How The Ewing Case Decision Could Shape Liability Coverage

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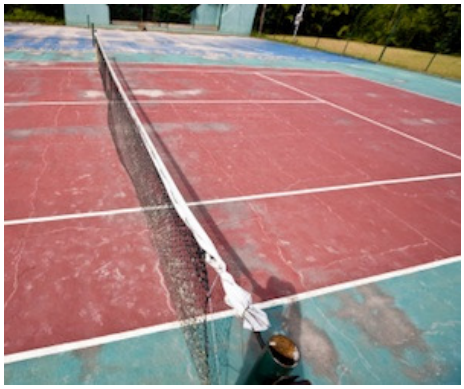
By Richard Korman



Tennis court cracks triggered a test case over liability insurance coverage.

A state court in Texas restored some order to U.S. contractors' general liability insurance, limiting insurers' efforts to narrow what is considered an "occurrence" covered under a policy.

Insurers have been trying to eliminate coverage for defects in the contractor's own work.

The issue has come up in several states in recent years, and state legislatures have stepped in several times to restore coverage through laws.

The current case originated in Texas and was widely watched as a bellwether.

In an opinion issued January 17, Judge Phil Johnson of the Texas Supreme Court ruled that general contractors don't "assume liability" for damages arising out of their defective work in a way that triggers the contractual liability exclusion. That exclusion would have cut off coverage.

In other words, when a contractor agrees in its contract to perform work in a good and workmanlike manner, unless the contract specifically says otherwise, defects in the contractor's own work are covered.

Johnson's ruling came in the form of answers to questions posed to Texas state supreme court judges from a federal appeals court in New Orleans. Now that the matter is settled in Texas, judges in other states may turn to the Texas ruling for guidance.

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Josh N. Bowlin, a shareholder in the Houston office of law firm Chamberlain Hrdlicka, says, “It’s not only good news for contractors in Texas but it’s far-reaching for contractors in other jurisdictions.”

“It’s significant for industry and for insurance coverage lawyers,” says Bowlin.

Christine Kirchner, another Chamberlain Hrdlicka shareholder, says that although insurers can create any kind of exclusion, most large carriers rely on standard forms and they are unlikely to want to “manuscript and add in additional exclusions.”

Tennis Court Cracks

The ruling stems from a case called Ewing Construction Co. and it is related to work Ewing did starting in 2008 on schools in Corpus Christi for the Tuluso-Midway Independent School District, including construction of tennis courts that later began to crack and flake. The value of the contract was $2.2 million.

The school district sued Ewing and Ewing then turned to its insurance carrier, Amerisure, to defend and indemnify it. Amerisure balked, and Ewing sued Amerisure in federal district court in Texas and lost. Ewing appealed, and a panel of judges ruled for the insurer in June, 2012—and then turned around and put its decision on hold when the panel realized its decision could remove insurance coverage as it had been understood to work for decades for contractors in Texas.

It was a rare do-over call, worthy of an umpire's perogative in a tennis match.

The federal appeals court decided to ask the Supreme Court of Texas to decide how it understood liability coverage and exclusions to work in Texas. The federal appeals court asked if a general contractor that agrees to perform work in a good and workmanlike manner “assumes liability’ for damages arising out of the contractor’s defective work and that the defective work is specifically not covered because of the Contractual Liability Exclusion in most contracts.

The answer from Texas is no, not unless the contractor agrees in the contract to enlarge its obligation.

One attorney wrote that this widely anticipated ruling allowed “insureds” to “breathe a sigh of relief.”

“The court got it exactly right,” notes Kirchner. “The court is saying that if you have duties you owe under common law to perform workmanlike, the fact that you reduce to a contract doesn’t mean it falls into the contractual liability exclusion of a policy.”

“You would have to promise more” in performing your duties under the contract, says Kirchner.

Kirchner and others noted that whether a contractor is indemnified for bad work under a general liability policy still is “tenuous because of all the other exclusions that may apply.”

So Ewing, says Bowlin, still may not be able to secure coverage under its policy.

Influence to Vary From State to State

Kenneth E. Rubinstein, a director in the Boston and Concord offices of attorneys Preti, Flaherty, agrees that the decision is significant but says the ramifications will differ from state to state and depending on the contract and insurance policies involved.

“My own take is that this is not going to be a sweeping change that pushes carriers to all of a sudden cover, for example, damage to the the second floor when the contractor is working on the third.”

The point to be taken from the Ewing case decision, says Rubinstein, is that

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contractors and designers must be careful about describing a standard of care of any kind in their contracts.

The Ewing decision says that although a contractor doesn't take on more liability unless it agrees to enlarge its obligation, that has to be taken with a rule of reason and to the extent that a standard of care articulated in the contract would otherwise apply.

"If you agree to a standard of care," says Rubinstein, you are taking on a contractually assured risk.'

Johnson's decision, Rubinstein notes, "doesn't convert every insurance agreement into a performance bond."

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