

SB 1370

Measure Title: RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE.

Report Title: Mortgage Foreclosures; Judicial Foreclosure Actions for Residential Property; Mandatory Dispute Resolution

Description: Expands 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. Applies the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this bill and pending an initial court hearing.

Companion:

Package: None

Current Referral: CPN, JDL

Introducer(s): BAKER, Galuteria, Keith-Agaran, Nishihara, Wakai

<u>Sort by</u> <u>Date</u>		Status Text
1/24/2013	S	Introduced.
1/28/2013	S	Passed First Reading.
1/28/2013	S	Referred to CPN, JDL.
1/29/2013	S	The committee(s) on CPN has scheduled a public hearing on 02-05-13 8:30AM in conference room 229.



NEIL ABERCROMBIE
GOVERNOR

SHAN S. TSUTSUI
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

TUESDAY, FEBRUARY 5, 2013
8:30 A.M.

TESTIMONY ON SENATE BILL NO. 1370, RELATING TO MEDIATION AFFECTING
JUDICIAL FORECLOSURE.

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

The Department of Commerce and Consumer Affairs ("DCCA"), Office of
Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on
Senate Bill No. 1370, Relating to Mediation Affecting Judicial Foreclosure. My name is
Bruce B. Kim and I am the Executive Director of OCP.

OCP supports of S.B. 1370. As reflected in the findings and purpose found in
section 1, the legislature has repeatedly, in the 2011 and 2012 sessions, expressed a
desire for dispute resolution coupled with the assistance of a HUD-certified housing

counselor to be available for homeowners facing foreclosure.

While mediation in a judicial foreclosure may be ordered in the discretion of the court, only the Third Circuit Court (the island of Hawaii) has a dedicated foreclosure mediation program, and anecdotal evidence suggests that foreclosure mediations in other Circuits are not generally ordered. By requiring pre-foreclosure dispute resolution at the option of the mortgagor, both mortgagees and mortgagors stand to benefit from the existing the Mortgage Foreclosure Dispute Resolution ("MFDR") Program administered by the DCCA. The MFDR's counseling component helps mortgagors better appreciate their individual financial situations as well as the options available to them in terms of alternatives to foreclosure. The MFDR mediators are specifically trained in foreclosure mediation for the MFDR Program with the able assistance (in no particular order) of the Judiciary's Center for Alternative Dispute Resolution, the Mediation Center of the Pacific, Ku'ikahi Mediation Center, and West Hawaii Mediation Center.

Pre-foreclosure mediation through the MFDR program will also reduce delays and conserve judicial resources. There is emerging evidence that mediation programs in foreclosure do work in helping distressed homeowners enter into various loss mitigation remedies with their lender and avoid foreclosure. There is also ample evidence that HUD-certified housing counselors are successful in the majority of circumstances in getting some form of help to distressed homeowners and avoid foreclosure.

Testimony on Senate Bill No. 1370
February 5, 2013
Page 3

OCP suggests the following formatting changes to section 1 of the bill: replace "mortgagor" with "mortgagee" on page 1, lines 11 and 15 and page 2 lines 2, 15 and 7; replace "mediation" with "dispute resolution" on page 2 line 21.

Thank you for the opportunity to testify in support of S.B. 1370. I will be happy to answer any questions that the members of the Committee may have.

Presentation To
Committee on Commerce and Consumer Protection
February 5, 2013 at 8:30am
State Capitol Conference Room 229

Testimony in Opposition to Bill S. B. 1370

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brickwood Galuteria, Vice Chair
Members of the Committee

My name is Edward Pei and I am the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

The Hawaii Bankers Association is opposed to SB 1370, which requires mediation prior to a mortgagee filing a judicial foreclosure action. We believe there is already an abundance of opportunities for lenders and borrowers to discuss alternatives to foreclosure and including this requirement would just needlessly repeat previous discussions and extend the timeframes for ultimate resolution.

When a mortgagor falls delinquent in payments, the lenders initiate discussions with the borrowers either under the Home Affordable Modification Program (HAMP), the rules of the Government Sponsored Enterprises (GSEs) such as Fannie Mae, or the lender's own loan modification programs. Should the borrower meet certain criteria, generally meeting a certain debt-to-income ratio (DTI), there will be a loan modification, which can take the form of interest rate reduction or extending the term of the loan to reach an affordable monthly payment. Generally with the HAMP program is a 31% DTI or in the case of the FDIC program used in the Indy Mac program, 38%.

The Consumer Financial Protection Bureau (CFPB) recently introduced voluminous changes to the rules governing mortgage servicing. The rules are so voluminous (approximately 1,500 pages), it will take some time for lenders to get their arms totally around the rules. However, we do know a lender cannot file for foreclosure until the loan is 120 days (4 months) delinquent because, in the words of the CFPB, "This will give borrowers reasonable time to submit modification applications."

Lenders must not only reach out to delinquent borrowers, they must also provide the borrower with written examples of loan modification options. In recognition of the fact that the investor, not the lender, rules on loan modifications, the CFPB requires that the lender be aware of the investor's loan modification programs so the borrower can be evaluated for all alternatives.

Thus, before foreclosure is filed (assuming the borrower applied for loan modification), there has been a thorough review of the borrower's finances to determine if loan modification is possible and, if not, the borrower is informed of the reasons for denial.

The CFPB also requires that even after foreclosure is initiated, if a borrower applies for loan modification, the application must be evaluated and since dual tracking is prohibited, in essence the foreclosure process is suspended at such time.

A loan modification process is similar to a loan application underwriting decision based on the debt and income; in other words the ability to repay the loan obligation. This is an important concept embodied in the new "ability to pay" rules required by Dodd-Frank.

A required mediation process would merely repeat the loan modification process with no different end result other than delay, which results in non-payment of the lender and possibly a condominium association.

When a judicial foreclosure action is brought against a borrower, the court's oversight over the proceedings also provides added protection for the borrower. The court then becomes the independent third party, which can serve in place of the mediation process, and courts have the inherent power to order mediation when appropriate. In fact, there is an ongoing judicial foreclosure mediation program on the Big Island.

We are also very concerned with the mediation program that was created for non-judicial foreclosure actions. There are several requirements which make it very difficult for lenders to comply. For example, the requirement to have individuals authorized to make loan decisions present at the mediation, in person or by phone, is extremely difficult for lenders if the lender has sold the loan to an investor like Fannie Mae or Freddie Mac, or when the approval of a private mortgage insurer is required. The process of obtaining investor or private mortgage insurance approval differs but the lender can do no more than notify the investor and await the result, which although usually quite prompt, still is not instantaneous. For example, on some loans, the data is inputted into a computer and the answer is received the next day. Since the current nonjudicial mediation process does not account for the procedure used for loan modifications, and because it is a Chapter 480 violation, there is a disincentive to use the mediation program, as now statutorily constructed. It seems unfair to impose a requirement that lenders cannot comply with and then deem the inevitable violation to be a chapter 480 violation.

This is just one of the reasons lenders have chosen the more lengthy and costly judicial foreclosure proceedings over the more expedient non-judicial foreclosure actions. We hope there will be some consideration to revise the requirements of the non-judicial foreclosure process to encourage lenders to utilize that alternative.

Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

Edward Y. W. Pei
Executive Director
Hawaii Bankers Association
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February 5, 2013

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

Re: **Senate Bill 1370 (Mediation Affecting Judicial Foreclosure)**
Hearing Date/Time: Tuesday, February 5, 2013, 8:30 a.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 as drafted.

The purposes of this Bill are 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 bill and pending an initial court hearing.

A foreclosure action is the last resort for a lender when a borrower's mortgage loan is delinquent. Before commencing a foreclosure action (whether judicial or nonjudicial), a lender will consider many pre-foreclosure options such as a loan modification, a short sale, or a deed in lieu of foreclosure. Requiring a lender to additionally participate in the Mortgage Foreclosure Dispute Resolution ("MFDR") program before filing a judicial foreclosure action, which is what this Bill envisions, is unnecessarily duplicative.

The existing MFDR Program, which is in Part V of Chapter 667 of the Hawaii Revised Statutes, is a pre-nonjudicial foreclosure program. That Program was designed as a pre-nonjudicial foreclosure program because non-judicial foreclosures do not have third party oversight. That Program has some flaws and an unduly lengthy timeline of about 5 months or more. Judicial foreclosures have a judge overseeing the process by hearing motions, issuing orders, and at times referring the lender and the borrower to mediation. A judicial foreclosure generally takes a year to 18 months to complete. The MFDR program will unnecessarily extend the time that it takes to complete a judicial foreclosure. The added time will only add to the costs of the foreclosure process.

Thank you for considering our testimony.



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

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Senate Committee on Commerce and Consumer Protection

**Hearing: Tuesday, February 5, 2013
8:30 a.m.**

IN SUPPORT OF SB 1370

Chair Baker, Vice Chair Galuteria, and Committee Members:

My name is George Zweibel. I am a Hawai'i Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawai'i, 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 served as a borrower representative on the Legislature's Mortgage Foreclosure Task Force ("Task Force") in both 2010 and 2011, and participated in formulating many of the Task Force recommendations that were implemented in Act 48 (2011) and Act 182 (2012).

SB 1370 would expand the applicability of mandatory 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 applies the dispute resolution requirement to judicial foreclosure actions filed prior to the bill's effective date and pending an initial court hearing. **I strongly support SB 1370.**

Foreclosure mediation has been highly successful in Connecticut, Nevada, and a number of other states and localities, helping homeowners and loan holders or servicers reach agreements involving loan modification or other loss mitigation, thereby avoiding foreclosure as well as unnecessary expense and delay. In Hawai'i, mortgage foreclosure dispute resolution is available upon request in non-judicial foreclosures pursuant to Act 48, but lenders have increasingly chosen to foreclose judicially instead. After getting off to a slow start, the judiciary's pilot foreclosure mediation program in Hawaii's Third Circuit Court is now reporting a high rate of success in foreclosure actions, helping to alleviate the pressure on that circuit's civil docket. The Hawai'i Access to Justice Commission has repeatedly recommended expansion of the judicial foreclosure mediation program to the other circuits.

Enacting legislation that makes mortgage foreclosure dispute resolution equally available in all foreclosures – whether judicial or non-judicial – and subject to the same

rules, is essential. This will give all owner-occupants facing foreclosure in Hawai'i an equal opportunity to have a trained mediator help the parties determine whether they can agree on a better outcome.

Finally, the likelihood that SB 1370 will achieve its goals is greatly enhanced by its inclusion of provisions requiring that foreclosure dispute resolution be made available before a judicial foreclosure action is filed and by applying it retroactively to existing actions.

Thank you for considering my testimony on this timely and important bill.



Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

February 5, 2013

The Honorable Rosalyn H. Baker, Chair,
The Honorable Brickwood Galuteria, Vice Chair, and
Members of the Senate Committee on Commerce and Consumer Protection
State Capitol, Room 229
Honolulu, Hawaii 96813

Re: Senate Bill 1370 Relating to Mediation Affecting Judicial Foreclosure

Chair Baker, Vice Chair Galuteria, and Members of the Senate Committee on Commerce and Consumer Protection:

I am Linda Nakamura, representing the Mortgage Bankers Association of Hawaii ("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii. Our membership consists of employees of banks, savings institutions, mortgage bankers, mortgage brokers, and other financial institutions. The members of the MBAH originate the vast majority of residential and commercial real estate mortgage loans in Hawaii. When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

MBAH opposes Senate Bill 1370 Relating to Mediation Affecting Judicial Foreclosure.

Servicers provide many opportunities to delinquent borrowers for a loan modification or other loss mitigation opportunities such as short sales and deed in lieu of foreclosure. Servicers are required under the Home Affordable Modification Program (HAMP) to reach out and solicit the various loss mitigation opportunities to delinquent borrowers as an alternative to foreclosure. If the borrower is not qualified under the HAMP program, the servicer is required to review non-HAMP loss mitigation programs under the Government Sponsored Enterprises (GSEs) such as Fannie Mae or Freddie Mac or their own internal loss mitigation programs. The GSEs require loss mitigation review prior to the initiation of any foreclosure.

Under the new Consumer Financial Protection Bureau (CFPB) guidance, servicers are required to provide delinquent borrowers with loss mitigation options prior to proceeding with any foreclosure.

Prior to any foreclosure action, the delinquent borrower will have had multiple opportunities to request and be reviewed for the various loss mitigation options. In addition to the multiple opportunities prior to foreclosure, the delinquent borrower also has the opportunity to request for the various loss mitigation options during the

foreclosure process. The GSEs and the CFPB require all servicers to place the foreclosure action on hold upon the request of the delinquent borrower for a modification or other loss mitigation options.

MBAH believes this bill will be duplicating current practice and extend the judicial foreclosure time line which will increase the costs of a judicial foreclosure.

Thank you for the opportunity to present this testimony.

LINDA NAKAMURA
President, Mortgage Bankers Association of Hawaii



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February 1, 2013

Senate Committee on Consumer Protection
Tuesday, February 5, 2013 at 8:30am
Conference Room 229

SUPPORT

SB1370 - RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE

Aloha Chair Baker, Vice Chair Galuteria, and Senate Members,

My name is Jeff Gilbreath, Executive Director with local HUD-approved housing counseling agency, Hawaiian Community Assets (HCA) and former member of the Hawaii State Task Force on Mortgage Foreclosures. Founded in 2000, HCA's mission is to build the capacity of low- and moderate-income communities to achieve and sustain economic self-sufficiency with a particular focus on Native Hawaiians. In our capacity as a HUD-approved housing counseling agency, our certified counselors provide free foreclosure prevention services to Hawaii homeowners with the goal of sustaining permanent housing.

I am submitting testimony on behalf of HCA in **strong support** for SB1370 – Relating to Mediation Affecting Judicial Foreclosure.

While the opportunity for borrowers and lenders to speak one-on-one to resolve complicated mortgage situations is in-line with Hawaii's culture and way of life, stretching back to the traditional practice of hooponopono, mediation is a practical approach to not only ensuring lenders maintain high performance portfolios without incurring the high costs of foreclosure, but also provides the opportunity for families to address unique mortgage issues with greater potential for securing work outs to establish sustainable mortgage payments.

The need for our Hawaii families to have the option to request mediation of judicial foreclosures could not be greater.

Unique Issues Facing Hawaii Homeowners

Since 2008, HCA has received 1089 calls into our *Call Us ~ We Can Help Prevent Foreclosure* statewide call center. These calls have led to Hawaii families sharing unique issues they face as homeowners including:

- **Limited English Proficiency.** HCA HUD-approved counselors have worked with families in which neighbors and family members are required to translate for homeowners with limited English proficiency. For instance, one family from Kapaau on Big Island is currently receiving HUD-approved counseling from HCA to prevent foreclosure. The family has 12 individuals living in the home and 4 adult wage earners with the necessary income to sustain affordable mortgage payments. However, the family members speak Tagalog and have limited English speaking abilities, requiring HCA to rely on its partnerships with the Kohala Intergenerational Center and Kapaau community members to counsel the family, process paperwork, and get them prepared for a mediation meeting in February. Without this assistance and the opportunity for mediation on judicial foreclosures, a Hawaii family with limited English proficiency may be foreclosed upon simply due to the fact that they are unable to understand what is required of them to secure a loan workout.
- **Loan Rescue Scams.** Over the past 12 months HCA has seen an influx of loan rescue scams that are unfortunately coming from neighbors, friends, and acquaintances of our homeowners here in Hawaii. In certain cases, Hawaii homeowners, who have been victims of loan rescue scams and contacted HCA, have paid as much as \$20,000 to an individual or company who falsely guaranteed a loan workout will be secured. These victims of loan rescue scams should not be placed at a disadvantage of securing a loan workout just because, through no fault of their own, they trusted the wrong person or company. With an option for mediation of judicial foreclosures, these victims, as well as other scammed homeowners, could pursue proper channels for bringing unscrupulous loan rescue scammers to justice without having to wait to go before a judge. At the same time, lenders would understand clearly the victim's unfortunate situation and be better equipped to work with the borrower and the State to mitigate an unnecessary foreclosure due to loan rescue and other predatory lending scams.
- **Family Loss.** The most tragic of all these unique situations is when our families have lost loved ones and are now living in the home without having any living person on title as a homeowner. While lenders have standardized processes to assist living family members in this situation assume the loan, these processes are rarely made available during the foreclosure process due to the time it takes for an assumption to occur. Through mediation, our Hawaii families could have greater opportunity to work one-on-one with their lender, under their standardized processes, to assume a mortgage loan after loss of a loved one.

Quick Sales of Mortgages to Off-Shore Servicers

In recent months HCA has identified a trend among borrowers at-risk of foreclosure who have mortgage loans with the five largest servicers identified in the National Mortgage Settlement. Namely, three borrowers HCA provided with HUD-approved housing counseling in December 2012 and January 2013 went through the appropriate loan modification process, only to be

denied, and quickly thereafter have their loans sold to small off-shore servicers. Once the loans are with the small off-shore servicers, our Hawaii families are facing situations all of us saw back in 2009 and 2010 before the passing of Act 48 in Hawaii, including:

- Lack of communication and inability to reach the servicer.
- Loss of paperwork and constant re-submission of financial documents for a financial assessment to occur.
- Inaccurate recordation of mortgage payments resulting loans to be placed in foreclosure out of no fault of the borrower.
- And in one very unique case, the need for borrowers to secure a workout option through third party loss mitigation customer centers placed in India and resulting in unnecessary delays in the loan workout process.

This is especially concerning due to the fact that the National Mortgage Settlement established servicing standards for the nation's five largest servicers to specifically address concerns of our communities and mitigate the potential for violation of consumer protections. In a release by the Federal Consumer Financial Protection Bureau in early January, national servicing standards for all servicers in the U.S. housing market will not go into effective until January 2014. By allowing a request for mediation of judicial foreclosures, our Hawaii families have an option to address this trend we see among our homeowners – albeit as a band-aid – until said national servicing standards are in place and appropriately regulating the market.

Mahalo for the opportunity to share HCA's strong support for SB1370 – Relating to Mediation Affecting Judicial Foreclosure. I welcome any questions should you have any of me in regards to my testimony.

Sincerely,



Jeff Gilbreath
Executive Director