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Property Damage Exclusion Precludes Duty to Defend

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The United States District Court for the District of Colorado has held that an insurer did not owe a duty to defend under a Non-Profit Executive Protection and Employment Practices Liability Insurance (D&O) policy issued to a condominium association (the Association) because the claims in the underlying breach of contract suit fell under the policy's property damage exclusion. *Beauvallon Condominium Assoc., Inc. v. Granite State Ins. Co.*, 2011 WL 2565474 (D. Colo. June 29, 2011).

The underlying complaint was filed by an investment company that purchased commercial space in the condominium development and leased it to retailers. After the retailers began to complain about problems with common elements, including drainage from the roof and interior leakage from overhead plumbing defects, the owner of the retail spaces filed suit against the Association, demanding repair of the common elements.

The Association timely tendered defense of the underlying lawsuit under the D&O policy. The insurer denied coverage, arguing that it had no duty to defend because the allegations in the underlying complaint fell squarely within its policy's property damage and construction defect exclusions. The property damage exclusion precluded coverage for any claim "based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or any way involving ... damage to or destruction of any tangible property, including the loss of use thereof...." The Court held that this exclusion was not ambiguous and that "the allegations of the Underlying Complaint are solely and entirely within the property damage exclusion." Consequently, the court held that the allegations of the underlying complaint did not trigger a duty to defend under

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