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Damon Key Celebrates Thirtieth Anniversary of Landmark U.S. Supreme Court Victory

What do you call a court opinion that has been cited by 627 other courts, expressly followed in 42 cases, distinguished in 24 others, and has been cited 1,041 times in law reviews and 147 times in legal treatises?

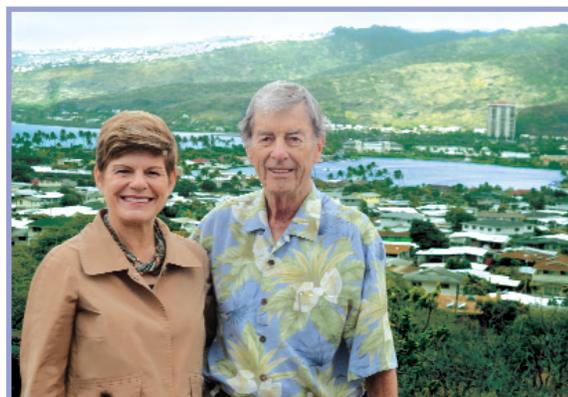
We call it a landmark. In 1979, the U.S. Supreme Court issued its decision in *Kaiser Aetna v. United States*, a truly landmark case, argued and won by Damon Key attorneys Charlie Bocken and Diane Hastert.

On behalf of the developer of Hawaii Kai, Charlie and Diane took on the federal government and overturned over a century of seemingly adverse precedent. *Kaiser Aetna* was the first modern case finding a "regulatory taking," which required the government to pay compensation if it wanted to open private property to public access.

Lawyers who practice property, eminent domain, or navigation law know this as the case in which the majority opinion, authored by Justice William Rehnquist, held that the navigational servitude is not a blanket exception to the Takings Clause, and just because a waterway is subject to regulation does not mean it is open to public access.

Hawaii residents know this as the case that kept Hawaii Kai Marina (the former Kuapa Pond) private, a status it continues to enjoy today.

Our firm knows this as the standard by which we have consistently measured ourselves: a case that looked difficult and required creative thinking and determined lawyering to resolve.



The facts of the *Kaiser Aetna* case are especially fascinating, starting with the creation of Kuapa Pond, as the Court recounted, in the "late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a lagoon."

Diane's primary task with co-counsel Rick Morry was drafting the petition for certiorari that convinced the Court to review the case, and the Opening and Reply Briefs that set out the legal arguments. The arguments turned, in part, on the treatment of Hawaiian fishponds under ancient custom and Kingdom law, and the condition of Kuapa Pond at various points in its history.

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Charlie argued the case on the opening day of the Court's Term, October 1, 1979. Opening day is filled with pomp and ceremony with the U.S. Attorney General and the Solicitor General attending in formal attire. Charlie, however, declined to appear in morning coat and tails.

Arguing a case in the U.S. Supreme Court is a rare privilege and one that can make even the most experienced advocates just a touch apprehensive. Charlie, however, was not intimidated and presented his argument forcefully:

MR. BOCKEN: Your Honors, I just want to conclude with this thought: If Kuapa Pond is burdened with the public navigation servitude, as the government urges, there will be, one, a public confiscation of private property for public recreational use of an area that was conceived, built, paid for and maintained by private funds, and confiscation would not only be servitude of the waters but the use of all of these improvements to which I just made mention.

And, two, such a result is constitutionally proscribed by the Fifth Amendment. It is not justified by any legitimate public interest and reeks of inequity.

Two months later, a majority of Justices agreed. The Court issued its opinion on Tuesday, December 4, which coincidentally is Charlie's birthday. "It was the best birthday present I could receive!" he said.

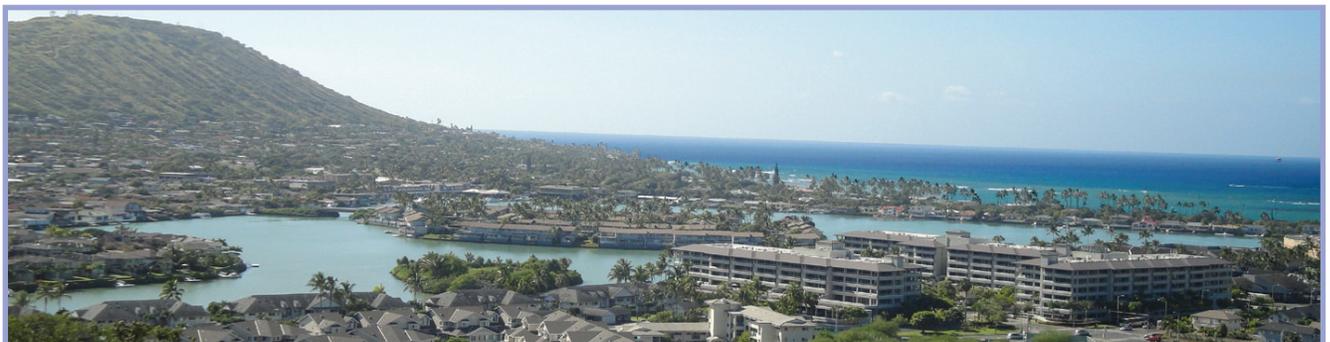
Charlie and Diane's handling of *Kaiser Aetna* established the firm's reputation as forceful advocates and experts in property and navigation law. In the intervening thirty years, the firm has cemented this reputation, championing the rights of property owners, including two other similar cases against the federal government.



In 1990, Diane and Robert Thomas (with Charlie providing guidance) beat the Corps of Engineers in a case involving a Molokai fishpond that had been converted into a navigable lagoon. The federal government claimed that by virtue of its improvement, the lagoon was open to public access. On behalf of the property owner, Diane and Robert maintained the lagoon's private status in a federal court trial, and preserved the judgment in the government's appeal to the Ninth Circuit.

In 1999, the Damon Key team defended a San Francisco Bay property owner who was being mistreated by the Corps of Engineers and the Port of Oakland. In a complex, multi-jurisdictional case that made national headlines, Diane and Robert (with Charlie continuing to provide sage counsel) once again broke new ground, resulting in the first decision in which the Court of Federal Claims ruled that a property owner was entitled to compensation for the taking of submerged property. The case required evidence of historical records dating back to the original Spanish grants for the property, and proof of the land's condition at California statehood. The case settled only after the Damon Key team filed a petition in the U.S. Supreme Court.

Find out more about these cases at our website, www.hawaiiilawyer.com. Or email Charlie at rcb@hawaiiilawyer.com to wish *Kaiser Aetna* (and him) Happy Birthday.



Courtney Kajikawa – Damon Key’s newest director is one of its youngest

Damon Key Leong Kupchak Hastert is proud to welcome Courtney Kajikawa as a director in our legal practice after just five years with the firm. She is among the youngest ever.

Firms like ours, we believe, are best judged by their people. Kajikawa exemplifies the kind of bright, young talent we value at Damon Key. Since the day she arrived, knowing her clients, not just their business but their goals and aspirations, has been a priority. Grounded in the human factor, shaped by a dynamic succession of female role models, Kajikawa soon gravitated to estate planning and the demanding areas of business, commercial and immigration law. Retail and restaurant operations are a focus.

She applies her strategic planning skills to every endeavor.

Kajikawa arrived in Hawaii in 2002 and began clerking at the First Circuit Court. “The experience taught me how to prepare for court and what issues are important from the judge’s perspective,” she says. She also met attorneys from every law firm in the area.

“I was impressed by the caliber of the Damon Key attorneys,” she says. “They were friendly, open and inviting, interested in the development and growth of the firm, not just substantive aspects of law. Attorneys were encouraged to network, develop marketing skills, join nonprofits, coach, get involved, work hard and serve the community.”

Damon Key is a mid-sized firm and intends to remain that way. “It’s a nurturing place to work,” Kajikawa concluded. That clinched the deal.

Kajikawa is as devoted to improving her chosen vocation as she is to her clients. She accepted positions of leadership with the Hawaii State Bar as a Leadership Institute Fellow (2009) and Chair of the Probate and Estate Planning Section and a member of the Hawaii Immigration Lawyers Association. She volunteers in the community as well, organizing programs and events for the Honolulu Japanese Chamber of Commerce and YWCA of Oahu.



Born and raised in California, Kajikawa earned her jurisprudence degree at Loyola Law School and served on the *Loyola of Los Angeles International and Comparative Law Review*. There she clerked for the Los Angeles Office of the District Attorney, Los Angeles County Counsel and the Superior Court of Los Angeles. Following a stint with Coleman & Associates in Los Angeles, she moved to Honolulu.

“The legal community in Hawaii is much smaller, so people tend to practice the golden rule,” Kajikawa says of the change. “Here reputation means more. Los Angeles was a corporate culture, lacking civility and not much aloha,” she recalls. “Hawaii is refreshing.”

Kajikawa feels she owes her legacy to her grandparents and her parents. Her paternal grandparents gave up everything and relocated voluntarily to Colorado during World War II rather than be interned. Also, her maternal grandfather served in the 442nd Regimental Combat Team.

While becoming a partner means a heavier workload, Kajikawa says she will try to find balance in the more leisurely activities she enjoys – reading, hula and spending time with friends and family.

Having a stake in the firm’s performance, being responsible for all its employees, will be her biggest challenge, she says.

Welcome, Courtney.

Protecting Your Image – Hawaii’s New Publicity Rights



By Michelle M. Shin

Hawaii recently joined approximately 20 other States that have a statutory right of publicity. A right of publicity is the right to restrict or control the commercial exploitation of an individual’s name, image, or character traits. Although Hawaii’s right of publicity statutes were modeled after the State of Washington’s right of publicity laws, testimony submitted in support of the legislation reflects that it primarily arose out of a desire to protect the Hawaiian performing arts community and related industries.

The scope of statutory publicity rights varies State by State. Hawaii’s right of publicity statutes are set forth in Hawaii Revised Statutes Chapter 482P. Chapter 482P provides that individuals have property rights in their names, voices, signatures, and likeness, which are protected from unauthorized commercial use. “Likeness” is defined very broadly as including any image, photograph, painting, sketching, model, diagram, or any other recognizable representation of an individual’s face or body, or even an individual’s distinctive appearance, gesture, or mannerism recognized as an identifying attribute of an individual’s personality. Everyone is accorded these rights, regardless of whether they are famous or commercially exploited these rights during their lives or not.

Hawaii recognizes publicity rights as freely transferable property rights, which survive death for a period of 70 years. Because these rights survive death, they may be transferred by way of testamentary transfer, including by will or trust, may otherwise be inherited by intestate succession as intangible personal property, and may be enforced by an individual’s successors, heirs, or other transferees. These rights may also be exercised by a personal representative, attorney-in-fact, parent of a minor child or guardian, or as authorized by a court of competent jurisdiction.

These publicity rights are infringed when an individual’s name, voice, signature, or likeness is used on or in goods, merchandise, or services

entered into commerce in Hawaii, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fundraising or solicitation of donations, or contained in any disseminated or published advertisements in Hawaii, without the express or implied consent of the owner of the right, regardless of whether the use or activity is for profit or not for profit. There are, however, certain limitations to these publicity rights. For example, in furtherance of free speech, Hawaii’s publicity statutes exempt the use an individual’s name, voice, signature, or likeness in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest, including, without limitation, comment, criticism, satire and parody. Other exemptions include insignificant or incidental use, where the use is merely descriptive and used in good faith only to identify or describe something other than the individual, and the use of the name, voice, signature or likeness of the creator of an artistic work to promote his or her artistic work where implied consent was provided.

The statutory remedies for infringement of publicity rights include injunctions to prevent unauthorized use, impoundment of infringing materials, and the destruction of materials made or used in violation of the injured person’s publicity rights. An infringing party may also be liable for the greater of \$10,000 or the actual damages sustained as a result of the infringement, profits that are attributable to the infringement, and the injured party’s attorneys’ fees, expenses, and court costs. These remedies are



cumulative and are in addition to any other remedies available at law, such as remedies for any related copyright infringement, trademark infringement, and violations of the Lanham Act.

To provide public notice of ownership of publicity rights, Chapter 482P permits an assignee or transferee of publicity rights to make a publicity rights trade name registration. Unless there is a publicity rights trade name registration for a living individual, there is a presumption that the living person has the right to assign or license his or her own publicity rights. If there is a current publicity rights trade name registration, there is a presumption that the registrant has the right to assign or license the publicity rights and a valid license from the registrant constitutes a complete defense to a publicity rights infringement action. Based on the list currently posted on the Hawaii Department of Commerce and Consumer

Affairs web site, it appears only a handful of publicity rights have been registered so far. As noted in Governor Lingle's Statement of Objections to this legislation, one potential problem with the registration process is that there is no guidance regarding the grounds for rejecting an application for publicity rights registration nor for the revocation of registration.

The next time you consider using an individual's name, voice, signature, or likeness for commercial purposes, you should carefully examine whether consent is required under Hawaii Revised Statutes Chapter 482P. If consent is required, you will need to determine whether consent is required from the depicted individual or from a transferee of the individual's publicity rights. Taking these steps can help you avoid liability and possible destruction of your investment under Chapter 482P and other potentially applicable laws.

**For more information or questions regarding this article,
please call Michelle at 531-8031 ext 613 or email her at mms@hawaiilawyer.com**

Damon Key Lawyers Co-Author ABA Construction Publication

Damon Key construction lawyers Ken Kupchak, Anna Oshiro, Michael Yoshida, Christi-Anne Kudo Chock, and Tred Eyerly teamed together to draft the Hawaii chapter of the ABA's recently published, "A State-by-State Guide to Construction & Design Law" (2nd ed.). The volume serves as a practical guide for construction industry lawyers, enabling users to easily locate design and construction law and contracting practices in all 50 states, plus the District of Columbia and Puerto Rico. The first edition of this work was published in 1998. This second edition fully updates relevant construction-industry requirements in each state.

The volume addresses each state in a separate chapter. Information is presented in a format following a standard template, allowing the reader to quickly compare how each state handles a particular construction issue. Consequently, the treatise is a particularly valuable tool for members of the construction industry with projects in more than one state.

Each chapter begins with practical information, including considerations for project delivery systems, statute of limitations for tort and contract claims, licensing and other regulations for design and construction professionals, and payments to contractors and subcontractors. Litigation-related matters are then addressed, including warranties, indemnification agreements, insurance, sureties and bonds, damages (including liquidated damage provisions and exculpatory clauses), and construction liens. Alternative dispute resolution procedures, including arbitration and mediation, are then covered. Each chapter concludes with sections on construction contracting, consumer protection laws applicable to design and construction contracts, environmental considerations, and issues regarding lenders.

Damon Key is actively involved in construction-related litigation and arbitration. Damon Key attorneys hold leadership positions in the ABA's Forum on Construction Law, a well-recognized body of construction lawyers from around the United States.

Damon Key Attorney to Lead ABA Constitutional Law Program

On February 25, 2010, Damon Key attorney Mark M. Murakami will be leading an American Bar Association-sponsored national conference of constitutional law scholars in a discussion of the upcoming U.S. Supreme Court case about local gun regulations.

McDonald v. City of Chicago involves a Second Amendment challenge to Chicago's ban on handguns in a home, and promises to be one of the most important cases on the Court's docket this Term. The issues in the case go well beyond gun control and could usher in a new era in constitutional interpretation, since the case asks to what extent the protections in the Bill of Rights limit a state or local government's regulatory power.

The Court has been asked to overrule an established 140-year precedent which held that the "Privileges or Immunities" Clause of the Fourteenth Amendment does not require local governments to honor the Bill of Rights. Following the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution to protect the rights of emancipated slaves. These amendments were also meant to limit the ability of state and local governments to infringe on fundamental freedoms. What those freedoms are has been the subject of debate ever since.

"*McDonald* is one of those cases that seem to come around only once in a generation," Mark notes. "If certain arguments are adopted by the Court, it could change the way we approach constitutional analysis." Mark continues, "the briefs filed in the case deal with American history and social policy as well as law, and depending on how the Court rules, it could give rise in the future to same sex marriage or universal health care being viewed as federal constitutional rights."

The case has generated national media attention and overwhelming participation. Groups as diverse as the National Rifle Association, the NAACP, and



leading Constitutional Law professors have filed briefs.

The ABA Section of State and Local Government Law tasked Mark with designing the teleconference, gathering speakers, and on the day of the conference, moderating the discussion among legal experts of national repute. Joining Mark will be law professors Michael Kent Curtis (Wake Forest University) and Lawrence Rosenthal (Chapman University). Professor Curtis authored the seminal book on the Privileges or Immunities Clause, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*. Also joining the panel is Ilya Shapiro of the Cato Institute, a Senior Fellow in Constitutional Studies and Editor-in-Chief of the *Cato Supreme Court Review*.

Each of the participants filed a friend of the court brief in the case and will be discussing the positions of the parties, the arguments pro and con, and will offer a preview of the oral arguments.

More information about the case and the teleconference, including registration information, is available on Mark's law blog www.hawaiiocanlaw.com, or by contacting him directly.

For more information or questions regarding this article, please call Mark at 531-8031 ext 628 or email him at mmm@hawaiilawyer.com

Damon Key Leong Kupchak Hastert's Commitment to Public Service



In addition to being active as Board members and chairs of sub-committees for the Hawaii State Bar Association, national, local, international, and industry associations, the Damon Key lawyers serve the community in the following areas:

Cherise Boyce keeps in touch with her Hawaiian roots while volunteering at her alma mater Kamehameha. She also volunteers at her other alma mater, UH Law School, where she will be a judge in the upcoming ABA Client Counseling Competition Regional Tournament.

Elizabeth Burroughs supports local high schools by volunteering as Judge for the Hawaii History Day district and state competitions.

Matthew Evans volunteers at Pali View Baptist Church.

Tred Eyerly helps to keep our beaches clean (Sierra Club), worries about Hawai'i Volcanoes National Park (Friends of HVP), keeps count of whales (NOAA), and takes on pro bono cases for the Hawai'i Legal Aid Society.

Diane Hastert keeps busy chairing committees and serving as National Director of Easter Seals. She also supports her alma mater, UH Law School and keeps tabs on nature through her work at the Garden Club.

Caron Ikeda volunteers at the Mahuahua Ai o Hoi, restoring wetlands in Kaneohe.

Courtney Kajikawa volunteers at the Honolulu Japanese Chamber of Commerce and helps organize programs for the YWCA of Oahu.

Chris Kubota continues her committee work to assure equal access to the court system even though we come from different countries, have different cultures and speak different languages. She also volunteers her time for the American Heart Association.

Greg Kugle provides pro bono legal advice to the Kailua United Methodist Church as well as representing the Defend Oahu Coalition in its effort to preserve the undeveloped lands surrounding the Turtle Bay Resort.

As Vice Chair of the Board of Trustees at Mid Pacific Institute and active in many other committees at the school, **Ken Kupchak** focuses on improving education in Hawaii.

David McCauley accepts pro bono asylum cases for those who fear returning to their home country, and provides pro bono representation in other areas of immigration law, including matters in immigration court.

Jim McWhinnie continues to worry about his golf game while serving as a past president on the Long Range Planning Committee at Oahu Country Club. He also volunteers his time to serve on the Hawaii Supreme Court's special committee on Judicial Performance and the Le Jardin Academy Boys Varsity Basketball Team.

Doug Smith continues his work with Goodwill Industries and Catholic Charities but shares his leadership skills with the Episcopal Church of Hawaii (Vice-Chancellor), YMCA (Philanthropy Committee) and 'Oahu 'Oahu Ko'olau (Chair of conservation charity).

Mike Yoshida helps with his wife and daughter's passion of swimming by volunteering with the Hawaii Swim Association and continues with his own passion by serving as a Board member at the Kokohead Skeet Club.

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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

Jim McWhinnie, Vice Chair of Meritas (www.meritas.org) and Chairman of its Finance Committee, attended the Meritas Executive Committee Meeting, Board of Directors Meeting and Financial Services Section Meeting in Nassau, Bahamas February 3-6, 2010.

Christine Kubota is featured in the February 2010 issue of Hawaii Business in the lead story "The Business of Love." If you want to be successful at both, the story advises, be careful whom you marry.

Tred Eyerly has been selected as a co-chair of the Additional Insured Subcommittee of the ABA's Section of Litigation, Insurance Coverage Litigation Committee. Tasks as a subcommittee co-chair will include drafting an article for the Committee's quarterly publication, "Coverage" and seeking new members for the subcommittee. Tred will also be a speaker at the Insurance Coverage Litigation Committee's annual conference in Tucson, AZ, held March 4-6, 2010. His topic will be "Triggers of Coverage for a Property Insurance Policy."

