



## **NEW TEXAS CLIENT ALERT– August 8, 2012**

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### **Fifth Circuit Withdraws June 11, 2012 Opinion in *Ewing* and Certifies Issue of Whether CGL’s “Contractual Liability” Exclusion Broadly Applies to Exclude Coverage in Construction Defect Cases**

In our June 18 Texas Client Alert, we reported on the 5<sup>th</sup> Circuit’s decision in *Ewing Construction v. Amerisure Ins. Co.*, 2012 WL 2161134 (5<sup>th</sup> Cir. June 15, 2012). As we previously summarized, in *Ewing* a 2-1 majority of the Court, over a vigorous dissent, held that the standard CGL policy’s “contractual liability” exclusion applied broadly to negate coverage for defective construction workmanship claims against builders and general contractors notwithstanding the Texas Supreme Court’s holding in *Lamar Homes* that unintended construction defects are generally “property damage” caused by an “occurrence” even if they only involve the insured’s own work. The *Ewing* majority held that even though the construction-related exclusions in the CGL policy have limited application when completed work performed by a subcontractor is involved, *if the only damages alleged are to the work that was the subject of the insured’s construction contract*, the “contractual liability” exclusion separately operates to negate coverage. And the *Ewing* majority held that the exclusion so applied even if negligence was also alleged.

Our prior Client Alert, however, predicted that the 5<sup>th</sup> Circuit’s June opinion might not be the final word as there were likely to be motions for rehearing and requests, like that of the dissenting judge, to certify the issues involved to the Texas Supreme Court. Our prediction proved true. On August 8, 2012, the 5<sup>th</sup> Circuit withdrew the *Ewing* opinion and instead certified the issues to the Texas Supreme Court. Specifically, the court certified the following issues for decision: (1) Is a contractor’s contractual obligation to perform its work in a good and workmanlike manner contractual liability that is excluded by the standard “contractual liability” exclusion, and, (2) If so, are separate negligence claims alleged also excluded by the exclusion.

#### **Practical Pointers—**

Until the Texas Supreme Court answers the certified questions in *Ewing*, builders, general contractors, and others involved in construction defect litigation, and their insurers, are now, once again, operating in an arena of significant uncertainty as to whether the standard “contractual liability” exclusion is or is not going to be a potentially broad coverage defense. Insurers must continue to make sure that they have properly reserved rights on the issue. Policyholders can take at least some comfort that the 5<sup>th</sup> Circuit’s opinion has now been withdrawn. Until the Texas Supreme Court rules, the parties are now back in the same uncertainty that they were in prior to the *Ewing* opinion.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at [www.schubertevans.com](http://www.schubertevans.com).