

HB2858: DCBS Procedures to Enforce Insurance Code

Testimony to Oregon House Business
and Labor Committee by

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Introduction – Paul Terdal

- Resident of Northwest Portland, Senate District 18 / House District 36
- 25+ years of professional experience in regulated environments
 - Lead critical projects; develop business processes, systems for regulatory compliance
 - Nuclear, healthcare, communications, education, commercial fisheries
 - 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 consumer advocate on key insurance legislation
 - SB414 (2013) – Insurance Commissioner’s Restitution Authority
 - SB365 (2013) and SB696 (2015) – Autism Health Insurance Reform

What HB2858 Does

- Establishes transparent and efficient procedures for DCBS to adjudicate consumer requests for restitution or enforcement of the insurance code
 - Sets target for DCBS to complete work within 1 year, but allows for more time if needed
- Permits director to engage in negotiations to settle complaint or to enter into remediation agreement to remedy violation
 - Permits / encourages DCBS to involve consumer in settlement discussions
 - Requires director to issue order to remedy violation if settlement negotiations or negotiations for remedial agreement fail
- Consumer may bring private right of action if resolution through this process is unsuccessful

HB2858 was modelled on the existing BOLI Civil Rights Enforcement Process

Why is HB2858 necessary?

Common concerns from the industry....

1. “... we compromised with advocates to adopt SB414 in 2013. That new law made an unprecedented grant of authority to the Insurance Division, which may now order claims be paid and also order restitution for damages. *This is free to the consumer, no trial lawyer required unless you want one.*” (Justin Delaney, The Standard, 2015)
2. “Should a problem arise, consumers can seek recourse ... through the Oregon Division of Insurance. In fact, current Oregon law allows DCBS to seek restitution for any damages a consumer suffers if an insurer violates the state insurance code. *This is a fast, fair, and affordable way to protect consumers*” (Michael Harper, State Farm Agent, 2017)

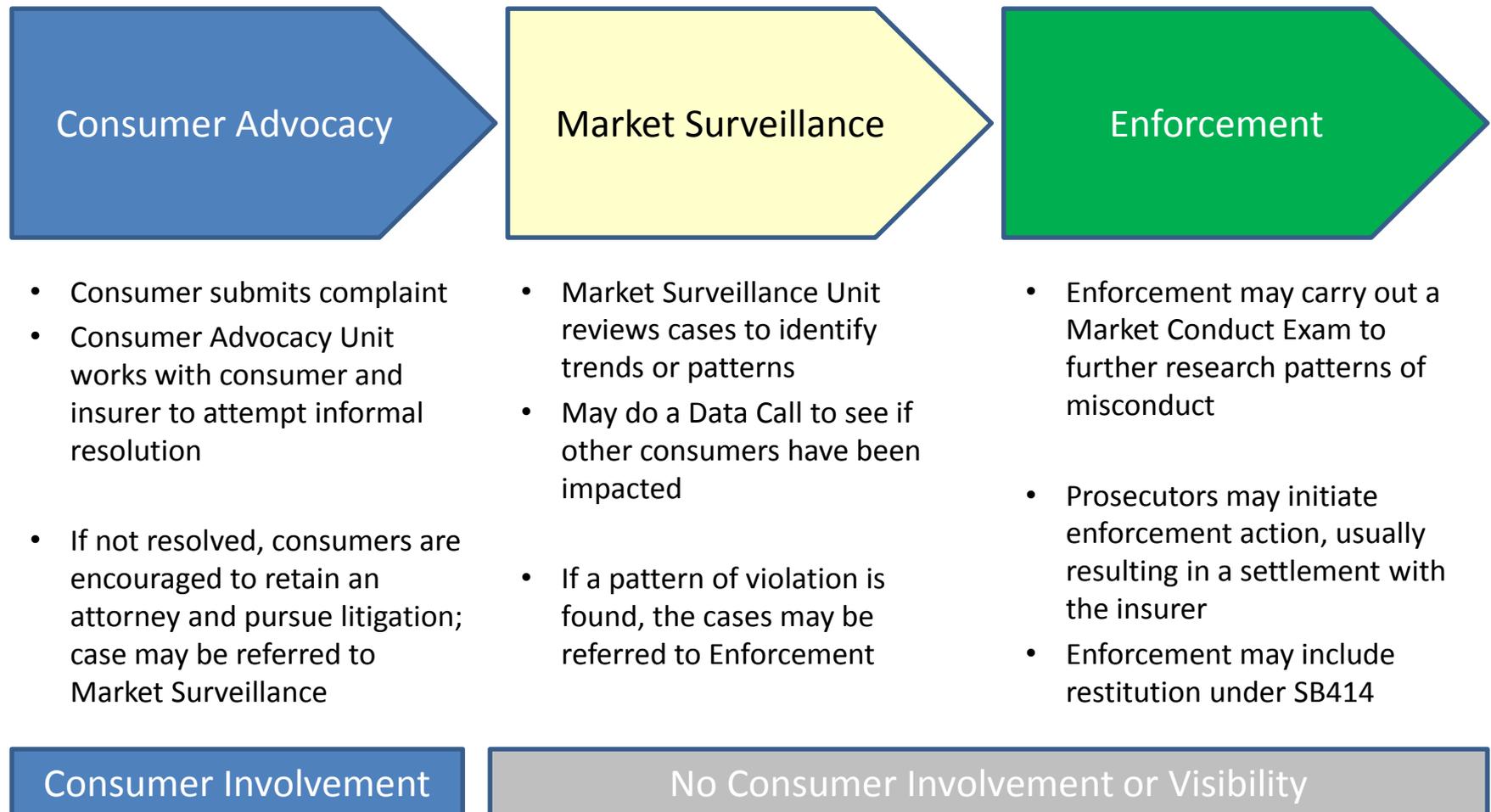
SB414 (2013) granted the Insurance Commissioner restitution authority ...

- 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

... but there are no Laws or Administrative Rules governing the Complaints and Enforcement process

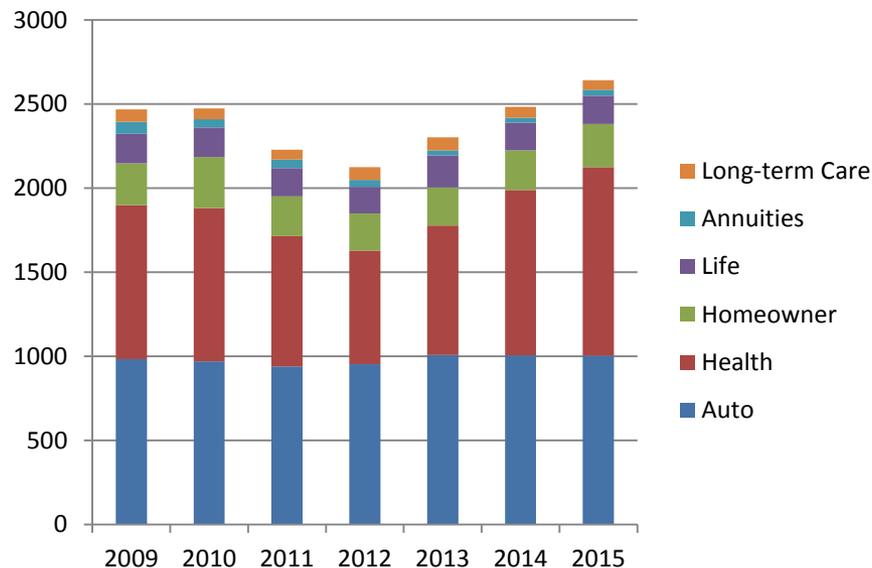
- While the Consumer Advocacy unit is eager to help consumers, there are no Laws or Administrative Rules on management of complaints about illegal conduct
 - Laws require DCBS to record and report on complaints....
 - ORS 731.288: Director shall record complaints and consider them before issuing licenses
 - ORS 731.264: Makes complaints confidential, and calls for an annual statistical report
 - ... but nothing describes 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
 - In recent cases, consumers haven't even been consulted about restitution
- DCBS encourages consumers to retain their own attorneys and pursue litigation rather than waiting for enforcement action or restitution

Current Enforcement Process is slow and uncertain, with little consumer involvement or visibility (Not published or defined in any administrative rule or statute)



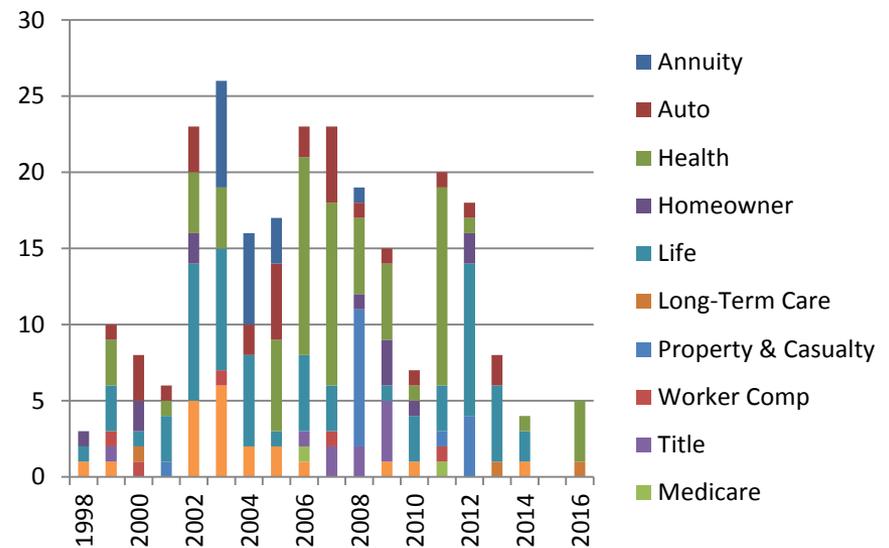
Only a fraction of a percent of Consumer Complaints result in Enforcement eligible for restitution

Consumer Complaints by Insurance Type, Year



Source: <http://dfr.oregon.gov/community/Pages/complaint-data.aspx>

Number of Enforcement Actions by Insurance Type, Year



Source: <http://dfr.oregon.gov/laws-rules/Pages/notices-orders.aspx>

- Restitution under SB414 is only possible with an Enforcement Action
 - Restitution has been ordered only once since enactment in 2013
- DCBS encourages consumers to pursue litigation if Consumer Advocacy is unsuccessful

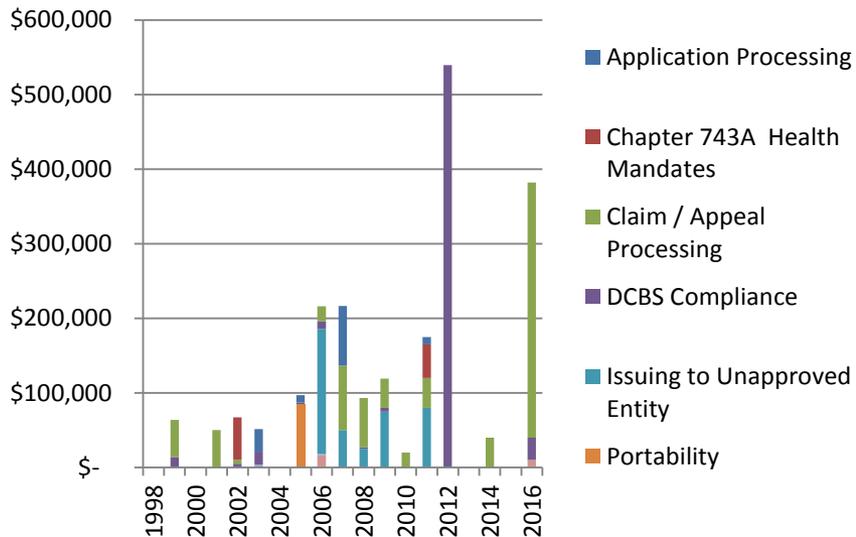
Discussion - Conclusion

- DCBS has the authority and the mandate to enforce the law for the protection of consumers – but not the process
 - Current enforcement practice addresses only broad issues involving many consumers – no real mechanism to deploy restitution authority for individuals
 - Consumers have little engagement even about restitution for their own cases
- Consumer Complaints involving autism and other mental health conditions have been under investigation without resolution for 5+ years
 - Core legal issues have long-since been resolved (AF v Providence, bulletins INS 2014-1 & 2014-2)
 - Reluctance to require insurers to pay older, wrongly denied claims even when consumers were already in the Appeals / Advocacy / Enforcement process
- Some issues probably should be litigated – but the tools are lacking
 - DCBS tends to enforce basic insurance procedure violations, not complex issues
 - Litigation is extraordinarily expensive, with little return – only the wealthy can afford justice
 - Limited to breach of contract – not violation of rights under insurance code

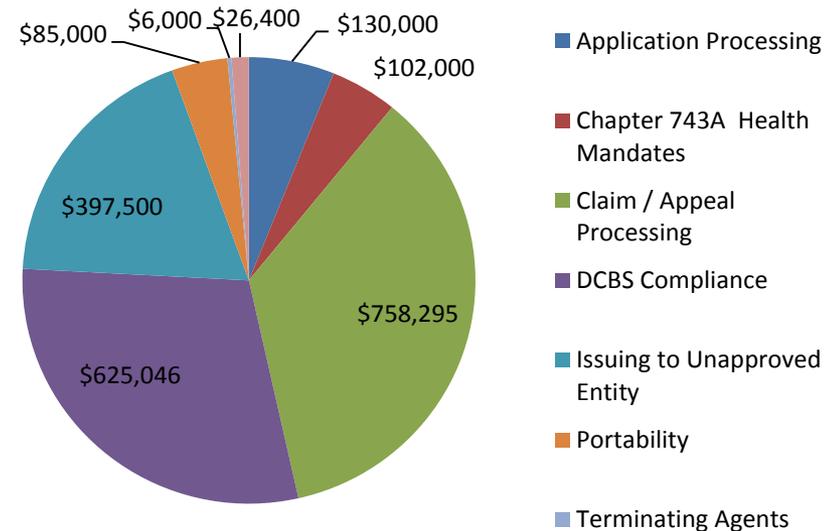
Supplemental Materials

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

Health Insurer Financial Penalties 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 1998-2016 2017-03-15.pdf](http://dfr.oregon.gov/laws-rules/Pages/notices-orders.aspx) for all lines of insurance

Source: <http://dfr.oregon.gov/laws-rules/Pages/notices-orders.aspx>

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 four 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 letter to the Judiciary Committee in 2015 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

DCBS Web Page: “Once you file a complaint”

Most complaints resolved within 60 days

- We handle complaints about mortgage lenders, loan originators, finance service professionals, and most lines of insurance. This includes auto, homeowner, health, life, annuities, long-term care, and even pet.

Once we receive a complaint, an advocate will:

- Let you know in writing that we received your complaint
- Send a copy of your complaint to the insurance company, agent, or both
- Obtain a detailed response from the company, agent, or both
- Analyze the response and any supporting documents (the company or agent must respond within three weeks)
- Determine whether more information is needed or there is a possible violation
- Advise you of our findings

How long will it take?

- Most complaints are resolved within 60 days but it depends on the type of complaint. Sometimes it is just a few days or weeks.

Source: <http://dfr.oregon.gov/gethelp/Pages/after-filing-complaint.aspx>

DCBS Web Page: “What can the division do?”

We can:

- Educate you about your rights.
- Resolve issues before they lead to further harm.
- Fine companies or agents that break the law or revoke their licenses.
- Tell you whether a company or agent is licensed in Oregon.
- Educate you about a company's complaint history and its financial soundness.
- Detect areas of that law that need to be changed.

Results vary from providing information to getting a claim paid. Consumers who are unhappy with the results we obtain may want to contact an attorney.

We cannot:

- Act as your attorney.
- Recommend an insurance company or agent.
- Force a company to pay claims, to cover a medical procedure, or to refund premiums if the company is following the law and its insurance contract.
- Resolve issues outside our jurisdiction. For example, the issue might be who is at fault or how much should be paid as a result of a car accident. We will make sure the insurance companies follow the law and you know your rights and options. However, the court system determines fault and damages rest with the court system.

Source: <http://dfr.oregon.gov/gethelp/Pages/after-filing-complaint.aspx>