



TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FOURTH LEGISLATURE, 2008

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ON THE FOLLOWING MEASURE:

H.B. NO. 2256, H.D. 1, RELATING TO INSURANCE

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 14, 2008 TIME: 2:45 PM

LOCATION: State Capitol Room 325  
*Deliver to: State Capitol, Room 325, 5 copies*

TESTIFIER(S): Mark J. Bennett, Attorney General  
or James F. Nagle, Deputy Attorney General

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Chair Waters and Members of the Committee:

We strongly oppose H.B. No. 2256, which would weaken consumer protection by affecting the tying prohibition of the insurance code found at section 431:13-103(a)(4), Hawaii Revised Statutes. We disapprove of forcing a consumer to purchase one product as a prerequisite for buying another. We object to a seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. We believe in consumer choice.

As noted by the Insurance Division ("Division"), this bill appears to involve the conduct of Hawaii Medical Assurance Association ("HMAA"). Currently, HMAA requires sole proprietors to purchase not only health insurance coverage but also life insurance coverage. HMAA counters that it occupies only about three percent of Hawaii's health insurance market and thus proposes this bill to allow it to tie its health insurance with life insurance from another producer. Although HMAA may have less than a five percent share of the "accident and sickness insurance market," the Division notes that HMAA presently controls one hundred percent of the market for group policies sold to sole proprietors. Thus, sole proprietors would be denied competitive access to the tied product market (life

insurance) on the basis of the HMAA's leverage in the tying product market (health insurance), thereby forcing those buyers to forego free choice between sellers.

The sole proprietor market in Hawaii is not insignificant. According to the latest U.S. Census Bureau report (2004), 16,503 out of 31,605 Hawaii businesses, or 52 percent, have one to four employees. Additionally, the bill as currently drafted raises many questions, such as which market is to be measured; who makes that market determination; how is that determination made; what happens if there is a dispute as to market share; what would happen if there is an error in the market share determination; and what happens if the market share exceeds five percent after the tying arrangement is implemented.

Thus, we oppose any changes to the anti-tying provision. That provision is meant to eradicate certain evils, including the denial of free access to the market for the tied product, forcing buyers to forego their free choice between competing tied products, and restraining free competition in the market for the tied product. Consequently, we respectfully oppose this measure and ask that it be held.



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TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-FOURTH LEGISLATURE  
Regular Session of 2008

Thursday, February 14, 2008  
2:45 p.m.

**TESTIMONY ON HOUSE BILL NO. 2256 HD 1 – RELATING TO INSURANCE**

TO THE HONORABLE TOMMY WATERS, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

My name is J.P. Schmidt, State Insurance Commissioner (“Commissioner”), testifying on behalf of the Department of Commerce and Consumer Affairs (“Department”). The Department opposes H. B. 2256, HD 1 which would weaken the anti-bundling provisions of the Insurance Code.

Under Hawaii Revised Statutes section 431:13-103(a)(4)(B), part of the unfair methods of competition and unfair and deceptive acts and practices in the business of insurance statute, insurance companies are prohibited from making the purchase of one class of insurance contingent upon the purchase of another class of insurance. This is known as the “anti-bundling” provision and is designed to protect consumers from an insurer who would seek to force consumers to purchase multiple types of insurance in order to buy a policy that they want to buy. The rule does not prohibit an insurer from offering different classes of insurance together in an attractively priced package. There is no violation if the consumer has the option of taking the package or just taking the insurance wanted. The law only prohibits an insurer from refusing to sell one policy unless another policy or other policies are also purchased.

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In other words, under current law a health insurer could pair a life insurance policy with a health insurance policy and offer the package to consumers who are free to accept or reject the life insurance. But, under current law the insurer can not refuse to sell the health policy unless the consumer also buys the life insurance.

H. B. 2256 would allow insurers with less than a 5% market share to force customers to purchase a bundle of insurance products as a condition of sale. The Insurance Division is aware of only one insurer engaging in this practice presently and that is the health insurer Hawaii Management Alliance Association ("HMAA"). Presently, HMAA requires sole proprietors to purchase not only health insurance related coverages such as vision and dental insurance, but also life insurance. The Insurance Division is moving to halt this practice. This bill seeks to reverse the Division's action.

Although this bill only applies to insurers with less than 5% market share, the issue is not market share, the issue is what the U.S. Supreme Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* called "market power". The Court stated:

... we have condemned tying arrangements when the seller has some special ability-usually called "market power"-to force a purchaser to do something that he would not do in a competitive market. [citations omitted] <sup>FN.20</sup> When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14, 104 S.Ct. 1551,1559 (U.S.La.,1984)

In footnote 20, the court noted:

FN20. This type of market power has sometimes been referred to as "leverage." Professors Areeda and Turner provide a definition that suits present purposes. "'Leverage' is loosely defined here as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." V P. Areeda & D. Turner, *Antitrust Law* ¶ 1134a at 202 (1980).

*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 104 S.Ct. 1551, 1559 (U.S.La.,1984)

HMAA has that "leverage" -- although HMAA has less than a 5% share of the "accident and sickness insurance market", HMAA presently controls nearly 100% of the market for group policies to sole proprietors.

Sole proprietors who don't qualify as "group of one" employers under Hawaii's HIPAA statute can get group health insurance only from HMAA. Other insurers could sell group insurance to sole proprietors but they are not required to do so by law (at least by our interpretation of Hawaii's HIPAA statute) -- so they don't. Because sole proprietors can only get group health insurance from HMAA, HMAA has "market power" even though it has less than 5% share of the "accident and sickness insurance market."

The Committee should understand that allowing this practice does not mean lower premiums for the insured. In HMAA's case for example, HMAA got a rebate, or "kick-back" if you will, from the life insurer of profits on the bundled life insurance. This rebate was not passed on to the customer; it went to a HMAA affiliated company as additional profit. In addition to this rebate, another HMAA affiliated company got commissions for placement of the life insurance, again not to the benefit of the consumer but to increase the profit of a privately owned company acting as an insurance agent for HMAA.

The anti-bundling rules are there to protect consumers; it would be bad policy to allow so called "small insurers" to use their market power to force consumers to take insurance they don't want or need. We understand that HMAA is pushing this bill as being beneficial to small business and that some small business groups believe that this legislation will help them get group health insurance. If you really want to help sole proprietors to get group health insurance, just amend the definition of "small employer" in HRS §431:2-201.5 to include sole proprietor; that way they will get the same protections under our HIPAA conformity statute enjoyed by other small employers.

We thank this Committee for this opportunity to testify and ask that this bill be held.

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**BEFORE THE**

**HOUSE COMMITTEE ON JUDICIARY**

Representative Tommy Waters, Chair  
Representative Blake K. Oshiro, Vice Chair

**HB 2256, HD1 RELATING TO INSURANCE**

**TESTIMONY OF  
JOHN HENRY FELIX  
Chairman of the Board and Chief Executive Officer**

February 14, 2008, 2:45 pm  
State Capitol Conference Room 325

Chair Waters, Vice Chair Oshiro and Committee Members:

My name is John Henry Felix, Chairman of the Board and Chief Executive Officer of Hawaii Medical Assurance Association (HMAA). HMAA **STRONGLY SUPPORTS** HB 2256, HD1, which would enable small insurers that occupy less than five percent of the health insurance market to continue combining different types of health and sickness-related insurance benefits into a single unified policy.

By way of background, HMAA is a non-profit mutual benefit society which provides health insurance to over 30,000 Hawaii residents. HMAA only occupies about three percent of Hawaii's health insurance market. As a small insurer, HMAA takes special pride in providing health insurance to sole-proprietors and small businesses, a segment of Hawaii's market which has a difficult time obtaining affordable health related insurance. Because these types of businesses are unable to take advantage of larger risk pools characteristic of larger employers, their insurance premiums tend to be more costly.

HB 2256, HD1 is intended to help self-employed workers and small businesses by allowing broader coverage for less cost. This bill is necessary because the current administration has recently chosen to interpret Hawaii law in a different way than it has ever been interpreted, to prohibit the combination of drug and medical coverage, or the combination of medical, dental and drug coverage, or any other combination of health related coverages, into one insurance policy. Numerous Hawaii laws already permit the combination of various types of health coverages under one policy, and this should be encouraged, not discouraged, to help provide the broadest health coverage possible for Hawaii's residents.

The current administration has deemed these combined benefits as a violation of state anti-tying laws, even though the U.S. Supreme Court has made clear that a company with less than 30% market share has no coercive power in the marketplace and cannot violate federal anti-tying laws. *Jefferson Parish Hospital v. Hyde*, U.S. 466 U.S. 2 (1984). Consistent with the federal standard, HB 2256, HD1 will encourage the existing practice by smaller accident and sickness insurers to "bundle" together different classes of insurance, such as health, dental, and vision, thereby continuing the State's historical acceptance of this practice by small insurers who lack coercive power in the marketplace. In these circumstances, bundling provides broader health care coverage in single unified policies, ultimately resulting in lower overall premiums, fostering greater competition within the Hawaii insurance marketplace, and providing consumers with greater flexibility, coverage and pricing options.

HB 2256, HD1 codifies into Hawaii law the same rules applicable to similar federal anti-tying laws, though using an even more conservative standard of 5% market share. HB 2256, HD1 does not change the Prepaid Health Care Act in any way, but rather simply provides that HMAA's 18 year practice of providing broad, cost-effective benefits to Hawaii's smallest business groups is not an unfair insurance practice. Without passage of HB 2256, HD1, hundreds of sole-proprietors, small businesses, and their families currently insured by HMAA could be forced to shop for more expensive individual policies with much less coverage.

**HMAA STRONGLY SUPPORTS** HB 2256, HD1 and urges the passage of this measure. Thank you for the opportunity to testify.

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