

# Hawaiian Alliance, LLC

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## COMMITTEE ON CONSUMER PROTECTION & COMMERCE

DATE: Monday, February 1, 2010

TIME: 2:00 p.m.

### Testimony on HB 304 Relating to Foreclosures

My name is Kale Gumapac, President of Hawaiian Alliance, LLC. I am submitting my testimony in support of HB 304 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 304 is an attempt to assist the homeowner in buying more time in hope that the foreclosure problem can be solved. 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.

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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 304 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.

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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.

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“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.

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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](mailto:jedwa...@reviewjournal.com) or 702-383-0420.

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