



*The Judiciary, State of Hawaii*

**Testimony to the House Committee on Finance**  
Representative Marcus R. Oshiro, Chair  
Representative Marilyn B. Lee, Vice Chair  
Friday, April 1, 2011, 5:00 p.m. - Agenda #4  
State Capitol, Conference Room 308

by  
Rodney A. Maile  
Administrative Director of the Courts

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**Bill No. and Title:** Senate Bill No. 651, S.D. 2, H.D. 1, Relating to Mortgage Foreclosures.

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

**Judiciary's Position:**

There are three different parts to this bill. The Judiciary supports the intent of resolving foreclosure disputes through alternative dispute resolution and notes that implementing such a program will require a significant financial commitment. The Judiciary takes no position on changes to the foreclosure statutes. Because the measure fails to provide a funding mechanism for converting cases to the judicial foreclosure process, and because a great influx of cases would negatively impact the public, the Judiciary must oppose the proposed conversion process.

**I. PROPOSED DISPUTE RESOLUTION PROCESS**

As noted above, 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. The Judiciary has some minor substantive suggestions.



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- In Section 667-E(e) at page 8, line 3, and (f) at line 14, the Judiciary suggests inserting “.. and if the neutral determines that the noncompliance was not the result of factors outside the parties’ control . . .”
- In Section 667-E(h), at page 10, line 1, the Judiciary suggests deleting the phrase “outside of dispute resolution.”
- In Section 667-F, at page 11, line 3, “settlement agreement” should be substituted for “resolution document.”

The Judiciary’s greatest concern on the dispute resolution portion of this bill relates to funding. This bill would generate income to the contemplated special fund of \$500 per case (Section 667-I) from the parties and an unspecified amount from the \$100 fee that will be collected by the circuit courts, land court, and bureau of conveyances (Section 667-L(c)). The Judiciary estimates that it would cost \$2,234,078 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 43. The Judiciary suggests an appropriation of \$1,000,000. It is critical that sufficient funding be allocated in order to implement a quality program.

Also, the Committee should also be aware that the Department of Commerce and Consumer Affairs and the Judiciary are working on a collaborative project for resolution of nonjudicial mortgage foreclosure cases.

## **II. PROPOSED CONVERSION PROCESS**

As indicated above, the Judiciary is committed to assisting the public and fully supports the bill’s intent to update the foreclosure statutes to better serve all parties. However, the Judiciary must respectfully oppose the proposed conversion process because there is no sufficient funding mechanism for the converted cases. As explained below, without sufficient funding, our ability to assist in the converted cases as well as other cases will be hindered.<sup>1</sup> Thus, we respectfully request funding to cover the period that the proposed conversion process is in effect.

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<sup>1</sup> The Judiciary may also need some time to accommodate the 45-day phase-in period outlined in the bill.



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Currently, most foreclosure cases--approximately 75% to 90%--proceed through the non-judicial process.<sup>2</sup> Last calendar year, there were approximately 1,331 *judicial* foreclosure filings<sup>3</sup> 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 during this period 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. In view of the above, we would like to provide estimates regarding a range of possible additional cases to request funding.<sup>4</sup>

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 significant, albeit temporary 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, without additional resources and staffing. Our estimate to fund the cost of the

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<sup>2</sup> 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.

<sup>3</sup> These figures may include agreements of sale.

<sup>4</sup> 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.

Since the budget cuts and furloughs, the median age of pending Circuit Court civil cases has increased by 41.8%. 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%. Moreover, the addition of newly converted foreclosure cases, without requisite funding to service these additional cases, will further delay existing civil and criminal cases during the time the conversion process is in effect. (The Judiciary currently has a budget bill, H.B. 300 pending which may impact furloughs.)



temporary additional judges and support staff to handle 6,000 new circuit court cases per year is approximately \$4,300,000.

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. 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 cost us an estimated \$1,075,000 yearly.

Even if these funds were allocated this Legislative session, it would take time for the Judiciary to hire qualified temporary 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 judges and staff would be fully integrated into the judicial foreclosure process.

Further, it is unclear whether the filing fee for the conversion complaint would include other costs, surcharges, and other fees associated with filing a complaint.

Moreover, 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.

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'



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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.

Thank you for the opportunity to testify on this measure.

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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

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# Facing Foreclosure

Continued from page 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# Star Advertiser

## Foreclosure filings hit new high

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

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

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

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

**NO PLACE LIKE HOME**  
 Hawaii's monthly 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	+37.5%
July	930	-6.1%
June	1,000	+11.6%
May	1,055	+29.3%
April	1,474	+115.5%
March	1,097	+51.5%
February	972	+81.0%
January	1,302	+286.4%
Total	14,224	+42.9%

**BY THE NUMBERS**  
 Five Hawaii communities with the most properties in foreclosure last year:

ZIP CODE	AREA	FORECLOSURES
96740	Kaliua-Kona	1,244
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."

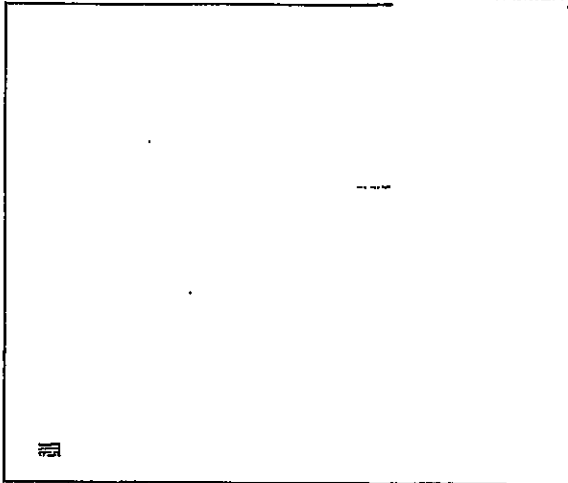
Hawaii's foreclosure level was close to the national average — 2.23 percent of housing affected by foreclosure last year — though Hawaii's rate was 11th highest.

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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## Star Advertiser

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.

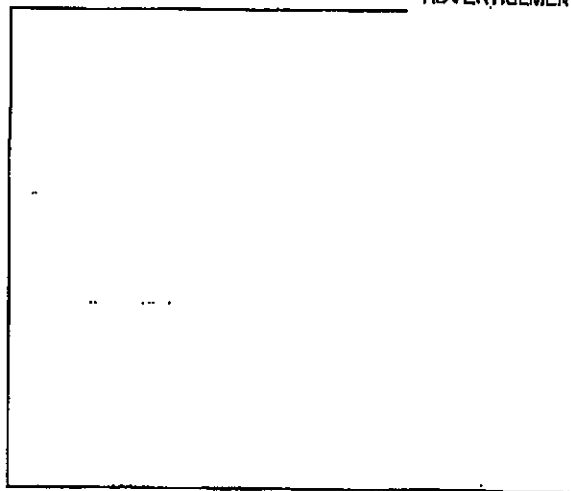
The number of foreclosure filings in December was 1,000. That was down 35 percent from 1,302 in the same month last year but was up from 877 in November.

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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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION  
TO THE HOUSE COMMITTEE ON FINANCE

TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2011

Friday, April 1, 2011  
5:00 p.m.

TESTIMONY ON SENATE BILL NO. 651, S.D. 2, H.D. 1, RELATING TO MORTGAGE FORECLOSURES.

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, AND MEMBERS OF THE COMMITTEE

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of Senate Bill No. 651, S.D. 2, H.D. 1, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

Senate Bill No. 651, S.D. 2, H.D. 1, as amended by the House Committee on Consumer Protection and Commerce, seeks to significantly amend Hawaii's current home foreclosure laws by: repealing the old non-judicial foreclosure process, as contained in part I of chapter 667 of the Hawaii Revised Statutes; adopting several

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

#### **Repealing Hawaii's Old Non-Judicial Foreclosure Law**

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

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chairperson of the Task Force intends to request that the task force thoroughly examine all issues associated with part II, including those described in Senate Bill No. 651, S.D. 2, H.D. 1, during its 2011 meetings.

If the Committee is not inclined to defer the proposed amendments to part II of chapter 667 (the "new non judicial foreclosure law") the Department believes that it would be in the interests of consumers to adopt additional changes to H.D. 1. In this regard, the Department proposes the following amendments:

1. On page 7 after line 20, add, "A dispute resolution conducted pursuant to this part must use the calculations, assumptions and forms that are established by the Federal Deposit Insurance Corporation and published in the Federal Deposit Insurance Corporation Loan Modification Program Guide as set out on the Federal Deposit Insurance Corporation's public accessible website". This amendment is based on a standard adopted by state of Maine and its purpose is to provide a transparent standard developed by the FDIC under which borrowers and lenders can determine if a loan modification is feasible.
2. Section 667-38 as contained on page 72, line 6 to line 13, **should not be repealed**, since doing so, would remove the current statutory prohibition on pursuing deficiency judgments pursuant to part II of chapter 667, "the new non judicial foreclosure law".

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### **Adoption of Task Force Recommendations**

House Bill No. 1411, H.D. 2, has adopted the recommendations of the Mortgage Foreclosure Task Force established by Act 162, Session Laws of Hawaii 2010. The Department is in support of these recommendations, which were provided to the Hawaii legislature on December 28, 2010 through the Preliminary Report of the Mortgage Foreclosure Task Force. They contain significant improvements to the current non-judicial foreclosure law in Hawaii. They provide for superior notice to homeowners of an impending foreclosure, offer them the ability to convert a non-judicial foreclosure to a judicial foreclosure, and allow them to escape a deficiency judgment in a non-judicial foreclosure.

### **Foreclosure Mediation**

The Department is in support of the intent of the mediation provisions of Senate Bill 651, S.D. 2, H.D. 1.

Across our nation, mediation has rapidly grown in popularity as a means to avoid foreclosure. Jurisdictions throughout the United States have implemented various forms of mediation in response to the foreclosure crisis. These include programs operating under the auspices of the judiciary in Nevada, New Jersey, Ohio, Florida, Connecticut, Indiana, Maine, New York, and Vermont, as well as programs established independent of the judiciary in the states of California, Oregon, Maryland, and Michigan. Despite some procedural differences, all of these programs have several features in common. They are designed to bridge the communication gap between loan services

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and homeowners, a gap that has often been cited as the major obstacle to effective loss mitigation. They do this by requiring active participation by a representative of the servicers with full authority to consider all loss mitigation options.

Senate Bill No. 651, S.D. 2, H.D. 1, establishes in Hawaii a mediation program as a means to avoid unnecessary foreclosures. The program, in a large part, is based on one currently in use in Nevada, one of the most successful models currently operating in the United States. Senate Bill No. 651, S.D. 2, H.D. 1 salient features are the same as those in Nevada. They include: having the judiciary as the administrator of the program; suspending all pending foreclosure proceedings against the borrower until the mediation is completed; requiring that participants be fully prepared for the mediation proceeding; and mandating that the lender's representative have full authority to come to an agreement or have immediate access to someone who does.

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

In this regard, the Department and the Judiciary have collaborated on the creation of a program which deviates slightly from the Nevada program while retaining the essential elements which has made it such a success.

#### **Maintenance of Mortgaged Property and Regulation of Mortgage Loan Servicers**

The Department believes that the provisions in Senate Bill No. 651, S.D. 2, H.D. 1, requiring the maintenance of mortgaged property, and the regulation of mortgage loan servicers, may lead to unintended adverse economic consequences. In this

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regard, the Office of Consumer Protection defers to the expertise of the Division of Financial Institutions, which is in a superior position to articulate the Department's concerns to the Committee.

Thank you for providing me with the opportunity to testify on Senate Bill No. 651, S.D. 2, H.D. 1. I will be happy to answer any questions that the Committee members may have.



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TO THE  
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THE TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION OF 2011

Friday, April 1, 2011  
5:00 p.m.

TESTIMONY ON S.B. NO. 651, S.D.2, H.D.1  
RELATING TO MORTGAGE FORECLOSURES

THE HONORABLE MARCUS R. OSHIRO, CHAIR,  
AND MEMBERS OF THE COMMITTEE:

My name is Iris Ikeda Catalani, Commissioner of Financial Institutions ("Commissioner") testifying on behalf of the Division of Financial Institutions ("Division") of the Department of Commerce and Consumer Affairs ("Department") in support of Senate Bill No. 651, S.D.2, H.D.1, with one requested change.

Section 1 of this measure proposes to amend Chapter 454M, HRS by adding a new section thereto, which would expressly void any action taken in connection with a mortgage foreclosure under Chapter 667, HRS by a person who engages in the business of mortgage servicing without a license as a mortgage servicer under Chapter 454M, HRS.



TESTIMONY ON SENATE BILL NO. 651, S.D.2, H.D.1  
April 1, 2011, 5:00 p.m.  
Page 2

The Division administers the licensing program for mortgage servicers under Chapter 454M, HRS, and fully supports the intent of the proposed amendment to the mortgage servicers law. However, our concern with the language as presently drafted is that it may not adequately reflect the fact that Chapter 454M, HRS provides exemptions from licensing to certain persons enumerated in Section 454M-3, HRS.

Accordingly, we would suggest that the language in Section 1 be amended, at lines 4 to 8, to read as follows:

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

Thank you for the opportunity to testify. I would be pleased to respond to any questions you may have.



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April 1, 2011

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

**RE: S.B. 651, S.D. 2, H.D. 1, Relating to Mortgage Foreclosures**

**HEARING: Friday, April 1, 2011, at 5:00 p.m.**

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

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i and its 8,500 members. HAR supports the intent of S.B. 651, S.D. 2, H.D. 1, Relating to Mortgage Foreclosures, which: (1) repeals the old nonjudicial foreclosure process; (2) clarifies the new nonjudicial foreclosure process; (3) strengthens laws regarding mortgage servicers; and (4) broadens the duties of the Center for Alternative Dispute Resolution.

HAR believes that a comprehensive evaluation of the non-judicial foreclosure process and balanced approach to amending the foreclosure law is needed. Accordingly, HAR provides the following comments on the bill:

**Definition of Owner-Occupant:** Section 17 of S.B. 651, S.D. 2, H.D. 1, creates a new definition of "owner-occupant." HAR believes that the present definition of "owner-occupant" in the bill may be too narrow, and should be modified to conform to the definition of "resident" under the State's tax code, HRS §235-1. Therefore, HAR respectfully requests that the definition be amended on page 41, lines 7-10 as follows:

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

**Alternative Dispute Resolution Program - Screening:** Section 2 of S.B. 651, S.D. 2, H.D. 1, creates a section that requires participation in dispute resolution if the borrower so elects. A similar program currently exists under Nevada's Foreclosure law. HAR supports the intent of allowing for dispute resolution in the context of both judicial and non-judicial foreclosures, but notes that a screening process may be needed, to ensure that borrowers are minimally qualified to proceed with dispute resolution. Otherwise, a borrower that opts-in to pursue dispute resolution may use it as a tactic to delay the foreclosure process. As such,





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HAR supports an expedited process so that both mortgagee and mortgagor are able to come to a good-faith agreement.

**Alternative Dispute Resolution Program – Report to Legislature:** HAR recommends that, as part of the dispute resolution program, the Center for Alternate Dispute Resolution should be required to submit a report prior to the convening of the 2012 and 2013 Legislative Sessions. HAR believes that such a report will provide benchmarks to determine whether the mediation program meets its intended goals -- including the early facilitation of loan modifications or other loss mitigation actions, and the avoidance of foreclosure where possible.

**Physical Presence of Mortgage Servicers:** Sections 6 and 8 of S.B. 651, S.D. 2, H.D. 1, requires that mortgage servicers licensed under §454M must establish a physical presence within the State. Under existing state law, non-exempt mortgage servicers are already licensed by the State of Hawai'i, Division of Financial Institutions (DFI.) In addition, Section 5 of S.B. 651, S.D. 2, H.D. 1 requires that an affiliate statement must be recorded with the Bureau of Conveyances to ensure that the mortgage servicer and foreclosing mortgagee are identified. As such, if the affiliate statement is not produced, future foreclosure notices may be invalidated. HAR believes that these existing and added protections may make Section 6 and 8 unnecessary. This could also lead to the unintended effect that certain mortgage servicers would no longer provide services in Hawai'i.

**Notice of Default/Intent to Foreclose:** HAR supports the intent of clarifying notice provisions in a non-judicial foreclosure. Section 18 of S.B. 651, S.D. 2, H.D. 1, amends notice requirements under §667-22, and adds the notice of the right to participate in dispute resolution, but does not mention the statement on conversion allowing an owner-occupant to convert a non-judicial foreclosure to a judicial foreclosure. HAR's understands that Section 18 was intended to include both the notice of dispute resolution and the statement on conversion. Therefore, we would suggest that §667-22 be amended to also include the statement of conversion as part of the notice requirements, so that it is consistent with the new section.

**Public Auctions:** HAR supports the intent of Section 21 of S.B. 651, S.D. 2, H.D. 1, which identifies at least one state facility for auctions in each county. We believe this will create understanding and consistency for all parties involved in the foreclosure process.

**Postponements on Sale:** Section 24 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 fourth postponement.

**Repealing Part I and Amending Part II:** Finally, HAR also supports the intent of S.B. 651, S.D. 2, H.D. 1 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





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removing the requirement of the mortgagor to sign the deed. HAR further supports and appreciates added protections for ensuring that proper notice is given, for notifying a mortgagor that the mortgagee intends to foreclose.

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

Mahalo for the opportunity to testify.





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Testimony to the House Committee on Finance  
Friday, April 1, 2011 at 5:00 p.m.

Testimony in opposition to SB 651 SD2 HD1, Relating to Mortgage Foreclosures

To: The Honorable Marcus Oshiro, Chair  
The Honorable Marilyn Lee, Vice-Chair  
Members of the Committee on Finance

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 SB 651 SD2 HD1, Relating to Mortgage Foreclosures. Mainly, this bill would require dispute resolution before any foreclosure action, and would impose a moratorium on all foreclosures until the mediation program is launched. Mandatory dispute resolution and a moratorium on foreclosures will have an extremely negative effect on our ability to lend, and may in turn harm credit unions' ability to offer low-cost services to our members. In turn, this legislation may have an adverse effect on an already struggling economy. We are also concerned that similar dispute resolution programs, such as the one underway in the Third Circuit Court, have not been effective.

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, we respectfully ask you to consider the effect this legislation will have on local financial institutions in the State of Hawaii. We are in agreement with the proposed amendments suggested by the Hawaii Bankers Association.

Thank you very much for the opportunity to testify.



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Presentation of the Committee on Finance  
Friday, April 1, 2011 at 5:00 p.m.  
Testimony on SB 61 SD2 HD1 Relating to Mortgage  
SB651  
In Opposition

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

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to SB 651 SD2 HD1. HBA is the trade organization that represents all FDIC insured depository institutions with offices in Hawaii.

We respectfully opposed this bill, which has morphed into an omnibus foreclosure bill, due to its potentially 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.

Hawaii banks will work with homeowners to help them stay in their homes if possible. However, lawmakers have heard from borrowers frustrated with being unable to communicate effectively without of state lenders/servicers. Thus we have a proliferation of bills introduced to improve the communications gaps and to address other reported abuses by out of state lenders.

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. It is expected that banks, all of whom are regulated by a federal banking regulator, will soon be required to conduct pre-foreclosure initiation loan modification procedures. In addition, it appears that federal banking regulators will soon, by way of a cease and desist order, impose loan modification requirements on the five banks currently negotiating a global settlement with the fifty states.

**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.**

This bill contains many 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. It will also prove to be especially important in the near future because of provisions in the Dodd-Frank bill that exempts only qualified residential mortgages ("QRMs") from certain risk retention provisions. The problem for Hawaii is that few Hawaii mortgages are QRMs because a mortgage is not a QRM unless the debt to income ratio is 28% or less. Because of the high cost of homes, most Hawaii mortgages do not have a debt to income ratio of 28%. Fannie Mae has indicated that it will change its policy to be consistent with the QRM standard. All of the foregoing means that it may be harder to sell to the government market and the private investor part of the private market. **While the local private market cannot fill any void if the government and private investors diminish its purchase of mortgages, the local lending source will become much more important in the near future, 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.

## Dispute Resolution aka 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. While we need more time to review their proposal, the concept of the draft is worthy of consideration, this bill should only address the dispute resolution proposal and eliminating all other provisions contained in bill. The other provisions of this bill should be assigned to the Mortgage Foreclosure Task Force to report back to the 2012 Legislature after further review and vetting.

**Any mediation provisions, unless subject to a quick sunset, is 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.

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 for a Dispute Resolution Bill

- **Carve out the local lenders:** Hawaii banks have not been the problem and should be carved out 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.



- **Limit Mediation to owner-occupant non-judicial foreclosures:** Limit mediation 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:** If a 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, or a post-foreclosure mediation process as contemplated by this bill, the borrower should not be eligible for mediation or conversion (unless of course, he chose conversion over mediation). We have been discussing this issue with FACE to craft an eligibility standard which can balance the lender need for avoiding duplicate and back-to-back loan modification procedures.
- **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.

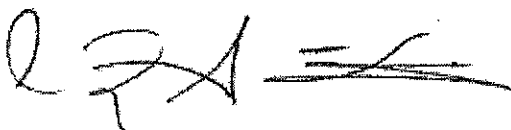
If a neutral report is required, it should be done within 14 days after the conclusion of the mediation in order to prevent the neutral from withholding the report as leverage against the lender or to stall the foreclosure.

- **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.
- **Eliminate the provision regarding communications with the borrower after foreclosure initiation. The unfortunate consequence of this provision is to cause lenders to shy from oral communications with the borrower as a matter of policy to avoid "he said, she said" arguments.**

**This not a permanent problem and we should create a permanent "solution" to this temporary problem.** Do not harm future borrowers by passing foreclose laws that do not solve the underlying issue of reduced income. 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



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March 31, 2011

House Committee on Finance  
Friday, April 1 at 5pm  
Conference Room 308

## **SUPPORT**

### **SB651 – Relating to Mortgage Foreclosures**

Aloha Chair Oshiro and Committee Members:

My name is Michelle Kauhane, Executive Director of Hawaiian Community Assets and I am submitting testimony on behalf of HCA in support of SB651 – Relating to Mortgage Foreclosures. SB 651 SD2 HD1 would require that a foreclosing mortgagee engage in alternative dispute resolution process before going forward with a foreclosure, in order to prevent avoidable foreclosures in the State. Mandatory mediation, especially when combined with a temporary moratorium, is the most proven way to that states and counties have used to address high rates of foreclosures. According to ABC News, Nevada cut its foreclosure rate by 47% after implementing mandatory mediation. In Nevada, local banks are not foreclosing on families, in part, because face-to-face contact tends to lead to loan modifications.

As a nonprofit organization and certified Department of Housing and Urban Development housing counseling agency, HCA has provided homebuyer and financial education to families across the state since our founding in 2000. In 2008, at the beginning of our current foreclosure crisis, HCA developed a foreclosure mitigation counseling program and free statewide call center as more families saw their incomes drop making them at-risk of foreclosure. Since that time the Center for Responsible Lending has reported that Hawaii foreclosure filings have increased 687% and resulted in a net loss of \$15 billion in home equity value for our communities. Furthermore, RealtyTrac recently reported that Honolulu had the highest year-over-year increase in foreclosure filings (39.55%) between 2009 and 2010 of any city in the nation. Based on the severity of foreclosures in Hawaii, HCA recommends the committee pass SB651 requiring mandatory mediation for the purpose of attempting to avoid foreclosure before foreclosure by action or by power of sale may take place.

Mahalo for your time, leadership, and consideration in supporting SB651 – Relating to Mortgage Foreclosures.

Sincerely

A handwritten signature in black ink that reads "Michelle Kauhane". The signature is written in a cursive, flowing style.

Michelle Kauhane  
Executive Director  
Hawaiian Community Assets

# HAWAII FINANCIAL SERVICES ASSOCIATION

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April 1, 2011

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

Re: **Senate Bill 651, SD2, HD 1 (Mortgage Foreclosures)**  
**Hearing Date/Time: Friday, April 1, 2011, 5:00 P.M.**

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

The HFSA **opposes** this Bill.

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

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

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

Most 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. Section 1 of this Bill (page 1):

We take no position at this time on the merits of this provision to void foreclosures by unlicensed mortgage servicers. This was not a Task Force recommendation.

2. Section 2 of this Bill (pages 2 through 15):

This Section creates a "Mandatory Foreclosure Dispute Resolution" process for 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. 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.

As an alternative to the "Mandatory Foreclosure Dispute Resolution" process in this Bill, the Hawaii State Judiciary and the Hawaii Department of Commerce & Consumer Affairs ("DCCA") have prepared a proposal for a collaborative project between them for a non-judicial "Mortgage Foreclosure Dispute Resolution" program.

We have reviewed a draft of the Judiciary-DCCA proposal dated March 24, 2011. The concept in that draft is problematic and needs to be vetted more. If the intent of the Judiciary-DCCA proposal is to apply only to owner-occupants of residential properties, there is no justification to require that all non-judicial foreclosure notices (to owner occupant and non-owner occupants, and for residential properties and non-residential properties) be filed with the DCCA and be subjected to a filing fee. The draft fails to provide a screening mechanism to remove from the program any non-owner-occupants and others who are ineligible; this screening needs to be done before a dispute resolution session is scheduled or held. The draft lacks specific deadlines for the DCCA to take certain actions in the process, such as when to notify mortgagors of the option to participate in the program. There is no date when the dispute resolution session must be concluded. There is no deadline for a neutral's report to be submitted. Making a violation by a mortgagee an unfair and deception act or practice is unwarranted because there are other provisions imposing sanctions against the mortgagee. It is objectionable to require all mortgagees, after an auction is held, to pay an additional fee earmarked for the mortgage foreclosure dispute resolution special fund when recording an affidavit or conveyance document in the land court or bureau of conveyances.

The Judiciary-DCCA proposal was not part of the Task Force's recommendations. We oppose the proposal.

3. Section 3 of this Bill (pages 15 through 22):

§§667-M through 667-O generally contain the Task Force's recommendations with some minor additions. These provisions create a process for owner-occupants to convert a non-judicial foreclosure to a judicial foreclosure. We support the intent. However, it should be noted that these revisions purport to change only the alternate Part II non-judicial foreclosure process in HRS Chapter 667, and not the old non-judicial foreclosure process. On page 16, line 12, "thirty days" should be changed to "twenty days" to be consistent with the Task Force's recommendation.

4. Sections 4 and 5 of this Bill (pages 22 through 28):

§667-P (bar against deficiency judgments; owner-occupant of residential property) contains the Task Force's recommendations regarding non-judicial foreclosures.

§667-Q (foreclosure notice) is not a Task Force recommendation.

§667-R (prohibited conduct) is not a Task Force recommendation. We oppose it.

§667-S (unfair or deceptive act or practice) is not a Task Force recommendation. We oppose it.

§667-T (invalid notice) is not a Task Force recommendation. We oppose it.

§667-U (actions and communications with the mortgagor in connection with a foreclosure) is not a Task Force recommendation. We oppose it.

§667-V (suspension of foreclosure actions by junior lienholders) is not a Task Force recommendation. We oppose it.

5. Sections 6 through 9 of this Bill (pages 28 through 33):

These Sections change HRS Chapter 454M relating to mortgage servicers. These are not Task Force recommendations.

6. Sections 10 and 11 of this Bill (pages 33 through 34):

These Sections would nearly triple from \$3,600 to \$10,000 the special assessment for delinquent condominium maintenance fees, which special assessments have a limited priority over mortgage liens. This is not a Task Force recommendation. We oppose the unwarranted increase.

7. Section 12 of this Bill (pages 34 through 36):

Because this relates to the mandatory mortgage foreclosure dispute program which is in Section 2 of this Bill and which we oppose, we similarly oppose this Section.

8. Sections 13 through 40 of this Bill (pages 36 through 72):

These Sections would repeal the old non-judicial foreclosure process. These Sections also attempt to revise the alternate non-judicial foreclosure statute (Part II of HRS Chapter 667). However, these revisions don't address all the provisions which make the alternate process unusable. These are not part 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." (Emphasis added.)

This item 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 these Sections 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 HRS Chapter 667). The Task Force can make appropriate recommendations to the 2012 Legislature.

9. Section 41 of this Bill (pages 72 through 73):

This Section requests the Judiciary to consider creating and adopting a form for the complaint to convert a non-judicial foreclosure to a judicial foreclosure under Section 3 of this Bill. This is one of the Task Force’s recommendations. We support it.

10. Section 42 of this Bill (pages 73 through 74):

This Section provides a 45 day phase-in period for the conversion from a non-judicial foreclosure to a judicial foreclosure. We take no position on this proposal.

11. Section 43 of this Bill (page 74):

Because this appropriation relates to the mandatory mortgage foreclosure dispute program which is in Section 2 of this Bill and which we oppose, we similarly oppose this Section.

10. Section 44 through 45 of this Bill (pages 74 through 75):

These Sections are “housekeeping”.

11. Section 46 of this Bill (page 75):

This Section sets the effective date of the Act. This Section also provides for sunset dates for Sections 2, 10, and 11 (3 years) and for Section 3 (18 months).

We support the concept of sunset dates in this Bill ... and we oppose various other concepts in this Bill ... for the reasons stated below.

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

Rep. Marcus R. Oshiro, Chair,  
and members of the House Committee on Finance  
Testimony of Hawaii Financial Services Association  
Senate Bill 651, SD12, HD 1 (Mortgage Foreclosures)  
Page 5

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 so that there is a lower loan-to-value ratio.

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

Thank you for considering our testimony.

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

(MSCD/hfsa)



## GOODSILL ANDERSON QUINN &amp; STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

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**TO:** Representative Marcus R. Oshiro  
 Chair, Committee on Finance  
*Via Facsimile: 586-6001*

**FROM:** Mihoko E. Ito

**DATE:** March 31, 2011

**RE:** **S.B. 651, S.D. 2, H.D. 1 – Relating to Mortgage Foreclosures**  
**Hearing: Friday, April 1, 2011 at 5:00 p.m.**  
**Agenda #4**

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Dear Chair Oshiro and Members of the Committee on Finance:

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

USAA **submits comments** regarding S.B. 651, S.D. 2, H.D. 1, which makes amendments to Hawaii's foreclosure law.

With regard to Section 8 of S.B. 651; S.D.2, H.D.1, which requires that a mortgage servicer maintain a physical presence in the state, USAA supports limiting this requirement to mortgage servicers whose business constitutes at least 20% of the market share of the total mortgage loan service market within the State. We note that this amendment was made by the Senate in Section 14 of H.B. 1411, H.D. 2, S.D. 1.

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

March 31, 2011

Page 2

Hawaii, there have been only 18 foreclosures on these loans.

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.



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**SOCIETY OF HAWAII**

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George J. Zweibel, Esq.  
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.  
Executive Director

**The Honorable Marcus R. Oshiro, Chair**  
**The Honorable Marilyn B. Lee, Vice Chair**  
**House Committee on Finance**

**Hearing :     Friday, April 1 2011, 5:00 p.m.**  
**State Capitol, Conference Room 308**

**IN SUPPORT OF THE INTENT OF SB 651 HD 1**

**Chair and Members of the Committee:**

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. We are testifying in support of the intent SB 651 HD1 as it may strengthen protections for consumers in the State of Hawaii.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home, what to do if you are in danger of losing your home through foreclosure and issues relating to predatory mortgage lending.

SB 651 HD 1 proposes to repeal and replace the existing non-judicial foreclosure process, requires a physical presence in the state for mortgage servicers, and requires mandatory mediation.

As you know the Hawaii Mortgage Foreclosure Task Force has submitted its recommendations to the Legislature, which are contained in HB 879. While LASH believes there are significant weaknesses in the current foreclosure law, it may be premature to completely repeal the law without additional consideration. Such consideration will be undertaken in the upcoming year by the Task Force.

With regards to the recommendations of the Task Force adopted by SB 651 HD 1, LASH fully supports these changes, which provide clarification of the current law, further protections

for homeowners, including the ability to convert a fast moving non-judicial foreclosure to a more moderate judicial foreclosure.

SB 651 HD 1 would require that a foreclosing mortgagee engage in alternative dispute resolution process before going forward with a foreclosure, in order to prevent avoidable foreclosures in the State. Ideally this would create a much needed means of communication between distressed homeowners and loan servicers, by requiring good faith, supervised participation by a representative of the servicer who has the authority to approve appropriate loss mitigation options. Effectively this bill would provide further protections for families in Hawaii how are having difficulty with the default, foreclosure and loan modification process. However this bill also relates the right to convert to a judicial foreclosure to the ability to mediate. LASH believes these two changes should be separate provisions.

The Legal Aid Society of Hawaii supports the intent of the bill, and its efforts to protect the consumers in the State of Hawaii.

**Conclusion:**

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. SB 651 HD 1 attempts to strengthen protections for consumers by requiring mortgage lenders to engage in mediation before instituting foreclosure proceedings. We support the intent of SB 651 HD 1 and its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.



**TESTIMONY IN SUPPORT OF SB651, SD2, HD1**

April 1, 2011; 5:00 p.m.; Conference Room 308  
Relating to Mortgage Foreclosures

To: Honorable Rep. Marcus Oshiro, Chair, House Committee on Finance  
Honorable Rep. Marilyn B. Lee, Vice Chair  
Honorable Finance Committee Members

From: Ron Menor, Chair, National Federation of Filipino American Associations  
("NaFFAA") Region XII

My name is Ron Menor. I serve as the Chair of the National Federation of Filipino American Associations ("NaFFAA") Region XII which represents the interests of Filipinos in Hawaii, Guam and the Commonwealth of Northern Marianas Islands. NaFFAA Region XII is an affiliate of the national NaFFAA. Washington policy-makers, private industry and national advocacy groups recognize NaFFAA as the voice of Filipinos and Filipino Americans throughout the United States. We are a non-partisan, non-profit national affiliation of more than five hundred Filipino-American institutions and umbrella organizations that span twelve regions throughout the continental United States and U.S. Pacific territories.

We would like to state for the record our support for the intent of the above-referenced legislation. This measure may help to clarify and strengthen the foreclosure process, and establish additional safeguards for borrowers while at the same time preserving the rights and interests of lenders. The passage of this legislation should be considered during these difficult economic times in Hawaii when homeowners are at increased risk of foreclosures.

Thank you for the opportunity to offer our views on this measure.

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c/o 220 So. King Street, Suite 1770 · Honolulu · Hawai'i 96813 · Phone/Fax: (808) 524-7773 ·

E-Mail: [hnaffaa2006@yahoo.com](mailto:hnaffaa2006@yahoo.com)

Ron Menor, Chair · Amy Agbayani, Vice Chair · Michael Dahilig, Vice Chair · Rouel Velasco, Youth Leader  
Leslie Cabingabang, Treasurer · Charlene Cuaresma, Secretary

HAWAII CHAPTER

  
**community**  
ASSOCIATIONS INSTITUTE

P.O. Box 976  
Honolulu, Hawaii 96808

April 1, 2011

Honorable Marcus R. Oshiro  
Honorable Marilyn B. Lee  
Committee on Finance  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: SB 651 SD2 HD1/**OPPOSED**

Dear Chair Oshiro, Vice-Chair Lee and Committee Members:

I chair the CAI Legislative Action Committee. CAI opposes SB 651 SD2 HD1. CAI opposes SB 652 SD2 HD1 because the sweeping changes to long established foreclosure law proposed therein should not be applied to condominiums.

In particular, but without limitation, the proposed section 667-V, suspension of foreclosure actions by junior lienholders, in Section 5 of the bill, would cause great harm to consumers. The fate of condominium associations cannot be left to the action or inaction of mortgage lenders.

Associations have no relation to lenders. Associations are non-profit entities that collect money to pay common expenses, such as utilities, insurance, maintenance and repair. If one owner fails to pay, then other consumers have to pay instead.

This is not a matter of lost profit for some abstract corporate entity. It means that other consumers will have to pay their own share of common expenses PLUS the share of the defaulting owner. An owner who cannot even pay maintenance fees simply has no prospect of being able to resolve issues with a lender.

In all events, the debts are entirely separate. Associations do not choose their members. Associations have no input into who lenders provide mortgages to and they have no opportunity to underwrite risk or to price risk. Associations do not make loans to owners. Every condominium owner must pay.

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Honorable Marilyn B. Lee  
April 1, 2011  
Page 2 of 5

The legislature has recognized the burden that defaulting owners place on condominiums. See, for example, 1999 Session Laws 723 (Act 236) (partial findings attached hereto). In particular, but without limitation, the legislature found that delinquencies place "an unfair burden on those non-delinquent apartment owners who must bear an unfair share of the common expenses[.]" Id.

A vast body of case law demonstrates that money is the lifeblood of associations. For example,

**"Because homeowners associations would cease to exist without regular payment of assessment fees,** the Legislature has created procedures for associations to quickly and efficiently seek relief against the non-paying owner." (Emphasis added) Park Place Estates Homeowners v. Naber, 29 Cal. App. 4<sup>th</sup> 427, 432, 35 Cal. Rptr. 2d 51, 53 (Cal. App. 4 Dist. 1994).

In Park Place East Condo. v. Hovbilt, 279 N.J. Super. 319, 323, 652 A.2d 781, 783 (N.J. Super. Ch. 1994), the court noted:

The legislative scheme for collection of assessments for maintenance charges against individual unit owners is a recognition that **such charges are the financial life-blood of the Association.** They are conceptually akin to the right of a municipality to levy and collect real estate taxes.

The hazards of enabling owners to avoid payment are aptly illustrated (in a related context) in Nottingdale Homeowner's Association v. Darby, 33 Ohio St.3d 32, 36, 514 N.E. 2d 702, 706 (Ohio 1987) (superseded by statute). After noting that the owner contracted freely to be bound by the condominium declaration, and that the owner enjoyed the services paid at common expense, the court stated:

No amount of legal wrangling can obscure the fact that appellees knowingly accepted the services and must pay for them. To obtain this inevitable result, appellant has been forced by appellees' intransigence to incur large amounts in attorney's fees to collect the relatively small amount of past due assessments. [footnote omitted] By refusing to enforce the

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provision which would require appellees to pay appellant's reasonable attorney fees, this court would make it virtually impossible for condominium unit owners' associations to recoup unpaid assessments from recalcitrant unit owners. The expense of collection would render the effort useless. The result would be that a unit owner, who for any reason does not wish to pay his monthly service assessment, can enjoy the benefits of such services and refuse to pay for them, secure in the knowledge that collection by the association will be prohibitively expensive. Under such circumstances, what incentive would exist for the unscrupulous unit owner to pay his assessments? Obviously, very little.

As can be seen, the fee-shifting agreement in this case protects the fund of the unit owners' association from potential bankruptcy, and the conscientious contributors thereto from the burden of paying for the delinquency of others. Without such fee-shifting arrangements, unit owners' associations may have to abandon claims against debtors, such as appellees, as too costly to pursue. *With* such agreements, the debtor will be encouraged to pay to avoid litigation, and if litigation becomes necessary, the association's resources will be protected if its suit proves meritorious. A more ideal arrangement can scarcely be imagined. (Italics in original)

Hawaii Revised Statutes Section 514B-146(c) and (d) prescribe the absolute obligation to pay, and the appropriate remedy once payment is made. The legislature should maintain this bright line rule.

No legislation should inhibit an association's exercise of remedies. The exercise of remedies is for the benefit of consumers. This is a matter of doing the greatest good for the greatest number of people.

Section 18 of SB651 SD2 HD1 includes a section 667-22(e), which requires service of non-judicial foreclosure notices in the same manner as the service of a civil complaint. That requirement should not apply to associations.



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Indeed, the right balance is reflected in Section 6 of SB652 SD2, to wit:

- "(A) By serving, not less than twenty-one days before the date of sale, written notice of the intent to foreclose on all persons entitled to notice under this part in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure, as they may be amended from time to time; provided that in the case of nonjudicial foreclosure of a lien by an association, the association shall mail the notice by certified or registered mail, not less than twenty-one days before the date of sale, to:
- (i) The unit owner at the address shown in the records of the association and, if different, at the address of the unit being foreclosed; and
  - (ii) All mortgage creditors whose names are known or can be discovered by the association; and"

Associations are not the problem, and the solution to the perceived mortgage crisis should not entail unintended adverse consequences to associations.

Very truly yours,

/s/

Philip S. Nerney

Honorable Marcus R. Oshiro  
Honorable Marilyn B. Lee  
April 1, 2011  
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1999 Session Laws 723 (Act 236) (partial findings)

SECTION 1. The legislature finds that associations of

2 apartment owners are increasingly burdened by the costs and  
3 expenses connected with the collection of delinquent maintenance  
4 and other common expenses.

5       The legislature further finds that the number of  
6 foreclosures in this State has greatly increased, and that  
7 associations of apartment owners are often required to bear an  
8 unfair share of the economic burden when purchasers in  
9 foreclosure actions exercise rights of ownership over purchased  
10 apartments without paying their share of common maintenance fees  
11 and assessments.

12       The legislature further finds that more frequently  
13 associations of apartment owners are having to increase  
14 maintenance fee assessments due to increasing delinquencies and  
15 related enforcement expenses. This places an unfair burden on  
16 those non-delinquent apartment owners who must bear an unfair  
17 share of the common expenses, and is particularly inequitable  
18 when a delinquent owner is also an occupant who has benefited  
19 from the common privileges and services.

Marcy Koltun-Crilly

Dear Committee Members,

Thank you for this hearing and for this opportunity to testify in **SUPPORT** of SB 651

I **SUPPORT** SB 651's call for **mandatory mediation** because **The banks have been using lack of transparency and every possible loophole in the modification process to avoid modifications and force foreclosures,**

1) Please make sure that this **mandatory mediation** is available to any families facing foreclosure who have not yet lost their home, and **Please allow the SIX MONTH FORECLOSURE MORITORIUM to take IMMEDIATE EFFECT**, so that nobody and Hawaii will illegally or unfairly lose their home while the program is put into place.

2). **Please require the banks and mortgage servicers to provide absolute proof that they have legal standing to pursue the foreclosure before the mediation can begin.** Similar to Arizona's Senate Bill 1259 and other states that are now introducing similar bills.

**Require that they show chain-of-title proof of mortgage ownership and allow foreclosure sales to be voided if lenders can't produce the full chain of title. Allow reimbursement of lawyer fees for injunctions or court cases that fail to prove ownership.**

Bankers should have **NO** objections because **all this asks for is that Banks follow existing laws before foreclosing on someone's home!**

**Without proper chain of title, a mortgaged-backed security is NOT BACKED By a Mortgage, therefore, there is no right to foreclose!**

**You might owe money, but you have a right to pay that money to the proper party. Without PROPER chain of title, that debt can not be secured with your HOME!**

**Without proof, some other party could later show up with real proof and you would be liable again! And this HAS been happening!**

**The following abbreviated version of my story will clearly show how banks are committing fraud and causing innocent home owners in Hawaii to default, and than making it almost impossible to avoid illegal foreclosure. It also demonstrates why this bill must be STRONG enough to avoid loopholes for the bank and to PUNISH banks when they have acted unfairly and illegally.**

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

We have been trying to get a HAMP loan modification from Bank of

America since January of 2010.

**1) Bank of America USED the Government HAMP program to cause us to default and put us into a situation where they can force foreclosure.**

We feel betrayed by the government for allowing this, as the intention of HAMP was to help home-owners stay in their homes, not to CAUSE homeowners to default and leave them worse off than when they started and certainly not to increase Servicers income.

**2) BANK OF AMERICA lied to us, multiple times, broke verbal agreements, sent incorrect mailings and notices and than gave conflicting advise about how to respond to those notices, and incorrect and conflicting advice and information so that any reasonable person would feel trapped and confused and blackmailed to do whatever they said for fear of losing their home.**

We did what they asked in good faith and followed their instructions. BANK OF AMERICA has not acted in good faith, I don't believe they are acting in the best interest of their investor and I can't believe what they are doing is legal.

**3) BANK OF AMERICA has directly broken several HAMP rules and requirements and has caused my family mental and financial harm, but there seems to be no enforcement or penalty for doing so.**

**4) Had BANK OF AMERICA not lied to us, if they had not told us verbally we were approved for HAMP Trial that would start in 30 days, we could have sold our home when it had a better market price. We would never have had to miss ANY payments and would have kept our excellent credit score.**

After 14 months of fighting with my servicer, Bank of America, I recently sent them a new HAMP application with PROOF that I qualify for a HAMP modification, and have a POSITIVE NPV meaning it is in my investors best interest to modify my loan with HAMP. Servicer by law, must act in the best interest of investors. Services do not like to do this, because SERVICERS make more money by foreclosing , or stringing home owners along, as they keep all the extra fees.

Previously they claimed I had a NEGATIVE NPV, but now I have shown them proof that it is POSITIVE..

They now claim my investor will not allow an extension on the terms of my loan , as required by HAMP..

However, when I contacted my investor, BNY Mellon, they said" BNY Mellon is a Trustee therefore we do not physically own the loan or the property. We do not have any say in how the property is disposed, loan modifications, etc. This is the responsibility of the Servicer. Since Bank of America services the loan associated with the property, they are the direct and only contact in regards to your request. "

**BNY Mellon says BOA decides and BOA says BNY Mellon decides!**

I have sent a QWR to BOA asking for the name and number of the investor and name, address and phone number of an agent or party with authority to act on that owner or holder's behalf.

They tell me it is BNY Mellon (address but no number ).

**They are required by law to answer this QWR correctly, yet they ignore this law as well..**

They continue to claim "my investor turned me down" and refuse to show me what trust my home is pooled in , or the contract that clearly describes how my loan can be modified, even though this is public record , and can be easily found if I know the name of the trust.

**This lack of transparency is another way banks create more fraud that they use to deny modifications, which is why full chain of title and Pooling and service agreements must be shown PRIOR to mediation, in order to allow for a fair mediation and to prove any party has a legal right to foreclose in the first place!**

This is my story but you can read the following references to see this is a huge and widespread problem involving fraud.

**Georgetown Law Professor, Adam Levitin, in conjunction with Tara Twomey of National Consumer Law Center, two of the country's leading experts in the intricacies of mortgage servicing as related to loan modifications, have just published a 90-page research paper that represents "the first comprehensive overview of the residential mortgage servicing business,"**  
**<http://scholarship.law.georgetown.edu/facpub/498/> and describes what I have written here.**

**Please see: Written Testimony of Adam J. Levitin  
Special Counsel to the Congressional Oversight Panel Before the House Financial Services Committee Subcommittee on Housing and Community Opportunity  
"Robo-Singing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing" November 18, 2010  
<http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>**

**Thank You**

**Marcy Koltun-Crilly  
2962 Kauhale Street  
Kihei, HI 96753  
808-874-5644**

## FINTestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, April 01, 2011 11:05 AM  
**To:** FINTestimony  
**Cc:** KimHarman@FACEHawaii.org  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: support  
Testifier will be present: Yes  
Submitted by: Kim Harman  
Organization: FACE Hawaii  
Address:  
Phone:  
E-mail: [KimHarman@FACEHawaii.org](mailto:KimHarman@FACEHawaii.org)  
Submitted on: 4/1/2011

### Comments:

My name is Kim Harman and I am the Policy Director for Faith Action for Community Equity. FACE represents more than four dozen dues-paying institutional members on Oahu Hawaii and Maui including churches, temples, synagogues, tenant organizations, social service agencies and a statewide labor union. On behalf of our membership, we have been advocating for a mandatory mediation bill for many months and we support SB651 and HB 1411. Both bills allow Hawaii's families the respect and dignity they deserve by giving them the right to request a face to face meeting with their mainland lender or mortgage servicer where both parties must try in good faith to avoid foreclosure.

FACE is doing everything we can to expedite loan modifications for families in Hawaii. FACE has run community actions, held press conferences and issued reports in order to get the attention of mainland banks that are driving the majority of foreclosures in Hawaii. To date, our work with Bank of America has resulted a handful of modifications, including modifications for some of the families who have testified in support of SB651 and HB1411 this session. We just made a similar agreement with Wells Fargo. This process can only address a small fraction of the total number of loan modifications that our families are applying for and a mediation law like the one in Nevada is the best way to give more families the opportunity they deserve to save their home.

### HOW SUCCESSFUL IS FORECLOSURE MEDIATION IN NEVADA?

Both SB651 and HB1411 are based on the very successful Nevada Foreclosure Mediation Model. According to ABC News, 47% of families who chose to participate in the Nevada Foreclosure Mediation Program in the first year were able to come to an agreement with their bank or mortgage servicer that avoided foreclosure and kept the family in their home.

There has been some confusion about the success rate of the Nevada program that I would like to clear up today. Several critics of the Nevada Foreclosure Mediation Model are saying that the program was only able to help stop "5% of foreclosures" in Nevada. In order to make that number work, you would have to take the total number of foreclosures in Nevada, including commercial and non-owner occupied dwellings such as rentals timeshares and divide by the total number of families who completed the mediation process with a formal agreement with their lender.

This claim of 5% is dishonest because the Nevada Model was never meant to deal with the tens of thousands of commercial and non-owner occupied foreclosures in the first year of the

program. Nevada's program, like Hawaii's program, is designed to help families stay in their homes, not investors.

The claim of 5% is also dishonest because it ignores the Nevada Model's success in helping families and the lenders reach agreements prior to the actual mediation. Once the date was set for the mediation, thousands of families were able to reach an agreement with their lender without going through the mediation process.

FACE Hawaii believes strongly that a mandatory mediation program based on the Nevada Model is the best long-term chance our families have to save their homes from foreclosure. We urge you to make sure that the program applies to all families facing foreclosure on their owner-occupied home and that you will hold the lenders to a high standard in proving their legal standing to pursue a foreclosure.

Thank you for all you have done this session to consider and act on behalf of Hawaii's families.

## FINTestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, April 01, 2011 12:08 PM  
**To:** FINTestimony  
**Cc:** richard@hawaiifirst.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Richard Emery  
Organization: Hawaii First inc.  
Address:  
Phone:  
E-mail: [richard@hawaiifirst.com](mailto:richard@hawaiifirst.com)  
Submitted on: 4/1/2011

**Comments:**

Very bad bill that will seriously affect condominium association and force increases in maintenance fees since associations will have no way to generate income on delinquent units.



## **FINTestimony**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, April 01, 2011 1:01 PM  
**To:** FINTestimony  
**Cc:** al@certifiedhawaii.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Al Denys  
Organization: Certified Hawaii  
Address:  
Phone:  
E-mail: [al@certifiedhawaii.com](mailto:al@certifiedhawaii.com)  
Submitted on: 4/1/2011

**Comments:**

This isn't a good bill. SB 652 is better and will take of business in a professional manner.  
Mahalo.

## FINTestimony

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From: mailinglist@capitol.hawaii.gov  
Sent: Friday, April 01, 2011 4:39 AM  
To: FINTestimony  
Cc: billalbinger@aol.com  
Subject: Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: support  
Testifier will be present: No  
Submitted by: Fr. William Albinger  
Organization: Individual  
Address:  
Phone:  
E-mail: [billalbinger@aol.com](mailto:billalbinger@aol.com)  
Submitted on: 4/1/2011

### Comments:

I am the pastor of Holy Innocents Episcopal Church and on the Board of FACE-Maui. I have experienced first hand the problems my parishioners, my preschool parents and friends in the Lahaina community are facing when trying to deal with the big mainland banks that service their home mortgages. Delays, poorly trained help, not enough people to handle the business, lost paperwork, etc are bad enough. But there are also untruths, intentional deceptive practices and other poor behavior on the part of the banks.

The banks have the money from the Federal Govt. (ie us taxpayers) but are not using it for loan modifications! Mandatory loan modification is a must in Hawaii as well as a well defined temporary moratorium on foreclosures .

## **FINTestimony**

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, April 01, 2011 8:38 AM  
**To:** FINTestimony  
**Cc:** judythoma3@gmail.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: support  
Testifier will be present: Yes  
Submitted by: Judith Thoma  
Organization: Individual  
Address:  
Phone:  
E-mail: [judythoma3@gmail.com](mailto:judythoma3@gmail.com)  
Submitted on: 4/1/2011

**Comments:**

I've tried modifying my loan with Wells Fargo and then short sale my house. Now they GARNISHED my bank accounts for the deficiency. This has affected my career and now my health. Please HELP.

## **FINTestimony**

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**From:** mailinglist@capitol.hawaii.gov  
**sent:** Friday, April 01, 2011 11:04 AM  
**To:** FINTestimony  
**Cc:** Alan@CertifiedHawaii.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Alan Takumi  
Organization: Individual  
Address:  
Phone:  
E-mail: [Alan@CertifiedHawaii.com](mailto:Alan@CertifiedHawaii.com)  
Submitted on: 4/1/2011

**Comments:**

I am a property manager for several associations and this bill is not in the best interest of the associations

## FINTestimony

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**From:** mailinglist@capitol.hawaii.gov  
**ent:** Friday, April 01, 2011 11:36 AM  
**To:** FINTestimony  
**Cc:** jneeley@alf-hawaii.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Joyce Y. Neeley  
Organization: Individual  
Address:  
Phone:  
E-mail: [jneeley@alf-hawaii.com](mailto:jneeley@alf-hawaii.com)  
Submitted on: 4/1/2011

Comments:

## FINTestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, April 01, 2011 1:08 PM  
**To:** FINTestimony  
**Cc:** lengomesjr@yahoo.com  
**Subject:** Testimony for SB651 on 4/1/2011 5:00:00 PM

Testimony for FIN 4/1/2011 5:00:00 PM SB651

Conference room: 308  
Testifier position: support  
Testifier will be present: No  
Submitted by: Len Gomes  
Organization: Individual  
Address:  
Phone:  
E-mail: [lengomesjr@yahoo.com](mailto:lengomesjr@yahoo.com)  
Submitted on: 4/1/2011

**Comments:**

Aloha, I am submitting testimony in favor of SB651. I am a small business owner, a general building contractor flattened by the recent recession. The years 2007, 2008 and 2009 were absolutely horrendous. But my recovery which started in the middle of 2010 is continuing and I am earning a very good income that will allow me to pay off my obligations. I just need my lender, Bank of America to work with me to restructure my loan. I have offered them to pay every bit of delinquent amounts over a longer amortization period as I believe my income will continue to grow. They have refused to take a deeper look into my progress. Please pass this bill. It will help the economy as well as the people.

Mahalo,  
Len Gomes Jr.