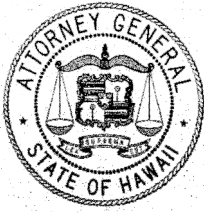


SB1241

TESTIMONY



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

S.B. NO. 1241, RELATING TO HEALTH CARE.

BEFORE THE:

SENATE COMMITTEES ON HEALTH AND ON
COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 6, 2013 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): David M. Louie, Attorney General, or
Rodney I. Kimura, Deputy Attorney General

Chairs Green and Baker and Members of the Committees:

The Department of the Attorney General recommends that this bill be held because it will not provide immunity from antitrust scrutiny, and because the exemption from the unfair competition provision is too broad.

The bill exempts certain cooperation, collaborations, or agreements ("collaborations") relating to the development and adoption of uniform health care-related procedures from the provisions of chapter 480, Hawaii Revised Statutes.

While the stated objective of the collaborations is to improve quality of care or health care outcomes, implicit in the bill is the notion that the contemplated collaborations will be in violation of chapter 480. Otherwise, there would not be a need for this bill.

We have two main concerns over the bill. First, the bill does not afford complete antitrust immunity because the collaborating entities will be subject to scrutiny under federal antitrust law.

Under the "state action" doctrine, anticompetitive conduct engaged in by private parties can be shielded from the antitrust laws if a rigorous two-pronged test is met. The private conduct must be (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy, and (2) actively supervised by the State itself.

Assuming for the moment that the wording in the bill is sufficient to constitute a "clearly articulated and affirmatively expressed state policy," nothing in the bill provides for active supervision of the collaborating parties by the State.

Thus, the participants will be subject to both governmental and private scrutiny under the federal antitrust laws, and could be subject to prosecution or suit.

Second, the exemption from the unfair competition provision in chapter 480 is too broad. The stated objective of the collaborations is to improve the quality of care or health care outcomes, and such collaborations have the potential to yield positive benefits.

However, unsupervised industry-wide collaborations that are self-implemented and self-policed also have the potential to produce negative outcomes. Besides not providing any structure for the collaborations, nothing in the bill prohibits some or all of the collaborators from discussing topics that raise unfair competition and anticompetitive concerns such as protocols that adversely affect certain medical procedures or practices, impediments to the prescribing of generic drugs, or strategies relating to pricing and output.

We therefore recommend that this bill be held.



SENATE COMMITTEE ON HEALTH

Senator Josh Green, Chair

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Senator Rosalyn Baker, Chair

February 6, 2013 at 2:00 p.m.

Conference Room 229

Supporting with amendments SB 1241: Relating to Health Care

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. In addition to providing quality care to all of Hawaii's residents, our members contribute significantly to Hawaii's economy by employing over 40,000 people. Thank you for this opportunity to testify in support of SB 1241, which encourages open and robust discussion among health care entities when developing uniform administrative standards and procedures to enhance the quality of health care in Hawaii.

Such standards include pre-authorization forms, drug formularies, credentialing forms, quality metrics, and patient demographic information. In the development of these standards, it is important to encourage discussions and agreements among health care providers, insurers, and other health care organizations. However, antitrust laws are likely to have a dampening effect on such discussions. We believe that the bill will facilitate collaborative efforts among Hawaii's health care providers and other relevant health care entities and assist them in meeting the triple aim of improving quality and population health while bending the cost curve downward.

We would like to propose an amendment to the bill. On page 2 in item (4) the types of health care entities should also include health care associations. This amendment would include entities such as the Hawaii Medical Association, the Hawaii Long Term Care Association, and the Healthcare Association of Hawaii.

A concern has been raised that the bill does not provide for State supervision of those who are engaged in collaboration. Section 624-25.5(b) and (c), Hawaii Revised Statutes, contains an example that can be used to develop such a mechanism. It authorizes the Department of Health (DOH) to convene committees to improve Hawaii's trauma care system, and prohibits the proceedings and records of these committees from being used in discovery. Similarly, the bill may be amended to authorize DOH to convene committees to collaborate on uniform administrative standards for health care that are not subject to Hawaii's antitrust laws.

Another concern has been raised that this bill does not apply to federal antitrust laws. That would not be appropriate, as the State Legislature does not have jurisdiction over federal law.

With the necessary amendments, the Healthcare Association of Hawaii supports SB 1241.

HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association

February 6, 2013

The Honorable Josh Green M.D., Chair
The Honorable Rosalyn H. Baker, Chair
Senate Committees on Health and Commerce and Consumer Protection

Re: SB 1241 – Relating to Health Care

Dear Chair Green, Chair Baker and Members of the Committees:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 1241 which would allow health care related organizations to freely discuss how to streamline administrative procedures that address measuring health care quality, prior authorization procedures for health care, methodology for preferred drug lists, and similar health care related issues. HMSA supports the intent of this measure.

This legislation is intended to allow the health care stakeholders to conduct full and free discussions on streamlining these administrative processes that could achieve savings in cost and item. However, the impact of SB 344 would be limited, since it does not extend beyond State antitrust statutes and does not provide an exemption under federal antitrust law.

We note that a substantially similar measure (SB 344) was heard by the Senate Committee on Health this past Monday, and concerns were raised by the Attorney General. We understand it is the Health Committee's intention to try to address those issues in a new draft, and decision-making on that Bill is scheduled for February 11, 2013. Pending the results of those efforts, we hope the Committee would allow either this Bill or that measure to continue through the legislative process.

Thank you for allowing us to testify on this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read 'JD' followed by a flourish.

Jennifer Diesman
Vice President
Government Relations