

**SB2472**

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## Hawaiian Alliance, LLC

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### **COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS**

DATE: Tuesday, February 23, 2010

TIME: 10:00 a.m.

### **Comments on SB 2472 Relating to Foreclosures**

My name is Kale Gumapac, President of Hawaiian Alliance, LLC. I am submitting my comments in opposition of SB 2472 in hoping that someone in the legislature will hear this plea for the homeowner to correct the injustice of the foreclosure tidal wave that is just starting in Hawaii. My company provides education, counseling, forensic mortgage audit, attorney referrals and paralegal research on mortgage foreclosures to homeowners and attorneys.

Hawaiian Alliance can no longer support SB 2472 as amended because this bill will not make any changes to the current foreclosure crisis in Hawaii. Hawaii is ranked 11<sup>th</sup> worst state on foreclosures for the month of January 2010 and showing a steeper decline in months to come. The present form of SB 2472 will not help the homeowner as it has been watered down to the point that it is now a joke. The bankers and mortgage companies who had a hand in the amendments know it's a joke and they are patting themselves on their backs because they have pulled another one over you the legislators and the homeowners. There is no balance here, it is out of balance and has been out of balance for over a decade.

Simply put, if the banks or mortgage companies cannot provide the original note there is "***no contract***". Instead, a mortgage company is only required to provide a copy to the mortgagor. In recent Federal Court cases they are dismissing foreclosures and finding for the mortgagor or borrower. So what does this mean? The mortgage company scanned in the documents at closing but have either lost or

misplaced the original note with the original signatures when they sold and resold the note. OR, the mortgage company probably securitized the note and do not want you to find out about it because they cannot produce the note when there are 100-200 investors on a mortgage and cannot get a consensus to foreclose nor can they find the note. Who has the note?

Furthermore, State of Hawaii laws do not permit the State courts to look for predatory lending practices, fraud, perjury and other violations committed upon the borrower because it only requires the judges to look at one issue, whether the borrower is behind on their payments. If so, the home must be foreclosed upon. The banks don't want you to know this....and sometimes I think you the legislators don't want to know it either and for some they even sweep it under the rug.

SB 2472 is necessary to mirror federal law. Lenders must produce the original note and not a copy in federal court to show standing in order to foreclose. Hawaii statutes do not require these documents and as a result we believe thousands of homes were foreclosed on by the mortgage companies without proving standing. SB 2472 must be amended to require the *original note with the original signatures* be produced at the beginning of the foreclosure process. SB 2472 must further be amended to include non-judicial foreclosure and judicial foreclosure.

The mortgage lenders don't want the amendments because it would be very difficult if not impossible for them to produce the original note and it is within the purview of the mortgagor to submit a motion to compel the lender to produce the original note in Federal Court. Why doesn't the State of Hawaii do the same thing?

I would also amend SB 2472 to repeal HRS 667. HRS 667 (Non-Judicial Foreclosure) takes 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 a 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. A Notice 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.

Majority of the mortgage lenders today do not want you to know about the *securitization of the mortgage loan*. What is securitization? CNBC's House of Cards did an in depth expose.

**Securitization** is a structured finance process that distributes risk by aggregating debt instruments in a pool, then issues new securities backed by the pool. The term "Securitization" is derived from the fact that the form of financial instruments used to obtain funds from the investors are securities. As a portfolio risk backed by amortizing cash flows - and unlike general corporate debt - the credit quality of securitized debt is non-stationary due to changes in volatility that are time- and structure-dependent. If the transaction is properly structured and the pool performs as expected, the credit risk of all tranches of structured debt improves; if improperly structured, the affected tranches will experience dramatic credit deterioration and loss.<sup>[1]</sup> All assets can be securitized so long as they are associated with cash flow. Hence, the securities which are the outcome of Securitisation processes are termed asset-backed securities (ABS). From this perspective, Securitisation could also be defined as a financial process leading to an issue of an ABS.

Securitisation often utilizes a special purpose vehicle (SPV), alternatively known as a special purpose entity (SPE) or special purpose company (SPC), reducing the risk of bankruptcy and thereby obtaining lower interest rates from potential lenders. A credit derivative is also sometimes used to change the credit quality of

the underlying portfolio so that it will be acceptable to the final investors. Securitisation has evolved from its tentative beginnings in the late 1970s to a vital funding source with an estimated outstanding of \$10.24 trillion in the United States and \$2.25 trillion in Europe as of the 2nd quarter of 2008. In 2007, ABS issuance amounted to \$3,455 billion in the US and \$652 billion in Europe.<sup>[21]</sup>

*Securitisation, in its most basic form, is a method of financing assets. Rather than selling those assets "whole," the assets are combined into a pool, and then that pool is split into shares. Those shares are sold to investors who share the risk and reward of the performance of those assets. It can be viewed as being similar to a corporation selling, or "spinning off," a profitable business unit into a separate entity. They trade their ownership of that unit, and all the profit and loss that might come in the future, for cash right now. A very basic example would be as follows. XYZ Bank loans 10 people \$100,000 a piece, which they will use to buy homes. XYZ has invested in the success and/or failure of those 10 home buyers- if the buyers make their payments and pay off the loans, XYZ makes a profit. Looking at it another way, XYZ has taken the risk that some borrowers won't repay the loan. In exchange for taking that risk, the borrowers pay XYZ a premium in addition to the interest on the money they borrow. XYZ will then take these ten loans, and put them in a pool. They will sell this pool to a larger investor, ABC. ABC will then split this pool (which consists of high risk loans and low risk loans) into equal pieces. The pieces will then be sold to other smaller investors, (as bonds).*

Who holds the note? There are several investors who bought into the securitized investments and each investor owns a share in the investment. So who has the actual note?

Where is the note if the note has been sold 3 or 4 times? The mortgage notes have disappeared, lost and/or misplaced. A contract that is in question and no longer exists.

State Supreme Courts in 4 states have ruled that MERS is a fictitious (strawman) entity as recent as October 2009. This has caused major turmoil and concern in the mortgage industry because they have no standing, they foreclosed on homes illegally and committed fraud upon the homeowner and courts. In addition, the mortgage lenders and their attorneys perjured themselves with fraudulent affidavits on non-judicial and judicial foreclosures.

Hawaii had almost 10,000 foreclosures last year according to Realty Trac. We are online to almost triple that amount in 2010. Please amend SB 2472 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 Alliance, LLC

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 Riegler for permission to start foreclosure proceedings against a property owned by Lisa Marie Chong. Bankruptcy trustee Lenard Schwartzer 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 Schwartzer’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](mailto:jedwa...@reviewjournal.com) or 702-383-0420.