



Building Industry Association of Washington
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July 29, 2021

Mr. David Forte
Office of Insurance Commissioner
302 Sid Snyder Ave. SW
Olympia, WA 98504

RE: Comment on CR 101: Rule Regarding Depreciation of Labor on Property Claims

VIA ELECTRONIC MAIL AT rulescoordinator@oic.wa.gov

Dear Mr. Forte,

On behalf of the Building Industry Association of Washington ("BIAW") representing nearly 8,000 businesses supporting in the homebuilding industry, we write to comment in support of the proposed rule that prohibits insurance contracts that allow for the depreciation of labor on property damage claims. The rule you are proposing is good policy, consistent with caselaw in our state and others, and is fair to all parties. We encourage you to adopt it at the earliest opportunity.

First, the proposed rule is good policy. At the heart of all insurance contracts is the concept of indemnity- that the insured should be made whole as is reasonably possible. While depreciation of an asset such as a residential or commercial structure is reasonable, easily ascertainable and part of the standard interpretation of the "actual cash value" in such contracts, recent efforts by the insurance industry nationwide to further reduce payments to insureds by depreciating of the labor costs completely undermines the core principle of indemnity. Put plainly, the insured is not made whole.

Second, courts in numerous states, including here in Washington, have not allowed depreciation of labor costs. The federal Eastern District of Kentucky for example, outlined the unfairness of such a policy, noting that "[t]he very idea of depreciating the value of labor defies good common society." *Bailey v. State Farm Fire & Cas. Co.*, No. CIV.A. 14-53-HRW, 2015 WL 1401640, at *8 (E.D. Ky. Mar. 25, 2015). The Court applied general principles of indemnity – "make the insured whole; give the insured what she had before the loss – nothing more; nothing less."

Similar conclusions disfavoring depreciation of labor have been reached by courts in Alabama, California, Montana, Pennsylvania, Tennessee, Vermont and Washington state. See e.g. *Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp.3d 746 (W.D. Penn. 2015)(Deduction for labor depreciation "would thwart the insured's expectation to be made whole.") *Arnold v. State Farm*, 268 F. Supp.3d 1297 (S.D. Ala. 2017) *Bailey v. State Farm Fire & Cas. Co.*, No. CIV.A. 14-53-HRW, 2015 WL 1401640, at *8 (E.D. Ky. Mar. 25,

2015). *McIntosh v. Hartford Fire Ins. Co.*, 78 P.2d 82, 84-85 (Mont. 1938) *Lammert v. Auto-Owners (Mutual) Insurance Co.*, No. M2017-2546-SC-R23-CV (Tenn. Apr. 15, 2019) *Bulletin 184*, 2015 WL 1975918 (VT INS BUL). (Insurance Department took position that depreciation of labor costs was an unfair claim settlement practice.)

In our state, the court in the Western District of Washington held that an insurer improperly depreciated labor costs because the policy defined actual cash value as “the amount it costs to repair or replace property with like kind and quality less depreciation for physical deterioration and obsolescence.” *Lains v. American Family Mut. Ins. Co.*, No. C14-1982-JCC, 2016 WL 4533075, at *2 (W.D. Wash. Feb. 2, 2016). To allow policies that depreciate labor would run counter to this established caselaw and fly in the face of the sound legal principles these cases expound.

Finally, trying to implement provisions of an insurance contract that limit recovery by depreciating labor costs results in practical difficulties. There will be significant delays in payments to contractors (since labor cannot likely be depreciated until conclusion of all work) and significant out-of-pocket costs to insureds that they may not be in a position to bear.

We once again offer our support to the proposed rule and respectfully request that you formally accept this comment, and proceed with adoption of the rule at your earliest convenience.

Sincerely,

A handwritten signature in blue ink that reads "Jackson Wilder Maynard, Jr." The signature is fluid and cursive, with the first name being the most prominent.

Jackson Wilder Maynard, Jr.
General Counsel
Building Industry Association of Washington