LEGAL AID SOCIETY OF HAWAI'I

Telephone: (808) 536-4302 • Fax: (808) 527-8088
Mailing Address: P.O. Box 37375 • Honolulu, Hawaii 96837-0375
924 Bethel Street • Honolulu, Hawaii 96813

Calvin Pang, Esq.
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.
Executive Director

The Honorable Marcus R. Oshiro, Chair
The Honorable Marilyn B. Lee, Vice Chair
House Committee on Finance

Hearing : Friday, March 30, 2012, 5:00 p.m.
State Capitol, Conference Room 308

In Support of SB 2429, SD2 Relating to Foreclosures

Chair, Vice Chair, and Members of the Committee:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("Legal Aid"). I am advocating for our clients who include the working poor, seniors, citizens who speak English as a second language, the disabled, 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 Legal Aid's Consumer Unit. 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 support** of SB 2429, SD2, which would implement the 2011 recommendations of the Mortgage Foreclosure Task Force ("Task Force") and other best practices. As we previously testified before the House Committee on Consumer Protection and Commerce and the House Committee on the Judiciary, Legal Aid supports the intent of the Task Force recommendations to make Act 48 and Hawai'i's foreclosure law more efficient and effective. We support in particular the provisions in § 667-60 of SB 2429, SD2, which limit lender liability for unfair and deceptive acts and practices under § 480-2, HRS, to serious, listed violations only, as recommended by the Task Force. As stated in our prior testimony, this recommendation was approved by 13 of the 17 voting Task Force members in direct response to lenders' stated concerns regarding potential liability for minor chapter 667 violations. We also support the provisions of SB 2429, SD2 which seek to (1) limit the types of violations that may void a title transfer of foreclosed property; and (2) establish a 180-day time limit for filing actions to void title transfers of foreclosed property. These provisions represent a key

compromise reached among borrower and lender members of the Task Force in order to accomplish meaningful foreclosure reform in Hawai'i.

Furthermore, we support SD2's provisions that (1) repeal of Part I of Chapter 667, HRS; (2) make permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures; and (3) repeal the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions. All of these provisions would greatly strengthen protections for mortgage consumers in Hawai'i.

Conclusion:

For the above reasons, we respectfully request passage of SB 2429, SD2. We appreciate the committee's recognition of the need to reform the mortgage foreclosure process in the State of Hawai'i and support SB 2429, SD2's attempts at doing so. Thank you for the opportunity to testify.

Hawai'i Association of REALTORS®
www.hawaiirealtors.com

The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaiirealtors.com

March 30, 2012

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

RE: S.B. 2429, S.D.2, Relating to Foreclosures

HEARING: Friday, March 30, 2012, at 5:00 p.m.; AGENDA #4

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

I am Myoung Oh, Government Affairs Director, testifying on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **submits comments and requests a proposed amendment** for S.B. 2429, S.D.2, which implements the recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner associations.

HAR sincerely appreciates the efforts of the Mortgage Foreclosure Task Force to make recommendations regarding the existing foreclosure law in Hawai'i. However, the HAR has concerns that some of these recommendations may create unintended adverse consequences if it becomes law.

HRS Section 667-60 – Oppose 180-Day Waiting Period (Section 35, Page 133)
Under Section 35, Page 133 of S.B. 2429, S.D.2, the Task Force recommends that a 180-day waiting period be implemented after a foreclosure sale, to allow the foreclosed borrower to bring forth any claims for invalidating the public auction sale. HAR has concerns that the imposition of the 180-day requirement would severely impact the ability of a bidder to be able to purchase foreclosed real estate at auction. This will discourage potential bidding from the public at large, because, among other reasons, the waiting period will make it challenging to obtain financing. Owner occupant financing usually contains a requirement that a buyer take occupancy of the property within 30-90 days of closing the loan/purchase. If a Buyer cannot occupy a property within the lender's guidelines, the loan is categorized as an "investor loan," which requires a much larger down payment and a higher interest rate.

The California civil code sections regarding bona fide purchaser protections have worked for many years and could provide guidance for this Committee to consider. In California, the law presumes that the lender has satisfied requirements relating to notification, the auction sale, and all other aspects of the foreclosure. The lender is liable for financial damages to the mortgagor if the sale is overturned, but the third-party bidder is protected. In short, the California system encourages competitive bidding at the auction, fosters competition that

Hawai'i Association of REALTORS®
www.hawaiirealtors.com

The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaiirealtors.com

will yield the highest possible sale price, and creates the opportunity for the homeowner who lost the property to recover funds in the event there is an overbid.

Based on the foregoing, if the Committee is inclined to move this bill forward for further discussion, HAR would recommend that the 180-day waiting period only apply in situations where the lender takes back the property at auction with a credit bid, but that a third-party purchaser be exempted from this requirement.

For the forgoing reasons, HAR respectfully ask this Committee to consider the attached amendments to protect third-party purchasers, while still preserving consumer protection for homeowners.

Mahalo for the opportunity to testify.

(D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;

(9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;

(10) Failing to distribute sale proceeds as required by section 667-31;

(11) Making any false statement in the affidavit of public sale required by section 667-32; and

(12) Attempting to collect a deficiency in violation of section 667-38.

(b) Notwithstanding the provisions of subsection (a), any failure to comply with the provisions of this chapter shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value without notice. The statements in the recorded affidavit required by section 667-5 or section 667-32, as applicable, shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of a bona fide purchaser and encumbrancer for value without notice. The purchaser of the mortgaged property, other than the foreclosing mortgagee, shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include lenders and holders of liens who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly-conveyed property. [~~the~~] A transfer of title to the [~~purchaser of the property~~] foreclosing mortgagee as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in sections (a)(1) to (9)

if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Without limiting the provisions of subsection (b), [~~A~~]any action to void the transfer of title to the purchaser of property under this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than one hundred eighty days following the recording of the affidavit required by section 667-5 or section 667-32, as applicable. If no such action is filed within the one hundred eighty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor.

(D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;

(9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;

(10) Failing to distribute sale proceeds as required by section 667-31;

(11) Making any false statement in the affidavit of public sale required by section 667-32; and

(12) Attempting to collect a deficiency in violation of section 667-38.

(b) Notwithstanding the provisions of subsection (a), any failure to comply with the provisions of this chapter shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value without notice. The statements in the recorded affidavit required by section 667-5 or section 667-32, as applicable, shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of a bona fide purchaser and encumbrancer for value without notice. The purchaser of the mortgaged property, other than the foreclosing mortgagee, shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include lenders and holders of liens who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly-conveyed property. [~~the~~] A transfer of title to the {~~purchaser of the property~~} foreclosing mortgagee as a result of a foreclosure under this chapter shall only be subject to avoidance under section 480-12 for violations described in sections (a)(1) to (9)

if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Without limiting the provisions of subsection (b), [~~A~~]any action to void the transfer of title to the purchaser of property under this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than one hundred eighty days following the recording of the affidavit required by section 667-5 or section 667-32, as applicable. If no such action is filed within the one hundred eighty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor.

Hawaii Bankers Association

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

Presentation to the Committee on Finance
Friday, March 30, 2012 at 5:00 p.m.
Testimony on SB 2429, SD2 Relating to Foreclosures

In Opposition

TO: Honorable Marcus Oshiro, Chair
Honorable Marilyn B. Lee, Vice Chair
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to SB 2429, SD2. HBA is the trade organization that represents FDIC insured depository institutions operating branches in Hawaii.

While we appreciate the efforts of all members of the Mortgage Foreclosure Task Force and remain sympathetic to those homeowners who are experiencing hardship due to inappropriate behavior by, and difficulty communicating with, their mainland lenders, we respectfully oppose this bill.

We recognize that steps were taken to address lenders' concerns, such as narrowing the scope of potential violations related to Unfair and Deceptive Acts or Practices. However, although modest improvements were incorporated into the Task Force recommendations, the recommendations and other added provisions still make Act 48 unworkable.

Several issues that need to be reconsidered include:

- Allowing borrowers to go through Dispute Resolution and then subsequently converting to a judicial foreclosure should they not like the outcome of the DR process. This extends the process and increases costs. Instead of using the Dispute Resolution process with the possibility of then going through the judicial foreclosure process, mortgagees will likely continue to use the judicial process.

- Allowing the filing of an action to void the foreclosure sale for up to six months after the sale is recorded. This will chill public bidding by third-parties and is unwarranted, overly broad and unnecessary.

- Removing the "cap" on the dollar amount on delinquent maintenance fees will likely lead to the unintended consequence of making it more difficult for first-time and middle-income homebuyers to qualify for a loan since it will require more money to complete the purchase.

  This provision is especially damaging to Hawaii borrowers because if the unit is a condominium, the buyer at foreclosure will have to pay the delinquent maintenance fees, and the potential for this liability will inherently be borne by future borrowers. It also makes it more difficult for the condo owner to sell.

- Language specifying the application of rent collected by an Association of Apartment Owners should be included in the bill. It is anticipated due to the extended period of time for a mortgagee to foreclose, Associations will likely be able to collect rent to cover its delinquent maintenance fees and other costs, therefore, any excess rental income received by the association from the unit should be paid to existing lienors based on priority of lien, and not on a pro rata basis.

- Repealing of nonjudicial foreclosures under Part I, Section 51 of SB 2429, SD2. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor owned properties.

- The dispute resolution program should sunset as scheduled on September 30, 2014.

All of the above proposals serve to discourage lenders from utilizing the non-judicial process. We must not lose sight of the fact that funds used to provide mortgages to borrowers come from banks' depositors. As depository institutions, banks have a fiduciary responsibility and obligation to all our depositors that the funds entrusted to us is preserved for future return. What the legislature is proposing no longer serves as a streamlined and fair method of foreclosure for lenders to seek fulfillment of their loan contracts.

Last year, we cautioned that Act 48 would likely result in unintended consequences. Almost immediately upon its passage, Fannie Mae and Freddie Mac issued mandates to lenders to stop all non-judicial foreclosures and switch to the judicial process. Absent any appropriate and immediate remedy, it was evident that our court system would become overburdened and an already lengthy foreclosure process would grow even longer. Additional delays in removing the backlog of foreclosures only prolong a return to a healthy housing market and Hawaii's economic recovery.

The Hawaii Credit Union League, Hawaii Financial Services Association and Hawaii Bankers Association "minority reports" contained in the Task Force report outline additional issues that need to be addressed in the non-judicial foreclosure law. A summary of those combined reports is attached.

Thank you for the opportunity to provide our testimony.

Gary Y. Fujitani
Executive Director

Attachment

Attachment

Summary of Lenders' Issues on Task Force Bill

1. **§667-56 Prohibited conduct:** Repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale. Item (5) attempts to give a potential short sale that is agreed to at or around the time of the non-judicial foreclosure sale priority over the foreclosure so long as the sales price is at least 5% greater than the foreclosure sale price. Recognizing that a sales commission of 6% on the short sale would wipe out the entire 5% increased sales price, the Task Force agreed to increase this percentage to at least 10%. However, this does not address other conditions in the short sale that might have prevented the lender from approving the short sale in the first place, such as payment of other debts of the seller that effectively reduce the amount of the payoff to the lender. This effectively places unsecured creditors ahead of the foreclosing lender and other lien holders

(b) Section 667-56(6) also uses the vague phrase "bona fide loan modification negotiations." If a mortgagor has been denied a loan modification, can the mortgagor then reapply seriatim and maintain the mortgagor's status as pending bona fide loan modification negotiations? Does the time reset each time a mortgagor submits a loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. This section presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

Section 667-60 must be amended to provide clarity to these items and allow the foreclosing lender to end negotiations at some point.

2. **§667-58 Valid notice; affiliate statement**: (a) As worded, the subsection implies mortgagee/lender must file affiliate statements naming their own officers. A suggested amendment to begin as follows:

> Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . .

3. **§667-59 Actions and communications with the mortgagor in connection with a foreclosure**: Besides the obvious proof problems and violation of the parol evidence rule, this section is directly counter to the express stated provisions in virtually all notes and mortgages which require any revision to the existing terms to be in writing. This section should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made **in writing** by its agents, including but not limited to its . . . ."

4. **§667-60 Unfair or deceptive act or practice; transfer of title**: The Task Force attempted to correct one of the more problematic provisions in Act 48 Sec. 667-60 states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." It unnecessarily subjects lenders to the liabilities in HRS Sec. 480-2 for even immaterial and nonsubstantive violations of HRS Chapter 667 (Mortgage Foreclosures). HRS Sec. 667-60 has been cited as one of the reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. This section should be repealed.

Instead, the Task Force recommended that Sec. 667-60 be changed to: (a) create a "laundry list" of 21 violations which would be unfair or deceptive acts or practices (including 7 items in Sec. 667-56 and 4 items related to the Mortgage Foreclosure Dispute Resolution Program), (b) create 17 violations which could result in a non-judicial foreclosure sale being voided, and (c) allow actions to void the foreclosure sale to be filed up to 6 months after an affidavit of the sale is recorded. This recommendation is arguably unwarranted and overly broad. Lenders likely will continue not to use non-judicially foreclosure process and consequently not use the dispute resolution program.

5. **§667-85 Neutral qualifications; status and liability**: Reads in part: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program." This sentence should be repealed. A neutral in the Mortgage Foreclosure Dispute Resolution Program should not be immune from testifying if the neutral makes findings or determinations which subject a lender or a borrower to sanctions.

6. **§667-80 Parties; requirements; process**: This section should be amended to permit mainland lenders to attend during reasonable business hours where they are situated. Additionally, provision must be made to accommodate situations where approval of a loan modification requires more than one approval. For example, in instances where mortgage insurance is in place, the insurer will be required to approve the modification in addition to the lender.

7. **§667-41 Public information notice requirement**: While improved tremendously by the proposed amendment approved by the Task Force, this section still potentially applies to certain commercial loans in which residential property is taken as collateral. It is doubtful that the Legislature intended this informational notice to apply to commercial borrowers and applicants and requests that the Legislature, in addition to adopting the proposed revisions made the Task Force, also enact a further amendment to specify that such notice requirement applies only to consumer, residential mortgage loans.

HAWAII FINANCIAL SERVICES ASSOCIATION
c/o Marvin S.C. Dang, Attorney-at-Law
P.O. Box 4109
Honolulu, Hawaii 96812-4109
Telephone No.: (808) 521-8521
Fax No.: (808) 521-8522

March 30, 2012

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

Re: **Senate Bill 2429, SD 2 (Foreclosures)**
Hearing Date/Time: Friday, March 30, 2012, 5:00 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: (a) implement the 2011 recommendations of the Mortgage Foreclosure Task Force, and other best practices, to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner association liens and the collection of unpaid assessments; (b) repeal the non-judicial foreclosure process under Part I of HRS Chapter 667; (c) make permanent the mortgage foreclosure dispute resolution program and the process for converting non-judicial foreclosures of residential property into judicial foreclosures; (d) repeal the provision excluding participants of the dispute resolution program from converting non-judicial foreclosure proceedings to judicial actions; and (e) delete language requiring open houses of foreclosed condominium and community association units and make conforming amendments.

1. Background.

I served as the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force") from 2010 to the present. I was a member of the Task Force as the designee of the HFSA. This testimony is not on behalf of the Task Force and it is not in my capacity as the Vice Chair of the Task Force.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its Preliminary Report to the 2011 Legislature. As indicated in the Final Report to the 2012 Legislature, there were various issues on which the 18 Task Force members were divided. These issues are detailed in the "minority reports", which are attached to the Final Report, for the HFSA, the Hawaii Bankers Association, and the Hawaii Credit Union League.

The testimony of the HFSA on this Bill includes some of the concerns raised in those three "minority reports" about some of the Task Force's recommendations.

This HFSA testimony also incorporates by reference the testimony which we understand is being submitted by the Hawaii Bankers Association and the Hawaii Credit Union League detailing the reasons for concerns about various provisions in this Bill.

2. Proposed revisions to this Bill.

This Bill should be revised as follows:

1. **Part I non-judicial foreclosures.** Undo the repeal in this Bill of the non-judicial foreclosure process under Part I of HRS Chapter 667.

The provisions for Part I non-judicial foreclosures are in HRS Secs. 667-5 through 667-15. Sections 51 through Section 57 of this Bill, which are on page 154 through page 163, would repeal those HRS sections for Part I non-judicial foreclosures.

The Task Force did not recommend the repeal. The Part I non-judicial foreclosure process was already enhanced by consumer protection provisions in Act 48 (2011).

At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures, i.e. investor foreclosures.

We ask that you: (a) delete Sections 51 through 57, and (b) delete any provisions in this Bill which would repeal references to specific HRS sections for Part I non-judicial foreclosures, such as references to HRS Sec. 667-5.

2. **Unfair or deceptive act or practice.** Repeal HRS Sec. 667-60 (unfair or deceptive act or practice) and do not put in the changes to HRS Sec. 667-60 in Section 35 of this Bill on pages 130 through 133. One of the changes to HRS Sec. 667-60(b) and (c) would allow a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

HRS Sec. 667-60 has been cited as one of the main reasons why lenders have not used the Part II non-judicial foreclosure process. The changes proposed to be made to HRS Sec. 667-60 in Section 35 of this Bill will not encourage lenders to use Part II. This is why a repeal is needed.

3. **Dispute resolution or conversion to judicial foreclosure.** Undo the repeal of the provision in HRS Sec. 667-53(c) in Section 28 (page 120 of this Bill) which excludes participants of the Mortgage Foreclosure Dispute Resolution program from converting non-judicial foreclosure proceedings to judicial actions. We do not support the repeal. The Task Force did not recommend the repeal. Such a repeal would mean that an owner-occupant could first require the lender to go through a Mortgage Foreclosure Dispute Resolution program session, and once the session is concluded, that owner-occupant could convert the foreclosure from a non-judicial process to a judicial process. The negative consequences of the repeal would be to unreasonably extend the foreclosure process and unnecessarily increase the cost of foreclosures.

In this regard, we ask that you:

(a) Reinstate HRS Sec. 667-53(c);

(b) For HRS Sec. 667–53(a)(1), delete the additional wording in subparagraph (B) on page 118, lines 7 through 9; and

(c) For HRS Sec. 667-55, delete the additional wording on page 123, lines 11 through 15.

4. **Publication of auction notices.** Amend this Bill to change the current practice of publishing notices of foreclosure sales (auctions) for non-judicial and judicial foreclosures. These notices are currently required to be published once each week for three successive weeks in advance of the auction in "daily" newspapers of general circulation. Because a major "daily" newspaper is charging thousands of dollars for these advertisements, these expenses unreasonably increase the cost of non-judicial and judicial foreclosures.

To change the publication requirement for notices, we ask that you:

(a) Allow notices of non-judicial foreclosure public sales or auctions ("auctions") under Part I of HRS Chapter 667 to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs ("DCCA"); and

(b) Allow notices of judicial foreclosure auctions by "foreclosure commissioners" to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the DCCA. Note that while portions of Part I deal with judicial foreclosures (e.g. HRS Sec. 667-1), the requirement of where notices are published is not specified in Part I but is instead in court orders. Putting in the publication requirement for judicial foreclosures in Part I will ensure consistency.

(c) In HRS Sec. 667-27(d), for publishing notices of the auction for non-judicial foreclosures on a website maintained by the DCCA, delete the phrase "provided that the mortgaged property is owned by an owner-occupant" (Section 22 of this Bill, page 103, lines 15 and 16). The foreclosing mortgagee in a non-judicial foreclosure should be allowed to publish auction notices of any property being foreclosed, regardless of whether the property is owner-occupied or not. Even a non-judicial foreclosure auction notice of an investor-owned property should be allowed to be published on the DCCA's website.

(d) For publishing auction notices for judicial foreclosures on a website maintained by the DCCA, do not put in the phrase "provided that the mortgaged property is owned by an owner-occupant". The foreclosure commissioner should be allowed to publish auction notices of any property being foreclosed, regardless of whether the property is owner-occupied or not. Even a judicial foreclosure auction notice of an investor-owned property should be allowed to be published on the DCCA's website.

5. **Monetary cap for association lien priority.** Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h) on page 73 and page 78, respectively. This cap is on the total amount of unpaid common area maintenance fees that a condominium association can specifically assess against a person who purchases a foreclosed unit. The amount of the cap is temporarily a maximum $7,200 based on 12 months of delinquent maintenance fees. (On September 30, 2014, the cap is set to return to $3,600 based on 6 months of delinquent maintenance fees.)

Even though this Bill at least reduces the 12 month period to 6 months, it nevertheless removes any dollar amount on the cap. The lack of a reasonable monetary cap could make it difficult for consumers to obtain mortgage financing for condominium units in certain projects.

We ask that you leave in the "defective" effective date in this Bill to ensure further discussion.

3. House version of this Bill.

The House version of this Bill is House Bill 1875, H.D. 2 (referred to as "the House Bill"). The House Bill is similar in many respects to this Senate Bill. However, there are various substantive differences.

If you are inclined to replace the contents of this Senate Bill with the contents of the House Bill, we ask that you make the following changes to the House Bill before it is inserted into this Senate Bill as a House Draft 1:

1. Do not repeal the non-judicial foreclosure process under Part I of HRS Chapter 667. At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures. See the discussion above.

2. Remove the proposed new HRS section in Section 3 of the House Bill beginning on page 45, line 1, and continuing through page 47, line 6. Additionally, in Section 67 of the House Bill, delete the first proviso on page 157, on lines 13 and 14. These provisions would mandate that when the Mortgage Foreclosure Dispute Resolution program expires on September 30, 2014, there would be at least 21 foreclosure violations specified as unfair or deceptive acts or practices, there would be a laundry list of at least 17 types of violations that could void a title transfer of property which is foreclosed non-judicially, and there would be a 180 day time limit for filing actions to void the title transfers of a non-judicially foreclosed property.

These changes should be deleted because the repeal of HRS 667-60 (unfair or deceptive act or practice) in Section 62 of the House Bill (page 154, lines 17 through 22) should not be dependent on whether there is a Mortgage Foreclosure Dispute Resolution program. Additionally, the proposed new section in Section 3 of the House Bill would permit a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

3. Delete the requirement in Part II of HRS Chapter 667 for staging "open houses" or "public showings" prior to the public sale (auction) in non-judicial mortgage foreclosures. The provisions to be deleted in Part II are in HRS Secs. 677-21, 667-22, 667-26, 667-27, and 667-32.

It should be noted that the non-judicial foreclosure process being proposed for condominium associations and planned community associations in the latest version of both the Senate Bill and the House Bill does not have such an open house requirement even though that requirement was in the original version of each of these Bills. It would be consistent to delete this same open house requirement in Part II for mortgage foreclosures. The deletion is needed because of the anticipated legal problems with trying to obtain access to the property to conduct open houses and because of the potential liability connected with such open house showings.

4. Delete the attorney affirmation provision for judicial foreclosures beginning on page 47, line 7, through page 49, line 15 in the House Bill. When the House Bill was heard by the House Finance Committee on February 29, 2012, the Hawaii State Bar Association submitted testimony expressing concerns about this provision because of attorney-client privilege issues and confidentiality issues. Existing court rules, such as the Hawaii Rules of Civil Procedure and the Hawaii Supreme Court's Rules of Professional Conduct governing attorneys, already provide enforcement remedies for problems that this attorney affirmation provision purports to address.

5. Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h). See the discussion above.

6. Enable notices of public sales (auctions) in non-judicial foreclosures and judicial foreclosures for all types of properties to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs. See the discussion above.

7. Keep a "defective" effective date in this Senate Bill to ensure further discussion.

Thank you for considering our testimony.

Marvin S. C. Dang

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

(MSCD/hfsa)

HAWAIIAN COMMUNITY ASSETS

1050 Queen Street, Suite 201
Honolulu, Hawaii 96814
Ph: 808-587-7886
Fax: 808-587-7899
Toll Free: 808-866-400-1116

House Committee on Finance
Friday, March 30, 2012, 5:00 pm
State Capitol, 415 South Beretania Street
Conference Room 308

SB2429, SD2: SUPPORT WITH AMENDMENTS

Aloha Chair Oshiro, Vice Chair Lee, and Committee Members,

My name is Jeff Gilbreath, Executive Director with Hawaiian Community Assets, a HUD-approved housing counseling agency that provides free foreclosure prevention counseling services through our statewide offices. Based on our reach and impact in community, Hawaiian Community Assets held representation on the State Mortgage Foreclosure Task Force since its inception in 2010.

Hawaiian Community Assets **strongly supports** SB2429, SD2 as a vehicle for implementing the 2012 recommendations of the State Mortgage Foreclosure Task Force as well as:

1. Leaving intact section 667-60 relating to Unfair and Deceptive Acts and Practices, a compromise that was reached in good faith by 13 of 17 members of the Task Force.
2. Making permanent the mortgage foreclosure dispute resolution program and the process for converting nonjudicial foreclosures of residential property into judicial foreclosures.
3. Repealing Part I of chapter 667 and the provision excluding participants of the dispute resolution program from converting nonjudicial foreclosure proceedings to judicial actions.

While we strongly support these components of the bill for the following reasons, I ask that the Committee **support an amendment requiring attorneys instituting residential judicial foreclosure actions to file affirmations regarding the accuracy of submitted documents.**

Passing of Act 48 and UDAP provision key in slowing the alarming rate of foreclosure we faced in 2010. I would like to take this opportunity to remind ourselves of the foreclosure crisis we faced last year which prompted the passing of Act 48, including the strong Unfair and Deceptive Acts and Practices provisions that have been the primary line of defense giving our families breathing room and ourselves a chance to reflect with regards to foreclosures in our communities. At the time of the passing of Act 48, Center for Responsible Lending reports showed that our State had seen a 687% increase in foreclosure filings between the third quarter of 2006 and the first quarter of 2010 resulting in a loss of approximately $15 billion in home equity for our families – an average loss per home of $41,668. As a result of implementing Act 48 and the UDAP provision, on January 11, 2012 RealtyTrac reported that the number of foreclosures in Hawaii had dropped by 52% from the year prior.

Maintaining the language regarding the UDAP provision as well as repeal of Part I of Chapter 667 in SB2429, SD2 will ensure that we continue to see success in improving Hawaii's foreclosure situation.

Working together to address rampant unfair and deceptive acts and practices. During our counseling work, we continue to see the impacts of a lending industry that has never had to modify loans on such a widespread basis – submitted paperwork is being reported as lost or never received, families' mortgage payments are not being recorded, repayment plans have been agreed upon verbally and changed when the family receives the approval paperwork, and we struggle alongside families to simply make contact with certain lenders from the Continent.

Our organization has recently received funding to support the free Independent Foreclosure Review process. The Reviews are to determine whether or not homeowners, who were in foreclosure between January 1, 2009 and December 31, 2010, experienced "financial injury". This process was established in light of the rampant "robo-signing" scandals that came to light in the fall of 2011, which resulted in Bank of America, the lender responsible for 98% of Hawaii home foreclosures in November 2010, in halting their foreclosure operations in all 50 states. Reinforcing the severity of such fraudulent lending practices, the HUD Inspector General has released reports on the heels of the National Mortgage Settlement confirming and detailing the lengths to which JPMorgan, Wells Fargo, CitiMortgage, Bank of America and Ally Financial went to violate state and federal foreclosure laws via robo-signing, foreclosing without proper documentation and with misidentification of the outstanding amounts owed by borrowers, forging documents and signatures, falsely notarizing paperwork and simply making up job titles. It had already been well documented that illegal conduct occurred at these institutions, but what the reports illuminate is that such actions occurred at the direction of mangers and executives at these banks.

The non-judicial foreclosure process, a process that is outlawed in 20 states throughout our nation, has been viewed as one factor for such blatant unfair and deceptive acts and practices to take place since such action does not require involvement of a third-party mediator or judge.

Another factor impacting the legitimacy of foreclosures was the reality of investment in "mortgage-backed securities", also known as Over-the-Counter Derivatives, by the nation's largest financial institutions. To provide the Committee with a basic background on an extremely complicated market, the Over-the-Counter Derivatives market is a highly unregulated market in which financial institutions essentially pool together subprime mortgage loans made to individuals and families without verifying income, reviewing Debt-to-Income ratios, or educating the homebuyer of adjustable rates among other aspects. As Over-the-Counter Derivatives became common within the lending industry in the 2000s, these pools of "toxic assets" were traded between various institutions and investors, all betting that the bottom would not fall out on a robust, growing housing market. As the Great Economic Recession started in 2007, trades intensified, especially after the failure of Lehman Brothers and AIG – two institutions that held large amounts of such pooled subprime loans. This has led to documented incidents where families' homes have been foreclosed upon despite the fact that lenders have not been able to prove they actually hold Title of the homes. The most recent and high profile case is U.S. Bank v. Ibanez, 10694, Supreme Judicial Court of Massachusetts (Boston) *[The lower-court cases are U.S. Bank National Association v. Ibanez, 08-Misc-384283, and Wells Fargo Bank NA v. LaRace, 08-Misc-386755, Commonwealth of Massachusetts, Trial Court, Land*

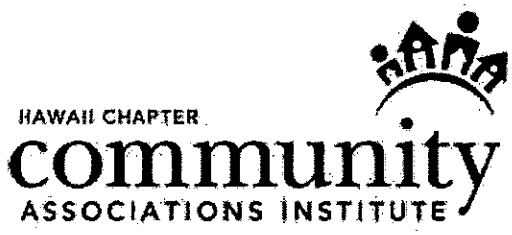
Court Department (Boston)] in which Judge Ralph Gants upheld a lower court judge's decision saying two foreclosures were invalid because the banks did not prove they owned the mortgages, which the lower court judge said were improperly transferred into two mortgage-backed trusts.

The decision of U.S. Bank v. Ibanez shows us that without proper checks-and-balances to verify all required documents held by the lender at time of initiating the foreclosure are legitimate, we run the risk of condoning the actions of those within the highly unregulated Over-the-Counter Derivatives market while at the same time rewarding such behavior by providing the opportunity for illegal foreclosure of our families' homes. **By requiring attorneys instituting residential foreclosure actions to file affirmations regarding the accuracy of submitted documents we have the opportunity to work together to learn from past mistakes, so we can ensure the dream of homeownership is available to our future generations.** Inclusion of this amendment in the existing SB2429, SD2, combined with community-based outreach and public education efforts will help our communities and our State by upholding a standard of law that does not allow property seizures based on backdated, incomplete, or fraudulent documentation, no matter what the circumstances are.

Thank you for your time and consideration.

Sincerely

Jeff Gilbreath
Executive Director



P.O. Box 976
Honolulu, Hawaii 96808

March 29, 2012

Honorable Marcus R. Oshiro, Chair
Honorable Marilyn B. Lee, Vice-Chair
House Committee on Finance
415 South Beretania Street
Honolulu, Hawaii 96813

Re: S.B. 2429, S.D.2 – Hearing March 30, 2012 at 5:00 p.m.

Dear Chair Oshiro and Chair Vice-Chair Lee and Committee Members:

I have been appointed by the Community Association's Legislative Action Committee (CAI) to provide comments regarding S.B. 2429, S.D.2.

CAI supports the Task Force's efforts and hard work in attempting to address concerns of various parties affected by the newly evolving nonjudicial foreclosure law. Recently, and after much hard work, *all interested parties* (*i.e.,* CAI, Consumer Protection and the Task Force) *have agreed on compromise language* that has been incorporated into the companion bill to S.B. 2429, S.D.2.

That alternative language has now been incorporated into H.B. 1875, H.D.2, S.D.1. It is this compromise language that CAI respectfully submits should be incorporated into S.B. 2429, S.D.2.

It is our understanding that Everett S. Kaneshige, on behalf of the Task Force, will be submitting testimony to your Committee and the relevant compromise language that has been agreed to by all interested parties, and CAI supports Mr. Kaneshige's efforts in this regard.

We trust that this compromise language – which is in the best interest of all concerned – will be carefully reviewed and incorporated into S.B. 2429, S.D.2. Thank you for your time and consideration.

If you have any questions, please feel free to contact me at cporter@HawaiiLegal.com, (direct line) 539-1114, or (cell number) 542-6603).

Very truly yours,

Christian P. Porter

Hawaii Credit Union League
Your Partner For Success

1654 South King Street
Honolulu, Hawaii 96826-2097
Telephone: (808) 941.0556
Fax: (808) 945.0019
Web site: www.hcul.org
Email: info@hcul.org

Testimony to the House Committee on Finance
March 30, 2012

Testimony in opposition to SB 2429 SD2 HD1, Relating to Foreclosures

To: The Honorable Marcus Oshiro, Chair
The Honorable Marilyn Lee, 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. We are in opposition to SB 2429 SD2 HD1, Relating to Foreclosures.

While we understand the current economic situation, and the plight of homeowners today, we oppose this measure. We recognize and appreciate the efforts of the legislature to amend Act 48 to address some concerns raised by lenders, however, this bill continues to present many significant concerns for Hawaii's credit unions, and the lending market as a whole. We have listed these concerns below.

1. The League opposes the repeal of nonjudicial foreclosures under Part I, (under sections 49 – 55 of SB 2429, SD 1). The Task Force split evenly on (and accordingly did not adopt) the motion that the Task Force recommend to the Legislature that "mortgagees [lenders] be allowed to continue to have the option to initiate non-judicial foreclosure actions under § 667-5 [Part I of HRS Chapter 667] when the moratorium in Act 48 (in Section 40) ends on July 1, 2012." The Part I non-judicial foreclosure process should continue to exist as a viable alternative to the Part II non-judicial foreclosure process now that Act 48 strengthened consumer protections in Part I. Act 48 now (a) requires that Part I foreclosure notices be served at least 21 days before the auction date, (b) specifies that the service of the notice be in the same manner as serving civil complaints, (c) enables an owner-occupant to convert a Part I non-judicial foreclosure to a judicial foreclosure or to elect dispute resolution under certain circumstances, and (d) prohibits a lender in a Part I non-judicial foreclosure from pursuing a deficiency against certain owner-occupants. At a minimum, Part I nonjudicial foreclosures should be permitted for foreclosures of commercial, industrial and investor-owned property, if not for owner-occupied residential property.

2. The League opposes the proposed repeal of the sunset provisions in Act 48. While Hawaii is faced with a unique situation involving residential mortgage foreclosures that is without precedent in its history, there is no reason to believe that these circumstances will persist for any substantial period. The radical and untested changes to Hawaii's foreclosure

laws made in Act 48 should sunset so that there is an impetus to further review the need to continue them.

3. Because of the increasing costs being charged by certain newspapers of daily circulation in Hawaii to print the notices of judicial and non-judicial foreclosure auctions required to be "published", the League supports the Legislature's efforts to have a state agency provide a centralized internet website for the official posting of notices required by Chapter 667.

4. **§§ 514A-90 and 514B-146**: The League opposes the lifting of the cap on an association's super-lien for maintenance fees. It was originally capped at the lesser of 6 months of $3,200. Under Act 48, that cap lifted to the lesser of 12 months or $7,200. Now, the super-lien is simply six months of monthly assessments with no monetary cap. This cost will eventually be borne by the next private buyer of the unit, and will effectively depress prices for units in the project.

5. **§ 667-41**: While the League agrees that the proposed amendment of § 667-41 is a tremendous improvement, the section still potentially applies to certain commercial loans in which residential property is taken as collateral. The League believes that the Legislature did not intend this informational notice to apply to commercial borrowers and applicants. The League asks that the Legislature, in addition to adopting the revisions proposed by the Task Force, also amend § 667-41 to specify that such notice requirement apply only to consumer, residential mortgage loans.

6. **§667-53(c)**: The League opposes the proposed repeal of §667-53(c), the effect of which is to give a mortgagor the opportunity to first go through the mortgage foreclosure dispute resolution process, and then convert the nonjudicial foreclosure to a judicial foreclosure.

7. **§667-56**: Prohibited practices: The League seeks repeal of §§667-56(5), -56(6) and -56(7). In all three subsections, the phrase "completing nonjudicial foreclosure proceedings is ambiguous. It is unclear whether that period ends with: recordation of an affidavit of sale; recordation of a conveyance document to the foreclosure sale purchaser; or recovery of possession from the foreclosed mortgagor of the foreclosed property by the purchaser.

(a) Section 667-56(5) also ignores that a lender or servicer may not have notice of a pending short sale escrow at the time of completion of a nonjudicial foreclosure sale.

(b) Section 667-56(6) also uses the phrase "bona fide loan modification negotiations." This phrase is vague, and raises many questions, such as: If a mortgagor has been denied a loan modification, can the mortgagor then reapply time after time and maintain the mortgagor's status as "pending" bona fide loan modification negotiations? Does the time reset with each mortgage loan modification request notwithstanding the requests are not materially different than one already denied?

(c) Section 667-56(7) also is too vague because it fails to define with clarity when a mortgagor is being evaluated and when a mortgagor is no longer being evaluated for a loan modification program. Section 667-56(7) presumes that there will be timely-issued documentation that a borrower is no longer being evaluated when that is not always the case.

8. **§667-58**: As worded, § 667-58(a) implies credit unions must file affiliate statements naming their own officers. The League suggests § 667-58(a) be amended to begin as follows:

> "Any notices made pursuant to this chapter may be issued only by the foreclosing mortgagee or lender, or an officer of the foreclosing mortgagee or lender, or by a person identified by the foreclosing mortgagee or lender in an affiliate statement signed by that foreclosing mortgage or lender and recorded . . . ."

9. **§667-59**: The League suggests that this section, captioned, "Actions and Communications with the Mortgagor in Connection with a Foreclosure," should be amended to include the words "in writing," in the first sentence so that it will read as follows:

> "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements to the mortgagor, which are made in writing by its agents, including but not limited to its . . . ."

10. **§ 667-60**: The League submits that the proposed amendment of § 667-60 is too complex and overly broad. Section 667-60 now states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." The requirement that a claimant must show a court proof that an act was "unfair and deceptive" is removed. Any violation of Chapter 667, no matter how miniscule, becomes an unfair and deceptive act or practice entitling the claimant to certain remedies and damages, and that includes voiding of the contract or agreement. Section 667-60 is often cited as one of the principal reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially. Section 667-60 should be repealed.

The League submits that the proposed amendment would continue to discourage lenders from foreclosing non-judicially. It is also unnecessary. Every lender is already subject to potential liability under §480-2 where someone has evidence sufficient to convince a court that a violation occurred.

11. **§ 667-80**: The League believes that § 667-80 should be amended to permit mainland lenders to attend dispute resolution sessions during reasonable business hours where they are situated. In addition, provisions must be made to accommodate situations where a lenders agreement to a loan modification requires more than one other approval. For example, in instances where mortgage insurance is in place, the insurer usually has the right to approve the modification in addition to the lender.

12. **§ 667-85**: The League submits that § 667-85 should be repealed. In part, this section reads:

> "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program. "

A neutral in the Mortgage Foreclosure Dispute Resolution Program should be immune from liability but should not be privileged from testifying where, for example, the neutral may make findings or determinations which subject a lender or a borrower to sanctions.

In addition to the concerns listed above, we also concur with the issues raised by the Hawaii Bankers Association and the Hawaii Financial Services Association. Thank you for the opportunity to testify.

RCO HAWAII, L.L.L.C.

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

phone - 808.532.0090
fax - 808.524.0092
www.rcolegal.com

March 29, 2012

Via Capitol Web Page and Hand Delivery

Representative Marcus R. Oshiro
Chair, Committee on Finance
Hawaii State Capitol, Room 306

Re: S.B. 2429, SD2 –Relating to Foreclosures
Hearing Date: Monday, March 30, 20121 at 5:00 p.m.
Conference Room 308

Dear Chair Oshiro, and Members of the Finance Committee:

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

RCO is pleased to **submit comments** regarding S.B. 2429, S.D.2, which implements the recommendations of the Mortgage Foreclosure Task Force, and makes numerous other changes to the Hawaii foreclosure law. RCO specifically supports the intent of the amendments made in S.B. 2429, S.D.2, which change the publication requirements for non-judicial foreclosures to a "newspaper of general circulation" and provide guidelines for qualifying as such a newspaper. This approach, which has been implemented in other states, ensures that a newspaper meets general circulation requirements, and that there is an opportunity for more than one paper to compete to publish non-judicial foreclosure notices. This helps to address the dramatic increase in costs that has occurred for publishing notices as a result of Act 48, Session Laws of Hawaii 2011. RCO believes the amendments proposed in S.B. 2429 S.D.2 are part of the solution to ensure that there is fair competition for the publication of notices.

In addition, RCO appreciates that S.B. 2429 S.D.2 goes one step further and allows for the alternative for notices of public sale to be posted electronically on the DCCA's website in non-judicial foreclosures. The Internet can and should play a role in improving the foreclosure auction process, particularly by increasing visibility and participation at foreclosure auctions. Allowing notices of a foreclosure sale to be published electronically will increase bidders and third party sales. These third party sales are beneficial to everyone because the bidder absorbs the foreclosure costs, the borrower might derive income (if the bid exceeds the offset bid), the

bank does not have to add a property to its REO portfolio, and the house is back moving in the market.

RCO believes that expanding the use of electronic notices to judicial foreclosures, as has been done in H.B. 1875 H.D. 2 S.D.1, will also be beneficial to improving the foreclosure process, and recommends that this provision be included in the current measure.

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

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

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

Star Advertiser

TO: Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair
House Committee on Finance

FR: Dave Kennedy, Senior Vice President
Honolulu Star-Advertiser

RE: TESTIMONY IN COMMENT TO SB 2429, SD2 – Relating to Foreclosures – Amendment Requested
March 30, 2012 – 5 PM (Agenda #4)
Hawaii State Capitol, Room 308

Aloha Chair Oshiro, Vice Chair Lee, and members of the committee:

The Honolulu Star-Advertiser respectfully submits comments to SB 2429, SD2. We take no position with this bill; however, we respectfully request that the committee amend this bill to address issues pertaining to the erosion of due process and non-judicial and judicial foreclosure sale notices requirements contained in this bill.

The U.S. Constitution provides due process protections recognizing the legal rights of individuals. The 5th and 14th amendments guarantee that government actions may not "deprive any person of life, liberty or property, without due process of law." When the State of Hawaii places constraints on the publication of notices concerning the taking of real property such as allowing notice of foreclosure sales on the Internet only, the state essentially uses its power to inhibit the due process protections guaranteed by the U.S. Constitution.

Currently, no western state has an online-only publication of non-judicial and judicial foreclosure sale notices. Two western states allow the publication of notice of sale in a newspaper of general circulation and on a qualified Internet website. All other western states require publication in a legal newspaper or newspaper of general circulation. There's a reason for this: publishing on a state website does not essentially meet the traditional definition of a legal notice that appears in an independent third-party publication.

The purpose of the public notice of a foreclosure sale is, among other things, to provide notice to the owner and others that the property will be sold by auction. If such notice is limited to the Internet only, there is a strong likelihood that the person who stands to lose their house may not see the notice. Such "lack of notice" could lead to legal challenges to the foreclosure process. Just one such successful challenge would chill the entire foreclosure process in Hawaii.

Furthermore, a notice published only on the Internet may not go through the scrutiny that a notice published in a daily newspaper may undergo. A daily newspaper has a staff to proof read and fact check. The method is safe; the data is secure and the information is authentic. Information entered through a public portal may not be accurate and can fall prey to internet crimes such as identity theft and can be compromised by computer hackers. By allowing official notices published only on the Internet to be entered as official documents in a sworn affidavit, the state opens a door to mistakes at the very least and fraud at the worst.

It is helpful to examine why newspaper publication of notices is such a longstanding and universal requirement. This requirement ensures that once printed, foreclosure sale notices are archived and are secure from modification and tampering and are widely and easily accessible. If any of these elements were absent, a legal ad and foreclosure sale notice could not be authenticated and would be subject to challenge.

Foreclosure sale notices published in the newspaper are certified by affidavit, which is a written statement confirmed by oath or affirmation, for use as evidence in court. This provides proof of publication that is required for a number of legal processes including mortgage foreclosures.

If foreclosure sale notices were no longer published in newspapers of general circulation, but instead only appeared online – let alone on a government-run website – they would have none of these hallmarks of reliability, verifiability, permanency and accessibility. Foreclosure sales notices – like all serious business – must be transparent, independently verifiable and above suspicion.

The Judiciary, AARP, and persons with disabilities raised concerns in its testimony that Hawaii residents may not have easy access to the Internet. By not advertising in newspapers, a segment of our residents who are not computer literate or do not have access to a computer – such as seniors, persons with disabilities, those have a high school education or less, and the poor – will not have access to vital government and legal information. These are the very people who stand to lose their homes to foreclosure. While the bill is aimed at protecting homeowners and other consumers, the proposed new Internet publication requirements actually hurts consumers facing foreclosure.

Newspapers are an independent and credible source of information that residents rely upon to keep informed. Requiring the posting of notices to be limited to online publication will reverse the free flow of information in Hawaii.

For these reasons, we respectfully ask for your consideration of this request to further amend language in this bill pertaining to the publication of judicial and non-judicial foreclosure notices.

MACDONALD RUDY BYRNS O'NEILL & YAMAUCHI

a Limited Liability Law Partnership, LLLP

1001 BISHOP STREET, SUITE 2650
HONOLULU, HI 96813
Tel. (808) 523-3080
Fax. (808) 523-0759

William C. Byrns
Cathy Gee H. Kong

E-mail: napuakea@macrudylaw.com
cathykong@macrudylaw.com

March 29, 2012

TESTIMONY TO THE HOUSE OF REPRESENTATIVES, COMMITTEE ON FINANCE

To: Honorable Representative Marcus R. Oshiro, Chair
Honorable Representative Marilyn B. Lee, Vice Chair
and Members of the Committee on Finance

Re: Testimony in Opposition to SB 2429 SD2, Relating to Foreclosures

HEARING
DATE: Friday, March 30, 2012
TIME: 5:00 P.M.
PLACE: Conference Room 308
State Capitol
415 South Beretania Street

My name is Cathy Gee H. Kong, and I am testifying on behalf of the Association of Apartment Owners of The Cliffs at Princeville located in Princeville, Kauai, Hawaii. We oppose SB 2429 SD2, Relating to Foreclosures for the following reasons:

1. **Protection of Automatic Liens for Condominium Associations**

Condominium associations have had automatic statutory liens for almost 50 years and a number of planned community associations have had automatic liens by virtue of their governing documents for even longer. Such automatic liens protect associations from owners selling their units or lots without paying delinquent assessments. SB 2429 SD2 will take away this vitally important legal right without a compelling reason. While the proponents of this bill may argue that the proposed language refers only to "recorded" liens, it will have the effect of destroying the automatic lien because the provision would be meaningless if the expiration of the written lien does not also destroy the automatic lien. **Solution:** It is requested a provision be added making it clear that the automatic lien will not be affected by the expiration of the recorded lien. (The House companion HB 1875 HD 2 has an express provision that the automatic lien is not affected.) There should be no reasonable objection to adding a provision of this nature because the proponents of the two-year lien provision assert that it will not affect the automatic lien.

2. **Lien Renewal**

SB2429 SD2 provides that the lien will expire in two years without any opportunity to renew it. (The House companion HB 1875 HD 2 does permit a renewal of the lien.) This means that an association could spend thousands of dollars in foreclosing a lien only to find the lien extinguished in the middle of the foreclosure process because the process was delayed for reasons beyond the association's control. Foreclosure actions can be delayed for a number of

reasons, such as problems in effectuating service, the filing of bankruptcies by delinquent owners, and the filing of appeals and/or motions filed by owners, lenders, and other parties to the action. In these instances, an association might not only lose its lien and right to foreclose, but it might also be required to pay the attorneys' fees and costs of the delinquent owner because the delinquent owner might be declared the "prevailing" party in the foreclosure proceeding and thus perhaps be entitled to an award of fees and costs against the association. **Solution:** It is requested the following revisions be made to the Bill to address this issue: (1) Add a provision allowing the association to extend the life of the lien by renewing—recording an updated lien, and (2) add a provision stating that the lien will not expire if proceedings have been initiated to enforce the lien.

3. **Exceptions to the Proposed Two Year Lien Language Are Needed**

While my clients understand that the purpose of the two-year lien is to compel associations to act swiftly to collect assessments, it is not always necessary to foreclose to collect assessments. For example, if an owner is making payments under a payment plan or the association is collecting rent from the tenant of the delinquent owner, the association ought to be permitted to collect the outstanding balance in that fashion rather than be forced to foreclose. Additionally at times foreclosure proceedings cannot be quickly completed. For example, an owner might die during the course of the proceedings, it may be difficult to obtain service, and/or the owner may deliberately cause delays. SB 2429 currently makes no exception if these problems arise. Furthermore, if an owner files for bankruptcy, the association will be barred by the automatic stay from commencing a foreclosure proceeding. No exception is made for bankruptcies to the lien restrictions although many other states do so. **Solution:** In order to remedy this potential unintended consequence, it is requested a provision be added that states that: 1) the recorded lien won't expire if the association has taken action to enforce the lien or collect the sums due; 2) define enforcement to include entering into a payment plan with an owner, sending a notice of default and intention to foreclose or taking any other action under chapter 667, filing a legal action to foreclose the recorded lien or for a monetary judgment for amounts due, demanding payment of rent from the tenant of the delinquent owner, and /or taking action to terminate utilities; and 3) if the owner of a unit subject to a recorded lien of the association files a petition for relief under the United States Bankruptcy Code, the period of time for instituting proceedings to enforce the recorded lien should be tolled until thirty (30) days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code is lifted as to the association's recorded lien as other states permit.

4. **Two Year Limitation is Too Short**

The proposed two year lien is too short. As set forth in the supporting materials attached to the testimony of Anderson Lahne & Fujisaki LLP, regarding this Bill, of the 33 states that have adopted a limitation on the life of a lien only 5 states have limited the lien to two years or less. The remaining states have given the life of the lien more years (*e.g.*, 17 states have adopted a 3 year lien statute, 3 states have adopted a 5 year lien statute, 7 states have adopted a 6 year lien statute, and 1 state has adopted a 12 year lien statute). Also, keep in mind that 20 states, including California, have not limited liens at all. **Solution:** Although condominium

associations generally prefer no time limit on their lien, a fair compromise would be to increase the life of the lien to 6 years to coincide with the statute of limitations for the collection of debts. (The House companion HB 1875 HD 2 provides a six year period.)

Thank you for your consideration of this testimony and suggested solutions to the two-year lien provision contained in S.B. No. 2429 SD2 which is opposed by the AOAO Cliffs at Princeville.

Dated: Honolulu, Hawaii, March 29, 2012 at 11:30 a.m.

Cathy Gee H. Kong, Esq.

I want to thank the members of the committee for reading and considering my testimony

My name is Marcy Koltun-Crilley and I am home owner living on Maui, who has experienced financial and other hardship first hand, BECAUSE of fraud committed by my mortgage servicer.

Had the servicer acted with the integrity required and expected of any business, I would be fine and not required any "help" from them.

I generally support SB 2429 SD2 and I **STRONGLY SUPPORT** :

(1) Making permanent the mortgage foreclosure dispute resolution program

(2) Repeal of the provision excluding participants in the dispute resolution program from converting nonjudicial foreclosures to judicial foreclosure actions. **Allow borrowers to participate in dispute resolution before they must decide whether to convert to a judicial foreclosure.**

(3) Repeal of the nonjudicial foreclosure process under Part I of chapter 667.

That being said I also **STRONGLY** ask that your committees amend SB 2429, SD2

to:

(1) **Require attorneys who institute residential judicial foreclosure actions to certify that they have verified the accuracy of the documents submitted;**

2) Retain the requirement that mortgagees give all notices and do all acts required by the power of sale contained in the mortgage.

3) **Do NOT LIMIT Lender UDAP Liability**

Finally, to avoid undermining the intent and effectiveness of Act 48 and current law, it is important to Include and RETAIN:

(1) **Mortgagee liability for oral misrepresentations made on mortgagees' behalf**

(2) **Mortgagee liability for completing a foreclosure after a loan modification has been approved or while one is being considered.**

There is a VERY Important reason for these revisions and to do whatever we can get make ACT 48 STRONG for Hawaii Home Owners.

I urge you to read **The Complaint For Violations Of The False Claims Act**, which was recently unsealed in federal court:

http://www.scribd.com/doc/84409561/BofA-False-Claims-Case-2

The suit is the second whistle blower complaint unsealed so far which lead to the $1 billion False Claims Act settlement announced by Bank of America and the U.S. Attorney's Office on 2/9/12.

The suit is long but it is anything but dry or boring! The complaint reads like a movie, and the level of deliberate fraud and harm BOA did to Home Owners and the Government and taxpayers is astonishing.

Anyone who has had to deal with mortgage servicers will feel validated as they read it.

It will also demonstrate why we MUST HAVE mortgagee liability for oral misrepresentations made on mortgagees' behalf.

You will understand WHY the bank lobbyists object to any bill or law that has real TEETH! Something that is bigger than just the cost of doing business.

The almost unbelievable fraud, abuse and theft was DELIBERATE and relied heavily on ORAL misrepresentations on the mortgagees' behalf that came from the VERY TOP.

Banks will not only deny any oral agreements, they will claim anything their representatives did was NOT fraud, because it was done "unkowingly" or without intention, and it has been clearly shown that servicers DELIBERATELY INTENDED to mislead. As long as they can get away with it, they will continue to do it, even now.

Home owners were given the "run-around" for months, documents demanded, then discarded or held up on purpose, and numbers deliberately changed so people could not qualify for modifications they were told they would, and should have qualified for.

That allowed the banks to tack on extra fees and interest, ruin their credit, and trap people in a vicious cycle. It also allowed them to collect money from tax payers and insurance and extra servicing fees.

Those " oral misrepresentations" caused MANY Hawaii home owners, including myself, to fall into default and lose hundred's of thousands of dollars when that **NEVER would have happened had they NOT been lied to!**

I ask anyone of you to call Bank of America , and most likely, any of the other main Servicers , and you will be told that your call will be recorded.

However, once you get a human, if you tell them you would also like to record the call, they will read you this sentence.

" Bank of America does not participate in recorded calls ".

And if you do not agree to not record , they will NOT speak to you at all.

They also will not speak to you if you do not let them record YOU!

Then try to get something in writing from them, if they do send you anything, it most likely will not be signed by anyone with a name (just general customer service), and the reply will have little to do with what you have asked them for.

These banks have spent time and money figuring out loop holes and ways to steal your home, and how much is acceptable to pay in fines in order to make it worth their while.

And no one seems to have to go to jail for it.

How can they cry about font size penalty when they have taken people's homes for not dotting an I, or miss a deadline by one day, which was often almost impossible to make in the first place?

Strong UDAP is our ONLY real protection.

Furthermore, under the recent landmark $25 billion foreclosure abuse settlement, banks are actually allowed to have a certain amount of "collateral " damage!

http://abigailcfield.com/?p=1057

WE are that collateral damage!

Only "reportable" errors count, and only if enough of those are reported, can a servicer get in trouble under the settlement. This allows them to make errors that may seem minor, but can cause you or I to lose our home. AND they are not required to report it!

In other words, they are allowed to steal without penalty using mathematical formulas!

That can create millions and millions of dollars for the bank, while home owners lose everything because of the banks " allowable "mistakes".

This is also why it is important for people to be able to use the judicial system if they feel mediation is not working.

The bank may offer what might seem like a fair modification, when in reality, the bank wants to walk away with much more than they would have had they not acted fraudulently with the home owner in the first place.

This is like robbing millions from a bank, and than agreeing to give back a small percentage of it. Why in the world would they stop?

It is also why we MUST have Strict UDAP laws that favor home owners, who do not have the means or knowledge to manipulate the rules.

Thank You for doing the right thing for the people of Hawaii who can not afford to spend money on lobbyists , as the banks all do.

Marcy Koltun-Crilley

Kihei, Hawaii

808-874-5644

LAW OFFICE OF GEORGE J. ZWEIBEL
45-3590A Mamane Street
Honoka'a, Hawaii 96727
(808) 775-1087

House Committee on Finance

Hearing: Friday, March 30, 2012, 5:00 p.m.
Conference Room 308, State Capitol, 415 South Beretania Street

IN SUPPORT OF SB 2429, SD2

Chair Oshiro, Vice Chair Lee, and Committee Members:

My name is George Zweibel. I am a Hawaii Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui. 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.

SB 2429, SD2 would implement the 2011 recommendations of the Task Force, which I generally support. In particular, the Task Force recommends amending § 667-60 to limit lender UDAP liability to serious, listed violations only. This recommendation was approved in direct response to lenders' stated concerns regarding potential liability for minor chapter 667 violations and I support the Task Force compromise.

I strongly support three other provisions in SB 2429, SD2: (1) making permanent the mortgage foreclosure dispute resolution program; (2) repeal of the prohibition against participants in the dispute resolution program converting nonjudicial foreclosures to judicial foreclosure actions; and (3) repeal of the nonjudicial foreclosure process under Part I of chapter 667.

I also respectfully request that your committee amend SB 2429, SD2 to: (1) require attorneys who institute residential judicial foreclosure actions to certify that they have verified the accuracy of the documents submitted (as in HB 1875, HD2, SD1); and (2) retain the § 667-5 requirement that mortgagees give all notices and do all acts required by the power of sale contained in the mortgage.

Finally, contrary to lenders' past testimony, to preserve the effectiveness of Act 48 and current law it is especially important to retain the current provisions: (1) making specific reference to the FDIC loan modification guidelines in the dispute resolution program; (2) establishing mortgagee liability for oral misrepresentations made on their behalf; and (3) establishing their liability for completing a foreclosure after a loan modification has been approved or while one is being considered.

1. **Retain Task Force § 667-60 compromise.** By expressly stating that any chapter 667 violation constitutes an unfair or deceptive act or practice ("UDAP") under § 480-2, § 667-60 deters violations of the foreclosure law and at the same time provides meaningful remedies if they do occur. This helps prevent wrongful foreclosure, *e.g.*, when servicers make mistakes or fail to honor loan modification agreements, and ensures that important borrower rights are honored, including dispute resolution and conversion of nonjudicial to judicial foreclosures.

Lenders contend that § 667-60 may subject them to disproportionate penalties for trivial violations of chapter 667. The Task Force recommendations respond to lenders' stated liability concern in two ways. First, it recommends creating several "safe harbors," *e.g.*, providing a public information notice form lenders can use to comply with § 667-41 and clarifying where foreclosure notices must be published. Second, the Task Force recommends limiting the applicability of § 667-60 to listed chapter 667 violations that are most likely to result in wrongful foreclosure and/or financial harm. Voiding a transfer of title under § 480-12 would be further limited to the most serious of those violations, and a court action seeking such relief would have to be filed within 180 days.

The Task Force's recommended revision of § 667-60, approved by 13 of the 17 voting members, reflects substantial compromise and strikes a fair and reasonable balance between lenders' stated concerns regarding liability for minor violations and the need to protect borrowers from real harm caused by serious chapter 667 violations.

2. **Add judicial foreclosure attorney affirmation requirement.** HB 1875, HD2, as passed by the House of Representatives, would require attorneys who file residential foreclosure actions to certify in writing that they have verified the accuracy of the documents they submit in court. Such due diligence by plaintiffs' attorneys would help prevent well-publicized problems involving failure to review loan documents establishing standing and other foreclosure requisites, filing notarized affidavits falsely attesting to such review and other material facts, and "robosigning" of documents.

A recent foreclosure audit in San Francisco County strongly suggests that the true magnitude of these problems – in Hawaii and elsewhere – is much greater than previously realized. Casting doubt on the validity of almost every

foreclosure it examined, that audit determined that *84%* contained law violations, with 2/3 having at least four violations or irregularities. New York Times, Feb. 16, 2012, at A1, A3. Transfers of many loans were made by entities that had no right to assign them and institutions took back properties in auctions even though they had not proved ownership. In *45%* of the reviewed foreclosures, properties were sold at auction to entities improperly claiming to be the beneficiary of deeds of trust (used instead of mortgages to secure residential loans in California). In *6%* of the foreclosures, the same security instrument was assigned to two or more different entities, raising questions about who actually had the right to foreclose. Many securitized foreclosures showed gaps in the chain of title, indicating that transfers from the original loan owner to the entity currently claiming to own the deed of trust had disappeared.

Hawaii would not be the first state to require attorneys to certify that they have personally verified their clients' legal right to foreclose. The New York State Unified Court System instituted this requirement in October 2010, stating in its press release that it was adopting an attorney affirmation requirement "to protect the integrity of the foreclosure process and prevent wrongful foreclosures" and that the new filing requirement "will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked to take the drastic step of foreclosure." The proposed Hawaii attorney affirmation form is nearly identical to the one used in New York.

Courts in two of Ohio's largest counties, Cuyahoga County (where Cleveland is located) and Franklin County (where Columbus is located) have issued Case Management Orders requiring mortgagees' lawyers in residential foreclosure cases to ascertain and certify the accuracy of the facts and documents provided to the court. Although Ohio foreclosure attorneys objected to attorney affirmation requirements based on purported attorney-client concerns (*i.e.*, compelling them to "breach" clients' attorney-client privilege and their ethical obligations regarding confidentiality of client information), the courts there have not modified the Case Management Orders and in April 2011 the Ohio Supreme Court refused to order them to do so.

The foreclosure attorney affirmation requirement in HB 1875, HD2, SD1, like those already in place in New York and Ohio (and possibly other states), would go far toward ending systematic foreclosure abuses and wrongful foreclosure in Hawaii.

3. **Retain repeal of dispute resolution program sunset.** Under Act 48, the dispute resolution program currently is scheduled to end on September 30, 2014. Although the program has been available since October 1, 2011, mortgagees have stopped doing nonjudicial foreclosures in Hawaii, based on their claimed fear of undue liability under § 667-60. Consequently, 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. On the other hand, by facilitating negotiations between owner-occupants and mortgagees to determine whether a loan modification or other agreement avoiding foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it exists. For these reasons, the sunset provision in Act 48 should be repealed.

4. **Retain repeal of requirement that borrowers choose between dispute resolution program and conversion.** Foreclosure dispute resolution and converting a nonjudicial foreclosure to a judicial foreclosure are both extremely important rights. However, they serve different purposes and borrowers should not be forced to choose between them. Conversion allows borrowers to assert legal claims and defenses in a court of law which, if established, may prevent a wrongful foreclosure and afford other relief. In contrast, dispute resolution creates a process for determining whether foreclosure can be avoided by reaching a mutually beneficial agreement, *e.g.*, by modifying loan terms, irrespective of whether legal foreclosure defenses may exist. Alternative dispute resolution should be encouraged and utilized as much as possible, but not at the cost of losing the conversion right if an agreement cannot be reached. Instead, the homeowner should retain the option, in the event dispute resolution is unsuccessful, to move the foreclosure to court so that a judge can decide whether valid foreclosure defenses exist.

5. **Retain repeal of nonjudicial foreclosure process under Part I.** When the moratorium on new nonjudicial foreclosures under Part I expires on July 1, 2012, Hawaii would again have two very different but overlapping nonjudicial foreclosure laws. With implementation of the Task Force's 2011 recommended revisions included in SB 2429, SD2, Part II will embody the best efforts of lender and borrower representatives as well as the Legislature to craft a fair, comprehensive and effective Hawaii nonjudicial foreclosure law. There is no reason for Part I to continue to provide for an inferior alternative nonjudicial foreclosure process and it should be eliminated.

6. **Add provision incorporating mortgage power of sale requirements into the statute.** SB 2429, SD2 repeals § 667-5 as part of the repeal of the nonjudicial foreclosure provisions in Part I. Current § 667-5(a)(3) requires mortgagees to give all notices and do all acts required by the power of sale contained in the mortgage. Part II should state that failure to provide notices or disclosures required by the mortgage will also violate chapter 667. This would help ensure mortgagee compliance with the mortgage itself. Otherwise, such violations would be enforceable only as breaches of contract. This provision should also be listed in § 667-60(a) and covered by § 667-60(b).

7. **Retain use of FDIC loan modification guidelines in foreclosure dispute resolution program.** Section 667-80(e) mandates use of the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation loan modification program (or a different program or

process if the parties and neutral agree). The Task Force considered but rejected recommending removal of the specific reference to the FDIC guidelines, because that program is widely regarded as the most objective, transparent and verifiable loan modification program in widespread use. Retention of the FDIC language in § 667-80(e) will help avoid mistakes and ensure that the "net present value" calculation accurately determines whether it is more beneficial for the loan holder to modify the loan or to foreclose. Conversely, its deletion would seriously undercut the dispute resolution program's ability to achieve its intended goal.

8. **Retain mortgagee liability for oral misrepresentations**. Lenders have proposed amending § 667-59 so that foreclosing mortgagees would be bound only by written agreements and representations made on their behalf. Consumer protection law enforcement agencies and private consumer attorneys have long recognized that most misrepresentations are oral and not put into writing, making them much easier to deny later. Contrary to general rules of evidence, proof of oral misrepresentations usually is permitted to establish UDAP or fraud claims. Lenders' proposed change would eliminate foreclosing mortgagees' legal responsibility for all oral misrepresentations made by their representatives. There can be no justification for giving anyone a "license" to commit fraud, especially when families' homes are at stake.

9. **Retain mortgagee liability for foreclosing during consideration or after approval of loan modification**. Lenders have proposed repealing § 667-56(6) and (7), which prohibit completing a foreclosure during loan modification negotiations or after acceptance into a federal loan modification program. There have been many instances in which mainland servicers have completed foreclosures while loan modifications were being considered or while trial or permanent modifications were in effect. Retaining § 667-56(6) and (7) is essential to protect Hawai'i homeowners from such abuses and the obvious harm they cause.

Thank you for your consideration of my testimony.

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 29, 2012 5:07 PM
To: FINTestimony
Cc: gomem67@hotmail.com
Subject: Testimony for SB2429 on 3/30/2012 5:00:00 PM

Testimony for FIN 3/30/2012 5:00:00 PM SB2429

Conference room: 308
Testifier position: Oppose
Testifier will be present: No
Submitted by: Eric M. Matsumoto
Organization: Mililani Town Association (MTA)
E-mail: gomem67@hotmail.com
Submitted on: 3/29/2012

Comments:
We oppose the provisions contained in SD 2. We do, however, support the compromise language for the provisions affecting PCAs in HB 1875 SD 1. While there appears to be a few more issues needing to be resolved, such as attorney affirmations, piublicaitons of notices and the lien cap, we feel that based on the significant effort expended to achieve SD 2 results, deferring of SB 2429 would help consolidate the issues needing resolution more effectively, and as such request SB 2429 be deferred.