

ACT 207

H.B. NO. 1518

A Bill for an Act Relating to Design Professionals.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to provide a design claims conciliation panel.

The design professional conciliation panel, established by Act 228, Session Laws of Hawaii 1981, was repealed by the legislature in 2004. The lack of a conciliation panel has left the design professional community with no protection against frivolous lawsuits.

This Act establishes a design claims conciliation panel modeled after the existing medical claims conciliation panel established by Act 219, Session Laws of Hawaii 1976. The purpose of the design claims conciliation panel is to provide the parties with advisory determinations of the relative merits of any claim brought against a design professional licensed under chapter 464, Hawaii Revised Statutes. The design claims conciliation panel will assist the parties in evaluating whether the claims should be pursued through the judicial system. The design claims conciliation panel will also provide opportunities for the parties to exchange information in a relatively expedited and inexpensive manner, which in turn provides for opportunities for the parties to explore the conciliation of meritorious claims prior to the claims being brought before the courts. Lastly, the requirements of exchanging information between the parties, and making conscientious and thorough presentations to the design claims conciliation panel, discourage the pursuit of frivolous or fraudulent claims, prior to further legal proceedings being taken by the parties.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
DESIGN CLAIMS CONCILIATION PANEL**

§ -1 **Definitions.** As used in this chapter:

“Department” means the department of commerce and consumer affairs.

“Design professional” means a professional engineer, architect, surveyor, or landscape architect licensed under chapter 464.

“Director” means the director of commerce and consumer affairs.

§ -2 **Administration of chapter.** The director shall be responsible for the implementation and administration of this chapter and shall adopt rules, in conformity with chapter 91, necessary for the purposes of this chapter.

§ -3 **Design claim conciliation panels; composition, selection, compensation.** (a) There are established design claim conciliation panels that shall review and render findings and advisory opinions on the issues of liability and damages in tort claims against design professionals licensed to practice under chapter 464.

(b) If all parties to a tort claim against a design professional licensed to practice under chapter 464 agree, the design claim conciliation panel shall not review and render findings and advisory opinions on the issues of liability and damages in the tort claim against the design professional licensed to practice under chapter 464.

(c) A design claim conciliation panel shall be formed for each claim filed pursuant to section -5 and after each panel renders its decision or the claim is otherwise disposed of, the panel shall be disbanded. Each design claim conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one design professional licensed to practice under chapter 464. The chairperson shall be appointed by the director from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court. The design professional shall be appointed by the chairperson and shall be currently licensed and in good standing under chapter 464.

(d) The chairperson shall preside at the meetings of the panel. The chairperson, all panel members, and any consultant called by the panel to appear before the panel shall be compensated at the rate of \$300 per claim, which will become payable when the decision of the panel is submitted. At the discretion of the director, the chairperson, panel members, and any consultant called by the panel to appear before the panel, may be compensated at one-half the amount of compensation specified in this section, if the claim is disposed of by any means prior to the hearing by the panel. The chairperson, all panel members, and any consultant called by the panel to appear before the panel also shall be paid allowances for travel and living expenses that may be incurred as a result of the performance of their duties on or for the panel. These costs shall be paid by the department of commerce and consumer affairs from the filing fees paid by the parties.

(e) The claimant shall pay a filing fee of \$450 to the department upon the filing of the claim and the failure to do so shall result in the claim being rejected for filing. Each party to the claim shall pay a filing fee of \$450 to the department within twenty days of being served with the claim. Each party to a claim shall be assessed a non-refundable processing fee by the department in the amount of \$50. The non-refundable processing fee shall be retained from each party's filing fee, and shall be used to defray the administrative costs of the design claims conciliation panel program.

(f) After the panel has made a final decision on a claim, or after a final disposition of the claim has been made without a hearing before the panel, the department shall return any moneys remaining after all panel costs have been paid, to the respective parties on a pro rata basis.

(g) The office and meeting space, secretarial and clerical assistance, office equipment, and office supplies for the panel shall be furnished by the department. The chairperson may designate any alternative meeting place or site for the hearing.

(h) The board of professional engineers, architects, surveyors, and landscape architects shall each prepare a list of design professionals along with their respective

specialties. These design professionals shall be eligible to serve as consultants to the panel in their respective fields. Panel members may consult with other legal, design, and insurance specialists.

§ -4 Waiver of filing fee. (a) If any party to a claim cannot pay the required filing fee, the party may file with the director a motion to waive the filing fee. The motion to waive the filing fee shall be accompanied by an affidavit in a format prescribed by the department, showing in detail:

- (1) The party's inability to pay the filing fee;
- (2) The party's belief that the party is entitled to redress; and
- (3) A statement of the issues that the party intends to present at the hearing before a design claims conciliation panel.

(b) The director shall decide on the motion to waive the filing fee as expeditiously as possible, and no oral arguments shall be permitted.

(c) If the director grants the motion to waive the filing fee, the party may proceed without further application to the director or panel, and without payment of the filing fee. If the motion is denied, the director shall state the reasons for the denial in writing. The director shall promptly provide the party with a filed copy of the director's order granting or denying the motion.

(d) If a motion to waive the filing fee is denied by the director, the party may seek judicial review under section 91-14.

(e) If the director denies a party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the denial of the motion, unless the party has filed an appeal under section 91-14. If the party has filed an appeal under section 91-14, the party may proceed without payment of the filing fee, until such time as a final judicial determination is rendered.

(f) If the party files an appeal under section 91-14, and the court upholds the director's denial of the aggrieved party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the court's affirmation of the denial. If the court determines that the party's motion for waiver of the filing fee was improperly denied, the party shall be entitled to proceed without payment of the filing fee.

§ -5 Review by panel required; notice; presentation of claims; request for a more definite statement of the claim. (a) Effective January 1, 2008, any person or the person's representative claiming that a tort has been committed by a design professional shall submit a statement of the claim to the design claim conciliation panel before a suit based on the claim may be commenced in any court of this State. Claims shall be submitted to the design claim conciliation panel in writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are then known to the claimant.

(b) Within five business days thereafter the panel shall give notice of the claim and the statement of the claim, by certified mail, to all design professionals and others who are or may be parties to the claim and shall furnish copies of written claims to these persons. The notice shall set forth a date, not more than twenty days after mailing the notice, within which any design professional against whom a claim is made shall file a written response to the claim, and a date and time, not less than fourteen days following the last date for filing a response, for a hearing of the panel. The notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the meeting. The times originally set forth in the notice may be enlarged by the chairperson, on due notice to all parties, for good cause.

(c) If the statement of the claim in the notice is so vague or ambiguous that any party receiving notice of the claim cannot reasonably be required to frame a

written response, the party may submit a written request to the chairperson for a more definite statement before filing the written response. Copies of the request shall be provided to the panel, the claimant, and other affected parties. The request, which shall be ex parte and stay the proceedings of the panel until notice of the chairperson's decision is given to the panel and all parties, shall specify the defects complained of and the details desired. The chairperson may deny, grant, or modify the request at the chairperson's own discretion, without the necessity of a hearing, although the chairperson may reach a decision after consulting with the panel or the claimant. The chairperson shall provide notice of the decision to the panel, the claimant, and other affected parties. If the request is granted and the claimant fails to provide a more definite statement of the claim within five days after notice of the decision, the panel may make an order as it deems just. This subsection shall not be used as a tactic to delay the proceedings.

§ -6 **Certificate of consultation.** (a) Any claim filed with the design claim conciliation panel under this chapter shall be accompanied by a certificate that declares one of the following:

- (1) That the claimant or the claimant's attorney has consulted with a design professional who is licensed to practice in this State or any other state, who is knowledgeable and experienced in Hawaii building codes and construction practices and the professional standard of care in Hawaii, and who is knowledgeable and experienced in the same specialty as the design professional against whom the primary claim is made, and that the claimant or claimant's attorney has concluded on the basis of the consultation that there is a reasonable and meritorious cause for filing the claim. If the claimant or the claimant's attorney is not able to consult with a design professional in the same specialty as the design professional against whom the primary claim is made, the claimant or claimant's attorney may consult with a design professional who is licensed in this State or in any other state, who is knowledgeable and experienced in Hawaii building codes and construction practices and the professional standard of care in Hawaii, and who is knowledgeable and experienced in a specialty that is as closely related as practicable to the specialty of the design professional against whom the primary claim is made. The design professional consulted by the claimant or the claimant's attorney may not be a party to the case, nor be compelled to testify or otherwise participate in the hearing before the design claim conciliation panel;
- (2) That the claimant or the claimant's attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed by the claimant or the claimant's attorney within ninety days after filing the claim; or
- (3) That the claimant or the claimant's attorney was unable to obtain the consultation required by paragraph (1) after the claimant or the claimant's attorney had made a good faith attempt to obtain the consultation and the design professional contacted would not agree to such a consultation. For purposes of this paragraph, "good faith attempt" refers to the responsibility of a claimant or claimant's attorney to make reasonable efforts to contact a design professional for the purpose of reviewing the circumstances upon which a claim is based. The claimant or claimant's attorney may contact design professionals by letter,

telephone, facsimile, or other electronic means of communication. If the design professional does not respond within a reasonable time, the claimant or claimant's attorney may submit its claim to the design claim conciliation panel along with a certificate declaring the nonresponse to claimant's good faith attempt. A "good faith attempt" shall ultimately be evaluated in light of the goal of having a qualified design professional assist the claimant or claimant's attorney in understanding the basis of the claim, and the determination shall depend upon the circumstances of each individual case.

(b) For the purposes of this section, the claimant or the claimant's attorney shall not be required to disclose the names of any design professional consulted to fulfill the requirements of subsection (a) to any of the other parties to the claim. The design claims conciliation panel may require the claimant or the claimant's attorney to disclose the name of any design professional consulted to fulfill the requirements of subsection (a). No disclosure of the name of any design professional consulted to fulfill the requirements of subsection (a) shall be made to any of the other parties to the claim; provided that the design claim conciliation panel may contact the design professional to determine if the requirements of subsection (a) were met.

(c) Unless a certificate is filed pursuant to subsection (a), the claim shall not be received for filing by the design claim conciliation panel.

§ -7 Design claim conciliation panel hearing; fact-finding; evidence; voluntary settlement. (a) Every claim of a tort against a design professional shall be heard by the design claim conciliation panel within thirty days after the last date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section -8 shall be present except with the permission of the chairperson. The panel, in its discretion, may conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

(b) The hearing shall be informal. Chapters 91 and 92 shall not apply. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but the record shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel, in its discretion, may permit any party, or any counsel for a party to question other parties, witnesses, or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with respect to the issues as it may consider, and unless otherwise designated by the panel, the burden shall initially rest with the claimant at the commencement of the hearing.

(c) The panel may require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey the order may be punished by the court as a contempt thereof. Any member of the panel, the director, or any person designated by the director may sign subpoenas. Any member of the panel may administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding these powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

(d) At the hearing of the panel and in arriving at its opinion the panel shall consider, but not be limited to, statements or testimony of witnesses, project records, and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication, statement of fact, or

opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel, upon the application of any party or upon its own decision, may appoint as a consultant, an impartial and qualified design professional, or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses to be paid as provided in section

-3. Except for the production of records kept in the usual course of the practice of the design professional, discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section -9, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily.

§ -8 Design claim conciliation panel hearing; persons attending. Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

- (1) The party or parties making the claim;
- (2) The design professional against whom the claim is made or representatives thereof; other than counsel, authorized to act for the design professional; or
- (3) Counsel for the parties, if any.

§ -9 Design claim conciliation panel hearing; decisions. (a) Within thirty days after the completion of a hearing, the design claim conciliation panel shall file a written advisory decision with the department and shall thereupon mail copies to all parties concerned, and their counsel. The panel shall decide the issue of liability and shall state its conclusions in writing.

(b) After a finding of liability, the design claim conciliation panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to the design professional, economic losses and noneconomic losses; provided the panel may not recommend punitive damages.

(c) The decision shall be signed by all members of the design claim conciliation panel; provided that any member of the panel may file a written concurring or dissenting opinion.

(d) The advisory decision required by this section need not be filed if the claim is settled or otherwise disposed of before the decision is written or filed.

§ -10 Expungement of records; liability insurance rates. (a) Upon a decision by the design claim conciliation panel finding for the design professional pursuant to section -9(a), the design professional may apply to the panel for expungement of all records of the related proceedings. The panel shall expunge all records if a majority of the panel finds that the complaint is fraudulent or frivolous.

(b) No insurer providing professional liability insurance for a design professional shall increase any premium rate for the design professional on the basis of the filing of a tort claim against the design professional that is determined by the design claims conciliation panel to be fraudulent or frivolous.

§ -11 Subsequent litigation; excluded evidence. The claimant may institute litigation based upon the claim in an appropriate court only after a party to a design claim conciliation panel hearing rejects the decision of the panel, or after the twelve-month period under section -15 has expired.

No statement made in the course of the hearing of the design claim conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action; provided that the statements may be admissible for the purpose of section -16. No decision, conclusion, finding, or recommendation of the design claim conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the design claim conciliation panel hearing, or the counsel or other representative of the party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury; provided that the decision, conclusion, finding, or recommendation may be admissible for the purpose of section -16.

§ -12 Arbitration; subsequent litigation. Any person or the person's representative claiming that a tort has been committed by a design professional or any design professional against whom a claim has been made may elect to bypass the court annexed arbitration program under section 601-20 after the claim has been submitted to the design claim conciliation panel and the panel has rendered a decision or has not reached a decision within the tolling period of the statute of limitations under section -15.

§ -13 Submission of claim to an alternative dispute resolution provider. (a) Any claim initially filed with the design claim conciliation panel may be subsequently submitted to an alternative dispute resolution provider upon the written agreement of all of the parties to the claim and with the written approval of the director. The director shall approve the alternative dispute resolution provider and the alternative dispute resolution procedures.

(b) The parties shall comply with the procedures established by the alternative dispute resolution provider and approved by the director. If a party does not comply with those procedures, any other party may file a motion with the director to have the claim resubmitted to the design claim conciliation panel.

(c) Within thirty days after the completion of the alternative dispute resolution process, the alternative dispute resolution provider shall notify all parties concerned, their counsel, and the representative of each design professional's liability insurance carrier authorized to act for the carrier, as appropriate, that the alternative dispute resolution process has been completed.

(d) The claimant may institute litigation based upon the claim in an appropriate court only if:

- (1) The parties were not able to resolve the entire claim through the alternative dispute resolution process and the matter has not been resubmitted to the design claim conciliation panel pursuant to subsection (b); or
- (2) The claim has not been resolved through the alternative dispute resolution process after twelve months from the date the claim was filed with the approved alternative dispute resolution provider.

(e) No statement made in the course of the approved alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved alternative dispute resolution provider on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the approved alternative dispute resolution hearing, their counsel, or other representative of the party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury.

§ -14 **Immunity of panel members from liability.** No member of a design claim conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to a design claim conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within the member's capacity as a member of a design claim conciliation panel under this chapter.

§ -15 **Statute of limitations tolled.** The filing of the claim with the design claim conciliation panel or with an approved alternative dispute resolution provider shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date of the decision of the panel or the notification of completion from the approved alternative dispute resolution provider is mailed or delivered to the parties. If a decision by the design claim conciliation panel is not reached within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations shall resume running and the party filing the claim may commence a suit based on the claim in any appropriate court of this State. The panel or the approved alternative dispute resolution provider shall notify all parties in writing of this provision.

§ -16 **Duty to cooperate; assessment of costs and fees.** It shall be the duty of every person who files a claim with the design claim conciliation panel, every design professional against whom the claim is made, and every insurance carrier or other person providing professional tort liability insurance for the design professional, to cooperate with the design claim conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of the claim; provided that cooperation shall not prejudice the substantive rights of those persons.

Any party may apply to the panel to have the costs of the action assessed against any party for failure to cooperate with the panel. The panel may award costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, filing fees, and costs of the design claim conciliation panel hearing to the party applying therefor.

In determining whether any person has failed to cooperate in good faith, the panel shall consider, but is not limited to, the following:

- (1) The attendance of the persons at the hearing of the design claim conciliation panel;
- (2) The extent to which representatives of parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;
- (3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;
- (4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel;
- (5) The reasons advanced by the person so charged for not fully cooperating or negotiating; and
- (6) The failure of the person to submit any required fees to the department, as required by this chapter.

The party against whom costs are awarded may appeal the award to the circuit court. The court may affirm or remand the case with instructions for further proceedings, or it may reverse or modify the award if the substantial rights of the petitioners may have been prejudiced because the award is characterized as an abuse of discretion.

§ -17 **Annual report.** The director shall prepare and submit to the legislature annually, no later than twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include a summary of the claims brought before the design claim conciliation panel and the disposition of the claims, a description and summary of the work of the panel under this chapter, an appraisal of the effectiveness of this chapter in securing prompt and fair disposition of design tort claims, a review of the number and outcomes of claims brought under section -5 and recommendations for changes, modifications or repeal of this chapter or parts thereof with accompanying reasons and data."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. This Act shall take effect on January 1, 2008.

(Approved June 21, 2007.)