

STAND. COM. REP. NO. 3325

Honolulu, Hawaii

APR 05 2012

RE: H.B. No. 1875  
H.D. 2  
S.D. 2

Honorable Shan S. Tsutsui  
President of the Senate  
Twenty-Sixth State Legislature  
Regular Session of 2012  
State of Hawaii

Sir:

Your Committee on Judiciary and Labor, to which was referred  
H.B. No. 1875, H.D. 2, S.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO FORECLOSURES,"

begs leave to report as follows:

The purpose of this measure is to implement the final  
recommendations of the Mortgage Foreclosure Task Force, which were  
submitted to the Legislature for the Regular Session of 2012, and  
other best practices to improve the mortgage foreclosures law and  
address related issues affecting homeowner association liens and  
the collection of unpaid assessments.

Specifically, this measure, among other things:

- (1) Amends section 667-60, Hawaii Revised Statutes, which  
makes any violation of the mortgage foreclosure law  
under Chapter 667, Hawaii Revised Statutes, an unfair or  
deceptive act or practice subject to enhanced penalties  
under Chapter 480, Hawaii Revised Statutes, to:
  - (A) Specify the types of violations under Chapter 667  
that constitute unfair or deceptive acts or  
practices;
  - (B) Limit the types of violations that may void a title  
transfer of foreclosed property; and



- (C) Establish a time limit for filing actions to void title transfers of foreclosed property;
- (2) Repeals the nonjudicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes, to provide for a single nonjudicial foreclosure process under Part II of that chapter;
- (3) Makes permanent the process under Act 48, Session Laws of Hawaii 2011, for converting nonjudicial foreclosures of residential property to judicial foreclosures;
- (4) With regard to the temporary mortgage foreclosure dispute resolution program under Part V of Chapter 667, Hawaii Revised Statutes, for owner-occupants of residential property facing nonjudicial foreclosure:
  - (A) Makes the program permanent by repealing its sunset date;
  - (B) Repeals the prohibition against participants of the program converting their nonjudicial foreclosure proceedings to judicial actions; and
  - (C) Streamlines the dispute resolution process;
- (5) With regard to condominium and planned community associations:
  - (A) Establishes an alternate power of sale process for the collection of unpaid assessments, modeled after the process set forth in Part II of Chapter 667, Hawaii Revised Statutes, as amended by the task force's recommendations;
  - (B) Places a time limit on recorded liens for unpaid assessments, excluding liens that automatically arise pursuant to law or the governing documents of the association, and provides that the recorded lien will not expire if proceedings to enforce the lien are instituted prior to the end of the time limit;



- (C) Prohibits nonjudicial foreclosures of association liens arising solely from fines, penalties, legal fees, or late fees;
  - (D) Provides associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program; and
  - (E) Allows associations to proceed with a nonjudicial foreclosure, notwithstanding a stay of foreclosure proceedings arising from a dispute resolution case opening, if the association has not been notified of the foreclosure action by the foreclosing mortgagee or of the dispute resolution case opening;
- (6) With regard to planned community associations organized under Chapter 421J, Hawaii Revised Statutes:
- (A) Provides these associations with the same options and protections as condominium associations with regard to association liens for assessments and the collection of unpaid assessments from tenants or rental agents; and
  - (B) Exempts these associations from the requirements of the mortgage foreclosure dispute resolution program and the process allowing owner-occupants to convert nonjudicial foreclosures to judicial foreclosures, to parallel the existing exemptions for condominium associations; and
- (7) Clarifies, improves, and corrects provisions of Act 48, Session Laws of Hawaii 2011, relating to mortgage foreclosures.

Your Committee received testimony in support of this measure from the Department of Commerce and Consumer Affairs; Office of Consumer Protection; Hawaiian Community Assets; Hawaiiana Management Co.; Royal Kunia Community Association; and Mililani Town Association.

Your Committee received testimony in opposition to this measure from the Hawaii Bankers Association; Hawaii Financial Services Association; Hawaii Credit Union League; Hawaii State Bar



Association; the Collection Law Section of the Hawaii State Bar Association; and the Association of Apartment Owners of The Cliffs at Princeville.

Your Committee received comments on this measure from the Hawaii Association of Realtors; RCO Hawaii L.L.C.; Honolulu Star-Advertiser; and one individual.

Your Committee finds that Act 162, Session Laws of Hawaii 2010, established the Mortgage Foreclosure Task Force to recommend policies and procedures to improve the way mortgage foreclosures are conducted in the State. Act 162 required the task force to submit its findings and recommendations, including any proposed legislation, to the Legislature for the regular sessions of 2011 and 2012.

Some of the task force's initial recommendations in its report to the Legislature for the Regular Session of 2011 were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure. This measure implements the recommendations in the task force's final report to the Legislature for the Regular Session of 2012, along with other best practices, to further improve the mortgage foreclosures law.

Your Committee notes the concerns regarding the provision in this measure requiring attorneys filing a judicial foreclosure action for residential property to sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted in the filing, under penalty of perjury and subject to applicable rules of professional conduct. This provision requires that the foreclosing client communicate to the attorney that the client's documents are factually accurate and also requires attorneys to make their own inspection and other reasonable inquiry into the documents. The concern is that these requirements could inject elements of distrust and adversity in the attorney-client relationship and may force the attorney to withdraw from representation on conflict of interest grounds if the affirmation is challenged. Your Committee was also informed that existing laws and court rules sufficiently ensure the integrity of the judicial foreclosure process and provide sanctions for misconduct.

In addition, concerns were raised regarding the provisions of section 667-56, Hawaii Revised Statutes, prohibiting foreclosing mortgagees from completing nonjudicial foreclosure proceedings



while the mortgagor is seeking a loan modification from the mortgagee or applying for a federal loan modification program. As currently written, these provisions may allow mortgagors who are denied loan modifications to unfairly stall foreclosure proceedings by continuously reapplying for loan modifications. At the same time, legitimate reapplications for loan modifications should be accommodated to help homeowners avoid foreclosures.

Your Committee further notes that owner-occupants who lose their primary residences to foreclosure suffer harsh personal losses that leave them particularly susceptible in cases where the lender may pursue a deficiency judgment to collect on any insufficiency of the foreclosure sale proceeds to satisfy the debt. As such, owner-occupants should be provided with greater relief from deficiency judgments. However, your Committee notes there are concerns about prohibiting deficiency judgments in the case of refinanced mortgages, as many borrowers refinance their mortgages for more than they currently owe, then use the difference to pay for cars, trips, or other consumer items that are unrelated to the purchase of the home. Although not addressed by the amendments proposed by your Committee to this measure, these concerns merit further discussion.

Finally, your Committee finds that the provisions in this measure allowing unit owners to avoid association judicial foreclosures of liens for assessments by curing the default or submitting a payment plan should be made consistent with the similar options that this measure provides to unit owners facing association nonjudicial foreclosures, with regard to the time period within which the unit owner must cure the default or submit a payment plan.

Accordingly, your Committee has amended this measure by:

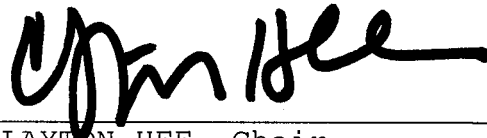
- (1) Deleting the provision requiring attorney affirmations in judicial foreclosure filings concerning residential property;
- (2) Amending section 667-56, Hawaii Revised Statutes, to allow foreclosing mortgagees to complete nonjudicial foreclosure proceedings while the mortgagor is seeking a loan modification from the mortgagee or applying for a federal loan modification program, if the mortgagor is applying to the same entity for more than the third time;



- (3) Prohibiting deficiency judgments against owner-occupants of residential properties sold in judicial foreclosures; and
- (4) Providing that the time period within which a unit owner must cure the default or submit a payment plan to avoid association judicial foreclosures of liens for assessments begins upon service of the association's complaint for judicial foreclosure, for consistency with similar provisions applying to association nonjudicial foreclosures under this measure.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1875, H.D. 2, S.D. 1, as amended herein, and recommends that it pass Third Reading in the form attached hereto as H.B. No. 1875, H.D. 2, S.D. 2.

Respectfully submitted on  
behalf of the members of the  
Committee on Judiciary and  
Labor,



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CLAYTON HEE, Chair



