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H.B. NO. 3039

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

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

SECTION 1. Section 672-2.1, Hawaii Revised Statutes, is amended to read as follows:

“[[§672-2.1]] Determination of unsuitability. Any party [or any person served with notice of a claim] may file a motion with the 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[.]; or
- (7) The fact that one or more of the design professionals named in the claim is no longer subject to the jurisdiction of the panel, or refuses to participate in the proceedings before the panel, to the detriment of the remaining parties.

For the purpose of any such application there shall be a rebuttable presumption that the subject matter is unsuitable for review by a panel under this chapter where the claim against the design professional arises out of a third-party action in pending litigation.

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."

SECTION 2. Section 672-3, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(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, surveyor, or landscape architect licensed to practice under chapter 464. The chairperson shall be appointed by the director of commerce and consumer affairs from a list of eligible persons approved 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, 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, 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 \$300 per claim [handled] which will become payable when the decision of the panel is submitted [and shall]. At the discretion of the director of commerce and consumer affairs, the chairperson and all panel members may be compensated at one-half of the amount of compensation specified in this section, when and if the claim is

disposed of by any means prior to the hearing before the panel. The chairperson and all panel members shall also be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties [and they]. These costs shall be paid by the department of commerce and consumer affairs from funds collected from the [claimant and defendant,] parties, 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] Each 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. Any moneys remaining after all costs have been paid shall be returned to the respective parties on a pro rata basis.

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

The board of registration shall prepare a list of architects, engineers, 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 3. Section 672-4, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Any person or the person's 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, surveyors, or landscape architects and others who are or may be parties to the claim and shall furnish copies of [written] the 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] shall 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 chairperson, 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 4. 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] as soon as possible 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 a design professional's records have been provided 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, the director of the department, or any person designated by the director of the department may sign subpoenas. Any member of the panel may 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, 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 to be paid 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

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consumer affairs [to be paid] as provided in section 672-3. [Discovery] Except for the production of documents and records kept in the usual course of the practice of an architect, engineer, surveyor, or landscape architect, discovery by the parties shall not be allowed. Requests for production of documents shall be submitted to the chairperson of the panel for approval, denial, or modification, at the chairperson's sole discretion.

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 5. Section 672-7, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Within [fifteen] thirty days after the completion of a hearing, the panel shall file a written advisory decision with the director of commerce and consumer affairs, who shall thereupon mail copies to all parties concerned, or their counsel[,] if represented by counsel, the board of registration, and the representative of each design professionals’ liability insurance carrier authorized to act for such carrier. The panel shall decide the issue of liability, and shall state its conclusions in writing [and after]. After a finding of liability, if evidence has been presented regarding damages, the panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to noneconomic losses; provided that the panel may not recommend punitive damages.”

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon its approval.

(Approved May 27, 1992.)