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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LEIF HANSEN, on behalf of)
himself and all others)
similarly situated,)

Plaintiff,)

v.)

GOVERNMENT EMPLOYEES INSURANCE)
COMPANY, a Maryland)
corporation,)

Defendant.)

Case No. 3:17-cv-01986-MO

April 5, 2018

Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

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APPEARANCES

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1 (P R O C E E D I N G S)

2 (April 5, 2018)

3 THE CLERK: Your Honor, this is the time set for oral
4 argument in Case No. 3:17-cv-1986-MO, Hansen v. Government
5 Employees Insurance Company.

6 Counsel, can you please state your name for the
7 record.

8 MR. BROOKSBY: Your Honor, Scott Brooksby for the
9 defendant.

10 MR. GOLDFINE: Dan Goldfine for the defendant,
11 Government Employees Insurance Company.

12 MR. FISHER: Ian Fisher for the defendant.

13 MR. CONABLE: Good afternoon, Your Honor. Paul
14 Conable for plaintiff.

15 MR. OLSON: Steve Olson for the plaintiff, Your
16 Honor.

17 THE COURT: Thank you all for being here.

18 I'd like to focus on the defense argument about
19 failure to state a claim, for the moment stay away from
20 standing and justiciability or redressability.

21 And so that principal theory, as you've all seen from
22 the briefing, is that if a breach of a contract is
23 fundamentally a broken promise, that the specific promise here
24 to pay for direct and accidental loss or damage to the car
25 hasn't been broken because there's been no identified loss or

1 damage to the car that wasn't paid for.

2 Fairly simple argument, mercifully put forth
3 initially, at least, in a fairly brief pleading.

4 So, Mr. Conable, are you going to start out on that?

5 MR. CONABLE: I'd be happy to, Your Honor. Thank
6 you.

7 THE COURT: So help me understand better than I now
8 do what it is, in terms of what the contract promises, that
9 your opponent didn't do.

10 MR. CONABLE: They didn't agree to pay for mandatory
11 pre- and post-accident electronic scanning, and that scanning
12 is part and parcel of the repair. The contract requires them
13 to perform a complete repair and to return the vehicle to
14 pre-loss condition.

15 THE COURT: I want to start, before we move to the
16 idea of repairs, I want to start specifically with the contract
17 language and then work our way there.

18 So when I ask what part of the contract wasn't met
19 here, we're referring, aren't we, to the idea that it's not so
20 much that they agree to repair, they agree to pay for all loss
21 from -- loss or damage to the car, right?

22 MR. CONABLE: Correct, Your Honor. The language is
23 set out, the pertinent language is set out in paragraph 10 of
24 our complaint.

25 THE COURT: So you're saying that there is a loss or

1 damage to the vehicle that wasn't paid for?

2 MR. CONABLE: That's correct, Your Honor.

3 THE COURT: And the scan becomes a loss or damage
4 how?

5 MR. CONABLE: Part and parcel of repairing a car to
6 pre-loss condition is ascertaining what's wrong with the car.
7 We wouldn't be here if the question was whether, for example,
8 GEICO had to pay for the amount of labor required for a
9 technician to lift the hood or to pull off a fender to look and
10 see or to measure. There's something about -- they focus their
11 argument on the possibility that a scan won't reveal damage.
12 But when a manufacturer says that part of repairing a car, a
13 mandatory part of repairing the car is to conduct these scans,
14 that is part and parcel. It's like saying you don't have any
15 damage for your broken leg, for the x-ray for your broken leg
16 because the x-ray might have ended up not showing anything.
17 No. The scan is indivisibly part of the repair.

18 THE COURT: Why in the contract is ascertaining the
19 amount of damage on the insurer? If I'm an insurer and I say,
20 whatever you tell me that I agree to is the damage, fine, then
21 why isn't it on the insured to say, okay, well, here's the
22 amount of damage to my car?

23 MR. CONABLE: Why isn't it on the insured?

24 THE COURT: Your argument is that it's sort of on the
25 insurance company, on GEICO here to go and figure out the

1 amount of loss. Why isn't that on the insured to say, well,
2 here, I'm presenting to you the amount of loss? I mean, we'd
3 have a different case, wouldn't we, if your client had done a
4 scan and then said, here's more loss than you knew of, and the
5 insurance company would then, assuming it was legit, would have
6 to pay it, right?

7 MR. CONABLE: We're not attempting to shift to the
8 insurance company the duty to perform the scan, just to pay for
9 the diagnostic elements of a repair. So you're correct. I
10 would agree with Your Honor that it's the insured and really
11 the insured's body shop that is going to do the work of saying
12 here are the things that we did, these are the elements that
13 are necessary for this full repair. And then the insurer's
14 duty is to pay for it under the contract.

15 What the insurer is doing here is saying
16 categorically, we will not pay for this part of that repair
17 process. So the part of the repair process that is following
18 the manufacturer's requirements, following the ASA
19 recommendations for how you repair a car, for how you figure
20 out what's wrong with a car, we're not going to pay for that
21 part.

22 So it's difficult from our perspective to say, on the
23 one hand, it is the responsibility of the insured and his or
24 her body shop to determine what needs to be fixed in this car,
25 but then to say --

1 THE COURT: Well, so you agree with that much? It is
2 the insured's ultimate obligation to present to the insurer
3 here the damage?

4 MR. CONABLE: Yes. And it is the insurer's
5 obligation to pay for the diagnostics necessary for the insured
6 to be able to make that presentation.

7 THE COURT: And that's why? I mean, contractually
8 speaking.

9 MR. CONABLE: Because the contract requires GEICO to
10 restore the car to pre-loss conditions. It's the manufacturers
11 of the cars we're talking about saying it is a mandatory part
12 of the repair to conduct these scans. And so to say --

13 THE COURT: That's just your part and parcel
14 argument. It's not textual, right? There's nothing in the
15 text that says we'll pay for damage and we'll pay for
16 diagnostics to determine damage. It says we'll pay for loss.

17 MR. CONABLE: We'll pay for loss. There's nothing in
18 the contract that says we'll pay for tires. There's nothing in
19 the contract that says that we'll pay for paint.

20 THE COURT: If you lose a tire, then you don't need
21 the contract to say we'll pay for tires because it's part of
22 the loss.

23 MR. CONABLE: And you'll be able to tell you lost a
24 tire because anybody can look at the car and see that a tire is
25 gone. But what if you've lost something else?

1 THE COURT: I'm just asking right now about text.
2 I'll get to other arguments.

3 But you'll have to agree, won't you, that the text
4 doesn't say we commit to pay for diagnostics?

5 MR. CONABLE: The text does not use the word
6 "diagnostic" or "scan." The text uses the word "repair to
7 pre-loss condition."

8 When a manufacturer says part of repairing to
9 pre-loss condition is conducting pre- and post-repair scans,
10 that is part of repairing a car to pre-loss condition.

11 THE COURT: What if it's not the manufacturer saying
12 so? What if it's just an insured saying, well, I really think
13 this is important, and so I think you ought to do this?

14 MR. CONABLE: Regardless of any -- for example, if I
15 have a 1980 Dodge Aries, and I come in and say, Your Honor, I
16 -- or excuse me, Your Honor.

17 GEICO, I'd like to have these scans, and GEICO says,
18 no, your car is not on a computer system, we're not going to do
19 that, and then I say, well, I'd like it anyway, that's not what
20 we've alleged in this case. Our allegations in this case have
21 to do with vehicles like Mr. Hansen's vehicle.

22 THE COURT: So it has to do with being ASA required?

23 MR. CONABLE: It has to do with being mandatorily
24 required by the manufacturer of this vehicle as part of the
25 repair of the vehicle. The ASA is the cherry on top.

1 THE COURT: I don't know what you mean first by
2 mandatorily required. I mean, how does a manufacturer tell
3 GEICO what they must do?

4 MR. CONABLE: The manufacturer is not telling GEICO
5 what they must do. The manufacturer is telling repair shops
6 what they must do.

7 THE COURT: Must do or what? You'll go to jail?

8 MR. CONABLE: No. If the question is what is a
9 repair of a GM vehicle, and GM says --

10 THE COURT: Well, I guess what I'm getting at by
11 these questions, I'm trying to get at what the point -- the
12 principle is that divides your Dodge Aries from your GMC
13 Sierra, you know.

14 MR. CONABLE: Because no manufacturer --

15 THE COURT: Is it manufacturers that divide it? Like
16 if the manufacturer says this is necessary, then that's what
17 makes it necessary to do the diagnostic test?

18 MR. CONABLE: At least, yes. I mean, we can argue
19 about whether with respect to a car -- we don't have an
20 allegation in this case because Mr. Hansen's vehicle -- we
21 don't have an allegation in this case that applies to -- there
22 may be a group of cars that fall within this class as to which
23 the ASA says you need to do these diagnostics and the
24 manufacturer doesn't, and that to me is a question of --

25 THE COURT: Mr. Conable, the reason I'm pressing you

1 on this is that although I'm not sure I got you to agree, I
2 think it's true that this is something that has to be sort of
3 read in between the lines here of the text of this contract.

4 The contract doesn't promise to do anything other
5 than pay for loss. And you're saying part and parcel, which is
6 sort of, to coin a phrase, a penumbra argument that it's
7 necessary. Although not promised, it's necessary to do this.

8 And I'm trying to figure out what makes it necessary
9 in what cases, because ultimately I'm not just going to
10 announce a rule that will decide this case, it will be talked
11 about by other people in other cases, and they're going to say,
12 well, what is the principle here? Is it necessary in ASA
13 cases, where ASA rules say it should be done? Is it necessary
14 when the insured puts an expert on the stand and says that the
15 industry standard is this, or is it necessary when you have
16 declarations from ten thousand people that they think it's
17 important to do it? I mean, you know, you've used an external
18 source -- manufacturers and ASA -- to import into the contract
19 something that the contract doesn't expressly say.

20 I'm not suggesting that's not legit, I'm just saying
21 how far does that principle go?

22 MR. CONABLE: Well, I'm -- let me start by taking
23 slight issue with a remark you made a moment ago, which is that
24 this is penumbral and not promised. They promised to return
25 the vehicle to pre-loss condition. If the manufacturer says

1 that, and the ASA says that in order to determine what
2 condition the vehicle is in you must conduct these pre and post
3 electronic scans at least with respect to certain enumerated
4 vehicles, then part of determining whether they kept their
5 promise to pay for restoring the car to pre-loss condition is
6 to allow the body shop --

7 THE COURT: Sure. That doesn't change the concern I
8 raised a moment ago at all. That just means if the same thing
9 is true but not expressed by manufacturers now but expressed by
10 a plaintiff's expert or expressed by 10,000 declarations or
11 four trade journal articles or newspaper articles, I mean, you
12 know, you're still referring to external sources to create this
13 expectation that return to pre-loss condition requires X.

14 So today you want to rely on what you might sort of
15 refer to as the pinnacle of this pyramid of possibilities, but
16 it won't end today if I say that this is what's required.

17 So what's not the facts but the principle that you're
18 relying on to say that this is part of what's necessary to
19 return to pre-loss condition?

20 MR. CONABLE: Your Honor articulated it, and it's
21 industry standard. And we're here on a motion to dismiss, and
22 there are going to be fact questions inherent in determining
23 whether with respect to a particular vehicle, my 1980 Dodge
24 Aries K or, as you said, the pinnacle vehicle, where the
25 manufacturer and the ASA say these scans are required. There's

1 a fact issue, and I'm not -- I wouldn't dispute with you that
2 if I were in here talking about a '57 Chevy, it doesn't have a
3 computer system in it. There's a point beyond which you can't
4 extend this.

5 I don't believe that to deny this motion to dismiss
6 the class certification at summary judgment is still in this
7 case. I don't believe that to deny this motion to dismiss,
8 Your Honor is required to issue a ruling that says yes with
9 respect to these cars and no with these.

10 Mr. Hansen's car is a pinnacle. Mr. Hansen's car is
11 a car as to which the manufacturer and the ASA say these scans
12 are required as part of the process of determining whether the
13 car is in pre-loss condition. So for purposes of the motion to
14 dismiss, I would confidently expect that on class
15 certification, summary judgment, and at trial, if any of those
16 occur, GEICO will make strong efforts to cabin the expense of
17 potential vehicles and claimants as to whom this can apply and
18 its standards will have to be applied.

19 All I'm saying is that in a motion to dismiss that
20 asks this Court to say that as a matter of law, this contract
21 doesn't require GEICO to pay for pre and post scans even for
22 car's like Mr. Hansen's, as to which the manufacturer says
23 those scans are required.

24 THE COURT: All right. Thank you.

25 MR. GOLDFINE: Your Honor, thank you for your time.

1 Let me try to attempt to articulate. We have an
2 agreement in place, as the Court identified. It turns on
3 specific words, which is "damage to the vehicle." That's the
4 operative word. It's not repair, it's not anything else. It
5 turns on damage to the vehicle. And there's a disconnect
6 between the absence of allegations of damage to the bumper that
7 hasn't been compensated by GEICO and the diagnostic scans, as
8 alleged here.

9 THE COURT: Does the contract talk about pre-loss
10 condition?

11 MR. GOLDFINE: The contract, in fact, does not
12 discuss pre-loss condition, but the contract says damage -- in
13 this case damage to the bumper. We have to compensate for
14 damage to the bumper. But they've alleged --

15 THE COURT: Well, if we're going to be precise, then
16 the contract doesn't talk about damage to the bumper.

17 MR. GOLDFINE: It talks damage to the vehicle, is the
18 operative language.

19 THE COURT: So you promise to pay for any loss from
20 damage to the vehicle?

21 MR. GOLDFINE: I mean, there could be other
22 vehicle -- it could be a total loss, for example, but for this
23 particular case, it would be we have promised to pay for damage
24 to the vehicle caused by a collision. That's the operative
25 language of the contract.

1 THE COURT: All right.

2 MR. GOLDFINE: And there's a disconnect between the
3 demand for scans in their allegations and the damage as set
4 forth in the contract, which is their breach of contract claim.
5 And, you know, their opportunity to have a preferred set of
6 diagnostic tools is not set forth in the contract. We are
7 obligated, as the Court identified -- Let me take a step back.
8 Plaintiff is obligated to tell us what the damage is --

9 THE COURT: Is a plaintiff obligated to pay on their
10 own for any -- any, not just these, in this case, but any
11 diagnostic tools it uses to learn the extent of damage?

12 MR. GOLDFINE: As alleged in this particular item,
13 they have not identified any damage that hasn't been
14 compensated, so I can't -- there's going to be all sorts of
15 different circumstances.

16 THE COURT: I don't think my question is quite as
17 tricky as you must think it is. I'm just asking in a typical
18 case, under a contract like this one, if the insured had to go
19 to diagnostic steps -- not scans but other less expensive, more
20 quotidian diagnostic steps -- does the insurance company pay
21 for those or not?

22 MR. GOLDFINE: It really depends on the
23 circumstances.

24 So typically there's a diagnostic step of doing the
25 estimate. It doesn't pay for the cost of doing the estimate.

1 THE COURT: The reason I'm asking this question is
2 there's sort of two ways to think about what the insurance
3 company has promised, and it may be a function of practice more
4 than promise, but, you know, you can draw that very severely.
5 You can say, we only promise to pay for loss, we never promise
6 to pay for diagnostic steps. Whether that's, you know, paying
7 someone to take photos or paying someone to take a look at it
8 or paying someone to open the hood up or whatever it might be,
9 we don't pay for diagnostics, just damage.

10 And the others say, well, we sometimes pay because
11 it's essential to learn loss, but we don't pay for weird ones
12 that we've never heard of before.

13 Now, I don't know which one you're talking about
14 here.

15 MR. GOLDFINE: Well, I think there's --
16 unfortunately, as to the hypothetical examples that are outside
17 this four square, there's a whole -- maybe 100 different
18 scenarios that could occur.

19 THE COURT: What I'm asking, then, is this contract
20 language that we're focusing on here, does it in any measure
21 promise to pay for diagnostic steps?

22 MR. GOLDFINE: No, it doesn't promise -- the language
23 promises to pay for the damage to compensate -- minus the
24 deductible, to compensate for the damage that's occurred that's
25 presented and that exists on the car.

1 THE COURT: And so you reject the idea that even if
2 manufacturers say that you must take certain diagnostic steps
3 to repair the damage, that that's part and parcel of paying for
4 damage?

5 MR. GOLDFINE: Yes, absolutely.

6 THE COURT: Because you just didn't promise to do
7 that?

8 MR. GOLDFINE: Not only didn't promise to do that,
9 but, one, the manufacturers can't bind GEICO under the
10 contract; and two, there are a -- to use your word -- a
11 penumbra of different reasons and explanations and, in fact,
12 different statements, policy statements as to -- or position
13 statements as to what should take place with respect to scans
14 or other diagnostic tools.

15 You know, it would be like Ford saying you have to
16 use a Ford-branded screwdriver to repair the car, and plaintiff
17 coming back and saying, well, you didn't use Ford-branded
18 screwdriver, so redo it, even if the repair had been done
19 properly with a regular screwdriver.

20 So what the manufacturer says, of course, it plays
21 into, you know, into everything that takes place, but what a
22 manufacturer says doesn't dictate the terms of the contract and
23 why they might be saying a particular diagnostic test and who
24 pays for a particular diagnostic test is not part of the
25 agreement here. The agreement says damage, damage from a

1 covered collision.

2 THE COURT: So whose obligation between the insurance
3 company and the customer, whose obligation is it to figure out
4 what the damage is?

5 MR. GOLDFINE: Well, the obligation in the first part
6 is that the customer can present the damage to the vehicle,
7 but, you know, they will obtain the assistance of a body shop
8 to figure out what the damage is, and they'll present the
9 claim. It's not a one-time shot. I mean, there's different
10 steps that take place in a typical claim. But if they don't
11 present any damage, there's no obligation for GEICO to pay or
12 to do its own investigation.

13 THE COURT: Thank you.

14 Could we turn to the good faith and fair dealing
15 argument, Mr. Conable.

16 MR. CONABLE: Yes, Your Honor.

17 THE COURT: So that can hinge on an agreed common
18 purpose or justified expectation, right?

19 MR. CONABLE: Yes, Your Honor.

20 THE COURT: And you, I assume, by virtue of us being
21 here litigating this, agree that there's no agreed common
22 purpose? GEICO doesn't agree, right? So you're relying on a
23 justified expectation?

24 MR. CONABLE: Yes, Your Honor.

25 THE COURT: So do you agree that the justified

1 expectation can't actually add a term to the contract?

2 MR. CONABLE: Yes. Add or alter terms, explicit
3 terms of the contract.

4 THE COURT: So to have this be satisfactory as a good
5 faith and fair dealing claim, it has to be a justified
6 expectation that is, as you say, part and parcel of or a part
7 of the promise that's already in the contract?

8 MR. CONABLE: We say not inconsistent with the
9 promise that's already in the contract. I don't read the good
10 faith and fair dealing cases quite as strongly as to say that
11 you have -- it's a term that exists within the contract that
12 can't be inconsistent with the other terms in the contract.

13 THE COURT: And that's how you read good faith and
14 fair dealing?

15 MR. CONABLE: It is, Your Honor.

16 THE COURT: All right. And so here I don't want to
17 put words in your mouth, but I guess your argument is that this
18 is not inconsistent with anything they've already promised to
19 do, and here we come back perhaps to this industry standard
20 idea?

21 MR. CONABLE: Yes, Your Honor.

22 THE COURT: That it's an expectation that's justified
23 for at least, at a minimum, owners of cars like your client's?

24 MR. CONABLE: Yes, Your Honor. And it's a little bit
25 in the nature of an alternative argument in this case, in that

1 we anticipated that they would say, aha, you know, our contract
2 doesn't say the words "diagnostic scan," it just says we'll pay
3 you for your loss. And so as a matter of good faith and fair
4 dealing, as a matter of the insured's reasonable expectations
5 of the contract, it is reasonable for an insured to assume that
6 or to conclude from looking at this contract that the insurer
7 will be responsible for paying for the necessary steps to
8 determine what the loss is, and then to repair the loss. It is
9 not reasonable to look at this agreement and to say we are
10 required to compensate you for loss but not for the process of
11 figuring out what the loss is.

12 And GEICO's lawyer said, as I think he has to, that
13 in some cases they do read this contract to require them to pay
14 for scans. They do not draw the line --

15 THE COURT: Actually, that's not what your opponent
16 said. Your opponent said that sometimes they do pay for
17 diagnostics, but he specifically denied that they did so
18 because the contract required them to do so.

19 MR. CONABLE: Well, then the implication of that is
20 that in some cases they make gratuitous diagnostic payments for
21 some reason specific to GEICO, not having to do with their
22 understanding of what the contract means. I would suggest --

23 THE COURT: Why is that? Why is that troubling in
24 any way, they sometimes pay diagnostics?

25 MR. CONABLE: Because it's factless. Because their

1 argument here has to be that as a matter of law, we don't pay
2 for this. As Your Honor suggested, it's because this contract
3 doesn't say we pay for diagnostics, GEICO doesn't pay for
4 diagnostics, except we know sometimes GEICO does pay for
5 diagnostics. It creates two possibilities: One, that in some
6 cases GEICO believes that -- possibility one, that GEICO
7 believes, and I think correctly, that in some circumstances the
8 time and labor necessary to figure out what the loss is and how
9 to fix it is part and parcel of covering the loss under this
10 contract; or the second possibility, as you've suggested, that
11 notwithstanding their belief that they're not required to pay
12 this, to pay for these -- to pay for any scanning under the
13 contract, nevertheless, sometimes they do it anyway.

14 Those are two possibilities. One, if GEICO as a
15 matter of fact --

16 THE COURT: So you're suggesting the second one is
17 fabulous?

18 MR. CONABLE: I am, Your Honor. But it's also
19 factual.

20 THE COURT: Why wouldn't it be perfectly -- if you
21 have a \$30 diagnostic test, then, you know, the insurance
22 company could easily just assume it's not worth the beef.

23 MR. CONABLE: And perhaps the insurance company will
24 come forward with evidence at trial where they point to some
25 policy that they have that they don't sweat the details or

1 they're not worried about squeezing a nickel or they're
2 motivated in some cases by something other than profit.

3 But again, the argument here has to be that the plain
4 language of this contract doesn't require them to pay for any
5 scans, even scans that are necessary to ascertain the amount of
6 damage, to allow for damage to occur.

7 All I'm suggesting, Your Honor, is that once GEICO
8 admits, as it must, that it sometimes pays for scans, including
9 sometimes paying for electronic scans, it either has to embrace
10 the idea that sometimes this contract does provide for coverage
11 in those circumstances or make the factual argument that we're
12 wrong on the facts when we say they have a policy of paying for
13 some scans and not paying for others. And that's -- this is a
14 motion to dismiss. That's a factual question.

15 Back to good faith and fair dealing. I got off of it
16 there for a minute. Our point is that it is within the
17 reasonable expectations of the party that contracts with
18 someone who agrees to pay for loss to their vehicle following a
19 collision, that part of paying for that is paying for figuring
20 out what the loss is.

21 THE COURT: Why?

22 MR. CONABLE: Because it is -- because there's no
23 division in that process from the perspective of the customer.
24 Because when you take your car --

25 THE COURT: Why isn't it perfectly reasonable to

1 contract with someone to pay for your loss, understanding that
2 it's on you to determine the loss?

3 MR. CONABLE: Because there is no process, in
4 everyone's ordinary understanding of getting a car fixed, the
5 process of determining what's wrong with the car and the
6 process of fixing the car are not disparate, divisible events.
7 There is no circumstance in which someone who has had a serious
8 collision to a car ever believed that they have some
9 responsibility independent of the body shop doing their repair
10 to figure out what's wrong with the car. It is -- fixing the
11 car and figuring out what's wrong with the car are not --

12 THE COURT: Well, but that doesn't help much. I
13 mean, sure, the person may think they've got to take it to a
14 body shop to figure out what's wrong and not figure it out
15 themselves. They may take photos or whatever, but they
16 understand they probably got to take it to the body shop to
17 figure out what's wrong.

18 MR. CONABLE: Yes, Your Honor.

19 THE COURT: But why would it be irrational to assume
20 that one could contract for protection against loss,
21 understanding that that whole process, including taking it to a
22 body shop, is on the client, and then the insurance company
23 pays for the loss?

24 MR. CONABLE: Well, the question is whether --
25 respectfully, I think the question is not whether it might be

1 rational for someone in some circumstance to form that belief,
2 but whether at the motion to dismiss stage, as a matter of law,
3 we can conclude that no reasonable person could have the
4 expectation, Mr. Hansen or anyone else would have the
5 expectation that fixing the car includes figuring out what's
6 wrong with the car.

7 THE COURT: Well, I guess what I have right now is
8 your say-so, that it's a justified expectation if you buy a GMC
9 like this one that you would get your scans paid for.

10 MR. CONABLE: We have our allegation to that effect
11 in the complaint. So in the sense that that's my say-so at the
12 motion to dismiss stage, yes, Your Honor.

13 THE COURT: The complaint alleges that it's a
14 justified expectation?

15 MR. CONABLE: Paragraph 47 in the second claim for
16 relief: "GEICO's policyholders have a reasonable
17 expectation" --

18 THE COURT: Slow down, please.

19 MR. CONABLE: Sorry.

20 "GEICO's policyholders have a reasonable expectation,
21 rooted in the plain language of the policy, that GEICO will
22 compensate them in an amount sufficient to obtain complete and
23 safe repairs. However, GEICO's policy of denying pre- and
24 post-repair scans, in direct opposition to manufacturer and
25 industry recommendations, frustrates this reasonable

1 expectation."

2 THE COURT: Thank you.

3 MR. GOLDFINE: I'll be very short here. I mean, I
4 think the operative language there that reflects the test in
5 Oregon, which is rooted in the plain language, and so the idea
6 that we're going to disregard the -- you know, the plain
7 language "damage," and the express limitation in "damage" to
8 read, candidly, a bunch of third parties' documents as to what
9 the terms are is inconsistent with the plain meaning.

10 THE COURT: We're not relying on third parties to
11 tell us what the terms are, consistent or not with plain
12 meaning. We're looking to third parties to decide what a
13 justified expectation is in terms of the good faith and fair
14 dealing theory.

15 MR. GOLDFINE: But it still has to, as I understand
16 Oregon law -- and it's not inconsistent with other states'
17 law -- it has to be consistent with the language of the policy.
18 The operative language of the policy still is "damage to the
19 vehicle."

20 THE COURT: How is paying for diagnostic tools to
21 determine damage inconsistent with the policy?

22 MR. GOLDFINE: Because that's a choice of diagnostic
23 tools as opposed to just compensating for the damage itself.
24 And so --

25 THE COURT: So you're saying if it imposes a new

1 financial obligation on the insurance company, it's
2 inconsistent with the express terms of the policy?

3 MR. GOLDFINE: I would agree with that proposition.

4 THE COURT: That wasn't a proposition, it was a
5 question. I was asking if that's what you're saying.

6 MR. GOLDFINE: I would agree with that. I think
7 there's other -- I mean, I don't want to limit it simply to
8 that, but yes, I would agree with that.

9 THE COURT: Assuming that's wrong, by what method do
10 I determine what a customer's justified expectations are?

11 MR. GOLDFINE: Well, I think you have to start with,
12 even as alleged here, you have to start with the language of
13 the contract. If the language of the contract uses a term, as
14 it does, "damage to the vehicle," you know, the justified
15 expectations are not going to be how you get the fix of the
16 vehicle, the techniques, the particular diagnostic tools. The
17 insured has agreed and the insurer has agreed to pay for,
18 compensate for the damage minus the deductible.

19 THE COURT: So you heard argument that the cat's out
20 of the bag, so to speak, and if GEICO -- if GEICO has, in fact,
21 acknowledged that it sometimes pays for diagnostic tools, it's
22 tough to say when it should or shouldn't, you know. We at
23 least now have to litigate what is reasonable expectation and
24 what isn't.

25 MR. GOLDFINE: Well, I guess I would take a step back

1 and, you know, assuming the truth of that allegation, just for
2 purposes of this argument here, the idea that we just pay for a
3 diagnostic tool, as the Court noted, could be gratuitous, it
4 could be for a variety of reasons, and it could be set on the
5 particular circumstances of a particular car. But the idea
6 here that a plaintiff can come to court and say, "Well, there
7 was damage to my rear bumper, I accidentally bumped into
8 something at the supermarket," but not allege that that damage
9 hasn't been compensated -- which is not in their complaint --
10 is not, you know, a justification for opening up a whole
11 panoply of particular circumstances.

12 The contract says, the policy says compensation for
13 damage to the vehicle caused by a covered collision. There's
14 not an allegation here that --

15 THE COURT: Sure. We're not talking about the
16 contract. We're talking about good faith and fair dealing. So
17 that's why I'm not focusing directly on the terms of the
18 contract except to the degree you suggest that this good faith
19 and fair dealing theory contravenes the terms of the contract.
20 I get that point.

21 MR. GOLDFINE: And it stems beyond the -- the term
22 "damage to the vehicle," it extends substantially beyond that.

23 THE COURT: Thank you.

24 I'll take a brief recess.

25 THE CLERK: Court is in recess.

1 (A recess is then taken.)

2 THE COURT: All right. Thank you for your briefing
3 and oral argument in this case.

4 I do find that the complaint in this case fails to
5 state a claim. For breach of contract, I think it's a fairly
6 straightforward analysis. Some loss or damage that wasn't paid
7 for has to be alleged. And the contract does not on its
8 express terms promise any more than that. It doesn't promise
9 to pay for diagnostics, and external events such as
10 manufacturer's requirements can't really plug much into the
11 contractual analysis.

12 Certainly, in context, the terms itself in context I
13 don't think mean much different than they do just on their
14 simple expression of the words. It doesn't really, as I look
15 at it in context, mean anything other than to pay for the loss
16 or damages. And so without that, I don't believe that a claim
17 is properly stated.

18 Most of the argument I heard today really gets at the
19 reasonable expectations of the parties for a good faith and
20 fair dealing claim. I mean, the manufacturer's requirements or
21 ASA requirements, for example, might go a long way towards
22 establishing the reasonable expectations of the parties. But
23 that's actually not really necessary here because I find that
24 the complaint itself at the motion to dismiss stage adequately
25 states that it's the reasonable expectations of the parties in

1 this kind of case to get this kind of diagnostic tool. You
2 don't really need much more than that at this stage.

3 But what you also need for good faith and fair
4 dealing is the violation you allege, the fair dealing that you
5 say did not take place is essentially a performance that you
6 think good faith and fair dealing requires, but it has to be a
7 performative act that's not inconsistent with the terms of the
8 contract. Even if it is a reasonable expectation of the
9 parties, it still has to not add a term to the contract.

10 And, of course, one good way to think of that is does
11 it require in a contract like this one to pay for something
12 that the contract never promised to pay for. And here I think
13 it is a new term, inconsistent with the express terms of the
14 contract. I think read as a whole, when you promise to pay for
15 certain things, then good faith and fair dealing can't get you
16 to promise to pay for more than the things you said you'd pay
17 for. That's an inconsistency when the nature of the contract
18 is fundamentally a promise to pay.

19 And so, for that reason, I find that there is also no
20 claim stated on good faith and fair dealing, and neither of
21 those, I think, are curable. I mean, if a complaint alleged a
22 loss that wasn't paid for, we'd have an entirely different
23 case, and one that probably would have to be, under the
24 contract itself -- some other steps would have to take place
25 before we could even be in court. And certainly the reasonable

1 expectation of the party prong of good faith and fair dealing
2 could be cured, but I've already said it doesn't need to be
3 cured. There's enough there.

4 And the adding -- the problem that it adds a new
5 term, required payment adds a new term isn't curable, in my
6 view, so I grant the motion here for failure to state a claim
7 on both theories with prejudice.

8 Thank you all. We'll be in recess.

9 THE CLERK: This court is in recess.

10 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

April 9, 2018

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

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