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No. 62767-8 I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

PEARL C. AVERILL, on behalf of herself
and all others similarly situated,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant.

RESPONDENT PEARL C. AVERILL'S SURREPLY

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as Respondent

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ORIGINAL

I. INTRODUCTION

New WAC § 284-30-393 specifies that any recovery by the insurer for the insured's property damage must first go to cover the insured's deductible. With the promulgation of WAC § 284-30-393 (and the concomitant repeal of WAC § 284-30-3905), the Insurance Commissioner acknowledged that the change was necessary to reflect existing law.

In its Appellant's Reply Brief, Farmers asserts that Averill is essentially asking the Court to apply WAC § 284-30-393 retrospectively, and that the regulation should only apply prospectively. Farmers Reply at 20-24. Farmers' argument fails for several reasons.

First, Farmers misapprehends the relevancy of the regulation: it supports the fact that (pre-)existing Washington law mandates that the make whole doctrine applies to collision deductibles, and that the Insurance Commissioner is of the same belief. Second, Farmers' "prospective application" argument is itself off point, for at least three reasons. One, it deals entirely with statutory law, not regulatory law. Two, Farmers has not identified any relevant changed statutory law to which its argument would apply. Three, Farmers ignores that case law is presumed to operate retrospectively. Finally, nothing in Farmers' argument alters two facts: (i) regardless of the new regulation, former WAC § 284-30-3905 is void as contrary to established law and public

policy; and (ii) the policy language adopted the make whole doctrine and incorporated it into the collision coverage.

II. ARGUMENT

A. The Insurance Commissioner Promulgated WAC § 284-30-393 to Comport With Existing Law

Averill has not asked the Court to apply WAC § 284-30-393 to the claims in this case, nor does upholding the trial court’s grant of summary judgment require it. Rather, Averill cited the regulation in further support of her argument that Washington law already required the application of the make whole doctrine to collision deductibles, and that the Insurance Commissioner is of the same opinion.

That WAC § 284-30-393 was designed to properly reflect existing law is made clear in the OIC’s Concise Explanatory Statement¹ (“CES”):

Basis for change: *Treatment of Subrogation Recovery:*

The following comment was received:

We respectfully request that [proposed WAC § 284-30-393] be amended in order to conform to Washington’s “insured made whole” rule as set forth in the Thiringer case and its progeny ...

...

The Commissioner agrees and has amended new section WAC 28[4]-30-393 as follows ...

¹ Attached as Exhibit B to Averill’s Second Statement of Supplemental Authority.

... Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss.

CES, at 6-7 (all emphasis in original). *See also* CES at 11 (“The final rule was changed as a result of this comment.”). Thus, it is clear not only that the Insurance Commissioner meant the regulation to comport with existing law, but the law as originally reflected in the 1978 *Thiringer*² case. This is further reflected in the statement that accompanied the regulations:

These rules clarify and recodify numerous sections of chapter 284-30 WAC The amendments do not make substantive changes to these rules; the amendments and new sections refine or clarify current rules.

Wash. St. Reg. 09-11-129, Permanent Rules Office Of Insurance Commissioner (May 20, 2009) (underscoring added).³

B. “Prospective Application” Argument

Farmers argument is unhelpful to begin with, as it cites only cases concerning changes to statutory law, not regulatory law. Farmers Reply at 21. The regulation was promulgated pursuant to the authority granted by RCW §§ 48.02.060 and 48.30.010, but Farmers has not identified any relevant change in either statute. Moreover, even a statutory change can

² *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 588 P.2d 191 (1978).

³ Farmers asserts that changes made in the WAC § 284-30-393 between the proposed and final versions reflect a substantive change in the law, pointing to an “other than editing” comment. *See* Farmers Reply at 23. Farmers misunderstands. While the comment indicates that more was done to the proposed rule than correcting a typo, the clearly stated “**Purpose**” for the changes to the chapter was to clarify and refine existing law.

be applied retroactively if curative or remedial. *E.g.*, *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002).

More importantly, Farmers ignores the general rule that decisional case law, such as *Sherry*⁴ and related cases, is ordinarily given retroactive effect. *E.g.*, *Lunsford v. Saberhagen Holdings*, 166 Wn.2d 264, 271, ___ P.3d ___ (2009); *Barros v. Barros*, 34 Wn. App. 266, 272, 660 P.2d 770 (1983) (citing *Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wn.2d 504, 589 P.2d 785 (1979)).

C. The Make Whole Doctrine Applies Here Irrespective of WAC § 284-30-393

Regardless of arguments concerning WAC § 284-30-393, the insurance policy explicitly adopted the make whole doctrine. Having been previously argued, it is not repeated here. Similarly, apart from the issue of the new regulation, former WAC § 284-30-3905 is void as contrary to established law and public policy. Having also been previously argued, it is likewise not repeated here.

It is necessary, however, to correct a misstatement by Farmers concerning the *Bordeaux*⁵ decision, as Farmers accuses Averill of misrepresenting the case. Farmers states that Averill fails to mention that

⁴ *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007).

⁵ *Bordeaux v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008). The case involves self-insured retentions, analogous to a deductible.

the court held the insured was entitled to recoup the second \$100k it paid, but not the first \$105k it incurred. Farmers' Reply at 17. Farmers' representation of the case, however, is incorrect. The trial court had ruled that the insured was entitled to both amounts, which was upheld by the Court of Appeals. This is clear from the opening paragraph of the opinion. *See id.* at 689-90. *See also id.* at 693, 696-97. As a result, Farmers' reliance on *Bordeaux* actually supports Averill's position.

III. CONCLUSION

New WAC § 284-30-393, and the circumstances around its creation, supports the conclusion that Washington law has long required that the make whole doctrine apply to collision deductibles, and that the Insurance Commissioner is of the same belief. In addition, while WAC § 284-30-393 is not necessary to uphold the trial court's grant of summary judgment, Farmers has not pointed to anything that would prevent the retrospective application of the regulation if it were. Finally, none of the arguments concerning the new regulation alter the fact that former WAC § 284-30-3905 is contrary to law and public policy, and thereby void, or that Farmers' collision coverage incorporated the make whole doctrine.

September 28, 2009.


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DECLARATION OF SERVICE

I certify that on September 28, 2009, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Respondent Pearl C. Averill's Surreply, and caused to be delivered, via messenger, a true and accurate copy to:

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*Attorneys for Appellant Farmers
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington, this 28th day of September, 2009.



Matthew J. Ide