

INSURANCE AND REINSURANCE

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IN THIS ISSUE

A common issue facing property insurance companies in storm damage claims is exactly how much has to be replaced. This problem is most often present in roof damage or siding damage claims, where the issue is whether the entire roof or siding of a structure have to be replaced in order for there to be a perfect match. This article analyzes recent cases involving such property insurance claim disputes.

Matching Disputes in Property Insurance Claims

ABOUT THE AUTHORS



David J. Rosenberg is a Partner in the Pittsburgh, Pennsylvania office of Weber Gallagher Simpson Stapleton Fires & Newby LLP. Mr. Rosenberg is a Vice Chair of the Insurance Committee of the IADC. Mr. Rosenberg focuses his practice in the area of insurance and commercial litigation. He is also a Fellow in the Academy of Trial Lawyers of Allegheny County, Pennsylvania and an Adjunct Professor of Law at the University of Pittsburgh School of Law. He can be reached at drosenberg@wglaw.com.

Matthew Zwick is a recent graduate of the University of Pittsburgh School of Law and currently works in the Pittsburgh office of Weber Gallagher Simpson Stapleton Fires & Newby LLP.

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Sharon D. Stuart
Vice Chair of Newsletters
Christian Small, LLP
(205) 795-6588
sdstuart@csattorneys.com

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A common issue facing property insurance companies in storm damage claims is exactly how much has to be replaced. This problem is most often present in roof damage or siding damage claims. The issue is if a portion of a roof is damaged, does the entire roof have to be replaced in order for there to be a perfect match? Similarly with siding, would the entire structure need to be resided or is it sufficient to replace either one wall of siding or several panels of siding?

The following is typical of relevant policy language:

“We will pay the cost to repair or replace with *similar construction for the same use on the premises* shown in the Declarations, the damaged part of the property covered . . .”
(emphasis added)

The issue in dispute is what is meant by the word “similar”? Courts across the country have come to different conclusions in interpreting this type of policy provision. The Texas Supreme Court in the case of *Republic Underwriters Insurance Co. v. Mex Tex, Inc.*, 106 S.W.3d 171 (2003) interpreted this language in regard to a claim for storm damage to a roof. The Republic policy included language that it had the option to “repair, rebuild or replace the property with other property of like kind and quality”. Further, the policy stated that it was required to pay only the cost of replacing damaged property with property “of comparable material and quality”.

In this case, a hail storm damaged the insured’s roof. The insured claimed that the roof had been destroyed and needed to be replaced. The insurance company investigated the claim and disputed the extent of the damage attributable to the hail, finding

that there had been long term leakage problems with the roof prior to the loss. While the investigation was ongoing, the insured replaced the roof at a cost of \$179,000 with a roof that was of the same type, but was installed with a different construction method. The carrier ultimately tendered it with a check which represented the cost of installing an identical roof but with the original construction method. This payment was approximately \$35,000 less than the cost to the insured of the replacement.

The Court held that the policy language neither restricted nor required the insurer to pay the cost to replace the roof with an identical one. It held that the policy language allowed for leeway and that the roof installed by the insured was within that leeway. At trial, the insured provided testimony and evidence that both the old and new roof were comparable, but the new one cost more. Based upon this interpretation of the policy language and the evidence presented at trial, the Texas Supreme Court affirmed the Trial Court’s ruling that the new roof which was installed in a more expensive manner was covered pursuant to the terms of the policy.

A Pennsylvania Appellate Court reached a different conclusion in interpreting similar policy language. In the case of *Green v. United States Automobile Insurance*, 2007 Pa.Super. 344, 936 A.2d 1178 (2007), appeal denied, 598 Pa. 750, 954 A.2d 577 (2008), the insured’s slate roof lost three shingles from its front slope during a storm. The roof also exhibited evidence of typical wear and tear. The carrier issued payment for minimal roof repairs and notified the insured that the wear and tear was not covered. Shortly after the first loss, there was a claim for a second loss alleging that another storm caused damage to the same slope of the roof. As in the *Mex Tex* case, the carrier discovered that the insured

had replaced the entire roof. The carrier issued payment in the amount of \$1,434.54 based upon photographs. The insured was not satisfied and sought payment for the entire roof. The insured's position was that matching roof shingles could not be found so therefore the carrier should be required to pay for the entire replacement roof. The carrier denied. The Trial Court awarded damages for slightly more than the amount paid by the carrier, but less than the insured was seeking to replace the entire roof. The insured appealed on the issue of matching.

The pertinent provision of the policy read as follows:

"If at the time of the loss, the amount of the insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

- (1) the limit of liability under this policy that applies to the building;
- (2) the replacement cost of the part of the building damaged;
- or (3) the necessary amount actually spent to repair or replace the damaged building.

The replacement cost will not exceed that necessary for the ***like construction and*** use on the same premises regardless of

whether the replacement building is located on the same or different premises."

(Emphasis added.)

On this issue, the insured made two arguments. The first argument was that the carrier was required to pay the cost of replacing the entire roof because the roof was the "part of the building damaged". The Pennsylvania Superior Court found the insured's interpretation of the policy language to be "unreasonable and absurd". Since there was damage to only one slope of a multi-sloped roof, the Court found that only the one slope was part of the building damage. The Appellate Court quoted the Trial Court as follows:

"To utilize [Appellant's] logic would necessitate replacing all siding when one piece of siding is damaged, or an entire door when a door knob is damaged. It defies common sense."

The Court then addressed the "like construction" argument. Plaintiff's argument was that the exact shingles used on the roof were no longer available and therefore they should be entitled to a new roof in order to assure that the entire roof was uniform. The Court noted that trial testimony revealed that shingles of similar color and texture were available. The Court held that the policy does not call for replacement of identical items to those damaged, but only for "like construction". So, by repairing the damaged slope with use of similar shingles that were close in function, color and shape to the original shingles, satisfied the requirement under the policy for "like construction". The Court specifically held that the carrier was not required to replace the entire roof.

In determining whether or not acceptably similar products are available, insurance companies will often use a third-party service, Itel (www.itelinc.com). Through Itel, carriers can take samples of roofing material, siding, flooring or carpeting and Itel can provide information as to whether or not the product can be matched along with supplier information for the original and available matching products. Where parties are in dispute, an Itel report can be strong evidence to determine compliance with the policy provisions.

A comparison of the decisions by the Appellate Courts from two different states emphasizes the fact that there is not a clear cut rule on matching. A determination of coverage will turn on fact specific circumstances and evidence. Ultimately, it will be reasonableness standard as to what is "similar". The condition of the structure prior to the loss will be significant. For example, in a siding claim, issues to be considered include whether or not the structure has a mix of siding types. Further, if the replacement materials differ slightly from the original materials, do the new and old materials abut, or are they separated by a corner or different level? Ultimately, the trier of facts will most likely ask themselves whether or not they would be satisfied with the partial replacement. Replacing an entire slope of a roof or side of a house is far more palatable than attempting to install a small patch of material that is not exact.

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