

# Legal Alert

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**DAMON KEY LEONG KUPCHAK HASTERT**  
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The Bankruptcy Abuse Prevention and Consumer Protection Act

## A Tribute to our Founders

**T**his article is the second in a series on our firm's founders – Frank Damon and Henry Shigekane. The first was dedicated to Frank, this second one is dedicated to Henry. Reading about these two individuals with such very different backgrounds and upbringing reminds us that success does not come from the opportunities we are offered, but rather from what we do with those opportunities.

### The Shigekane Heritage

Henry's parents were both immigrants from Japan. Shigezo Shigekane (father) came to Hawaii to work in the sugar cane fields on the Big Island of Hawaii. Fuji Akao (mother) came to the Big Island to join her parents. Her father was likewise working in the sugar cane fields. Henry's father then left his work to join an importing firm in Hilo and it was there that he settled with his wife to raise a family of nine children, of which Henry was the sixth.



### Henry Shigekane

For most, early school years meant attending classes from fall to spring, followed by a long break during the summer to play. But as they grew older, many were recruited to work in the pineapple fields on Oahu and giving them a chance to earn money. Henry was one of those Hilo boys recruited to work in the pineapple fields in Kunia, Oahu. The boys lived in Kunia housing – more like barracks with a common bathroom they all shared. While some may think it was a rough life, the boys enjoyed their times together, working and relaxing. The experience was eye-opening and a memorable one for all of the Hilo boys who were exposed to life in the "big" city of Honolulu during the weekends.

When Henry started his public school education, the then territorial Department of Education had established two sets of schools: regular public schools for the greater majority of children and English Standard Schools for those children proficient in English, mainly Caucasians. Henry, speaking only pidgin English and a smattering of Japanese, attended the regular public schools. At that time in Hilo, because of its small population, the English Standard School ended after the sixth grade and its graduates were funnelled into an intermediate school along

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with students from the regular public schools. However, these students were set aside in a special classroom apart from other students in the seventh grade, and this separation was continued throughout high school.

Henry somehow was enrolled in this special classroom made up of graduates from the English Standard School and separated from his former classmates. This was a startling and, as it turned out, an agonizing change for him as he was then made aware of his deficiency in language skills and that he was the only one there speaking pidgin English. This daily embarrassment did not last long as there occurred the attack on Pearl Harbor on December 7, 1941 and all schools in Hawaii were promptly closed. But upon commencement of the next school term in September of 1942, Henry was once again placed in the same classroom with the students at the English Standard School.

There was then in the school an entity designated as “homeroom” where the students conducted classroom activities other than school learning. Each homeroom had class officers. To his great surprise, Henry was chosen by his roommates as president which required him each day to stand before the class and conduct a meeting. His use of pidgin became a glaring embarrassment. This predicament forced him to improve his speech, which he did, and to this he credits and thanks his classmates. “I thought that was an amazing thing, and they really gave me the shove which no other thing or person could have done for me at that time – only the kids from that school.”

***After high school, Henry, lacking adequate funds, enrolled at the University of Hawaii. With his eye still on a mainland college, Henry, while attending UH, took on a job as busboy, baker, yardman and otherwise general factotum at a restaurant called Queen’s Surf in Waikiki. Then with the help of his philosophy professor, he was accepted at Yale University with a partial scholarship and then was off for New Haven, Connecticut on a chartered air flight and a Greyhound bus ride paid for with his hard-earned savings.***

## **Henry Meets Frank**

When he arrived at Yale, he was overwhelmed by the architecture of gothic buildings planted in the city. He had never seen or been surrounded by buildings like that. And it wasn’t just the buildings -- the environment was different, the people were different and the food was different. He was homesick and thought he made a terrible mistake going to the Mainland. But eventually toward the end of the semester, things started falling into place and he began to feel not only comfortable but to love the place.

It was here at Yale that Frank and Henry first met. With few Asians at the school, Frank noticed Henry and asked if he was from Hawaii. Being a year ahead, Frank took time to show him around the school and occasionally dropped in to check on Henry in his dorm and to make sure he was doing alright. It was because of, and with, Frank that Henry first experienced skiing -- as Frank’s guest.

After completing his undergraduate work at Yale, Henry applied for and was accepted at Harvard Law School. It was also here in Massachusetts that Henry married Joanne Holmes.

Law School was a mystery for Henry, although he enjoyed Harvard and the surroundings. The return to Hawaii was not to Hilo but to Honolulu as it was the site for the Hawaii bar exam.

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***In January of the following year (1955), the results of the bar examination were finally published and Henry was one of the fortunate fifty-five percent who passed. Frank then sponsored Henry before Hawaii's Supreme Court for admission to the bar. Fortunate again was he when he landed a job as clerk to one of Hawaii's Federal district court judges. From there, he went to the territorial Attorney General's Office as a deputy and then to the City Attorney's Office at the City and County of Honolulu.***

During this period, Henry's family had grown to five with one more daughter and a son. And during this time, he was regularly in contact with Frank mainly through a reading club started by Frank with a nucleus of Yale alumni who met monthly.

After years of governmental service, he went into private practice with Morio Omori, Matsuo Takabuki, and Dan Inouye who was at the time a Congressman. His association with that firm was cut short when Wallace Fujiyama asked Henry to help him in his firm since Fujiyama's partner, Walter Chuck, had become ill and could not work. It was there that Henry was exposed to a variety of private law practice cases. Walter Chuck recovered from his illness and returned; the law group was now three and prospering.

It was the early 60s and the civil rights movement was shaking the entire nation. While there were a lot of Asians who lived in Hawaii, the majority of the top business people were Caucasians and there was a sharp line between the two.

It was during this period that Frank proposed to Henry they join together to form a law firm. This was not something Henry had ever considered. Although they were now in the same profession and equals as lawyers, the two men came from very different family backgrounds and social classes. "You know when that happened, when Frank proposed that, I really thought...Gee this is really adventurous for somebody like him to turn his back on that kind of thing (being a partner in a big law firm)." From Frank's point of view, forming a law partnership with Henry was a promising challenge -- based on their prior relationship, friendship, trust, and Henry's personal qualities and abilities. That Henry was of Japanese ancestry was never an issue. In doing so, Frank being color blind was ahead of the times.

In 1963, Damon & Shigekane was formed as one of the first, if not the first, multi-racial law firms in Hawaii. At that time, major law firms in Hawaii had few, if any, Asian or woman lawyers and none as partners. Thus was born the firm of Damon & Shigekane in a little office in the Hawaiian Trust Building with three cubicles and a secretary to be shared by the two of them.

***The third and final article of this series will appear in the next issue of Legal Alert -- the early days of the firm and the legacy left by Frank and Henry.***

# Real Estate and Construction Practice

**D**amon Key's Real Estate and Construction ("Recon") practice group is pleased to announce that two of its members will be officers of the Hawaii State Bar Association's Real Property and Financial Services Section in 2009. Greg Kugle was elected section Chairperson for 2009 and Michelle Shin will be the Secretary. Damon Key salutes Greg and Michelle for their service to the Real Property section, the bar association, and for this recognition of their talents by their peers.

## Landmark Zoning Decision.

In a very important land use decision, Hawaii's Intermediate Court of Appeals held that there is no private right of action to enforce Hawaii's state-wide zoning law. In *Pono v. Molokai Ranch, Ltd.*, the ICA affirmed the circuit court's dismissal of a lawsuit filed against Molokai Ranch by several individuals seeking to stop Molokai Ranch's tent camping program on its agriculture-zoned lands. Greg Kugle and Ken Kupchak, representing the Ranch, successfully argued that the individuals could not sue Molokai Ranch in court, bypassing the county zoning enforcement mechanism. The Hawaii Supreme Court declined to review the case, making the ICA decision the law of the land. This case applies to the approximately 50% of the land in Hawaii, in all four counties, that is classified in the Agricultural and Rural districts by the Land Use Commission.

## Important Agricultural Lands.

Back in 1978, Hawaii amended its Constitution to require the Legislature to take steps to protect agriculture in Hawaii. For nearly 30 years, the Legislature took no steps to implement this requirement. In 2005, the Legislature finally passed a law requiring the identification of Important Agricultural Lands ("IAL"), and directing the State and the counties to enact incentives for property owners to preserve these lands. In 2008, the Hawaii Legislature enacted Act 233, which sets out the State-offered incentive package for Hawaii landowners to voluntarily seek to have their lands deemed Important Agricultural Lands ("IAL"). These incentives include: farm dwellings and employee housing; up to \$7.5 million total tax credits for qualified agricultural costs; up to \$2.5 million in total annual loan guarantees; and priority permitting for agribusiness processing facilities. The counties have not yet enacted their incentive packages. Act 233 sets up an expedited Land Use Commission process for private landowners to seek to have 85% of their land classified IAL, and the remaining 15% classified into another district, such as Urban, Rural or Conservation. The LUC process is not automatic and the IAL-designated lands must satisfy statutory criteria. The LUC has not yet adopted rules for the expedited IAL process.

## Alternative Energy Production.

Some experts estimate that Hawaii obtains 90% of its energy from imported oil and other fossil fuels, which is the highest dependence on imported oil in the United States. As the price of oil spiked to record levels in 2008, more attention was focused on developing alternative and renewable energy sources to feed Hawaii's energy needs. Thus, in 2008, the Legislature enacted a number of measures intended to facilitate alternative energy production. Act 31 permits solar energy facilities on land classified Agricultural by the Land Use Commission, with a soil productivity rating of D or E. Wind energy facilities and biofuel processing facilities were already permitted on land in the Agricultural district. Act 207 establishes a stream-lined process for state and county permitting for the siting, development, construction and operation of renewable energy facilities over 200 megawatts. Finally, Act 208 establishes the position of a Renewable Energy Facilitator within the Department of Business, Economic Development and Tourism.

## Significant Eminent Domain Ruling.

On December 24, 2008, the Hawaii Supreme Court issued an opinion in *County of Hawaii v. C&J Coupe Family Limited Partnership*, a case one commentator referred to as the "most important eminent domain decision nationwide in 2008." Damon Key attorneys Ken Kupchak, Robert Thomas and Mark Murakami, representing the Coupe family, successfully challenged Hawaii County's efforts to condemn property for a road. The Hawaii Supreme Court held that the government must pay damages when its attempts to take property fail. The Court also held that judges must not simply take the government's word that a taking is for public use, but must seriously consider a property owner's claim that a taking is a pretext. This ruling represents a significant victory for Hawaii property owners and the rule of law.

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### Owners' Counsel of America.

Robert Thomas has been honored with membership in the Owner's Counsel of America. OCA is a voluntary network of experienced eminent domain attorneys from every state in the nation, representing property owners facing condemnation or other infringement on their constitutional rights to own property, and dedicated to advancing the cause of property rights. OCA membership is by invitation only and is open to only one attorney from every state.

### Land Use Law Article Published.

In December 2008, the Zoning and Planning Law Report (Thomson | West) published an article by Damon Key attorney Robert Thomas about the latest developments in federal protections for property rights, The Ninth Circuit Rediscovered Substantive Due Process in Land Use Cases. Email Robert at [rht@hawaiiattorney.com](mailto:rht@hawaiiattorney.com) and he will send you a copy.

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## Meet The Real Estate and Construction (Recon) Practice Group



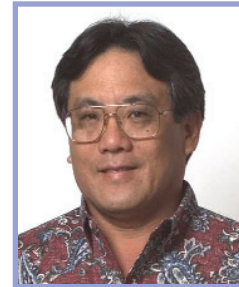
Gregory W. Kugle



Kenneth R. Kupchak



Diane D. Hastert



Michael A. Yoshida



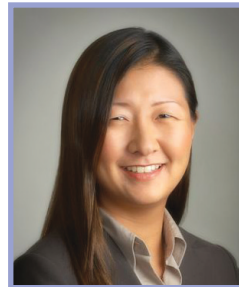
James C. McWhinnie



Christine A Kubota



Anna H. Oshiro



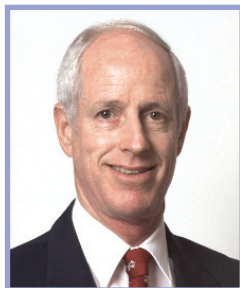
Michelle M. Shin



Mark M. Murakami



Todd Y. Hirai



Tred R. Eyerly



Noelle B. Catalan



Christi-Anne H. Kudo Chock



Matthew T. Evans

# The Bankruptcy Abuse Prevention and Consumer Protection Act

by Michael Yoshida



## I. BAPCPA and Trade Creditors.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) which was signed into law on April 20, 2005 made significant and major changes to the Bankruptcy Code. In essence, BAPCPA tipped the scales in favor of creditors.

One of the significant changes benefits trade creditors who provided goods to a debtor within 20 days of the commencement of a bankruptcy case. Prior to BAPCPA, trade creditors often times ended up in the untenable position of holding large and usually unsecured accounts receivable resulting from the debtor’s purchase of goods (which adds value to the debtor’s bankruptcy estate) on the eve of the filing of the debtor’s bankruptcy petition. In essence, trade creditors often times financed the debtor’s stockpiling of inventory. As a result of BAPCPA, this is no longer the case and trade creditors now have an important benefit; they have an administrative priority claim for such goods.

This is a significant benefit because administrative priority claims would be paid prior to unsecured claims and claims for certain wages, taxes and contributions to an employee benefit plan. Previously, only a narrow range of pre-petition claims would qualify for administrative expense priority. These included the expenses of a creditor commencing an involuntary bankruptcy case and the expenses of a superseded custodian.

The benefits of administrative expense priority are many. For example, in a Chapter 12 case (available to Farmers and Fishermen) and a Chapter 13 case (available to any individuals with a regular income) administrative expenses must be paid in full. In a Chapter 11 case (Reorganization) administrative expense claims must be paid in cash on the effective date of the plan of reorganization unless the creditor agrees otherwise. In a Chapter 7 case (Liquidation), following payment of pertinent secured claims, administrative expense claims must be paid first upon distribution of assets of an estate.

## II. Statutory Language (Bankruptcy Code Section 503(5)(9)) and its Limitations.

Specifically, Section of 503(b)(a) of the Bankruptcy Code now provides:

*After notice and a hearing, there shall be allowed, administrative expenses ... including ...*

*(a) the value of any goods received by the debtor within 20 days before the commencement of a case under this title in which goods have been sold to the debtor in the ordinary course of such debtor’s business.*

Section 503(b)(9) does have several limitations. First, the Section is limited to “goods”. Although “goods” is not specifically defined in the Bankruptcy Code, presumably the definition contained in Article 2 of the Uniform Commercial Code will be used. Claims for services and personal property, other than goods, are not covered by the Section. Second, the goods must have been received by the debtor within the 20 day period before the commencement of the bankruptcy case. Third, the goods must have been received by the debtor in its ordinary course of business.

## III. Enforcing Section 503(b)(9) Rights.

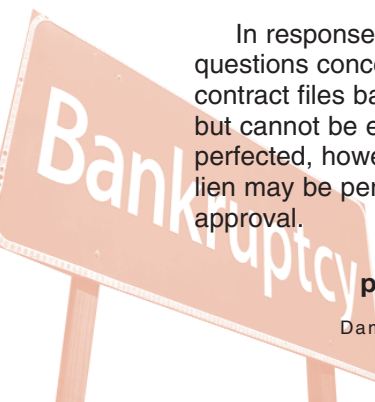
Trade creditors requesting administrative expenses priority pursuant to Section 503(b)(9) of the Bankruptcy Code should bring a motion which would be a contested matter, governed by Rule 9014 of the Bankruptcy Rules. In essence, unless a settlement is reached, the matter would be an adversary matter which would be resolved through a motion, discovery and trial process.

## IV. Clarification of Mechanic’s and Materialman’s Rights and the Automatic Bankruptcy Stay.

In response to our article in the October 2008 Legal Alert on *Construction in Risky Times*, we received several questions concerning the timing of perfecting and enforcing a mechanic’s lien when a party to the construction contract files bankruptcy. If the lien was perfected before bankruptcy was filed, the lien may survive in bankruptcy, but cannot be enforced without Bankruptcy Court approval. If bankruptcy was filed before the mechanic’s lien was perfected, however, perfection of a mechanic’s lien is an exception to the automatic bankruptcy stay and, thus, the lien may be perfected post petition. However, the lien cannot be enforced without prior Bankruptcy Court approval.

**For more information or questions regarding this article,  
please call Michael at 531-8031 ext 626 or email him at [may@hawaiilawyer.com](mailto:may@hawaiilawyer.com)**

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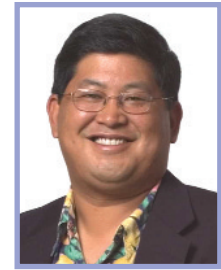


## Construction Client Wins Medical Malpractice Suit: \$6M

**A**ntonio Richardson, a 45-year-old glazier and owner of a local glass company was recently awarded more than \$6 million in a medical malpractice claim against a Wahiawa physician.



*Anna H. Oshiro*



*Todd Y. Hirai*

A Damon Key Leong Kupchak Hastert client, Richardson failed a life insurance physical examination in 2001. He gave his doctor the blood test results, underwent further tests, and the doctor concluded he was suffering from high blood pressure. For more than two and a half years, Richardson received treatment for high blood pressure only, even though the during that same time period, Richardson's blood and urine test results indicated progressive kidney disease.

When Richardson was finally referred to a specialist in 2004, he discovered that for the last two and one half years, his kidneys had been failing as a result of a blood disease. Although this condition was treatable, it was too late to save his kidneys. He suffered end stage kidney failure, and catastrophic injury to his health and business. At the conclusion of the trial, the jury awarded Richardson \$4,141,300 in special damages and another \$2,000,000 in general damages.

Richardson was represented in trial by **Anna Oshiro** and **Todd Hirai** of Damon Key Leong Kupchak Hastert, and by the father and son team of Marvin and Jed Kurzban of Kurzban, Kurzban, Weinger & Tetzeli, a Florida law firm admitted pro hac vice for the case. Richardson had been a construction business client of Oshiro's. The \$6M award is among the highest to be awarded in the state.

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## Douglas Smith Receives Honor, Named 2009 Elsie Katz Volunteer Leader of the Year

**D**ouglas C. Smith, a director and head of Damon Key Leong Kupchak Hastert's Estate Planning practice, has been selected as the recipient of the 2009 Elsie Katz Volunteer Leader of the Year for Goodwill Industries International, Inc.



*Douglas C. Smith*

This national award is given to a local Goodwill Industries volunteer in recognition of outstanding leadership and service to a member Goodwill Industries organization. In nominating Doug for this award, Goodwill Industries of Hawaii, Inc., the Hawaii affiliate, noted that for 13 years Doug worked tirelessly to advance Goodwill Industries' mission statewide. In particular, he is credited with leading the organization through a two-year \$11 million capital campaign to secure five acres of land and build the Ohana Career and Learning Center. The new facility will serve more than 1,600 Leeward Oahu residents each year. His leadership also helped establish a first-of-its-kind NISH contract providing housing management services for the Army. (NISH is a national nonprofit agency whose mission is to create employment opportunities for people with severe disabilities.)

Through Doug's exceptional tenure with Goodwill Industries of Hawaii, the organization has grown in vision and scope. Revenues increased by 24%, the number of people served by nearly 33%, and the number of people placed through Goodwill's services has nearly doubled. Doug continues to work on the board's planning for expansion of services on other islands, through its next capital campaign and in building new centers.

Awarded annually by Goodwill Industries, this award recognizes an outstanding volunteer leader who works to support the Goodwill programs and helps further the mission of the organization, and who demonstrates exceptional leadership qualities in his/her daily work.

Doug has been involved as a local volunteer board member since 1995, serving in many roles over the years. He was asked to serve on the executive committee early on and has remained ever since. He served as Goodwill's chairman of the board from July 2004-June 2007 and has also served as the chairman of the board for Goodwill Contract Services of Hawaii, a separate non-profit entity.

Doug will receive this award at the Goodwill Industries Delegate Assembly in June in Indianapolis, Indiana.

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## Attorneys in the News

**Tred R. Eyerly** participated on a panel offered by Sterling Education Services on the topic of “Bad Faith Insurance Claims.” He is also speaking on the topic of “Impact of Sale of Assets and Liabilities on Assignment of Seller’s CGL Policies” at the 2009 ABA Insurance Coverage Litigation Seminar in Tucson, Arizona in March. Tred’s blog, [www.insurancelawhawaii.com](http://www.insurancelawhawaii.com), has also been named one of LexisNexis Insurance Law Center’s Top 50 Blogs for Insurance.

**Courtney S. Kajikawa** has been selected Chair of the Probate & Estate Planning Section of the Hawaii State Bar Association.

**Christine A. Kubota** spoke on the topic of “Doing Business in Hawaii” at the Tokyo American Club in Tokyo, Japan. She will also do a session at the Western States Bar Conference on March 28th at Turtle Bay. The topic is “How Globalization Affects Your Practice.” Chris will serve on the Office of International Affairs Advisory Council for the Department of Business, Economic Development and Tourism.

**Gregory W. Kugle** has been selected Chair of the Real Property and Finance Services Section of the Hawaii State Bar Association. Greg has been asked by Chief Judge Helen Gillmor to participate in the annual United States District Court Conference, as a lawyer delegate, for a three-year term.

**David P. McCauley**, head of our immigration law section, was quoted in the March 16 Honolulu Advertiser story “Immigration officials refocus: Employers who hire illegal workers will face increased pressure.” David expects a major increase in

criminal enforcement against Hawaii employers of unauthorized workers, noting that recent criminal indictments in Hawaii are in keeping with the Obama administration’s intent to target employers while, at the same time, working for comprehensive immigration reform.

**Mark M. Murakami** has been selected Chair of the Admiralty and Maritime Section of the Hawaii State Bar Association.

**Mark M. Murakami, Greg W. Kugle, Robert H. Thomas and Noelle B. Catalan** gave a seminar on Zoning, Subdivision and Land Development Law for real estate professionals, property owners, developers and lawyers.

**Douglas C. Smith**, spoke at a regional meeting of the American College of Trust and Estate Counsel on the topic of Estate Planning Considerations for Clients’ Hawaii Property. He also was an author in the revised HSBA Probate Forms Manual (3rd Ed.) on the topic of estate disputes, and he was selected among the authors to give a presentation on this topic at the HSBA Annual Meeting.

**Robert H. Thomas** will be featured in the April Issue of *Hawaii Business* as a guest columnist.

**James C. McWhinnie**, Vice Chair of Meritas and Chairman of its Finance Committee, has been asked to serve another term in both positions and on the Meritas’ Executive Committee. Jim attended the Board meeting in Guadalajara, Mexico, and will attend the Board meeting and Annual Meeting in Orlando, Florida along with **Gregory W. Kugle**.

