# HB1875,SD1

HSBA
Hawaii State Bar Association

# Collection Law Section

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**Re: Testimony in *Opposition* to House Bill 1875 SD 1**

The Collection Law Section of the Hawaii State Bar Association (HSBA) joins in the testimony submitted by the HSBA in opposing the Attorney Affirmation requirement contained in House Bill 1875 SD 1. As an organization made up of practicing attorneys, foreclosure commissioners, and others involved in the unpopular, but necessary, function of debt liquidation and collection, we believe that any affirmation that is mandated as a precursor to filing a lawsuit is unnecessary and prejudicial to creditors.

First, there is simply no evidence that judicial foreclosure complaints have been or are being improperly filed in Hawaii. Moreover, the Legislature can be reassured that safeguards already exist within the existing law to allow judges and litigants to police unethical attorney and/or lender misconduct. For example, judges may discipline attorneys and litigants under Rule 11 of the Hawaii Rules of Civil Procedure; award legal fees and costs under HRS § 607-14; and/or file complaints and make referrals to the Office of Disciplinary Counsel for attorneys engaging in unethical conduct.

Second, even in other jurisdictions where there is perceived to be a problem with improper court filings, legislation to mandate affirmations has not been adopted. Thus, there is no precedent to look to for guidance in determining the impact of such a drastic change in the law. There is simply no reason for Hawaii's Legislature to act precipitously in this arena.

Third, a mandatory affirmation is particularly problematic because it makes the individual signing the affirmation vulnerable to being sued personally whether or not there is an actual violation. While the verifier might prevail against such claims, simply defending him/herself would be expensive and time consuming and create a significant imposition on judicial resources in having to determine such claims. With respect to an attorney affirmation, there is the added ethical issue of whether, once a violation of the affirmation is asserted, the attorney might be compelled to withdraw from representing the plaintiff, as a conflict of interest might exist.

While it might seem as if the bringing of such a false claim against an innocent verifier would be uncommon, it is going to happen. Desperate borrowers, especially those who are *pro se*, who are attempting to delay the loss of their home and who may be fueled by misleading advice from the internet and other questionable sources, already are bringing such claims because they have nothing to lose. The risk of facing such claims will dissuade attorneys from representing foreclosing mortgagees and will increase the expense to lenders in foreclosing.

Finally, requiring an affirmation at the time an action is commenced, is contrary to the express provisions of the Hawaii Rules of Civil Procedure, which state that complaints are subject to amendment, and that the facts of a case (including those related to any defense that might exist) are subject to discovery during the course of litigation. Consequently, imposing a requirement that a plaintiff not be able to amend its factual allegations, except under potential penalty of a substantial civil fine, is counter-productive. Such a requirement would create a disincentive to negotiations and would likely result in plaintiffs defending their initial allegations to the end rather than admitting and attempting to correct a pleading error. This would result in more contentious litigation as opposed to settlement.

These are just some of the many reasons legislating an affirmation requirement would be bad law and bad public policy.

Thank you for the opportunity to testify.

***"The comments and positions of the Collection Law Section of the Hawaii State Bar Association (HSBA) are not necessarily those of the HSBA proper."***

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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 Supplement**

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.

This is a supplement to our testimony on this bill to address some of the more problematic provisions contained in this bill; and in HRS Chapter 667 Part II. Alternate Power of Sale Foreclosure Process, Part III. Other Provisions and Part V. Mortgage foreclosure Dispute Resolution. The list is based on the order of priority.

**1. Deficiency judgment.** Part II (**§667-38)** has a provision that prohibits deficiency judgment on any Part II nonjudicial foreclosure (NJF), regardless whether owner-occupant or not, regardless of the nature of the property. Part I (**§667-5 (e))** prohibits deficiency judgment on any Part I NJF for owner occupants who do not have other real property. The Part I language should be substituted for the Part II existing language. The Part I language was the recommendation of the Mortgage Foreclosure Task for the 2011 legislative session.

**2. Prohibited Conduct or Proposed UDAP related provisions.**

- **§667-56 (7)** Lender cannot complete foreclosure while a person is being evaluated for a federal loan mod program (HAMP). The problem is that in theory, a borrower after being denied can repeatedly apply. Related to this is a provision that a lender cannot complete a foreclosure while bona fide loan modification is going on. As a remedy, after a denial of the first loan modification application, lender can complete the foreclosure, even if borrower reapplied. Therefore, a negotiation during a subsequent loan mod application is not a bona fide loan modification under this provision.

- **§667-60 (c)** Right to file a lawsuit to void a foreclosure auction sale period is 180 days after sale closing. This period should be shorten to 90 days and apply only if the lender was the purchaser. It should not apply to third parties sales in order to encourage bidding to ensure the highest possible price.

- **§667-56 (5)** A short sale price which is 10% higher (present law says 5%) trumps auction sale if 10% higher and escrow opened with 10 days of sale and closes within 45 days of sale. The trouble is that if short sale buyer does not close, you might lose the auction buyer, and the lender must close sale within 45 days within sale.

**3. Authority to negotiate at a Dispute Resolution Session (§667-80 (a) (1))**.

- The law requires a representative of the mortgagee who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the mortgagee or have direct access by phone, etc. to a person who is so authorized.

  A 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 owner of the loan.

  A possible alternative would be to limit the requirement to situations where the representative is from the bank that owns the loan and if the loan is owned by an investor &/or has private mortgage insurance, the servicer contact these parties promptly for a decision.

**4. §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 . . . ."

**5. Publication of notice on DCCA website (Section 3 of the Bill, page 21, lines 5 and 6; and Section 20 of the Bill, page 102, lines 8 and 9).** This bill limits it to publication for an owner occupant foreclosure. It should be expanded to include all foreclosures.

Shortly, we will provide suggested language to amend the provisions outlined above.

Thank you for the opportunity to provide our testimony.

Gary Y. Fujitani
Executive Director