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FIFTH CIRCUIT EXPANDS SUPREME COURT'S HOLDING IN *GILBERT* TO BREACH OF CONTRACT CLAIM

Last Friday, the Fifth Circuit extended the holding in the Texas Supreme Court's decision in *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex.2010), to a coverage dispute involving a construction defect claim between the property owner and the general contractor. *Ewing Const. Co., Inc. v. Amerisure Ins. Co.*, --- F.3d ----, 2012 WL 2161134 (5 Cir. June 15, 2012.) The court began by setting out its reading of *Gilbert*, "the Dallas Area Rapid Transit Authority (DART) contracted with a construction company (Gilbert) to construct a light rail system. The contract required the company to protect the area surrounding its work site, and the company contractually agreed with DART to repair damages to the property of third parties caused by its construction. During construction, heavy rains caused flooding in a building near the work site, and the third party building owner sued the construction company under several theories. *Id.* The construction company's primary insurer assumed its defense, but its excess coverage insurer maintained that it had no duty to defend the company and might ultimately have no duty to indemnify either. The Texas Supreme Court held that the excess insurer owed no duty to its insured construction company because the CGL policy's contractual liability exclusion applied. The court reasoned that in its construction contract with DART, the construction company had undertaken legal accountability to the third-party building owner by contract, and therefore the contractual liability exclusion applied by its plain meaning."

The court then applied Gilbert to the claims by the property owner against the general contractor. The court rejected the construction company's argument that *Gilbert* did not preclude coverage for breach of contract claims. The company argued: "the district court's reliance on *Gilbert* was misplaced because entering a construction contract is not the same as assuming liability for faulty workmanship performed under the contract. In Ewing's view, the construction company's promise to repair third party property in *Gilbert* was an assumption of liability, but the relevant promise here—an implied promise to the School Board to perform the contract with ordinary care—is not."

The court stopped short of finding no coverage under the policy. It determined that because the duty to indemnify was to be based on the facts to be adjudicated, resolving the duty to indemnify was premature. The court affirmed the summary judgment as to the duty to defend for the insurer.

FIFTH CIRCUIT HOLDS ALCOHOL-RELATED CAR CRASH "ACCIDENT" UNDER ERISA POLICY ABSENT SPECIFIC LANGUAGE TO THE CONTRARY

In a second case of first impression issued on Friday, the Fifth Circuit held that an insured's death in an alcohol-related car crash was an "accident" under an ERISA life insurance plan. *Firman v. Life Ins. Co. of North America*, --- F.3d ----, 2012 WL 2161135 (5th Cir. June 15, 2012.) The court found the self-

administered ERISA plan abused its discretion and failed to follow the law. The insured had died in a car crash with a blood alcohol level well above the legal limit. But, the death certificate and accompanying medical records indicated the death was an "accident" involving "blunt force trauma." The court noted the policy at issue defined an accident and that the car crash met the definition. The court then noted the policy did not exclude alcohol-related car crashes. Of particular concern to the court was that the ERISA plan had twice told the beneficiary in denial letters that the plan did not provide coverage. The court noted that this was directly contrary to the law: "No circuit court considering drunk driving crashes has approved a claims administrator's use of a *per se* rule in the context of ERISA accidental death policies." The court went on to render judgment for the beneficiary against the ERISA plan.