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## A BILL FOR AN ACT

RELATING TO INSURANCE.

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

1           SECTION 1. The legislature finds that the insurance  
2 commissioner has recently interpreted Hawaii law to prohibit the  
3 combining of different types of health and sickness insurance  
4 benefits within the same policy, on the grounds that such acts  
5 are a violation of anti-tying statutes described in section  
6 431:13-103(a)(4)(B), Hawaii Revised Statutes. The legislature,  
7 recognizing that access to affordable insurance is one of the  
8 State's most pressing concerns, further finds that small  
9 insurers lack coercive power and that a prohibition on tying  
10 arrangements by small insurers hurts consumers by preventing  
11 small insurers from offering different types of benefits in a  
12 single unified policy. Accordingly, this Act will provide the  
13 insurance division in the department of commerce and consumer  
14 affairs with the authority and duty to allow broader  
15 combinations of insurance benefits in Hawaii.

16           The legislature further finds that comparable federal  
17 antitrust laws regarding anti-tying apply only to companies that  
18 command a market share of at least thirty per cent. In the



1 seminal decision of *Jefferson Parish Hospital v. Hyde*, 466 U.S.  
2 2 (1984), the United States Supreme Court held that under the  
3 Sherman Act, Jefferson Hospital had no market power with an  
4 assumed market share of thirty per cent, and therefore its tying  
5 arrangement was not unlawful. See *Hovenkamp*, Federal Antitrust  
6 Policy (3d edition, 2005) 402; *Hack v. President and Fellows of*  
7 *Yale College*, 237 F.3d 81 (2d Cir. 2000); *Marts v. Xerox*, 77  
8 F.3d 1109, 1113 n.6 (8th Cir. 1996) (eighteen per cent too  
9 small); *Shafi v. St. Francis Hosp.*, 937 F.2d 603 (4th Cir. 1991)  
10 (eleven per cent insufficient); *Grappone, Inc. v. Subarus of New*  
11 *England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (recognizing a  
12 general rule of at least thirty per cent). Hence, federal  
13 antitrust law recognizes that small insurers are essential in  
14 providing consumers with coverage options, and that they operate  
15 under more significant market constraints than larger insurers.

16 The purpose of this Act is to bring Hawaii into compliance  
17 with the foregoing well-settled federal standards in order to  
18 encourage the longstanding practice by smaller insurers to  
19 "bundle" different classes of insurance, such as health, dental,  
20 and vision together, and to continue the historical acceptance  
21 of this practice by small insurers who lack coercive power in  
22 the marketplace. The legislature recognizes that under certain



1 circumstances, the industry practice of bundling provides  
2 broader health care coverage in single unified policies that  
3 will ultimately result in lower overall premiums, greater  
4 competition within the Hawaii insurance marketplace, and greater  
5 flexibility, coverage, and pricing options for consumers.

6 SECTION 2. Section 431:13-103, Hawaii Revised Statutes, is  
7 amended by amending subsection (a) to read as follows:

8 "(a) The following are defined as unfair methods of  
9 competition and unfair or deceptive acts or practices in the  
10 business of insurance:

11 (1) Misrepresentations and false advertising of insurance  
12 policies. Making, issuing, circulating, or causing to  
13 be made, issued, or circulated, any estimate,  
14 illustration, circular, statement, sales presentation,  
15 omission, or comparison which:

16 (A) Misrepresents the benefits, advantages,  
17 conditions, or terms of any insurance policy;

18 (B) Misrepresents the dividends or share of the  
19 surplus to be received on any insurance policy;

20 (C) Makes any false or misleading statement as to the  
21 dividends or share of surplus previously paid on  
22 any insurance policy;



- 1 (D) Is misleading or is a misrepresentation as to the  
2 financial condition of any insurer, or as to the  
3 legal reserve system upon which any life insurer  
4 operates;
- 5 (E) Uses any name or title of any insurance policy or  
6 class of insurance policies misrepresenting the  
7 true nature thereof;
- 8 (F) Is a misrepresentation for the purpose of  
9 inducing or tending to induce the lapse,  
10 forfeiture, exchange, conversion, or surrender of  
11 any insurance policy;
- 12 (G) Is a misrepresentation for the purpose of  
13 effecting a pledge or assignment of or effecting  
14 a loan against any insurance policy;
- 15 (H) Misrepresents any insurance policy as being  
16 shares of stock;
- 17 (I) Publishes or advertises the assets of any insurer  
18 without publishing or advertising with equal  
19 conspicuousness the liabilities of the insurer,  
20 both as shown by its last annual statement; or



- 1 (J) Publishes or advertises the capital of any  
2 insurer without stating specifically the amount  
3 of paid-in and subscribed capital;
- 4 (2) False information and advertising generally. Making,  
5 publishing, disseminating, circulating, or placing  
6 before the public, or causing, directly or indirectly,  
7 to be made, published, disseminated, circulated, or  
8 placed before the public, in a newspaper, magazine, or  
9 other publication, or in the form of a notice,  
10 circular, pamphlet, letter, or poster, or over any  
11 radio or television station, or in any other way, an  
12 advertisement, announcement, or statement containing  
13 any assertion, representation, or statement with  
14 respect to the business of insurance or with respect  
15 to any person in the conduct of the person's insurance  
16 business, which is untrue, deceptive, or misleading;
- 17 (3) Defamation. Making, publishing, disseminating, or  
18 circulating, directly or indirectly, or aiding,  
19 abetting, or encouraging the making, publishing,  
20 disseminating, or circulating of any oral or written  
21 statement or any pamphlet, circular, article, or  
22 literature which is false, or maliciously critical of



1 or derogatory to the financial condition of an  
2 insurer, and which is calculated to injure any person  
3 engaged in the business of insurance;

4 (4) Boycott, coercion, and intimidation.

5 (A) Entering into any agreement to commit, or by any  
6 action committing, any act of boycott, coercion,  
7 or intimidation resulting in or tending to result  
8 in unreasonable restraint of, or monopoly in, the  
9 business of insurance; or

10 (B) Entering into any agreement on the condition,  
11 agreement, or understanding that a policy will  
12 not be issued or renewed unless the prospective  
13 insured contracts for another class or an  
14 additional policy of the same class of insurance  
15 with the same insurer; provided that this clause  
16 shall not apply to any insurer with a market  
17 share of less than ten per cent;

18 (5) False financial statements.

19 (A) Knowingly filing with any supervisory or other  
20 public official, or knowingly making, publishing,  
21 disseminating, circulating, or delivering to any  
22 person, or placing before the public, or



1            knowingly causing, directly or indirectly, to be  
2            made, published, disseminated, circulated,  
3            delivered to any person, or placed before the  
4            public, any false statement of a material fact as  
5            to the financial condition of an insurer; or

6            (B) Knowingly making any false entry of a material  
7            fact in any book, report, or statement of any  
8            insurer with intent to deceive any agent or  
9            examiner lawfully appointed to examine into its  
10           condition or into any of its affairs, or any  
11           public official to whom the insurer is required  
12           by law to report, or who has authority by law to  
13           examine into its condition or into any of its  
14           affairs, or, with like intent, knowingly omitting  
15           to make a true entry of any material fact  
16           pertaining to the business of the insurer in any  
17           book, report, or statement of the insurer;

18           (6) Stock operations and advisory board contracts.  
19           Issuing or delivering or permitting agents, officers,  
20           or employees to issue or deliver, agency company stock  
21           or other capital stock, or benefit certificates or  
22           shares in any common-law corporation, or securities or



1 any special or advisory board contracts or other  
2 contracts of any kind promising returns and profits as  
3 an inducement to insurance;

4 (7) Unfair discrimination.

5 (A) Making or permitting any unfair discrimination  
6 between individuals of the same class and equal  
7 expectation of life in the rates charged for any  
8 policy of life insurance or annuity contract or  
9 in the dividends or other benefits payable  
10 thereon, or in any other of the terms and  
11 conditions of the contract;

12 (B) Making or permitting any unfair discrimination in  
13 favor of particular individuals or persons, or  
14 between insureds or subjects of insurance having  
15 substantially like insuring, risk, and exposure  
16 factors, or expense elements, in the terms or  
17 conditions of any insurance contract, or in the  
18 rate or amount of premium charge therefor, or in  
19 the benefits payable or in any other rights or  
20 privilege accruing thereunder;

21 (C) Making or permitting any unfair discrimination  
22 between individuals or risks of the same class





1 and of essentially the same hazards by refusing  
2 to issue, refusing to renew, canceling, or  
3 limiting the amount of insurance coverage on a  
4 property or casualty risk because of the  
5 geographic location of the risk, unless:

6 (i) The refusal, cancellation, or limitation is  
7 for a business purpose which is not a mere  
8 pretext for unfair discrimination; or

9 (ii) The refusal, cancellation, or limitation is  
10 required by law or regulatory mandate;

11 (D) Making or permitting any unfair discrimination  
12 between individuals or risks of the same class  
13 and of essentially the same hazards by refusing  
14 to issue, refusing to renew, canceling, or  
15 limiting the amount of insurance coverage on a  
16 residential property risk, or the personal  
17 property contained therein, because of the age of  
18 the residential property, unless:

19 (i) The refusal, cancellation, or limitation is  
20 for a business purpose which is not a mere  
21 pretext for unfair discrimination; or



1           (ii) The refusal, cancellation, or limitation is  
2                       required by law or regulatory mandate;  
3       (E) Refusing to insure, refusing to continue to  
4           insure, or limiting the amount of coverage  
5           available to an individual because of the sex or  
6           marital status of the individual; however,  
7           nothing in this subsection shall prohibit an  
8           insurer from taking marital status into account  
9           for the purpose of defining persons eligible for  
10          dependent benefits;  
11       (F) Terminating or modifying coverage, or refusing to  
12          issue or renew any property or casualty policy or  
13          contract of insurance solely because the  
14          applicant or insured or any employee of either is  
15          mentally or physically impaired; provided that  
16          this subparagraph shall not apply to accident and  
17          health or sickness insurance sold by a casualty  
18          insurer; provided further that this subparagraph  
19          shall not be interpreted to modify any other  
20          provision of law relating to the termination,  
21          modification, issuance, or renewal of any  
22          insurance policy or contract;



1 (G) Refusing to insure, refusing to continue to  
2 insure, or limiting the amount of coverage  
3 available to an individual based solely upon the  
4 individual's having taken a human  
5 immunodeficiency virus (HIV) test prior to  
6 applying for insurance; or  
7 (H) Refusing to insure, refusing to continue to  
8 insure, or limiting the amount of coverage  
9 available to an individual because the individual  
10 refuses to consent to the release of information  
11 which is confidential as provided in section  
12 325-101; provided that nothing in this  
13 subparagraph shall prohibit an insurer from  
14 obtaining and using the results of a test  
15 satisfying the requirements of the commissioner,  
16 which was taken with the consent of an applicant  
17 for insurance; provided further that any  
18 applicant for insurance who is tested for HIV  
19 infection shall be afforded the opportunity to  
20 obtain the test results, within a reasonable time  
21 after being tested, and that the confidentiality



1 of the test results shall be maintained as  
2 provided by section 325-101;

3 (8) Rebates. Except as otherwise expressly provided by  
4 law:

5 (A) Knowingly permitting or offering to make or  
6 making any contract of insurance, or agreement as  
7 to the contract other than as plainly expressed  
8 in the contract, or paying or allowing, or giving  
9 or offering to pay, allow, or give, directly or  
10 indirectly, as inducement to the insurance, any  
11 rebate of premiums payable on the contract, or  
12 any special favor or advantage in the dividends  
13 or other benefits, or any valuable consideration  
14 or inducement not specified in the contract; or

15 (B) Giving, selling, or purchasing, or offering to  
16 give, sell, or purchase as inducement to the  
17 insurance or in connection therewith, any stocks,  
18 bonds, or other securities of any insurance  
19 company or other corporation, association, or  
20 partnership, or any dividends or profits accrued  
21 thereon, or anything of value not specified in  
22 the contract;



- 1           (9) Nothing in paragraph (7) or (8) shall be construed as  
2 including within the definition of discrimination or  
3 rebates any of the following practices:
- 4           (A) In the case of any life insurance policy or  
5 annuity contract, paying bonuses to policyholders  
6 or otherwise abating their premiums in whole or  
7 in part out of surplus accumulated from  
8 nonparticipating insurance; provided that any  
9 bonus or abatement of premiums shall be fair and  
10 equitable to policyholders and in the best  
11 interests of the insurer and its policyholders;
- 12           (B) In the case of life insurance policies issued on  
13 the industrial debit plan, making allowance to  
14 policyholders who have continuously for a  
15 specified period made premium payments directly  
16 to an office of the insurer in an amount which  
17 fairly represents the saving in collection  
18 expense;
- 19           (C) Readjustment of the rate of premium for a group  
20 insurance policy based on the loss or expense  
21 experience thereunder, at the end of the first or  
22 any subsequent policy year of insurance



1                   thereunder, which may be made retroactive only  
2                   for the policy year; and

3                   (D) In the case of any contract of insurance, the  
4                   distribution of savings, earnings, or surplus  
5                   equitably among a class of policyholders, all in  
6                   accordance with this article;

7                   (10) Refusing to provide or limiting coverage available to  
8                   an individual because the individual may have a third-  
9                   party claim for recovery of damages; provided that:

10                  (A) Where damages are recovered by judgment or  
11                  settlement of a third-party claim, reimbursement  
12                  of past benefits paid shall be allowed pursuant  
13                  to section 663-10;

14                  (B) This paragraph shall not apply to entities  
15                  licensed under chapter 386 or 431:10C; and

16                  (C) For entities licensed under chapter 432 or 432D:

17                   (i) It shall not be a violation of this section  
18                   to refuse to provide or limit coverage  
19                   available to an individual because the  
20                   entity determines that the individual  
21                   reasonably appears to have coverage  
22                   available under chapter 386 or 431:10C; and



1           (ii) Payment of claims to an individual who may  
2           have a third-party claim for recovery of  
3           damages may be conditioned upon the  
4           individual first signing and submitting to  
5           the entity documents to secure the lien and  
6           reimbursement rights of the entity and  
7           providing information reasonably related to  
8           the entity's investigation of its liability  
9           for coverage.

10           Any individual who knows or reasonably should  
11           know that the individual may have a third-party  
12           claim for recovery of damages and who fails to  
13           provide timely notice of the potential claim to  
14           the entity, shall be deemed to have waived the  
15           prohibition of this paragraph against refusal or  
16           limitation of coverage. "Third-party claim" for  
17           purposes of this paragraph means any tort claim  
18           for monetary recovery or damages that the  
19           individual has against any person, entity, or  
20           insurer, other than the entity licensed under  
21           chapter 432 or 432D;



- 1 (11) Unfair claim settlement practices. Committing or  
2 performing with such frequency as to indicate a  
3 general business practice any of the following:
- 4 (A) Misrepresenting pertinent facts or insurance  
5 policy provisions relating to coverages at issue;
  - 6 (B) With respect to claims arising under its  
7 policies, failing to respond with reasonable  
8 promptness, in no case more than fifteen working  
9 days, to communications received from:
    - 10 (i) The insurer's policyholder;
    - 11 (ii) Any other persons, including the  
12 commissioner; or
    - 13 (iii) The insurer of a person involved in an  
14 incident in which the insurer's policyholder  
15 is also involved.
- 16 The response shall be more than an acknowledgment  
17 that such person's communication has been  
18 received, and shall adequately address the  
19 concerns stated in the communication;
- 20 (C) Failing to adopt and implement reasonable  
21 standards for the prompt investigation of claims  
22 arising under insurance policies;





- 1 (D) Refusing to pay claims without conducting a
- 2 reasonable investigation based upon all available
- 3 information;
- 4 (E) Failing to affirm or deny coverage of claims
- 5 within a reasonable time after proof of loss
- 6 statements have been completed;
- 7 (F) Failing to offer payment within thirty calendar
- 8 days of affirmation of liability, if the amount
- 9 of the claim has been determined and is not in
- 10 dispute;
- 11 (G) Failing to provide the insured, or when
- 12 applicable the insured's beneficiary, with a
- 13 reasonable written explanation for any delay, on
- 14 every claim remaining unresolved for thirty
- 15 calendar days from the date it was reported;
- 16 (H) Not attempting in good faith to effectuate
- 17 prompt, fair, and equitable settlements of claims
- 18 in which liability has become reasonably clear;
- 19 (I) Compelling insureds to institute litigation to
- 20 recover amounts due under an insurance policy by
- 21 offering substantially less than the amounts



1 ultimately recovered in actions brought by the  
2 insureds;

3 (J) Attempting to settle a claim for less than the  
4 amount to which a reasonable person would have  
5 believed the person was entitled by reference to  
6 written or printed advertising material  
7 accompanying or made part of an application;

8 (K) Attempting to settle claims on the basis of an  
9 application which was altered without notice,  
10 knowledge, or consent of the insured;

11 (L) Making claims payments to insureds or  
12 beneficiaries not accompanied by a statement  
13 setting forth the coverage under which the  
14 payments are being made;

15 (M) Making known to insureds or claimants a policy of  
16 appealing from arbitration awards in favor of  
17 insureds or claimants for the purpose of  
18 compelling them to accept settlements or  
19 compromises less than the amount awarded in  
20 arbitration;

21 (N) Delaying the investigation or payment of claims  
22 by requiring an insured, claimant, or the



1           physician of either to submit a preliminary claim  
2           report and then requiring the subsequent  
3           submission of formal proof of loss forms, both of  
4           which submissions contain substantially the same  
5           information;

6           (O) Failing to promptly settle claims, where  
7           liability has become reasonably clear, under one  
8           portion of the insurance policy coverage to  
9           influence settlements under other portions of the  
10          insurance policy coverage;

11          (P) Failing to promptly provide a reasonable  
12          explanation of the basis in the insurance policy  
13          in relation to the facts or applicable law for  
14          denial of a claim or for the offer of a  
15          compromise settlement; and

16          (Q) Indicating to the insured on any payment draft,  
17          check, or in any accompanying letter that the  
18          payment is "final" or is "a release" of any claim  
19          if additional benefits relating to the claim are  
20          probable under coverages afforded by the policy;  
21          unless the policy limit has been paid or there is



1                   a bona fide dispute over either the coverage or  
2                   the amount payable under the policy;

3       (12) Failure to maintain complaint handling procedures.  
4           Failure of any insurer to maintain a complete record  
5           of all the complaints which it has received since the  
6           date of its last examination under section 431:2-302.  
7           This record shall indicate the total number of  
8           complaints, their classification by line of insurance,  
9           the nature of each complaint, the disposition of these  
10          complaints, and the time it took to process each  
11          complaint. For purposes of this section, "complaint"  
12          means any written communication primarily expressing a  
13          grievance;

14       (13) Misrepresentation in insurance applications. Making  
15          false or fraudulent statements or representations on  
16          or relative to an application for an insurance policy,  
17          for the purpose of obtaining a fee, commission, money,  
18          or other benefit from any insurer, producer, or  
19          individual; and

20       (14) Failure to obtain information. Failure of any  
21          insurance producer, or an insurer where no producer is  
22          involved, to comply with section 431:10D-623(a), (b),





**Report Title:**

Insurance; Unfair Methods of Competition

**Description:**

Clarifies that it is not an unfair method of competition or an unfair or deceptive act or practice for an insurer with a less than 10% market share to refuse to issue or renew a policy with a prospective insured unless the prospective insured contracts for another class or an additional policy of the same class of insurance with the same insurer.

