

PUBLICATION

Is there a Duty to Defend for Breach of Contract?

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As we recently addressed, the United States Court of Appeals for the 5th Circuit ruled that a contractual liability exclusion in a commercial general liability insurance policy negated an insurance company's duty to defend a contractor where the contractor was sued for failing to perform its work according to the terms of a contract with the owner.

The contractor asked the 5th Circuit to rehear the issue and the 5th Circuit withdrew its previous opinion.

The 5th Circuit noted, that since the issue was governed by state law it is better for the state's highest court, in this case the Supreme Court of Texas, to determine certain policies.

The 5th Circuit certified the following two questions to the Supreme Court of Texas:

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."

This certification does not change the fact that duty to defend is separate from the duty to indemnify.

We will provide additional updates after the Supreme Court of Texas answers the certified questions.