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NOTE

Actual Cash Value and Depreciation of Labor on Homeowner's Policies

LaBrier v. State Farm Fire & Casualty Company, 147 F. Supp. 3d 839 (W.D. Mo. 2015)

Jessica Peterman*

I. INTRODUCTION

There are approximately eighty-seven million homeowners in the United States.¹ Although not every homeowner carries insurance coverage, it is estimated that 97% do.² That means there are approximately eighty-five million homeowner insureds in the United States. Property and casualty insurance companies are now facing the “next big wave” of class actions regarding depreciation on homeowner’s policies.³ Specifically, policy language referring to labor depreciation and the actual cash value (“ACV”) of that labor is currently being litigated all across the country.⁴ Courts in Alabama, Arkansas, Kentucky, Missouri, Oklahoma, and Pennsylvania are currently reviewing this issue or have already done so.⁵ State Farm Fire and Casualty Company (“State Farm”) has about 20% of the national market share in homeowner’s insurance.⁶ State Farm’s homeowner’s claims payouts

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1. *QuickFacts – United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Mar. 12, 2017).

2. See Neda Jafarzadeh, *Do You Need Homeowner's Insurance?*, US NEWS & WORLD REP. (June 12, 2013, 9:44 AM), <http://money.usnews.com/money/blogs/my-money/2013/06/12/do-you-need-homeowners-insurance> (“Most lenders require homeowners to carry an insurance policy in case the home is damaged.”).

3. *The Next Big Wave of Insurance Class Actions*, LAW360 (Apr. 13, 2015, 10:57 AM), <http://www.law360.com/articles/641945/the-next-big-wave-of-insurance-class-actions> [hereinafter *Next Big Wave*].

4. See generally Robinson & Cole LLP, *Archives: Property Insurance Articles*, CLASS ACTIONS INSIDER, <https://www.classactionsinsider.com/category/property-insurance/> (last visited Mar. 12, 2017) (list of class actions on labor depreciation in Minnesota, Michigan, Georgia, Arkansas, and Kansas).

5. See *Next Big Wave*, *supra* note 3.

6. See Rosalie L. Donlon, *Top 10 Homeowners' Insurance Carriers for 2015, as Ranked by NAIC* (Mar. 24, 2016), <http://www.propertycasualty360.com/2016/03/24/top-10-homeowners-insurance-carriers-for-2015-as-r> (“State Farm held

in 2015 were around twelve billion dollars.⁷ Although the exact number of disputed claims dealing with this issue is unknown, it is safe to assume that the exposure to the entire insurance industry is at least in the hundreds of millions of dollars.⁸ Needless to say, this is a huge issue for property and casualty insurers around the country.

This Note will examine the arguments concerning the definition of ACV and whether labor can or should be included in the ACV depreciation calculation in Missouri. In addition, this Note will review case law on this issue around the country and the impact of these holdings on insurance companies and consumers.

II. FACTS AND HOLDING

This case came before the U.S. District Court for the Western District of Missouri on diversity jurisdiction grounds; the defendant, State Farm, filed a motion to dismiss for failure to state a claim.⁹ Amanda LaBrier owned a home insured by State Farm.¹⁰ The home was damaged in a hail storm, which was a covered loss under her homeowner's policy.¹¹ LaBrier's homeowner's policy was a "replacement cost" policy.¹² These types of policies involve a two-step payout.¹³ Prior to the repair, a payment is made based on the ACV of the damaged property at the time of the loss.¹⁴ After the repair, a second payment is made to cover the additional amount the insured actually and necessarily spent to repair or replace the damaged property.¹⁵

In the case at hand, a State Farm claims adjuster assessed damages to LaBrier's home at \$8087.57.¹⁶ This cost represented the total cost of repair, including labor, materials, and sales tax on the materials.¹⁷ The adjuster then

its No. 1 position again in 2015 with \$17.5 billion in direct premiums written, representing a market share of 19.67%, a slight drop of 0.67 percentage points, but still the market leader by \$10 billion more than Allstate, in the number two spot. State Farm topped the 2014 list as well, with a market share of 20.34%.”).

7. See State Farm, *State Farm® Announces 2015 Financial Results*, NEWSROOM (Feb. 26, 2016), <https://newsroom.statefarm.com/state-farm-announces-2015-financial-results#bPM80fby3zOSmywp.97> (noting that total homeowners, CMP, and “other” claims payments totaled \$12.2 billion).

8. See *id.*

9. *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 842 (W.D. Mo. 2015).

10. *Id.*

11. *Id.*

12. *Id.*

13. See, e.g., *Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 758–59 (W.D. Pa. 2015) (explaining the two-step payout process in detail).

14. *LaBrier*, 147 F. Supp. 3d at 842.

15. *Id.* at 842–43.

16. *Id.* at 842.

17. *Id.* at 847.

subtracted \$1421.00 for the deductible and \$2009.79 for depreciation, leaving a total payout of \$4657.28.¹⁸ In calculating the depreciation, State Farm included certain types of labor costs.¹⁹ “Mixed” labor costs, which are costs representing both labor and materials, were included in the depreciation calculation.²⁰ “Pure” labor costs, which do not include the cost of materials, were not included in the depreciation calculation.²¹ For example, certain labor costs, such as general contractor profit and overhead, as well as debris removal, are pure labor costs that an insured must “incur” in order for the insured to be compensated for them.²² The insured cannot “incur” those costs unless the repairs have actually been made.²³ Therefore, they are not included in an ACV estimate.

The State Farm policy did not define ACV, nor did it mention labor costs when defining depreciation.²⁴ However, in the estimate given to LaBrier, a definition of ACV was provided that stated ACV is “[t]he repair or replacement cost of the damaged part of the property less *depreciation* and *deductible*.”²⁵ The estimate defined depreciation as “[t]he decrease in the value of property over a period of time due to wear, tear, condition, and obsolescence. A portion or all of this amount may be eligible for replacement cost benefits.”²⁶

LaBrier alleged that State Farm improperly applied a deduction for depreciation to the labor costs in the estimate and thus breached its obligations under the policy.²⁷ LaBrier sought to represent a class of insureds whose payments were reduced by State Farm for labor depreciation dating from March 30, 2005, to the end of trial.²⁸ To illustrate mathematically what LaBrier was requesting, consider the following example: under normal conditions, if the replacement cost of a roof is \$15,000, the standard lifetime of a roof is fifteen years, and the age at loss is ten years old, the actual cash value would be \$5000 ($\$15,000 * [15-10]/15$). That is only the basic calculation; the condition of the roof may cause an adjuster to further revise that number

18. *Id.* at 842.

19. *Id.*

20. *Id.* (providing an example of “mixed” costs, “such as removing and replacing a gutter and downspout”).

21. *Id.* (providing an example of “pure” costs, “such as the labor cost of removing, hauling, and disposing of roof shingles”).

22. See State Farm, *Sample State Farm Homeowners Policy*, MO. DEP’T INS. 5, <http://insurance.mo.gov/consumers/home/documents/HomeownersPolicyFP-7955.pdf> (last visited Mar. 12, 2017) [hereinafter State Farm, *Sample State Farm Homeowners Policy*].

23. *Id.*

24. *LaBrier*, 147 F. Supp. 3d at 843.

25. *Id.* (alteration in original).

26. *Id.* (alteration in original) (meaning that a portion of those amounts that were depreciated could be repaid to the insured after the repairs were completed).

27. *Id.*

28. *Id.*

up or down.²⁹ For the sake of simplicity, further assume that the depreciated amount (\$10,000) includes both the labor costs and the materials, at 50% each (\$5000 for labor and \$5000 for materials). LaBrier would claim that the \$5000 depreciated amount that represents labor costs *should not have been depreciated at all*.³⁰ The actual cash value, according to LaBrier, should be \$10,000 and not \$5000.³¹ LaBrier was seeking a refund of the difference between the actual cash value that includes the labor costs versus the actual cash value that does not include the labor costs.³² In the case at hand, the actual amount of depreciation totaled \$2009.79.³³ Some of that amount included labor costs.³⁴ LaBrier is seeking a refund of those labor costs.³⁵

State Farm made a motion to dismiss for failure to state a claim, listing several arguments in response.³⁶ First, State Farm argued that LaBrier's breach of contract claim failed because LaBrier did not allege enough facts to show the ACV of the insured loss.³⁷ State Farm believed that ACV means the fair market value of the home before and after the loss, whereas LaBrier contended that ACV means replacement cost less depreciation.³⁸ State Farm argued that "replacement cost minus depreciation . . . may or may not reflect the fair market value of the property before and after the [] loss."³⁹ State Farm also stated that the breach of contract claim should be dismissed because LaBrier did not state whether the damaged property was actually replaced.⁴⁰ According to State Farm, if LaBrier replaced the damaged property, then she would be entitled to a payment that compensated her for any amount previously withheld as depreciation.⁴¹

29. See Holly Tachovsky & Joseph Masters Emison, *Part Three: The Value of Accurate Roof Age in Claims*, CLAIMS J. (Mar. 11, 2014), <https://www.claimsjournal.com/news/national/2014/03/11/245733.htm>.

30. *LaBrier*, 147 F. Supp. 3d at 848.

31. *Id.* at 842.

32. *Id.* at 851.

33. *Id.* at 842.

34. *Id.*

35. *Id.* at 847.

36. *Id.* at 842.

37. *Id.* at 843.

38. *Id.*

39. *Id.* There is no controlling policy definition of ACV in the State Farm policy or legal definition of ACV in Missouri. The State Farm estimate given to LaBrier used the "replacement cost less depreciation" definition. *Id.* Ideally, ACV would be reflective of the fair market value (which would take into consideration the condition of the property), but these are just estimates. The fair market value is not known unless the home is put on the market. The ACV is not known until after the repairs are completed, because the true replacement cost is not known until the repairs are done.

40. *Id.*

41. *Id.*

State Farm alleged that Missouri case law defined ACV to mean the fair market value of the home before and after the loss.⁴² State Farm then claimed that even if ACV means replacement cost less depreciation, LaBrier's claim failed because labor was properly depreciated.⁴³ By contrast, LaBrier pointed to other out-of-state cases that reached the opposite conclusion.⁴⁴ State Farm argued that LaBrier's interpretation was unreasonable because it allowed LaBrier to get replacement cost for labor, even though LaBrier did not repair the roof.⁴⁵ State Farm noted that this kind of policy could create a windfall for insureds.⁴⁶ For example, an insured with a roof that has a thirty-year life expectancy that was thirty years old at the time of the loss would get thousands of dollars in labor costs, which would put him or her in a much better position than before the loss occurred.⁴⁷

After examining both parties' positions, as well as the case law around the country, the district court held that, while State Farm's interpretation of ACV and depreciation of labor may be "more reasonable," LaBrier's interpretation is not unreasonable.⁴⁸ Therefore, State Farm's motion to dismiss was denied.⁴⁹ As of the publication of this Note, this case has been certified as a class action, which is currently under review by the Eighth Circuit, and a trial date is pending.⁵⁰

III. LEGAL BACKGROUND

ACV coverage has existed in the United States since at least 1849.⁵¹ In Missouri, ACV coverage dates back to at least 1919.⁵² In *Joyce v. St. Paul Fire & Marine Insurance Co.*, the court stated:

The burden of proof was upon plaintiff to show the actual cash value of the property destroyed at the time of the fire in question . . . in case

42. *Id.* at 844.

43. *Id.* at 848.

44. *Id.*

45. *Id.* at 850.

46. *Id.*

47. *Id.*

48. *Id.* at 851.

49. *Id.*

50. See Docket Entry, *LaBrier v. State Farm Fire & Cas. Co.*, No. 16-3562 (8th Cir. Jan. 11, 2017). Oral argument was heard on January 11, 2017. No determination has been made at the time of publication as to whether the class certification will stand or be overturned.

51. See *Mut. Safety Ins. Co. v. Hone*, 2 N.Y. 235, 235 (N.Y. 1849) (the insurance policy quoted had the following language: "the loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen").

52. See *Joyce v. St. Paul Fire & Marine Ins. Co.*, 211 S.W. 390, 390 (Mo. Ct. App. 1919).

there had been deterioration in the value of the property between the time it was insured and the time of the fire.⁵³

Traditionally, insurers have provided two different types of property insurance for homeowners. One is the ACV policy, and the other is a replacement cost policy.⁵⁴ Both types of policies are typically subject to a maximum limit of coverage.⁵⁵ The most prominent form of homeowner's coverage is currently a hybrid between the two types of policies.⁵⁶ Coverage is first provided on an ACV basis until the repairs are completed.⁵⁷ Then, a supplemental payment is made so the total cost of the repair or replacement is paid, less the deductible.⁵⁸

In Missouri, the case law and statutory law relating to ACV and depreciation are sparse. There is no precedent in Missouri that provides a controlling definition of ACV, and the statutory law deals only with homeowners' claims caused by fire.⁵⁹ Missouri Revised Statutes sections 379.140 and 379.150 address the assessment of damage done to a property when a loss is caused by fire.⁶⁰ Section 379.140 states that "the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value," which clearly allows depreciation.⁶¹ Section 379.150 states that insurers shall pay "a sum of money equal to the damage done to the property . . . so that said property shall be in as good condition as before the fire," which means that the insured should be paid a sum to put him or her back into the position he or she was in before the loss occurred.⁶² These statutes apply only to claims caused by fire.⁶³ Three Missouri cases cite to these statutes: *Wells v. Missouri Property Insurance Placement Facility*, *Porter v. Shelter Mutual Insurance Co.*, and *Cincinnati Insurance Co. v. Bluewood, Inc.*⁶⁴ In

53. *Id.* at 391.

54. *See* *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982). *See also* Amici Curiae Brief of American Insurance Association, Property Casualty Insurers Association and National Association of Mutual Insurance Companies at 3–4, *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859 (Neb. 2017) (No. S-16-597), 2016 WL 4618884, at *3–4.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. MO. REV. STAT. § 379.140 (2000); *id.* § 379.150.

60. *Id.* § 379.140; *id.* § 379.150.

61. *Id.* § 379.140.

62. *Id.* § 379.150.

63. *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 845 (W.D. Mo. 2015).

64. *Wells v. Mo. Prop. Ins. Placement Facility*, 653 S.W.2d 207, 208 (Mo. 1983) (en banc); *Porter v. Shelter Mut. Ins. Co.*, 242 S.W.3d 385, 390–91 (Mo. Ct. App. 2007); *Cincinnati Ins. Co. v. Bluewood, Inc.*, 560 F.3d 798, 802–03 (8th Cir. 2009).

Wells and *Porter*, both properties were damaged by fire.⁶⁵ In *Bluewood*, the Eighth Circuit was asked to determine whether sections 379.140 and 369.150 also applied to a claim caused by water damage, and the court determined that the statutes only applied to fire losses.⁶⁶

The court in *LaBrier* stated that the definition of ACV could be the fair market value of the property immediately before and after the loss, but it could also be replacement cost less depreciation.⁶⁷ The court suggested that replacement cost may be insufficient to prove ACV, but the court did not go so far as to make a ruling to that effect.⁶⁸

Outside Missouri law, there are common law insurance principles that pertain to this case. The principle of indemnity, the doctrine of *contra proferentem*, and the doctrine of reasonable expectations all relate to this knotty challenge of policy interpretation.⁶⁹ The principle of indemnity

refers to the compensation necessary to reimburse the insured's loss [I]nsurance aims to reimburse and to do nothing more. It is consistent with the principle of indemnity to pay the insured a benefit *less than* the loss, but the principle of indemnity is violated if the insured is paid a benefit greater than the loss.⁷⁰

Indemnity is important in insurance law because it helps to mitigate the risk of moral hazard.⁷¹ A moral hazard exists when an insured has an incentive to intentionally destroy property or to not take adequate precautions in safeguarding property because the insured would benefit in the event of a loss.⁷² For example, if an insured could receive a claim payment that is in excess of the value of the property, the insured may think it is financially beneficial to destroy the property and receive the payout.⁷³ The principle of indemnity aims to extinguish moral hazard.⁷⁴

The doctrine of *contra proferentem* represents the idea that where a promise, agreement, or term is ambiguous, the preferred meaning should be the one that works against the interests of the party that drafted the contract.⁷⁵ It is important in the insurance context because insurance policies are contracts of adhesion (or “one-sided” contracts).⁷⁶ Since insurance policies are

65. *Wells*, 653 S.W.2d at 207–08; *Porter*, 242 S.W.3d at 387.

66. *Bluewood*, 560 F.3d at 804.

67. *LaBrier*, 147 F. Supp. 3d at 845.

68. *Id.*

69. ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 141–42, 258–60 (5th ed. 2012).

70. *Id.* at 259.

71. *Id.* at 258–60.

72. *Id.* at 258.

73. *See id.* at 258–60.

74. *Id.*

75. *Id.*

76. *Id.* at 141.

drafted by the insurer, oftentimes with little input from the insureds, they are construed against the insurer when a term is deemed ambiguous.⁷⁷ The goal of this doctrine is to encourage parties that draft contracts, like insurers, to be as clear and explicit as possible when drafting their policies.⁷⁸ In *LaBrier*, the district court was justified in reading ambiguity into a policy where neither ACV nor depreciation was clearly defined.⁷⁹ Considering how State Farm calculated ACV, it is entirely reasonable – and likely correct – for the court to determine that ACV means replacement cost less depreciation.

Contra proferentem is also closely tied to the doctrine of reasonable expectations. Under this doctrine, whenever there is an ambiguity in an insurance policy, it is resolved in favor of the insured's reasonable expectations.⁸⁰ The purpose is to protect the consumer from unfair surprise in how the policy services his or her claims should a loss occur.⁸¹ Courts will sometimes use this doctrine to strike down certain provisions in an insurance policy, or they will use it in combination with *contra proferentem* in order to interpret policy language in favor of the insured and against the insurer.⁸²

Beginning in the early 2000s, insureds began to question whether depreciation of labor costs in ACV policies is acceptable under policy language that defined depreciation costs ambiguously.⁸³ There are two schools of thought. Some courts have stated that depreciation of labor is proper in determining ACV, and other courts have stated that only materials can be depreciated in an ACV calculation.⁸⁴ One of the first cases to address the issue came out of the Oklahoma Supreme Court: *Redcorn v. State Farm Fire & Casualty Co.*⁸⁵ The *Redcorn* court stated the following:

[A] roof is a single product consisting of both materials and labor, and that pursuant to the “broad evidence rule,” which allows a fact-finder to consider the age and condition of the roof, depreciation of the whole product is appropriate. Because labor is a part of the whole product, it is included in the depreciation of the roof.⁸⁶

77. *Id.*

78. *See id.*

79. *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 850 (W.D. Mo. 2015).

80. JERRY & RICHMOND, *supra* note 69, at 142–43.

81. *See id.* at 142.

82. *See id.* at 141–42.

83. *See Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1018–19 (Okla. 2002).

84. *See id.* at 1018, 1019; *but see Shelter Mut. Ins. Co. v. Goodner*, 477 S.W.3d 512, 513 (Ark. 2015).

85. *See Redcorn*, 55 P.3d at 1018.

86. *Id.*

The *Redcorn* court also relied on prior Oklahoma case law that explained the relationship between the broad evidence rule and ACV.⁸⁷ In Oklahoma, “[a]ctual cash value . . . is determined by the ‘broad evidence rule,’” which requires considering “all relevant factors and circumstances existing at the time of loss,” including “purchase price, replacement cost, appreciation or depreciation, the age of the building, the condition in which it has been maintained and market value.”⁸⁸ Missouri does not use the broad evidence rule to determine ACV.

More recently, in 2015, the U.S. District Court for the Western District of Pennsylvania, in *Papurello v. State Farm Fire & Casualty Co.*, held that the insurer could include labor costs when calculating ACV.⁸⁹ The court took a similar approach to the Oklahoma court when evaluating depreciation on the property as a whole. In *Papurello*, the court stated that “[w]hen a roof is in issue, as it is here, the ‘plain and ordinary’ meaning of the ‘property’ to which the Policy refers is the *finished* product in issue.”⁹⁰ Of particular importance is the court’s determination of what “depreciation” actually means. The court stated that depreciation is a diminution in the value of the property.⁹¹ The court went on to note that, “‘at the time of [its] loss,’ the ‘value’ of the ‘property’ at issue in this case – *i.e.*, plaintiffs’ finished roof – suffered diminution.”⁹² The roof is comprised of labor and materials, but the court viewed the roof as a *unit*, and the loss in value to the roof applied to both the labor and materials needed to make it a finished product.⁹³

While *Redcorn* and *Papurello* have determined that the inclusion of labor costs in determining depreciation under an ACV policy is acceptable, other courts have reached a different conclusion. In *Adams v. Cameron Mutual Insurance Co.*, the Arkansas Supreme Court held that ACV was not defined in Cameron Mutual’s policy and was therefore ambiguous.⁹⁴ In addition, the court stated “[d]epreciation’ plainly means ‘[a] decline in an asset’s value because of use, wear, obsolescence, or age.’”⁹⁵ As labor cannot decline in value because of use, wear, obsolescence, or age, it cannot be depreciable.⁹⁶

87. *Id.* at 1020.

88. *Id.* at 1018.

89. See *Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 770 (W.D. Pa. 2015).

90. *Id.* (quoting Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 14 (Pa. 2014)) (including labor costs).

91. *Id.* at 771.

92. *Id.* (alteration in original).

93. *Id.* at 770.

94. *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675, 678 (Ark. 2013) (ACV was not defined in the policy at issue).

95. *Id.* (second alteration in original) (quoting *Depreciation*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

96. *Id.* at 678–79.

In *Bailey v. State Farm Fire & Casualty Co.*, the U.S. District Court for the Eastern District of Kentucky reached a similar conclusion.⁹⁷ The parties agreed on the definition of ACV; however, they disagreed on whether labor was depreciable.⁹⁸ As depreciation was not specifically defined in the policy, the court determined that it was ambiguous.⁹⁹ The *Bailey* court also agreed with a dissenting opinion written by Judge Boudreau in the *Redcorn* case, where Judge Boudreau stated that, while materials logically wear out over time, labor does not.¹⁰⁰ Specifically, the court held that “[t]he very idea of depreciating the value of labor defies good common society. To adequately indemnify its insureds, State Farm should pay the cost of materials, depreciated for wear and tear, plus the cost of their installation.”¹⁰¹

One of the more interesting cases regarding labor depreciation is *Shelter Mutual Insurance Co. v. Goodner*, which was heard by the Arkansas Supreme Court.¹⁰² In this case, there was no ambiguity in the policy regarding either ACV or depreciation.¹⁰³ This Shelter policy, unlike most policies, actually provided a definition for both.¹⁰⁴ The policy defined ACV as the “total restoration cost less depreciation.”¹⁰⁵ Depreciation was then defined as follows:

The amount by which any part of the covered property which must be replaced has decreased in value since it was new. The condition, age, extent of use, and obsolescence of the property will be considered in determining depreciation. When calculating depreciation, we will include the depreciation of the materials, the labor, and the tax attributable to each part which must be replaced to allow for replacement of the damaged part, whether or not that part is damaged.¹⁰⁶

Putting aside the clear inclusion of labor costs in the definition of depreciation, the court held that it was still illogical to depreciate labor.¹⁰⁷ It also stated that, while parties are generally free to contract on whatever terms they

97. *Bailey v. State Farm Fire & Cas. Co.*, No. CIV.A. 14-53-HRW, 2015 WL 1401640, at *8 (E.D. Ky. Mar. 25, 2015).

98. *Id.* at *5.

99. *Id.* at *6.

100. *Id.* at *7–8.

101. *Id.* at *8.

102. *Shelter Mut. Ins. Co. v. Goodner*, 477 S.W.3d 512 (Ark. 2015).

103. *Id.* at 513. Shelter’s policy language states that “[w]hen calculating depreciation, we will include the depreciation of the materials, the labor, and the tax attributable to each part which must be replaced to allow for replacement of the damaged part” *Id.* (emphases omitted).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 515–16.

may agree to, they cannot contract against Arkansas law.¹⁰⁸ The court held that depreciation of labor violated the principle of indemnity and that it was contrary to Arkansas law.¹⁰⁹

The Arkansas court took the extra step that other courts have thus far not taken in striking policy language that is clear and unambiguous. The cases filed in Missouri thus far are only focused on insurance companies with ambiguous policy language, and no case has been filed against Shelter as of the time of this Note's publication that challenges the public policy of Shelter's policy language.¹¹⁰

IV. INSTANT DECISION

Unlike in the *Goodner* case, ACV and depreciation were not defined terms in LaBrier's State Farm policy.¹¹¹ The court noted that the interpretation of an insurance policy is a question of law that is determined by the court.¹¹² The district court stated that the language used in the policy would be given the meaning understood by the lay person who bought and paid for the policy.¹¹³ If an ambiguity exists, it would be construed against the insurance company.¹¹⁴ The court noted that ambiguity exists when the language is *reasonably* open to different interpretations.¹¹⁵

A. Missouri Common Law and the Definition of Actual Cash Value

The district court first addressed State Farm's contention that there is controlling Missouri case law that defines ACV.¹¹⁶ State Farm pointed to two

108. *Id.* at 515 (the court was not clear on the source of this law).

109. *Id.* There is a sense in the opinion that the court feels that depreciation of labor is against public policy; however, it is not clear where the source of that public policy is being derived from. In addition, the principle of indemnity does not state that an insured cannot be paid less than the value of the loss; it states that an insured cannot be paid more than the value of the loss. See *JERRY & RICHMOND*, *supra* note 69, at 259.

110. See Wylan Ackerman, *Labor Depreciation Class Actions Heating up Across the Country*, JD SUPRA BUS. ADVISOR (Mar. 30, 2015), <http://www.jdsupra.com/legal-news/labor-depreciation-class-actions-heating-01326/> (writing that *Riggins v. American Family Mutual Insurance Co.*, *McLaughlin v. Fire Insurance Exchange*, and *Bellamy v. Nationwide Affinity Insurance Co.* have been filed in the U.S. District Court for the Western District of Missouri, the Circuit Court of Jackson County, and the Circuit Court of Jackson County, respectively.)

111. *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 843 (W.D. Mo. 2015).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 844.

116. *Id.*

Missouri cases, *Wells v. Missouri Property Insurance Placement Facility* and *Porter v. Shelter Mutual Insurance Co.*, which State Farm alleged gave support to its definition.¹¹⁷ Both of these cases dealt with a loss caused by fire, a situation controlled by Missouri Revised Statutes sections 379.140 and 379.150.¹¹⁸ In addition, State Farm cited *Hannan v. Auto-Owners Insurance Co.*, which involved storm damage to a home.¹¹⁹ The U.S. District Court for the Eastern District of Missouri noted in *Hannan* that Auto-Owners's policy did not provide a definition of ACV.¹²⁰ In addition, the court stated that the definition of ACV could be the difference in fair market value immediately before and after the loss, but it could also be replacement cost less depreciation.¹²¹ The court stated that evidence of replacement cost is admissible but may not be sufficient to show what the ACV of the property was at the time of the loss.¹²²

While State Farm believed that this case law is controlling on the definition of ACV, the court disagreed.¹²³ The court noted that the only point of guidance from a higher controlling court is from *Cincinnati Insurance Co. v. Bluewood, Inc.*, an Eighth Circuit case.¹²⁴ In *Bluewood*, the court needed to determine whether sections 379.140 and 379.150, which pertain to fire losses, also applied to a water loss.¹²⁵ The court determined that they did not.¹²⁶ As the definition of fair market value in the Missouri statutes did not apply to a water loss, the court stated that section 379.140, section 379.150, and the *Wells* opinion also did not apply to LaBrier because LaBrier's loss was from hail damage.¹²⁷ In addition, the court in *Hannan* suggested that proof of replacement cost may be insufficient to prove ACV, but the court did not make a ruling to that effect.¹²⁸ *Hannan* is not persuasive to the extent that it contradicts *Bluewood*, which was decided by the Eighth Circuit.¹²⁹ Therefore, the court held that the definition of ACV was ambiguous and not controlled by Missouri case law.¹³⁰

117. *Id.*

118. *Id.*

119. *Id.*

120. *Hannan v. Auto-Owners Ins. Co.*, No. 2:13CV00053 ERW, 2014 WL 3701031, at *4–5 (E.D. Mo. July 25, 2014).

121. *Id.* at *5–6.

122. *Id.* at *6.

123. *LaBrier*, 147 F. Supp. 3d at 845–46.

124. *Id.* at 844–45.

125. *Id.*

126. *Id.* at 845.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 846.

B. Ambiguity and Actual Cash Value

The court noted that several courts in other jurisdictions have concluded that the phrase “actual cash value” used in other insurance policies is also ambiguous when left undefined.¹³¹ In *Evanston Insurance Co. v. Cogswell Properties, LLC*, the district court stated that “[a] variety of methods are used to determine the value of real property, including market value, replacement cost, replacement cost minus depreciation, and stream of income.”¹³² The court noted that since the policy in LaBrier’s case did not define ACV, it is ambiguous and must be construed in favor of the insured.¹³³ Therefore, the court held that LaBrier’s definition of ACV – replacement cost less depreciation – would be controlling.¹³⁴

C. Can Labor Be Depreciated?

The court then turned to the issue of whether labor should be included in the calculation of depreciation, which is what State Farm contended.¹³⁵ State Farm claimed that, under Missouri law and the policy language, LaBrier was entitled to full replacement cost after the repairs were complete.¹³⁶ State Farm further argued that the principle of indemnity had been violated by allowing LaBrier to receive the replacement value for the labor, even though the roof was not repaired.¹³⁷ State Farm relied on *Dollard v. Depositors Insurance Co.*, in which the Missouri Court of Appeals, Western District, stated that “[t]he insured bears the share of the loss resulting from the deterioration, obsolescence and similar depreciation of the property’s value at the time of the loss. Replacement cost insurance covers this shortfall.”¹³⁸ In addition, State Farm pointed to an Oklahoma case, *Redcorn v. State Farm Fire & Casualty Co.*, where the Oklahoma Supreme Court held that labor can be depreciated in calculating ACV.¹³⁹ State Farm also cited a Kansas case, *Graves v. American Family Mutual Insurance Co.*, which allowed for depreciation but also noted that it is an “uncomfortably abstract notion.”¹⁴⁰

131. *Id.*

132. *Evanston Ins. Co. v. Cogswell Props., LLC*, No. 1:08-CV-475, 2009 WL 198745, at *4 (W.D. Mich. Jan. 23, 2009).

133. *LaBrier*, 147 F. Supp. 3d at 847.

134. *Id.*

135. *Id.* at 848.

136. *Id.*

137. *Id.* See *JERRY & RICHMOND*, *supra* note 69, at 259.

138. *LaBrier*, 147 F. Supp. 3d at 848 (alteration in original) (quoting *Dollard v. Depositors Ins. Co.*, 96 S.W.3d 885, 889 (Mo. Ct. App. 2002)).

139. *Id.*

140. *Id.* at 849 (quoting *Graves v. Am. Family Mut. Ins. Co.*, No. 14-2417-EFM-JPO, 2015 WL 4478468, at *4 (D. Kan. July 22, 2015)). The notion is “uncomfortably abstract” because the court notes that labor does not depreciate over time. *Graves*, 2015 WL 4478468, at *3–4. To “depreciate” means to be subject to wear and

In response, LaBrier argued that Kentucky and Arkansas case law support her contention that labor cannot be depreciated.¹⁴¹ In *Adams v. Cameron Mutual Insurance Co.*, the Arkansas Supreme Court held that when ACV is ambiguous, labor may not be depreciated.¹⁴² The court in *LaBrier* stated that “[d]epreciation’ plainly means ‘[a] decline in an asset’s value because of use, wear, obsolescence or age’ and these factors do not apply to labor.”¹⁴³ LaBrier also cited *Bailey v. State Farm Fire & Casualty Co.*, a Kentucky case that examined the decisions in *Adams* and *Redcorn* and held that depreciating the value of labor was unacceptable and that the full cost of installation should be covered.¹⁴⁴

The court considered whether LaBrier’s position that labor cannot be included in depreciation is reasonable.¹⁴⁵ In doing so, the court asked a series of questions regarding how the “lay person” would interpret the language in State Farm’s policy.¹⁴⁶ Namely, the court analyzed whether a lay person would understand that depreciation is calculated on both the labor and materials.¹⁴⁷ It stated that it would be unreasonable for a lay person to expect that he or she is getting paid for the same amount twice in a replacement cost policy.¹⁴⁸ However, the court also stated that it would be reasonable for the lay person to be put back into a position where he or she was before the casualty occurred – “not better off, but at least as well off.”¹⁴⁹

The court also addressed State Farm’s hypothetical of a thirty-year-old roof.¹⁵⁰ At year thirty, if insurance were to cover the full cost of the labor after a loss, State Farm claimed the insured would be getting thousands of dollars in additional labor costs – a windfall.¹⁵¹ The court stated that this hypothetical is based on a total loss, and not a partial loss, which is what LaBrier had.¹⁵² Additionally, in this example, if both materials and labor are depreciated, then the insured would be left with zero payout.¹⁵³ At a minimum, even if the roof has outlived its life expectancy, it still sheltered the homeowners.¹⁵⁴ Therefore, it would not be unreasonable for an insured to

tear or obsolescence. *Id.* This process, according to the court, happens to the physical materials, but not to labor, as labor does not lose value over time. *Id.*

141. *LaBrier*, 147 F. Supp. 3d at 848–49.

142. *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675, 678 (Ark. 2013).

143. *LaBrier*, 147 F. Supp. 3d at 849 (second alteration in original) (quoting *Adams*, 430 S.W.3d at 678).

144. *Id.*

145. *Id.* at 850, 851.

146. *Id.* at 850.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 851.

151. *Id.* at 850.

152. *Id.*

153. *Id.* at 851.

154. *Id.*

expect compensation for the labor to replace the roof, even on a roof with no value left in the materials.¹⁵⁵

V. COMMENT

A. *The Rationale for Labor Depreciation*

The concepts of indemnity and moral hazard, discussed above, help explain why it is important to the insurance industry that depreciation of labor is allowed on ACV policies. The incentive to either intentionally create a loss or disregard a loss because it will financially benefit the insured is less likely under the current hybrid policies that pay an ACV amount up front until the repairs are completed.¹⁵⁶ This is because the insured is not being compensated for more than the value of the loss to the home, before repairs are completed.¹⁵⁷ For example, if an insured can intentionally destroy a roof (without getting caught) and receive *more* than what the roof is worth, the insured may be tempted to do so to financially benefit from the loss. This creates a moral hazard.

In addition, allowing an insured who has not actually repaired the damage to his or her roof to be paid the labor costs as if the replacement has occurred violates the principle of indemnity.¹⁵⁸ An ACV payment accurately puts the insured in the position he or she was in before the loss occurred – an owner of an aged roof with no hail damage.¹⁵⁹ The ACV payment pays for the hail damage and deducts for the age of the roof.¹⁶⁰ Should the insured choose to actually repair the roof, he or she would be in a position where he or she has a repaired roof and will be reimbursed for any additional costs to fix the damage.¹⁶¹

This principle of indemnity is also present in other forms of property and casualty insurance.¹⁶² Under a motor vehicle policy, certain parts of a car are subject to wear and tear, and a deduction is applied for that wear and tear.¹⁶³ This is most often seen with tires, batteries, or convertible roof-

155. *Id.*

156. *D & S Realty, Inc. v. Markel Ins. Co.*, 816 N.W.2d 1, 11–12 (Neb. 2012).

157. *Id.* at 12.

158. *LaBrier*, 147 F. Supp. 3d at 848.

159. *Id.* at 849.

160. *Id.* at 848–49.

161. *Id.* at 848. Note that an insurance company does not have to pay for 100% of the loss. An insured can choose to buy less coverage, and thus have lower limits. It does not violate the principle of indemnity for the insured, who chooses not to repair, to get less than 100% reimbursement.

162. See *Determining Your Car's Value and Cost of Repair*, INS. INFO. INST., <http://www.iii.org/article/how-are-value-my-car-and-cost-repair-determined> (last visited Mar. 13, 2017).

163. See *id.*

tops.¹⁶⁴ If an insured is in an accident and any of those parts is damaged, then an insurance company can take a deduction for the wear and tear of that part.¹⁶⁵ So, for example, if an insured had badly worn tires that were replaced with new tires, then the insured would not recover the full cost of the new tires – including labor – as that would put the insured in a better position than the position he or she was in before the loss occurred.¹⁶⁶ To date, courts have not taken issue with application of depreciation under a motor vehicle policy.

Another consideration in this case was whether consumer expectations had been violated by allowing depreciation of labor on ACV policies, as the district court seemed to suggest.¹⁶⁷ It is difficult to rationalize how consumers would not expect to see depreciation in an ACV payment. In Missouri, a court of appeals ruled in 2007 that the two-step hybrid payment system discussed earlier was allowable.¹⁶⁸ In fact, the Supreme Court of Missouri, as far back as 1944, ruled that ACV policies that allow for depreciation are permissible.¹⁶⁹ The consumer should not be surprised to have an ACV payment that takes depreciation on labor and materials, since it has been the practice in Missouri in some way for at least seventy-two years.¹⁷⁰ In addition, insurance agents should be accurately marketing and explaining to an insured how the homeowner's policy pays claims. It is hard to see how, in 2016, an insured who has access to information regarding how his or her policy functions would be unreasonably surprised by the use of depreciation in an ACV payment.¹⁷¹

In addition, this same type of valuation method is seen across other areas of law.¹⁷² It is odd for the court to determine that labor depreciation is inappropriate in the insurance context when every other application of depre-

164. *See id.*

165. *See id.*

166. *See id.*

167. *LaBrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 850 (W.D. Mo. 2015) (listing a series of questions regarding what a consumer may or may not understand in the policy).

168. *See Porter v. Shelter Mut. Ins. Co.*, 242 S.W.3d 385, 394 (Mo. Ct. App. 2007).

169. *Wells v. Mo. Prop. Ins. Placement Facility*, 653 S.W.2d 207, 212–13 (Mo. 1983) (en banc) (“That has been the language of the standard fire insurance policy in Missouri since July 1, 1944 . . .”). However, this was in the context of a fire loss, which the district court differentiated from hail losses in *LaBrier*.

170. *Id.* at 212.

171. This is because ACV payments have been around for a long time, and because agents should be explaining these payments to the insureds. Insureds should not expect to be put in a better position after a claim, although administratively speaking, claim payment estimation is not always precise and some insureds do profit from a loss.

172. For example, this method applies in tax law and property law, including real property and eminent domain. *See Amici Curiae Brief of American Insurance Association, Property Casualty Insurers Association and National Association of Mutual Insurance Companies*, *supra* note 54, at 2–3.

ciation that is known today applies depreciation to the property as a whole and does not disaggregate the property into labor and materials components.¹⁷³ Moreover, it undermines any argument that insureds can make about being unfairly surprised because of the alleged ambiguity of the terms “ACV” and “depreciation” when the authority in all other areas cuts in a different direction.¹⁷⁴

An example germane to insurance valuation can be found in general real estate valuation. One method used to determine the value of property is the “cost approach.”¹⁷⁵ The Appraisal Institute explains that when using the cost approach, “the value of a property is derived by adding the estimated value of the land to the current cost of constructing a reproduction or replacement for the improvements and then *subtracting the amount of depreciation in the structures from all causes.*”¹⁷⁶ The Appraisal Institute goes on to add that “[d]epreciation is of three different types (physical deterioration, functional obsolescence and external obsolescence) and is measured through market research and the application of specific procedures.”¹⁷⁷ There is no disaggregation of labor and materials when using the cost approach in real estate valuation.¹⁷⁸ Rather, the home (“unit”) is looked at as a whole, as it is a product of both labor and materials.¹⁷⁹

This methodology is condoned by the Appraisal Institute and by federal law – 32 C.F.R. § 644.44 discusses fee appraisals in the real estate context.¹⁸⁰ Subsection (c)(2) states that “[i]t also is extremely important that [the appraiser] fully consider all forms of depreciation such as physical deterioration, functional obsolescence, economic obsolescence, etc., and justify his methods and factors used in developing his depreciation factors.”¹⁸¹ There is no mention here of disaggregation for labor and materials because, again, the physical deterioration applies to the home as an economic “unit.”¹⁸²

Further support is provided by the Bureau of Economic Analysis (“BEA”), which provides a table of depreciation for many different types of assets, including consumer durable goods and residential structures.¹⁸³ A

173. *Id.* at 1.

174. *Id.*

175. See *Understanding the Appraisal*, APPRAISAL INST. 11 (2013), [http://www.appraisalinstitute.org/assets/1/7/understand_appraisal_1109_\(1\).pdf](http://www.appraisalinstitute.org/assets/1/7/understand_appraisal_1109_(1).pdf).

176. *Id.* (emphasis added).

177. *Id.*

178. Amici Curiae Brief of American Insurance Association, Property Casualty Insurers Association and National Association of Mutual Insurance Companies, *supra* note 54, at 3.

179. *Id.*

180. 32 C.F.R. § 644.44(b) (2017).

181. *Id.* § 644.44(c)(2).

182. *Id.* § 644.44.

183. See *BEA Depreciation Estimate*, BUREAU ECON. ANALYSIS 5–10, <https://www.bea.gov/national/FA2004/Tablecandtext.pdf> (last visited Mar. 13, 2017) (showing depreciation estimates).

Goldsmith and Lipsey study shows the average service life for residential structures.¹⁸⁴ The table shows that a new residential structure with one unit (a single family dwelling) has an eighty-year service life, on average, with an annual depreciation rate of 0.0114.¹⁸⁵ This figure is not disaggregated into labor and materials by the BEA, as the entire asset as a unit depreciates, according to the BEA.¹⁸⁶

The idea that an economic unit can be disaggregated into labor and materials components and that only the materials component can be depreciated is inconsistent with every other area of the law where depreciation is taken into consideration.¹⁸⁷ In fact, it is even potentially inconsistent within a homeowner's policy.¹⁸⁸ Personal property that is damaged within the home can also be replaced on an ACV basis.¹⁸⁹ Unlike a contractor's estimate for a roof, the insurance company and the consumer do not know which part of the replacement cost of a refrigerator, for example, is comprised of materials and which part is labor. There is no disaggregation or line item given when a durable good or other consumer good is purchased. It is unclear how a consumer could even go about getting this information, and in some cases, it would be a protected trade secret. If ACV can be applied to other personal property within the home that is comprised of both labor and materials, then it seems inconsistent that, under the same policy, the same type of calculation cannot be applied to the structure of the home.

B. Repercussions

Should State Farm lose this case, it will likely need to (1) change its policy language to clearly define depreciation as including labor costs or (2) change the policy language so that labor is not included in depreciation. Either way, this is bad news for policyholders as a whole. A change in language that increases the amount of coverage will probably lead to a rate increase.¹⁹⁰ Premium rates will go up for all policyholders who have ACV-only policies or policies that pay an initial ACV payment followed by a sup-

184. *Id.* at 4.

185. *Id.* at 8 (this means that the structure loses 1.14% of its value annually, using straight-line depreciation).

186. *Id.*

187. See Amici Curiae Brief of American Insurance Association, Property Casualty Insurers Association and National Association of Mutual Insurance Companies, *supra* note 54, at 2 (listing tax, real estate appraisals, BEA depreciation, and eminent domain). All of these areas apply depreciation to a property as a whole and do not disaggregate it into separate labor and materials components.

188. See State Farm, *Sample State Farm Homeowners Policy*, *supra* note 22, at 5 (comparing personal property coverage with dwelling coverage).

189. See *id.*

190. See *Insurance Company Rate, Rule and Policy Form Filings*, MO. DEP'T INS., <http://insurance.mo.gov/companies/ins-co-rate-rule-form.php> (last visited Apr. 2, 2017). The Department of Insurance reviews rate requests.

plementary replacement cost payment (two groups which constitute the majority of policyholders).¹⁹¹ A legislative fix was proposed in Missouri, and the bill would go into effect in August 2017.¹⁹² House Bill 346 would add a new section to the Missouri Revised Statutes, and the proposed law would allow for “expense depreciation”: “depreciation of the cost of all goods, materials, labor, services, fees, permits, and taxes necessary to replace, repair, or rebuild damaged property.”¹⁹³ It also states that insurance policies may allow for expense depreciation.¹⁹⁴ A similar bill has already been signed into law in Arkansas.¹⁹⁵ It is anticipated that legislation may be proposed in other states where depreciation of labor has been disallowed by courts.

Even without changing policy language, insurance companies can still request a rate increase from the Department of Insurance if they incur exorbitant costs in class action litigation on these homeowner’s claims.¹⁹⁶ In addition, a policyholder who files a claim under his or her homeowner’s policy could see an individual rate increase.¹⁹⁷ From an underwriting perspective, the insurer’s risk has increased, and a higher premium will need to be collected to offset that risk.¹⁹⁸ If State Farm has to pay more in claims payments because ACV now includes 100% of the labor costs, then it will be more likely that the policyholder will meet the threshold that signals to underwriters that there should be an increase in his or her premium rates.¹⁹⁹ In either case, consumers are likely to face rate increases as a whole and on an individual basis because of widely distributed rate increases, even though select consumers with damaged roofs might benefit in individual instances.

191. See Amici Curiae Brief of American Insurance Association, Property Casualty Insurers Association and National Association of Mutual Insurance Companies, *supra* note 54, at 3.

192. See H.R. 346, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017).

193. *Id.*

194. *Id.*

195. S. 133, 91st Gen. Assemb., 1st Reg. Sess. (Ark. 2017).

196. See *Your Premium Has Gone Up. Why?*, ALLSTATE 1, <https://www.allstate.com/resources/allstate/attachments/claims/my-premium-changed.pdf> (last visited Mar. 13, 2017) (noting that external factors raise premium costs, such as the “[r]ise in home, auto and medical costs for claims”).

197. See *id.* (“We review . . . the type of claims you’ve made . . .”).

198. See Mark Vallet, *10 Factors That Affect Your Car Insurance Rates*, PROP. CASUALTY 360 (Mar. 20, 2015), http://www.propertycasualty360.com/2015/03/20/10-factors-that-affect-your-car-insurance-rates?page=3&page_all=1 (“A large number of claims will peg you as a higher risk and raise your premiums for at least two to three years.”).

199. See *Why Car Insurance Rates Go Up After Accidents*, DMV.ORG, <http://www.dmv.org/insurance/how-car-insurance-claims-affect-your-auto-insurance-policy.php> (last visited Apr. 2, 2017) (explaining how surcharges work).

VI. CONCLUSION

The district court in *LaBrier* should carefully consider the impact of a ruling in this case. A ruling in favor of the policyholders will prompt insurers to modify their policy language to allow for depreciation of labor should they so choose. Insureds moving forward will still be in the same position they are in now, with a policy that allows for labor depreciation but likely facing an increase in premiums. Insurers will effectively be punished for using the same types of valuation methods that are utilized in other areas, such as tax law and real estate law.

In addition, putting the insured in a better position than he or she was in when the loss occurred is a clear violation of the indemnity principle and could lead to moral hazard. Consumer expectations have not been violated by the use of an ACV policy that has been around in some shape or form for 167 years. Given this large exposure to depreciation in other arenas, plus the information available through agents, marketing, and other sources, it is hard to see how consumer expectations have been violated.

The large exposure to the insurance industry created by this ambiguity is undoubtedly attractive to class action plaintiffs' attorneys, which could explain why there are several cases filed on this issue so far in Missouri. No matter the result, the anticipated litigation costs could be enormous, since the liability created by an unfavorable ruling could run in the hundreds of millions of dollars. A ruling against State Farm will result in a windfall to insureds who are being paid full replacement costs on labor, despite failing to repair their property, and a windfall to plaintiffs' attorneys, who stand to make millions in fees from the ensuing litigation on this issue.