



## NEW TEXAS COVERAGE CASE ALERT—JUNE 11, 2010

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As part of our service to our clients, we periodically send out advisories concerning important issues in the insurance arena. In this regard you might be interested in a coverage opinion issued by the Texas Supreme Court last week, *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London* which follows up on its earlier landmark opinion in *Lamar Homes* a few years ago. The Court was less than crystal clear in the opinion, so the impact/meaning of this case will be hotly debated over the ensuing months and years.

As you may recall, in *Lamar Homes*, the Court held that breach of contract claims in the construction defect context could qualify as an “occurrence” under the standard CGL policy. In *Gilbert Construction*, the Court seems to hold that the same breach of contract claim is now excluded under the “contractual liability” exclusion.

Prior to *Gilbert*, it was commonly believed in Texas, and a significant number of other jurisdictions, that the “contractual liability” exclusion only applied to situations where the liability of *another party* was assumed. The Court, **adhering to its recent trend strictly construing and applying the literal policy language**, disagreed, noting that the exclusion is not limited to that scenario. It applies in all instances where liability was assumed by contract. As a side note, there is an exception to the exclusion for “insured contracts” which essentially means indemnity agreements, so if that scenario is presented the exclusion will not apply.

**Carriers can now cite *Gilbert* for the broad proposition that breach of contract claims are not covered, notwithstanding statements suggesting to the contrary in *Lamar*.** Expect policyholder counsel to argue, though, that a close reading of the opinion suggests that the holding may not be so broad and is limited to the unique facts of *Gilbert* where the insured had expressly agreed to assume liability for damaging third parties' property. **From a duty to defend standpoint, the case is only a potential killshot for the carrier where the sole claim is breach of contract.** The typical construction defect claim usually alleges other various claims, some of which are tort-based and, as such, fall outside the exclusion. Under this circumstance, the carrier would still owe a defense notwithstanding *Gilbert*. Policyholders will likely come up with other arguments to try and distinguish *Gilbert* from the typical CD case, thereby minimizing its impact.

In any event, we will now likely be wrangling over *Gilbert's* meaning and application on future construction claims. We just wanted to bring it to your attention. Please feel free to give me a call if you have any questions on this issue or if I can be of assistance on any other insurance-related matters.

If you have questions about this recent decision or its implications for a specific matter, contact Schubert & Evans, P.C. at 214-744-4400.