Case No. 11-10166

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOUG CROWNOVER AND KAREN CROWNOVER,

Plaintiffs - Appellants,

v.

MID-CONTINENT CASUALTY COMPANY,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF AMICI CURIAE TEXAS BUILDING BRANCH – ASSOCIATED GENERAL CONTRACTORS OF AMERICA AND AMERICAN SUBCONTRACTORS ASSOCIATION, INC. IN SUPPORT OF APPELLANTS DOUG AND KAREN CROWNOVERS' PETITION FOR PANEL REHEARING

Patrick J. Wielinski
COKINOS, BOSIEN & YOUNG
105 Decker Court, Suite 800
Irving, Texas 75062
Tel.: (817) 635-3620
Fax: (817) 635-3633

ATTORNEYS FOR AMICI CURIAE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

Plaintiff – Appellant:	**Counsel for Plaintiff – Appellant:**
Doug Crownover Karen Crownover	Gregory A. Harwell Slates Harwell LLP Dallas, Texas

Defendant – Appellee:	**Counsel for Defendant – Appellee:**
Mid-Continent Casualty Company	R. Brent Cooper Diana L. Faust Cooper & Scully, P.C. Dallas, Texas
Amici Curiae:	**Counsel for Amici Curiae:**
Texas Building Branch – Associated General Contractors of America	Patrick J. Wielinski Cokinos, Bosien & Young Irving, Texas
American Subcontractors Association, Inc.	
Texas Association of Builders	Lee H. Shidlofsky Douglas P. Skelley Shidlofsky Law Firm Austin, Texas

By: */s/ Patrick J. Wielinski*
PATRICK J. WIELINSKI

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IDENTITY AND INTEREST OF AMICI CURIAE

The following Amici Curiae tender this brief in support of the Petition for Panel Rehearing filed by Appellants Doug Crownover and Karen Crownover (the "Crownovers").

Texas Building Branch – Associated General Contractors of America ("ACG-TBB") is a statewide Texas branch of the Associated General Contractors of America, with the Texas Building Branch consisting of eleven commercial building chapters located throughout the State of Texas. The membership of these eleven chapters includes approximately 370 general contractors and 3,890 specialty contractors, subcontractors and suppliers, all doing business in Texas.

The American Subcontractors Association ("ASA") is the nation's largest trade organization representing the interests of approximately 2,500 subcontractor member businesses in the United States, including 505 members in five Texas chapters. ASA members include the entire spectrum of businesses including union and non-union companies and range from the smallest closely held corporations and sole proprietorships to the nation's largest specialty contractors. These members provide labor and materials on construction projects throughout the United States of America. ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA represents its members in

matters before the executive, legislative, and judicial branches of government at both the state and local level.

AGC-TBB and ASA members conduct significant amounts of business in Texas and provide employment for many Texas citizens. They also construct commercial, public and residential projects, including homes, for their clients and customers and are major purchasers of insurance and insurance-related services governed by Texas insurance law. Because of their unique perspective as influential representatives of broad segments of the construction industry in Texas and the United States, Amici Curiae have submitted amicus curiae briefs to this and other courts on many occasions, including the major cases affecting the insurability of and coverage for risks encountered on construction projects in Texas, including *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007); *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010); and the *Ewing Construction v. Amerisure Ins. Co.*, appeals to this Court and the Texas Supreme Court. This is another of those cases, since the Court's Opinion calls into question the insurance coverage previously upheld by those courts.

Whether AGC-TBB and ASA members can depend on their commercial general liability insurance policies for coverage for the many risks they face is a

matter of continuing and urgent interest to them. Consequently, although Amici Curiae are not parties to this appeal, this brief has been submitted through the undersigned independent attorneys, who were not paid a fee by Amici Curiae to prepare it.

STATEMENT AS TO CONSENT OF PARTIES

Appellants Doug and Karen Crownover and Appellee Mid-Continent Casualty Company consent to the filing of this Amici Curiae Brief.

BRIEF OF AMICI CURIAE

INTRODUCTION

This Court's opinion (the "Opinion") denying coverage for defects in the construction of the Crownover home will have a profoundly negative effect, not only upon the construction industry and the insurance brokers and agents that service it, but also upon the "consumer" side of the industry, that is, owners of projects, whether commercial, public or residential. The commercial general liability ("CGL") coverage at stake here is completed operations coverage, which is virtually the only insurance available to repair property damage arising out of defective construction once a construction project is completed. Due to the critical nature of completed operations coverage for all segments of the construction industry, AGC-TBB, the statewide Texas chapter of the Associated General Contractors of America, and ASA, the national organization for the American Subcontractors Association, have joined in sponsoring this brief.[1]

Amici Curiae respectfully submit that the Court's opinion misapprehends the scope of the coverage available to a contractor or builder for completed operations losses under its CGL policy. In applying the Contractual Liability Exclusion to the express warranty context before it, the Court over-extended the exclusion's scope

[1] For simplicity's sake, the analysis in this brief often uses the generic term "contractor." This term includes builders, homebuilders, subcontractors and other participants in the construction industry, unless otherwise indicated.

far beyond the Texas Supreme Court's opinion in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), as clarified and limited by *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014). Read together, those two opinions establish that the "assumption of liability" that is excluded must exceed the insured contractor's liability under general law (*Gilbert*) and that the implied warranty against defects, equivalent to the implied warranty of good workmanship, does not constitute such an assumption in excess of general law (*Ewing*).

In terms of the Contractual Liability Exclusion and completed operations coverage under a contractor's CGL policy, there is no substantive difference between an implied workmanship warranty against defects and an express warranty to repair those defects. The effect is the same, i.e., the damages awarded to a homeowner are the costs of repair, whether assumed by means of an implied or an express warranty, where the claim involves property damage caused by an occurrence.

Contractors depend on their standardized CGL policies to provide coverage for their exposure to the risks of their trade, and express warranties to repair, like implied warranties, are included in most construction contracts. In other words, a cornerstone of risk management in the construction industry is predictability based, in part, on the ability to purchase insurance products that the construction insured,

its broker or agent, and owners can be reasonably certain will provide coverage for the many and varied risks, including construction defects, that are frequently faced in the industry. It is respectfully submitted that the Court's opinion robs the industry of that predictability, returning it to the uncertainties that existed post-*Gilbert* and prior to clarification by the Texas Supreme Court in *Ewing*.

ARGUMENT AND AUTHORITIES

A. The Opinion has Far-Reaching Implications for the Construction and Insurance Industries

The Opinion sets out what the Court perceives to be a dichotomy between a workmanship warranty against defects and a warranty to repair defective or noncompliant work within one year of substantial completion. Setting aside the fact that, for purposes of CGL coverage, there is no such distinction between the two warranties in terms of covered property damage,[2] these types of warranties are not peculiar to the contract between the Crownovers and Arrow, their homebuilder. Virtually every written construction contract entered into in Texas, as well as throughout the United States, includes provisions that are substantially similar to § 14.4 (implied workmanship warranty against defects) and § 23.1 (express warranty to repair) from the Crownover contract.

The American Institute of Architects (AIA) promulgates standard construction documents for use by the industry. Those forms are widely used, and

[2] This issue is addressed in Section B of this brief.

in the alternative, contract language is often modeled after those templates. Virtually all construction contracts impose a general duty to perform and to protect the work performed under the contract. As such, the incorporation of "general law" principles into construction contracts is reflected in the standard forms used by much of the construction industry. In fact, the contract between the Crownovers and Arrow was on an AIA form, specifically, AIA Document A117, Abbreviated Form of Agreement between Owner and Contractor, 1987 edition and §§ 14.4 and 23.1 in their contract are verbatim from that form. (R. 672-685.)

In addition, Document A201, the General Conditions of the Contract for Construction, as promulgated by the American Institute of Architects, is incorporated or adapted into construction contracts (and subcontracts) throughout Texas and the entire United States and is recognized as the standard by leading authorities on construction law in Texas and the United States.[3] AIA Document A201 includes both implied and express warranty provisions in which the contractor explicitly agrees to duties that mirror its "general law" obligation to

[3] *See*, Joe F. Canterbury, Jr. et al, TEXAS CONSTRUCTION MANUAL § 5:7 (3rd ed. 2005) (many, if not most, contracts between owners and general contractors and between general contractors and subcontractors incorporate AIA Document A201); Mark J. Heley et al, *Lessons Learned: How the 1997 Revisions to A201 Have Fared after 10 Years, Litigation Experience and Negotiation Tips*, *in* THE 2007 AIA DOCUMENTS: NEW FORMS NEW ISSUES, NEW STRATEGIES Tab 3, at 2 (American Bar Association, January 31, 2008) ("The number of cases which cite to the A201 document manifests the frequency with which parties in the construction industry utilize these standard General Conditions. In many ways, the A201 has become the 'gold standard' for construction projects, generating along the way a fairly comprehensive body of case law interpreting and applying the terms and conditions.").

remedy and repair damage to the work performed pursuant to the contract. The implied warranty in the current edition of A201 is included in § 3.5 as follows:

> **§ 3.5 WARRANTY**
> The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

AIA Document A201, General Conditions of the Contract for Construction, 16th ed., American Institute of Architects (2007).

In addition, the express warranty is included in Document A201 as follows:

> **§ 12.2.2 AFTER SUBSTANTIAL COMPLETION**
> **§ 12.2.2.1** In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner

> waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.4.

AIA Document A201, General Conditions of the Contract for Construction, 16th ed., American Institute of Architects (2007) (excerpts of A201-2007 are attached as **Appendix Exhibit A**).

The 2007 edition of AIA Document A201 is the most current version of that document. The warranty provisions in the prior 1997 and 1987 editions of A201 are substantially identical and in fact, are still in use, as the Crownover contract, written on a 1987 vintage AIA form, indicates. The abbreviated AIA contract form is intended for smaller projects, such as the Crownover home, but nevertheless includes the same warranty provisions at §§ 14.4 and 23.1 as are included in the 1987 A201 General Conditions, which in turn are substantially the same as those in the 2007 A201 document appended to this brief.

The widespread inclusion of both implied warranties and express warranties of repair in standard construction contract documents renders the Opinion a critically important pronouncement regarding CGL coverage for the construction and the insurance industries, as well as those serviced by these industries, including commercial and public owners as well as homeowners. As such, Amici Curiae urge the court to reconsider and withdraw the Opinion.

B. The Opinion Awakens the Spectre of Gilbert Uncertainty

The Texas Supreme Court's opinion in *Gilbert* unleashed considerable concern as to the scope of insurance coverage for construction insureds and their commercial owner, homeowner and public entity customers as to the scope of insurance coverage provided under their CGL policies for the costs of repairing buildings, homes, and projects arising out of alleged or actual defective workmanship by those insured contractors, builders and subcontractors. Particularly, the opinion appeared to undo the Court's prior affirmation of completed operations coverage for property damage arising out of the work of the insured's subcontractors, i.e., that unexpected and unintended property damage constituted an occurrence under a contractor's CGL policy, and that coverage was preserved by the Subcontractor Exception to the Your Work Exclusion. *Lamar Homes, Inc. v. Mid-Continental Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).[4]

The argument that an additional CGL exclusion, the Contractual Liability Exclusion, can affect coverage for damage to a contractor's work was addressed in *Gilbert*, and the court appeared to struggle mightily with that issue through the course of two opinions. The Contractual Liability Exclusion denies coverage for property damage and bodily injury for which the insured is obligated to pay

[4] AGC-TBB and ASA agree with the argument made in the original amicus curia brief of the Texas Association of Builders that the application of the Contractual Liability Exclusion under these circumstances renders the Subcontractor Exception to the Your Work Exclusion illusory.

damages by reason of the "assumption of liability in a contract or agreement." What emerged from *Gilbert* was a somewhat novel test to determine whether liability was assumed under a contract or agreement, which is whether the insured contractor assumed liability "in excess of what it had under general law principles." *Gilbert*, 327 S.W.3d at 127. The Texas Supreme Court provided broad guidelines as to this concept, noting that a contractor's compliance with the law and conduct of its operations with ordinary care is not the type of assumption of liability affected by the Contractual Liability Exclusion. However, the contractor's obligation to ***third parties*** to repair or pay for damaged property adjacent to the job site was the type of assumption of liability addressed by the exclusion. Because Gilbert, the contractor, shared in the governmental immunity of DART, the owner of the public project, the only means whereby Gilbert could be liable for the third party claimant's damages was through its contractual undertaking to ***third parties*** to repair property adjacent to the project.

Despite this peculiar circumstance that gave rise to the opinion in *Gilbert*, the opinion was widely regarded as having dealt a serious blow to the existence of CGL coverage for contractors in the state of Texas, as well as nationally. The limitations of the Texas Supreme Court's opinion were little understood and uncertainty as to its scope ruled the day. On the one hand, insured contractors argued that it was limited to its particular facts and circumstances – a contractor

that shared in governmental immunity as to tort claims, coupled with an express contractual undertaking to repair and replace third party property. On the other hand, many insurers took an expansive view of the holding – that virtually any contractual obligation might constitute an "assumption of liability" to which the Contractual Liability Exclusion applied to preclude coverage.

These arguments soon crystalized before this Court in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 684 F.3d 512 (5th Cir. 2012), *opinion withdrawn* ("*Ewing I*"), in which the Court expansively interpreted "assumption of liability" to include breach of implied warranty. On rehearing, the Court certified the question. *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 690 F.3d 628 (5th Cir. 2012). In response, the Texas Supreme Court, in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) ("*Ewing II*"), specifically distinguished the circumstances of *Gilbert.* Unlike the assumption of liability to a third party to repair property in *Gilbert*, the court determined that the allegations that Ewing had failed to perform in a good and workmanlike manner were substantively the same as the claim that Ewing negligently performed under its contract because they were based upon the same factual allegations and the same misconduct. In other words, allegations that the contractor failed to perform in a good and workmanlike manner – in other words, that it performed its work defectively – are substantively the same as allegations that it negligently performed

under the contract. The court concluded that a general contractor who agrees to perform its construction work in a good and workmanlike manner does not enlarge its duty to exercise ordinary care in fulfilling its contract. *Ewing II*, 420 S.W.3d at 38. Therefore, there was no "assumption of liability" to trigger the Contractual Liability Exclusion.

The Opinion's determination that a contractual provision expressly obligating the contractor to repair its work constitutes an "assumption of liability" eviscerates the holding of *Ewing II* since there is substantively little, if any, difference between an implied warranty of good workmanship against defects and an express warranty to repair those same defects. For example:

- Both provisions are intended to right the same wrong, i.e., prevention and repair of defective workmanship.
- The damages under both clauses are the same, i.e., typically the cost of repair.
- The damages awarded in the underlying arbitration were to repair property damage caused by the original defective work of Arrow, the insured contractor, not for any property damage arising out of actual repairs since none were undertaken.

As can be seen, in terms of CGL coverage, there is no distinction between the two warranties: breach of either constitutes a failure to perform under the insured's contract, and the same measure of damages – the cost to repair otherwise covered property damage. In essence, the express warranty results in no additional liability to the insured contractor. It makes little sense for the cost of repairs

necessitated by defective workmanship under the implied warranty provision to be covered losses under a CGL policy and for the same cost of repairs to be excluded losses under the express warranty provision of the same contract.

C. Unpredictability Seriously Harms the Construction Industry

Viewed in this light, the Opinion upsets the equilibrium established by *Ewing II* in limiting the scope of the Contractual Liability Exclusion, and it returns the construction and industries to the post-*Gilbert* uncertainty as to CGL coverage for defects in the work of the insured. As a result, construction insureds will find themselves in the same state of limbo as in the period following the issuance of *Gilbert* and prior to its clarification by the Texas Supreme Court in *Ewing II*.

The confusion during that period, both for the Texas and the national construction industries, was well-documented throughout the legal, construction and insurance communities. One insurance commentator noted that *Ewing I* was so anomalous that it commanded the author's attention, arguing that the Court imposed an "expansive interpretation of what constitutes 'assumption of liability' in a contract."[5] Also, in June 2012, two authors wrote an article for publication by the American Bar Association that highlighted the fact that *Ewing I* "eliminate[d] construction industry policyholders' coverage for virtually all property damage

[5] *See* Craig F. Stanovich, *Contractual Liability Exclusion – The Ball is in Your Court*, June 2012 (originally published on IRMI.com) (attached as **Appendix Exhibit B**).

claims."[6] Other commentators reached similar conclusions, expressing the collective belief that the Court's decision represented an expansion of *Gilbert*.[7]

Following the Supreme Court of Texas's opinion in *Ewing II*, however, calm was restored. One commentator noted that the Supreme Court's decision meant "Great relief among builders," and also noted that "the insurance industry should be as relieved as the builders because now contractors will have a reason to continue buying CGL insurance policies."[8] The national web publication, Law360, also issued two articles pointing to the relief that the Supreme Court's decision in *Ewing II* brought the construction industry.[9]

Respectfully, the Opinion returns the construction and insurance industries to the period of grave uncertainty. Emboldened by the Opinion's overly broad

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[6] *See* Jeremiah M. Welch & Theresa A. Guertin, *The Fifth Circuit Eliminates Construction Industry Policyholders' Coverage for Virtually All Property Damage Claims*, June 2012 (to be published by the American Bar Association), *available at* http://www.sdvlaw.com/articles/SDVs%20Ewing%20Article.pdf (attached as **Appendix Exhibit C**).

[7] *See* MDJW INSURANCE LAW NEWSBRIEF, "Fifth Circuit Expands Supreme Court's Holding in *Gilbert* to Breach of Contract Claim" (June 18, 2012) (attached as **Appendix Exhibit D**); *Fifth Circuit Ruling on Commercial General Liability Policies Could Have a Significant Impact on the Texas Construction Industry*, PORTER HEDGES LLP CONSTRUCTION ALERT (June 22, 2012) (attached as **Appendix Exhibit E**); Ben Westcott, et al., *Fifth Circuit Decision Adversely Impacts Insurance Coverage for General Contractors*, ANDREWS MYERS MONTHLY LAW UPDATE (June 27, 2012) (attached as **Appendix Exhibit F**).

[8] *See* David S. White, *The Texas Construction Industry Wins Big with Ruling That Faulty Workmanship Lawsuits Do Not Fall Within the Contractual Liability Exclusion*, LAW AND INSURANCE (January 17, 2014) (attached as **Appendix Exhibit G**).

[9] *See* Roberta D. Anderson, *Texas High Court Fortunately Says "No" in Ewing*, LAW360 (January 17, 2014) (attached as **Appendix Exhibit H**); Bibeka Shrestha, *Texas Justices Rescue Builders from Limbo in Ewing Case*, LAW360 (January 17, 2014) (attached as **Appendix Exhibit I**) (noting that the Supreme Court provided "much-needed reassurance to the construction industry 19 months after the Fifth Circuit's liberal—and later withdrawn—take on the [contractual liability] exclusion").

interpretation that express warranty liability exceeds "general law," insurers will take more aggressive positions relying on the Contractual Liability Exclusion. Once again, as was the case after *Gilbert* and before the issuance of *Ewing II*, predictability will be lost because insurance protection will be jeopardized for contractors, owners and homeowners involved in lawsuits over property damage arising out of inadvertent defective work. If the Opinion stands, defense of contractors by their CGL carriers may be withdrawn and settlement monies pulled from the table, settlement monies that are often the sole source of funds to enable needed repairs of defects. The loss of predictability makes it extremely difficult, or nearly impossible, for the construction industry, and owners, to plan for the effective transfer of risk through insurance.

CONCLUSION

If not withdrawn, the Court's opinion interjects (yet again) unfounded and unnecessary uncertainty into the landscape of CGL insurance coverage. It contradicts recent clarification of the very limited scope of the Contractual Liability Exclusion as applied to coverage for property damage that is within the general duties of construction contractors. For that reason, Amici Curiae request that this Court grant Appellant's Petition for Panel Rehearing.

Respectfully submitted,

/s/Patrick J. Wielinski
Patrick J. Wielinski
Texas State Bar No. 21432450
COKINOS, BOSIEN & YOUNG
105 Decker Court, Suite 800
Irving, Texas 75062
Tel.: (817) 635-3620
Fax: (817) 635-3633

ATTORNEYS FOR
AMICI CURIAE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the Brief of Amici Curiae Texas Building Branch – Associated General Contractors of America and American Subcontractors Association, Inc. in Support of Appellants Doug and Karen Crownovers' Petition for Panel Rehearing was electronically served upon counsel of record as indicated below, via the Court's CM/ECF system on this 18th day of July, 2014.

R. Brent Cooper
Diana Faust
COOPER & SCULLY, P.C.
Founders Square
900 Jackson Street, Suite 100
Dallas, Texas 75202

Gregory A. Harwell
Slates Harwell LLP
1700 Pacific Ave., Ste. 3800
Dallas, Texas 75201

Lee H. Shidlofsky
SHIDLOFSKY LAW FIRM PLLC
7200 N. Mopac Expy., Suite 430
Austin, Texas 78731

/s/ Patrick J. Wielinski
PATRICK J. WIELINSKI

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APPENDIX

Exhibit A – Excerpts from AIA Document A201-2007.

Exhibit B – Craig F. Stanovich, *Contractual Liability Exclusion – The Ball is in Your Court*, June 2012.

Exhibit C – Jeremiah M. Welch & Theresa A. Guertin, *The Fifth Circuit Eliminates Construction Industry Policyholders' Coverage for Virtually All Property Damage Claims*, June 2012 (to be published by the American Bar Association.

Exhibit D – MDJW INSURANCE LAW NEWSBRIEF, "Fifth Circuit Expands Supreme Court's Holding in *Gilbert* to Breach of Contract Claim" (June 18, 2012)

Exhibit E – *Fifth Circuit Ruling on Commercial General Liability Policies Could Have a Significant Impact on the Texas Construction Industry*, PORTER HEDGES LLP CONSTRUCTION ALERT (June 22, 2012).

Exhibit F – Ben Westcott, et al., *Fifth Circuit Decision Adversely Impacts Insurance Coverage for General Contractors*, ANDREWS MYERS MONTHLY LAW UPDATE (June 27, 2012).

Exhibit G – David S. White, *The Texas Construction Industry Wins Big with Ruling That Faulty Workmanship Lawsuits Do Not Fall Within the Contractual Liability Exclusion*, LAW AND INSURANCE (January 17, 2014).

Exhibit H – Roberta D. Anderson, *Texas High Court Fortunately Says "No" in Ewing*, LAW360 (January 17, 2014).

Exhibit I – Bibeka Shrestha, *Texas Justices Rescue Builders from Limbo in Ewing Case*, LAW360 (January 17, 2014).