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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Gerald Walker, III, and Ada Walker,)

Plaintiffs,)

No. CIV 20-449-TUC-CKJ

11

vs.)

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Auto-Owners Insurance Company,)

ORDER

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Defendant.)

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On August 5, 2021, this Court issued an Order which, *inter alia*, denied the Motion to Dismiss and advised the parties of the Court’s intent to certify question(s) to the Supreme Court of Arizona (“Supreme Court”). Aug. 5, 2021, Order (Doc. 15). Additionally, the Court has afforded the parties an opportunity to provide input as to the question(s) to be certified to the Supreme Court. *Id.*, Aug 31, 2021 Order (Doc. 21). The Court considers the parties’ input herein. *See* Docs. 17, 18, 20, 23, 24.

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Additionally, Plaintiffs have filed a Motion for Leave to File First Amended Complaint (Doc. 16). A response (Doc. 19) and a reply (Doc. 22) have been filed. As it relates to the issues involved in the certifying a question to the Supreme Court, the Court will address this motion prior to considering the form of question(s) to be certified to the Supreme Court.

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1 *Plaintiffs Motion for Leave to File First Amended Complaint* (Doc. 16)

2 A “party may amend its pleading only with the opposing party's written consent or
3 the court's leave. The court should freely give leave when justice so requires.”
4 Fed.R.Civ.P. 15(a)(2). In determining whether an amended pleading should be permitted,
5 “[f]ive factors are frequently used to assess the propriety of a motion for leave to amend:
6 (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment;
7 and (5) whether [plaintiff] has previously amended his complaint.” *Allen v. City of Beverly*
8 *Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

9 In this case, Plaintiffs do not seek to add or modify their claims or the parties.
10 Rather, they simply seek to clarify the claims which they made in the original Complaint.
11 Plaintiffs state:

12 Because the Court will certify questions to the Arizona Supreme Court, Plaintiffs
13 believe it is helpful to more fully explain their claims to provide the Arizona
Supreme Court with a more complete understanding of the issues.

14 Motion (Doc. 16, p. 2).

15 While the Court agrees with Defendant that Plaintiffs could have sought to amend
16 their complaint earlier, neither the applicable rule nor any order of the Court required such
17 an earlier request. Additionally, the Court finds there is no basis to conclude Plaintiffs have
18 acted in bad faith. Again, while Plaintiffs could have raised the issue earlier, there is no
19 basis to conclude their failure to do so was in bad faith. Furthermore, the Court finds that
20 allowing the amended complaint would not cause undue delay. There is no reason to
21 believe an amended complaint would delay the state certification process or further
22 proceedings in this Court upon the response of the state court.

23 The Court also consider whether Defendant would be prejudiced by the amendment.
24 It is this consideration that carries the greatest weight. *Eminence Capital, LLC v. Aspeon,*
25 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *see also Allen v. McCurry*, 449 U.S. 90, 94
26 (1980). The Court recognizes that “generally a party will not be deemed prejudiced by an
27 amended pleading if the amendment relates to the same conduct, transaction, or occurrence
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1 alleged in the original pleading, or if the opposing party is otherwise aware of the facts
2 contained in the amended pleading.” 61A Am. Jur. 2d Pleading § 724, *citations omitted*.
3 However, other circumstances may result in prejudice, such as when a “radical shift in
4 direction” posed by new claims require defendant to undertake, at a late hour, an entirely
5 new course of defense.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
6 (9th Cir.1990). Here, Plaintiffs are not making a radical shift in direction, but the proposed
7 amended complaint may require Defendant to significantly modify its arguments as to the
8 pending issues. Indeed, Defendants have not had an opportunity to address the new alleged
9 facts in this matter.¹ However, any prejudice from this is minimized by the rule governing
10 certification of questions of law to the Supreme Court which indicates the parties will be
11 afforded an opportunity to submit briefs before that Court. *See* Ariz.R.Sup.Ct. 27(d).

12 Additionally, the proposed amendment relates to the same conduct, transaction, or
13 occurrence alleged in the original complaint and there is no reason to believe Defendant is
14 not aware of the facts contained in the amended pleading. However, Plaintiffs’ request does
15 include a conclusory allegation. *See* Proposed Amended Complaint (Doc. 16-1, p. 14)
16 (“Through its payment based exclusively upon the ‘replacement cost less depreciation’
17 methodology, Auto-Owners has waived, and is estopped from asserting, any right to contend
18 that ACV should have been calculated under any methodology other than the methodology
19 actually used by Auto-Owners in this case.”). The Court finds Defendant would be
20 minimally prejudiced by the proposed amendment.

21 As to whether the proposed amendment is futile, the Court finds the amendments
22 supplement the facts alleged in the original complaint. Generally, the proposed amendment
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24 ¹Although new facts are alleged in the proposed amended complaint, these facts
25 supplement the facts alleged in the original complaint instead of contradicting them. There
26 does not appear, therefore, to be a disputed factual issue making it difficult to determine the
27 first question to be certified to the Supreme Court. *See* § 4248 Certification to State Court,
28 17A Fed. Prac. & Proc. Juris. § 4248 (3d ed. April 2021) (“Certification is not appropriate
if there are a number of disputed factual issues making it difficult or impossible to agree on
what the legal questions are.”).

1 provides additional facts as to how Defendant calculated actual cash value. However, the
2 original complaint stated, “in short and plain terms[,]” Fed.R.Civ.P. 8, the claims against
3 Defendant. In other words, the proposed amendment appears superfluous and does not
4 appear to alter the substantive legal issues presented in this case. Such amendments are
5 futile. *Sims v. Cabrera*, No. 1:12-CV-01904-LJO, 2014 WL 6893776, at *3 (E.D. Cal.
6 Dec. 8, 2014) (proposed amendments “are futile in that they would add purely superfluous
7 facts to the pleading”); *Powell v. Wells Fargo Home Mortg.*, No. 14-CV-04248-MEJ, 2016
8 WL 1718189, at *23 (N.D. Cal. Apr. 29, 2016) (“leave to amend is not an invitation for
9 Plaintiff to include more redundant and unnecessary facts”).

10 “Futility of amendment can, by itself, justify the denial of a motion for leave to
11 amend.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Considering this factor,
12 along with the minimal prejudice to Defendant, the Court finds it appropriate to deny the
13 Motion for Leave to File First Amended Complaint.

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15 *First Proposed Question of Law to be Answered*

16 The Court has proposed the following question be certified to the Supreme Court:

17 Where an insurance policy does not define depreciation or actual cash value,
18 may an insurer depreciate both materials and labor from the actual cash value?

19 Plaintiffs agree with this proposed form of the question. Defendant asserts this
20 question unduly suggests a meaningful distinction between materials and labor for purposes
21 of calculating actual cash value, even though the “policy itself does not distinguish between
22 (or even mention) materials and labor, but instead permits depreciation to be taken from the
23 entire cost of the “damaged covered *property*.” Defendant’s Requested Modifications to
24 Proposed Certified Questions (“Defendant’s Request”) (Doc. 18, p. 2) (emphasis in
25 original). Defendant requests the Court certify the following question to the Supreme Court:

26 Where a homeowner’s insurance policy does not define the term “actual cash value”
27 but provides that actual cash value “includes a deduction for depreciation,” may an
28 insurer estimate the actual cash value of “damaged covered property” by applying
depreciation to the entire cost to replace or repair the damaged covered property?

1 *Id.* at p. 3.

2 The issue before the Court, however, *is* whether both materials and labor may be
3 depreciated from actual cash value. In other words, if there was not this distinction, the
4 issues before the Court would be altered. Significant to the Court is that the policy is set
5 forth in a document drafted by Defendant. Had the policy specifically stated what was or
6 was not included in calculating depreciation and/or actual cash value, the arguable
7 ambiguity would not exist. In fact, at least one court has recognized a distinction between
8 instances where a policy defines or clarifies what is included in an ACV from where a
9 policy does not include such clarification. *Didyoung v. Allstate Ins. Co.*, No.
10 CV-12-348-PHX-GMS, 2013 WL 2896847, at *3 (D. Ariz. June 13, 2013). To accept
11 Defendant’s argument as set forth in their proposed question would be to presume the
12 validity of Defendant’s position as to the issues before the Supreme Court.

13 Defendant also submits the following as an alternate proposed question:

14 When a homeowner’s insurance policy does not define the term “actual cash value,”
15 may an insurer depreciate the cost of labor in determining the “actual cash value” of
16 a covered loss when the estimated cost to repair or replace the damaged property
17 includes both materials and embedded labor components?

18 “Defendant’s Request”) (Doc. 18, p. 3). Plaintiffs assert, however, they do not dispute that
19 the covered property, “in its indivisible whole[,]” was the property depreciated and they
20 have not sought to recover depreciation related to embedded labor within the covered
21 property. Plaintiffs’ Response to Defendant’s Objections Regarding Proposed Certified
22 Questions (Doc. 23) (Doc. 23, p. 2). Rather, in effect, they argue this refers to the labor
23 used to build Plaintiffs’ home instead of the future repair labor costs.

24 The Court agrees with Plaintiff that Defendant’s alternate proposed question does not
25 fairly present the issue of depreciation of future repair labor costs. However, the Court
26 agrees with Defendant that their proposed questions better place the legal issue into context.

27 The parties are advised the Court will certify the following question to the Supreme Court:

28 When a homeowner’s insurance policy does not define the terms “actual cash value”
or “depreciation,” may an insurer depreciate both the costs of materials and labor in
determining the “actual cash value” of a covered loss?

1 *Second Proposed Question of Law to be Answered*

2 The Court has proposed the following question be certified to the Supreme Court:

3 Is the broad evidence rule applicable in Arizona such that an insurer and/or
4 fact finder may consider labor depreciation as a pertinent factor in
determining actual cash value?

5 Plaintiffs assert this question is redundant because, if the Supreme Court answer this
6 Court's First Proposed Question, the answer will be dispositive as to the issues pending in
7 the Motion to Dismiss. While the Court agrees with this assertion, it also recognizes that
8 it is within the Supreme Court's discretion whether to agree to answer the Court's First
9 Proposed Question. The Court finds, therefore, this is not a sufficient reason to not include
10 a second question to the Supreme Court.

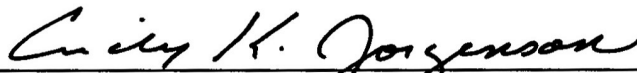
11 Additionally, Plaintiffs argue this question is not at issue because a replacement cost
12 less depreciation methodology of calculating actual cash value was used in this case.
13 Indeed, they point out that whether Arizona "is a broad evidence state is not at issue
14 because in this case . . . the parties agreed that the actual cash value was to be calculated
15 based on the replacement cost method." *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572
16 S.W.3d 170, 178 (Tenn. 2019). However, Defendant asserts "there is nothing inconsistent
17 between the replacement-cost-minus-depreciation method and the broad evidence rule."
18 Defendant's Motion for Leave to Respond to Plaintiffs' Objections to Certified Questions
19 ("Motion for Leave") (Doc. 20, p. 3). Indeed, the authority on this issue is not uniform. *See*
20 *e.g.*, *Stuart v. State Farm Fire & Casualty Co.*, 910 F.3d 371, 376 (8th Cir. 2018) ("the
21 parties agreed on a methodology and the only dispute is over including labor depreciation
22 in the calculation"), *reh'g and reh'g en banc denied* (8th Cir. Jan. 29, 2019); *Couch on Ins.*
23 § 175:34 (June 2021) ("In applying this broad evidence rule, the courts have not abandoned
24 consideration of either market or reproduction or replacement values in arriving at 'actual
25 cash value,' but view them merely as guides in making that determination, rather than
26 shackles compelling strict adherence thereto."). Notably, in this case, the Policy does not
27 require a specific method of valuation. *See e.g. Stuart v. State Farm Fire & Cas. Co.*, 910
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1 F.3d 371, 374 (8th Cir. 2018) (explaining that policy required use of replacement cost
2 minus depreciation).

3 The parties have not presented this Court with any authority to indicate whether
4 Arizona courts would determine the broad evidence rule, if applicable, is a valuation
5 technique that replaces a replacement cost less depreciation methodology of calculating
6 actual cash value or an evidentiary approach that allows fact finders the discretion to decide
7 what factors are relevant to valuing property. The Court disagrees with Plaintiffs that, to
8 the extent Defendant disputes it used a replacement cost less depreciation methodology to
9 calculate Plaintiffs' ACV payment, there is necessarily a factual dispute. Rather, the
10 Supreme Court may decide a fact finder may consider all evidence in resolving an actual
11 cash value. The Court, therefore, will submit the Second Proposed Question as drafted, with
12 a modification to include "fact finder," to the Supreme Court.

13 Accordingly, IT IS ORDERED Plaintiffs' Motion for Leave to File First Amended
14 Complaint (Doc. 16) is DENIED.

15 DATED this 30th day of September, 2021.

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Cindy K. Jorgenson
19 United States District Judge
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