



# Maine Credit Union League

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## **TESTIMONY OF THE MAINE CREDIT UNION LEAGUE**

### **Neither for nor Against**

#### **Proposed Committee Amendment to LD 1389, An Act To Expedite the Foreclosure Process (Based on Recommendations of Attorney General Janet T. Mills)**

Before the Joint Standing Committee on Judiciary

March 5, 2014 1:00 p.m.  
State House Building, Room 438

Good Afternoon Senator Valentino, Representative Priest, members of the Judiciary Committee. My name is Benjamin Marcus. I am an attorney at Drummond Woodsum and am testifying today on behalf of the Maine Credit Union League which is the trade association representing Maine's 61 credit unions with 637,000 credit union members across the state. I would like to take this opportunity, on behalf of Maine's credit unions, to thank Attorney General Mills for the significant time and effort that was put into the foreclosure working group which solicited the feedback of many interested parties, as well as this proposed amendment. We appreciate the thoughtful consideration that went into this process. It was a pleasure to collaborate with her and her staff on this issue.

Our decision to testify within the Neither for nor Against category was arrived at after careful and lengthy discussions and was a difficult one for us to make. There is much in this bill that we do support. However, there are sections in this bill about which

we do have serious concerns and would like to see modifications in an effort to make the proposal more useful and effective for both financial institutions and consumers. In my testimony, I will offer suggested changes to the current language and, should these changes be adopted, we would fully support this legislation.

### **Part B – Abandoned Property**

The proposed Part B to the Committee Amendment to LD 1389 addresses an issue of serious concern to Maine's credit unions as well as to municipalities in Maine and Maine home owners generally: so-called abandoned property that is the subject of a pending foreclosure. Part B of LD 1389 would establish a process and standards by which a judicial determination of abandonment can be made with the result that the foreclosure of abandoned property can be expedited for the benefit of all stakeholders.

The Maine Credit Union League and its members encourage this Committee to strengthen and improve LD 1389 with respect to abandoned property to better accomplish the goals of LD 1389. LD 1389 would reduce the redemption period to 45 days from the current 90 day period if a court determines that the property meets the criteria to be declared abandoned. The Maine Credit Union League asks, why retain a 45 day redemption period if the property is abandoned? If the purpose of the law is to expedite foreclosure of abandoned property to reduce blight and protect public safety, of what use is a 45 day redemption period? By determining that the property is abandoned, the Court has concluded that the debtor no longer has any interest in preserving the property or his interest in the property. Maintaining a redemption period following entry of judgment of foreclosure with respect to abandoned property is inconsistent with the finding of abandonment and inconsistent with the goal of expediting the disposition of abandoned property. The Maine Credit Union League encourages the

Committee to eliminate the redemption period altogether following a judicial determination of abandonment.

The argument for eliminating the redemption period altogether is strengthened by the very high bar that must be met in order to obtain a determination of abandonment. The property can be declared abandoned only upon a finding by the Court upon Motion of the plaintiff. The plaintiff must demonstrate by clear and convincing evidence based on testimony or sworn affidavit of neutral non-parties that the property has been abandoned for at least 90 days and that the debtor or any lawful occupant of the premises has not objected to the motion. Note that the debtor need not demonstrate that the property is not abandoned – the debtor need only oppose the Motion to defeat the Motion. Given the very high bar that has been set, there is no concern whatsoever that a property will be erroneously declared abandoned.

The Maine Credit Union League also encourages the Committee to modify proposed Section 6326 (3) (C) with respect to the reversal of the Court's finding of abandonment because that provision could undermine the benefits of the law and result in gamesmanship by debtors. Proposed Section 6326 (3) (C) provides as follows:

The court shall vacate the order under paragraph A [the finding of abandonment] if the mortgagor or a lawful occupant of the mortgaged premises appears in the action and objects to the order prior to the public sale provided for in section 6323.

There are multiple problems with this provision. First, the debtor can undo the finding of abandonment without making any showing other than filing an objection. In other words, the debtor need not demonstrate that the property is not abandoned – the debtor need only object after the court has already made a finding of abandonment. If

the debtor is to be given two bites at the apple, the debtor should have the burden of demonstrating that the court's ruling was wrong. Second, the debtor is permitted to undo the Court ruling at any time prior to the foreclosure sale even though the lender may have already incurred considerable expense, including publication costs, in advertising the foreclosure sale. The debtor's opportunity to challenge the finding of abandonment should expire upon entry of the foreclosure judgment and should not persist until the sale. As drafted, Part B of LD 1389 will provide a clever (or well represented) debtor with the opportunity to hold back and allow the finding of abandonment to enter and then threaten to upset the lender's foreclosure sale merely by filing an objection with the Court.

We also encourage the Committee to modify proposed Section 6326 (1) (B) with respect to the prerequisites to a Court's finding of abandonment because that provision is unduly restrictive and undermines the effectiveness of the proposed law. Proposed Section 6326 (1) (B) provides that a Motion seeking a determination of abandonment can be filed by the plaintiff only in a case where the debtor has not appeared in the action to defend the foreclosure. The problem with this hurdle is that a debtor may have appeared in the case and subsequently abandoned the property, but, as drafted, LD 1389 would render the Court powerless to make a finding of abandonment. Put another way, the issue should not be whether the debtor appeared in the case or did not appear in the case. The issue should be whether the property is abandoned and the Court should be able to make that determination on the merits even if the debtor has appeared in the case. It is also very important to recognize that debtors may appear and oppose the foreclosure merely by checking a box on the cover sheet that accompanies the foreclosure case. The effectiveness of LD 1389 will be lost because a mere check the box appearance will prevent the court from ever making a finding of abandonment. We understand the Attorney General's goal that the abandonment remedy should be

available only in an “uncontested” foreclosure proceeding, but we recommend a different definition of uncontested in a revised Section 6326(1) set forth below.

We propose the following changes to the amendment:

Section 6326 Order of Abandonment for residential properties in foreclosure.

1. Plaintiff Request. The plaintiff in a residential foreclosure action may present evidence of abandonment as described in subsection 2 and may request a determination pursuant to subsection 3 that the mortgaged premises have been abandoned if the premises are:

A. A residential property as described in section 6321-A subsection 2; and

B. The subject of an uncontested foreclosure action or an uncontested foreclosure judgment has been issued with respect to the premises ~~and a foreclosure sale with respect to the premises is pending pursuant to this subchapter.~~ An action or judgment is uncontested if:

(1) The mortgagor has not *or did not oppose a Motion for Summary Judgment filed by the plaintiff in the proceeding* ~~appeared in the action to defend against foreclosure;~~

(2) There has been no communication from or on behalf of the mortgagor to the plaintiff for at least 90 days showing any intent of the mortgagor to continue to occupy the premises or there is a document of conveyance or other written statement signed by the mortgagor, that indicates a clear intent to abandon the premises; and

(3) Either all mortgagees with interests that are junior to the interests of the plaintiff have waived any right of redemption pursuant to section 6322 or the plaintiff has obtained or has moved to obtain a default judgment against such junior mortgagees.

## **Part F – Relating to Residential Real Estate Property Preservation Company**

Part F introduces a new entity called a “residential real estate property preservation company”. This bill does not define residential real estate property preservation company but rather leaves that to the administrator at a future date. It further instructs the administrator, at that future date, to also adopt rules to implement this section. Without knowing what would constitute a residential real estate property preservation company, we are unable to support these provisions at this time.

Should the Joint Standing Committee nonetheless support adoption of Part F, please note that we believe there is a serious typographical error in the third sentence of proposed F-3, 32 MRS Section 11017 (4). As drafted, the sentence is as follows:

“The company shall inventory any unsecured items removed from the dwelling and immediately notify the appropriate consumer that the **dwelling** will be made available in a manner convenient to the consumer.”

We believe the sentence should read as follows:

“The company shall inventory any unsecured items removed from the dwelling and immediately notify the appropriate consumer that the **removed unsecured items** will be made available in a manner convenient to the consumer.”

## **Part G - Mediator’s Report**

The Maine Credit Union League also recommends a change to Part G of LD 1389 dealing with the report to be filed by mediators. Proposed Section 6321-A (13) would add to the required report by the mediator a statement of all agreements reached at the mediation and a statement whether the parties fulfilled their agreements, including whether the parties mediated in good faith. Because a finding of bad faith can lead to

sanctions, Subsection 13 should be clear that a mediator's report of bad faith is not conclusive and that parties have the right to a hearing before any such finding is adopted by the court. We propose the following language at the end of proposed Subsection (13):

"A mediator's recitation of the parties' agreements and/or a finding that a party failed to meet the requirements set forth in subsection 12 shall not be conclusive or binding on the Court. The parties may object to any matters included in the report by filing an appropriate pleading with the Court. No finding that a party violated the requirements of subsection 12 shall be made by the court without further notice and opportunity for hearing before the Court."

Thank you very much for the ability to testify today. I would be happy to answer any questions the Committee may have.

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