

# Support HB2956: Insurance Consumer Complaints and Enforcement Process

Testimony to Oregon House Committee  
on Business and Labor by

**Paul Terdal**

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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

# A few of the insurance issues I've encountered....

- When consumers successfully appealed denials of autism treatment with help from a participating physician, an insurer prohibited the physician from making any further referrals
- An insurer told U.S. District Court that it had structured denials to evade the legally mandated External Review process for the purpose of provoking litigation
  - The same insurer acknowledged in a sworn statement that it continued denying treatment as “experimental” after its experts concluded that it was proven while it evaluated cost and pricing
- An insurer provided inaccurate claims about research findings into a treatment. When consumers asked for copies of the reports, the insurer refused
  - We found the reports ourselves – and they directly contradicted the insurers claims
- After DCBS issued bulletins requiring all insurers to provide coverage of treatment for autism, a plan added a specific exclusion of the mandated coverage
  - It falsely claimed to be exempt from state regulation
  - Refused to provide the consumer with a written denial of coverage

# What HB2956 Does:

## HB2956 requires DCBS / Division of Financial Regulation to:

- Establish procedures by rule for investigating complaints, to include:
  - Schedules and deadlines for completing an investigation
  - Standards for regular and informative communication with the complainant
  - Procedures for presenting and responding to a complaint
  - Format of findings and decisions
  - Range of potential enforcement actions
  - Standards and procedures to involve complainant in determinations regarding restitution and equitable relief under ORS 731.256 (SB414 – 2013)
  - Procedures to appeal the department's determination
- Study and make recommendations concerning changes to Insurance Code that address managing, investigating and enforcing violations
  - Examples could include revisions to the Division's authority; a private right of action for consumers, such as through UTPA; or no further changes

## HB2956 allows consumers to seek help from an advocate or family member in the complaints process

- The Division currently speaks only with the consumer – even if they are elderly, disabled, or otherwise in need of assistance
  - The Division is even prohibited from discussing complaints with legislative representatives
- -1 amendment clarifies definition of “authorized representative”

# 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

# Insurance Commissioner Lou Savage testified that SB414 would be “a great tool” and “quick” for consumers

- “Senate Bill 414 is not our bill, but we do think that it would add a great tool to the insurance division toolbox.”
- “It would be an important tool particularly for claims which are small enough that a consumer has really been damaged but possibly not large enough for an attorney to take the case. It would be relatively quick. There is a due process element for the insurer. They could ask for a hearing if the division decides to assess a penalty. It would be resolved, again, in certainly a much shorter period of time than litigation would be, if that was the only alternative.”
- “I think the reason this bill is before you right now, and Paul Terdal can speak to this, is that consumers are frustrated that they have to hire a lawyer in order to get this kind of restitution. I think our history is that when we are given the authority that we need, we are actually very effective in getting the remedy the consumers need. A consumer could avoid coming to the department, just like they can today. If they decided that they wanted to hire a lawyer on their own and not go through the department, they could certainly do that. But they wouldn't need to if they came to the division.”
- “Vice Chair Hicks, we currently have an enforcement unit. We have the capacity to handle more cases, because we will just prioritize the most important cases. We will eventually get to all of them as we have done.”
  - (This was in response to a question from Rep. Hicks: “There is no expenditure impact. Who does pay for this? Who does pay for your action?”)
- “... we would certainly get the permission of the consumer to issue that order and enter into any kind of settlement.”

# Insurers endorsed SB414 – and continue to cite it as the preferred tool for resolution (page 1 of 2)

## State Farm Insurance Companies (2013):

- "SB 414 empowers the Insurance Commissioner's office, to order restitution on behalf of any consumer, who suffers actual damages as a consequence of an insurer's violation of the Insurance Code or breach of an insurance contract. That remedy would be more immediate and available to all consumers. *State Farm and State Farm Agents, and every other insurer and insurance producer* that continuously works to provide appropriate insurance products and to fair resolve claims of Oregon consumers, are fully supportive of this recommended enhancement of regulatory authority."

## The Standard (2013):

- "If Oregon consumer protection is indeed the sponsor's goal. .. SB 414, presently before the Senate Rules Committee, would grant Oregon's insurance regulators authority to order insurers to pay restitution to consumers. This is a much more appropriate, better tailored remedy to achieve the sponsors' the stated goals."

## The Standard (2015):

- "Nevertheless, to end the seemingly endless debate, we compromised with advocates to adopt SB 414 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."

# Insurers endorsed SB414 – and continue to cite it as the preferred tool for resolution (page 2 of 2)

## **NAMIC (2015):**

- “... the Oregon State Legislature granted the OID civil restitution powers in 2013, so that the OID could assist insurance consumers (at no cost to the consumer) in resolving disputed claims. Pursuant to SB 414, the OID may order an insurer to pay an insurance consumer civil restitution on a disputed claim.”
- “Since this new regulatory power to resolve insurance claims disputes in a fast, efficient, and cost-effective manner has yet to be given ample opportunity to be used to the benefit of insurance consumers, NAMIC suggests that the legislature afford the OID time to use this new regulatory power to address consumer needs before considering the adoption of unnecessary “litigation-oriented” legislation.”

## **Farmers Insurance (2019):**

- “... 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.”

## **John Powell, on behalf of State Farm, The Standard, and Liberty Mutual Insurance Companies (2019):**

- “In 2013, the legislature passed SB 414, which granted the power to the director of DCBS to seek and order restitution on behalf of a consumer for actual damages the consumer suffers from an insurer’s violation of the insurance code or any other applicable law as well as for a breach of the insurance contract. In addition, SB 414 also allows the director to seek any other equitable relief the director deems appropriate.”



# SB414 hasn't been implemented; there are no Laws or Administrative Rules governing the Complaints process

- Restitution authority has been used only once in the six years since enactment
  - The one restitution order was issued in November 2016 (Case No. INS-16-0138)
  - [https://dfr.oregon.gov/AdminOrders/actions\\_2016/insurer\\_2016/marketplace\\_2016/20161108-timeinsco-ins-16-0138.pdf](https://dfr.oregon.gov/AdminOrders/actions_2016/insurer_2016/marketplace_2016/20161108-timeinsco-ins-16-0138.pdf)
- The DFR website and complaint forms make no reference to restitution authority, and no provision for consumers to request restitution (see example next slide)
- There are no Laws or Administrative Rules on management of complaints
  - 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
  - Consumers aren't consulted or even informed about restitution
- DCBS encourages consumers to retain their own attorneys and pursue litigation rather than waiting for enforcement action or restitution

# The DFR Web Page makes no reference to restitution



File a complaint or check a license

## 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.

*No reference to restitution authority*

*Consumers are encouraged to litigate – despite no private right of action*

*Misleading and incomplete – CAN force company to pay legitimate claims PLUS actual damages*

Source: <https://dfr.oregon.gov/help/complaints-licenses/Pages/after-complaint-filing.aspx>

# A restitution attempt

- I filed consumer complaints in 2011 and 2012 regarding issues related to coverage of treatment for autism
- For years, the Insurance Division assured me that they were working on my complaints and asked me to be patient
- When my 6-year statute of limitations was about to expire, the Division advised me that it needed a little more time.
  - I filed a lawsuit to preserve my rights while the Division finished its work
- Division attorneys urged me not to agree to any settlements that required me to withdraw my complaints with the Division
- I learned that the Division was taking enforcement action in my case from the news media
  - Two reporters contacted me for comment after seeing a press release
  - The Division released detailed information about my complaint to the news media, identifying me by name – without ever informing me
- One of the largest civil penalties ever assessed against an individual insurer – but no restitution, and no order to pay my claims

# Other Recent Enforcement Actions

## (From a DCBS Press Release in 2017)

- **Pioneer Educators Health Trust**, which provides health plans to local universities, is fined a proposed \$100,000 for several violations, including:
  - Applying an annual visitation limit for neurodevelopmental therapy, a mental health treatment, when there was not a similar limit for other medical or surgical benefits.
  - Excluding ABA therapy in its 2015 health benefit plan and issuing the plan without receiving approval from the state.
  - Denying a consumer's pre-authorization request for ABA therapy and not providing a written response with information about the consumer's right to appeal.
  - Denying a claim for ABA therapy with no basis for that denial.
- **Regence BlueCross BlueShield of Oregon**, in its role as third-party administrator for Pioneer Educators Health Trust, is fined a proposed \$100,000. In particular, Regence provided incorrect information to Pioneer and at least one consumer about whether it was required to cover ABA therapy.
- **United Healthcare Insurance Company** is fined a proposed \$110,000 for denying 22 speech therapy claims for children who have been diagnosed with a pervasive developmental disorder (such as autism). Oregon law requires insurers to cover all medical services for a child enrolled in the plan who is younger than 18 years old and who has been diagnosed with a pervasive developmental disorder. Those services include rehabilitation services, such as speech therapy, that are medically necessary and are otherwise covered under the plan.
- **Kaiser Foundation Health Plan of the Northwest** is fined a proposed \$250,000 for providing incorrect and misleading information in its member documents about whether it would pay for members' attorney fees in a lawsuit. Kaiser's documents stated that members would bear their own attorney fees, but Oregon law requires insurers to honor a court award for attorney fees. This order was the result of a complaint from a consumer who has filed a lawsuit against Kaiser related to mental health parity issues.

# Discussion – Basic Principles:

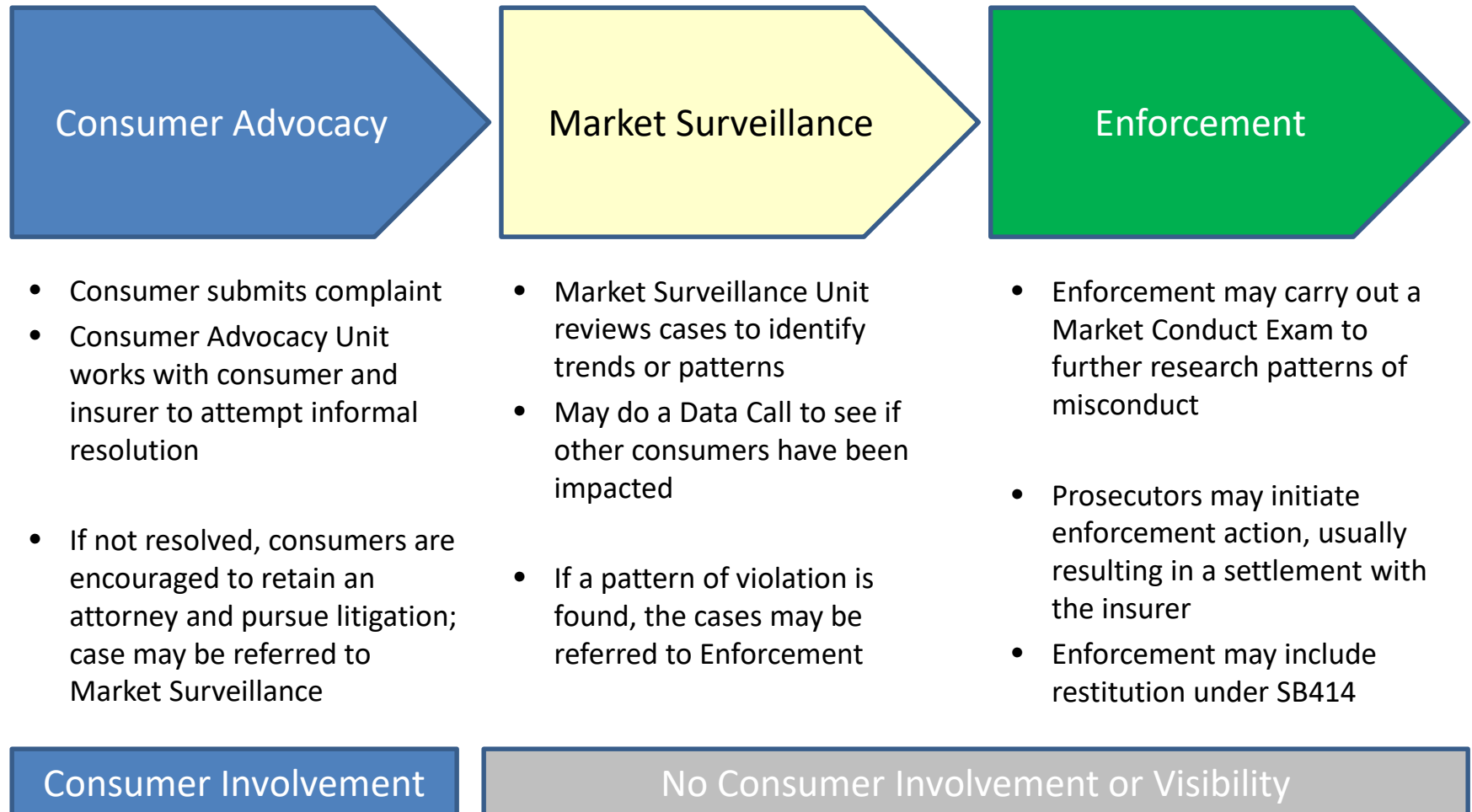
- When a consumer submits a valid, substantiated complaint that an insurer has violated the insurance code, the Division should take action, either through voluntary compliance in consumer advocacy or enforcement
- The Division should act in a timely manner – it should not take six (6) years for the Division to take action on a valid, substantiated complaint
- The Division should keep the consumer informed about progress, even if that information is that progress is going to be slow
- When consumers submit a Consumer Complaint, the Division should always ask consumers about “actual damages” they have experienced as a result of an insurer’s violation of the law
- The Division should always consider restitution as a part of any enforcement action, and should always consult with the consumer before making a decision.
  - “Consider” doesn’t mean that restitution is mandatory, and “Consult” doesn’t mean doing whatever a consumer wants, but consumer input must be considered reasonably.
- Before the Division decides not to take enforcement action, the Division should notify the consumer and discuss the reasons before making a final decision
- When the Division does decide to take enforcement action, the Division should notify the consumer.
  - Consumers should not learn that enforcement action has been taken on their behalf by news reporters seeking interviews.

# 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
- Potential next steps:
  - DCBS should consult with stakeholders – including insurers and consumers, and initiate rule-making on its own initiative
  - Reintroduce HB2956 in a future session, with feedback from stakeholders
  - Rules petition under ORS 183.390
  - Introduce private right of action or UTPA if DCBS is unable or unwilling to implement its' restitution authority SB414
- Other ideas? Questions / Concerns?

# Supplemental Materials

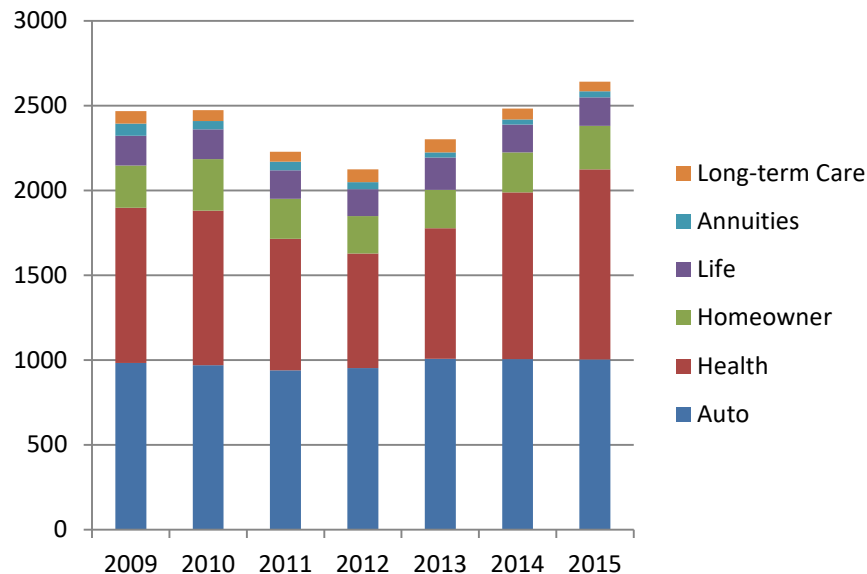
# Current Enforcement Process is slow and uncertain, with little consumer involvement or visibility (Not published or defined in any administrative rule or statute)





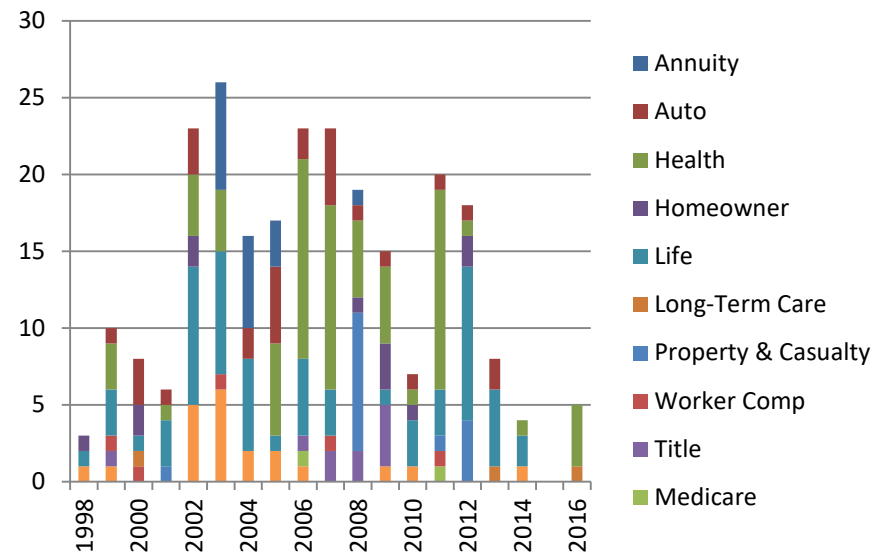
# Only a fraction of a percent of Consumer Complaints result in Enforcement eligible for restitution

## Consumer Complaints by Insurance Type, Year



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

## Number of Enforcement Actions by Insurance Type, Year

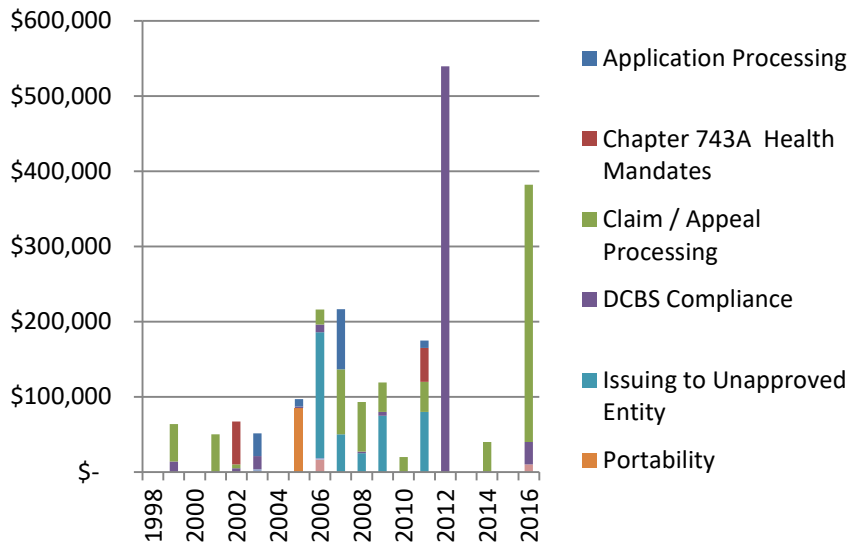


Source: <http://dfr.oregon.gov/laws-rules/Pages/notices-orders.aspx>

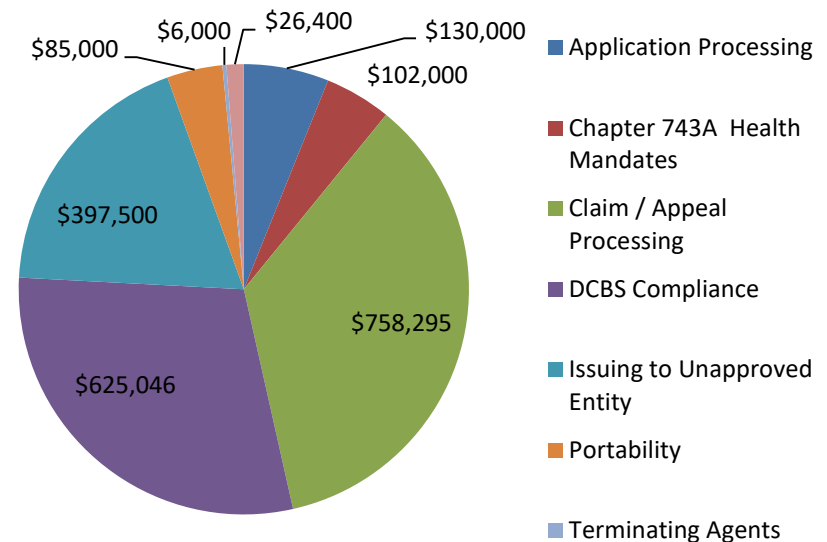
- Restitution under SB414 is only possible with an Enforcement Action
  - Restitution has been ordered only once since enactment in 2013
- DCBS encourages consumers to pursue litigation if Consumer Advocacy is unsuccessful

# 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