



LINDA LINGLE
GOVERNOR
JAMES R. AIONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: (808) 586-2850
Fax Number: (808) 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEES ON CONSUMER PROTECTION & COMMERCE
AND JUDICIARY

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION OF 2009

Monday, February 2, 2009
2:00 p.m.

TESTIMONY ON HOUSE BILL NO. 233 – RELATING TO THE MORTGAGE RESCUE
FRAUD PREVENTION ACT.

TO THE HONORABLE ROBERT N. HERKES AND JON RIKI KARAMATSU, CHAIRS,
AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of House Bill No. 233, Relating to the Mortgage Rescue Fraud Prevention Act. My name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection ("OCP").

This bill seeks to correct an unintended consequence of the Mortgage Rescue Fraud Prevention Act ("Act"), Chapter 481E, HRS. The Act, which became law on July 1, 2008, was designed to protect Hawaii consumers from scammers who prey on

homeowners facing foreclosure, by requiring that mortgage rescue contracts contain clear disclosures, right to cancel provisions, and fee limitations. Soon after the Act became law, it became apparent that the Act's fee limitations were creating a disincentive for licensed real estate brokers and salespersons to facilitate the implementation of "short sales". A short sale occurs when the bank or mortgage lender agrees to discount a loan balance due to an economic or financial hardship on the part of the mortgagor. It is typically executed to prevent a home foreclosure. Often a bank will allow a short sale if they believe that it will result in a smaller financial loss than foreclosing. For the home owner, advantages include avoidance of a foreclosure on their credit history and partial control of the monetary deficiency.

This bill seeks to correct this undesirable result by specifically excluding licensed real estate brokers and salespersons who are engaged in the act of real estate brokering or sales from the Act's definition of "distressed property consultant".

Although the vast majority of brokers and agents are honorable, the OCP has had some mortgage rescue fraud cases in which licensed brokers and agents have become involved. To address this exigency this amendment is being proposed to the governing licensing statute, Chapter 467, HRS, which would prohibit a licensed real estate broker or agent from obtaining an interest in a distressed property for which the licensee has or had a listing agreement for at least 365 days. This provision is important because the OCP has observed instances in which licensees have obtained

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title to the homeowners' home through fraud, usually within a short period of time after the rescue contract has been executed. The required waiting period will allow the licensee to acquire an interest in a distressed property only after a sufficient period of time has elapsed.

Thank you for this opportunity to testify on House Bill No. 233. I will be happy to answer any questions that the members of the Committees may have.



HB 233 Relating to the Mortgage Rescue Fraud Prevention Act
Committee on Consumer Protection & Commerce and
Committee on Judiciary

February 2, 2009
Room 325

2:00 p.m.

The Office of Hawaiian Affairs opposes the purpose and intent of HB 233 to exclude licensed real estate brokers and salespersons from the definition of distressed property consultants in the Mortgage Foreclosure Rescue Fraud Prevention Act.

Consumer protection laws benefit all of Hawaii's residents which include the beneficiaries of the Office of Hawaiian Affairs.

Section 467-14, Hawaii Revised Statutes, details in great length "causes" for revocation, suspension, and fine of any registration or certificate authorized by law. It is obvious for this need to make clear the unacceptable actions. The need to keep transactions at "arms length" is particularly crucial when commissions earned are part of the transaction.

Real estate brokers and salespersons commissions are negotiated in loss mitigation transactions, therefore, the "arms length" will be compromised if they are able to act as the distressed property consultant.

Mahalo nui loa for the opportunity to provide this testimony and we urge your support.

February 2, 2009

The Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce
The Honorable Jon Riki Karamatsu, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 233 Relating to the Mortgage Rescue Fraud Prevention Act

Aloha Chair Herkes, Chair Karamatsu, and members of the Joint Committees on Consumer Protection & Commerce and Judiciary,

On behalf of our 9,600 members in Hawai'i, the Hawai'i Association of REALTORS® (HAR) strongly supports H.B. 233.

In 2008 the Legislature passed the Mortgage Rescue Fraud Prevention Act as Act 137, Session Laws of Hawai'i (SLH) 2008. This law was primarily intended to protect financially strapped homeowners from equity skimming and foreclosure rescue scams.

After the passage of Act 137, HAR and others became aware of the broader implications of the law for consumers and the real estate industry. Specifically, Act 137 has created very real concerns for licensees engaged in bona fide real estate services by creating the potential for licensees to unwittingly become distressed property consultants and face liability for violating the law.

Prior to Act 137, real estate licensees could help homeowners avoid foreclosure by contacting and negotiating with lenders and representing homeowners in short sale transactions. The real estate licensees would negotiate with the lender, and, if a lender agreed to accept a reduced payment for a property, the short sale of the property would result. Short sales have been a great benefit to distressed property owners, because they allow the homeowner to avoid the negative consequences of foreclosure.

The language of Act 137 made it uncertain whether real estate licensees could continue the practice of representing owners in short sale transactions and negotiating with lenders on behalf of distressed homeowners. Under Act 137, a licensee who assists a homeowner with a distressed property would likely fall under the category of a "distressed property consultant" under the Act. Once deemed a distressed property consultant, the licensee would be subject to onerous requirements and penalties under the law.

Because of the ambiguity resulting from Act 137, real estate firms and licensees have shied away from representing existing or potential distressed homeowners for fear of the potential legal consequences. In these tough economic times, it has been the consumer who has ultimately suffered by being denied the valuable services of real estate licensees.



The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaii Realtors.com

HAR has worked with the Department of Commerce and Consumer Affairs (DCCA) since the passage of the Act. Together, HAR and DCCA have agreed upon amendments to Act 137 that will exempt realtors from the requirements of the Act, and impose additional requirements under the real estate licensing regulations, Hawai'i Revised Statutes Chapter 467. The result of this collaborative effort is H.B. 233 in its present form. We urge your support.

HAR looks forward to working with our state lawmakers in building better communities by supporting quality growth, seeking sustainable economies and housing opportunities, embracing the cultural and environmental qualities we cherish, and protecting the rights of property owners.

Mahalo for the opportunity to testify.

The Honorable Robert N. Herkes, Chair
The Honorable Glenn Wakai, Vice Chair
House Committee on Consumer Protection and Commerce

The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
House Committee on Judiciary

Hearing : Monday, February 2, 2009, 2:00 p.m.
State Capitol, Conference Room 325

IN OPPOSITION TO HB 233

Chair and Members of the Committees:

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled and other low and moderate income families who are consumers. We are testifying in opposition to HB 233 as it would weaken protections for consumers in the State of Hawaii.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home and what to do if you are in danger of losing your home through foreclosure. In the past Fiscal Year we serviced more than 200 clients in our Project.

HB 233 seeks to amend Act 137, the Mortgage Foreclosure Rescue Fraud Prevention Act, to, among other things, exempt real estate brokers and sales persons from the definition of distressed property consultants. Act 137 was designed to protect consumers from foreclosure rescue scams and fraudulent distressed property consultants who offer "help" to homeowners who are in arrears or foreclosure. This "help" usually comes in the form of scam artists who take a fee for negotiating with a distressed homeowners mortgage company. Instead the homeowners get little or nothing for their fee and the scam artist has disappeared with the homeowner's money. A more insidious form of the foreclosure rescue scam involves the scammer taking title to the homeowner's property with the

homeowner staying in the property as a renter and attempting to buy it back over the next few years. The terms of these deals usually make it impossible for homeowners to buy back their property, allowing the scammer to walk off with all or most of a home's equity.

While LASH appreciates the challenges for real estate brokers and salespersons due to the enactment of Act 137, we do not believe a wholesale exemption of the industry is the appropriate avenue to make the process smoother while still protecting the rights of the consumer.

LASH anticipates a growing number of foreclosures in the coming years as the so-called exotic mortgage products mature and consumers are not able to keep up with their adjusted mortgage payments or find a suitable refinance. With the growing number of foreclosures, there will only be an increase in the number of foreclosure rescue scams and wronged consumers in the State of Hawaii.

The Legal Aid Society of Hawaii opposes HB 233 and its efforts to exempt real estate brokers and salespersons from Act 137. We do not believe this is the appropriate means to protect the consumers in the State of Hawaii.

Conclusion:

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. HB 233 attempts to weaken protections for consumers. We oppose HB 233 but are more than willing to work with the industry to find the most suitable way to ease the challenges of Act 137 while protecting the interests of the consumers in the State of Hawaii. Thank you for the opportunity to testify.

Representative Jon Riki Karamatsu, Chair
Representative Ken Ito, Vice-Chair
Judiciary Committee
Mortgage Assistance & Mitigation Group
(808) 383-1035
February 2, 2009

Opposition to House Bill 233 Relating to the Mortgage Rescue Fraud Prevention Act

Mortgage Assistance & Mitigation Group is a private organization providing assistance to homeowners experiencing financial difficulty with their mortgage through educational and advocacy efforts. We are certified by NeighborWorks of America as Foreclosure Prevention and Default Counselors as well as endorsers of the National Industry Standards for Homeownership Education and Counseling. We strongly oppose H.B. No. 233, Relating to the Mortgage Rescue Fraud Prevention Act which excluded licensed real estate brokers and salespersons from the definition of distressed property consultants in the Mortgage Rescue Fraud Prevention Act.

For a homeowner struggling to make their mortgage payment, it may be premature to seek the services of a real estate professional. The homeowner may have options available by means of loan modification to effect a more affordable mortgage payment. This modification would keep the property holder in their home. A real estate professional may not be aware of the options available in loss mitigation. Our experience, certification, and ongoing training keeps Mortgage Assistance & Mitigation Group aware of the changes lenders are making in the field of loan modification. Without the knowledge and the exposure to loss mitigation, the realtor is unable to present to the homeowner options that may in essence keep them in their homes. He/she, without this information, may inadvertently sell the property, displace a family needlessly, and add yet another struggling family to our growing homeless population

Excluding licensed real estate brokers and salespersons from the definition of distressed property consultants and allowing them to represent a distressed property homeowner in negotiating with the homeowner's lender would immediately create an avenue for misrepresentation and unethical dealings. Since realtors are commission-based, their fee has a direct bearing on the closing of the transaction and the amount of the sale. Based on those factors alone, it would be unimaginable that the real estate professional could negotiate unbiased in the best interest of the homeowner without protecting his/her own stake in the transaction. Since a distressed property consultant has no direct gain in the transaction, the homeowners' welfare is protected. By changing the existing law, you change the problem of predatory lending to predatory real estate dealings.

In addition, our State has recently been inundated with "Loan Modification" companies from across the nation soliciting our homeowners with the promise of reduced mortgage payments in exchange for exuberant fees upfront. As the Mortgage Rescue Fraud Prevention Act currently exempts "Licensed attorneys engaged in the practice of law;" from adhering to the fee and payment restrictions, more agencies are promoting themselves as "attorney-backed" or "attorney-based" in order to collect monies from desperate homeowners. Unfortunately, once paid, agency falls short on their promise and the homeowner has been swindled out of their funds. I proposed that the exemption of licensed attorneys be expanded to exclude only those attorneys licensed and practicing in the State of Hawaii.

Over the last 6 months, the real estate market has changed drastically, not because the Mortgage Rescue Fraud Prevention Act was implemented, but because the housing industry collapsed. Properties are still being sold in short sales. ACT 137 has not prevented sales from occurring. For those realtors who adhere to the law as written and use the services of a distressed property consultant as well as comply with all requirements, business is thriving. Realtors who shy away from assisting a homeowner that qualifies as a distressed property do so by choice, not because of lack of business. It is the interpretation of the Mortgage Rescue Fraud Prevention Act, the fear of the law being untested, the misinformation about short sales and its process, as well as the additional documents required that keep others from entering the short sale arena.

With our economy being in the state it is in, more citizens in our communities are experiencing financial difficulties. Our homes are our biggest asset. It provides shelter, comfort, stability for the family, and a refuge from the trials and tribulations of the outside world. If we do not mandate a layer of protection for a property owner already vulnerable and desperate because of their financial situation, we may as well have them sign away their property rights now. Their dream of homeownership will be ripped away unnecessarily.

We urge this committee to reject H.B. No. 233 and allow the exclusion of realtors as distressed property consultants to remain unchanged. We also urge this committee to expand the exclusion of licensed attorneys to those attorneys licensed and practicing in the State of Hawaii.

Thank you for this opportunity to for this opportunity to provide these comments on House Bill No. 233.