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2011 LEGISLATIVE UPDATE
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New Foreclosure Procedures Under Hawaii Law -- Act 48 (SLH 2011)
(Effective, In Part, May 5, 2011 (Senate Bill 651 CD 1))

OVERVIEW

On May 5, 2011 the governor signed Act 48 into law. The primary purpose of the act is to protect the rights of "owner occupants" under Hawaii's non-judicial foreclosure procedures. "Owner-occupant" is defined as a person, *at the time that a notice of default and intention to foreclose is served*:

> *(1) Who owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and*
>
> *(2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served.*

Under Act 48, if a lender begins a non-judicial foreclosure against an owner-occupant borrower, that borrower may: 1) demand the right to participate in a foreclosure mediation process before the non-judicial foreclosure can continue (beginning October 1, 2011); or 2) convert the lender's non-judicial foreclosure into a judicial foreclosure. Both processes have the potential to create significant delays for lender foreclosures, which, in turn, has the potential to create significant delays for an association's ability to collect its delinquencies. Condominium associations are specifically exempt from either process, but Act 48 also creates delays for an association trying to pursue their own foreclosures.

The potential liability that Act 48 imposes for conducting nonjudicial foreclosures has surfaced as a major problem in the almost three months since the act became law. The legislature made a conscious decision to impose significant liability for violations of Hawaii's foreclosure law -- Chapter 667, Hawaii Revised Statutes -- to dissuade lenders from practices which reportedly caused significant harm to consumers. The legislature did so by making a violation of Chapter 667 a violation of Hawaii's unfair and deceptive acts or practices statute, Chapter 480, HRS. This decision, in turn, creates the possibility that a violation of Chapter 667

could result in the treble damages penalties imposed by chapter 480. While lenders seem to have the most potential liability as a result of this change, condominium associations choosing to conduct nonjudicial foreclosures after Act 48 face the uncertainty of the same type of liability. (See attached summary for more information on association liability.)

As a result of the potential liability, reports indicate that many lenders have either officially or unofficially decided to conduct only judicial foreclosures in Hawaii, foregoing the nonjudicial process altogether. In doing so, the lenders also eliminate the requirement to participate in the mortgage foreclosure dispute resolution program, which applies only to nonjudicial foreclosures. To that extent, since the judicial process does not require any meetings between lenders and borrowers to try to keep borrowers in their homes, the decision to impose liability under Chapter 480 seems to have had a counter-productive effect.

From a condominium association's point of view, a decision by lenders to follow the judicial foreclosure process means even more delays (because of the delays inherent in the judicial foreclosure process). In other words, it will take even longer for a condominium association to put a paying owner in a delinquent unit.

BACKGROUND

Hawaii law provides for both a judicial and a nonjudicial foreclosure process. A judicial foreclosure used to take three to four times as long as a nonjudicial foreclosure – ten to twelve months and $9,000-$10,000, versus three to four months and $3,000-$4,000. After Act 48, time frames and costs for both foreclosure procedures have increased (see below).

Hawaii also has two nonjudicial foreclosure laws, found in "Part I" and "Part II" of Chapter 667, Hawaii Revised Statutes. Part I is an older law with a simpler process that lacks some of the notice and due process procedures found in Part II. Nevertheless, for the last decade or more, Part I was the preferred nonjudicial procedure because it was quicker and less cumbersome. Act 48 prohibits all nonjudicial foreclosures under Part I until July 2012, leaving Part II as the only option for anyone wishing to pursue a nonjudicial foreclosure.

Sections 13 and 14 of Act 48 try to compensate condominium associations for the adverse effects of the act by increasing the "Act 39" guaranteed recovery for condominium associations under the existing condominium law. Specifically, in any foreclosure a condominium's recovery goes from up to **6** months of maintenance fees or $3,600 to **12** months or $7,200, whichever is less – *i.e.*, doubling the guaranteed recovery for condominium associations. (Unfortunately, non-condominium homeowner associations have no such guaranteed recovery.) This increase lasts until **September 30, 2014.**

Unfortunately, the additional six months or $3,600 provided by Act 48 may be insufficient in many cases to compensate for the delays that Act 48 introduces into the foreclosure process.

I. Delays From Dispute Resolution.

Section 1 of Act 48 creates a "Mortgage Foreclosure Dispute Resolution" ("MFDR") program for owner-occupants facing a lender nonjudicial foreclosure. (The program is supposed

to be operative no later than October 1, 2011. In the interim, Section 37 of Act 48 establishes a "phase-in period", ending on August 15, 2011. During the phase-in period, any owner-occupant who is undergoing a nonjudicial foreclosure that has not yet been completed may elect to convert it to a judicial foreclosure under Section 5 of Act 48.)

The State Department of Commerce and Consumer Affairs has indicated that the process of MFDR could take up to 110 days -- almost 4 months. A nonjudicial foreclosure under part II of Chapter 667 – the only nonjudicial process currently available – can take 5 to 6 months. As a result, under the MFDR program, instead of the lender's nonjudicial foreclosure taking 3 to 4 months, it may take 8 to 9 months, *i.e.*, approaching the same time as a judicial foreclosure.

[Note: As outlined above, the potential liability for lenders for participating in this process seems to have convinced most, if not all lenders to forego the nonjudicial foreclosure process altogether, in favor of the judicial foreclosure process. Therefore, the delays that could arise under this process may turn out to be academic, because the process will not be used. Regardless, driving lenders into court means the judicial process will probably become even slower -- instead of taking 10 to 12 months, it will probably take 12 to 18 months to complete a judicial foreclosure and put a paying owner in a unit.]

II. Conversion From Nonjudicial To Judicial Foreclosure.

Act 48 also allows an owner-occupant to convert a lender's nonjudicial foreclosure into a judicial foreclosure. (Condominium associations are not required to convert their nonjudicial foreclosures under this provision.) As noted above, generally, under the best of circumstances, a judicial foreclosure takes ten to twelve months to complete. If more and more foreclosures are driven into foreclosure court by Act 48, that timeframe may be extended to 12 to 18 months, as it was in the early 1990s when judicial foreclosures clogged the courts. [In fact, as outlined in more detail above, the conversion process may have little effect because lenders may file no nonjudicial foreclosures to convert, instead opting for the judicial process for all their foreclosures.]

(Note, again, Section 37 of Act 48 provides a phase-in period for the new law ending on August 15, 2011. During that phase-in period, any owner-occupant who is subject to a nonjudicial foreclosure that has not been completed may elect to convert to a judicial foreclosure under special procedures outlined in Act 48.)

III. Moratorium On Nonjudicial Foreclosures Under Part I Of Chapter 667.

Section 40 of Act 48 provides that no nonjudicial foreclosures may be conducted under Part I of Chapter 667 until July 1, 2012. Essentially, this moratorium forces anyone – including an association – wishing to proceed with a nonjudicial foreclosure to follow the more lengthy procedures required under Part II of Chapter 667. (For example, under Part II, anyone – including a condominium association – proposing to conduct a nonjudicial foreclosure must first send the defaulting owner notice of intent to foreclose and then give the owner 60 days to respond before starting the foreclosure.) In other words, any lender or condominium association wishing to conduct a nonjudicial foreclosure must follow Part II until July 1, 2012.

Basically, this process, alone, has the potential to eat up 60 more days of the additional

six months of maintenance fees provided by Act 48.

IV. Mandatory 60 Day Stay To Allow The Unit Owner To Cure The Owner's Default With The Association.

On top of that delay, Section 4 of Act 48 requires associations to give a delinquent owner up to 60 days to cure a default, if the unit owner sends notification of intent to propose a plan. Moreover, the association is not allowed to reject a "reasonable payment plan. . . . ." The only requirement for a reasonable payment plan is that it pays, at a minimum, the current maintenance fee, plus "some amount" owed on the past due balance.

This process has the potential to eat up another 60 days of the additional six months of maintenance fees provided by Act 48, leaving only 60 days of "surplus."

V. Prohibition On The Association Foreclosing If The Lender Is Already Foreclosing.

Section 6 of Act 48 includes a requirement that if a lender has begun a foreclosure action, no junior lien holder – such as an association – is permitted to begin its own nonjudicial foreclosure under Part I of Chapter 667 until: (i) the lender completes its judicial foreclosure; (ii) the lender completes its nonjudicial foreclosure; or (iii) the lender and an owner-occupant complete the foreclosure dispute resolution process. (Since there is a moratorium on Part I foreclosures until July 2012, this provision is temporarily moot.)

Section 6 also states that no junior lien holder – such as an association – is permitted to begin its own nonjudicial foreclosure under Part II of Chapter 667 while an owner-occupant and lender are participating in the foreclosure dispute resolution process, unless the junior lien holder has already begun a nonjudicial foreclosure under Part II of Chapter 667 before the lender files its foreclosure. In other words, if the association is already foreclosing, it can continue with its foreclosure, regardless of the lender's actions.

Those associations who have waited for a lender to foreclose know this cannot be good.

VI. Special Note For Non-Condominium Homeowner Associations.

As is often the case, associations established under Chapter 421J, Hawaii Revised Statutes, have been overlooked under Act 48. For example:

- Condominium associations are specifically excluded from having to participate in the mortgage foreclosure dispute resolution; associations established under Chapter 421J are not. This at least suggests that associations established under Chapter 421J may have to participate in the mortgage foreclosure dispute resolution process. (Note: The definitions section defines "association" to have the same meaning as in Sections 514B-3 and 421J-2. Unfortunately, only condominium associations are specifically excluded from having to participate in the program under Section 667-A of Act 48.)

- "Associations" are defined in Part II of Chapter 667 as an association as defined in Section 514B-3. In other words, associations established under Chapter 421J are not

specifically authorized to conduct nonjudicial foreclosures under Part II of Chapter 667. In addition, Section 667-40 of Part II of Chapter 667 only specifically allows condominium associations and timeshare plans to use Part II of Chapter 667.

- Act 48 indicates that an owner-occupant may convert any nonjudicial foreclosure to a judicial foreclosure. The act specifically excludes conversion to judicial foreclosure for association liens under Chapters 514A and 514B. It does not exclude liens that arise under Chapter 421J.

Therefore, once again, associations established under Chapter 421J find themselves in a legal limbo with respect to Act 48.

ACT 34 RELATING TO CIVIL RIGHTS (HB546 SD1)

This act prohibits discrimination on the basis of "gender identity or expression" as a public policy matter and specifically with regard to employment. (SD1). The act first amends the chapter of Hawaii Revised Statutes dealing with the Hawaii Civil Rights Commission as follows:

> ***"§368-1 Purpose and intent.*** *The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism [~~which~~] that provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws."*

The act then adds a definition to Chapter 378-1, HRS, dealing with employment practices as follows:

> *"Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.*

While this might not seem particularly relevant to the day-to-day operations of an association, the definition of "gender identity or expression" resurfaces in Act 31, below, which makes amendments to Chapter 515, Hawaii's [anti-]discrimination in real property transactions law. In doing so, Act 31 makes it clear that discrimination in housing on the basis of gender identity or expression is also prohibited.

ACT 31 RELATING TO FAIR HOUSING EXEMPTIONS (SB1301 SD1 HD1)

First, the act amends the first paragraph of Section 515-3 to state:

> ***§515-3 Discriminatory practices.*** *It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection*

Second, the act amends Chapter 515-16 to add the following:

> ***§515-16 Other discriminatory practices.*** *It is a discriminatory practice for a person, or for two or more persons to conspire:*
>
> * * *
>
> *(6) To threaten, intimidate or interfere with persons in their enjoyment of a housing accommodation because of the race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection of [~~such~~] the persons, or of visitors or associates of [~~such~~] the persons[~~.~~]*

(Emphasis added.)

In that way, Act 31 imports the concept of gender identity or expression into housing discrimination, thereby directly affecting homeowner associations.

The other major change made by Act 31 was to eliminate an exemption for certain groups of people that, in effect, allowed them to engage in discriminatory advertising. Prior to Act 31, Section 515-3 prohibited any attempt *"to print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, that indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect [to the real estate transaction]."*

Nevertheless, prior to Act 31, certain groups were exempted from this prohibition. More specifically, Section 515-4 exempted the following groups from the prohibition on advertising in Section 515-3, by stating that Section 515-3 did not apply:

> *(1) To the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other if the lessor resides in one of the housing accommodations; or*
>
> *(2) To the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides [in the housing accommodation].*

In effect, prior to Act 31, the combination of these two sections (515-3 and 515-4) provided an exemption from the restrictions in Section 515-3 to people who fit the definitions in Section 515-4. In other words, those people could advertise in a discriminatory way when, for example, advertising real property for rent.

Essentially, the legislators recognized in Section 515-4 that landlords who live in close proximity to their tenants, or who share a home with their tenants should be able to choose their tenants more carefully, even if, as a result, discrimination might occur. For example, a woman seeking a co-tenant to share her home could reasonably decide that she did not want to have a man as a co-tenant and exclude the man as a tenant, even though such action would otherwise be discriminatory under Section 515-3. Prior to Act 31, the woman could have included that prohibition in her advertisement if she advertised for a roommate. Following Act 31, that is no longer permitted.

In Act 31 the legislators decided, that the limited right to discriminate should not apply to advertising. Therefore, the legislature deleted the prohibition against discriminatory advertising from Section 515-3 and added it to Section 515-16. As a result, the exemption in Section 515-4 no longer applies to discriminatory advertising. Instead, Section 515-16 now reads, in its relevant part:

> ***§515-16 Other discriminatory practices.*** *It is a discriminatory practice for a person, or for two or more persons to conspire:*
>
> * * *
>
> *(7) To print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, that indicates, directly or indirectly, an intent to make a limitation or specification, or to discriminate because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection.*

Finally, Act 31 amends Section 515-4 to revise the exemption for certain landlords as follows:

> *(a) Section 515-3 does not apply:*
>
> *(1) To the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other if the owner or lessor resides in one of the housing accommodations; or*
>
> *(2) To the rental of a room or up to four rooms in a housing accommodation by an [~~individual~~] owner or lessor if the [~~individual~~] owner or lessor resides [~~therein.~~] in the housing accommodation.*

ACT 175 RELATING TO SERVICE ANIMALS (SB892 SD2 HD2)

This act amends certain laws regarding the use of service dogs in statutes relating to dog licensing, quarantine, public conveyances, criminal acts, and discriminatory practices in real estate transactions.

In particular, Act 175 defines "service dog" as follows:

> ***§347-___ Service dog, defined.*** *As used in this chapter, "service dog" means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, intellectual, or other mental disability. A companion or comfort animal* ***is not a service dog*** *[!!!!!] unless it meets the requirements of this definition and it accompanies a person for the purpose of performing the work or tasks for which it has been trained."*

(Emphasis added.)

This change might seem to help homeowner associations deal with the ever present problem of "comfort animals." Unfortunately, that is not the case. Instead, Act 175 arguably makes the situation worse by confirming that "comfort animals" do not have to meet any requirements of a service animal. More specifically, Act 175 first deletes from Section 515-3 the subsection (subsection (8)) that deals with trained animals and then amends subsection (10) of Section 515-3, as follows:

> ***§515-3 Discriminatory practices.*** *It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection:*
>
> * * *
>
> *[~~(8) To refuse to engage in a real estate transaction with a person or to deny equal opportunity to use and enjoy a housing accommodation due to a disability because the person uses the services of a guide dog, signal dog, or service animal; provided that reasonable restrictions or prohibitions may be imposed regarding excessive noise or other problems caused by those animals. For the purposes of this paragraph:~~*
>
> *~~"Blind" shall be as defined in section 235-1;~~*
>
> *~~"Deaf" shall be as defined in section 235-1;~~*
>
> *~~"Guide dog" means any dog individually trained by a licensed guide dog trainer for guiding a blind person by means of a harness attached to the dog and a rigid handle grasped by the person;~~*
>
> *~~"Reasonable restriction" shall not include any restriction that allows any owner or person to refuse to negotiate or refuse to engage in a real estate transaction; provided that as used in this paragraph, the "reasonableness" of a restriction shall be examined by giving due consideration to the needs of a reasonable prudent person in the same or similar circumstances. Depending on the circumstances, a "reasonable restriction" may require the owner of the service animal, guide dog, or signal dog to comply with one or more of the following:~~*
>
> *~~(A) Observe applicable laws including leash laws and pick-up laws;~~*

~~*(B) Assume responsibility for damage caused by the dog; or*~~

~~*(C) Have the housing unit cleaned upon vacating by fumigation, deodorizing, professional carpet cleaning, or other method appropriate under the circumstances.*~~

~~*The foregoing list is illustrative only, and neither exhaustive nor mandatory;*~~

~~*"Service animal" means any animal that is trained to provide those life activities limited by the disability of the person;*~~

~~*"Signal dog" means any dog that is trained to alert a deaf person to intruders or sounds;]*~~

* * *

*[~~(11)~~] (10) To refuse to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a housing accommodation; provided that if reasonable accommodations include the use of an animal, **reasonable restrictions** may be imposed;*

As for the "reasonable restrictions" that may be imposed on comfort/service animals, essentially, associations are now at the mercy of the Hawaii Civil Rights Commission because the statutory restrictions that were deleted -- see above -- no longer exist. Nevertheless, the Hawaii Civil Rights Commission has now produced a short informational handout on animals in housing (see attached), which states that the following restrictions are, in their view, permitted.

As outlined in that handout according to the Hawaii Civil Rights Commission, housing providers may establish reasonable restrictions on the use of an assistance animal, such as:

1) Having the animal licensed with the county.

2) Having the animal vaccinated, with documentation of the vaccination.

3) Having the animal registered with the housing provider.

4) Having the animal meet minimum sanitary standards.

5) Requiring pick up of solid waste.

6) Having the animal under the control of its handler by use of a harness, leash, tether, cage or other physical control. If the nature of the person's disability makes physical control impracticable, or if the physical control would interfere with the assistance that the animal provides, the housing provider may require that the animal be otherwise under the control of its handler, by voice control, signals, or other effective means.

7) Having the person assume responsibility for damages caused by the animal. However, because assistance animals are not "pets", they may not be subject to deposits, fees, or surcharges imposed on pet owners.

8) Having the person clean the dwelling upon vacating, by fumigation, deodorizing, professional carpet cleaning, or other appropriate methods, at his or her expense.

ACT 103 RELATING TO THE TRANSIENT ACCOMMODATIONS TAX (SB1186 SD2 HD1 CD1)

Act 103 applies a daily transient accommodations tax to each transient accommodation furnished on a complimentary or gratuitous basis, or otherwise at no charge. [The act also imposes a ceiling on the amount of transient accommodation tax funds transferred to the tourism special fund and to the counties.]

> *(c) There is levied and shall be assessed and collected each month a daily tax of $10 for every transient accommodation that is furnished on a complimentary or gratuitous basis, or otherwise at no charge, including transient accommodations furnished as part of a package.*

Anyone in the business of furnishing transient accommodations should be aware of this restriction.

ACT 37 RELATING TO NONPROFIT CORPORATIONS (SB1349 SD1 HD1)

This act amends the Hawaii nonprofit corporations act to permit members to act by ballot and electronic voting, use electronic notice, and conduct meetings by teleconference. Specifically, the act implements certain portions of the Model Nonprofit Corporations Act, Third Edition to allow: (i) voting by ballot and electronic means, including by electronically-transmitted ballots; (ii) the conduct of membership (not just board) meetings through electronic communications technology in appropriate circumstances; and (iii) the use of electronic transmission to provide notice to directors in the manner currently permitted for notice to members; provided that the member or director has consented to receive notice by that method.

The purpose of the act is to allow for greater participation by members in nonprofit membership corporations and reduce the costs associated with annual elections and matters involving membership voting. Anyone proposing to use Act 37 should read its requirements carefully, since they are detailed. The most relevant of those requirements are shown in the attached addendum, and relate primarily to informing Association members of the percentages required to pass or adopt various provisions, etc.

Members of incorporated non-profit associations (including incorporated condominium associations) should be aware that they may now be required to include the additional information in their mail outs to members if the mail outs relate to any matters that fit within the requirements of Act 37. Otherwise, it is possible that the results of voting by written consent may be challenged under Act 37.

ACT 98 RELATING TO HAWAII REVISED STATUTES SECTION 514B-153(e) (SB1483 SD1 HD1 CD1)

Basically, Act 98 makes it harder for members of a timeshare association to obtain the direct contact information of their fellow owners! More specifically, Section 514B-153, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

> *Where the condominium project or any units within the project are subject to a time share plan under chapter 514E, the association shall only be required to maintain in its records the name and address of the time share association as the representative agent for the individual time share owners* ***unless*** *the association receives a request by a time share owner to maintain in its records the name and address of the time share owner.*

The end result of this process will be that since most owners of timeshare intervals rentals will probably not furnish their addresses, any contact with most such interval owners will be through the timeshare association.

ACT 171 RELATING TO DISTRICT COURTS (SB1491 SD1 HD1)

This act clarifies the circumstances under which a Hawaii State district court may serve a summons or other writ outside of the State. (SB1491 HD1). Essentially, it allows out-of-state service of those district court complaints without having to first file a motion with the court for permission to serve out of the state.

Service of complaints in State circuit courts has long followed this practice. In effect, this change will reduce the time and expense for associations that decide to seek deficiency judgments against out-of-state owners in Hawaii State district court.

ACT 83 RELATING TO INSURANCE (HB924 HD2 SD2)

Act 83 clarifies that the terms of a liability insurance policy issued to a construction professional are to be construed according to the reasonable expectations of the parties at the time that the insurance policy was issued. The purpose of this act is to restore the insurance coverage that construction industry professionals paid for and to ensure that the good-faith expectations of parties at the time they entered into the insurance contract are upheld.

While this law may seem to have no direct impact on condominium associations, it could impact those associations involved in construction related disputes with developers, contactors, and design, engineering other construction professionals by making insurance coverage available to satisfy claims where none, arguably, existed before.

The background to this act is that, in May 2010, a Hawai'i appeals court held that faulty work, as well as the natural and expected consequences of faulty work (*i.e.*, damage caused by one contractor's work to another contractor's work), were not a covered "occurrence" under a Commercial General Liability ("CGL") policy. *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Hawai'i 142, 231 P.3d 67 (2010). That court held that neither a breach of contract claim alleging shoddy performance, nor tort-based claims derivative of a breach of contract claim, are covered

under a CGL policy. This meant that construction professionals who had purchased insurance coverage to protect themselves were suddenly without coverage, hence Act 83.

Any condominium association involved in a construction dispute following this change would find that the construction professionals involved in the construction of the condominium project might find themselves without insurance coverage. Act 83 is designed to remedy this problem.

ACT 141 RELATING TO SMALL CLAIMS COURT (HB1333 HD1 SD1 CD1)

This act increases the maximum monetary claim that may be filed in small claims court, effective July 1, 2011, from less than $3,500 to less than $5,000. Associations that decide to pursue delinquency claims in court, by means of a deficiency judgment may find the process could be cheaper.

ACT 105 RELATING TO TAXATION (SB 754 CD1)

This act suspends temporarily the exemptions for certain persons and certain amounts of gross income or proceeds from the general excise and use tax and requires the payment of both taxes at a four per cent rate. Effective 7/1/2011, and sunsets on 6/30/2013. This act does not suspend the existing general excise tax exemption for associations but does eliminate the exemption for a contractor's subcontractors.

The suspension and imposition of the tax commences on July 1, 2011, and ends on June 30, 2013.

Regarding the association general excise tax exemption, the general excise tax is structured in such a way that payments by an association member to the association's managing agent would generally be subject to general excise tax. Since, in effect, the Association member is paying money from himself to himself, the legislature long ago decided the payment should not be a taxable event. Fortunately, the legislature did not eliminate this exemption in 2011.

Nevertheless, by suspending an exemption from GET for subcontractors, it has the potential to increase costs for associations contracting for construction work. In effect, if the association pays the general contractor for work, the general contractor must pay GET on the amount received. Then, if the general contractor pays the subcontractor for work performed for the general contractor, the subcontractor must also pay GET on the amount received. To cover those taxes, subcontractors will probably increase their bids, which could result in an overall increase in the general contractor's bid of over 4%. The exemption for subcontractors used to eliminate the second payment, apparently on the grounds that all the work under the contract was a single contract and should not be taxed twice. Now that the exemption has been temporarily eliminated, associations may see the cost of construction and repair work increasing.

ACT 65 RELATING TO SERVICE OF PROCESS (HB 1130 SD1)

Act 65 repeals the sunset date of Act 158, Session Laws of Hawaii 2009, requiring condominium associations, planned community associations, and cooperative housing corporations to establish an access policy for civil process servers. The requirement was due to expire on July 1, 2012. The law applies to secure properties that are not open for access by

process servers. Therefore, associations of those properties that have not established such a policy should consider doing so, to control access to their properties for process servers.

The original act requires boards of condominium associations, planned community associations and residential cooperatives (that have not already done so) to adopt a policy to provide reasonable access to process servers to serve summons, subpoenas, notices, or orders on persons present at the property. (Again, this policy is required only if the project is inaccessible to the general public, like a secured building or a gated community.)

The policy should include the following elements:

- That the process server is permitted access to the common areas adjacent to a principal entry to the residence solely for the purpose of serving process.

- That the process server must provide clear personal identification and evidence that the person is authorized to serve process, including documentation clearly indicating the precise name and address, and if applicable, unit number, of the person residing or present on the property to be served.

- State reasonable time and manner restrictions on when the process server may enter and remain at the Project.

- Permit the community to compel the process server to leave the Project if he or she fails to comply with the reasonable time and manner restrictions.

- Designate an individual by position (e.g., Site Manager, President, etc.) who is located in or reasonably near the building or community, or another person who is generally available to respond in a timely manner to a request for access during normal business hours.

- Designate an alternate person (presumably also by position) if the primary individual is not available.

Condominium associations will be required to identify the primary and alternate designees as part of its biannual condominium registration with the Hawaii Real Estate Commission. Residential cooperatives and planned community associations will be required to make a copy of the policy available at all times at the principal point of entry to the building or community.

ACT 139 RELATING TO CONTRACTS (HB 663 CD1)

This act requires: (i) clear and conspicuous disclosure of automatic renewal clauses and cancellation procedures for all **consumer** contracts and offers with an automatic renewal provision; and (ii) additional disclosure for contracts with a specified term of twelve months or more. The operative provisions of this act take on July 1, 2012.

Many condominium associations have experienced problems with automatic renewal clauses in their contracts, and there is some suggestion that the Association contracts would be subject to these disclosure requirements.

More specifically, Act 139 states that "consumer" has the same meaning as in Section 480-1 (which states "Consumer" means a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment). There is at least some indication that this definition may apply to condominium association under certain circumstances. More specifically, section 514 B-104 (a) states:

> ***§514B-104 Association; powers.*** *(a) Except as provided in section 514B-105, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:*
>
> * * *
>
> *(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium. For the purposes of actions under chapter 480, associations shall be deemed to be "consumers"*;

(Emphasis added.)

This language from chapter 514B at least suggests that if a matter involving an automatic renewal clause came to court, an association might have an argument that the requirements of the Act 139 should apply. Therefore, individuals and entities dealing with associations who include automatic renewals in their contracts may want to consider following the requirement for clear and conspicuous disclosure of the automatic renewal clauses in their contracts. On that issue, Act 139 includes the following definition:

> *"Clearly and conspicuously" means in larger type than the surrounding text; in contrasting type, font, or color to the surrounding text of the same size; or set off from the surrounding text of the same size by symbols or other marks in a manner that clearly calls attention to the language. In the case of an audio disclosure, "clear and conspicuous" and "clearly and conspicuously" mean in a volume and cadence sufficient to be readily audible and understandable.*

There are exceptions from this act for financial institutions and insurers.

ACT 156 RELATING TO GRAFFITI (HB 555 CD1)

This act requires a person convicted of criminal property damage by graffiti to remove graffiti from property within 250 yards of the site of the offense, if the property owner consents and the act of removal does not endanger the person or others nor inconvenience the public. In addition, this act allows the court to require the person to perform one hundred hours of community service in lieu of removing the graffiti, if the government agency supervising the removal does not have the resources to ensure the person's compliance with removing the graffiti.

ACT 120 (SLH 2009) RELATING TO DEREGISTRATION FROM LAND COURT

The Hawaii State Legislature passed Act 120 in 2009. It took effect on July 1, 2011, and is included as Part II of the statute dealing with Hawaii's land court, chapter 501, H.R.S. Act 120 provides for mandatory deregistration of all fee simple timeshare interests. ("Deregistering" means taking the property out of land court registration and converting it to "regular system" property recorded in the bureau of conveyances.) Thereafter, all deeds, etc., affecting the deregistered land would be recorded in the Bureau instead of in the land court.

Act 120 also permits the owner of other (non-timeshare) land registered in the land court to voluntarily choose to take it out of the land court system and convert it to "regular system" property. To voluntarily deregister land, an owner must present a request for deregistration to land court (not the bureau of conveyances). Upon receiving a request for deregistration, the land court will update the owner's certificate of title. When it is complete, the land court will then record in the regular system (a) the updated certificate of title, and (b) the request for deregistration.

[There are two recording systems in Hawaii. The first is the regular system (or bureau of conveyances), where documents are recorded and documents are located by searching indices of the parties to the document. The second is the land court system where all fee simple property is assigned a transfer certificate of title and a transfer certificate of title number. Any document relating to the property must be noted on the transfer certificate of title and reference the transfer certificate of title number. Every time land court property is sold, a new transfer certificate of title and a new transfer certificate of title number are issued. Although there are some benefits of the land court system, it is more cumbersome, particularly because the land court registrar's office is backlogged and it is difficult to get accurate information about the transfer certificate of title numbers for timeshares and condominium projects.]

This act will affect the way that time share documents and amendments will be recorded, but can also affect the way condominium documents and amendments will be recorded. For instance, if any unit has been removed from the land court system, an amendment to the condominium documents would need to be filed and noted on the transfer certificate of title for each unit still in the land court system and once in the regular system for those that have been removed from the land court system. The provisions relating to removing property from the land court system will sunset on December 31, 2014.

(See attached for more information.)

CONDO COURT R.I.P.

Act 9 SB 574 SD1 (SLH 2009) stated that the Condominium Dispute Resolution Pilot Project "shall be repealed on June 30, [~~2009.~~] 2011." It was not extended (again), so the repeal goes into effect as of that date.

(Condo court was a pilot project and was originally scheduled to end in 2006 after two years. It was extended for another three years and would have ended on June 30, 2009. In 2009, it was extended another two years until June 30, 2011.)

SELECTED SECTIONS FROM ACT 37

SECTION 2. Chapter 414D, Hawaii Revised Statutes, is amended by adding a *new* section to be appropriately designated and to read as follows (emphasis added):

"**§414D- Action by ballot.** (a) Except as otherwise provided by the articles of incorporation or bylaws of a corporation, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a ballot *to every member* entitled to vote on the matter. The corporation may deliver ballots by electronic transmission.

(b) *A ballot shall*:

(1) Be either in written form or in the form of an electronic transmission;

(2) Set forth each proposed action;

(3) Provide an opportunity to *vote for or withhold* a vote for each candidate for election as a director or officer; and

(4) Provide an opportunity to *vote for or against* each proposed action.

(c) Approval by ballot pursuant to this section shall be valid *only if*:

(1) The number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting to authorize the action; and

(2) The number of affirmative votes equals or exceeds the number of affirmative votes for approval that would be required to approve the action at a meeting.

(d) All solicitations for votes by ballot *shall*:

(1) Indicate the number of responses needed to meet the quorum requirements;

(2) State the percentage of approvals necessary to approve each action; and

(3) Specify the time by which a ballot shall be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles of incorporation or bylaws of the corporation, a ballot shall not be revoked."

SECTION 3. Section 414D-14, Hawaii Revised Statutes, is amended by amending the definitions of "approved by (or approval by) the members" and "vote" to read as follows:

""Approved by the members" [~~(~~]or "approval by[~~)~~] the members" means an act approved or ratified by [~~the~~]:

(1) The affirmative vote of a majority of the votes represented and [~~voting~~] cast at a duly held meeting at which a quorum is present [~~(which affirmative votes also constitute a majority of the required quorum) or by a written~~];

(2) A ballot or written consent in conformity with this chapter; or [~~by the~~]

(3) The affirmative vote, [~~written~~] ballot, or written consent of [~~such~~] the greater proportion, including the votes of all the members of any class, unit, or grouping as may be provided in the articles, bylaws, or this chapter for any specified member action.

"Vote" includes authorization by [~~written~~] ballot and written consent."

SECTION 4. Section 414D-15, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (a) and (b) to read:

"(a) Notice may be oral, in the form of an electronic transmission as described in subsections (i) and (j), or written.

(b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; [~~or~~] by mail or private carrier[~~.~~]; or by electronic transmission as described in subsections (i) and (j). If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where it is published; or by radio, television, or other form of public broadcast communication."

2. By amending subsections (i) and (j) to read:

"(i) Without limiting the manner by which notice otherwise may be given to members[~~,~~] or directors, notice to members or directors given by the corporation under this chapter, the articles of incorporation, or the bylaws shall be effective if provided by electronic transmission consented to by the member or director to whom the notice is given. Any consent shall be revocable by the member or director by written notice or notice by electronic transmission to the corporation. [~~Any consent~~] Consent shall be deemed revoked if:

(1) The corporation is unable to deliver by electronic transmission two consecutive notices given by the corporation in accordance with [~~such~~] the consent; and

(2) The inability to deliver becomes known to the secretary or an assistant secretary of the corporation, to the transfer agent, or other person responsible for giving notice; provided that the inadvertent failure to treat [~~such~~] the inability to give electronic notice as a revocation shall not invalidate any meeting or other action.

(j) Notice given pursuant to subsection (i) shall be deemed given:

(1) If by facsimile telecommunication, when directed to a number at which the member or director has consented to receive notice;

(2) If by electronic mail, when directed to an electronic mail address at which the member or director has consented to receive notice;

(3) If by posting on an electronic network together with separate notice to the member or director of [~~such~~] the specific posting, upon the later of the posting and the giving of [~~such~~] the separate notice; and

(4) If by any other form of electronic transmission, when directed to the member[~~.~~] or director.

An affidavit of the secretary, assistant secretary, transfer agent, or other agent of the corporation that the notice has been given by a form of electronic transmission, in the absence of fraud, shall be prima facie evidence of the [~~facts stated therein.~~] fact of notice."

SECTION 5. Section 414D-17, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates, or directors[~~,~~] or otherwise obtain their consent[~~,~~] in the manner prescribed by its articles, bylaws, or this chapter, then upon petition of a director, officer, delegate, or member, the court may order that [~~such a~~] the meeting be called or that a [~~written~~] ballot or other form of obtaining the vote of members, delegates, or directors be authorized[~~,~~] in [~~such~~] a manner [~~as~~] that the court finds fair and equitable under the circumstances."

SECTION 6. Section 414D-101, Hawaii Revised Statutes, is amended to read as follows:

"**[~~[~~§414D-101[~~]~~] Annual and regular meetings.** (a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

(b) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.

(c) Annual and regular membership meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings shall be held at the corporation's principal office.

(d) At the annual meeting:

(1) The president and chief financial officer shall report on the activities and financial condition of the corporation; and

(2) The members shall consider and act upon [~~such~~] other matters as may be raised consistent with the notice requirements of sections 414D-105 and 414D-111.

(e) At regular meetings, the members shall consider and act upon [~~such~~] matters as may be raised consistent with the notice requirements of sections 414D-105 and 414D-111.

(f) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws shall not affect the validity of any corporate action.

(g) If authorized by the board of directors in its sole discretion, members or proxies of members may participate at an annual or regular meeting of members by means of the Internet, teleconference, or other electronic transmission technology in a manner that allows members the opportunity to:

(1) Read or hear the proceedings substantially concurrently with the occurrence of the proceedings;

(2) Vote on matters submitted to the members;

(3) Pose questions; and

(4) Make comments.

A member or proxy of a member participating in a meeting by means authorized by this subsection shall be deemed to be present in person at the meeting. The corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of the Internet, teleconference, or other electronic transmission technology is a member or proxy of a member."

SECTION 7. Section 414D-102, Hawaii Revised Statutes, is amended to read as follows:

"**§414D-102 Special meetings.** (a) A corporation with members shall hold a special meeting of members:

(1) On call of its board, or the person or persons authorized to do so by the articles or bylaws; or

(2) Unless the articles or bylaws provide otherwise, if the holders of at least five per cent of the voting power of any corporation sign, date, and deliver to any corporate officer one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) The close of business on the thirtieth day before delivery of the demand or demands for a special meeting to any corporate officer shall be the record date for the purpose of determining whether the five per cent requirement of subsection (a) has been met.

(c) If a notice for a special meeting demanded under subsection (a)(2) is not given pursuant to section 414D-105 within thirty days after the date the written demand or demands are delivered to a corporate officer, [~~regardless of~~] notwithstanding the requirements of subsection (d), a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to section 414D-105.

(d) Special meetings of members may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(e) Only those matters that are within the purpose or purposes described in the meeting notice required by section 414D-105 [~~may~~] shall be conducted at a special meeting of members.

(f) If authorized by the board of directors in its sole discretion, members or proxies of members may participate at a special meeting of members by means of the Internet, teleconference, or other electronic transmission technology in a manner that allows members the opportunity to:

(1) Read or hear the proceedings substantially concurrently with the occurrence of the proceedings;

(2) Vote on matters submitted to the members;

(3) Pose questions; and

(4) Make comments.

A member or proxy of a member participating in a meeting by means authorized by this subsection shall be deemed to be present in person at the meeting. The corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of the Internet, teleconference, or other electronic transmission technology is a member or proxy of a member."