

HB 1411

HD2, SD1

WRITTEN ONLY

TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
HOUSE BILL NO. 1411, H.D. 2, S.D. 1

March 30, 2011

RELATING TO MORTGAGE FORECLOSURES

House Bill No. 1411, H.D. 2, S.D. 1, creates a Foreclosure Dispute Resolution special fund outside of the State treasury to be administered by the Judiciary. The special fund will receive moneys from fees of an unspecified amount from individuals bringing an action to the Circuit Court for foreclosure disputes pursuant to Section 667-1, HRS. The measure further appropriates an unspecified amount of general funds to be deposited into the special fund to cover the initial costs to establish the dispute resolution program.

The department recognizes the benefit of user fees to offset operational expenses and costs. The contemporary events of the financial crises and the rise of foreclosures makes this proposal very compelling and would go a long way to assist in resolving many disputed foreclosure actions. However, as a matter of general policy, the Department of Budget and Finance expects the creation of any special fund or revolving fund would meet the requirements of Sections 37-52.3 and 37-52.4, Hawaii Revised Statutes. Special and revolving funds should: 1) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program; 2) provide an appropriate means of financing for the program or activity; and 3) demonstrate the capacity to be financially self-sustaining. In regards to House Bill No. 1411, H.D. 2, S.D. 1, it is difficult to determine whether the Foreclosure Dispute Resolution special fund would be financially self-sustaining.



THE JUDICIARY, STATE OF HAWAII

Testimony to the Senate Committee on Ways and Means
Senator David Y. Ige, Chair
Senator Michelle Kidani, Vice Chair

Wednesday, March 30, 2011, 9:30 a.m.
State Capitol, Conference Room 211

by
Rodney A. Maile
Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1411, H.D. 2, S.D. 1, Relating to Mortgage Foreclosures

Purpose: Authorizes the conversion of non-judicial power of sale foreclosures to judicial foreclosures in certain cases; authorizes recordation of notice of default and intent to foreclose; specifies allowable locations for public auction of foreclosed properties; specifies prohibited conduct; requires suspension of actions by junior lienholders during the pendency of foreclosure; provides that violations of chapter 667 by foreclosing mortgagees shall be unfair and deceptive trade practices; prohibits deficiency judgments after non-judicial foreclosure; specifies that the interest of a mortgagor is extinguished upon recordation of affidavit of sale; imposes requirements for mortgage servicers including physical presence within the State; creates dispute resolution process for non-judicial foreclosures; creates dispute resolution special fund; creates requirements for notice of default; makes conforming amendments; makes appropriation.

Judiciary's Position:

I. PROPOSED DISPUTE RESOLUTION PROCESS

The most current version of this bill essentially contains the provisions in Senate Bill No. 651, S.D.2, which are of great concern to the Judiciary. In short, while the Judiciary supports facilitating the resolution of foreclosure cases, the Judiciary is concerned whether the program described in this bill would be workable. The Judiciary has testified at length and in detail about the problems associated with this bill, and a copy of its most recent testimony is attached for your reference.



Because the current committee hearing the bill will primarily be concerned about the financial impact of the bill, the Judiciary will limit its comments to fiscal matters. The Committee should also be aware that a proposal for a collaborative project between the Department of Commerce and Consumer Affairs and the Judiciary was submitted for consideration to Senator Rosalyn Baker.

This bill would generate income to the contemplated special fund of \$400 per case (Section 667-S) from the parties and an unspecified amount from fees that will be collected by the circuit courts, land court, and bureau of conveyances (Section 667-V). The Judiciary conservatively estimates that it would cost \$2,141,709 to run this program if 2,000 cases were included each year, and \$3,461,705 if 3,000 cases were included each year. The Judiciary also notes that it will be critical for the Legislature to make an initial appropriation sufficient to cover initial costs as contemplated by Section 25. The Judiciary suggests an appropriation of \$1,000,000.

II. PROPOSED CONVERSION PROCESS

The Judiciary is committed to assisting the public and appreciates the bill's intent to update the foreclosure statutes to better serve all parties. However, as stated in our previous testimony, we are concerned that without adequate funding from the Legislature, the purpose of this bill will be frustrated. Thus, we must respectfully oppose this bill's proposed "conversion" process unless it is amended to include a sufficient funding mechanism.¹

A. Funding is Critical to the Success of this Measure

Previous testimony from the borrowers has included frustration at delays in loan modifications and at the failure to have their cases timely resolved. However, shifting these cases to the Judiciary, *without the Legislature's providing adequate funding for their adjudication*, will result in a similarly frustrating situation of a backlog of cases and further expenses and delays, prolonging an already stressful situation for borrowers and all those involved. Moreover, adding significant numbers of new cases may harm other parties who already have pending cases before the courts. The Judiciary understands that these are difficult economic times. In fact, there is talk in other spheres of government regarding cutting back of services. However, this bill envisions the opposite—an increase in services—without a counterpart provision for sufficient funding to support this measure, which is not realistic.

¹ The Judiciary believes that the alternate process provided by our collaborative project with the Department of Commerce and Consumer Affairs would be more efficient in resolving the non-judicial foreclosure cases than the dispute resolution and conversion process proposed by this bill.



To illustrate the potential increase in the volume of cases and the resultant delay and detrimental effect on borrowers, other interested parties, and the overall public, should this measure pass without adequate funding, we note the following:

1. The Conversion Complaint Process Will Significantly Increase the Number of Additional Cases in the Circuit Court System, Requiring An Estimated Additional \$1,075,000 to \$4,300,000 Yearly.

Currently, most foreclosure cases--approximately 75% to 90%--proceed through the non-judicial process.² Last calendar year, there were approximately 1,331 *judicial* foreclosure filings³ state-wide compared with a total of 12,425 foreclosure cases. See *Star Advertiser* article dated January 13, 2011. If the 12,425 foreclosure cases included both judicial and non-judicial foreclosures, approximately 90% or 11,094 cases last year proceeded through the non-judicial process.

The conversion "complaint" form appears to make it easier for a borrower without an attorney to simply complete the form to stop the non-judicial foreclosure on his or her home, while the court decides the issues. Looking at it from an operational standpoint, it would appear that the bill's intent is to benefit as many members of the public who need the assistance as possible. The challenge in estimating how many borrowers might avail themselves of the conversion option is that there is no "before and after" empirical data since this conversion procedure is entirely new in Hawaii. Thus, we are left with our best reasoned estimates. It would be far better to do our best to prepare than to *underestimate* the number of possible additional cases, to the detriment of the public. In view of the above, we would like to provide estimates regarding a range of possible additional cases so that the Legislature can have a better understanding of what the costs may be for a broader range of situations.

If about 50% of the 11,094 non-judicial foreclosure cases in 2010 were converted to judicial foreclosure actions pursuant to this bill, adding approximately 6,000 new cases (500 new cases per month), would constitute a very significant increase in the Judiciary's caseload. The Judiciary would not be able to timely process 6,000 new cases per year at the circuit court level,

² See attached 3/22/09 Honolulu Star Bulletin article (estimating that at least 75% of foreclosures proceeded non-judicially); see also Star Advertiser article dated January 13, 2011 (citing statistics from Realty Trac). Since the Judiciary does not track non-judicial foreclosures, we only have knowledge regarding the number of *judicial* foreclosures. Please note that the figures in this testimony are preliminary estimates based on recently-gathered information.

³ These figures may include agreements of sale.



without additional resources and staffing. Our estimate to fund the cost of the additional judges and support staff to handle 6,000 new circuit court cases per year is approximately \$4,300,000.⁴

Alternatively, if about 25% of the 11,094 non-judicial foreclosure cases were converted, adding 3,000 new cases would still constitute a significant increase in our caseload and negatively impact the length of time it took to resolve cases. Our estimate to fund the cost of these additional cases is approximately \$2,150,000 *yearly*.

Finally, if 1,500 new cases were added *per year* (about 13-14% of the 11,094 non-judicial foreclosures), this would still result in an appreciable increase in our caseload, costing us an estimated \$1,075,000 yearly. It is important to note that without adequate funding, these cases would continue to accumulate yearly and contribute to any backlog of existing cases.

2. Because of Budget Cuts, Furloughs, and Increase in Cases, There is Already Significant Delay in Our Cases, Including Foreclosure Cases

Since the budget cuts and furloughs, the median age of pending Circuit Court civil cases has increased by 41.8%.⁵ At the same time, there has been an increase in the number of cases filed with the courts. The number of pending judicial foreclosure cases increased by 80% and the median *age* of pending foreclosure cases increased by 44%. *Please see attached the Judiciary's report, "Justice in Jeopardy" dated December 2010 ("Justice in Jeopardy Report"), p.12.* In other words, although judicial foreclosures comprise only approximately 10% to 25% of the total existing foreclosure cases, the length of time it takes to resolve the existing caseload has increased by almost 50%.

Moreover, the addition of foreclosure cases, as allowed by the bill, without requisite funding to service these additional cases, will further delay existing civil and criminal cases, including those critical to public safety. For example, in the District Court of the First Circuit, due to budget cuts, traffic and DUI trials that took 1-2 months to be heard prior to furloughs, now take at least 4-5 months to schedule. In fiscal year 2010, the courts processed approximately 179,740 criminal cases, including murder, manslaughter, rape, narcotics, burglary, and DUI cases. This does not include Family Court proceedings which address domestic abuse protective

⁴ The measure also provides that the action shall be dismissed if all interested parties fail to file a statement submitting themselves to the court process within a certain period of time after the filing of the conversion complaint. Additional resources would be needed to reduce delays in dismissal. Any delay in dismissal would further prolong the foreclosure process since the filing of the complaint stays the non-judicial foreclosure until the judicial proceeding has been dismissed. If this measure passes, the Judiciary requests that the action may be dismissed after the filing of a motion by any interested party, rather than requiring court clerks to monitor each case.

⁵ Please note that the Judiciary currently has a budget bill, H.B. 300 pending which may impact furloughs.



orders, foster custody cases, and juvenile probation cases and other civil circuit court cases. *See attached "Justice in Jeopardy" Report, pp. 3 & 12.* Adding a significant number of foreclosure cases (which may involve time-consuming and complex issues) to this caseload, *without providing sufficient funding for these new cases*, does not realistically take into consideration the logistical costs of delivering judicial services to the public.⁶

Even if these funds were allocated this Legislative session, it would take time for the Judiciary to hire qualified staff for the new positions and be in a position to provide the judicial services envisioned by the bill. Even with immediate attention, the Judiciary estimates that between nine (9) and twelve (12) months would be required before the new judges and staff would be fully integrated into the judicial foreclosure process. In the interim and/or alternative, with no additional funding, the existing court staff will be required to process the new cases presented.⁷ This would significantly delay the timely provision of judicial services and ultimately, the public would bear the consequences of inadequate funding of the bill.

B. Requiring the Borrower to Become the Plaintiff and Lender to Become Defendant May Be Confusing to Borrowers Who Are Not Represented by Attorneys

The proposed conversion complaint requires the borrower to become the "Plaintiff" and the lender to become the "Defendant." The Judiciary believes that this portion of the bill can result in procedural confusion, especially for those who are not represented by attorneys. Because the lender is still in the position of seeking foreclosure, it makes sense to have the lender retain the title of "Plaintiff," similar to normal judicial foreclosures. This would avoid any unintended conflicts with various court rules and procedures that use the terms "Plaintiff" and "Defendant" to define various duties to the court and others. For example, traditionally the "Plaintiff" bears the burden of proof; this measure might lead to confusion about which party bears the burden of proof.

Thus, in the event this measure passes, to avoid confusion, the Judiciary respectfully suggests that (a) the "complaint" form be changed to a "Notice of Conversion" ("notice"); and (b) a provision be added to require that after receiving the notice, the lender, in order to proceed with the foreclosure, must file a complaint, in accordance with the rules of court, no later than 30 days after having received notice. The process can then follow the usual course for judicial foreclosures.

⁶ As previously noted, the moratorium may also result in a large influx of cases when the moratorium is lifted.

⁷ It is also unclear whether the bill's filing fee for the conversion complaint would include other costs, surcharges, and other fees associated with filing a complaint.



House Bill No. 1411, H.D. 2, S.D. 1, Relating to Mortgage Foreclosures
Senate Committee on Ways and Means
March 30, 2011
Page 6

Finally, the proposed language requires the lender to serve notice of the non-judicial foreclosure "in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure" However, the rules of court are generally applied only after a party has initiated a court case. From an operational standpoint, we would like to avoid the parties' confusion and incorrectly assuming that the person initiating and serving notice of the non-judicial foreclosure must also make a proof/return of service filing or any other filings in court.

In conclusion, the Judiciary would like to be able to provide meaningful assistance. However, as currently drafted, the bill does not provide for sufficient funding and adding to the Judiciary's caseload without adequate funding may actually compound the problem. Until sufficient funding is provided, we must respectfully oppose this bill.

Thank you for the opportunity to testify on this measure.



THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Consumer Protection and Commerce

Representative Robert N. Herkes, Chair
Representative Ryan I. Yamane, Vice Chair

House Committee on Judiciary

Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair

Wednesday, March 16, 2011, 2:00 p.m.
State Capitol, Conference Room 325

by

Elizabeth Kent

Director

Center for Alternative Dispute Resolution

Bill No. and Title: Senate Bill No. 651, S.D. 2, Relating to Mortgage Foreclosures

Purpose: The purpose of the bill is to create a mandatory foreclosure dispute resolution process conducted through the center for alternative dispute resolution within the Judiciary to avoid or mitigate the damages of foreclosure.

Judiciary's Position:

The Judiciary supports the intent of the bill -- facilitating the resolution of foreclosure disputes, whether by action or by power of sale, of residential real property that is occupied by the mortgagor as a primary residence. However, there are significant concerns that must be addressed, both of a general and specific nature, before the Judiciary can support the process outlined in this bill. Most notably, sufficient financial resources must be provided to implement the process.

General Concerns

Sufficient financial allocation to run an effective program. The bill provides for a foreclosure dispute resolution special fund to be administered by the Judiciary; makes an initial appropriation for the establishment of the program; and provides that fees collected from the



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 2

mortgagors and mortgagees be deposited into the special fund. While the amount of the initial appropriation has been left blank, the start-up costs must include sufficient funds to contract for program design, staff, workspace, and related overhead expenses. The Center for Alternative Dispute Resolution (Center), like other Judiciary programs, has absorbed serious cuts in both budget and staff. There is not sufficient staff, budget, or workspace to absorb the foreclosure dispute resolution program within current allocations.

The fees charged to the parties would generate \$400 per case. There is a funding mechanism in the bill that would require the payment of an unspecified fee upon the filing of certain documents, and those fees would be placed into the foreclosure dispute resolution special fund. These fees, which will be collected by entities other than the Center (which will administer the program), must be set high enough to generate sufficient income to cover the costs of the program. It is expected that this program would be costly to run, certainly considerably more than \$400 per case.

Section 10 of the bill allows for an initial appropriation from the general fund to be repaid upon receipt of sufficient moneys to sustain the program. This initial appropriation must be sufficient to cover program costs, as it will take time for the fees noted above to accumulate to a point at which the fund will be adequate to support the program.

Impact of a moratorium. The Judiciary anticipates that if the moratorium is implemented, there would be a large number of cases at the start of the program and filed in the courts when the moratorium ends. If there are an overwhelming number of cases when the program starts up, there may be delays and unanticipated impacts on court operations as well, to the detriment of the public. More about the Judiciary's concerns about court operations is contained in testimony in response to Senate Bill No. 652, S.D. 2.

One way to address this concern regarding this program would be to add a section stating that the program is only available to foreclosure actions commenced after the effective date of the Act. Another way to address it would be to require owner occupants to choose between a conversion to a judicial foreclosure action or dispute resolution, as set forth in HB 1411, H.D. 2. Though we would like to assist in the currently pending actions, without sufficient funding, we will be unable to provide effective assistance.

Particularity that may be better addressed by court rules. Many provisions of the bill are quite detailed, and enactment of this kind of detail might hamper the program's ability to be flexible and to make appropriate changes between legislative sessions. The Judiciary suggests that many of the programmatic details may be better addressed by Supreme Court rules or through procedures adopted by the Center. The Judiciary also notes that this draft variously refers to rules enacted by different judicial entities (e.g., the Chief Justice and the Supreme Court). The Judiciary suggests that the proper entity to formulate the rules would be the



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 3

Supreme Court and notes that there are procedures for enactment of Supreme Court rules that allow for input from the public.

Imposition of extraordinary duties on the Center that can be better performed by the parties or other entities. There are numerous provisions of the bill that impose duties on the Center for which it has no staffing or expertise. In most cases, the parties are well-equipped to assume these duties.

For instance, Section 667-D(c) would require that all foreclosure proceedings be stayed effective upon receipt by the Center of a notice of election to pursue dispute resolution. However, the Center does not currently file and process public documents, so it is unclear how other entities would know that such a stay had been effected. Similarly that same section requires the Center to determine the appropriate entity (the court, bureau of conveyances, and/or the land court) if a mortgagor elected to waive dispute resolution or fails to give notice within a specific time. There are other examples of this throughout the bill, as noted below. The Judiciary suggests that whenever possible, the burden of notification and notice should be on the parties to the dispute and not on the Center or its designee.

Specific Concerns

Form of dispute resolution (Section 667-A, page 3, line 13 and throughout the bill). This bill contemplates a process of dispute resolution not defined elsewhere in the Hawaii revised statutes or commonly used in Hawaii. However, the term "facilitator" has many other meanings and thus may lead to confusion. The Judiciary suggests substituting the term neutral instead.

Certain important terms not included in the definitions provisions (Section 667A, page 3). The Judiciary notes that this bill does not define the terms "owner occupant," "primary residence," and "residential property," and these terms are essential to the interpretation of the bill.

Center or its designee (Section 667-B(b), at page 4, line 3). In order to increase options for delivery of all services, the Judiciary suggests that the term "or its designee" be inserted into the next draft of this bill. This would permit the Center to contract with neutrals and others to provide dispute resolution and other services that may become necessary.

HUD approved local housing counsel agency (Section 667-C(b), at page 4, line 18). It is very important for mortgagors to receive as much information as possible about their options in order to prepare for their dispute resolution session. One potential bottleneck in this system will be if there are not sufficient HUD approved counselors to provide services to mortgagors. Therefore, the Judiciary suggests that contact information for all HUD approved counseling



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 4

agencies in Hawaii be provided in the Notice of Dispute Resolution in order to provide more options for mortgagors.

Parties provide notice to each other as well as the Center (Section 667-C(b)(4), at page 5. The notice should note either that the mortgagor has to provide this information to the mortgagee as well, or the last phrase should be deleted so that it is clear that the information must be provided as part of participation in the program.

Notification to the Center that a party elects to participate (Section 667-D). Pursuant to the current draft, the Center will learn of a mortgagor's election to participate in dispute resolution when the mortgagor contacts the Center. Without information from the mortgagee that an action was initiated, it will be challenging to determine the time frame for timely return of the notice, as well as information about the parties involved in the action. Additionally, there is no provision stating that the court, bureau, or land court need to be notified of the participation in dispute resolution, although there is a requirement of notice of waiver or failure to respond within the time specified. Again, without knowing when an action is commenced by the mortgagee, the Center will not be able to determine if the response is untimely. The Judiciary suggests that the determination of an untimely response should fall on the parties and not the Center.

Sharing of information (Section 667-E(b), at page 7, line 3). This provision states that the mortgagor and mortgagee must provide the Center with certain materials. This is a section that seems overly specific, with material that may be better left to Supreme Court rules. However, should the Legislature decide to keep the language, then it should be made clear that the parties must also share this information between and among themselves as well in order that they may prepare for the session.

Site and time allotted to session (Section 667-E(c), at page 7). If the Legislature needs to specify the length of time for each session, the Judiciary suggests that the session length be three rather than four hours. That would allow a neutral to conduct two sessions in a day. Also, the Judiciary suggests deleting reference to the site for the session.

Notification of failure to comply with program rules (Section 667-E (d) and (e), at pages 7-8). These sections place the burden on the neutral to determine and notify the appropriate entity -- the court, bureau of conveyances, or land court -- of a parties' failure to meet the requirements of this process. The Judiciary notes that this provision requires strict compliance on the pain the non-compliant party loses rights to relief. Requiring strict compliance may be a trap for unsophisticated homeowners and provide grounds upon which to challenge the neutral who is not strict. For instance, must a neutral impose sanctions if a party fails to attend a session due to illness or because the party was in an accident on the way to the session? This is an example of sections that would be better left to Supreme Court rule. Additionally, the burden of notification should be on the parties and not on the Center or the neutral. The Center's role



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 5

should be limited to supplying or filing such a report, with notification to the proper entity to be undertaken by the parties.

The Judiciary also notes that there may need to be imposition of lesser sanctions for noncompliance with other Program rules.

Notification of compliance with program rules (Section 667-E(f), at page 8). This section requires the neutral to notify the appropriate entity when the parties have met the requirements of the program. s with the sections above, the Center’s role should be limited to supplying or filing such a report, with notification of the proper entity to be left to the parties.

Timing for notification of agreement prior to dispute resolution session (Section 667E-(g), at page 9, line 9). The Judiciary suggests deletion of the requirement of two days notification of settlement. Often parties settle just prior to a scheduled date, and all settlements should be encouraged. Settlement, even on the eve of a session, will save the parties and the neutral time.

Outcome of dispute resolution (Section 667-F(a), at page 9, line 17). The Judiciary suggests that the term “settlement agreement,” which is a commonly used term, be substituted for the term “resolution document.” This bill does not specify who should file this document with the appropriate entity, and the Judiciary, which is not problematic; the Judiciary notes that this obligation should fall upon the parties.

Filing of temporary modification agreement (Section 667-F(b), at page 10, line 13). As in the section above, the obligation of filing this document should fall on the parties.

Confidential materials (Section 667-G, at page 10). This section states that the public does not have a right to review “personal financial information” and “other sensitive personal information,” neither of which are defined, presumably excluding this information from Chapters 91 and 92.

ne definition of “personal information” include “data used to identify an individual or entity, or locate personal assets, income, or debts, and in which the individual or entity has a significant privacy interest, but does not include the address, electronic mail address, and telephone number provided for court contact and service of process. Personal information includes, but is not limited to, social security numbers, dates of birth, names of minor children, bank or investment account statements, financial records, property inventories, medical and health records, social service reports, and the like.” See Rule 2.18, Hawaii Court Records Rules. rule . notes that confidential means “not accessible. ynonyms include, but are not limited to, protected, restricted, and sealed.”



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 6

The Judiciary suggests that the open records law should not apply to this program, at least for the first year of the program.

Other charges included in fee (Section 667-I, at page 11, line 4). It is not clear if other charges may apply to the \$400 filing fee. For instance, it is not uncommon in alternative dispute resolution for there to be a nominal charge for participation by telephone to address additional administrative costs associated with use of the telephone. The Judiciary assumes that the party who participates by phone would incur the cost of the call, but may this charge be added to the fees. Also, the Judiciary assumes that the \$400 covers solely participation in the program and will be allocated to the foreclosure dispute resolution program, and that the \$400 does not cover other costs associated with filing a complaint, recording an affidavit, or recording a conveyance document, which fees are also deposited into the foreclosure dispute resolution special fund. Mortgagees may argue that they are being charged twice, for filing foreclosure documents and participating in the dispute resolution process. It also must be clarified that these charges are separate from those associated with filing a complaint in the court.

Rulemaking entity (Section 667-K, at page 11, line 17). The Judiciary suggests that the proper rule making entity is the Hawaii Supreme Court.

Rules re special fund (Section 667-L, at page 12, line 20). It is unclear what type of rules the Legislature anticipates will be adopted regarding distribution of moneys from the special fund.

Only one assessment per property (Section 667-l, at page 13, line 10). The provision notes that there shall be only one assessment per subject property, regardless of the number of filings related to that property. The Judiciary suggests that perhaps the intent of that provision was to apply to run with the parties on that particular piece of land while they are in a dispute related to that land, rather than with the land. If, for instance, the land changes hands, are the parties exempt from the filing fee because one had been imposed on that land earlier?

As a logistical matter, the Judiciary notes that determining a one-time fee will place a significant burden on court filing clerks and land court staff, and that they do not currently have a method to implement such a limited assessment.

Start up time required (Section 12, at page 24). The Judiciary estimates that it would take a minimum of six months to implement this program. The current draft establishes a moratorium on all foreclosure actions for property located in Hawaii for a period of six months after the effective date of the bill. It is unclear what effect is contemplated by creating a moratorium which expires before the proposed foreclosure dispute resolution program can be operational.

The Judiciary also notes that this draft contains a defective start date of July 1, 2050, for the Act.



Senate Bill No.651, S.D. 2, Relating to Mortgage Foreclosures
House Committee on Consumer Protection and Commerce
House Committee on Judiciary
Wednesday, March 16, 2011
Page 7

Sunset date. The bill does not contain a sunset date; the Legislature may want to consider a sunset date of two years.

Choice between conversion to judicial foreclosure or dispute resolution. The Judiciary requests that the Committee consider adding a provision similar to the provision in House Bill No. 1411, H.D. 2, requiring an owner occupant of residential property to choose between filing a judicial foreclosure and pursuing dispute resolution.

Thank you for the opportunity to testify on this bill.

Island Homes

Items

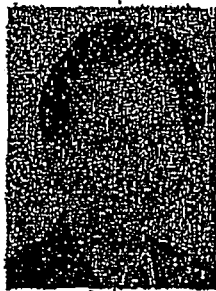
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Open Homes

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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

Continued on Page 2

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 foreclosures over the past year, including the year-over-year percentage gain:

2010	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	Kailua-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."

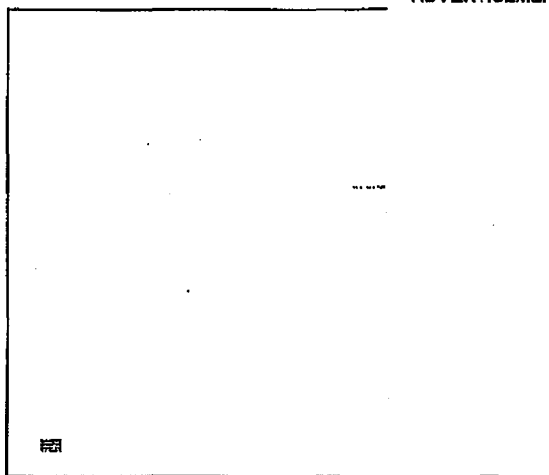
Hawaii's foreclosure level was close to the national average — 2.23 percent of housing affected by foreclosure last year — though Hawaii's rate was 11th highest.

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.

be counted on the same property in different months.

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.

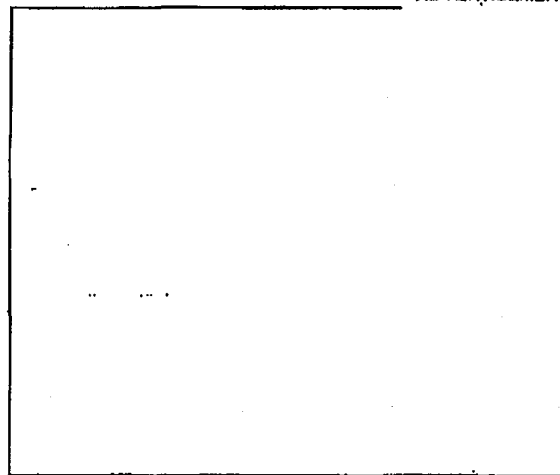
The number of foreclosure filings in December was 1,000. That was down 35 percent from 1,302 in the same month last year but was up from 877 in November.

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

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JUSTICE IN JEOPARDY

**THE IMPACT OF BUDGET CUTS AND
FURLOUGHS ON THE JUDICIARY, STATE OF HAWAI‘I
DECEMBER 2010**



TABLE OF CONTENTS

TABLE OF CONTENTS

A Message from Chief Justice Mark Recktenwald	1
Hawai'i State Courts at Work	2
Judiciary General Fund Appropriation	6
Hawai'i State Judiciary Expenses	8
Judiciary Budget Reductions	10
Specific Budget Impacts on the Courts	12



A MESSAGE FROM CHIEF JUSTICE MARK RECKTENWALD

These have been difficult economic times for all of Hawai'i, and the Judiciary has been no exception. In the last two years, the Hawai'i State Judiciary's general fund appropriation has been reduced by \$19.7 million (or 13.1% of its overall budget), while demand for Judiciary services has increased due to the impact of the difficult economy on our citizens. Furloughs alone have eliminated over 600,000 available staff hours of work.

These reductions have had substantial negative effects throughout the judicial system, by reducing, delaying and in some cases eliminating important services. Notably, Hawaii's families and most vulnerable citizens have been significantly impacted. The time it takes to process an uncontested divorce has doubled, and the wait time for children to participate in the Judiciary's Kids First program in Kapolei, which seeks to alleviate the impacts of divorce by having children participate in a group counseling session, has more than doubled.

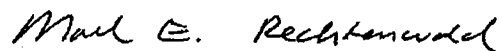
Budgetary reductions have also had negative effects in criminal cases. For example, 24 adult probation positions were eliminated in the First Circuit, including positions in high risk areas such as the sex offender unit and the domestic violence unit. Individual probation officers now supervise as many as 180 defendants, well above the nationally recommended ratio.

Justice has been delayed in civil cases as well. From FY2008 through FY2010, the median age of pending Circuit Court civil cases has increased by more than 40 percent. By delaying the time it takes to resolve civil disputes, the cost and uncertainty of litigation increases and our community's efforts at economic recovery are hindered.

Finally, the Judiciary's programs and services can save the public money in the long run. The cost of supervising a criminal defendant in the HOPE probation program, or providing intensive supervision and treatment through programs such as drug court, is far less than the \$137/day that it costs to incarcerate a defendant.

This report highlights some of the impacts that furloughs and budget cuts have had on the Judiciary's ability to fulfill its mission "to administer justice in an impartial, efficient, and accessible manner in accordance with the law."

Adequately funding the state court system is an investment in justice, and an investment in our democracy, that should not be compromised even during tough economic times.



Mark E. Recktenwald
Chief Justice

HAWAI‘I STATE COURTS AT WORK

The Hawai‘i State Judiciary resolves a wide-range of disputes facing our local community.

CIVIL JUSTICE

Hawai‘i residents and businesses rely on the courts to fairly resolve their civil conflicts. In FY2010, the Judiciary was involved with:

- ◆ 60,575 District Court civil cases including:
 - 44,292 Regular Claims Division cases (\$3,500 - \$25,000 damages range)
 - 6,141 Small Claims Division cases (up to \$3,500 damages limit)

- ◆ 37,251 Circuit Court civil proceedings including:
 - 14,090 condemnation, contract and personal injury cases
 - 8,736 probate proceedings
 - 6,938 conservatorship and guardianship proceedings
 - 1,422 trust proceedings
 - 6,065 land court, tax appeal and mechanic’s lien cases

“It is time to ensure that, in a country founded on the rule of law and the principle of access to justice, our judicial branch does not wither under the burden of financial stress...It is time for our lawmakers to recognize the value of our judicial branch as more than a line item in a budget. A strong judicial branch is essential to maintaining responsible government and protecting citizens’ rights.”

– Stephen N. Zack, President of the American Bar Association

CRIMINAL JUSTICE

The Judiciary strives to expeditiously and fairly adjudicate or resolve all criminal matters. In FY2010, the Judiciary was involved with:

- ◆ 68,041 criminal traffic cases including:
 - 13,593 DWI/DUI cases
 - 1,264 reckless driving cases
- ◆ 94,479 District Court criminal cases including:
 - 9,413 larceny/theft cases
 - 6,154 assault cases
 - 2,169 vandalism cases
 - 1,349 prostitution cases
 - 4,096 narcotics cases
 - 1,232 sex offense cases
- ◆ 17,220 Circuit Court criminal cases including:
 - 178 murder & manslaughter cases
 - 97 forcible rape cases
 - 1,602 aggravated assault cases
 - 1,235 burglary cases
 - 2,686 larceny/theft cases
 - 3,633 narcotics cases

"[A]s a practicing litigator, I can share with you the impact that the budget cuts on the Judiciary have caused. Among my case load, I have a case that is about four years old that has been ready to go to trial since late last year. It has been delayed because of the backlog of criminal trials and was recently reset to [redacted], 2011 - a year away. Many of my colleagues are reporting similar occurrences. The Judiciary allows economic, political and social life to function properly and it must be spared any further budget cuts."

- An attorney in private practice

FAMILY COURT

The Family Court hears all legal matters involving children, such as delinquency, waiver of jurisdiction, status offenses, abuse and neglect, termination of parental rights, adoption, guardianships, and detention. The Family Court also hears domestic relations cases, including divorce, domestic violence, temporary restraining order, nonsupport, paternity, and uniform child custody jurisdiction cases. In FY2010, the Family Court workload involved:

- ◆ 57,696 Family Court proceedings including:
 - 10,761 divorces
 - 5,150 domestic abuse protective orders
 - 1,604 child abuse and neglect cases
 - 926 adoptions
 - 3,674 paternity cases
- ◆ 1,557 foster custody cases
- ◆ 2,326 juvenile probation cases

“As a current participant, the Family Drug Court program has helped me do things I never thought I could do. I have learned the skills I need to remain clean and sober for the rest of my life...Without the support and instruction given to me by the Family Drug Court, I would not have the hope I have in my life today, and I am currently on the path to being reunified with my children... I will continue to battle this disease of addiction with the skills the Family Drug Court has armed me with and my children will never return to the foster care system.”

- Family Drug Court participant

TREATMENT COURTS

Many criminal defendants have substance abuse and/or mental health issues. When appropriate, the Judiciary provides these defendants with probation and treatment in lieu of incarceration. Treatment can help defendants live a clean and sober life, allowing them to reunite with their families and become productive citizens. In FY2010, the Judiciary's treatment courts served 1,085 clients statewide. The strength of the treatment courts lies in their ability to lower recidivism rates and costs to the State of Hawai'i. Less recidivism means less court and incarceration costs. Hawaii's Adult Drug Courts have an average recidivism rate of about 8 percent as opposed to a recidivism rate of 50 percent for those persons on general probation. The cost of treatment in these courts averages about \$5,000 per client per year as opposed to a cost of about \$50,000 per year for incarceration.

PROBATION

Most convicted criminal defendants are sentenced to probation in lieu of or in addition to incarceration. The Judiciary supervises probationers to reduce recidivism and encourage the rehabilitation and reintegration of these individuals into the community. In FY2009, the Judiciary's 129 probation officers supervised:

- ◆ 20,586 probationers
- ◆ 23,534 cases

"It makes social and economic sense to provide treatment rather than incarceration when appropriate. Treatment courts besides being cost effective are a major tool in breaking the cycles of substance abuse, domestic violence and many other social issues facing our state."

- Dee Dee Letts, Treatment Court Coordinator

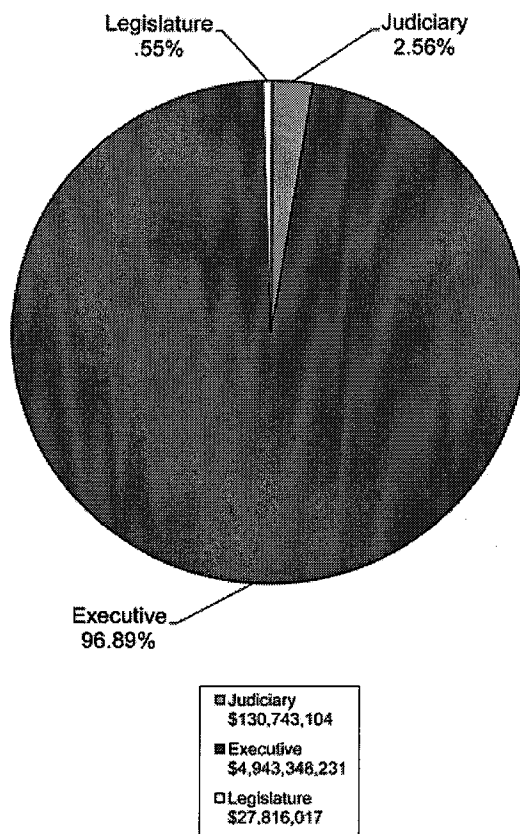
"Due to the limited number of slots available, we have a waiting list to get into Mental Health Court. There are not enough resources in the community for treatment and housing which puts defendants and community at risk."

- Louise Crum , First Circuit, Adult Client Services, Mental Health Court

JUDICIARY GENERAL FUND APPROPRIATION

The Judiciary's Hawai'i general fund appropriation is its most important funding source, accounting for over 90 percent of its funding. The Judiciary receives less than three percent of Hawaii's general fund appropriations.

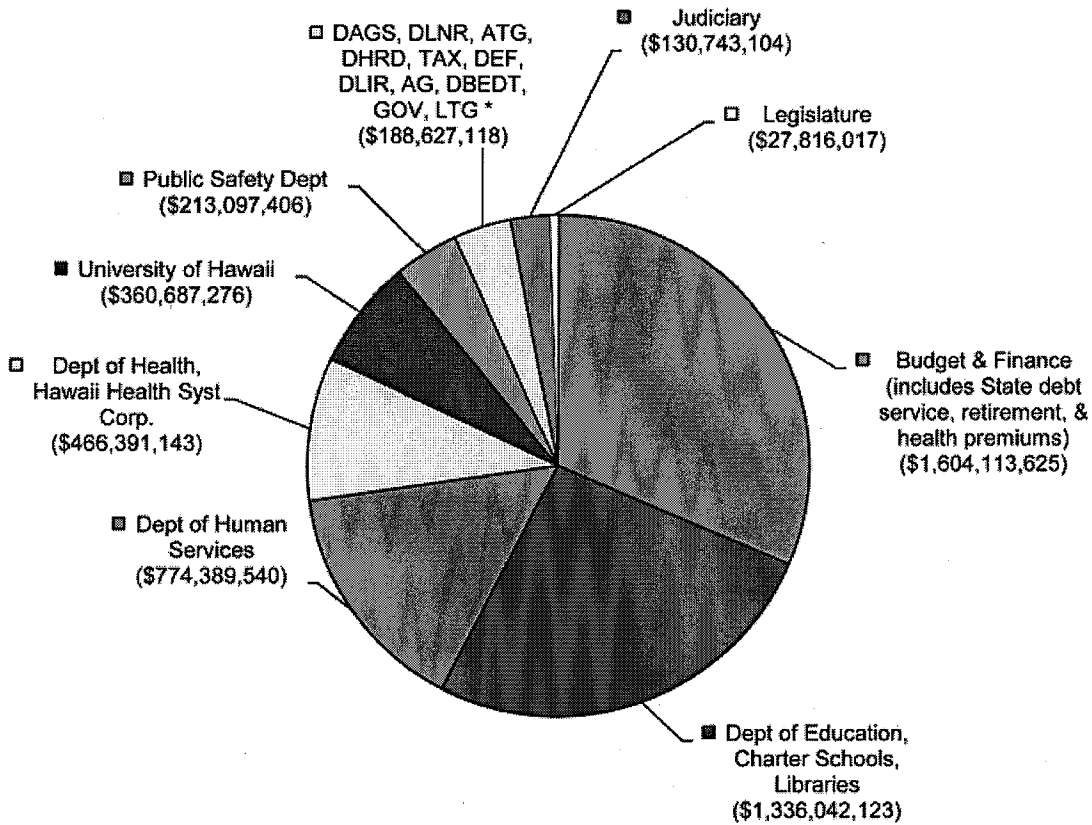
**Hawai'i General Fund Appropriations
(FY2011)**



“The Legal Documents Branch of the Circuit Court on O’ahu receives, files and processes, on average per year, approximately 300,000 original documents, depositions, and exhibits (approximately 116,000 Family Court, 80,000 criminal and Family Court criminal, and 104,000 civil documents, depositions, and exhibits).”

- Lori Okita, First Circuit, Legal Documents Branch 1

FY2011 Hawai'i General Fund Appropriations (\$5,101,907,352)

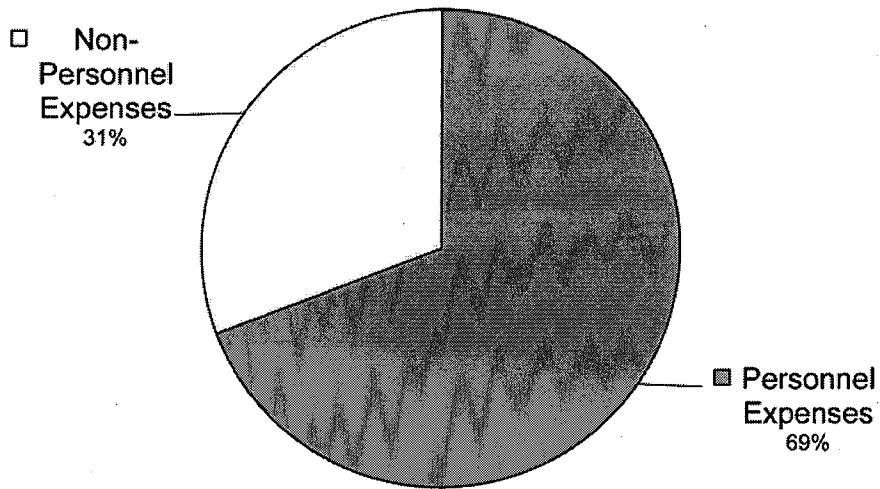


* Dept of Accounting & General Svcs
 Dept of Land & Natural Resources
 Dept of Attorney General
 Dept of Human Resources Development
 Dept of Taxation
 Dept of Defense
 Dept of Labor & Industrial Relations
 Dept of Agriculture
 Dept of Business & Economic Development
 Office of the Governor & Lt. Governor

HAWAI‘I STATE JUDICIARY EXPENSES

The Judiciary uses its general fund appropriation to pay its 1,900 employees, operate its 21 facilities, and provide court services to thousands of Hawai‘i residents each year.

**Judicial Branch Expenses
(FY2011)**

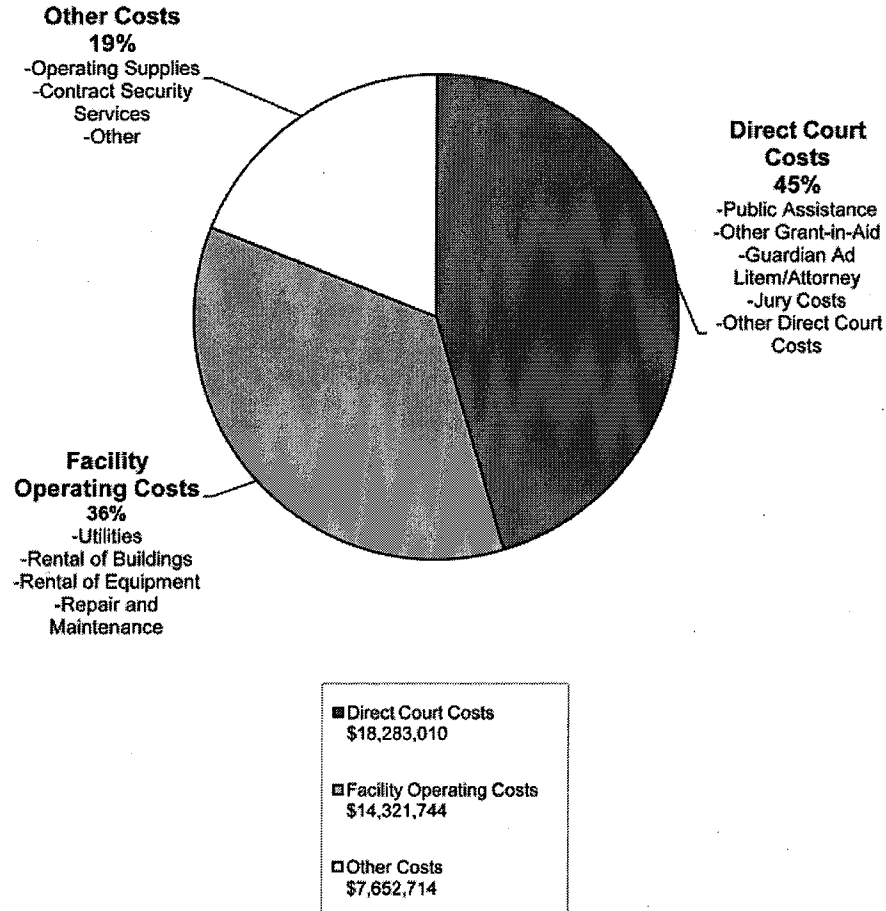


■ Personnel Expenses	\$90,485,636
□ Non-Personnel Expenses	\$40,257,468

“Our greatest concern is that the furloughs negatively impact our system’s response/coordination of cases involving children who are alleged victims of abuse or who are witnesses to crime. For example, delays in scheduling forensic interviews of these young victims and witnesses may result in concern for their safety. Justice may not be served for the crimes.”

- Jasmine Mau-Mukai, Children’s Justice Centers of Hawai‘i

Judicial Branch Non-Personnel Expenses (FY2011)



“The ‘Achieving Access to Justice for Hawaii’s People: The 2007 Assessment of Civil Legal Needs and Barriers to Low- and Moderate-Income People in Hawaii Report’ found that due to a lack of resources legal service providers are able to assist only one of three of those who seek their help. Since 2007 it has only gotten worse, resulting in more persons appearing in court without representation. Greater resources are required from the Judiciary to assist these persons to navigate the court system.”

- Judge Daniel Foley, Chair, Access to Justice Commission

JUDICIARY BUDGET REDUCTIONS

FY2009

- ◆ Judiciary's general fund appropriation was \$150.5 million
- ◆ The Legislature applied a 7 percent reduction (about \$1 million) in discretionary costs to the Judiciary's core budget base
- ◆ The Legislature provided Capital Improvement Program (CIP) funding of about \$13.8 million
- ◆ The Legislature took \$1 million from the Computer System Special Fund to help balance the state general fund budget deficit

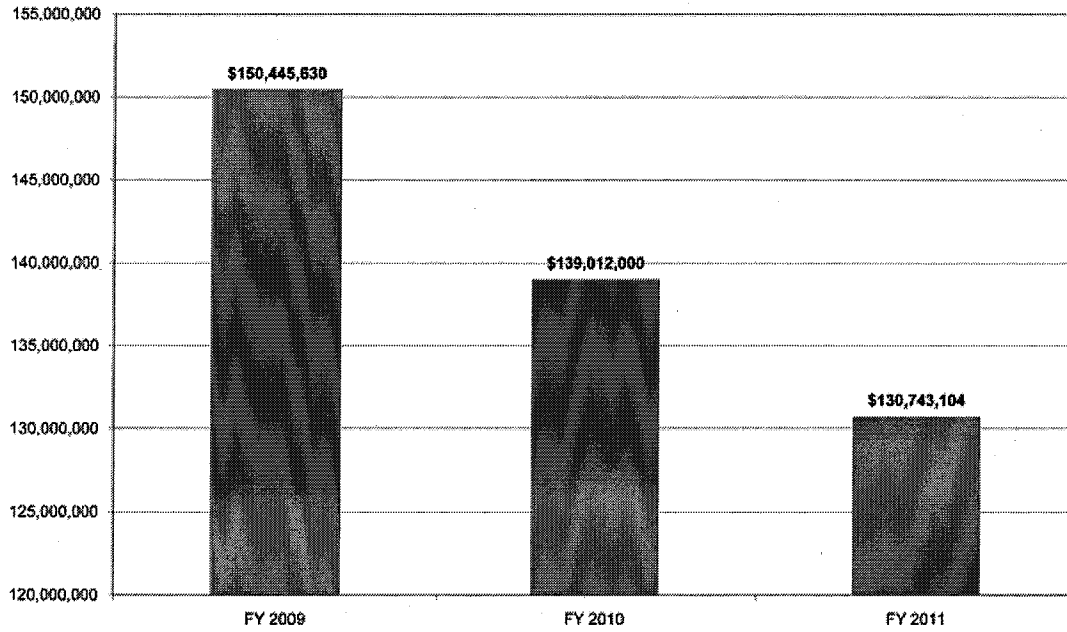
FY2010

- ◆ Judiciary's general fund appropriation was reduced to \$139 million, \$11.5 million lower than in FY2009
- ◆ The Judiciary initiated furloughs for its employees
- ◆ The Legislature reduced the salaries of state judges by 5 percent
- ◆ The Legislature eliminated 79 vacant positions
- ◆ The Legislature authorized \$2 million and 22 positions to staff the Kapolei Judiciary Complex
- ◆ The Legislature provided a one-time \$2.5 million ceiling increase for the Computer System Special Fund
- ◆ The Legislature provided CIP funding of about \$9.8 million

FY2011

- ◆ Judiciary's general fund appropriation was reduced to \$130.7 million, an \$8.3 million reduction from FY2010
- ◆ No CIP funding was provided as the Legislature indicated it would wait for the results of the Judiciary's Facilities Master Plan Study
- ◆ The Legislature allocated an additional \$2.5 million to the Judiciary for domestic violence (\$1 million) and legal/treatment service providers (\$1.5 million)
- ◆ The Legislature authorized the transfer of \$2 million in funds from the Computer System Special Fund and \$1.5 million from the Drivers Education Fund to the general fund

Judiciary General Fund Appropriations
 (including collective bargaining & specific appropriations)



“We are unable to keep up with the demands and backlogs that occur in almost every area due to lack of manpower resources. The law enforcement divisions work 24/7 and are making arrests and issuing citations around the clock. With the economic downturn, there are more lawsuits being filed thereby increasing the courts’ caseloads. There are two less work days a month due to the furloughs, however, the workload has increased.”

- Iris Murayama, First Circuit Court, Deputy Chief Court Administrator

SPECIFIC BUDGET IMPACTS ON THE COURTS

JUSTICE DELAYED

- ◆ From FY2008 through FY2010, there was a 28.4 percent increase in pending Circuit Court civil actions and a 19.6 percent increase in the number of cases filed. Since the budget cuts and furloughs, the median age of pending Circuit Court civil cases increased by 41.8 percent.
- ◆ From FY2008 through FY2010, the number of pending court foreclosure cases increased by 80 percent. The median age of pending foreclosure cases increased by 44 percent.
- ◆ From FY2008 through FY2010, there was a 98.2 percent increase in pending District Court civil actions and a 36.4 percent increase in the number of cases filed.
- ◆ At the District Court of the First Circuit, furloughs and position reductions have resulted in substantial delays in scheduling hearings and trials. Traffic and DUI trials typically took 1-2 months to be heard prior to furloughs and now take 4-5 months to schedule. Trials in regular claims cases were scheduled within two weeks prior to the furloughs but now take 4-6 weeks to schedule.
- ◆ In the Family Court of the First Circuit, the time it takes to process an uncontested divorce has increased from 3-4 weeks, to 6-8 weeks since furloughs and budget cuts were implemented. The wait to schedule a mandatory session with the Judiciary's Kids First program in Kapolei has increased from 4 weeks up to 10 weeks. Filing for divorce can be the start of a traumatic process for a child that may involve physical relocation, a new school, financial insecurity and the inability to see one parent. Delays in processing divorce cases increase the stress that children experience.

"The judiciary is currently on a two day per month furlough system where, in addition to state holidays, the courts close for two workdays per month. Two days equate to 16 hours per month of court time. On Oahu, there are approximately 12 circuit court criminal divisions. As a result, the furloughs result in about 192 hours of lost court time per month for the circuit court criminal calendar on Oahu. Conservatively speaking, that time could accommodate approximately 8 average-length criminal jury trials, 192 evidentiary motions, 384 plea hearings or 576 non-evidentiary motions. This is an illustration of the very direct and serious consequences that budget shortfalls are having on the criminal justice system."

- John M. Tonaki, Office of the Public Defender

MORE SELF-REPRESENTED LITIGANTS

- ◆ More Hawai'i residents are entering the court system without the benefit of an attorney. Even with reduced hours and resources, the Judiciary's Ho'okele service centers on O'ahu assisted 103,009 self-represented litigants in 2009, a 5.6 percent increase from the year before.
- ◆ The Fifth Circuit Service Center in Lihue opened in March 2008 to assist self-represented litigants with court forms and questions about court procedures. It was closed in December 2008 due to staffing shortages.

COURT SERVICES REDUCED

- ◆ In 2005, the Honolulu Traffic Violations Bureau was open five nights a week to serve the public after working hours. It is only open one night a week now. In the near future, it will probably close at night altogether, requiring more non-criminal defendants to take off from work to resolve their cases.
- ◆ Due to a staffing shortage by the Department of Public Safety's Sheriff Division, there were not enough sheriffs to provide security for Judiciary facilities on the Big Island. The Judiciary was forced to close the North Kohala, Hamakua, and Ka'u rural courts in October 2010, requiring court customers to make a 20-60 minute drive to a courthouse.

"Increasing numbers of self-represented litigants in civil cases receive less in terms of court services because they are often disadvantaged due to lack of education, language barriers, and/or sometimes suffer from mental health issues."

- Judge Barbara Richardson, Deputy Chief Judge, District Court

PROBATION STAFFING ELIMINATED

- ◆ In the Client Services Division of the First Circuit, 24 positions were lost last year due to budget cuts, including positions in both the Sex Offender Unit and the Domestic Violence Unit. These units work with some of the most dangerous offenders who are at a higher risk than others to recidivate. According to the American Probation and Parole Association, the caseload standard is 30:1 to 120:1 depending on the risk level of the probationer. In Hawai'i, the ratio of cases to probation officers is as high as 180:1.
- ◆ Furloughs also are affecting public safety. Our probation officers have 24 fewer days a year to supervise offenders. As a result, revocations of probation are being delayed, and probation officers are unable to provide the level of supervision necessary for certain clients because there are fewer hours in the week to monitor the same, or increasing, numbers of probation clients.

EFFECT ON FAMILIES AND VICTIMS

- ◆ To efficiently use public funds, the Judiciary contracts with external entities to provide services that are not performed internally. These contracts were cut by more than \$2.8 million in FY2010 to balance the Judiciary budget. The contracts involve the purchase of assessment and/or treatment services for substance abuse, child sex abuse, and mental health, as well as domestic violence emergency shelter services, juvenile client and family services, anger management, victim impact classes, and more.
- ◆ The reduction in purchase of service (POS) contracts has resulted in fewer social services for crime victims. For example, reduced Judiciary funding of Catholic Charities Hawai'i in FY2010 resulted in the loss of two positions which led to 165 fewer child sexual abuse clients being served compared to the previous year.
- ◆ Cutting treatment court budgets has resulted in taxpayers having to pay more, not less. As a result of the budget cuts, 5 of the 11 treatment courts have waitlists for admittance due to a reduction in the programs' capacity. Many people on a waitlist are incarcerated at a cost of \$137 per day to taxpayers as compared to about \$14 a day when they are in a treatment court.

- ◆ In FY2010, the Judiciary's Maui/Moloka'i Drug Court program lost four full-time equivalent (FTE) positions after it had its annual allocation cut over \$420,000. There is now at least a 13-month wait for men to receive drug treatment services on Maui. The wait for treatment was already between 8 and 12 months in May 2008 when the Legislature authorized four FTE positions to reduce the delay.
- ◆ Due to budget cuts, Drug Courts have had to reduce electronic and voice monitoring of clients by 30 percent. Since monitoring is used to ensure clients' compliance with curfew restrictions, the decrease in monitoring reduces community safety and increases the likelihood of clients relapsing. Furthermore, the Oahu Adult Drug Court lacks sufficient funding to accept new clients who need residential treatment after March 2011 until the start of the next fiscal year.
- ◆ The budget cuts forced a reduction to the Judiciary's POS contract for mediation and other dispute resolution services. The Mediation Centers of Hawai'i are now expected to provide services for approximately 3,100 cases, as opposed to 4,000 prior to the reduction in the contract amount for the POS. Mediation is provided in many types of cases including domestic and family, landlord/tenant, temporary restraining orders, and neighbor disputes.

"I felt all was lost and no one could help let alone begin to understand the difficulties I was facing. It is because of Girls Court that I now know that I am not alone...Help had finally arrived...I do not wish to imagine what our lives would be like had Girls Court not intervened. I implore that additional funding be granted so that this program may continue its vital work in helping young ladies and their families."

- Girls Court participant



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
Wednesday, March 30, 2011 at 9:30 a.m.
Testimony on HB 1411 HD2 SD1 Relating to Mortgage

In Opposition

TO: The Honorable Chair David Ige
The Honorable Vice Chair Michelle Kidani
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 1411 HD2 SD1. HBA is the trade organization that represents all FDIC insured depository institutions with offices in Hawaii.

While HB 1411 HD2 SD1 is an improvement over the HD2 proposal, we are still opposed because of its potential deleterious effect on the economy by harming the mortgage market, which would harm consumers, all participants in the housing market, and our state's economic recovery.

All lenders with Fannie Mae loans participate in the Federal Home Affordable Modification Program (HAMP) 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 to a diminution of the value of their house and a reduction in income caused by unemployment or underemployment. So in most cases foreclosure mediation does not really solve the underlying problem of loss of income and declining housing value.**

In analyzing the foreclosure related bills, it is important to distinguish between the impact on mortgage loans already made and those to be made in the future. **Impact on loans to be made in the future is the most troubling and causes the largest potential for harm to Hawaii.**

The other foreclosure related bill SB 651 SD2 HD1 contains many other troubling provisions that would have the unintended consequences like: requiring larger down payments; fewer borrowers able to qualify for loans; higher interest rates; depressed property values delaying economic recovery (which harms sellers and neighborhoods); flood of foreclosures down the road. This would just further delay Hawaii's economic recovery.

Mortgage Market Highlights and Changes

There are two mortgage markets. One is the government market which is about 90% of the market today. Those are mortgages bought/insured by Fannie Mae, Freddie Mac and the FHA. These entities are government sponsored enterprises (GSEs), which are regulated by the Federal Housing Finance Agency (FHFA). Fannie Mae and Freddie Mac are under government conservatorship.

The other is the private market. This market can be further subdivided into two subsections: a) the securitized market involving private investors; and b) the local market where local banks and credit unions make loans which they do not sell to the GSEs, but retain on their books. Depending on market

conditions, the local private market can be 10% to 25% of mortgages made in Hawaii. This market is characterized by more **flexible** pricing and underwriting. It is clear that lending by local banks/credit unions for their own portfolio make a critical difference on mortgage loan availability, which helps to foster a healthy real estate market.

The government market pricing and underwriting requirements are uniform nationally. The uniformity works against flexibility in underwriting. It makes underwriting a science and not an art. For example, the Fannie Mae minimum FICO credit score is 620, if your score is 619, then you are not eligible for a Fannie Mae loan, but, a local lender can make the loan for its own portfolio. Fannie Mae has loan limits, while local lenders making portfolio loans have loan limits based on Hawaii housing prices. Federal legislation has been introduced to eventually limit GSEs to a \$417,000 loan limit, which would not even finance a median priced home on Oahu unless the borrower can make a large down payment. Thus the loan limit flexibility of local lenders will become more important in the future.

It is clear that the government market will diminish. The Obama administration proposed three options for getting the government out of the mortgage business. One impact admitted by Treasury Secretary Geithner will be that it will be much harder to get a fixed 30-year mortgage loan. Thus, a substantial source of mortgage funds will be provided the private market and not the government.

The local source of loans will take on greater significance as the mortgage market undergoes a radical transformation over the next several years because the role of the GSEs in mortgage financing will be heavily reduced and it will be up to the private market to bear the brunt of making mortgage loans. **As GSEs loans are harder to get, the local lending source becomes more important, especially for condo loans** The only question is the speed of the transformation and the ultimate structure of the mortgage market.

Loan availability is so important that a strong consumer advocate, Center for Responsible Lending, argued against a proposal by GSEs to raise down payment requirements from 3% to 10%, since it would diminish loan availability for middle to lower income people. The Center stated there are less concerned about loans made recently because mortgage lending has become more traditional and prudent, thus minimizing foreclosure concerns.

It is important to preserve the mortgage funding sources, and that really means the both the out of state private and local sources, because lack of loans means lower home prices and eventually more foreclosures.

Opt-In Dispute Resolution aka Mediation

The mediation provisions, unless subject to a quick sunset, is much more problematic for our economy because it does affect future loans. Mediation should be on an opt-in basis like Nevada and mediation should only apply to owner-occupant non-judicial foreclosures and not judicial foreclosures. Further, if federal laws are enacted to require pre-foreclosure modification attempts, then lender should not be required to go through mediation.

It is our understanding that the Judiciary and the Department of Commerce and Consumer Affairs have just developed a proposal regarding the dispute resolution process. We need more time to review this proposal before we can offer any comments.

HAMP and other proprietary modification programs that are done pre-foreclosure have worked better than those made post-foreclosure filing. The most obvious reason is that the success of a loan modification depends heavily on an **early workout before foreclosure is initiated.**

Mediation is a post-foreclosure loan modification attempt, not a pre-foreclosure loan modification attempt. That alone is a big difference. By the time, the mediation occurs; it is likely that the borrower will be

severely delinquent because foreclosure is a last step for lenders and the longer a loan has been delinquent, the harder it is to do a successful loan modification.

Another reason for mediation's lack of success: As long as the mediator or the court acts as an arbitrator, using its powers such as the power to declare lack of "good faith" to leverage an unwanted loan mod, it is likely to fail because the loan mod will not be well thought out. A loan mod is a loan underwriting process, and absent a mediator who is an experienced loan underwriter, the substitution of the mediator or court's judgment for a knowledgeable lender's judgment is not likely to be successful.

In no case, should mediation be used as another way for a borrower that that did not already qualify for a loan modification, be given the opportunity to delay collection of the loan. For that reason, a person who has been through the loan modification process and either has been denied a loan modification or failed to perform under a loan modification agreement should not be eligible for mediation.

The reason that most troubled borrowers do not qualify for a loan modification is the lack of income to pay a reasonable modified monthly mortgage payment. Also HAMP does not take into account the borrowers other debt payments, which means the likelihood of failure is greater. Mediation does not solve the problem of lack of income.

Improvements to the Bills

- **Carve out the local lenders** that have not been the problem to avoid adversely impacting the local private market. Otherwise, loan availability may be lessened which only lead to lower prices which eventually will lead to more foreclosures. A carve out based on asset size is clearly constitutional, and in fact, in banking, such exemptions are common, as seen for example in the President's financial regulatory reform bill.
- **Sunset the entire bill within two years.** The real problem are not the loans being made now especially because of the President's financial regulatory reform bill. Even the Center for Responsible Lending argued against a GSE proposal to raise the down payment requirement because it would lead to less loan availability, and it argued that newer loans posed less risk because less risky loans are being made.
- **Apply mediation only to loans made from 2003-2007.** Mediation should apply to loans made from 2003 to 2007. Most of the foreclosures are from that period, which was the peak of the sub-prime and non-traditional loans. California used this time frame

In Hawaii, the peak years of mortgage lending were from 2003 to 2006 and then it started to drop off as shown below.

Year	Number of Mortgages	Amount
2001	51,356	\$11,507,107,833
2002	68,662	\$15,264,375,201
2003	109,597	\$27,689,785,752
2004	91,700	\$26,885,426,182
2005	95,233	\$32,784,085,210
2006	82,778	\$33,853,041,238
2007	68,261	\$34,917,997,981
2008	44,745	\$17,561,656,807
2009	46,988	\$20,904,414,932
2010	38,481	\$17,435,588,850

The mortgage data reflects both residential and commercial real estate transactions. It is a safe assumption that the number of mortgages is primarily residential loans, while the dollar amount may be distorted by larger commercial mortgages.

The out of state lender/servicer commonly mentioned in complaints from borrowers made approximately 60,000 loans during this period and for the last two years less than 3,000 loans per year.

By applying mediation only to loans made during the 2003-2007 period, should not affect loans to be made and thus should not impact the mortgage market. In fact, HAMP loan modifications are limited to mortgages originated on or before January 1, 2009. Since the bursting of the housing bubble, lenders have tightened up its loan qualifications, to prevent a recurrence of the present foreclosure mess.

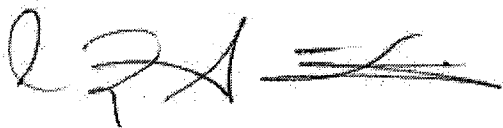
- **Limit Mediation to owner-occupant non-judicial foreclosures:** Continue to limit an opt-in mediation program to non-judicial owner-occupant foreclosures. The judicial foreclosure process is an already lengthy process with Judiciary oversight to insure fairness for borrowers.
- **Owner-occupant mediation eligibility:** In addition to retaining the provision if borrower elects mediation then the right to convert to a judicial foreclosure terminates, if the borrower already went through HAMP or any other federally mandated pre-foreclosure loan modification process, the borrower should not be eligible for mediation or conversion.
- **Limit Mediator aka Neutral Authority:** The mediator should not have the authority or leverage to force a loan modification on either the lender or the borrower. If the mediation is not successful, then the lender should be allowed to proceed with foreclosure without the need for the neutral to sign/file a document signifying the end of mediation.

If a neutral report is required, it should be done within 14 days after the conclusion of the mediation in order to prevent the neutral from withholding the report as leverage against the lender.

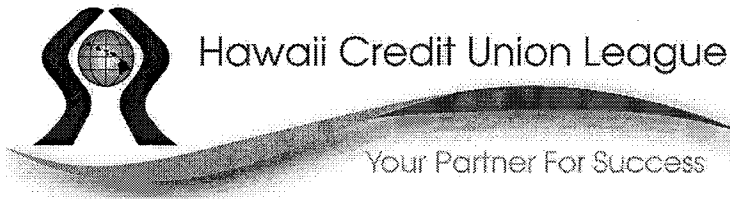
- **Eliminate Mediation Mortgage Documentation Requirements:** The mediator is not acting in a judicial capacity, therefore, the mortgage, note, etc., should not be required. The purpose of the dispute resolution session is about a loan modification and not about proper loan documentation. If there is a question of the servicer's authority to foreclose, the borrower should elect to convert to a judicial foreclosure to challenge the documentation.

This not a permanent problem and thus we do not think we should create a permanent "solution" to this temporary problem. We need to increase the number of jobs, not the number of foreclosed homes. We are sympathetic to the difficulty some borrowers are facing. An improving economy would benefit everyone. Homes 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, could have a negative impact on Hawaii economy recovery and may affect future borrowers by making it more difficult to qualify for a mortgage loan.

Thank you for the opportunity to provide our testimony.



Gary Y. Fujitani
Executive Director



1654 South King Street
Honolulu, Hawaii 96826-2097
Telephone: (808) 941.0556
Fax: (808) 945.0019
Web site: www.hcul.org
Email: info@hcul.org



Testimony to the Senate Committee on Ways and Means
Wednesday, March 30, 2011 at 9:30 a.m.

Testimony in opposition to HB 1411 HD2 SD1, Relating to Mortgage Foreclosures

To: The Honorable David Ige, Chair
The Honorable Michelle Kidani, Vice-Chair
Members of the Committee on Ways and Means

We are Stefanie Sakamoto and Frank Hogan, Esq., and we are testifying on behalf of the Hawaii Credit Union League, the local trade association for 85 Hawaii credit unions, representing approximately 810,000 credit union members across the state.

We are in opposition to HB 1411 HD2 SD1, Relating to Mortgage Foreclosures. Mainly, this bill would require a form of mandatory mediation (dispute resolution), before foreclosure action can take place. This bill would be extremely harmful to local lenders in Hawaii. In this difficult economic climate, credit is still extremely tight, as the economy has been slow to recover. This legislation has the ability to harm the mortgage market in Hawaii, which will in turn harm the housing market.

Credit unions have a long history of "serving the underserved", and do everything in their power to keep borrowers in their homes. Foreclosure is often the very last avenue that credit unions will take, after every option – such as loan modification - has been exhausted. Currently, 63 Hawaii credit unions offer mortgage loans. As of 2010, credit unions had approximately 23,000 real estate loans on the books. Out of those loans, credit unions currently only have 22 foreclosures in process.

It is agreed upon between proponents of the bill and lenders that the foreclosure problem in Hawaii was not caused by local lenders. Therefore, it makes sense that we be excluded from this legislation. We are in agreement with the proposed amendments from the Hawaii Bankers Association.

We ask you to consider the impact this bill will have on our ability to deliver low-cost services to our member base. This bill could raise the cost of loans, and could result in a smaller amount of people who can afford to purchase a home.

Thank you for the opportunity to testify.



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

March 30, 2011

The Honorable David Y. Ige, Chair
Senate Committee on Ways and Means
State Capitol, Room 211
Honolulu, Hawaii 96813

RE: H.B. 1411, H.D. 2, S.D. 1, S.D. 1, Relating to Mortgage Foreclosures

DECISION MAKING: Wednesday, March 30, 2011 at 9:00 a.m.

Aloha Chair Ige, Vice Chair Kidani, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, submitting written comments on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **supports the intent** of H.B. 1411, H.D. 2, S.D. 1, which: (1) authorizes the conversion of nonjudicial power of sale foreclosures to judicial foreclosures in certain cases; (2) authorizes recordation of notice of default and intent to foreclose; (3) specifies allowable locations for public auction of foreclosed properties; (4) specifies prohibited conduct; (5) requires suspension of actions by junior lienholders during the pendency of foreclosure; (6) provides that violations of Chapter 667 by foreclosing mortgagees shall be unfair and deceptive trade practices; (7) prohibits deficiency judgments after nonjudicial foreclosure; (8) specifies that the interest of a mortgagor is extinguished upon recordation of affidavit of sale; (9) imposes requirements for mortgage servicers including physical presence within the State; (10) creates dispute resolution process for nonjudicial foreclosures; (11) creates dispute resolution special fund; and (12) creates requirements for notice of default.

Overall, 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, Section 14 of H.B. 1411, H.D. 2, S.D. 1, which requires a physical presence in the State, may go too far in adding regulations, and may result in negative consequences for the real estate industry in Hawaii.

HAR provides the following specific comments on this measure:

Dispute Resolution: Section 18 of H.B. 1411, H.D. 2, S.D. 1, creates 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 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. As such, HAR supports an expedited process so that both mortgagee and mortgagor are able to come to a good-faith agreement.

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HAR further believes that as part of any proposed dispute resolution program, the mortgagor should be required to continue paying any property taxes and association fees until the dispute mediation program is concluded. It does not make sense for any other parties to bear the burden of the taxes and fees, and this will prevent homeowners from taking advantage of a dispute resolution program to avoid the payment of such taxes and fees.

HAR notes that there is an inconsistency between the alternative dispute resolution (Section 18) and notice provisions (Section 2, at page 8-11) in H.B. 1411, H.D. 2, S.D. 1. It is HAR's understanding that the intent of the bill is to make dispute resolution available for only non-judicial foreclosures. (The Senate Committee on Consumer Protection Committee Report SSCR 985 states that the bill specifies that "conversion to judicial foreclosure and mandatory alternative dispute resolution are mutually exclusive remedies for mortgagors in a foreclosure action.")

HAR does not take a position as to whether dispute resolution should be available for both non-judicial and judicial foreclosures. However, as drafted, the notice provision in Section 2 provides for mutual exclusivity, but the alternative dispute resolution section includes both non-judicial and judicial foreclosures.

Physical Presence of Mortgage Servicers: HAR expresses concerns regarding Section 14 of H.B. 1411, H.D. 2, S.D. 1, which requires that mortgage servicers licensed under §454M to 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 12 of H.B. 1411, H.D. 2, S.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. If the affiliate statement is not produced, future foreclosure notices may be invalidated. HAR believes that the existing protections in the law and added protections proposed by the bill may make Section 14 unnecessary. This could also lead to the unintended effect that certain mortgage servicers would no longer provide services in Hawaii.

Notice of Default/Intent to Foreclose: HAR supports the intent of clarifying notice provisions in a non-judicial foreclosure. Section 21 of H.B. 1411, H.D. 2, S.D. 1, amends notice requirements under §667-22, and adds the notice of the right to participate in dispute resolution and a statement on conversion allowing an owner-occupant to convert a non-judicial foreclosure to a judicial foreclosure.

Locations of Public Auctions: HAR supports the intent of Section 23 of H.B. 1411, H.D. 2, S.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.



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@hawaiirealtors.com

Postponements on Sale: Section 30 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 restart with public notices upon the forth postponement.

Repealing Part I and Amending Part II: Finally, HAR also **supports the intent** of language contained in H.B. 1411, H.D. 2 insofar as it 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.

Mahalo for the opportunity to submit written comments.





P.O. Box 976
Honolulu, Hawaii 96808

March 28, 2011

Honorable David Y. Ige
Honorable Michelle Kidani
Committee on Ways and Means
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB1411 HD2 SD1/ OPPOSED

Dear Chair Ige, Vice-Chair Kidani and Committee Members:

I chair the CAI Legislative Action Committee. CAI opposes HB1411 HD2 SD1.

HB1411 HD2 SD1 addresses perceived concerns about mortgage lenders but would adversely affect condominium associations. Numerous changes should be made to HB1411 HD2 SD1 if it is to move.

Associations deserve different treatment because they are non-profit entities that merely collect money to pay common expenses. They do not underwrite risk, choose who becomes an owner or profit.

Associations cannot control the actions of lenders and cannot be at the mercy of lenders who may or may not initiate remedies in a timely fashion to address the defaults of their borrowers. Thus, associations should not be prevented from the exercise of their independent remedies.

As written, HB1411 HD2 SD1 does not distinguish between for profit lenders and non-profit associations. The requirements of HB1411 HD2 SD1 should not, in any way, apply to (or affect) associations.

Thus, in the absence of substantial amendment, CAI respectfully requests that the Committee hold HB1411 HD2 SD1.

Very truly yours,

/s/

Philip S. Nerney

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

March 30, 2011

Senator David Y. Ige, Chair
and members of the Senate Committee on Ways and Means
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1411, HD 2, SD 1 (Mortgage Foreclosures)**
Hearing Date/Time: Wednesday, March 30, 2011, 9:30 A.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 submits comments on this Bill.

This Bill: (1) authorizes the conversion of non-judicial power of sale foreclosures to judicial foreclosures in certain cases; (2) authorizes recordation of notice of default and intent to foreclose; (3) specifies allowable locations for public auction of foreclosed properties; (4) specifies prohibited conduct; (5) requires suspension of actions by junior lienholders during the pendency of foreclosure; (6) provides that violations of chapter 667 by foreclosing mortgagees shall be unfair and deceptive trade practices; (7) prohibits deficiency judgments after non-judicial foreclosure; (8) specifies that the interest of a mortgagor is extinguished upon recordation of affidavit of sale; (9) imposes requirements for mortgage servicers including physical presence within the State; (10) creates dispute resolution process for non-judicial foreclosures; (11) creates dispute resolution special fund; (12) creates requirements for notice of default; (13) makes conforming amendments; and (14) makes appropriation.

These comments are 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 also contained in other bills. The HFSA believes 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.

Many of the provisions in this Bill are not part of the Task Force's recommendations. The HFSA contends that only the recommendations of the Task Force should be adopted by the legislature. Any other issues, such as what is in other portions of 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.

Here are our comments about this Bill:

1. Part I of this Bill (pages 3 through 26):

A. §§667-A through 667-E generally contain the Task Force recommendations with some minor additions. We support the intent.

B. §667-F (Location of public sale following non-judicial power of sale foreclosure) is not a Task Force recommendation, but we support this provision because of the urgent need to establish public locations for auctions.

C. §667-G (Prohibited conduct; unfair or deceptive act of practice), §667-H (Suspension of foreclosure actions by junior lienholders), and §667-I (Unfair or deceptive act or practice) are not the Task Force recommendations. We oppose these.

D. Section 3 (beginning on page 15) through Section 10 (on page 26) generally contain the Task Force's recommendations. We support the intent.

E. The provision on Page 20, line 11 is not a Task Force recommendation. It states that for non-judicial foreclosures notices sent by an association (such as a condominium association), the association can merely "mail the notice". We believe that this wording should be changed to require that the association should give notice "in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure". This suggested wording is used on page 20, lines 7 through 9, and is the Task Force's recommendation for situations where a mortgage lender needs to give non-judicial foreclosure notices.

2. Part II of this Bill (pages 26 through 36):

Part II has problematic provisions regarding invalid notices and affiliate statements, changes to the existing mortgage servicing statute (Chapter 454M), and changes to the alternate non-judicial foreclosure statute (Part II of Chapter 667). Part II of this Bill is not one of the Task Force's recommendations. We oppose these.

3. Part III of this Bill (pages 36 through 59):

Part III creates a "Mandatory Foreclosure Dispute Resolution" process for judicial and non-judicial foreclosures involving owner-occupants. This was not part of the Task Force's recommendations. We oppose these provisions. We believe that this new process will be unnecessary, 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.

4. Part IV of this Bill (pages 59 through 70):

Part IV attempts to revise on a piecemeal basis the alternate non-judicial foreclosure statute

(Part II of Chapter 667). However, these revisions don't even address all the provisions which make the alternate process unusable. Part IV is not one of the Task Force's recommendations. We oppose these revisions at this time.

Under Act 162 (which created the Task Force), the Task Force is to make recommendations to the 2011 and 2012 Legislature on various issues:

" ... the task force shall consider the following areas for possible improvements:

...
(6) Revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power of sale foreclosures."

This issue was addressed at the Task Force meeting on December 15, 2010. The Task Force members adopted a motion stating:

"The task force is in the process of reviewing and considering the item in more depth, but did not have sufficient time to consider and make specific recommendations, and is therefore making no statements on the merits of this item. Furthermore, the task force will address this item as part of its report to the 2012 Legislature and requests that the Legislature defer action on this and related matters until the 2012 regular session."

The Task Force should be allowed to review the provisions in Part IV of this Bill and in any other provisions in this Bill which purport to make changes to the alternate non-judicial foreclosure statute (Part II of Chapter 667). The Task Force can make appropriate recommendations to the 2012 legislature.

5. Part V of this Bill (pages 70 through 71):

Part V in Section 34 on page 70 would impose a 3 month moratorium on foreclosures. The concept of a moratorium was not part of the Task Force's recommendations. We oppose a moratorium because of the considerations below. These considerations also apply to the dispute resolution process proposed in Part III of this Bill.

A foreclosure of a delinquent mortgage loan is the last option for a mortgage lender. If a lender is not able to resolve the default with the borrower, the lender would want to have a foreclosure process that is not costly and not time consuming.

The number of foreclosures in Hawaii is affected by economic factors. Family problems (such as divorces) and medical expenses will always be factors in mortgage delinquencies. However, in a down economy, more borrowers will be unemployed or underemployed ... and they will be more likely to become delinquent in paying their mortgage loans. During the current down turn in Hawaii's economy, foreclosures have been increasing.

There should not be permanent legislative fixes to temporary problems. Hawaii will not always have the same amount of foreclosures as the present. In considering legislative solutions for

foreclosures, the questions that must be asked are: Who are we helping? How do we help them? Who will be hurt by the legislation? Will there be unintended negative consequences?

The medical adage of "do no harm" seems appropriate in dealing with Hawaii legislative solutions for foreclosures, such as the approach in this Bill:

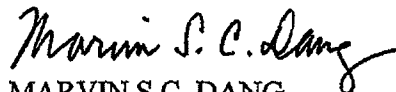
- Don't make it harder for lenders to collect and foreclose. If the foreclosure process takes longer and becomes more costly and complex because of additional statutory foreclosure requirements, lenders might have to start the foreclosure process sooner for delinquent loans. This change will in turn increase the number of foreclosures. A moratorium or a dispute resolution/mediation process can unproductively delay the foreclosure process.

- Don't harm Hawaii's economy. Don't harm the mortgage market. Don't make it harder for future borrowers get loans because of additional statutory foreclosure requirements which can result in borrowers having to pay higher interest rates and being required to make a larger down payment (such as 30%) so that there is a lower loan-to-value ratio (such as 70%).

- Legislative solutions in other states should not automatically be copied for Hawaii. Hawaii's unique situation is different from that in other states.

The HFSA wishes to state that while we support the Task Force recommendations, our support for the recommendations is conditioned on whether other foreclosure concepts (such as dispute resolution and moratorium) which were not considered or recommended by the Task Force, do not pass the legislature this session. The Task Force's recommendations are balanced and represent compromises by the various stakeholders on the Task Force. For that reason, the HFSA believes that non-Task Force concepts that are in this Bill and other bills should be deferred until the final recommendations of the Task Force are made to the 2012 legislature.

Thank you for considering our comments.



MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

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

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

TO: Senator David Y. Ige
Chair, Committee on Ways and Means
Hawaii State Capitol, Room 215
Via Email: WAMTestimony@Capitol.hawaii.gov

FROM: Gary M. Slovin/Mihoko E. Ito

DATE: March 29, 2011

RE: **H.B. 1411, HD2, SD1—Relating to Mortgage Foreclosures
Decision Making: Wednesday, March 30, 2011 at 9:30 a.m.**

Dear Chair Ige and Members of the Committee on Ways and Means:

We respectfully submit comments on behalf of USAA, a diversified financial services company, who 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 Hawai'i.

USAA **submits comments** regarding H.B. 1411, H.D. 2, S.D. 1. Specifically, USAA supports Section 14 of H.B. 1411, H.D. 2, S.D. 1 as presently drafted, which requires that a mortgage servicer maintain a physical presence in the State, only if the mortgage servicer's business constitutes at least 20% of the market share of the total mortgage loan service market within the State.

We believe that this amendment reflects the intent of the bill to address concerns about the customer service and business practice of certain mainland mortgage servicers.

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. We note that USAA has had an exceptional record of service and has a very small rate of 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.

March 29, 2011
Page 2

The amendment proposed would ensure that Hawai'i consumers—including many military members in Hawai'i who acquire real property in the State—are not limited in their choices and have access to a broad range of financial services from responsible financial institutions like USAA.

Thank you very much for the opportunity to submit comments on this measure.

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 29, 2011 12:14 PM
To: WAM Testimony
Cc: plahne@alf-hawaii.com
Subject: Testimony for HB1411 on 3/30/2011 9:30:00 AM

Testimony for WAM 3/30/2011 9:30:00 AM HB1411

Conference room: 211
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Philip L. Lahne
Organization: CAI Legislative Action Committee
Address:
Phone:
E-mail: plahne@alf-hawaii.com
Submitted on: 3/29/2011

Comments:

As written, this bill will essentially disable condominiums from taking any effective action to collect unpaid maintenance fees from delinquent owners despite the fact that the "budget hole" created by non-paying owners must be filled by increasing assessments on other owners.