to notify carriers of Chapter 558 notices of claim and carriers incur greater defense costs as a result, this result is certainly foreseeable. However, the majority's opinion in *Altman* did not address the statute's command that furnishing a copy of a Chapter 558 notice of claim is *not* a claim for insurance purposes, unless (effective October 1, 2015) the policy otherwise provides, arguably leaving this as an unsettled question of law. Although it is possible to envision a push for legislative clarification of this anomaly, the more direct path (especially in light of the 2015 amendment) may be an endorsement to the policy that specifically addresses Chapter 558 notices of claim and when they are considered a "claim" for notice as well as underwriting purposes. In the extreme case, insurers could effectively overturn *Altman* by writing endorsements that substitute a definition of the term "suit" that expressly excludes Chapter 558 notices of claim. Until that happens, there will remain several years' worth of CGL policies already written without such endorsements, and it will be up to the Courts to determine whether a "written notice of claim" that is not a

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40 *See* AIA Brief at 14-15.

41 *See id*. at 13-14.

"claim" is nevertheless a reportable event for loss run purposes when it results in defense costs being incurred on behalf of an insured in a Chapter 558 proceeding.

IX. CONCLUSION

At face value, the *Altman* decision strikes a reasonable balance between policyholders and insurers with an interpretation of the CGL policy firmly grounded in a plausible interpretation of the policy's terms, which terms the industry is free to modify in future policies. Any such modification will take precedence over any contrary language in the statute based on the language added in the 2015 amendment to Chapter 558. In the meantime, however, policyholders and insurers will have to grapple with the tension between the Court's interpretation of existing policies and the text in Chapter 558 that the Court overlooks, with no certainty of how the Legislature and the Courts will sort out these tensions. *Altman* almost certainly will not be the last chapter written on this subject.

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