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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 339297

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WILLIAM MERRIMAN AND COLLEEN MERRIMAN, husband and
wife,

Plaintiffs-Appellants,

v.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY;
YORK RISK SERVICES GROUP, INC.; PARTNERS CLAIM
SERVICES INC.; BERND MOVING SYSTEMS, INC.; a Washington
Corporation; DOUGLAS A. BERND AND JANE DOE BERND; and
JOHN DOES 1-5,

Defendants-Respondents.

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
	A. Factual background.....	2
	1. A fire destroyed Bernd Moving Systems, Inc.'s Yakima warehouse and its contents.....	2
	2. Bernd's insurer, American Guarantee, insured the property Bernd's customers stored at the warehouse.....	3
	3. Respondent York Risk Services Group, Inc. was hired to adjust all claims arising from the fire, but told none of the owners about the relevant coverage.	4
	4. The Merrimans learned of the coverage for their property in discovery after filing a lawsuit against Bernd.....	7
	5. York never made a good faith effort to adjust the owners' claims.....	9
	B. Class certification and summary judgment rulings.....	15
	1. The trial court approved a class settlement agreement with Partners.....	15
	2. The trial court granted class certification on all claims against all remaining defendants.	15
	3. The trial court granted in part York's first summary judgment motion.	17
	4. Even though the trial court permitted class claims against Partners and American	

	Guarantee, it decertified each remaining claim against York.	18
5.	After decertification of the York claims, the trial court dismissed each remaining claim against York.	19
IV.	ARGUMENT	19
A.	York is legally liable for its failure to properly advise the owners of their coverage and adjust their claims.	19
1.	York should be held liable for insurance bad faith.	20
2.	York violated the Consumer Protection Act.	23
3.	York should be held liable for its own negligence.	30
4.	York committed negligent misrepresentation.	36
B.	The trial court erred in decertifying the class claims against York because common issues predominate.	37
1.	Standard of review.	37
2.	The purpose of CR 23 is to resolve common legal issues as a whole.	39
3.	CR 23 class certifications requirements were satisfied at the time of class certification.	41
a.	Common issues predominate the customers' claims against York.	42
b.	A class action is superior to 38 individual lawsuits against York.	46
V.	CONCLUSION	47

TABLE OF AUTHORITIES

Federal Cases

<i>Blough v. Shea Homes, Inc.</i> , No. 2:12-CV-01493 RSM, 2014 WL 3694231 (W.D. Wash. July 23, 2014)	44
<i>Califano v. Yamasaki</i> , 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).....	39
<i>Collins v. Olin Corp.</i> , 248 F.R.D. 95 (D. Conn. 2008).....	45
<i>Doe v. Karadzic</i> , 192 F.R.D. 133 (S.D.N.Y. 2000)	38
<i>Grays Harbor Adventist Christian School v. Carrier Corp.</i> , 242 F.R.D. 568 (W.D. Wash. 2007)	44
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981).....	39
<i>Hickey v. City of Seattle</i> , 236 F.R.D. 659 (W.D. Wash. 2006)	40, 43
<i>J.S. v. Attica Cent. Sch.</i> , No. 00-CV-513S, 2011 WL 4498369 (W.D.N.Y. Sept. 27, 2011)	38
<i>Jermyn v. Best Buy Stores, L.P.</i> , 276 F.R.D. 167 (S.D.N.Y. 2011)	38
<i>Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA</i> , No. C08-1862RSL, 2009 WL 3444762 (W.D. Wash. Oct. 20, 2009)	<i>passim</i>

State Cases

<i>Aldrich & Hedman, Inc. v. Blakely</i> , 31 Wn. App. 16, 639 P.2d 235 (1982).....	19, 31, 32
<i>Anderson v. State Farm Mut. Ins. Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (2000).....	20
<i>Andry v. Murphy Oil, U.S.A., Inc.</i> , 710 So. 2d 1126 (La. Ct. App. 1998).....	45
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	33, 34
<i>Bodenhamer v. Superior Court</i> , 178 Cal. App. 3d 180, 223 Cal. Rptr. 486 (Ct. App. 1986)	30
<i>First State Ins. Co. v. Kemper Nat. Ins. Co.</i> , 94 Wn. App. 602, 971 P.2d 953 (1999).....	30, 31, 32
<i>Gentry v. Cotton Elec. Co-op., Inc.</i> , 268 P.3d 534 (Okla. Ct. App. 2010)	45
<i>Griffin v. Allstate Ins. Co.</i> , 108 Wn. App. 133, 29 P.3d 777 (2001)	22
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	24, 25, 27, 29
<i>Haueter v. Cowles Pub. Co.</i> , 61 Wn. App. 572, 811 P.2d 231 (1991).....	39
<i>Hockley v. Hargitt</i> , 82 Wn.2d 337, 510 P.2d 1123 (1973).....	24
<i>Indus. Indem. Co. of the Nw. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	29
<i>Klem v. Washington Mut. Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	24, 29

<i>Lloyd v. Allstate Ins. Co.</i> , 167 Wn. App. 490, 275 P.3d 323 (2012).....	23
<i>Miller v. Farmer Bros. Co.</i> , 115 Wn. App. 815, 64 P.3d 49 (2003).....	43
<i>Moeller v. Farmers Ins. Co. of Washington</i> , 173 Wn.2d 264, 267 P.3d 998 (2011).....	37, 40
<i>Morrison v. Warren</i> , 174 Misc. 233, 20 N.Y.S. 2d 26 (1940).....	44, 45
<i>Munich v. Skagit Emergency Commc'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	20
<i>Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.</i> , 168 Wn. App. 86, 285 P.3d 70 (2012).....	32
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	26, 27, 34, 44
<i>Rhodes v. AIG Domestic Claims, Inc.</i> , 961 N.E.2d 1067 (Mass. 2012).....	29
<i>Ross v. Kirner</i> , 162 Wn.2d 493, 172 P.3d 701 (2007).....	36
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	35
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	35
<i>Schwendeman v. USAA Cas. Ins. Co.</i> , 116 Wn. App. 9, 65 P.3d 1 (2003).....	37
<i>Sitton v. State Farm Mut. Auto Ins. Co.</i> , 116 Wn. App. 254, 63 P.3d 198 (2003).....	40, 43, 46
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	40, 43

<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003)	20, 23
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024 (2002)	37
<i>St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.</i> , 165 Wn.2d 122, 196 P.3d 664 (2008)	22
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007)	26
<i>Sutton Carpet Cleaners v. Firemen’s Ins. Co. of Newark, N.J.</i> , 68 N.Y.S.2d 218 (1947)	45
<i>Tank v. State Farm Fire & Casualty Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986)	22
State Statutes	
Consumer Protection Act	20, 23
Consumer Protection Act, chapter 19.86 RCW	8, 23
Ins.Code, §§ 790 et seq.	30
RCW 4.22.070	33
RCW 5.40.050	33
RCW 19.86.020	23
RCW 19.86.090	23
RCW 48.01.020	21
RCW 48.01.030	20, 21, 22, 33
RCW 48.01.070	21, 28
RCW 48.30.010	28
RCW 48.30.010(1)–(2)	28, 33

Rules

Civil Rule 12(b)(6).....21
Civil Rule 2339

Regulations

WAC 284-30-330.....28
WAC 284-30-330(1).....25, 28, 29
WAC 284-30-330(4).....28
WAC 284-30-350(1).....13, 14, 28

Other Authorities

5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE
 § 23.02 (3d ed. 2011)39
Restatement (Second) of Torts section 286 (1965).....33

I. INTRODUCTION

York Risk Services Group, Inc. (York) is a firm that provides insurance adjusting services to settle property claims. It was hired by American Guarantee & Liability Insurance Company (American Guarantee) and given the task of adjusting the claims of 38 property owners, all of whom lost property when a Yakima storage warehouse burned to the ground. Within two days of the fire, York noted that the American Guarantee policy provided not just liability coverage to the warehouse, but direct property coverage for property in the warehouse owner's "care, custody and control." CP 84. York told none of the owners about this coverage. In fact, it told its representatives speaking with the customers to say they did not know if there was any coverage.

Months later, Bill and Colleen Merriman started a negligence lawsuit against the warehouse owner. They had hundreds of thousands of dollars worth of property destroyed in the fire, but only approximately \$15,000 in homeowners' coverage because of limitations in their policy. It was then that they discovered the American Guarantee policy and learned that they had had coverage for their shortfall all along.

The Merrimans ask this Court to reverse the superior court's ruling dismissing the Merrimans' and all other owners' class claims against York based on its concealment of the available coverage.

II. STATEMENT OF THE ISSUES

1. Did the trial court err in dismissing all claims against York when York was responsible for adjusting all of the customers' losses but never disclosed the policy or explained the coverages?

2. Did the trial court err in decertifying the class claims against York when all claims arise out of the same course of conduct, the requirements of CR 23 were met, and York's handling of all the owners' claims was materially identical?

III. STATEMENT OF THE CASE

A. Factual background.

1. A fire destroyed Bernd Moving Systems, Inc.'s Yakima warehouse and its contents.

On August 5, 2012, a storage warehouse owned by Bernd Moving Systems, Inc. (Bernd) in Yakima, Washington, burned to the ground. CP 18. In addition to the warehouse itself, the personal belongings of 38 of Bernd's storage customers—including appellants Bill and Colleen Merriman—were also destroyed. *See* CP 2694.

At the time of the fire, Bernd's insurer, American Guarantee, hired CASE Forensics to examine the scene and produce a cause and origin report. CP 786. By October 2012, American Guarantee had adopted CASE Forensics' conclusion that the "likely cause of the fire was a cigarette." CP

1153. The cause of the fire was not disclosed to the Merrimans nor any of the other customers. CP 966–67.

2. Bernd’s insurer, American Guarantee, insured the property Bernd’s customers stored at the warehouse.

Bernd’s insurance policy covered “Business Personal Property.” By endorsement, this term was defined to include “[p]ersonal property of others in your care, custody and control.” CP 84. The policy therefore provided direct coverage for the owners’ property. The first party property coverage provided as follows:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

* * *

- b. Your Business Personal Property**
located in or on the building
described in the Declarations ...

II. Changes To The Building And Personal Property Coverage Form

* * *

B. The following paragraph is added to **b. Your Business Personal Property** of paragraph **1. Covered Property** of section **A. Coverage**:

Personal property of others in your care, custody and control. However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

CP 84, 88. The policy also provided additional coverages, such as coverage for "Fine arts," and for inventory and appraisal expense to cover the cost of preparing property inventories. CP 83, 85.

Coverage for the customers' losses was admitted by American Guarantee's CR 30(b)(6) designee:

Q. (BY MR. SMART:) Showing you Exhibit No. 6 to your deposition, sir, can we agree that this is the Bernd policy?

A. Yes.

Q. Can we agree that the Merrimans' property constitutes business personal property?

MR. BERNSTEIN: Object to the form of the question to the extent it calls for a legal conclusion.

A. **I believe that their property would be property under the policy, under the first party, property in the insured's care, custody or control, subject to exclusions and limitations.**

CP 1279. (emphasis added). York agreed as well. CP 953.

3. Respondent York Risk Services Group, Inc. was hired to adjust all claims arising from the fire but told none of the owners about the relevant coverage.

After the fire, American Guarantee hired York to adjust the claims on its behalf. CP 1277. York took on all obligations of the insurer for

claims adjustment, establishment of claim files, appeals, payment, investigation, setting reserves, among other things. CP 2488–2586. York also agreed to “comply with all applicable laws imposed by statutory, regulatory or judicial authority.” CP 2497.

Under York’s engagement, the task of “Adjusting” was agreed to include:

- A preliminary coverage review.
- Recommendation as to acceptance or denial of coverage.
- Appropriate investigation of the circumstances of the loss.
- Securing factual information and file documentation to substantiate a final coverage determination.

CP 2489. York agreed that it would “[i]nvestigate all such reported Claims under the Policy to the extent reasonable and customary.” CP 2491. York agreed to “[p]romptly and thoroughly review, process, Adjust, settle and pay Claims under the Policy.” *Id.* It was to do so in compliance with the policy and with “all applicable legal and regulatory requirements.” *Id.*

York was given a copy of the insurance policy. Two days after the fire, on August 7, 2012, York noted the coverage provision in the American Guarantee policy providing direct coverage for the owners’ loss, determining that “the Property Basket Coverage Endorsement ... makes the following changes that may apply to this loss: Covered Property— includes property of other in care, custody & control.” CP 2037. This was

consistent with York's role as later described by its own counsel, explaining, "[t]he responsibility of York was to adjust the claims on behalf of American Guarantee" and that York was responsible for "analyzing" the claim and "determin[ing] what these people's losses looked like in an effort to try and figure out dollars and cents" VRP 7-24-15 at 868:5-7; 786:16-25.

But York did not disclose this coverage to any owner.

York did not interact directly with the customers, but hired Partners Claim Service (Partners) as its "on-the-ground contact in the state of Washington." CP 2785. Critically, York did not give Partners a copy of the policy which York had determined provided coverage for the owners. CP 1367, 2788. York's counsel admitted that "Partners didn't know what the coverages were. That wasn't their task." VRP 7-24-15 at 806:9-10. According to Partners representative Elizabeth Bowers, her job did not include informing the owners about their coverage. CP 2828. Partners was not entitled disclose the coverage, Ms. Bowers "just said I don't know" when asked, and was told by York to say this. CP 2831. Partners' understanding of its assignment was to do "what York told you to do" and "nothing else." CP 2833.

When Partners contacted the customers its representatives stated that they were "calling on behalf of York who was managing the claims

and we were going to report to them.” CP 2834. *See also* CP 2835 (“I would say I’m representing York, York’s managing the claims on behalf of the insurance company for the Benrds.”). As a result, when Mr. Merriman made an inquiry about whether he could or should submit an inventory claim to his homeowners’ carrier or to York, the Partners representative relayed York’s instruction that he could submit a claim either to his homeowners’ carrier or to York, but not both. CP 1418, 2829.

Mr. Merriman understood that he should not even bother to put together a property inventory, “because there would most likely be no coverage for us under the Bernd policy.” CP 1193. It is undisputed that the Merrimans had hundreds of thousands of dollars of property loss in the warehouse fire, but only approximately \$15,000 in coverage through their homeowners’ coverage. Throughout two years of litigation in the superior court, no evidence has surfaced that York disclosed the coverage for property in Bernd’s care, custody, and control to any customer.

4. The Merrimans learned of the coverage for their property in discovery after filing a lawsuit against Bernd.

On February 20, 2013, left with woefully inadequate insurance coverage, the Merrimans filed a lawsuit, later amended to add class allegations, against Bernd. The Merrimans alleged that Bernd’s employee caused the fire by carelessly discarding a cigarette. CP 1230. During

discovery, Bernd produced its insurance policy with American Guarantee pursuant to CR 26(b)(2). CP 78. Upon review of the policy, the Merrimans learned for the first time that the policy provided not only liability coverage to Bernd, but also first party coverage to them along with the other customers. *See* CP 41.

After learning about the available coverage and the apparent scheme to cover them up and send the customers to the homeowners' carriers instead, the Merrimans filed a second lawsuit, later amended to add class allegations, against American Guarantee, York, and Partners for (1) breach of contract, a declaratory judgement, and injunctive relief (American Guarantee only); (2) insurance bad faith; (3) violations of the Washington Administrative Code; (4) violations of the Insurance Fair Conduct Act (IFCA), and (5) violations of the Consumer Protection Act, chapter 19.86 RCW (CPA); and constructive fraud. CP 60. The Merrimans alleged from the beginning that "[a]t all times defendants withheld the terms, conditions, rights, and benefits of policy No. 9222905-02, which in actual fact provided first-party benefits to property owners such as the Merrimans." CP 5.

5. York never made a good faith effort to adjust the owners' claims.

York had the assignment to properly “[a]djust” and “settle” the owners’ claims, CP 2491, but utterly failed to do so.

- York had the authority to carry out all day-to-day claims handling functions. CP 2775.
- York was supposed to tell the Merrimans of the provisions in the insurance policy within 30 days of the fire. CP 2760.
- York was supposed to tell the Merrimans about the fine art coverage. CP 2762.
- York was supposed to inform property owners that it was the insurance company’s obligation to perform a full and fair investigation into all material aspects of the claim. CP 500.
- York was supposed to tell the Merrimans that they were entitled to an inventory. CP 2764-65.
- York was supposed to ensure that the Merrimans were informed of the facts concerning the investigation into the fire. CP 2776–77.
- It was York’s responsibility to create the inventories. CP 2848–49.
- If York failed to tell the property owners of the existence of the policy and their rights under it, York would have fallen below American Guarantee’s expectations. CP 2773–74.

This, in fact, was American Guarantee’s view of York’s responsibility. American Guarantee always asserted that York was at fault for any mishandling of the owners’ claims. This included, specifically, York’s failure to disclose to the owners the coverage for their property:

Q. Thank you. Who was supposed to share with the Merrimans the terms of the policy?

MR. BERNSTEIN: Object to the form of the question; vague and ambiguous, lacks foundation.

A. Well, as I previously testified, York.

CP 2760 at 64:19–24.

American Guarantee's designee stated:

Q. Okay. And in order to figure out what American Guarantee owes, it's your position that you need an inventory of all of the property owners, right?

A. Yes.

Q. And you agreed last time that it was the insurance company's obligation to make that investigation but that it had been delegated to York through the third-party agreement, right?

A. Yes.

CP 2850; *see also* CP 2848–49 (stating that it was York's responsibility to create the inventories).

Instead of fulfilling these obligations, however, York never told Bernd's customers about the policy or the first party coverages available to them for their losses. CP 944 at 18–19. York never gave a copy of the policy to the customers. CP 954. York never told the customers that it had an obligation to value their loss, including completing inventories and valuations of the losses. CP 946.

In fact, York never spoke to the owners. As York's CR 30(b)(6)

designee testified:

Q So let me ask it this way: Is it correct to say that you don't know, of your own knowledge or from any source, like somebody told you that anybody from York ever specifically reached out to any of the property owners to tell them what their rights and benefits were under [the policy]?

A That's correct.

CP 946. The record confirms that York took no reasonable steps to adjust the owners' claims:

- There are no documents at York that tell claims representatives how to comply with the fair claims practices regulations. CP 687.
- York has no policies, protocols, or procedures that address compliance with the WAC regulations that serve to ensure proper adjusting of claims. CP 686–87.
- York's standard practice is to *not* explain to property owners who suffer a loss of goods in a warehouse catastrophe what all of the provisions in the policy are even if the provisions establish that their goods are business personal property. CP 705.
- York handles claims for other carriers in exactly the same way. It does *not* inform customers of all of their rights and benefits under first party property coverages unless instructed by the carrier. *Id.* York has adopted *no policies* that tell claims representatives when or under what circumstances they should take steps to alert property owners of coverage for business personal property. CP 710.

No one at York ever evaluated the owners' rights to coverage under the Business Personal Property coverage. York testified:

Q Okay. But if somebody makes a claim to York, and they get a claim number, and it's assigned to inland marine, and nobody from York ever tells you, hey, check out business personal property, then you would not have performed an analysis to determine what those people were entitled to under business personal property; correct?

A That's correct.

Q And because you didn't do it, nobody did it; right?

A Because a claim was not presented, I never reviewed it under the --

Q Because you --

A -- first-party property policy. That's true.

* * *

Q Because you didn't do it, nobody at York did it; right?

A Correct.

CP 957. York's CR 30(b)(6) designee candidly admitted that he did not know who was supposed to explain the applicable coverages to the customers:

Q Let's do it this way. Do you understand the concept of who -- in other words, I'm asking for an individual. Can you tell me the name of any individual who York says was responsible for explaining the rights and benefits that the property owners who had their stuff stored at the warehouse would have under [the policy]? Are you with me?

A Yes, I am.

Q Okay. Who?

A I don't have a name for that. I don't know --

CP 1366. The facts show that even though York was hired to adjust the claims, it simply did not do so.

* * *

It is a basic feature of insurance claims handling that relevant coverages must be disclosed to the insured. Washington law provides that “[n]o 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.” WAC 284-30-350(1). In turn, claims adjusting—generally speaking, the handling of insurance claims—is precisely the work that insurers often hire outside adjusters like York to perform. York’s website states, for example, “York’s staff of field adjusters, investigators and administrative adjusters is among the best in the industry *for settling any property claim* from a small homeowner’s loss to high-dollar catastrophe claims.”¹

The record contains ample evidence from which the jury can reasonably find that York breached the obligation to adjust the owners’ claims. York had a financial relationship with American Guarantee’s parent, Zurich. CP 2808. The two entered into a “Third Party

¹ See <<http://www.yorkrsg.com/index.php/claims-administration/property>> (accessed Apr. 16, 2014) (emphasis added).

Administrator Agreement,” pursuant to which York performed “claims administration services” in exchange for compensation. *Id.* The Third Party Administrator Agreement was subject to termination with 60 days’ written notice. CP 2820. It was in the interest of keeping American Guarantee’s business that York joined American Guarantee in the scheme of concealment and delay, the purpose of which was to avoid paying the coverages and benefits. York breached its standard of care to the customers by failing to disclose the fire liability report to the customers at the time of the loss. CP 43, 45–46.

The Merrimans retained Gerald Hartmann, former Vice-President of Claims with Safeco, who issued a scathing report on the scheme by both American Guarantee and York to conceal the coverage for the owners’ property and thereby avoid paying by directing them to other insurers. CP 33–56. This supports the conclusion that York’s handling of the owners’ claims was deficient.

The evidence supports the conclusion that York took no reasonable steps to adjust the owners’ claims. The class notice sent to the owners after class certification in 2014, more than 1 1/2 years after the fire, was the first notice some of them ever received that they had coverage, because York had never told them.

The facts show that even though York was hired to adjust the claims, it simply did not do so. Despite this, the superior court granted York summary judgment. This was error.

B. Class certification and summary judgment rulings.

1. The trial court approved a class settlement agreement with Partners.

Early in the litigation, the Merrimans reached a settlement with Partners. CP 1509. In May 2014, the trial court granted preliminary approval of a class for settlement purposes consisting of “all persons who stored property at the Bernd storage facility at the time of the August 5, 2012 fire, which was damaged or destroyed by the fire, and any insurer that has paid proceeds to such persons, not including the Bernds or any person who executes a timely and valid exclusion request.” CP 2204–05. On July 18, 2014, the trial court granted final approval of the class settlement and dismissed Partners from the litigation. CP 2300. In so doing, the trial court had to find that the elements of CR 23 were met as to the class claims against Partners (which were identical to the class claims against York). *See id.*

2. The trial court granted class certification on all claims against all remaining defendants.

On the same day the trial court granted preliminary approval of the Partners class, it also granted plaintiffs’ motion to certify a class as to the

claims against the other defendants, American Guarantee and York. CP 2187. The trial court certified the class on three grounds under CR 23(b)(1), (b)(2), and (b)(3).

The CR 23(b)(1) class was a limited fund class based on the breach of contract (failure to provide coverage) claims. American Guarantee had deposited funds with the court under CR 67 in an amount that American Guarantee contended were the policy limits. CP 2196. Because it was believed that the amount deposited did not allow for complete recovery for all class members, the CR 23(b)(1) class was a mandatory limited fund class consisting of all of Bernd's customers. *Id.*

The trial court also certified a class under CR 23(b)(2) for the customers' declaratory judgment claim on the coverages and an extra-contractual class under CR 23(b)(3) for the violations of unfair claims handling regulations, IFCA, CPA, bad faith, negligent claims handling, and constructive fraud. CP 2198.

On the issue of claims handling, the customers are identically situated. American Guarantee admitted this:

Q. BY MR. SMART: Going back to Exhibits 26 and 27, Mr. Wood, these are the building and personal property coverage forms and the property basket we discussed at some length earlier. Do you remember them?

A. Yes, sir.

Q. Okay. I asked you about the Merrimans, but I understood from your testimony that any owner of property who had that property stored in the warehouse at the time of the fire would be in the same position as the Merrimans, that position being that American Guarantee takes the position that it cannot determine what it owed to those owners until an inventory of all of the owners' property is performed; is that right?

A. Yes, sir.

Q. Okay. So all of them are in the same boat?

A. Yes.

CP 1494–95. Upon issuing its order on class certification, the trial court found that “[a]ll members of the proposed class share an interest in establishing liability” on these claims. VRP 142:12–13.

3. The trial court granted in part York’s first summary judgment motion.

In May 2014, the trial court granted in part York’s motion for summary judgment dismissing all claims against York other than (1) constructive fraud; (2) negligent misrepresentation; and (3) non-per se CPA claims. CP 2185. The trial court found that York was not an “insurer” under IFCA; that it had no duty under bad faith insurance law; that there is no independent cause of action under the WACs and, therefore, there could be no per-se CPA violations; and that York could not be liable for negligence or negligent claims handling. CP 2186; VRP 5-5-2014 at 359–368. The trial court also found that the breach of contract,

injunctive relief, declaratory judgment, and claim for *Olympic Steamship* attorney fees were all inapplicable to York. CP 2186. The trial court made these rulings while the class was certified as to York under CR 23. Later, it would rule that these rulings bound the class members.

4. Even though the trial court permitted class claims against Partners and American Guarantee, it decertified each remaining claim against York.

On June 19, 2015, even while maintaining class certification as to American Guarantee for the same conduct, the trial court decertified all remaining claims against York. CP 2638. The class settlement with Partners, the previous summary judgment rulings on class claims against York, and the class claims against American Guarantee remained undisturbed.

The trial court found that the remaining claims against York for negligent misrepresentation, constructive fraud, and non-per se violations of the CPA would involve “individualized issues that would predominate over any common questions” under CR 23(b)(4). CP 2640–41.

At the same time the trial court held that a class was inappropriate to resolve the customers’ claims against York, the trial court held that a class was appropriate for the claims it had already resolved on summary judgment (including claims for negligent claims handling, bad faith, and per se CPA violations). The court stated in its order that “all previous class

rulings and determinations between York and the class members . . . are applicable to individual class members in any claims that they will bring forward against York, in any forum, on an individual basis.” CP 2641. Thus, while the Court found that a non-per se CPA claim could not be part of a class claim, it bound the entire class by its previous determination as to a per se CPA claim.

The Merrimans moved for reconsideration of the trial court’s decertification motion, CP 2716, which the trial court denied.

5. After decertification of the York claims, the trial court dismissed each remaining claim against York.

York moved for summary judgment a second time on the remaining claims. CP 2643. On September 11, 2015, the trial court dismissed all remaining claims against York. CP 3304.

IV. ARGUMENT

A. York is legally liable for its failure to properly advise the owners of their coverage and adjust their claims.

Owners assign error to the superior court’s dismissal of their claims against York for: (a) insurance bad faith; (b) CPA violation; (c) negligence; and (d) negligent misrepresentation. The superior court granted summary judgment to York on these claims based on the conclusion that York owed no duty to the owners. This was error. In Washington, this Court has upheld a claim against an independent

adjusting entity grounded in negligence. *Aldrich & Hedman, Inc. v. Blakely*, 31 Wn. App. 16, 19, 639 P.2d 235 (1982) (finding adjusting entity liable for “attorney’s fees as an element of consequential damages” as “the natural and proximate consequence of the acts or omissions” of the adjuster). And a federal district court has upheld claims for bad faith and CPA violation against an adjusting entity. *Lease Crutcher Lewis WA, LLC v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. C08-1862RSL, 2009 WL 3444762, at *5 (W.D. Wash. Oct. 20, 2009) (“Plaintiff’s bad faith Consumer Protection Act, ... actions may proceed”). The existence of a duty is a question of law reviewed de novo. *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

Based on Washington’s statutory regulation of the business of insurance, and its common law of insurance bad faith, negligence, private CPA claims, and negligent misrepresentation, the owners ask that this Court find issues for trial on these claims.

1. York should be held liable for insurance bad faith.

A claim for bad faith is analyzed according to tort principles of duty, breach, causation, and damages. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Washington imposes a duty of good faith on “all persons” in the “business of insurance.” RCW 48.01.030.

Washington’s law of insurance bad faith is grounded in this statute.

Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d

1029 (2000) (“The duty of good faith owed by an insurer to its insured is statutory”). RCW 48.01.030 reads in full:

The business of insurance is one affected by the public interest, requiring that **all persons** be actuated by **good faith**, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, **and their representatives** rests the duty of preserving inviolate the integrity of insurance.

(emphases added.) The insurance code applies to “[a]ll . . . insurance transactions . . . and all persons having to do therewith . . .”

RCW 48.01.020. “Person” is defined to include corporations such as York.

RCW 48.01.070. York is a person in the business of insurance that owes a duty of good faith when it adjusts insurance claims.

In *Lease Crutcher Lewis*, the general contractor on the Bellevue Tower Crane Collapse² tendered defense of the claims against it to its insurer, National Union. The contractor claimed that an adjusting entity and fellow AIG subsidiary, AIG Domestic Claims, “implemented a claim settlement strategy that allowed National Union to recover from a third party amounts paid under the insurance policy before its insured was made whole.” 2009 WL 3444762 at *1. AIG Domestic Claims moved for Rule 12(b)(6) dismissal, arguing that a claims adjusting entity owes no duty to

² https://www.youtube.com/watch?v=AaEbmi_nZqs

the insured. The court disagreed. Because the duty of good faith applies to “all persons” in the “business of insurance,” *Lease Crutcher Lewis* held, “[t]he statutory duty of good faith set forth in RCW 48.01.030 is easily broad enough to encompass AIG Domestic Claims’ conduct in these circumstances,” and allowed the bad faith claim to proceed. *Id.* at *2.

This Court should reach the same result here for the same reasons. Washington courts hold that the duty of good faith is independent of the insurance contract. *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986) (“[The special relationship between an insurer and insured] exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insured’s dependence on their insurers.”); *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008) (“The duty of good faith is not specific to either of the main benefits of an insurance contract but permeates the insurance arrangement.”); *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 143, 29 P.3d 777 (2001) (“Breach of the duty gives rise to a remedy sounding in tort, independent of the insurance contract”). Because the duty of good faith in Washington is owed by “all persons” in the “business of insurance,” it is owed by York here.

Washington’s standard for bad faith is met where the insurer’s—here York’s—actions, were “unreasonable, frivolous, or unfounded.” *Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496, 275 P.3d 323 (2012). Bad faith is a question of fact. *Smith*, 150 Wn.2d at 485. A jury here could conclude that although tasked with handling the adjustment of the claims, and aware that the owners had coverage, York acted in a manner that was “unreasonable, frivolous, or unfounded” in failing to inform the owners of the pertinent coverage. As a result, the owners were without the benefits of knowing that they were covered, assistance with their claims, and a direct source of payment for their loss, which only some were able to make up for with homeowners’ claims.

2. York violated the Consumer Protection Act.

Washington’s CPA, chapter 19.86 RCW, declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. The CPA creates a statutory action for damages and injunctive relief on behalf of any person injured by an unfair or deceptive act or practice. The CPA provides: “[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 ... may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both ...” RCW 19.86.090.

The elements of a CPA claim are: “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). In addition to recovering damages, a CPA claimant may enjoin an unfair act or practice even if future violations would not directly affect the individual’s own private rights. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973).

To show a “deceptive” act, a CPA claimant “need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public.” *Id.* at 785 (emphases in original). Alternatively, a claimant may base a CPA claim on an “unfair” act, which is defined to include a practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.” *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) (quoting 15 U.S.C. § 45(n)). A claimant may premise a CPA claim on conduct that is unfair or deceptive that is not otherwise regulated. *Klem*, 176 Wn.2d at 787 (“a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the

public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.”).

Based on the CPA’s statutory right of action, the owners were entitled to establish at trial that York committed an unfair or deceptive act or practice that harmed them, whether regulated or not. They further were entitled to enjoin any unfair or deceptive act or practice that the evidence established. Evidence supported each of the *Hangman Ridge* elements. A jury could conclude that York’s failure to alert the owners to the available coverage was an “unfair” or a “deceptive” act that led to harm for purposes the CPA, when the owners were required to resort to other sources for payment of their loss, or in some cases go without complete indemnity as a result. This is especially so in light of WAC 284-30-330(1) and -350(1), which require full and accurate disclosure of pertinent policy benefits to claimants. York specifically agreed that it would analyze coverage under the policy. CP 2489. York agreed to “[p]romptly and thoroughly review, process, Adjust, settle and pay Claims under the Policy,” all in compliance with “all applicable legal and regulatory requirements.” CP 2491. The applicable regulatory requirements included WAC 284-30-330(1) and -350(1). York failed to follow these regulations.

In *Lease Crutcher Lewis* also, the court allowed the insured to proceed with a CPA claim against the adjusting entity. This holding was

based on the *Hangman Ridge* elements for a CPA claim. 2009 WL 3444762 at *4. In that case, the adjusting entity argued that a “contractual relationship” was a requirement of a CPA claim. *Id.* at *5. The adjusting entity argued that in the absence of a contract between the insured and the adjusting entity, the insured could not pursue a CPA claim—presumably even if injured by an unfair or deceptive act or practice by the adjusting entity. *Lease Crutcher Lewis* held that a contractual relationship was not a requirement of a CPA claim, and allowed the CPA claim to proceed. *Id.*

The *Lease Crutcher Lewis* holding was based on *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 175–76, 159 P.3d 10 (2007), which was affirmed along with a companion case in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 43–44, 204 P.3d 885 (2009). In *Stephens* and *Panag*, insurance companies with auto subrogation claims against allegedly at-fault drivers hired a collection agency. The collection agency sent collection notices to the at-fault drivers, implying that they owed unpaid debts when in reality the insurers had only unliquidated tort claims against them. *Panag*, 166 Wn.2d at 35–36. The drivers brought CPA claims against both the insurers and the collection agency. *Id.* at 35, 36. There was no contractual relationship.

The insurers and the collection agency argued that they should not be liable to the drivers under the CPA either because they had never

entered into consumer or business transactions with the drivers, or because as subrogation tort claimants against the drivers, they were adverse to them. *Id.* at 38, 42. The court rejected these arguments because both the insurance and collections industries are highly regulated for a “primary purpose” of “creat[ing] public confidence in the honesty and reliability of those who engage in the business of insurance and the business of debt collection.” *Id.* at 43. Accordingly, the court reaffirmed that only the *Hangman Ridge* elements need be satisfied for a CPA claim and affirmed summary judgment that the insurers and the agency committed an unfair or deceptive act or practice. *Id.* at 47–48.

What makes *Panag* compelling here is that it was admitted in that case that the insurers and the collection agency pursuing collections claims were adverse parties towards the allegedly at-fault drivers. In this case, York was tasked with the investigation of the owners’ insurance claims and discovered early on that the policy directly covered their property. Under *Panag*, even if York were viewed as an adverse party towards the owners it would be subject to liability under the CPA. But York was not, in fact, adverse. York was supposed to inform the customers of their coverage according to American Guarantee, who likewise sought to place blame on York in the lawsuit for York’s failure to do so. Whether York is

viewed as adverse or, properly, owing direct, first-party obligations to the customers, York is subject to a claim under the CPA.

The owners' CPA claim against York is supported by the fact that York's conduct amounts to activities that are defined as unfair practices under Washington law. Washington's fair claim handling regulation, WAC 284-30-330, defines certain practices as "unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance." These include:

- "Misrepresenting pertinent facts or insurance policy provisions," WAC 284-30-330(1); and
- "Refusing to pay claims without conducting a reasonable investigation," WAC 284-30-330(4).

The regulations also provide that "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." WAC 284-30-350(1).

These regulations are based on RCW 48.30.010, which provides that "[n]o person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices" as further defined by the Insurance Commissioner. RCW 48.30.010(1)–(2). As noted, for purposes of the insurance code, "person" is defined to

include corporations such as York. RCW 48.01.070. Based on RCW 48.30.010, a violation of the claims handling regulations found in WAC 284-30-330 “constitutes a statutorily proscribed unfair trade practice” and therefore “a per se unfair trade practice under the CPA.” *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 924, 792 P.2d 520 (1990).

York may seek to avoid the rule of *Kallevig* by arguing that these regulations technically bind the “insurer,” rather than an adjusting entity such as York. But this argument would ignore the breadth of York’s authority and undertaking to properly adjust and settle the customers’ claims. CP 2489, 2491. York was aware that the policy provided direct coverage for the owners’ property and failed to disclose that information to any owner, thereby accomplishing precisely the practice sought to be proscribed by WAC 284-30-330(1) and -350(1). Since the CPA proscribes all unfair or deceptive acts or practices even when “not regulated” but still “in violation of public interest,” *Klem*, 176 Wn.2d at 787, the owners should have been permitted to proceed with their CPA claim against York pursuant to the *Hangman Ridge* elements.

Finally, courts in other states have upheld claims against adjusters premised on statutes similar to the CPA. *E.g. Rhodes v. AIG Domestic Claims, Inc.*, 961 N.E.2d 1067, 1070, 1075 (Mass. 2012) (“the excess insurer, National Union Fire Insurance Company of Pittsburgh,

Pennsylvania (National Union), and more particularly its claims administrator, the defendant AIG Domestic Claims, Inc. (AIGDC), had engaged in willful and knowing violations of G.L. c. 93A (c. 93A), and G.L. c. 176D (c. 176D),” based on violation of unfair claims regulation if the company “[f]ail[s] to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.” G.L. c. 176D, § 3(9) (f).”); *Bodenhamer v. Superior Court*, 178 Cal. App. 3d 180, 181, 223 Cal. Rptr. 486, 487 (Ct. App. 1986) (“The sole issue in this mandate proceeding is whether the Unfair Trade Practices Act (Act) of the Insurance Code (Ins.Code, §§ 790 et seq.;1 see also § 1620.2) which regulates trade practices in the business of insurance applies to independent claims adjusters. We hold that it does.”).

3. York should be held liable for its own negligence.

York should be found liable to the owners on the independent ground that it was negligent with respect to their insurance claims. In Washington, “negligence and bad faith are different causes of action.” *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 605, 971 P.2d 953 (1999). In *First State*, an excess carrier made to contribute to a large liability verdict sued the underlying carrier for bad faith, negligence, and other claims arising out of the underlying carrier’s handling of the claim. *Ibid.* The trial court refused to instruct on negligence in addition to

bad faith. The Court of Appeals reversed. It explained: “Where courts have adopted standards of good/bad faith and ordinary care, as we have in Washington, the plaintiff is entitled to a jury verdict on theories of either negligence or bad faith, *independent of each other* because a party may fail to use ordinary care yet still not act in bad faith” (emphasis in original, footnote omitted). *Id.* at 612.

This Court has imposed liability on an adjusting firm for negligence in the handling of an insurance claim. In *Aldrich, supra* at 19–20, a homeowner submitted a fire damage claim to her insurer, Farmers. 31 Wn. App. at 17. Farmers retained General Adjustment Bureau, Inc. (GAB), an adjusting entity, to adjust the claim. *Ibid.* GAB deviated from company policy in selecting a contractor without discovering that he “did not have any significant history in repairing residential structures,” among other shortcomings. *Ibid.* When the building inspector “red tagged” the repairs due to the contractor’s violations, the contractor arranged for another builder to complete repairs. *Id.* at 18. The contractor defaulted on the payment to this builder, who placed a lien on the insured’s property and filed suit against the insured and Farmers, among others. *Id.* at 19.

This Court held GAB liable to the insured and Farmers for their attorney fees. The Court applied the rule that: “[w]here the natural and proximate consequence of the acts or omissions of a party to an agreement

or an event have exposed one to litigation with a third person, equity may allow attorney's fees as an element of consequential damages." *Ibid.* This rule is known as "equitable indemnity" or the "ABC rule" in Washington case law. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 104 & n.11, 285 P.3d 70 (2012). While often expressed as an "exception" to the American Rule against recovery of attorney fees, the basis for liability is awarding fees "as damages" based on "a breach of contract or tortious conduct by the party against whom the claim is asserted." *Id.* at 104, 105. In *Aldrich*, the adjusting firm was liable for attorney fees "as an element of consequential damages" awarded "because of GAB's negligence." 31 Wn. App. at 19, 20.

Aldrich is instructive here because common law negligence supplied the duty of GAB to adjust the insurance claim with due care—in that case by retaining a properly qualified contractor to conduct the repairs. The owners seek to impose the same duty on York here.

Finding York liable for negligence in adjusting the claim as described in *First State* and as found in *Aldrich* comports with principles of negligence in Washington. York specifically agreed to properly adjust the owners' claims and to do so in compliance with applicable law. CP 2489, 2491. In Washington, one who undertakes to perform a duty must

do so without negligence. *Brown v. MacPherson's, Inc.*, 86 Wm.2d 293, 299, 545 P.2d 13 (1975).

Further, a statutory duty supports a negligence claim. Under RCW 48.01.030, as a person in the business of insurance, York had the obligation to “be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” Likewise, under RCW 48.30.010(1)–(2), York was obligated to refrain from “unfair methods of competition or in unfair or deceptive acts or practices” as defined by the Insurance Commissioner. And RCW 4.22.070 directs that “[i]n all actions involving fault of more than one entity, the trier of fact *shall* determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages.” RCW 4.22.070(1) (emphasis added).

In Washington, a “breach of a duty imposed by statute ... or administrative rule ... may be considered by the trier of fact as evidence of negligence.” RCW 5.40.050. “For more than 30 years, we have turned to the Restatement (Second) of Torts section 286 (1965) ‘[i]n deciding whether violation of a public law or regulation shall be considered in determining liability.’” *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004) (quoting *Kness v. Truck Trailer Equip. Co.*,

81 Wn.2d 251, 257, 501 P.2d 285 (1972) (adopting statutory provision as duty in negligence action)).

Section 286 sets forth a four-part test:

The court may adopt as the standard of conduct of a reasonable [person] the requirements of a legislative enactment ... whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Barrett, 152 Wn.2d at 269 (quoting Restatement (Second) of Torts § 286).

This test is readily met with respect to an insurance adjuster. One of the “primary purpose[s]” for which the business of insurance is “highly regulated” in Washington is to “create public confidence in the honesty and reliability of those who engage in the business of insurance.” *Panag*, 166 Wn.2d at 43. The purpose of requiring good faith in all matters from those in the insurance business is to protect insureds such as the owners when they are reliant on insurance professionals to disclose coverage that they are entitled to, but cannot learn of on their own. The particular interest of the insured is to have loss paid when it is covered, the kind of

harm sought to be avoided surely includes the nonpayment of loss with the insured never the wiser, and this is precisely the hazard to which the owners were exposed by York's conduct here.

The elements of a claim of negligence are duty, breach, causation, and damages. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). "The issues of negligence and proximate cause are generally not susceptible to summary judgment." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)).

Plaintiffs' insurance expert testified that "York" along with American Guarantee breached the standard of paying claims once liability became reasonably clear. CP 43. It is undisputed that York never disclosed the direct coverage for the owners' property, though it learned of that coverage. Instead, it ordered that customers be told "I don't know" in response to an inquiry about coverage for their property loss. This supports a conclusion that York was negligent and harmed the customers by leaving them ignorant both of coverage that they had and important rights, such as assistance with their claims and property inventories. The superior court erred by dismissing the owners' negligence claim on summary judgment.

4. York committed negligent misrepresentation.

The elements of a claim of negligence are: “(1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff’s reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.” *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

The evidence here supports the conclusion that York instructed Partners to deny knowledge of whether there was coverage for the owners, even though York (but not Partners) had the policy had knew that it did provide coverage for the owners. York’s instruction to tell the customers only “I don’t know” if they asked about coverage facilitated the overall goal of re-directing the owners to other avenues (homeowners’ coverage or no coverage) besides the American Guarantee coverage. *See* CP 44 (“These efforts were designed to insulate American Guarantee from the very substantial expense of creating 43 inventories, payment under any first party coverage, and payment under Bernd’s liability coverage. All of these ‘savings’ were intended to come at the direct expense of the property

owners.”). York’s instruction that the owners were to be told that coverage was an unknown, in the face of policy language providing direct coverage, supports a conclusion of negligent misrepresentation. The superior court erred by dismissing this claim on summary judgment.

* * *

This Court should reverse the grant of summary judgment to York, and remand for trial.

B. The trial court erred in decertifying the class claims against York because common issues predominate.

Each time the trial court was asked to certify a class in this case, once for a liability class against American Guarantee and York, and again for a settlement class with Partners, the trial court found that the elements of CR 23(a) and (b) were met. No change in facts or controlling law or warranted decertification. Because the claims and issues are common, the trial court erred when it later decertified the class claims against York.

1. Standard of review.

The standard of review for class certification is abuse of discretion. *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). In determining class certification, a court may not conduct a preliminary inquiry into the merits. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 26, 65 P.3d 1 (2003). “A court’s determination of whether class certification is appropriate must be made independently,

with no consideration of the merits of the claims.” *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 299–300, 38 P.3d 1024 (2002). A court abuses its discretion if its decision as to class certification “is the practical effect of its rulings on substantive issues.” *Id.*

Under CR 23(c)(1), a court may alter or amend its order granting class certification at any time before a decision on the merits. But decertification is a drastic step not to be taken lightly. *See J.S. v. Attica Cent. Sch.*, No. 00-CV-513S, 2011 WL 4498369, at *6 (W.D.N.Y. Sept. 27, 2011) (“decertifying or redefining the scope of a class should only be done where defendants have met their ‘heavy burden’ of proving the necessity of taking such a ‘drastic’ step.”) (internal quotations omitted). In *J.S.*, the trial court refused to decertify the class when the defendant had “fail[ed] to present new facts or legal argument in support of its motion to decertify.” *Id.* A trial court “may not disturb its prior [certification] findings absent ‘some significant intervening event,’ or ‘a showing of compelling reasons to reexamine the question.’ ” *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 169 (S.D.N.Y. 2011) (internal citations omitted). Compelling reasons to reexamine class certification include a change in law, new evidence, or the need to correct a clear error or prevent a manifest injustice. *Doe v. Karadzic*, 192 F.R.D. 133, 136–37 (S.D.N.Y. 2000). Here, in decertifying the class after the trial court’s partial

summary judgment ruling, the practical effect was dismissing the Merriman's substantive claims and, therefore, an abuse of discretion.

In addition, however, the trial court misperceived the available legal remedies against York. The trial court's summary judgment rulings are reviewed de novo. *Haueter v. Cowles Pub. Co.*, 61 Wn. App. 572, 584, 811 P.2d 231 (1991). Because the Court should reverse the trial court's grant of summary judgment, remand will necessarily involve a different set of claims that the trial court thought were tenable. At a minimum, therefore, the trial court's class certification decisions must be remanded for reconsideration with the proper legal claims in view.

2. The purpose of CR 23 is to resolve common legal issues as a whole.

As the Supreme Court has stated: "Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981). A class action is "peculiarly appropriate" when a case raises legal issues "common to the class as a whole" and "turn on questions of law applicable in the same manner to each member of the class" because Rule 23 provides an economical vehicle for the resolution of multiple common claims. *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).

Rule 23 strikes a balance between the need for and efficiency of a class action and the interests of class members in pursuing their claims individually. The class action rule aims “to promote judicial economy and efficiency by avoiding multiple adjudications of the same issues.” *See* 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.02 (3d ed. 2011); *Hickey v. City of Seattle*, 236 F.R.D. 659, 666–67 (W.D. Wash. 2006) (certifying class of WTO conference arrestees, where common questions required uniform determination).

Washington looks favorably on class actions. In upholding class certification of claims turning on common questions of insurance coverage such as that presented here, our Supreme Court stated:

CR 23 is liberally interpreted because the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits [,] and ... also frees the defendant from the harassment of identical future litigation.

Moeller, 173 Wn.2d at 278. (quotations omitted) (affirming class certification of insurance coverage claims). “[T]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002) (quotation omitted). The purpose of class actions under CR 23 includes “conserving time, effort and expense.” *Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn.

App. 254, 257, 63 P.3d 198 (2003) (quoting 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, §§ 4.32 at 4-129 to -130).

3. CR 23 class certifications requirements were satisfied at the time of class certification.

Class certification is governed by CR 23. The prerequisites to a class action are listed in CR 23(a):

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

None of these requirements were brought into question in the trial court's decertification of the claims against York.

A class action must also satisfy one of the three requirements of CR 23(b)(1), (2), or (3). Under CR 23(b)(3), a class is appropriate when:

The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Although the trial court made findings of “predominance” and “superiority” when it certified the class claims against York, the trial court later decertified on the grounds that the claims “involve individualized questions that would predominate over any common questions . . .” CP 2640–41.

But York’s duty to disclose and explain coverages did not vary customer by customer. Nor did its behavior. The record reflects that York applied a uniform process and that the handling of the claims of Bernd’s customers was common among them all. York has admitted that all of the claims against it “depend on the same theory: York allegedly had a duty to disclose the existence of insurance coverage to the class members, but did not.” CP 2324. Its obligations under Washington insurance law were not individualized. The claims arose from the same loss, the same insurance policy, and the same set of facts. The issues should be resolved on a class-wide basis because no new facts or law suggest that the predominance and superiority requirements are no longer met. York withheld the critical coverage information from all customers alike.

a. Common issues predominate the customers’ claims against York.

The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether “adjudication of the common issues in the particular suit has important and desirable advantages of

judicial economy compared to all other issues, or when viewed by themselves.” The predominance requirement is not a demand that common issues be dispositive, or even determinative; it is not a comparison of court time needed to adjudicate common issues versus individual issues; nor is it a balancing of the number of issues suitable for either common or individual treatment. Rather, “[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.”

Sitton, 116 Wn. App. at 254–55. The shared questions need not be identical, and “the predominance requirement is not defeated merely because individual factual or legal issues exist.” *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 825–26, 64 P.3d 49 (2003).

Even if some case-by-case analysis is necessary in this case, class certification is appropriate as long as a court’s overarching determinations will impact all class members. Class certification is appropriate even if class members “may eventually have to make an individual showing of damages.” *Smith*, 113 Wn. App. at 323. *See also Hickey*, 236 F.R.D. at 666 (determining liability uniformly prior to second state damages determination). The trial court always intended to determine liability on a class-wide basis and later apply a method to determine damages for each class member.

The class issues predominate here because customers are identically situated with regard to their liability claims against York. York

was wrong when it argued that the customers have to prove individual reliance under the CPA. The class claims against York are based on its failure to disclose and explain policy coverages, which does not require an individual showing. In *Blough v. Shea Homes, Inc.*, No. 2:12-CV-01493 RSM, 2014 WL 3694231, at *11 (W.D. Wash. July 23, 2014), the court analyzed the causal link between the CPA unfair or deceptive act under the CPA and the class members' injuries. As noted by *Blough*, the Washington Supreme Court has acknowledged that reliance is "virtually impossible to prove" in cases alleging "nondisclosure of material facts." *Id.* at *13 (citing *Morris v. Int'l Yogurt Co.*, 107 Wn.2d 314, 328, 729 P.2d 33 (1986)). Further, "[i]t is not necessary to prove one was actually deceived" under the CPA. *Panag*, 166 Wn.2d at 63. Thus, there is a presumption of reliance CPA fraud claims. *Grays Harbor Adventist Christian School v. Carrier Corp.*, 242 F.R.D. 568, 573 (W.D. Wash. 2007). Accordingly:

This presumption shifts the focus of the causation inquiry from what information each class member received to what the defendant "allegedly concealed in light of what consumers reasonably expect," a question capable of generating a common answer across the class without substantial individualized inquiries.

Blough, 2014 WL 3694231, at *13 (citing *Grays Harbor* 242 F.R.D. at 573).

Courts have frequently certified class actions arising out of common losses like the Bernd warehouse fire. In *Morrison v. Warren*, 174 Misc. 233, 234, 20 N.Y.S. 2d 26 (1940)—before CR 23 had been adopted—the court found that a class suit was proper on behalf of all customers who lost personal property in a fire in a lawsuit against the building owners’ insurer. See also *Sutton Carpet Cleaners v. Firemen’s Ins. Co. of Newark, N.J.*, 68 N.Y.S.2d 218, 220 (1947) (following the procedure adopted in *Morrison* for 79 claimants in a class suit against an insurance company for claims of personal property loss arising from a fire). In *Collins v. Olin Corp.*, 248 F.R.D. 95, 104 (D. Conn. 2008), the court also certified a class arising out of alleged environmental contamination, finding predominance where the defendant’s “entire course of conduct and knowledge of its potential hazards is a common issue to the class.” In *Gentry v. Cotton Elec. Co-op., Inc.*, 268 P.3d 534, 540 (Okla. Ct. App. 2010), where a fire destroyed 48 homes, the court found predominance in determining liability on behalf of a class: “We find that issues related to the cause of the fire and CEC’s liability therefore are not only common to the claims of all class members, but also that those issues predominate” even though damages varied. In *Andry v. Murphy Oil, U.S.A., Inc.*, 710 So. 2d 1126, 1131 (La. Ct. App. 1998), the court said in certifying a class arising out of a refinery explosion:

This case involves one common disaster and the alleged liability of the defendants is derived from the same theories of liability. There are no material variations in the elements of the claims of the various categories of class members. Although there obviously are individual questions of quantum, this does not preclude a class action where, as here, predominant liability issues are common to the class.

These principles are established in this case also. York's conduct following the loss raises predominating questions in this case. The trial court always recognized this, which is evidenced by its ruling that the claims of negligent claims handling, a per-se CPA violation, insurance bad faith, and others were appropriate for resolution on a wide class basis. CP 2641. No justification exists to treat other claims arising from the same conduct differently. Because issues common to all customers predominate over individual issues, decertification was improper.

b. A class action is superior to 38 individual lawsuits against York.

In determining whether a class action is superior to individual claims, courts compare available alternatives. *Sitton*, 116 Wn. App. at 256. A single proceeding is the better alternative in which to determine whether York's failure to disclose the coverage that benefitted the owners and otherwise properly adjust their claims violated Washington law. This is true regardless of the answer, though we believe it beyond peradventure that York's failings certainly did violate Washington law. Because York adopted a uniform approach of not telling any customers about the

available coverage, one proceeding is sufficient to determine if this was bad faith, a CPA violation, negligence, or negligent misrepresentation. In fact, York has never identified any way in which any customer's claim handling differed from any other's. The superior court erred by decertifying the owners' claims against York.

V. CONCLUSION

The trial court's orders decertifying the class and granting summary judgment in favor of York should be reversed, and this matter should be remanded for class certification and trial on the merits.

RESPECTFULLY SUBMITTED this 21st day of April, 2016.

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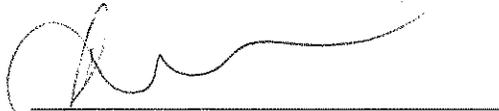
CERTIFICATE OF SERVICE

I certify that on this 21 day of April, 2016. I cause the foregoing to be filed in the Court of Appeals Division III, Spokane, Washington and a true and correct copy to be served on the following below via email per agreement.

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