

LATE

Hawaiian Alliance, LLC

Kale Gumapac, President
HC 2 Box 9607
Kea'au, HI 96749
Phone: 982-9020
Email: kgumapac@gmail.com

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 5, 2010

TIME: 9:00 a.m.

Testimony on SB 2472 Relating to Foreclosures

My name is Kale Gumapac, President of Hawaiian Alliance, LLC. I am submitting my testimony in strong support of SB 2472 with amendments to this bill. My company provides education, counseling, forensic mortgage audit, attorney referrals and paralegal research on mortgage foreclosures to homeowners and attorneys.

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.

I am certain that the mortgage lenders will be in agreement with SB 2472 and amendments because they would not want homes to be wrongfully foreclosed upon. I would also amend SB 2472 to repeal HRS 667.

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

deterioration and loss.^[1] 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.^[2]

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?

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.

THE SENATE
COMMITTEE ON COMMERCE & CONSUMER PROTECTION

LATE

Senator Rosalyn Baker, Chair

Senator David Y. Ige, Vice Chair

Friday, February 5, 2010

9:00 a.m., Conf.Rm.229, State Capitol

Testimony in Support of SB2472

Mr.Chair, distinguished Committee members and others:

I am Keoni Kealoha Agard, a concerned citizen, and an attorney licensed to practice law in the State of Hawaii. I testify today on behalf of dozens of individuals, including my clients and their family members, who have been personally victimized by predatory lending practices by lenders here and on the Mainland.

Chapter 667, HRS provides a fast track to lenders to bring a non judicial foreclosure action against borrowers without any court intervention whatsoever and without the procedural safeguards that are normally provided to any borrower in a courtroom, or a judicial proceeding. One potential safeguard to assist borrowers in this current economic crisis is to make a sincere effort to begin to level the playing field and to provide some protection to borrowers in this financially strapped economy that we all face today.

Court decisions on the Mainland have determined that unless the original is produced, the lender(s) cannot move to foreclose in the absence of same. Courts have reasoned that because the loss of one's personal residence is such a serious matter, that before it takes place, the lender should at a minimal be required to show the "original" note and mortgage to prove it is the true