



WASHINGTON MODIFIES DEDUCTIBLE REIMBURSEMENT LAW

Averill v. Farmers Ins. Co. of Washington, 2010 WL 891889 (Wash. App. 2010)

The State of Washington has joined a growing number of states tightening its deductible reimbursement laws. In *Averill v. Farmers Ins. Co. of Washington*, 2010 WL 891889 (Wash. App. 2010), Pearl Averill's daughter was in a motor vehicle accident while driving Averill's Honda Accord. Farmers Insurance Company of Washington insured the Accord under a motor vehicle liability insurance policy, which included collision coverage with a \$500 deductible. State Farm Mutual Insurance Company insured the other driver. Farmers found the Accord to be a total loss, valued at \$16,254. Under the policy's collision coverage, Farmers paid Averill for the loss, less her \$500 deductible.



Farmers then submitted a claim against State Farm via inter-company arbitration seeking recovery of its payment and Averill's \$500 deductible. The arbitrator determined that each driver was 50 percent at fault for the accident and awarded one-half of Farmers' request for itself and one-half of Averill's deductible. State Farm then paid \$7,556 to Farmers and \$250 to Averill. Averill took no action related to recovering either the property damage or her deductible from the other

party or its insurer. Instead, she did the all-American thing – claiming the Made Whole Doctrine required her to receive 100% of her deductible and suing her insurer for Deceptive Trade Practices Act violations, bad faith, negligence, breach of contract, and unjust enrichment – all more than \$250.

Washington adopted the Made Whole Doctrine in *Thiringer v. American Motors Insurance Co.*, 588 P.2d 191 (Wash. 1978), in which it stated:

"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."

Washington is one of a growing minority of states whose Office of the Insurance Commissioner (OIC) has promulgated a regulation which concerns deductible reimbursement. Section 284-30-393 of Washington's Administrative Code was amended effective August 21, 2009 and now provides as follows:

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.*

This administrative regulation changed the terms of the previous regulation dealing with this subject, but does not apply retroactively. Therefore, the *Averill* decision did not clarify what the new regulation means, but merely stated it did not apply to accidents which happened before August 21, 2009. For accidents prior to that date, the previous



regulation (284-30-3905) provided (1) At a minimum, recovery will be shared on a proportionate basis between insured and insurer, and (2) No deduction for expenses can be made from the deductible recovery unless an outside attorney is retained to collect such recovery, and then only for the pro rata share of the allocated loss adjustment expense.



The *Averill* court held that the new regulation did not apply to that case and merely articulated that the Made Whole Doctrine is precise in that it applies only to cases where the insured recovers the payment and the insurer is seeking reimbursement. The “Made Whole” Doctrine is merely a limitation on the recovery of the insurer when it seeks reimbursement from its insured from proceeds paid to the insured by the tortfeasor for a loss it has previously paid to the insured. It is not a magic formula which turns states without statutes dealing with deductible reimbursement into “first money” states in which the carrier cannot make a subrogation recovery until the insured has been repaid its deductible in full. The common law “Made Whole” Doctrine does not apply to insurers’ rights of subrogation, and thus, does not require an automobile insurer to make insured whole by reimbursing her for her unrecovered portion of her deductible.

The new Washington regulation eliminates the pro-rata reimbursement of a deductible which the old regulation provided for and for the first time requires an insurance company to pursue recovery of the insured's deductible when pursuing its own subrogation interest. It provides that insureds be fully reimbursed for their deductibles from any recovery obtained by the insurance company in the course of pursuing its subrogation interest, except for a pro rata deduction for costs of collection, provided an attorney is used for subrogation. The Court also held that the insured did not have contractual right under policy to reimbursement of her unrecovered portion of her deductible.

There is a chart on our website at www.mwl-law.com entitled “[50 State Deductible Reimbursement Chart](#)” which catalogs the statutes, administrative regulations, and case decisions for every state which deal with reimbursement of deductibles.

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