



**NEIL ABERCROMBIE**  
GOVERNOR

**BRIAN SCHATZ**  
LT. GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF THE DIRECTOR**  
**DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

**KEALI'I S. LOPEZ**  
DIRECTOR

**EVERETT KANESHIGE**  
DEPUTY DIRECTOR

**TO THE**  
**HOUSE COMMITTEES ON**  
**CONSUMER PROTECTION AND COMMERCE**  
**AND**  
**JUDICIARY**

**THE TWENTY-SIXTH STATE LEGISLATURE**  
**REGULAR SESSION OF 2012**

**Wednesday, January 25, 2012**  
**2:00 p.m.**

**TESTIMONY ON H.B. 2019**  
**RELATING TO MORTGAGES**

**TO THE HONORABLE ROBERT N. HERKES, CHAIR,**  
**THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR,**  
**AND MEMBERS OF THE COMMITTEES:**

My name is Iris Ikeda Catalani, Commissioner of Financial Institutions ("Commissioner"). I would like to provide comments on H.B. 2019 relating to mortgages.

The Bill prohibits requesting and rendering deficiency judgments for short sales when mortgagors have been in continuous occupancy of properties used as their

TESTIMONY ON HOUSE BILL NO. 2019

January 25, 2012, 2:00 p.m.

Page 2

principal residence; when mortgagors used proceeds secured by the real property to purchase the real property; and when mortgagors have not refinanced the mortgage after origination. DFI believes that when financial institutions agree to sell property at a price which is less than the mortgaged amount, the decision is based on a thorough and sophisticated evaluation of the factors relating to the property's value, the economy, and the financial interests of the financial institution. DFI notes that there are situations where the borrower is not delinquent with the mortgage payments, but would like to get out of the loan because the valuation of the property dropped below the amount of the mortgage.

DFI provides comments to the bill as we believe there are unintended consequences.

1. When working with borrowers, financial institutions consider a number of options when the borrower experiences a financial hardship, one of which allows the borrower to request that the bank accept a discounted payoff (or short sale) in order to release the mortgage lien and allow a borrower to sell their home. Short sale agreements do not necessarily release borrowers from their obligations to repay any deficiencies of the loans, unless specifically agreed to between the parties.
2. Financial institutions may not use short sales as an option in working on a solution with the borrower if they are not allowed to seek deficiency

judgments. Since the financial institution must agree to the short sale, if the sale is significantly below the mortgaged amount, the financial institution may not agree to the sale price even if the seller agrees. The loss to the financial institution may cause the financial institution to be in a situation where it becomes unsafe in the eyes of the federal and state regulators.

3. Even if the first position lien holder agrees to the short sale, the junior lien holder may not agree to forgive the debt entirely and may require the borrower to pay the difference as a personal obligation which could result in a subsequent collection action against the borrower.
4. Although a short sale is used as an alternative to foreclosure, because it may mitigate additional fees and costs to both the financial institution and the borrower, there may be a negative report filed against the property owner (borrower). After a short sale, borrowers may find it difficult to obtain a new mortgage as a financial institution's underwriting guidelines might look unfavorably on a potential borrower who obtained a short sale in the past.
5. When a borrower suggests a short sale as an alternative to foreclosure, the borrower should realize that the financial institution does not have to agree to the short sale. The financial institution does its own analysis on whether the short sale is the best option for the financial institution and for the borrower.

TESTIMONY ON HOUSE BILL NO. 2019

January 25, 2012, 2:00 p.m.

Page 4

Although the DFI understands that allowing lenders to obtain deficiency judgments after agreeing to short sales may dissuade borrowers from participating in short sales to fulfill their financial obligations, the potential losses faced by financial institutions may create situations where financial institutions may not be safe and sound. Keeping our financial institutions safe and sound is the mission of DFI.

Thank you for the opportunity to provide testimony on this measure and I am available to answer any questions the committee might have.



**NEIL ABERCROMBIE**  
GOVERNOR

**BRIAN SCHATZ**  
LT. GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF CONSUMER PROTECTION**  
**DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**  
LEIOPAPA A KAMEHAMEHA BUILDING  
235 SOUTH BERETANIA STREET, ROOM 801  
HONOLULU, HAWAII 96813-2419  
Phone Number: (808) 586-2636  
Fax Number: (808) 586-2640  
[www.hawaii.gov/dcca/ocp](http://www.hawaii.gov/dcca/ocp)

**KEALI'I S. LOPEZ**  
DIRECTOR

**EVERETT S. KANESHIGE**  
DEPUTY DIRECTOR

**BRUCE B. KIM**  
EXECUTIVE DIRECTOR  
OFFICE OF CONSUMER PROTECTION

**PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION**

**TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE**

**AND**

**THE HOUSE COMMITTEE ON JUDICIARY**

**TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2012**

**Wednesday, January 25, 2012  
2:00 p.m.**

**TESTIMONY ON HOUSE BILL NO. 2019, RELATING TO MORTGAGES.**

**TO THE HONORABLE ROBERT N. HERKES, CHAIR  
TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR  
AND MEMBERS OF THE COMMITTEES:**

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on H.B. No. 2019, Relating to Mortgages. My name is Bruce B. Kim and I am the Executive Director of the Department's Office of Consumer Protection ("OCP"). OCP offers the following comments on the bill.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("Task Force") pursuant to Act 162. The Task Force met over the course of the past two years

and submitted separate reports to the Legislature. The reports covered many of the issues surrounding the foreclosure crisis affecting the State and proposed legislation addressing this complex subject. The first report led to the adoption of Act 48 which sought to reform the foreclosure process and enact significant consumer protections especially in the area of nonjudicial foreclosures. This year the Task Force through its various working groups devoted a significant amount of time and effort in attempting to strengthen Act 48. Ultimately, the Task Force's working groups came up with a number of recommendations intended to provide clarity and certainty to both lenders and borrowers in the foreclosure process. It is OCP's sincere hope that the measures submitted by the Task Force this year will lead to further implementation of Act 48, particularly utilization of the DCCA's alternate dispute resolution program created back in October under Act 48.

The Task Force did not consider changes relevant to H.R.S. Chap. 506 or to Chap. 667 concerning deficiency judgments. In light of the foregoing, OCP takes no position on H.B. No. 2019 and respectfully defers to the Task Force at this time.

Thank you for this opportunity to testify on H.B. 2019. I will be happy to answer any questions that the Committee members may have.



---

TEL:  
808-524-5161  
FAX:  
808-521-4120  
ADDRESS:  
1000 Bishop Street, Suite 301B  
Honolulu, HI 96813-4203

Presentation of the Committees on Commerce and Consumer Protection and Judiciary  
Wednesday, January 25, 2012 at 2:00 p.m.  
Testimony on HB 2019 Relating to Mortgages

**In Opposition**

TO: The Honorable Chairs Robert N. Herkes and Gilbert S.C. Keith-Agaran  
The Honorable Vice Chairs Ryan I. Yamane and Karl Rhoads  
Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA),  
testifying in opposition to HB 2019. HBA is the trade organization that represents all  
FDIC insured depository institutions doing business in Hawaii.

This bill prohibits attempts to collect on any shortfall resulting from a sale that does not  
pay off the remaining balance on mortgage loans for certain residential property sold in  
a foreclosure action or short sale.

A **short sale** is a sale of real estate in which the proceeds from selling the property will  
fall short of the balance of debts secured by liens against the property and the property  
owner cannot afford to repay the liens' full amounts, whereby the lien holders agree to  
release their lien on the real estate and accept less than the amount owed on the debt.  
Any unpaid balance owed to the creditors is known as a *deficiency*. Short sale  
agreements do not necessarily release borrowers from their obligations to repay any  
deficiencies of the loans, unless specifically agreed to between the parties. In certain  
cases, the entire unpaid debt is forgiven but in other cases, an agreement is reached so  
the borrower does pay a portion or all of the remaining unpaid balance depending on  
the financial condition of the borrower.

A short sale is often used as an alternative to foreclosure because it mitigates additional  
fees and costs to both the creditor and borrower; however both will often result in a  
negative credit report against the property owner.

This proposed law if enacted will have the unintended consequence of possibly limiting  
the use of a short sale as a loss mitigation tool. This proposal would take away the right  
of a lender to pursue a deficiency for both judicial and nonjudicial foreclosures.

All mortgage loans were underwritten on the basis that the entire loan would be repaid over time. To change the contract between the lender and borrower that converts a recourse loan to a non-recourse loan after the loan was funded presents severe legal ramifications. Certainly, if mortgage loans become non-recourse, lenders would have to consider a larger down payment requirement to protect itself against loss.

The bill in 667-(1) limits collection of a deficiency to "a financial institution as defined in HRS 37D-1". A financial institution is defined under this section as follows:

"Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including without limitation banks, savings banks, savings and loan companies or associations, financial services loan companies, and credit unions."

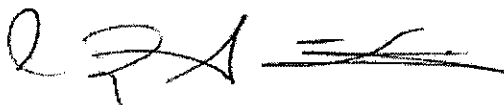
On January 11, 2012, a Consumer Financial Protection Bureau press statement contained a quote as follows: *"Until now, a significant part of the mortgage market — which includes independent lenders, brokers, servicers, and others unaffiliated with banks and depository institutions — has not been subject to federal supervision. This "nonbank" mortgage sector included many of the largest subprime lenders during the housing bubble. The Dodd-Frank Wall Street Reform and Consumer Protection Act significantly reformed the gaps in federal supervision of the mortgage market by providing the CFPB with authority to supervise a range of mortgage participants."*

Therefore, another unintended consequence may be to allow nonbank lenders, insurance companies, private individual lenders, etc. exemption under this law. This just further discriminates against Hawaii banks that did not contribute to this mortgage dilemma.

Most Hawaii banks use the judicial foreclosure process to preserve their right to obtain a deficiency judgment in order to limit their potential loss. The decision to seek a deficiency should be made on a case by case basis taking into consideration the troubled borrower's financial condition and any other circumstances and not dictated by law.

We asked that this bill be held.

Thank you for the opportunity to provide our testimony.

A handwritten signature in black ink, appearing to read 'Gary Y. Fujitani', followed by a horizontal line.

Gary Y. Fujitani  
Executive Director



**Testimony for HB2019 on 1/25/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Monday, January 23, 2012 6:41 PM

**To:** CPCtestimony

**Cc:** jade@steadfastpt.com

---

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB2019

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Jadine L Brown

Organization: Individual

E-mail: jade@steadfastpt.com

Submitted on: 1/23/2012

**Comments:**

Thank you for hearing the People and creating Act 48 to protect Hawaii homeowners from unfair practices by financial institutions and to ensure mandatory and transparent mediation/modification as well as ensuring due process during foreclosures. Mainland banks are attempting to bypass our law by filing judicial foreclosures. Despite copious evidence of fraud by the banks, it appears that the Hawaii judiciary is not yet compelled to rule in favor of Hawaiian homeowners, or even hear their arguments in court. We need stronger laws. Please pass HB2033, HB2018, HB2019, HB2020, and HB1875. Thank you again for hearing your People.

**LAW OFFICE OF GEORGE J. ZWEIBEL  
45-3590A Mamane Street  
Honoka'a, Hawaii 96727  
(808) 775-1087**

**House Committee on Consumer Protection & Commerce  
House Committee on Judiciary**

**Hearing: Wednesday, January 25, 2012, 2:00 p.m.  
Conference Room 325, State Capitol, 415 South Beretania Street**

**IN SUPPORT OF HB 2019**

**Chairs Herkes and Keith-Agaran, Vice Chairs, and Committee Members:**

My name is George Zweibel. I am a Hawaii Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui. Earlier, I was a regional director and staff attorney at the Federal Trade Commission enforcing consumer credit laws as well as a legal aid consumer lawyer. I have served on the Legislature's Mortgage Foreclosure Task Force since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

HB 2019 would prohibit deficiency judgments for remaining balances on mortgage loans for certain residential property sold in judicial foreclosures or short sales. I strongly support HB 2019 for the reasons set forth below. To protect more homeowners who have lost their homes, I respectfully recommend revising HB 2019 to also cover refinance mortgage loans and deeds in lieu of foreclosure and to eliminate the uninterrupted occupancy requirement.

**(1) Cover refinance as well as purchase mortgage loans.** Most homeowners have refinanced their mortgages, e.g., to reduce their monthly payments when interest rates dropped. Moreover, most loan-related abuses occurred in refinance transactions after time or appreciation created substantial home equity. Some states broadly prohibit deficiency judgments in residential judicial foreclosures. For example, Oregon broadly bars deficiency judgments after residential foreclosure sales. Or. Rev. Stat. § 86.770(2)(2009). North Dakota prohibits deficiency judgments for owner-occupied residential property with four or fewer units up to 40 contiguous acres in size. N.D. Cent. Code § 32-19-03 (2011). California prohibits deficiency judgments where a loan holder consents to a short sale of a dwelling of not more than four units. Cal. Civ. Proc. Code § 580e.

**2. Eliminate uninterrupted occupancy requirement.** Oregon and North Dakota have no such requirement. Although Arizona does bar deficiency

judgments solely for purchase money mortgages, it requires only that the property be utilized as a single one or two-family dwelling. Ariz. Rev. Stat. Ann. § 33-729 (2011). At most, HB 2019 should be limited to “owner-occupants,” as that term is defined in chapter 667.

**3. Cover deeds in lieu of foreclosure.** Deeds in lieu of foreclosure and short sales both avoid foreclosure and involve the voluntary relinquishing of the property by the homeowner. Moreover, the reasons for prohibiting deficiency judgments described below apply equally in both situations. Accordingly, Section 1 should apply to both, not just short sales.

### **REASONS FOR ESTABLISHING ANTI-DEFICIENCY PROTECTION**

- Prevent “double recovery” by loan holder. In the vast majority of foreclosures, the property is purchased by the loan holder. Often there is no competitive bidding. Even if there is, bidders other than the mortgagee are required to pay 10% of the purchase price on the spot. In this context, the mortgagee can bid low and obtain a judgment for the deficiency, then sell the property on the open market for a higher price, thereby receiving a “double recovery” at the expense of the borrower, who is still liable for the “deficiency.” Barring deficiency judgments would eliminate the incentive to sell (or buy) property for less than it is worth.
- Avoid borrower bankruptcy filings. Struggling homeowners who have lost their homes to foreclosure but still face deficiency liability may be forced to file for bankruptcy. This is humiliating and traumatic for debtors and will be reported by credit bureaus for ten years. Bankruptcy also hurts creditors. With few or no assets to distribute, all unsecured creditors receive little or nothing when the debts are discharged in the bankruptcy.
- Limit effects of foreclosure on homeowners. Losing a home through foreclosure is devastating to homeowners and their families. It is hard to justify the added imposition of personal liability on a homeowner following the loss of his/her home, with the indefinite threat of garnishing wages or taking other assets. Protecting such persons from the additional burden of personal liability greatly increases their prospects for financial recovery and avoiding bankruptcy.
- Reduce unfair shifting of risk to borrowers. Borrowers cannot “negotiate” with lenders regarding deficiency liability or other boilerplate provisions buried in the voluminous mortgage documents they are required to sign. In effect, lenders thereby shift all risk to borrowers. This is unfair, particularly when recession has caused widespread unemployment and reduced property values.

- Deficiency judgments provide minimal benefit to loan holders. Deficiency judgments are often uncollectible and little effort has traditionally been made to collect on them. Accordingly, the adverse effects on former homeowners far outweigh any actual benefits to loan holders.
- Deficiency judgments hinder Hawaii's economic recovery. The vast majority of mortgages foreclosed in Hawaii are held by out-of-state entities. Therefore, when deficiencies are collected, rather than returning money to Hawaii lenders or creditors, it goes to judgment creditors on the mainland.
- Sale of deficiency judgments to debt buyers. Deficiency judgments, or the right to seek a deficiency, are increasingly being sold to third parties who purchase them at a deep discount, then aggressively attempting to collect on them regardless of the former homeowner's ability to pay, opening the door to abusive debt collection practices.

Thank you for your consideration of my testimony.

# HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

January 25, 2012

Rep. Robert Herkes, Chair

and members of the House Committee on Consumer Protection & Commerce

Rep. Gilbert Keith-Agaran, Chair

and members of the House Committee on Judiciary

Hawaii State Capitol

Honolulu, Hawaii 96813

Re: **House Bill 2019 (Mortgages)**

**Hearing Date/Time: Wednesday, January 25, 2012, 2:00 p.m..**

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

**The HFSA opposes this Bill.**

The purpose of this Bill is to prohibit deficiency judgments to recover the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale.

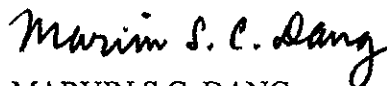
Section 1 of this Bill involves a "short sale" where a property is voluntarily sold by an owner, but the sales proceeds is not enough to pay off all liens on the property such as mortgage liens. This Bill would allow a person who has occupied a residential property as a principal residence to avoid being responsible for any monies still owing on a mortgage loan (that was used to initially buy the property) after the property is sold at "short sale".

Section 2 of this Bill involves a foreclosure of a property in which the monies from the sale is not enough to pay off all liens on the property such as mortgage liens. This Bill would allow a person who has occupied a residential property as a principal residence to avoid being liable under a deficiency judgment for any monies still owing on a mortgage loan (that was used to initially buy the property).

It does not appear to be sound public policy to create a state law which uses a broad brush approach to enable homeowners to escape the obligation to pay the balance of their mortgage loans after a short sale or a foreclosure sale. The federal bankruptcy law already provides such an option.

If this Bill becomes law, there will undoubtedly be unintended consequences. Lenders might not readily consent to future short sales. Loan underwriting standards of lenders could be tightened. These would negatively affect existing and potential homeowners.

Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association



Telephone: (808) 536-4302 • Fax: (808) 527-8088  
Mailing Address: P.O. Box 37375 • Honolulu, Hawaii 96837-0375  
924 Bethel Street • Honolulu, Hawaii 96813

Calvin Pang, Esq.  
President, Board of Directors

M. Nalani Fujimori Kaina, Esq.  
Executive Director

**The Honorable Robert N. Herkes, Chair**  
**The Honorable Ryan I. Yamane, Vice Chair**  
**House Committee on Consumer Protection and Commerce**

**The Honorable Gilbert S.C. Keith-Agaran, Chair**  
**The Honorable Karl Rhoads, Vice-Chair**  
**House Committee on Judiciary**

**Hearing : Wednesday, January 25, 2012, 2:00 p.m.**  
**State Capitol, Conference Room 325**

**In support of HB 2019 Relating to Foreclosures**

**Chair and Members of the Committees:**

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in the Consumer Unit at the Legal Aid Society of Hawai'i. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, tax debt, and other consumer debt problems.

We are testifying **in support** of HB 2019 as it would strengthen protections for borrowers in the State of Hawai'i.

HB 2019 seeks to prohibit deficiency judgments to recover any remaining balances on mortgage loans, when the property is sold through a short sale. In the short sale process, a distressed property is sold prior to foreclosure for a sale price less than the amount owed on the mortgage. HB 2019 seeks to limit these protections to continuously owner-occupied properties,

situations where the mortgagor used the proceeds of the mortgage to purchase the property, and where there has been no refinance of the mortgage.

In essence, HB 2019 seeks to prevent a situation where a lender has agreed to a short sale and then subsequently seeks to recover the difference in sale price and mortgage owed from the prior homeowner.

Furthermore, HB 2019 seeks to prohibit deficiency judgments on foreclosed-upon residential property that has been owner-occupied, the proceeds of the mortgage were used to purchase the property, the mortgage has not been refinanced and the mortgagee is a financial institution.

**Conclusion:**

For the above reasons, we respectfully request passage of HB 2019. We appreciate these committees' recognition of the need to protect consumers in the State of Hawai'i and support HB 2019's attempts at doing so. Thank you for the opportunity to testify.



The REALTOR® Building  
1136 12<sup>th</sup> Avenue, Suite 220  
Honolulu, Hawaii 96816

Phone: (808) 733-7060  
Fax: (808) 737-4977  
Neighbor Islands: (888) 737-9070  
Email: har@hawaiirealtors.com

January 25, 2012

**The Honorable Robert N. Herkes, Chair**  
House Committee on Consumer Protection & Commerce

**The Honorable Gilbert S.C. Keith-Agaran, Chair**  
House Committee on Judiciary  
State Capitol, Room 325  
Honolulu, Hawaii 96813

**RE: H.B. 2019, Relating to Mortgages**

**HEARING: Wednesday, January 25, 2012, at 2:00 p.m.**

Aloha Chair Herkes, Chair Keith-Agaran, and Members of the Joint Committees:

I am Brian Benton, Government Affairs Committee Chair, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR provides **comments** on H.B. 2019 which prohibits deficiency judgments to recover the remaining balance on mortgage loans for certain residential property sold in a foreclosure action or short sale.

In general, a short sale is a sale of real estate in which the proceeds from selling the property will fall short of the balance of debts secured by liens against the property. As such, in all cases, lien holders must agree to release their lien on the real estate and accept less than the amount owed on the debt. Any unpaid balance owed to the creditors is typically known as a deficiency.

Cases involving short sales require negotiation with the lien holders. Short sale agreements do not necessarily release borrowers from their obligations to repay any deficiencies of the loans, unless specifically agreed to between the parties as part of the negotiation process. Moreover, if the negotiation does not include the repayment of deficiencies or "forgiveness," there may be tax consequences involving the issuance of 1099s.

At this time, HAR takes no official position with respect to the prohibition of deficiency judgments in judicial actions.

Mahalo for the opportunity to provide comments.

