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January 28, 2013

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
REGARDING HOUSE BILL 25

Hearing Date:		WEDNESDAY, January 30, 2013
Time	:	2:00 p.m.
Place	:	Conference Room 325

Chair McKelvey, Vice Chair Kawakami, and Members of the Committees,

My name is John Morris and I am testifying in favor of HB 25, with one suggested amendment. HB 25 serves an extremely worthwhile purpose, as the preamble to the bill clearly states: allowing condominium and homeowner associations to commence nonjudicial foreclosures to collect delinquencies even if the lender has filed foreclosure. In addition, as outlined in more detail below, one simple additional amendment to section 667-37 could make the bill even more effective.

Under the current law, as outlined in HB 25, even if an association has begun a nonjudicial foreclosure before the lender begins its foreclosure, that nonjudicial foreclosure may have to be converted to a judicial foreclosure or put on hold. Given the long periods of time that have been typical of lender foreclosures, this is a major problem for associations. Admittedly, section 667-57 does not prevent associations from conducting a judicial foreclosure, but the right to conduct a judicial foreclosure is often of limited value to an association because of the very high cost.

Specifically, in a typical situation facing an association, there is a large mortgage that has priority over the association's lien and exceeds the value of the unit. If a unit is worth less than the mortgage - for example a $400,000 unit has a $500,000 mortgage - the association's foreclosure has to be made subject to the prior mortgage, which basically means the association will have no bidders at the auction (i.e., for a property worth $100,000 less than its mortgage) and will end up buying the property for a dollar because it has a minus $100,000 value. While that is not an ideal situation, the association at least has the opportunity of renting the unit out until the lender finally forecloses.

The association will still have to spend $5,000 - $6,000 foreclosing nonjudicially. If, however, an association is forced by section 667-57 to conduct a judicial foreclosure,

it will end up spending $12,000 - $14,000 and take 12 to 14 months to complete its judicial foreclosure with the same result – buying the unit for a dollar and trying to rent it out.

Section 667-57 can also prevent associations from exercising the other remedies in a nonjudicial foreclosure. Specifically, in Act 182 the legislature gave associations three options if they are unable to personally serve the delinquent owner with the notice of intention to begin the nonjudicial foreclosure process:

> (1) File a special proceeding in the circuit court for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting;
>
> (2) Proceed with a nonjudicial foreclosure of the unit without making personal service, but then the association loses the right to obtain a deficiency judgment against the unit owner; or
>
> (3) Take control of the unit, if the unit is unoccupied, and rent out the unit to generate rental income to pay the unit owner's delinquency.

If an association is faced with an abandoned unit and wants to begin the process of nonjudicial foreclosure to take advantage of these options, it presently cannot do so under sections 667-37 and 667-57 if the lender has already started a foreclosure.

As a real-life example, a homeowner's association in west Oahu has two empty and abandoned homes that have been vacant for a year or more. About three months ago, the association wanted to start the process of nonjudicial foreclosure so they could take over those homes and rent them out to generate income. Unfortunately, when the association obtained a title report, it discovered that the lender had actually started a foreclosure in 2010, two years before, and had done nothing since. Nevertheless, since the lender foreclosure was still going on – at least theoretically – the association could do nothing because section 667-57 prohibited it from beginning a nonjudicial foreclosure (and there was no economic way to justify a judicial foreclosure of the units). Similarly, the association was unable to use any of the three remedies above because they required the association to first begin the nonjudicial foreclosure, which section 667-57 prohibited the association from doing. There is no real logic for such a situation.

Finally, the proposed changes to the last sentence of section 667-37 in HB 25 seek

to prevent anyone conducting a nonjudicial foreclosure from continuing once a foreclosure commissioner is appointed. That change is unnecessary, so HB 25 can be further simplified by making one simple change to the existing language of section 667-37, as follows:

> §667-37 ***Judicial action of foreclosure before public sale.*** *This part shall not prohibit the foreclosing mortgagee, or any other creditor having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23, from filing an action for the judicial foreclosure of the mortgaged property in the circuit court of the circuit where the mortgaged property is located; provided that the action is filed before the public sale is held. ~~The power of sale foreclosure process shall be stayed during the pendency of the circuit courtl foreclosure action.~~*

(Note: "power of sale foreclosure" is just another name for nonjudicial foreclosure.) In other words, when evaluated in the context of the nonjudicial and judicial foreclosure process, the last sentence of section 667-37 does not need to be amended because it is unnecessary in the first place.

The foreclosure commissioner in a judicial foreclosure needs no protection from anyone conducting a nonjudicial foreclosure because the commissioner is appointed by the circuit court and has the protection and authority of the court. In other words, since a judicial foreclosure is a judicial proceeding, the judge will be available at all times to, if necessary, prevent a nonjudicial foreclosure from interfering in the judicial foreclosure proceeding. Therefore, section 667-37 loses nothing from having the last sentence eliminated completely, rather than amended to protect the commissioner's conduct of the judicial foreclosure.

Moreover, eliminating the last sentence will also eliminate one other potential delay. The standard operating procedure is that the foreclosure commissioner follows the timetable of the lien holder conducting the foreclosure. Under that policy, it is not unheard of for a foreclosing mortgagee to have a commissioner appointed and then ask the commissioner to "stand down" for various reasons (e.g., problems finding necessary paperwork, etc.).

Sometimes this pause in the judicial foreclosure continues for months or even years, even though a commissioner is standing by and ready to proceed. Under those circumstances, if the judicial foreclosure is not going forward, there is no reason to delay the nonjudicial foreclosure or allow it to in any way impede the nonjudicial

foreclosure from proceeding. More specifically, there is no reason that the condominium association conducting a nonjudicial foreclosure should have to wait just because a commissioner has been appointed by a foreclosing mortgagee that is doing nothing to move the judicial foreclosure forward.

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,

John A. Morris

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