

HB 2585

Measure Title: RELATING TO FORECLOSURES.

Report Title: Foreclosure; Association Assessments; Notice

Description: Specifies parties other than unit owners who may be served notice by publication and posting of nonjudicial foreclosure.

Companion:

Package: None

Current Referral: CPN

Introducer(s): MCKELVEY (Introduced by request of another party)



NEIL ABERCROMBIE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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KEALI'I S. LOPEZ
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

THE TWENTY-SEVENTH
REGULAR SESSION OF 2014

MARCH 11, 2014
9:30 AM

TESTIMONY IN SUPPORT OF H. B. 2585, RELATING TO FORECLOSURES.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE BRIAN T. TANIGUCHI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs, Office of Consumer Protection ("OCP") appreciates the opportunity to appear today in support of H. B. 2585, Relating to Foreclosures. My name is Bruce B. Kim and I am the Executive Director of OCP.

H. B. 2585 clarifies the service requirements of HRS §667-92 to allow service by publication for parties other than unit owners.

As a member of the Mortgage Foreclosure Task Force ("MFTF"), and as evidenced by the 2012 report of the MFTF, it was and is clear that the intent of Part VI of HRS

Testimony on H. B. 2585
March 11, 2014
Page 2

Chapter 667 (as enacted by Act 182, SLH 2012) was to provide associations with a means to foreclose nonjudicially. While the possibility of a "missing or defunct lender" was never raised in the MFTF, it was definitely the intent of the MFTF to provide associations with a separate alternate power of sale foreclosure process to enable them to remedy assessment delinquencies without having to resort to a HRS §667-1.5 judicial foreclosure. If the Judiciary has interpreted the lack of enabling language for other parties for eligibility for service by publication, that may conflict with the intent of the MFTF recommendations.

Thank you for the opportunity to support H. B. 2585. I would be happy to answer any questions members of the committee may have.



Collection Law Section

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Steven Guttman

Vice Chair:
William J. Plum

Secretary:
Thomas J. Wong

Treasurer:
Arlette S. Harada

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March 10, 2014

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
Committee on Commerce and Consumer Protection

**RE: House Bill 2585, Hearing Relating to Foreclosures
on Tuesday, March 11, 2014 at 9:30 AM in
Conference Room 229**

My name is Arlette Harada and I am testifying in favor of House Bill 2585 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 2585 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 to 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

Testimony on House Bill 2585

March 10, 2014

Page 2

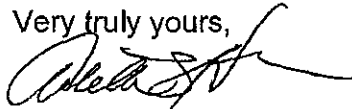
or power of sale foreclosure process over the judicial foreclosure process is lost if the matter must be converted due to inability to serve other parties.

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 2585. If you have any questions, I would be happy to answer them. I will not be able to attend the hearing due to a conflict but 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

HB2585

Submitted on: 3/10/2014

Testimony for CPN on Mar 11, 2014 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Christian Porter	Cpommunity Association Institute	Support	No

Comments: This Bill will clarify a current procedural issue for associations pursuing a non-judicial foreclosure. Therefore, Community Association Institute supports HB2585.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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March 10, 2014

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
REGARDING HOUSE BILL 2585

Hearing Date: TUESDAY, March 11, 2014
Time : 9:30 a.m.
Place : Conference Room 229

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

My name is John Morris and I work as an attorney representing condominium and other homeowner associations. I am testifying in support of HB 2585 (which is the same as SB 2482) 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 nonjudicial foreclosure from going forward. Fortunately, the solution is simple, and is outlined in the current wording of HB 2585: 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 2585

March 10, 2014

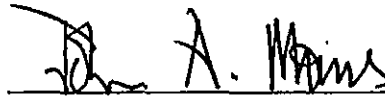
Page 2

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,



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;

* * *

HB2585

Submitted on: 3/10/2014

Testimony for CPN on Mar 11, 2014 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Eric M. Matsumoto	Individual	Support	No

Comments: This bill clarifies the law and should be passed.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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