



Collection Law Section

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February 3, 2014

Representative Angus L. K. McKelvey, Chair
Representative Derek S. K. Kawakami, Vice Chair
Committee on Consumer Protection and Commerce

**RE: House Bill 2485, Hearing Relating to Association
Power of Sale Foreclosure Process on Wednesday,
February 5, 2014 at 2:10 PM in Conference Room 325**

My name is Arlette Harada and I am testifying in favor of House Bill 2485 on behalf of the Collection Section of the Hawaii State Bar Association. **The comments and recommendations submitted herein reflect the position of the Collection Section of the HSBA. The position has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.**

The Collection Section urges you and your colleagues to vote in favor of HB 2485 which seeks to allow condominium and homeowner associations that are foreclosing under power of sale to serve mortgagees and other parties through the same means allowed for service on owners. The 2012 amendments to the power of sale foreclosure law allowed associations several means for making service of the document initiating the foreclosure where a party could not be found. There are three options. Two of them, taking possession of a vacant unit to rent or proceeding with foreclosure without making service but foregoing the right to obtain a deficiency judgment, can only apply where the owners cannot be found.

The third option, to file a special proceeding and obtain court permission to serve by posting and publication, states that it applies to the owner "only." However, subsection (f) of the statute setting forth these alternate means of making service states that it is intended to apply service on owners and other parties. The reason the alternate service was sought was to allow associations to make service on parties in a non-judicial foreclosure rather than having to convert the matter to a judicial foreclosure in order to obtain court permission for service by publication. The savings of the non-judicial or power of

Testimony on House Bill 2485

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sale foreclosure process over the judicial foreclosure process is lost if the matter must be converted due to inability to serve other parties.

One type of party that might need to be served but might not be found would be prior or current mortgagees which are now defunct. At least one judge has ruled that the provision for service by special proceeding for permission to post and publish does not apply to service on mortgagees. The anomalous result is that owners, who have an interest in the property and whose interest can be extinguished by the foreclosure, can be served in this manner but a mortgagee, whose interest remains on the property after an association foreclosure, cannot be served except through a judicial foreclosure. Typically, an association forecloses "subject to" the senior lien interests, including the prior mortgages of record. As such, the mortgagees retain their rights under the mortgage, including the ability to foreclose the mortgage.

The special proceeding process provides sufficient assurances that the party seeking to serve by posting and publication has made reasonable attempts to serve the unserved party. A judge will apply the same standard to decide whether service by posting and publication should be allowed either in the special proceeding or in a judicial foreclosure. This bill would allow associations to use the more cost efficient means of foreclosing their liens.

For the above reasons, the Collection Section urges the Committee to vote in favor of House Bill 2485. If you have any questions, I would be happy to answer them or you may reach me at 523-0702.

Very truly yours,



Arlette S. Harada

Treasurer

Collection Law Section of the
Hawaii State Bar Association

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cc: Steven Guttman, Chair, Collection Law Section
Patricia Mau-Shimizu, Executive Director, Hawaii State Bar
Association

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February 4, 2014

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
REGARDING HOUSE BILL 2485

Hearing Date: WEDNESDAY, February 5, 2014
Time : 2:10 p.m.
Place : Conference Room 325

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

My name is John Morris and I work as an attorney representing condominium and other homeowner associations. I am testifying in support of HB2485 because it will assist in making homeowner association nonjudicial foreclosures more cost-effective and efficient.

Currently, subsection 667-92(e), HRS (attached), requires an association to serve its notice of default and intention to nonjudicially foreclose on: (1) the unit owner; (2) any prior or junior creditors who have a recorded lien on the unit; (3) the state director of taxation; (4) the director of finance of the county where the unit is located; and (5) any other person entitled to receive notice under section 667-5.5. If the association cannot find the owner, it can go to court to ask for permission to serve the owner by publication, the standard practice for defendants in a court case who cannot be found; see subsection 667-92(f)(1), HRS (also attached).

Of course, the state director of taxation and the director of finance of the county where the unit is located can always be served. Unfortunately, subsection 667-92(f)(1), HRS, does not specifically allow the association to serve any of the other potential defendants (e.g., defunct lenders, long lost judgment holders, etc.) by publication if they cannot be found, which prevents the association's non judicial foreclosure from going forward. Fortunately, the solution is simple, and is outlined in the current wording of HB 2485: allow the judge to approve service of certain other missing defendants by publication so the nonjudicial foreclosure can continue.

The benefits to an association are considerable. Instead of being forced to spend the additional time and expense for a judicial foreclosure, the association can continue

TESTIMONY REGARDING HOUSE BILL 2485

February 4, 2014

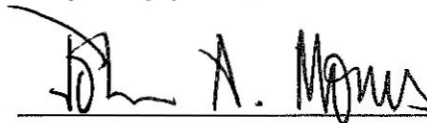
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its nonjudicial foreclosure. (The difference is substantial: a nonjudicial foreclosure typically costs between \$5,000 and \$6,000 and takes about six months, while a judicial foreclosure typically costs between \$12,000 and \$14,000 and takes over a year.)

Moreover, the change is not radical because, again, subsection 667-92(f)(1), HRS, already allows an association to serve a missing owner by publication, after a hearing before a judge. In addition, a circuit court judge oversees the process of service by publication in the nonjudicial foreclosure with respect to service of ALL missing defendants, to ensure that all the requirements of due process are followed.

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", written over a horizontal line.

John A. Morris

ADDENDUM

[§667-92] Notice of default and intention to foreclose; contents; distribution; alternative remedies for failure to serve.

* * *

(e) The association shall have the notice of default and intention to foreclose served on:

(1) The unit owner;

(2) Any prior or junior creditors who have a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-93;

(3) The state director of taxation;

(4) The director of finance of the county where the unit is located; and

(5) Any other person entitled to receive notice under section 667-5.5.

(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner or any other party listed in subsection (e)(2) to (5) within sixty days, the association may:

(1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting;

* * *