

Honolulu, Hawaii

MAR 01 2013

RE: S.B. No. 1370
S.D. 2

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred
S.B. No. 1370, S.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO MEDIATION AFFECTING JUDICIAL
FORECLOSURE,"

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Expand the application of mandatory mortgage foreclosure dispute resolution by requiring mortgagees, at the mortgagor's election, to participate in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period; and
- (2) Apply the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this measure and pending an initial court hearing.

Your Committee received testimony in support of this measure from the Office of Consumer Protection of the Department of Commerce and Consumer Affairs. Testimony in opposition to this measure was submitted by the Hawaii Credit Union League, Hawaii Financial Services Association, and Hawaii Bankers Association.

Your Committee finds that the Legislature has previously expressed a desire for dispute resolution combined with the



assistance of United States Department of Housing and Urban Development (HUD)-certified housing counselors to be available for homeowners facing foreclosure. Foreclosure mediation has been highly successful in Connecticut, Nevada, and other states and can assist homeowners and loan holders or servicers in reaching agreements involving loan modification or other loss mitigation. These agreements can avoid foreclosure and unnecessary expense and delay.

Your Committee further finds that although mortgage foreclosure dispute resolution is available upon request in non-judicial foreclosures, mortgagees have instead chosen to pursue judicial foreclosure. Although mediation in a judicial foreclosure may be ordered in the discretion of the court, only the Third Circuit, on the Island of Hawaii, has a dedicated foreclosure mediation program. This foreclosure mediation program now reports a high rate of success in foreclosure actions, which has in turn helped alleviate the pressure on the Third Circuit's civil docket. Your Committee additionally finds that although the Hawaii Access to Justice Commission has strongly recommended that the Hawaii Supreme Court retain, improve, and expand the Judiciary's foreclosure mediation program, it has not yet expanded beyond the Third Circuit.

Your Committee also finds that there is emerging evidence that the availability of HUD-certified counselors in foreclosure dispute resolution programs is one of the most, if not the most, important factors in the ability of homeowners to navigate mediation programs and achieve optimal results. The report, released by the Department of Justice Access to Justice Initiative, states that there is ample evidence to suggest HUD-certified housing counselors are successful in the majority of cases in obtaining some form of loss mitigation help for distressed homeowners and thereby avoiding foreclosure.

This measure will ensure mortgage foreclosure dispute resolution is equally available for nonjudicial and judicial foreclosures. This gives all mortgagors facing foreclosure in Hawaii an opportunity to have a specifically trained mediator who can offer assistance regarding the mortgagor's financial situation and any available options. Your Committee concludes that this measure will benefit mortgagors and mortgagees by shortening the overall foreclosure process and reducing strain on the judicial system.



Your Committee notes the testimony in opposition to this measure that requiring a lender to additionally participate in the mortgage foreclosure dispute resolution program before filing a judicial foreclosure action is duplicative. The Hawaii Credit Union League testified that credit unions often have close relationships with their members. Thus, credit unions will begin working with their members as soon as a potential default becomes apparent and provide their members with alternatives to foreclosure as a matter of course. Pre-foreclosure mediation requirements will only duplicate these efforts. Therefore, the Hawaii Credit Union League testified that making mediation mandatory for judicial foreclosures would lengthen the foreclosure process by six to eight months.

Moreover, the Hawaii Bankers Association testified that in January 2012, the Consumer Financial Protection Bureau introduced changes to the federal rules governing mortgage servicing, including foreclosures, and that these rules apply to all persons servicing mortgage loans. Among other things, a lender cannot file for foreclosure until the loan is one hundred twenty days delinquent in order to provide borrowers reasonable time to submit loan modification applications. The Hawaii Bankers Association further testified that lenders are required under the rules to contact the borrower by telephone and provide written notice of loan modification options, including credit counseling contact information. Thus, if a lender is already required under federal regulations to notify borrowers regarding loan modification options prior to filing for foreclosure, a mandatory mediation process on top of these federal requirements is duplicative and potentially burdensome for the lender and borrower.

Accordingly, your Committee has amended this measure by adopting the suggestions made by the Hawaii Bankers Association and the Commissioner of Financial Institutions to:

- (1) Require mortgagees to engage in early intervention measures prior to filing a judicial foreclosure action that complies with the Consumer Financial Protection Bureau federal regulations that include:
 - (A) Establishing live contact with the mortgagor to inform the mortgagor about the availability of loss mitigation options; and



- (B) Providing the mortgagor with a written notice that encourages the mortgagor to contact the mortgagee, informs the mortgagor about loss mitigation options, and informs the mortgagor about access to and information about homeownership counselors or counseling organizations, including HUD-certified counselors;
- (2) Amend sections 667-17 and 667-18, Hawaii Revised Statutes, to require an attorney when filing for a judicial foreclosure action to affirm that a mortgagee engaged in loss mitigation procedures with the mortgagor in accordance with federal regulations;
- (3) Exempt the dispute resolution requirement to judicial foreclosure actions if the mortgagee engages in loss mitigation procedures with the mortgagor and add a definition of "loss mitigation";
- (4) Insert an effective date of July 1, 2050, to encourage further discussion; and
- (5) Make technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 1370, S.D. 1, as amended herein, and recommends that it pass Third Reading in the form attached hereto as S.B. No. 1370, S.D. 2.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,



CLAYTON HEE, Chair



The Senate
Twenty-Seventh Legislature
State of Hawai'i

Record of Votes
Committee on Judiciary and Labor
JDL

Bill / Resolution No.:* <div style="font-size: 1.2em; font-family: cursive;">SB 1370 SDI</div>	Committee Referral: <div style="font-size: 1.2em; font-family: cursive;">CPN, JDL</div>	Date: <div style="font-size: 1.2em; font-family: cursive;">3/1/13</div>		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div style="text-align: center;"> <input type="checkbox"/> Pass, unamended 2312 </div> <div style="text-align: center;"> <input checked="" type="checkbox"/> Pass, with amendments 2311 </div> <div style="text-align: center;"> <input type="checkbox"/> Hold 2310 </div> <div style="text-align: center;"> <input type="checkbox"/> Recommit 2313 </div> </div>				
Members	Aye	Aye (WR)	Nay	Excused
HEE, Clayton (C)	✓			
SHIMABUKURO, Maile S.L. (VC)	✓			
GABBARD, Mike				✓
IHARA, Jr., Les	✓			
SLOM, Sam		✓		
TOTAL	3	1		1
Recommendation: <div style="display: flex; justify-content: space-around; margin-top: 5px;"> <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted </div>				
Chair's or Designee's Signature: <div style="font-size: 1.5em; font-family: cursive; margin-top: 10px;"> </div>				
Distribution: <div style="display: flex; justify-content: space-between; font-size: 0.8em;"> <div>Original File with Committee Report</div> <div>Yellow Clerk's Office</div> <div>Pink Drafting Agency</div> <div>Goldenrod Committee File Copy</div> </div>				

*Only one measure per Record of Votes