A Response to the Star Advertiser's Foreclosure Report

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The three-part "Foreclosure Special Report" published by the *Honolulu Star-Advertiser* on August 5-7, 2012 pointedly focused on the critics of the State's recently amended foreclosure laws (Act 48 and Act 182). It did not, at any time, offer perspectives from economically distressed homeowners who actually stood to benefit from the consumer protections under the new law. Those homeowners were the focus of the Legislature's actions.

In light of the issues raised by the Report, I believe the other side of the story needs to be heard in order to get a more balanced perspective on the foreclosure reform.

During the past four years, mortgage foreclosures in Hawai`i have increased to the point that we hold the unfortunate distinction of having one of the highest foreclosure rates in the nation. As Chair of the Senate Commerce and Consumer Protection Committee, I, along with my committee and House colleagues, championed Act 48 to give distressed homeowners a fair shake and protect them against fraudulent mortgage schemes that were being perpetuated at the time. Some these schemes are continuing and the subject of investigation and action by both the Office of Consumer Protection and the Office of the Attorney General.

The subsequent Act 182, recently signed into law by the Governor, reflects state lawmakers continuing efforts to respond to evolving issues and when appropriate, amend the laws accordingly. These two Acts evolved from two years of intensive scrutiny and recommendations from the stakeholder members of the Legislatively-created Mortgage Foreclosure Task Force and hours of committee hearings and deliberations.

Responding to the negatives
In an effort to respond to the negative stance taken by the Star Advertiser's Foreclosure Report series, I approached the Department of Commerce and Consumer Affairs and Everett S. Kaneshige, chairperson of the Mortgage Foreclosure Task Force for their thoughts. Director of Commerce and Consumer Affairs Keali`i S. Lopez offered the following:

"We find it disheartening that lenders and their attorneys have been unwilling to approach the Mortgage Foreclosure Dispute Resolution Program that was created with Act 48. They were invited to participate in the process of non-judicial foreclosure so that all parties could benefit from this type of mediation that ensures homeowners are being treated fairly."

The Department's responses to specific quotes (highlighted in bold below) in Part 1 of the Report are as follows:

> **"At the same time, a mediation program created by Act 48 that was supposed to help homeowners has never been used."**
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> *The purpose of the mediation program was to provide lenders and borrowers the opportunity to meet face to face to agree on loan modification, or if that was not possible, a mutually acceptable solution to resolve the problem as part of the nonjudicial foreclosure process. Doing so would save both sides' time and money. This program was a direct result of overwhelming testimony from*

homeowners at the Legislature who stated that the lenders refused to talk to them.

Rather than look at the program as being a positive way to address the problem, the lenders refused to participate in the program because their attorneys advised them that Act 48 exposed them to new liability under the State's Unfair and Deceptive Acts (UDAP) and Practices Law. However, earlier this year, the Ninth Circuit Court of Appeals ruled that a lender who engaged in an improper nonjudicial foreclosure had violated UDAP even before Act 48 was enacted. This shows that lenders who did not follow foreclosure laws were always subject to UDAP, not just after Act 48 was enacted.

"Critics say it [Act 182] makes the law worse to the point where foreclosures will be further restricted."

This is the lenders' attorneys' response to the provision in Act 182 that requires the attorneys to affirm the validity of the information contained in the foreclosure documents filed with the court in a judicial foreclosure. Similar to the situation regarding UDAP and Act 48, courts had always required the lenders themselves to affirm the information that was filed. It is arguable that a lender's attorney had the same obligations under the existing rules which govern an attorney's legal and ethical responsibilities.

The new provisions were similar to those enacted in the state of New York and were designed to ensure that both the lender and its attorneys would take responsibility for providing the court with accurate information. To the extent a lender's attorney is uncomfortable with putting himself on the line for his client, then it is arguable that further information or research should be done before the case is filed in court.

As an alternative, the lender could instruct its attorney to file a nonjudicial foreclosure, which does not require any affirmation by the attorney.

"The law hasn't made it easier for lenders to resolve problem loans, and many delinquent borrowers are taking advantage of foreclosure delays by keeping their homes while making no mortgage payments."

Act 182 contains numerous changes and refinements to the previous law that makes it easier for lenders to resolve problem loans. For example, the revisions to section 667-60, Hawaii Revised Statutes, now specifically describe what consists of unfair deceptive acts and practices.

This removes much of the uncertainty that had previously existed under Act 48. The problem of delinquent borrowers making no mortgage payments is a problem created by the lenders themselves because they stubbornly refuse to use the laws and processes available to them under existing law to process foreclosures more quickly.

"Act 48 has inhibited a faster recovery in the housing market because foreclosures have been delayed and homeowner credit hasn't been restored."

Act 48 has only been on the books for one year. While it may have had an effect in slowing down nonjudicial foreclosures (which was one of intended purposes in response to the previous situation in which owner occupants were losing their homes with little or no notice or opportunity to try to resolve the problem with the lender), it is unreasonable to claim that it is responsible for inhibiting a faster recovery of the housing market. To the extent there were negative aspects to Act 48, these have been corrected in Act 182.

"Brewbaker contends that a relatively small number of Hawaii families beset by circumstances such as job loss or divorce were caught up in foreclosure after making un-risky home purchases. He contends that far more people made risky purchases and are now coasting on benefits from Act 48."

Brewbaker's testimony is inconsistent with the overwhelming testimony received by the legislature over the last three years from owner occupants forced into foreclosure. These were not speculative investors but ordinary citizens who, for various reasons such illness, loss of job or other unforeseen economic circumstances, found themselves unable to make their mortgage payment.

To the extent that purchases were "risky," the lenders have themselves to blame since they were ones who qualified the purchasers for the loan. It is unclear how an owner who cannot make their monthly mortgage payment and whose foreclosure is delayed solely because the lender refuses to proceed with either a nonjudicial or judicial foreclosure can be considered to be "coasting".

Publication of public notices

Certain aspects of the Report focusing on the publication requirements for public notice of public sale warrant further clarification. Act 182 revised these publication requirements to encourage competitive pricing while also retaining the wide dissemination of public notice information.

Dennis Francis, the Star-Advertiser publisher, states in the Report that there "will not be competition among publications because Act 182 allows attorneys with financial incentives to direct auction ads to an affiliated company." There is no real evidence to substantiate the Star-Advertiser's claim and any publication that wants to be deemed a publication of general circulation criteria for purposes of carrying public foreclosure sale notices can file petition for such certification in circuit court.

No mention is made in the Report that the Star-Advertiser itself has a financial interest in the publication of the notices of public sale. Language in Act 48 inadvertently gave the Star-Advertiser a monopoly on Oahu, and the rates for these notices were subsequently increased approximately three-fold. The Legislature did not believe it was prudent for the Star-Advertiser to continue with a state-sanctioned monopoly, so revisions to the publication requirements were made under Act 182.

Furthermore, the Star-Advertiser's Report mentions that it lowered the rate for auction notices by half, but it does not state what percent of its revenues are generated by mortgage foreclosure ads, or how much it has benefited from the inadvertent monopoly under Act 48. If the Star-Advertiser has superior circulation, service, and price, then it should compete for the business of publishing notices of public sale.

Bruce Kim, Executive Director of the Office of Consumer Protection, Department of Commerce and Consumer Affairs, notes that although critics in the Report claim the amended law limits residents' access to public notices, the existing requirements of mailing or delivering the notice of public sale remain unchanged.

A foreclosing mortgagee still must mail or deliver copies of the notice of public sale to the mortgagor or borrower at their last known address, junior creditors, the State Director of Taxation, and the Director of Finance of the county where the mortgaged property is located. The notice of public sale also must be posted on mortgaged property.

Notifying renters

The Report also states that Act 182 could affect renters who are unaware that their rentals are at risk of foreclosure. However, Executive Director Kim notes there is no empirical evidence cited in the Report that renters would be more aware of the status of their rentals if the publication is made in a newspaper of general circulation. Both Act 182 and existing statute require the notice of public sale to be posted on the subject property 60 days prior to the public sale.

Executive Director Kim also points out that tenants have additional federal protection under the 2009 Protecting Tenants at Foreclosure Act. Following the foreclosure on a federally-related mortgage loan, the foreclosing mortgagee or purchaser at a foreclosure auction must provide tenants with a 90-day notice before being evicted as the result of a foreclosure.

The bottom line

Act 48's reform of the State's foreclosure laws was a necessary response to lender abuses. Act 182 builds on the work of Act 48 and **once it is given sufficient time to be implemented,** it will offer more assurances to lenders, while also maintaining essential consumer protections. The result is a **balanced process that works for both lenders and consumers** in Hawaii.