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

TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION OF 2009

Tuesday, March 31, 2009
4:00 p.m.

TESTIMONY ON SENATE BILL NO. 35, S.D. 1 – RELATING TO MORTGAGES.

TO THE HONORABLE JON RIKI KARAMATSU, 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. 35, S.D. 1, Relating to Mortgages.

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 480E, Hawaii Revised Statutes. 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

Testimony on S.B. No. 35, S.D. 1
March 31, 2009
Page 2

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 certified public accountants from representing clients before tax authorities whose distressed properties were being subject to tax liens.

This bill seeks to correct this undesirable result by specifically excluding from the definition of "distressed property consultant" certified public accountants licensed and regulated pursuant to chapter 466, Hawaii Revised Statutes, as well as out-of-state public accountants and certified public accountants operating legally under a temporary permit issued by the board of accountancy pursuant to chapter 466, Hawaii Revised Statutes.

Thank you for this opportunity to testify on Senate Bill No. 35, S.D. 1. I will be happy to answer any questions that the members of the Committee may have.

From: Alsop, Marty M. [mma@torkildson.com]
Sent: Monday, March 30, 2009 8:59 AM
To: JUDtestimony
Cc: Heller, Ronald I.
Subject: Testimony of Ronald I. Heller in support of SB 35 SD 1

Will not be present at the hearing

Ronald I. Heller

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Testimony of Ronald I. Heller

Before the House Committee on Judiciary

Tuesday, March 31, 2009

4:00 pm

Conference Room 325

Re: SB 35 SD 1

Mortgages/Certified Public Accountants

Chair Karamatsu, Vice Chair Ito, and Committee members:

Thank you for the opportunity to testify in support of Senate Bill 35, SD 1. We believe this Bill is needed to clarify the intent of the Mortgage Rescue Fraud Prevention Act passed last year. Basically, this Bill would exempt CPAs, who are already licensed and regulated by the State Board of Accountancy, from the provisions of the Mortgage Rescue Fraud Prevention Act.

The Mortgage Rescue Fraud Prevention Act was intended to protect the public from so-called “consultants” who promised to help property owners avoid foreclosure, obtain the release of liens, and/or restructure debt, but who often promised much more than they could deliver. Before the Mortgage Fraud Prevention Act was passed, anyone could call himself or herself a “consultant,” and some unethical and/or incompetent consultants were preying upon desperate homeowners. Thus, the Act was passed in the 2008 legislative session.

The problem is that the Act defines the term “distressed property consultant” in a way that could include many CPAs. For example, a CPA assisting a taxpayer in trying to get an IRS lien released would be within the definition. A CPA advising a client about refinancing of debt could be within the definition. CPAs often perform these types of tax and financial planning services. Unlike other consultants, however, CPAs are already subject to licensing and regulation, and potentially subject to disciplinary action, by the State Board of Accountancy.

It is therefore unnecessary, and potentially creates conflicting interpretations of the law, to include CPAs within the definition of “distressed property consultants” under the Mortgage Fraud Prevention Act.

I do not believe that the Legislature ever actually intended to include licensed CPAs, practicing under the laws and rule that govern CPAs, to be covered by the Mortgage Fraud Prevention Act. I suspect that this question simply did not come to the attention of the Legislature last year.

I urge you to pass SB 35, SD 1, and eliminate the potential confusion, allowing CPAs to be regulated by the State Board of Accountancy, under the laws and rules that exist for that purpose.

Thank you for your attention to this matter.

Respectfully submitted,



Ronald I. Heller

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

Hearing : Tuesday, March 31, 2009, 4:00 p.m.
State Capitol, Conference Room 325

WITH PROPOSED AMENDMENTS TO SB 35 SD 1

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 with proposed amendments to SB 35 SD 1 as it relates to 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.

Prior to Cross-over, proponents and opponents of HB 202 relating to foreclosures, specifically, notice to tenants who live in properties being foreclosed upon, worked upon a draft that was acceptable to all parties. Due to time constraints, HB 202 was deferred, stopping an attempt by all parties and the Consumer Protection and Commerce (CPC) Committee to further protect consumers in the State of Hawaii by giving proper notice to tenants when the property they are living in is being foreclosed upon. It is our understanding that the CPC Committee's counterpart in the Senate was expecting a measure to cross over from the House in order to further discussion on the bill. Unfortunately, because no such measure crossed, this particular consumer protection issue has not gone further.

The Legal Aid Society of Hawaii hereby provides testimony to the House Committee on Housing on HB202– Relating to Foreclosure, supporting the intent of the bill, but requesting that §521- (a) be amended to include a section on the landlord’s responsibility to notify a tenant in writing prior to move-in that a foreclosure is pending and that proposed section 521- 71 Termination of tenancy; landlord ‘s remedies to be amended to include not only landlord but also successor-in-interest. This would give a tenant the same rights as those of a tenant not involved in a foreclosure.

We also believe a comprehensive bill to protect tenants should require these additional provisions:

- (1) 521-21 (f) Explain that rent should be paid to landlord until after sale or recordation, at which time the tenant should pay rent to the successor-in-interest;
- (2) 521-8 Definition of successor-in-interest
- (3) 521-44 Upon 21 day notice of auction, landlord is to provide to the tenant, written proof that the security deposit is segregated and exists minus deductions. Failure to provide this proof allows the tenant to use the security deposit as one month’s rent however, once landlord proves the security deposit exists and is segregated, landlord is to transfer the security deposit to the successor-in-interest.
- (4) 667-5 (d) The party bringing the foreclosure will notify the tenant via mail or post a notice of auction on the door of the dwelling unit 21 days before auction.

Proposed language is added as an attachment.

Conclusion:

We understand that SB 35 SD 1 is not the exact vehicle that this issue was meant to be addressed in. However the issues and consumer protections created in HB 202 are important to consumers in Hawaii, and SB 35 SD 1 is the most appropriate vehicle to further these protections. We appreciate these committees’ recognition of the need to protect consumers in the State of Hawaii and beg the Committee’s indulgence in allowing this testimony. We offer suggested amendments to comments on SB 35 SD 1 and urge this committee to amend this measure accordingly to protect the interests of the consumers in the State of Hawaii. Thank you for the opportunity to testify.

Report Title:

Landlord Tenant; Mortgage Foreclosures; Tenant Notification

Description:

Provides for notice to tenants of rental properties that are foreclosed upon. (HB202 HD1)

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. 202
H.D. 1

A BILL FOR AN ACT

RELATING TO FORECLOSURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 521, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§521- Foreclosure; notice to tenant. (a) Before the commencement of a tenancy, the landlord or any person authorized to enter into a rental agreement on the landlord's behalf shall disclose to the tenant in writing if the dwelling unit is the subject of a pending foreclosure action pursuant to chapter 667.

(b) A successor-in-interest shall give written notice to a tenant or subtenant in possession of a rental housing unit to vacate the property within forty-five days from the date the

notice is delivered to the tenant or subtenant, pursuant to subsection (c), before the tenant or subtenant may be removed from the property.

(c) The notice required in subsection (a) and (b) may be delivered by any of the following means:

- (1) By delivering a copy to the tenant personally;
- (2) If the tenant is absent from the tenant's residence or usual place of business, by leaving a copy of the notice with a person of suitable age and discretion at either place and mailing a copy of the notice to the tenant at the tenant's place of residence; or
- (3) If the tenant's whereabouts cannot be ascertained or a person of suitable age or discretion cannot be found, then by affixing a copy of the notice in a conspicuous place at the rental housing unit and mailing a copy of the notice to the tenant or current occupant at the rental housing unit. Service upon a subtenant may be made in the same manner."

SECTION 2. Section 521-71, Hawaii Revised Statutes, is amended to read as follows:

"§521-71 Termination of tenancy; landlord's and successor-in-interest's remedies for holdover tenants[-]; foreclosure.

(a) When the tenancy is month-to-month, the landlord or successor-in-interest may terminate the tenancy (rental

~~agreement~~) by notifying the tenant, in writing, at least forty-five days in advance of the anticipated termination. When the landlord or successor-in-interest provides notification of termination, the tenant may vacate at any time within the last forty-five days of the period between the notification and the termination date, but the tenant shall notify the landlord or successor-in-interest of the date the tenant will vacate the dwelling unit and shall pay a prorated rent for that period of occupation.

(b) When the tenancy is month-to-month, the tenant may terminate the rental agreement by notifying the landlord or successor-in-interest, in writing, at least twenty-eight days in advance of the anticipated termination. When the tenant provides notice of termination, the tenant shall be responsible for the payment of rent through the twenty-eighth day.

(c) Before a landlord or successor-in-interest terminates a month-to-month tenancy where the landlord contemplates voluntary demolition of the dwelling units, conversion to a condominium property regime under chapter 514A or 514B, or changing the use of the building to transient vacation rentals, the landlord shall provide notice to the tenant at least one hundred twenty days in advance of the anticipated demolition or anticipated termination. If notice is revoked or amended and reissued, the notice period shall begin from the date it was reissued or

amended. Any notice provided, revoked, or amended and reissued shall be in writing. When the landlord or successor-in-interest provides notification of termination pursuant to this subsection, the tenant may vacate at any time within the one-hundred-twenty-day period between the notification and the termination date, but the tenant shall notify the landlord or successor-in-interest of the date the tenant will vacate the dwelling unit and shall pay a prorated rent for that period of occupation.

(d) When the tenancy is less than month-to-month, the landlord, the successor-in-interest or tenant may terminate the rental agreement by notifying the other at least ten days before the anticipated termination.

(e) Whenever the term of the rental agreement expires, whether by passage of time, by mutual agreement, by the giving of notice as provided in subsection (a), (b), (c), or (d) or by the exercise by the landlord or the successor-in-interest of a right to terminate given under this chapter, if the tenant continues in possession after the date of termination without the landlord's or successor-in-interest's consent, the tenant may be liable to the landlord or the successor-in-interest for a sum not to exceed twice the monthly rent under the previous rental agreement, computed and prorated on a daily basis, for each day the tenant remains in possession. The landlord or successor-in-

interest may bring a summary proceeding for recovery of the possession of the dwelling unit at any time during the first sixty days of holdover. [~~Should~~] If the landlord or successor-in-interest [~~fail~~] fails to commence summary possession proceedings within the first sixty days of the holdover, in the absence of a rental agreement, a month-to-month tenancy at the monthly rent stipulated in the previous rental agreement shall prevail beginning at the end of the first sixty days of holdover.

~~(f) Before a successor in interest to a foreclosed property may terminate a tenancy under subsection (a), (c), or (d) that is month to month or less than month to month and commence a summary proceeding for possession, the successor in interest shall notify the tenant of the foreclosure. Notice shall be given at least forty five days prior to the date of the summary proceeding for possession. Notwithstanding subsection (c), after giving notice under this subsection, for each day the tenant remains in possession after termination of the rental agreement under subsection (a), (c), or (d) and to the date of commencement of the summary proceeding for possession, the tenant may be liable to the successor in interest for a sum not to exceed the monthly rent under the rental agreement and any other charges specified under the terms of the rental agreement, computed and prorated on a daily basis. Thereafter, the tenant~~

~~may be liable to the successor-in-interest for the sums authorized under subsection (e) for each day the tenant remains in possession.~~

As used in this subsection, "successor-in-interest" means a person who acquired an interest in the property through a foreclosure.

(f) ~~[(f)]~~ (g) Any notice of termination initiated for the purposes of evading the obligations of the landlord or the successor-in-interest under subsections 521-21(d) or (e) shall be void."

(g) payment of Rent:

a. During the pendency of a sale, rent will continue to be paid to the landlord with whom the tenant has the lease.

b. Upon the approval of a sale at auction by a court pursuant to part I of chapter 667 or the accordation of the affidavit and conveyance document pursuant to section 667-33, if the tenant is to remain in the property, notice shall be provided to the tenant by both the landlord and the successor-in-interest as to who and where the rent shall be directed.

(h) Security Deposit. Upon notice of approval of a sale at auction or by a court pursuant to part I of

chapter 667, or the recordation of the affidavit and conveyance document pursuant to section 667-33, if the tenant is to remain in the property, the owner shall transfer to the new owner the security deposit previously paid by the tenant, if the security deposit is not transferred the tenant may use the previously paid security deposit as a credit toward one month's rent.

(i) Remedies. If a landlord or a successor-in-interest fails to provide the written notices as required by section 521- , a tenant may recover, in addition to any other remedy under law:

(1) the greater of actual damages or one month's rent plus the security deposit amount and reasonable attorney's fees; or

(2) Obtain injunctive relief.

SECTION 3. Section 667-5, Hawaii Revised Statutes, is amended to read as follows:

"§667-5 Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises[7] desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or

person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and
- (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

(b) Copies of the notice required under subsection (a) shall be:

- (1) Filed with the state director of taxation; and
- (2) Posted on the premises not less than twenty-one days before the day of sale.

(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:

(1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and

(2) The sale price of the mortgaged property once auctioned.

(d) A tenant in possession of a mortgaged property shall be notified fifteen days before the actual sale of the mortgaged property.

~~[(d)]~~ (e) Any sale, of which notice has been given as ~~[aforesaid,]~~ provided in this section, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction~~[,]~~ or, if the auction is canceled, information that the auction was canceled. The mortgagee, within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

~~(e)~~ (f) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

~~(f)~~ (g) This section is inapplicable if the mortgagee is foreclosing as to personal property only."

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2009.



HAWAII BANKERS ASSOCIATION

1000 BISHOP ST., SUITE 301B • HONOLULU, HAWAII 96813-4203
PHONE: (808) 524-5161 • FAX: (808) 521-4120

Presentation to the House Committee on Judiciary
Tuesday, March 31, 2009 at 4:00 pm

Testimony for SB 35 Relating to Mortgages

TO: The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
Members of the House Committee on Judiciary

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association regarding SB 35 relating to mortgages. We make no comment on the substance of SB 35, SD 1 but we oppose any effort by the Legal Aid Society to amend the bill by including a variation of HB 202 and a comment in the Standing Committee Report 1094 of the House Committee on Consumer Protection and Commerce regarding the same.

Because the title of this act relates to “Mortgages”, there is a serious constitutional issue whether the bill can be amended to include provisions on foreclosures. Simply stated, foreclosures may result from a failure to pay debts other than those that arise from a mortgage loan; to wit: agreements of sale, non-mortgage liens, unpaid maintenance fees, etc., and not just mortgages.

More importantly, the testimony presented by Legal Aid to the Consumer Protection and Commerce Committee was inaccurate. There was no draft acceptable to all parties as claimed by Legal Aid. While we had narrowed differences considerably, it is simply inaccurate to say that agreement was reached.

Legal Aid attached a draft of an HB 202 to Legal Aid’s previous testimony but that draft was not even the draft on the table that was being discussed by the parties.

I would also note that various bills addressing this topic did not receive a hearing in the final Senate committee which does not portend well for its prospects.

In summary, we oppose the Legal Aid amendment and will be happy to answer any questions you may have.



SB 35, SD 1 (HSCR 1094) Relating to Mortgages
Committee on Judiciary

March 31, 2009
325

4:00 p.m.

Room

The Office of Hawaiian Affairs supports the purpose and intent of SB 35, SD 1 (HSCR 1094) to amend the definition of "distressed property consultant" to add public accountants and certified public accountants to the list of exclusions.

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 and fees earned are part of the transaction.

The "arms length" will be compromised if public accountants and certified public accountants are able to act as the distressed property consultant.

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