# TEXAS SUPREME COURT HANDS BIG INSURANCE WIN TO CONSTRUCTION INDUSTRY

**January 28, 2014** *Pamella A. Hopper*

*In a significant win for the construction industry, the Texas Supreme Court has ruled that a general contractor that entered into a contract in which it agreed to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, did not "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.*

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The *Ewing Construction Co. v. Amerisure Insurance Co.* saga began in 2008, when Ewing Construction entered into a contract with a school district to build tennis courts. After Ewing completed construction, the school district complained that the tennis courts were flaking, cracking and crumbling, rendering them unusable. The school district filed suit against Ewing, asserting claims for breach of contract and negligence. Ewing tendered the defense to its general liability carrier, Amerisure, which denied coverage. Ewing sued Amerisure in federal court in Texas, seeking a declaration that Amerisure had breached its duties to defend and indemnify it in the school district's suit. On cross motions for summary judgment, the district court ruled in favor of Amerisure based on the contractual liability exclusion. Ewing appealed to the Fifth Circuit, which affirmed the district court in a 2-1 opinion. On rehearing, in an unusual turn of events, the Fifth Circuit withdrew its opinion and sent the case over to the Texas Supreme Court on certified questions.

The Fifth Circuit asked the Texas Supreme Court to answer the following questions:

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.
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."

**Ewing Constr. Co. v. Amerisure Ins. Co., 690 F.3d 628, 633 (5th Cir.2012).**

In a significant win for the construction industry, the Texas Supreme Court answered the first question "no," and thus did not reach the second question.

The Amerisure CGL policy's insuring agreement provided coverage for "property damage" during the policy period caused by an "occurrence." Amerisure did not dispute that the school district's claim fell within the policy's insuring agreement. Instead, relying on the Texas Supreme Court's opinion in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyds*, 327 S.W.3d 118 (Tex. 2010), Amerisure contended that the policy's contractual liability exclusion, which barred coverage for liability Ewing assumed in a contract or agreement, applied. Ewing argued that the exclusion did not apply because it excepts liability for damages the insured would have in the absence of the contract or agreement. Ewing argued that its agreement to construct the tennis courts in a good and workmanlike manner did not enlarge its obligation under the general law to comply with the contract's terms and to exercise ordinary care in doing so. Because its express

agreement to perform the construction in a good and workmanlike manner did not add to its obligations, it thus was not an "assumption of liability" within the meaning of the contractual liability exclusion.

The Texas Supreme Court, distinguishing *Gilbert*, agreed with Ewing, concluding that the 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 the contract, and thus does not "assume liability" for damages arising out of its defective work so as to trigger the contractual liability exclusion. In reaching its decision, the court affirmed its holding in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007), in which it held that a claim for an insured's faulty workmanship can qualify as an "occurrence" under a CGL policy.

## About the Author

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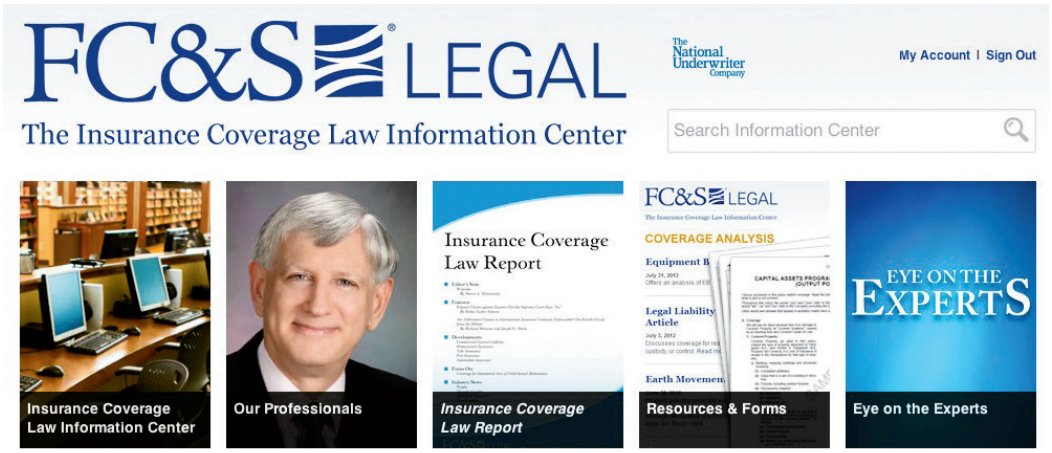


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