HB 2132

LINDA LINGLE
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH STATE LEGISLATURE
Regular Session 2010

Friday, March 12, 2010
9:30 a.m.

TESTIMONY ON HOUSE BILL NO. 2132, H.D. 1 -- RELATING TO MORTGAGE FORECLOSURES.

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

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to comment on House Bill No. 2132, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection ("OCP").

House Bill No. 2132, H.D. 1 imposes a requirement on foreclosing lenders to formally notify their mortgagors, prior to the initiation of foreclosure proceedings, to seek mortgage counseling. Mortgage counseling is a laudatory concept so long as the counselor is well trained, has no ulterior motive of self dealing and is sincere in assisting

the mortgagor work through their financial difficulties. Counselors approved by the United States Department of Housing and Urban Development (HUD) appear to meet these criteria. They offer services to homeowners that involve repayment plans, refinancing options, and financial counseling. To the extent that House Bill No. 2132, H.D. 1 can help mortgagors receive this kind of assistance from the HUD counselors the Department is generally supportive of the intent of this Bill.

The Department has one specific area of concern with House Bill No. 2132, H.D. 1, however, which is the Bill's mandate that the Department adopt a form of written notice for the mortgagors. In this regard, the Department believes that it would be more efficient and cost effective to place the particular language of the desired written notice in the Bill itself rather than delegating this function to the Department.

Thank you for this opportunity to testify on House Bill No. 2132, H.D. 1. I will be happy to answer any questions that the Committee members may have.

Hawaii Bankers
Association

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Presentation to the Senate Committee on Commerce and Consumer Protection

Friday, March 12, 2010, at 9:30 a.m., Room 229

Testimony for HB 2132, HD 1 Relating to Mortgage Foreclosures

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable David Y. Ige, Vice Chair
Members of the Senate Committee on Commerce and Consumer Protection

My name is Neal K. Okabayashi of First Hawaiian Bank and I testify for the Hawaii Bankers Association.

HBA opposes HB 2132, HD 1 because it will not accomplish its intended task. We prefer that section 1 of SB 2472, SD 2 be inserted into this bill if this Committee intends to pass this measure.

Both measures intend that the mortgagor be notified of the availability of counseling but the major difference is that HB 2132, HD 1 seeks to accomplish such task by amending a portion of the foreclosure law that has sat moribund since its passage. Since no lender uses the law HB 2132, HD 1 seeks to amend, such an amendment would be phyrric. Since section 1 of SB 2472, SD 2 amends that part of chapter 667 that lenders use, SB 2472, SD 2 would accomplish the goal of notifying homeowners of the availability of counseling. I should point out that federal law already requires that lenders provide a counseling notice not later than 45 days after the loan becomes delinquent, which is the more appropriate time to deliver an availability of counseling notice. However, HBA is willing to deliver two notices of the availability of counseling.

This bill also poses severe problems for lenders. The bill provides that a foreclosure is void if the notice is not provided which is a severe remedy which benefits no one. Not only will the lender have to start all over, which increases the cost for the borrower and lender, it would mean there would be no finality for a foreclosure sale, other than the statute of limitations, because even after a sale, a borrower could claim he or she did not receive the notice and thus try to overturn a foreclosure sale. That would serve as a chill on foreclosure sales, meaning lower sales prices, which benefits no one. The stringent remedy would open the floodgates of litigation as every foreclosed defendant will claim that they did not receive the notice. As often is the case, if there are two mortgagors, say, husband and wife, the notice may be opened by one spouse and the other spouse may claim that he or she did not receive the notice; a scenario which may be likely if one spouse had moved out. To avoid that issue, lenders will have to send out the notice, signature restricted but that does not solve the problem because if the delinquent borrower

simply does not pick up the letter at the post office, there will be no proof that the delinquent borrower received the notice, even if the lender separately sends the notice by regular mail.

For these reasons, we oppose this bill in its present form but would support an amendment of it by including Section 1 of SB 2472, SD2.

Thank you for this opportunity to testify, and I would be happy to answer any questions the committee may have.

Hawaii Credit Union League
Your Partner For Success

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Testimony to the Senate Committee on Commerce and Consumer Protection
Friday, May 12, 2010, at 9:30 am

Testimony in opposition to HB 2132 HD1, Relating to Mortgage Foreclosures

To: The Honorable Rosalyn Baker, Chair
The Honorable David Ige, Vice-Chair
Members of the Committee on Commerce and Consumer Protection

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for over 90 Hawaii credit unions, representing approximately 810,000 credit union members across the state.

We are in opposition to HB 2132 HD1. This provision is already required by federal law, thus, it is duplicitous. This bill may also needlessly lengthen the foreclosure process, which would be burdensome to all parties involved.

Additionally, we are very concerned about the language used in (c) of this bill, appearing on page 2, lines 7-13 of this bill, which would void the foreclosure if conditions are not met. This is a very severe penalty, and we are strongly opposed to this.

Thank you very much for the opportunity to testify.

HAWAII FINANCIAL SERVICES ASSOCIATION

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March 12, 2010

Rep. Rosalyn H. Baker, Chair
and members of the Senate Committee on Commerce & Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2132, House Draft 1 (Mortgage Foreclosures)**
Hearing Date/Time: Friday, March 12, 2010, 9:30 A.M.

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is the trade association for Hawaii's financial services loan companies which make mortgage and other loans and which are regulated by the Hawaii Commissioner of Financial Institutions.

The HFSA **opposes** this Bill as drafted.

The purpose of this Bill is to require foreclosing lenders to notify their mortgagors about mortgage counseling. This Bill would make foreclosure void if notice is not provided. Effective January 1, 2050.

The Senate earlier passed SB 2472, SD 2 (Mortgage Foreclosures). SB 2472, SD 2 does the following: (a) requires a thirty days written notice of the mortgagee's intent to foreclose and make the mortgagor aware of the availability of mortgage counseling; (b) requires a foreclosing mortgagee to, upon the mortgagor's request, provide a copy of the promissory note and mortgage document before initiating foreclosure proceedings; and (c) clarifies that 70% of an appraisal or broker's price opinion is a fair and reasonable public sale price.

We recommend that your Committee replace the contents of HB 2132, HD 1 with the contents of SB 2472, SD 2, but with the revisions attached and described below:

1. Section 1 of SB 2472, SD 2 concerns the notice of the availability of mortgage counseling. Our proposed revisions clarify that this applies only to power of sale (non-judicial) foreclosures and that the notice needs to be sent (rather than delivered) to the mortgagor by mail.

2. Section 2 of SB 2472, SD 2 requires the mortgagee (lender) to mail a copy of the promissory note and mortgage document if requested by the mortgagor prior to the mortgagee initiating a power of sale foreclosure. Our proposed revision specifies that this request only applies to a mortgagor who is an owner occupant of the mortgaged property. Additionally, the mortgagor needs to mail the mortgagee a written request for those copies.

3. Section 3 of SB 2472, SD 2 states that an auction sales price of 70% of the fair market value of the mortgaged property, as established by an appraisal or broker's price opinion, is fair and reasonable. The proposed revision explains how the 70% calculation is computed when a junior mortgagee (lender) is foreclosing on property that is "subject to" senior liens or encumbrances (such as real property taxes or a first mortgage). We have also changed the word "consumer" to "mortgagor" to be consistent the wording in the rest of this Bill.

We are willing to work with your Committees on any revisions to this Bill. Thank you.

Thank you for considering our comments.

Marvin S. C. Dang

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

(MSCD/hfsa)

Replace contents of HB 2132, HD 1 with SB 2472, SD 2 but with the following revisions:

1. SECTION 1. Chapter 667, Hawaii Revised Statutes, is amended by adding a new section to part I to be appropriately designated and to read as follows:

§667- Foreclosure counseling. (a) No later than thirty days prior to initiating any **power of sale** foreclosure under section 667-5, a foreclosing mortgagee shall provide a mortgagor [that] **who** is an owner-occupant of a mortgaged property that is held in fee simple and is subject to foreclosure, written notice of default and of the mortgagee's right to foreclose. The notice shall be [delivered] **sent** by first class mail to the address of the mortgaged property or to the address designated by the mortgagor by written notice to the mortgagee as the mortgagor's address for receipt of notice.

2. SECTION 2. Section 667-5, Hawaii Revised Statutes, is amended to read as follows:

[(d) Upon the request of the mortgagor, the mortgagee shall not initiate foreclosure proceedings until the mortgagee has mailed to the mortgagor, by way of registered or certified mail, a copy of the promissory note and mortgage document.]

(d) If the mortgagor, who is an owner-occupant of a mortgaged property, requests in writing a copy of the promissory note and mortgage document, the mortgagee shall not initiate foreclosure proceedings under this section until the mortgagee has mailed those copies to the mortgagor by registered or certified mail. The request by the mortgagor shall be in writing and sent by first class mail to the address designated by the mortgagee as the mortgagee's address for receipt of notice.

3. SECTION 3. Section 667-5.7, Hawaii Revised Statutes, is amended to read as follows:

[]§667-5.7[]] Public sale. At any public sale pursuant to section 667-5, the successful bidder at the public sale, as the purchaser, shall not be required to make a downpayment to the foreclosing mortgagee of more than ten per cent of the highest successful bid price. [A public sale price of seventy per cent of the fair market value of the mortgaged property owned and occupied by a consumer, as established by an appraisal or broker's price opinion, shall be fair and reasonable.] **If a mortgaged property is owned and occupied by the mortgagor, a public sale price of seventy per cent of the fair market value of the mortgaged property, as established by an appraisal or broker's price opinion, shall be fair and reasonable. Solely for the purpose of determining the public sale price under this section, if the sale is subject to senior liens or encumbrances, the dollar amount of the senior liens or encumbrances should be included in the public sale price.**

HSBA
Hawaii State Bar Association

Collection Law Section

Reply to: **STEVEN GUTTMAN, CHAIR**
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Re: Testimony of the Collection Law Section of the Hawaii State Bar Association on House Bill No. 2132 and Senate Bill No. 2472

Dear Committee Members:

My name is David Rosen, I am an attorney in private practice with over 11 years of experience handling foreclosure and Landlord/Tenant legal matters in Hawaii. In that capacity, I am one of approximately a dozen or so attorneys who handle the bulk of foreclosures, both judicial and non-judicial, in Hawaii.

I am also a Director of the Collection Law Section of the Hawaii State Bar Association, which is a voluntary organization made up of attorneys, real estate professionals, and members of Hawaii's lending and debt collection communities. It is on behalf of this organization that I testify here today.

Like you, the Collection Law Section is well aware of the financial upheaval currently taking place. And, like you, we wish that more could be done to help those who are being affected in these difficult times. However, House Bill No. 2132 ("HB 2132") and Senate Bill No. 2472 ("SB 2472") (collectively, "the Bills") will not only fail to provide any meaningful assistance to homeowners, but may actually make matters significantly worse. In particular, the Bills will likely result in delays to the foreclosure process that will harm those who are paying their mortgages and who may be attempting to purchase property in Hawaii. Among other reasons, delaying the foreclosure process increases the fees Associations are forced to charge to paying members to cover fees not being paid by parties in foreclosure.

As a starting point, let me note that this is not the first time that Hawaii has experienced high foreclosure rates. Then, as now, it is important to allow this process to run its course under the legal and financial systems currently in place. With respect to Hawaii's foreclosure and Landlord/Tenant laws, and as someone who has been involved with them for over a decade, I can honestly tell you that the laws as they currently stand are working.

Could they be improved? Yes. However, rather than attempting to do so in a "piece meal" manner and in reaction to anecdotal complaints you may have heard, it would be better to take a more circumspect and prospective approach so that, in the quest to help, more harm is not done.

While they may be well intended, the Bills are unnecessary, vague, subject to abuse, and potentially harmful to the general public.

First, **the debt counseling notice contemplated by the Bills is already being provided by most, if not all, lenders under federal mandates. Likewise, most, if not all, lenders are already providing mortgagors with copies of their loan documents (i.e., promissory note, mortgage, account statement, and any assignments or transfers of the loan documents) upon request.** Consequently, the Bills are unnecessary.

Second, any modifications to the existing foreclosure laws create new bases for confusion and increased litigation. Desperate or unscrupulous mortgagors use these changes to assert new arguments as to why they should be allowed to delay and avoid their contractual obligations. These assertions are rarely successful, but they do delay the process and burden the judicial system, which is compelled to interpret the application of new statutory requirements.

Such delays harm lenders, by compelling them to bear the resulting legal expenses, and innocent third parties, who are compelled to "subsidize" their neighbors' unpaid Association dues. In some instances this has resulted in increased AOAO dues charges of hundreds of dollars per month for those members who are paying. This issue has reached epidemic proportions in areas such as Miami and Las Vegas, where some Associations have significantly more members who are not paying than those that are.

Third, the Bills' reliance on HUD's conduct is also potentially problematic. The State of Hawaii cannot compel a federal agency, such as HUD, to do anything. Consequently, should HUD decide not to approve counselors, or should no counselors be willing to provide such services in Hawaii, the Bills could be interpreted as prohibiting non-judicial foreclosures altogether. This could result in lenders being unwilling to lend on new mortgages in Hawaii, borrowers in Hawaii having to pay more to obtain a mortgage, and/or our courts being overwhelmed with judicial foreclosures.

Fourth, the vagueness of language in the Bills is also highly problematic. In particular, the Bills require notice of the availability of mortgage counseling before any foreclosure action is "initiated." However, the term "initiated" is not defined, and could mean when a default letter is first sent or when an auction is noticed.

Also, there are no "cure" or "safe harbor" provisions. Consequently, if a lender fails to provide the required notice at the appropriate time, it is not clear whether or how a lender could "cure" this defect. Compelling the lender to restart the entire foreclosure process would appear to be unduly burdensome and expensive and confusing to the mortgagor. Instead permitting the lender to provide the notice and wait for 30 days before proceeding would satisfy the intent of the Bills, but is not provided for.

Fifth, the Bills fail to address how the change would affect the large number of pending foreclosure matters, where the required notice may not have been given, but which may not go to auction for sometime because the lender is engaging in ongoing efforts to work with the mortgagor. Similarly, in the case of HB 2132, it is not clear what, if any, notice must be given prior to the DCCA's issuance of the approved form of notice, which is not contemplated for a year.

Sixth, SB 2472 is more comprehensive than HB 2132. However, it only applies to non-judicial foreclosure actions. In addition to the concerns about the counseling notice requirement, SB 2472 would require a foreclosing mortgagee to provide, upon request of a mortgagor, a copy of the note and mortgage. **Again, this is already being done by most, if not all, foreclosing mortgagees.**

While mandating such a requirement would not appear to be objectionable on its face, when a borrower may request this documentation is unclear from SB 2472, which only provides that the mortgagee may not "initiate" a foreclosure proceeding until this documentation is provided. Does this mean that once the foreclosure action is already "initiated" the mortgagee no longer has any obligation to provide the documentation, or that once it is "initiated" the mortgagor no longer has a right to request the documentation?

Seventh, SB 2472 attempts to impose a "fair market" valuation requirement with respect to non-judicial foreclosure sales. This requirement makes absolutely no sense in a non-judicial foreclosure because, by presumption of law, a foreclosing mortgagee is already waiving its right to seek a deficiency judgment if it forecloses non-judicially. See HRS § 667-38. Moreover, if a property had significant equity, the mortgagor would have likely wanted and been able to sell the property prior to the non-judicial auction.

This provision is particularly onerous for junior lien holders and associations who may be proceeding via a power of sale. This is because the sale price when a junior lien or association lien is foreclosed will take into consideration any senior lien(s) and, therefore, will usually not meet the seventy per cent requirement.

Eighth, there are also ambiguity problems with this valuation provision. It is unclear how close in time to the sale the appraisal must be and how the appraisal should value the subject property. In the case of virtually all non-judicial foreclosure actions, the mortgagor is uncooperative, which means that the appraisal would need to be conducted without an interior inspection of the property. Not knowing the inside condition of the property makes it virtually impossible to accurately value and could result in valuation disputes between the mortgagor and the foreclosing mortgagee that, again, would delay and increase the expense of the process. SB 2472 is also silent as to the consequence, if any, of a sale that does not satisfy the "fair and reasonable" sale price requirement.

In summation, with rare exceptions, existing federal laws and state foreclosure and Landlord/Tenant laws appear to be functioning adequately and provide sufficient mechanisms and time for adequate notice to be given to borrowers and for borrowers to obtain documentation and negotiate with their lenders. While certain individuals may have complaints and may believe that a particular lender or association is behaving unfairly or unreasonably, these situations make up a very small percentage of the total number of foreclosures and, in such instances, there are legal remedies that are already available, which are currently being used very aggressively by borrowers who believe they have been wronged.

Again, foreclosing on a property is very expensive. At a minimum, it is going to costs a lender or association several thousand dollars and in many instances it can cost more than $10,000 to complete a foreclosure. Foreclosing also takes a long time. In my decade of experience, I have never seen, nor heard of, anyone complete a foreclosure action in less than 6 months from the date of the initial default. Usually, this process takes more than a year. During that time, the lender is carrying the cost of the loan and may have to pay the real property taxes, lease rent, and insurance on the property. Consequently, it is in a lender or an association's best interest, a fact of which they are well aware, to exhaust all efforts to work out a modification or other arrangement with a homeowner prior to referring a matter to legal counsel and/or proceeding with foreclosure.

To the extent that you are inclined to disagree with my assessment of the state of Hawaii's existing laws, we encourage you to consider an overhaul of the non-judicial foreclosure process by amending the Part II (HRS § 667-21 *et. seq.*) non-judicial foreclosure statute. The Part II law, which was enacted in 1998, after years of consideration and input from the various constituencies involved in the process, was rendered useless by a number of procedural defects, including a requirement that the borrower being foreclosed upon execute the conveyance deed following the auction. See HRS § 667-31(a). Thus, a foreclosure under this law could not occur without the participation of the party who was losing his/her property.

It should, therefore, come as no surprise that not a single foreclosure action appears to have occurred under this statute. Instead, associations and lenders have been forced to foreclose under Hawaii's Part I non-judicial foreclosure statute, which was enacted in 1859, and which does not contain many of the clarifications and protections contained within Part II.

Should the Committees be willing to consider this proposal, members of our section would welcome the opportunity to work with other interested parties in recommending amendments to the Part II statute that would make it the preferred vehicle for carrying out foreclosures. Such an undertaking would allow for a careful and thoughtful review in place of consideration of the Bills currently in play and could be presented for consideration next session.

Such a review could also address inefficiencies in the existing process such as how to adequately notice a party whose whereabouts are unknown or who may be deceased. Presently, addressing such issues can add thousands of dollars and months of delay to a foreclosure. These types of amendments would result in benefits to all interested parties.

Thank you for this opportunity to testify.

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