

JAN 21 2011

S.B. NO. 652

A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

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

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

8 The legislature finds that as the rationale for Act 162,
9 the legislature had found that the number of mortgage
10 foreclosures of residential property in the State had reached an
11 alarming level, prompting numerous legislative proposals during
12 the regular session of 2010. The legislature, however, had
13 concluded that a comprehensive evaluation of Hawaii's mortgage
14 foreclosure laws would be necessary before meaningful
15 legislation could be enacted that, on balance, addressed the
16 concerns of both borrowers and lenders, without further
17 overburdening the courts.



1 The legislature notes that the mortgage foreclosure task
2 force was comprised of individuals representing borrowers,
3 lenders, and other stakeholders in the mortgage foreclosure
4 process. The legislature finds that the recommendations in the
5 preliminary report of the mortgage foreclosure task force for
6 the regular session of 2011 reflect a consensus that was finally
7 reached among this diverse group of individuals over a course of
8 several months of public meetings held during the legislative
9 interim of 2010.

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

19 The purpose of this Act is to implement the recommendations
20 that were adopted by the mortgage foreclosure task force and
21 submitted in the preliminary report to the legislature for the
22 regular session of 2011.



1 More specifically, the purpose of this Act is to accomplish
2 the following:

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

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

15 (3) Authorize an owner-occupant of residential property
16 that is being subjected to a foreclosure under power
17 of sale to convert the action into a foreclosure by
18 action;

19 (4) Authorize the mortgagee conducting a foreclosure under
20 power of sale to record with the land court or the
21 bureau of conveyances a copy of the notice of intent
22 to foreclose, and to furthermore give the recorded



1 copy of the notice the same effect as a notice of
2 pendency of action in a civil action, such as the
3 foreclosure by action;

4 (5) Authorize the land court to record the notice of
5 intent to foreclose; and

6 (6) Adopt a portion of the 2005 ruling of the United
7 States Bankruptcy Court for the District of Hawaii in
8 *In re Hoopai*, 2005 WL 1156091 (Bankr. D. Hawaii
9 January 12, 2005) (No. 04-02511), order affirmed by *In*
10 *re Hoopai*, 2005 WL 2864748 (D. Hawaii October 14,
11 2005) (No. CV.05-00186 DAE-KSC, CV.05-00187 HG-BMK),
12 by specifying that for a foreclosure under power of
13 sale, the mortgagor's interest is extinguished upon
14 the recordation of the affidavit in the bureau of
15 conveyances or in the land court, as the case may be,
16 within thirty days of the date of sale.

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

20 "§667-A Definitions. As used in this part, unless the
21 context requires otherwise:



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

3 "Nonjudicial foreclosure" means foreclosure under power of
4 sale.

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

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

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

15 "Residential property" means real property that is improved
16 and used for residential purposes.

17 §667-B Conversion; residential property; conditions. (a)

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

21 (1) A complaint conforming to section 667-C shall be filed
22 with the circuit court in the circuit where the



1 residential property is located, stating that the
2 owner-occupant of the property elects to convert the
3 nonjudicial foreclosure to a judicial foreclosure
4 proceeding;

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

10 (3) Within ninety days of the filing of the complaint, all
11 owners of an interest in the residential property
12 whose interests are pledged or otherwise encumbered by
13 the mortgage that is being foreclosed and all persons
14 who have signed the promissory note or other
15 instrument evidencing the debt secured by the mortgage
16 that is being foreclosed, including without limitation
17 co-obligors and guarantors, shall file a statement in
18 the circuit court action that they agree to submit
19 themselves to the judicial process and the
20 jurisdiction of the circuit court. If this condition
21 is not satisfied, the circuit court action shall be
22 dismissed with prejudice as to the right of any owner-



1 occupant to convert the action to a judicial
2 proceeding, and the mortgagee may proceed
3 nonjudicially;

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

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

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

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

18 (b) This section shall not apply to nonjudicial
19 foreclosures of association liens that arise under a declaration
20 filed pursuant to chapters 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 co-
20 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 667-
17 7, a statement printed in not less than 14-point font as
18 follows:

19 "IF THE PROPERTY BEING FORECLOSED IS
20 IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN
21 OWNER-OCCUPANT OF THE PROPERTY (DEFINED UNDER
22 PART I OF CHAPTER 667 OF THE HAWAII REVISED



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

15 IN ADDITION, ALL OWNERS OF AN INTEREST IN
16 THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE
17 BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE
18 MORTGAGE THAT IS BEING FORECLOSED AND ALL PERSONS
19 WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER
20 INSTRUMENT EVIDENCING THE DEBT SECURED BY THE
21 MORTGAGE THAT IS BEING FORECLOSED, INCLUDING,
22 WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS,



1 SHALL FILE A STATEMENT IN THE CIRCUIT COURT
2 ACTION THAT THEY AGREE TO SUBMIT THEMSELVES TO
3 THE JUDICIAL PROCESS AND THE JURISDICTION OF THE
4 CIRCUIT COURT WITHIN NINETY DAYS OF THE FILING OF
5 THE ATTACHED FORM. FAILURE TO SATISFY THIS
6 CONDITION WILL RESULT IN DISMISSAL OF THE CIRCUIT
7 COURT ACTION.

8 AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE
9 HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE
10 FILING OF THE CONVERSION FORM.

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

21 (b) The statement required by this section shall not be
22 required to be included in the notice of sale published pursuant



1 to section 667-5(a)(1)(B). Nothing in this section shall be
2 construed to set a minimum font size for the published notice of
3 sale.

4 §667-E Recordation of notice of intent to foreclose. The
5 foreclosing mortgagee may record a copy of the notice of intent
6 to foreclose with the assistant registrar of the land court or
7 the bureau of conveyances, as the case may be, in a manner
8 similar to recordation of notices of pendency of action under
9 section 501-151 or section 634-51, or both, as applicable. The
10 recorded notice shall have the same effect as a notice of pendency
11 of action. From and after the recordation of the notice, any
12 person who becomes a purchaser or encumbrancer of the mortgaged
13 property shall be deemed to have constructive notice of the power
14 of sale foreclosure and shall be bound by the foreclosure."

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

17 "**§501-151 Pending actions, judgments; recording of,**
18 **notice.** No writ of entry, action for partition, or any action
19 affecting the title to real property or the use and occupation
20 thereof or the buildings thereon, and no judgment, nor any
21 appeal or other proceeding to vacate or reverse any judgment,
22 shall have any effect upon registered land as against persons



1 other than the parties thereto, unless a full memorandum
2 thereof, containing also a reference to the number of
3 certificate of title of the land affected is filed or recorded
4 and registered. Except as otherwise provided, every judgment
5 shall contain or have endorsed on it the State of Hawaii general
6 excise taxpayer identification number, the federal employer
7 identification number, or the last four digits only of the
8 social security number for persons, corporations, partnerships,
9 or other entities against whom the judgment is rendered. If the
10 judgment debtor has no social security number, State of Hawaii
11 general excise taxpayer identification number, or federal
12 employer identification number, or if that information is not in
13 the possession of the party seeking registration of the
14 judgment, the judgment shall be accompanied by a certificate
15 that provides that the information does not exist or is not in
16 the possession of the party seeking registration of the
17 judgment. Failure to disclose or disclosure of an incorrect
18 social security number, State of Hawaii general excise taxpayer
19 identification number, or federal employer identification number
20 shall not in any way adversely affect or impair the lien created
21 upon recording of the judgment. This section does not apply to
22 attachments, levies of execution, or to proceedings for the



1 probate of wills, or for administration in a probate court;
2 provided that in case notice of the pendency of the action has
3 been duly registered it is sufficient to register the judgment
4 in the action within sixty days after the rendition thereof.

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

7 Notice of the pendency of an action in a United States
8 District Court, as well as a court of the State of Hawaii, may
9 be recorded.

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

12 The party seeking registration of a judgment shall redact
13 the first five digits of any social security number by blocking
14 the numbers out on the copy of the judgment to be filed or
15 recorded."

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

18 "**§667-3 Proceeds, how applied.** Mortgage and other
19 creditors shall be entitled to payment according to the priority
20 of their liens, and not pro rata; and judgments of foreclosure
21 and foreclosures under power of sale that are conducted in
22 compliance with this part and for which an affidavit is recorded



1 as required under section 667-5 shall operate to extinguish the
2 liens of subsequent mortgages and liens of the same property,
3 without forcing prior mortgagees or lienors to their right of
4 recovery. The surplus after payment of the mortgage foreclosed,
5 shall be applied pro tanto to the next junior mortgage[~~r~~] or
6 lien, and so on to the payment, wholly or in part, of mortgages
7 and liens junior to the one assessed."

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

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

19 (1) Give notice of the mortgagee's, successor's, or
20 person's intention to foreclose the mortgage and of
21 the sale of the mortgaged property[~~r~~by] as follows:



1 (A) By serving, not less than twenty-one days before
2 the date of sale, written notice of the intent to
3 foreclose on all persons entitled to notice under
4 this part in the same manner as service of a
5 civil complaint under chapter 634 and the Hawaii
6 rules of civil procedure, as they may be amended
7 from time to time; and

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

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

16 (b) Copies of the notice required under subsection (a)

17 shall be:

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

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

21 (c) Upon the request of any person entitled to notice
22 pursuant to this section and sections 667-5.5 and 667-6, the



1 attorney, the mortgagee, successor, or person represented by the
2 attorney shall disclose to the requestor the following
3 information:

4 (1) The amount to cure the default, together with the
5 estimated amount of the foreclosing mortgagee's
6 attorneys' fees and costs, and all other fees and
7 costs estimated to be incurred by the foreclosing
8 mortgagee related to the default prior to the auction
9 within five business days of the request; and

10 (2) The sale price of the mortgaged property once
11 auctioned.

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



1 acts in the premises fully and particularly, in the bureau of
2 conveyances.

3 (e) The mortgagee or other person who completes, pursuant
4 to this part, the nonjudicial foreclosure of a mortgage or other
5 lien on residential property shall not be entitled to pursue or
6 obtain a deficiency judgment against an owner-occupant of the
7 residential property who, at the time the notice of intent to
8 foreclose is served, does not have a fee simple or leasehold
9 ownership interest in any other residential real property;
10 provided, however, that nothing herein shall prohibit any other
11 mortgagee or person who holds a lien on the residential property
12 subject to the nonjudicial foreclosure, whose lien is subordinate
13 to the mortgage being foreclosed and is extinguished by the
14 nonjudicial foreclosure sale, from pursuing a monetary judgment
15 against that owner-occupant.

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

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

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



1 "**§667-8 Affidavit as evidence, when.** If it appears by the
2 affidavit that the affiant has in all respects complied with the
3 requirements of the power of sale and the statute, in relation
4 to all things to be done by the affiant before selling the
5 property, and has sold the same in the manner required by the
6 power, the affidavit, or a duly certified copy of the record
7 thereof, shall be admitted as evidence that the power of sale
8 was duly executed. The interests of the mortgagor, and all
9 those claiming under, by, or through the mortgagor, in the
10 property being foreclosed by exercise of a power of sale under
11 this part, including land whose title is not registered in the
12 land court under chapter 501, shall be deemed extinguished upon
13 the recordation of the affidavit in the bureau of conveyances or
14 in the office of the assistant registrar, as the case may be,
15 within thirty days of the date of sale of the property at public
16 auction."

17 SECTION 7. This Act shall apply only to foreclosure
18 proceedings initiated after the effective date of this Act.

19 SECTION 8. Upon the effective date of this Act, the
20 judiciary is requested to consider creating and adopting a form
21 for the conversion complaint established under section 2 of this
22 Act.



1 SECTION 9. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 10. In codifying the new sections added by section
5 2 of this Act, the revisor of statutes shall substitute
6 appropriate section numbers for the letters used in designating
7 the new sections in this Act.

8 SECTION 11. Statutory material to be repealed is bracketed
9 and stricken. New statutory material is underscored.

10 SECTION 12. This Act shall take effect on
11

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Report Title:

Mortgage Foreclosures; Task Force

Description:

Implements recommendations of the mortgage foreclosure task force relating to service of notice, conversion from nonjudicial to judicial foreclosure, the bar against deficiency judgments, notice of pendency of action, and extinguishment of the mortgagor's interest pursuant to the old nonjudicial foreclosure law.

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

