NO. 08-0246

IN THE SUPREME COURT OF TEXAS

GILBERT TEXAS CONSTRUCTION, L.P.,
Petitioner

v.

UNDERWRITERS AT LLOYD'S LONDON,
Respondent

On Appeal from the Court of Appeals for
The Fifth Judicial District of Texas — Dallas
Cause No. 05-05-01686-CV

BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TEXAS BUILDING BRANCH – ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND ASA OF TEXAS, INC. IN SUPPORT OF MOTION FOR REHEARING OF PETITIONER, GILBERT TEXAS CONSTRUCTION, L.P.

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TO THE HONORABLE TEXAS SUPREME COURT:

AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TEXAS BUILDING BRANCH – ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND ASA OF TEXAS, INC. (HEREIN "AMICI CURIAE"), submit this brief in support of PETITIONER, GILBERT TEXAS CONSTRUCTION, L.P. ("GILBERT") urging the

Court to grant Gilbert's Motion for Rehearing, reconsider its opinion and reissue a new opinion as urged by Gilbert.

STATEMENT OF INTEREST OF AMICI CURIAE

This Amici Curiae Brief speaks for the national and state chapters of two of the largest construction trade associations in the United States. The sponsorship of these national organizations and their Texas chapters underscores the importance of the insurance coverage issues addressed by the Court in its opinion both for Texas and national construction businesses alike.

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.

The Texas Building Branch of the Associated General Contractors of America ("TBB–AGC") is a branch of AGCA. TBB–AGC encompasses eleven AGCA building chapters located throughout Texas. The membership of these eleven chapters consists of approximately 370 general contractors and 3,890 specialty contractors, subcontractors and suppliers, all doing business in Texas.

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.

AGCA 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 submitted 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 *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007). This is another of those cases, since the Court's ruling in this case threatens the insurance coverage previously reaffirmed in *Lamar Homes.*

Whether AGCA 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 the members of AGCA and ASA. 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.

ISSUE PRESENTED

> Applying the contractual liability exclusion to an insured contractor's duty to repair its work may result in the denial of coverage for property damage arising out of an occurrence under the insurance policy. Is this denial consistent with the plain and ordinary language of the policy and existing Texas case law, including *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007)?

INTRODUCTION

The proposition that an insurer should not be obligated to pay amounts that are outside its coverage is not astounding. Nevertheless, the issues before this Court are both critical and extremely complex for many Texas construction insureds. 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. The Court's interpretation in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, ___ S.W.3d ___, 2010 WL 2219645 (Tex. June 4, 2010) of Exclusion 2(b), the "contractual liability exclusion," complicates that process for construction businesses by not only running counter to the plain language of the exclusion, but also the vast majority of federal and state case law, both nationally and in Texas, which holds that the exclusion does not apply under these circumstances.

The facts presented to this Court in this case represent a constantly occurring scenario for Texas insureds, particularly those engaged in construction. Texas contractors[1] and contractors nationwide face these issues, which accounts for the participation of national construction organizations such as AGCA and ASA as amici curiae on this brief.

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 the driving forces behind the economic well being of this state and nation. While contractors and subcontractors usually are 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 construction defects, making commercial general liability insurance a critical element of any construction project whereby substantial exposures are insured against in exchange for significant premiums.

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.

[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.

Unfortunately, the Court's opinion in this case robs the construction industry of the consistency that is critical to the management of its risks. These same Amici Curiae submitted a brief in support of the homebuilder in *Lamar Homes, Inc. v. Mid-Continent Casualty* less than three years ago. In the *Lamar Homes* case, this Court rightly upheld the existence of an "occurrence" and "property damage," as those terms are defined in the standard commercial general liability (CGL) policy, in connection with the costs of repairing defective work performed by the insured's subcontractors. This Court further determined that the labels giving rise to liability, whether negligence, tort or breach of contract, were irrelevant if the property damage was unexpected and unintended by the insured. In other words, if the property damage arose out of an occurrence under the CGL policy, it was within the scope of the CGL insuring agreement regardless of how the party seeking coverage labeled its claim.

In contrast, this Court departed from that holding in *Gilbert* and instead applied Exclusion 2(b) in the policy to exclude coverage for property damage to a third party arising out of the insured's breach of its own contract. As discussed below, such a result is not only out of step with *Lamar Homes*, but also with prior 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.

Amici Curiae recognize the potential that the Court's opinion, even though it seemingly disregards this considerable amount of case law, may be influential throughout

the United States in promoting similar arguments before other courts and similar unwarranted denials of coverage to construction insureds.

Numerous courts cite the *Lamar Homes* opinion in support of coverage in Texas and sister states, and in the event the Court's opinion in this appeal stands, the protection for construction insureds through *Lamar Homes* and similar cases is in grave danger. This is especially true since the Court's ruling paints with a broad brush and would appear to eliminate coverage for all direct contractual duties involving an obligation to repair property damage arising out of defective workmanship. The scope of Exclusion 2(b) cannot be that sweeping in light of the existing Texas and national case law.

Nevertheless, Texas contractors are already seeing the unfortunate results of the *Gilbert* opinion where it is being raised by numerous insurers as an excuse for denying claims that are otherwise covered under *Lamar Homes* and its progeny. 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.

Based on the arguments in this brief, Amici Curiae urge the Court to reconsider the plain language of Exclusion 2(b) and align itself with the vast majority of other jurisdictions and Texas courts that have previously held that Exclusion 2(b) is limited to indemnity obligations and does not apply under the circumstances of this appeal.

ARGUMENT AND AUTHORITIES

I. THE PLAIN LANGUAGE OF THE CONTRACTUAL LIABILITY EXCLUSION AND THE CGL POLICY DO NOT SUPPORT THE COURT'S RULING

Texas courts have always adhered to tenets of contract construction when interpreting insurance policies, as acknowledged by the Court in its opinion. *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 2010 WL 2219645 at *5. One would expect that the application of this rule to an already overly complex CGL policy would bring welcome clarity. And it is perhaps a somewhat overzealous search for clarity that led the Court to extend the plain and ordinary meaning doctrine to extraordinary lengths. Moreover, this effort appears to have led the Court to interpret the contractual liability exclusion before it essentially in a vacuum, setting aside years of precedent and commentary consistently interpreting and applying the contractual liability exclusion in a manner limiting its application to indemnity and hold harmless agreements. That limitation is particularly critical for the construction industry, an industry that does business through contracts in which the parties obligate themselves to perform various duties that necessarily encompass insurable liability risks.

The disregard of decades of prior insurance and legal commentary and court interpretations is even more problematic because the insurance contract before the Court is a standard form CGL policy that has been in use since 1973. *See Gilbert*, 2010 WL 2219645 at *8-9. Although the parties below cited an impressive amount of commentary and case law to this Court, in reality, the meaning and intent behind the plain and ordinary language of the contractual liability exclusion was recognized at the time of the

promulgation of the 1973 policy form. This is also true of the 1973 Broad Form Commercial General Liability Endorsement ("BFCGLE"), which narrowed the contractual liability exclusion by setting out certain exceptions to it, particularly for liability assumed under an "incidental contract." Again, the Court recognized this mechanism in its opinion. *Id.* at *8. A landmark contemporaneous commentary on the scope of coverage provided by the 1973 revisions 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), excerpts of which are attached at Tab A. At the time he authored his commentary, Mr. Tinker was Associate General Counsel of Kemper Insurance Companies. It is difficult to articulate a clearer explanation of the concept of assumption of liability under a contract or agreement.

While the contractual liability exclusion in the 1973 CGL form differed slightly, the major concept as to assumption of liability is identical in the 1986 policy form before

this Court. In the 1973 policy form, the exclusion states that the insurance did not apply, in relevant part, "to liability assumed by the insured under any contract or agreement except an incidental contract. . . ." The operative term "*a liability assumed by the insured under any contract or agreement*" is substantially identical to the formulation *'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 . . .*" in the current 1986 form. In other words, "liability assumed by the insured under any contract or agreement" is substantially identical to "assumption of liability in a contract or agreement" so that differences in the definitions of "incidental contract" and "insured contract" in the 1973 and 1986 policy forms are immaterial for this analysis because the operative terms of the exclusions themselves are substantially identical. Moreover, the contract provision between Gilbert and DART before this Court does not involve an "assumption of liability" within the terms of the contractual liability exclusion, and further consideration of "incidental contract" versus "insured contract" is unnecessary and, as set out below, muddies the analysis.

Tinker's explanation of the language and intent of the 1973 vintage contractual liability exclusion is echoed by commentators to the 1986 policy form. While many similar commentaries were cited to the Court in the briefs of the parties on appeal, the analysis in Appleman, like that in Tinker, 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 Court relied upon this treatise for other propositions in its opinion, it inexplicably did not recognize this explanation of the difference between a duty of performance giving rise to liability versus an assumed liability of another by virtue of an indemnity clause. The difference between assumption of liability pursuant to an indemnity clause and a contractual duty of performance is at the heart of this appeal and at the heart of coverage for the construction industry, in which virtually every contract includes a contractual assumption of liability of other upper tier parties on a construction project.

Against the backdrop of nearly forty years of use throughout the insurance and construction industries, nearly forty years of court decisions, and nearly forty years of analysis by legal and industry commentators, it is respectfully submitted that the construction industry is entitled to a deeper analysis than this Court's conclusion that the exclusion simply "means what it says" and that the Court disagrees "by and large" with those authorities in the face of the plain language of the exclusion. *Id.* at *8, *10.

As set out below, this Court's abrupt departure from the standard interpretation of the contractual liability exclusion is out of step with its recent opinion in *Lamar Homes* and past Texas precedent applied by federal and state courts. As such, *Gilbert* has now made it virtually impossible for Texas contractors (and if adopted outside of Texas, all

contractors) to plan for and insure against the risk of property damage arising out of defective work.

II. THE COURT'S OPINION RENDERS KEY PROVISIONS IN THE CGL POLICY MEANINGLESS

Another basic tenet of insurance policy contract interpretation is that the Court must apply the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless. *Gilbert*, 2010 WL 2219645 at *5. The Court contravenes this rule by failing to restrict the contractual liability exclusion to indemnity and hold harmless agreements, and instead applying the exclusion to all contractual obligations. This overbroad (and unintended) application of the contractual liability exclusion to all contract obligations by definition virtually eliminates from the policy both the Your Work Exclusion and its exception for subcontractor-performed work that were the subject of extensive treatment by the Court fewer than three years ago in *Lamar Homes*.

In *Lamar Homes*, the Court relied upon that subcontractor exception to support its conclusion that unintended construction defects may constitute an "accident" or "occurrence" and "property damage," pointing to the subcontractor exception that preserved coverage otherwise negated by the Your Work Exclusion in support of that determination. *Lamar Homes*, 242 S.W.3d at 11-12.

Despite previously recognizing this principle and providing coverage for unintended construction defects constituting a breach of contract, with the *Gilbert* decision the Court virtually eliminates the necessity of the Your Work Exclusion and its

subcontractor exception. Briefly, that 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 damage to work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Under the Court's broad interpretation of the contractual liability exclusion, all coverage arising from the insured contractor's performance of its work is excluded. As this Court recognized in *Lamar Homes*, the economic loss rule, although a remedies rule, generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract. This rule restricts parties to contractual remedies, rather than tort remedies. *Lamar Homes*, 242 S.W.3d at 12-13.

Even though the economic loss rule is not determinative of whether damage arising from a construction defect is within the insuring agreement of the CGL policy, it nevertheless may eliminate a tort action against the contractor, much the same as the doctrine of governmental immunity eliminated the tort causes of action against the insured in *Gilbert*. Under the Court's reasoning here, where only the breach of contract cause of action survives, the contractual liability exclusion would then apply to negate coverage. This leaves no purpose whatsoever for the Your Work exclusion, since by definition the term "your work" includes the work performed by or on behalf of the named insured under its contract.

The Court's broad interpretation of the contractual liability exclusion to all contractual obligations renders the Your Work Exclusion surplusage, which is an

impermissible and illogical interpretation of the policy. Moreover, the exclusion of coverage for virtually any breach of contract nullifies the coverage for subcontractor-performed work upheld by this Court in *Lamar Homes*, as well as virtually all coverage for property damage to the work if that work breaches the contract under which the work was performed. In other words, if the insured is sued for breach of contract only, coverage for the occurrence that is preserved under *Lamar Homes* despite the breach of contract claim and the applicability of the economic loss rule, is lost due to the contractual liability exclusion as broadly applied by the Court. While not all claims invoking the economic loss rule are within the coverage of a CGL policy, those that involve property damage and those that involve an "occurrence" of "property damage" certainly are, and the contractual liability exclusion cannot be so broadly applied as to deny coverage for those claims, rendering the business risk exclusions such as the Your Work Exclusion meaningless.

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

The Court appeared troubled in its opinion as to the scope of the contractual duty of Gilbert to repair property damage arising out of its work for DART. This Court determined that once the trial court granted summary judgment on RTR's theories of liability other than breach of contract, Gilbert's only remaining potential liability was liability in excess of what it had under "general law principles." *Gilbert*, 2010 WL 2219645 at *6. Even though the Court observed that Gilbert's contractual obligation with DART mirrored Gilbert's duty to RTR "under general law principles," apparently tort,

the Court nevertheless disposed of coverage for that contractual duty by applying the contractual liability exclusion, even though that liability was for Gilbert's direct liability and not any liability assumed under an indemnification agreement.

As acknowledged by the Court in *Lamar Homes*, contractual and tort duties overlap in the construction industry. In fact, one of the salutary effects of *Lamar Homes* was to end pleading gamesmanship based upon contract versus tort under the economic loss rule. Rather, the *Lamar Homes* decision focused upon what it called the "proper inquiry" – whether there has been an "occurrence" of "property damage" within the definitions of the policy, and whether any exclusion applies. *Lamar Homes*, 242 S.W.3d at 16. Unfortunately, this Court's overly broad application of the contractual liability exclusion, an exclusion never intended to be applied to duties of performance in a contract, has the potential of inviting a return to artful pleadings and motion practice to pound the square peg of contractual duty into the round hole of assumption of liability to invoke the contractual liability exclusion.

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. [Emphasis added.]

AIA Document A201, General Conditions of the Contract for Construction, 15th Ed., American Institute of Architects (1997). Paragraph 10.2, Safety of Persons and Property, as included in AIA Document A201, attached at Tab B of this brief.

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. Particularly, if the economic loss doctrine is applied to eliminate tort causes of action against a contractor relating to these types of contractual duties, the contractor will be left with no insurance coverage for legitimate property damage that was unexpected and unintended. If the Court's opinion stands, contractors that previously would have had coverage, as reaffirmed through this court's opinion in *Lamar Homes*, will be left with no coverage whatsoever in many circumstances, particularly public contracts or when governmental immunity is invoked.

Nevertheless, the Gilbert-DART contract before this Court is somewhat novel in that it provided for a performance duty not only owed by Gilbert, the contractor, to DART, the owner, but also to neighboring landowners. In the event Gilbert failed to perform repairs, the contract obligated Gilbert to reimburse DART if DART performed the repair work. The interjection of third parties to whom performance duties are owed

presents a complicating factor, a factor that may have caused this Court to view the arrangement as more akin to the assumption of liability of another, the proper situation in which the contractual liability exclusion appropriately applies. Nevertheless, applying the plain and ordinary rule of contract interpretation to the DART contract provision should lead to the conclusion that the Protection of Existing Site Conditions provision is not an assumption of liability, but rather a performance duty under the contract.

IV. IN DISREGARDING PRIOR TEXAS PRECEDENT, THE COURT CHANGED THE RULES OF THE GAME AND IGNORED STARE DECISIS

Inexplicably, this Court chose to ignore unanimous prior Texas case law (until the Fifth Court of Appeals' decision in *Underwriters at Lloyd's of London v. Gilbert Texas Construction, L.P.*, 245 S.W.3d 29 (Tex.App.—Dallas 2007, pet. granted), that 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.

A. The Intent Behind the Contractual Liability Exclusion Previously Was Interpreted Under Texas Law

In *Federated Mutual Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999), the Fifth Circuit, in a relatively simple 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. The 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 here, the Court could have simply 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.

In *Federated Mutual*, the Fifth Circuit relied upon *Olympic, Inc. v. Providence Washington Ins. Co.*, 648 P.2d 1008 (Alaska 1982), a case this Court distinguished and dismissed in *Gilbert* because it interpreted an earlier version of the contractual liability exclusion rather than the 1986 version used in this case, 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 the Fifth Circuit 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 harmless another, 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 between 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 [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. Thus, as was the case here, where the insured contractor's liability involves its own breach of its duty to protect neighboring property, 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 because there is no assumption by Gilbert for DART's liability to the neighboring landowners.

The clarity of its analysis makes *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. Cases citing *Olympic* and *Federated Mutual* include Texas precedent such as *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex.App.—Houston [14th Dist.] 2006, pet. denied), *Insurance Company of North America v. McCarthy Brothers Co.*, 123 F.Supp.2d 373 (S.D. Tex. 2000), *E&R Rubalcava Construction, Inc. v. The Burlington Ins. Co.*, 147 F.Supp.2d 523 (N.D. Tex. 2000), and *Home Owners Management Enterprises, Inc. v. Mid-Continent Casualty Co.*, 294 Fed. Appx. 814 (5th Cir. (Tex.) 2008).

As such, *Olympic* has more than ample support to guide this Court to conclude that applying the contractual liability exclusion to Gilbert's performance obligation to repair damage to neighboring property was outside the exclusion's scope. Instead, the Court chose to disregard that clear precedent, together with the mountain of precedent from other jurisdictions, commentators and the insurance industry, in favor of a rather

random determination 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 on a daily basis. Unfortunately, when considered in light of prior opinions such as *Lamar Homes*, *Gilbert* represents a significant deviation and is a step backward from predictability in the law necessary for conducting construction business in Texas.

B. ***Gilbert*** **Seriously and Negatively Alters the Rules of the Game for Construction Insureds**

As set out above, on August 31, 2007, this 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 this Court's rejection of the false 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.

On June 4, 2010, however, this Court effectively overruled *Lamar Homes* with 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. This state of affairs creates

uncertainty on these issues and potentially risks promoting the elimination of negligence claims through the economic loss rule in favor of what now may be uncovered breach of contract claims under the contractual liability exclusion. Furthermore, this action jeopardizes insurance protection for contractors involved in lawsuits against them for property damage arising out of inadvertent defective work. If the decision in *Gilbert* stands, defenses of contractors by their CGL carriers may be withdrawn and settlement monies pulled from the table.

The *Gilbert* opinion flies in the face of the doctrine of stare decisis, a doctrine that has a salutary effect since, if a court does not follow its own decisions, no issue can ever be considered resolved. *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). Moreover, a court should give due consideration to the settled expectations of litigants who justifiably rely on the principles articulated by the court and the legitimacy of the judiciary, which rests in a large part upon a stable and predictable decision-making process. From a practical perspective, stare decisis "results in predictability in the law, which allows people to rationally order their conduct and affairs." *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000). In addition, "[a]dhering to precedent fosters efficiency, fairness and legitimacy." *Id.* citing *Weiner*, 900 S.W.2d at 320.

Here, there simply is no basis in efficiency, fairness and legitimacy for the Court to depart from its decision in *Lamar Homes* and prior Texas precedent, both of which limit the scope of the contractual liability exclusion. This Court attempted to harmonize *Gilbert* with *Lamar Homes* on the basis that the contractual liability exclusion was not

addressed in *Lamar Homes* and that the case addressed the duty to defend under the eight corners rule. *Gilbert*, 2010 WL 2219645 at *10. Nevertheless, the fact remains that an across-the-board application of the contractual liability exclusion to property damage arising out of an inadvertent breach of contract eviscerates the holding of *Lamar Homes*, so the left hand has taken away what the right hand had given. If *Gilbert* stands, under no circumstances will the construction industry in Texas be able to effectively plan for and insure the significant risks that accompany its work. Moreover, ongoing uncertainty as to the very existence of insurance coverage will discourage contractors from other states from entering the Texas market to the detriment of not only potential building owners, but construction workers as well.

In short, the Court had no compelling reason to depart from prior precedent's longstanding and settled interpretation of the scope of the contractual liability exclusion, and no reason to defeat the legitimate expectations of the construction industry regarding coverage for its operations by changing the very rules of the game in midstream.

PRAYER

Amici Curiae Associated General Contractors of America, Texas Building Branch-Associated General Contractors of America, American Subcontractors Association, Inc. and ASA of Texas, Inc. request that the Court grant the Motion for Rehearing of Petitioner, Gilbert Texas Construction, L.P., vacate its opinion of June 4, 2010, reverse the judgment of the Court of Appeals and affirm the trial court, or in the alternative, to issue a new opinion limiting the application of the contractual liability

exclusion to the specific facts, including the peculiar construction contract, before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Brief of Amici Curiae Associated General Contractors of America, Texas Building Branch – Associated General Contractors of America, American Subcontractors Association, Inc. and ASA of Texas, Inc. has been served upon the following counsel by certified mail, return receipt requested on the ___ day of July, 2010.

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