

SB3052

Measure Title: RELATING TO INDEPENDENT MEDICAL EXAMINATIONS.

Report Title: Independent Medical Examinations; Tort Actions

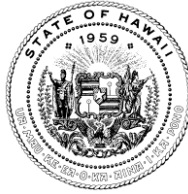
Description: Requires all liability insurance policies to specify that when an examination of an injured party is requested by the insurance company, the selection of the examining doctor is made by mutual agreement. Authorizes the insurance commissioner or circuit court to select an independent medical examiner in the event a mutual agreement is not reached.

Companion:

Package: None

Current Referral: CPH, JDL

Introducer(s): SHIMABUKURO, CHUN OAKLAND, Baker, Keith-Agaran



DAVID Y. IGE
GOVERNOR
SHAN S. TSUTSUI
LT. GOVERNOR

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TO THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2016

Friday, February 5, 2016
9:00 a.m.

**TESTIMONY ON SENATE BILL NO. 3052 – RELATING TO INDEPENDENT
MEDICAL EXAMINATIONS.**

TO THE HONORABLE ROSALYN H. BAKER, 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 opposes the proposed amendment to § 431:10-211, Hawaii Revised Statutes (HRS), and submits the following comments:

S.B. 3052 requires all liability policies to specify that the physician who will conduct the independent medical examination (IME) must be selected by mutual agreement. If the parties cannot agree, then the insurance commissioner or a circuit court will make the selection. The IME physician must be of the same specialty as the provider whose treatment is being reviewed unless the parties otherwise agree, and IME records and charges must be made available to the plaintiff upon request.

If the intent of this bill is to establish a mandate similar that in § 431:10C-308.5, HRS, governing resolution of IME physician challenges in motor vehicle accident matters, then the Department respectfully requests the addition of safeguards that will insulate the commissioner from conflicts of interest should those related matters or parties present themselves for adjudication or regulation.

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DCCA Testimony of Gordon Ito
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The Department respectfully recommends that the Committee consider removing the proposed IME selection requirement from the Insurance Code, generally, and instead assigning the selection function to each of the respective insurance or coverage programs within Hawaii Revised Statutes.

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

Hawaii State Legislature
Committee on Commerce, Consumer Protection and Health
Hawaii State Capitol
415 South Beretania Street
Honolulu, HI 96813

February 3, 2016

Filed via electronic testimony submission system

RE: SB 3052, Liability Insurance Policies - NAMIC's Written Testimony in Opposition to Legislation

Dear Senator Baker, Chair; Senator Kidani, Vice Chair; and honorable members of the Committee on Commerce, Consumer Protection, and Health:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to your committee for the February 5, 2016, public hearing. Unfortunately, I will not be able to attend the public hearing, because of a previously scheduled professional obligation.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,300 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than \$208 billion in annual premiums, accounting for 48 percent of the automobile/homeowners market and 33 percent of the business insurance market. NAMIC has 69 members who write property/casualty and workers' compensation insurance in the State of Hawaii, which represents 30% of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

The proposed legislation states:

(d) Every liability *policy shall specify* that when an examination of an injured party is requested by the insurance company, the selection of the examining doctor *shall be by mutual agreement*; provided that if no agreement is reached, the selection shall be submitted to the insurance commissioner or a circuit court. The examining doctor shall be of the *same specialty* as the

provider whose treatment is being reviewed unless otherwise agreed by the parties. All records and charges relating to an independent medical examination shall be made available to the plaintiff upon request. [Emphasis added]

NAMIC respectfully submits the following statement of concerns with the proposed amendments to the statute:

1) SB 3052 will create an unnecessary administrative cost and burden for insurance companies and require the DOI to have to re-review and approve insurance policy forms.

The proposed legislation states, that “[e]very liability *policy shall specify*” NAMIC is concerned that this provision could be strictly read to require insurers to rewrite their policies to include this consumer disclosure and then resubmit them to the DOI for prior approval of the policy forms. This requirement will create unnecessary administrative costs and IT expenses for insurers, when the insurer could provide this disclosure information during the claims process in a more cost-effective, timely, and meaningful manner. If the goal is to make sure that the insurance consumer knows about this proposed statutory right, it makes more sense to educate the consumer about it at a time when it is salient, i.e. when an independent medical exam (IME) has been requested by the insurer, not when the policyholder purchases the insurance policy.

Additionally, NAMIC is concerned that this new requirement will create a needless delay in the issuance of new and renewal insurance policies. Hawaii is a prior approval of insurance rates and forms regulatory regime, so any required change in an insurance policy must be filed and approved by the DOI, which takes time.

2) NAMIC is concerned that the proposed requirement that, “the selection of the examining doctor shall be by mutual agreement” will needlessly delay the IME process to the detriment of the injured insurance consumer, increase IME costs for insurers and policyholders, and make the IME process unnecessarily contentious.

Policyholders already possess the legal right to have the IME reviewed by a doctor of their selection, if they want to contest the insurer’s IME doctor’s medical assessment. Therefore, the proposed requirement that the IME doctor be selected by “mutual agreement” (whatever that means procedurally) doesn’t really provide the policyholder with any new consumer protection. The only thing it does is make the insurance claims process more complicated and protracted.

Moreover, the proposed “mutual agreement” selection requirement could create unintended professional liability and ethical duty problems for medical professionals. When the insurer retains the IME doctor and the insurance consumer retains his own doctor, the ethical and professional duties of the respective medical professionals are quite clear. The proposed “mutual agreement” selection requirement makes the physician’s duties unclear to the detriment of both parties and the physician.

3) NAMIC is concerned that the proposed legislation will adversely impact an insurer’s ability to secure a timely and accurate medical evaluation and the insurance consumer’s ability to secure prompt medical treatment.

The proposed legislation states, that “if no agreement is reached, the selection shall be submitted to the insurance commissioner or a circuit court.” First of all, this provision is ambiguous in that it is not clear as to who shall ultimately resolve the IME medical professional selection dispute. Is it the commissioner *or* a circuit court judge? What if the insurer wants a circuit court judge to decide and the insurance consumer wants the commissioner to decide? Moreover, how and when would an appeal of the commissioner’s or circuit court judge’s decision on the medical professional selection dispute be handled?

Since a resolution of a dispute over the selection of the IME medical professional would need to be resolved *before* any IME may be conducted, the insurer will be hindered in its ability to comply with its regulatory duty to promptly investigate and settle claims and will be prevented from securing timely information about the insurance consumer’s medical diagnosis. Additionally, the insurance consumer will be delayed in securing medical treatment or a change in medical treatment, because the IME and any subsequent challenge of the IME doctor’s medical finding will be delayed until the commissioner or circuit court judge resolve the IME selection dispute.

4) NAMIC is also concerned that the proposed legislation is impractical and may create unnecessary inconvenience and cost for insurance consumers.

The proposed legislation states, that the “examining doctor shall be of the *same specialty* as the provider whose treatment is being reviewed” Conceptually, this seems reasonable, but in reality it may be unrealistic. If the injured insurance consumer lives on the island of Maui, but the only examining doctor of the *same specialty* practices on the island of Oa’hu, the proposed legislation creates a dynamic where the consumer may have to travel to another island for the IME. This will create an unnecessary burden and cost for the injured insurance consumer.

Although, NAMIC appreciates the fact that the proposed legislation does specifically state that the parties may agree to deviate from the “same specialty” requirement, an insurer may be legally apprehensive to do so, since the proposed provision arguably creates a quasi-preference for the retention of a physician of the “same specialty”.

The fact of the matter is that unless the insurance consumer suffers from a specialized injury, most doctors with general medical training or doctors with similar or related medical experience to the treating doctor is skilled and qualified to perform the IME. If there ends up being a dispute after the IME has been performed as to whether the insurer selected IME doctor had the requisite subject matter knowledge and experience necessary to have conducted the IME, that issue can then be resolved by the parties. The proposed requirement presumes that there is going to be dispute between the insurer and insurance consumer over the medical abilities of the selected IME doctor. Such disputes are rare.

One also has to remember that licensed medical providers have ethical and professional duties, and no doctor is going to risk jeopardizing her license (ability to make a living) and reputation or expose herself to malpractice by conducting an IME the doctor is not qualified to perform. The

only thing this proposed requirement will accomplish is to drive up the cost of retaining a doctor to perform the IME, which will ultimately be a cost borne by all insurance consumers.

In closing, NAMIC believes that SB 3052 is unnecessary, and likely to create unintended adverse consequences for insurance consumers, impose needless requirements that will be insurance rate cost-driver for policyholders, and turn a standard medical evaluation claims process into a costly, complicated, and contentious procedure. For the aforementioned reasons, NAMIC respectfully asks the committee to VOTE NO on SB 3052.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written testimony.

Respectfully,

A handwritten signature in black ink, appearing to read "Christian John Rataj". The signature is written in a cursive, flowing style.

Christian John Rataj, Esq.
NAMIC Senior Director – State Affairs, Western Region

TESTIMONY OF MARIE WEITE

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION & HEALTH
Senator Rosalyn H. Baker, Chair
Senator Michelle N. Kidani, Vice Chair

Friday, February 5, 2016
9:00 a.m.

SB 3052

Chair Baker, Vice Chair Kidani, and members of the Committee on Commerce, Consumer Protection and Health, my name is Marie Weite, Assistant Vice President of Claims of First Insurance Company of Hawaii and the Law & Regulations Chair of Hawaii Insurers Council. Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately thirty-six percent of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes** this bill. The proposed bill amends Section 431:10-211 Content of policies in general. It requires that all liability policies specify that when an insurance company requests an independent medical examination, the examining doctor shall be by mutual agreement, of the same specialty, and that records and charges be made available to the plaintiff. This provision would affect commercial general liability, motor vehicle bodily injury liability, uninsured motorist, underinsured motorist, and homeowners liability coverages.

Currently, most IMEs in these areas of insurance are performed by the mutual agreement of plaintiff and defense. In the rare case that mutual agreement cannot be reached, the Court would decide whether to order an IME and, if so, the medical professional to perform the examination, according to Rule 35 of the Hawaii Rules of

Civil Procedure. This bill would usurp the role and power of the Court to oversee litigation discovery, including medical examinations. If the lawsuit is in the Court Annexed Arbitration Program, Rule 14 of the Hawaii Arbitration Rules specifically provides that the extent to which discovery (including an IME) is allowed is “at the sole discretion of the arbitrator.” This bill would also usurp the role and function of the arbitrator in the Court Annexed Arbitration Program.

Furthermore, the proposed amendments could unfairly inflate the costs of the underlying case and therefore could inflate settlements. It is unfair because the plaintiff chooses their treating physician and so as a check and balance, the defendant should be able to choose a second-opinion physician if there is a question of causation, appropriate treatment, or over-treatment.

We ask that you hold this bill. Thank you for the opportunity to testify.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF S.B. NO. 3052**

Date: Friday, February 5, 2016

Time: 9:00 am

To: Chair Rosalyn Baker and Members of the Senate Committee on Commerce, Consumer Protection and Health:

My name is Bob Toyofuku and I am presenting testimony on behalf of the Hawaii Association for Justice (HAJ) in SUPPORT of S.B. No. 3052, relating to Independent Medical Examinations (IME). The Hawaii Association for Justice supports this measure because it brings fairness to a process that is full of abuse.

This measure provides that when an insurance company requires an injured consumer to submit to an **independent** medical examination, the independence of the examining doctor is assured by requiring mutual agreement or appointment by the court or insurance division. This is the same procedure required for IME's in auto insurance personal injury protection benefits.

The abuse inherent in the IME industry has been the subject of recent investigative reports and court decisions involving IME doctors who were video taped without their knowledge and caught lying and cheating for insurance companies in exchange for very lucrative incomes. The New York Times published an investigative report on the IME industry on March 31, 2009, where it chronicled many instances where IME doctors were caught cheating when they were videotaped without them knowing it. Dr. Hershel Samuels, an orthopedic surgeon, was caught on video lying in his IME report for the insurance company about the results of his IME examination. The video showed him doing tests which indicated an injury, yet his report said the tests confirmed that there was no injury. When interviewed by the New York Times and confronted with the video, he made the remarkably honest admission: "If you did a truly pure report, you'd be out on your ears and the insurers wouldn't pay for it. You have to give them what they want, or you're in Florida. That's the game, baby."

Orthopedic surgeon Pierre Rafiy was videotaped examining a swollen ankle and saying it was swollen, yet in his report for the insurance company he said there was no swelling so the

person should return to work. When confronted, he blamed it on his secretary for making a mistake. Johanne Aumoithe recorded a video of her IME on her iPhone. The IME doctor verbally confirms her limited range of motion yet wrote the opposite in his report for the insurance company. The investigative report concluded: “New York Times review of case files and medical records and interviews with participants indicate that the exam reports are routinely tilted to benefit insurers by minimizing or dismissing injuries.”

A recent New York Supreme Court case has gained notoriety amongst lawyers because two insurance lawyers were fined \$10,000 each when their insurance IME doctor lied in a trial. The doctor testified about his findings from a series of medical tests he performed in an IME examination lasting 10-20 minutes. After he perjured himself, the injured plaintiff showed the court a video of the IME exam that showed it lasted 1 minute and 56 seconds and that the doctor did not do the tests he claimed he did. The exasperated judge said: “He testified as to findings that he obviously could not have had in a minute and 56 seconds . . . We are wasting our time trying cases over and over and over again because a doctor who is making millions of dollars doing IME’s decides that he is going to lie.” And this is the crux of the problem – IME doctors must lie to maintain their lucrative business – as the IME doctor in the New York Times article admitted: “You have to give them what they want, or you’re in Florida. That’s the game, baby.”

Insurance companies will all say they only hire truly independent and fair IME doctors. IME doctors will all say they never favor insurance companies in order to maintain their lucrative business. Yet if this is true, why would there be any opposition to having the court or insurance division – two truly independent sources – pick the IME doctor? This is exactly what the law has been for almost 20 years for motor vehicle IME examinations for personal injury protection benefits. Section 431:10C-308.5 provides: “The independent medical examiner shall be selected by mutual agreement between the insurer and claimant; provided that if no agreement is reached, the selection may be submitted to the commissioner, arbitration or circuit court.” The legislature has already recognized the importance of maintaining the integrity of the IME process by requiring those IME doctors to be selected by mutual agreement or a neutral judge, arbitrator or insurance commissioner. The law has worked well for almost 20 years and there is no reason to believe that it will not work to preserve the integrity of all insurance company IME exams.

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.

**SENATE COMMITTEE
ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH**

February 5, 2016

Senate Bill 3052 Relating to Independent Medical Examinations

Chair Baker, Vice-Chair Kidani, members of the Senate Committee on Commerce, Consumer Protection, and Health, I am Rick Tsujimura, representing State Farm Mutual Automobile Insurance Company (State Farm).

State Farm offers the following comments about Senate Bill 3052 Relating to Independent Medical Examinations.

This bill attempts to convert a litigation procedure issue into an insurance liability contract issue. When a personal injury suit is brought against one of our policyholders, our contract requires us to defend it, and this includes obtaining, where appropriate, an examination of the plaintiff to verify the extent of the claimed injuries. This bill would fundamentally interfere with that contract in favor of someone that is not even a party to it. State Farm disagrees with the purpose of this bill, but it definitely should not be addressed in the insurance contract.

Requiring independent medical examiners to be selected by mutual consent would unduly tip the balance in favor of plaintiffs. All their examinations and treatment, as well as the doctors they call to testify, are selected by them and their attorneys, not the defendant or the insurance company. The defendants, State Farm's insureds, should be permitted to have the plaintiff examined by a qualified doctor to evaluate the nature and extent of the injuries. This is provided for by the Hawaii Rules of Civil Procedure, Rules 26 and 35.

Thank you for the opportunity to present this testimony.

From: mailinglist@capitol.hawaii.gov
To: [CPH Testimony](#)
Cc: [aalcselena@gmail.com](mailto:aalcselela@gmail.com)
Subject: Submitted testimony for SB3052 on Feb 5, 2016 09:00AM
Date: Tuesday, February 02, 2016 3:58:49 PM
Attachments: [160129 Written Testimony on IME Bill SB 3052.pdf](#)

SB3052

Submitted on: 2/2/2016

Testimony for CPH on Feb 5, 2016 09:00AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
John Choi	Individual	Support	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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AUTO ACCIDENT



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SB3052 - Written Testimony in support

Measure Title: RELATING TO INDEPENDENT MEDICAL EXAMINATIONS.

Report Title: Independent Medical Examinations; Tort Actions

Description: Requires all liability insurance policies to specify that when an examination of an injured party is requested by the insurance company, the selection of the examining doctor is made by mutual agreement. Authorizes the insurance commissioner or circuit court to select an independent medical examiner in the event a mutual agreement is not reached.

A kindergarten teacher was riding her bicycle to work one morning and suffered head trauma after flipping over a car door that was abruptly opened into the bike lane. The driver of the vehicle was an elderly gentleman whose insurance company required the teacher to submit to a medical examination by a doctor who was selected by the insurance company. That doctor claimed that the teacher was not injured ignoring the following facts: she could no longer work as a teacher, could not use scissors, could not play the piano, and a host of other symptoms. Based upon the insurance doctor's report, the insurance company refused to pay medical treatment benefits, ignoring the teacher's doctor's records properly diagnosing her injury. This is not an isolated incident but rather a systematic re-occurring theme in the personal injury arena.

The current system is rigged and everyone knows that insurance company hired doctors report that injured persons are not injured. These doctors rarely have any patients of their own, and merely review records of injured persons so that the insurance company may unreasonably deny, delay, and defend valid injury claims.

Visiting a doctor for an examination is an intimate and personal experience and this bill will provide dignity and fairness in the process. This bill will save time and costs in the long term.

I support this bill.

Thank you,
/s/ John Choi
John Choi
January 29, 2016

The People's Choice Law Firm®
www.HIautoAccident.com

From: mailinglist@capitol.hawaii.gov
To: [CPH Testimony](#)
Cc: REGOA@HAWAII.RR.COM
Subject: Submitted testimony for SB3052 on Feb 5, 2016 09:00AM
Date: Monday, February 01, 2016 5:24:25 PM

SB3052

Submitted on: 2/1/2016

Testimony for CPH on Feb 5, 2016 09:00AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
ANSON REGO	Individual	Support	No

Comments: I support Senate Bill 3052. Fairness requires an independent medical examiner who neither favors the employer or the claimant while answering questions that the employers have. That is the essence of this proposed bill. It is simple and easy to administer. It will save time and litigation between the parties and therefore save money to the defense/employer. There will be fewer disputes and therefore save time for the disability compensation division Department of Labor. I wholly support this recommended change. Anson Rego Waianae Attorney

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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