

Annual External Review Report

In Accordance with Hawaii Revised Statutes §432E-13

Prepared by the

INSURANCE DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

December 2008

Foreword

Hawaii Revised Statutes (“HRS”) section 432E-13 requires the Insurance Commissioner to submit to the Legislature a report that contains the number of external review hearing cases reviewed, the type of cases reviewed, a summary of the nature of the cases reviewed, and the disposition of the cases reviewed. Furthermore, the identities of the plan and the enrollee shall be protected from disclosure in the report.

The external review process is an important component to the Patients’ Bill of Rights and Responsibilities Act, HRS chapter 432E. As such, the Insurance Division has provided a general overview of the external review statistics for fiscal year 2007-2008.

J.P. SCHMIDT
Insurance Commissioner

External Review Report for Fiscal Year 2007-2008

This annual report is filed pursuant to Hawaii Revised Statutes (“HRS”) section 432E-13, which requires the Insurance Commissioner to submit an annual report concerning external review cases to the Legislature.

The Insurance Division administers the external review process under the Patients’ Bill of Rights and Responsibilities Act, HRS chapter 432E (“Act”). The Act provides patients with a mechanism for appealing adverse coverage decisions made by their health plans. After exhausting the health plans’ internal appeals process, patients may file a petition for external review with the Insurance Commissioner. If the Commissioner finds that there is good cause for a petition, a hearing is scheduled on the petition. The Insurance Commissioner may conduct the hearing for cases where the amount in controversy is less than \$500. Cases in excess of \$500 are heard by a three-member panel, consisting of the Commissioner or his representative, a representative of a health plan not involved in the case, and a practicing physician. The Act also provides for expedited hearings in cases involving serious jeopardy to life or health.

For fiscal year ‘07-’08, fifteen (15) external review requests were filed. The nature of the cases reviewed involved nine (9) cases of inadequate coverage; three (3) cases regarding denial of coverage; two (2) regarding claim appeals; and one regarding the plan’s provider network. There were no cases that required a hearing for the fiscal year. Eight (8) cases were dismissed; a settlement between the parties was reached in six (6) cases; and one case is under review.

In November 2004, the Hawaii Supreme Court ruled in *Hawaii Management Alliance Association v. Insurance Commissioner*, 106 Haw. 21 (2004), that the external review process is pre-empted by the federal Employees Retirement Income Security Act (“ERISA”) as to health plans that fall under ERISA. The vast majority of health plans fall under ERISA because they are provided by private employers. As a result, the number of external review cases has been substantially lower since 2005.

On May 7, 2008 the Administrator for the Hawaii Employer-Union Health Benefits Trust Fund requested the Attorney General for a written opinion as to the applicability of Patients’ Bill of Rights to the EUTF. On August 14, 2008 the Department of the Attorney General responded with an opinion. The Department of the Attorney General opined that the Legislature did not explicitly apply HRS Chapter 432E to the State, in general, or to the EUTF. As such, the Department of the Attorney General found that HRS Chapter 432E does not apply to the EUTF. The opinion of the Department of the Attorney General is attached to this report.

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August 14, 2008

Mr. Jim Williams
Administrator
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Hawaii Employer-Union Health
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Re: Request for Written Opinion As To The Applicability of
Patients Bill of Rights to the EUTF

Dear Mr. Williams:

On May 7, 2008 you wrote to the Attorney General asking whether Hawaii Revised Statutes ("HRS") chapter 432E (Patients' Bill of Rights "PBOR") applies to the Hawaii Employer-Union Health Benefits Trust Fund ("EUTF") in full or in part. If it applies in part, you asked which parts apply to the EUTF.

The short answer to your first question is that HRS chapter 432E does not apply to the EUTF. Thus, we need not answer your second question. Our analysis follows.

I. Introduction.

The EUTF's governing statutes are found in HRS chapter 87A, titled the Hawaii Employer-Union Health Benefits Trust Fund. The legislative history shows that the EUTF is a governmental agency that was established as "a single health benefits delivery system for the State and county employees and their dependents." The EUTF's governing body was given "complete discretion, authority, and flexibility to devise and maximize the levels and types of benefits available for public employees and retirees." Conf. Com. Rep. No. 124, in 2001 House Journal, at 1097-1098. The EUTF is the conduit for the provision of

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health care benefits to Hawaii governmental employees and retirees.

Your questions involve the interplay, if any, between HRS chapters 87A (the EUTF's chapter) and 432 (the PBOR's chapter). These questions arise because the PBOR mandates that managed care plans provide certain protections to their enrollees, e.g., participation in treatment decisions, a complaint and appeal procedure, an external review procedure. See HRS chapter 432E. Arguably, the EUTF might be considered to be a "managed care plan" within the definition of that phrase in HRS § 432E-1. However, before we address whether the EUTF is a "managed care plan," we must first address whether HRS chapter 432E even applies to the EUTF.

It is a well-established principle of law, explicitly recognized in Hawaii, that statutory laws of general application do not pertain to the State unless the legislature, in the enactment of those laws, made them explicitly applicable to the State. Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 433, 106 P.3d 339, 356 (2005) (there is no statutory authority that expressly surrenders the State's immunity for postjudgment interest as to claims for relief based upon contracts, express or implied per HRS § 661-1); Big Island Ranchers Ass'n v. State, 60 Haw. 228, 236, 588 P.2d 430, 436 (1978) (the legislature did not make HRS chapter 480 (monopolies; restraint of trade) explicitly applicable to the State.); A.C. Chock, Ltd. v. Kaneshiro, 51 Haw. 87, 89, 451 P.2d 809, 811 (1969) (the legislature in enacting chapter 103A did not authorize a mechanic's or materialman's lien on the State's interest in lands). There is no question that the EUTF is a State agency. See HRS chapter 87A. Thus we must consider whether HRS chapter 432E was made explicitly applicable to the State, in general, and the EUTF, in particular.

As noted, HRS chapter 432E is a chapter of general applicability that mandates, *inter alia*, that managed care plans provide certain protections to their enrollees. See HRS chapter 432E. There is nothing in HRS chapter 432E that makes that chapter specifically applicable to the State, in general, or the EUTF, in particular. Further, there is no reference to the EUTF

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or its chapter (HRS chapter 87A) in HRS chapter 432E. Neither the EUTF nor its predecessor¹, the Public Employees Health Fund, were made subject to HRS chapter 432E². If the Legislature wanted to subject the EUTF to HRS chapter 432E, it could have easily done so.

In fact, the legislative history supports the conclusion that HRS chapter 432E does not apply to the State or to the EUTF. In response to an inquiry, from the Office of Information Practices, whether the definition for "managed care plan" includes a government-sponsored health plan, the Senate Committee on Commerce, Consumer Protection, and Information Technology stated that "this measure is intended to protect consumers in private managed care plans." See Sen. Stand. Comm. Rep. No. 2718, in 1998 Senate Journal, at 1098. The version of the bill before that committee defined "managed care plan" as a plan offered or administered by any entity and briefly described the services and benefits of such a plan.

The final version of the bill, C.D. 1, significantly expanded that definition of "managed care plan" to include plans offered or administered by any person or entity and by adding various examples of these persons or entities. However, none of the examples in this list reference the State nor does the definition of person in HRS § 1-19 include governmental bodies. Thus, the expanded definition does not counter in any way the Legislature's earlier statement that the bill was directed toward private plans nor does the expanded language override the general proposition that, unless the law is made explicitly applicable to the State, the State is excluded.

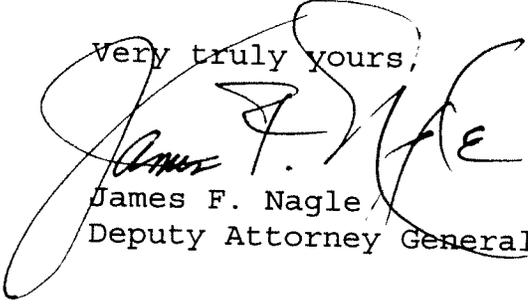
¹ Act 88, SLH 2001 created the EUTF and, at section 3, repealed the Public Employees Health Fund (formerly, HRS chapter 87).

² HRS chapter 432E was enacted in 1998 (Act 178, SLH 1998); the Public Employees Health Fund was enacted in 1961 (Act 146, SLH 1961); and as noted in footnote 1, the EUTF was enacted in 2001.

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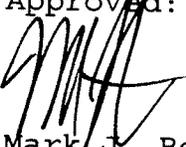
Because the Legislature did not make HRS chapter 432E explicitly applicable to the State, in general, or to the EUTF, in particular, our inquiry ends and we need not consider whether the EUTF could be considered to be a "managed care plan" within the definition per HRS § 432E-1. Accordingly, we find that HRS chapter 432E does not apply to the EUTF at all. Thus, we need not answer your second question. Should you have any additional questions, please contact us.

Very truly yours,



James F. Nagle
Deputy Attorney General

Approved:



Mark J. Bennett
Attorney General