

SB 2892

JAN 27 2010

A BILL FOR AN ACT

RELATING TO FORECLOSURE.

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

1 SECTION 1. The legislature finds that homeowners who lose
2 their home through the non-judicial foreclosure process are
3 disadvantaged because the sales price of the property is not
4 supervised by the court.

5 The purpose of this Act is to allow homeowners who
6 successfully challenge a sales price through non-judicial
7 foreclosure procedures to have a court supervised sale.

8 SECTION 2. Section 667-35, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "~~§~~667-35~~§~~ **Appeal to circuit court.** (a) The
11 borrower, the mortgagor, and any creditor having a recorded lien
12 on the mortgaged property before the recordation of the notice
13 of default under section 667-23, shall have the right to file an
14 appeal in the circuit court where the mortgaged property is
15 located to contest the presumptions set forth in section 667-34,
16 and the statements contained in the affidavit required by
17 section 667-32. No appeal shall be filed later than thirty days
18 after the recordation of the affidavit. Failure to timely



1 appeal shall result in the statements in the affidavit and the
2 presumptions set forth in section 667-34 becoming conclusive in
3 accordance with the terms of that section.

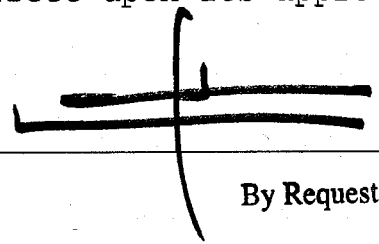
4 (b) If an appeal by the borrower or mortgagor is granted
5 by the circuit court as a result of a determination by the court
6 that the sales price for the mortgaged property is unreasonable,
7 the foreclosure shall be conducted pursuant to section 667-1."

8 SECTION 3. This Act does not affect rights and duties that
9 matured, penalties that were incurred, and proceedings that were
10 begun before its effective date.

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 Statutory material to be repealed is bracketed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

13 SECTION 5. This Act shall take effect upon its approval.
14

INTRODUCED BY: _____

A handwritten signature in black ink, consisting of a vertical line intersecting two horizontal lines, with a small loop at the top of the vertical line.

By Request



Report Title:

Non-Judicial Foreclosure; Appeals

Description:

Allows a homeowner to force a court supervised foreclosure if a non-judicial foreclosure is successfully appealed due to an unfair sales price.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



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February 5, 2010

Sen. Rosalyn H. Baker, Chair,
and members of the Senate Committee on Commerce and Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 2892 (Foreclosure)**
Hearing Date/Time: Friday, February 5, 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.

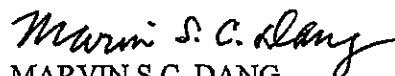
1. The non-judicial foreclosure process generally takes approximately 3 to 4 months. Under this Bill, once a non-judicial foreclosure is completed (after 3 to 4 months) the borrower would be able to appeal to a circuit court to invalidate the non-judicial foreclosure and to force a judicial foreclosure. 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

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(MSCD/hfsa)



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Presentation to the Senate Committee on Commerce & Consumer Protection

Friday, February 5, 2010, @ 9:00 am, Conf Rm 229

Testimony for SB 2892 Relating to Foreclosure

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable David Y. Ige, Vice Chair
Members of the Senate Committee on Commerce & Consumer Protection

My name is Neal Okabayashi, and I represent the Hawaii Bankers Association. HBA generally supports the intent of SB 2892 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.

The Honorable Rosalyn H. Baker, Chair
The Honorable David Y. Ige, Vice Chair
Senate Committee on Commerce and Consumer Protection

Hearing : Friday, February 5, 2009, 9:00 a.m.
State Capitol, Conference Room 229

IN SUPPORT OF SB 2892

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 SB 2892 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.

SB 2892 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 SB 2892 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. SB 2892 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 SB 2892 its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.