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# Cal-Dive International, Inc. v. Seabright Insurance Company United States Court of Appeals, Fifth Circuit 627 F.3d 110 (Decided November 22, 2010)

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harmed."[6] Furthermore, the Court stated that "simply because the physical damage to . . . Catalyst's facility has been repaired by removal of the barge without cost to Catalyst does not mean that no physical damage occurred by the intrusion."[7] In reaching its decision the Court relied on *Consolidated Aluminum Corp. v. Bean Corp.*,[8] where the Fifth Circuit held, "harm resulting from the interruption of the gas supply to [Plaintiff's] facility satisfied *Testabank*."[9] Much like the disruption to the flow of gas in *Consolidated*, the *Catalyst* Court found the blockage of water to the Plaintiff's facility also satisfied *Testabank*.

The Court further found that Catalyst's voluntary reduction of its turbines, to prevent additional damage to its facility, may also be used to satisfy the *Testabank* rule. The Court stated that "[a]cts taken in mitigation to prevent permanent physical damage can serve as the physical damage requirement in the *Testabank* rule."[10] Without mitigating potential damage, Catalyst would have run the "unacceptable" risk of incurring physical damage to its hydroelectric station. By applying the rule set forth by this Court in *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*,[11] such reduction of power would be enough to satisfy the requisite damage requirement, despite the fact that there was no lasting physical damage to the facility or intake channel after the removal of the barge was completed.

For the above stated reasons the Court of Appeals reversed and remanded the judgment of the district court.

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## UNDER ALTERNATIVE EMPLOYMENT ENDORSEMENT POLICIES NAMED AND ANY ADDITIONAL INSUREDS ARE SUBJECT TO THE SAME BENEFITS AND RESTRICTIONS

**The United States Court of Appeals for the Fifth Circuit reversed an order of the district court granting summary judgment in favor of the Plaintiff-Appellee, finding that the Protection and Indemnity Clause and the Alternative Employment Endorsement Clause were not conflicting and thus, SNIC was not awarded reimbursement for their defense costs**

Cal-Dive International, Inc. v. Seabright Insurance Company
United States Court of Appeals, Fifth Circuit.
627 F.3d 110
(Decided November 22, 2010)

This case involves an insurance policy coverage dispute. Coastal Catering, LLC ("Coastal") and Horizon Offshore Contractors, Inc. ("Horizon") entered into a catering services agreement. David Brown, a Coastal employee, was injured while aboard a Horizon vessel. Brown brought a Jones Act lawsuit, naming Coastal and Horizon as co-defendants. Under the terms of their business contract, Coastal was obligated to defend Horizon through plaintiff-appellee State National Insurance Company ("SNIC"), its Maritime General Liability ("MGL") insurer. Coastal defended itself through defendant-appellant Seabright Insurance Company ("Seabright"), its Maritime Employer's Liability ("MEL") insurer. After the underlying case settled, SNIC and Seabright divided the defense costs fifty-fifty, and SNIC sought reimbursement.

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[6] *Id.* at 213.
[7] *Id.* at 214.
[8] 772 F.2d 1217 (5th Cir. 1985).
[9] *Catalyst,* 639 F.3d at 212–13.
[10] *Id.* at 213 (citing *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198 (5th Cir. 1995)).
[11] 71 F.3d 198.

Seabright's policy excluded coverage if its insured maintained a Protection and Indemnity Clause ("P&I"). Citing this policy, Seabright refused to reimburse SNIC because Horizon's P&I absolved them from a duty to defend. SNIC maintained that Seabright's Alternative Employment Endorsement Clause ("AEE"), which guaranteed coverage to "borrowed employees," did not absolve them of their duty to defend. SNIC argued that the AEE policy extended only to the named insured, Coastal, and not any additional insureds, such as Horizon. Accordingly, SNIC brought suit to compel Seabright to reimburse them. The United States District Court for the Eastern District of Louisiana found the AEE and P&I policies were mutually exclusive, and granted SNIC's motion for summary judgment. Seabright appealed.

According to the Fifth Circuit, the interpretation of an insurance policy is a question of law.[1] State law governs the interpretation of a marine policy of insurance. In this case, Louisiana law applied because the insurance policy was drafted and executed in Louisiana.[2] Absent ambiguity, Louisiana law applies a plain meaning doctrinal interpretation when construing contracts.[3]

Relying on *Landerman v. Liberty Services*, the Court held that even if the AEE triggered Seabright's duty to defend, the P&I nonetheless excluded coverage. In *Landerman*, the plaintiff, like Brown, was injured while working on a vessel owned by an entity other than his payroll employer.[4] Like SNIC, the additional insured argued that the AEE did not apply to them, but the Court found otherwise. Similarly here, the Court held that SNIC's reliance on the AEE was misplaced. Consistent with their holding in *Landerman*, the Court determined that when AEE policies add additional insureds, the additional insureds enjoy the same benefits and are subject to the same restrictions as a named insured absent policy language to the contrary.[5] Thus, the P&I applied to Horizon. In addition, the Court held that the P&I and AEE were not conflicting, and refused to ignore the clear precedent. Applying a "plain meaning" interpretation of Horizon's policy the Court reversed the district court and held in favor of Seabright.

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[1] Cal-Dive Int'l, Inc. v. Seabright Ins. Co., 627 F.3d 110, 113 (5th Cir. 2010) (citing Diversified Group, Inc. v. Van Tassel, 806 F.2d 1275, 1277 (5th Cir.1987)).
[2] *See Cal-Dive*, 627 F.3d at 113 (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 320–21 (1955)).
[3] *See Landerman v. Liberty Servs., Inc.*, 637 So. 2d 809, 812 (La. Ct. App. 1994).
[4] *See id.*
[5] *Cal-Dive*, 627 F.3d at 114.