



STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 2, 2012

TO: The Honorable John M. Mizuno, Chair
House Committee on Human Services

FROM: Patricia McManaman, Director

SUBJECT: H.B. 2448 - RELATING MEDICAID

Hearing: Thursday, February 2, 2012; 8:30 a.m.
Conference Room 329, State Capitol

PURPOSE: The purpose of the bill is 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 as stated in section 346-37(f) and (h), Hawaii Revised Statutes.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) strongly supports this Administration bill. Currently, section 346-37(f) and (h), Hawaii Revised Statutes, 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.

This formula 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.

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

The DHS defers to the Department of the Attorney General regarding the technical aspects of 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, RELATING TO MEDICAID.

BEFORE THE:

HOUSE COMMITTEE ON HUMAN SERVICES

DATE: Thursday, February 2, 2012 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 329

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

Chair Mizuno and Members of the Committee:

The Department of the Attorney General strongly supports this measure.

The purpose 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).

Currently, section 346-37(f) 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. However, 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. Establishing a formula would help to resolve the issue as to how much of the total settlement moneys that a Medicaid recipient receives, shall be considered to be for medical expenses.

Currently, section 346-37(h) 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.

Moneys that are recovered from the 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 help reduce the burden on the program while helping to ensure that the Medicaid program continues to be available for the community. As such, we would also like to suggest several amendments that would assist in the recovery of moneys to help sustain the viability of the Medicaid program. The suggested amendments are attached, and are described as follows.

We are requesting that the term "value of damages" be defined 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. We also request that the term "medical institution" be defined as being an institution created for the practice of medicine, which also provides long-term care services at a nursing facility level of care. Finally, another helpful amendment to the HRS would be that the lien amount, stated in notices of lien produced by the Department of Human Services for reimbursement of Medicaid benefits paid for a recipient, shall be presumed to be valid.

We respectfully request passage of this bill with the suggested amendments.



H.B. NO. 2448 Proposed H.D. 1.

A BILL FOR AN ACT

RELATING TO MEDICAID.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that, the United States
2 Supreme Court has significantly limited the states' ability to
3 recover full reimbursement in Medicaid third-party-lien cases.
4 The Supreme Court left the discretion to the states to use
5 formulas to address the allocation and distribution of proceeds
6 in these cases. Many states have implemented such formulas to
7 address this outstanding issue and to clarify what will happen
8 in settlements in these cases. Section 346-37(h), Hawaii
9 Revised Statutes, also requires that a reasonable amount be
10 contributed towards a claimant's attorney's fees and costs,
11 which results in many disputes as to what is considered a
12 "reasonable amount".

13 The legislature also finds that there is a need to
14 strengthen the opportunity for Medicaid to recover moneys that
15 it is entitled to as these moneys are used to help sustain the

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1 viability of the Medicaid program. The Medicaid program has
2 been facing budget cuts, which result in reduced benefits for
3 all the recipients. Recovering reimbursements help to reduce
4 the burden on the program while helping to ensure it is
5 available for the community. These amendments would enhance the
6 ability to recover these moneys.

7 The purpose of this Act is to establish a formula for
8 calculating the amount to be contributed by the State towards a
9 claimant's attorney's fees and costs, in lieu of recovering the
10 full amount as stated in section 346-37(f) and (h), Hawaii
11 Revised Statutes.

12 This Act also defines the terms "value of damages" and
13 "medical institution" and amends sections 346-29.5 and 346-37,
14 Hawaii Revised Statutes, to provide that the lien amount, stated
15 in notices of lien produced by the department of human services
16 for reimbursement of Medicaid benefits paid for a recipient,
17 shall be presumed to be valid.

18 SECTION 2. Section 346-1, Hawaii Revised Statutes, is
19 amended by adding two new definitions to be appropriately
20 inserted and to read as follows:

21 "Medical institution" means, for the purposes of dealing
22 with Medicaid liens in this chapter, an institution created for

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1 the practice of medicine and also provides long-term care
2 services at a nursing facility level of care.

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

7 SECTION 3. Section 346-29.5, Hawaii Revised Statutes, is
8 amended by amending subsection (b) to read as follows:

9 "(b) The department may also place a lien against the real
10 property of any recipient receiving medical assistance who is an
11 inpatient in a nursing facility, intermediate care facility for
12 individuals with intellectual disabilities, or other medical
13 institution, after a state determination, pursuant to notice and
14 hearing requirements of chapter 91, that the recipient cannot
15 reasonably be expected to be discharged from the medical
16 institution and returned home. The lien amount shall be
17 presumed to be valid. There is a rebuttable presumption that
18 the recipient cannot reasonably be expected to be discharged
19 from the facility and return home if the recipient or a
20 representative of the recipient declares that there is no intent
21 to return home or if the recipient has been institutionalized
22 for six months or longer without a discharge plan.

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- 1 (1) The department may not place a lien on the recipient's
2 home if the recipient's:
- 3 (A) Spouse;
- 4 (B) Minor, blind, or disabled child; or
- 5 (C) Sibling who has an equity interest in the home
6 and who was residing in the home for a period of
7 at least one year immediately before the date of
8 the recipient's admission to the medical
9 institution;
- 10 is lawfully residing in the home.
- 11 (2) The department shall not recover funds from the lien
12 on the recipient's home when:
- 13 (A) A sibling who was residing in the home for a
14 period of at least one year immediately before
15 the date of the recipient's admission to the
16 medical institution; or
- 17 (B) A son or daughter who was residing in the
18 recipient's home for a period of at least two
19 years immediately before the date of the
20 recipient's admission to the medical institution,
21 and who establishes to the satisfaction of the
22 State that he or she provided care to the

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1 recipient which permitted such recipient to
2 reside at home rather than in an institution;
3 lawfully resides in the home and has lawfully
4 resided in the home on a continuous basis since
5 the date of the recipient's admission to the
6 medical institution.

7 (3) The department also shall not recover funds from the
8 lien if the recipient has a surviving spouse; or
9 surviving minor, blind, or disabled child.

10 (4) Any lien imposed with respect to this subsection shall
11 be dissolved upon the individual's discharge from the
12 medical institution and return home."

13 SECTION 4. Section 346-37, Hawaii Revised Statutes, is
14 amended by amending subsections (f), (g), and (h) to read as
15 follows:

16 "(f) If liability is found to exist, or if the issue of
17 third-party liability is settled or compromised without a
18 finding of liability, regardless of who institutes legal
19 proceedings or seeks other means of recovering, the department
20 shall have a right to recover the full amount of the costs of
21 medical assistance or burial payment made. To aid in the
22 recovery of the costs the department shall have a first lien in
23 the full amount of the costs of medical assistance or burial

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1 payment made against the proceeds from all damages awarded in a
2 suit or settlement. The lien shall attach as provided by
3 subsection (g). Thirty-three per cent of the total settlement
4 or, if not specified by a jury, thirty-three per cent of any
5 judgment or award shall be considered special damages for the
6 limited purpose of identifying the total amount available to
7 satisfy the lien.

8 (g) The lien of the department for reimbursement of costs
9 of medical assistance or burial payments under subsection (f),
10 shall attach by a written notice of lien served upon the
11 claimant's attorney or upon the third person, the third person's
12 agent, attorney, or insurance company. The method of service
13 shall be by certified or registered mail, return receipt
14 requested, or by delivery of the notice of lien personally to
15 the individuals referred to. Service by certified or registered
16 mail is complete upon receipt. The notice of lien shall state
17 the name of the injured, diseased, or deceased person, the
18 amount of the lien, and the date of the accident or incident
19 which caused the injuries, disease, or death which necessitated
20 the department's medical assistance or burial payments. If the
21 notice of lien is served upon the claimant's attorney, the
22 notice of lien shall state that the claimant's attorney shall
23 pay the full amount of the lien from the proceeds of any

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1 judgment, settlement, or compromise based on the incident or
2 accident. If the notice of lien is served upon the third
3 person, the third person's agent, attorney, or insurance
4 company, the notice of lien shall state that the third person
5 shall pay the full amount of the lien prior to disbursing any of
6 the proceeds to the claimant or to the claimant's attorney. A
7 notice of lien may be amended from time to time until
8 extinguished, each amendment taking effect upon proper service.
9 The lien amount shall be presumed to be valid.

10 (h) The lien shall attach as provided by subsection (g).
11 If a notice of lien is properly served upon the attorney
12 representing the claimant as provided in subsection (g), that
13 attorney shall pay the full amount of the lien, prior to
14 disbursing any of the proceeds of the suit or settlement to the
15 attorney's client. If a notice of lien is properly served upon
16 the third person, the third person's agent or attorney, or the
17 third person's insurance company, as provided in subsection (g),
18 it shall be the responsibility of the person receiving the
19 notices to pay the full amount of the lien prior to disbursing
20 any of the proceeds to the claimant's attorney.

21 ~~[If, after having received timely written notice of any~~
22 ~~claim or action under subsection (c), the department did not~~
23 ~~intervene or join in the action or prosecute its own claims or~~

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1 ~~actively participate with claimant or claimant's attorney in the~~
2 ~~prosecution of claims, or a distribution agreement was not~~
3 ~~entered into between the parties, then the department shall~~
4 ~~determine its fair contribution toward attorney fees and costs~~
5 ~~incurred in the action that shall be a reasonable amount based~~
6 ~~solely upon legitimate costs and services rendered by the~~
7 ~~claimant or claimant's attorney in recovering the lien amount.~~
8 ~~Any dispute regarding the department's determination of its~~
9 ~~contribution to fees and costs may be submitted to~~
10 ~~administrative hearing under subsection (i) or a court of~~
11 ~~competent jurisdiction. The value of services contributed by~~
12 ~~the claimant and department may be considered in fairly~~
13 ~~allocating fees and costs between the claimant and department~~
14 ~~where both contribute to recovering the lien amount.] If the~~
15 lien is less than or equal to the special damages amount
16 specified in subsection (f), thirty-three per cent of the lien
17 amount will be deducted and considered the State's reasonable
18 and fair contribution towards the claimant's attorney's fees and
19 costs unless the State prosecutes its own claim, in which case
20 it is not required to reduce its lien. If the lien is greater
21 than this special damages amount, the total settlement shall be
22 split equally between the State, the claimant, and the
23 claimant's attorney, after deducting all legitimate costs

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1 incurred by claimant's attorney, in prosecuting claimant's
2 case."

3 SECTION 5. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 6. This Act shall take effect upon its approval.

6

7

INTRODUCED BY: _____

8

BY REQUEST

9

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Proposed H.D. 1.

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 as stated in section 346-37(f) and (h), Hawaii Revised Statutes; amends section 346-1, Hawaii Revised Statutes, to define, for the limited purpose of reimbursing Medicaid for benefits paid out, the term "value of damages" as the total amount that a Medicaid recipient receives from a settlement or what a court or jury awards to the Medicaid recipient; amends section 346-1, Hawaii Revised Statutes, 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; and amends sections 346-29.5(b) and 346-37(g), Hawaii Revised Statutes, to state that the lien amount in the Notice of Lien sent by the Department of Human Services for reimbursement of Medicaid benefits shall be presumed to be valid.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2448

Date: Thursday, February 2, 2012
Time: 8:30 am

To: Chairman John Mizuno and Members of the House Committee on Human Services:

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

Current law dictated by the United States Supreme Court ruling in *Arkansas Dept. of Health and Human Services v. Ahlborn*, decided in 2005, provides that when a person is injured and Medicaid has paid for medical bills related to those injuries, Medicaid should be reimbursed its fair share only from that portion of a recovery that represents medical expenses. 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 sets an arbitrary amount of 33% of any settlement, judgment or award, if not specified by a jury, as special damages “available to satisfy the lien.” This violates the U. S. Supreme Court’s decision that the Medicaid lien can only apply to the settlement or judgment’s “medical expenses portion alone.”

In addition, this bill purports to make all “special damages” subject to the Medicaid lien for medical expenses. Special damages include such things as medical expenses, lost wages, out-of-pocket expenses, and services not covered by Medicaid.

The U. S. Supreme Court decision made it clear that this is not allowed: “Medicaid recipients must, as a condition of eligibility, assign the State any rights to payment for medical care from any third-party, **not rights to payment for, for example, lost wages.**”

The U. S. Supreme Court decision addressed methods for determining the proper allocation for medical expenses, stating that an allocation can be made by “agreement to an allocation or, if necessary, by submitting the matter to a court for decision.”

Accordingly, the new language added on page 2, lines 13 – 17, of the bill should be deleted and replaced with the following:

“The lien shall attach to that portion of the settlement, award or judgment allocated or allocable to payments by the department for medical expenses. If the settlement, award or judgment does not include an allocation for medical expenses, a reasonable allocation shall be determined by agreement or by submission to any court of competent jurisdiction.”

Finally, the bill proposes a formula to determine Medicaid’s net reimbursement, after considering attorney’s fees and expenses, which similarly fail to comply with the U. S. Supreme Court decision and which eliminates its obligation to assume its fair share where both the department and claimant’s attorneys contribute to a recovery. The current statute provides: “The value of services contributed by the claimant and department may be considered in fairly allocating fees and costs between the claimant and department where both contribute to recovering the lien amount.” This language should be retained to fairly cover the situation where both contribute to a recovery. The proposed language on page 4, lines 1 – 12, should be deleted and replaced with the following to comply with the U. S. Supreme Court decision:

“The lien shall apply to that portion of the settlement, award or judgment allocated or allocable to medical expenses paid by the department. The

department shall be reimbursed its lien, less 33% for the claimant's attorney's fees plus a proportionate share of costs and expenses, where the claimant alone prosecutes the claim. There shall be no reduction for the claimant's attorney's fees and expenses where the department alone prosecutes the claim. The value of services contributed by the claimant and department may be considered in fairly allocating fees and expenses between the claimant and department where both contribute to recovering the lien amount. Any dispute regarding the department's fair share of attorney's fees, costs and expenses may be submitted to any court of competent jurisdiction."

Thank you very much for allowing me to testify in OPPOSITION TO this measure. Please feel free to contact me should you have any questions or desire additional information.