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No. 62767-8-I

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant,

v.

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

Respondent.

**FARMERS' RESPONSE TO RESPONDENT AVERILL'S
SURREPLY**

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ORIGINAL

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Int’l Longshoremens’ Ass’n v. NLRB</i> , 56 F.3d 205 (D.C. Cir. 1995)	4
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 114 S. Ct. 1483 (1994).....	1, 2, 3, 4
<i>Mejia v. Gonzales</i> , 499 F.3d 991 (9th Cir. 2007)	2
<i>Moses v. Providence Hosp. & Med. Ctrs. Inc.</i> , 561 F.3d 573 (6th Cir 2009)	2
<i>Nat. Mining Ass’n v. Dept. of Labor</i> , 292 F.3d 849 (D.C. Cir. 2002)	2, 3
<i>Piper v. Chris-Craft Ind. Inc.</i> , 430 U.S. 1, 97 S. Ct. 926 (1977).....	4
WASHINGTON STATE CASES	
<i>Bordeaux, Inc. v. Am. Safety Ins. Co.</i> , 145 Wn. App. 687, 186 P.3d 1188 (2008)	5
<i>DOT Foods, Inc. v. Wash. Dep’t of Revenue</i> , 215 P.3d 185 (Wash. 2009).....	4
<i>Sherry v. Fin. Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	1
<i>Thiringer v. Am. Motors Ins. Co.</i> , 91 Wn.2d 215, 588 P.2d 191 (1978).....	3, 4, 5
REGULATIONS	
WAC § 284-30-393.....	1, 2, 3, 4

WAC §§ 284-30-3904.....1, 3
WAC §§ 284-30-3905.....1, 3

Ms. Averill invites the Court to rely on the new WAC § 284-30-393, which became effective on August 21, 2009, to “clarify” the meaning of the old WAC §§ 284-30-3904 and -3905, which were effective prior to August 21, 2009, and to decide whether *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007), applies to deductibles. The new WAC § 284-30-393 “cannot bear the weight [she] places upon [it].” *Landgraf v. USI Film Products*, 511 U.S. 244, 262, 114 S. Ct. 1483 (1994). It shows only what the OIC regulations require of insurers after August 21, 2009. To suggest that it “clarifies” the prior (and plainly contrary) regulations would violate the “anti-retroactivity principle [that] finds expression in several provisions of [the United States] Constitution.” *Id.* at 266.

Ms. Averill claims, without authority, that the anti-retroactivity principle does not apply to administrative regulations. Surreply Br. at 1, 3. She is wrong. “[T]he presumption against retroactive legislation . . . embodies . . . elementary considerations of fairness that individuals should have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Landgraf*, 511 U.S. at 265. It applies equally to “congressional enactments and administrative rules,” and has “special force” when it comes to “contract rights” that are at issue in this case. *Id.* at 272. *See*

also *Mejia v. Gonzales*, 499 F.3d 991, 997 (9th Cir. 2007); *Moses v. Providence Hosp. & Med. Ctrs. Inc.*, 561 F.3d 573, 583 (6th Cir 2009) (“courts should not construe . . . ‘administrative rules to have retroactive effect unless their language requires this result.’”) (citing *Landgraf*).

“To determine whether a regulation should be applied to events arising prior to [its] enactment, courts first inquire whether the regulation expressly reaches retroactively; if the regulation is silent on the issue, then the court asks ‘whether applying [it] to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.’ If such rights are affected, then courts must apply a presumption against retroactivity.” *Providence Hosp.*, 561 F.3d at 583-84.

Because the new WAC § 284-30-393 states that it became effective prospectively, on August 21, 2009, it does not reach prior conduct. Neither does it matter that the OIC described the new WAC § 284-30-393 as a “refinement” of the old rules. “Rather than relying on . . . labels, a court must ‘ask whether the regulation operates retroactively.’” *Nat. Mining Ass’n v. Dept. of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (citing *Landgraf*, 511 U.S. at 275). This inquiry involves “a commonsense, functional judgment about whether the new provision

attaches new legal consequences to events completed before its enactment.” *Landgraf*, 511 U.S. at 270. “[W]here a rule changes the law in a way that adversely affects a party’s prospects for success on the merits . . . it may operate retroactively even if designated ‘procedural’ by the [drafter].” *Nat’l Mining Ass’n*, 292 F.3d at 860 (citation omitted).

“In analyzing each new regulation the courts first look to see whether it effects a substantive change from the agency’s prior regulation or practice. . . . If a new regulation is substantively inconsistent with a prior regulation, [or] prior agency practice, it is . . . impermissibly retroactive as applied to pending claims.” *Id. See id.* at 859 (“the critical question is whether a challenged rule . . . changes the legal landscape”).

The new WAC § 284-30-393 changed the landscape. Before August 21, 2009, the old WAC §§ 284-30-3904 and -3905 did not require the insurers to pursue the insured’s deductibles from the third parties; if the insurer collected any part of the deductible it could prorate it to reflect its costs and fees. The regulations did not require the insurer to pay the insured a greater share of the deductible than it was able to collect.¹ After August 21, 2009, the conduct that was explicitly permitted became

¹ The OIC’s view was that the make-whole doctrine adopted by *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), did not require a different result. See discussion in Farmers’ Opening Brief at 18-20 and Appendix A (OIC letter)

explicitly disallowed. Insurers now “must include the insured’s deductible, if any, in . . . subrogation demands” and allocate all recovery “first to the insured for any deductible.” WAC § 284-30-393.² The new obligation does not apply retroactively, no matter how it is labeled.

Ms. Averill’s reliance on the OIC’s current views on what *Thiringer* means is also misplaced. The key issue in this case – whether the make-whole doctrine applies to deductibles – is an issue of common law that is within the exclusive province of the courts where no deference to the agency is due. *Int’l Longshoremen’s Ass’n v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995). This is particularly true when, as here, the agency changes its views. *Piper v. Chris-Craft Ind. Inc.*, 430 U.S. 1, 42 n.27, 97 S. Ct. 926 (1977) (“Even if the agency spoke with a consistent voice . . . is presumed ‘expertise’ is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution”). *See also DOT Foods, Inc. v. Wash. Dep’t of Revenue*, 215 P.3d 185, 189 (Wash. 2009) (no deference to the Department’s changing views on the construction of unambiguous statutes). For the reasons discussed in Farmers’ prior briefs, the make-whole doctrine does not apply to deductibles. OIC’s changing views on the matter are irrelevant to the Court’s analysis.

² The OIC now apparently believes that the make-whole doctrine expressed in *Thiringer* requires this result.

Lastly, Ms. Averill argues with Farmers' discussion of *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008). In *Bordeaux*, the insurer strong-armed its insured (Bordeaux) to contribute to a settlement double the self-insured retention ("SIR") that the policy required. "Bordeaux later settled with several of the third-party subcontractors." *Id.* at 692 (emphasis added). At issue was the priority and rights of reimbursement from the third-party recovery. Relying on *Thiringer*, this Court held that Bordeaux was entitled to be made whole for the SIR "before any third-party recovery funds are paid to the insurers." *Id.* at 697. Bordeaux was also entitled to be reimbursed *by the insurer* for the second SIR it overpaid. *Id.* at 689. Unlike the insureds in *Bordeaux* and *Thiringer*, Averill did nothing to obtain the third-party recovery, and cannot claim the same priority. Farmers obtained the entire recovery by itself and paid Averill all of the deductible it recovered. Until August 21, 2009, if Averill wanted more she had to get it herself.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of Washington State that I caused true and correct copies of the foregoing document to be served on the following individual(s) by the method(s) indicated:

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