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LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol, Room 446
415 S. Beretania Street
Honolulu, Hawaii 96813

Written Comments

HCR85, HD1

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY RELATING TO THE STATE'S AUTHORITY TO ALLOW COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND HEALTH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE MONOPSONISTIC MARKET POWER OF HEALTH CARE INSURERS OVER INDEPENDENT PHYSICIANS

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the House Committee on Consumer Protection & Commerce

Monday, March 29, 2021, 2:00 p.m.
Conference Room 329

Chair Johanson and Members of the Committee:

Good afternoon, Chair Johanson and members of the Committee. My name is Charlotte Carter-Yamauchi, and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written comments on H.C.R. No. 85, H.D. 1, Requesting the Legislative Reference Bureau to Conduct a Study Relating to the State's Authority to Allow Collective Negotiation Between Physicians and Health Care Insurers in Hawaii to Restrain or Balance the Monopsonistic Market Power of Health Care Insurers Over Independent Physicians.

The purpose of this measure is to request the Legislative Reference Bureau to conduct a study relating to the State's authority to allow collective negotiation between physicians and health care insurers in Hawaii to restrain or balance the monopsonistic market power of health care insurers over independent physicians. The measure also requests that the study include an examination of the Parker immunity doctrine and its current legal status and the extent of any statutory or policy implementation by other states relating to collective negotiation by physicians.

The measure further requests the Legislative Reference Bureau to submit a report to the Legislature of its findings and recommendations, including any proposed legislation to allow collective negotiation between physicians and health care insurers in Hawaii, no later than twenty days prior to the convening of the Regular Session of 2022.

The Bureau takes no position on the merits of this measure but submits the following comments for your consideration.

Generally speaking, we note that Hawaii is the only state in the nation that possesses an explicit exemption from the federal Employee Retirement Income Security Act of 1974 (ERISA), for its Prepaid Health Care Act (PHCA), which is codified as Chapter 393, Hawaii Revised Statutes. As I am sure you are aware, ERISA is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.

We also note that the 1983 federal legislation that provided the State of Hawaii with the ERISA exemption for the PHCA had the effect of “freezing” the provisions of that Act by invalidating “any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for anything more than the effective administration of such Act as in effect on such date.” 29 U.S.C. 1144(b)(5)(B)(ii). We further note that some legal scholars have emphasized that the Hawaii U.S. District Court, in *Council of Hotels v. Agsalud*, 594 F. Supp. 449 (D. Hawaii 1984), strictly construed Hawaii's ERISA exemption provision, ruling that a collective bargaining-related PHCA amendment enacted after September 2, 1974, was preempted since it was deemed a substantive change and therefore exceeded the narrow exemption provided under 29 U.S.C. § 1144(b) (5) (A) & (B) (ii).

The Bureau has no specific expertise regarding antitrust law, ERISA, the PHCA, or how enacting state action immunity legislation could impact the State's ERISA exemption for its PHCA. We note that the House Draft 1 of the measure attempts to meet the Bureau's concerns about our lack of expertise, as was expressed in our testimony to the House Standing Committee on Health, Human Services, & Homelessness, by deleting specific references to the PHCA. However, House Draft 1 requests the Bureau to study *whether the State has the authority to allow collective negotiation between physicians and health care insurers* in Hawaii to restrain or balance the monopsonistic market power of health care insurers over independent physicians. The measure further requests that the Bureau's report to the Legislature include *proposed legislation to allow collective negotiation* between physicians and health care insurers in Hawaii.

Accordingly, the Bureau is still effectively being asked to determine whether such state action could impact the State's ERISA exemption for its PHCA. Lacking any expertise in this area, the Bureau is unable to make this determination with any credibility. As the PHCA is outside of the Bureau's scope of expertise, we request that the Committee remove the Bureau from the measure, as we believe that the requested study would be best undertaken

by another entity having specific expertise in the subject matters and the requisite professional services to perform the analysis and make recommendations.

If the Committee still desires that the Bureau conduct the study as requested, the Bureau would need to contract the services of an entity that specializes in such analysis. In all likelihood, we would not be able to complete the contracting process, much less the study itself, within the limited timeframe provided for in this measure. Accordingly, we would need an exemption from the procurement code requirements, additional time in which to complete the study, or both. Moreover, since the Bureau's annual operating budget does not contain funds for the contracting of study services, a specific amount of funds for the purposes of this measure would need to be appropriated.

If, regardless of the issue of the State's ERISA exemption for its PHCA, the Committee believes that factual information regarding any relevant actions taken in other states and the status of the Parker Immunity Doctrine would be useful to the Legislature, then the Bureau would respectfully request that the Committee amend the measure to:

- (1) Focus the study on the language on page 3, lines 34-38; and
- (2) Remove all language, including with respect to proposed legislation, relating to the State's authority to allow collective negotiation between physicians and health care insurers in Hawaii.

If the measure is amended to keep the Bureau in but adopts the foregoing alternative, or if a bill is advanced that provides for funding and sufficient time to contract out this study, then the Bureau believes that its amended responsibilities could be manageable; *provided that the Bureau's interim workload is not adversely impacted by too many other studies or additional responsibilities*, such as conducting, writing, or finalizing other reports, drafting legislation, or both, for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for the opportunity to submit written comments.



March 29, 2021

The Honorable Aaron Ling Johanson, Chair
The Honorable Lisa Kitagawa, Vice Chair
House Committee on Consumer Protection and Commerce

Re: HCR85 HD1 – Requesting the Legislative Reference Bureau to conduct a study relating to the State’s authority to allow collective negotiation between physicians and health care insurers in Hawaii to restrain or balance the monopsonistic market power of health care insurers over independent physicians

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committees:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify expressing our serious concerns on HCR85 HD1.

HMSA respectfully opposes this resolution. The intent of the study is to evaluate allowing physicians who are not part of a group practice to share information about contractual terms and rates with insurance companies in order to collectively bargain. We believe this premise would presume to allow physicians to engage in price fixing which is against federal antitrust laws. The concern with price fixing and collusion among physicians is that it will lead to artificially increased reimbursements resulting in increased and unsustainable health care costs and premiums for our members.

The Federal Trade Commission (FTC) has weighed in on active state legislation in the past and found that similar attempts to circumvent federal antitrust law would not improve patient care, but instead would likely raise health care costs and decrease access to care.

We respectfully ask that this measure be deferred. Should this measure move forward, we respectfully recommend that the legislature request the FTC to weigh in on this concept.

Thank you for the opportunity to testify on this measure. Your consideration of our concerns is greatly appreciated.

Sincerely,

Matthew W. Sasaki
Director, Government Relations

HCR-85-HD-1

Submitted on: 3/26/2021 12:53:42 AM

Testimony for CPC on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Thomas Brandt	Foresight/Policy Analysis	Support	No

Comments:

Chair Johanson, Vice Chair Kitagawa, and members of the House Committee on Consumer Protection and Commerce:

I strongly support this resolution.

I think this is the least we can do to begin to level the playing field between private third-party health insurance companies--whom I regard as the biggest drivers of excessive and unnecessary health care cost inflation--and physicians who actually provide health "care"--

UNlike private third-party health insurance companies--

which make it unnecessarily difficult for physicians simply to get under-paid, much less fairly paid, for their work.

Third-party private health insurers also bill Hawaii health care consumers and taxpayers for excessive, unnecessary bureaucracy whose primary purpose is to find reasons to deny health care to insurance customers,

while coercively and exorbitantly increasing health insurance company revenues at consumer and taxpayer expense, in my opinion.

A much better solution would be to transition Hawaii to a state-level form of universal health care known as "All-Payer", which would subject all private insurance companies to the same reimbursement schedule determined by we, the people,

instead of health insurance company "business" managers whose mandate is to constantly increase health insurance company revenues.

Short of that, the next best thing we could do is to switch health care for active and retired state and county government employees (EUTF) and the State's share of federal Medicaid costs to "self-insurance" because

1) most states already self-insure one or both, and because

2) the so-called "value-based" payment system used by private health insurers is the leading cause of Hawaii's worsening doctor shortage.

Local as well as mainland self-insurance experts have offered--free of charge--to show Hawaii legislators, as well as Hawaii's EUTF and Medicaid administrators,

how self-insurance can save Hawaii taxpayers up to \$850 MILLION ANNUALLY!

Yet despite numerous bills to encourage consideration of self-insurance introduced this year by:

- the Hawaii Democratic Party Health Committee,

- the Hawaii State Association of Counties (HSAC),

- Maui County, and even

- TEN members of the Hawaii State House of Representatives,

exactly NONE was even scheduled for a hearing

so a full and fair public discussion of the pros and cons of self-insurance could take place.

Similarly, several resolutions requesting a study of self-insurance by the Legislative Auditor were also not even scheduled for one committee hearing.

So, once again, given these facts, I think the very least the Legislature can do is at least try to slow down Hawaii's growing shortage of doctors.

Otherwise, doing anything else to make health care more accessible and more affordable for all might be pointless

because private health insurance companies in Hawaii will have effectively put themselves out of business along with ever more doctors.

Thank you for the opportunity to offer these comments.

Thomas Brandt

Foresight/Policy Analysis



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HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

Rep. Aaron Ling Johanson, Chair

Rep. Lisa Kitagawa, Vice Chair

Date: March 29, 2021

Time: 2:00 p.m.

Place: Conference Room 329

From: Hawaii Medical Association

Elizabeth A. Ignacio, MD, Chair, HMA Legislative Committee

Thomas Kosasa, Executive Director

Re: HCR85 HD1 REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY RELATING TO THE STATE'S AUTHORITY TO ALLOW COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND HEALTH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE MONOPSONISTIC MARKET POWER OF HEALTH CARE INSURERS OVER INDEPENDENT PHYSICIANS.

Position: STRONG SUPPORT

In the current national market it is important that clear lines of communication are open between insurers and providers. Under federal antitrust law, independent physicians cannot negotiate collectively with health insurers. This imbalance in relative size leaves most physicians with a weak bargaining position relative to commercial payers. Excessive use of market power harms the state in both quality and access to health care.

An exception to this negotiation exclusion is the "State Action Doctrine" based upon the Supreme Court case Parker v. Brown (1943). The State of Alaska passed legislation in 2009 to allow physicians and insurers to collectively convene for discussion of fee schedules and work rules under an exemption to federal antitrust statute based upon the Parker decision.

The purpose of HCR85 HD1 is to task the Hawaii Legislative Reference Bureau with the examination of statute passed by Alaska and other states, and the ability and logistics of implementation of similar statute in Hawaii, with report back to the legislature for review in advance of the 2022 legislative session.

The Hawaii Medical Association is willing and ready to assist in any way the LRB might deem necessary. Thank you for allowing the Hawaii Medical Association to testify on this issue.

HMA OFFICERS

President – Michael Champion, MD President-Elect – Angela Pratt, MD Secretary – Thomas Kosasa, MD

Immediate Past President – Jerry Van Meter, MD Treasurer – Elizabeth A. Ignacio, MD

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