No. 18-35383

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
a Maryland corporation,

Defendant-Appellee.

On Appeal From United States District Court
For the District of Oregon
D.C. No. 3:17-cv-01986-MO
Honorable Michael W. Mosman

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INTRODUCTION

Three decades ago, Doc's DeLorean traveled back to the future with the use of a single flux capacitor. Modern cars may not travel in time, but they contain circuity that even Doc and Marty McFly could not have imagined: dozens of computers use millions of lines of software code to operate all of a car's essential functions, from door locks and power steering, to automatic engine and braking systems. Modern cars are among the most sophisticated machines ever built.

Given these advances in vehicle technology, fixing a car now requires more than just a proverbial look under the hood. A car's computers talk to and work with each other. This means that a fender-bender that damages a rear bumper can disrupt electronic systems in other parts of the car, including the brakes and blind-spot detection. Certain tools, called diagnostic scans, examine whether all computer systems are in sync after a collision. If the scan detects a problem with any system, it returns a diagnostic trouble code, which tells a mechanic what is broken in the car and why. Major automobile manufacturers agree that, with every modern car, diagnostic scans are a necessary part of every collision repair.

Here, Appellant Leif Hansen owned a 2017 Sierra 3500 pickup truck, a modern vehicle replete with computers and electronic systems. Hansen insured his truck with Appellee Government Employees Insurance Company (GEICO). The

insurance policy for the truck covered all collision "loss," limited to the cost to "repair or replace" the damaged vehicle. After a collision damaged Hansen's rear bumper, GEICO refused to pay for diagnostic scans as part of the repair. Hansen sued for breach of contract and for breach of the covenant of good faith and fair dealing. On a motion to dismiss, the district court dismissed Hansen's complaint with prejudice, ruling that the policy covered, as a matter of law, only visible physical damage to the car.

This Court should reverse. In an age where every modern car combines digital and mechanical engineering, diagnostic scans are part and parcel of every collision repair. Indeed, GEICO pays for other diagnostic scans under this very policy. At the very least, whether a diagnostic scan was necessary to repair Hansen's truck to its pre-collision condition was a question of fact for a jury.

JURISDICTIONAL STATEMENT

This appeal is from the district court's final order dismissing Hansen's complaint with prejudice. The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). The district court entered judgment on April 6, 2018, and Hansen timely appealed on May 7, 2018. ER 1, 32–33. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether GEICO's express promise to pay for any collision "loss," measured by the cost to "repair or replace" a damaged vehicle, covers diagnostic scans that Hansen alleged are necessary to identify any latent damage to the vehicle's electronic systems.

2. Whether Hansen's alleged reasonable expectation that GEICO cover diagnostic scans contradicts an express term of GEICO's insurance policy under the implied covenant of good faith and fair dealing.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Technology in Modern Cars

Modern cars are computers on wheels. They contain more software code than an F-35 fighter jet.[1] Computer software and technology operate virtually all major vehicle functions, including steering, braking, acceleration, and battery systems.[2]

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[1] *See* Jim Motavalli, *The Dozens of Computers That Make Modern Cars Go (and Stop)*, N.Y. Times (Feb. 4, 2010), https://www.nytimes.com/2010/02/05/technology/05electronics.html; Nicole Perlroth, *Why Car Companies Are Hiring Computer Security Experts*, N.Y. Times (June 7, 2017), https://www.nytimes.com/2017/06/07/technology/why-car-companies-are-hiring-computer-security-experts.html.

[2] David Gelles, Hiroko Tabuchi & Matthew Dolan, *Complex Car Software Becomes the Weak Spot Under the Hood*, N.Y. Times (Sept. 26, 2015), https://www.nytimes.com/2015/09/27/business/complex-car-software-becomes-

With greater car technology comes greater risks to driver and passenger safety. Researchers have shown that hackers can remotely access a modern car's electronics and thereby control the car's locks, windshield wipers, speedometer, radio, and blinkers.[3] Hackers can even remotely engage and disengage a car's steering and brakes.[4] Apart from the malfeasance of hackers, modern cars are also vulnerable to software malfunctions. A car's mechanical features may be intact physically, but a computer glitch can render the car unsafe and, ultimately, inoperable due to electronic system failure. The standard functions discussed above, as well as safety features such as blind-spot detection, all depend on properly functioning software code.[5]

As the range of potential problems with cars has increased, repairing a car after a collision has demanded greater sophistication from mechanics and repair shops. Without the proper repairs to a car's electronics, a host of preventable disasters can occur. If a car's passenger seat sensor is broken, then the passenger

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the-weak-spot-under-the-hood.html; John Markoff, *Researchers Show How a Car's Electronics Can Be Taken Over Remotely*, N.Y. Times (March 9, 2011), https://www.nytimes.com/2011/03/10/business/10hack.html.

[3] Nicole Perlroth, *Security Researchers Find a Way to Hack Cars*, N.Y. Times (July 21, 2015), https://bits.blogs.nytimes.com/2015/07/21/security-researchers-find-a-way-to-hack-cars.

[4] *Id.*

[5] *See* Motavalli, *supra* note 1.

airbag will not deploy in the next crash. If a car's blind-spot detection is not working, then the driver will not receive a warning to avoid a potentially fatal lane change. *See* ER 37–39, 72. If the lane departure warning system has failed, then the car will not alert a dozing driver that he is about to drift across the center line of the road. ER 39. Each and every unfixed error to a car's electronics system can be catastrophic, particularly as drivers increasingly rely on the car's systems to operate properly.

To help mechanics identify and correct vehicle malfunctions in modern cars, automakers developed tools that scan cars for diagnostic trouble codes, which identify what is broken with the car and why. ER 72. These codes are stored in the car's computer memory and can reveal latent issues invisible to the human eye. ER 37. Diagnostic trouble codes are designed to tell mechanics, not drivers, precisely what is wrong with a car. Consequently, a diagnostic trouble code can be present even if a maintenance light is not illuminated on the car's dashboard. *Id.* Diagnostic scans are the only way to ensure that all diagnostic trouble codes, and the full extent of damage to a car, are identified. *See* ER 40, 77 ¶¶ 12–13.

Thus, every car manufacturer that has spoken on the issue recommends diagnostic scans as part of every collision repair involving a modern car. This includes General Motors, Nissan, Honda, and Toyota. *See* ER 36–40, 72–73. In a formal position statement, General Motors emphasized that repair shops should

perform diagnostic scans after every collision because “[e]ven minor body damage or glass replacement may result in damage to one or more safety-related systems on the vehicle.” ER 72, 77 ¶ 16.

The Automotive Service Association, an independent organization dedicated to promoting quality and integrity in the auto repair industry, also has endorsed diagnostic scans. ER 41; *see* ER 77 ¶ 17. According to the Association, diagnostic scans are essential for safe, complete repairs of modern cars after any collision. ER 41. The growing consensus in the automotive industry is that the complex technology in modern cars requires diagnostic scans as part of every collision repair. *See* ER 77 ¶¶ 12–13.

B. Hansen’s 2017 Pickup Truck and GEICO’s Insurance Policy

Hansen owns a 2017 Sierra 3500 pickup truck manufactured by General Motors. ER 76 ¶ 9. Like all modern General Motors vehicles, digital software controls the truck’s safety features and vehicle functions. *See* ER 72–73. Because of its modern technology, the truck is one for which General Motors recommends scanning for diagnostic trouble codes after any collision. *Id.*

GEICO issued an insurance policy for Hansen’s truck on October 23, 2017. ER 42. The policy specifies that GEICO “will pay for collision loss to the owned auto or non-owned auto for the amount of each loss less the applicable deductible.” ER 52 (emphasis omitted); *see* ER 76 ¶ 10. The policy defines “loss” as “direct

and accidental loss of or damage to: (a) an insured auto, including its equipment; or (b) other [insured] property." ER 51 (emphasis omitted); *see* ER 76 ¶ 10. The policy lists 17 exclusions for losses not covered by the policy, none of which mentions electronic scans. ER 52–53. The limit of liability for GEICO "is the actual cash value of the property at the time of the loss," which "will not exceed the prevailing competitive price to repair or replace the property at the time of loss, or any of its parts, including parts from non-original equipment manufacturers, with other of like kind and quality." ER 53 (emphasis omitted). GEICO has the option to "pay for the loss" or to "repair or replace the damaged or stolen property" itself. ER 54.

C. Hansen's Collision and Insurance Claim

In early November 2017, Hansen was in a collision while driving his truck. ER 76 ¶ 11. The accident damaged the truck's rear bumper. *Id.* On November 4, 2017, he filed a claim with GEICO. *Id.* When Hansen took his truck to an auto body shop, GEICO elected to pay the cost of repair. *See id.* GEICO refused, however, to authorize diagnostic scans to identify any latent damage to the truck's electronic systems. ER 78 ¶ 19. GEICO took the position that it would pay for diagnostic scans only if a maintenance light was illuminated on the truck's dashboard, which was not the case. *Id.*

Hansen knew from his experience as an owner of auto repair shops that diagnostic scans are a necessary part of collision repairs, even when a maintenance light is not illuminated. ER 77 ¶ 12. He repeatedly requested that GEICO authorize the scans. GEICO refused. ER 78 ¶¶ 20–21.

II. PROCEDURAL HISTORY

On December 13, 2017, Hansen sued GEICO on behalf of himself and all other GEICO policyholders for whom GEICO has refused to authorize diagnostic scans after a collision of a modern car. *See* ER 74–84. Hansen alleged that diagnostic scans are part of the "loss," measured by the cost to "repair or replace" the damaged vehicle, for which GEICO must pay under the express terms of its insurance policy. ER 80 ¶ 28, 83 ¶ 43. Hansen further alleged that GEICO violated the implied covenant of good faith and fair dealing by frustrating his reasonable expectation that GEICO would pay for a complete and safe repair of his truck, which included diagnostic scans to detect any latent damage from the collision. ER 83 ¶¶ 47–48.

In response, GEICO moved to dismiss Hansen's complaint for lack of standing and for failure to state a claim. *See* ER 2–31. GEICO also moved to strike Hansen's class allegations. ER 89. The district court held a hearing on GEICO's motions on April 5, 2018. ER 2. At the hearing, Hansen argued that, just as x-rays are a necessary part of medical care after collision, diagnostic scans

are part and parcel of collision repair to modern cars. ER 6. GEICO conceded that it sometimes pays for diagnostic scans, but stated that "[i]t really depends on the circumstances" for when it chooses to do so. ER 15; *see also* ER 20–22 (discussing when GEICO might pay for diagnostic tests).

The district court dismissed Hansen's complaint with prejudice for failure to state a claim. The court ruled from the bench as a matter of law that, although diagnostic scans may be necessary to identify and diagnose latent physical damage, and although GEICO conceded that it sometimes pays for scans under Hansen's policy, the express terms of the insurance policy do not cover diagnostic scans—they cover only *visible* physical damage. ER 28–30. The court further ruled that, although the parties might reasonably have expected that the insurance policy covered diagnostic scans, covering scans would contradict the express terms of the policy. ER 28–29. The district court therefore granted GEICO's motion to dismiss Hansen's two individual claims without reaching GEICO's motion to strike Hansen's class allegations. ER 30.

SUMMARY OF THE ARGUMENT

The district court erred in two primary respects. First, the court incorrectly ruled that the term "loss" cannot reasonably be interpreted to include coverage for diagnostic scans of modern cars. GEICO's insurance policy defines "loss" as the cost to "repair or replace" a damaged vehicle. GEICO elected to repair Hansen's

truck. The policy does not define "repair" but, in the context of the policy and case law, "repair" means any non-excluded cost or service necessary to restore a car to its pre-collision condition. As alleged in Hansen's complaint, diagnostic scans are necessary to identify any latent damage in a modern car after a collision, and the policy does not exclude them. GEICO also conceded that it sometimes pays for scans under Hansen's policy. Whether scans actually are necessary to restore Hansen's truck to its pre-collision condition is a question of fact for a jury that must be answered in Hansen's favor at the motion to dismiss stage.

Second, and relatedly, the district court incorrectly ruled that Hansen failed to state a claim for breach of the implied covenant of good faith and fair dealing. The court accepted as true Hansen's allegation that, in light of manufacturer recommendations and repair industry standards, the parties reasonably expected that GEICO would pay for diagnostic scans. However, the court nevertheless concluded that covering scans would contradict the express terms of the policy. The court misinterpreted the policy for the reasons discussed above: as alleged, scans are necessary to identify latent damage to Hansen's truck and, thus, to restore it to pre-collision condition.

STANDARD OF REVIEW

The district court addressed only Hansen's individual claims, to which Oregon substantive law indisputably applies. *See* Dist. Ct. Dkt. 21 at 10. The

Court reviews questions of law de novo. *See Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 938 (9th Cir. 2009); *see also St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1205 (Or. 1996) (stating that interpretation of an insurance contract is a question of law). At the motion to dismiss stage, the Court accepts all well-pleaded allegations of material fact as true and construes them in the light most favorable to the non-moving party. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013). "It is well-established that questions of fact cannot be resolved or determined on a motion to dismiss for failure to state a claim upon which relief can be granted." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990).

ARGUMENT

I. THE EXPRESS TERMS OF GEICO'S INSURANCE POLICY COVER NECESSARY DIAGNOSTIC SCANS

GEICO's insurance policy promises to pay for "loss." *See* ER 28. The district court interpreted that term to cover only visible damage to a car, thereby excluding any and all diagnostic scans to discover the full extent of damage to the car. *Id.* The court erred in doing so. Construing the facts in the light most favorable to Hansen, as a court must at the motion to dismiss stage, the scans are necessary to diagnose any latent physical damage to a modern car after a collision.

The scans are thus part and parcel of restoring the car to its pre-collision condition, as provided for in the policy.

Oregon courts follow a three-step analytical process to construe disputed terms in an insurance policy. *Andres v. Am. Standard Ins. Co. of Wis.*, 134 P.3d 1061, 1063 (Or. Ct. App. 2006). "The first step is to examine the text of the policy to determine whether it is ambiguous, that is, whether it is susceptible to more than one plausible interpretation." *Id.*; *see Rhiner v. Red Shield Ins. Co.*, 208 P.3d 1043, 1045 (Or. Ct. App. 2009) ("We begin with the wording of the policy . . . . If, from that vantage point, there is only one plausible interpretation of the disputed terms, our analysis goes no further.").

At step one, courts look to the express definitions in the policy and then, if express definitions do not resolve a disputed term's meaning, to the term's plain meaning as established by common dictionary definitions. *See St. Paul Fire*, 923 P.2d at 1210; *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Or.*, 836 P.2d 703, 706 (Or. 1992). In evaluating the plain meaning of a term, courts seek to interpret words the same way as "an ordinary purchaser of insurance." *St. Paul Fire*, 923 P.2d at 1213. If the policy's express definitions and the plain meaning of a term are "broad enough to cover the proposed definitions of both sides," courts look to whether any binding precedent establishes the term's meaning. *See id.* at 1212.

At step two, courts examine the context of the terms as they appear in the policy. Courts subject the parties' proposed interpretations of a term "to scrutiny in light of the context in which it is used and in light of the other provisions of the policy." *Hoffman*, 836 P.2d at 709. This inquiry requires courts to ask whether a proffered interpretation would impermissibly nullify or render superfluous other parts of the policy. *Id.* at 708–09; *see Bresee Homes, Inc. v. Farmers Ins. Exch.*, 293 P.3d 1036, 1041 (Or. 2012) ("[W]e construe the text of the policy as a whole, rather than view particular parts of the policy in isolation.").

Finally, if wording and context do not resolve the ambiguity in the insurance policy, courts turn to step three and apply rules of construction. *Hoffman*, 836 P.2d at 706–07 (stating that rules of construction only apply "when two or more competing, plausible interpretations prove to be reasonable after all other methods for resolving the dispute over the meaning of particular words fail"). Foremost among these rules is "that[,] if there is an ambiguity in the terms of an insurance policy, any reasonable doubt as to the intended meaning of such terms will be resolved against the insurance company and in favor of extending coverage to the insured." *Shadbolt v. Farmers Ins. Exch.*, 551 P.2d 478, 480 (Or. 1976).

A. As Used in GEICO's Insurance Policy, "Loss" Means the Cost to Repair or Replace

GEICO's insurance policy contains a promise to "pay for collision loss to the owned auto . . . for the amount of each loss less the applicable deductible."

ER 52 (emphasis omitted). Section III.8 of the policy defines the term "loss" as "direct and accidental loss of or damage to . . . an insured auto, including its equipment." ER 51 (emphasis omitted). The district court concluded that "loss" cannot include any diagnostic tests. ER 28. The district court was mistaken. None of the three steps of insurance policy interpretation—wording, context, and rules of construction—supports the district court's reading.

1. The Term "Loss" is Broad and Includes any Financial Detriment

Step one requires analysis of the term "loss." The definition of "loss" in the policy is broader than just visible physical damage to the vehicle. It includes "direct and accidental loss of" a car, including its equipment, as well as "damage to" a car and its equipment. ER 51. And the policy itself does not distinguish between visible physical damage and other types of direct and accidental losses.

Dictionary definitions of the term also are inherently broad and would lead the ordinary insured to believe that "loss" includes *any* cost resulting from a covered event, such as a collision. *Black's Law Dictionary* defines "loss" in the insurance context as "[t]he amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable." *Black's Law Dictionary* (10th ed. 2014). Similarly, *Webster's Third New International Dictionary* defines "loss" as "the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury,

destruction, or damage) in such a manner as to charge the insurer with a liability under the terms of the policy." *Webster's Third New Int'l Dictionary* (unabridged ed.), *available at* http://unabridged.merriam-webster.com. No credible dictionary defines loss in the insurance context as merely visible physical damage.

Oregon case law further confirms that the word "loss" is broad enough to include an array of costs beyond visible physical damage. In *Gonzales v. Farmers Insurance Co. of Oregon*, for example, the Oregon Supreme Court concluded that the term "loss" was "broad enough to include diminished value," or the difference in the value of the car before and after an accident. 196 P.3d 1, 7 (Or. 2008). In *Busch v. Ranger Insurance Co.*, the Oregon Court of Appeals held that the insurance provision "direct and accidental loss of or damage to the aircraft" covered more than "physical" damage; "loss" also included the cost of returning an aircraft to "airworthy" condition. 610 P.2d 304, 307 (Or. Ct. App. 1980). Similarly, in *Rossier v. Union Automobile Insurance Co.*, the court stated matter-of-factly, "It is common knowledge that the nature and extent of damage to a car may be such that [mere] replacement or repair of broken parts will not compensate the insured for his loss." 291 P. 498, 500 (Or. 1930). When interpreting insurance policies, Oregon courts have repeatedly treated the term "loss" as broader than visible physical damage.

2. The Context of "Loss" Means the Cost to Repair or Replace

Step two of the process for interpreting a term in an insurance policy requires analysis of the term's context. The context of GEICO's policy as a whole confirms that "loss" includes more than just visible physical damage. Specifically, the policy defines "loss" as the cost to repair or replace the damaged property.

Two sections of the policy establish this definition. First, the Exclusions section excludes, among other losses, "compensation for diminished value." ER 52–53 (emphasis omitted). Second, the policy titles section III as "Physical Damage Coverages" and "Your Protection for Loss Or Damage To Your Car." ER 51. If "loss" meant only visible physical damage, GEICO would have no need to specifically exclude certain losses such as "compensation for diminished value." The title of section III also indicates that, although it primarily covers physical damage, "loss" is not coextensive with "damage." The section states that it protects drivers against both "loss" *and* "damage." "Loss" must therefore be construed as broader than physical damage to avoid "creat[ing] a meaningless redundancy" in the policy. *Hoffman*, 836 P.2d at 708; *see also Rhiner*, 208 P.3d at 1045-46 ("In determining whether a phrase is ambiguous, we do not lightly assume that contract language is superfluous.").

The same sections, however, show that "loss" does not mean *any* cost resulting from a collision. Again, diminished value is excluded. Additionally, the

policy states that GEICO will not pay more than the cost of repairing or replacing the vehicle. The Conditions section clarifies that "loss" is fully paid if GEICO either "pay[s] for the loss" or "repair[s] or replace[s] the damaged or stolen property." ER 54. The Conditions section could only give GEICO these two options if payment for loss were equivalent to the value of a repair or replacement. Therefore, under the express terms of its policy, GEICO must pay for the repair or replacement, or perform the repair or replacement itself, unless a specific exclusion applies.

B. As Used in GEICO's Insurance Policy, "Repair" Includes Diagnostic Scans Necessary to Restore a Car to its Pre-Collision Condition

GEICO elected to repair rather than replace Hansen's truck, making "repair" the operative term in the policy. The case thus depends on whether "repair" includes diagnostic tests such as diagnostic scans. The answer is yes.

1. "Repair" Means any Cost or Service Necessary to Restore a Car to its Pre-Collision Condition

Returning to step one of insurance policy interpretation, GEICO's policy does not expressly define "repair." Thus, the term is given its plain meaning, or the meaning that "an ordinary purchaser of insurance" would ascribe to it. *St. Paul Fire*, 923 P.2d at 1213. *Black's Law Dictionary* defines "repair" as "[t]he process of restoring something that has been subjected to decay, waste, injury, or partial destruction, dilapidation, etc." *Black's Law Dictionary* (10th ed. 2014). *Webster's*

Third New International Dictionary defines the term as "to restore by replacing a part or putting together what is torn or broken"; "to restore to a sound or healthy state"; "to make good: REMEDY"; "to make up for: compensate for." *Webster's Third New Int'l Dictionary* (unabridged ed.), *available at* http://unabridged.merriam-webster.com. These definitions do not establish definitively whether resting a car to its pre-collision condition includes diagnostic tests to determine the extent of the damage or just the cost of replacing parts already known to be damaged. Case law therefore must serve as a guide to the meaning of "repair." *See St. Paul Fire*, 923 P.2d at 1212.

The Oregon Supreme Court case *Gonzales v. Farmers Insurance Co. of Oregon* establishes that the term "'repair' encompasses the restoration of the vehicle to its condition prior to the collision." 196 P.3d at 6. In *Gonzales*, the plaintiff's car suffered property damage in an accident. The insurer paid for repairs, but the repairs failed to "restore the vehicle to its preaccident condition." *Id.* at 2. The plaintiff claimed that the policy made the insurer liable for the difference between the value of the car before the accident and its decreased value after the accident. *Id.*

The policy in question provided that the insurer "will pay for loss to [the] insured car caused by collision less any applicable deductibles." *Id.* at 3 (alteration in original). The policy defined "'loss' as 'direct and accidental loss of or damage

to [the] insured car, including its equipment.'" *Id.* (alteration in original). The insurer's liability was limited to "[t]he amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation." *Id.* The policy further provided that the insurer could choose whether to "pay the loss in money or repair or replace damaged or stolen property." *Id.*

The Oregon Supreme Court determined that "repair" was the operative term that defined the scope of the insurer's liability. *Id.* at 4. After analyzing the common definitions of "repair," the context of the overall policy, and existing case law, the court concluded that, "under the policy at issue, if an attempted 'repair' does not or cannot result in a complete restoration of the vehicle's preloss condition, the vehicle is not 'repair[ed],' and the resulting diminution of value of the vehicle remains a 'loss to [the] insured car caused by collision' for which defendants are liable under their policy." *Id.* at 6 (alterations in original). The court noted that nothing in its decision "prevents insurers from including a definition of repair in automobile policies that excludes diminished value from coverage." *Id.* at 6 n.3

Here, GEICO's insurance policy specifically excludes coverage for diminution in value. ER 53. In all other relevant respects, however, GEICO's policy is identical to the policy at issue in *Gonzales*. Therefore, with the exception

of diminution in value and other specific exclusions, "repair" covers any cost or service that is necessary to restore a vehicle to its pre-collision condition. This includes any necessary diagnostic tests, without which there is no way for mechanics to know the nature and extent of needed repairs.

Analogous case law concerning medical insurance confirms that diagnostic tests are part and parcel of any restorative care and treatment. In *Zeh v. National Hospital Association*, the Oregon Supreme Court considered whether "an examination, a diagnosis, and advice as to the future" constituted "medical care." 377 P.2d 852, 857 (Or. 1963). The court concluded that diagnostic services qualified as "medical care" because the services identified "a course of treatment that [the plaintiff] would have to adopt if he was to be restored to good health." *Id.* at 858 ("If the consultation with the medical man is for the purpose of medication, or of diagnosis so that he may know what he must do next, it should be deemed medical care.").

Following *Zeh*, the Oregon Court of Appeals held that diagnostic tests, which are preceded or followed by therapeutic measures, constitute "treatment." *See Beveridge v. Hartford Acc. & Indem. Co.*, 770 P.2d 943 (Or. Ct. App. 1989). The *Beveridge* court rejected the argument to the contrary as "unacceptable" because it would mean that "'diagnostic' adjuncts, such as regular temperature readings and blood tests, could not be considered as part of the 'treatment' for an

acute infection." *Id.* at 945 n.2; *see also SAIF Corp. v. Carlos-Macias*, 418 P.3d 54, 56 (Or. Ct. App. 2018) (holding that "diagnostic services were compensable because they were necessary to determine the extent of claimant's disability from his accepted conditions").

For the purposes of insurance coverage, there is no meaningful difference between "repair" and "care" or "treatment." A "repair" restores a car to good condition, while "care" or "treatment" restores a person to good health. An interpretation of "repair" that excludes diagnostic tests for cars would conflict with the definition of "repair" adopted by the Oregon Supreme Court in *Gonzales*, as well as established case law that defines "care" and "treatment" for patients to include diagnostic tests such as temperature readings.

2. Nothing in the Policy Precludes Coverage for Necessary Diagnostic Tests

At step two of insurance policy interpretation, the question is whether the context of the policy as a whole prevents an interpretation of "repair" that includes diagnostic tests. *See Hoffman,* 836 P.2d at 707; *Denton v. Int'l Health & Life Ins. Co.*, 528 P.2d 546, 549 (Or. 1974) ("[T]he policy must be viewed by its four corners and considered as a whole. Thus, all parts and clauses must be construed to determine if and how far one clause is modified, limited or controlled by others." (citation omitted)). It does not.

The 17 exclusions in GEICO's insurance policy preclude recovery for several types of restorations, but not diagnostic tests. An insured cannot recover for, among other things, "[l]oss due to war"; "loss for custom parts or equipment, in excess of $1,000, unless the existence of those custom parts or equipment has been previously reported"; or "compensation for diminished value." ER 53 (emphasis omitted). None of these exclusions bars diagnostic tests that are necessary to restore a damaged car to pre-collision condition.

Indeed, other provisions in the policy indicate that "repair" includes diagnostic tests. The Limit of Liability section obligates GEICO to "repair or replace" a damaged vehicle and its parts with "other of like kind and quality." ER 53. GEICO could never meet its obligation to ensure that it restored a vehicle to its former "quality" without some sort of diagnostic test. As in *Gonzales*, the phrase "of like kind and quality" is another factor supporting the conclusion that GEICO is "obligated to restore the damaged vehicle" by whatever means necessary. *See* 196 P.3d at 7.[6]

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[6] The case *Grooms v. Davidson Chevrolet Oldsmobile Cadillac*, 800 N.Y.S.2d 321 (City Ct. 2005), appears to be the only published decision specifically addressing diagnostic scans of modern cars. There, the court held that a repair shop breached its duty of reasonable care by failing to inform the plaintiff about the importance of performing diagnostic scans. *Id.* at 326. The court reasoned, "It is no longer possible for a mechanic to fully perform his job without the use of a computer diagnostic scan." *Id.* at 325.

Moreover, at the hearing on GEICO's motion to dismiss, GEICO confirmed that it pays for diagnostic tests under Hansen's policy. ER 15–16. Hansen alleged as much in his complaint. ER 78 ¶ 19. It would be illogical, and an extreme aberration in the insurance carrier business, for GEICO to pay for diagnostic tests not covered by its policy.[7]

3. The Court Must Resolve any Remaining Ambiguity in the Policy in Favor of Coverage

The first two steps of insurance policy analysis resolve any ambiguity in the definition of "repair," and, transitively, the definition of "loss." "Loss" and "repair" mean any non-excluded cost or service necessary to restore a car to pre-collision condition, including necessary diagnostic tests. However, to the extent

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In a somewhat analogous case, the Fifth Circuit applied Louisiana law to interpret the terms "loss" and "repair" as used in an insurance policy. *See Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 676 (5th Cir. 2007). The Fifth Circuit accepted that "repair or replacement" means "restoring the vehicle to pre-accident mechanical function and condition." *Id.* (quoting *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747, 753 (5th Cir. 2005)). The court went on to hold that these terms did not include extensive seatbelt inspections but that an insurance company arguably "would have to pay for the tests necessary to determine" what was wrong with the car "and how to fix it." *Id.* at 676 n.2.

[7] Oregon courts do not consider extrinsic evidence of the contracting parties' intent when interpreting the express terms of insurance policies. *See In re Helicopter Crash Near Weaverville, Cal. 8/5/08*, 714 F. Supp. 2d 1098, 1104–08 (D. Or. 2010); *Rhiner*, 208 P.3d at 1045. Nonetheless, the fact that not even GEICO believes that it is *never* obligated to pay for diagnostic tests shows how profoundly the district court erred in holding that the policy excludes diagnostic tests in every case as a matter of law.

any doubt remains about whether GEICO's insurance policy covers diagnostic tests, step three requires resolving the ambiguity in favor of coverage. In short, "under Oregon common law, if a contractual term is found to be ambiguous, it is generally interpreted against the insurer." *Anderson Bros. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 936 (9th Cir. 2013); *see N. Pac. Ins. Co. v. Hamilton*, 22 P.3d 739, 741 (Or. 2001) ("If a term of the policy is ambiguous, then the court employs a rule of construction by which the question of the meaning of the term is resolved by construing the term against the drafter of the policy, here, North Pacific.").

C. The Necessity of Diagnostic Scans Must Be Construed in Hansen's Favor at the Motion to Dismiss Stage

GEICO's insurance policy promises to compensate the insured for any non-excluded "loss," which includes diagnostic tests that are necessary to restore the car to pre-collision condition. Whether diagnostic scans are necessary to restore Hansen's car to pre-collision condition is a question of fact for a jury.

At the motion to dismiss stage, the court accepts all "well-pleaded factual allegations" as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679-80 (2009); *see Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). Well-pleaded factual allegations are those that are "nonconclusory." *Iqbal*, 556 U.S. at 680. A court may not resolve questions of fact on a motion to dismiss for failure to state a claim. *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 245.

In the complaint, Hansen alleged that he knows from his professional experience that electronic scans are "a necessary part of collision repairs." ER 77 ¶ 12. He described how "electronic scans use software to test for diagnostic trouble codes that identify potential damage and help ensure safe and complete repairs." ER 77 ¶ 13. He also alleged that General Motors, Nissan, Honda, Toyota, and the Automotive Service Association all direct that repair shops run diagnostic scans on all modern cars involved in a collision. ER 77 ¶¶ 15–17. These allegations contain sufficiently detailed facts to support Hansen's claim that diagnostic scans are necessary to return his truck to its pre-collision condition. At the motion to dismiss stage, the district court was required to accept these well-pleaded factual allegations as true and allow the case to proceed. Accordingly, this Court should reverse the district court's dismissal of Hansen's breach of contract claim.

II. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING PROTECTS HANSEN'S REASONABLE EXPECTATION THAT GEICO PAY FOR SCANS TO IDENTIFY ANY LATENT DAMAGE TO HIS TRUCK

Hansen alleged that, in addition to the policy's express terms, the implied duty of good faith and fair dealing obligated GEICO to pay for diagnostic scans. The district court dismissed this claim. The court concluded that requiring GEICO

to pay for diagnostic scans would add a provision to the insurance policy that conflicted with the policy's express terms. ER 28–30. It would not.

A. Coverage for Diagnostic Scans Does Not Contradict the Express Terms of GEICO's Insurance Policy

"In general, every contract has an obligation of good faith in its performance and enforcement under the common law." *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 240 P.3d 94, 101 (Or. Ct. App. 2010). A party breaches its implied duty when it acts in a way "that would 'have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.* (quoting *Iron Horse Eng'g Co., Inc. v. Nw. Rubber Extruders, Inc.*, 89 P.3d 1249, 1259 (Or. 2004)). A party can breach its implied duty without also violating the express terms of a contract. *Id.* However, "the duty 'cannot contradict an express contractual term, nor otherwise provide a remedy for an unpleasantly motivated act that is expressly permitted by the contract.'" *Id.* (quoting *Zygar v. Johnson*, 10 P.3d 326, 330 (Or. Ct. App. 2000)); *see Richardson v. Guardian Life Ins. Co. of Am.*, 984 P.2d 917, 923 (Or. Ct. App. 1999) ("[A]ny implied covenant of good faith and fair dealing must be consistent with the terms of a contract, in this case the scope of coverage provided by the policies.").

Here, paying for electronic scans does not contradict an express term in the insurance policy. As discussed, the express terms promise that GEICO will pay for or perform any non-excluded "repair," meaning cost or service that is necessary to

restore a vehicle to its pre-collision condition. The policy does not exclude necessary diagnostic tests. An implied duty to pay for diagnostic scans, if they are necessary diagnostic tests, is therefore consistent with the express terms of the policy.

In addition, the district court's approach turns insurance policy interpretation on its head. Insurance policies contain broad terms with specific exclusions, and courts must "construe exclusion clauses narrowly." *Am. Econ. Ins. Co. v. Hughes*, 854 P.2d 500, 501 (Or. Ct. App. 1993). Courts also must construe "insurance policies, especially their exclusion clauses, . . . strictly . . . against the insurer." *I-L Logging Co. v. Mfrs. & Wholesalers Indem. Exch.*, 273 P.2d 212, 223 (Or. 1954). "[A]ny reasonable doubt as to the intended meaning of such terms will be resolved against the insurance company and in favor of extending coverage to the insured." *Shadboldt*, 551 P.2d at 480. By contrast, the district court essentially ruled the opposite, reasoning that Hansen's policy could not be construed to cover diagnostic scans because there was not an inclusion clause explicitly providing for such coverage. That is not the law. *See Richardson*, 984 P.2d at 923; *Shadbolt*, 551 P.2d at 480.

B. Whether GEICO Breached the Implied Covenant is a Question of Fact for a Jury

"The common-law implied duty of good faith and fair dealing serves to effectuate the objectively reasonable expectations of the parties." *Klamath*,

240 P.3d at 101. Whether a party has conformed to objectively reasonable expectations is a question of fact. *Best v. U.S. Nat'l Bank of Or.*, 714 P.2d 1049, 1056 (Or. Ct. App. 1986), *aff'd*, 739 P.2d 554, 565 (Or. 1987). Industry standards and practices can inform this inquiry. *See Iron Horse*, 89 P.3d at 1259 (stating that "holding the parties to industry standards and practices effectuates the reasonable contractual expectations of the parties").

As the district court ruled, Hansen adequately alleged that the parties reasonably expected that GEICO would pay for diagnostic scans. For example, he alleged that "GEICO's policyholders have a reasonable expectation, rooted in the plain language of the Policy, that GEICO will compensate them in an amount sufficient to obtain complete and safe repairs." ER 83 ¶ 47. He described manufacturer requirements and industry standards that informed the parties' expectations. ER 77 ¶¶ 15–17. He further alleged that "GEICO's policy of denying pre- and post-repair scans, in direct opposition to manufacturer and industry recommendations, frustrates this reasonable expectation." ER 83 ¶ 47.

The district court erred by ruling that, despite the parties' reasonable expectations of coverage, coverage would contradict the express terms in the policy. It would not, as discussed above. Thus, Hansen's allegation of a reasonable expectation suffices to survive a motion to dismiss. Accordingly, this

Court should reverse the district court's ruling on the implied covenant of good faith and fair dealing.

CONCLUSION

The Court should reverse the district court's order dismissing Hansen's claims with prejudice and remand for further proceedings.

DATED this 14th day of September, 2018.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellant Leif Hansen's Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,778 words.

STATEMENT OF RELATED CASES

Plaintiff-Appellant Leif Hansen has no knowledge of any related cases pending in this court as defined by Circuit Rule 28-2.6.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 14, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 14th day of September, 2018.

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