Senate Judiciary Committee

Statement in Opposition to SB 728

March 5, 2019

Mr. Chairman and members of the committee:

My name is John C. Powell. I am an attorney and an associate at John Powell & Associates. Our offices are at 2015 State Street, Salem, Oregon.

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 worker's compensation insurance. We oppose SB 728, which seeks to add insurance to Oregon's Unlawful Trade Practices Act (UTPA). The UTPA is a statute that protects consumers from unfair general business practices by granting the Attorney General jurisdiction over such matters as well as creating a private cause of action. Insurance was explicitly excluded from the UTPA when it was written and should remain so for many reasons.

This testimony will focus on the wide difference between the insurance product and other products consumers would buy at an appliance store, automobile dealership, a retail electronics outlet, an online subscription service, etc. This is really the issue raised by SB 728 and why each form of commerce should be regulated differently. In addition, this testimony will discuss the regulatory framework of the insurance marketplace today, the vast array of remedies available to consumers under current law and finally why SB 728 is unnecessary and unwise public policy.

When a consumer purchases a product in general commerce she is depending on the manufacturer and retailer to be fair. The consumer expects the product to be of reasonable quality and fairly represented by all involved in the sale. Those transactions and the actions of the parties are protected under the UTPA.

On the other hand, 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 & Business Services (DCBS) must first approve the actual wording of the insurance policy (***See Exhibit #1***). 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 their producers/agents are subject to an entire section of Oregon law – over 620 pages of statute known as the Insurance Code (ORS 731 – 752).

Within the Insurance Code, insurers and insurance producers/agents are subject to extensive and specific trade practice laws in ORS 746, including a section entitled, <u>Unfair Claim Settlement Practices</u> (ORS 746.230) (***See Exhibit #2***). 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 not here that SB 728 specifically propose to link the Unfair Claim Settlement Practices with the UTPA thereby creating both 1st and 3rd party "second lawsuits" for any perceived violation (SB 728 does it on Page 6 Line 42 of the bill). 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 SB 728:

> "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.
> **<u>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.</u>** 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 the Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this act."
> (http://www.naic.org/store/free/MDL-900.pdf)

Furthermore, the Insurance Code gives nearly unlimited regulatory authority to the Director of DCBS. ORS 746.240 in entitled, <u>Undefined trade practices injurious to public prohibited</u>, 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 rule.

In addition to the Insurance Code, the OID has vast rulemaking powers. ***Exhibit #3*** is a copy of the table of contents of the DFR's rules, just to give you an idea of how expansive the regulation of insurance is in Oregon. 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. (***See Exhibit #4*** for actions DFR took related to insurance in 2018)

<u>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. ***(See Exhibit #5)***</u>

In addition to the regulation described above, workers' compensation insurance is regulated by a separate division of DCBS, the Workers' Compensation Division. Insurer's 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.

Insurance and the method of regulating it are different from other industries covered by the UTPA. 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 the following actions: ***(See Exhibit #6*** for more details on the actions listed below):

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 judgement

In summary, the business of insurance is distinct and different than the general scope of the other industries that are in effect regulated by the UTPA. Consumers are protected by an entire agency dedicated solely to regulating insurance products, companies and agents. In addition, there are many remedies available to consumers both through DCBS/DFR and the restitution authority granted by SB 414 (2013 Regular Session) as well as through the courts. SB 728 seeks to establish unnecessary additional and costly remedies that are "inherently inconsistent" with the intent and design of Oregon's Insurance regulatory system.

Chair Prozanski and members of the committee, on behalf of insurers, producers/agents and insurance policyholders, we ask you to oppose SB 728.

Sincerely,

John C. Powell