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Testimony to the Senate Committee on Commerce and Consumer Protection  
March 14, 2012

Testimony in Opposition to HB 2019 HD1, Relating to Mortgages

To: The Honorable Rosalyn Baker, Chair  
The Honorable Brian Taniguchi, 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. Approximately 60 of our credit unions write mortgage loans in the State of Hawaii. We are in opposition to HB 2019 HD1.

HB 2019 seeks to bar the collection of a deficiency judgment in the case where a short sale or foreclosure sale of a residential property does not pay off the balance of a mortgage loan.

Short sales are often a desirable alternative to foreclosure because of the lesser costs and fees on both sides. However, a short sale does not mean that the borrower is automatically forgiven of the remainder of their mortgage debt.

We submit that these provisions would inject unnecessary risk and uncertainty into both the short sale process and the mortgage foreclosure process. The provisions regarding relief from deficiency judgments in Act 48, developed by the Mortgage Foreclosure Task Force in 2010, are adequate and should not be expanded.

Thank you for the opportunity to provide comments.

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March 14, 2012

Senator Rosalyn H. Baker, Chair  
Senator Brian T. Taniguchi, Vice Chair  
Committee on Commerce and Consumer Protection

via email

RE: BILL: H.B. No. 2019, H.D.1  
DATE: March 14, 2012  
TIME: 9:00 a.m.  
PLACE: Conference Room 229

Dear Senators Baker and Taniguchi and Members of the Committee:

I apologize for the late testimony on this Bill; however, I personally believe that this is a very important bill to help protect consumers in Hawaii from an economic burden that should be borne by the financial institutions and not the consumers.

Thank you for the opportunity to present testimony on H.B. No. 2019, H.D.1. Because I believe that Hawaii should be an anti-deficiency judgment state, I have drafted legislation based on the legislation enacted by the California legislature. It is not exactly identical with California Civil Code 580 because the first provision was not related to the anti-deficiency judgment rules and that provision is already covered by Hawaii law. Also, as you know, California is a "deed of trust" state and thus, I made some changes to take out any references to trustees or deeds of trust. Otherwise, this new language is drawn from California law which has been amended as recently as 2012. This proposal is made by me as a taxpayer, a consumer and a lawyer who practices real estate law. I believe I am as qualified to testify on this issue as any other consumer. I practiced in Arizona for 3 years and I am licensed to practice (inactive) in California. Both of those states have anti-deficiency judgment legislation and the banking industry has survived very well in both of those states to my knowledge. During my legal practice in Hawaii, I have served and testified on behalf of the HSBA Subcommittee on Community Associations (part of the Real Property Section) and on the Legislative Action Committee for CAI. (I do not represent CAI any longer.) I have been selected by my peers over the last few years as one of the "Best Lawyers in America." I have practiced real estate law for more than 30 years in Hawai'i. I have not, however, represented banks or other financial institutions. A few observations to begin with:

1. Banks and financial institutions have every opportunity to "screen" buyers to ensure that the buyer can pay the amount of the mortgage. Banks are able to obtain unlimited amounts of financial information including credit reports, tax returns, employment information, on the applicant buyer and have the right to say "no" if the bank believes the applicant cannot pay its loan costs (banks in Hawaii have no motivation to worry about whether buyers can pay assessments due to community associations because the law is currently written by banks to

protect banks from ever having to come out of pocket for unpaid assessments unless they purchase the real property).

2. Banks and financial institutions have every opportunity to also “screen” the property to be purchased. Prospective buyers are required to pay for appraisals that satisfy the bank that the property is worth more than the loan. In fact, most loans are only made for a percentage of the appraised value – 90% or 80%, etc. – thus providing banks with a cushion to protect them against a property losing value.

3. Banks suffer a loss of profit if they are not allowed to obtain deficiency judgments. That impact will be small compared to the impact on the consumer. Banks seem to enjoy significant profit margins in their businesses. Most banks would not pursue a deficiency judgment if the debtor has no other assets (which they will know because of their intense financial review of borrowers). Moreover, this seems to me the kind of risk a bank should be forced to take. After all, it was banks (maybe not local banks - but Lehman Brothers, etc.) that got our economy in this mess to begin with. It is banks who used robo- signature machines to sign sworn affidavits and who foreclosed on numerous homeowners without any basis to do so. Surely, the equities favor the owner of the property under these circumstances. Banks may be required to pay their executives less but consumers could be placed in a position where the consumer could not feed his or her children if the banks execute on the deficiency judgment (e.g. garnishment). A bank is a for profit business that pays its executives outrageous sums (in my humble opinion), pays for wild parties on yachts and who wants to have a profit so that it can continue this type of expenditure while at the same time paying out dividends to shareholders. Certainly there is some sanity in the system in this country that would not sacrifice a family who has already lost a home and cause it to be unable to rent or to provide a meal for a child.

4. Borrowers who cannot pay do not get off without adverse consequences. The credit scores of consumers who default on their mortgage and have their property sold in a foreclosure sale will fall significantly. The foreclosure stays on their record for seven years and makes obtaining a different mortgage extremely difficult.

The California law (which has been in place in one form or another since the Great Depression of 1933) will protect buyers of residences from liability to the lender in the event the proceeds from a foreclosure sale are not enough to fully pay the loan. The California Civil Code of Procedure, Sections 580a through 580e, the "anti-deficiency" laws, prohibit secured lenders, under certain circumstances, from pursuing the borrower for the unpaid balance when the proceeds from a foreclosure sale do not fully pay the amount of the borrower's secured debt. In other words, when the "anti-deficiency" laws apply to certain protected borrowers, lenders will be barred, from pursuing the borrowers, personally, for any excess amount of the secured debt left unpaid after a foreclosure sale (the "deficiency").

The California law has been described in the past as follows: “Section 580b specifically prohibits recovery of a deficiency from a borrower, who incurred the loan in order to purchase real property as a residence for the debtor, when the property contains one-to-four units and

Senator Rosalyn H. Baker, Chair  
Senator Brian T. Taniguchi, Vice Chair  
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the property was used to secure the purchase loan. (Home buyers who later refinance their home loans may risk losing their "anti-deficiency" protection.) Section 580b also bars a deficiency as to sellers, who sold the secured property to the borrower, and who "carried back" a loan as part of the purchase price, as "seller financing". ... [The California law] further prohibits deficiency judgments from otherwise unprotected borrowers, when a lender has foreclosed upon the secured property by a private, "power-of-sale" foreclosure proceeding, pursuant to the terms of the deed of trust. If the lender wishes to obtain a deficiency judgment against an unprotected borrower (otherwise, there is no judge or commissioner watching the amount the bank pays for the property at auction) for the unpaid loan balance, a classic case of the fox watching the hen house.

In 2011, the California legislature apparently modified the legislation again to protect banks (bankers have a very strong lobby in all state legislatures) and to allow non-judicial and deficiencies if certain restrictions are met and part (a) is now modified to allow banks to exercise a power of sale foreclosure (non-judicial) and then later obtain a deficiency judgment against a borrower as long as an appraiser (it is called a referee in California) is appointed to ensure that the bank did sell the property for fair market value. This would violate the "single action" rule in Hawaii and is unfair to the debtor. Previously, California prevented any deficiency judgment in a non-judicial foreclosure. I have left the California law the way it was previously drafted because it was better for consumers and for simplicity's sake. Under the new law, the owner ousted from his home could be required to pay not only the deficiency judgment but also the cost of the appraiser (appraisals cost hundreds if not thousands of dollars).

I will give you a copy of the California Anti Deficiency Law, as amended to favor lenders, so you can compare it with my version.

Senator Rosalyn H. Baker, Chair  
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Thank you for your consideration of our testimony and suggested solutions to the two-year lien restriction provision currently found in H.B. No, 1875, H.D. 2. We would note that the House Committee did allow associations to renew the "recorded" lien. We are, of course, in favor of that concept.

Sincerely,

ANDERSON LAHNE & FUJISAKI LLP  
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Loyce Y. Neeley". The signature is fluid and cursive, with a large loop at the beginning.

Attached: My version of the California Anti Deficiency Legislation

A full copy of the California anti-deficiency statute so you can see the changes I made. (My paralegal will provide you with a red-lined version to make the changes obvious tomorrow when she returns – I don't know how to work that function.)

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**A BILL FOR AN ACT**

RELATING TO MORTGAGES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

SECTION 1. Chapter 506, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

~~"§506—Deficiency judgment prohibited for short sales and deeds in lieu of foreclosure of certain mortgaged residential property. (a) No deficiency shall be owed or collected, and no deficiency judgment shall be requested or rendered, for any deficiency upon a note secured by a mortgage for a residential property of not more than four units, in any case in which:~~

- ~~(1) The mortgagor sells the property for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the mortgage holder; or~~
- ~~(2) The mortgagor conveys all interest in the property to the mortgagee;~~

~~provided that on the date a letter or notice of default on the mortgage indebtedness was delivered to the mortgagor, the mortgagor occupied the property as a principal residence.~~

~~—(b) Following:~~

- ~~(1) The sale of the property;~~
- ~~(2) The voluntary transfer of title to a buyer by grant deed or by other document of conveyance recorded or filed pursuant to chapter 501 or 502, as applicable; and~~
- ~~(3) The tender to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary of the sale proceeds, as agreed;~~

~~the rights, remedies, and obligations of any holder, beneficiary, mortgagee, trustor, mortgagor, obligor, obligee, or guarantor of the note or mortgage, and with respect to any other property~~

that secures the note, shall be treated and determined as if the property had been sold through foreclosure sale for a price equal to the sale proceeds received by the holder, in the manner prescribed by chapter 667.

~~—(c) In the case of a short sale subject to subsection (a), a holder of a note shall not require the mortgagor or the maker of the note to pay any additional compensation other than the proceeds of the property sale, in exchange for the written consent to the sale.~~

~~—(d) If the mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures the mortgage, this section shall not limit the ability of the mortgage holder to seek damages and use existing rights and remedies against the mortgagor or any third party for fraud or waste.~~

~~—(e) Any purported waiver of this section shall be void."~~

"§506- (a) Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such mortgage, the plaintiff shall set forth in his or her complaint the entire amount of the indebtedness which was secured by the mortgage at the time of sale, the amount for which the real property or interest therein was sold and the fair market value thereof at the date of sale and the date of that sale. Upon the application of either party made at least 10 days before the time of trial the court shall, and upon its own motion the court at any time may, appoint a licensed appraiser qualified to appraise the property or the interest therein sold as of the time of sale. The appraiser shall file his or her appraisal with the clerk and that appraisal shall be admissible in evidence. The appraiser shall take and subscribe an oath to be attached to the appraisal that he or she has truly, honestly and impartially appraised the property to the best of his or her knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation of the appraiser in an amount as determined by the court to be reasonable, but those fees shall not exceed similar fees for similar services in the community where the services are rendered, which may be taxed and allowed in like manner as other costs. Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of the judgment, exclusive of interest after the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by the mortgage. Any such action must be brought within three months of the time of sale under the mortgage. No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of the mortgage, unless the real property or interest therein has become valueless.

(b) No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a mortgage given to the vendor to secure payment of the balance of the purchase price

of that real property or estate for years therein, or under a mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Where both a chattel mortgage and a mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof if no deficiency judgment would lie under the mortgage on the real property or estate for years therein.

(c) In all cases where existing mortgages are judicially foreclosed unless a different amount is set up in the mortgage, and in all cases of mortgages executed by the mortgagor, the mortgagor may be required to pay only such amount in attorney's fees for processing the judicial foreclosure as the court may find reasonable and also the actual cost of publishing, recording, mailing and posting notices, litigation guarantee, and litigation cost of suit.

(d) No judgment shall be rendered for any deficiency upon a note secured by a mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee under power of sale contained in the mortgage.

(e) (1) No deficiency shall be owed or collected, and no deficiency judgment shall be requested or rendered for any deficiency upon a note secured solely by a mortgage for a dwelling of not more than four units, in any case in which the mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the mortgage, provided that both of the following have occurred:

(A) Title has been voluntarily transferred to a buyer by grant deed or by other document of conveyance that has been recorded in the county where all or part of the real property is located.

(B) The proceeds of the sale have been tendered to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary, in accordance with the parties' agreement.

(2) In circumstances not described in paragraph (1), when a note is not secured solely by a mortgage for a dwelling of not more than four units, no judgment shall be rendered for any deficiency upon a note secured by a mortgage for a dwelling of not more than four units, if the mortgagor sells the dwelling for a sale price less than the remaining amount of the indebtedness outstanding at the time of sale, in accordance with the written consent of the holder of the mortgage. Following the sale, in accordance with the holder's written consent, the voluntary transfer of title to a buyer by grant deed or by other document of conveyance recorded in the county where all or part of the real property is located, and the tender to the mortgagee, beneficiary, or the agent of the mortgagee or beneficiary of the sale proceeds, as agreed, the rights, remedies, and obligations of any holder, beneficiary, mortgagee,



mortgagor, obligor, obligee, or guarantor of the note, or mortgage, and with respect to any other property that secures the note, shall be treated and determined as if the dwelling had been sold through foreclosure under a power of sale contained in the mortgage for a price equal to the sale proceeds received by the holder.

A holder of a note shall not require the mortgagor, or maker of the note to pay any additional compensation, aside from the proceeds of the sale, in exchange for the written consent to the sale.

If the mortgagor commits either fraud with respect to the sale of, or waste with respect to, the real property that secures the mortgage, this section shall not limit the ability of the holder of the mortgage to seek damages and use existing rights and remedies against the mortgagor or any third party for fraud or waste.

This section shall not apply if the mortgagor is a corporation, limited liability company, limited partnership, or political subdivision of the state.

Any purported waiver of subdivision (a) or (b) shall be void and against public policy.

SECTION 2. Chapter 667, Hawaii Revised Statutes, is amended by adding a new section to part I to be appropriately designated and to read as follows:

~~"§667—Deficiency judgment on foreclosure action prohibited for certain mortgaged residential property. A court shall not award a deficiency judgment against the mortgagor in a foreclosure action conducted pursuant to this part, notwithstanding any deficiency of the proceeds collected in the public sale and a balance remaining due on the indebtedness; provided that:~~

- ~~(1) The mortgagee is a financial institution as defined in section 37D-1; and~~
- ~~(2) On the date a letter or notice of default on the mortgage indebtedness was delivered to the mortgagor, the mortgagor occupied the property as a principal residence.~~

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

**Report Title:**

**Mortgages; Deficiency Judgments; Foreclosure by Action; Short Sales; Deeds in Lien of Foreclosure**

**Description:**

**Prohibits deficiency judgments to recover the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale. (HB2019 HD1)**

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*