



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. 2661, S.D. 2, H.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, March 25, 2010 **TIME:** 12:30 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Caron M. Inagaki, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to appropriate funds to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

S.B. No. 2661, S.D. 2, H.D. 1, contains fourteen claims that total \$5,902,352.64. Of this total, \$5,754,127.30 consists of general fund appropriation requests and \$148,225.34 consists of appropriation requests from departmental funds. Attachment A provides a brief description of each claim in the bill.

Since this bill was last amended, seven new claims have been resolved for an additional \$1,449,499.00. All of these claims are general fund appropriation requests. Attachment B provides a brief description of each claim in the bill.

We request that the Committee amend the bill to appropriate funds for these claims.

In addition to the new claims in Attachment B, we are requesting the following amendment be made to the current draft of the bill. On page 3, line 6, "Hensen" should be changed to "Henson".

Including the new claims and amendment, the appropriation requests total \$7,351,851.64 allocated among twenty-one claims. Of this total, \$7,203,626.30 consists of general fund appropriation requests and \$148,225.34 consists of appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We therefore respectfully request amendment and passage of this measure.

ATTACHMENT "A"

DEPARTMENT OF EDUCATION:

Cabanting, et al. v. Poouahi, **\$ 3,485,815.38** *(General Fund)*
et al., Civil No. 07-1-0038, **Settlement**
Third Circuit

The parental grandfather and the father of a now 15-year-old child alleged that employees of the Department of Education wrongfully failed to make mandatory reports of suspected child abuse after the minor's natural mother voluntarily had placed her with a caregiver. As a result, the minor was alleged to have suffered extensive and permanent injuries including brain damage from infections, loss of hearing in one ear, blindness in one eye, and the loss of her nose and upper lip and other injuries, the effect of which has left her unable to care for herself and unlikely to obtain employment. She was alleged to have needed some \$481,000 in future cosmetic surgery and lifetime care.

The State and its excess insurance carrier, Chartis Insurance (fka AIG), recently agreed to settle the Plaintiffs' claims for a total of \$5,750,000. The State's portion is its self-insured retention and deductible of \$3,500,000 applicable for the year of this incident. (The State's self-insured retention was \$3,000,000. Also, for the period when this incident occurred, there was a further deductible of 50 percent of the first \$1,000,000 or any portion thereof in excess of the retained limit.)

\$835,470.96 is to be paid to the State as reimbursement for an outstanding Department of Human Services lien. (As part of the settlement, the State agreed to waive \$50,000 of the outstanding DHS lien of \$885,470.96). Thus, the State will, in effect, pay out a net amount of \$2,664,529.04, and Chartis will pay approximately \$2,250,000.

We have provided further details regarding this case in a confidential letter to the Chair of the House Committee on Finance.

DEPARTMENT OF HUMAN SERVICES:

Henson v. State of Hawaii **\$ 30,000.00** *(General Fund)*
Civil No. 06-1-0794, First Circuit **Settlement**

The biological parents of two minor children ages 9 and 6 years old allege that the Department of Human Services (DHS) wrongfully removed the children from their family home and placed them in a temporary foster home. The parents allege that DHS conducted an untimely and incomplete investigation of a child neglect complaint against them, and misrepresented, among other things, that three mental health professionals supported removal of the children, when they, in fact, did not. As a result, the children were removed from their home for a month, but subsequently returned when the three professionals disclaimed support for the removal.

Manalo v. Wells, et al. \$ 32,478.37 *(General Fund)*
Civil No. 08-1-2212-10, First Circuit **Judgment**

Claimant's vehicle was struck by a State of Hawaii, Department of Human Services' employee acting in the course and scope of his duties on December 4, 2006. Claimant suffered damages as a result of the accident. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator found in favor of the Claimant and awarded her \$40,109.66 in total damages, less \$10,000 for the covered loss deductible, plus \$1,391.73 in costs and interest.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Consolidated Cases:

Fehring, et al. v. Pflueger, et al. \$1,500,000.00 *(General Fund)*
Civil No. 06-1-0082, Fifth Circuit **Settlement**

Midler, et al. v. Pflueger, et al.
Civil No. 06-1-0110, Fifth Circuit

Pflueger, et al. v. State of Hawaii
Civil No. 07-1-0117, Fifth Circuit

Calisher, et al. v. Pflueger, et al.
Civil No. 07-1-0106, Fifth Circuit

Fehring, et al. v. Pflueger, et al.
Civil No. 08-1-0050, Fifth Circuit

Fehring, et al. v. Pflueger, et al.
Civil No. 08-1-0051, Fifth Circuit

Bosma, et al. v. Pflueger, et al.
Civil No. 08-1-0052, Fifth Circuit

Midler, et al. v. Pflueger, et al.
Civil No. 08-1-0053, Fifth Circuit

These cases are based on the breach of the Ka Loko Dam on March 14, 2006, resulting in a flood that caused the death of seven persons (Fehring) and damage to numerous parcels of property (Midler, Bosma and Calisher). The State was made a party based on the allegations of negligence by PUC in regulating the irrigation system operator, by the Department of Land and Natural Resources in not inspecting the dam and requiring the owner of the dam to maintain the dam, and by the State of Hawaii generally as the landowner of the watershed above the dam allegedly having the responsibility of controlling the flow of water.

The consolidated cases proceeded to mediation resulting in the global settlement among all parties. The State of Hawaii succeeded on having all allegations of liability dismissed except for the allegations related to the State of Hawaii being the owner of the property above the private property on which the dam was located.

The settlement agreement includes an assignment of claims of any rights, privileges, claims, or any other recourse the State may have pursuant to insurance policies that provide insurance coverage to the State arising out of the released claims.

Roque v. Dickman, et al.	\$ 93,850.00	<i>(General Fund)</i>
Civil No. 07-1-0497-03 First Circuit	Settlement	

Claimants were defrauded of their interest in property pursuant to a forged deed. The parties who defrauded Claimants of their interest subsequently mortgaged the property. The mortgagee claims to have a superior secured interest in the property based upon the Land Court having issued a transfer certificate of title naming the defrauding parties as owners of the property. Pursuant to section 501-212, Hawaii Revised Statutes, et seq., the Claimants may recover the value of the property from the Director of Finance after exhausting all other remedies. All other remaining defendants are insolvent.

DEPARTMENT OF PUBLIC SAFETY:

Botelho, et al. v. State of Hawaii, et al. \$ 30,454.33 (General Fund)
Civil No. 06-00096 DAE-BMK, USDC Judgment

Inmates at the Hawaii Community Correctional Center in Hilo were injured while the prison was being evacuated during a fire on July 24, 2004. The judgment in favor of the inmates for their injuries (\$20,500.00) was paid with funds appropriated by the 2009 Legislature. Thereafter, the court awarded \$30,454.33 to the inmates' attorney for fees.

DeJesus, et al. v. State of Hawaii, \$ 80,000.00 (General Fund)
et al., Civil No. 06-1-1070-06, Settlement
First Circuit

This case involves the discharge of eight employees of the Department of Public Safety who were on workers' compensation leave for one year or more and had no foreseeable return to work date. Former Director of Public Safety John Peyton made the decision to discharge the employees to address staffing issues at the correctional facilities, i.e., to fill the positions with people who could work.

**DEPARTMENT OF TRANSPORTATION,
HARBORS DIVISION:**

Flores, et al. v. Department of \$ 23,225.34 (Department
Transportation, et al., Judgment Appropriation)
Civil No. 07-1-0204, Fifth Circuit

A roll-up door at the Pier 3 warehouse at Nawiliwili Harbor on Kauai suddenly and unexpectedly came down and struck Claimant on the head while he was picking up freight from Young Brothers on August 4, 2005. The roll-up door, which is approximately 20 feet high, had been in an open position before it unexpectedly fell and struck Claimant. Claimant's alleged injuries include a closed head injury, cervical strain, right shoulder strain and impingement, and chronic and constant headaches. This case proceeded to the Court Annexed Arbitration Program. The arbitrator found the State of Hawaii 100 percent liable and co-defendant Young Brothers not liable. Plaintiff was awarded \$88,332 in damages. The State appealed and the case went to trial. The trial court found that both Young Brothers and the State were liable. The State's share of damages was \$27,298.93. Because the State was able to substantially improve on the

arbitration award, Plaintiff was required to pay for the State's trial costs, reducing the total amount of the State's liability to \$22,661.59. With interest, the total amount of the appropriation is \$23,225.34.

**DEPARTMENT OF TRANSPORTATION,
HIGHWAYS DIVISION:**

D&J Ocean Farms, Inc. v. Pedro, \$ 25,000.00 (Department
et al., Civil No. 06-1-0373(3), Settlement Appropriation)
Second Circuit

D&J Ocean Farms operated an aquaculture farm on Molokai. D&J alleged that the State of Hawaii negligently designed and maintained a culvert running under Kamehameha V Highway located mauka of its property. As a result, runoff from the upslope property, including mud and debris, was diverted onto its property during rainy weather causing flooding and damage to D&J's aquaculture ponds.

MISCELLANEOUS CLAIMS:

Kathy M. Gillett \$ 1,379.31 (General Fund)

Claimant requests tax refunds for amended tax returns for 2003 through 2005. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

June S. Hashizaki \$ 150.00 (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

ATTACHMENT "B"

DEPARTMENT OF HUMAN SERVICES:

Ayala, et al. v. Wilson, et al. **\$ 50,000.00** (General Fund)
Civil No. 04-1-0250, Third Circuit **Settlement**

This case arises out of an alleged sexual abuse of a foster child by the adult son of foster parents. The Department of Human Services is alleged to have negligently placed the child in the foster home.

McMillon, et al. v. State of Hawaii, **\$ 610,000.00** (General Fund)
et al., Civil No. 08-00578, USDC **Settlement**

and
Faletogo, et al. v. State of Hawaii,
et al., Civil No. 08-1-2608-12,
First Circuit

Two class action lawsuits were filed simultaneously relating to the Kuhio Park Terrace (KPT) and Kuhio Homes housing projects. The *McMillon* lawsuit was filed in federal court and involved federally protected civil rights, i.e., Americans with Disability Act, Rehabilitation Act section 504, and Fair Housing Act disability rights. The *Faletogo* lawsuit was filed in state court and primarily involved general living conditions at KPT and the alleged breach of lease and warranty of habitability. A class has been certified in the federal case.

KPT is the oldest housing project in the State's federal inventory. Built in 1965, it consists of two 16-story towers and several two-story buildings. Built only a little later and contiguous to KPT is Kuhio Homes, which consists of several two story "town-house" style units. Both are considered part of the same project and are managed together. Large high-rise public housing projects have proven themselves to be a failed approach to low-income public housing and have been torn down throughout the United States. Because this is a United States Department of Housing and Urban Development (HUD)-financed project, nothing can be done without HUD approval and HUD funds. The Hawaii Public Housing Authority has twice applied for a HUD "Hope VI" grant to raze KPT and both times the application was denied - not for lack of merit, but rather for lack of available federal funds. Given their age, the buildings have become difficult and expensive to maintain. For example, the garbage chutes were designed as incinerator chutes and do not function well as collection receptacles. The elevators are obsolete and repair parts are no longer available; moreover, the original design of

two passenger and one service elevator per building may have been adequate for a middle class apartment building but are not adequate for public housing, resulting in frustrating waits and ensuing vandalism. The high concentration of residents has led not only to vandalism but other crimes among the residents, which has increased the difficulty of maintaining the premises.

This settlement was reached after extensive mediation with a federal magistrate and a private mediator. Of the settlement amount, \$245,000 will go to residents of KPT as damages and/or "rent abatement"; the balance represents attorneys' fees for the plaintiffs' attorneys recoverable under federal statutes.

Kong-Guillermo v. Hefferman, et al. \$ 110,000.00 (General Fund)
Civil No. 07-1-2406-12, First Circuit **Settlement**

A female inmate was sexually assaulted by staff at the Hawaii Youth Correctional Facility in 1995 when she was housed there as a minor. This case was mediated by Keith Hunter of Dispute Prevention & Resolution, which resulted in settlement.

Perez v. Karr, et al. \$ 213,333.00 (General Fund)
Civil No. 07-1-2418-12, First Circuit **Settlement**

A female inmate was sexually assaulted by staff at the Hawaii Youth Correctional Facility in 2002 when she was housed there as a minor. This case was mediated by Keith Hunter of Dispute Prevention & Resolution, which resulted in settlement.

Wolters v. Carroll, et al. \$ 213,333.00 (General Fund)
Civil No. 07-1-2358-12, First Circuit **Settlement**

A female inmate was sexually assaulted by staff at the Hawaii Youth Correctional Facility in 2002 when she was housed there as a minor. This case was mediated by Keith Hunter of Dispute Prevention & Resolution, which resulted in settlement.

Toomey v. Karr, et al. \$ 213,333.00 (General Fund)
Civil No. 07-1-2407-12, First Circuit **Settlement**

A female inmate was sexually assaulted by staff at the Hawaii Youth Correctional Facility in 2002 when she was housed there as a minor. This case was mediated by Keith Hunter of Dispute Prevention & Resolution, which resulted in settlement.

DEPARTMENT OF PUBLIC SAFETY:

Ra v. State of Hawaii \$ 39,500.00 *(General Fund)*
Civil No. 08-1-2111-10, First Circuit **Settlement**

A passenger in a car driven by his mother was injured when the car was struck by a State of Hawaii van driven by an adult corrections officer. Both vehicles were traveling westbound on Dillingham Boulevard before the Alakawa Street intersection. Plaintiff alleges that the State van rear-ended their vehicle and he sustained serious injuries as a result of the collision and the State filed a counterclaim against the mother. The State of Hawaii driver claims the Claimant's vehicle came to an abrupt stop in the middle of flowing traffic while the light was green. The case settled for \$40,000.00 with the State paying \$39,500.00 and Claimant's mother paying \$500.00.