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### Color Match Arrives (Again) In Minnesota

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The Minnesota Supreme Court issued an opinion last month addressing, in living color, an insurer's obligation to match replacement materials after homes suffered storm damage. The opinion in *Cedar Bluff Townhome Condominium Association, Inc. v. American Family Mutual Insurance Company*, --N.W.2d--, No. A13-0124, 2014 WL 7156914 (Minn. Dec. 17, 2014) stemmed from a hail storm in October 2011 that damaged buildings in the Cedar Bluff townhome neighborhood.

The roofs on all 20 of the buildings required replacement, and at least one siding panel on each building sustained damage from hail. At the time of the storm the siding was more than a decade old, and the color had faded. Replacement panels were available with the same specifications, but they were not available in the same color. The policy that Cedar Bluff had with American Family (Am Fam) required payment for "direct physical loss or damage" to covered property resulting from a covered cause of loss. Furthermore, under the loss payment clause, Am Fam elected to "[p]ay the cost of repairing or replacing the lost or damaged property" and replacement cost was defined to be the cost to replace "the lost or damaged property with property . . . [o]f comparable material and quality."

Cedar Bluff sought coverage for complete replacement of the siding. Am Fam took the position that the policy only required replacement of the individual panels actually damaged by the storm, even though the replacement panels would be slightly darker or lighter than the original panels. An appraisal panel held that there was not a reasonable color match available for the existing materials and calculated the replacement value for a total replacement of the siding. Am Fam refused to pay the award, believing it was based upon an unauthorized coverage determination. Cedar Bluff brought a district court action to enforce. The

district court granted summary judgment to Am Fam, finding that the policy did not require payment for replacing property that had not experienced direct physical loss or damage. The court of appeals reversed. *Cedar Bluff Townhome Condominium Association, Inc. v. American Family Mutual Insurance Company*, No. A13-0124, 2013 WL 6223454 (Minn. Ct. App. Dec. 2, 2013). Relying on *Quade v. Secura Ins.*, 814 N.W.2d 703 (Minn. 2012), the court held that, subject to judicial review, the appraisal panel had the authority to consider the meaning of policy terms in order to determine the amount of loss. The court further held that the district court had erred by refusing to accept the factual determinations of the appraisal award (i.e. that matching replacement siding was not available).

The Minnesota Supreme Court reviewed the coverage determinations *de novo*. The court cited to *Quade* and reaffirmed that, while appraisal panels may not construe an insurance policy or decide whether an insurer should pay, they can determine questions of fact that are mere incidents to the determination of the amount of loss or damage. The Cedar Bluff court went on to hold that the term “comparable material and quality” in a replacement cost policy means “a reasonable color match between new and existing siding.” Finally, the court held that because of the color mismatch resulting from the inability to replace the hail-damaged panels, Cedar Bluff “has sustained a ‘distinct, demonstrable, and physical alteration’” and therefore suffered a “direct physical loss of or damage to” covered property, as required by the policy.

The Minnesota Supreme Court held in *Cedar Bluff* that replacement cost insurance requires reasonable color match. The case follows a similar lawsuit brought by the Attorney General of the State of Minnesota against Am Fam in 1999. *State of Minnesota v. American Family Mut. Ins. Co.*, No. MC 99-3907, 2000 WL 35566048 (Henn. Cnty Dist. Ct. Oct. 12, 2000). In that case, the Minnesota Attorney General alleged false advertising, deceptive trade practices and consumer fraud for Am Fam’s then-practice of paying only for the directly damaged portions of consumer’s homes resulting in mismatched materials where replacement siding or roofing was no longer available. In *Minnesota v. Am Fam*, the Hennepin County District Court specifically held that the Am Fam policy’s requirement of replacement with materials of “like kind and quality” was “not satisfied by the replacement of only those materials that are physically damaged by a storm, if the replacement materials do not or would not reasonably match in terms of color, quality, texture or type of material.” The court went on to hold that Am Fam was required to “replace the existing materials so there is a reasonable match.”

Given this clear precedent in Minnesota, if insurance carriers are failing to provide full replacement where there is an inability to match pre-existing materials, policyholders should closely review their property insurance policies and verify that their insurers are providing them with the coverage that they are entitled.

For more information, contact the Barnes & Thornburg attorney with whom you work, or Christopher Yetka at [christopher.yetka@btlaw.com](mailto:christopher.yetka@btlaw.com) or 612-367-8748 in the firm’s Policyholder Insurance Recovery and Counseling Group.

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