LATE TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER LAWYERS OF HAWAII (CLH) REGARDING H.B. NO. 2252

January 31, 2008

To: Chairman Robert Herkes and Members of the House Committee on Consumer Protection and Commerce:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) regarding H.B. No. 2252.

This measure repeals current Article 16 Guaranty Association provisions of H.R.S. Chapter 431 and replaces it with a new Guaranty Association Act. Consideration should be given to whether there is a need for a wholesale replacement of the current Guaranty Association Act, or whether significant issues, if any, are best addressed through specific amendments.

Subsection 16-C(2)(E) excludes third-party claims under a policy where the insured policyholder has a net worth in excess of $25 million. Current Guaranty Fund provisions exclude first-party claims by a policyholder with a net worth in excess of $25 million for benefits under its own policy. The principle being that a policyholder of such vast wealth does not need the protection of the Guaranty Fund. An ordinary consumer with a claim against a wealthy policyholder, however is not in the same position to absorb losses because the other person who caused injury or damages (the policyholder) is wealthy. The purpose of the Guaranty Fund "to provide a mechanism for the payment of covered claims . . . to avoid excessive delay in payment and . . . minimize financial loss to claimants or policyholders because of the insolvency of an insurer" is not served in the case of ordinary consumers who comprise the vast majority of third-party claimants. This provision would force ordinary consumers to abandon valid claims or pursue expensive and time consuming lawsuits against uninsured policyholders of insolvent insurance companies.

Subsections 16-C(2)(H) & (I) exclude attorneys fees incurred by consumers who are forced to retain legal representation to challenge wrongful denials of benefits by the Guaranty Association. It is a fundamental principle of insurance law that consumers are entitled to payment of valid claims and that any legal expense required because of the wrongful denial of benefits should be paid by the insurer or Guaranty Association. Otherwise consumers will be forced to abandon valid claims because the cost of recovery often exceeds the amount of the claim and is thus prohibited. It is an established rule that the Guaranty Association must pay for legal expenses incurred by consumers to challenge the wrongful denial of benefits. See, e.g., Carrier v. Hawaii Insurance Guaranty Association, 68 Haw. 545 (1986).

Subsection 16-F(5) apparently invalidates settlements entered into within the one year before an order of liquidation. This provision has the potential to wreak havoc with consumers who have likely spent or otherwise committed their settlement funds over such a long period of time. The current Guaranty Association law recognizes the difficulty with such "look-back" provisions and instead provides that the association shall honor covered claims existing prior to the order of liquidation in Section 431:16-108(a)(1). A one year look-back provision is unfair and unrealistic when applied to ordinary consumers.

There are immunity provisions that grant the association, its agents, employees and others acting by or on behalf of the association total immunity for any action taken or failure to act in the performance of their powers and duties. The extent of this immunity should be clarified to specifically subject the association and its employees to general statutory and agency rules governing the conduct of those involved in a transaction of insurance, as well as specifically exempt liability for egregious misconduct such as gross negligence, willful or intentional misconduct or conduct giving rise to punitive damages. This will strike a balance in providing

protection against ordinary errors and mistakes, while retaining protection for consumers to prohibit and discourage extreme misconduct.

CLH appreciates this opportunity to testify regarding H.B. No. 2252.