

TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2010

ON THE FOLLOWING MEASURE:

S.B. NO. 2661, S.D. 2, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE:	Tuesday, March 9, 2010	TIME:	2:05 p.m.
LOCATION:	State Capitol, Room 325		
TESTIFIER(S):	Mark J. Bennett, Attorney (Caron M. Inagaki, Deputy At		

Chair Karamatsu and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to appropriate funds to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

S.B. No. 2661, S.D. 2, contains nine claims that total \$1,791,527.35. Of this total, \$1,768,302.01 consists of general fund appropriation requests and \$23,225.34 is an appropriation request from departmental funds. Attachment A provides a brief description of each claim in the bill.

Since the bill was introduced, five new claims have been resolved for an additional \$4,110,815.29. Of this total, \$3,985,815.29 consists of general fund appropriation requests and \$125,000.00 consists of appropriation requests from departmental funds. Attachment B provides a brief description of each claim in the bill.

We request that the Committee amend the bill to appropriate funds for these claims.

In addition to the appropriation of funds for the claims described in Attachments A and B, we are requesting a new

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section 3 of part II of the bill be added to reflect the Department of Transportation, Highways Division, case. The new section 3 should read as follows:

SECTION 3. The following sums or so much thereof as may be necessary for fiscal year 2009-2010 are appropriated out of the state highway fund for the purpose of satisfying claims for legislative relief as to the following named persons, for claims against the State or its officers or employees for payments of judgments or settlements, or other liabilities, in the amount set forth opposite their names:

JUDGMENTS AGAINST THE STATE AMOUNT AND SETTLEMENTS OF CLAIMS:

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Cabrera, et al. v. State of \$ 75,000.00 (Department Hawaii, et al., Civil No. 06-1-0317-02, Settlement Appropriation) First Circuit

D&J Ocean Farms, Inc. v. Pedro,\$ 25,000.00 (Departmentet al., Civil No. 06-1-0373(3),Settlement Appropriation)Second CircuitSettlement Appropriation

Morales v. Department of\$ 25,000.00 (DepartmentTransportation, et al.,Settlement Appropriation)Civil No. 06-1-2206-12, First Circuit

SUBTOTAL:

TOTAL (SECTION 3)

\$125,000.00

\$125,000.00

The sums appropriated shall be expended by the department of transportation, highways division, for the purposes of this Act.

Sections 3 and 4 under part II should be renumbered accordingly as sections 4 and 5, and the sections in part III should also be renumbered. Testimony of the Department of the Attorney General Twenty-Fifth Legislature, 2010 Page 3 of 10

Including the new claims, the appropriation request totals \$5,902,342.64 allocated among fourteen claims. Of this total, \$5,754,117.30 consists of general fund appropriation requests and \$148,225.34 consists of appropriation requests from departmental funds.

S.D. 2 does not include dollar amounts for the identified claims. We request that the bill be amended to include the dollar amounts consistent with H.B. No. 2508, H.D. 1, which was heard on February 22, 2010, before the House Committee on Finance.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We therefore respectfully request amendment and passage of this measure.

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ATTACHMENT "A"

DEPARTMENT OF HUMAN SERVICES:

Hensen v. State of Hawaii\$ 30,000.00 (General Fund)Civil No. 06-1-0794, First CircuitSettlement

The biological parents of two minor children ages 9 and 6 years old allege that the Department of Human Services (DHS) wrongfully removed the children from their family home and placed them in a temporary foster home. The parents allege that DHS conducted an untimely and incomplete investigation of a child neglect complaint against them, and misrepresented, among other things, that three mental health professionals supported removal of the children, when they, in fact, did not. As a result, the children were removed from their home for a month, but subsequently returned when the three professionals disclaimed support for the removal.

Manalo v. Wells, et al.\$ 32,478.37 (General Fund)Civil No. 08-1-2212-10, First CircuitJudgment

Claimant's vehicle was struck by a State of Hawaii, Department of Human Services' employee acting in the course and scope of his duties on December 4, 2006. Claimant suffered damages as a result of the accident. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator found in favor of the Claimant and awarded her \$40,109.66 in total damages, less \$10,000 for the covered loss deductible, plus \$1,391.73 in costs and interest.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Consolidated Cases: Fehring, et al. v. Pflueger, et al. Civil No. 06-1-0082, Fifth Circuit

Midler, et al. v. Pflueger, et al. Civil No. 06-1-0110, Fifth Circuit

Pflueger, et al. v. State of Hawaii Civil No. 07-1-0117, Fifth Circuit

Calisher, et al. v. Pflueger, et al. Civil No. 07-1-0106, Fifth Circuit

Fehring, et al. v. Pflueger, et al. Civil No. 08-1-0050, Fifth Circuit 368805_1.DOC \$1,500,000.00 (General Fund) Settlement Testimony of the Department of the Attorney General Twenty-Fifth Legislature, 2010 Page 5 of 10

Fehring, et al. v. Pflueger, et al. Civil No. 08-1-0051, Fifth Circuit

Bosma, et al. v. Pflueger, et al. Civil No. 08-1-0052, Fifth Circuit

Midler, et al. v. Pflueger, et al. Civil No. 08-1-0053, Fifth Circuit

These cases are based on the breach of the Ka Loko Dam on March 14, 2006, resulting in a flood that caused the death of seven persons (Fehring) and damage to numerous parcels of property (Midler, Bosma and Calisher). The State was made a party based on the allegations of negligence by PUC in regulating the irrigation system operator, by the Department of Land and Natural Resources in not inspecting the dam and requiring the owner of the dam to maintain the dam, and by the State of Hawaii generally as the landowner of the watershed above the dam allegedly having the responsibility of controlling the flow of water.

The cases proceeded to mediation resulting in the global settlement among all parties. The State of Hawaii succeeded on having all allegations of liability dismissed except for the allegations related to the State of Hawaii being the owner of the property above the private property on which the dam was located.

The settlement agreement includes an assignment of claims of any rights, privileges, claims, or any other recourse the State may have pursuant to insurance policies that provide insurance coverage to the State arising out of the released claims.

Roque v. Dickman, et al.\$ 93,850.00 (General Fund)Civil No. 07-1-0497-03 First CircuitSettlement

Claimants were defrauded of their interest in property pursuant to a forged deed. The parties who defrauded Claimants of their interest subsequently mortgaged the property. The mortgagee claims to have a superior secured interest in the property based upon the Land Court having issued a transfer certificate of title naming the defrauding parties as owners of the property. Pursuant to section 501-212, Hawaii Revised Statutes, et seq., the Claimants may recover the value of the property from the Director of Finance after exhausting all other remedies. All other remaining defendants are insolvent. Testimony of the Department of the Attorney General Twenty-Fifth Legislature, 2010 Page 6 of 10

DEPARTMENT OF PUBLIC SAFETY:

Botelho, et al. v. State of Hawaii, et al. \$ 30,454.33 (General Fund) Civil No. 06-00096 DAE-BMK, USDC Judgment

Inmates at the Hawaii Community Correctional Center in Hilo were injured while the prison was being evacuated during a fire on July 24, 2004. The judgment in favor of the inmates for their injuries (\$20,500.00) was paid with funds appropriated by the 2009 Legislature. Thereafter, the court awarded \$30,454.33 to the inmates' attorney for fees.

DeJesus, et al. v. State of Hawaii, \$ 80,000.00 (General Fund) et al., Civil No. 06-1-1070-06, Settlement First Circuit

This case involves the discharge of eight employees of the Department of Public Safety who were on workers' compensation leave for one year or more and had no foreseeable return to work date. Former Director of Public Safety John Peyton made the decision to discharge the employees to address staffing issues at the correctional facilities, i.e., to fill the positions with people who could work.

DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:

Flores, et al. v. Department of Transportation, et al., Civil No. 07-1-0204, Fifth Circuit \$ 23,225.34 (Department Judgment Appropriation)

A roll-up door at the Pier 3 warehouse at Nawiliwili Harbor on Kauai suddenly and unexpectedly came down and struck Claimant on the head while he was picking up freight from Young Brothers on August 4, 2005. The roll-up door, which is approximately 20 feet high, had been in an open position before it unexpectedly fell and struck Claimant. Claimant's alleged injuries include a closed head injury, cervical strain, right shoulder strain and impingement, and chronic and constant headaches. This case proceeded to the Court Annexed Arbitration Program. The arbitrator found the State of Hawaii 100 percent liable and codefendant Young Brothers not liable. Plaintiff was awarded \$88,332 in damages. The State appealed and the case went to trial. The trial court found that both Young Brothers and the State were liable. The State's share of damages was \$27,298.93. Because the State was able to substantially improve on the arbitration award, Plaintiff was required to pay for the State's trial costs, reducing the total amount of the State's liability

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to \$22,661.59. With interest, the total amount of the appropriation is \$23,225.34.

MISCELLANEOUS CLAIMS:

Kathy M. Gillett

\$ 1,379.31 (General Fund)

Claimant requests tax refunds for amended tax returns for 2003 through 2005. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

June S. Hashizaki

\$ 150.00 (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes. Testimony of the Department of the Attorney General Twenty-Fifth Legislature, 2010 Page 8 of 10

ATTACHMENT "B"

DEPARTMENT OF EDUCATION:

Cabanting, et	al.	v. Poouahi,	\$ 3,485,815.38 (General Fund)
et al., Civil	No.	07-1-0038,	Settlement

The parental grandfather and the father of a now 15-year-old child alleged that employees of the Department of Education wrongfully failed to make mandatory reports of suspected child abuse after the minor's natural mother voluntarily had placed her with a caregiver. As a result, the minor was alleged to have suffered extensive and permanent injuries including brain damage from infections, loss of hearing in one ear, blindness in one eye, and the loss of her nose and upper lip and other injuries, the effect of which has left her unable to care for herself and unlikely to obtain employment. She was alleged to have needed some \$481,000 in future cosmetic surgery and lifetime care.

The State and its excess insurance carrier, Chartis Insurance (fka AIG), recently agreed to settle the Plaintiffs' claims for a total of \$5,750,000. The State's portion is its self-insured retention (SIR) and deductible of \$3,500,000 applicable for the year of this incident. (The State's self-insured retention was \$3,000,000. Also, for the period when this incident occurred, there was a further deductible of 50% of the first \$1,000,000 or any portion thereof in excess of the retained limit.)

\$835,470.96 is to be paid to the State as reimbursement for an outstanding DHS lien. (As part of the settlement, the State agreed to waive \$50,000 of the outstanding DHS lien of \$885,470.96). Thus, the State will, in effect, pay out a net amount of \$2,664,529.04, and Chartis will pay approximately \$2.25 million.

We are providing further details regarding this case in a confidential letter to the Chair of the House Committee on Judiciary.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Cabrera, et al. v. State of Hawaii,\$ 75,000.00 (Departmentet al., Civil No. 06-1-0317-02,Settlement Appropriation)First CircuitSettlement Appropriation

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Plaintiffs Warlito Cabrera, his wife Petra Cabrera, his son and daughter-in-law Peter Cabrera and Sharon Cabrera, and their daughter Lauren Cabrera own and reside at a property located at 1934 Ahuahu Place in Kalihi Valley. The property is located below DOT land that abuts Likelike Highway. There was an old storm drain that ran from the west to the east side of the highway, and behind the Cabrera property.

During heavy rains that occurred on February 27, 2004, the storm drain failed. Mud and water then entered the Cabreras' house, and yard. The investigation after the flood indicated that the storm drain had never been checked, cleaned out, or otherwise maintained. After the flood, DOT had Royal Contracting repair and upgrade the storm drain. DOT director Rod Haraga also made a promise to Plaintiffs to repair the damage to their property. Thereafter, DOT helped perform some of the clean-up work, and Royal also performed some repairs to the yard. In light of the DOT's post-flood investigation, and Mr. Haraga's promise to Plaintiffs, the State's negligence is not in dispute.

Plaintiffs submitted an estimate of \$1,014,980 for the damages to the dwelling. After determining that Plaintiffs' expert who provided the estimate was a family member who had not used any accepted methodology for doing the estimate, the State produced its experts' estimates and itemizations, which took into account pre-flood substandard construction that contributed to the extent of the damage, as well as depreciation. Using the State's experts' analysis, the figure of \$56,015.95 was determined to be the cost of repairs (less depreciation) to damage caused solely by the flood.

In addition, the Plaintiffs made a claim for emotional distress caused by the incident and the aftermath of damage to their home. Both the mediation and settlement judges estimated that the amount for emotional distress could be in the range of \$10,000 - \$15,000. In addition, Plaintiffs would receive their costs of \$5,000 to \$8,000 if we tried the case. Therefore, the settlement amount is reasonable.

D&J Ocean Farms, Inc. v. Pedro,\$ 25,000.00 (Departmentet al., Civil No. 06-1-0373(3),Settlement Appropriation)Second CircuitSettlement Appropriation

D&J Ocean Farms operated an aquaculture farm on Molokai. D&J alleged that the State of Hawaii negligently designed and maintained a culvert running under Kamehameha V Highway located mauka of its property. As a result, runoff from the upslope property, including mud and debris, was diverted onto its Testimony of the Department of the Attorney General Twenty-Fifth Legislature, 2010 Page 10 of 10

property during rainy weather causing flooding and damage to D&J's aquaculture ponds.

Morales v. Department of Transportation, \$ 25,000.00 (Department et al., Civil No. 06-1-2206-12, Settlement Appropriation) First Circuit

This case arises out of a single-vehicle accident that occurred on December 27, 2004, at approximately 2:30 p.m. Prior to the accident, Plaintiff was driving her 2000 Isuzu northbound on the Likelike Highway (Wilson Tunnel) to Kaneohe. Plaintiff was wearing her seat belt at the time of the accident. The Plaintiff alleges that when her vehicle came out of the tunnel, her car slid on road grime that was on the roadway, making her vehicle spin and slam into the right wall of the highway. She further alleges that the accident was the result of the State's failure to reasonably inspect, maintain, and repair the roadway. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State of Hawaii 100 percent liable and awarded the Plaintiff \$28,198.25. The case later settled for \$25,000.00.

MISCELLANEOUS CLAIM:

DB Structured Products Inc.

\$ 499,999.91 (General Fund)

Claimant requests reissuance of an outdated check that was never received. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.