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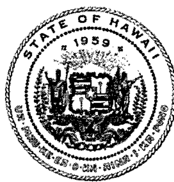

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June 1, 2011

The Honorable Robert N. Herkes
Chair of the Committee on Consumer
Protection and Commerce
House of Representatives
The Twenty-Sixth Legislature
State Capitol, Room 320
Honolulu, Hawai'i 96813

Re: Your Memo of May 17, 2011, Requesting The Attorney General To Provide A Written Opinion on Legal Questions Presented By Act 48 Session Laws 2011

Dear Representative Herkes:

I. BACKGROUND

By memo dated May 17, 2011, you have requested our advice on eight questions. Additionally, seven of the eight questions also request our advice as to whether certain acts or omissions would result in violations of state laws concerning unfair and deceptive acts or practices. Our respective answers to those questions are set forth below. Those answers are both based upon and limited to the hypothetical questions set forth in the request. Because there may be significant factual differences with respect to individual foreclosure cases involving various mortgagees and mortgagors, individual constituents or others seeking advice from your office on these issues should be advised to seek appropriate legal counsel for any questions they may have concerning Act 48. Accordingly, our responses below represent our informal legal advice to you on the general hypotheticals you have raised concerning certain provisions of Act 48.

II. DISCUSSION

A. General Principles of Statutory Interpretation

Our answers below are guided by the following general principles of statutory interpretation. Where the language of a statute is plain and unambiguous, the intention of the Legislature can be determined from the language of the statute itself. Accordingly, its plain and obvious meaning should be given effect. *State v. Woodfall*, 120 Haw. 387, 206 P.3d. 841 (2009). Thus, in those instances, where the statutory language is plain and there is no ambiguity,

it is unnecessary to look to any extrinsic materials in order to determine the Legislature's intent. Notwithstanding the above, if a court were to disagree and construe certain provisions of Act 48 to be ambiguous, then the court would look to legislative intent. Given the clear intent of the Legislature to provide homeowners with an opportunity to avoid foreclosure and negotiate a resolution where possible, it is likely that a court would interpret Act 48 broadly to allow homeowners an opportunity to avoid foreclosure where possible.

Although certain sections of Act 48 appear to have retroactive effect, they generally would be defensible. Although Hawaii Revised Statutes § 1-3 (2009) specifically provides that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended," the Hawaii Supreme Court has noted that the foregoing provision "is only a rule of statutory construction and where the legislative intent may be ascertained, it is no longer determinative." *First Ins. Co. of Hawaii, Ltd. v. Dayoan*, 124 Hawai'i 426, 435, 246 P.3d 358, 367 (2010). Thus, in general, Hawaii courts prefer to interpret statutes in a prospective fashion only.

Notwithstanding this general principle against retroactivity, Hawaii recognizes a rule of construction such that if a statute provides remedies or procedures that do not affect existing rights, but merely alters the method of enforcing or giving effect to such rights, that statute may apply to existing claims, including those commencing before the effective date of the statute. *Clark v. Cassidy*, 64 Haw. 74, 77, 636 P.2d 1344, 1347 (1981) (citations omitted); *Landgraf*, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501, ("Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision.' ") (Citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed. 476 (1974).

The purpose of Act 48 is to reduce unnecessary and improper foreclosures by providing homeowners who face nonjudicial foreclosures with a meaningful opportunity to mediate a resolution, or a fair chance to protect their rights and home ownership through the judicial system. Act 48 clearly effects only how and when the remedy of nonjudicial foreclosure can be applied. Additionally, the law has no impact on judicial foreclosures and lenders are free to use that remedy as appropriate. Accordingly, Act 48 is reasonably designed to promote a legitimate public purpose, and may be applied to existing matters in furtherance of that purpose.

Until the program is implemented by the Department of Commerce and Consumer Affairs (DCCA), it will be impossible to actually participate in the foreclosure dispute resolution program. Accordingly, provided that the foreclosing mortgagee gives any requisite statutory notices that can be given, then it should not be subject to a claim for unfair and deceptive practices because of the current but temporary impossibility in fact of engaging in the program.

B. General Questions and Responses

Question (1). "Under section 667-D, is a foreclosing mortgagee required to participate in the mortgage foreclosure dispute resolution program, if the program is not yet operative, for a nonjudicial foreclosure that had been initiated under Part 1 of chapter 667 before the enactment of Act 48 but had not yet advanced to public auction? If so, what timeframes for notification and election should apply? If a foreclosing mortgagee fails to comply with 667-D under these circumstances, will they have committed an unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: Yes. This conclusion is dictated by the plain language of the statute which mandates that:

> Before a public sale may be conducted pursuant to section 667-5 or 667-25 for a residential property that is occupied by an owner-occupant as a primary residence, the foreclosing mortgagee shall, at the election of the owner-occupant, participate in the mortgage foreclosure dispute resolution program under this part to attempt to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable.

HRS § 667-D. Thus, if a foreclosing mortgagee has not conducted a public sale, then at the election of the owner occupant, the mortgagee is required to participate in the foreclosure dispute resolution program, and may not complete the nonjudicial foreclosure until it has complied with the program. HRS § 667-D. Any notices that can be appropriately given by the mortgagee despite the program not yet being operative should be given. We do not believe that a mortgagee could be appropriately subjected to a claim for violation of the deceptive acts or practices laws where certain aspects of compliance with Act 48 are currently impossible to perform because the dispute resolution program is not yet operative.

Question (2). "Under 667-E and 667-5(a)(2), must a foreclosing mortgagee provide notice to a mortgagor of the mortgagor's right to elect mortgage foreclosure dispute resolution if the mortgage foreclosure dispute resolution program is not yet operative? If a foreclosing mortgagee fails to comply with 667-E and 667-5(a)(2) under these circumstances, will they have committed an unfair and deceptive act or practice under 667-AC and section 480-2?"

Answer: Yes. Notice must be given based upon the plain language of the statute, but where certain aspects of compliance with the law are currently impossible to perform there would be no violation of the deceptive acts or practices laws.

Question (3). "Under the amendments to chapter 667, is a foreclosing mortgagee, who had already initiated a nonjudicial foreclosure by properly issuing its notice of intention to

foreclose under 667-5 before the enactment of Act 48, required to "re-notice" the foreclosure in conformity with the amendments to 667-5 and under 667-AA by personally serving the notice and referencing the relevant affiliate statements? Does such a failure constitute an unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: No, but pursuant to section 667-D, if a foreclosing mortgagee has not conducted a public sale, then at the election of the owner occupant, the mortgagee is required to participate in the foreclosure dispute resolution program, and may not complete the nonjudicial foreclosure until it has complied with the program, including the provision of any relevant notices pursuant to section 667-D.

Question (4). "Under the amendments to Part I chapter 667, is a foreclosing mortgagee, who had already initiated a nonjudicial foreclosure by properly issuing its notice of intention to foreclose and publishing its notice of the public sale under 667-5 before the enactment of Act 48, but had not yet conducted the public sale, required to republish its notice of public sale in conformity with the amendments to 667-5 before proceeding to the public sale? Does such a failure constitute an unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: Yes, because of new legal requirements such as restrictions on where the sale may be held (see below) the prior notice would be inaccurate. Additionally, pursuant to section 667-D, if a foreclosing mortgagee has not conducted a public sale, then at the election of the owner occupant, the mortgagee is required to participate in the foreclosure dispute resolution program, and may not complete the nonjudicial foreclosure until it has complied with the program, including the provision of any relevant notices pursuant to section 667-D. In accordance with section 667-AC a sale conducted in violation of sections 667-D and 667-R would be a violation of chapter 667 and therefore would constitute an unfair or deceptive act or practice under section 480-2.

Question (5). "Can a foreclosing mortgagee, who had already initiated a nonjudicial foreclosure by properly issuing its notice of intention to foreclose and publishing notice of the public sale under 667-5 before the enactment of Act 48, proceed with the public sale, as noticed, if the location of the public sale does not comply with section 667-R or if the department of accounting and general services has not yet designated a location? Does such an act constitute an unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: No, the sale may only be conducted at a location that complies with section 667-R. Additionally, pursuant to section 667-D, if a foreclosing mortgagee has not conducted a public sale, then at the election of the owner occupant, the mortgagee is required to participate in the foreclosure dispute resolution program, and may not complete the nonjudicial foreclosure until it has complied with the program, including the provision of any relevant notices pursuant to section 667-D. In accordance with section 667-AC a sale conducted in violation of sections

667-D and 667-R would be a violation of chapter 667 and therefore would constitute an unfair or deceptive act or practice under section 480-2.

Question (6). "Can a foreclosing mortgagee, who had already initiated a nonjudicial foreclosure by properly issuing its notice of intention to foreclose and publishing notice of the public sale under 667-5 before the enactment of Act 48, postpone the public sale to a location designated by the department of accounting and general services by making a public announcement at the originally noticed time and location, without complying with 667-5(a)(1)(B) and 667-y(3)? Does such a failure constitute an unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: No. Additionally, pursuant to section 667-D, if a foreclosing mortgagee has not conducted a public sale, then at the election of the owner occupant, the mortgagee is required to participate in the foreclosure dispute resolution program, and may not complete the nonjudicial foreclosure until it has complied with the program, including the provision of any relevant notices pursuant to section 667-D.

Question (7). "Can a foreclosing mortgagee, who had already initiated a nonjudicial foreclosure by properly issuing its notice of intention to foreclose, publishing notice of the public sale, and conducting the public sale under 667-5 before the enactment of Act 48, but had not filed its affidavit under 667-5(d) by the date of the enactment of Act 48, proceed with filing the affidavit to complete its foreclosure without complying with any of the amendments to chapter 667? Would such a failure constitute and unfair or deceptive act or practice under 667-AC and section 480-2?"

Answer: Yes, but subject to the mortgagor's right to convert during the phase in period set forth in section 37 of Act 48.

Question (8). "Under the amendments to chapter 667-41, must all persons authorized to conduct a nonjudicial foreclosure under Part II of chapter 667 provide the informational materials described in 667-41 to all mortgagors having entered into a mortgage agreement before September 1, 2011?"

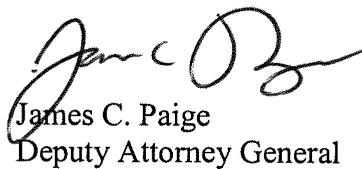
Answer: Yes. With respect to the public disclosure requirement under section 667-41 as amended by Act 48, the revision should be read prospectively. The plain language of the section provides that "Beginning on September 1, 2011" the disclosure documents must be made available to mortgagors. Thus, the plain language of the statute should be given effect and under the plain language lenders are required to provide the disclosure from September 1, 2011.

As we stated initially, because any given foreclosure may involve unique facts or issues, mortgagors and mortgagees should consult their respective legal counsel for advice as to the

application of Act 48 to any particular case. Accordingly, our guidance in response to the general questions that you have posed is not intended, and should not be used as, legal advice in any specific case.

Should you have questions concerning any of the above please do not hesitate to contact me.

Very truly yours,



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APPROVED:

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