



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 775, H.D. 2, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 12, 2013 **TIME:** 10:30 a.m.
LOCATION: State Capitol, Room 016
TESTIFIER(S): David M. Louie, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek an 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.

The bill contains twenty five claims that total \$7,447,605.33. Twenty one claims are general fund appropriation requests that total \$4,887,605.33 and four claims are appropriation requests from departmental funds that total \$2,560,000.00. Attachment A provides a brief description of each claim in the bill.

Since the bill was introduced, five new claims have been resolved for an additional \$5,197,471.21. These five claims are general fund appropriation requests. Attachment B provides a brief description of each new claim. We request that the Committee amend the bill to appropriate funds to satisfy the new claims.

Including the new claims, the appropriation request totals \$12,645,076.54 allocated among thirty claims. Of this total, \$10,085,076.54 are general fund appropriation requests and \$2,560,000.00 are 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 respectfully request passage of this bill.

DEPARTMENT OF EDUCATION:

Basa v. State of Hawaii \$ **30,000.00** (*General Fund*)
Civil No. 10-1-1374-06, First Circuit **Settlement**

A 12-year-old student at Moanalua Middle School was injured while attempting to jump over an 18 inch modified hurdle. As a result of the incident, the student sustained a displaced fracture involving the anterior aspect of the tibial plateau and the tibial tubercle. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State of Hawaii 80 percent negligent. The arbitrator awarded the student \$45,755.51. The State of Hawaii appealed the award. The case subsequently settled for \$30,000.00.

Bitanga v. State of Hawaii \$ **18,000.00** (*General Fund*)
Tort Claim **Settlement**

A student at Kailua High School was inadvertently struck on the head when a teacher threw a hammer in shop class. The student suffered a gash to his head. The parties agreed to settle the matter prior to the filing of a lawsuit.

Cain, et al. v. State of Hawaii Academy of Arts & Science Charter School \$ **30,000.00** (*General Fund*)
Civil No. 11-00501, USDC **Settlement**

Hawaii Academy of Arts & Sciences is a publicly funded "start-up" public charter school and is an entity of the State of Hawaii. Plaintiffs Lisa and Michael Cain worked at the school for most of 2007 and part of 2008. Plaintiff Lisa Cain was originally assigned to serve as an instructor in Home Economics and Cooking, but was asked, and supposedly agreed, to a new assignment maintaining a school herbal garden. Plaintiff Michael Cain (Lisa's husband) was retained as an independent contractor to perform construction/handyman services for the school on an as-needed basis. On August 13, 2008, Ms. Cain was terminated for allegedly repeatedly failing to show up for work and neglecting to notify the school that she would not be coming in. Ms. Cain claims she was terminated because of her disability, her race, and in retaliation for complaining about discrimination. On August 19, 2008, Mr. Cain was called in for a meeting with the school's principal to explain why Mr. Cain had improperly told his wife information that was not true. The meeting ended so poorly that Mr. Cain was informed that his services were no longer required. Mr. Cain claims that he was terminated in retaliation for complaining about discrimination. Plaintiffs filed suit alleging, among other things, violations of the Americans with Disabilities Act and Title VII, Civil Rights Act of 1964, hostile work environment, retaliation and invasion of privacy. The parties agreed to a settlement in the amount of \$30,000.

Lopes v. Department of Education, et al. \$ **14,000.00** (*General Fund*)
Civil No. 10-1-1886-08, First Circuit **Settlement**

A tenth grade student at Campbell High School cut his foot on a piece of metal on the corner of a platform stage in the music classroom. The student sustained a serious laceration to his left foot with

scarring. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the student \$19,182.66. The State of Hawaii appealed the award and subsequently settled for \$14,000.00.

Lum, et al. v. State of Hawaii, et al. **\$ 155,000.00** (*General Fund*)
Civil No. 11-1-1498-07, First Circuit **Settlement**

A woman fell on the grounds of Ahuimanu Elementary School in Kaneohe after stepping in a hole on the ground. She sustained a fractured shoulder joint that required one surgery to replace the shoulder joint and a second surgery to increase range of motion and remove scar tissue. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the woman \$189,000.00 plus \$1,900.00 in costs. The State of Hawaii appealed the award and subsequently settled for \$155,000.00.

Manigo-Brown v. State of Hawaii, et al. **\$ 23,396.66** (*General Fund*)
Civil No. 00-00383 LEK-RLP, USDC **Settlement**

A woman was driving on Waikele Street towards Farrington Highway when her vehicle collided with a state vehicle being driven by a state employee. As a result of the accident, the woman suffered neck and back pain. The police report states that the cause of the collision was due to inattention and misjudgment of the state driver. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the woman \$23,396.66. The parties agreed to settle for the same amount to avoid additional costs.

Mark H., et al. v. Hamamoto, et al. **\$ 3,300,000.00** (*General Fund*)
Civil No. 00-00383 LEK-RLP, USDC **Settlement**

Plaintiffs filed suit in 2000 claiming money damages under Section 504 of the Rehabilitation Act upon allegations that the Department of Education (DOE) discriminated against Plaintiff sisters, who are both autistic and eligible for special education and related services, by failing to provide the sisters with appropriate autism-specific services from 1994-1999. Although the autism-specific services were available and being provided to other autistic students, they were not provided to the sisters. However, liability for damages under Section 504 requires a showing of "deliberate indifference" and the DOE disputed that its employees were deliberately indifferent and that the services were not delivered, at most, as a result of negligence. Plaintiffs claimed that the sisters, currently ages 21 and 19, would now be better off had the autism-specific services been provided. Plaintiffs' requested damages included life care plans for the sisters, which together totaled approximately \$20 million. Plaintiffs' attorneys' fees, which is permitted by statute to a "prevailing party," was reportedly close to \$2 million. This very contentious lawsuit was litigated for over a decade and involved two separate appeals to the Ninth Circuit Court of Appeals.

CAMPAIGN SPENDING COMMISSION:

Yamada v. Weaver \$ **63,852.34** (*General Fund*)
Civil No. 10-00497 JMS-RLP, USDC **Judgment**

Plaintiffs filed several claims alleging that certain provisions of Hawaii's campaign finance laws were unconstitutional under the First Amendment. The State of Hawaii prevailed on most of the claims, but lost one. Plaintiffs were entitled to some fees premised on their partial success under 42 U.S.C. section 1988. The amount the State owed in attorneys' fees was substantially reduced through successful litigation at the district court level from the nearly \$200,000.00 initially sought by the Plaintiffs to just over \$60,000.00 ordered by the United States District Court.

DEPARTMENT OF HEALTH:

E.P., et al. v. State of Hawaii, et al. \$ **40,000.00** (*General Fund*)
Civil No. 10-1-1357-06, First Circuit **Settlement**

Hawaii Disabilities Rights Center sued the Department of Health, Adult Mental Health Division (AMHD) because in 2009, AMHD narrowed the scope of its eligibility criteria for services by policy and procedure rather than promulgating administrative rules. Applicants were evaluated under these new criteria from July 1, 2009, until December 16, 2010, when legally promulgated administrative rules went into effect. In its settlement agreement, AMHD agreed to notify the people who applied for AMHD services between July 1, 2009, and December 16, 2010, that they would be eligible for a new eligibility determination under the old, broader criteria. There was no money settlement with respect to the substance of this lawsuit. This settlement is for attorneys' fees and costs only.

Vendetti, et al. v. Abercrombie, et al. \$ **84,000.00** (*General Fund*)
Civil No. 10-1-2084-09, First Circuit **Settlement**

Plaintiffs were employed in the positions of Service Area Administrator (SAA) by the Department of Health (DOH), State of Hawaii. The SAAs were responsible for coordinating adult mental health services on the islands of Maui, Hawaii, and Kauai. The SAA positions were exempt positions with yearly not to exceed (NTE) dates. In June 2010, the SAAs were informed that they were not being extended beyond their current NTE dates and that the last day of work would be on June 30, 2010. In October 2010, the DOH abolished the SAA positions. On September 29, 2010, the Plaintiffs filed a Complaint in State circuit court alleging: (1) whistleblower; (2) declaratory relief/constitutional violation; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. The SAA positions were 3 of approximately 350 positions at DOH that were abolished as cost-saving measures. Appointment of an SAA in each county is mandated pursuant to section 334-3(c)(3), HRS. When the DOH abolished the SAA positions the functions assigned to the SAAs were assigned to other DOH employees and those employees were appointed SAAs in addition to their other duties. During the course of their employment with DOH, the SAAs were vocal in their complaints about the impact of budget cuts on adult mental health services. This is the basis for the whistleblower claim. The basis for the claim of declaratory relief/constitutional violation is the allegation that section 334-3(c)(3), HRS, requires the DOH to appoint an SAA to perform exclusive

within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

Gwen Kubo **\$ 3,337.75** (*General Fund*)

Claimant requests reissuance of an outdated check that could no longer be cashed. Although the claim was not 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, there is sufficient reason the delay was caused by circumstances beyond the claimant's control, and, therefore, good cause exists to pay the claim.

Debra Matthey **\$ 700.00** (*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:

Callo, et al v. State of Hawaii **\$ 2,100,000.00** (*Department*
Civil No. 05-19782, Second Circuit **Settlement Appropriation)**
Douger, et al. v. State of Hawaii
Civil No. 05-18339, Second Circuit
(Consolidated cases)

These two cases arose out of a single vehicle accident that occurred at a remnant parcel owned by the State of Hawaii Department of Transportation overlooking the ocean along Honoapiilani Highway. In the car was the driver, 34-year-old Denise Callo, her 16 year old lover, passenger James Makekau, her brother's girlfriend 16-year-old Tiffany Romena and Romena's infant daughter. The vehicle went over the edge of the remnant and fell approximately 300 feet to the rocks at the shoreline. Denis Callo and James Makekau died. Romena and her daughter survived. The case was tried without a jury and although Callo was intoxicated and had recently used marijuana, the judge determined that the State was one hundred percent at fault and that Callo, as well as her passengers, who were aware of Callo's alcohol and marijuana use, were zero percent at fault. The judge awarded Denise Callo's mother \$400,000, the Estate of Denise Callo \$725,000 and Tiffany Romena \$250,000 for a total of \$1,375,000. The judge awarded the Estate of James Makekau \$1,103,834, Karen Douger (James Makekau's mother) \$400,000 and the Estate of Robert Makekau (James' father) \$400,000, for a total of \$1,903,834. The total judgment in both cases was \$3,360,000.00. The parties mediated the case and reached a settlement in the amount of \$2,100,000 for both cases.

Dela Cruz v. State of Hawaii, et al.
Civil No. 06-1-0258, Third Circuit

\$ 35,000.00 (*Department
Settlement Appropriation*)

Prior to sunrise on November 13, 2005, as Plaintiff was driving on Route 19 toward Hilo, his vehicle struck a large boulder that had fallen off the cut slope on the shoulder of the road and had rolled into the middle of the paved surface. Plaintiff was severely injured. The State of Hawaii Department of Transportation, Highways Division had contracted with Hawaiian Dredging Construction Co. two years before to repair the same part of the cut slope from where the boulder had fallen. The repairs made by Hawaiian Dredging were necessary due to rock falls and flooding of that portion of the highway. Although the cut slope was repaired, Plaintiff alleged that the State was negligent in its follow up inspection and maintenance. The contractor, Hawaiian Dredging, is paying one half of the total settlement of \$70,000.00.

Delouise v. Werner, et al.
Civil No. 07-1-0459(1), Second Circuit

\$ 275,000.00 (*Department
Settlement Appropriation*)

Plaintiff was struck by Defendant Werner as he was driving a motorcycle on Kuihelani Highway on Maui. Defendant Werner failed to yield after stopping at the stop sign at the intersection of Kuihelani and Maui Lani Parkway. The Plaintiff sustained severe orthopedic injuries and brain damage. The Plaintiff alleged that the State of Hawaii failed to install traffic signals in view of the increase in traffic volume as a result of the development of the Maui Lani planned community. The settlement amount is the State of Hawaii's contribution to a universal settlement among all the parties.

DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:

Andrade v. State of Hawaii, et al.
Civil No. 09-1-2959-12, First Circuit

\$ 150,000.00 (*Department
Settlement Appropriation*)

A longshoreman for Young Bros., injured his left ankle in a concrete expansion joint at the Young Bros. pier area, Pier 40, at Honolulu Harbor while he was unloading a container. The State owns the pier, but while Young Bros. has, in effect, exclusive use of the pier, Department of Transportation remains responsible for its maintenance. The longshoreman allegedly suffered torn ligaments and a fracture in his ankle and was out of work for seven months. He later re-injured his ankle in October 2009, while stepping off a forklift. He claimed he had chronic ankle instability as a result of the first injury.

ATTACHMENT "B"

DEPARTMENT OF EDUCATION:

Doe, et al. v. State of Hawaii, et al.
Civil No. 11-00550, USDC

\$ 5,000,000.00 (*General Fund*)
Settlement

This lawsuit is a class action alleging that Plaintiffs and others had been the victims of sexual assaults alleged to have occurred at the Hawaii Center for the Deaf and Blind, also known as the Hawaii School For the Deaf and Blind, a school operated by the Department of Education, State of Hawaii. The Plaintiffs have made two basic claims: Defendants failed to properly supervise the students and/or school staff and Defendants attempted to cover up the alleged sexual assaults after becoming aware of the allegations.

The Settlement Class is defined as any student who is or was enrolled in the Hawaii School for the Deaf and Blind or the Hawaii Center for the Deaf and Blind, between August 10, 2001, and the date of approval of the Settlement Agreement by the District Court, and who suffered injury as a result of one of the following:

- A sexual assault on the school grounds or on a school bus or a coerced sexual encounter on the school grounds or on a school bus involving another student or students;
- A sexual encounter involving a staff member; or
- Witnessing a sexual assault or a coerced sexual encounter involving another student on the school grounds or on the school bus or a sexual encounter involving a staff member and a student.

This settlement will resolve in full all claims against the State of Hawaii and its employees involving the alleged sexual assaults that occurred at the Hawaii Center for the Deaf and Blind or the Hawaii School for the Deaf and Blind and any violations of Title II of the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*), Title IX of the Educational Amendments of 1972 (20 U.S.C. § 1681, *et seq.*), and the Individuals with Disabilities Acts (20 U.S.C. § 1400 *et seq.*), as alleged in the First Amended Complaint, as a result of those alleged sexual assaults.

The United States District Court gave preliminary approval to the settlement on February 19, 2013 and has scheduled a hearing to provide final approval for April 22, 2013. A notice of the proposed settlement was published on February 25, 2013, and a notification to the Settlement Class by mailing is scheduled for March 8, 2013.

The proposed settlement will allow class members to make their claims through a Claim Administrator, who will likely be Judge Riki May Amano (Ret.). It was the belief of the parties that a claimant would be more likely to make a claim using this process rather than being required to prosecute their claim in a public setting, such as a courtroom.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Gentry v. Aila, et al. \$ **75,000.00** (*General Fund*)
Civil No. 11-1-0008, Fifth Circuit **Settlement**

A man was camping overnight at Polihale State Park on Kauai. After dark, in an attempt to gather wood for a campfire, he climbed a tree and hung from a branch about 10 feet off the ground to break it while his friend held a flashlight. When he came down, he landed on a metal post and was severely injured in his groin area. The man alleged the pole was unreasonably dangerous because it was painted green and the top of the pole had sharp edges.

DEPARTMENT OF PUBLIC SAFETY:

Aliviado, et al. v. Kimoto, et al. \$ **86,871.21** (*General Fund*)
Civil No. 12-00259 SOM-BMK, USDC **Settlement**

This action involves the denial of permission to two Hawaii inmates in Arizona to marry their fiancés. The Plaintiffs are the fiancés. The Defendants are officials involved in the decision to deny permission. The Department of Public Safety will be issuing a Memorandum to ensure that its employees understand the policy, and clarifying that permission to marry should be granted unless the employee can articulate specific reasons as to why permission should not be granted pursuant to Department policy. Additionally, the application packets provided to inmates wishing to apply to be married will contain a copy of the Department's policy for the inmate's review.

MISCELLANEOUS CLAIM:

Hon Ying Yuen \$ **600.00** (*General Fund*)

Claimant requests reissuance of outdated checks that could no longer be cashed. Although the claim was not 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, there is sufficient reason the delay was caused by circumstances beyond the claimant's control, and, therefore, good cause exists to pay the claim.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Pleasanton v. State of Hawaii \$ **35,000.00** (*Department*)
Civil No. 09-1-2836-12 KTN, First Circuit **Settlement** (*Appropriation*)

A woman was driving to work on the Pali Highway and a tree fell onto the road. Her vehicle struck the fallen tree, and she was injured as a result of the collision. The case proceeded to the Court Annexed Arbitration Program which resulted in the settlement.