

**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 942, H.D. 2, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

**BEFORE THE:**

SENATE COMMITTEE ON JUDICIARY

**DATE:** Friday, March 15, 2019

**TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 016

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Caron M. Inagaki, Deputy Attorney General

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Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports this bill.

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

The bill contains fourteen (14) claims that total \$1,131,723.08. Thirteen (13) claims are general fund appropriation requests that total \$1,119,556.63, and one (1) claim is an appropriation request from a departmental fund that totals \$12,166.45. Attachment A provides a brief description of each claim in the bill.

Since the bill was last amended, twelve (12) new claims have been resolved for an additional \$5,161,313.50. Eight (8) claims are appropriation requests from the general fund totaling \$1,130,872.63, and four (4) claims are appropriation requests from a department fund totaling \$4,030,440.87. Attachment B provides a brief description of the new claims.

In addition to adding the new claims referenced above, the Department requests to amend page 9, line 5, of the current draft of the bill by deleting "Settlement" and replacing it with "Judgment."

Including the new claims, the appropriation requests total \$6,293,036.58 allocated among twenty-six (26) claims. Of this total \$2,250,429.26 are general fund appropriation requests, and \$4,042,607.32 are appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department also has 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 respectfully request passage of this bill with the additional appropriations and amendments.

## ATTACHMENT "A"

### DEPARTMENT OF ATTORNEY GENERAL:

**Aloha Pregnancy Care and Counseling  
Center, Inc. v. Suzuki, et al.  
Civil No. 17-00343, USDC**

**\$ 20,344.50 (General Fund)  
Settlement**

This is one of two lawsuits brought in the U.S. District Court for the District of Hawaii against the Attorney General by religiously affiliated pregnancy centers, and an organization composed of religiously affiliated pregnancy centers, challenging the constitutionality of Act 200, Session Laws of Hawaii 2017 ("Act 200"). Act 200 requires "limited service pregnancy services," as that term is defined in the act, to disseminate a written notice to clients or patients informing them that Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including all FDA-approved methods of contraception and pregnancy-related services for eligible women. Act 200 was modeled after California's Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), which required certain licensed pregnancy centers in California to post a notice similar to the notice required under Act 200. California's FACT Act was the subject of a similar constitutional challenge in Nat'l Inst. of Family & Life Advocates v. Becerra, brought in the Southern District of California, which was appealed to the United States Supreme Court. On June 26, 2018, the Supreme Court issued its opinion in Nat'l Inst. of Family & Life Advocates v. Becerra, 2018 WL 3116336 (U.S. June 26, 2018), holding, in a 5-4 majority opinion, that the licensed notice likely violates the First Amendment. After the Supreme Court issued its decision, there was little choice but to resolve the matter without further litigation.

**Calvary Chapel Pearl Harbor, d/b/a A Place for  
Women in Waipio, et al. v. Suzuki, et al.  
Civil No. 17-00326, USDC**

**\$ 40,000.00 (General Fund)  
Settlement**

This is one of two lawsuits brought in the U.S. District Court for the District of Hawaii against the Attorney General and the Governor of Hawaii by religiously affiliated pregnancy centers, and an organization composed of religiously affiliated pregnancy centers, challenging the constitutionality of Act 200, Session Laws of Hawaii 2017 (Act 200). Act 200 requires "limited service pregnancy services," as that term is defined in the act, to disseminate a written notice to clients or patients informing them that Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including all FDA-approved methods of contraception and pregnancy-related services for eligible women. Act 200 was modeled after California's Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), which required certain licensed pregnancy centers in California to post a notice similar to the notice required under Act 200. California's FACT Act was the subject of a similar constitutional challenge in Nat'l Inst. of Family & Life Advocates v. Becerra, brought in the Southern District of California, which was appealed to the United States Supreme Court. On June 26, 2018, the Supreme Court issued its opinion in Nat'l Inst. of Family &

Life Advocates v. Becerra, 2018 WL 3116336 (U.S. June 26, 2018) holding, in a 5-4 majority opinion, that the licensed notice likely violates the First Amendment. After the Supreme Court issued its decision, there was little choice but to resolve the matter without further litigation.

**DEPARTMENT OF EDUCATION:**

**Miller-Potter v. State of Hawaii, et al.** **\$ 75,000.00 (General Fund)**  
**Civil No. 16-1-0385K, Third Circuit** **Settlement**

Plaintiff was at a meeting on the premises of Waimea Middle School, a Charter School maintained and operated by the State Public Charter School Commission. During the meeting, and after it had become dark outside, Plaintiff excused herself to go to the restroom. Unknown to school administrators, the hallway lights had burned out. As a result, the hallway leading to the restroom was dark. While walking to the restroom, Plaintiff tripped over a low bench that was painted brown in color, fell, and injured her face, teeth and allegedly her left knee. As result of the accident, Plaintiff sustained facial and dental injuries and scarring, right shoulder pain, and aggravation of a pre-existing left knee condition that necessitated a total knee replacement. Plaintiff did not claim lost wages, or lost future earnings. Plaintiff's settlement demand listed related medical expenses of \$212,846.86. The case proceeded to mediation resulting in the settlement of \$75,000.

**DEPARTMENT OF HEALTH:**

**Kawamoto, et al. v. Ige, et al.** **\$ 27,500.00 (General Fund)**  
**Civil No. 16-00362, USDC** **Settlement**

This case involved claims against the Department of Health and the Department of Human Services. On or about August 30, 2018 a global settlement of \$55,000.00 was achieved in this litigation. The Department of Health's share of this settlement amount is \$27,500.00.

Plaintiffs are an elderly couple that requires a 24-hour level of nursing care, and wanted to live together in a small, community-like, care home operated for profit to service the elderly population of Hawaii. There are two types of these care homes in Hawaii: community care foster family homes ("CCFFHs"), and expanded adult residential care homes ("E-ARCHs"). They both provide 24-hour nursing level of care to elderly persons who require that level of care in a home-like, community setting, but CCFFHs are designed for Medicaid recipients whereas E-ARCHs are for anyone and thus primarily service "private-pay" clients, who are people that do not receive Medicaid.

This lawsuit was about a provision in section 321-481, Hawaii Revised Statutes, which no longer exists, that made a critical distinction between CCFFHs and E-ARCHs as applied to persons such as Plaintiffs who are not Medicaid recipients. Previously, CCFFHs were statutorily defined as accommodations “for not more than two adults at any one time, at least one of whom shall be a Medicaid recipient.” A CCFFH could be certified for a “third adult” but that third adult also had to be “a Medicaid recipient.” As a result, a CCFFH could not admit a married couple together if neither was a Medicaid recipient, such as the Plaintiffs.

Plaintiffs filed this lawsuit to challenge the provision in section 321-481 that prevented them from living together in the CCFFH of their choice. In the course of this lawsuit, through an act of the 2007 Hawaii Legislature, the statutory wording of section 321-481 at issue in this lawsuit has changed. Under the new statutory wording of section 321-481, the Department of Health was provided with the discretion to allow two private pay individuals to reside together in a CCFFH after considering several factors. So the Plaintiffs are now allowed to live together in a CCFFH.

The Court refused to dismiss the entire case based on mootness, and suggested that the State could have made a “case-by-case exception for Plaintiffs’ situation” to the statute even though the statute itself was found to be facially constitutional. To avoid the risk of exposure to a substantial attorneys’ fee award at the conclusion of trial, the State negotiated the present settlement amount to resolve the case in full.

**DEPARTMENT OF HUMAN SERVICES:**

**Doe 1, John, et al. v. Department of  
Human Services, et al.,  
Civil No. 14-1-0554(2), Second Circuit**

**\$ 585,000.00 (General Fund)  
Settlement**

The plaintiffs, John Doe 1 and John Doe 2, alleged that they were sexually molested by their foster care provider, Florentino Rios. Mr. Rios had changed his name to “Zack Morris” and a background check into “Zack Morris” did not uncover any information. John Doe 1 was placed with Mr. Morris and his wife. There was a physical altercation between John Doe 1 and Mr. Morris and, at that time, John Doe 1 claimed that Mr. Morris had sexually abused him. Mr. Morris claimed that John Doe 1 had assaulted him. The police and the court sided with Mr. Morris. The Department of Human Services’ (DHS) investigation classified the sexual abuse allegation as “unconfirmed.” John Doe 1 was then removed from the Morris home. Mr. Morris sued DHS for discrimination for not placing any foster children with him and won. Despite lingering suspicions, DHS placed a second child, John Doe 2, with the Morrises at the request of John Doe 2’s mother. It was not until a third child (John Doe 2’s younger brother) was placed with the Morrises and reported sexual abuse to his therapist, were John Doe 2 and his brother removed from the home. Plaintiffs’ expert opined that both boys suffer

from multiple issues, including PTSD, delayed education, and alcoholism, as a result of the sexual abuse.

**Kawamoto, et al. v. Ige, et al.**  
**Civil No. 16-00362, USDC**

**\$ 27,500.00** (*General Fund*)  
**Settlement**

This case involved claims against the Department of Health and the Department of Human Services. On or about August 30, 2018 a global settlement of \$55,000.00 was achieved in this litigation. The Department of Human Services' share of this settlement amount is \$27,500.00.

Plaintiffs are an elderly couple that requires a 24-hour level of nursing care, and wanted to live together in a small, community-like, care home operated for profit to service the elderly population of Hawaii. There are two types of these care homes in Hawaii: community care foster family homes ("CCFFHs"), and expanded adult residential care homes ("E-ARCHs"). They both provide 24-hour nursing level of care to elderly persons who require that level of care in a home-like, community setting, but CCFFHs are designed for Medicaid recipients whereas E-ARCHs are for anyone and thus primarily service "private-pay" clients, who are people that do not receive Medicaid.

This lawsuit was about a provision in section 321-481, Hawaii Revised Statutes, which no longer exists, that made a critical distinction between CCFFHs and E-ARCHs as applied to persons such as Plaintiffs who are not Medicaid recipients. Previously, CCFFHs were statutorily defined as accommodations "for not more than two adults at any one time, at least one of whom shall be a Medicaid recipient." A CCFFH could be certified for a "third adult" but that third adult also had to be "a Medicaid recipient." As a result, a CCFFH could not admit a married couple together if neither was a Medicaid recipient, such as the Plaintiffs.

Plaintiffs filed this lawsuit to challenge the provision in section 321-481 that prevented them from living together in the CCFFH of their choice. In the course of this lawsuit, through an act of the 2007 Hawaii Legislature, the statutory wording of section 321-481 at issue in this lawsuit has changed. Under the new statutory wording of section 321-481, the Department of Health was provided with the discretion to allow two private pay individuals to reside together in a CCFFH after considering several factors. So the Plaintiffs are now allowed to live together in a CCFFH.

The Court refused to dismiss the entire case based on mootness, and suggested that the State could have made a "case-by-case exception for Plaintiffs' situation" to the statute even though the statute itself was found to be facially constitutional. To avoid the risk of exposure to a substantial attorneys' fee award at the conclusion of trial, the State negotiated the present settlement amount to resolve the case in full.

**DEPARTMENT OF LAND AND NATURAL RESOURCES:**

**Boucher v. Vitousek, et al.** **\$ 70,000.00** *(General Fund)*  
**Civil No. 16-1-155K, Third Circuit** **Settlement**

Plaintiff was driving through the intersection of Nani Kailua and Queen Kaahumanu Highway on the island of Hawaii and was struck by a vehicle driven by an employee of the Department of Land and Natural Resources. It is undisputed that the State employee was solely at fault and, therefore, the State was fully liable. Plaintiff's vehicle was a total loss and she alleged that she suffered from post concussive syndrome, sustained injuries to her left knee that required surgery, right knee and ankle pain, and had hernia surgery. Plaintiff sought total damages in the amount of \$450,000.

**Umberger, et al. v. Department of Land and Natural Resources, State of Hawaii, Civil No. 12-1-2625-10,** **\$ 160,645.29** *(General Fund)*  
**First Circuit** **Judgment**

Plaintiffs claim the Department of Land and Natural Resources should not issue permits allowing use of fine mesh nets to take aquatic life for commercial and recreation aquarium purposes without a chapter 343, Hawaii Revised Statutes, study. The circuit court granted summary judgment to the department. The Intermediate Court of Appeals unanimously affirmed. The Supreme Court reversed and granted summary judgment to plaintiffs. The Supreme Court held that in a chapter 343 case, a party prevailing on a claim against the State is entitled to attorneys' fees based on the Court's "private attorney general" theory. The Supreme Court previously awarded \$74,491.81 for fees and costs on appeal. That was paid last year. The circuit court has now awarded an additional \$160,645.29. No further appeals are available.

**DEPARTMENT OF PUBLIC SAFETY:**

**Fraser v. Lingle, et al.** **\$ 25,000.00** *(General Fund)*  
**Civil No. 08-1-0709(1), Second Circuit** **Settlement**

Plaintiff, a former inmate at the Maui Community Correctional Center, was over detained in jail by 76 days in 2006-2007 because the jail staff applied an incorrect amount of presentence credit leading to a miscalculation of his sentence expiration date.

**Luong v. Sequeira, et al.** **\$ 27,500.00** *(General Fund)*  
**Civil No. 16-00613, USDC** **Settlement**

This case arises from an altercation that occurred at the Oahu Community Correctional Center (OCCC) where Plaintiff was incarcerated. Plaintiff claims that during "open

module,” he and three other inmates were in his cell “talking story.” One of the inmates was smoking in the cell. According to the Plaintiff, when an Adult Correction Officer (ACO) came in to investigate the smoke, Plaintiff uttered an obscenity and the ACO struck Plaintiff and knocked him down, causing him to hit his head. Smoking in the cells is against the rules and matches or other sources of ignition are contraband. According to the ACO, he smelled the smoke and went to investigate. He found the occupants of the cell to be high and in a stupor. One of the inmates suddenly awoke and attacked the ACO. In the ensuing melee, Plaintiff, still in a stupor fell off his chair and struck his head on the concrete floor. After a bench trial in the United States District Court for the District of Hawaii, the judge made a preliminary finding in favor of the Plaintiff and made a provisional damages award of \$35,000. The case subsequently settled for \$27,500.

**Johnson v. Department of Public Safety, et al.**                                 **\$ 18,000.00 (General Fund)**  
**Civil No. 15-1-0609-04, First Circuit**   **Settlement**

Plaintiff, a former inmate at the Oahu Community Correctional Center (OCCC), was over detained in jail by 127 days because the court’s April 2, 2013, order entitling him to release was not received by OCCC until August 7, 2013.

**MISCELLANEOUS CLAIM:**

**Asset Mortgage of Hawaii LLC**   **\$ 2,466.84 (General Fund)**  
**c/o Sandy Knapp**

This claim is for an escheated tax check for Asset Mortgage of Hawaii LLC. Asset Mortgage of Hawaii LLC was a subsidiary of First Magnus Financial Corporation which went into bankruptcy in 2007. The subject check was never cashed or received by the Bankruptcy Trustee during the management of the bankruptcy, which ended in 2015. 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.

**Shim Ching**   **\$ 40,600.00 (General Fund)**

Claimant requests reissuance of an outdated check that was lost. 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.

**DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:**

**Bowles v. Hawaiian Electric Company, et al.**   **\$ 12,166.45 (Department**  
**Civil No. 17-1-0259-02 VLC, First Circuit**   **Settlement Appropriation)**



Plaintiff stepped into a deep, grass-covered hole on the grassy median at the intersection of Kailua Road and Kalanianaʻole Highway, which is owned and maintained by the Department of Transportation. The hole was described as about 8 feet deep and 20 inches wide. Plaintiff sustained a tibial plateau fracture, which is a fracture located at the top of the tibia (shin bone) in the knee joint. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Plaintiff \$60,917.89. After a reduction for Plaintiff's comparative negligence and a credit for the amount paid by a settling co-defendant, the State's share of the damages and costs totaled \$12,166.45.

## ATTACHMENT "B"

### DEPARTMENT OF EDUCATION:

**Kauhako, et al. v. State of Hawaii, et al.**  
**Civil No. 13-00567, USDC**

**\$ 783,391.13** *(General Fund)*  
**Judgment**

Minor Plaintiff, a special education student, alleged that she was sexually assaulted in the school bathroom by her classmate, another special education student. The case proceeded to trial, and the jury found that the State of Hawaii was liable to Plaintiffs for this alleged assault. The State of Hawaii appealed the jury's verdict, and the United States Court of Appeals affirmed the verdict and judgment.

**Wong v. State of Hawaii, et al.**  
**Civil No. 14-1-0281, Third Circuit**

**\$ 50,000.00** *(General Fund)*  
**Settlement**

A student was attending classes at Keaukaha Elementary School in Hilo, Hawaii. Plaintiff alleges that, while she was leaving the classroom to go to recess, she slipped or tripped over an area rug that was on the classroom tile floor at the doorway of the classroom and fell. After her fall, Plaintiff was unable to walk and was taken to the health room with assistance from her teacher and other classmates. Plaintiff was then taken to the doctor and was diagnosed with a slipped capital femoral epiphysis ("SCFE"), which is a fracture through the growth plate in the hip. Plaintiff was required to undergo surgery for this condition, and both hips were repaired. Plaintiff underwent two additional surgeries after this initial surgery, one for foot pain, and the other to remove the metal in her hips and in her knee. Plaintiff's orthopedic surgeon has testified that that second surgery was not related to the fall. The case proceeded to the Court Annexed Arbitration Program and the arbitrator awarded the Plaintiff \$144,976.64. The case later settled for \$50,000.00.

### DEPARTMENT OF PUBLIC SAFETY:

**Coma, et al. v. State of Hawaii v. Global Medical Staffing, Inc., Civil No. 15-1-0437-03, Fist Circuit**

**\$ 74,900.00** *(General Fund)*  
**Settlement**

Plaintiff filed this action on her own behalf and on behalf of the Estate of Jonathan Ibana, her son, who hanged himself in his cell at Halawa Correctional Facility on March 11, 2013. The Plaintiff alleged that the State was negligent in failing to closely monitor Mr. Ibana by keeping him on suicide watch in the prison Infirmary in view of his suicidal tendencies and his amenability to sexual assault. Mr. Ibana was initially incarcerated based on his conviction of Attempted Murder and Sexual Assault for stabbing his underage girlfriend, and claimed to be suicidal. He threatened suicide on numerous occasions during his first ten years of incarceration at the mainland prisons to which he had been sent. He continued to claim to be suicidal after he was returned to Hawaii in 2010. He had been diagnosed with mental illness, including depression, over the years of his incarceration. He claimed to have been sexually assaulted at Halawa Correctional Facility twice. After he claimed he was sexually assaulted for the second

time, he was placed in the Special Holding Unit for his protection. He was visited by mental health staff on the two days following the alleged assault. Mr. Ibana did not act suicidal, emotionally upset, or mentally ill on those visits. Nevertheless, he hanged himself by fashioning a ligature from strips of his bed sheet, fastening it to the top of the inside of his cell door and blocking the view of his cell from the outside by a paper stating that he was using the toilet. The case proceeded to the Court Annexed Arbitration Program, and the Plaintiff was awarded \$196,040.31. The case later settled for \$74,900.00.

**United States Department of Justice Investigation on      \$ 45,000.00 (General Fund)**  
**State of Hawaii Department of Public Safety for      Settlement**  
**Americans With Disabilities Act Violations**

In December 2015, inmates housed at the Hale Nani furlough facility on the Big Island submitted complaints to the U.S. Department of Justice (DOJ) that they were being discriminated against due to their physical disabilities because they were unable to participate in work furlough when the Hawaii Paroling Authority informed them that participating in “work” furlough would improve their chances for parole. The DOJ requested documents and records that included the Department of Public Safety’s policies, procedures, and records of the complainants. The investigation subsequently expanded to include all facilities on Oahu because the cause appeared to be systemic. The DOJ conducted interviews with Department of Public Safety personnel and visited the facilities. The Department of Public Safety fully cooperated.

The Settlement Agreement is for three years and is comprehensive as it requires changes to policies, programs, and remedial fixing of the physical architecture of the facilities to be in compliance. The terms are designed to prevent the reoccurrence of ADA violations. The monetary portion of the settlement is to go to the disabled inmate complainants.

**MISCELLANEOUS CLAIM:**

**Jean A. Lee and Nancy Adachi      \$ 20,238.55 (General Fund)**  
**Designated Beneficiaries of Linda G. Lee, Deceased**

Claimants request reissuance of an outdated check that was lost. 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.

**James McIntosh      \$ 92,764.00 (General Fund)**

Claimant requests reissuance of an outdated check that was lost. 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.

**Monessa Miranda** **\$ 10,200.00** (*General Fund*)

Claimant requests reissuance of an outdated check that was found after her father passed away. 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.

**Dustin S. Payne** **\$ 54,378.95** (*General Fund*)

Claimant requests reissuance of outdated checks that were lost. 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.

#### **DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:**

**Acosta, et al. v. State of Hawaii, et al.** **\$ 115,440.87** (*Department Settlement Appropriation*)  
**Civil No. 18-1-1507-09, First Circuit**

This case arises out of an accident that occurred on at approximately 10:30 p.m. on Farrington Highway eastbound toward Pearl City. That portion of the highway leads from the H-1 freeway Ewa/Kapolei eastbound toward Kamehameha Highway in Pearl City and serves as a ramp from the freeway to Kamehameha Highway. The speed limit on the ramp is 35 m.p.h. The Plaintiffs were returning from a Christmas Party and Parade in Kapolei. Plaintiff was operating his motorcycle and his wife was riding as his passenger. Their riding companions were following on other motorcycles. As they exited the freeway and entered onto the ramp, Plaintiff reduced his speed to 30 m.p.h. and encountered pothole number 1. When the motorcycle fell, Plaintiff and his wife were separated from the motorcycle and remained on the ground. The motorcycle continued forward and encountered pothole number 2. Plaintiffs left the scene by ambulance and their riding companions remained at the scene. Firemen who arrived at the scene spray painted around the potholes before the Plaintiffs' friends took photographs of the potholes. The case proceeded to the Court Annexed Arbitration Program (CAAP) and the arbitrator awarded a total of \$115,440 which is reasonable in light of the injuries and damages sustained. It would be very difficult to avoid court imposed sanctions if this case was taken to trial. A settlement was reached for the amount of the CAAP award.

**Huynh, et al. v. City and County of Honolulu, et al.** **\$ 900,000.00** (*Department*)

**Civil No. 15-1-1640-08, First Circuit**

**Settlement** *Appropriation*)

A man died when he lost control of his motorcycle while driving on the Likelike Highway, in a curve, on the on-ramp to the H-3 Freeway. He crashed into a guardrail and sustained extensive and fatal head injuries. Decedent was 47 years old, retired from the military, and employed as a federal police officer. Plaintiffs included Decedent's wife and two minor children. Plaintiffs alleged that the "hairpin curve" on the on-ramp was a dangerous condition, where numerous other accidents had occurred, including one prior and two subsequent motorcycle or motor scooter fatalities. Plaintiffs alleged that the signage on the on-ramp was insufficient to warn motorists of the approaching "hairpin curve."

**O'Grady, et al. v. State of Hawaii, et al.**  
**Civil No. 07-1-0372, Third Circuit**

**\$ 3,000,000.00** *(Department*  
**Settlement** *Appropriation)*

Plaintiffs were traveling in their vehicle on Route 11 in Hawaii County when a large boulder suddenly fell from the adjacent hillside onto the highway. The boulder struck the vehicle causing it to roll over. In November 2011, the liability portion of the case was tried before Judge Greg Nakamura. Although the trial judge found that the State had breached its duty by failing to have a "routine, coordinated system of rock fall mitigation at the operational level," the judge also found that the breach was not a proximate cause of the accident and resulting injuries. However, on appeal, the Hawaii Supreme Court determined that the trial court did not apply the appropriate legal standard for "legal causation," vacated the judgment in favor of the State and remanded the case to the trial court for "further proceedings consistent with the opinion." *O'Grady v. State*, 140 Hawai'i 36, 398 P.3d 625 (2017). Judge Nakamura subsequently amended his findings of fact and conclusions of law to reflect the Court's decision as follows:

2. In this case, the State breached this duty of care by not having a routine, coordinate system of rockfall mitigation at the operational level in the Hawaii District from December 22, 2014 to March 8, 2007.
3. The State's breach of duty contributed to harm suffered by Plaintiffs and, thus, was a substantial factor in causing such harm.
4. The State is liable to Plaintiffs.

The comparative negligence of Plaintiffs is not an issue. The only proceeding remaining is a trial to determine the amount of damages. Both Plaintiffs sustained multiple fractures as well as traumatic brain injury and internal injuries. They also sustained past and future wage loss. The range for special damages is likely to be between \$1 and \$1.5 million. Although it is more difficult to predict the range of general damages, if the

trial court awarded approximately \$1.5 million in general damages to each Plaintiff, the appellate courts would not deem such an award to be excessive. Therefore, a total damages award of \$4 would not be deemed excessive.

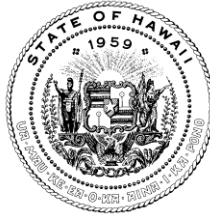
The parties participated in a mediation session on November 28, 2018, with Hawaii Supreme Court Justice James Duffy (retired) serving as the mediator, and was able to reach a settlement. Justice Duffy continued to have communications with the attorneys for the parties, as well as with the representative of the State's excess insurance company AIG through the middle of February 2019.

**Sybounmy, et al. v. State of Hawaii, et al.**  
**Civil No. 16-1-1078-06, First Circuit**

**\$ 15,000.00** (*Department  
Settlement Appropriation*)

Plaintiff was driving her car on Kamehameha Highway in Kahuku, Hawaii, when she allegedly hit a large pot hole in the road and damaged her car. Plaintiff also alleges that she sustained personal injuries in the accident. After the accident, Plaintiff was treated for soft tissue injuries. The police report made on the date of the accident noted that the pothole was 5' x 3'6". From the picture, it seems clear that the pothole was not 5 feet; however, the pothole does appear to be deep, indicating that it would have been there for enough time to provide notice to the State. The damage to the car started at \$422.79 to replace the left front wheel, but then increased to \$5,325.11 for replacement of the front and rear right wheels, a cable on the underside of the car (which was characterized as "hidden damage"), replacements in the vehicle restraint systems, and replacements in the seats and tracks. The case proceeded to the Court Annexed Arbitration Program (CAAP), and the arbitrator found the State to be 100% at fault and awarded the Plaintiff a total of \$37,739.21 (which included costs of \$1,161.89). After the arbitration, the State hired an accident reconstruction expert to determine whether the damage to the vehicle was caused by this pothole and Plaintiff's speed at the time of the accident. The case later settled for \$15,000.00. The cost of the experts to take this case to trial would have exceeded the amount of the settlement.

DAVID Y. IGE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
SUZANNE D. CASE  
Chairperson**

**Before the Senate Committee on  
JUDICIARY**

**Friday, March 15, 2019  
9:00 AM  
State Capitol, Conference Room 016**

**In consideration of  
HOUSE BILL 942, HOUSE DRAFT 2  
MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE  
STATE, ITS OFFICERS, OR ITS EMPLOYEES**

House Bill 942, House Draft 2 proposes to make appropriations for claims against the State, its officers, and its employees. **The Department of Land and Natural Resources (Department) appreciates the intent of this measure and offers the following comments and amendments limited to PART VIII, SECTION 8 as follows:**

PART VIII, SECTION 8 of the measure proposes to approve payment for judgments against the State and settlement of claims in Boucher v. Vitousek, et al. (Civil No. 16-1-155K, Third Circuit) in the amount of \$70,000, *provided that the amount is expended by the Department from its FY18-19 budget (LNR 906, general funds).*

**The Department respectfully requests that the Legislature appropriates \$70,000 out of the general revenues of the State to satisfy this claim.** The Department's State Historic Preservation Division, where this claim emanates, has 90% of its budget supports personnel costs. Adding an additional \$70,000 to its operating expenses will seriously hinder the Division's ability to meet its mission.

PART VIII, SECTION 8 of the measure proposes to approve payment for judgments against the State and settlement of claims in Umberger, et al. v. Department of Land and Natural Resources, State of Hawaii (Civil No. 12-1-2625-10, First Circuit) in the amount of \$160,645.29, *provided that the amount is expended by the Department from its FY18-19 budget (LNR 906, general funds).*

**SUZANNE D. CASE**  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**ROBERT K. MASUDA**  
FIRST DEPUTY

**M. KALEO MANUEL**  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**The Department respectfully requests that the Legislature appropriates \$160,645.29 out of the general revenues of the State to satisfy this claim.** This amount represents the Plaintiffs' attorneys' fees and costs incurred in a lawsuit filed against the Department. In defending this lawsuit, the Department relied on existing legal precedent. Both the First Circuit Court and the Intermediate Court of Appeals ruled in favor of the Department before the Supreme Court forged new ground in its interpretation of Chapter 343, Hawaii Revised Statutes. Requiring the Department to pay these attorneys' fees and costs from its Fiscal Year 18-19 budget has no practical policy benefit, and would create a chilling effect on defense of lawsuits against the State. It would also adversely impact the Department's ability to fulfill its mission.

Additionally, LNR 906, the Department's Administration Division, has 88% of its budget earmarked for personnel costs, leaving 12% for other operating expenses. Using these funds to pay for the aforementioned judgments will adversely impact the Department's ability in meeting its operational needs.

Thank you for the opportunity to comment on this measure.