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## A BILL FOR AN ACT

RELATING TO CAPTIVE INSURANCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Chapter 431, Hawaii Revised Statutes, is  
2 amended by adding a new article to be appropriately designated  
3 and to read as follows:

4   **"ARTICLE**

5                                 **MEDICAL MALPRACTICE CAPTIVE INSURANCE COMPANY**

6           §431:     -101   **Purpose.**   The medical malpractice captive  
7 insurance company is established to provide medical malpractice  
8 insurance coverage to self-employed medical doctors licensed and  
9 practicing in the state at the highest level of service with the  
10 lowest possible cost, consistent with reasonable and applicable  
11 actuarial standards and the sound financial integrity of the  
12 company.

13          §431:     -102   **Definitions.**  As used in this article:

14          "Administrator" means the president and chief executive  
15 officer of the medical malpractice captive insurance company.

16          "Board" means the board of directors of the medical  
17 malpractice captive insurance company.



1 "Company" means the medical malpractice captive insurance  
2 company established by this article.

3 "Council" means the medical malpractice captive insurance  
4 company oversight council.

5 "Investment manager" means any fiduciary that has been  
6 designated by the board to manage, acquire, or dispose of the  
7 company's assets, a bank as defined by law, or an insurance  
8 company qualified to perform services under the laws of more  
9 than one state.

10 "Medical doctor" means a physician licensed under chapter  
11 453 or 460.

12 "Qualified actuary" means a member of the American Academy  
13 of Actuaries who is either a fellow of the Casualty Actuarial  
14 Society or an Associate of the Casualty Actuarial Society who  
15 has five or more years of experience.

16 **§431: -103 Medical malpractice captive insurance**  
17 **company, established.** (a) The medical malpractice captive  
18 insurance company is established as an independent corporation  
19 to provide medical malpractice insurance and related services to  
20 self-employed medical doctors. The company may be reorganized  
21 as a nonprofit corporation under chapter 414D.



1           (b) The company shall be organized and operated as a  
2 domestic mutual insurance company. The company shall comply  
3 with, unless specifically excluded, all requirements of the  
4 insurance code regarding a domestic mutual insurance company.  
5 The company shall not be an agency of the State. The company or  
6 its liabilities shall not be deemed to constitute debts or  
7 liabilities of the State or pledges of the full faith and credit  
8 of the State. The company shall write medical malpractice  
9 insurance policies covering self-employed medical doctors to the  
10 same extent as any other private insurer. The company shall not  
11 write other lines of insurance, reinsurance, or excess  
12 insurance.

13           (c) The company shall also be designated and licensed as a  
14 class 4 company under article 19. The company shall comply  
15 with, unless specifically excluded, all requirements of the  
16 insurance code regarding a class 4 company. No person shall be  
17 allowed to become a participant of the class 4 company unless  
18 the person is a self-employed medical doctor licensed and  
19 practicing medicine in this state. The company may insure the  
20 risks of its participants through participant contracts that  
21 segregate each participant's or related participants'



1 liabilities through one or more protected cells pursuant to  
2 section 431:19-106.3.

3 (d) The company's assets shall consist of real and  
4 personal property and shall include all premiums and other  
5 moneys paid to the company, all property, and other income  
6 acquired, earned, or otherwise gained by the use of premiums and  
7 other moneys paid to the company by deposits, investments,  
8 exchanges, and other transactions. The company's assets shall  
9 be the sole property of the company and shall be used  
10 exclusively by the company for the operation and obligations of  
11 the company.

12 (e) Notwithstanding any other law to the contrary, the  
13 company shall be excluded from the surplus requirements of  
14 domestic mutual insurers from January 1, 2009, through December  
15 31, 2019.

16 (f) The company is exempt from participation, and shall  
17 not join, contribute financially to, nor be entitled to the  
18 protection of, any plan, association, guaranty, insolvency fund,  
19 or education and training fund authorized or required by this  
20 chapter. Notwithstanding the foregoing exemptions, beginning  
21 January 1, 2009, the company shall participate in the property  
22 and liability insurance guaranty association, pursuant to





1 sections 431:16-101 to 431:16-117; provided that the company  
2 shall meet the surplus requirements applicable to all other  
3 domestic insurers under chapter 431 effective January 1, 2009.

4 (g) On or after January 1, 2009, the company shall provide  
5 medical malpractice insurance coverage to self-employed medical  
6 doctors otherwise entitled to coverage but not able to or not  
7 electing to purchase coverage in the voluntary insurance market,  
8 and not authorized, either individually or as a part of a group,  
9 to self-insure. An authorized self-insured is eligible for  
10 coverage upon termination of self-insurance.

11 **§431: -104 Board of directors, established.** (a) The  
12 board of directors of the company shall be responsible for the  
13 organization, management, policies, and activities of the  
14 company. The board shall consist of nine voting members and one  
15 nonvoting member. The voting members shall consist of the  
16 following:

17 (1) Eight directors who shall be self-employed medical  
18 doctors licensed and practicing in the state; and

19 (2) One director who shall be a public, at-large member  
20 elected by the board of directors.

21 The administrator shall be the nonvoting member of the board.



1 (b) The initial eight directors shall be appointed by the  
2 governor within sixty days of July 1, 2008, and shall serve for  
3 terms of one year each.

4 The public, at-large member initially elected by the board  
5 shall serve for a term of one year.

6 The initial board of directors shall determine the  
7 staggering and length of future directors' terms; provided that  
8 no term shall exceed three years. Upon the expiration of the  
9 terms of the initial directors, the company's policyholders  
10 shall elect the directors. Each director shall serve for terms  
11 as specified by the board unless sooner removed for cause  
12 pursuant to rules adopted by the board. Each director shall  
13 hold office until a successor is elected as provided in this  
14 section. No person shall serve more than two full terms as  
15 director. Any other law to the contrary notwithstanding, the  
16 election and composition of the board of directors as provided  
17 in this section shall be deemed adequate to qualify the company  
18 as a mutual insurer under chapter 431.

19 (c) A vacancy on the board shall be filled by appointment  
20 of the governor or insurance commissioner in the case of  
21 appointed directors, or by election by the company policyholders  
22 or the board of directors in the case of positions formerly



1 occupied by a director elected by the company policyholders or  
2 by the board of directors, respectively. The person appointed  
3 to fill a vacancy shall serve for the remainder of the term of  
4 the person's predecessor.

5 (d) Within one year after appointment, each director shall  
6 be a member or a policyholder of the company and shall continue  
7 in that status during the director's term of office. Any  
8 director who fails to maintain medical malpractice insurance  
9 from the company shall be disqualified from serving on the  
10 board.

11 (e) Each director shall receive necessary traveling and  
12 board expenses incurred in the performance of duty as director  
13 and a fee commensurate with the duties expected of actual  
14 attendance at board meetings.

15 (f) No person shall be a director who has a direct and  
16 substantial interest in a competing insurer as a stockholder  
17 (excluding the holding of less than one per cent of the  
18 outstanding shares in a publicly traded insurer).

19 **§431: -105 Powers; generally.** Except as otherwise  
20 limited by this chapter, the company may:

21 (1) Sue, be sued, complain, and defend, in its corporate  
22 name;



- 1           (2) Have a corporate seal, which may be altered at  
2            pleasure, and use the seal by causing it, or a  
3            facsimile thereof, to be impressed, affixed, or in any  
4            other manner reproduced;
- 5           (3) Purchase, take, receive, lease, take by gift, devise,  
6            or bequest, or otherwise acquire, own, hold, improve,  
7            use, and otherwise deal in and with real or personal  
8            property, or any interest therein, wherever situated;
- 9           (4) Sell, convey, mortgage, pledge, lease, exchange,  
10           transfer, and otherwise dispose of all and any part of  
11           its property and assets;
- 12           (5) Make contracts and incur liabilities, borrow money at  
13           rates of interest as the board may determine, issue  
14           guaranty capital shares and surplus notes, require  
15           capital contributions, issue its notes, debenture  
16           bonds, and other obligations, secure any of its  
17           obligations by mortgage or pledge of all or any  
18           portion of its property or income, and secure  
19           financing by any board-approved mechanism;
- 20           (6) Allocate fiduciary responsibilities among the  
21           directors and designate other persons to carry out  
22           fiduciary responsibilities;



1 (7) Collect, receive, hold, and disburse all money payable  
2 to or by the company;

3 (8) Deposit the company's money in banks or depositories  
4 selected by the board and withdraw the company's money  
5 from those banks or depositories; provided that the  
6 withdrawal shall be made or authorized only upon the  
7 signatures of at least two persons approved by the  
8 board;

9 (9) Pay money from the company to effectuate the company's  
10 purpose and administration, including amounts for  
11 costs incurred to establish the company; and

12 (10) Exercise all powers necessary or convenient to effect  
13 the purposes of the company.

14 **§431: -106 Duties and responsibilities.** (a) All  
15 corporate powers shall be exercised by or under the authority of  
16 the board, unless otherwise provided in this chapter or in the  
17 articles of incorporation.

18 (b) The board shall discharge its duties:

19 (1) In accordance with the company's purpose;

20 (2) With the care, skill, prudence, and diligence under  
21 the circumstances that a prudent director, acting in a



- 1           like capacity and familiar with those matters would  
2           use in conducting a similar enterprise and purpose;
- 3           (3) By diversifying the company's investments to minimize  
4           the risk of losses, unless it is prudent not to do so;
- 5           (4) In accordance with governing legal documents;
- 6           (5) By having an annual audit of the company by an  
7           independent certified public accountant;
- 8           (6) By securing a fidelity bond for the administrator and  
9           in its discretion for other agents dealing with the  
10          company's assets at the company's expense;
- 11          (7) By purchasing liability insurance for errors and  
12          omissions for the board, each director, and any other  
13          fiduciary employed or contracted by the company to  
14          cover liability or losses caused by the act or  
15          omission of a fiduciary;
- 16          (8) By maintaining proper books of accounts and records of  
17          the company's administration;
- 18          (9) By carrying out the reporting and disclosure  
19          requirements required by law;
- 20          (10) By appointing a qualified actuary to develop and  
21          recommend a responsible schedule of premium rates with  
22          consideration of the company's investment income or



- 1           refunds, or both, and to provide actuarial  
2           certification of the company's loss reserves; and  
3       (11) By cooperating with and assisting the council in its  
4           duties and responsibilities.
- 5       (c) Except as otherwise provided by law, the board may:
- 6       (1) Transact workers' compensation insurance policies  
7           required or authorized by state law to the same extent  
8           as any other insurer;
- 9       (2) Provide the terms and conditions of an insurance  
10           policy;
- 11       (3) Provide that any written instrument be executed for  
12           the company by the administrator or the  
13           administrator's agent;
- 14       (4) Enter into agreements to reinsure all or part of the  
15           company's exposure to loss and to limit the risk to  
16           the company; and
- 17       (5) Employ persons to administer the company, including  
18           legal counsel, accountants, insurance consultants,  
19           administrators, qualified actuaries, investment  
20           managers, adjustors, other experts, and clerical  
21           employees and pay compensation and expenses in  
22           connection therewith.



1           **§431:   -107 Administrator; appointment; duties.** (a) The  
2 board shall hire an administrator, who shall serve at the  
3 pleasure of the board. The administrator shall be the president  
4 of the company and the chief executive officer, who shall be  
5 responsible for the day-to-day operations and management of the  
6 company.

7           (b) The administrator shall have proven, successful  
8 experience as an executive at the general management level in  
9 the insurance business. The administrator shall manage and  
10 conduct the business of the company according to the board's  
11 direction and policies. The administrator shall receive  
12 compensation authorized by the board.

13           (c) Before entering the duties of office, the  
14 administrator shall give a fidelity bond in an amount and with  
15 sureties approved by the board. The premium for the bond shall  
16 be paid by the company.

17           (d) The administrator shall be an ex officio, nonvoting  
18 member of the board.

19           **§431:   -108 Financial management.** (a) The board shall  
20 select a custodial trustee to collect, receive, hold, or  
21 disburse moneys payable to or by the company.





1 (b) The board shall invest the company's principal and  
2 income without distinction between principal and income and keep  
3 the company's assets invested in real or personal property or  
4 other securities. The board may retain cash temporarily  
5 awaiting investment or to meet contemplated payments without  
6 liability for interest thereon.

7 (c) The board shall manage the company's assets, except to  
8 the extent that the authority to manage the company's assets is  
9 delegated to other qualified investment managers. The board may  
10 appoint investment managers to manage, acquire, or dispose of  
11 any of the company's assets. An investment manager may be  
12 designated as an "investment agent". The investment manager  
13 shall acknowledge in writing that the investment manager is a  
14 fiduciary under the company.

15 (d) The board may:

16 (1) Sell the company's securities. No purchaser of the  
17 company's securities is bound to see to the  
18 application of the purchase money or inquire as to the  
19 validity of such sale;

20 (2) Vote on behalf of any stocks, bonds, or securities of  
21 any corporation or issuer held in the company or  
22 request any action to such corporation or issuer. The



1 board may give general or special proxies or powers of  
2 attorney with or without powers of substitution;

3 (3) Participate in reorganizations, recapitalization,  
4 consolidations, mergers, and similar transactions for  
5 stocks, bonds, or other securities of any corporation  
6 that are held by the company, and accept and retain  
7 any property received thereunder for the company;

8 (4) Exercise any subscription rights and conversion  
9 privileges for the company's stocks or securities;

10 (5) Compromise, compound, and settle any debt or  
11 obligation due to or from the company; reduce the  
12 amount of principal and interest, damages, and costs  
13 of collection in settling such debts;

14 (6) Cause securities held by it to be registered in its  
15 own name or in the name of a nominee without  
16 indicating that the securities are held in a fiduciary  
17 capacity and to hold any securities in bearer form.

18 The company's records, however, shall show that such  
19 investments are part of the company;

20 (7) Delegate its investment powers to investment managers  
21 of the company to expedite the purchase and sale of  
22 securities. The purchase or sale of securities by



1           these managers shall be in the name selected by the  
2           board. The authority of these managers to purchase or  
3           sell securities for the company shall be evidenced by  
4           written authority executed by the administrator. The  
5           board shall require these managers to keep it  
6           currently informed as to the nature and amount of the  
7           investments made for the company by them. The board  
8           may enter into appropriate agreements with these  
9           managers setting forth their investment powers and  
10          limitations. The board may terminate the services of  
11          these managers. These managers shall be subject to  
12          the board's instructions;

13          (8) Pay taxes or assessments that are assessed against the  
14          company;

15          (9) Require any applicant or policyholder to furnish the  
16          board with information necessary for the company's  
17          administration; and

18          (10) Delegate its authority to the administrator or any  
19          authorized representative to maintain any legal  
20          proceedings necessary to protect the company or the  
21          directors or to secure payment due to the company. In  
22          connection with this delegation, the board or the



1 administrator or their representative may compromise,  
2 settle, or release claims on behalf of or against the  
3 company or the board.

4 **§431: -109 Oversight council.** (a) There is established  
5 the medical malpractice captive insurance company oversight  
6 council which shall meet at least once annually. For  
7 administrative purposes only, the council shall be assigned to  
8 the department of commerce and consumer affairs. The council  
9 shall oversee the activities of the company to ensure that the  
10 company fulfills its purpose as set forth in this article.

11 (b) The council shall consist of five members who shall  
12 include:

- 13 (1) A member of the senate appointed by the president of  
14 the senate;
- 15 (2) A member of the house of representatives appointed by  
16 the speaker of the house of representatives;
- 17 (3) The director of health;
- 18 (4) The director of commerce and consumer affairs; and
- 19 (5) An at-large member who is an owner, officer, or  
20 employee of the company policyholder appointed by the  
21 governor;



1 provided that if any designee under paragraphs (1) to (4) does  
2 not meet the test in subsection (c), the president of the  
3 senate, speaker of the house of representatives, or governor, as  
4 applicable, shall designate an appropriate representative.

5 Section 26-34 shall not apply to appointments under this  
6 section.

7 (c) No person shall serve on the council, who within the  
8 second degree of consanguinity or affinity, has a direct and  
9 substantial interest in an insurer that competes with the  
10 company, including but not limited to:

- 11 (1) A stockholder of a competing company (excluding a  
12 holder of less than one per cent of the outstanding  
13 shares in a publicly traded company);
- 14 (2) An employee of a competing company;
- 15 (3) An attorney who represents a competing company; or
- 16 (4) A party who contracts with a competing company  
17 (excluding an independent contractor or business owner  
18 who does less than twenty-five per cent of its total  
19 annual volume of business per year with competing  
20 insurers).



1 (d) Members of the council shall serve without  
2 compensation, but shall be reimbursed for reasonable expenses  
3 necessary for the performance of their duties.

4 (e) The administrator shall serve as liaison officer to  
5 the council. Not later than sixty days after July 20, 2010, and  
6 every June 15 thereafter, the board shall provide to the council  
7 any and all data and information the council may require,  
8 including but not limited to:

9 (1) The company's statutorily-required annual financial  
10 statement;

11 (2) Copies of any reports issued by the insurance division  
12 in connection with the triennial examination of the  
13 company; and

14 (3) Actuarial certification of loss reserves.

15 (f) After receipt of the data and information required  
16 pursuant to subsection (e), the council shall review the  
17 activities of the company and determine whether the company is  
18 fulfilling its purpose as set forth in this article. The  
19 council shall promptly, but in no event later than October 15,  
20 2010, and every October 15 thereafter, submit a report to the  
21 governor with a copy to the board of directors, stating whether  
22 the company is fulfilling its purpose as set forth in this



1 article. If the council determines that there are any  
2 deficiencies in the company's fulfillment of its purposes as set  
3 forth in this article, it shall include in its report a detailed  
4 description of any deficiencies. Within a period established by  
5 the council, but in no event later than six months after  
6 delivery of the council's report in accordance with this  
7 section, the company shall respond in writing to any  
8 deficiencies identified in the council's report. The medical  
9 malpractice captive insurance company shall provide staff  
10 support to the council.

11 (g) If the governor determines that corrective action is  
12 appropriate after reviewing the council's report and the  
13 company's response, the governor shall inform the legislature,  
14 and the legislature shall consider what action is needed.

15 **§431: -110 Premium rates, determination.** (a) The board  
16 shall establish the premium rates to be charged for insurance  
17 sold by the company. The company shall comply with the  
18 requirements set forth in articles 14 and 19 of this chapter.  
19 Premium rates shall be set at levels sufficient, when invested,  
20 to carry all claims to maturity, to meet the reasonable expenses  
21 for administering the company, and to maintain a reasonable  
22 surplus.



1 (b) The board shall hire a qualified actuary to assist  
2 with the development of sound premium rates.

3 **§431: -111 Reserves, investment.** The board may invest  
4 or reinvest any surplus or reserves within the limitations  
5 established for insurance companies under chapter 431.

6 **§431: -112 Financial statements and other reports.** (a)  
7 The company shall submit to the commissioner an annual statement  
8 of financial condition audited by an independent certified  
9 accountant. The audit report shall contain an actuarial opinion  
10 prepared by a qualified actuary on the company's claims reserves  
11 and expenses. The financial statement shall be on a form  
12 prescribed by the commissioner and shall include actuarially  
13 appropriate reserves for:

- 14 (1) Known claims and associated expenses;  
15 (2) Claims incurred but not reported and associated  
16 expenses;  
17 (3) Unearned premiums; and  
18 (4) Bad debts, reserves for which shall be shown as  
19 liabilities.

20 (b) The company shall compile and maintain statistical and  
21 actuarial data relating to the determination of premium rate  
22 levels, the incidence of medical malpractice claims, the cost of





1 medical malpractice claims, and other data relating to medical  
2 malpractice. The compiled information shall be submitted  
3 annually to the commissioner.

4       **§431: -113 Annual accounting; dividends.** (a) The  
5 company shall conduct an annual accounting of its incurred loss  
6 experience and expenses.

7       (b) The board may declare and apportion reasonable  
8 dividends to policyholders, determined by an actuarial opinion  
9 prepared by a qualified actuary after evaluating the impact of  
10 the dividends on the solvency of the company. The dividends may  
11 be paid or credited to policyholders according to  
12 classifications of policies established by the board.

13       (c) No dividends shall be:

14       (1) Paid or credited in a manner that unfairly  
15 discriminates between policies within the same  
16 classification;

17       (2) Made contingent upon payment of any renewal premium on  
18 any policy; or

19       (3) Paid or credited in the first three years of operation  
20 of the company.

21       **§431: -114 Audits.** The administrator, or designated  
22 representative, shall have reasonable access to any



1 policyholder's payroll and employment records during regular  
2 working hours to carry out audits of payroll reported, the  
3 number of employees on the payroll, and other information  
4 necessary for the administration of this article.

5       **§431: -115 Denial, cancellation, and termination.** The  
6 company may deny coverage or renewal of an existing policy or  
7 may terminate an existing policy of a policyholder or applicant  
8 for:

- 9       (1) Nonpayment of an undisputed premium;
- 10       (2) Refusal to permit on-site workplace safety  
11           examinations;
- 12       (3) Failure to comply with workplace safety and health  
13           programs required by the company; or
- 14       (4) Failure to accurately disclose information concerning  
15           the applicant's or policyholder's ownership, change of  
16           ownership, operations, or payroll, including the  
17           allocation of payroll among state and federal  
18           compensation programs, and other information necessary  
19           for the board to determine premium rates.

20       **§431: -116 Wilful misrepresentation and fraud.** (a) Any  
21 person who wilfully makes a false statement or representation  
22 for the purpose of directly obtaining any compensation or



1 payment or for the purpose of avoiding any compensation or  
2 payment under this article shall be subject to the penalties in  
3 article 13.

4 (b) The company shall develop and implement a program to  
5 identify and investigate fraudulent insurance acts.

6 **§431: -117 Discontinuation of residual market plan.** (a)  
7 The residual market plan, as authorized by section 431:14-116.6,  
8 is discontinued effective December 31, 2008, or the date the  
9 company writes its first policy, whichever date is later, except  
10 for dissolution of any obligations for claims arising out of any  
11 policies written pursuant to the plan with inception dates of or  
12 before December 31, 2008, or the date the company writes its  
13 first policy, whichever date is later. It is the intent of this  
14 section to provide for an orderly transfer of policies from the  
15 residual market plan as authorized by section 431:14-116.6 to  
16 the company.

17 (b) The residual market plan shall continue its operation  
18 for all policies with inception dates of or before December 31,  
19 2008, or the date the company writes its first policy, whichever  
20 date is later. All policies written thereunder shall be for  
21 one-year terms, and shall not be terminated prior to expiration  
22 except for cause. In no case shall policies with inception



1 dates of January 1, 2009, or the date the company writes its  
2 first policy, whichever date is later, be provided under the  
3 residual market plan authorized by section 431:14-116.6.

4 **§431: -118 Discontinuation of assigned risks. (a)**

5 Assigned risk coverage, as authorized by section 431:14-116, is  
6 discontinued effective December 31, 2008, or the date the  
7 company writes its first policy, whichever date is later, except  
8 for dissolution of any obligations for claims arising out of any  
9 policies written pursuant to section 431:14-116 with inception  
10 dates on or before December 31, 2008, or the date the company  
11 writes its first policy, whichever date is later. It is the  
12 intent of this section to provide for an orderly transfer of  
13 assigned risks as authorized by section 431:14-116 to the  
14 company.

15 (b) Assigned risk coverage, as authorized under section  
16 431:14-116, shall continue operation for all policies with  
17 inception dates of or before December 31, 2008, or the date the  
18 company writes its first policy, whichever date is later. All  
19 policies written thereunder shall be for one-year terms, and  
20 shall not be terminated prior to expiration except for cause.  
21 In no case shall policies with inception dates of January 1,  
22 2009, or the date the company writes its first policy, whichever



1 date is later, be provided for assigned risks authorized by  
2 section 431:14-116."

3 SECTION 2. There is appropriated out of the general  
4 revenues of the State of Hawaii the sum of \$ or so  
5 much thereof as may be necessary for fiscal year 2008-2009 for  
6 the insurance commissioner to oversee the establishment of the  
7 medical malpractice captive insurance company.

8 The sum appropriated shall be expended by the department of  
9 commerce and consumer affairs for the purposes of this Act.

10 SECTION 3. This Act shall take effect on January 1, 2050.



**Report Title:**

Medical Malpractice Captive Insurance

**Description:**

Forms a captive insurance company to provide medical malpractice insurance to self-employed medical doctors. (HB2151 HD1)

