Maine Credit Union League

2 Ledgeview Drive · Westbrook, ME 04092
Mailing Address: P.O. Box 1236 · Portland, ME 04104
207-773-5671 · 1-800-442-6715
www.mainecul.org

Testimony by Daniel Cummings
In Opposition to LD 1444

An Act to Prevent Foreclosures Without Strict Compliance with Notice Requirements

Committee on the Judiciary
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Senator Carney, Representative Kuhn, and distinguished members of the Committee on the Judiciary, my name is Daniel Cummings. I am an attorney at Norman, Hanson, DeTroy, and I provide legal counsel to the Maine Credit Union League. I have been practicing law for over 35 years, and I have represented both lenders and borrowers, as well bankruptcy debtors and creditors, in various aspects of debtor-creditor relationships, including foreclosures.

The Maine Credit Union League is the trade association for Maine's 48 credit unions and over 750,000 members statewide. Credit unions are not-for-profit, cooperative financial institutions that return profits earned to their depositors in the form of dividends and advantageous rates. I am submitting testimony on the League's behalf in opposition to LD 1444, An Act to Prevent Foreclosures Without Strict Compliance with Notice Requirements.

Although the League appreciates that the proponents want to protect consumers from bad actors, this bill misses the mark on that score and goes too far.

The title of bill, to start, is a bit misleading, as it is not limited to "preventing foreclosures" but rather it goes well beyond that concept.

This bill would require that financial institutions perform to exacting standards or risk losing their entire interest in the property serving as collateral for the loan. LD 1444 would return foreclosures to the chaotic environment to that of 2017 to 2024 whereby the "free house" rule prevailed even where an error, though small, technical, and unintended, could result in a defaulting borrower being relieved of their mortgage obligation and granted title to their house without having to pay for it. This practice was applied without consideration for the magnitude of the harm on the consumer, nor on the intent of the mortgagee.

Another slightly misleading point in the proposed bill appears in the "Summary" section, in which it states, "this was the law prior to the decision of the Supreme Judicial Court in *Finch v. U.S. Bank, N.A.*, 2024 Me 2." This seems to imply that the *Finch* case was a sudden departure from established law. Although it was a departure, it was a departure from new law that in fact had deviated from prior long-standing law, with *Finch*, and others such as *J.P. Morgan Mortgage Acquisition Corp. v. Moulton*, 2024 ME 13, getting Maine law back in line with what had been for decades before cases such as *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190 and *Pushard v. Bank of Am., N.A.*, 2017 ME 230 resulted in sharp deviations from long-established law.

In *Pushard*, the Law Court ruled that a bank who failed to adhere to strict compliance with the notice requirements of 14 M.R.S. § 6111 was required to

discharge the mortgage, resulting in the borrower, who failed to pay his debt, owing the property free of the mortgage and free from any liability for the unpaid debt. The decision in *Finch* was one case, along with *Moulton* and others, that brought the law back to where it was and to a more measured approach. The *Finch* court explained that the "effect of *Pushard* is that a ***typographical error*** in a section 6111 notice issued before the commencement of a foreclosure action can result in a ***literal forfeiture of the lender's entire interest in the note and mortgage and a transfer of title to the borrower.***" *Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 5, 307 A.3d 1049, 1055 (emphasis added).

The Law Court further explained that overturning *Pushard* would avoid the "disproportional and draconian nature of that result [and], the doubtful legal premise that it rests on" combined with "the fact that no other jurisdiction has adopted either that result or that premise combine to call our *Pushard* analysis into question." *Id.*

The Law Court found their previous ruling, which would be codified in law in LD 1444, to be based on flawed legal analysis and ultimately unjust. In addition, the law would continue to make Maine an outlier in the realm of mortgage law. The Court noted that "[b]ased on section 20(2) of the Restatement and similar authority, courts around the country have concluded that a prior judgment against a foreclosing lender based on the lender's failure to comply with a notice precondition to bringing suit does not preclude a subsequent foreclosure action. *See, e.g., State St. Bank & Tr. Co. v. Badra*, 765 So. 2d 251, 254-55 (Fla. Dist. Ct. App. 2000); *PNC*

Bank, Nat'l Ass'n v. Richards, No. 11AP-275, 2012 WL 1245719, at *3-6 (Ohio Ct. App. Apr. 10, 2012); *Cap. Invs., Inc. v. Lofgren*, 81 Or.App. 93, 724 P.2d 862, 864-65 (1986)." *Id.* at 1062.

Credit unions feel this harm acutely. As mutually owned financial institutions their losses are felt throughout their membership and this bill would heighten the risk of loss. Credit unions are significantly smaller than nationwide banks and are significantly smaller than even statewide banks; nonetheless, they are vital to maintaining the vibrant and competitive financial services market in Maine. In a smaller institution, the loss of a foreclosure judgment is more significant than in a large one, which is why Maine credit unions work hard to find a way to avoid foreclosure with their members. This law would create an increased risk to credit unions and harm the lending environment in Maine, as the lending institution will have to take into account the "typo risk" in addition to the normal credit risk.

All this is unnecessary as there are other methods to address those mortgagees who are "bad actors" as opposed to those who make mistakes or those that are even sloppy. Again, the Law Court explained how:

> Another relevant factor is whether the precedent promotes sound public policy and addresses social needs. . . . Drastic foreclosure sanctions are sometimes defended . . . on the ground that foreclosing lenders and their servicers will
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> otherwise bring repeated failed foreclosure actions. . . . However, the Legislature in 2019 enacted a statute imposing a duty on

> lenders and servicers to act in good faith and authorizing courts to impose sanctions for breach of the duty, including damages and dismissal of a foreclosure action. . . . [14 M.R.S. § 6113]. We should not assume the courts will not use their authority to deal with abusive foreclosure practices.

Finch v. U.S. Bank, N.A., 2024 ME 2, ¶ 47, 307 A.3d 1049, 1067–68.

While we appreciate that the proponents of this bill are looking to protect consumers, we would argue that this bill would create an unjust outcome and would harm the financial services industry as a whole. Again, the *Finch* court succinctly noted "[U]nder *Pushard*, just one defective notice in one foreclosure action can result in a 'free house,' as this case illustrates. How many failed foreclosure actions is too many? The answer has to be more than one. A 'free house' forfeiture, if it is ever decreed, should be reserved for conduct worse than issuing a single defective notice.

Another faulty provision in the bill is Section 2 seeking retroactive application to "all foreclosure judgments, orders or dismissals entered in favor of a mortgagee." What does that even mean? What if the appeal period expired with no appeal? What if the redemption period expired? What if the property was sold at auction?

All that is confusing enough but then adding "all . . . orders . . . in favor of a mortgage" really exacerbates the confusion. Again, what does that even mean? What is it intended to accomplish? Trying to apply what would be very bad legislation on its own retroactively would be calamitous.

I appreciate the opportunity to share my views and urge an "Ought Not To Pass" vote on this bill and I am happy to answer any questions you might have.