

FILED  
COURT OF APPEALS  
DIVISION II

No. 37194-4-II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**COURT OF APPEALS - DIVISION II  
OF THE STATE OF WASHINGTON**

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**TERRANCE S. COX and JULIE K. COX,**

**Appellants,**

**vs.**

**JAMES H. O'BRIEN, et ux, et al.,**

**Respondents.**

**APPELLANTS' BRIEF**

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## I. INTRODUCTION

Home buyers Terrance and Julie Cox (“Cox”) sued pest inspector O’Brien for improperly performing a pest inspection commissioned by sellers Danny and Mary DeMers (“DeMers’). *CP 1-7* The inspection failed to reveal significant structural pest damage inside the walls of the home. Mr. and Mrs. Cox were initially reluctant to sue Mr. and Mrs. DeMers who were personal friends. *RP 15* O’Brien settled with the home buyers and as part of the settlement, assigned to them rights the inspector had under indemnity provisions in his contract with sellers DeMers. *CP 170-202* a mandatory arbitration was held which was appealed by sellers. Sellers sued home buyers Cox and Cox counterclaimed. Both parties moved for summary judgment. *CP 96-210* The trial court granted DeMers’ motion for summary judgment and denied the cross-motion for summary judgment by the home buyers finding that the indemnity provision between O’Brien and DeMers was violative of public policy. *CP 212-214* A truncated trial was held to decide the only remaining issue which was an unjust enrichment claim made by home buyers Cox against DeMers. The trial court granted the home seller’s motion for a directed verdict at the conclusion of plaintiff’s case. *CP 215-220* This appeal follows.

## **II. ASSIGNMENTS OF ERROR**

No. 1: The trial court erred in invalidating the indemnity agreement between the home sellers and pest inspector.

No. 2: The trial court erred in not granting the cross-motion of the home buyers seeking to enforce the indemnity agreement between the pest inspector and sellers.

No. 3: The trial court erred in issuing a directed verdict on the plaintiff home buyers' unjust enrichment claim at the conclusion of plaintiffs' case.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

No. 1: Did the trial court err in finding that the indemnification provision between the home inspector and home sellers was violative of public policy pursuant to *Dirk v. Amerco Marketing Co. of Spokane*, 88 Wn. 2d 607, 612, 565 P. 2d 98 (1977)?

No. 2: Did the trial court correctly construe the indemnification language at issue?

No. 3: Did the trial court correctly rule as a matter of law that the indemnification language was not rendered void by RCW 4.24.115?

No. 4: Did the trial court err in denying buyers' cross-motion for summary judgment?

No. 5: At trial, did the trial court err in finding that a directed verdict was appropriate on the home buyers' unjust enrichment claims?

No. 6: Are sellers entitled to attorneys fees?

#### **IV. STATEMENT OF THE CASE**

Home buyers Terrance and Julie Cox needed to purchase a larger house for their growing family. *CP 170-202* They learned through their church friends Danny and Mary DeMers that the DeMers were selling a home they had previously occupied that was being used as a rental. *RP 7*

After Mr. and Mrs. Cox made a cursory inspection of the home (which was occupied at the time by renters) they agreed on a price and entered into a Purchase and Sale Agreement with sellers. *RP 8, 10, Ex.2* A condition of the sale was for DeMers to provide a pest inspection on the home. *RP 14-15, Ex. 2* DeMers selected and hired O'Brien Home Inspection Services. *RP 14* Unfortunately, O'Brien failed to detect insect infestation and structural damage inside the walls of the home. *CP 170-202*

In his contract, O'Brien required DeMers to sign an inspection contract which included an indemnification provision. *CP 170-202* A copy of the agreement signed by the sellers is attached as Exhibit A to this brief. O'Brien also requested home buyers Cox to sign the agreement which they did. *CP 170-202*

After the buyers took possession of the home, they discovered significant damage to the home. *CP 170-202* They filed a lawsuit against home inspector O'Brien who tendered defense of the claim to the sellers pursuant to the indemnification agreement. *CP 161-169* The sellers did not respond to the tender but notified their insurance company. *RP 13-14, 32-33* Pest inspector O'Brien brought sellers into the litigation and they were defended by their insurance carrier. *CP 11-15*

Home buyers Cox ultimately settled with O'Brien. *CP 170-202* As part of the settlement, O'Brien signed and conveyed to Cox his claims against the home sellers. *CP 83-84, 161-202*

An arbitration was held which was appealed by the home sellers.

Following the appeal from the mandatory arbitration, both parties moved for summary judgment. *CP 96-210* The trial court granted summary judgment to the home sellers and denied summary judgment to the home buyers, finding that the indemnification provision was violative of public policy. *CP 212-214*

At trial, the only issue remaining was the claim of the home buyers for unjust enrichment. *CP 212-214* At the close of the plaintiff home buyers' case, a directed verdict was entered in favor of home sellers. *CP 215-220*

This appeal follows.

## V. SUMMARY OF ARGUMENT.

As plaintiffs' claims are limited to economic losses, the economic loss rule applies. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) The home sellers procured insurance to protect them from this loss. *RP 27* The pest inspector allocated his risk to sellers by an indemnification provision requiring the sellers to protect him in the event there was undetected pest damage. *RP 37-49* By invalidating the indemnification provision, the trial court improperly interfered in the allocation of risk provided for in the agreements between the buyers, sellers and pest inspector. Where parties have contracted for their potential economic liability, those agreements need to be respected. Otherwise, the rationale behind economic loss rule becomes meaningless. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), *Berschauer/Phillips Construction Co. v. Seattle School Dist.* 124 Wn. 2d 816, 881 P. 2d 986 (1994).

## VI. ARGUMENT

**Issue No. 1: The trial court erred in invalidating the indemnity agreement between the home sellers and pest inspector.**

The economic loss complained of by the home buyers in this case concerns substantial structural damage by insects within the walls of the home. *CP 170-202* This damage was not readily apparent. The sellers acknowledge that had they known of the hidden problems with the house,

there would have been discussions about an adjustment in the contract price or rescission. *RP 23-24*

To assure the buyers that there was not insect damage within the structure, the sellers hired a pest inspection company. *CP 170-202* The pest inspection company contract made it clear that in the event the pest inspection failed to discover insect damage and a claim was made for errors in the pest inspection, the seller agreed to indemnify and hold the pest inspection company harmless from such claims including attorney's fees and costs incurred in defending against the claim. *CP 37-49*

Under an economic loss analysis, this indemnification provision makes perfect sense. The pest inspection company charged a relatively small fee to perform the inspection. *CP 37-49* Had the pest inspection detected the damage, the sellers would have been required to repair the damage, adjust the contract price downward or cancel the transaction. *RP 23-24* In the instant case, the failure of the pest inspection company to detect the damage resulted in a windfall for the seller. It is not unreasonable for a pest inspection company to ask that the party receiving the benefit of the inspection error be required to indemnify the inspector.

This analysis is further buttressed by the fact that the sellers had insured against this loss. The evidence submitted by offer of proof at trial established that the sellers had tendered this claim to their insurance

company Farmers Insurance. Farmers had accepted the tender of defense and had provided defense counsel for the sellers. Farmers apparently indicated that it would cover this loss and did not defend under a reservation of rights. *RP 32-33*

The trial court invalidated the indemnity agreement between the home sellers and pest inspector. It relied on *Dirk v. Amerco Marketing Co.*, 88 Wn.2d 607, 565 P.2d 90 (1977), finding that the provision at bar violated public policy. This ruling stems from language in *Dirk* that “clauses purporting to exculpate an indemnitee from liability for losses flowing from his own acts or omissions are not favored as a matter of public policy and are to be clearly drawn and strictly construed.”

This holding ignores the very premise underlying the economic loss rule. As *Alejandro* states:

Further, where allocation of risk occurs, it can occur directly or indirectly. For example, parties might allocate risk through express contract terms, such as the inclusion of warranties, or through the procuring of insurance, or risk might be reflected in a lower price obtained by the buyer in exchange for the risk falling on the buyer. *Maersk Line Ltd. v. Care & Adm, Inc.*, 271 F.Supp.2d 818, 822 (E.D.Va.2003). As one court stated: “Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.” *Daanen & Janssen*, 216 Wis.2d at 408, 573 N.W.2d 842 (quoting > *Stoughton Trailers, Inc. v. Henkel Corp.*, 965

F.Supp. 1227, 1230 (W.D.Wis.1997)); see Nigrelli Sys., 31 F.Supp.2d at 1138.

*Alejandro*, supra at 780.

The sellers in this transaction should not be able to have it both ways. They correctly point out that the economic loss rule applies to buyers' claims but then challenge the risk-shifting language forming the basis for the economic loss rule.

The applicability here of *Dirk v. Amerco Leasing Co.* is also suspect in light of numerous decisions respecting and upholding similar risk-allocation provisions in a commercial context. See for example *Bershauer/Phillips* where the economic loss rule is supported by language pointing out the beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. The Court also notes that in cases involving construction disputes, the contracts entered into among the various parties should govern their economic expectations. The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.

It is difficult to find authority for invalidation of indemnity provisions in disputes such as the one *sub judice*. As stated in *McLean Townhomes v. America 1<sup>st</sup> Roofing*, 133 Wn. App. 828, 138 P.3d 155

(2006), when interpreting an indemnity provision, fundamental rules of contract construction apply. *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527, P.2d 1115 (1974). The words used in a contract should be given their ordinary meaning. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). Courts may not adopt a contract interpretation that renders a term absurd or meaningless. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985).

The contract language at issue here is as follows:

In the event any person or company makes a claim for any alleged error, omission, or other act arising out of their performance of professional services under this contract, each signer of this agreement agrees to defend and hold us harmless from any such claim, including reasonable attorney's fees and costs incurred in defending against the claim.

There is nothing ambiguous or mysterious in this language. Sellers agreed to indemnify the pest inspector for errors in the inspection.

As stated in *McDowell v. Austin Co.*, 105Wn.2d 48, 710 P.2d 192 (1985):

Parties rely on indemnity agreements for allocating the responsibility to purchase insurance when a construction project is initiated. Here, Canron and Austin clearly spelled out their allocation of responsibilities. It is not for this court to frustrate such a planning device. *Id.* at 51.

In the instant case, there is nothing in the language of the indemnification agreement suggesting it should be invalidated. This pest inspection firm initially limited its liability to the fee for the services provided under the agreement. The provision further provides that in the event of a claim against the pest inspection company for any error arising out of the performance of the pest inspection services, the seller is obligated to defend and hold the pest inspection company harmless from such claims including reasonable attorney's fees and costs.

As with the case cited above, the home seller and pest inspector clearly spelled out their allocation of responsibilities. The benefactor from an error by the pest inspection company is obviously the seller, who receives an economic windfall from selling damaged goods. It is certainly reasonable for the pest inspector to require the seller to apply that economic windfall to protect the pest inspector. The provision should be enforced.

**Issue No. 2: Did the trial court correctly construe the indemnification language at issue?**

In the trial court, the seller argued that the contract language at issue did not require the seller to indemnify the pest inspector. Without any legal authority, the seller argued that the contract should be construed

to only require seller indemnification if someone other than a party to the agreement sued O'Brien for that person's negligence.

In the instant case, there is little doubt that the word "their" is misused in the indemnity contract. The word that should be employed is the word "the". The word "the" has been mistakenly typed as the word "their" on O'Brien's contract.

Clearly, the contract required sellers to indemnify and hold O'Brien harmless from plaintiffs' claims against O'Brien. This interpretation makes perfect sense. Under the interpretation urged upon the Court by sellers, the provision should only apply to a non-party to the contract who sues O'Brien. Such a conclusion is not only illogical but nonsensical. Under that interpretation, the contract would have no purpose.

The trial court correctly refused to accept the seller's interpretation of the contract. After all, the contract only involved the buyer and the seller. Clearly, the parties intended and the contract language provided that indemnification would be by the seller for claims made by the buyer

**Issue No. 3: Did the trial court correctly rule as a matter of law that the indemnification language was not rendered void by RCW 4.24.115?**

The seller further argued to the trial court that the contractual language should be rendered void by RCW 4.24.115. This statute relates to the validity of agreements to indemnify relative to construction, alteration, improvement of structures or improvements attached to real estate. Sellers argue that pest inspection services should be considered as maintenance of real property and should be invalidated under RCW 4.24.115. No authority is cited for this proposition. The trial court correctly found that pest inspection services are not subject to RCW 4.24.115.

**Issue No. 4: Did the trial court err in denying buyers' cross motion for summary judgment?**

The evidence is undisputed that the pest inspector tendered defense of buyers' Summons and Complaint to sellers. The evidence is also undisputed that sellers never responded to this tender of defense. Pest inspector O'Brien incurred attorney's fees in defending the claim. Further, O'Brien settled with Coxes by payment of the sum of \$20,000.00.

As part of the settlement between Cox and O'Brien, the pest inspector assigned to buyers its claims against the sellers.

Under the indemnification provision at issue, buyers are entitled to recover the attorney's fees expended by O'Brien as well as the settlement

monies paid by O'Brien to Cox to resolve Cox's claims. Summary judgment should have been granted in that amount by the trial court.

**Issue No. 5: The only issue remaining at trial concerned buyers' claims against sellers for unjust enrichment.**

The gravamen of the evidence presented in support sellers' unjust enrichment claim was that sellers had been unjustly enriched by receiving proceeds from the house assumed by both parties to be structurally sound. In light of the actual condition of the home, sellers should have been required to disgorge some of the proceeds to reflect a reduced purchase price.

A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. *Farwest Steel Corp. v. Mainline Metalworks Inc.*, 48 Wn. App. 719, 731-32, 741 P.2d 59 (1987).

The trial court entered a directed verdict in favor of sellers at the close of buyers' evidence. The trial court determined that while the sellers had been enriched by selling a house structurally damaged, the enrichment was not unjust as there was no evidence to establish sellers knew or should have known of the damaged condition.

This ruling was in error. Unjust enrichment is better viewed as a legal remedy in the form of restitution. *Ducalon Mechanical Inc. v. Schinstine/Forness Inc.*, 77 Wn. App. 707, 893 P.2d 1127 (1995).

Under equitable theories of unjust enrichment or restitution, a court has the authority to adjust the contract to make it fair to both parties where money has been paid by mistake. Assuming that the seller and buyer were both innocent in this transaction, the mistake made was that both parties believed that the home being sold was structurally sound. Because of this mistake, the sellers received more money for the home than it was worth and the buyers paid more than they should have for its purchase. Under its equitable power, the trial court had the ability to equalize the transaction requiring payment of monies from sellers to buyers. As the sellers candidly acknowledged, had they realized their home was not structurally sound, an adjustment would have been made in the purchase price or repairs would have been made.

**Issue No. 6: Are sellers entitled to attorney's fees?**

Sellers appealed a Mandatory Arbitration Award in favor of buyers. Should the court direct entry of summary judgment in favor of buyers, buyers will have improved their position from the amount awarded pursuant to the Mandatory Arbitration Proceeding. Under those

circumstances, buyers are entitled to attorney's fees for bringing this appeal. MAR 7.3

Buyers are also entitled to attorney's fees pursuant to the indemnification provision as buyers have been assigned O'Brien's rights under the indemnification language. Sellers are responsible for payment of attorney's fees incurred by buyers on appeal. RCW 4.84.330

#### V. CONCLUSION.

While not perfectly worded, the indemnification provision between the home sellers and pest inspector was clear. In the event of a mistake made by the pest inspector, sellers agreed to indemnify and hold him harmless and further agreed to provide legal defense for any claims based upon his mistakes. There is no public policy violated by this business arrangement which makes perfect economic and business sense. Summary judgment should be granted in favor of buyers and they should be awarded their attorney's fees on appeal.

Respectfully submitted this 15<sup>th</sup> day of May, 2008.



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DECLARATION OF MAILING

Maureen E. Ahern, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

1. That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this Declaration;
2. That on May 1, 2008, I sent via first class mail, a copy of the Appellants' Brief to:

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DATED this 1<sup>st</sup> day of May, 2008.



Maureen E. Ahern, Paralegal

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# WASHINGTON STATE PEST CONTROL ASSOCIATION Uniform Structural Wood Destroying Organism Inspection Report



Company Name O'Brien Home Inspection  
Company Address 90 Raft Island, Gig Harbor, Wa. 98335  
Company Phone 253-549-3998 File/Case No. \_\_\_\_\_

Inspection Date 7-31-00 Time 10:00 Type of Building Single Family Residence

Address of Building Inspected 5202 REST PL BREMERTON 9834

Owner/Seller \_\_\_\_\_ Buyer \_\_\_\_\_

Structural Pest Inspector Name Jim O'Brien License # 58086

## FINAL REPORT

### Uniform Structural Wood Destroying Organism Inspection Report

At the time of this inspection, no visible evidence of active wood destroying organisms or conducive conditions were found in the subject structure.

This document is not intended to be a warranty of the subject structure in any manner. It is a written opinion of a qualified inspector based upon what was visible and evident at the time of inspection. Refer to inspection standards on reverse side.

Authorization Signature: Jim O'Brien Title: Owner/Operator

REMARKS: There were no WDOs (wood destroying organisms) or conducive conditions for WDOs found when inspection was performed.

#### LIMITATION OF LIABILITY

The above inspecting firm endeavors to perform its services in a professional manner consistent with the care and skill ordinarily exercised by similar pest control professionals. No warranty, express or implied, other than as set forth herein, is made or intended by performing the work identified in this agreement. Should this firm, or its employees, be found to have been negligent in their performance of services, it is agreed that the maximum total recovery against us or our employees shall be limited to our fee for the services provided under this agreement.

In the event any person or company makes a claim for any alleged error, omission, or other act arising out of their performance of professional services under this contract, each signer of this agreement agrees to defend and hold us harmless from any such claim, including reasonable attorney's fees and costs incurred by us in defending against the claim.

ACCEPTANCE: This report is of no force or effect unless signed by the Seller and Purchaser and a copy returned to the inspecting firm. We have read the report and inspection standards and understand all of the terms and conditions thereof, including the scope and limitations thereof and do accept the same:

Accepted By: [Signature] Date 7-31-00  
Seller's Signature  
[Signature] Date 8/22/00  
Purchaser's Signature



EXHIBIT A

**WOOD DESTROYING ORGANISM INSPECTION STANDARDS of the  
WASHINGTON STATE PEST CONTROL ASSOCIATION**

**I. WOOD DESTROYING ORGANISM INSPECTION REPORT.**

A wood destroying organism inspection report is a written opinion of a qualified Washington State Licensed Structural Pest Control Inspector based upon what was visible and evident at the time of inspection. As such, the inspection report does not in any way represent or guarantee the structure to be free from wood destroying organisms or their damage, nor does it represent or guarantee that the total damage or infestation is limited to that disclosed in this report.

**II. INSPECTION PROCEDURES.**

The inspector shall make a thorough inspection of the subject structure to render an opinion of the visible evidence of wood destroying organisms, as well as, those conditions which are conducive to such wood destroying organisms.

**AREAS INSPECTED** shall include: Structural Exterior (that which is readily accessible, visibly and physically, to an inspector at ground level); Structure Interior; Substructural Crawl Space(s); Garages, Carports, and Decks which are attached to the structure. [Deck inspection shall include: railings, wooden steps, and accessible wooden surface materials, as well as, deck substructures which are accessible (those with at least a 5' soil-to-joist clearance, or, in the case of elevated decks, those which can be suitably reached using a 6' step ladder).]

**WOOD DESTROYING ORGANISMS** shall include: Subterranean Termites, Dampwood Termites, Carpenter Ants, Wood Boring Beetles, and Wood Decay Fungus (rot).

**CONDUCTIVE CONDITIONS** shall include, but not be limited to:

- (a) **INADEQUATE CLEARANCES.** This shall normally exist where there is less than 18" clear space between the bottom of the floor joists and the unimproved ground area in any crawl area or portion thereof.
- (b) **EARTH-WOOD CONTACT.** This condition exists where wood of the structure is in direct contact with the soil.
- (c) **CELLULOSE DEBRIS.** Cellulose debris in the crawl area shall be considered any wood or wood by-product material that can be raked, or larger.
- (d) **INADEQUATE VENTILATION:** Where there is detectable excessive moisture content in the wood of a substructure, and/or an active infestation of wood destroying organisms which can be attributed to the lack of sufficient ventilation in the substructure.
- (e) **EXCESSIVE MOISTURE.** Any condition with the potential to enhance the moisture content of the wood such as: obvious plumbing or roof leaks; bare moist soil, or standing and/or seasonal standing water in the crawl space.

**III. LIMITATIONS OF INSPECTIONS.**

The inspecting firm shall not be held responsible by any party for any condition or consequence of wood destroying organisms which is beyond the scope of this inspection. The scope, defined in section II. INSPECTION PROCEDURES, is limited as follows:

- (a) **INACCESSIBLE AREAS.** Certain areas of a structure, which are inaccessible by their nature, may be subject to infestation of wood destroying organisms yet cannot be inspected without excavation, or unless physical obstructions are removed. Such areas include, but are not limited to: wall voids; spaces between floors; substructures concealed by subfloor insulation or which have inadequate clearance; floors beneath coverings; sleeper floors; areas concealed by furniture, appliances, and/or personal possessions; and deck substructures with less than a 5-foot clearance.
- (b) **ROOF SYSTEMS AND ATTIC AREAS.** The inspecting firm shall not be held responsible or assume liability in any manner concerning the condition of any portion of the roof area, including outside covering, soffits, eaves, rafter tails, fascia boards, barge rafters, gutters and inside attic spaces, their soundness or estimated life. The inspector may note visual evidence of infestation and/or infections of wood destroying organisms in the portions of the eaves that are visible and accessible from the ground. He/she may also make note of conditions of the gutters and downspouts that are contributing to moisture conditions in the subarea or at the exterior perimeter of the foundation. No opinion is rendered nor guarantee implied concerning the water-tight integrity of the roof or concerning the condition or future life of the roof coating system. Any comment(s) made by the inspector regarding an obvious condition of (a) component(s) of the roof system or attic space(s) shall not imply an extension of scope of this inspection. It is recommended that if professional opinion or certifications are needed for these areas, that the interested parties contact a qualified, licensed roofing contractor.
- (c) **SHEDS AND OUTBUILDINGS.** Sheds, garages, carports, decks, or other structures which are not attached to the main structure are excluded from this report unless specifically requested and noted. The inspecting firm reserves the right to charge additionally to inspect any unattached structures.
- (d) **CARPENTER ANT DORMANCY.** Due to the natural habits of carpenter ants to go dormant during the winter months, carpenter ants may go undetected if this inspection was performed during their dormant season. We do not assume any responsibility for carpenter ant infestations that were not detected during their dormant season.
- (e) **MINOR ROT CONDITIONS.** In certain geographical areas of Washington State where wet climate is common, a large percentage of structures are subject to minor rot conditions. While such conditions are technically fungi infestations they may not substantially affect the quality, structural soundness or anticipated future life of the structure. Such conditions as spot areas on doors, window casings, and common weathering on siding, and non-supporting wooden members shall not be reported on inspection reports except at the discretion of the inspecting firm for purposes of clarification only.
- (f) **STRUCTURAL ASSESSMENT.** While it may be possible for the pest inspector to note damaged materials, neither the inspector or the pest control firm is liable nor responsible in any way to determine the structural integrity of any infested building materials. It is recommended that if professional opinions are needed in regards to this area that the interested party contact a qualified, licensed engineer or building contractor.
- (g) **REQUIREMENTS OF OTHERS.** Inspection standards shall not be altered by any person, private or government agency on any given Structural Wood Destroying Organism inspection report.

**IV. REPORTS.**

No report shall be issued by the inspecting firm unless a state licensed inspector from that firm has made a careful and thorough inspection of the structure in conformity with these standards. Reports shall be subject to III. LIMITATIONS OF INSPECTIONS.

- (a) **PRELIMINARY REPORTS.** Any report, whether pertaining to an initial or subsequent inspection, which discloses current visible evidence of wood destroying organisms or conducive conditions shall be considered a Preliminary Report only. As such, a Preliminary Report should not be relied upon for the closing of any real estate transaction and necessary steps should be taken to obtain a Final Report. Preliminary Reports shall contain inspection findings and shall recommend procedures necessary to obtain a Final Report. In addition, Preliminary Reports shall include a diagram to help identify locations of wood destroying organism infestations, infections, and/or conducive conditions.
- (b) **FINAL REPORT.** A wood destroying organism inspection Final Report shall be issued when the inspecting firm performing the inspection has found no visible evidence of active wood destroying organisms or conducive conditions in the subject structure.

**V. WORK RECOMMENDATIONS AND TREATMENTS.**

- (a) **WARRANTIES.** No Final Report shall be issued unless those firms which contract to perform all or part of the work recommendations, warrant the quality of workmanship and the effectiveness of such work for a minimum period of one year from the date of completion. As used in these standards, the term "warranty" shall mean that, should the effectiveness of any work performed fail, the contracting firm shall correct the workmanship or perform additional treatments to eliminate infestations at no charge.
- (b) **THIRD PARTY AGREEMENT.** Should the owner, purchaser, or other interested party elect to perform all or part of the work recommendations or to contract with a contractor other than the inspecting firm, the owner, buyer, or other interested party shall provide a written agreement certifying that either he and/or the contractor performing the work has completed the recommendations as specified in the inspection report and agree to assume full liability for, hold the inspecting firm harmless for any defects in the work performed [including but not limited to defects resulting from non-compliance with the Uniform Building Code (current revision)], and that all work is warranted for a minimum period of one year.
- (c) **CONDITIONS REVEALED DURING PERFORMANCE OF RECOMMENDATIONS.** Should any wood destroying organism, damage, or conducive condition be revealed during the performance of any recommendations, whether performed by the owner, the purchaser, a contractor, or any other party in interest, the inspecting firm must be notified of such conditions for the purpose of having a reasonable opportunity of re-inspection and determining any additional work recommendations before such conditions are covered. The owner, the purchaser, or any party undertaking the work shall be responsible for such notification. The inspecting firm, if notified as provided in this paragraph, shall perform an additional inspection to determine and document, at its discretion, any additional finding and/or recommendations that may be necessary to obtain a Final Report. Nothing contained herein shall prevent the inspecting firm from assessing additional charges for each additional inspection.

