NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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

KEALI'I S. LOPEZ
DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Thursday, March 29, 2012
10:30 a.m.

TESTIMONY ON HOUSE BILL NO. 1875, H.D. 2, S.D. 1, RELATING TO FORECLOSURES.

TO THE HONORABLE CLAYTON HEE, CHAIR,
TO THE HONORABLE MAILE S.L. SHIMABUKURO, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs appreciates the opportunity to testify on H.B. No. 1875, H.D. 2, S.D. 1, Relating to Foreclosures. My name is Bruce Kim, Executive Director of the Office of Consumer Protection ("OCP"). OCP supports the bill and offers an amendment.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("MFTF") pursuant to Act 162. This year the Task Force through its various working groups devoted a significant amount of time and effort in attempting to strengthen Act 48. Ultimately, the Task Force's working groups came up with a number of

recommendations intended to provide clarity and certainty to lenders, borrowers and associations in the foreclosure process.

OCP is in support of the bill. OCP notes that the bill has extended the expiration date for recorded association liens from the original two years proposed by the MFTF to six years and makes clear that an association may not enforce a lien on any assessments which arose more than six years before the proceedings to enforce the lien are instituted.

The bill now precludes an association from pursuing nonjudicial foreclosure against a unit owner for association liens that arise solely from fines, penalties, late fees or attorneys' fees and allows such cases to be foreclosed judicially. However, in doing so, it affords important protections to individual unit owners similar to the protections contained in the bill's provisions governing nonjudicial foreclosures by associations. The unit owner will be able to have any disputed charges reviewed by a judge before a foreclosure occurs. The unit owner will also have a statutory right to cure any default within sixty days of the commencement of the foreclosure action and the right to enter into a payment plan within thirty days of the commencement of the foreclosure action in lieu of losing his or her unit through foreclosure. It would also require the foreclosing association to serve the unit owner with written contact information for approved housing counselors and approved budget and credit counselors at the commencement of the association's foreclosure action.

OCP notes that in incorporating the right to cure and the right to a payment plan in the association's right to judicially foreclose on liens arising solely from fines, penalties, late fees or attorneys' fees, the intent was to give unit owners in such cases the same protections afforded to unit owners in the new nonjudicial foreclosure provisions governing association nonjudicial foreclosure proposed by the MFTF. *See* Part II Section 3 of H.B. 1875, H.D. 2, S.D. 1, § 667-B(c) at page 31. Under the new association nonjudicial foreclosure provisions, the time limit on the unit owner's right to cure and the right to a payment plan runs for sixty days and thirty days respectively after service of the association's notice of default and intent to foreclose on the unit owner. However, the new judicial foreclosure provision provides that the deadlines for the right to cure and right to a payment plan run from the date of the "commencement of the foreclosure by action" instead of from the date of service. This is clearly inconsistent with the existing association nonjudicial foreclosure provisions.

In order to resolve this obvious inconsistency, OCP strongly recommends that the language in Part II, Section 3 of H.B. 1875 H.D. 2, S.D. 1 § 667 - Association foreclosures; cure of default on Page 16, Line 21, and Page 17, Line 7 be amended to state that the right to cure period runs for sixty days after service of the association's complaint for foreclosure by action and the right to a payment plan period runs for thirty days after service of the association's complaint for foreclosure by action. This would bring the provisions in line with the right to cure and right to a payment plan language in the new association nonjudicial foreclosure provisions in the bill as originally intended.

OCP represents that it circulated the foregoing suggested amendments for approval among various condominium representatives. No objections to the proposed amendment were received.

Thank you for allowing me to testify on this matter. I would be happy to answer any questions the committee may have.

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KEALI'I S. LOPEZ
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TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Thursday, March 29, 2012
10:30 a.m.

TESTIMONY IN SUPPORT OF HB 1875 HD2 SD1: RELATING TO FORECLOSURES

TO THE HONORABLE CLAYTON HEE, CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to testify in support of HB 1875 HD2 SD1. My name is Everett Kaneshige, I am the chairperson of the Mortgage Foreclosure Task Force ("MFTF"), testifying on behalf of the DCCA.

The SD1 under consideration by this committee contains new language resulting from an agreement between DCCA, the Community Association Institute ("CAI"), and members of the MFTF, to resolve issues surrounding §421J nonjudicial foreclosures, particularly the length of recorded liens and the restriction of foreclosure for fines, penalties and late fees to the judicial foreclosure process. It was based off of the SB 2429 SD2 that crossed over from this committee to the House, and the DCCA

housekeeping amendments that were previously in HB 1875 HD2, as well as the attorney affirmation language inserted by the House CPC committee have been retained.

Thank you for this opportunity to testify in support of HB 1875 HD2 SD1, DCCA recommends that it be passed. I will be happy to answer any questions that the Chairperson or members of the Committee may have.

HSBA
Hawaii State Bar Association

Testimony of the
HAWAII STATE BAR ASSOCIATION

TO: Honorable Clayton Hee, Chair
Honorable Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FROM: Carol K. Muranaka ckm
President, Hawaii State Bar Association

RE: **HB 1875, HD2, SD1 (Relating to Foreclosures)**

Hearing: Thursday, March 29, 2012, at 10:30 a.m., Room 016

Chair Hee, Vice Chair Shimabukuro, and Members of the Committee, I have been authorized by the Board of the Hawaii State Bar Association to OPPOSE the section of the bill relating to attorney affirmations in judicial foreclosure cases.

The HSBA takes no position on H.B. No. 1875, HD2, SD1 (SSCR2945), as a whole, but we oppose the proposed attorney affirmation requirement in judicial foreclosure cases, found at pages 21-22 of the bill.

The provision is objectionable because:

1. The proposed affirmation compromises the attorney-client relationship.
2. Existing safeguards ensure the integrity of the judicial foreclosure process.
3. Sanctions for misconduct already exist and are effective.
4. No state has adopted such legislation.

A. The proposed affirmation compromises the attorney-client relationship.

The proposed required affirmation requires the attorney to divulge the contents of communication with a representative(s)

his/her client. We do not believe it is advisable to intrude into the principle of confidentiality that is a cornerstone of the attorney-client relationship.

An attorney will typically sign a pleading to swear to the accuracy of the *pleading*, but not the factual accuracy of (presumably) all "documents and records" relating to the case. The proposed attorney affirmation provision would improperly affect the client's right of confidentiality by forcing the attorney to be a material witness if the affirmation is challenged. Under the Hawaii Rules of Professional Conduct, the attorney may be forced to withdraw from representation on conflict of interest grounds.

The proposed affirmation requires not only that the client communicate to the lawyer that the client's documents were accurate and properly executed, but also that the lawyers make their "own inspection and other reasonable inquiry" of the documents. This requirement could create a level of distrust in the attorney-client relationship --- this could inject potential adversity into the attorney-client relationship and erode the attorney-client privilege.

The principles of client confidentiality and the attorney-client privilege are important foundations in our judicial system.[1] The proposed required attorney affirmation is the "slippery slope" that will erode this privilege.

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[1] Rule 1.6 of the Hawaii Rules of Professional Conduct generally provides that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 provides an explanation for the rule:

> *[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.*
> *[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.*

B. Existing safeguards ensure the integrity of the judicial foreclosure process.

The standards for attorney conduct within the attorney-client relationship and before the courts have largely been the province of ethics rules promulgated by the Judiciary, not the Legislature. Stepping into this area by the Legislature raises concerns as to the separation of powers.

Rules already exist to ensure that an attorney acts properly when representing a client. For example, the Rules prohibit an attorney from engaging in "frivolous action." Similarly, court rules expose an attorney to monetary sanctions and penalties for engaging in frivolous conduct.[2] Haw. R. Civ. P. Rule 11 and F. R. Civ. P. Rule 11. Ethics rules define a "frivolous action" (as to factual matters) as a situation where "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Comment [2], Haw. R. P. C. 3.1.

In representing a client before a tribunal, ethics rules dictate that,

> (a) a lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;

[2] Rule 11 of the Hawaii Rules of Civil Procedure provides, in pertinent part, as follows:

> (b) Representations to court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; [or]

* * *

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.

Haw. R.P.C. 3.3.

These existing sanctions are more than sufficient to deter frivolous conduct by attorneys, including foreclosure cases. There are no other statutes or causes of action where attorneys are directly held to a standard higher than already exists in these sanctions rules. The danger here is that the attorney's zealous representation of the client can be dulled by the attorney's desire to protect him/herself from liability, which in turn will have a negative impact on that attorney's obligation to faithfully represent the client.

C. Sanctions for misconduct already exist for the judicial foreclosure process.

Those who misuse or corrupt the notarization process in a foreclosure case in court can be prosecuted or otherwise sanctioned.[3] The summary judgment rules[4] of the courts already provide sanctions (such as attorney's fees) for affidavits filed in bad faith.

Rule 56(g) of the Hawaii Rules of Civil Procedure provide as follows:

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[3] In the event of a breach of notarial duties, the notary may be subject to criminal liability. HRS §§ 456-20 (Failure to verify identity and signature); 456-21 (Failure to authenticate with a certification statement); 710-1069 (Misrepresenting a notarized document in the first degree); 710-1069.5 (Misrepresenting a notarized document in the second degree).

[4] Generally, a lender will file a motion for summary judgment under Rule 56 to obtain a decree of foreclosure and the appointment of a commissioner to auction the subject property. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCP Rule 56(c). The burden will be on the lender (moving party) to convince the court that no genuine issue of material fact exists and that it is entitled to summary judgment as a matter of law. Ocwen Federal Bank v. Russell, 99 Haw. 173, 53 P.3d 312 (Haw. App. 2002). "The moving party's burden is a stringent one, since the inferences to be drawn from the underlying facts alleged in the relevant materials considered by the court in deciding the motion must be viewed in the light most favorable to the non-moving party." GECC Financial Corp. v. Jaffarian, 79 Haw. 516, 521, 904 P.2d 530, 535 (1995).

> (g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Similarly, Rule 11 of the Hawaii Rules of Civil Procedure provides that the court may impose an appropriate sanction upon the attorneys, law firms, or parties who have presented papers filed in court that do not have the proper evidentiary support for factual contentions and allegations made.[5]

Rule 3.1 of the Hawaii Rules of Professional Conduct require that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

These rules promulgated by the Judiciary are working to police any potential misconduct.

D. No state has adopted such legislation.

No state, New York and Ohio included, has adopted Legislation akin to H.B. No. 1875, HD2, SD2. New York's judiciary created an attorney affirmation requirement by a court administrative rule, which was later held to be invalid.[6] Ohio has not done anything on a state-wide level; rather, two of its counties have adopted administrative rules akin to that in New York.

We respectfully ask you to amend this bill by removing the attorney affirmation provision in the bill. The HSBA remains open to continue discussions on this issue and working with the Committee. Thank you very much for the opportunity to testify.

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[5] If an attorney's conduct rises to the level of an ethical violation, the presiding judge may also refer the matter to the Office of the Disciplinary Counsel. HRPC Rule 8.3.

[6] See LaSalle Bank, NA v. Pace, 919 N.Y.S.2d 794 (N.Y. sup. 2011).

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www.hawaiirealtors.com

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

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

March 28, 2012

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary and Labor
State Capitol, Room 016
Honolulu, Hawaii 96813

RE: H.B. 1875, H.D.2, S.D.1, Relating to Foreclosures

HEARING: Thursday, March 28, 2012, 2012, at 10:30 a.m.

Aloha Chair Hee, Vice-Chair Shimabukuro, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, testifying on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **submits comments and requests a proposed amendment** on H.B. 1875, H.D.2, S.D.1, which implements the recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner associations.

HAR sincerely appreciates the efforts of the Mortgage Foreclosure Task Force to make recommendations regarding the existing foreclosure law in Hawai'i. However, the HAR has concerns that some of these recommendations may create unintended adverse consequences if it becomes law.

HRS Section 667-60 – Oppose 180-Day Waiting Period (Page 132)
Under Page 132 of H.B. 1875, H.D.2, S.D.1, the Task Force recommends that a 180-day waiting period be implemented after a foreclosure sale, to allow the foreclosed borrower to bring forth any claims for invalidating the public auction sale. HAR has concerns that the imposition of the 180-day requirement would severely impact the ability of a bidder to be able to purchase foreclosed real estate at auction. This will discourage potential bidding from the public at large, because, among other reasons, the waiting period will make it challenging to obtain financing. Owner occupant financing usually contains a requirement that a buyer take occupancy of the property within 30-90 days of closing the loan/purchase. If a Buyer cannot occupy a property within the lender's guidelines, the loan is categorized as an "investor loan," which requires a much larger down payment and a higher interest rate.

The California civil code sections regarding bona fide purchaser protections have worked for many years and could provide guidance for this Committee to consider. In California, the law presumes that the lender has satisfied requirements relating to notification, the auction sale, and all other aspects of the foreclosure. The lender is liable for financial damages to the mortgagor if the sale is overturned, but the third-party bidder is protected. In short, the

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California system encourages competitive bidding at the auction, fosters competition that will yield the highest possible sale price, and creates the opportunity for the homeowner who lost the property to recover funds in the event there is an overbid.

Based on the foregoing, if the Committee is inclined to move this bill forward for further discussion, HAR would recommend that the 180-day waiting period only apply in situations where the lender takes back the property at auction with a credit bid, but that a third-party purchaser be exempted from this requirement.

For the forgoing reasons, HAR respectfully ask this Committee to consider the attached amendments to protect third-party purchasers, while still preserving consumer protection for homeowners.

Mahalo for the opportunity to testify.

Attachment

Summary of Lenders' Issues on Task Force Bill

1. **§667-56 Prohibited conduct:** Repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale. Item (5) attempts to give a potential short sale that is agreed to at or around the time of the non-judicial foreclosure sale priority over the foreclosure so long as the sales price is at least 5% greater than the foreclosure sale price. Recognizing that a sales commission of 6% on the short sale would wipe out the entire 5% increased sales price, the Task Force agreed to increase this percentage to at least 10%. However, this does not address other conditions in the short sale that might have prevented the lender from approving the short sale in the first place, such as payment of other debts of the seller that effectively reduce the amount of the payoff to the lender. This effectively places unsecured creditors ahead of the foreclosing lender and other lien holders

(b) Section 667-56(6) also uses the vague phrase "bona fide loan modification negotiations." If a mortgagor has been denied a loan modification, can the mortgagor then reapply seriatim and maintain the mortgagor's status as pending bona fide loan modification negotiations? Does the time reset each time a mortgagor submits a loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. This section presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

Section 667-60 must be amended to provide clarity to these items and allow the foreclosing lender to end negotiations at some point.

2. **§667-58 Valid notice; affiliate statement**: (a) As worded, the subsection implies mortgagee/lender must file affiliate statements naming their own officers. A suggested amendment to begin as follows:

> Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . .

3. **§667-59 Actions and communications with the mortgagor in connection with a foreclosure**: Besides the obvious proof problems and violation of the parol evidence rule, this section is directly counter to the express stated provisions in virtually all notes and mortgages which require any revision to the existing

terms to be in writing. This section should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made **in writing** by its agents, including but not limited to its . . . ."

4. **§667-60 Unfair or deceptive act or practice; transfer of title**: The Task Force attempted to correct one of the more problematic provisions in Act 48 Sec. 667-60 states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." It unnecessarily subjects lenders to the liabilities in HRS Sec. 480-2 for even immaterial and nonsubstantive violations of HRS Chapter 667 (Mortgage Foreclosures). HRS Sec. 667-60 has been cited as one of the reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. This section should be repealed.

Instead, the Task Force recommended that Sec. 667-60 be changed to: (a) create a "laundry list" of 21 violations which would be unfair or deceptive acts or practices (including 7 items in Sec. 667-56 and 4 items related to the Mortgage Foreclosure Dispute Resolution Program), (b) create 17 violations which could result in a non-judicial foreclosure sale being voided, and (c) allow actions to void the foreclosure sale to be filed up to 6 months after an affidavit of the sale is recorded. This recommendation is arguably unwarranted and overly broad. Lenders likely will continue not to use non-judicially foreclosure process and consequently not use the dispute resolution program.

5. **§667-85 Neutral qualifications; status and liability**: Reads in part: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program." This sentence should be repealed. A neutral in the Mortgage Foreclosure Dispute Resolution Program should not be immune from testifying if the neutral makes findings or determinations which subject a lender or a borrower to sanctions.

6. **§667-80 Parties; requirements; process**: This section should be amended to permit mainland lenders to attend during reasonable business hours where they are situated. Additionally, provision must be made to accommodate situations where approval of a loan modification requires more than one approval. For example, in instances where mortgage insurance is in place, the insurer will be required to approve the modification in addition to the lender.

7. **§667-41 Public information notice requirement**: While improved tremendously by the proposed amendment approved by the Task Force, this section still potentially applies to certain commercial loans in which residential property is taken as collateral. It is doubtful that the Legislature intended this informational notice to apply to commercial borrowers and applicants and requests that the Legislature, in addition to adopting the proposed revisions made the Task Force, also enact a further amendment to specify that such notice requirement applies only to consumer, residential mortgage loans.

§667-60 Unfair or deceptive act or practice; transfer of title. (a) Any foreclosing mortgagee who engages in any of the following violations of this chapter shall have committed an unfair or deceptive act or practice under section 480-2:

(1) Failing to provide a borrower or mortgagor with, or failing to serve as required, the information required by sections 667-5, 667-22, or 667-55;

(2) Failing to publish, or to post, information on the mortgaged property, as required by sections 667-5, 667-27, or 667-28;

(3) Failing to take any action required by section 667-24 if the default is cured or an agreement is reached;

(4) Engaging in conduct prohibited under section 667-56;

(5) Holding a public sale in violation of section 667-25 or section 667-26;

(6) Failing to include in a public notice of public sale the information required by section 667-27 or section 667-28;

(7) Failing to provide the information required by section 667-41;

(8) With regard to mortgage foreclosure dispute resolution under part V:

(A) Failing to provide notice of the availability of dispute resolution as required by section 667-75;

(B) Participating in dispute resolution without authorization to negotiate a loan modification, or without access to a person so authorized, as required by section 667-80(a)(1);

(C) Failing to provide required information or documents as required by section 667-80(c);

(D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;

(9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;

(10) Failing to distribute sale proceeds as required by section 667-31;

(11) Making any false statement in the affidavit of public sale required by section 667-32; and

(12) Attempting to collect a deficiency in violation of section 667-38.

(b) Notwithstanding the provisions of subsection (a), any failure to comply with the provisions of this chapter shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value without notice. The statements in the recorded affidavit required by section 667-5 or section 667-32, as applicable, shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of a bona fide purchaser and encumbrancer for value without notice. The purchaser of the mortgaged property, other than the foreclosing mortgagee, shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include lenders and holders of liens who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly-conveyed property. [~~the~~] A transfer of title to the [~~purchaser of the property~~] foreclosing mortgagee as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in sections (a)(1) to (9)

if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Without limiting the provisions of subsection (b), [~~A~~]any action to void the transfer of title to the purchaser of property under this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than one hundred eighty days following the recording of the affidavit required by section 667-5 or section 667-32, as applicable. If no such action is filed within the one hundred eighty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor.

Hawaii Bankers Association

Presentation to the Committee on Judiciary and Labor
Thursday, March 29, 2012 at 10:30 a.m.
Testimony on HB 1875, HD2, SD1 Relating to Foreclosures

In Opposition

TO: Honorable Clayton Hee, Chair
Honorable Maile S.L. Shimabukuro, Vice Chair
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 1875, HD2, SD1. HBA is the trade organization that represents FDIC insured depository institutions operating branches in Hawaii.

While we appreciate the efforts of all members of the Mortgage Foreclosure Task Force and remain sympathetic to those homeowners who are experiencing hardship due to inappropriate behavior by, and difficulty communicating with, their mainland lenders, we respectfully oppose this bill.

We recognize that steps were taken to address lenders' concerns, such as narrowing the scope of potential violations related to Unfair and Deceptive Acts or Practices. However, although modest improvements were incorporated into the Task Force recommendations, the recommendations and other added provisions still make Act 48 unworkable.

Several issues that need to be reconsidered include:

- Allowing borrowers to go through Dispute Resolution and then subsequently converting to a judicial foreclosure should they not like the outcome of the DR process. This extends the process and increases costs. Instead of using the Dispute Resolution process with the possibility of then going through the judicial foreclosure process, mortgagees will likely continue to use the judicial process.

- Allowing the filing of an action to void the foreclosure sale for up to six months after the sale is recorded. This will chill public bidding by third-parties and is unwarranted, overly broad and unnecessary.

- Removing the "cap" on the dollar amount on delinquent maintenance fees will likely lead to the unintended consequence of making it more difficult for first-time and middle-income homebuyers to qualify for a loan since it will require more money to complete the purchase.

  This provision is especially damaging to Hawaii borrowers because if the unit is a condominium, the buyer at foreclosure will have to pay the delinquent maintenance fees, and the potential for this liability will inherently be borne by future borrowers. It also makes it more difficult for the condo owner to sell.

- Language specifying the application of rent collected by an Association of Apartment Owners should be included in the bill. It is anticipated due to the extended period of time for a mortgagee to foreclose, Associations will likely be able to collect rent to cover its delinquent maintenance fees and other costs, therefore, any excess rental income received by the association from the unit should be paid to existing lienors based on priority of lien, and not on a pro rata basis.

- Repealing of nonjudicial foreclosures under Part I, Section 51 of SB 2429, SD1. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor owned property.

- The dispute resolution program should sunset as scheduled on September 30, 2014.

- The attorney affirmation in judicial foreclosure provision, as pointed out by the Hawaii Bar Association, violates the attorney-client privilege. As the Attorney General testified in a hearing the Attorney General's settlement, "robo" signing was not a problem in Hawaii which raises the question of the purpose of this provision. The rules of civil procedure already provide for remedies for improper action by an attorney. This provision should be deleted

All of the above proposals serve to discourage lenders from utilizing the non-judicial process. We must not lose sight of the fact that funds used to provide mortgages to borrowers come from banks' depositors. As depository institutions, banks have a fiduciary responsibility and obligation to all our depositors that the funds entrusted to us is preserved for future return. What the legislature is proposing no longer serves as a streamlined and fair method of foreclosure for lenders to seek fulfillment of their loan contracts.

Last year, we cautioned that Act 48 would likely result in unintended consequences. Almost immediately upon its passage, Fannie Mae and Freddie Mac issued mandates to lenders to stop all non-judicial foreclosures and switch to the judicial process. Absent any appropriate and immediate remedy, it was evident that our court system would become overburdened and an already lengthy foreclosure process would grow even longer. Additional delays in removing the backlog of foreclosures only prolong a return to a healthy housing market and Hawaii's economic recovery.

The Hawaii Credit Union League, Hawaii Financial Services Association and Hawaii Bankers Association "minority reports" contained in the Task Force report outline additional issues that need to be addressed in the non-judicial foreclosure law. A summary of those combined reports is attached.

Thank you for the opportunity to provide our testimony.

Gary Y. Fujitani
Executive Director

Attachment

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law
P.O. Box 4109
Honolulu, Hawaii 96812-4109
Telephone No.: (808) 521-8521
Fax No.: (808) 521-8522

March 29, 2012

Senator Clayton Hee, Chair
and members of the Senate Committee on Judiciary and Labor
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1875, HD 2, SD 1 (Foreclosures)**
Hearing Date/Time: Thursday, March 29, 2012, 10:30 a.m.

I am Marvin Dang, 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 as drafted.**

The purposes of this Bill are to: (a) implement the 2011 recommendations of the Mortgage Foreclosure Task Force, and other best practices, to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments; (b) repeal the non-judicial foreclosure process under part I of chapter 667, HRS; (c) make permanent the mortgage foreclosure dispute resolution program and the process for converting non-judicial foreclosures of residential property into judicial foreclosures; (d) repeal the provision excluding participants of the dispute resolution program from converting non-judicial foreclosure proceedings to judicial actions.

1. Background.

I served as the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force") from 2010 to the present. I was a member of the Task Force as the designee of the HFSA. This testimony is not on behalf of the Task Force and it is not in my capacity as the Vice Chair of the Task Force.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its Preliminary Report to the 2011 Legislature. As indicated in the Final Report to the 2012 Legislature, there were various issues on which the 18 Task Force members were divided. These issues are detailed in the "minority reports", which are attached to the Final Report, for the HFSA, the Hawaii Bankers Association, and the Hawaii Credit Union League.

The testimony of the HFSA on this Bill includes some of the concerns raised in those three "minority reports" about some of the Task Force's recommendations.

This HFSA testimony also incorporates by reference the testimony which we understand is being submitted by the Hawaii Bankers Association and the Hawaii Credit Union League detailing the reasons for concerns about various provisions in this Bill.

2. Proposed revisions to this Bill.

The Senate version of this House Bill is Senate Bill 2429, S.D. 2 (referred to as "the Senate Bill"). For the Senate Draft 1 version of this House Bill, the Senate Committee on Commerce and Consumer Protection had replaced the contents of the House Draft 2 version with contents of the Senate Bill but with various changes.

This Bill should be revised as follows:

1. **Part I non-judicial foreclosures.** Undo the repeal in this Bill of the non-judicial foreclosure process under Part I of HRS Chapter 667.

The provisions for Part I non-judicial foreclosures are in HRS Secs. 667-5 through 667-15. Sections 49 through Section 55 of this Bill, which are on page 152 through page 161, would repeal those HRS sections for Part I non-judicial foreclosures.

The Task Force did not recommend the repeal. The Part I non-judicial foreclosure process was already enhanced by consumer protection provisions in Act 48 (2011).

At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures, i.e. investor foreclosures.

We ask that you: (a) delete Sections 49 through 55, and (b) delete any provisions in this Bill which would repeal references to specific HRS sections for Part I non-judicial foreclosures, such as references to HRS Sec. 667-5.

2. **Unfair or deceptive act or practice.** Repeal HRS Sec. 667-60 (unfair or deceptive act or practice) and do not put in the changes to HRS Sec. 667-60 in Section 33 of this Bill on pages 129 through 132. One of the changes to HRS Sec. 667-60(b) and (c) would allow a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

3. **Dispute resolution or conversion to judicial foreclosure.** Undo the repeal of the provision in HRS Sec. 667-53(c) in Section 26 (page 119 of this Bill) which excludes participants of the Mortgage Foreclosure Dispute Resolution program from converting non-judicial foreclosure proceedings to judicial actions. We do not support the repeal. The Task Force did not recommend the repeal. Such a repeal would mean that an owner-occupant could first require the lender to go through a Mortgage Foreclosure Dispute Resolution program session, and once the session is concluded, that owner-occupant could convert the foreclosure from a non-judicial process to a judicial process. The negative consequences of the repeal would be to unreasonably extend the foreclosure process and unnecessarily increase the cost of foreclosures.

In this regard, we ask that you:

(a) Reinstate HRS Sec. 667-53(c);

(b) For HRS Sec. 667–53(a)(1), delete the additional wording in subparagraph (B) on page 117, lines 1 through 3; and

(c) For HRS Sec. 667-55, delete the additional wording on page 122, lines 7 through 11.

4. **Publication of auction notices.** Further amend this Bill regarding publishing notices of foreclosure sales (auctions) for non-judicial and judicial foreclosures. These notices are currently required to be published once each week for three successive weeks in advance of the auction in "daily" newspapers of general circulation. Because a major "daily" newspaper is charging thousands of dollars for these advertisements, these expenses unreasonably increase the cost of non-judicial and judicial foreclosures. This Bill makes changes to the existing procedures by allowing notices of judicial and non-judicial foreclosure public sales ("auctions") under HRS Chapter 667 to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by the Department of Commerce and Consumer Affairs ("DCCA").

We ask that you do the following:

(a) For publication of auction notices for judicial foreclosures (page 19, line 12), the reference to "foreclosing mortgagee" should be changed to "foreclosure commissioner". In a judicial foreclosure, it is the court-appointed foreclosure commissioner, not the foreclosing mortgagee, who arranges for the publication of the notice of the auction.

(b) For publishing auction notices for judicial foreclosures on a website maintained by the DCCA, delete the phrase "provided that the mortgaged property is owned by an owner-occupant" (page 21, lines 5 and 6). The foreclosure commissioner should be allowed to publish auction notices of any property being foreclosed, regardless of whether the property is owner-occupied or not. Even a judicial foreclosure auction notice of an investor-owned property should be allowed to be published on the DCCA's website.

(c) In HRS Sec. 667-27(d), for publishing notices of the auction for non-judicial foreclosures on a website maintained by the DCCA, delete the phrase "provided that the mortgaged property is owned by an owner-occupant" (Section 20 of this Bill, page 102, lines 8 and 9). The foreclosing mortgagee in a non-judicial foreclosure should be allowed to publish auction notices of any property being foreclosed, regardless of whether the property is owner-occupied or not. Even a non-judicial foreclosure auction notice of an investor-owned property should be allowed to be published on the DCCA's website.

5. **Monetary cap for association lien priority.** Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h) on page 71 (lines 19 through 21) and page 77 (lines 9 through 11), respectively. This cap is on the total amount of unpaid common area maintenance fees that a condominium association can specifically assess against a person who purchases a foreclosed unit. Currently, the amount of the cap is temporarily a maximum $7,200 based on 12 months of delinquent maintenance fees. (On September 30, 2014, the cap is set to return to $3,600 based on 6 months of delinquent maintenance fees.)

Even though this Bill at least reduces the 12 month period to 6 months, it nevertheless removes any dollar amount on the cap. The lack of a reasonable monetary cap could make it difficult for consumers to obtain mortgage financing for condominium units in certain projects.

6. **Attorney affirmation for judicial foreclosures.** Delete the attorney affirmation provision for judicial foreclosures beginning on page 21, line 7, through page 22, line 40 in this Bill. The Senate Bill did not contain such a provision.

When this House Bill was heard by the Senate Committee on Commerce and Consumer Protection on March 14, 2012, the Hawaii State Bar Association submitted testimony opposing this provision because of attorney-client privilege issues and confidentiality issues. Existing court rules, such as the Hawaii Rules of Civil Procedure and the Hawaii Supreme Court's Rules of Professional Conduct governing attorneys, already provide enforcement remedies for problems that this attorney affirmation provision purports to address.

We ask that you leave in the "defective" effective date in this Bill to ensure further discussion.

Thank you for considering our testimony.

Marvin S. C. Dang

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

(MSCD/hfsa)

HAWAIIAN COMMUNITY ASSETS

1050 Queen Street, Suite 201
Honolulu, Hawaii 96814
Ph: 808-587-7886
Fax: 808-587-7899
Toll Free: 808-866-400-1116

Senate Committee on Judiciary and Labor
Thursday, March 29, 2012, 10:30 a.m.
State Capitol, 415 South Beretania Street
Conference Room 016

HB1875, HD2, SD 1: SUPPORT WITH AMENDMENT

Aloha Chair Hee, Vice Chair Shimabukuro, and Committee Members,

My name is Jeff Gilbreath, Executive Director with Hawaiian Community Assets, a HUD-approved housing counseling agency that provides free foreclosure prevention counseling services through our statewide offices. Based on our reach and impact in community, Hawaiian Community Assets held representation on the State Mortgage Foreclosure Task Force since its inception in 2010.

Hawaiian Community Assets **strongly supports** HB1875, HD2, SD1 as a vehicle for implementing the 2012 recommendations of the State Mortgage Foreclosure Task Force as well as:

1. Leaving intact section 667-60 relating to Unfair and Deceptive Acts and Practices, a compromise that was reached in good faith by 13 of 17 members of the Task Force.
2. Making permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures.
3. Repealing Part I of chapter 667 and the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions.

While we strongly support these components of the bill (for the reasons listed below), I ask that the Committee **support an amendment requiring attorneys instituting residential judicial foreclosure actions to file affirmations regarding the accuracy of submitted documents.**

Passing of Act 48 and UDAP provision key in slowing the alarming rate of foreclosure we faced in 2010. I would like to take this opportunity to remind ourselves of the foreclosure crisis we faced last year which prompted the passing of Act 48, including the strong Unfair and Deceptive Acts and Practices provisions that have been the primary line of defense giving our families breathing room and ourselves a chance to reflect with regards to foreclosures in our communities. At the time of the passing of Act 48, Center for Responsible Lending reports showed that our State had seen a 687% increase in foreclosure filings between the third quarter of 2006 and the first quarter of 2010 resulting in a loss of approximately $15 billion in home equity for our families – an average loss per home of $41,668. As a result of implementing Act 48 and the UDAP provision, on January 11, 2012 RealtyTrac reported that the number of foreclosures in Hawaii had dropped by 52% from the year prior.

Maintaining the language regarding the UDAP provision as well as repeal of in HB1875, HD2, SD1 with regards to will ensure that we continue to see success in improving Hawaii's foreclosure situation.

Working together to address rampant unfair and deceptive acts and practices. During our counseling work, we continue to see the impacts of a lending industry that has never had to modify loans on such a widespread basis – submitted paperwork is being reported as lost or never received, families' mortgage payments are not being recorded, repayment plans have been agreed upon verbally and changed when the family receives the approval paperwork, and we struggle alongside families to simply make contact with certain lenders from the Continent.

Our organization has recently received funding to support the free Independent Foreclosure Review process. The Reviews are to determine whether or not homeowners, who were in foreclosure between January 1, 2009 and December 31, 2010, experienced "financial injury". This process was established in light of the rampant "robo-signing" scandals that came to light in the fall of 2011, which resulted in Bank of America, the lender responsible for 98% of Hawaii home foreclosures in November 2010, in halting their foreclosure operations in all 50 states. Reinforcing the severity of such fraudulent lending practices, the HUD Inspector General has released reports on the heels of the National Mortgage Settlement confirming and detailing the lengths to which JPMorgan, Wells Fargo, CitiMortgage, Bank of America and Ally Financial went to violate state and federal foreclosure laws via robo-signing, foreclosing without proper documentation and with misidentification of the outstanding amounts owed by borrowers, forging documents and signatures, falsely notarizing paperwork and simply making up job titles. It had already been well documented that illegal conduct occurred at these institutions, but what the reports illuminate is that such actions occurred at the direction of mangers and executives at these banks.

The non-judicial foreclosure process, a process that is outlawed in 20 states throughout our nation, has been viewed as one factor for such blatant unfair and deceptive acts and practices to take place since such action does not require involvement of a third-party mediator or judge.

Another factor impacting the legitimacy of foreclosures was the reality of investment in "mortgage-backed securities", also known as Over-the-Counter Derivatives, by the nation's largest financial institutions. To provide the Committee with a basic background on an extremely complicated market, the Over-the-Counter Derivatives market is a highly unregulated market in which financial institutions essentially pool together subprime mortgage loans made to individuals and families without verifying income, reviewing Debt-to-Income ratios, or educating the homebuyer of adjustable rates among other aspects. As Over-the-Counter Derivatives became common within the lending industry in the 2000s, these pools of "toxic assets" were traded between various institutions and investors, all betting that the bottom would not fall out on a robust, growing housing market. As the Great Economic Recession started in 2007, trades intensified, especially after the failure of Lehman Brothers and AIG – two institutions that held large amounts of such pooled subprime loans. This has led to documented incidents where families' homes have been foreclosed upon despite the fact that lenders have not been able to prove they actually hold Title of the homes. The most recent and high profile case is U.S. Bank v. Ibanez, 10694, Supreme Judicial Court of Massachusetts (Boston) *[The lower-court cases are U.S. Bank National Association v. Ibanez, 08-Misc-384283, and Wells Fargo Bank NA v. LaRace, 08-Misc-386755, Commonwealth of Massachusetts, Trial Court, Land*

Court Department (Boston)] in which Judge Ralph Gants upheld a lower court judge's decision saying two foreclosures were invalid because the banks did not prove they owned the mortgages, which the lower court judge said were improperly transferred into two mortgage-backed trusts.

The decision of U.S. Bank v. Ibanez shows us that without proper checks-and-balances to verify all required documents held by the lender at time of initiating the foreclosure are legitimate, we run the risk of condoning the actions of those within the highly unregulated Over-the-Counter Derivatives market while at the same time rewarding such behavior by providing the opportunity for illegal foreclosure of our families' homes. **By requiring attorneys instituting residential foreclosure actions to file affirmations regarding the accuracy of submitted documents we have the opportunity to work together to learn from past mistakes, so we can ensure the dream of homeownership is available to our future generations.** Inclusion of this amendment in the existing HB1875, HD2, SD1, combined with community-based outreach and public education efforts, will help our communities and our State by upholding a standard of law that does not allow property seizures based on backdated, incomplete, or fraudulent documentation, no matter what the circumstances are.

Thank you for your time and consideration.

Sincerely

Jeff Gilbreath
Executive Director

hee6 - Dinna

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 28, 2012 3:08 PM
To: JDLTestimony
Cc: bruceh@hmcmgt.com
Subject: Testimony for HB1875 on 3/29/2012 10:30:00 AM

Testimony for JDL 3/29/2012 10:30:00 AM HB1875

Conference room: 016
Testifier position: Support
Testifier will be present: Yes
Submitted by: Bruce Howe
Organization: Hawaiiana mamagement Co.
E-mail: bruceh@hmcmgt.com
Submitted on: 3/28/2012

Comments:
This bill, with the changes made by Senator Baker increasing the lien expiration time to six years from three and preserving the basic pay first/contest later procedure which has always been in effect for condos, along with a straight six-month recovery from purchasers after a lender foreclosure; addresses the issues we found so negative in the earlier drafts of this bill. As modified, we urge passage of this bill so that non-judicial foreclosures can again proceed in an orderly manner when other measures fail to resolve seriously delinquent accounts, to the benefit of condominium and community association owners throughout the State.
Thank you for taking the time to understand the needs of the communities we represent.
Bruce Howe

Hawaii Credit Union League
Your Partner For Success

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

Testimony to the Senate Committee on Judiciary and Labor
March 29, 2012

Testimony in opposition to HB 1875 HD2 SD1, Relating to Foreclosures

To: The Honorable Clayton Hee, Chair
The Honorable Maile Shimabukuro, Vice-Chair
Members of the Committee

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 81 Hawaii credit unions, representing approximately 811,000 credit union members across the state. 60 of our member credit unions write mortgage loans in Hawaii. We are in opposition to HB 1875 HD2 SD1, Relating to Foreclosures.

While we understand the current economic situation, and the plight of homeowners today, we respectfully oppose this measure. We recognize and appreciate the efforts of the legislature to amend Act 48 to address some concerns raised by lenders, however, this bill continues to present many significant concerns for Hawaii's credit unions, and the lending market as a whole. We have listed these concerns below.

1. The League opposes the repeal of nonjudicial foreclosures under Part I. The Part I non-judicial foreclosure process should continue to exist as a viable alternative to the Part II non-judicial foreclosure process now that Act 48 strengthened consumer protections in Part I. Act 48 now (a) requires that Part I foreclosure notices be served at least 21 days before the auction date, (b) specifies that the service of the notice be in the same manner as serving civil complaints, (c) enables an owner-occupant to convert a Part I non-judicial foreclosure to a judicial foreclosure or to elect dispute resolution under certain circumstances, and (d) prohibits a lender in a Part I non-judicial foreclosure from pursuing a deficiency against certain owner-occupants. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor-owned property, if not for owner-occupied residential property.

2. Because of the increasing costs being charged by certain newspapers of daily circulation in Hawaii to print the notices of judicial and non-judicial foreclosure auctions required to be "published", the League supports the Legislature's efforts to have a state agency provide a centralized internet website for the official posting of notices required by Chapter 667.

3. The League opposes the lifting of the cap on an association's super-lien for maintenance fees. It was originally capped at the lesser of 6 months of $3,200. Under Act 48, that cap lifted to the lesser of 12 months or $7,200. Now, the super-lien is simply six months of

monthly assessments with no monetary cap. This cost will eventually be borne by the next private buyer of the unit, and will effectively depress prices for units in the project.

4. **§667-56**: Prohibited practices: The League seeks repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale.

(b) Section 667-56(6) also uses the phrase "bona fide loan modification negotiations." This phrase is vague, and raises many questions.

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. Section 667-56(7) presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

5. **§667-58**: As worded, § 667-58(a) implies credit unions must file affiliate statements naming their own officers. The League suggests § 667-58(a) be amended to begin as follows:

> "Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or an officer of the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . ."

6. **§667-59**: The League suggests that this section, captioned, "Actions and Communications with the Mortgagor in Connection with a Foreclosure," should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made in writing by its agents, including but not limited to its . . . ."

7. **§ 667-60**: The League submits that the proposed amendment of § 667-60 is too complex and overly broad. Section 667-60 now states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." The requirement that a claimant must show a court proof that an act was "unfair and deceptive" is removed. Any violation of Chapter 667, no matter how miniscule, becomes an unfair and deceptive act or practice entitling the claimant to certain remedies and damages, and that includes voiding of the contract or agreement. Section 667-60 is often cited as one of the principal reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially.

The amendment of §667-60 proposed by this bill should not be enacted because:

(a) It would create a "laundry list" of violations which would be unfair or deceptive acts or practices,

(b) It would create violations which could result in a non-judicial foreclosure sale being voided, and

(c) It would allow actions to void the foreclosure sale to be filed up to 6 months after an affidavit of the sale is recorded.

The League submits that the proposed amendment is too complex and overly broad and it would continue to discourage lenders from foreclosing non-judicially. It is also unnecessary.

Every lender is already subject to potential liability under §480-2 where someone has evidence sufficient to convince a court that a violation occurred.

9. Section 4 of the bill adds a new section to Chapter 667, requiring an attorney affirmation before a foreclosure can be pursued. Adequate safeguards already exist under the rules of court and the Judiciary has the ability to respond to abusive practices much more quickly than the Legislature. This provision encroaches on the Judiciary's authority to control the practice of attorneys appearing before it, and duplicates the provisions in Rule 11, Hawaii Rules of Civil Procedure. In addition, this provision would force attorneys to violate the attorney-client privilege.

In addition to the concerns listed above, we also concur with the issues raised by the Hawaii Bankers Association and the Hawaii Financial Services Association. Thank you for the opportunity to testify.

hee6 - Dinna

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 29, 2012 6:07 AM
To: JDLTestimony
Cc: onealdo03@hawaii.rr.com
Subject: Testimony for HB1875 on 3/29/2012 10:30:00 AM

Testimony for JDL 3/29/2012 10:30:00 AM HB1875

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: David O'Neal
Organization: Royal Kunia Community Association
E-mail: onealdo03@hawaii.rr.com
Submitted on: 3/29/2012

Comments:
As the Government Affairs Chair of RKCA, I would like to thank the legislature for working with Planned Community Associations to make amendments to this bill. I urge passage of HB1875 HD2 SD1 as amended. Thank you.

Dave O'Neal

hee6 - Dinna

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 28, 2012 7:08 PM
To: JDLTestimony
Cc: gomem67@hotmail.com
Subject: Testimony for HB1875 on 3/29/2012 10:30:00 AM

Testimony for JDL 3/29/2012 10:30:00 AM HB1875

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: Eric M. Matsumoto
Organization: Mililani Town Association (MTA)
E-mail: gomem67@hotmail.com
Submitted on: 3/28/2012

Comments:
We support the compromise language for the provisions affecting PCAs, as reflected in SD 1, and urge that it be passed in its present form.

Star Advertiser

TO: Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FR: Dave Kennedy, Senior Vice President
Honolulu Star-Advertiser

RE: **TESTIMONY IN COMMENT TO HB 1875 HD2 SD1 – Relating to Foreclosures – Amendment Requested**
March 29, 2012 – 10:30 AM
Hawaii State Capitol, Room 016

Aloha Chair Hee, Vice Chair Shimabukuro, and members of the committee:

The Honolulu Star-Advertiser respectfully submits comments to HB1875 HD2 SD1. We take no position with this bill; however, we respectfully request that the committee amend this bill to address issues pertaining to the erosion of due process and non-judicial and judicial foreclosure sale notices requirements contained in this bill.

The U.S. Constitution provides due process protections recognizing the legal rights of individuals. The 5th and 14th amendments guarantee that government actions may not "deprive any person of life, liberty or property, without due process of law." When the State of Hawaii places constraints on the publication of notices concerning the taking of real property such as allowing notice of foreclosure sales on the Internet only, the state essentially uses its power to inhibit the due process protections guaranteed by the U.S. Constitution.

Currently, no western state has an online-only publication of non-judicial and judicial foreclosure sale notices. Two western states allow the publication of notice of sale in a newspaper of general circulation and on a qualified Internet website. All other western states require publication in a legal newspaper or newspaper of general circulation. There's a reason for this: publishing on a state website does not essentially meet the traditional definition of a legal notice that appears in an independent third-party publication.

The purpose of the public notice of a foreclosure sale is, among other things, to provide notice to the owner and others that the property will be sold by auction. If such notice is limited to the Internet only, there is a strong likelihood that the person who stands to lose their house may not see the notice. Such "lack of notice" could lead to legal challenges to the foreclosure process. Just one such successful challenge would chill the entire foreclosure process in Hawaii.

Furthermore, a notice published only on the Internet may not go through the scrutiny that a notice published in a daily newspaper may undergo. A daily newspaper has a staff to proof read and fact check. The method is safe; the data is secure and the information is authentic. Information entered through a public portal may not be accurate and can fall prey to internet crimes such as identity theft and can be compromised by computer hackers. By allowing official notices published only on the Internet to be entered as official documents in a sworn affidavit, the state opens a door to mistakes at the very least and fraud at the worst.

It is helpful to examine why newspaper publication of notices is such a longstanding and universal requirement. This requirement ensures that once printed, foreclosure sale notices are archived and are secure from modification and tampering and are widely and easily accessible. If any of these elements were absent, a legal ad and foreclosure sale notice could not be authenticated and would be subject to challenge.

Foreclosure sale notices published in the newspaper are certified by affidavit, which is a written statement confirmed by oath or affirmation, for use as evidence in court. This provides proof of publication that is required for a number of legal processes including mortgage foreclosures.

If foreclosure sale notices were no longer published in newspapers of general circulation, but instead only appeared online – let alone on a government-run website – they would have none of these hallmarks of reliability, verifiability, permanency and accessibility. Foreclosure sales notices – like all serious business – must be transparent, independently verifiable and above suspicion.

The Judiciary, AARP, and persons with disabilities raised concerns in its testimony that Hawaii residents may not have easy access to the Internet. By not advertising in newspapers, a segment of our residents who are not computer literate or do not have access to a computer – such as seniors, persons with disabilities, those have a high school education or less, and the poor – will not have access to vital government and legal information. These are the very people who stand to lose their homes to foreclosure. While the bill is aimed at protecting homeowners and other consumers, the proposed new Internet publication requirements actually hurts consumers facing foreclosure.

Newspapers are an independent and credible source of information that residents rely upon to keep informed. Requiring the posting of notices online will reverse the free flow of information in Hawaii.

For these reasons, we respectfully ask for your consideration of this request to further amend language in this bill pertaining to the publication of judicial and non-judicial foreclosure notices.

hee6 - Dinna

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 28, 2012 4:30 PM
To: JDLTestimony
Cc: marcy@marcyfrommaui.com
Subject: Testimony for HB1875 on 3/29/2012 10:30:00 AM

Testimony for JDL 3/29/2012 10:30:00 AM HB1875

Conference room: 016
Testifier position: Comments Only
Testifier will be present: No
Submitted by: Marcy Koltun-Crilley
Organization: Individual
E-mail: marcy@marcyfrommaui.com
Submitted on: 3/28/2012

Comments:
I want to thank the members of the committee for reading and considering my testimony

My name is Marcy Koltun-Crilley and I am home owner living on Maui, who has experienced financial and other hardship first hand, BECAUSE of fraud committed by my mortgage servicer.

Had the servicer acted with the integrity required and expected of any business, I would be fine and not required any " help" from them.

I GENERALLY support HB 1875, HD2 to the extent it implements the 2012 recommendations of the Task Force and repeals Part I of chapter 667 and requires attorneys instituting residential judicial foreclosure actions to file affirmations regarding the accuracy of submitted documents.

I strongly OPPOSE repealing § 667-60 (declaring that any violation of chapter 667 violates § 480-2) until the dispute resolution program ends and then implementing the § 667-60 compromise included in the Task Force recommendations.

Further , I URGE the Committee to revise HB 1875, HD2 by:

(1) repealing the dispute resolution program sunset

(2) allowing borrowers to participate in dispute resolution before they must decide whether to convert to a judicial foreclosure.

Finally, to avoid undermining the intent and effectiveness of Act 48 and current law, it is important to retain:

(1) specific reference to the FDIC loan modification guidelines in the dispute resolution program;

AND ESPECIALLY

(2) mortgagee liability for oral misrepresentations made on mortgagees' behalf; and

(3) mortgagee liability for completing a foreclosure after a loan modification has been approved or while one is being considered.

There is a VERY Important reason for these revisions and to do whatever we can get make ACT 48 STRONG for Hawaii Home Owners.

I urge you to read the Complaint For Violations Of The False Claims Act, which was recently unsealed in federal court

http://www.scribd.com/doc/84409561/BofA-False-Claims-Case-2

The suit is the second whistle blower complaint unsealed so far which lead to the $1 billion False Claims Act settlement announced by Bank of America and the U.S. Attorney's Office on 2/9/12.

The suit is long but it is anything but dry or boring! The complaint reads like a movie, and the level of deliberate fraud and harm BOA did to Home Owners and the Government and taxpayers is astonishing.

Anyone who has had to deal with mortgage servicers will feel validated as they read it.

It will also demonstrate why we MUST HAVE mortgagee liability for oral misrepresentations made on mortgagees' behalf.

You will understand WHY the bank lobbyists object to any bill or law that has real TEETH! Something that is bigger than just the cost of doing business.

The almost unbelievable fraud, abuse and theft was DELIBERATE and relied heavily on ORAL misrepresentations on the mortgagees' behalf that came from the VERY TOP.

Home owners were given the "run-around" for months, documents demanded than discarded or held up on purpose, and numbers deliberately changed so people could not qualify for modifications they were told they would and should have qualified for.

That allowed the banks to tack on extra fees and interest, ruin their credit and trap people in a vicious cycle.

It also allowed them to collect money from tax payers and insurance, and extra servicing fees.

Those " oral misrepresentations" (read lies) caused MANY Hawaii home owners, including myself, to fall into default and lose hundred's of thousands of dollars when that NEVER would have happened had they NOT been lied to!

I ask anyone of you to call Bank of America (and most likely any of the other main Servicers) and you will be told that your call will be recorded. However, once you get a human, if you tell them you would also like to record the call, they will read you this sentence.

" Bank of America does not participate in recorded calls ".

And if you do not agree , they will NOT speak to you at all.

These banks have spent time and money figuring out loop holes and ways to get steal your home, and how much in fines are acceptable to pay to do so, since no one seems to have to go to jail for it.

Furthermore, under the recent landmark $25 billion foreclosure abuse settlement, banks are actually allowed to have a certain amount of "collateral damage!

http://abigailcfield.com/?p=1057

Only "reportable" errors count, and only if enough of those are reported can get a servicer in trouble under the settlement. This allows them to make errors that may seem minor, but can cause you to lose your home, and they are not required to report it!

Believe me, that can create millions and millions of dollars for the bank, while home owners lose everything because of the banks " allowable "mistakes".

This is also why it is important for people to be able to use the judicial system if they feel mediation is not working. The bank may offer what might seem like a fair modification, when in reality the bank walks away with much more than they would have had they not acted fraudulently with the home owner in the first place.

Thank You for doing the right thing for the people of Hawaii who can not afford to spend money on lobbyists as the banks all do.

Marcy Koltun-Crilley
Kihei, Hawaii
808-874-5644