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**PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION
TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
AND
THE HOUSE COMMITTEE ON JUDICIARY
TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012
Wednesday, January 25, 2012
2:00 p.m.**

TESTIMONY ON HOUSE BILL NO. 2018, RELATING TO FORECLOSURES.

**TO THE HONORABLE ROBERT N. HERKES, CHAIR
TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
AND MEMBERS OF THE COMMITTEES:**

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on H.B. No. 2018, Relating to Foreclosures. My name is Bruce B. Kim and I am the Executive Director of the Department's Office of Consumer Protection ("OCP"). OCP offers the following comments on the bill.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("Task Force") pursuant to Act 162. The Task Force met over the course of the past two years

and submitted separate reports to the Legislature. The reports covered many of the issues surrounding the foreclosure crisis affecting the State and proposed legislation addressing this complex subject. The first report led to the adoption of Act 48 which sought to reform the foreclosure process and enact significant consumer protections especially in the area of nonjudicial foreclosures. 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 both lenders and borrowers in the foreclosure process. It is OCP's sincere hope that the measures submitted by the Task Force this year will lead to further implementation of Act 48, particularly utilization of the DCCA's alternate dispute resolution program created back in October under Act 48.

The original Act 48 established important consumer protections for borrowers by making the violation of Act 48's provisions a violation of H.R.S. §480-2. This year the Task Force and its Act 48 working group spent a substantial amount of time attempting to reach a compromise between the lenders and borrowers on this contentious issue. This effort led to the Task Force's adoption of an amended H.R.S. §667-60 which identifies twelve (12) specific violations of §667-60 meriting unfair or deceptive acts or practices treatment under §480-2. The amendment also makes clear that only nine (9) violations out of the listed twelve (12) violations are serious enough to warrant setting aside the foreclosure sale under H.R.S. §480-12.

The proposed changes to §667-60 further impose an expedited statute of limitations of 180 days in which to bring an action to set aside a foreclosure sale under § 480-12.

This compromise addresses the lenders' concerns that even a small typographical error could expose them to §480-2 liability and expressly limits such liability to all but the most serious violations of Act 48. Further a borrower may only void a foreclosure sale if an action is filed within 180 days of the recording of the affidavit of sale. Significantly, these changes have the important effect of making the issuance of title insurance on a property purchased in foreclosure more predictable.

Based on the foregoing, OCP believes the Task Force's proposed changes significantly address concerns over the scope of §480-2 violations while continuing to provide important protections to borrowers. Accordingly, the OCP supports the Task Force's changes to H.R.S. 667-60 as approved.

Thank you for this opportunity to testify on H.B. 2018. I will be happy to answer any questions that the Committee members may have.

Presentation of the Committees on Commerce and Consumer Protection and Judiciary
Wednesday, January 25, 2012 at 2:00 p.m.
Testimony on HB 2018 Relating to Mortgages

In Opposition

TO: The Honorable Chairs Robert N. Herkes and Gilbert S.C. Keith-Agaran
The Honorable Vice Chairs Ryan I. Yamane and Karl Rhoads
Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 2018. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

This bill repeals the provision automatically making all violations of the mortgage foreclosure law an unfair or deceptive act or practice, in favor of determinations made on a case-by-case basis. Establishes a time limit for filing actions to void title transfers of foreclosed property. Specifies a mortgagor's right to claim that a violation of the mortgage foreclosure law constitutes an unfair or deceptive act or practice. Provides that a mortgagee's failure to demonstrate rights of a holder in due course is prima facie evidence of an unfair or deceptive act or practice. Following the expiration of the mortgage foreclosure dispute resolution program in 2014, specifies certain foreclosure violations as unfair or deceptive acts or practices, and limits the types of violations that may void a title transfer of foreclosed property.

A major concern of Government Sponsored Enterprises (GSEs), such as Fannie Mae and Freddie Mac, with ACT 48 was section 667-60 covering Unfair or deceptive act or practice (UDAP). This bill restates what is the present state of the law that troubled borrowers always have the right to bring up a UDAP violation use 480-2 as evidenced in the wording as follows:

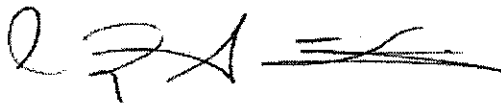
"Nothing in this chapter shall be construed as preventing a mortgagor from asserting that a violation of this chapter [~~shall have committed~~] is an unfair or deceptive act or practice under section 480-2..."

To make this provision more palatable to lenders we suggest the following:

1. Eliminate SECTION 2. Section 667-60 that would be take effect on October 1, 2014. This proposed UDAP section is the recommendation of Mortgage Foreclosure Task Force, which the lenders did not support.
2. The period to void a transfer of title should be no longer that 40 calendar days following the recording of the affidavit after public sale. Such period is consistent with the present requirement that a sale be closed within 45 days. A reasonable time period to complete the transfer of title would encourage more bidding as lenders will not fund a loan to purchase property at auction if there is an overhang of future litigation.

While the proposed changes are an improvement over the exiting UDAP provision, we remain unsure if the GSEs and lenders would use the NJF process without further changes in other parts of Chapter 667.

Thank you for the opportunity to provide our testimony.



Gary Y. Fujitani
Executive Director

Testimony for HB2018 on 1/25/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 6:40 PM

To: CPCtestimony

Cc: jade@steadfastpt.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB2018

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: Jadine L Brown
Organization: Individual
E-mail: jade@steadfastpt.com
Submitted on: 1/23/2012

Comments:

Thank you for hearing the People and creating Act 48 to protect Hawaii homeowners from unfair practices by financial institutions and to ensure mandatory and transparent mediation/modification as well as ensuring due process during foreclosures. Mainland banks are attempting to bypass our law by filing judicial foreclosures. Despite copious evidence of fraud by the banks, it appears that the Hawaii judiciary is not yet compelled to rule in favor of Hawaiian homeowners, or even hear their arguments in court. We need stronger laws. Please pass HB2033, HB2018, HB2019, HB2020, and HB1875. Thank you again for hearing your People.

**LAW OFFICE OF GEORGE J. ZWEIBEL
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**House Committee on Consumer Protection & Commerce
House Committee on Judiciary**

**Hearing: Wednesday, January 25, 2012, 2:00 p.m.
Conference Room 325, State Capitol, 415 South Beretania Street**

IN OPPOSITION TO H.B. No. 2018

Chairs Herkes and Keith-Agaran, Vice Chairs, and Committee Members:

My name is George Zweibel. I am a Hawaii Island attorney and have represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui for many years. Earlier, I was a regional director and staff attorney at the Federal Trade Commission enforcing consumer credit laws as well as a legal aid consumer lawyer. I have served on the Legislature's Mortgage Foreclosure Task Force ("Task Force") since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

I strongly oppose HB 2018 because it would drastically reduce existing homeowner rights and protections and encourage widespread noncompliance with Chapter 667.

HB 2018 would repeal the provision of § 667-60 declaring that any violation of chapter 667 is an unfair or deceptive act or practice ("UDAP") under § 480-2. It would also establish a time limit for filing actions to void title transfers of foreclosed properties.

Apparently, HB 2018 seeks to eliminate lenders' claimed reason for their decision to boycott nonjudicial foreclosures – potential liability for "trivial" violations of chapter 667 – so they will reconsider and participate in Act 48 dispute resolution. However, in attempting to solve one problem, HB 2018 would create a much bigger one.

In response to lenders' professed liability concerns, the Task Force painstakingly crafted a compromise that was approved by 13 of 17 voting members. Specifically, the Task Force's proposed subsections (a) and (b) of § 667-60 would limit foreclosing mortgagees' UDAP liability to listed, serious chapter 667 violations. To get Task Force approval, another major concession to

lenders was added. Proposed subsection (c) would additionally limit to 180 days the time for filing a court action seeking to void the wrongful transfer of title in a nonjudicial foreclosure. Read together, the Task Force's recommended revisions to § 667-60 address lenders' stated liability concerns but still preserve the most important homeowner protections.

Conversely, enacting only subsection (c) while delaying the effective date of proposed subsections (a) and (b) eliminates the balancing of interests embodied in the Task Force's recommended revision of § 667-60, and benefits only foreclosing mortgagees. First, it would be considerably more difficult for homeowners to establish foreclosure-related UDAP violations. Second, the deterrent effect of including a strong statutory remedy would be lost. Third, the primary beneficiaries of HB 2018 would be the same large mainland servicers that caused the problems leading to enactment of Act 48 in the first place.

HB 2018 would greatly reduce the time now available for homeowners to save their homes by challenging wrongful foreclosures in court. Borrower representatives on the Task Force reluctantly agreed to a 180-day limit solely as a tradeoff for specifically retaining UDAP liability for the serious chapter violations listed in Task Force subsections (a) and (b).

Delaying incorporation of subsections (a) and (b) until after the dispute resolution program is scheduled to end is also problematic. Presumably, the rationale for sunsetting the program was an assumption that the foreclosure crisis would abate by then.¹ Thus, the protections afforded by adding subsections (a) and (b) would not be available until after the time when they are needed most has passed. Nor would they ever apply to violations related to dispute resolution, the heart of Act 48.

For the above reasons, I respectfully request that HB 2018 receive no further consideration and that you instead approve the Task Force's recommended revisions to § 667-60, which reflect substantial compromise and balance the legitimate interests of homeowners and lenders alike.

¹ In my separate testimony on H.B. No. 1875, I request that Act 48's sunset provision relating to dispute resolution be repealed, because (1) mortgagees' decision to stop doing nonjudicial foreclosures will reduce to considerably less than the intended three years the period during which dispute resolution is actually available, and (2) by facilitating negotiations between owner-occupants and mortgagees to determine whether a loan modification or other agreement avoiding nonjudicial foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it is available.

HAWAII FINANCIAL SERVICES ASSOCIATION

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January 25, 2012

Rep. Robert Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Gilbert Keith-Agaran, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2018 (Foreclosures)**
Hearing Date/Time: Wednesday, January 25, 2012, 2:00 p.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: (1) repeal the provision automatically making all violations of the mortgage foreclosure law an unfair or deceptive act or practice, in favor of determinations made on a case-by-case basis, (2) establish a time limit for filing actions to void title transfers of foreclosed property, (3) specify a mortgagor's right to claim that a violation of the mortgage foreclosure law constitutes an unfair or deceptive act or practice, (4) provide that a mortgagee's failure to demonstrate rights of a holder in due course is prima facie evidence of an unfair or deceptive act or practice, and (5) following the expiration of the mortgage foreclosure dispute resolution program in 2014, specify certain foreclosure violations as unfair or deceptive acts or practices, and limit the types of violations that may void a title transfer of foreclosed property.

A provision in Act 48 (2011) is HRS Sec. 667-60 (unfair or deceptive act or practice). It is cited as one reason why lenders have elected to pursue judicial foreclosures, rather than judicial foreclosures, after May 5, 2011 (the effective date of Act 48).

The proposed change in Section 1 is a step in the right direction to address the problematic wording in HRS Sec. 667-60.

However, we recommend that:

1. The unstated time period to bring an action to void the transfer of title in Section 1 on page 2, lines 1 and 4, be 30 days following the recording of the affidavit.
2. Section 2 be deleted.

Thank you for considering our testimony.


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

(MSCD/hfsa)



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Calvin Pang, Esq.
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.
Executive Director

The Honorable Robert N. Herkes, Chair
The Honorable Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection and Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Karl Rhoads, Vice-Chair
House Committee on Judiciary

Hearing : Wednesday, January 25, 2012, 2:00 p.m.
State Capitol, Conference Room 325

In opposition to HB 2018 Relating to Foreclosures

Chair and Members of the Committees:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in the Consumer Unit at the Legal Aid Society of Hawai'i. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, tax debt, and other consumer debt problems.

We are testifying **in opposition** to HB 2018 as it would seriously weaken protections for borrowers in the State of Hawai'i.

HB 2018 would repeal the provision of § 667-60 declaring that any violation of chapter 667 is an unfair or deceptive act or practice ("UDAP") under § 480-2. It would also establish a time limit for filing actions to void title transfers of foreclosed properties.

Thirteen of 17 voting members of the Mortgage Foreclosure Task Force (“Task Force”) approved a compromise created in response to concerns raised by the lender representatives. Specifically, the Task Force’s proposed subsections (a) and (b) of § 667-60 would limit foreclosing mortgagees’ UDAP liability only to specifically delineated chapter 667 violations. Furthermore, proposed subsection (c) would limit to 180 days the time for filing a court action seeking to void the wrongful transfer of title in a nonjudicial foreclosure. These recommended revisions to § 667-60 address lenders’ stated liability concerns but still preserve the most important homeowner protections.

HB 2018 would also greatly reduce the time now available for homeowners to save their homes by challenging wrongful foreclosures in court. Borrower representatives on the Task Force reluctantly agreed to a 180-day limit solely as a tradeoff for specifically retaining UDAP liability for the serious chapter violations listed in Task Force subsections (a) and (b).

Conclusion:

For the above reasons, we respectfully request that HB 2018 receive no further consideration and that you instead approve the Task Force’s recommended revisions to § 667-60, which reflect substantial compromise and balance the legitimate interests of homeowners and lenders alike. Thank you for the opportunity to testify.