Summer / Fall 2022

LEGAL ALERT

Providing clients worldwide access to sophisticated legal advice and exceptional service.

DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION
hawaiilawyer.com®

The Battle Over 30-Day Short-Term Rentals Continues

By Loren A. Seehase

It's not every day that a press conference informs you of how an opposing party is going to proceed after losing an argument in court. Well, October 20, 2022, was that day. The Mayor of the City & County of Honolulu ("City") held a press conference on October 20th to announce the City's response to the recent federal court order granting a preliminary injunction in favor of Damon Key's client, Hawaii Legal Short-Term Rental Alliance ("HILSTRA"). On October 13th, Federal District Court Chief Judge Watson issued a ruling against the City and its newly enacted Ordinance 22-7 that attempts to further regulate short-term rentals by increasing the minimum rental period from 30 days to 90 days. The order granted HILSTRA's request for a preliminary injunction, thereby enjoining the City from enforcing the portions of Ordinance 22-7 that pertain to the use and advertisement of rental properties that rent for periods of 30-89 days. The portions of Ordinance 22-7 untouched by the court's order went into effect on October 23rd.

The court's order is the result of months of hard work by Damon Key attorneys. On June 6, 2022, HILSTRA, a Hawaii not-for-profit 501(c)(4) organization filed a lawsuit in federal district court. HILSTRA brought ten counts for: violation of Hawaii Revised Statutes ("HRS") § 46-4(a), vested rights/zoning estoppel, denial of due process (U.S. & HI Const.), just compensation (U.S. & HI Const.), contracts clause, excessive fines (U.S. & HI Const.), and violation of civil rights.

Continued on page 2

Inside this Issue:

Insurance-Related COVID-19 Issues: Where We Are, Where We Are Going

Protecting your Intellectual Property online starts with warning

Estate Planning for Intellectual Property

2022 Damon Key Ohana Picnic Celebrating Summer & Family!

Continued from cover

On July 7, 2022, HILSTRA filed a motion for a preliminary injunction to halt Ordinance 22-7 from going into effect ("Motion"). The Motion focused on the claims for violation of HRS § 46-4(a) and vested rights/zoning estoppel, and sought to enjoin enforcement until the City creates a nonconforming use certificate process for rental periods of 30-89 days. The Motion argued that state law, HRS § 46-4(a), expressly prohibits Hawaii counties, such as the City, from discontinuing any lawful residential use without creating a mechanism to allow the lawful use to continue as a nonconforming use. Hawaii counties derive their zoning powers from HRS § 46-4(a), referred to as the Zoning Enabling Act, which prohibits counties from enacting ordinances that eliminate a preexisting lawful residential use. Constitutional principles require that counties cannot simply eliminate a preexisting lawful use, but must allow the use to continue as a nonconforming use. The Zoning Enabling Act also prohibits Hawaii counties from amortizing or phasing out residential uses. So, the only option counties have is to create a nonconforming use category, which Ordinance 22-7 did not. A hearing was held on September 7, 2022.

On October 13th, the court issued its ruling in which it agreed with HILSTRA's reasoning that Ordinance 22-7 violates HRS § 46-4(a) by eliminating the preexisting lawful use of renting residential properties for periods of 30 to 89 days without creating a nonconforming use category, and as such the City is prohibited from enforcing such provisions.

At the press conference on October 20th, the Mayor announced that the City would continue to defend the 30-89 day ban as part of the City's long-term plan, move forward with enforcement of the provisions of Ordinance 22-7 not banned under the order, and "enforce [the ordinance] in an unprecedented way." As of October 24th, the City's Department of Planning and Permitting ("DPP") had new systems in place for both enforcement and registration. The City has hired seven (7) full-time inspectors to focus on illegal short-term rentals and purchased a computer monitoring system to scour rental websites and identify rental properties. The City believes that there are as many as 14,000 short-term rental properties on the island of Oahu.

On October 24th, the City began receiving registrations of lawful transient vacation rentals ("TVR"), rentals for less than 30 days, for properties in the Resort zone. Ordinance 22-7 now permits TVRs in Resort zones and adjoining Apartment zones that are in the Waikiki, Ko Olina, and Turtle Bay areas. The City will allow such Resort-zoned TVRs to continue pending approval. However, owners must register their properties, or face a fine of $10,000 a day. The Mayor did not establish whether there will be a grace period in which to register.

These are challenging times for short-term rentals on Oahu. The Mayor made his stance clear at the press conference: that in enforcing Ordinance 22-7, the City will be "unyielding", "enforcement will be in full force", it will "fine aggressively at unprecedented levels", "will enforce in an unprecedented way", and "if they have to lien properties, they will"; the City is "prepared to take this [lawsuit] as far as [they] have to"; and the order "doesn't dismiss their ability to enforce [Ordinance 22-7]." What was not clear from the October 20th press conference is how the City is going to distinguish between legal rentals of 30 to 89 days and illegal short-term rentals of less than 30 days. Under the order, the City is prohibited from issuing violations for advertisements with rates for less than 30 days. Property owners may also find it challenging to comply with Ordinance 22-7, given the City's recent tactics of issuing violations for advertisements with less-than-30-day rates or less-than-30-day minimum stays despite the advertisement explicitly stating that the property only rents for 30-day periods and the host is in fact only renting for 30-day terms. If the City enforces the new ordinance against those properties protected by the order, the City runs the risk of incurring contempt of court penalties.

For more information or questions regarding this article, please call Loren at (808) 531-8031, email las@hawaiilawyer.com or scan the code with your smartphone.

Insurance-Related COVID-19 Issues: Where We Are, Where We Are Going

By Tred R. Eyerly

Two and a half years into the COVID-19 pandemic, insurance coverage litigation is in full swing. Hundreds of cases have been filed across the country by restaurants, hotels, and other businesses after insurance companies universally denied claims for business interruption due to COVID-19 and government shut-down orders issued early in the pandemic. In the overwhelming majority of these cases, federal courts have found in favor of the insurance companies and determined there is no coverage for business interruption claims arising from COVID-19.

Business interruption coverage provides for recovery of business losses when a business suffers "direct physical loss of or damage to" property, curtailing its ability to continue conducting its business. For example, if a fire damages the insured's building, the business is unable to earn income until the fire-damaged building is repaired. This would undoubtedly be a "direct physical loss of or damage to" the building and business interruption coverage would likely be triggered.

Insurance coverage is a matter of state law and interpretation. A federal court can only predict what a state's highest court might decide on a particular issue. Relatively few state appellate courts have addressed whether business interruption claims related to COVID-19 are covered. Policyholders can only hope that state courts will be more receptive of business interruption claims than the federal courts have been.

Prior to the COVID-19 pandemic, business interruption claims were covered in cases where asbestos or mold were found in buildings, drywall emitted gasses, the odor of cat urine made the building uninhabitable, smoke from wildfires shut down an outdoor theater, gas collected beneath the building, or arsenic was located in the roof. In each of these covered events, there was no physical damage to property, but there was "loss of" property, triggering the business interruption provision.

These cases seemingly set the stage for the thousands of business interruption claims that were filed after the arrival of the pandemic. Insured businesses filed claims when they were forced to limit operations due to the presence of COVID-19 or they had to close their business due to government shut-down orders. The insurance companies routinely denied these claims because there was no damage to property. The mere presence COVID-19 particles floating in the air was not damage to property. Surfaces could be wiped clean. Further, shut-down orders did not cause loss or damage to property.

As a result of these denials, hundreds of lawsuits were filed across the country, primarily in federal courts, and most of the cases were dismissed in favor of the insurance companies. Despite pre-pandemic cases that held no physical damage was required to trigger business interruption claims, the federal courts have overwhelmingly required physical alteration or structural damage to property for business interruption claims to survive. Therefore, the federal courts have curtailed discovery and expert reports that have subsequently found that COVID-19 can live on surfaces for up to 28 days.

The few state court decisions to date have been mixed. The Hawaii Supreme Court has not decided a business interruption claim arising from COVID-19. A trial court in Texas recently rejected the insurer's argument that the virus cannot cause physical loss or damage to property. The jury then awarded Baylor College of Medicine $48 million for its business interruption claim.

Therefore, we will have to wait to see whether the remaining state courts – including Hawaii – will dismiss COVID-19 claims at the starting gate or actually allow insureds to develop their cases and prove loss of or damage to property through scientific evidence.

For more information or questions regarding this article, please call Tred at (808) 531-8031, email him at te@hawaiilawyer.com or scan the code with your smartphone.

Damon Key attorney Ross Uehara-Tilton was recently featured in the Honolulu Star-Advertiser's Tech View column. We thought you'd enjoy reading the article, as it provides valuable information about intellectual property infringement and what you can do about it:

Protecting your Intellectual Property online starts with warning

Courtesy Honolulu Star-Advertiser
Rob Kay covers technology and sustainability and is the creator of fijiguide.com.

Many of you reading this column are creators—writers, poets, photographers, painters, illustrators and the like. As a travel writer, I'm part of this cohort. When I recently discovered my intellectual property or "IP"—text and photos from my website Fijiguide.com, on another website, I was not pleased.

Unfortunately, this happens to a lot of people. So, what to do?

Of course, you could hire an attorney. However, as I found out from Ross Uehara-Tilton, who practices law at Damon Key Leong Kupchak Hastert, there are measures you can deploy before engaging a lawyer.

I spoke to him recently and he had some great advice for all you creators out there who find their IP ripped off.

Question: What can you do to stop someone who has taken and reposted content from your website?

Answer: The easiest way to start is by sending a "DMCA Takedown Notice" to the website host. It's a powerful tool to put the brakes on the bad guys, and you don't need an attorney.

Q: How does that work?

A: The Digital Millennium Copyright Act (DMCA) is a U.S. federal law that imposes liability for copyright infringement on the Internet. It extends liability not only to the person responsible for posting the infringing content, but also potentially the technology providers that host the websites where the infringing content is re-published. Because of that, they must pay attention to you.

Q: What's involved with the DMCA process?

A: Essentially write a letter or fill out a form provided by the ISP [Internet Service Provider] with all the pertinent information and the URLs that illustrate the infringing activity. The ISP will respond. It's not 100% foolproof but it will get the bad guy's attention. Infringers with truly malicious intent can still get around this by hosting the infringing content on a DMCA-ignored server—usually one that is outside of the U.S.

Q: Any other methods you recommend?

A: Yes, a "Cease and Desist" letter to the infringer can be effective. It serves two basic functions. The first is to give notice of the infringement. Sometimes an infringer does not realize that they are publishing a copyrighted work, since it's so easy to copy and paste the content. Second, a letter (particularly if sent by an attorney) can be a sort of scare tactic: take down the content or else . . .

Q: Is the easiest solution then to go the DMCA route?

A: I prefer a multi-faceted approach. The DMCA Takedown Notice and the Cease and Desist Letter serve different functions. The Cease and Desist Letter can be easy to ignore but serves as a foundation in the case of future litigation, and the DMCA Takedown Notice potentially has a more practical result of causing a third party (the web host) to remove the infringing content.

Q: Will DMCA help you with someone who is cybersquatting?

A: First an explanation. Cybersquatting is a type of IP infringement that involves registering or using an Internet domain name that is similar to an existing legitimate website owned by another, with the intent to profit off the goodwill of the legitimate website. With Cybersquatting, the IP that is being infringed upon is usually a trade name, not a copyright. Thus, the DMCA protections and processes do not really apply to Cybersquatting.

Q: So what do you do in that situation?

A: It's more complicated than the DMCA takedown process, but there is a multinational agency called ICANN [International Corporation for Assigned Names and Numbers] that helps to resolve these disputes. More information about the process is on their website ICANN.org, and in some cases there is a fee charged to resolve domain name disputes.

Q: At what point do you hire an IP attorney?

A: One benefit of hiring an attorney is to show the infringer the seriousness of the situation. There isn't necessarily any magic language an attorney can write in a Cease and Desist Letter or DMCA Takedown Notice that a non-attorney could not write. The effect instead originates from the fact that the letter is coming from an attorney, and often contains a warning of possible further legal action if its contents are ignored.

For more information or questions regarding this article, please call Ross at (808) 531-8031, email him at rut@hawaiilawyer.com or scan the code with your smartphone.

Estate Planning for Intellectual Property

By Amber M. Yonamine

Estate planning is a useful tool to transfer your assets upon your death. Traditional estate plans account for assets such as bank accounts, real property, and personal items. However, many people now own intellectual property ("IP") which might not be addressed in a traditional estate plan. IP consists of products or inventions that are the result of human creativity and intellect which are legally protected from unauthorized use by others. Common types of IP include copyrights, patents, and trademarks.

Copyrights

A copyright is the exclusive right to reproduce, publish, sell, or distribute original works of authorship such as books, music, and artwork. Copyright protection generally lasts for the life of the author plus 70 years after the author's death for any works made on or after January 1, 1978. Beyond this, copyrights are governed by a complex statutory scheme that affords different rights to different parties. The rules can even lead to shocking, unexpected results. For example, if an author transfers their copyright to a third party but dies prior to the expiration of a statutory vesting period, the author's statutory heirs can intervene and terminate the transfer, contravening the author's intent. An important exception to this rule, however, is that the statutory heirs will not have such a right if the author transfers the copyright at his death by will. You should work with an estate planning attorney to ensure that surprises like this are avoided and that the rights to your work go to – and stay with – the people you choose.

Patents

Patents grant inventors the exclusive right to make, use, offer for sale, or sell their invention. The length of the patent depends on the type of item being patented and ranges from 14-20 years. Once a patent expires, the invention generally becomes part of the public domain. Patents may be transferred by a will or assigned to a trust. Patents should be clearly identified in estate planning documents and should identify the owner of the patent, the patent number, those who have the right to license the patent, and the parties who are responsible for paying the fees required to maintain the patent. Patent assignments should be recorded with the United States Patent and Trademark Office ("USPTO").

Trademarks

Trademarks protect names, slogans, logos, and other identifying characteristics of goods and services. While trademark protection does not require registration, trademarks should be registered at the state and federal level for the strongest protection. Trademarks may last indefinitely if the owner continues to use the trademark and pay required fees. Similar to patents, trademarks may be transferred by a will or assigned to a trust, and assignments should be recorded with the state office and the USPTO. The trustee or new owner of the trademark must continue to use and maintain the trademark or risk losing the trademark.

Owners of IP should create an estate plan that considers transfer requirements, taxes, fees, ongoing use, and recording and filing obligations to ensure their IP is transferred according to their wishes. Owners should also consider if the intended recipient of their IP has the funding, knowledge, and desire to maintain the asset, or the IP interest may be lost.

For more information or questions regarding this article, please call Amber at (808) 531-8031, email her at amy@hawaiilawyer.com or scan the code with your smartphone.

2022 Damon Key Ohana Picnic

Celebrating Summer & Family!

At Damon Key, strong relationships have always been fundamental to our success. That's why each summer the Damon Key ohana comes together to enjoy some time outside the office, connecting with old and new colleagues.

This year, the firm's annual beach picnic was held on a delightful summer day in August. It once again provided an ideal opportunity to see how much the keiki have grown and catch up with the rest of the family. Great food, fun games, and priceless fellowship made the day complete!

We believe that this annual event helps to refresh and revitalize our team. The annual picnic provides us with an opportunity to bond together with our work ohana and reinforce the sense of togetherness we strive for as a firm.

Damon Key Leong Kupchak Hastert · 1003 Bishop Street · Suite 1600 · Honolulu, Hawaii 96813
Telephone (808) 531-8031 · Facsimile (808) 533-2242 · Website www.hawaiilawyer.com

DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION
SERVING HAWAII SINCE 1963

hawaiilawyer.com®
MERITAS
LAW FIRMS WORLDWIDE

1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813

ADDRESS SERVICE REQUESTED

PRESORTED
STANDARD
U.S. POSTAGE
PAID
HONOLULU, HI
PERMIT NO. 289

ADVERTISING MATERIAL

Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interests. It is not intended to provide legal advice or opinion. To opt out of receiving this publication, please email info@hawaiilawyer.com.

Attorneys in the News

Christine A. Kubota is a member of the Hawaii Tax Institute Advisory Committee and was a speaker at the 59th Hawaii Tax Institute Japan-US Alliance Program that was held on 11/06-11/10/22 at the Sheraton Waikiki. Chris did a session on probate proceedings in Hawaii with Attorney Ikuko Sano, of Sano & Associates from San Diego.

Gregory W. Kugle and **Tred R. Eyerly** participated in panel discussions before the Civil Forum of the Judicial Administrative Committee in September. The audience consisted of several judges and civil law practitioners. Greg addressed administrative appeals and Tred discussed COVID-19 business interruption claims under commercial business property insurance policies.

Gregory W. Kugle and **Mark M. Murakami** have been named Lecturers-in-Law at the University of Hawaii William S. Richardson School of Law. They are teaching Real Property 2 during the Fall semester.

Na Lan was on Law Across the Sea on Think Tech Hawaii. She chairs the HSBA International Law Section, whose officers had a panel discussion during the session.