NO. 14-12151

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PENNSYLVANIA NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY

Plaintiff - Appellee,

v.

ST. CATHERINE OF SIENA PARISH

Defendant - Appellant

On Appeal from the United States District Court
For the Southern District of Alabama, Southern Division
1:13-cv-00066-KD-M

BRIEF OF AMICI CURIAE FOR ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALABAMA AGC AND AMERICAN SUBCONTRACTORS ASSOCIATION, INC. IN SUPPORT OF APPELLANT, ST. CATHERINE OF SIENA PARISH

Patrick J. Wielinski
COKINOS, BOSIEN & YOUNG
105 Decker Court, Suite 800
Irving, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

Attorneys for Amici Curiae

CASE NO. 14-12151

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PENNSYLVANIA NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY

Plaintiff- Appellee,

v.

ST. CATHERINE OF SIENA PARISH

Defendant- Appellant

On Appeal from the United States District Court
For the Southern District of Alabama, Southern Division
1:13-cv-00066-KD-M

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Amici Curiae, Associated General Contractors of America, Alabama AGC and American Subcontractors Association, Inc. state as follows:

1. Associated General Contractors of America, Alabama AGC, and American Subcontractors Association, Inc. have no parent companies.

2. No publicly held corporation owns ten percent (10%) or more of the stock of Associated General Contractors of America, Alabama AGC, or American Subcontractors Association, Inc.

3. The undersigned counsel of record certifies the following listed persons or entities have an interest in the outcome of this Appeal:

Alabama AGC (Amici Curiae)

American Subcontractors Association, Inc. (Amici Curiae)

Associated General Contractors of America (Amici Curiae)

Burford, Steve R., Counsel for Appellee

DuBose, Kristi K., U.S. District Court Judge

Galloway, Robert M., Counsel for Kiker Corporation, Defendant/Insured

Garrett, III, J. Willis, Counsel for Kiker Corporation, Defendant/Insured

Hembree, Lindsay P., Counsel for Appellant

Kiker Corporation, Defendant/Insured

LaGarde, Paul V., Counsel for Appellant

MacKey, Peter S., Counsel for Appellant

Milling, Bert W., U.S. Magistrate Judge

Pennsylvania National Mutual Insurance Company, Appellee

Rossi, Clay T., Counsel for Appellant

St. Catherine of Siena Parish, Appellant

Wielinski, Patrick J., Counsel for Amici Curiae

Respectfully submitted this 1st day of July, 2014.

COKINOS, BOSIEN & YOUNG

By:______________________________

Patrick J. Wielinski

105 Decker Ct., Suite 800
Arlington, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

Attorneys for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

IDENTITY AND INTEREST OF AMICI CURIAE ix

BRIEF OF AMICI CURIAE 1

STATEMENT OF THE ISSUES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND AUTHORITES 7

I. THE DISTRICT COURT'S RULING IS CONTRARY TO THE PLAIN LANGUAGE AND THE INTENT BEHIND THE CONTRACTUAL LIABILITY EXCLUSIONS 7

A. The District Court's Ruling Is Out of Step with the Majority Interpretation 8

B. Alabama Courts Have Acknowledged the Intent Behind the Contractual Liability Exclusion 11

C. The Overwhelming Majority of Jurisdictions Have Followed the Intent Behind the Contractual Liability Exclusion 13

II. APPLYING THE CONTRACTUAL LIABILITY EXCLUSION TO THIS CLAIM UNRAVELS NEARLY FIFTY YEARS OF CAREFUL POLICY DRAFTING, INTERPRETATION *AND* MARKETING 17

A. The 1966 CGL Revision: Broad Exclusion of the Insured Contractor's Work 18

B. The 1973 Revision: Acceptance of the Broad Form Endorsement Limiting the Work Performed Exclusion 19

C. The 1986 Revision: Preservation of Coverage for Property Damage to the Insured Contractor's Work in Plain Language 21

D. The Contractual Liability Exclusion Has "Peacefully Co-Existed" with the Business Risk Exclusions for the Last Fifty Years 23

III. IMPROVIDENT APPLICATION OF THE CONTRACTUAL LIABILITY EXCLUSION TO LIABILITY FOR BREACH OF CONTRACT RADICALLY CHANGES THE GAME FOR ALABAMA INSUREDS 26

A. Applying the Contractual Liability Exclusion Will Deprive Alabama Insureds of Completed Operations Coverage 26

B. Applying The Contractual Liability Exclusion Will Deprive Alabama Insureds of Predictability and Ability to Transfer and Evaluate Risk 28

CONCLUSION 30

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Cases

Action Auto Stores, Inc. v. United Capitol Ins. Co., 845 F. Supp. 428 (W.D. Mich. 1993) 15

ACUITY v. Burd & Smith Constr., Inc., 721 N.W.2d 33 (N.D. 2006) 9, 15

Aetna Ins. Co. v. Pete Wilson Roofing & Heating Co., Inc., 272 So.2d 232 (Ala. 1972) 19

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Pigott, 393 So.2d 1379 (Ala. 1981) .. 8

Alabama Ins. Guar. Ass'n v. Ass'n of Gen. Contractors Self-Insurer's Fund, 80 So.3d 188 (Ala. 2010) 7

Alea London Ltd. v. Howard, 2008 WL 693799 (M.D. Ga. March 12, 2008) 16

Am. Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004) 13,16

Am. Resources Ins. Co. v. H & H Stephens Const., Inc., 939 So.2d 868 (Ala. 2006) 25

Arnett v. Mid-Continent Cas. Co., 2010 WL 2821981 (M.D. Fla. July 16, 2010) .. 16

Assurance Co. of Am. v. Admiral Ins.Co., 2011 WL 1897589 (S.D. Ala. May 18, 2011) 22

Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of La., 912 So.2d 400 (La. App. 2d Cir. 2005) 15

Desert Mountain Properties Ltd. P'ship v. Liberty Mut. Fire Ins., 250 P.3d 196 (Ariz. 2011) 15

Ewing Constr. Co., Inc. v. Amerisure Ins. Co., 420 S.W.3d 30 (Tex. 2014) 16

Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co., 949 P.2d 337 (Utah 1997) 15

Int'l Paper Co., Inc. v. QBE Ins. Corp., 2010 WL 1856193 (N.D. Ala. May 5, 2010) 11

JACO Airfield Constr., Inc. v. Nat'l Trust Ins. Co., 2007 WL 5114438 (W.D. Tenn. Jan. 29, 2007) 16

King County v. Travelers Ins. Co., 1996 WL 257135 (W.D. Wash. Feb. 20, 1996) 16

Landmark Am. Ins. Co. v. The Indus. Dev. Board of the City of Montgomery, 2013 WL 4788588 (N.D. Ala. Sept. 9, 2013) 12

Marlin v. Wetzel County Bd. of Educ., 569 S.E.2d 462 (W. Va. 2002) 15

Musgrove v. Southland Corp., 898 F.2d 1041 (5th Cir.1990) 16

Olympic, Inc. v. Providence WA Ins. Co., 648 P.2d 1008 (Alaska 1982) 14, 15

Owners Ins. Co. v. Jim Carr Homebuilder, LLC, ___ So.3d ___, 2014 WL 1270629 (Ala. March 28, 2014) .... *passim*

PA Nat'l Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish, Doc. 110 4

QBE Ins. Corp. v. Indus. Corrosion Control, Inc., 2008 WL 1868431 (S.D. Miss. April 24, 2008) 15

Roger H. Proulx & Co. v. Crest-Liners, Inc., 119 Cal.Rptr.2d 442, 455 (Cal. Ct. App. 2002) 16

Schuylkill Stone Corp. v. State Auto. Mut. Ins. Co., 735 F. Supp. 2d 150 (D. N.J. 2010) 15

Southern Sash of Columbia v. U.S. Fidelity & Guar. Co., 525 So.2d 1388 (Ala.1988) 8

Townsend Ford, Inc. v. Auto-Owners Ins. Co., 656 So.2d 360 (Ala. 1995) 11, 12

U.S Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871 (Fla. 2008) 27

Statutes

Ala. Code § 6–5–220 – § 6–5–228 26

Other Authorities

21 Eric Mills Holmes, HOLMES' APPLEMAN ON INSURANCE 2D §132.3[C] (2002) .. 8

Jill B. Berkeley, *How to Use Contractual Liability Coverage Effectively*, CGL REPORTER (FALL 2001) 9

James Duffy O'Connor, *What Every Court Should Know About Insurance Coverage for Defective Construction*, JOURNAL OF THE AMERICAN COLLEGE OF CONSTR. LAWYERS (Winter 2011) 29

Jeffrey W. Stempel, STEMPEL ON INSURANCE CONTRACTS §14.13[D] (3d ed. Supp. 2007)) 27

George H. Tinker, *Comprehensive General Liability Insurance - Perspective and Overview*, 25 FED. INS. COUN. Q. 217 (1975) 10

B.Weimer, A.Whitman, C. Hagglund & A. Hillestad, CGL POLICY HANDBOOK §8.02 (2d ed, Sept. 2013) 9

IDENTITY AND INTEREST OF AMICI CURIAE

This Amici Curiae Brief speaks for the national and state chapters of the largest construction trade associations in the United States. The sponsorship by these organizations underscores the importance of the insurance coverage issue currently on appeal for Alabama construction businesses. This brief is filed in support of St. Catherine, the judgment creditor of Kiker Corporation "Kiker"), its roofing contractor.

The Associated General Contractors of America (AGCA) is the oldest and largest nationwide association representing construction contractors. Formed in 1918, the AGCA represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are more than 7,000 of the nation's leading general contractors, more than 11,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. The association's members engage in the construction of office buildings, apartments, condominiums, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, and site utilities necessary for housing development.

Since January 1, 1920, Alabama AGC ("AAGC") has brought together qualified construction contractors and industry-related companies dedicated to *skill, integrity and responsibility.* AAGC provides broad influence and a full range

of services satisfying the needs and concerns of its members, partners and the industry, thereby improving the quality of construction and protecting the public interest. With more than 800 members located throughout the state of Alabama and Northwest Florida, AAGC is comprised of general contractors, specialty contractors, subcontractors, suppliers and service providers that service and provide commercial and industrial construction as well as road building for both public and private sectors in the state of Alabama and outside Alabama on a regional or international basis. AAGC provides educational, networking, and business development and enhancement opportunities to its members.

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 twenty-one members in ASA of Alabama, the local Alabama Chapter of ASA. 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

Amici Curiae and their members conduct significant amounts of business in Alabama and provide employment for many Alabama citizens. Those members are major purchasers of insurance and insurance-related services governed by Alabama insurance law. Because of their unique perspective as influential representatives of broad segments of the construction industry in Alabama and the United States, Amici Curiae submit amicus curiae briefs to the courts, including cases affecting the insurability of and coverage for risks encountered on construction projects.

Although Amici Curiae are not parties to this appeal, this brief has been submitted through the undersigned independent attorney, who was paid a fee by Amici Curiae to prepare it.

BRIEF OF AMICI CURIAE

STATEMENT OF THE ISSUES

1. Whether the application of the Contractual Liability Exclusion to a claim involving a breach of contractual performance is contrary to the plain language and the intent behind that exclusion?

2. Whether an overly broad interpretation of the Contractual Liability Exclusion to a claim involving the breach of a duty of contractual performance renders other provisions useless and negates coverage in the CGL policy for contractors?

3. Whether an insured's contractual duty to repair is an "assumption of liability" within the meaning of the Contractual Liability Exclusion?

SUMMARY OF THE ARGUMENT

The proposition that an insurer should not be obligated to pay claims that are outside the coverage of the policy is not astounding. However, some insurers are extremely adept at finding reasons, some would say excuses, to deny what otherwise appear to be claims more than arguably within the coverage of the policy. This is particularly true as to claims involving allegedly defective workmanship by insured contractors under their commercial general liability ("CGL") policies, and if the position advocated by Pennsylvania National is adopted by this Court, insurers will invariably have yet another excuse to deny legitimate claims. Often, insureds not only face the burden of defending against and settling an adversarial claim, but also the burden of defending against an adversarial insurer out to minimize its own obligation to defend and indemnify its insured.

The facts presented to this Court represent an all too frequently occurring dilemma for Alabama insureds, particularly those engaged in construction. Contractors in Alabama and throughout the United States face these issues, which accounts for the participation of national and state construction organizations such as AGC and ASA as Amici Curiae on this brief.[1] Members of these organizations

---

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

must regularly manage the considerable risks associated with building construction, risks that often exceed the value of the project itself. The construction industry as a whole has the difficult task of simultaneously protecting itself against these risks and maintaining itself as one of the driving forces behind the economic well-being of this state and nation. While contractors and subcontractors are usually successful in providing quality construction services, inadvertent mistakes occasionally occur, including mistakes that may result in defective construction. Construction insureds pay substantial premiums for liability insurance to protect themselves from property damage arising out of inadvertent and alleged construction defects.

Every construction insured seeks predictability and consistency in the manner in which its liability insurance policies apply in the event of a claim. Predictability and consistency as to CGL coverage for construction defect claims was most recently established by the Alabama Supreme Court in *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, ___ So.3d ___, 2014 WL 1270629 (Ala. March 28, 2014), upholding coverage for the costs of repairing construction defects that caused property damage to the insured's work or other property.

In fact, the district court below relied upon *Owners Insurance v. Jim Carr* to determine that the cost to repair the property damage to the parish buildings, that is, the gypsum substrate of the roof, and the interior and ceilings of the buildings,

was covered under the Pennsylvania National policy. In this regard, the court held that the faulty workmanship property damage constituted an "occurrence" as defined under the policy. *Pennsylvania National Mutual Casualty Insurance Co. v. St. Catherine of Siena Parish*, Doc. 110, p. 11. However, the district court did not stop there. It went on to apply the plain language of the Subcontractor Exception to the Your Work Exclusion in the policy, determining that because of the exception for property damage arising out of the work of Kiker's subcontractors, the exclusion for property damage arising out of Kiker's own work did not apply. Doc. 110, p. 14. As such, the district court applied the policy according to its plain terms and according to Alabama law. Amici Curiae ask nothing more of this Court on appeal.

Unfortunately, after finding that Kiker's breach of contract constituted an "occurrence" and applying the Subcontractor Exception to preserve coverage, the district court nevertheless refused to uphold coverage. Instead, it accepted the argument of Pennsylvania National and applied Exclusion b, the Contractual Liability Exclusion, to deny the claim. In doing so, the court virtually dashed all notions of predictability conferred by *Jim Carr* and threw coverage for insured contractors in Alabama into disarray by overextending and misapplying that exclusion. Under the ruling below, virtually any breach of contract would involve the assumption of liability within the meaning of the Contractual Liability

Exclusion, with a resulting denial of coverage for property damage arising out of the insured's breach of its own contract. The scope of that exclusion is not and cannot be so sweeping in light of existing Alabama case law as well as case law throughout the country – and the realities of the construction industry and all other industries that provide a service on a contract basis. Here, Kiker did not assume any liabilities beyond those that are customarily set out in typical construction contracts entered into by insured contractors on a daily basis.[2]

Over the last 50 years, Alabama contractors have paid substantial premiums for standard CGL policies that include exclusions that carefully circumscribe the types of business risks for which coverage is excluded under policies sold to the construction industry. Those policies have been marketed aggressively by insurers to contractors to provide them protection against property damage arising out of the defective work of their subcontractors by preserving coverage from exclusion. The Contractual Liability Exclusion is not one of the "business risk" exclusions specifically tailored to the needs of the construction industry, and to broadly apply it to claims such as the one before this Court interjects uncertainty, unpredictability and an unforeseen loss of coverage, once again placing Alabama contractors and

[2] Particularly, the district court explicitly found that the contract between Kiker and St. Catherine's included an implied warranty which constitutes an *ex delicto* claim, one that arises from, but does not rely upon, a contract. Moreover, such a claim sounds in tort under Alabama law and that claim is outside the express terms of the Contractual Liability Exclusion.

other insured businesses at risk for unpredicted losses. That lack of predictability not only strikes at the heart of the construction industry's ability to manage its business effectively, but to the underpinnings of insurance as a tool for risk management.

Accordingly, this Amici Curiae brief seeks to inform the Court of the serious consequences of the improvident application of the Contractual Liability Exclusion to property damage arising out of an insured contractor's breach of warranties within its own contract. Amici Curiae believe that St. Catherine's has provided this Court with ample basis under Alabama law to determine that the exclusion does not apply to Kiker's breach of warranty, and it is not their purpose to reiterate that law here. Rather, Amici Curiae adopt those arguments and instead provide this Court with a broader picture as to how the position urged by Pennsylvania National is contrary to the drafting, interpretation and marketing of CGL insurance policies to the construction industry.

For these reasons, Amici Curiae urge the Court to reverse the district court and render judgment in favor of St. Catherine's that the alleged breach of warranty by Kiker, whether express or implied, is not a liability "assumed" by the insured under the Contractual Liability Exclusion. In the alternative, Amici Curiae join in the request of St. Catherine's that this Court certify that question to the Alabama

Supreme Court as to whether a breach of warranty is excluded by the Contractual Liability Exclusion in a contractor's CGL policy.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT'S RULING IS CONTRARY TO THE PLAIN LANGUAGE AND THE INTENT BEHIND THE CONTRACTUAL LIABIITY EXCLUSION

The district court's application of Exclusion 2(b), the Contractual Liability Exclusion, to deny coverage to Kiker for its alleged failure to live up to its own contractual obligations to St. Catherine's defies the intent as well as the plain language of the provision. The Contractual Liability Exclusion does not apply that broadly, being expressly limited to assumptions of liability through indemnity or hold harmless provisions. The district court's interpretation of the exclusion is problematic because this dispute involves a standard form CGL policy, versions of which have been in use since 1973, with revisions incorporated in 1986, as set out more fully below.

The district court failed to take into account decades of prior insurance and legal commentary and court interpretations. The commentary and authority is particularly helpful in this instance since Alabama courts look to precedent from other jurisdictions when interpreting insurance policy provisions and their application. *See, Alabama Ins. Guar. Ass'n v. Ass'n of Gen. Contractors Self-Insurer's Fund*, 80 So.3d 188 (Ala. 2010) (referring to interpretations by Louisiana,

Florida, Iowa); *Southern Sash of Columbia v. U.S. Fidelity & Guar. Co.*, 525 So.2d 1388 (Ala.1988) (looking to interpretations by the Fourth, Fifth and Seventh Circuits); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Pigott*, 393 So.2d 1379, 1383 (Ala. 1981) (adopting interpretation of a particular provision by South Carolina and Kentucky courts).

A. <u>The District Court's Ruling Is Out of Step with the Majority Interpretation</u>

The vast majority of the courts, together with legal and insurance commentators, limit the scope of the Contractual Liability Exclusion to assumptions of liability, primarily through indemnity or hold harmless agreements. The virtual unanimity of commentators on this subject is remarkable in and of itself. The analysis found in *Appleman on Insurance* as to the meaning of "assumption of liability" can hardly be improved upon:

> "Assumption of liability" by the insured is the key to understanding. Although, arguably, a person or entity assumes liability (that is, a duty of performance, the breach of which would give rise to liability) whenever one enters into a binding contract, in a CGL policy and other liability policies an "assumed" liability is generally understood and interpreted by the courts to mean the liability of a third party, which liability one "assumes" in the sense that one agrees to indemnify or hold the other person harmless.

21 Eric Mills Holmes, HOLMES' APPLEMAN ON INSURANCE 2D §132.3[C], pp. 36-37 (2002). The difference between assumption of liability pursuant to an indemnity clause and a contractual duty of performance is at the heart of this appeal. It is also

at the heart of CGL coverage for the construction industry, because virtually every project is constructed pursuant to a contract that includes implied and express warranties.

As to the rather confusing labeling of the exclusion as the "contractual liability" exclusion, another commentator notes as follows:

> Strictly speaking, the exclusion should be more aptly named if it were called the "contractual assumption exclusion." The exclusion does not deny coverage for the insured's own contractual liability for breach of contract actions. Rather, the exclusion defeats coverage for the assumption of another's liability for bodily injury or property damage unless that liability is assumed under an agreement that constitutes an "insured contract."

Jill B. Berkeley, *How to Use Contractual Liability Coverage Effectively*, CGL REPORTER, ¶ 310 (FALL 2001).[3] Additionally a commentator also notes that the Contractual Liability Exclusion does not apply to breach of contract claims involving performance:

> The contract liability exclusion for damages "assumed" in a contract or agreement does not exclude all breach of contract claims. The contract exclusion has generally been limited to indemnity and hold-harmless contracts. In the contractual liability exclusion, an "assumed" liability means "the liability of another which one assumes in the sense that one agrees to indemnify or hold the other person harmless therefor." [Citing *Acuity v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 40 (N.D. 2006)].

---

[3] Available at http://www.irmi.com/online/cgl/sc000050/11000241.aspx.

B.Weimer, A.Whitman, C. Hagglund & A. Hillestad, CGL POLICY HANDBOOK §8.02 (2d ed, Sept. 2013).

Other authorities are legion for the proposition that the Contractual Liability Exclusion is directed at hold harmless or indemnity agreements, and not breach of contract. A landmark commentary on the scope of coverage provided by the 1973 revisions[4] to the CGL policy explains the intent of the insurance industry underlying the Contractual Liability Exclusion:

> The coverage agreement embraces "all sums which the insured shall become legally obligated to pay as damages. . ."
>
> That portion of the coverage grant is intentionally broad enough to include the insured's obligation to pay damages for breach of contract as well as for tort, within limitations imposed by other terms of the coverage agreement. . . . In fact that part of the coverage grant would include the liability of others assumed by the insured under contract (hold harmless agreements).
>
> It is the latter to which this exclusion is addressed. Note that the exclusion does not run to duties assumed by contract, or to liability by reason of contract, but to "liability assumed" by the insured under a contract. The exclusion therefore does not remove coverage simply because a claim is based on contract and not in tort.

George H. Tinker, *Comprehensive General Liability Insurance - Perspective and Overview*, 25 FED. INS. COUN. Q. 217, 265 (1975). At the time he authored his commentary, Mr. Tinker was Associate General Counsel of Kemper Insurance

[4] As more fully set out below, the 1973 policy form is substantially similar to the 1986 CGL form before this Court.

Companies. It is difficult to articulate a clearer explanation of the concept of assumption of liability under a contract or agreement.

B. Alabama Courts Have Acknowledged the Intent Behind the Contractual Liability Exclusion

Alabama courts, on occasion, have interpreted the Contractual Liability Exclusion in accord with the policy intent, that is, recognizing that its applicability is limited to indemnity or hold harmless agreements. In *Townsend Ford, Inc. v. Auto-Owners Ins. Co.*, 656 So.2d 360 (Ala. 1995), the issue was whether a car dealer's liability policy provided coverage for a breach of warranty claim. In upholding coverage, the court refused to apply the Contractual Liability Exclusion, stating that "the trial court correctly noted that this type of provision 'traditionally serve[s] to exclude "indemnity" types of liability, where the liability itself was assumed, rather than warranty situations.'" *Id.* at 365.

The *Townsend Ford* case is the most recent treatment by the Alabama Supreme Court as to applicability of the Contractual Liability Exclusion to indemnity clauses. Moreover, even though that case involved breach of an express warranty, the rationale of the court is equally applicable to breach of an implied warranty, an action that sounds in tort under Alabama law.

Another case applying Alabama law and recognizing the limitation on the Contractual Liability Exclusion is *International Paper Co., Inc. v. QBE Ins. Corp.*, 2010 WL 1856193, at *6 (N.D. Ala. May 5, 2010), in which the court addressed an

argument that the Contractual Liability Exclusion applied to an indemnity clause before it. However, since the plaintiff had not entered into the particular indemnity provision, there was no contract or agreement under which it was obligated to pay damages by reason of the "assumption of liability." Therefore, the exclusion could not be enforced against it.

If Pennsylvania National had its way, the Contractual Liability Exclusion would be converted into a blanket breach of contract exclusion. In order to do so, Pennsylvania National ignores the limitation that the "assumption of liability" formulation places on the exclusion. In contrast, an actual breach of contract exclusion was addressed by the court in *Landmark American Ins. Co. v. The Industrial Development Board of the City of Montgomery*, 2013 WL 4788588 (N.D. Ala. Sept. 9, 2013). In that case, the insurer sought a declaration that it had no duty to defend the Industrial Development Board ("IDB") under a directors and officers liability policy in a lawsuit for breach of option contracts with certain landowners. The provision, in relevant part, excluded loss "arising out of or based upon any actual or alleged liability of the Insured Organization ***assumed or asserted*** under the terms, conditions or warranties of any contract or agreement…." *Id.* at *3 (emphasis added). In response to the insurer's reliance on the exclusion, IDB argued that the exclusion applied only to an express contractual assumption of another's potential liability in an indemnity agreement, citing *Townsend Ford v.*

Auto-Owners, 656 So.2d 360. The court rejected this argument, holding that the exclusion also applied to losses arising out of actual or alleged liability "asserted under the terms, conditions or warranties of any contract or agreement," and stating that the terms of the exclusion were broad and could not be read in a narrow manner to apply only to indemnity situations. *Id.* at *5. Here, the opposite is true. The narrow and limited Contractual Liability Exclusion applies only to "assumption of liability," and not the "assertion of liability" in a contract.

Thus, Alabama Courts are familiar with the application of the "assumption of liability" limitation on the scope of the Contractual Liability Exclusion and the district court's application of it to the breach of contact before it is outside the bounds of that limitation.

C. The Overwhelming Majority of Jurisdictions Have Followed the Intent Behind the Contractual Liability Exclusion

The virtual unanimity of industry and legal commentators as to the policy intent has been adopted and followed by the vast majority of the courts. One of the leading cases as to the scope of the Contractual Liability Exclusion is *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004). In that case, the owner sought recovery from the insured general contractor for damage to a warehouse resulting from settlement of the foundation that resulting in sinking, buckling, and cracking of the warehouse structure. The Wisconsin Supreme Court rejected the CGL insurer's argument that the 1986 version of the Contractual

Liability Exclusion (the version before this Court) applied to exclude coverage for the allegations against the insured that involved breach of contract. In doing so, the Court upheld the dichotomy between breach of contract and "assumption of liability in a contract or agreement" as follows:

> The term "assumption" must be interpreted to add something to the phrase "assumption of liability in a contract or agreement." Reading the phrase to apply to all liability sounding in contract renders the term "assumption" superfluous. We conclude the contractually assumed liability exclusion applies where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement; it does not operate to exclude coverage for any and all liabilities to which the insured is exposed under the terms of the contracts it makes generally.

Id. at 79.

At the same time, the seminal case as to the Contractual Liability Exclusion is *Olympic, Inc. v. Providence Washington Ins. Co.*, 648 P.2d 1008 (Alaska 1982), which interprets an earlier version of the Contractual Liability Exclusion rather than the 1986 version before this Court. Nevertheless, that case is relied upon for its clear analysis that assumption of liability in a contract refers to liability incurred when one promises to indemnify or hold another harmless, and does not refer to the liability that results from breach of contract. *Olympic*, 648 P.2d at 1011. The court stated:

> Thus, Chicago [the insured's subrogee] overlooks the important distinction between incurring liability through breach of contract and specifically contracting to assume liability for another's negligence [citation omitted]. Liability ordinarily occurs only after breach of

> contract. However, in the case of indemnification or hold harmless agreements, assumption of another's liability constitutes performance of the contract.

Id. Here, where Kiker's alleged liability involves its own breach of its contractual duty, liability arises only upon its actual breach of that duty. That is not an assumption of another's liability as contemplated by the exclusion.

As stated, the clarity of its analysis renders *Olympic* a seminal case as to interpretation of the Contractual Liability Exclusion, and it is not weakened by the fact that it interprets an earlier version of the exclusion referring to "liability assumed by the insured under any contract or agreement except an incidental contract." The contractual liability provisions in the standard CGL policy forms have been in use for over forty years since 1973, which has afforded the courts of numerous jurisdictions ample opportunity to interpret the scope of the Contractual Liability Exclusion. The term "vast majority" is inadequate to describe the number of courts that have limited the scope of "assumption of liability" to an indemnity or hold harmless agreement.[5]

---

[5] A small sample includes *Broadmoor Anderson v. National Union Fire Ins. Co. of La.*, 912 So.2d 400 (La. App. 2d Cir. 2005), *cert. denied*, 925 So.2d 1239 (La. 2006); *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F. Supp. 428, 442 (W.D. Mich. 1993); *Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co.*, 949 P.2d 337,341-42 (Utah 1997); *Marlin v. Wetzel County Bd. Of Educ.*, 569 S.E.2d 462, 468-69 (W. Va. 2002); *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 40 (N.D. 2006); *Desert Mountain Properties Ltd. P'ship v. Liberty Mut. Fire Ins.*, 250 P.3d 196, 196 (Ariz. 2011); *Schuylkill Stone Corp. v. State Auto. Mut. Ins. Co.*, 735 F. Supp. 2d 150, 159 (D. N.J. 2010); *QBE Ins. Corp. v. Indus. Corrosion Control,*

In one of the more recent opinions on this issue, *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014), the Texas Supreme Court addressed substantially the same issue that is before this Court, i.e., whether a general contractor that agrees to perform its construction work in a good and workmanlike manner assumes liability for damages arising out of defective work. The court held that an "assumption of liability" means that the insured has assumed a liability for damages that exceeds the liability it would have under general law, citing *American Family Mutual v. American Girl*, 673 N.W.2d 65, for the proposition that "assumption" must be interpreted to add something to the phrase "assumption of liability in a contract or agreement." *Id.* at 37. Therefore, the court concluded that a general contractor that agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, and thus "does not assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. Likewise, here, Kiker did not assume any extraordinary

---

Inc., 2008 WL 1868431, at *2-3 (S.D. Miss. April 24, 2008); *JACO Airfield Constr., Inc. v. National Trust Ins. Co.,* 2007 WL 5114438, at *10 (W.D. Tenn. Jan. 29, 2007); *King County v. Travelers Ins. Co.,* 1996 WL 257135, at *4 (W.D. Wash. Feb. 20, 1996); *Alea London Ltd. v. Howard,* 2008 WL 693799, at *4-5 (M.D. Ga. March 12, 2008); *Arnett v. Mid-Continent Cas. Co.,* 2010 WL 2821981, at *8-9 (M.D. Fla. July 16, 2010); *Roger H. Proulx & Co. v. Crest-Liners, Inc.,* 119 Cal.Rptr.2d 442, 455 (Cal. Ct. App. 2002); *Musgrove v. Southland Corp.,* 898 F.2d 1041, 1044 (5th Cir.1990).

liability above and beyond the typical warranty found in every construction contract. Therefore, the Contractual Liability Exclusion simply does not apply.

Unfortunately, the district court's ruling flies in the face of the mountain of precedent from other jurisdictions, and legal and insurance industry commentators, in favor of a rather random interpretation of a standard insurance policy provision that had previously been determined and settled for decades. This interpretation is inexplicable to the construction industry, which is in dire need of consistency in the interpretation of the insurance policies and contracts upon which it relies to transfer billions of dollars of risk. And, when considered in light of the recent *Owners Insurance v. Jim Carr* opinion, the result below represents a significant deviation and is nothing short of a step backward from predictability in the law necessary for conducting construction business in Alabama.

II. APPLYING THE CONTRACTUAL LIABILITY EXCLUSION TO THIS CLAIM UNRAVELS NEARLY FIFTY YEARS OF CAREFUL POLICY DRAFTING, INTERPRETATION *AND* MARKETING

Applying the Contractual Liability Exclusion to property damage to an insured contractor's work simply because that property damage may breach its contract has a profoundly negative effect on CGL coverage for the construction industry. It is nothing short of a radical departure from the means by which CGL coverage has traditionally been marketed and provided by the insurance industry to contractors.

This appeal presents the paradigm for a covered construction defect claim, in which the district court found an "occurrence" of "property damage" within the terms of the policy, and but for the application of the Contractual Liability Exclusion, Kiker was entitled to the benefit of the Subcontractor Exception to the Your Work Exclusion that preserves coverage for its work. In fact, in *Owners Insurance v. Jim Carr,* the Alabama Supreme Court considered similar facts and upheld coverage for the contractor. This preservation of coverage for property damage arising out of a subcontractor's work is no happenstance. It developed nearly fifty years ago in 1966 when liability coverage for an insured contractor's work began to receive systematic treatment in the CGL forms, a development that cannot be overlooked in considering its scope and interaction with the Contractual Liability Exclusion in the basic CGL policy.

A. The 1966 CGL Revision: Broad Exclusion of the Insured Contractor's Work

The 1966 policy form dealt with the exposure of property damage to the work of the named insured by absolutely excluding it. Exclusion (o), the Work Performed Exclusion, in that policy form provided that the insurance does not apply:

> [T]o property damage to work performed ***by or on behalf of*** the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

The highlighted term "by or on behalf of" extended the exclusion to apply not only to the insured contractor's work, but also to that of its subcontractors that perform work "on behalf of" the insured. The Work Performed Exclusion was the most prominent of several exclusions that impacted the construction industry. These exclusions and their subsequently revised versions have come to be known as "business risk" exclusions.

The straightforward exclusion was applied by Alabama courts to exclude coverage for property damage to the insured's work arising out of its work. *See Aetna Ins. Co. v. Pete Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972). As discussed below, the reasoning of such cases does not apply to more recent CGL policy forms that include either a broad form endorsement or an explicit Subcontractor Exception.

B. The 1973 Revision: Acceptance of the Broad Form Endorsement Limiting the Work Performed Exclusion

The CGL policy was revised again in 1973, but the revision did not modify Exclusion (o), the Work Performed Exclusion from the 1966 form, maintaining intact the exclusion for property damage arising out of an insured contractor's work. The presence of this exclusion in the 1966 and 1973 CGL forms rendered the coverage of considerably less utility for the construction industry. As a result, in a very significant development, the Insurance Services Office (ISO)

promulgated a standard endorsement to the CGL policy in 1969 that modified the Work Performed Exclusion as well as others. That endorsement became widely offered in 1973, and eventually became known as the Broad Form Property Damage Endorsement ("BFPDE").

That endorsement modified the CGL policy to replace Exclusion (o) with Exclusion (z) that states that the insurance does not apply:

> (z) with respect to the completed operations hazard and with respect to any classification stated above as "including completed operations," to property damage to work performed ***by the named insured*** arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith. [Emphasis added.]

The emphasized language reflects the elimination of the phrase "or on behalf of" from the exclusion. As a result, the intent behind this endorsement was to provide coverage for property damage arising from subcontractor work on behalf of the named insured, but not arising out of work performed by the named insured itself. Through this subtle change in wording, coverage was preserved for an insured contractor or builder that performs its work through subcontractors.

The Exclusion (z) modification of the Work Performed Exclusion by the BFPDE applied to property damage within the Completed Operations Hazard (after completion of the work). That provision has been the most frequently encountered extension as to CGL coverage provided to construction contractors.

Despite the extra premium charged for it, the BFPDE was extremely popular throughout the 1970's and early 1980's. In fact, most CGL policies issued to construction risks included the BFPDE. Obviously, application of the Contractual Liability Exclusion to the circumstances where damage to the insured contractor's work breaches its contract, and nothing more, contravenes the limitations on the property exclusions introduced through the standard CGL policy by the attachment of the carefully crafted BFPDE.

C. The 1986 Revision: Preservation of Coverage for Property Damage to the Insured Contractor's Work in Plain Language

Due in part to what was perceived as the complexities of the expanded coverage provided to construction insureds, the 1973 CGL policy as endorsed by the BFPDE underwent a major revision in 1986. That revision attempted to use plainer language and to lessen the cumbersome practice of adding endorsements such as the BFPDE to accomplish the desired coverage.[6] As a part of that effort, the endorsement providing coverage for property damage arising out of a subcontractor's work was moved from an endorsement to an affirmative statement preserving coverage for property damage arising out of the work of subcontractors

[6] While there have been subsequent revisions to the CGL form after 1986, the basic rewriting of the form at that time is still referred to as the "1986 form" and the operative provisions before this Court have not changed since then. The Pennsylvania National policy is written on the 1986 form.

and inserted into the coverage form itself in the 1986 policy. Exclusion l, the Your Work Exclusion, states that the insurance does not apply to:

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

While the provision preserving coverage for an insured contractor for property damage arising out of the work of its subcontractors was not necessarily new, having been inserted into the BFPDE in 1969 by modifying Exclusion (o), it nevertheless gained increasing acceptance and popularity in its own right. Eventually, the concept has come to be referred to as the Subcontractor Exception and has been the subject of numerous court opinions, most of them upholding coverage for a general contractor for property damage arising out of the defective work of its subcontractors.

The case law as to application of the Subcontractor Exception is not as developed in Alabama as it is nationally. However, one court addressed it in *Assurance Company of America v. Admiral Insurance Co.*, 2011 WL 1897589 (S.D. Ala. May 18, 2011), involving CGL coverage for property damage arising out of the defective construction of a home. The court recognized the Subcontractor Exception to the Your Work Exclusion, but determined that there was a question of fact as to whether the defective workmanship was performed

solely by the insured or by a subcontractor. *Id.* at 7. Of course, here, the district court below, consistent with the growing trend in Alabama and nationally, summarily held that under the plain language of the Subcontractor Exception Kiker was entitled to coverage because the defective workmanship on the Parish roofs was performed by a subcontractor. Doc. 110, p. 14. That portion of its judgment is not on appeal.

The application of the Contractual Liability Exclusion to property damage to the work arising out of the insured's own breach of a construction contract is troublesome and contrary to the Subcontractor Exception and the structure and application of the CGL policy in the construction industry. In addition, it robs a contractor of coverage for property damage to its own work, as was upheld by the Alabama Supreme Court in *Owners Insurance v. Jim Carr*, 2014 WL 1270629 at 5-6.

D. The Contractual Liability Exclusion Has "Peacefully Co-Existed" with the Business Risk Exclusions for the Last Fifty Years

Throughout the nearly fifty years of revisions to the CGL policy, the Contractual Liability Exclusion itself has undergone some revisions, but has not changed significantly. The 1966 and 1973 forms contained identical exclusions that, in relevant part, stated that the insurance did not apply to "liability assumed by the insured under any contract or agreement except an incidental contract." The

term "incidental contract," usually broadened by endorsement, included "any contract or agreement relating to the conduct of the named insured's business."

As is the case with the business risk exclusions discussed above, in 1986, contractual liability coverage previously added by endorsement was incorporated into the CGL form itself under the present day exclusion found in the Pennsylvania National policy, stating that the insurance does not apply to:

> **b. Contractual Liability**
>
> "Bodily Injury" or "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:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract" ... [Emphasis added.]

As can be seen, all of the CGL revisions, including the 1966, 1973 and 1986 CGL forms, exclude coverage only for liability assumed by the named insured, or liability for damages by reason of the "assumption of liability" in a contract or agreement. Thus, the scope of the exclusion is essentially the same, being limited to liability assumed by the insured under a contract or agreement.

Against the backdrop of the development of the business risk exclusions set out above, contractual liability coverage and the business risk exclusions have "co-existed" in the CGL policy for years, without the Contractual Liability Exclusion

being read to trump the coverage preserved for simple breaches of contract involving subcontractor work that do not involve assumption of additional liability. As such, Pennsylvania National's position warrants unqualified rejection by this Court.

Pennsylvania National's argument results in an incomplete analysis of the CGL policy. Such an incomplete analysis is impermissible, in that an insurance contract, like any other contract, must be interpreted as a whole so as to give meaning to all of its provisions. *American Resources Ins. Co. v. H & H Stephens Const., Inc.*, 939 So.2d 868, 873 (Ala. 2006). Amici Curiae do nothing more than ask this Court to consider all of the provisions of the CGL policy issued to contractors such as Kiker in light of how they have been marketed and interpreted for almost fifty years. When all of those provisions are considered, the Contractual Liability Exclusion should be harmonized with the other business risk exclusions that preserve coverage for defective work performed by a construction insured and its subcontractors. The disharmony and dissection of the policy caused by the argument of Pennsylvania National can be eliminated by reversal of the district court.

III. IMPROVIDENT APPLICATION OF THE CONTRACTUAL LIABILITY EXCLUSION TO LIABILITY FOR BREACH OF CONTRACT RADICALLY CHANGES THE GAME FOR ALABAMA INSUREDS

An unwarranted over-extension of the Contractual Liability Exclusion to an insured contractor's liability for property damage arising out of its own breach of contract is truly a game changer for the Alabama construction industry and has potential ramifications well beyond that industry. Construction is a complex industry and contractors must assess and plan for future risks and exposures arising out of a complex construction project. If Pennsylvania National's position is accepted on appeal, Alabama insureds must then apparently try to predict how a court will interpret a standard insurance policy designed to protect the contractor and smooth out the hazards that may be encountered during the course of constructing a project, let alone years after the project is completed.

A. Applying the Contractual Liability Exclusion Will Deprive Alabama Insureds of Completed Operations Coverage

If Pennsylvania National's argument is accepted, it also will likely deprive the Alabama construction industry of one of the most valued components of the CGL policy – completed operations coverage. Completed operations coverage is critical since it protects a construction insured from the long tail post-completion liabilities that accompany most construction projects. The need for effective completed operations coverage is demonstrated by the statute of repose under Ala.

Code § 6–5–220 through § 6–5–228. That statute subjects a contractor to liability for up to seven years after substantial completion of the project, a period that can be extended up to nine years based on date of discovery. Alabama contractors, as well as contractors around the United States, have learned that a statute of repose is not necessarily a limitation, but instead an invitation to other parties to file suit against the contractor up to the end of that period and years after completion of the project.

As previously indicated, one of the driving forces behind the extension of coverage available under the BFPDE and the 1986 CGL policy form was to make it more acceptable to contractors, i.e., to make the CGL insurance product more marketable and to sell more policies. The Florida Supreme Court recently acknowledged this strategy of the insurance industry:

> The insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871, 879 (Fla. 2008) (quoting 2 Jeffrey W. Stempel, STEMPEL ON INSURANCE CONTRACTS §14.13[D] at 14-224.8 (3d ed. Supp. 2007)).

Emphasis by insurers on the heightened coverage provided to construction contractors through the BFPDE and the 1986 policy revision has contributed to the construction industry's legitimate expectation of that coverage, and more significantly, reliance upon its existence in managing the risks associated with its business. Significant coverage was provided to construction insureds, particularly those who performed their work through subcontractors as to losses that occurred subsequent to completion, and in many instances well after completion.

B. Applying the Contractual Liability Exclusion Will Deprive Alabama Insureds of Predictability and the Ability to Transfer and Evaluate Risk

The application of the Contractual Liability Exclusion to the type of breach of contract involved in this case amounts to a novel interpretation of the policy rendering it virtually impossible for any Alabama insured, let alone its insurance agent or broker, to predict and then plan accordingly. Setting aside the fact that such an interpretation is contrary to the language of the policy itself and the vast majority of the precedent interpreting it, it is simply ill-advised.

Traditional management of the risks of complex construction projects has always included insuring against fortuitous or accidental losses. For that reason, predictability as to the existence and scope of insurance coverage for the construction industry is critical, as is well-noted in the commentary:

> There is an alarming lack of predictability in the construction industry today about whether contractors' CGL policies will cover property

> damage arising out of defective construction. It is particularly unpredictable for those contractors performing work in multiple states. National contractors, especially, cannot foretell the scope of the coverage in their CGL policies. This problem isn't with the policies they procure; virtually every contractor's CGL policy form is identical and mirrors the ISO's standard General Liability Form, the CG 20 10 [sic]. The problem is the identical policy forms are being construed in radically different ways by the courts. As a result, contractors are covered in some states, but bare in others.

James Duffy O'Connor, *What Every Court Should Know About Insurance Coverage for Defective Construction*, JOURNAL OF THE AMERICAN COLLEGE OF CONSTR. LAWYERS, p. 1 (Winter 2011)("O'Connor").

O'Connor addresses lack of predictability and uniformity of results among different states. For example, a claim of the type before this Court, i.e., property damage arising out of defective construction performed by an insured contractor's subcontractor, may not be covered in Alabama if Pennsylvania National's argument is adopted, but in nearby states, the claim would be covered, as set out in footnote 5 above. On the other hand, in the event this Court accepts Pennsylvania National's over-extension of the Contractual Liability Exclusion to Kiker's breach of contract, such an opinion likely would be relied upon by other courts and insurers outside of Alabama, only compounding the lack of predictability of coverage for insured contractors.

In addition, the ISO CGL policy form is used throughout the entire United States and Alabama to insure all sorts of businesses from nursing homes to dry

cleaners, including smaller contractors and subcontractors, as well as the largest contractors in the world. Thus, the lack of predictability created by the district court's opinion will likely go well beyond the construction industry and may result in a significant reduction of coverage for any insured that does business via contract. Those businesses will now find themselves without coverage for their completed operations, coverage which they legitimately believed they had under their CGL policies. For this reason, this Court should consider whether the loss of fifty years of predictability in insurance coverage is warranted by the over-extension advocated by Pennsylvania National.

CONCLUSION

Only a few months ago, the Alabama Supreme Court issued its opinion in *Owners Ins. v. Jim Carr*, a case that confirmed coverage for construction defects under Alabama law. The district court's application of the Contractual Liability Exclusion supports a back door circumvention of that coverage through an unwarranted over-extension of the Contractual Liability Exclusion. Taken to its logical end, that over-extension will result in the elimination of the coverage preserved in *Jim Carr*. Therefore, Amici Curiae request the court reverse the district court and render judgment in favor of St. Catherine's, or alternatively, to certify the question of whether the Contractual Liability Exclusion truly applies to breach of a warranty undertaken by an insured in its construction contract.

Respectfully submitted this 1st day of July, 2014.

COKINOS, BOSIEN & YOUNG

By:____________________________

Patrick J. Wielinski

105 Decker Ct., Suite 800
Arlington, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,673 words.

Patrick J. Wielinski

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2014, that the Brief of Amici Curiae was served on the following parties, by placing a copy of the United States Mail, postage prepaid, and properly addressed as follows:

Steve R. Burford, Esq.
Lindsay Paige Hembree, Esq.
Simpson McMahan Blick & Burford, PLLC
2700 Hwy 280, Suite 203 W
Birmingham, AL 35223-2468

Clay Thomas Rossi, Esq.
Peter Scott Mackey, Esq.
Burns Cunningham & Mackey, PC
P.O. Box 1583
Mobile, AL 36633-1583

____
Patrick J. Wielinski