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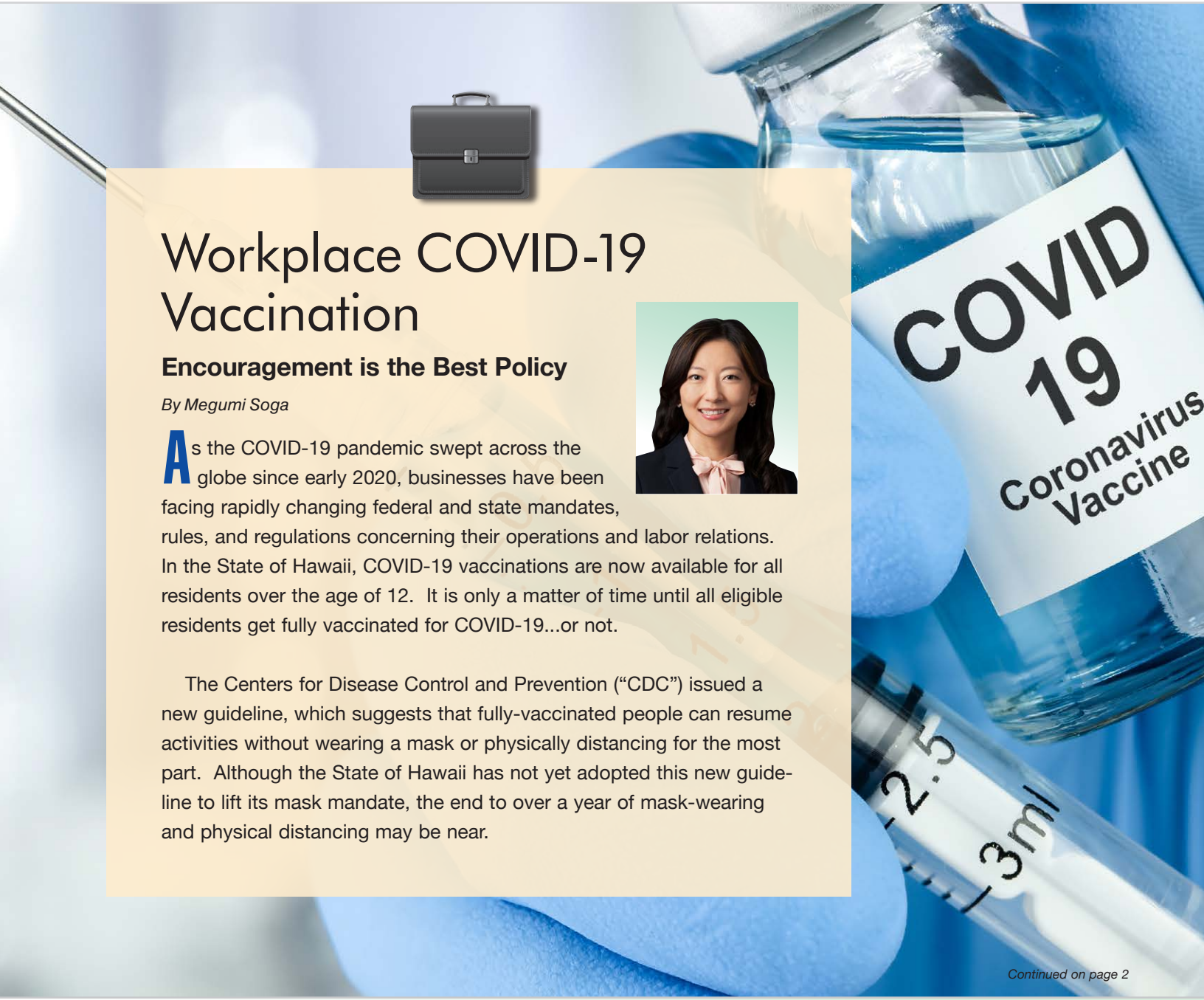

Workplace COVID-19 Vaccination

Encouragement is the Best Policy

By Megumi Soga

As the COVID-19 pandemic swept across the globe since early 2020, businesses have been facing rapidly changing federal and state mandates, rules, and regulations concerning their operations and labor relations. In the State of Hawaii, COVID-19 vaccinations are now available for all residents over the age of 12. It is only a matter of time until all eligible residents get fully vaccinated for COVID-19...or not.

The Centers for Disease Control and Prevention ("CDC") issued a new guideline, which suggests that fully-vaccinated people can resume activities without wearing a mask or physically distancing for the most part. Although the State of Hawaii has not yet adopted this new guideline to lift its mask mandate, the end to over a year of mask-wearing and physical distancing may be near.

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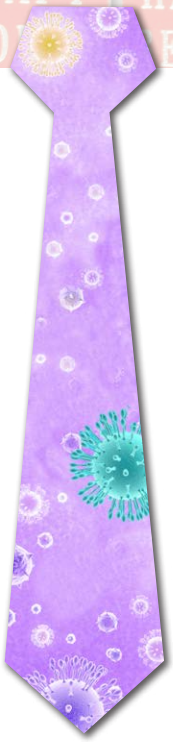

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During the course of this pandemic, businesses implemented various structural, physical, and logistical changes to prevent the spread of the COVID-19 virus. Requiring employees to receive the COVID-19 vaccination might seem like a reasonable next step to end many of the COVID-19 prevention measures and return to normalcy in the workplace. Now the question is: Can an employer require its employees to receive COVID-19 vaccinations? The short answer is yes. However, employers are encouraged to carefully examine potential drawbacks of vaccination requirements in the workplace before implementation.

Under the Americans with Disabilities Act ("ADA"), the employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. The U.S. Equal Employment Opportunity Commission ("EEOC") clarified that the administration of a COVID-19 vaccine is not a "medical examination" for purposes of the ADA. The employer may require its employees to receive a COVID-19 vaccine without considering whether it is job-related or consistent with business necessity. However, certain religious and medical exemptions still apply.

The EEOC provides guidance that an employer may require all employees physically entering the workplace to be vaccinated subject to certain restrictions under Title VII and the ADA. Under Title VII and the ADA, an employee may be exempt from the employer's vaccine requirement because of a disability or a sincerely held religious belief, practice, or observance. Under the ADA, the employer is prohibited from requiring an employee with a disability to receive a COVID-19 vaccination unless such employee would pose a significant risk of substantial harm to the health or safety of the employee or others in the workplace, which cannot be mitigated by a reasonable accommodation.

When an employee communicates to the employer about their needs for exemption from the vaccine requirement because of a medical condition, disability, or religious belief, the employer must provide a reasonable accommodation unless such accommodation would pose a significant difficulty or expense to the employer. Such reasonable accommodations may include wearing face masks, working at a social distance from coworkers or non-employees, modified shifts, periodic tests for COVID-19, remote work, and/or reassignment. These accommodations have already been implemented by many employers during the course of the COVID-19 pandemic and it would be difficult to reject these accommodations for reasons that they would pose a significant difficulty or expense to the employer.

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Further, when an employee requests for a reasonable accommodation, the employee does not have to mention phrases such as the "ADA," "disability," or "reasonable accommodation." Managers and supervisors responsible for communicating about the vaccination requirement should be able to recognize indications that the employee is indeed requesting a reasonable accommodation.

Other considerations include potential allegations that the vaccine requirement has a disparate impact on or disproportionately excludes employees based on their race, color, religion, sex, or national origin under Title VII and that the vaccine requirement is applied to treat employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information.

As such, employers considering requiring their employees to receive a COVID-19 vaccine must carefully examine their workforce makeup and be prepared to address potential allegations and reasonable accommodation requests. Or instead of requiring the COVID-19 vaccine, employers should consider encouraging employees to be vaccinated voluntarily.

The EEOC suggests that employers can encourage employees and their family members to be vaccinated by providing education, raising awareness, and addressing questions and concerns. The CDC provides a toolkit to help employers educate their employees about COVID-19 vaccines on their website: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717640568.

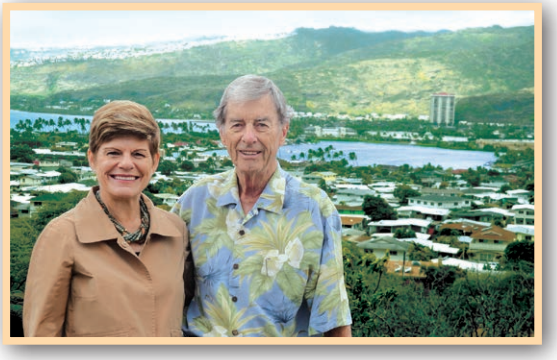
Employers can also encourage their employees by providing paid time off for them to receive and to recover from the vaccine. Under the American Rescue Plan Act of 2021, eligible employers with fewer than 500 employees can receive a tax credit for providing paid time off for each employee receiving the vaccine and for any time needed to recover from the vaccine from April 1, 2021 through September 30, 2021.

Although mandating the COVID-19 vaccination, in and of itself, is not unlawful, it could potentially trigger a swarm of issues arising under Title VII and the ADA. There are toolkits available to employers to facilitate voluntary COVID-19 vaccination among their employees.

For more information on this article, please call Megumi at (808) 531-8031 or email her at ms@hawaiilawyer.com.

Damon Key's 1979 Supreme Court Win Still Making Waves

Did you know that a landmark property law case about Hawaii Kai Marina on Oahu, litigated and won at the U.S. Supreme Court more than four decades ago by Damon Key's Charlie Bocken (1921-2020) and Diane Hastert, is still positively influencing the law today?



Diane Hastert and Charlie Bocken overlooking the Hawaii Kai Marina in 2010.

In June 2021, in another landmark property decision, the U.S. Supreme Court held that a California regulation that requires agricultural employers to open their land to labor union organizers was an unconstitutional taking requiring compensation under the U.S. Constitution's Fifth Amendment. This regulation allowed union organizers to access agricultural workers on the farm's private property for up to three hours per day, 120 days per year. The owner of a strawberry farm sued the state to strike down the regulation after union organizers entered its property without prior notification at 5:00am, and began shouting at workers over bullhorns.

The U.S. Supreme Court agreed with the farm's owner, and concluded that the regulations violated the farm's right to say "keep out." Although this was not a situation where California had formally exercised its power to take property for public use via the eminent domain power, the Court concluded that from the owners' perspective, a government regulation that allowed third parties to invade and occupy the property -- even if only temporarily -- has the same effect on the landowner's rights. And when property is taken, the U.S. Constitution requires the government to pay "just compensation," which California had refused to do. The Court noted that this regulation was not a typical regulation of a business or property such as zoning, but was more like the government saying to union organizers "come on in, the water's fine" and enter private property even if the invasion is only temporary.

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And this takes us back to Charlie Bocken and Diane Hastert's 1979 landmark win in the Supreme Court, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In that case, the federal government claimed that after Henry J. Kaiser's Hawaii Kai development company transformed private Kuapa Fishpond into the navigable Hawaii Kai Marina by connecting the new Marina to the Pacific Ocean, it somehow lost the private status it enjoyed under Hawaii property law. Charlie and Diane took the case to the Supreme Court, which ruled in their favor, and the Marina remains private to this day. A big win for our clients for sure, but an even bigger win for private property rights. Since 1979, the *Kaiser Aetna* decision has been followed by 42 subsequent court decisions, and cited more than 1,100 times in law reviews and legal treatises. To call this a "landmark" property ruling would be an understatement.

The *Kaiser Aetna* decision played a central role in the Supreme Court's latest decision ruling the California regulation unconstitutional. If Kaiser Aetna didn't lose its ability to say "keep out" because it opened the Marina to the ocean, then the California farm didn't lose its right to control who could enter its land simply by being in the farming business. Proving that Charlie and Diane's big win all those years ago continues to play an important role in the protection of the essential right of private property. Ten years ago, on the thirtieth anniversary of the decision, Charlie noted that the day the Supreme Court handed down the ruling – December 4, 1979 – was coincidentally his birthday. "It was the best birthday present I could receive!" he noted several years ago when reminiscing about the decision.

That's certainly true Charlie, but as the most recent Supreme Court case reminds us, your 1979 win remains a bigger present to constitutional rights and the rule of law.

From Hawaii Kai Marina to the Supreme Court

For more information on this article, please call Mark M. Murakami at (808) 531-8031 or email him at mmm@hawaiilawyer.com.

Hawaii Legislators Used "Gut and Replace" to Increase Conveyance Taxes, With Little Practical Effect

By Ross Uehara-Tilton

In just one of several "gut and replace" moves during this year's legislative session, Hawaii legislators passed a bill increasing the conveyance tax rate on some real estate transactions valued at $4 million or more. The move was intended to preserve some aspects of Senate Bill 56, which contained astronomical increases in income taxes (both individual and corporate) and conveyance taxes, and also suspended certain general excise tax exemptions. House Bill 58 was originally intended to redirect conveyance tax proceeds to partially make up for budgetary shortfalls in the wake of the COVID-19 pandemic. However, when it became clear that Senate Bill 56 would not pass in the House, Senators gutted House Bill 58 and replaced its contents with the conveyance tax increase and some other provisions of the failed Senate Bill 56. The new version of House Bill 58 passed both houses of the legislature, but fortunately the measure has been included on the Governor's proposed veto list.

Under Section 247-1 of the Hawaii Revised Statutes, a conveyance tax is imposed on the actual and full consideration paid for all transfers of real property. The rate of tax depends on several factors, including the value of the consideration being exchanged, and whether the transaction is a sale of a condominium or single-family residence for which the purchaser is ineligible for a county homeowner's exemption on property tax.

The rates are summarized in the following table:

Transaction Value	Current Rate per $100		Proposed Rate per $100		
	Residential Homeowner	Residential Non-Homeowner	Commercial	Residential Homeowner	Residential Non-Homeowner
< $600k	$0.10	$0.15	$0.10	$0.10	$0.15
$600k < $1m	$0.20	$0.25	$0.20	$0.20	$0.25
$1m < $2m	$0.30	$0.40	$0.30	$0.30	$0.40
$2m < $4m	$0.50	$0.60	$0.50	$0.50	$0.60
$4m < $6m	$0.70	$0.85	$0.75	$1.40	$1.70
$6m < $10m	$0.90	$1.10	$0.90	$2.70	$3.30
≥ $10m	$1.00	$1.25	$1.00	$4.00	$5.00
No Change in Rate					
Increase in Rate					
New Category but No Effective Change in Rate					

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Initial proponents argued that the Bill would help address wealth and income inequality, raising taxes on the rich. These arguments ignored the other costs, in that the draft bill would also redirect conveyance tax proceeds from the Legacy Land Conservation Fund, thereby defunding important environmental conservation initiatives. Numerous environmental groups submitted opposing testimony, and these provisions were removed. More importantly, however, proponents of the Bill misunderstand that the Bill likely will not have a significant increase in conveyance tax revenue.

First, the conveyance tax increases only affect property transactions valued at $4 million or more. In May 2021, according to Multiple Listing Service data, the median single family home sale price was $985,000 and the average single family home sale price was $1,252,090. These price points are already out of reach for many families, but are still significantly lower than the $4 million price point where the tax increase would come into effect. The vast majority of sales will be unaffected by this increase.

Second, the increase does not affect the rates for commercial transactions. Although $4 million is a lot for a residential property, it is insignificant compared to some commercial properties, which can change hands for tens or hundreds of millions of dollars. As a recent example, Amazon's purchase of industrial property for its new distribution center adjacent to Honolulu Harbor was for $125 million, which would be subject to conveyance tax at the same rate under the new law as the old law. "Commercial properties" are those that are classified as commercial for county real property tax purposes, and thus the term generally does not include residential rentals or vacation rental properties.

Finally, the new law discounts the potential for careful conveyance tax planning, which can allow transactions to occur free of conveyance tax. For example, transfers to or from trusts that are not for a business purpose are potentially exempt from conveyance taxes, meaning that generational transfers of wealth can occur without conveyance tax consequences. In the business context, there is also an exemption available for corporate mergers, which can enable companies to transfer real property without incurring conveyance tax liability. Parties to these kinds of transactions were already considering conveyance tax liability before the new Bill, and simply increasing the rates will only serve to discourage transactions from occurring or motivate parties to engage in more aggressive conveyance tax planning.

House Bill 58 is lukewarm at best. To proponents with only a superficial understanding of tax law, it looks like a "win" in that it may result in a marginal amount of tax increase on high-end transactions. However, the increase won't have an effect on the vast majority of transactions, and for the transactions that will be affected, careful conveyance tax planning strategies may still be available to help reduce or eliminate the conveyance tax burden.

For more information on this article or about taxation, please call Ross at (808) 531-8031 or email him at rut@hawaiilawyer.com.

Are Arbitration Clauses Severable When A Contract Is Being Challenged As Void?

By Joanna C. Zeigler

The United States Supreme Court had answered yes to that question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), but until recently no Hawaii cases directly answered the issue. However, in *Inoue v. Harbor Legal Group*, CAAP-19-0000589, 2021 Haw. App. LEXIS 127 (April 29, 2021), the Intermediate Court of Appeals ("ICA") affirmatively concluded, when the contract as a whole is being challenged as void, but there is not challenge as to the validity of the arbitration clause in the contract, the arbitration clause is severable.

Inoue challenged a contract he entered into with Harbor Legal Group ("HLG") to help him manage his debts. He later filed a Complaint against HLG in the Circuit Court of the First Circuit alleging that HLG was a debt collector in violation of Haw. Rev. Stat. § 480-2 and, therefore, his contract with HLG was void as to illegality. Pursuant to the arbitration provision in the contract, HLG filed a motion to compel arbitration and the Circuit Court granted the motion to compel.

On appeal, Inoue challenged the Circuit Court's ruling asserting that because the contract as a whole was allegedly void, the arbitration clause is also void. The ICA first noted that two questions must be answered when presented with a motion to compel arbitration: "1) whether an arbitration agreement exists between the parties; and 2) if so, whether the subject matter of the dispute is arbitrable under such agreement." (quoting *Brown v. KFC Nat'l Mgmt. Co.,* 82 Haw. 226, 238, 921 P.2d 146, 158 (1996)).

To answer the first question, if an arbitration agreement exists, three elements must be met: (1) it must be in writing; (2) it must be unambiguous as to the intent to submit the dispute to arbitration; and (3) there must be bilateral consideration. (citing *Gabriel v. Island Pacific Academy, Inc.,* 140 Haw. 325, 334, 400 P.3d 526, 535 (2017)). In this case, the ICA concluded that the three *Gabriel* elements were met, thus, an arbitration agreement existed. To answer the second question, there was no dispute that the subject matter was arbitrable, Inoue only contended that because the contract was being challenged as void, the arbitration agreement was also void.

However, the ICA agreed with HLG that under prevailing case law, the arbitration agreement should be severed. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the plaintiffs filed a class action lawsuit alleging that Buckeye charged usurious interest rates and the agreement in that case violated Florida lending and consumer-protection laws. 546 U.S. at 443. Buckeye sought to compel arbitration.

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The Supreme Court in *Buckeye*, explained that challenges to the validity of arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract can be divided into two types. "One type challenges specifically the validity of the agreement to arbitrate." 546 U.S. at 4444. "The other challenges the contract as a whole, either on the ground that directly affects the entire agreement . . . or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Id*. The Court concluded that previous cases had established three important propositions:

1. An arbitration provision is severable;
2. Unless, the challenge is to the arbitration provision itself, the issue of the contract's validity is considered by the arbitrator; and
3. The Federal Arbitration Act (from where the first two conclusions derive) apply in state as well as federal courts.

Id. at 445-46. Thus, the Court concluded that because the challenge in that case was to the agreement itself and not specifically to the arbitration clause, the arbitration provision was enforceable apart from the remainder of the contract and the challenge to the contract should be decided by the arbitrator. *Id*. at 446.

Two Hawaii cases also informed the ICA's conclusion that the arbitration provision in Inoue was severable. In *Lee v. Heftel*, 81 Haw. 1, 911 P.2d 721 (1996), where the contract was being challenged for fraud, the Hawaii Supreme Court concluded that because the fraud was not directed at the arbitration clause, the issue of whether the contract was induced by fraud was arbitrable. In addition in *Siopes v. Kaiser Foundation Health Plan, Inc.*, 130 Haw. 437, 312 P.3d 869 (2013) the court concluded that arbitration agreements were severable.

Therefore, given *Buckeye, Lee*, and *Siopes*, the ICA concluded that it was appropriate to sever the arbitration provision from the rest of the contract in *Inoue* and enforce the agreement to arbitrate.

For more information on this article or litigation issues, please call Joanna at (808) 531-8031 or email her at jcz@hawaiilawyer.com.

All Is Not Lost for Policyholders Seeking Coverage for COVID-19 Losses

By Tred R. Eyerly

For policyholders following the multitude of lawsuits seeking business interruption coverage created by COVID-19, the current scorecard looks bleak. The Penn University COVID Coverage Litigation Tracker (https://cclt.law.upenn.edu/#top) shows that most COVID-19 business interruption cases have been filed in federal court. As of June 14, 2021, 1,902 COVID-19 business interruption cases had been filed in federal and state court. For those cases facing motions to dismiss, 92% of the cases filed in federal court have not survived. Motions to dismiss were successful in 59% of the cases in state courts confronting such motions.

Complaints have been unsuccessful at the pleading stage because inadequate allegations fail to trigger coverage under the policies. A commercial property policy typically requires "direct physical loss or damage to" covered property. The insurers have been successful in arguing that the words "loss" and "damage" are synonymous. Therefore, the insurers argue, the complaint must allege "physical . . . damage" to the insured's building, such as damage caused by fire, to successfully allege coverage under the policy. Buildings did not suffer structural damage due to COVID-19, but insureds were forced to close or to operate their businesses at a restricted level, causing loss of business income.

Yet, not all is lost for policyholders. Appeals may reverse some of the dismissals. Further, a spattering of recent cases' carefully drafted complaints have survived motions to dismiss. These cases have pled that government orders restrict businesses from operating or force them to close, causing insureds to suffer a "direct physical loss" under the applicable policies. Here is a sampling of recent cases where insurers' motions to dismiss were denied.

In a case decided in August 2020, the federal district court in Missouri issued the first decision rejecting the insurer's argument that the policy required a physical, structural alteration of the building to trigger coverage. *Studio 417, Inc. v. The Cincinnati Ins. Co.* The insureds operated hair salons and a restaurant that were restricted in their business operations by government authorities once the pandemic was underway. The insureds alleged that it was likely that customers and employees were infected with COVID-19, thereby infecting the property. They further alleged that the property was unsafe and unusable due to the presence of COVID-19, forcing them to reduce or suspend their businesses. The court found that the insureds adequately stated a claim for direct physical loss, and survived the motion to dismiss.

... the complaint must allege "physical . . . damage" to the insured's building, such as damage caused by fire, to successfully allege coverage under the policy.

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A similar result occurred in multi-district litigation where the court considered business interruption claims from restaurants in several states that had been denied by the insurer. *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*. Again, the insurer moved to dismiss, arguing that a slowdown due to a suspension of business by governmental authority orders was not a direct physical loss. The court disagreed. The restaurants were not able to use their premises as they did before the pandemic. A jury could find that the restaurants suffered direct physical loss of property because the pandemic limited them from using much of their space.

Finally, a trial court in North Carolina granted summary judgment to seven restaurants seeking business interruption coverage. *North State Deli, LLC, et al. v. The Cincinnati Ins. Co.* Government decrees forbid the restaurants from making full use of the property, creating a "direct physical loss."

Accordingly, as COVID-19 business interruption litigation evolves, policyholders with well-pled allegations demonstrating a direct physical loss of their business operations are more likely to move beyond motions to dismiss and be permitted to pursue coverage under the policies.

For more information on this article or Insurance issues, please call Tred at (808) 531-8031 or email him at te@hawaiilawyer.com.

Staff Appreciation Week

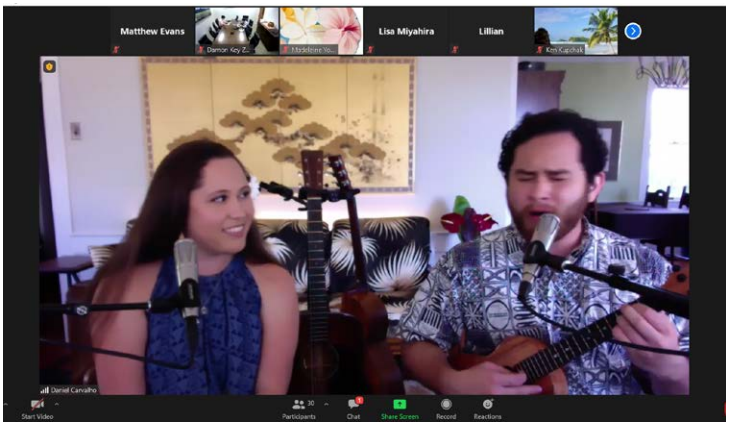
A proud annual Damon Key tradition is the celebration of our incredible staff with not just an Administrative Professionals' Day, but a Staff Appreciation Week. Despite the challenges posed by COVID-19 restrictions, Damon Key attorneys Casey T. Miyashiro and Cheyne I.Y. Yonemori rose to the challenge, working with numerous local artists and vendors to put together a week of events filled with joy, laughter, and, of course, aloha.

To kick off the week, staff members participated in a *lei po'o* making class taught by Kaipo Leopoldino, a Hawaiian language teacher at Saint Louis High School and a member of Halau Na Kamelei o Lililehua. Younger readers may also remember him from old 808 Viral videos. The class was filled with laughter and *mo'olelo* about flowers, the different types of lei, and the importance of thinking only happy thoughts while making lei, for that *mana* is imbued into the lei and thus transferred to the recipient. The next *lei po'o* you see might have been made by a Damon Key staff member!

Shirley Akamine, Attorney Nick Ernst and Rochelle Panoke

Jenny Ling, Rochelle Panoke and Daisha-Ann Alejandro

On Wednesday, staff were treated to a delicious meal prepared by Feast by Jon Matsubara. Entrée options included Kunoa Ranch Butter Poached Filet Mignon, Kauai Prawns, Maine Diver Scallop Scampi, and a Vegan Bento. To finish, staff had the option of choosing a Decadent Chocolate Torte or a Lilikoi and Mango Cheesecake. A 'feast' for the ears was also provided by local music duo Kailua Moon (featuring Danny Carvalho and Nani Edgar), who serenaded the staff via Zoom. Selections included popular melodies such as Mele a ka Pu'uwai, Ku'u Home o Kahalu'u, and White Sandy Beach.

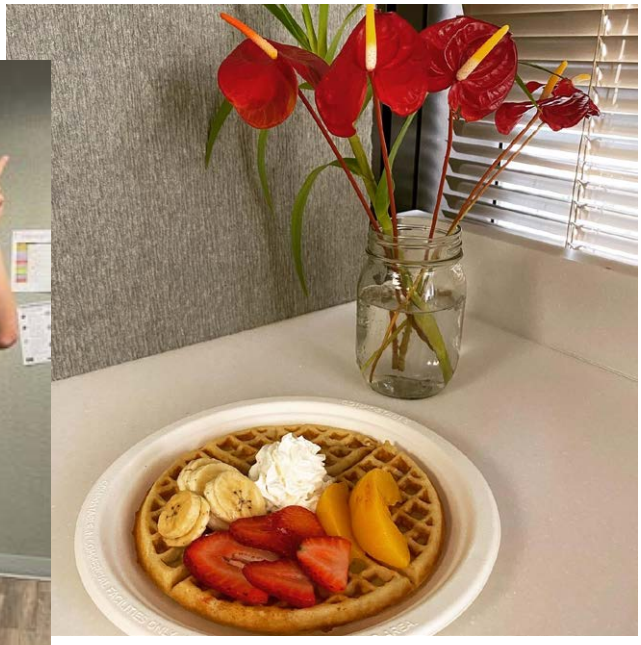


Nani Edgar and Danny Carvalho

On Thursday morning, staff arrived to find on their desk a tulip and a furoshiki-wrapped box with a sakura-shaped keychain. Inside the box were pineapple chocolate-covered macadamia nuts from Menehune Mac and a gift card from Nordstrom. The box, furoshiki, and keychain were designed and assembled by Shop Toast, located in Kaimuki (the same vendor who made our "batteries" for last year's Staff Week).

Mahalo, Staff

To close out the week, Casey and Cheyne donned their aprons and made waffles. Staff members were able to select from a plethora of toppings including whipped cream, strawberries, raspberries, blueberries, peaches, bananas, maple syrup, coconut sytrup, lilikoi syrup, Nutella, marshmallows, mochi balls, strawberry jam, guava butter, etc. Vegan staff members were not left out with vegan donuts purchased from Down to Earth. A sweet ending to a memorable week for the people who make Damon Key a special place to work.



Attorneys Casey Miyashiro and Cheyne Yonemori

Gregory W. Kugle spoke at the Hawaii State Bar Association CLE program entitled “Airbnb and Short-Term Rentals”.

Kenneth R. Kupchak’s son Rob and his family are visiting from Connecticut wearing their Damon Key Leong Kupchak Hastert masks.

Mark M. Murakami was asked to speak to the Shidler College of Business’ Family Business Center – Hawaii Island Chapter about how to engage with attorneys in business and estate planning. The Family Business Center is a partnership between the Shidler College and the Hawaii Family Business community with a goal of “equipping, educating, and celebrating families in business.”