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Presentation to the House Committee on Judiciary

Thursday, March 18, 2010, at 2:45 pm, Conf Rm 325

Testimony for SB 2910 Relating to Real Property

TO: The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
Members of the House Committee on Judiciary

My name is Neal Okabayashi of First Hawaiian Bank testifying on behalf of the Hawaii Bankers Association. We oppose SB 2910 in its present form because it creates needless uncertainty which may be cured by a simple amendment which we propose.

We propose to insert the words “. . . the owner’s policy of . . . “ be inserted on line 10, after “that” and before “title insurance” to clarify that the provisions of this bill apply only to the owner’s title insurance policy, and not to the lender’s title policy.

In any real estate purchase transaction financed by a lender, there are two policies. An owner’s title policy which protects the interests of the buyer and the lender’s title policy which protects the interest of the lender. Just as the lender should not dictate the choice of the owner’s title policy, we should clarify that the buyer cannot dictate the lender’s choice of a title insurer. That is only fair. We believe that even if the bill passes, the lender can choose its own title insurer but wish to make that crystal clear which is the reason for our proposed amendment.

This bill addresses only a foreclosure real estate transaction where a lender finances the purchase of the property by the buyer of the foreclosed property either at the foreclosure sale or the purchase of the property from the foreclosing lender who takes the property back at auction.

In reality, we do not see the need for this bill because to our knowledge, the situation has never arisen and it would be a very, very rare occurrence if it ever happens.

In the normal case, when the transaction is a purchase transaction, the buyer does pick the escrow company and the title insurer. The lender will not object to the buyer’s choice if the escrow company or title insurer is on the approved list. It is possible that the lender would not approve the buyer’s choice of a title insurer but that would be very rare.

Please keep in mind, that the life of the lender's title policy may be as long as 30 years and the lender does have an interest in the ability of the title insurer to perform on the policy. Thus, if a title insurer is undercapitalized, in financial distress, or there are doubts whether it can meet its obligations, the lender may want another title insurer. Hawaii insurance laws on title insurer's does not protect policy holders since Hawaii only requires that a title company have a mere \$400,000 in capital, which is a paltry sum.

Another situation where the lender may wish to have a different title insurer is if there are title issues which are not a priority item for the title insurer selected by the buyer. There are pockets of real property in this state where a more conservative title insurer may hesitate to issue a title policy without extensive research while another insurer is more willing to issue a policy without extensive research. In that situation, the lender may wish to use another title insurer.

Some may argue that the buyer would have to pay slightly more if the lender chooses a different title insurer. That is correct but we should keep in mind this bill only applies to a foreclosure sale where it is more than likely that the borrower is purchasing the property at less than market value and is thus not being harmed at all in any way. That is also the price the buyer should pay for selecting a questionable title insurer.

I should point out that subsection (b) provides for a punitive penalty of three times the cost of the title policy and thus the amendment we propose for clarification purposes is quite appropriate.

We thank you for this opportunity to testify and would be happy to answer any questions you may have.



Title Guaranty Escrow Services, Inc.

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March 16, 2010

The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
Members of the House Committee on Judiciary
415 South Beretania Street, Conference Room 325
Honolulu, HI 96813

Re: Senate Bill Relating to Escrow Depositories, SB No. 2910

Dear Representative Karamatsu, Representative Ito, and Members of the House Committee on Judiciary:

We submit this testimony on behalf of Title Guaranty Escrow Services, Inc. in support of Senate Bill No. 2910.

The purpose of this bill is to amend Chapter 667, Hawaii Revised Statutes ("HRS"), with the goal of protecting a buyer who bids and buys property from a foreclosing mortgagee from unfair use of the mortgagee's leverage to demand that the buyer use title insurers and escrow agents with whom the bank/lender has an established relationship.

One consequence of the foreclosure crisis has been that banks or other lending institutions increasingly are entering the residential real estate market as sellers and use their institutional leverage to require that their foreclosure buyers use the bank's favored service providers, especially title insurance and escrow services, even though the buyer is generally the one who pays for the service. The practice of requiring buyers to use the seller's service providers also has the potential adverse consequence of excluding smaller, local businesses from the title insurance and escrow market. This Bill will help to level the playing field.

The Bill adds a section to Chapter 667 (which regulates mortgage foreclosures) to generally prohibit a lender or other party that acquires title to and seeks to sell a foreclosed residential property from requiring a buyer to purchase title insurance or escrow services from a particular company chosen by the seller. California passed a similar law in October 2009.

The federal Real Estate Settlement Procedures Act or RESPA prohibits a seller from requiring the buyer to purchase title insurance from a particular insurer as a condition of the sale – regardless of whether or not the property was acquired by foreclosure. This federal law applies to title insurance and not escrow services. Here, a similar State law should be passed to protect our consumers and allow State enforcement.

We would be happy to answer any further questions that the Committee may have. Thank you for this opportunity to submit this testimony.

Very truly yours,

David T. Pietsch, Jr.
President