

HB 2895

In support of Bill 2895, I agree that if it is found that a non-judicial foreclosure is appealed due to an unfair sales price, then the home buyer should have the right to have the court step in.

Should this bill pass, which I pray it does, it may cause an ebb and flow on the part of the lender to work with the buyer to come to a mediated compromise.

We need to be proactive, the newspapers are full of non-judicial foreclosures at an alarming rate and I have taken notice that 20 foreclosures published in one day were out-of-state lenders.

Please vote this bill in on behalf of the people of Hawaii who are having to deal with the insurmountable reality.

Donna R. Welker

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 02, 2010 9:26 AM
To: HSGtestimony
Cc: dangm@aloha.net
Subject: Testimony for HB2895 on 2/3/2010 9:00:00 AM
Attachments: HB 2895 - testimony to HSG 02-03-10.pdf

Testimony for HSG 2/3/2010 9:00:00 AM HB2895

Conference room: 325
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Marvin Dang
Organization: Hawaii Financial Services Association
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Submitted on: 2/2/2010

Comments:

HAWAII FINANCIAL SERVICES ASSOCIATION

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February 3, 2010

Rep. Rida Cabanilla, Chair,
and members of the House Committee on Housing
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2895 (Foreclosure)**
Hearing Date/Time: Wednesday, February 3, 2010, 9:00 A.M.

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is the trade association for Hawaii's financial services loan companies, which are regulated by the Hawaii Commissioner of Financial Institutions. Financial services loan companies make mortgage loans and other loans.

The HFSA **opposes** this Bill. This testimony is based, in part, on my experience as an attorney who has actively done foreclosures for 32 years since 1978.

The purpose of this Bill is to allow a homeowner to force a court supervised foreclosure if a non-judicial foreclosure is successfully appealed due to an unfair sales price.

1. The non-judicial foreclosure process generally takes approximately 3 to 4 months. Under this Bill, once a non-judicial foreclosure is completed (after 3 to 4 months) the borrower would be able to appeal to a circuit court to invalidate the non-judicial foreclosure and to force a judicial foreclosure. A judicial foreclosure would add an additional 9 to 12 months to the process. The result would be a combined foreclosure process that would take 12 to 16 months to complete.

A foreclosure action is a last option for a lender because it is a "lose-lose" situation. By the time that a foreclosure is commenced the loan is already at least 3 to 4 months delinquent. If this Bill passes, the loan could be unpaid for over a year. Creating this delay in the process is not warranted.

2. If there is an appeal from the non-judicial foreclosure as contemplated by this Bill, the borrower should be required post a bond to compensate the lender for any losses resulting because the foreclosure would have to go through the judicial foreclosure process. These losses would include, among other things, any decrease in final sales price, the additional unpaid interest, and the added expenses for attorneys' and Commissioners' fees and costs.

3. This Bill would make changes to Part II of Chapter 667 of the Hawaii Revised Statutes ("HRS"). Part II is the "Alternate Power of Sale Foreclosure Process". I was involved in drafting Part II during the 1997 and 1998 legislative sessions. However, before the legislation passed in 1998, the legislature made certain changes to Part II that made it essentially unusable and unworkable. As a result, no lender today uses the Part II alternate power of sale process which are in HRS Sections 667-21 through 667-51. Instead, all non-judicial foreclosures are initiated under the provisions in HRS Sections 667-5 through 667-10, much of which was first enacted 136 years ago in 1874.

We are willing to work with your Committee to revise this Bill if necessary. Thank you.


MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 02, 2010 2:24 PM
To: HSGtestimony
Cc: rywada@lashaw.org
Subject: Testimony for HB2895 on 2/3/2010 9:00:00 AM
Attachments: hb 2895 - court sup foreclosure price - hsg.pdf

Testimony for HSG 2/3/2010 9:00:00 AM HB2895

Conference room: 325
Testifier position: support
Testifier will be present: Yes
Submitted by: Ryker Wada
Organization: Legal Aid Society of Hawaii
Address:
Phone:
E-mail: rywada@lashaw.org
Submitted on: 2/2/2010

Comments:

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Executive Director

The Honorable Rida Cabanilla, Chair
The Honorable Pono Chong, Vice Chair
House Committee on Consumer Protection and Commerce

Hearing : Wednesday, February 3, 2010, 9:00 a.m.
State Capitol, Conference Room 325

IN SUPPORT OF HB 2895

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, other low and moderate income families who are consumers and families facing default and foreclosure on their homes. We are testifying in support of HB 2895 as it may strengthen 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, what to do if you are in danger of losing your home through foreclosure and issues relating to predatory mortgage lending.

HB 2895 seeks to allow a homeowner to force a court supervised foreclosure if a non-judicial foreclosure is successfully appealed due to an unfair sales price. Essentially if a homeowner is granted an appeal by the circuit courts as a result of a determination by those courts that the sales price is unreasonable, the foreclosure shall be conducted as a judicial foreclosure.

Through our duties as housing counselors dealing annually with hundreds of consumers facing foreclosure, it has been our experience that many homeowners face non-judicial, power of sale foreclosures, based upon relatively small amounts owed. In these situations there is no judicial oversight and homes can be sold for a small fraction of what they're worth. An example of this is a condo owner who owns a property worth \$200,000, and owes \$10,000 in association dues. The homeowner can be foreclosed on non-judicially and the property can be sold for \$10,000, with the full benefit of the

property value being gained by the buyer. In other situations, properties are non-judicially foreclosed on and sold for well over what is owed by the homeowners with no recompense for the homeowner. In these situations the difference between what is owed and what the property is sold for is not given to the homeowner. Taking the same situation illustrated above, the property in question can be sold for \$150,000. The association is paid the \$10,000 owed and takes the \$140,000 as a profit from the sale paying nothing to the foreclosed upon homeowner.

Either of these situations is unfair and HB 2895 is a step in the right direction to correct the deficiencies in the current law. The Legal Aid Society of Hawaii supports the bill, and its efforts 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 2895 attempts to strengthen protections for consumers by allowing a homeowner to force a court supervised foreclosure if a power of sale foreclosure is successfully appealed due to an unfair sales price. We support HB 2895 its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.

Presentation to the House Committee on Housing

Wednesday, February 3, 2010, @ 9:00 am, Conf Rm 325

Testimony for HB 2895 Relating to Foreclosure

TO: The Honorable Rida Cabanilla, Chair
The Honorable Pono Chong, Vice Chair
Members of the House Committee on Housing

My name is Neal Okabayashi, and I represent the Hawaii Bankers Association. HBA generally supports the intent of HB 2895 to provide that a reasonable price be paid for the property given the context of the nature of the sale, which is a foreclosure sale for a property which may or may not have been maintained properly.

Accordingly, we recommend that the bill be amended by inserting a new sentence at the end of new language, page 2, line 7, as follows: "A sales price which is 70% of the fair market value of the mortgaged property is a reasonable sales price."

70% is the Durrett benchmark. In the bankruptcy case of Durrett v. Washington Natural Insurance Co., 621 F.2d 201 (5th Cir. 1980), the bankruptcy court addressed the adequacy of a foreclosure sales price, and in doing so, the Court commented it could not find a judicial case which upheld a foreclosure price that did not realize at least 70% of the fair market value of the property. Thus, 70% became known as the Durrett rule. Accordingly, if this Committee is to pass this measure, we urge that it adopt the Durrett rule as a measure of reasonableness.

The Durrett rule is no longer good law as prices lower than 70% have been deemed reasonable by courts but nonetheless, we believe that it is a reasonable benchmark that we can use.

If this amendment is adopted, HBA supports the passage of the bill, as amended.

Hawaiian Alliance, LLC

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COMMITTEE ON HOUSING

DATE: Wednesday, February 3, 2010

TIME: 9:00 a.m.

Testimony on HB 2895 Relating to Foreclosures

My name is Kale Gumapac, President of Hawaiian Alliance, LLC. I am submitting my testimony in support of HB 2895 with reservations and propose an amendment to this bill. My company provides education, counseling, forensic mortgage audit, attorney referrals and paralegal research on mortgage foreclosures to homeowners and attorneys.

HB 2895 is an attempt to assist the homeowner after the fact of having their home foreclosed. Regardless of the appeal, the homeowner still loses their home. This is a band aid approach when CPR is needed for Hawaii's faltering economy with the record foreclosures, furloughs, unemployment and business collapse.

HRS 667 (Non-Judicial Foreclosure) took away all the rights of the homeowner and the right to have their day in court. The most devastating and egregious effect on the homeowner. Unfortunately HRS 667 was enacted solely for the benefit of mortgage lender. It was never intended to provide a level playing field for both the mortgagee and the mortgagor.

HRS 667 was intended to provide an streamline way for the mortgage lender to foreclose on homes without going through the State of Hawaii Judicial System. When HRS 667 was passed into law no one had any idea of its devastating consequences to the Hawaii homeowner. There were few foreclosures at the time and it would save money for the lender from having to do a judicial foreclosure.

Mortgage companies and banks have used and continue to use HRS 667 solely for their benefit to foreclose on homes illegally with the protection of the Hawaii Revised Statutes. HRS 667 does not allow the homeowner to introduce evidence of federal violations, predatory lending practices, proof of standing and MERS (Mortgage Electronic Registration Systems) committed by the lender just to name a few. Fraud is committed by the lenders and their attorneys upon the homeowners, Legislature and Judicial System and you the lawmakers have a chance to fix this problem.

There is no process available in HRS 667 for an objection to be made by the homeowner. The mortgagee simply needs to submit an affidavit to the Bureau of Conveyances stating that the homeowner is behind 2 months on their monthly payments and will foreclose. Notices of foreclosure must be posted in the newspaper and a notice left at the home. 30 days later the home is auctioned and the lender goes to court to get the courts to evict the homeowner if they haven't abandoned the property.

Hawaii had almost 10,000 foreclosures last year according to Realty Trac. We are on track to almost triple that amount in 2010. Please amend HB 2895 with the following:

- Repeal HRS 667
- Amend the foreclosure laws requiring mortgage companies to provide standing to the courts before a foreclosure can be initiated which includes submitting the original note.
- Require State District Courts to rescind mortgages if fraud is committed by the lender and criminal charges must be filed against all those participating in this crime.

I've included an article from the Las Vegas Review Newspaper reporting on a MERS case that went against the mortgagee. Please repeal HRS 667.

Kale Gumapac
President
Hawaiian Alliances

By JOHN G. EDWARDS
LAS VEGAS REVIEW-JOURNAL

Judge rules Mortgage Electronic Registration Systems can't foreclose on home

Homeowners struggling to avoid foreclosure got some good news Tuesday.

U.S. District Judge Kent Dawson upheld a bankruptcy court ruling that makes it harder for lenders to foreclose on home mortgages.

The case, which was heard by a panel of federal judges in November, concerned whether Mortgage Electronic Registration Systems Inc., or MERS, could foreclose on residences on behalf of lenders. The electronic system records the ownership of residential mortgages for the mortgage banking industry.

Dawson said the company could not foreclose on a home because it did not provide evidence that it held the note on the residence and didn't show that it was an agent of the lender.

About half of all U.S. mortgages "whose loans have been securitized, sliced and diced are now held by (MERS)," according to a blog posted by securities analyst Barry Ritholtz.

The case started in bankruptcy court two years ago.

MERS asked bankruptcy Judge Linda Riegle for permission to start foreclosure proceedings against a property owned by Lisa Marie Chong. Bankruptcy trustee Lenard Schwartz objected, saying the electronic system was not a "real party in interest" in the mortgage loan.

Like many mortgages, Chong's loan had been securitized, meaning it had been pooled or packaged into a security held by investors.

MERS was unable to show that it had possession of the note. The bankruptcy judge ruled in Schwartz's favor. The decision was appealed to federal court.

In his decision Tuesday, Dawson said the registration system does not lose money when borrowers fail to make payments on home mortgages.

Dawson ruled that Mortgage Electronic Registration Systems must at least provide evidence that it was a representative of the mortgage loan holder, which it failed to do.

“Since MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, it has failed to meet its burden of establishing that it is a real party in interest with standing,” Dawson said, affirming the bankruptcy court ruling.

Real estate attorney Tisha Black-Chernine said the ruling is good news for struggling borrowers and home-owners.

“It will have a dramatic effect on lenders being able to foreclose,” she said.

Because the decision makes it more difficult to foreclose, she hopes lenders will be more willing to negotiate with homeowners struggling to meet mortgage payments by approving short sales or making other concessions.

In a short sale, a lender agrees to let a homeowner sell his home for less than is owed. This is particularly helpful, because many homeowners owe far more than their homes are worth since home prices have fallen.

Houses sold in short sales typically go for 30 percent more than homes sold after foreclosure, Black-Chernine said.

Appraisers looking at the short sale price will use it in determining the market value. Thus, avoiding foreclosure results in higher market values for other houses, she said.

“It should help buoy home prices,” Black-Chernine said.

Bill Uffelman, chief executive officer of the Nevada Bankers Association, a trade group, predicted that most foreclosures will be able to proceed because the real mortgage owners and notes will be able to be identified in most cases. However, he said many homeowners facing foreclosure may be able to stay in their homes longer because of the delay.

“In the end in 99.9 percent of the cases, ownership of the note will be proved,” he said.

Although the decision is believed to be the first of its kind in Nevada, the Kansas Supreme Court made a similar finding in a similar case.

An attorney for the electronic system did not return a call for comment on whether it will appeal.

Contact reporter John G. Edwards at jedwa...@reviewjournal.com or 702-383-0420.