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 AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF MOTION FOR REHEARING OF PETITIONER, GILBERT TEXAS CONSTRUCTION, L.P.

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STATEMENT OF INTEREST

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumers' rights. The organization is tax-exempt under the Internal Revenue Code § 501(c)(3). United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

In addition to serving as a resource on insurance claims for disaster victims and commercial policyholders, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public.

INTRODUCTION

This Court's decision in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, No. 08-0246, 2010 WL 2219645 (Tex. June 4, 2010) places Texas in the extreme minority of jurisdictions by broadening the so-called "contractual liability" exclusion to preclude coverage for risks that have been covered for decades in Texas and

elsewhere under standard Commercial General Liability ("CGL") policies while ignoring the basic terms of the contract.

The "contractual liability" exclusion expressly applies only to "'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." (emphasis added).[1] The exclusion's plain language does not extend to all liability in a contract or agreement. Yet, the Court's holding eviscerates the terms requiring an "assumption" of liability by effectively foreclosing coverage for any and all liability arising under a contract, assumed or not. By its terms, the exclusion is not a "contractual liability" exclusion, but an "assumption of liability" exclusion. Gilbert Texas Construction, L.P. ("Gilbert") did not assume "liability" under a contract. At most, Gilbert assumed *duties* under a contract. The distinction between "duty" and "liability" under a contract is particularly relevant in the context of a general *liability* policy in which *liability* connotes an obligation that is distinct from a mere duty.[2] Because Gilbert did not assume "liability" under a contract or agreement, the plain language of the "assumption of liability" exclusion does not apply. To hold otherwise disregards the terms of the policy and undermines the purpose of the "assumption of liability" exclusion – to protect the insurer against underwriting the unforeseen and unintended risks of third-party conduct.

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1 *Gilbert*, 2010 WL 2219645, at *8.

2 *See, e.g.*, *id.* at *6 ("Gilbert undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, and to repair or pay for damage to any such property 'resulting from a failure to comply with the requirements of this contract *or* failure to exercise reasonable care in performing the work.'").

Moreover, the contractual duty assumed by Gilbert is a covered risk. As this Court recognizes, CGL policies cover damages that flow from the insured's alleged negligence, regardless of whether the liability arises from tort or contract.[3] The language of the insuring agreement does not in anyway distinguish between property damage arising out of a duty assumed under contract versus arising out of tort. Indeed, "Underwriters does not argue that RTR's claim is not within the general terms of the policy."[4]

This Court's holding to the contrary departs from the clear majority of jurisdictions addressing this issue. In virtually every other jurisdiction, the liability at issue in this case (*i.e.*, damage to third-party property) is considered a covered risk under an insured's CGL policy because the true origin of the liability is property damage caused by the insured's acts or omissions. The Court's stark divergence from the majority puts Texas companies at a significant disadvantage relative to policyholders in other states. Because this Court's holding broadens the "assumption of liability" exclusion, it acts to narrow CGL coverage for Texas insureds. By narrowing coverage, Texas companies will have to pay more out-of-pocket costs for contractual liability arising out of their allegedly negligent acts. This could have a devastating financial impact, particularly on smaller companies, which rely on insurance the most. Due to these increased transactional costs,

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[3] *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 13 (Tex. 2007) ("[A]ny preconceived notion that a CGL policy is only for tort liability must yield to the policy's actual language.") Although this Court may not have overruled *Lamar Homes*, no doubt exists that *Gilbert* undercuts the holding in *Lamar Homes*. Now, while a Texas insured may be entitled to a duty to defend based on damages arising from a breach of contract, the insured would not be entitled to indemnification for the exact same damages.

[4] *Gilbert*, 2010 WL 2219645, at *4.

Texas companies will bear a greater financial burden than their counterparts in other states, and foreign companies will avoid doing business in Texas to escape the possibility of losing coverage for contractually assumed duties.

While construction companies are potentially most vulnerable to the increased financial burden,[5] all Texas companies are at risk of bearing this burden because all companies transact their business through contracts. Companies commonly include provisions in their contracts, like the one at issue in this case, which obligate the insured to assume a duty to act with ordinary care and to repair or pay for damages caused by the insured's negligence.[6] Even though these provisions encompass duties, which the insured would otherwise have under the law, such provisions provide additional security and assurances to the contracting parties.[7]

In order to protect Texas companies' contractual relationships and financial well-being, as well as the integrity of the policy's plain language, this Court should reconsider its holding and limit the "assumption of liability" exclusion to its intended scope, precluding coverage for assumed *liability*, but not assumed *duty*.

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5 *See generally* Brief of Amici Curiae Associated General Contractors of America, Texas Building Branch – Associated General Contractors of America, American Subcontractors Association, Inc. & ASA of Texas, Inc. In Support of Motion for Rehearing of Petitioner, Gilbert Texas Construction, L.P., filed in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, No. 08-0246 (July 20, 2010) ("Brief of Amici Contractors").

6 *Id.* at 15–17.

7 *Id.* at 17 ("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 …").

ARGUMENT & AUTHORITIES

I. THE COURT SHOULD RECONSIDER ITS HOLDING IN ORDER TO PRESERVE POLICYHOLDERS' RIGHTS UNDER THE INSURANCE CONTRACT.

A. The Plain Language Of The "Assumption of Liability" Exclusion Does Not Apply.

The subject exclusion only applies to damages for "bodily injury" and "property damage," which "the insured is obligated to pay … by reason of the *assumption of liability* in a contract or agreement."[8] The exclusion does not apply so broadly as to exclude coverage by reason of an assumption of a "duty" in a contract or agreement. Yet, the Court's holding equates "liability" with "duty," effectively reaching the same result.

The distinction between "duty" and "liability" is crucial in understanding the scope of the "assumption of liability" exclusion. It means the difference between preserving and denying coverage for "property damage" arising out of the allegedly negligent breach of a contract – a risk that this Court acknowledged ought to be covered under a CGL policy.[9] This distinction between "duty" and "liability" is also what distinguishes this Court's decision from the great majority of jurisdictions, and thus relegates Texas to a severe minority. BLACK'S LAW DICTIONARY – the authority which this Court relies on in *Gilbert* – clarifies the distinction:

> The term "liability" is one of at least double signification. In one sense it is the synonym of *duty* … In a second sense, the term "liability" is the correlative of *power* and the opposite of *immunity*. … It would be wise to adopt the second exclusively … Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong.

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8 *Gilbert*, 2010 WL 2219645, at *8 (emphasis added).

9 *See Lamar Homes*, 242 S.W.3d at 9 ("[O]n even a moment's reflection, we all understand that contracts are broken, many times, for reasons that we would call 'accidental.'") (quoting Ellen S. Pryor, *Economic Loss Rule and Liability Insurance,* 48 ARIZ. L.REV. 905, 917 (2006)).

> This *vinculum juris* is not one of mere duty to obligation; it pertains not to the sphere of ought but to that of must.

BLACK'S LAW DICTIONARY 932 (8th ed. 2004) (citations omitted) (emphasis in original). Consistent with this definition, a "duty" implies an inchoate obligation,[10] whereas a "liability" assumes a fixed and ripened responsibility. In other words, the assumption of a *duty* is an obligation to act or not act in such a way that would not otherwise be required but for the contract.[11] However, the assumption of *liability* is an obligation to be liable for someone else's legal requirement to pay damages to a third party. [12]

The Court's interpretation of the subject exclusion ignores this fundamental difference between *duty* and *liability*. Furthermore, the Court's broad interpretation of the exclusion also disregards the requirement of any "assumption" of liability by suggesting that coverage is excluded for damages that the insured is obligated to pay by reason of liability in a contract or agreement, whether assumed or not.[13] The majority of courts are justifiably reluctant to apply the "assumption of liability" exclusion so broadly as to preclude coverage for any liability resulting from breach of a contractual duty.[14] At

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[10] 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D § 132.3[C] (2010) ("[A] person or entity assumes liability (that is, a duty of performance, the breach of which will give rise to liability) whenever one enters into a binding contract.")

[11] *See* Craig F. Stanovich, *Contractual Liability & the CGL Policy*, International Risk Management Institute, May 2002, http://www.irmi.com/expert/articles/2002/stanovich05.aspx.

[12] APPLEMAN ON INSURANCE, *supra*, ("[I]n the CGL policy … an 'assumed' liability is generally understood and interpreted by the courts to mean liability of third party.")

[13] *See, e.g., Evanston Ins. Co. v. Atofina Petrochemicals, Inc.*, 256 S.W.3d 660, 669 n.27 (Tex. 2008) (stating that courts "cannot adopt a construction that renders any portion of a policy meaningless, useless or inexplicable")

[14] *See, e.g., U.S. Fidelity & Guar. Co. v. Virginia Eng'g Co.*, 213 F.2d 109, 112 (4th Cir. 1954) (concluding that the insured entered "into a contract in which liabilities of this sort might be incurred as a result of negligence on the part of its agents and servants; and the purpose of the insurance policy was to protect

a minimum, the distinction between "duty" and "liability" is reasonable and thus requires this Court to construe the policy's terms in favor of the insured.[15]

Gilbert assumed "duties" under its contract with DART – not liability. In the underlying contract, Gilbert "undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, and to repair or pay for damage to any such property 'resulting from a failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work.'"[16] This contract created an obligation to *repair* or pay for damage to an adjacent property resulting from Gilbert's actions or inactions—not to be liable for a third-party's legal requirement to pay damages to an additional party. Thus, Gilbert assumed a duty, not a liability under this contract.[17] Because the subject exclusion expressly applies to the "assumption of liability," Gilbert's assumption of the aforementioned "duties" and the damages relating

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against liability arising from such negligence."); *Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of La.*, 912 So.2d 400, 407 (La. Ct. App. 2005) ("The 'assumption of liability' language of exclusion (b) has been argued by insurers to broadly exclude coverage for the liability of *any* contract of the insured. … The broad interpretation of the 'assumption of liability' exclusion has been rejected by the courts.") (emphasis added).

15 *See, e.g.*, *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977) (courts must "adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.")

16 *Gilbert*, 2010 WL 2219645, at *6.

17 *See Virginia Eng'g Co.*, 213 F.2d at 112 (concluding that the purpose of the agreement was to protect the contracting party against liability for which the insured was responsible: "[i]t is not reasonable to suppose that, when the insured was taking insurance to protect against liability imposed by law, it was intended to exclude coverage of claims for which the law imposed liability on the insured, merely because insured had agreed to protect another against secondary liability on account of such claims."); *Broadmoor*, 912 So.2d at 407 (finding that even though a subcontractor failed to properly install the showers, which caused damage to other parts of the hotel, the court maintained that "the failure of performance regarding the shower installations represents [the insured's] failed performance under its contract with Hollywood." Consequently, the "assumption of liability" exclusion did not apply because the liability did not arise by a contract "directly and solely" between the sub-contractor and Hollywood, with a separate agreement by insured to indemnify the negligent sub-contractor.)

thereto are not precluded from coverage. To hold otherwise or refuse Gilbert's motion for rehearing will deny Texas policyholders of coverage to which they have a reasonable expectation based on the plain language of the standard CGL policy. Moreover, the issue extends beyond construction contractors to all businesses that perform work or services pursuant to contracts.

B. The Risk Involved In *Gilbert* Is Precisely The Type of Risk Covered By The CGL Policy.

The duties assumed by *Gilbert* in its contract are covered under the terms of Gilbert's CGL Policy.[18] First, Gilbert's assumption of a duty to repair damage to an adjacent party is a legal duty that Gilbert would have with or without the contract. Second, the obligation to repair or pay for damage to an adjacent property resulting from the policyholder's actions or inactions is a covered risk, contemplated by the insurer when calculating the premium and coverage agreement.[19] To deny the insured coverage of a legally required duty, which is also a covered risk, is a breach of the insurance contract.

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[18] *See* APPLEMAN ON INSURANCE, *supra*, ("[T]he contractual liability exclusion clause is not effective primarily in two situations: (1) when the insured is the one who is solely responsible for the injury and (2) when the insured is the actively negligent wrongdoer.")

[19] An insurance contract shifts the risk of one party to another in return for a premium. 9A LEE R. RUSS, COUCH ON INSURANCE § 101:1 (3d ed. 2010). Generally, a CGL policy covers "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" *See, e.g., Gilbert*, 2010 WL 2219645, at *3. For example, an insured owes a legal duty to its adjacent property owner not to damage the adjacent property. The covered risk in this scenario is property damage. If the insured negligently damages the adjacent property, the insured is legally obligated to pay damages to the property owner to repair the property. *See, e.g.*, COUCH ON INSURANCE, *supra*, § 129:1 ("a commercial general liability insurance policy is generally designed to provide coverage for tort liability for physical damage to others …"). Regardless of how the insured incurs this liability, the insured is liable to the property owner for property damage, and therefore, the insurer must provide coverage for the liability incurred as a result of the insured's negligent acts which caused the property damage.

Underwriters must not be permitted to rewrite the insurance contract with Gilbert to extend the "assumption of liability" exclusion beyond its original scope. While the Court was careful not to rewrite the exclusion by inserting the word "another," its holding rewrites the policy to preclude coverage for cases in which "an insured is obligated to pay damages by reason of an assumption of liability *or duty* in a contract or agreement." This language narrows the scope of Gilbert's CGL policy coverage and in turn reduces its value, and the value of all similar policies held by Texas insureds, by requiring the insureds to bear an inordinate portion of the risk and costs for what is generally considered a covered risk.

C. Even If The Risk Were Excluded By The "Assumption Of Liability" Exclusion, Gilbert's Damages Would Be Covered By An Exception To That Exclusion.

Gilbert's claim is a covered risk because the damages claimed under breach of contract are damages that Gilbert would have in the absence of the underlying contract. The "assumption of liability" exclusion "does not apply to liability for *damages* … [t]hat the insured would have in the absence of the contract or agreement."[20] Thus, even if the "assumption of liability" exclusion initially precludes coverage for Gilbert's claim, which is denied, this exception brings Gilbert's claim back into coverage.

This Court recognized that Gilbert could be liable for damages that it "would have in the absence of the contract or agreement." The Court concluded that "[i]ndependent of its contractual obligations, Gilbert owed [RT Realty ("RTR")] the duty to comply with law and to conduct its operations with ordinary care so as not to damage RTR's property,

[20] *Gilbert*, 2010 WL 2219645, at *4.

and absent its immunity it could be liable for damages it caused by breaching its duty."[21] But, the Court determined that this exception did not apply because the Court focused exclusively on the theory of liability at issue in the case, rather than the risk covered by the policy.[22]

In order to determine whether Gilbert's claim fell within the exception to the "assumption of liability" exclusion, the Court accepted Underwriters' argument that "the duty to indemnify is based on the actual facts proven and adjudicated liability, and the only liability theory remaining when Gilbert settled with RTR was the breach of contract claims."[23] This analysis, however, is contrary to both the plain language of the exclusion and, more importantly, longstanding Texas jurisprudence holding that "[i]n Texas, the underlying liability facts, rather than the legal theory of liability, trigger the duty to indemnify."[24] Specifically, courts must look to the "origin of the damages, not the legal theory asserted for recovery" in evaluating the applicability of a policy exclusion.[25]

Pursuant to Texas law, the Court should look to the origin of RTR's damages, not the theory of liability asserted for RTR's recovery. This is consistent with the terms of the exception to the "assumption of liability" exclusion, which does not apply to liability

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21 *Gilbert*, 2010 WL 2219645, at *6.

22 *Id*. at *6–7.

23 *Id.* at *12.

24 *Ins. Co. of N. Am. v. McCarthy Bros. Co.*, 123 F. Supp. 2d 373, 377 (S.D. Tex. 2000) (citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 822 (Tex. 1997)) (holding that coverage was not barred by "assumption of liability" exclusion because damage stemmed from negligent construction, not breach of contract).

25 *Cont'l Cas. Co. v. Hall*, 761 S.W.2d 54, 56 (Tex. App—Houston [14th Dist.] 1988, writ denied); *see also U.S. Fire Ins. Co. v. Deering Mgmt. Group, Inc.*, 946 F. Supp. 1271, 1282 (N.D. Tex. 1996) (applying Texas law) ("[I]n determining the applicability of policy provisions, including exclusions, a court must focus on the origin of the damages, not the legal theory asserted for recovery.")

for "damages" that the insured would have in the absence of the contract. In the instant case, the origin of RTR's damages was Gilbert's failure to preserve and protect adjacent property. The legal theory that RTR asserted for recovery was breach of contract, under which Gilbert could have been held *liable for damages* which flowed from Gilbert's failure to preserve and protect RTR's property. Therefore, in order to determine whether the exception to the "assumption of liability" exclusion applies, the Court must look to Gilbert's failure to preserve and protect adjacent property. As this Court recognized, Gilbert "could be liable for damages it caused by breaching its duty," and therefore Gilbert could be liable for its damages to RTR in the absence of the contract. Because Gilbert's liability would exist in the absence of the contract, and according to the terms of the policy itself, Gilbert's liability is excepted from the "assumption of liability" exclusion and is therefore covered.

D. The Purpose Of The "Assumption Of Liability" Exclusion Is To Prevent The Insurer From Insuring A Risk For Which It Did Not Underwrite, Not To Cut Off A Category Of Potential Claims That Were Underwritten.

Distinguishing between "duties" and "liability" for purposes of the "assumption of liability" exclusion is consistent with not only the policy's terms, but also the purpose and intent of exclusion itself. The purpose of the "assumption of liability" exclusion is to protect insurers from covering risks for which they did not underwrite, namely the risks of a third-party.[26] Thus, the "assumption of liability" exclusion precludes coverage for a

[26] *See Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co.*, 949 P.2d 337, 342 (Utah 1997) ("[T]he rationale behind the rule is that 'liability assumed by the insured under a contract or agreement presents an uncertain risk' which cannot be determined in advance for the purpose of fixing premiums." Therefore, the exclusion should only apply in situations where "the insured would not be liable to a third person except for the

liability assumed by the insured that arises as a result of a third-party's actions or inactions.[27] It does not, however, preclude coverage for the insured's own liability that resulted from the insured's failure to perform a duty or obligation required by law or contract.[28]

Liability incurred by the insured for failure to perform a legally required duty, whether by law or contract, is covered by a CGL policy because the insurer had a full and fair opportunity to consider those types of risks when underwriting the policy. The insured paid a premium to the insurer to have those risks covered, but did not pay a premium to cover the liability of a third-party.[29]

E. The "Assumption Of Liability" Exclusion Excludes A Type Of Risk, Not A Cause Of Action

When a policyholder pays the premium of its insurance contract, the insurer is obligated to "pay those sums that the insured becomes legally obligated to pay as damages" as a result of personal injury or property damage.[30] It does not matter whether the legal obligation to pay damages results from a breach of statute, contract, or tort, so

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express assumption of such liability." (quoting 1 Rowland H. Long, *Law of Liability Insurance* §1.07[2], at 1-42.1)).

27 *See Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 726 (5th Cir. 1999) ("This exclusion operates to deny coverage when the insured assumes responsibility for the conduct of a third party.")

28 *See* 4 PHILLIP L. BRUNER & PATRICK J. O'CONNOR, BRUNER & O'CONNOR ON CONSTRUCTION LAW § 11:109 (2010) (The purpose of the exclusion is to protect the insurer from covering a third party's liability for which the insurer did not perform any underwriting. "In other words, the exclusion applies to the 'assumed' liability of another, not one's own liability due to a contractual undertaking.")

29 *See Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 81 (Wis. 2004) (limiting the exclusion "furthers the goal of protecting the insurer from exposure to risks whose scope and nature it cannot control or even reasonably foresee.")

30 *See, e.g., Gilbert*, 2010 WL 2219645, at *3.

long as the damages are incurred from a breach of its own legal obligation and not the legal obligation of another.[31]

CGL policies provide coverage for liability that arises from the insured's breach of a legal duty.[32] It does not provide coverage for a particular cause of action. For example, the language of the policy does not distinguish between tort and contract for the purpose of determining whether a loss is covered by the CGL policy.[33] The very "definition of 'occurrence' in the CGL policy does not refer to the legal category of the claim; there is no language limiting the term to those occurrences that are actionable only in tort."[34]

Virtually all companies must enter into contracts in order to transact business. Many of these contracts must include provisions to assume a duty that is otherwise required under the law as an additional protection for the contracting parties. Where a party can only bring a claim under the contract, looking to the cause of action, as opposed to the risk involved, would severely limit coverage under the CGL policy, and would do so in a manner having no basis in the terms of the contract.[35]

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[31] *Lamar Homes*, 242 S.W.3d at 13 ("[A]ny preconceived notion that a CGL policy is only for tort liability must yield to the policy's actual language."); *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 38 (N.D. 2006) (finding that because a CGL policy insures consequential damages that stem from an insured's work, "a CGL policy may provide coverage for claims arising out of tort, breaches of contract, and statutory liabilities as long as the requisite accidental occurrence and property damage are present.")

[32] *See* COUCH ON INSURANCE, *supra*, § 101:40 (Insurance law employs proximate cause analysis "for purposes of determining whether the specific type of injury caused by the specific type of physical act or event was intended to be covered under the terms of the subject policy.")

[33] *Am. Girl, Inc.*, 673 N.W.2d at 77.

[34] *Id.* at n.6.

[35] *See Gibbs*, 949 P.2d at 342; Brief of Amici Contractors at 8.

II. THE COURT'S DECISION INJURES TEXAS POLICYHOLDERS BY PUTTING INSUREDS AT A DISADVANTAGE RELATIVE TO THEIR COUNTERPARTS IN THE MAJORITY OF JURISDICTIONS BY EXPANDING THE "ASSUMPTION OF LIABILITY" EXCLUSION.

In adopting Underwriters' argument that the "assumption of liability" exclusion precluded coverage for property damage resulting from the insured's acts or omissions merely because the liability arose under a breach of contract claim, the Court departs from the majority of jurisdictions interpreting the "assumption of liability" exclusion. Most courts agree that "a contractual liability exclusion clause refers to a specific contractual assumption of liability by the insured as exemplified by an indemnity agreement."[36] According to a popular insurance treatise, "[i]t appears unanimous among all jurisdictions that the contractual liability exclusion … does not relieve the insurer from liability under the policy when the insured failed to enter into a contractual agreement whereby the insured expressly assumed any liability even though the insured's liability may *arise* out of a contract entered into with a third party."[37]

What distinguishes this Court's reasoning in *Gilbert* from decisions of courts in other jurisdictions is that, in determining whether the "assumption of liability" exclusion applies, this Court's sole focus was on the theory of liability under which the damages arose. Instead, other courts look to whether the liability itself is a covered risk within the insurance policy regardless of the cause of action alleged. The analysis adopted by a majority of jurisdictions, which focuses on the covered risk, is better reasoned because

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[36] APPLEMAN ON INSURANCE, *supra* (emphasis added).

[37] *Id.*

the purpose of an insurance policy is to cover risk, not a cause of action.[38] This Court should reconsider its decision and focus on Gilbert's risk to determine whether the "assumption of liability" exclusion precludes coverage.

The Court's holding, as it stands, puts Texas companies at a significant disadvantage relative to policyholders in other jurisdictions. All companies transact business through contractual agreements, and often times these agreements obligate the insured to assume a duty to prevent personal injury and property damage.[39] Therefore, by broadening the "assumption of liability" exclusion to preclude coverage for "liability associated with a contract made by the insured," the court renders "commercial liability insurance [] severely limited in its coverage."[40]

Because almost every other state interprets the "assumption of liability" exclusion more narrowly, a CGL policy is of less value to a Texas insured than its counterparts in other states.[41] Texas companies are already starting to experience the injurious effects of this Court's holding.[42] In fact, the Court of Appeals' decision has been cited numerous times, even outside of Texas, in interpreting CGL policies that are governed by Texas

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38 *Am. Girl, Inc.*, 673 N.W.2d at 81 (limiting the scope of the "assumption of liability" exclusion is consistent with the general purpose of liability insurance).

39 Brief of Amici Contractors at 8 ("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."); *Gibbs*, 949 P.2d at 342.

40 *Gibbs*, 949 P.2d at 342.

41 *See* BRUNER & O'CONNOR, *supra* note 13.

42 *See* Brief of Amici Contractors at 7 ("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.")

law.[43] Insureds, similarly situated with Gilbert, from other jurisdictions have benefited from more favorable coverage interpretations in other states.[44] For example, while the insureds in *Broadmoor* and *Pierce* incurred liability solely through contractual liability, the courts in those cases determined that the "assumption of liability" exclusion did not apply because their contractual liability was an assumption of a *duty* not *liability*.

Texas' broad interpretation of the "assumption of liability" exclusion will discourage companies to do business in Texas, particularly companies who rely on both their contractual relationships and their insurance coverage. Moreover, it will hurt Texas insureds who incur liability through a breach of contract and may nonetheless be precluded from coverage even though the damages flow from negligence, which many perceive as a classic covered risk. On the other hand, policyholders in almost every other jurisdiction will retain coverage for damages resulting from negligence, regardless of the theory of liability under which the claim is brought. No doubt exists that this Court's opinion will be read for the proposition that a CGL policy does not cover liability based

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[43] *See, e.g., Simco Enter., Ltd. v. James River Ins. Co.*, 566 F. Supp. 2d 555, 562 (E.D. Tex. 2008); *Western Sur. Co. v. Beck Elec. Co., Inc.*, 2008 WL 345821 (W.D.N.C. Feb. 5, 2008) (applying Texas law to the interpretation of an indemnity agreement); C.T. Drechsler, *Scope & Effect of Clause in Liability Policy Excluding From Coverage Liability Assumed by Insured Under Contract Not Defined in Policy, Such as One for Indemnity*, 63 A.L.R. 1122 (Originally published 1958) (Updated 2010); Travelers Casualty & Surety Company of America's Memorandum of Law in Opposition to Julio & Sons' Motion for Partial Summary Judgment, *Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 2009 WL 1266259, No. 08CV03001 (S.D.N.Y. May 5, 2009).

[44] *See Broadmoor*, 912 So.2d 400 (finding that the "assumption of liability" exclusion did not preclude coverage even though the liability arose from a contractual obligation and no complaint was ever filed); *Pierce Assocs., Inc. v. St. Paul Mercury Ins. Co.*, 421 F. Supp. 2d 11, 23 (D.D.C. 2006) (decision vacated on other grounds, 437 F. Supp. 2d 16 (D.D.C. 2006)) (holding that the "assumption of liability" exclusion did not apply, even though the only surviving claim was a breach of contract claim; coverage exists because the contractual claims seek "damages that, although they arise out of Pierce's work under the contract, are consequential damages to third parties – such as costs of repairing the damage to the property … for which [the insured] very well might have independent tort liability" had the tort claim not been dismissed on personal jurisdiction grounds).

on an insured's breach of contract. If that was not the Court's intent, the Court – at the very least – should clarify the scope of its holding.

CONCLUSION

The Texas Supreme Court should grant Gilbert's Motion for Rehearing because failure to do so will harm Texas policyholders. Insurance companies are obligated to provide coverage for covered risks like the damage to RTR's property in the case at hand. While insurance companies are not obligated to cover third-party liability assumed by contract, the insurer is required to cover a contractually assumed duty like the duty Gilbert assumed in its contract with DART. The distinction is that liability from an assumed duty generally arises, like here, from damages that are incurred as a result of the insured's negligence - a covered risk - and liability assumed by contract arises from a third-party's negligence - not a covered risk. Here, the negligence theory was not available solely because of the liability defense of governmental immunity. Even so, it does not change the origin of the damages. A great majority of jurisdictions recognize this distinction and thus do not interpret the "assumption of liability" exclusion as broadly as this Court. Because of this Court's broad reading of the exclusion, Texas policyholders will be put at a significant disadvantage relative to policyholders in other jurisdictions because they will lose value in their CGL policies. Moreover, companies outside of Texas will be discouraged from doing business in Texas so as to avoid Gilbert's fate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been served on the following counsel of record, by certified mail, return receipt requested on this 3rd day of August, 2010.

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