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Moody v. Oregon Community Credit Union: The Oregon Supreme Court Heralds a Significant New Development in First-Party Insurance Litigation

by Stephen Leggatt
Bonaparte & Bonaparte

On December 29, 2023, the Oregon Supreme Court released a new opinion that will have far-reaching implications for Oregon insurance consumers: *Moody v. Oregon Community Credit Union*, 371 Or 772 (2023). To fully convey the significance of the new decision, it is necessary first to set the stage and explain the backstory.

In January 2022, Judge Jack Landau of the Oregon Court of Appeals issued a groundbreaking opinion that significantly expanded Oregon policyholders' ability to hold insurance companies accountable for improper conduct. In *Moody v. Oregon Community Credit Union*, 317 Or App 233, 505 P3d 1047 (2022), Judge Landau opined that where an insurer violates the standard of care codified at ORS 746.230(1) - which requires insurers to adhere to fair claim settlement practices, including conducting reasonable investigation of claims, paying claims promptly once the insurer's obligation becomes reasonably clear, and refraining from offering policyholders substantially less than what is actually owed under the policy - the policyholder may bring a claim against the insurer for "negligence *per se*" (that is to say, negligence in which the requisite duty of care is created by statute). Judge Landau further opined that, because the purpose of Section 746.230(1) was, at least in part, to ensure that purchasers of insurance get what they are paying for - including "the peace of mind that is a principal benefit of an insurance policy" - policyholders deprived of that peace of mind may seek emotional distress damages from their insurers in connection with such a negligence *per se* claim.

It is not an exaggeration to say that Judge Landau's decision had revolutionary implications for the insurance industry and for the insurance-buying public. For decades, the received wisdom among first-party insurance litigators was that aggrieved policyholders seeking to impose liability on a defaulting insurance company were virtually always limited strictly to contract damages, which is to say the amount of the insurer's underpayment of the policy benefits owed. Only where policyholders could prove the insurance company's intentional bad faith were any form of extra-contractual damages available - and intentional bad faith is notoriously difficult to prove, particularly in the insurance-dispute context. To establish insurer bad faith, a policyholder faces not merely the usual challenges of proving a corporate entity's state of mind, but also must disprove the always-colorable hypothesis that delayed payments or low proffers were motivated, not by the intent to force the policyholder into accepting pennies on the dollar out of sheer financial desperation, but rather by its need to conduct a diligent investigation of the policyholder's claim. And with the only existing mechanism for recovering extra-contractual damages well out of reach for virtually all policyholders, insurance companies had little incentive *not* to try to get away with underpaying their obligations; as a practical matter, the worst possible outcome of an action on the policy was that the insurer would simply have to pay in full what it had owed all along.

Judge Landau's decision thus raised the prospect that insurance companies might face real economic consequences if they treated their policyholders unreasonably in seeking to underpay policy benefits. Insurance companies, perhaps like most for-profit enterprises, tend to view adverse economic consequences with a jaundiced eye. When the *Moody* defendant appealed Judge Landau's opinion, the Oregon insurance industry spilled considerable ink on *amicus* briefs roundly condemning Judge Landau's legal reasoning and suggesting that if *Moody* were affirmed, the cost of insurance would skyrocket.

While the appeal was pending, Oregon insurance companies fought hard to discredit and limit *Moody* in the trial courts. Insurer defendants argued that the courts should not recognize *Moody* because it contravened decades of Oregon law and was sure to be overturned. Specifically, they argued (correctly) that nearly 50 years ago, in *Farris v. U.S. Fid. and Guar. Co.*, 284 Or 453, 587 P2d 1015 (1978), the Oregon Supreme Court unambiguously found that there was no private cause of action for violation of ORS 746.230(1) (while ignoring that the *Farris* court had expressly left unanswered the question whether conduct in violation of the standard of care the statute

Continued on page 10

Calendar

FEBRUARY

10 Saturday
WinterSmash
Details on p. 1

19 Monday
Presidents' Day
MBA Office Closed

20 Wednesday
Solo & Small Firm Workshop: Discovery Strategies for Small Firms
Details on p. 11

29 Thursday
Axe Throwing Event
Details on p. 7

MARCH

6 Wednesday
Solo & Small Firm Workshop: Cloud Storage and e-Discovery
Details on p. 11

21 Thursday
YLS Speed Networking Event
Details on p. 10

21 Thursday
Minoru Yasui Day Event
Details on p. 11

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We are grateful to the legal and broader community for their generous year-end donations to the Multnomah Bar Foundation. We appreciate all of our supporters who make it possible for the MBF to staff the information desk at the Central Courthouse with a CourtSupport Navigator, provide free drop-in childcare to parents with business in the courthouse through Multnomah CourtCare, broaden our civic education outreach to the community through CourtConnect, and provide seed money to explore future projects that support the court and benefit the community.

Contributions of a certain level are acknowledged here; all contributions are acknowledged on the MBA website.

A special note of thanks to the OCF Joseph E. Weston Public Foundation for awarding the MBF a $20,500 grant to benefit Multnomah CourtCare, and to the Multnomah County Prosecuting Attorneys Association for a donation of $8,680 to benefit CourtCare. Looking ahead, the US District Court for the District of Oregon Attorney Admission Fund announced it is making a $50,000 donation to the MBF in 2024.

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Learn more about the work of the MBF in Past President Joe Franco's article in the December 2023 issue of the Multnomah Lawyer *(www.bit.ly/dec23-ml).*

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What is the YLS?

An inclusive section of the bar, comprised of any MBA member in practice less than six years or under the age of 36. The YLS provides leadership, networking, professional development and service opportunities. And we have fun!

Michael Yates: Pro Bono Work in Private Practice

Pro Bono Spotlight

by Jessy Morris
YLS Pro Bono Committee

In the Multnomah County family law community, one is hard-pressed to find an individual as well known and universally respected as Michael Yates. Currently of counsel at Gevurtz Menashe, Michael was previously at the helm of Yates Family Law. Yates Family Law alumni include the now Honorable Judge Jacqueline Alarcón of the Multnomah County Circuit Court, and Sarah Brown of Holtey Law, incumbent president of the Oregon Academy of Family Law Practitioners (OAFLP), both of whom reflect a dedication to pro bono legal work that Michael has exemplified throughout his career.

In his early post-graduate years, Michael accepted a position clerking for the Honorable Judge R. William Riggs of the Multnomah County Court, who at the time served as the Chief Family Court Judge. It was during his tenure as a clerk that he decided to focus his practice on family law matters and in 1984, Michael began his career in private practice when Albert Menashe hired him as an associate. Michael met other attorneys working with Legal Aid Services of Oregon who inspired him to begin offering pro bono legal services, first by volunteering for the Wednesday Night Clinic at St. Andrew Legal Clinic. At the time, attorneys in private practice would go to the clinic to provide initial consultations and assist in completing forms, and though the specifics of attorney volunteer work at the clinic have shifted through the years, the Night Clinic continues to be a mechanism for attorneys to provide limited scope pro bono assistance to individuals in need.

Michael continued to expand his pro bono work by volunteering with PROSAP, now known as LASO Family Law Forms Clinic, to help more individuals navigate the myriad of pleadings required in family law matters and even taking some cases on a pro bono basis. He continues to do so today. Michael has seen a plethora of potential clients through this work, and his experience has highlighted the great need for more attorneys, especially bilingual attorneys, to offer services to the immigrant communities in our state.

Two of Michael's more recent ventures in pro bono volunteering have been through the Multnomah County Judicial Settlement Conference Program as a pro tem judge and by serving as legal

Michael Yates

representation for minor children in Multnomah County family law proceedings. Judicial Settlement Conferences are essentially a form of mediation offered at significantly lower costs than private mediation, and allow clients the opportunity to mediate with counsel present. Many times, these conferences offer attorneys the opportunity to hear a fresh perspective on their position and receive feedback similar to what they may receive in court. Representing minor children in family law matters can be one of the most rewarding forms of pro bono legal work. It requires an ability to connect with the client and understand complex family dynamics that sometimes the client is not able to fully articulate or even comprehend. Michael recommends those already familiar with family law practice be the primary ones offering their services to minor clients, though the opportunity is available to those in any legal practice as long as they attend the informational session offered by Chief Family Court Judge Susan Svetkey.

When asked, Michael says that pro bono work is a great way to gain courtroom experience and connect with other attorneys. His advice for attorneys newer to pro bono work is to take it one case at a time. In 2015, then Oregon City High School senior Eileen Keen wrote about Michael's pro bono work for her family, helping her mother retain legal custody of Eileen after she was taken to another state by her father in the middle of the night. Ms. Keen wrote, "I am grateful beyond words to Michael Yates. To him, and to those of you who do pro bono work for people who have fallen into difficult circumstances, thank you, because it really does mean the world. It certainly did for me, and I couldn't be more grateful." "A Thanksgiving Message," *Oregon State Bar Bulletin*, Eileen Keen, November 2015.

Moody v. Oregon Community Credit Union

Continued from page 2

created might otherwise be actionable in tort; no Oregon court appears to have circled back to that unanswered question until the *Moody* case). And they argued, among other things, that even if Judge Landau was correct that a negligence *per se* claim could lie for violation of Section 746.230(1), the courts should not enforce his opinion to the extent he opined that a policyholder could seek emotional distress damages in connection with such a claim, because such damages are generally available under Oregon law only where the plaintiff has suffered physical as well as emotional injury.

The insurance industry's arguments found at least tentatively receptive ears in some of the judges of the federal bench. Sitting in diversity and applying Oregon law, at least one federal judge expressly declined to recognize Judge Landau's opinion as binding precedent in the absence of a statement from the Oregon Supreme Court; at least one acknowledged that the opinion was precedential as to the existence of a negligence claim premised on violation of the ORS 746.230(1) standard of care while declining to enforce the opinion as to the availability of emotional distress damages; several federal decisions expressly avoided reaching some or all of the thorny questions *Moody* raised, and either deferred the issues or resolved them on alternative grounds. Meanwhile, in the state courts *Moody* was acknowledged to be the law of the land.

This confused and confusing state of affairs persisted for nearly two years, with plaintiffs' *Moody* claims taken at face value in state court and either disregarded or enervated in federal court. Accordingly, the settlement value of plaintiffs' *Moody* claims was largely governed by the citizenship of the insurer defendant: if the plaintiff's insurer was based in Oregon, the plaintiff's claim could proceed in state court and its settlement value was relatively straightforward, whereas if the insurer was headquartered in another state, the plaintiff's claim could be removed to federal court on diversity grounds, where the settlement value of the *Moody* claim was necessarily diminished in some degree. This naturally created serious tension under the universally recognized *Erie* principle that, sitting in diversity, the federal courts must apply state law in the same manner as would the state courts.

On December 29, 2023, the Oregon Supreme Court at last resolved the *Moody* appeal. By a 4-3 decision, the court elected to affirm, "conclud[ing] that the insurance claim practices that ORS 746.230 requires and the emotional harm that foreseeably may occur if that statute is violated are sufficiently weighty to merit imposition of liability for common-law negligence and recovery of emotional distress damages." However, while the Oregon Supreme Court agreed with Judge Landau both that an insurer's violation of the ORS 746.230(1) standard of care gives rise to a cause of action sounding in negligence and that emotional distress damages are available in connection with that cause of action, the high court's reasoning differed substantially from Judge Landau's.

Judge Landau characterized the newly recognized cause of action as one for negligence *per se* that was in some sense distinct from garden variety negligence, expressly rejecting the argument that such a cause may only lie in connection with a separate and independent common-law negligence claim. By contrast, the Oregon Supreme Court affirmed the principle that negligence *per se* is nothing more than a special case of ordinary negligence in which the at-issue duty is a creature of statute, and recognized that a negligence *per se* claim will lie only if a common-law negligence claim "otherwise exists." Specifically as to the particular negligence *per se* claim recognized for the first time by Judge Landau, namely one arising out of an insurer's violation of the Section 746.230(1) standard of care, the Oregon Supreme Court determined that, in light of the nature of the relationship between policyholder and insurer, it is reasonably foreseeable that an insurer's violation of the statutory standard of care will create a risk of harm to a legally protected interest of the policyholder; the court further opined that that legally protected interest is of sufficient importance to give rise to a common-law claim of negligence. The high court additionally found the policyholder's legally protected interest in freedom from the unfair practices proscribed by ORS 746.230 to be both of a kind and of sufficient importance to warrant subjecting insurance companies to liability for the policyholder's consequential emotional distress damages.

To be sure, the Oregon Supreme Court's decision does not answer every question litigants have raised regarding the newly recognized cause of action. Further jurisprudence will be required before the reach, scope, and elements of a Section 746.230(1) negligence claim become settled. In particular, the Oregon Supreme Court expressly left unresolved the question whether *economic* consequential damages are available in connection with such a claim (although there is very little ground for supposing that economic damages would *not* be available). But unanswered questions aside, the high court has expressly taken a step calculated to bring Oregon in line with the majority of American jurisdictions, which have long recognized the need for a cause of action to rectify the harms unfair settlement practices can cause policyholders to suffer beyond and apart from deprivation of the benefits of the insurance contract itself. The Oregon Supreme Court's *Moody* opinion can therefore correctly be viewed as a significant victory for Oregon's insurance consumers, and as marking the beginning of a sea change in Oregon first-party insurance litigation.

mba yls | EVENT

Speed Networking Event

Thursday, March 21
5:30-7 p.m.

Barran Liebman
601 SW 2nd Avenue, Suite 2300, Portland

Attendance is free for MBA members, $10 for non-members

The YLS Membership Committee invites you to prepare your elevator pitch and come ready to take part in this structured and fast-paced networking event. Conversation topics will be provided in advance with participants free to engage wherever the conversation takes them.

Register online at www.mbabar.org