

CONCURRING OPINION BY WATANABE, PRESIDING J.

I agree with the majority that the assessments imposed against insurers by the Hawai'i Insurance Commissioner (the Commissioner) pursuant to Hawaii Revised Statutes (HRS) § 431:2-215 are problematic under McCandless v. Campbell, 20 Haw. 411 (1911), and State v. Medeiros, 89 Hawai'i 361, 973 P.2d 736 (1999). I am also troubled that the amounts of past assessments were apparently determined by the Commissioner without following the rulemaking procedures set forth in the Hawaii Administrative Procedures Act, HRS chapter 91. See Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 493, 522 P.2d 1255, 1265 (1974); Tanaka v. State, 117 Hawai'i 16, 26, 175 P.3d 126, 136 (App. 2007).

I write separately to express my concern about the impact this opinion may have on other specially funded programs and the integrity of the state government's fiscal infrastructure if the test in Medeiros is not adjusted. According to a 2001 report by the Auditor of the State of Hawai'i (the Auditor), over 200 special and revolving funds<sup>1</sup> were in existence as of June 30,

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<sup>1</sup> The Auditor noted in the report that "[i]n governmental accounting, a special fund is defined as 'a fund that must be used in accordance with specific legal or administrative restrictions.'" Office of the Auditor (Auditor), State of Hawai'i, Report No. 01-12, Update of the 1992 Summary of Special and Revolving Funds 1 (2001). HRS § 37-52.3 (Supp. 2007) currently provides, as it did when this lawsuit was brought:

**Criteria for the establishment and continuance of special funds.** Special funds shall only be established pursuant to an act of the legislature. The legislature, in establishing or reviewing a special fund to determine whether it should be continued, shall ensure that the special fund:

- (1) Serves the purpose for which it was originally established;
- (2) Reflects a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program, as opposed to serving primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process;

(continued...)

2000 and the aggregate cash balance of those funds at the time totaled approximately \$1.19 billion. Office of the Auditor, State of Hawai'i, Report No. 01-12, Update of the 1992 Summary of Special and Revolving Funds 9 (2001). According to the Auditor, most of these special funds "are designed to be self-sustaining through revenues earmarked from special sources." Id. at 1. The Auditor specifically mentions, for example, that the Compliance Resolution Fund (CRF)<sup>2</sup> at issue in this appeal was created "to support the [Department of Commerce and Consumer Affairs'] goal of fiscal self-sufficiency" at a time of "declining general fund support[.]" Id. at 12. It is highly probable that other special funds exist which, like the CRF, are comprised of assessments or charges that do not qualify as valid "fees" under the three-pronged test established by the supreme court in Medeiros.

In Medeiros, the supreme court expressly recognized that

[f]ees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as a proprietor of the instrumentalities used, or regulatory fees (including

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<sup>1</sup>(...continued)

(3) Provides an appropriate means of financing for the program or activity; and

(4) Demonstrates the capacity to be financially self-sustaining.

"Special funds" are defined for budget purposes as "funds which are dedicated or set aside by law for a specified object or purpose, but excluding revolving funds and trust funds." HRS § 37-62 (1993). Pursuant to HRS § 37-32 (Supp. 2007), special funds must be appropriated by the legislature and may be expended only after allotment by the director of finance. Additionally, expenditures out of any special fund shall not be made "in excess of the moneys available in the special fund[.]" HRS § 37-52 (1993), and unless otherwise provided by law, every special fund appropriation or part thereof "remaining unexpended and unencumbered at the close of any fiscal year shall lapse and be returned to the general fund in the manner prescribed in section 40-66." HRS § 37-41 (Supp. 2007).

<sup>2</sup> This appeal involved the Insurance Recovery Fund, which, as the majority notes, merged into the CRF in 2002 and became one of several sub-funds of the CRF.

licensing and inspection fees), founded on the police power to regulate particular businesses or activities.

89 Hawai'i at 366, 973 P.2d at 741 (quoting Emerson Coll. v. City of Boston, 391 Mass. 415, 424, 462 N.E.2d 1098, 1105 (1984)). In adopting the three-part test for determining whether a charge constitutes a fee or a tax, however, the supreme court seems to have focused on user fees and overlooked the nature of regulatory fees, which are generally imposed to offset the burdens imposed on the government by the fee-payer, rather than the benefits received by the fee-payer. See id. at 366-67, 973 P.2d at 741-42. Other courts examining the issue have adopted a broader test with regard to regulatory fees. See, e.g., San Juan Cellular Tel. Co. v. Public Serv. Comm'n of Puerto Rico, 967 F.2d 683 (1st Cir. 1992); Hexom v. Oregon Dep't of Transp., 177 F.3d 1134 (9th Cir. 1999); Attorney's Liab. Assurance Soc'y, Inc. v. Fitzgerald, 174 F. Supp. 2d 619 (W.D. Mich. 2001); Okeson v. City of Seattle, 150 Wash. 2d 540, 78 P.3d 1279 (Wash. 2003).

Under the Medeiros test, the entire assessment imposed on insurers by the Insurance Commissioner is invalid, not just the excess portion of the assessments in the CRF that the legislature transferred to the state general fund, prompting this lawsuit. Cf. Bloom v. City of Ft. Collins, 784 P.2d 304, 311 (Colo. 1989) (confirming that a transportation utility fee imposed on owners and occupants of certain property to provide revenues for maintenance of local streets was a special fee and not a property tax subject to a constitutional uniformity requirement, but holding that transfer of excess monies generated by the fee to the general fund rendered the transferred fees an invalid tax). Thus, failure to reexamine Medeiros may well have dire consequences on the state government's ability to maintain its fiscal infrastructure and funding mechanisms.

*Ceremie K.A. Watanabe*  
Presiding Judge