Rafael del Castillo

Attorney at Law

LATE

COMMENTS IN OPPOSITION TO S.B. 1274

From: Rafael del Castillo
Attorney at Law
Personal testimony, not on behalf of any particular client or organization

To: Senate Committee on Ways and Means
Hon. David Y. Ige, Chair; Hon. Michelle Kidani, Vice Chair,

Hearing: February 24, 2011, 9:00 a.m., Conference Room 211
1 paper copy requested

Emailed to: WAMTestimony@Capitol.hawaii.gov

I **strongly oppose** Senate Bill 1274-SD1. Regrettably, only major revisions to S.B. 1274 will make it acceptable. The repeal of H.R.S. § 432E-6 is absolutely unnecessary and there are substantial misconceptions about this measure. In order to deal with those misconceptions and ensure that this Legislature does not make a colossal and unfortunate error, Richard Miller, Professor Emeritus of Law, and I, with the assistance of Congresswoman Hanabusa, persuaded the staff of the Office of Consumer Information and Insurance Oversight (OCIIO) to have a telephone conference last week. I have included below the transcript of that conference, which I also have on audio. For purposes of this comment, I have annotated the transcript with my comments for clarification of certain issues. I believe this is the best way for you to have, from the horse's mouth, what we should and should not do.

To summarize the information:

1. Hawaii is NOT required to repeal its existing external review law. If Hawaii's law is not in compliance with the 16 consumer protection elements in federal interim regulations implemented in connection with the Patient Protection and Affordable Care Act (PPACA), our law will be preempted by the federal external review process until it is brought into compliance with the 16 consumer protection elements.
2. We must make certain technical corrections to H.R.S. § 432E-6, as noted below.
3. Our external review administrative hearing differs from the independent review organization (IRO) consumer protection element in the interim regulations, but that does not compel preemption of our law. We have been invited to submit information concerning why our law meets, or make the argument to OCIIO policy makers why we do not have to substitute the mandatory IRO for our administrative hearings because the hearings comply with the PPACA section 2719.
4. The "uniformity" concern found in the original "justifications" for S.B. 1274 does not warrant repeal of H.R.S. § 432E-6 because, as long as the OCIIO finds our external review to be in compliance with the interim regulations or section 2719 of the PPACA, members of ERISA plans have the right to go to the state review process if

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their plan has purchased a fully-insured product, as is the case for most plans in the State. Our 1998 law actually acknowledged that the small number of self-insured ERISA plans were exempt. They are still exempt and must comply with a federal review process. S.B. 1274 WILL NOT CHANGE THAT.

5. S.B. 1274 excludes 264,000 persons who presently have the right to apply to the Commissioner for a review.

Transcript of telephone conference on February 17, 2011
Ellen, Kara, and Julie Harada, Office of Consumer Information and Insurance Oversight, DHHS, with Prof. Richard Miller and Rafael del Castillo.

RdC: What's happened in our state is that our Administration has introduced a bill to repeal the external review law we've had on the books for a dozen years, and we are concerned about that because we believe the legislators have been misinformed, inasmuch as it appears that they have been told that we are mandated to repeal our law and replace it with the NAIC law. It was my guess, and Julie told me she thought I was correct, that you all have not actually reviewed our review statute. I did forward a copy of it to her. There are a couple of features we are loathe to lose, and one of them is that our review provides for a face-to-face hearing with a 3-person panel at which a patient who has a complex situation can present expert testimony and has an afternoon to present the case. It also provides for them to have advocacy on their behalf, whereas the NAIC model act of course goes off to an IRO and you submit whatever you have in writing and there you are. They also are repealing the right to appeal to our circuit courts, but that is probably not constitutional, so that's not going to stand. In any event, we've been through hearings on companion bills, and on the House side, the bill was deferred because the Insurance Commissioner's representative said "We really don't have to have do anything this year. . . "-- and that is how I figured out that they have been told [repeal] is mandated – "as long as we make progress." Then on the Senate side, the bill is still alive. They are actually waiting for amendments from us [not correct]. But I think the key information, and Senator Green, who is the chair of the Health Committee asked me to confirm, we don't believe that there is a mandate that we repeal our law. As we read [section] 2719, it says that we have to have a good or better than the NAIC. So we want to confirm a few things with you all, such as whether or not you have reviewed our law, and a few other things about the situation.

Ellen: Okay. I think the first basic thing is that there is confusion between being mandated to do something versus being given a set of standards which, if they are not met, will invoke federal preemption. **The Affordable Care Act sits, as you know, sits inside of HIPAA, which means that we set a floor, and the states can exceed that floor, but, at a minimum, they have to meet that floor.** It's not the NAIC model in its totality. It is

actually the sixteen elements that are listed in the interim final rule that was published on July 23rd. So those 16 elements that we, the three federal agencies articulated, as the minimum consumer protections elements contained in the [NAIC] model, those sixteen elements must be met by a state in order for a state to continue to run an external review process. If they are not met, then there will be a federal external review process that will preempt the state review process.
There's nothing in the federal law or the regulation that requires a state to take its existing law in total off the books. What is required is that the state meet the 16 articulated elements of an external review process in order to continue running their state external review process. In the interim final rule, we articulated that **the current state external review process will stand as acceptable until July 1, 2011.** We are in the process of determining and watching each state's legislature to see what changes may be made, but we are in the process of determining which states meet the minimum consumer protections and which states do not. On July 1st, the states that do not meet the minimum consumer protections, their external review laws will be preempted.

Prof: Could you generalize about what the 16 elements amount to? We currently have a very comprehensive external review program which even allows a losing patient to recover attorneys' fees as long s his claim is not unreasonable or outrageous, or in bad faith. It's worked rather well. There have been about 30 hearings, of which about 80% were won by the patient. PLEASE NOTE THIS IMPORTANT FACT.
What is the essence of the 16 elements?

Ellen: Very, very generally: They have to allow for reviews of medical necessity cases. Our law meets this requirement and we have a medical necessity statute on the books (which exceeds the federal requirements).
Claimants have to get written notice of their rights to external review. Our law requires this.
There are certain conditions when the internal appeal process has been exhausted. One is that the issuer waived it. Our law imposes this requirement. Two is that it is an urgent care situation, so that you can do simultaneous internal and external review process. Our law has an expedited review requirement, but needs technical corrections to meet this requirement. Three, in the internal appeals process if there is not strict compliance, then the claimant can go onto external. Our law is consistent.
Only a nominal filing fee is allowed, and if you have that fee, it has to be refunded if the claimant wins, there should be a financial waiver, and there is an annual limit of $75. Our law exceeds this requirement as there is no fee.
There is no claim threshold. Our law is consistent.
You have four months to file an external review. Our law requires a claim be filed in 60 days, so this requires a technical correction.

It's an independent review organization that conducts the review, and the IRO has to be assigned randomly. I would say that our law meets this requirement. There is nothing that requires the IRO to be a standing IRO, per se. Ours is set up by the Commissioner on a case-by-case basis. Alternatively, as noted below, our face-to-face administrative hearing is superior to a 1-person, out-of-state, written-submissions-only review.
It must be impartial and independent. Our law is consistent.
The state must maintain a list of IROs, and their qualified to conduct reviews. We do not do this presently.
They cannot have any conflict with the plan or issuer or person or provider. Our law is consistent in the fact that the panel is subject to conflicts challenges and the members are vetted for conflicts.
The claimant should have the right to submit additional information to the IRO, OUR LAW IS MUCH SUPERIOR IN THE SUBMISSIONS ALLOWED to be notified of that right. Our law requires.
The decision must be binding. The decision is immediately binding because there is no relief from the Commissioner's order. Our law is superior because, although the health plan issuer must provide the benefit, either party can appeal the decision (the plan merely gets the satisfaction of having its denial held to be correct on appeal, but can do nothing about providing coverage pursuant to the law). Federal law or no federal law, the right of appeal is a constitutional right in Hawaii.
The decision must be issued within 45 days after the IRO receives the request our law sets the maximum at 30 days, unless it is an expedited case, which is 72 hours or less depending on the medical exigencies of the case. Consistent with our law.
The external review rights must be included in the coverage materials, such as summary plan documents, required by our law.
The IRO must maintain certain records for at least three years, not an issue as the Commissioner is required to maintain records under state law, and
There must be a process for reviewing experimental and investigational cases that is substantially similar to the NAIC model. Further analysis under way. We believe our law is superior. It is important to understand that cases in which the plan denies on the grounds of experimental or investigative have never been treated any differently under our law because those distinctions are simply not recognized under our medical necessity criteria as a ground for denying a benefit.

RdC: The part that we take issue with is the independent review organization. We believe that our face-to-face hearing is better because the panel actually hears testimony from live experts, by telephone albeit and it is an administrative hearing, so it is quite efficient so we do not operate on the rules of evidence,. And then the panel deliberates over the issue, and it is a local panel which is capable of applying local standards and being culturally competent for Hawaii. We believe that exceeds an IRO. We are proposing that we keep our review panel, and we can import the IRO as an option. We actually do not believe that we need to repeal our law at all, but there is some confusion in our

legislature that we have to do something, so calling a middle ground, we were looking at an IRO option. What are the prospects that you all will take a look at Hawaii's law in the near future. We could tell our senators that you are going to review our law and you will have comments about it. We know that there is at least one technical correction we have to make, and that is, under our law you have sixty days to file, not four months. So what are the prospects that you will actually take a look at our existing statute and determine that it has all of the sixteen rights that are required.

Ellen: We actually have taken a look at Hawaii's statue and we found the issue of not having an IRO review the case because it is implied in the 16 protections that it will be an independent review organization. We also talked to Lloyd Lim and, we did not get into the specifics, because he started off the conversation that they were going to put forward the NAIC model because they recognize that the Hawaii process is being used by so few people at this point, a lot having to do with the state supreme court case [*HMAA v. Commissioner*]. As the discussion below demonstrates, this is no longer an issue.

RdC: That is another issue. We do want to ask you about ERISA, it would be more uniform if ERISA cases were included, but our law does not exclude ERISA, it is just that supreme court held that it was preempted. Now we have this other legislation in the Patient Protection Act which appears to make it a requirement that the plans offer the state's review option. I don't understand how you can conclude that an IRO is better than a three-person face-to-face panel. That mystifies me.

Ellen: I don't think we are coming to a conclusion that one is better than the other. I think we are telling you that the reg requires an IRO process.

RdC: And therefore we actually have a better process preempted because of that? I don't think that is consistent with the law.

Ellen: I think you would have to make an argument, we are staff. We are not the policy makers. I think you would have to make an argument at the policy level that what you are providing meets the requirement. I don't know how you get to this meeting the requirement. We are not arguing with you about whether it is better.

Prof: Right now we are thinking about leaving the option to the hearing or the IRO to the patient. We are thinking of leaving all of the NAIC stuff, but leaving it to the patient.

Ellen: That would have to be an argument made to the policy makers. What is happening is the policy makers are figuring out how to make the determinations for each state. Having made the arguments to us, it is just a matter of us articulating that this is what is going on in Hawaii, that this is where Hawaii is, and this is the argument that you have put forth.

RdC: I think we would want to submit a written brief on that at the least.

Ellen: **I think if you want to submit a letter to us and why you think that it meets or exceeds the floor, that would be terrific.**

RdC: We appreciate the opportunity to do that and to do that and to provide evidence of what we believe are our excellent results. On the issue of ERISA, as we read the Patient Protection Act, ERISA plans are not exempt from the requirement that they provide the state's review.

Ellen: That's not quite correct. What ERISA plans must do under the Patient Protection and Affordable Care Act is provide an external review. Nothing has changed in terms of ERISA preemption, or the fact are not subject to state law. So, the one instance in which you would have an ERISA plan tangentially touched by state law is, **if you have an ERISA plan that went to one of your issuers and purchased for their employees a fully-insured product, in that case, because they purchased a fully-insured product, the employees of that ERISA plan would have access to the state appeal rights because they have a full-insured health product.** THIS BRINGS MOST ERISA PLANS IN HAWAII WITHIN OUR EXTERNAL REVIEW. If you have an ERISA plan that self-insures, and they have a flat-out ERISA self-insured health plan, those are not subject to the state external review law. Instead, there is a federal external review process, and the Dept. of Labor has published technical guidance telling ERISA plans how to comply with the law in providing external review to their members. THESE SELF-INSURED PLANS HAVE ALWAYS BEEN EXEMPT.

RdC: That is actually consistent with the review law that we have had on the books all along. We have a couple of other questions that you may be able to answer. We are curious about how this law applies to Medicare Advantage plans because that is a fully-insured product.

Ellen: I think we will have to get back to you on that. They did. Advantage plans are exempt

RdC: Shall we take from the discussion that federal employee plans are exempt?

Ellen: Yes federal employee benefit plans fall under FEHBP under the office of personnel management and they have an external review process.

RdC: Are here any other major exemptions, other than the military plans, that you are aware of.

Ellen: Any state or municipality self-insured plans have the ability to utilize the state process if the state allows it. If they choose not to use the state process, they fall under the federal review process unless the state process is in compliance. Some states have specific laws on their books which say the state employee plans shall comply with certain elements of the insurance law, and that usually includes the state external review process. If that is the case, then the state employee plans will continue to use the state process as long as the state review is compliant. However, if there is no such law on the books, the state plan is, by definition a non-federal governmental plan, it's a self-insured plan, but it is not an ERISA plan. It is under the jurisdiction of DHHS. As such, it will utilize the federal external review program. The July 23rd regulations articulate what the federal external review process is. First, this discussion assumes that the state and municipal plans are self-funded. Where the entity purchases a fully insured plan, the employee has the right to go to the state review process. Further, the state and municipal plans have been subject to H.R.S. § 432E-6, at least until Mark Bennett issued an opinion that EUTF was exempt because the state is not explicitly included. Of course, the plans were purchased, fully-insured. It is not a good for the state and municipal plans to default to the federal external review for self-insured plans, so, if they are fully-insured they should, and do,

fall under the state external review law as long as it complies with the 16 consumer protection elements.

As the foregoing confirms, S.B. 2719 is analogous to going squirrel hunting with an elephant gun. Not very sporting and there will be nothing left of the squirrel. H.R.S. § 432E-6 should not be repealed. We are working on technical corrections we believe will bring H.R.S. § 432E-6 into full compliance with the 16 elements and appreciate the opportunity to present them.

Thank you for the opportunity to comment on this measure.

Very truly yours,

Rafael del Castillo

TESTIMONY IN OPPOSITION TO H.B. 1047

Form: Arden Delos Santos

Occupation: Hotel Maintenance

LATE

To: House Committee on Health,
Hon. Ryan I. Yamane Chair, Hon. Dee Morikawa, Vice Chair

Hearing: February 4, 2011, 9:00 a.m., Conference Room 329

Emailed to: HLTtestimony@Capitol.hawaii.gov or faxed to: 586-6281 or 1-800-535-3859

I am **strongly opposed** to House Bill 1047 (and the companion Senate Bill 1274), which will unjustifiably and irreversibly damage health care consumer protection in Hawaii. Our external review law, H.R.S. § 432E-6, has served health care consumers well for over a decade. It gives health care consumers a more level playing field against powerful insurance companies. Consumers have access to experienced advocates to assist them with preparing and presenting their cases in a manner consistent with Hawaii's medical necessity law. Decisions are made by a local expert panel, and consumers are able to present expert testimony and other evidence in a fair, but efficient, hearing process.

Instead of repealing our existing external review statute, it should be expanded to include ERISA plan members now that the health care reform act has made that possible. The Insurance Commissioner should be directed to require ERISA plans to make our existing external review available to their members. (If the Commissioner can order ERISA plans to use the outsource review process proposed in H.B. 1047, he can order them to use our existing process.) Decisions on health care in Hawaii should be made in Hawai`i, not outsourced to mainland doctors who are not in touch with our values, our culture, and our people.

I have been through the external review twice for my daughter, Audrey Delos Santos, due to her nursing hours being reduced to 70 or less hours a week. Audrey Delos Santos is a 7 year old female who has anoxic brain damage, sleep disturbance, esophageal ferlux, chronic nonspecific lung disease, cerebral pulsy nec, seizure disorder, spastic quadriparesis, respiratory distress, and many more diagnoses. She requires 24 hour nursing care. Her health insurance company is reducing her nursing hours to get profit over her care. I don't know what would have happened to my daughter's nursing hours without the external review. Having the right to appeal a decision to the circuit court is a very important right for anyone, and has been crucial to the well-being of my child and family.

Thank you for the opportunity to express my strong opposition to this measure.

Very truly yours,

Arden Delos Santos

Address: 2116 Ehu Pl. Lihue, HI, 96766
Telephone Number: (808)647-0098

LATE

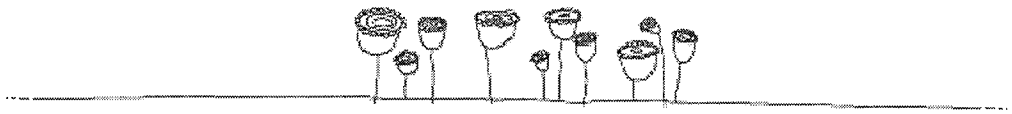
From: Les Krenk [leskrenk@yahoo.com]
Sent: Thursday, February 24, 2011 6:04 AM
To: WAM Testimony

please do not repeal HRS 432E-6 and my right to have an advocate on my side when my benefits are denied.

Les Krenk
808 877 6222

LATE

From: Jill Nattenberg [jillnattenberg@yahoo.com]
Sent: Wednesday, February 23, 2011 9:43 PM
To: WAM Testimony; sendige@capitolhawaii.gov; senkidani@capitolhawaii.gov; senchunoakland@capitolhawaii.gov; Sen. Donovan Dela Cruz; Sen. J. Kalani English; Sen. Will Espero; Sen. Carol Fukunaga; Sen. Gilbert Kahele; Sen. Donna Mercado Kim; Sen. Ronald D. Kouchi; Sen. Pohai Ryan; Sen. Jill Tokuda; Sen. Glenn Wakai; Sen. Sam Slom
Subject: *****SPAM*****
Attachments: --static--purplethistles_tc.gif



DO NOT REPEAL HRS 432E-6.
DO NOT REPEAL OUR RIGHT TO HAVE AN ADVOCATE ON OUR SIDE WHEN WE ARE DENIED BENEFITS. PLEASE!!

LATE

From: daniel david [danield96740@gmail.com]
Sent: Thursday, February 24, 2011 9:33 AM
To: WAM Testimony; sendige@capitolhawaii.gov; senkidani@capitolhawaii.gov; senchunoakland@capitolhawaii.gov; Sen. Donovan Dela Cruz; Sen. J. Kalani English; Sen. Will Espero; Sen. Carol Fukunaga; Sen. Gilbert Kahele; Sen. Donna Mercado Kim; Sen. Ronald D. Kouchi; Sen. Pohai Ryan; Sen. Jill Tokuda; Sen. Glenn Wakai; Sen. Sam Slom
Subject: do not repeal HRS 432E 6

Hello I am A paitent please do not repeal HRs432E6
please dont take away my rights 70% of the population
are paitents! thank you Daniel!

LATE

From: kulanajava@aol.com
Sent: Thursday, February 24, 2011 10:30 AM
To: WAM Testimony; sendige@capitolhawaii.gov; senkidani@capitolhawaii.gov; senchunoakland@capitolhawaii.gov; Sen. Donovan Dela Cruz; Sen. J. Kalani English; Sen. Will Espero; Sen. Carol Fukunaga; Sen. Gilbert Kahele; Sen. Donna Mercado Kim; Sen. Ronald D. Kouchi; Sen. Pohai Ryan; Sen. Jill Tokuda; Sen. Glenn Wakai; Sen. Sam Slom
Subject: *****SPAM***** DO NOT REPEAL SB432E-6

DO NOT REPEAL SB43E-6. HEALTHCARE IN HAWAII IS LIKE THIRD WORLD COUNTRY ALREADY, WE MUST FIGHT FOR THE BASIC NECESSITIES. DO NOT REPEAL OUR RIGHTS TO HAVE AN ADVOCATE WHEN WE ARE DENIED BENEFITS.

LATE

From: Danny none [daniel_d_kauth@yahoo.com]
Sent: Thursday, February 24, 2011 9:51 AM
To: WAM Testimony; sendige@capitolhawaii.gov; senkidani@capitolhawaii.gov; senchunoakland@capitolhawaii.gov; Sen. Donovan Dela Cruz; Sen. J. Kalani English; Sen. Will Espero; Sen. Carol Fukunaga; Sen. Gilbert Kahele; Sen. Donna Mercado Kim; Sen. Ronald D. Kouchi; Sen. Pohai Ryan; Sen. Jill Tokuda; Sen. Glenn Wakai; Sen. Sam Slom
Subject: do not repeal 432E-6

please dont repeal 4332E-6 I am a paitinent I need my rights!!
thank you daniel

--- On **Wed, 2/23/11, Rafael del Castillo <*rafa@hawaii.rr.com*>** wrote:

From: Rafael del Castillo <rafa@hawaii.rr.com>
Subject: Please read immediately - action on SB1274 due today
To: daniel_d_kauth@yahoo.com
Date: Wednesday, February 23, 2011, 6:04 PM

Aloha Danny Kauth,

I am keeping this short. Action is needed TODAY.

Senate Ways and Means ("WAM") is having a "decision only" hearing on S.B. 1274 (external review repeal) tomorrow. Comments (no testimony) must be received today. I am sending a second email with the email address of every committee member, topped with the address for submitting comments. Look for it in your "junk mail" if you don't receive it in a few minutes.

I urge you copy all of the addresses into your "To" box and blast an email to the WAM members opposing the bill and urging them to defer it indefinitely. Senator Baker, Consumer Protection (some title), changed the bill so that now we are told even the Administration no longer supports it. Needless to say, the health plans were the architects of the changes, which favor them.

All you have to say is:

DO NOT REPEAL HRS 432E-6.

DO NOT REPEAL OUR RIGHT TO HAVE AN ADVOCATE ON OUR SIDE WHEN WE ARE DENIED BENEFITS.

Don't wait. Do it this morning!

Thanks!

Rafael