

THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Finance

Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

Monday, February 28, 2011, 5:00 p.m.
State Capitol, Conference Room 308

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: House Bill No. 1411, H.D. 1, Relating to Mortgage Foreclosures

Purpose: Repeals the old non-judicial foreclosure process. Clarifies the new non-judicial foreclosure process. Strengthens laws regarding mortgage servicers. Broadens the duties of the Center for Alternative Dispute Resolution. Effective July 1, 2050.

Judiciary's Position:

The measure provides, among other things, that certain owner/occupants of residential properties that are being non-judicially foreclosed upon, may opt: (1) to convert the foreclosures to judicial foreclosure proceedings; or (2) for dispute resolution, administered by the Judiciary Center for Alternative Dispute Resolution ("Center"). The Judiciary's testimony focuses on the significant fiscal impacts of both alternatives.

It is our understanding that approximately 75% to 90% of foreclosures are currently proceeding non-judicially and that most pertain to residential properties.¹ For example, a recent report indicates that the total number of foreclosure cases for January through December 2010 in Hawaii was 12,425. *See attached Star Advertiser article dated January 13, 2011 (citing statistics from Realty Trac).* During this same period, there were approximately 1,331 judicial foreclosure filings state-wide. If the Realty Trac report includes both judicial and non-judicial foreclosures, approximately 11,094 cases or almost 90% of foreclosure cases proceeded non-judicially last year.

¹ The attached Honolulu Star Bulletin article dated March 22, 2009 which was attached to the Preliminary Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2011 estimates that non-judicial foreclosures account for at least 75% of foreclosure proceedings.



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Even if we conservatively estimate that only half of the 11,094 non-judicial foreclosure cases would be shifted to the Judiciary to be resolved through judicial foreclosure proceedings or through dispute resolution administered by the Center, this would add approximately 6,000 new cases (500 new cases per month) and would constitute a very significant increase in the Judiciary's caseload.

Specifically, if half of these new cases were converted to judicial foreclosure actions (creating 3,000 new cases), the Circuit Courts would need additional resources and staffing. Our conservative estimate to fund the cost of additional judges and support staff to handle these new cases per year is approximately \$2,150,000. Even if the funds were allocated this Legislative session, it would still take the Judiciary between nine (9) and twelve (12) months before the new judges and staff would be fully integrated into the judicial foreclosure process.

Similarly, if the Center had to assist in resolving the other half of the 6,000 new cases, it would require additional funding and time before it could implement a dispute resolution process that would be able to meaningfully assist the public. Although we appreciate that the measure provides for a foreclosure dispute resolution special fund, this draft does not make an initial appropriation for the establishment of the program. There will be start-up costs, including sufficient funds for program design, staff, workspace, and related overhead expenses. The Center has absorbed serious cuts in budget and staff and there is not sufficient staff, budget, or workspace to absorb the foreclosure dispute resolution program within current allocations. Moreover, it is unlikely that the contemplated fees of \$400 per dispute and an unspecified amount per circuit court, land court, or bureau of conveyance filing will be sufficient to defray the on-going expenses of the program.

It is important to note that there are many specific provisions in the bill related to details of the dispute resolution process and court procedures that are of concern to the Judiciary. In many cases these would be better left to be addressed in judicial rule-making. As it is still relatively early in the Legislative calendar, these issues may be addressed at a later time.

Finally, the current draft of the bill has an effective date of July 1, 2050 and a repeal date of three years later. The proposed draft also provides that if any Act of the 2011 Legislature effects a moratorium on non-judicial foreclosures, then the effective date of the proposed H.B. No. 1411, H.D. 1 shall supersede the end-date for that moratorium. Since the details of such a contemplated moratorium are unknown, as is the duration of the as yet unspecified moratorium, we respectfully request that the Legislature re-assess whether to link the two measures.

Thank you for the opportunity to testify on House Bill No. 1141, H.D. 1.

Island Homes

Events

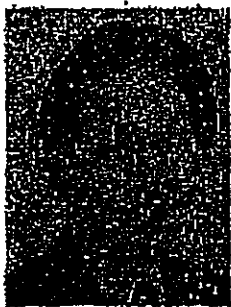
Rentals

Open Homes

* starbulletin.com/classifieds

Facing The Challenges Of Today's Real Estate Marketplace

Facing Foreclosure



Marvin S. C. Dang
Attorney and
Managing Member
Law Offices of
Marvin S. C. Dang, LLC

Foreclosure is a financial disaster home owners hope they will never have to face. Not only does foreclosure mean the loss of their real property - probably their biggest personal investment - but their credit is severely damaged and chances of obtaining another mortgage loan substantially diminished.

Attorney Marvin Dang has handled foreclosures as an attorney for lenders for 30 years and as a commissioner for 28 years. He believes many foreclosures could be avoided if the home owner acknowledged potential problems before they reached crisis proportions, and contacted their lender to try to work out a solution.

He noted that there are many reasons why a borrower might be unable to continue making mortgage payments: loss of job, reduction in working hours and salary, huge medical bills, break-up of a marriage, an increase in the monthly mortgage payment, etc.

"Although there is no guarantee that a lender will make accommodations, chances are better that the lender will not start a foreclosure if the borrower contacts him with an explanation instead of simply halting payments," Dang said.

"Generally, lenders prefer to work out a 'win-win' solution rather than resort to foreclosure. The foreclosure process is costly and time consuming. It is a 'lose-lose' scenario. The only one who potentially benefits from a foreclosure is a buyer who manages to



pick up a foreclosed property at a bargain price at a foreclosure auction."

Dang explained that after one or two payments are missed, a lender will contact the borrower and mail out reminders to pay. If no mutual arrangement is made, a lender may refer the account to an attorney after three or four missed payments. But it could be sooner if the property is abandoned.

"Usually the first notification from the lender's attorney to the property owner is a letter confirming the default. This is sent out before the attorney begins the foreclosure proceeding. Once the borrower gets the attorney's letter, it still may be possible to work with the lender, so the property owner

should not ignore the letter," Dang said.

"If the borrower consults with a third party for assistance, it's also important to check the credentials of that person, as there are local and Mainland scam artists who have taken advantage of inexperienced Hawaii home owners with devastating results. It's best to talk with a Hawaii-based credit counseling service or a Hawaii real estate professional, rather than getting advice from the internet. People can also meet with a bankruptcy attorney to decide what their best course may be."

Dang noted that in Hawaii there are two types of foreclosure actions, judicial and non judicial. The judicial process is run through the court system. The lender files a complaint with the court regarding the delinquent loan and requests that the court allow the lender to foreclose on the mortgage on the real property. After the borrower is served with the complaint by a process server, the borrower needs to file a written answer with the court. If the borrower fails to respond, they will be in default as to the complaint.

The lender will ask the court to schedule a hearing to appoint a foreclosure commissioner to auction the property. At the hearing the party being foreclosed on has an opportunity to tell the judge why a commissioner should not be appointed; for example, the property is in the process of being voluntarily sold and should close in a few months or the borrower is getting money to bring the loan current. If the judge is convinced that such a sale will close, or believes the loan can be reinstated he or she may be willing to delay the foreclosure proceeding for a short period.

If the property owner is able to pay off the loan or bring it current, the foreclosure can be dismissed.

"In a judicial foreclosure, the commissioner

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Facing Foreclosure

Continued from page 1

who is usually either an attorney or a real estate professional, is accountable to and acts on behalf of the court, not on behalf of the lender," Dang said. "It will be the responsibility of the commissioner to get access to the property to inspect it. Generally, during the foreclosure, the commissioner will not evict the home owner or the tenant of the property. But any tenant will now need to pay rent to the commissioner and not to the landlord.

"The commissioner will hold two open houses at the property, usually on Saturdays and Sundays, and place ads in newspapers, such as the Honolulu Star-Bulletin. The ads must run once each week for three consecutive weeks announcing the date and time of the open houses and the date, time, and place of the auction. The last ad needs to appear at least two weeks before the auction is to be held. In Honolulu, the foreclosure auctions are held Monday through Friday beginning at 12 noon at the Eva Lani at First Circuit Court at 777 Punchbowl Street, where notices of upcoming auctions are posted. There could be more

than one property being auctioned at the same time by more than one commissioner."

According to Dang, anyone planning to bid at the auction will be required to show the commissioner before the auction proof of having a deposit in the form of a cashier's check or money order or cash, since the highest bidder needs to give the commissioner ten percent of the bid price at the end of the auction. The rules of the auction are announced by the commissioner and there is usually no upset price.

"Often the lender jumps in and bids at the auction," Dang said. "These lenders could be local and Mainland banks, credit unions, and other parties who may have bought the loan being foreclosed. Before they bid, lenders would have researched the condition and value of the property being foreclosed. Other bidders should do the same. The lender is not always the highest bidder. Investors and potential home buyers sometimes outbid the lenders.

"The highest bidder needs to understand that the judicial foreclosure sale is sub-

ject to court approval. After the auction, the commissioner will file a report with the court. The lender's attorney will schedule a court hearing to approve the sale, at which time the judge will ask if anyone wants to reopen the bidding for five percent higher than the auction price. Whoever is the highest bidder either from the first public auction or at the reopening at the hearing is generally approved by the court. The winning bidder has about 35 days to come up with the rest of the money to close the sale. Upon closing, the foreclosure commissioner will sign a deed to convey the property in 'as is' condition to the buyer. When the deed is recorded at Bureau of Conveyances, the title to the property is transferred."

Dang said that the second type of foreclosure in Hawaii, the non-judicial foreclosure, was rarely held until the late 1990s but now accounts for about 75 percent or more of foreclosure proceedings here.

"There are several basic differences between a non-judicial foreclosure and a judicial procedure," Dang pointed out. "A judicial foreclosure can take six to nine

months, whereas a non-judicial foreclosure takes two to three months since there are no court filings, no open houses, and no hearings. However, one similarity is that a newspaper ad announcing an auction will be required to run in a local newspaper once each week for three consecutive weeks, the last ad to appear at least two weeks prior to the auction. The notice of the non-judicial foreclosure sale needs to be mailed to the borrower and should be served by a process server. The notice must be posted on the property. No open houses are required to be held at the property and there is no opportunity to inspect it in advance of the auction.

"For non-judicial foreclosures the auction and bidding procedures are similar to those of a judicial foreclosure. However, a non-judicial foreclosure auction is conducted by the lender's attorney or representative rather than a court appointed commissioner. At the conclusion of the non-judicial auction, the buyer pays the ten percent deposit. The rest of the sales price must be paid within thirty days

after the auction. Once the sales price is paid, the buyer will get a deed and becomes the owner of the property after the deed is recorded at the Bureau of Conveyances.

"For both judicial and non-judicial foreclosures, the new owner, that is, the successful bidder, is responsible for obtaining possession of the property. The new owner can keep the occupants there or can ask them to move out. In cases where occupants refuse to move, the new owner may need to go to

court to ask the judge to issue an order to evict them."

"The entire foreclosure process could possibly be avoided if the borrower simply phoned the lender before missing that first payment," Dang said. "And people who find themselves facing possible foreclosure should keep in mind that, even if the foreclosure is started, it can be delayed and the auction can be postponed if the borrower is able to work out an arrangement with the lender."

Star Advertiser

Foreclosure filings hit new high

Figures show 38 percent more Hawaii properties were affected last year compared with 2009

By Andrew Gomes
 POSTED: 01:30 a.m. HST, Jan 13, 2011

Lenders pursued or completed foreclosure against a record number of Hawaii properties last year.

There were 12,425 properties statewide affected by foreclosure last year, which was 38 percent more than the 9,002 properties in 2009 and more than triple the 3,525 properties in 2008, according to the latest report from RealtyTrac, a real estate data company.

NO PLACE LIKE HOME

Hawaii's monthly foreclosure rates over the past year, including the year-over-year percentage gain

MONTH	TOTAL	CHANGE
December	1,000	-34.8%
November	877	+0.6%
October	1,271	+37.4%
September	1,617	+66.9%
August	1,629	+97.5%
July	930	-6.1%
June	1,000	+41.6%
May	1,055	+29.3%
April	1,474	+115.5%
March	1,097	+51.5%
February	972	+81.0%
January	1,302	+286.4%
Total	14,224	+42.9%

BY THE NUMBERS

Five Hawaii communities with the most properties in foreclosure last year.

ZIP CODE	AREA	FORECLOSURES
96740	Kaliua-Kona	1,241
96753	Kihei	905
96706	Ewa Beach	867
96761	Lahaina	646
96707	Kapolei	609

Source: RealtyTrac

Most of the properties were homes, though RealtyTrac doesn't exclude commercial real estate from its foreclosure data. If all the properties affected by foreclosure were homes, the total last year would represent 2.42 percent of all homes in the state, up from 1.8 percent the year before.

The growing number reflects the state's continuing struggle with economic recovery, and has strained families.

But so far foreclosures haven't reached epidemic proportions seen in states such as Nevada, Arizona and Florida.

"We've been relatively fortunate," said Jon Mann, a Honolulu real estate agent. "We haven't really been impacted as significantly as some mainland markets."

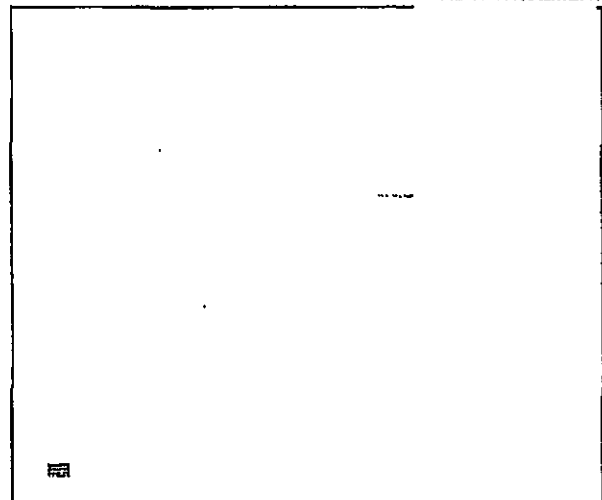
Hawaii's foreclosure level was close to the national average — 2.23 percent of housing affected by foreclosure last year — though Hawaii's rate was 11th highest.


The worst problem is in Nevada, where 9.42 percent of homes were affected by foreclosure last year. The lowest rate was 0.13 percent in Vermont.

In Hawaii, more than half the properties affected by foreclosure were on the neighbor islands, where many out-of-state investors bought vacation homes during the real estate boom in the mid-2000s.

On the Big Island, there were foreclosure filings against 3,370 properties last year, representing 4.23 percent of homes.

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Maui had 2,675 properties with foreclosure filings, or 4.05 percent of homes.

Kauai had 819 properties with foreclosure filings, or 2.75 percent of homes.

Oahu had the most properties affected by foreclosure but the lowest rate -- 5,561 properties representing 1.65 percent of the housing market.

Real estate industry watchers caution that foreclosures could put downward pressure on housing prices if an overbearing number of foreclosed homes wind up on the market.

On Oahu, there were close to 3,200 single-family homes and condominiums on the market at the end of last year.

Mann said about 15 percent to 20 percent of the inventory was owned by lenders or homeowners trying to avoid foreclosure through short sales.

Whether the percentage will rise is hard to tell because not all homes that enter foreclosure are sold. Some owners work out their mortgage difficulties. In other cases, foreclosure can drag on for more than a year.

Mann notes that some additional inventory won't necessarily hurt the market because present inventory is relatively tight.

Hawaii's foreclosure problem is expected to worsen this year, according to local foreclosure attorneys.

There was a lull in the past two months, but the industry attributes that to lenders holding up cases to address improper processing issues raised a few months ago.

The number of foreclosure filings in December was 1,000. That was down 35 percent from 1,302 in the same month last year but was up from 877 in November.

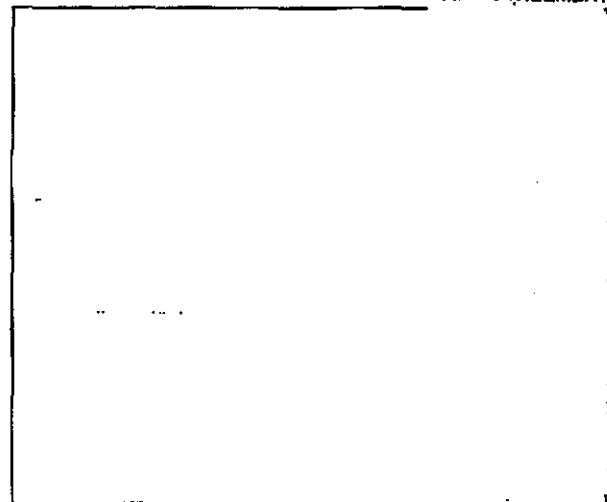
Lenders filed a flurry of new foreclosure cases last month -- 163 default notices, which according to RealtyTrac was the highest number in more than a year.

The bulk of filings last month were auction notices and lender repossessions.

RealtyTrac numbers for the full year are different in that they count properties going through foreclosure. The monthly counts are foreclosure filings, which can

be counted on the same property in different months.

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STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dca

KEALI I B. LOPEZ
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION
TO THE HOUSE COMMITTEE ON FINANCE
TWENTY-SIXTH LEGISLATURE
Regular Session of 2011
Monday, February 28, 2011
5:00 p.m.

TESTIMONY ON HOUSE BILL NO. 1411, H.D. 1, RELATING TO MORTGAGE FORECLOSURES.

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, AND MARILYN B. LEE, VICE CHAIR, AND MEMBERS OF THE COMMITTEE

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of House Bill No. 1411, H.D.1, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

House Bill No. 1411 H.D. 1, seeks to significantly amend Hawaii's current home foreclosure laws by repealing the old non-judicial foreclosure process, as contained in part I of chapter 667 of the Hawaii Revised Statutes, adopting several recommendations of the Mortgage Foreclosure Task Force, implementing a

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comprehensive foreclosure mediation program, imposing a mandatory foreclosure moratorium, requiring a physical presence in Hawaii for mortgage servicers, imposing duties on the part of mortgagees to maintain mortgage property, and adopting several amendments to Hawaii's "new non-judicial foreclosure law" as contained in part II of chapter 667 of the Hawaii Revised Statutes.

Repealing Hawaii's Old Non-Judicial Foreclosure Law

While the Department acknowledges that there appear to be several deficiencies with Hawaii's "old non-judicial foreclosure process" as reflected in part I of chapter 667, of the Hawaii Revised Statutes, the Department believes that the recommendations of the Task Force submitted to the legislature on December 28, 2010 and contained in House Bill 879, addresses many of them, and, if adopted, will greatly benefit Hawaii homeowners facing foreclosure. In this regard, it does not appear to be appropriate to completely repeal the "old law" at this time. Additionally, the Department believes that the committee should defer consideration of amendments to the "new law" since the Mortgage Foreclosure Task Force intends to perform a comprehensive review of its contents during the next year. Although the Mortgage Foreclosure Task Force discussed the possibility of amending part II of chapter 667, of the Hawaii Revised Statutes, during several of its meetings, it ultimately determined that in view of the complexity of the issues associated with its possible revision, it did not want to analyze it in a piecemeal fashion, and deemed it necessary to defer a thorough review until the 2011 calendar year. See, pages 13-14 of the Preliminary Report of the Mortgage

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Foreclosure Task Force. In this regard, the chairperson of the Task Force intends to request that the task force thoroughly examine all issues associated with part II, including those described in House Bill No. 1411, H.D. 1, during its 2011 meetings.

Adoption of Task Force Recommendations

House Bill No. 1411, H.D. 1, has adopted the recommendations of the Mortgage Foreclosure Task Force established by Act 162, Session Laws of Hawaii 2010. The Department is in support of these recommendations, which were provided to the Hawaii legislature on December 28, 2010 through the Preliminary Report of the Mortgage Foreclosure Task Force. They contain significant improvements to the current non-judicial foreclosure law in Hawaii. They provide for superior notice to homeowners of an impending foreclosure, offer them the ability to convert a non-judicial foreclosure to a judicial foreclosure, and allow them to escape a deficiency judgment in a non-judicial foreclosure.

Foreclosure Mediation

The Department is in general support of the mediation provisions of House Bill No. 1411, H.D. 1, which, in large part, are similar to that contained in Senate Bill 651, S.D. 1.

Across our nation, mediation has rapidly grown in popularity as a means to avoid foreclosure. Jurisdictions throughout the United States have implemented various forms of mediation in response to the foreclosure crisis. These include programs operating under the auspices of the judiciary in Nevada, New Jersey, Ohio, Florida,

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Connecticut, Indiana, Maine, New York, and Vermont, as well as programs established independent of the judiciary in the states of California, Oregon, Maryland, and Michigan. Despite some procedural differences, all of these programs have several features in common. They are designed to bridge the communication gap between loan services and homeowners, a gap that has often been cited as the major obstacle to effective loss mitigation. They do this by requiring active participation by a representative of the servicers with full authority to consider all loss mitigation options.

House Bill No. 1411, HD 1, establishes in Hawaii a mediation program as a means to avoid unnecessary foreclosures. The program, in a large part, is based on one currently in use in Nevada, one of the most successful models currently operating in the United States. House Bill No. 1411, H.D. 1 salient features are the same as those in Nevada. They include: having the judiciary as the administrator of the program; suspending all pending foreclosure proceedings against the borrower until the mediation is completed; requiring that participants be fully prepared for the mediation proceeding; and mandating that the lender's representative have full authority to come to an agreement or have immediate access to someone who does.

In view of the high success rate of the program in Nevada, the Department is in strong support of the operation of a similar program in Hawaii.

Despite being generally in support of the mediation provisions contained in this measure, the Department does have a significant concern with two of the provisions which unreasonably impedes the right to mediation if one converts their non-judicial

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foreclosure to a judicial foreclosure. See, P. 3 lines 16 to 18 (§667 C(a)) and P. 15 line 20 to P. 16 line 2 (§667 M(c)). In this regard, the Department believes that the applicable provisions should be stricken in their entirety.

The intent of the mediation provisions contained in this measure is to give **all homeowners** alleged to be in default an equal opportunity to determine whether an agreement is possible *before foreclosure can occur*. The conversion right has a different purpose, namely to ensure that homeowners have the opportunity to assert possible claims and defenses that may legally preclude foreclosure.

Moratorium, Maintenance of Mortgaged Property, and Regulation of Mortgage Loan Servicers

The Department believes that the provisions in House Bill No. 1411, H.D. 1, relating to implementation of a foreclosure moratorium, requirements relating to the maintenance of mortgaged property, and mortgage loan servicers, may lead to unintended adverse economic consequences. In this regard, the Office of Consumer Protection defers to the expertise of the Division of Financial Institutions, which is in a superior position to articulate the Department's concerns to the committee.

Thank you for providing me with the opportunity to testify on House Bill No. 1411, H.D. 1. I will be happy to answer any questions that the committee members may have.

Presentation to the House Committee on Finance

Monday, February 28, 2011 at 5:00 p.m.

Testimony on House Bill 1411 HD1 Relating to Mortgage Foreclosures

TO: The Honorable Marcus R. Oshiro, Chair
The Honorable Marilyn B. Lee, Vice Chair
Members of the House Committee on Finance

My name is Neal Okabayashi, and I testify for Hawaii Bankers Association. We are opposed to HB 1411, HD 1 in its present form. There are many provisions in this bill that will chill job growth and economic development; so it will harm many but help few.

I will defer to Mr. Gary Fujitani of the Hawaii Bankers Association on the other provisions of this bill, My testimony is on a discrete issue.

The purpose of this bill is to afford homeowners in foreclosure an opportunity to make a case for a loan modification. Many are able to do so through the HAMP process or through a bank's own loan modification program which has generally proven to be better at loan modification than the HAMP government process.

The local banks and credit unions have been particularly adept at working with willing borrowers on a loan modification because (1) we have so few foreclosures and (2) we are located in Hawaii.

The local lenders are essential to our ability to stabilize the housing market and continue what has been a relatively tepid recovery. Fannie Mae and Freddie Mac, since the subprime loan debacle, have immeasurably tightened their lending standards and raised the cost of loans. In fact, Lewis Ranieri, the father of residential mortgage securities, recently said that home financing from Fannie and Freddie and other government agencies, is now less than what just one agency, the FHA, made in 1999. Most loans made in Hawaii are sold to or through Fannie Mae or Freddie Mac. However, local lenders, while they do sell loans to Fannie or Freddie, do make loans which they retain in their own loan portfolio. These loans, which I shall call portfolio loans, are essential to the economic vibrancy of Hawaii because they fill that void referenced by Mr. Ranieri.

As Fannie Mae and Freddie Mac have raised loan costs and made it harder to obtain loan approval, it has been up to the local lenders to fill that void because on loans that we keep in our portfolio, we have greater flexibility. For example, if the FICO standard is 620

and your FICO score is 618, while that is not a loan that Fannie or Freddie would make, that is a loan that at least a local lender can contemplate making.

This bill will increase the cost of loans and more importantly make it harder to get a loan or require a larger down payment. To impose that burden on the local lenders who are really the only ones to make flexible loans that do not meet Fannie and Freddie standards is self-defeating to our economy and future. Thus, we ask that the bill be amended to include an exemption that covers the local lenders.

The exemption is not based on location but on asset size and is thus not subject to any challenge. Because the asset threshold is set so that it would cover all the banks that have had or may have servicing problems in Hawaii (Bank of America, JP Morgan Chase, Wells Fargo and GMAC, now known as Ally), this exemption will not detract from the bill's purpose of providing a forum for borrowers who are unable to discuss loan modification from their lender to be able to discuss it with the lender.

The asset threshold is also set on the assumption that the dispute resolution process will sunset otherwise the thresholds will become outdated. Federal banking provisions based on asset size are adjusted from time to time by the banking regulators to account for inflation and growths.

Distinctions based on asset size are common in banking. Examples are the CRA Act and the HMDA Act. President Obama's financial regulatory reform bill (more commonly known as Dodd-Frank) contains many provisions that are based on asset size (e.g., systemic risk, Durbin interchange, Bureau of Consumer Financial Protection). President Obama has proposed a special tax based on assets and of course, the most prominent exemptions are found in our tax code as well as the Internal Revenue Code.

The essence of the amendment exemption local lenders is as follows:

" Part ___ Mandatory Foreclosure Dispute Resolution of Chapter 667, Hawaii Revised Statutes, shall not apply to a foreclosure initiated by (i) a bank whose deposits are insured by the Federal Deposit Insurance Corporation or a credit union whose deposits are insured by the National Credit Union Administration and (ii) which has assets less than \$50 billion as of the end of the previous calendar year and (iii) is not owned by a domestic bank holding company or domestic financial holding company with assets more than \$150 billion as of the end of the previous calendar year. Bank shall have the same meaning as in section 3(a)(1) of the Federal Deposit Insurance Act. A domestic bank holding company or domestic financial holding company means a bank holding company or a bank holding company which has elected to become a financial holding company whose principal office is in the United States of America or a territory, commonwealth or possession of the United States of America."

I would be happy to answer any questions you may have.



TEL:
808-524-5161
FAX:
808-521-4120
ADDRESS:
1000 Bishop Street, Suite 301B
Honolulu, HI 96813-4203

Presentation of the Committee on Ways and Means
Monday, February 28, 2011 at 5:00 p.m.
Testimony on HB 1411 HD1 Relating to Mortgage Foreclosures

In Opposition

TO: The Honorable Chair Marcus R. Oshiro
The Honorable Vice Marilyn B. Lee
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 1411 HD1. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

It is our understanding that HB 1411 HD1 repeals the old non-judicial foreclosure process; clarifies the new non-judicial foreclosure process; strengthens laws regarding mortgage servicers; broadens the duties of the Center for Alternative Dispute Resolution; and other provisions.

Local lenders go to great lengths to work with the borrower before moving to foreclosure. Banks do not want to foreclose and would prefer to keep borrowers in their homes. Lenders do not want the house back, nor do they wish to maintain it. It is much better for everyone to keep the homeowner in the home, if at all possible.

Lenders will work with borrowers that have the willingness and ability to pay. Most lenders participate in the Federal Home Affordable Modification Program or have their own modification programs to help troubled homeowners stay in their homes.

However, it is our experience that most residential owner occupants are unable to make their mortgage loan payments due a reduction in income caused by unemployment or underemployment. So in most cases foreclosure dispute resolution does not really solve the underlying problem of loss of income.

The unfortunate reality is that efforts to lengthen the foreclosure process will not substantially alter borrower outcomes. They will only extend a painful time for borrowers and the economy. During that time, uncertainty will prevent borrowers from moving on with their lives, including starting to pay rent and make purchase that would inject money into the economy.

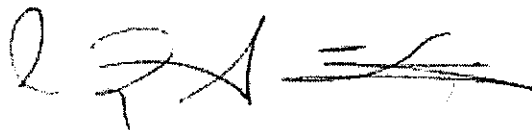
Not only do provisions in this bill delay the foreclosure process, it will also drive up cost in collecting on troubled loans. The consequences of these overly burdening laws could make it harder for first time home buyers and Hawaii middle class residents to obtain mortgages due higher interest rates; larger down payments; and stricter loan qualification requirements.

Do not create a permanent "solution" to a temporary problem. We are sympathetic to the difficulty some borrowers are facing. An improving economy would benefit everyone. Home prices increase and people's income will start to be restored. We do not want to be left with a policy that results in unintended consequences. While the legislation is well-intended it ultimately benefits relatively few and could have a negative impact on other Hawaii residents that want to buy homes or sell their home to buy another property.

Hawaii depends on the "flow of funds" from outside the state to ensure loans to homeowners will continue. Restrictive and burdensome foreclosure laws are poor policy and will only serve to prolong Hawaii's real estate recovery.

The frustration and anger of borrowers stems largely from not being able to communicate efficiently and effectively with their mainland servicers. If this is the case, then local lenders should not be penalized for the actions of others.

Thank you for the opportunity to provide our testimony.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', with a horizontal line underneath.

Gary Y. Fujitani
Executive Director



The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaiiirealtors.com

February 28, 2011

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol, Room 308
Honolulu, Hawaii 96813

RE: H.B. 1411, H.D. 1, Relating to the Mortgage Foreclosures

HEARING: Monday, February 28, 2011 at 5:00 p.m.

Aloha Chair Oshiro, Vice Chair Lee and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR submits comments regarding H.B. 1411, H.D. 1, which: (1) repeals the old non-judicial foreclosure process; (2) clarifies the new non-judicial foreclosure process; (3) strengthens laws regarding mortgage servicers; and (4) broadens the duties of the Center for Alternative Dispute Resolution.

HAR believes that a comprehensive evaluation of the non-judicial foreclosure process and balanced approach to amending the foreclosure law is needed- however, HAR believes that, as drafted, H.B. 1411 imposes some requirements that go too far in creating a balanced foreclosure system. This can have severe consequences for the real estate industry in Hawaii. Accordingly, HAR provides the following comments on the bill:

Dispute Resolution: Section 2 of H.B. 1411, H.D. 1, creates a section that requires participation in dispute resolution if the borrower so elects. A similar program currently exists under Nevada's Foreclosure law. HAR supports the intent of allowing for dispute resolution in the context of both judicial and non-judicial foreclosures, but notes that a screening process may be needed, to ensure that borrowers are minimally qualified to proceed with dispute resolution. Otherwise, a borrower that opts-in to pursue dispute resolution may use it as a tactic to delay the foreclosure process.

Conversion from Non-Judicial to Judicial Foreclosure: Section 3 of H.B. 1411, H.D. 1, creates a new section, §667-M, which provides the right for an owner-occupant to convert a non-judicial foreclosure to a judicial foreclosure proceeding. HAR supports the intent of this provision, but suggests a technical amendment -- while §667-M(3) provides "forty-five" days from the date of the filing of the complaint to require co-obligors and guarantors to file a statement submitting to the court's jurisdiction, it is in conflict with the notice language under §667-O(a), page 19, line 10, which calls for "ninety days." HAR therefore recommends that page 19, line 10 be changed to "forty-five" days.



Duty of Foreclosing Mortgagees to Maintain Property: Section 3 of H.B. 1411, H.D. 1, creates a new section, §667-Q, which provides that a foreclosing mortgagee must maintain the property. HAR has concerns regarding this section which requires the mortgagee to:

- (1) Ensure that the mortgaged property complies with all applicable building and housing laws materially affecting health and safety;
- (2) Keep the mortgaged property in a clean and safe condition;
- (3) Make all repairs and arrangements necessary to put and keep the mortgaged property in a habitable condition;
- (4) Maintain all electrical, plumbing, and other facilities and appliances in good working order and condition;
- (5) Make payments for all utility fees for the mortgaged property; and
- (6) Make regular payments for any association fees and real property taxes owing on the mortgaged property.

HAR would support the intent of the measure insofar as certain upkeep requirements are concerned (i.e maintenance of the exterior of a property, minimizing impacts on other adjacent units, and payment of association fees and property taxes). However, HAR would note that, as currently drafted, this measure is problematic. At the time of foreclosure, some properties may not be safe or habitable. For example, some properties may have existing owner builder permits or other open permits. As drafted, requiring that a property be “habitable” and comply with “all building and housing laws, will require mortgagees to actively rehabilitate or restore properties to a habitable or safe condition, including the possibility that mortgagees might be required to fully build a partially built property.

Physical Presence of Mortgage Servicers: Section 5 of H.B. 1411, H.D. 1, requires that mortgage servicers licensed under §454M must establish a physical presence within the State. Under existing state law, non-exempt mortgage servicers are already licensed by the State of Hawaii, Division of Financial Institutions (DFI). In addition, Section 4 of H.B. 1411, H.D. 1 requires that an affiliate statement must be recorded with the Bureau of Conveyances to ensure that the mortgage servicer and foreclosing mortgagee are identified. HAR believes that these existing and added protections may make Section 5 unnecessary. This could also lead to the unintended effect that certain mortgage servicers would no longer provide services in Hawaii.

Definition of Owner-Occupant: Section 16 of H.B. 1411, H.D. 1, creates a new definition of “owner-occupant.” HAR believes that the present definition of “owner-occupant” in the bill may be too narrow, and should be modified to conform with the definition of “resident” under the State’s tax code, HRS §235-1. Therefore, HAR respectfully requests that the definition be amended on page 37, lines 13-15 as follows:

- (2) The residential property is and has been the person’s primary residence for a ~~continuous~~ period of not less than ~~one hundred eighty days~~ two hundred days of the immediately preceding



The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
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Email: har@hawaii Realtors.com

calendar year prior to ~~immediately preceding~~ the date on which the notice is served.

Notice of Default/Intent to Foreclose: HAR supports the intent of clarifying notice provisions in a non-judicial foreclosure. Section 17 of H.B. 1411, H.D. 1, amends notice requirements under §667-22, and adds the notice of the right to participate in dispute resolution, but does not mention the statement on conversion allowing an owner-occupant to convert a non-judicial foreclosure to a judicial foreclosure. It is HAR's understanding that Section 17 was intended to include both the notice of dispute resolution and the statement on conversion. Therefore, we would suggest that §667-22 be amended to also include the statement of conversion, so that it is consistent with the new section, §667-O.

Public Auctions: HAR supports the intent of Section 20 of H.B. 1411, H.D. 1, which identifies at least one state facility for auctions in each county. We believe this will create understanding and consistency for all parties involved in the foreclosure process.

Postponements on Sale: Section 22 provides for limiting the number of postponements on sale to four consecutive postponements. HAR supports the intent of limiting the number of postponements by requiring that the foreclosing mortgagee follow the requirements of public notice upon the forth postponement.

Repealing Part I and Amending Part II: Finally, HAR also supports the intent of H.B. 1411, H.D. 1 insofar as it which repeals Part I pertaining to non-judicial foreclosures, and amends Part II relating to non-judicial foreclosures and making this section function by removing the requirement of the mortgagor to sign the deed. HAR further supports and appreciates added protections for ensuring that proper notice is given, for notifying a mortgagor that the mortgagee intends to foreclose.

Recognizing the possibility that homeowners may continue to face greater hardship, and that this bill would serve address a part of the foreclosure problem facing our State, HAR respectfully requests your favorable consideration of this measure to continue the discussion, and ensure that all concerns can be addressed as fully as possible.

Mahalo for the opportunity to testify.



HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

February 28, 2011

Rep. Marcus R. Oshiro, Chair
and members of the House Committee on Finance
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1411, HD 1 (Mortgage Foreclosures)**
Hearing Date/Time: Monday, February 28, 2011, 5:00 P.M.

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA **strongly opposes** this Bill.

The purpose of this Bill is to: (1) repeal the old non-judicial foreclosure process; (2) clarify the new non-judicial foreclosure process; (3) strengthen laws regarding mortgage servicers; and (4) broaden the duties of the Center for Alternative Dispute Resolution.

This testimony is based, in part, on my perspective as the Vice Chairperson of the Hawaii Mortgage Foreclosure Task Force ("Task Force"). I served as a member of the Task Force as the designee of the HFSA. This testimony is also based on my experience as an attorney who has actively done foreclosures for nearly 33 years since 1978.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its 2011 Preliminary Report to the Legislature. The Task Force's recommendations are contained in other bills, such as House Bill 879. We believe that the recommendations are substantive and provide meaningful improvements to the non-judicial foreclosure process. The recommendations are the result of consensus by the 17 Task Force members who represented diverse ... and in some instances opposing ... interests.

The provisions in this Bill (House Bill 1411) are not part of the Task Force's recommendations. The HFSA believes that only the recommendations of the Task Force should be adopted by the legislature. Any other issues, such as what is in this Bill, can be reviewed by the Task Force over the remainder of this year as the Task Force considers other recommendations for the 2012 Legislature.

Additionally, there are numerous problematic provisions in this Bill:

* Creating an unnecessary dispute resolution process for judicial and non-judicial foreclosures involving owner-occupants (this new process will be time consuming and expensive and it will conceivably result in only a minimal success rate based on the experience with a Foreclosure Mediation Pilot Project on the Big Island and the experience with a mediation program in Nevada which is the model for this Bill's dispute resolution process);

* Requiring foreclosing lenders to advance monies under a new questionable duty to maintain certain mortgaged properties (even when the lenders don't have title or possession of the properties);

* Doubling the special assessments that condominium associations can receive as a limited priority in foreclosures (which increased assessment will increase the cost of lenders in foreclosure actions);

* Attempting to revise on a piecemeal basis the new, alternate non-judicial foreclosure process (which revisions don't even address all the provisions which make the process unusable from the lenders' perspective); and

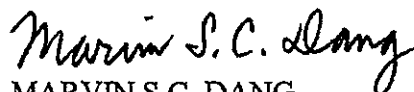
* Establishing prohibited conduct (even though there is no justification that this is needed).

There are other problematic provisions which other testimonies will address.

In total, this Bill as drafted is short-sighted with foreseen negative and unintended negative consequences. This Bill is not in the best interest of Hawaii's consumers and lenders. It will harm the mortgage market. The additionally statutory requirements in this Bill could make it harder for future borrowers get loans because they could have to pay higher interest rates and they could be required to make a larger down payment so that there is a lower loan-to-value ratio. Lenders who, as a last resort, need to foreclose on delinquent loans will be penalized by this Bill which will unnecessarily lengthen and delay the foreclosure process and will unjustifiably increase the cost to foreclose ... all with no real benefit to consumers.

Accordingly, we ask that you do not pass this Bill.

Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

ALII PLACE, SUITE 1800 • 1099 ALAKEA STREET
HONOLULU, HAWAII 96813

MAIL ADDRESS: P.O. BOX 3196
HONOLULU, HAWAII 96801

TELEPHONE (808) 547-5600 • FAX (808) 547-5880
info@goodsill.com • www.goodsill.com

INTERNET:
gslovin@goodsill.com
ahoriuchi@goodsill.com
meito@goodsill.com
cnoh@goodsill.com
ckaramatsu@goodsill.com

GOVERNMENT RELATIONS TEAM:
GARY M. SLOVIN
ANNE T. HORIUCHI
MIHOKO E. ITO
CHRISTINA ZAHARA NOH
CHRISTINE OGAWA KARAMATSU

TO: Representative Marcus Oshiro
Chair, Committee on Finance
Hawaii State Capitol, Room 306
VIA FACSIMILE: 586-6001

FROM: Gary M. Slovin / Mihoko E. Ito

DATE: February 27, 2011

RE: **HB 1411 HD1 – Relating to Mortgage Foreclosures**
Hearing: Monday, February 28, 2011 at 5:00 p.m., Room 308
Agenda #8

Dear Chair Oshiro and Members of the Committee on Finance:

I am Gary Slovin, testifying on behalf of USAA. USAA, a diversified financial services company, is the leading provider of competitively priced financial planning, insurance, investments, and banking products to members of the U.S. military and their families. USAA has over 82,000 members in Hawaii, the vast majority of which are military-based members.

USAA opposes Section 5 of H.B. 1411, HD1 (page 27, lines 3-9), which prohibits any mortgage servicing business that does not maintain a physical presence in the State from doing business in Hawai'i.

USAA has a long and proud history of efficiently and effectively serving the myriad financial needs of its customers, comprised predominantly of active duty and former United States military service members and their families. However, Section 5 of H.B. 1411, HD1 which requires a physical presence in the state in order to be a mortgage servicer, would limit Hawai'i consumers—including many military members in Hawai'i who acquire real property in the State— access to a broad range of financial services from responsible financial institutions like USAA.

While we understand that the intent of this may be to address concerns about the customer service and business practice of mainland mortgage servicers, we note that USAA has had an exceptional record of service and has a very small rate of

February 27, 2011

Page 2

foreclosures in Hawaii. For example, in the last two years, of the approximately 800 loans made in Hawaii, there have been only 18 foreclosures on these loans.

Requiring a company such as USAA to maintain a local office would come at a significant cost, with no added benefits to Hawaii's military members.

As such, USAA requests the following amendment to Section 5 of H.B. 1411 HD1, at HRS Section 454M-2:

“(b) No person shall be engaged in the business of mortgage servicing in this State unless the person providing services has a physical presence in the State pursuant to section 454M-5(a)(5). **Nothing in this subsection shall apply to an insured depository institution the customers of which are predominantly active or former members of the United States military services, or the family members of such members.**”

This amendment is critical to ensuring that USAA can continue to provide high quality financial mortgage services to the military and other consumers in Hawai'i.

Thank you for the opportunity to submit testimony.

TESTIMONY FOR HB1411HD1

DATE: Monday, February 28, 2011
TIME: 5:00 P.M.
PLACE: Conference Room 308
State Capitol
415 South Beretania Street

TO:

COMMITTEE ON FINANCE
Rep. Marcus R. Oshiro, Chair
Rep. Marilyn B. Lee, Vice Chair
And Colleagues

FROM:

JADE L. BROWN
Participant of FACE and Representing Homeowners of Hawaii
239 Upper Kimo Drive, Kula, HI 96790
(808) 344-1740

My name is Jade L. Brown. I am a responsible Maui homeowner at risk of losing my home and I represent thousands of families across our state who are also facing and/or trying to prevent foreclosure. I am in support of **HB1411HD1**.

As the financial crisis hit, my income was significantly reduced and we began to struggle making our mortgage payment. President Obama appeared ready to help us with his Making Homes Affordable Program. We applied for a modification. We were told by our servicer (Chase Home Finance) that we had to be delinquent in order to qualify. We had never been late on a payment before, but after receiving this instruction 3 times from Chase, we trusted them, because after all, this was a government program and surely they were conducting themselves with integrity and in good faith. Attempting to modify our mortgage has become a 2nd full time job for me. After over 167 phone calls, 85 faxes because they kept losing our paperwork, a trial modification that was supposed to last 3 months – but dragged on for about a year, and a final modification agreement that we signed and sent back on time, we still have no permanent modification. My husband and I are hard-working people and have acted in good faith to modify our mortgage. Now, we may be facing foreclosure. We take personal responsibility for saving our home, although we cannot help but feel “set-up” with this modification process. We have complained to the OCC, sought the help of our Senators, and now the assistance of an

attorney. All we want is to keep our home that we have worked so hard to love and maintain over the years.

For 2 years now, I have spent countless hours trying to educate myself because I could not understand why Chase was putting us through these sham loan modification negotiations. It is time to end the myth that it is "deadbeat borrowers" who are to blame for the mortgage crisis, and show how the banks have made beggars out of decent, responsible people.

I have become shocked and sickened to learn what has become of our home ownership to the players of the banking industry and Wall Street. I have learned that the contracts we entered into when purchasing our homes were not really mortgages, but security instruments involving parties unknown and undisclosed to us. Our mortgages have been endorsed and assigned to parties unknown and undisclosed to us, often many times over. Such endorsements and assignments were conducted without proper recordkeeping, possibly making identification of our true creditor impossible and therefore, valid lien release upon payoff, also impossible. The banking industry allegedly avoided proper recordkeeping intentionally to bypass having to pay local recording fees. This lost revenue, which could tally millions of dollars, has robbed our local economy and contributed to the financial crisis that our state is in. Credit enhancements and insurance policies were attached to our mortgages without our knowledge, financially enriching parties unknown and undisclosed to us in the millions of dollars if we went into default. Often times, we were targeted for such default at loan origination. I have learned that because our titles are now clouded due to securitization, documents may have been falsified to fabricate a perfected chain of title allowing parties with questionable standing to foreclose on our homes. I have learned that our creditor or creditors have likely been made whole already through various insurance policies, credit default swaps, and when all those funds were exhausted, bailout money from our tax dollars. The banks and servicers are foreclosing on our homes anyway, perhaps being unjustly enriched yet again. **It is important to know that such fraud is no longer alleged. Testimony of loan servicing fraud, loan origination fraud, appraisal fraud, assignment fraud, foreclosure fraud, and securities fraud are part of the Congressional Record and are being elucidated in the judgments of courts around the country following civil litigation. Given the widespread questionable nature of these practices, a national investigation appears in order.**

I don't know about you, but this financial crisis caught me off guard. I did not know what was going on financially for the country. I do not believe the powers in the banking industry and Wall Street are afforded the same benefit of the doubt. I do not believe that the genius financial engineers who created securities and other exotic products out of our mortgages were unaware of the fraudulent practices they were committing or of the potential financial consequences of their actions. Being financially shrewd, I think they counted on always being

one step ahead of us. I can see that they have already planned their response to the financial, housing, and foreclosure crisis. Their game plan is strategically underway and being played out with a well-funded lobby and high powered law firms. They are taking away our land as quickly as possible so as to be ahead of the curve of any new consumer protections and local legislation that safeguards our People.

To us here in Hawaii "home" is a sacred meeting place for friends, family, and community. To the big banks and Wall Street, our home is a game piece on a monopoly board. But, our love of this Land is greater than the greed of Wall Street. **If we continue to passively respond and submit to these strategies of big banks and Wall Street, I do not believe we are acting in our best interest as a State. Surely, we as a people who still remember our stewardship of the Land, recognize that we are more qualified than Wall Street to direct this narrative in the State of Hawaii. I am encouraged that this legislature is considering HB1411HD1. As we focus our efforts on economic recovery in the State of Hawaii, it is especially important to protect our citizens from fraudulent practices that will lead to their economic failure. We, who love this Land so much, will cause Hawaii to thrive once again, but we need a fair chance to keep our homes so that we *can* recover and prosper. Thank you.**

A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

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

SECTION 1. Chapter 454M, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§454M- Unlicensed foreclosure actions voided. Any action taken in connection with a mortgage foreclosure under chapter 667 by a person who engages in the business of mortgage servicing without a license as provided in this chapter shall be void for purposes of chapter 667."

SECTION 2. Chapter 667, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

"PART . MANDATORY FORECLOSURE DISPUTE RESOLUTION

§667-A Definitions. As used in this part:

"Association" has the same meaning as in sections 514B-3 and 421J-2.

"Dispute resolution" means a facilitated negotiation between a mortgagor and mortgagee for the purpose of reaching an agreement for mortgage loan modification or other agreement in an attempt to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.

"Neutral" means the person assigned to facilitate the dispute resolution process required by this part.

§667-B Dispute resolution required before foreclosure. (a) Before a circuit court may order a judgment of foreclosure pursuant to section 667-1 or before a public sale may be conducted pursuant to section 667-25 for a residential property that is occupied by the mortgagor as a primary residence, the foreclosing mortgagee shall, at the election of the mortgagor, participate

in dispute resolution pursuant to this part to attempt to reach a negotiated agreement to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.

(b) Dispute resolution required by this part shall be conducted through the center for alternative dispute resolution established by section 613-2.

(c) This part shall not apply to judicial or nonjudicial foreclosures of association liens that arise under a declaration filed pursuant to chapters 514A or 514B or to a mortgagor who has previously participated in dispute resolution under this part for the same property on the same mortgage loan.

§667-C Notice of dispute resolution required. (a) Notice of a foreclosure action in circuit court pursuant to section 667-1 or notice of default and intention to foreclose served pursuant to section 667-22(d) shall include notice that the foreclosing mortgagee is required, at the election of the mortgagor, to participate in dispute resolution pursuant to this part for the purpose of attempting to avoid foreclosure.

(b) The notice required by subsection (a) shall include:

- (1) The name and contact information of a person or entity with the authority to negotiate a loan modification on behalf of the mortgagee;
- (2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development;
- (3) A form for the mortgagor to use to elect or to waive dispute resolution pursuant to this part that shall contain the mailing address of the center for alternative dispute resolution and instructions for the return of the form to the center for alternative dispute resolution;
- (4) A description of the information that the mortgagor is required to provide to the center for alternative dispute resolution;
- (5) A certification under penalty of perjury that the mortgagor electing dispute resolution is an owner-occupant of the subject property, including supporting documentation; and
- (6) Contact information for an accredited consumer credit counseling agency in the State.

§667-D Election of dispute resolution; stay of foreclosure proceedings.

(a) No later than thirty days after receipt of notice of dispute resolution under section 667-C, a mortgagor shall contact the center for alternative dispute resolution to indicate whether or not the mortgagor elects to pursue

dispute resolution pursuant to this part.

(b) Upon receipt of notice that a mortgagor has elected to pursue dispute resolution, the mortgagor's right to convert to a judicial foreclosure under section 667-M shall expire.

(c) Upon receipt of notice that a mortgagor has elected to pursue dispute resolution, the center for alternative dispute resolution shall process the notice, assign the matter to a neutral, and schedule the dispute resolution no later than seventy-five days after receipt of the mortgagor's election to pursue dispute resolution according to rules adopted by the supreme court. All foreclosure proceedings shall be stayed effective upon receipt by the center for alternative dispute resolution of the notice of election to pursue dispute resolution pending the outcome of the dispute resolution process.

(d) If a mortgagor elects to waive dispute resolution or fails to give notice within the time specified to the center for alternative dispute resolution of the mortgagor's election to pursue dispute resolution, the center for alternative dispute resolution shall notify the court, the bureau of conveyances, or the land court, as appropriate, and the foreclosure process shall proceed pursuant to statute.

§667-E Dispute resolution process; requirements. (a) Parties to a dispute resolution process conducted pursuant to this part shall consist of the mortgagor or the mortgagor's representative and the mortgagee or the mortgagee's representative; provided that any representative of the mortgagee who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the mortgagee or shall have direct access by telephone or other immediately available communications medium at all times during the dispute resolution process to a person who is so authorized. All parties may be represented by counsel in the dispute resolution process; provided that the mortgagor may be represented by a housing counselor who is certified by the United States Department of Housing and Urban Development.

(b) Thirty days prior to participating in a scheduled dispute resolution

process pursuant to this part, the mortgagor shall have consulted with a certified housing counselor with a local housing counseling agency approved by the United States Department of Housing and Urban Development.

(c) Prior to a dispute resolution process scheduled pursuant to this part, the mortgagor and the mortgagee shall provide the center for alternative dispute resolution with any information that the center for alternative dispute resolution may request. Information required by this subsection shall include financial and employment information to be provided by the mortgagor and loan information, including:

- (1) The original mortgage agreement, and any subsequent mortgage agreements and assignments;
- (2) The promissory note, signed by both the mortgagor and the mortgagee, and any endorsements and allonges on the note; and
- (3) Any other documents that amended or altered the terms of the original mortgage agreement that were signed by the mortgagor and the mortgagee or any successors or assigns of the mortgagor or the mortgagee.

(d) A dispute resolution pursuant to this part shall take place at a

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Arizona SB1259; Proof of Ownership

A. FOR ANY BENEFICIARY WHO IS NOT THE ORIGINATING BENEFICIARY ON THE DEED OF TRUST, THE BENEFICIARY SHALL RECORD A SUMMARY DOCUMENT REGARDING THE BENEFICIARY'S LEGAL INTEREST IN THE DEED OF TRUST THAT CONTAINS THE FOLLOWING INFORMATION IN CHRONOLOGICAL ORDER:

THE FULL NAME AND ADDRESS OF RECORD OF EVERY PRIOR BENEFICIARY ON THE DEED OF TRUST.

THE DATE, RECORDATION NUMBER OR OTHER UNIQUE DESIGNATION OF THE INSTRUMENT, AND A DESCRIPTION OF THE INSTRUMENT THAT CONVEYED THE INTEREST OF EACH BENEFICIARY.

THE SUMMARY DOCUMENT PRESCRIBED BY THIS SECTION SHALL BE RECORDED AT THE SAME TIME AND PLACE THAT THE NOTICE OF TRUSTEE'S SALE IS RECORDED PURSUANT TO SECTION 33-808 AND A COPY OF THE SUMMARY DOCUMENT SHALL BE ATTACHED TO ANY NOTICE OF TRUSTEE'S SALE THAT IS REQUIRED TO BE PROVIDED AS PRESCRIBED IN SECTION 33-809.

C. FAILURE TO PROPERLY RECORD THE SUMMARY DOCUMENT THAT DEMONSTRATES EVIDENCE OF TITLE FOR THE FORECLOSING BENEFICIARY AS OF THE DATE OF THE TRUSTEE'S SALE AS PRESCRIBED BY THIS SECTION RESULTS IN A VOIDABLE SALE.

D. ANY PERSON WITH AN INTEREST IN THE TRUST PROPERTY MAY FILE AN ACTION TO VOID THE TRUSTEE'S SALE FOR FAILURE TO COMPLY WITH THIS SECTION AND IS ENTITLED TO AN AWARD OF ATTORNEY FEES AS WELL AS DAMAGES AS OTHERWISE PROVIDED BY LAW IF THE PERSON SUBSTANTIALLY PREVAILS, INCLUDING AN AWARD OF ATTORNEY FEES FOR ANY INJUNCTION OR OTHER PROVISIONAL REMEDIES RELATED TO THE CLAIM.

court.

(f) If the mortgagor fails to attend the dispute resolution or fails to comply with the requirements of this part or the rules of the supreme court adopted pursuant to this part, the neutral shall notify the court, the bureau of conveyances, or the land court, as appropriate, that the requirements of this part have been met and the foreclosure process shall proceed pursuant to statute.

(g) If, despite the participation by both parties in the dispute resolution process and compliance with the requirements of this part and the rules of the supreme court adopted pursuant to this part, the parties are not able to come to an agreement, the neutral shall notify the court, the bureau of conveyances, or the land court, as appropriate, that the requirements of this part have been met. Upon receipt of notice pursuant to this subsection, the foreclosure process shall proceed pursuant to statute.

(h) If the parties to a dispute resolution come to an agreement to resolve the matters at issue in the dispute resolution before the dispute resolution scheduled pursuant to this section, the parties shall notify the neutral of the resolution no later than two business days before the scheduled dispute resolution. No fees shall be refunded if the parties come to an agreement prior to or outside of a dispute resolution conducted pursuant to this part.

(i) The dispute resolution process shall conclude within sixty days from the first scheduled meeting between the parties to the dispute resolution and the neutral.

§667-F Outcome of dispute resolution. (a) When the parties to dispute resolution have complied with the requirements of this part and the rules of the supreme court adopted pursuant to this part and have reached an agreement, the agreement shall be memorialized in a resolution document that shall be filed with the circuit court, the land court, or the bureau of conveyances, as appropriate. The resolution document shall be a contract between the parties

and shall be enforceable in a private contract action in a court of appropriate jurisdiction in the event of breach by either party. If the resolution document allows for foreclosure or other transfer of the subject property, the court shall order foreclosure and the land court or bureau of conveyances shall record a notice of sale or other conveyance document upon presentation by the mortgagee, as appropriate.

(b) The parties to a dispute resolution may enter into a temporary modification agreement as an outcome of a dispute resolution conducted pursuant to this part; provided that any temporary modification agreements shall include an expiration date, which shall be a date certain upon which the parties shall have complied with their respective obligations under the agreement. A temporary modification agreement shall be a private contract memorialized, filed, and enforceable according to subsection (a).

§667-G Confidentiality. Personal financial information and other sensitive personal information disclosed in the course of mortgage foreclosure dispute resolution pursuant to this part shall be confidential and shall not be subject to public disclosure.

§667-H Neutral qualifications. The supreme court shall adopt rules for qualifications and training of neutrals for mortgage foreclosure dispute resolution pursuant to this part; provided that neutrals shall possess sufficient knowledge in the areas of law, real estate, or finance and shall receive sufficient training to be able to effectuate the purposes of this part.

§667-I Fee. The center for alternative dispute resolution may charge a fee not to exceed \$400 for dispute resolution services provided pursuant to this part. Any fee for dispute resolution services shall be divided equally between the mortgagee and the mortgagor. All fees collected pursuant to this section shall be deposited into the foreclosure dispute resolution special fund established by section 667-L.

§667-J Applicability. This part shall apply to foreclosures, whether by action or by power of sale, of residential real property that is occupied by

the mortgagor as a primary residence; provided that this part shall not apply to actions by an association to foreclose on a lien for amounts owed to the association.

§667-K Rules. The chief justice of the supreme court may adopt rules for the administration of this part, including rules to:

- (1) Ensure that dispute resolution occurs in an orderly and timely manner;
- (2) Require each party to provide any information that the facilitator deems necessary;
- (3) Protect the dispute resolution process from abuse and ensure that each party complies with this part and the rules adopted by the supreme court pursuant to this part;
- (4) Establish qualifications and training requirements for neutrals; and
- (5) Protect personal financial information and other sensitive personal information obtained in the course of foreclosure dispute resolution from disclosure.

§667-L Mortgage foreclosure dispute resolution special fund. (a) There is established outside of the state treasury a special fund to be known as the mortgage foreclosure dispute resolution special fund to be administered by the judiciary to implement the mandatory dispute resolution in foreclosure proceedings required by this part. The fund shall consist of contributions from the sources identified in subsections (c) and (d). Interest earned from the balance of the fund shall become a part of the fund. The judiciary shall adopt rules regarding the distribution of moneys from the fund.

(b) The judiciary may allow expenditure of moneys from the fund directly by the center for alternative dispute resolution.

(c) All persons who bring an action in the circuit court for foreclosure pursuant to section 667-1, who record an affidavit in the land court pursuant to section 501-118, or who record a conveyance document in the bureau of conveyances for a property subject to a nonjudicial power of sale foreclosure shall pay a fee of \$ _____ for deposit into the mortgage foreclosure dispute resolution special fund.

(d) Fees for mortgage foreclosure dispute resolution charged pursuant to section 667-I shall be deposited into the mortgage foreclosure dispute

resolution special fund."

SECTION 3. Chapter 667, part II, Hawaii Revised Statutes, is amended by adding eight new sections to be appropriately designated and to read as follows:

"§667-M Conversion: residential property: conditions. (a) An owner-occupant of a residential property that is being foreclosed nonjudicially under this part may convert the action to a judicial foreclosure under the following conditions:

(1) A complaint conforming to section 667-N shall be filed with the circuit court in the circuit where the residential property is located, stating that the owner-occupant of the property elects to convert the nonjudicial foreclosure to a judicial foreclosure proceeding;

(2) The complaint described in paragraph (1) shall be filed with the circuit court no later than twenty days after the notice of default and intention to foreclose is served on the owner-occupant as required by section 667-22;

(3) Within forty-five days of the filing of the complaint, all owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors, shall file a statement in the circuit court action that they agree to submit themselves to the judicial process and the jurisdiction of the circuit court. If this condition is not satisfied, circuit court action shall be dismissed with prejudice as to the right of any owner-occupant to convert the action to a judicial proceeding, and the mortgagee may proceed nonjudicially;

(4) The filing of the complaint shall automatically stay the nonjudicial foreclosure action unless and until the judicial proceeding has been dismissed;

(5) The person filing the complaint shall have an affirmative duty to promptly notify the Hawaii attorney who is handling the nonjudicial foreclosure about the filing of the conversion;

(6) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and

(7) Notwithstanding chapter 607, the fee for filing the complaint shall be not more than \$400.

(b) This section shall not apply to nonjudicial foreclosures of association liens that arise under a declaration filed pursuant to chapters 514A or 514B.

(c) Upon receipt by the center for dispute resolution of notice that a mortgagor has elected to pursue dispute resolution pursuant to section 667-D, the mortgagor's right to convert to a judicial foreclosure under this section shall be terminated.

§667-N Complaint: residential property: required contents. The complaint

authorized under section 667-M shall contain at a minimum the following:

- (1) A caption setting forth the name of the court, the title of the action, and the file number. The title of the action shall include the names of the filing party as plaintiff and the foreclosing party as the defendant;
- (2) The name, mailing address, and telephone number of the filing party;
- (3) The address or tax map key number and the certificate of title or TCT number if within the land court's jurisdiction, of the property subject to the foreclosure action;
- (4) A statement identifying all other owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors;
- (5) A certification under penalty of perjury that the filing party is an owner-occupant of the subject property and seeks to convert the nonjudicial foreclosure to a judicial proceeding;
- (6) A statement certifying that the filing party served a copy of the complaint on the attorney identified in the notice of default and intention to foreclose either by personal delivery at, or by postage prepaid United States mail to, the address of the attorney as set forth in the notice of default and intention to foreclose; and
- (7) A copy of the notice of default and intention to foreclose that was served on the filing party and for which the filing party is seeking to convert to a judicial proceeding.

§667-O Notice of default and intention to foreclose; residential property; required statement on conversion. (a) The notice of default and intention to foreclose that is served as required under sections 667-22 shall include, in addition to the contents required under section 667-22, a statement printed in not less than 14-point font as follows:

"IF THE PROPERTY BEING FORECLOSED IS IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN OWNER-OCCUPANT OF THE PROPERTY (DEFINED UNDER PART II OF CHAPTER 667 OF THE HAWAII REVISED STATUTES, AS A PERSON WHO, AT THE TIME THIS NOTICE IS SERVED, OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND THE RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY RESIDENCE CONTINUOUSLY FOR NOT LESS THAN ONE-HUNDRED EIGHTY DAYS) HAS THE RIGHT TO CONVERT A NONJUDICIAL FORECLOSURE PROCEEDING TO A JUDICIAL FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS RIGHT, THE OWNER-OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED FORM

WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE THE PROPERTY IS LOCATED WITHIN TWENTY DAYS AFTER SERVICE OF THIS NOTICE.

IN ADDITION, ALL OWNERS OF AN INTEREST IN THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE MORTGAGE THAT IS BEING FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER INSTRUMENT EVIDENCING THE DEBT SECURED BY THE MORTGAGE THAT IS BEING FORECLOSED, INCLUDING, WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS, SHALL FILE A STATEMENT IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO SUBMIT THEMSELVES TO THE JUDICIAL PROCESS AND THE JURISDICTION OF THE CIRCUIT COURT WITHIN NINETY DAYS OF THE FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS CONDITION WILL RESULT IN DISMISSAL OF THE CIRCUIT COURT ACTION.

AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE FILING OF THE CONVERSION FORM.

A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY SHALL BE PROHIBITED UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT AGAINST AN OWNER-OCCUPANT WHO DOES NOT OWN A FEE SIMPLE OR LEASEHOLD INTEREST IN ANY OTHER REAL PROPERTY. IF THIS ACTION IS CONVERTED TO A JUDICIAL PROCEEDING, HOWEVER, THEN ALL REMEDIES AVAILABLE TO A LENDER MAY BE ASSERTED, INCLUDING THE RIGHT TO SEEK A DEFICIENCY JUDGMENT."

(b) The statement required by this section shall not be required to be included in the public notice of public sale published pursuant to section 667-27. Nothing in this section shall be construed to set a minimum font size for the published notice of sale.

S667-P Bar against deficiency judgments; owner-occupant of residential property. The mortgagee or other person who completes, pursuant to this part, the nonjudicial foreclosure of a mortgage or other lien on residential property

shall not be entitled to pursue or obtain a deficiency judgment against an owner-occupant of the residential property who, at the time the notice of fault and intention to foreclose is served, does not have a fee simple or leasehold ownership interest in any other real property; provided, however, that nothing in this section shall prohibit any other mortgagee or person who holds a lien on the residential property subject to the nonjudicial foreclosure, whose lien is subordinate to the mortgage being foreclosed and is extinguished by the nonjudicial foreclosure sale, from pursuing a monetary judgment against that owner-occupant.

§667-Q Duty of foreclosing mortgagee to maintain mortgaged property.

(a) Subject to subsection (b), from the deadline date in the notice of default and intention to foreclose until the recordation of the affidavit and conveyance document, for any period of time in which the mortgaged property is not occupied by the mortgagor, the foreclosing mortgagee shall:

- (1) Ensure that the mortgaged property complies with all applicable building and housing laws materially affecting health and safety;
- (2) Keep the mortgaged property in a clean and safe condition;
- (3) Make all repairs and arrangements necessary to put and keep the mortgaged property in a habitable condition;
- (4) Maintain all electrical, plumbing, and other facilities and appliances in good working order and condition;
- (5) Make payments for all utility fees for the mortgaged property; and
- (6) Make regular payments for any association fees and real property taxes owing on the mortgaged property.

(b) Subsection (a) shall not apply from the deadline date in the notice of default and intention to foreclose until the date of the public sale for any period of time in which the foreclosing mortgagee permits the mortgagor to occupy or otherwise possess the mortgaged property.

(c) The costs of maintenance borne by the foreclosing mortgagee under subsection (a) shall be added to the costs of the public sale under section 667-31(a). The costs of maintenance under subsection (b) shall be borne by the mortgagor.

§667-R Prohibited conduct. (a) It shall be a prohibited practice for

any foreclosing mortgagee to engage in any of the following practices:

- (1) Holding a public sale on a date, at a time, or at a place other than that described in the public notice of the public sale;
- (2) Specifying a fictitious place in the public notice of the public sale;
- (3) Conducting a postponed public sale on a date other than the date described in the new public notice of the public sale;
- (4) Delaying the conveyance of the conveyance document deed to a bona fide purchaser who purchases in good faith for more than forty-five days after the completion of the public sale;
- (5) Completing nonjudicial foreclosure proceedings during "short sale" escrows for bid prices that are less than a purchaser's offer to purchase;
- (6) Completing nonjudicial foreclosure proceedings during loan modification negotiations with the mortgagor; or
- (7) Completing nonjudicial foreclosure proceedings against a mortgagor who has been accepted or is being evaluated for consideration into a federal loan modification program before obtaining a certificate or other documentation confirming that the mortgagor is no longer eligible or an active participant of that federal program.

§667-S Unfair or deceptive act or practice. Any foreclosing mortgagee who violates section 667-O or 667-R shall be guilty of an unfair or deceptive act or practice under section 480-2.

§667-T Foreclosure notice. Notwithstanding any law or agreement to the contrary, any person who forecloses on a property within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by way of registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the foreclosure at the time foreclosure proceedings are begun. The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. This section shall not apply when the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against parties other than the planned community association, association of owners, or cooperative housing

corporation."

SECTION 4. Chapter 667, part III, Hawaii Revised Statutes, is amended by adding three new sections to be appropriately designated and to read as follows:

"§667-U Invalid notice. (a) Any notices made pursuant to this chapter may be issued only by persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement signed by that foreclosing mortgagee or lender and recorded at the bureau of conveyances identifying the agency or affiliate relationship and the authority granted or conferred to that agent or representative.

(b) The bureau of conveyances document number for the affiliate statement required under subsection (a) shall be included in any notice required to be personally served upon the mortgagor or borrower under this chapter.

(c) Any notice provided by a mortgage servicer, including an agent, employee, or representative of that mortgage servicer, shall be issued only by mortgage servicer that has been listed in the affiliate statement filed by the foreclosing mortgagee or lender under subsection (a); provided further that the mortgage servicer shall be licensed under or otherwise exempt from chapter 454M. The agency relationship or affiliation of the mortgage servicer and the foreclosing mortgagee or lender and any authority granted or conferred to that mortgage servicer shall be described in the affiliate statement filed under both subsection (a) and section 454M-5(a)(4)(F).

§667-V Actions and communications with the mortgagor in connection with a foreclosure. Once a foreclosure has been initiated under either part I or part II of this chapter, a foreclosing mortgagee shall be estopped from denying liability for any action or communication respecting the subject property that is received by the mortgagor from a mortgage servicer, lender, foreclosing mortgagee, or the foreclosing mortgagee's affiliate as named in the disclosure statement filed with the bureau of conveyances pursuant to section 667-U. This section shall also apply to any actions and communications made by the agents,

employees, or representatives of the lender, foreclosing mortgagee, mortgage servicer, or foreclosing mortgagee's affiliate.

§667-W Suspension of foreclosure actions by junior lienholders. Upon initiation of a foreclosure action in part I or part II of this chapter by a foreclosing mortgagee as defined in section 667-21(b), no junior lienholder shall be permitted to initiate or continue with a foreclosure until the foreclosure initiated by the foreclosing mortgagee has been concluded by either a judgment issued by a court pursuant to section 667-1, the filing of an affidavit after public sale pursuant to section 667-33, or the filing of a resolution document under the dispute resolution provisions of section 667-F: provided that a junior lienholder shall be permitted to initiate or continue with a foreclosure if the resolution document allows for foreclosure."

SECTION 5. Section 454M-2, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) [A] ~~No~~ person ~~[is]~~ shall be engaged in the business of mortgage servicing ~~[if the person provides those services]~~ in this State ~~[even if]~~ unless the person providing services has ~~[no]~~ a physical presence in the State[.] pursuant to section 454M-5(a)(5)."

SECTION 6. Section 454M-5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A mortgage servicer licensed or acting under this chapter, in addition to duties imposed by law, shall:

- (1) Safeguard and account for any money handled for the borrower;
- (2) Act with reasonable skill, care, timeliness, promptness, and diligence;
- (3) Disclose to the commissioner in the application and yearly renewal a complete, current schedule of the ranges of costs and fees it charges borrowers for its servicing-related activities; ~~[and]~~
- (4) File with ~~[the commissioner upon request]~~ its yearly renewal statement a report in a form and format acceptable to the director detailing the servicer's activities in this State, including:
 - (A) The number of mortgage loans the servicer is servicing;
 - (B) The type and characteristics of such loans in this State;
 - (C) The number of serviced loans in default, along with a breakdown

of thirty-, sixty-, and ninety-day delinquencies;

(D) Information on loss mitigation activities, including details on workout arrangements undertaken;

(E) Information on foreclosures commenced in this State; ~~and~~

(F) The affiliations of the mortgage servicer, including any lenders or mortgagees for which the mortgage servicer is providing service, any subsidiary or parent entities, and a description of the authority held by the mortgage servicer through its affiliations; and

~~(F)~~ (G) Any other information that the commissioner may require~~[-]~~;

and

(5) Maintain an office in the State that is staffed by at least one agent or employee for the purposes of addressing consumer inquiries or complaints and accepting service of process; provided that the mortgage servicer has actively serviced at least mortgage loans in the State within the previous calendar year."

SECTION 7. Section 454M-10, Hawaii Revised Statutes, is amended to read follows:

"~~+~~**\$454M-10**~~+~~ **Penalty.** Any person who violates any provision of this chapter may be subject to an administrative fine of not more than ~~[\$5,000]~~ \$7,000 for each violation."

SECTION 8. Section 514A-90, Hawaii Revised Statutes, is amended by amending subsection (h) to read as follows:

"(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the ~~[six]~~ twelve months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of ~~[\$3,600.]~~ \$7,200."

SECTION 9. Section 514B-146, Hawaii Revised Statutes, is amended by ~~ending~~ subsection (h) to read as follows:

"(h) The amount of the special assessment assessed under subsection (g)

shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the [~~six~~] twelve months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of [~~\$3,600.~~] \$7,200."

SECTION 10. Section 613-2, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) There is established within the judiciary the center for alternative dispute resolution. The center shall facilitate the effective, timely, and voluntary resolution of disputes. Through these resolutions, it shall help reduce public and private costs of litigation and increase satisfaction with the justice system. The center shall accomplish its purposes by:

(1) Providing, where feasible and agreed to by the parties, the consultative resources and technical assistance needed to achieve voluntary resolutions for cases that affect the public interest or the work of state and county agencies. These cases shall include but not be limited to:

- (A) Public disputes involving actual or threatened court actions over the allocation or management of public resources or the siting of public facilities;
- (B) Complex litigation cases in which a court or a regulatory or administrative agency has determined that the dispute involves multiple parties or formidable technical, procedural, or factual issues, or both;
- (C) Policy roundtables in which the center, at the request of an executive, legislative, or judicial decisionmaker, convenes and chairs advisory discussions on matters pertaining to standards or rules; [~~and~~]
- (D) Foreclosures subject to part of chapter 667; and
- [~~(D)~~] (E) Other cases directly referred by judges, legislators, agency heads, or appointed government officials;

(2) Promoting in a systematic manner the appropriate use of alternative dispute resolution; and

(3) Disseminating to government agencies and to the community at large up-to-date information on the methods and applications of alternative dispute resolution."

SECTION 11. Chapter 667, Hawaii Revised Statutes, is amended by amending the title of part I to read as follows:

**"PART I. FORECLOSURE BY ACTION [OR
~~FORECLOSURE BY POWER OF SALE]~~"**

SECTION 12. Section 667-1, Hawaii Revised Statutes, is amended to read as follows:

"§667-1 Foreclosure by action. The circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury[7] and, subject to the requirements of part , shall render judgment for the amount awarded[7] and the foreclosure of the mortgage. Execution may be issued on the judgment[7] as ordered by the court."

SECTION 13. Section 667-5.5, Hawaii Revised Statutes, is amended to read as follows:

"§667-5.5 Foreclosure notice. Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by way of registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the foreclosure at the time foreclosure proceedings are begun. The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment which is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. This section shall not apply when the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against parties other than the planned community association, association of owners, or cooperative housing corporation."

SECTION 14. Section 667-10, Hawaii Revised Statutes, is amended to read follows:

"**§667-10 Power unaffected by transfer; surplus after sale.** No sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the mortgaged property, as attorney or agent of the mortgagor, except as otherwise provided by chapters 501 and 502. When public sale is made of the mortgaged property under this ~~[chapter,]~~ part, the remainder of the proceeds, if any, shall be paid over to the owner of the mortgaged property, after deducting the amount of claim and all expenses attending the same."

SECTION 15. Chapter 667, Hawaii Revised Statutes, is amended by amending the title of part II to read as follows:

"~~[+]PART II. []-ALTERNATE]~~ **POWER OF SALE FORECLOSURE PROCESS**"

SECTION 16. Section 667-21, Hawaii Revised Statutes, is amended to read as follows:

"~~[+]§667-21 []-Alternate power]~~ **Power of sale foreclosure process; definitions.** (a) The process in this part is ~~[an alternative power of sale process to the foreclosure by action and the foreclosure by power of sale in part I.]~~ a power of sale foreclosure process.

(b) As used in this part:

"Association" has the same meaning as the term is defined in section 514B-

3.

"Borrower" means the borrower, maker, cosigner, or guarantor under a mortgage agreement.

"Foreclosing mortgagee" means the mortgagee that intends to conduct a power of sale foreclosure; provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in

section 207-11, or an institutional investor as defined in section 454-1.

Unless the context clearly indicates otherwise, as used in this part, a "foreclosing mortgagee" shall encompass all of the following entities:

- (1) The foreclosing mortgagee;
- (2) The lender that has an ownership interest in the promissory note on the mortgage agreement or a security interest represented by the mortgage for the subject property;
- (3) Any mortgage servicer, who services the mortgage loan of the mortgagor; and
- (4) The agents, employees, trustees, and representatives of a lender, the foreclosing mortgagee, a mortgagee, and a mortgage servicer.

"Mailed" means to be sent by regular mail, postage prepaid, and by certified, registered, or express mail, postage prepaid and return receipt requested.

"Mortgage" means a mortgage, security agreement, or other document under which property is mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.

"Mortgage agreement" includes the mortgage, the note or debt document, or any document amending any of the foregoing.

"Mortgaged property" means the property that is subject to the lien of the mortgage.

"Mortgagee" means the current holder of record of the mortgagee's or the lender's interest under the mortgage, or the current mortgagee's or lender's duly authorized agent.

"Mortgagor" means the mortgagor or borrower named in the mortgage and, unless the context otherwise indicates, includes the current owner of record of the mortgaged property whose interest is subject to the mortgage.

"Nonjudicial foreclosure" means foreclosure under the alternate power of sale foreclosure process under part II.

"Open house" means a public showing of the mortgaged property during a scheduled time period.

"Owner-occupant" means a person who, at the time that a notice of default

and intention to foreclose is served on the mortgagor under the power of sale:

(1) Owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed;
and

(2) The residential property is and has been the person's primary residence for a continuous period of not less than one-hundred eighty days immediately preceding the date on which the notice is served.

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure under this part when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

"Property" means property (real, personal, or mixed), an interest in property (including fee simple, leasehold, life estate, reversionary interest, and any other estate under applicable law), or other interests that can be subject to the lien of a mortgage.

"Record" or "recorded" means a document is recorded or filed with the office of the assistant registrar of the land court under chapter 501 or recorded with the registrar of conveyances under chapter 502, or both, as applicable.

"Residential property" means real property that is improved and used for residential purposes.

"Served" means to have service of the notice of default and intention to foreclose made in accordance with the service of process or the service of summons under the Hawaii rules of civil procedure, and under sections 634-35 and 634-36."

SECTION 17. Section 667-22, Hawaii Revised Statutes, is amended to read as follows:

"§667-22 Notice of default[+] and intention to foreclose; contents; distribution. (a) When the mortgagor or the borrower has breached the mortgage agreement, and when the foreclosing mortgagee intends to conduct a power of sale foreclosure under this part, the foreclosing mortgagee shall prepare a written notice of default and intention to foreclose addressed to the

mortgagor, the borrower, and any guarantor. The notice of default and intention to foreclose shall state:

- (1) The name and address of the current mortgagee;
- (2) The name and last known address of the mortgagor, the borrower, and any guarantor;
- (3) The address or a description of the location of the mortgaged property, [~~and~~] the tax map key number, and the certificate of title or TCT number if within the jurisdiction of the land court, of the mortgaged property;
- (4) The description of the default, and if the default is a monetary default, an itemization of the delinquent amount shall be given;
- (5) The action that must be taken to cure the default, including the amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default by the deadline date;
- (6) The date by which the default must be cured, which deadline date shall be at least [~~sixty~~] ninety days after the date of the notice of default[;] and intention to foreclose;
- (7) That if the default is not cured by the deadline date stated in the notice of default[;] and intention to foreclose, the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will be due, that the mortgagee intends to conduct a power of sale foreclosure to sell the mortgaged property at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the mortgaged property at the public sale; [~~and~~]
- (8) The name, address, [~~including~~] electronic address, and telephone number of the attorney who is representing the foreclosing mortgagee; provided that the attorney shall be licensed to practice law in the State and physically located in the State[-]; and
- (9) Notice of the right of the mortgagor to elect to participate in a dispute resolution process as required by part

(b) The notice of default and intention to foreclose shall also contain wording substantially similar to the following in all capital letters:

"IF THE DEFAULT ON THE LOAN CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE MORTGAGED PROPERTY MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT ACTION AND WITHOUT GOING TO COURT.

YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES. FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY LICENSED IN THIS STATE.

AFTER THE DEADLINE DATE IN THIS NOTICE, TWO PUBLIC SHOWINGS (OPEN HOUSES) OF THE PROPERTY BY THE LENDER WILL BE HELD, BUT ONLY IF ALL MORTGAGORS (OWNERS) OF THE PROPERTY SO AGREE. TO SHOW THAT ALL OWNERS AGREE TO ALLOW TWO OPEN HOUSES BY THE LENDER, ALL OWNERS MUST SIGN A LETTER SHOWING THEY AGREE. ALL OWNERS MUST SEND THE SIGNED LETTER TO THIS OFFICE AT THE ADDRESS GIVEN IN THIS NOTICE.

THIS OFFICE MUST ACTUALLY RECEIVE THE SIGNED LETTER BY THE DEADLINE DATE IN THIS NOTICE. THE SIGNED LETTER MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED.

IF THE SIGNED LETTER IS NOT RECEIVED BY THIS OFFICE BY THE DEADLINE DATE, THE

PROPERTY WILL THEN BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

EVEN IF THIS OFFICE RECEIVES THE SIGNED LETTER TO ALLOW THE LENDER TO HOLD TWO OPEN HOUSES OF THE PROPERTY, IF ALL OWNERS LATER DO NOT COOPERATE TO ALLOW THE OPEN HOUSES, THE PROPERTY WILL BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED."

(c) The notice of default and intention to foreclose shall include:

- (1) A copy of the original mortgage agreement, and any subsequent mortgage agreements and assignments;
- (2) The promissory note, signed by both the mortgagor and the mortgagee, and any endorsements and allonges on the note; and
- (3) Any other documents that amended or altered the terms of the original mortgage agreement that were signed by the mortgagor and the mortgagee or any successors or assigns of the mortgagor or the mortgagee.

(d) The notice of default and intention to foreclose shall also include contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development.

~~[(e)]~~ (e) The foreclosing mortgagee shall have the notice of default and intention to foreclose served on:

- (1) The mortgagor and the borrower[+] in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure, as they may be amended from time to time;
- (2) Any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (3) The state director of taxation;
- (4) The director of finance of the county where the mortgaged property is located; and
- (5) Any other person entitled to receive notice under [section 667-5.5.] this part."

SECTION 18. Section 667-23, Hawaii Revised Statutes, is amended to read as follows:

"[+]§667-23[+] Recordation of notice of default[-] and intention to foreclose. Before the deadline date in the notice of default[-] and intention to foreclose, the notice ~~[of default]~~ shall be recorded in a recordable form ~~[shall be recorded]~~ in a manner similar to recordation of notices of pendency

of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice of default and intention to foreclose shall have the same effect as a notice of pendency of action. From and after the recordation of the notice of default~~[7]~~ and intention to foreclose, any person who becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure."

SECTION 19. Section 667-24, Hawaii Revised Statutes, is amended to read as follows:

"~~[7]~~**\$667-24** **Cure of default.** (a) If the default is cured as required by the notice of default~~[7]~~ and intention to foreclose, or if the parties have reached an agreement to avoid foreclosure pursuant to part , the foreclosing mortgagee shall rescind the notice of default~~[7]~~ and intention to foreclose. Within fourteen days of the date of the cure~~[7]~~ or an agreement reached by the parties through a dispute resolution process pursuant to part the foreclosing mortgagee shall so notify any person who was served with the notice of default~~[7]~~ and intention to foreclose. If the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default~~[7]~~ and intention to foreclose or if the parties have not reached an agreement to avoid foreclosure pursuant to part , the foreclosing mortgagee, without filing a court action and without going to court, may foreclose the mortgage under power of sale to sell the mortgaged property at a public sale."

SECTION 20. Section 667-25, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) ~~[The]~~ Subject to the requirements of part , public sale of the mortgaged property shall take place on the later of the following:

(1) At least sixty days after the public notice of the public sale is distributed under section 667-27; or

(2) At least fourteen days after the date of the publication of the

third public notice advertisement under section 667-27.

(b) The public sale of the mortgaged property shall be held only in the county where the mortgaged property is located [~~-. However, if the borrower, the mortgagor, and the foreclosing mortgagee all agree in writing, the public sale may be held in a different county in the State.~~]; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

(1) At the state capitol, for a public sale of mortgaged property located in the city and county of Honolulu;

(2) At a state facility or on public lands in Hilo, for a public sale of mortgaged property located in the eastern portion of the county of Hawaii;

(3) At a state facility or on public lands in Kona, for a public sale of mortgaged property located in the western portion of the county of Hawaii; and

(4) At a state building or on public lands in Maui, for a public sale of mortgaged property located in the county of Maui; and

(5) At a state building or on public lands in Kauai, for a public sale of mortgaged property located in the county of Kauai;

Provided further that no public sale shall be held on grounds or at facilities under the administration of the judiciary. The public sale shall be held during business hours on a business day."

SECTION 21. Section 667-26, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) If the default is not cured as stated in the notice of default [~~7~~] and intention to foreclose, the foreclosing mortgagee shall conduct two open houses of the mortgaged property before the public sale; provided that the foreclosing mortgagee timely received the signed letter of agreement from the mortgagor as required by the notice of default [~~-~~] and intention to foreclose. Only two open houses shall be required even if the date of the public sale is postponed."

SECTION 22. Section 667-27, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (a) to read:

"(a) The foreclosing mortgagee shall prepare the public notice of the public sale. The public notice shall state:

- (1) The date, time, and place of the public sale;
- (2) The dates and times of the two open houses of the mortgaged property, or if there will not be any open houses, the public notice shall so state;
- (3) The unpaid balance of the moneys owed to the mortgagee under the mortgage agreement;
- (4) A description of the mortgaged property, including the address or description of the location of the mortgaged property, and the tax map key number of the mortgaged property;
- (5) The name of the mortgagor and the borrower;
- (6) The name of the foreclosing mortgagee;
- (7) The name of any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (8) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; [~~and~~]
- (9) The terms and conditions of the public sale[-]; and
- (10) An estimate of the opening bid."

2. By amending subsections (c) and (d) to read:

"(c) If the default is not cured as required by the notice of default[~~7~~] and intention to foreclose, the foreclosing mortgagee shall have a copy of the public notice of the public sale of the mortgaged property:

- (1) Mailed or delivered to the mortgagor and the borrower at their respective last known addresses;
- (2) Mailed or delivered to any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (3) Mailed or delivered to the state director of taxation;
- (4) Mailed or delivered to the director of finance of the county where the mortgaged property is located;
- (5) Posted on the mortgaged property or on such other real property of which the mortgaged property is a part; and
- (6) Mailed or delivered to any other person entitled to receive notice under section [~~667-5.5:~~] 667-T.

(d) The foreclosing mortgagee shall have the public notice of the public sale published in the classified section of a daily newspaper [~~of~~] having the largest general circulation expressly in the county where the mortgaged property is located. The public notice shall be published once each week for

three consecutive weeks (three publications). The public sale shall take place sooner than fourteen days after the date of the publication of the third public notice advertisement."

SECTION 23. Section 667-28, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) The public sale may be either postponed or canceled by the foreclosing mortgagee. Notice of the postponement or the cancellation of the public sale shall be:

(1) Announced by the foreclosing mortgagee at the date, time, and place of the last scheduled public sale; and

(2) Provided, upon request, to any other person who is entitled to receive the notice of default and intention to foreclose under section 667-22~~[(e)]~~(e).

(b) If there is a postponement of the public sale of the mortgaged property, a new public notice of the public sale shall be published once in the format described in section 667-27. The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. ~~[No sooner]~~ Not less than fourteen days before the date of the public sale, a copy of the new public notice shall be posted on the mortgaged property or on such other real property of which the mortgaged property is a part, and it shall be mailed or delivered to the mortgagor, to the borrower, and to any other person entitled to receive notice under section 667-27. Notwithstanding the foregoing, upon the fourth postponement of every series of four consecutive postponements, the foreclosing mortgagee shall follow all the public notice of public sale requirements of section 667-27, including the requirements of mailing and posting under section 667-27(c) and of publication under section 667-27(d)."

SECTION 24. Section 667-29, Hawaii Revised Statutes, is amended to read as follows:

"~~[-]~~**\$667-29**~~[+]~~ **Authorized bidder; successful bidder.** Any person, including the foreclosing mortgagee, shall be authorized to bid for the

mortgaged property at the public sale and to purchase the mortgaged property. The highest bidder who meets the requirements of the terms and conditions of the public sale shall be the successful bidder. The public sale shall be considered as being held when the mortgaged property is declared by the foreclosing mortgagee as being sold to the successful bidder. When the public sale is held, the successful bidder at the public sale, as the purchaser, shall make a nonrefundable downpayment to the foreclosing mortgagee of not less than ten per cent of the highest successful bid price. If the successful bidder is the foreclosing mortgagee or any other mortgagee having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23, the downpayment requirement may be satisfied by offset and a credit bid up to the amount of the mortgage debt."

SECTION 25. Section 667-31, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) After the purchaser completes the purchase by paying the full purchase price and the costs for the purchase, the mortgaged property shall be conveyed to the purchaser by a conveyance document. The conveyance document shall be in a recordable form and shall be signed by the foreclosing mortgagee in the foreclosing mortgagee's name. The mortgagor or borrower shall not be required to sign the conveyance document [~~on his or her own behalf~~]."

SECTION 26. Section 667-32, Hawaii Revised Statutes, is amended to read as follows:

"**[+]§667-32[+]** **Affidavit after public sale; contents.** (a) After the public sale is held, the foreclosing mortgagee shall sign an affidavit under penalty of perjury:

- (1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the mortgage;
- (2) Stating that the power of sale foreclosure was conducted as required by this part;
- (3) Summarizing what was done by the foreclosing mortgagee;
- (4) Attaching a copy of the recorded notice of default[;] and intention to foreclose;
- (5) Attaching a copy of the last public notice of the public sale[-];

(6) Attaching a copy of the affiliate statement filed at the bureau of conveyances as required under section 667-U: and

(7) Attaching a copy of the statement filed with the commissioner of financial institutions of the mortgage servicer affiliations as required under section 454M-5(4)(F), describing the authority held by the mortgage servicer through its affiliations.

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

"(1) I am duly authorized to represent or act on behalf of _____ (name of mortgagee) ("foreclosing mortgagee") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part II, Hawaii Revised Statutes);

(2) The foreclosing mortgagee is a "foreclosing mortgagee" as defined in the power of sale foreclosure law;

(3) The power of sale foreclosure is of a mortgage made by _____ (name of mortgagor) ("mortgagor"), dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The mortgaged property is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the mortgaged property is attached as Exhibit "A". The name of the borrower, if different from the mortgagor, is _____ ("borrower");

(4) Pursuant to the power of sale provision of the mortgage, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:

(A) A notice of default and intention to foreclose was served on the mortgagor, the borrower, and the following person:

_____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;

(B) The date of the notice of default and intention to foreclose was _____ (date). The deadline in the notice for curing the default was _____ (date), which deadline date was at least sixty days after the date of the notice;

(C) The notice of default and intention to foreclose was recorded before the deadline date in the _____ (bureau of conveyances or office of the assistant registrar of the land court). The notice was recorded on _____ (date) as document no. _____. A copy of the recorded notice is attached as Exhibit "1";

- (D) The default was not cured by the deadline date in the notice of default[+] and intention to foreclose:
- (E) A public notice of the public sale was initially published in the classified section of the _____, a daily newspaper of general circulation in the county where the mortgaged property is located, once each week for three consecutive weeks on the following dates: _____. A copy of the affidavit of publication for the last public notice of the public sale is attached as Exhibit "2". The date of the public sale was _____ (date). The last publication was not less than fourteen days before the date of the public sale;
- (F) The public notice of the public sale was sent to the mortgagor, to the borrower, to the state director of taxation, to the director of finance of the county where the mortgaged property is located, and to the following: _____. The public notice was sent on the following dates and in the following manner: _____. Those dates were after the deadline date in the notice of default[+] and intention to foreclose, and those dates were at least sixty days before the date of the public sale;
- (G) The public notice of the public sale was posted on the mortgaged property or on such other real property of which the mortgaged property is a part on _____ (date). That date was at least sixty days before the date of the public sale;
- (H) Two public showings (open houses) of the mortgaged property were held (or were not held because the mortgagor did not cooperate);
- (I) A public sale of the mortgaged property was held on a business day during business hours on: _____ (date), at _____ (time), at the following location: _____. The highest successful bidder was _____ (name) with

the highest successful bid price of \$_____; and

(J) At the time the public sale was held, the default was not cured and there was no circuit court foreclosure action pending in the circuit where the mortgaged property is located; and

(5) This affidavit is signed under penalty of perjury."

SECTION 27. Section 667-39, Hawaii Revised Statutes, is amended to read as follows:

"~~[+]§667-39[+]~~ **Right to enforce this part.** (a) The foreclosing mortgagee, any other creditor having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23, the borrower, and the mortgagor, may enforce this part by bringing an action in the circuit court of the circuit where the mortgaged property is located.

(b) The remedies provided in this part are cumulative and shall not bridge the right of a party to bring action under any other law, including but not limited to section 454M-9."

SECTION 28. Section 667-41, Hawaii Revised Statutes, is amended to read as follows:

"~~[+]§667-41[+]~~ **Public information requirement.** ~~[A+] Beginning on September 1, 2011, all~~ financial institutions, mortgagees, lenders, business entities and organizations without limitation, and persons, who intend to use the power of sale foreclosure under this part, under the conditions required by this part, shall also develop informational materials to educate and inform borrowers and mortgagors. These materials shall be made available to the public~~[7]~~ and provided to the mortgagors of all mortgage agreements entered into, including the borrowers at the time of application for a mortgage or loan, or other contract containing a power of sale foreclosure provision. These materials, among other things, shall inform the borrower that the financial institution and other business entities and persons who are authorized under this part to exercise the power of sale foreclosure, in the

event of the borrower's default, have the option of pursuing either a judicial or nonjudicial foreclosure as provided by law. These informational materials shall fully and completely explain these remedies ~~[]~~ in simple and understandable terms."

SECTION 29. Section 667-5, Hawaii Revised Statutes, is repealed.

~~["§667-5 Foreclosure under power of sale; notice; affidavit after sale.~~

~~(a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:~~

~~(1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and~~

~~(2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage:~~

~~(b) Copies of the notice required under subsection (a) shall be:~~

~~(1) Filed with the state director of taxation; and~~

~~(2) Posted on the premises not less than twenty-one days before the day of sale.~~

~~(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:~~

~~(1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and~~

~~(2) The sale price of the mortgaged property once auctioned.~~

~~(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person~~

~~who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.~~

~~(e) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.~~

~~(f) This section is inapplicable if the mortgagee is foreclosing as to personal property only."]~~

SECTION 30. Section 667-6, Hawaii Revised Statutes, is repealed.

~~["**§667-6 Notice to mortgage creditors.** Whenever a mortgage creditor having a mortgage lien on certain premises desires notice that another mortgage creditor having a mortgage lien on the same premises intends to foreclose the mortgage and sell the mortgaged property pursuant to a power of sale under section 667-5, the mortgage creditor may submit a written request to the mortgagee foreclosing or who may foreclose the mortgage by power of sale, to receive notice of the mortgagee's intention to foreclose the mortgage under power of sale. This request for notice may be submitted any time after the recordation or filing of the subject mortgage at the bureau of conveyances or the land court, but must be submitted prior to the completion of the publication of the mortgagee's notice of intention to foreclose the mortgage and of the sale of the mortgaged property. This request shall be signed by the mortgage creditor, or its authorized representative, desiring to receive notice, specifying the name and address of the person to whom the notice is to be mailed. The mortgagee receiving the request shall thereafter give notice to all mortgage creditors who have timely submitted their request. The notice shall be sent by mail or otherwise communicated to the mortgage creditors, not~~

~~less than seven calendar days prior to the date of sale.~~

~~No request for copy of any notice pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any party requesting copy of the notice has or claims any right, title, or interest in, or lien or charge upon the property described in the mortgage referred to therein."]~~

SECTION 31. Section 667-7, Hawaii Revised Statutes, is repealed.

~~["**S667-7 Notice, contents, affidavit.** (a) The notice of intention of foreclosure shall contain:~~

- ~~(1) A description of the mortgaged property; and~~
- ~~(2) A statement of the time and place proposed for the sale thereof at any time after the expiration of four weeks from the date when first advertised.~~

~~(b) The affidavit described under section 667-5 may lawfully be made by any person duly authorized to act for the mortgagee, and in such capacity conducting the foreclosure."]~~

SECTION 32. Section 667-8, Hawaii Revised Statutes, is repealed.

~~["**S667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed."]~~

SECTION 33. Section 667-9, Hawaii Revised Statutes, is repealed.

~~["**S667-9 Dower barred, when.** If the mortgage was executed by a man having at the time no lawful wife, or if the mortgagor being married, his wife joined in the deed in token of her release of dower, the sale of the property the mode aforesaid shall be effectual to bar all claim and possibility of dower in the property."]~~

SECTION 34. Section 667-34, Hawaii Revised Statutes, is repealed.

~~["**[§667-34] Foreclosure sale; conclusive presumptions.** Unless an appeal taken as set forth in section 667-35, any foreclosure sale held in accordance with this part shall be conclusively presumed to have been conducted in a legal, fair, and reasonable manner. The sale price shall be conclusively presumed to be reasonable and equal to the fair market value of the property based on the circumstances and on the economic conditions at the time of the sale. The statements in the recorded affidavit shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of bona fide purchasers and encumbrancers for value without notice. The purchaser of the mortgaged property shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include liens placed by lenders who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly conveyed property."]~~

SECTION 35. Section 667-35, Hawaii Revised Statutes, is repealed.

~~["**[§667-35] Appeal to circuit court.** The borrower, the mortgagor, and any creditor having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23, shall have the right to file an appeal in the circuit court where the mortgaged property is located to contest the presumptions set forth in section 667-34, and the statements contained in the affidavit required by section 667-32. No appeal shall be filed later than thirty days after the recordation of the affidavit. Failure to timely appeal shall result in the statements in the affidavit and the presumptions set forth in section 667-34 becoming conclusive in accordance with the terms of that section."]~~

SECTION 36. Section 667-37, Hawaii Revised Statutes, is repealed.

~~["**[§667-37] Judicial action of foreclosure before public sale.** This part shall not prohibit the borrower, the foreclosing mortgagee, or any other creditor having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23, from filing an~~

action for the judicial foreclosure of the mortgaged property in the circuit court of the circuit where the mortgaged property is located; provided that the action is filed before the public sale is held. While that circuit court foreclosure action is pending, the power of sale foreclosure process shall be stayed."]

SECTION 37. Section 667-38, Hawaii Revised Statutes, is repealed.

~~["**[S667-38] Recordation; full satisfaction of debt by borrower.** The recordation of both the conveyance document and the affidavit shall operate as full satisfaction of the debt owed by the borrower to the foreclosing mortgagee even if the foreclosing mortgagee receives nothing from the sale proceeds, unless the debt is secured by other collateral, or except as otherwise provided by law. The debts of other lien creditors are unaffected except as provided in this part."]~~

SECTION 38. Section 667-42, Hawaii Revised Statutes, is repealed.

~~["**[S667-42] Application of this part.** The requirements of this part all apply only to new mortgages, loans, agreements, and contracts containing power of sale foreclosure language executed by the borrowers or mortgagors after July 1, 1999."]~~

SECTION 39. Upon the effective date of this Act, the judiciary is requested to consider creating and adopting a form for the conversion complaint established under section 3 of this Act.

SECTION 40. In codifying the new sections added by sections 1, 2, 3, and 4 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 41. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 42. This Act shall take effect on July 1, 2050; provided that sections 2, 8, and 9 shall be repealed on July 1, 2053; provided that on July 2053, sections 514A-90 and 514B-146, Hawaii Revised Statutes, shall be reenacted in the form in which they read on June 30, 2053; and provided further

that if any other act of the legislature effectuates a moratorium on nonjudicial foreclosures and whose termination date is subsequent to July 1, 2050, the moratorium shall be terminated on July 1, 2050.

Report Title:

Mortgage Foreclosures

Description:

Repeals the old non-judicial foreclosure process. Clarifies the new non-judicial foreclosure process. Strengthens laws regarding mortgage servicers. Broadens the duties of the Center for Alternative Dispute Resolution. Effective July 1, 2050. (HB1411 HD1)

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

Dear Committee Members,

Thank you for this hearing and for this opportunity to testify.

I SUPPORT HB1411

I am Maui home owner who has been fighting to save our home from foreclosure and have been shocked and overwhelmed by the treatment from my mainland servicer.

I can not believe that the law either allows these banks to treat the people of Hawaii this way, or does nothing to stop them.

The best way to stop unnecessary foreclosures in Hawaii is require Mandatory Mediation.

I have heard testimony from Bankers saying that "Lenders do not want to foreclose on homeowners. Therefore, lenders will work borrowers that have the willingness and ability to keep them in their homes. Most lenders participate in the Federal Home Affordable Modification Program or have their own modification programs to help troubled homeowners stay in their homes. " and "that most residential owner occupants are unable to make their mortgage loan payments due a reduction in income caused by unemployment or underemployment"

NOTHING could be further than the truth, as my own story will demonstrate, and is EXACTLY WHY we need this bill.

Successful mediation for both parties **MUST INCLUDE** the following:

1) The bank representative has to have the full authority to negotiate and approve a fair loan modification during the mediation with full transparency, with no loop holes for the servicer to abuse.

2) The bank representative MUST bring to the mediation the ORIGINAL or a certified copy of the ORIGINAL note AND ALL intervening endorsements and assignments showing a complete chain of the title of the mortgage instrument. No "lost note affidavits". A copy of the Pooling and Servicing Agreement, if applicable.

The above requirements are needed to show proof the bank has the legal right to foreclose. If the mortgages were not properly transferred in the securitization process (including through the use of MERS to record the mortgages), then the party bringing the foreclosure does not in fact own the mortgage and therefore lacks standing to foreclose. The PSA (which is public record) allows for more complete transparency during the process.

3) An Immediate Temporary Moratorium on foreclosures until the mediation program is in place. Otherwise, banks will speed up the rate of unfair foreclosures prior to mediation and more people will be tossed to the street unfairly.

There is no doubt the bank lobbyists will strongly oppose the above and will give many reasons why it is bad for "everyone" if they do. They have much more to lose than an individual foreclosure. HOWEVER, including the above WILL provide strong incentive for the banks to work out fair deals with home owners as the risks of not doing so are huge . Please see:

Written Testimony of Adam J. Levitin

**Special Counsel to the Congressional Oversight Panel Before the House Financial Services Committee Subcommittee on Housing and Community Opportunity
"Robo-Singing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing" November 18, 2010**

<http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>

We are counting on you to make this a very strong Bill, because allowing loopholes will simply defeat the purpose and will NOT help home owners.

I have been trying to get a modification for almost a year, and I believe Bank Of America is hearing about the possibility of Hawaii passing bills to protect the people of Hawaii and are working to rush foreclosures before any bills are passed.

ESPECIALLY if the do not have proper documentation that would be required for mediation and for people they have wrongly been denied HAMP modifications. The above provisions are absolutely key to stop the major mainland servicers from unfairly foreclosing on the families of Hawaii.

I know this from my own personal experience, which I will describe and show why ONLY a STRONG Mediation Program will work.

I live with my husband (a Maui County Firefighter) and our son in Kihei.

We have been trying to get a HAMP loan modification from Bank of America since January of 2010 .

Our original Mortgage was taken out in 2003 with Country Wide Home Loans , than taken over by Bank of America who than sold our loan to Bank Of New York Melon. Our new servicer became " BAC Home Loans Servicing, LP " a division of Bank Of America

In December of 2009 I was notified by BAC mail about the HAMP program and to call to see if I qualified.

After a 2 hour phone interview in January 2010 I was told I was Approved for HAMP trial, and would make 3 payments to be sure I could pay and in the meantime they would verify my income and hardship. However, it would take 30 days to get my trial package by Fed -Ex, and I would start paying the new modified mortgage payment of 31% of my gross income for the three month trial. when it arrived. This seemed fair and affordable to us.

I was warned I had to want to keep, stay, and live in my home and not be trying to sell it.

I agreed because we very much wanted to keep our home!

At this time I had excellent credit, had no other debt, had never missed a payment but was experiencing a large loss of income and we were at the end of our savings.

I have a notebook full of calls and promises from BOA, but long story short, I never got to start a trial although they finally mailed me a packet to apply months later, only after I ran out of money and could only make a partial payment, and after they TOLD me I should miss payments because otherwise I was at the bottom of a stack and they were backlogged and only working with people who had missed payments.

They had lied directly to me when I had told them I only had a few months of savings to pay my mortgage. They assured me I would start the trial payments and I was already approved for a HAMP trial, and would get a permanent loan modification as long as the phone interview information I gave them was verifiable.

I finally got an APPLICATION three months later. NOT for a trial, as promised, but new paperwork to start all over again. Over the next few months I spent hours and hours making phone calls, getting disconnected, faxing and re faxing documents, and being told everything was fine.

I have a filled a notebook with documentation of over 100 calls, conversations and transactions I have made and have started a second notebook.

Finally on 7/22/10 I got a fed ex telling me I was denied for negative NPV and that I could request my NPV info, and that they were working on alternatives for me.

Giving me the NPV data on request is a direct requirement of HAMP.

The reason they have to provide this information to you is to give you the opportunity to make any necessary corrections to the values they used as they make or break your ability to be considered eligible for the Home Affordable Modification Program.

The servicers are well known to put incorrect data into the NVP tool. From the numbers quoted back to me by some BAC-reps, I am certain the DID use the wrong numbers, IF they even ran it.

As of today 2/07/11, I have not gotten the NPV. BAC has become notorious for this, as I found out from others with the same stories.

I asked many times, all documented. I had to verbally ask because they would not give me an address to ask in writing, nor was one provided in the letter.

One BAC rep told me he knew for a fact that NPV results had to come from my investor (Bank Of New York), and that BAC had nothing to do with it, and it was out of their hands.

I called BONY and they denied this completely. They told me they can not make any decisions about loan modifications, the servicer makes all the decisions "on their behalf". They told me it WAS in their best interest, in most cases, to do loan modifications, rather than foreclosure. I have documented all details of these conversations.

The servicers are not even acting in good faith with their investors.

Meanwhile, in April during the process, we had a change in circumstances. My husband suffered severe injury during a MFD fire call at work, was put on Workman's comp, and was getting less than his normal income .

After the HAMP denial but before getting our NPV data, BAC finally agreed to a Special Forbearance, because my husband required two surgeries before he could return to work.

The Forbearance ends this month and our income will have improved. We are trying to re-apply for a loan mode but fear we will be foreclosed on first. I can not trust BOA to Work with me "In Good Faith"!

We are now so behind on payments, we can not catch up without a modification, which they have already denied us, with no clear reason and after telling us we were approved!

Bottom line is THEY have USED the Government HAMP program to CREATE defaults that forces foreclosures.

Our once perfect credit is ruined. If we lose our home, renting will be difficult as landlords do credit checks. Even employers do credit checks, so looking for additional employment will become even more difficult ..

Had I known that it would take four months to get an application and four more months to get turned down, I would have sold my home when I still had some savings, time to sell it ,and when the market value was higher. We might have even had some equity or at least broke even, kept our excellent credit, and been able to rent and find additional work with out being denied for poor credit..

We tried to do the right thing, and we believed the law would never allow a bank to lie to us and mislead us without consequences, especially with the HAMP program.

Bank Of America lied to us and created this situation, I feel this is down right Criminal!

I BEG you to make the banks do the right thing, by passing POWERFUL bills.

If they declare during mediation a mod. can not be done because of a negative NPV than **MAKE** them show this, make it transparent. Otherwise they will just use this as an excuse to deny the modification, as they have done with me and so many others.

Make them prove they have the original note, all the assignments and investor servicing agreements, because they have already lied to me and others about this.

Please read the TESTIMONY OF MR. ADAM J. LEVITIN from the November 16, 2010 US Senate Committee on Banking , Housing and Urban Affairs Problems in Mortgage Servicing From Modification to Foreclosure,
<http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>

" The servicing problems stem from servicers' failed business model. Servicers are primarily in the transaction processing business and are failing miserably at trying to adapt themselves to the loan modification business. Servicers' business model also encourages them to cut costs wherever possible, even if this involves cutting corners on legal requirements, and to lard on junk fees and in-sourced expenses at inflated prices. The financial incentives of mortgage servicers also encourage them to foreclose, rather than modify loans in many cases, even when modification would maximize the net present value of the loan for investors. "

Servicers have a conflict of interest and in most cases make money by foreclosing and even delaying foreclosures.

If you listen to these hearings as I have, I am sure you will be outraged, and you will see that Hawaii will **NEED** to have a very strong law, that does not allow loopholes, to stop these big servicers from unfairly foreclosing on the people of Hawaii!

This is what happened with HAMP but you have the opportunity to learn from HAMP and not make the same mistakes.

I know if these provisions were in place right now, Bank of America would give me the loan modification they keep trying to deny me **BEFORE** ever having to use the mediation.

They would do so because it would now be in their best interest to do so. Because I **DO** qualify, and because they have **MORE TO LOSE** if they had to do an honest Mediation with me in Hawaii, **AND** actually be **REQUIRED** to **PROVE** they have the legal paperwork to foreclose,

The State of Hawaii has the power right now to save thousands of homes and families. The savings for Hawaii would be huge, because when people lose their homes, government costs rise.

HOWEVER: If any mediation law is passed that does **NOT** included the above, or stronger measures, it will be a total waste of everyone's time and money, and will just be another excuse for the banks to say "we have tried to help but we can only do so much".

Thank You

Marcy and Larry Crilley
2962 Kauhale Street
Kihei, HI 96753
808-874-5644

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, February 27, 2011 2:41 PM
To: FINTestimony
Cc: KimHarman@FACEHawaii.org
Subject: Testimony for HB1411 on 2/28/2011 5:00:00 PM

Testimony for FIN 2/28/2011 5:00:00 PM HB1411

Conference room: 308
Testifier position: support
Testifier will be present: No
Submitted by: Kim Harman
Organization: FACE Hawaii
Address:
Phone:
E-mail: KimHarman@FACEHawaii.org
Submitted on: 2/27/2011

Comments:

My name is Kim Harman and I am the Policy Director for FACE Hawaii. We have been working with families facing mortgage default and foreclosure on Maui and Oahu for more than two years. On behalf of FACE Hawaii, I wholeheartedly support this bill which gives Hawaii's families more rights when dealing with mainland banks attempting to foreclose on our homes.

FACE has studied the Nevada Foreclosure Mediation model extensively and we believe Hawaii's mediation program will be just as successful. The Nevada model pays for itself through its collection of mediation and filing fees.

I live on Maui and I know that Maui and Big Island have been even harder hit than Oahu. Mandatory Mediation like HB1411 requires is the best chance we have to stop unnecessary foreclosures in Hawaii.