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NEW TEXAS COVERAGE CASE ALERT—JUNE 11, 2010

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 ever 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.