Case No. 11-40512

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EWING CONSTRUCTION CO., INC.,

Plaintiff – Appellant

v.

AMERISURE INSURANCE COMPANY,

Defendant – Appellee

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division

BRIEF OF AMICI CURIAE TEXAS BUILDING BRANCH – ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TEXO – THE CONSTRUCTION ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS – HOUSTON CHAPTER, AMERICAN SUBCONTRACTORS ASSOCIATION, INC., AND ASA OF TEXAS, INC. IN SUPPORT OF APPELLANT EWING CONSTRUCTION CO., INC.

Patrick J. Wielinski
Rene R. Pinson
COKINOS, BOSIEN & YOUNG
800 Crestview Tower
105 Decker Court
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-Appellee:**
Ewing Construction Co., Inc.	Lee H. Shidlofsky Douglas P. Skelly The Shidlofsky Law Firm PLLC

Defendant – Appellee:	**Appellate Counsel for Defendant-Appellee:**
Amerisure Insurance Company	R. Brent Cooper Diana L. Faust Cooper & Scully, P.C.
	Trial Counsel for Defendant-Appellee:
	David Pruessner Jes Alexander Pruessner & Alexander
Amici Curiae:	**Counsel for Amici Curiae:**
Texas Building Branch – Associated General Contractors of America	Patrick J. Wielinski Rene R. Pinson Cokinos, Bosien & Young
American Subcontractors Association, Inc.	
ASA of Texas, Inc.	
TEXO – The Construction Association	
Associated General Contractors – Houston Chapter	

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

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BRIEF OF AMICI CURIAE

IDENTITY AND INTEREST OF AMICI CURIAE

This Amici Curiae Brief speaks for the national, state and local chapters of two of the largest construction trade associations in the United States. The sponsorship of these organizations underscores the importance of the insurance coverage issues addressed by the Court in its opinion, both for Texas and national construction businesses alike. This Amici Curiae Brief is tendered in support of Appellant, Ewing Construction Co., Inc. ("Ewing").

Amicus Curiae Texas Building Branch – Associated General Contractors of America ("Texas Building Branch") is a statewide Texas branch of the Associated General Contractors of America ("AGCA"). AGCA is a national non-profit association comprised of more than 33,000 companies, including 7,500 general contractors, 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. Amicus Curiae Associated General Contractors – Houston Chapter ("Houston – AGC") is the local chapter serving over 700 Houston-area members of AGCA.

TEXO – The Construction Association ("TEXO") is the largest commercial contractors association in Texas and is affiliated with the national organization Associated Builders and Contractors, Inc. (ABC) and AGCA. With over 1,900 members in north and east Texas, TEXO provides innovative programs, quality services and strategic alliances focusing on governmental representation, safety, health and environmental issues, craft workforce development, professional training and community networking events.

The American Subcontractors Association ("ASA") is a national organization of construction trade contractors. Founded in 1966, ASA leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as stewards for the community. ASA dedicates itself to improving the business environment in the construction industry, with an emphasis on ethical and equitable business practices, quality construction, membership diversity, integrity, and a safe and healthy work environment. ASA has 5,000 members nationwide, including 500 members from five Texas chapters in Houston, North Texas, San Antonio, the Rio Grande Valley, and statewide. These five chapters make up ASA of Texas, Inc., another Amicus Curiae sponsoring this brief.

AGC and ASA members conduct significant amounts of business in Texas and provide employment for many Texas citizens. Those members 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 sponsored amicus curiae briefs to this Court on many occasions, including cases affecting the insurability of and coverage for risks encountered on construction projects, such as *Gilbane Building Company v. Admiral Insurance Company*, No. 10-20817, currently pending before this Court.

Whether AGC 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 their members. Consequently, although Amici Curiae are not parties to this appeal, this brief has been submitted through the undersigned independent attorneys, who were paid a fee by Amici Curiae to prepare it.

STATEMENT OF THE ISSUES

1. Whether the application of Exclusion 2(b) to a claim involving a breach of contractual performance is contrary to the plain language of and intent behind that exclusion?

2. Whether a broad interpretation of Exclusion 2(b) to a claim involving the breach of a duty of contractual performance renders important 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 Exclusion 2(b)?

INTRODUCTION

The proposition that an insurer should not be obligated to pay claims that are outside the coverage of the policy is not astounding. However, many insurers are extremely adept at finding reasons, some would say excuses, to deny what otherwise appear to be claims clearly within the coverage of the policy. This is particularly true as to claims involving alleged defective workmanship by insured contractors under their commercial general liability ("CGL") policies. Often, those 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.

That is precisely the scenario before this Court on appeal. Ewing is faced with a lawsuit alleging defective construction of a tennis facility for Tuloso-Midway Independent School District ("TMISD") in Corpus Christi. In all too typical fashion, Appellee Amerisure Insurance Company ("Amerisure"), its CGL insurer, refused to defend, citing a litany of policy provisions as purported defenses, leaving Ewing no choice but to file this action to enforce the terms of the policy it purchased to protect itself.

The district court, in ruling in favor of Amerisure, relied on the recent case of *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), to determine that Exclusion 2(b), the "contractual liability

exclusion," denied coverage to Ewing. That determination presents two problems for Texas insured contractors. The first is the novel and minority approach taken by the court in *Gilbert*, an approach that contravened prior Texas case law and the underwriting intent of the insurance industry itself in promulgating that exclusion. Despite the infirmities of *Gilbert* in its apparent disregard of the plain meaning of the policy before it, the district court compounded the problem for Texas contractors by extending *Gilbert* to a scenario clearly not involving the type of assumption of liability addressed in *Gilbert* and to which the exclusion is directed, as well as applying it to deny even a defense to Ewing.

The facts presented to this Court represent an all too frequently occurring scenario for Texas insureds, particularly those engaged in construction. Contractors in Texas and nationwide face these issues, which accounts for the participation of national construction organizations such as AGC and ASA as amici curiae on this brief. [1]

Members of these organizations 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

[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.

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 them from property damage arising out of inadvertent and alleged construction defects.

As such, every construction insured seeks, and deserves, consistency in the manner in which its liability insurance policies apply in the event of a claim. While the district court properly upheld the existence of an "occurrence" and "property damage" under *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007), as to the costs of repairing construction defects that caused property damage that was neither expected nor intended by the insured, the result below ignores the fact that the alleged defective work was performed by subcontractors to Ewing and the property damage occurred after completion of the project, thus triggering the subcontractor exception to Exclusion l, the Your Work Exclusion, in the Amerisure policy. As such, the district court not only extended *Gilbert* beyond its carefully circumscribed facts, but in doing so, disregarded the recognition by the Texas Supreme Court in *Lamar Homes* of the purposeful inclusion by the insurance industry of coverage in the CGL policy for property damage arising out of subcontractor work.

In contrast, the district court accepted Amerisure's overly-simplistic argument that any breach of contract involves the assumption of liability within the meaning of Exclusion 2(b) in order to exclude coverage for property damage to a third party arising out of the insured's breach of its own contract. The scope of Exclusion 2(b) is not and cannot be so sweeping in light of the existing Texas and national case law. As discussed below, such a result is not only out of step with *Lamar Homes*, but also with overwhelming prior Texas case law that limits the scope of Exclusion 2(b) to contractually assumed liabilities of third parties; that is, liabilities undertaken by an insured contractor by virtue of an indemnity or hold harmless agreement.

This appeal presents a paradigm of the over-extension of *Gilbert* by overly zealous insurers that raise it as an excuse for denying claims that may otherwise be covered. The denial of coverage for direct contractual obligations under *Gilbert* has now become a roadblock to coverage for which Texas contractors have paid substantial premiums.

Due to the radical departure of *Gilbert v. Underwriters*, the opinion relied upon by the district court below, Amici Curiae respectfully request that the Court certify the questions presented by Ewing in its Motion to Certify, and as further argued in its brief on the merits. Based on the numerous questions that surround *Gilbert's* application to factual scenarios as demonstrated by this appeal,

certification to the Supreme Court of Texas can provide it the opportunity to either reconsider or to clarify the limits of its opinion. Alternatively, Amici Curiae request that if this Court declines to certify the questions, that it nevertheless recognizes the limited nature of the type of "assumption of liability" and reverse the district court's judgment.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT'S RULING IS CONTRARY TO THE PLAIN LANGUAGE OF AND INTENT BEHIND EXCLUSION 2(B)

The district court's application of Exclusion 2(b) to deny a defense and indemnity to Ewing for its alleged failure to live up to its own contractual obligations to TMISD defies the intent as well as the plain language of the provision. The contractual liability exclusion simply does not apply that broadly, being expressly limited to assumptions of the liability of third parties.

In the district court's defense, it relied on the recent opinion of the Texas Supreme Court in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), as binding precedent for an overly expansive interpretation of Exclusion 2(b). As such, and as argued extensively below, any cogent analysis of the district court opinion requires consideration of the *Gilbert* decision itself. For that reason, although there are certainly valid bases

upon which to distinguish *Gilbert* from this appeal,[2] a direct analysis of the broad departure of the Texas Supreme Court from the intent of the contractual liability exclusion is warranted, particularly as to this Court's determination on certification.

Texas courts have always adhered to tenets of contract construction when interpreting insurance policies in order to ascertain the parties' intent. In doing so, the court examines the entire agreement, harmonizing and giving effect to all provisions and applying the ordinary and generally accepted meaning of the words. *Gilbert*, 327 S.W.3d at 126. One would expect that the application of these rules to an already overly-complex CGL policy would bring welcome clarity. And it was perhaps a somewhat overzealous search for clarity that led the court to extend the plain and ordinary meaning doctrine to extraordinary lengths, interpret the contractual liability exclusion essentially in a vacuum, and set aside years of precedent and commentary.

The *Gilbert* court's disregard of precedent and commentary runs counter to the pronouncement by the Texas Supreme Court that precedent from other jurisdictions is to be considered in interpreting insurance policy language: "We have repeatedly stressed the importance of uniformity 'when identical insurance provisions will necessarily be interpreted in various jurisdictions.'" *Zurich*

[2] The over-extension by the district court of the reasoning of *Gilbert* to Ewing's duties under its contract with TMISD is addressed below.

American Ins. Co. v. Nokia, Inc., 268 S.W.3d 487, 497 (Tex. 2008), citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 522 (Tex. 1995).

Moreover, the disregard of decades of prior insurance and legal commentary and court interpretations in *Gilbert* is even more problematic because that case involved a standard form CGL policy, versions of which have been in use since 1973, with revisions incorporated in 1986. *Gilbert*, 327 S.W.3d at 131. As the court noted, the move from the 1973 to the present-day 1986 policy form that is before this Court was to incorporate blanket contractual liability into the policy form itself, eliminating the need for an endorsement to accomplish that broadening of coverage so as to include liability assumed under hold harmless or indemnity agreements within the scope of the policy. This was accomplished by substituting the broader definition of "insured contract" for the previously used definition of "incidental contract." *Id.* at 131-32. None of these relatively minor revisions are necessarily before this Court since the definition of insured contract is not germane to the determination of whether the exclusion applies in the first instance. It does not apply because a breach of performance of a contractual obligation does not amount to an "assumption of liability" for purposes of denying coverage under Exclusion 2(b). Thus there should be no need to resort to exceptions to the exclusion.

A. The *Gilbert* Opinion is Out of Step with the Majority View

Despite its recognition that the vast majority of the courts and legal and insurance commentators limit the scope of the contractual liability exclusion to assumptions of liability, primarily through indemnity or hold harmless agreements, the court in *Gilbert* nevertheless chose not to follow that mountain of authority. 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). While the Texas Supreme Court relied upon this treatise for other propositions in *Gilbert*, it inexplicably did not recognize this explanation of the difference between a duty of performance that gives rise to liability versus an assumed liability of another under an indemnity clause. The difference between assumption of liability pursuant to an indemnity clause and a contractual duty of performance was at the heart of *Gilbert* as well as this appeal. It is also at the heart

of CGL coverage for the construction industry, in which virtually every project is constructed pursuant to a contract.

Other commentary is not lacking. One commentator, as to the rather confusing labeling of Exclusion 2(b) as the "contractual liability" exclusion, notes as follows:

> Strictly speaking, the exclusion would 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] Other commentators also note 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 (N.D. 2006)]

HAGGLUND, WEIMER, WHITMAN & HILLESTAD, §8.02 (July 2010).

[3] Available on www.irmionline.com.

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. Professor Windt states as follows:

> The provision in standard liability policies stating that there is coverage for certain liability assumed in a contract does not lead to a contrary result.

3 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES §11:7 (5th ed. 2007). Footnote 3 accompanying this text sets out no less than 29 cases from 19 different states for the proposition that contractual liability provisions apply to assumption of liability in hold harmless or indemnity agreements.

The *Gilbert* opinion, being relatively new, has not been included in many treatises as of yet. However, in those that have included it, it has been relegated to the tail end of lengthy footnotes (à la WINDT above). Those footnotes detail the case law supporting the majority view that assumption of liability as to contractual liability insurance applies to agreements to indemnify or hold harmless a third party. *Gilbert* is relegated to the tail end of those footnotes with a "but see" mention as a contrarian view. *See* OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES, §7.05 (December 2010 Supp.); JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS, *Contractual Liability* (November 2010 Supp.). The virtual unanimity of industry and legal commentators has been adopted and followed by the vast majority of the courts.

B. Foreign Case Law and Texas Case Law Prior to *Gilbert* Have Followed the Intent Behind the Contractual Liability Exclusion

Texas case law prior to *Gilbert* recognized the contractual liability exclusion to be limited to hold harmless and indemnity agreements in which the insured assumes the liability of a third party. In *Federated Mutual Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. (Tex.) 1999), this Court, in a straightforward analysis, concluded that the contractual liability exclusion did not apply where the insured is being sued for its own conduct, rather than as the contractual indemnitor of a third party's conduct. *Id.* at 726. This Court noted that since the contractual liability exclusion was inapplicable for that reason, there was no need to reach the issue of whether the contract constituted an "insured contract" as defined in the policy. *Id.* Likewise, the *Gilbert* court could have eliminated many complexities from its opinion by recognizing that Gilbert's own liability to the third party property owners was not the type of indemnity clause to which the contractual liability exclusion applied, thus eliminating the issues as to the "insured contract" and the "liability in absence of contract" exceptions, along with the remainder of the other issues raised by the parties. Obviously, the same applies here, since the allegations against Ewing did not involve indemnity obligations to a third party, but rather its own liability to TMISD for non-performance.

In *Federated Mutual*, this Court relied upon *Olympic, Inc. v. Providence Washington Ins. Co.*, 648 P.2d 1008 (Alaska 1982), a case distinguished and

dismissed in *Gilbert* because it interpreted an earlier version of the contractual liability exclusion rather than the 1986 version before the court, finding that the *Olympic* court therefore was not faced with a similar "circular" reading of the exclusion coupled with the insured contract exception. That distinction is without substance, however, since subsequent courts, including this Court in *Federated Mutual*, relied upon *Olympic* 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. Moreover, the Alaska Supreme Court's further distinction of breach of contract is worth quoting at length:

> 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. 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. (citation omitted). Thus, as was the case below, where Ewing'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 contractual liability exclusion.

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." For that reason, it is often cited together with *Federated Mutual* for the proposition that the contractual liability exclusion does not extend to breach of contract. Other Texas cases upholding the limitation of liability assumed by contract to indemnity and hold harmless clauses include *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex.App.—Houston [14th Dist.] 2006, pet. denied); *Century Sur. Co. v. Hardscape Constr. Specialties Inc.*, 578 F.3d 262, 266 (5th Cir. 2009); *Insurance Company of North America v. McCarthy Brothers Co.*, 123 F.Supp.2d 373 (S.D. Tex. 2000); *E&R Rubalcava Construction, Inc. v. Burlington Ins. Co.*, 147 F.Supp.2d 523 (N.D. Tex. 2000); *Home Owners Management Enterprises, Inc. v. Mid-Continent Casualty Co.*, 294 Fed. Appx. 814 (5th Cir. (Tex.) 2008).

The contractual liability provisions in the standard CGL policy forms have been in use since 1973, nearly forty years, which has afforded the courts of numerous jurisdictions ample opportunity to interpret the scope of the contractual liability exclusion, and as graphically illustrated below, the term "vast majority" is inadequate to describe the number of jurisdictions that have limited the scope of "assumption of liability" to the assumption of the liability of a third party by means of an indemnity or hold harmless agreement. Contrary case law is comparatively scant. The table below sets out a survey of jurisdictions that have addressed the exclusion or the purpose of contractual liability coverage. Based upon this survey,

courts in most jurisdictions, as a rule, limit the scope of the contractual liability exclusion and contractual liability coverage and do not apply either to breaches of performance of contractual duties.

Assumption of liability limited to indemnity and hold harmless clauses	***Assumption of liability includes breach of contract***
American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 79-82 (Wis. 2004).	*TGA Dev., Inc. v. Northern Ins. Co. of N.Y.*, 62 F.3d 1089, 1091-92 (8th Cir. (Minn.) 1995).
Desert Mountain Properties Ltd. P'ship v. Liberty Mut. Fire Ins., 236 P.3d 421 (Ariz. Ct. App. 2010), *aff'd*, 250 P.3d 196, 196 (Ariz. 2011).	*Nationwide Mut. Ins. Co. v. CPB Int'l Inc.*, 562 F.3d 591, 599 (3rd Cir. (Pa.) 2009).
Olympic, Inc. v. Providence Wash. Ins. Co. of Alaska, 648 P.2d 1008, 1010-11 (Alaska 1982).	*Younglove Construction, LLC v. PSD Development, LLC*, 724 F.Supp.2d 847 (N.D. Ohio 2010).
Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co., 949 P.2d 337, 341-42 (Utah 1997).	*Monticello Ins. Co. v. Dismas Charities, Inc.*, 1998 WL 1969611 (W.D. Ky. April 3, 1998) (unpublished opinion).
Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of La., 912 So.2d 400, 406-08 (La. Ct. App. 2005).	*Union Ins. Co. v. Williams Contracting Inc.*, 2006 WL 1582405, at *4-7 (W.D. Va. June 2, 2006) (unpublished opinion).
Office Structures, Inc. v. Home Ins. Co., 503 A.2d 193 (Del. 1985).	*Assurance Co. of America v. Admiral Ins. Co.*, 2011 WL 1897589, at *7-8 (S.D. Ala. May 18, 2011).
Action Auto Stores, Inc. v. United Capitol Ins. Co., 845 F. Supp. 428, 442 (W.D. Mich. 1993).	
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).	
U.S. Underwriters Ins. Co. v. Falcon Constr.Corp., 2003 WL 22019429, at *6 (S.D.N.Y. Aug. 27, 2003) (unpublished opinion).	

Cincinnati Ins. Co. v. Stonebridge Financial Corp., 2011 WL 2549975, at *5 (E.D. Penn. June 23, 2011).	
Provident Bank of Maryland v. Travelers Prop. Cas. Corp., 236 F.3d 138, 147 (4th Cir. (Md.) 2000).	
Dreis & Krump Mfg. Co. v. Phoenix Ins. Co., 548 F.2d 681, 684 (7th Cir. (Ill.) 1977).	
Haugan v. Home Indem. Co., 197 N.W.2d 18, 23 (S.D. 1972).	
Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co., 484 N.W.2d 192 (Iowa 1992).	
Barletta Heavy Div., Inc. v. Layne Christensen Co., 2011 WL 1399692, at *10-11 (D. Mass. April 13, 2011).	
Golf Cars of Arkansas, Inc. v. Union Standard Ins. Co., 2003 WL 21229106, at *4-5 (Ark. Ct. App. May 28, 2003) (unpublished opinion).	
Nationwide Mut. Ins. Co. v. Lydall Woods Colonial Village, 2003 WL 21718376, at *7 (Conn. Super. Ct. July 14, 2003) (unpublished opinion).	
King County v. Travelers Ins. Co., 1996 WL 257135, at *4 (W.D. Wash. Feb. 20, 1996) (unpublished opinion).	
Arnett v. Mid-Continent Cas. Co., 2010 WL 2821981, at *8-9 (M.D. Fla. July 16, 2010) (unpublished opinion).	
Acceptance Ins. Co. v. Ross Contractors, Inc., Nos. A04-2102, A04-2226, 2005 WL 1870688, at *3 (Minn. Ct. App. Aug 9, 2005) (unpublished opinion).	
Townsend Ford, Inc. v. Auto Owners Ins. Co., 656 So.2d 360, 364 (Ala. 1995).	

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

Unfortunately, the *Gilbert* court chose to disregard not only prior Texas precedent, but also the mountain of precedent from other jurisdictions and legal and insurance industry commentators, in favor of a rather random interpretation of the "plain and ordinary meaning" of a standard insurance policy provision that had previously been determined and settled for decades. This disregard of precedent and the ensuing about-face in interpretation remains 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.

The *Gilbert* court found some support for its expansion of the contractual liability exclusion in cases from a minority of jurisdictions. Those cases include *Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 2007 WL 4198173 (M.D. Pa. Nov. 26, 2007), *CIM Ins. Corp. v. Mid-pac Auto Ctr., Inc.*, 108 F.Supp.2d 1092 (D. Haw. 2000), and *Silk v. Flat Top Constr., Inc.*, 453 S.E.2d 356 (W.Va. 1994). These cases are from jurisdictions where the governing law states that property damage arising out of any breach of contract is not an occurrence in the first place and are squarely at odds with Texas law as set out in *Lamar Homes*. Thus, the jurisprudence on contractual liability appears to be more of an afterthought,

providing further evidence of the degree that *Gilbert* is out of step with Texas law itself.

Unfortunately, when considered in light of prior opinions such as *Lamar Homes v. Mid-Continent, Gilbert* represents a significant deviation and is nothing short of a step backward from predictability in the law necessary for conducting construction business in Texas. It was the Texas Supreme Court in *Gilbert* that left the Texas construction industry with a somewhat shallow analysis in its conclusion that the exclusion simply "means what it says" and that the court disagreed "by and large" with other authorities in the face of the plain language of the exclusion. *Gilbert,* 327 S.W.3d at 131. The case on appeal illustrates the dire circumstances that have been created by *Gilbert* for Texas contractors seeking coverage for inadvertent construction defects where defense and coverage are being denied based upon an exclusion that was never intended to apply. Unfortunately these circumstances appear to have been created by legal precedent – or at least overly expansive interpretations of legal precedent – and not the terms of the insurance policies that contractors purchased to protect themselves.

II. THE BROAD INTERPRETATION OF THE CONTRACTUAL LIABILITY EXCLUSION RENDERS IMPORTANT PROVISIONS IN THE CGL POLICY USELESS FOR CONTRACTORS

The Texas Supreme Court's move to an overly-broad interpretation of the contractual liability exclusion that is not limited to indemnity and hold harmless

agreements has raised the issue of whether breaches of direct contractual duties are also excluded. This speculation heralds a return to a distinction between tort and contractual liability as to insurance coverage for construction contractors under Texas law. Only three years prior to *Gilbert*, the Texas Supreme Court had decried such a distinction in the landmark opinion of *Lamar Homes v. Mid-Continent Casualty*. In that same case, the Texas Supreme Court recognized the economic loss rule as a remedies doctrine, precluding recovery in tort for economic losses resulting from the failure of a party to perform under a contract. *Lamar Homes*, 242 S.W.3d at 12-13. As such, the court determined that the economic loss rule was not determinative of the existence of whether property damage arising from a construction defect is within the insuring agreement of the CGL policy. Nevertheless, under *Gilbert*, if CGL coverage for property damage arising out of breaches of contract are routinely excluded by Exclusion 2(b), much of the coverage upheld in *Lamar Homes* for unexpected and unintended physical injury to tangible property, i.e., "occurrences" of "property damage" as defined in the CGL policy, will simply be lost. In other words, since construction work is performed pursuant to contracts, and property damage arising out of that work usually involves a breach of the construction contract, the out-of-context application of Exclusion 2(b) is devastating to the insured contractor. Again, the decision below is an example of such a result.

The district court's opinion and judgment also illustrate another serious infirmity in the over-extension of the contractual liability exclusion. One of the linchpins of the *Lamar Homes* opinion was the subcontractor exception to the Your Work Exclusion. That exclusion states that the insurance does not apply to property damage to the named insured's work arising out of it or any part of it and included in the products-completed operations hazard, unless the damage to the work or the work out of which the damage arises was performed on the named insured's behalf by a subcontractor. As argued extensively below and in Ewing's principal brief, the work of which TMISD complained was performed on Ewing's behalf by its subcontractor and the property damage to the tennis facility occurred subsequent to completion. As such, it is the type of claim that the Texas Supreme Court in *Lamar Homes* held to be squarely within the subcontractor exception, and the cornerstone of coverage for an insured contractor such as Ewing.

The reasoning of *Lamar Homes* has been regarded by numerous courts in many states to be a well-reasoned interpretation of CGL coverage for contractors where the property damage arises out of the work of a subcontractor. Inexplicably, the Texas Supreme Court strayed from that interpretation in *Gilbert*, a case that did not involve the subcontractor exception since the property damage occurred prior to completion of the DART project in that case.

It should be noted that even in factual scenarios involving ongoing operations (as in *Gilbert*), the application of Exclusion 2(b) to the insured's own breach of performance of a construction contract is also problematic and may rob a contractor of coverage that has otherwise been upheld by the courts, including this Court. In *Mid-Continent Casualty Co. v. JHP Dev., Inc.*, 557 F.3d 207 (5th Cir. 2009) and *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365 (5th Cir. 2008), this Court limited the scope of Exclusions j(5) and (6) in the standard CGL policy to only the "particular part" of the work upon which the insured was performing operations or that had to be repaired or replaced because the insured performed its work defectively upon it. In doing so, this Court preserved coverage for the property damage to other elements of the insured's work.

It strains credulity that Exclusion 2(b) can be so broadly applied to exclude coverage for property damage arising out of breach of performance duties under a contract so as to negate coverage available to a contractor in the policy, as interpreted by the courts of the State of Texas.

III. AN INSURED'S CONTRACTUAL DUTY TO REPAIR IS NOT AN "ASSUMPTION OF LIABILITY" WITHIN THE MEANING OF THE CONTRACTUAL LIABILITY EXCLUSION

The district court determined that by entering into the contract, Ewing was liable if the work it agreed to perform under that contract was defective. *Ewing*

Constr. v. Amerisure at *7. While that determination is not particularly astounding, it expansively applied *Gilbert* to deny coverage for that liability, stating that *Gilbert* "stands for the position that the contractual liability exclusion applies when an insured has entered into a contract and, by doing so, has assumed liability for its own performance under that contract." *Id.* at *6. The resolution of the coverage issues below illustrates the danger of over-extension of *Gilbert*. It also illustrates that this Court, in the event it declines to certify the questions in this appeal to the Texas Supreme Court, has more than sufficient grounds to reverse the district court and limit the scope of *Gilbert v. Underwriters*.

In contrast to the district court's sweeping interpretation, the Texas Supreme Court in *Gilbert* held that only under the unusual circumstances before it was there an assumption of liability within the meaning of the contractual liability exclusion. *Gilbert,* 327 S.W.3d at 135. The court stated that under "general law," Gilbert could not have been liable to DART, due to DART's governmental immunity, but Gilbert expressly assumed that liability by contract by agreeing to repair or pay for damage to the neighboring property. *Id.* at 127. Here, there is no such assumption of liability of neighboring property owners, or any other third parties by Ewing. It was sued for its own alleged non-performance of its contract through the defective construction of the tennis facility.

Virtually all construction contracts impose a general duty to perform and protect the work 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. For example, 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, as recognized by leading authorities on construction law in Texas. *See* Joe F. Canterbury, Jr. and Robert J. Shapiro, 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).

AIA Document A201 includes a paragraph in which the contractor explicitly agrees to the duty that mirrors its "general law" obligation to remedy damage to the work performed pursuant to the contract. That paragraph states as follows:

> 10.2 SAFETY OF PERSONS AND PROPERTY
>
> 10.2.1 ***The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:***
>
> .1 employees on the Work and other persons who may be affected thereby;
>
> .2 ***the Work and materials and equipment to be incorporated therein,*** whether in storage on or off the site, under care,

> custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
>
> .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

AIA Document A201, General Conditions of the Contract for Construction, 15th Ed., American Institute of Architects (1997) (emphasis added).

Commentators on the AIA documents echo that the purpose of this provision is to explicitly impose a duty of reasonable care in the contract:

> This provision places the risk of loss on the contractor for the Work and all of the materials that will ultimately be incorporated into the work, whether or not such materials are actually installed at the time of the loss. … This is, however, apparently not absolute. The contractor must take 'reasonable' precautions to protect the work. What this means must be determined on a case-by-case basis.
>
> * * *
>
> The contractor is responsible for reasonable safety precautions on the job site in order to prevent damage to non-Work items at the site. This would include the listed items, plus other materials or items belonging to the owner or to other contractors, or to property owned by neighbors or other parties.

Werner Sabo, LEGAL GUIDE TO AIA DOCUMENTS, FIFTH EDITION §4.59 (2008).

These types of performance duties that mirror "general law" are part and parcel of all construction contracts due to the confluence of tort and contract, particularly with regard to property damage to the work (the subject matter of the contract) due to defective work and breach of that contract. The district court's

premature application of the economic loss doctrine eliminated the tort causes of action against Ewing relating to these types of contractual duties, leaving Ewing with no insurance coverage for legitimate property damage that was unexpected and unintended. If that application stands, contractors that previously would have had coverage, as reaffirmed by the Texas Supreme Court in *Lamar Homes*, will be left without a defense or coverage in many circumstances, particularly when governmental immunity is invoked or the economic loss rule is prematurely applied at the defense stage of the proceedings, as occurred below. This anomalous result could occur if a statute of limitations defense eliminates otherwise valid tort claims.

As stated, the contract before the *Gilbert* court was novel in that it provided for a performance duty not only to DART, the owner, but also to neighboring landowners. In the event the contractor failed to perform repairs, the contract obligated it to reimburse the owner if the owner performed the repair work. The interjection of third parties to whom performance duties were owed presented a complicating factor, a factor that may have caused the court to view the arrangement as more akin to the assumption of liability of another, the situation in which the contractual liability exclusion appropriately applies. No such performance duty to third parties was assumed by Ewing in its contract with TMISD and, for that reason, the contractual liability exclusion does not apply.

Thus, this Court has the opportunity to distinguish and reconcile *Gilbert* with the commonplace circumstances before this Court by recognizing that the contractual liability exclusion does not apply to them.

CONCLUSION

In 2007, the Texas Supreme Court decided *Lamar Homes v. Mid-Continent Casualty*, a case that laid to rest the distinction between breach of contract and tort under a CGL policy insuring agreement where the damages involve "property damage" caused by an "occurrence." After *Lamar Homes*, construction insureds and their defense counsel enjoyed the certainty of knowing that, because of the Texas Supreme Court's rejection of the tort versus contract distinction, remedies doctrines such as the economic loss rule could not be used as a sword by insurers to eliminate covered tort claims from a lawsuit, leaving only uncovered contract claims.

In 2010, however, the same court issued its opinion in *Gilbert*, providing insurers with a back door to deny legitimate claims, once again based upon a distinction between breach of contract and tort, now through an overly broad application of the contractual liability exclusion. The worst fears of insured contractors have come to fruition through the application by the district court of the contractual liability exclusion to performance obligations under a construction contract, likely beyond the boundaries contemplated by the court in *Gilbert.*

For these reasons, Amici Curiae request that the Court certify the questions as requested by Appellant to the Texas Supreme Court to appropriately limit *Gilbert*, or alternatively, that the Court reverse the judgment below, and rule that the contractual liability exclusion does not apply, and for such other relief as requested by Appellant from this Court.

Respectfully submitted,

/s/Patrick J. Wielinski
Patrick J. Wielinski
Texas State Bar No. 21432450
Rene R. Pinson
Texas State Bar No. 24046885
COKINOS, BOSIEN & YOUNG
800 Crestview Tower
105 Decker Court
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, TEXO – The Construction Association, Associated General Contractors –Houston Chapter, American Subcontractors Association, Inc., and ASA of Texas, Inc. in Support of Appellant Ewing Construction Co., Inc. was electronically served upon counsel of record, as indicated below, via the Court's CM/ECF system.

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

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

/s/ Patrick J. Wielinski
PATRICK J. WIELINSKI

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), and Fifth Circuit Rule 32.3, the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and Fifth Circuit Rule 32.2, the brief contains 6,697 words.

2. This brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman, 14 point type for text and footnotes.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing this brief.

/s/ Patrick J. Wielinski
PATRICK J. WIELINSKI