Testimony for Public Hearing
Oregon House Committee on Business and Labor
March 10, 2021

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To: The Honorable Paul Holvey, Chair
The Honorable Daniel Bonham, Vice Chair
The Honorable Dacia Grayber, Vice Chair
House Committee on Business and Labor

Re: **HB 3171**
FAIIR Coalition Position: OPPOSE

Date: Wednesday, March 10, 2021, 3:35 p.m., Remote E

Chair Holvey and Members of the Committee:

I am a shareholder at the Betts, Patterson & Mines law firm in Portland, and my specialty is insurance coverage analysis, advice and litigation. I have more than two decades of experience in the insurance coverage field in Oregon, Washington, Idaho, Montana, and many other states, and I am a frequent writer and speaker on insurance law topics nationwide. Besides my work as an advocate, I am the author of several scholarly analyses on insurance law that have been cited and adopted by courts across the country, and I am a contributing author to respected and influential insurance treatises. I represent the Fighting Against Increased Insurance Rates for Oregonians Coalition (FAIIR).

The FAIIR Coalition **is opposed to HB 3171,** which would drastically alter Oregon insurance law and would warp the Oregon Unlawful Trade Practices Act to create incentives for lawsuits against insurance companies and others over minor, frivolous or even invented reasons, and would expand the scope of the UTPA for insurers and also for other businesses. HB 3171 would increase the UTPA mandate (for insurers only) beyond its current scope, which addresses "goods or services" concerning "personal, family or household purposes" and would create UTPA claims related to any type of insurance. In other words, the bill would authorize lawsuits involving commercial disputes (currently not allowed by the UTPA) and would dramatically change the existing landscape of Oregon insurance law. And, all of these changes would occur without additional funding for the already overburdened courts and regulators.

HB 3171 would allow administrative complaints and lawsuits by just about anyone who can imagine a connection to an insurance issue, including third parties such as auto body shops with

questionable charges, plaintiffs suing a policyholder for meritless claims, and many other people who have no contract with an insurer and have not been awarded a judgment in court to pursue direct lawsuits. Currently, third parties and strangers to the insurance contract have no legal standing in insurance issues unless they have a court judgment. HB 3171 would change this well-established principle of contract law and insurance law. These third parties could seek punitive damages and even criminal charges against insurers merely because they claim some future right to be paid. Stated differently, HB 3171 would give lawyers a virtually unrestricted ability to file a "bad faith" lawsuit against an insurance company for defending their own policyholder – the bill would actually be incentivizing frivolous or inflated insurance claims in hopes of obtaining large punitive damages against the policyholder's insurer. Investigating and disproving these false claims – or settling excessive claims to avoid court costs – drives up rates for responsible policyholders.

Indeed, the scope of the HB 3171 is so broad that not only is the definition of who can file a complaint or file a lawsuit flexible enough to include just about anyone connected in any way with an insurance dispute, the definition of who can be sued is equally flexible and may include insurance agents, insurance company officials and attorneys for the insurer or even the claimant.

This concept of expanding the UTPA to include insurance companies is not new. It has been repeatedly introduced in the Oregon Legislature and has never been accepted. It must be stressed that there are no studies or documented empirical evidence that suggest that there is a problem in Oregon with systematic or widespread misconduct by insurers, or that policyholders lack a remedy with the Department of Consumer and Business Services or in court to resolve disputes or when misconduct does occur. The lack of documented widespread problems is evidence that the system is working. To overtax a system that is already working with large quantities of new claims and no additional funding creates a danger for taxpayers and policyholders who will be left footing the consequences and the cost. On this point there *is* empirical evidence: five states where similar legislation passed saw increases in insurance premiums. For example, according to independent studies, Florida saw costs for auto liability insurance (which Oregon requires drivers to purchase) increase between 30 percent and 70 percent.

Insurance is already perhaps the most highly regulated business field in the United States. To state or even suggest that insurance is not subject to a very high degree of regulatory and judicial scrutiny is to fly in the face of reality.

What HB 3171 would do.

HB 3171 is not a "consumer protection" bill. Instead, it will weaponize the courts and the Department of Consumer and Business Services and put them in the hands of a small group of insurance specialist trial lawyers who know how to game the system to their own profit. HB 3171 will allow the trial lawyers to use the courts and state government to enhance their own pocketbooks. HB 3171 creates a threat not only of punitive damages over inconsequential or minor issues, but even creates threats of prosecution by the Oregon Attorney General and county

prosecutors, for trial lawyers to use to extort insurer payments that Oregon courts have not endorsed.

Some overall points about HB 3171, in addition to the points stated above:

- As mentioned, the bill weaponizes the UTPA, the Department of Consumer and Business Services, the court system and even the Attorney General and county prosecutors on behalf of trial lawyers to threaten insurers and those affiliated with them, and would overtax the system by creating huge amounts of work to deal with these ballooning claims without providing any new source of funding to handle these burdens. HB 3171 will be used by trial attorneys to try to circumvent established protections for attorney-client privileged documents, claims files, and responses by insurers to investigations of complaints by the Department. Trial lawyers will also use HB 3171 to create new types of litigation, and to pressure insurers to make payments where no payment is owed simply to avoid the threat of litigation and punitive damages.
- **HB 3171 would be very costly for premium payers and taxpayers**. It will create higher costs of doing business for insurers that will necessarily be reflected in higher premiums, and will burden an already taxed regulatory and court system by for example, requiring staffing and budget increases at the Department without providing any funding for these added costs.
- The definition of "person" is so broad and ambiguous that, as noted above, even counsel for the insured or a claimant against the insured could be sued under the new language. In other words, a claim or lawsuit for punitive damages can be filed against anyone based on a perceived wrong opinion or "representation." Oregon law already has statutory and common law remedies against insurance companies, including attorney fees for a prevailing plaintiff.
- HB 3171 treats minor violations or delays in insurance adjusting the same as serious violations and makes them subject to punitive damages. HB 3171 makes all insurance issues that are subject to regulation subject to a lawsuit and punitive damages without regard to whether they have caused any damage to anyone.
- HB 3171's amendments to the UTPA would create confusion because the provisions conflict with the existing regulatory framework and with Oregon insurance coverage common law – which has been thoughtfully developed by the courts over decades. HB 3171 would impose a new framework that would create uncertainty in insurance markets, among insureds and in the courts, merely to benefit a small group of trial lawyers regarding a problem that does not exist – no one has produced systematic evidence to document the supposed problem or how HB 3171 would fix it without causing greater problems and greater expense.

Some additional details about specific sections of HB 3171:

- **Section 1(4):** As said above, the definition of "person" is overbroad, in relation to who may file a complaint, and regarding against whom a complaint or lawsuit may be filed. In relation to those claimed against, "person" could include lawyers, adjusters, other individuals employed by insurance companies, insurance agents, and a multitude of others.

In relation to who may make a claim, HB 3171 allows even those peripherally related to an insurance issue to sue or file a complaint, without being part of the insurance contract. This is a dramatic change from the law in Oregon and most other states. Insurance is already perhaps the most highly regulated business field in the United States, and there have been no studies that show widespread or any abuse of insurance consumers, so there is no need to introduce a revolutionary change in Oregon insurance law.

- **Section 1(6)(a):** "goods or services" in the UTPA currently means personal, family or household goods or services. HB 3171, by expanding this definition to insurance, necessarily creates ambiguity, because the well-developed body of common law by Oregon courts concerning insurance law does not touch on this definition. In addition, this expanded definition greatly enlarges the scope of the UTPA by including all types of insurance including commercial insurance, whereas the scope of the UTPA regarding other business fields remains just household or personal goods and services. This means that a system that was set up to protect one type of claimant (the "little person" who has no other recourse against "big corporations") now can be used as a weapon by large corporate entities and worldwide conglomerates, which will lead to raising premiums and taxes to pay for the claims and the expansion of work for the courts and regulators. The framework in place was designed specifically to exclude insurance (the removed language) – originally it was understood that the UTPA framework was not set up for insurance claims, because insurance already had an entirely separate and well-developed regulatory framework and a long history of strict judicial oversight. The attempt to shoehorn insurance into the UTPA now creates ambiguous and broad claims that will overburden the courts, the Department and the Attorney General's office, which is to be dragooned into the trial lawyer's scheme as part of a panoply of heightened threats to use against insurers. Of course, if such threats lead to higher payouts, that increases the cost of insurance and, while it makes trial lawyers richer, makes insurance less affordable for individuals and small businesses, which feel premium increases or reduced choices in the insurance market most keenly, especially during the time of COVID.
- **Section 1(9)(a):** The definition of unconscionable tactics related to one's ignorance/inability to understand could be said to relate to every insurance matter – the insured's counsel could argue the policyholder never is able to understand the language of the agreement. Does this create a requirement to educate policyholders? What must agents do when selling insurance? What about lawyers — do they have to make sure the policyholder understands every legal argument made before a court? HB 3171 creates many unanswered questions.
- **Section 2(e)/(g):** These sections state that a person who "Represents that . . . goods or services have . . . qualities [or have particular standards]" that they do not have has engaged in an unlawful practice. Applied to insurance, these clauses introduce a tremendous amount of ambiguity and uncertainty into well-settled Oregon insurance law. Is it a violation when an insurance agent purchases insurance for a policyholder and then, after a claim arises, the claim is precluded from coverage because of an exclusion or for some other reason? Was the insurance agent misrepresenting the characteristics of insurance?
- **Section 2(u):** One of the proscribed activities is to "Engage in any other unfair or deceptive conduct in trade or commerce." Again, this section is so incredibly broad that it gives carte blanche to creative and determined trial lawyers and will overtax the courts, the AG, and the Department. Recall that not only insureds but third parties who claim to be affected by

an unlawful practice now may sue for punitive damages. Can someone who views an insurance commercial on TV claim that it is deceptive and bring a lawsuit or seek to have a criminal charge filed?

- **Section 2(bbbb):** This section creates vast new remedies against anyone who allegedly "Violates a provision of ORS 746.230 [unfair insurance claim settlement practices]." This provision will balloon the number of claims and lawsuits by making minor violations of the Unfair Claim Settlement Practices statute subject to lawsuits or prosecution. The Unfair Claim Settlement Practices statute was meant for administrative use by state regulators, not as a template to invite litigation by opportunity-seeking trial lawyers. This change will result in many, many more claims and force an increase in insurance rates to pay for the defense of these claims. This will slow the court system to respond to all of the new suits and will create large amounts of work for the AG/Department without additional funding.
- **Section 2(2):** "A representation . . . may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." This definition is ambiguous. In the insurance context, what does it mean to misrepresent a fact or policy provision by failing to disclose a fact or by making an assertion by conduct? That question would only be answered in a multitude of costly lawsuits.
- **Section 2(4):** Creates a right against insurers by the Attorney General and requires the AG to create rules and collaborate with the Department about prosecutions and rules without providing any additional funding for either the AG or the Department.
- **Section 4/5(1):** Creates additional "equitable" remedies against insurers as well as punitive damages remedies. Does this create estoppel based on minor violations? This goes against the fundamentals of contract damages in Oregon and more than 160 years of court cases and legislative history. Oregon courts have repeatedly said that no coverage by estoppel or waiver exists in Oregon insurance law or Oregon contract law in general.
- **Section 5(2):** This section requires the AG to provide the Department with a copy of any complaint that the AG receives. The ballooning claims will all have to be reported to the AG who must provide them to Department. This will be a large cost but there is no funding for the additional work.
- **Section 5(3):** The UTPA contains an attorney fee provision whereby a court "may" award reasonable attorney fees and costs to a prevailing plaintiff and may award fees and costs to a prevailing defendant if there was no objectively reasonable basis for the plaintiff's claim. This conflicts with and is substantially weaker than the attorney fee statute for insurance matters, ORS 742.061, which states that a prevailing plaintiff "shall" be awarded reasonable fees and costs, and which makes no provision for prevailing defendants to recover anything. Thus, attorney fees related to insurance are already controlled by 742.061, and the proposed amendment of the UTPA would result in confusion and decreased rights for insureds.
- **Section 5(8):** This section expands the right to bring class actions against insurers, based on a body of definitions and subsections of the Act that are completely without a frame of reference in the insurance context and which therefore are ambiguous. This will encourage more class actions, which will be extremely costly and will violate norms of protections for insurance claim files and attorney-client privileged documents, and will invade current protections for not deposing adjusters and other policy makers in insurance companies.
- **Section 8:** This section expands upon the right to seek prosecutions of insurance companies and people connected with insurance companies by the Attorney General and county

prosecutors. The purpose of this section seems to be to allow trial lawyers to circumvent existing protections for discovery.

Oregon already has sufficient common law, statutes, and regulatory protections for insureds. The proposed expansion of the UTPA will merely financially benefit trial lawyers.

HB 3171 is a solution in search of a problem. In 1919, Oregon was one of the first states to enact a law, currently designated as ORS 742.061, that states that insureds shall recover their reasonable attorney fees and costs if the insured sues "upon a policy" and prevails. Note that ORS 742.061 does not say that recovery of attorney fees by a prevailing plaintiff is a possibility, the statute says that the plaintiff "shall" be awarded reasonable attorney fees for prevailing. Likewise, there are sufficient remedies through administrative law through the Department of Consumer and Business Services, and through the courts. The Department's oversight functions were further strengthened in 2013, when the Oregon Legislature passed SB 414, giving the Department the authority to order insurance companies to pay restitution, claims, and any other equitable relief they deem appropriate.

HB 3171 would create a "free for all" in Oregon insurance law. Even as a response to a crisis, it would be a dangerous, impractical measure, but there is no evidence of a widespread problem at all, much less a crisis.