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TO THE SENATE COMMITTEE ON HEALTH

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Friday, January 28, 2011
2:45 p.m.

**TESTIMONY ON SENATE BILL NO. 41 – RELATING TO THE HAWAII PREPAID
HEALTH CARE ACT.**

**TO THE HONORABLE JOSH GREEN, M.D., CHAIR, AND MEMBERS OF THE
COMMITTEE:**

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department defers to the Department of Labor and Industrial Relations on this bill, which repeals the sunset provision in the Hawaii Prepaid Health Care Act.

We thank this Committee for the opportunity to present testimony on this matter.



**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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January 28, 2011

To: The Honorable Josh Green, M.D., Chair
and Members of the Senate Committee on Health

Date: Friday, January 28, 2011

Time: 2:45 p.m.

Place: Conference Room 229, State Capitol

From: Dwight Y. Takamine, Interim Director
Department of Labor and Industrial Relations

Testimony in Support of
Re: S.B. No. 41 Relating to the Hawaii Prepaid Health Care Act

I. OVERVIEW OF PROPOSED LEGISLATION

Current federal legislation mandating national health care coverage for all legal residents by January 1, 2014 is still undergoing Congressional review with possible further amendment. Although this national discussion may result in better health care, the program has yet to prove itself, whereas Hawaii's Prepaid Health Care law has been in effect for almost four decades and the better health enjoyed by its citizenry ably validates it as a successful social welfare program. To ensure the program continues to thrive regardless of the probable changes in the federal legislation, the proposed bill seeks to delete from the statute Section 393-51 that allows for the termination of the Prepaid Health Care Act upon the effective date of federal legislation for health care. The bill also seeks to repeal the 1994 Act 99 which also provided for the repeal of Section 393-51 but bore conflictive language.

II. CURRENT LAW

The 1974 legislation of Act 210 effective January 1, 1975, provided the working uninsured with quality mandated health care benefits and maintained the prevailing standards for those employees already fortunate to have medical coverage. The law requires employers to insure their workers upon attainment of eligibility. As a result of the reform, Hawaii's workers and their families constitute one of the healthiest populations in the nation today. In anticipation of national health care reform that would

presumably provide greater federal protections, Act 210 included a sunset provision to be implemented upon the effective date of the federal legislation. Subsequently, discussions on the implementation and costs of a national health program raised the question as to whether the high quality of medical benefits enjoyed by Hawaii's workers were in jeopardy. In 1994, the Prepaid Health Care Act was amended with Act 99 repealing the statute's termination provision. However, the repeal was made subject to a requisite amendment of the federal Employee Retirement Income Security Act of 1974 (ERISA) that would allow for the "substantive" change to the Hawaii law. There has been no federal legislation to amend ERISA.

III. SENATE BILL

The Department supports the bill to remove the statute's sunset provision and thus maintain the integrity of the Prepaid Health Care Act. Congressional review of the federal legislation appears imminent with further amendment very possible, and such amendment may not preserve the level of high quality health care currently enjoyed by Hawaii's citizens.

UNIVERSITY OF HAWAII AT MĀNOA

The William S. Richardson School of Law

Hazel Glenn Beh

Professor of Law and Co-Director, Health Law Policy Center

January 26, 2011

Committee on Health
Senator Josh Green, MD, Chair
Senator Clarence K. Nishihara, Vice Chair
State Capitol
415 South Beretania Street
Honolulu, HI 96813

Re: Senate Bill 41- Relating to the Hawai'i Prepaid Health Care Act

Dear Senators:

My name is Hazel Beh; I am a law professor and the Co-Director of the Health Law Policy Center at the William S. Richardson School of Law. I strongly support Senate Bill 41, Relating to the Hawai'i Prepaid Health Care Act (PHCA). Since 1974, PHCA has enabled Hawai'i to achieve one of the highest rates of health insurance coverage in the nation.

Our state enjoys the only preemption waiver from the Employee Retirement Income Security Act (ERISA) ever granted to a state. Our federal ERISA waiver, enacted in 1983, represents congressional recognition that when it comes to providing access to health care, Hawai'i has done it right.

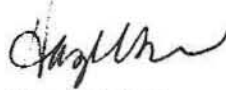
Congress again recognized the benefits to our citizens of Hawai'i's PHCA in 2010, when the federal government enacted the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 and carved out the following language specifically in order to allow our state to preserve our law:

(b) Rule of Construction Regarding Hawai'i's Prepaid Health Care Act.--Nothing in this title (or an amendment made by this title) shall be construed to modify or limit the application of the exemption for Hawai'i's Prepaid Health Care Act (Haw. Rev. Stat. 393-1 et seq.) as provided for under section 514(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(b)(5)).

Ironically, without passing SB 41, we, not the federal government, may cause PHCA's demise. Within PHCA, the state inserted a provision repealing our law when federal law "provides for voluntary prepaid health care for the people of Hawai'i in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawai'i." Haw. Rev. Stat. § 393-51 (2009). At this time, we do not know if the federal Patient Protection and Affordable Care Act, as it currently exists, is "at least as favorable" as our law or if it constitutes the "mandatory prepaid health care" that this repeal provision envisioned. But, we should not take chances with the health of our citizens. Congress gave us the opportunity to save our PHCA and we should do so.

I strongly support the federal Patient Protection and Affordable Care Act and the promise it holds for Americans struggling under the burden of uninsured and unobtainable health care. However, I also believe that Hawai'i's best course of action is to try and work within both laws, taking the benefits of federal law such as exchanges and its many consumer protections, as well as preserving our own employer based insurance unless and until we are confident that the federal law will better protect our citizens. Finally, so long as there is talk at the federal level regarding the repeal of the Patient Protection and Affordable Care Act, we must preserve the advances in health care coverage that we in Hawai'i have already achieved.

Sincerely,

A handwritten signature in black ink, appearing to read "Hazel G. Beh".

Hazel G. Beh
Professor of Law
Co-Director, Health Law Policy Center

Pieces of a Puzzle: Will Hawai'i's Prepaid Health Care Act Survive?

- 1) In 1974 Congress enacted the Employee Retirement Income Security Act (ERISA). Although ERISA did not mandate employers to provide any particular employee benefits, ERISA provided that federal law would regulate the management of benefit plans provided to employees. ERISA expressly and broadly preempted "any and all State laws" that "relate to" employee benefit plans. 29 U.S.C. §§ 1001-1461 (2008).
- 2) By coincidence, in 1974 Hawai'i enacted its Prepaid Health Care Act (PHCA), requiring employers to provide certain employees with health coverage. Hawai'i Revised Statutes §§ 373 et seq.
- 3) PHCA contains a provision that sunsets or repeals itself if and when federal law "provides for voluntary prepaid health care for the people of Hawai'i in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawai'i." Haw. Rev. Stat. § 393-51 (2009).
- 4) In *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), aff'd. mem., 454 U.S. 801 (1981), PHCA was held to be preempted by ERISA.
- 5) In 1983, Hawai'i's Congressional delegation saved PHCA by getting Congress to amend ERISA to waive the ERISA preemption just for Hawai'i's PHCA. However, it also had the effect of "freezing" PHCA by invalidating "any amendment of the Hawai'i Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date." 29 U.S.C. 1144(b)(5)(B)(ii).
- 6) In *Council of Hotels v. Agsalud*, 594 F. Supp. 449 (D. Hawaii 1984), ERISA's waiver provision was construed strictly and therefore a PHCA amendment regarding collectively bargained plans was invalidated because it was interpreted as a substantive change to PHCA.
- 7) In 1994, the Hawai'i State Legislature desired to, but also recognized that it could not, repeal the sunset provision in the PHCA unless and until ERISA was changed to allow Hawai'i to make substantive changes to PHCA. Therefore, it enacted Act 99. Act 99 repeals the sunset provision within PHCA if and when ERISA is amended to allow changes to PHCA. That law provides "This Act shall take effect upon the effective date of any federal act permitting the amendment of the Hawai'i Prepaid Health Care Act." Hawai'i's ERISA waiver has not been amended.
- 8) In 2010, the federal government enacted the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. It provides:
 - (b) Rule of Construction Regarding Hawaii's Prepaid Health Care Act.--Nothing in this title (or an amendment made by this title) shall be construed to modify or limit the application of the exemption for Hawaii's Prepaid Health Care Act (Haw. Rev. Stat. 393-1 et seq.) as provided for under section 514(b)(5) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1144(b)(5)).
- 9) Here are some of the issues that now confront Hawai'i as to the remaining vitality of PHCA.
 - A. Under state law, will PHCA be automatically repealed because the federal government has enacted "mandatory prepaid health care"?
 - B. Under state law, will PHCA be automatically repealed because the federal government has enacted voluntary prepaid health care that is "at least as favorable" as PHCA?
 - C. Can Hawai'i repeal the state law provision that repeals PHCA or is that a change to the PHCA that is precluded by our ERISA waiver?
 - D. If PHCA is not subject to automatic repeal under state law, can the Patient Protection and Affordable Care Act and PHCA co-exist, and if so, how will the requirements of each be reconciled?



HAWAII MEDICAL ASSOCIATION

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Friday, January 28, 2011; 9:30AM Conference Room 329

To: COMMITTEE ON HEALTH
Senator Josh Green, M.D., Chair
Senator Clarence K. Nishihara, Vice Chair

From: Hawaii Medical Association
Dr. Morris Mitsunaga, MD, President
Linda Rasmussen, MD, Legislative Co-Chair
Dr. Joseph Zobian, MD, Legislative Co-Chair
Dr. Christopher Flanders, MD, Executive Director
Lauren Zirbel, Community and Government Relations

Re: SB 41 RELATING TO THE HAWAII PREPAID HEALTH CARE ACT

Chairs & Committee Members:

Hawaii Medical Association supports universal access to health care.

We have a real dilemma in that our Prepaid Health Care law (PHCA) ensures better benefits than those required for the insurance exchanges under PPACA. From that point of view, the PHCA should be extended. However, the PHCA does not cover those who are not eligible for employer-based health insurance, and we need to do something about that population to comply with the PPACA.

HMA would like to participate in a task force to compare options and decide what direction we want to go, and then deal with the PHCA extension issue accordingly. This task force needs representation from the Abercrombie administration, DHS, DOH, and the legislature, as well as from the health care provider community (doctors, advanced practice nurses and hospitals).

Thank you for the opportunity to testify.

OFFICERS

**PRESIDENT - MORRIS MITSUNAGA, MD PRESIDENT-ELECT –ROGER KIMURA, MD
SECRETARY - THOMAS KOSASA, MD IMMEDIATE PAST PRESIDENT – DR. ROBERT C. MARVIT, MD TREASURER
– STEPHEN KEMBLE, MD EXECUTIVE DIRECTOR – CHRISTOPHER FLANDERS, MD**

HMSA



Blue Cross
Blue Shield
of Hawaii

An Independent Licensee of the Blue Cross and Blue Shield Association

January 28, 2011

The Honorable Josh Green M.D., Chair
The Honorable Clarence K. Nishihara., Vice Chair
Senate Committee on Health

Re: SB 41 – Relating to Hawaii Prepaid Health Care Act

Dear Chair Green, Vice Chair Nishihara, and Members of the Committee:

The Hawaii Medical Service Association (HMSA) supports SB 41 which would repeal Section 393-51, Hawaii Revised Statutes, the termination provision in the State's Prepaid Health Care Act (PHCA). This Bill also repeals Act 99, Session Laws of Hawaii 1994, which would repeal that statutory termination upon specific federal action.

Residents in Hawaii have benefitted from expanded health care coverage under a unique and successful employer health care mandate that has been in place for more than 30 years – the PHCA. The overall impact of the law since 1974 has been the maintenance of relatively robust private benefit plans, low rates of uninsured, and some of the lowest premiums in the country. While Hawaii suffers from some of the same issues relative to access, quality and cost as states across the country, the PHCA has been the backbone over the years ensuring system stability and moderation of problems in health care delivery and finance.

Although the current system has been preserved through legislative language included by Hawaii's Congressional Delegation in the federal health care reform law, the Affordable Care Act (ACA), it may unintentionally be jeopardized without further federal- and state-level legislative fixes prior to the implementation of a newly mandated health insurance exchange in 2014.

Work to create Hawaii's health exchange, through which individuals may shop for an appropriate health plan, has just begun. This Legislature will consider legislation to do just that. But, while the states scramble to address the ACA, the shift in the balance of power in Washington confounds those efforts and confuses what health care reform eventually will cover.

Hawaii's prepaid system is established and proven to be effective.

There must be coordination of PHCA and the ACA, specifically with respect to how PHCA will work in tandem with the exchange. Resolution of this uncertainty would ensure that Hawaii's businesses, insurers, and residents understand the way in which they should invest their appreciable yet limited resources, particularly if they must radically change the way health care is done in Hawaii. The provisions of SB 41 offer a simple, single step to maintain the premium health care that the majority of people in Hawaii already enjoy.

Sincerely,

Jennifer Diesman
Vice President
Government Relations

Hawaii Medical Service Association

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Branch offices located on
Hawaii, Kauai and Maui

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green1 - Karen

From: Myron Berney [myberney@hotmail.com]
Sent: Tuesday, January 25, 2011 6:47 PM
To: HTHTestimony
Subject: SB 41 Pre Paid Health Care Protection IN SUPPORT

COMMITTEE ON HEALTH
Senator Josh Green, M.D., Chair
Senator Clarence K. Nishihara, Vice Chair

DATE: Friday January 28, 2011
TIME: 2:45 p.m.
PLACE: Conference Room 229

SB 41-RELATING TO THE HAWAII PREPAID HEALTH CARE ACT.

Repeals the sunset provision of the Hawaii Prepaid Health Care Act. Repeals Act 99, Session Laws of Hawaii 1994, which repealed the sunset provision of the Hawaii Prepaid Health Care Act effective upon certain federal law.

IN SUPPORT

WE at Natural Cancer Wellness Foundation approve and support the intent of this bill to secure Hawaii's pre-paid health care act.

Although the Federal Law has specific language included to protect Hawaii's prepaid health care plan, This measure becomes more essential now that the Republican House has repealed the entire Federal Law and has vowed to pull the new Federal Health Care Law apart piece by piece.

Please also include a "**survival clause**" that would protect the Law against the standard constitutionality questions and include language that would protect the law from being null due to changes in language.

Historically the State of Hawaii has been derelict in the enforcement of HRS 393-3c in its entirety and specifically HRS 393-3cA.

By following the HMA into Federal Anti-Trust Violations the State of Hawaii along with the entire USA health care system fallen into the worst health care delivery system in any developed nation.
We have the most expensive health care with the worst results because of the crimes directed against Wellness and Naturopathic Medicine.

Although, at this time, NO Naturopathic Physician is interested in participating in any insurance program.

However, this and other Laws must be in harmony with Federal and State Constitutional principles, anti trust laws and Privacy, Choice considerations.

Please also restore the COMPASSIONATE CLAUSE in Health Care Delivery as a stand alone chapter.

Dr. Myron Berney, ND LAc
Natural Cancer Wellness Foundation
naturalcancerwellness.com



SENATE COMMITTEE ON HEALTH
Senator Josh Green, M.D., Chair

Conference Room 229
Jan. 28, 2011 at 2:45 p.m.

Commenting on SB 41.

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including all acute care hospitals, as well as long term care facilities, home care agencies, and hospices. The Healthcare Association takes no position on SB 41, which repeals the sunset clause of the Prepaid Health Care Act (PHCA), but appreciates this opportunity to comment on it.

The federal Affordable Care Act (ACA) will transform health care in the United States and has recently begun to go into effect. Many of the rules have not yet been written, and the ACA will become operational in stages, taking take several years before it becomes fully effective. So while the broad structure of national health care reform is known, there are also many uncertainties associated with it's implementation. In addition, each will state will have discretion in formulating how reform is structured in that state.

In Hawaii, the PHCA has been responsible for for reducing the uninsured rate and maintaining on of the lowest uninsured rates in the nation for nearly 30 years. It is understandable that there is an interest in preserving it by repealing its sunset clause, which would terminate the PHCA upon the effective date of federal legislation that provides for mandatory health care insurance. According to legal experts in this area, that would happen in 2014.

At this time there are many uncertainties associated with how the PHCA would operate in conjunction with the ACA. Hawaii may have to get a federal exemption to continue the PHCA. It is too early to know if the PHCA and ACA operating together would result in a lower uninsured rate than the ACA operating alone.

Should you choose to pass SB 41, the effective date of the bill should be changed to 2016 so that the full effect of the Affordable Care Act and how it can work in conjunction with the PHCA can manifest itself.

Thank you for this opportunity to testify on SB 41.



To: Senate Committee on Health
Senator Josh Green, M.D., Chair
Senator Clarence K. Nishihara, Vice Chair

Date: January 28, 2011, Conference Room 229, 2:45 pm

Re: **SB 41, RELATING TO THE HAWAII PREPAID HEALTH CARE ACT**

Chair Green and Committee Members:

My name is Barbara Kim Stanton, State Director of AARP Hawaii. AARP is a membership organization of people 50 and older with nearly 150,000 members in Hawaii. We are committed to championing access to affordable, quality health care for all generations, providing the tools needed to save for retirement, and serving as a reliable information source on issues critical to Americans age 50+.

AARP supports the SB 41, which would repeal the sunset provision of the Hawaii Prepaid Health Care Act (PHCA).

The Hawaii PHCA includes a provision repealing the law:

§ 393-51 Termination of Chapter. This Chapter shall terminate upon the effective date of federal legislation that provides for voluntary prepaid health care for the people of Hawaii in a manner at least as favorable as the health care provided by this chapter, or upon the effective date of federal legislation that provides for mandatory prepaid health care for the people of Hawaii.

The federal government enacted the Patient Protection and Affordable Care Act in 2010 which may cause the termination of the Hawaii PHCA due to the sunset provision in the law. However, it is vital that Hawaii's PHCA should remain in place while the federal laws are enacted. The Hawaii PHCA contains many provisions which were groundbreaking and should be used as the minimum "floor" for any federal legislation. Furthermore, as the federal Patient Protection and Affordable Care Act is implemented and potentially revised, the Hawaii PHCA provides the state with assurance that baseline provisions will continue, and not be prematurely terminated.

AARP strongly supports the implementation of the Patient Protection and Affordable Care. However, until it is fully implemented we feel that it is in Hawaii's best interest to continue and take advantage of the provisions in Hawaii's PHCA that has resulted in a near universal health care coverage system in Hawaii. AARP therefore strongly supports SB41 which would repeal the sunset provision of the Hawaii Prepaid Health Care Act.

Thank you for the opportunity to testify.