

mortgage lender, but rather operates independently in a competitive market for title and escrow services, working with a range of lenders and setting its fees according to competitive rates. While different mortgage lenders have diverse internal policies regarding mortgage and release recordation, Hawaii Title nonetheless has a fiduciary duty to pass clear title in each and every mortgage transaction. Thus, prior to 2003, both to meet its title obligations and to keep escrow service costs competitive through the efficiency of uniformity, Hawaii Escrow charged a \$25.00 fee for each document it expected to record at the Bureau of Conveyances.¹ In a refinance transaction such as this one at issue in this case, a \$25.00 fee was charged for recording the new mortgage and for recording the release of the original mortgage. In many, if not most cases, Hawaii Escrow did in fact record the applicable documents with the Bureau of Conveyances and applied the \$25.00 fee collected from the borrower for this purpose. Where lenders themselves recorded the document, or where lenders used third-party bulk recordation services, Hawaii Escrow still had an obligation to follow up on the recordation to ensure that titles were clear of any encumbrances. Such a follow up service can take more than two years after the transaction closes, and costs more than \$25.00, yet Hawaii Escrow performs such services to protect both the mortgage lender and borrower. Whether Hawaii Escrow records the mortgage or release itself, or performs a lengthy follow-up service, depends entirely on the mortgage lender and is not within Hawaii Escrow's discretion.

In this case, Hawaii Escrow provided title and escrow services in 2002 to Nakamura and her husband when they refinanced their Countrywide mortgage. The transaction closed on August 30, 2002. The HUD-1 statement applicable to the transaction provided that

¹ In January 2003, due to widespread changes in mortgage lender recordation policies, Hawaii Escrow changed its procedure. Hawaii Escrow now charges a "Reconveyance Processing Fee," which relates to all costs and expenses associated with tracking title, obtaining release of satisfied obligations, and recording such releases or preparing an Affidavit of Release.

Nakamura and her husband would be charged \$25.00 for recording the new Countrywide mortgage, and \$25.00 for recording a release of the original Countrywide mortgage.

In August 2002, Hawaii Escrow was subject to the same obligations and constraints described above, namely, a duty to ensure that title was cleared of encumbrances, regardless of the mortgage lender's internal recordation policies. The release of the Nakamuras' original Countrywide mortgage was recorded in January 2004. Between the August 2002 closing date and the January 2004 recordation date of the release, Hawaii Escrow performed its standard escrow follow-up services to protect both Nakamura and Countrywide. Among other things, the documents show that at the time the transaction closed in August 2002, Hawaii Escrow fully expected to record the release of Nakamura's original Countrywide mortgage ("RELEASE TO FOLLOW", "Documents to follow: RELEASE OF MORTGAGE"). Hawaii Escrow's logs show that on three occasions in 2003, Hawaii Escrow contacted Countrywide to follow up on the status of the release. On October 14, 2003, Hawaii Escrow reported that Countrywide was unable to locate the release document and that it would prepare a new one and send it to the Bureau of Conveyances. Hawaii Escrow requested Countrywide to send the release of mortgage to Hawaii Escrow so that Hawaii Escrow could record it itself due to the backup at the Bureau of Conveyances. That was apparently never done.

Nonetheless, on April 24, 2007, Plaintiff filed this case, alleging that Hawaii Escrow never paid the Bureau of Conveyances the recordation fee, and that Hawaii Escrow's actions were a breach of fiduciary duty, constituted an unfair or deceptive trade practice, and resulted in unjust enrichment.² In addition to asserting claims on her own behalf, Plaintiff seeks to represent a putative class of "All individuals who contracted with Hawaii Escrow and Title[.]"

² Nakamura has also asserted a claim for injunctive relief.

Inc. for escrow services, who were charged a Recordation Fee for release of their mortgage which Hawaii Escrow and Title, Inc. did not pay to the Bureau of Conveyances.”

A. Procedural Background

The following timeline sets forth all of the relevant events and rulings thus far in this case.

- April 24, 2007: Nakamura files Complaint.
- June 26, 2007: Hawaii Escrow answers Complaint.
- July 9, 2007: Nakamura serves her First Request for Answers to Interrogatories.
- July 18, 2007: Hawaii Escrow meets with Nakamura’s counsel in a good faith effort to resolve this dispute.
- July 23, 2007: Nakamura files her Second Request for Answers to Interrogatories.
- July 23, 2007: Nakamura files Motion for Class Certification.
- August 8, 2007: Hawaii Escrow responds to Nakamura’s First Request for Answers to Interrogatories.
- August 16, 2007: Hawaii Escrow files Motion for Summary Judgment on Plaintiff’s Unfair and Deceptive Trade Practice Claims.
- August 24, 2007: First Hearing on Class Certification. This Court continues the hearing and orders Plaintiff to conduct greater discovery on the issue of numerosity. Hawaii Escrow is not required to answer Nakamura’s Second Request for Answers to Interrogatories until after a Rule 30(b)(6) deposition on class certification matters.
- September 5, 2007: Hearing on Hawaii Escrow’s Motion for Summary Judgment. Court rules that (1) the occurrence rule applied to accrual of UDTP claims covered by HRS § 480-24; (2) the alleged UDTP violation occurred when Nakamura’s release was recorded by a third party in January 2004; and (3) because the occurrence was inside the four-year limitation period, *Nakamura’s* UDTP claim was not barred. This ruling raised the possibility that some members of Nakamura’s proposed class had viable UDTP claims, while most others do not.
- September 27, 2007: Nakamura conducts Rule 30(b)(6) deposition of Hawaii Escrow, pursuant to this Court’s August 24 instruction to hold an expedited Rule 30(b)(6)

deposition on issues affecting class certification. Nakamura's counsel terminates the deposition after only a few moments.

- October 4, 2007: Nakamura files Motion to Compel (1) Defendant's Testimony at HRCP Rule 30(b)(6) Deposition and (2) Defendant's Responses to Plaintiff's Outstanding Discovery Requests. Nakamura files this Motion without making any attempt to meet and confer to resolve the dispute without Court action.
- October 30, 2007: Hearing on Nakamura's Motion to Compel. This Court orders that Hawaii Escrow should produce a report on its files by November 19, and that after that date, Nakamura may conduct discovery to confirm findings of Hawaii Escrow's reports.
- November 16, 2007: Hawaii Escrow advises its counsel that it will not be able to finish reports by November 19 deadline and requests extension to December 5.
- December 4, 2007: Hawaii Escrow produces its reports and files response Nakamura's Second Request For Answers to Interrogatories.
- December 4, 2007: Nakamura files Motion to Enforce Order Granting in Part and Denying in Part Motion to Compel.
- December 17, 2007: This Court holds a combined hearing on Nakamura's Motion for Class Certification and Nakamura's Motion to Enforce. This Court continues Class Certification hearing until February 19 to allow Plaintiff more time to do more discovery and provide further briefing on the statute of limitations applicable to UDTP claims. This Court takes no action on the Motion to Enforce.
- January 30, 2008: Parties conduct HRCP Rule 30(b)(6) deposition of Hawaii Escrow, with Denise Kaehu serving as representative. Denise Kaehu answers questions regarding the spreadsheets produced by Hawaii Escrow on December 4, 2007.

II. PROPOSED JUDICIALLY RECOGNIZED FACTS

1. The statute of limitations governing actions for unfair and deceptive trade practices is HRS § 480-24, providing a four year period which accrues upon the occurrence of the violation.
2. After January 1, 2003, Hawaii Escrow never charged any customers a "Recordation Fee" in connection with the release of a mortgage in a refinance transaction.

III. ADMITTED FACTS

1. Hawaii Escrow admits that Cynthia Nakamura is a resident of the State of Hawaii.

2. Hawaii Escrow admits that it is a corporation registered to do business in the State of Hawaii as an escrow in real estate transactions, and that at all times relevant to this action it conducted business in the State of Hawaii.

3. Hawaii Escrow admits that at the closing of Nakamura's residential mortgage refinance transaction, for which it performed escrow services, it provided Nakamura with a HUD-1 Settlement Statement which summarized the transaction and itemized all of Defendant's settlement charges.

4. Hawaii Escrow admits that it has a limited fiduciary duty to the parties to an escrow transaction for which it provides escrow services.

IV. DEFENSES ASSERTED

Hawaii Escrow denies that its pre-2003 policy of charging a "Recordation Fee" and providing follow up services was wrongful in any way. Hawaii Escrow also denies that its HUD-1 form falsely implied that the Recordation Fee would be paid by Hawaii Escrow to the Bureau of Conveyances, and denies that Hawaii Escrow took any action to conceal or avoid disclosing the fact that Hawaii Escrow might not pay the fee to the Bureau of Conveyances. Accordingly, Hawaii Escrow contends that its pre-2003 policy of charging customers a "Recordation Fee" (1) did not in violation of HRS § 480-2; (2) did not cause Nakamura or the putative class any damage; (3) did not expose Hawaii Escrow to any liability for punitive damages; (4) did not result in unjust enrichment; (5) did not constitute a continuing violation; (6) did not entitle Nakamura or the putative class to injunctive relief; and (7) did not in any way

entitle any former Hawaii Escrow customer to disgorgement of Hawaii Escrow's profits from escrow fees.

Hawaii Escrow's answer set forth the following affirmative defenses:

FIRST DEFENSE

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. Plaintiff is barred from maintaining this action against Defendant by the applicable statute of limitations, including but not limited to Hawaii Revised Statutes § 480-24.

THIRD DEFENSE

3. Plaintiff has suffered no damages from any actual or proximate acts or omissions attributable to defendant.

FOURTH DEFENSE

4. Plaintiff lacks standing to bring some or all of the claims alleged in the Complaint.

FIFTH DEFENSE

5. The "business practices" alleged in the Complaint are not unlawful in that Defendant complied with all applicable statutes and regulations at all times relevant to this action.

SIXTH DEFENSE

6. The claims alleged in the Complaint are preempted or otherwise precluded from serving as the basis of a claim by virtue of Hawaii Revised Statutes § 506-8.

SEVENTH DEFENSE

7. The "business practices" alleged in the Complaint are not fraudulent nor are they likely to mislead the public.

EIGHTH DEFENSE

8. Plaintiff's causes of action and their injunctive and restitution remedies are barred in light of the fact that Plaintiff as a member of the general public has an adequate remedy at law.

NINTH DEFENSE

9. Plaintiff and the members of the general public she purports to represent have a reasonably available alternative source of supply from which to obtain title and escrow services in that numerous other companies conduct such business within the State of Hawaii, and as such, the Complaint fails to state a claim for unfair business practices.

TENTH DEFENSE

10. Defendant is informed and believes that Plaintiff's claims may be barred, in whole or in part, by the doctrine of estoppel as a result of Plaintiff's own conduct.

ELEVENTH DEFENSE

11. Plaintiff's claims are barred in whole or in part due to the unreasonable delay in notifying Defendant of the alleged actionable wrongs, and by reason of the unreasonable delay in seeking recovery requested herein, which delays have resulted in prejudice to Defendant.

TWELFTH DEFENSE

12. Defendant is informed and believes that Plaintiff's claims are not common to the purported class and do not involve sufficient common issues of either law or fact.

THIRTEENTH DEFENSE

13. Defendant is informed and believes that class treatment of the aggregate claims would not further judicial economy or be more effective than individual claims.

FOURTEENTH DEFENSE

14. Defendant is informed and believes that Plaintiff is not a proper representative class Plaintiff.

V. WITNESSES

Hawaii Escrow expressly reserves the right to amend its lists of expert and lay witnesses below in light of ongoing discovery and investigation. Further, Hawaii Escrow reserves the right to call those expert and lay witnesses identified in Nakamura's Pretrial Statement, Final Naming of Witnesses or Settlement Conference Statement and any amendments filed in this action.

Hawaii Escrow reserves the right to name additional lay and expert witnesses for rebuttal and as necessitated by further discovery. Finally, Hawaii Escrow reserves the right to amend this Pretrial Statement at any time before the trial date to name additional witnesses. Subject to the foregoing reservations, Hawaii Escrow's lists of lay and expert witnesses are as follows:

A. Lay Witnesses

#	Name & Address	Expected Testimony
1.	Denise Kaehu c/o Bays Deaver Lung Rose & Holma Alii Place, 16 th Floor 1099 Alakea Street Honolulu, Hawaii 96813	Ms. Kaehu will testify as to the facts and allegations contained in the complaint. She will further testify as to Hawaii Escrow's defenses to liability and damages.

2.	Brenda Cipriano-Critcher c/o Bays Deaver Lung Rose & Holma Alii Place, 16 th Floor 1099 Alakea Street Honolulu, Hawaii 96813	Ms. Cipriano-Critcher will testify as to the facts and allegations contained in the complaint. She will further testify as to Hawaii Escrow's defenses to liability and damages.
3.	Cynthia Nakamura c/o Perkin & Faria Davies Pacific Center 841 Bishop Street, Suite 2000 Honolulu, HI 96813	Ms. Nakamura will testify as to the facts and allegations contained in the complaint.

B. Expert Witnesses

At this time, Hawaii Escrow has not yet identified any expert witnesses which it may call.

VI. STATUS OF DISCOVERY

Discovery is ongoing.

VII. FACE-TO-FACE MEETING

Hawaii Escrow concurs that its counsel met with Nakamura's counsel on December 17, 2007 to discuss the subjects outlined in H.R.C.C. Rule 12(b).

VIII. ALTERNATIVE DISPUTE RESOLUTION

Hawaii Escrow remains open to alternative dispute resolution.

DATED: Honolulu, Hawaii February 15, 2008.



KARIN L. HOLMA
JONATHAN S. MOORE

Attorneys for Defendant
HAWAII ESCROW & TITLE, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

CYNTHIA NAKAMURA, individually)	CIVIL NO. 07-1-0730-04 (SSM)
and on behalf of all others similarly)	(Class Action)
situated,)	
)	CERTIFICATE OF SERVICE
Plaintiff,)	
)	
vs.)	
)	
HAWAII ESCROW & TITLE, INC.;)	
DOE DEFENDANTS 1-50,)	
)	
Defendants.)	

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2008, a copy of the foregoing was served on the following counsel of record by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawai'i, addressed as set forth below:

JOHN F. PERKIN, ESQ.
BRANDEE J. K. FARIA, ESQ.
PERKIN & FARIA, LLLC
Davies Pacific Center
841 Bishop Street, Suite 200
Honolulu, Hawaii 96813

and

GEORGE VAN BUREN, ESQ.
ROBERT G. CAMPBELL, ESQ.
Van Buren Campbell & Shimizu
Hawaii Tower, Suite 1950
745 Fort Street
Honolulu, Hawaii 96813

Attorneys for Plaintiff

DATED: Honolulu, Hawaii, February 8, 2008.



KARIN L. HOLMA
JONATHAN S. MOORE

Attorneys for Defendant
HAWAII ESCROW & TITLE, INC.