

JAN 21 2011

A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that Act 162, Session
2 Laws of Hawaii 2010, created a mortgage foreclosure task force
3 to undertake a study to develop general and specific policies
4 and procedures necessary to improve the manner in which mortgage
5 foreclosures are conducted in the State. The legislature
6 further finds that the Act directed the task force to submit two
7 reports, a preliminary report for the regular session of 2011
8 and a final report for the regular session of 2012.

9 The legislature finds that in the preliminary report for
10 the regular session of 2011, the task force recommended proposed
11 legislation that amends the old nonjudicial foreclosure process,
12 which is established as the foreclosure by power of sale process
13 under part I of chapter 667, Hawaii Revised Statutes. The
14 legislature further finds that implementing the task force
15 recommendations will help modernize the present law, by
16 providing it with increased clarity, certainty, efficiency, and
17 fairness to both borrowers and lenders.



1 The purpose of this Act is to implement the recommendations
2 for proposed legislation that were adopted by the mortgage
3 foreclosure task force and submitted in the preliminary report
4 to the legislature for the regular session of 2011.

5 More specifically, the purpose of this Act is to accomplish
6 the following:

7 (1) Require that for a foreclosure under power of sale,
8 the notice of intent to foreclose be served, not less
9 than twenty-one days before the date of sale, on all
10 persons entitled to notice in the same manner as the
11 service of a civil complaint under chapter 634, Hawaii
12 Revised Statutes, and the Hawaii rules of civil
13 procedure;

14 (2) Prohibit a mortgagee who completes a foreclosure under
15 power of sale upon a mortgage on residential property
16 from subsequently pursuing or obtaining a deficiency
17 judgment against certain owner-occupants of that
18 residential property;

19 (3) Authorize an owner-occupant of residential property
20 that is being subjected to a foreclosure under power
21 of sale to convert the action into a foreclosure by
22 action;



- 1 (4) Authorize the mortgagee conducting a foreclosure under
2 power of sale to record with the land court or the
3 bureau of conveyances a copy of the notice of intent
4 to foreclose and give the recorded copy of the notice
5 the same effect as a notice of pendency of action in a
6 civil action, such as the foreclosure by action;
- 7 (5) Authorize the land court to record the notice of
8 intent to foreclose; and
- 9 (6) Adopt a portion of the 2005 ruling of the United
10 States Bankruptcy Court for the District of Hawaii in
11 In re Hoopai, 2005 WL 1156091 (Bankr. D. Hawaii
12 January 12, 2005) (No. 04-02511), order affirmed by In
13 re Hoopai, 2005 WL 2864748 (D. Hawaii October 14,
14 2005) (No. CV.05-00186 DAE-KSC, CV.05-00187 HG-BMK),
15 by specifying that for a foreclosure under power of
16 sale, the mortgagor's interest is extinguished upon
17 the recordation of the affidavit in the bureau of
18 conveyances or in the land court, as the case may be,
19 within thirty days of the date of sale.

20 SECTION 2. Chapter 667, Hawaii Revised Statutes, is
21 amended by adding five new sections to part I to be
22 appropriately designated and to read as follows:



1 "§667-A Definitions. As used in this part, unless the
2 context requires otherwise:

3 "Association" has the same meaning as the term is defined
4 in section 514B-3.

5 "Nonjudicial foreclosure" means foreclosure under power of
6 sale.

7 "Owner-occupant" means a person who, at the time that a
8 notice is served of the intent to foreclose under the power of
9 sale:

10 (1) Owns an interest in the residential property, and the
11 interest is encumbered by the mortgage being
12 foreclosed; and

13 (2) The residential property is and has been the person's
14 primary residence for a continuous period of not less
15 than one hundred eighty days immediately preceding the
16 date on which the notice is served.

17 "Residential property" means real property that is improved
18 and used for residential purposes.

19 §667-B Conversion; residential property; conditions. (a)

20 An owner-occupant of a residential property that is being
21 foreclosed nonjudicially under this part may convert the action
22 to a judicial foreclosure under the following conditions:



1 (1) A complaint conforming to section 667-C shall be filed
2 with the circuit court in the circuit where the
3 residential property is located, stating that the
4 owner-occupant of the property elects to convert the
5 nonjudicial foreclosure to a judicial foreclosure
6 proceeding;

7 (2) The complaint described in paragraph (1) shall be
8 filed with the circuit court no later than twenty days
9 after the notice of the nonjudicial foreclosure action
10 is served on the owner-occupant as required by section
11 667-5(a)(1)(A);

12 (3) Within ninety days of the filing of the complaint, all
13 owners of an interest in the residential property
14 whose interests are pledged or otherwise encumbered by
15 the mortgage that is being foreclosed and all persons
16 who have signed the promissory note or other
17 instrument evidencing the debt secured by the mortgage
18 that is being foreclosed, including without limitation
19 co-obligors and guarantors, shall file a statement in
20 the circuit court action that they agree to submit
21 themselves to the judicial process and the
22 jurisdiction of the circuit court. If this condition



1 is not satisfied, the circuit court action shall be
2 dismissed with prejudice as to any owner-occupant's
3 right to convert the action to a judicial proceeding,
4 and the mortgagee may proceed nonjudicially;

5 (4) The filing of the complaint shall automatically stay
6 the nonjudicial foreclosure action unless and until
7 the judicial proceeding has been dismissed;

8 (5) The person filing the complaint shall have an
9 affirmative duty to promptly notify the Hawaii
10 attorney who is handling the nonjudicial foreclosure
11 about the filing of the conversion;

12 (6) All parties joined in the converted judicial
13 proceeding may assert therein any claims and defenses
14 that they could have asserted had the action
15 originally been commenced as a judicial foreclosure
16 action; and

17 (7) Notwithstanding chapter 607, the fee for filing the
18 complaint shall be not more than \$ _____.

19 (b) This section shall not apply to nonjudicial
20 foreclosures of association liens that arise under a declaration
21 filed pursuant to chapter 514A or 514B.



1 §667-C Complaint; residential property; required contents.

2 The complaint authorized under section 667-B shall contain at a
3 minimum the following:

4 (1) A caption setting forth the name of the court, the
5 title of the action, and the file number. The title
6 of the action shall include the names of the filing
7 party as plaintiff and the foreclosing party as the
8 defendant;

9 (2) The name, mailing address, and telephone number of the
10 filing party;

11 (3) The address or tax map key number of the property
12 subject to the foreclosure action;

13 (4) A statement identifying all other owners of an
14 interest in the residential property whose interests
15 are pledged or otherwise encumbered by the mortgage
16 that is being foreclosed and all persons who have
17 signed the promissory note or other instrument
18 evidencing the debt secured by the mortgage that is
19 being foreclosed, including without limitation
20 co-obligors and guarantors;

21 (5) A certification under penalty of perjury that the
22 filing party is an owner-occupant of the subject



1 property and seeks to convert the nonjudicial
2 foreclosure to a judicial proceeding;

3 (6) A statement certifying that the filing party served a
4 copy of the complaint on the attorney identified in
5 the notice of intent to foreclose either by personal
6 delivery at, or by postage prepaid United States mail
7 to, the address of the attorney as set forth in the
8 notice of intent to foreclose; and

9 (7) A copy of the notice of intent to foreclose that was
10 served on the filing party and for which the filing
11 party is seeking to convert to a judicial proceeding.

12 §667-D Notice of intent to foreclose; residential

13 property; required statement on conversion. (a) The notice of
14 intent to foreclose nonjudicially that is served and posted as
15 required under sections 667-5(a)(1)(A) and 667-5(b)(2) shall
16 include, in addition to the contents required under section
17 667-7, a statement printed in not less than 14-point font as
18 follows:

19 "IF THE PROPERTY BEING FORECLOSED IS IMPROVED AND USED
20 FOR RESIDENTIAL PURPOSES, AN OWNER-OCCUPANT OF THE PROPERTY
21 (DEFINED UNDER PART I OF CHAPTER 667 OF THE HAWAII REVISED
22 STATUTES, AS A PERSON WHO, AT THE TIME THIS NOTICE IS



1 SERVED, OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT
2 IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND THE
3 RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY RESIDENCE
4 CONTINUOUSLY FOR NOT LESS THAN ONE HUNDRED EIGHTY DAYS) HAS
5 THE RIGHT TO CONVERT A NONJUDICIAL FORECLOSURE PROCEEDING
6 TO A JUDICIAL FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE
7 CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS RIGHT, THE
8 OWNER-OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED FORM
9 WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE THE PROPERTY IS
10 LOCATED WITHIN TWENTY DAYS AFTER SERVICE OF THIS NOTICE.

11 IN ADDITION, ALL OWNERS OF AN INTEREST IN THE
12 RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE BEEN PLEDGED OR
13 OTHERWISE ENCUMBERED BY THE MORTGAGE THAT IS BEING
14 FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE PROMISSORY
15 NOTE OR OTHER INSTRUMENT EVIDENCING THE DEBT SECURED BY THE
16 MORTGAGE THAT IS BEING FORECLOSED, INCLUDING, WITHOUT
17 LIMITATION, CO-OBLIGORS AND GUARANTORS, SHALL FILE A
18 STATEMENT IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO
19 SUBMIT THEMSELVES TO THE JUDICIAL PROCESS AND THE
20 JURISDICTION OF THE CIRCUIT COURT WITHIN NINETY DAYS OF THE
21 FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS



1 CONDITION WILL RESULT IN DISMISSAL OF THE CIRCUIT COURT
2 ACTION.

3 AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE HAWAII
4 ATTORNEY LISTED IN THIS NOTICE ABOUT THE FILING OF THE
5 CONVERSION FORM.

6 A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL
7 FORECLOSURE OF RESIDENTIAL PROPERTY SHALL BE PROHIBITED
8 UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT
9 AGAINST AN OWNER-OCCUPANT WHO DOES NOT OWN A FEE SIMPLE OR
10 LEASEHOLD INTEREST IN ANY OTHER RESIDENTIAL REAL PROPERTY.
11 IF THIS ACTION IS CONVERTED TO A JUDICIAL PROCEEDING,
12 HOWEVER, THEN ALL REMEDIES AVAILABLE TO A LENDER MAY BE
13 ASSERTED, INCLUDING THE RIGHT TO SEEK A DEFICIENCY
14 JUDGMENT."

15 (b) The statement required by this section shall not be
16 required to be included in the notice of sale published pursuant
17 to section 667-5(a)(1)(B). Nothing in this section shall be
18 construed to set a minimum font size for the published notice of
19 sale.

20 §667-E Recordation of notice of intent to foreclose. The
21 foreclosing mortgagee may record a copy of the notice of intent
22 to foreclose with the office of the assistant registrar of the



1 land court or the bureau of conveyances, as the case may be, in
2 a manner similar to recordation of notices of pendency of action
3 under section 501-151 or section 634-51, or both, as applicable.
4 The recorded notice shall have the same effect as a notice of
5 pendency of action. From and after the recordation of the
6 notice, any person who becomes a purchaser or encumbrancer of
7 the mortgaged property shall be deemed to have constructive
8 notice of the power of sale foreclosure and shall be bound by
9 the foreclosure."

10 SECTION 3. Section 501-151, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "§501-151 Pending actions, judgments; recording of,
13 notice. No writ of entry, action for partition, or any action
14 affecting the title to real property or the use and occupation
15 thereof or the buildings thereon, and no judgment, nor any
16 appeal or other proceeding to vacate or reverse any judgment,
17 shall have any effect upon registered land as against persons
18 other than the parties thereto, unless a full memorandum
19 thereof, containing also a reference to the number of
20 certificate of title of the land affected is filed or recorded
21 and registered. Except as otherwise provided, every judgment
22 shall contain or have endorsed on it the State of Hawaii general



1 excise taxpayer identification number, the federal employer
2 identification number, or the last four digits only of the
3 social security number for persons, corporations, partnerships,
4 or other entities against whom the judgment is rendered. If the
5 judgment debtor has no social security number, State of Hawaii
6 general excise taxpayer identification number, or federal
7 employer identification number, or if that information is not in
8 the possession of the party seeking registration of the
9 judgment, the judgment shall be accompanied by a certificate
10 that provides that the information does not exist or is not in
11 the possession of the party seeking registration of the
12 judgment. Failure to disclose or disclosure of an incorrect
13 social security number, State of Hawaii general excise taxpayer
14 identification number, or federal employer identification number
15 shall not in any way adversely affect or impair the lien created
16 upon recording of the judgment. This section does not apply to
17 attachments, levies of execution, or to proceedings for the
18 probate of wills, or for administration in a probate court;
19 provided that in case notice of the pendency of the action has
20 been duly registered it is sufficient to register the judgment
21 in the action within sixty days after the rendition thereof.



1 As used in this chapter "judgment" includes an order or
2 decree having the effect of a judgment.

3 Notice of the pendency of an action in a United States
4 District Court, as well as a court of the State of Hawaii, may
5 be recorded.

6 A notice of intent to foreclose as provided in section
7 667-E may be recorded.

8 The party seeking registration of a judgment shall redact
9 the first five digits of any social security number by blocking
10 the numbers out on the copy of the judgment to be filed or
11 recorded."

12 SECTION 4. Section 667-3, Hawaii Revised Statutes, is
13 amended to read as follows:

14 "**§667-3 Proceeds, how applied.** Mortgage or other
15 creditors shall be entitled to payment according to the priority
16 of their liens, and not pro rata; and judgments of foreclosure
17 and foreclosures under power of sale that are conducted in
18 compliance with this part and for which an affidavit is recorded
19 as required under section 667-5 shall operate to extinguish the
20 liens of subsequent mortgages and liens of the same property,
21 without forcing prior mortgagees or lienors to their right of
22 recovery. The surplus after payment of the mortgage foreclosed,



1 shall be applied pro tanto to the next junior mortgage[7] or
2 lien, and so on to the payment, wholly or in part, of mortgages
3 or liens junior to the one assessed."

4 SECTION 5. Section 667-5, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "§667-5 Foreclosure under power of sale; notice; affidavit
7 after sale[-]; deficiency judgments. (a) When a power of sale
8 is contained in a mortgage, and where the mortgagee, the
9 mortgagee's successor in interest, or any person authorized by
10 the power to act in the premises, desires to foreclose under
11 power of sale upon breach of a condition of the mortgage, the
12 mortgagee, successor, or person shall be represented by an
13 attorney who is licensed to practice law in the State and is
14 physically located in the State. The attorney shall:

15 (1) Give notice of the mortgagee's, successor's, or
16 person's intention to foreclose the mortgage and of
17 the sale of the mortgaged property[7-by] as follows:

18 (A) By serving, not less than twenty-one days before
19 the date of sale, written notice of the intent to
20 foreclose on all persons entitled to notice under
21 this part in the same manner as service of a
22 civil complaint under chapter 634 and the Hawaii



1 rules of civil procedure, as they may be amended
2 from time to time; and

3 (B) By publication of the notice once in each of
4 three successive weeks (three publications), the
5 last publication to be not less than fourteen
6 days before the day of sale, in a newspaper
7 having a general circulation in the county in
8 which the mortgaged property lies; and

9 (2) Give any notices and do all acts as are authorized or
10 required by the power contained in the mortgage.

11 (b) Copies of the notice required under subsection (a)
12 shall be:

13 (1) Filed with the state director of taxation; and

14 (2) Posted on the premises not less than twenty-one days
15 before the day of sale.

16 (c) Upon the request of any person entitled to notice
17 pursuant to this section and sections 667-5.5 and 667-6, the
18 attorney, the mortgagee, successor, or person represented by the
19 attorney shall disclose to the requestor the following
20 information:

21 (1) The amount to cure the default, together with the
22 estimated amount of the foreclosing mortgagee's



1 attorneys' fees and costs, and all other fees and
2 costs estimated to be incurred by the foreclosing
3 mortgagee related to the default prior to the auction
4 within five business days of the request; and

5 (2) The sale price of the mortgaged property once
6 auctioned.

7 (d) Any sale, of which notice has been given as aforesaid,
8 may be postponed from time to time by public announcement made
9 by the mortgagee or by some person acting on the mortgagee's
10 behalf. Upon request made by any person who is entitled to
11 notice pursuant to section 667-5.5 or 667-6, or this section,
12 the mortgagee or person acting on the mortgagee's behalf shall
13 provide the date and time of a postponed auction, or if the
14 auction is canceled, information that the auction was canceled.
15 The mortgagee within thirty days after selling the property in
16 pursuance of the power, shall file a copy of the notice of sale
17 and the mortgagee's affidavit, setting forth the mortgagee's
18 acts in the premises fully and particularly, in the bureau of
19 conveyances.

20 (e) The mortgagee or other person who completes, pursuant
21 to this part, the nonjudicial foreclosure of a mortgage or other
22 lien on residential property shall not be entitled to pursue or



1 obtain a deficiency judgment against an owner-occupant of the
2 residential property who, at the time the notice of intent to
3 foreclose is served, does not have a fee simple or leasehold
4 ownership interest in any other residential real property;
5 provided that nothing herein shall prohibit any other mortgagee
6 or person who holds a lien on the residential property subject
7 to the nonjudicial foreclosure, whose lien is subordinate to the
8 mortgage being foreclosed and is extinguished by the nonjudicial
9 foreclosure sale, from pursuing a monetary judgment against that
10 owner-occupant.

11 [~~e~~] (f) The affidavit and copy of the notice shall be
12 recorded and indexed by the registrar, in the manner provided in
13 chapter 501 or 502, as the case may be.

14 [~~f~~] (g) This section is inapplicable if the mortgagee is
15 foreclosing as to personal property only."

16 SECTION 6. Section 667-8, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "**§667-8 Affidavit as evidence, when.** If it appears by the
19 affidavit that the affiant has in all respects complied with the
20 requirements of the power of sale and the statute, in relation
21 to all things to be done by the affiant before selling the
22 property, and has sold the same in the manner required by the



1 power, the affidavit, or a duly certified copy of the record
2 thereof, shall be admitted as evidence that the power of sale
3 was duly executed. The interests of the mortgagor, and all
4 those claiming under, by, or through the mortgagor, in the
5 property being foreclosed by exercise of a power of sale under
6 this part, including land whose title is not registered in the
7 land court under chapter 501, shall be deemed extinguished upon
8 the recordation of the affidavit in the bureau of conveyances or
9 in the office of the assistant registrar, as the case may be,
10 within thirty days of the date of sale of the property at public
11 auction."

12 SECTION 7. Upon the effective date of this Act, the
13 judiciary is requested to consider creating and adopting a form
14 for the conversion complaint established under section 2 of this
15 Act.

16 SECTION 8. This Act does not affect rights and duties that
17 matured, penalties that were incurred, and proceedings that were
18 begun before its effective date.

19 SECTION 9. In codifying the new sections added by section
20 2 of this Act, the revisor of statutes shall substitute
21 appropriate section numbers for the letters used in designating
22 the new sections in this Act.



1 SECTION 10. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 11. This Act shall take effect upon its approval;
4 provided that the requirements under this Act shall only apply
5 to foreclosures initiated after the effective date of this Act.

6

INTRODUCED BY:

C. M. H. H. H.



Report Title:

Mortgage Foreclosures

Description:

Amends the nonjudicial foreclosure process under part I of chapter 667, to among other things require notice of intent to foreclose be served upon required parties, to prohibit a mortgagee of residential property using the nonjudicial foreclosure process from subsequently obtaining a deficiency judgment against owner-occupants, authorize an owner-occupant of residential property to convert the process to a judicial foreclosure proceeding.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

