FILED
Court of Appeals
Division II
State of Washington
9/20/2019 12:59 PM

No. 52913-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Nathaniel D. Cumming and Jennifer Cumming, and the marital community comprised thereof,

Appellants

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent

and

Brighton Enterprises, Inc. and Ross Kolditz,

Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This Appeal from the Trial Court's proper granting of Respondent's Motion for Summary Judgment arises from a case filed by the Appellant under a rental insurance policy for a purported "vandalism" claim arising from an undisclosed business use at the insured location that was clearly and unequivocally not covered by the terms of the rental insurance contract.

Summary Judgment and dismissal of the contract, tort and statutory claims are proper for the following four (4) reasons:

1. The breach of contract claim fails as a matter of law because the ***claimed loss was not covered*** under the policy.
2. The breach of contract claim fails as a matter of law because the policy ***does not cover structures at the insured location used for business***.
3. The breach of contract claim fails as a matter of law because the ***policy is void based on concealment or a material misrepresentation*** about the business use of the property.
4. The claims for bad faith and statutory violations (CPA and IFCA) fail as a matter of law, based on the ***prompt investigation*** and ***reasonable denial of the claim***.

Respondent respectfully submits and requests that this non-covered insurance claim and related tort and statutory litigation be brought to an end

by affirming the Trial Court's grant of Summary Judgment. Additionally, Appellants erroneously request a review of the Trial Court's decision granting Respondent's Motion to Set Aside Default Judgment, which is argued fully below.

II. STATEMENT OF THE CASE

This Appeal arises from a rental dwelling insurance coverage lawsuit between Appellants Nathaniel Cumming and Jennifer Cumming ("Appellants" or "Cumming") and Respondent, USAA Casualty Insurance Company ("Respondent" or "USAA") alleging four claims for Breach of Contract, Insurance Bad Faith, Consumer Protection Act ("CPA"), and Insurance Fair Claims Act ("IFCA"). Cumming's tenants, Brighton Enterprises, Inc. and Ross Kolditz ("Brighton"), were also involved in the lawsuit, but are not involved in this appeal. (CP 1-11.)

Appellants are the owners of a single family home located at 3622 Ryan Street SE, Lacey, Washington 98503 (the "Property"). (CP 2 ¶ 1; CP 213.) On October 1, 2015, Appellants hired Vanguard Realty, Inc. ("Vanguard") to manage their rental property. (CP 2 ¶ 10-12; CP 3 ¶ 18-20; CP 299–304.)

Cumming requested a quote for rental insurance from USAA for their property on September 29, 2015 (CP 236 ¶ 5.) USAA provided a quote over the phone, which was based upon Cumming's ***representation that***

their rental property would not be used for business. (*Id.*) Soon thereafter, USAA issued a rental property policy to Cumming[1] providing property loss and liability coverage for their rental property located at 3622 Ryan Street SE, Lacey, Washington 98503 (the "Policy"). (CP 2 ¶ 8; CP 3 ¶ 14; CP 237 ¶6; CP 243-297.)

The insurance policy only covers a home used for residential purposes and explicitly ***does not cover properties used for business*** because ***USAA does not issue residential Rental Property Insurance that will be used for business purposes.*** (CP 260; CP 282; CP 287; CP 237 ¶ 7-9.) On October 26, 2015, the property was leased to Kolditz to use for his ***business***. (CP 3 ¶ 20; CP 199 ¶ 5; 305–323.) On November 14, 2017 at approximately 9:50am CT, Cumming reported their ***business tenant who ran an assisted living facility at their property*** may have been operating a methamphetamine laboratory. (CP 9-10 ¶ 80-89; CP 199 ¶ 5; CP 203-204.)

During the insurance application process, after the policy was issued, and ***during the two year period of the business tenancy,*** Cumming had ***never informed USAA*** that their property was being ***used for business purposes***. (CP 3 ¶ 20-21; CP 199 ¶ 5; CP 203-204; CP 226; CP 236 ¶ 5; CP 237 ¶ 7-9; CP 260; CP 282; CP 287.)

[1] USAA rental insurance policy number 02416 19 23 80A, effective October 13, 2015.

Cumming's failure to tell USAA the subject property was being used for business purposes is ***concealment*** and a ***material misrepresentation*** under the policy, because if USAA had known the property was used for business, they would not have issued the Policy to Cumming or would have voided the policy because of the high risk nature business exposure to USAA. (CP 237 ¶ 7-9; CP 260; CP 282; CP 287.) Regardless of what Cumming knew or when, it does not change the undisputed material fact that the Cumming's insurance policy with USAA did not cover structures used for business. (*Id.*) The entire policy was voidable from the beginning of the policy term because of Cumming's concealment and material misrepresentation. (CP 280.)

Immediately after Cumming reported a possible loss to USAA on the morning of November 14, 2017, USAA began an investigation into Cumming's reported loss, by calling, speaking with, and sending an email to the owner of BioClean,[2] asking them to conduct an assessment for methamphetamine levels inside the home. (CP 199-200 ¶¶ 6-7; CP 206–207; CP 209–211.) Therefore, ***USAA's response to the claim was prompt***

[2] BioClean is a corporation located in Marysville, WA, https://www.biocleanwa.com/. The website describes the company as "Disaster response, biohazard & meth lab cleanup, crime scene cleaners serving Washington." BioClean is certified with the Washington State Department of Health as a "Drug Lab Clean Up Company," and the owner, Theresa Borst, who USAA communicated with directly during the investigation, is a Supervisor certified for drug lab decontamination with ID # S032-17R pursuant to RCW 64.44.060.

and reasonable.

BioClean then prompty inspected the property on November 16, 2017, sent fouteen (14) samples out for testing, and prepared a report dated November 22, 2017 concerning the methamphetamine levels in the home. (CP 213-224.) BioClean's report concluded methamphetamine residue was present, but the levels were less than what would be required for decontamination under Washington State clean up guidelines. Therefore, BioClean did not recommend to decontaminate the home. (CP 214-215; Revised Code of Washington ("RCW") §§ 64.44.010(2), (4)(a); 64.44.070; Washington State Register ("Wash. St. Reg.") 15-01-041; Washington Administrative Code ("WAC") 246-205-541(1).) ***USAA's investigation was reasonable.***

Although Cumming acknowledged to USAA on November 26, 2017 they would ***not*** have to decontaminate their property according to Washington state guidelines, they nonetheless sought coverage for removal of all drywall, all finishing products, carpets, flooring, duct systems, etc. (CP 200 ¶¶ 8, 9; CP 226.) USAA sent a letter to Cumming dated December 20, 2017 denying Cumming's claim for multiple, specific reasons verifiable at that time. (CP 200-201 ¶¶ 9-10; CP 228-229; CP 231–234.) Therefore, ***USAA's denial was reasonable.***

Following the denial of coverage, Cumming sent USAA an IFCA

notification letter and subsequently commenced this lawsuit with the filing of their Complaint on March 6, 2018. (CP 1-11.)

III. RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED BY THE TRIAL COURT

Respondent filed a Motion for Summary Judgment, which the Trial Court properly granted in open court during oral argument on November 16, 2018, dismissing all of Cumming's claims against USAA. (CP 175-442; CP 645-655.) In issuing its ruling granting Respondent's Motion for Summary Judgment, the Trial Court did not strike any portion of the record and, therefore, considered the entire record when deciding to grant Respondent's Motion for Summary Judgment. (CP 649–655).

The Trial Court also held it was undisputed that Cumming's property was being used for business and Cumming had failed to disclose the business use of the premises to USAA after the insurance policy began. (CP 652:17-23.) The Court confirmed that Cumming's failure to disclose the business use of the property supported dismissal of the breach of contract claim against USAA. (CP 654:3-8.) Therefore, Cumming's breach of contract claim fails, as a matter of law.

The Court also ruled in open court that USAA had ***reasonably*** denied Cumming's claim as a matter of law based upon ***uncontested*** facts. (CP 652:6-23; 652-653:24-17.) The Court held there was no issue of

material fact with regard to the methamphetamine levels because "the record is clear that there was an amount of methamphetamine found at the premises and that it was below the level that is specified in the WAC." (CP 654:16-21; WAC 246-205-541(1).) Finally, the Court ruled that USAA was not estopped from modifying its reasons for denial on summary judgment. (CP 652-653:24-8.)

With those considerations, the Court concluded Cumming could not make out a prima facie case for breach of contract, bad faith, CPA, or IFCA, and dismissed those claims as a matter of law. On December 21, 2018, the Trial Court signed the order granting Respondent USAA's Motion for Summary Judgment and dismissed all of Cumming's claims against USAA. (CP 646-647). Respondent respectfully requests that this Court affirm the Trial Court's grant of their Motion for Summary Judgment and dismissal of Cumming's claims against USAA. (CP 646-647.)

IV. COUNTERSTATEMENT OF THE ISSUES

1. Whether Summary Judgment dismissing Cumming's breach of contract cause of action should be affirmed where the ***claimed loss was not covered by the policy***?
2. Whether Summary Judgment dismissing Cumming's breach of contract cause of action should be affirmed where the policy ***does not cover structures used for business at the insured***

location?

3. Whether Summary Judgment dismissing Cumming's breach of contract cause of action should be affirmed where the policy ***is voided by Cumming's concealment/misrepresentations regarding the business use of the property***?
4. Whether Summary Judgment dismissing Cumming's bad faith, CPA, and IFCA claims should be affirmed where ***USAA reasonably denied Cumming's claims*** of coverage under the rental property insurance policy based on a prompt and reasonable investigation into Appellants' claims?

V. STANDARD OF REVIEW

The Trial Court's order granting Respondent's Motion for Summary Judgment is subject to *de novo* review. (*Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).) The Court of Appeals performs the same inquiry as the trial court and should affirm the order granting summary judgment when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." (*Id.*, quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).)

The Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. (*Lakey*, 176 Wn.2d at 922.) However, the nonmoving party "may not rest upon

the mere allegations or denials of his pleading" to resist a motion for summary judgment. CR 56(e). If a plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then the defendant's motion for summary judgment should be granted. (*Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).) A trial court ruling, including a grant of summary judgment, may be affirmed on any ground supported by the record, even if the trial court did not consider it. (*Estep v. Hamilton*, 148 Wn. App. 246, 255-56, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).)

VI. THERE WAS NO BREACH OF THE INSURANCE CONTRACT AS A MATTER OF LAW

1. The Claimed Loss Was Not Covered By the Insurance Policy

Cumming's initial report to USAA of a possible loss claimed their assisted living facility ***business tenant*** *may* have been running a methamphetamine laboratory in the residence. (CP 9-10 ¶ 80-89; CP 199 ¶ 5; CP 203-204.) The material part of this claim is that Cumming had a business tenant, not that Cumming *suspected* the business tenant was running a methamphetamine laboratory. After USAA denied their claim, Cumming then changed their story in their Complaint to allege they had suffered "vandalism damage" because of a methamphetanie laboratory,

even though they could produce no ***evidence of vandalism*** or ***any duty for USAA to decontaminate*** the property. (CP 3 ¶ 13; CP 3 ¶ 15; CP 5 ¶ 37; CP 200 ¶8-9.)

Under Washington law, it is ***the insured's burden*** to "prov[e] the loss is a covered occurrence within the policy period," which Appellant has failed to prove. (*Walla Walla College v. Ohio Cas. Ins. Co.*, 149 Wash. App. 726, 730 (2009) (emphasis added) (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash. 2d 50, 70 (1994)).) In other words, the burden is on Appellant to establish that "the loss falls within the scope of the policy's insured losses." (*Schwindt v. Underwriters at Lloyd's of London*, 81 Wash. App. 293, 298 (1996), *review denied*, 130 Wash. 2d 1003 (1996).)

In this case, Cumming has failed to meet this burden to establish that a loss occurred that was covered by the rental insurance policy.

a. No Decontamination of the Property Was Required Under Washington's Statutory Requirements

Washington decontamination standards were never triggered based upon BioClean's test results. (CP 215; CP 213-224, RCW 64.44.010(2), (4)(a), 64.44.070; Wash. St. Reg. 15-01-041; WAC 246-205-541(1).) Cumming has failed to produce any evidence or argument that USAA should be forced to "clean up" or "cover" a property that did not require

decontamination. Cumming even acknowledged on November 28, 2017 they ***were not required to decontaminate their home***. (CP 226.) Therefore, Cumming's claim for removal of all drywall, all finishing products, carpets, flooring, duct systems, etc. was not covered under the policy. (CP 200 ¶¶ 8, 9; CP 226.)

The mere presence of chemical residue, found to be less than the minimum safe levels by the Washington State Department of Health, does not trigger a duty by USAA to decontaminate the property or replace walls and ducts, as Cumming had requested. A positive reading from a methamphetamine test does not mean the property was "contaminated." (WAC 246-205-010.)

Under the Revised Code of Washington, decontamination is only necessary when a property is "contaminated" to the point where "*the property is unfit for human habitation or use* due to immediate or long-term hazards." (emphasis added) (RCW 64.44.010(2), (4)(a).)

The Washington State Department of Health is responsible for determining rules and standards for decontaminating properties in Washington. (RCW 64.44.070.) Pursuant to their statutory authority, the Washington Health Department determined that decontamination of methamphetamine residue is only required when the test results are greater than 1.5 µg/100 cm^2. (Wash. St. Reg. 15-01-041; WAC 246-205-541(1).)

In this case, BioClean's test results revealed the methamphetamine levels were less than the state's clean up requirements and therefore, there was nothing to decontaminate.

Methamphetamines are considered "hazardous chemicals" when the methamphetamine residue is found in "***amounts exceeding the decontamination standards set by the department [of Health]. . .*** ." (RCW § 64.44.010(4)(a) (emphasis added).) The Administrative Code states if methamphetamine residue readings are **greater** than 1.5 micro grams per 100 square centimeters, decontamination is required. (WAC 246-205-541(1).) Therefore, if the methamphetamine residue is equal to or less than 1.5 micro grams per 100 square centimeters, then there is no hazardous chemical that has contaminated the property and the property is deemed fit for human habitation or use. (RCW 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC 246-205-541(1).)

The reason for this threshold requirement is important because if there was no bright line, an insurer would always be required to ignore any statutory guidelines and be forced to remediate *any* contamination that resulted in *any* measured level of pollutant residue. That means every building containing asbestos or lead or mercury contaminants in the air would *always* need to be remediated regardless of the guidelines set by the Environmental Protection Agency under 40 CFR § 61.140 et seq. or by the

Washington Health Department in Washington Administrative Code § 246-205-541. Not only is this an untenable result, it is also unreasonable. The methamphetamine remediation standards in Washington were set for a reason: to establish a health based standard for methamphetamine decontamination. (Wash. St. Reg. 15-01-041.) Therefore, it was reasonable for USAA to rely on the statutory guidelines to determine there was no contamination and no reason to decontaminate the Cumming's property.

b. <u>Since there was No Decontamination Required, there was No Covered Vandalism Claim</u>

Appellant argues that contamination by methamphetamine was vandalism as determined by the *Graff* and *Bowers* courts. (Appellants' Opening Brief pg 28-29.) The *Graff* court held that the "*operation of a methamphetamine laboratory* is vandalism [and] a covered event under [an insurance] policy". (*Graff v. Allstate Ins. Co.*, 113 Wash. App. 799 (2002).)

The *Graff* court explicitly held it was the presence of a methamphetamine laboratory that results in coverage under the vandalism provision of an insured's policy because it is the act of "cooking or mixing" methamphetamines that leads to the contamination of the property. (*Id.* at 805-06.) The *Graff* court came to this conclusion because the presence of a methamphetamine laboratory was supported by the police investigation that uncovered evidence of methamphetamines and the *manufacturing* of

methamphetamines. (*Id.*)

Cumming failed to meet his burden of proving coverage under *Graff* or the vandalism provision of their policy because he has not proven contamination or the existence of a methamphetamine laboratory. Appellants have presented no evidence that refutes the presumption that ***there was no methamphetamine contamination and therefore no methamphetamine laboratory***, which distinguishes the fact of this case from *Graff*. Furthermore, Appellants have presented no evidence to rebut the presumption that Cumming failed to call the police or file a police report, alleging vandalism. (CP 491-569; Appellants' Opening Brief.). Therefore, Appellants' reliance on *Graff* is misplaced.

The *Bowers* Court conducted the same analysis and concluded that because the mold damage would not have occurred but for the tenants running a marijuana operation within the basement of the insured's home, the operation was the proximate cause of the loss and fell within the vandalism provision of the insured's policy. (*Bowers v. Farmers Ins. Exch.*, 99 Wash. App. 41 (2000).) In that case, the insureds proved there was mold damage caused by the tenants requiring cleaning that cost $14,802.90 to clean up. (*Id.* at 43.)

In contrast, Appellants have not proven methamphetamine damage occurred that necessitated decontamination, thus failing to meet their

burden to prove that there was a loss covered under the vandalism provision of their policy. USAA conducted a reasonable investigation into whether there was a methamphetamine laboratory by asking a state-certified decontamination company to investigate the claim. (CP 199-200 ¶¶ 6, 7; CP 206-207; CP 209-211; CP 213-224.) USAA reasonably relied on BioClean's report that confirmed the presence of methamphetamine residue ***below Washington State clean up guidelines***. (*Id.* ¶¶ 6, 7, 9; CP 206-207; CP 209-211; CP 215; CP 213-224; CP 228-229)

The policy language also states that Cumming had a duty to "promptly notify" USAA about the loss and to "Notify the police in case of loss by theft, **vandalism**, or any other criminal act," which Cumming ***failed to do***. (CP 275; CP 491-569; Appellants' Opening Brief,.)

With no evidence there was a methamphetamine laboratory or vandalism, there is no coverage under the vandalism provision of their insurance policy. Therefore, when USAA denied coverage under Cumming's Policy, the decision was not made in error and Cumming's breach of contract claim fails as a matter of law.

c. <u>There Were No "Sudden and Accidental Damages" to the "Dwelling," so There was No "Loss"</u>

Cumming failed to meet their burden to prove any damage fell within the scope of the policy's insured losses because there was no ***sudden***

and accidental loss to any tangible property in the "dwelling." (*Walla Walla College v. Ohio Cas. Ins. Co.*, 149 Wash. App. 726, 730 (2009) (emphasis added) (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash. 2d 50, 70 (1994)).)

Insurance contracts are interpreted through "the same construction that an 'average person purchasing insurance' would give the contract.'" (*Woo v. Fireman's Fund Ins. Co.*, 161 Wash. 2d 43, 52 (2007) (quoting *Butzberger v. Foster*, 151 Wash. 2d 396 (2004)).) Here, the rental insurance policy clearly explains USAA covers "sudden and accidental" losses, which means "an abrupt, fortuitous event which is unexpected or unintended from the perspective of a reasonable person." (CP 259.)

SECTION I – LOSSES WE COVER

> **COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES**
>
> We insure against "**sudden and accidental**" direct physical loss to tagible property described in SECTION I – PROPERTY WE COVER – COVERAGES A and B unless excluded in SECTION I – LOSSES WE DO NOT COVER.
>
> (CP 268.)

However, Cumming can point to no evidence that shows their property suffered any abrupt or unintended loss covered by the policy. Furthermore, the policy covers the "dwelling on the 'described location,'" (CP 260) which means a place of residence. A business, even a business

used as an assisted living facility, is not a dwelling under the meaning of the policy. Therefore, Cumming failed to meet their burden to prove their claim was covered by the policy and their breach of contract claim fails.

d. Since the Property was Used for Business Purposes, the Claim is Not Covered Under the Policy

Even if the Court determined there was a loss, *which Respondent emphatically denies*, Cumming's policy with USAA ***does not cover any structures used for business.*** (CP 260; CP 282; CP 287.) The rental insurance contract states, "***We do not cover: . . . Structures used in whole or part for "business"*** unless such use consists solely of use of office space for paperwork, computer work or use of a telephone," etc. (emphasis added.) (CP 260.)

Under the policy, whether a business is being run at the ***insured location*** is what matters, and not who is running the business. The unambiguous language of the Exclusions Section of the policy states:

SECTION II – EXCLUSIONS

1. COVERAGE L – Personal Liability . . . do[es] not apply to "bodily injury" or "property damage":

* * *

b. (1) Arising out of or in connection with a "business" conducted ***from an "insured location"*** or engaged in by any "insured", ***whether or not the "business" is owned or operated by an "insured"*** or employs an "insured". This exclusion applies but is not limited to an act or omssion, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the

nature of the "business".

(emphasis added) (CP 282.)

Therefore, USAA would ***not*** be required to pay benefits for this alleged loss (even if Cumming had ever proven there was a loss, which they did not do) because no benefits are owed if the property was used for a business.

e. <u>The Concealment and Material Misrepresentation Regarding the Business Use of the Property is Grounds to Void the Policy</u>

USAA has a right to deny coverage or void the policy when the coverage was obtained based upon Cumming's concealment or misrepresentation. "A misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented." (*Onyon v. Truck Ins. Exch.*, 859 F. Supp. 1338, 1341 (W.D. Wash. 1994) (quotations omitted) (citation omitted).) If the insured made material misstatements to the insurer, then the policy is void. (*Id.* at 1343.)

Washington law does not require that an insured have an *intent* to conceal or deceive. If a risk would have resulted in the insurer not issuing the policy had the risk been disclosed, ***then the misrepresentation <u>is</u> material***. (*Karpenski v. Am. Gen. Life Cos.*, LLC, 999 F. Supp. 2d 1235, 1244 (W.D. Wash. 2014) (citations omitted).) Regardless, "where a false

statement has been knowingly made, there is a presumption that it was made with intent to deceive." (*Kay v. Occidental Life Ins. Co.*, 28 Wash. 2d 300, 302 (1947) (citations omitted).) In the event "the insured discovers a false statement, he or she must bring it to the attention of the insurance company. If the insured does not do this, he or she ratifies the answers." (*Brown v. Jackson Nat'l Life Ins. Co.*, 48 Wash. App. 268, 274 (1987), *review denied*, 109 Wash. 2d 1004 (1987).) Where an insured conceals or misrepresents to the insurance company the intended usage of the property, the insurance policy obtained based upon those misrepresentations cannot be enforced.

If USAA had been aware that the property was going to be used as a business, it would not have issued a rental property policy to Cumming. (CP 237 ¶¶ 7-9.) Therefore, ***not disclosing the property was being used for business is a material misrepresentation under the policy***. (CP 9-10 ¶ 80-89; CP 199 ¶ 5; CP 203-204; *Mut. Life Ins. Co. of N.Y. v. Campbell*, 170 Wash. 485, 491 (1932).) "Business exposures at an insured location must be carefully underwritten to ensure the insured has adequate coverage, understands the contractual limitations, and to ensure USAA does not unknowingly insure an unacceptable risk." (*Id.* ¶ 7.) For example, a homeowners or rental policy would not be issued to an insured because of the following types of high risk business exposures:

- "Full time business operation with employees and/or

frequent visitors

- Business equipment, supplies, or products not typically found in a private residence that significantly increase the likelihood of a covered loss
- Overnight accommodations (Bed and breakfast, hospice, assisted living, etc.)"

(*Id.* ¶ 8.)

Cumming requested a quote over the phone and did not fill out a paper or electronic application for insurance coverage. Sandra Sausman reviewed the circumstances surrounding Cumming's request for a quote and noted that Cumming had stated the subject property was ***not going to be used for business purposes***. (CP 236 ¶ 5.) However, at some point before reporting the loss on November 14, 2017, Cumming was aware the rental property was being used for business purposes. (CP 199 ¶ 5-8; CP 203-204; 226.)

Before USAA issued the policy, Cumming had entered into a management agreement with Vanguard Realty. (CP 239 ¶ 4; CP 299-304; CP 3 ¶¶ 18-19.) Within days of USAA issuing the policy to Cumming, Vanguard Realty entered into a lease agreement with Ross Kolditz, who also listed Brighton Enterprise, Inc.'s information. (CP 239 ¶ 4; CP 306-323; CP 3 ¶¶ 19-20; CP 237 ¶ 6.) Brighton was Cumming's business tenant

for ***two years*** from 2015 to 2017. (CP 3 ¶¶ 19-21; CP 8-10 ¶¶ 64-91; CP 199 ¶ 5; CP 203-204; CP 226; CP 236 ¶ 5; CP 239 ¶ 4; CP 306-323.) Once Cumming learned their property was being used for business purposes, they had a duty to inform USAA of the business use of the property. (CP 288-289.)

These facts raise the presumption that Cumming purposefully did not disclose that the subject property was being used for business purposes. (*Music v. United Ins. Co. of Am.*, 59 Wash. 2d 765, 769 (1962).) Respondent's Motion for Summary Judgment raised an inference that Cumming was aware their property was being used for business use, which Cumming failed to rebut in their Opposition to USAA's MSJ or in their Appellate Brief. (CP 184; *Kay v. Occidental Life Ins. Co*., 28 Wash. 2d 300, 301 (1947).) Indeed, an examination of the record reveals Appellant did not provide one single sentence that states simply their tenant was not using the property for business *or* they were not aware a business was operating on their property. (CP 491–569). In other words, Appellant does not deny knowing that the subject property was being run as an assisted living facility and they do not deny failing to report the usage of the rental property as a business.[3] (CP 3 ¶¶ 19-21, 64-91; CP 199 ¶¶ 5, 8; CP 203-204; CP 226.)

[3] At oral argument on November 16, 2018, Cumming's counsel indicated Cumming was aware the policy did not allow utilizing the premises for business or commercial use. (November 16, 2018 Transcript, Pg 13:6-20.)

The unambiguous, binding language of the insurance policy clearly states that USAA may deny coverage or void the policy if the insured has intentionally concealed or misrepresented any material fact or circumstance; or engaged in fraudulent conduct relating to this insurance; or made false statements with the intent to deceive which, if known by us would have caused us not to: (a) Issue the policy; . . ." (CP 280.)

SECTION I – CONDITIONS

* * *

15. Concealment, Misrepresentation or Fraud.

a. At our option we may **deny coverage or declare the entire policy void** from the beginning of the policy term if **you** or any other "**insured**", whether before or after the loss, has:

(1) **Intentionally concealed or misrepresented any material fact or circumstance**;

* * *

(3) **Made false statements with the intent to deceive which, if known by us, would have caused us not to**:

(a) **Issue the policy**;
(b) Issue the policy in as large an amount;
(c) **Provide coverage for the hazard resulting in the loss**; or
(d) Issue the policy for the same amount of premium or at the same rate.

(emphasis added) (CP 280.)

Because of Cumming's concealment or material misrepresentation, the policy is void and the contract claim fails, as a matter of law.

VII. THE PROMPT INVESTIGATION AND DENIAL OF THE CLAIM WERE REASONABLE AND, THEREFORE, THE BAD FAITH, CPA AND IFCA CLAIMS FAIL AS A MATTER OF LAW

"[A] reasonable basis for denial of an insured's claim constitutes a **complete defense** to any claim that the insurer acted in bad faith or in violation of the [CPA]." (*Shields v. Enter. Leasing Co*., 139 Wash. App. 664, 676 (2007) (quotations omitted) (emphasis added) (quoting *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wash. App. 245, 260 (1996), *review denied*, 131 Wash. 2d 1018 (1997)).)

Appellant claims that Respondent's denial was unreasonable because they failed to reasonably investigate the claim (WAC 284-30-330), failed to disclose all the relevant policy provisions (WAC 284-30-350), and state the specific grounds for denial of the claim (WAC 284-30-380). However, the Washington Supreme Court has made it clear that an insured cannot sue their insurance carrier for alleged regulatory violations. The insured must prove that USAA ***unreasonably denied a claim for coverage*** or ***unreasonably denied payment of benefits.*** Only then does a claim for IFCA emerge. (*Hanson v. State Farm Mut. Auto. Ins. Co.,* 261 F. Supp. 3d

1110, 1116 (W.D. Wash. 2017)).

In Washington, "[a]n action for bad faith handling of an insurance claim sounds in tort." (*St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wash. 2d 122, 130 (2008) (quotation omitted) (citation omitted).) To establish a breach of the common law duty of good faith, an insured is required to prove that the insurer's action was "unreasonable, frivolous, or unfounded." (*Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wash. 2d 903, 916 (2007) (en banc) (quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 560 (1998) (en banc)).)

The Washington Supreme Court has considered whether an insured can sue her insurance company under IFCA for Washington regulatory violations. The court held that insureds have no private cause of action under IFCA against insurers for violating the Washington Administrative Code (WAC). *Id.* at 482–83. "The insured must show that the insurer unreasonably denied a claim for coverage *or* that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA." (*Perez–Crisantos v. State Farm Fire and Casualty Co.*, 187 Wash.2d 669, 389 P.3d 476, 479 (2017), citing *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wash.App. 52, 322 P.3d 6, 20 (2014).)

Respondent respectfully requests that this Court affirm the Trial Court's ruling that its denial of Cumming's claims was ***reasonable.*** (November 16, 2018 Hearing Transcript, pg 32.)

1. <u>The Denial of Coverage was Based on a Prompt and Reasonable Investigation and, Consequently, Not in Bad Faith</u>

An insurer does not act in bad faith where it "acts honestly, bases its decision on adequate information, and does not overemphasize its own interest." (*Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wash. App. 804, 808 (2005) (footnote omitted), *review denied*, 157 Wash. 2d 1004 (2006).) The determinative question concerning bad faith is the reasonableness of the insurer's actions in light of all the facts and circumstances of the case. (*Anderson v. State Farm Mut. Ins. Co.*, 101 Wash. App. 323, 329-30 (2000) (citation omitted), *review denied*, 142 Wash. 2d 1017 (2001).)

Here, USAA's coverage determination was based upon the investigation conducted by BioClean. (CP 200-201 ¶¶ 9, 10; CP 228-229; CP 231-234.) USAA requested that BioClean investigate the Cumming's methamphetamine contamination claim. (CP 199-200 ¶ 6; CP 206-207; 209-211.) BioClean determined that the methamphetamine residue did not trigger the cleanup requirements as defined by Washington regulations and administrative codes. (CP 200 ¶ 7; CP 213-224.) Because there was no duty to decontaminate the subject property, USAA reasonably denied

coverage and the Cumming's desired remediation of gutting and rebuilding the interior of the home. (CP 200-201 ¶¶ 9, 10; CP 228-229; CP 231-234.) Based upon the information USAA had after its investigation into the Cumming's claim, it reasonably denied coverage, thereby precluding the Cumming's bad faith claim.

Even if this determination was in error, *which it was not because it was based upon the clean-up standards set by the State of Washington*, the error was a reasonable one. Based upon Washington statutory standards and BioClean's test results, it was reasonable for USAA to conclude that the Cumming's subject property did not need to be decontaminated. (RCW §§ 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC § 246-205-010(5) (6) (9), §246-205-541; CP 200-201 ¶¶ 7–10; CP 213-224; CP 228-229; CP 231-234.) At no time did USAA, or its adjuster, Ariana Mendez ("Mendez"), act with ill will or with the intent to cause Cumming harm. (CP 201 ¶ 12.) USAA was willing to consider and review any additional information or evidence Cumming may have had concerning the methamphetamine residue. (CP 201 ¶¶ 11-13.) USAA's actions were never unreasonable, frivolous, or unfounded, which precludes any claim for bad faith damages.

2. <u>The Denial of Coverage was Not Unfair or Deceptive and, Consequently, Not a Violation of the CPA</u>

The Consumer Protection Act ("CPA") provides that unfair or

deceptive acts in the conduct of trade or commerce are unlawful. (RCW § 19.86.020.) To prevail on a CPA claim, a plaintiff must prove five elements: (1) the defendant engaged in an unfair or deceptive act; (2) the act occurred in trade or commerce; (3) the act impacted the public interest; (4) the plaintiff was injured in his or her business or property; and (5) the act actually caused injury. (*Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780 (1986) (en banc), *rev'g*, 1984 WL 921205 (1984).)

USAA did not engage in any unfair or deceptive acts. It properly denied coverage because the duty to decontaminate the subject property was not triggered as defined by the Washington Statute and Administrative Code. (RCW 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC 246-205-241(1); CP 200-201 ¶¶ 7, 9, 10; CP 213-224; CP 228-229; CP 231-234.) This denial of coverage does not impact the public because, per the Washington Administrative Code, BioClean's methamphetamine residue test results were well below the decontamination standards. (RCW 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC 246-205-241(1); CP 200 ¶ 7; CP 213-224.)

As there was no legal or medical requirement to remediate the subject property, the claimed loss was not covered under the policy and the Appellants' CPA claim fails as a matter of law.

3. **The Denial of Coverage was Reasonable and, Consequently, Not a Violation of IFCA**

The Insurance Fair Claims Act ("IFCA") establishes a cause of action for first party insurance claimants in certain, narrow circumstances. In order to qualify for relief under the IFCA, an insurer must have "**unreasonably** denied a claim for coverage or payment of benefits". (RCW § 48.30.015(1) (emphasis added).) The insured must also provide proof of "actual damages sustained," and cannot recover absent damages. (*Id.*)

Appellant alleges that Respondent violated IFCA and WAC 284-30-330 by unreasonably denying benefits, failing to settle their claims, misrepresenting facts, failing to conduct a reasonable investigation, and forcing them to seek legal assistance to recover their policy benefits. (Complaint ¶¶ 35-40.) However, USAA reasonably investigated the Cummings' claim of methamphetamine contamination. (CP 199-200 ¶¶ 6, 7, 9; CP 206-207; CP 209-211; CP 213-224; CP 228-229.) BioClean initiated an investigation at USAA's request. (CP 199-200 ¶¶ 6, 7; CP 206-207; CP 209-211; CP 213-224.) Based upon BioClean's report, it was determined that USAA's duty to decontaminate the subject property was not triggered by Washington decontamination standards and, therefore, the ***claimed loss was not covered*** under the policy. (RCW 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC 246-205-241(1); CP 200 ¶¶ 7, 9, 10; CP

213-224; CP 228-229; CP 231-234.). USAA's denial was not unreasonable.

The property was not contaminated per the Washington methamphetamine decontamination guidelines. (RCW 64.44.010(2), 64.44.010(4)(a), 64.44.070; WAC 246-205-241(1); CP 200 ¶ 7; CP 213-224.) Those guidelines set the standard for what constitutes or triggers the necessity to decontaminate a property subject to methamphetamine residue. Even Appellant admits that the measured methamphetamine residue does not give rise to the necessity of having to remediate per Washington standards. (CP 200 ¶ 8; CP 226.) Therefore, Appellants' IFCA claim also fails.

Notwithstanding the misrepresentations made by the Appellants, Respondent did not act in bad faith, nor did it violate the CPA or IFCA because the denial for coverage was reasonable and is a complete defense to their extracontractual damages claims.

4. <u>The Concealment and Material Misrepresentation Regarding the Business Use of the Property Preclude Bad Faith and Extracontractual Damages</u>

"Washington follows the rule that the doctrine of equitable estoppel is available to innocent parties only." (*Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wash. 2d 643, 651 (1988), *reconsideration denied*, July 15, 1988, (citing *Christman v. Gen. Constr. Co.*, 2 Wash. App. 364, 365 (1970), *review denied*, 78 Wash. 2d 994 (1970)).) When an insured has

misrepresented a material fact to the insurer, the court will not award damages to the insured. (*Cox*, 110 Wash. 2d at 652.)

Cumming was required to disclose to USAA that their property would be used for business purposes during the application process for their rental property. (CP 236 ¶ 5.) Had they done so, then USAA would not have issued the rental property policy. (CP 236-237 ¶¶ 5, 7-9.) The business would have posed too great a risk to be covered under a rental property policy. (CP 237 ¶¶ 7, 8.) However, Cumming never reported that the subject property was being used for business purposes until after the loss, even though they knew for two years that the property was being used for business purposes. (CP 236 ¶ 5; CP 3 ¶¶ 19-21, CP 8-11 ¶¶ 64-91; CP 199-200 ¶¶ 5, 8; CP 203-204; CP 226.) Furthermore, Cumming had ***two years*** from October 1, 2015 until October 2017 to notify USAA, but never did. Therefore, based upon their concealment, misrepresentation and false statements, Appellant should be estopped from asserting any extracontractual or bad faith claims against Respondent.

VIII. RESPONDENT IS NOT PREVENTED FROM ASSERTING ADDITIONAL REASONS FOR DENYING APPELLANTS' CLAIMS

Appellant incorrectly argues that Respondent is estopped from denying coverage because they asserted "new" grounds for denying their claim in their Motion for Summary Judgment. (CP 524-528.) The Trial

Court specifically concluded "that USAA is not estopped from modifying its reasons for denial, and so the Court is basing its ruling also on the reasons put forth by USAA for denial, some of which have not been factually contested by the plaintiff, some of which have been." (CP 652-653.)

Washington law requires that only when an insurer "voluntarily and intentionally relinquish[] a known right or that their conduct 'warrants an interference of the relinquishment of such right'" will the insurer waive the right. (*Saunders v. Lloyd's of London*, 113 Wash. 2d 330, 339-40 (1989) (en banc) (quoting *PUD 1 v. WPPSS*, 104 Wash. 2d 353, 365 (1985)).) Furthermore, a failure to inform, by itself, does not amount to the relinquishment and waiver necessary to bar assertion of the defense. (*Specialty Surplus Ins. Co. v. Second Change, Inc*., No. C03-0927C, 2006 WL 2459092 at *13 (W.D. Wash. Aug. 22, 2006).)

For the Appellant to prevail under the "mend the hold" doctrine by way of estoppel, there must be a showing of a voluntary and intentional relinquishment of a particular right. While Respondent raised additional grounds for its denial in its Motion, it never waived them, and never modified its original basis for the denial. Respondent still argues that there is no coverage because "removal and replacement of [their] drywall, all finishing products, flooring and duct systems or other repairs [were not] needed." (CP 200-201 ¶¶ 8-10; CP 231-234.)

Appellant claims they were prejudiced by the "new" grounds for denial. However, it was Appellants' duty to prove they suffered prejudice or that Respondent acted in bad faith when it did not raise all its grounds for denial in its denial letter. (*Hayden v. Mut. Of Enumclaw Ins. Co*., 141 Wash. 2d 55, 63 (2000) (citations omitted).) Appellants have not pointed to any evidence of such prejudice or made any effort at all do to so, aside from making bare assertions they were "clearly prejudiced." (Appellants' Opening Brief, pg 27-28.)

Raising additional reasons for denying the claim does not prejudice Appellants as the claim has already been denied. Appellants were aware of BioClean's report, its conclusions that remediation was not necessary per the Washington guidelines, and USAA's stance that remediation was not necessary pursuant to BioClean's Report and the Washington guidelines. (CP 200-201 ¶¶ 8-10; CP 226; CP 228-229; CP 231-234.) Furthermore, the original denial was not made in bad faith. The adjuster, Mendez, had already communicated with Cumming (prior to issuing its formal denial letter) that the minute traces of methamphetamine contamination found at the subject property was not required to be remediated under the Washington guidelines and that their claim was not covered. (CP 200 ¶ 9; CP 228-229.) This communication was made after BioClean also concluded that no remediation was necessary. (CP 200 ¶ 7; CP 213-224.) Therefore, the facts

of this case do not trigger coverage by estoppel.

Respondent respectfully requests this Court affirm the Trial Court's ruling that it is not estopped from modifying its reasons for denial. (CP 652-653; November 16, 2018 Verbatim Report of Proceedings, pg 32-33.)

IX. THE TRIAL COURT PROPERLY SET ASIDE THE ENTRY OF DEFAULT

Appellants request that this Court reconsider Respondent's Motion to Set Aside Default against USAA granted on June 1, 2018. (CP 28-44; CP 87-94; CP 637-638.). The Trial Court did not err when it entered its order granting the Motion to Set Aside Default and this Court should affirm that ruling.

Washington courts also favor litigation on the merits, rather than deafulting a party out of litigation. The *Griggs* Court held "[j]ustice will not be done if hurried defaults are allowed any more than continuing delays are permitted…." (*Griggs v. Averbeck Realty, Inc.* 92 Wash.2d 576, 582 (1979).) As such, the Washington Supreme Court liberally sets aside default judgments for equitable reasons in the interests of fairness and justice. (*Morin v. Burris*, 160 Wash.2d 745, 749 (2007).)

Requests to set aside the entry of default should be liberally granted where good cause to do so exists. (*In re Estate of Stevens*, 94 Wash. App. 20, 30 (1999) ("*In re Estate of Stevens*"; *Seek Sys., Inc. v. Lincoln*

Moving/Glob. Van Lines, Inc., 63 Wash. App. 266, 271 (1991) ("*Seek Sys., Inc.*").) Good cause exists when a party can show both due Diligence and excusable neglect, which USAA demonstrated in this case. (CP *In re Estate of Stevens, supra,* 94 Wash. App. at 30; *Seek Sys., Inc., supra*, 63 Wash. App. at 271.)

The due diligence standard is assessed by courts based on how quickly the defendant reacted after being advised of the entry of default. (*In re Estate of Stevens, supra,* 94 Wash.App. at 35.) Here, USAA and its counsel acted quickly after learning of the entry of default and filed its answer shortly thereafter. (CP 28-44.) A review of the record shows the due diligence of USAA's attorneys cannot be reasonably disputed.

Most significantly, the cases Appellant cites in their Opposition and Opening Brief of Appellant entirely ignore and fail to address the findings of the Supreme Court in *White*, a case that squarely addressed the standards for setting aside defaults under Washington law. (*White v. Holm*, 73 Wash.2d 348 (1968) ("White").) In *White*, the Washington State Supreme Court granted a Motion to Set Aside Default Judgment despite the fact that the defendant had failed to answer the complaint. (*White, supra,* Wash. 2d at 50.) However, in this case, the existence of excusable, good faith neglect here cannot be reasonably disputed. USAA's counsel made a good faith calendaring mistake that it quickly corrected. (*See* Motion, at 5-7.)

Cumming has faced no disadvantage in litigating this case on the merits. Furthermore, USAA's counsel offered to compensate Cumming's counsel for his reasonable fees and costs incurred in seeking the entry of default.

Based upon the standards provided by both the Washington Supreme Court and the Court of Appeals, this Court should affirm the Trial Court's order granting USAA's Motion to Set Aside the Entry of Default.

X. CONCLUSION

Based on the foregoing and the designation of Clerk's Papers cited herein, Respondent respectfully requests this Court affirm the Trial Court's grant of their Motion for Summary Judgment and dismissal of Cumming's claims against USAA and Motion to Set Aside Entry of Default.

DATED this 20th day of September 2019.

Respectfully submitted,
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Appendix A

RCW 19.86.020

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

NOTES:

Hearing instrument dispensing, advertising, etc.—Application: RCW 18.35.180.

Appendix B

RCW 48.30.015

RCW 48.30.015

Unreasonable denial of a claim for coverage or payment of benefits.

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

(4) "First party claimant" means an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.

(5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";

(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";

(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";

(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";

(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or

(f) An unfair claims settlement practice rule adopted under RCW **48.30.010** by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.

(7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW **48.43.005**. "Health carrier" has the same meaning as in RCW **48.43.005**.

(8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

[2007 c 498 § 3 (Referendum Measure No. 67, approved November 6, 2007).]

NOTES:

Short title—2007 c 498: "This act may be known and cited as the insurance fair conduct act." [**2007 c 498 § 1.**]

Appendix C

RCW 64.44.010

RCW 64.44.010

Definitions.

The words and phrases defined in this section shall have the following meanings when used in this chapter unless the context clearly indicates otherwise.

(1) "Authorized contractor" means a person who decontaminates, demolishes, or disposes of contaminated property as required by this chapter who is certified by the department as provided for in RCW 64.44.060.

(2) "Contaminated" or "contamination" means polluted by hazardous chemicals so that the property is unfit for human habitation or use due to immediate or long-term hazards. Property that at one time was contaminated but has been satisfactorily decontaminated according to procedures established by the state board of health is not "contaminated."

(3) "Department" means the department of health.

(4) "Hazardous chemicals" means:

(a) Methamphetamine in amounts exceeding the decontamination standards set by the department when found in transient accommodations such as hotels, motels, bed and breakfasts, resorts, inns, crisis shelters, hostels, and retreats that are regulated by the department; and

(b) The following substances associated with the illegal manufacture of controlled substances: (i) Hazardous substances as defined in RCW 70.105D.020; (ii) precursor substances as defined in RCW 69.43.010 which the state board of health, in consultation with the pharmacy quality assurance commission, has determined present an immediate or long-term health hazard to humans; and (iii) the controlled substance or substances being manufactured, as defined in RCW 69.50.101.

(5) "Officer" means a local health officer authorized under chapters 70.05, 70.08, and 70.46 RCW.

(6) "Property" means any real or personal property, or segregable part thereof, that is involved in or affected by the unauthorized manufacture, distribution, storage, or use of hazardous chemicals. This includes but is not limited to single-family residences, units of multiplexes, condominiums, apartment buildings, transient accommodations, boats, motor vehicles, trailers, manufactured housing, any shop, booth, garden, or storage shed, and all contents of the items referenced in this subsection.

[2017 c 115 § 2; 2013 c 19 § 49; 2006 c 339 § 201; 1999 c 292 § 2; 1990 c 213 § 2.]

NOTES:

Intent—Part headings not law—2006 c 339: See notes following RCW 74.34.020.

Finding—Intent—1999 c 292: "The legislature finds that the contamination of properties used for illegal drug manufacturing poses a threat to public health. The toxic chemicals left behind by the illegal drug manufacturing must be cleaned up to prevent harm to subsequent

occupants of the properties. It is the intent of the legislature that properties are decontaminated in a manner that is efficient, prompt, and that makes them safe to reoccupy." [**1999 c 292 § 1.**]

Effective date—1990 c 213 §§ 2, 12: "Sections 2 and 12 of this act are necessary for the immediate preservation of the public peace, health, or safety or support of the state government and its public institutions, and shall take effect on the effective date of the 1989-91 supplemental omnibus appropriations act (SSB 6407) [April 23, 1990] if specific funding for this act is provided therein." [**1990 c 213 § 17.**]

Appendix D

RCW 64.44.060

RCW 64.44.060

Certification of contractors, supervisors, or workers—Denial, suspension, revocation, or restrictions on certificate—Penalties—Fees.

(1) A contractor, supervisor, or worker may not perform decontamination, demolition, or disposal work unless issued a certificate by the state department of health. The department shall establish performance standards for contractors, supervisors, and workers by rule in accordance with chapter **34.05** RCW, the administrative procedure act. The department shall train and test, or may approve courses to train and test, contractors, supervisors, and workers on the essential elements in assessing contaminated transient accommodations or property used as an illegal controlled substances manufacturing or storage site to determine hazard reduction measures needed, techniques for adequately reducing contaminants, use of personal protective equipment, methods for proper decontamination, demolition, removal, and disposal of contaminated property, and relevant federal and state regulations. Upon successful completion of the training, and after a background check, the contractor, supervisor, or worker shall be certified.

(2) The department may require the successful completion of annual refresher courses provided or approved by the department for the continued certification of the contractor or employee.

(3) The department shall provide for reciprocal certification of any individual trained to engage in decontamination, demolition, or disposal work in another state when the prior training is shown to be substantially similar to the training required by the department. The department may require such individuals to take an examination or refresher course before certification.

(4) The department may deny, suspend, revoke, or place restrictions on a certificate for failure to comply with the requirements of this chapter or any rule adopted pursuant to this chapter. A certificate may be denied, suspended, revoked, or have restrictions placed on it on any of the following grounds:

(a) Failing to perform decontamination, demolition, or disposal work under the supervision of trained personnel;

(b) Failing to perform decontamination, demolition, or disposal work using department of health certified decontamination personnel;

(c) Failing to file a work plan;

(d) Failing to perform work pursuant to the work plan;

(e) Failing to perform work that meets the requirements of the department and the requirements of the local health officers;

(f) Failing to properly dispose of contaminated property;

(g) Committing fraud or misrepresentation in: (i) Applying for or obtaining a certification, recertification, or reinstatement; (ii) seeking approval of a work plan; and (iii) documenting completion of work to the department or local health officer;

(h) Failing the evaluation and inspection of decontamination projects pursuant to RCW **64.44.075**; or

(i) If the person has been certified pursuant to RCW **74.20A.320** by the department of social

and health services as a person who is not in compliance with a support order or a *residential or visitation order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license or certificate shall be automatic upon the department's receipt of a release issued by the department of social and health services stating that the person is in compliance with the order.

(5) A contractor, supervisor, or worker who violates any provision of this chapter may be assessed a fine not to exceed five hundred dollars for each violation.

(6) The department of health shall prescribe fees as provided for in RCW **43.70.250** for: The issuance and renewal of certificates, conducting background checks of applicants, the administration of examinations, and the review of training courses.

[**2017 c 115 § 3; 2013 c 251 § 6; 2006 c 339 § 206; 1999 c 292 § 7; 1997 c 58 § 878; 1990 c 213 § 7**.]

NOTES:

***Reviser's note:** 1997 c 58 § 886 requiring a court to order certification of noncompliance with residential provisions of a court-ordered parenting plan was vetoed. Provisions ordering the department of social and health services to certify a responsible parent based on a court order to certify for noncompliance with residential provisions of a parenting plan were vetoed. See RCW **74.20A.320**.

Residual balance of funds—Effective date—2013 c 251: See notes following RCW **41.06.280**.

Intent—Part headings not law—2006 c 339: See notes following RCW **74.34.020**.

Finding—Intent—1999 c 292: See note following RCW **64.44.010**.

Short title—Part headings, captions, table of contents not law—Exemptions and waivers from federal law—Conflict with federal requirements—Severability—1997 c 58: See RCW **74.08A.900** through **74.08A.904**.

Effective dates—Intent—1997 c 58: See notes following RCW **74.20A.320**.

Appendix E

RCW 64.44.070

RCW 64.44.070

Rules and standards—Chapter administration, property decontamination.

(1) The state board of health shall promulgate rules and standards for carrying out the provisions in this chapter in accordance with chapter 34.05 RCW, the administrative procedure act. The local board of health and the local health officer are authorized to exercise such powers as may be necessary to carry out this chapter. The department may provide technical assistance to local health boards and health officers to carry out their duties under this chapter.

(2) The department shall adopt rules for decontamination of a property used as a laboratory for the production of controlled substances and methods for the testing of porous and nonporous surfaces, groundwater, surface water, soil, and septic tanks for contamination. The rules shall establish decontamination standards for hazardous chemicals, including but not limited to methamphetamine, lead, mercury, and total volatile organic compounds.

[2009 c 495 § 7; 2006 c 339 § 207; 1999 c 292 § 8; 1990 c 213 § 9.]

NOTES:

Effective date—2009 c 495: See note following RCW 43.20.050.

Intent—Part headings not law—2006 c 339: See notes following RCW 74.34.020.

Finding—Intent—1999 c 292: See note following RCW 64.44.010.

Appendix F

WAC 246-205-010

WASHINGTON STATE LEGISLATURE

WAC 246-205-010

Definitions.

For the purposes of this chapter, the following words and phrases shall have the following meanings unless the content clearly indicates otherwise.

(1) "Authorized contractor" means any person or persons:

• Registered under chapter **18.27** RCW; and

• Certified by the department to decontaminate, demolish, or dispose of contaminated property as required by chapter **64.44** RCW and this chapter.

(2) "Basic course" means a training course which has been sponsored or approved by the department for workers and supervisors who perform or supervise decontamination on illegal drug manufacturing or storage sites.

(3) "Certificate" means a department issued written approval under this chapter.

(4) "Certified" means a person who has department issued written approval under this chapter.

(5) "Contaminated" or "contamination" means polluted by hazardous chemicals so that the property is unfit for human habitation or use due to immediate or long-term hazards. Property that at one time was contaminated, but has been satisfactorily decontaminated according to procedures established by the state board of health is not "contaminated."

(6) "Decontamination" means the process of reducing levels of known contaminants to the lowest practical level using currently available methods and processes.

(7) "Department" means the Washington state department of health.

(8) "Disposal of contaminated property" means the disposition of contaminated property under the provisions of chapter **70.105** RCW.

(9) "Hazardous chemicals" means the following substances used in the manufacture of illegal drugs:

• Hazardous substances as defined in RCW **70.105D.020**; and

• Precursor substances as defined in RCW **69.43.010** which the state board of health, in consultation with the pharmacy quality assurance commission, has determined present an immediate or long-term health hazard to humans.

(10) "Illegal drug manufacturing or storage site" means any property where a person illegally manufactures or stores a controlled substance or a law enforcement agency or the property owner believes a person illegally manufactured or stored a controlled substance.

(11) "Initial site assessment" means the first evaluation of a property to determine the nature and extent of observable damage and contamination.

(12) "List of contaminated properties" means a list of properties contaminated by illegal drug manufacturing or the storage of hazardous chemicals.

(13) "Local department" means the jurisdictional local health department or district.

(14) "Local health officer" means a health officer or authorized representative as defined under chapters **70.05**, 70.08, and **70.46** RCW.

(15) "Person" means an individual, firm, association, copartnership, political subdivision,

government agency, municipality, industry, public or private corporation, or other entity.

(16) "Posting" means attaching a written or printed announcement conspicuously on property which may be, or is determined to be, contaminated by illegal drug manufacturing or the storage of a hazardous chemical.

(17) "Property" means any site, lot, parcel of land, structure, or part of a structure involved in the illegal manufacture of a drug or storage of a hazardous chemical including, but not limited to:

- Single-family residences;
- Units or multiplexes;
- Condominiums;
- Apartment buildings;
- Motels and hotels;
- Boats;
- Motor vehicles;
- Trailers;
- Manufactured housing;
- Any ship, booth, or garden; or
- Any site, lot, parcel of land, structure, or part of a structure that may be contaminated by previous use.

(18) "Property owner" means a person with a lawful right of possession of the property by reason of obtaining it by purchase, exchange, gift, lease, inheritance, or legal action.

(19) "Refresher course" means a department sponsored or approved biennial training course for decontamination workers and supervisors. An approved refresher course:

- Reviews the subjects taught in the initial training course; and
- Includes updated information on emerging decontamination technology.

(20) "Storage site" means any property used for the storage of hazardous chemicals or illegally manufactured controlled substances.

(21) "Supervisor" means a person certified by the department and employed by an authorized contractor who is on site during the decontamination of an illegal drug manufacturing or storage site and who is responsible for the activities performed.

(22) "Warning" means a sign posted by the local health officer conspicuously on the site of an illegal drug manufacturing or storage site informing potential occupants that hazardous chemicals may exist on, or have been removed from, the premises and that entry is unsafe.

(23) "Worker" means a person certified by the department and employed by an authorized contractor who performs decontamination of an illegal drug manufacturing or storage site.

[Statutory Authority: 2013 c 19 and RCW **64.44.070**. WSR 15-09-108, § 246-205-010, filed 4/20/15, effective 5/21/15. Statutory Authority: RCW **64.44.070**. WSR 03-02-022, § 246-205-010, filed 12/23/02, effective 1/23/03. Statutory Authority: RCW **64.40.070** [64.44.070] and chapter **64.44** RCW. WSR 92-10-027 (Order 268B), § 246-205-010, filed 4/29/92, effective 5/30/92. Statutory Authority: RCW **64.44.060** and **64.44.070**. WSR 92-02-017 (Order 223SB), § 246-205-010, filed 12/23/91, effective 1/23/92. Statutory Authority: RCW **64.44.060** and chapter **64.44** RCW. WSR 91-04-007 (Order 125SB), § 246-205-010, filed 1/24/91, effective 4/1/91.]

Appendix G

WAC 246-205-541

WAC 246-205-541

Decontamination standards.

The decontamination standards include:

(1) Methamphetamine of less than or equal to 1.5 micro grams per 100 square centimeters;

(2) Total lead of less than or equal to 20 micro grams per square foot;

(3) Mercury of less than or equal to 50 nano grams per cubic meter in air; and

(4) Volatile organic compounds (VOCs) of 1 part per million total hydrocarbons and VOCs in air.

[Statutory Authority: RCW **69.44.070**. WSR 15-01-041, § 246-205-541, filed 12/9/14, effective 1/9/15; WSR 03-02-022, § 246-205-541, filed 12/23/02, effective 1/23/03.]

Appendix H

WAC 284-30-330

WASHINGTON STATE LEGISLATURE

WAC 284-30-330

Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation.

(5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.

(10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver payment, whether by check, draft, electronic funds transfer, prepaid card, or other method of electronic payment to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 16-20-050 (Matter No. R 2016-12), § 284-30-330, filed 9/29/16, effective 10/30/16; WSR 09-11-129 (Matter No. R 2007-08), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.]

Appendix I

WAC 284-30-350

WASHINGTON STATE LEGISLATURE

WAC 284-30-350

Misrepresentation of policy provisions.

(1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

(2) No insurance producer or title insurance agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim for failure to exhibit the property without proof of demand and unfounded refusal by a claimant to do so.

(4) No insurer shall, except where there is a time limit specified in the policy, make statements, written or otherwise, requiring a claimant to give written notice of loss or proof of loss within a specified time limit and which seek to relieve the company of its obligations if such a time limit is not complied with unless the failure to comply with such time limit prejudices the insurer's rights.

(5) No insurer shall request a first party claimant to sign a release that extends beyond the subject matter that gave rise to the claim payment.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage which contain language which release the insurer or its insured from its total liability.

(7) No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

[Statutory Authority: RCW **48.02.060** (3)(a) and **48.17.010**(5). WSR 11-01-159 (Matter No. R 2010-09), § 284-30-350, filed 12/22/10, effective 1/22/11. Statutory Authority: RCW **48.02.060**, **48.44.050** and **48.46.200**. WSR 87-09-071 (Order R 87-5), § 284-30-350, filed 4/21/87. Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 78-08-082 (Order R 78-3), § 284-30-350, filed 7/27/78, effective 9/1/78.]

Appendix J

WAC 284-30-380

WASHINGTON STATE LEGISLATURE

WAC 284-30-380

Settlement standards applicable to all insurers.

(1) Within fifteen working days after receipt by the insurer of fully completed and executed proofs of loss, the insurer must notify the first party claimant whether the claim has been accepted or denied. The insurer must not deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to the specific provision, condition, or exclusion is included in the denial. The denial must be given to the claimant in writing and the claim file of the insurer must contain a copy of the denial.

(2) If a claim is denied for reasons other than those described in subsection (1) and is made by any other means than in writing, an appropriate notation must be made in the claim file of the insurer describing how, when, and to whom the notice was made.

(3) If the insurer needs more time to determine whether a first party claim should be accepted or denied, it must notify the first party claimant within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed. If after that time the investigation remains incomplete, the insurer must notify the first party claimant in writing stating the reason or reasons additional time is needed for investigation. This notification must be sent within forty-five days after the date of the initial notification and, if needed, additional notice must be provided every thirty days after that date explaining why the claim remains unresolved.

(4) Insurers must not fail to settle first party claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

(5) Insurers must not continue negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney until the claimant's rights may be affected by a statute of limitations or a policy or contract time limit, without giving the claimant written notice that the time limit may be expiring and may affect the claimant's rights. This notice must be given to first party claimants thirty days and to third party claimants sixty days before the date on which any time limit may expire.

(6) The insurer must not make statements which indicate that the rights of a third party claimant may be impaired if a form or release is not completed within a specified period of time unless the statement is given for the purpose of notifying the third party claimant of the provision of a statute of limitations.

(7) Insurers are responsible for the accuracy of evaluations to determine actual cash value.

[Statutory Authority: RCW **48.02.060** and **48.30.010**. WSR 09-11-129 (Matter No. R 2007-08), § 284-30-380, filed 5/20/09, effective 8/21/09; WSR 78-08-082 (Order R 78-3), § 284-30-380, filed 7/27/78, effective 9/1/78.]

Appendix K

Wash. St. Reg. 15-01-041

the other hospitals is proportional to each hospital's share of the particular DSH program.

(c) This subsection does not apply to the DSH independent audit findings and recoupment process described in WAC 182-550-4940.

(17) All information related to a hospital's DSH application is subject to audit by the agency or its designee. The agency determines the extent and timing of the audits. For example, the agency or its designee may choose to do ((~~a desk review~~)) an audit of an individual hospital's DSH application and/or supporting documentation, or audit all hospitals that qualified for a particular DSH program after payments have been distributed under that program.

(18) If a hospital's submission of incorrect information or failure to submit correct information results in DSH overpayment to that hospital, the agency will recoup the overpayment amount((~~, in accordance with the provisions of~~)) as allowed in RCW 74.09.220 and ((~~43.20B.695~~)) chapter 41.05A RCW.

(19) DSH calculations use fiscal year data, and DSH payments are distributed based on funding for a specific SFY. Therefore, unless otherwise specified, changes and clarifications to DSH program rules apply for the full SFY in which the rules are adopted.

NEW SECTION

WAC 182-550-4940 Disproportionate share hospital independent audit findings and recoupment process. (1) In order to comply with federal law and regulation (42 U.S.C. 1396r-4 (j)(2); 42 C.F.R. Part 455, Subpart D), the medicaid agency contracts with an independent auditor to conduct an annual, independent, certified audit of the agency's disproportionate share hospital (DSH) payments. Chapter 182-502A WAC is not applicable to the independent, certified audits described in this section.

(2) Hospitals must comply with the agency's or the auditor's requests for documentation. A hospital's failure to provide requested documentation may result in a finding that any or all of the DSH payments for the audited year are overpayments.

(3) Beginning in state fiscal year 2011, an audit finding that demonstrates DSH payments made to a hospital in that year exceeded the documented hospital-specific DSH cap (as defined in WAC 182-550-4900(3)), is considered a discovery of an overpayment under 42 C.F.R. Part 433, Subpart F.

(4) Hospitals must return overpayments to the agency for redistribution to qualifying hospitals. A qualifying hospital is defined as a disproportionate share hospital that has a positive hospital-specific DSH cap.

(5) The additional DSH payment to be given to each of the other qualifying hospitals from the recouped amount is proportional to each hospital's share of the particular DSH program. Only the recouped payments are redistributed among those eligible DSH hospitals that have a remaining positive hospital-specific DSH cap.

(6) The independent auditor will provide preliminary audit results to each hospital that received DSH payments, including a statement as to whether the hospital's payments did or did not exceed the hospital's DSH cap. Hospitals identified as receiving DSH payments exceeding their hospital-specific DSH cap may request additional information on the preliminary audit results. The agency must receive the hospital's request for the additional information on the preliminary audit results no later than the last working day in November of the year in which the audit is conducted.

(7) In response to a hospital's timely request under subsection (6) of this section, the independent auditor will provide the hospital with at least the following information specific to the requesting hospital:

(a) Calculation of the medicaid inpatient utilization rate (MIUR);

(b) Regular inpatient and outpatient medicaid fee for service basic rate payments;

(c) Supplemental/enhanced inpatient and outpatient medicaid payments;

(d) Total medicaid payments;

(e) Total cost of care;

(f) Total cost of care of the uninsured; and

(g) A provider data summary schedule (PDSS) to compare to the agency's report required by 42 C.F.R. Sec. 447.299, Subpart E.

(8) Under this section, a hospital may only dispute an overpayment. An overpayment hearing is held under WAC 182-502-0230.

WSR 15-01-041
PERMANENT RULES
DEPARTMENT OF HEALTH

[Filed December 9, 2014, 9:06 a.m., effective January 9, 2015]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 246-205-541 Decontamination standards, the purpose of this rule revision is to establish a health-based methamphetamine decontamination standard of 1.5 micrograms per 100 square centimeters.

Citation of Existing Rules Affected by this Order: Amending WAC 246-205-541 Decontamination standards.

Statutory Authority for Adoption: RCW 69.44.070.

Adopted under notice filed as WSR 14-19-110 on September 17, 2014.

A final cost-benefit analysis is available by contacting Vicki M. Bouvier, P.O. Box 47822, Olympia, WA 98504, phone (360) 236-3011, fax (360) 236-2250, e-mail vicki.bouvier@doh.wa.gov.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 1, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making:

New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: December 9, 2014.

Dennis E. Worsham
Deputy Secretary
for John Wiesman, DrPh, MPH
Secretary

AMENDATORY SECTION (Amending WSR 03-02-022, filed 12/23/02, effective 1/23/03)

WAC 246-205-541 Decontamination standards. The decontamination standards include:

(1) Methamphetamine of less than or equal to ((~~0.1~~)) 1.5 micro grams per 100 square centimeters;

(2) Total lead of less than or equal to 20 micro grams per square foot;

(3) Mercury of less than or equal to 50 nano grams per cubic meter in air; and

(4) Volatile organic compounds (VOCs) of 1 part per million total hydrocarbons and VOCs in air.

WSR 15-01-042
PERMANENT RULES
DEPARTMENT OF AGRICULTURE

[Filed December 9, 2014, 9:07 a.m., effective January 9, 2015]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This rule-making order amends chapter 16-324 WAC, Certification of seed potatoes, by:

(1) Repealing the requirement for laboratory testing of lots entered in the postharvest testing for PVY;

(2) Clarifying the definition of seed potato farm;

(3) Requiring a certificate of compliance for evidence of eligibility for the transfer of seed lots between seed potato farms;

(4) Authorizing the department to permit seed growers to plant lots in which the eligibility hasn't been determined under certain conditions; and

(5) Including the bacterium *Candidatus liberibacter* with the tolerance for phytoplasmas.

Citation of Existing Rules Affected by this Order: Amending WAC 16-324-361, 16-324-375, 16-324-391, 16-324-398, and 16-324-409.

Statutory Authority for Adoption: RCW 15.14.015.

Other Authority: Chapter 34.05 RCW.

Adopted under notice filed as WSR 14-21-175 on October 22, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 5, Repealed 0.

Date Adopted: December 9, 2014.

Don R. Hover
Director

AMENDATORY SECTION (Amending WSR 13-12-014, filed 5/24/13, effective 6/24/13)

WAC 16-324-361 Definitions. "Certification" means that the lot of seed potatoes was inspected and meets the requirements of this chapter.

"Cull" means any lot of potatoes rejected for certification for any reason.

"Department" means the department of agriculture of the state of Washington.

"Director" means the director of the department of agriculture or his/her duly appointed representative.

"Disease tested" means tested for and found free of all of the following diseases: Potato virus A (PVA), potato virus M (PVM), potato virus S (PVS), potato virus X (PVX), potato virus Y (PVY), potato leafroll virus (PLRV), potato mop top virus (PMTV), potato spindle tuber viroid (spindle tuber), *Erwinia carotovora* ssp. *carotovora* (soft rot), *Erwinia carotovora* ssp. *atroseptica* (black leg) and *Clavibacter michiganense* spp. *sepedonicus* (ring rot).

"ELISA testing" means laboratory testing by enzyme-linked immunosorbant assay or other equivalent methodologies.

"Micropropagated" means potato stock propagated using aseptic laboratory techniques and culture media to promote plant tissue growth.

"Microtubers" means tubers produced in vitro by a micropropagated plant or plantlet.

"Minitubers" means tubers produced under controlled greenhouse conditions.

"Nematode" means plant parasitic nematodes capable of infesting potatoes, including but not limited to the genus *Meloidogyne*.

"Nuclear stock" means plantlets, microtubers, minitubers, or seed potatoes produced from prenuclear stock, and grown in the field for the first time.

"Plot" means a seed potato planting that is 0.25 acre or less in size.

"Powdery scab" means the disease caused by the fungus *Spongospora subterranea*.

"Prenuclear" means micropropagated plants or tubers and plants or minitubers produced in a greenhouse.

"Quarantine pest" means a pest of potential economic importance and not yet present in the state, or present but not widely distributed and being officially controlled.

"Recertification" means the process of certifying a seed lot that was certified the previous year.

"Rogue" means removing diseased or undesirable plants, including all associated plant parts, from a seed potato field.

Appendix L

Washington State Department of Health
Drug Lab Cleanup Companies

Drug Lab Cleanup Companies

Last update: April 19, 2019

The following list of contractor companies are certified by the Department of Health for drug lab decontamination . For a list of individuals certified to perform cleanup, see Workers and Supervisors Certified for Drug Lab Decontamination (PDF) .

A Best Construction, LLC

Service Area: Entire State

5001 SW Dawson Street, Seattle, WA 98136
Phone: 206-323-9025

14510 128th Street E, Puyallup, WA 98374
Phone: 253-435-5861

6300 NE 163rd Avenue, Vancouver, WA 98682
Phone: 360-571-3248

16630 SE Lillian Way, Portland, OR 97236
Phone: 503-492-2885

Email: info@abestenvironmental.com
Website: www.abestenvironmental.com

Certification Expires: 1/9/2020

A Bio Clean, Inc.

Service Area: Western Washington

PO Box 655, Lake Stevens, WA 98258

Phone: 1-888-412-6300 or 425-377-2303
Website: www.biocleanwa.com

Certification Expires: 1/7/2020

Abatement and Decontamination Specialists

2390 Peace Portal Dr #53, Blaine, WA 98230-9330

Phone: 360-223-2666
Email: abatement.nw@gmail.com
Website: www.getridofmeth.com

Certification Expires: 2/5/2020

Able Clean-up Technologies, Inc.

Service Area: Entire State (except King County and Pierce County)

4117 E Nebraska Avenue, Spokane, WA 99217

Phone: 1-866-466-5255 or 509-466-5255
Email: ablecleanup@ablecleanup.com
Website: www.ablecleanup.com

Certification Expires: 3/7/2020

Able Environmental, LLC

Service Area: Entire State

PO Box 9578, Tacoma, WA 98490

Phone: 253-566-5818
Email: ableenvironmental@hotmail.com

Certification Expires: 4/23/2020

Bio Management Northwest Inc.

Service Area: Entire State

19215 Southeast 34th Street, Camas, WA 98607

Phone 206-582-0583
Email: info@bionw.com
Website: www.bionw.com

Certification Expires: 5/21/2020

Meth Lab Cleanup Company

Service Area: Entire State

711 Capitol Way S, Suite 204, Olympia, WA 98501-1267

Phone: 1-800-959-6384
Western WA Phone: 206-397-1991
Central and Eastern WA Phone: 208-683-1974

Email: joe@methlabcleanup.com
Website: methlabcleanup.com , methlabtestkit.com

Roto-Rooter Plumbing Service

Service Area: Entire State

PO Box 29082, Bellingham, WA 98228

Phone: 360-384-6401
Email: cashcorporation@msn.com

Certification Expires: 11/2/2019

Wood Environmental and Infrastructure Solutions

Service Area: Entire State

4020 Lake Washington Blvd NE, Suite 200, Kirkland, WA 98033
Phone: 425-368-1000
Email: mike.s.smith@amec.com

221 S 28th Street, Suite 102, Tacoma, WA 98402
Phone: 253-572-0516
Email: david.braungardt@amec.com

7376 SW Durham Road, Portland, OR 97224
Phone: 503-639-3400
Email: sari.peterson@amec.com

Website: www.amec.com

Certification Expires: 8/20/2019

Disclaimer: This list of contractors is presented for information purposes only as required under the provision of RCW 64.44. This list does not constitute an endorsement or preference of these contractors.

Appendix M

Washington State Department of Health
Workers and Supervisors Certified for Drug Lab Decontamination

Workers and Supervisors Certified for Drug Lab Decontamination

WORKERS			
ID #	Expires on	Last Name	First Name
W026-17R	11/30/2019	RUIZ	EVERARDO
W171-17R	11/30/2019	STAVROS	NICKOLAS
W210-18	11/30/2019	BURNS	KIRK
W211-18	11/30/2019	MORGAN	JON
W212-18	11/30/2019	AMBROZY	GEORGE
W213-18	11/30/2019	GARCIA	ANDY
W214-17	11/30/2019	LINDE	APRIL

SUPERVISORS			
ID #	Expires on	Last Name	First Name
S008-17R	11/30/2019	VENABLE	TODD
S016-17R	11/30/2019	HAMILTON	HEIDI
S022-17R	11/30/2019	HAMILTON	WILLIAM
S032-17R	11/30/2019	BORST	THERESA
S030-17R	11/30/2019	SILVER	KIPP
S064-17R	11/30/2019	MAZZUCA	JOSEPH
S065-17R	11/30/2019	MAZZUCA	JULIE
S071-17R	11/30/2019	CASH	PAMELA
S077-17R	11/30/2019	MARTINEZ	LISA
S081-17R	11/30/2019	RUIZ	GONZALO
S087-17R	11/30/2019	MOLINE	JASON
S089-17R	11/30/2019	DALLEY	RANDALL
S090-17R	11/30/2019	LINDE	APRIL
S091-17R	11/30/2019	PARKE	TRAVIS
S092-17R	11/30/2019	PARKE	DEVIN
S093-17R	11/30/2019	RUIZ	JOSE
S094-17R	11/30/2019	QUALLS	CHRISTOPHER
S112-17R	11/30/2019	TONEY	JUSTIN
S118-17R	11/30/2019	STAVROS	JOHN
S121-17R	11/30/2019	MCPHERSON	JOEL
S129-17R	11/30/2019	KIMBALL	SUSAN
S132-17R	11/30/2019	CARPENTER	ROBERT
S138-17R	11/30/2019	ANDERSON	SUSAN
S139-17R	11/30/2019	HOLLAND	RHONDA
S140-17R	11/30/2019	JONES-CALHOUN	HUNTER
S143-17R	11/30/2019	DISIPIO	STEVE
S160-18	11/30/2019	AMBROZY	GEORGE
S161-17R	11/30/2019	SULLIVAN	ROGER
S162-17	11/30/2019	STURTZ	DARIN
S163-17	11/30/2019	CHRISTIANSEN	JACOB

Date Updated: November 27, 2018

For more information, see www.doh.wa.gov/druglabs or call 360-236-3385.

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Court of Appeals
Division II
State of Washington
9/20/2019 12:59 PM

No. 52913-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Nathaniel D. Cumming and Jennifer Cumming, and the marital community comprised thereof,

Appellants

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent

and

Brighton Enterprises, Inc. and Ross Kolditz,

Defendants.

DECLARATION OF SERVICE

Robert S. McLay (WSBA No. 32662)
Joshua N. Kastan (WSBA No. 50899)
Elizabeth G. Lunde (WSBA No. 51565)
Attorneys for United Services Automobile Association

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1700 7th Ave., Suite 2100, Seattle, WA 98101
Tel: (206) 407-2518

Declaration of Service

On said day below, I served via electronic e-service and U.S. Mail true and accurate copies of BRIEF OF RESPONDENT with APPENDICES to the following:

Neal E. Bonrud, Jr.
LAW OFFICES OF NEAL BONRUD, PLLC
22525 SE 64th Place, Suite 274
Issaquah, WA 98027

Phillip Haberthur
805 Broadway Street, Suite 1000
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Vancouver, WA 98666

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

DATED THIS 20TH day of September, 2019.

Respectfully submitted,

Summer Bertolet

DKM LAW GROUP, LLP

September 20, 2019 - 12:59 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52913-1
Appellate Court Case Title:	Nathaniel D. Cumming, et al., Apps v. United Services Automobile Assoc., Resp
Superior Court Case Number:	18-2-01338-8

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