
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 both general and specific
4 policies and procedures necessary to improve the manner in which
5 mortgage foreclosures are conducted in the State. The
6 legislature further finds that the Act directed the task force
7 to submit two reports, a preliminary report for the regular
8 session of 2011 and a final report for the regular session of
9 2012.

10 The legislature finds that in the preliminary report for
11 the regular session of 2011, the task force recommended proposed
12 legislation that amends the old nonjudicial foreclosure process,
13 which is established as the foreclosure by power of sale process
14 under part I of chapter 667, Hawaii Revised Statutes. The
15 legislature further finds that implementing the task force
16 recommendations will help modernize the present law, by
17 providing it with increased clarity, certainty, efficiency, and
18 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 to furthermore give the recorded
5 copy of the notice the same effect as a notice of
6 pendency of action in a civil action, such as the
7 foreclosure by action;
- 8 (5) Authorize the land court to record the notice of
9 intent to foreclose; and
- 10 (6) Adopt a portion of the 2005 ruling of the United
11 States Bankruptcy Court for the District of Hawaii in
12 *In re Hoopai*, 2005 WL 1156091 (Bankr. D. Hawaii
13 January 12, 2005) (No. 04-02511), order affirmed by *In*
14 *re Hoopai*, 2005 WL 2864748 (D. Hawaii October 14,
15 2005) (No. CV.05-00186 DAE-KSC, CV.05-00187 HG-BMK),
16 by specifying that for a foreclosure under power of
17 sale, the mortgagor's interest is extinguished upon
18 the recordation of the affidavit in the bureau of
19 conveyances or in the land court, as the case may be,
20 within thirty days of the date of sale.



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

4 "§667-A Definitions. As used in this part, unless the
5 context requires otherwise:

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

8 "Nonjudicial foreclosure" means foreclosure under power of
9 sale.

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

13 (1) Owns an interest in the residential property, and the
14 interest is encumbered by the mortgage being
15 foreclosed; and

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

20 "Residential property" means real property that is improved
21 and used for residential purposes.



1 §667-B Conversion; residential property; conditions. (a)

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

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

11 (2) The complaint described in paragraph (1) shall be
12 filed with the circuit court no later than twenty days
13 after the notice of the nonjudicial foreclosure action
14 is served on the owner-occupant as required by section
15 667-5(a)(1)(A);

16 (3) Within ninety days of the filing of the complaint, all
17 owners of an interest in the residential property
18 whose interests are pledged or otherwise encumbered by
19 the mortgage that is being foreclosed and all persons
20 who have signed the promissory note or other
21 instrument evidencing the debt secured by the mortgage
22 that is being foreclosed, including without limitation



1 co-obligors and guarantors, shall file a statement in
2 the circuit court action that they agree to submit
3 themselves to the judicial process and the
4 jurisdiction of the circuit court. If this condition
5 is not satisfied, the circuit court action shall be
6 dismissed with prejudice as to the right of any owner-
7 occupant to convert the action to a judicial
8 proceeding, and the mortgagee may proceed
9 nonjudicially;

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

13 (5) The person filing the complaint shall have an
14 affirmative duty to promptly notify the Hawaii
15 attorney who is handling the nonjudicial foreclosure
16 about the filing of the conversion;

17 (6) All parties joined in the converted judicial
18 proceeding may assert therein any claims and defenses
19 that they could have asserted had the action
20 originally been commenced as a judicial foreclosure
21 action; and



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

3 (b) This section shall not apply to nonjudicial
4 foreclosures of association liens that arise under a declaration
5 filed pursuant to chapters 514A or 514B.

6 **§667-C Complaint; residential property; required contents.**

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

9 (1) A caption setting forth the name of the court, the
10 title of the action, and the file number. The title
11 of the action shall include the names of the filing
12 party as plaintiff and the foreclosing party as the
13 defendant;

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

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

18 (4) A statement identifying all other owners of an
19 interest in the residential property whose interests
20 are pledged or otherwise encumbered by the mortgage
21 that is being foreclosed and all persons who have
22 signed the promissory note or other instrument



1 evidencing the debt secured by the mortgage that is
2 being foreclosed, including without limitation co-
3 obligors and guarantors;

4 (5) A certification under penalty of perjury that the
5 filing party is an owner-occupant of the subject
6 property and seeks to convert the nonjudicial
7 foreclosure to a judicial proceeding;

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

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

17 §667-D Notice of intent to foreclose; residential

18 property; required statement on conversion. (a) The notice of
19 intent to foreclose nonjudicially that is served and posted as
20 required under sections 667-5(a)(1)(A) and 667-5(b)(2) shall
21 include, in addition to the contents required under section 667-



1 7, a statement printed in not less than 14-point font as
2 follows:

3 "IF THE PROPERTY BEING FORECLOSED IS
4 IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN
5 OWNER-OCCUPANT OF THE PROPERTY (DEFINED UNDER
6 PART I OF CHAPTER 667 OF THE HAWAII REVISED
7 STATUTES, AS A PERSON WHO, AT THE TIME THIS
8 NOTICE IS SERVED, OWNS AN INTEREST IN THE
9 RESIDENTIAL PROPERTY THAT IS SUBJECT TO THE
10 MORTGAGE BEING FORECLOSED AND THE RESIDENTIAL
11 PROPERTY HAS BEEN THE PRIMARY RESIDENCE
12 CONTINUOUSLY FOR NOT LESS THAN ONE-HUNDRED EIGHTY
13 DAYS) HAS THE RIGHT TO CONVERT A NONJUDICIAL
14 FORECLOSURE PROCEEDING TO A JUDICIAL FORECLOSURE
15 WHERE CLAIMS AND DEFENSES MAY BE CONSIDERED BY A
16 COURT OF LAW. TO EXERCISE THIS RIGHT, THE OWNER-
17 OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED
18 FORM WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE
19 THE PROPERTY IS LOCATED WITHIN TWENTY DAYS AFTER
20 SERVICE OF THIS NOTICE.

21 IN ADDITION, ALL OWNERS OF AN INTEREST IN
22 THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE



1 BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE
2 MORTGAGE THAT IS BEING FORECLOSED AND ALL PERSONS
3 WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER
4 INSTRUMENT EVIDENCING THE DEBT SECURED BY THE
5 MORTGAGE THAT IS BEING FORECLOSED, INCLUDING,
6 WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS,
7 SHALL FILE A STATEMENT IN THE CIRCUIT COURT
8 ACTION THAT THEY AGREE TO SUBMIT THEMSELVES TO
9 THE JUDICIAL PROCESS AND THE JURISDICTION OF THE
10 CIRCUIT COURT WITHIN NINETY DAYS OF THE FILING OF
11 THE ATTACHED FORM. FAILURE TO SATISFY THIS
12 CONDITION WILL RESULT IN DISMISSAL OF THE CIRCUIT
13 COURT ACTION.

14 AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE
15 HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE
16 FILING OF THE CONVERSION FORM.

17 A FORECLOSING LENDER WHO COMPLETES A
18 NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY
19 SHALL BE PROHIBITED UNDER HAWAII LAW FROM
20 PURSUING A DEFICIENCY JUDGMENT AGAINST AN OWNER-
21 OCCUPANT WHO DOES NOT OWN A FEE SIMPLE OR
22 LEASEHOLD INTEREST IN ANY OTHER RESIDENTIAL REAL



1 PROPERTY. IF THIS ACTION IS CONVERTED TO A
 2 JUDICIAL PROCEEDING, HOWEVER, THEN ALL REMEDIES
 3 AVAILABLE TO A LENDER MAY BE ASSERTED, INCLUDING
 4 THE RIGHT TO SEEK A DEFICIENCY JUDGMENT."

5 (b) The statement required by this section shall not be
 6 required to be included in the notice of sale published pursuant
 7 to section 667-5(a)(1)(B). Nothing in this section shall be
 8 construed to set a minimum font size for the published notice of
 9 sale.

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

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



1 "§501-151 Pending actions, judgments; recording of,
2 notice. No writ of entry, action for partition, or any action
3 affecting the title to real property or the use and occupation
4 thereof or the buildings thereon, and no judgment, nor any
5 appeal or other proceeding to vacate or reverse any judgment,
6 shall have any effect upon registered land as against persons
7 other than the parties thereto, unless a full memorandum
8 thereof, containing also a reference to the number of
9 certificate of title of the land affected is filed or recorded
10 and registered. Except as otherwise provided, every judgment
11 shall contain or have endorsed on it the State of Hawaii general
12 excise taxpayer identification number, the federal employer
13 identification number, or the last four digits only of the
14 social security number for persons, corporations, partnerships,
15 or other entities against whom the judgment is rendered. If the
16 judgment debtor has no social security number, State of Hawaii
17 general excise taxpayer identification number, or federal
18 employer identification number, or if that information is not in
19 the possession of the party seeking registration of the
20 judgment, the judgment shall be accompanied by a certificate
21 that provides that the information does not exist or is not in
22 the possession of the party seeking registration of the



1 judgment. Failure to disclose or disclosure of an incorrect
2 social security number, State of Hawaii general excise taxpayer
3 identification number, or federal employer identification number
4 shall not in any way adversely affect or impair the lien created
5 upon recording of the judgment. This section does not apply to
6 attachments, levies of execution, or to proceedings for the
7 probate of wills, or for administration in a probate court;
8 provided that in case notice of the pendency of the action has
9 been duly registered it is sufficient to register the judgment
10 in the action within sixty days after the rendition thereof.

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

13 Notice of the pendency of an action in a United States
14 District Court, as well as a court of the State of Hawaii, may
15 be recorded.

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

18 The party seeking registration of a judgment shall redact
19 the first five digits of any social security number by blocking
20 the numbers out on the copy of the judgment to be filed or
21 recorded."



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

3 **"§667-3 Proceeds, how applied.** Mortgage and other
4 creditors shall be entitled to payment according to the priority
5 of their liens, and not pro rata; and judgments of foreclosure
6 and foreclosures under power of sale that are conducted in
7 compliance with this part and for which an affidavit is recorded
8 as required under section 667-5 shall operate to extinguish the
9 liens of subsequent mortgages and liens of the same property,
10 without forcing prior mortgagees or lienors to their right of
11 recovery. The surplus after payment of the mortgage foreclosed,
12 shall be applied pro tanto to the next junior mortgage[~~r~~] or
13 lien, and so on to the payment, wholly or in part, of mortgages
14 and liens junior to the one assessed."

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

17 **"§667-5 Foreclosure under power of sale; notice; affidavit**
18 **after sale[~~-~~]; deficiency judgments.** (a) When a power of sale
19 is contained in a mortgage, and where the mortgagee, the
20 mortgagee's successor in interest, or any person authorized by
21 the power to act in the premises, desires to foreclose under
22 power of sale upon breach of a condition of the mortgage, the



1 mortgagee, successor, or person shall be represented by an
2 attorney who is licensed to practice law in the State and is
3 physically located in the State. The attorney shall:

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

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

14 (B) By publication of the notice once in each of
15 three successive weeks (three publications), the
16 last publication to be not less than fourteen
17 days before the day of sale, in a newspaper
18 having a general circulation in the county in
19 which the mortgaged property lies; and

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



1 (b) Copies of the notice required under subsection (a)
2 shall be:

- 3 (1) Filed with the state director of taxation; and
4 (2) Posted on the premises not less than twenty-one days
5 before the day of sale.

6 (c) Upon the request of any person entitled to notice
7 pursuant to this section and sections 667-5.5 and 667-6, the
8 attorney, the mortgagee, successor, or person represented by the
9 attorney shall disclose to the requestor the following
10 information:

- 11 (1) The amount to cure the default, together with the
12 estimated amount of the foreclosing mortgagee's
13 attorneys' fees and costs, and all other fees and
14 costs estimated to be incurred by the foreclosing
15 mortgagee related to the default prior to the auction
16 within five business days of the request; and

- 17 (2) The sale price of the mortgaged property once
18 auctioned.

19 (d) Any sale, of which notice has been given as aforesaid,
20 may be postponed from time to time by public announcement made
21 by the mortgagee or by some person acting on the mortgagee's
22 behalf. Upon request made by any person who is entitled to



1 notice pursuant to section 667-5.5 or 667-6, or this section,
2 the mortgagee or person acting on the mortgagee's behalf shall
3 provide the date and time of a postponed auction, or if the
4 auction is canceled, information that the auction was canceled.
5 The mortgagee within thirty days after selling the property in
6 pursuance of the power, shall file a copy of the notice of sale
7 and the mortgagee's affidavit, setting forth the mortgagee's
8 acts in the premises fully and particularly, in the bureau of
9 conveyances.

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



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

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

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

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



1 within thirty days of the date of sale of the property at public
2 auction."

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

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


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

12 SECTION 10. In codifying the new sections added by section
13 2 of this Act, the revisor of statutes shall substitute
14 appropriate section numbers for the letters used in designating
15 the new sections in this Act.

16 SECTION 11. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 12. This Act shall take effect on
19

INTRODUCED BY:


S.C. Keith-Allen

JAN 24 2011



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, bar against deficiency judgments, notice of pendency of action, and extinguishment of a mortgagor's interest.

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

