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Case Study

## An Insured's Verbal Conversation May Override Written Policy Exclusions

— by Jeffrey D. Eberhard

**Claims Pointer:** Temporary contracts of insurance, also known as binders, provide insurance between the time coverage is accepted by the insurer and when the policy is actually issued. The insurance binder generally adopts the usual terms of a standard insurance policy, including the exclusions. However, the terms of a written insurance policy can be superseded (i.e. voided) by an oral binder, if the terms of the oral binder clearly and expressly contradict the policy's usual terms and exclusions. Depending on the context of the conversation between the agent and the insured, oral statements as broad as "safety net" or "catch basin" may be sufficient to supersede a policy's written terms and provide coverage for a loss normally excluded.

In Oregon, temporary insurance policies, or binders, are contracts that may be created through conversations and paperwork between an insurance agent and an insured. Binders generally obligate insurers to pay insureds if a loss occurs before a complete and formal policy is issued. Oregon Revised Statutes §742.043 governs the creation of oral binders, and provides:

"Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given together with such applicable endorsements as are designated in the binder, except as superseded by the clear and express terms of the binder."

In other words, oral binders will include all of the usual terms in a standard policy, including applicable endorsements and exclusions, unless the terms are superseded by clear and express terms of the oral binder. Oregon law provides that if a formal policy is issued to the insured with an exclusion that was clearly and expressly not included in the oral

binder, the exclusion in the formal policy is not effective. See, Gifford v. Western Aviation Ins. Group, 77 Or App 645, 650, 713 O2d 1085, *adhered to as clarified*, 79 Or App 228 (1986); see also ORS 742.043(2). So, determining the substance of any conversations between an insured and an insurance agent is crucial in determining under what conditions a binder was created. An Oregon Supreme Court case, Stuart v. Country Mutual Ins. Co., recently identified very broad language that constituted "clear and express terms of the binder" that was sufficient to supersede the usual terms of the policy issued to the insured. (Case No. A134858, June 3, 2011).

In March 2003, Plaintiff John Stuart met with his Country Mutual insurance agent. Plaintiff had decided to build a new house and told the agent that he wanted a course-of-construction insurance to cover his house during construction. Although Plaintiff was not familiar with traditional course-of-construction insurance policies, the insurance agent had 19 years experience as an insurance agent. During their meeting, Plaintiff and the agent discussed, at length, the type of coverage Plaintiff wanted; specifically, Plaintiff wanted coverage from start to finish, and coverage that was beyond what would normally be covered by a homeowner's insurance policy. Plaintiff spent several hours with his agent, explaining that he wanted a policy that would provide coverage for the negligence or non-performance of his contractor – effectively taking the place of his contractor's performance bond and general liabilities policies. Plaintiff referred to the coverage requested as a "safety net" or "catch basin" coverage for "all instances that something goes wrong during construction"—including losses that resulted from weather, a builder's faulty work, and mold. Plaintiff wanted, in essence, an "all risk" policy. The insurance agent agreed to provide coverage through an oral binder, effective September 1, 2003 (An oral binder is an oral contract for insurance that is effective until the written policy is issued). Plaintiff did not receive a written policy until March 2004, when he received a declaration page that a dwelling under construction had been added to his existing policy.

In January 2004 during construction, the new building was framed but not enclosed. A snow and ice storm hit the area and caused the building's interior

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sheathing to split, water to accumulate in the crawl space and mold grew. Plaintiff filed a claim under his policy with Country Mutual, but he was denied coverage because the written policy expressly excluded coverage for damage caused by faulty work, water and mold. Plaintiff sued Country Mutual for breach of contract.

At trial, Country Mutual moved for a directed verdict arguing Plaintiff failed to establish the oral binder provided coverage for his loss. The trial court denied Country Mutual's motion and sent the case to the jury. The jury found that Country Mutual breached the oral binder and awarded Plaintiff \$268,417 in damages. Country Mutual appealed based upon ORS 742.043(1) which provides:

Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given together with such applicable endorsements as are designated in the binder, except as superseded by the clear and express terms of the binder.

Country Mutual argued Plaintiff failed to produce sufficient evidence that the oral binder "clearly and expressly waived or superseded the usual terms or exclusions" normally associated with a course-of-construction policy (i.e., damage caused by faulty workmanship, water, and mold). The Oregon Court of Appeals agreed with Country Mutual and reversed the trial court's judgment. Plaintiff appealed to the Oregon Supreme Court.

On appeal, Plaintiff argued the Court of Appeals had erred by finding the terms "safety net" and "coverage in all instances that something goes wrong" were too vague and obscure to satisfy the "clear and express" requirements of ORS 742.043 (1). The Oregon Supreme Court agreed with Plaintiff and reversed the Court of Appeals' decision.

The Oregon Supreme Court explained the terms "clear and express," as used in ORS 742.043(1), meant that only easily understood and expressed terms would "be sufficient to supersede the usual or contrary terms in a policy." The court determined that Plaintiff's "request for coverage 'in all instances [where] something goes wrong during construction' is easily understood," and the terms

"safety net" or "catch basin" were not vague or obscure, were easily understandable, and were not implied or inferred given the totality of the information given to the agent. The Court noted that the insurance agent knew Plaintiff wanted a policy that provided coverage greater than what was usually provided under a homeowner's policy. Accordingly, the Oregon Supreme Court ruled the Court of Appeals erred because there was sufficient evidence to allow a reasonable jury to conclude that the insurance agent agreed to provide coverage that was different from the written policy, and which eliminated the exclusions for damage caused by faulty workmanship and water and mold damage.

Although Plaintiff also argued the Court of Appeals erred by finding he had failed to prove he was injured by Country Mutual's failure to timely deliver the written policy (thereby giving rise to another cause of action), the Oregon Supreme Court choose not to address this argument because it determined there was sufficient evidence for the jury to determine that Country Mutual had breached its oral binder. ❖

— Full case available at: [www.publications.ojd.state.or.us/A134858.htm](http://www.publications.ojd.state.or.us/A134858.htm)

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