



GOV. MSG. NO. 915

EXECUTIVE CHAMBERS  
HONOLULU

July 9, 2008

LINDA LINGLE  
GOVERNOR

The Honorable Colleen Hanabusa, President  
and Members of the Senate  
Twenty-Fourth State Legislature  
State Capitol, Room 409  
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

Re: Senate Bill No. 2314 SD1 HD2 CD1

On July 8, 2008, Senate Bill No. 2314, entitled "A Bill for an Act Relating to Insurance" became law without my signature, pursuant to Section 16 of Article III of the State Constitution.

The purpose of this bill is to allow certain health insurers with less than five percent of the market share to bundle different types of benefits into a single unified policy by exempting such actions from the anti-tying provision in section 431:13-103(a)(4)(B), Hawaii Revised Statutes. The bill also requires the State Auditor to perform an analysis of the effects of this bill and submit a report to the Legislature no later than 20 days prior to the 2010 regular session.

In providing a limited exemption from the anti-tying law, this bill ostensibly seeks to enhance the ability of smaller insurers to offer broader health insurance options at a lower cost to certain types of customers, such as sole proprietors and small businesses. Although this is a laudable goal, this bill raises concerns because it ties the purchase of health insurance to the purchase of contracts for dental, vision, drug, and life insurance.

Under the anti-bundling provision of the Insurance Code, insurers are prohibited from requiring a consumer to buy two or more policies when the consumer only wishes to purchase one policy. However, this bill changes that provision and allows certain health insurers to package one insurance product as a prerequisite for buying another.

This bill limits the anti-bundling exception to certain health insurers with less than five percent of the market share, thus limiting the impact on consumer choice. Although this bill may assist sole proprietors and others in obtaining health care coverage, who might not otherwise be able to obtain such coverage, minimizing the choices of these individuals and business people is not an ideal method for increasing access to affordable health care.

The Honorable Colleen Hanabusa, President  
and Members of the Senate

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For the foregoing reasons, I allowed Senate Bill No. 2314 to become law as Act 227,  
effective July 8, 2008, without my signature.

Sincerely,



LINDA LINGLE

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**A BILL FOR AN ACT**

RELATING TO INSURANCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The insurance commissioner has recently chosen  
2 to interpret Hawaii law as prohibiting the combination of  
3 different types of accident and health or sickness insurance  
4 benefits within the same policy, as a violation of anti-tying  
5 statutes described in section 431:13-103(a)(4)(B), Hawaii  
6 Revised Statutes. The legislature, recognizing that access to  
7 affordable health insurance is one of the state's most pressing  
8 concerns, finds that small accident and health or sickness  
9 insurers lack coercive power and that a prohibition on tying  
10 arrangements by small insurers harms consumers by preventing  
11 small insurers from offering different types of benefits in a  
12 single unified policy. Accordingly, this Act provides the  
13 insurance division in the department of commerce and consumer  
14 affairs with the authority and duty to allow broader  
15 combinations of health insurance benefits in Hawaii.

16           The legislature finds that comparable federal antitrust  
17 laws regarding anti-tying only apply to companies that occupy 30



1 per cent or more of the market. In the seminal decision of  
2 *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2 (1984), the United  
3 States Supreme Court held that under the Sherman Act, Jefferson  
4 Hospital had no market power with an assumed market share of 30  
5 per cent, and therefore its tying arrangement was not unlawful.  
6 See *Hovenkamp*, *Federal Antitrust Policy* (3d edition, 2005) 402;  
7 *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d  
8 Cir. 2000); *Marts v. Xerox*, 77 F.3d 1109, 1113 n.6 (8th Cir.  
9 1996) (18 per cent too small); *Shafi v. St. Francis Hosp.*, 937  
10 F.2d 603 (4th Cir. 1991) (11 per cent insufficient); and  
11 *Grappone, Inc., v. Subarus of New England, Inc.*, 858 F.2d 792,  
12 797 (1st Cir. 1988) (recognizing a general rule of at least 30  
13 per cent). Hence, federal antitrust law reflects the  
14 overarching policy and recognition that small insurers are  
15 essential in providing consumers with coverage options and that  
16 they operate under more significant market constraints than  
17 larger insurers.

18 The purpose of this Act is to adopt the foregoing well-  
19 settled federal standards and thereby validate and encourage the  
20 long-standing practice of smaller accident and health or  
21 sickness insurers, who lack coercive power in the marketplace,  
22 of "bundling" different classes of insurance, such as health,



1 dental, and vision together. Under these circumstances,  
2 bundling provides broader health care coverage in single unified  
3 policies, ultimately resulting in lower overall premiums,  
4 fostering greater competition within the Hawaii insurance  
5 marketplace, and providing consumers with greater flexibility,  
6 coverage, and pricing options.

7 SECTION 2. Section 431:13-103, Hawaii Revised Statutes, is  
8 amended by amending subsection (a) to read as follows:

9 "(a) The following are defined as unfair methods of  
10 competition and unfair or deceptive acts or practices in the  
11 business of insurance:

12 (1) Misrepresentations and false advertising of insurance  
13 policies. Making, issuing, circulating, or causing to  
14 be made, issued, or circulated, any estimate,  
15 illustration, circular, statement, sales presentation,  
16 omission, or comparison which:

17 (A) Misrepresents the benefits, advantages,  
18 conditions, or terms of any insurance policy;  
19 (B) Misrepresents the dividends or share of the  
20 surplus to be received on any insurance policy;



- 1 (C) Makes any false or misleading statement as to the  
2 dividends or share of surplus previously paid on  
3 any insurance policy;
- 4 (D) Is misleading or is a misrepresentation as to the  
5 financial condition of any insurer, or as to the  
6 legal reserve system upon which any life insurer  
7 operates;
- 8 (E) Uses any name or title of any insurance policy or  
9 class of insurance policies misrepresenting the  
10 true nature thereof;
- 11 (F) Is a misrepresentation for the purpose of  
12 inducing or tending to induce the lapse,  
13 forfeiture, exchange, conversion, or surrender of  
14 any insurance policy;
- 15 (G) Is a misrepresentation for the purpose of  
16 effecting a pledge or assignment of or effecting  
17 a loan against any insurance policy;
- 18 (H) Misrepresents any insurance policy as being  
19 shares of stock;
- 20 (I) Publishes or advertises the assets of any insurer  
21 without publishing or advertising with equal



1                   conspicuousness the liabilities of the insurer,  
2                   both as shown by its last annual statement; or  
3           (J) Publishes or advertises the capital of any  
4                   insurer without stating specifically the amount  
5                   of paid-in and subscribed capital;  
6           (2) False information and advertising generally. Making,  
7                   publishing, disseminating, circulating, or placing  
8                   before the public, or causing, directly or indirectly,  
9                   to be made, published, disseminated, circulated, or  
10                   placed before the public, in a newspaper, magazine, or  
11                   other publication, or in the form of a notice,  
12                   circular, pamphlet, letter, or poster, or over any  
13                   radio or television station, or in any other way, an  
14                   advertisement, announcement, or statement containing  
15                   any assertion, representation, or statement with  
16                   respect to the business of insurance or with respect  
17                   to any person in the conduct of the person's insurance  
18                   business, which is untrue, deceptive, or misleading;  
19           (3) Defamation. Making, publishing, disseminating, or  
20                   circulating, directly or indirectly, or aiding,  
21                   abetting, or encouraging the making, publishing,  
22                   disseminating, or circulating of any oral or written



1 statement or any pamphlet, circular, article, or  
2 literature which is false, or maliciously critical of  
3 or derogatory to the financial condition of an  
4 insurer, and which is calculated to injure any person  
5 engaged in the business of insurance;

6 (4) Boycott, coercion, and intimidation.

7 (A) Entering into any agreement to commit, or by any  
8 action committing, any act of boycott, coercion,  
9 or intimidation resulting in or tending to result  
10 in unreasonable restraint of, or monopoly in, the  
11 business of insurance; or

12 (B) Entering into any agreement on the condition,  
13 agreement, or understanding that a policy will  
14 not be issued or renewed unless the prospective  
15 insured contracts for another class or an  
16 additional policy of the same class of insurance  
17 with the same insurer; provided that this  
18 subparagraph shall not apply to any insurer  
19 subject to chapter 432 with less than five per  
20 cent of the health insurance market share,  
21 offering contracts for dental, vision, drug, and  
22 life insurance as a condition, agreement, or





1                   understanding to a health insurance policy

2                   pursuant to chapter 432;

3           (5) False financial statements.

4           (A) Knowingly filing with any supervisory or other  
5           public official, or knowingly making, publishing,  
6           disseminating, circulating, or delivering to any  
7           person, or placing before the public, or  
8           knowingly causing, directly or indirectly, to be  
9           made, published, disseminated, circulated,  
10          delivered to any person, or placed before the  
11          public, any false statement of a material fact as  
12          to the financial condition of an insurer; or

13          (B) Knowingly making any false entry of a material  
14          fact in any book, report, or statement of any  
15          insurer with intent to deceive any agent or  
16          examiner lawfully appointed to examine into its  
17          condition or into any of its affairs, or any  
18          public official to whom the insurer is required  
19          by law to report, or who has authority by law to  
20          examine into its condition or into any of its  
21          affairs, or, with like intent, knowingly omitting  
22          to make a true entry of any material fact



1           pertaining to the business of the insurer in any  
2           book, report, or statement of the insurer;

3       (6) Stock operations and advisory board contracts.

4           Issuing or delivering or permitting agents, officers,  
5           or employees to issue or deliver, agency company stock  
6           or other capital stock, or benefit certificates or  
7           shares in any common-law corporation, or securities or  
8           any special or advisory board contracts or other  
9           contracts of any kind promising returns and profits as  
10          an inducement to insurance;

11       (7) Unfair discrimination.

12           (A) Making or permitting any unfair discrimination  
13           between individuals of the same class and equal  
14           expectation of life in the rates charged for any  
15           policy of life insurance or annuity contract or  
16           in the dividends or other benefits payable  
17           thereon, or in any other of the terms and  
18           conditions of the contract;

19           (B) Making or permitting any unfair discrimination in  
20           favor of particular individuals or persons, or  
21           between insureds or subjects of insurance having  
22           substantially like insuring, risk, and exposure



1 factors, or expense elements, in the terms or  
2 conditions of any insurance contract, or in the  
3 rate or amount of premium charge therefor, or in  
4 the benefits payable or in any other rights or  
5 privilege accruing thereunder;

6 (C) Making or permitting any unfair discrimination  
7 between individuals or risks of the same class  
8 and of essentially the same hazards by refusing  
9 to issue, refusing to renew, canceling, or  
10 limiting the amount of insurance coverage on a  
11 property or casualty risk because of the  
12 geographic location of the risk, unless:

13 (i) The refusal, cancellation, or limitation is  
14 for a business purpose which is not a mere  
15 pretext for unfair discrimination; or

16 (ii) The refusal, cancellation, or limitation is  
17 required by law or regulatory mandate;

18 (D) Making or permitting any unfair discrimination  
19 between individuals or risks of the same class  
20 and of essentially the same hazards by refusing  
21 to issue, refusing to renew, canceling, or  
22 limiting the amount of insurance coverage on a



1 residential property risk, or the personal  
2 property contained therein, because of the age of  
3 the residential property, unless:

4 (i) The refusal, cancellation, or limitation is  
5 for a business purpose which is not a mere  
6 pretext for unfair discrimination; or

7 (ii) The refusal, cancellation, or limitation is  
8 required by law or regulatory mandate;

9 (E) Refusing to insure, refusing to continue to  
10 insure, or limiting the amount of coverage  
11 available to an individual because of the sex or  
12 marital status of the individual; however,  
13 nothing in this subsection shall prohibit an  
14 insurer from taking marital status into account  
15 for the purpose of defining persons eligible for  
16 dependent benefits;

17 (F) Terminating or modifying coverage, or refusing to  
18 issue or renew any property or casualty policy or  
19 contract of insurance solely because the  
20 applicant or insured or any employee of either is  
21 mentally or physically impaired; provided that  
22 this subparagraph shall not apply to accident and



1 health or sickness insurance sold by a casualty  
2 insurer; provided further that this subparagraph  
3 shall not be interpreted to modify any other  
4 provision of law relating to the termination,  
5 modification, issuance, or renewal of any  
6 insurance policy or contract;

7 (G) Refusing to insure, refusing to continue to  
8 insure, or limiting the amount of coverage  
9 available to an individual based solely upon the  
10 individual's having taken a human  
11 immunodeficiency virus (HIV) test prior to  
12 applying for insurance; or

13 (H) Refusing to insure, refusing to continue to  
14 insure, or limiting the amount of coverage  
15 available to an individual because the individual  
16 refuses to consent to the release of information  
17 which is confidential as provided in section  
18 325-101; provided that nothing in this  
19 subparagraph shall prohibit an insurer from  
20 obtaining and using the results of a test  
21 satisfying the requirements of the commissioner,  
22 which was taken with the consent of an applicant



1 for insurance; provided further that any  
2 applicant for insurance who is tested for HIV  
3 infection shall be afforded the opportunity to  
4 obtain the test results, within a reasonable time  
5 after being tested, and that the confidentiality  
6 of the test results shall be maintained as  
7 provided by section 325-101;

8 (8) Rebates. Except as otherwise expressly provided by  
9 law:

10 (A) Knowingly permitting or offering to make or  
11 making any contract of insurance, or agreement as  
12 to the contract other than as plainly expressed  
13 in the contract, or paying or allowing, or giving  
14 or offering to pay, allow, or give, directly or  
15 indirectly, as inducement to the insurance, any  
16 rebate of premiums payable on the contract, or  
17 any special favor or advantage in the dividends  
18 or other benefits, or any valuable consideration  
19 or inducement not specified in the contract; or

20 (B) Giving, selling, or purchasing, or offering to  
21 give, sell, or purchase as inducement to the  
22 insurance or in connection therewith, any stocks,



1           bonds, or other securities of any insurance  
2           company or other corporation, association, or  
3           partnership, or any dividends or profits accrued  
4           thereon, or anything of value not specified in  
5           the contract;

6           (9) Nothing in paragraph (7) or (8) shall be construed as  
7           including within the definition of discrimination or  
8           rebates any of the following practices:

9           (A) In the case of any life insurance policy or  
10           annuity contract, paying bonuses to policyholders  
11           or otherwise abating their premiums in whole or  
12           in part out of surplus accumulated from  
13           nonparticipating insurance; provided that any  
14           bonus or abatement of premiums shall be fair and  
15           equitable to policyholders and in the best  
16           interests of the insurer and its policyholders;

17           (B) In the case of life insurance policies issued on  
18           the industrial debit plan, making allowance to  
19           policyholders who have continuously for a  
20           specified period made premium payments directly  
21           to an office of the insurer in an amount which



1           fairly represents the saving in collection  
2           expense;

3           (C) Readjustment of the rate of premium for a group  
4           insurance policy based on the loss or expense  
5           experience thereunder, at the end of the first or  
6           any subsequent policy year of insurance  
7           thereunder, which may be made retroactive only  
8           for the policy year; and

9           (D) In the case of any contract of insurance, the  
10          distribution of savings, earnings, or surplus  
11          equitably among a class of policyholders, all in  
12          accordance with this article;

13          (10) Refusing to provide or limiting coverage available to  
14          an individual because the individual may have a third-  
15          party claim for recovery of damages; provided that:

16          (A) Where damages are recovered by judgment or  
17          settlement of a third-party claim, reimbursement  
18          of past benefits paid shall be allowed pursuant  
19          to section 663-10;

20          (B) This paragraph shall not apply to entities  
21          licensed under chapter 386 or 431:10C; and

22          (C) For entities licensed under chapter 432 or 432D:





- 1 (i) It shall not be a violation of this section
- 2 to refuse to provide or limit coverage
- 3 available to an individual because the
- 4 entity determines that the individual
- 5 reasonably appears to have coverage
- 6 available under chapter 386 or 431:10C; and
- 7 (ii) Payment of claims to an individual who may
- 8 have a third-party claim for recovery of
- 9 damages may be conditioned upon the
- 10 individual first signing and submitting to
- 11 the entity documents to secure the lien and
- 12 reimbursement rights of the entity and
- 13 providing information reasonably related to
- 14 the entity's investigation of its liability
- 15 for coverage.

16 Any individual who knows or reasonably should  
17 know that the individual may have a third-party  
18 claim for recovery of damages and who fails to  
19 provide timely notice of the potential claim to  
20 the entity, shall be deemed to have waived the  
21 prohibition of this paragraph against refusal or  
22 limitation of coverage. "Third-party claim" for



1 purposes of this paragraph means any tort claim  
2 for monetary recovery or damages that the  
3 individual has against any person, entity, or  
4 insurer, other than the entity licensed under  
5 chapter 432 or 432D;

6 (11) Unfair claim settlement practices. Committing or  
7 performing with such frequency as to indicate a  
8 general business practice any of the following:

9 (A) Misrepresenting pertinent facts or insurance  
10 policy provisions relating to coverages at issue;

11 (B) With respect to claims arising under its  
12 policies, failing to respond with reasonable  
13 promptness, in no case more than fifteen working  
14 days, to communications received from:

15 (i) The insurer's policyholder;

16 (ii) Any other persons, including the  
17 commissioner; or

18 (iii) The insurer of a person involved in an  
19 incident in which the insurer's policyholder  
20 is also involved.

21 The response shall be more than an acknowledgment  
22 that such person's communication has been



- 1 received, and shall adequately address the  
2 concerns stated in the communication;
- 3 (C) Failing to adopt and implement reasonable  
4 standards for the prompt investigation of claims  
5 arising under insurance policies;
- 6 (D) Refusing to pay claims without conducting a  
7 reasonable investigation based upon all available  
8 information;
- 9 (E) Failing to affirm or deny coverage of claims  
10 within a reasonable time after proof of loss  
11 statements have been completed;
- 12 (F) Failing to offer payment within thirty calendar  
13 days of affirmation of liability, if the amount  
14 of the claim has been determined and is not in  
15 dispute;
- 16 (G) Failing to provide the insured, or when  
17 applicable the insured's beneficiary, with a  
18 reasonable written explanation for any delay, on  
19 every claim remaining unresolved for thirty  
20 calendar days from the date it was reported;



- 1 (H) Not attempting in good faith to effectuate
- 2 prompt, fair, and equitable settlements of claims
- 3 in which liability has become reasonably clear;
- 4 (I) Compelling insureds to institute litigation to
- 5 recover amounts due under an insurance policy by
- 6 offering substantially less than the amounts
- 7 ultimately recovered in actions brought by the
- 8 insureds;
- 9 (J) Attempting to settle a claim for less than the
- 10 amount to which a reasonable person would have
- 11 believed the person was entitled by reference to
- 12 written or printed advertising material
- 13 accompanying or made part of an application;
- 14 (K) Attempting to settle claims on the basis of an
- 15 application which was altered without notice,
- 16 knowledge, or consent of the insured;
- 17 (L) Making claims payments to insureds or
- 18 beneficiaries not accompanied by a statement
- 19 setting forth the coverage under which the
- 20 payments are being made;
- 21 (M) Making known to insureds or claimants a policy of
- 22 appealing from arbitration awards in favor of



1 insureds or claimants for the purpose of  
2 compelling them to accept settlements or  
3 compromises less than the amount awarded in  
4 arbitration;

5 (N) Delaying the investigation or payment of claims  
6 by requiring an insured, claimant, or the  
7 physician of either to submit a preliminary claim  
8 report and then requiring the subsequent  
9 submission of formal proof of loss forms, both of  
10 which submissions contain substantially the same  
11 information;

12 (O) Failing to promptly settle claims, where  
13 liability has become reasonably clear, under one  
14 portion of the insurance policy coverage to  
15 influence settlements under other portions of the  
16 insurance policy coverage;

17 (P) Failing to promptly provide a reasonable  
18 explanation of the basis in the insurance policy  
19 in relation to the facts or applicable law for  
20 denial of a claim or for the offer of a  
21 compromise settlement; and



1 (Q) Indicating to the insured on any payment draft,  
2 check, or in any accompanying letter that the  
3 payment is "final" or is "a release" of any claim  
4 if additional benefits relating to the claim are  
5 probable under coverages afforded by the policy;  
6 unless the policy limit has been paid or there is  
7 a bona fide dispute over either the coverage or  
8 the amount payable under the policy;

9 (12) Failure to maintain complaint handling procedures.

10 Failure of any insurer to maintain a complete record  
11 of all the complaints which it has received since the  
12 date of its last examination under section 431:2-302.  
13 This record shall indicate the total number of  
14 complaints, their classification by line of insurance,  
15 the nature of each complaint, the disposition of these  
16 complaints, and the time it took to process each  
17 complaint. For purposes of this section, "complaint"  
18 means any written communication primarily expressing a  
19 grievance;

20 (13) Misrepresentation in insurance applications. Making  
21 false or fraudulent statements or representations on  
22 or relative to an application for an insurance policy,



1 for the purpose of obtaining a fee, commission, money,  
2 or other benefit from any insurer, producer, or  
3 individual; and

4 (14) Failure to obtain information. Failure of any  
5 insurance producer, or an insurer where no producer is  
6 involved, to comply with section 431:10D-623(a), (b),  
7 or (c) by making reasonable efforts to obtain  
8 information about a consumer before making a  
9 recommendation to the consumer to purchase or exchange  
10 an annuity."

11 SECTION 3. The auditor shall perform an analysis of the  
12 effects of the provisions contained in this Act and submit a  
13 report to the legislature no later than twenty days prior to the  
14 convening of the regular session of 2010.

15 SECTION 4. New statutory material is underscored.

16 SECTION 5. This Act shall take effect upon its approval,  
17 and shall be repealed on June 30, 2011.

APPROVED this                      day of                      , 2008

GOVERNOR OF THE STATE OF HAWAII



