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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BY _____
DEPUTY

JAY MERRILL, Appellant,

v.

PEMCO Mutual Insurance Company, Respondent

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This case involves the interpretation of the Settlement Agreement; CP104-132, reached between the members of a Certified Class of PEMCO Insureds (Insureds) and PEMCO Mutual Insurance Company (PEMCO) after the Superior Court had certified a litigation Class.

The Settlement Agreement was preliminarily approved by the Superior Court on April 17, 2015, CP76-82, and notice and claim forms were sent out to members of the Class shortly thereafter. The Settlement was granted final approval on September 23, 2015. CP83-87. The Settlement was “claims made”; Class Members who submitted valid claims would receive a pro-rata share of the \$15,000,000 settlement fund. Both parties, and the Superior Court, recognized and acknowledged that the claims rate would be well below 100%. RP 20:14-16, 31:14-22.

By the September 12, 2015 claims deadline, 7442 Class Members, 42.34% of those who received the notice, filed claims. CP192. After these claims were received, a dispute arose between the Insureds and PEMCO as to how much each claim was to be paid under the settlement payment formula found in ¶44 of the

Settlement Agreement. CP115. The dispute involved what number should be used in the formula's denominator as the "Total Repair Cost Payments". This number was to reflect what PEMCO had paid on the underlying vehicle repairs "for those on the **Class List** minus the repair costs shown for any member of the Class who submits a valid exclusion request." ¶44(1), CP115 (bolding added).

Given how the formula worked, the bigger the number used in the denominator, the lower the payments to each Class Member who submitted a valid claim under the payment formula. The Insureds contend that the formula in ¶44 required the use of the figure provided by PEMCO on the "Class List", which was expressly defined by the Settlement Agreement in ¶9 as "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015." CP108. As PEMCO admitted, the denominator from this list – which was furnished on March 31, 2015 - was \$59,132,932.10. CP99. Using this figure in the settlement formula in ¶44 the average payment to members of the Class would (and Insureds argue should) have been \$610.99. CP195.

As PEMCO repeatedly admitted, the parties recognized that there would be a few Uninsured Motorist claims that were within the Class that would accrue after generation of the Class List, and before the cut off of the Class Period. The parties agreed that the Class List was subject to confirmatory discovery and the parties expressly contemplated that additional Class Members than those listed on the March 31, 2015 Class List would be able to receive settlement payments. RP 17:14-19, 19:5-7, 21:25-22:3. The Insureds expected approximately another 58 UIM claims to be eligible for payment under the settlement. CP192. Yet, due in large part to PEMCO's failure to include second accidents by insureds (and to send those claims forms with the original notice) on the March 31, 2014 list, PEMCO ended up identifying 2208 extra Claims that fell within the Class, and therefore the Settlement. RP99-101.¹

On October 8, 2015 PEMCO filed a motion to construe the contract and allow it to use the repair costs for this larger group - \$64,523,387.26 – in place of the figure set by the defined term “Class List” in ¶9 in paying claims CP88-98. Using this higher

¹ From these 2208 Extra Claims for which notices were sent, PEMCO identified 652 claims that were eventually made under the settlement, a much lower 29.52% claims rate, from these extra/additional Class Claims. CP99-101.

denominator would result in average payments of \$559.43, *\$50.77 less to each Class Member who submitted a valid claim.* CP195.

The Insureds opposed this Motion. CP180-190.

Although PEMCO agreed that that denominator was fixed by the Settlement and was a defined term, a point the Superior Court recognized, RP17:7-11; 23:9-12, the Superior Court chose to modify the defined settlement term, “Class List”, resulting in *lower* payments to everyone who made claims in the Settlement.

Attachment A.² As the Superior Court reasoned in its decision:

It makes more sense if you're going to increase the numerator, which I think is good, more claims, more individuals get paid. They will get paid somewhat less, but it only makes sense to increase the denominator also, so I'm going to adopt Mr. Phillips' argument over [the Insureds] vigorous objection.

RP33:18-24. Insureds have now received checks for the lower payments under ¶44, as modified by the Superior Court. This Appeal seeks review of the Superior Court’s modification of the Settlement Agreement, and its definition of “Class List” in ¶9 and full payment to the Insureds under the clear and unambiguous

² The Superior Court’s October 16, 2015 Order granting PEMCO’s motion, and ordering that 64,523,387.26 be used as the “Total Repair Cost Payments” is attached hereto as Attachment A.

terms of the Settlement Agreement, and its defined terms, including ¶9.

II. ASSIGNMENT OF ERROR

The Superior Court erred in its interpreting the Settlement Agreement so as improperly modify a defined term, “Class List,” resulting in settlement payments being reduced to Insureds.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err in in failing to adopt and enforce the plain meaning of the Settlement Agreement?
2. Did the Superior Court improperly vary/modify the unambiguous terms of Settlement Agreement?

IV. STATEMENT OF THE CASE

This case involves a pro-rata settlement, in which Insureds are entitled to a payment for “diminished value” calculated based upon their vehicles’ cost of repair as a portion of the “Total Repair Cost Payments” shown on the “Class List.” Settlement ¶44.

(CP115) The expressly referenced “Class List” (which sets the denominator in the settlement formula) is specifically defined by the Settlement itself, in ¶9. Paragraph 9 reads: “‘Class List’ means the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015.” CP108. There is no disagreement about what figure the referenced “Class List”

identified in ¶9 of the Settlement as a denominator was. PEMCO and Plaintiff's agree, it is (once opt-outs are removed) \$59,079,170.66. CP99. The figure required to be used by the settlement's ¶9 would have resulted in average payments, once plugged into the settlement formula in ¶44, of around \$610.99 per valid claim that was submitted. CP195.

Without citing any support for its view in the settlement itself – which is quite clear, and has an express reference in ¶9 and 44 to the denominator being that from the 3/31/15 “Class List” – PEMCO argued below that the Superior Court should instead use the denominator from the second of two later lists that PEMCO generated, a figure of \$64,523,387.26 . Both of these lists were provided *after* the parties had signed the Settlement Agreement and finalized the size of the fund, a fund negotiated based upon PEMCO having answered discovery, and represented that there were 17,050 people in the Class, with roughly \$59 Million in repair costs. CP99-101, CP192-194.

The Second of these lists – *the one the Superior Court ruled would be the denominator* (see Attachment A) - was never approved by Class Counsel, and was only provided to Class Counsel on October 2, 2015 *well after* final approval, and nearly a

month after the close of the period for making claims. CP195-97. Using the total repair cost figure from this October 2, 2015 list (\$64,523,387.26) as the denominator – as the Superior Court ordered - resulted in average payments to claimants of \$559.42, saving PEMCO roughly \$50.77 in payments to each Class Member who submitted a valid claim. CP195.

These lower figures arise from the fact that PEMCO, after providing the 3/31/15 “Class List” whose “Total Repair Costs” the Settlement *expressly* referenced as the denominator, somehow managed to find another 2208 claims. *Why* so many claims were found late by PEMCO is in the Insureds view irrelevant to what the denominator should be – since the settlement in ¶9 is clear and unambiguous, and should have been enforced as written. However, PEMCO’s attempt to justify its finding another 2208 claims to the Superior Court below made no logical sense, and was just wrong.

First, PEMCO attempted to assert, CP91-92, that the extra claims were the result of adding the few March 2015 Claims not reflected on the 3/31/15 Class List (those between the pulling of the “Class List” and the cut off date of the Class) , which as PEMCO correctly told the Superior Court the parties both

expected. RP 17:14-19, 19:5-7, 21:25-22:3. Yet, the Insureds expected around another 58 UIM claims to be eligible for payment under the settlement, since that was the rate at which UIM claims that fell within the Class were made. CP192.

Second, PEMCO asserted it told Plaintiffs' counsel it would be adding another 1,395 claims and implied Plaintiffs' counsel agreed to this. CP93. Yet, the e-mail referenced by PEMCO and provided to the Superior Court, CP197, said no such thing. The addition of 1,395 claims was something that PEMCO did *unilaterally*, and without consulting with Class Counsel. In fact, the list that PEMCO finally asserted, and which the Superior Court found, should be used as the denominator to reduce how much each person would be paid was not provided to Class Counsel for the Insureds until October 2, 2015. CP195. Notably, perhaps because this second round of notices were sent out later by PEMCO based on second accidents that they had failed to capture earlier and the Class Member recipients had already received a notice, these Class Member recipients failed to see a reason to return the second claim notice and the claims rate on these later notices were substantially lower. See, fn. 1, *supra*.

Regardless, this does not make these additional later found claims ineligible for payment under the settlement –both parties agreed, and expressly told the Superior Court -that PEMCO was to update the Class List, and the resulting extra claims, if any, were Class Members entitled to payment if they timely submitted a valid claim form. As PEMCO told the Superior Court:

THE COURT: But didn't you understand there would be some claims for people who weren't on the, quote, class list?

MR. PHILLIPS: No. We understood that the class list was a moving target and that we would finalize it through the confirmatory discovery process....

RP17:14-19, and

[PEMCO's Counsel] "everyone understood that the March 31st, 2015 list was not complete, but the class itself is defined as carrying through March 31st in paragraph 11"

RP19:5-7 and

[PEMCO's Counsel] "So under the settlement you've got an agreement that says it runs through March 31st. You've got an agreement that says a defendant shall update the class list."

RP21:25-22:3. PEMCO told the Superior Court the same thing in writing stating, "it would be inconsistent with the Settlement and this Court's express directive" for later identified Claims not to be included in the Settlement. CP89; *see also* CP91 (same).

Likewise, the *agreed* Preliminary Approval Order entered by the Superior Court contemplated the addition of claims eligible for notice and payment beyond those listed on the March 31, 2015 “Class List”, stating that: “The Individual Notice shall be mailed per the Stipulation of Settlement using the Class List provided to Class Counsel on March 31, 2015 or as updated by Defendants.” CP78; CP147.

Below, PEMCO implied – and the Superior Court appears to have accepted - that somehow the addition of these extra claims was a *quid pro quo* for watering down the per claim recovery. Yet, PEMCO shows nothing to support this conclusion in the Settlement Agreement itself, nor by way of any extrinsic evidence that this was the Parties contemplation. Instead, as the Insureds showed the Superior Court with unrebutted facts, the defined term “Class List” with a set amount of repair costs (\$59 Million) to be used as the denominator was *expressly contemplated* as part of the settlement structure so that claims could not be watered down by later found claims. CP 195-96.

V. ARGUMENT

A. Standard of Review

This Court reviews the Superior Court's ruling on the interpretation of the settlement agreement's settlement formula de novo. *Hearst Communications, Inc., vs. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262, 265 (2005)(interpretation of agreement reviewed de novo); *Quadrant Corp., v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733, 737 (2005)(same); *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978)("Absent dispute facts, the construction or legal effect of a contract is determined by the court as a matter of law.").

B. The Unambiguous terms of ¶9 and 44 of the Settlement Agreement required that \$59,079,170.66 be used as the Denominator.

Paragraph 9 of the Settlement (CP108) reads: "'Class List' means the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015." There is no disagreement about what figure the referenced "Class List" provided for by ¶9 of the Settlement gives as a denominator. PEMCO and Insureds agree that it is (once opt-outs are removed) \$59,079,170.66. As PEMCO admitted to the Superior Court, there was also no misunderstanding, PEMCO knew that this figure - to be used as the

“total repair costs” under ¶44 (CP115) - was *fixed* by the terms of the settlement agreement:

THE COURT: I got it. So, Mr. Phillips [PEMCO’s Counsel], don't we have a defined term, class, defendants will use the total amount of payments covered on the class list?

MR. PHILLIPS: We do

RP17:7-11;

THE COURT: Well, but Mr. Nealey [Class Counsel], as I understand it, says the denominator is defined and fixed by the settlement.

MR. PHILLIPS: He says that, and it's true...

RP23:9-12.

A contract term is only ambiguous “when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.” *Mayer v. Pierce County Medical Bur., Ind*, 80 Wn.App. 416, 909 P.2d 1323, 1326 (Div. 2 1995).

This requires that “the *language on its face* is fairly susceptible to two different but reasonable interpretations” *Washington Public Utility District’ Utility System v. PUD 1 of Clallam Cty.*, 112 Wn.2d 1, 11, 771 P.2d 70 (1989)(*italics* in original).

The Superior Court was required to, and this Court must, “give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates

a contrary intent.” *Hearst Communications v. Seattle Times Co.*, 154 Wn.2d 493 at 503. "Ambiguity will not be read into a contract where it can be reasonably avoided." *Id.* (quoting *McGary v. Westlake Investors*, 99 Wash.2d 280, 285, 661 P.2d 971 (1983)). Where the language of a contract is “clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists.” *Transcontinental Ins. Co. v. Washington Public Utilities Districts’ Utility System*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988); *Washington Public Utility District’ Utility System*, 112 Wn.2d at 10-11 (same).

Here, the term “Class List” in ¶9 and what is referred to in the settlement formula in ¶44 is clear and unambiguous. PEMCO provided no alternative meaning for the term to the Superior Court, nor could they.³ It is also a defined term that makes sense, and if it did not exist, would have resulted in the settlement being a pig-in-a-poke for the Insureds, and rewarded PEMCO’s failure to respond accurately to discovery requests for the initial generation

³ PEMCO made no attempt before the Superior Court to claim a subjective intent or belief on its part that if it added more claims it could water down what it would have to pay, nor would such an intent be relevant: “when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Hearst Communications*, 154 Wn.2d at 504.

of a list of claims.⁴

PEMCO instead argued, and the Superior Court appeared to accept, that some type of fairness called for modifying the Settlement Agreement's expressly defined terms. As the Superior Court ruled:

It makes more sense if you're going to increase the numerator, which I think is good, more claims, more individuals get paid. They will get paid somewhat less, but it only makes sense to increase the denominator also, so I'm going to adopt Mr. Phillips' argument over [the Insureds] vigorous objection.

RP33:18-24. Yet, this reasoning ignored that the parties all agreed that the extra claims were to be paid under the Settlement, and that it was *expressly contemplated* by both parties that claims not on the March 31, 2015 list would be added (or perhaps removed) as a result of confirmatory discovery and adding those claims that accrued after the list was generated. It was further admitted by PEMCO that ¶9 was clear. As such there was no ambiguity in who should be included in the Settlement, and as such nothing to be in essence “traded off for” as the Superior Court reasoned

⁴ Insureds note that they do not suggest, nor imply, that PEMCO's failure to generate a complete list until after the settlement was finalized and the initial notice was sent was intentional or malicious. Instead, as they told the Superior Court, the use of a defined denominator addressed any eventuality which might arise and insured *predictable compensation* to those in the Class who submitted claims.

should be done, with a change of the denominator. Insureds neither contemplated, nor bargained for, nor signed, a Settlement Agreement which would require them to receive lower settlement payments in the event PEMCO identified further members of the Class.

The legal principles that should have been applied to this case are clear: “If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists.” *American Nat. Fire Ins. Co. v. B&L Trucking and Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250, 256 (1998); *Transcontinental Ins. Co.*, 111 Wn.2d at 456, (same); *Washington Public Utility District’ Utility System*, 112 Wn.2d at 10-11 (same). The Superior Court committed clear error in failing to enforce the parties Settlement Agreement and the definition in ¶9 as written, requiring reversal of its Order. “A court cannot, based upon general considerations of abstract justice, make a contract for parties which they did not make for themselves.” *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980).

C. The Superior Court’s Order Prejudiced Insureds, Requiring Reversal.

As noted above, had the Superior Court applied the plain

and uncontested terms of the contract, and used the “Total Repair Cost Payments” denominator found on the “3/31/15 Class List,” Class Members would have received under the formula found in ¶44, an average payment of \$610.99. CP195. Using the Total Repair Cost figure from the later October 2, 2015 list as the denominator – as the Superior Court ordered - resulted in average payments to Class Members of \$559.42, saving PEMCO *on average* \$50.77 in payments to each Class Member who submitted a valid claim. CP195. This took from each Class Member what was negotiated on their behalf, saving PEMCO what it did not have to pay. As such, this Court should reverse the Superior Court’s Order and order that Insureds be paid under the Settlement Agreement the *difference* in what the Settlement provided, using the figure for “Total Repair Cost” on the “3/31/15 Class List” and the lesser amount they already received.

VI. CONCLUSION

For the foregoing reasons this Court should reverse and remand for payment of the amounts required by the plain and

unambiguous terms of the parties' Settlement Agreement.

RESPECTFULLY SUBMITTED this 15th day of April,
2016.

Law Offices of STEPHEN M. HANSEN, PS

A handwritten signature in black ink, appearing to read 'S M H', is written above a horizontal line.

STEPHEN M. HANSEN, WSBA #15642
Of Attorneys for Appellant

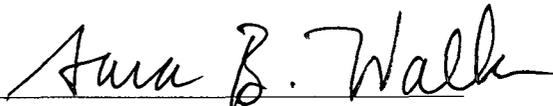
CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 15th day of April, 2016, I [X] e-mailed [X] mailed via regular U.S. mail [] faxed [] delivered by legal messenger a true and correct copy of this document to:

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