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

APPELLANT LEIF HANSEN'S REPLY BRIEF

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INTRODUCTION

This is a case about the intersection between car insurance and modern technology. Appellant Leif Hansen purchased insurance from Appellee Government Employees Insurance Company (GEICO) for a 2017 pickup truck manufactured by General Motors. Like most modern cars, sensitive computer software and technology operate virtually all of the car's major vehicle functions. As a result, General Motors recommends that, after any collision, a repair shop conduct a scan of the car's electronics systems in order to identify and diagnose for repair any damage that may be undetectable to the naked eye.

Hansen suffered a collision to his rear bumper. GEICO refused to pay for diagnostic digital scans. Hansen sued under Oregon law for breach of contract and breach of the implied covenant of good faith and fair dealing, arguing that scans are part and parcel of collision repair for modern cars, including his 2017 General Motors pickup truck. The district court granted GEICO's motion to dismiss, ruling that, as a matter of law, the policy covers known collision damage to a car, but not digital scans that identify collision damage.[1] ER 28–30.

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[1] Hansen also sued on behalf of all other GEICO policyholders for whom GEICO has refused to pay for diagnostic scans after the collision of a modern car, which GEICO moved to strike. The district court never reached GEICO's motion to strike, so Hansen's class allegations are not before the Court in this appeal.

On appeal, GEICO concedes that the insurance policy requires that GEICO pay to repair damage to Hansen's car. Red Br. 27. GEICO also concedes "[t]hat scans are sometimes necessary to effectuate a repair," Red Br. 20 n.7 (emphasis omitted), and that it sometimes pays for digital scans under the policy, ER 15. Critically, no exclusion in the policy excludes digital scans. Thus, under Oregon law, the policy must be construed in favor of the insured: the policy covers digital scans that are necessary to effectuate a collision repair. And, at the motion to dismiss stage, the district court had to accept as true Hansen's allegation that scans were necessary to identify and thereby repair the full collision damage to his car. This Court should reverse the district court's dismissal of Hansen's complaint.

ARGUMENT

I. GEICO's insurance policy covers necessary diagnostic scans

On appeal, GEICO makes three primary arguments, none of which has merit. GEICO argues that: (1) paying for "loss" under its policy unambiguously means "damage," (2) repairing collision damage under the policy does not include scanning for latent damage, and (3) Hansen failed to allege that scans were necessary to identify latent collision damage to his vehicle.

A. The policy defines "loss" as repairing damage to a car

Hansen's appeal turns on whether GEICO's policy can be construed to cover diagnostic scans as part of a collision repair. Oregon courts interpret insurance

policies as a matter of law using a three-step process. *See Holloway v. Republic Indem. Co. of America*, 147 P.3d 329, 333 (Or. 2006). At step one, courts look to the express definitions in the policy and, if express definitions do not resolve a disputed term's meaning, to the term's plain meaning as established by common dictionary definitions and prior court decisions. *Id.*; *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1210, 1212 (Or. 1996). If the term remains susceptible to more than one interpretation, courts then proceed to step two, examining the context of the term "in which it is used and in light of the other provisions of the policy." *Hoffman Constr. Co. v. Fred S. James & Co.*, 836 P.2d 703, 709 (Or. 1992); *see Holloway*, 147 P.3d at 333–34. Finally, if wording and context do not resolve the ambiguity, then "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); *see Holloway*, 147 P.3d at 334.

Here, the Court should construe GEICO's policy to cover necessary diagnostic scans. At step one, the policy promises to "pay for collision loss" and defines loss as "direct or accidental loss of or damage to * * * an insured auto" or other insured property. ER 51–52. But the policy does not otherwise define what "loss of or damage to" means, much less how that definition relates to digital scans in the collision context. Dictionary definitions and Oregon case law do not resolve

the ambiguity. *Black's Law Dictionary* (10th ed. 2014) defines "loss" in the insurance context as "[t]he amount of financial detriment caused by * * * an insured property's damage, for which the insurer becomes liable," and defines "damage" as "monetary compensation for loss or injury to a person or property." Both definitions conceivably include any cost associated with a collision, including the cost of diagnostic scans necessary to determine the full scope of harm caused by the collision. Oregon courts also have held that, in the insurance context, the phrase "loss of or damage to" insured property can extend beyond "only 'physical' damage" to include the cost of inspecting the property in connection with an accident claim. *Busch v. Ranger Ins. Co.*, 610 P.2d 304, 307 (Or. Ct. App. 1980). Step one does not resolve the interpretive inquiry.

At step two, the context of GEICO's policy limits "loss" to the cost of repairing or replacing a vehicle after a collision. The policy's limitation of liability section sets GEICO's liability for "loss" at "the prevailing competitive price to repair or replace the property." ER 53. Additionally, 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. With Hansen's collision, GEICO agreed to pay the cost to repair his truck, making "repair" the operative term in the policy.

The Court should interpret "repair" to include necessary diagnostic scans in connection with a vehicle collision. The policy does not define "repair," but Oregon courts have defined the word broadly to mean "the restoration of the vehicle to its condition prior to the collision." *Gonzales v. Farmers Ins. Co.*, 196 P.3d 1, 6 (Or. 2008). In *Gonzales*, the Oregon Supreme Court held that, "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].'" *Id.* (alteration in original). As relevant here, necessary diagnostic scans are the only way to identify and diagnose any latent damage to a car's electronics systems. ER 77 ¶¶ 12–13, 16. GEICO's refusal to pay for them thus renders a repair shop unable to restore the car to its pre-collision condition. *See Busch*, 610 P.2d at 307 (interpreting a policy for accident damage to include inspecting for damage because "[i]t would be beyond reason to say that all of the risks against which they were insured were only those which produced open and obvious or visually observable destruction of parts"). In addition, no provision in the policy excludes diagnostic scans. To the extent any ambiguity remains about the coverage of diagnostic scans, it must be resolved in favor of extending coverage to Hansen. *Shadbolt*, 551 P.2d at 480.

Consequently, as a matter of law, GEICO's promise to repair Hansen's car includes coverage for diagnostic scans that are necessary to identify and diagnose any latent damage from his collision. GEICO impliedly concedes as much. *See*

Red Br. 14 (arguing only that the policy "excludes *unnecessary* scans from coverage" (emphasis added)). And, as pertinent here, Hansen alleged that scans were necessary in light of the sensitive computer software and technology that operate his vehicle's major functions. ER 77 ¶¶ 12–22. At the motion to dismiss stage, the district court was required to accept this well-pleaded allegation as true and should have denied GEICO's motion to dismiss.

GEICO argues that the district court did not err in dismissing Hansen's complaint because its policy defines "loss" as "damage to" a vehicle and that, "[b]ecause the Policy's definition is undisputably ambiguous, it controls." Red Br. 13. According to GEICO, "Hansen does not argue that the Policy's definition of 'loss' is ambiguous or is otherwise defective." Red Br. 12.

GEICO misunderstands Hansen's argument. Yes, the policy defines collision "loss" as "loss of or damage to" a covered vehicle. ER 51–52. But the policy does not define "loss of or damage to." Because dictionaries and Oregon case law define loss and damage in a way that plausibly includes any cost associated with a collision, including diagnostic tests, the Court must proceed to step two to examine the context of the terms in the policy. At step two, the policy's other provisions narrow the terms to repairing or replacing a vehicle after a collision. ER 53–54. With Hansen's collision, GEICO agreed to pay the cost to repair his truck, making "repair" the operative term in the policy. GEICO

ultimately concedes as much. *See* Red Br. 27 ("Hansen needed to allege a 'loss' * * * that Geico did not pay to repair or replace.").

B. Necessary digital scans are part of repairing a modern car

GEICO next argues that digital scans are not part of repairing a vehicle after a collision "where no unrepaired damage is identified" by the insured. Red Br. 15; *see* Red Br. 17, 22–23. GEICO's position ignores the reality of modern cars. A collision can damage a modern car's electronics systems in ways undetectable to the naked eye, and digital scans are the only way to identify that damage. ER 77–78 ¶¶ 12–13, 16–18, 22. Undoubtedly for that reason, GEICO conceded below that it sometimes pays for digital scans to identify, diagnose, and repair collision damage under the policy. ER 15. GEICO maintains, however, that an insured first must identify that damage. GEICO does not explain how an insured can logically or realistically do so in light of the near invisibility of damage to computer code and systems. GEICO promised in the policy to repair any damage to the car, and Oregon law equates repairing a car with restoring the car to pre-collision like kind and quality. *Gonzales*, 196 P.3d at 7. GEICO cannot insert a limitation or condition into the policy that it omitted in drafting the policy. *See* Or. Rev. Stat. § 42.230.

GEICO cites the Fifth Circuit case of *Sonnier v. State Farm Mutual Automobile Insurance Co.*, 509 F.3d 673 (5th Cir. 2007), to support its argument

that damage must be visible to the insured in order to invoke coverage under its policy. Red Br. 17–20. *Sonnier* is inapposite. In *Sonnier*, the Fifth Circuit held that, under similar car insurance terms, repairing a vehicle after a collision did not require the insurer to pay for extensive inspection of the car's seatbelt systems—including physical, electronic, and road testing of the seatbelts—absent visible damage to a seatbelt. 509 F.3d at 674 n.1, 676. But damage to a seatbelt is both visible and tangible, whereas vehicle software malfunctions are undetectable to the naked eye. A software malfunction may present itself to the insured only when, for example, an air bag fails to deploy, a blind-spot detector fails to identify a car in the next lane, or a lane-departure warning system fails to alert a dozing driver who drifts across the center lane. *See* ER 36–39, 72. GEICO cannot require drivers to endure these additional harms before agreeing to identify and fix latent collision damage.

In addition, in *Sonnier*, the Fifth Circuit had interpreted Louisiana law to define repair as "the cost of restoring the vehicle to substantially the same physical condition as before the accident." 509 F.3d at 676 (citation omitted). Oregon law, however, defines repair obligations more broadly. The Oregon Supreme Court rejected such a narrow interpretation in holding that "repair" requires restoring a car to "like kind and quality" as before the collision. *Gonzales*, 196 P.3d at 7.

Likewise, in *Busch*, the Oregon Court of Appeals held that an insurance policy's coverage for damage to an airplane included coverage to inspect for damage. 610 P.2d at 307. The court reasoned that, in the context of such intricate, non-visible damage, "[i]t would be beyond reason to say that all of the risks against which they were insured were only those which produced open and obvious or visually observable destruction of parts." *Id.* GEICO attempts to distinguish *Busch* by arguing that the inspection in that case was necessary to obtain an airworthiness certification to fly the airplane, whereas Hansen still can use his truck without the digital scans. Red Br. 24. In doing so, GEICO ignores the dual holdings in *Busch*: (1) that a lack of airworthy certification could constitute damage under the policy, *and* (2) that "loss of or damage to" insured property extends beyond "only 'physical' damage" to include the cost of inspecting the property in connection with a damage claim. 610 P.2d at 307. The second holding controls here.

Indeed, GEICO attempts to minimize the threat posed by foregoing digital scans in modern cars by asserting that Hansen's position, "[t]aken to its logical conclusion, * * * is that a small paint scratch cannot be 'completely' 'repaired' without a scan." Red Br. 31 n.11. Of course that is not his position. A small paint scratch does not damage a car's electronics systems and thereby run the risk of

malfunctioning the car's airbag system, blind-spot detector, or lane-departure warning system. A collision, on the other hand, does. ER 77–78 ¶¶ 12–18.

Moreover, as discussed in Hansen's opening brief, analogous case law in the medical insurance context confirms that, under Oregon law, diagnostic tests are part and parcel of restorative care and treatment. Blue Br. 20–21; *see Zeh v. Nat'l Hosp. Ass'n*, 377 P.2d 852 (Or. 1963); *Beveridge v. Hartford Accident & Indemnification Co.*, 770 P.2d 943 (Or. Ct. App. 1989); *SAIF Corp. v. Carlos-Macias*, 418 P.3d 54 (Or. Ct. App. 2018).

In response, GEICO argues that Oregon law limits coverage for restorative care only to an "identified damage or injury." Red Br. 20. Not so. In *Zeh*, the court held that "medical care" or "treatment" included "not only what the physician or surgeon views as treatment, that is, things done in an effort to relieve or cure a physical disease or infirmity, but also all of the things performed by a doctor or a surgeon on the body of the patient *in the diagnosis of* or in preparation for cure." 377 P.2d at 857 (emphasis added). The diagnostic test in that case constituted care simply because it "brought the plaintiff mental relief, gave him hope, and constituted a program to which he yielded full allegiance and faith." *Id.* at 858. In *Beveridge*, the court held that a diagnostic test to explore for a possible new condition was considered part of overall care because it had been "preceded or followed by therapeutic measures" of some kind. 770 P.2d at 944–45. And in

SAIF Corp. v. Carlos-Macias, the court held that diagnostic tests constituted covered care regardless of whether they identified a covered condition "because they were necessary to determine the extent of [the] claimant's disability." 418 P.3d at 804. Here, Hansen's car suffered a collision injury, and a digital scan is but one repair measure of determining and treating the extent of that injury.

In short, Oregon courts do not require that a patient identify a broken bone before that patient can receive an x-ray. Exploratory medical tests to rule out or confirm possible health conditions are part of parcel of medical care. Similarly, diagnostic digital scans that are necessary to rule out or confirm possible damage to a car's electronics systems are part and parcel of post-collision vehicle repair.

C. Hansen sufficiently alleged that digital scans were necessary to repair the collision damage to his vehicle

In addition to the legal challenges discussed above, GEICO further challenges the sufficiency of Hansen's factual allegations. First, GEICO argues that Hansen failed to sufficiently allege that digital scans were necessary to repair the collision damage to his vehicle. Red Br. at 16, 24. GEICO is mistaken. In his complaint, Hansen specifically alleged that GEICO violated the terms of its policy by failing to pay for diagnostic scans that were necessary to restore his truck to pre-loss condition. ER 75 ¶ 3, 77 ¶ 12, 79 ¶ 26. And, at oral argument, Hansen emphasized the necessity of digital scans. *See* ER 9 ("When a manufacturer says

part of repairing to pre-loss condition is conducting pre- and post-repair scans, that is part of repairing a car to pre-loss condition.").

Next, GEICO contends that Hansen's allegations are too conclusory to be entitled to a presumption of truth. Red Br. 29–31. GEICO again is mistaken. Courts define "conclusory allegations" as "naked assertion[s] * * * without some further factual enhancement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Here, Hansen alleged that diagnostic digital scans are necessary to repair the collision damage to his modern car because scans are the only way to identify latent damage to the car's electronics systems after a collision; he further alleged that he knows this from his personal experience as an owner of auto repair shops, from the position statement of his truck's manufacturer, and from the position statements of other car manufacturers and a prominent automotive repair industry association. ER 77–78 ¶¶ 12–18. Hansen alleged facts sufficient to survive a motion to dismiss.

Third, GEICO argues in the alternative that the necessity of digital scans to repair his post-collision damage is a question of law rather than fact. Red Br. 29–30. GEICO is incorrect. To be sure, the interpretation of terms in an insurance policy is a question of law. *Holloway*, 147 P.3d at 333. But once a court has construed the text of a policy, the jury, as the trier of fact, must resolve "disputed issues of material fact as to whether the particular circumstances or historical facts

fall within the court's 'matter of law' determination of the policy's content." *Farmers Ins. Co. of Or. v. Munson*, 930 P.2d 878, 882 (Or. Ct. App. 1996). Here, as a matter of law, GEICO's promise to "repair" collision damage includes necessary digital scans. The necessity of scans to repair the damage to Hansen's vehicle is a disputed material fact that a jury must resolve.

Finally, GEICO argues that Hansen failed to allege the damages element of his breach-of-contract claim. Red Br. 27. GEICO is wrong. As alleged, the digital scans would have cost approximately $100 per scan, which GEICO refused to pay. ER 77–78 ¶¶ 14, 19. Deprivation of money to which one is entitled is a quintessential injury-in-fact. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). And, under Oregon law, an insurer's refusal to pay for a service constitutes a damaging repudiation of the contract, whether or not the insured then chooses to pay for the service. *E.g.*, *Anderson v. Farmers Ins. Co.*, 71 P.3d 144, 149 (Or. Ct. App. 2003).

In sum, Hansen sufficiently alleged that digital scans were necessary to repair the collision damage to his vehicle. At the motion to dismiss stage, the district court was required to accept Hansen's factual allegations as true.

II. Hansen's reasonable expectation that GEICO pay for necessary digital scans does not contradict the express terms of the policy

As discussed in his opening brief, Hansen sufficiently alleged that GEICO's refusal to pay for digital scans breached the implied covenant of good faith and fair dealing under Oregon law. Blue Br. 25–29. The district court dismissed the claim for the same reason that it dismissed Hansen's breach-of-contract claim: the court ruled that, as a matter of law, the policy does not cover diagnostic scans, so Hansen's alleged good faith expectation that GEICO pay for scans would contradict the express terms of the policy. ER 28–29. GEICO essentially concedes that Hansen's claim on good faith and fair dealing rises and falls with his breach-of-contract claim for that reason. *See* Red Br. 27–29. As discussed above in Part I, GEICO's policy includes coverage for necessary diagnostic scans. As a result, Hansen's expectation that GEICO pay for those scans does not contradict the policy's express terms.

GEICO also argues that, even if payment for diagnostic scans would not contradict the policy's express terms, "Hansen has not plausibly alleged any objectively reasonable expectation was not met." Red Br. at 28. GEICO is incorrect. As found by the district court, Hansen's "complaint itself at the motion to dismiss stage adequately states that it's the reasonable expectations of the parties in this kind of case to get this kind of diagnostic tool." ER 28–29. And Hansen's

complaint alleges precisely that he reasonably expected GEICO to pay for diagnostic scans and that GEICO refused to do so. ER 77–78 ¶¶ 12–18, 83 ¶¶ 47–48; *see Anderson*, 71 P.3d at 149 (an insurer's refusal to pay for a service considered an injury regardless of whether the insured incurs the expense).

III. If the Court finds that Hansen's complaint failed to allege sufficient facts, then the Court should remand for an opportunity to amend

As discussed above in Part I.C, Hansen sufficiently alleged that digital scans were necessary to repair the collision damage to his vehicle. If this Court agrees on Hansen's legal argument, but disagrees that Hansen sufficiently alleged facts around the nature and necessity of digital scans with respect to repairing collision damage, then Hansen requests that the Court reverse and remand to provide an opportunity for Hansen to amend his complaint.

The district court dismissed Hansen's complaint with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). ER 30. Before dismissing a case under 12(b)(6), "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted). In addition, a district court abuses its discretion when it bases "its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Here, the district court effectively ruled that amendment could not cure any deficiency in Hansen's complaint. The court dismissed the complaint not for lack of sufficient factual allegations, but because of the court's legal interpretation of GEICO's obligations under the contract. *See* ER 28. The district court abused its discretion by making that determination based on its erroneous view of GEICO's obligations under the policy, as discussed above in Parts I and II. And, because of that erroneous legal interpretation, any attempt by Hansen to seek leave to amend would have been futile.

GEICO cites *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000), to argue that Hansen waived his right to amend by failing to move to amend before the district court. Red Br. 31. GEICO is wrong. In *Alaska*, this Court held that the government could not seek to amend its answer to a complaint on appeal from judgment on the pleadings under Federal Rule of Civil Procedure 12(c) where it had intentionally adopted its answer as a strategic litigating position. *See* 201 F.3d at 1163. Rule 12(c) places no duty on a district court to grant leave to amend. By contrast, the district court in this case dismissed Hansen's complaint under Rule 12(b)(6). In doing so, the court had a duty to grant Hansen leave to amend if doing so could have cured any deficiencies in the complaint. *See Lopez*, 203 F.3d at 1127. Amending would do so if this Court agrees with Hansen's legal interpretation of the policy but finds that he failed to allege sufficient facts.

CONCLUSION

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

Respectfully Submitted,

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DATED this 15th day of April, 2019.

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 Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,006 words.

By *s/ Robert Koch*
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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 April 15, 2019.

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.

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