

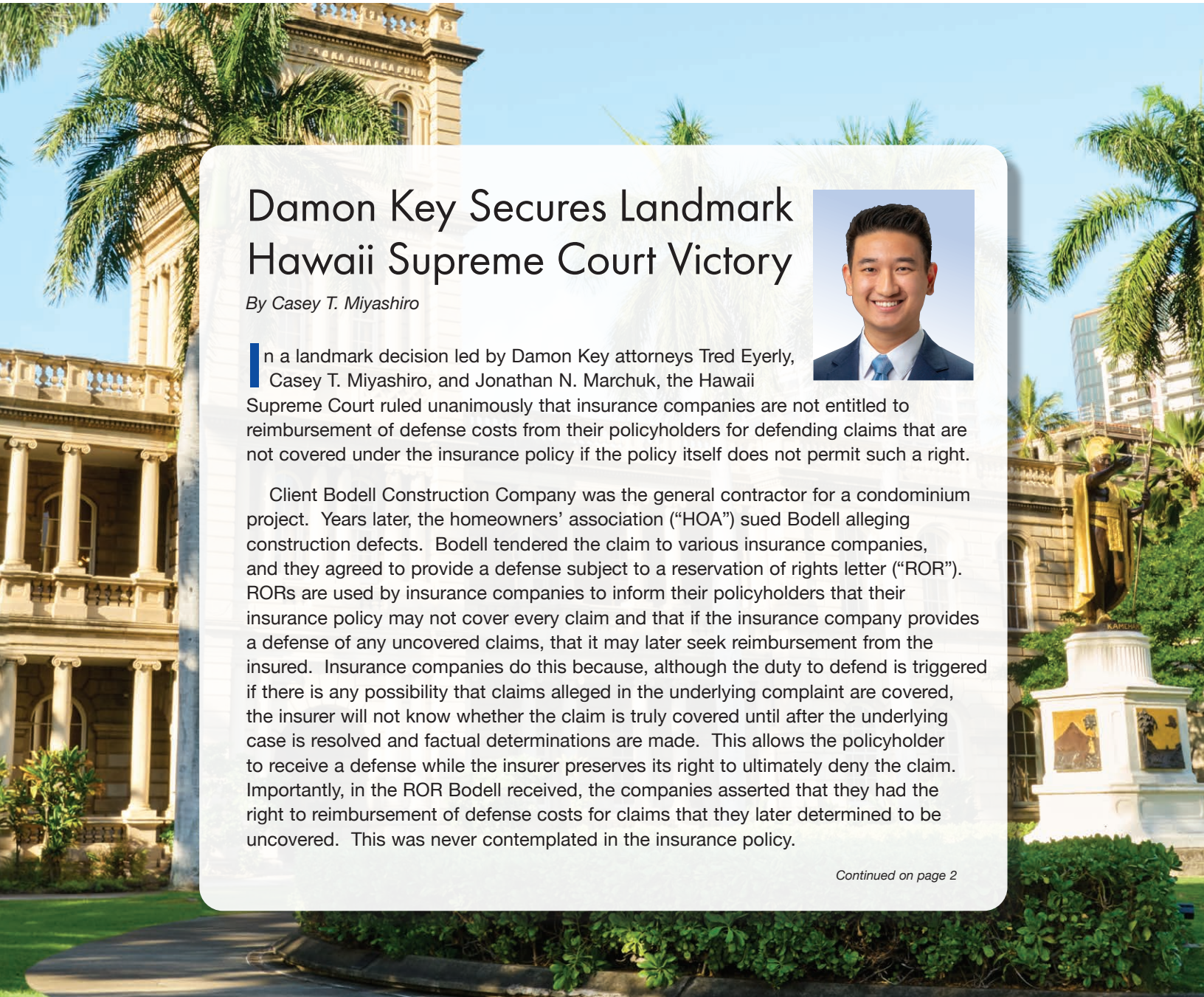
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Damon Key Secures Landmark Hawaii Supreme Court Victory

By Casey T. Miyashiro



In a landmark decision led by Damon Key attorneys Tred Eyerly, Casey T. Miyashiro, and Jonathan N. Marchuk, the Hawaii Supreme Court ruled unanimously that insurance companies are not entitled to reimbursement of defense costs from their policyholders for defending claims that are not covered under the insurance policy if the policy itself does not permit such a right.

Client Bodell Construction Company was the general contractor for a condominium project. Years later, the homeowners' association ("HOA") sued Bodell alleging construction defects. Bodell tendered the claim to various insurance companies, and they agreed to provide a defense subject to a reservation of rights letter ("ROR"). RORs are used by insurance companies to inform their policyholders that their insurance policy may not cover every claim and that if the insurance company provides a defense of any uncovered claims, that it may later seek reimbursement from the insured. Insurance companies do this because, although the duty to defend is triggered if there is any possibility that claims alleged in the underlying complaint are covered, the insurer will not know whether the claim is truly covered until after the underlying case is resolved and factual determinations are made. This allows the policyholder to receive a defense while the insurer preserves its right to ultimately deny the claim. Importantly, in the ROR Bodell received, the companies asserted that they had the right to reimbursement of defense costs for claims that they later determined to be uncovered. This was never contemplated in the insurance policy.

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The insurance companies eventually determined that some of the claims were not covered by the policy, so they filed a declaratory action in Federal court seeking a determination whether all, some, or none of the HOA's claims are covered. The court determined that some of the claims were covered, and some were not. Using this, the insurance companies asked for a determination that Bodell reimburse them for the defense costs of the non-covered claims. As indicated previously, Bodell never agreed to that in their policy; the only time it was addressed was in the ROR. The insurance companies' position was that because they never agreed to defend uncovered claims, they should not have to pay for defending those claims. Thus, out of fairness, Bodell should reimburse them for the costs they incurred defending Bodell for uncovered claims. The Federal court, applying Hawaii law in the case, had no guidance because this was an unsettled question under Hawaii State law, so the Federal court sent the question to the Hawaii Supreme Court for disposition. Cases across the country have addressed the issue with some courts deciding the insurer is entitled to reimbursement of defense costs for uncovered claims, while other courts holding the insurer has no right to reimbursement.

In a major victory for Bodell and other insureds, the Hawaii Supreme Court unanimously rejected the insurers' claim: "We hold that an insurer may not recover defense costs for defended claims unless the insurance policy contains an express reimbursement provision. A reservation of rights letter will not do." The Court noted three key reasons for its decision. First, the insurance contract did not provide a right of reimbursement. Even though the ROR claimed to have given the insurers a right to reimbursement in exchange for defending against the HOA's claims, that meant nothing – insureds cannot be forced to pay for something to which it never agreed. "A reservation of rights letter does not alter policy coverage or remake a contract," said the Court.

Second, the Court observed that allowing a right to reimbursement would erode an insurance company's duty to defend. When people purchase an insurance policy, they are paying for the right to be immediately defended against all claims potentially covered under the policy. If one claim is potentially covered, the insurer must defend all claims. This includes uncovered claims; claims that are groundless, false, or fraudulent; and even mixed actions (i.e., some claims covered, some not). Reimbursement for defense costs of non-covered claims would effectively erode the duty to defend because the insurance companies would only be financially responsible for defending covered claims. That would diminish the value of premiums, which the insured paid with the expectation that it would receive a full defense for all claims.

Finally, the Court rejected the insurance companies' argument that policyholders will be unjustly enriched if they receive a defense for non-covered claims. When insurance companies issue an insurance policy, it is with the agreement that the company will get full control of the defense because the company bears the risk of having to pay out a claim. This means the insurance company gets to decide how much it wants to spend on a defense and whether and when to settle. They do so mindful of the financial loss they might suffer relative to the premium and deductible they received from the policyholder. Allowing reimbursement would destroy this arrangement and harm the policyholder. Indeed, it would be the insurance companies that are enriched because it could spend all the money it wants defending non-covered claims knowing that the policyholder will reimburse them at the end. In other words, the insurance company would have nothing to lose organizing an overzealous defense so that it does not have to pay a claim because the policyholder would just pay for it later! The Court soundly rejected such an outrageous result.

With this decision, Hawaii joins a growing number of states rejecting a right of reimbursement of defense costs where the contract is silent. At a time when insurance claims are becoming far more frequent due to the proliferation of natural disasters, court decisions like this are key to ensuring fair play for policyholders. Many legal commentators have also praised the decision for its simplicity and no-nonsense approach, suggesting that other appellate courts around the country and elsewhere are likely to cite to it and adopt its reasoning. Damon Key attorneys don't just apply the law, they help make it too.

For more information or questions, please call Casey at (808) 531-8031, email him at ctm@hawaiilawyer.com or scan the code with your smartphone.



Christine Kubota Receives Special Commendation

Damon Key President Christine Kubota is one of 187 individuals worldwide who received a Commendation from the Ministry of Foreign Affairs of Japan in Fiscal Year 2023. The commendation was bestowed for her efforts in the promotion of mutual understanding between Japan and the United States.

Christine received her award certificate and commemorative gift at the Foreign Minister's Commendation Conferment Ceremony held at the Consulate-General of Japan in Honolulu, on November 21, 2023.

"It is thanks to my wide-ranging network of support that I have been honored to receive this commendation. I am grateful to those who have been by my side – the community, organizations and people of Honolulu who have helped to bridge Japan and Hawaii. We are so much closer to each other thanks to all of you," said Christine.

Over the years, Christine has served in leadership roles at various Japan-related organizations in Honolulu, including the Honolulu Japanese Chamber of Commerce, the United Japanese Society of Hawaii and the Japanese Cultural Center of Hawaii. In 2018, she served as the co-chair of the 150th Anniversary of the Gannenmono Celebration Committee, and in October 2019, she was selected to attend the Enthronement to the Throne of His Majesty the Emperor along with then-Governor David Ige representing the Japanese American Community in Hawaii.



Corporate Transparency Act Brings New Compliance Requirements for Small Businesses

By B. Matthew Gozun



Have you ever wanted to found your own company? Well, if you have enough money for a tank of gas, then you are in luck! In Hawaii, with just a \$50 filing fee, you too can start your own corporation. Sure, its stock may be worthless (for now), but at least you will be able to print cards with your new title.

If you do start your own company, it will be joining the millions of others within the United States. Many economists believe that making company formation easy encourages economic innovation. However, at the same time, keeping track of all these companies has become a problem for the federal government. Organized crime, terrorist groups, and foreign governments use fraudulent businesses to commit money laundering and dodge sanctions. By forming multiple, intertwined entities, bad actors can conceal themselves within a web of secretive shell companies.

To combat such actions, Congress passed the Corporate Transparency Act (CTA) in 2020 to create a central database of the country's companies and their owners. According to the Treasury Department, by 2025, tens of millions of businesses will need to submit an ownership report to the Financial Crimes Enforcement Network (FinCEN). Are you the owner of a company, or maybe someone who does the paperwork for one? If so, read ahead to learn how to stay compliant with the CTA.

Do I have to submit a report to FinCEN?

The CTA applies to legal entities requiring government registration, such as LLCs and corporations, including foreign-registered entities operating within the U.S. However, because the CTA contains numerous exemptions, not all registered entities are "reporting companies" under the CTA.

Exempted entities under the CTA are mostly those already subject to higher levels of oversight due to their size or industry. Registered financial institutions, including banks, credit unions, security brokers, and accounting firms, along with non-profit 501(c) organizations, have their own reporting requirements and generally do not need to submit an ownership report to FinCEN. The CTA also exempts "large operating companies," which are entities that have more than 20 full-time employees within the U.S. and more than \$5,000,000 in gross receipts or sales.

If you own a company to hold a home or run a very small business, then you likely do not qualify for an exemption, and must file a report with FinCEN. "Inactive" entities owned entirely by U.S. citizens are also exempt, but if your entity owns any type of property (including any interest in other companies), or has received more than \$1,000 in funds within the past year, then it will not be exempt, no matter how long you may have been neglecting it.

What does my report have to include?

If your registered entity is a reporting company, you will need to inform FinCEN of all the company's "Beneficial Owners." A "Beneficial Owner" is someone who either owns or controls at least 25 percent of a company or has substantial control over its operations. A person has "substantial control," if they are a senior officer (such as the president, general counsel, COO, or other high-ranking position), or have the power to make important decisions for the company. What constitutes an "important decision" will depend on the company, but decisions such as appointing and removing senior officers, entering into major contracts, or amending the governing documents are always important decisions.



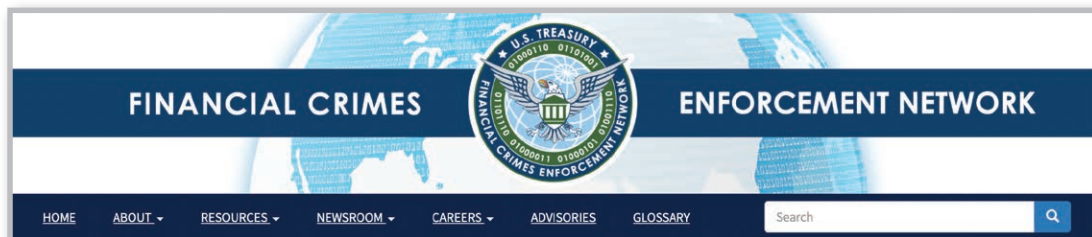
While reporting companies formed before January 1, 2024 only need to provide information about their Beneficial Owners, those formed on or after January 1, 2024 must also inform FinCEN of all their “Company Applicants,” who may be separate from, or overlap with, the Beneficial Owners. A “Company Applicant” is a person who directly files or is primarily responsible for the documents used to create or register a company. Please note that while attorneys who submit documents on behalf of a company might be Company Applicants, outside attorneys for a company (along with accountants and other third-party advisors) generally are not Beneficial Owners. When providing information about a Beneficial Owner or Company Applicant, reporting companies need to provide the individual’s name, date of birth, residential address, and a scanned copy of the individual’s passport, driver’s license, or other state-issued identification.

In addition to the above information, reporting companies will also have to provide FinCEN with the company’s legal name, the company’s trade names, the company’s principal place of business within the U.S., the jurisdiction of the company’s formation or registration, and the company’s taxpayer identification number (or foreign equivalent).

When do I have to submit my report?

If your company came into existence before January 1, 2024, then you must file an initial report with FinCEN by January 1, 2025. If your company was formed after January 1, 2024, then you must file your report within 90 days of receiving notice that the company’s registration was successful. However, companies formed after January 1, 2025 will only have 30 days to file a report.

If there is any change to your company or its beneficial owners, you must file an additional report with FinCEN within 30 days after the change. Moving offices, registering a DBA, or the death of a beneficial owner are all changes that must be reported to FinCEN. However, there is no requirement to report a company’s termination or dissolution.



How do I submit a report to FinCen?

Reports required under the CTA may be submitted online using a secure filing system accessible via the FinCEN website.

What happens if I don’t submit a report?

If a reporting company willfully fails to provide current, accurate information to FinCEN, then the company and its senior officers can face civil penalties of up to \$500 for each day that the violation continues, or criminal penalties including imprisonment for up to two years and/or a fine of up to \$10,000.

Given these potential penalties, it is a good idea for all business owners, officers, and managers to take a minute and go through some of those old company documents lying around. After all, no one wants to pay a fine just because Auntie still has that 25 percent of the company she got for Christmas.

For more information or questions, please call Matthew at (808) 531-8031, email him at bmg@hawaiilawyer.com or scan the code with your smartphone.



Hawaii Legal Short-Term Rentals

By Katie T. Pham



On October 13, 2022, just days before City and County of Honolulu Ordinance 22-7 went into effect, U.S. District Court Judge Derrick Watson issued a ruling in favor of Damon Key's client, Hawaii Legal Short-Term Rental Alliance ("HILSTRA"), granting HILSTRA's request for a preliminary injunction which allowed existing 30 to 89-day rentals to continue operations. Just a little over a year later, Judge Watson issued another ruling in favor of HILSTRA. On December 21, 2023, summary judgment was granted in HILSTRA's favor, turning the preliminary injunction that HILSTRA was granted in October 2022 into a permanent injunction enjoining the City from prohibiting the operation of existing 30 to 89-day rentals. This victory is a result of months of hard work by Damon Key attorneys, and is a momentous win for the community.

Ordinance 22-7

Ordinance 22-7 redefined the meaning of "short-term" rental from a minimum of 30 days to 90 days for residential properties. Violation of the Ordinance 22-7 would subject the violator to fines of up to \$10,000 per day, plus the "total sum received by the owner, operator, or proprietor of [the rental] from any impermissible rental activity during the period in which the owner, operator, or proprietor was subject to daily fines." Prior to the enactment of Ordinance 22-7, residential property owners on Oahu were able to rent their properties for a minimum period of 30 days. Thus, at its core, Ordinance 22-7 attempted to curb short-term rentals by increasing the minimum rental period. If left unchallenged, Ordinance 22-7 enactment would have forced many property owners—who up until the effective date of Ordinance 22-7 had been lawfully renting their properties for such time periods—to cease renting their properties for periods between 30 and 89 days, or risk paying a hefty fine.

HILSTRA's Legal Challenge

HILSTRA, a nonprofit organization comprising of property managers and owners who would have been impacted by Ordinance 22-7, commenced its challenge of Ordinance 22-7 in June 2022 by filing a lawsuit in federal district court. At the outset, HILSTRA sought a preliminary injunction to prevent Ordinance 22-7 from going into effect. The Court granted HILSTRA's request for a preliminary injunction and enjoined the City from enforcing Ordinance 22-7 "insofar as it prohibits 30 to 89-day rentals, or advertisements of such rentals, on Oahu." Subsequently, HILSTRA filed a motion for summary judgment ("Motion") seeking, principally, a ruling from the Court that Ordinance 22-7 is invalid and a permanent injunction enjoining the City from enforcing it. The crux of HILSTRA's



argument is that a state law, HRS § 46-4(a), preempts and thereby restricts the City from passing a zoning ordinance immediately prohibiting the continued use of a property as a short-term rental if doing so is legal at the time the ordinance takes effect.

In Hawaii, a county's authority to zone is conferred upon it by the legislature. The relevant statute is HRS § 46-4(a), which provides: "Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any... purpose for which the building or premises is used at the time this section or the ordinance takes effect." Thus, the City—a county—is only authorized to zone in accordance with the dictates of HRS § 46-4(a). Preemption is when there is a conflict between a State law and a county regulation. Under Hawaii law, when such a conflict arises, the conflict is resolved in favor of the State law by virtue of the supremacy provisions in article VIII, section 6 of the Hawaii Constitution and HRS § 50-15.

Despite the City's efforts to characterize Ordinance 22-7 as a rent regulation rather than a zoning regulation (and thus avoid being preempted by HRS § 46-4 (a)), the Court was not convinced. The Court agreed with HILSTRA and found that Ordinance 22-7 is indeed a zoning ordinance. The Court writes, "the city drafted and passed Ordinance 22-7 as part of the Land Use Ordinance of the City and County of Honolulu. Though the placement of the ordinance is not, by itself, determinative, its location and characterization belie the city's current attempts to call it something it is not and never was—even according to the city." Having found that Ordinance 22-7 is a zoning ordinance, the Court ruled that it is preempted by HRS § 46-4(a) for prohibiting the use of residential properties for 30 to 89-day rentals, which was a lawful use of residential properties prior to the enactment of Ordinance 22-7.

Understanding the Court's Ruling

The Court's ruling affirms that 30 to 89-day home rentals that were in existence as of the effective date of Ordinance 22-7 are lawful and can continue operating without fear of being forced to shut down or be subjected to a fine. It's important to note, however, that this ruling did not address less-than-30-day home rentals and any home rentals that were established on or after October 23, 2022. Thus, this ruling only protects the operation of 30 to 89-day rentals that were already established as of October 23, 2022.

Nevertheless, this ruling still represents a win for the community because it also recognized and validated the need for short-term rentals on Oahu. In evaluating the harm that the lack of a permanent injunction would cause, the Court noted numerous intangible injuries flowing from Ordinance 22-7 that HILSTRA raised in its Motion such as, reduction of the housing supply for service members, traveling medical practitioners, residents displaced due to natural and man-made disasters, and neighbor island residents who travel to Oahu for medical treatment or events; a restriction on local residents' ability to transition between homes; and inhibiting other individuals' ability to travel as they prefer. The Court recognized that these intangible injuries are "nearly impossible to remedy retrospectively" and that there is no adequate remedy at law for them.

This successful ruling is another prime example of Damon Key's ongoing fight to secure the property rights of landowners in Hawaii.



For more information about how Damon Key can help defend your right to short-term rent, please visit the Short Term Rental Defense page at www.hawaiilawyer.com/short-term-rental-defense or scan the code with your smartphone.



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Damon Key Welcomes Attorney Katie T. Pham

Katie T. Pham has joined Damon Key as an Associate in the firm's Litigation & Dispute Resolution practice group. Born and raised in Vietnam, Katie moved to Hawaii as a teenager and attended James Campbell High School on Oahu. She went on to earn Master of Arts and Bachelor of Arts degrees in French Literature before deciding to pursue her law degree. Proficient in Vietnamese and French, Katie contributes to our firm's ability to offer client services in a growing number of languages.

"The firm is pleased to welcome Katie to the 'ohana," said Damon Key President Christine Kubota. "Having our team grow through the addition of quality associates with diverse backgrounds is vital to our success."

Before joining Damon Key, Katie served as a Judicial Law Clerk to the Honorable R. Mark Browning, Chief Judge of the First Circuit, where she assisted the Court with probate, trust, conservatorship, and guardianship matters. She earned her law degree from the University of Hawaii at Manoa, William S. Richardson School of Law, where she served as Senior Editor of the Asian-Pacific Law & Policy Journal. She was also an Oralist on the Jessup International Moot Court Team, a Teaching Assistant for Civil Procedure for Professor Linda H. Krieger, and a Scholar Advocate for Professor Eric K. Yamamoto.

While in law school, Katie was a Summer Associate at Hawaii Gas. In this position, she assisted general counsel with various matters involving property law, administrative law, and environmental law. She also served as a Judicial Extern to the Honorable Mark E. Recktenwald, Chief Justice of the Hawaii Supreme Court, where she assisted the Court in reviewing applications for certiorari. As an Extern for Project Expedite Justice, she assisted human rights attorneys in building cases and drafting a request to the International Criminal Court to open an investigation.

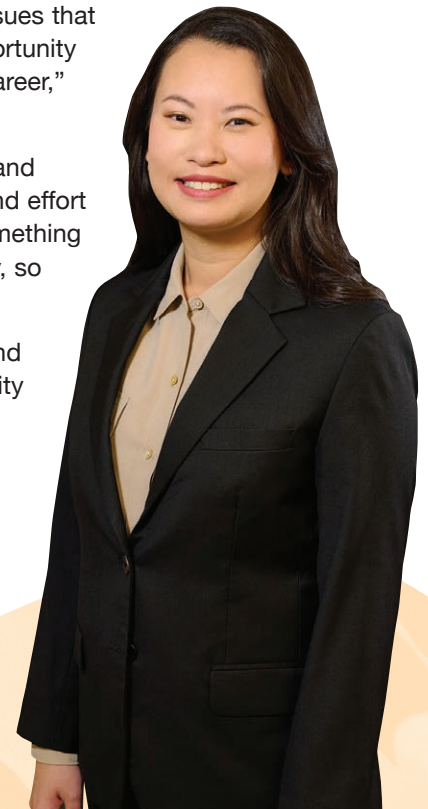
Before law school, Katie completed a Security Studies Internship at the Daniel K. Inouye Asia-Pacific Center for Security Studies (APCSS), where she was also the recipient of the Daniel K. Inouye Fellowship. While there, she assisted faculty members with planning lessons and facilitating class discussions, as well as provided support to visiting fellows. It was during her time at APCSS that she first considered a career in law, having seen how the law touches every aspect of our lives and the importance of rule of law.

"It was inspiring to meet people from all over the world who were working on issues that are, in one way or another, rooted in the law. I was also fortunate to have the opportunity to interact with attorney faculty members who encouraged me to explore a legal career," said Katie.

Among Katie's strengths are her work ethic and genuine concern. "Every case and assignment that I touch is equally important to me, and I dedicate as much time and effort as necessary to see each one through," said Katie. "I'm also resilient, which is something I attribute to having lived in a few different countries. I can adapt and learn quickly, so I'm not afraid of unfamiliar things and situations."

Katie earned her Master of Arts degree in French Literature, with high honors, and a Bachelor of Arts degree in French Literature, *magna cum laude*, from the University of Hawaii at Manoa. During this time, she served as a Graduate Assistant, independently planning and teaching beginner and intermediate French classes. When out of the office, Katie enjoys watching movies, reading, hiking, film photography, traveling, and learning languages. She resides in Honolulu with her husband and dog.

*"Every case and assignment that I touch
is equally important to me..."*



Attorney B. Matthew Gozun Joins Damon Key

Attorney B. Matthew Gozun has joined Damon Key as an Associate, practicing in the firm's Business & Commercial Law and Immigration & Naturalization Law practice groups. In addition to his legal education, Matt brings previous success teaching English as a second language and serving as a legal intern at a multinational law firm in Japan. Today, Matt uses his proficiency in Japanese to assist the firm's Japanese-speaking clients.

Matt graduated *magna cum laude* with a certificate in Pacific-Asian Legal Studies from the University of Hawaii at Manoa, William S. Richardson School of Law. While there, he received CALI Excellence for the Future Awards for achieving the highest grade in six classes. Matt was also an Oralist on the Jessup International Moot Court Team.

While in law school, Matt's paper on revisions to Japan's Childcare and Family Leave law received the Frank Boas Award for best Second-Year Seminar research paper on a subject relating to a Pacific Asian topic. He was honored with the Sam and Helen Piesner Endowed Scholarship for Japanese Legal Studies, a scholarship awarded to high-achieving students who wish to pursue the study of Japanese Law, and the Spirit of Alison Adams Scholarship, awarded to students with success in careers prior to attending law school.

Matt worked as a Research Assistant for Professor Richard Chen, assisting with research on how sociocultural and structural influences affect the practice of investor-state dispute settlement, a system in which private investors sue countries for alleged treaty violations. For his pro bono service, Matt worked with the Medical-Legal Partnership for Children in Hawaii, a collaboration between the Richardson School of Law and Kōkua Kalihi Valley Comprehensive Family Services to provide low-income clients with access to legal services.

"In law school, we often reduce law to a series of theoretical facts and rules, forgetting that behind every case is a real person. Volunteering for the Medical-Legal Partnership helped me to put a human face to the practice of law and better appreciate that my work as a lawyer has real consequences on the lives of others," said Matt.

During the summer of 2022, Matt was a Legal Intern at OneAsia Lawyers in Tokyo, Japan, a multinational law firm with member offices across Asia and Oceania. While there, he assisted Japanese clients with their legal matters in Southeast Asian countries. Prior to law school, Matt was an Assistant Language Teacher for the Japan Exchange and Teaching (JET) Programme in Tokushima, Japan. While there, he taught English as a second language to senior high school students, while concurrently working as a part-time teacher at a school for students with auditory or visual disabilities.

Matt enjoys helping others achieve their goals. As a transactional attorney working in business law, he hopes that his work will help bring new economic opportunities to the people of Hawaii, especially the younger generation.

Matt earned a Bachelor's Degree with a double major in Biology and Economics at Marquette University in Milwaukee, Wisconsin. He was born in New York and moved to Hawaii at the age of three, growing up in Mililani on Oahu, and later attending Damien Memorial School. Outside of the office, Matt enjoys traveling and his hobbies include reading, cycling, running, hiking, playing musical instruments, and photography.



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Attorneys in the News



B. Matthew Gozun, Kira-Nariese K. Brown and Daniel J. Koller sworn in as Damon Key's newest attorneys.



Christine A. Kubota, Kira-Nariese K. Brown and Anna H. Oshiro



B. Matthew Gozun and Anna H. Oshiro



Kenneth R. Kupchak and Daniel J. Koller