

**SB 34**



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](http://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 SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH STATE LEGISLATURE  
REGULAR SESSION OF 2009

Wednesday, February 4, 2009  
9:30 a.m.

**TESTIMONY ON SENATE BILL NO. 34 – RELATING TO THE MORTGAGE RESCUE  
FRAUD PREVENTION ACT.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of Senate Bill No. 34, 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 an 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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February 4, 2009  
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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 Senate Bill No. 34. I will be happy to answer any questions that the members of the Committee may have.

February 3, 2009

**The Honorable Rosalyn H. Baker, Chair**

Senate Committee on Commerce and Consumer Protection  
State Capitol, Room 229  
Honolulu, Hawaii 96813

**RE: S.B. 34 Relating to the Mortgage Rescue Fraud Prevention Act**

**HEARING DATE:** Wednesday, February 4, 2009 at 9:30 a.m.

Aloha Chair Baker and Members of the Committee on Commerce and Consumer Protection,

On behalf of our 9,600 members in Hawai'i, the Hawai'i Association of REALTORS® (HAR) **strongly supports** S.B. 34.

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. Relying on their professional training in lending and finance, 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. Prior to Act 137, real estate licensees regularly received calls from homeowners in distress. With their experience and training, licensees have helped distressed homeowners to, in many instances, avoid the negative consequences of foreclosure.

The language of Act 137, however, 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 12<sup>th</sup> Avenue, Suite 220  
Honolulu, Hawaii 96816

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

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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 S.B. 34 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.



*REALTORS<sup>®</sup>*  
*Association of*  
*Maui, Inc.*

441 Ala Makani Place  
Kahului, Maui, HI 96732-3507  
Phone: 808-243-8585 ~ Fax: 808-243-8585  
Dave DeLeon, Government Affairs Director  
Cell: 808-281-3269  
E-mail: GAD@RAMaui.com  
www.RAMaui.com

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February 2, 2009

Honorable Roslyn H. Baker, Chair  
Senate Committee on Commerce and Consumer Protection  
Conference Room 229, State Capitol  
415 South Beretania Street  
Honolulu, Hi. 96813

**RE: Senate Bill 34, Relating to the Mortgage Rescue Fraud Prevention Act**

Dear Chair Baker:

Thank you for this opportunity to offer testimony in support of Senate Bill 34. The 1,450 members of the REALTORS Association of Maui have expressed serious concerns about the unintended consequences of last year's Act 137 and support Senate Bill 34 as a direct means for resolving those concerns quickly.

While Act 137 had the laudable purpose of protecting financially distressed families from equity skimming and foreclosure rescue scams, it inadvertently also had the effect of forcing most real estate licensees to steer clear of "short sales." Short Sale transactions typically occur when a homeowner is experiencing difficulty making timely payments on their mortgages. The property owner can negotiate with the lender, and if the lender agrees to accept a reduced payment for a property, a short sale would occur and the property owner would be saved from the long-term financial impacts of foreclosure. Typically, Realtors would play a key role in these types of transactions, particularly helping the homeowner negotiate with their lender. Act 137 effectively took the Realtor out of that role because it caused the Realtor, who is helping a client with a short sale, to unwittingly become a "distressed property consultant" and to face serious liability for violating the law. This is especially unfortunate because many homeowners need the expertise that a Realtor can bring to the table on their behalf. As foreclosures mount in Hawaii, it is important that the real estate licensee be allowed to once again come to the aid of their clients in distress.

Our state association, Hawaii Association of Realtors, has worked with the Department of Commerce and Consumer Affairs since the passage of Act 137 and, together, they came up with the amendments proposed in Senate Bill 34. This bill would resolve the issues our industry has with Act 137, while still allowing for the necessary protection of distressed property owners. We urge the approval of Senate Bill 34.

Senator Rosalyn H. Baker, Chair  
Senator David Y. Ige, Vice-chair  
Committee on Commerce and Consumer Protection  
Mortgage Assistance & Mitigation Group  
(808) 383-1035  
February 4, 2009

Opposition to S.B. No.34 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 S.B. No. 34, 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 S.B. No. 34 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 provide comments on Senate Bill No. 34

**The Honorable Rosalyn H. Baker, Chair**  
**The Honorable David Y. Ige, Vice Chair**  
**Senate Committee on Commerce and Consumer Protection**

**Hearing :      Wednesday, February 4, 2009, 9:30 a.m.**  
**State Capitol, Conference Room 229**

**IN OPPOSITION TO SB 34**

**Chair and Members of the Committee:**

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 SB 34 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.

SB 34 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 SB 34 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. SB 34 attempts to weaken protections for consumers. We oppose SB 34 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.

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, February 03, 2009 1:15 PM  
**To:** CPN Testimony  
**Cc:** laureljhall@yahoo.com  
**Subject:** Testimony for SB34 on 2/4/2009 9:30:00 AM

Testimony for CPN 2/4/2009 9:30:00 AM SB34

Conference room: 229  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Laurel Hall  
Organization: Individual  
Address: 965 Prospect St #307 Honolulu, Hawaii  
Phone: 1-808-224-3755  
E-mail: [laureljhall@yahoo.com](mailto:laureljhall@yahoo.com)  
Submitted on: 2/3/2009

**Comments:**

I am submitting the following testimony in hopes that Realtors will be allowed to participate in short sales so far as performing the usual duties of a Realtor. I believe the duties of negotiating the short sale with the lenders can only be done effectively with the expert additional help of a loss mitigation specialist. I do not believe Realtors are trained for or can fulfill this negotiator role nor can anyone who hasn't been trained and doesn't do this job on a daily basis.

Here is my story:

I have experienced a huge decline in income as a Realtor over the last year while sustaining huge increases in maintenance fees and lease rent fees for the condo I own and live in. My condo dropped drastically in value and I put it on the market in hopes of a short sale or deed in lieu of foreclosure. When I started to contact my lender about the short sale I quickly found out that I don't have any skills as a Realtor to negotiate or even understand the processes involved to represent myself. I talked with two CPAs, one attorney and two loss mitigation specialists and found out that only the loss mitigation specialists are trained and experienced in dealing with lenders and presenting the options. They do this on a daily basis and really know their business. I hired an exceptional loss mitigation consultant and transferred my own listing to another agent rather than representing myself in the sale. This new Realtor dropped my listing in one week saying she was afraid of being sued because of Act 134. She didn't understand or want to look into Act 134 and was acting in her best interest and not in mine.

I found another Realtor who took my listing and said she had worked with my loss mitigation specialist before and agreed she was top notch and easy to work with. We received a ridiculously low offer and after the Realtor admitted that the lender wouldn't accept such a low offer, she told me to accept it. I talked it over with my loss mitigation specialist and agreed that responding to this offer would not be in my best interests since it would waste my lender and investor's time - something they would be angered by. I informed my new Realtor of this and she promptly cancelled my listing because I wouldn't accept the offer.

This shows that the realtor didn't have my best interests in mind, but my loss mitigation specialist did. It also shows that the realtor wouldn't or couldn't make the time to train and find out how to negotiate with lenders - something that my loss mitigator is not only trained to do, but does every hour of every day.

Realtors can definitely run a short sale transaction but they can't possibly negotiate expertly with lenders.

I now have a third Realtor representing me who I hope will be able to consider what is in my best interests as I continue this distressed property process. I am so grateful to have found my loss mitigation specialist who continues to keep my process moving forward in a way that is in my best interest.

It is astounding to me that the use of a Realtor for the real estate side of the short sale and the loss mitigation specialist for the negotiation and information side of short sales is being called into question. I consider this roadblock to getting desperately needed help for the scores of homeowners like myself to be egregious and hope the legislators will correct this immediately.

Respectfully Submitted,

Laurel Hall

**From:** Randy & Camille [The\_Rains@hotmail.com]  
**Sent:** Monday, February 02, 2009 2:07 PM  
**To:** CPN Testimony; 'Sheri Kagimoto'  
**Subject:** SB 34 RELATING TO THE MORTGAGE RESCUE FRAUD PREVENTION ACT

**Importance:** High

Aloha,

My name is Camille Rains, and this email is in reference to Senate Bill 34 RELATING TO THE MORTGAGE RESCUE FRAUD PREVENTION ACT as it relates to the exemptions of Real Estate Professionals.

I adamantly oppose the passage of the Realtor exemption being sought.

My husband and I are going through a "Short Sale" at the moment. We had a Realtor negotiating the first offer we had, before ACT 137 came into effect. It was horrible. She dropped the ball. Didn't know the correct way to file the papers. Didn't know how to negotiate with the lender. She had to re-file papers over 8 different times. In short, this caused an additional 30 day delay. Which then caused the buyers to cancel. Had she been knowledgeable and cared enough to find out what she needed to do originally, my husband and I would not be in the situation we are in today. We had 810 credit scores when this started, and we are now down to 610. It is my belief that had we had a neutral third party negotiator working our loan in the first place, we wouldn't be suffering as we are today!

Going through this first hand, I believe Realtors are only in it for what it can do for them. It's disturbing. As we are suffering and wondering what is going to happen to our lives, you've got the Realtor muddling through..unsure, unknowledgeable, unaware of the things needed to get us through this with the least amount of damage as possible. Suffice it to say, the Realtor we had was NOT what we needed to negotiate the loan. We needed a neutral party (Mortgage Assistance & Mitigation Group) helping US. Someone working for US and not themselves.

Since we've had Sheri Kagimoto and her company, the difference has been astronomical. As I've been stating throughout this letter, had we had Sheri, I truly believe we would not be suffering as we are today.

PLEASE, PLEASE, PLEASE prevent the modification of ACT 137 from being passed. The homeowners NEED the neutral third party intervention. Otherwise, we have no one else to turn to but the Realtor. The homeowner loses and the only people making money is the Realtors and the mortgage brokers. What a hopeless thought.

There MUST be a neutral party involved to PROTECT the homeowner.

Thank you for your time,

Camille and Randy Rains