

JAN 24 2013

A BILL FOR AN ACT

RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE.

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

1 SECTION 1. The legislature finds that Act 48, Session Laws
2 of Hawaii 2011, among other things established a mortgage
3 foreclosure dispute resolution program to require mortgagees, at
4 the mortgagor's election and prior to conducting a public sale
5 of the subject residential property, to participate in dispute
6 resolution to negotiate an agreement to avoid foreclosure or
7 mitigate damages in cases where foreclosure is unavoidable.
8 Application of the dispute resolution program is limited to
9 nonjudicial foreclosures conducted by power of sale.

10 Following the commencement of the dispute resolution
11 program, many mortgagors bypassed the program by instead
12 pursuing foreclosures in court. Consequently, the rate of
13 judicial foreclosures rose dramatically while the dispute
14 resolution program remained dormant. The principal reason
15 mortgagors cited for their refusal to use the nonjudicial
16 foreclosure process and, as a result, the dispute resolution
17 program, was the risk of incurring significant penalties under
18 section 667-60, Hawaii Revised Statutes, relating to unfair or



1 deceptive acts or practices, for any violation of the mortgage
2 foreclosure law. Mortgagors expressed concern about potentially
3 incurring penalties for minor violations of the mortgage
4 foreclosure law, such as missed deadlines or using the wrong
5 font sizes on printed materials. Hence, mortgagors largely
6 opted to pursue foreclosures under the supervision of a court.

7 In response to the mortgagors' concerns and to ensure the
8 availability of both the nonjudicial foreclosure process and the
9 dispute resolution program, Act 182, Session Laws of Hawaii
10 2012, among other things specified the categories of conduct
11 that expressly constitute an unfair or deceptive act or
12 practice, in an effort to narrow the application of this
13 provision in the foreclosures law. However, the legislature
14 finds that more action should be taken to make the dispute
15 resolution program available to all homeowners facing the
16 prospect of losing their homes to foreclosure, including
17 judicial foreclosures.

18 The purpose of this Act is to assist homeowners at risk of
19 foreclosure and expand the availability of mandatory mortgage
20 foreclosure dispute resolution by requiring mortgagees, at the
21 mortgagor's election, to participate in mediation to avoid
22 foreclosure or to mitigate damages from foreclosure prior to



1 filing a judicial foreclosure action for property that has been
2 the mortgagor's primary residence for a specified period. This
3 Act also applies to judicial foreclosure actions filed prior to
4 the effective date of this Act and pending an initial court
5 hearing. It is the intent of the legislature that nothing in
6 this Act be construed as affecting the dispute resolution
7 provisions for nonjudicial foreclosures, as provided in part V
8 of chapter 667, Hawaii Revised Statutes, as those provisions
9 existed on the day prior to the effective date of this Act.

10 SECTION 2. Section 667-1, Hawaii Revised Statutes, is
11 amended by amending the definitions of "owner-occupant" and
12 "serve" to read as follows:

13 ""Owner-occupant" means a person, at the time that a notice
14 of default and intention to foreclose is served on the mortgagor
15 under the power of sale[+], or at the time a notice of dispute
16 resolution availability is served on the mortgagor pursuant to
17 section 667-75(b), as applicable:

18 (1) Who owns an interest in the residential property, and
19 the interest is encumbered by the mortgage being
20 foreclosed; and

21 (2) For whom the residential property is and has been the
22 person's primary residence for a continuous period of



1 not less than two hundred days immediately preceding
2 the date on which the notice is served.

3 "Serve", when referring to providing notice of intention to
4 foreclose or notice of default and intention to foreclose
5 pursuant to a nonjudicial foreclosure, or when referring to
6 providing notice of dispute resolution availability under
7 section 667-75(b), means to have service of the notice [~~of~~
8 ~~default and intention to foreclose~~] made in accordance with the
9 service of process or the service of summons under the Hawaii
10 rules of civil procedure and under sections 634-35 and 634-36,
11 excluding however, any return or affidavit of service
12 obligations required therein."

13 SECTION 3. Section 667-60, Hawaii Revised Statutes, is
14 amended by amending subsection (a) to read as follows:

15 "(a) Any foreclosing mortgagee who engages in any of the
16 following violations of this chapter shall have committed an
17 unfair or deceptive act or practice under section 480-2:

- 18 (1) Failing to provide a borrower or mortgagor with, or
19 failing to serve as required, the information required
20 by section 667-22 or 667-55;



- 1 (2) Failing to publish, or to post, information on the
2 mortgaged property, as required by section 667-27 or
3 667-28;
- 4 (3) Failing to take any action required by section 667-24
5 if the default is cured or an agreement is reached;
- 6 (4) Engaging in conduct prohibited under section 667-56;
- 7 (5) Holding a public sale in violation of section 667-25;
- 8 (6) Failing to include in a public notice of public sale
9 the information required by section 667-27 or section
10 667-28;
- 11 (7) Failing to provide the information required by section
12 667-41;
- 13 (8) With regard to mortgage foreclosure dispute resolution
14 under part V:
- 15 (A) Failing to provide notice of the availability of
16 dispute resolution as required by section 667-75;
- 17 (B) Participating in dispute resolution without
18 authorization to negotiate a loan modification,
19 or without access to a person so authorized, as
20 required by section 667-80(a)(1);
- 21 (C) Failing to provide required information or
22 documents as required by section 667-80(c);



1 (D) Completing a nonjudicial foreclosure if a
 2 neutral's closing report under section 667-82
 3 indicates that the foreclosing mortgagee failed
 4 to comply with requirements of the mortgage
 5 foreclosure dispute resolution program;

6 (9) Completing a nonjudicial foreclosure while a stay is
 7 in effect under section 667-83;

8 (10) Filing a foreclosure action under part IA without
 9 compliance with part V;

10 [~~+10~~] (11) Failing to distribute sale proceeds as required
 11 by section 667-31;

12 [~~+11~~] (12) Making any false statement in the affidavit of
 13 public sale required by section 667-32;

14 [~~+12~~] (13) Attempting to collect a deficiency in violation
 15 of section 667-38; and

16 [~~+13~~] (14) Failing to file a foreclosure notice with the
 17 department as required by section 667-76(a)."

18 SECTION 4. Section 667-71, Hawaii Revised Statutes, is
 19 amended by amending subsection (a) to read as follows:

20 "(a) This part shall apply to [~~nonjudicial~~]:

21 (1) Nonjudicial foreclosures conducted by power of sale
 22 under part II [~~of~~]; and



1 (2) Mortgagees seeking to file a foreclosure action under
2 part IA;
3 for residential [~~real~~] property that is occupied by one or more
4 mortgagors who are owner-occupants."

5 SECTION 5. Section 667-74, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "**§667-74 Availability of dispute resolution required**
8 **before foreclosure.** Before [a]:

9 (1) A public sale may be conducted pursuant to section
10 667-25; or

11 (2) A foreclosure action under part IA may be filed;
12 for a residential property that is occupied by an owner-
13 occupant, the [~~foreclosing~~] mortgagee, at the election of the
14 owner-occupant, shall participate in the mortgage foreclosure
15 dispute resolution program under this part to attempt to
16 negotiate an agreement that avoids foreclosure or mitigates
17 damages in cases where foreclosure is unavoidable."

18 SECTION 6. Section 667-75, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "**§667-75 Notice of dispute resolution availability**
21 **required.** (a) A foreclosure notice served pursuant to section
22 667-22(e) shall include notice that the mortgagee is required,



1 at the election of an owner-occupant, to participate in the
2 mortgage foreclosure dispute resolution program pursuant to this
3 part to attempt to avoid foreclosure or to mitigate damages
4 where foreclosure is unavoidable.

5 (b) A mortgagee seeking to file a foreclosure action under
6 part IA against residential property shall first serve notice to
7 the owner-occupant that the mortgagee is required, at the
8 election of the mortgagor, to participate in the mortgage
9 foreclosure dispute resolution program pursuant to this part to
10 attempt to avoid foreclosure or to mitigate damages where
11 foreclosure is unavoidable.

12 [~~(b)~~] (c) The notice required by [subsection] subsections
13 (a) and (b) shall be printed in not less than fourteen-point
14 font and include:

15 (1) The name and contact information of the mortgagor and
16 the mortgagee;

17 (2) The subject property address and legal description,
18 including tax map key number and the certificate of
19 title or transfer certificate of title number if
20 registered in the land court;

21 (3) The name and contact information of a person or entity
22 authorized to negotiate a loan modification on behalf



- 1 of the mortgagee;
- 2 (4) A statement that the mortgagor shall consult with an
3 approved housing counselor or an approved budget and
4 credit counselor at least thirty days prior to the
5 first day of a scheduled dispute resolution session;
- 6 (5) Contact information for all approved housing
7 counselors;
- 8 (6) Contact information for all approved budget and credit
9 counselors;
- 10 (7) A statement that the mortgagor electing to participate
11 in the mortgage foreclosure dispute resolution program
12 shall provide a certification under penalty of perjury
13 to the department that the mortgagor is an owner-
14 occupant of the subject property, including supporting
15 documentation;
- 16 (8) A general description of the information that an
17 owner-occupant electing to participate in the mortgage
18 foreclosure dispute resolution program is required to
19 provide to participate in the program as described
20 under section 667-80(c)(2);
- 21 (9) A statement that the owner-occupant shall elect to
22 participate in the mortgage foreclosure dispute



1 resolution program pursuant to this part no later than
2 thirty days after the department's mailing of the
3 ~~[notice]~~ notification required under section 667-77 or
4 the right shall be waived."

5 SECTION 7. Section 667-76, Hawaii Revised Statutes, is
6 amended to read as follows:

- 7 "(a) Within three days after a mortgagee serves [a]:
8 (1) A foreclosure notice on an owner-occupant pursuant to
9 section 667-22[7]; or
10 (2) Notice of dispute resolution availability on an owner-
11 occupant pursuant to section 667-75(b);

12 the mortgagee shall file the ~~[foreclosure]~~ notice with the
13 department and pay a filing fee of \$250, which shall be
14 deposited into the mortgage foreclosure dispute resolution
15 special fund established under section 667-86."

16 SECTION 8. Section 667-77, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "**§667-77 Notification to mortgagor by department.** Within
19 ten days after the mortgagee's filing of a notice ~~[of default~~
20 ~~and intention to foreclose]~~ with the department[7] pursuant to
21 667-76(a), the department shall mail a written notification by
22 registered or certified mail to the mortgagor that [a] the



1 notice [~~of default and intention to foreclose~~] has been filed
2 with the department. The notification shall inform the
3 mortgagor of an owner-occupant's right to elect to participate
4 in the foreclosure dispute resolution program and shall include:

5 (1) Information about the mortgage foreclosure dispute
6 resolution program;

7 (2) A form for an owner-occupant to elect or to waive
8 participation in the mortgage foreclosure dispute
9 resolution program pursuant to this part that shall
10 contain instructions for the completion and return of
11 the form to the department and the department's
12 mailing address;

13 (3) A statement that the mortgagor electing to participate
14 in the mortgage foreclosure dispute resolution program
15 shall provide a certification under penalty of perjury
16 to the department that the mortgagor is an owner-
17 occupant of the subject property, including a
18 description of acceptable supporting documentation as
19 required by section 667-78(a)(2);

20 (4) A statement that the owner-occupant shall elect to
21 participate in the mortgage foreclosure dispute
22 resolution program pursuant to this part no later than



1 thirty days after the department's mailing of the
2 [~~notice~~] notification under this section or the owner-
3 occupant shall be deemed to have waived the option to
4 participate in the mortgage foreclosure dispute
5 resolution program;

6 (5) A description of the information required under
7 section 667-80(c)(2) that the owner-occupant shall
8 provide to the mortgagee and the neutral assigned to
9 the dispute resolution;

10 (6) A statement that the owner-occupant shall consult with
11 an approved housing counselor or approved budget and
12 credit counselor at least thirty days prior to the
13 first day of a scheduled dispute resolution session;

14 (7) Contact information for all approved housing
15 counselors;

16 (8) Contact information for all approved budget and credit
17 counselors; and

18 (9) Contact information for the department.

19 The notification shall be mailed to the subject property address
20 and any other addresses for the mortgagor as provided in the
21 mortgagee's notice of dispute resolution under section 667-75



1 and, if applicable, the foreclosure notice under section 667-
2 22(a)."

3 SECTION 9. Section 667-78, Hawaii Revised Statutes, is
4 amended by amending subsections (b) and (c) to read as follows:

5 "(b) If the completed form and fee are not received within
6 the required time period, the owner-occupant shall be deemed to
7 have waived any right to participate in the mortgage foreclosure
8 dispute resolution program with respect to the subject property
9 and the [~~foreclosure~~] notice filed with the department[~~-~~]
10 pursuant to section 667-76(a)(1) or (2).

11 (c) If the owner-occupant does not elect to participate in
12 dispute resolution pursuant to this part, the department shall
13 notify the mortgagee within ten days of receiving an election
14 form indicating nonelection or the termination of the thirty-day
15 time period for election. After receiving the department's
16 notification, the mortgagee may proceed with [~~the~~]:

17 (1) The nonjudicial foreclosure process according to the
18 process provided in part II [~~of this chapter.~~]; or

19 (2) Filing a foreclosure action under part IA,
20 as applicable."

21 SECTION 10. Section 667-79, Hawaii Revised Statutes, is
22 amended by amending subsection (c) to read as follows:



1 "(c) [The] For nonjudicial foreclosures, written
2 notification of a case opening under this section shall operate
3 as a stay of the foreclosure proceeding in accordance with
4 section 667-83 and may be recorded."

5 SECTION 11. Section 667-80, Hawaii Revised Statutes, is
6 amended by amending subsection (c) to read as follows:

7 "(c) The parties shall comply with all information
8 requests from the department or neutral. No less than fifteen
9 days prior to the first day of the scheduled dispute resolution
10 session:

11 (1) The mortgagee shall provide to the department and the
12 mortgagor:

13 (A) A copy of the promissory note, signed by the
14 mortgagor, including any endorsements, allonges,
15 amendments, or riders to the note evidencing the
16 mortgage debt;

17 (B) A copy of the mortgage document and any
18 amendments, riders, or other documentation
19 evidencing the mortgagee's right of [~~nonjudicial~~]
20 foreclosure and interest in the property
21 including any interest as a successor or
22 assignee; and



1 (C) Financial records and correspondence that confirm
2 the mortgage loan is in default.

3 (2) The owner-occupant shall provide to the department and
4 the mortgagee:

5 (A) Documentation showing income qualification for a
6 loan modification, including any copies of pay
7 stubs, W-2 forms, social security or disability
8 income, retirement income, child support income,
9 or any other income that the owner-occupant deems
10 relevant to the owner-occupant's financial
11 ability to repay the mortgage;

12 (B) Any records or correspondence available which may
13 dispute that the mortgage loan is in default;

14 (C) Any records or correspondence available
15 evidencing a loan modification or amendment;

16 (D) Any records or correspondence available that
17 indicate the parties are currently engaged in
18 bona fide negotiations to modify the loan or
19 negotiate a settlement of the delinquency;

20 (E) Names and contact information for approved
21 housing counselors, approved budget and credit
22 counselors, or representatives of the mortgagee,



1 with whom the owner-occupant may have or is
 2 currently working with to address the
 3 delinquency; and

4 (F) Verification of counseling by an approved housing
 5 counselor or approved budget and credit
 6 counselor."

7 SECTION 12. Section 667-81, Hawaii Revised Statutes, is
 8 amended by amending subsections (b), (c), and (d) to read as
 9 follows:

10 "(b) If, despite the parties' participation in the dispute
 11 resolution process and compliance with the requirements of this
 12 part, the parties are not able to come to an agreement, the
 13 neutral shall file a closing report with the department that the
 14 parties met the program requirements. The mortgagee may record
 15 the report. Upon recording of the report pursuant to this
 16 subsection~~[, the]~~:

17 (1) The nonjudicial foreclosure process shall resume along
 18 the timeline as it existed on the date before the
 19 mortgagor elected dispute resolution, and may proceed
 20 as otherwise provided by law~~[]~~; or

21 (2) The mortgagee may proceed with filing a foreclosure
 22 action under part IA,



1 as applicable. The mortgagee shall notify the mortgagor of the
2 recording date and document number of this report and, in the
3 case of nonjudicial foreclosure, the deadline date to cure
4 default in an amended foreclosure notice. Nothing in this
5 subsection shall be construed to require the neutral to wait the
6 full sixty days allotted for dispute resolution to determine
7 that the parties were unable to reach an agreement and file a
8 report.

9 (c) If the parties have complied with the requirements of
10 this part and have reached an agreement, the agreement shall be
11 memorialized in writing and signed by the parties or their
12 authorized representatives. The parties shall be responsible
13 for drafting any agreement reached and enforcing the agreement.
14 The agreement shall be a contract between the parties and shall
15 be enforceable in a private contract action in a court of
16 appropriate jurisdiction in the event of breach by either party.
17 If the agreement allows for foreclosure or other transfer of the
18 subject property, the stay of the foreclosure under section 667-
19 83, where applicable, shall be released upon the recordation of
20 the neutral's closing report. Thereafter, the office of the
21 assistant registrar of the land court or bureau of conveyances



1 may record a notice of sale or other conveyance document, as
2 appropriate.

3 (d) If the parties to a dispute resolution process reach
4 an agreement [~~which~~] that resolves the matters at issue in the
5 dispute resolution before the first day of the scheduled dispute
6 resolution session scheduled pursuant to this section, the
7 parties shall notify the neutral by that date. The neutral
8 shall thereafter issue a closing report that the parties have
9 reached an agreement prior to the commencement of a dispute
10 resolution session. If the agreement provides for foreclosure,
11 the parties shall memorialize the agreement in writing, which
12 shall be signed by both parties. The parties may record the
13 report. If the agreement authorizes foreclosure, the stay of
14 the foreclosure under section 667-83, where applicable, shall be
15 released upon the recordation of the report. Thereafter, the
16 land court or bureau of conveyances may record a notice of sale
17 or other conveyance document, as appropriate. No fees shall be
18 refunded if the parties come to an agreement prior to a dispute
19 resolution session conducted pursuant to this part."

20 SECTION 13. Section 667-82, Hawaii Revised Statutes, is
21 amended by amending subsection (b) to read as follows:

22 "(b) If the neutral determines that the noncompliance was



1 unjustified as a result of circumstances within a party's
2 control, sanctions may be imposed on the noncompliant party as
3 follows:

4 (1) Sanctions against a mortgagee for unjustified
5 noncompliance with the program shall include [a]:
6 (A) A stay of the foreclosure under section 667-83;
7 or
8 (B) Continuance of the bar against filing a
9 foreclosure action under part IA for the subject
10 property, pursuant to section 667-74(2), until
11 the requirements of this part are met,
12 as applicable, and a fine payable to the owner-
13 occupant not to exceed \$1,500; or

14 (2) Sanctions against an owner-occupant for unjustified
15 noncompliance with the program shall include [a]:
16 (A) A removal of the stay of the foreclosure pursuant
17 to section 667-83(b); or
18 (B) Authorization for the mortgagee to proceed with
19 filing a foreclosure action under part IA,
20 as applicable, and a fine payable to the mortgagee not
21 to exceed \$1,500."



1 SECTION 14. Section 667-83, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) [~~The~~] In the case of nonjudicial foreclosure, written
4 notification of a case opening under section 667-79 shall
5 operate as a stay of the foreclosure proceeding and may be
6 recorded; provided that:

7 (1) The written notification shall not act as a stay on a
8 foreclosure proceeding by an association unless the
9 association has been provided notice pursuant to
10 sections 667-5.5, 667-21.5, or 667-79; and

11 (2) The written notification shall not act as a stay on a
12 foreclosure proceeding for the purpose of the date by
13 which the default must be cured pursuant to section
14 667-22(a)(6)."

15 SECTION 15. (a) This Act shall not apply to mortgagees
16 who have filed a judicial foreclosure action under part IA of
17 chapter 667, Hawaii Revised Statutes, at any time prior to July
18 1, 2013, except as provided in this section.

19 (b) The department of commerce and consumer affairs shall
20 implement the amendments made to the mortgage foreclosure
21 dispute resolution program pursuant to this Act no later than
22 July 1, 2013, whereupon:



1 (1) All judicial foreclosure actions filed under part IA
2 of chapter 667, Hawaii Revised Statutes, prior to July
3 1, 2013, for "residential property" occupied by
4 "owner-occupants", as those terms are defined in
5 section 667-1, Hawaii Revised Statutes, as amended by
6 this Act, and for which no court hearing has been
7 conducted as of July 1, 2013, nor will be conducted
8 for at least the days immediately following that
9 date, shall be immediately suspended; and

10 (2) All mortgagees who filed a judicial foreclosure action
11 described in paragraph (1) shall comply with the
12 requirements of part V of chapter 667, Hawaii Revised
13 Statutes, as amended by this Act, in the same manner
14 and under the same conditions, to the extent feasible,
15 as prescribed by that part for a mortgagee seeking to
16 file a judicial foreclosure action.

17 (c) A judicial foreclosure action shall remain suspended
18 under subsection (b) until the satisfaction of any requirement
19 or condition under part V of chapter 667, Hawaii Revised
20 Statutes, as amended by this Act, entitling a mortgagee to file
21 a judicial foreclosure action, including as provided under



1 sections 667-78(c), 667-81, and 667-82(b), Hawaii Revised
2 Statutes, as amended by this Act.

3 (d) All mortgagees to whom this section applies shall be
4 subject to all penalties for noncompliance with part V of
5 chapter 667, Hawaii Revised Statutes, as amended by this Act,
6 including as provided under sections 667-60(a) and 667-82(b),
7 Hawaii Revised Statutes, as amended by this Act.

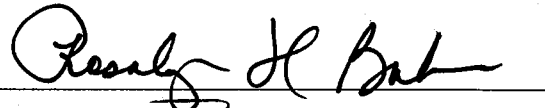
8 SECTION 16. Except as provided in section 15 of this Act,
9 this Act does not affect rights and duties that matured,
10 penalties that were incurred, and proceedings that were begun
11 before its effective date.

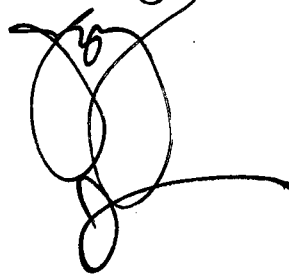
12 SECTION 17. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

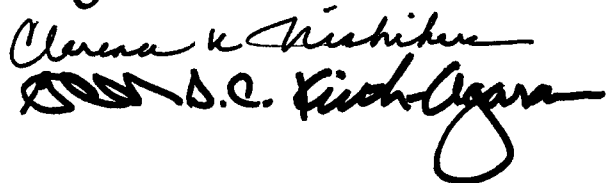
14 SECTION 18. This Act shall take effect on July 1, 2013.

15

INTRODUCED BY:









S.B. NO. 1370

Report Title:

Mortgage Foreclosures; Judicial Foreclosure Actions for Residential Property; Mandatory Dispute Resolution

Description:

Expands the application of mandatory mortgage foreclosure dispute resolution by requiring mortgagees, at the mortgagor's election, to participate in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period. Applies the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this bill and pending an initial court hearing.

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

