

Charlotte A. Carter-Yamauchi
Director

Shawn K. Nakama
First Assistant

Research (808) 587-0666
Revisor (808) 587-0670
Fax (808) 587-0681



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

Written Comments

SCR102

REQUESTING THE LEGISLATIVE REFERENCE BUREAU TO CONDUCT A STUDY ON THE FEASIBILITY OF ENACTING STATUTORY AUTHORITY FOR COLLECTIVE NEGOTIATION BETWEEN PHYSICIANS AND HEALTH CARE INSURERS IN HAWAII TO RESTRAIN OR BALANCE THE MONOPSONISTIC MARKET POWER OF HEALTHCARE INSURERS OVER INDEPENDENT PHYSICIANS.

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the Senate Committees on Government Operations
and Labor, Culture and the Arts

Thursday, March 12, 2020, 2:45 p.m.
Conference Room 225

Chairs Laura H. Thielen and Brian T. Taniguchi and Members of the Committees:

Good afternoon, Chairs Thielen and Taniguchi and members of the Committees, my name is Charlotte Carter-Yamauchi and I am the Director of the Legislative Reference Bureau (LRB). Thank you for providing the opportunity to submit written comments on S.C.R. No. 102, Requesting the Legislative Reference Bureau to Conduct a Study on the Feasibility of Enacting Statutory Authority for Collective Negotiation Between Physicians and Health Care Insurers in Hawaii to Restrain or Balance the Monopsonistic Market Power of Healthcare Insurers Over Independent Physicians.

The purpose of this measure is to request the Legislative Reference Bureau to conduct a study of:

- (1) The 2009 Alaska legislation that permitted physicians to collectively negotiate contracts with health benefit plans;

- (2) The Parker Immunity Doctrine and its current legal status;
- (3) The extent of similar Parker Immunity Doctrine-compliant statutory or policy implementation by other states; and
- (4) The feasibility of enacting statutory authority compliant with the Parker Immunity Doctrine to allow collective negotiation between physicians and health care insurers in Hawaii.

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 you probably know, 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.

The Bureau has no specific expertise regarding antitrust law, the Prepaid Health Care Act (PHCA), or if or how enacting state action immunity legislation would impact the State's ERISA exemption for its PHCA. Furthermore, if the study is to include an economic or actuarial analysis on how enacting a state action immunity law would affect patient costs, then the Bureau would need to contract the services of an entity that specializes in such analyses, since the Bureau does not employ any economists or actuaries. To this point, we note that the Bureau's current budget does not contain any funding for such contracted services.

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 Hawai’i Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for 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, according to a powerpoint presentation by Professor Hazel G. Beh (a professor at the William S. Richardson School of Law), on a comparison of the Affordable Care Act and the PHCA, the Hawaii U.S. District Court, in *Council of Hotels v. Aghsalud*, 594 F. Supp. 449 (D. Hawaii 1984), strictly construed the 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).

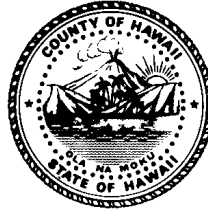
Accordingly, the Bureau believes that conducting a study on the issues outlined in paragraphs (1), (2), and (3), above would probably be manageable, but the issue outlined in paragraph (4) may be outside of the Bureau's scope of expertise and would be best

undertaken by either another agency or a contracted entity with specific expertise in the subject matter and the requisite professional services to perform an economic or actuarial analysis to determine whether implementing such legislation is feasible.

In closing, if the measure is amended to exclude study of the issue of feasibility of enacting a statute that is compliant with the Parker Immunity Doctrine to allow collective negotiation between physicians and health care insurers in Hawaii, and if the Bureau is not required or requested to conduct too many other studies or to staff interim committees during the 2020 interim, then the Bureau believes it can manageably conduct a study of the remaining components contained in the measure.

Thank you again for your consideration.

Harry Kim
Mayor



Roy Takemoto
Managing Director

Barbara J. Kossow
Deputy Managing Director

County of Hawai'i Office of the Mayor

25 Aupuni Street, Suite 2603 • Hilo, Hawai'i 96720 • (808) 961-8211 • Fax (808) 961-6553
KONA: 74-5044 Ane Keohokālole Hwy., Bldg C • Kailua-Kona, Hawai'i 96740
(808) 323-4444 • Fax (808) 323-4440

March 11, 2020

Senator Laura H. Thielen, Chair
Senator Lorraine R. Inouye, Vice Chair
Committee on Government Operations

Senator Brian T. Taniguchi
Senator Les Ihara, Jr., Vice Chair
Committee on Labor, Culture and the Arts

Dear Chairs Thielen and Taniguchi, Vice Chairs Inouye and Ihara, and Committee Members:

RE: SCR 102/SR 66 Requesting the Legislative Reference Bureau to Conduct a Study on the Feasibility of Enacting Statutory Authority for Collective Negotiation Between Physicians and Health Care Insurers in Hawai'i to Restrain or Balance the Monopsonistic Market Power of Healthcare Insurers Over Independent Physicians

Hawai'i's healthcare system is in crisis. We do not have enough providers, and many of the providers we have are at or near retirement age. There is little prospect that we will somehow generate enough new providers to replace those we are losing, and the situation gets worse with every passing year.

The Legislature has actively tried to address the problem with innovative approaches, but it is clear that more must be done. If we do not improve the economics of practicing medicine, we will not have enough medical practitioners to meet the needs of our citizenry. We are at a breaking point.

There are many reforms to be tried, but one of the most promising is to allow collective action by physicians when dealing with health benefit plans. Such an innovation will not be without cost—if the plans have to pay out more, they will charge higher premiums. But the alternative—the status quo—is unacceptable. It is time to consider “collective mediation.”

I hope you will approve SCR 102 and SR 66.

Respectfully Submitted,


Harry Kim
MAYOR



March 11, 2020

The Honorable Laura H. Thielen, Chair
The Honorable Lorraine R. Inouye, Vice Chair
Senate Committee on Government Operations

The Honorable Brian T. Taniguchi, Chair
The Honorable Les Ihara, Jr., Vice Chair
Senate Committee on Labor, Culture and the Arts

Re: SCR 102 / SR 66 – Requesting the Legislative Reference Bureau to conduct a study on the feasibility of enacting statutory authority for 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 Thielen, Chair Taniguchi, Vice Chair Inouye, Vice Chair Ihara, and Members of the Committees:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify expressing our serious concerns for SCR 102 and SR 66.

HMSA respectfully opposes these resolutions. 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,

Pono Chong
Vice President, Government Relations

SCR-102

Submitted on: 3/10/2020 2:12:45 PM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Cynthia J. Goto	Individual	Support	No

Comments:

SCR-102

Submitted on: 3/10/2020 4:48:39 PM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Christopher Regala	Individual	Support	No

Comments:

Aloha Senators,

As an otolaryngologist practicing for fifteen years in central Oahu and the immediate past-president of the Philippine Medical Association of Hawaii and a current board of governor, I am writing to express my support for SCR102.

Hawaii has an extreme physician shortage. In my own practice, I was recently forced to close my office in Wahiawa to decrease my overhead to maintain my practice. I believe the lack of insurer competition has led to diminished reimbursement rates for physician services and has made Hawaii a very difficult place to maintain a financially viable medical practice. This is contributing to our state's current physician shortage, especially of specialists in rural areas.

The ability to collectively negotiate with insurers will help significantly by decreasing the financial burden placed on physicians to continue serving the Hawaii community and is a step in the right direction toward solving our current physician shortage crisis.

Mahalo for your consideration of this important bill.

Sincerely, Christopher Regala, MD

Immediate Past President and Board of Governor, Philippine Medical Association of Hawaii

Ear, Nose, & Throat Clinics of Oahu, LLC

(808)622-2626



Support: SCR 102

Support: SB 2983

Support: SB 2542

March 10, 2020

Honorable Senators and Representatives,

I have offered a primary care position to 4 physicians in the last 6 months. None have accepted the position. The wage I am able to provide does not cover the costs of living in Hawaii, repaying student loans, let alone supporting a family. Nor does it compare to the much higher compensation offered on the mainland. In order to pay a higher wage to a new physician, I would literally be losing money on that hire.

Sadly, this is what the hospitals do – lose money on primary care – in an effort to earn more referrals. The money lost in primary care is then made up in radiology services or specialty clinics. But this is not an option for those of us in private practices, who are the ones on the front lines serving our outer island communities. We are serving our communities daily, yet are forced to support our clinics by working additional jobs in order to continue to keep our doors open.

Our communities continue to be at risk daily from a lack of adequate health care and this will be grossly magnified during an infectious outbreak. Our physician shortage has been at crisis level for years and continues to worsen. Failure to take action to mitigate the situation will result in further loss of life and function of the people who live in Hawaii. Those of us who have been on the front lines have watched the suffering for years and had hoped that the breaking point would be prior to an infectious outbreak.

While the legislature is not in control of the physician reimbursements, the state can help:

1. Allow physicians to collectively negotiate with insurers to promote fair reimbursements
2. Eliminate the GE tax for physicians
3. Support student loan repayment

Physicians want to care for the people of Hawaii. We just need to make it a job, not a medical mission.

To your health,

Michelle Mitchell, M.D.

SCR-102

Submitted on: 3/10/2020 9:56:21 PM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
William Wong	Testifying for Hawaii Vision Clinic	Support	No

Comments:

Dear Senators,

I am an physician practicing in Hawaii for the past 15 + years. In this span of time, I have seen a great many of our colleagues throw in the towel and leave the state or close their practices because of unsustainable economics and unreasonable administrative burdens placed on physicians. We are now facing a grave physician shortage, with no viable solution. We are 820 physicians short of our state's required needs. We lost the most physicians last year in decades.

I support this bill as a small step in the right direction to make Hawaii a viable and attractive practice environment. Ours is the only industry where our fees are consistently lowered by the government, which also makes it criminal to collect the difference from our patients or other entities. Our expenses increase every year through inflation, taxes, and other regulations like the minimum wage raise. We have been squeezed to the limit.

The lone powerhouse insurer in Hawaii has made it impossible to fairly negotiate rates and terms of contracts. Take it or leave it. The State Insurance Commission is not concerned and useless in their capacity to monitor and enforce fair trade.

This bill would stimulate an economy of fair trade, and start the change in momentum to rebuild our state's healthcare system.

It's now or never. Fix our system. For our citizens and our future.

Dr. William K. Wong, Jr.

Past President - Hawaii Medical Association, Honolulu County Medical Society, and Hawaii Ophthalmological Society

Testimony Presented Before the
Hawaii State Senate

SCR102/SR66 – Collective Mediation by Physicians

I am writing in **strong support** of SCR 102/SR66, which examines collective mediation by physicians. In a survey of Hawaii physicians, 75% said they were unhappy with payment transformation. Many physicians feel powerless when trying to get resources for their patients. Both of these factors can lead to burn out.

However collective mediation would create an atmosphere of discussion between physicians and insurers for improved, stronger contractual relationship and stronger coherent practice models.

This would allow for improved care because of open discussion of:

- Clinical practice guidelines

- Coverage criteria

- Liability issues

- Administrative issues, such as payment schedules and methods

- Procedures for resolution of disputes

- Patient referral procedures

- Payment fees and methodology

- Quality assurance programs

- Utilization review procedures

- Criteria for physician selection and termination

I believe this will decrease the rates of burnout in physicians in Hawaii, and that is essential if we are to solve our 820 physician shortage!

Thank you for allowing me to testify.

Kelley Withy, MD, PhD



HAWAII MEDICAL ASSOCIATION

1360 S. Beretania Street, Suite 200, Honolulu, Hawaii 96814
Phone (808) 536-7702 Fax (808) 528-2376
www.hawaiimedicalassociation.org

SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Sen. Laura Thielen, Chair

Sen. Lorraine Inouye, Vice-Chair

SENATE COMMITTEE ON LABOR, CULTURE AND THE ARTS

Sen. Brian Taniguchi, Chair

Sen. Les Ihara, Vice-Chair

Date: March 12, 2020

Time: 2:45 p.m.

Place: Conference Room 225

From: Hawaii Medical Association

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

Christopher Flanders, DO, Executive Director

Re: SCR 102/SR 66 – Requesting the Legislative Reference Bureau to Conduct a Study on the Feasibility of Enacting Statutory Authority for 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 of health care.

Examination of the Hawaii insurance market published by the American Medical Association in “Competition in Health Insurance: A Comprehensive Study of U.S. Markets” (2019), reveals a highly concentrated total insurance market, with a single insurer controlling 67% of the total market. The second largest insurer controls 21%, confined to a single (HMO) sector of insurance. This makes Hawaii the third least competitive state health insurance market in the nation, behind only Alabama and Louisiana.

Typical insurance physician participation agreements are issued as “contracts of adhesion,” whereby the insurer drafts and issues a contract to physicians who only have the right of refusal. The physician cannot counter the offer or create a new agreement to which the insurer can agree. In a situation where one party controls the purchase of services, this lack of negotiation serves to remove the balancing influence of market forces. In Hawaii this has led, in large part, to the

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
Executive Director – Christopher Flanders, DO



HAWAII MEDICAL ASSOCIATION

1360 S. Beretania Street, Suite 200, Honolulu, Hawaii 96814
Phone (808) 536-7702 Fax (808) 528-2376
www.hawaiimedicalassociation.org

current severe shortage of physicians practicing in the state and the inability to recruit or retain physicians due to the non-competitive position of the state physician economy.

An exception to this negotiation exclusion is the “State Action Doctrine” based upon the Supreme Court case *Parker v. Brown* (1943), which applies to the state when it exercises state authority in creating a regulation with anti-competitive effects, and to private actors when they act at the direction of the state after it has done so. In the case of Hawaii, the single controlling insurer controls both physician service input (monopsony) and insurance purchase output (monopoly) markets. This has resulted in an overall market which finds insurance premiums to be competitive nationally, while payments to physicians are low and non-competitive on a national level. As a result, Hawaii has been non-competitive in recruiting and retaining physicians, both nationally and graduates of the John A. Burns School of Medicine in Honolulu. This has led to a significant and increasing shortage of physicians to provide health care services to the public, as documented by the biannual Physician Workforce Assessment Study conducted by the Area Health Education Center of Hawaii at the University of Hawaii. Access to care has now become an overriding interest of the state.

Under the Parker indemnity exemption an action in question must follow “a clearly articulated and affirmatively expressed state action.” Additionally, when the parties are all private parties the question in qualifying for the state action exemption must not only conform with the “clearly articulated and affirmatively expressed state action,” but must also be subject to active state supervision. The state must, in practice, exercise some degree of independent judgement or control over the activity in question. In submitting legislation to permit collective mediation between physicians and insurers, the Hawaii Medical Association is requesting the Legislative Reference Bureau to study the feasibility and constitutionality of putting the Parker indemnity exemption into effect in the state.

Statute has been passed by the State of Alaska in 2009 to allow physicians and insurers to collectively convene for discussion of contractual issues. To date, no formal negotiations have been needed as insurers have voluntarily come to the table to discuss issues in order to avoid more formal proceedings.

It is important to note, this legislation **does not form a physician union**. Participation is voluntary to both parties, physicians and insurers. Each side retains the ability to decline to meet. What the Parker exemption does provide is an open forum for discussion and agreement on issues relevant to either side, including quality assurance, utilization review, clinical practice guidelines, coverage criteria, and administrative issues such as resolution of disputes and physician credentialing, maintenance of adequate networks and termination.

It is the opinion of the Hawaii Medical Association that passage and implementation of this process will allow for an improved and stronger contractual relationship between physicians and insurers, as well as stronger and more coherent programs aimed at improving access to care for the people of Hawaii.

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
Executive Director – Christopher Flanders, DO

SCR-102

Submitted on: 3/11/2020 12:07:51 PM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Stephen B Kemble	Individual	Support	Yes

Comments:

Senators Thielen and Taniguchi and members of Senate GVO and LCA Committees:

We are experiencing a severe and worsening physician shortage throughout Hawaii, worse on the neighbor islands. HMSA's dominance of the non-Kaiser market in Hawaii has enabled them to unilaterally control physician payment systems and fees, and they have used this power to nearly freeze physician payment for the past decade, especially for primary care, while practice costs have risen sharply, due in large part to HMSA's payment transformation initiative for primary care. As a result, primary care practices and other cognitive specialties such as psychiatry are being rapidly driven out of independent practice because the economics of private practice are no longer viable. The only way to assure an adequate supply of physicians willing to practice in Hawaii going forward would be to enable physicians to have negotiating power over how and how much they are paid, and in assuring that the administrative burden and cost of the payment system is not excessive. Antitrust law has prevented independent physicians from negotiating collectively, but U.S. law provides for an exception for circumstances where the imbalance of power in negotiation of fees is so great that the physician work force and public health and welfare are threatened, and this is exactly what has happened in Hawaii. Alaska has already passed a law requiring collective mediation between payers and physicians, supervised by the Attorney General to ensure that negotiations are kept reasonable and in the public interest.

This resolution calls for a study of the feasibility of establishing collective mediation of physician payment for Hawaii. This is urgently needed if we are to stop the rapid loss of doctors willing to practice here. Please pass this resolution to preserve the future of health care for the residents of Hawaii. Thank you.

SCR-102

Submitted on: 3/11/2020 9:13:16 PM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Scott Grosskreutz, M.D.	Testifying for Hawaii Physician Shortage Crisis Task Force	Support	No

Comments:

As stated by Mayor Harry Kim, there is a access to health care crisis on Hawaii Island with the impending collapse of the health care delivery system. We do not have enough providers to even meet the medical needs of our local population. Tourists will be much less likely to visit a travel destination, where health care access is uncertain, especially in the next 2-3 years with the COVID-19 crisis.

A third of Hawaii Island doctors are past age 65, and between retirement, and the impact of quarantine, illness and death will increase the shortage of doctors here on our island well in excess of 50%. "Same old same old" thinking has contributed to this worsening crisis, and will not be the way forward.

In order to replace our losses of the healthcare workforce, Hawaii can no longer be there least fiscally attractive state to practice in the United States. Collective mediation is one long term practication solution to provide some semblance of balance between insurance companies and healthcare providers. The alternative of doing nothing is chaos.

SCR-102

Submitted on: 3/12/2020 5:27:05 AM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Hazel Abinsay	Individual	Support	No

Comments:

I adamantly support SCB102. As a primary care physician, I can tell you that we are struggling to stay open to take care of Hawaii's families. We are burnt out because we need to make up our financial deficits by being forced to see more patients. This in turn leads to rushed / suboptimal care. You or your loved one could be on the receiving end of our struggles. Please pass this bill. It will make an immense difference in the medical care that Hawaii receives from PCPs.

Hazel Abinsay, MD

Pediatrician serving heavy Quest populations in Kalihi and Ewa

Board of Governor, Philippine Medical Association of Hawaii

LATE

SCR-102

Submitted on: 3/12/2020 10:07:13 AM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Joseph Gary Dela Cruz	Individual	Support	No

Comments:

I support SCR 102.

LATE

SCR-102

Submitted on: 3/12/2020 10:15:15 AM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kristyn Nishimoto	Individual	Support	No

Comments:

LATE

SCR-102

Submitted on: 3/12/2020 10:36:42 AM

Testimony for GVO on 3/12/2020 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Bryan Mih	Individual	Support	No

Comments:

I am a solo pediatrician in Honolulu who cares for many of our keiki while also running the business side of my practice as a small business owner. I do this because I love what I do, and I feel it is important for the people of Hawaii to receive excellent medical care. However, it is a tremendous challenge to remain viable as our costs continue to rise for vaccinations, medical supplies, office supplies, electronic medical records, staffing, rent, utilities, waste disposal, and insurance (malpractice, business, and other). The cost of living continues to increase while the majority of health insurance reimbursements remain unchanged. This contributes to physicians leaving the state or deciding not to start practice here, thus causing our state's physician shortage. In addition, this makes it much more difficult for patients to find medical care, especially on our neighbor islands.

Please support SCR 102 to allow the Legislative Reference Bureau to study the option of Hawaii physicians being able to collectively negotiate with insurers. Currently, what the insurers call "negotiated rates" are usually "take it or leave it" amounts calculated by the companies. This bill is the first step to having the information available to adjust to Hawaii's unique health care environment and make appropriate adjustments that might help physicians survive in Hawaii and be able to provide medical care to our people. Thank you for your support of SCR 102,

Bryan Mih, MD MPH FAAP

Pediatrician