

HB 2448, HD2

Measure Title: RELATING TO MEDICAID.

Report Title: Medicaid

Description: Establishes a formula for calculating the amount to be contributed by the State, towards a claimant's attorney's fees and costs, in lieu of recovering the full amount. Defines the term "medical institution". Clarifies that the lien amount in the Notice of the Lien sent by the Department of Human Services for reimbursement of Medicaid benefits shall be presumed to be valid. Effective January 7, 2059. (HB2448 HD2)

Companion: SB2710

Package: Gov

Current Referral: HMS/JDL, WAM

Introducer(s): SAY (Introduced by request of another party)

NEIL ABERCROMBIE
GOVERNOR



PATRICIA MCMANAMAN
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STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
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March 22, 2012

TO: The Honorable Suzanne Chun Oakland, Chair
Senate Committee on Human Services

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary & Labor

FROM: Patricia McManaman, Director

SUBJECT: H.B. 2448, H.D.2 - RELATING MEDICAID

Hearing: Thursday, March 22, 2012; 1:30 p.m.
Conference Room 016, State Capitol

PURPOSE: The purposes of this bill are to: 1) amend section 346-1, Hawaii Revised Statutes (HRS), to define the term "medical institution" as being an institution created for the practice of medicine and for caring for patients on a long-term basis; 2) amend Sections 346-29.5(b), HRS, to state that the lien amount in the Notice of the Lien sent by the Department of Human Services for reimbursement of Medicaid benefits shall be presumed to be valid; and 3) amending various sections of 346-37, HRS, to establish a formula for calculating the amount to be contributed by the State, towards a claimant's attorney's fees and costs, in lieu of recovering the full amount and to clarify that amount that a Medicaid recipient, who receives from a settlement or what a court or jury awards to the Medicaid recipient at trial, must reimburse Medicaid for benefits paid out.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) strongly supports this Administration bill. The amendments proposed in this bill will

assist the Department of Human Services in its collections of reimbursements for its Medicaid liens.

Section 2 of this bill proposes to define in Section 346-1, Hawaii Revised Statutes (HRS), the term "medical institution." Section 346-29.5, Hawaii Revised Statutes, allows Medicaid liens to be placed on the real property of Medicaid recipients who are in a "medical institution." This bill will define that a medical institution is any facility that engages in the practice of medicine and also provides long-term care services at a nursing facility level of care. By clarifying what types of institutions would fall within the statute, the DHS will be able to determine whether or not a lien may be properly placed on the recipient's real property.

Section 3 of this bill amends Section 346-29.5(b), HRS, to state that the lien amount in the Notice of the Lien sent by the Department of Human Services for reimbursement of Medicaid benefits shall include an itemized list of payments made by the Department and presumes the lien to be valid absent a good faith basis contesting the amount. The lien amounts stated in the DHS' Notices of Lien have been challenged on numerous occasions in cases where the Department is seeking restitution. The proposed amendments in Section 3 would reduce the need for a court hearing to prove the amount of the lien and expedite the determination of the amount of restitution that must be paid.

Section 4 of this bill amends Section 346-37 (d), (e), (f), (g), (h), and (i) to also establish the validity of the lien notice and establish a formula for calculating the amount to be contributed by the State, towards a claimant's attorney's fees and costs, in lieu of recovering the full amount as stated in Section 346-37(f) and (h), HRS. This formula proposed for the State's contribution towards a claimant's attorney's fees and costs would be a fair method of balancing the amounts owed to the Department of Human

Services with the amount that should be contributed by the State towards a claimant's attorney's fees and costs. Currently, Section 346-37(f) and (h), HRS, allows the Department of Human Services to have a lien for the full amount of its lien, on the moneys that a Medicaid recipient recovers in a settlement or lawsuit. The United States Supreme Court has stated that recovery can only be made on the moneys recovered for medical expenses (special damages). Establishing a formula would help to resolve the issue as to what amount should be contributed by the State towards a claimant's attorney's fees and costs.

Section 4 which amends section 346-37 (k), (l), (m) and (o) would also clarify the amount that a Medicaid recipient, who receives from a settlement or what a court or jury awards to the Medicaid recipient at trial, must reimburse Medicaid for benefits paid out. This will improve Medicaid program integrity and to ensure that funding for the Medicaid program is used to provide health insurance coverage for those who really need it.

The DHS defers to the Department of the Attorney General regarding the technical aspects or amendments needed for this bill.

Thank you for the opportunity to testify on this bill.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 2448, H.D. 2, RELATING TO MEDICAID.

BEFORE THE:

SENATE COMMITTEES ON HUMAN SERVICES AND ON JUDICIARY AND LABOR

DATE: Thursday, March 22, 2012 **TIME:** 1:30 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Elton Au, or Michael Vincent, Deputy Attorneys General

Chair Chun Oakland, Chair Hee and Members of the Committees:

The Department of the Attorney General strongly supports this measure.

The purpose of this bill is to assist the Department of Human Services in recovering moneys owed by third parties responsible for injuries to Medicaid recipients.

One of the primary purposes of this bill is to establish formulas for calculating the amount to be contributed by the Department of Human Services (DHS) towards a Medicaid recipient's attorney's fees and costs, in lieu of recovering the full amount of a Medicaid lien as currently stated in section 346-37(f) and (h), Hawaii Revised Statutes (HRS). Another primary purpose of this bill is to clarify that the lien amounts stated in notices of lien sent by the Department of Human Services are presumed valid, when certain information is provided to the parties. Other minor amendments are intended to help pursue reimbursement for medical expenses.

Currently, section 346-37(f), HRS, allows DHS to recover the full amount of the costs of medical assistance made on behalf of a Medicaid recipient from any moneys that the recipient receives from a lawsuit or settlement. However, the United States Supreme Court has significantly limited the states' ability to recover full reimbursement in Medicaid third-party-lien cases by limiting state Medicaid agencies to recover only from moneys that a recipient receives that represent medical expenses or special damages. Because settlement moneys are usually for general damages only, recipients and their attorneys dispute the amount of the settlement moneys that should go towards reimbursing medical expenses or special damages. The Court also encouraged the states to come up with a formula by stating "we leave open the possibility that

such rules and procedures might be employed to meet concerns about settlement manipulation." Establishing a formula would help to resolve the issue as to how much of the total settlement moneys that a Medicaid recipient receives would be considered available for the limited purpose of medical expenses.

Currently, section 346-37(h), HRS, requires that the full amount of the Medicaid lien be paid before the recipient can receive any portion of the settlement moneys. This section also provides that DHS shall determine a "reasonable amount" to be contributed towards a recipient's attorney's fees and costs. This creates many disputes as to what is considered a "reasonable amount." This bill would help resolve this issue by establishing another formula as to how much should be deducted from the Medicaid lien to be considered DHS' contribution towards a recipient's attorney's fees and costs.

After consulting with the Hawaii Association for Justice, we believe that this bill will resolve the disputes and establish a fair and equitable balance of the competing interests of the DHS and Medicaid recipients.

We are also requesting that the term "value of damages" be reinserted into section 2 of the bill and defined for the limited purpose of reimbursing Medicaid for benefits paid out, as "the total amount that a medicaid recipient receives from a settlement or what a court or jury awards to the medicaid recipient at trial". This definition was included in the proposed revisions that were agreed to by the Hawaii Association for Justice, but were removed from House Draft 2. The new definition should read:

"Value of damages" for the limited purpose of reimbursing medicaid for benefits paid out means the total amount that a medicaid recipient receives from a settlement or what a court or jury awards to the medicaid recipient."

The valuation of damages that a Medicaid recipient incurs can be vague. In many cases the recipients and their attorneys argue that the value of damages is actually the amount that a provider charges, which is usually significantly more than the actual amount that Medicaid has paid on a recipient's behalf. The result is that recipients claim that the settlement amount they received is a small percentage of what the damages are, and often argue that the Medicaid lien should be reduced by the same percentage. These situations significantly reduce the amount of money that is recovered for reimbursing the Department of Human Services for its lien, resulting in the loss of potential reimbursements to the State.

Medicaid recipients have already benefitted from the Medicaid program by receiving free, or greatly discounted medical care. Additionally, the amount that Medicaid pays the provider of the medical service is about twenty-five to thirty-three percent of what the provider charges for the medical service, thereby giving the recipients a significant benefit. Complementing this is the fact that under federal law, medical providers are precluded from seeking the unpaid balance from any settlement or award, thereby giving the recipients a further benefit.

Moneys recovered from third parties responsible for injuring Medicaid recipients are used to help sustain the viability of the Medicaid program. The Medicaid program has been facing budget cuts, which result in reduced benefits for all the recipients. Recovering reimbursements helps reduce the burden on the program while helping to ensure that the Medicaid program continues to be available for the community.

We respectfully request passage of this bill with the inclusion of the wording that was previously removed from section 2.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF H.B. NO. 2448 H.D. 2**

Date: Thursday, March 22, 2012

Time: 1:30 pm

To: Chairpersons Suzanne Chun Oakland and Clayton Hee and Members of the Senate
Committee on Human Services and Senate Committee on Judiciary and Labor:

My name is Robert Toyofuku and I am presenting this testimony on behalf of the
Hawaii Association for Justice (HAJ) in SUPPORT of H.B. No. 2448 HD2, relating to
Medicaid.

The current Hawaii statute is invalid under the United States Supreme Court
ruling in Arkansas Dept. of Health and Human Services v. Ahlborn, decided in 2005.
The U. S. Supreme Court ruled that federal law: “does not authorize the State to demand
reimbursement from portions of the settlement allocated or allocable to nonmedical
damages; instead, it gives the State priority disbursement from the medical expenses
portion alone.” This bill brings the Hawaii statute in compliance with the U. S. Supreme
Court’s decision.

This bill is necessary because it is just a matter of time before the current statute is
challenged and declared invalid by the courts. This could result in an extended period of
time when the State will not be able to obtain any reimbursement until corrective
legislation can be enacted.

This measure currently contains a defective effective date which I assume will be
corrected in a final version if the bill moves forward.

Thank you very much for allowing me to testify in SUPPORT of this measure.

Please feel free to contact me should you have any questions or desire additional information.