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Inside this Issue:

- Employment Eligibility Verification Form
- Insurance
- Advanced Zoning and Land Use

Insurance 101

By Fred R. Eyerly



Insurance policies are complex instruments. Policyholders may be inclined to accept the terms of a policy and pay a premium without fully understanding the terms. Careful study and negotiation may result in more favorable terms. Below are ten basic considerations regarding insurance policies.

1. WHY INSURANCE? - Businesses and individuals seek security from risks of future financial loss or other harm. Self-insurance is not a viable option for most people or businesses. Consequently, insurance allows the policyholder to share the risk with the insurance company in exchange for an annual premium.

2. TYPES OF INSURANCE - There are many types of insurance policies covering practically every aspect of life. "First-party" coverage applies to loss or damage sustained by the insured; the insurer promises to pay money to the insured when a covered risk occurs. For example, health insurance protects the policyholder in the event of illness. Life insurance protects the policyholder's beneficiary in the event of death. Fire insurance protects against damage to the policyholder's possessions. Performance bonds protect the obligee against loss from the principal's breach of contract by guaranteeing the principal's performance. Fidelity bonds protect the obligee against loss due to employee theft or dishonesty.

"Third-party" insurance covers the policyholder's liability to others; the insurer generally agrees to pay judgments for damages because of "bodily injury" or "property damage" entered against the insured because of its negligence. The liability policy also typically

requires the insurance company to defend the policyholder in the event of a lawsuit.

3. OCCURRENCE VS. CLAIMS MADE POLICIES - An "occurrence policy" provides coverage if the event insured against (the "occurrence") takes place during the policy period, irrespective of when a claim is presented. Therefore, if there is an "occurrence" during the policy period, but it is not discovered until after the policy period ends, there is still coverage. On the other hand, coverage is triggered under a "claims made" policy when the claim is presented during the policy term regardless of when the event occurs.

4. POLICY EXCLUSIONS - Policies frequently have exclusions, which take away coverage under specified conditions. For example, in a general liability policy, liability assumed under contract is typically excluded. The insurance company bears the burden of showing an exclusion bars coverage. Exclusions are strictly construed so that ambiguities are construed in favor of the policyholder and against the insurance company.

5. POLICY ENDORSEMENTS - Typically, the insurance policy includes the printed form policy or declarations and endorsements. Endorsements

Continued on page 2

must be reviewed carefully because they frequently amend the declarations by limiting or taking away coverage. However, endorsements may also grant additional coverage or remove the effect of exclusions. For example, endorsements may add additional risks such as new automobiles or locations. Endorsements must be read with the rest of the policy and will be construed, if possible, to give effect to all provisions. The order of attaching the endorsements and other portions of the policy is unimportant for purposes of coverage.

6. DEDUCTIBLES AND SELF-INSURED RETENTION - Under a deductible, the insured must pay the amount of the claim up to the deductible amount prior to any obligation on the part of the insurer. Therefore, the amount of the deductible reduces the amount of insurance provided under the policy. With a self-insured retention, the insurer agrees to pay the excess of the retention amount. The amount of the insurance is not reduced, but only begins to apply over and above the amount of the self-retention. Thus, with a \$10 million policy and a \$100,000 deductible, the amount of insurance is \$9,900,000. Under a self-insured retention provision, the amount of insurance provided by the policy is still be \$10 million, but only covers the claim to the extent that it exceeds the \$100,000 self-insured retention.

7. DUTY TO DEFEND - One of the most important aspects of a policy is the insurer's duty to defend if the policyholder is sued. A general liability policy typically states the insurer has the right and duty to defend any suit against the insured seeking damages because of bodily injury or property damage, even if the allegations in the suit are groundless, false or fraudulent. The duty to defend is broader than the duty to pay claims. To determine whether it has a duty to defend, the insurer must look to the allegations made in the complaint against the policyholder. If there is any possibility that coverage exists under the terms of the policy, even if remote, the insurance company must defend. All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured. Moreover, if only one claim in a suit raises the possibility of coverage, the insurance company must defend the entire suit.

8. CANNIBALIZING POLICY - Frequently, when the insurer is obligated to defend the policyholder in a lawsuit, the costs of defending the lawsuit are in addition to, and not deducted from, the policy limits. Under what is known as a "cannibalizing policy," however, the defense costs are included in the policy limits. In other words, the cost of defending the insured against a third party eats away at the policy limits, leaving a decreased amount to pay any damages assessed against the insured. In a section of the policy labeled "Limits of Insurance," the following cannibalizing language may appear: "The most we will pay for the sum of all damages and 'defense expenses' for coverage is the annual aggregate limit shown on the declarations page." A cannibalizing policy should be avoided.

9. AMBIGUITIES IN POLICY CONSTRUED IN INSURED'S FAVOR - If there are reasonable arguments for and against coverage under the policy language, an ambiguity exists. To resolve the conflict, insurance policies are construed liberally in favor of the insured. In other words, any ambiguity must be resolved against the insurance company. The Hawaii Supreme Court has explained that insurance policies are construed in accordance with the reasonable expectations of a layperson.

10. MAKING A CLAIM - The policyholder should never hesitate to make a claim. Even if coverage appears questionable or unlikely, a claim should be submitted to force the insurance company to make an evaluation on coverage. If the claim is denied, the insurance company should point to portion(s) of the policy on which it relies. If the policyholder disagrees with the denial of coverage, a letter arguing for coverage is entirely appropriate.

It is difficult to imagine modern society functioning without insurance. The complexity of insurance can be minimized, however, by a thoughtful process. Consult with your insurance team (usually a qualified broker and an attorney experienced in insurance law) who can advise on potential problems in a policy and review legal issues if a claim is denied.



USCIS Issues New I-9 Employment Eligibility Verification Form

By David P. McCauley



On November 7, U.S. Citizenship and Immigration Services (USCIS) announced it was issuing a revised Employment Eligibility Verification Form (Form I-9). All U.S. employers are required to complete a Form I-9 for each employee, including U.S. citizens, hired after November 6, 1986, the date on which the employment verification law originally took effect. Certain exceptions apply for employees providing intermittent domestic services in a private household, or providing services as independent contractors.

The revised version of Form I-9 includes the revision date (Rev. 06/05/07) printed on the lower right corner of the form. The Nov. 7 announcement advised employers they have 30 days from November 26, 2007, the date notice regarding the new form was published in the Federal Register, to transition to the revised form. Accordingly, effective Dec. 26, 2007, employers who fail to use the revised form will be subject to applicable penalties. Forms with earlier revision dates cannot be used after that date. We advise employers to begin using the new form now.

The I-9 form must be completed within three days of hiring a new employee. Employers only need to complete the new version of Form I-9 for new employees. They do not need to complete new forms for existing employees. Unlike tax forms, I-9 forms are not filed with the U.S. government. Instead, employers must maintain I-9 records in their files for 3 years after the date of hire or 1 year after the date the employee's employment is terminated, whichever is later.

The revised Form I-9 is a further step in USCIS' ongoing work toward reducing the number of documents used to confirm identity and work eligibility. The revision removes certain documents previously used. The revised list now includes: a U.S. passport (unexpired or expired); a Permanent Resident Card (Form I-551); an unexpired foreign passport with a

temporary I-551 stamp; an unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, or I-688B); and an unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer (for example, persons with H-1B, E-2, or L-1 visas).

Proper completion of I-9 forms and maintenance of I-9 files is an employer's first line of defense against any allegation that the employer has hired someone not authorized to work in the United States. I-9 files should be periodically reviewed, especially in the case of foreign workers whose employment authorization documents may have expiration dates.

Both the revised I-9 form and the "Handbook for Employers, Instructions for Completing the Form I-9" are available online at www.uscis.gov. Click on "Immigration Forms" and scroll all the way down to "I-9" (which follows Form I-881). Employers can also order forms by calling USCIS toll-free at (800) 870-3676.

David P. McCauley, Head of Immigration Law Section

For more information or questions regarding this article, please call David at 531-8031 ext 618 or email him at dpm@hawaiiilawyer.com

Meet The Members Of Our Insurance Practice Group



James C. McWhinnie

Jim has been selected by his peers to be included in the The Best Lawyers in America and Hawaii's Best Lawyers in the area of Commercial Litigation. He has been rated "AV" (the highest available rating) by Martindale Hubbell for many years, and is a member of The Million Dollar Advocates Forum (attorneys who have won million and multi-million dollar cases). His legal practice emphasizes civil litigation.

Gregory W. Kugle

Greg concentrates his practice in the area of litigation. He has worked in the areas of insurance, commercial disputes, construction, land use, real estate, antitrust, product liability, personal injury, aviation, bankruptcy, admiralty and Native Hawaiian rights. He has litigated cases before the Hawaii Circuit Courts and the United States District Court, and has handled appeals before the Hawaii Supreme Court and the Ninth Circuit Court of Appeals.



Mark M. Murakami

Mark practices in the firm's Insurance, Dispute Resolution and Real Estate & Construction practice groups. Mark was the Valedictorian of the Class of 1999 from the William S. Richardson School of Law at the University of Hawaii. Mark is a graduate of the U.S. Coast Guard Academy in New London, Connecticut and was twice nominated for the American Bar Association's Military Lawyer of the Year Award.

Tred R. Eyerly

Tred has accumulated a wide variety of litigation skills over the past twenty-six years having practiced in Alaska for eleven years, the Commonwealth of the Northern Mariana Islands for ten years, and Hawaii for the past five and a half years, concentrating on commercial litigation.



Robert D. Harris

Robert practices mostly in the area of civil litigation with an interest in environmental, insurance coverage and health related matters. Robert received a B.A. degree in chemistry and environmental science from the University of Hawaii and a J.D. degree, cum laude, from the University of Hawaii, William S. Richardson School of Law.

Noelle B. Catalan

Noelle obtained her law degree, cum laude, from the William S. Richardson School of Law, University of Hawai'i in 2006. While in law school, she was a member and Managing Editor of the University of Hawai'i Law Review and a member of the Moot Court Board. She practices in Business Commercial, Real Estate and Dispute Resolution Groups.



Insurance Practice

Damon Key's Insurance Group attorneys are knowledgeable about all major types of insurance coverage, including Commercial General Liability (CGL) Insurance, Individual Disability Insurance, as well as Automobile Insurance, Homeowners Insurance, and Excess Insurance Coverage. We have decades of experience litigating, arbitrating, and negotiating insurance coverage and bad faith disputes, including the following:

- Several members are the principal contributors to Hawai'i's premiere insurance coverage blog located at <http://www.insurancelawhawaii.com>
- Retained by the State of Hawaii as Special Deputy Attorney General in State of Hawaii v. National Union, First Circuit, State of Hawaii, Civil No. 99-2756-07; obtained \$3 million of previously denied coverage for payments made by the State to settle the QUEST class actions;
- Successfully represented numerous prominent local companies, including a law firm, in multi-million-dollar coverage disputes with their insurers, with the viability of the entities at stake;
- Produced, co-conducted and written legal materials for numerous seminars on Hawaii Insurance Coverage, Bad Faith Law and Litigation, and related topics.
- Successfully represented numerous commercial entities of various sizes in coverage disputes with their insurers;
- Successfully represented the plaintiff in Mikelson v. USAA, a 21 year-old student from California who was in Hawaii to attend Leeward Community

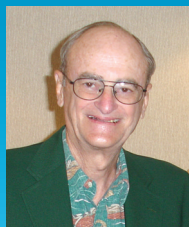
College and was injured in automobile-motorcycle collision. His insurance company denied his Underinsured Motorist ("UIM") coverage on the grounds Mat was not a resident relative of his California resident father. We obtained a judgment of coverage after a court trial on that issue, which was affirmed by the Hawai'i Supreme Court in Mikelson v. USAA, 107 Hawai'i 192, 111 P.3d 601 (2005);

- Successfully represented individual claimants who had been denied disability insurance coverage by their insurers;
- Members founded the Insurance Coverage Section of the Hawai'i State Bar Association; and
- Successfully represented insurance companies on a multitude of coverage issues and bad faith claims.

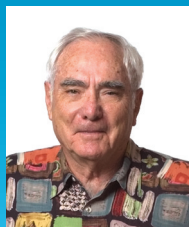


Happy New Year

from
Damon Key Leong Kupchak Hastert



C.F. Damon, Jr.



Charles W. Key



Denis C.H. Leong



*Kenneth R.
Kupchak*



Diane D. Hastert



Noelle B. Catalan



*Christi-Anne H.
Kudo Chock*



Tred R. Eyerly



Robert D. Harris



Todd Y. Hirai



Caprice R. Itagaki



*Courtney S.
Kajikawa*



*Christine A.
Kubota*



Gregory W. Kugle



*Tricia K.
Fujikawa Lee*



*Kathryn
Mashima*



*David P.
McCauley*



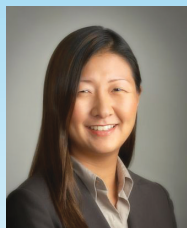
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Anna H. Oshiro



Michelle M. Shin



Douglas C. Smith



*Robert H.
Thomas*



*Michael A.
Yoshida*

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Damon Key Leong Kupchak Hastert Client Breakfasts

For over 10 years, Damon Key Leong Kupchak Hastert has sponsored presentations to our clients by a diverse group of notable business, political, and community leaders. Over breakfast, our speakers and guests share information and insight about current issues such as the Hawaii Superferry, homeland security, mass transit, and Hawaii's economy. The relaxed setting provides opportunities for our clients to exchange ideas and share information with our presenters and to network with one another. Past speakers have included:

Rowena Akana, *Chairperson, Board of Trustees,
Office of Hawaiian Affairs*

Paul Brewbaker, *VP & Chief Economist of
Bank of Hawaii*

Congressman Ed Case

Admiral Thomas B. Fargo, *Commander,
U.S. Pacific Command*

Robert J. Fishman, *CEO, Hawaii Tourism Authority*

Mayor Mufi Hannemann, *City and County of Honolulu*

Rodney K. Haraga, *Director, State of Hawaii,
Department of Transportation*

Major General Robert G.F. Lee, *Adjutant General,
State of Hawaii, Department of Defense*

Mayor Linda Lingle, *County of Maui*

Governor Linda Lingle, *State of Hawaii*

Council Chair Barbara Marshall, *City Council,
City and County of Honolulu*

Paul Le Mehieu, *Superintendent of Education*

Kenneth Mortimer, *President, University of Hawaii*

Calvin Say, *Speaker of the House, State of Hawaii,
House of Representatives*

Thurston Twigg-Smith

Terry White, *Hawaii Superferry*

If you are interested in attending a future Client Breakfast, send us an email with your contact information to clientbreakfast@hawaiilawyer.com.

7

Damon Key Leong Kupchak Hastert's Land Use Practice Group is giving a one-day seminar on February 20th, 2008, at the Ala Moana Hotel



ADVANCED ZONING AND LAND USE IN HAWAII

This one-day seminar is designed for attorneys, executives, owners, project managers, engineers, architects, developers, planners, principals, real estate agents and brokers, lenders, surveyors, title officers and land use officials.

The attorneys that will
be speaking are:

Noelle B. Catalan
Robert D. Harris
Gregory W. Kugle
Mark M. Murakami
Robert H. Thomas

Contact Donna Shiira at 531-8031 or visit hawaiilawyer.com for agenda details and registration information.

1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813

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Attorneys in the News

Diane D. Hastert has been re-elected to the National Easter Seals Board of Directors and appointed the National President's Council Chair.

Robert D. Harris is the Chair-emeritus for the National Resources Section of the Hawaii State Bar Association

Courtney S. Kajikawa has been elected as Vice Chair of the HSBA Probate and Estate Planning Section & Chair of the YWCA Event Management Committee Regional Director of Occidental College Alumni Association.

Gregory W. Kugle has been elected as Chair-Elect of the Real Property and Financial Services Section of the Hawaii State Bar Association.

Kenneth R. Kupchak has been reelected for a 3-year term as Vice Chair of the Board of Trustees of Mid-Pacific Institute.

David P. McCauley's article "Employing Foreign Workers in the Construction Industry" published in the current (Fall 2007) issue of The Construction Lawyer from the American Bar Association.

Michelle M. Shin has been elected to the Board for Hawaii State Bar Association's Real Property and Financial Services Section.

Calendar of Events

Gregory W. Kugle was selected to present a seminar of the unexpected discovery of burial or archeological sites during construction projects at the American Bar Association, Forum on the construction Industry Annual Meeting in Palm Springs, CA on April 25, 2008

James C. McWhinnie, Vice Chair and Director of Meritas Lawfirms Worldwide, will be attending the Meritas Executive Committee Meeting and Board of Directors Meeting in Los Angeles, California on January 24 – 26, 2008.

