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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: MARGERY KANAMU-KALEHUANANI KEKAUOHA-ALISA, Debtor, _____ AMERIQUEST MORTGAGE COMPANY; JPMC SPECIALITY MORTGAGE LLC, fka WM SPECIALITY MORTGAGE LLC, Appellants and Cross-Appellees, v. MARGERY KANAMU-KALEHUANANI KEKAUOHA-ALISA, Appellee and Cross-Appellant.	BAP Nos. HI-08-1166-JuPaD HI-08-1237-JuPaD (Cross-Appeals) Bk. No. 05-01215 Adv. No. 06-90041 **M E M O R A N D U M**[1]

Argued by Video Conference
and Submitted on March 18, 2009

Filed - April 8, 2009

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Honorable Robert J. Faris, Chief Bankruptcy Judge, Presiding

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Before: JURY, PAPPAS and DUNN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellee and Cross-Appellant Margery Kanamu-Kalehuanani Kekauoha-Alisa ("Debtor") filed an adversary proceeding against Appellants and Cross-Appellees Ameriquest Mortgage Company ("Ameriquest") and JPMC Speciality Mortgage LLC ("JPMC") (collectively, "Appellants") alleging state-law causes of action arising out of the nonjudicial foreclosure sale of her real property in violation of Hawaii law.

After a trial on the merits, the bankruptcy court entered judgment in Debtor's favor setting aside the foreclosure sale, ordering the property reconveyed to her and awarding her $417,761.66 in treble damages and $277,120.32 in attorneys' fees and costs.

Appellants seek reversal of the judgment for essentially two reasons. First, Appellants assert that the bankruptcy court lacked subject matter jurisdiction over Debtor's state-law claims. Second, they argue that the bankruptcy court erroneously construed and wrongly applied Haw. Rev. Stat. ("HRS") § 667-5(d)[2], which authorizes the postponement of a previously noticed foreclosure sale by "public announcement." As a result of these errors, Appellants contend that the court's decision setting aside the foreclosure sale and finding a breach of the mortgage contract and further finding a violation of the Hawaii Unfair and Deceptive Practices Act (the "UDPA") was flawed.

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[2] HRS § 667-5(d) provides in relevant part: "Any sale, of which notice has been given ..., may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf."

Debtor filed a cross-appeal on the sole issue of whether the bankruptcy court erred in its application of Hawaii law when awarding her attorneys' fees as the prevailing party in her breach of contract claim against Appellants.

We rule that the bankruptcy court had subject matter jurisdiction over Debtor's state-law claims. However, we conclude that the bankruptcy court misconstrued HRS § 667-5(d). As a result, the court applied an erroneous legal standard when ruling on Debtor's state-law claims.

For the reasons more fully explained below, WE REVERSE the judgment on Debtor's state-law claims. However, WE REMAND the proceeding to the bankruptcy court so that it may determine whether Debtor is entitled to recover under her 11 U.S.C. §§ 542 and 543[3] claims for turnover of surplus proceeds from the sale.

Because of our reversal on Debtor's state-law claims, Debtor's cross-appeal on the amount of the attorneys' fee award is moot.

I. FACTS

Debtor owned real property in Paauilo, Hawaii.[4] She

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

[4] Debtor testified that she resided in the home from 1992 to 1996. She testified that thereafter she "remained" in the house, but commuted between the Big Island and Honolulu because of work. Tenants had occupied the property since February 2001, but Debtor did not charge them rent until her bankruptcy filing.

refinanced her mortgage on the property with a $127,500 loan from Ameriquest in 2002. Thereafter, JPMC bought the loan, but Ameriquest remained the mortgagee of record and serviced the loan for JPMC.[5]

Over the next two years, Debtor defaulted on the loan eight times, which eventually caused Ameriquest to begin nonjudicial foreclosure proceedings on the property. Three days before the scheduled foreclosure sale, Debtor filed her chapter 13 petition on May 10, 2005.

In her Schedule A, Debtor estimated the value of the Property at $350,000. She claimed a $20,000 exemption in the Property under § 522(d)(5). After the chapter 13 trustee objected, Debtor reduced her exemption to $4,180 and then to $680 in a second amended Schedule C.

Debtor's thirty-six month plan provided for monthly payments of $724.85, which included payment of the prepetition mortgage arrearages and 100% to unsecured creditors.[6] Debtor continued to make her postpetition mortgage payments outside the plan. The court confirmed Debtor's chapter 13 plan on July 8, 2005.

A. The September 23, 2005 Postponement of the Foreclosure Sale

Ameriquest hired a law firm to conduct the foreclosure sale

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[5] Ameriquest reorganized its operations subsequent to the foreclosure sale and one of its affiliates, AMC Mortgage Services, Inc. ("AMC"), undertook the servicing of the loan.

[6] Debtor owed JPMC $12,381.67 in prepetition arrears. She listed one unsecured creditor in her Schedule F with a debt of $8,277.

of the property prior to Debtor's bankruptcy.[7] The law firm continued the sale numerous times due to Debtor's bankruptcy filing.[8]

On September 23, 2005, a secretary from the law firm went to the auction site to announce the postponement of the foreclosure sale to December 2, 2005. HRS § 667-5(d) authorizes a postponement by "public announcement."

It is undisputed that the secretary did not make a "public announcement" within its commonly understood or dictionary meaning. Instead, her testimony reflects that she spoke to a few people who were near the flag pole at the auction site because she believed they could have been there for her sale, but they were not. It is also undisputed that there was another auction taking place near the flag pole, so she did not speak to everyone in the vicinity.

The secretary also testified that she waited at the flag pole for approximately twenty to twenty-five minutes after the scheduled auction time. By that time, the other auction had been completed, the gathered people had left, the area was deserted and she left.

B. The Default and Relief From Stay

Debtor defaulted on her postpetition mortgage payments. As a result, on November 1, 2005, Ameriquest moved for relief from

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[7] HRS § 667-5(a) requires that a mortgagee must be represented by a licensed attorney when it seeks to foreclose under a power of sale contained in a mortgage.

[8] The foreclosure sale was postponed from (a) May 13, 2005 to June 17, 2005; (b) June 17, 2005 to August 26, 2005; (c) August 26, 2005 to September 2, 2005; (d) September 2, 2005 to September 23, 2005; and (e) September 23, 2005 to December 2, 2005.

the automatic stay to complete the foreclosure. The court granted the unopposed motion by order entered on November 21, 2005.

The property was sold at public auction on December 2, 2005. Debtor did not attend the sale, cure her defaults or take any action to avoid the foreclosure. No bidders attended the sale. JPMC bought the property by credit bid of $147,606.17.

Debtor converted her case to chapter 7 on December 21, 2005. Thereafter, Ameriquest recorded an Affidavit of Foreclosure and conveyed the property to JPMC by quitclaim deed on December 27, 2005.[9]

C. The Hawaii Circuit Court Ejectment Action

Debtor and her tenants remained in possession of the property after the foreclosure sale. Subsequently, on January 5, 2006 JPMC commenced an ejectment action in the Hawaii state court to evict Debtor and the other occupants from the property. None of the defendants, including Debtor, filed an answer to the ejectment complaint.

After its request for default judgment was rejected by the court, JPMC moved for summary judgment on March 2, 2006. Neither Debtor nor the other defendants appeared or filed any reply memoranda. On April 11, 2006, the state court entered its "Findings of Fact; Conclusions of Law; and Order Granting Plaintiffs' Motion for Summary Judgment As against All Defendants Filed on March 2, 2006." A Writ of Possession and Judgment for Possession were entered on the same date. As part of its ruling,

[9] Under Hawaii law, the foreclosure was deemed completed when the Affidavit of Foreclosure was recorded.

the court found that the sale met all statutory requirements for nonjudicial foreclosures under HRS §§ 667-5 through 667-10.

Despite not participating in the action prior to judgment, Debtor appealed the state court judgment on May 2, 2006, contending that the foreclosure violated Hawaii law in numerous respects. The appeal is still pending before the Hawaii Intermediate Court of Appeal.

D. The Adversary Proceeding

Debtor filed an adversary proceeding against Appellants on April 26, 2006 (prior to her appeal of the state court ejectment action). Her second amended complaint asserted eleven causes of action.[10] Dispositive motions[11] left six claims remaining and narrowed the issues for trial, with the focus placed on whether Appellants had conducted the postponement of the September 23rd foreclosure sale in violation of HRS § 667-5(d).

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[10] Her complaint uses the terminology "causes of action." For brevity, we sometimes refer to her "causes of action" as claims (as in claims for relief).

[11] The court granted summary judgment in Appellants' favor and dismissed Debtor's first three causes of action, which were based on alleged violations of the automatic stay, by order entered on December 15, 2006. The court granted summary judgment in Appellants' favor and dismissed Debtor's sixth cause of action, which alleged that Ameriquest conveyed the property to JPMC with actual intent to hinder, delay, or to defraud her out of her claim of exempt equity in the property in violation of the Uniform Fraudulent Transfer Act (HRS chapter 651(C)), by order entered on June 15, 2007. By order entered on June 22, 2007, the court denied Debtor's request for leave to amend her complaint to add another cause of action, which requested an avoidance of security interest under §§ 522 and 544, and granted her request to amend to assert a claim against JPMC for violation of the stay.

Debtor's three state-law causes of action for breach of the mortgage contract, violation of HRS § 480-2[12], and avoidance of the foreclosure sale were all based on Appellants' alleged violation of HRS § 667-5(d). The remaining three claims were under the Bankruptcy Code, for injunctive relief under § 105 preventing JPMC from transferring the property, turnover of property to the estate under §§ 542 and 543 which was based on Debtor's allegation that there were surplus proceeds from the sale, and violations of the automatic stay against JPMC.

E. Debtor's Agreement With the Chapter 7 Trustee

On April 8, 2008, Debtor filed a motion to approve her agreement with the chapter 7 trustee guaranteeing payment of the estate's allowed claims. According to the motion, Appellants claimed in their trial brief that the chapter 7 trustee had the exclusive right to prosecute Debtor's state-law claims because they were property of her bankruptcy estate.

Debtor disputed whether the state-law claims were property of her estate because they arose and accrued postpetition and were based on property which had revested in her postconfirmation and preconversion. However, in an abundance of caution, Debtor agreed with the trustee that the allowed claims of the chapter 7 estate would be satisfied first from the proceeds of any recovery from her adversary proceeding. The parties further agreed that if the recovery was insufficient, Debtor's counsel would be personally liable for the deficiency. The bankruptcy court

[12] HRS § 480-2(a) provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

approved the agreement by order entered on June 13, 2008.[13]

F. The Adversary Proceeding Trial

The bankruptcy court conducted the trial on April 7, 9, 10, 14, and 15, 2008. After trial, the bankruptcy court determined that Appellants improperly handled the September 23rd postponement due to the absence of a "public announcement" in violation of HRS § 667-5(d). On June 23, 2008, the bankruptcy court entered its Findings of Fact and Conclusions of Law disposing of the issues. The bankruptcy court determined that Appellants breached the mortgage contract and violated the UDPA, HRS § 480-2. The court set aside the foreclosure sale and awarded Debtor treble damages of $417,761.66 (plus $2,700 per month from July 2008 until Debtor regained possession of the property) and attorneys' fees and costs of $277,120.32. The bankruptcy court concluded that Debtor's claims based on §§ 542 and 543 were moot because it ordered Appellants to reconvey the property to Debtor. The court found in favor of JPMC on the § 362 claim. The Findings of Fact and Conclusions of Law were amended on September 3, 2008, and published in Kekauoha-Alisa v. Ameriquest Mortgage Co. (In re Kekauoha-Alisa), 394 B.R. 507 (Bankr. D. Haw. 2008).

Appellants timely appealed the judgment. Debtor timely filed her cross-appeal on the issue of whether the bankruptcy

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[13] The motion was filed under "notice and opportunity to be heard" procedures. No objections were filed and an order ultimately was entered post-trial but before entry of the Findings and Conclusions. There may be some question whether the motion was properly noticed as a compromise since in essence it amounted to a sale of the estate's causes of action to Debtor. See Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415 (9th Cir. BAP 2003).

court properly calculated the attorneys' fee award for breach of contract under Hawaii law.

As discussed below, we hold that the bankruptcy court erred in setting aside the foreclosure sale and ordering the property reconveyed to Debtor. We conclude that there was insufficient evidence to establish any causal connection between the procedural irregularity regarding the postponement of the foreclosure sale and Debtor's alleged damages. Finally, we conclude that the bankruptcy court erred in finding that the procedural irregularity rose to the level of an "unfair" or "deceptive" act or practice under the UDPA.

II. JURISDICTION

The bankruptcy court had "related to" jurisdiction over Debtor's state-law claims under 28 U.S.C. §§ 1334 and 157(a) and core jurisdiction over her bankruptcy claims under § 157(b)(2)(A),(E) and (O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court had subject matter jurisdiction over Debtor's state-law claims.

B. Whether the bankruptcy court erroneously construed HRS § 667-5(d), which authorizes a "public announcement" to postpone a previously noticed foreclosure sale.

C. Whether the bankruptcy court erred in concluding that Appellants' failure to make a "public announcement" in violation of HRS § 667-5(d) justified setting aside the foreclosure sale.

D. Whether the bankruptcy court erred in concluding that Appellants' violation of HRS § 667-5(d) constituted a breach of

the mortgage contract which proximately caused Debtor's injuries.

E. Whether the bankruptcy court erred in concluding that Appellants' violation of HRS § 667-5(d) constituted an unfair or deceptive act or practice under the UDPA, which entitled Debtor to treble damages under that statute.

IV. STANDARDS OF REVIEW

We review questions of subject matter jurisdiction de novo. Atty. Gen. of the State of Mont. v. Goldin (In re Pegasus Gold Corp.), 394 F.3d 1189, 1193 (9th Cir. 2005).

We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo. Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008).

Causation is a question of fact. Vollendorff v. United States, 951 F.2d 215, 217 (9th Cir. 1991). Whether an unfair or deceptive trade practice exists is also a question of fact. Courbat v. Dahana Ranch, Inc., 141 P.3d 427, 436 (Haw. 2006). We review factual findings for clear error. In re PW, LLC, 391 B.R. at 32. Clear error exists when, after examining the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been committed. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

We are obliged to accept the bankruptcy court's findings of fact unless clearly erroneous, but we are not required to accept its conclusions as to the legal effect of those findings. Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001).

V. DISCUSSION

We address first Appellants' challenges to the existence and exercise of the bankruptcy court's subject matter jurisdiction over Debtor's state-law claims because "[a] judgment entered by a court without jurisdiction is void." Bentley v. Bank of Coronado (In re Crystal Sands Props.), 84 B.R. 665, 667 (9th Cir. BAP 1988). Consequently, we must assure ourselves that we have jurisdiction over this appeal before we proceed.

A. The Bankruptcy Court Had "Related to" Jurisdiction

The bankruptcy court's "arising under," "arising in" and "related to" jurisdiction derives from two statutes: 28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The district courts may, in turn, refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 U.S.C. § 157(a).

The bankruptcy court's "related to" jurisdiction also includes the district court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367[14] "over all other claims that are so related to claims in the action within [the court's] original

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[14] 28 U.S.C. § 1367(a) provides in pertinent part: "... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Pegasus Gold Corp., 394 F.3d at 1195 ("Where a federal claim exists, supplemental jurisdiction may be applied to state-law claims that arise out of a 'common nucleus of operative fact.'").

Claims for breach of contract or violation of state statutes do not arise under the Bankruptcy Code, nor do they arise in a bankruptcy case. They are not created or governed by federal law, exist outside bankruptcy, and can be resolved fully in the state court. Applying these standards, Debtor's state-law claims are not core. See Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.), 205 B.R. 231, 237 (9th Cir. BAP 1997). Her state-law claims, however, fell squarely within the scope of the bankruptcy court's "related to" jurisdiction because they were causes of action which Debtor owned that became property of her estate. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) ("Proceedings 'related to' the bankruptcy include causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541."); see also Rosner v. Worcester (In re Worcester), 811 F.2d 1224, 1229 (9th Cir. 1987)(same).

We decline to review Appellants' challenge to the bankruptcy court's exercise of "related to" jurisdiction over Debtor's state-law claims. Appellants never raised the issue that the claims were not property of Debtor's estate in the bankruptcy court. Freytag v. C.I.R., 501 U.S. 868, 894 (1991)(The word "review" presupposes that a litigant's arguments have been raised and considered in the trial court.). To the contrary, they asserted the state-law claims were estate property.

Appellants' trial brief clearly demonstrates that they argued that Debtor's state-law claims were property of her estate under §§ 541(a)(1) and (7). They contended that Debtor's state-law claims were sufficiently rooted in her pre-bankruptcy past based on their view that the claims were "related to" the prepetition mortgage contract and prepetition notice of foreclosure. They therefore maintained that the chapter 7 trustee was the proper party to assert the state-law claims.

Their argument prompted Debtor to seek an agreement with her chapter 7 trustee, guaranteeing payment of the estate's claims. The bankruptcy court approved Debtor's unopposed motion seeking approval of the agreement.

In an about-face, Appellants now assert that Debtor's state-law claims "were never property of the estate." We will not condone the practice of "sandbagging" when Appellants pursued their previous argument before the bankruptcy court, only to claim reversible error now due to an unfavorable outcome. Freytag, 501 U.S. at 894. Based on their previous position, we conclude that Appellants failed to preserve the issue for the argument they now assert; it has been waived. Burnett v. Resurgent Capital Servs. (In re Burnett), 435 F.3d 971, 976 (9th Cir. 2006).

Accordingly, we do not disturb the bankruptcy court's finding that Debtor's state-law claims were property of her estate. We conclude that the court properly exercised its "related to" jurisdiction over Debtor's state-law claims.[15]

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[15] We need not address Appellants' argument that the bankruptcy court did not have supplemental jurisdiction over Debtor's state-law claims because we conclude that the bankruptcy

(continued...)

B. The Rooker-Feldman Doctrine is Inapplicable

Appellants maintain that Debtor's state-law claims should be precluded under the Rooker-Feldman doctrine because they constitute an improper attack on the state court ejectment judgment. The Rooker-Feldman doctrine is a preclusion doctrine which prohibits federal courts from exercising appellate review over final state court judgments. Reusser v. Wachovia Bank, N.A., 525 F.3d 855, 859 (9th Cir. 2008). In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005), the Supreme Court explained that "the Rooker-Feldman doctrine . . . is confined to . . . cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the [bankruptcy] court proceedings commenced and inviting [bankruptcy] court review and rejection of those judgments."

Although the Debtor here lost in the state court, the claims were property of the bankruptcy estate. As a consequence, the Rooker-Feldman doctrine may not be invoked against the chapter 7 trustee because he was not a party to the prior state court judgment. Lance v. Dennis, 546 U.S. 459, 464-65 (2006). We conclude that the doctrine is inapplicable.

C. Violation of HRS § 667-5 and Setting Aside the Foreclosure Sale

To resolve the majority of the remaining issues Appellants raise on appeal, we consider whether the bankruptcy court

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[15](...continued)
court properly exercised "related to" jurisdiction. Moreover, Appellants' argument has been waived. See Acri v. Varian Assocs., 114 F.3d 999 (9th Cir. 1997)(en banc)(court is not obliged to make a 28 U.S.C. § 1367(c) analysis when no one has asked it to do so).

properly construed and applied HRS § 667-5(d) to the facts of this case.

The construction of the statute is a question of law that we review de novo. In re PW, LLC, 391 B.R. at 32. Our analysis under the general rules of statutory construction begins with the language of the statute itself. United States v. Ron Pair Enters., 489 U.S. 235, 240-41 (1989).

The relevant text of HRS § 667-5 states:

> (a) When a power of sale is contained in a mortgage, and where the mortgagee . . . desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee . . . shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:
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> (1) Give notice of the mortgagee's . . . intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and
>
> (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.
>
> (b) Copies of the notice required under subsection (a) shall be:
>
> (1) Filed with the state director of taxation; and
> (2) Posted on the premises not less than twenty-one days before the day of sale.
>
> . . .
>
> (d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. . . .

Subsection (d) does not provide any guidance as to what constitutes a "public announcement."

The bankruptcy court adopted the dictionary definition of "announce" as "to make known publicly: PROCLAIM" and "announcement" as "public notification or declaration." Based on this definition, the court concluded that the secretary's efforts to comply with the statute by speaking to people individually in order to ascertain whether they were present for the auction did not amount to a "public announcement." The court also construed Hawaii case law to require strict compliance with the notice requirements under the statute. For these reasons, the court set aside the sale.

While dictionary definitions may be helpful, they are not controlling. In construing the plain language of the statute, we should not overlook the fair and reasonable construction of the term "public announcement" and lose sight of the object for which the foreclosure statute was designed.

We consider the text of the statute and its language as a whole to determine the object and purpose of HRS § 667-5(d). HRS § 667-5(a)(1) requires that the notice of the mortgagee's intention to foreclose be made by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies while subsection (a)(2) requires the attorney for the mortgagee to provide any notices and do all acts as are authorized or required by the power contained in the mortgage. However, under subsection (d), once these requirements are met, the sale may be postponed from time

to time by "public announcement." There are no further requirements to publicize the sale.

Construing the statute as a whole, it is evident that the primary purpose for making the "public announcement" is to inform those who appeared at a foreclosure sale that it has been postponed. The term "public announcement" should be interpreted in a manner that achieves this purpose, keeping in mind that the legislature would not require a futile act. See Ohio v. Roberts, 448 U.S. 56, 74 (1980)("The law does not require the doing of a futile act."). We conclude that any mode of communication that reasonably achieves the spirit and purpose of the "public announcement" requirement ought to suffice.

The bankruptcy court primarily relied on Silva v. Lopez, 5 Haw. 262 (1884), and Ulrich v. Sec. Inv. Co., 35 Haw. 158 (1939) for its determination that the foreclosure notice provisions in the statute must be strictly followed. In Silva, the mortgagor brought an action to set aside a sale under a power in a mortgage of real and personal property on grounds that the sale was not advertised as required by the power, or initiated as provided by the mortgage, and was improperly conducted. The power provided that the sale shall be at public auction, "first giving three weeks notice in the English and Hawaiian languages in two newspapers published and printed in Honolulu, of the time and place of such sale." The first advertisement was made in the Hawaiian Gazette of June 4th, Wednesday, announcing the sale for June 24th, Tuesday, the intervening time being only twenty instead of twenty-one days. Because the sale occurred one day early, the court found that the notice of sale was insufficient.

In addition, the mortgagor argued that auctioning the livestock in town where potential bidders could not inspect it breached an implied condition in the mortgage that the sale be conducted to the "highest advantage" of the mortgagor. Id. at 263. The court agreed, holding that the livestock auction should have been held at the ranch because "the law requires the mortgagee, in the exercise of his power, to use discretion in an intelligent and reasonable manner, not to oppress the debtor or to sacrifice his estate." Id. at 265. The court set aside the sale.[16]

Ulrich involved a Honolulu attorney who owed $1,500 to his law partner, secured by a chattel mortgage assigning the borrower's interest in the general partnership and his one-half interest in all fees to be earned by the firm. When the borrower defaulted on the debt, the creditor-partner exercised a power of sale in the mortgage and held an auction where he sold the partnership interest to himself for $250 and sold the unearned fees to a nominee for $100. The foreclosing partner did not disclose prior to the auction that the law firm held a claim for fees with an estimated value of $200,000 in a case on which the

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[16] The Silva court, however, rejected the mortgagor's other challenges to the irregularity of the sale: first, that the mortgage authorized and empowered mortgagee to enter into and take possession of the property and chattels mortgaged upon failure of payment, which was not done; and, second, that the plaintiffs' solicitor bought several lots of the property sold, which he was unauthorized to do by law. The court found that the mortgage authorized and empowered the mortgagee to enter into and take possession, but did not require it to do so. Additionally, the court found that as long as the sale was fairly conducted, there was no prohibition on the mortgagee or his solicitor from buying the property.

mortgagor-partner had worked for more than a decade. Id. at 166, 173. The Hawaii Supreme Court observed that the "legal duties imposed upon the mortgagee required it to use all fair and reasonable means in obtaining the best prices for the property on sale." Id. at 168. Because the foreclosing partner took "wrongful and unfair advantage" of his partner, the court held that the sale must be set aside. Id.[17]

Silva and Ulrich, do not address the precise issue at hand. The Silva court provided no rationale as to why strict, rather than substantial, compliance with the notice provision under the power contained in the mortgage was required nor did it discuss whether the mortgagee had been prejudiced by the sale occurring one day early. Furthermore, the defect in the notice requirement was coupled with another irregularity — the livestock was not available for inspection at the auction site.

Ulrich demonstrates that unfair or wrongful conduct is grounds for setting aside a foreclosure sale. But this holding does not provide support for concluding that strict, rather than substantial, compliance with the notice provisions is required.

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[17] Any alleged inadequacy of the price realized on a property at sale under a power contained in a mortgage is not by itself considered sufficient cause for setting aside the sale. Maile v. Carter, 17 Haw. 49, 53 (1905). Debtor previously alleged that Appellants breached their common law duty to obtain the best possible price for the property. After analyzing Silva and Ulrich, the court found that Debtor had not "shown conduct by either of the defendants that approaches the unreasonableness of the mortgagee's actions in Silva or the wrongful and unfair advantage taken by the mortgagee in Ulrich. There is no evidence that Ameriquest tried to keep the sale secret as in Ulrich, or that it departed from customary sales practices and failed to give purchasers adequate information about the assets being sold, as in Silva." See Kekauoha-Alisa v. Ameriquest Mortgage Co. (In re Kekauoha-Alisa), 2007 WL 1752266 at *7 (Bankr. D. Haw. 2007).

In short, these cases do not address whether trivial or technical irregularities in conducting a foreclosure sale alone justify setting it aside.

Debtor's claim for violation of HRS § 667-5 presents a novel issue of Hawaii state law. The state precedents that we have examined are not controlling. Accordingly, "we must try to predict how the highest state court would decide the issue." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1548 (9th Cir. 1989). In determining how the Hawaii Supreme Court would decide the issue before us, we may look to pertinent decisions from other jurisdictions that have similar statutes and procedures. Id. at 1548.

Our survey of the case law in this area demonstrates that a procedural irregularity does not justify setting aside a foreclosure sale unless it is significant, material, or causes prejudice or otherwise contributes to the inadequacy of the price or other injury. For example, in construing a statute similar to HRS § 667-5(d)[18], the Ninth Circuit addressed the failure of a trustee under a deed of trust to make a "public declaration" regarding the postponement of a sale under California law. Giannotta Props., Inc. v. Barbaccia, 146 Fed. Appx. 97,97 (9th Cir. 2005). Giannotta Properties, Inc. ("GPI") sought to have a foreclosure sale set aside on the ground that the postponement failed to comply with the statutory requirement that notice of

[18] Cal. Civ. Code § 2924g(d) provides: "The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale...." (Emphasis added.) This is similar, but not identical to HRS § 667-5(d).

the postponement must be given by public declaration by the trustee at the time and place last appointed for sale. The Ninth Circuit found that even if there was evidence that notice of the postponement was not properly given, GPI failed to show that the technical violation resulted in any surprise or prejudice. The court held that where the borrower received adequate notice of the foreclosure sale, this slight procedural irregularity did not entitle the borrower to set aside the sale absent a showing of prejudice. Id.

Other cases addressing irregularities, not involving the postponement, but rather the initial notice of the foreclosure sale, are in accord. See, e.g., Mortgage Elec. Reg. Sys., Inc. v. Schotter, 50 A.D.3d 983 (N.Y. App. Div. 2008); Knapp v. Doherty, 123 Cal. App. 4th 76, 92 (Cal. Ct. App. 2004); Stein v. Cula Capital Corp., 260 A.D.2d 569 (N.Y. App. Div. 1999). In addition, case law from other jurisdictions holds that irregularities have to be significant in order to set aside a sale, even when they do not involve notice of the sale. See Ypsilanti Charter Tp. v. Kircher, 761 N.W.2d 761, 782 (Mich. Ct. App. 2008).

Given these holdings, we predict that the Hawaii courts would similarly conclude that a procedural irregularity in conducting a foreclosure sale does not justify setting it aside unless it is significant, material, causes prejudice or otherwise contributes to the inadequacy of the price or other injury. The reasoning for a such a requirement is consistent with the need for the finality of foreclosure sales. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 1287 (Cal.

Ct. App. 2001)("The public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, efficient, and final sales.").

Here, the bankruptcy court did not make an explicit finding that the secretary's failure to follow the dictionary definition of a "public announcement" was a significant or material departure from the statute. "We review the question of whether an irregularity in the sale is material de novo since it is a question of law." Worcester, 811 F.2d at 1229.

Initially, we observe that the record does not show other procedural insufficiencies apart from the irregularity in the September 23rd postponement. See Silva, 5 Haw. at 265 (a too short notice period coupled with another irregularity justified setting aside the sale). Any potential bidders who attended the first sale date, including Debtor, would have known of the next. However, evidence in the record shows that only one potential bidder appeared at the first sale and thereafter no bidders, including Debtor, attended any of the continued sales. The inescapable conclusion is that none of the previous bidders could have been present on the September 23rd date.

The record shows that the secretary arrived early at the auction site, spoke to various people to inquire whether they were attending her sale, and stayed for twenty to twenty-five minutes after the auction time. Her assessment that no one appeared for her sale is unchallenged.

To the extent that there is an ambiguity in the phrase "public announcement," it should be resolved in favor of a just, equitable and beneficial operation of the law. 2A Singer,

Sutherland on Statutory Construction, § 45:12 (7th ed. 2009). Under these circumstances, we conclude that the secretary's conduct and communications with the various people at the auction site fulfilled the purpose and spirit of the "public announcement" requirement. Therefore, we hold as a matter of law that her failure to follow the dictionary definition of making a "public announcement" was not a material or significant procedural irregularity.

Moreover, we have combed the record for any evidence of prejudice to Debtor or any causal connection between the procedural irregularity and her alleged injuries. No evidence shows that if the secretary followed the dictionary definition of "public announcement," it would have increased the likelihood of competitive bidding since no bidders attended the September 23rd sale. Nor can we conclude that there were any bidders present who likely were misled by the lack of a "public announcement" as defined by the bankruptcy court. We agree with Appellants that Debtor's speculation about possible bidders in the vicinity does not establish any connection between the procedural irregularity and her alleged injuries. See Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081 (9th Cir. 1996)(finding that mere allegation and speculation is insufficient to establish causal connection).

Without any evidence in the record, we are left with a firm and definite conviction that the bankruptcy court erred in finding a causal connection between the procedural irregularity and Debtor's alleged injuries. See Vollendorff, 951 F.2d at 217 (causation is a question of fact, reviewable for clear error); U.S. Gypsum Co., 333 U.S. at 395 (clear error exists when, after

examining the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been committed).

In sum, even assuming that the sales price was inadequate because of Debtor's equity[19] in the property, Debtor did not prove that the procedural irregularity was of consequence or contributed in any way to an insufficient price or other injury she has allegedly suffered. Accordingly, we conclude that the court erred in setting aside the sale and ordering the property reconveyed to her.

D. Breach of Contract

Debtor had the burden of proving, by a preponderance of the evidence, a breach of the contract and resulting damages. See Malani v. Clapp, 542 P.2d 1265, 1270 (Haw. 1975).

The bankruptcy court's decision in Debtor's favor on her breach of contract claim was based on Appellants' failure to comply with HRS § 667-5(d). Since we have concluded that the secretary substantially complied with the "public announcement" requirement, the court's conclusion that a breach of the mortgage contract occurred has no basis. Even if there was a breach, as noted above, the record fails to establish any causal connection between the breach and Debtor's claimed injuries. See Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 839 P.2d 10, 32-33 (Haw. 1992). Therefore, we conclude that the bankruptcy court erred in its conclusion that Debtor established her prima facie case for breach of contract.

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[19] The bankruptcy court determined that Debtor had equity in the property of $155,780.83.

E. Unfair or Deceptive Acts or Practices

Appellants also argue that the bankruptcy court erred in its ruling that the failure to make a "public announcement" in violation of HRS § 667-5 was an unfair or deceptive act within the meaning of HRS § 480-2. They contend that their technical violation of the "public announcement" foreclosure statute does not rise to the level of an unfair or deceptive act or practice. We agree.

HRS § 480-2(a) declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." The statute prohibits unfair or deceptive acts or practices generally without identifying the specific conduct that violates the act. Haw. Cmty. Fed. Credit Union v. Keka, 11 P.3d 1, 15 (Haw. 2000)(noting that unfair or deceptive acts or practices in the conduct of any trade or commerce is not defined in HRS chapter 480). Consequently, the analysis of whether certain conduct meets the statutory terms is made on a case-by-case basis.

Hawaii courts have observed that the paramount purpose of the UDPA was to "encourage those who have been victimized by persons engaging in unfair or deceptive acts or practices to prosecute their claim," thereby affording "an additional deterrent to those who would practice unfair and deceptive business acts." Flores v. Rawlings Co., LLC, 177 P.3d 341, 359 (Haw. 2008). Thus, the legislature sought to protect all "consumers" adversely affected by unfair or deceptive acts or practices.

The statute "must be liberally construed in order to accomplish the purpose for which it was enacted." Cieri v. Leticia Query Realty Inc., 905 P.2d 29, 43 (Haw. 1995). However, we cannot conclude that a liberal construction equates to a blank check for consumers. Indeed, the threat of treble damages is a powerful one.

Hawaii courts have not decided whether a nonjudicial foreclosure occurs in the "conduct of any trade or commerce" or whether a person standing in Debtor's shoes would have standing as a "consumer" to bring a UDPA action. However, those are questions we need not answer because we reverse on other grounds.

Hawaii courts have adopted a three-prong test for determining whether a particular act or practice is "unfair": (1) the act or practice must offend public policy; (2) the act or practice must be immoral, unethical, oppressive, or unscrupulous; and (3) the act or practice must cause substantial injury to consumers. Keka, 11 P.3d at 15, citing Rosa v. Johnston, 651 P.2d 1228 (Haw. Ct. App. 1982). The words used in the test ("offend", "immoral", "unethical, "oppressive", "unscrupulous" and even "substantial injury") connote the application of a subjective standard rather than an objective one. Further, the terms used serve to characterize the targeted conduct as justifying deterrence and punishment. Indeed, the possibility of a treble damages award under the UDPA plays an important role in penalizing wrongdoers and deterring wrongdoing while at the same time providing a meaningful remedy for those injured. See HRS

§ 480-13.[20]

On the other hand, the test for determining whether an act or practice is "deceptive" is more narrowly drawn and is essentially an objective test rather than a subjective one. Under Hawaii law, a deceptive act or practice is (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances where (3) the presentation, omission, or practice is material. Courbat, 141 P.3d. at 435. A representation, omission or practice is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." Id. The test is an objective one, turning on whether the act or omission "'is likely to mislead consumers,'. . . as to information 'important to consumers' in making a decision regarding the product or service." Id.

Although the bankruptcy court cited these standards, it failed to apply them correctly. While we are obliged to accept the bankruptcy court's findings of fact unless clearly erroneous, we are not required to accept its conclusions as to the legal effect of those findings. Rifino, 245 F.3d at 1087.

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[20] HRS 480-13(b) provides that "[a]ny consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2: (1) May sue for damages sustained by the consumer, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit;...and (2)[m]ay bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit."

In construing HRS § 480-2, courts are required to examine the nature of a defendant's conduct to determine if it is either unfair or deceptive with emphasis placed on the reprehensibility of a defendant's conduct. Riopta v. Amresco Residential Mortgage Corp., 101 F. Supp. 2d 1326, 1333 (D. Haw. 1999). Here, the bankruptcy court ignored the focus on the reprehensibility of Appellants' conduct and applied what was more akin to a strict liability standard. As noted, the record on the whole shows that the secretary substantially complied with the "public announcement" requirement, and any insufficiency was merely an isolated[21] and inadvertent mistake. Finally, the bankruptcy court found no reprehensible conduct; it found as a fact that the secretary was "attempting to do the right thing."

These facts, which we accept because they are not clearly erroneous, do not support the court's legal conclusion that Appellants' failure to make a "public announcement" constituted an "unfair" or "deceptive" act or practice within the scope of the UDPA. To adopt the bankruptcy court's approach would read the reprehensible nature of the conduct out of the statute as construed by Hawaii courts.

We conclude as a matter of law that the secretary's failure to orally announce the postponement of the foreclosure sale does not amount to the type of reprehensible conduct that gives rise to an "unfair" act or practice. We simply cannot characterize

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[21] Debtor challenged the postponements on the ground that written notice was required. The bankruptcy court correctly rejected this contention. Debtor could not prove that any of the other postponements were defective because of the lack of a "public announcement."

her conduct as immoral, unethical, oppressive, or unscrupulous. Moreover, as previously observed, the record does not demonstrate any causal connection between the procedural irregularity and the sales price or any other of Debtor's alleged injuries. We conclude that the test for finding an act or practice "unfair" within the meaning of the UDPA has not been met here.

We also conclude that the secretary's failure to make the announcement was not "deceptive" under an objective test. Acts or practices which are "deceptive" do not exist in a theoretical vacuum. Her omission would deceive, or possibly have the capacity to deceive, had there been any consumers in the vicinity. The record shows that no "consumers" were present when the secretary left the auction site.

In short, Debtor did not need the protection of the UDPA. She initially had protection under the cover of the automatic stay and her chapter 13 plan, but failed to make her payments and did not object to Ameriquest's motion for relief from stay. She also had state court remedies but failed to appear in the ejectment action and did not exercise them. It would be ironic in light of that record of repeated defaults by Debtor to conclude now that she has been victimized by Appellants engaging in unfair or deceptive acts or practices through a single minor procedural irregularity in postponing a foreclosure sale.

In sum, we hold that the bankruptcy court erred as a matter of law in concluding that the slight procedural deviation from the dictionary definition of a "public announcement" rose to the level of an "unfair" or "deceptive" act or practice under the UDPA.

F. DAMAGES

In light of our foregoing conclusions, we do not reach Appellants' claims of error relating to Debtor's treble damages under HRS § 480-13 or her attorneys' fee award. Nor do we reach Debtor's claims of error relating to the calculation of her attorneys' fees for breach of contract, as she is entitled to none.

VI. CONCLUSION

For the reasons stated above, We REVERSE, but REMAND this proceeding to the bankruptcy court for the purpose of deciding Debtor's claim for turnover of surplus proceeds under §§ 542 and 543. The cross-appeal is moot.