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**DAMON KEY LEONG KUPCHAK HASTERT**  
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## Their reputations speak for themselves. Now their peers have spoken too.



*Left: Douglas Smith, Best Lawyer Trusts and Estates; James McWhinnie, Best Lawyer Commercial Litigation; Diane Hastert, Best Lawyer Commercial Litigation; Kenneth Kupchak, Best Lawyer in three categories; Commercial Litigation, Construction Law, and Corporate Law*

**E**ach year attorneys nationwide are asked, "If you could not handle a case yourself, to whom would you refer it?" For 2009 Damon Key Leong Kupchak Hastert attorneys Jim, Diane, Ken, and Doug have been named as the Best Lawyers in Hawaii.

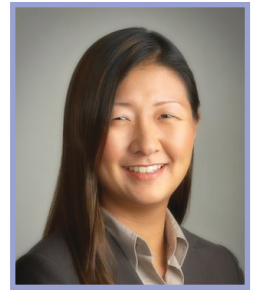


Jim's practice emphasizes Civil Litigation; Diane's practice emphasizes Complex Litigation and Dispute Resolution; Ken's practice emphasizes Complex Litigation, Land Use Litigation, International Joint Ventures and Construction. All three have been selected previously. Doug, whose practice emphasizes Estate Planning and Business Planning, is new to the list.

In previous years, other Damon Key attorneys including Frank Damon, Charlie Key, and Charlie Bocken were selected as Best Lawyers in Hawaii.

How gratifying to be recognized by your peers for having earned an outstanding reputation.

# Damon Key Assists Activated Carbon Project



By Michelle M. Shin

**D**amon Key Leong Kupchak Hastert has been fortunate to have the opportunity to assist Denham Capital and Big Island Carbon, LLC in obtaining a long term lease for Department of Hawaiian Homelands property in Kawaihae. The property will be used by Big Island Carbon, LLC to construct and operate facilities for the conversion of macadamia nut shells into high grade activated carbon which is used for the removal of impurities from liquid and gas phase materials. The most familiar use of activated carbon is in water and air filters.

Damon Key's involvement in the project included assisting Denham and Big Island Carbon, LLC with performing its due diligence, such as providing legal advice regarding minimizing potential environmental liability, reviewing and complying with permit requirements, confirming the inapplicability of certain zoning requirements to Department of Hawaiian Homelands property, understanding leasing procedures and restrictions relating to State lands, and negotiating general lease terms. We have also provided legal advice regarding the project's macadamia nut shell supply agreement and construction agreements.

Big Island Carbon, LLC, held its groundbreaking ceremony in April, and expects its facilities to be completed in less than one year. The company estimates it will hire 30 full-time workers to operate its facility, and that it will create approximately 100 additional job opportunities in the construction of the facilities.



*CEO of Big Island Carbon, LLC, Rick Vidgen, at the April 23, 2009, groundbreaking ceremony.*



*Damon Key attorney, Michelle M. Shin, at the location of Big Island Carbon, LLC's future activated carbon facility.*

## Michelle Shin Recognized Among *Forty Under 40*

**J**une, 2009: Michelle Shin has been selected as one of Pacific Business News' *Forty Under 40* in 2009. Awardees, who are all under the age of 40, are selected for their leadership in the business community and community service. They must be recognized as a leader in their industry, show a consistent "take charge" attitude, demonstrate a commitment to the community beyond the requirements of their jobs, and show a high degree of business acumen and savvy business-like approaches to efficiency and change.

Michelle performs the expected functions of a full-service transactional attorney. Beyond her legal expertise, Michelle's understated approach builds a relationship of loyalty and respect with her clients. They cite as her hallmark, the provision of sound, practical advice. Because of this, many clients involve her in their businesses beyond the scope of their legal engagements.

Michelle is exemplary in her commitment to community service. At a time when her peers were enjoying time off, Michelle spent her undergraduate years volunteering with various nonprofit and governmental agencies. "Not knowing any better, I picked up the phone book and called nonprofits that sounded interesting, asking to volunteer," said Michelle. Michelle's commitment to her community continues today. From 2002 – 2008, Michelle served on the Make A Wish, Hawaii, Inc. Board of Directors. She also served as Vice-Chair of the Hawaii State Bar Association, Business Law Section, and currently serves as a Director and Secretary of the Hawaii State Bar Association, Real Property and Financial Services Section.

One of Damon Key's youngest directors, Michelle represents the progression of the firm in its transition from one generation of partners to the next. Her clients, many of whom are significantly older than she, recommend her legal services to their contemporaries. Michelle gracefully straddles the needs of the traditional law firm client with the changing needs of this new generation of decision makers. Instrumental in shaping the firm's new culture, Michelle is leading the way in developing the next generation of loyal clients for the firm.

Visit this site to pull-down a photo of Michelle and Governor Lingle at the *Forty Under 40* Awards:  
<http://hawaii.gov/gov/news/events/2009/june/40>

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## On Cracking the Glass Ceiling

**R**ecently, Michelle appeared opposite Dr. Virginia Hinshaw, Chancellor University of Hawai'i, on the question of whether the glass ceiling for professional women still exists.

Citing the achievements of women that came before her, Michelle noted that it is gone in some places. She observes that younger women are slowly seeing more options as younger men are more prepared to assume greater responsibilities at home than their fathers did. She noted that among her peers, duties at home are less about gender, and more about what makes economic sense for the family.

For the full article see the July 2009 issue of Hawaii Business magazine, page 24.



# The “Red Flags” Rule: Is Your Business Covered?

By Matthew T. Evans



**W**e’ve all read or heard about the growing identity theft problem that is plaguing our nation. Whether it results in fraudulent credit card charges, bank account withdrawals, investment transactions, or credit report alterations, identity theft victimizes as many as nine million Americans each year. Too often, we view this problem as an issue for only banks, credit card companies, and other major financial institutions to worry about. Indeed, you may think that identity theft has nothing to do with you or your small business. However, according to the Federal Trade Commission (“FTC”), you should probably think again.

The FTC’s “Red Flags” Rule, codified at 16 C.F.R. § 681.1, requires many businesses and organizations to develop, implement, and administer a written Identity Theft Prevention Program (“ITPP”) designed to detect warning signs – “red flags” – of identity theft in day-to-day operations with the goal of ultimately preventing identity theft or, at the very least, mitigating the harm caused by it. And while, on its face, the Rule applies only to “financial institutions” and “creditors,” it applies equally to businesses and other entities that might not be typically associated with these terms. This is due, in large part, to how the Rule defines the term “creditor.”

The definition of “creditor” under the Rule is extremely broad and includes businesses and organizations that regularly defer payment for goods or services or provide goods or services and bill customers later. Entities that regularly grant loans, arrange for the extension of credit, or make credit decisions are also covered as “creditors.” Examples of covered groups may include utilities, telecommunication companies, mortgage brokers, automobile dealers, health care providers, lawyers, accountants, and other professionals. Thus, the Rule applies to a wide variety of businesses and organizations, including many that, generally speaking, might not be thought of as being susceptible to identity theft.

If a business or organization falls under the purview of the Rule and maintains “covered accounts,” another broadly-defined term under the Rule, it is required to develop, implement, and administer a written ITPP. The ITPP must contain reasonable policies and procedures that enable the business or organization to: (1) identify relevant “red flags”; (2) detect those “red flags” in day-to-day operations; (3) prevent and mitigate identity theft by responding appropriately once “red flags” are detected; and (4) regularly update the ITPP to address changing risks of identity theft and educate staff accordingly. The ITPP must be appropriate to the size and complexity of the business or organization as well as the nature and scope of its activities. Those failing to comply with the Rule may be subject to financial penalties.



While the Rule has been in effect since January 1, 2008, the FTC has delayed enforcement of the Rule several times due to concerns and confusion about its scope and specific requirements. Most recently, the FTC postponed the mandatory compliance date for many entities to November 1, 2009. In the meantime, the FTC has committed to further educating small businesses and other entities about compliance with the Rule. The FTC has also sought to ease the burden of complying with the Rule by providing additional resources and guidance to clarify whether businesses or organizations are covered by the Rule and, if so, what they must do to comply.

***The ITPP must be appropriate to the size and complexity of the business or organization as well as the nature and scope of its activities. Those failing to comply with the Rule may be subject to financial penalties.***

In this connection, the FTC has launched a website devoted to the Rule which can be found at: [www.ftc.gov/redflagrule](http://www.ftc.gov/redflagrule). The site is quite useful and contains a "How-To Guide" for businesses seeking to comply with the Rule, as well as an online compliance template that enables "low-risk" companies to design their own ITPP by utilizing a fill-in-the-blank form. However, while the materials provided by the FTC are undoubtedly useful to a certain degree, businesses or organizations with specific questions or concerns about the Rule should consult legal counsel to ensure compliance. The Rule has caused much confusion among large and small businesses alike, and its scope and particular requirements are not always clear under a given set of circumstances. What is clear, however, is that the Rule will surely affect, in some form or another, a multitude of businesses and organizations nationwide. Is your business covered?

**For more information or questions regarding this article,  
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# Recession Survival 101: Tips for Consumers and Debt Collectors

By Joseph W. Huster



In tough economic times, misfortune will sometimes render a financially responsible person unable to pay credit card balances and other debts. In addition to being hit with exorbitant fees and interest rates, consumers are frequently confronted by collection agencies and other debt collectors. Recessions can be equally hard on debt collectors. As economic conditions worsen, debt collecting becomes a far more difficult enterprise.

In 1978, and in response to widespread abusive and deceptive collection practices, Congress passed the Fair Debt Collection Practices Act (“FDCPA”). The FDCPA, which was updated in 2006, protects consumers from abusive debt collectors. It also provides clear behavioral guidelines for debt collectors when they interact with consumers. A consumer who understands his or her rights under the FDCPA will be in a position to protect himself or herself from an unscrupulous debt collector. Conversely, a debt collector who understands the requirements of the FDCPA is far less likely to violate the law and be sued.

Under the FDCPA, “consumer” means “any natural person obligated, or allegedly obligated, to pay any debt.” The FDCPA covers all consumer obligations to pay money, based on transactions that were “primarily for personal, family, or household purposes.” Such obligations include rent, medical expenses, and non-business related credit card purchases or cash advances. Debt collectors attempting to collect such debts must follow all of the requirements of the FDCPA. The FDCPA defines “debt collector” as anyone in the business of debt collecting, or anyone who collects debts as part of their business. Collection agencies and collection attorneys are clearly subject to the provisions of the FDCPA.

Debt collectors may contact third parties, including employers, but only to locate a consumer. Debt collectors who contact third parties must identify themselves and state that they are confirming or correcting location information regarding a consumer. Debt collectors may not reveal that a consumer owes a debt, or contact the same third party more than once (unless the third party asks them to do so, or the debt collector reasonably believes that the third party has

obtained new information about the location of the consumer). Aside from locating a consumer, the law forbids debt collectors from communicating with third parties about a consumer’s debt obligation. Credit reporting agencies, the creditor, and the creditor’s counsel are the only exceptions.

Once a debt collector contacts a consumer, he or she must, within five days, provide the consumer with written notice stating:

- the amount of the debt;
- the name of the creditor to whom the debt is owed;
- that unless the consumer disputes the debt, or any portion of it, within thirty days after receiving this notice, the debt will be assumed to be valid by the debt collector;
- that if the consumer notifies the debt collector, in writing, within the thirty-day period, that he or she disputes the debt, or any portion of it, that the debt collector will obtain a verification of the debt (or judgment) and mail the verification to the consumer; and
- that upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if it is different from the current creditor.

Once a consumer disputes a debt, or requests the name and address of the original creditor, the debt collector must cease collection of the disputed debt until it mails the consumer verification of the debt, or the original creditor’s information. However, a consumer’s failure to dispute a debt or any portion of a debt is not an admission of liability. Additionally, serving a debtor with pleadings in a civil lawsuit does not constitute an initial contact under the FDCPA.

If a consumer notifies a debt collector in writing that the consumer refuses to pay the debt or wants communications to stop, the debt collector must cease communications with the consumer. The debt collector may still advise the consumer that efforts to collect the debt will be terminated. He may also notify the consumer that the debt collector or creditor may invoke legal remedies against the consumer. We recommend that debt collectors accomplish these final communications by written letter to avoid accusations of harassment.

Debt collectors may not contact consumers at an inconvenient time or place, which the consumer is free to specify. Unless the consumer gives their consent, debt collectors may not call consumers before 9:00 a.m., or after 8:00 p.m., in the time zone where the consumer lives. Additionally, if a consumer is represented by an attorney, the debt collector must communicate directly with the attorney and may not call the consumer. However, a debt collector may contact a represented consumer, if the attorney fails to respond to a debt collector's communications within a reasonable period of time, or if the attorney consents to the communication.

Debt collectors may not harass, oppress, or abuse "any person" in connection with the collection of a debt. "Any person" includes the consumer and anyone else that a debt collector might engage in connection with the collection of the debt. Prohibited conduct includes:

- violence or threats of violence;
- obscene or profane language directed at the consumer;
- repeated telephone calls; and
- telephone calls during which a debt collector refuses to reveal his or her identity. Debt collectors are also prohibited from making false, deceptive, or misleading statements. Debt collectors may not:
- misrepresent the amount of money a consumer owes or the status of the collection proceedings;
- state or imply that nonpayment could result in the arrest or imprisonment of any person;
- state or imply that, by failing to repay a debt, the consumer is committing a crime;
- represent that collection proceedings are court proceedings, if this is untrue. Debt collectors are prohibited from using other unfair debt collection practices as well. Debt collectors may not:
- solicit, deposit, or threaten to deposit a postdated check;
- collect amounts that are not specified in the agreement creating the debt;
- take possession of property (or threaten to take possession of property) without the legal right to do so.

Debt collectors can be sued in both State and Federal Court for violating any provision of the FDCPA. Victims of debt collector misconduct may also sue as a class. Debt collectors who violate any provision of the FDCPA, with respect to any person, not just the consumer, are liable for (1) each victim's actual losses; (2) up to an additional \$1,000.00 per victim (up to \$500,000 for a class); and (3) the costs of the suit, including the victim's attorney's fees and costs. However, if a court finds that a plaintiff sued a debt collector in bad faith, the court may require that person to pay the debt collector's attorney's fees and costs.

There are other provisions and restrictions on debt collector conduct in the FDCPA. You can download a copy of the FDCPA at: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf>. You can also request a copy by writing to The Federal Trade Commission, Consumer Response Center, 600 Pennsylvania Avenue, NW Washington, DC 20580.

Times are tough. Consumers need not let tough economic circumstances get tougher because of an overly aggressive or unscrupulous debt collector. Likewise, debt collectors should resist the temptation to resort to prohibited practices that can result in their getting sued.

**For more information or questions regarding this article,  
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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

**Damon Key Leong Kupchak Hastert** has been recertified as the Exclusive Meritas Member in Hawaii.

**Frank Damon** was awarded the prestigious Punahou Alumni Association's O in Life Award.

**Diane Hastert** had been nominated to a second three-year term on the National Easter Seals Board of Directors.

**Caron Ikeda** featured in the Member to Member section of the July 2009 Honolulu Japanese Chamber of Commerce's Shoko Newsletter.

**Courtney Kajikawa** was selected to the Hawaii State Bar Association's 2009 Leadership Institute Fellowship Program.

**Christine Kubota** was a featured speaker at the *HawaiiBusiness* magazine's Wahine Forum, and has been elected to the Hawaii State Bar Association Board of Directors. Chris will be participating in an Employment Seminar in Honolulu in October and will speak at an Estate Plan/Business seminar in Tokyo in November. She will serve as Mistress of Ceremony at the Annual Moon Viewing Festival sponsored by the United Japanese Society on October 2. She will be travelling to Hiroshima in November as Vice Chair of the Honolulu Japanese Chamber of

Commerce to celebrate the 50th anniversary of the Honolulu/Hiroshima sister city relationship.

**Jim McWhinnie** will be attending the Meritas Board Meeting in Charlotte, North Carolina in the first week in October.

**Anna Oshiro** and **Ken Kupchak** will be speaking at the Hawaii State Bar Association Convention on Construction Contracts and Bonding, and Land Use which will be chapters in the Hawaii Real Estate Law Manual, Second Edition. **Tred Eyerly**, Ken and Anna co-authored the construction bond chapter.

**Doug Smith** was awarded the Goodwill Industry's National Volunteer Leader of the Year Award.

**Robert Thomas** is the Chair of the Condemnation Law Committee for the ABA's Section of State and Local Government Law. He was on the faculty of "Practical Guide to Zoning and Land Use Law," a one-day seminar in Honolulu in September. Robert will be speaking to Small Business Hawaii on October 29, 2009 at its monthly Sunrise Networking Breakfast about property rights and the latest important decisions from the U.S. and Hawai'i Supreme Courts.