Late
SB 651

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WRITTEN ONLY

TESTIMONY BY KALBERT K. YOUNG
INTERIM DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON COMMERCE AND
CONSUMER PROTECTION
ON
SENATE BILL NO. 651

February 2, 2011

RELATING TO MORTGAGE FORECLOSURES

Senate Bill No. 651 creates a Foreclosure Mediation special fund to be administered by the Office of Consumer Protection of the Department of Commerce and Consumer Affairs. The special fund will receive moneys from filing fees collected from the lender or creditor foreclosing on the mortgage and used to fund the costs of foreclosure mediation.

As a matter of general policy, the Department of Budget and Finance does not support the creation of any special fund or revolving fund that does not meet the requirements of Sections 37-52.3 and 37-52.4, Hawaii Revised Statutes. Special and revolving funds should: 1) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program; 2) provide an appropriate means of financing for the program or activity; and 3) demonstrate the capacity to be financially self-sustaining. In regards to Senate Bill No. 651, it is difficult to determine whether the Foreclosure Mediation special fund would be financially self-sustaining.

Hawaii Credit Union League
Your Partner For Success

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Testimony to the House Committee on Housing
Wednesday, February 2, 2011 at 8:30 a.m.

Testimony in opposition to SB 651, Relating to Mortgage Foreclosures

To: The Honorable Rosalyn Baker, Chair
The Honorable Brian Taniguchi, Vice-Chair
Members of the Committee on Commerce and Consumer Protection

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, Relating to Mortgage Foreclosures. This bill would require mediation before a foreclosure action. Local lenders, such as Hawaii banks and credit unions, do everything in their power to help keep homeowners from losing their homes when a mortgage loan becomes delinquent. Making mediation mandatory may serve to lengthen the foreclosure process, thereby requiring lenders to begin the foreclosure process sooner, which is of no benefit to homeowners.

We understand that there has been a pilot program on the Big Island, put on by the Judiciary. We are interested to hear their findings, as we did not have any credit unions involved in the program.

As an alternative to this measure, we suggest that the recommendations of the Mortgage Foreclosure Task Force be implemented. Also, we would be in support of looking into implementing the idea of Mortgage Loan Modification Fairs, as has been done on the mainland. We would be interested in exploring that.

We are also in agreement with the testimony submitted by the Hawaii Bankers Association and the Hawaii Financial Services Association.

Thank you for the opportunity to testify.

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Thanks for letting me email this - it makes it easier for those of us on Maui to testify.

I am testifying for two bills - SB 576 and 651, both recognize the need for mediation to address Hawai'i's foreclosure woes. I am in support of both bills, but SB 576 is better thought out and more thorough in its approach to the problem. It would be easy to amend SB 651 to improve it and make it match the good provisions in SB 576. Without the following specific changes I am afraid that SB 651 will simply fail to meaningfully impact the problem, and may even serve to weaken interest in the mediation process as a solution. The problem is in every State Senate district and it is getting worse all the time. The people of our state need swift strong action on this, and I hope the Committee can provide it.

The additions needed for SB 651 to meet the slightly higher standard set by SB 576 are:

1. Banks and mortgage services must be required to prove they own the loan before foreclosing. SB 576 requires it, and SB 651 does not. Given the evidence of widespread fraud around the country on this matter - especially in light of the so called robo foreclosures this is an essential part of any successful mediation process. That SB 651 does not include it is a simple oversight and it should be corrected.

2. Mediation has had mixed results around the country - it has succeeded (Nevada and Maryland) where it is strongly mandatory, and where the mortgage servicer or bank is required to send a representative to the mediation that is empowered to make modifications to the loan. Mediation has not done as well when this is not required, and SB 651 sadly does not require it. In order to truly fix this problem we have to require that the servicers send people with authority to make changes.

3. Finally the bill need teeth to work - loan servicers must face penalties if they do not comply with the mediation process, otherwise there is strong evidence that they will ignore it. SB 651 lacks any enforcement tools, and risks failure without them.

Mahalo to Senator Susan Chun Oakland and Senator Roz Baker for their work on this. You have both always listened to the needs of your communities and I am confident that with a little work either of these bills could address the people's needs on this issue. Perhaps a merged bill could answer the weaknesses of SB 651.

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Testimony for CPN 2/2/2011 8:30:00 AM SB651

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Conference room: 229
Testifier position: oppose
Testifier will be present: No
Submitted by: Donald C. Chaikin
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Address:
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Submitted on: 2/2/2011

Comments:
This bill would hurt Associations as a whole while trying to protect delinquent owners.

Laulima, LLC.

Pupukahi I Holomua- Together we can move forward

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

LATE

DATE: Wednesday, February 2, 2011
TIME: 8:30 a.m.
PLACE: Conference Room 229
State Capital
415 South Beretania Street
RE: Testimony on Senate Bills 652, 235, 1191, 576, 234, 651, 1074, 1175

My name is Kale Gumapac, President of *Laulima, LLC*, formerly known as *Hawaiian Alliance, LLC*. I am submitting my testimony as comments regarding Senate Bills 652, 235, 1191, 576, 234, 651, 1074, 1175, which all have to do with mortgages and foreclosures. My company used to provide education, counseling, forensic mortgage auditing, attorney referrals and paralegal research on mortgage foreclosures to homeowners and attorneys. Since my company's reorganization our business name was changed from *Hawaiian Alliance* to *Laulima*, referring to the cooperative nature of our company with our clients, and our focus is investigating land titles for the purpose of filing insurance claims with our client's title insurance companies from whom they purchased an owner's and lender's title insurance policies should there be a defect in title.

Previously unknown in contemporary legal understandings of Hawai`i's history are two executive agreements that settled the overthrow of the Hawaiian government and continue to remain binding upon the current United States President, Barack Obama, as successor of President Grover Cleveland, under both international law and U.S. Federal law. The first agreement is a temporary and conditional assignment of executive power by Queen Lili`uokalani to the U.S. President on January 17th 1893 calling for an investigation of the participation of U.S. troops and actions of its diplomat in the overthrow of the Hawaiian government, and after the investigation to restore to the Queen her constitutional authority. Pursuant to Article 31 of the Hawaiian constitution, the Queen's authority was that she was constitutionally vested with the executive power and it was her duty to ensure that certain insurgents be apprehended by the police for committing the crime of treason, being a violation of Chapter VI of the Penal Code. But for the presence of U.S. troops who were ordered by the U.S. diplomat to protect the insurgents, the police force, headed by Marshall Wilson, would have been able to apprehend the insurgents. President Cleveland accepted this temporary and conditional assignment on March 9th 1893, and initiated the investigation by appointing James Blount as Special Commissioner to report his findings to Secretary of State Walter Gresham. This first executive agreement is called the *Lili`uokalani assignment*, which also temporarily transferred and assigned to the President the administration of Hawaiian Kingdom law. The investigation was initiated on April 1 and completed on October 18, 1893.

The investigation concluded that the U.S. diplomat, John Stevens, and naval commander, Captain Wiltse, violated international law and were responsible for the overthrow of the Hawaiian government. On October 18th, Secretary of State Walter Gresham directed the new U.S. diplomat assigned to Hawai`i, Albert Willis, to begin negotiations for settlement and restoration of the Hawaiian government as it stood before the landing of U.S. troops on January 16, 1893, with the condition that after restoration and reassignment of the executive power, the Queen would grant amnesty to the insurgents. At this first meeting between the Queen and U.S. Minister Willis on November 13th 1893 at the U.S. legation (embassy) in Honolulu, Willis, on behalf of the President, sincerely apologized for the reprehensible conduct of its diplomat and naval commander and that the

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President determined that the Hawaiian government must be restored, but only after a guarantee that full amnesty could be granted to the insurgents by the Queen. At this first meeting the Queen refused to grant amnesty, but after three more meetings with the U.S. diplomat she agreed and a declaration was signed by her on December 18th and dispatched to the U.S. State Department on the 20th. This is the second executive agreement known as the *Agreement of restoration*, whereby the Queen would grant amnesty "after" the government was restored and the executive power returned.

The Hawaiian Kingdom's status was that of a recognized sovereign and independent State under international law. Contrary to the language in Public Law 103-150 native Hawaiians are not indigenous peoples within the United States, but are nationals of a recognized sovereign and independent State. One might object, arguing, how can a State that has not had a government for 118 years still have citizens? Hawaiian nationality persists through time even without a government, because nationality arises as an incident of the continuity of State sovereignty and not the continuity or discontinuity of the governmental apparatus. One can be born the "national" of a State even if the State is "occupied" by a foreign government for a long period. Current examples would be Latvia, Lithuania and Estonia, which were occupied by the Soviet Union for more than fifty years. This would also be true of any child born in Iraq to Iraqi nationals since the beginning of the US occupation since 2003 to 2004.

Thus State sovereignty exists until properly extinguished, and this sovereignty is separate and distinct from another sovereign authority that may be effectively operating in its boundaries. This situation—two sovereigns in one country—is referred to by international law as *occupation*. Both the 1893 *Lili`uokalani assignment* and the international laws of occupation mandate that the occupying State administer the laws, both civil and penal, of the occupied State, being the Hawaiian Kingdom. This is not discretionary on the part of the occupant. It is a *mandate* caused by the fact that the occupied State's sovereignty did not merge with the occupier's sovereignty, and therefore the occupier is barred from administering the occupier's national laws within the boundaries of an independent and sovereign State. American law was not applied in occupied Japan after World War II, Japanese law was. American law was not applied in Iraq, after the overthrow of the Iraqi government. Iraqi law was.

Since the United States is a Federal government, States within the Federal Union are subject to the supremacy of Federal laws and treaties, in particular, executive agreements. Article VI, clause 2, of the U.S. constitution, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." In *U.S. v. Belmont*, 301 U.S. 324 (1937), *U.S. v. Pink*, 315 U.S. 203 (1942), and *American Insurance Association, et al. v. Garamendi*, 539 U.S. 396 (2003), the U.S. Supreme Court affirmed that executive agreements entered under the sole authority of the President in foreign relations with foreign states does not require ratification from the U.S. Senate to have the force and effect of a treaty; and that executive agreements bind successor Presidents for their faithful execution. In particular, the Court stated in *Garamendi*, "Specifically, the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress." And in Belmont, the Court stated: "We held that although [an executive agreement] might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty.'"

For the past 118 years, President Cleveland, and his successors in office have violated the *Lili`uokalani assignment*, being an executive agreement, which mandated the President and his successors in office to

administer Hawaiian Kingdom law. As a result of the President's failure to administer Hawaiian law all acts performed by the provisional government and the Republic of Hawai`i on behalf of or concerning the Hawaiian Islands cannot be considered lawful because these individuals were insurgents and were not granted amnesty from the Queen because the Hawaiian Kingdom government wasn't restored and the executive power returned. According to §1255 of the Hawaiian Civil Code, the execution of a deed of conveyance and mortgage under Hawaiian law must first be acknowledged by "the party or parties executing the same, before the Registrar of Conveyances, or his agent, or some judge of a court of record, or notary public of this Kingdom," and then pursuant to §1262, the deed must be recorded in the Bureau of Conveyances, where "all deeds, leases for a term of more than one year, or other conveyances of real estate within this Kingdom shall be recorded in the office of the Registrar of Conveyances." According to Justice Judd in *Kaaihue v. Crabbe*, 3 Haw. 768, 773 (1877), "The Legislature deemed it advisable that deeds of landed property should be recorded." §1267 of the Civil Code also provides that "no person who is not a subject of this Kingdom shall be eligible to the office of notary public." Only Hawaiian subjects can serve as notaries public under Hawaiian law.

Deeds of conveyance of real property and mortgages after January 17, 1893 cannot be considered lawfully executed because the Registrar of Conveyances or notaries public were not lawfully vested with the authority to acknowledge the execution of deeds of conveyance and mortgages because they were insurgents and members of the so-called provisional government and its successor the Republic of Hawai`i—not officers of the Hawaiian Kingdom. Since August 12th 1898, execution of deeds of conveyance of real estate and mortgages also cannot be considered lawfully executed because these insurgents were maintained under the Territory of Hawai`i government, and only Hawaiian subjects can serve as the Registrar of Conveyance and notaries public. Because Hawaiian Kingdom law was not being administered, it in effect, renders all conveyances of real estate and mortgages securing the repayment of loans within Hawaiian territory since January 17, 1893 to the present null and void. The notary public and Registrar of of Conveyances were not competent to execute deeds or mortgages.

Our company operates in strict conformity to the *Supremacy clause* of the United States Constitution, whereby executive agreements are the supreme law of the land and anything in the constitution or laws of the State of Hawai`i to the contrary notwithstanding. Mortgages are liens mortgaged to the lender to secure the repayment of the promissory note. Without legal title vested in the mortgagor, there is no mortgage and therefore no foreclosure. To protect the lender should there be a defect in the title, the lender requires the borrower to purchase a lender's title insurance policy to pay off the loan; and in order to protect the owner should there be a defect in the title, the owner purchases an owner's title insurance policy to pay the owner the stated coverage of the policy, which is usually the value of the property. Title insurance polices are indemnity contracts that insures the accuracy of the title search performed by local title companies, and if accepted by the underwriters of the major title insurance companies, a policy is issued.

For these reasons, our company now focuses on investigations of land titles for the purpose of filing claims of defect in title, which is a covered risk in the lender's and owner's title insurance policy. *Laulima, LLC*, has retained an expert consultant and attorneys to represent their clients in their claims with the title insurance company and even goes as far to assist the lender to file their claim under the lender's policy, which the lender required the borrower to purchase for their protection. Therefore, in closing, I suggest that this committee reevaluate these mortgage and foreclosure bills in light of the executive agreements and the mandate of the Supremacy Clause of the United States Constitution. Because these executive agreements exist, there are no valid mortgages. Proper relief for lenders would be their lender's title insurance policy, which they required

the borrower to purchase for their protection should there be a defect in title. Therefore, lenders cannot rely on foreclosure proceedings, whether judicial or non-judicial, to recover on the outstanding loan without committing fraud.

I've included with this testimony two articles by Ticor Title Insurance Company that explains the "what" and "why" of title insurance, which can also be accessed online at https://www.ticortitle.com/title_insurance.asp.

Kale Gumapac
President
Laulima, LLC

What Is Title Insurance? (https://www.ticortitle.com/whatistitle.asp)

A Word About Real Estate

Real estate has traditionally been a family's most valuable asset. It is a form of wealth that is protected by many laws. These laws have been enacted to protect one's ownership of real estate and the improvements located on the land. The owner, the owner's family, and the owner's heirs have rights or claims in and to the property that you are buying. Those who may have an interest in or lien upon the property could be governmental bodies, contractors, lenders, judgment creditors, the Internal Revenue Service, or various other individuals or corporations. The real estate may be sold to you without the knowledge of the party having a right or claim in and to the property. In addition, you may purchase the real estate without having any knowledge of these rights or claims. In either event, these rights or claims remain attached to the title to the property that you are buying until they are extinguished.

The Past Can Determine Your Future

Generally, a person thinks of insurance in terms of the payment of future loss due to the occurrence of some future event. For instance, a party obtains automobile insurance in order to pay for future loss occasioned by a future "fender bender" or for the future theft of the car. Title insurance is a unique form of insurance. It provides coverage for future claims or future losses due to title defects which are created by some past event (i.e., event prior to the acquisition of the property.) These risks are far less obvious than those protected against by automobile insurance, but can be just as devastating. The following information will answer some commonly asked questions about title insurance.

Will You Get Clear Title?

It is of utmost importance that you receive clear title to the property when you purchase real estate. In order to do so, you must first be informed of any existing rights or claims that may, in the future, threaten your title and possession to the property. Title insurance provides you with this twofold protection.

How Do You Find Out What Claims Exist?

In order to determine the status of title, Ticor Title conducts a diligent search of the public records for those documents associated with the property. Ticor Title then examines those recorded documents in order to determine if there are any rights or claims that may have an impact upon the title to the property. The title search may reveal the existence of recorded defects, liens or encumbrances upon the title such as unpaid taxes, unsatisfied mortgages, judgments and tax liens against the current or past owners, easements, restrictions and court actions. These recorded defects, liens and

encumbrances are reported to you prior to your purchase of the property. Once reported, these matters can be accepted, resolved or extinguished prior to the closing of the transaction. In addition, you are protected against any recorded defects, liens or encumbrances upon the title that are unreported to you and which are within the coverage of the particular policy issued in the transaction. This is the first benefit you receive from title insurance.

What About Undiscovered Claims?
The title to the property that you have purchased could be seriously threatened or lost completely by hazards which are considered "hidden risks." "Hidden Risks" are those matters, rights or claims that are not shown by the public records and, therefore, are not discoverable by a search and examination of those public records. Matters such as forgery, incompetency or incapacity of the parties, fraudulent impersonation, and unknown errors in the records are examples of "hidden risks" which could provide a basis for a claim after you have purchased the property. In order to protect you against this possibility, Ticor Title provides insurance coverage for such claims. This is the second benefit you receive from title insurance.

How Does a Title Insurance Policy Protect Against All These Claims?
If a claim is made against your insured title, Ticor Title protects you by: (1) Defending your title, in court if necessary, at no cost to you, and (2) Bearing the cost of settling the case, if it proves valid, in order to protect your title and maintain your possession of your property.

Title Insurance Protects Your Asset
Title insurance gives you the assurance that possible clouds on title to the property you are purchasing - which can be discovered from the public records - have been called to your attention that such defects can be corrected before you buy. Additionally, it is insurance that if any undiscovered claims covered by your policy arises out of the past to threaten your ownership of real estate, it will be disposed of, or you will be reimbursed exactly as your title insurance policy provides.

Only One Premium
Unlike other forms of insurance, the original premium is your only cost as long as you or your heirs own the property. There are no annual payments to keep your Owner's Title Insurance Policy in force.

Why Do You Need Title Insurance? (https://www.ticortitle.com/whyneedtitle.asp)

To protect possibly the most important investment you'll ever make - the investment in your home. With a title insurance policy, you as owner, have an indemnity contract that will reimburse you for loss in the event someone asserts a claim against your property that is covered by the policy.

How can there be a title defect if the title has been searched?
Title insurance is issued after a careful examination of copies of the public records. But even the most thorough search cannot absolutely assure that no title hazards are present, despite the knowledge and experience of professional title examiners. In addition to matters shown by public records, other title problems may exist that cannot be disclosed in a search.

What title insurance protects against
Here are just a few of the most common hidden risks that can cause a loss of title or create an encumbrance on title:

- False impersonation of the true owner of the property
- Forged deed, releases or wills, Instruments executed under invalid or expired power of attorney;
- Undisclosed or missing heirs; Mistakes in recording legal documents
- Misinterpretations of wills Deeds by persons of unsound mind
- Deeds by minors
- Deeds by persons supposedly single, but in fact married
- Fraud
- Liens for unpaid estate, inheritance, income or gift taxes

What protection does title insurance provide against defects and hidden risks?
Title insurance will pay for defending against any lawsuit attacking your title as insured, and will either clear up title problems or pay the insured's losses. For a one-time premium, an owner's title insurance policy remains in effect as long as you, or your heirs, retain an interest in the property.

What this means to you
The peace of mind in knowing that the investment you've made in your home is a safe one.

Call Ticor Title
If you have any questions concerning title insurance coverage, please call a Ticor Title office, or any of our policy issuing agents. We are here to assist you.