

# SB 508

Measure Title: RELATING TO SUSPENSION OF FORECLOSURE ACTIONS BY JUNIOR LIENHOLDERS.

Report Title: Foreclosure Actions; Junior Lienholders; Condominium Associations

Description: Allows a condominium association, as a junior lienholder, to commence or continue a nonjudicial foreclosure action on a property subject to a judicial foreclosure until a foreclosure commissioner is appointed by the circuit court.

Companion:

Package: None

Current Referral: CPN, JDL

Introducer(s): BAKER, CHUN OAKLAND, ESPERO, Keith-Agaran, Ruderman, Wakai

<b><u>Sort by</u></b> <b><u>Date</u></b>		<b>Status Text</b>
1/18/2013	S	Introduced.
1/22/2013	S	Passed First Reading.
1/22/2013	S	Referred to CPN, JDL.
1/29/2013	S	The committee(s) on CPN has scheduled a public hearing on 02-05-13 8:30AM in conference room 229.



NEIL ABERCROMBIE  
GOVERNOR

SHAN S. TSUTSUI  
LT. GOVERNOR

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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2013

TUESDAY, FEBRUARY 5, 2013  
8:30 A.M.

TESTIMONY ON SENATE BILL NO. 508, RELATING TO SUSPENSION OF  
FORECLOSURE ACTIONS BY JUNIOR LIENHOLDERS.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,  
AND TO THE HONORABLE BRICKWOOD GALUTERIA, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on Senate Bill No. 508, Relating to Suspension of Foreclosure Actions by Junior Lienholders. My name is Bruce B. Kim and I am the Executive Director of OCP. OCP would like to offer comments regarding S.B. 508.

This legislation would effectively give associations a super lien, allowing them to foreclose regardless of any other liens on the property, or any foreclosure proceedings

already in process (up until a foreclosure commissioner is appointed). Given the difficulties and obstacles that associations have encountered when trying to foreclose, this bill seeks to mitigate the damage and neglect, as well as the loss of revenue, resulting from the long period of time currently required for a mortgagee to foreclose, judicially. However, it may also have the unintended consequence of accelerating foreclosures by mortgagees, as the removal of an owner-occupant may make the nonjudicial foreclosure process under Part II of HRS Chapter 667 more attractive to mortgagees who are currently foreclosing by action via Part IA of HRS Chapter 667, exclusively, at this time. Because there would be no owner-occupant resident at the time the foreclosing mortgagee initiated a foreclosure pursuant to HRS § 667-22, the foreclosure would not be subject to the dispute resolution provisions contained in Part V of HRS Chapter 667.

OCP takes no position on the policy merits of this legislation, and is cognizant of the detrimental impact that unoccupied and/or delinquent units have on other members of the association and the association as a whole. However, S.B. 508 should not inadvertently be a vehicle to circumvent the mortgagor's right to opt in to the MFDR program under Part V.

Thank you for the opportunity to submit testimony on S.B. 508. I would be happy to answer any questions members of the committee may have.



P.O. Box 976  
Honolulu, Hawaii 96808

February 1, 2013

Honorable Rosalyn H. Baker  
Honorable Brickwood Galuteria  
Commerce and Consumer Protection  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: **SB 508/SUPPORT**

Dear Chair Baker, Vice-Chair Galuteria and Committee Members:

I am the vice-chair of the CAI Legislative Action Committee. CAI has the following comments in support of SB 508.

First, CAI recognizes that the timely pursuits of judicial foreclosures by senior mortgagees, like lenders, are in everyone's best interest. However, for various reasons there have been delays of many of these judicial or court foreclosures where the property is left vacant and not sold via a court ordered auction for up to 3 or 4 years.

Second, while these judicial foreclosures are pending in the courts, and prior to the court's appointment of a foreclosure commissioner, these properties (including homes, townhomes and condominiums) fall into a state of disrepair and negatively impact the surrounding neighbors and the community as large.

One example of what can happen to a vacant unit while the judicial foreclosure is pending is depicted in the following picture:

Honorable Rosalyn H. Baker  
Honorable Brickwood Galuteria  
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[This unit was left vacant while the judicial foreclosure took years to resolve, and the association in this case had no idea of the condition of this unit.]

Currently non-judicial foreclosures by associations come to a grinding halt once the lender initiates a judicial foreclosure. If associations could proceed with the non-judicial foreclosures until the court appoints a foreclosure commissioner, then the associations would have the opportunity to move forward; conduct a non-judicial foreclosure on the unit; and then enter the unit and attempt to mitigate the damages for everyone's benefit.

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Honorable Brickwood Galuteria  
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SB 508 is a step in the right direction and provides associations and their surrounding communities with a mechanism to address lender judicial foreclosures that are stalled.

CAI represents the association industry, and endorses this approach. We respectfully request the Committee to pass SB 508. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Porter', with a stylized, cursive flourish extending to the right.

Christian P. Porter

888 Mililani Street, 2<sup>nd</sup> Floor  
Honolulu, Hawaii 96813-2918  
January 31, 2013

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION  
REGARDING SENATE BILL 508

Hearing Date: TUESDAY, February 5, 2013  
Time : 8:30 a.m.  
Place : Conference Room 229

Chair Baker, Vice Chair Galuteria, and Members of the Committees,

My name is John Morris and I am testifying in favor of SB 508, with one suggested amendment. SB 508 serves an extremely worthwhile purpose, as the preamble to the bill clearly states: allowing condominium and homeowner associations to commence or continue 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 SB 508, an association cannot foreclose NONjudicially if a lender is foreclosing. Even if an association has already begun a nonjudicial foreclosure before the lender begins its foreclosure, under current law, that association's nonjudicial foreclosure has to be put on hold or converted to a judicial foreclosure. Given the long, drawn-out process that has been typical of lender foreclosures, this prohibition 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.

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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 provided in connection with 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



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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 SB 508 seek to prevent anyone conducting a nonjudicial foreclosure from continuing once a foreclosure commissioner is appointed. That change is unnecessary, so SB 508 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 court 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 lienholder 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.).

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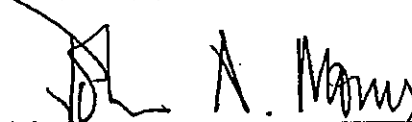
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Sometimes this pause in the judicial foreclosure continues for months or even years, even though a commissioner is standing by and ready to proceed. Under those circumstances, if the judicial foreclosure is not going forward, there is no reason to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

A handwritten signature in black ink, appearing to read "John A. Morris". The signature is written in a cursive style with some loops and is positioned above a horizontal line.

John A. Morris

JAM:alt

G:\C\2013 Testimony SB 508 (01.31.13)