IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

ANNIE ARNOLD, individually, And on behalf of all others similarly situated,	*	
Plaintiffs,	*	
vs.	*	Case No.: 2:17-CV-148-TFM-C
STATE FARM FIRE AND CASUALTY COMPANY,	*	Hon. Terry F. Moorer
Defendant.	*	

STATE FARM FIRE AND CASUALTY COMPANY'S SEPARATE SUBMISSION IN SUPPORT OF PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT

Defendant State Farm Fire and Casualty Company ("State Farm"), by and through its undersigned counsel, respectfully provides this separate submission in support of preliminary approval of the Proposed Settlement of this case, as described in the Stipulation and Settlement Agreement entered into by State Farm and, as representatives of the asserted class, Plaintiff Annie Arnold ("Plaintiff") and additional class representatives Bobby Abney, Tina Daniel, and Kenneth Scruggs (collectively, the "Additional Class Representatives"). Doc. 196-1.

INTRODUCTION

This case is one of many class actions filed against insurers across the country challenging the common practice of calculating "actual cash value" (or "ACV") claim payments for structural damage claims by estimating the cost to repair or replace the damaged property and applying depreciation to that full cost—including any embedded labor and other non-material costs (hereinafter, "labor depreciation"). Plaintiff's complaint asserts a single claim for breach of

contract on behalf of policyholders who made structural damage claims for property located in Alabama under policies written by State Farm. Doc. 1-2.

State Farm has vigorously defended this litigation, and absent this class settlement, would continue to do so through trial. Though the Court denied State Farm's motion to dismiss and granted class certification over State Farm's objection, neither ruling has been tested via the appellate review process. State Farm believes these interlocutory rulings potentially would be reversed on appeal, even if Plaintiff were to prevail at trial (which, for the reasons discussed below, would be unlikely). Plaintiff and Class Counsel have recognized and acknowledged that, despite the Court's certification of a class, prosecuting this action through further fact and expert discovery, dispositive motions, trial, and appeals will involve considerable uncertainty, time, and expense. *See* Doc. 196-6, at Page ID#11742-47.

At a trial on the merits, State Farm believes Plaintiff would be unable to carry the burden of proof to establish a breach of contract on behalf of herself and other asserted class members. As a threshold matter, Plaintiff must convince a jury that State Farm's policy does not permit labor depreciation, an issue on which the jury may well find in State Farm's favor, ending the case immediately. Indeed, the majority of state supreme courts to consider the labor depreciation issue nationwide have rejected Plaintiff's theory. Further, State Farm believes Plaintiff would be unable to carry the burden of proof to show that, for each potential class member, the ACV payment State Farm made was insufficient or that State Farm otherwise failed to fully meet its contractual obligations.

Despite State Farm's confidence that it would have achieved a favorable outcome at trial and in any subsequent appeal, it believes that a settlement as described in the Stipulation and Settlement Agreement is in the best interests of its policyholders. First, this matter has been

pending for nearly five years, and would likely span several more years inclusive of trial and appeals. Second, as previously noted, State Farm believes that although it likely would prevail in any post-trial appeal before the Eleventh Circuit, both on the merits and on the class certification issue, a trial of this matter would make clear the unmanageable nature of a class-wide trial of Plaintiff's claims. And reaching such an outcome will likely present significant costs and risks for each side.

For these reasons and as explained further below, State Farm has determined that the Proposed Settlement is in the best interests of its current and former Alabama policyholders. State Farm seeks to resolve this case so that it can avoid further litigation expenses and uncertainty and continue providing excellent service to its policyholders. As set forth below, State Farm believes that the Proposed Settlement is fair, reasonable, and adequate, especially in view of the strength of State Farm's defenses to the asserted claims and the difficulties Plaintiff would face in establishing liability and proving damages. Accordingly, State Farm supports the Proposed Settlement and requests that it be preliminarily approved.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 23(e)(2), the Court should approve the class action settlement as fair, reasonable, and adequate before it becomes effective. In making this assessment, the Court must consider the factors enumerated in Rule 23(e)(2), as well as factors established by the Eleventh Circuit in *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984) in deciding whether to approve a proposed settlement agreement. *Williams v. New Penn Fin., LLC,* No. 3:17-CV-570-J-25JRK, 2019 WL 2526717, at *3 (M.D. Fla. May 8, 2019) (quoting *Bennett,* 737 F.2d at 986); *see also* Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment. The Eleventh Circuit has identified the following factors as relevant to settlement approval:

1) the likelihood of success at trial;

2) the range of possible recovery;
3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable;
4) the complexity, expense and duration of litigation;
5) the substance and amount of opposition to the settlement; and
6) the stage of proceedings at which the settlement was achieved.

In re Equifax Inc. Customer Data Sec. Breach Litig., 999 F.3d 1247, 1273 (11th Cir.) (quoting *Bennett*, 737 F.2d at 986), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021). "The likelihood of success at trial is by far the most important factor when evaluating a settlement." *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1032–33 (N.D. Ala. 2006), *aff'd sub nom. United States v. Alabama*, 271 F. App'x 896 (11th Cir. 2008). "The likelihood of success on the merits is weighed against the amount and form of relief contained in the settlement." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1319 (S.D. Fla. 2005). This includes assessing the litigation risks faced by class members, including the strength of the defendant's defenses and the potential for an unfavorable verdict. *See Broughton v. Payroll Made Easy, Inc.*, No. 2:20-CV-41-NPM, 2021 WL 3169135, at *2 (M.D. Fla. July 27, 2021) (approving settlement where the plaintiff faced "legal challenges not only to the merits of the action but also to certification of the class as well as the possibility of an appeal"); *In re Checking Acct. Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2020 WL 4586398, at *11 (S.D. Fla. Aug. 10, 2020) (finding a settlement to be "a fair compromise" where there were "myriad risks attending [the plaintiff's] claims, as well as the certainty of substantial delay and expense from ongoing litigation").

The following discussion briefly summarizes State Farm's defenses and demonstrates why the Proposed Settlement is fair, reasonable, and adequate in light of those defenses.

I. The Proposed Settlement is Fair, Reasonable, and Adequate in View of the Strength of State Farm's Liability Defenses to the Breach of Contract Claim.

Given the Court's ruling on State Farm's motion to dismiss finding that State Farm's prior policy language was ambiguous as to whether it permitted labor depreciation, the ultimate

resolution of Plaintiff's liability theory remains an open question in this case. Specifically, whether labor depreciation was permissible under State Farm's policy will need to be decided by the jury: "when the terms of a contract are ambiguous in any respect, the determination of the true meaning of the contract is a question of fact for the jury." *Dill v. Blakeney*, 568 So.2d 774, 777-78 (Ala. 1990); *accord Certain Underwriters at Lloyd's, London v. S. Nat'l Gas Co.*, 142 So.3d 436, 454 (Ala. 2013). State Farm submits that a jury could find in its favor on that issue. Indeed, another federal court in Alabama has concluded that a policy effectively defining "ACV" as replacement cost less depreciation—the same formula that Plaintiff acknowledges State Farm appropriately used to calculate ACV under their policies—"logically" permits "depreciation of the full estimated cost of repair, which obviously includes materials and labor." *Ware v. Metropolitan Property and Casualty Insurance Co.*, 220 F. Supp. 3d 1288, 1291 (M.D. Ala. 2016) (Land, J.) (emphasis added). Further, the majority of state supreme courts (and two federal appellate courts) have reached a similar conclusion.[1]

In addition, to prevail on the breach of contract claim, Plaintiff, the Additional Class Representatives, and each class member must prove that State Farm's ACV payments did not sufficiently compensate them for the actual cash value of their damaged property. State Farm contends that resolution of this question turns on whether the amount paid was or was not less than the amount the policy promised—namely, the ACV of the damaged property. But because State Farm calculates ACV payments using *estimates* of replacement costs, State Farm's estimate of ACV may not reflect the actual ACV of any damaged property. Indeed, depending upon the inputs

[1] *See, e.g.*, *Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454, 457 (N.C. 2020) (holding that it "makes little sense" to "differentiat[e] between labor and materials when calculating" ACV under the replacement cost less depreciation method because the "value of a house is determined by considering it as a fully assembled whole, not as the simple sum of its material components").

to the estimated ACV and for a myriad of reasons, the amount paid by State Farm to a policyholder may be much higher than the actual ACV, regardless of the application of depreciation for labor and other non-material costs. *See generally* Doc. 119, at 10-13. Only by examining the actual costs to repair the damaged property can the true ACV be derived and compared to the ACV payment each policyholder received. Further, because State Farm's policies expressly cap the amount owed for ACV at the policyholder's cost to complete repairs, State Farm submits that members of the class who received initial claim payments that exceeded their actual cost of repairs will be unable to establish breach of contract as a matter of law. Simply put, those class members were not underpaid for ACV and, thus, the policy was not breached.

Plaintiff's claim is illustrative. State Farm believes that the evidence at trial would establish that its initial ACV payment to Plaintiff for several repairs substantially exceeded her actual cost for these repairs, meaning that State Farm overpaid her for ACV by several thousand dollars. *See, e.g.*, Doc. 119, at 12-13. For example, while Plaintiff represented to State Farm that she would incur replacement costs identified by a particular contractor of $49,704, *see* Arnold Dep., PageID.8382-8383, at 139:22-141:22, 164:17-165:16, she conceded in her deposition that she did not recall hiring the contractor or paying them to do the repairs, *see* Arnold Dep., PageID.8377, 8382-8383, at 63:14-64:4, 65:2-7, 140:15-141:14, 162:22-163:13. As a result, Plaintiff's documented repair costs were substantially less than the amount of the ACV payment she received from State Farm. *See* Pierce Decl., PageID.8391-8392, ¶ 10, Bent Tree Electric Co. Estimate, PageID.8482-8483; Premium Roofing & Construction Proposal, PageID.8484, Payment Summary, PageID.8450; Claim File History, PageID.8490; *see also* Plaintiff's RFA Resp., PageID.8493, at 5-6. In sum, Plaintiff may well be unable to prove at trial that she was

underpaid, regardless of State Farm's application of depreciation for labor and other non-material costs in calculating her ACV payment.

How overstatements such as this impact the overall sufficiency of State Farm's ACV payments—regardless of labor depreciation—is an issue that cannot be decided in a vacuum based solely on an initial estimate, but rather will require individualized determinations by the trier of fact. Indeed, this Court denied State Farm's motion for summary judgment as to Plaintiff's individual claim after finding that there were multiple triable issues of fact for her claim that would need to be resolved by a jury. *See* Doc. 179, at 9-12.

A similar analysis could well be required for a substantial number of potential class members' claims. In fact, as State Farm demonstrated in opposing class certification, individualized review and analysis of claim files as well as records in the sole possession of policyholders may be required to determine which policyholders (a) received an ACV payment with labor depreciation applied, (b) received a payment of the applicable policy limit, (c) recovered any RCBs, or (d) completed repairs to all or part of the damaged property using their initial ACV payment. *See* Albright Rpt., PageID.7739-7749 (Examples 1-5).[2]

Although this Court granted Plaintiff's motion for class certification, that ruling—like the Court's ruling denying State Farm's motion to dismiss—was interlocutory in nature and did not resolve on the merits any elements of Plaintiff's claims or State Farm's defenses, and neither ruling

[2] For example, State Farm's forensic accounting expert found that some policyholders whose claims she reviewed were paid full replacement costs up-front, without depreciation, and more than one-third of the policyholders whose claims she reviewed recovered replacement cost benefits for at least some repairs. *See id*., PageID.7722. Still others were able to complete repairs to some or even all of the damaged property using only their ACV payment. *Id*., PageID.7741-7743. And when actual repair costs were available, State Farm's expert found that they frequently differed from estimated costs. *Id*., PageID.7744-7745. State Farm's expert further found that State Farm often does not have records of policyholders' actual repair costs unless they seek replacement costs benefits. *Id*., PageID.7743.

has been tested via the appellate review process. While State Farm expects that a jury might well rule in its favor in this matter, the Court may also determine at, before, or after trial that the case should not be maintained as a class action under Rule 23 because of litigation manageability issues. Indeed, another district court in Alabama recently denied class certification in a similar case because of the individualized proof that would be required at trial. *See Brasher v. Allstate Indem. Co*., No. 4:18-CV-00576-ACA, 2020 WL 4673259, at *13 (N.D. Ala. Aug. 12, 2020) (Axon, J.) (holding that even "assuming that depreciating labor breaches the policies, if a class member with one of these policies made repairs for less than their ACV payment, then the class member would [be] unable to establish" any claim for breach of contract). Alternatively, that issue could well be addressed upon any post-trial appeal.

The Proposed Settlement avoids the intractable litigation manageability issues presented by such individualized liability proofs.

II. The Proposed Settlement is Fair, Reasonable, and Adequate in View of the Need for Individualized Proof to Establish Damages.

The Proposed Settlement in this case is also fair, reasonable, and adequate in light of the need for individualized proof to establish damages. As discussed above, determining whether or not Plaintiff or any other potential class member received less than the contracted-for amount (ACV) will require an individualized analysis of each claim, analysis that creates further litigation manageability issues. Indeed, there may be any number of policyholders for whom an individualized review would show there is no entitlement to damages whatsoever, including (for example) because the policyholder did not in fact receive an ACV payment with labor depreciation applied. This Court has already acknowledged that such an analysis may be necessary for each potential class member's claim—that is, that it may be necessary to examine the individual claim

files for as many as 50,000 potential class members to exclude approximately 1,000 policyholders paid replacement costs upfront. *See* Doc. 178, at 7-8.

Individualized review of class members' claim files may also reveal a lack of damages in situations where class members (i) already received full payment of the applicable limits under their policy, (ii) sought or received replacement cost benefits payments; (iii) were able to complete repairs in full for the amount of their ACV payment; or (iv) received an ACV payment that was overstated by more than the amount of any labor depreciation applied in calculating the payment (as State Farm would prove at trial with respect to Plaintiff's individual claim, *see* Doc. 119, at 4-9).

The Proposed Settlement eliminates the litigation manageability challenges that would otherwise be presented in a class-wide trial requiring such individualized proof on damages. The Proposed Settlement will provide agreed-upon relief to those class members who arguably experienced an economic impact because of an ACV payment that included depreciation of labor and other non-material costs and who submit a claim. While State Farm will have the right to review any claims submitted as part of the Proposed Settlement for purposes of determining the settlement payment amount (pursuant to the terms agreed to in the Proposed Settlement), the Proposed Settlement will avoid individualized disputes as to damages that would prevent this case from being tried on a class-wide basis.

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that the Court preliminarily find that the Proposed Settlement is fair, reasonable, and adequate, and preliminarily approve the Proposed Settlement in the form agreed to by the Parties, as attached to Plaintiff's motion for preliminary approval.

Dated: February 9, 2022.

Respectfully submitted,

/s/ Jacob L. Kahn

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel of record.

/s/ Jacob L. Kahn