



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

**H.B. NO. 2438, HD1 MAKING EMERGENCY APPROPRIATIONS FOR CLAIMS
AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.**

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Friday, February 10, 2012

TIME: 4:30 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): David M. Louie, 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 seek an emergency appropriation to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

During the regular session of 2011, a request was made for funds to satisfy judgments and settlements of claims against the State for fiscal year 2010-2011. Those funds were not appropriated. As a result, claimants sought or threatened to initiate legal action against the State, including attempting to garnish the amounts owed from State of Hawaii bank accounts. Therefore, it is necessary to seek an emergency appropriation to satisfy those judgments and settlements to avoid further legal action and expense.

We request that an amendment be made to clarify that the funds for the claims under part III, section 5, are to be paid out of the state harbor special fund. Therefore, "special" should be inserted following "harbor" on page 6, line 4.

The bill contains twenty-four claims that total \$5,790,697.12. Nineteen claims are general fund appropriation requests that total \$3,684,847.12, and five claims are appropriation requests from departmental funds that total \$2,105,850.00. Attachment A provides a brief description of each claim in the bill.

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 respectfully request passage of this bill.

ATTACHMENT "A"

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES:

**Mediation of Hilo Judiciary Complex
Construction Claims**

**\$ 2,141,098.00 (General Fund)
Settlement**

This case involves the construction of the new Hilo Courthouse Complex ("Project"). The parties to the construction contract dated October 11, 2004, are the general contractor, Swinerton Pacific Builders ("SP") and the State of Hawaii, Department of Accounting and General Services ("DAGS"). DAGS also has a contract with a design consultant, Durant-Media Five ("DM5"), who prepared the plans and specifications. The state Judiciary is the owner and occupant of the Project, which despite the ongoing disputes was opened to the public on March 30, 2009.

Unfortunately, this Project was marked by disputes and contentiousness between SP, DM5, various subcontractors and the State, which contributed to the difficulty in completing the Project. Both SP and the State allege that delays attributable to one another inflated the cost of completion and therefore, each party made a claim for delay against the other during the mediation. There are a remarkably inordinate number of requests for information and incomplete work items that characterize the contentiousness of this Project. Therefore, if this case is not settled the delay claims and other claims for compensation will be the subject of future litigation.

On January 11 and 12, 2010, the parties proceeded to mediation. The mediation produced a tentative settlement of claims between DAGS and SP. However, as discussed below, a portion of the settlement would require that approximately \$2,100,000 would need to be appropriated from the Legislature.

Since the mediation, the parties have cooperated to close out the Project. Because project completion is a priority the settlement agreement includes: finishing the ongoing problems listed on the punchlist; reducing the retention held by DAGS; indemnifying and defending against SP's subcontractors; and terminating the liquidated damages claims through an agreed upon March 4, 2009 completion date.

In addition, since the mediation SP has returned to the Project to repair or replace deficient work such as a faulty building garage door and landscaping. It should be noted that although the cost for this work is significant, SP has nevertheless agreed to perform this work at no cost to the State. Any remaining work will be performed pursuant to the settlement agreement.

DEPARTMENT OF EDUCATION:

**In the Matter of the Arbitration
Between Hawaii State Teachers Association,
AFSME Local 152, AFL-CIO and Kihei
Public Charter High School**

**\$ 12,298.00 (General Fund)
Settlement**

This arbitration involved a grievance filed by HSTA on behalf of a former teacher at Kihei Public Charter School who was terminated in 2002 by the then principal for failing to perform the specific task of "leveling standards" for each student project in their respective classes. The arbitrator awarded \$24,798 to the teacher. Per an agreement with HSTA, the school paid \$12,500, leaving the balance of \$12,298.00 to be submitted to the Legislature for approval.

Jemwai v. Keau, et al.
Civil No. 09-1-0095-01, First Circuit

\$ 252,500.00 (General Fund)
Settlement

An educational assistant physically and sexually assaulted a special education student various times between March 1, 2007, and May 6, 2008, while the student was attending McKinley High School. The assaults occurred on McKinley High School premises. The special education student and the State of Hawaii both filed suit against the educational assistant and obtained an entry of default against him. This case proceeded to mediation, which resulted in settlement.

**John Doe Parent, et al. v. State of
Hawaii, et al., Civil No. 10-1-0505-03,
First Circuit**

\$ 70,700.00 (General Fund)
Settlement

A third grade student at Mililani Ike Elementary School was injured while the teacher was conducting a science experiment entitled "Cloud In a Jar" to demonstrate the water cycle that occurs in the atmosphere. It consisted of placing heated water in a large jar over which was placed an aluminum pie pan with ice cubes in it. The teacher filled the jar halfway with hot water and called 3-4 students to sit on the floor around the table to observe the experiment. The student that was injured was one of those students who observed the experiment while seated on the floor around the jar and pie pan on the table. The pie pan dropped, causing the jar to fall to its side and water from the jar spilled onto the student's torso and arm. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the student \$74,406.85. The case later settled for \$70,700.00

McCauley v. Inouye, et al.
Civil No. 07-01-206K, Third Circuit

\$ 136,350.00 (General Fund)
Settlement

A student at Konawaena High School injured his eye in the auto shop class. The teacher was removing a metal cap of a universal joint from an automobile drive shaft with the use of an air powered wrench. The metal cap broke and a portion of the metal cap was propelled into the student's eye. The student was not wearing any eye protection. The student sustained a lacerated cornea which, to date, has required two surgeries and three laser procedures. Although a corneal transplant may theoretically be available to treat the scar in the middle of the student's field of vision, the recovery period after surgical implantation is two years and its outcome is uncertain. The student has incurred medical bills of \$27,000. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the student \$168,750.00. The case later settled for \$135,000.00.

HAWAII HEALTH SYSTEMS CORPORATION:

United Public Workers AFSCME, Local 646, AFL-CIO and State of Hawaii, et al. S.P. No. 09-1-0305, First Circuit	\$ 19,511.73 (General Fund) Judgment
---	---

In 2009, the United Public Workers (UPW) and several public employers were in negotiations regarding the terms of the collective bargaining agreement for Bargaining Unit 10 beginning July 1, 2009, to June 30, 2011. The public employers were the State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, and the City and County of Honolulu. When an impasse in the negotiations was reached, the parties proceeded to an interest arbitration to resolve the disputes regarding the terms of the successor agreement pursuant to chapter 89, Hawaii Revised Statutes. In November 2009, the interest arbitration was completed. On January 14, 2010, the interest arbitration award was issued to the parties.

On February 19, 2010, the UPW filed a motion for an order confirming the interest arbitration award and for entry of judgment in the First Circuit Court. This department opposed the motion because under section 89-11(g) the award is final and binding on the parties and the statute contemplates that the Legislature retains the power to approve any cost items contained in the award. On April 14, 2010, a hearing was held on the motion. At the hearing, the court granted the motion and allowed the UPW to later file a motion for fees and costs as the prevailing party on its motion.

On May 11, 2010, the UPW filed its motion for fees and costs. On September 13, 2010, the court filed the Order Granting Motion for Allowance of Costs and Attorney's Fees. The court awarded \$417.69 in costs and \$9,748.69 in attorney's fees and later awarded additional costs and fees in the amount of \$8,327.11. The amount requested includes post-judgment interest.

DEPARTMENT OF HEALTH:

Segundo v. Frederick, et al. Civil No. 08-1-0106, Third Circuit Court	\$ 328,250.00 (General Fund) Settlement
--	--

On April 21, 2006, Defendant Frederick, while employed by the State of Hawaii, fell asleep at the wheel of her vehicle and crossed over the center line on Highway 11 on the Island of Hawaii, into the path of Plaintiff's pickup truck and crashed into the front driver's side of Plaintiff's vehicle. Plaintiff sustained fractures to his hip and femur, requiring internal fixation, a fracture of his L4 vertebra and a nasal fracture. He was also diagnosed with Post Traumatic Stress Disorder.

DEPARTMENT OF HUMAN SERVICES:

Robinson v. Tripler Army Medical Center, et al. Civil No. 04-00672, USDC	\$ 20,929.57 (General Fund) Order
---	--

The United States District Court, District of Hawaii, found that a Department of Human Services social worker violated the Plaintiffs' civil rights by interfering with their ability to make medical decisions for their son who was born premature in November 2002. The parties settled this case in April 2010 for \$12,000 and the 2010 Legislature appropriated funds in that amount. Following the close of the 2010 Legislature, the Plaintiffs' attorneys were awarded fees in the amount of \$20,929.57. This request is for an appropriation to cover the attorneys' fees.

Sound v. Koller, et al.
Civil No. 09-00409 JMS/KSC, USDC

\$ 70,124.05 (General Fund)
Settlement

The settlement is in the amount of an Order awarding attorneys' fees to the Plaintiffs' counsel of \$70,124.05. Initially the State had appealed the Order to the Ninth Circuit Court of Appeals. Upon further review, the State chose to abandon the appeal and pay the amount called for in the Order in exchange of a waiver of costs of the appeal.

The underlying action arose out of the decision of former Director Lillian Koller to create a state-funded medical benefits program for residents of COFA countries in 2009. The new program was called Basic Health Hawaii (BHH). BHH reduced the medical benefits of the COFA residents. The notices sent to these residents was deemed to be in violation of their procedural due process rights by U.S. District Court Judge Seabright. He ordered their benefits be restored. In addition to the problem with the notices, the Department failed to complete the rulemaking process mandated by the Hawaii Administrative Procedure Act. A decision was made to not appeal the injunction issued by Judge Seabright, to complete the rulemaking process, and roll out a new version of BHH in 2010. The decision to go forward with BHH was a policy decision by DHS, approved by former Governor Lingle, and was made after consultation with the Department of the Attorney General.

Although a request was made for payment of this amount from General Funds during the 2011 legislative session, the legislature did not appropriate the funds to satisfy this indebtedness. As a result the law firm of Alston, Hunt, Floyd and Ing and Lawyers for Equal Justice sought to garnish this amount from a State of Hawaii bank account. To avoid garnishment, the Department of Human Services agreed on the record in court to advance to the law firm of Alston, Hunt, Floyd and Ing and Lawyers for Equal Justice \$39,243.15 in October 2011, from the Medicaid program, in partial payment for the amount owing. The Department of Human Services agreed to ask the legislature for an expedited appropriation of \$30,880.90 as the amount due to the law firm of Alston, Hunt, Floyd and Ing and Lawyers for Equal Justice. The Department of Human Services also requests reimbursement of the \$39,243.15 previously expended from its Medicaid funds for payment to the law firm of Alston, Hunt, Floyd and Ing and Lawyers for Equal Justice. In exchange for the partial payment and the agreement to request this expedited appropriation, the law firm of Alston, Hunt, Floyd and Ing and Lawyers for Equal Justice halted their garnishment proceedings against the State of Hawaii.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

**Kinney v. Department of Land and Natural
Resources, et al., Civil No. 03-1-0010,**

\$ 54,169.39 (General Fund)
Judgment

Fifth Circuit

A woman tripped and fell in a hole that she claimed was covered by grass at Kaumualii State Park on Kauai. She injured her left shoulder, left knee, and low back, which required surgery. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded her \$51,540.57 plus interest.

Santiago v. County of Kauai, et al. **\$ 18,180.00** *(General Fund)*
Civil No. 08-1-0210, Fifth Circuit **Settlement**

On July 8, 2007, Plaintiff, a minor, was "sand sliding" on a boogie board along the shoreline at Poipu Beach Park, a County of Kauai beach park. As Plaintiff was sand sliding, she sustained a laceration on her right leg from a metal stake embedded in the sand. The metal stake was a fragment from a monk seal warning sign, used by the State of Hawaii in a project to protect monk seals. Plaintiff's laceration extended from her lateral knee to mid-thigh and required 18 stitches to close the wound.

DEPARTMENT OF PUBLIC SAFETY:

Botelho, et al. v. State of Hawaii, **\$ 277,750.00** *(General Fund)*
et al., Civil No. 06-00096 DAE-BMK, USDC **Settlement**

This lawsuit arises from overcrowding at the Hawaii Community Correctional Center ("HCCC") in Hilo dating back to 2004. In July of that year, several inmates were injured during a fire. They and other inmates also alleged that the conditions at HCCC deprived them of their constitutional rights. Judgment was entered in favor of four representative plaintiffs and against the defendants. The parties have now settled the remaining plaintiffs' claims.

Itagaki v. Frank, et al. **\$ 83,830.00** *(General Fund)*
Civil No. 09-00110 SOM-RLP, USDC **Settlement**

An inmate was overdetailed in prison by 83 days. A jury awarded the inmate \$83,000, or \$1,000 per day of overdetention. The Department of Public Safety took the position that because the sentencing court had not issued a written order disposing of all of the charges against the inmate the department was legally required to keep him in custody until such time as the court did so.

Kuresa v. Frank, et al. **\$ 25,250.00** *(General Fund)*
Civil No. 09-1-0303-02 RAT, First Circuit **Settlement**

An inmate at Waiawa Correctional Facility was bitten on the hand by a wild pig when he was standing in line after eating a meal. He required surgery and has suffered a permanent injury to his hand. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the inmate \$30,000.00 plus costs. The case later settled for \$25,000.00.

Maier v. State of Hawaii, et al. **\$ 20,200.00** *(General Fund)*
Civil No. 10-00449 JMS BMK, USDC **Settlement**

A woman alleges that while she was incarcerated at the Women's Community Correctional Center (WCCC), the WCCC medical staff failed to provide timely and adequate medical treatment for a cancerous lesion on her left ear. As a result, the woman alleged that she sustained additional destruction and loss of tissue to her left ear. Surgery was required to remove the cancerous lesion and to reconstruct the outer part of her left ear.

Tenney v. State of Hawaii , et al.
Civil No. 09-1-0190-01, First Circuit

\$ 150,995.00 (*General Fund*)
Settlement

An inmate at Oahu Community Correctional Center (OCCC) was a passenger in a state van driven by a state employee. The state employee was traveling on Dillingham Boulevard when he claims that the vehicle in front of him suddenly stopped, causing the van to rear end the vehicle. The inmate alleges that the State had a duty to take reasonable steps to safely transport him back to OCCC. The inmate was not wearing a seatbelt and was handcuffed to a belly waist chain. His ankles were also shackled. As a result of the motor vehicle accident, the inmate underwent surgery for three disc cervical discectomies and foraminotomies. Settlement was reached in the amount of \$149,500.00.

MISCELLANEOUS CLAIMS:

Tom Ishigo

\$ 1,852.64 (*General Fund*)

Claimant requests reissuance of outdated checks that were misplaced. The checks when found were 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.

Nicole T. Kelley

\$ 394.74 (*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.

Paulette Yoshida

\$ 464.00 (*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.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Labinia v. State of Hawaii, et al.
Civil No. 07-1-0075-01, First Circuit

\$ 909,000.00 (*Department
Settlement Appropriation*)

A man operating a moped was injured when a State Department of Transportation dump truck driver made a U-turn in order to pick up a dead animal along Fort Weaver Road in Ewa Beach. The moped driver suffered significant injuries, including a closed head injury, pelvic fracture, a comminuted right femur fracture that was set with a permanent rod, cervical and lumbar injuries, and post-concussion syndrome. The moped driver was certified as being medically disabled from work from the date of the accident to present. Three economists estimated his future wage loss to be between \$356,000.00 to \$481,144.00, future medical costs/life care plans at \$786,570.00 to \$1,195,579.00, and loss of household services at \$233,000 - \$342,905. His past medical special damages total \$84,413.19. This case proceeded to mediation. The mediator recommended settlement of \$1,200,000 to \$1,500,000. The case settled for \$900,000.00.

Moulton, et al. v. Alamo Rental, et al.
Civil No. 08-1-0447(3), Second Circuit

\$ 909,000.00 (*Department
Settlement Appropriation*)

A woman was driving a rented red Malibu, and her son was seated in the front passenger seat. He was wearing a seatbelt but he was not sitting in a child restraint seat. They were headed east on Honoapiilani Highway on Maui or Kihei bound.

There was another vehicle headed in the Lahaina bound direction that had stopped to turn left into the beach park. A third vehicle, a blue Mazda, was headed west or Lahaina bound. According to witnesses, the blue Mazda was traveling at great speed, did not stop, and instead passed the left turning vehicle on the shoulder. The right front and rear tires of the blue Mazda vehicle were on the dirt shoulder. When the blue Mazda attempted to return to the pavement, the tires bit the drop off, the vehicle went into a yaw to the left, crossed the center line, and struck the red Malibu. Laboratory tests on the driver of the blue Mazda showed the driver's blood indicated 0.07 mg/l of methadone. As the result of the injuries he sustained in the accident, the boy in the red Malibu died. According to both witnesses, the boy was conscious and moaning for some period of time after the collision and before he was taken to the hospital.

The speed limit in the vicinity of the accident is 55 mph. At the time of impact, the red Malibu was traveling between 60 and 68 mph. Soon after this accident, the blue Mazda's insurer tendered its policy limits of \$100,000. To date, the plaintiffs have refused to accept the tender.

Initially, claims were brought against General Motor Corporation and Alamo Rental (US) Inc. However, quite early during the litigation, GMC filed for bankruptcy, and plaintiffs dismissed their claims against the company. Plaintiffs settled their claims against Alamo for inadequate warning regarding the child restraints and seat belt pursuant to section 663-15.5, Hawaii Revised Statutes, in the amount of \$250,000. The case proceeded to mediation which resulted in settlement.

Requelman v. State of Hawaii, et al.
Civil No. 06-1-0366, Third Circuit

\$ 232,300.00 (*Department
Settlement Appropriation*)

A man was driving on Route 19 on the Big Island before dawn, and his vehicle hit a tree that was growing in the State's right of way but had fallen across Route 19. The Department of Transportation had inspected these trees the year prior and, despite noting that they needed to be trimmed or cut, failed to cut these trees. The man sustained a compression fracture of his L-3 vertebrae with permanent residual symptoms and disabilities. This case proceeded to mediation, and the mediator recommended settlement in the amount of \$230,000.00.

DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:

Barba v. State of Hawaii, et al.
Civil No. 09-1-0470-02, First Circuit

\$ 35,350.00 (*Department
Settlement Appropriation*)

A Department of Transportation (DOT) employee was traveling eastbound on Nimitz Highway in a State-owned Chevy van during heavy morning traffic. The employee rear-ended a vehicle which, in turn, was pushed into the rear of another vehicle, a jeep operated by Claimant. The DOT employee was an air conditioning mechanic who was en route to the Pier 19 Ferry Terminal to respond to a trouble call at the time of the accident. The Claimant sustained a low back injury that may require future surgery. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Claimant \$39,271.00. The State of Hawaii appealed the award and later settled for \$35,000.00.

**Lexington Insurance Company A/S/O/
Harry and Jeannette Weinberg Foundation,
Inc. v. State of Hawaii, et al.**
Civil No. 09-1-2864-12, First Circuit

\$ 20,200.00 (*Department
Settlement Appropriation*)

An employee of the State of Hawaii Department of Transportation, Harbors Division was driving his state patrol car responding to a trouble call. He lost control of the vehicle and ran into the side of a Harry and Jeanette Weinberg Foundation building on Nimitz Highway. An insurance claim was presented, adjusted and paid by Lexington Insurance Co. in the amount of \$25,945.12. The state employee and the State of Hawaii were sued for the damages. Based upon substantial documentation of the damages, settlement was reached in the amount of \$20,000.00.



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Judiciary and Labor

Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

Friday, February 10, 2012, 4:30 p.m.
State Capitol, Conference Room 308

by
Tom Mick
Policy and Planning Department Director

Bill No. and Title: House Bill No. 2438, H.D. 1, Making Emergency Appropriations for Claims Against the State, Its Officers, or Its Employees.

Purpose: Makes emergency appropriations for claims against the State or its officers or employees that were submitted during the Regular Session of 2011 but were not appropriated.

Judiciary's Position:

The Judiciary supports Section 3, item number 1, of this bill, which would equip the Department of Accounting and General Services (DAGS) and the Department of the Attorney General to settle the outstanding claims on the construction contract for the Hilo Judiciary Complex, which was substantially completed and occupied in April 2009.

It was the Judiciary's hope, as well as DAGS' and the Attorney General's, that closure on this matter would have been achieved within the present fiscal year, via appropriation of the settlement funds in the 2011 Session. Because that did not occur, the Judiciary joins DAGS and the Department of the Attorney General in the request for funds via this bill, during this Session, in order that the unfinished business that this matter represents can be settled. It is feared that any additional deferral on this matter, beyond that which has already occurred, could incur further claims for interest and so forth from the affected parties.

Thank you for the opportunity to testify on House Bill No. 2438, H.D. 1.