

No. 23-2641

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUSAN DOW, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Montana
No. 1:20-cv-00031-SPW
Hon. Susan P. Watters

**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT
OF REVERSAL ON A DISCRETE LEGAL ISSUE ADVANCED BY
PLAINTIFF-APPELLANT SUSAN DOW**

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CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Founded in 1991, UP is a tax-exempt § 501(c)(3) entity sustained by individual and corporate donations and foundation grants. UP supporters include but are not limited to Fannie Mae, which works to maintain a stable, affordable, and efficient mortgage market in the United States, the American Red Cross, which provides disaster relief throughout the United States, several county community foundations as well as Fortune 500 companies. UP does not sell insurance or accept money from insurance companies.

UP's mission is to serve as an effective voice and a source of information and guidance for commercial and personal lines policyholders. UP assists purchasers of insurance when pursuing claims for loss and is routinely called upon to help policyholders in the wake of national disasters including floods and windstorms in the Midwest, wildfires in the Western United States, and hurricanes in the Gulf States and across the Eastern Seaboard.

UP regularly submits *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. UP has filed *amicus curiae* briefs in over 500 cases nationwide and its

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

arguments have been adopted by numerous state and federal appellate courts. UP's *amicus curiae* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999). UP has frequently appeared in this Court as an *amicus curiae*.²

UP's assistance in this lawsuit was not solicited by counsel for the parties. Rather, UP seeks to fulfill the classic role of *amicus curiae* by drawing the court's attention to broader considerations of the case that may have escaped consideration. As commentators have stressed, an amicus is often in a superior position to focus the court's attention on the broad implications of various possible rulings. *See* R. Stern, E. Greggman & S. Shapiro, *SUPREME COURT PRACTICE* 570-71 (1986) (citing Bruce J. Ennis, *Symposium on Supreme Court Advocacy: Effective Amicus Briefs*, 33 *CATH. U.L. REV.* 603, 608 (Spring, 1984)).

Here, Safeco made an actual cash value ("ACV") coverage payment to the policyholder. The policyholder alleges that Safeco breached its ACV coverage terms when it made this payment. The district court held that the policyholder forfeited her right to receive a full ACV payment by seeking replacement cost ("RCV") benefits.

² *E.g.*, *Oregon Clinic, PC v. Fireman's Fund Ins. Co.*, 75 F.4th 1064 (9th Cir. 2023); *Mudpie, Inc. v. Traveler Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *HotChalk Inc. v. Scottsdale Ins. Co.*, 736 F. App'x 646 (9th Cir. 2018).

When property insurers are permitted to make claim payments below the ACV for a personal lines structural damage claim, they fail to meet their duty to indemnify insureds for the necessary cost of restoring insured assets to their pre-loss condition. Insurance payments below ACV create shortfalls in repair and rebuilding financing for property owners *and* negatively impacts the local, state, and federal government entities that have an interest in communities' successful economic recovery and the restoration of property tax bases.

The district court's holding allowing Safeco to pay "less than ACV" is directly contrary to black-letter insurance law and has been repeatedly rejected by federal and state appellate and trial courts around the country. Because this narrow ACV policy interpretation issue goes to the very heart of commercial and personal lines consumers' rights, it falls squarely within UP's advocacy interests. This Court's disposition of this issue has the potential to affect thousands of policyholders not only in Montana but throughout the Ninth Circuit and beyond.

INTRODUCTION

The legal issue of interest to UP is whether a policyholder's actual cost of repairs "caps" the amount of an ACV coverage payment, thereby eviscerating the policyholder's entitlement to full ACV. The following hypothetical illustrates the legal dispute.

Assume a policyholder's oak front door is damaged during a burglary. The insurer's adjuster estimates the RCV of the oak door is \$5,000, applies \$1,000 in depreciation, and makes a \$4,000 ACV payment. The legal question presented is whether, *after the ACV payment*, the amount of ACV coverage owed can decrease, and possibly require the policyholder to pay monies back to Safeco, if the policyholder:

- a. never replaces his oak door, and the final, actual cost of repairs is \$0?
- b. replaces the oak door with his own labor, and the final, actual cost of repairs is \$1,000?
- c. replaces the oak door with a new oak door by hiring an unlicensed contractor and paying cash, and the final, actual cost of repairs is only \$3,900?
- d. replaces the oak door with a cheaper pine door, and the final, actual cost of repairs is \$2,500?

The answer to each of the foregoing hypotheticals is "no."

In contrast to virtually all courts nationwide to have considered the issue, the district court held that an insurer's ACV payment is somehow capped by the policyholder's subsequent actual repair costs. Specifically, the district court held that the policyholder's receipt of RCV benefits at the second step of the claim adjustment process forecloses a policyholder's claim for underpayment of the insurer's prior, and allegedly deficient, ACV payment. *Dow v. Safeco Ins. Co. of Am.*, 2023 WL

3572444, at *2 (D. Mont. May 19, 2023). The district court cited no legal authorities whatsoever to support its unique opinion.

In truth, ACV is an estimate made by the insurer before repairs are undertaken, is valued solely as of the date of loss, and is always the minimum payment a policyholder is entitled to receive. The actual cost of repairs made *after* an ACV payment, if any, are irrelevant to both the ACV calculation itself and the policyholder's entitlement to *full* ACV, including potential receipt of general contractors overhead and profit ("GCOP").

As the Sixth Circuit succinctly explained nearly 20 years ago in a case directly on point and ignored by the district court in this case:

What [the insured] actually spends to repair its property does not affect its right to recover the actual cash value of its loss, as the actual cash value is not calculated based upon what the insured ultimately pays to repair its property. Indeed, even if [the insured] chooses not to repair its property at all, it would still be entitled to what it bargained for: the actual cash value of its loss, which includes contractor's overhead and profit where a contractor would reasonably be utilized to make repairs.

Parkway Assocs., LLC v. Harleysville Mut. Ins. Co., 129 F. App'x 955, 962–63 (6th Cir. 2005).³

The district court's opinion is an outlier. Montana law honors and enforces the principle that insurance policies should be interpreted to effectuate indemnity.

³ Unless otherwise noted, all emphasis is added, and internal citations and footnotes are omitted.

Consistent with those principles, the subsequent cost to repair or replace damaged structural property does *not* cap—let alone eviscerate—a policyholder’s entitlement to a *full* ACV payment. An insurer’s alleged withholding of, *inter alia*, GCOP from its policyholders’ ACV payments can result in policyholders not receiving their full ACV payment, and ACV coverage established the minimum amount of indemnity coverage owed for a structural loss. Failure to pay full ACV can also result in policyholders being unable to collect RCV benefits because by lowering the ACV payment, the policyholder cannot afford to make repairs to trigger RCV coverage. That can lead to a life-changing loss for policyholders—and a windfall for the insurer.

Here, however, Dow was ultimately able to afford certain repairs to her property and, as a result, received subsequent RCV benefits under the RCV provisions. *Dow v. Safeco Ins. Co. of Am.*, 2023 WL 3572444, at *2 (D. Mont. May 19, 2023). But this does not mean that Safeco does not have to pay full ACV if higher than the amount spent. As the Alabama Supreme Court held nearly 40 years ago, the conclusion that Dow somehow forfeited her right to obtain a full ACV payment by making repairs “makes a mockery of the overall coverage afforded by the policy” as “*the insured’s right to claim [ACV] is unaffected by his choice to rebuild his house* There is absolutely nothing in the policy language . . . that requires the insured to forfeit the ACV coverage” provided by the policy if he later elects to repair the

property and make a claim for optional RCV benefits. *State Farm Fire & Cas. Co. v. Ponder*, 469 So.2d 1262, 1266 (Ala. 1985).

Because the district court's decision in this case is neither supported by the policy language nor black-letter insurance law, UP believes that the district court's outlier analysis was error and should be reversed.

STATEMENT OF THE CASE

UP specifically highlights the following record facts germane to the narrow issue of whether the actual cost of repairs caps an ACV payment. Safeco issued a Landlord Protection Policy to Dow ("the Safeco Policy"). Dkt. 62-1, at 41. For repairable structures like a dwelling, the Safeco Policy calculates the amount of the ACV coverage available to the policyholder by using a methodology colloquially referred to within the insurance industry as the "replacement cost less depreciation" ("RCLD") methodology. Dkt. 62-1, at 68 (ACV coverage is provided for "repair cost less wear and tear, deterioration and obsolescence").

Like most property coverage forms, ACV coverage payments under the Safeco Policy are made *before* repairs are undertaken. Dkt. 62-1, at 65 ("we will pay the difference between *actual cash value* and replacement cost *only after the damaged or destroyed property has actually been repaired or replaced*"). On September 9, 2019, Safeco estimated the ACV of Dow's loss through a commercial claims estimating software program known as Xactimate®, manufactured by

Xactware Solutions, Inc. Dkt. 62-1, at 88 *et seq.* (Xactimate® estimate). Xactimate software only utilizes the RCLD methodology to calculate ACV. This can be seen from Safeco’s Xactimate estimate itself by simply subtracting the DEPREC. (“depreciation”) column from the RCV (“replacement cost value”) column to arrive at the ACV column for each line item. *Id.* at 89-98.

Safeco’s Xactimate estimate estimated the cost to repair Dow’s roof was \$28,623.98, and after depreciating the loss by \$1,882.89 and subtracting the deductible, Safeco made an ACV payment for Dow’s roof at \$26,741.09. Dkt. 62-1, at 89. Dow alleges that Safeco breached the ACV coverage provision by refusing to pay GCOP for any Montana policyholder’s roof repairs. Dkt. 101, at 8, ¶36. The Safeco Policy caps the amount of an RCV payment at “the amount actually and necessarily incurred to repair or replace the damaged dwelling,” but this provision is contained solely in the RCV coverage section of the policy. Dkt. 62-1, at 68 (appearing under provision providing Safeco “will pay the full cost of repair or replacement, without deduction for depreciation”).

ARGUMENT

I. THE DIFFERENCES BETWEEN THE TERMS ACTUAL CASH VALUE AND REPLACEMENT COST VALUE.

ACV coverage provides the “floor” for a property insurance payment. As stated by one insurance treatise:

Insurance policies afford either replacement cost coverage or actual

cash value coverage when an insured has incurred a property damage loss. Actual cash value is the value of the property in its depreciated condition. If the policy affords replacement cost coverage, the insured will, typically, be entitled to a payment representing the actual cash value of the loss and, if and when the insured replaces/repairs the property, *an additional payment* representing the cost of the replacement/repair to the extent that such cost exceeded the actual cash value payment.

Allan D. Windt, 3 INS. CLAIMS AND DISPUTES § 11:35 (6th ed. Mar. 2024 Update) (hereinafter “INS. CLAIMS AND DISPUTES”) (emphasis added).

The timing of an ACV and an RCV differ. Property policies like Safeco’s generally provide that the policyholder can only receive RCV benefits if the policyholder first incurs repair or replacement costs greater than ACV *and* submits invoices to that effect. Dkt. 62-1, at 65. ACV is therefore the minimum amount the insurer is obligated to pay its policyholders for a structural damage loss.⁴ As the recovery of RCV benefits requires an insured to take additional steps, insurers may try to allocate as much of the loss as possible into RCV coverage rather than ACV to make it less likely the insurer will have to pay any replacement costs.

ACV coverage is intended to return the policyholder’s building to the same

⁴ Examining similar loss settlement policy provisions, the Missouri Court of Appeals recently described the standard “two-step” claim adjustment process as follows: “the policy provides for a “two-step” claim adjustment process. In the first step, [the insurer] determines the ACV of a covered loss and issues an ACV payment. The second step of the process is for the policyholder to request *additional payment* for RCV coverage *only after repairs are completed.*” *Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286, 293 (Mo. Ct. App. 2022); *see also* COUCH §176:56.

condition it was in right before the loss, or “*status quo ante.*” *Mitchell v. State Farm Fire & Cas. Co.*, 954 F.3d 700, 706-07 (5th Cir. 2020); *Hicks v. State Farm Fire & Cas. Co.*, 751 F. App’x. 703, 706-07 (6th Cir. 2018) (similarly explaining ACV coverage). To indemnify “means simply to place the insured back in the position she enjoyed prior to the loss.” Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 WAKE FOREST L. REV. 295, 296 (1999); Steven Plitt, *et al.*, COUCH ON INSURANCE § 175:5 (3d ed. Nov. 2023 Update) (hereinafter “COUCH”) (indemnity operates “to place him or her in the same financial condition” as if there had been no casualty). Its purpose “is to make the insured whole but never to benefit him because a [loss] occurred.” *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982).

For example, if a policyholder owned a house with a ten-year-old roof destroyed by hail, ACV would be the price of providing the policyholder a ten-year-old roof that was not destroyed by hail. The RCLD methodology (set forth in the Safeco Policy) attempts to calculate ACV by providing all the labor necessary to complete repairs plus the cost of new building materials but the building materials are discounted for wear and tear (to reflect the cost of 10-year old roofing materials). Dkt. 62-1, at 68.

In contrast to ACV (which provides enough money to return damaged property to the same condition it was in immediately before a casualty), RCV

coverage “*results in the insured being better off than he or she was prior to the loss, since the insured ends up with a more valuable property.*” INS. CLAIMS AND DISPUTES § 11:35; *see also Arnold v. State Farm Fire & Cas. Co.*, 268 F. Supp. 3d 1297, 1309 n.17 (S.D. Ala. 2017) (“[T]he very point of an RCV policy is to place the insured in a better position than she previously occupied.”).

In other words, using the above example of a ten-year-old roof, replacement cost coverage will pay for the cost of a *new* roof, as opposed to the ten-year-old roof destroyed by hail. Because RCV coverage places policyholders in a *better* position than before the loss (they now have a new roof rather than a ten-year-old roof), it is not indemnity coverage. Policyholders must pay an additional premium for replacement cost coverage.

II. THE POLICY PHRASE “ACTUALLY OR NECESSARILY INCURRED” DOES NOT CAP THE AMOUNT OF AN ACV PAYMENT, NOR DOES A POLICYHOLDER FORFEIT HER RIGHT TO A FULL ACV PAYMENT BY SEEKING OR ACCEPTING RCV BENEFITS.

A. Under Black-Letter Law, The Actual Cost of Repairs Are Irrelevant To The Insured’s Entitlement To A Full ACV Payment.

The leading insurance law treatise, APPLEMAN ON INSURANCE LAW, sets forth the black-letter law on this issue, ignored by the district court in this case: “[ACV] is an estimate of the needed repairs and the determination of [ACV] is not based upon what the insured actually pays to repair or replace the damaged property. Therefore, *the amount an insured ultimately spends to make needed repairs, if any,*

is irrelevant.” Richard J. Cohen, et al., 5 NEW APPLEMAN ON INS. LAW LIBRARY ED. § 47.04[2][b][iii] (hereinafter “APPLEMAN”).

To understand APPLEMAN’S principle, it is important to appreciate that ACV coverage is paid *before* repairs are made, and therefore *must be based upon estimates*. “ACV is determined *prospectively at the time of the loss as an estimate of what it would cost to repair*—that is, what it would cost to return the structure to its state prior to the loss[,]” whereas RCV “is determined retrospectively, and is paid subsequent to the completion of repairs, in the amount of the actual cost of repairs.” *Johnson v. Hartford Cas. Ins. Co.*, 2017 WL 2224828, at *5 (N.D. Cal. May 22, 2017).

Because ACV payments are tied to *estimates* of repair or replacement costs and are always required to be issued to the policyholder *before* repairs, “*the baseline is ACV—the estimated cost of repair or replacement at the time of loss—which is not lowered by subsequent events.*” *Riggins v. Am. Family Mut. Ins. Co.*, 217 F. Supp. 3d 1017, 1018, 1022 (W.D. Mo. 2016). For this reason, court decision after court decision confirm “*that subsequent cost to repair or replace does not change an insured’s entitlement to full ACV.*” *Id.* at 1022 (denying insurer summary judgment

and holding policy did not cap ACV payment at subsequent, actual repair or replacement cost; collecting cases).⁵

⁵ See also *Arnold v. State Farm Fire & Cas. Co.*, 2020 WL 6882748, at *4-5 (S.D. Ala. Nov. 23, 2020) (denying insurer summary judgment in labor depreciation class action; recognizing that “only State Farm’s deficient ACV payment is at issue in this action, *not the sufficiency of her subsequent claim for replacement cost benefits*” and “under the policy, *State Farm was obligated to pay up front the appropriate ACV amount*”); *Lafollette v. Liberty Mut. Ins. Co.*, 2017 WL 1026424, at *9 (W.D. Mo. Mar. 16, 2017) (“*The amount the [the policyholders] actually spent to repair the damage is wholly irrelevant* to whether they were injured. This is because, as already discussed, *the ACV payment* belongs to the insured, does not have to be used for repairs, and *is not tied to repair costs.*”); *Cent. Mut. Ins. Co. v. White Stone Prop., Ltd.*, 2014 WL 1092121, at *6, 10 (W.D. Tex. Mar. 19, 2014) (explaining “why insured receives ACV before repairs” and, further, “if after repairs are complete, the amount actually spent to repair the roof exceeds the [ACV], then the insured is entitled to that amount. If the amount actually spent is less than the [ACV], then the insured gets to keep the full amount of the [ACV].”), *aff’d* by 596 F. App’x 333 (5th Cir. 2015); *Ghoman v. N.H. Ins. Co.*, 159 F. Supp. 2d 928, 935 (N.D. Tex. 2001) (holding “Plaintiff contracted for the [ACV] of his loss. His recovery is not tied to the repair or replacement of his property.... *What plaintiff actually spent to repair his property ... does not affect his right to recover [ACV]*”); *Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 529 (Ariz. Ct. App. 2006) (“The [ACV] is an *estimate* of the needed repairs; the determination of [ACV] is not based upon what the insured actually pays to repair or replace the damaged property. Therefore, *the amount an insured ultimately spends to make needed repairs, if any, is irrelevant.*”); *Salesin v. State Farm Fire & Cas. Co.*, 581 N.W.2d 781, 791 (Mich. Ct. App. 1998) (“[T]he original estimate of [ACV] of the damage under the State Farm insurance policy in force in Michigan is entirely theoretical and is therefore not limited by the lack of actual expenditures.”); *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 945-46 (Pa. Super. Ct. 1994) (reversing summary judgment to insurer because it “clearly agreed to pay to its insureds the [ACV] of a covered loss whether or not repairs or replacement actually occur” and, thus, the insurer could not automatically withhold labor in the form of overhead and profit from its advance payment of ACV); see also *Fassina v. Liberty Mut. Fire Ins. Co.*, 2024 WL 1018440, at *11 (D. Mass. Mar. 8, 2024) (rejecting insurer’s argument that an insured’s receipt of RCV benefits moots a breach of contract claim relating to a deficient ACV payment); *Glasner v. Am. Econ. Ins. Co.*, 2024 WL 1018449, at *7 (D. Mass. Mar. 8, 2024) (same).

Further, because a policyholder need not make any repairs, the actual cost of repairs can be \$0 or another nominal amount. This does not mean that ACV coverage is eviscerated—any such “interpretation *makes a mockery* of the overall coverage afforded by the policy.” *Ponder*, 469 So.2d at 1266.

As in the instant case, the policy in *Ponder* permitted the insured to either make a claim for RCV or ACV supplemented by additional replacement cost coverage. *Id.* at 1263. After the insured’s home suffered a fire loss, the insurer paid more than \$61,000 based on the cost estimate to repair the property. The insured chose to rebuild the home himself for \$45,000. The Alabama Supreme Court rejected the insurer’s argument that by choosing to rebuild, the insured was “locked into a replacement cost basis.” *Id.* at 1266. Like *Ponder*, Dow’s Safeco policy entitled her to recover the full ACV of her loss regardless of whether she repaired the damaged property and/or made a claim for “additional liability” under the RCV provisions of her Safeco policy. Dow Aplt. Br. at 12-13 (quoting policy language at ER-37-38).

More recently, a unanimous Missouri Court of Appeals rejected the position taken by the district court here—that somehow the receipt of an RCV payment forecloses a claim relating solely to an insurer’s improper withholdings from an ACV payment—in *Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286 (Mo. Ct. App. 2022). The *Franklin* court explained that once an insurer makes an ACV payment, the insurer is obligated to make a *full* ACV payment—regardless of the RCV claim

process. *Id.* at 292, n.7. And, just as in *Franklin*, nothing in the RCV claim process here eviscerates Dow’s right to a *full* ACV payment.

A property insurer cannot “reverse” the two-step loss settlement provision and choose to pay RCV in lieu of making a full ACV payment. *Id.* at 293. An ACV payment is the initial minimum payment owed under the policies because RCV payments are an “additional liability”—*not a substitute payment*. *Id.*; *Ponder*, 469 So.2d at 1266 (stating RCV “is an additional coverage, or, perhaps, more accurately, an additional optional coverage offered the insured”).

The district court’s ruling that Dow’s ACV payment could be lowered due to final repair costs, and a request for and receipt of RCV benefits, thus conflicts with the legion of cases discussed above.⁶ The district court’s decision not only ignores these uniform authorities but fails to support its aberrant ruling with any counter-authorities. The district court’s outlier analysis was error and, therefore, should be reversed.

CONCLUSION

For the foregoing reasons, UP requests that the Court clarify in its ruling that the actual costs of repairs do not cap the amount of an ACV payment.

⁶ *See, e.g., Franklin*, 652 S.W.3d at 304 (holding policyholder “was entitled to a *full* ACV payment (one in which depreciation for estimated labor costs was not withheld), *regardless of repair costs*”); *Arnold*, 2020 WL 6882748, at *4-5 (agreeing that, “under the policy, State Farm was *obligated to pay up front the appropriate ACV amount*” irrespective of “her subsequent claim for replacement cost benefits”).

DATED this 4th day of April, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume of limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,926 words as counted by Microsoft Word for Microsoft 365 MSO, Version 2401, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 36(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman.

DATED this 4th of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2024, I electronically file the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Erik D. Peterson
Erik D. Peterson, KY Bar #93003