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## **“MATCHING” IN REPLACEMENT COST HOMEOWNERS INSURANCE POLICIES\***

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### **I. The issue**

Replacement cost coverage in a homeowners insurance policy is designed to prevent the gap in coverage that occurs under a policy compensating the policyholder only for the “Actual Cash Value” of the property that suffers a loss. Under an ACV policy, the policyholder bears the difference between the depreciated value of the damaged property prior to loss and the higher cost of repairing or replacing it. Under a replacement cost policy, the insurer pays the full cost of repairing or replacing the damaged property.

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Disputes can arise under a replacement cost policy if property is partially damaged. The insurer asserts that it is only required to pay for repair or replacement of the limited portion of the property that is damaged. The policyholder claims that more is needed to replace the property to a condition comparable to the position it was in prior to loss. A typical example arises if a portion of a roof is damaged. Replacing only the damaged shingles restores the functionality of the roof but does not fully replace the damaged property because the new shingles do not match the existing shingles. Prior to the loss the roof had a uniform appearance, and uniformity has a significant effect on value; therefore, the proper measure of replacement cost is the cost to replace the entire roof to restore the uniform appearance. This is the issue of “matching” — matching the damaged part of the property to the undamaged part to restore the property to the condition prior to loss, such as a roof with uniform appearance.

This report is limited to the issue of matching in homeowners insurance, particularly with regard to policy terms typically found in homeowners insurance policies.\* It does not discuss related issues such as:

- Matching under commercial property insurance policies. See, e.g., *Ocean View Towers Ass'n, Inc. v. QBE Ins. Corp.*, No. 11-60447-CIV, 2011 WL 6754063, at \*10 (S.D. Fla. Dec. 22, 2011), citing *Strasser v. Nationwide Mut. Ins. Co.*, No. 09-60314-CIV, 2010 WL 667945 (S.D. Fla. Feb. 22, 2010).
- Whether damage alleged to be purely “cosmetic”, such as dents to a metal roof caused by hail, is covered “direct physical injury”. See, e.g., *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015).
- The extent of loss that is covered where damage may be caused by both covered and excluded causes of loss. See, e.g., *State Farm Lloyds v. Kaip*, No. 05-99-01363-CV, 2001 WL 670497 (Tex. App. June 15, 2001).

## II. Policy language

Here are examples of language relevant to the problem of matching in the current ISO HO-3 and HO-5 and company-specific policies. ISO policy forms include many state-specific versions of these, usually in identical language.

### A. ISO standard terms

Covered property losses are settled as follows:

...

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\* The discussion of *National Presbyterian Church, Inc. v. GuideOne Mutual Insurance Co.*, 82 F. Supp. 3d 55 (D.C. Cir. 2015) (D.C. law), is an exception because of the court’s specific use of a homeowners insurance example.

2. Buildings covered under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

a. If, at the time of loss, the amount of 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 any deductible and without deduction for depreciation, but not more than the least of the following amounts:

...

(2) The replacement cost of that part of the building damaged with material of like kind and quality and for like use; or

(3) The necessary amount actually spent to repair or replace the damaged building.

b. If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

...

(2) That proportion of the cost to repair or replace, after application of any deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

ISO, HO 53 – Homeowners 3 – Special Form, Section I – Conditions, C. Loss Settlement (HO 00 03 05 01, 2008); HO 5 – Homeowners 5 – Comprehensive Form (HO 00 05 05 01, 2000) has identical language.

Earlier versions of the policy had different language in 2.a(2):

(2) The replacement cost of that part of the building damaged for equivalent construction and use on the same premises.

ISO HO-3 CA (10-92)

## ***B. Individual company standard terms***

Harleysville Worcester:

(1) the cost of repair or replacement with similar materials for the same use and purpose, on the same site; or

(2) the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable.

Cited in Trout Brook S. Condo. Ass'n v. Harleysville Worcester Ins. Co., 995 F. Supp. 2d 1035, 1042 (D. Minn. 2014) (condominium policy); also Cedar Bluff

Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co., No. A13-0124, 2013 WL 6223454, at \*1 (Minn. Ct. App. Dec. 2, 2013) aff'd, 857 N.W.2d 290 (Minn. 2014)

USAA:

(2) the replacement cost of that part of the building damaged;

...

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.

Cited in Greene v. United Servs. Auto. Ass'n, 2007 PA Super 344, ¶ 10, 936 A.2d 1178, 1186 (2007)

### ***C. Terms limiting matching***

#### ***1. Matching in particular***

**Matching of Undamaged Property.** We will not pay to repair or replace undamaged property due to mismatch between undamaged and new material used to repair or replace damaged material because of:

- a. Texture, dimensional difference;
- b. Color, fading, oxidation, weathering differences;
- c. Wear and tear, marring, scratching, deterioration; or
- d. Obsolescence or discontinuation.

We do not cover the loss in value to any property due to mismatch between undamaged material and new material used to repair or replace damaged material.

American Family Mutual, cited in Trudel v. Am. Family Mut. Ins. Co., No. CV-12-1208-PHX-SMM, 2014 WL 4053405, at \*2 (D. Ariz. Aug. 15, 2014)

#### ***2. Common construction***

##### DEFINITIONS

The following definition is added:

"Functional replacement cost" means the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equivalent to obsolete, antique or custom construction materials and methods used in the original construction of the building.

##### CONDITIONS

##### E. Loss Settlement

Paragraph 2. is replaced by the following:

2. Buildings covered under Coverage A or B:

a. If, at the time of loss, the amount of insurance in this Policy on the damaged building is 80% or more of the "functional replacement cost" of the building immediately before the loss and you contract for repair or replacement of the damaged building for the same use, within 180 days of the damage unless we and you otherwise agree, we will pay the lesser of the following amounts:

- (1) The limit of liability under this Policy that applies to the building; or
- (2) The necessary amount actually spent to repair or replace the damaged building on a "functional replacement cost" basis.

ISO HO DP 05 30 07 14 (2014)

We will pay the cost to repair or replace with common construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under SECTION I—COVERAGES, COVERAGE "A" DWELLING, except for wood fences, subject to the following:

- (1) we will pay only for repair or replacement of the damaged part of the property with common construction techniques and materials commonly used by the building trades in standard new construction. We will not pay the cost to repair or replace obsolete, antique or custom construction with like kind and quality . . .

State Farm (A2 Replacement Cost—Common Construction option)

Cited in *Enwereji v. State Farm Fire & Cas. Co.*, No. 10-CV-4967, 2011 WL 3240866, at \*1 (E.D. Pa. July 28, 2011)

### ***3. Roof damage caused by windstorm or hail***

Covered property losses are settled as follows:

2. "Roof surfacing" on buildings covered under Coverage A or B if the loss is caused by the peril of windstorm or hail at the percentage of the replacement cost shown in the Roof Surfacing Loss Percentage Table found in this endorsement, based on the age and type of "roof surfacing" damaged, but not more than the least of the following amounts:

- a. The limit of liability under this Policy that applies to the building;
- b. The cost to repair or replace that portion of the "roof surfacing" damaged with material of like kind and quality and for like use, without deduction for depreciation; or
- c. The necessary amount actually spent to repair or replace the damaged "roof surfacing".

[followed by the Roof Surfacing Loss Percentage Table, a portion of which is reprinted below]

**Roof Surfacing Loss Percentage Table [partial excerpt]**

<b>Age Of Roof  (In Years)</b>	<b>Type Of Roof Surfacing Material</b>		
	<b>Metal</b>	<b>Slate</b>	<b>Asphalt Shingle</b>
Less than 1	100.0%	100.0%	100.0%
1	100.0%	100.0%	100.0%
2	100.0%	100.0%	100.0%
3	100.0%	100.0%	100.0%
4	100.0%	100.0%	100.0%
5	96.7%	96.7%	91.7%
6	96.0%	96.0%	90.0%
7	95.3%	95.3%	88.3%
8	94.7%	94.7%	86.7%
9	94.0%	94.0%	85.0%
10	93.3%	93.3%	83.3%
11	92.7%	92.7%	81.7%
12	92.0%	92.0%	80.0%
13	91.3%	91.3%	78.3%
14	90.7%	90.7%	76.7%
15	90.0%	90.0%	75.0%
16	89.3%	89.3%	73.3%
17	88.7%	88.7%	71.7%
18	88.0%	88.0%	70.0%
19	87.3%	87.3%	68.3%
20	86.7%	86.7%	66.7%
21	86.0%	86.0%	65.0%
22	85.3%	85.3%	63.3%
23	84.7%	84.7%	61.7%
24	84.0%	84.0%	60.0%
25	83.3%	83.3%	58.3%
26	82.7%	82.7%	56.7%
27	82.0%	82.0%	55.0%
28	81.3%	81.3%	53.3%
29	80.7%	80.7%	51.7%
30 or older	80.0%	80.0%	50.0%

\* The Age of Roof is determined by subtracting the Year of Installation, as indicated in the Schedule, from the year of the current policy period effective date.

ISO HO 06 46 04 16 (2015)

A. SECTION I - CONDITIONS (INCLUDES RESTRICTIONS OR ABRIDGMENTS)

For a premium credit, under paragraph 3. Loss Settlement, the following applies to the Special Loss Settlement Endorsement, if this endorsement is made a part of the policy, and to all Forms except HO 00 06 and HO 00 08:

1. Item a.(3) is deleted and replaced by the following:
  - a.(3) Structures, including their roof surfacing, that are not buildings;
2. The following item is added:
  - a.(4) Roof surfacing on structures that are buildings if a loss to the roof surfacing is caused by the peril of Windstorm or Hail;
3. The introductory statement of item b. "Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:" is deleted and replaced by the following:
  - b. Buildings under Coverage A or B, except for their roof surfacing if the loss to the roof surfacing is caused by the peril of Windstorm or Hail, at replacement cost without deduction for depreciation, subject to the following:

ISO HO 04 93 05 94 (2008)

The following exclusion is added:

Cosmetic Damage

Cosmetic damage means:

1. Marring;
2. Pitting; or
3. Other superficial damage;

that alters the appearance of the "roof surfacing" on buildings covered under Coverage A or B caused by the peril of windstorm or hail, but such damage does not prevent the "roof surfacing" from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred.

ISO HO 06 44 04 16 (2015)

### III. Statutes and regulations

The NAIC Unfair Property/Casualty Claims Settlement Practices Model Regulation (MDL-902, 1997) includes the following provision:

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

A. When the policy provides for the adjustment and settlement of first party losses based on replacement cost, the following shall apply:

(1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making such repair or replacement not otherwise excluded by the policy shall be included in the loss. The insured shall not have to pay for betterment nor any other cost except for the applicable deductible.

(2) When a covered loss for real property requires the replacement of or items and the replacement items do not match in quality, color or size, the insurer shall replace items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible, if any.

The Model Regulation has been the basis for statutes or regulations in a number of states, typically with minor variations, as shown below.

Several courts have held that a policyholder does not have a private right of action under the statute or regulation. *Rattan v. United Servs. Auto. Ass'n*, 84 Cal. App. 4th 715, 101 Cal. Rptr. 2d 6 (2000); *Woods Apartments, LLC v. U.S. Fire Ins. Co.*, No. 3:11-CV-00041-H, 2013 WL 3929706 (W.D. Ky. July 29, 2013). This result is an instance of the position taken by all but a few states that violation of an unfair claims settlement practices act does not give the policyholder a cause of action. Instead, violation of the statute or regulation can lead to administrative penalty or can be used as evidence of unreasonableness in a breach of contract or bad faith action.

### ***Alaska***

Alaska Admin. Code, tit. 3, § 26.090(l) Additional standards for prompt, fair, and equitable settlements of property claims

(l) Any person adjusting, negotiating, or settling a property claim on the basis of replacement cost

...

(2) for a loss that requires replacement of property, and if the replacement property does not match in quality, color or size, shall replace the property in the area to provide for a reasonably uniform appearance; this paragraph applies to interior and exterior losses; the claimant is not required to pay for betterment or any other cost except for the applicable deductible.

### ***California***

Cal. Code of Regulations, tit. 10, § 2695.9 Additional Standards Applicable to First Party Residential and Commercial Property Insurance Policies

When a residential or commercial property insurance policy provides for the adjustment and settlement of first party losses based on replacement cost, the following standards apply:

(1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making the repair or replacement not otherwise excluded by the policy shall be included in the loss. The insured shall not have to pay for depreciation nor any other cost except for the applicable deductible.

(2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all items in the damaged area so as to conform to a reasonably uniform appearance.

### ***Connecticut***

Conn. Gen. Stat. § 38a-316e (2014) Matching of adjacent items under real property covered loss.

When a covered loss for real property requires the replacement of an item or items and the replacement item or items do not match adjacent items in quality, color or size, the insurer shall replace all such items with material of like kind and quality so as to conform to a reasonably uniform appearance. This provision shall apply to interior and exterior covered losses.

### ***Florida***

Fla. Stat. Ann. § 626.9744 Claim settlement practices relating to property insurance  
When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas.

### ***Iowa***

Iowa Admin. Code § 191-15.44 (507B)- Standards for determining replacement cost and actual cost values

When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace as much of the item as is necessary to result in a reasonably uniform appearance within the same line of sight. This subrule applies to interior and exterior losses. Exceptions may be made on a case-by-case basis. The insured shall not bear any cost over the applicable deductible, if any.

### ***Kentucky***

Ky. Admin. Regs. tit. 806, ch. 12 § 095 Unfair claims settlement practices for property and casualty insurance

If a loss requires replacement of items and the replaced items do not reasonably match in quality, color, or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible.

### ***Nebraska***

Neb. Admin. R. & Regs. tit. 210, Ch. 60, § 010 Replacement Cost Coverage

When a loss requires replacement of items and the replacement items do not reasonably match in quality, color or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to both interior and exterior losses. The insured shall not bear cost over any applicable deductible.

### ***Ohio***

Ohio Admin. Code § 3901-1-54 Unfair property/casualty claims settlement practices

When an interior or exterior loss requires replacement of an item and the replaced item does not match the quality, color or size of the item suffering the loss, the insurer shall replace as much of the item as to result in a reasonably comparable appearance.

### ***Rhode Island***

R.I. Admin. Code § 11-5-73:9 Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all such items so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The first party claimant shall not bear any cost over the applicable deductible, if any.

### ***Utah***

Utah Admin. Code R590.190-13(1)(b) Unfair Property, Liability and Title Claims Settlement Practices Rule

[W]hen a loss requires replacement or repair of items and the repaired or replaced items do not match in color, texture, or size, the insurer shall repair or replace items so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured is only responsible for the applicable deductible.

## IV. Case law

Among the cases that discuss matching under homeowners insurance policies, most support the rule that matching is required, a few narrow or appear to narrow the application of the rule, and many turn on the application of policy language to particular facts.

There are two related sub-issues in the cases that courts sometimes distinguish: Whether policy language referring to the “damaged part” of the property refers to only particular damaged elements or to a larger portion of which they are a part (e.g., roof shingles vs. the roof as a whole), and whether terms such as “equivalent construction” require matching.

### ***A. Matching required***

The position that matching is required is supported by principles of insurance policy interpretation and by the nature of the replacement cost policy.

First, policy terms such as “that part of the building damaged for equivalent construction and use on the same premises,” “other property of like kind and quality,” and “of comparable material and quality” are not defined in the policies, do not have a plain meaning, and therefore are ambiguous. When a policy term is ambiguous, ambiguities are resolved in favor of the insured. Coverage provisions in an insurance policy are to be liberally construed in favor of the insured to provide the broadest possible coverage. Therefore, these policy terms should be interpreted to require matching. *Nat'l Presbyterian Church, Inc. v. GuideOne Mut. Ins. Co.*, 82 F. Supp. 3d 55, 56-57 (D.D.C. 2015); *Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, No. A13-0124, 2013 WL 6223454, at \*1 (Minn. Ct. App. Dec. 2, 2013), *aff'd*, 857 N.W.2d 290 (Minn. 2014); *Trout Brook S. Condo. Ass'n v. Harleysville Worcester Ins. Co.*, 995 F. Supp. 2d 1035, 1042 (D. Minn. 2014); *Alessi v. Mid-Century Ins. Co., Inc.*, 464 S.W.3d 529, 530 (Mo. Ct. App. 2015).

Second, coverage under a replacement cost policy is broader than under an actual cash value policy. A policyholder pays a higher premium for a replacement cost policy so that it can repair or replace damaged property in a manner that puts it into functionally the same position as before the loss. A matching repair or replacement is required to fulfill that promise. *Alessi v. Mid-Century Ins. Co.*, *supra*.

Examples of courts expressing and applying these principles include the following:

A replacement cost policy, as specifically stated in the policy, is defined as the cost of repair or replacement without deduction for depreciation. Replacement cost policies generally charge higher premiums in exchange for agreeing to repair or replace with material of like kind and quality, and it is irrelevant that the homeowner may be in a

better position after a loss than before. Under the facts here, Alessi's replacement-cost policy stated it would repair or replace the damaged part of her building for equivalent construction and use without deduction for depreciation. Alessi's replacement-cost policy stated it would repair or replace the damaged part of her building for equivalent construction and use without deduction for depreciation. Black's Law Dictionary defines "equivalent" as "1. Equal in value, force, amount, effect, or significance; 2. Corresponding in effect or function; nearly equal; virtually identical." Considering the definition in full, construed in favor of the insured to provide the broadest coverage possible, "equivalent" requires that the replacement be "equal in value" and "virtually identical." Alessi argues that by replacing the siding on the damaged portion of the property with mismatched siding, Mid-Century is not fulfilling its contractual obligation to replace the damaged part of the building with "equivalent" materials. Certainly, it is likely that the value of Alessi's property would be reduced by obviously mismatched siding. If Mid-Century's proposed replacement is not "equal in value," then Mid-Century has not fulfilled its contractual obligations to provide a loss settlement of the replacement cost for equivalent construction and use.

Alessi v. Mid-Century Ins. Co., Inc., 464 S.W.2d at 530 (citations omitted)

Similarly, "other property of like kind and quality" could be read to mandate property that looks the same. Imagine that an insurance company pays for repairs to one wall of an insured's dining room. The room's paint color—a light blue—is no longer manufactured. If the insurance company were to insist on a bright red or even dark blue paint—of the same quality and manufacture—just for that single wall, no one would feel that the insured had been made whole; only repainting the whole room would do that.

Nat'l Presbyterian Church, Inc. v. GuideOne Mut. Ins. Co., 82 F. Supp. 3d at 60.

See also *Erie Ins. Exch. v. Sams*, 20 N.E.3d 182, 190 (Ind. Ct. App. 2014), transfer denied, 29 N.E.3d 124 (Ind. 2015)

## ***B. Matching limited***

Other courts limit the application of the matching principle by using different approaches to interpretation and a different conception of the insurer's obligation under a replacement cost policy. These courts regard the policy language as clear and express concern about the undue burden on the insurer and the concomitant "windfall" to the policyholder if the property is improved by matching. *Woods Apartments, LLC v. U.S. Fire Ins. Co.*, No. 3:11-CV-00041-H, 2013 WL 3929706, at \*1 (W.D. Ky. July 29, 2013); *Enwereji v. State Farm Fire & Cas. Co.*, No. 10-CV-4967, 2011 WL 3240866, at \*1 (E.D. Pa. July 28, 2011).

Some opinions expressing the limitation are relatively clear. In *Graffeo v. State Farm Fire & Cas., Inc.*, 628 So. 2d 790 (Ala. Civ. App. 1993), the court held that policy language referring to “that part of the building damaged” was unambiguous and plain in referring to damaged siding shingles, not an entire wall. See also *Padgett v. State Farm Fire & Cas. Co.*, 714 So. 2d 302 (Ala. Civ. App. 1997), citing *Graffeo*. *Accord, Woods Apartments, LLC v. U.S. Fire Ins. Co.*, No. 3:11-CV-00041-H, 2013 WL 3929706, at \*1 (W.D. Ky. July 29, 2013).

However, the language in other cases limiting matching may not accurately describe the principles being applied and the facts of the cases, suggesting that there is not an irreconcilable conflict between these cases and the matching cases. Pennsylvania law provides a particularly good example because its leading case, *Greene v. United Servs. Auto. Ass'n*, 2007 PA Super 344, ¶ 10, 936 A.2d 1178, 1186 (2007), uses colorful and oft-cited language that inaccurately describes the case’s facts and holding.

In the relevant facts in *Greene*, a portion of the front slope of the Greene’s eighteen-year-old roof was damaged by a covered storm as well as exhibiting damage from wear and tear. The Greene’s replaced the entire roof and subsequently submitted a claim to USAA for the cost of replacement.

The court first held that policy language providing for indemnification for “the replacement cost of that part of the building damaged” required “at most” replacement of one slope of a multi-sloped roof. Requiring replacement of the entire roof would be an “absurdity;” quoting the trial court: “To utilize [Appellants’] 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.” *Id.* at 1186. The court’s view may have been colored by the minor damage in the case relative to the entire roof; in any event, replacement of one slope of the roof would conform to the “line of sight” approach to matching, under which the property that must be matched is that within a single view.

The court also stated that policy language requiring “like construction” was unavailing. However, the facts on this point were consistent with the matching principle. As the court noted, a new roof was not required where damaged shingles could be replaced with shingles similar in “function, color, and shape.” *Id.*

In *Collins v. Allstate Ins. Co.*, No. CIV.A.2:09CV01824WY, 2009 WL 4729901, at \*6 (E.D. Pa. Dec. 10, 2009), by contrast, *Greene*’s principle was applied to require matching. In *Collins*, unlike in *Greene*, there were no slate roofing tiles available “sufficiently similar in color, size and texture, to those on the Collins home at the time of the loss so as to make them of ‘like kind and quality’ or ‘equivalent construction.’”

In *Enwereji v. State Farm Fire & Cas. Co.*, No. 10-CV-4967, 2011 WL 3240866, at \*1 (E.D. Pa. July 28, 2011), the court applied *Greene*’s interpretation of the “damaged part” language to conclude that roof tiles could be replaced without replacing the entire roof. In that case, however, State Farm’s expert noted that the roof, originally constructed in 1920, had been repaired many times previously, sometimes improperly, and that it was standard in the roofing industry to replace broken shingles with new shingles equivalent in size, thickness and shade. *Id.* at \*2. Moreover, the policyholder had purchased a policy with a “common construction”

endorsement, providing for indemnity only with “materials commonly used by the building trades in standard new construction.” *Id.* at 6. For another case applying the “common construction” endorsement to limit matching, see *Bernert v. State Farm Fire & Cas. Co.*, No. 10-12359, 2012 WL 1060089, at \*2 (E.D. Mich. Mar. 29, 2012).

### ***C. Factual disputes***

The fact-intensive nature of the Pennsylvania cases is reflected in other cases in which matching is at issue but the issue is essentially factual—what repairs are required to constitute “equivalent construction” or the like. See *Mohr v. Am. Auto. Ins. Co.*, No. 01 C 3229, 2004 WL 533475, at \*9-10 (N.D. Ill. Mar. 5, 2004); *Seamon v. Acuity*, No. A11-429, 2011 WL 6015355, at \*3 (Minn. Ct. App. Dec. 5, 2011); *Eledge v. Farmers Mut. Home Ins. Co. of Hooper, Nebraska*, 6 Neb. App. 140, 148, 571 N.W.2d 105, 111 (1997); *Bufano v. State Farm Gen. Ins. Co.*, 2004 WL 2526422, at \*5 (Cal. Ct. App. Nov. 9, 2004).

### ***D. Other***

Finally, *Trudel v. Am. Family Mut. Ins. Co.*, No. CV-12-1208-PHX-SMM, 2014 WL 4053405 (D. Ariz. Aug. 15, 2014), held that a policy term excluding payment for due to mismatch between new and undamaged material was unambiguous, but the possibility that it violated Arizona’s unique reasonable expectations doctrine prevented summary judgment for the insurer.

## Appendix: State-by state authority

(Cases are discussed in the memo.)

### Alabama

1. **Regulation**
2. **Statute- None**
3. **Case Law**
  - a. Graffeo v. State Farm Fire & Cas., Inc., 628 So. 2d 790 (Ala. Civ. App. 1993)  
(matching not required; factual issue)
  - b. Padgett v. State Farm Fire & Cas. Co., 714 So. 2d 302 (Ala. Civ. App. 1997)  
(matching not required)

### Alaska

1. **Regulation**

Alaska Admin. Code, tit. 3, § 26.090(l) Additional standards for prompt, fair, and equitable settlements of property claims

(l) Any person adjusting, negotiating, or settling a property claim on the basis of replacement cost . . .

(2) for a loss that requires replacement of property, and if the replacement property does not match in quality, color or size, shall replace the property in the area to provide for a reasonably uniform appearance; this paragraph applies to interior and exterior losses; the claimant is not required to pay for betterment or any other cost except for the applicable deductible.
2. **Statute- None**
3. **Case Law- None**

### Arizona

1. **Regulation- None**
2. **Statute- None**
3. **Case Law**
  - a. Trudel v. Am. Family Mut. Ins. Co., No. CV-12-1208-PHX-SMM, 2014 WL 4053405, at \*1 (D. Ariz. Aug. 15, 2014) (non-matching term unambiguous but may violate reasonable expectations)

### California

1. **Regulation**

Cal. Code of Regulations, tit. 10, § 2695.9 Additional Standards Applicable to First Party Residential and Commercial Property Insurance Policies

When a residential or commercial property insurance policy provides for the adjustment and settlement of first party losses based on replacement cost, the following standards apply:

(1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making the repair or replacement not otherwise excluded by the policy shall be included in the loss. The insured shall not have to pay for depreciation nor any other cost except for the applicable deductible.

(2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all items in the damaged area so as to conform to a reasonably uniform appearance.

**2. Statute- None**

**3. Case Law**

- a. *Bufano v. State Farm Gen. Ins. Co.*, 2004 WL 2526422, at \*5 (Cal. Ct. App. Nov. 9, 2004) (factual issue)
- b. *Rattan v. United Servs. Auto. Ass'n*, 84 Cal. App. 4th 715, 101 Cal. Rptr. 2d 6 (2000) (matching regulations do not create private right of action)

**Connecticut**

**1. Regulation- None**

**2. Statute**

Conn. Gen. Stat. § 38a-316e (2014) Matching of adjacent items under real property covered loss

When a covered loss for real property requires the replacement of an item or items and the replacement item or items do not match adjacent items in quality, color or size, the insurer shall replace all such items with material of like kind and quality so as to conform to a reasonably uniform appearance. This provision shall apply to interior and exterior covered losses.

**3. Case Law – None**

**D.C.**

**1. Regulation- None**

**2. Statute- None**

**3. Case Law**

- a. *National Presbyterian Church, Inc. v. GuideOne Mutual Ins. Co.*, 82 F. Supp. 3d 55 (D.C. Cir. 2015) (matching required)

**Florida**

**1. Regulation- None**

**2. Statute**

Fla. Stat. Ann. § 626.9744

When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas.

**3. Case Law- None**

**Illinois**

**1. Regulation- None**

**2. Statute- None**

**3. Case Law**

- a. Mohr v. American Auto Ins. Co., 2004 WL 533475 (N.D. Ill., March 5, 2004) (factual issue)

**Indiana**

**1. Regulation- None**

**2. Statute- None**

**3. Case Law**

- a. Erie Ins. Exchange v. Sams, 20 N.E.3d 182 (Ind. App. Ct. 2014) (matching required)

**Iowa**

**1. Regulation-**

Iowa Admin. Code § 191-15.44 (507B)- Standards for determining replacement cost and actual cost values

When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace as much of the item as is necessary to result in a reasonably uniform appearance within the same line of sight. This subrule applies to interior and exterior losses. Exceptions may be made on a case-by-case basis. The insured shall not bear any cost over the applicable deductible, if any

**2. Statute- None**

**3. Case Law- None**

**Kentucky**

**1. Regulation**

Ky. Admin. Regs. tit. 806, ch. 12 § 095 Unfair claims settlement practices for property and casualty insurance

If a loss requires replacement of items and the replaced items do not reasonably match in quality, color, or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible

**2. Statute- None**

**3. Case Law**

- a. Woods Apartments, LLC v. U.S. Fire Ins. Co., No. 3:11-CV-00041-H, 2013 WL 3929706, at \*1 (W.D. Ky. July 29, 2013) (regulations do not create private right of action; matching not required)

## Michigan

1. Regulation- None
2. Statute- None
3. Case Law

- a. Bernert v. State Farm Fire & Cas. Co., No. 10-12359, 2012 WL 1060089, at \*2 (E.D. Mich. Mar. 29, 2012) (common construction provision does not require matching)

## Minnesota

4. Regulation- None
5. Statute- None
6. Case Law

- a. Seamon v. Acuity, 2011 WL 6015355 (Minn. App. Ct., Dec. 5, 2011) (factual issue)
- b. Cedar Bluff Townhome Condo. Assoc. v. American Family Mutual Ins. Co., 2013 WL 6223454 (Minn. App. Ct., Dec. 2, 2013) (matching required)
- c. Trout Brook South Condo. Assoc. v. Harleyville Worcester Ins. Co., 995 F. Supp. 2d 1035 (D. Minn. 2014) (matching required)

## Missouri

1. Regulation- None
2. Statutes-None
3. Case Law

- a. Alessi v. Mid-Century Ins. Co., Inc., 464 S.W.3d 529 (Mo. App. Ct. 2015) (matching required)

## Nebraska

1. Regulation

Neb. Admin. R. & Regs. tit. 210, Ch. 60, § 010 Replacement Cost Coverage

When a loss requires replacement of items and the replacement items do not reasonably match in quality, color or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to both interior and exterior losses. The insured shall not bear cost over any applicable deductible.

2. Statutes – None
3. Case law

- a. Eledge v. Farmers Mut. Home Ins. Co. of Hooper, Nebraska, 6 Neb. App. 140, 148, 571 N.W.2d 105, 111 (1997) (matching not required; factual issue)

## Ohio

1. Regulation

Ohio Admin. Code § 3901-1-54 Unfair property/casualty claims settlement practices  
When an interior or exterior loss requires replacement of an item and the replaced item does not match the quality, color or size of the item suffering the loss, the insurer shall replace as much of the item as to result in a reasonably comparable appearance.

2. **Statutes-None**
3. **Case Law-None**

#### **Pennsylvania**

1. **Regulation- None**
2. **Statute- None**
3. **Case Law**
  - a. Greene v. United Services Auto. Assoc., 936 A.2d 1178 (Pa. Super. 2007) (matching not required; factual issue)
  - b. Collins v. Allstate Ins. Co., 2010 WL 2510376 (E.D. Pa. Dec. 10, 2010) (matching not required; factual issue)
  - c. Enwereji v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 83417 (E.D. Pa. July 28, 2011) (matching not required; factual issue)

#### **Rhode Island**

1. **Regulation**

R.I. Admin. Code § 11-5-73:9 Standards for Prompt, Fair and Equitable Settlements  
Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all such items so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The first party claimant shall not bear any cost over the applicable deductible, if any.
2. **Statute- None**
3. **Case Law- None**

#### **Tennessee**

1. **Regulation- None**
2. **Statute- None**
3. **Case Law**
  - a. Hutcherson v. Tennessee Farmers Mut. Ins. Of Columbia, 1986 WL 9608 (Tenn. App. Ct., Sept. 3, 1986)- Insurers were required to replace the entire paint job as to match.

#### **Utah**

1. **Regulation**

Utah Admin. Code R590.190-13(1)(b) Unfair Property, Liability and Title Claims Settlement Practices Rule

[W]hen a loss requires replacement or repair of items and the repaired or replaced items do not match in color, texture, or size, the insurer shall repair or replace items so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured is only responsible for the applicable deductible.

**2. Statute-None**

**3. Case Law- None**