Suit, Insured's Consent to Settlement, Assignment of Post-Loss Benefits Coverage Update

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Florida, New Hampshire Coverage Cases
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Suit – Florida

Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.
--- So. 3d ---, 2017 WL 6379535 (Fla. Dec. 14, 2017)

The Florida Supreme Court, in response to a question of law certified by the U.S. Court of Appeals for the Eleventh Circuit, found that Florida's statutory notice and repair process for resolving construction defect claims constituted a "suit" as defined by the subject insurance policy. Altman Contractors, Inc. (Altman), the general contractor for a condominium construction project, was served with several notices by the property owner under chapter 558, which is "a statutory process for resolving construction defect claims that is a condition precedent to filing a lawsuit." Altman sought insurance coverage under its commercial general liability policy issued by Crum & Forster Specialty Insurance Company (C&F) for the chapter 558 notices, which provided, in pertinent part, that C&F had "the right and duty to defend the insured against any 'suit' seeking those damages." "Suit" was defined as "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]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."

Based on this definition, the Supreme Court determined that "the chapter 558 notice and repair process cannot be considered a civil proceeding under the policy terms because the recipient's participation in the chapter 558 settlement process is not mandatory or adjudicative." But, the Supreme Court found that the chapter 558 notice process did constitute an "alternative dispute resolution" under the plain meaning of the policy's terms because the notice is "a statutorily required presuit process aimed to encourage the claimant and insured to settle claims for construction defects without resorting to litigation." In summary, the Supreme Court held that "the notice and repair process set forth in chapter 558 constitutes a 'suit' within the meaning of the commercial general liability policy issued by C&F to Altman. Although the chapter 558 process does not constitute a 'civil proceeding,' it is included in the policy's definition of 'suit' as an 'alternative dispute resolution proceeding' to which the insurer's consent is required to invoke the insurer's duty to defend the insured."

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Insured's Consent to Settlement – New Hampshire

Johnson v. Proselect Ins. Co.
--- N.E.2d ---, 2017 WL 6327844 (Mass. App. Ct. Dec. 12, 2017)

Applying New Hampshire law, the Massachusetts Appeals Court affirmed the dismissal of the insured's negligence and breach of contract claims against her insurer relating to the insurer's settlement of an underlying medical malpractice suit without the insured's consent. After a jury verdict of $5 million was returned against the insured in the underlying case, the insurer settled the case within policy limits for $3.75 million. The insured then filed a lawsuit against her insurer, alleging negligence and breach of contract because the settlement purportedly "harmed her professional reputation, her future career prospects, and caused her emotional distress." The appellate court, however, found that the policy specifically authorized the insurer to make a post-verdict settlement without the insured's consent. The appellate court further held that while the insured "correctly asserts that New Hampshire recognizes an implied covenant of good faith and fair dealing in all contracts, including insurance policies, it has not recognized a breach of the implied covenant where a party merely exercises a right expressly granted under an enforceable contract." The appellate court recognized that New Hampshire also "has not recognized a breach of that duty absent insurer conduct exposing its insured to personal liability for a verdict in excess of the policy limits."

Assignment of Post-Loss Benefits – Florida

Security First Ins. Co. v. Fl. Office of Ins. Reg.
--- So. 3d. ---, 2017 WL 5907449 (Fla. Ct. App. Dec. 1, 2017)

The Florida Court of Appeals held that an insurer is not permitted to restrict the ability of a policyholder to assign post-loss benefits. Security First Insurance Company (Security First), an insurance company licensed to transact business in Florida, submitted proposed policy endorsements to the Florida Office of Insurance Regulation (OIR), which it was statutorily required to do. One such endorsement was titled "Assignment of Benefits" and the language restricted the ability of policyholders to assign post-loss benefits absent the consent of all insureds, all additional insureds and all mortgagees named in their policies. The OIR issued a letter disapproving of the proposed endorsement because it contained "language restricting the assignment of post-loss claim benefits under the policy which is contrary to Florida law." The Florida Court of Appeals, after reviewing the pertinent Florida precedent which held that the right to recover under an insurance policy is freely assignable, affirmed the OIR's decision.

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