

# COLORADO

# SUMMARY JUDGMENT

# BAD FAITH



**Sandy Eloranto**

720.625.8833

[seloranto@suttonbooker.com](mailto:seloranto@suttonbooker.com)

**S**hareholder Sandy Eloranto obtained dismissal of claims against an insurer on summary judgment in a property damage bad faith action.

Plaintiff claimed a June 2019 storm produced category 3 hurricane winds, damaging the wood shake roofs at his Castle Rock, Colorado home. Plaintiff waited five months to report the damage to his insurance carrier. The carrier quickly inspected and determined the wood roofs were old and past their life expectancy, causing the wood shingles to dislodge and fall off the roof even without a covered wind event. The carrier also noted the asphalt shingle roof on Plaintiff's shed, more susceptible to wind damage than a wood shake roof, was completely undamaged. When the carrier denied the wood roof damage as wear, tear and deterioration, Plaintiff hired a public adjuster who alleged wind on the date of loss averaged 62 mph, with gusts up to 112 mph, causing the shakes to dislodge. Plaintiff's public adjuster submitted video of himself and a contractor simulating wind damage to the wood shakes with a high-powered leaf blower. He claimed the costs to replace the wood roof totaled \$85,000+ and alleged early on that the carrier was acting in bad faith and unreasonably denying covered damage.

The carrier sent an engineer out to reinspect the wood roofs. The engineer determined the roofs were beyond their useful life and damaged by age and weather related wear and tear as opposed to a covered wind event. The engineer also noted the nearby undamaged asphalt shingle shed roof. Plaintiff then hired a lawyer who continued to claim Category 3 hurricane winds damaged the wood roofs, claiming \$84,167 in roof replacement costs, \$168,335 in unreasonable denial damages, \$15,994 in prejudgment interest, \$89,490 in attorneys' fees (before suit was filed), and \$35,798 in public adjuster's fees, for a total of \$393,787, and threatening to seek punitive damages. When the carrier disagreed, Plaintiff filed suit.

The carrier first moved to dismiss Plaintiff's Complaint, noting a full roof replacement was not covered under Plaintiffs policy and the actual cash value of Plaintiffs' 25+ year old roof was zero. The Court denied the Motion to Dismiss because of factual disputes but acknowledged the

actual cash value language for wood shake roofs in Plaintiffs' policy. Discovery proceeded and Plaintiffs ultimately endorsed five different experts to support their position a total roof replacement was owed and unreasonably denied, and ultimately sought to add a claim for punitive damages. None of Plaintiff's experts acknowledged the actual cash value language in the policy or applied it in forming their opinions. The carrier, on the other hand, disclosed a life cycle costing expert who calculated the actual cash value of the wood roofs using the policy definition, concluding the actual cash value of Plaintiff's wood roof after the alleged wind-storm was zero.

Colorado county building departments in high fire areas started prohibiting wood shake roofs in the early 2000s. Insurance carriers in Colorado started limiting wood shake roof surface coverage to actual cash value as early as 2008, leading to disputes on how actual cash value should be calculated. Most Homeowners policies do not define actual cash value. This policy, however, did and defined actual cash value as follows:

Actual cash value is defined in the policy as the least of the following four calculations:

- (1) the value of damaged property;
- (2) the change in value of damaged property directly due to the loss;
- (3) cost to repair damaged property; or
- (4) cost to replace damaged property less any deduction for age, condition, obsolescence, or depreciation, at the time of loss.

In its motion for summary judgment, the carrier renewed its position that the actual cash value of Plaintiff's roof was zero and regardless of the cause of the damage no additional amounts were owed, seeking summary judgment on all claims. Judge Domenico of the United States District Court for the District of Colorado agreed and granted summary judgment, dismissing the case in its entirety. The Court rejected Plaintiff's argument that the actual cash value limitation applied only to the "roof surface" and not to other roof components. The Court similarly rejected Plaintiff's attempt to use hypothetical code upgrades not mentioned in the Complaint to create a dispute of fact over whether additional amounts were owed. Because the Court found the carrier's life cycle costing expert's calculations to be unrebutted, it agreed the actual cash value of Plaintiffs' wood roofs is zero. The Court dismissed Plaintiff's claims, denied his motion to add a claim for punitive damages, and entered judgment in the carrier's favor, showing how pivotal the actual cash value definition contained in the policy was in the claim and the litigation.