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#### FEDERATION TRIUMPHS...



**Robert Shults** of McFall, Breitbeil and Shults PC recently obtained a victory in The Fifth Circuit Court of Appeals on behalf of his client Century Surety Company. The Fifth Circuit affirmed the Northern District of Texas' order granting summary judgment in favor of Century finding that Hardscape's claim for indemnification fails as a matter of law because the underlying breach of contract claim falls within the insurance policy's liability exclusion clause. The appellant, Hardscape Construction Specialties Inc, was contracted to construct a swimming pool facility for Hillwood Residential. After completion of

the facility, Hillwood sued Hardscape alleging that faulty design and construction had caused physical and aesthetic damage to the surrounding complex. Hardscape demanded its subcontractor's insurer, Century Surety, indemnify the claim.

The Fifth Circuit decided two issues in this case. First, the Court held that the term "occurrences" under commercial general liability (CGL) policies encompasses "allegations of unintended construction defects." Therefore, the Century policy's "occurrence" terms covered the Hillwood suit. Second, the Court held that the Hillwood suit does not fall within the policy's "insured contract" exception to the "contractual liability" exclusion. The Court stated that the scope of the commercial policy exclusion turns on the difference between tort and contract allegations in the underlying lawsuit. In this case, only a breached of contract claim was alleged which means that the claim falls within the policy's exception to coverage, and therefore reveals Century of any duty to indemnify Hardscape. (Posted 9/3/09)