

THOUGHT LEADERSHIP

News

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

Newsbrief

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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.