MAINE BANKERS
Association

Testimony of William S. Kany of the Maine Bankers Association
in Opposition to
LD 1444

AN ACT TO PREVENT FORECLOSURES WITHOUT STRICT COMPLIANCE WITH NOTICE REQUIREMENTS

Good morning, Senator Carney, Representative Kuhn, and members of the Judiciary Committee. My name is William Kany. I live in Saco. I am the Executive Vice President and the in-house attorney for Saco and Biddeford Savings Institution. I have been a Maine licensed attorney since 1984, and I have handled foreclosures throughout my career. In fact, I still handle Saco and Biddeford Savings' foreclosures. I am also the chair the Maine Bankers Association's Legislative Committee and I previously chaired the MBA's Collection Committee. As a result, I have been before legislative committees discussing foreclosures for over 13 years now. I am here today testifying in opposition to LD 1444.

Section 6111 was passed to make sure that people who convey mortgages related to their primary residences will receive notice of their default and be provided with 35 days in which to bring their mortgage current. Section 6111 sets forth what should be in the notice, where and how it should be mailed, and an itemization of what must be paid to cure the existing default. It was designed to provide clarity to such borrowers regarding their obligations as a last effort to let a borrower cure before a foreclosure is commenced.

Beginning after the mortgage crisis in 2008 and continuing with Bank of America v. Greenleaf in 2014 and the cases that followed, Section 6111 became weaponized. There was an explosion of consumer attorneys defending foreclosure actions. Prior to 2008 it was very rare that foreclosures were contested. Groups like Maine Attorneys Saving Homes (MASH) were formed to organize a defense bar against foreclosures.

The reality is that in almost 100% of foreclosure cases the borrowers are in default. They have failed to pay their mortgage payments on a timely basis, and/or they have failed to pay their real estate taxes or insurance premiums. It is extremely difficult to defend such cut and dried cases other than working with borrowers and their lenders to reach some type of workout solution.

Section 6111 became a focal point. Consumer advocates were able to convince courts to put some fine points on what was expected in a 6111 notice. They were then able to convince the courts that a 6111 notice and the subsequent foreclosure action was an acceleration of the entire debt. If the 6111 notice was in anyway defective, the argument was that the lender should lose and since they had accelerated the whole debt, the lender is barred by res judicata from filing another foreclosure against the same borrowers. With no second bite at the apple, the cases eventually held that the borrowers got a free house. That was true until last year when the Maine Supreme Court in the Finch and Moulton cases ruled that if the 6111 was defective there was no acceleration of the debt and the lender can start again.

LD 1444 is an attempt to undo Finch and Moulton and again make Section 6111 a trap for the unwary. It is an effort to restore one of the only technical defenses to a foreclosure action to provide defense counsel

with both leverage and the opportunity to argue for a free house. Clearly, that was never the intent of Section 6111.

LD 1444 takes 6111 to an extreme. If a mortgage lender does not strictly comply with Section 6111 which is undefined, the borrower gets a free house. They are also proposing to delete the acceleration language to prevent the courts from ruling that a defective 6111 notice prevents acceleration. It is an effort to create an incredibly penal statute that erases thousands of dollars of mortgage debt in many instances due to a technicality.

Take the J.P. Morgan Mortgage Acquisition Corp. v Camille Moulton case. In that case the 6111 notice included an amount to cure of $20,930.04 but then referred to an Exhibit A that had a breakdown of the amount owed being $20,257.66. The difference was the credit of $672.38 which as an amount being held in suspense by the lender. It was true that the total due was $20,930.04, but the credit was then provided to reduce the amount to cure by $672.38. Because those amounts were different the lower court ruled the 6111 notice was defective, ruled against the mortgage holder and stated that they could not foreclose again giving Ms. Moulton a free house.

LD 1444 would restore those extreme results by amending a statute originally intended to provide a 35 day notice of a right to cure. However, LD 1444 takes it a step further because it makes this change retroactive to "all foreclosure judgments, orders or dismissals entered in favor of a mortgagee." That retroactivity will cause title chaos.

Assuming the Moulton foreclosure is now complete, the house has been sold, and a new owner is living there. This statute would let Ms. Moulton assert that she owns the house free and clear. The ramification for the unsuspecting new owner is huge and all because of a $672.38 discrepancy which arguably was not an error at all. How many such disruptions would that cause, I am not sure anyone knows.

Section 6111 should be left as it was intended, a means to inform borrowers of their right to cure. It should not be a trap for those who do not strictly comply. It should never be used to provide free houses to individuals who have defaulted on their mortgage obligations. Such a result was never the intent of Section 6111.

Members of the Maine Bankers Association are committed to working with their customers to resolve mortgage issues. That is the reason our bank has only foreclosed on one primary residence in the last 5 years. However, we all make mistakes from time to time, and the prospect of a mistake result in a huge financial loss for our bank is daunting. The further prospect of retroactively undoing foreclosure sales is terrifying. Accordingly, we would urge you to vote ought not to pass related to LD 1444.