Ewing Construction Company, Inc. v. Amerisure Insurance Company, 2014 WL 185035 (Tex. Jan. 17, 2014) came to the Supreme Court of Texas on two certified questions from the United States Court of Appeals for the Fifth Circuit, both of which centered around the contractual liability exclusion in a Commercial General Liability (“CGL”) insurance policy. Relying on a prior decision concerning the interpretation of a CGL policy’s contractual liability exclusion, as well as the language of the policy itself, the Court held that a contract in which the general contractor agrees to perform its construction work in a good and workmanlike manner, without more, does not trigger the contractual liability exclusion.

Ewing Construction Company, Inc. entered into a contract with Tuluso-Midway Independent School District to serve as a general contractor to construct tennis courts at a school. Shortly after Ewing completed construction of the tennis courts, the School District complained that the courts were flaking, crumbling, and cracking, rendering them unusable. The School District filed suit in Texas state court against Ewing and others, alleging breach of contract and negligence claims against Ewing based upon its theory that construction of the tennis courts was faulty.

Ewing tendered defense of the underlying suit to its insurer, Amerisure Insurance Company, but Amerisure denied coverage. Ewing then filed suit in the United States District Court for the Southern District of Texas against Amerisure seeking a declaratory judgment that Amerisure was obligated to defend it in the underlying lawsuit. Although Amerisure did not deny that Ewing established coverage under the policy, it argued that the contractual liability exclusion precluded coverage and negated its duties to defend and indemnify. The district court granted Amerisure’s motion for summary judgment based on the contractual liability exclusion and entered final judgment dismissing the entire case.

The district court’s analysis relied heavily upon Gilbert Texas Const., L.P. v. Underwriters at Lloyd’s London, 327 S.W.3d 118 (Tex. 2010), another case in which the Texas Supreme Court interpreted the contractual liability exclusion in a CGL policy. Applying Gilbert, the district court concluded that the CGL policy’s contractual liability exclusion applied to exclude coverage because Ewing had assumed liability for its own performance under the contract with the School District. Thus, if the work was deficient, Ewing alone was liable and Amerisure had no duty to defend or indemnify.
On appeal, the Fifth Circuit initially affirmed the district court’s judgment on the duty to defend but vacated and remanded with respect to the duty to indemnify and related issues. When Ewing petitioned for a rehearing, the Fifth Circuit withdrew its opinion and certified the following questions to the Texas Supreme Court: (1) 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; and (2) If the answer to question one is “Yes” and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for “liability that would exist in the absence of contract.” The court answered the first question “no” and therefore did not answer the second.

In determining an insurer’s duty to defend, Texas courts follow the eight corners rule: the courts look to the facts alleged within the four corners of the pleadings and measure them against the language within the four corners of the insurance policy and determine if the facts alleged present a matter that could potentially be covered by the insurance policy. In this case, Amerisure did not dispute that the alleged defects in the tennis courts constituted “property damage” caused by an “occurrence” within the scope of the policy’s insuring agreement. Thus, the key question before the Court was whether the contractual liability exclusion applied.

To answer this question, the Court looked again to the Gilbert case. The underlying suit in Gilbert involved an agreement for Gilbert Texas Construction, L.P. to build a light rail system for the Dallas Area Rapid Transit Authority (“DART”). The contract between DART and Gilbert required Gilbert to protect adjacent property and to repair or pay for damage to any such 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. During construction, heavy rain caused flooding to a building adjacent to the work site and the building’s owner sued Gilbert alleging various theories of liability sounding in both contract and tort. The court held that because Gilbert’s second obligation under the contract—to exercise reasonable care—mirrored Gilbert’s duty under general principles of law (such as negligence), Gilbert did not assume liability for damages in its contract under the second obligation sufficient to trigger the policy’s contractual liability exclusion. With regard to Gilbert’s first obligation, the court held that damages “resulting from a failure to comply with the requirements of the contract” extended beyond Gilbert’s obligations under general law and thus, the exclusion did apply.

Applying the Gilbert principles, the Ewing court concluded that Ewing’s agreement to perform the construction in a good and workmanlike manner did not add anything to the obligation that Ewing had under general law to comply with the contract’s terms and to exercise ordinary care in doing so. In other words, Midway School District’s allegations that Ewing failed to perform in a good and workmanlike manner were substantially the same as its claims that Ewing negligently performed under the contract.
Ewing had a common law duty to perform its contract with skill and care, and the agreement did not enlarge this obligation in any way. Accordingly, the Court concluded that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not “assume liability” for damages arising out of its defective work so as to trigger the contractual liability exclusion.

As the court determined in Gilbert, “assumption of liability” means that the insured has assumed a liability for damages that exceeds the liability it would have under general law. To find otherwise would render the words “assumption of liability” meaningless. The decision in Ewing further emphasizes this concept. A contract that simply re-states a general contractor’s common law duty will not work to trigger the contractual liability exclusion. Rather, the contract must enlarge the contractor’s general common law duties in some way. Only then will the contractor have truly “assumed liability” for damages that exceed the liability it would have under general law.

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