



THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Finance

Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

Monday, February 28, 2011, 5:00 p.m.
State Capitol, Conference Room 308

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: House Bill No. 879, Relating to Mortgage Foreclosures

Purpose: Implements recommendations of the mortgage foreclosure task force relating to service of notice, conversion from non-judicial to judicial foreclosure, bar against deficiency judgments, notice of pendency of action, and extinguishment of a mortgagor's interest.

Judiciary's Position:

The Judiciary expresses no opinion about the intent or purpose of this bill. Though there are provisions in the bill related to details of court procedures that may be better left to the Judiciary, since it is still relatively early in the Legislative calendar, these issues may be addressed at a later time. Putting aside these details and concentrating on the bill's financial impact, we note that if this measure passes, we would like the proposed process to be workable. In order to effectively implement this measure and to ensure that any assistance the Judiciary provides the public is meaningful, we respectfully request additional funds and sufficient time.

Since the bill outlines the steps certain mortgagors can take to easily "convert" non-judicial foreclosures to judicial foreclosures and to stay the non-judicial foreclosure proceedings, we anticipate a rise in the number of court filings. It is our understanding that approximately 75% to 90% of foreclosures are currently proceeding non-judicially. *See, for example, attached Honolulu Star Bulletin article dated March 22, 2009 which was attached to the Preliminary Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2011 (indicating that non-judicial foreclosures account for at least 75% of foreclosure proceedings).*



House Bill No. 879, Relating to Mortgage Foreclosures
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Another recent report indicates that the total number of foreclosure cases for January through December 2010 in Hawaii was 12,425.¹ *See attached Star Advertiser article dated January 13, 2011 (citing statistics from Realty Trac).* During this same period, there were approximately 1,331 judicial foreclosure filings state-wide. If the Realty Trac report includes both judicial and non-judicial foreclosures, approximately 11,094 cases or almost 90% of foreclosure cases proceeded non-judicially last year. The current measure allows certain owner-occupants of *residential* property to file a conversion complaint. The attached January 13, 2011 Star Advertiser article indicates that most of the foreclosures in 2010 were of residential property.

Even if we conservatively estimated that only half of the 11,094 non-judicial foreclosure cases or 6,000 new cases (500 cases a month) would now be converted to judicial foreclosure actions, this would still significantly increase our caseload.² As a practical matter, to effectively address the filings resulting from this measure, the Judiciary would need to receive approval and appropriations for additional judges, staff, and courtrooms, as well as for other administrative support. Since the current circuit court judges are already carrying maximum caseloads, the Judiciary would not be able to process these 6,000 new cases per year at the circuit court level, without additional resources and staffing. Our conservative estimate to fund the cost of the additional judges and support staff to handle these new circuit court cases per year, is approximately \$4,300,000. Even if these funds were allocated this Legislative session, it would still take time for the Judiciary to hire staff for the new positions. Even with immediate attention, we estimate that the Judiciary would still require between nine (9) and twelve (12) months before the new judges and staff would be fully integrated into the judicial foreclosure process.

Since the Judiciary would like any assistance it provides the public to be effective and meaningful, if this measure passes, we respectfully ask for the requisite resources and sufficient time to implement this measure.

Thank you for the opportunity to testify on House Bill No. 879.

¹ Since the January 13, 2011 Star Advertiser article indicates that the yearly figure of 14,224 may include some overlap, we are using the 12,425 estimate instead. Please note that these are preliminary estimates based on recently-gathered information.

² This measure would not only increase the number of our cases, but may require operational changes as well. The bill provides that to successfully sustain the court action, all interested persons must file a statement submitting themselves to the court process within 90 days of the filing of the conversion complaint or the action will be dismissed and proceed non-judicially. It is currently unclear whether the court clerks would need to monitor the timely filing of such statements for dismissal or whether this would be the subject of a motion to dismiss filed by a mortgagee.

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Facing The Challenges Of Today's Real Estate Marketplace

Facing Foreclosure

Foreclosure is a financial disaster home owners hope they will never have to face. Not only does foreclosure mean the loss of their real property - probably their biggest personal investment - but their credit is severely damaged and chances of obtaining another mortgage loan substantially diminished.

Marvin S. G. Dang
Attorney and
Managing Member
Law Offices of
Marvin S. G. Dang, LLC

Attorney Marvin Dang has handled foreclosures as an attorney for lenders for 30 years and as a commissioner for 28 years. He believes many foreclosures could be avoided if the home owner acknowledged potential problems before they reached crisis proportions and contacted their lender to try to work out a solution.

He noted that there are many reasons why a borrower might be unable to continue making mortgage payments: loss of job, reduction in working hours and salary, huge medical bills, break-up of a marriage, an increase in the monthly mortgage payment, etc.

"Although there is no guarantee that a lender will make accommodations, chances are better that the lender will not start a foreclosure if the borrower contacts him with an explanation instead of simply halting payments," Dang said.

"Generally, lenders prefer to work out a 'win-win' solution rather than resort to foreclosure. The foreclosure process is costly and time consuming. It is a 'lose-lose' scenario. The only one who potentially benefits from a foreclosure is a buyer who manages to



pick up a foreclosed property at a bargain price at a foreclosure auction."

Dang explained that after one or two payments are missed, a lender will contact the borrower and mail out reminders to pay. If no mutual arrangement is made, a lender may refer the account to an attorney after three or four missed payments. But it could be sooner if the property is abandoned.

"Usually the first notification from the lender's attorney to the property owner is a letter confirming the default. This is sent out before the attorney begins the foreclosure proceeding. Once the borrower gets the attorney's letter, it still may be possible to work with the lender, so the property owner

should not ignore the letter," Dang said.

"If the borrower consults with a third party for assistance, it's also important to check the credentials of that person, as there are local and Mainland scam artists who have taken advantage of inexperienced Hawaii home owners with devastating results. It's best to talk with a Hawaii-based credit counseling service or a Hawaii real estate professional, rather than getting advice from the Internet. People can also meet with a bankruptcy attorney to decide what their best course may be."

Dang noted that in Hawaii there are two types of foreclosure actions, judicial and non-judicial. The judicial process is run through the court system. The lender files a complaint with the court regarding the delinquent loan and requests that the court allow the lender to foreclose on the mortgage on the real property. After the borrower is served with the complaint by a process server, the borrower needs to file a written answer with the court. If the borrower fails to respond, they will be in default as to the complaint.

The lender will ask the court to schedule a hearing to appoint a foreclosure commissioner to auction the property. At the hearing, the party being foreclosed on has an opportunity to tell the judge why a commissioner should not be appointed; for example, the property is in the process of being voluntarily sold and should close in a few months or the borrower is getting money to bring the loan current. If the judge is convinced that such a sale will close, or believes the loan can be reinstated, he or she may be willing to delay the foreclosure proceeding for a short period.

If the property owner is able to pay off the loan or bring it current, the foreclosure can be dismissed.

"In a judicial foreclosure, the commissioner

Continued on Page 2

Facing Foreclosure

Continued from page 1

who is usually either an attorney or a real estate professional, is accountable to and acts on behalf of the court...not on behalf of the lender," Dang said. "It will be the responsibility of the commissioner to get access to the property to inspect it. Generally, during the foreclosure, the commissioner will not evict the home owner or the tenant of the property. But any tenant will now need to pay rent to the commissioner and not to the landlord.

"The commissioner will hold two open houses at the property; usually on Saturdays and Sundays, and place ads in newspapers, such as the Honolulu Star-Bulletin. The ads must run once each week for three consecutive weeks announcing the date and time of the open houses and the date, time, and place of the auction. The last ad needs to appear at least two weeks before the auction is to be held. In Honolulu, the foreclosure auctions are held Monday through Friday beginning at 12 noon at the Eva Lani at First Circuit Court at 777 Punchbowl Street, where notices of upcoming auctions are posted. There could be more

than one property being auctioned at the same time by more than one commissioner."

According to Dang, anyone planning to bid at the auction will be required to show the commissioner before the auction proof of having a deposit in the form of a cashier's check or money order or cash, since the highest bidder needs to give the commissioner ten percent of the bid price at the end of the auction. The rules of the auction are announced by the commissioner and there is usually no upset price.

"Often the lender jumps in and bids at the auction," Dang said. "These lenders could be local and Mainland banks, credit unions, and other parties who may have bought the loan being foreclosed. Before they bid, lenders would have researched the condition and value of the property being foreclosed. Other bidders should do the same. The lender is not always the highest bidder. Investors and potential home buyers sometimes outbid the lenders.

"The highest bidder needs to understand that the judicial foreclosure sale is sub-

ject to court approval. After the auction, the commissioner will file a report with the court. The lender's attorney will schedule a court hearing to approve the sale, at which time the judge will ask if anyone wants to reopen the bidding for five percent higher than the auction price. Whoever is the highest bidder either from the first public auction or at the reopening at the hearing is generally approved by the court. The winning bidder has about 35 days to come up with the rest of the money to close the sale. Upon closing, the foreclosure commissioner will sign a deed to convey the property in 'as is' condition to the buyer. When the deed is recorded at Bureau of Conveyances, the title to the property is transferred."

Dang said that the second type of foreclosure in Hawaii, the non-judicial foreclosure, was rarely held until the late 1990s but now accounts for about 75 percent or more of foreclosure proceedings here.

"There are several basic differences between a non-judicial foreclosure and a judicial procedure," Dang pointed out. "A judicial foreclosure can take six to nine

months, whereas a non-judicial foreclosure takes two to three months since there are no court filings, no open houses, and no hearings. However, one similarity is that a newspaper ad announcing an auction will be required to run in a local newspaper once each week for three consecutive weeks, the last ad to appear at least two weeks prior to the auction. The notice of the non-judicial foreclosure sale needs to be mailed to the borrower and should be served by a process server. The notice must be posted on the property. No open houses are required to be held at the property, and there is no opportunity to inspect it in advance of the auction.

"For non-judicial foreclosures the auction and bidding procedures are similar to those of a judicial foreclosure. However, a non-judicial foreclosure auction is conducted by the lender's attorney or representative rather than a court appointed commissioner. At the conclusion of the non-judicial auction, the buyer pays the ten percent deposit. The rest of the sales price must be paid within thirty days

after the auction. Once the sales price is paid, the buyer will get a deed and becomes the owner of the property after the deed is recorded at the Bureau of Conveyances.

"For both judicial and non-judicial foreclosures, the successful bidder is responsible for obtaining possession of the property. The new owner can keep the occupants there or can ask them to move out. In cases where occupants refuse to move, the new owner may need to go to

court to ask the judge to issue an order to evict them."

"The entire foreclosure process could possibly be avoided if the borrower simply phoned the lender before missing that first payment," Dang said. "And people who find themselves facing possible foreclosure should keep in mind that, even if the foreclosure is started, it can be delayed and the auction can be postponed if the borrower is able to work out an arrangement with the lender."

Star Advertiser

Foreclosure filings hit new high

Figures show 38 percent more Hawaii properties were affected last year compared with 2009

By Andrew Gomes
 POSTED: 01:30 a.m. HST, Jan 13, 2011

Lenders pursued or completed foreclosure against a record number of Hawaii properties last year.

There were 12,425 properties statewide affected by foreclosure last year, which was 38 percent more than the 9,002 properties in 2009 and more than triple the 3,525 properties in 2008, according to the latest report from RealtyTrac, a real estate data company.

NO PLACE LIKE HOME
Hawaii's monthly foreclosures over the past year, including the year-over-year percentage gain:

2010	MONTH	TOTAL	CHANGE
	December	1,000	-34.8%
	November	877	+0.6%
	October	1,271	+37.4%
	September	1,617	+66.9%
	August	1,629	+87.5%
	July	930	-6.1%
	June	1,000	+41.6%
	May	1,055	+29.3%
	April	1,474	+115.5%
	March	1,097	+51.5%
	February	972	+81.0%
	January	1,302	+286.4%
	Total	14,224	+42.9%

BY THE NUMBERS
Five Hawaii communities with the most properties in foreclosure last year:

ZIP CODE	AREA	FORECLOSURES
96740	Kailua-Kona	1,244
96753	Kihei	905
96706	Ewa Beach	867
96761	Lahaina	646
96707	Kapolei	609

Source: RealtyTrac

Most of the properties were homes, though RealtyTrac doesn't exclude commercial real estate from its foreclosure data. If all the properties affected by foreclosure were homes, the total last year would represent 2.42 percent of all homes in the state, up from 1.8 percent the year before.

The growing number reflects the state's continuing struggle with economic recovery, and has strained families.

But so far foreclosures haven't reached epidemic proportions seen in states such as Nevada, Arizona and Florida.

"We've been relatively fortunate," said Jon Mann, a Honolulu real estate agent. "We haven't really been impacted as significantly as some mainland markets."

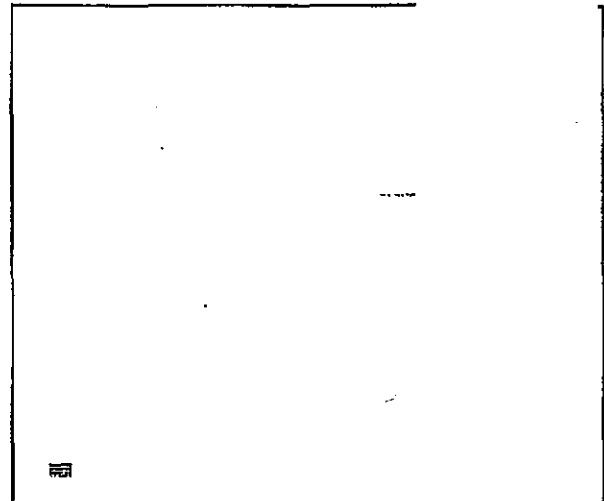
Hawaii's foreclosure level was close to the national average -- 2.23 percent of housing affected by foreclosure last year -- though Hawaii's rate was 11th highest.

The worst problem is in Nevada, where 9.42 percent of homes were affected by foreclosure last year. The lowest rate was 0.13 percent in Vermont.

In Hawaii, more than half the properties affected by foreclosure were on the neighbor islands, where many out-of-state investors bought vacation homes during the real estate boom in the mid-2000s.

On the Big Island, there were foreclosure filings against 3,370 properties last year, representing 4.23 percent of homes.

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Maui had 2,675 properties with foreclosure filings, or 4.05 percent of homes.

be counted on the same property in different months.

Kauai had 819 properties with foreclosure filings, or 2.75 percent of homes.

Oahu had the most properties affected by foreclosure but the lowest rate — 5,561 properties representing 1.65 percent of the housing market.

Real estate industry watchers caution that foreclosures could put downward pressure on housing prices if an overbearing number of foreclosed homes wind up on the market.

On Oahu, there were close to 3,200 single-family homes and condominiums on the market at the end of last year.

Mann said about 15 percent to 20 percent of the inventory was owned by lenders or homeowners trying to avoid foreclosure through short sales.

Whether the percentage will rise is hard to tell because not all homes that enter foreclosure are sold. Some owners work out their mortgage difficulties. In other cases, foreclosure can drag on for more than a year.

Mann notes that some additional inventory won't necessarily hurt the market because present inventory is relatively tight.

Hawaii's foreclosure problem is expected to worsen this year, according to local foreclosure attorneys.

There was a lull in the past two months, but the industry attributes that to lenders holding up cases to address improper processing issues raised a few months ago.

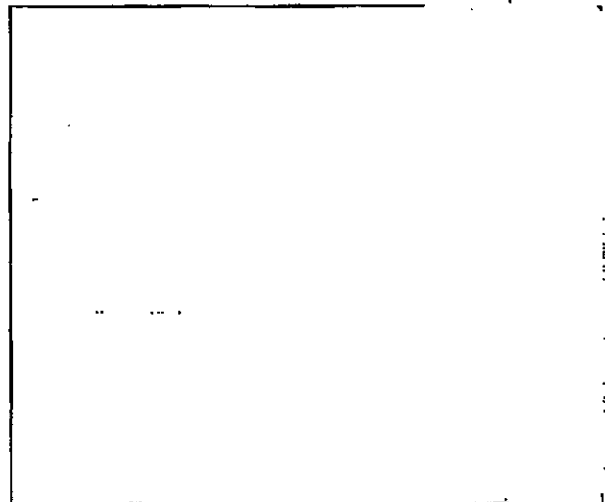
The number of foreclosure filings in December was 1,000. That was down 35 percent from 1,302 in the same month last year but was up from 877 in November.

Lenders filed a flurry of new foreclosure cases last month — 163 default notices, which according to RealtyTrac was the highest number in more than a year.

The bulk of filings last month were auction notices and lender repossessions.

RealtyTrac numbers for the full year are different in that they count properties going through foreclosure. The monthly counts are foreclosure filings, which can

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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION
TO THE HOUSE COMMITTEE ON FINANCE
TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Monday, February 28, 2011
5:00 p.m.

**TESTIMONY ON HOUSE BILL NO. 879, RELATING TO MORTGAGE
FORECLOSURES.**

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, AND MARILYN B. LEE, VICE
CHAIR, AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of House Bill No. 879, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

House Bill No. 879 seeks to implement the recommendations of the Mortgage Foreclosure Task Force established by Act 162, Session Laws of Hawaii 2010. The recommendations were provided to the Hawaii legislature on December 28, 2010 through the Preliminary Report of the Mortgage foreclosure Task Force. They contain

significant improvements to the current non-judicial foreclosure law in Hawaii. The proposal will provide for superior notice to homeowners of an impending foreclosure, offer them the ability to convert a non-judicial foreclosure to a judicial foreclosure, and allow them to escape a deficiency judgment in a non-judicial foreclosure. The measure also will help to bring certainty to title issues by authorizing the mortgagee to record a copy of the notice of intent to foreclose with the land court or the bureau of conveyances and will harmonize state law with a recent Hawaii Bankruptcy decision.

The task force represented a broad cross section of our community and as such was able to obtain the input of virtually all interested parties. The executive director of the Office of Consumer Protection served as the chairperson. This measure is the product of hundreds of hours of hard work by its members. Because of their strong commitment to improving the mortgage foreclosure laws in Hawaii, consensus was reached on these important proposals. Since the Department believes that each of them will further the interests of consumer protection in Hawaii, it strongly supports this measure.

Thank you for providing me with the opportunity to testify on House Bill No. 879. I will be happy to answer any questions that the committee members may have.

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February 28, 2011

Rep. Marcus R. Oshiro, Chair
and members of the House Committee on Finance
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 879 (Mortgage Foreclosures)**
Hearing Date/Time: Monday, February 28, 2011, 5:00 P.M.

I am 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 **supports** this Bill and **offers two amendments**.

The purpose of this Bill is to implement recommendations of the Hawaii Mortgage Foreclosure Task Force relating to service of notice, conversion from nonjudicial to judicial foreclosure, bar against deficiency judgments, notice of pendency of action, and extinguishment of a mortgagor's interest.

This testimony is based, in part, on my perspective as the Vice Chairperson of the Hawaii Mortgage Foreclosure Task Force ("Task Force"). I served as a member of the Task Force as the designee of the HFSA. This testimony is also based on my experience as an attorney who has actively done foreclosures for nearly 33 years since 1978.

This Bill contains the "Language for Proposed Legislation" that is in the Task Force's 2011 Preliminary Report. The recommendations of the Task Force are substantive and provide meaningful improvements to the non-judicial foreclosure process. The recommendations are the result of consensus by the 17 Task Force members who represented diverse ... and in some instances opposing ... interests.

The four Hawaii mortgage lender organizations represented on the Task Force are: **Hawaii Bankers Association, Hawaii Credit Union League, Mortgage Bankers Association of Hawaii, and Hawaii Financial Services Association.** The members of these organizations have offices and employees in the State of Hawaii.

The attachment to this testimony (**Exhibit "A"**) details why the four Hawaii mortgage lender organizations support this Bill. The Hawaii mortgage lender organizations are committed to working this year on the Task Force to consider other recommendations for the 2012 Legislature.

There are two additional issues that Hawaii mortgage lenders believe should be addressed by the 2011 legislature:

1. The first issue relates to the Task Force recommendation about deficiencies against an owner-occupant after a non-judicial foreclosure sale. The Task Force recommendation is that if an owner-occupant who is being foreclosed on has "a fee simple or leasehold ownership interest in any

other residential real property”, the foreclosing lender can pursue or obtain a deficiency judgment against that person. However, the lender would not be able to pursue or obtain a deficiency judgment if that person owned non-residential property.

That provision is unduly restrictive. Mortgage lenders should be allowed to pursue an owner-occupant for a non-judicial foreclosure deficiency if that person also owns any non-residential property, such as a commercial property, etc.

This Bill should be amended to delete the word “residential” on page 10, line 22 and on page 17, line 16. The phrase should read: “a fee simple or leasehold ownership interest in any other real property”.

2. A second issue was brought to the attention of the Task Force at its October 12, 2010 meeting. This issue involves the locations where non-judicial foreclosure auctions can and cannot be conducted. More information about this is in the Task Force Report.

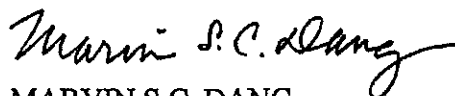
Judicial foreclosure auctions and non-judicial foreclosure auctions in the State have usually been held at court locations. On the Big Island, they have been held at a State building (Hilo) and a public park (Kona). Late last year, the Department of Accounting and General Services stated that it would not allow foreclosure auctions at the State building in Hilo. The Judiciary took the position that it will not approve the use of any court facilities in the entire State for the purpose of conducting non-judicial foreclosure auctions. The Judiciary was concerned that the public would be confused about whether or not non-judicial foreclosures are court-sanctioned. Additionally, in Hilo, there is a question as to whether non-judicial foreclosure auctions can be conducted on public sidewalks adjacent to court buildings and other State buildings.

This issue, which was not voted on by the Task Force, is urgent enough that it needs to be addressed legislatively this session to codify what has been a general practice. Unless this problem is corrected, non-judicial foreclosure auctions might have to take place at numerous, inconvenient locations. This could discourage members of the public who would want to attend and bid at the auctions. It is in the interest of both the lenders and the borrowers to have members of the public bidding at non-judicial foreclosures.

The legislative wording to correct this problem is simple. **This Bill should be amended in Sec. 667-5, Hawaii Revised Statutes, to read:**

“The sale shall take place at a state building in the county where the property is located, subject only to reasonable conditions on the time, place, and manner of the sale.”

Thank you for considering our testimony.



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

EXHIBIT "A"

The four Hawaii mortgage lender organizations represented on the 17 member Hawaii Mortgage Foreclosure Task Force ("Task Force") are:

Hawaii Bankers Association (Neal Okabayashi)
Hawaii Credit Union League (Stefanie Sakamoto, initially, and then Frank Hogan)
Mortgage Bankers Association of Hawaii (Linda Nakamura)
Hawaii Financial Services Association (Marvin Dang)

The members of these organizations have offices and employees in the State of Hawaii.

A. Views of Hawaii mortgage lenders regarding foreclosures.

In addressing the foreclosure issue on the Task Force, Hawaii mortgage lenders were guided by the following views and perspective:

- A foreclosure of a delinquent mortgage loan is the last option for a mortgage lender. Before assigning a delinquent loan to an attorney for foreclosure, the lender will send notices to the borrower. The lender will attempt to personally contact the delinquent borrower to determine the situation. Various options are explored including, loan workouts, loan modifications, short sales, and deeds in lieu of foreclosure. Under appropriate circumstances, the lender and the borrower can explore the option of the Obama Administration's federal initiative called Making Home Affordable Program, which has components called Home Affordable Refinance Program (HARP), Home Affordable Modification Program (HAMP), and Home Affordable Foreclosure Alternatives (HAFA). If there is no acceptable resolution of the delinquency, only then will the lender consider the last alternative of either a judicial or non-judicial foreclosure.

- If a lender is not able to resolve the default with the borrower, the lender would want to have a foreclosure process that is not costly and not time consuming.

- The number of foreclosures in Hawaii is affected by economic factors. Family problems (such as divorces) and medical expenses will always be factors in mortgage delinquencies. However, in a down economy, more borrowers will be unemployed or underemployed ... and they will be more likely to become delinquent in paying their mortgage loans. During the current down turn in Hawaii's economy, foreclosures have been increasing. We saw a similar trend in the mid-1990's to early 2000's. On the other hand, during the mid-2000's, as Hawaii's economy prospered, the number of foreclosures was relatively low. There will always be these cyclical peaks and valleys.

- Recent media coverage have focused on internal problems of out-of-state mortgage lenders and servicers in communicating with their customers and in handling the foreclosure process. These servicing issues involve out-of-state lenders which don't have servicing offices and employees in Hawaii. Sometimes a mortgage loan is owned by a mainland lender or investor, but the loan is serviced by other companies which collect the payments and interact with the borrowers. These third party servicers usually do not have offices and employees in Hawaii.

- National factors affect the foreclosure process:

HB 879 (Mortgage Foreclosures)
Hawaii Financial Services Association testimony
Exhibit "A"
February 28, 2011

- Some Hawaii lenders are servicers of mortgage loans which are owned or guaranteed by Fannie Mae (Federal National Mortgage Association) or Freddie Mac (Federal Home Loan Mortgage Corporation), which are federal government-sponsored enterprises. In these instances, Hawaii lenders must follow the servicing guides of Fannie Mae or Freddie Mac regarding delinquency management and default prevention. Failure to comply could result in the Hawaii lender being forced to repurchase the loan.

- Actions by Congress and federal agencies impact foreclosures. Any Hawaii legislative initiative regarding foreclosures should not be at odds with what is happening in Washington, D.C.

- There should not be permanent legislative fixes to temporary problems. Hawaii will not always have the same amount of foreclosures as the present. Servicing concerns will diminish as out-of-state lenders and their out-of-state servicers improve their procedures.

- In considering legislative solutions for foreclosures, the questions that must be asked are: Who are we helping? How do we help them? Who will be hurt by the legislation? Will there be unintended negative consequences?

- The medical adage of "do no harm" seems appropriate in dealing with Hawaii legislative solutions for foreclosures:

- Don't make it harder for Hawaii and out-of-state lenders to collect and foreclose. If the foreclosure process takes longer and becomes more costly and complex because of additional statutory foreclosure requirements, lenders might have to start the foreclosure process sooner for delinquent loans. This change will in turn increase the number of foreclosures. For this reason, Hawaii lenders would oppose mandatory mediation which could unproductively delay the foreclosure process.

- Don't harm Hawaii's economy. Don't harm the mortgage market. Don't make it harder for future borrowers get loans because of additional statutory foreclosure requirements which can result in borrowers having to pay higher interest rates and being required to make a larger down payment (such as 30%) so that there is a lower loan-to-value ratio (such as 70%).

- Legislative solutions in other states should not automatically be copied for Hawaii. Hawaii's unique situation is different from that in other states.

- Non-legislative solutions to foreclosure issues should be considered. For example, the Neighborhood Assistance Corporation of America ("NACA"), a HUD-certified counseling agency, describes on its website a loan modification fair where lenders meet with their borrowers. NACA holds these modification fairs ... "Save the Dream Tour" ... in cities across the country. Here's a link for more information about these fairs: https://www.naca.com/index_main.jsp. According to the NACA website:

"These events are the most effective and the only viable solution for large numbers of homeowners with an unaffordable mortgage. No where else can homeowners can meet with their Lender/Servicer to address their personal circumstances and get a same day solution. Hundreds of thousands of participants have participated at NACA's

HB 879 (Mortgage Foreclosures)
Hawaii Financial Services Association testimony
Exhibit "A"
February 28, 2011

Save-the-Dream events nationwide with over 30,000 people at each one. Thousands of homeowners received same day solutions with many having their interest rates permanently reduced to 4%, 3%, and 2% and in some also having their outstanding principal reduced. Homeowners saved hundreds of dollars a month and some over a thousand dollars. NACA provides the most effective long-term solutions because it has secured legally binding agreements with all the major servicers/lenders and the major investors (i.e. Fannie Mae and Freddie Mac) which cover approximately 90% of the country's at-risk homeowners. NACA has established the national standard in providing long-term affordable solutions for at-risk homeowners - All of NACA's services are FREE."

Such an event in Hawaii, organized by NACA or another other entity, would have the benefit of Hawaii borrowers meeting face-to-face with their out-of-state lenders and servicers to discuss loan modifications.

B. Hawaii mortgage lenders support the recommendations of the Mortgage Foreclosure Task Force.

Hawaii mortgage lenders support the recommendations in the Task Force Report. The approaches taken by the recommendations are consistent with the above-stated views and perspective of Hawaii mortgage lenders regarding foreclosures. The recommendations to the legislature provide substantive and meaningful improvements to the non-judicial foreclosure process. Where existing law is silent regarding certain steps and procedures in the non-judicial foreclosure process, the Task Force recommendations provide substance. These recommendations benefit both lenders and borrowers.

The following summarizes the recommendations and gives the lenders' comments about how the recommendations compare to the current non-judicial foreclosure law:

1. Amend Hawaii Revised Statutes Section 667-5, on foreclosures under power of sale (non-judicial foreclosure), to:

a. Require that the notice of intent to foreclose be served, not less than twenty-one days before the date of sale, on all persons entitled to notice under HRS Chapter 667 in the same manner as the service of a civil complaint under HRS Chapter 634, on civil actions and proceedings, and the Hawaii Rules of Civil Procedure.

Lenders' comment: The existing law is silent.

b. Prohibit a mortgagee who completes a foreclosure upon a mortgage on residential property from subsequently pursuing or obtaining a deficiency judgment against certain owner-occupants of that residential property; but

i. Provides that the completed foreclosure upon a mortgage on that residential property does not prohibit any subordinate lienholders

whose liens are extinguished by the foreclosure sale from pursuing a monetary judgment against those certain owner-occupants.

Lenders' comment: *The existing law is silent.*

2. Amend Part I of HRS Chapter 667 to:

a. Authorize an owner-occupant of residential property that is being foreclosed upon non-judicially to convert the action into a judicial foreclosure, under specified conditions, beginning with the filing of a complaint with the appropriate circuit court; but

i. Provides that the authorization to convert the action into a judicial foreclosure does not apply to non-judicial foreclosures of association liens that arise under a declaration filed pursuant to HRS Chapters 514A or 514B;

b. Require certain information to be included in the complaint; and

c. Require that if a notice of intent to foreclose non-judicially relates to property that is improved and used for residential purposes, the notice of intent to foreclose non-judicially shall contain a statement to notify the owner-occupant of the right of conversion.

Lenders' comment: *The existing law does not have such a procedure.*

3. Request the Judiciary to consider creating and adopting a form for the conversion complaint.

Lenders' comment: *The existing law does not have such a procedure.*

4. Amend Part I of HRS Chapter 667 to:

a. Authorize the foreclosing mortgagee or lienor to record a copy of the notice of intent to foreclose with the Land Court or the Bureau of Conveyances; and

b. Give the recorded copy of the notice the same effect as a notice of pendency of action in a civil action.

Lenders' comment: *The existing law is silent.*

5. Amend HRS Section 501-151, on the recording of notices of pending actions, to authorize the recording in the Land Court system of a notice of intent to foreclose.

Lenders' comment: *The existing law is silent.*

6. Amend part I of HRS Chapter 667 to specify that, for a non-judicial foreclosure, the mortgagor's interest shall be extinguished upon the recordation of the affidavit in

HB 879 (Mortgage Foreclosures)
Hawaii Financial Services Association testimony
Exhibit "A"
February 28, 2011

the Bureau of Conveyances or in the Office of the Assistant Registrar of the Land Court, as the case may be, within thirty days of the date of sale.

Lenders' comment: The existing law is silent.

C. Remaining issues from the point-of-view of Hawaii's mortgage lenders.

Hawaii lenders support the Task Force recommendation which states that other issues, including possible revisions to the alternate power of sale statute (Part II of HRS Chapter 667), be addressed by the Task Force. The Task Force can then make any recommendations on these other issues in its Final Report to the 2012 legislature.

February 28, 2011

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol, Room 308
Honolulu, Hawaii 96813

RE: H.B. 879, Relating to Mortgage Foreclosures

HEARING: Monday, February 28, 2011 at 5:00 p.m.

Aloha Chair Oshiro, Vice Chair Lee and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR supports the intent of H.B. 879, which implements recommendations from the Mortgage Foreclosure Task Force by: 1) changing the notice provisions for non-judicial foreclosure, 2) prohibiting a deficiency judgment against owner-occupants for non-judicial foreclosures 3) allowing an owner-occupant to convert a non-judicial foreclosure into a judicial foreclosure, 4) allowing the recordation of a notice of intent to foreclose to have the same effect as a notice of pendency of action, 5) providing that the mortgagor's interest in a non-judicial foreclose is extinguished when the affidavit is recorded in the bureau of conveyances or filed in land court.

While HAR supports the intent of the foregoing recommendations, HAR also believes that, overall, a comprehensive evaluation of the non-judicial foreclosure process and balanced approach to amending the foreclosure law is needed, and that the work of the task force is a step in the right direction. However, HAR further believes that, by only amending part I of the foreclosure law, the recommendations of the Task Force represent piecemeal solutions to the problem. Accordingly, HAR supports amending Part II relating to non-judicial foreclosures, and making Part II function by removing the requirement that the mortgagor must sign the deed.

With respect to H.B. 879, Section 2 creates a definition of "owner-occupant," and prohibits the pursuit of deficiency judgments against such "owner-occupants." in non-judicial foreclosures. HAR would suggest that the definition of "owner-occupant" in the bill may be too narrow, and that it therefore should be modified to conform with the definition of "resident" under the State's tax code, HRS §235-1.

Therefore, HAR respectfully requests that the definition be amended on page 4, lines 16-19 as follows:

- (2) The residential property is and has been the person's primary residence for a ~~continuous~~ period of not less than ~~one hundred eighty days~~ two hundred days of the immediately preceding calendar year prior to immediately preceding the date on which the notice is served.



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Recognizing the possibility that homeowners may continue to face greater hardship, and that this bill would serve address a part of the foreclosure problem facing our State, HAR respectfully requests your favorable consideration of this measure to continue the discussion, and ensure that all concerns can be addressed as fully as possible.

Mahalo for the opportunity to testify.

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.





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**Presentation of the Committee on Finance
Monday, February 28, 2011 at 5:00 p.m.
Testimony on HB 879 Relating to Mortgage Foreclosures**

**TO: The Honorable Chair Marcus R. Oshiro
The Honorable Vice Chair Marilyn B. Lee
Members of the Committee**

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in support of HB 879 with reservations. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

The purpose of this bill is to implement recommendations of the mortgage foreclosure task force relating to service of notice, conversion from nonjudicial to judicial foreclosure, bar against deficiency judgments against owner-occupants, notice of pendency of action, and extinguishment of a mortgagor's interest. HBA had a participating member serving on the Task Force.

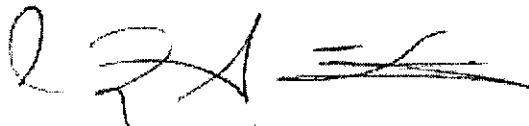
This bill reflects the "Language for Proposed Legislation" that is in the Task Force's 2011 Preliminary Report. The recommendations of the task force are substantive and provide meaningful improvements to the non-judicial foreclosure process. The recommendations are the result of consensus by the 17 Task Force members who represented diverse, and in some instances opposing, interests.

We believe the word "residential" should be deleted on page 17, line 16. This would make it consistent with the language on page 10 line 22. These sections deal with deficiencies against an owner-occupant after a non-judicial foreclosure sale. The intent was to allow a lender to only pursue an owner-occupant for a nonjudicial foreclosure deficiency if that person owns any other property (e.g. commercial property, etc.).

Our reservations stem from the possible piling on affect of other foreclosure bills still being considered by the legislature. These bills would add an inordinate amount of time to an already long process for lenders to get repaid on troubled mortgage loans.

The primary reason many borrowers are experiencing difficulty meeting their mortgage obligations is reduced income from unemployment or underemployment. Local lenders go to great lengths to work with the borrower before moving to foreclosure. Banks do not want to foreclose and would prefer to keep borrowers in their homes. Lenders do not want the house back, nor do they wish to maintain it. It is much better for everyone to keep the homeowner in the home, if at all possible.

Thank you for the opportunity to provide our testimony.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', with a horizontal line underneath.

Gary Y. Fujitani
Executive Director

TESTIMONY FOR HB1411HD1

DATE: Monday, February 28, 2011
TIME: 5:00 P.M.
PLACE: Conference Room 308
State Capitol
415 South Beretania Street

TO:

COMMITTEE ON FINANCE
Rep. Marcus R. Oshiro, Chair
Rep. Marilyn B. Lee, Vice Chair
And Colleagues

FROM:

JADE L. BROWN
Participant of FACE and Representing Homeowners of Hawaii
239 Upper Kimo Drive, Kula, HI 96790
(808) 344-1740

My name is Jade L. Brown. I am a responsible Maui homeowner at risk of losing my home and I represent thousands of families across our state who are also facing and/or trying to prevent foreclosure. **I am in support of HB879.**

As the financial crisis hit, my income was significantly reduced and we began to struggle making our mortgage payment. President Obama appeared ready to help us with his Making Homes Affordable Program. We applied for a modification. We were told by our servicer (Chase Home Finance) that we had to be delinquent in order to qualify. We had never been late on a payment before, but after receiving this instruction 3 times from Chase, we trusted them, because after all, this was a government program and surely they were conducting themselves with integrity and in good faith. Attempting to modify our mortgage has become a 2nd full time job for me. After over 167 phone calls, 85 faxes because they kept losing our paperwork, a trial modification that was supposed to last 3 months – but dragged on for about a year, and a final modification agreement that we signed and sent back on time, we still have no permanent modification. My husband and I are hard-working people and have acted in good faith to modify our mortgage. Now, we may be facing foreclosure. We take personal responsibility for saving our home, although we cannot help but feel “set-up” with this modification process. We have complained to the OCC, sought the help of our Senators, and now the assistance of an

attorney. All we want is to keep our home that we have worked so hard to love and maintain over the years.

For 2 years now, I have spent countless hours trying to educate myself because I could not understand why Chase was putting us through these sham loan modification negotiations. It is time to end the myth that it is "deadbeat borrowers" who are to blame for the mortgage crisis, and show how the banks have made beggars out of decent, responsible people.

I have become shocked and sickened to learn what has become of our home ownership to the players of the banking industry and Wall Street. I have learned that the contracts we entered into when purchasing our homes were not really mortgages, but security instruments involving parties unknown and undisclosed to us. Our mortgages have been endorsed and assigned to parties unknown and undisclosed to us, often many times over. Such endorsements and assignments were conducted without proper recordkeeping, possibly making identification of our true creditor impossible and therefore, valid lien release upon payoff, also impossible. The banking industry allegedly avoided proper recordkeeping intentionally to bypass having to pay local recording fees. This lost revenue, which could tally millions of dollars, has robbed our local economy and contributed to the financial crisis that our state is in. Credit enhancements and insurance policies were attached to our mortgages without our knowledge, financially enriching parties unknown and undisclosed to us in the millions of dollars if we went into default. Often times, we were targeted for such default at loan origination. I have learned that because our titles are now clouded due to securitization, documents may have been falsified to fabricate a perfected chain of title allowing parties with questionable standing to foreclose on our homes. I have learned that our creditor or creditors have likely been made whole already through various insurance policies, credit default swaps, and when all those funds were exhausted, bailout money from our tax dollars. The banks and servicers are foreclosing on our homes anyway, perhaps being unjustly enriched yet again. **It is important to know that such fraud is no longer alleged. Testimony of loan servicing fraud, loan origination fraud, appraisal fraud, assignment fraud, foreclosure fraud, and securities fraud are part of the Congressional Record and are being elucidated in the judgments of courts around the country following civil litigation. Given the widespread questionable nature of these practices, a national investigation appears in order.**

I don't know about you, but this financial crisis caught me off guard. I did not know what was going on financially for the country. I do not believe the powers in the banking industry and Wall Street are afforded the same benefit of the doubt. I do not believe that the genius financial engineers who created securities and other exotic products out of our mortgages were unaware of the fraudulent practices they were committing or of the potential financial consequences of their actions. Being financially shrewd, I think they counted on always being

one step ahead of us. I can see that they have already planned their response to the financial, housing, and foreclosure crisis. Their game plan is strategically underway and being played out with a well-funded lobby and high powered law firms. They are taking away our land as quickly as possible so as to be ahead of the curve of any new consumer protections and local legislation that safeguards our People.

To us here in Hawaii "home" is a sacred meeting place for friends, family, and community. To the big banks and Wall Street, our home is a game piece on a monopoly board. But, our love of this Land is greater than the greed of Wall Street. **If we continue to passively respond and submit to these strategies of big banks and Wall Street, I do not believe we are acting in our best interest as a State. Surely, we as a people who still remember our stewardship of the Land, recognize that we are more qualified than Wall Street to direct this narrative in the State of Hawaii. I am encouraged that this legislature is considering HB879. As we focus our efforts on economic recovery in the State of Hawaii, it is especially important to protect our citizens from fraudulent practices that will lead to their economic failure. We, who love this Land so much, will cause Hawaii to thrive once again, but we need a fair chance to keep our homes so that we *can* recover and prosper. Thank you.**

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, February 27, 2011 5:22 PM
To: FINTestimony
Cc: marcyfrommaui@gmail.com
Subject: Testimony for HB879 on 2/28/2011 5:00:00 PM
Attachments: Amendment hb879.doc

Testimony for FIN 2/28/2011 5:00:00 PM HB879

Conference room: 308
Testifier position: support
Testifier will be present: No
Submitted by: Marcy Koltun-Crilley
Organization: Individual
Address:
Phone:
E-mail: marcyfrommaui@gmail.com
Submitted on: 2/27/2011

Comments:

I Support HB879 , however, in ALL cases the mortgagee must prove with proper documentation they have the right to foreclose.

They MUST produce the ORIGINAL or a certified copy of the ORIGINAL note AND ALL intervening endorsements and assignments showing a complete chain of the title of the mortgage instrument. No "lost note affidavits";.

The most basic rule of real estate law is that only the mortgagee may foreclose.

Evidence and process in foreclosures are not mere technicalities nor are they just symbols of rule of law. They are part of the bargain between banks and homeowners.

Rule of law should NOT yield to banks' convenience. To argue that problems in the foreclosure process are irrelevant because the homeowner owes someone a debt is to declare that the banks are above the law.

MUST produce the ORIGINAL or a certified copy of the ORIGINAL note AND ALL intervening endorsements and assignments showing a complete chain of the title of the mortgage instrument.

No "lost note affidavits". A copy of the Pooling and Servicing Agreement, if applicable.

The above requirements are needed to show proof the bank has the legal right to foreclose. If the mortgages were not properly transferred in the securitization process (including through the use of MERS to record the mortgages), then the party bringing the foreclosure does not in fact own the mortgage and therefore lacks standing to foreclose. The PSA (which is public record) allows for more complete transparency during the process.

The above requirements are needed to show proof the bank has the legal right to foreclose.

If the mortgages were not properly transferred in the securitization process (including through the use of MERS to record the mortgages), then the party bringing the foreclosure does not in fact own the mortgage and therefore lacks standing to foreclose. The PSA (which is public record) allows for more complete transparency during the process.

There is no doubt the bank lobbyists will strongly oppose the above and will give many reasons why it is bad for "everyone" if they do. They have much more to lose than an individual foreclosure. HOWEVER, including the above WILL provide strong incentive for the banks to work out fair deals with home owners as the risks of not doing so are huge .

Please see:

Written Testimony of Adam J. Levitin
Special Counsel to the Congressional Oversight Panel Before the House Financial Services Committee Subcommittee on Housing and Community Opportunity
"Robo-Singing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing"
November 18, 2010
<http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>