IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTINE MOODY, individually, and in her capacity as the Personal Representative of the Estate of Steven "Troy" Moody, Deceased,
Plaintiff-Appellant,
Respondent on Review,

v.

OREGON COMMUNITY CREDIT UNION, aka OCCU, an Oregon entity, association, union, or corporation et al.,
Defendants,

and

FEDERAL INSURANCE COMPANY, an Indiana corporation,
Defendant-Respondent,
Petitioner on Review.

Court of Appeals No. A172844

Supreme Court No. S069409

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND OREGON BUSINESS & INDUSTRY IN SUPPORT OF PETITION FOR REVIEW

On Review of a Decision of the Court of Appeals, on Appeal from a Judgment of the Lane County Circuit Court, by the Honorable Bradley A. Cascagnette

Opinion filed January 26, 2022
Author: Senior Judge Landau
Concurring: Presiding Judge Powers
and Judge Egan

April 2022

Sage R. Vanden Heuvel, OSB 210472
sagevandenheuvel@quinnemanuel.com
Quinn Emanuel Urquhart & Sullivan, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: 213-443 3000

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

Paloma Sparks, OSB 084805
palomasparks@oregonbusinessindustry.com
Oregon Business & Industry
1149 Court Street NE
Salem, Oregon 97301
Telephone: 541-337-4740

Attorney for *Amicus Curiae* Oregon Business & Industry

R. Daniel Lindahl, OSB 842765
dan.lindahl@bullivant.com
Stuart D. Jones, OSB 842568
stuart.jones@bullivant.com
BULLIVANT HOUSER BAILEY PC
One S.W. Columbia St., #800
Portland, Oregon 97204-4022
Telephone: 503-228-6351

Attorneys for Petitioner on Review

Travis Eiva, OSB 052440
travis@eivalaw.com
EIVA LAW
101 East Broadway, Suite 303
Eugene, Oregon 97401
Telephone: 541-636-7480

Attorneys for Respondent on Review

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community. This is such a case.

Oregon Business & Industry ("OBI") is the state's largest and most comprehensive business association. With over 1,600 members who employ over 250,000 people in every corner of the state, OBI represents the diversity of Oregon's business community. OBI's members range from very small businesses to the state's largest employers. OBI advocates on behalf of a strong and healthy business climate for Oregon. OBI is also the Oregon Retail Council and the state affiliate of the National Association of Manufacturers.

The Chamber's and OBI's membership each includes a wide range of companies that rely upon certainty in the contractual rights and expectations that govern their relationship to their customers and other businesses. Amici have a strong interest in ensuring that the legal environment in which their members operate is consistent and fair. Amici are therefore well-suited to offer a perspective on the impact of extra-contractual damages on businesses in general and in particular on insurance companies that are their members.

Insurance is a contractual means for managing risk. The value of insurance contracts and the stability of insurance markets depend upon the certainty and predictability created by specified contract terms and obligations. The imposition of new extra-contractual causes of action and damages theories like those allowed by the Court of Appeals here upends the expectations of insurers in issuing insurance policies and setting premiums for those policies. Such disruption threatens to cause grave adverse practical consequences for insurers and policyholders alike. Accordingly, the Chamber has previously filed amicus briefs in cases relating to extra-contractual damages in the insurance context, and respectfully writes here together with OBI in support of Federal Insurance Company's Petition for Review.

INTRODUCTION

Oregon has long honored the primacy of contract in insurance relationships. Unlike many other States that recognize expansive "bad faith" claims against insurers, Oregon has historically limited policyholders to contract claims rather than tort claims against their insurers for supposed violations of contractual obligations. Oregon has allowed tort claims against insurers for breach of contractual obligations only in very narrow circumstances involving "special relationships," such as where an insurer assumes a duty to defend an insured against a third-party lawsuit.

The decision of the Court of Appeals here, however, dramatically upends that settled jurisprudence. The Court of Appeals ruled that an insured may bring a negligence *per se* action, and seek emotional-distress damages, for an insurer's violation of any of the numerous and detailed statutory claims-handling provisions set forth in ORS 746.230. The Court of Appeals thus allowed the insured in this case to convert a contract claim under an insurance contract with a $3000 policy limit into a tort claim for negligent infliction of emotional distress supposedly worth $47,000—more than ***fifteen times as much*** as the coverage the parties had bargained for in their insurance contract.

That decision warrants this Court's review not only because it makes new law that sharply departs from precedent, but also because it has exceptional importance for the business of insurance in Oregon. If left to stand, the Court of Appeals' decision would precipitate an avalanche of new tort litigation against insurers who do business in Oregon. It would also invite new damages claims in eye-popping amounts many times greater than contracted-for insurance policy limits. Such a result would unsettle the contractual terms upon which insurers and policyholders have long relied to set the metes and bounds of their relationships. And far from yielding fair results that improve insurance coverage in Oregon, it would lead inexorably to disproportionate windfalls to insureds who chose to litigate these newly-permitted causes of action, at the price of increased premiums for all insureds. Armed with the Court of Appeals' new interpretation of ORS 746.230, enterprising plaintiffs' counsel representing policyholders would be free to invoke negligent-infliction-of-emotional-distress theories to subject insurers and their claims-handling employees to new and intrusive forms of litigation discovery. Such plaintiffs' counsel would also be empowered to use the threat of tort damages in amounts far exceeding any bargained-for insurance policy limits to extract extortionate settlements from insurers. Such results not only would harm the business of insurance; they also would harm the interests of insurance consumers in Oregon by necessarily driving up the cost of insurance premiums for all. This Court's review is warranted to avert these harms to the business of insurance in Oregon.

ARGUMENT

Review should be granted for the reasons set forth in the Petition for Review, with which Amici concur, and also because the Court of Appeals' decision, if left to stand, would have grave adverse practical consequences for insurance providers and consumers in Oregon.

I. THE BUSINESS OF INSURANCE DEPENDS UPON CONTRACTUAL CERTAINTY AND PREDICTABILITY

Liability insurance is a contractual means of managing risk. A policyholder pays a specified premium to transfer to an insurer a specified risk (such as the risk of accidental death within a specified time period), and the insurer in exchange promises to compensate for that risk up to specified policy limits. The premiums an insurer collects from policyholders create a pool of money that the insurer must manage prudently in order to make sure it has enough resources to pay claims on the risks policyholders have paid to transfer to the insurer. Such prudent management is upended, however, when courts impose unanticipated causes of action or damages theories on insurers outside the terms and expectations embodied in the parties' insurance contracts. And when that happens, it is policyholders who must foot the bill. New and unexpected claims that exceed the premiums collected can be offset only through collecting new or higher premiums from other policyholders.

Specifically, liability insurers set premiums based on their estimates of the likelihood and amount of future losses that may be covered by their policies when covered events occur. Calculating the appropriate premiums for insurance policies requires determining the nature, probability, and magnitude of any assumed risk. *See* 1 Steven Plitt et al., COUCH ON INSURANCE § 1:2 (3d rev. ed. 2010). To calculate premiums, an insurer thus relies on various factors, including the probability and amount of potential loss, policy limits, and the insurer's operational costs. *Id*. at § 1:6. Insurers must also accurately calculate and set aside reserves that enable them to continue operations while being able to pay out policyholders' future valid covered claims.

Adding new extra-contractual obligations to an insurance policy without increasing the premiums an insured pays to the insurer undermines the insurer's ability to prudently manage its resources. It also disrupts the insurer's ability to maintain predictable and cost-effective premiums for its insureds. If an insurer does not receive premiums adequate to cover the risk and expenses it has undertaken, it could be left with inadequate funds to pay valid claims—thus jeopardizing not only the insurer's business but also the valid expectations of its insureds. And in the long term, such new obligations necessitate charging higher premiums to other policyholders who pay for insurance policies and thus replenish the risk pool.

These basic insurance principles help to illustrate why the Court of Appeals' decision will have profoundly negative effects on the Oregon insurance market, as explained further below.

II. THE NEW EXTRA-CONTRACTUAL LIABILITY CREATED BY THE COURT OF APPEALS WILL ADVERSELY AFFECT THE BUSINESS OF INSURANCE IN OREGON

The outcome of this case is critical to the insurance industry in Oregon, since it threatens to open the floodgates of litigation based on a new and expanded theory of tort liability. If left to stand, the Court of Appeals' holding will be invoked by enterprising plaintiffs' lawyers to attempt to hold any Oregon insurance provider liable for extra-contractual damages far exceeding policy limits, based solely on alleged statutory violations.

Legal observers have already recognized the potential magnitude of the decision. *See* Samantha Javier, *A New Era? Interpreting the Impact of Moody*, MSMLegal.com (Apr. 6, 2022) https://msmlegal.com/2022/04/a-new-era-interpreting-the-impact-of-moody (observing that the Court of Appeals' decision expands the circumstances in which insurers are exposed to noneconomic damages); Seth Row, *Oregon Bad Faith Insurance Claims Gain Traction Thanks to New Ruling from Court of Appeals*, JDSupra (Jan. 31, 2022), https://www.jdsupra.com/legalnews/oregon-bad-faith-insurance-claims-gain-9980992 (stating that the Court of Appeals' decision "has the potential to open up common-law bad faith claims across all kinds of insurance coverage"); Neil J. Philip, *Bad Faith in Oregon? The Oregon Court of Appeals Cracks Open the Door*, Lexology (Feb. 4, 2022), https://www.lexology.com/library/detail.aspx?g=a081ccc3-87d0-4357-96f8-9e6e81da3600 (referring to the Court of Appeals' decision as "a dramatic expansion of insurance coverage bad faith law in Oregon").

There is ample basis for such concern. The Court of Appeals' decision, if allowed to stand, would permit plaintiffs to seek damages that are exponentially higher than the maximum expectation damages available under their insurance contracts. In this instance the plaintiff sought damages ***fifteen times*** greater than the policy limit set forth in the contract, but one can easily imagine future plaintiffs seeking damages that are fifty times or one hundred times greater. Insurance companies would need to price the risk of potentially *unlimited* damages into their contracts, and would be required to raise premiums as a result in order to stay in business.

This tide of litigation would necessarily impose costs on insurers, not only in terms of damages awards but also the cost of litigation itself. Depositions, document discovery, and trial would necessarily be more far-ranging, time-consuming, and complex, as what would have previously been a contract dispute would expand into the more fact-specific and unpredictable realm of tort law. This would massively increase the pressure on Oregon insurers to enter into settlements in cases where they would not otherwise be warranted.

The reasons for such settlements—even when a tort claim against an insurer is wholly without merit—have been noted by other commentators and are aptly explained as follows:

> Choosing to litigate an insurance claim is a costly undertaking for an insurer, regardless of the economies of scale an insurer might possess. There are attorneys' fees and other unavoidable costs, and the outcome is uncertain. Insurers are also not blind to the poor public perception of their industry; a perception that contributed to the creation of tort liability in insurance contracts where it does not exist in other contexts. The prospect of paying extra-contractual damages, especially punitive damages, is itself daunting; this daunting prospect is enhanced by the insurer's position as an unpopular defendant and the belief of many juries

> that insurers have deep pockets and can afford it. In addition, any plaintiff verdict could lead to negative press, which could cause existing policyholders to change insurers or could deter future customers. A particularly high damage award could also provide harmful precedential value and inflate other award amounts. For these reasons, insurers are poised to settle claims they reasonably believe they will lose, as well as some they believe they should win. Settlement simply becomes the better option.

Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1520-21 (2009) (footnotes omitted).

Moreover, there is no guaranty that such litigation would be limited to ORS 746.230 or even the Insurance Code. The Court of Appeals' decision rests largely on its holding that a statute or regulation may establish a noncontractual standard of care necessary for negligence *per se* claims. Enterprising plaintiffs' counsel will undoubtedly scour Oregon's statutes to find potentially relevant provisions—even where, as here, the statute does *not* provide for a private right of action—and thereby seek to turn a whole host of breach claims into negligence claims.

To allow one party to obtain such sweeping new extra-contractual damages could open up Oregon businesses to massive, widespread, and uncertain liability. Such an end-run around contractual agreements creates the kind of uncertainty that is anathema to businesses, especially insurance companies whose entire business model is based on predicting risk and loss. This Court should grant review of the Court of Appeals' decision, which, if left to stand, would greatly unsettle well-established insurance and contract law in this State.

III. THE NEW EXTRA-CONTRACTUAL LIABILITY CREATED BY THE COURT OF APPEALS WILL ADVERSELY AFFECT OREGON CONSUMERS

Ultimately, consumers are the ones who would bear the increased costs resulting from litigation and settlement of the new negligence *per se* claims the Court of Appeals has authorized. That is because, as litigation costs due to such claims increase, "[i]nsurers internalize the systemic risks of bad-faith litigation and raise premiums accordingly. Because this happens, in part, on an industry-wide level, the increase in cost occurs independent of a specific insurer's risks of bad-faith litigation . . . ." Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1529 (2009). Such concerns are not merely theoretical; one study concluded that a 1979 court ruling permitting a private right of action for bad faith against insurers in California raised average insurance premiums by up to 19%. *See* Angela

Hawken, et al., *The Effects of Third-Party, Bad Faith Doctrine on Automobile Insurance Costs and Compensation* (RAND Institute for Civil Justice 2001).

Any similar effects from the decision here would be harmful to the citizens of Oregon, for whom the cost of insurance is a perennial concern. Increased premiums resulting from exposure to new potential tort liability would render certain types of insurance prohibitively expensive for low-income or even middle-income individuals. It could even force some insurers out of the market altogether, reducing competition, harming Oregon's business climate, and further increasing premiums. These grave consequences for Oregon consumers underscore the importance of this Court's review of the Court of Appeals' decision.

CONCLUSION

This Court should grant Federal Insurance Company's Petition for Review.

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Respectfully submitted,

Dated: April 12, 2022

/s/ *Sage R. Vanden Heuvel*
Sage R. Vanden Heuvel, OSB No. 210472
Quinn Emanuel Urquhart & Sullivan, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
(213) 443-3000
sagevandenheuvel@quinnemanuel.com

Attorneys for Amicus Curiae *Chamber of Commerce of the United States of America*

/s/ *Paloma Sparks*
Paloma Sparks, OSB No. 084805
Oregon Business & Industry
1149 Court Street NE
Salem, Oregon 97301
(541) 337-4740
palomasparks@oregonbusinessindustry.com

Attorney for Amicus Curiae *Oregon Business & Industry*

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R. Daniel Lindahl, OSB 842765
dan.lindahl@bullivant.com
BULLIVANT HOUSER BAILEY PC
One S.W. Columbia St., #800
Portland, Oregon 97204-4022

Travis Eiva, OSB 052440
travis@eivalaw.com
EIVA LAW
101 East Broadway, Suite 303
Eugene, Oregon 97401

I further certify that service of a copy of this brief will be accomplished on the following participant in this case on this date through electronic mail at the participant's email address per ORCP 9.

Stuart D. Jones, OSB 842568
stuart.jones@bullivant.com
BULLIVANT HOUSER BAILEY PC
One S.W. Columbia St., #800
Portland, Oregon 97204-4022

Dated: April 12, 2022

/s/ *Sage R. Vanden Heuvel*
Sage R. Vanden Heuvel, OSB 210472
Attorney for Amicus Curiae *Chamber of Commerce of the United States of America*