

Smith Freed & Eberhard P.C.

OREGON LAW UPDATE

Unilateral Modifications to Performance Obligations under an Insurance Policy

From the desk of Robert S. May: Can an insured unilaterally add a condition, such as a confidentiality agreement, to the performance obligation under the policy?

Claims Pointer: No. While the duty of good faith is implied in the contract, it does not impose new terms to the insurance policy, including a confidentiality provision.

case in point...

Safeco Ins. Co. of Oregon v. Masood, 264 Or. App. 173, 330 P.3d 61 (2014).

Sohail Masood had a homeowner policy (the "Insurance Policy") with Safeco, when a fire destroyed his residence. Safeco provided security for the property while firefighters and cleanup crews worked on the site. Mr. Masood and his family eventually returned to the property after the initial cleanup had been completed. Upon returning to his residence, Mr. Masood reported a theft from the site of an additional \$3.5 million of personal property which was otherwise undamaged by the fire.

Mr. Masood's Insurance Policy with Safeco required that he: (1) Prepare an inventory of the loss to the building and damaged personal property; (2) exhibit the damaged and undamaged property; (3) provide Safeco with requested records and documents and permit Safeco to make copies; and (4) submit to examinations under oath.

As part of its investigation, Safeco requested that Mr. Masood produce extensive personal financial information including, records of Mr. Masood's children's college fees, health insurance costs for Mr. Masood and his family, and monthly expenses associated with Mr. Masood's pet care. Safeco further required that Mr. Masood consent to the disclosure of his Social Security information to third parties for the purpose of verifying financial information and purchases.

In response, Mr. Masood demanded a confidentiality agreement restricting Safeco's

use of Mr. Masood's personal information and limiting Safeco's ability to contact third parties. Essentially, Mr. Masood conditioned his cooperation upon Safeco's agreement to the confidentiality provision. Although Mr. Masood was willing to negotiate the terms of the confidentiality agreement Safeco opposed the confidentiality agreement in its entirety. Safeco filed a declaratory judgment suit that Safeco was entitled to the requested information without condition. The trial court agreed with Safeco, concluding that the policy required Mr. Masood to cooperate with Safeco's investigation and that Mr. Masood could not condition his cooperation or impose additional terms. Mr. Masood appealed the trial court's decision.

The issue before the Oregon Court of Appeals was whether an insured, after filing a claim of loss, may condition compliance with an insurer's information requests by requiring the insurer to sign a confidentiality agreement limiting use of personal information. It is important to note that the Court of Appeals began its discussion with the understanding that Mr. Masood had the benefit of any existing legal protection as to his personal information. Should Safeco violate the law as to the use of his financial information, Mr. Masood retains every legal recourse available. The court was also careful to note that Mr. Masood did not allege that the request was unrelated to the loss investigation. Therefore, the court did not address whether Mr. Masood could have refused an unreasonable or unrelated request for information. Instead, Mr. Masood argued that because every insurance contract in



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Oregon includes the implied duty of good faith and fair dealing, and because his financial information is “sensitive,” Mr. Masood had a contractual right to require Safeco to enter into the confidentiality agreement before he relinquished his requested financial information. The Court of Appeals disagreed with Mr. Masood.

The interpretation of an insurance contract is a legal question which requires the court “to ascertain the intention of the parties.” See Hoffman Construction Co. v. Fred S. James & Co., 313 Or. 464, 469 (1992) (citation omitted). However, Oregon has never adopted a standard of interpretation that favors the understanding of the insured over that of the insurer when contract terms are clear. Rather, “the primary and governing” rule of interpreting an insurance policy “is to ascertain the intention of the parties.” See Dewsnup v. Farmers Ins. Co., 349 Or. 33, 39-40 (2010) (emphasis added). When interpreting a contract, the parties’ intent is manifested by the terms that they use, not the subjective beliefs of what the terms mean. “Only if a contractual ambiguity exists does the court construe the policy in a manner that favors the insured.” Red Lion Hotels, Inc. v. Commonwealth Ins. Co., 177 Or. App. 58, 64-65 (2001).

Safeco had an express contractual right to request information, and Mr. Masood had an express contractual obligation to provide the requested information. Further, the implied duty of good faith does not allow a party to change or insert additional terms into a contract. “Instead, ‘[t]he law imposes a duty of good faith and fair dealing in contracts to facilitate performance and enforcement in a manner that is consistent with the terms of the contract.’” See Whistler v. Hyder, 129 Or. App. 344, 348, 879 P.2d 214, rev den, 320 Or. 453 (1994).

Here, the policy required that Mr. Masood “must”, as often as Safeco required, provide records and documents requested by Safeco. There is no ambiguity. Safeco certainly owed Mr. Masood the duty to act in good faith in making its information demands and in handling Mr. Masood’s personal information, but Mr. Masood was not free to unilaterally modify the contract to impose restrictions on Safeco’s claim investigation. The Court of Appeals thus affirmed the trial court’s ruling that Masood’s cooperation must be unconditional.



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