HOUSE BUSINESS & LABOR COMMITTEE

STATEMENT IN OPPOSITION TO HB 3272 Section 4

March 9, 2021

Chair Holvey, Vice Chair Bonham and members of the committee:

My name is John C. Powell and today I speak on behalf of State Farm, The Standard, and Liberty Mutual insurance companies. These insurers market most lines of insurance in Oregon, including but not limited to property/casualty, life, disability, long term care, and workers' compensation insurance. We oppose significant portions HB 3272 as currently drafted.

This testimony will focus on Section 4 of the bill to describe just what that section of the bill would do if enacted and why passing HB 3272 would be unwise public policy. The second part of this testimony will discuss the legal and regulatory framework of the insurance marketplace today, the vast array of remedies available to consumers under current law and why Section 4 is unnecessary and potentially very harmful.

Section 4 of the bill would apply to most lines of insurance and establish such a broad multitude of private causes of action that it is difficult to even comprehend what the potential impact on the insurance market would be. Below are some of the potential impacts of Section 4:

(1) Section 4 would create a 1st and 3rd party private cause of action with potential unlimited damages for any alleged violation of ORS 746.230, known as the Unfair Claims Settlement Practices portion of the Insurance code. (*See* Page 3 Lines 34-37 and Page 4 Lines 3-13 of the bill*)*

Within the Insurance Code, insurers and insurance producers/agents are subject to extensive and specific trade practice laws, including a section entitled, Unfair Claim Settlement Practices (ORS 746.230). This act gives protections to consumers against misrepresentations, delay in processing claims fairly and failure of insurers to respond promptly to communications related to claims, among many more protections. It is important to note here that HB 3272 specifically proposes to establish a private cause of action under the Unfair Claim Settlement Practices section thereby creating both 1st and 3rd party "second lawsuits" for any perceived violation. This is important to note because Oregon's Unfair Claim Settlement Practices were taken in large part from the National Association of Insurance Commissioner's (NAIC) model act. In a footnote to the model act, the NAIC warns against precisely what is sought in HB 3272:

> "Section 1. Purpose
> The purpose of this Act is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents [insert state]. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. Nothing herein shall be construed to create or imply a private cause of action for violation of this act.

Drafting Note: A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has promulgated the Unfair Property/Casualty Claims Settlement Practices and Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this act." (http://www.naic.org/store/free/MDL-900.pdf)

The bottom line is the Unfair Claims Settlement Practices statute is extremely broad in its application by design and is intended to be used as a tool for an insurance regulator, not for a private cause of action as HB 3272 proposes.

(2) Section 4 would create a 1st and 3rd party private cause of action against an insurer or insurance producer/agent with potential unlimited damages for any alleged violation of the entire Oregon Revised Statutes. (*See* Page 3 Lines 34-37 and Page 4 Lines 3-13 of the bill, specifically "The unfair claim settlement practices described in this section are not exclusive or comprehensive and the director **or a court** may deem an act or practice that is not described in this section to be …a violation of a provision of the Insurance code or other law.")

This potentially sets up a scenario where most of the insurance industry would be under constant threat of lawsuit for any alleged violation of any law no matter how minor an alleged infraction may be. It's difficult to imagine any business or industry being able to function under this scenario, let alone one whose sole mission is to manage risk and price their products accordingly.

(3) Section 4 goes so far as to seemingly create a 1st and 3rd party private cause of action with potential unlimited damages for an act or practice not even described in or prohibited by law. (*See* Page 3 Lines 34-37 and Page 4 Lines 3-13 of the bill, specifically "The unfair claim settlement practices described in this section are not exclusive or comprehensive and the director **or a court** may deem an act or practice that is not described in this section to be an unfair claim settlement practice...").

This appears to do something that at least this lawyer is unaware of existing anywhere in Oregon statute. The bill would establish a private cause of action for an act or practice that is not described or prohibited in law. It would be very difficult for any insurer to operate in the Oregon market if this became the case.

Current Legal / Regulatory Insurance Framework

When a consumer purchases an insurance product, the issue of fairness has been addressed before the product can even be sold and marketed to the consumer. The Division of Financial Regulation (DFR) within the Department of Consumer and Business Services (DCBS) must first approve the actual wording of the insurance policy. After the sale of an insurance product, the consumer continues to be protected by an entire governmental department, the DFR. Insurance products, insurance companies and insurance producers (agents) are subject to an entire section of Oregon law – over 620 pages of statute known as the Insurance Code.

Furthermore, the Insurance Code gives nearly unlimited regulatory authority to the Director of DCBS. ORS 746.240 is entitled, Undefined trade practices injurious to public prohibited, which states:

> "No person shall engage in this state in any trade practice that, although not expressly Defined and prohibited in the Insurance Code, is found by the Director of the Department of Consumer and Business Services to be an unfair or deceptive act or practice in the transaction of insurance that is injurious to the insurance-buying public."

In other words, under ORS 746.240, the insurance regulatory regime is so broad that the director of DCBS has the authority and discretion under current law to go after insurers or producers/agents for actions that are not even prohibited by law or administrative rule.

In addition to the Insurance Code, the DFR has vast rulemaking powers. The Insurance Code and related administrative rules grant the Director of DCBS the authority to issue fines, issue cease and desist orders, revoke producer/agent licenses, and revoke the licenses of an entire insurance company to do business in Oregon.

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, this law also allows the director to seek any other equitable relief the director deems appropriate. (*See* ORS 731.256)

In addition to the regulation described above, workers' compensation insurance is regulated by a separate division of DCBS, the Workers' Compensation Division. Insures selling workers' compensation coverage are regulated by this Division of government, and as you know, workers' compensation insurance has its own voluminous consumer protection statutes and rules.

The Insurance Code was drafted to deal *particularly* with insurance and creates a form of regulation that deals with the content of the product before it is sold and trade practices after it is sold. This large body of law and regulation is enforced by a specific agency that has teeth and expertise.

Currently, in addition to and beyond the regulatory protection outlined above, a consumer may file a civil action in court against an insurance company or producer/agent under at least the following actions:

1. Breach of contract for policy benefits
2. Consequential damages for breach of contract
3. Emotional distress damages for breaches of contract that directly cause physical injury
4. Damages in excess of the stated policy limit for failing to adequately defend the insured

5. Unrestricted damages for the tort of intentional infliction of emotional distress
6. Unrestricted damages for the tort of intentional interference with contractual relations
7. Unrestricted damages for the tort of fraudulent reductions or denials of benefits
8. Punitive damages where the misconduct of the insurer has been deliberate, intentional, wanton and willful
9. Assignability of claims against insurers
10. Attorney's fees for actions on the policy
11. Actions against the insurer to recover policy proceeds following entry of a judgment
12. *also note that unlike all other businesses covered by the UTPA, insurers cannot force mandatory arbitration to settle disputes.

Insurance consumers are protected by an entire agency dedicated solely to regulating insurance products, companies and producers/agents. In addition, there are many remedies available to consumers both through DCBS/DFR and the restitution authority under ORS 731.256 as well as through the courts. HB 3272 seeks to establish unnecessary additional and costly remedies that are "inherently inconsistent" with the intent and design of Oregon's Insurance regulatory and legal system.

Chair Holvey, Vice Chair Bonham and members of the committee, on behalf of insurers, producers/agents and insurance policyholders, we ask you to oppose HB 3272.

Sincerely,

John C. Powell