
A BILL FOR AN ACT

RELATING TO INSURANCE.

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

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

16 The legislature finds that comparable federal antitrust
17 laws regarding anti-tying only apply to companies that occupy 30



1 per cent or more of the market. In the seminal decision of
2 *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2 (1984), the United
3 States Supreme Court held that under the Sherman Act, Jefferson
4 Hospital had no market power with an assumed market share of 30
5 per cent, and therefore its tying arrangement was not unlawful.
6 See *Hovenkamp*, *Federal Antitrust Policy* (3d edition, 2005) 402;
7 *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d
8 Cir. 2000); *Marts v. Xerox*, 77 F.3d 1109, 1113 n.6 (8th Cir.
9 1996) (18 per cent too small); *Shafi v. St. Francis Hosp.*, 937
10 F.2d 603 (4th Cir. 1991) (11 per cent insufficient); and
11 *Grappone, Inc., v. Subarus of New England, Inc.*, 858 F.2d 792,
12 797 (1st Cir. 1988) (recognizing a general rule of at least 30
13 per cent). Hence, federal antitrust law reflects the
14 overarching policy and recognition that small insurers are
15 essential in providing consumers with coverage options and that
16 they operate under more significant market constraints than
17 larger insurers.

18 The purpose of this Act is to adopt the foregoing well-
19 settled federal standards and thereby validate and encourage the
20 long-standing practice of smaller accident and health or
21 sickness insurers, who lack coercive power in the marketplace,
22 of "bundling" different classes of insurance, such as health,



1 dental, and vision together. Under these circumstances,
2 bundling provides broader health care coverage in single unified
3 policies, ultimately resulting in lower overall premiums,
4 fostering greater competition within the Hawaii insurance
5 marketplace, and providing consumers with greater flexibility,
6 coverage, and pricing options.

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

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

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

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

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



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



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



1 statement or any pamphlet, circular, article, or
2 literature which is false, or maliciously critical of
3 or derogatory to the financial condition of an
4 insurer, and which is calculated to injure any person
5 engaged in the business of insurance;

6 (4) Boycott, coercion, and intimidation.

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

12 (B) Entering into any agreement on the condition,
13 agreement, or understanding that a policy will
14 not be issued or renewed unless the prospective
15 insured contracts for another class or an
16 additional policy of the same class of insurance
17 with the same insurer; provided that this
18 subparagraph shall not apply to any insurer
19 subject to chapter 432 with less than five per
20 cent of the health insurance market share,
21 offering contracts for dental, vision, drug, and
22 life insurance as a condition, agreement, or



1 understanding to a health insurance policy
2 pursuant to chapter 432;
3 (5) False financial statements.
4 (A) Knowingly filing with any supervisory or other
5 public official, or knowingly making, publishing,
6 disseminating, circulating, or delivering to any
7 person, or placing before the public, or
8 knowingly causing, directly or indirectly, to be
9 made, published, disseminated, circulated,
10 delivered to any person, or placed before the
11 public, any false statement of a material fact as
12 to the financial condition of an insurer; or
13 (B) Knowingly making any false entry of a material
14 fact in any book, report, or statement of any
15 insurer with intent to deceive any agent or
16 examiner lawfully appointed to examine into its
17 condition or into any of its affairs, or any
18 public official to whom the insurer is required
19 by law to report, or who has authority by law to
20 examine into its condition or into any of its
21 affairs, or, with like intent, knowingly omitting
22 to make a true entry of any material fact

- 1 pertaining to the business of the insurer in any
2 book, report, or statement of the insurer;
- 3 (6) Stock operations and advisory board contracts.
4 Issuing or delivering or permitting agents, officers,
5 or employees to issue or deliver, agency company stock
6 or other capital stock, or benefit certificates or
7 shares in any common-law corporation, or securities or
8 any special or advisory board contracts or other
9 contracts of any kind promising returns and profits as
10 an inducement to insurance;
- 11 (7) Unfair discrimination.
12 (A) Making or permitting any unfair discrimination
13 between individuals of the same class and equal
14 expectation of life in the rates charged for any
15 policy of life insurance or annuity contract or
16 in the dividends or other benefits payable
17 thereon, or in any other of the terms and
18 conditions of the contract;
- 19 (B) Making or permitting any unfair discrimination in
20 favor of particular individuals or persons, or
21 between insureds or subjects of insurance having
22 substantially like insuring, risk, and exposure



1 factors, or expense elements, in the terms or
2 conditions of any insurance contract, or in the
3 rate or amount of premium charge therefor, or in
4 the benefits payable or in any other rights or
5 privilege accruing thereunder;

6 (C) Making or permitting any unfair discrimination
7 between individuals or risks of the same class
8 and of essentially the same hazards by refusing
9 to issue, refusing to renew, canceling, or
10 limiting the amount of insurance coverage on a
11 property or casualty risk because of the
12 geographic location of the risk, unless:

13 (i) The refusal, cancellation, or limitation is
14 for a business purpose which is not a mere
15 pretext for unfair discrimination; or

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

18 (D) Making or permitting any unfair discrimination
19 between individuals or risks of the same class
20 and of essentially the same hazards by refusing
21 to issue, refusing to renew, canceling, or
22 limiting the amount of insurance coverage on a



1 residential property risk, or the personal
2 property contained therein, because of the age of
3 the residential property, unless:
4 (i) The refusal, cancellation, or limitation is
5 for a business purpose which is not a mere
6 pretext for unfair discrimination; or
7 (ii) The refusal, cancellation, or limitation is
8 required by law or regulatory mandate;
9 (E) Refusing to insure, refusing to continue to
10 insure, or limiting the amount of coverage
11 available to an individual because of the sex or
12 marital status of the individual; however,
13 nothing in this subsection shall prohibit an
14 insurer from taking marital status into account
15 for the purpose of defining persons eligible for
16 dependent benefits;
17 (F) Terminating or modifying coverage, or refusing to
18 issue or renew any property or casualty policy or
19 contract of insurance solely because the
20 applicant or insured or any employee of either is
21 mentally or physically impaired; provided that
22 this subparagraph shall not apply to accident and



1 health or sickness insurance sold by a casualty
2 insurer; provided further that this subparagraph
3 shall not be interpreted to modify any other
4 provision of law relating to the termination,
5 modification, issuance, or renewal of any
6 insurance policy or contract;

7 (G) Refusing to insure, refusing to continue to
8 insure, or limiting the amount of coverage
9 available to an individual based solely upon the
10 individual's having taken a human
11 immunodeficiency virus (HIV) test prior to
12 applying for insurance; or

13 (H) Refusing to insure, refusing to continue to
14 insure, or limiting the amount of coverage
15 available to an individual because the individual
16 refuses to consent to the release of information
17 which is confidential as provided in section
18 325-101; provided that nothing in this
19 subparagraph shall prohibit an insurer from
20 obtaining and using the results of a test
21 satisfying the requirements of the commissioner,
22 which was taken with the consent of an applicant



1 for insurance; provided further that any
2 applicant for insurance who is tested for HIV
3 infection shall be afforded the opportunity to
4 obtain the test results, within a reasonable time
5 after being tested, and that the confidentiality
6 of the test results shall be maintained as
7 provided by section 325-101;

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

- 10 (A) Knowingly permitting or offering to make or
11 making any contract of insurance, or agreement as
12 to the contract other than as plainly expressed
13 in the contract, or paying or allowing, or giving
14 or offering to pay, allow, or give, directly or
15 indirectly, as inducement to the insurance, any
16 rebate of premiums payable on the contract, or
17 any special favor or advantage in the dividends
18 or other benefits, or any valuable consideration
19 or inducement not specified in the contract; or
20 (B) Giving, selling, or purchasing, or offering to
21 give, sell, or purchase as inducement to the
22 insurance or in connection therewith, any stocks,



1 bonds, or other securities of any insurance
2 company or other corporation, association, or
3 partnership, or any dividends or profits accrued
4 thereon, or anything of value not specified in
5 the contract;

6 (9) Nothing in paragraph (7) or (8) shall be construed as
7 including within the definition of discrimination or
8 rebates any of the following practices:

9 (A) In the case of any life insurance policy or
10 annuity contract, paying bonuses to policyholders
11 or otherwise abating their premiums in whole or
12 in part out of surplus accumulated from
13 nonparticipating insurance; provided that any
14 bonus or abatement of premiums shall be fair and
15 equitable to policyholders and in the best
16 interests of the insurer and its policyholders;

17 (B) In the case of life insurance policies issued on
18 the industrial debit plan, making allowance to
19 policyholders who have continuously for a
20 specified period made premium payments directly
21 to an office of the insurer in an amount which



1 fairly represents the saving in collection
2 expense;

3 (C) Readjustment of the rate of premium for a group
4 insurance policy based on the loss or expense
5 experience thereunder, at the end of the first or
6 any subsequent policy year of insurance
7 thereunder, which may be made retroactive only
8 for the policy year; and

9 (D) In the case of any contract of insurance, the
10 distribution of savings, earnings, or surplus
11 equitably among a class of policyholders, all in
12 accordance with this article;

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

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

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

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

- 1 (i) It shall not be a violation of this section
- 2 to refuse to provide or limit coverage
- 3 available to an individual because the
- 4 entity determines that the individual
- 5 reasonably appears to have coverage
- 6 available under chapter 386 or 431:10C; and
- 7 (ii) Payment of claims to an individual who may
- 8 have a third-party claim for recovery of
- 9 damages may be conditioned upon the
- 10 individual first signing and submitting to
- 11 the entity documents to secure the lien and
- 12 reimbursement rights of the entity and
- 13 providing information reasonably related to
- 14 the entity's investigation of its liability
- 15 for coverage.

16 Any individual who knows or reasonably should
17 know that the individual may have a third-party
18 claim for recovery of damages and who fails to
19 provide timely notice of the potential claim to
20 the entity, shall be deemed to have waived the
21 prohibition of this paragraph against refusal or
22 limitation of coverage. "Third-party claim" for



1 purposes of this paragraph means any tort claim
2 for monetary recovery or damages that the
3 individual has against any person, entity, or
4 insurer, other than the entity licensed under
5 chapter 432 or 432D;

6 (11) Unfair claim settlement practices. Committing or
7 performing with such frequency as to indicate a
8 general business practice any of the following:

9 (A) Misrepresenting pertinent facts or insurance
10 policy provisions relating to coverages at issue;

11 (B) With respect to claims arising under its
12 policies, failing to respond with reasonable
13 promptness, in no case more than fifteen working
14 days, to communications received from:

15 (i) The insurer's policyholder;

16 (ii) Any other persons, including the
17 commissioner; or

18 (iii) The insurer of a person involved in an
19 incident in which the insurer's policyholder
20 is also involved.

21 The response shall be more than an acknowledgment
22 that such person's communication has been



- 1 received, and shall adequately address the
2 concerns stated in the communication;
- 3 (C) Failing to adopt and implement reasonable
4 standards for the prompt investigation of claims
5 arising under insurance policies;
- 6 (D) Refusing to pay claims without conducting a
7 reasonable investigation based upon all available
8 information;
- 9 (E) Failing to affirm or deny coverage of claims
10 within a reasonable time after proof of loss
11 statements have been completed;
- 12 (F) Failing to offer payment within thirty calendar
13 days of affirmation of liability, if the amount
14 of the claim has been determined and is not in
15 dispute;
- 16 (G) Failing to provide the insured, or when
17 applicable the insured's beneficiary, with a
18 reasonable written explanation for any delay, on
19 every claim remaining unresolved for thirty
20 calendar days from the date it was reported;



- 1 (H) Not attempting in good faith to effectuate
- 2 prompt, fair, and equitable settlements of claims
- 3 in which liability has become reasonably clear;
- 4 (I) Compelling insureds to institute litigation to
- 5 recover amounts due under an insurance policy by
- 6 offering substantially less than the amounts
- 7 ultimately recovered in actions brought by the
- 8 insureds;
- 9 (J) Attempting to settle a claim for less than the
- 10 amount to which a reasonable person would have
- 11 believed the person was entitled by reference to
- 12 written or printed advertising material
- 13 accompanying or made part of an application;
- 14 (K) Attempting to settle claims on the basis of an
- 15 application which was altered without notice,
- 16 knowledge, or consent of the insured;
- 17 (L) Making claims payments to insureds or
- 18 beneficiaries not accompanied by a statement
- 19 setting forth the coverage under which the
- 20 payments are being made;
- 21 (M) Making known to insureds or claimants a policy of
- 22 appealing from arbitration awards in favor of



1 insureds or claimants for the purpose of
2 compelling them to accept settlements or
3 compromises less than the amount awarded in
4 arbitration;

5 (N) Delaying the investigation or payment of claims
6 by requiring an insured, claimant, or the
7 physician of either to submit a preliminary claim
8 report and then requiring the subsequent
9 submission of formal proof of loss forms, both of
10 which submissions contain substantially the same
11 information;

12 (O) Failing to promptly settle claims, where
13 liability has become reasonably clear, under one
14 portion of the insurance policy coverage to
15 influence settlements under other portions of the
16 insurance policy coverage;

17 (P) Failing to promptly provide a reasonable
18 explanation of the basis in the insurance policy
19 in relation to the facts or applicable law for
20 denial of a claim or for the offer of a
21 compromise settlement; and



1 (Q) Indicating to the insured on any payment draft,
 2 check, or in any accompanying letter that the
 3 payment is "final" or is "a release" of any claim
 4 if additional benefits relating to the claim are
 5 probable under coverages afforded by the policy;
 6 unless the policy limit has been paid or there is
 7 a bona fide dispute over either the coverage or
 8 the amount payable under the policy;

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

20 (13) Misrepresentation in insurance applications. Making
 21 false or fraudulent statements or representations on
 22 or relative to an application for an insurance policy,



1 for the purpose of obtaining a fee, commission, money,
2 or other benefit from any insurer, producer, or
3 individual; and

4 (14) Failure to obtain information. Failure of any
5 insurance producer, or an insurer where no producer is
6 involved, to comply with section 431:10D-623(a), (b),
7 or (c) by making reasonable efforts to obtain
8 information about a consumer before making a
9 recommendation to the consumer to purchase or exchange
10 an annuity."

11 SECTION 3. The auditor shall perform an analysis of the
12 effects of the provisions contained in this Act and submit a
13 report to the legislature no later than twenty days prior to the
14 convening of the regular session of 2010.

15 SECTION 4. New statutory material is underscored.

16 SECTION 5. This Act shall take effect upon its approval,
17 and shall be repealed on June 30, 2011.



Report Title:

Insurance; Unfair Practices; Exception for Small Insurers

Description:

Specifies that it is not an unfair method of competition or an unfair or deceptive act or practice for an accident and health or sickness insurer with a market share of less than 5 percent 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. (CD1)

