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The Mechanics of Mechanic's Liens in Hawaii

By Matthew T. Evans



If you work in the construction industry, chances are you have an idea of what a mechanic's lien is. But, in practice, we've found that even experienced parties sometimes lack an accurate understanding of how a mechanic's lien actually "works." What is a mechanic's lien anyway? And why should you care?

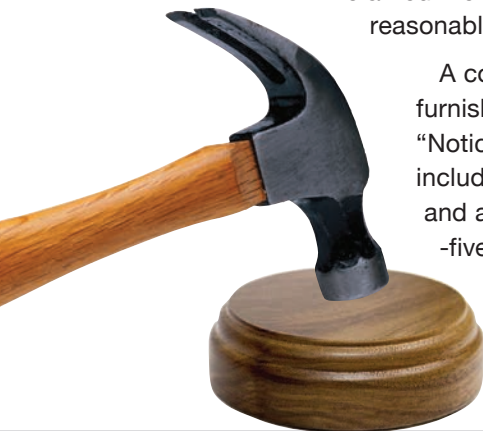
A mechanic's lien is a powerful tool, created by statute, which allows those who provide labor or materials for a construction project to guard against the risk of non-payment by obtaining a security interest – or lien – on the property being improved. Construction participants should be aware of their mechanic's lien rights and how to effectively leverage them, while property owners should seek to understand the risks posed by such liens and potential strategies to help mitigate those risks.

Contractors and Suppliers: Lien Filing Basics

In Hawaii, mechanic's liens are governed primarily by Chapter 507 of the Hawaii Revised Statutes, which provides that any person or entity who furnishes labor or material in the "improvement" of real property "shall have a lien upon the improvement as well as upon the interest of the owner of the improvement in the real property upon which the same is situated[.]" An "improvement" of real property is very broadly defined and encompasses most aspects of construction, repairs, alterations or additions to property. Generally speaking, the amount of a mechanic's lien will be determined by the lesser of the contract price or "the fair and reasonable value of all labor and materials" furnished.

A contractor, subcontractor, or material supplier who has not been paid for labor or materials furnished on a project may apply for a mechanic's lien by filing an "Application For A Lien" and "Notice Of Lien" in the appropriate circuit court. The Application must set forth several things including the amount of the claim, the labor or material furnished, a sufficient property description, and any other matter necessary to a clear understanding of the claim. A lien applicant has forty-five (45) days following a project's "date of completion" – typically indicated by the publication and filing of a Notice of Completion – within which to file an Application. This deadline is strictly construed, and a claimant who fails to file a lien Application within the forty-five (45) day period will have forfeited its lien rights.

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Once an Application has been filed, an initial return hearing date will be set by the Court. If the property's owner or any other "interested party" contests the applicant's entitlement to a lien, then the Court will schedule a "probable cause hearing" – an evidentiary hearing or "mini-trial" of sorts – for the purpose of determining "whether probable cause exists to permit the lien to attach to the property." At this subsequent hearing, the parties will present to the Court testimony and documentary evidence supporting their respective positions. If the Court finds that probable cause for the lien exists, it will enter an Order Directing Lien to Attach to the property in the net amount that the Court determines is the reasonable probable outcome of the dispute. This Order is then typically recorded at the State of Hawaii Bureau of Conveyances.

Once a mechanic's lien has attached to a property, it acts as an encumbrance on title which, like a mortgage or judgment lien, can be foreclosed upon in order to satisfy the underlying payment obligation. A mechanic's lien will expire three (3) months after entry of the Court's written Order directing its attachment unless a separate lawsuit is prepared and filed within that window of time to foreclose on the lien and collect the amount due. This subsequent action will proceed similar to a judicial mortgage foreclosure: a commissioner may be appointed to sell the property, and the Court will direct the distribution of the sale proceeds to satisfy any mortgages or other encumbrances – including the mechanic's lien – in order of their legal priority.

Owners: Things to Consider

Plainly, the risk to an owner can be great if a lien attaches to its property. But there are a number of

ways that property owners can attempt to challenge a mechanic's lien or mitigate the risks posed by same. For example, if an owner has substantial bargaining power, it might attempt to negotiate a contract in which the contractor waives its mechanic's lien rights altogether. If an owner is well-funded, it can attempt to engage a surety to issue a payment bond for the project to serve as substitute security in lieu of a mechanic's lien. Similarly, if a contractor commences a mechanic's lien proceeding, an owner contesting same may choose to "bond around" the lien claim by posting a sufficient bond, thereby discharging the lien.

A prudent owner will also insist that its contractor(s) sign partial lien releases throughout the course of the project, usually in conjunction with progress payments made by the owner. In this way, an owner can create a solid documentary record demonstrating that the contractor expressly released its lien rights – in whole or in part – depending on the terms of the written releases.

Concluding Thoughts

Even though much of the mechanic's lien law is codified by statute, there are many nuances not readily apparent to a party lacking experience or familiarity with the process. Among other things, there are notable licensing implications, mandatory disclosures for projects involving residential property, and special filing requirements for properties subject to the State's land court recordation system, all of which may significantly affect a claimant's lien rights. Experienced legal counsel can help contractors and owners preserve their respective rights and navigate a process that can otherwise be quite complicated and fraught with potential pitfalls.



**For more information on this article, please call Matt at 531-8031
or email him at mte@hawaiiilawyer.com.**

Honolulu's Sidewalk Obstruction Ordinance Goes Island-Wide

Honolulu's homeless problem is a tough nut to crack. There are no easy answers. People have rights, even if that means they have the freedom to live outside. But a drive around town crystallizes what that freedom sometimes means, and merely walking outside of a downtown office often becomes an exercise in dodging human waste, and unfortunates in various stages of mental illness or addiction.

In July, *Honolulu Star-Advertiser* reporter Gordon Pang spoke to Robert Thomas for an article about the City's latest efforts to do something. The City is considering two bills, one dealing with an island-wide prohibition on obstructing a sidewalk from 6am - 10pm, the other which would prohibit "lodging" in a public area, anytime.

"Obviously, (the bills) are designed to keep the homeless from setting up homes on the sidewalk," said [Damon Key] attorney Robert Thomas, who specializes in land use law.

Thomas, who specializes in land use law, said it appears city lawyers have taken great pains to craft the bills with language that works around areas that federal courts have found unacceptable.

"They've put in what might be considered safety valves in there to keep them from a successful challenge," Thomas said. The obstruction bill is similar to the sit-lie bill, "but there are some key distinctions" which might make it tougher for a challenge to be successful, he said.

The argument against an islandwide ban in the past has been that a blanket ban on sidewalk dwelling and storing amounts to discriminating against homelessness, making it unconstitutional. The courts have concluded generally that municipalities can, in the interest of public safety and health, regulate conduct, but not on status or speech, Thomas said.

The new obstruction bill takes the prohibition off during certain hours of the day, thus taking away the argument that it is a blanket ban on sleeping on the sidewalks or criminalizing homelessness, Thomas said.

And while the sit-lie bans are misdemeanors, the obstruction bill leads to a civil violation resulting in a fine or civil service, he said.

As for the lodging bill, "there has to be a place for you to go under this bill" before a person can be removed from the sidewalk, he said.

Thomas said he expects the bills, if they become law, to be challenged. "Now if I had to put money on it, I'd say that there is a better chance than not that they would stand up," he said. "Of course, a lot of it depends on a particular situation — and how they're enforced."



We wish everyone luck on this one. As we noted, no easy answers.

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

Hawaii's Service Charge Law

By Kelly Y. Uwaine

The Hawaii Supreme Court issued its second opinion in *Kawakami v. Kahala Hotel Investors, LLC* (“*Kawakami*”) this summer on its interpretation of Hawaii’s hotel and restaurant service charge law (“Service Charge Law”). The Service Charge Law, codified in Section 481B-14 of the Hawaii Revised Statutes, provides that all hotel and restaurants that add a service charge to its sale of food and beverage must distribute the service charge directly to its employees as tipped income or clearly disclose to the purchaser that the service charge is being used to pay other expenses and costs other than employee wages or tips.



The Hawaii Supreme Court in *Kawakami* held that the Kahala Hotel was liable to Mr. Jason Kawakami for damages in its violation of Hawaii’s Unfair or Deceptive Acts or Practices Statute (“UDAP”) by its failure to comply with the Service Charge Law.

Mr. Kawakami’s story began in 2007 when he held his wedding reception at Kahala Hotel. In his agreement with the Kahala Hotel, there was a 19% service charge on the sale of food and beverages. There was no disclosure otherwise in the agreement that the monies would not be distributed as tipped income. After the wedding, Mr. Kawakami discovered that the Kahala Hotel would retain 15% of the service charge as part of its “management share” and then reclassified that income as wages for its banquet employees. In 2014, the Hawaii Supreme Court issued an opinion in *Kawakami* that a failure to disclose that the service charge was being used for administrative costs, i.e. offsetting the wages of banquet employees, the Kahala Hotel violated Hawaii’s Service Charge Law and was a violation of Hawaii’s UDAP. *Kawakami* was then remanded to the determine damages.

This year, *Kawakami* again came before the Hawaii Supreme Court. This time it was to determine whether Mr. Kawakami was entitled to damages for the UDAP violation. To recover damages under the UDAP, a consumer must prove that 1) the defendant violated the UDAP statute or that his actions are deemed to violate the UDAP statute by another statute; 2) that the consumer was injured as a result of the violation, and 3) the amount of damages sustained as a result of the UDAP violation. The Hawaii Supreme Court held that as an implied term in every contract is that the service charge will either be distributed as required under the

Service Charge Law or that the hotel or restaurant will clearly state in its agreement with purchaser that the service charge will be used to pay other costs and expenses. The purchaser maintains the assumption that the service charge will be distributed to the tipped employees unless the hotel or restaurant clearly discloses otherwise. The Hawaii Supreme Court held that the violation of the Service Charge Law is a breach of the implied term in the hotel’s contract with Mr. Kawakami.

In determining whether Mr. Kawakami was injured as a result of the violation, the Hawaii Supreme Court found that since injury means a harm to some legally -protected interest, the second element was satisfied because the hotel caused harm to Kawakami’s legally protected expectation or performance interest.

The third element of a UDAP violation is proof of the amount of damages. The requisite proof of the amount of damages was supplied by proof at the trial on damages of the combined service charges totaling \$269,114.73.

For more information on this article, please contact Kelly at 531-8031 or email her at kyu@hawaiiilawyer.com.





Insurance Hurricane Preparedness

By Tred R. Eyerly

In the midst of hurricane season and having survived Hurricane Lane with less than the predicted damage, here are some tips for preparing and submitting claims to your insurer for any loss caused by storms:



- Collect and scan important papers, including your homeowners insurance policy so they are available after the storm. Scanning the paper documents allows them to be electronically stored as well.
- Keep contact information for your insurer and agent available for use after the storm.
- Inventory household items and save any receipts you may have for expensive purchases to assist in making any claim.
- Photograph the interior and exterior of your home, be sure to date the photos. This will assist in demonstrating the condition of the home before and after the storm.
- Keep all receipts for any repairs that are made post-storm to support your claim.
- Your insurance adjuster may have recommendations for professional restoration and repairs.
- Note: A homeowners or commercial property policy does not cover damage caused by flood. The federal government insures flood damage through policies that are administered by private insurers. Wind damage caused by hurricane is covered if endorsed.
- Download and complete our Personal Preparedness Checklist, available at <https://hawaiilawyer.com/publications/personal-preparedness-checklist/>.

Most important, stay safe Hawaii.

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

2018 Legislative Update

By Christopher J.I. Leong



The Hawaii State Legislature concluded its 2018 Regular Session with 220 bills becoming law. Here are a few of the noteworthy new laws.

Taxation.

Effective September 15, 2018, Act 122 increases the taxes withheld on the amount realized by nonresidents from the disposition of Hawaii real property under the Hawaii Real Property Tax Act, commonly known as HARPTA, from 5% to 7.25%. Act 66 authorizes the State Department of Taxation to require electronic filing of certain types of tax returns. These will include: withholding returns where total tax liability for the fiscal or calendar year exceeds \$40,000; general excise returns where total tax liability for the fiscal or calendar year exceeds \$4,000; transient accommodations returns where total tax liability for the fiscal or calendar year exceeds \$4,000; corporate income returns; and all returns due for fuel tax, liquor tax, tobacco tax, rental motor vehicle tax, bank franchise tax, public service company tax, and generation-skipping transfer tax.

Health.

Several bills were passed concerning key issues in healthcare and public health. Act 148 authorizes the State Department of Health to investigate and penalize care facilities reported to be operating without the required certificate or license; it is now also unlawful for a licensed healthcare provider or care facility to knowingly refer or transfer a patient to an uncertified or unlicensed care facility. Act 159 establishes the Office of Medical Cannabis Control and Regulation within the Department of Health, which will be responsible for implementing licensure and regulation for the medical cannabis dispensary system and administering the medical cannabis patient registry. Act 206 establishes a comprehensive regulatory scheme applicable to all retailers of electronic smoking devices and clarifies that sales of all cigarettes, tobacco products, and electronic smoking devices are a matter of state law and therefore prevail over any county-level laws attempting to regulate these products. Act 206 also creates and funds several new positions within the Department of Health aimed at alleviating the current delay in the review and certification process for new dialysis centers to operate in the state.

Landlord-Tenant Code.

Act 194 applies to the unusual but possible situation where a seller of residential real property fails or refuses to vacate the property after the sale has closed. In such situations, Act 194 provides that no landlord-tenant relationship is created under the law. In practical terms, this means the buyer may, if necessary, immediately institute a lawsuit to evict the overstaying seller.

Private Roads.

Act 9 specifically requires that any owners of private streets within the Kaka'ako community development district who charge the public a fee for the use of any portion of such streets are responsible for the costs of maintaining those streets to county construction and maintenance standards. An exception is made for streets not open to the public and used solely by the owner and/or employees of the owner of such streets. This Act took effect on May 1, 2018 and will be repealed on June 30, 2023.



Consumer Credit.

Act 22 expands a consumer's ability to place a security freeze on the consumer's own credit report by making a request to the consumer credit reporting agency at an address, telephone number, or secure website designated by the agency to receive such requests. The request may be made by the consumer or the consumer's representative. Further, Act 22 repeals the existing provision allowing reporting agencies to charge the consumer a \$5.00 fee for each request made by the consumer to place, temporarily lift, or remove a security freeze from the consumer's credit report.

For more information, please call Christopher at 531-8031 or email him at cjil@hawaiilawyer.com.

2018 New Laws Affecting Condominium Associations

By Na Lan

Act 195 – HB1873 (effective 7/1/2018, sunset on 6/30/2020)

A payment plan agreement merely puts a hold on an association's nonjudicial foreclosure, which can be resumed upon owner's default. Priority of payment policy is no longer permissible. The "pay first, dispute later" principle is valid for common assessments only. A unit owner may demand mediation before payoff, contesting any fines, late fee, legal fees and other charges. Owners have 30 days from the date of Association's debt verification written statement to demand mediation.

Act 196 – HB1874 (effective 1/2/2019)

Voluntary binding arbitration following attempted fruitless mediation will be subsidized by the condo education trust fund subject to a \$6,000 cap per arbitration. Additional issues and parties can be included as long as all parties agree.

Legislators imposed conditions and a \$1,500 ceiling on award of legal fees and costs to discourage parties from prematurely filing court action to compel for mediation. Each party shall bear its own attorney's fees and costs incurred in mediation, unless the parties agree otherwise in writing or obtains a court order or arbitration award providing otherwise. There is a \$3,000 cap on the subsidy per evaluative mediation, but you may include additional issues and parties as long as all parties agree to that.

Act 108 – SB2351 (effective 1/1/2019)

Inquiring about or relying on the salary history of a job applicant is now prohibited during the hiring process. An employer shall not retaliate or discriminate against an employee for, nor prohibit an employee from, disclosing his or her wages, discussing and inquiring about the wages of others, or aiding or encouraging other employees to exercise their rights to do so.

Ordinance 18-14 – Bill 69 (2017) (effective 5/3/2018)

Fire sprinkler retrofitting is required in high-rise residential buildings, except of buildings with exterior corridors or with less than 10 floors. Existing buildings not protected by an automatic fire sprinkler system shall be subject to a life safety evaluation code assessments, which needs to be conducted by a licensed design professional by May 2, 2021. Buildings shall comply by passing the building fire and life safety evaluation by May 2, 2024, with possible

extension if you opt for the fire sprinkler system.

A condo association or coop may opt out of the automatic fire sprinkler system requirement with a majority ownership approval within three years of the completion of such evaluation, as long as the building receives a passing score by implementing alternative fire prevention and safety systems. However, buildings that have opted out shall provide public disclosure, including posting a sign. Each building owner shall file a written statement of its intent to comply with this new law by November 2, 2018.

Goudelock vs. Sixty-01 Association of Apartment Owners, Case Number 16-35384 (9th Cir. 2018)

Our 9th Circuit held that post-petition condominium association assessments are dischargeable, when the owner surrenders the property in the Chapter 13 bankruptcy.

Wells Fargo Bank, N.A. vs. Omiya et al., SCWC-13-0000133 (Haw. 2018)

HRS § 501-118 precludes a mortgagor or other person in interest from impeaching foreclosure proceedings after the entry of a new transfer certificate of title ("TCT") for Land Court properties. Our Supreme Court held that assignment of a new TCT number is not the statutory equivalent of an entry of a TCT, the latter is currently delayed for several years due to the backlog in Land Court.

Sakal v. AOA Hawaiian Monarch et al.

The Hawaii Intermediate Court of Appeals held that condo associations must have power of sale specified in their declarations or bylaws in order to nonjudicially foreclose on a delinquent unit. The foreclosure statutes do not create the power of sale.

Act 217 – SB2461 (effective 1/1/2019)

Imposes a civil penalty for knowingly misrepresenting an animal as a service animal.

Act 094 – HB2033 (effective 7/1/2018)

makes it easier to serve by certified mail with return receipt in cases involving real property.



For more information on this article or condominium and community law, please call Na at 531-8031 or email her at nl@hawaiilawyer.com.

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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
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Matthew T. Evans has been appointed by Meritas to serve a two-year term on its Young Lawyer Advisory Board, which is charged with providing input to Meritas regarding its Young Lawyer Program, developing and implementing initiatives targeted toward young lawyers at Meritas member firms, and planning and coordinating programs to encourage global young lawyer engagement. His term started October 1, 2018.

Tred R. Eyerly was interviewed by Super Lawyers Magazine on a story regarding Insurance Coverage and the Big Island's Volcanic Eruption. "Lava Disaster Claims and Homeowner's Insurance in Hawaii"
<https://bit.ly/2QsMoMz>

Michelle M. Shin, an experienced local bank executive, has joined Damon Key as Firm Administrator. Michelle was with First Hawaiian Bank for six years and most recently served as Vice President & Division Manager of Loan Operations, overseeing the bank's commercial and consumer loan documentation and servicing. Prior to that, she was an Assistant Vice President in the bank's Commercial Loan Center. Michelle is legally trained and has a firm understanding of law, which will serve her well in her new position. She is a member of the Association of Legal Administrators and the Pacific Business News Forty Under 40, class of 2009.

In August in Washington, D.C., **Robert H. Thomas** and his American Bar Association colleagues from New York and Maryland, under the auspices of the U.S. State Department, met with a delegation of visiting lawyers and government officials from Malaysia, to discuss government transparency. Robert presented a session on the acquisition of private property for public projects, and discussed the budgeting and political aspects of these projects.



Pictured here are the Malaysian delegation, Robert and his ABA colleagues, and the Meridian House hosts. The delegation is also visiting New York City, Cleveland, Reno, and Seattle.