

S.B. NO. 2668

JAN 25 2010

A BILL FOR AN ACT

RELATING TO AWARDS OF ATTORNEY'S FEES OR INTEREST AGAINST THE STATE.

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

1 SECTION 1. "[L]ike the federal government, [our state
2 government] is one in which the sovereign power is divided and
3 allocated among three co-equal branches." Trustees of OHA v.
4 Yamasaki, 69 Haw. 154, 170-71 (1987). The courts have
5 recognized that under that allocation, the legislature is
6 responsible for "clearly relinquish[ing the State's] sovereign
7 immunity" by prescribing in unequivocal, statutory text, when
8 and under what circumstances the State's sovereign immunity is
9 waived so that plaintiffs may bring suits against the State to
10 recover monetary damages, including attorney's fees and
11 interest. Office of Hawaiian Affairs v. State, 110 Haw. 338,
12 357-58 (2006); Chun v. Board of Trustees of the ERS, 106 Haw.
13 416, 432 (2005); Taylor-Rice v. State, 105 Haw. 104, 110 (2004);
14 Fought & Co., Inc. v. Steel Engineering & Erection, Inc., 87
15 Haw. 37, 51 (1998). The legislature is given exclusive
16 responsibility to make this determination because "the crucial
17 inquiry under our sovereign immunity principle" is whether, and

1 to what extent the State's treasury may be impacted by the
2 waiver. Bush v. Watson, 81 Haw. 474, 482 (1996).

3 The purposes of this Act are to (1) expressly and
4 unequivocally specify in statutory text when the State
5 relinquishes and waives its sovereign immunity, and consents to
6 allowing awards of attorney's fees to be made or interest to be
7 recovered against the State and (2) repudiate any judicial
8 precedent rendering the State liable for attorney's fees or
9 interest to the same extent as other litigants, that is not
10 grounded in a statute expressly waiving the State's sovereign
11 immunity and imposing that liability upon the State.

12 SECTION 2. Chapter 661, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 "§661- Award of attorney's fees or interest against the
16 State. Any law, including any common-law principle of law, to
17 the contrary notwithstanding, no attorney's fees or interest may
18 be assessed or recovered from the State, its agencies, or its
19 officials in any civil or administrative action or proceeding
20 unless an award or a recovery is specifically authorized by a
21 statute that both explicitly waives the State's sovereign
22 immunity and expressly permits the award or recovery of

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1 attorney's fees or interest as the case may be, irrespective of
2 whether the attorney's fees or interest are awarded or assessed
3 (1) as damages, costs, a reimbursement, or an offset; (2)
4 pursuant to the private attorney general doctrine; or (3) by any
5 other means.

6 The provisions of this section shall not apply to
7 attorney's fees imposed as sanctions pursuant to court rules."

8 SECTION 3. New statutory material is underscored.

9 SECTION 4. This Act shall take effect upon its approval.

10
11 INTRODUCED BY: _____

12 BY REQUEST

Report Title:

Awards of Attorney's Fees and Interest Against the State

Description:

Limits awards or the recovery of attorney's fees or interest against or from the State to only those cases for which the Legislature expressly waives the State's sovereign immunity and permits the award or recovery.

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO AWARDS OF ATTORNEY'S FEES OR INTEREST AGAINST THE STATE.

PURPOSE: To assure that decisions to waive the State's sovereign immunity, or to subject the State Treasury to claims and obligations to pay attorney's fees or judgment interest, are made exclusively, and only by the Legislature, by duly enacted statutes.

MEANS: Add a new section to chapter 661, Hawaii Revised Statutes.

JUSTIFICATION: In Fought & Co., Inc. v. Steel Engineering and Erection Inc., 87 Haw. 37, 54-55 (1998), the Hawaii Supreme Court wrote:

"This court stated in *Hawaiian Isles* that 'HRS § 607-14 governs the award of attorneys' fees in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing and does not limit an award of attorneys' fees to non-governmental parties. Considerations of *stare decisis* have particular strength . . . where the legislative power is implicated, and [the legislature] remains free to alter what we have done.' *Hawaiian Isles* was decided in 1994. The legislature has had numerous opportunities to correct our interpretation of HRS § 607-14 if it deemed that interpretation to be mistaken. It has not done so. Accordingly, we can only presume that the legislature agrees with our interpretation, and we can discern no good reason to change it." (Citations and internal quotation marks omitted.)

Since then, courts have relied on Fought to award attorneys' fees against the State in cases grounded on contracts brought under chapter 661, HRS.

More recently, the Supreme Court awarded fees under the private attorney general doctrine, and the rationale described in the excerpt from Fought quoted above, despite the State's assertion of sovereign immunity and nothing in the statutes that expressly allowed attorneys' fees to be awarded against the State. See Sierra Club v. Department of Transportation, 120 Haw. 181 (2009).

This bill retrieves the Legislature's exclusive authority to determine when attorney's fees and judgment interest may be assessed against the State, and rescinds the Supreme Court's adoption of the private attorney general doctrine as the common law of the State. Until the Legislature enacts a statute expressly permitting an award of attorney's fees or judgment interest against the State, no such award may be made by a state court.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION:

OTHER AFFECTED
AGENCIES: Judiciary.

EFFECTIVE DATE: Upon approval.