

# Use of Restitution Authority by Insurance Commissioner under SB414 (2013)

Testimony to Oregon House / Senate  
Judiciary Committees by

**Paul Terdal**

September 30, 2015

# Introduction – Paul Terdal

- Resident of Northwest Portland, Senate District 18 / House District 36
- 25+ years of professional experience in regulatory environments
  - Lead critical projects; develop business processes, systems for regulatory compliance
    - Nuclear, healthcare, communications, education
  - MBA, Yale School of Management
    - John M. Olin Fellow in the Study of Markets and Regulatory Behavior
- Volunteer consumer advocate assisting families with insurance appeals related to autism and related medical / mental health coverage
  - Assisted more than 100 families with insurance denials, coverage issues
- Lead advocate on key health insurance consumer legislation
  - SB414 (2013) – Insurance Commissioner’s Restitution Authority
  - SB365 (2013) and SB696 (2015) – Autism Health Insurance Reform

# SB414 (2013) granted the Insurance Commissioner restitution authority

- SB414 (2013) created a new provision in ORS 731.256:
  - (2) As part of or in addition to any action or proceeding the director institutes against an insurer under subsection (1) of this section, the director may:
    - (a) Seek restitution on a consumers behalf for actual damages the consumer suffers as a result of the insurers violation of a provision of the Insurance Code or applicable federal law or the insurers breach of an insurance contract or policy the insurer has with the consumer; and
    - (b) Seek other equitable relief the director deems appropriate under the circumstances.
- Black’s Law Dictionary Definition of “Actual Damages”:
  - Actual damages. Real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed to on the one hand “nominal” damages, and on the other to “exemplary” or “punitive” damages. Synonymous with “compensatory damages” and with “general damages.”
- Restitution under SB414 is a form of civil penalty tied to the harm resulting from illegal activity – it is only available as part of an enforcement action by DCBS

# A Case Study in “Actual Damages” (1 of 2)

- 5 year old child with autism – physician recommended intensive ABA therapy
  - Insurer denied coverage solely on the claim that the provider was allegedly unqualified
    - Provider was approved by DHS as required by ORS 743A.168(5)(a) and grandfathered to practice ABA under 2013 Oregon Laws Chap 771(4)
    - Insurer had no alternative providers in network
  - Insurance Division called the Insurer in July 2014 and advised them that their denial was unlawful – Insurer responded that it would not comply without a written order
  - In November 2014, Bulletins INS 2014-1 and 2014-2 expressly prohibited Insurer’s basis for denial, with a supporting opinion from the Department of Justice
- Consumer suffered real, substantial damages as a result of the insurers violation – see letter on next slide
  - Forced to sell house and car to pay for treatment that should have been covered
  - Still couldn’t afford full amount of recommended treatment – so child missed the prime age window for intervention. Child lost developmental milestones and will need more substantial care, for more time, to attempt to make up lost ground
  - Moved across state to Portland and changed job to get an insurance plan willing to comply with the law
- After nearly two years of investigation, complaint remains active but no enforcement action has been taken or restitution provided

# A Case Study in “Actual Damages” (2 of 2)

9/28/15

- The parents provided this anonymous letter to describe the impact the Insurer’s violation had upon them in their own words:

To Whom it May Concern:

Although we followed the steps we were supposed to, the claims and the appeals meant nothing. We sold our house to pay for therapies. We sold a car to pay for doctor’s visits. We took jobs in different cities to obtain the best benefits possible. Over and over, we have sacrificed and adapted to help our child recover as much as possible.

Two years ago, we tried to start ABA (applied behavioral analysis) therapy. We had started coverage under a different insurance plan, but our insurance changed and we started the approval process over. Because therapy was already under way, we didn’t want to stop while we waited for them to get through the rounds of appeal. We were told countless times that it would be resolved shortly. We were denied services based on untrue claims that our provider wasn’t licensed. Seeing that it was unjust, we continued to press on and seek help in fighting the denials. We continued therapy minimally throughout the year as we could afford. It was much less than what we should have done to achieve maximum recovery of lost skills.

At the end of the year, the recovery wasn’t substantial enough. I had to take a job in Portland for better benefits, hoping that it would open the door to better therapies. Six weeks into that job, I had to switch to yet another job to work at the school my child attended so I could help facilitate care. Still, no services, no restitution. Finally, this year I embarked in my own graduate studies to help secure a long term future for our family. But, one week in, I received a report about our child’s skill levels and across the board they were too low. Because we were not able to give the therapy needed after insurance denied it, I had to take a leave of absence to oversee the new therapy schedule and to try and find a job to pay for it. We have absorbed and weathered loss after loss as a family. We are always fighting. We want only what every parent wants-to provide for their child what he/she needs. Our only limitations to helping our child has been what insurance would and would not cover. I find this odd and disheartening as I am paying my premium every month, so why aren’t they doing their part?

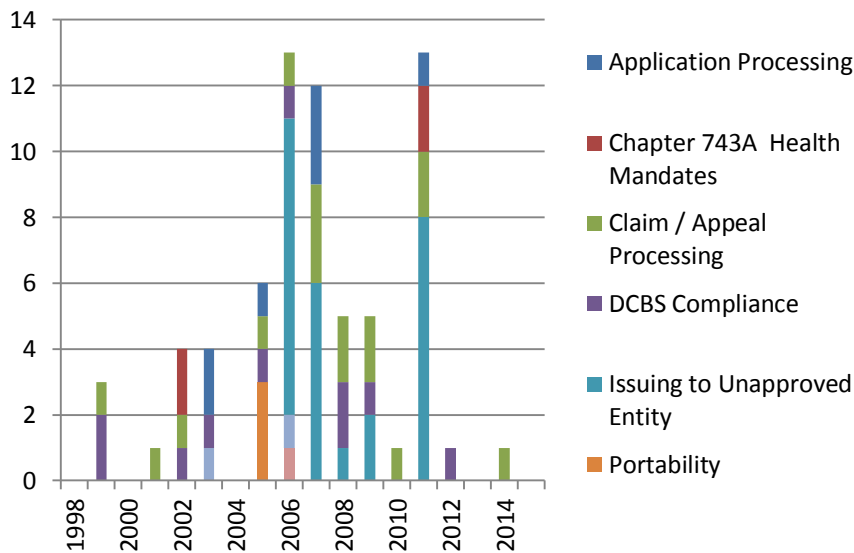
We are hard working, intelligent, and dedicated people who serve and love others for a living. We are asking for justice here. Please remember this story and the hundreds and thousands of other untold stories as you consider this important matter.

Respectfully,

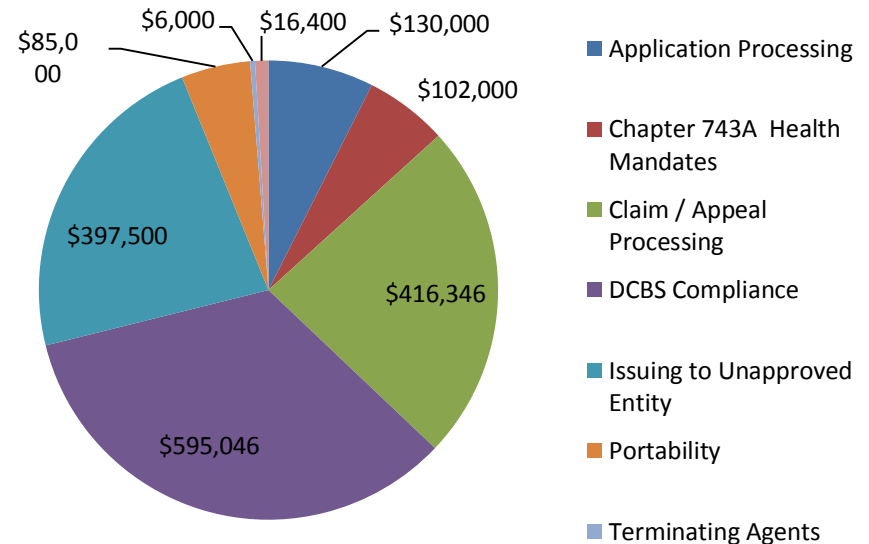
A Mother and a Father

# Marketplace enforcement actions from Consumer Complaints are rare, and penalties mild

## Health Insurer Enforcement Actions by Violation, Year



## Health Insurer Financial Penalties by Violation, Since 1998



- Insurance Division receives 700 – 900 Consumer Complaints against health insurers each year
- Since 1998, only 4 enforcement actions for failure to provide mandated health coverage
  - Most enforcement actions involve compliance with insurance procedures
  - Financial penalties average \$100k / year
- See [TerdalP Report OID Market Enforce 1998-2015 2015-09-30.pdf](#) for all lines of insurance

Source: [http://www.cbs.state.or.us/ins/admin\\_actions/adminact.html](http://www.cbs.state.or.us/ins/admin_actions/adminact.html)

# There are no Laws or Administrative Rules governing the Consumer Complaints process

- While the Consumer Advocacy unit is eager to help consumers, there are no Laws or Administrative Rules on management of complaints about illegal conduct
  - Laws require DCBS to record and report on complaints....
    - ORS 731.288: Director shall record complaints and consider them before issuing licenses
    - ORS 731.264: Makes complaints confidential, and calls for an annual statistical report
  - ... but nothing requires investigation of complaints
- There is no transparent process for consumers to have their complaints heard, receive a decision on the merits, and resolve appeals
  - Many complaints have lingered for years, under review pending a decision on enforcement – with no status report or communication to the consumer
  - DCBS has asserted that consumers have no right to appeal or protest decisions regarding whether or how much restitution to provide under SB414
- DCBS encourages consumers to retain their own attorneys and pursue litigation rather than waiting for enforcement action or restitution

# Insurers and elected officials pressure the Insurance Division to avoid enforcement

- Insurance Division management and staff clearly care about consumer protection and want to help, but....
- Insurers have threatened to sue the Insurance Division if it ever imposes meaningful restitution under SB414:
  - From an Insurer on the SB414 Rules Advisory Committee:
  - “... one of the consumers that you are stating you want to protect is going to be tied up in court for three years.... I guarantee that because I will be the plaintiff.”
- The Governor’s Office has also intervened on behalf of insurers



# A Case Study in Political Intervention (1 of 4)

- Autism advocates have been appealing to the Insurance Division for enforcement assistance under Mental Health Parity since 2006
- In May 2013, the Insurance Division advised us that they thought we were right – that ABA therapy coverage was already required in at least some cases
- The Insurance Division and Cover Oregon notified the Legislative Fiscal Office and Governor’s Office of their preliminary finding

**REEVES Liani \* GOV**

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**From:** KING Rocky <rking@coveroregon.com>  
**Sent:** Tuesday, May 28, 2013 4:41 PM  
**To:** STAYNER Matt  
**Cc:** SAVAGE Louis D; KOLMER Sean P \* GOV; BONETTO Mike \* GOV  
**Subject:** RE: SB 365

Hi Matt,

As discussed last week, I believe that at least some portions of ABA therapy are covered under the PacificSource plan that was selected as the benchmark for essential health benefits. Any such services would not constitute a mandate "in excess of EHB" and would not present a cost for the state. However, there may be additional ABA services that would be required under SB 365 that would not be covered by the PacificSource benchmark. These services could constitute a mandate in excess of EHB such that the state would have to defer the costs. The Oregon Insurance Division is working with PacificSource to determine exactly which ABA services are – and are not – included in the EHB benchmark. Once we get that analysis, Cover Oregon and the Insurance Division would will work together to determine which services would have to be covered by the state if SB 365 were to pass and be signed into law.

Rocky

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# A Case Study in Political Intervention (2 of 4)

PacificSource Improves Access to Providers of ABA in Treatment of Autism Spectrum Disorder

4/15/13 12:19 AM

- PacificSource – Oregon’s Benchmark Plan – has been covering ABA since 2010 at the direction of the court
- In *McHenry v PacificSource* (2010), U.S. District Court ordered PacificSource to pay for ABA by DHS- approved providers under ORS 743A.168(5)(a)
- PacificSource posted a Press Release in early 2013 announcing improved access to ABA providers



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## PacificSource Improves Access to Providers of ABA in Treatment of Autism Spectrum Disorder

PacificSource now recognizes Board Certified Behavior Analysts® (BCBAs) for applied behavior analysis therapy (ABA) in the treatment of autism spectrum disorder. This change, which was effective January 1, 2013, will improve access to providers of this treatment for our members.

ABA is one treatment for autism spectrum disorder, particularly for children. The treatment is typically provided by Board Certified Behavior Analysts (BCBAs). BCBAs receive certification from the Behavior Analyst Certification Board®, Inc., an independent nonprofit established in 1998 to meet professional credentialing needs.

While **ABA is a covered treatment for members of our group plans**, BCBAs are not part of our provider network because they are not licensed in Oregon. State licensure is one of the check points used to verify provider credentials. PacificSource, like other health plans, verifies credentials, including state licensure, before including a provider in our network. This ensures members receive the best possible care from qualified professionals. Unfortunately, many states, including Oregon, don't have a licensing structure for BCBAs.

“We will continue to support and participate in efforts toward state licensure for BCBAs,” said Ken Provencher, President and CEO. “As this process may take time, we felt it was in the best interest of our members to look at our practices and see what we could do now; recognizing BCBAs as eligible providers gives our members greater access to providers of ABA therapy for the treatment of Autism Spectrum Disorder.”

By recognizing BCBAs as “eligible” providers for ABA in the treatment of Autism Spectrum Disorder, BCBAs will be able to receive reimbursement as nonparticipating providers in the PacificSource network.

# A Case Study in Political Intervention (3 of 4)

- The Governor's Office intervened after a meeting with PacificSource CEO Ken Provencher – and advised that since PacificSource was only providing ABA “due to lawsuit” it shouldn't be considered part of the Benchmark

**From:** BONETTO Mike \* GOV [mike.bonetto@state.or.us]

**Sent:** Wednesday, May 29, 2013 4:16 PM

**To:** BEHRENS Anthony A; CALI Laura N; SAVAGE Louis D; King Rocky; KOLMER Sean P \* GOV

**Subject:** Conversation with Ken Provencher...

Fyi...a few notes below from my conversation with Ken on the autism issue. Not sure this clarifies much...other than once we have some final numbers from them we can probably get a better sense of fiscal impact to the state which we can then take to legislators.

MB

- Nothing has changed in their base policy around ABA therapy (meaning ABA coverage has only occurred in limited situations due to lawsuit)
- ABA therapy was never specifically identified during the EHB development
- Their big issue is that they don't have an accurate way to estimate (or compare to 621) since they don't have a true basis for costs today
- At this point, they are estimating that it would be less than 1% impact on premiums...around \$2.50-3.00/PMPM...but guessing that other carriers will probably come in much higher
- Sounds like they are finalizing some numbers and will be sending them to Laura shortly
- They have continued to struggle around using credentialed/non-credentialed providers for ABA therapy
- Bottom line...they do not feel that the EHB includes ABA therapy and it should be considered a new mandate

# A Case Study in Political Intervention (4 of 4)

- Consumer advocates were advised that private litigation would be required before any enforcement action would be taken
- A year later, U. S. District Court ruled for consumers in AF v Providence (Case No. 3:13-cv-00776-SI, 8/8/2014) in summary judgment
  - “the Court finds that Providence cannot simultaneously purport to cover autism and yet deny coverage for medically necessary ABA therapy through its Developmental Disability Exclusion consistent with the Oregon Mental Health Parity Act.”
  - Summary Judgment is granted only when “... there is no genuine dispute as to any material fact ...” and “... the record taken as a whole could not lead a rational trier of fact to find for the non-moving party....”
- Even when consumers presented a case so strong that “a rational trier of fact” couldn't possibly find for insurers – the Insurance Division couldn't overcome political opposition to consumer protection

# Recommendations

1. Establish transparent and efficient procedures to adjudicate consumer requests for restitution or enforcement of the insurance code
  - Established by law or administrative rule
  - Enable consumers and insurers to present their evidence, and rebut opposing arguments
  - Make a decision in a timely manner
  - Provide a reasonable opportunity for administrative appeal by both parties
  - Refer to Oregon Department of Education complaint procedures under OAR 581-015-2030 for an example
2. Allow consumers to seek help from an advocate or family member in the complaints process
  - Insurance Division currently speaks only with the consumer – even if they are elderly, disabled, or otherwise in need of assistance
3. Provide a meaningful private right of action to consumers for serious violations of the law
  - End the UTPA exemption for insurers
  - Allow recovery of attorney's fees and appropriate compensation for serious offences

# Supplemental Materials

# Other States are much more assertive in protecting insurance consumers

- Missouri has imposed \$6 million fines on a single insurer since 2012 for failure to cover treatment for autism
  - Nearly 4 times the total amount Oregon's Insurance Division has imposed on all health insurers for all Marketplace violations in the past 17 years
- California has completed enforcement against 5 major insurers over autism coverage
  - Blue Shield, Health net, CIGNA, United Healthcare, Anthem
  - <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/05-autism/>

## Missouri Department of Insurance Press Release

May 19, 2015

### Gov. Nixon announces \$4.5 million settlement with Aetna after company failed to provide required autism coverage

**If Aetna violates settlement terms, Missouri Department of Insurance will be able to suspend certificate to do business in state**

Springfield, MO - **Gov. Jay Nixon** today announced that the State of Missouri has reached a \$4.5 million settlement with Aetna Life Insurance Company and Aetna Health Insurance Company (referred to collectively as Aetna in this news release) after the companies failed to provide coverage for the diagnosis and treatment of autism spectrum disorders.

...

Today's settlement, in which Aetna admitted it failed to offer autism coverage in some cases, includes a \$4.5 million fine and the requirement that Aetna subject itself to a corrective action plan and three years of monitoring by the Department of Insurance. A portion of the fine, \$1.5 million, will be suspended if Aetna complies with the settlement agreement.

In 2012, the two Aetna companies also admitted to violating the autism mandate and paid a \$1.5 million fine under a settlement agreement with the Department of Insurance. The companies were required to undertake a full and complete audit to ensure compliance with all Missouri insurance mandates. Aetna admits it did not undertake that full compliance audit.

"Aetna violated Missouri law and withheld state mandated benefits from Missouri families," said Missouri Department of Insurance Director **John M. Huff**, who also was at today's announcement. "Insurers must provide Missourians with benefits required under Missouri law and I will use the full extent of my regulatory authority to ensure they receive them. Additionally, these companies failed to comply with previous orders issued by me. This is a serious compliance issue that requires serious regulatory consequences."

"When an insurance company chooses to do business in our state, they agree to follow our laws," the Governor said. "These were serious violations that deserved serious punishment - and that's what Aetna received."

# Providence intentionally provoked litigation against itself (AF v Providence) and State of Oregon (PS v PEBB) (1 of 2)

- Providence denied ABA therapy solely because it was “related to autism” – but Oregon’s Mental Health Parity law has required autism treatment since 2005:
  - *“Under Providence’s Plan, services ‘related to developmental disabilities, developmental delays or learning disabilities’ are specifically excluded from coverage. **Because ABA services are related to Autism Spectrum Disorder, they are therefore not benefits covered by your plan.**”*
- Providence knew that this exclusion couldn’t be applied to autism, as it told the Insurance Division in its SERFF filing – but did it anyway:
  - *“Providence believes we are able to exclude treatment for learning disability developmental disabilities **other than Autism Spectrum Disorders** under the mental health coverage on our plan as the statutory definition of mental health (OAR 836-053-1404) allows for such exclusion”*
- The Insurance Division had already found another insurer in violation for the same offence, as it reported to the House Health Care committee on 9/16/2008:
  - *In the two Consumer Advocacy cases where violations of Senate Bill 1 were found, **contractual language specifically limiting coverage for developmental disorders and mental health and chemical dependency treatment was identified, The Division required the companies to remove the offending language and to comply with the mandates of Senate Bill 1.***



# Providence intentionally provoked litigation against itself (AF v Providence) and State of Oregon (PS v PEBB) (2 of 2)

- Providence explained its strategy to U.S. District Court:
  - *“It had become apparent, therefore, that access to a decision by a judge (rather than by physicians) on the federal ERISA issues of law presented by these cases was going to require one of three things: (a) resting a final grievance decision solely on grounds not authorized for IRO review under Oregon’s statute; (b) waiting until a member elected to sue in federal court rather than appeal to an IRO physician; or (c) finding an IRO reviewer that would agree with Providence’s reading of the clinical literature and waiting for the member to appeal from that decision. Of those choices, only (a) was within Providence’s control. In short, Providence was effectively being denied the opportunity for federal judicial review under ERISA of the soundness of its conclusion that ABA services are “experimental/investigational,” presumably until such time as either (b) or (c) occurred. Providence therefore decided, for a time, to implement strategy (a), in order to attempt to resolve what it could before a judge rather than a physician.*
  - *“... Providence has done what it can to place these issues before this Court by relying on the exclusions other than that relating to services that are “experimental/investigational.””*
- U.S. District Court has ruled against Providence:
  - “Providence cannot simultaneously purport to cover autism and yet deny coverage for medically necessary ABA therapy through its Developmental Disability Exclusion consistent with the Oregon Mental Health Parity Act.”