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TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Monday, January 31, 2011
2:00 p.m.

TESTIMONY ON HOUSE BILL NO. 751 - RELATING TO INSURANCE FRAUD

TO THE HONORABLE ROBERT N. HERKES AND MEMBERS OF THE COMMITTEE:

My name is Gordon I. Ito, State Insurance Commissioner ("Commissioner"), testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). Thank you for hearing this bill.

The Department supports this bill. This bill is patterned after Section 9 of the National Conference of Insurance Legislators ("NCOIL") Insurance Fraud Model Act.

This bill enhances the Department's ability to investigate insurance fraud by requiring individuals to provide information and cooperate with the Department's investigations. The individual who provides the information is also protected because the bill states the person shall not be subject to civil liability arising from the actions to furnish or disclose requested information, provided that the person was acting without malice and did not commit perjury in furnishing or disclosing information.

In addition, the bill contains an enforcement provision that precludes individuals who do not cooperate with the Department's investigations and prosecutions from collecting proceeds or restitution.

We thank this Committee for the opportunity to present testimony on this matter and ask for your favorable consideration.

HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association

January 31, 2011

The Honorable Robert Herkes, Chair
The Honorable Ryan Yamane, Vice Chair
House Committee on Consumer Protection and Commerce

Re: HB 751 – Relating to Insurance Fraud

Opposition

Dear Chair Herkes, Vice Chair Yamane and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 751 which would require individuals, entities, and insurers who have a "reasonable belief" that insurance fraud has been committed to report that information to the Insurance Commissioner. HMSA has concerns with HB 751.

After five years of consensus building, the 2009 Legislature actually addressed the issue of insurance fraud with the passage of HB 262 (Act 149, 2009). Included in that law is the mandatory reporting requirement under Section 431:2-409:

Within sixty days of an insurer or other licensee's employee or agent discovering credible information indicating a violation of section 431:2-403, or as soon thereafter as practicable, the insurer or licensee shall provide to the branch information, including documents and other evidence, regarding the alleged violation of section 431:2-403. The insurance fraud investigations branch shall work with the insurer or licensee to determine what information shall be provided.

An allegation of fraud is a serious matter. Each potential case must be reviewed methodically and with care to, for example, distinguish a case of mistakes in billing from a case of fraud. This Bill would have insurers report on cases where someone has a "reasonable belief" that insurance fraud has been committed. We are uncertain as to what would constitute "reasonable belief."

We believe the carefully crafted reporting language currently in statute should not be tampered with. Instead, the Commissioner should be allowed sufficient time to review the implementation of the law and to allow him to propose changes that may be necessary to address any limitations.

We believe this legislation is untimely and should be deferred.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark K. Oto".

Mark K. Oto
Director, Government Relations

COMMENTS OF THE AMERICAN COUNCIL OF LIFE INSURERS
ON HOUSE BILL 751, RELATING TO INSURANCE FRAUD

January 31, 2011

Via e mail: cpctestimony@capitol.hawaii.gov

Hon. Representative Robert N. Herkes, Chair
Committee on Consumer Protection and Commerce
State House of Representatives
Hawaii State Capitol, Conference Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Herkes and Committee Members:

Thank you for the opportunity to comment on House Bill 751, relating to Insurance Fraud.

Our firm represents the American Council of Life Insurers (“ACLI”), a national trade association, who represents more than three hundred (300) legal reserve life insurer and fraternal benefit society member companies operating in the United States. These member companies account for 90% of the assets and premiums of the United States Life and annuity industry. ACLI member company assets account for 91% of legal reserve company total assets. Two hundred thirty-nine (239) ACLI member companies currently do business in the State of Hawaii; and they represent 93% of the life insurance premiums and 95% of the annuity considerations in this State.

Insurance fraud is costly to both the insurance industry and consumers alike.

Accordingly, ACLI is in accord with the intent and purpose of HB 751.

Section 1 of the bill states that the purpose of the bill is to “incorporate selected provisions from the National Conference of Insurance Legislators’ model insurance fraud act to strengthen existing insurance fraud provisions.”

While HB 751 contains provisions that are similar to those in the model act there are material differences.

Subsection (a) of the proposed addition to Chapter 431, HRS, which is set forth in section 1 of the bill (1st page, lines 9 through 13) provides that where a person or a licensee has a “reasonable belief” that insurance fraud is being or will be committed, the person or licensee must furnish all information concerning the fraud to the Insurance Division whether or not there is any legal privilege protecting such information. Further, the fraud that must be reported is limited to those currently being or may in the future be committed – it does not include fraud which was committed in the past.

Subsection (d) of the proposed addition to Chapter 431, HRS, which is set forth in section 1 of the bill (2nd page, lines 5 through 10) grants immunity from civil liability to anyone providing information relating to insurance fraud except a person acting with malice.

The National Conference of Insurance Legislators (NCOIL) Insurance Fraud Model Act provides civil immunity to all persons reporting fraud except those acting with "actual malice".

"Actual malice" is defined under Hawaii law to mean a "deliberate falsification of facts or reckless disregard of the truth; that is, reckless publication despite a high degree of awareness harbored by the publisher, of the probable falsity of the published statements." Beamer v. Nishiki, 66 Haw. 572, 670 P.2d 1264 (1983); Tagawa v. Maui Publishing Co., 50 Haw. 648, 448 P.2d 337 (1968), cert. denied, 396 U.S. 822, 20 S. Ct. 63, 24 L. Ed. 2d 73 (1968).

ACLI believes that providing a higher standard of "actual malice" will afford greater protection to those reporting insurance fraud from frivolous lawsuits and, thus, provide a greater incentive to report insurance fraud.

Accordingly, ACLI respectfully recommends that HB 751 be amended as follows:

1. The following provision be added after the very last sentence in Subsection (a) of the proposed addition to Chapter 431, HRS, as follows:

(a) Any person or licensee that has a reasonable belief that a violation under section 431: 2-403 has been, is being or will be committed shall furnish and disclose any information to the branch to detect, prosecute, or prevent insurance fraud, subject to any privilege protecting the information.

2. Subsection (C) of the proposed addition to Chapter 431, HRS, be amended as follows:

(c) No person or licensee furnishing or disclosing information under this section shall be subject to civil liability arising from the actions to furnish or disclose requested information; provided that the person was acting without actual malice and did not commit perjury in furnishing or disclosing information.

Again, thank you for the opportunity to comment on this bill.

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**HOUSE COMMITTEE ON
CONSUMER PROTECTION & COMMERCE**

January 31, 2011

House Bill 751 Relating to Insurance Fraud

Chair Herkes and members of the House Committee on Consumer Protection & Commerce, I am Rick Tsujimura, representing State Farm Insurance Companies, a mutual company owned by its policyholders. State Farm opposes House Bill 751 Relating to Insurance Fraud.

We are opposed to House Bill 751 because it (1) conflicts with existing fraud provisions, and (2) creates ambiguities which may hamper fraud prosecutions.

Hawaii Revised Statutes section 431:2-409, requires:

Mandatory reporting. (a) Within sixty days of an insurer or other licensee's employee or agent discovering credible information indicating a violation of section 431:2-403, or as soon thereafter as practicable, the insurer or licensee shall provide to the branch information, including documents and other evidence, regarding the alleged violation of section 431:2-403. The insurance fraud investigations branch shall work with the insurer or licensee to determine what information shall be provided.

(b) Information provided pursuant to this section shall be protected from public disclosure to the extent authorized by chapter 92F and section 431:2-209; provided that the branch may release the information in an administrative or judicial proceeding to enforce this part to federal, state, or local law enforcement or regulatory authorities, the National Association of Insurance Commissioners, the National Insurance Crime Bureau, or an insurer or other licensee aggrieved by the alleged violation of section 431:2-403.

Moreover HRS section 431:2-408 provides:

Civil cause of action for insurance fraud; exemption. (a) An insurer or other licensee shall have a civil cause of action to recover payments or benefits from any person who has violated section 431:2-403; provided that no recovery shall be allowed if the person has made restitution pursuant to section 431:2-404 or 431:2-405(b)(1).

(b) A person, insurer, or other licensee, including an insurer's or other licensee's adjusters, bill reviewers, producers, representatives, or common-law agents shall not be subject to civil liability for providing information, including filing a report, furnishing oral, written, audiotaped, videotaped, or electronic media evidence, providing documents, or giving testimony concerning suspected, anticipated, or completed insurance fraud to:

- (1) A court;
- (2) The commissioner;
- (3) The branch;
- (4) The National Association of Insurance Commissioners;
- (5) The National Insurance Crime Bureau;
- (6) Any federal, state, or county law enforcement or regulatory agency; or
- (7) Another insurer or other licensee,

if acting without actual malice and if the information is provided for the purpose of preventing, investigating, or prosecuting insurance fraud, except if the person commits perjury.

(c) Civil actions for insurance fraud under this part shall be filed within six years after the insurance fraud is discovered or should have been discovered by exercise of reasonable diligence; provided that no civil action shall be filed more than ten years after the date on which a violation of this part is committed.

Licenses are all subject to disciplinary action and potential loss of license if they fail to comply with the chapter. Given these collective sections of the statute and the overall regulation of licenses we do not believe the provisions of HB 751 are necessary, and may if enacted introduce conflicts and ambiguities which may ultimately bar action on the very fraudulent acts intended to be prevented.

House Bill 751 provides that:

"§431:2- Cooperation with insurance fraud investigations. (a) Any person or licensee that has a reasonable belief that a violation under section 431:2-403 is being or will be committed shall furnish and disclose any information to the branch to detect, prosecute, or prevent insurance fraud.

(b) When the branch requests information from a person or licensee to detect, prosecute, or prevent insurance fraud, the person or licensee shall take all reasonable actions to provide the information requested, subject to any privilege protecting the information.

(c) Failure to cooperate pursuant to subsections (a) and (b) shall bar eligibility from any proceeds or restitution, pursuant to section 431:2-404, resulting from branch investigations and prosecutions.

(d) No person or licensee furnishing or disclosing information under this section shall be subject to civil liability arising from the actions to furnish or disclose requested information; provided that the person was acting without malice and did not commit perjury in furnishing or disclosing information."

This language contains language which is already embedded in current law as shown above. We also understand that the trial bar which represents insureds who may be subject to an allegation of fraud may have issues with this language since it would require attorneys who have knowledge of actual fraud to "turn in" their clients because they would not be subject to a civil action for breaching their ethical code, but would be subject to disciplinary action for making such a disclosure by the law.

In any case, we believe the current statute is adequate.

Thank you for the opportunity to present this testimony.