

**"CHAPTER 506
MORTGAGES OF REAL PROPERTY OR FIXTURES**

Section

- 506-1 Lien of mortgages of real property or fixtures;
debts secured; priority
- 506-2 On what property; enforceability
- 506-3 After-acquired real property and fixtures
- 506-4 Interests in recorded mortgages and leases
- 506-5 Use and possession of mortgaged property
- 506-6 Registered land
- 506-7 Mortgages on real property, damage or
destruction of collateral
- 506-8 Release of mortgages of real property or fixtures
- 506-9 Mortgage insurance; notice of right to cancel
- 506-10 Reverse mortgage loan

Cross References

Civil relief for state military forces, see chapter 657D.

Mortgage rescue fraud prevention act, see chapter 480E.

Secure and fair enforcement for mortgage licensing act, see chapter 454F.

" **§506-1 Lien of mortgages of real property or fixtures; debts secured; priority.** (a) Every transfer of an interest in real property or fixtures made as security for the performance of another act or subject to defeasance upon the payment of an obligation, whether the transfer is made in trust or otherwise, is to be deemed a mortgage and shall create a lien only as security for the obligation and shall not be deemed to pass title.

(b) A mortgage may secure the repayment of past debt, a debt incurred at the time the mortgage is executed, or a debt incurred for advances which may be made by the mortgagee subsequent to the execution of the mortgage even though the mortgagee is under no contractual duty to make these advances. Except as otherwise provided in sections 490:9-334 and 490:9-604 of the Uniform Commercial Code with respect to security interests in fixtures, a mortgage which secures future advances, up to but not exceeding the maximum amount of future advances stated in the mortgage, shall be superior to any subsequently recorded mortgage, lien, or other encumbrances or conveyance, other than liens for real property taxes and assessments for public improvements, even though the subsequently recorded mortgage, lien, or other encumbrance or conveyance is recorded prior to the date upon which any advance or advances have been made. [L 1939, c 255, pt of §1; RL 1945, §8871; am L 1951, c 202, §1; RL 1955, §196-1; am L 1966, c 18, §5(b); HRS §506-1; am L 1986, c 28, §1; am L 1987, c 275, §1; am L 2000, c 241, §5]

Law Journals and Reviews

Hawai'i 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions. 22 UH L. Rev. 347.

Case Notes

Agreement of sale is not a mortgage. 324 F. Supp. 1314.

Cited in connection with construction of bill of sale of automobile under prior law which included personal property under this section. 38 H. 279.

Deed accompanied by lease-back with option to repurchase construed as mortgage under the circumstances. 49 H. 160, 413 P.2d 221, reh'g den. 49 H. 255, 413 P.2d 221.

Mortgages for future advances; scope of coverage determined. 50 H. 304, 440 P.2d 262.

Where an absolute conveyance contains a defeasance clause, the instrument is a mortgage. 50 H. 493, 443 P.2d 153.

General creditor of mortgagor has standing to contest amount due mortgagee in foreclosure proceeding. 54 H. 107, 503 P.2d 424.

Decree of foreclosure and order of sale as appealable final orders. 55 H. 414, 520 P.2d 431.

Cited as authority for mortgages securing past debts. 60 H. 413, 591 P.2d 104.

Foreclosure decree is deemed final for appeal purposes although many matters remain unsettled. 2 H. App. 140, 627 P.2d 296.

" **§506-2 On what property; enforceability.** (a) Subject to the limitations contained in this chapter and to sections 490:9-334 and 490:9-604 of the Uniform Commercial Code respecting security interests in fixtures, if the mortgage so provides, the lien of the mortgage may attach to additions, improvements, and purchases or substitutions made to supply the place of any real property or fixtures disposed of and to all other after-acquired real property or fixtures referred to in the mortgage when the mortgagor acquires an interest therein to the extent of the interest, but subject to existing liens and the lien of a purchase money mortgage given by the mortgagor of any such after-acquired real property or fixtures.

(b) Any mortgage, except to the extent provided in this chapter, shall be enforceable against the mortgagor, creditors of the mortgagor, and against subsequent purchasers, mortgagees, assignees, and transferees, who take without valuable consideration or with notice, actual or constructive, even though the mortgaged real property or fixtures may have been detached or moved to a location different from that occupied by it at the time of the execution of the mortgage. [L 1939, c 255, pt of §1; RL 1945, §8872; RL 1955, §196-2; am L 1966, c 18, §5(c); HRS §506-2; am L 2000, c 241, §6]

" **§506-3 After-acquired real property and fixtures.** The mortgage shall operate only as a contract between the parties with respect to, and shall not create a lien upon real property or fixtures acquired in any manner by the mortgagor subsequent to the execution of the mortgage, if there are not described therein such real property, such fixtures and the real property

to which such fixtures are or will be affixed, unless and until the mortgagor or the mortgagee, at the time of or subsequent to the acquisition, executes and duly records in the bureau of conveyances an instrument or affidavit containing a reference to the book and page or document number where the mortgage is recorded and also a description of such real property, such fixtures and the real property to which such fixtures are or will be affixed sufficient to identify and locate the same, which description of real property may be made by describing the deed or other instrument of conveyance by which the real property was acquired or by describing the land by metes and bounds. [L 1939, c 255, §3; RL 1945, §8874; RL 1955, §196-4; am L 1966, c 18, §5(d); HRS §506-3; am L 1989, c 47, §15]

" **§506-4 Interests in recorded mortgages and leases.** The mortgage shall operate only as a contract between the parties with respect to, and shall not create a lien upon, any recorded mortgage or lease, unless and until a specific reference to the mortgage or lease in the manner contemplated by section 502-33 is contained in an instrument or affidavit executed by the mortgagor or mortgagee and duly recorded in the bureau of conveyances at Honolulu. [L 1939, c 255, §4; RL 1945, §8875; RL 1955, §196-5; HRS §506-4]

Law Journals and Reviews

Later mortgagee having actual notice of earlier mortgage is not entitled to priority merely because earlier mortgage omitted book and page references required by §502-33. Haw Supp, 4 HBJ, Nov 1966, at 30.

Case Notes

Ambiguity in mortgage should be resolved against drafter, particularly where interests of a party not privy to the mortgage contract are sought to be encumbered. 62 H. 188, 613 P.2d 1315.

" **§506-5 Use and possession of mortgaged property.** In the absence of an agreement to the contrary, the mortgagor of real property or fixtures under a duly recorded mortgage is entitled to the use or possession thereof until default. [L 1939, c 131, §1; RL 1945, §8879; RL 1955, §196-9; ren and am L 1966, c 18, §5(f); HRS §506-5]

" **§506-6 Registered land.** Nothing in this chapter shall be deemed to modify or amend chapter 501. [L 1939, c 255, §2; RL 1945, §8873; RL 1955, §196-3; HRS §506-6]

" **[§506-7] Mortgages on real property, damage or destruction of collateral.** Notwithstanding any provisions to the contrary in any agreement between a mortgagor and a mortgagee, if residential real property which is the subject of a mortgage securing a loan is damaged or destroyed by fire, earthquake, tidal wave or any natural disaster, the rate of interest on the loan shall not be increased by reason of the damage or destruction and the proceeds of any insurance insuring against such damage or destruction shall be applied, at the option of the mortgagor, to reduce the indebtedness due under the loan or to repair, restore or rebuild the residential real property. [L 1980, c 188, §5]

Law Journals and Reviews

Hawai'i 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions. 22 UH L. Rev. 347.

" **§506-8 Release of mortgages of real property or fixtures.** The mortgagee of real property or the record assignee of a mortgage interest shall provide to the mortgagor a release of mortgage upon full satisfaction of the mortgage and discharge of any secured debt. The instrument shall be duly acknowledged, shall sufficiently describe the mortgage that has been satisfied, and be recordable in the bureau of conveyances or office of the assistant registrar of the land court, or both, as appropriate. If the mortgagee or record assignee fails to provide a release of the mortgage as required by this section within sixty days from the date of a request made in writing by any party in interest, and sent by certified or registered mail to the mortgagee or record assignee at its last known address, then:

- (1) Any title insurer or underwritten title company as defined in section 431:20-102 may execute the release of mortgage on behalf of the mortgagee or record assignee; provided that:
 - (A) The release shall have attached to it an affidavit setting forth proof, such as a canceled check or written confirmation from the mortgagee, that reasonably establishes that the mortgage debt has been discharged and the mortgage has been fully satisfied; and

- (B) The release shall be executed by an officer of the title insurer or underwritten title company. In the event that a mortgage is released by a title insurer or underwritten title company under the provisions of this section but the mortgage debt has not been discharged, the mortgage has not been fully satisfied, and the title insurer or underwritten title company acted with gross negligence or in bad faith in releasing the mortgage, the title insurer or underwritten title company releasing the mortgage shall be liable to the mortgagee for treble damages and reasonable attorneys' fees and costs; or
- (2) The mortgagor or a company issuing title insurance to a new owner of the mortgaged subject real property or to another mortgagee of the subject real property, or the escrow company charged by the mortgagor with obtaining the release of mortgage, or any other interested party, as plaintiff, may institute an action in any circuit court to obtain the release of mortgage; provided that:
- (A) The plaintiff in the action shall mail a copy of the complaint to the mortgagee or record assignee by certified or registered mail addressed to the mortgagee or record assignee at its last known address;
- (B) If the mortgagee or record assignee does not file an answer to the complaint within forty-five days after the mailing, the court, upon receipt of an affidavit of mailing required by this section and upon satisfactory proof that the mortgage debt has been discharged and the mortgage has been fully satisfied, shall issue an order releasing the mortgage;
- (C) This order shall be recorded in the bureau of conveyances or office of the assistant registrar of the land court, or both, as appropriate; and
- (D) Upon a finding of good cause by the court, the plaintiff shall be entitled to treble damages and reasonable attorneys' fees and costs incurred in the action unless the court finds that the mortgagee had a reasonable basis for believing that a dispute existed regarding whether the mortgage should have been released. [L 1988, c 143, §1; am L 1994, c 78, §1]

" **[§506-9] Mortgage insurance; notice of right to cancel.**

- (a) Any person, on behalf of a casualty insurance company, that

provides a mortgagor with mortgage life insurance without charge for a period less than the term of the mortgage, which insurance is not a condition of obtaining the mortgage, shall send each insured mortgagor written notice advising each such mortgagor of the right to cancel the insurance, of the requirements for effecting such cancellation, and that premiums will be charged for the insurance unless it is canceled. The notice shall be sent to each insured mortgagor at least four weeks prior to the expiration of the period during which the insurance is provided without charge.

(b) For the purposes of this section, "mortgage life insurance" means an insurance plan which will pay off the mortgage balance in the event of the death or, as the case may be, disability of the insured mortgagor. [L 1989, c 239, §5]

" **§506-10 Reverse mortgage loan.** (a) Prior to accepting an application for a reverse mortgage loan, a lender shall refer every borrower to counseling from an organization that is a housing counseling agency approved by the United States Department of Housing and Urban Development, and shall receive certification from the counselor that the borrower has received counseling. The certificate shall be signed by the borrower and the counselor and include the date of counseling, the name, address, and telephone number of both the borrower and the organization providing counseling, and shall be maintained by the holder of the reverse mortgage throughout the term of the reverse mortgage loan.

(b) A lender that fails to comply with the requirements of subsection (a) shall be deemed to have engaged in an unfair method of competition or unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2.

(c) As used in this section, "reverse mortgage loan" means a loan that:

- (1) Is a nonrecourse loan wherein the committed principal amount is secured by a mortgage on residential property owned by the borrower;
- (2) Is due upon sale of the property securing the loan, or upon the death of the last surviving borrower, or upon the borrower terminating use of the real property as a principal residence, or upon the borrower's default;
- (3) Provides cash advances to the borrower based upon the equity or the value in the borrower's owner-occupied principal residence;
- (4) Requires no payment of principal or interest until the entire loan becomes due and payable; and

- (5) Is made by a lender licensed or chartered under state or federal law.

For purposes of this section, "reverse mortgage loan" shall not include a loan:

- (1) Insured by the United States Department of Housing and Urban Development;
- (2) Intended for sale to the Federal National Mortgage Association (also known as "Fannie Mae") or to the Federal Home Loan Mortgage Corporation (also known as "Freddie Mac"); or
- (3) For which mortgage counseling is required under other state or federal laws.
- (d) No person other than a state chartered or licensed, or federally chartered or licensed, lender shall offer reverse mortgage loans. [L 1999, c 50, §1; am L 2000, c 63, §1]