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Without Insurance Coverage, What Good Is Construction Defect Law?

Commentary by John Moore, Daily Business Review

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In 2003, the Florida Legislature, with the stated goals of reducing the amount of construction-defect litigation and protecting the rights of property owners, created a mandatory pre-litigation alternative dispute resolution proceeding by enacting Chapter 558 of the Florida statutes.

Pursuant to Chapter 558, before a property owner can file a lawsuit for construction defects, the owner must first provide written notice of the defects to the responsible parties (contractor, subcontractor, supplier or design professional as applicable) and give them an opportunity to investigate and to resolve the claims. This notice and cure process has had mixed results in its real-world application, and as a result the Legislature has continued to tweak Chapter 558 through various amendments since it was first enacted.

Now, Chapter 558's ability to achieve the aforementioned goals faces its stiffest challenge yet, as the U.S. Court of Appeals for the Eleventh Circuit has recently certified to the Florida Supreme Court the question of whether a contractor's insurance company is obligated to provide coverage to the contractor for its fees and costs incurred in responding to and addressing a property owner's Chapter 558 notice. The issue in *Altman Contractors v. Crum & Forster Specialty Insurance* arose because the insurer denied coverage, arguing that a Chapter 558 notice does not satisfy its commercial general-liability policies' definition of "suit," and that under the terms of those policies, it only has to defend the insured against a "suit" seeking damages to which the insurance applies.

The U.S. District Court for the Southern District of Florida ruled in favor of the insurer, finding that a Chapter 558 notice was not a suit and therefore Crum & Forster did not have to provide a defense or indemnity. The insured, Altman Contractors, filed an appeal to the Eleventh Circuit. Earlier this month, after receiving briefs from the parties and the construction and insurance industries, the Eleventh Circuit decided that since it was an

issue of first impression and because of the important public policy considerations involved, it should be resolved by the Florida Supreme Court.

From the property owner's perspective, the Chapter 558 pre-litigation proceeding is beneficial only if the property owner can obtain a resolution faster and at less cost than it could achieve by proceeding straight to litigation. Similarly, the primary benefit for those in the construction industry is the ability to avoid the costs and time incurred by being involved in litigation. Although the property owner is likely not concerned with whether it is the responsible parties or those parties' insurers that pay to remedy the defects and damages, it should be concerned with whether the responsible parties are incentivized to meaningfully participate in the Chapter 558 alternative dispute resolution proceeding.

And if those in the construction industry forgo their right to insurance coverage by resolving the claims prior to being sued, that is certainly a significant disincentive for them to pursue a pre-litigation resolution. Thus, property owners and the construction industry are generally aligned in wanting insurance coverage for the Chapter 558 pre-litigation proceedings. Accordingly, the construction industry argues that as a matter of public policy, in order to achieve Chapter 558's stated goals insurance policies must be construed as providing coverage.

Insurance Crisis?

The insurance industry argues that the express language of Chapter 558 and their standard policies do not require that they provide insurance coverage. Moreover, they contend such a requirement is not necessary because insurers have the contractual right to voluntarily participate in the proceedings and to settle the claims without a suit being filed. They further note that insurers have an incentive to participate because they may achieve an economic benefit by settling prior to litigation being filed. Additionally, Crum & Forster has argued that if it were required to provide such coverage, it would create an insurance crisis, limiting the availability of the insurance and dramatically increasing premiums.

The Florida Legislature, in apparent recognition that achieving a pre-litigation resolution is implausible if insurers do not participate, amended Section 558.01 effective Oct. 15, 2015, to note that the proceedings provide the "contractor ... and the insurer of the contractor ... with an opportunity to resolve the claim." The Legislature, however, did not amend Chapter 558 to expressly require insurance coverage. Despite the insurance industries' claims to the contrary, without a requirement that insurers provide coverage, contractors and others in the construction industry will not meaningfully participate in Chapter 558, and Chapter 558 will simply become a futile process that property owners have to endure before filing suit.

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