

JAN 23 2009

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# A BILL FOR AN ACT

RELATING TO ATTORNEYS' FEES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Section 514B-157, Hawaii Revised Statutes, is  
2 amended by amending subsection (b) to read as follows:

3           "(b) If any claim by an owner is substantiated in any  
4 action against an association, any of its officers or directors,  
5 or its board to enforce any provision of the declaration,  
6 bylaws, house rules, or this chapter, then all reasonable and  
7 necessary expenses, costs, and attorneys' fees incurred by an  
8 owner shall be awarded to [~~such~~] the owner; provided that no  
9 [~~such~~] award shall be made in any derivative action unless:

10           (1) The owner first shall have demanded and allowed  
11           reasonable time for the board to pursue [~~such~~]  
12           enforcement; or

13           (2) The owner demonstrates to the satisfaction of the  
14           court that a demand for enforcement made to the board  
15           would have been fruitless.

16           If any claim by an owner is not substantiated in any court  
17 action against an association, any of its officers or directors,



1 or its board to enforce any provision of the declaration,  
2 bylaws, house rules, or this chapter, then all reasonable and  
3 necessary expenses, costs, and attorneys' fees incurred by an  
4 association shall be awarded to the association, unless before  
5 filing the action in court the owner has first submitted the  
6 claim to mediation, or to arbitration under subpart D, and made  
7 a good faith effort to resolve the dispute under any of those  
8 procedures.

9 Section 607-14 shall not apply to this subsection."

10 SECTION 2. Section 607-14, Hawaii Revised Statutes, is  
11 amended to read as follows:

12 **"§607-14 Attorneys' fees in actions in the nature of**  
13 **assumpsit, etc. (a)** In all the courts, in all actions in the  
14 nature of assumpsit and in all actions on a promissory note or  
15 other contract in writing that provides for an attorney's fee,  
16 there shall be taxed as attorneys' fees, to be paid by the  
17 losing party and to be included in the sum for which execution  
18 may issue, a fee that the court determines to be reasonable;  
19 provided that the attorney representing the prevailing party  
20 shall submit to the court an affidavit stating the amount of  
21 time the attorney spent on the action and the amount of time the  
22 attorney is likely to spend to obtain a final written judgment,



1 or, if the fee is not based on an hourly rate, the amount of the  
2 agreed upon fee. The court shall then tax attorneys' fees [~~7~~  
3 ~~which~~] that the court determines to be reasonable, to be paid by  
4 the losing party; provided that this amount shall not exceed  
5 twenty-five per cent of the judgment.

6 (b) Where the note or other contract in writing provides  
7 for a fee of twenty-five per cent or more, or provides for a  
8 reasonable attorney's fee, not more than twenty-five per cent  
9 shall be allowed.

10 (c) Where the note or other contract in writing provides  
11 for a rate less than twenty-five per cent, not more than the  
12 specified rate shall be allowed.

13 (d) Where the note or other contract in writing provides  
14 for the recovery of attorneys' fees incurred in connection with  
15 a prior debt, those attorneys' fees shall not be allowed in the  
16 immediate action unless there was a writing authorizing those  
17 attorneys' fees before the prior debt was incurred. "Prior  
18 debt" for the purposes of this section is the principal amount  
19 of a debt not included in the immediate action.

20 (e) The [~~above~~] fees provided for by this section shall be  
21 assessed on the amount of the judgment exclusive of costs and



1 all attorneys' fees obtained by the plaintiff, and upon the  
2 amount sued for if the defendant obtains judgment.

3 (f) Nothing in this section shall limit the recovery of  
4 reasonable attorneys' fees and costs by a planned community  
5 association and its members in actions for the collection of  
6 delinquent assessments, the foreclosure of any lien, or the  
7 enforcement of any provision of the association's governing  
8 documents, or affect any right of a prevailing party to recover  
9 attorneys' fees in excess of twenty-five per cent of the  
10 judgment pursuant to any statute that specifically provides that  
11 a prevailing party may recover all of its reasonable attorneys'  
12 fees. "Planned community association" for the purposes of this  
13 section means a nonprofit homeowners or community association  
14 existing pursuant to covenants running with the land.

15 (g) This section shall not apply to a claim for attorneys'  
16 fees in actions under section 514B-157(b) incurred by an owner  
17 of a condominium for any common law tort, breach of fiduciary  
18 duty, or statutory cause of action, including but not limited  
19 to, claims under chapter 480, brought by the owner against the  
20 association, any of its officers or directors, or its board to  
21 enforce any provision of the declaration, bylaws, house rules,  
22 or chapter 514B."



# S.B. NO. 573

1 SECTION 3. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 4. This Act shall take effect upon its approval.

4

INTRODUCED BY: Will Eyer  
Carol Fukunaga  
Barbara H. Bell  
John Hsu



**Report Title:**

Attorneys' Fees; Condominiums; Association

**Description:**

Clarifies that Hawaii law relating to the recovery of attorneys' fees in actions in the nature of assumpsit does not apply to common law tort, breach of fiduciary duty, and statutory causes of actions brought by a condominium unit owner against an association.





Mililani Town Association

95-303 Kaloapau Street  
Mililani Town, HI 96789  
Phone (808) 623-7300

February 7, 2009

Senator Rosalyn Baker, Chair  
Senator David Ige, Vice-Chair  
Committee on Commerce  
& Consumer Protection  
State Capitol  
Honolulu, HI 96813

VIA E-Mail: CPNTestimony@Capitol.hawaii.gov

Re: S.B. No. 573– Relating to Attorneys’ Fees  
Hearing: Wednesday, February 11, 2009, 8:30 am, Conf Room 229

Dear Chair Baker, Vice-Chair Ige and Committee Members:

My name is Eric Matsumoto, Vice-President of the Mililani Town Association (MTA). I have served in MTA leadership capacities for 24 of the last 30 years serving on the board. MTA encompasses 16,000 plus units, both single family units and townhouse projects.

We strongly oppose this bill. Associations’ revenues are primarily from dues fairly and equitably charged to and received from homeowners. This bill, however, is flawed in creating an untenable and costly situation for associations when unable, legislatively, to collect those attorneys’ fees that would properly be due them otherwise, in addition to likely increased insurance premiums. More importantly, it transfers the burden of costs to the 99+% of the homeowners who are not involved in the lawsuit, but become responsible for the added costs the association must bear.

With passage of this bill we can be certain that the number of frivolous or meritless lawsuits will increase, perhaps significantly, since no more than 25% of attorneys can be charged to those filing and losing them, resulting in unrecoverable, unnecessary expenses. This displays a blatant disregard for the rights of and likely increased dues for the 99+% of homeowners who bear the burden of covering the costs for the homeowners who bring frivolous or meritless lawsuits, while promoting only win-lose scenarios; wins for the homeowners filing frivolous or meritless lawsuits and losses for the associations and their 99+% membership.

We strongly urge that this bill be held.

Sincerely yours,

Eric M. Matsumoto  
Vice-President, Board of Directors

Cc: Senator Kidani  
Senator Bunda  
Representative Lee  
Representative Yamane

**STEPHEN M. SHAW**

Attorney At Law

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Telephone: (808) 521-0800

Fax: (808) 531-2129

Email: shawy001@gmail.com

**February 9, 2009**

**ATTN: SENATE SERGEANT-AT-ARMS (Fax: 586-6659)**

**TESTIMONY SUPPORTING SB 573  
WITH MINOR AMENDMENT**

**To: COMMERCE AND CONSUMER PROTECTION COMMITTEE**

**Hearing: February 11, 2009, Wednesday, Room 229**

**From: Stephen M. Shaw, Esq.**

**Re: SB 573 – Relating To Attorneys Fees/Condominiums**

Dear Chair Baker, Vice Chair David Ige, and other Honorable Members of the Senate Commerce and Consumer Protection Committee, State of Hawaii:

Thank you for allowing SB 573 to be heard.

I am an attorney in private practice which includes handling condominium disputes for homeowners. While I have done condo court cases, mediations, and other litigated condominium matters on behalf of condo owners, most of the more egregious cases cannot be litigated until the attorney's fee provisions are clarified.

If passed, SB 573 will clarify existing law relating to attorney's fees and costs in disputes between owners and condominiums and their managers, managing agents, directors and officers, ("management"). This will provide predictability and fairness to litigants in both the DCCA condo court" pilot

program, and the State courts. More importantly, this minor change will firmly establish the use of mediation for nearly all condo disputes, rather than just a few enforcement issues.

Clarification is needed because HRS §514B-157(b) presently only covers the single remedy of enforcing provisions of the declaration, bylaws, house rules, or chapters 514B. Owners bringing actions for this very narrow range of disputes do not have to pay the other side's attorney fees if they lose and if the owners first go to mediation

Unless clarified by SB 573, the implication of HRS §514B-157(b) is that all other disputes are subject to HRS §607-14 because of the presence of numerous contracts underlying Hawaii's condominium projects. When courts classify causes of action as within the HRS §607-14, losing parties are required to pay the other side's attorney fees and costs. This is not a sanctions statute for frivolous litigation. For condominium disputes, there is currently no mediation caveat other than for enforcement proceedings, which prevents "loser pays" awards if enforcement claims are first mediated.

Since many condominium owners are unrepresented and management is often represented by large law firms this "English Rule" of fee allocation unfairly penalizes condominium owners who rightfully fear liens from their opponents' attorneys' fees being foreclosed on their homes. So much so that owners are chilled and deterred from petitioning to redress significant grievances; with the exception of the narrow enforcement procedure spelled out by current by HRS §514B-157(b).

While enforcement against future violations is important, the existing language of 157(b) does not cover damages, disgorgement, and other remedies for

misapplying association funds, for example. Most of the calls I receive from condo owners involve misapplication of their maintenance fees by managing agents, managers or directors/officers. Under the current version of HRS §514B-157(b), condominium owners injured financially by misapplication of their maintenance fees are chilled from bringing appropriate claims for breach of fiduciary duty. This is because judicial “legislation” has classified the cause of action as within HRS §607-14’s “loser pays” scheme for attorney’s fees and costs. Blair v. Ing, 96 Haw 327, 31 P.3d 184, 189 (2001). As a result, this very serious breach may now be only enjoined prospectively, but the misapplied funds may not be recovered due to fears by owners over liens for attorneys’ fees, even if they mediate. In many cases, these misapplied funds run into the hundreds of thousands of dollars. On Kauai, one case is in the millions.

The intent of the legislature was to discourage breaches of fiduciary duties in condominium management. This intent is expressed by two statutes clearly making managing agents, directors and officers fiduciaries. HRS §514B-106(a) and 514B-132(c). Without this minor clarification, to HRS §§514B-157(b) and 604-14, there will be no mechanism to recover the misapplied funds from condominium fiduciaries. This is because owners rightfully fear liens being placed on their homes unless they pay the other side’s attorney fees and costs, even if they mediate beforehand. These fees and costs are not imposed for frivolous claims. That is a separate statute not relevant here – HRS §607-14.5.

This minor, urgently needed, clarification will provide predictable guidelines for the judiciary and the DCCA condo court in the growing number of disputes related to misapplication of association funds and maintenance fees. The proposed change will allow owners to bring claims to recover misapplied funds based on Chapter 480, tort causes of action, or statutory violations. At the same time, the

proposed change encourages mediation of these claims, which currently do not need to be mediated, since they do not involve enforcement of bylaws etc.

It is well to remember that the American Rule is that each side bears its own attorney fees and costs win or lose. Exceptions to that rule must have some articulated basis; which, in condominium law, is to encourage mediation. Clarifying these two statutes in this minor way will further the goal of mediating a broader range of disputes between condominium owners and management, within a predictable and fair framework.

### **PROPOSED CHANGE TO SB 573**

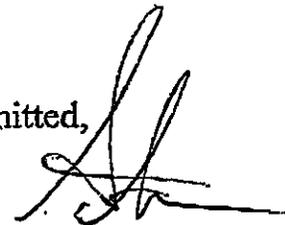
At page 4 of SB 573, in the underlined portion, the phrase "by an owner of a condominium" should be stricken. This is because HRS §607-14 is double-edged. The English Rule, "loser pays" system applies regardless of whether it is a condominium owner or the opponents. Striking this phrase will harmonize the amendment with the rest of the section it modifies.

### **CONCLUSION**

As a litigation attorney (over 26 years active in California and over 23 years in Hawaii) and a condominium owner, I strongly believe that the legislature wants its condominium laws enforced, and that the proposed amendment is needed simply due to previous oversight in drafting.

DATED: Honolulu, Hawaii, February 9, 2009.

Respectfully Submitted,



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Stephen M. Shaw, Esq.  
Attorney

**HARBOR SQUARE VOLUNTEER APARTMENT OWNERS' COMMITTEE (VAOC)**

c/o 225 Queen Street, #17C  
Honolulu, Hawaii 96813  
Email: [hsvaoc@gmail.com](mailto:hsvaoc@gmail.com)

Catherine Shim, Chair  
(808) 533-1142

Yuan Shaw, Secretary  
(808) 383-0998

**February 9, 2009**

**ATTN: SENATE SERGEANT-AT-ARMS (Fax: 586-6659)**

**TESTIMONY SUPPORTING SB 573**

**To: COMMERCE AND CONSUMER PROTECTION COMMITTEE**

**Hearing: February 11, 2009, Wednesday, Room 229**

**From: HARBOR SQUARE VOLUNTEER APARTMENT OWNERS' COMMITTEE (VAOC)**

**Re: SB 573 – Relating To Attorneys Fees/Condominiums**

Dear Chair Baker, Vice Chair David Ige, and other Honorable Members of the Senate Commerce and Consumer Protection Committee, State of Hawaii:

Thank you for affording the opportunity to testify in support of SB 573. We are volunteer members of HARBOR SQUARE VOLUNTEER APARTMENT OWNERS' COMMITTEE (Harbor Square VAOC). This owners' Committee was formed and authorized by Hawaii Revised Statutes sections 514B-108(c) and 514B-110(b).

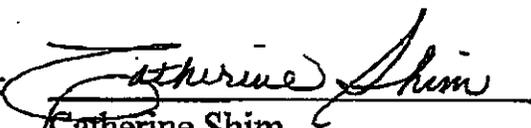
Harbor Square, 700 Richards and 225 Queen Street, Honolulu, HI 96813, has 370 units (360 residential units and 10 commercial units). Harbor Square VAOC was formed by volunteer homeowners after numerous owners raised concerns over mismanagement of funds, directors' self-dealing and out of control increases in maintenance fees, waste and assessment abuses.

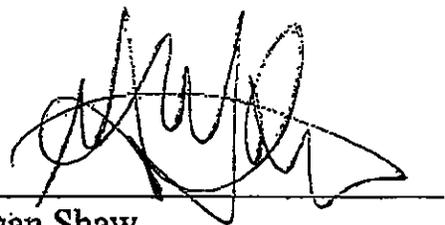
Harbor Square's VAOC promptly launched a petition drive to amend the bylaws to impose term limits on directors. Harbor Square VAOC has obtained 143 owners' signatures from 128 apartments at Harbor Square. Harbor Square VAOC regularly communicates with all owners at Harbor Square, with reports.

On behalf of Harbor Square 143 homeowners, and many others who are afraid to sign the petition due to incidents of physical and financial retaliation and intimidation by management, **Harbor Square VAOC supports SB 573**. If passed, SB 573 will encourage management to mediate claims over misapplied Association funds or maintenance fees and to offer obtain credits or damages when management fraud, waste, and assessment abuses are substantiated.

SB 573 makes it clear that if mediation does not resolve claims by unit owners for return of misapplied maintenance fees or association funds that the American rule of attorney fees will apply. Both sides of these disputes will understand that they are responsible for only their own attorney fees, but only if they first submit the dispute to mediate.

SB 573 eliminates a chill on the right of apartment owners to petition for redress of grievances when their fiduciaries misapply maintenance fees and association funds. The present version of HRS §514B-157(b) only applies to actions to enforce bylaws, rules, declarations, and Chapter 514 by looking forward. The present version is too restrictive when association funds are misapplied, because the loser will pay the other side attorneys' fees even if the parties mediate.

By:   
Catherine Shim,  
Chair, Harbor Square VAOC

By:   
Yuan Shaw  
Secretary, Harbor Square VAOC

FEB 10 2009  
10:50 A

February 10, 2009

SENATE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE  
REGARDING SENATE BILL 573

Hearing Date : WEDNESDAY, February 11, 2009  
Time : 8:30 a.m.  
Place : Conference Room 229

Chair Baker and Members of the Committee:

My name is John Morris and I am testifying on behalf of the Hawaii Legislative Action Committee of the Community Associations Institute ("CAI") about Senate Bill 573. CAI Hawaii is the local chapter of a national organization dedicated to improving the management and operation of community associations nationwide. CAI has over 200 members in Hawaii and over 14,000 nationwide.

CAI has concerns because we are not sure of the purpose of this bill. The wording of the bill suggests that it is intended to confirm that section 607-14, Hawaii Revised Statutes, does not apply to disputes involving condominium associations. CAI was not aware that there was a problem or that section 607-14 had been interpreted to apply to condominium associations. Under the general principle of interpretation that "a specific section on a particular issue overrides a more general section", CAI has always understood that the attorneys' fees provision in the condominium law, section 514B-157, not section 607-14, was the controlling section of Hawaii Revised Statutes relating to legal fees for condominium disputes. On that basis, SB 573 seems unnecessary.

On the other hand, if the intent of SB 573 is to limit a condominium association's ability to recover legal fees from an owner who brings a claim against a condominium association in circuit court, CAI opposes such a limit. As the bill indicates, section 514B-157(b) already includes a protection for condominium owners who pursue claims against their associations. More specifically, the section states:

*If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless before filing the action in court the owner has first submitted the*

CAI Testimony Regarding SB 573

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Page 2

*claim to mediation, or to arbitration under subpart D, and made a good faith effort to resolve the dispute under any of those procedures.*

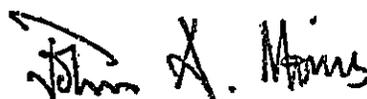
Essentially, the underlined language in section 514B-157(b) already protects an owner from legal fees awards. The language does so by clearly stating that if before going to court the owner tries mediation or arbitration, even if the owner goes to court and loses, he will not be liable for the association's legal fees. This language seems to be sufficient protection for an owner's interests and encourages alternative dispute resolution procedures so that condominium disputes do not clog the courts.

Finally, it is not clear that section 607-14 would apply to tort claims, breach of fiduciary claims, or chapter 480 claims because they are not actions in the "nature of assumpsit." Therefore, that provision of the amendment seems unnecessary.

In light of the analysis outlined above, SB 573 seems to be unnecessary and will only create additional complications in the condominium law without providing any real benefits. Therefore, CAI believes this bill should be held unless there is a clear purpose for its introduction.

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,



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John A. Morris  
Hawaii Legislative Action Committee  
of the Community Associations Institute

JAM:alt

**LAW OFFICES OF PHILIP S. NERNEY, LLLC**

A LIMITED LIABILITY LAW COMPANY  
201 MERCHANT STREET, SUITE 1500, HONOLULU, HAWAII 96813  
PHONE: 808 537-1777  
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February 6, 2009

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
and Consumer Protection  
415 S. Beretania Street  
Honolulu, Hawaii 96813

Re: SB 573/Oppose-2/11 @ 8:30 a.m.  
Commerce and Consumer Protection

Dear Senator Baker:

I am an attorney in private practice. I have represented condominium and community associations full time since 1990.

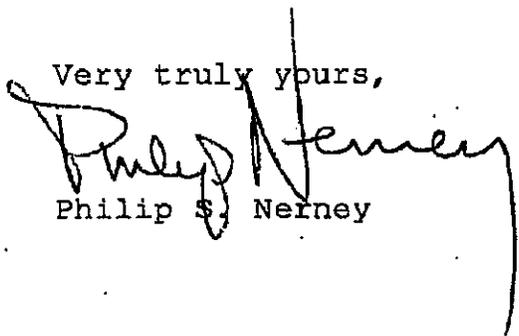
SB 573 should not be enacted. There is no rational basis for enabling condominium owners to escape the usual and customary consequences of losing in litigation.

The Legislature should not enable a tyranny of the minority. This is simply special legislation for people who want to avoid personal responsibility and accountability for bringing baseless lawsuits.

This legislation would allow any person, whether motivated by malice, illness, greed or otherwise, to impose expense on the majority of innocent owners, without risk of accountability. What is the body of empirical evidence that suggests that there is even the slightest need or reason for such legislation? Why would the Legislature even consider such a radical notion?

Individuals with meritorious claims can bring them with reasonable assurance that they will be prevailing parties. If they do not have meritorious claims, then there is no reason to shield them from the consequences of a longstanding law, of general applicability, to the effect that prevailing parties are entitled to recover attorney's fees.

Very truly yours,

  
Philip S. Nerney