Ore. Insurance Litigation Is Testing The Bounds After Moody

By **Sarah Pozzi** (August 8, 2024)


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The start of 2024 marked the end of an insurance era in Oregon. On Dec. 29, 2023, the Oregon Supreme Court issued its much-anticipated decision in Moody v. Oregon Community Credit Union.[1]

Before Moody, Oregon had long been a jurisdiction declining to recognize first-party negligence claims against insurers, along with the damages associated with those tort-based negligence claims.

With Moody, the Oregon Supreme Court changed this status quo, allowing for the first time a policyholder's ability to recover extracontractual damages stemming from alleged negligent claims handling.

Cases seeking further interpretation of Moody's application have yet to trickle up to Oregon's appellate levels. However, state and federal court litigation, and resulting trial court orders, provide insight on some of the resulting insurance litigation trends materializing in Moody's wake.

Oregon's Pre-Moody Approach to Claims Against Insurance Companies

Oregon courts generally examine negligence through the lens of a so-called special relationship between a plaintiff and a tortfeasor. In the specific context of insurance, that special relationship attached when an insurer accepted and undertook its insured's defense.[2] So, Oregon policyholders traditionally could only recover tort damages if an insurer first assumed an insured's defense and then breached the standard of care, resulting in harm.

Conversely, Oregon policyholders could recover only contract damages based on an insurer's predefense or nondefense conduct.

And although Oregon's Unfair Claims Settlement Practices Act — Oregon Revised Statutes, Section 746.230(1) — codifies standards by which insurance companies must conduct themselves, it was long assumed that those statutes did not provide an independent cause of action against carriers found violating them.

Moody: The Facts, Law and Reasoning

Moody ushered in a significant change to this understanding, and insurance claims handling and litigation in Oregon have accordingly entered uncharted waters. The facts were straightforward, yet unfortunate.

A man was accidentally shot and killed by his friend while the two were on a camping trip. A toxicology report later revealed trace amounts of marijuana in the decedent's system. Later, his wife attempted to recover a $3,000 accidental death payout on the man's life insurance policy.

However, the insurer denied coverage, citing an exclusion for deaths "caused by or resulting from a decedent being under the influence of any narcotic or other controlled substance."

The wife brought suit against the insurer, alleging wrongful denial of benefits, and asserted claims for both breach of contract and negligence per se for the insurer's violation of the standards set forth in Oregon's Unfair Claims Settlement Practices statute. The wife sought recovery for contract damages, in addition to tort-based damages for emotional distress stemming from the claim's denial.

Citing to Oregon's long-standing position that emotional distress damages are not available for claims stemming from pure breach of an insurance policy, the defendants successfully moved to dismiss the wife's negligence per se claim and her request for emotional distress damages.

However, the Oregon Court of Appeals reversed the trial court, permitting a negligent per se violation of Section 746.230 to proceed. As a result, the Oregon Court of Appeals provided a new path for recovery of tort-based, noneconomic, emotional distress damages stemming from an insurer's denial of a first-party claim.

The Oregon Supreme Court affirmed the Court of Appeals' decision, albeit on grounds differing from the appellate court.

The Court of Appeals' decision suggested that an insured could bring an independent claim for negligence per se against an insurer who violated Oregon's Unfair Claims Settlement Practices Act.

In contrast, the Oregon Supreme Court held that an insurer's violation of the Unfair Claims Settlement Practices Act does not on its own give rise to liability for negligence per se.

Rather, it is the relationship between an insurer and its insured that is sufficiently special to permit a negligence claim for violations of the statutory claims standards. The Oregon Supreme Court clarified that it is the nature of that relationship that creates a reasonably foreseeable harm when the statutory standards are violated.

Finally, and attempting to cap the impact of its ruling, the high court further clarified that its holding was limited to the Moody case's unique circumstances, including the nature of life insurance and the public policy interest in payment of life insurance benefits. The court noted the importance of an insurer knowing both the identity of the person contracting, and the reliance of the person seeking the benefit.

Rapidly Developing Changes: Application of Moody and Potential Certification to Oregon's Supreme Court

The Oregon Supreme Court's Moody decision was intended to be a narrow one. In actuality, the decision raised more questions than it answered. Accordingly, litigators and trial courts at both the state and federal levels are now testing the bounds of the decision's parameters.

So far, pending litigation and new trial court rulings are starting to reflect the following trends: (1) less compelling facts giving rise to claims for negligence per se; (2) expansion of the types of damages sought by plaintiffs; and (3) attempted applications of Moody to breaches of the duty to defend.

Less-Compelling-Facts Cases

Factoring into the Oregon Supreme Court's Moody analysis was the compelling nature of the facts and loss: A widow had been denied the life insurance benefits of her deceased spouse, who had been the sole breadwinner of the family.

Oregon's high court acknowledged the significant public policy importance of having life insurance benefits paid. This strong public policy interest weighed in favor of permitting the negligence claim at issue in Moody to proceed. Regardless of judicial intent, post-Moody, litigants are pursuing negligence per se claims under facts that some courts have described as less compelling than those at issue in Moody.

The Oregon circuit courts have, in some instances, refused to foreclose negligence per se emotional distress in cases pivoting strictly on claims for property damage. For example, in Henigson v. Safeco Insurance Co., the Jackson County Circuit Court permitted an insurance-based negligence per se claim to proceed, despite the fact that the claim stemmed from a dispute over homeowner repair valuations.[3]

The Jackson County Circuit Court took note of this distinction in its June 13 decision, acknowledging that the defendant "is correct that the underlying facts in this case are less compelling than the facts in Moody." Regardless, the court denied the insurer's motion for partial summary judgment on the negligence claim, ruling that the seriousness of the emotional distress claim was ultimately not an issue of law; rather, it remained an issue for determination by the fact finder at trial.

Oregon's circuit court judges have also allowed negligence per se claims to proceed where an insured's emotional distress purportedly stemmed from anxiety and uncertainty surrounding how to afford repairs to commercial property where coverage for those repairs had been denied.[4]

In Huynh v. Truck Insurance Exchange, the plaintiff-insured overcame her insurer's motion for partial summary judgment by submitting a declaration attesting to her own anxiety-related emotional distress. As is standard in a summary judgment assessment, the Multnomah County Circuit Court viewed the facts in a light most favorable to the nonmoving party — here, the plaintiff.

The court's June decision let the plaintiff's negligence per se claim stemming from her property damage repairs proceed, noting that:

> While it is tempting to say that this is a less vital societal interest to protect than that of a recently widowed fighting over life insurance, ORS 746.230 is not limited to noncommercial

> policies. ... A finder of fact ... could find that it is reasonably foreseeable that negligence in claim handlings would cause financial crisis and emotional damage to Plaintiff.

In both Henigson and Huynh, the trial courts acknowledged that emotional distress claims stemming strictly from property damage did not quite fit the mold formed by Moody. Regardless, both courts allowed the claims for emotional distress to proceed.

These decisions reflect that Oregon trial courts are tending to view these types of Moody-based emotional distress claims as an issue for the fact-finder at trial, rather than a question of law ripe for decision at the summary judgment stage.

Expansion of Damages Types

The Oregon Supreme Court intended for Moody to have a narrow application, and addressed the discrete issue of emotional distress damages stemming from extreme claims-handling scenarios. However, the decision's silence on other categories of damages has, in practice, resulted in Oregon plaintiffs broadly shoehorning other categories of damages into negligence per se claims.

For example, in a March 28 order in Hinzman v. Foremost Insurance Co, the U.S. District Court for the District of Oregon permitted punitive damages to attach to a Moody-style negligence per se claim.[5]

At dispute in Hinzman was Foremost Insurance Co.'s adjusting of wildfire smoke and soot damage to the plaintiffs' home. The court denied Foremost's summary judgment motion on the plaintiffs' punitive damages claim, reasoning that disputed facts existed related to Foremost's adjusting, and whether the adjusting conduct rose to Oregon's "reckless or outrageous indifference" punitive damages standard.

Similar to the reasoning in Henigson and Huynh, the level of an insurer's mental culpability remained within the purview of the fact-finder. Accordingly, punitive damages were permitted to attach to an insurance-related suit, widening the potentially recoverable damages well beyond what was addressed in Moody.

Negligence Per Se Claims for Breaching the Duty to Defend

According to Moody, Oregon's Unfair Claims Settlement Practices Act delineates a certain standard of claims-handling care. And according to Moody, that standard of care — with prohibited practices expressly laid out in statute — could give rise to a common law claim for negligence where (1) an insurer engages in a prohibited practice, violating the statute; and (2) the plaintiff has a negligence claim that otherwise exists.

Section 746.230 enumerates a dozen or so prohibited practices, but understandably omits any reference to an insurer's duty to defend. In other words, an insurance company's duty to defend stands alone as an independent concept, set apart from that insurer's obligations to investigate or

act reasonably in settling claims. So in theory, breaching a duty to defend shouldn't subject an insurer to the tort liability under Moody, because it is a separate concept and because it is not expressly listed as a prohibited act under Section 746.230.

Rather, a breach of the duty to defend entitles an insured to contract damages only — the cost of the defense that would have been. An insured's ability to recover only contract-based damages where the duty to defend is breached has been the long-standing and well-settled law in Oregon — a concept further crystallized by Oregon Supreme Court precedent.[6]

However, at least one party in litigation currently pending in the District of Oregon appears poised to upend this seemingly well-settled principle.[7] LiquidAgents Healthcare LLC v. Evanston Insurance Co. is an insurance coverage lawsuit involving a breach of the duty to defend and indemnify. Pursuing this complex case is named insured, LiquidAgents Healthcare — a healthcare staffing agency.

The underlying facts giving rise to the coverage suit are as follows.

LiquidAgents places its employees at medical centers nationwide, and in exchange, receives money for these placements.

One such LiquidAgents employee, a nurse, was placed at a medical center in southern Oregon by both LiquidAgents and its business partner, FocusOne. While at the medical center, the nurse was accused of sexually assaulting a patient.

In the civil lawsuit that followed, the medical center filed third-party claims against both LiquidAgents and FocusOne. LiquidAgents tendered the claim to its insurer, who initially denied coverage pursuant to the insurance policy's sexual acts exclusion. FocusOne, who was an additional insured under LiquidAgents' policy, similarly tendered its defense to the insurer, and also received a denial of coverage.

After these coverage denials, business relations between the underlying defending parties deteriorated, causing LiquidAgents to allegedly suffer profit losses.

LiquidAgents later filed a coverage lawsuit against its insurer, seeking the court's declaration that its insurer owed a defense. LiquidAgents also claimed its lost profits from the deteriorated business relationship, alleging its entitlement to recover those extracontractual damages under a negligent per se violation of ORS 746.230.

However, LiquidAgents maintains that it was the insurer's breach of its duty to defend that gave rise to its negligence claim. Its insurer disagrees, and is currently pursuing a motion to dismiss LiquidAgents' negligence claim, arguing that a breach of the duty to defend cannot give rise to the type of negligence claim that the Moody court permitted.

Notably, the defending insurer further intends to file a motion seeking certification of this question

to the Oregon Supreme Court.[8] If certification is eventually sought and granted, Moody's purportedly narrow application stands the chance of eventually widening.

Conclusion

Despite the Oregon Supreme Court's attempt to limit the application of Moody, insurance companies providing coverage in the state now face more exposure to extracontractual claims, and a slew of new legal issues remain to be tested through the course of litigation. This exposure underscores the importance of reviewing and closely complying with Oregon's Unfair Claims Settlement Practices Act.

As insurance litigation parties increasingly encounter the uncertainties and unknowns of the landmark Moody decision, insights from Oregon's trial courts will prove helpful in understanding just how far the Moody decision could reach.

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[1] Moody v. Oregon Community Credit Union, et al., 371 Or 772 (2023).

[2] Georgetown Realty Inc. v. Home Ins. Co., 313 Or 97, 111 (1992).

[3] Henigson v. Safeco Ins. Co., No. 23CV19975 (Jackson County Cir. Ct., June 13, 2024).

[4] Huynh v. Truck Ins. Exchg., No. 22CV05568 (Multnomah County Cir. Ct., June 21, 2024).

[5] Hinzman v. Foremost Ins. Co., No. 6:22-CV-01798-AA, 2024 LEXIS 56114 (D. Or., Mar. 28, 2024).

[6] Farris v. U.S. Fidelity & Guaranty Co., 284 Or 453 (1978).

[7] LiquidAgents Healthcare, LLC v. Evanston Ins. Co., 1:20-CV-02225-CL (D. Or., 2020).

[8] Id. at Dkt. 97, page 1, fn. 1.