



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:

H.B. NO. 382, RELATING TO STATE TORT LIABILITY.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 24, 2009 **TIME:** 2:05 PM

LOCATION: State Capitol, Room 325

Deliver to: State Capitol, Room 302, 1 Copy

TESTIFIER(S): Mark J. Bennett, Attorney General,
or Caron Inagaki, Deputy Attorney General

Chair Karamatsu and Members of the Committee:

The Department of the Attorney General opposes this bill.

This bill requires notification of potential class action lawsuits against the State, prior to filing or prosecution, to the Governor, the President of the Senate, and the Speaker of the House of Representatives. It also requires that "[a] filed copy of the complaint and all relevant supporting and exculpatory materials in possession of the proposed class representative or its counsel shall be served" on the President of the Senate and the Speaker of the House of Representatives.

It is unclear what, if anything, the Governor, the President of the Senate, and the Speaker of the House of Representatives are expected to do once the class action notification is made. Also, it is not logical to have only the President of the Senate and the Speaker of the House of Representatives receive the supporting and exculpatory materials, and not the Governor who has also received notice of the potential class action. Moreover, if this bill proceeds, the Department of the Attorney General should also be notified of any litigation or potential litigation, even if a lawsuit has not been filed.

It is also unclear what, if anything, the President of the Senate and the Speaker of the House of Representatives are expected to do with the supporting and exculpatory materials once they

receive them, particularly if the Legislature is not in session at that time.

If the intent of this bill is to have the members of the Legislative Branch attempt to resolve the matter prior to the filing of the lawsuit, the bill may violate the separation of powers because it usurps the powers of the Executive Branch.

The bill further provides in the second sentence of section 1(b) that "[t]he complaint 'shall remain under seal' for at least sixty days after service upon the attorney general of the complaint and all relevant supporting and exculpatory materials in the possession of the proposed class representative or its counsel." However, nothing is mentioned about filing the complaint under seal in the first sentence of section 1(b). If the intent is to have the complaint filed under seal at the outset, some reference should be made in the first sentence that the complaint, when filed, must be filed under seal. In addition, if the lawsuit is meant to be kept confidential while it remains under seal, there should be some reference to the obligations of the President of the Senate, the Speaker of the House of Representatives, or any other person who is served with the complaint, as well as the plaintiff or the plaintiff's representatives, to prevent this information from becoming public. We further note that, while section 1(b) references service on the Attorney General, class actions often name individual defendants who also must be served under existing court rules.

Finally, if this proposed section is to be placed anywhere, it should be placed in chapter 661, Hawaii Revised Statutes, and not in chapter 662, Hawaii Revised Statutes, which is the State Tort Liability Act. Placing this proposed section in chapter 662 could have the unintended consequence of having the State automatically waive its sovereign immunity in every class action lawsuit where torts are alleged.

We therefore respectfully request that this measure be held.