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Insurance Coverage for Property Damage Caused by the Big Island's Volcanic Eruptions



By Tred R. Eyerly

Spring brought to the Puna District of the Big Island numerous volcanic eruptions causing extensive loss of property. At least 700 homes across several subdivisions have been destroyed since Kilauea began erupting on May 3. Two dozen recent fissures have created lava fountains and explosions during the eruption. Fissures have been seen spouting lava over 200 feet into the air. While lava has been steadily flowing to the ocean for weeks, lava from fissure 8 was playing havoc in Leilani Estates in mid-July, destroying more homes.

Residents who have secured a Homeowners 3 ISO Policy may have some coverage for their loss related to the volcanic eruptions. The policy states it will "insure against risk of direct physical loss" to dwellings and other structures unless specifically excluded by the policy. Volcanic eruption is not excluded under the standard Homeowners Policy. Moreover, some policies have a specific endorsement to cover loss to a dwelling or other structures caused by volcanic eruption/lava flow. Coverage is provided for loss caused by the eruption, explosion, effusion of a volcano, or a moving outpouring of lava. Fire or explosion resulting from volcanic eruption should also be covered. And insurance should be available for vandalism or theft due to looting from a home where the owners are displaced.



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But some loss related to a volcanic eruption will not be covered. Damage from earth movement is typically excluded. This includes earthquake, land shock waves or tremors before, during or after a volcanic eruption. Damage to land, trees, shrubs, lawns, etc. is not covered. The cost of removing ash from land surrounding the dwelling is also not covered.

If a homeowner is unable to obtain a policy in the private market, coverage may be available from the Hawaii Property Insurance Association, a nonprofit collection of insurance companies created by statute in 1991 to provide basic property insurance. Any insurance agent can assist in applying for such a policy. The catch, however, is that uninsured homeowners must wait six months before the policy becomes effective.

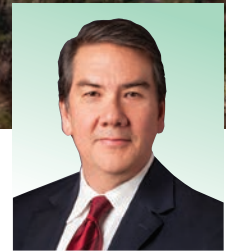
Only a handful of cases addressing coverage for volcanic eruptions have been issued by courts across the country, probably because there are so few areas exposed to active volcanos. The Washington Supreme Court addressed coverage issues in 1983 after the eruption of St. Helens. The insureds' homes were destroyed by a mudflow ten hours after the eruption began. Coverage was denied under an earth movement exclusion. The trial court granted summary judgment to the insurers.

The Washington Supreme Court determined it was unclear whether the eruption or earth movement caused the damage. Under the efficient proximate cause doctrine, the court noted that the efficient or predominant cause which sets into motion the chain of events producing the loss is regarded as the proximate cause, not the last act in a chain of events. If the predominant cause is a covered peril, there was coverage under the policy. The mudflows that caused the destruction of the homes would not have occurred without the eruption of St. Helens. Therefore, the case was remanded for the jury to consider whether the mudflows or the eruption were the proximate cause of the damage.

Hawaii courts have also adopted the efficient proximate cause doctrine when two or more perils combine to cause a loss. Therefore, if the insurer claims earth movement from the Kilauea eruptions caused damage to the home, coverage may still be available if fire or other perils that originated from the eruptions were the primary cause of the damage.

**For more information on this article, please call Tred at 531-8031 ext. 603
or email him at te@hawaiilawyer.com**

Who Owns New Land Created by the Big Island Volcano?



By Robert H. Thomas

We've all been watching with a mix of fascination and horror at the dramatic images from the Big Island, and the creation of new land where the flow has entered the ocean.

As lawyers, our thinking naturally turned to the question: who owns this newly-created land?

Here's a multiple choice test:

Who owns the new land created when lava flows over private property and into the sea and hardens into fast land:

- A. The property owner over whose land the lava flowed.
- B. The United States.
- C. The State of Hawaii Office of Hawaiian Affairs.
- D. The State of Hawaii.

The correct answer, provided in 1977 by the Hawaii Supreme court in a case called *State ex rel. Kobayashi v. Zimring*:

D. The State of Hawaii.

In *Zimring*, the court held that this new land is owned by the State. The opinion, relying upon the public trust doctrine, ignored its own prior precedent regarding construction of littoral (oceanfront) property descriptions and held the public owns land created by volcanic action. The facts in that case seem very similar to what we're seeing today: In 1955, a lava flow created 7.9 acres of new land when lava flowed into the ocean. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title in itself, asserting public ownership of the new fast land. The littoral owner's property description extended private ownership to the "high water mark."

The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. The court vested title to the new land in the State because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" any one landowner, but rather should insure to the collective public. *Id.* at 734-35.

So as we continue to watch this drama unfold, please keep in mind that there's always a legal angle.

**For more information on this article, please call Robert at 531-8031
or email him at rht@hawaiilawyer.com.**

2018 Lawyer of the Year, Best Lawyers and Super Lawyers



2018
LAWYER
OF THE YEAR
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Condemnation Law

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Matthew T. Evans



Tred R. Eyerly



Diane D. Hastert



Christine A. Kubota



Gregory W. Kugle



Kenneth R. Kupchak



David P. McCauley



Mark M. Murakami



Anna H. Oshiro



Douglas C. Smith



Michael A. Yoshida

Exemplifying Excellence

Congratulations to Robert H. Thomas on being selected Lawyer of the Year and our colleagues on being selected to the latest edition of The Best Lawyers in America® and Super Lawyers. For over fifty years, our firm continues the commitment to serving Hawaii's people and businesses with excellence.

Robert H. Thomas
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Land Use & Zoning Law
Litigation – Land Use & Zoning
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2014 Lawyer of the Year:
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Super Lawyers: Appellate

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Employment Law – Management
Real Estate Law
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Corporate Law

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Land Use & Zoning Law
Litigation – Real Estate
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Litigation – Land Use & Zoning
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Trusts & Estates
Litigation – Trusts & Estates
2015 Lawyer of the Year:
Litigation – Trusts & Estates
2013 Lawyer of the Year:
Trusts & Estates
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Super Lawyers: Business Litigation

David P. McCauley
Super Lawyers: Immigration

Michael A. Yoshida
Business Organizations
(including LLC's & Partnerships)
Construction Law
Mortgage Banking Foreclosure Law
Real Estate Law
Super Lawyers: Creditor Debtor Rights



Super Lawyers



A Very Busy Month of June for Christine Kubota

Director Christine Kubota was very busy in June with events of the Gannenmono Committee, the Pan Pacific Festival and the Japanese Cultural Center of Hawaii. The events were part of the year-long celebration to mark the 150th anniversary of Gannenmono, the first Japanese immigrants to arrive to Hawaii.

As one of the Tri-Chairs of the Gannenmono Committee, Christine's month began with promotional opportunities discussing Gannenmono on radio and TV. She also attended events planned for the Tokyo Bar Association's visit to Hawaii where the Hawaii State Bar Association (HSBA) International Section hosted golf on Saturday, a cocktail event on Sunday and dinner at Café Julia on Monday. The visit culminated with a friendship agreement between the bar associations.

Christine greeted their imperial Highnesses Prince and Princess Akishino at the reception of the Association of Nikkei and Japanese Abroad and at Gannenmono Symposium both held at the Sheraton Waikiki Hotel. Over 600 guests from around the world attended this conference.

The Imperial Highnesses were here to attend the Gannenmono festivities. They visited Bishop Museum, Honolulu Art Academy, Japanese Cultural Center of Hawaii, University of Hawaii, Makiki Cemetery, Ehime Maru Memorial, Punchbowl and many other sites during their stay.



As Chair of the Pan Pacific Festival, Christine celebrated Gannenmono and participated in the parade down Kalakaua Avenue. The three-day festival opened with a Hoolaulea in Waikiki. The Pan Pacific Festival is in its 39th year and entertained over 100,000 people over the weekend. In the photo: Christine is with Governor and Mrs. Ige; George Szigeti; Consul General Ito; Mr. Nakamura Japan Chair of the Pan Pacific Festival (Matsuri in Hawaii); Director Michael Tseng; and Mr. Ikehara from KNT Holdings.

The month wrapped up with a Japanese Cultural Center of Hawaii (JCCH) Gala which celebrated the original Japanese immigrants to Hawaii and honored, amongst others, Hawaii-born Donna Tanoue, ukulele virtuoso Jake Shimabukuro and Star Trek icon George Takei. Christine served as JCCH Board Chair for two years and ended her term on June 30, 2018.



Congratulations Matt!

**Congratulations to our very own
Matthew T. Evans
for being honored as a member of the
Pacific Business News
“40 Under 40” Class of 2018.**



Every year Pacific Business News recognizes the best and brightest young business leaders in Hawaii with its signature 40 Under 40 awards. PBN looks for professionals who are making a difference in the workplace and the community. Over 200 nominations were submitted and our Matt Evans was one of the 40 selected to the Class of 2018.

Matt has been an integral part of our team since he joined us more than ten years ago as a summer associate. Today, as a Director, he is a key component of not only our present, but our future. With his innovative leadership and commitment to the firm's and our clients' success, he is leading the way for the next generation of attorneys in Hawaii.



Morris Kaneshige, Rachel Kaneshige, Jeri Evans, Jeffrey Evans, Matt Evans, Taryn Yonaha, Kaydi Yonaha, Natalie Kiehm, Rick Kiehm



Matt and wife Taryn Yonaha



Sitting: Rochelle Panoke, Mary Renfer, Michael Yoshida; Standing: Joseph Gleason, Douglas Smith, Taryn Yonaha, Matt Evans, Anna Oshiro, Christopher Leong

Construction Project Terms of Art: Just the Nuts and Bolts

By Loren A. Seehase



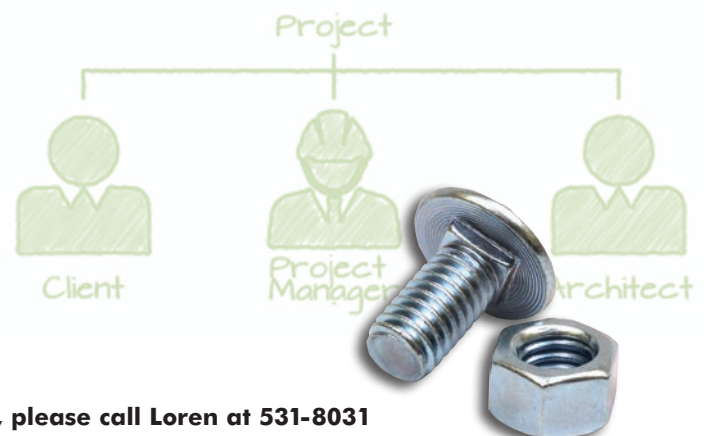
A construction project can be daunting for the inexperienced, but filling your toolbox with a few key industry terms can demolish confusion, provide a foundation of understanding, and the framework for a successful project. Once you have decided to renovate or build new you can hire an architect who will design the project, solicit bids from contractors, and the lowest bidding contractor will build the project, known as a **Design-Bid-Build** project. Or, hire a contractor that can do both the design and construction of the project, known as a **Design-Build** project.

Generally, there are three basic types of construction contracts that serve different purposes. A **Lump Sum or Fixed Price** contract sets the contract at a specific total that is meant to include everything construction related. A **Cost Plus** contract is where the owner pays the cost of the materials and labor plus a fixed fee or percentage over that amount. If the project is relatively small and the scope of the project is unclear then a **Time and Materials** contract may be preferred. Under which, you can set parameters such as type (daily or hourly) and amount of rate, costs (direct, indirect, markup, and overhead), and duration.

The American Institute of Architects (AIA), provides the most widely used construction contract forms. The key terms of the contract are price, payment terms, start date, date of completion, and most importantly the **Scope of Work**, which provides a detailed description of the work to be performed. A thorough description is vitally important, as this is a big source of disputes. A **Time is of the Essence** clause makes the timely completion of the project a condition of performance. The ramifications, of which, is usually the application of **Liquidated Damages**, which is a fixed daily rate payable to the owner for each day past the date of completion. **Indemnification** clause addresses whether, and which, party is to compensate the other party in case of certain types of damages or loss. A construction **Warranty** guarantees the work against any defects for a specific period of time, and that the work be fit for its intended purpose. A **Performance Bond** can be obtained by

the contractor from a surety to guarantee timely performance of the contract. The **Dispute Resolution** provision determines the jurisdiction and venue of where to bring a claim if there is an issue, which may not always be in Hawaii or in court.

Payments are made on a periodic basis, usually monthly, based on the value of work completed during each billing cycle, called **Progress Payments**. Any deviation from the Scope of Work requires both parties to approve and sign a **Change Order**, a one page document detailing the change in work, price, and pertinent details that effectively changes the contract. A Change Order may need to include an **Extension of Time**, to extend the date of completion. **Substantial Performance** or **Substantial Completion** signifies sufficient completion of the work so the owner can occupy it or it can be used for its intended purpose. After which, the owner or architect will generate a **Punch List** itemizing all remaining incomplete work, or unsatisfactory items. The completion of which will conclude the entire project and signal **Final Payment**.



For more information on this article, please call Loren at 531-8031 or email her at las@hawaiilawyer.com.

1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813

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A D V E R T I S I N G M A T E R I A L

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

Megan L.M. Lim was recently selected as a Fellow of the Hawaii State Bar Association's 10th Annual Leadership Institute. The HSBA Leadership Institute is designed to foster professional growth and develop leaders in various areas of the legal community.

Na Lan held a free I-9 Immigration Workshop for the Chinese Chamber of Commerce.

Robert H. Thomas has accepted appointment as the inaugural Joseph T. Waldo Visiting Chair in Property Rights Law at the William & Mary Law School in Williamsburg, Virginia. Robert will be teaching Eminent Domain and Property Rights Law, an upper-division course in the fall.

Kelly Y. Uwaine volunteered with the Hawaii Immigrant Justice Center at Legal Aid. They hosted a free community legal clinic at St. Stephen's Episcopal Church in Wahiawa, Oahu. The legal clinic was designed to assist citizens of the Marshall Islands, Micronesia, and Palau apply for work permits, or Employment Authorization Documents, from the US Citizenship and Immigration Services.



Congratulations to new UH Law School graduates: Laurel Pepe, Adam Miller, and Travis Moon. Also in the photo are DK lawyers Megumi Honami, Loren Seehase and Ross Uehara-Tilton.