
A BILL FOR AN ACT

RELATING TO HEALTH INSURANCE.

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

1 SECTION 1. Hawaii has a shortage of physicians, and
2 patients are unable to obtain the medical care that they need.
3 This crisis is most acute on our neighbor islands, which are
4 more rural and have a smaller physician workforce. However,
5 symptoms of the crisis are beginning to emerge on Oahu. The
6 Queen's Trauma Center on Oahu has an alarming shortage of
7 doctors willing to volunteer for emergency and trauma call. For
8 at least two years, Queen's Trauma Center has had only two
9 orthopedic surgeons on call. Queen's recently added a third
10 orthopedic surgeon, who will take one day of call per week. In
11 2007, public forums sponsored by the Hawaii Medical Association
12 in Hilo, Kahului, Kona, and Lihue attracted large audiences of
13 patients eager to express their concerns about the physician
14 shortage and frustrations in trying to find a physician to care
15 for them. Neighbor island hospitals have large gaps in their
16 on-call coverage. As a result, patients who need emergency
17 surgery have been held in neighbor island hospitals for long
18 hours and sometimes days because no local surgeon is available.



1 Transfers of neighbor island patients to Hawaii's only certified
2 trauma center, located at Queen's Medical Center in Honolulu,
3 are frequently delayed due to the lack of patient beds or lack
4 of available surgeons.

5 Immediate action is necessary to reverse this trend.
6 Hawaii's high malpractice insurance premiums, coupled with its
7 high cost of living and low reimbursement rates have made it
8 difficult to effectively recruit and retain physicians. A 2004
9 survey by the Hawaii Chapter of the American College of
10 Obstetricians and Gynecologists found that 42 per cent of the
11 Hawaii obstetrician/gynecologists surveyed plan to stop
12 providing pregnancy care for women, largely because of
13 malpractice issues. Over the past ten years, Hawaii has lost 20
14 orthopedic surgeons, a decrease from 68 to 48. Medical students
15 at the John A. Burns School of Medicine have testified before
16 the legislature that the lack of liability reform has caused
17 them to avoid specialties that pay high medical malpractice
18 premium rates and may cause them to start their practice in
19 another state.

20 Hawaii's medical malpractice insurance premiums are
21 unstable and have significantly increased in recent years.
22 Unlimited and unpredictable jury awards have led to unlimited



1 and unpredictable risk for liability insurers. Because
2 insurance premiums are set by assessing risk, premiums in states
3 without effective reforms have skyrocketed. In 2004, Hawaii had
4 the third-highest average payment per malpractice claim in the
5 U.S. On average, \$393,589 was paid per claim in Hawaii compared
6 to \$132,696 in California, which has had medical liability
7 reform since 1975. The American College of Emergency Physicians
8 gave Hawaii a D minus for its medical liability environment in
9 its January 2006 report, "The National Report Card on the State
10 of Emergency Medicine, Evaluating the Environment of Emergency
11 Care Systems State by State." It is no longer profitable to
12 offer medical malpractice insurance in Hawaii, where there are
13 no longer any for-profit insurers. Medical Insurance Exchange
14 of California (MIEC), The Doctors Company, and Hawaii Physicians
15 Indemnity Plan (HAPI) are the remaining malpractice insurers in
16 Hawaii. All are not-for-profit organizations owned and operated
17 by physicians. In Hawaii, MIEC annual premiums increased an
18 average of 90 per cent between 2002 and 2006 for specialists who
19 provide high-risk but life-saving treatment, due to the cost of
20 defending malpractice cases filed in Hawaii. MIEC insures
21 1,110, the majority of Hawaii physicians. Specialists such as
22 orthopedic surgeons, neurosurgeons, general surgeons,



1 obstetricians, and anesthesiologists have been hit hardest by
2 steep increases in malpractice insurance premiums. The fear of
3 being sued has caused physicians to stop performing high-risk
4 procedures and volunteering for on-call emergency and trauma
5 care duty.

6 An improved medical liability environment would help to
7 recruit and retain Hawaii physicians. The legislature has the
8 authority to adopt reforms that would bring malpractice lawsuits
9 and insurance premiums under control. Other states have adopted
10 legislation that balances the need for patient access to care
11 and preserves the patient's right to sue. The Texas model has
12 been deemed successful and is an excellent prototype of what
13 Hawaii should strive to do to fix the access-to-care crisis. In
14 2003, the Texas Legislature passed sweeping liability reforms to
15 combat health care lawsuit abuse, reverse skyrocketing
16 professional liability insurance premiums, and ensure access to
17 high-quality care. The centerpiece of those reforms was a
18 \$750,000 stacked cap on non-economic damages assessed against
19 physicians and health care facilities in a liability judgment.
20 There is no cap on economic damages. Texas voters then approved
21 Proposition 12, a constitutional amendment, which ratified the
22 legislature's authority to impose such caps. As a result of the



1 reforms, claims and lawsuits in most Texas counties have been
2 cut in half. Texas licensed a record 3,324 new doctors in 2007,
3 808 more than in 2006, including a net gain of 186
4 obstetricians, 156 orthopedic surgeons, and 26 neurosurgeons.
5 Texas has improved its national standing from 48th to 42nd in
6 the American Medical Association's measurement of patient-care
7 doctors per capita. Critical specialties have increased in
8 underserved areas such as Rio Grande Valley, which gained 189
9 physicians.

10 All major physician liability carriers in Texas have cut
11 their rates since the passage of the reforms, most by double-
12 digits. Texas physicians have seen their liability rates cut
13 24.3 per cent on average. Two-thirds of Texas doctors have seen
14 their rates slashed a quarter or more. Seventeen rate cuts have
15 occurred in Texas since the passage of the 2003 landmark
16 reforms.

17 The purpose of this Act is to address the growing shortage
18 of physicians due to high medical malpractice insurance premiums
19 by:

20 (1) Requiring insurers, after receiving a claim for the
21 payment of benefits, to make direct payment to the
22 healthcare provider that provided the services; and



1 (2) Limiting the amount of noneconomic damages in medical
2 tort actions.

3 SECTION 2. Chapter 237, Hawaii Revised Statutes, is
4 amended by adding a new section to be appropriately designated
5 and to read as follows:

6 "§237- Exemption of insurer payments for healthcare
7 services. There shall be exempted from and excluded from the
8 measure of the taxes imposed by this chapter all insurer
9 payments made to any healthcare provider for the provision of
10 healthcare services pursuant to sections 431:10A-A, 432:1-A, and
11 432D-A."

12 SECTION 3. Chapter 431, Hawaii Revised Statutes, is
13 amended by adding two new sections to article 10A to be
14 appropriately designated and to read as follows:

15 "§431:10A-A Direct payment for healthcare services. (a)
16 An insurer, after receiving a claim for payment of benefits,
17 shall make the payment directly to the healthcare provider that
18 provided the services, regardless of the healthcare provider's
19 participatory status with the insurer's plan; provided that this
20 subsection shall not require payment for services that are not
21 covered under the plan.



1 (b) If the insurer makes payment to the insured, the
2 insurer shall remain liable for payment to the healthcare
3 provider. This subsection shall not prohibit the insurer from
4 recovering any amount mistakenly paid to the insured.

5 (c) The provisions of this section shall not apply to any
6 entity or situation when their application to the entity or
7 situation would be preempted under the Employee Retirement
8 Income Security Act of 1974, 29 United States Code Section 1001,
9 et seq.

10 (d) As used in this section, "healthcare provider" means a
11 "provider of services", as defined in 42 United States Code
12 Section 1395x(u), a provider of "medical and other health
13 services", as defined in 42 United States Code Section 1395x(s),
14 and any other person or organization who furnishes, bills, or is
15 paid for healthcare in the normal course of business.

16 **§431:10A-B Medical malpractice insurance premiums; patient**
17 **surcharge.** No insurer shall prohibit any healthcare provider as
18 defined in section 431:10A-A(d) from passing on the cost of
19 medical malpractice insurance premiums that exceed \$15,000
20 annually in the form of a patient surcharge that may not exceed
21 \$10 per office visit and \$100 per surgical procedure."



1 SECTION 4. Chapter 432, Hawaii Revised Statutes, is amended
2 by adding two new sections to article 1 to be appropriately
3 designated and to read as follows:

4 "§432:1-A Direct payment for healthcare services. (a) A
5 mutual benefit society, after receiving a claim for benefits
6 under this chapter, shall make payment directly to the
7 healthcare provider that provided the services, regardless of
8 the healthcare provider's participatory status with the
9 society's healthcare plan; provided that this subsection shall
10 not require payment for services that are not covered under the
11 plan.

12 (b) If the society makes payment to the member, the
13 society shall remain liable for payment to the healthcare
14 provider. This subsection shall not prohibit the society from
15 recovering any amount mistakenly paid to the member.

16 (c) The provisions of this section shall not apply to any
17 entity or situation when their application to the entity or
18 situation would be preempted under the Employee Retirement
19 Income Security Act of 1974, 29 United States Code Section 1001,
20 et seq.

21 (d) As used in this section, "healthcare provider" means a
22 "provider of services", as defined in 42 United States Code



1 Section 1395x(u), a provider of "medical and other health
2 services," as defined in 42 United States Code Section 1395x(s),
3 and any other person or organization who furnishes, bills, or is
4 paid for healthcare in the normal course of business.

5 **§432:1-B Medical malpractice insurance premiums; patient**
6 **surcharge.** No mutual benefit society shall prohibit any
7 healthcare provider as defined in section 432:1-A(d) from
8 passing on the cost of medical malpractice insurance premiums
9 that exceed \$15,000 annually in the form of a patient surcharge
10 that may not exceed \$10 per office visit and \$100 per surgical
11 procedure."

12 SECTION 5. Chapter 432D, Hawaii Revised Statutes, is
13 amended by adding two new sections to be appropriately
14 designated and to read as follows:

15 **"§432D-A Direct payment for healthcare services.** (a) A
16 health maintenance organization, after receiving a claim for
17 benefits under this chapter, shall make payment directly to the
18 healthcare provider that provided the services, regardless of
19 the healthcare provider's participatory status with the health
20 maintenance organization healthcare plan; provided that this
21 subsection shall not require payment for services that are not
22 covered under the plan.



1 (b) If the health maintenance organization makes payment to
2 the enrollee, the health maintenance organization shall remain
3 liable for payment to the healthcare provider. This subsection
4 shall not prohibit the health maintenance organization from
5 recovering any amount mistakenly paid to the enrollee.

6 (c) The provisions of this section shall not apply to any
7 entity or situation when their application to the entity or
8 situation would be preempted under The Employee Retirement
9 Income Security Act of 1974, 29 United States Code Sections
10 1001, et seq.

11 (d) As used in this section, "healthcare provider" means a
12 "provider of services," as defined in Title 42 United States
13 Code Section 1395x(u), a provider of "medical and other health
14 services", as defined in Title 42 United States Code Section
15 1395x(s), and any other person or organization who furnishes,
16 bills, or is paid for healthcare in the normal course of
17 business.

18 **§432D-B Medical malpractice insurance premiums; patient**
19 **surcharge.** No health maintenance organization shall prohibit
20 any healthcare provider as defined in section 432D-A(d) from
21 passing on the cost of medical malpractice insurance premiums
22 that exceed \$15,000 annually in the form of a patient surcharge



1 that may not exceed \$10 per office visit and \$100 per surgical
2 procedure."

3 SECTION 6. Chapter 671, Hawaii Revised Statutes, is
4 amended by adding five new sections to be appropriately
5 designated and to read as follows:

6 **"§671- Limitation on noneconomic damages.**

7 Notwithstanding section 663-8.7, noneconomic damages as defined
8 in section 663-8.5 shall be limited in medical tort actions to a
9 maximum award of:

10 (1) \$ per health care provider other than
11 institutions;

12 (2) \$ per health care institution, on a per
13 case/occurrence basis; and

14 (3) \$ per each unrelated health care institution
15 on a per case/occurrence basis.

16 **§671- Assessing percentage of negligence.** Upon request
17 of any nonsettling healthcare provider against whom a plaintiff
18 alleges a medical tort causing injury, the trier of fact shall
19 consider, in assessing any percentage of negligence or other
20 fault, the negligence or other fault of all alleged parties,
21 including the negligence or other fault of any person or entity
22 who has entered into a settlement with the plaintiff for the



1 claimed damages, even when the settlement has been determined to
2 have been made in good faith, pursuant to section 663-15.5.

3 **§671- Economic damages.** (a) A trier of fact may render
4 a verdict for the plaintiff in a medical tort action that
5 includes economic damages.

6 (b) For the purposes of this section, "economic damages"
7 includes but are not limited to:

8 (1) Past and future medical expenses;

9 (2) Loss of past and future earnings;

10 (3) Loss of use of property;

11 (4) Cost of repair or replacement;

12 (5) Cost of obtaining domestic services;

13 (6) Loss of employment; and

14 (7) Loss of business and employment opportunities.

15 **§671- Proportionate allocation of economic damages.** The
16 amount of economic damages allocated to a healthcare provider in
17 a medical tort action shall be based upon the healthcare
18 provider's proportionate percentage of negligence or other
19 fault.

20 **§671- Noneconomic damages.** (a) If the trier of fact
21 renders a verdict for the plaintiff in a medical tort action,
22 the court shall enter judgment of liability against each



1 defendant healthcare provider in accordance with the percentage
2 of negligence or other fault for compensatory damages that is
3 attributed to the healthcare provider by the trier of fact.

4 (b) Judgment shall not be entered against any healthcare
5 provider who has not been named a party or has been released,
6 dismissed, or otherwise discharged as a party pursuant to
7 section 663-15.5."

8 SECTION 7. Section 663-11, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "**§663-11 Joint tortfeasors defined.** For the purpose of
11 this part, the term "joint tortfeasors" means two or more
12 persons jointly or severally liable in tort for the same injury
13 to person or property, whether or not judgment has been
14 recovered against all or some of them~~[-]~~, except as provided for
15 healthcare providers in chapter 671."

16 SECTION 8. Section 671-1, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "**§671-1 Definitions.** As used in this chapter:

19 [~~4~~] "Health care provider" or "healthcare provider"
20 means a physician or surgeon licensed under chapter 453, a
21 physician and surgeon licensed under chapter 460, a podiatrist
22 licensed under chapter 463E, a health care facility as defined



1 in section 323D-2, and the employees and legal representatives
2 of any of them. Health care provider shall not mean any nursing
3 institution or nursing service conducted by and for those who
4 rely upon treatment by spiritual means through prayer alone, or
5 employees of such institution or service.

6 [(2)] "Medical tort" means [~~professional negligence, the~~
7 ~~rendering of professional service without informed consent, or~~
8 ~~an error or omission in professional practice, by a health care~~
9 ~~provider, which proximately causes death, injury, or other~~
10 ~~damage to a patient.] a negligent act or omission to act by a
11 healthcare provider in the rendering of professional services,
12 or the rendering of professional service by a healthcare
13 provider without informed consent, which act or omission or
14 rendering of service without informed consent is the proximate
15 cause of a personal injury or wrongful death; provided that the
16 services are within the scope of services for which the provider
17 is licensed and which are not within any restriction imposed by
18 the licensing agency or licensed hospital."~~

19 SECTION 9. This Act does not affect rights and duties that
20 matured, penalties that were incurred, and proceedings that were
21 begun, before its effective date.



1 SECTION 10. In codifying the new sections added by
2 sections 3, 4, and 5 of this Act, the revisor of statutes shall
3 substitute appropriate section numbers for the letters used in
4 designating the new sections in this Act.

5 SECTION 11. Statutory material to be repealed is bracketed
6 and stricken. New statutory material is underscored.

7 SECTION 12. This Act shall take effect on July 1, 2008.



Report Title:

Medical Tort Actions; Non-economic Damages

Description:

Limits the amount of noneconomic damages in medical tort actions. Requires insurers to make direct payments to healthcare providers making claims for the payment of benefits.
(HB2291 HD2)

