

E-Newsletter

Key Insurance Decision: Contractual Liability Exclusion Revisited and Restricted

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EWING: CONTRACTUAL LIABILITY EXCLUSION REVISITED AND RESTRICTED

In *Ewing Construction Co. v. Amerisure Ins. Co.*, No. 12-0661 (Tex., January 17, 2014), the Texas Supreme Court held that the contractual liability exclusion does not apply to every contractual obligation to perform. The Court massaged its prior holding in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), which had suggested that *any* bilateral contractual agreement or obligation involved an “assumption” of liability invoking the exclusion. In *Gilbert*, the contract at issue between DART and Gilbert required Gilbert to “*repair or pay for damage* to third-party property resulting from either (1) a failure to comply with the requirements of the contract, or (2) a failure to exercise reasonable care in performing the work.” *Ewing*, slip op., at 8-9 (emphasis added). The Court stated that in *Gilbert* it had reasoned that “Gilbert did not contractually assume liability for damages within the meaning of the policy exclusion unless the liability for damages it contractually assumed was greater than the liability it would have had under general law—in Gilbert’s case, negligence.” It was the assumption of a duty to comply with “the requirements” of the contract that was greater than that required under common law negligence. *Id.* at 9.

Based on *Ewing*, the contractual liability exclusion applies to a contractual assumption of liability for damages that is different and greater than its pre-existing obligation under the law independent of the contract. Thus, a contractual undertaking to act as a reasonable person or to do work in a good and workmanlike manner is, according to the court, a pre-existing duty. The mere fact these duties would not exist in the absence of a contract to do the work did not seem to trouble the Court.

The Court emphasized that it disagreed with the carrier's broad position that a CGL policy was not a performance bond covering the insured's own work, noting its prior decision in *Lamar Homes*. Thus, the Court confirmed its commitment to coverage for defective products under standard CGL policies.

The reasoning in *Ewing* is hard to square with the Court's treatment and analysis of “con-torts” in other decisions. Absent a contractual agreement to do work, oral or written, no tort duty would apply. So, absent the contract, there would be no pre-existing general duty. Clearly, it would have been easier to say that *Gilbert* presented a contractual assumption very similar to an indemnity agreement and thus fell within the operation of the exclusion. In other words, if you assume an automatic duty to repair without the necessity of anyone proving negligence or establishing proximate cause, that is clearly something more than the general law would require.

WORDS TO THE WISE

The immediate impact of the decision:

- It is pro-policyholder, and thus it is pro-business.
- Confirms CGL coverage in many cases for construction defects
- Will result in restriction of other contractual liability exclusions used in other insurance policies, such as D & O and professional liability policies
- Requires drafters of construction contracts to beware of “repair and pay” clauses and to reconsider what duties they want to be assumed—assume as much as Gilbert and you have an obligation without insurance; assume no more than Ewing and you have a base duty and potentially insurance for a breach of that duty.

The opinion appears at: <http://www.supreme.courts.state.tx.us/historical/2014/jan/120661.pdf>

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