

# Condo Owner's Suit Barred By Property Damage Exclusion Because It "Arises Out Of" Property Damage

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The United States Court of Appeals for the Eleventh Circuit, applying Florida law, has held that coverage for a condominium owner's suit against a condominium association was barred by the policy's property damage exclusion because the suit arose out of physical damage to the condominium. *Eastpointe Condo. I Assoc., Inc. v. Travelers Cas. & Sur. Co. of America*, 2010 WL 1995841 (11th Cir. May 20, 2010).

A condominium owner brought suit against a condominium association for breaching its fiduciary duty to maintain and repair the condominium roof and air conditioning system before and after two hurricanes. The condominium owner alleged that this failure caused water to intrude into her condominium and create mold and other damage. The condominium association tendered the action to its directors and officers liability insurer, which denied coverage based on an exclusion for any claim "for or arising out of any damage, destruction, loss of use or deterioration of any tangible property including . . . mold, toxic mold, spores, mildew, fungus, or wet or dry rot." The condominium association brought suit against the insurer to recover the costs of defending the suit.

The court first rejected the condominium association's argument that the condominium owner's claim arose out of the association's alleged breach of duty and held that the condominium owner's suit arose out of the alleged property damage to her condominium. Under Florida precedent broadly interpreting "arising out of" to mean "having a connection with," the court held that the breach of fiduciary duty cause of action "ha[d] a connection with" the property damage because the cause of action "depended upon the existence of the property damage." Second, the court held that the property damage exclusion was not ambiguous simply because "different judges have reached different interpretations of similar policy language." Finally, the court noted that its holding would not make coverage under the policy illusory because other claims could potentially fall outside the property damage exclusion.