



*THE JUDICIARY, STATE OF HAWAII*

**Testimony to the House Committee on Judiciary**  
Representative Gilbert S.C. Keith-Agaran, Chair  
Representative Karl Rhoads, Vice Chair

Thursday, March 3, 2011, 2:30 p.m.  
State Capitol, Conference Room 329

by  
Elizabeth Kent, Director  
Center for Alternative Dispute Resolution

**WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** House Bill No. 1140, Relating to Arbitration

**Purpose:** Authorizing a default ruling against any party to an arbitration who fails to pay the arbitration fees or costs directed by an arbitrator or arbitrator organization.

**Judiciary's Position:**

The Judiciary takes no position on this bill as it raises policy concerns. However, the Judiciary does note that the bill calls for imposition of a harsh penalty – default -- for failure to pay arbitration fees or costs. There is no indication as to the extent of the problem of parties failing to pay arbitration fees or costs, and the Legislature may wish to have supporting data before proceeding with this bill.

Moreover, arbitration agreements may involve unsophisticated parties who may be unfamiliar with arbitration and may not be in a financial position to pay up-front arbitration fees and deposits. For example, applicants for credit cards or other consumer products may not fully understand that they have entered into arbitration agreements or that arbitration providers may require fee deposits. To dismiss an otherwise valid claim or position for failure to pay up-front fees or costs raises concerns, especially because review of arbitration decisions is limited.

Thank you for the opportunity to testify on House Bill No. 1140.



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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION  
TO THE HOUSE COMMITTEE ON JUDICIARY  
TWENTY-SIXTH LEGISLATURE  
Regular Session of 2011

Thursday, March 3, 2011  
2:30 p.m.

**TESTIMONY ON HOUSE BILL NO. 1140, RELATING TO ARBITRATION.**

TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR, AND KARL RHOADS,  
VICE CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in opposition of House Bill No. 1140, Relating to Arbitration. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

House Bill No. 1140 seeks to authorize a default ruling against any party to an arbitration who fails to pay the arbitration fees or costs directed by an arbitrator or arbitration organization. The Department is opposed to this measure because it is fundamentally unfair to consumers. It would deprive a consumer without sufficient

financial resources from seeking any legal recourse against a company that violated their consumer rights, even in the most egregious circumstances.

In an attempt to stack the deck against consumers, many contracts for goods and services contain binding mandatory arbitration provisions. Pursuant to them, it is a condition that consumers agree to resolve *all* disputes through binding arbitration, often in a location far from where the consumer resides. Most consumer protectors believe such agreements to be fundamentally unfair. Consumers are often unaware that they even exist since the provisions disclosing them are generally buried in fine print. Compounding the unfairness are the significant financial costs associated with a consumer's participation in the arbitration which in most instances exceed that of going to small claims court. It is not unusual for the filing fees to exceed \$750 and the arbitrator's charges to range from \$200 to \$300 an hour. Finally, and perhaps most disturbing, is that the arbitrations are often biased in favor of businesses, since it is the business which selects the arbitrator. If an arbitrator wishes to be considered for future arbitrations it is axiomatic that it is in their self interest to disproportionately rule in favor of the party who chooses it. Recent events substantiate this assertion. Last year, the state of Minnesota filed suit against the largest arbitration company in the country for consumer credit disputes after it determined that the organization operated essentially as the alter ego of the business. Despite its representations to the contrary, the company was not a neutral party and in fact worked behind the scenes alongside creditors and against the interests of consumers to convince credit card companies and

other creditors to insert arbitration provisions in their customer agreements and then appoint it to decide the disputes. The ultimate disposition of that case was that the arbitrator ceased operations.

If this proposal were to become law, Hawaii consumers without sufficient financial resources would have nowhere to seek legal recourse against a company that violated their fundamental consumer rights. Their only alternative would be to participate in a process in which the outcome was predetermined, a proceeding in which they would inevitably come out on the short end.

In view of the foregoing, the Department strongly opposes this measure.

Thank you for providing me with the opportunity to testify on House Bill No. 1140. I will be happy to answer any questions that the committee members may have.



## 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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<sup>1</sup> 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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HB 1140 (with amendment) Relating to Arbitration

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

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 1140**

March 3, 2011

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in opposition to H.B. No. 1140.

The provisions in subsection (f) on page 3 which provides that an arbitrator or an arbitration organization may enter a default ruling against a party who fails to pay fees or costs is extremely harsh and appears to be like a penalty. This gives the decision maker the option to enter a default judgment for non-payment of fees regardless of fact that the evidence presented may favor that party.

In many instances the arbitrator or the arbitration organization has the right to ask for fees in advance of the arbitration proceedings and hearing so HAJ feel that this bill creates too harsh a result for the parties in arbitration.

Thank you for the opportunity to present testimony in opposition to this bill.