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New Court Decision Adds to the Costs of Construction



By Anna H. Oshiro

The Supreme Court of Hawai'i has issued a new construction licensing case that is likely to create confusion and add cost to construction renovation projects. The case addresses the scope of a specialty contractor's renovation license, and what work the renovation contractor can lawfully perform. The potential fallout of this decision is of huge import to the industry and is of particular interest to this firm due to our understanding of the history leading up to the decision.

In the fall of 1993, Ken Kupchak and I worked on a bid protest involving one of the refurbishing phases for the Honolulu Stadium. At issue in that case was whether a general contractor had to have a specialty license to do painting and waterproofing work on a construction project, or whether the general's license allowed it to do specialty license work. The case generated an inquiry with the Contractors License Board, asking the Board to clearly state what exactly the scope of a general contractor's license may be. The Board answered that for the construction of a building, as long as the work involved more than two specialty trades or crafts, the general could do the whole job with its general contracting license, except for work that required a separate permit. The Board's interpretation was memorialized in meeting minutes which were used by us and others in a number of different bid protests through the years.

This was the law until the Okada Trucking decision came along in 2002. In that case, the Supreme Court of Hawai'i reviewed the licensing laws and the Board's administrative rules, noting that through its rules, the Board automatically awarded a number of specialty licenses to general engineering and building contractors upon licensure. Unfortunately, the Board's 1993 meeting minutes were not in front of the Supreme Court when it considered the case. The Okada Trucking Court decided, in direct opposition to the Board's own statements on the scope of the licenses it policed, that these automatically awarded specialty licenses must be the only work the Board believed the general engineering and building contractor was capable of performing itself, and so ruled.

The Okada Trucking decision changed drastically the scope of work that could be legally self-performed by general contractors licensed in the State of Hawaii. Whereas formerly, general contractors could self-perform nearly all of the work covered by C-specialty licenses, suddenly they were deemed "unqualified" to self-perform painting, masonry, or drywall work they had been performing for decades.

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Despite multiple efforts to address the decision through legislative amendments or through rule changes at the Contractors License Board, reversal of the decision was never achieved, and the industry continues to work through the repercussions of the case.

Fast forward to 2013, and you have most the recent decision, addressing the C-5 renovation license. The scope of work covered by this license is written very broadly in the licensing administrative rules. The question is whether the Okada Trucking decision dictates that in renovation, a contractor must hire specialty contractors for all work that is covered by a specialty license, or whether the contractor can perform any work necessary to complete the renovation (aside from work requiring a special permit, of course).

The case originally arose out of the Department of Accounting and General Services (DAGS) a project involving the installation of 10,390 vinyl slats and 476 aluminum jalousie windows. The State put the job out to public bid, and awarded the contract to Allied Pacific Builders, Inc. The Appellant filed a petition for declaratory ruling with the administrative hearings offices, arguing that a C-22 specialty glazing and tinting license was needed for the work. Allied possessed a C-5 specialty license for renovations.

The hearings officer ruled against Appellant, finding that the jalousie window replacement was related to and necessary for the completion of the renovation work and as such was incidental and supplemental to completion of the project. The administrative hearings officer found no license violation, and on appeal the Circuit Court agreed. Appellant sought further review at the Intermediate Court of Appeals (ICA). The ICA also affirmed, finding that the hearing officer's findings were entitled to deference unless plainly erroneous, which in this case they were not. The decision was affirmed.

Appellant was not done. It sought review by the Supreme Court of Hawai'i, which accepted Appellant's petition for certiorari. The Court has now issued a construction licensing opinion concluding renovation contractors are not entitled to undertake specialty work (such as painting), that is directly related to and necessary for the completion of the renovation project, unless the cost and scope of the specialty work is "incidental and supplemental" in comparison to the overall cost.

The Supreme Court of Hawai'i said renovation contractors may only perform specialty work that is "incidental and supplemental" to a renovation job, taking into account the cost and scope of the work. The Court held the incidental and supplemental exception was supposed to have been narrow and minor in scope. Yet, other than noting that specialty work cannot lawfully constitute the majority of a renovation project, the decision provides virtually no guidance on what is "narrow and minor," i.e. what percentage or amount of specialty work will be deemed legally unacceptable, or what "work" is to be counted in making that determination.



Because the question of what is "incidental and supplemental" under a C-5 license is now gray at best, it will likely be subject to continued bid protests and litigation in the future. This will be bad news for the long overdue renovation work needed at Hawaii's schools and other public buildings, which will now be subject to a new round of bid protests. Hawaii already leads the nation for cost of construction in nearly every category, and this decision will only add to that unfortunate statistic. This will also mean for every renovation project (homes, schools, airports, courthouses, etc.) contractors may now have to hire subcontractors to perform work they used to perform themselves, which will mean more expense, and will also mean less work for the industry.

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Estate Planning Update: Tenancy by the Entirety Protection in Trusts



By Caron N. Ikeda

A recently enacted (July 2012) law offers a way for married couples, civil union partners and reciprocal beneficiaries (collectively referred to herein as “spouses”) to have the benefit of tenancy by the entirety (“TE”) creditor protections even if they hold their real property in trust. This was not possible prior to the enactment of this law. TE is a form of ownership between spouses under which both spouses have an equal, undivided interest in the whole property. TE ownership is unique from other forms of joint ownership in that creditors of only one spouse may not attach and sell the interest of that spouse in TE property. For example, if husband and wife hold property as TE and husband has separate debts against him, a creditor would not be able to go after the property to satisfy husband’s separate debts since the property is held as TE with his wife. The only way that a creditor would be able to go after property held as TE is if the debt was against both husband and wife.

Previously, you couldn’t have the best of both worlds. Spouses had to choose between holding title to real property as TE or transferring title to such real property to their trust(s). Given the choice, holding property in trust was often thought to be the more advantageous of the two options because it avoids the need for a probate proceeding on the second spouse’s death and also avoids the need for a conservatorship proceeding upon the incapacity of either or both spouses. Holding property in trust also offers certain estate tax benefits to those spouses with taxable estates (combined estates of over \$10.5 million in 2013).

Thanks to this new law, spouses no longer have to make this choice. Instead, they can now transfer their property to their trusts while also maintaining TE protections against creditors. In order for this to happen, the following requirements must be met:

(1) Your real property must be held as TE prior to the conveyance to your trust with the TE protections. If your property is already in a joint or separate revocable trust without TE protections, you will need to convey it out of your trust(s) to yourselves, as TE, and then back to your trust(s) with the TE protections.

(2) Your real property must be conveyed in equal shares, as tenants in common, to your respective revocable trusts, or wholly to your trust in the case of a joint trust.

3) Certain language must be included in the deed transferring the property to your trust. This language must include a statement that the real property held in trust is immune from the claims of each spouse’s separate creditors.

Property transferred to your trust with TE protections passes according to the dispositive provisions in your trust, and not to the surviving owner as is usually the case with TE property. These TE protections automatically terminate upon divorce and can also be expressly waived by the trust or by the written consent of both spouse.

This new law benefits all spouses owning real property together in this state. Any real property conveyed to trust prior to July 1, 2012, will not have TE protections. Therefore, this is an opportunity for many of you to maximize the benefit of your estate plans by adding TE protections to any real property held by your trusts.



For more information on this article, please call Caron at 531-8031 ext 608, email her at cni@hawaiilawyer.com, or scan the code with your smartphone.



Owner Controlled Insurance Programs – A Help or Hindrance



By Tred R. Eyerly

Under the traditional method for insuring construction projects, the general contractor and the subcontractors secure their own coverage. Each participant is responsible for arranging its own insurance coverage, although there may be contractual requirements as to the type and amount of coverage.

On large construction or infrastructure projects, however, a consolidated insurance program may be preferred, insuring all participants under one policy. Such programs are known as a Controlled Insurance Program, and colloquially referred to as a “wrap up” program. Under an Owner Controlled Insurance Program (“OCIP”), the owner controls the procurement of insurance for all of the project participants. Rather than each party providing its own insurance for the project and passing the cost through in each contract or subcontract, the owner purchases certain lines of insurance to cover all the participants. An OCIP typically includes commercial general liability, business auto liability, and workers compensation coverage.

All parties involved in the project are named as insureds under the same policy. The OCIP participants waive subrogation claims against each other.

A wrap up “administrator”, frequently the insurance broker, administers the program. The administrator manages all submitted claims to ensure that all claims covered by the wrap-up policies are defended and paid, as appropriate.

Advantages of an OCIP include: higher policy limits

dedicated to the project; uniformity of policy terms; ability to select carriers; reduced insurance costs; centralized cost control and administration; implementation of formal safety program for the project; and reducing litigation between project participants and their insurers.

On the other hand, disadvantages of an OCIP are: administrative costs; partial loss of control over the insurance program; need for additional insurance, such as off-site liability and professional coverage; and potential coverage gaps.

A participant in a wrap-up program must carefully review and understand the policies, endorsements, and agreements to ensure they are consistent with one another and do not result in gaps in coverage. Damon Key lawyers are currently representing subcontractors in a case where, although the OCIP participants are being defended in a suit pursued by the occupants of the project, the insurer maintains the primary coverage has been exhausted through defense costs, leaving nothing for indemnity coverage. The insurer further contends the OCIP’s excess coverage is not triggered until a very high self-insured retention is paid. Such a gap in coverage should have been addressed by the OCIP administrator when creating the program.

Group Builders’ II finds a duty to defend claims arising from faulty workmanship

By Tred R. Eyerly



We discussed in our last issue the disagreement between federal courts and state courts in interpreting the meaning of the Intermediate Court of Appeals’ 2010 decision in Group Builders. The legislature reacted to Group Builders by enacting Act 82 in an effort to negate the case. In April 2013, the ICA issued a second Group Builders decision (unpublished), holding that there is a duty to defend the subcontractor on the construction defect claims under Hawaii law, based upon the policy language and the allegations in the underlying complaint. Group Builders, Inc. v. Admiral Ins. Co. (Haw. Ct. App. April 15, 2013).

The ICA applied the test for determining a duty to defend under Hawaii law. Before a defense can be denied, the insurer must prove it would be “impossible” for the insured subcontractor to obtain coverage under the policy on any claim raised against it in the underlying suit. It is of no consequence if the court later determines that there is no duty to indemnify.

For more information on this article, please call Tred at 531-8031 ext 625, email him at te@hawaiiilawyer.com or scan the code with your smartphone.



Preeminent Family Law Attorney Judith A. Schevtchuk Joins Damon Key



Experienced local attorney Judith A. Schevtchuk has joined Damon Key in an “of counsel” affiliation. She will continue her family law practice with the concentrations in military family law and guardianships of *keiki* (children) and *kupuna* (elderly).

Judy Schevtchuk (pronounced SEVT-chuk) advocates mediated and cooperative settlements wherever possible. Judy handles both traditional family law matters and dissolutions of civil unions and other alternative family arrangements for all members of our community regardless of the state where they entered their relationship. She is available for confidential consultations to discuss all aspects of divorce, adoption (domestic, international and step-parent), cohabitation and unmarried parenthood, child custody, the financial support of children and relocation. She also advises potential clients who want to investigate a guardianship for a special needs child, family member or others with medical or other conditions requiring sensitive arrangements.

Prior to joining Damon Key, Judy had been a solo family law practitioner in Honolulu, was a Deputy Prosecutor and an associate at a Hawaii law firm. Judy retired as a Commander from the Judge Advocate General's Corps of the U.S. Naval Reserve. Previously Judy had served on active duty with the U.S. Navy Judge Advocate General's Corps (JAGC) in Washington, DC and with the 1st Marine Division at Camp Pendleton, California. After active duty, Judy became a civilian Special Agent in what is now the Naval Criminal Investigative Service in California and later at NCIS Headquarters in Washington, DC. Judy jokes that she served with both JAG and NCIS before either of those organizations had become popular TV shows.

We welcome Judy and the breadth of experience in family law she brings to our firm and our clients.

For more information on family law, please call Judy at 531-8031 ext 669, email her at jas@hawaiilawyer.com or scan the code with your smartphone.



The Ho‘opili Project

Damon Key attorneys Greg Kugle and Matt Evans successfully defended D.R. Horton – Schuler Homes’ Ho‘opili project on May 8, 2013. The Ho‘opili project, a 1,500 acre, mixed use transit-oriented development project in Ewa, located between Wahiawa and UH West Oahu, was approved by the Land Use Commission (“LUC”) in 2012. The Ho‘opili community will include over 11,000 primary residential units, including affordable housing, five public schools, commercial and industrial space, and a unique urban agriculture component.



By Gregory W. Kugle

The LUC’s approval had been appealed to the Circuit Court by the Sierra Club, Senator Clayton Hee and the Friends of Makakilo in 2012. On May 8th, following oral arguments, Judge Rhonda Nishimura dismissed the Sierra Club/Hee appeal, finding that the LUC had not erred in reclassifying the land for urban use. Earlier, Judge Nishimura had dismissed the Friends of Makakilo appeal as untimely.

Judge Nishimura correctly concluded that reclassification of the property, which had been planned for urban use by the City and County of Honolulu for forty years, was not barred by either a Hawaii Constitutional provision relating to agriculture, nor the Important Agricultural Lands bill that was passed in 2005. The property had not been designated as “Important Agricultural Land” and would not be so designated in the future because it had always been planned for urban use as a component of the second city at Kapolei. The Court was also mindful of the extensive evidence considered by the LUC on the need for primary housing in Ewa in the coming decades, as well as the availability of approximately 40,000 acres of agricultural land on Oahu, and significantly more unused and available agricultural land on the other islands.

Although unsuccessful at both the Land Use Commission and the Circuit Court, the appellants have expressed their intent to further appeal the decision, seeking review at either the Intermediate Court of Appeals or the Supreme Court of Hawai‘i. Given the strength of the record considered by the LUC and the legally sound reasoning of the Circuit Court, Mr. Kugle and Mr. Evans anticipate that successive appeals will fail and D.R. Horton’s Ho‘opili project will move forward through the County zoning and approval process, providing a needed stimulus to Hawaii’s economy and providing relief from the high cost of housing on Oahu.

For more information on this article, please call Greg at 526-3603, email him at gwk@hawaiilawyer.com or scan the code with your smartphone.



Sun Yat-sen and Francis Williams Damon

Born in southern China in 1866, Sun, then known by his childhood name of Tai Cheong, was sent to Hawaii at age 13 to join his older brother Ah Mi, a successful rice farmer who had moved to Oahu some years earlier. Ah Mi had the foresight to realize that his younger brother's best chance for survival here would require English language fluency and some basic knowledge about Western business practices. Accordingly, in 1879, he enrolled Tai Cheong in Iolani School, where the boy would receive his first exposure to the religious, political and cultural ideas that would fuel his revolutionary imagination.



Iolani was, back then, an Anglican school presided over by Bishop Alfred Willis. Historian Al Castle whose great-grandfather Samuel Northrup Castle was a founding trustee of Punahou School has researched and written extensively about Sun Yat-sen's early years in Hawaii. "At Iolani, Sun received his first exposure to western literary and philosophical classics," Castle describes, "as well as a lesson in cultural resistance to imperialism." In his three years at Iolani, Sun became proficiently bilingual, and he was introduced to, in Castle's words, "practical and specific examples" of British and American forms of government.

After graduating from Iolani in 1882, Sun entered Oahu College (now known as Punahou School), the only post-secondary institution of learning in the islands at the time. Tuition was \$1 a week, \$12 for the term, and Sun studied math, geography, history and English. Castle wrote in a 2005 article, adding that, "the curriculum, with its emphasis on logic, speech, the liberal arts and rhetoric, gave Sun additional confidence in the efficacy of the liberal mind." Perhaps most crucial to Sun's Punahou experiences was his growing understanding of "the Christian doctrine of the power of individuals to effect change in earthly institutions," Castle wrote.

Indeed, the theology that had galvanized Punahou's founding missionaries – that humans could be empowered to effect moral and social change in the world – ignited Sun as well. Says Castle, "Individuals, he was taught, were, with God's help, capable of self-rule, democracy, social justice and disinterested benevolence." Furthermore, Castle points out that Punahou's founding missionaries were, in fact, social activists, liberal and very progressive.

Castle concludes that the missionaries' brand of "Protestant theology, which imbued the religious instruction at Oahu College, would support (Sun's) enthusiasm for democracy and social and political change for the rest of his life." Nor was this brand of democracy limited to politics. "Sun was very impressed with Hawaii as an interracial democracy," he says

Perhaps no one had more influence on young Sun than Punahou's Latin and Greek teacher (and eventual trustee) Francis Williams Damon (the grandfather of our Frank Damon). Damon was himself no stranger to social activism, having long been Hawaii's Superintendent of Chinese Missions (besides the two Classical languages, he was also fluent in Cantonese). Taken by Sun's quick intelligence and probity, Damon fostered the student's growing interest in Christianity.

Al Castle adds "asked to leave Punahou by Ah Mi, who feared Punahou's 'radicalized' curriculum, he returned to China having absorbed enough learning to help formulate his 'three principals of the people.' First developed in 1905, these included nationalism, democracy, and democratic socialism. These became his plan for ending the repressive Manchu Dynasty and restoring economic and moral strength to China." Thus, Sun's Hawaii education played a major role in shaping his early faith in democratic institutions, social justice and anti-imperialism.

Years later, Damon's wife's father, Dr. Andrew Happer who was a medical missionary in China, would baptize Sun into Christianity in Hong Kong.

It was Damon, along with members of the Castle family and other missionary families that admired Sun's "Christian dedication to American ideals of government," who sent him the considerable sum of \$300 to allow him to continue his studies in China. With Damon's backing, Sun would now begin in earnest his work as a revolutionary.



Returning to Honolulu in 1895, Sun organized the Hsing Chung Hui (Revive China Society). Damon himself “suggested that we (hui members) take up military training to fit ourselves for leading the revolution in China.” Allen Damon ’78, great-grandson of Damon and author of a paper entitled “Financing Revolution: Sun Yat-sen and the Overthrow of the Ch’ing Dynasty,” writes about his great grandfather: “Damon offered his home on Chaplain Lane as a training ground, and twice a week the revolutionaries practiced marching on his property.” His unwavering support saw Sun through 16 years of struggle, exile and failed uprisings. Finally, on October 10 – Double Ten Day – their goal was achieved when 2,000 years of imperial rule came crashing to an end.

“After the success of the 1911 revolution,” Allen Damon reports, “Sun wrote to Damon to express his appreciation.” “I am glad to know,” wrote Sun, “that the realization of my object in liberating China from the thralldom of the Manchus has given pleasure to my many foreign friends; and while at this I must not be oblivious to the fact that you have all along cheered and assisted me in my efforts to bring this great movement to a success.”

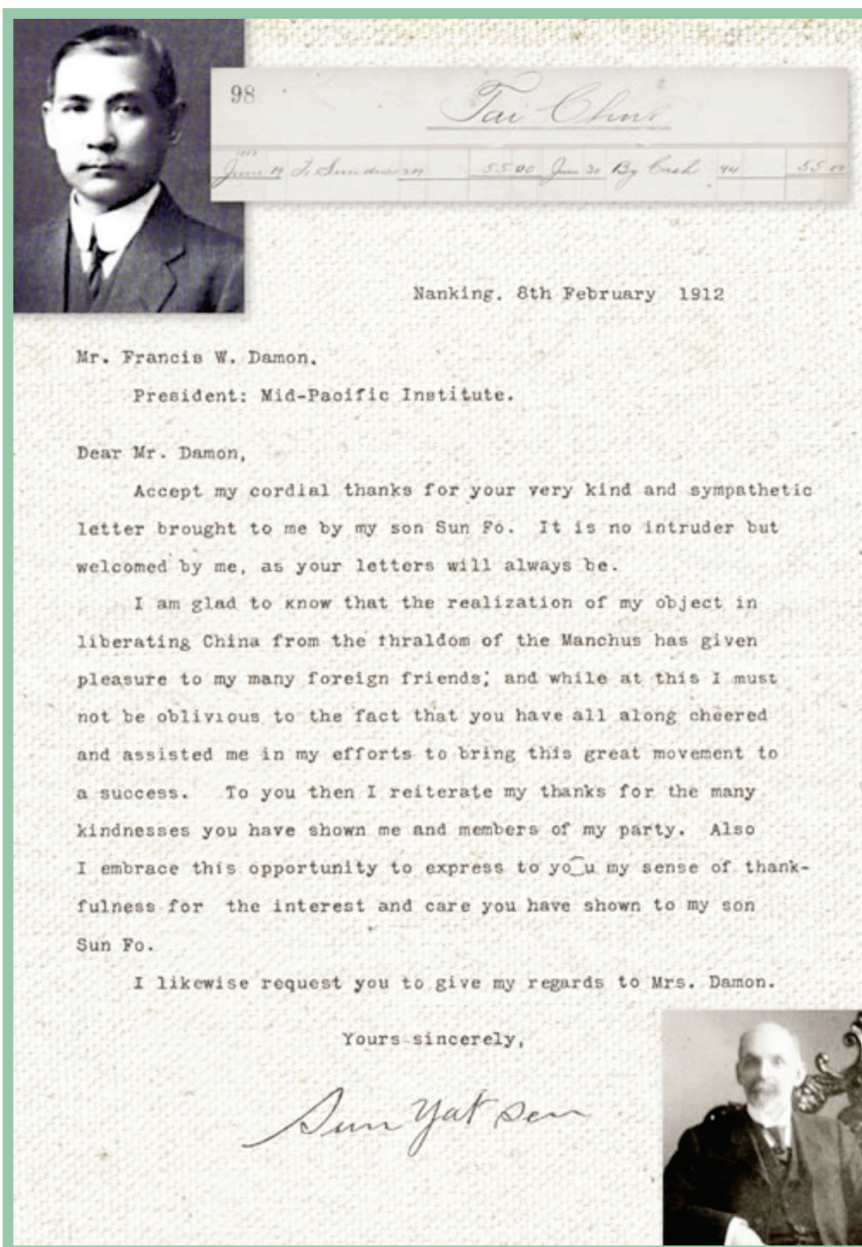
“This letter,” Allen Damon recalls, “was passed on to my father (longtime Punahou trustee Frank Damon ’44, Damon’s grandson), who had it framed and hanging in his study for many years. I remember being very intrigued by it as a boy. Maybe that’s what led me to study history – and specifically focus on Asian history – at Yale under Jonathan Spence, the renowned China scholar.” Reflecting on the strong China ties that have persisted across the generations in his family, Allen Damon muses, “It’s the China connection that may well have been one of the things that inspired my father to create the Foundation for Study in Hawaii and Abroad at Punahou with Siegfried Ramler in the 1970’s.” Our Frank Damon with Siegfried Ramler started the first summer exchange program between Punahou School and Keio University in 1969 followed by many additional international programs. That foundation and its future international

programs eventually morphed into the Wo International Center at Punahou School.

Concerning his early education in Hawaii, Sun said “This is my Hawaii. Here I was brought up and educated; and it was here that I came to know what modern civilized governments are like and what they mean.” Two of Sun’s famous teachings are “Bo Ai” meaning “universal love” and “Tian Xia Wei Gong” meaning “The whole world as one community.”

In words similar from Francis Williams Damon, “Within The Four Seas, All Men Are Brothers.”

Article courtesy of Punahou Bulletin 2011 and Al Castle. Visit www.punahou.edu



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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

Diane D. Hastert's passion to further the lives of individuals with disabilities and their families continues. Having served the maximum number of years on the Board of Directors of Easter Seals, Inc., Diane has now been elected an Honorary Member of the Easter Seals Global Board of Directors and will also serve as Chair of the Emeritus Council.

Christine A. Kubota was on a panel in Tokyo, Japan discussing real estate and immigration issues to potential investors. She also was a panelist with Justice Sabrina McKenna of the Supreme Court of Hawai'i and Steve Silver at the 2013 Hawaii Access to Justice Conference in June at the William S. Richardson School of Law discussing language access in the Courts.

Gregory W. Kugle is representing the Defend Oahu Coalition in a Land Use Commission (LUC) case challenging the Turtle Bay Resort's 1986 expansion plan. Greg was quoted in the June 19 Honolulu Star-Advertiser, stating that recent events such as the Supreme Court of Hawai'i decision on the Turtle Bay environmental impact statement and recently published revised development plans demonstrate

the need for the LUC to re-examine its nearly 30 year-old approval. On June 25, Gregory Kugle was interviewed on Hawaii Public Radio's "The Conversation" program, about the Turtle Bay land use litigation.

Mark M. Murakami has been elected Vice President of Good Beginnings Alliance. Mark is also on the Nominating Committee for the ABA State and Local Government Law Section.

Robert H. Thomas will be moderating a panel of expert legal scholars and practitioners for the American Bar Association in July, discussing the U.S. Supreme Court's important recent land use and property law decisions. The program, "Supreme Court Takings: A First Look at Koontz and Horne," is scheduled for July 12, 2013.

Tred R. Eyerly was the guest speaker at the May 21, 2013 meeting of the HSBA's Section of Litigation. He discussed coverage for construction defects in Hawaii. Tred is now Of Counsel to the firm.