

Matching Colors And Policies: Insurers May Be On The Hook

Law360, New York (May 01, 2014, 4:57 PM ET) -- The forces of nature can wreak havoc on all aspects of a building, especially the roof, siding and facia. As the storm clouds part and give way to blue skies, property owners sometimes do not find a totally destroyed roof or wall of siding. Instead, only a few shingles or sections of siding may have suffered damage and need to be replaced. Under these circumstances, insurers often wonder if they are also required to pay for the replacement of the surrounding undamaged property.



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Recently, several courts have addressed this issue. Using allegedly ambiguous policy language, these courts have concluded that where shingles and siding do not match, insurers must pay to replace damaged and undamaged property. Replacement of undamaged property simply because of discoloration of shingles or siding can be very expensive. This article explores when an insurer will be obligated to cover both damaged, as well, as undamaged property and how such a risk can be mitigated from an insurer's perspective.

What is "Comparable Material" of Like Kind and Quality?

Property policies commonly provide for repair, rebuild or replacement of property with comparable material of like kind and quality. The term "comparable material" is generally not defined in property policies. Consequently, a solely esthetic difference between the new replacement materials and existing materials may result in the insurer having to pay for the replacement of damaged as well as undamaged property.

The Minnesota Court of Appeals in *Cedar Bluff Townhome Condominium Association Inc. vs. American Family Mutual Insurance Co.*, 2013 Minn. App. Unpub. LEXIS 1063 (Dec. 2, 2013), recently concluded that a reasonable person could understand the term "comparable material" to mean material that is the same color as damaged property. In Cedar Bluff, the siding on all 20 buildings that made up the townhome complex was damaged to some degree during a storm in October 2010. Under the terms of the insurance policy, American Family agreed to "[r]epair, rebuild or replace the property with other property of like kind and quality." Replacement property was to be "of comparable material and quality."

The siding on the buildings was 12-to-13 years old and had faded, and the existing siding was no longer manufactured in the original color. Siding from the same manufacturer, with the same specifications, was available, but the color was "slightly darker or slightly lighter" than the color of the original siding at the time of installation. American Family proposed replacing only the damaged siding boards with the closest colors available. Cedar Bluff, however, demanded that all siding be replaced on all of the

buildings. The cost of replacing all of the siding was approximately double the cost of replacing only the damaged siding boards.

Following an appraisal award in favor of Cedar Bluff, the trial court found that American Family was only responsible for only direct physical damage and not for the undamaged siding to achieve a color match. The Minnesota Court of Appeals, however, disagreed. That court found that American Family specifically agreed to “[r]epair, rebuild or replace the property with other property of like kind and quality,” and that the value of the covered property would be determined based on the cost to “replace ... with other property ... [o]f comparable material and quality.”

The policy did not define property “of like kind and quality” or property “of comparable material and quality.” As a result, the appellate court found the term “comparable material” to be ambiguous and stated that a reasonable person could understand it to mean material that is the same color as the damaged property.

Just a few months later, a Minnesota federal district court came to a similar conclusion. In *Trout Brook South Condominium Association v. Harley Worcester Insurance Co.*, No. Civ. No. 12-2888, 2014 U.S. Dist. LEXIS 14108 (D. Minn. Feb. 5, 2014), the claim involved mismatched shingles. There, the court found that because the phrase “like kind and quality” was not defined and that the “insured’s interpretations — ‘requir[ing] that the building have uniformly color siding’ — was no less reasonable.” Consequently, the court concluded that the policy was ambiguous.

Clearing up the Confusion

The operative language in these cases boils down to the meaning of comparable materials of “like kind and quality.” For insurers, the good news is that the “ambiguity” in this term probably can be resolved by looking at language found elsewhere in the policy. For example, in *Green v. United Services Automobile Association*, 936 A.2d 1178 (Pa. Super. Ct. 2007), part of the insured’s roof was damaged, and matching shingles could not be obtained. As a result, the insured wanted the entire roof replaced. The carrier refused to totally replace the roof and based its denial on policy language that required “replacement of that part of the building damaged.” The court ultimately found the term unambiguous and that the carrier owed only the cost to repair the damaged part of the roof, and not the cost of a total roof replacement.

Unlike the language in Cedar Bluff and Trout Brook, which required replacement with property of “like kind and quality,” the Green court focused on the language that more specifically identified which parts of the property must be replaced. Would the results in Cedar Bluff and Trout Brook have been different if the policies covered replacement of only that part of the property that is damaged with other property of like kind and quality? The answer is likely yes.

This language eliminates the question of whether an insurer must pay to replace undamaged property, including mismatched, undamaged property. Unfortunately, Cedar Bluff and Trout Brook are silent on the presence of this language. Absent clear language with regard to matching or undamaged property, an insurer can find itself exposed to the prospect of replacing undamaged and mismatched property even if the same building materials, from the same manufacturer, in the same color are available for replacement, but are a slightly different color than the original materials because of natural weathering. But see also *Labrilla v. Farmers Group Inc.*, 119 Cal. App. 4th 1070, 1082 (2004) (stating “the expression ‘like kind and quality’ refers to the kind and quality used in original construction.”).

Better to be protected than exposed.

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