



## Collection Law Section

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March 1, 2011

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Representative Gilbert S.C. Keith-Agaran, Chair  
Karl Rhoads, Vice Chair  
House Judiciary Committee  
State of Hawaii

**TESTIMONY IN SUPPORT OF  
HB 1138 RELATING TO ATTORNEY'S LIENS AND  
HB 1140 (with amendment) RELATING TO ARBITRATION**

**Bill Numbers:** HB 1138 and HB1140  
**Date and Time:** Thursday, March 3, 2011 at 2:30 pm  
**Location:** Conference Room 329

**Committee:** Committee on the Judiciary

Dear Representative Keith-Agaran and Committee Members:

The Collection Law Section of the Hawaii State Bar Association supports passage of HB 1138; and the passage of HB 1140 with an amendment.<sup>1</sup>

1. HB 1138 amends HRS 507-81 to delete the deadline for filing the lien with the court or arbitrator and generally improves the section by offering a more consistent use of terms therein. For background, this statute was enacted in 2004 in response to a double taxation issue concerning individuals who obtain a settlement or judgment.

More specifically, the Internal Revenue Service ("IRS") had taken the position that certain parts of settlements or judgments recovered by individuals may be taxed without a deduction for attorney's fees necessary to obtain the settlement or judgment. After being taxed at that level, those same attorney's fees are again taxed by the IRS on the attorney's personal income tax return, amounting to effectively, double taxation. HRS 507-81 clearly defines the attorney's portion of the recovery to belong to the attorney and therefore provides

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The opinions of the Collection Law Section are not necessarily the opinions of the Hawaii State Bar Association proper.

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assistance to a taxpayer looking to avoid having to pay taxes on the amount his or her attorney receives for services.

As currently written, if the attorney forgets to file a lien within one year or before the complaint is dismissed, or if an individual needs to go to another attorney to collect on the judgment, and more than one year has lapsed since the judgment's entry or dismissal of the case, the lien never is perfected; causing obvious taxation problems for the individual.

2. HB 1140 amends HRS 658A-15 to add a new subsection (f) to empower arbitrators to enter a default against a party to the arbitration who fails to pay the arbitration fees or costs directed by an arbitrator or arbitration organization. The effect of the entry of default would constitute a ruling against that party. As currently written, the arbitration statute does not clearly empower the entry of default in arbitration cases under these circumstances. In litigation, under the various rules of the courts and rules of civil procedure, failure to participate in the litigation can be met with the entry of default against the party failing to participate. Unlike litigation, in arbitration, one of the ways that a party can fail to participate is by not paying the required fees and/or costs, since parties to arbitration must directly pay for the arbitration services. In litigation, those similar services are not paid directly by the litigants.

The effect in arbitration of failing to pay the required fees and/or costs, is that the arbitration does not move forward until those fees and/or costs are paid. Therefore, a party to a dispute which has previously been submitted to arbitration can forestall the process simply by not paying that party's share of the fees and/or costs. The current effect is that the claims of the other party(s) to the arbitration, who in fact paid their required fees and/or costs, do not proceed until the defaulting party fulfills its commitment to pay its share of the fees and/or costs. This is an oversight that frustrates the very purpose of the arbitration statute itself.

The Collection Law Section proposes to amend HB 1140 to take account of those situations where the failure of a party to pay its required fees and/or costs is due solely to the party's economic inability to make the payment. The Collection Law Section suggests that the Judiciary Committee add language which provides that no default shall be entered against a party who fails to pay the required arbitration fees and/or costs in the situation where that party qualifies for the status of *in forma pauperis* under the court rules for litigation. The Collection Law Section believes that the *in forma pauperis* provisions can be incorporated by reference or set forth in their entirety in subparagraph (f) of HRS 658A to protect those parties.

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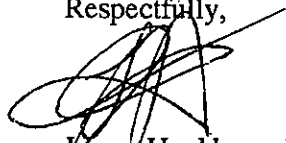
If the following sentence is added where subparagraph (f) of HB 1140 currently ends, this correction can be accomplished:

“However, no party shall be defaulted who qualifies as *in forma pauperis*.”

As indicated above, the Collection Law Section supports the passage of HB 1138 as presented to the Judiciary Committee on March 3, 2011, and supports the intent of HB 1140 as presented for hearing, but recommends the above-described modification.

Thank you.

Respectfully,



James Hochberg, Esq.  
Director,  
Collection Law Section  
HSBA

cc: Steve Guttman  
Lyn Flanigan