NOT FOR PUBLICATION

FILED

DEC 6 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES FIRE INSURANCE COMPANY; et al., Plaintiffs-counter-claim-defendants-Appellees, v. ICICLE SEAFOODS, INC.; et al., Defendants-counter-claimants-plaintiffs-Appellants.	No. 22-35024 D.C. No. 2:20-cv-00401-RSM MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted October 19, 2022
Seattle, Washington

Before: TALLMAN, R. NELSON, and FORREST, Circuit Judges.
Dissent by Judge R. NELSON

Icicle Seafoods, Inc. (Icicle) sought loss of hire coverage from its various U.S. and London insurers (Insurers), claiming in part that its factory processing vessel, the M/V R.M. THORSTENSON, was unable to process fish in Alaska's Area M

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

fishery because of engine damage giving rise to a related hull insurance claim that was separately adjusted and is not before us. Icicle and Insurers sued each other in federal court, disputing the losses, if any, recoverable under Icicle's loss of hire claim. The parties also disputed whether Icicle breached any duty it had to cooperate in Insurers' adjustment of Icicle's claim. Icicle appeals the district court's grant of summary judgment to Insurers.

Icicle argues the district court erred by finding it had breached an express duty to cooperate by withholding from the adjusters historical financial information, discharging Insurers of their coverage obligations under the loss of hire policy. Because Icicle breached an implied duty to cooperate, and Insurers were prejudiced as a result, we affirm.

Although the district court misconstrued a specific loss mitigation clause in the policy as imposing a general duty to cooperate, that error was harmless given the rule that every Washington contract contains "'an implied duty of good faith and fair dealing' that 'obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.'" *Rekhter v. State ex. rel. Dep't of Soc. & Health Servs.*, 323 P.3d 1036, 1041 (Wash. 2014) (quoting *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991)).

This implied duty is not "free-floating" but rather "exists only 'in relation to'" Insurers' specific contractual obligation to cover *actual loss* sustained. *Keystone*

Land & Dev. Co. v. Xerox Corp., 94 P.3d 945, 949 (Wash. 2004).[1] An insurer may be relieved of its coverage obligations if the insured fails to substantially comply with a material request and the insurer is prejudiced as a result. *Tran v. State Farm Fire & Cas. Co.*, 961 P.2d 358, 363 (Wash. 1998).[2] Insurers have established that no genuine issue of material fact exists as to any of these elements.

First, Insurers' requests for financial information were material because that information was "relevant and germane" to Insurers' investigation into the actual loss arising from Icicle's claim. *Id.* (citation omitted); *see also Puget Sound Lumber Co. v. Mechanics' & Traders' Ins. Co.*, 10 P.2d 568, 572 (Wash. 1932) (explaining "due consideration must be given to the experience of the business before the [loss] and the probable experience thereafter" (quotations omitted)).

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[1] The Washington Supreme Court has clarified that a breach of a specific contractual provision is not required for a violation of the duty of good faith to occur. A violation of the implied duty can occur where a party merely fails to act in good faith when exercising discretion to determine its obligations under the contract. *See Rekhter*, 323 P.3d at 1041-42.

[2] Washington courts do not appear to have addressed precisely what standard applies to cases involving only an implied duty to cooperate. *Compare, e.g.*, *Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 937, 938 (Wash. 1998) (suits under the implied duty by insured against insurers treated as tort claims), *with NOVA Contracting, Inc. v. City of Olympia*, 426 P.3d 685, 690 (Wash. 2018) ("A claim of breach of the covenant of good faith and fair dealing sounds in contract . . . ."). Accordingly, "we are required to use our best judgment to predict how the Washington Supreme Court would [analyze] it." *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 927 F.2d 459, 462 (9th Cir. 1991). We apply Washington's framework for express cooperation clauses to the implied duty here as we see no reason to distinguish between express and implied duties where they impose the same nonspecific obligation to cooperate.

Second, Icicle's partial disclosures prior to litigation do not amount to substantial compliance. Icicle expressly and unequivocally refused to supply material financial records for at least 15 months.

Third, Insurers were prejudiced as a matter of law by this 15-month delay, which culminated in a demand letter from Icicle threatening administrative action and a bad faith claim against Insurers if Icicle's demand was not paid in full without seeing the documents later produced in the ensuing lawsuit before us. Insurers then faced a "'Hobson's choice' of either paying [the unsubstantiated] claim, or exposing itself to bad faith liability." *Staples v. Allstate Ins. Co.*, 295 P.3d 201, 209-10 (Wash. 2013). On this record, Icicle breached its implied duty to cooperate, and Insurers were prejudiced as a matter of law.[3] We conclude that the district court properly

[3] We disagree with the dissent's characterization of Icicle's 15-months of prelitigation "hardball" tactics as little more than a mere workaday discovery dispute. The dissent's implication that Insurers were not prejudiced because they always retained the option to sue for the requested documents vitiates the entire purpose of the implied covenant of good faith and fair dealing: by promoting cooperation and punishing exactly the sort of bad faith, hardball tactics that existed here, the implied covenant incentivizes parties to avoid litigation altogether. This case does not involve a discovery dispute occurring after litigation ensued; it involves the breach of an implied condition precedent to cooperate with Insurers on the investigation of the claim. The district court properly found on summary judgment that Icicle's persistent refusal to cooperate by withholding relevant documents precluded Insurers from performing their duties under the contract. The remedy for that breach, relieving Insurers of their obligation to indemnify the alleged loss, is a harsh result. But Icicle has only itself to blame for its bad faith tactics. The record amply supports the district court's decision.

entered summary judgment. Because we conclude that summary judgment was properly granted, Icicle's challenge to the denial of its motion to compel is moot.

AFFIRMED.

R. NELSON, Circuit Judge, dissenting:

I respectfully dissent from the majority disposition. In my view, the majority's conclusion that Icicle Seafoods did not substantially comply with its duty to cooperate and that Insurers were prejudiced is troubling. If followed, this could open the floodgates to denials of coverage based on little more than what is better characterized as discovery disputes over insurers' adjustment of claims. The penalty for discovery disputes should not be the denial of coverage; appropriate penalties for dilatory discovery are available, including limiting recoverable damages for a claim. The penalty here is all the more harsh because Insurers acknowledged a possible covered loss of nearly $1 million based on the information that was provided.

I want to focus on the majority's holding that Insurers were prejudiced by Icicle's failure to cooperate. Here is a summary of the dispute: Icicle valued its claim between $3.1 and $4.7 million and submitted documents in support of that valuation. Insurers requested additional information to support the claim, but Icicle refused the requests it believed were either irrelevant or overbroad. Icicle then submitted a formal claim for $4.7 million, but continued to refuse to provide requested documents. Icicle's refusal to provide the requested documents resulted in a roughly 15-month delay of the investigation. Without the requested information, Insurers calculated Icicle's possible loss at just under $1 million. Icicle sent Insurers

a demand letter threatening administrative action and a bad-faith claim against Insurers if they did not promise to pay Icicle's valuation. Insurers then filed this action, seeking a declaratory judgment valuing Icicle's claim.

Washington's leading case on this issue is *Staples v. Allstate Ins. Co.*, 295 P.3d 201 (Wash. 2013) (en banc). The majority concludes that Insurers were prejudiced because they faced a "'Hobson's choice' of either paying [the unsubstantiated] claim, or exposing itself to bad faith liability." Maj. at 4. (modifying a quote from *Staples*, 295 P.3d at 209–10 (Wash. 2013) (alteration in majority memorandum)).

"A claim of actual prejudice requires 'affirmative proof of an advantage lost or disadvantage suffered as a result of the breach, which has an identifiable detrimental effect on the insurer's ability to evaluate or present its defenses to coverage or liability.'" *Staples*, 295 P.3d at 209 (quoting *Dien Tran v. State Farm Fire & Cas. Co.*, 961 P.2d 358, 358 (1998)). Prejudice is an issue of fact and will be established only in extreme cases. *Id*. (citing *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash. 2d 471, 484 (2011)). This case is not one of them.

In *Staples*, the Washington Supreme Court concluded that the insurer could not establish prejudice where the insurer had opportunities to question the insured, where the insured provided only some documents the insurer requested, and where there was not urgency to investigate the claim before evidence was lost. *Id*. at 210.

That sounds a lot like our facts. Here, although Icicle did not provide Insurers all the information they requested, it nonetheless provided Insurers thousands of documents during their claim investigation, submitted written answers to their questions, and conducted telephonic and in-person meetings with them. And Insurers sought access to historical records that were in no danger of being lost.

In contrast, *Tran*, which preceded *Staples*, is one of those rare cases in which the Washington Supreme Court determined the insurer was prejudiced. Tran had submitted a fraudulent claim and then stonewalled the insurer's investigation to prevent the fraud from being discovered. *See* 961 P.2d at 360, 364 (Tran reported a burglary to police and said he noticed nothing out of place, but the next day filed an insurance claim in which he reported property damage and many stolen items.). Here, however, there is no evidence that Icicle was acting fraudulently or in bad faith. So, Insurers never faced the "'Hobson's choice' of either paying a suspected fraudulent claim, or exposing itself to bad faith liability." *Staples*, 295 P.3d at 209–10 (paraphrasing *Tran*, 961 P.2d at 365–66). The majority alters that key line from *Staples* so that it would apply to any unsubstantiated claim. Maj. at 4.

This case also differs from *Tran* since the question was whether Tran's claims were covered by the insurance policy at all. *Tran*, 961 P.2d at 362. Here, Icicle's claim was covered; the only question is the quantum of damages. When just the

quantum of damages is at issue, it is more likely that issues of material fact will not properly be resolved via summary judgment.

Insurers do not deny that they must cover Icicle's claim; the parties only disagree about what the claim is worth. Icicle concededly played hardball with Insurers. And a penalty for that litigation tactic is appropriate. But the majority provides Insurers a windfall; that will encourage future insurers to rush to the courts seeking similar advantage, rather than work to resolve disputes in good faith.