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**LATE TESTIMONY**

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February 15, 2011

To: The Honorable Ryan I. Yamane  
and Members of the House Committee on Health

Date: February 15, 2011

Time: 10:00 a.m.

Place: Conference Room 329, State Capitol

Re: H.B. No. 1243

**Written Testimony Only**

As the attorney for several Hawaii physicians who offer in-office prescription drug dispensing to their patients, I am writing in strong opposition to SB 1414. Although the bill's proponents attempt to characterize as villainous the current reimbursement for in office dispensing by pointing out that the charges for these prescription drugs are substantially more than if obtained from a pharmacy, such as Long's Drug Store, as discussed below, the reality is that this contention is illogical and based upon false premises.<sup>1</sup>

**Economic Explanation for Differences in Prescription Drug Charges**

The reason that there is a differential in price between the AWP for pharmaceutical products obtained from a wholesaler and pharmaceutical products obtained from a re-packer is because there is a tremendous difference in the costs involved between the two. That is, while Longs, who purchases an enormous amount

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<sup>1</sup> Another aspect of this bill is to incorporate the concept of the "pharmacy benefit network price". Although is highly sketchy, it appears that beyond the endless ways that insurance carriers already utilize to obstruct the payment of claims, this would be a legally sanctioned way for the carrier to circumvent the Workers Compensation Fee Schedule and ram rod its own proprietary fee schedule down the throats of physicians.

of product from manufacturers, has great bargaining power and is able to purchase these products at rock bottom prices, the opposite is true of a small scale medical practitioner. Requiring such a small scale dispenser to charge the same as a retail giant is akin to requiring a privately owned corner convenience store to sell Tylenol for the same price per tablet as it is sold per tablet at Costco. Obviously, Costco is able to sell the product for far less because (1) it has the bargaining power to obtain rock bottom prices from manufacturers, and (2) given the large volume of product that it sells, what it gives up in per unit profit it makes up for by the large total number of units of product sold.

#### Legal Distinction Between a Retail Pharmacy and Physician Dispensary

The proponents of this bill attempt to treat physician dispensaries as if they were retail pharmacies. In reality, there is a fundamental distinction between the two.

##### **1. Physicians are legally required to utilize re-packagers**

By virtue of Hawaii law, physicians are unable to buy in bulk and thereafter fill individual prescriptions from this bulk purchase. Instead, Hawaii law requires them to dispense prescription medication through these pre-filled discretely sized bottles. For example, it requires no extended discussion to realize that the cost to a retail pharmacy of purchasing 1,000 tablets of Vicodin in bulk is far far less than the cost to a physician of purchasing 33 bottles of Vicodin, each with 30 tablets. Accordingly, given the great discrepancy in the relative purchase prices per tablet, it is absurd to expect a physician to charge the same amount for a 30 tablet bottle as would be charged by a retail pharmacy. Again, this is akin to expecting the corner convenience store to charge the same per price tablet for Tylenol as Costco.

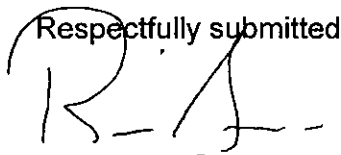
##### **2. Physicians are limited to dispensing prescription medication to Workers Compensation and No Fault Patients**

Another major distinction between the retail pharmacy and the physician dispensary is that while the former is able to enjoy the economies of scale associated with being able to dispense to the general public, physician dispensaries, on the other hand, have a very limited market, i.e., their Workers Compensation and No Fault Patients. Again, this small patient market places physicians at a distinct disadvantage and reasonably requires that they be allowed to charge the amounts currently allowed under Hawaii law in order that they be able to absorb the direct costs and overhead costs associated with an in office dispensary.

Business Distinction Between the "Product" Dispensed  
At Retail Pharmacy Vis a Vis the Physician Dispensary

As anyone schooled with a business education will attest, from a marketing standpoint, the "product" that a consumer is purchasing is not merely the bare physical product itself but also the features associated with that physical product such as place of purchase and ease of purchase. For an injured worker or driver the convenience of being able to obtain these medication products at the doctor's office and not have to drive to retail pharmacy, find a parking space, labor into the store, take a number, and hope that the pharmacist has gotten around to filling the prescription, is enormous.<sup>2</sup> Accordingly, contrary to the pedestrian assertion by the HEMIC lawyer that the physician's repackaged medication is the "same product" as the retail pharmacists, an enlightened understanding of the term "product" reveals the fallacy of his assertion. Thus, the current law, which is in accordance with the Federal Drug Listing Act of 1972, does not contain a "loophole", as insurance counsel would have you believe, but actually demonstrates cognizance of the substantial differences between these two products.

In light of the above, the proposed bill is actually a bill to eliminate physician dispensing altogether by requiring physicians to economically compete with giant retail pharmacies. Accordingly, it is anything but conducive to "insuring providers and suppliers who care for Hawaii's injured workers are fairly reimbursed." In light of the extraordinary differences in the cost to a physician vis a vis a retail pharmacy in purchasing the same amount of medication, there will be no profit whatsoever for physicians if this insurance company written bill is passed. Physician dispensing will be a thing of the past.

Respectfully submitted  
  
Richard H. Grover

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<sup>2</sup> And this does not even consider the flagrant problem of injured workers arriving at the pharmacy only to be faced with the problem of having to pay for the prescription out of pocket or having to come back the next day because the pharmacy is unable to obtain confirmation from the carrier that there is coverage.

# HEMIC

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February 14, 2011

The Honorable Ryan Yamane,  
Chair, House Committee on Health

## LATE TESTIMONY

The Honorable Dee Morikawa  
Vice Chair, House Committee on Health

Re: H.B. 1243, HD1 - Relating to the Repackaged Drug and Compound Medications Bill

Dear Chairman Yamane, Vice Chairman Morikawa, and Members of the Health Committee

My name is Paul Naso. I am the General Counsel of the Hawaii Employers' Mutual Insurance Company, Inc. ("HEMIC"). I am here today on behalf of HEMIC to testify in strong support of H.B.1243, HD1.

### I. UNDERSTANDING THE REPACKAGING PROBLEM

"Repackaging" is the practice of breaking a bottle of a large quantity of drugs down to several bottles of smaller quantities. These medications are identified by a number called an NDC (National Drug Code) number.

In 1972, congress enacted the Federal Drug Listing Act. The Federal Drug Listing Act required all registered drug establishments to provide the Food and Drug Administration (FDA) with a current list of all drugs manufactured, prepared, propagated, compounded, or processed by it for commercial distribution.

The significance of this Act was its broad classification of the term "Manufacturer" to include non-manufacturers including repackagers. While this may have been appropriate within the scope and intended purpose of the Drug Listing Act, it has caused the problem that we are facing today.

Because of the FDA's "manufacturing" classification, a repackager (who, again, does not actually manufacture the drugs) has the ability to re-label an existing product with the repackager's own National Drug Code number identifying them as the manufacturer for the product delivered in the bottle. More important, because of its manufacturing classification and right to create a new NDC number, re-packagers can establish a new wholesale price for the same product.

So what does that mean? That means if an original manufacturer produces a pill and sets a price (Average Wholesale Price) at, say, \$.50 per pill, the repackager can simply relabel bottles of the same pill with a new NDC number and can and has set a new Average Wholesale Price. We have seen instances in Hawaii where a repackager has unreasonably and unjustifiably increased the per pill prices by 1627%.

Now, if the State in setting the fee schedules simply made a distinction between the original manufacturer's AWP and the repackager's AWP, it could address the repackaging problem.

Unfortunately, in its present version, Hawaii law does not make that distinction and simply requires the drug reimbursement rate to be the AWP + 40%, and therein lies the problem. Under the present statutory scheme, repackagers can create their own prices without justification and have used this ability to massively increase profits for the sale of drugs under Hawaii's workers' compensation fee schedule. In states where the repackaging problem was not addressed quickly, repackaged drugs became a major profit center for those involved in selling the repackaged drugs. In Hawaii, repackagers are only now gaining a foothold, after having been shut down in California, Arizona, and Mississippi, among other states.

H.B. 1243, HD1 simply makes it clear that the original manufacturer's average wholesale price (AWP) must be used as the basis when calculating reimbursements for drugs under Hawaii's workers' compensation fee schedule (i.e., 100% of the original manufacturer's AWP plus 40% profit).

## II. THE COMPOUND MEDICATION ISSUE

As with repackaging, physicians often contract with a company that specializes in producing compound medication in large quantities and provides a supply of these compounded medications for the physician to dispense out of their office setting.

We note that although compounded medications are generally a more sophisticated version of repackaging, some compound medications may be medically necessary. That being said, compounded medications present a challenge in how they are reported and identified for billing purposes.

Unlike repackaged drug manufacturers who create a unique National Drug Code (NDC), compound medications do not have unique NDCs, as they are the combination of several drug products - each with its own NDC.

So when billing them to a payer, compounds are often identified with a "dummy" NDC of all 9s, (99999-99999-99) with an abbreviated description of the combination of products used in the production of the compound medication.

Since there is no assigned NDC and thus no Average Wholesale Price reported to a pricing source, if a state's workers' compensation fee schedule statutes or administrative rules are not clear in

defining compound medications, compounding pharmacies can exploit this ambiguity to their advantage by unreasonably and unjustifiably marking up the costs of such medications.

### III. H.B. 1243, HD1 IS A COST CONTAINMENT MEASURE

By helping to contain unreasonable and unjustifiable increases in prescription drug costs H.B. 1234, HD1 is a cost containment measure.

The unregulated practice of marking up repackaged prescription drugs affects everyone. It doesn't just affect insurance companies; it unreasonably and unjustifiably drives up the cost of prescription drugs for all self-insured entities, including the State of Hawaii, all of the counties in the state, and self-insured companies such as Marriott and Safeway. Ultimately, failing to contain the costs of repacked drugs and compound medications will have a significant effect on employers as their lost cost ratios rise, raising premiums as well.

Finally, a recent study by the National Council on Compensation Insurance, ("NCCI") Inc. shows on a state by state basis the substantial cost increases experienced by states that have failed to contain repackaged prescription drug costs.

### IV. REPACKAGED DRUGS/COMPOUND MEDICATIONS IS A NATIONWIDE PROBLEM

As noted above, the problem that this legislation seeks to address is a problem facing many states. Several states, such as California, Arizona, and Mississippi, have already refined their statutes and administrative rules to demarcate the difference between original manufacturers and repackagers, clearly defined compound medications, and ultimately contained the unreasonable and unjustifiable increase in prescription drug costs caused by repackaged drugs and compound medications.

The experience in other states has also shown that when a state government closes the repackaging loophole, repackaging firms resort to compound medications to unreasonably inflate drug costs and their profit margins. Therefore, H.B. 1243, HD1 seeks to address both practices at the same time.

### V. DISPELLING MYTHS

The above-mentioned testimony describes what this bill is about. During previous testimony before committees in the House and Senate, certain opponents have attempted to create a smokescreen by raising issues unrelated to this bill and attacking HEMIC directly with false and misleading charges. They have also attempted to characterize this bill as a "HEMIC" bill in an effort to further confuse legislators. To clarify what is real from what is not, I submit the following points:

### 1. THIS IS NOT A HEMIC BILL

This bill is supported by a broad coalition that ranges from government to business and from self insureds to insurers (including HEMIC), all supporting the concept of fairness and restricting unreasonable and unjustifiable increases in prescription drug costs.

### 2. THIS BILL IS NOT ABOUT THE OVERALL COMPENSATION OF DOCTORS WITHIN THE WORKERS' COMPENSATION SYSTEM

At the previous hearing on H.B. 1243, HD1, opponents of the bill argued that it will severely impact the ability of doctors to earn their living. H.B. 1243, HD1, however, deals strictly with containing the unreasonable and unjustifiable increase in the cost of prescription drugs caused by repackaged drugs and compound medications. It does not deal at all with doctors' compensation under the workers' compensation system issues.

In any case, it should be noted that the DLIR is required by law to update the Hawaii Workers' Compensation Supplemental Fee Schedule for physician reimbursement at least every three years or annually, as required. So remedies are already in place.

As to the alleged severe impact on workers' compensation physicians continuing to work in Hawaii, abusive repackaging and compound medication re-pricing practices to create a new profit center is done by only a small group of Hawaii physicians at this point in time.

Finally, if you think about the logic behind their argument, it appears the opposition is saying that because they are unhappy with the current compensation rates for their services within the workers' compensation system, we should support continued abuse and price gouging in the prescription drug area.

### 3. THIS BILL DOES NOT IMPACT PHYSICIAN DISPENSING

This bill is not about physician dispensing. We only raise the issue because it was a problem in the California repackaging battle because the repackaging practice had developed to a much greater degree and had become a major profit center for California workers' compensation physicians. Because of that, the cost-containment effort in California included doing away with the entire practice of physician dispensing.

That is not the case here in Hawaii. Although the repackagers have established a beachhead, they have not yet fully established their business model in the islands.

Therefore, H.B. 1243, HD1 does not alter, revise or in any way impact the practice of physician dispensing of prescription drugs. In fact, HEMIC supports physician dispensing. We believe it is a good practice which benefits the treatment of injured workers.

We note that most workers' compensation doctors dispense medications that are not repackaged and getting reimbursed at AWP plus 40%.

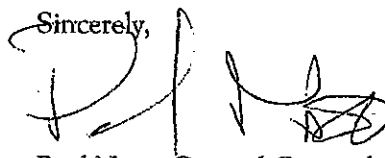
There is plenty of room in Hawaii's generous prescription drug fee schedule to allow physicians to make a fair profit on the medications they dispense. But distorting the fee schedule as I described earlier is simply an abuse; an abuse that this legislation will effectively curtail.

4. THIS BILL WILL NOT AFFECT A WORKERS RIGHT, OR ACCESS TO, MEDICAL TREATMENT FOR THEIR INJURIES.

Again, this bill is about preventing price gouging in the prescription drug area. It deals exclusively with reimbursement and does not affect, in any way, an injured worker's right or access to medical treatment for his or her injuries. As there is no co-pay in workers' compensation, the claimant is simply not affected by this bill.

At the end of the day, this bill is about the prohibition of price gouging and nothing else.

We respectfully request that you support this bill.

Sincerely,  


Paul Naso, General Counsel  
Hawaii Employers' Mutual Insurance Company, Inc.

PN:rm



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INJURY RECOVERY CENTER

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**LATE TESTIMONY**

February 15, 2011

Committee on Health

**HOUSE BILL 1243 HD1 RELATING TO REPACKAGED DRUGS AND COMPOUND MEDICATIONS**

The medical community has reached out, and continues to reach out to insurers and employer seek win-win approaches to improve workers compensation delivery and efficiency. In the words of our new Governor "all parties need to come together in the spirit of cooperation!" In that spirit, as an additional convenience service to the patient and because it makes economic sense, many of Hawaii's top specialists have adopted in house dispensing programs—a time honored tradition in medicine that saves patients time as well. This includes such well known entities as Orthopedic Associates, Portner Orthopedic Rehabilitation and our own Workstar Injury Recovery Center—essential specialties in short supply here, and especially neighbor islands.

As a restraint of trade issue, this bill will make it impossible for doctors to continue the time-honored medical tradition dispense medications to their patients. This is analogous to your hairdressers being banned from providing hair products in their shops or your dentist barred from providing tooth whitening paste and is, therefore, fundamentally unfair to doctors and those they serve.

That said, it is even more important that this bill be defeated from access to care and generic cost saving standpoint. Therefore please ask the sponsors and proponents of this ill conceived legislation the following questions:

- 1) How does this measure help the 500 doctor shortage presently revealed by a recent comprehensive study.
- 2) How does this measure help the less than 50% state wide doctors stay in business and offer the enhance services these cases demand.
- 3) How does this bill improve access to care for those hurt at work?
- 4) And finally, with its emphasis on generic dispensing, how does this bill support such cost containment physician efforts which, if enacted, will be reversed in all likelihood due to the pharmaceutical industry's offer of newer brand drugs pushed through promotional pressure from the pharmaceutical industry and from patients thru direct to consumer advertising.

The answer to all four of these important questions is, "that this bill does not!"

Please discard HB 1243 HD 1 which is antithetic to the well-being of injured workers, doctors and even payers and should, therefore, be pronounced "Dead on Arrival".

Thank you.

Scot McCaffrey M.D.

February 14, 2011

# LATE TESTIMONY

Attn: Committee on Health; Rep Ryan Yamane, Chair and Rep Dee Morikawa, Vice Chair

Re: **HB1243 - Relating to Repackaged Drugs and Compound Medications**

Dear Sirs and Madams:

I oppose strongly the proposed bill HB1243. This is to reduce my physician's reimbursement so that he will no longer be able to afford to offer such a convenient service to his patients, like medication dispensing. This will make it difficult for workers who are injured, easy to access medication. Apparently, there are extra costs in work comp because the doctors have to deal with adjusters and the insurance carriers take forever to pay. Insurance companies own pharmacies who get rebates from manufactures (my Auntie is a pharmaceutical rep and she told me this). They give discounts (lower reimbursement fee schedules) to themselves or make it seem that the only way to get medications to have patients utilize their programs, i.e., mail order. They don't care about how difficult this is for the patients. Aren't there laws against these kinds of kick backs?

I hear that if this law is passed all the good doctors will stop seeing injured workers. I heard Hawaii is already short 644 physicians for the amount of people in Hawaii. Of those existing physicians, only a very few will take on Workers' Compensation patients.

I am asking you don't allow this proposed law to be enacted. Vote no on HB1243.

Sincerely,  
*Cathy Wilson*

cathywilson@aol.com