Case No. 12-0661

IN THE SUPREME COURT OF TEXAS

EWING CONSTRUCTION CO., INC.,
Appellant,

v.

AMERISURE INSURANCE CO.,
Appellee.

On certified questions from the U.S. Court of Appeals, Fifth Circuit

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BRIEF OF AMICI CURIAE, TEXAS APARTMENT ASSOCIATION, INC., TEXAS HOSPITAL ASSOCIATION, TEXAS HOTEL & LODGING ASSOCIATION, TEXAS AUTOMOBILE DEALERS ASSOCIATION, INC., TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, TEXAS COMMUNITY ASSOCIATION ADVOCATES, TEXAS ORGANIZATION OF RURAL & COMMUNITY HOSPITALS, TEXAS ASSOCIATION OF COUNTIES, TEXAS MUNICIPAL LEAGUE, AND TEXAS BUILDING OWNERS AND MANAGERS ASSOCIATION, INC. IN SUPPORT OF APPELLANT, EWING CONSTRUCTION CO, INC.

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Texas Hotel & Lodging Association
Texas Automobile Dealers Association, Inc.
Texas Association of School Boards Legal Assistance Fund
Texas Organization of Rural & Community Hospitals
International Council of Shopping Centers
Texas Community Association Advocates
Texas Association of Counties
Texas Municipal League
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INTERESTS OF AMICI CURIAE

This brief is submitted jointly on behalf of eleven amici curiae, all of whom are trade organizations, each in turn representing a large number of owners and operators of commercial, community and/or government property and improvements to property.

The common interest of these organizations is that they represent the interests of various owners of real property throughout Texas who benefit from the coverage provided under standard commercial general liability ("CGL") insurance policies for certain types of property damage caused by negligent construction.

The outcome of this case substantially affects the rights of all Texas business owners and operators, and particularly owners and operators of commercial and government property whose only meaningful relief for property damage caused by negligent construction is often the payment of proceeds under the CGL policies. Contractors and subcontractors are required to obtain these policies as a condition of most construction contracts - for which property owners themselves ultimately pay. Thus, these amici curiae join in support of Appellant, Ewing Construction Co., Inc. No payment was received for the preparation or filing of this brief.

Texas Apartment Association, Inc. ("TAA") is a non-profit trade association that has been serving the rental housing industry in Texas for more than 50 years. In that capacity, TAA represents an association comprised of landlords,

managers and allied service representatives of the rental housing industry. TAA has 25 affiliated local chapters and more than 10,700 members. Through its members, TAA represents more than 1.83 million residential dwelling units that provide housing for more than 4 million individuals across the State of Texas. TAA members pay for and depend on CGL insurance coverage and regularly retain the services of contractors both for new construction and renovation and repair of existing property. TAA members hold property with a market value in excess of $150 billion and pay more than $3 billion in annual property taxes.

Texas Hospital Association ("THA") is a nonprofit trade association that represents 444 hospitals across the State. THA member hospitals have made and continue to make very substantial investment in the construction of all types of health care facilities, including ambulatory surgery centers, hospitals and primary care clinics, and rely on, and ultimately pay for, CGL insurance coverage to compensate them for damages caused by faulty workmanship.

Texas Hotel & Lodging Association ("THLA") is a nonprofit trade association representing every aspect of the lodging and tourism industry. THLA membership ranges from the largest convention center hotel to the smallest bed & breakfast, full service and limited service operators, convention and visitor bureaus, chambers of commerce, and vendors who work within the hospitality industry. THLA is the largest hotel association in the nation, with over 2,500 members. THLA and its members have a significant interest in this case because investment in new

construction is likely the largest business risk taken by owners and operators of commercial lodging enterprises, and the cost of CGL coverage to offset the risk of property damage due to faulty workmanship is part of the business calculation considered by owners when negotiating for construction services.

Texas Automobile Dealers Association, Inc. ("TADA") is comprised of the franchised new motor vehicle dealers in Texas. This industry is a major component of the economy of both rural and metropolitan areas, providing jobs in sales, service, and financing, and providing transportation for Texas citizens. TADA members likewise regularly engage the services of construction contractors and have an expectation that CGL policies be a meaningful part of the protection afforded to owners of commercial property in the event of negligent construction.

Texas Association of School Boards Legal Assistance Fund ("TASB-Legal Assistance Fund") Nearly 800 public school districts in Texas are members of the TASB Legal Assistance Fund, which advocates the interests of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA"). TASB is a non-profit corporation whose members are the approximately 1,030 public school boards in Texas. As locally elected boards of trustees, TASB's members are

responsible for the governance of Texas public schools. [1] TASA represents the State's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees. CSA is comprised of attorneys who represent more than ninety percent of the public school districts in Texas..

Texas Organization of Rural & Community Hospitals ("TORCH") is an organization of rural and community hospitals, corporations, and interested individuals working together to address the special needs and issues of rural and community hospitals and staff, and the patients they serve. The organization's mission is to be the voice and principal advocate for rural and community hospitals in Texas, and to provide leadership in addressing the special needs and issues of these hospitals. As with school boards, construction is a substantial, risky and necessary investment for rural and community hospitals. TORCH member institutions likewise depend on CGL coverage providing relief for property damage caused by faulty workmanship.

Texas Community Association Advocates ("TCAA") is a nonprofit organization with stakeholders who are involved in community association living. These stakeholders include community associations, board members, managers, attorneys, developers, builders, title companies, management companies, real estate

[1] *See* TEX. EDUC. CODE § 11.151 (b) & (d).

professionals, realtors, homeowners and others who provide service to those living in deed restricted communities. TCAA serves as the voice of Texas chapters of the Community Associations Institute and others involved in community association living on legislative and regulatory matters. TCAA provides education throughout the state, coordinating efforts with the CAI chapters and other organizations who serve the community association industry and profession.

The International Council of Shopping Centers ("ICSC") is a non-profit corporation organized under Illinois law. It is the global trade association of the shopping center industry with nearly 60,000 members worldwide, 47,733 in the United States and 4,571 in the State of Texas. ICSC members include developers, owners, retailers, lenders, and other entities that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the 11,836 shopping centers in the Texas, which in 2011 accounted for 966,200 jobs in Texas, and contributed $210.6 billion in retail sales.

Texas Association of Counties ("TAC") is a Texas non-profit corporation with all 254 Texas counties as members. The following associations are represented on the Board of Directors of TAC: the County Judges and Commissioners Association of Texas; the North and East Texas Judges' and Commissioners' Association; the South Texas Judges' and Commissioners' Association; the West Texas Judges' and Commissioners' Association; the Texas District and County

Attorneys' Association; the Sheriff's Association of Texas; the County and District Clerks' Association of Texas; the Texas Association of Tax Assessor-Collectors; the Texas County Treasurers' Association; the Justice of the Peace and Constables' Association of Texas; and the County Auditors' Association of Texas.

The availability of insurance coverage for contractors is of concern to the members of TAC because counties engage in many building projects, including jails and office buildings. The construction contracts typically require that the contractors have insurance. The insurance gives the counties a means of rectifying negligent performance by a contractor under a construction contract.

Texas Municipal League ("TML") is a non-profit association of over 1,100 incorporated cities that provides legislative, legal, and educational services to its members. Over 13,000 persons consisting of city mayors, council members, city managers, city attorneys, and department heads are member officials of TML by virtue of their respective cities' participation. The TML legal defense program was established to monitor major litigation that affects cities and to file amicus briefs on behalf of its members in cases of special significance to cities and city officials.

Texas Building Owners and Managers Association, Inc. ("Texas BOMA") represents the interests of owners and managers of commercial real estate in the State of Texas. Texas BOMA is composed of six local federated associations located in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio.

Texas BOMA members manage 661 million square feet of commercial real estate in Texas, and pay an estimated $1.6 billion in property taxes annually. Texas BOMA represents over 2,000 members state-wide, and approximately 3.3 million people conduct business in Texas BOMA members' buildings. As with the other commercial property owners joining in presenting this brief as amici curiae, Texas BOMA has a substantial interest in how the Court handles the legal issues involved in this case.

ISSUES

The questions certified to this Court by the Fifth Circuit are as follows:

> 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 a contract"?

Related to and necessarily implied in these questions, and central to the issue of resolving an apparent conflict between certain of this Court's prior opinions, these amici curiae propose an additional sub-issue relevant to the central coverage issue involved in this case:

> To give full effect to all terms of the policy, is it reasonable to construe the exceptions to the "business risk" exclusions – in particular the "subcontractor exception" and the "products-completed operations hazard" exception – as exceptions to the contractual liability exclusion as well?

SUMMARY

CGL policies are full of coverage provisions and exceptions to exclusions that would be rendered meaningless if the contractual liability exclusion were read as broadly as Amerisure Insurance Company ("Amerisure") seeks. Rather, the contractual liability exclusion should be read in the context of the policy in its entirety,

and interpreted as Ewing Construction Co, Inc. ("Ewing") urges – understanding that merely because a duty is assumed by contract, it does not preclude coverage the policy language otherwise provides. The policy clearly was intended to cover some of these damages, such as those instances where a loss falls within the "products-completed operations hazard" and where faulty workmanship performed by subcontractors causes covered property damage as an exception to the "business risk" exclusions.

Amerisure's interpretation of the contractual liability exclusion completely negates the balanced consideration of CGL coverage for construction defects undertaken by this Court in *Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007). Amerisure's broad construction of the exclusion creates confusion for property damage claims of any nature so long as they arise from activities that were undertaken by the insured or on the insured's behalf by reason of a contract. Indeed, Amerisure's argument is directly contrary to this Court's conclusion in *Lamar Homes* that the "economic loss" rule is not determinative of whether a claim is covered. *Id.*

With regard to the certified questions, one of the following two propositions must be true. Either:

(1) Texas *tort* law does *not* impose liability on a general contractor for property damage caused to the work by the faulty workmanship of subcontractors. If so, there is no circumstance under which a general contractor would ever be liable for "property damage" to its own work or product. That would, in turn, make the "subcontractor exception" to the "your work" exclusion, and the "products-completed operations hazard" exception to exclusion j(6) meaningless and of no effect if such losses were already excluded by the contractual liability exclusion, as argued by Amerisure. Consistent with the canons of contract construction, the policy has to be construed so that the exceptions to the business risk exclusions intended to preserve coverage for certain claims for damage to the insured's work are also read as exceptions to the contractual liability exclusion. Thus, the first question should be answered "no"; or,

(2) Texas *tort* law *does* impose liability on a general contractor for property damage to the insured's work caused by the faulty workmanship of subcontractors. If so, the general contractor ***would*** be liable to the owner apart from a contractual undertaking to perform the work in a good and workmanlike manner, and the second question, as written, would be answered "yes."

The Court can avoid any seeming conflict between its prior holdings in *Lamar Homes* and *Gilbert* in either of two ways. First, clarify that claims for property damage to an insured's work caused by the faulty workmanship of the insured's subcontractors is recoverable by the owner without a specific contract provision, thereby falling within one exception to the contractual liability exclusion. Second, by construing the exceptions to the "business risk" exclusions, particularly the "subcontractor exception" and the "products-completed operations hazard" exception, to effectively preserve coverage as exceptions to the contractual liability exclusion in order to prevent these exceptions from becoming meaningless.

ARGUMENT

To construe the contractual liability exclusion as broadly as sought by Amerisure is to render meaningless several other provisions of standard CGL policies - including the policy at issue in this case - all demonstrating the parties contemplated situations where the policy provides coverage or partial coverage under exceptions to exclusions for damages to the insured's own work. The alternative interpretation of the contractual liability exclusion urged by Ewing should be adopted, not just because it is the construction that favors coverage, but because it is the only construction that can be reconciled with the remainder of the policy when read as a whole. Additionally, it is the only construction urged before the Court that is consistent with this Court's prior holdings and rationale in *Lamar Homes* and *Grimes Const., Inc. v. Great Am. Lloyds Ins. Co.*, 248 S.W.3d 171 (Tex. 2008)("*Grimes II*").

I. THE CONTRACTUAL LIABILITY EXCLUSION MUST BE HARMONIZED WITH THE REST OF THE POLICY

Insurance policies are subject to the general rules of interpretation and construction applicable to contracts. *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003); *Guaranty Nat'l Ins. Co. v. Azrock Indus.*, 211 F.3d 239, 243 (5th Cir. 2000). In construing the terms of a contract, the court's primary purpose is always to ascertain the true intent of the parties as expressed in the written instrument. *Mid-Century Ins. Co. v. Lindsey,* 997 S.W.2d 153, 158 (Tex. 1999); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995). To this end, the Court reads all

provisions within the contract as a whole and gives effect to each term so that no part of the agreement is left without meaning. *Balandran v. Safeco Ins. Co. of Am.,* 972 S.W.2d 738, 741 (Tex. 1998); *State Farm Life Ins. Co. v. Beaston,* 907 S.W.2d 430, 433 (Tex. 1995); *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983).

However, because the language of insurance policies is under the control of the insurer, exclusionary clauses are interpreted narrowly by the courts and in favor of coverage and strictly against the insurer. *Balandran*, 972 S.W.2d at 741; *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). In fact, if the insured's construction of an exclusionary provision is reasonable, a court must adopt the interpretation offered by the insured, even if the insurer's construction might seem more reasonable. *Toops v. Gulf Coast Marine, Inc.,* 72 F.3d 483, 486 (5th Cir. 1996) (applying Texas law); *Balandran*, 972 S.W.2d at 741. The insurer bears the burden of proving that an exclusionary provision bars coverage. *Venture Encoding Service, Inc. v. Atlantic Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App. — Fort Worth 2003, pet. denied); *see also* TEX. INS. CODE §554.002.

Also significant in this case is the rule that exceptions to exclusions can act to preserve coverage that would otherwise be excluded when consistent with the intent of the parties as ascertained by consideration of the whole policy. *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, n26 (Tex. App. – Houston [14th Dist.] 2006, pet. denied). A loss that would be covered under the "insuring agreement," but is

removed from coverage by an exclusion, can be preserved or reinserted into the agreement through an exception to the exclusion. *Id.*

The foremost task of the Court is to read the policy as a whole with the goal of ascertaining the parties' true intent. If an interpretation of a clause of the policy would render other parts of the policy meaningless or of no effect, then such an interpretation must be rejected as a matter of law. Such is the case with Amerisure's interpretation of the contractual liability exclusion, which would rob certain exceptions to exclusions of all meaning or effect.

A. The "Business Risk" Exclusions Themselves Belie Amerisure's Argument

The biggest inconsistency in Amerisure's argument is its attempt to equate the contractual liability exclusion with the "business risk" exclusions, when, in fact, the business risk exclusions themselves clearly indicate that property damage to an insured's own work is actually covered in some circumstances. If Amerisure were correct that the contractual liability exclusion precludes coverage of any damages arising of any liability assumed by contract, exceptions to the business risk exclusions - especially the "subcontractor" exception and "products-completed operations hazard" exception - would be meaningless.

The business risk exclusions are those exclusions intended to restrict coverage for damages to the insured's own work or products. In the policy at issue (and most

CGL policies) they are exclusions *j* through *n*. (JE 5:351-352)[2] The business risk exclusions do not apply to "bodily injury" claims – only to claims for "property damage" that essentially arise from the failure of the insured to properly perform its own work or deficiencies in the insured's own products. For instance, exclusion *k* is for "'property damage' to 'your product'," exclusion *l* applies to "'property damage' to 'your work'," and exclusion *n* excludes coverage for damages "for the loss of use, withdrawal, recall, inspection, repair . . . of 'your product' . . . 'your work.'" (JE 5:352)

There are a couple of significant problems with Amerisure's attempt to shoehorn the contractual liability exclusion into the rationale underlying the "business risk" exclusions. First, unlike the business risk exclusions, which are limited to property damage and damages that are the consequence of property damage, such as loss of use or cost of repair, the contractual liability exclusion also applies to claims for "bodily injury." (JE 5:349) There is no reasonable construction of the business risk exclusions, or the rationale behind these exclusions, that could make them applicable to damages arising out of bodily injury, which is patently distinct from harm to the insured's own work. That alone signals that there is a fundamental difference between the business risk exclusions and the contractual liability exclusion.

Second, and more importantly, the business risk exclusions, in turn, have exceptions that this and other courts have interpreted to provide coverage for some

[2] Citations to the record are to the "Joint Exhibits" filed by the parties, identifying the exhibit number and the page number marked on each exhibit (where the exhibit is paginated).

types of property damage arising out of defective construction or faulty workmanship. The coverage preserved under these exceptions would be meaningless and superfluous if – as Amerisure argues – CGL policies never provide coverage for damages arising out of the breach of duties assumed by contract.

1. The subcontractor exception

The subcontractor exception to the "your work" exclusion (exclusion *l*) is the most obvious example. Exclusion *l* applies to '"property damage' to 'your work' arising out of it or any part of it included in the 'products-completed operations hazard'." (JE 5:352) However, the exclusion has the following exception: "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by subcontractors." (Id.)

This subcontractor exception has been interpreted to allow coverage for property damage in construction defect cases where the damage is to a completed project and arises out of the faulty work of the insured's subcontractors. In *Lamar Homes*, the Court explained:

> Lamar submits that this exclusion would have eliminated coverage here but for the subcontractor exception. According to Lamar, this exception was added to protect the insured from the consequences of a subcontractor's faulty workmanship causing "property damage." Thus, when a general contractor becomes liable for damage to work performed by a subcontractor - *or for damage to the general contractor's own work* arising out of a subcontractor's work - the subcontractor exception preserves coverage that the "your-work" exclusion would otherwise negate. Lamar's understanding of the subcontractor exception is consistent with other authorities who have commented on its effect.

Id. at 11 (emphasis added); see also *Mid-Continent Cas. Co. v. Camaley Energy Co., Inc.*, 364 F.Supp.2d 600, 607 (N.D. Tex. 2005); *Lennar*, 200 S.W.3d at 668 ("coverage for some 'business risks' is not eliminated when the damaged work, or the work out of which the damage arose, was performed by subcontractors.").

Even under the "business risk" exclusions with which Amerisure tries to equate the contractual liability exclusion, there are ***still*** conditions under which even property damage to the insured's own work is covered. This raises a rather obvious question: What work does an insured business perform (and particularly a general contractor and its "subcontractors") that it is not performing according to some kind of contract? Practically speaking – nothing. The only reason an insured would ever have "your work" to which the exclusion and the subcontractor exception could apply is because the insured has contracted to perform some work.

However, if Amerisure's construction of the contractual liability exclusion were adopted, the subcontractor exception would be superfluous. There would be no reason to exempt from the "your work" exclusion damage caused by work performed on the insured's behalf by subcontractors if damages arising out of the insured own contractual obligations were never covered anyway because of the contractual liability exclusion.

It is axiomatic that to bear liability for work performed on one's behalf by "subcontractors" one must first be involved in some type of work in furtherance of a

contract to which these other relationships are subordinate. Moreover, there must be some legal means by which the insured could be liable for the conduct of these subcontractors carried out on the insured's behalf for this exception to mean anything. Put another way, if Texas tort law does not impose any general liability on a contractor for damage to its work caused by its subcontractors, there is no reason to have an exception to an exclusion that provides coverage for damage to the insured's own work caused by subcontractors, if the policy also never covers the insured's contractual liability.[3]

2. The "products-completed operations hazard" exception

Exclusion j(6) applies to property damage arising out of "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." (JE 5:352) This exclusion also has an exception, however, stating it "does not apply to 'property damage' included in the 'products-completed operations hazard.'" (Id.)

As with the subcontractor exception, the exception for property damage included in the products-completed operations hazard that must be "restored, repaired or replaced because 'your work' was incorrectly performed on it" is superfluous if the contractual liability exclusion is interpreted to broadly exclude any

[3] There could be one reason. If Texas *tort* law makes the contractor impliedly liable for damage to its own work caused by the faulty workmanship of its subcontractors, that would also harmonize the business risk exceptions with the contractual liability exclusion, as explained in Section II, *infra*.

damages (whether property or bodily injury) arising out of duties imposed by a contract. The result would be an exception that only applies when the insured is doing "work" and producing a "product" or "completed operations" without any sort of contract to do so, which – practically speaking – is never.

Moreover, a general contractor would not do any work that could be judged "incorrect" without regard to a duty imposed by some sort of contract document or related construction specification. Yet the policy language clearly contemplates some coverage available because of work that was performed "incorrectly." (JE 5:352) If the very language of exception to exclusion *j(6)* depends on a contractual basis to define the scope of a coverage exception, yet no coverage is ever provided for damages arising from duties assumed by contract as argued by Amerisure, then the products-completed operations hazard exception would mean nothing in this policy, nor most any CGL policy.

B. Amerisure's Argument Conflicts With This Court's Opinions In *Lamar Homes* and *Grimes*.

In *Lamar Homes*, the Court was clear in rejecting any suggestion that coverage under a CGL policy was determined by whether the damages involved constituted "economic loss," concluding "the economic-loss rule . . . is not a useful tool for determining insurance coverage." *Id.*, 242 S.W.3d at 12. In *Grimes II*, the Court held that labeling a claim as a breach of contract did not preclude coverage under a CGL policy *Id.*, 172 S.W.3d at 172. Amerisure's argument conflicts with both of the

Court's opinions, effectively making the economic loss doctrine and the characterization of the claim as a breach of contract determinative of coverage by broadly construing the contractual liability exclusion to apply to coverage otherwise intended to be preserved by the business risk exceptions.

In *Lamar Homes*, the Court explained that the purpose of the economic loss rule is to determine whether "the injury to the subject of the contract itself," with the purpose of restricting the contracting parties to contractual remedies. As such, the Court was careful to explain that the rule is "a liability defense or remedies doctrine, not a test for insurance coverage." *Id.* at 13. However, as is clear from the procedural history in *this* case, where the economic loss rule is applied to first strike any claims based in tort, the rule becomes entirely determinative of coverage if the contractual liability exclusion is interpreted as broadly as urged by Amerisure.

In *Grimes*, the court of appeals affirmed summary judgment for the insurer after reasoning that the negligent performance of work by a subcontractor was so foreseeable by the general contractor so as to not constitute an "accident." *Grimes Const., Inc. v. Great Am. Lloyds Ins. Co.*, 188 S.W.3d 805 (Tex. App. – Ft. Worth, 2006)("*Grimes I")*, *rev'd, Grimes II*. The lower court concluded the "negligence allegation is simply a recharacterization of their basic breach of contract and warranty claims, which are the gravamen of the complaint." *Id.* at 812. This Court reversed *Grimes I* shortly after it handing down the opinion in *Lamar Homes*. In doing so, the

Court explained the trial court erred by concluding a "homebuilder's CGL policy did not protect the builder from property damage claims involving its own work," instead holding "labels of tort or contract could not override the language of the insuring agreement." *Grimes II*, 248 S.W.3d at 172.

Yet, that is precisely what Amerisure argues for in its construction of the contractual liability exclusion. Under Amerisure's interpretation, the economic loss doctrine becomes completely determinative of the coverage issue by restricting the claim to one of "breach of contract," even though the language of the insuring agreement expressly contemplates coverage for damage to the insured's own work (i.e. the subject of the contract). Amerisure's argument then makes the formalistic application of labels of "contract" or "tort" the decisive factor in coverage, and thereby overrides the language of the insuring agreement.

A shallow analysis of *Lamar Homes* and this Court's opinion in *Gilbert Tex. Const., L.P. v. Underwriters at Lloyds London*, 327 S.W.3d 118 (Tex. 2010), might lead to the impression that they are irreconcilable. Amerisure's argument is essentially that the Court need not have bothered with *Lamar Homes*, because its later analysis of the contractual liability exclusion in *Gilbert* obviates everything the Court said in *Lamar Homes* about the meaning of "occurrence" and the application of the business risk exceptions. Fortunately, the two opinions, and the policy language, can be reconciled without either negating the holdings of *Lamar Homes* and *Grimes*, or overruling *Gilbert*.

C. The Policy Can Be Harmonized By Reading the Exceptions to the Business Risk Exclusions As Exceptions to The Contractual Liability Exclusion As Well.

Under basic rules of contract interpretation, the Court must endeavor to find a way to read the policy as a whole that harmonizes all its language without rendering any clause superfluous or meaningless. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 350 (Tex. 2011); *Gym-N-1 Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007)(explaining that courts must examine the entire writing and harmonize all provisions, rendering none meaningless). Applying the rule that an exception can preserve or effectively re-instate coverage removed by an exclusion,[4] the Court can reconcile all of the policy language (and the Court's opinions in *Lamar Homes, Grimes II*, and *Gilbert*) by clarifying that even if the policy contemplates exclusion of claims based solely on duties assumed by contract, the exclusion has ***two*** major exceptions, at least one of which (and perhaps both) is applicable to cases like this one alleging damage to the insured's completed work caused by the faulty workmanship of subcontractors.

The first exception is the one provided for within the text of the contractual liability exclusion itself – where the duty assumed by contract would have applied independent of the insured assuming the duty by the terms of the contract. As explained in section II, *infra.*, since Texas law impliedly imposes liability on a

[4] *See e.g. Lamar Homes*, 242 S.W.3d at 11 (explaining "the subcontractor exception preserves coverage" that would otherwise be excluded as business risk).

contractor for faulty workmanship by its subcontractors, even if the contractor does not assume that liability by contract, this exception would commonly apply to construction defect lawsuits such as this one without rendering any portion of policy language inoperative. In such cases, by the express exception included within the contractual liability exclusion itself, the exclusion simply would not apply.

The second exception would apply where the alleged loss falls within the scope of the exceptions contained with the business risk exclusions – e.g., where the claim involves damage to the insured's own products or completed operations resulting from work performed on the insured's behalf by its subcontractors.

There is no reason why an exception has to be located immediately after the contractual liability exclusion for it to preserve coverage over the exclusion. There is nothing in the rules of contract interpretation that requires such a reading. To the contrary, this Court rejected that basic notion in *Balandran* when it harmonized language from multiple coverage parts of a homeowner's policy to ensure the whole policy was given its intended effect. The Court expressly disagreed with the insurer's argument that the lack of contextual proximity between clauses forbade the Court from trying to read the clauses together:

> That the exclusion repeal provision is contained in Coverage B does not necessarily dictate Safeco's narrow reading. Instead, the exclusion repeal provision could be located under Coverage B simply because that is the only place in the policy that the "accidental discharge" risk is specifically described. Because the exclusion repeal provision applies solely to that

> risk, it is logical for it to be adjacent to the policy's description of the risk.

Id., 972 S.W.2d at 741. The Court held that even though the exclusion repeal was contextually located in Coverage B, that did not prohibited reading the clause to limit the effect of an exclusion contained in Coverage A. *Id.*

The same is true of the business risk exceptions acting as exceptions both the business risk exclusions and to the contractual liability exclusion. It is logical to include the subcontractor and products-completed operations hazard exceptions in the business risks exclusion, because that is the specific sort of loss to which they are most immediately an exception. The contractual liability exclusion is a more general exclusion of which the business risk exclusions are one type, which in turn have their own specific exceptions to preserve coverage. Nothing about the policy prohibits reading the exceptions to the business risk exclusions as exceptions to the contractual liability exclusion as well, where (as here) doing otherwise would render these exceptions meaningless.

For these reasons, the Court should adopt the construction of the policy urged by Ewing, and clarify that the CGL policy in this case *does* provide coverage for claims falling within the language of the products-completed operations hazard and subcontractor exceptions to the business risk exclusions. These are exceptions to *both* the business risk exclusions and the contractual liability exclusion. In terms of the Fifth Circuit's certified questions, this would mean the Court either answering the first

question "no," or clarifying that the exceptions to the business risk exclusions are also exceptions preserving coverage in the face of the contractual liability exclusion.

II. LIABILITY FOR FAULTY WORKMANSHIP EXISTS EVEN ABSENT ASSUMPTION OF THAT DUTY BY CONTRACT.

In the alternative, the Court could answer the second certified question "yes" by clarifying the nature of the duty owed by a contractor to an owner for the negligent work of the contractor's own subcontractors. Since Texas law imposes an implied duty on contractors to see that their subcontractors perform work in a good and workmanlike manner, the exception to the contractual liability exclusion applicable to "liability that would exist in the absence of a contract" applies to claims like those alleged in the underlying construction defect case.

Texas law has long recognized that a commercial contractor has an implied duty to perform work in a good and workmanlike manner. *See e. g. Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 823 (Tex. App. – Dallas 2003, pet. denied); *Continental Dredging, Inc. v. De-Kaizered, Inc.*, 120 S.W.3d 380, 391 (Tex. App. – Texarkana 2003, pet. denied); *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 798 S.W.2d 805, 812 (Tex. App. – Beaumont 1990, writ dism'd) *cert. denied*, 502 U.S. 861 (1991). As the *Continental Dredging* court explained:

> While parties can agree to another standard for the manner, performance, or quality in an express warranty, an implied warranty applies when there has been no agreement as to an express warranty. [citations omitted] Because the contract between Continental and De-

> Kaizered did not contain an express warranty, the contract contained an implied warranty of "good and workmanlike manner."

Id. Even in the absence of the contractual assumption of the duty to perform the work in a good and workmanlike manner, Texas common law would impose such a duty. Put another way, this is liability that would exist even where the contractor does not expressly assume that duty by contract.

This not only means that the express exception to the contractual liability exclusion for "liability that would exist in the absence of a contract" applies to such claims, but it also clarifies the reason why coverage is preserved by the business risk exceptions discussed above. As the Court explained in *Lamar Homes*: "when a general contractor becomes liable for damage to work performed by a subcontractor – or for damage to the general contractor's own work arising out of a subcontractor's work – the subcontractor exception preserves coverage that the 'your-work' exclusion would otherwise negate." *Id.*, 242 S.W.3d at 11.

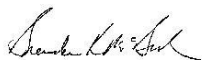
Consistent with its holding in *Grimes II* – that labels of "contract" and "tort" should not determine the scope of coverage – the Court should clarify that allegations against the insured based on implied liability for faulty workmanship triggers the exception to the contractual liability exclusion, because this liability exists in the absence of a contact. By the express language of the contractual liability exclusion, the exclusion simply does not apply to such claims. The second certified question should be answered "yes."

CONCLUSION

With regard to the certified questions, the Court should answer the first question about the applicability of the contractual liability exclusion "no" by clarifying that the business risk exceptions also act as exceptions to the contractual liability exclusion. In that instance, the Court need not then address the second question. In the alternative, should the Court proceed to the second question about whether the exception for liability that would exist absent a contract applies to claims like this one at issue, the Court should answer "yes," because Texas law implies liability on a contractor for the faulty workmanship of its subcontractors even in the absence of an express contractual assumption of such liability.

The practical result is the same either way - coverage would be provided for those claims that fall within the exceptions to the business risk exclusions, just as this Court already held in *Lamar Homes*.

Respectfully submitted,



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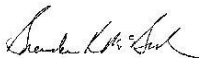
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Amici Curiae brief has been forwarded to all counsel of record via electronic delivery through ProDOC, on this 11th day of February, 2013.



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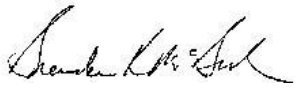
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length and font requirements for briefs prepared by electronic means. The brief was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 6,136. The "Garamond" font is used in this brief, with 14 pt. font for the body of the brief, and 12 pt. font used for footnotes.



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