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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 STEVE E. BARRON, et al.,

7 Plaintiffs,

8 v.

9 AMERICAN FAMILY MUTUAL  
10 INSURANCE COMPANY,

11 Defendant.

CASE NO. C16-5576 BHS

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PERMISSION TO  
APPEAL, CERTIFYING ORDER  
FOR APPEAL, AND  
TEMPORARILY STAYING  
MATTER

12 This matter comes before the Court on Plaintiffs Steve Barron, Christine Hillestad,  
13 Marc Hillestad, Raymond Owens, Tammy Owens, and Frank Schoen's ("Plaintiffs")  
14 motion for permission to appeal (Dkt. 62). The Court has considered the pleadings filed  
15 in support of and in opposition to the motion and the remainder of the file and hereby  
16 grants the motion for the reasons stated herein.

17 **I. PROCEDURAL HISTORY**

18 On June 28, 2016, Plaintiffs filed a class action complaint against Defendant  
19 American Family Mutual Insurance Company ("American Family") asserting numerous  
20 causes of action. Dkt. 1. All of the causes of action are based on the theory that  
21 American Family failed to pay the actual cash value for damaged items because  
22 American Family improperly depreciated the value of these items based solely on the age  
of each item. *Id.* ¶¶ 29, 30.

1 On February 15, 2017, American Family filed a motion for summary judgment.  
2 Dkt. 44. On March 9, 2017, Plaintiffs filed a cross-motion for summary judgment. Dkt.  
3 55. On April 27, 2017, the Court granted American Family’s motion in part and denied it  
4 in part and denied Plaintiffs’ cross-motion. Dkt. 61. In relevant part, the Court concluded  
5 that the parties’ contract did not preclude American Family from considering the age of  
6 an item when determining the depreciated value of the item. *Id.* at 5. This conclusion  
7 directly conflicts with the holding in *Lains v. Am. Family Mut. Ins. Co.*, C14-1982-JCC,  
8 2016 WL 4533075, at \*2 (W.D. Wash. Feb. 9, 2016) (“Defendant improperly took age  
9 into consideration when determining depreciation.”).

10 On May 15, 2017, Plaintiffs filed the instant motion requesting permission to  
11 appeal the conflicting ruling of law. Dkt. 62. On May 30, 2017, American Family  
12 responded. Dkt. 63. On June 2, 2017, Plaintiffs replied. Dkt. 66.

## 13 II. DISCUSSION

14 “Section 1292(b) provides a mechanism by which litigants can bring an immediate  
15 appeal of a non-final order upon the consent of both the district court and the court of  
16 appeals.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025–26 (9th Cir. 1981). The  
17 “certification requirements are (1) that there be a controlling question of law, (2) that  
18 there be substantial grounds for difference of opinion, and (3) that an immediate appeal  
19 may materially advance the ultimate termination of the litigation.” *Id.* at 1026. “[T]he  
20 legislative history of 1292(b) indicates that this section was to be used only in exceptional  
21 situations in which allowing an interlocutory appeal would avoid protracted and  
22 expensive litigation.” *Id.*

1 In this case, Plaintiffs have met their burden on all three requirements. First,  
2 “Congress did not specifically define what it meant by ‘controlling’” as used in section  
3 1292(b). *See id.* Likewise, “[t]he Ninth Circuit’s guidance as to what constitutes a  
4 controlling question of law is minimal.” *Sierra Foothills Public Utility District v.*  
5 *Clarendon America Insurance Company*, 2006 WL 2085244, at \*2 (E.D.Cal. July 25,  
6 2006). It is well settled, however, that “[t]he issue need not be ‘dispositive of the lawsuit  
7 in order to be regarded as controlling[.]’” *Id.* at \*2 (quoting *United States v. Woodbury*,  
8 263 F.2d 784, 787–88 (9th Cir.1959)). In this Circuit, “all that must be shown in order  
9 for a question to be ‘controlling’ is that resolution of the issue on appeal could materially  
10 affect the outcome of litigation in the district court.” *Kight v. Eskanos & Adler, P.C.*,  
11 2007 WL 173825, at \*2 (S.D. Cal. Jan. 8, 2007) (quoting *In re Cement*, 673 F.2d at  
12 1026).

13 The Court concludes that resolution of the interpretation of the policy language is  
14 a controlling question of law. While it is true that the issue is not dispositive of the  
15 lawsuit, resolution could be dispositive of class certification. Under the Court’s  
16 interpretation, whether American Family properly determined an item’s depreciation is  
17 likely a claim-by-claim, item-by-item task. It is highly unlikely that a class could be  
18 certified on such a fact-specific inquiry. On the other hand, under *Lains*, considering age  
19 at all is a breach of contract which would apply to all members of the proposed class.  
20 Once liability is determined, only the administrative task of determining damages would  
21 remain. Therefore, resolution of the contrary interpretations of the relevant contract  
22 language could materially affect the outcome of this matter.

1 Second, substantial grounds for disagreement exist in the competing conclusions  
2 of law.

3 Third, an immediate appeal would advance this litigation because it would not  
4 only resolve the question of law but also would essentially determine whether the matter  
5 may proceed as a class. If the Court is affirmed on appeal, then the matter would most  
6 likely proceed on an individual basis foregoing the complicated aspects of a class action  
7 and preserving both the parties' and the Court's resources.

### 8 III. ORDER

9 Therefore, it is hereby **ORDERED** that Plaintiffs' motion for permission to appeal  
10 (Dkt. 62) is **GRANTED**. The Court's order on summary judgment (Dkt. 61) is hereby  
11 **CERTIFIED** to the U.S. Court of Appeals for the Ninth Circuit for an Interlocutory  
12 Appeal.

13 The matter is temporarily stayed pending the Ninth Circuit's resolution of  
14 Plaintiffs' petition to appeal, and the Clerk shall remove the pending motions from the  
15 Court's calendar. If the Ninth Circuit accepts the petition to appeal, the Court shall enter  
16 an order staying the case for statistical purposes. Otherwise, the Court will request a joint  
17 status report from the parties regarding a schedule for this matter.

18 Dated this 8th day of June, 2017.

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21 BENJAMIN H. SETTLE  
22 United States District Judge