

No. 48381-5-II

COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON

JAY MERRILL, individually, and as the representative of all persons
similarly situated,

Appellants,

v.

PEMCO MUTUAL INSURANCE COMPANY and PEMCO
INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Court should affirm the Superior Court's interpretation of this successfully concluded and administered Class Settlement. Interpreting the contract as a whole, this Court should construe all relevant contract terms to make sense of the Contract as a matter of language and logic. Merrill claims that the defined term, "Class List" is unambiguous, but then fails to apply that defined term consistently throughout the Settlement Agreement. Indeed, Merrill's illogical approach makes mathematical nonsense of the Settlement and would cause class members not to get their pro rata share of the Settlement's common fund. PEMCO's interpretation, affirmed by the Superior Court, applies defined terms consistently to ensure that all class members were given notice and paid if they made a valid claim. This Court should affirm the Superior Court.

II. SUMMARY OF OPPOSITION ARGUMENT

Construing the contract as a whole, this Court should conclude that the Settlement Agreement requires individual awards to be calculated by including "Individual Class Member Repair Cost Payments" in both the *numerator* and *denominator* of the individual payment calculation formula (hereafter "payment formula"). To conclude otherwise would render the Settlement Agreement illogical and its material terms meaningless.

First, Paragraph 44.1 of the Settlement Agreement refers to the defined term, "Class List," in *two* places – both to determine

“Total Repair Cost Payments” (the denominator in the payment formula) and to identify “Individual Class Member Repair Cost Payment” (the numerator in the payment formula). If, as Merrill contends, the “Class List” was frozen as of March 31, 2015, (CP 108) then the payment formula would contain a lower “Total Repair Cost Payments” – which Merrill advocates here – but it would also exclude hundreds of “Individual Class Member Repair Cost Payment[s]” because those class members’ names are not on the March 31, 2015 Class List, which means those class members should have received no compensation (which PEMCO already has paid, consistent with the Superior Court’s rational interpretation). Merrill’s attempt at the 11th hour to freeze the denominator but not the numerator in the payment formula – when both are delimited by the defined term, “Class List” – is illogical, and contrary to the reasonable expectations of the parties. It is an attempt by Merrill to “have his cake and eat it, too.”

Indeed, the Settlement numbers simply don’t add up if – as Merrill urges – one changes the numerator but not the denominator in the payment formula when both refer to the defined term, “Class List.” The entire purpose of paragraph 44.1 is to provide to each class member a pro rata share of the \$15 million common fund. Under Merrill’s approach, the \$15 million common fund would be insufficient to cover class member claims and each payment made

would not be a pro rata share. Thus, the Court should reject Merrill's approach as a matter of language, logic *and* arithmetic.

Second, the Settlement Agreement specifically provides that the "Class List" will undergo revision "*as updated by Defendants.*" CP 146-47. In preliminarily approving the Settlement, the Superior Court specifically directed that the Class List – a defined term – be "*updated by Defendants.*" The "updated" Class List governs here, and thus, updated "Individual Class Member Repair Cost Payment[s]" must be included in *both* the numerator and denominator of the payment formula, as required by paragraph 44.1 of the Settlement. Under this logical approach, all class members who made claims were paid, and they were paid their pro rata share based on the \$15 million common fund. No class members were excluded, but their pro rata share of the common fund was calculated by adding their individual repair costs to the denominator and numerator of the payment formula.

Along the same lines, paragraph 51 of the Settlement directed that Class Notice should be sent "to each Person on the Class List," a defined term. CP 118. If the Class List were not "updated by Defendants" as provided in the Settlement and as directed by the Superior Court, then PEMCO never should have sent class notice to 813 Class Members, because their names were not on the "Class List" as of March 31, 2015. Such a result would have deprived many Class Members of the right to make a claim. Under the

Settlement, the “Class List” is either “updated” under the Settlement, or it is not. PEMCO updated the Class List for all purposes – sending class notice, determining the numerator (“Individual Class Member Repair Cost Payment[s]”) of the payment formula, and determining the denominator (“Total Repair Cost Payments”) in the payment formula. Merrill, by contrast, would have the Court “update” the “Class List” for some purposes but not for others. “Class List,” however, is the same defined term for all purposes in the Settlement.

Finally, while the Court should conclude that the Settlement Agreement is unambiguous when construed as a whole, to the extent the Court concludes the Settlement is ambiguous, extrinsic evidence plainly supports PEMCO’s logical reading of the contract. In transmitting the March 31, 2015 “Class List” to Class Counsel, PEMCO’s Counsel specifically stated that the list was incomplete. That was necessarily the case because the Settlement covered claims through March 31, 2015 (*see* CP 108). The Settlement specifically provided for confirmatory discovery by Class Counsel to finalize the Class List after March 31, 2015, which in fact occurred, and Class Counsel specifically agreed – after confirmatory discovery – that the final Class List included 17,863 Class Members, not the 17,050 on the March 31, 2015 Class List. Class Counsel never suggested that the 17,863 Class Members comprised the “final” Class List for some purposes but not for others.

The Class Settlement in this case has been finally approved by the Superior Court. Merrill did not appeal that final approval. The Settlement has been administered and all valid claims have been paid based on the updated Class List. This Court should affirm the Superior Court.

III. STATEMENT OF CASE

The Settlement. The Settlement between the Parties created a \$15 million “common fund” to pay all class members’ claims on a pro rata basis. It provides for the creation of a Class List that contains all Class Members, their Individual Class Member Repair Cost Payments and the Total Repair Cost Payments, which is the sum of those individual payments. The simple formula for calculating individual payments provides for individual payments, made on a pro rata basis, based on the ratio of the class member’s individual repair cost to total repair costs. The formula ensures that each class member is entitled to a pro rata share of the \$15 million common fund, after subtraction of attorney fees and expenses. Paragraph 44.2 of the Settlement contains the formula for individual payments, which may be expressed as follows:

$$(\$15 \text{ mm} - \$4.572 \text{ mm}) \times \left(\frac{\text{Individual Class Member Repair Cost Payment}}{\text{Total Repair Cost Payments}} \right)$$

The following provisions of the Settlement (CP 108, 115, 118, 129, 146-47) bear on the Court’s construction of that contract:

- ¶ 9: “Class List” means the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015.
- ¶ 11: “Class Period” means the period from October 8, 2007 to March 31, 2015, inclusive.
- ¶ 44.1: Defendants will use the total amount of payments under the Collision and/or Comprehensive and/or UIM PD coverages as shown on the Class List (excluding payments to Opt Outs) as the “Total Repair Cost Payments. “That amount will be the total repair cost for those *on the Class List* minus the repair costs shown for any member of the class who submits a valid exclusion request. The individual amounts listed as having been paid for each Class Member *on that list* shall be considered the “Individual Class Member Repair Cost Payment.” (Emphasis added.)
- ¶ 51: As soon as practicable after the Preliminary Approval of this Settlement the Claims Administrator shall have sent a copy of the Individual Notice and a

Claim Form, by first-class mail, to each Person *on the Class List*.

(Emphasis added.)

¶ 83: The exhibits to this Stipulation are an integral part of the Settlement and are hereby incorporated into and made a part of this Stipulation.

Exhibit C to the Settlement provides:

“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.*”

(Emphasis added.)

The Circumstances Surrounding Settlement. The Settlement was reached not on the basis of a fixed class size but based on an agreed method for determining the class size and thus the Class List. CP 204-05 at ¶ 2, & 214-23. In February 2015 – before reaching settlement – Class Counsel estimated that the class size was 17,607. CP 204-05 at ¶ 2 & 210-13. When the parties agreed to a settlement fund of \$15 million, they did not have the

March 31, 2015 Class List. CP 221-23.

The Class List sent to Class Counsel on March 31, 2015, was of necessity not final, as the transmitting email from PEMCO's Counsel to Class Counsel explained: "Here is an updated list *through the end of February 2015[.]*" (Emphases added.) CP 161. The partial list included 17,050 Class Members. Because under the Settlement, the "Class Period" extends to March 31, 2015, PEMCO's Counsel told Class Counsel that PEMCO would send a Revised Class List as soon as the March data were gathered. CP 99-100. At the same time, the parties wanted to have a signed settlement agreement by early April 2015, in order to have the Superior Court preliminarily approve the class settlement in April.

In Class Counsel's April 10, 2015, Motion for Preliminary Approval of the proposed Settlement (CP 6), Class Counsel informed the Superior Court that:

Defendants expect to update [the Class List] before the preliminary approval hearing, and the completeness of the list will be the subject of confirmatory discovery before notice is sent.

The Court preliminarily approved the Class Settlement and directed that notice be sent “using the Class List provided to Class Counsel on March 31, 2015 *or as updated by Defendants.*” CP 77-78.¹

Working cooperatively with Class Counsel (CP 100 at ¶ 5, 162-165), the Class List was further “updated” several times. As a result of that process, PEMCO and Class Counsel identified additional Class Members and repairs not included on the March 31, 2015 Class List. The March 31, 2015 Class List included 17,050 Class Members, but the final agreed Class List contained 17,863 Class Members. As Class Counsel stated, “I am comfortable based upon our discussions to use this list. So that [at] the end of the day there are 17863 Class members.” CP 172. PEMCO then sent notice to the 17,863 Class Members, as provided by the Settlement.

Through further discussion and agreement with Class Counsel, supplemental notice was sent to some of those same Class

¹ The *Merrill* Settlement is thus materially different than the settlement in *Moeller v. Farmers*. See *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 267 P.3d 998 (2011). Because the *Moeller* settlement addressed ancient claims that were well known and fixed, the comparable paragraph in the *Moeller* Settlement Agreement identified the Total Repair Cost Payments” as a very specific amount – \$146,128,368.99. CP 103-59 (Settlement), 200-02, 206 at ¶ 4, & 224-34.

Members who had more than one repair on the same vehicle. CP 100-01 at ¶ 7, 174-79. The final Class List continued to contain 17,863 Class Members but with the addition of second repairs those Class Members had 19,258 eligible “Individual Class Member Repair Cost Payment[s],” increasing Total Repair Cost Payments to \$64,577,010.19.

Merrill suggests (Brief of Appellant at 7) that PEMCO somehow concealed this total from Class Counsel, but that is palpably wrong. Not only did PEMCO’s counsel and Class Counsel agree to send a second notice to Class Members who had a second qualifying repair, but as part of the briefing and argument regarding final approval, PEMCO fully explained how it calculated individual payments under the payment formula, and that the additional individual repair costs associated with second repairs had been added to both the numerator and denominator of the payment formula. The Court granted final approval to the Class Settlement. CP 83-96, 99-101 at ¶¶ 3-8, & 160-79. Merrill did not appeal the Court’s final approval, and PEMCO has since paid its obligations to Class Counsel and to the Class under the finally approved Class

Settlement.

In negotiating the Settlement Agreement and in reaching agreement regarding a class of 17,863 Class Members, Class Counsel never claimed that while they knew the March 31, 2015 Class List was being “updated,” that the “Class List” referenced in the “Total Repair Cost Payments” sentence would not be updated while the “Class List” referenced in the “Individual Class Member Repair Cost Payment” sentence would be updated. CP 204-06 at ¶¶ 2-3 & 214-23.

The Superior Court’s Hearing and Decision. In his brief, Merrill is as selective in his quotations from the Superior Court hearing as he is selective in calling to this Court’s attention the relevant contract terms. Merrill excerpts statements by PEMCO’s counsel at the hearing to suggest that PEMCO agreed with Merrill’s construction of the contract. PEMCO supplies here (in bold and italics) the language that Merrill omits in his brief:

So, Mr. Phillips, 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, *but then we also have -- you've just got to finish reading the contract; that's all.*

RP at 17:8-13.

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

MR. PHILLIPS: He says that, and it's true, *but so is the numerator. So if the numerator and the denominator are going to be defined by the settlement, then those 830 claims are removed.*

RP at 23:9-15. Finally, in ruling for PEMCO and concluding that the defined term “Class List” must be applied the same throughout the Settlement, the Court ruled:

[THE COURT:] 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 Mr. Nealey's vigorous objection.

RP 33:18-24.

IV. ARGUMENT

A. Construing the Settlement Agreement As a Whole, the Court Should Conclude That Individual Class Member Repair Cost Payments Must be Added Both To the Numerator and the Denominator of the Payment Formula.

Under Washington law, the Court must construe the Settlement Agreement taking account of all its material terms in order to make sense of the contract. “Determination of the intent of

the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973) (citing cases); *see also* 25 David K. DeWolf, et al., Wash. Practice, § 5:3 (3d ed. Updated 2015).

A defined term in a contract should be given the same meaning wherever that defined term is used in the contract. *E.g.*, *Holter v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 1 Wn. App. 46, 50, 459 P.2d 61 (1969) (“In the absence of anything in the context of a contract clearly indicating a contrary intent, when the same word is used in different parts of the contract, it will be presumed to be used in the same sense throughout the contract. Where its meaning in one instance is clear, that meaning will be attached to it in other parts of the contract.”). Particular language of a contract is reviewed “in the context of other contract provisions.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014)

(citation omitted). “An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.” *Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985), *rev. denied*, 105 Wn.2d 1015 (1986) (citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)).

Under these basic principles of contract construction, this Court should affirm the Superior Court’s interpretation of the Settlement Agreement.

B. The “Class List” Delimits Both the Numerator and Denominator of the Payment Formula in the Settlement.

In paragraph 44.1 of the Settlement Agreement, the defined term, “Class List,” is used to determine both “Total Repair Cost Payments” (the denominator in the payment formula) *and* to identify “Individual Class Member Repair Cost Payment[s]” (the numerator in the payment formula). Merrill emphasizes that the denominator (“Total Repair Cost Payments”) is defined by reference to the “Class List,” but Merrill ignores that the numerator (“Individual Class Member Repair Cost Payment”) also is defined by reference to the same “Class List.” Thus, if the Class List were immutable as of

March 31, 2015, it would of necessity also be immutable for *both* the numerator and denominator of the payment formula fraction, because both are defined by reference to the “Class List.”

Such a contractual interpretation would have led to exclusion of 813 Class Members whose “Individual Class Member Repair Cost Payment[s]” do not appear on the March 31, 2015, Class List. Merrill’s attempt to freeze the denominator but not the numerator in the formula – when both are delimited by the same defined term, “Class List,” would have been counterproductive for the Class, and, as discussed in the next section, would be inconsistent with how the defined term, “Class List” is employed elsewhere in the Settlement.

Moreover, the Settlement’s arithmetic simply doesn’t add up if – as Merrill urges – one adds “Individual Class Member Repair Cost Payment[s]” to the numerator but not to the denominator in the payment formula. The entire purpose of paragraphs 44.1 and 44.2 is to provide a pro rata share of the \$15 million common fund (minus fees and expenses) to each class member. Under Merrill’s approach, the \$15 million common fund would be insufficient to cover all class member claims, and each payment made would not be a pro rata

share of the common fund.

Merrill argues (Brief of Appellant at 2) that everyone knew that the claims rate for the Settlement would not be 100%, but that does not explain away how the Settlement was actually structured. It was structured to ensure that the common fund would pay all class members their pro rata share. Merrill's construction of the Settlement would not do so. As a simple matter of arithmetic, it literally does not "add up." See CP 208 at ¶ 9. If one adds Individual Class Member Repair Cost Payments to the numerator, one needs to add them to Total Repair Cost Payments, so that the common fund will be adequate to pay all claims and each claim will be paid pro rata. In making sense of a contract the court is required both to make sense of the words and the numbers in the contract. If the numbers add up under one interpretation but not the other, the Court should adopt the former interpretation. *Forest Marketing Enterprises, Inc. v. State, Dep't of Nat. Resources*, 125 Wn. App. 126, 133-35, 104 P.3d 40 (2005) (court offset statutorily required contractual deposit within liquidated damage formula as best reflecting the parties' reasonable expectations and rejected plaintiff's

interpretation, which create mathematically absurd liquidated damages); *BKCAP, LLC v. CAPTEC Franchise Trust 2000-1*, 572 F.3d 353, 359-60 (7th Cir. 2009) (court rejected apparent reading of contract where it resulted in a prepayment premium *penalty* always being calculated as zero – a mathematically absurd result that made no economic sense). *See also Wilkinson v. Chiwawa Comm. Ass’n*, 180 Wn.2d 241, 254-55, 327 P.3d 614 (2014) (Court declined to read restrictive covenant provision in manner that would produce absurd results).

C. The Settlement Specifically Provided That the March 31, 2015 Class List Would Be Updated.

The Settlement Agreement specifically provides that the “Class List” will undergo revision “*as updated by Defendants*” so that no claims would be artificially excluded. CP 146-47 (Settlement, Ex. C). Thus, while the defined term “Class List” states that it is as of March 31, 2015, the Settlement also specifically provides that the Class List will be “updated.” In preliminarily approving the Settlement, the Superior Court – consistent with Exhibit C to the Settlement – specifically directed that the Class List (a defined term) be “*updated by Defendants.*” CP 77-78. The Class List “updated by Defendants” was then used to send class notice. Paragraph 51 of the Settlement directs that Class Notice should be

sent “to each Person on the Class List,” a defined term. CP 118. If the Class List were immutable, as Merrill contends, 813 class members would have received no notice and would have been unable to make any claim for compensation. Because the Court and parties agreed that the defined term “Class List” should be updated for purposes of Paragraph 51 of the Settlement, it also makes sense that the defined term “Class List” would be updated for purposes of the payment formula’s numerator and denominator.

Merrill’s argument that the Court should “update” the Class List for some purposes but not for others is inconsistent with the principle of contract construction that a defined term should be given the same meaning throughout the contract. *See Holter v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 1 Wn. App. at 50. PEMCO submits that the defined term, “Class List” must be applied consistently throughout the entire Settlement. It has the same meaning for purpose of Class Notice as it does for purpose of establishing both the numerator and the denominator in the payment formula under paragraphs 44.1 and 44.2. Thus, all Class Members who made valid claims were paid, and they were paid their pro rata share based on the \$15 million common fund.

Merrill argues – without any foundation – that the Superior Court treated “the addition of these extra claims [as] a *quid pro quo* for watering down the per claim recovery.” Brief of Appellant at 11. In fact, the Superior Court simply applied the straightforward

principle of contract construction that a defined term in a contract must be given the same meaning throughout the contract. *Holter*, 1 Wn. App. at 50. Moreover, the 1,395 second repairs were all for existing Class Members. It is hard to see how entitling those existing class members to make a second claim “waters down” the settlement.

D. The Circumstances Surrounding Contract Formation Are Consistent with the Superior Court’s Interpretation of the Contract.

While PEMCO believes that the only coherent reading of all the material contract terms requires that the Class List was to be “updated” for all purposes, the documentary record simply reinforces that conclusion. The Court may review that evidence to better understand the parties’ intentions. *Berg v. Hudesman*, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990).² The Settlement was reached not on the basis of a fixed class size but based on an agreed method for determining the class size and thus the Class List. CP 204-05 at ¶ 2 & 214-23. Prior to reaching agreement, Class Counsel

² “Surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (citations omitted). Here, the documentary record confirms the parties’ *agreed* intentions.

estimated that the class size was 17,607, considerably larger than the 17,050 on the March 31, 2015 Class List. The \$15 million common fund amount was agreed to by the parties long before the March 31, 2015 Class List was generated. CP 204-05 at ¶ 2, 210-13, & 221-23.

PEMCO's counsel specifically informed Class Counsel that the March 31, 2015, the Class List was incomplete, and Class Counsel agreed. Through confirmatory discovery, Class Counsel agreed that the final Class List contained 17,863 Class Members, a number that included both subtraction from and addition to the March 31, 2015 list. CP 172-73. As Class Counsel stated, "I am comfortable based upon our discussions to use this list. So that [at] the end of the day there are 17,863 Class members." CP 172. PEMCO then sent notice to the 17,863 Class Members, as provided by the Settlement. Thereafter, through discussion and agreement with Class Counsel, supplemental notice was sent to some of those Class Members who had more than one repair on the same vehicle.

In negotiating the Settlement Agreement and in reaching agreement regarding a class of 17,863 Class Members, Class Counsel never claimed that while they knew the March 31, 2015

Class List would need to be “updated,” that the “Class List” referenced in the “Total Repair Cost Payments” sentence would not be updated while the “Class List” in the “Individual Class Member Repair Cost Payment[s]” sentence would be.

Thus, to the extent the Court concludes that the contract is ambiguous, the extrinsic evidence of contract formation demonstrates that if the “Class List” is updated for the numerator, it must be updated for the denominator to be consistent with the reasonable expectations of the parties.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court.

DATED this 5th day of May, 2016.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: _____

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused to be served a true and correct copy of the foregoing with this Certificate of Service upon:

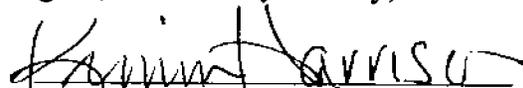
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