



August 2011

Vol. 28, No. 8

# THE DICTA

## The Docket

August 6 (Saturday)

DAYL Food for Thought  
7:00 p.m., Tower Club

August 9 (Tuesday)

DAYL Equal Access to Justice Committee Meeting  
Noon, Belo Mansion

August 10 (Wednesday)

DAYL Lunch and Learn – Ethics  
Noon, Belo Mansion

August 10 (Wednesday)

DAYL LADV BackPACK to School Sorting  
5:00 p.m., Belo Mansion

August 10 (Wednesday)

DAYL Membership Committee Meeting  
6:30 p.m.

August 11 (Thursday)

DAYL Lawyers Serving Children Committee Meeting  
11:30 a.m., Belo Mansion

August 11 (Thursday)

DAYL Tech CLE  
3:30 p.m., George Allen Courthouse

August 15 (Monday)

DAYL Foundation Board of Trustees Meeting  
Noon, Belo Mansion

August 16 (Tuesday)

DAYL Elder Law Committee Meeting  
Noon, Belo Mansion

August 16 (Tuesday)

DAYL Animal Welfare Committee  
Noon, Belo Mansion

August 18 (Thursday)

DAYL Freedom Run Committee Meeting  
Noon, Belo Mansion

August 18 (Thursday)

DAYL Wine Tasting  
6:00 p.m., Sammons Center

August 20 (Saturday)

DBA Law Jam 3  
6:00 p.m., The Granada

August 24 (Wednesday)

DAYL Young In-House Committee Meeting  
Patrizio's (Highland Park Village), Noon

August 25 (Thursday)

DAYL Social  
6:00 p.m., Dallas Chop House

August 27 (Saturday)

DAYL Ask-A-Lawyer Program  
2:00 p.m., Irving Public Library

### DAYL ONE TO WATCH

**Aaron Capps** has been selected as the August 2011 DAYL One to Watch! To find out why, visit [www.dayl.com](http://www.dayl.com).

## DAYL Social at Chop House

**J**oin DAYL at the **Dallas Chop House** at 1717 Main Street on **Thursday August 25, 2011** for the August Social from 6:00 p.m. – 8:00 p.m. The cost to attend is \$3 for DAYL members and \$5 for non-members. Complimentary drinks and appetizers will be served. Parking validation is available for the Comerica building parking garage. Entrance to the garage is located on Elm Street. This month's sponsor, **Veritas Advisory Group, Inc.** will also be holding drawings for three \$100 Visa gift cards!

Veritas Advisory Group is a business consulting firm. Their engagement teams include accountants, financial analysts, engineers, and information management professionals. Veritas Advisory Group's experts have testified in federal and state courts, domestic and international arbitration, and regulatory proceedings. Veritas Advisory Group's complex commercial litigation practice focuses on early case assessment, discovery assistance, economic damages analyses, and expert testimony. For more information contact **Brandi Kleinman** or **Michael Ott** (214.720.1995; BKleinman@VeritasAG.com; Mott@VeritasAG.com).

## Ethical Crossroads: Where Lawyers and Judges Meet

**P**lease join DAYL on **Wednesday, August 10, 2011** from 12:00-1:00 p.m. at the Belo Mansion for a panel discussion focusing on the ethics of lawyer-judge interactions. Attendees can expect to receive practical advice about interacting with the judiciary.

The distinguished panel will consist of the **Honorable Catharina Haynes** of the United States Court of Appeals for the Fifth Circuit, the **Honorable Mark Greenberg**

of County Court at Law No. 5, and the **Honorable Tonya Parker** of the 116th District Court. **Jim Mitchell** of the Payne Mitchell Law Group will moderate.

This program has been approved for 1.0 hour of ethics credit. There is no cost for DAYL members to attend; the non-member fee is \$10. Lunch is available for purchase.

For more information, or to RSVP, please contact **Cherie Harris** ([cherieh@dayl.com](mailto:cherieh@dayl.com)).

## Texas Rangers and DAYL = Summer Fun

**J**oin the DAYL Solo & Small Firm Committee and our sponsor **3TPRO, Inc.** on **Thursday, September 15** at

The Ballpark in Arlington as our first-place Rangers will play the Cleveland Indians in what could be a postseason preview.

As a continuation of our two previous Networking Skills programs, expert Paul Maynard will be on hand to offer advice and assistance in networking.

RSVP's are required as we only have 50 spots. \$15 gets you admission to the

game, beer, and all you can eat hamburgers and hot dogs. Contact Cherie Harris at [cherieh@dayl.com](mailto:cherieh@dayl.com) to RSVP and arrange payment.



# THE DICTA

Jonathan Childers, Editor

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Copy Deadline for September Issue:

**August 10, 2011**

**Jonathan Childers**

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The views expressed in *The Dicta* do not necessarily reflect the views of the Dallas Association of Young Lawyers.

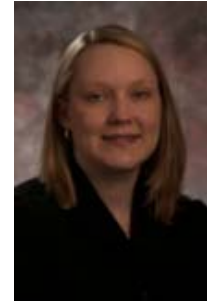
## From the President

# Calling All Law Students!

**I** often think that the name “Dallas Association of Young Lawyers” can be misleading. I spend a great deal of time explaining to people that you do not have to be “young” to be involved in DAYL - and you do not even have to be licensed as a lawyer - you can still be a law student. In fact, many of our superstar DAYL volunteers are law students who take advantage of our special reduced membership rates for students and the DAYL works hard each year to get involved with law students.

The DAYL Law Student Assistance Committee plans several joint events with DAYL and the two local law schools, SMU and TWU. So far this year DAYL members have volunteered as moot court judges, mock interviewers, and have organized a swearing in ceremony for newly licensed attorneys -- with more events to come as the semester gears up.

DAYL’s Judicial Intern committee is wrapping up another successful year of its internship program. DAYL received 226 applications from law students across the United States. From these applications, Dallas area state and federal judges selected 75 first and second year law students to serve as interns in the civil, criminal, probate, family and appellate courts. These internships not only brought the law students to the courtrooms and the annual



Penelope Brobst Blackwell

luncheon, but also to DAYL events like Bowling with the Bench, and many other programs at the Belo this summer. This month the DAYL also welcomes to its Board of Directors the 2011-2012 law student representatives, **Erin Chancellor** of SMU and **Beth Hearn** of TWU. These eager and energetic students will spend the next year working hard to get the word out about all the great programs DAYL has to offer and getting actively involved in several of the DAYL’s programs. If you want to know where to start, our socials are also hot spots for law students every month. Also, in October we are again holding a decorating contest at the DAYL’s Midnight Recess for some friendly competition between our SMU and TWU students. In addition, many of DAYL’s committees are looking for help with various community service projects and welcome law student involvement.

So whether you are new to the Dallas legal scene and just starting your law school adventure at SMU or TWU, or you are finding more time on your hands and needing to work on your local network as a second or third year law student, I encourage you to join the DAYL and get involved with one of our many committees. As for our “lawyer” members - consider joining our Law Student Assistance committee for one of its upcoming events. You’ll be glad you did.

**Family Day with the Grand Prairie Air Hogs**  
**Air Hogs v. Amarillo Sox | August 27 at 7:05 p.m.**

DAYL Counsel with Kids Committee invites you to join us in the suite where you can enjoy the game and all-you-can-eat hot dogs, hamburgers, chips and (non-alcoholic) drinks. Stay afterward for postgame fireworks. Tickets are \$25 per person, and children three and under get in free. Contact Lance Currie ([lcurrie@ccsb.com](mailto:lcurrie@ccsb.com)) for information.

## Better Trial Technique Through Technology

**T**oday, your courtroom technology skills may be the difference between winning and losing your case. That's why we're inviting you to join DAYL on **Thursday, August 11, 2011** from 4:00-5:30 p.m. (registration begins at 3:30 p.m.) in the 68th District Court of the George Allen Courthouse for a hands-on discussion on not only what resources are available in the courtroom, but how to effectively

use those resources in a live trial setting.

Attendees can expect to receive practical advice for using technology to maximize the jury's retention and understanding of your case, hands-on instruction for operating the equipment in the courtroom, a demonstration of effectively using technology, and an overview of trial presentation software available.

Distinguished speakers include the

**Honorable Judge Martin Hoffman** (Judge of the 68th District Court), **Austin Jones** (Andrews Kurth LLP) and **Cynthia Halatyn**, coordinator for the 68th District Court.

This program has been approved for 1.5 hours of CLE credit. The cost for DAYL members is \$10 and the non-member fee is \$20. Payment should be made in advance. Contact **Cherie Harris** (cherieh@dayl.com) for information.

## Third Annual Food for Thought to Benefit Big Thought

**T**he Dallas Association of Young Lawyers will host the 3rd annual Food for Thought on **Saturday, August 6th**, from 7:00 p.m.-11:00 p.m. at The Tower Club in downtown Dallas. Showcasing DFW's finest Chefs and cuisine, Food for Thought benefits Big Thought, one of Dallas' leading nonprofits dedicated to improving public education by giving children access to creative instruction and hands-on learning during school hours and beyond, all year long.

Food for Thought features more than a dozen chefs from our city's finest establishments presenting signature "tastes" of their specialties during the evening. The event includes entertainment, silent and live auction and premium bar. Chefs include **John Tesar**, *The Commissary*; **Brian C. Luscher**, *The Grape*; **Tiffany Derry**, *Private Social*; **Scott Blankenship**, *The Tower Club*; **Samir Dhurandhar**, *Coal Vines* and *Nick and Sam's*; **Lisa Garza**, *Taste Studio*; **Wilfredo Calderon**, *Chiloso Mexican Bistro*; and more.

"We are so excited to be in our third year of Food for Thought," says

**Mark Melton**, Co-chairman of Food for Thought. "Our goal is to make imagination a part of overall learning. In supporting Big Thought we are providing access to creative instruction and hands-on learning during school hours and beyond, all year long."

Each year, Food for Thought honors a local civic leader with the Gavel of Excellence award for significant contributions of service made to our community. This year's recipient is **Daryl "Moose" Johnston**, who will be honored with the coveted Gavel of Excellence Award for his work with SLANT 45. Created to utilize Super Bowl XLV as a catalyst to get kids to design and implement volunteer

projects throughout North Texas that would impact the community long after the final play, the three time Dallas Cowboy, Super Bowl winning fullback and NFL commentator more than doubled the original goal with his outstanding leadership. Previous Gavel of Excellence award recipients include **Jim Keyes**, former CEO of Blockbuster, and **Ebby Halliday**.

The Tower Club is located at 1601 Elm Street on the 48th Floor of Thanksgiving Tower. Complimentary valet parking is provided.

Tickets are \$100 per person. For more information and to purchase tickets call 214-979-2952 or go to [www.foodforthoughtdallas.com](http://www.foodforthoughtdallas.com).

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# Flag Football 2010 Recap: Ackels Sets Record

**T**he 2010 DAYL Flag Football season came to an end in January, with Cardiac winning the championship over Boone Dogs. A highlight of the championship game included **Joe "Brett Favre" Ackels** coming out of retirement for the ninth time to add one more DAYL championship to his long and checkered career. Ackels has now won DAYL Flag Football World Championships in FIVE decades beginning in 1979. This impressive achievement is almost as unassailable as the career record for interceptions thrown that Ackels set along the way. The former commissioner, now commissioner

again, **Jay Hartnett** has the opportunity to tie Ackels' record if he plays for ten more years, when he will have attained the ripe old age of 56.

Ackels' impact in the Championship was felt immediately upon his entry into the game when his lack of hair caused the Haynes and Boone players to become disoriented due to the glare from his bald head and the horrible noise coming from his mouth.. Unfortunately the glare also caused Cardiac's **Dale Henley** to drop an easy touchdown pass from quarterback Kevin Vice early in the first half.

The Championship Game was a slugfest between two teams which had

met 13 times in the regular season and were the last ones standing in the double elimination tournament. **Kyle Ballard** made his most important contribution to the Cardiac team by winning the coin toss. Cardiac's victory was achieved despite the absence of teammate **Darren "hammy" Harrington**. Harrington, who is typically good for about six to ten plays before pulling his hamstring, was home nursing his injury from the semi-final game and could not play. Fortunately, **Paul Simon** was able to break away from DAYL Basketball long enough to carry the defensive load.

Thanks to the all the teams that participated last year!

# Flag Football Is Back in 2011

**T**he 2011 Flag Football season will get under way in September. As usual we will play on Monday and Wednesday nights (at Norbuck Park) in Divisions A, and B. While there is no coed league, women are encouraged to play in any of the leagues.

Once again the commissioner is challenging all of the large firms to sponsor at least one team. We had only 8 teams competing last year, and I am sure that we can do better this year. This year's entry fee is \$700. The rules are available through the Commissioner's office and are always subject to change at the last minute in games involving the commissioner.

If you are interested, please contact the Commissioner Jay Hartnett at (214) 742-4655, or simply fill out the enclosed form and fax it to (214) 855-7857 or email it to [jay@hartnettlawfirm.com](mailto:jay@hartnettlawfirm.com).

TEAM NAME: \_\_\_\_\_

TEAM MANAGER CONTACT INFORMATION (PLEASE INCLUDE NAME, ADDRESS, TELEPHONE AND FACSIMILE NUMBERS, AND EMAIL ADDRESS)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

ROSTER:

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9. \_\_\_\_\_

LEAGUE PREFERENCE (A OR B) \_\_\_\_\_

PLEASE COMPLETE AND RETURN THE FOOTBALL REGISTRATION FORM AND PAYMENT (PAYABLE TO DAYL) BY 9/2/2011 TO: JAY DAVID HARTNETT, THE HARDNETT LAW FIRM, 2920 N. PEARL STREET, DALLAS, TEXAS 75201. CONTACT JAY (214.742.4655 OR [JAY@HARTNETTLAWFIRM.COM](mailto:jay@hartnettlawfirm.com)) FOR MORE INFORMATION.

Please join the DBA Transition to Law Practice Program CLE program, focusing on Legal Writing for Beginning Lawyers. The speaker is Chad Baruch and it will be held on Friday, October 7, from noon to 1 p.m. at the Belo Mansion. This program has been approved for one hour of CLE credit. RSVP Alicia Hernandez ([ahernandez@dallasbar.org](mailto:ahernandez@dallasbar.org)) so we can have ample seating.

## DAYL Wine Tasting to Raise Money for DVAP

**D**on't miss this year's DAYL Equal Access to Justice Committee Wine Tasting benefiting the Dallas Volunteer Attorney Program. The Wine Tasting will be held on **Thursday, August 18, 2011**, from 6:00 p.m. to 8:00 p.m., at the Sammons Center for the Arts, 3301 Harry Hines Blvd., Dallas, TX. The event includes the tasting of wines, heavy hors d'oeuvres, a cork pull, complimentary valet parking, and more . . .

DAYL will also be presenting its first annual Young Lawyer Pro Bono Service Award at the Wine Tasting to **Amanda A. Todd-Thomas**, for her outstand-

ing contributions and access to justice to those in need of legal services.

The Wine Tasting is always fun, provides great networking opportunities, and most importantly, helps raise funds for the Dallas Volunteer Attorney Program, which provides free legal services to indigent citizens of Dallas. The wines will be Spanish-themed.

Tickets for the event are \$25 in advance and \$15 for government employees, law clerks, law students and interns. Add \$10 at the door. Email **Cherie Harris** (cherieh @dayl.com) for ticket information or if you have any questions about the Wine Tasting.

The DAYL gives a special thank you to our sponsors (as of printing date): *Vineyard Sponsor: Frost Banking Investments Insurance*; *Champagne Sponsors: Carrington, Coleman, Sloman & Blumenthal, L.L.P.; Lynn Tillotson Pinker Cox; and Sayles Werbner*; *Cabernet Sponsors: Greenberg Traurig; Sommerman & Quesada; Lewis Brisbois Bisgaard & Smith; and Gruber Hurst Johansen Hail & Shank*; and *Chardonnay Sponsors: Baker Botts L.L.P.; Gardere Wynne Sewell, LLP; Godwin Ronquillo; KASTL Law; Sedgwick; and Strasburger & Price, LLP.*

The Elder Law Committee invites you to join DAYL in the fight against Alzheimer's. DAYL will participate in the 2011 Dallas Walk to End Alzheimer's, taking place Saturday, November 12, 2011 at Fair Park. Please join the DAYL team, donate to the Alzheimer's Association, or volunteer to assist at the event. To join the DAYL team and make a donation towards our fundraising goal, follow this link: <https://www.kintera.org/faf/search/searchTeamPart.asp?ievent=456151&lis=1&kntae456151=88908AD2C04F4DC680B01590A49A8338&supld=330944211&team=4235918>



11th Annual Freedom Run  
5k Run, One-Mile Walk and Festival  
[www.freedomrun.com](http://www.freedomrun.com)

Thursday, September 8, 2011 at 6:30 p.m.  
Dallas City Hall Plaza

The Freedom Run was first established by the Dallas Association of Young Lawyers in 2001 to honor the heroes and victims of the 9/11 attacks.

All proceeds from the Freedom Run benefit local first responders through the Assist the Officer Foundation ([www.atodallas.org](http://www.atodallas.org)).

To register a corporate team or an individual please visit [www.freedomrun.com](http://www.freedomrun.com).

LAWYERS ROCKIN' FOR PRO BONO

# LAW JAM

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## "Korean BBQ In My Tacos?" It's More Likely Than You Think

**W**e know what you're thinking – "Man, this summer is so unbearably hot, even for Texas. I should be having lunch in my car." Fantastic idea, Anonymous Reader; blast that a/c and roll down the windows, the neighborhood needs cooling off! So, lunch in the car it is... but it's not time for the Sonic happy hour, and you just had McDonald's for second breakfast. Lucky for you, you have been cruising Harry Hines and you are near **Goghee To Go** (2222 Inwood Road, Dallas, [www.gogheetogo.com](http://www.gogheetogo.com)) in the little building that used to house the Dreamsicle-colored Burguesa Burger. Repainted a cool mint green, Goghee To Go is about to satisfy the urge you never knew you had. No, not that one, you sick freak. We're talking about the urge for delicious Korean BBQ tacos.

While folks in L.A. still haven't quite

caught on to the Dallas way of being fake-nice to people we don't like, Dallas folks are slowly warming up to Korean tacos, one of the hottest food fads out west. To the uninitiated, typical Korean BBQ ("goghee" means meat in Korean) consists of very thinly sliced beef that has been marinated for a long time. The combination of thin slices and extra-long marinade time makes for some sweet and very tender BBQ.

Typical Korean fare also include kimchee (or gimchee, as Goghee to Go spells it), which is pickled cabbage, seasoned with chilies and other spices. Kimchee (gimchee, whatever) is ubiquitous in Korean meals, and in the case of Goghee to Go, makes a great complement to BBQ tacos.

Goghee to Go offers three types of protein - beef, chicken, and pork, as well as portabella mushrooms as fillings for its small

## DAYL and DVAP Organize Probate Symposium for September

**D**VAP and the DAYL Elder Law Committee are sponsoring a Probate Symposium from 12:00 p.m. - 4:00 p.m. on **Friday, September 16, 2011** at the Belo Mansion. Topics will include a legislative update, judge's panel, and developments with the new Guardianship Code.

Attendees are eligible for 4.0 hours of CLE credit, including 1.0 hour of ethics

credit. A social hour with the Dallas County Probate Judges will follow the conclusion of the Symposium from 4:00 p.m. - 5:00 p.m.

The cost to attend is only \$50, or free for those who volunteer to assist DVAP in providing pro bono legal services to local senior citizens.

For more information, please contact **Cherie Harris** ([cherieh@dayl.com](mailto:cherieh@dayl.com)) or watch for information by email.

## The Law Reviewers

by *Anthony Lowenberg and Michael Anderson*

menu. Order any of those in tacos, a burrito, a burrito bowl, a quesadilla, or on a torta (that's "sandwich" in 'Merican).

An order of three beef tacos (\$6.25) was like taking a bite into some wonderful multicultural food concoction, a first class flight for your taste buds – a real first class flight on some far east airline with lie-flat beds privacy curtains. With the kimchee add-on (\$0.75), the tacos were a great combination of sweet, sour, salty, soft, and crunchy. For a moment, the experience of eating in the car was replaced by the experience of dining in some exotic Mexikorean bistro on Planet Delicious.

Thusly, on our sunburned five-gavel scale, where one gavel is an 85 degree morning "low," and five gavels is an ice-cold beer just after mowing the lawn on a hot day, we give Goghee To Go four gavels, or Dollar Ice Cream Night at a Rangers game.

On Friday, August 5th, the DBA Peer Assistance Committee and the DBA CLE Committee are hosting a one hour Ethics Credit program titled "Four Generations in the Workplace: Multi-Generational Perspectives on the Practice of Law". The CLE is at noon in Belo Hall.

The speakers include DAYL President Penelope Brobst Blackwell, DBA Immediate Past President Ike Vanden Eykel, Rust Reid, and SMU Student Bar Association President Erin Callahan. The program will be moderated by Cindy Pladziewicz. For more information or to RSVP, contact Kathryn Zach ([kzach@dallasbar.org](mailto:kzach@dallasbar.org)).

The DAYL Aid to the Homeless and Elder Law Committees are proud to co-sponsor the 2011 Toiletries Drive. The committees are seeking donations of travel size toiletries (including shampoo, conditioner, lotion, soap and toothpaste) to benefit the homeless and senior citizens of Dallas. The collection drive will run throughout the year.

Donations can be dropped off at the DAYL office at the Belo Mansion. Cash donations are also accepted.

# Contractual Liability Exclusion in Commercial General Liability Policy

by Sean A. Clemmensen



The Texas Supreme Court recently reaffirmed that the contractual liability exclusion in a Commercial General Liability (“CGL”) policy applies when the only basis for liability is the insured’s contractual agreement to be responsible for determined liabilities. *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd’s London*, No. 08-0246, 2010 WL 5133658 (Tex. Dec. 17, 2010). In *Gilbert*, the insured contracted with Dallas Area Rapid Transit (“DART”) to serve as general contractor in the construction of a light rail system. Under the contract, the insured agreed to protect adjacent third-party property from damage. At the time of construction, flooding damaged a building adjacent to the construction area. The building’s owner sued DART, the insured, and other involved entities. The insured’s primary insurance coverage was through a CGL policy with Argonaut Insurance Company (“primary insurer”). In addition, the insured had previously purchased excess policies with Underwriters Lloyd’s at London (“Underwriters”).

The insured’s primary insurer assumed its defense. At the insistence of Underwriters, the insured moved for partial summary judgment on the tort claims based on governmental immunity. The trial court granted the motion, leaving only the breach of contract claim. Subsequent to the trial court’s ruling, Underwriters sent a reservation of rights letter to the insured stating, in part, that the building owner’s breach of contract claim was excluded under the policy. Soon thereafter, the insured settled the building owner’s breach of contract claim. The primary carrier tendered its limits, but Underwriters denied coverage, and thereafter, the insured filed suit against Underwriters.

The trial court found coverage, but the court of appeals reversed and ruled in favor of Underwriters, holding that the breach of contract claim fell within the contractual liability exclusion of the policy. The issue for the Supreme Court was whether the contractual liability exclusion found in the

CGL policy excludes coverage for property damage when the only basis for liability is the insured’s contractual agreement, and if so, whether an exception to the exclusion brings the claim back within coverage.

The insured argued that the contractual liability exclusion was inapplicable because its liability arose from its own breach of contract and not from another’s liability the insured assumed. Underwriters argued that the contractual liability exclusion precluded coverage for liability assumed in a contract, and the court should not insert the phrase “of another” into the plain language of the exclusion. After examining the contractual liability exclusion and the exception applicable when the insured assumes the tort liability of another, the Court held that the exclusion applied as written. Relying on traditional principles of contract interpretation, the Court held that had the contractual liability exclusion been intended to be so narrow as to apply only to an agreement in which the insured assumed liability of another party by an indemnity or hold-harmless agreement, it would have included such language in the exclusion.

The Court also found that the exception for liability the insured would have absent its contract was inapplicable. The Court reasoned that, following the trial court’s partial summary judgment ruling, the building owner’s only viable theory of recovery remaining at the time the insured settled was for breach of contract, which fell within the terms of the contractual liability exclusion. The Court rejected the insured’s argument that the exception to the exclusion applied, since the insured’s potential liability rested solely upon the obligation it assumed in its contract with DART to protect third party properties from damage.

The Court refused to address the insured’s argument that interpreting the exception to apply only to actual proven facts and adjudicated liability will bar coverage anytime a tort claim is dismissed during litigation and a contractual claim remains. The

Court reasoned that “speculation about coverage of insurance policies based on surmised factual scenarios is a risky business because small alterations in the facts can warrant completely different conclusions as to coverage.” Therefore, while unclear, it appears as though the Court is limiting its interpretation of the exception to the exclusion to the specific facts of this case.

The Court rejected the insured’s contention that it was entitled to recover under an estoppel theory because Underwriters assumed control of the insured’s defense and prejudiced the insured as a result. The insured alleged that it was prejudiced because Underwriters’ actions deprived it of the opportunity to make an informed decision about which risk to take.

The Court refused to address whether Underwriters assumed control of the defense, reasoning that even if the insured was deprived of the opportunity to make an informed decision, it was not prejudiced by the deprivation because in the final analysis, the insured did not have coverage for the contract claim regardless of whether it asserted the immunity defense as Underwriters directed it to do. Therefore, essentially, the Court refused to address the insured’s two-part argument regarding prejudice. Instead, the Court bypassed the issues entirely by holding that there was no prejudice because the contract claim did not fall within coverage.

The *Gilbert* decision surprised many practitioners who had operated under the assumption that the contractual liability exclusion only applied to the insured’s assumption of liability “of another.” Given the Court’s heavy reliance on the specific facts of this case and refusal to address certain issues presented, it is unclear how the holding will affect coverage in certain areas in the years to come.

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*Sean A. Clemmensen is an associate at Thompson, Coe, Cousins & Irons, L.L.P., practicing in insurance litigation and coverage.*

### **Announcements**

The Law Office of Gil L. Daley, II, P.C. ([www.GilDaleyLaw.com](http://www.GilDaleyLaw.com)) has a new Fort Worth address of 201 Main Street, Suite 600, Fort Worth, Texas 76102; Tel. 817.763.9553. The Dallas office address is 325 N. Paul Street, Suite 2550, Dallas, Texas 75201; Tel. 214.698.5988.

Thompson & Knight is excited to announce the addition of **Barbara-Ellen Gaffney** to their Labor and Employment Practice Group in the Dallas office.

**Monica Berry**, formerly of Hostess Brands, Inc., has become Assistant General Counsel of NTR Metals, LLC. She can be reached at [mberry@ntrmetals.com](mailto:mberry@ntrmetals.com).

**Penelope Brobst Blackwell** was named to 2011 Dallas Business Journal's 40 Under Forty List.

The National Association of Attorneys General announced that **James C. Ho** received a Best Brief Award for excellence in brief writing in the U.S. Supreme Court.

*To submit an announcement for a future issue of The Dicta, please email **Cherie Harris** ([cherieh@dayl.com](mailto:cherieh@dayl.com)).*

**DAYL thanks Central Reproduction Company for their support of the DAYL and *The Dicta* by absorbing all costs associated with the printing of *The Dicta* for over 25 years.**