

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR



CATHERINE P. AWAKUNI COLÓN
DIRECTOR

GORDON I. ITO
INSURANCE COMMISSIONER

STATE OF HAWAII
INSURANCE DIVISION
DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS
P. O. BOX 3614
HONOLULU, HAWAII 96811-3614
335 MERCHANT STREET, ROOM 213
HONOLULU, HAWAII 96813
PHONE NO: (808) 586-2790
FAX NO: (808) 586-2806
cca.hawaii.gov/ins

LATE

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. 3105 – RELATING TO HEALTH CARE
REFERRALS.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of the Insurance Division ("Division"). The Division supports the intent of the bill promoting transparency and the imposition of health care provider self-referral disclosure requirements, and submits the following comments.

Chapter 431, article 10C, Hawaii Revised Statutes ("HRS"), regulates motor vehicle insurance, including personal injury protection benefits and payment of health care providers associated with motor vehicle accidents. In that context, section 431:10C-308.7, HRS, regulates attorney and health care provider referral conduct, requiring a health care provider to disclose a financial interest in any entity to which the patient may be referred. The disclosure must be made in advance and in writing, and the patient must be advised that she or he is free to choose a different health care provider. The patient must sign the disclosure form, which the provider must retain for two years.

Except for the limited provision mentioned above, the Division does not regulate the activities of health care providers.

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

LATE

O'CONNOR PLAYDON & GUBEN LLP

Dennis E. W. O'Connor
George W. Playdon, Jr.
Jerrold K. Guben
Michael J. McGuigan
James A. Kawachika*
Cid H. Inouye
Kelvin H. Kaneshiro
Jeffrey W. Juliano, LL.M.
Dennis E. W. O'Connor Jr.
Peter B. Carlisle

W. Thomas Fagan
(1945 - 2013)

*A Law Corporation

A LIMITED LIABILITY LAW PARTNERSHIP
ATTORNEYS AT LAW *Since 1876*

Pacific Guardian Center • Makai Tower • 733 Bishop Street • 24th Floor
Honolulu, Hawaii 96813-4070

Telephone: (808) 524-8350 • Fax: (808) 531-8628
email: info@opglaw.com
www.opglaw.com

Charles S. O'Neill, Jr., LL.M.
Jeffery S. Flores
Miranda F. Tsai
Kristi L. Arakaki
Lahela H. F. Hite
H. Maxwell Kopper
Cecily D.M. Kaya

COUNSEL
Dennis J. Hwang

February 5, 2016

TESTIMONY OF PETER CARLISLE

ON BEHALF OF PACIFIC RADIATION ONCOLOGY IN OPPOSITION TO SENATE BILL NO. 3105 RELATING TO HEALTH CARE REFERRALS

To The Honorable Senate Commerce, Consumer Protection, and Health Committee

My name is Peter Carlisle and I thank you for the opportunity to testify in opposition to Senate Bill No. 3105 on behalf of Pacific Radiation Oncology, the plaintiff in a 5-year-old antitrust action against Queens Medical Center that is now pending in United States District Court in Hawaii, which was referred to in the Bill. Senate Bill 3105 is **not** a pro consumer bill, it is instead, a thinly veiled attempt to arm the largest medical facility in the state, Queens Medical Center, with remedies to combat the rash of free standing outpatient centers where an increasing numbers of our community have found treatment venues for colonoscopies, orthopedic surgeries, ophthalmological surgeries, imaging, endoscopies, cancer radiation services, laboratory services, chemotherapy, etc. These services, only a few years ago, could only be provided at major hospitals but with the growth of these outpatient centers our local community has found that the same medical treatment can be delivered cheaper, quicker, safer, less risk of infection, and far more convenient than Queens. It has created viable competition to Queens' former stranglehold on certain medical services and it has eaten into the competitive position of Queens. Many patients appreciate receiving services at these smaller and cheaper venues that are governed by separate reimbursement rules, where nursing, supplies and medication is cheaper and where a patient cannot be charged 30 dollars for a box of Kleenex.

PHYSICIAN SELF REFERRAL IS PREEMPTED BY FEDERAL LAW

Physician self-referral is a complicated, extensively regulated federal concern by a statute known as the Stark Law and The Anti-kickback Statute. The disclosure of financial interests associated with self-referral applies, under Stark for all Medicare and Medicaid patients. Its

benefits and its problems have been extensively studied as part of Stark's statutory scheme and is vigorously enforced by The US Department of Health and Human Services. The requirement for disclosure of financial interests already exists in this complicated federal scheme and it has been studied in almost all specialties. **The field for state regulation of these disclosure is preempted by these federal regulations and there are different rules that apply to separate specialties.**

There are some supporters of Stark that are concerned about over utilization by a referral. On the other hand, there is a very substantial well-documented in the evidence for the federal law that problems within certain specialties do not exist. When Stark was originally enacted it only applied to physician referrals for clinical laboratory services. When a health care provider ordered a blood test and the patient was directed to a specific lab, it was important for the patient to know the referring physician had an economic interest in the lab and in fact, the patient had other choices for their treatment. On the other hand, when patients consult a specific surgeon who will later do the procedure, the fact that the surgeon has an economic interest in procedure is self-evident. Some studies have revealed that this enhanced choice for patients has resulted in consumer confidence since the surgeon is responsible for the equipment and facility where the procedure will take place and therefore disclosure is unnecessary. Some studies on mandatory disclosures create a circumstance in which the physician has to give every patient "a pitch" causing more problems and limiting patient choice than no self-disclosure at all. Under Stark, there are different rules for different specialties and the State should not now enter this very regulated world.

This legislature should not in any way attempt to interfere or change the extensive regulations adopted by the federal government over the past 20 years.

THE EFFECT OF SENATE BILL 3105 AND THE PENDING ANTI TRUST LAWSUIT AGAINST QUEENS

However the Senate Bill 3105 which was the product of attorneys for Queens Medical Center in an anti-trust action is quite different. This five year old legal controversy is still pending in the federal courts, which has been up to the Ninth Circuit twice and currently pending on certified questions before the Hawaii Supreme Court is complicated but arises out of a decision by Queens Hospital to terminate the privileges of the largest group of radiation oncologists in the State of Hawaii unless they agreed to divest themselves and quit practicing at other radiation facilities that were in competition with Queens and to become full-time employees. It was a move to eliminate its competition and create a monopoly on Oahu in this field.

Pacific Radiation Oncology is the oldest and largest radiation oncology group in the State. Its physicians' pioneered radiation oncology in this state at Queens. For hospital based

February 5, 2016

Page 4

retroactive right to sue these physicians referring patients to the outpatient facilities for treble damages under the Unfair Business Practices Act for failing to provide self-disclosures which they were not obligated to do under Stark during the last eight years (January 1, 2008 retroactive date). This bill is simply a sham to empower Queens with legal remedies that it has been denied by the federal courts and under Stark.

Before the legislature attempts to try to enter the world of self-referral regulations that has been assumed and likely pre-empted by federal laws, the legislature should make sure and determine whether the consumer is in any way harmed. For the most part as a practice most facilities including all the facilities that the physicians of Pacific Radiation Oncology practice at has a voluntary disclosure form provided to patients in advance of treatment. The federal judges reviewing the pending litigation as well as those of the Ninth Circuit have taken a careful review of the self-referral procedures and to Queens' chagrin has ruled against them. The matter should be best left to the appropriate complex regulations of the federal government which in any event would likely pre-empt any state law and to allow the Queens to pursue its' remedy in court rather than before this legislature.

Thank you.