Nos. 16-3185 & 16-3562

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMANDA LABRIER
Appellee-Respondent,
v.

STATE FARM FIRE AND CASUALTY COMPANY
Appellant-Petitioner.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE-RESPONDENT AMANDA LABRIER AND AFFIRMANCE OF THE DISTRICT COURT IN NO. 3562

APPEAL AND MANDAMUS
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION
The Honorable Nanette K. Laughrey, United States District Judge
No. 2:15-cv-04093-NKL

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly traded corporation owns 10% or more of the stock of United Policyholders.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

United Policyholders ("UP") is a non-profit 501(c)(3) organization, founded in 1991, whose mission is to be an information resource and effective voice for consumers of all types of insurance, including commercial and residential policyholders, in all 50 states—including the policyholders at issue in this case.

UP's work is divided into three program areas: *Roadmap to Recovery* (claim assistance), *Roadmap to Preparedness* (promoting insurance/financial literacy), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators and legislators, and in the media). Donations, foundation grants, and volunteer labor support the organization's work. UP does not accept funding from insurance companies.

Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's work. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States—one of which was cited in the United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999). In addition, UP's arguments have been cited with approval in numerous state and

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the *amicus curiae* or its counsel, contributed money intended to fund the preparation or submission of this brief.

federal court opinions. UP monitors litigation of concern to insurance consumers and identifies cases that will have statewide or national significance. UP believes that this case will have such significance.

UP has an interest in the present case because its outcome will have a large impact on policyholders; thus it seeks to fulfill its role as a voice for insurance consumers. The underlying issue in this case addresses the practice of depreciating labor, which negatively impacts individual and commercial policyholders.

Labor depreciation results in the failure to indemnify policyholders with sometimes devastating results—especially for commercial policyholders. This practice effectively turns replacement cost value ("RCV") policies, which cover the complete cost of repair of damaged property, into actual cash value ("ACV") policies, which only cover a depreciated value, for individuals who cannot self-fund the repair.

UP seeks to represent the voice of the policyholders in this matter by providing the Court with the history, reasons for, and effect of the growing industry practice of labor depreciation, explaining that widespread labor depreciation is a fairly recent trend in the insurance industry made substantially easier by the overwhelming use of Xactimate, an estimating software, and detailing why it results in the failure to indemnify policyholders.

INTRODUCTION AND SUMMARY OF ARGUMENT

Labor should not be depreciated because it will never conform to the ideals underlying depreciation. Unlike materials, labor is an intangible that does not age or lose its value over time—it does not depreciate. When labor is depreciated, the policyholder is not indemnified. The policyholder will pay the same cost, or potentially more, to have depreciated materials installed as it would to have new materials installed.

Despite this clear notion that labor is an intangible that is incapable of depreciating, the practice of labor depreciation is expanding in the insurance industry. This expansion is likely due to the benefit it confers upon the insurer and the widespread use of the estimating software Xactimate. Labor depreciation is an undeniably beneficial practice for insurers. The more an insurer can depreciate, the less it pays out on the claim initially; thus allowing it to hold funds (premiums) longer and not pay them out unless the policyholder can afford to repair his/her property. In essence, labor depreciation has become an extension of the deductible, and it is a windfall for the insurer when the policyholder cannot afford to repair the property.

The practice of labor depreciation is also expanding because of a widely-used claim estimating software called Xactimate. Labor depreciation was not always the industry practice, but with the addition of software that makes labor

depreciation as easy as the click of a button, this practice has expanded. The clear benefit to insurers and the ease with which this software allows insurers to depreciate a valid claim requires courts to step in to protect policyholders.

The District Court, recognizing the importance of the underlying issue in this case, certified a class of Missouri policyholders who had their actual cash value payments reduced by this practice of labor depreciation. This decision should be affirmed because this case is a negative value suit, all class members have standing, common liability issues predominate, and allowing the case to proceed as a class will promote marketplace knowledge in an ambiguous industry.

ARGUMENT

I. The Widespread Depreciation Of Labor Is A New Practice With Injurious Results

A. Labor Depreciation Fails To Indemnify Policyholders

State Farm's position on depreciating labor is harmful to policyholders and sets a dangerous precedent. As noted in the parties' briefing, labor depreciation occurs when an insurer depreciates both the materials and certain labor costs in calculating the ACV of an approved claim. When an insurer (like State Farm) depreciates labor, the resulting amount does not reflect the cost necessary to restore the damaged property to its condition immediately preceding the loss. As a result, the insurer's ACV payment fails to indemnify the policyholder.

As an initial matter, labor simply does not comport with notions underlying

depreciation. Materials depreciate because they age; thus they have less value at the time of loss. Labor does not depreciate because it is not less valuable at any time—it is always the same value or higher based on the relevant market. *See* Don Wood & John Wood, *Insurance Recovery After Hurricane Sandy: Correcting the Improper Depreciation of Intangibles Under Property Insurance Policies*, 42 TORTS, INSURANCE & COMPENSATION LAW JOURNAL 18, 22 (Winter 2013) ("Only physical items are subject to wear and tear, obsolescence, or deterioration by exposure to elements . . . . [whereas] labor is an intangible, not subject to wear and tear, but may actually increase.") Once material is installed, it is left to depreciate and the labor simply goes away. Labor does not stay with the materials to depreciate. If labor is needed again in the future, it will reappear along with its *current price*.

The practice of labor depreciation is also contrary to the language of the insurance policy at-issue in this case and the fundamental tenet of insurance law that "[p]roperty insurance is fundamentally a contract of indemnity." 1 *New Appleman on Insurance Law Library Edition* § 1.05[4]. The purpose of actual cash value coverage is indemnity. *See* 47 *New Appleman on Insurance Law Library Edition* § 47.04 ("[a]n actual cash value policy is a pure indemnity contract."). Under a standard property insurance policy (like the one at-issue in this case), the policyholder is entitled to indemnification for any covered loss, which labor

depreciation fails to achieve.

Consistent with this, the District Court below explained that indemnity, at its minimum, "gives the policyholder what she had." *Labrier v. State Farm Fire & Cas. Co.*, 147 F. Supp. 3d 839, 851 (W.D. Mo. 2015). Therefore, the court reasoned, to be indemnified by an RCV policy that offers initial ACV coverage, "an ordinary lay person could reasonably expect that any actual cash value payment would be in an amount that would put her back where she was before the casualty—not better off, but at least as well off . . . . [t]hen, once she made repairs, she would get 'additional' covered amounts necessarily incurred—not expenses already covered by the actual cash value payment, but the 'additional' expenses incurred." *Id.* at 850.

When an insurer depreciates labor, the policyholder will never be fully indemnified. *See Bailey v. State Farm Fire & Cas. Co.*, No. 14-53-HRW, 2015 U.S. Dist. LEXIS 37568, at *15 (E.D. Ky. Mar. 25, 2015) ([D]epreciated labor costs would result in underindemnification."). As one district court explained, to put a policyholder "back where she was" before the loss, the insurer must provide sufficient funds to purchase materials of identical value as those that were destroyed *and to cover the labor involved in putting the structure back to its condition immediately preceding the loss*. *See Id.* at *15, *19–20 ("To adequately indemnify its policyholders, State Farm should pay the cost of materials,

depreciated for wear and tear, plus the cost of their installation . . . . the cost of labor to install a new garage would be same as installing a garage with 10 year old materials."). Full and complete indemnity is impossible when the insurer depreciates labor, as State Farm did with the class members here.

To be sure, labor depreciation negatively impacts all policyholders, individuals and business owners alike, but has the harshest impact on those policyholders that lack financial resources and/or liquidity. In general, the cash output necessary to build a replacement building is far greater than the amount the insurer pays for actual cash value. Therefore, unless the policyholder has enough liquidity to make up the difference, he/she will not have the resources to fully rebuild or replace the building. Labor depreciation essentially converts RCV policies into ACV policies because the policyholder cannot afford to bridge the gap and self-fund his/her repair. Under its policy, State Farm will only "pay the amount you actually and necessarily spend on to repair." So, when a policyholder cannot pay for the repair, he/she will only receive actual cash coverage.

This essential conversion of an RCV policy to an ACV policy is extremely harmful to the policyholder and clearly favorable to the insurer. The policyholder pays the value required to receive the benefit of replacement cost coverage but only receives the benefit of actual cash value coverage. Conversely, the insurer receives the benefit of RCV premiums while only providing ACV coverage.

This shortfall in funds necessary to repair the damaged property could result in disastrous consequences for a policyholder whose home or business is damaged by an event that is indisputably covered by their insurance policy. One can imagine the impact this would have when the damaged structure is the policyholder's home, or the silo a farmer needs to store his/her livestock's food, or, worse yet, a business owner's store that has an upside down mortgage. Commercial policyholders actually fare the worst, because the amount of the loss is generally more substantial than an individual's loss; thus the out-of-pocket costs necessary to continue their business can be insurmountable. Additionally, the extensive work involved in making repairs removes the possibility of performing the work personally.

Recognizing the detrimental impact that labor depreciation has on policyholders, various courts have rightfully expressed their concerns and, at times, outrage. *See Bailey*, 2015 U.S. Dist. LEXIS 37568, at *20 ("The very idea of depreciating the value of labor defies good common society."); *see also Boss v. Travelers Home and Marine Ins. Co.*, No. 16-04065, 2016 U.S. Dist. LEXIS 101342 (W.D. Mo. July 25, 2016); *Brown v. Travelers Cas. Ins. Co. Am.*, No. 15-50, 2016 U.S. Dist. LEXIS 55037 (E.D. Ky. Apr. 25, 2016); *Lains v. Am. Family Mut. Ins. Co.*, No. C14-1982, 2016 U.S. Dist. LEXIS 199879 (W.D. Wash. Feb. 9, 2016); *Riggins v. Am. Family Mut. Ins. Co.*, 106 F. Supp. 3d 1039 (W.D. Mo. 2015); *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675 (Ark. 2014). At least one

court has held that it is *against public policy* to depreciate labor in calculating ACV, even if the policy explicitly allows it. *See Shelter Mut. Ins. Co. v. Goodner*, 477 S.W.3d 512, 515–16 (Ark. 2015).

B. Labor Depreciation Is Not The Historical Industry Standard

Based on the lack of transparency in the insurance industry, it is not clear exactly when insurers started depreciating labor. However, it is clear that labor depreciation was not always a widespread industry practice—like it is today. This is clear from the lack of case law on the propriety of this practice, the nationwide regulation in response to the recent case law addressing it, and commentary from longtime industry professionals.

It is impossible for UP to tell this Court exactly when the majority of insurers started to depreciate labor based on the undeniable lack of transparency in the insurance industry. *See e.g.*, Daniel Schwarcz, *ARTICLE: Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. Rev. 394, 396 (Jan. 2014) ("One domain of financial regulation . . . has consistently and repeatedly failed to embrace market transparency as a regulatory tool: state insurance regulation."). Even today, it is next to impossible for a policyholder to determine which carriers depreciate labor.[2]

[2] Even after the policyholder purchases coverage from the insurer he/she is unlikely to know if labor is depreciated. This is because most carriers, with the exception of those who have recently updated their forms, use forms that do not

There is no publicly available list outlining which carriers engage in this practice, "almost no insurers make [policy] documents publicly available online," state insurance regulators "do not systematically maintain copies of different carrier policies," and "state-regulated insurers are virtually never required to provide consumers with standardized summaries of key coverage terms before purchase."[3] *Id.* at 397, 495.

Moreover, there is a dearth of case law on the propriety of this practice, with only one court addressing the issue prior to 1998.[4] *See, e.g., Davis v. Mid-Century Ins. Co.*, No. 96-2070-T, 1998 U.S. Dist. LEXIS 23411 (W.D. Okla. Mar. 26, 1998). Between 1998 to 2013, only one court confronted the problematic practice of labor deprecation. *See, e.g., Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1021 (Okla. 2002). Labor Depreciation has become a prevalent topic in the industry and courts after 2013, which undercuts State Farm's assessment that it is a

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say whether labor is depreciated. In addition, often times the policyholder cannot determine whether labor was depreciated based on the face of the claims handling paperwork itself, especially in cases like the present where the insurer depreciates "embedded costs."

[3] Despite the overall lack of transparency in the insurance industry, UP is aware that, unlike the majority of states, the Missouri Department of Insurance maintains an online bank of insurance policies.

[4] In 1978, the Mississippi Supreme Court mentioned labor depreciation with disapproval. *See Bellefonte Ins. Co. v. Griffin*, 358 So. 2d 387, 390–91 (Miss. 1978) ("the language in the policy is ambiguous and does not specifically prohibit or allow depreciation on the cost of labor . . . [a]ccordingly we are of the opinion that the trial court was correct in disallowing proof of depreciation on repairs as the policy provision was ambiguous . . . .").

longstanding industry practice. Even still, only a few courts have addressed the scope and methodology of labor depreciation in the context of property insurance policies.

Industry regulators' response to the recent expansion of labor depreciation further demonstrates that this was not the historical industry standard. Since the issue of labor depreciation was brought to the legal forefront, state insurance regulators across the country have responded aggressively, ranging from harsh criticism to outright bans on the practice.[5]

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[5] *See e.g.*, 10 CCR §2695.9(f)(1) (in 2005, California promulgated this regulation, which precludes the depreciation of labor costs in the determination of actual cash value); *Preliminary Examination Report (Market Conduct)*, Minn. Dep't of Commerce (Aug. 28, 1997) available at https://www.mnfairplan.org/Documents/DOC%20Market%20Conduct%20Exam%201997.pdf (Finding specific acts of labor depreciation to be inappropriate, "[c]leaning and repairing are not depreciable items. The sealing of plaster and lath walls are not depreciable. Depreciating labor on painting is also problematic.... Depreciation was improperly taken on the repair of plaster and sealing of sheetrock."); *Proposed Market Conduct Examination of Big Sky Mut. Ins. Co. Bozeman, Montana, as of Dec. 31, 2008*, at 6 (March 23, 2010) available at http://csimt.gov/wp-content/uploads/Big-Sky-FOF-COL-and-Order.pdf ("depreciation was improperly applied to labor, instead of just materials, in claims that were adjusted directly by the Company without an independent adjustor."); *Preliminary Examination Report (Market Conduct)*, Vermont Dep't Financial Regulation, Division of Insurance, Insurance Bulletin #184 (May 1, 2015) available at http://www.dfr.vermont.gov/sites/default/files/Bulletin_184.pdf (Vermont Department of Financial Regulation released a bulletin stating that, "[i]t is the Department's position that depreciation of labor costs is prohibited by [sections of the Vermont Insurance Trade Practices Act] when committed or performed with such frequency as to indicate a business practice.").

Indeed, some industry regulators clarify that labor depreciation was not, in fact, the historical practice. *See Market Conduct Examination of Sandy and Beaver Valley Farmers Mutual Ins. Co. as of June 30, 2011*, Ohio Dep't of Insurance, at 6 (May 21, 2012)[6] ("[i]n order *to be consistent with the industry practice of not depreciating labor*, the examiners considered the depreciation of labor to be an exception.") (emphasis added); Arkansas Insurance Department, Bulletin No. 13A-2013 (July 18, 2013)[7] (the bulletin sought to clarify the Department's position that "labor of any kind related to the repair, rebuild, or replacement of covered property cannot be depreciated" and explained that "[t]his is not a new Department position.").

Finally, as labor depreciation has rapidly expanded among carriers, industry professionals have argued against making it the industry standard. *See generally* Wood & Wood, *supra*, at 23 ("[D]epreciation should be applied only to physical items. This is the historic and usual use of depreciation in the insurance industry.") Notably, property adjusters were trained not to depreciate labor. *See* Wood & Wood, *supra*, at 23 ("[d]ecades ago, as a staff property adjuster for a national carrier, I was trained not to depreciate either labor or Debris Removal.").

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[6] Available at http://www.insurance.ohio.gov/Company/MC/Sandy%20and%20Beaver%20Valley%20Exam%20Report.pdf.

[7] Available at http://www.insurance.arkansas.gov/Legal/Bulletins/13A-2013.pdf.

C. Widespread Labor Depreciation Is A Practice Made Significantly Easier By The Overwhelming Use Of Xactimate In The Insurance Industry

Insurance carriers' uniform movement toward labor depreciation as the industry standard is largely attributable to the now overwhelming use of Xactimate. Xactimate is a claim estimating software created by Xactware in 1986. *See* Xactware, *Company History*, https://www.xactware.com/en-us/groundbreaking/media-kit-and-company-history/company-history/ (last visited Dec. 3, 2016). The company that designed Xactimate estimates that twenty-two of the top twenty-five insurance carriers in the United States currently use Xactware products, and more than eighty-percent of homeowner property claim estimates are written by those carriers. *Id.* The ease of process and substantial benefit to the insurer makes labor depreciation so desirable for carriers and a dangerous practice for policyholders.

The process to depreciate labor is simple. Xactimate allows insurers to depreciate labor, or not, with the click of one button. To depreciate both labor and materials, insurers check a box that says "depreciate materials" and another box that says "depreciate non-materials."

Conversely, to not depreciate labor, the insurer checks a box that says "Depreciate Material Only." *See* Wood & Wood, *supra*, at 24 ("Xactimate includes an option to select 'Depreciate Material Only.' It is there because it has been the

option for much of insurance claim settlement history."). Mr. Wood, a longtime insurance professional trained by a large carrier, concludes that "selecting that option is the most appropriate choice in every case where the policy calls for depreciation." *Id.* Experts with "the highest possible certification in the use and instruction of Xactimate" also argue that labor should not be depreciated. *What if you had the best experts to evaluate & debate Property Damage claims, especially Estimatics?*, topadjuster xactimate training, http://www.topadjuster.com/expert-witness/ (last visited Dec. 4, 2016) ("At the core of this dispute – is labor depreciable? My report stated that labor has no intrinsic value, and should not be depreciated.").

II. The District Court Did Not Abuse Its Discretion When It Granted Class Certification

A. A Class Action Is The Superior Method Of Adjudication Because This Case Is A Negative Value Suit

"[T]he most compelling rationale for finding superiority in a class action is the existence of a negative value suit." 1 McLaughlin on Class Actions § 5:64 (13th ed) (Oct. 2016 update) (internal citations omitted); *see also Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 379 (E.D. Ark. 2007) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998)). A negative value suit is a claim that, absent aggregation, is too small to be litigated. Essentially, the cost of litigation is likely to exceed the value of the claim itself. This is precisely the claim

before this Court.

In support of State Farm's Notice of Removal, it submitted the Declaration of Juan L. Guevara, Jr. Mr. Guevara is a Claim Consultant for State Farm. Doc. 1-5. Mr. Guevara created an Estimate Subset that aimed to identify estimates that would be representative of class members. *Id.* at 5. In 2012, he estimated that "there were more than 10,000 estimates uploaded to Xactware within this Estimate Subset. And for those estimates, the total amount of the depreciation reflected on the State Farm estimate data from Xactware that was attributable to embedded labor costs in the Xactware unit pricing used in the estimates was approximately $5,500,000.00" *Id.* at 5. Based on State Farm's evidence, the value of each individual claim can be estimated at approximately $550.

These claims fall squarely within the definition of a negative value suit. With an approximate value of $550, it is extremely unlikely that individual policyholders would be able to retain counsel or otherwise litigate their claims.

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mac v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). This policy is served here by allowing this case to proceed as a class.

There are additional factors here that make it even more unlikely that these cases could proceed on an individual basis. Most importantly, individuals that are most affected by the harsh results of labor depreciation are those without enough money to replace their structure. If these individuals are unable to pay out-of-pocket to rebuild their home or business, it is very unlikely that they would be able to afford counsel to bring a claim—let alone initiate litigation against one of the largest carriers in Missouri. *See Mayo v. USB Real Estate Sec., Inc.*, No. 08-00568-CV-W-DGK, 2011 U.S. Dist. LEXIS 31390, at *22 (W.D. Mo. Mar. 25, 2011) ("An individual claim that is potentially worth thousands of dollars is likely to be a 'negative value' case when brought against large financial institutions with almost unlimited resources to litigate, even when a attorneys' fees are available to a prevailing plaintiff.").

B. The District Court Properly Held That All Class Members Have Standing and Common Liability Issues Predominate

In addition to claiming that a class action is not the superior method of adjudication, State Farm argues that class certification was not proper because not all class members have standing and common issues do not predominate. These arguments must fail for two reasons. First, State Farm's standing argument is based on its purposefully complicated interpretation of its own policy and contrary to the basic principle of indemnity. Second, common issues predominate because all class members' claims rise and fall on the interpretation of the same policy form.

State Farm attempts to make the issue of standing very complicated, but it simply comes down to one of the most basic concepts in insurance—indemnity. State Farm depreciated labor and labor depreciation fails to indemnify policyholders. *See supra* I. A. All class members were injured by this practice even if State Farm ultimately paid them the depreciated amount because they lost the time value of money stemming from the initial act that resulted in the failure to indemnify.

State Farm erroneously argues that the Court should look to what the policyholder ultimately paid to repair her property when determining injury-in-fact. However, the amount that some policyholders ultimately paid to make repairs is irrelevant to his/her impermissibly depreciated ACV payments. *See* 47 *New Appleman on Insurance Law Library Edition*, §47.05[1] at 47-40 (2015) (citing *Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 529 (Ariz. Ct. App. 2006)) ("[A]ctual cash value is an estimate of the needed repairs and the determination of actual cash value is not based upon what the policyholder actually pays to repair or replace the damaged property. Therefore the amount an insured ultimately spends to make needed repairs, if any, is irrelevant.")

Common issues also predominate here. State Farm's individualized issue argument, like its standing argument, stems from its own erroneous interpretation of the policy at issue; thus it should likewise be rejected. This is a breach of

contract claim wherein the class members all challenge the uniform application of the same provision of same policy form. Unlike the breach of insurance contract claims where courts found common issues did not predominate, here, all class members claims rise and fall on the same interpretation of the same State Farm policy form. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). Therefore, the District Court properly held that common issues predominate.

C. Allowing This Case To Proceed As A Class Will Promote Marketplace Knowledge In An Ambiguous Industry

Prior to this case, State Farm was not doing anything that would allow policyholders to know that it was depreciating labor. This fact was not in its form policy, it was not included in any of its marketing efforts, and State Farm did not otherwise provide policyholders with any knowledge regarding this uniform practice.

On March 9, 2016 State Farm filed new policy language, explicitly allowing labor depreciation, with the Missouri Department of Insurance. This "Actual Cash Value Endorsement" states:

> The following is added to any provision which uses the term "actual cash value":
>
> Actual cash value means the value of the damaged part of the property at the time of loss, calculated as the estimated cost to repair or replace such property, less a deduction to account for pre-loss depreciation. For this

calculation, all components of this estimated cost including, but not limited to:

1. materials, including any tax;
2. labor, including any tax; and
3. overhead and profit;
are subject to depreciation.
The depreciation deduction may include such considerations as:
1. age;
2. condition;
3. reduction in useful life;
4. obsolescence; and
5. any pre-loss damage including wear, tear, or deterioration;
of the damaged part of the property.

All other policy provisions apply.

FE-3650 Actual Cash Value Endorsement. Although UP does not support labor depreciation, this act by State Farm demonstrates the value of the present case. It has already promoted marketplace knowledge. Now, a consumer may review this form at the time of purchase and choose to seek coverage elsewhere, or not, but it provides them with the necessary knowledge to appropriately make that decision.

Expanding and otherwise promoting marketplace knowledge on the issue of labor depreciation is extremely important. Many carriers, like State Farm, prior to the above-mentioned endorsement, use coverage forms that do not say whether labor is depreciated. This practice is also not discussed in insurer's advertising, promotional materials, or other marketplace communications. As a result, most policyholders will not know whether their policy depreciates labor until after the policy is purchased, a loss has occurred, and the insurer has already adjusted the

loss. This lack of knowledge, until it is too late, is extremely prejudicial to policyholders.

CONCLUSION

The newly widespread practice of depreciating labor does not make sense, runs contrary to principles of indemnity, can devastatingly impact individual and commercial policyholders, and shows no sign of slowing down. Without judicial intervention, this practice will continue to expand because it can be implemented with the click of a button and allows insurers to receive the benefit of RCV premiums when, in many cases, only providing ACV coverage. This case represents the opportunity to slow down or end this clearly partisan practice; thus, United Policyholders respectfully requests that this Court protect individual and commercial policyholders and affirm class certification.

Respectfully submitted this 8th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this motion contains 4,675 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

/s/ Paige C. Fishman
Paige C. Fishman