HB-2286
Submitted on: 2/2/2024 1:18:16 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Idor Harris	Honolulu Tower AOAO	Oppose	Written Testimony Only

Comments:

Honolulu Tower is a 396 unit condominium located at Beretania and Maunakea Streets on the edge of Chinatown. At our monthly board meeting on February 7, 2022, the board unanimously opposed SB2730, which contains many of the features of HB2286.

Owners agree to comply with the rules of the association when they purchase their unit. The Board believes the legislature should not be telling condominiums that they cannot go after infractions.

The Board urges you to defer HB2286.

Idor Harris

Resident Manager

HAWAII LEGISLATIVE
ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

February 2, 2024

Honorable Mark M. Nakashima
Honorable Jackson D. Sayama
Committee on Consumer Protection and Commerce
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **HB 2286 OPPOSE**

Dear Chair Nakashima, Vice Chair Sayama and Committee Members:

CAI opposes HB 2286. There are several reasons for this, all of which relate to the severely prejudicial effect the bill would have on an association's ability to conduct legitimate and necessary enforcement action.

The proposed findings recited below demonstrate a misunderstanding of condominium governance:

> SECTION 1. The legislature finds that when boards of directors of condominium associations seek legal assistance to protect the collective interests of their associations, it is the board, not the individual unit owners, who are the clients of the attorneys. Accordingly, compensation for the legal services and costs should be paid in full entirely with the associations' funds and reserves, as the exclusive sources of payment, except in matters involving the collection of delinquent assessments for common expenses, as these are the responsibility of the unit owner. The legislature further finds that the absence of clearly defined legal fee responsibilities has resulted in inequitable fee payments by unit owners.
>
> The legislature also finds that fees for legal services paid by an association should be limited in proportion to the costs of the matter being resolved. The costs of an association are shared by all its unit owners. As such, excessive fees have a negative impact on all unit owners in an association.

First, the *association* is an attorney's client. The board is *not* the client.[1]

Second, even if the board were the client (which it is not), the board is the governing authority of the association. The directors owe a fiduciary duty to the association.

This means that the board is obligated to enforce compliance with the governing documents of the association. The legislature cannot reasonably hold directors to a fiduciary standard and disable their capacity to govern at the same time.

The underlying premise of the bill is contrary to the existing remedial scheme,[2] and would have the effect of disabling enforcement. Hawaii Revised Statutes §514B-112 reads as follows:

> **[§514B-112] Condominium community mutual obligations.** (a) All unit owners, tenants of owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to this chapter are subject to this chapter and to the declaration and bylaws of the association adopted pursuant to this chapter.
> (b) All agreements, decisions, and determinations lawfully made by the association in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all unit owners.
> (c) Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the managing agent, resident manager, or board on behalf of the association or, in a proper case, by an aggrieved unit owner.

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[1] See, Final Report to the Legislature, Recodification of Chapter 514A, Real Estate Commission's comment, at page 38: "Some members may feel that because they are members of the association, and because the attorney represents the association, the attorney represents them too. The association attorney is, however, actually general corporate counsel whose client is the corporation/association, not the board of directors or any of the association's membership."

[2] "**§514B-10 Remedies to be liberally administered.** (a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Punitive damages may not be awarded, however, except as specifically provided in this chapter or by other rule of law.
(b) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.
(c) Any right or obligation declared by this chapter is enforceable by judicial proceeding."

HB 2286 would effectively render the premise of mutually enforceable obligations meaningless.

The following proposed finding completely fails to recognize that owners are responsible for the harm caused to fellow owners from violating the governing documents:

> Accordingly, compensation for the legal services and costs should be paid in full entirely with the associations' funds and reserves, as the exclusive sources of payment, except in matters involving the collection of delinquent assessments for common expenses, as these are the responsibility of the unit owner.

That finding does recognize that an owner may have "responsibility" but overlooks that such responsibility includes owner responsibility for misconduct.

HB 2286 also overlooks that owners are the consumers who pay 100% of the expenses of an association. Condominium associations are not commercial entities involving a profit component.

There are two choices when an owner improperly causes an expense to an association. Assign the expense to the defaulting owner or force innocent neighbors to bear the cost.

HB 2286 effectively licenses misconduct.

It does so not only by discounting the real need, and often difficult task, of bringing seriously bad actors into compliance, but also by creating an insuperable financial disincentive to doing so. Enforcement will largely cease if 75% of the cost of enforcement is imposed upon innocent consumers who lack responsibility for the misconduct at issue.

Moreover, the convoluted provisions of Section 2 of HB 2286 are not sensible and are ill-suited to real world circumstances.

One exemplar in Section 2 is the condition that attorney's fees may be assessed against an owner if:

> "(1) The association assesses, demands, or seeks reimbursement of the cost of attorneys' fees against all of the unit owners in accordance with the allocations under section 514B-41;"

The proper focus is the *recovery* of scarce common resources from defaulting owners, *not* the imposition of fees upon innocent consumers.

HB 2286 proceeds from the premise that associations are bad and must be hobbled. That premise is invalid and contrary to the premise stated in HRS §514B-10 that:

> (b) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.

HB 2286 does not facilitate the operation of the condominium property regime. It does the opposite.

HB 2286 seeks to regulate the practice of law. The practice of law is regulated by a separate branch of government. The judicial branch of government holds attorneys accountable for misconduct.

Also, the language requiring attorneys to comply with federal law is, at best, pointless and superfluous. Attorneys comply with federal law *because it is federal law.*

Finally, the Committee should defer HB 2286 because Act 189 (2023) created a Condominium Property Regime Task Force, whose mission includes to:

> Investigate whether additional duties and fiduciary responsibilities should be placed on members of the boards of directors of condominium property regimes[.]

The animating spirit of HB 2286 is that boards are bad and cannot responsibly discharge their fiduciary duties. The concerns reflected in HB 2286 have been heard by the Task Force, which unanimously voted in favor of an LRB study to obtain objective data to enable recommendations in a subsequent legislative session.

CAI Legislative Action Committee, by

Philip Nerney

Its Chair

HB-2286
Submitted on: 2/3/2024 3:55:39 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Richard Emery	Hawaii First Realty LLC	Oppose	In Person

Comments:

Public records reflect that most mediations are caused by owners who make improper alterations to their unit that often jeopardize the safety and soundness on the building. Often demands are not financial in nature. If there is a violation an attorney must notify the unit owneer. Why should the other owners carry the financial burden to enforce the governing documents, documents that all agreed to upon purchase? Attorneys are already required to comply with th Fair Debt Act as it is alreasdy a law.

TESTIMONY in OPPOSITION of S.B. 2286 February 4, 2024

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with

association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send

demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure

would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the

bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Reyna C. Murakami

AOUO President of Mariner's Village 1

AOUO President of Waialae Place

AOUO Vice President of The Continental Apartments

HB-2286
Submitted on: 2/5/2024 7:46:28 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Rachel Glanstein	AOAO Lakeview Sands	Oppose	Written Testimony Only

Comments:

Aloha,

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First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

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because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever.

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise

from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

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In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

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of condominium associations to enter into their own fee and billing arrangements with their attorneys.

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Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose. For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure. It is already difficult to collect past due maintenance fees and attorney's costs and this will make it close to impossible. It shouldn't be every owner's responsiblility to pay for those that break the rules and refuse to fulfill their obligations to the association.

Mahalo for your time,

Rachel Glanstein

Chamber of Sustainable Commerce
P.O. Box 22394
Honolulu, HI
96823

CHAMBER OF SUSTAINABLE COMMERCE

Rep. Mark M. Nakashima, Chair
Rep. Jackson D. Sayama, Vice-Chair
Comm. on Consumer Protection & Commerce

Tuesday, February 6, 2024
2:00 PM
Via Videoconference

RE: **HB2286** Limit Frivolous Attorney Fees - **Support**

Dear Chair Nakashima, Vice Chair Sayama & Committee Members,

The Chamber of Sustainable Commerce represents over 100 small businesses across the State of Hawaii that strive for a triple bottom line: people, planet and prosperity; we know Hawaii can strengthen its economy without hurting workers, consumers, communities or the environment.

This is why we support HB2286, which requires that the fees for attorneys retained by a condominium association be paid from an association's funds or reserves, **limits the total and final legal fees to 25 per cent** of the original debt amount, requires attorneys retained by a condominium association to confine their communications to the condominium board, except when the attorneys must request and require materials and responses directly from owners for each matter, and prohibits attorneys retained by a condominium association from billing unit owners directly.

This bill provides perfectly contoured solutions to some rampant problems: 1) frivolous dispatch and wasteful use of attorney resources, 2) unverifiable billing and unchecked errors in billing, and 3) disproportionately high attorney fees to address relatively low-cost problem.

Yours is the only House committee charged with protecting consumers. HB2286 demonstrates the legislature's ability to offer consumer protections to condo owners: understanding that many kupuna live in these condos, and may be living on a limited retirement income. We applaud Representative Belatti for this finely crafted, compassionate bill.

HB-2286
Submitted on: 2/5/2024 12:10:28 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Sandra Jamora	Villages of Kapolei Association	Oppose	Written Testimony Only

Comments:

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I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

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owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

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A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

1. even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise

from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right

of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Sandra Jamora

HB-2286
Submitted on: 2/2/2024 2:37:06 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Elaine Panlilio	Individual	Oppose	Written Testimony Only

Comments:

I respectfully oppose HB2286 because it impedes on the association's abilty to exercise the right to self-governance.

HB-2286
Submitted on: 2/2/2024 3:52:34 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Michael Ayson	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill.

HB-2286
Submitted on: 2/2/2024 5:00:28 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Marcia Kimura	Individual	Support	Remotely Via Zoom

Comments:

Dear CPN Committee:

Thank you for extending this hearing for HB2286.

I am testifying in support of this measure, chiefly the main premise that states that when an individual or an organization, or both hires an attorney, that individual and/or organization becomes the client of the attorney, and is therefore responsible for paying the legal fees of the attorney. And this condition applies to condo association parties, REGARDLESS OF WHAT GOVERNING DOCUMENTS OF AN ASSOCIATION STATE.

Condominium associations have no right to re-assign the legal fees to indiivdual owners, except for matters involving collection fees for delinquent common dues payments. Boards have been known to use the demands for owner reimbursement of legal fees that must be paid out of association funds, in retaliation for individual owners' opposition to board actions. §514B-191also prohibits retaliation in the realm of condominium associations.

I also deeply appreciate that you have maintained the provision for the 25% legal fee cap applied to collection activities, **in accordance with the terms of the federal Fair Debt Collections Practices Act which does apply to condominium attorneys who are collectors bound by the Act.** It is a known fact that many of these attorneys have denied that they are collectors who must abide by the terms of FDCPA, and as a result, their unreasonable, escalating fees have caused owners to lose their properties through foreclosure or forced property sales.

I sincerely appreciate that most of the provisions in your version on this measure represent the original intentions I hoped would be drafted into this proposal, however may I suggest the following additions (in bold type)?:

- In Section 1., (2) " Prohibit associations from assessing, demanding, or seeking reimbursement from unit owners for legal fees in excess of twenty-five percent **of the original delinquent common dues payments debt**."
- In Section 3., (a) (2) "Foreclosing any lien thereon; provided that thirty days have elapsed since the notice of default, intention to foreclose under Section 667-92, **and the opportunity for the unit owner to protest the foreclosure** within the thirty days, have been served on the unit owner.

I ask that you consider these modifications to HB2286, and that you progress the bill forward to the passage of this timely measure.

Respectfully,

Marcia Kimura, Hawaii Condominium Unit Owner

HB-2286
Submitted on: 2/2/2024 5:50:21 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Sharon Heritage	Individual	Oppose	Written Testimony Only

Comments:

This bill impedes enforcement by preventing assessment of attorney's fees against the defaulting owners.

HB-2286
Submitted on: 2/3/2024 8:06:45 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Robert Miskae	Individual	Oppose	Written Testimony Only

Comments:

This bill takes the teeth out of an association's collection policy and puts the financial collection burden on the other owners, and not on the one causing the fees. Please re think or do not pass. I have been involved with condos and associations since 1986 and this bill is not advisable as written.

HB-2286
Submitted on: 2/3/2024 12:55:08 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Sandie Wong	Individual	Oppose	Written Testimony Only

Comments:

I am a condo owner and resident and I strongly oppose this bill. Why should other owners (via the AOAO) pay for the attorney fees caused by an individual owner. It is simply not fair. Thank you.

HB-2286
Submitted on: 2/4/2024 1:42:25 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
lynne matusow	Individual	Oppose	Written Testimony Only

Comments:

I am an owner occupant and board member of a high rise condo in Downtown Honolulu. I STRONGLY OPPOSE S.B. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recovery if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court. The attorney for my association has represented us in the examples mentioned in this paragraph. The attorney also discovered an agreement between the developer and the city that was effectuated more than 30 years ago and had not been communicated to the association. Clearly the attorney was communicating with others, When this information was communicated we were all in shock.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right

of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

HB-2286
Submitted on: 2/4/2024 2:34:39 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Julie Wassel	Individual	Oppose	Written Testimony Only

Comments:

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help,

because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

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It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

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In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

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This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Julie Wassel

HB-2286
Submitted on: 2/4/2024 3:13:18 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Kathy Kosec	Individual	Oppose	Written Testimony Only

Comments:

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

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In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Kathy Kosec

House of Representatives
The Thirty-Second Legislature
Committee on Consumer Protection and Commerce
Tuesday, February 6, 2024
2:00 p.m.

To: Representative Mark M. Nakashima, Chair
Re: HB 2286, Relating to Condominium Associations

Aloha Chair Mark Nakashima, Vice-Chair Jackson Sayama, and Members of the Committee,

I am Lila Mower, president of Kokua Council, one of Hawaii's oldest advocacy groups with over 800 members and affiliates in Hawaii and I serve on the board of the Hawaii Alliance for Retired Americans, with a local membership of over 20,000 retirees.

I also serve as the leader of a coalition of hundreds of property owners, mostly seniors, who own and/or reside in associations throughout Hawaii and I have served as an officer on three condominium associations' boards.

Mahalo for the opportunity to submit testimony in **support of HB 2286.**

With no checks and balances to limit condominium association boards, the obligations of associations to unit owners become inconsequential.

Associations do not have to be correct; their obstructive tactics using excessive legal fees are rewarded when owners are financially and emotionally drained and abandon their efforts for redress.

These owners are forced to recognize their powerlessness and capitulate because they cannot outgun their association board with its limitless ability to retain attorneys whose legal fees are often assigned to the affected owners. These owners and their neighbors who observe these abusive acts are silenced because they can also be saddled with unreasonable legal fees foisted upon them by their associations to stifle inquiry and dissent, and to intimidate those who are merely seeking to enforce their statutory rights and protections.

Owners should not have to pay premium rates (e.g., $500 per hour) for clerical tasks and attorneys should not receive full compensation at their standard hourly rates for services that should have been delegated to non-attorneys.

Both the hourly rates and the number of hours charged by the attorney should be reasonable.

And legal fees should be proportional to the amount in dispute.

HB 2286 defines the responsibility of legal fees and serves to diminish the abusive practice of saddling owners with excessive legal fees.

HB-2286
Submitted on: 2/4/2024 5:45:22 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
marg knight	Individual	Support	Written Testimony Only

Comments:

I support HB 2286.

Owners need help with better laws that
Protect owners rights.

HB-2286
Submitted on: 2/4/2024 6:26:49 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Anne Anderson	Individual	Oppose	Written Testimony Only

Comments:

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit

owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise

from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right

of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

M. Anne Anderson

HB-2286
Submitted on: 2/4/2024 6:56:50 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Carol Walker	Individual	Oppose	Written Testimony Only

Comments:

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For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully Submitted,

Carol Walker

Committee on Consumer Protection & Commerce

Tuesday, February 6, 2024 @ 2:00 PM

HB2286: Attorney Fees

My name is Jeff Sadino, I am a condo owner in Makiki, and I **STRONGLY SUPPORT** this Bill.

Weaponizing attorneys against Owners is one of the main foundational problems in condo governance today. 100% reimbursement of attorney fees encourages the escalation of disputes to attorneys instead of promoting dialogue between an Owner and the Board Members.

An over-reliance on attorneys is a plague upon our condo governance. For example, attached to this is a recent Civil Beat article where Porter McGuire Kiakona threatened to foreclose on a retiree's home over a measly **$300.** I will also point out that to my understanding, a foreclosure can ONLY occur for unpaid common expenses, NOT for fines. It is clear that Porter McGuire was objectively breaking a very basic rule of the law**:**

> But the septuagenarian retiree says it was overkill for her condo association to hire Honolulu lawyer Kapono Kiakona to run up a $3,300 legal bill to collect just over $300 in alleged fines. Tensions escalated in December, when Kapono upped the ante, notifying Sipirok-Siregar that her association intended to foreclose on her property to collect past due payments.

Edits To Bill

I find some of this Bill confusing and some of it great.

I find subsection (b) to be confusing, primarily because of (b)(1). (b)(1) seems to indicate that this subsection is an expense assessed against all Owners, although the intro to (b) and (b)(2) hint that this subsection is targeted towards one individual offending Owner.

DEBT COLLECTION:

I strongly support subsection (c). Most debt collection companies operate by keeping a portion of the debt that they are actually able to recover. This provides an incentive for the debt collectors to be efficient.

Condominium debt collectors instead are attorneys who charge $300 - $500/hr to attempt to collect a debt, even if they fail to do so. In my case, I was billed hundreds (and probably thousands) of dollars in attorney debt collection fees because of incompetence on the part of the attorneys themselves.

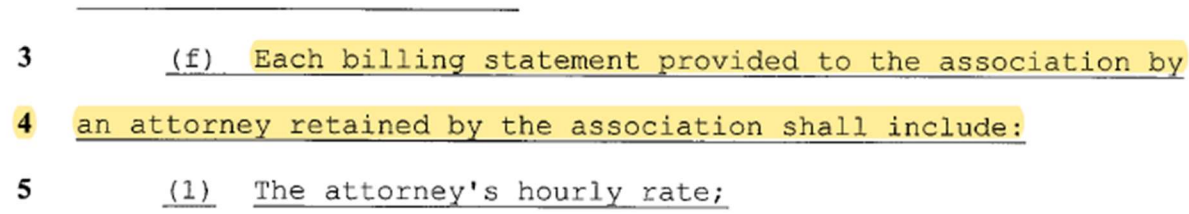
The current system of 100% attorney reimbursement actually provides more incentive for the attorneys to NOT successfully collect a debt. In practice, this is achieved by the attorneys constantly adding new charges onto an Owner's account so that they can continue charging $300+/hr for a service where most debt collectors would never dream of getting paid that much.

Additionally, I think this 25% cap should be applied to all attorney expenses, above and beyond the proposed limitation to debt collection amounts. In practice, speaking from experience, it will be impossible to separate out the attorney fees for debt collection from the attorney fees from everything else the attorneys are doing against an individual Owner.

NOTIFICATIONS

I strongly support subsection (f). I received a bill from Hawaiiana for attorney reimbursement. When I asked Hawaiiana when the amount was due, they literally told me that they did not know! How is an Owner supposed to know when an amount is due when not even the Property Manager knows??? In addition, Hawaiiana and Porter McGuire charged me Late Fees on the claimed amount at the equivalent rate of an **unbelievable 435% interest!!!**

I would clarify (f) to say that the billing statement needs to be provided to the Owner if a demand for reimbursement is made. The billing statement already is provided to the association; that is not the problem.



(f) Each billing statement provided to the association by an attorney retained by the association shall include:

(1) The attorney's hourly rate;

In addition, the attorney invoice needs to be provided to the Owner without redactions. I discovered literally thousands of dollars of billing errors on my account ledger that both Hawaiiana and Porter McGuire admitted were erroneous charges, but only after I contested them. I would sometimes request copies of the attorney charges to check them for errors. One time, Hawaiiana, Porter McGuire, and the Board flat out refused to give me any information on the demanded attorney charges, claiming that information was subject to "attorney-client privilege." Another time, they provided me heavily redacted invoices. Afterwards, I found out that Hawaiiana and Porter McGuire literally **posted attorney charges for a completely different lawsuit onto my account!** It is critical that the Owner is given a receipt for their payment that documents what they are paying for to protect against erroneous charges.

I am including an attorney invoice, redacted by the Association. How can we expect Owners to pay attorney fees when the invoices are so heavily redacted that they don't even know what they are paying for, especially when the attorneys have a documented history of posting erroneous charges to Owners' accounts?

Thank you for the opportunity to testify,

Jeff Sadino

Attachment #1

Redacted Attorney Invoice From Hawaiiana

Note also that it is clearly illegal to post Mediation expenses to an Owner's account

Note also that I later found out that this ENTIRE bill was for Mediation expenses

PORTER McGUIRE KIAKONA, LLP

ATTORNEYS AT LAW
841 BISHOP STREET, SUITE 1500
HONOLULU, HAWAII 96813

FED. ID NO.
99-0210947

TELEPHONE: (808) 539-1100
FACSIMILE: (808) 539-1189

ODE RANCHO (AOAO)
C/O HAWAIIANA MANAGEMENT CO LTD
711 KAPIOLANI BLVD STE 700
HONOLULU, HI 96813 USA
ATTN: JESI ANDERSON

RE: SADINO, JEFFREY LEWIS (UNIT 803)

October 22, 2019
File #: [redacted]
Inv #: 110299

This invoice may not include some expenses (telephone, photocopying, depositions, etc.) for which we have not yet been billed.

For Legal Services Rendered and Costs Incurred Through: October 15, 2019

PREVIOUS BALANCE: $1,289.80

DATE	ATTY	DESCRIPTION	HOURS	AMOUNT
Sep-19-19	MCB	Review [redacted]	0.10	$20.00
Sep-21-19	RLM	Review 9/19/19 emails from Jesi Anderson [redacted]	0.45	$141.75
Sep-23-19	RLM	Review 9/23 emails from Jesi [redacted]	0.50	$157.50
	RLM	[Mediation] Email from Kelly advising Paul Herran will represent Sadino at the Mediation; research [redacted]	0.40	$126.00
Sep-27-19	RLM	Emails from and to Jesi [redacted]	0.25	$78.75
Oct-08-19	MCB	Review email from PM regarding [redacted]	0.10	$20.00
	MCB	Draft reply email to [redacted]	2.50	$500.00
Oct-09-19	RLM	Emails from and to Jesi regarding [redacted]	0.40	$126.00

Unredacted Mediation Charge

FOR CURRENT LEGAL FEES RENDERED: 4.70 $1,170.00

GENERAL EXCISE TAX ON LEGAL FEES: $55.13

WE ARE NOW ACCEPTING CREDIT CARD PAYMENTS. THERE WILL BE A 3.36% SERVICE CHARGE PER PAYMENT AMOUNT.
THIS BILL IS DUE UPON RECEIPT. PLEASE RETURN A COPY WITH YOUR PAYMENT

TERMS: INTEREST OF 1% PER MONTH (periodic rate), which corresponds to an ANNUAL PERCENTAGE rate of 12%, will be CHARGED ON AMOUNTS UNPAID 30 days from the closing date of our last billing cycle as a FINANCE CHARGE.

Attachment #2

Civil Beat Article About Overly Aggressive Attorneys

Struggling To Get By

It Started With A Messy Front Porch. Now This Elderly Woman's Condo Association May Take Her Home

Bills designed to protect Hawaii condo owners face a potential new life in the 2024 legislative session after stalling in 2023

139

By Stewart Yerton / January 16, 2024

Reading time: 7 minutes.

Rosita Sipirok-Siregar admits her Makakilo home could be neater.

But the septuagenarian retiree says it was overkill for her condo association to hire Honolulu lawyer Kapono Kiakona to run up a $3,300 legal bill to collect just over $300 in alleged fines. Tensions escalated in December, when Kapono upped the ante, notifying Sipirok-Siregar that her association intended to foreclose on her property to collect past due payments.

Sipiro-Siregar acknowledges that her front stoop has at times been cluttered. She also admits that her shoe rack doesn't meet association specifications,

which her next-door neighbor also doesn't follow. But Sipirok-Siregar says it's not justified for the Association of Apartment Owners of Westview at Makakilo Heights to force her to sell her home.

"They go after an old lady who's single and living alone," she says. "I'm a law-abiding citizen, and I'm cited for having fricking shoes on the front porch."

Rosita Sipirok-Siregar's dispute with her Makakilo condo association has led the association to levy more than $3,300 in legal fees against her to pursue $325 in fines for alleged violations and to tell her it intends to foreclose on her townhome to collect. (Stewart Yerton/Civil Beat/2024)

While Sipirok-Siregar plans to contest the fines and charges levied against her in mediation, legislators this session have the chance to look more broadly at the laws governing such disputes and condo associations in general. A handful of bills carried over from the last legislative session would change the way condo associations operate. One measure would provide an alternative to mediation for people like Sipiro-Siregar.

But whether such bills get any traction is another question.

Rep. Luke Evslin, chairman of the House Housing Committee, says he spent much of the summer working on other housing issues. He plans to introduce bills meant to allow more housing density in urban-zoned areas as a way to promote home building while preserving agriculture and conservation land.

Still, Evslin said, he saw what he believes were excessive power grabs by homeowner associations at the expense of residents when he was a Kauai council member. He said he helped pass county legislation limiting what the associations were doing. Evslin said he hasn't ruled out holding hearings on bills addressing condo associations on the state level this session.

Condominiums are generally private self-governing entities, run according to various bylaws and house rules. These governing documents are essentially contracts between condo owners and associations, administered by elected boards. The boards typically hire management companies to oversee operations, as well as lawyers, contractors, consultants and the like — all paid by owners.

Often likened to private governments, the associations have the power to raise money through fees and assessments, fine owners and in some cases foreclose on properties, forcing people to sell their homes to pay debts to the association. Owners often must pay the fees of the lawyers taking action against them on the associations' behalf.

Still, the associations are ultimately creatures of state law and must operate under the broad framework of the Hawaii condominium statute, which is administered by the Department of Commerce and Consumer Affairs' Real Estate Commission. The nine-member commission is made up entirely of real estate brokers and lawyers.

Rep. Luke Evslin, Chairman of the House Housing Committee, said he “wouldn’t write off” any bills aimed at amending Hawaii;’s condominium law this session. (David Croxford/Civil Beat/2023)

One bill would change the way condo elections are held so they more closely resemble elections for public office. Another amounts to an open records law for condo owners, giving them the power to inspect and copy a range of documents that the condo law requires associations to maintain.

A third bill would establish a condo ombudsman to serve as “a resource for members of condominium associations.” That includes helping ensure associations are complying with existing laws and association governing documents and helping resolve disputes without attorneys.

“I wouldn’t write off any of these bills,” Evslin said. “But I would admit to not knowing the details of many of those bills and not being able to comment too specifically.”

Bills To Change Hawaii’s Condo Law Face Hurdles

It's easy to write off the bills simply because they often go nowhere. Lawmakers didn't grant the open records and ombudsman bills a hearing last session, for instance. And bills that do manage to get hearings often face opposition from condo lawyers, associations, lobbyists and consultants that support the existing system.

The bill proposing change to condo board elections, for instance, faced opposition from the Hawaii Council of Community Associations, a lobbying group, and the Hawaii State Association of Parliamentarians, whose members are hired by associations to help run board meetings. Kapono Kiakona's law firm, Porter McGuire Kiakona, which is known for running up big tabs on behalf of associations against owners, also testified against the bill. In addition, several current association board members submitted identical testimony opposing the bill.

One of the few voices in support was Lila Mower, president of Kokua Council, an advocacy organization that has been pushing for legal changes designed to help individual owners.

In an interview, Mower said Sipirok-Siregar's situation – where she faces an alleged $1,133 in unpaid maintenance fees, fines and late fees and $3,366 in legal fees — is hardly an outlier.

"The situation where what she really owes is $1,000 but Kapono's fees are three times that – that's not unusual. Sometimes it's more than three times," said Mower, who was nominated by House Speaker Scott Saiki to a legislative working group established to study condo issues. "It's sadly not unusual."

It's important to make it easier to vote out board directors who bless such behavior, she said.

"It's excruciatingly difficult" to oust board members, she said.

Homeowner Admits Errors

Sipirok-Siregar acknowledges she has occasionally left items like a broom or mop on her front stoop, in violation of house rules. Her shoe rack also doesn't meet association specs, which call for a two-tier white or off-white rack. But on a recent morning her rack was hidden from street view by a pillar, as was a vacuum cleaner and trash can she had placed near the front door.

Sipirok-Siregar also admits she hasn't opened many of the numerous letters she has gotten from Kiakona. The association's lawyer said he couldn't comment on the pending matter without written authorization from Sipiro-Siregar, which she had not provided.

But one letter from Kiakona that Sipirok-Siregar did open shows what the association is demanding and potential paths forward for her.

Titled "NOTICE OF DEFAULT AND INTENTION TO FORECLOSE" and dated Dec. 14, 2023, the letter says Sipirok-Siregar owes $4,499.88 in delinquent "assessments, other charges and attorneys fees and costs unpaid to the association." Although the letter says Sipiro-Siregar must pay $4,938 to bring her account current, she can remove the lien on her property and notice of intention to foreclose by paying $438.49.

The letter also says she has the right to submit a payment plan and request mediation. It also suggests she hire an attorney to understand potential legal rights and defenses, although that would mean paying two lawyers: her own and Kiakona.

Sipirok-Siregar expresses confusion about the situation, including the sobering reality that the association can foreclose on her property to collect payment under Hawaii's condo law. At the same time, she denies she has ever fallen behind on paying maintenance fees, as Kiakona's letter alleges.

Regardless, she's hoping to sort things out in mediation.

Whether that results in an agreement remains to be seen. Mower has collected reports published by the Real Estate Commission dating back to

1991. Those indicate that mediation results in an agreement in less than one third of cases, she said.

Mower and other owner-advocates believe an ombudsman could be more effective in helping resolve disputes between owners and associations. Regardless of whether that's the best solution, Mower said the current system of associations turning lawyers loose on owners – at the owners' expense — benefits only the lawyers.

If the associations "want to be good neighbors, there are so many alternatives," she said. "Where's the reasonableness? Where's the rationality? Where's the humanity?"

About the Author

Stewart Yerton

Stewart Yerton is the senior business writer for Honolulu Civil Beat. You can reach him at syerton@civilbeat.org.

Use the RSS feed to subscribe to Stewart Yerton's posts today

HB-2286
Submitted on: 2/4/2024 10:16:21 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Teresa Ahsing	Individual	Oppose	Written Testimony Only

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Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

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It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

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In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure

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In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

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Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Teresa Ahsing

HB-2286
Submitted on: 2/4/2024 11:08:39 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Steve Glanstein	Individual	Oppose	Written Testimony Only

Comments:

Dear Rep. Mark M. Nakashima, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

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This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

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Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

HB-2286
Submitted on: 2/5/2024 5:48:51 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Paul A. Ireland Koftinow	Individual	Oppose	Written Testimony Only

Comments:

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

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This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

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In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Paul A. Ireland Koftinow

HB-2286
Submitted on: 2/5/2024 7:17:30 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Lance S. Fujisaki	Individual	Oppose	Written Testimony Only

Comments:

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Respectfully submitted

Lance Fujisaki

HB-2286
Submitted on: 2/5/2024 8:30:28 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Laura Bearden	Individual	Oppose	Written Testimony Only

Comments:

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit

owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise

from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right

of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Laura Bearden

HB-2286
Submitted on: 2/5/2024 9:00:31 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Mark McKellar	Individual	Oppose	Written Testimony Only

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In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

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of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Mark McKellar

HB-2286
Submitted on: 2/5/2024 9:38:01 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Julie Sparks	Individual	Oppose	Written Testimony Only

Comments:

Representative Mark M. Nakashima, Chair

Representative Jackson D. Sayama, Vice Chair

House Committee on Consumer Protection and Commerce

RE: House Bill 2286 – Relating to Condominiums

Hearing date: February 6, 2024, 2:00 p.m.

Aloha Chair Nakashima, Vice Chair Sayama, and Members of the Committee:

This testimony is submitted in *strong opposition* of House Bill 2286 – Relating to Condominiums.

First, when a law firm is retained by an association, the association entity is the client, not the Board of Directors. The Board is empowered to make decisions on behalf of the Association but the Board is *not* the client. All funds available to the association are funds paid by the owners. Associations do not generally possess any funds that do not come from the owners. Limiting the association's ability to assess the full amount of legal fees against owners whose actions caused the association to incur those fees, hurts all owners since it will result in increased maintenance fees and special assessments for all.

Second, the language in subsection (a) should be clarified to clearly describe which attorneys' fees are at issue in this section.

"**§514B- Attorney's fees; reimbursement; limitations; communication requirements.** (a) Notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves.

The preamble states the bill is not intended to apply to collecting delinquent common assessments, however subsection (a) of the bill references 514B-157(a). This reference is confusing since 157(a) includes collecting delinquent assessments and enforcing any provision

of the governing documents of an association. Therefore, it is uncertain which legal fees are subject to this proposed new section.

Third, subsection c of the above proposed section is particularly troubling for several reasons. Subsection c states:

(c) The association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association.

This provision is not workable for several reasons, first the phrase original debt implies the amount of legal fees would be limited to twenty-five percent of the amount the owner owed when the file was sent to a law firm for action. This limitation would make pursuing any legal action against an owner financially impossible and therefore cripple the association's enforcement power. Original amounts owed are sometimes small but it is still the duty of the Board to attempt to enforce and collect amounts owed for the financial health of the association as a whole. As stated previously, association funds come from the owners. Therefore, if the association does not assess the unit owner for legal fees in excess of twenty-five percent, the association will pay the remainder from its reserves. The reserves will be depleted and a special assessment or maintenance fee increase will be forthcoming for all owners. Limiting the amount of fees the association can seek reimbursement for may have a chilling effect on its ability to perform its duties which will result in financial harm to all owners over the long run.

Finally, subsection d is also problematic and will result in higher legal fees which is the opposite result of this bill's stated intent.

(d) Attorneys retained by the association shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner.

Assocations and boards vary in size. Some have numerous Board members and can vary from three (3) Board members to nine (9) Board members. If the attorney is limited to only communicating with the Board, there is a high likelihood that there will be an increase of legal fees that are ultimately paid by all owners. There will be an increase in legal fees because only communicating with the Board will mean that there will be an increase in the number of calls and emails that the attorney is receiving and spending time responding. Whereas, typically the communication is to/from the association's managing agent (and sometimes one authorized Board member) and minimizes the number of calls and emails. In addition, the individual Board members are not the record keepers for the association. Rather, the management company for the association would be the proper record keeper and as such, communications and requests for information should be directed to the managing agent, not individual Board members.

I recommend the bill be deferred pending studies on the financial impact the bill would have on associations and ultimately, all owners. If not deferred, it should at least be amended to remove subsections (c) and (d).

Thank you for the opportunity to offer this written testimony for your consideration.

Respectfully submitted,

Julie Sparks, Esq.

Dallas H. Walker, Esq.
841 Bishop Street, Suite 1500
Honolulu, Hawaii
dwalker@HawaiiLegal.com

The Honorable Representative Mark M. Nakashima, Chair
The Honorable Representative Jackson D. Sayama, Vice Chair
House Committee on Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB 2286 – Oppose

Dear Chair Nakashima, Vice Chair Sayama and Committee Members:

I am an attorney here in Honolulu, Hawaii. As part of my practice, I represent condominium associations. I hope that my experience can shed some light on some of the issues with this bill. For the reasons below, I oppose HB 2286.

I. The Costs of Enforcement Should be Borne by the Offending Owner, Not the Innocent Neighbors

The basic question before you is this: If a unit owner is breaking a house rule or is delinquent in paying for common expenses, and ignoring numerous notices from the property management company, such that the matter is referred to legal counsel, then who should pay for the legal fees? The offending owner? Or the innocent neighbors?

According to this proposed legislation, it is the innocent neighbors who should pay.

II. Clarifications

The bill appears to be based on certain fundamental misunderstandings. I offer the following clarifications:

1. The association is the client of the law firm, not the board.

2. The law firm does not send invoices to the offending owner. That is not how it works.

3. Instead, the law firm invoices the association (its client), and the association may assess certain legal fees to an offending owner (in the nature of a reimbursement) as provided by law, or pursuant to the association's Declaration and Bylaws.

4. Accordingly, the legal fees are already paid out of the association's funds and reserves. What this bill is really attacking is the association's ability to recoup legal

expenses from the offending owner. **This bill seeks to push those costs onto the innocent neighbors.**

5. Law firms are already bound by the Fair Debt Collection Practices Act. Adding such language does nothing. And even if the law firms were not bound by the FDCPA, the decision of whether to bind law firms to it should be left to Federal legislation and the courts.

6. The Notice of Default and Intention to Foreclose (NDIF) under Section 667-92 is part of the **nonjudicial** foreclosure process. **It is Not part of the judicial foreclosure process.** See HRS § 667-92 (referring to power of sale foreclosures). However, associations no longer perform nonjudicial foreclosures. Title insurers no longer insure nonjudicial foreclosures. The proposed language requiring 30 days to have passed after an NDIF before a foreclosure commences is misdirected.

III. The Proposed 25% Limitation on Legal Fee Reimbursements Is Vague, Unreasonable and Contrary to Established Policy

Part of the proposed language of this bill seeks to limit the attorneys' fees reimbursement collected by the Association to 25% of the "original debt." For the following reasons, this language is vague, unreasonable and contrary to established policy.

For background, a condominium association is like a *hui*, where everyone in the canoe needs to paddle. If someone stops paddling, then everyone else must paddle harder. Although it must collect monies owed to it, an association is not like a bank that makes hundreds of millions of dollars every year. **An association is a not-for-profit collective that operates at a zero balance**, where each unit owner contributes toward a share of the common expenses and reserves.

To further inform you regarding the collections process, when an Association is collecting delinquent maintenance fees, a delinquent unit owner will receive the following notices:

- First Delinquency Letter from the Property Management Company
- Second Delinquency Letter from the Property Management Company
- Third Delinquency Letter from the Property Management Company
- (In fact, I have see cases where an Association has issued dozens of Delinquency Letters before referring the matter to legal counsel).
- Demand Letter from the law firm
- Sometimes, a Debt Verification Letter from the Law Firm
- Post-Lien Demand Letter from the Law Firm
- Sometimes, additional notices, payment plan letters, and sometimes an NDIF even though it is not required.
- Most delinquencies are paid off in these stages. However, as a last resort, if the delinquency is still not cured, a foreclosure complaint may be filed.

For the following reasons, I would oppose the proposed language limiting legal fee reimbursements to 25% of the "original debt."

(1) The term "original debt" is not defined. Is it the amount named in the foreclosure complaint? Or is it the amount listed in one of the demand letters listed above? The First Delinquency Letter from the Property Management Company is sent when the debt is only a few hundred dollars. However, by the time the matter is referred to legal counsel, the delinquency is most likely in the thousands of dollars.

(2) Maintenance fees continue to accrue during the pendency of a foreclosure case, which can last months, if not years. During that time, the delinquency may have doubled or tripled. **Limiting the legal fee reimbursement to a percentage of the amount of the "original debt" (however that term is interpreted) unfairly pushes the remainder of the legal costs upon the innocent neighbors who have not defaulted on their assessments.**

(3) This bill conflicts with HRS § 607-14 which provides that nonprofit homeowners associations do not have a percentage limitation on legal fee reimbursements.

(4) This language does not address legal action where there is little to no "original debt" such as legal action due to rule violations (**e.g., violence, property damage, threats, hoarding**, etc.). These types of cases can require intensive legal work. However, at the initiation of the case, the offending owner may only have a few hundred dollars in fines. The innocent neighbors should not be forced to shoulder the burden of legal expenses caused by the offending owner.

IV. The Language Restricting Communications to the Board is Vague and Serves no Purpose

This bill proposes language that restricts the law firm employed by the association from communications with persons other than the board of directors, except in certain undefined situations, where the law firm is allowed to communicate with unit owners for "essential requirements." I would oppose this language for the following reasons:

(1) What happens when the law firm has to speak with security guards or the resident manager because of an incident that happened at the building? The bill does not allow this.

(2) The term "essential requirements" is vague and undefined. This is concerning because when collecting a debt, the law firm is required to send communications to the unit owner. Furthermore, what happens when the unit owner contacts the law firm? (This happens frequently). Is the law firm allowed to call the unit owner back? The bill does not address this.

V. HB 2286 Should be Deferred

In any event, HB 2286 should be deferred because Act 189 (2023) created a Condominium Property Regime Task Force, whose mission includes the following:

> Investigate[ing] whether additional duties and fiduciary responsibilities should be placed on members of the boards of directors of condominium property regimes[.]

The concerns reflected in HB 2286 have been heard by the Task Force, which unanimously voted in favor of an LRB study to obtain objective data to enable recommendations in a subsequent legislative session.

For the reasons above, I would oppose this bill.

Thank you,

/s/ Dallas H. Walker, Esq.

* * * NOT FOR PUBLICATION * * *

NO. 26826

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ASSOCIATION OF APARTMENT OWNERS OF AHUIMANU GARDENS, by its Board of Directors, Plaintiff-Appellee,

vs.

ELIZABETH N. FLINT, Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 04-1-0100)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant Elizabeth N. Flint appeals from the Circuit Court of the First Circuit's August 19, 2004 final judgment.[1] Flint contends that the circuit court erred in granting summary judgment to Plaintiff-Appellee, Association of Apartment Owners of Ahuimanu Gardens (the Association), by its Board of Directors (the Board). Flint asserts that her right to exclusive ownership and possession of her condominium unit under Hawai'i Revised Statutes (HRS) § 514A-5 (1993) (repealed 2004)[2] trumps the Board's power to treat termite infestation in the common elements by tent fumigation of the building in which her unit is located. The sole issue on appeal is whether the circuit court was correct in finding no genuine issues of material fact and that the Board was entitled to judgment as a matter of law

[1] The Honorable Bert I. Ayabe presided over this matter.

[2] HRS § 514A-5 provides, in relevant part: "The apartment owner is entitled to the exclusive ownership and possession of the apartment."

because the Board has the authority to treat termite infestation in the common elements of the condominium building by tent fumigation. See Coon v. City and County of Honolulu, 98 Hawai'i 233, 244-45, 47 P.3d 348, 359-60 (2002) ("We review the circuit court's grant or denial of summary judgment de novo.").

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issue raised, we hold:

(1) The Bylaws are determinative of whether the Board has the authority to contract for tent fumigation services as a method of termite treatment of the common elements in this condominium building. See HRS § 514A-81 (1993) (repealed 2004) ("The operation of the property shall be governed by the bylaws."); HRS § 514A-3 (1993) (repealed 2004) ("'Operation of the property' means and includes . . . the maintenance [and] repair . . . [of] the common elements.");

(2) The Board's power and duty to maintain the common elements, in the interest of the Association, outweighs Flint's right to exclusive ownership and possession, and Flint must therefore comply with the decision of the Board. See The Bylaws, Article IV, § 2 ("the Board of Directors shall have the following powers and duties: (a) To manage, operate, care and maintain the property of this condominium property regime, the common elements and limited common elements."); Ass'n of Owners of Kukui Plaza

v. City and County of Honolulu, 7 Haw. App. 60, 74, 742 P.2d 974, 983 (1987) ("The uniqueness of the condominium concept of ownership has caused the law to recognize that each unit owner must give up some degree of freedom of choice he might otherwise enjoy in separate, privately owned property.") (Quotation marks omitted); River Terrace Condo. Ass'n v. Lewis, 514 N.E.2d 732, 735-36 (Ohio Ct. App. 1986) ("[W]hile the owner of a unit has exclusive ownership of and responsibility for his unit, . . . the owner's freedom of action is of necessity limited by the fact that the unit is one of many units . . . ."); The Declaration, Part I. ("[E]ach owner, tenant, or occupant of a family unit shall comply with the provisions of this Declaration, the Bylaws, the decisions and resolutions of the Association or its representative . . . .");

(3) Despite its lack of express authority in the Bylaws, the Board's broad authority to do all things necessary for the operation of the Association includes the authority to require Flint to temporarily vacate her unit so that termite infestation in the common elements may be treated by tent fumigation of the building in which she owns and occupies a unit. The Bylaws state:

> The Board of Directors shall have the powers and duties necessary for the administration of the affairs of the Association and may do all such acts and things as are not by law or by these Bylaws directed to be exercised and done by the owners. Without limiting the generality of the

> foregoing, the Board of Directors shall have the following powers and duties . . . .

The Bylaws, Article IV, § 2 (emphases added). Thus, the absence of any provision explicitly authorizing the Board to require a condominium unit owner to temporarily vacate her unit is not fatal to the Board's right to do so. See Beachwood Villas Condo. v. Poor, 448 So. 2d 1143, 1145 (Fla. App. 1984) ("It would be impossible to list all restrictive uses in a declaration of condominium."); O'Buck v. Cottonwood Village Condo. Ass'n, Inc., 750 P.2d 813, 816 (Alaska 1988) (quoting same);

(4) The Board's decision to treat termite infestation in the common elements by tent fumigation is reasonable and made in good faith, and thus, should be upheld. See McNamee v. Bishop Trust Co., Ltd., 62 Haw. 397, 407, 616 P.2d 205, 211 (1980) (holding that the decision of a managing committee of a community association will be upheld as long as the decision is "reasonable and in good faith[.]"). Therefore,

IT IS HEREBY ORDERED that the circuit court's August 19, 2004 final judgment granting summary judgment against Flint is affirmed.

DATED: Honolulu, Hawai'i, December 2, 2005.

On the briefs:

John A. Morris and
Mi Yung C. Park
(of Ashford & Wriston)
for plaintiff-appellee
Association of Apartment
Owners of Ahuimanu Gardens

Corey Y.S. Park and
Pamela S. Bunn
(of Paul Johnson Park & Niles)
for defendant-appellant
Elizabeth N. Flint

HB-2286
Submitted on: 2/5/2024 10:12:47 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Sean Valdez	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 10:27:20 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Olivia Staubus	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 10:28:54 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
C. Fraine	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 10:36:07 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jenny Caban	Individual	Oppose	Written Testimony Only

Comments:

I strongly oppose HB 2286. As a owner and Board member in a condominium project, the legal fees and costs to collect on delinquent owners will fall on the rest of the other owners resulting in maintenace fee increases. I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the other owners in the condominium project.

HB-2286
Submitted on: 2/5/2024 10:36:51 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Meredith Ross	Individual	Oppose	Written Testimony Only

Comments:

-
  - I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 10:46:33 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Laine	Individual	Oppose	Written Testimony Only

Comments:

Aloha,

I am a voting citizen and I oppose Bill HB2286 because the expenses of enforcement and collection should be paid by the offending owner and not by innocent neighbors. Please oppose this bill. Thank you for your faithful service to our innocent citizens.

Mahalo,

Laine Hamamura

HB-2286
Submitted on: 2/5/2024 10:47:16 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Natalie Younoszai	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 10:59:38 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Fixon Leung	Individual	Oppose	Written Testimony Only

Comments:

I own an apartment in a condominium, I don't want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 11:06:59 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Christian Porter	Individual	Oppose	Written Testimony Only

Comments:

Associations function on zero-based budgeting. Meaning that they collect maintenance fees to cover all of the anticipated expenses. The expenses of attorneys' fees for collection matters cannot be anticipated for each year's budget. So, Associations need to be able to collect the attorneys' fees from the delinquent party, or parties, and not have a cap. The courts have and will determine what is a reasonable amount to be paid by the debtor, and then be reimbursed to the Association to make up this expense. For these reasons, this measure should not pass out of this committee. Thank you.

HB-2286
Submitted on: 2/5/2024 11:13:08 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Rebecca Szucs	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 11:15:31 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Ivy yeung	Individual	Oppose	Written Testimony Only

Comments:

- As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.
- I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 11:19:46 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Patricia Biro	Individual	Oppose	Written Testimony Only

Comments:

As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 11:25:30 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Angela Hui	Individual	Oppose	Written Testimony Only

Comments:

As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 11:34:08 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Lillian Ishado	Individual	Oppose	Written Testimony Only

Comments:

As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 11:35:42 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Sean Cristobal	Individual	Oppose	Written Testimony Only

Comments:

As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 11:47:59 AM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Albert Kim	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offending owner and not by the innocent neighbors.

HB-2286
Submitted on: 2/5/2024 12:16:22 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Andrea Yogi	Individual	Oppose	Written Testimony Only

Comments:

As an owner in a condominium project, I do not want my maintenance fees to increase because of the misconduct of another owner. The expenses of enforcement or collection should be paid by that owner.

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

Proposed H.B.2286 targets enforcement action by associations and their attorneys since most non-enforcement legal services (contract negotiation, legal opinions, etc.) are assessed to the entire population as part of an association budget. Therefore, this bill punishes thousands of home owners for the acts of the very few, subsidizes the non-compliant owner's bad acts, and discourages Boards of Directors from performing their duty to enforce the project's governing documents.

I strongly oppose the passage of this bill.

Most owners of property subject to an owners' association comply with the provisions of the project documents and many chose to purchase their property because of the reliability of the standards set by the community. In contrast, homeowners associations do not have the ability to screen or research prospective owners and their volunteer Boards of Directors are tasked by the governing documents with the duty to enforce regulations and requirements adopted for the collective benefit of all of the association members.

Owners who are not familiar with the guidelines of the community are generally initially informed if they are in violation of House Rules or governing covenants **at no cost**. If they ignore or defy the notice, a fine may be assessed, with the owners entitled to a hearing and review of their position. Only after multiple requests from the association have been ignored will the association seek assistance from legal counsel. There is no justification for imposing the cost of the legal counsel on all owners, the vast majority of which are complying with the rules.

Many architectural or design guidelines do not involve an "original debt" upon which the proposed twenty-five percent allowed for attorneys' fees may be calculated and these can be the matters in which the owner(s) are the most confrontational and require more Board of Directors', property managers', and/or legal time to be spent. Entire populations should not be punished through the assessment of attorneys' fees and costs caused by wilful defiance of a small minority.

Thank you for your consideration. Respectfully,

Pamela J. Schell

HB-2286
Submitted on: 2/5/2024 12:22:58 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jaclyn Sonobe	Individual	Oppose	Written Testimony Only

Comments:

I feel that maintenance fees should not be increased due to the misconduct of another owner. The expenses of enforcement should be paid by that owner.

HB-2286
Submitted on: 2/5/2024 1:24:07 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Greg Misakian	Individual	Support	Remotely Via Zoom

Comments:

I support HB2286 with an important amendment that is needed.

Association attorneys are often used in an abusive way, to harass and intimidate owners, and assess improper and excessive attorney's fees.

Association Board members, who often are not well understanding of their fiduciary duties and often violate them, frequently abuse the use of the association attorney, resulting in financial hardships for owners and the association.

I am requesting an amendment to HB2286, which would make Individual Board Members fully responsible for all attorney charges and legal costs when they vote to initiate improper and/or unlawful actions against owners for any reason, in violation of the association's governing documents or any state laws, including Hawaii Revised Statutes 514B.

Greg Misakian

Kokua Council, 2nd Vice President

Waikiki Neighborhood Board, Sub-District 2 Vice Chair

Keoni Ana AOAO, Director

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

Third, even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential

requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize

nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Laurie Sokach AMS, PCAM

Senior Community Portfolio Manager

HB-2286
Submitted on: 2/5/2024 2:05:18 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

LATE

Submitted By	Organization	Testifier Position	Testify
Taylor Gray	Individual	Oppose	Written Testimony Only

Comments:

I oppose this bill because the expenses of enforcement and collection should be paid by the offend

LATE

HB-2286
Submitted on: 2/5/2024 5:42:44 PM
Testimony for CPC on 2/6/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Vince Costanzo	Individual	Oppose	Written Testimony Only

Comments:

Dear Representative Johanson, Chair, Representative Sayama, Vice Chair, and Members of the Committee:

I STRONGLY OPPOSE H.B. No. 2286 for the reasons set forth below.

This measure will require all owners to bear the burden of paying attorneys' fees incurred by an association as the result of a single owner's actions, except under very narrow circumstances.

First, this bill will override the fee shifting provision in HRS Section 514B-157(a). Instead, it will require all owners to pay their proportionate share of attorneys' fees incurred by an association because of a single owner's default in the payment of assessments or breach of the governing instruments. This is unfair to those owners who pay their assessments on time and comply with the governing instruments.

Section 1 of the bill states that the bill will require owners who are delinquent in the payment of assessments to pay the attorneys' fees incurred in collection actions, but it does not do that. Section 2 of the bill, which adds a new statutory section to carry out its intent, states in the new subsection (a) that "notwithstanding sections 514B-144(d) and 514B-157(a), all costs for attorneys' fees incurred by or on behalf of the association shall be paid from association funds or reserves." No exception is made for fees incurred in connection with the collection of delinquent assessments.

The language of subsection (b) of the new proposed statutory section then goes on to add confusing language which states that "[i]n addition to any reasonable attorneys' fee incurred

against a unit owner pursuant to section 514B-157(a), the association may assess, demand, or seek reimbursement of the costs for attorneys' fees against a unit owner if: (1) [t]he association assesses, demands, or seeks reimbursement of the costs of attorneys' fees against all the unit owners in accordance with the allocations under section 514B-41 (i.e., based on common interest); and 2) [t]he association prevailed in a matter that did not pertain to the collection of delinquent common expense assessments from a unit owner, and which was resolved through binding arbitration or litigation that occurred after the legal fees were initially paid with association funds." In other words, even under this limited exception for the recovery of fees from an owner, fees may not be recovered from an owner who has defaulted in the payment of assessments. The words "in addition to any reasonable attorneys' fees incurred against a unit owner pursuant to section 514B-157(a)" used to begin the new subsection (b) are of no help, because the new subsection (a) overrides section 514B-157(a) and requires that the fees be paid from association funds or reserves.

The limited exception allowing the recovery of fees from owners who violate the covenants (other than nonpayment of assessments) is ill-conceived because it will only allow recover if the association has actually obtained a judgment or an arbitration award in its favor. Many enforcement matters are resolved without the need to initiate lawsuits or demands for arbitration. This short-sighted measure will not only increase the number of lawsuits and arbitrations filed by associations, but it will end up making enforcement actions more costly than ever,

A twenty-five percent cap on attorneys' fees is not reasonable.

Not only does this measure make it far more difficult to collect fees, but it also places an unreasonable cap on fees. This measure states that an association shall not assess, demand, or seek reimbursement from the unit owners for its total and final legal fees in any matter in excess of twenty-five percent of the original debt amount sought by the association. This is unreasonable and problematic for a number of reasons.

First, the 25% cap on fees, without regard to the magnitude or importance of the issue or the impact that the cap will have on an association, is arbitrary. It is a random percentage rather than one based on a legitimate reason.

Second, subsection (c) which contains the cap is at odds with subsections (a) and (b) above which do not even allow fees in collection cases.

1. even if you can somehow get past the contradictory language, the cap would nonetheless prevent associations from the recovery of even 25% of a total debt because it refers to 25% of the "original debt amount sought by the association." It offers no definition of the "original debt amount" which leaves that term open to many interpretations. Generally, associations send demand letters to owners the month after an owner fails to pay assessments. If this is considered the "original debt amount sought," then it would have the effect of capping the fees that an association may recover to 25% of a single month of maintenance fees even though the owner may be several years delinquent by the time a court judgment is obtained. This would have the effect of letting the delinquent owner off the hook for fees and requiring all other owners to foot the bill.

Another problem with the 25% cap is that is it so poorly worded that it could be read to mean that attorneys' fees over the 25% cap cannot even be charged as a common expense because it does not refer to "delinquent unit owners"; it refers only to "unit owners." Under this interpretation, who will pay the fees?

It should also be noted that not all enforcement actions against owners involve the collection of sums due. Associations regularly file legal actions to enforce covenants related to unauthorized modifications, noise violations, and threatening behavior. These types of actions do not arise from an "original debt." This measure could be argued to mean that no fees may be recovered in those instances.

This measure would prohibit the association's attorney from communicating with others, which would effectively deprive associations of their right to effective legal counsel.

Without good reason, the new subsection (d) would prohibit condominium association attorneys from communicating with anyone other than the board of directors, except under limited circumstances. It provides that "attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter but shall not bill or demand payment of fees directly from any unit owner." The words "for essential requirements of each matter" are vague and ambiguous and will leave everyone guessing at their meaning.

In effect, this measure would require that an association's attorney communicate only with the board of directors, even if a communication does not involve owners or a matter which is in dispute. For example, the association's attorney would be prohibited from communicating with the association's property manager, managing agent, resident manager, insurance agent, and CPA. The association's attorney would be prohibited from negotiating contracts on behalf of the association because the attorney would be prohibited from speaking with the other party to the contract. In cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association's attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. This measure would even go so far as preventing an association's attorney from filing or defending lawsuits because the attorney would be prohibited from communicating with the adverse party and other attorneys in the case. The attorney would also be prohibited from filing legal briefs and making arguments in open court because those would be considered communications with the court.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. This bill offends the sense of reasonableness and fairness.

The Fair Debt Collections Practice Act Applies on its own.

Federal law, not Hawaii law, governs when the federal Fair Debt Collection Practices Act applies. This bill attempts to dictate how the federal law shall be applied. It is not likely to be met with great favor by the Federal Courts.

The Legislature Should Not Dictate the Billing Arrangement Between the Association and its Attorney.

This measure will dictate the contents of attorney invoices, even when those invoices do not involve fees related to proceedings against owners. It is not only vague and ambiguous, which will undoubtedly lead to numerous lawsuits, but it is not necessary and interferes with the right of condominium associations to enter into their own fee and billing arrangements with their attorneys.

The Proposed Change to HRS Section 514B-157(a)(2) Reflects a Lack of Understanding of the Law

Section 3 of the measure proposes to amend HRS Section 157(a)(2) to state that fees may be recovered in foreclosing a lien (if such recovery is even possible under the other portions of the bill) "provided that thirty days have elapsed since the notice of default and intention to foreclose under section 667-92 has been served on the unit owner." This change assumes that the foreclosure is a "nonjudicial foreclosure" because HRS Section 667-92 pertains to nonjudicial foreclosures and not judicial foreclosures. The fact is that few, if any, associations utilize nonjudicial foreclosures due to Hawaii Supreme Court rulings. Accordingly, this change makes little sense and could have the effect of preventing associations from recovering fees in judicial foreclosures. Furthermore, even in nonjudicial foreclosure proceedings, this additional language makes little sense. There is no good reasons to tie "the recovery of fees" to "the service of a notice of default and intention to foreclose" on an owner. Additionally, the thirty day period appears to be arbitrary.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

Finally, it should be noted that this committee considered and deferred a very similar bill in 2022. See HB 1857. It should defer this bill for the same reasons.

In conclusion, this is an extremely bad bill. Not only is it poorly drafted, but it contradicts itself and serves no good purpose.

For the foregoing reasons, I respectfully OPPOSE H.B. 2286 and strongly urge your Committee to defer this measure.

Respectfully submitted,

Vincent Costanzo