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No. 62767-8-I

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

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FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant,

v.

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

Respondent.

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**APPELLANT'S REPLY BRIEF**

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## I. SUMMARY

Averill concedes that she received everything she was entitled to under her policy. See Pearl Averill's Brief of Respondent ("Respondent's Brief") at 1 ("The case does not involve any claim by Averill for further insurance payments by Farmers under [collision] coverage, *or any insurance coverage for that matter . . .*") (emphasis added). This concession is fatal to her breach of contract claim against Farmers. A person that receives the full value of his or her contract cannot sue or seek damages from contract breach. *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998) ("This is not to say an insurer is required to pay claims which are not covered by the contract or take other actions inconsistent with the contract."); *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 789, 189 P.3d 777 (2008) ("Washington law does not . . . force insurers to pay for losses that they have not contracted to insure").

In fact, Averill received *more* than her policy promised because Farmers recovered in the intercompany arbitration with the other driver's insurer \$250 of her \$500 deductible and paid it to her without any reduction. The arbitrator also awarded to Farmers half of its net payment to Averill, or \$7,555.83. Nothing in the then-current Washington law required Farmers to subtract from *its* subrogation recovery the other \$250 of Averill's deductible and pay it to her as a condition of exercising its

right of subrogation against the other driver. WAC § 284-30-3904, in effect until August 21, 2009, explicitly states that the insurer has no obligation to pursue the recovery of the insured's deductible, but may do so to accommodate the insured's request. Any deductible so recovered may be shared with the insured "on a proportionate basis." WAC § 284-30-3905. Averill's claim that Farmers must pay her *the entire* deductible, no matter what it was able to recover, is contrary to the regulation.

Averill argues that the \$250 "at the center of the case [is] not funds from Farmers" and instead "represent[s] money from the tortfeasor in payment of Averill's property damage loss." Respondent's Brief, at 1. This misses the point. To obtain priority of recovery from the tortfeasor that is afforded by the make-whole rule, the insured must attempt to obtain recovery from the tortfeasor in the first place. As stated in her policy:

When a person has been damaged by us under this policy *and also recovers from another*, we shall be reimbursed to the extent of our payment after that person has been fully compensated for his or her loss.

CP 35 (emphasis added). *See also Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978).

Had Averill pursued successful recovery against the other driver, she would have had priority of being "fully compensated" for her tort damages before Farmers could recover anything from the same source. But Averill did not do so. She elected instead to receive the full value of

her car, less her \$500 deductible, from Farmers. It was Farmers that then pursued the recovery from the other driver's insurer through intercompany arbitration. The arbitration resulted in the issuance of two checks: a check for \$7,555.83 to Farmers as the subrogee of the amounts it had paid to Averill, and a check for \$250 to Averill for half of her deductible. Averill now seeks to reduce *Farmers'* arbitration recovery by \$250, even though she did absolutely nothing to obtain it.

All courts and commentators that have addressed similar claims have rejected them. Most recently, one court explained:

Pennsylvania requires that an insured must recover the full amount of his losses from a third-party before the insurer may claim any reimbursement from the insured. . . . [The] cases do not describe a right of the insured to the recovery of the full amount of his contractually required deductible *when the insurer recovers in subrogation from a third party*.

*Harnick v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 579378 \*3 n.1 (E.D. Pa. 2009) (emphasis added).<sup>1</sup> See also *Chong v. State Farm Mut. Auto. Ins. Co.*, 428 F. Supp.2d 1136, 1144 n.4 (S.D. Cal. 2006) (“The make-whole doctrine . . . applies only to a small subset of cases where the carrier has elected not to participate in the policyholder's tort action and the

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<sup>1</sup> See RAP 14.1(b) (unpublished opinions may be cited as authority if citation is permitted by the issuing court); FRAP 32.1 (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as ‘unpublished’ . . . and . . . issued on or after January 1, 2007.”).

policyholder's payment of her attorney fees and costs have rendered her recovery inadequate to fully compensate her for her loss.").

Similarly, nothing in Washington law suggests that the make-whole doctrine applies to allow the *nonparticipating insured* to get priority of recovery (much less recovery of the deductible) from the amounts recovered *by the insurer* from the third-party tortfeasor or tortfeasor's insurer. *See Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 848-49, 90 P.3d 1154 (2004) ("The *Thiringer* . . . full compensation principle was applied . . . to hold that in order to protect an insured's right to full compensation, it is necessary for an insurer to share with its insured the expense of obtaining a recovery from which the insurer seeks to satisfy its subrogation rights.").

Averill's contrary argument rests solely on her overbroad reading of the statement in *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 621, 160 P.3d 31 (2007), that "insureds are not fully compensated until they have recovered all of their damages as a result of a motor vehicle accident." But *Sherry* does not address the deductibles; it also makes clear that the meaning of "full compensation" depends on the context. For the purposes of claims against the insurer, it refers to the limits of all coverage provided by the insurance policy; nothing requires the insurer to pay more than the policy promised. *Id.* at 622-23 ("UIM insurance simply insures a driver against someone else not having enough insurance to pay a

judgment, rather than insuring for full compensation in the case of an accident; PIP “cover[s] the immediate costs of an accident, such as medical expenses and loss of income.”). For the purposes of an insured’s claim against the tortfeasor, “full compensation” refers to the actual losses the insured is legally entitled to recover in tort. *Id.* at 626.

But Averill did not sue the other driver in tort. If she had, Farmers’ subrogation right would have been secondary in priority to her claim against the other driver. *Thiringer*, 91 Wn.2d at 219 (“insurer . . . can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss”); *Cook*, 121 Wn. App. at 848-49 (in order for the *Thiringer* full compensation principle to apply, there must be, at a minimum, a joint effort and shared expense of obtaining recovery “from which the insurer seeks to satisfy its subrogation rights); *Harnick*, 2009 WL 579378 at\*3 n.1. Because Averill did not do so, the make-whole rule does not apply.

Averill concedes that she received everything she was entitled to under her policy, plus half of her deductible, consistent with the then-current insurance regulations. WAC §§ 284-30-3904, -3905. Neither the policy nor the make-whole doctrine require anything else. “Subrogation is an equitable doctrine . . . [that] attempt[s] to resolve each case upon a consideration of the equitable factors . . .” *Cook*, 121 Wn. App. at 848 (citing *Thiringer*, 91 Wn.2d at 220). It does not require the insurer to pay

the insured for deductibles the insured expressly agreed to assume, or share its subrogation recovery with the insured that did nothing to help obtain it. *Id.* at 848-49. The trial court’s order of summary judgment against Farmers on Averill’s breach of contract claim should be reversed.

## II. ARGUMENT

### A. **The Make-Whole Doctrine Does Not Require That Nonparticipating Insureds be Reimbursed for Their Entire Deductibles When the Insurer Obtains Subrogation Recovery**

Subrogation is an equitable doctrine that may arise by contract or by operation of law. *Mahler v. Szucs*, 135 Wn.2d 398, 412, 957 P.2d 632 (1998) (right to reimbursement may arise by operation of law (“legal” or “equitable” subrogation) or by contract (“conventional” subrogation)); *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 417, 693 P.2d 697 (1985) (“regardless of the source of the right of subrogation, the right will only be enforced in favor of a meritorious claim and after a balancing of the equities”); *General Ins. Co. v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966) (“subrogation is an equitable right . . . [that] arises independently of contract provision.”) (emphasis added).<sup>2</sup>

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<sup>2</sup> See also 2 Alan Windt, *Insurance Claims and Disputes*, § 10:7 (5th ed. March 2008) (“In general, absent a statute to the contrary, an insurance company will, on making a payment to the insured required under the policy, always be subrogated either totally or partially (if the insurer pays less than the insured’s entire loss), to the insured’s rights and remedies against the wrongdoer.”) (citations omitted); 16 *Couch on Ins.* § 222:22 (3rd ed. June 2009) (“Accordingly, the principles of equitable subrogation have been held to govern . . . where, even though there is a subrogation clause, there is some question in  
(continued . . .)

Subrogation allows the party who paid a loss to impose ultimate liability on the party who caused it and “in equity and good conscience, ought to bear it.” *Mahler*, 135 Wn.2d at 411-12. Subrogation is “always liberally allowed in the interests of justice and equity.” *Id.* at 412.

Having paid Averill the value of her car under the collision coverage, Farmers obtained an equitable right to recoup its payment from the person responsible for the accident. *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 537, 123 P.3d 519 (2005), *rev. denied*, 167 Wn.2d 1018, 142 P.3d 607 (2006). To enforce this right, Farmers could stand in Averill’s shoes and pursue “a legal action . . . against the tortfeasor.” *Mahler*, 135 Wn.2d at 415. The insurance policy also gave Farmers a parallel right of conventional subrogation for the amounts it had paid to Averill. *See* CP 35 (“[w]e are entitled to all the rights of recovery of the person to whom payment was made against another”). Neither equity nor the policy allow Farmers to subrogate against Averill’s deductible because Farmers did not pay it. WAC §§ 284-30-3904 and -3905 permit the insurer to pursue recovery of the deductible in the subrogation action to accommodate the insured.

Averill could have pursued her own tort action against the other driver. If successful, she would have obtained priority of recovery before

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(. . . continued)

equity about whether subrogation should be imposed, and where the subrogation clause does not provide terms upon which subrogation would occur.”).

Farmers could recover anything from the same source. *See Chong*, 428 F. Supp.2d at 1144 n.4. If Averill’s recovery had created a “common fund” that benefited Farmers, Farmers would have been responsible for a proportionate share of Averill’s attorney fees. *Mahler*, 135 Wn.2d at 426-27; *Peterson v. Safeco Ins. Co. of Illinois*, 95 Wn. App. 254, 264, 976 P.2d 632 (1999). *See also Allstate Ins. Co. v. Superior Court*, 60 Cal. Rptr.3d 782, 790 (Cal. Ct. App. 2007).<sup>3</sup>

This is exactly what happened in each of the Washington cases cited by Averill. *See Thiringer*, 91 Wn.2d at 217 (the insured “proceeded [against the third party] . . . with the assistance of counsel, and accepted settlement of \$15,000, this being the limit of the tortfeasor’s liability policy”). The issue then becomes how to allocate the recovery as between the insured and the insurer. The make-whole doctrine provides that the nonparticipating insurer, as a matter of equity, gets second priority, and “can recover only the excess which the insured has received from the wrongdoer remaining after the insured is fully compensated for his loss.” *Thiringer*, 91 Wn.2d at 219.

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<sup>3</sup> The court in *Allstate* explained that the make-whole doctrine and the common fund rule represent two parallel equitable limitations on the subrogation/reimbursement right. “The made-whole exception applies to preclude reimbursement [to the insurer] only where the policyholder was not made whole and *where the insurer did not participate in the recovery efforts.*” 60 Cal. Rptr. at 790 (emphasis added). The common fund rule “is founded on the principle of fairness to the successful litigant who achieves a benefit for others who should equitably share in the cost of recovery.” *Id.*

But the make-whole doctrine does not apply, and equity does not require, to give priority of recovery – much less the recovery of the contractually negotiated deductible – to the nonparticipating insured. *See, e.g., Cook*, 121 Wn. App. at 848-49 (for the *Thiringer* full compensation principle to apply there must be, at a minimum, a shared effort and expense by the insured and insurer “of obtaining a recovery from which the insurer seeks to satisfy its subrogation right”).

Courts and commentators have uniformly rejected make-whole claims by nonparticipating insureds for several interrelated equitable and legal reasons. *See Monte De Oca v. State Farm Fire & Cas. Co.*, 897 So.2d 471, 473 (Fla. Dist. Ct. App. 2004) (“[t]he Insured is demanding the second \$250 of the deductible based on his contention that without his receiving it he has not been made whole. . . . The Insured, as a wrongdoer legally responsible for 50% of the harm, is not entitled to be absolved from liability and must not receive a windfall. His liability as a 50% comparative wrongdoer is for half of the deductible”); *Nat. Cont. Ins. Co. v. Perez*, 897 So.2d 492, 492 (Fla. Dist. Ct. App. 2005) (“In *Monte De Oca* . . . we clarified that an automobile insurer will not be held to have violated the made-whole doctrine when it returns to its contributorily-negligent insured a properly prorated portion of insured’s collision deductible after recovery in a subrogation action”); *State Farm Fire and Cas. Co. v. Hannig*, 764 So.2d 543 (Ala. 2000), *overruling* 764 So.2d 538

(Ala. Ct. Civ. App. 1999) (to apply the make-whole doctrine to the deductible represents “a sharp departure from the law of subrogation that had previously existed in this State).” *See also Chong*, 428 F. Supp.2d at 1144 n.4 (the make-whole doctrine applies only when the insurer does not participate in the insured’s tort action against the third party); *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143, 146-47 (Iowa 1986) (applying the make-whole doctrine that requires insurer to indemnify its insured for items not covered by the policy “would be [a] windfall to an insured who has not paid for such protection”); *Allstate*, 60 Cal. Rptr.3d at 794 (“it is not the purpose of the made-whole rule to rewrite the parties’ contract . . . such that it would provide the insured with a benefit for which he did not pay for a risk it did not assume.”).<sup>4</sup> *See also Windt, supra*, § 10.6 at 10-38 (“the made whole doctrine does not apply to deductibles”); *Couch, supra*, § 223:149 (same).

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<sup>4</sup> The California Court of Appeals in *Allstate* disagreed with the conclusion in *Chong* that California law requires that the insured who sues the tortfeasor should be “made whole” for the attorney fees incurred in the recovery. *Allstate*, 60 Cal. Rptr.3d at 794-95. The Court in *Allstate* concluded, relying, in part, on *Peterson*, 95 Wn. App. 254, that “in the tort context, full compensation refers to payment for all damages suffered, and does not include attorney fees. *Allstate*, 60 Cal. Rptr.3d at 793. Both *Chong* and *Allstate* agree, however, that in order to trigger the make-whole doctrine in the first place, the insured must obtain recovery from the third party. *See Allstate*, 60 Cal Rptr.3d at 785 (“Delanzo . . . suffered injuries resulting from an automobile accident with a third party. Under Allstate’s med-pay policy provisions, Allstate paid Delanzo \$4,203.36. **Delanzo then settled his claim against the third party tortfeasor for \$11,000, and received the settlement payment in full.** Delanzo alleged he incurred attorney fees of \$3,850 and costs of \$2,076.84 . . . to obtain this settlement.”) (emphasis added); *Chong*, 428 F. Supp.2d at 1138 (“Defendant paid \$5,000 towards Plaintiff’s medical bills. **Plaintiff pursued a claim against the third party with whom she had the accident and ultimately recovered a settlement of \$65,000.** To obtain the settlement, she paid approximately \$28,000 in attorney fees and costs.”) (emphasis added).

Most recently another court rejected a claim identical to Averill's under Pennsylvania law. *See Harnick*, 2009 WL 579378. Harnick filed a class action complaint challenging State Farm's practice of prorating insureds' deductibles following State Farm's subrogation recovery from third parties. Similarly to WAC §§ 284-30-3904 and -3905, Pennsylvania Insurance Regulations explicitly allows the prorating of deductibles:

Insurers shall, upon the request of the claimant, include the first-party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with the first-party claimant, unless the deductible amount has been otherwise recovered. A deduction of expenses cannot be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be for only a *pro rata* share of the allocated loss adjustment expense.

31 Pa. Code. § 146.8(c).

Harnick argued that the regulation was invalid because it was promulgated without authority from the General Assembly. Like Averill, Harnick also argued that prorating the deductible violated the make-whole doctrine. The court rejected both arguments. With respect to the make-whole doctrine it held:

[T]he cases which the plaintiffs cite in support of their construction of the "made whole" doctrine do not comport with the plaintiff's characterization of that doctrine. . . . This doctrine requires that an insured recover the full amount of his losses before his insurer may demand reimbursement for any payment previously made to the insured under an insurance policy. . . . These cases do not describe a

right of the insured to the recovery of the full amount of his contractually required deductible **when the insurer recovers in subrogation from a third party.**

*Harnick*, 2009 WL 579378 at \*3 (emphasis added).<sup>5</sup>

The make-whole doctrine under Washington law applies in the same way. In *Thiringer*, the insured pursued recovery against the third-party tortfeasor and obtained a settlement that exhausted all of the tortfeasor's assets and policy limits. *Thiringer*, 91 Wn.2d at 217-218. The court held that the insured's effort triggered

The general rule that, while an insurer is entitled to be reimbursed to the extent **its insured recovers payment** for the same loss **from a tortfeasor** responsible for the damage, it can recover only the excess which **the insured has received from the wrongdoer**, remaining after the insured is fully compensated for his loss.

*Id.* at 219 (emphasis added).

In *Peterson*, 95 Wn. App. at 257, Safeco's insured, Peterson, sued the tortfeasor and settled for \$20,000, \$230,000 short of the tortfeasor's liability limits. Peterson then demanded that Safeco waive the right of reimbursement for the \$3,900 in PIP benefits it had paid to Peterson after the accident. Peterson argued that he was not fully compensated by the

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<sup>5</sup> The *Harnick* court dismissed all claims against State Farm. *See id.* at \*4 (“[t]he behavior does not stand as an act of bad faith . . . because the defendant acted in reasonable reliance on a valid state insurance regulation. . . . The complaint does not state a claim for unjust enrichment . . . because the defendants were entitled by law to a prorated amount of the deductible. Finally, the complaint's . . . count for injunctive relief fails to state a claim because the defendant's behavior as alleged was permissible under Pennsylvania law.”).

\$20,000 settlement because he owed a percentage of his recovery to his attorney. The Court of Appeals held that *Thiringer* did not require that the make-whole rule be extended to attorney fees. *Id.* at 260-261.

*Peterson* is good law. See *Loc Thien Truong v. Allstate Property and Cas. Ins. Co.*, \_\_ Wn. App. \_\_, 211 P.3d 430 (2009). In *Truong*, the insured, who settled with a tortfeasor for less than the tortfeasor's policy limits, claimed that he did not have to reimburse his insurer, Allstate, for the PIP payments because the settlement had not fully compensated him for his loss. Like Averill, the insured in *Truong* relied on *Sherry*. This Court disagreed. It noted that in *Sherry* the insured obtained an arbitration award for damages sustained when he was struck by an uninsured driver. The arbitrator reduced the insured's damage award to 30 percent because the insured was 70 percent at fault. "The court held that insureds are fully compensated when they have made a complete recovery of the 'actual losses suffered as a result of an automobile accident' as determined by a court or arbitrator. Because Sherry's actual losses as determined by the arbitrator were . . . greater than the amount he recovered in UIM benefits, his insurer was not entitled to reimbursement of PIP benefits." *Truong*, 211 P.3d at 432-33 (citing *Sherry*, 160 Wn.2d at 614).

Although *Truong* obtained his recovery as a result of a settlement with the tortfeasor's insurer rather than as a result of UIM arbitration, this Court concluded that *Sherry* applied. *Id.* at 433 ("the rationale for denying

an offset to the PIP insurer can be equally applicable in a case where an insured obtains a settlement from a tortfeasor.”). That did not help Truong, however, because he failed to overcome the presumption that his voluntary settlement for less than the tortfeasor’s policy limits fully compensated him for his injuries. The Court concluded that Truong’s case was more analogous to *Peterson* than to *Sherry*:

Farmers [third party’s insurer] had \$250,000 available to settle [Peterson’s] claim. After negotiations and consultation with an experienced personal injury lawyer, Mr. Peterson accepted \$20,000 . . . [and] fully released Farmers and [the tortfeasor] from any further liability. . . . If the gross settlement did not reflect what Mr. Peterson, or his attorney, believed to be full compensation, then he had no obligation to accept it.

...

Like the plaintiff in *Peterson*, Truong had no obligation to settle if he felt the amount offered did not reflect his total damages. He fully released [the tortfeasor] and Pemco when he accepted the settlement. If Allstate cannot now obtain reimbursement from the proceeds of the settlement, the effect would be to unfairly eliminate Allstate’s subrogation interest in the PIP payments.

*Truong*, 211 P.3d at 435.

Unlike the plaintiffs in *Truong* and *Sherry*, both of whom made an attempt to recover against the third-party tortfeasor in settlement or UIM arbitration, Averill did nothing. Farmers pursued its subrogation interest in the intercompany arbitration with the other driver’s insurer on its own. Equity does not require that Farmers’ recovery, obtained solely through its

own efforts, be shared with Averill. See *Chen v. State Farm Mut. Ins. Co.*, 123 Wn. App. 150, 158, 94 P.3d 326 (2004) (where the property damage settlement with third-party's insurer was obtained solely due to the efforts of Chen's insurer, State Farm, and not due to Chen's efforts, "granting fees in equity under the common fund is inappropriate") (citation and internal quotation marks omitted).

Under WAC § 284-30-3904, Farmers also pursued the collection of Averill's \$500 deductible in the same arbitration, and recovered \$250. CP 69-71. Averill could have declined Farmers' offer to pursue her deductible and pursued her own recovery of her deductible, and any additional amounts, in a tort action against the other driver. She is still free to do so today because, unlike in *Peterson* and *Truong*, the other driver was not released from liability arising out of the accident. Neither is the other driver bound by Farmers' payment to Averill as the measure of her property damage. If Averill pursues tort recovery against the other driver, it is possible that the court may find that her total damages are less than, equal to, or more than the amount she recovered under her policy plus \$250. In the absence of such determination, Averill's claim that she was not fully compensated remains entirely speculative and cannot eliminate Farmers' right of subrogation for collision payments it actually made. *Truong*, 211 P.3d at 434.

More importantly, because Averill elected not to pursue any claim against the other driver, equity does not support her attempt to prejudice Farmers' right of subrogation for the amounts it had paid to her under her policy. *See Harnick*, 2009 WL 579378 at \*3 n.1 (“[t]he made-whole doctrine . . . requires that ***an insured recover*** the full amount of his losses before his insurer may demand reimbursement for any payments previously made. . . [I]t do[es] not describe a right of the insured to the recovery of the full amount of his contractually required deductible when ***the insurer recovers*** in subrogation from a third party”). *See also Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 696, 186 P.3d 1188 (2008) (“subrogation provision allows [the insurer] to recover payments it actually made.”).<sup>6</sup>

Averill's overbroad view of the make-whole doctrine (and the *Sherry* case) is in conflict with *Peterson*, 95 Wn. App. 254, that held that the make-whole doctrine does not require the insured to recover his attorney fees before the insurer can exercise its right of subrogation. It is also in conflict with *Meas*, 130 Wn. App. at 538, that held that the make-whole doctrine does not require that the insured be fully compensated for a physical injury before the insurer could pursue its subrogation claim for property damage payment. If “full compensation” was absolute as Averill

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<sup>6</sup> Averill's reliance on *Bordeaux*, *see* Respondent's Brief, at 18-20, is misplaced because under *Bordeaux* the deductible is outside of the make-whole doctrine. *See also* discussion *infra* at 17.

claims, each of these cases, which limit the “full compensation” to a much greater extent than prorating the deductible, was wrongly decided. This is obviously not the case. *See Truong*, 211 P.3d at 434-35.

Averill’s argument is also in direct conflict with *Bordeaux*, 145 Wn. App. 687, decided a year after *Sherry*. In her three-page discussion of *Bordeaux*, Averill analogizes the self-insured retention (SIR) to the deductible, but never mentions the actual holding that is contrary to her claim. Respondent’s Brief, at 18-20. The insured contractor in *Bordeaux* had a policy with the SIR of \$100,000. The insured satisfied the SIR by contributing \$105,399 to the defense costs. The insurer demanded that the insured contribute another \$100,000 to the settlement. This Court held that under the make-whole rule the insured was entitled to be reimbursed for the second \$100,000 – ***but not for the \$105,399, which met the SIR and which Averill analogizes to the deductible*** – before “any third-party recovery funds [were] paid to the insureds.” *Bordeaux*, 145 Wn. App. at 697-98.

Like the SIR discussed in *Bordeaux*, the deductible represents the amount of risk the insured agreed to retain before his insurer is obligated to make any payments under the policy. The make-whole doctrine does not operate to reduce or eliminate the risk she assumed. Averill’s reliance on the make-whole doctrine fails.

**B. Averill’s Insurance Policy Requires the Same Result**

Averill argues, alternatively, that Farmers’ insurance policy “expressly adopted the make-whole doctrine” and therefore Farmers should have paid her the other half of her deductible whether it recovered it in intercompany arbitration or not. Respondent’s Brief, at 31-32 (citing the policy statement, at CP 35, that “we [Farmers] shall be reimbursed to the extent of our payment after that person has been fully compensated for his or her loss.”). Averill’s citation to the policy is incomplete and is misleading in two ways.

First, Averill neglects to mention that “loss” is a defined term. Its definition incorporates the deductible, which “applies . . . to each loss:”

**Coverage G – Collision.** We will pay for loss to your insured car caused by collision *less any applicable deductibles. Any deductible shall apply separately to each loss.*

...

2. Loss means direct and accidental loss or damage to your insured car, including its equipment.

...

**Our Right to Recover Payment.** When a person has been paid damages by us under this policy *and also recovers from another*, we shall be reimbursed to the extent of our payment after that person has been fully compensated for his or her loss. Except as limited above, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to that recovery, do

whatever is necessary to help us exercise those rights  
and do nothing after loss to prejudice our rights.

CP 33, 35 (emphasis added). Because each “loss” is subject to the deductible, the “full compensat[ion] . . . for . . . loss” is also subject to the deductible.

Second, Averill cites only the second part of the first sentence in the “Our Right to Recover Payment” section. The first part of that sentence states that in order to trigger the make-whole doctrine, the insured must receive payment from Farmers and also “*recove[r] from another.*” CP 35. *See also Thiringer*, 81 Wn.2d 219 (“The general rule is that, while an insurer is entitled to be reimbursed to the extent that its *insured recovers payment for the same loss from a tortfeasor* responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.”) (emphasis added). *See also Harnick*, 2009 WL 579378 at \*3 n.1 (the make-whole doctrine “do[es] not describe a right of the insured to the recovery of the full amount of his contractually required deductible when *the insurer recovers in subrogation from a third party*”) (emphasis added).

Averill’s claim is contrary to plain language of her policy. The policy plainly excludes the deductible from “full compensation.” It also plainly requires that in order to invoke the make-whole rule the insured

must “recover from another.” Averill has not attempted to recover anything from the third party. She also admits that her case “does not involve any claim . . . for further insurance payments by Farmers under [collision] coverage, or any insurance coverage for that matter.” Respondent’s Brief, at 1. Her contract argument fails.

**C. The Amendment to § WAC 284-30-393 and the Repeal of §§ WAC 284-30-3904 and -3905 Operate Prospectively Only**

Averill submits as supplemental authority the recent amendments to numerous sections of Chapter 284-30 WAC that applies to insurance claims-handling related to motor vehicles. *See* Respondent’s Statement of Additional Authority. In May of 2009, the Office of the Insurance Commissioner (“OIC”) repealed WAC §§284-30-3904 and -3905, discussed above, which allowed (but did not require) the insurers to pursue the insured’s deductible as part of the subrogation action and authorized the prorating of the deductibles so recovered. Effective on August 21, 2009, the OIC adopted a new regulation, WAC §284-30-393, that requires insurers to seek recovery of the deductibles:

**WAC 284-30-393 Insurer must include an insured’s deductible in its subrogation demands.** The insurer must include the insured’s deductible, if any, in its subrogation demands. Subrogation recoveries must be allocated first to the insured for any deductible[s] incurred in the loss. Deductions for expenses must not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be

made only as a *pro rata* share of the allocated loss adjustment expense. The insurer must keep its insured regularly informed of its efforts related to the progress of subrogation claims. “Regularly informed” means that the insurer must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured’s interest is resolved.

Averill implicitly invites this Court to apply the newly-promulgated regulation retroactively in this case. “Retroactivity is not favored in the law.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468 (1988). *See also Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002) (“This court generally disfavors retroactive application of a statute”). Amendments are presumed to have only prospective application; the presumption can be overcome only if the legislature intended retroactivity or if the amendment was curative or remedial. *Id.* at 536-37. *See also State v. Smith*, 144 Wn.2d 665, 672-73, 30 P.3d 1245 (2001) (superseded by statute) (“[a]ny legislative intent that a statute applies retroactively must be in the form of an explicit legislative command. . . . We begin our . . . analysis with a presumption an amendment is prospective.”) The presumption “in favor of prospectivity” is further strengthened “when the legislature . . . uses only present and future tenses in drafting the statute.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993).

Averill cannot overcome the presumption of prospectivity because the OIC specifically stated that the amended WAC § 284-30-393 is effective on August 21, 2009. Neither is the amended WAC § 284-30-393 curative or remedial. *See Stewart Title*, 145 Wn. 2d at 537 (“[a]n amendment is curative and remedial if it clarifies or technically corrects an **ambiguous** statute . . .”) (emphasis added). Nothing about WAC §§ 284-30-3904 and -3905 was ambiguous. The regulations were plainly permissive, both with respect to the insurer’s ability to pursue the recovery of the insured’s deductible in the subrogation action, and with respect to the sharing of the deductible on a proportionate basis:

**Will my insurer pursue collection of my deductible?**

Yes, if . . . you . . . request [it] will pursue collection of your deductible for you. WAC § 284-30-3904(1).

**If my insurer collects my deductible back, will I recover the full amount of my deductible?**

At a minimum, recovery will be shared on a proportionate basis with your insurer. WAC § 284-30-3905

The new WAC § 284-30-393 is not simply a departure from the Q&A format or a clarification as Averill suggests. It imposes on insurers a new obligation that requires them to pursue the deductible and establishes a new rule of priority that did not previously exist. The OIC’s Rule-Making Order states that WAC § 284-30-393 represents a substantive change rather than an editorial refinement:

Describe any *changes other than editing* from proposed to adopted version:

The following *changes* were made based on public comment:

- Amended the definition of “comparable motor vehicle” in WAC 284-30-230 (3)
- WAC 284-30-390(5) was amended to include: “If requested by the claimant and”
- ***WAC 284-30-393 was amended to include: “Must be allocated first to the insured for any deductible(s) incurred in the loss”***

Farmers’ Statement of Supplemental Authority (OIC Rule-Making Order CR-103P May 2009) (found on the OIC website, [http://www.insurance.wa.gov/laws\\_regs/rules\\_new.shtml](http://www.insurance.wa.gov/laws_regs/rules_new.shtml) (last visited on August 11, 2009) at 1 (emphasis added).

Averill’s Statement of Additional Authority neglects to include the full text of the OIC Rule-Making Order. Instead, Averill offers a partial quote from the OIC’s general statement of purpose that applies to “numerous sections of Chapter 284-30 WAC related to unfair practices in the settlement of insurance claims.” *Compare* Respondent’s Statement of Additional Authority and Farmers’ Statement of Supplemental Authority, OIC Rule-Making Order at 1. While most of the amendments to Chapter 284-30 WAC simply refined the existing regulations, the OIC identified three amendments – including WAC § 284-30-393 – that went beyond that and changed the *status quo*.

WAC § 284-30-393 therefore applies prospectively only. *See Washington v. Ramirez*, 140 Wn. App. 278, 288-290, 165 P.3d 61, *rev. denied*, 163 Wn.2d 1036, 187 P.3d 269 (2008) (“the . . . legislative amendment **changed** the earlier, non-ambiguous version [of the statute]; therefore, as a matter of law, the amendment was not simply a ‘clarification’ of the statute;” “[w]e hold, therefore, that . . . it does not apply retroactively”) (emphasis added); *Malbco Holdings LLC v. Amco Ins. Co.*, 546 F. Supp.2d 1130, 1132-33 (E.D. Wa. 2008) (Washington’s Insurance Fair Conduct Act (“IFCA”), that became law on December 6, 2007, operates prospectively only; the legislature has not expressed an intent to apply IFCA retroactively, the statute is not curative because it creates “an altogether new cause of action and does not clarify or correct a previous statutory ambiguity;” nor is it remedial because it “concerns more than practice, procedures and remedies . . . prescribed by law to enforce a right.”). *See also Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 181, 930 P.2d 307 (1997); *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 557, 637 P.2d 652 (1981).

The “strong presumption against retroactivity” controls. *See In Re Personal Restraint of Stewart*, 115 Wn. App. 319, 332, 75 P.3d 521 (2003). By its own terms, WAC § 284-30-393 is effective on August 21, 2009 and does not apply retroactively to Averill’s complaint against Farmers.

**D. Averill Cannot Claim Attorney Fees under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991)**

“*Olympic Steamship* does not apply when coverage is not at issue.”  
*Ledcor Ind. (USA), Inc. v Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 16, 206 P.3d 1255 (2009). *See also Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 176-77, 208 P.3d 557 (2009) (“*Olympic Steamship* authorizes an award of attorney fees only if the insured is required to litigate an issue of coverage, as opposed to the value of his claim”).

Averill concedes that Farmers paid her everything she was entitled to under her policy before she filed her Complaint. *See* Respondent’s Brief, at 1. She therefore cannot seek *Olympic Steamship* fees on appeal.

**III. CONCLUSION**

For the reasons stated, the trial court’s order granting summary judgment to Averill on the breach of contract claim should be reversed. The make-whole doctrine and Farmers’ policy do not require Farmers to reimburse Averill for her entire deductible as a condition for exercising its valid subrogation right. The case should be remanded to the trial court directing dismissal of the breach of contract claim with prejudice.

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