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## Fringe Science Put to the Test in “Collapse” Case

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The Washington Court of Appeals recently addressed what evidence an insured can present to prove that a building reached a state of “collapse”—or “substantial structural impairment”—during a past policy period.

In *Lake Chelan Shores Homeowners Ass’n v. St. Paul Fire & Marine Ins.*,<sup>1</sup> the Lake Chelan Shores Homeowners Association (LCS) insured its condominium complex with policies issued by St. Paul from 1996 to 1999. Seven years later, LCS discovered a problem with severe wood decay and tendered a claim to St. Paul.

LCS claimed that by backdating the wood decay at the condominiums, LCS could show that the buildings (or parts thereof) were in a state of “collapse” during the effective period of—and thus covered by—the St. Paul policies. Before St. Paul made its final coverage determination, LCS sued St. Paul in state court.

St. Paul moved for summary judgment. According to St. Paul, the mathematical equation used by the LCS experts to backdate the wood decay and show that the buildings reached a state of “collapse” during the St. Paul policy period was not generally accepted in the scientific community. Because the equation was not generally accepted, St. Paul argued that the opinions of the two LCS experts were inadmissible under *Frye v. United States*.<sup>2</sup> The trial court agreed with St. Paul and, without conducting a *Frye* hearing, granted the motion.

LCS appealed, arguing that the trial court improperly resolved a genuine factual dispute on summary judgment. The Washington Court of Appeals, however, disagreed.

According to the Court, to admit scientific evidence, the trial court must first determine that the underlying scientific theory, the evidence, and the methodol-

ogy used to implement the theory are all generally accepted within the scientific community. Although LCS supported its theory of the case with two expert opinions, St. Paul’s motion pointed out that the alleged scientific basis of these expert opinions—the mathematical equation used to backdate wood decay—was *not* generally accepted within the scientific community.

LCS’s experts attempted to use the equation to trace the progression of decay at the LCS properties at issue by using only two pieces of information: (1) the date each building was built and (2) the depth of the rot when it was uncovered during remediation in 2007–09. However, the Court found that the “equation did not come from any scientific literature.” Rather, it came from another engineer in one expert’s firm.

The Court noted that the experts, in formulating the equation, “simply assumed decay began one year after construction was complete.” The expert “did not testify that the assumption was generally accepted in the scientific community . . . , described his calculations as ‘educated guesses’ and was unable to identify any other person or literature stating his formula is a proper equation for estimating rot progression.”

The Court held that because LCS failed to establish that the scientific community did, in fact, generally accept the use of the equation to backdate wood decay, the trial court rightly concluded that the expert opinions were inadmissible. LCS, then, could not prove an essential element of its case—that a “collapse” condition existed during the effective period of the St. Paul policies—and, therefore, the trial court properly granted summary judgment in favor of St. Paul.

The Court further noted that the admissibility of LCS’s expert testimony did not hinge on “the general acceptance of the science of wood decay.” Rather, it depended on the general acceptance of

the methodology—the mathematical equation—used by the experts to try to backdate the wood decay.

In addition, the Court rejected LCS’s alternative argument that, even without the equation, the experts could testify based on their own knowledge and experience, noting that unless the scientific evidence is generally accepted in the scientific community, the knowledge and experience of the expert witnesses are irrelevant. The Court stated: “[I]t makes little sense to conclude that an expert could avoid the application of *Frye* simply by eschewing the use of any particular methodology or technique and purporting to rely only on their knowledge and experience.”

*Lake Chelan Shores* indicates that Washington courts will not allow policyholders to present evidence to juries based on fringe science. Insurers defending against claims of “collapse” should carefully scrutinize the methodology used to determine when the alleged “collapse” occurred. If the methodology is not generally accepted in the scientific community, then, under *Lake Washington Shores*, such evidence should not be admitted. ■

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The authors represented a third party in the *Lake Chelan* case, but were not involved in the referenced appeal.

<sup>1</sup> \_\_\_ Wn. App. \_\_\_, 2013 WL 4432162 (August 19, 2013).

<sup>2</sup> 293 F. 1013 (D.C. Cir. 1923).