

CALVIN P.
"KELLY" VANCE
ATTORNEY AT LAW

4711 SO. PITTSBURGH STREET • SPOKANE, WA 99223 • PHONE 509.448.2588

WASHINGTON MOLD LITIGATION

By Kelly Vance, Attorney at Law ¹

There are not a lot of reported decisions involving mold litigation in Washington. As in Oregon, most cases which have been filed in court have settled before trial and verdict. Many of the reported "mold cases" in Washington are actually insurance coverage cases that have arisen in a mold setting. Also many of the insurance issues that apply in Oregon also apply in Washington, although there are some differences between the states.

1. Insurance Issues

While this chapter is not designed to be an overview of insurance issues arising in mold litigation, a brief discussion of insurance issues is appropriate to illustrate the importance of insurance in mold cases.

a. Coverages vary within a homeowner's policy.

Many mold cases arise in the context of first party homeowners' insurance claims. Typically a loss occurs where a homeowner has suffered a roof leak or a burst water pipe, which may or may not be covered by their homeowner's policy. Usually a homeowner notifies his insurer of the loss. The insurer usually then investigates the problem and determines whether or not the loss is covered. The insurer then either arranges for repair work (if coverage exists) or sends the customer a letter saying the loss is not covered. Many homeowners receiving such a denial letter are shocked. Like many of us, they probably did not read their policy thoroughly when they received it and expected that almost any damage to their house from an unexpected source would be covered.

¹ Kelly Vance resides in Spokane and handles mold cases throughout the Northwest. He can be reached by e-mail at moldlawyer@aol.com or through the contact information on his website, kellyvancelaw.com.

Washington has adopted the "efficient proximate cause" test for insurance coverage disputes.² Generally, if a claim arises from a covered event, the loss is considered covered under the efficient proximate cause doctrine even though other excluded events may play a part in or increase the level of damage. This doctrine may be relevant in a mold context when, for example, a water line bursts, which is usually covered under a homeowner's policy. Mold may grow after the leak as the wetted building materials in the house presents a fertile ground for mold growth.

The issue of insurance coverage for mold claims is a hotbed of litigation nationally. Many insurers have taken great pains to write exclusions in their policies for damage *caused by mold*. Insurers began writing mold exclusions to their policies around 2002, after the celebrated Texas verdict in the *Ballard* case against Farmers Insurance. But what if the damage was caused by a covered peril and mold is simply another part of the damage? A policy excluding coverage for damage "caused by mold" would not seem to exclude mold damage *resulting* from a covered peril which is the efficient proximate cause of the loss.

A few courts have held that policies which exclude coverage for damage caused by mold would still cover damage resulting from a covered peril, even if that damage was mold related. In those cases, mold was found to be both the damage and a cause. At least some courts held that such policies covered the loss, despite the exclusion. There is no reported decision on point in Washington.³

In the wake of these rulings finding mold was both a cause and a loss itself, some insurers have changed their policies to say that they cover mold, but only up to some small amount, such as \$ 10,000.⁴ Other insurers have revised their mold exclusions to say that they exclude any coverage for mold, regardless of cause. The problem with such

² See e.g. *Kish v Ins. Co. of N. America*, 125 Wn 2d 164, 488 P2d 308 (1994).

³ See e.g. *Liristis v American Family Mut. Ins. Co.*, 61 P3d 22, 25 (2002)(mold can be both a loss and cause of loss).and the unpublished opinion in *Simonetti v Selective Ins. Co.*, New Jersey Appellate Division, Case no. A-3755-03T2.

⁴ Perhaps a wise decision, as this avoids spending much more than that on attorneys litigating coverage.

broad exclusions is that a policy saying it covers one kind of loss but excludes damages from that kind of loss if mold is involved could be interpreted as being ambiguous.

Under most homeowners' policies, where a loss is to the dwelling itself, the loss is usually presumed to be covered unless specifically excluded. This is an "all risk" type of policy. However, that coverage rule does not apply regarding personal property insured by the same policy. Where the loss relates to personal property in the house, the property must usually be specifically named as a covered item or category of items under the policy's personal property coverage. This is usually referred to as "named perils coverage." Unless a specific item of personal property is named in the policy, it may not be covered. As with any generalization there can be exceptions, but generally the building damage is presumed to be covered unless excluded and personal property loss is presumed to be excluded unless specifically "named" in the policy.

Most homeowner's policies exclude damage caused by construction defects, unworkmanlike repairs or design defects. The general idea is to lay responsibility for such problems at the feet of the contractor who caused them, not the homeowner's insurer. Often those exclusions have an exception for ensuing losses that arise from the defect. The ensuing loss clauses in some states allow the exclusion to govern a roof leak resulting from a shoddy roofing job, for example, but the homeowner's insurer can be called upon to repair ensuing damage to the house even in the wake of the faulty repair. Generally, these clauses result in the homeowner insurer not being required to repair the shoddy workmanship, but to repair ensuing losses resulting from it. Washington takes a narrow view of the "ensuing loss" doctrine, however. In Washington ensuing losses must be more or less unrelated to the initial defect to extend coverage.⁵

⁵ See e.g. *McDonald v State Farm Fire & Casualty Co*, 119 Wn 2d 724, 837 P2d 1000 (1992).

b. Coverage issues for claims against contractors.

Insurance coverage problems are cropping up more frequently in claims against builders as well. When a homeowner sues a contractor for defects in the building and resulting loss to the house and its contents, the contractor usually tenders the defense of the claim to his liability insurer. More and more often the contractor finds out to his dismay that his insurer denies coverage for such claims.

Some insurers refuse to render coverage after a house is completed because their policies may include a “completed operations” exclusion. The rationale behind these exclusions is that the contractor’s liability policy is only intended to be in effect during construction and once a house is completed, the reason for the liability coverage expires. Many other policies include exclusions for “your work” or workmanship. Still others contain specific exclusions for any damage caused by mold.

Contractors also find themselves in trouble if they do not promptly report the claim to the insurer. Some contractors fear their rates will rise if they report the claim and try to handle it on their own. An insurer can terminate coverage for a contractor’s failure to promptly disclose the claim or cooperate in his own defense. In Washington, the duty to defend a contractor has been considered to be very broad. Even where there is serious doubt that a claims is covered, an insurer is held to the duty to defend any claim that would possibly be covered. The same is not true of the insurer’s duty to pay after a case is over. Often a claim may trigger the duty to defend, but the court later rules that the insurer’s policy does not cover the loss so it has no duty to pay the verdict.

Practice tip: Lawyers representing clients against builders or any defendants with insurance should always request a defendant to produce any insurance policies and letters regarding coverage from his insurer. That way the lawyer can analyze a claim to see if it is covered. This may factor heavily in settlement strategy. Defense counsel should tender the defense of a claim to the contractor’s insurer immediately and determine whether the insurer who refuses to defend a claim has breached the policy.

2. Construction negligence claims in Washington

In *Davis v Baugh Industrial Contractors, Inc.*, case no 76696-7, decided January 18, 2007, the Washington Supreme Court abandoned the “completion and acceptance” doctrine and adopted the Restatement (Second) of Torts rule which holds building contractors liable in negligence for defective workmanship.

Prior to *Davis v Baugh*, it was unclear whether a cause of action for construction defect existed beyond a claim for breach of contract or breach of warranty. There was some confusion in Washington’s case law on the subject, with some cases requiring privity between plaintiff and defendant. But *Davis v Baugh* not only abandoned the completion and acceptance doctrine, but adopted the Restatement (Second) of Torts rule establishing that a Washington contractor can be held liable for negligent construction work, especially if it causes personal injury.

Some defense attorneys had traditionally cited Washington’s “economic loss” rule in asserting that there was no cause of action for construction negligence in Washington. An “economic loss” is described in Washington as “those damages falling on the contract side of the line between tort and contract.” *Id.* (quoting *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 861 n.10, 774 P.2d 1199, 779 P.2d 697 (1989)). Under Washington law, economic loss is distinguished from physical harm or property damage. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987).

The economic loss rule was designed as a boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 821, 881 P.2d 986 (1994). This rule was developed allow parties to allocate risk of pure economic loss by contract. *Id.* at 822. If, for example, a contractor walks off the job, leaving the owner to hire another to complete the project at greater expense or if he

overcharges the owner, the law of contracts establishes the aggrieved party's remedy to recover the economic loss of the additional expense of completion. He can sue for breach of contract and receive the benefit of his bargain – a structure completed for the price he agreed to pay. This is often referred to as “expectation damages.” He is entitled to the result which he had a right to expect when he made the contract with the breaching party.

But it is not generally expected that a builder will perform negligently. In fact, the expectation is just the opposite. Therefore, the law needed to provide a remedy for such unexpected malfeasance. If, for example, a contractor, through his negligence, damages the building or makes the owner sick because the building gives off toxic gases or is contaminated by mold due to bad workmanship, the cost to repair and other consequential damages are not perceived as economic losses but damages flowing from the negligent acts or omissions of the builder.

Contrary to the arguments routinely made by defense attorneys, an argument can be made that, even before *Davis v Baugh*, Washington law has acknowledged a negligence cause of action in construction defect cases. For example, Washington's statutes, RCW 4.16.300 et seq., requires that a consumer give written notice of construction defects to a builder 45 days before filing a construction defect suit. In addition, RCW 4.16.326 sets up a defense of comparative fault to a consumer claim based on construction defect. Obviously, there would be no need to have a comparative negligence statute if Washington did not at least implicitly recognize construction negligence claims. This statute, moreover, clearly states that this comparative fault defense was not applicable in a case where a person suffered personal injury from a construction defect. The statute states in pertinent part that it:

“[D]oes not apply to any **civil action in tort** alleging personal injury or wrongful death to a person or persons resulting from a construction defect.” (Emphasis added).

Plaintiffs in Washington also have the ability to rely on the Washington Consumer Protection Act if builders misrepresent the quality and nature of their services. See Washington's Consumer Protection Act, RCW 19.86 *et seq.*

Practice tip: An attorney should analyze his case and the type of damages his client suffered before pleading a complaint. If there is a construction contract, look to see if the contractor breached it or breached the warranty. If he breached a contract provision (remember, most contracts incorporate the plans and specifications into the contract) the claim can be made for breach of contract regarding the damage resulting from that breach. Where there are defects that would not be, strictly speaking, a breach of the contract, then allege a negligence cause of action if a person suffered property damage or personal injury.

Another practice tip. Don't forget to analyze whether there is an attorney fee clause in the contract. I have seen attorneys fail to include a claim for attorney fees in their complaint and end up losing their client's right to reimbursement for their attorney fees after the case is won. Remember, however, that these clauses are usually interpreted to be reciprocal, so if a party loses the case he or she can be required to pay the prevailing party's attorney fees.

3. Washington Standards for Admissibility of Expert Evidence

Washington follows a standard for admissibility of scientific and medical evidence that follows *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (expert testimony is only admissible if it is generally accepted in the relevant scientific community). Washington's Supreme Court implicitly adopted the *Frye* standard in *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974). Although the court may not weigh evidence, it does have the discretion to determine whether a witness qualifies as an expert and whether his or her testimony would be helpful to the trier of fact. *See In re Pers. Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993) ("The determination of

whether expert testimony is admissible is within the discretion of the trial court.""). Additionally, new scientific evidence is subject to the *Frye* test for admissibility. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006).

Under *Frye*, a court is to determine if the evidence in question has a valid, scientific basis. Because judges do not have the expertise required to decide whether a challenged scientific theory is correct, they defer this judgment to scientists. This inquiry turns on the level of recognition accorded to the scientific principle involved, so courts look for general acceptance in the appropriate scientific community. If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted. Evidence deriving from a scientific theory or principle is admissible if that theory or principle has achieved general acceptance in the relevant scientific community. But scientific opinion need not be unanimous for scientific evidence to be admissible. The difference of opinion is why both sides hire experts and let the jury decide which side's view it believes is more valid.

Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight, not admissibility. Washington's evidentiary rule, ER 702, allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact. *See also State v. Copeland*, 130 Wn.2d 244, 263, 272, 922 P.2d 1304 (1996) (citing *State v. Cauthron*, 120 Wn.2d 879, 886, 846 P.2d 502 (1993)).

The question of admissibility is not based on reliability, but whether it is generally accepted in the scientific community. Blood tests have been accepted in the scientific community for many decades, yet defense attorneys will sometimes try to suppress blood tests showing the presence of mold antibodies in a mold victim's blood. How do they do that? A defense attorney may challenge the circumstances under which the test was taken or the test mechanism itself. But with blood tests, they all pretty much do the same thing, even though their methodologies differ. All blood tests seek to see if there is evidence

that a certain substance is present in the blood. In Washington, whether a given scientific technique has been performed correctly in a particular instance, (i.e. whether laboratory error has occurred) goes to its weight, not admissibility. *Copeland, supra*, 130 Wn.2d at 270.

A brief example of how this type of challenge is made appears in the chapter on Oregon Mold Litigation. The defense attorney in the *Haynes* case, referenced in the Oregon chapter, tried to exclude plaintiffs' lead medical expert, the late Dr. Vincent Marinkovich, from testifying. Dr. Marinkovich was an immunologist who had treated thousands of mold victims over his career and was well qualified to render an expert opinion based on his experience and training. The defense seized upon the idea that he had invented a new kind of blood test for mold antibodies, using a thread upon which mold antigens were imbedded. Other blood tests utilized different means to introducing the blood to mold antigens, such as a porous jell or plastic plates. Dr. Marinkovich developed this thread test and sold it to a private entity because he did not want to be accused of having a conflict of interest when he used his own test. That company had not marketed it effectively, leading defense to claim that the test was not generally accepted in the medical community. But the essence of all bloods tests is to see if the blood reacted with the mold antigens. If a reaction occurred, this evidenced that the body had been exposed to mold because it had started developing an immunological response (antibodies).

It made no difference how blood was introduced to the antigens, because any one of the blood tests used would lead to the same result. Dr. Marinkovich agreed with this and the court allowed him to testify despite the fact that the test he invented was not in widespread use.⁶

⁶ A Washington court would possibly have reached the same result, although it is not a sure thing. It may have helped that the blood tests in the *Haynes* case were corroborated by other blood work performed by other doctors using different laboratories and different methodology.

Defense attorneys will routinely challenge the testimony of plaintiffs' experts, but the plaintiffs rarely challenge defense experts. Why is that? Usually a plaintiffs' attorney is concentrating on other aspects of the case such as proving liability and damages. But more than one plaintiff attorney has been blindsided by a motion to exclude plaintiffs' experts at trial. The lawyer should become familiar with the tests run by his medical expert and be able to explain them to the judge. The unwary mold attorney who does not understand mold science will likely not be able to overcome the defense's objections to his experts and their evidence..

Ultimately, the admission of expert testimony is within the trial court's discretion. Under ER 702, expert testimony may be admitted if the witness qualifies as an expert and the expert testimony will be helpful to the jury. On appeal, reviewing courts examine this evidentiary ruling *de novo* and substitute their own judgment for the trial courts, if appropriate.

Practice tip: If your expert is challenged by a defense attorney who claims that his doctor is right and yours is wrong, argue to the court that this is not an issue of whether your doctor's testimony is admissible, but one which goes to the weight of the testimony. Which expert to believe is a jury question.

Another practice tip: Plaintiff attorneys, do not merely acquiesce in the defense experts being allowed to testify at trial. Challenge their theories and whatever tests they rely upon. Often the defense experts use animal studies and fuzzy math to extrapolate from them and then theorize that humans will not suffer from mold exposure. Challenge the theories that the defense employs. Often defense experts are willing to take leaps of logic that they would sharply criticize if a doctor testifying for a mold victim did something similar.

Still another practice tip: The plaintiff's attorney should file a pretrial motion *in limine* to obtain a ruling that defense counsel and his experts be precluded from using the term "junk science" when referring to plaintiffs expert reports and sources that back them

up. This name calling by defense experts can stick in a juror's mind and influence his or her opinion.

Clinical diagnoses (or differential diagnosis) depends upon observation of objective symptoms and the process of elimination. A medical doctor gathers information from a patient from an interview and an objective physical examination to develop a working diagnosis (a hypothesis). He then uses that working diagnosis to gather further information or to conduct specify tests that will confirm or refute the working diagnosis. Certain possible causes can be eliminated as the list of possible maladies is winnowed down to eliminate certain suspect causes that do not produce given symptoms. In fact, this deductive reasoning is the hallmark of most clinicians' approaches to treating patients. As a generally accepted medical guide to expert testimony states:

"The goal of the clinician is to arrive at a diagnosis that can be used to develop a rational plan for further investigation, observation, or treatment, and ultimately to predict the course of the patient's illness * * *. To do this, the clinician must verify or validate the diagnostic hypothesis."

Reference Guide on Medical Testimony at 463-64. If a patient presents with a malady having ten symptoms, the doctor can eliminate those causes that do not apply. For example, a mold victim may have an upset stomach, which may eliminate allergy or sinusitis as a diagnosis, but not the flu. An additional symptom, such as a skin rash, may eliminate flu or colds as a possible diagnosis and implicate a fungal infection. This is how doctors have been diagnosing illnesses since medical science was born.

Practice tip: Make sure that when your medical expert is challenged, you lay great emphasis on the fact that he made objective findings of the presence of symptoms during a physical examination. Doctors have been performing physical examinations upon patients since Hypocrates. Then show that the tests used are similar to those used throughout the medical field for a long time (skin prick testing, allergy testing and blood sampling). Once the methodology is established as within the mainstream of medical

science, then it is just a matter of the doctor interpreting his findings. Prepare your doctor for facing this exercise so he is ready to authenticate the methods he uses from his past experiences. If his assumption in past cases was mold contamination and his treatment for that malady improved the patient's health, this indicates that he is on track. If the doctor has been allowed to testify in the past, it would not hurt for him to mention that he has been allowed to testify by other judges when trying to overcome a defense objection in your case.

4. Reported mold cases

There are not a lot of reported decisions involving mold cases in Washington. In most of the decisions that are in the books, the mold issues took second place to other procedural issues which governed the disposition of the case. For example:

***Mercer Place Condo. Ass'n v State Farm,*
104 Wn. App. 597, 17 P.3d 626 (2000)**

In late 1996, Mercer Place discovered structural rot to its wood frame structures. A structural engineer determined that Mercer Place was in a state of progressive structural decay. After Mercer Place notified State Farm of the damage, the insurer conducted investigative tears of the structure to determine which portions were in a collapsed state. State Farm recognized that coverage could be provided for such damage under the policy's "collapse" provision. But State Farm only wanted to extend coverage for parts of the buildings facing "imminent" collapse, not deteriorating parts that may collapse in the future.

The condominium association sued State Farm contending that coverage for loss under its insurance policy was not limited to damage involving collapse that occurred during the policy period. It argued that coverage also extended to that damage not yet in a state of collapse during the policy period but that will eventually reach a point of collapse, unless repaired.

The trial court found that the language of the policy only extended coverage to those portions of the property shown to be in a state of collapse during the policy period. The court granted partial summary judgment to State Farm, and conducted a bench trial limited to the issues of the extent of "collapse damage" that occurred during the policy period and whether State Farm fulfilled its obligation to investigate Mercer Place's claim fully and fairly. The court determined that State Farm fully and fairly conducted its investigation, that State Farm paid for all collapse loss which occurred during the policy period, and that there was no credible evidence of any collapse loss "which has not been reasonably and adequately investigated and repaired" by State Farm. The decision was appealed.

The Court of Appeals held that while the policy covers loss commencing during the policy period, the loss that is covered is "collapse" or substantial impairment of structural integrity. It further held that the trial court correctly observed "collapse cannot commence before it occurs. The structure is either in a 'collapse' condition or it is not." Looking at the policy as a whole, the court found that adopting Mercer Place's argument would defeat the purpose of the policy's exclusionary provisions. The policy specifically excludes those losses flowing from such conditions as decay, continuous or repeated seepage or leakage of water, or faulty construction or design, except to the extent that such conditions are found to have created substantial impairment of structural integrity during the policy period. The result is that the trial court decision stood, and State Farm's responsibility was limited.

***DePhelps v. Safeco Ins. Co. of America,*
116 Wn. App. 441, 65 P.3d 1234 (2003)**

This was an insurance coverage case where the homeowner had converted the use of the home to a bed and breakfast. The homeowner's policy insured the dwelling for use principally as a private residence, but the policy also covered various aspects of room rentals.

In March 1997, heavy accumulations of snow and ice on the roof shifted, which loosened part of the metal roof. The homeowner attempted to fix the damage himself, but realized the damage was more extensive than he had originally estimated. He reported the damage to his insurance carrier, Safeco, and submitted a claim. He also submitted a contractor's estimate of \$40,000 to repair the roof. Safeco inspected the damage and approved the estimate. It paid \$28,432 for the repairs in November 1998. But additional damage appeared. Mr. DePhelps and Safeco argued over the extent of that damage. Safeco paid an additional \$49,163 in August 1999. But the roof still leaked. The owner's contractor temporarily repaired it. Safeco paid for those temporary repairs. In December 1999, the home and its contents were found to be contaminated by toxic mold caused by water leaks resulting from defective repairs. In January 2000, the homeowners moved out of the house and submitted more claims for mold damage and loss of use.

Safeco estimated the repair costs at over \$600,000 and paid \$536,446.86. The DePhelps submitted a repair claim for \$1,724,650 and sued for breach of contract, bad faith, and Consumer Protection Act (chapter 19.86 RCW) violations. Both sides moved for partial summary judgment on the coverage issues. The trial court held that the claim was not covered by the policy. The Court of Appeals reversed the trial court's decision. The Court of Appeals held that the policy anticipated that rooms will be rented out and defined the limits of Safeco's liability in the event they are. Nothing in the policy suggested that the presence of renters limited Safeco's liability for structural damage. The policy did not distinguish between "business pursuits" and "rental or holding for rental."

Because the homeowners lost income from renting out the premises, they claimed that lost income under the "loss of use" provisions of the policy. Safeco argued that they were only entitled to loss of their use as a residence, not lost rental income. The Court noted that, in a tort action, loss of income is recoverable "if the proof is adequate."⁷

⁷ " *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211-12, 989 P.2d 1181 (1999) (quoting DAN B. DOBBS, LAW OF REMEDIES § 5.15(2), at 876 (2d ed. 1993)).

Proof of lost profits or business income may be considered as evidence of the value of the loss of use in an action for damages.⁸ The DePhelps' policy provided that, in the event of a claim, the insured must provide "records supporting the fair rental value loss." But the policy contained separate loss of use provisions: one for the loss of the insureds' own housing and another for lost rental income. The court then held that the DePhelps may recover the rental value of the home as a single-family rental, or they can recover the reasonable cost of equivalent housing for themselves (as reduced by the rental activity) plus an estimate of the amount they would have earned from the rented portions.

The court took an actual cash value approach to the loss of the building. The policy defined actual cash value as "the market value of property in a used condition equal to that of the destroyed property, if reasonably available on the used market." The court then held that additional costs to upgrade the house to comply with new building code provisions applicable to use of rental premises or hotels were not covered. Replacement cost considerations - such as building code upgrades - did not apply. The court stated that a determination of market value of the destroyed property will depend on whether it was saleable as a bed and breakfast when the damage occurred. This depended upon whether it was in compliance with the then existing building codes for that purpose, and whether that code compliance would pass to a buyer - or whether the county could or would require upgrades as a condition of sale (as well as for reconstruction). The key holding was that cash value applied to the property as it stood at the time of loss. Replacement costs, including code upgrades, were not included.

***O'Neill v. Farmers Ins. Co. of Washington,*
124 Wn. App. 516 (2004)**

In September 2001, the O'Neills discovered a water leak in their residence and filed a claim for coverage against their homeowner's policy. Their homeowner's insurer,

⁸ *King Logging Co. v. Scalzo*, [16 Wn. App. 918](#), 928, 561 P.2d 206 (1977).

Farmers, retained Flare Corporation (Flare) to prepare a scope of work and submit a bid to repair the damages caused by the leak. Flare estimated that the repairs would total \$23,557.10. The O'Neills retained AACE Contracting (AACE) to do the repair work. Farmers agreed to pay AACE, which began the repair process in January 2002. The O'Neills alleged that Farmers required the company to try to dry the walls by forcing warm air through the wall cavities. They alleged that this practice, along with other cost-saving measures authorized by Farmers, damaged their home, that Farmer's delay and defective work caused "the retention of excess moisture, and attendant decay and mold growth."

The O'Neills' attorney delivered copies of the complaint to the secretary of Farmers' legal counsel, at his office. Farmers was, apparently, never personally served with process. In its October 31, 2002 answer, Farmers listed insufficiency of service of process among its affirmative defenses. Farmers later filed a motion for summary judgment alleging that the O'Neills' case should be dismissed because they had not served Farmers within 90 days of filing their summons and complaint. The O'Neills filed a motion to amend their claim. The trial court granted Farmers' motion for summary judgment and did not consider the O'Neills' motion to amend. The O'Neills appealed.

The O'Neills' policy had a "suit against us" provision, which mandated that all suits against Farmers under the policy must be filed within a year. Their claims were deemed untimely because service was never perfected within a year.⁹ But they also asserted that the statute of limitations on their bad faith and CPA claims had not expired as of September 13, 2002, and that the trial court erred in dismissing those claims with prejudice because they could still bring those claims as if they had never filed a prior suit.

⁹ Washington courts have repeatedly held that the filing of a complaint does not constitute the commencement of an action for the purposes of tolling the statute of limitations. It is still necessary for the plaintiff to serve a defendant within 90 days of the date of filing in order for the commencement to be complete. *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 855 (1981); *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 660 P.2d 756 (1983); *Sidis v. Brodie/Dohrmann, Inc.*, [117 Wn.2d 325](#), 815 P.2d 781 (1991).

Under RCW 4.16.080, claims for bad faith are subject to a three-year statute of limitations and claims under the Consumer Protection Act are subject to a four-year statute of limitations. RCW 19.86.120. Farmers asserted that the trial court properly dismissed all claims before it because the O'Neills failed to complete proper service.

The trial court dismissed all of the O'Neills' claims with prejudice. But the Court of Appeals reversed dismissal of the bad faith and Consumer Protection Act violation claims with prejudice, holding that, because the statute of limitations had not run on those claims, they should have been dismissed without prejudice.

***Kelsey Lane Homeowners Association v. Kelsey Lane Co., Inc.,*
125 Wn. App. 227, 103 P.3d 1256 (2005)**

A condominium homeowners association sued KLC, after construction defects caused severe water damage to the condominium buildings. The Association contends that KLC fraudulently concealed from prospective purchasers the fact that building envelope components were missing or improperly installed. The trial court dismissed the complaint, finding no genuine issue of material fact about the developer's actual knowledge of the defects without considering claims that relied on a "should have known" standard. Plaintiffs introduced no evidence suggesting that the defendant had actual knowledge of the defects or that it breached its fiduciary duty while it controlled the homeowners association. The court rejected a "should have known" standard.

State Farm Fire & Casualty. Co. v. Piazza, 132 Wn. App. 329 (2006)

This was an insurance coverage case under a homeowner's policy where the insurer sued its policyholder seeking a decision from the court that it did not have a duty to defend an action for damages brought by the insureds' former tenants for personal injuries caused by mold in the house. The insurance policy excluded coverage for injuries or damage arising out of renting the property unless rental was on an occasional basis. The homeowners had continuously rented the property for more than 26 months. The

Superior Court entered a summary judgment in favor of the insurer. The Court of Appeals affirmed.

Piazza claimed that she raised a genuine issue of material fact precluding summary judgment regarding whether the rental was "on an occasional basis." She contended that the phrase "on an occasional basis" is ambiguous and that this ambiguity must be construed in her favor and against the insurer which drafted the policy. State Farm argued that "occasional" means "on a now and then basis" or "irregularly or infrequently" and that there is no other reasonable interpretation of "occasional." The courts agreed with the insurer and found this definition was clear and not ambiguous.

Ramos v. Arnold, WACA 58679-3 – 071607 (2007)

The Ramos family purchased a home in Lynnwood in 2001. Before making an offer, they noticed that a three-foot portion of the hallway ceiling was sagging. They questioned their real estate agent about this defect and the agent stated that it was likely a "PUD package," apparently referring to insulation added to conserve energy. A cousin who worked in the drywall and ceiling business looked at the hallway ceiling and told the Ramoses that the sag may have been caused by water damage. The Ramoses nevertheless made an offer on the home on September 24, 2001, conditioned on a satisfactory home inspection. Their inspector noted that the roof was in "very poor condition with decay under the trees and missing shakes on the south faces and east face." The inspector's report advised that the roof would not last much longer but did not mention the sagging ceiling in the hallway.

After the inspection, the Ramoses waived the contingencies and proceeded with the purchase. Their lender ordered an appraisal. The appraiser made a visual inspection of both the inside and exterior of the home in order to estimate the property's market value. The appraiser did not report noticing any apparent defects either inside or outside the

home and did not communicate with the Ramos family or send them a copy of the appraisal.

The sale closed on October 15, 2001. Several days later, after the Ramos family moved in, the roof began leaking during a storm. Water damaged the roof and ceiling and caused mold growth. The ceiling started crumbling and material containing asbestos fell into the house, causing Karina and the two children to experience respiratory problems.

The Ramoses filed a claim under their homeowner's insurance policy. Their claim for water damage was accepted and paid, but their claim for mold damage was rejected. They then filed suit against several defendants, including claims against the appraiser for breach of contract, negligence in conducting the appraisal, and violation of the Consumer Protection Act. The appraiser moved for summary judgment arguing that the Ramoses were actually aware of the sagging ceiling before purchasing the home and that the Ramoses could not show that they had relied on the appraisal report when they decided to purchase the house. Karina declared that she did review "the contents of" the appraisal before the purchase, which she apparently contradicted in her deposition. The Ramos' claimed that the appraiser committed an unfair or deceptive act by failing "to include major defects in the residence in the appraisal report which kept the paperwork 'clean' on the residence. They alleged that this prevented further investigation, and caused the Ramoses to enter into the purchase and sale agreement for the residence.

Both parties cited the same case to support their respective positions, *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995).¹⁰ In *Schaaf*, the trial court found that while the appraiser owed a duty of care, the plaintiff did not demonstrate justifiable reliance on the appraisal report and already knew *before* he bought the house that it

¹⁰ In *Schaaf*, the homeowner discovered that the roof leaked and sued the appraiser. He claimed the appraiser negligently failed to note the defective roof in the appraisal report. The trial court concluded that the appraiser owed no duty to the prospective homebuyer and granted the appraiser's motion for summary judgment. On appeal, Schaaf argued that lack of contractual privity with the appraiser did not negate the fact that the appraiser owed him a duty of care. The Court concluded that under the law of negligent misrepresentation, an appraiser does owe a duty of care to third parties. *Schaaf*, 127 Wn.2d at 21.

needed a new roof. He could not blame the appraiser for failing to report what he already knew to be true. *Schaaf*, 127 Wn.2d at 30. Lack of reliance on the appraisal report barred Schaaf's claim. In *Ramose*, their claim failed under the negligent misrepresentation analysis detailed in *Schaaf*, because without proof of reliance there is no basis upon which to find that any breach by the appraiser proximately caused their damages.¹¹

The Court of Appeals held that there was no claim against the appraiser under the Consumer Protection Act, stating that the purpose of the Consumer Protection act is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. The term "trade" as used by the Act only includes the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.¹² Entrepreneurial aspects include how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients. Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act.¹³ The Ramoses allegations concerning the inadequacy of the appraisal amounted to an allegation of negligence, not an implication of entrepreneurial or commercial aspects of professional services. The Court of Appeals upheld the trial court dismissal of the Consumer Protection Act claim on summary judgment.

The Ramoses also appealed the trial court's dismissal of their breach of contract claim contending that, even though they had no contract with the appraiser, they were third party beneficiaries to her contract with the bank. Under Washington law, as in most states, a party is a third party beneficiary only if the contracting parties intend to create

¹¹ The court noted that where there was a conflict between deposition testimony and a subsequent affidavit, this conflict in a witness' testimony did not create a question of fact sufficient to defeat summary judgment.

¹² Citing *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032 (1987) where the court stated that to prevail in a private Consumer Protection Act action, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.

¹³ Citing *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984).

such a relationship at the time the contract is formed.¹⁴ The test of intent is an objective one, for which the key is whether performance of the contract would necessarily and directly benefit the party claiming to be a third party beneficiary.¹⁵ Although the appraisal report identifies the Ramoses as potential borrowers, the report was written for the benefit of the lender which wanted to see if the house was worth what the lender was lending for its purchase. There was no evidence the bank intended for the appraiser to assume a direct obligation to the Ramoses or that they would necessarily benefit from the terms of the contract between the bank and the appraiser. The Court upheld the trial court's dismissal of the contract claim, concluding that the Ramoses were not third party beneficiaries to the appraisal contract between the appraiser and the lender.

© Kelly Vance 2008

This article is excerpted from *Toxic Mold Litigation, Second Edition*, published by Lawyers and Judges Publishing Company. It is reproduced here by permission of the publisher.

¹⁴ *Burke & Thomas, Inc. v. International Organization of Masters*, [92 Wn.2d 762](#), 767, 600 P.2d 1282 (1979).

¹⁵ *Lonsdale v. Chesterfield*, [99 Wn.2d 353](#), 362, 662 P.2d 385 (1983).