

LEGAL ALERT

Providing clients worldwide access to sophisticated legal advice and exceptional service.



DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION | hawaiiattorney.com[®]

Giving Notice Immediately

The importance of a policy holder giving notice of a claim to the insurance company cannot be over-emphasized. Insurance policies typically require that notice be given “immediately” or “as soon as practicable.” The insured may be reluctant to give notice, fearing increased premiums, uncertain if the claim will be covered, believing the damage or claim will not amount to much, or wishing to avoid an unpleasant experience interacting with an insurance company. Despite these concerns, an insured should always give notice. After all, insurance is purchased to cover eventual risks the policy holder may have. Why buy the policy if a claim is not going to be submitted?



By Tred R. Eyerly

Notice of a claim must be timely, however, or it may be fatal. Under some policies, the insurance company may have to accept late notice if it suffers no prejudice in doing so. But other policies, such as claims made policies, strictly require compliance with the notice provisions.

In an occurrence-based policy, coverage is triggered when the policy holder is sued after an accident. Notice is generally required to be “prompt” or given “as soon as possible.” The insurer requires prompt notice to aid in investigating, defending and settling a claim. If notice is late under an occurrence-based policy, however, the insurance company must typically demonstrate it has been prejudiced by the late notice to escape its coverage obligations.

For example, what if a business owner receives a potentially responsible party (PRP) letter from the EPA for polluting a site, but fails to give notice to the insurer for two years? There is no case law in Hawaii to address this point. Other states, however, have found that a delay of five months or even 90 days relieves the insurance company from affording coverage under the policy.

Various states have decided that if some form of notice is given in a timely manner, failure to comply with the exact method of notification dictated by the policy may be excused. Therefore, receipt of timely notice, even from a party other than the insured, was sufficient notice. Another court held that oral, as opposed to written notice, substantially complied with the policy requirements.

Continued on page 2



**Inside
this
Issue:**

New Administration,
New Questions

Damon Key Attorneys
Speak at UH “Sharing
Economy” Conference

Congratulations, Tred!
Tred Eyerly Named Director

American Law Institute-CLE
Eminent Domain
Conference, San Diego

Continued from cover

Notice requirements under a claims-made policy are stricter than under an occurrence-based policy. In a claims-made policy, coverage is triggered when a claim is made against the insured during the policy period regardless of when the wrongful act giving rise to the claim took place. Claims-made policies are frequently used for directors and officers (D&O), errors and omissions (E&O), employment practices, malpractice, and other professional liability insurance needs.

Claims-made policies provide retroactive coverage for losses that occurred at any time prior to the policy period. Therefore, coverage is limited to claims made against the policy holder where notice is given to the insurer during the term of the policy. Under a claims-made policy, the claim may be rejected if late notice is given, even if the insurer suffers no prejudice.

In one of the few cases in Hawaii addressing a claims-made policy, the policy holder purchased a claims-made policy with an extended reporting period. In *CIM Ins. Corp. v. Midpac Auto Ctr., Inc.*, however, Federal District Court held that the claim was not reported within the required sixty days after the end of the policy period, and was therefore properly denied by the insurer.


In a recent New Jersey case, the claims-made policy required that notice be given “as soon as practicable.” The insured gave notice six months after it was aware that a complaint would be filed. This was still within the policy period, but there was an inadequate explanation for the six month delay. The New Jersey Supreme Court held that an unexplained delay of six months was not notice

given “as soon as practicable,” and found coverage was properly denied. *Templo Fuente De Vida Corp. v. National Union Fire Ins. Co. of Pittsburgh.*

The Texas Supreme Court issued more of an outlier decision. In *Prodigy Communications Corp. v. Agricultural Excess & Surplus Ins. Co.*, the insured did not report a claim for a year after being sued in a class action securities lawsuit. The notice was given during the policy period, but not “as soon as practicable.” The trial court and court of appeals found that the insured’s one year delay in providing notice did not fulfill the “as soon as practicable” requirement for giving notice. Consequently, the insurer was not required to show it was prejudiced by the policy holder’s late notice.

On appeal, the Texas Supreme Court reversed. When the insured notified its insurer of a claim within the policy period or extended reporting period, the failure to give notice “as soon as practicable” would not defeat coverage if there is no prejudice to the insurer.

Despite the *Prodigy* decision, it would be risky for a policy holder to assume its rationale would be adopted in Hawaii. Most courts across the country do not allow an insured to be covered under a claims-made policy if late notice is given, even if the insurance company has not been prejudiced. Therefore, when served with a claim or a potential claim, the insured is well advised to give immediate notice to the carrier to avoid potential late reporting problems.



How much
time do I
have to file
my claim?

**For more information on this article, please call Tred at 531-8031 ext. 603
email him at te@hawaiilawyer.com or scan the code with your smartphone.**



New Administration, New Questions

Damon Key's Immigration Practice Group has been busy fielding anxious phone calls since the January 20, 2017 Presidential inauguration. The most commonly asked question has been, "Is it safe for me to travel?" Which usually means, "if I leave the U.S. for an international trip, will I be able to get back into the U.S.?" Even some U.S. citizens are unsure of their rights.

For U.S. citizens, the answer is yes, you will be let back in. This "yes" extends to dual nationals from the six nations named in the most recent travel ban scheduled to begin on March 16, 2017 as well, so long as they are not traveling on a passport issued by one of the six named countries. Time will tell if those with dual citizenship are stopped for additional screening (known as "secondary inspection") upon arrival.

The rules regarding admission for non-US citizens are not so black and white, however. Lawful permanent residents ("LPRs", AKA green card holders) returning to the U.S. from abroad are always subject to heightened scrutiny by Customs and Border Patrol agents. If a green card holder has been away from the U.S. for more than a year without having obtained re-entry permit, or if s/he has been convicted of certain crimes at any point, CBP agents can, in worst-case scenarios, deny admission and offer someone the option of detention plus an opportunity to appear before an immigration judge, or to relinquish LPR status and get sent back from where they arrived on the next flight. Alternatively, CBP may allow someone in to the country while setting in motion removal proceedings in immigration court.



By Clare M. Hanusz

LPRs from seven nations listed in President Trump's Executive Order on January 27, 2017 (commonly referred to as the first "Muslim Ban") who were abroad on January 27th were left in limbo for a short period of time, unsure of their possibility to return to the US, even if their records were squeaky clean. The Trump administration quickly clarified that LPRs would be exempt from the ban. The superseding Executive Order of March 6, 2017 expressly excludes LPRs from the list of those who will be denied entry.

For most "non-immigrants" -- people who are not U.S. citizens or LPRs but have a specific kind of visa or are from one of the 38 visa waiver countries, the ability to enter (or re-enter) the U.S. after a trip abroad can depend on many factors. For example, people are commonly denied entry if a CBP agent finds evidence of "immigrant intent" (in other words, the intent to stay in the US long-term to live, rather than to visit as a tourist) or when evidence of commission of certain crimes pops up on a database.

We are also frequently asked about possible issues with domestic travel, including to and from our neighbor islands. For US citizens, LPRs and others with clear evidence of lawful status, domestic air travel should be no problem. However, for those out of status, or without status, even neighbor island travel can pose problems, as there have been recent reports of TSA detaining individuals and turning them over to ICE.

Continued on page 4

Continued from page 3

Finally, many want to know if the government can really search their electronic devices, such as laptops and cell phone, upon entry to the U.S. The answer is YES, including devices of U.S. citizens. CBP guidance states that “All persons, baggage, and merchandise arriving in, or departing from, the United States are subject to inspection, search and detention.” CBP officers are not permitted to “profile” or seek out individuals based upon their race, religion, national origin, ethnic group or political beliefs. If individuals, including U.S. citizens, refuse to unlock devices or provide passwords, CBP agents have the authority to confiscate the device. If you have information that you want kept private, think about keeping the device at home, encryption, or mailing it rather than

traveling with it. More on CBP policy can be found at <https://www.cbp.gov/sites/default/files/documents/inspection-electronic-devices-tearsheet.pdf>

If you have concerns about travel, or entry, or re-entry into the U.S., or anything immigration related, call 531-8031 and ask to speak to one of Damon Key’s immigration team – David McCauley, Christine Kubota, Kelly Uwaine, Megumi Honami or Clare Hanusz. This a time of great uncertainty and there are no silly questions. We are here to help.

For questions about the article email Clare at cmh@hawaiiattorney.com.

Damon Key Attorneys Speak at UH “Sharing Economy” Conference

Last month, Damon Key lawyers Gregory Kugle and Robert Thomas spoke at the *Sharing Economy Symposium*, presented by the University of Hawaii School of Law’s *Law Review*.

Greg spoke about shared housing issues (short-term rentals and Airbnb, among other things), and Robert moderated a panel discussion of the legal issues in transportation sharing (Lyft, Uber, and similar services). These are developing issues both in Hawaii and nationally, and the question of how much freedom property owners have to rent their homes, or car owners have to pick up riders, have yet to be settled. Local governments nationwide are grappling with the issue, and the Conference brought in experts from around the country, including legal scholars, government regulators, and industry players to speak. Greg is one of the State’s leading experts on housing issues, and Robert was instrumental in forming the first American Bar Association group on sharing economy issues.



Greg Kugle speaking at the Conference.



Editors-in-Chief of the Law Review Ross Uehara-Tilton and Sianha Gualano at the firm reception. Ross was a Summer Associate with the firm in 2016, and will be joining us full-time later this year after graduation.

University of Hawai'i Law Review
PRESENTS

Sharing Economy Symposium

Are existing laws sufficient to regulate the Sharing Economy?

Friday, February 17, 2017
9:00am - 5:00pm
William S. Richardson School of Law

Registration begins at 8:15am to 9:00am
Panel 1: Housing - 9:30am to 11:00am
Keynote Address: 11:15am to 12:15pm
Panel 2: Transportation - 1:15pm to 2:45pm
Panel 3: Discrimination/Civil Rights - 3:00pm to 4:15pm

Lunch provided with RSVP
RSVP at www.hawaiilawreview.com/rsvp

Please join us for a closing cocktail reception generously hosted by
Damon Key Leong Kupchak Hastert
Pauahi Tower, 1003 Bishop Street, 2nd Floor Lobby
5:30pm - 7:30pm
Validated parking at Bishop Square

Congratulations, Tred!

Tred Eyerly Named Director

In the thirteen years since he joined Damon Key, Tred Eyerly has earned a reputation among his colleagues and clients for being a superb listener, a consistent problem solver, and an invaluable team player. As the head of the firm's Insurance Coverage Practice group, Tred tirelessly represents his clients' interests with a breadth of insurance expertise and wide variety of litigation skills. These are among the reasons why Damon Key is proud to make Tred the newest Director of our firm.

Tred came to Hawaii after having practiced in Alaska and the Commonwealth of the Northern Mariana Islands. After graduating from law school, Tred started his career working for Alaska Legal Services in bush Alaska before moving to Anchorage, working primarily with Alaska Natives on subsistence, sovereignty, and land entitlement issues throughout the state. Recalls Tred, "One of my most memorable days at work was boating up the Chilkat River in southeast Alaska to land claimed by two clients within the Chilkat Bald Eagle Preserve. We met with officials from the Bureau of Land Management who were present to survey the claimed parcels. Our work involved several hours of hiking through the property, occasionally observing the eagles flying overhead." Tred lived and worked in Alaska for eleven years. "The case load was varied, and it was a fascinating experience for a young lawyer," he says. Tred's legal career then took him to Saipan, Commonwealth of the Northern Mariana Islands, working first for Micronesian Legal Services representing under-privileged clients confronted with a variety of legal problems, and then for a small private firm. He moved to Honolulu in 2001.

Originally from California, Tred attended the University of the Pacific and San Francisco Law School. He played varsity soccer for four years as an undergraduate and was a co-captain and an all-league selection in his senior year. Tred has also been a long distance runner for over forty-five years and hopes to toe the starting line of what will be his tenth marathon on December 10, 2017 at the 44th Honolulu Marathon.



Tred maintains an active presence on social media. His blog at insurancelawhawaii.com has been selected as one of LexisNexus' Top 50 Blogs for Insurance and he regularly posts insurance articles on LinkedIn. In addition, Tred is active in the American Bar Association's Insurance Coverage Litigation Committee and is currently a co-editor of the social media websites maintained by the group. He is also a frequent speaker at the ICLC's annual meeting in Tucson each spring. Tred is a co-founder of the Hawaii State Bar Association's Insurance Coverage Section. Tred has been acknowledged by Super Lawyers in the area of Insurance Coverage and has an AV Preeminent rating from his peers under Martindale-Hubbell.

Tred says he enjoys working on insurance coverage issues because they frequently present an intellectual puzzle. "Matching the facts and/or allegations with the provisions in the policy is required to determine if coverage exists. It also allows me to work with various clients facing interesting factual patterns."

Tred lives in Hawaii Kai and is happily married to his wife, Akiko.

Congratulations, Tred!

2017 Lawyers of the Year, Best Lawyers and Super Lawyers



2017
LAWYER
OF THE YEAR
Eminent Domain &
Condemnation Law

Kenneth R. Kupchak



2017
LAWYER
OF THE YEAR
Litigation - Land Use & Zoning

Gregory W. Kugle



2017
LAWYER
OF THE YEAR
Land Use & Zoning Law

Robert H. Thomas



Diane D. Hastert



Michael A. Yoshida



Christine A. Kubota



Douglas C. Smith



David P. McCauley



Mark M. Murakami



Anna H. Oshiro



Matthew T. Evans



Tred R. Eyerly

Exemplifying Excellence

Congratulations to our colleagues on being selected 2017 Lawyers of the Year, Best Lawyers and Super Lawyers, and for exemplifying excellence in their areas of practice. For over 50 years, our firm has provided superior service and creative solutions to Hawaii's business community.

Kenneth R. Kupchak

Corporate Law, Construction Law
Litigation – Construction
Litigation – Land Use & Zoning
Eminent Domain & Condemnation Law
Lawyer of the Year 2015:
Litigation – Land Use & Zoning
Real Estate Law
Super Lawyers: Construction Litigation

Gregory W. Kugle

Construction Law
Land Use & Zoning Law
Litigation – Construction
Litigation – Land Use & Zoning
Real Estate Law
Lawyer of the Year 2013:
Land Use & Zoning Law
Super Lawyers: General Litigation

Robert H. Thomas

Eminent Domain & Condemnation Law
Land Use & Zoning Law
Litigation – Land Use & Zoning
Lawyer of the Year 2014: Eminent
Domain & Condemnation Law
Super Lawyers: Appellate

Diane D. Hastert

Commercial Litigation

Michael A. Yoshida

Business Organizations
(including LLCs & Partnerships)
Super Lawyers: Creditor Debtor Rights

Christine A. Kubota

Corporate Law
Employment Law – Management
Lawyer of the Year 2013:
Corporate Law

Douglas C. Smith

Trusts & Estates
Litigation – Trusts & Estates
Lawyer of the Year 2015:
Litigation – Trusts & Estates
Lawyer of the Year 2013: Trusts & Estates
Super Lawyers: Estate Planning & Probate

David P. McCauley

Super Lawyers: Immigration

Mark M. Murakami

Eminent Domain & Condemnation Law
Land Use & Zoning Law
Litigation – Real Estate
Lawyer of the Year 2013: Eminent
Domain & Condemnation Law
Super Lawyers: Business Litigation

Anna H. Oshiro

Construction Law
Litigation – Construction
Super Lawyers: Construction Litigation

Tred R. Eyerly

Super Lawyers: Insurance Coverage

Matthew T. Evans

Super Lawyers: Business Litigation



Super Lawyers

American Law Institute-CLE Eminent Domain Conference, San Diego

In January, the American Law Institute-CLE produced the 34th Annual Eminent Domain and Land Valuation Litigation Conference in San Diego, California. Damon Key's Robert Thomas is the Co-Planning Chair for the Conference, and is responsible along with his colleague Joe Waldo of Norfolk, Virginia, for planning the agenda and faculty.



A Great Crowd

Damon Key's Mark M. Murakami presented "Highway and Railway Projects: What A Difference Federal Funding Makes," along with Minming Wu, Regional Counsel for the Federal Transit Administration of the U.S. Department of Transportation.



Minming Wu and Mark Murakami on federal funding issues in infrastructure projects.

But it wasn't 100% serious. St. Louis eminent domain lawyer Paul Henry, a devoted Trekkie, presented "Everything About Eminent Domain I Need to Know, I Learned From Star Trek," in his Starfleet uniform.



St. Louis eminent domain attorney Paul Henry, in full regalia.

The conference saw record attendance. The 2018 Conference will be held in Charleston, South Carolina.



A full house.

This Conference is the annual gathering of the nation's most experienced eminent domain and property lawyers, and is two-and-a-half days of legal education programming on topics such as jury presentations, appeals, expert appraisal testimony, and ethical issues for property lawyers.

San Diego's spectacular weather was also a draw.



1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813

ADDRESS SERVICE REQUESTED

PRESORTED
STANDARD
U.S. POSTAGE
PAID
HONOLULU, HI
PERMIT NO. 985



If you would not like to receive a printed copy of the Legal Alert, but would like to receive it electronically, please email us at legalalert@hawaiilawyer.com.



A D V E R T I S I N G M A T E R I A L

Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interest. It is not intended to provide legal advice or opinion.

Attorneys in the News

E. Kumau Pineda-Akiona, is on the Hawaii State Bar Association Young Lawyers Division Board as an Oahu Director for the 2017 year.

Tred R. Eyerly, spoke in Tucson recently at the annual American Bar Association conference on Insurance Coverage Law. Tred has become a national expert on the topic, and speaks annually at the conference. He was recently appointed to be a board member of Volunteer Legal Services of Hawaii.

Clare M. Hanusz, was on ThinkTech Hawaii to discuss the Trump Administration's Muslim Ban with Carl Campagna. Clare was interviewed by Hawaii News Now regarding new federal guidelines on undocumented immigrants and also interviewed by KHON and KITV. She was on Hawaii Public Radio twice and at the University of Hawai'i at Manoa as a panelist on three different occasions. Clare recently spoke at Niu Valley Middle School's Career Day about careers in law.

David P. McCauley, was interviewed by KHON2 regarding the decision by Hawaii U.S. District Court Judge Derrick Watson to block President Trump's revised travel ban.

Kelly Y. Uwaine, is on the Hawaii State Bar Association as Vice Chair for the Business Law Section.

Damon Key Leong Kupchak Hastert was honored with the APIL (Advocates for Public Interest Law) Corporate Sector Award by the William S. Richardson School of Law for Damon Key's support of pro bono work and public interest law.