

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

NICHOLAS A. JONDRO, NEAL)	
KAHRE, and POSTAL PROPERTIES)	Case No.: 2022-LA-0000228
WESTPORT INDUSTRIAL, LLC,)	
individually and on behalf of all others)	JURY TRIAL DEMANDED
similarly situated,)	
)	
Plaintiff,)	
)	
v.)	
)	
COUNTRY MUTUAL INSURANCE)	
COMPANY,)	
)	
Defendant.)	

FIRST AMENDED COMPLAINT

COME NOW Plaintiffs Nicholas A. Jondro, Neal Kahre, and Postal Properties – Westport Industrial, LLC, individually and on behalf of all others similarly situated (collectively Plaintiffs), and for their Complaint against Defendant Country Mutual Insurance Company (“Country” or “Defendant”), state and allege:

OVERVIEW OF CLAIMS

1. This lawsuit concerns actual cash value (“ACV”) coverage for buildings and structures. All the claims set forth in this pleading only concern property insurance coverage for structural damage (*e.g.*, homes, buildings and other structures) and *not* personal property (*e.g.*, clothes and furniture).
2. Pursuant to Defendant’s property insurance policy forms at issue, ACV payments are to be made prospectively, that is, prior to the policyholder undertaking repairs to damaged

buildings and structures. On the other hand, RCV payments are made retrospectively, after repairs have been completed.

3. Defendant calculates ACV under the “replacement cost less depreciation” (“RCLD”) methodology. When calculating ACV for buildings and structures under the RCLD methodology, Defendant estimates the full amount of labor and new materials required to repair or replace the property, then subtracts depreciation for physical deterioration.

4. Courts in several jurisdictions hold that the RCLD methodology is reasonably intended to result in an ACV payment to the policyholder in an amount that allows the policyholder to return the damaged property to its *status quo ante*, thereby precluding the withholding of labor from ACV payments. *See generally Mitchell v. State Farm Fire and Cas. Co.*, 954 F.3d 700, 706-07 (5th Cir. 2020). An exception occurs—not at issue in this lawsuit—when a property insurer expressly states in its policy forms that it can withhold labor from an ACV payment. *E.g., Kurach v. Truck Ins. Exchange*, 235 A.2d 1106 (Pa. 2020).

5. This lawsuit concerns the withholding of certain labor costs that Defendant itself has determined will be incurred if the policyholders undertake repairs. However, this lawsuit does *not* concern labor that is expressly permitted to be withheld under the express terms of Defendant’s insurance policies.

6. Property insurers attach different labels to justify the withholding of certain labor from ACV payments, such as “paid when incurred” or “labor depreciation.” *E.g., Mills v. Foremost Ins. Co.*, 511 F.3d 1300 (11th Cir. 2008) (property insurer cannot withhold labor from ACV payments because it has not been incurred); *Mitchell*, 954 F.3d at 706-07 (property insurer cannot withhold ordinary labor from ACV payments under the auspice of “depreciation”).

7. Regardless of the artificial label affixed by the property insurer to the practice of withholding labor from an ACV payment, the result is the same—namely, a deficient ACV payment. This lawsuit seeks to remedy the improper withholdings of labor from Plaintiffs’ and class members’ ACV payments.

PARTIES AND VENUE

8. At all relevant times, Plaintiffs Nicholas A. Jondro Neal Kahre (“Jondro and Kahre”) operated a business in a building located at 170 Washington Street, Carlyle, Illinois (the “Jondro and Kahre Property”).

9. At all relevant times, Plaintiff Postal Properties – Westport Industrial, LLC (“Postal”), a Missouri limited liability company, operated a business at a building located at 1449 Strassner Dr. in St. Louis, Missouri (the “Postal Property”).

10. Defendant County Mutual insurance Company (“Country”) is organized under the laws of the State of Illinois with its principal place of business in Illinois.

11. Country has offices within, and is doing business within, Peoria County.

12. The putative class members for this class action, as more specifically defined below, include policyholders spread throughout the counties in the State of Illinois, including Peoria County.

13. Defendant sells property insurance for buildings and structures in several states, specifically including the states of Arizona, Illinois, Ohio, Tennessee, and Wisconsin.

14. Defendant engaged in the challenged insurance coverage practice described herein in a uniform manner and pursuant to a uniform policy.

FACTS

A. The Property Insurance Policies and Casualty Losses

15. At all times relevant hereto, Plaintiffs Jondro and Kahre were insured pursuant to an insurance contract whereby Country agreed to insure, *inter alia*, the Jondro and Kahre Property against property damage, bearing Policy No. AB 9257642 03 (the “Jondro and Kahre Policy”).

16. The Jondro and Kahre Policy provided insurance coverage for direct physical loss or damage to the Jondro and Kahre Property, except as specifically excluded or limited by the Jondro and Kahre Policy.

17. Pursuant to the Jondro and Kahre Policy, Plaintiffs Jondro and Kahre paid Country an annual premium in exchange for insurance coverage. The required premiums were paid at all times relevant to this Complaint.

18. On or about March 2, 2020, the Jondro and Kahre Property suffered accidental direct physical loss and damage due to a storm (the “Jondro and Kahre Loss”).

19. The Jondro and Kahre Policy was in effect at the time of the Jondro and Kahre Loss, and the Jondro and Kahre Loss is compensable under the terms of the Jondro and Kahre Policy. As it relates to the Jondro and Kahre Loss, there is no applicable exclusion.

20. Plaintiffs Jondro and Kahre notified Country of the Jondro and Kahre Loss and made a claim against the Jondro and Kahre Policy.

21. After its inspection, Country determined that the Jondro and Kahre Loss was covered by the terms of the Jondro and Kahre Policy.

22. Country calculated its ACV payment obligation to Plaintiffs Jondro and Kahre pursuant to the replacement cost less depreciation (“RCLD”) methodology.

23. Plaintiffs Jondro and Kahre received an ACV payment from Country.

24. The Jondro and Kahre Policy does not define ACV so as to permit the labor withholdings complained of below.

25. At all times relevant hereto, Plaintiff Postal was insured pursuant to an insurance contract whereby Country agreed to insure, *inter alia*, the Postal Property against property damage, bearing Policy No. AM9107271 (the “Postal Policy”).

26. The Postal Policy provided insurance coverage for direct physical loss or damage to the Postal Property, except as specifically excluded or limited by the Postal Policy.

27. Pursuant to the Postal Policy, Plaintiff Postal paid Country an annual premium in exchange for insurance coverage. The required premiums were paid at all times relevant to this Complaint.

28. On or about June 28, 2015, the Postal Property suffered accidental direct physical loss and damage due to a storm (the “Postal Loss”).

29. The Postal Policy was in effect at the time of the Postal Loss, and the Postal Loss is compensable under the terms of the Postal Policy. As it relates to the Postal Loss, there is no applicable exclusion.

30. Plaintiff Postal notified Country of the Postal Loss and made a claim against the Postal Policy.

31. After its inspection, Country determined that the Postal Loss was covered by the terms of the Postal Policy.

32. Country calculated its ACV payment obligation to Plaintiff Postal pursuant to the replacement cost less depreciation RCLD methodology.

33. Plaintiff Postal received an ACV payment from Country.

34. The Postal Policy does not define ACV so as to permit the labor withholdings complained of below.

B. Country's Calculation of Plaintiffs' ACV Payments

35. In adjusting Plaintiffs' claims, Defendant affirmatively and unilaterally chose to use the RCLD methodology to calculate the loss and make its ACV payment.

36. Defendant did not calculate any portion of Plaintiffs' losses by reference to or analysis of any alleged increase or decrease in the market value of its structures(s), or the market value of any portion of their property. Defendant did not conduct an appraisal of Plaintiffs' structure.

37. Defendant has waived, and is estopped from asserting, any right to contend that ACV should be calculated under any methodology other than the RCLD methodology.

38. Country's adjuster determined that the Jondro and Kahre Property sustained a loss with a replacement cost value ("RCV") of \$16,357.32, as set forth in a December 21, 2020 written estimate provided to Jondro and Kahre by Country.

39. Country's adjuster determined that the Postal Property sustained a loss with a replacement cost value ("RCV") of \$44,242.87, as set forth in a July 13, 2016 written estimate provided to Postal by Country.

40. In calculating its ACV payment obligations to Plaintiffs, Country subtracted from the adjuster's RCV estimate amounts for depreciation. Included in the depreciation were amounts for non-material items like labor.

41. In the past two decades, there has been an ongoing dispute between members of the insurance industry, on the one hand, and state insurance regulators and policyholders, on the other hand, over the practice of depreciating not only finished goods, construction materials and physical property due to wear, tear, condition and obsolescence, but also the new practice of depreciating non-tangible items, such as labor necessary to return damaged property to its pre-loss condition.

42. In this Complaint, whenever reference is made to depreciation of labor, this means that Country is improperly depreciating intangible non-materials, specifically, labor and the equipment costs of laborers, general contractors overhead and profit, as well as “removal” costs under the software program described below.

43. Country uses computer software, including the “Xactimate®” estimating program, to calculate its ACV payments. Xactimate software allows an insurer to depreciate materials only through clicking on check boxes with a mouse. Xactimate’s default setting is to depreciate only materials when calculating ACV payment amounts.

44. Country materially breached its duty to indemnify Plaintiffs and putative class members by depreciating labor costs in the ACV payments provided to policyholders, thereby paying Plaintiffs and putative class members less than what they were entitled to receive under the terms of their insurance contracts.

CLASS ACTION ALLEGATIONS

45. Plaintiffs bring this lawsuit as a class action on behalf of themselves and on behalf of all others similarly situated. This action satisfies the requirements of numerosity, commonality and adequacy of representation. Only to the extent it is a requirement under applicable law, the proposed class herein is ascertainable.

46. The proposed labor withholding class that Plaintiffs seek to represent is defined as follows:

All Country policyholders who made:

(1) a structural damage claim for property located in the States of Arizona, Illinois, Missouri, Ohio, Tennessee or Wisconsin; and

(2) for which Defendant accepted coverage and then chose to calculate ACV through the RCLD methodology; and

(3) which resulted in an actual cash value payment during the class period from which labor was withheld from the policyholder.

47. Included in the putative class definition are policyholders who would have received an ACV payment but for the withholding of labor causing the loss to drop below the applicable deductible.

48. Certain amounts initially withheld as labor may be later repaid to policyholders upon further adjustment of the claim. However, policyholders who have been subsequently repaid for initially withheld labor still have incurred damages, at the least, in the form of the lost “time value” of money during the period of withholding, *i.e.*, interest on the amounts improperly withheld, for the time period of withholding.

49. Excluded from the putative class definition are: (1) all claims arising under policy forms expressly permitting the withholding of labor from ACV payments for the claim at issue within the text of the policy form; (2) any claims in which the initial ACV payment exhausted the applicable limits of insurance; (3) Plaintiffs’ counsel; (4) Defendant and its affiliates; and (5) the Court to which this case is assigned and its staff.

50. The members of the proposed class are so numerous that joinder of all members is impracticable. Plaintiffs reasonably believe that thousands of policyholders geographically dispersed across Arizona, Illinois, Missouri, Ohio, Tennessee, or Wisconsin have been damaged by Country’s actions.

51. The names and addresses of the members of the putative class are identifiable and ascertainable through the electronic records maintained by Country.

52. Common questions of law and fact exist as to all putative class members and predominate over any questions affecting only individual class members. The questions of law and fact common to the putative class include, but are not limited to:

- A. Whether Country's insurance policies allow Country to depreciate labor in calculating ACV payments for covered losses;
- B. Whether Country's standard form insurance policies are ambiguous concerning the depreciation of labor costs in calculating ACV payments, and if so, how Country's insurance policies should be interpreted;
- C. Whether Country's depreciation of labor costs in making ACV payments for covered losses constitutes a breach of the insurance contracts issued by Country to the Plaintiffs and other putative class members;
- D. Whether Plaintiffs and other putative class members have been damaged by Country's breaches, as alleged herein, and if so:
 - 1. What is the nature and extent of those damages; and
 - 2. What relief should be awarded to the Plaintiffs and other putative class members; and
- E. What is the applicable class period.

53. Plaintiffs' claims are typical of the claims of all putative class members, as they are all similarly affected by Country's custom and practice concerning labor depreciation. Further, Plaintiffs' claim is typical of the claims of all putative class members because their claims arise from the same underlying facts and are based on the same factual and legal theories. Plaintiffs are no different in any material respect from any other member of the putative class.

54. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the putative class. Plaintiffs' interests do not conflict with the interests of the putative class they seek to represent. Plaintiffs have retained counsel who are competent and experienced in class action and insurance litigation.

55. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Joining all putative class members in one action is impracticable and prosecuting individual actions is not feasible. The size of the individual claims is likely not large enough to justify filing a separate action for each claim. For many, if not most putative class members, a class action is the only procedural mechanism that will afford them an opportunity for legal redress and justice. Even if putative class members had the resources to pursue individual litigation, that method would be unduly burdensome to the courts in which such cases would proceed. Individual litigation exacerbates the delay and increases the expense for all parties, as well as the court system. Individual litigation could result in inconsistent adjudications of common issues of law and fact.

56. In contrast, a class action will minimize case management difficulties and provide multiple benefits to the litigating parties, including efficiency, economy of scale, unitary adjudication with consistent results and equal protection of the rights of Plaintiffs and putative class members. These benefits would result from the comprehensive and efficient supervision of the litigation by a single court.

COUNT I
BREACH OF CONTRACT

57. The Plaintiffs reallege the foregoing paragraphs as if set forth in full here.

58. Defendant entered into policies of insurance with Plaintiffs and members of the proposed class. These insurance policies govern the relationship between Defendant, Plaintiffs, and members of the proposed class, as well as the manner in which claims for covered losses are handled.

59. The policies of insurance between Defendant and Plaintiffs and the other members of the proposed class are binding contracts under applicable law and are supported by valid consideration in the form of premium payments in exchange for insurance coverage.

60. Defendant drafted the insurance policies at issue, which are essentially identical in all respects material to this litigation.

61. To receive ACV claim payments, Plaintiffs and putative class members complied with all material provisions and performed all its respective duties with regard to the insurance policy.

62. At all times relevant hereto, Defendant's custom and practice has been, and is, to make such payments based upon Defendant's calculation of the ACV through the RCLD methodology.

63. Defendant breached its contractual duties to pay Plaintiffs and members of the proposed class the labor necessary to return damaged property to its *status quo ante* by withholding labor from their respective ACV payments under the RCLD methodology.

64. Defendant's actions in breaching its contractual obligations to Plaintiffs and members of the proposed class benefitted and continue to benefit Defendant. Likewise, Defendant's actions damaged and continue to damage Plaintiffs and members of the proposed class.

65. Defendant's actions in breaching its contractual obligations, as described herein, are the direct and proximate cause of damages to Plaintiffs and members of the proposed class.

66. Given the foregoing, Plaintiffs and members of the proposed class are entitled to recover damages sufficient to indemnify them for the unlawfully withheld labor from their ACV payments.

67. Plaintiffs and members of the proposed class seek any and all relief as may be permitted under applicable law to remedy the ongoing breaches of contract.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Jondro, Kahre, and Postal on behalf of themselves and others similarly situated, respectfully requests that this Court:

1. Certify the class identified herein or as amended during litigation;
2. Award damages (including prejudgment interest) to named representatives and certified class members under the terms of their contracts;
3. Award Plaintiffs and the putative class costs, expenses, and disbursements incurred herein; and
4. Grant such other and further relief as the Court deems necessary and proper.

February 26, 2024.

NICHOLAS A. JONDRO, NEAL CAHRE, and
POSTAL PROP-WESTPORT IND. LLC,
individually and on behalf of all others similarly
situated,

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