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LATE

February 10, 2017

The Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce, Consumer Protection and Health

The Honorable Gilbert S.C. Keith-Agaran, Chair
Senate Committee on Judiciary and Labor

Re: SB 1076 – Relating to Insurance

Dear Chair Baker, Chair Keith-Agaran and Members of the Committees:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 1076, which establishes protocols for the contacting of air ambulance transport services by healthcare facilities. HMSA supports the intent of this Bill and have comments..

SB 1076 is a product of a workgroup convened by the State Insurance Commissioner to adopt provisions of the NAIC Network Adequacy Model Act. During its deliberations, the workgroup decided it appropriate to bifurcate the issues of network adequacy and balanced billing. The network adequacy provisions are found in SB 387. Upon further deliberation, the workgroup decided that balanced billings for air ambulance services were deserving of specific consideration, and SB 1076 attempts to address this concern.

The primary intent of the workgroup was to establish statutory guidance on a patient air transport process that would hold harmless the patient from balanced billings. The concept of a dispute resolution process was discussed by the workgroup, but consensus was not achieved. However, even with the absence of the dispute resolution section of the Bill, we believe this Bill fairly accomplishes the workgroup's goal of holding the patient harmless.

Given this, we suggest the Committee consider the deletion of the dispute resolution section of HB 1076 (Section 321E - Page 7, Line 9 thru Page 12, Line 16),

In addition, we ask the Committee further consider amending to Bill to clarify that, when a non-contracted air ambulance service is required to transport a patient, the transferring facility simply notifies the patient's health plan of the use of the non-contracted service. This may be accomplished by amending Section 231D(2) as follows:

> (2) The transit time is not medically indicated for the covered person, taking into account the acuity of the covered person's medical condition, the transferring facility, [~~prior to commencing a transfer of the covered person using a non-contracted air ambulance service,~~] shall notify the health carrier of the use of a non-contracted ambulance service.

Thank you for allowing us to testify on SB 1076.

Sincerely,

Mark K. Oto
Director, Government Relations

STARN • O'TOOLE • MARCUS & FISHER

A LAW CORPORATION

LATE

February 9, 2017

The Honorable Rosalyn H. Baker, Chair
The Honorable Clarence K. Nishihara, Vice Chair
Committee on Commerce, Consumer Protection, and Health
and Members of the Committee
Room 230

Submitted Online

The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice Chair
Committee on Judiciary and Labor
and Members of the Committee
Room 221

Submitted Online

S.B. No. 1076, Relating to Air Ambulance Services

HEARING

Date: Friday, February 10, 2017
Time: 8:30 a.m.
Place: Conference Room 016
State Capitol, 415 S. Beretania Street, Honolulu, HI

Dear Chair Baker and Vice Chair Nishihara and Members of the Committee on Commerce, Consumer Protection, and Health and Chair Keith-Agaran and Vice Chair Rhoads and Members of the Committee on Judiciary and Labor:

My name is Mark J. Bennett, and I am counsel for Hawaii Life Flight Corporation ("HLF"). I respectfully provide testimony on Senate Bill No. 1076 ("SB1076"), relating to air ambulance services on behalf of HLF. I am testifying in opposition to SB1076 for the following reasons.

I believe strong arguments can be made that if enacted into law, SB1076:

(1) would be preempted under the Airline Deregulation Act of 1978 ("ADA");

(2) would encroach upon the exclusive jurisdiction of the federal Department of Transportation ("DOT"); and

(3) would be contrary to the Emergency Medical Treatment & Active Labor Act (42 U.S.C.A. § 1395dd) ("EMTALA") and the Affordable Care Act (42 U.S.C. § 18022(b)).

1. Preempted Under the Airline Deregulation Act.

The Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.) was enacted, in part, to attract investment and capital into the airline industry. Congress specifically recognized that the public interest would be served by "placing maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and attract capital." 49 U.S.C. § 40101. To achieve this goal, the ADA includes a broad preemption clause, which provides:

> a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide transportation under this subpart.

49 U.S.C. § 41713(b)(1). The United States Supreme Court has recognized that the ADA "express[es] a broad pre-emptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 347, 383-84 (1992) (internal citations omitted). The *Morales* Court held that the ADA preempts any state law having a connection with or reference to an airline's rates, routes or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 390 (internal quotation marks omitted); *see also American Air Lines, Inc. v. Wolens*, 513 U.S. 219 (1995) (holding that a state consumer protection law was preempted); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014) (noting, while holding that a state-law claim for breach of implied covenant of good faith and fair dealing was preempted, that "[w]hat is important" for preemption is "the effect of a state law, regulation or provisions, not its form").

The DOT expressly recognizes that air ambulance operators certified by the FAA are air carriers entitled to the protections afforded by the ADA. See *Guidelines for the Use and Availability of Helicopter Medical Transport (HEMS)*, U.S. Dep't of Transp., at 9. And since *Morales, Wolens,* and *Ginsberg* were decided, courts have struck down state legislation similar to SB1076. In *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp. 3d 930 (2016), the Court enjoined preempted legislation that sought to create a "primary call list," and required air ambulance providers to be "participating providers" with certain insurance companies in order to be placed on the primary call list. North Dakota's legislation was preempted because it, like SB1076, effectively required air ambulance providers to become participating providers, thereby indirectly impacting their rates. 171 F. Supp. 3d at 941. The Court expressly recognized North Dakota's public policy concerns, which are likely similar to the public policy concerns that might support SB1076, but correctly held that "[t]his type of consumer protection law is precisely the type of law Congress sought to preempt when it enacted the ADA." *Id.* at 942.

2. **Exclusive Jurisdiction of the DOT.**

Congress granted the Secretary of Transportation exclusive rights to investigate and to remedy unfair and deceptive practices by air carriers, including air ambulance service providers. The Secretary has specifically opined that the attempted "economic regulation of air carriers operating an air ambulance service" is "indeed preempted by the express Federal preemption provision, 49 U.S.C. § 41713." (*See* Letter from Dep't of Transp. Acting General Counsel Rosalind A. Knapp to Gregory S. Walden, Esq. (Apr. 23, 2007), relating to regulations by the State of Hawaii). The Department similarly opined that the Hawaii Certificate of Need program requiring the State to determine, among other things, the "reasonableness" of the cost of the air ambulance service was preempted by the ADA. Hawaii should address its concerns with the DOT, not by pushing through preempted legislation. *See* Gov't Accountability Office, *Air Ambulance, Effects of Industry Changes on Services Are Unclear*, GAO-10-907, p. 25 (2010).

3. **EMTALA and the Affordable Care Act.**

The Emergency Medical Treatment & Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, and its implementing regulations, at 42 C.F.R. § 489.24, have been interpreted by the Centers of Medicare and Medicaid Services ("CMS")[1] as precluding consideration of a patient's insurance coverage or ability to pay when a patient is treated in an emergency department. *See Bryant v Adventist Health System*, 289 F3d 1162 (9th Cir 2002). Failure to comply with EMTALA by a hospital or a physician may lead to "termination from the Medicare program" and the imposition of civil monetary penalties of up to "$50,000 per violation." (See CMS Guidance Manuel).

The EMTALA Operations Manual specifically mandates that "[I]t is the treating physician at the transferring hospital who decides how the individual is transported to the recipient hospital and what transport service will be used, since this physician has assessed the individual personally." *State Operations Manual Appx. V*, at Tag A-2411/C-2411, CMS (Rev. July 16, 2010). SB1076 purports to place this critical decision in the hands of an insurance company. If enacted, SB1076 could interfere with decisions that federal law requires be made by the treating physician, and would put hospitals and physicians at risk of violating EMTALA.

Similarly, the Essential Health Benefits set out in the Affordable Care Act require that an insurance "plan or issuer . . . must provide coverage for emergency services . . . (i) without the need for any prior authorization determination, even if the emergency services are provided on an out-of-network basis." 29 C.F.R. § 2590.715-2719A(b)(2). SB1076's preauthorization requirement is contrary to the Affordable Care Act.

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[1] CMS has released "Interpretive Guidelines" (http://www.emtala.com/ig.pdf) and a Guidance Manuel (http://go.cms.gov/2lpLODL). Courts rely on these interpretations in resolving cases involving the EMTALA (*e.g. Goodvine v. Pasha*, 2013 WL 395457, at *2 (E.D. Wisc. Jan. 31, 2013)).

4. Closing

In closing, and in light of the foregoing concerns, I respectfully submit that SB1076 should be reviewed by the Department of the Attorney General prior to further consideration by this body, and I respectfully oppose SB1076. I also respectfully submit that it makes no sense to adopt a bill with serious constitutional concerns that would almost certainly be subject to legal challenge. Again, respectfully, the Attorney General should opine on this bill's constitutionality before it advances.

Very truly yours,

Mark J. Bennett

Mark J. Bennett
Counsel for Hawaii Life Flight Corporation

CPH Testimony

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 9, 2017 2:40 PM
To: CPH Testimony
Cc: speedy_bailey@amr-ems.com
Subject: *Submitted testimony for SB1076 on Feb 10, 2017 08:30AM*

LATE

Categories: Late

SB1076
Submitted on: 2/9/2017
Testimony for CPH/JDL on Feb 10, 2017 08:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Speedy Bailey	Individual	Support	No

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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