

A Bill for an Act Relating to Design Professional Conciliation Panel.

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

SECTION 1. Chapter 672, Hawaii Revised Statutes, is amended by adding two new sections to read as follows:

“§672- Determination of unsuitability. Any party or any person served with notice of a claim may file a motion with circuit court in the judicial circuit in which the claim arose for a determination that the subject matter of the dispute is unsuitable for review by a panel under this chapter; provided that no such application may be filed within ten days of the date on which the claim is scheduled to be heard by a panel or after such a hearing has taken place.

In determining whether the subject matter of a dispute is unsuitable for disposition pursuant to this chapter, a court may consider:

- (1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;
- (2) Problems referred to the court where court regulated discovery is necessary;
- (3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;
- (4) The fact that the design professional’s involvement in the matter is distinctly secondary in importance to the involvement of parties not covered by this chapter;

- (5) The potential for unreasonable delays in reaching any resolution of the matter by its referral to a panel pursuant to this chapter; or
- (6) The fact that there are too many parties or issues involved to be effectively handled by the informal processes of this chapter.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions.

§672- Certificate of consultation. (a) Any claim filed under this chapter shall be accompanied by a certificate which declares one of the following:

- (1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one design professional who is licensed to practice and practices in this State or any other state, or who teaches at an accredited college or university and is licensed to practice in this State or any other state, in the same discipline as the design professional against whom the claim is made and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable and meritorious cause for the filing of the claim. The persons consulted may not be a party to the case;
- (2) That the 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 within thirty days after filing the claim; or
- (3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney has made three separate good faith attempts with three separate design professionals to obtain such consultation and none of those contacted would agree to such a consultation.

(b) Where an attorney intends to rely solely on a failure to inform of the consequences of a procedure, this section shall be inapplicable. The attorney shall certify upon filing of the claim that the attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the attorney shall not be required to disclose the names of design professionals consulted to fulfill the requirements of subsection (a).

(d) Unless a certificate is filed pursuant to subsection (a) or (b), the claim shall not be received for filing by the department."

SECTION 2. Section 672-1, Hawaii Revised Statutes, is amended to read as follows:

"[[§672-1 Definitions.[]] For the purposes of this [[chapter], "design] chapter:

"Design professional" means a professional engineer, architect, [or] surveyor[.], or landscape architect.

"Entities employing design professionals" means professional corporations or other business structures under which design professionals may practice and does not include non-design professional entities."

SECTION 3. Section 672-2, Hawaii Revised Statutes, is amended to read as follows:

“[]§672-2[] Actions against architects, professional engineers, [and] surveyors[.], and landscape architects. In any action for damages arising out of the alleged professional negligence of actions performed in the professional practice of a person holding a license as a professional engineer, architect, [or] surveyor, or landscape architect under chapter 464, before the time of filing the complaint, the aggrieved person shall file a claim with the design professional conciliation panel.”

SECTION 4. Section 672-3, Hawaii Revised Statutes, is amended to read as follows:

“§672-3 Design professional conciliation panel; composition, selection, compensation. (a) There are established conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in tort claims against professional architects, engineers [and], surveyors[.], and landscape architects.

(b) A design professional conciliation panel, hereafter called “the panel”, shall be formed for each claim filed pursuant to section 672-4 and after each panel renders its decision or the claim is otherwise disposed of it shall be disbanded. Each design professional conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the tort claims settlement process, one attorney licensed to practice in the courts of the State and experienced in trial practice, and one architect, engineer [or], surveyor, or landscape architect licensed to practice under chapter 464. The chairperson shall be appointed 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 architect, engineer, [or], surveyor, or landscape architect shall be appointed by the chairperson from a list of not less than thirty-five design professionals submitted annually by the board of registration of professional engineers, architects, [and] surveyors[.], and landscape architects.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall be compensated at the rate of [\$100] \$300 per claim handled which will become payable when the decision of the panel is submitted and shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties and they shall be paid by the department of commerce and consumer affairs from funds collected from the claimant and defendant, to be shared equally. The claimant shall deposit \$450 with the department upon the filing of the claim and the failure to do so shall result in the claim being rejected for filing. The design professional shall deposit \$450 with the department within twenty days of being served with the claim and the failure to do so shall result in termination of proceedings under this chapter allowing the claimant to proceed in accordance with section 672-8. If the claim is withdrawn, determined to be unsuitable for proceedings under this chapter, or otherwise terminated without participation by a panel, the department shall return all moneys collected to the respective parties.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the board shall be furnished by the department of commerce and consumer affairs.

The board of registration shall prepare a list of architects, engineers, [and] surveyors, and landscape architects along with their respective specialties

who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, technical, and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid by the department of commerce and consumer affairs."

SECTION 5. Section 672-4, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Any person or his representative claiming that a tort has been committed by the design professional or entities employing such design professionals shall file a claim with the department of commerce and consumer affairs before a suit based on the claim may be commenced in any court of the State. All claims shall be submitted to the department of commerce and consumer affairs in writing on forms provided by the department. If the claim is presented orally, the department of commerce and consumer affairs shall reduce the claim to writing. The claimant shall set forth facts upon which the claim is or may be based and shall include the names of all parties against whom the claim is or may be made who are known to the claimant. Within five business days thereafter, the panel shall give notice of the claim, by certified mail, to all architects, engineers [or], surveyors, or landscape architects and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such 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 may file a written response to the claim, and a date and time, not less than five days following the date for filing a response, for a hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the hearing. The times originally set forth in the notice may be changed by the chairman, on due notice to all parties, for good cause[.]; provided that a party requesting the rescheduling of the hearing within seven days of the scheduled date shall be required in the sole discretion of the panel chairperson to additionally compensate the panel in an amount equal to the fee panel members receive pursuant to section 672-3."

SECTION 6. Section 672-5, Hawaii Revised Statutes, is amended to read as follows:

"§672-5 Design professional conciliation panel hearing; fact-finding; evidence; voluntary settlement. Every claim of a tort shall be heard by the design professional conciliation panel within thirty days after the date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section 672-6 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

The hearing shall be informal. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such 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 may, in its discretion, 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 such issues as it may consider, and unless otherwise designated by the panel, when the design

professional's records have been provided to the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When such 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 such order may be punished by the court as a contempt thereof. Any member of the panel may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

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, construction documents, inspection reports, calculations, and other records kept in the usual course of the practice of the design professional without the necessity for other identification or authentication, statements 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 may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified architect, engineer, [or] surveyor, or landscape architect 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 which may be incurred as a result of such person's appearance before the panel. Such expenses shall be paid by the department of commerce and consumer affairs to be paid as provided in section 672-3. 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 672-7, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily."

SECTION 7. Section 672-10, Hawaii Revised Statutes, is amended to read as follows:

"[[§672-10[]] Statute of limitations tolled. The filing of the claim with the design professional conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel is mailed or delivered to the parties[.]; provided that in no case shall the applicable statute of limitations be tolled for more than twelve months. If a decision by the design professional conciliation panel is not reached 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 shall notify in writing all parties of this provision."

SECTION 8. Section 672-11, Hawaii Revised Statutes, is amended to read as follows:

"§672-11 Duty to cooperate; assessment of costs and fees. It shall be the duty of every person who files a claim with the design professional conciliation

panel, every architect, engineer, [or] surveyor, or landscape architect against whom such claim is made, to cooperate with the design professional conciliation panel for the purpose of achieving a prompt, fair, and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or after settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party or any insurance carrier or any other person providing professional liability insurance to a party design professional or both, for failure to cooperate with the design professional conciliation panel. The court may award such costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the director of commerce and consumer affairs, the court may award as a civil penalty against any party or any insurance carrier or other person providing professional liability insurance to a party design professional, or all or any combination of such persons, all or a portion of the costs and expenses of the design professional conciliation panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the design professional conciliation panel. Such penalty shall be payable to the general fund.

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

- (1) The attendance of the persons at the hearing of the design professional conciliation panel;
- (2) The extent to which representatives of the 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; and
- (5) The reasons advanced by the person so charged for not fully cooperating or negotiating."

SECTION 9. Section 672-14, Hawaii Revised Statutes, is amended to read as follows:

"[[§672-14[]] **Retroactive application.** This chapter shall apply to any claim arising prior to June 22, 1981 if a suit based on the claim has not been filed in a court of competent jurisdiction prior to [the effective date of this Act.] that date."

SECTION 10. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 11. This Act shall take effect upon its approval; provided that all claims pending before the panel as of the effective date of this Act shall be deemed to have been filed on that date for the purposes of Section 7 of this Act.

(Approved April 24, 1985.)

Note

1. Edited pursuant to HRS §23G-16.5.