HB1875,SD1

RCO
RCO HAWAII, L.L.L.C.

900 Fort Street Mall, Ste. 800
Honolulu, HI 96813

phone - 808.532.0090
fax - 808.524.0092
www.rcolegal.com

March 28, 2012

Via Email (JDLtestimony@capitol.hawaii.gov) and Hand Delivery

Senator Clayton Hee
Chair, Committee on Judiciary
Hawaii State Capitol, Room 407

Re: H.B. 1875, H.D.2, S.D. 1 –Relating to Foreclosures
Hearing: Thursday, March 29, 2012 at 10:30 a.m.
Conference Room 16

Dear Chair Hee and Members of the Committee on Judiciary:

I am Michael Wong, an attorney with RCO Hawaii LLLC ("RCO Hawaii"), a law firm dedicated to the representation of the mortgage banking and default servicing industry. Our firm provides a wide range of services in banking and real estate law to more than 200 large and small companies located in several Western states, including Alaska, Idaho, Arizona, Washington, Oregon, California, Nevada and Hawaii. It also serves as retained counsel for Fannie Mae in Hawaii.

RCO is pleased to **submit comments** regarding H.B. 1875, H.D.2, S.D. 1, which implements the recommendations of the Mortgage Foreclosure Task Force, and makes numerous other changes to the Hawaii foreclosure law. RCO specifically supports the intent of the amendments made in H.B. 1875, H.D.2, S.D.1, which change the publication requirements for non-judicial foreclosures to a "newspaper of general circulation" and provide guidelines for qualifying as such a newspaper. This approach, which has been implemented in other states, ensures that a newspaper meets general circulation requirements, and that there is an opportunity for more than one paper to compete to publish non-judicial foreclosure notices. This helps to address the dramatic increase in costs that has occurred for publishing notices as a result of Act 48, Session Laws of Hawaii 2011. RCO believes the amendments proposed in H.B. 1875, H.D.2, S.D.1 are part of the solution to ensure that there is fair competition for the publication of notices.

In addition, RCO appreciates that H.B. 1875, H.D.2, S.D.1 goes one step further and allows for the alternative of notices of public sale for owner-occupant properties to be posted electronically on the DCCA's website, for both judicial and non-judicial foreclosures. RCO believes that the Internet can and should play a role in improving the foreclosure auction process, particularly by increasing visibility and participation at foreclosure auctions. Specifically, allowing notices of a

foreclosure sale to be published electronically will increase bidders and third party sales. These third party sales are beneficial to everyone because the bidder absorbs the foreclosure costs, the borrower might derive income (if the bid exceeds the offset bid), the bank does not have to add a property to its REO portfolio, and the house is back moving in the market.

RCO notes that, in other states, in lieu of a government sponsored website, notices of sale are either allowed or required to concurrently be published in newspapers and qualified online websites. In Alaska, for example, this approach has been used, and a number of newspaper websites and other qualified websites compete to publish foreclosure sale notices online for a minimal cost. RCO believes that the best solution to the notice issue is to require both print and website publication, in line with the Alaska model.

If the Committee is inclined to leave the requirement as a print publication or website publication, RCO would recommend that it should be made clear that the choice of publication requirement is at the sole discretion of the foreclosing mortgagee, so that the choice of one publication method over the other does not become a point of dispute.

RCO remains willing to engage in further discussion and to provide input on this issue, based upon its experiences in Hawaii and other states. Thank you very much for the opportunity to testify regarding this measure.

From: George Zweibel [george.zweibel@hawaiiantel.net]
Sent: Tuesday, April 03, 2012 5:24 PM
To: Sen. Clayton Hee
Subject: HB 1875, HB 2019

Aloha Senator Hee,

I electronically submitted testimony supporting HB 1875 and HB 2019 on 3/27/12, well in advance of the 3/29/12 hearing (with decision making currently deferred to 4/4/12), but neither is included with the testimony on line for these measures. I received email confirmation for both when I submitted them, was later told by the webmaster to communicate directly with JDL, and attempted to do so. However, my testimony on these important bills still seems to be missing from the record.

For convenience, I attach my testimony on both bills. Please add them to the record and distribute to the Committee if that has not already been done.

I understand that testimony from the Legal Aid Society of Hawaii has similarly not been posted.

Mahalo,

George Zweibel

HSBA
Hawaii State Bar Association

Collection Law Section

Reply to: **DAVID B. ROSEN, ESQ.**
810 RICHARDS STREET, SUITE 888
HONOLULU, HAWAII 96813
TELEPHONE: (808) 523-9393
FAX: (808) 523-9595
E-MAIL: rosenlaw@hawaii.rr..com

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."

Hawaii Bankers Association

TEL:
808-524-5161
FAX:
808-521-4120
ADDRESS:
1000 Bishop Street, Suite 301B
Honolulu, HI 96813-4203

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

LAND USE RESEARCH
FOUNDATION OF HAWAII
1100 Alakea Street, 4th Floor
Honolulu, Hawaii 96813
(808) 521-4717
www.lurf.org

April 2, 2012

Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair
House Committee on Judiciary and Labor

Support of HB 1875, HD2, SD1, Relating to Foreclosures (Implements 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. Repeals the nonjudicial foreclosure process under part I of chapter 667, HRS. Makes permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures. Repeals the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions. Effective 6/30/20. (SD1))

Monday, April 2, 2012, 10:00 a.m., in CR 016

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii ("LURF"), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide our **support for the amendments made in HB 1875, HD2, SD1.**

HB 1875, HD2, SD1. This bill implements the 2011 recommendations of the Mortgage Foreclosure Task Force ("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; repeals the nonjudicial foreclosure process under part I of chapter 667, Hawaii Revised Statutes ("HRS"); makes permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures; and repeals the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions. Effective June 30, 2020.

LURF's Position. LURF acknowledges the hard work done by the Task Force, and the efforts of the various legislative committees to address the concerns of the planned community associations and condominium associations. LURF has submitted prior testimony commenting on the Task Force recommendations and the prior versions of HB 1875, HD2, SD1 which could have had unintended adverse consequences on planned community associations and condominium associations. We believe that most of these concerns have been addressed by the SD1 version.

For purposes of equity and fairness, the SD1, made certain amendments to the judicial foreclosure processes which are consistent with the nonjudicial foreclosure processes, including **providing for unit owner payment plans** to avoid association foreclosures.

With regard to planned community association and condominium association liens, the SD1 addressed LURF concerns by further amending this measure as follows:

(A) **Extension of time period for recorded association liens from two years to six years.** SD1 amendments extended the time limit for recorded association liens for unpaid assessments from two years to six years, which is consistent with Hawaii's *statute of limitations* to collect contract debts.

(B) **Non-expiration of recorded liens if proceedings to enforce the lien are instituted within six years.** SD1 amendments also provided that the recorded lien will not expire if proceedings to enforce the lien are instituted prior to the end of the six-year time period;

(C) **Recognition of "automatic liens" for planned community associations and condominium associations.** The SD1 also clarified that the expiration of a recorded association lien does not affect liens that "automatically" arise pursuant to law or the governing documents of the association;

(D) **If the delinquent owner files for bankruptcy, providing for tolling of the period of time for instituting proceedings until thirty days after the automatic stay of proceedings under the federal bankruptcy laws is lifted.** The SD1 also addresses situations where the delinquent owner files for bankruptcy, specifying that proceedings to enforce an association's lien for any assessment must be instituted within six years after the assessment became due, except that if the unit owner files for bankruptcy, the period of time for instituting proceedings shall be tolled until thirty days after the automatic stay of proceedings under the federal bankruptcy laws is lifted; and

(E) **Allows judicial foreclosures of liens that arise solely from fines, penalties, legal fees, or late fees.** SD1 also limits the prohibition against association foreclosures of liens that arise solely from fines, penalties, legal fees, or late fees to nonjudicial foreclosures only. Accordingly, the SD1 amendment allows judicial foreclosures of liens that arise solely from fines, penalties, legal fees, or late fees, as supervised by the courts.

Conclusion. For the reasons stated above, LURF is in **support of HB 1875, HD2, SD1**, and respectfully urges your favorable consideration of this measure.

Thank you for the opportunity to present testimony regarding this matter.