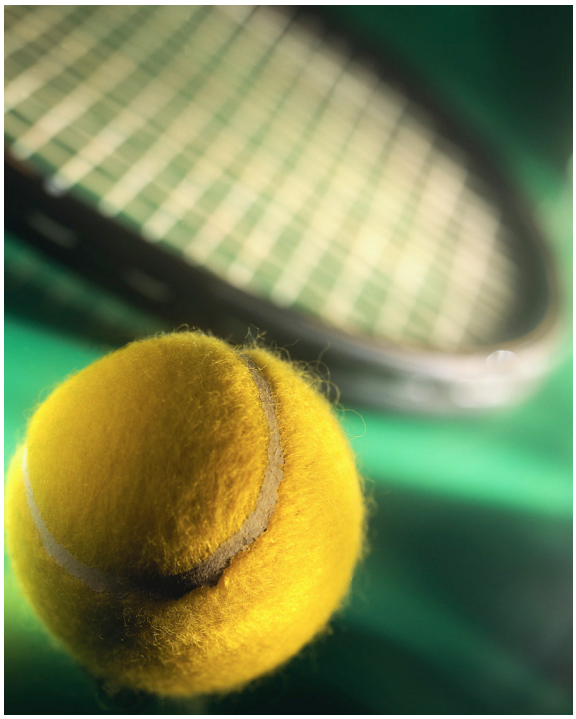
February 2014

Litigation News

The Con-Tortionist Texas Supreme Court

By: Keith Langley

In Texas, when a general contractor enters into a contract that says the contractor agrees "to perform its work in a good and workmanlike manner" that does not trigger the contractual liability exclusion in a commercial general liability (CGL) insurance policy. The Texas Supreme Court so held on January 17, 2014, in answering certified questions from the United States Fifth Circuit Court of Appeals.



The project was to build a school and tennis courts. The work for the tennis courts was subcontracted, and problems developed with the tennis courts. Ewing, the general contractor, tendered defense to Amerisure on a CGL policy. Amerisure denied coverage. Ewing filed suit in the U.S. District Court for the Southern District of Texas. The district court relied upon the Texas Supreme Court opinion in 2010 of *Gilbert Texas Construction v. Underwriters at Lloyds London* and held that the contractor signed a contract and assumed liability for its own performance and thus triggered the contractual liability exclusion. The district court also held that the owner's claim sounded only in contract not in tort, and that Amerisure had no duty to either defend or indemnify.

The policy stated that "this insurance does not apply to property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement." Accordingly, the analysis of the Texas Supreme Court focused upon the "general law", meaning the law of torts. The Texas Supreme Court ran into a bit of a roadblock based upon a prior holding that when the loss or damage is the subject matter of the contract, the plaintiff's action is ordinarily on the contract. On certified questions, the Texas Supreme Court first said that Amerisure assumed two "distinct and separate" duties: to defend and to indemnify. The Texas courts follow the eight corners rule in determining a duty to defend. The Court said that Ewing did not enlarge its obligations beyond its general common-law duties.

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Well done is better than well said.

- Benjamin Franklin

Agreeing to construct the tennis courts in a good and workmanlike manner did not add anything to the obligation it has under general law to comply with the contract's terms and exercise ordinary care in doing so. Therefore this was not an "assumption of liability" within the meaning of the policy's contractual liability exclusion, which would require the insured to contractually assume liability for damages that exceeded the liability it would otherwise have under general law - or the words "assumption of liability" are meaningless and are surplusage. The interpretation of contracts as a whole are favored so that none of the language in them is rendered surplusage. Accordingly, the owner's allegations of breach of contract are substantially the same as the claims that the contractor negligently performed.

Interestingly, in footnote seven the Texas Supreme Court in an amazing act on contortion on the field of the intersection of contract and tort law stated that it was not abandoning its holding in *Southwestern Bell v. Delanney* that when the loss or damage is the subject matter of the contract, the plaintiff's action is ordinarily on the contract. There will be much argument and debate about interpreting the prior *Gilbert* opinion which excluded coverage both on the duty to defend and the duty to indemnify where the contractor had contractually agreed to pay for damage of property to third parties and the analysis was complicated by the fact that the owner was entitled to sovereign immunity (the Dallas Area Rapid Transit Authority). Given that the District Court and the Fifth Circuit Court of Appeals (originally) interpreted the *Gilbert* case in conjunction with the *Southwestern Bell v. Delanney* case to exclude coverage, one can see many arguments ahead in Texas regarding defective work claims on a CGL policy. Keep in mind that there are other complex issues associated with the analysis of determination of coverage.

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Finally, the Court went out of its way to say that it was not addressing other policy exclusions and coverage limitations and accordingly said that its decision did not convert a CGL policy into a performance bond.

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