

Enforcement Of The Mental Health Parity And Addiction Equity Act Through Expanded State Attorney General Authority

INTRODUCTION

The Ohio Department of Insurance (ODOI) has primary responsibility to enforce the Mental Health Parity and Addiction Equity Act (MHPAEA) for state-regulated private insurance plans. Pursuant to a mandatory reporting requirement included in the State's 2017 operating budget, ODOI identified the strategies it pursues to enforce MHPAEA. It (1) conducts form review for plan compliance with state and federal laws; (2) helps consumers understand their parity rights and resolve complaints against insurance companies; and (3) tracks consumer complaints and other data to determine if further investigation of carrier practices is needed through market conduct examinations (MCE). Ohio Mental Health Parity Report 2018 at 2 (March 20, 2018). ODOI's MHPAEA enforcement data suggest that a far greater level of consumer education and state oversight and enforcement are needed to ensure that health plans comply with federal law and state insurance mandates for the coverage of mental health and substance use disorder benefits.

- Of the 55 objections identified through form review for each of the 2018 plans, 3 objections (5%) related to mental health parity.
- Of the 2,517 complaints received in 2017 regarding accident and health insurance, 7 complaints pertained to mental health services and, of the 5 within ODOI's jurisdiction, 2 complaints presented MHPAEA claims (.08%).
- No MCEs were conducted to evaluate MHPAEA compliance.

Ohio Mental Health Parity Report at 3- 4.

In other states, such as New York, the State Attorney General has pursued state and federal parity law investigations and enforcement actions to supplement the state's department of insurance compliance efforts. The Attorney General's Health Care Bureau launched its mental health parity initiative after receiving increasing numbers of complaints (100 complaints in 2012) about the gaps in coverage of mental health and substance use disorder benefits. Since 2013, the NY Attorney General has conducted investigations of seven (7) carriers and entered eight (8) settlement agreements with the seven carriers. According to a recent report on its initiative, the settlements put in place "sweeping reforms" of medical management practices, coverage of residential treatment, co-pays for outpatient treatment, and prior authorization requirements for medication assisted treatment for opioid use disorders; resulted in restitution to consumers of over \$2 million for previously denied claims; and plan payments of \$3 million in penalties. New

EQUAL INSURANCE COVERAGE OF SUBSTANCE USE AND MENTAL HEALTH DISORDERS. IT'S THE LAW.

York State Office of the Attorney General, Health Care Bureau, “Mental Health Parity: Enforcement of the New York State office of the Attorney General” (May 2018) at 1-3.

Launching a similar Attorney General initiative in Ohio would require legislative reform to expand the Attorney General’s investigatory authority of health insurance practices. As briefly discussed in the Ohio Landscape Review, the Attorney General’s investigatory and prosecutorial authority in insurance matters is dependent entirely upon an initial investigation by and referral from the Superintendent of Insurance (Superintendent). Under existing Ohio law, the Superintendent has broad authority to investigate insurance code violations under Titles 39 and 17 and unfair and deceptive health insurance acts or practices that relate to health insurance. Under Title 39 Unfair and Deceptive Acts (UDA), OHIO REV. CODE § 3901.20, the Superintendent has primary enforcement authority to conduct hearings and issue orders regarding unfair and deceptive insurance acts and practices and may refer matters to the Attorney General for prosecution only if an order against an insurer has been violated. OHIO REV. CODE § 3901.22. The Attorney General has no independent authority to initiate an investigation of health insurance complaints under the Insurance Code generally or the UDA.

In addition, the Attorney General has no authority under the Ohio Consumer Sales Practices Act (CSPA) – a law for which the Attorney General has primary enforcement authority – to investigate violations of state insurance mandates or MHPAEA. Insurance companies, including health insuring corporations, are explicitly excluded from the CSPA’s definition of “consumer transactions” (OHIO REV. CODE § 1345.01(A)) that are subject to the CSPA. OHIO REV. CODE § 5725.01(C)). This exclusion prevents the Attorney General from investigating or prosecuting unfair and deceptive practices related to health insurance.

Technical Assistance Request

The Ohio Council of Behavioral Health & Family Services Providers has requested technical assistance from the Parity at 10 Campaign to identify amendments to the Ohio Code that would expand the Ohio Attorney General’s authority to enforce MHPAEA and state insurance mandates to cover mental health and substance use disorder benefits in state-regulated private insurance plans. This report has been prepared by the Legal Action Center to:

- Explain the scope of enforcement authority under state statutes that require compliance with insurance benefit mandates and bar unfair and deceptive consumer practices, including those related to insurance practices.
- Recommend amendments to state Code provisions to expand the Attorney General’s authority to investigate and prosecute insurance health practices that constitute violations of MHPAEA or state insurance mandates for the coverage of mental health and substance use disorders.

We recommend amendments to the two state enforcement tools that would:

- Expand the Attorney General’s authority under Title 39 to independently initiate investigations of carrier violations of state mental health and substance use disorder mandates or MHPAEA without referral from or preliminary enforcement actions by the Superintendent of Insurance.
- Amend the Consumer Sales Practices Act to authorize the Attorney General to investigate violations of state insurance mental health and substance use disorder mandates and MHPAEA violations.

Our proposed amendments would accomplish the above goals in the current enforcement framework. To the extent the state adopts comprehensive MHPAEA compliance standards, those provisions could include explicit authority for the Attorney General to enforce those standards (independent of the Title 39 UDA or CSPA, as amended).

INVESTIGATORY AND ENFORCEMENT AUTHORITY TO ADDRESS INSURANCE CODE VIOLATIONS

Insurance Code Enforcement Authority

The Ohio Insurance Code, Title 39, provides expansive authority to the State Superintendent of Insurance to launch investigations of health insurance practices that: (1) are illegal or prohibited under Titles 39 (sickness and accident insurance) and 17 (health insuring corporations); (2) are defined as unfair or deceptive acts; or (3) when the Superintendent “believes it to be in the best interest of the public.” Ohio Rev. Code § 3901.04(B). Such investigations may be based on the “superintendent’s files, upon complaints, or otherwise.” *Id.* The Superintendent may require an entity to file reports, respond to summonses and subpoenas, and produce documents. Ohio Rev. Code § 3901.04(B)(1-2).

To the extent an administrative procedure is not available to resolve the matter, the Superintendent may “request the attorney general to commence an action for a declaratory judgment...with respect to the matter.” Ohio Rev. Code § 3901.04(B)(3). Finally, the Superintendent may refer a matter in which there is evidence of a criminal offense to a county attorney to initiate a criminal prosecution. The county attorney may request that the attorney general assist in the prosecution. Ohio Rev. Code § 3901.04(B)(4). Under this statutory framework, the Attorney General’s authority to conduct health insurance investigations is entirely derivative of the Superintendent’s authority, and the relief that the Attorney General can seek in a civil matter appears to be limited to a declaration of illegality as opposed to monetary penalties.

A separate provision under Title 39, governing unfair and deceptive acts and practices, gives the Superintendent the authority to initiate a hearing process to determine whether an individual’s

complaint of unfair or deceptive insurance practices violates the Code. Ohio Rev. Code § 3901.22(A). The UDA defines “unfair and deceptive insurance acts and practices” broadly. The most relevant provisions that would encompass violations of MHPAEA or statutory benefit coverage for mental health and substance use disorder benefits, include:

- “Making, issuing, circulating...any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby....”
- Making or permitting any unfair discrimination between individuals in the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance... or in the benefits payable thereunder... or in any of the terms or condition of such contract, or in any other manner whatever.”

Ohio Rev. Code § 3901.21(B) and (M).

Upon a finding of a violation, the Superintendent is required to issue a cease and desist order and may impose a range of penalties, including suspension or revocation of the person’s license to engage in the business of insurance, return of payments, including interest on the payments, and reimbursement to the state treasury for the costs of conducting the investigation and hearing. Ohio Rev. Code § 3901.22(D).

The Superintendent may refer the matter to the Attorney General for prosecution if he or she has reasonable cause to believe that an order has been violated. Ohio Rev. Code § 3901.22(E). The Attorney General has the authority to take any appropriate action, including “the commencement of a class action...on behalf of policyholders, subscribers, applicants for policies or contracts, or other insurance consumers for damages caused by or unjust enrichment received as a result of the action.” Ohio Rev. Code § 3901.22(E). As with the general enforcement provisions, the Attorney General’s authority to address unfair or deceptive practices is triggered only when the Superintendent’s administrative remedies fail to fully address the problem.

Consumer Sales Practices Act

The Ohio Consumer Sales Practices Act (CSPA) provides expansive authority to the Attorney General to (1) conduct research and hold public hearings relating to consumer transactions; (Ohio Rev. Code § 1345.05(B)); and (2) conduct investigations of unfair or deceptive acts or practices based on “the attorney general’s own inquiries or as a result of complaints.” Ohio Rev. Code § 1345.06(A). The Attorney General may subpoena witnesses, take testimony, obtain evidence and require the production of relevant materials. Ohio Rev. Code § 1345.06(B). Based on a reasonable cause finding that a supplier has engaged in or is engaging in an unfair or deceptive act or practice, the Attorney General may initiate court proceedings to obtain a declaratory judgment that the supplier’s act violates the CSPA and a temporary or a permanent injunction to enjoin the practice;

relief that will reimburse consumers found to have been harmed; and civil penalties. Ohio Rev. Code § 1345.07.

RECOMMENDATIONS

Expanding the Attorney General’s authority to initiate investigations and prosecute violations of MHPAEA or state insurance mandates for the coverage of mental health and substance use disorder benefits can be accomplished through amendments to Title 39 and/or the CSPA. We recommend that amendments to both statutes be pursued to ensure consistency across enforcement provisions and create a clean legislative history that can be relied upon in any subsequent challenge to the Attorney General’s expanded authority. Courts will look to the legislative history of Title 39 to determine whether the Ohio General Assembly expressed a clear intent to grant the Attorney General authority to investigate insurance practices under the CSPA. See Johnson v. Lincoln Nat’l. Life Ins. Co., 69 Ohio App.3d 249, 255; 590 N.E.2d 761, 765 (Ohio App. 2 Dist. 1990) (in dismissing a claim against a health insurance carrier under the CSPA, the court held that “[i]t is clear the Ohio Legislature meant to regulate the insurance industry in R.C. Title 39 and that the Ohio Consumer Sales Practices Act has no application.”). An explicit amendment to Title 39 will memorialize that legislative intent.

Title 39 Insurance Code

The expansion of the Attorney General’s authority under Title 39 can take several forms. For example, the Attorney General and Superintendent could exercise joint authority to receive and investigate complaints or initiate investigations based on their own inquiries related to mental health and substance use disorder benefits or MHPAEA violations. Alternatively, the Attorney General could be given separate and independent authority to receive consumer complaints or initiate investigations based on his or her own inquiries related to the coverage of behavioral health benefits or MHPAEA violations. To ensure consistency with the Attorney General’s authority in the CSPA, we recommend that a new provision be included in §§ 3901.04 and 3901.22 that would give the Attorney General independent authority to initiate and conduct such investigations based on complaints received or his or her own inquiries. We also recommend the inclusion of a new provision in the list of unfair and deceptive acts and practices that encompasses violations of state mental health and substance use disorder mandates or MHPAEA to articulate the limited scope of the Attorney General’s expanded authority.

Proposed Language

The following amendment would expand the Attorney General’s authority to align with that of the Superintendent of Insurance for matters related to mental health and substance use disorder benefits.

Section 3901.04: Power to Require Reports, Administer Oaths, Summon Witnesses, Request Declaratory Judgment Action, and Initiate Criminal Proceedings.

Add new subsection (C).

WHENEVER IT APPEARS TO THE ATTORNEY GENERAL, FROM THE ATTORNEY GENERAL’S FILES, UPON COMPLAINT OR OTHERWISE, THAT ANY PERSON HAS ENGAGED IN, IS ENGAGING IN, OR IS ABOUT TO ENGAGE IN ANY ACT OR PRACTICE THAT VIOLATES THE BENEFIT COVERAGE REQUIREMENTS FOR MENTAL HEALTH OR SUBSTANCE USE DISORDER BENEFITS UNDER TITLES 39 OR 17 OR THE FEDERAL MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT, THE ATTORNEY GENERAL MAY TAKE ANY ACTION THAT COULD BE EXERCISED BY THE SUPERINTENDENT OF INSURANCE UNDER THIS PROVISION TO PREVENT THE VIOLATION OF LAW.

Section 3901.22: Aggrieved Person’s Rights; Procedures; Penalties.

Add new subsection (J).

NOTWITHSTANDING THE RIGHTS AFFORDED THE SUPERINTENDENT OF INSURANCE, THE ATTORNEY GENERAL MAY TAKE ANY ACTION THAT COULD BE EXERCISED BY THE SUPERINTENDENT OF INSURANCE REGARDING UNFAIR AND DECEPTIVE ACTS AND PRACTICES INVOLVING HEALTH PLAN COVERAGE AND REIMBURSEMENT FOR MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS OR RIGHTS UNDER THE FEDERAL MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT.

Finally, the following amendment would define unfair and deceptive acts and practices to include the failure to provide benefits in compliance with statutory mandates for mental health and substance use disorder benefits or MHPAEA. The amendment has been modelled after existing provisions, such as § 3901.21 (W), to identify the mental health and substance use disorder benefit provisions in Titles 39 and 7 and link violations of those provisions with an unfair and deceptive insurance act.

Section 3901.21 Unfair and Deceptive Acts Defined

Add new subsection (CC).

(CC) FAILING TO COMPLY WITH SECTION 3923.28, 3923.281, 39223.282, 3923.29, 3923.30, OR 1751.01 OF THE REVISED CODE BY ENGAGING IN ANY UNFAIR, DISCRIMINATORY PRACTICE AS DEFINED UNDER THE FEDERAL MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT.

Consumer Sales Practices Act

The CSPA provides that “No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during or after the transaction.” Ohio Rev. Code § 1345.02(A). Three elements are required for a CSPA violation: a “supplier;” a “consumer

transaction;” and an “unfair or deceptive act or practice.” To expand the CSPA to grant the Attorney General authority to enforce provisions of state insurance law and MHPAEA would require:

- Including insurance transactions (or a subset of insurance transactions) in the definition of “consumer transaction” in § 1345.01(A);
- Identifying the scope of the Attorney General’s authority in insurance matters; and
- Defining the “suppliers” of insurance products that are subject to the CSPA.

The definition of an “unfair or deceptive act or practice” under § 1345.02(A) is sufficiently broad to address insurance practices that fraudulently represent the level of coverage for mental health and substance use disorder benefits. While this definition is less specific than the corresponding list of deceptive insurance practices under § 3901.21, we do not believe that an amendment is required to encompass insurance fraud.ⁱ

In defining the scope of the Attorney General’s authority, the amendment could be limited to cover only those matters related to the enforcement of mental health and substance use disorder benefits or, alternatively, extend to other insurance matters.ⁱⁱ To minimize opposition by ODOJ, we recommend that any amendment limit the extension of the Attorney General’s authority to enforcement of state insurance mandates for mental health and substance use disorders, under Titles 17 and 39, and MHPAEA violations. The rationale for this narrow extension of authority is to provide the state’s chief law enforcement officer with the independent authority to pursue all strategies needed to address the state’s substance use disorder and mental health crises and minimize cross-agency administrative hurdles, disputes and delays.

Proposed Language

The following amendments would:

- Create an exception to the exclusion of “insurance company” transactions (which are currently excluded by reference to § 5725.01) to the extent those insurance transactions relate to plan coverage of mental health and substance use disorder benefits; and
- Clarify the persons who are “suppliers” engaged in the consumer transaction involving insurance.

1345.01 Definitions

As used in sections 1345.01 to [1345.13 of the Revised Code](#):

(A) “Consumer transaction” means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. “Consumer

transaction” does not include transactions between persons, defined in [sections 4905.03 and 5725.01 of the Revised Code](#), and their customers, except for transactions involving a loan made pursuant to [sections 1321.35 to 1321.48 of the Revised Code](#) and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions involving a home construction service contract as defined in [section 4722.01 of the Revised Code](#); transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services; **AND TRANSACTIONS BETWEEN AN INSURER, AS DEFINED IN SECTION 3901.32 OF THE REVISED CODE, AND THEIR CUSTOMERS, AS DEFINED IN SECTION 3901.19 OF THE REVISED CODE, FOR MATTERS RELATED TO COVERAGE UNDER A SICKNESS AND ACCIDENT POLICY OR OTHER HEALTH PLAN FOR MENTAL ILLNESS AND MENTAL DISORDERS, OR ALCOHOL AND DRUG USE DISORDERS UNDER TITLES 39 AND 17.**

....

(C) “Supplier” means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, “supplier” does not include an assignee or purchaser of the loan for value, except as otherwise provided in [section 1345.091 of the Revised Code](#). For purposes of this division, in a consumer transaction in connection with a residential mortgage, “seller” means a loan officer, mortgage broker, or nonbank mortgage lender. **FOR PURPOSES OF THIS DIVISION, A CONSUMER TRANSACTION IN CONNECTION WITH A HEALTH INSURANCE PRODUCT, “SELLER” MEANS AN INSURER AS DEFINED IN SECTION 3901.32 OF THE REVISED CODE.**

CONCLUSION

The State Attorney General can enhance ODOI’s enforcement of MHPAEA by collecting consumer complaints, initiating investigations, and prosecuting violations of state mental health and substance use disorder mandates and federal law standards. Amendments to Title 39 are required to provide the Attorney General with independent authority to pursue such actions, and amendments to the Consumer Sales Practices Act will reinforce the expansion of the Attorney General’s authority to address this limited scope of health insurance matters.

¹ For example, a “deceptive representation” includes: “that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or **benefits** that it does not have;” that the subject of a consumer transaction is of a particular **standard**, quality, grade, style, prescription, or model, if it is not;” and “that a consumer transaction involves...a warranty, a disclaimer of warranties or **other rights**, remedies, or **obligations** if the representation is false.” 1345.02(B)(1), (2) and (10). (Emphasis added). These provisions would encompass policies that represent a certain level of insurance coverage or compliance with MHPAEA but employ practices that deny members those benefits.

ⁱⁱ Corresponding revisions would have to be made to the Ohio Administrative Code, OHIO ADMIN. CODE §109:4-1-02, to conform the Attorney General’s authority under the consumer protection sections to the office’s expanded statutory authority.