

Property Damage Exclusion Bars Coverage for Negligence and Breach of Fiduciary Duty Claims

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The United States District Court for the Southern District of Texas, applying Texas law, has held that an insurer had no duty to defend two lawsuits asserting negligence and breach of fiduciary duty claims where the relevant policy contained a property damage exclusion and the claims arose out of property damage related to Hurricane Ike. *Landing Council of Co-Owners v. Fed. Ins.Co.*, 2013 WL 4787954 (S.D. Tex. Sept. 9, 2013).

The insured, a homeowners' association that managed and maintained a condominium development, sought coverage for three different lawsuits filed after the property was damaged during Hurricane Ike. The insurer denied coverage for the lawsuits based on the property damage exclusion contained in the relevant policy, which barred coverage for claims "based upon, arising from, or in consequence of any actual or alleged . . . damage to or destruction of any tangible property including loss of use thereof whether or not it is damaged or destroyed." After the insured filed a coverage action in federal district court, the insurer moved for summary judgment, arguing that the exclusion precluded coverage for the underlying suits.

Granting the insurer's motion in part and denying it in part, the court concluded that the insurer had no duty to defend two of the three lawsuits but had a duty to defend the third. In so doing, the court considered the applicability of the property damage exclusion to each cause of action asserted in the lawsuits, explaining that, under Texas law, the phrase "arise out of" is interpreted to mean "but for" causation. According to the court, the first lawsuit only asserted a negligence claim based on the insured's alleged failure to clean up and repair the property after the hurricane. Similarly, the second lawsuit included a negligence claim based on the insured's purported failure to exercise reasonable care to preserve the value of the claimants' property. The second lawsuit also included a breach of fiduciary duty claim based on the insured's alleged mismanagement of insurance proceeds received as a result of the hurricane. The court reasoned that the first and second lawsuits both asserted causes of action only arising from property damage related to the hurricane and therefore coverage for those suits was precluded by the property damage exclusion.

With respect to the third lawsuit, the court determined that the insurer had a duty to defend that suit because "some of the causes of action in that case are not specifically alleged to have arisen from property damage"—namely, a breach of fiduciary duty claim based in part on the insured's failure to collect assessments after

the hurricane due to an undisclosed interest in selling the property, and a claim for breach of the Texas Property Code based in part on the insured's alleged "fail[ure] to make and assess assessments for common expenses, including security." According to the court, such claims appeared to be "separate and independent of the hurricane," and thus did not fall within the exclusion.