

**SB344**

**TESTIMONY**



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

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**ON THE FOLLOWING MEASURE:**

**S.B. NO. 344, RELATING TO HEALTH CARE ADMINISTRATIVE UNIFORMITY.**

**BEFORE THE:**

**SENATE COMMITTEE ON HEALTH**

**DATE:** Monday, February 4, 2013

**TIME:** 1:15 p.m.

**LOCATION:** State Capitol, Room 229

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

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Chair Green and Members of the Committee:

The Department of the Attorney General recommends that this bill be held because it will not provide immunity from antitrust scrutiny.

The bill expresses an exception to the application of the Hawaii antitrust law for the apparent purpose of conferring antitrust immunity on certain cooperation, collaborations, or agreements ("collaborations") relating to the development and adoption of uniform health care-related procedures.

Implicit in the bill is the notion that the contemplated collaborations will be in violation of the antitrust laws. Otherwise, there would not be a need for this bill.

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. First, the private conduct must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy. Second, the private conduct must be 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.

We therefore recommend that this bill be held.



**HAWAII MEDICAL ASSOCIATION**

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**Monday February 4, 2013**

**1:15 p.m.**

**Conference Room 229**

To: COMMITTEE ON HEALTH  
Sen. Josh Green, Chair  
Sen. Rosalyn H. Baker, Vice Chair

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

Re: SB 344 RELATING TO HEALTH CARE ADMINISTRATIVE UNIFORMITY

In Support.

The Hawaii Medical Association agrees with the legislature that collaborative development of uniform administrative standards for quality health care measures could help produce better quality health care that is more cost effective, while allowing providers to spend more time providing quality patient care and less time with administrative claims procedures.

The HMA agreeS that it is important to encourage productive discussion and agreements between health care providers, insurers, and other interested entities on uniform administrative standards regarding evidence-based medicine, clinical efficacy, and quality in health claims processing.

Removing collaboration from the State's unfair competition and antitrust laws is a necessary step in the right direction.

Thank you for introducing this bill and for the opportunity to provide testimony.

**OFFICERS**

**PRESIDENT - STEPHEN KEMBLE, MD PRESIDENT-ELECT –WALTON SHIM, MD**  
**SECRETARY - THOMAS KOSASA, MD IMMEDIATE PAST PRESIDENT – ROGER KIMURA, MD**  
**TREASURER – BRANDON LEE, MD EXECUTIVE DIRECTOR – CHRISTOPHER FLANDERS, DO**



SENATE COMMITTEE ON HEALTH  
Senator Josh Green, Chair

February 4, 2013 at 1:15 p.m.  
Conference Room 229

**Supporting SB 344: Relating to Health Care Administrative Uniformity**

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 344, 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, anti-trust 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.

With that amendment, the Healthcare Association of Hawaii supports SB 344.

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February 3, 2013

Senator Josh Green, Chair  
Senate Committee on Health  
Hawai'i State Legislature

## **Testimony in Opposition to SB 344**

**Date:** Monday, February 4, 2013  
**Time:** 1:15 p.m.  
**Place:** Conference Room 229  
State Capitol  
415 Beretania Street

Chair Green and Members of the Committee:

My name is Tom Grande. I am testifying today as an individual.

I strongly urge the Committee to reject SB 344, which creates a broad and vague exemption for insurance companies, third party administrators, and health care providers, including drug companies, pharmacies, and other national health care organizations, to engage in collusive and anti-competitive behavior in violation of Hawai'i and national consumer protection, unfair competition, and anti-trust legislation.

SB 344 is an ill-advised attempt to exempt a growing sector of our economy from appropriate governmental oversight. In doing so, it hamstring the state of Hawai'i from fulfilling its statutory mandate to ensure that our consumer and business-protection laws are enforced. *In re Insurance Anti-Trust Litigation*, 938 F.2d 919, 927 (9<sup>th</sup> Cir. 1999) (“The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction.”).

HRS Chapter 480 is an amalgam of three public and private enforcement powers: (1) it allows the state and consumers to bring claims for unfair or deceptive acts or practices; (2) it allows the state and businesses to bring claims for unfair competition; and (3) it allows the state, businesses, and consumers to bring claims for anti-trust violations. This bill exempts health care providers and insurance companies from regulatory enforcement under all three areas of Chapter 480 and from enforcement by consumers, businesses, and the state.

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## Testimony in Opposition to SB 344

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The Chapter 480 exemption applies as long as the activity relates to adoption of “uniform administrative procedures” for “health care quality.” Both of these terms are undefined and both are broad enough to cover virtually any health care activity. See U.S. Department of Health and Human Services, Agency for Health Care Research and Quality (“What exactly is health care quality? We know that quality means different things to different people.”) <http://www.ahrq.gov/consumer/guidetoq>.

Further, because of the broad definition of “health care provider”, national drug companies, pharmacies, pharmacy benefit managers, and other national health care providers would be exempted. See e.g., HRS § 432:1-605:1 (“health care provider means...any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.”) and HRS § 327E-2 (“Health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition....”).

The most important example of litigation that might be affected by this exemption is the \$84 million recovered by the State of Hawai'i for drug overpricing in the last several years. These cases were brought primarily under two statutes – the state False Claims Act and HRS Chapter 480. If this legislation were in place, it certainly would have been raised as a defense in that case and might have precluded litigation against these drug companies under Chapter 480.

I am unaware of any other state that has provided exemption for these broad activities.

This legislation provides no direct benefits to Hawai'i's consumers, business, and the State. It opens up a Pandora's box of potential exemptions to laws that protect Hawai'i's consumers and businesses. It also undermines the state's enforcement powers under Chapter 480.