

# TEXAS INSURANCE LAW NEWSBRIEF

MAY 9, 2016

## COURT REQUIRES INSURER TO SHOW NO POSSIBILITY OF A DUTY TO DEFEND OR INDEMNITY BEFORE CONSIDERING SEPARATE DECLARATORY JUDGMENT ACTION

Magistrate Judge Andrew W. Austin issued a Report and Recommendation in *Mid-Continent Cas. Co. v. Christians Dev. Co., Inc.*, A-16-CA-31-LY, 2016 WL 1734114, at \*1 (W.D. Tex. Apr. 28, 2016), dismissing without prejudice Mid-Continent's Declaratory Judgment against Christians Development Company, Inc. for lack of subject matter jurisdiction.

Christians Development Company, Inc. was hired to build a three-building multi-use shopping center in San Marcos, Texas. The owner alleged the shopping center structures experienced distress, including cracks in the slabs, cracking in the stucco veneer and that the door frames are strained out of alignment. The owners sued Christians in an underlying state court action. Christians made a demand for defense and indemnification under its CGL policies with Mid-Continent. Based on the initial underlying pleading, Mid-Continent initially denied Christians a defense and indemnification. However, after the owner filed its Second Amended Petition in the underlying lawsuit, Mid-Continent agreed to defend Christians, subject to a complete reservation of rights. On January 19, 2016, Mid-Continent filed a declaratory judgment action in the United States District Court for the Western District of Texas seeking a declaration that it is not required to defend or indemnify Christians in the underlying lawsuit.

The Magistrate Judge reviewed the arguments of the parties and determined that Mid-Continent failed to show that no facts could possibly be proven in the underlying case that would trigger a duty to indemnify. The Judge determined Mid-Continent did not meet the narrow exception permitting a justiciable action while the underlying suit was still pending—in that, “the duty to indemnify is justiciable before the insured’s liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.*” *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (emphasis in original). Accordingly, the magistrate judge recommended that the Court grant Christians Motion to Dismiss due to lack of subject matter jurisdiction.

## COURT GRANTS INSURER'S DECLARATORY JUDGMENT INVOLVING INTERPRETATION OF "CREW" IN A MARINE HULL AND PROTECTION POLICY

On May 5, 2016, *United Specialty Ins. Co. v. Porto Castelo, Inc.*, CV H-15-1036, 2016 WL 2595072, at \*2 (S.D. Tex. May 5, 2016), the United States District Court for the Southern District of Texas granted summary judgment on behalf of United Specialty Insurance Company regarding a dispute over coverage afforded by a marine Hull and Protection and Indemnity provisions of a Commercial Lines Policy.

The Policy insured a Marine vessel named *Miss Eva*, owned by Porto and Trident. *Miss Eva* was insured in the amount of \$550,000, with a protection and indemnity limit of \$500,000, and a crew sublimit of \$100,000. In late 2014, an explosion and fire occurred on board the *Miss Eva* while it was in the Gulf of Mexico. As a result of the explosion and fire the *Miss Eva* sank, and an oil pollution incident occurred. The four crewman suffered different degrees of injury and were flown via helicopter to Baton Rouge for hospitalization and medical treatment.

After the accident, Porto and Trident demanded full limits of the Hull portion of the Policy after United Specialty Insurance Company determined the *Miss Eva* was a constructive total loss. United paid Porto and Trident the Agreed Amount of \$550,000 and informed them that the Policy excluded coverage for claims, loss, costs or expenses, fines, penalties, or other sums directly or indirectly arising out of the removal of the sunken ship. United Specialty Insurance Company also sent a reservation of rights letter to Porto and Trident, indicating that there was coverage under the Protection and Indemnity portion of the Policy, specifically under the applicable crew sublimit, for the claims of the four injured crew members, but that the \$100,000 sublimit was the total amount of coverage for all claims by the four crewmembers for injuries arising out of single occurrence.

Porto and Trident argue that the Policy did not explain how the \$100,000 crew sublimit reconciles with the applicability of the \$500,000 Protection & Indemnity limit in the Policy. Specifically, Porto and Trident argued that in light of the high premiums they paid, i.e., \$2,500 for each crew member for crew coverage and \$12,000 for the \$500,000 Protection and Indemnity coverage, they

believed they were buying crew coverage of up to \$100,000 per crew member per occurrence. Porto and Trident also argued the term “crew” was not defined in the policy, and the “crew sublimit” was ambiguous.

The Court agreed with United Specialty Insurance Company that the \$100,000 crew sublimit was unambiguous on its face and that it was subject to only one reasonable interpretation, i.e., that it applies to damages to the crew as a whole. Further, the Court determined the term “crew sublimit” had only one clear and definite legal meaning. “Crew” does not refer to a single person; “crewmember” would be appropriate if it did. United Specialty Insurance Company argued, and the Court agreed if Porto and Trident were entitled to up to \$500,000 for crew claims, there would be no purpose in including the sublimit in the Policy; therefore the crew sublimit would be rendered meaningless in violation of Texas law on contract interpretation. *El Paso Field Services, LP v. MasTec North America, Inc.*, 389 S.W. 3d 802, 805 (Tex. 2012)(“In discerning the parties’ intent, we must give effect to all the provisions of the contract so that none will be rendered meaningless,”), quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W. 3d 223, 229 (Tex. 2003).

The Court granted United Specialty Insurance Company’s Motion for Summary Judgment, and ordered United to provide additional motion and billing records to recover its fees and costs in the litigation.