

**CHAPTER 661**  
**ACTIONS BY AND AGAINST THE STATE**

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## Law Journals and Reviews

Plausibility of Notice Pleading: Hawaii's Pleading Standards in the Wake of *Ashcroft v. Iqbal*. 32 UH L. Rev. 485 (2010).

Ala Loop and the Private Right of Action Under Hawai'i Constitution Article XI, Section 9: Charting a Path Toward a Cohesive Enforcement Scheme. 33 UH L. Rev. 367 (2010).

## Case Notes

Plaintiff's lawsuit against employees' retirement system was obviously cognizable under this chapter as a claim against the State. 75 H. 42, 856 P.2d 1227 (1993).

Trial court erred in granting plaintiffs the right to sue for breach of contract under this chapter where, with respect to the individual beneficiary claims under chapter 674, the language of Act 14, L Sp 1995 merely indicated the legislature's expressed desire for "title-related" claims to be settled in a timely manner. 111 H. 84, 137 P.3d 990 (2006).

Where employees' retirement system trustees were alleging in lawsuit that Act 100, L 1999 was unconstitutional as being violative of article XVI, §2 of the Hawaii constitution, their claims were not "founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract" and were not referred to the court by the legislature; thus, trustees' claims were not cognizable under this chapter, and, therefore, were not subject to the statute of limitations set forth in §661-5. 114 H. 302, 162 P.3d 696 (2007).

## "[PART I. GENERAL PROVISIONS]"

### Note

Sections 661-1 to 661-12 designated as Part I pursuant to §23G-15.

**§661-1 Jurisdiction.** The several circuit courts of the State and, except as otherwise provided by statute or rule, the several state district courts, subject to appeal as provided by law, shall have original jurisdiction to hear and determine the following matters, and, unless otherwise provided by law, shall determine all questions of fact involved without the intervention of a jury:

- (1) All claims against the State founded upon any statute of the State; upon any rule of an executive department; or upon any contract, expressed or implied, with the State, and all claims which may be

referred to any such court by the legislature; provided that no action shall be maintained, nor shall any process issue against the State, based on any contract or any act of any state officer that the officer is not authorized to make or do by the laws of the State, nor upon any other cause of action than as herein set forth; and

- (2) All counterclaims, whether liquidated or unliquidated, or other demands whatsoever on the part of the State against any person making claim against the State under this part. [L 1894-5, c 26, §1; RL 1925, §2669; am L 1929, c 213, §1; RL 1935, §4420; RL 1945, §10475; RL 1955, §245-1; HRS §661-1; am L 1972, c 164, §1(a); am L 1978, c 156, §1; am L 1979, c 152, §1; am L 1984, c 135, §2; am L 2016, c 55, §41]

### **Cross References**

Costs, bond, when State a party, see §607-24.

Money paid under protest, suit to recover, see §40-35.

### **Rules of Court**

Counterclaim, see HRCP rule 13.

Costs, bond, when State a party, see HRCP rules 54(d), 62(e).

### **Case Notes**

A suit to restrain unconstitutional act of state officer is not suit against the State. 402 F. Supp. 95 (1975).

No defense of sovereign immunity, including Eleventh Amendment, can be raised as to actions under this chapter if the applicable consent section is §661-11. 512 F. Supp. 889 (1981).

This section and §662-2 did not constitute a waiver of defendants' Eleventh Amendment immunity where plaintiffs contended that defendants' failure to provide sufficient Hawaiian language in Hawaii's public schools violated state and federal laws. 951 F. Supp. 1484 (1996).

Nothing in the language of this section and §662-3 suggests that Hawaii intended to subject itself to suit in federal court. 950 F. Supp. 2d 1159 (2013).

Public officer making government contracts, not personally liable. 2 H. 433 (1861); 5 H. 383 (1885).

Suit by way of mandamus against state officer to do what a statute requires of officer is not a suit against the State. 7 H. 470 (1888). Suit against Commissioner of Public Lands to rescind lease made with another not suit against the State. 40

H. 675, 686 (1955). Suit for recovery of money illegally exacted and already paid over is suit against State. 11 H. 10 (1897). See §40-35.

Where salary has been paid to de facto officer acting under color of title, de jure officer cannot recover from government salary of office while he was out of same. 9 H. 311 (1893).

Hawaiian government not liable for conversion of private fund by one of its employees acting outside scope of his official duties. 10 H. 607 (1897).

Government consenting to be sued may do so upon such terms and conditions as it pleases. 11 H. 10 (1897).

Statute not unconstitutional on ground that jury is denied. 11 H. 10 (1897). Nor on ground that it is retrospective. 11 H. 404 (1898). See 11 H. 566 (1898); 13 H. 465 (1901); 17 H. 285 (1906), rev'd 206 U.S. 206 (1907).

State not liable for injuries from defective streets. 13 H. 478 (1901) (prior to enactment of chapter 662). Ejectment does not lie against government. 13 H. 1 (1900). Partition does not lie when State claims absolute title. 48 H. 92, 395 P.2d 620 (1964). State cannot be made party to suit to foreclose mortgage. 17 H. 82 (1905), aff'd 205 U.S. 349 (1907). State not liable for extras except in accordance with contract. 16 H. 711 (1905). See 27 H. 792 (1924).

Waiver by statute. 33 H. 379 (1935); 33 H. 409 (1935); 34 H. 213 (1937).

Implied contract. 36 H. 75 (1942); 43 H. 28 (1958) (prior to enactment of chapter 662).

Suit against government agency in private capacity as trustee. 37 H. 8 (1944).

Claim under §101-27 may not be made subject of collateral suit against State under this section. 49 H. 365, 369-370, 418 P.2d 482 (1966).

Proceeding against property in which State has an interest is suit against State and cannot be maintained without consent of State. 50 H. 207, 436 P.2d 527 (1968); 49 H. 365, 418 P.2d 482 (1966); 51 H. 87, 451 P.2d 809 (1969).

Implied contract for State to pay taxpayer earnings on protested, paid tax. 56 H. 655, 547 P.2d 581 (1976).

Sovereign immunity held to preclude suit against State based on chapter 480. 60 H. 228, 588 P.2d 430 (1978).

Where plaintiffs seek injunction for unconstitutional acts and damages, sovereign immunity bars suit. 68 H. 192, 708 P.2d 129 (1985), cert. denied, 476 U.S. 1169 (1986).

An order denying a pretrial motion based on sovereign immunity is not a final judgment, therefore, not appealable. 71 H. 519, 795 P.2d 283 (1990).

Further waiver of sovereign immunity not necessary for §607-14 to apply to the State and its agencies in matters in which, by virtue of the express waiver of sovereign immunity set forth in this section, the State has become a party. 87 H. 37, 951 P.2d 487 (1998).

Insofar as the State has not expressly and statutorily waived its sovereign immunity from postjudgment interest in suits brought pursuant to this section, the State is immune from awards of §478-3 postjudgment interest in actions under this section; thus, the trial court erred in ordering that the employees' retirement system pay statutory interest at the rate of ten per cent per annum, pursuant to §478-3. 106 H. 416, 106 P.3d 339 (2005).

Where ocean recreation management area permit at issue was a revocable license rather than a contract, this section was not a basis for subject matter jurisdiction. 113 H. 184, 150 P.3d 833 (2006).

Where §343-7 waived the State's sovereign immunity against actions brought to challenge: (1) the lack of an environmental assessment; (2) the determination that an environmental impact statement is or is not required; and (3) the acceptance of an environmental impact statement, sovereign immunity did not prevent the application of the private attorney general doctrine against the State and the circuit court did not err in relying on the doctrine as a basis for its award of attorney's fees against the State and Superferry jointly. 120 H. 181, 202 P.3d 1226 (2009).

Plaintiffs had to demonstrate a waiver of sovereign immunity specifically over attorneys' fees because plaintiffs did not implicate this section (case did not arise under this section) or any statutory waiver of sovereign immunity; rather plaintiffs' case involved claims for declaratory and injunctive relief based on alleged constitutional violations by defendant State and state officials. 130 H. 162, 307 P.3d 142 (2013).

Does not confer jurisdiction on insurer actions to recover moneys paid to the State without protest under §431-318. 5 H. App. 122, 678 P.2d 1104 (1984).

Suit authorized as one based on implied contract of warranty of authority. 5 H. App. 616, 705 P.2d 72 (1985).

Suit to recover public assistance benefits wrongfully denied is a claim against State founded upon any statute. 6 H. App. 160, 715 P.2d 813 (1986).

As the doctrine of primary jurisdiction applies to claims against the employees' retirement system arising out of alleged miscalculation of retirement contribution and benefits, while the circuit court had original jurisdiction over the claim, the court did not abuse its discretion in staying, rather than

dismissing, the class action pending administrative review of plaintiffs' individual claims. 121 H. 462 (App.), 220 P.3d 1043 (2009).

While the accrual and extent of an employee's benefits are governed by the applicable statutory provisions of chapter 88, the duty of the employees' retirement system to pay accrued benefits is deemed to be contractual under article XVI, §2 of the Hawaii constitution; thus, a circuit court's jurisdiction under paragraph (1) over such claims is "founded upon contract", as well as statute and the circuit court did not err in rejecting defendant's contention that plaintiffs' claims were barred by sovereign immunity. 121 H. 462 (App.), 220 P.3d 1043 (2009).

As this section contains a limited waiver of sovereign immunity for claims against the State that are founded upon a statute or founded upon a contract with the State, the circuit court did not err when it allowed plaintiff substitute teachers to pursue breach-of-contract claims against the State where the teachers were in a contractual relationship with the State, sought money that they claimed were due them for the work they performed under the contract, and alleged that under the express and implied terms of their agreement, they were entitled to pay in accordance with §302A-624(e). 122 H. 150 (App.), 223 P.3d 215 (2009).

The State's sovereign immunity from plaintiff substitute teachers' claims against the State was waived under this section and §302A-624(e) where §302A-624(e) stated that the per diem salary for substitute teachers "shall be" based on the formula that it described, and §302A-624(e), as a pay-mandating statute, provided an alternative basis for invoking the court's jurisdiction under the "founded upon any statute" language in this section. 122 H. 150 (App.), 223 P.3d 215 (2009).

" **§661-2 Judgment against claimant when.** Upon the trial of any cause in which any counterclaim or other demand is set up on the part of the State against any person making claim against the State, the court shall, without the intervention of a jury, hear and determine the claim or demand both for and against the State and claimant; and if upon the whole case it finds that the claimant is indebted to the State, it shall render judgment to that effect. [L 1894-5, c 26, §2; RL 1925, §2670; am L 1929, c 213, §2; RL 1935, §4421; RL 1945, §10476; RL 1955, §245-2; HRS §661-2; am L 1972, c 164, §1(b)]

#### **Cross References**

Costs, bond, when State a party, see §607-24.

Money paid under protest, suit to recover, see §40-35.

" **§661-3 No jurisdiction, when.** No person shall file or prosecute under this part any claim for or in respect to which that person or any assignee of that person has pending an action against a person who, at the time when the claim alleged in the action arose, was, in respect thereto, acting or professing to act, directly or indirectly, under the authority of the State. [L 1894-5, c 26, §3; RL 1925, §2671; RL 1935, §4422; RL 1945, §10477; RL 1955, §245-3; HRS §661-3; am L 1972, c 164, §1(c); am L 2016, c 55, §42]

#### Case Notes

Section does not prevent joinder of State and person who acted or professed to act under State's authority as defendants in one suit. 9 H. App. 21, 821 P.2d 937 (1991).

Where plaintiffs brought individual and class action claims against only the employees' retirement system and did not file a lawsuit against the State while there was a pending action against a person acting under state authority, this section did not bar the circuit court from having jurisdiction. 121 H. 462 (App.), 220 P.3d 1043 (2009).

" **§661-4 Action by alien, when.** Aliens who are citizens or subjects of a government that accords to citizens of this State the right to prosecute claims against that government in its courts shall have the privilege of prosecuting claims against the State under this part. [L 1894-5, c 26, §4; RL 1925, §2672; RL 1935, §4423; RL 1945, §10478; RL 1955, §245-4; HRS §661-4; am L 1972, c 164, §1(d); am L 2016, c 55, §43]

" **§661-5 Limitations on action.** Every claim against the State, cognizable under this part, shall be forever barred unless the action is commenced within two years after the claim first accrues; provided that the claims of persons under legal disability shall not be barred if the action is commenced within one year after the disability has ceased. [L 1894-5, c 26, §5; RL 1925, §2673; RL 1935, §4424; RL 1945, §10479; RL 1955, §245-5; HRS §661-5; am L 1972, c 164, §1(e); am L 2016, c 55, §44]

#### Cross References

Actions on contract for loss in connection with registered land, see §501-217.

#### Case Notes

Court on own motion will dismiss action if not brought within time limited, namely, two years. 11 H. 404 (1898).

Claim accrues when the plaintiff knew or should have known that an actionable wrong has been committed. 63 H. 117, 621 P.2d 957 (1980).

Lawsuit seeking judicial review of employees' retirement system declaratory order not time-barred. 75 H. 42, 856 P.2d 1227 (1993).

Where employees' retirement system trustees were alleging in lawsuit that Act 100, L 1999 was unconstitutional as being violative of article XVI, §2 of the Hawaii constitution, their claims were not "founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract" and were not referred to the court by the legislature; thus, trustees' claims were not cognizable under chapter 661, and, therefore, were not subject to the statute of limitations set forth in this section. 114 H. 302, 162 P.3d 696 (2007).

The circuit court did not err in summarily ruling that this section barred claims against the State for back pay prior to November 8, 2000 where there was nothing in the record to indicate why plaintiffs could not have brought their claims within the two-year statute of limitations period and there was no "extraordinary circumstance". 122 H. 150 (App.), 223 P.3d 215 (2009).

Under the "continuing tort doctrine", while the statute of limitations is "tolled" by a continuing tortious act, recovery may be had only for damages accruing within the statutory period before the action, but not for damages accrued prior to that period; thus, the statute of limitations applicable to periodic pay claims begins to run on each paycheck as it becomes due and plaintiffs' claims for back pay due prior to November 8, 2000 were barred by this section, but their claims for pay due from that date onward were not barred by the statute of limitations. 122 H. 150 (App.), 223 P.3d 215 (2009).

" **§661-6 Complaint; assignments.** The claimant shall, in all cases, in addition to setting forth the claimant's claim, show:

- (1) What persons are owners of the claim or interested therein, with their citizenship;
- (2) The names and citizenship of all persons who have been at any time owners of the claim or any part thereof or interest therein, all of whom shall be citizens of the United States or persons eligible under section 661-4; and



- (3) That no assignment or transfer of the claim, or of any part thereof or interest therein, has been made, except as stated in the complaint.

Section 634-1 shall be applicable. [L 1894-5, c 26, §6; RL 1925, §2674; RL 1935, §4425; RL 1945, §10480; RL 1955, §245-6; HRS §661-6; am L 1972, c 164, §1(f); gen ch 1985]

#### Revision Note

Section "634-1" substituted for "634-31" and in paragraph (2), "and" added after ending punctuation pursuant to §23G-15.

#### Case Notes

In action against Territory on contract made by certain officers of house of representatives, petition should show authority to make it. 19 H. 491 (1909).

" **§661-7 Claim forfeited by fraud.** (a) Any person who intentionally submits a false claim or attempts to commit any fraud against the State in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the State shall forfeit the same to the State; and when an action is brought to recover on such a claim, the court shall find specifically that fraud was committed or attempted to be committed, and thereupon give judgment that such claim is forfeited to the State, and that the claimant is forever barred from prosecuting the same.

(b) Any person who intentionally submits a false claim or attempts to commit a fraud against the State in the proof, statement, establishment, or allowance of any claim under \$5,000 or any part of any claim under \$5,000 against the State shall, in addition to any other penalty provided by law, be liable for civil penalties of:

- (1) Payment of interest on the amount of excess benefits or payments at the maximum legal rate in effect on the date the payment was made to the person, for the period from the date upon which payment was made to the date upon which repayment is made to the State;
- (2) Payment of an amount not to exceed double the amount of such excess benefits or payments; and
- (3) Payment in the sum of \$1,000 for each fraudulent claim or part of a fraudulent claim made against the State.

(c) All interest and penalties provided for in this section may be sought and recovered in an administrative proceeding held pursuant to chapter 91 and conducted by the department to which the claim was submitted. [L 1894-5, c 26,

§7; RL 1925, §2675; RL 1935, §4426; RL 1945, §10481; RL 1955, §245-7; HRS §661-7; am L 1979, c 115, §1]

#### Revision Note

Pursuant to §23G-15:

- (1) In subsection (a), commas deleted before and after the phrase "or of any part of any claim against the State";
- (2) In subsection (b)(1), "said person" changed to "the person";
- (3) Subsection "(c)" designation added; and
- (4) In subsection (c), "and" added after "chapter 91".

#### Case Notes

Defense under section discussed. 58 H. 187, 567 P.2d 397 (1977).

" **§661-8 Interest.** No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court, unless upon a contract expressly stipulating for the payment of interest, or upon a refund of a payment into the "litigated claims fund" as provided by law. [L 1894-5, c 26, §8; RL 1925, §2676; RL 1935, §4427; RL 1945, §10482; am L 1951, c 224, §4; RL 1955, §245-8; HRS §661-8]

#### Cross References

Litigated claims fund, see §§40-35 and 232-24.

#### Case Notes

Section does not preclude prejudgment interest where the State is not involved. 51 H. 346, 461 P.2d 140 (1969).

As this section disallows prejudgment interest on claims against the State, except in certain, identified instances, the State did not waive its sovereign immunity from an award of prejudgment interest under this section, and §478-2 did not contradict or supersede the limitation of the State's obligation to pay prejudgment interest only upon a "contract expressly stipulating for the payment of interest", the circuit court did not err when it denied plaintiffs' request for prejudgment interest. 122 H. 150 (App.), 223 P.3d 215 (2009).

Mentioned: 654 F. Supp. 2d 1142 (2009).

" **§661-9 REPEALED.** L 2004, c 202, §81.

" **§661-10 Actions by State.** Whenever it is necessary or desirable for the State in order to collect or recover any money or penalty, or to recover or obtain the possession of any specific property, real or personal, or to enforce any other right (except in respect to criminal prosecutions) to institute judicial proceedings, except as otherwise expressly provided by law, the attorney general may bring and maintain an action or actions for any such purpose in any appropriate court or courts. All such actions shall be entitled in the name of the State by the attorney general, against the party or parties or thing sued, as defendants. [L 1888, c 51, §1; am imp Org Act, §§2, 81, 86; RL 1925, §2678; RL 1935, §4429; RL 1945, §10484; RL 1955, §245-10; HRS §661-10; am L 1972, c 164, §1(h)]

### Case Notes

Where complaints asserted that the attorney general brought the actions under §480-2(d) and this section, the state procedural devices were not similar to an action under rule 23 of the federal rules of civil procedure. 761 F.3d 1027 (2014).

Discussed, regarding the attorney general's authority to bring a non-class action parens patriae suit that sought, among other things, an order enjoining defendants from engaging in unfair or deceptive acts or practices and civil penalties. 907 F. Supp. 2d 1188 (2012).

Suit by public official must be in the name of the government. 7 H. 314 (1888).

Suit entitled in name of the Hawaiian government by attorney general could be brought by attorney general through counsel. 8 H. 16 (1890).

Section is irrelevant and attorney general is without standing as party to rate proceeding before PUC. 54 H. 663, 513 P.2d 1376 (1973).

" **§661-11 Tort claims against State where covered by insurance.** (a) This section applies to an action where:

- (1) The State is a party defendant;
- (2) The subject matter of the claim is covered by a primary insurance policy entered into by the State or any of its agencies; and
- (3) Chapter 662 does not apply.

No defense of sovereign immunity shall be raised in an action under this section. However, the State's liability under this section shall not exceed the amount of, and shall be defrayed exclusively by, the primary insurance policy.

(b) An action under this section shall not be subject to sections 661-1 to 661-10. [L 1955, c 253, §1; RL 1955, §245-11;

HRS §661-11; am L 1972, c 164, §1(i); am L 1988, c 266, §2; am L 2016, c 55, §45]

### **Cross References**

State risk management and insurance administration, see chapter 41D.

### **Case Notes**

State, University of Hawaii, and Research Corporation of the UH waived immunity under Eleventh Amendment and consented to suit in federal court. 512 F. Supp. 889 (1981).

The applicability of this section was immaterial to the case where, whether or not the State's sovereign immunity was waived pursuant to this section with respect to plaintiff's claim against the State for vicarious liability, where the Hawaii employer-union health benefits trust fund trustees' choice of a two-tiered rate structure was not an abuse of discretion, the trustees did not breach a fiduciary duty, and thus, the State could not be vicariously liable therefor. 115 H. 126, 165 P.3d 1027 (2007).

" **[\$661-12] Awards of attorney's fees against agencies.** (a) Any law to the contrary notwithstanding, in any civil proceeding initiated by a small business against any agency in a state court, the court shall allow the small business reasonable attorney's fees, if the court finds that the agency lacked a reasonable basis for its action.

(b) Any agency against which a civil proceeding is initiated in any state court may request and shall be awarded reasonable attorney's fees, if the court finds that the small business' action was frivolous and wholly without merit.

(c) Whenever any court awards attorney's fees pursuant to this section, the award shall not exceed \$7,500. The award shall be limited to the attorney's normal hourly rate, but in no event more than \$75 an hour multiplied by the number of hours reasonably spent in litigating claims and issues upon which the claimant clearly and substantially prevails. If a small business is represented by counsel from a publicly funded legal service organization, attorney's fees shall not be awarded.

(d) The small business or agency shall provide the court with evidence to establish the attorney's normal hourly rate and the number of hours spent representing the claimant on each issue or claim which the claimant asserts. Each request for attorney's fees shall be accompanied by itemized records detailing the nature of the services provided or performed and

the amount of time spent coincidental to the time when the legal services were actually provided or performed. A claimant that fails to comply with this section shall not be awarded attorney's fees.

(e) All attorney's fees awarded against an agency pursuant to this section shall be payable only after a budget request for the amount is submitted to and approved by the legislature. The amount of attorney's fees awarded against an agency shall be identified by the agency and included in the agency's budget request submitted to the legislature for the fiscal year immediately following the year the award was made against the agency. If the budget request is approved by the legislature, that amount shall be included in the program appropriation for the agency in the appropriation bill for that fiscal year.

(f) As used in this section:

"Agency" means any state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases except those in the legislative or judicial branches.

"Civil proceeding" means any proceeding other than a criminal proceeding or a proceeding before a family court.

"Small business" means an independently owned business with less than fifty employees. [L 1986, c 336, §1]

### **Cross References**

Vexatious litigants, see chapter 634J.

### **"[PART II.] QUI TAM ACTIONS OR RECOVERY OF FALSE CLAIMS TO THE STATE**

**§661-21 Actions for false claims to the State; qui tam actions.** (a) Notwithstanding section 661-7 to the contrary, any person who:

- (1) Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (2) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (3) Has possession, custody, or control of property or money used, or to be used, by the State and, intending to defraud the State or to wilfully conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- (4) Is authorized to make or deliver a document certifying receipt of property used, or to be used by the State

and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true;

- (5) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any officer or employee of the State who is not lawfully authorized to sell or pledge the property;
- (6) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State;
- (7) Is a beneficiary of an inadvertent submission of a false claim to the State, who subsequently discovers the falsity of the claim, and fails to disclose the false claim to the State within a reasonable time after discovery of the false claim; or
- (8) Conspires to commit any of the conduct described in this subsection,

shall be liable to the State for a civil penalty of not less than \$5,500 and not more than \$11,000, plus three times the amount of damages that the State sustains due to the act of that person.

(b) If the court finds that a person who has violated subsection (a):

- (1) Furnished officials of the State responsible for investigating false claims violations with all information known to the person about the violation within thirty days after the date on which the defendant first obtained the information;
- (2) Fully cooperated with any state investigation of the violation; and
- (3) At the time the person furnished the State with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation;

the court may assess not less than two times the amount of damages that the State sustains because of the act of the person. A person violating subsection (a) shall also be liable to the State for the costs and attorneys' fees of a civil action brought to recover the penalty or damages.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section shall not apply to any controversy involving an amount of less than \$500 in value. For purposes of this subsection, "controversy" means the aggregate of any one or more false claims submitted by the same person in violation of this part. Proof of specific intent to defraud is not required.

(e) For purposes of this section:

"Claim" means any request or demand, whether under a contract or otherwise, for money or property, and whether or not the State has title to the money or property, that is presented to an officer, employee, or agent of the State or is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the State's behalf or to advance a state program or interest, and if the State provides or has provided any portion of the money or property that is requested or demanded or will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded. "Claim" shall not include requests or demands for money or property that the State has paid to an individual as compensation for employment or as an income subsidy with no restrictions on that individual's use of the money or property.

"Knowing" and "knowingly" means that a person, with respect to information:

- (1) Has actual knowledge of the information;
- (2) Acts in deliberate ignorance of the truth or falsity of the information; or
- (3) Acts in reckless disregard of the truth or falsity of the information;

and no proof of specific intent to defraud is required.

"Material" means having the tendency to influence or capability to influence the payment or receipt of money or property.

"Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute, regulation, or administrative rule, or from the retention of any overpayment. [L 2000, c 126, pt of §1; am L 2001, c 55, §28(1); am L 2012, c 294, §6]

### **Case Notes**

Defendants' motion for summary judgment granted as to plaintiffs' claim under the federal and state False Claims Acts (claim analyzed under the federal Act); there were no genuine issues of material fact as to whether defendant knowingly

submitted false claims to medicare under the "incident to" rules. 490 F. Supp. 2d 1062 (2007).

Where plaintiffs' qui tam action, brought under the federal and state False Claims Acts, alleged that defendants submitted false claims to medicaid, defendants' motion for summary judgment granted; among other things, defendants did not submit facially false claims. 560 F. Supp. 2d 988 (2008).

" **§661-22 Civil actions for false claims.** The attorney general shall investigate any violation under section 661-21. If the attorney general finds that a person has violated or is violating section 661-21, the attorney general may bring a civil action under this section. [L 2000, c 126, pt of §1]

" **§661-23 Evidentiary determination; burden of proof.** A determination that a person has violated the provisions of this part shall be based on a preponderance of the evidence. [L 2000, c 126, pt of §1; am L 2001, c 55, §28(2)]

" **§661-24 Statute of limitations.** An action for false claims to the State pursuant to this part shall be brought within six years after the false claim is discovered or by exercise of reasonable diligence should have been discovered and, in any event, no more than ten years after the date on which the violation of section 661-21 is committed. [L 2000, c 126, pt of §1; am L 2001, c 55, §28(3)]

" **§661-25 Action by private persons.** (a) A person may bring a civil action for a violation of section 661-21 for the person and for the State. The action shall be brought in the name of the State. The action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this part.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State in accordance with the Hawaii rules of civil procedure. The complaint shall be filed in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within sixty days after it receives both the complaint and the material evidence and information.

(c) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (b). Any such motions may be supported by affidavits or other submissions in camera. The



defendant shall not be required to respond to any complaint filed under this section until twenty days after the complaint is unsealed and served upon the defendant in accordance with the Hawaii rules of civil procedure.

(d) Before the expiration of the sixty-day period or any extension obtained, the State shall:

- (1) Proceed with the action, in which case the action shall be conducted by the State and the seal shall be lifted; or
- (2) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action and the seal shall be lifted.

(e) When a person brings an action under this section, no person other than the State may intervene or bring a related action based on the facts underlying the pending action. [L 2000, c 126, pt of §1; am L 2001, c 55, §28(4)]

" **[§661-26] Rights of parties to qui tam actions.** (a) If the State proceeds with an action under section 661-25, the State shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the person bringing the action. The person shall have the right to continue as a party to the action, subject to the following limitations:

- (1) The State may dismiss the action notwithstanding the objections of the person initiating the action if the court determines, after a hearing on the motion, that dismissal should be allowed;
- (2) The State may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable. Upon a showing of good cause, the hearing may be held in camera;
- (3) The court, upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, may, in its discretion impose limitations on the person's participation by:
  - (A) Limiting the number of witnesses the person may call;
  - (B) Limiting the length of the testimony of the witnesses;
  - (C) Limiting the person's cross-examination of witnesses; or

(D) Otherwise limiting the participation by the person in the litigation.

(b) The defendant, by motion upon the court, may show that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense. At the court's discretion, the court may limit the participation by the person in the litigation.

(c) If the State elects not to proceed with the action, the person who initiated that action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the State's expense. When a person proceeds with the action, the court without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon showing of good cause.

(d) Whether or not the State proceeds with the action, upon motion and a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for a period of not more than sixty days. The court may extend the sixty-day period upon a motion and showing by the State that the State has pursued the investigation or prosecution of the criminal or civil matter with reasonable diligence and the proposed discovery would interfere with the ongoing investigation or prosecution of the criminal or civil matter.

(e) Notwithstanding section 661-25, the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceedings to determine civil monetary penalties. If any alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in the proceedings as the person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that becomes final shall be conclusive on all parties to an action under this section.

(f) Whether or not the State elects to proceed with the action, the parties to the action shall receive court approval of any settlements reached. [L 2000, c 126, pt of §1]

" **§661-27 Awards to qui tam plaintiffs.** (a) If the State proceeds with an action brought by a person under section 661-25, the person shall receive at least fifteen per cent but not more than twenty-five per cent of the proceeds of the action or

settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award sums as it considers appropriate, but in no case more than ten per cent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under this subsection shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(b) If the State proceeds with an action brought under section 661-21, the State may file its own complaint or amend the complaint of a person who has brought an action under section 661-21 to clarify or add detail to the claims in which the State is intervening and to add any additional claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such state pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(c) If the State does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five per cent and not more than thirty per cent of the proceeds of the action or settlement and shall be paid out of the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All expenses, fees, and costs shall be awarded against the defendant.

(d) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 661-21 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under

subsection (a), taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of section 661-21, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the State to continue the action.

(e) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was frivolous, vexatious, or brought primarily for purposes of harassment.

(f) In no event may a person bring an action under section 661-25:

- (1) Against a member of the state senate or state house of representatives, a member of the judiciary, or an elected official in the executive branch of the State, if the action is based on evidence or information known to the State. For purposes of this section, evidence or information known only to the person or persons against whom an action is brought shall not be considered to be known to the State; or
- (2) That is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party. [L 2000, c 126, pt of §1; am L 2012, c 294, §7]

" **§661-28 REPEALED.** L 2012, c 294, §8.

" **[\$661-29] Fees and costs of litigation.** The State shall not be liable for expenses or fees, including attorney fees, that a person incurs in bringing an action under this part and shall not elect to pay those expenses or fees. [L 2000, c 126, pt of §1]

" **[\$661-30] Relief from retaliatory actions.** (a) Notwithstanding any law to the contrary, any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment, contract, or agency relationship because of lawful acts done by

the employee, contractor, agent, or associated others in furtherance of an action under section 661-25 or other efforts to stop or address any conduct described in section 661-21(a).

(b) Relief under subsection (a) shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An action for relief from retaliatory actions under subsection (a) may be brought in the appropriate court of this State for the relief provided in this part.

(c) An action for relief from retaliatory actions under subsection (a) shall be brought within three years of the retaliatory conduct upon which the action is based. [L 2012, c 294, pt of §5]

" **[§661-31] Certain actions barred.** (a) In no event may a person bring an action under this part that is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(b) The court shall dismiss an action or claim under this part, unless opposed by the State, if the allegations or transactions alleged in the action or claim are substantially the same as those publicly disclosed:

(1) In a state criminal, civil, or administrative hearing in which the State or its agent is a party;

(2) In a state legislative or other state report, hearing, audit, or investigation; or

(3) By the news media,

unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

(c) For purposes of this section, "original source" means an individual who:

(1) Prior to public disclosure under subsection (b), has voluntarily disclosed to the State the information on which the allegations or transactions in a claim are based; or

(2) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the State before filing an action under this part. [L 2012, c 294, pt of §5]