

Texas Supreme Court Limits the Scope of the Contractual Liability Exclusion

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On Friday, January 17, 2014, the Texas Supreme Court issued its opinion in *Ewing Construction Company v. Amerisure Insurance Company* - holding that “a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, . . . does not ‘assume liability’ for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion.”

The case came to the Texas Supreme Court on certified questions from the Fifth Circuit Court of Appeals arising out of Ewing’s request for defense and indemnity from Amerisure for underlying allegations of faulty construction of a school tennis court. The district court granted summary judgment for Amerisure, concluding that despite allegations of negligence, the underlying claims against Ewing were only contractual in nature. Moreover, Ewing’s entry into a contract to build the underlying tennis court constituted the “assumption of liability” necessary to trigger the Contractual Liability Exclusion, which applies to injury and damage the insured is obligated to pay “by reason of the assumption of liability in a contract or agreement.”

After initially affirming the district court’s decision, the Fifth Circuit Court of Appeals certified the following question to the Texas Supreme Court: “Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, ‘assume liability’ for damages arising out of the contractor’s defective work so as to trigger the Contractual Liability Exclusion.” In answering this question in the negative, the Texas Supreme Court confirmed that “assumption of liability” “means that the insured has assumed a liability for damages that exceeds the liability it would have under general law.” Allegations that Ewing failed to perform its contract in a good and workmanlike manner are, according to the Court, the same as allegations that Ewing failed to use ordinary care and do not represent the assumption of duties beyond the “general law.”

Importantly, the Court’s decision also limits *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd’s, London*, 327 S.W.3d 118 (Tex. 2010) to the particular facts of that case. There, the insured “undertook a specific contractual obligation to repair or pay for damage to third-party property” resulting from the insured’s work. According to the *Ewing* Court, it was that obligation - not the duty to exercise reasonable care in performing the contract - that triggered the Contractual Liability Exclusion in that case.

Because of the ruling on the first certified question, the Court did not reach the second question addressing an exception to the Contractual Liability Exclusion for “liability that would exist in the absence of the contract or agreement.” The Court did, however, respond directly to arguments from Amerisure that failing to apply the Contractual Liability Exclusion to unworkmanlike performance of Ewing’s contract would transform the CGL policy into a “performance bond.” In rejecting this argument, the Court reasoned that other provisions in CGL policies, including “business risk exclusions,” prevent the policy from acting as a performance bond.

In summary, the Court's decision in *Ewing* is a significant victory for policyholders and removes uncertainty over the scope of the Contractual Liability Exclusion created by the *Gilbert* decision in 2010.

If you have any questions about the Texas Supreme Court's decision in *Ewing Construction Company v. Amerisure Insurance Company*, the Contractual Liability Exclusion or liability insurance generally, please contact one of the [Insurance Coverage Practice Group](#) partners listed below.

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