

CHAPTER 667
FORECLOSURES

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Note

As to procedural statutes superseded by the rules of court, see note preceding Title 32.

Chapter heading amended by L 2012, c 182, §3(4).

Cross References

Mortgage rescue fraud prevention act, see chapter 480E.

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

Rules of Court

See Rules for Conversion of Non-Judicial Foreclosure Proceedings.

Law Journals and Reviews

Timesharing in the 1990s. I HBJ, no. 13, at 89 (1997).

Case Notes

Defendant's motion for summary judgment granted on count alleging violation of this chapter, where plaintiffs did not establish a genuine issue of material fact regarding the claim and further failed to state a claim for wrongful foreclosure. 907 F. Supp. 2d 1165 (2012).

"PART I. GENERAL PROVISIONS

Note

This Part I heading and §667-1 are new. Former Part I heading and §667-1 were renumbered as Part IA and §667-1.5, respectively. L 2012, c 182, §3(5), (6).

§667-1 Definitions. As used in this chapter:

"Approved budget and credit counselor" means a Hawaii-based budget and credit counseling agency that has received approval from a United States trustee or bankruptcy administrator to provide instructional courses concerning personal financial management pursuant to title 11 United States Code section 111.

"Approved housing counselor" means a Hawaii-based housing counseling agency that has received approval from the United States Department of Housing and Urban Development to provide housing counseling services pursuant to section 106(a)(2) of the

Housing and Urban Development Act of 1968, title 12 United States Code section 1701x, as the agency appears on the United States Department of Housing and Urban Development website.

"Assessment" has the same meaning as "common expenses" in section 514B-3 and "assessment" in section 421J-2.

"Association" has the same meaning as defined in sections 421J-2 and 514B-3.

"Association documents" has the same meaning as defined in section 421J-2 and includes the "declaration" defined in section 514B-3 and the "bylaws" described in section 514B-108, respectively.

"Association lien" has the same meaning as the lien established under section 421J-10.5 or 514B-146.

"Borrower" means the borrower, maker, cosigner, or guarantor under a mortgage agreement.

"Department" means the department of commerce and consumer affairs.

"Director" means the director of commerce and consumer affairs.

"Dispute resolution" means a facilitated negotiation under part V between a mortgagor and mortgagee for the purpose of reaching an agreement for mortgage loan modification or other agreement in an attempt to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.

"Foreclosure notice" means notice of default and intention to foreclose prepared pursuant to section 667-22.

"Mailed" means to be sent by first class mail, postage prepaid, unless otherwise expressly directed in this chapter.

"Mortgage" means a mortgage, security agreement, or other document under which property is mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.

"Mortgage agreement" includes the mortgage, the note or debt document, or any document amending any of the foregoing.

"Mortgaged property" means the property that is subject to the lien of the mortgage.

"Mortgagee" means the current holder of record of the mortgagee's or the lender's interest under the mortgage or the current mortgagee's or lender's duly authorized agent.

"Mortgagor" means the mortgagor or borrower named in the mortgage and, unless the context otherwise indicates, includes the current owner of record of the mortgaged property whose interest is subject to the mortgage.

"Neutral" means a person who is a dispute resolution specialist assigned to facilitate the dispute resolution process required by part V.

"Nonjudicial foreclosure" means foreclosure under power of sale.

"Owner-occupant" means a person, at the time that a notice of default and intention to foreclose is served on the mortgagor under the power of sale:

- (1) Who owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and
- (2) For whom the residential property is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served.

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

"Property" means property (real, personal, or mixed), an interest in property (including fee simple, leasehold, life estate, reversionary interest, and any other estate under applicable law), or other interests that can be subject to the lien of a mortgage.

"Record" means to record or file a document in the office of the assistant registrar of the land court under chapter 501 or to record a document in the bureau of conveyances under chapter 502, or both, as applicable.

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

"Serve", when referring to providing notice of intention to foreclose or notice of default and intention to foreclose pursuant to a nonjudicial foreclosure, means to have service of the notice of default and intention to foreclose made in accordance with the service of process or the service of summons under the Hawaii rules of civil procedure and under sections 634-35 and 634-36, excluding however, any return or affidavit of service obligations required therein.

"Time share interest" has the same meaning as in section 514E-1.

"Unit" has the same meaning as in sections 421J-2 and 514B-3.

"Unit owner" has the same meaning as "member" in section 421J-2 and "unit owner" in section 514B-3. [L 2012, c 182, §3(1)]

"PART IA. FORECLOSURE BY ACTION

Note

Sections 667-1 to 667-13 designated as Part I by L 1998, c 122, §2.

This is former Part I that was renumbered as Part IA and amended by L 2012, c 182, §3(5).

Law Journals and Reviews

Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i. 24 UH L. Rev. 245 (2001).

§667-1.5 Foreclosure by action. The circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury, and shall render judgment for the amount awarded, and the foreclosure of the mortgage. Execution may be issued on the judgment, as ordered by the court. [CC 1859, §1231; RL 1925, §2887; RL 1935, §4720; RL 1945, §12420; RL 1955, §336-1; HRS §667-1; am L 1972, c 90, §9(a); ren L 2012, c 182, §3(6)]

Case Notes

In the absence of direction from mortgagor, mortgagee may appropriate payment on mortgage to either principal or interest, or to another debt due to mortgagee. 5 H. 405 (1885).

Guardian of heirs of mortgagor justified in assenting to application of proceeds of sale of land of deceased ancestor to payment of debt, secured or unsecured. 28 H. 81, 85 (1924).

Burden of guarantor sued for deficiency after foreclosure to show foreclosure price paid by mortgagee inadequate. 31 H. 34 (1929).

Economic depression alone not enough to refuse remedy of foreclosure. 32 H. 835 (1933). Upset price. 32 H. 835 (1933).

Decree of foreclosure is a final judgment for purposes of appellate review. 55 H. 414, 520 P.2d 431 (1974); 57 H. 557, 560 P.2d 490 (1977).

The judicial foreclosure system in Hawaii, pursuant to this section, is not clearly, manifestly and unmistakably violative of due process; considering the two basic elements of procedural due process--notice and the opportunity to be heard--appellants were afforded due process. 94 H. 422 (App.), 16 P.3d 827 (2000).

Cited: 40 H. 269, 274 (1953).

See 33 H. 1 (1934); 34 H. 283 (1937).

" **§667-2 Other mortgagees joined.** All prior and subsequent mortgage creditors, whose names are or can be discovered by the

party foreclosing a mortgage, shall be made parties to the action. [CC 1859, §1232; RL 1925, §2888; RL 1935, §4721; RL 1945, §12421; RL 1955, §336-2; HRS §667-2; am L 1972, c 90, §9(b)]

Rules of Court

Parties, see HRCP rules 19 to 21.

Case Notes

See 5 H. 397.

" **§667-3 Proceeds, how applied.** Mortgage and other creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and judgments of foreclosure that are conducted in compliance with this part shall operate to extinguish the liens of subsequent mortgages and liens of the same property, without forcing prior mortgagees or lienors to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage or lien, and so on to the payment, wholly or in part, of mortgages and liens junior to the one assessed. [CC 1859, §1233; RL 1925, §2889; RL 1935, §4722; RL 1945, §12422; RL 1955, §336-3; HRS §667-3; am L 1972, c 90, §9(c); am L 2011, c 48, §16; am L 2012, c 182, §12]

Rules of Court

See HRCP rule 13.

Case Notes

Mortgagee of recorded chattel mortgage taking possession of unharvested rice crop has prior right over subsequent creditors. 9 H. 616 (1895).

Tender must include attorney's fee in order to ward off foreclosure when mortgage provides for attorney's fee. 21 H. 470 (1913); 29 H. 20 (1926).

Under HRCP rule 54(b), court has discretion to leave adjudication of junior lien status for later determination. 56 H. 587, 545 P.2d 1173 (1976).

First mortgage lien should not have been terminated by confirmation of sale unless first mortgagee's priority as to proceeds was preserved. 67 H. 322, 687 P.2d 1333 (1984).

See 33 H. 1 (1934); 35 H. 482 (1940).

" **§667-4 Defenses.** The mortgagor, or any subsequent mortgagee, may defend the action for foreclosure, and may show any matter in legal or equitable avoidance of the mortgage. [CC 1859, §1234; RL 1925, §2890; RL 1935, §4723; RL 1945, §12423; RL 1955, §336-4; HRS §667-4; am L 1972, c 90, §9(d)]

Rules of Court

Pleading under the Hawaii Rules of Civil Procedure, see HRCP rules 7, 8, 10, 12. Affirmative defenses, see HRCP rule 8(c).

Case Notes

Acceleration provision in mortgage although not in note secured is enforceable by foreclosure. 32 H. 420 (1932).

" **§667-5 REPEALED.** L 2012, c 182, §50.

" **§667-5.5 Foreclosure notice; planned communities; condominiums; cooperative housing projects.** Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

- (1) The foreclosure at the time foreclosure proceedings are begun; and
- (2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in the mortgage foreclosure dispute resolution program under part V.

The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. Paragraph (1) shall not apply if the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against parties other than the planned community association, association of owners, or cooperative housing corporation. [L 1984, c 204, §1; am L 1988, c 166, §1; am L 2006, c 275, §2; am L 2008, c 28, §39; am L 2011, c 48, §18; am L 2012, c 182, §13]

" **§§667-5.7 to 667-8 REPEALED.** L 2012, c 182, §§51 to 54.

" **§667-6 REPEALED.** L 2012, c 182, §52.

" **§667-7 REPEALED.** L 2012, c 182, §53.

" **§667-8 REPEALED.** L 2012, c 182, §54.

" **§667-9 Dower barred, when.** If the mortgage was executed by a man having at the time no lawful wife, or if the mortgagor being married, his wife joined in the deed in token of her release of dower, the sale of the property in the mode aforesaid shall be effectual to bar all claim and possibility of dower in the property. [L 1874, c 33, §3; RL 1925, §2882; RL 1935, §4727; RL 1945, §12427; RL 1955, §336-8; HRS §667-9; am L 1972, c 90, §9(h)]

" **§667-10 Power unaffected by transfer; surplus after sale.** No sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the mortgaged property, as attorney or agent of the mortgagor, except as otherwise provided by chapters 501 and 502. When public sale is made of the mortgaged property under this part, distribution of the proceeds of the sale shall be as specified in section 667-3, and the remainder of the proceeds, if any, shall be paid over to the owner of the mortgaged property, after deducting the amount of all claims and all expenses attending the same. [L 1874, c 33, §4; RL 1925, §2883; RL 1935, §4728; RL 1945, §12428; RL 1955, §336-9; HRS §667-10; am L 1972, c 90, §9(i), (j); am L 2011, c 48, §19; am L 2012, c 182, §14]

Case Notes

Upon foreclosure sale after death of mortgagor surplus goes to administrator if required to pay debts. 17 H. 453 (1906) (prior to enactment of §531-14).

Mortgagor can recover surplus from first mortgagee when second mortgagee not a party to the action. 18 H. 352 (1907).

Owner of mortgaged property had right to surplus proceeds. 71 H. 204, 787 P.2d 674 (1990).

" **§§667-11 to 667-13 REPEALED.** L 1972, c 90, §9(k).

" **§§667-14 and 667-15 REPEALED.** L 2012, c 182, §§55, 56.

" **§667-15 REPEALED.** L 2012, c 182, §56.

" **§667-17 Attorney affirmation in judicial foreclosure.**
[Section repealed July 1, 2017. L 2012, c 182, §69(1)(A). See also §667-18.] Any attorney who files on behalf of a mortgagee seeking to foreclose on a residential property under this part shall sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted, under penalty of perjury and subject to applicable rules of professional conduct. The affirmation shall be filed with the court at the time that the action is commenced and shall be in substantially the following form:

" _____CIRCUIT COURT OF THE STATE OF HAWAII

Plaintiff,

AFFIRMATION

v.

Defendant(s)

Mortgaged Premises:

Note: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits that falsely attest to such review and to other critical facts in the foreclosure process; and "robotic signature" of documents.

* * *

[_____] , Esq., pursuant to Hawaii Revised Statutes §667-17 and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the State of Hawaii and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.
2. On [date], I communicated with the following representative or representatives of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

Name

Title

-
-
3. Based upon my communication with [persons specified in item 2], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law and that plaintiff has legal standing to bring this foreclosure action. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.
4. I am aware of my obligations under Hawaii Rules of Professional Conduct.

DATED:

N.B.: Counsel may augment this affirmation to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose."

[L 2012, c 182, pt of §3(3); am L 2014, c 37, §1]

" **[\$667-18] Attorney affirmation in judicial foreclosure.** [Section effective July 1, 2017. L 2012, c 182, §69(1)(B). See also §667-17.] An attorney who files a complaint in a mortgage foreclosure action shall affirm in writing, under penalty of perjury, that to the best of the attorney's knowledge, information, and belief the allegations contained in the complaint are warranted by existing law and have evidentiary support. [L 2012, c 182, pt of §3(3)]

" **[\$667-19] Association foreclosures; cure of default; payment plan.** If a foreclosure by action is initiated by an association pursuant to section 421J-10.5, 514A-90, or 514B-146:

- (1) At the time of the commencement of the foreclosure by action, the association shall serve the unit owner with written contact information for approved housing counselors and approved budget and credit counselors;
- (2) A unit owner may cure the default within sixty days after service of the association's complaint for foreclosure by action by paying the association the full amount of the default, including the foreclosing association's attorneys' fees and costs, and all other fees and costs related to the default, along with any additional amounts estimated to be incurred by the foreclosing association;
- (3) A unit owner may submit a payment plan within thirty days after service of the association's complaint for foreclosure by action. The unit owner shall submit the payment plan to the association or its attorney by certified mail return receipt requested or by hand

delivery. The association shall not reject a reasonable payment plan. A unit owner's failure to strictly perform any agreed-upon payment plan shall entitle the association to pursue its remedies without further delay. For purposes of this paragraph, "reasonable payment plan" means a plan that provides for:

- (A) Timely payment of all assessments that become due after the date that the payment plan is proposed; and
 - (B) Additional monthly payments of an amount sufficient to cure the default, within a reasonable period under the circumstances as determined by the board of directors in its discretion; provided that a period of up to twelve months shall be deemed reasonable; and provided further that the board of directors shall have the discretion to agree to a payment plan in excess of twelve months;
- (4) From and after the date that the unit owner gives written notice to the association of the unit owner's intent to cure the default pursuant to paragraph (2) or timely submits a payment plan pursuant to paragraph (3), any foreclosure by action shall be stayed during the sixty-day period to cure the default or during the term of the payment plan or a longer period that is agreed upon by the parties;
- (5) If the default is cured pursuant to paragraph (2), the association shall dismiss the foreclosure by action. If the parties have agreed on a payment plan pursuant to paragraph (3), the association shall stay the foreclosure by action. Within fourteen days of the date of the cure or an agreement on a payment plan, the association shall notify any person who was served as a result of the foreclosure by action that the action has been dismissed or stayed, as the case may be. If a notice of pendency of action for the foreclosure by action was recorded, a release of the notice of pendency of action shall be recorded if the action is dismissed; and
- (6) If the default is not cured pursuant to paragraph (2), or the parties have not agreed on a payment plan pursuant to paragraph (3), the association may continue to foreclose the association's lien under foreclosure by action. [L 2012, c 182, pt of §3(3)]

" **[§667-20] Publication of notice of public sale.** The foreclosing mortgagee or association in a foreclosure by action shall have the public notice of the public sale:

- (1) Printed in not less than seven-point font and published in the classified section of a newspaper that is published at least weekly and having a general circulation in the county in which the mortgaged property or unit is located. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement; or
- (2) Not less than twenty-eight days before the date of the public sale, published on a state website at the discretion of the agency that maintains the website; provided that the public notice shall be published at least once in the format described in paragraph (1) at least fourteen days prior to the public sale. [L 2012, c 182, pt of §3(3), §§63, 69(5)]

Revision Note

Subsection (a) designation deleted pursuant to §23G-15.

" **[§667-20.1] Postponement, cancellation of sale.** (a) The public sale may be either postponed or canceled by the court-appointed commissioner. Notice of the postponement or the cancellation of the public sale shall be:

- (1) Announced by the court-appointed commissioner at the date, time, and place of the last scheduled public sale; and
- (2) Provided to:
 - (A) The mortgagor, the borrower, and the foreclosing mortgagee;
 - (B) Any prior or junior creditors who have a recorded lien on the mortgaged property before the commencement of the foreclosure action; and
 - (C) Any party named in the foreclosure action and any prospective bidder who requested notice of the public sale date or any change in the public sale date.

(b) If there is a postponement of the public sale of the mortgaged property, the court-appointed commissioner shall have a new public notice of the public sale published once in the format described in section 667-20. The new public notice shall state that it is a notice of a postponed sale. The public sale

shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before the rescheduled date of the public sale, a copy of the new public notice of the rescheduled public sale shall be posted on the mortgaged property or on another real property of which the mortgaged property is a part, and it shall be mailed or delivered to the mortgagor, the borrower, the foreclosing mortgagee, and any other person entitled to receive notification of the foreclosure action under subsection (a)(2).

(c) Upon the fourth postponement of every series of four consecutive postponements, the court-appointed commissioner shall follow all of the public notice of public sale requirements of section 667-20. [L 2013, c 181, §2]

"PART II. POWER OF SALE FORECLOSURE PROCESS

Note

Part heading amended by L 2012, c 182, §3(7).

Law Journals and Reviews

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

§667-21 Power of sale process. The power of sale process in this part is an alternative to the foreclosure by action in part IA. [L 1998, c 122, pt of §1; am L 2011, c 48, §20; am L 2012, c 182, §15]

" **§667-21.5 Foreclosure notice; planned communities; condominiums; cooperative housing projects.** Notwithstanding any law or agreement to the contrary, any person who forecloses on a property under this part within a planned community, a condominium apartment or unit, or an apartment in a cooperative housing project shall notify, by way of registered or certified mail, the board of directors of the planned community association, the association of owners of the condominium project, or the cooperative housing project in which the property to be foreclosed is located, of the following:

- (1) The foreclosure at the time foreclosure proceedings are begun; and
- (2) Any election by an owner-occupant of the property that is the subject of the foreclosure to participate in the mortgage foreclosure dispute resolution program under part V.

The notice, at a minimum, shall identify the property, condominium apartment or unit, or cooperative apartment that is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. Paragraph (1) shall not apply when the planned community association, condominium association of owners, or cooperative housing corporation is a party in a foreclosure action. This section shall not affect civil proceedings against parties other than the planned community association, association of owners, or cooperative housing corporation. [L 2011, c 48, pt of §4; am L 2012, c 182, §16]

" **§667-21.6 REPEALED.** L 2012, c 182, §57.

" **§667-22 Notice of default and intention to foreclose; contents; distribution.** (a) When the mortgagor or the borrower has breached the mortgage agreement, and when the foreclosing mortgagee intends to conduct a power of sale foreclosure under this part, the foreclosing mortgagee shall prepare a written notice of default and intention to foreclose addressed to the mortgagor, the borrower, and any guarantor. The notice of default and intention to foreclose shall state:

- (1) The name and address of the current mortgagee;
- (2) The name and last known address of the mortgagors, the borrowers, and any guarantors;
- (3) With respect to the mortgaged property, the address or a description of its location, tax map key number, and certificate of title or transfer certificate of title number if registered in the land court;
- (4) The description of the default or, if the default is a monetary default, an itemization of the delinquent amount;
- (5) The action required to cure the default, including the delinquent amount and the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs related to the default estimated to be incurred by the foreclosing mortgagee by the deadline date;
- (6) The date by which the default must be cured, which shall be at least sixty days after the date of the notice of default and intention to foreclose;
- (7) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will become due, that the mortgagee intends to conduct a power of sale foreclosure to sell the

mortgaged property at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the mortgaged property at the public sale;

- (8) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the mortgagee may publish the public notice of the public sale in a newspaper of general circulation or on a state website, pursuant to section 667-27(d);
- (9) The name, address, electronic address, and telephone number of the attorney who is representing the foreclosing mortgagee; provided that the attorney shall be licensed to practice law in the State and physically located in the State; and
- (10) Notice of the right of the owner-occupant to elect to participate in any other process as established by law.

(b) The notice of default and intention to foreclose shall also contain wording substantially similar to the following in all capital letters and printed in not less than fourteen-point font:

"IF THE DEFAULT ON THE LOAN CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE MORTGAGED PROPERTY MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT ACTION AND WITHOUT GOING TO COURT.

YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES. FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY LICENSED IN THIS STATE.

ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED. "

(c) The notice of default and intention to foreclose shall include a copy of:

- (1) The original mortgage agreement, and copies of any subsequent mortgage agreements and assignments;
- (2) The promissory note signed by the mortgagor and any endorsements and allonges on the note; and
- (3) Any other documents that amend or alter the terms of the original mortgage agreement that were signed by

the mortgagor and the mortgagee or any successors or assigns of the mortgagor or the mortgagee.

(d) The notice of default and intention to foreclose shall also include contact information for approved housing counselors and approved budget and credit counselors.

(e) The foreclosing mortgagee shall have the notice of default and intention to foreclose served on:

- (1) The mortgagor and the borrower;
- (2) Any prior or junior creditors who have a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (3) The state director of taxation;
- (4) The director of finance of the county where the mortgaged property is located;
- (5) The department of commerce and consumer affairs, by filing the notice with the department when required; and
- (6) Any other person entitled to receive notice under this part.

(f) As used in this part, unless the context clearly indicates otherwise, the notice of default and intention to foreclose shall also include any amended notice that results from participation in the mortgage foreclosure dispute resolution program under part V. [L 1998, c 122, pt of §1; am L 2008, c 138, §3; am L 2011, c 48, §21; am L 2012, c 182, §17]

" **§667-23 Recordation of notice of default and intention to foreclose.** Before the deadline date in the notice of default and intention to foreclose, the notice shall be recorded in a recordable form in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice of default and intention to foreclose shall have the same effect as a notice of pendency of action. From and after the recordation of the notice of default and intention to foreclose, any person who becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure. [L 1998, c 122, pt of §1; am L 2011, c 48, §22]

" **§667-24 Cure of default.** (a) If the default is cured as required by the notice of default and intention to foreclose, or if the parties have reached an agreement to resolve the nonjudicial foreclosure, the foreclosing mortgagee shall rescind the notice of default and intention to foreclose. Within fourteen days of the date of the cure or an agreement to resolve

the nonjudicial foreclosure, the foreclosing mortgagee shall so notify any person who was served with the notice of default and intention to foreclose. If the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default and intention to foreclose, the parties have not reached an agreement to resolve the nonjudicial foreclosure and no report of noncompliance has been issued against the mortgagee under section 667-82, and the mortgagor has not elected to convert the foreclosure to a judicial action, the foreclosing mortgagee, without filing a court action and without going to court, may foreclose the mortgage under power of sale to sell the mortgaged property at a public sale. [L 1998, c 122, pt of §1; am L 2011, c 48, §23; am L 2012, c 182, §18]

" **§667-25 Date, place of public sale of mortgaged property.**

(a) The public sale of the mortgaged property shall take place on the later of the following:

- (1) At least sixty days after the public notice of the public sale is distributed under section 667-27; or
- (2) At least fourteen days after the date of the publication of the third public notice advertisement under section 667-27.

(b) The public sale of the mortgaged property shall be held only in the county where the mortgaged property is located; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

- (1) At the state capitol, for a public sale of mortgaged property located in the city and county of Honolulu;
- (2) At a state facility in Hilo, for a public sale of mortgaged property located in the districts of Hamakua, north Hilo, south Hilo, or Puna;
- (3) At a state facility in Kailua-Kona, for a public sale of mortgaged property located in the districts of north Kohala, south Kohala, north Kona, south Kona, or Kau;
- (4) At a state facility in the county seat of Maui, for a public sale of mortgaged property located in the county of Maui; and
- (5) At a state facility in the county seat of Kauai, for a public sale of mortgaged property located in the county of Kauai;

as designated by the department of accounting and general services; provided further that no public sale shall be held on grounds or at facilities under the administration of the

judiciary. The public sale shall be held during business hours on a business day.

(c) The public sale of the mortgaged property shall be conducted by the foreclosing mortgagee on the date, at the time, and at the place described in the public notice of the public sale. [L 1998, c 122, pt of §1; am L 2011, c 48, §24; am L 2012, c 182, §19]

" **§667-26 REPEALED.** L 2012, c 182, §58.

" **§667-27 Public notice of public sale; contents; distribution; publication.** (a) The foreclosing mortgagee shall prepare the public notice of the public sale. The public notice shall state:

- (1) The date, time, and place of the public sale;
- (2) The unpaid balance of the moneys owed to the mortgagee under the mortgage agreement;
- (3) A description of the mortgaged property, including the address and the tax map key number of the mortgaged property;
- (4) The name of the mortgagor and the borrower;
- (5) The name of the foreclosing mortgagee;
- (6) The name of any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (7) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and
- (8) The terms and conditions of the public sale.

(b) The public notice shall also contain wording substantially similar to the following in all capital letters:

"THE DEFAULT UNDER THE MORTGAGE AGREEMENT MAY BE CURED NO LATER THAN THREE BUSINESS DAYS BEFORE THE DATE OF THE PUBLIC SALE OF THE MORTGAGED PROPERTY BY PAYING THE ENTIRE AMOUNT WHICH WOULD BE OWED TO THE FORECLOSING MORTGAGEE IF THE PAYMENTS UNDER THE MORTGAGE AGREEMENT HAD NOT BEEN ACCELERATED, PLUS THE FORECLOSING MORTGAGEE'S ATTORNEY'S FEES AND COSTS, AND ALL OTHER FEES AND COSTS INCURRED BY THE FORECLOSING MORTGAGEE RELATED TO THE DEFAULT, UNLESS OTHERWISE AGREED TO BETWEEN THE FORECLOSING MORTGAGEE AND THE BORROWER. THERE IS NO RIGHT TO CURE THE DEFAULT OR ANY RIGHT OF REDEMPTION AFTER THAT TIME. IF THE DEFAULT IS SO CURED, THE PUBLIC SALE SHALL BE CANCELED."

(c) If the default is not cured as required by the notice of default and intention to foreclose, the foreclosing mortgagee shall have a copy of the public notice of the public sale of the mortgaged property:

- (1) Mailed or delivered to the mortgagor and the borrower at their respective last known addresses;
- (2) Mailed or delivered to any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
- (3) Mailed or delivered to the state director of taxation;
- (4) Mailed or delivered to the director of finance of the county where the mortgaged property is located;
- (5) Posted on the mortgaged property or on such other real property of which the mortgaged property is a part; and
- (6) Mailed or delivered to any other person entitled to receive notice under section 667-5.5 or 667-21.5.

(d) The foreclosing mortgagee shall have the public notice of the public sale:

- (1) Printed in not less than seven-point font and published in the classified section of a newspaper that is published at least weekly and having a general circulation in the county in which the mortgaged property is located. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement; or
- (2) Not less than twenty-eight days before the date of the public sale, published on a state website at the discretion of the agency that maintains the website; provided that:
 - (A) If the mortgaged property is owned by an owner-occupant, the public notice shall be published on a website maintained by the department. The department shall publish the public notice pursuant to this subparagraph upon satisfaction of the filing requirements of section 667-76(b); and
 - (B) The public notice shall be published at least once in the format described in paragraph (1) at least fourteen days prior to the public sale. [L 1998, c 122, pt of §1; am L 2011, c 48, §26; am L 2012, c 182, §§20, 64, 69(5)]

" **§667-28 Postponement, cancellation of sale.** (a) The public sale may be either postponed or canceled by the foreclosing mortgagee. Notice of the postponement or the cancellation of the public sale shall be:

- (1) Announced by the foreclosing mortgagee at the date, time, and place of the last scheduled public sale; and
- (2) Provided to any other person who is entitled to receive the notice of default under section 667-22.

(b) If there is a postponement of the public sale of the mortgaged property, a new public notice of the public sale shall be published once in the format described in section 667-27. The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before the date of the public sale, a copy of the new public notice shall be posted on the mortgaged property or on another real property of which the mortgaged property is a part, and it shall be mailed or delivered to the mortgagor, to the borrower, and to any other person entitled to receive notice under section 667-22(e).

(c) Upon the fourth postponement of every series of four consecutive postponements, the foreclosing mortgagee shall follow all of the public notice of public sale requirements of section 667-27, including the requirements of mailing and posting under section 667-27(c) and of publication under section 667-27(d).

(d) The default under the mortgage agreement may be cured no later than three business days before the date of the public sale of the mortgaged property by paying the entire amount which would be owed to the foreclosing mortgagee if the payments under the mortgage agreement had not been accelerated, plus the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs incurred by the foreclosing mortgagee related to the default, unless otherwise agreed to between the foreclosing mortgagee and the borrower. There is no right to cure the default or any right of redemption after that time. If the default is so cured, the public sale shall be canceled. [L 1998, c 122, pt of §1; am L 2008, c 138, §4; am L 2011, c 48, §27; am L 2012, c 182, §21]

" **§667-29 Authorized bidder; successful bidder.** Any person, including the foreclosing mortgagee, shall be authorized to bid for the mortgaged property at the public sale and to purchase the mortgaged property. The highest bidder who meets the requirements of the terms and conditions of the public sale shall be the successful bidder. The public sale shall be

considered as being held when the mortgaged property is declared by the foreclosing mortgagee as being sold to the successful bidder. When the public sale is held, the successful bidder at the public sale, as the purchaser, shall make a nonrefundable downpayment to the foreclosing mortgagee of not less than ten per cent of the highest successful bid price. If the successful bidder is the foreclosing mortgagee or any other mortgagee having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23, the downpayment requirement may be satisfied by offset and a credit bid up to the amount of the mortgage debt. [L 1998, c 122, pt of §1; am L 2011, c 48, §28]

" **§667-30 Successful bidder's failure to comply; forfeiture of downpayment.** If the successful bidder later fails to comply with the terms and conditions of the public sale or fails to complete the purchase within forty-five days after the public sale is held, the downpayment shall be forfeited by that bidder. The forfeited downpayment shall be credited by the foreclosing mortgagee first towards the foreclosing mortgagee's attorney's fees and costs, then towards the fees and costs of the power of sale foreclosure, and any balance towards the moneys owed to the foreclosing mortgagee. The foreclosing mortgagee, in its discretion, may then accept the bid of the next highest bidder who meets the requirements of the terms and conditions of the public sale or may begin the public sale process again. [L 1998, c 122, pt of §1]

" **§667-31 Conveyance of property on payment of purchase price; distribution of sale proceeds.** (a) After the purchaser completes the purchase by paying the full purchase price and the costs for the purchase, the mortgaged property shall be conveyed to the purchaser by a conveyance document. The conveyance document shall be in a recordable form and shall be signed by the foreclosing mortgagee in the foreclosing mortgagee's name. The mortgagor or borrower shall not be required to sign the conveyance document.

(b) From the sale proceeds, after paying all liens and encumbrances in the order of priority as a matter of law, after paying the foreclosing mortgagee's attorney's fees and costs, after paying the fees and costs of the power of sale foreclosure, and after paying the moneys owed to the foreclosing mortgagee, the balance of the sale proceeds shall be distributed by the foreclosing mortgagee to junior creditors having valid liens on the mortgaged property in the order of their priority and not pro rata. Any remaining surplus after payment in full

of all valid lien creditors shall be distributed to the mortgagor.

(c) Lien creditors prior to the foreclosing mortgagee shall not be forced to their right of recovery. However, the foreclosing mortgagee and any prior lien creditor may agree in writing that the proceeds from the sale will be distributed by the foreclosing mortgagee to the prior lien creditor towards the payment of moneys owed to the prior lien creditor before any moneys are paid to the foreclosing mortgagee. [L 1998, c 122, pt of §1; am L 2011, c 48, §29]

" **§667-32 Affidavit after public sale; contents.** (a) After the public sale is held, the foreclosing mortgagee shall sign an affidavit under penalty of perjury:

- (1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the mortgage;
- (2) Stating that the power of sale foreclosure was conducted as required by this part;
- (3) Summarizing what was done by the foreclosing mortgagee;
- (4) Attaching a copy of the recorded notice of default and intention to foreclose;
- (5) Attaching a copy of the last public notice of the public sale;
- (6) Referencing the document number of the affiliate statement filed at the bureau of conveyances as required under section 667-58; and
- (7) Stating the date of filing and any relevant referencing information assigned by the division of financial institutions to the statement filed with the commissioner of financial institutions of the mortgage servicer affiliate statement as required under section 454M-5(b)(5)(F).

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

- "(1) I am duly authorized to represent or act on behalf of _____ (name of mortgagee) ("foreclosing mortgagee") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the power of sale foreclosure process (Chapter 667, Part II, Hawaii Revised Statutes);
- (2) The foreclosing mortgagee is a mortgagee as defined in section 667-1, Hawaii Revised Statutes, conducting a power of sale foreclosure;

- (3) The power of sale foreclosure is of a mortgage made by _____ (name of mortgagor) ("mortgagor"), dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The mortgaged property is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the mortgaged property, including the certificate of title or transfer certificate of title number if registered in the land court, is attached as Exhibit "A". The name of the borrower, if different from the mortgagor, is _____ ("borrower");
- (4) Pursuant to the power of sale provision of the mortgage, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:
- (A) A notice of default and intention to foreclose was served on the mortgagor, the borrower, and the following person: _____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;
 - (B) The date of the notice of default and intention to foreclose was _____ (date). The deadline in the notice for curing the default was _____ (date), which deadline date was at least sixty days after the date of the notice;
 - (C) The notice of default and intention to foreclose was recorded before the deadline date in the _____ (bureau of conveyances or office of the assistant registrar of the land court). The notice was recorded on _____ (date) as document no. _____. A copy of the recorded notice is attached as Exhibit "1";
 - (D) The default was not cured by the deadline date in the notice of default and intention to foreclose;
 - (E) A public notice of the public sale was initially published in the classified section of the _____, in accordance with section 667-27(d), Hawaii Revised Statutes, once each week for three consecutive weeks on the following dates: _____. A copy of the

affidavit of publication for the last public notice of the public sale is attached as Exhibit "2". The date of the public sale was _____ (date). The last publication was not less than fourteen days before the date of the public sale;

- (F) The public notice of the public sale was sent to the mortgagor, to the borrower, to the state director of taxation, to the director of finance of the county where the mortgaged property is located, and to the following: _____ . The public notice was sent on the following dates and in the following manner: _____. Those dates were after the deadline date in the notice of default and intention to foreclose, and those dates were at least sixty days before the date of the public sale;
- (G) The public notice of the public sale was posted on the mortgaged property or on such other real property of which the mortgaged property is a part on _____ (date). That date was at least sixty days before the date of the public sale;
- (H) A public sale of the mortgaged property was held on a business day during business hours on: _____ (date), at _____ (time), at the following location: _____. The highest successful bidder was _____ (name) with the highest successful bid price of \$_____; and
- (I) At the time the public sale was held, the default was not cured and there was no circuit court foreclosure action pending in the circuit where the mortgaged property is located; and
- (5) This affidavit is signed under penalty of perjury."

[L 1998, c 122, pt of §1; am L 2011, c 48, §30; am L 2012, c 182, §22; am L 2015, c 62, §7]

" **§667-33 Recordation of affidavit, conveyance document; effect.** (a) The affidavit required under section 667-32 and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different

days. After the recordation, the foreclosing mortgagee shall mail or deliver a recorded copy to those persons entitled to receive the public notice of the public sale under section 667-27(c).

(b) When both the affidavit and the conveyance document are recorded:

- (1) The sale of the mortgaged property is considered completed;
- (2) All persons claiming by, through, or under the mortgagor and all other persons having liens on the mortgaged property junior to the lien of the foreclosing mortgagee shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the mortgaged property and every part of the mortgaged property, except as otherwise provided by law;
- (3) The lien of the foreclosing mortgagee and all liens junior in priority to the lien of a foreclosing mortgagee shall be automatically extinguished from the mortgaged property; and
- (4) The purchaser shall be entitled to immediate and exclusive possession of the mortgaged property.

(c) The mortgagor and any person claiming by, through, or under the mortgagor and who is remaining in possession of the mortgaged property after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejection. The purchaser may bring an action in the nature of summary possession under chapter 666, ejection, or trespass or may bring any other appropriate action in a court where the mortgaged property is located to obtain a writ of possession, a writ of assistance, or any other relief. In any such action, the court shall award the prevailing party its reasonable attorney's fees and costs and all other reasonable fees and costs, all of which are to be paid for by the non-prevailing party. [L 1998, c 122, pt of §1; am L 2012, c 182, §23]

" **§§667-34 and 667-35 REPEALED.** L 2011, c 48, §§34, 35.

" **[§667-36] Sale of property separately.** If the mortgaged property consists of more than one real property, each property may be sold separately to satisfy the mortgage debt. [L 1998, c 122, pt of §1]

" **§667-37 Judicial action of foreclosure before public sale.** This part shall not prohibit the foreclosing mortgagee, or any other creditor having a recorded lien on the mortgaged property

before the recordation of the notice of default under section 667-23, from filing an action for the judicial foreclosure of the mortgaged property in the circuit court of the circuit where the mortgaged property is located; provided that the action is filed before the public sale is held. [L 1998, c 122, pt of §1; am L 2011, c 48, §31; am L 2012, c 182, §24; am L 2013, c 197, §2]

" **§667-38 Deficiency judgment against owner-occupant prohibited.** Upon completion of the nonjudicial foreclosure of residential property pursuant to this part, the mortgagee or other person, excluding an association, shall not be entitled to pursue or obtain a deficiency judgment against an owner-occupant unless the debt is secured by other collateral. The debts of other lien creditors are unaffected except as provided in this part. [L 1998, c 122, pt of §1; am L 2012, c 182, §25]

" **§667-39 Right to enforce this part.** (a) The foreclosing mortgagee, any other creditor having a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23, the borrower, and the mortgagor, may enforce this part by bringing an action in the circuit court of the circuit where the mortgaged property is located.

(b) The remedies provided in this part are cumulative and shall not abridge the right of a party to bring an action under any other law, including sections 454M-9 and 480-2. [L 1998, c 122, pt of §1; am L 2011, c 48, §32]

" **[§667-40] Use of power of sale foreclosure in certain non-mortgage situations.** A power of sale foreclosure under this part may be used in certain non-mortgage situations where a law or a written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving time share plans, condominium property regimes, and agreements of sale. [L 1998, c 122, pt of §1]

" **§667-41 Public information notice requirement.** (a) All financial institutions, mortgagees, lenders, business entities and organizations without limitation, and persons, who intend to use the power of sale foreclosure under this part, under the conditions required by this part, shall provide the public information notice described in subsection (b) to the public, upon request, and to any applicant submitting a loan application where residential property is required to be used to secure the

loan. The notice shall be provided to all applicants and all owners of the residential property (if different from the applicants) within three business days after the submission of a written loan application, or within three business days after the time residential property is required to be used to secure a loan, whether or not there is a written loan application. The purpose of the public information notice is to inform the public, applicants, and others that the financial institutions, mortgagees, lenders, organizations, and other business entities and persons who are authorized under this part to enforce the foreclosure rights in a mortgage, in the event of the borrower's default, have the option of pursuing either a judicial or nonjudicial foreclosure in the manner provided by law.

(b) The public information notice requirement shall be satisfied by the delivery of a separate notice that contains the following wording and is printed in not less than fourteen-point font:

"PUBLIC INFORMATION NOTICE PURSUANT TO
HAWAII REVISED STATUTES SECTION 667-41
WHAT IS FORECLOSURE?"

This notice informs you regarding a lender's right to foreclose in the event of a default on the loan you have applied for or are considering if your home is used to secure its repayment.

The mortgage agreement or contract that you may enter into states that in the event the amounts due under the loan are not paid when they are due, or for other reasons you do not perform your promises in the note and mortgage, all of which are known as defaults, the lender shall have the option to foreclose the mortgage, which will result in a sale of your home.

The entity or person who holds your mortgage ("Mortgagee") may send you a notice informing you that the Mortgagee is starting foreclosure proceedings. You should not wait for that to happen; take steps to prevent a foreclosure as soon as you are having trouble paying your mortgage. You should contact your lender or your lender's loan servicer, or you may contact a budget and credit counselor or housing counselor, to discuss your situation.

STEP ONE: NOTICE OF DEFAULT. The first step in the foreclosure process is the Mortgagee usually sends you a written notice of default, which occurs after you are past due on your mortgage payment. The Mortgagee will tell you in the notice how much time

you have to pay the required amount that is past due and, by paying, will return your loan to good standing.

STEP TWO: PROCEEDING TO FORECLOSURE. If you do not pay the required amount past due by the deadline in the notice of default, the Mortgagee may elect to proceed to collect the balance due on your loan through foreclosure. In Hawaii, there are two types of foreclosures: judicial and nonjudicial.

In a JUDICIAL FORECLOSURE, the Mortgagee files a lawsuit against you in order to obtain a court judgment that you owe the balance due under your loan and to obtain an order to sell the property. The initial legal document you will receive in the lawsuit is called the complaint. You should consult an attorney of your choice who can advise you as to the steps needed to protect your rights. Judicial foreclosure involves the sale of the mortgaged property under the supervision of the court. You will receive notice of the foreclosure case hearings and the sale date and the judicial decision is announced after a hearing in court. The sale of the property must be approved by the court before it can be completed.

In a NONJUDICIAL FORECLOSURE, the process follows the procedures spelled out in Chapter 667 of the Hawaii Revised Statutes and in your mortgage. The nonjudicial procedures allow a Mortgagee to foreclose on and sell the property identified in the mortgage without filing a lawsuit or court supervision. This nonjudicial foreclosure is also called a power of sale foreclosure. The Mortgagee starts the process by giving you a written notice of default and of the Mortgagee's intent to sell the property.

After the required time has elapsed, you will be sent a notice of nonjudicial foreclosure sale, which will tell you the date and location of the sale.

In a NONJUDICIAL FORECLOSURE, if you own an interest in the property you may have the right to participate in the Mortgage Foreclosure Dispute Resolution Program or to convert the nonjudicial foreclosure into a judicial foreclosure. The nonjudicial foreclosure may not proceed during the dispute resolution process or after it has been converted to a judicial foreclosure.

PLEASE NOTE: Even if a judicial or nonjudicial foreclosure has commenced, you may be able to

reinstate the loan and keep your home if you pay the delinquent amount then due and the foreclosure expenses that your Mortgagee has incurred. You must contact the Mortgagee as soon as possible to determine whether reinstatement is possible.

STEP THREE: PUBLIC SALE. The sale of a foreclosed home is usually made through a public auction, where the highest bidder who can make a cash deposit of up to 10% of the bid can buy the property. In a judicial foreclosure, the court appoints a third party commissioner to advertise and conduct the sale. In a nonjudicial foreclosure, the Mortgagee advertises and conducts the sale. In both types of sales, the Mortgagee has the right to buy the property by submitting a credit bid based upon the balance owed on the mortgage, so long as its bid is higher than any other bids. If the Mortgagee buys the property, the Mortgagee has the right to re-sell it in a private sale at a later date.

STEP FOUR: DISBURSEMENT OF PROCEEDS; POTENTIAL DEFICIENCY JUDGMENT. After the foreclosure sale is completed, the proceeds are paid out to lien holders, including the Mortgagee, in the order set by law and lastly to you if there are any proceeds left.

In a JUDICIAL FORECLOSURE, the court tells the commissioner whom to pay and how much. If the property did not sell for enough to pay off the balance due under your loan, the Mortgagee has the right to ask the court for a deficiency judgment against you for the difference.

In a NONJUDICIAL FORECLOSURE, the Mortgagee distributes the proceeds from the sale. If you are an owner-occupant, the law prohibits a deficiency judgment against you unless the debt is secured by other collateral.

READ THE NOTE AND MORTGAGE CAREFULLY TO UNDERSTAND WHAT IS REQUIRED AND HOW TO AVOID FORECLOSURE, AND CONSULT WITH AN ATTORNEY REGARDING YOUR LEGAL RIGHTS."

(c) The requirements of this section shall apply only to written loan applications submitted, or to loans where residential property is required to be used as security, after August 31, 2012. [L 1998, c 122, pt of §1; am L 2011, c 48, §33; am L 2012, c 182, §26]

" **§667-42 REPEALED.** L 2011, c 48, §36.

"[PART III. OTHER PROVISIONS]

Revision Note

Part heading added pursuant to §23G-15.

§667-50 REPEALED. L 2012, c 182, §59.

" **[\$667-51] Appeals.** (a) Without limiting the class of orders not specified in section 641-1 from which appeals may also be taken, the following orders entered in a foreclosure case shall be final and appealable:

- (1) A judgment entered on a decree of foreclosure, and if the judgment incorporates an order of sale or an adjudication of a movant's right to a deficiency judgment, or both, then the order of sale or the adjudication of liability for the deficiency judgment also shall be deemed final and appealable;
- (2) A judgment entered on an order confirming the sale of the foreclosed property, if the circuit court expressly finds that no just reason for delay exists, and certifies the judgment as final pursuant to rule 54(b) of the Hawaii rules of civil procedure; and
- (3) A deficiency judgment; provided that no appeal from a deficiency judgment shall raise issues relating to the judgment debtor's liability for the deficiency judgment (as opposed to the amount of the deficiency judgment), nor shall the appeal affect the finality of the transfer of title to the foreclosed property pursuant to the order confirming sale.

(b) An appeal shall be taken in the manner and within the time provided by the rules of court. [L 2003, c 89, §2]

" **[\$667-52] Buyer's choice of title insurer and escrow agent.** (a) In connection with a judicial foreclosure or foreclosure by power of sale of residential property improved by four or fewer dwelling units, no foreclosing mortgagee or mortgagee who acquires the property through a foreclosure proceeding shall require, directly or indirectly, as a condition of selling the property, that the buyer purchase an owner's title insurance policy covering the property or escrow service in connection with the sale of the property from a particular title insurer or escrow depository. This section shall not prohibit a buyer from agreeing to accept the services of a title insurer or an escrow depository recommended by the foreclosing mortgagee or mortgagee who acquires the property through the

foreclosure proceeding if written notice of the right to make an independent selection of those services is first provided to the buyer by the foreclosing mortgagee or mortgagee who acquires the property through the foreclosure proceeding.

(b) A foreclosing mortgagee or mortgagee who acquires the property through a foreclosure proceeding who violates this section shall be liable to a buyer in an amount equal to three times all charges incurred in the purchase of the title insurance or escrow service.

(c) A transaction subject to this section shall not be invalidated solely because of the failure of any person to comply with any provision of this section. [L 2010, c 36, §1]

" **§667-53 Conversion to judicial foreclosure; residential property; conditions.** (a) An owner-occupant of a residential property that is subject to nonjudicial foreclosure under part II may convert the action to a judicial foreclosure provided that:

- (1) A petition conforming to section 667-54 shall be filed with the circuit court in the circuit where the residential property is located, stating that the owner-occupant of the property elects to convert the nonjudicial foreclosure to a judicial foreclosure proceeding, no later than thirty days after the foreclosure notice is served on the owner-occupant, as required by section 667-22;
- (2) Within forty-five days of the filing of the petition, all owner-occupants and mortgagors of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors, shall file a statement in the circuit court action that they agree to submit themselves to the judicial process and the jurisdiction of the circuit court; provided further that if this condition is not satisfied, the circuit court action may be dismissed with prejudice as to the right of any owner-occupant to convert the action to a judicial proceeding, and the mortgagee may proceed nonjudicially;
- (3) Filing a petition pursuant to paragraph (1) shall automatically stay the nonjudicial foreclosure action unless and until the judicial proceeding has been dismissed;

- (4) The person filing the petition pursuant to paragraph (1) shall have an affirmative duty to promptly notify the Hawaii attorney who is handling the nonjudicial foreclosure about the filing of the complaint for conversion;
- (5) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and
- (6) The fee for filing the petition shall be \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86.

(b) This section shall not apply to foreclosures of association liens that arise under a declaration filed pursuant to chapter 421J, 514A, or 514B.

(c) This section shall not apply to a foreclosure for which the mortgagor has elected to participate in the mortgage foreclosure dispute resolution program pursuant to part V.

(d) The judiciary may create and adopt a form for a conversion petition. [L 2011, c 48, pt of §5, §45(4); am L 2012, c 182, §§27, 49]

Note

Conditions for owner-occupants undergoing nonjudicial foreclosures and electing to convert to judicial foreclosure. L 2011, c 48, §37.

Rules of Court

See Rules for Conversion of Non-Judicial Foreclosure Proceedings.

" **§667-54 Petition for conversion; residential property; required contents.** (a) A petition filed pursuant to section 667-53 shall contain at a minimum:

- (1) A caption setting forth the name of the court, the title of the action, and the file number; provided that the title of the action shall include the names of the filing party as petitioner and the foreclosing party as the respondent;
- (2) The name, mailing address, and telephone number of the filing party;
- (3) The address or tax map key number, and the certificate of title or transfer certificate of title number if

- registered in the land court, of the property subject to the foreclosure action;
- (4) A statement identifying all other owner-occupants and mortgagors of the property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors;
 - (5) A certification under penalty of perjury that the filing party is an owner-occupant of the subject property and seeks to convert the nonjudicial foreclosure to a judicial proceeding;
 - (6) A statement certifying that the filing party served a copy of the petition on the attorney identified in the foreclosure notice under section 667-22 either by personal delivery at, or by postage prepaid United States mail to, the address of the attorney as set forth in the foreclosure notice under section 667-22; and
 - (7) A copy of the foreclosure notice that was served on the filing party pursuant to section 667-22 and for which the filing party is seeking to convert to a judicial proceeding.

(b) The assignment of parties in the petition for conversion pursuant to subsection (a) shall relate to the petition for conversion only and shall not be construed to affect the assignment of parties in a nonjudicial power of sale foreclosure converted to a judicial foreclosure pursuant to this part. [L 2011, c 48, pt of §5, §45(4); am L 2012, c 182, §§28, 49]

Rules of Court

See Rules for Conversion of Non-Judicial Foreclosure Proceedings.

" **§667-55 Notice of default and intention to foreclose; residential property; required statement on conversion.** (a) The foreclosure notice that is served as required under section 667-22 shall include, in addition to the contents required under section 667-22, a statement printed in not less than fourteen-point font as follows:

"IF THE PROPERTY BEING FORECLOSED IS
IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN

OWNER-OCCUPANT OF THE PROPERTY (DEFINED IN CHAPTER 667 OF THE HAWAII REVISED STATUTES AS A PERSON WHO, AT THE TIME THIS NOTICE IS SERVED, OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND THE RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY RESIDENCE CONTINUOUSLY FOR NOT LESS THAN TWO HUNDRED DAYS) HAS THE RIGHT TO CONVERT A NONJUDICIAL FORECLOSURE PROCEEDING TO A JUDICIAL FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS RIGHT, THE OWNER-OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED FORM WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE THE PROPERTY IS LOCATED, WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE.

IN ADDITION, ALL OWNER-OCCUPANTS AND MORTGAGORS OF THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE MORTGAGE THAT IS BEING FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER INSTRUMENT EVIDENCING THE DEBT SECURED BY THE MORTGAGE THAT IS BEING FORECLOSED, INCLUDING, WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS, SHALL FILE A STATEMENT IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO SUBMIT TO THE JUDICIAL PROCESS AND THE JURISDICTION OF THE CIRCUIT COURT WITHIN FORTY-FIVE DAYS OF THE FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS CONDITION MAY RESULT IN DISMISSAL OF THE CIRCUIT COURT ACTION WITH PREJUDICE.

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

MORTGAGE FORECLOSURE DISPUTE RESOLUTION MAY BE AVAILABLE IN NONJUDICIAL FORECLOSURE ACTIONS AS AN ALTERNATIVE FOR OWNER-OCCUPANTS ATTEMPTING TO AVOID FORECLOSURE OR TO MITIGATE THE EFFECTS OF FORECLOSURE ON AN OWNER-OCCUPANT. HOWEVER, IF THE NONJUDICIAL FORECLOSURE IS CONVERTED TO A JUDICIAL FORECLOSURE ACTION, DISPUTE RESOLUTION MAY NOT THEREAFTER BE AVAILABLE UNLESS ORDERED BY A JUDGE.

A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY COULD BE PROHIBITED UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT AGAINST A MORTGAGOR. IF THIS ACTION IS CONVERTED TO A

JUDICIAL PROCEEDING, HOWEVER, THEN ALL REMEDIES AVAILABLE TO A LENDER MAY BE ASSERTED, INCLUDING THE RIGHT TO SEEK A DEFICIENCY JUDGMENT."

(b) The statement required by this section shall not be required to be included in the public notice of public sale published pursuant to section 667-27. [L 2011, c 48, pt of §5, §45(4); am L 2012, c 182, §§29, 49]

Rules of Court

See Rules for Conversion of Non-Judicial Foreclosure Proceedings.

" **§667-56 Prohibited conduct.** It shall be a prohibited practice for any foreclosing mortgagee to engage in any of the following practices:

- (1) Holding a public sale on a date, at a time, or at a place other than that described in the public notice of the public sale or a properly noticed postponement;
- (2) Specifying a fictitious place in the public notice of the public sale;
- (3) Conducting a postponed public sale on a date other than the date described in the new public notice of the public sale;
- (4) Delaying the delivery of the recorded, conformed copy of the conveyance document to a bona fide purchaser who purchases in good faith for more than sixty days after the completion of the public sale;
- (5) Completing nonjudicial foreclosure proceedings during short sale escrows with a bona fide purchaser if the short sale offer is at least ten per cent greater than the public sale price; provided that escrow is opened within ten days and closed within forty-five days of the public sale; and provided further that a bona fide short sale purchaser shall have priority over any other purchaser;
- (6) Completing nonjudicial foreclosure proceedings during bona fide loan modification negotiations with the mortgagor; or
- (7) Completing nonjudicial foreclosure proceedings against a mortgagor who has been accepted or is being evaluated for consideration for entry into any federal loan modification program before obtaining a certificate or other documentation confirming that the mortgagor is no longer eligible for, or an active

participant of, that federal program. [L 2011, c 48, pt of §6; am L 2012, c 182, §30]

" **§667-57 Suspension of foreclosure actions by junior lienholders.** (a) Upon initiation of a foreclosure action pursuant to part IA or part II by a foreclosing mortgagee, no junior lienholder, except for an association, shall be permitted to initiate or continue a nonjudicial foreclosure until the foreclosure initiated by the foreclosing mortgagee has been concluded by a judgment issued by a court pursuant to section 667-1.5, the recording of an affidavit after public sale pursuant to section 667-33, or the filing of an agreement under the mortgage foreclosure dispute resolution provisions of section 667-81; provided that if pursuant to part IA or part VI:

- (1) An association forecloses on a unit occupied by one or more mortgagors for whom the unit is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served; and
- (2) The mortgagee subsequently forecloses its lien on the same property,

those mortgagors shall be deemed to be owner-occupants, as defined in section 667-1, for the purpose of section 667-38 and shall retain their right to require the foreclosing mortgagee to participate in the procedures established under part V, notwithstanding the association's foreclosure.

(b) Upon initiation of a foreclosure action pursuant to part II by a foreclosing mortgagee, no junior lienholder, except for an association, shall be permitted to initiate or continue a nonjudicial foreclosure during the pendency of a stay pursuant to section 667-83; provided that a junior lienholder may initiate or continue with a nonjudicial foreclosure if the junior lien foreclosure was initiated before the foreclosure action by the foreclosing mortgagee and if pursuant to part IA or part VI:

- (1) An association forecloses on a unit occupied by one or more mortgagors for whom the unit is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served; and
- (2) The mortgagee subsequently forecloses its lien on the same property,

those mortgagors shall be deemed to be owner-occupants, as defined in section 667-1, for the purpose of section 667-38 and shall retain their right to require the foreclosing mortgagee to participate in the procedures established under part V,

notwithstanding the association's foreclosure. [L 2011, c 48, pt of §6; am L 2012, c 182, §31; am L 2013, c 197, §3]

" **§667-58 Valid notice; affiliate statement.** (a) Any notices made pursuant to this chapter may be issued only by persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement signed by that foreclosing mortgagee or lender and recorded at the bureau of conveyances identifying the agency or affiliate relationship and the authority granted or conferred to that agent or representative.

(b) The bureau of conveyances document number for the affiliate statement required under subsection (a) shall be included in any notice required to be personally served upon the mortgagor or borrower under this chapter.

(c) Any notice provided by a mortgage servicer, including an agent, employee, or representative of that mortgage servicer, shall be issued only by a mortgage servicer that has been listed in the affiliate statement filed by the foreclosing mortgagee or lender under subsection (a); provided further that the mortgage servicer shall be licensed under or otherwise exempt from chapter 454M. The agency relationship or affiliation of the mortgage servicer and the foreclosing mortgagee or lender and any authority granted or conferred to that mortgage servicer shall be described in the affiliate statement filed under both subsection (a) and section 454M-5(b)(5)(F).

(d) No attorney of a mortgage servicer, foreclosing mortgagee, or lender shall be required to be included in any affiliate statement of a foreclosing mortgagee or lender. No notice or other correspondence made by any attorney for the foreclosing mortgagee or lender shall be required to reference any affiliate statement made by the foreclosing mortgagee or lender. Any notice or other correspondence made by any attorney for a mortgage servicer shall reference, in accordance with subsection (b), the appropriate affiliate statement of the foreclosing mortgagee or lender authorizing the mortgage servicer to act. [L 2011, c 48, pt of §6; am L 2012, c 182, §32; am L 2015, c 62, §8]

" **§667-59 Actions and communications with the mortgagor in connection with a foreclosure.** A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements made on its behalf by its agents, including but not limited to its employees, representatives, mortgage servicers, or persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement recorded in the bureau of conveyances pursuant to section 667-58. [L 2011, c 48, pt of §6; am L 2012, c 182, §33]

" **§667-60 Unfair or deceptive act or practice; transfer of title.** (a) Any foreclosing mortgagee who engages in any of the following violations of this chapter shall have committed an unfair or deceptive act or practice under section 480-2:

- (1) Failing to provide a borrower or mortgagor with, or failing to serve as required, the information required by section 667-22 or 667-55;
- (2) Failing to publish, or to post, information on the mortgaged property, as required by section 667-27 or 667-28;
- (3) Failing to take any action required by section 667-24 if the default is cured or an agreement is reached;
- (4) Engaging in conduct prohibited under section 667-56;
- (5) Holding a public sale in violation of section 667-25;
- (6) Failing to include in a public notice of public sale the information required by section 667-27 or section 667-28;
- (7) Failing to provide the information required by section 667-41;
- (8) With regard to mortgage foreclosure dispute resolution under part V:
 - (A) Failing to provide notice of the availability of dispute resolution as required by section 667-75;
 - (B) Participating in dispute resolution without authorization to negotiate a loan modification, or without access to a person so authorized, as required by section 667-80(a)(1);
 - (C) Failing to provide required information or documents as required by section 667-80(c); or
 - (D) Completing a nonjudicial foreclosure if a neutral's closing report under section 667-82 indicates that the foreclosing mortgagee failed to comply with requirements of the mortgage foreclosure dispute resolution program;
- (9) Completing a nonjudicial foreclosure while a stay is in effect under section 667-83;
- (10) Failing to distribute sale proceeds as required by section 667-31;
- (11) Making any false statement in the affidavit of public sale required by section 667-32;
- (12) Attempting to collect a deficiency in violation of section 667-38; and
- (13) Failing to file a foreclosure notice with the department as required by section 667-76(a).

(b) Notwithstanding subsection (a), the transfer of title to the purchaser of the property as a result of a foreclosure

under this chapter shall only be subject to avoidance under section 480-12 for violations described in subsection (a)(1) to (9) if such violations are shown to be substantial and material; provided that a foreclosure sale shall not be subject to avoidance under section 480-12 for violation of section 667-56(5).

(c) Any action to void the transfer of title to the purchaser of property pursuant to a foreclosure by power of sale under part II of this chapter shall be filed in the circuit court of the circuit within which the foreclosed property is situated no later than sixty days following the recording of the affidavit required by section 667-32. If no such action is filed within the sixty-day period, then title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or anyone claiming by, through, or under the mortgagor. [L 2011, c 48, pt of §6; am L 2012, c 182, §34]

"[PART IV. TIME SHARE INTEREST FORECLOSURES]

Revision Note

Part heading added pursuant to §23G-15.

§667-61 REPEALED. L 2012, c 182, §60.

" **[\$667-62] Time share interest foreclosure under power of sale; notice; affidavit after sale.** (a) When a power of sale is contained in a mortgage of a time share interest, the mortgagee or the mortgagee's successor in interest or any person authorized by the power to act in the premises, upon a breach of the condition, may foreclose upon the mortgage by:

- (1) Giving notice of the intention to foreclose the mortgage and of the sale of the mortgaged time share interest by:
 - (A) Certified mail, return receipt requested, to the mortgagor at the mortgagor's last known address, for mortgagors whose address is within the United States; or
 - (B) Mail to the mortgagor at the mortgagor's last known address, for mortgagors whose address is outside the United States; and
 - (C) Publication once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper of general circulation in

the county in which the mortgaged time share interest lies; and

- (2) Giving such notices and [doing] all such acts as are authorized or required by the power contained in the mortgage.

Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises of the time share interest not less than twenty-one days before the day of sale.

(b) The day of sale may be at any time after four weeks from the date of publication of the first notice pursuant to subsection (a)(1). Any sale of which notice has been given pursuant to subsection (a) may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf.

(c) Within thirty days after selling the time share interest pursuant to the power of sale, the mortgagee shall file a copy of the notice of sale and the mortgagee's affidavit in the bureau of conveyances. The affidavit may lawfully be made by any person duly authorized to act for the mortgagee and in such capacity conducting the foreclosure, and shall set forth the mortgagee's acts in the time share interest fully and with particularity. The notice may contain a description of the mortgaged time share interest and the time and place proposed for its sale.

(d) The affidavit and copy of the notice shall be recorded and indexed by the registrar of conveyances as provided in chapter 501 or 502, as the case may be. [L 2005, c 82, pt of §1]

Revision Note

Pursuant to §23G-15, in:

- (1) Subsection (a)(1), comma deleted after "the mortgage"; and
- (2) Subsection (a)(2), "do" changed to "doing".

" **§667-63 Notice to mortgage creditors.** (a) A mortgage creditor having a mortgage lien on a time share interest who desires notice that another mortgage creditor having a mortgage lien on the time share interest intends to foreclose and sell the mortgaged time share interest, pursuant to the power of sale under section 667-62, may submit a written request to the mortgagee who is foreclosing or who may foreclose the mortgage by power of sale, asking to receive notice of the mortgagee's intention to foreclose the mortgage under section 667-62. The request for notice:

- (1) May be submitted any time after the recordation of the subject mortgage; provided that the request is

submitted prior to completion of publication of notice of the intention to foreclose the mortgage and of the sale of the mortgaged time share interest;

- (2) Shall be signed by the mortgage creditor desiring to receive notice, or its authorized representative; and
- (3) Shall specify the name and address of the person to whom the notice is to be mailed.

(b) The mortgagee receiving the request shall thereafter give notice to all mortgage creditors who have timely submitted their request. The notice shall be sent by mail or otherwise communicated to the mortgage creditors not less than seven calendar days prior to the day of sale.

(c) No request for a copy of any notice pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to the time share interest or be deemed notice to any person that any party requesting copy of the notice has or claims any right, title, or interest in, or lien or charge upon the time share interest described in the mortgage referred to therein. [L 2005, c 82, pt of §1; am L 2012, c 182, §35]

" **[\$667-64] Affidavit as evidence.** If it appears by the affidavit filed under section 667-62(c) that the affiant has in all respects complied with the requirements of the power of sale and section 667-62 in relation to all things to be done by the affiant before selling the time share interest, a certified copy of the record thereof shall be admitted as evidence that the power of sale was duly executed. [L 2005, c 82, pt of §1]

" **[\$667-65] Application of time share interest power of sale requirements.** The requirements of sections 667-62 to 667-64 shall apply only to time share interest mortgages, loans, agreements, and contracts that contain the power of sale. [L 2005, c 82, pt of §1]

"[PART V.] MORTGAGE FORECLOSURE DISPUTE RESOLUTION

§667-71 Applicability. (a) This part shall apply to nonjudicial foreclosures conducted by power of sale under part II, of residential real property that is occupied by one or more mortgagors who are owner-occupants.

(b) This part shall not apply to actions by an association to foreclose on a lien for amounts owed to the association that arise under a declaration filed pursuant to chapter 421J, 514A, or 514B, or to a mortgagor who has previously participated in dispute resolution under this part for the same property on the same mortgage loan.

(c) This part shall not apply to a power of sale foreclosure that has been converted to a judicial foreclosure action pursuant to section 667-53. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§36, 49]

" **§667-72 REPEALED.** L 2012, c 182, §61.

" **§667-73 Mortgage foreclosure dispute resolution program; administration.** (a) There is established in the department a mortgage foreclosure dispute resolution program to provide an owner-occupant an opportunity to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable.

(b) The judiciary, through the center for alternative dispute resolution, shall provide assistance to the department in program matters including:

- (1) Contract procurement;
- (2) Performance oversight, such as monitoring compliance with the program requirements; and
- (3) Management services to oversee any contract between the department and a private organization retained by the department to provide dispute resolution services or personnel, including providing the department with monthly status reports and evaluations.

The department and the judiciary shall execute a memorandum of understanding that establishes their rights and responsibilities relating to the mortgage foreclosure dispute resolution program, which may be amended from time to time.

(c) The department is authorized to contract with county, state, or federal agencies, and with private organizations, approved housing counselors, and approved budget and credit counselors for the performance of any of the functions of this part. These contracts shall not be subject to chapter 103D or 103F. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§37, 49]

" **§667-74 Availability of dispute resolution required before foreclosure.** Before a public sale may be conducted pursuant to section 667-25 for a residential property that is occupied by an owner-occupant, the foreclosing mortgagee, at the election of the owner-occupant, shall participate in the mortgage foreclosure dispute resolution program under this part to attempt to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§38, 49]

" **§667-75 Notice of dispute resolution availability**

required. (a) A foreclosure notice served pursuant to section 667-22(e) shall include notice that the mortgagee is required, at the election of an owner-occupant, to participate in the mortgage foreclosure dispute resolution program pursuant to this part to attempt to avoid foreclosure or to mitigate damages where foreclosure is unavoidable.

(b) The notice required by subsection (a) shall be printed in not less than fourteen-point font and include:

- (1) The name and contact information of the mortgagor and the mortgagee;
- (2) The subject property address and legal description, including tax map key number and the certificate of title or transfer certificate of title number if registered in the land court;
- (3) The name and contact information of a person or entity authorized to negotiate a loan modification on behalf of the mortgagee;
- (4) A statement that the mortgagor shall consult with an approved housing counselor or an approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;
- (5) Contact information for all approved housing counselors;
- (6) Contact information for all approved budget and credit counselors;
- (7) A statement that the mortgagor electing to participate in the mortgage foreclosure dispute resolution program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including supporting documentation;
- (8) A general description of the information that an owner-occupant electing to participate in the mortgage foreclosure dispute resolution program is required to provide to participate in the program as described under section 667-80(c)(2);
- (9) A statement that the owner-occupant shall elect to participate in the mortgage foreclosure dispute resolution program pursuant to this part no later than thirty days after the department's mailing of the notice or the right shall be waived. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§39, 49]

" **§667-76 Mortgagee's filing of notice with department; filing fee; electronic public notice of public sale.** (a)

Within three days after a mortgagee serves a foreclosure notice on an owner-occupant pursuant to section 667-22, the mortgagee

shall file the foreclosure notice with the department and pay a filing fee of \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86.

(b) A mortgagee who elects to publish a public notice of public sale electronically pursuant to section 667-27(d)(2)(A) shall publish the notice by filing the same with the department and paying a filing fee of \$300, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§40, 49]

" **§667-77 Notification to mortgagor by department.** Within ten days after the mortgagee's filing of a notice of default and intention to foreclose with the department, the department shall mail a written notification by registered or certified mail to the mortgagor that a notice of default and intention to foreclose has been filed with the department. The notification shall inform the mortgagor of an owner-occupant's right to elect to participate in the foreclosure dispute resolution program and shall include:

- (1) Information about the mortgage foreclosure dispute resolution program;
- (2) A form for an owner-occupant to elect or to waive participation in the mortgage foreclosure dispute resolution program pursuant to this part that shall contain instructions for the completion and return of the form to the department and the department's mailing address;
- (3) A statement that the mortgagor electing to participate in the mortgage foreclosure dispute resolution program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including a description of acceptable supporting documentation as required by section 667-78(a)(2);
- (4) A statement that the owner-occupant shall elect to participate in the mortgage foreclosure dispute resolution program pursuant to this part no later than thirty days after the department's mailing of the notice or the owner-occupant shall be deemed to have waived the option to participate in the mortgage foreclosure dispute resolution program;
- (5) A description of the information required under section 667-80(c)(2) that the owner-occupant shall provide to the mortgagee and the neutral assigned to the dispute resolution;

- (6) A statement that the owner-occupant shall consult with an approved housing counselor or approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;
- (7) Contact information for all approved housing counselors;
- (8) Contact information for all approved budget and credit counselors; and
- (9) Contact information for the department.

The notification shall be mailed to the subject property address and any other addresses for the mortgagor as provided in the mortgagee's notice of dispute resolution under section 667-75 and the foreclosure notice under section 667-22(a). [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§41, 49]

" **§667-78 Owner-occupant's election of dispute resolution; owner-occupant program fee; right to dispute resolution waived.**

(a) An owner-occupant elects to participate in the mortgage foreclosure dispute resolution program by returning to the department:

- (1) The completed program election form provided:
 - (A) Pursuant to section 667-77(2); or
 - (B) On a website maintained by the department;
- (2) Certification under penalty of perjury that the mortgagor is an owner-occupant, accompanied with any supporting documentation, including copies of recent utility billing statements, voter registration records, real estate property tax records, or state identification forms; and
- (3) A program fee of \$300.

The completed form and fees shall be received by the department no later than thirty days after mailing of the department's notification pursuant to section 667-77.

(b) If the completed form and fee are not received within the required time period, the owner-occupant shall be deemed to have waived any right to participate in the mortgage foreclosure dispute resolution program with respect to the subject property and the foreclosure notice filed with the department.

(c) If the owner-occupant does not elect to participate in dispute resolution pursuant to this part, the department shall notify the mortgagee within ten days of receiving an election form indicating nonelection or the termination of the thirty-day time period for election. After receiving the department's notification, the mortgagee may proceed with the nonjudicial foreclosure process according to the process provided in part II of this chapter. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§42, 49]

" **§667-79 Notification of opening a dispute resolution case; mortgagee's program fee.**

(a) If an owner-occupant elects to participate in the mortgage foreclosure dispute resolution program, the department shall open a dispute resolution case. Within twenty days of receipt of the owner-occupant's election form and fee in accordance with section 667-78, the department shall mail written notification of the case opening to the parties and, if applicable, the condominium or other homeowner association of the project where the owner-occupant's property is located, by registered mail, return receipt requested, which shall include:

- (1) Notification of the date, time, and location of the dispute resolution session;
- (2) An explanation of the dispute resolution process;
- (3) Information about the dispute resolution program requirements; and
- (4) Consequences and penalties for noncompliance.

The dispute resolution session shall be scheduled for a date no less than forty and no more than seventy days from the date of the notification of case opening, unless mutually agreed to by the parties and the neutral.

(b) Within fourteen days of the date of the mailing of the written notification, the mortgagee shall pay a program fee of \$300 to the department.

(c) The written notification of a case opening under this section shall operate as a stay of the foreclosure proceeding in accordance with section 667-83 and may be recorded. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§43, 49]

" **§667-80 Parties; requirements; process.** (a) The parties to a dispute resolution process conducted under this part shall consist of the owner-occupant or the owner-occupant's representative, and the mortgagee or the mortgagee's representative; provided that:

- (1) A representative of the mortgagee who participates in the dispute resolution shall be authorized to negotiate a loan modification on behalf of the mortgagee or shall have, at all stages of the dispute resolution process, direct access by telephone, videoconference, or other immediately available contemporaneous telecommunications medium to a person who is so authorized;
- (2) The mortgagee and owner-occupant may be represented by an attorney; and
- (3) The owner-occupant may be assisted by an approved housing counselor or approved budget and credit

counselor.

(b) No fewer than thirty days prior to the first day of a scheduled dispute resolution session pursuant to this part, the owner-occupant shall consult with an approved housing counselor or approved budget and credit counselor.

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

- (1) The mortgagee shall provide to the department and the mortgagor:
 - (A) A copy of the promissory note, signed by the mortgagor, including any endorsements, allonges, amendments, or riders to the note evidencing the mortgage debt;
 - (B) A copy of the mortgage document and any amendments, riders, or other documentation evidencing the mortgagee's right of nonjudicial foreclosure and interest in the property including any interest as a successor or assignee; and
 - (C) Financial records and correspondence that confirm the mortgage loan is in default.
- (2) The owner-occupant shall provide to the department and the mortgagee:
 - (A) Documentation showing income qualification for a loan modification, including any copies of pay stubs, W-2 forms, social security or disability income, retirement income, child support income, or any other income that the owner-occupant deems relevant to the owner-occupant's financial ability to repay the mortgage;
 - (B) Any records or correspondence available which may dispute that the mortgage loan is in default;
 - (C) Any records or correspondence available evidencing a loan modification or amendment;
 - (D) Any records or correspondence available that indicate the parties are currently engaged in bona fide negotiations to modify the loan or negotiate a settlement of the delinquency;
 - (E) Names and contact information for approved housing counselors, approved budget and credit counselors, or representatives of the mortgagee, with whom the owner-occupant may have or is currently working with to address the delinquency; and
 - (F) Verification of counseling by an approved housing counselor or approved budget and credit

counselor.

(d) The dispute resolution session shall consist of at least one meeting lasting no more than three hours, which may be extended by the equivalent of one additional three-hour session on the same or a different day at the neutral's discretion.

The parties shall be present in person at the dispute resolution session; provided that a party may submit a written request to the department at least fourteen days prior to the scheduled dispute resolution session to participate through telephone, videoconference, or other contemporaneous telecommunications medium. A request to participate through a telecommunications medium shall be granted only for good cause and upon agreement of the neutral and the other party to the dispute resolution. For purposes of this subsection, "good cause" means an event or circumstance outside of the requesting party's control that makes in-person participation impossible. The neutral shall have the discretion to postpone a dispute resolution session in order to allow the requesting party to participate in person; provided that postponement shall not delay the dispute resolution process beyond timelines established by this part.

(e) A dispute resolution process conducted pursuant to this part shall use the calculations, assumptions, and forms established by the Federal Deposit Insurance Corporation Loan Modification Program Guide as set out on the Federal Deposit Insurance Corporation's publicly accessible website or a different program or process if agreed to by both parties and the neutral.

(f) The dispute resolution process shall conclude within sixty days from the first scheduled meeting between the parties to the dispute resolution and the neutral; provided that the neutral shall have the authority to extend this period. Nothing in this part shall be construed to require the dispute resolution process to take the full sixty days allotted to reach a negotiated agreement. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§44, 49]

" **§667-81 Outcome of dispute resolution; neutral's closing report.** (a) Within ten days from the conclusion of the dispute resolution, the neutral shall file a closing report with the department, which verifies the parties' presence at the session, compliance with the requirements of this part, and reports whether the parties reached an agreement to resolve the dispute and the date of the dispute resolution's conclusion. Upon receipt of the neutral's closing report, the department shall close the case. The department shall forward a written copy of the neutral's closing report by registered or certified mail to

the parties within five days after receipt from the neutral.

(b) If, despite the parties' participation in the dispute resolution process and compliance with the requirements of this part, the parties are not able to come to an agreement, the neutral shall file a closing report with the department that the parties met the program requirements. The mortgagee may record the report. Upon recording of the report pursuant to this subsection, the foreclosure process shall resume along the timeline as it existed on the date before the mortgagor elected dispute resolution, and may proceed as otherwise provided by law. The mortgagee shall notify the mortgagor of the recording date and document number of this report and the deadline date to cure default in an amended foreclosure notice. Nothing in this subsection shall be construed to require the neutral to wait the full sixty days allotted for dispute resolution to determine that the parties were unable to reach an agreement and file a report.

(c) If the parties have complied with the requirements of this part and have reached an agreement, the agreement shall be memorialized in writing and signed by the parties or their authorized representatives. The parties shall be responsible for drafting any agreement reached and enforcing the agreement. The agreement shall be a contract between the parties and shall be enforceable in a private contract action in a court of appropriate jurisdiction in the event of breach by either party. If the agreement allows for foreclosure or other transfer of the subject property, the stay of the foreclosure under section 667-83 shall be released upon the recordation of the neutral's closing report. Thereafter, the office of the assistant registrar of the land court or bureau of conveyances may record a notice of sale or other conveyance document, as appropriate.

(d) If the parties to a dispute resolution process reach an agreement which resolves the matters at issue in the dispute resolution before the first day of the scheduled dispute resolution session pursuant to this section, the parties shall notify the neutral by that date. The neutral shall thereafter issue a closing report that the parties have reached an agreement prior to the commencement of a dispute resolution session. If the agreement provides for foreclosure, the parties shall memorialize the agreement in writing, which shall be signed by both parties. The parties may record the report. If the agreement authorizes foreclosure, the stay of the foreclosure under section 667-83 shall be released upon the recordation of the report. Thereafter, the land court or bureau of conveyances may record a notice of sale or other conveyance document, as appropriate. No fees shall be refunded if the parties come to an agreement prior to a dispute resolution

session conducted pursuant to this part. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§45, 49]

" **§667-82 Noncompliance with requirements; statement.** (a) The neutral's closing report shall indicate if the mortgagee or the owner-occupant failed to comply with requirements of the mortgage foreclosure dispute resolution program.

- (1) In the case of the mortgagee, failure to comply with the requirements of the program may consist of:
 - (A) Participation in dispute resolution without the authority to negotiate a loan modification or without access at all stages of the dispute resolution process to a person who is so authorized;
 - (B) Failure to provide the required information or documents;
 - (C) Refusal to cooperate or participate in dispute resolution; or
 - (D) Refusal or failure to pay program fees under section 667-79 in a timely manner.
- (2) In the case of the owner-occupant, failure to comply with the requirements of the program may consist of:
 - (A) Failure to provide the required information or documents; or
 - (B) Refusal to cooperate or participate in dispute resolution;

provided that failure by the mortgagee and the owner-occupant to reach an agreement to resolve the dispute shall not constitute failure by the mortgagee or the owner-occupant to comply with the requirements of the mortgage foreclosure dispute resolution program.

(b) If the neutral determines that the noncompliance was unjustified as a result of circumstances within a party's control, sanctions may be imposed on the noncompliant party as follows:

- (1) Sanctions against a mortgagee for unjustified noncompliance with the program shall include a stay of the foreclosure under section 667-83 and a fine payable to the owner-occupant not to exceed \$1,500; or
- (2) Sanctions against an owner-occupant for unjustified noncompliance with the program shall include a removal of the stay of the foreclosure pursuant to section 667-83(b) and a fine payable to the mortgagee not to exceed \$1,500. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§46, 49]

" **§667-83 Stay of nonjudicial foreclosure proceedings.** (a) The written notification of a case opening under section 667-79 shall operate as a stay of the foreclosure proceeding and may be recorded; provided that:

- (1) The written notification shall not act as a stay on a foreclosure proceeding by an association; and
- (2) The written notification shall not act as a stay on a foreclosure proceeding for the purpose of the date by which the default must be cured pursuant to section 667-22(a)(6).

(b) Upon a stay pursuant to subsection (a), a mortgagee shall not foreclose upon a mortgage:

- (1) Until the neutral's report confirming either that the parties have been unable to reach an agreement under section 667-81(b) or the parties have reached an agreement that authorizes foreclosure under section 667-81(c) or (d) is filed with the department;
- (2) If a statement of noncompliance has been issued against the mortgagee pursuant to section 667-82; or
- (3) Unless otherwise provided by law or court order. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§47, 49; am L 2013, c 197, §4]

" **[§667-84] Confidentiality.** Personal financial information and other sensitive personal information, including information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness which is disclosed by the parties in the course of the mortgage foreclosure dispute resolution program, shall be confidential and not subject to public disclosure under chapter 92F or any other state law. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §49]

" **[§667-85] Neutral qualifications; status and liability.**
[(a)] A neutral shall possess sufficient knowledge in the areas of law, real estate, or finance and shall receive sufficient training to be able to effectuate the purposes of this part.
[(b)] A neutral shall not be liable for any act or omission that occurs in relation to the administration or operation of the mortgage foreclosure dispute resolution program. A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §49]

" **§667-86 Mortgage foreclosure dispute resolution special fund.** (a) There is established in the state treasury a special fund to be known as the mortgage foreclosure dispute resolution special fund to be administered by the department to implement and operate the mortgage foreclosure dispute resolution program established by this part. Moneys collected as fees or fines under sections 454M-10, 667-76, 667-78, 667-79, and 667-53, for the mortgage dispute resolution program and contributions from the sources identified under subsection (b) shall be deposited in the fund. Interest earned from the balance of the fund shall become a part of the fund.

(b) All persons who record an affidavit in the office of the assistant registrar of the land court, pursuant to section 501-118, or who record a conveyance document in the bureau of conveyances for an owner-occupied property subject to a nonjudicial power of sale foreclosure shall pay a fee of \$100, which shall be deposited into the mortgage foreclosure dispute resolution special fund on a quarterly basis. [L 2011, c 48, pt of §1, §45(2); am L 2012, c 182, §§48, 49]

"**[PART VI.] ASSOCIATION ALTERNATE POWER OF SALE
FORECLOSURE PROCESS**

[§667-91] Alternate power of sale process. The power of sale process in this part is an alternative process for associations to the foreclosure by action in part IA and the foreclosure by power of sale in part II. [L 2012, c 182, pt of §3(2)]

" **§667-92 Notice of default and intention to foreclose; contents; distribution; alternative remedies for failure to serve.** (a) When a unit owner has failed to pay an assessment, and when the association intends to conduct a power of sale foreclosure under this part, the association shall prepare a written notice of default and intention to foreclose addressed to the unit owner. The notice of default and intention to foreclose shall state:

- (1) The name and address of the association;
- (2) The name and last known address of the unit owners;
- (3) With respect to the unit, the address or a description of its location, tax map key number, and certificate of title or transfer certificate of title number if registered in the land court;
- (4) The description of the default or, if the default is a monetary default, an itemization of the delinquent amount;

- (5) The action required to cure the default, including the delinquent amount and the estimated amount of the association's attorney's fees and costs, and all other fees and costs related to the default estimated to be incurred by the association by the deadline date;
- (6) The date by which the default must be cured, which shall be within sixty days after service of the notice of default and intention to foreclose;
- (7) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the entire unpaid balance of the moneys owed to the association will become due, that the association intends to conduct a power of sale foreclosure to sell the unit at a public sale without any court action and without going to court, and that the association or any other person may acquire the unit at the public sale;
- (8) A statement that if the default is not cured by the deadline date stated in the notice of default and intention to foreclose, the association may publish the public notice of the public sale in a newspaper of general circulation or on a state website, pursuant to section 667-96(d);
- (9) The name, address, electronic address, and telephone number of the attorney who is representing the association; provided that the attorney shall be licensed to practice law in the State and physically located in the State; and
- (10) Notice of the right of the unit owner to submit a payment plan within thirty days pursuant to subsection (c).

(b) The notice of default and intention to foreclose shall also contain wording substantially similar to the following in all capital letters and printed in not less than fourteen-point font:

"IF THE DEFAULT ON THE PAYMENT OF ASSESSMENTS CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE UNIT MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT ACTION AND WITHOUT GOING TO COURT.

YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES. FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY LICENSED IN THIS STATE.

ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT

ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED."

(c) A unit owner may submit a payment plan within thirty days after service of a notice of default and intention to foreclose on the unit owner. The unit owner shall submit the payment plan to the association or its attorney by certified mail return receipt requested or by hand delivery. The association shall not reject a reasonable payment plan. A unit owner may also cure the default within sixty days after service of a notice of default and intention to foreclose on the unit owner by paying the association the full amount of the default, including the foreclosing association's attorneys' fees and costs, and all other fees and costs related to the default that are incurred or estimated to be incurred by the foreclosing association. From and after the date that the unit owner gives written notice to the association of the unit owner's intent to cure the default or timely submits a payment plan, any nonjudicial foreclosure of the lien shall be stayed during the sixty-day period to cure the default or during the term of the payment plan or a longer period that is agreed upon by the parties. A unit owner's failure to strictly perform any agreed-upon payment plan shall entitle the association to pursue its remedies without further delay.

For purposes of this section, "reasonable payment plan" means a plan that provides for:

- (1) Timely payment of all assessments that become due after the date that the payment plan is proposed; and
- (2) Additional monthly payments of an amount sufficient to cure the default, within a reasonable period under the circumstances as determined by the board of directors in its discretion; provided that a period of up to twelve months shall be deemed reasonable; and provided further that the board of directors shall have the discretion to agree to a payment plan in excess of twelve months.

(d) The notice of default and intention to foreclose shall also include contact information for approved housing counselors and approved budget and credit counselors.

(e) The association shall have the notice of default and intention to foreclose served on:

- (1) The unit owner;
- (2) Any prior or junior creditors who have a recorded lien on the unit before the recordation of the notice of

default and intention to foreclose under section 667-93;

- (3) The state director of taxation;
- (4) The director of finance of the county where the unit is located; and
- (5) Any other person entitled to receive notice under section 667-5.5.

(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner or any other party listed in subsection (e)(2) to (5) within sixty days, the association may:

- (1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner or any other party listed in subsection (e)(2) and (e)(5) by publication and posting;
- (2) Proceed with a nonjudicial foreclosure of the unit; provided that if the association proceeds without the permission of the court, the association shall not be entitled to obtain a deficiency judgment against the unit owner, and the unit owner shall have one year from the date the association records the deed in the nonjudicial foreclosure to redeem the unit by paying the unit owner's delinquency to the association; or
- (3) Take control of the unit if the unit is unoccupied, after giving notice to the unit owner at the unit owner's last known address as shown on the records of the association or as determined by the association as part of its due diligence to serve notice to the owner. The association's authority to take control of the unit pursuant to this paragraph shall be exercised solely for the purpose of renting the unit to generate rental income to pay the unit owner's delinquency, and the association shall acquire no legal title to the unit. In addition, the association shall credit the net rental proceeds generated from the rental of the unit to the owner's delinquency. For purposes of this paragraph, "net rental proceeds" means the rental proceeds remaining each month after deducting:
 - (A) The unit's regular monthly assessments that come due while the association controls the unit pursuant to this subsection;
 - (B) Any rental agent commissions; and
 - (C) Expenses incurred by the association in maintaining the unit in rentable condition.

If the unit owner pays the full amount of the unit owner's delinquency to the association, the

association shall return control of the unit to the unit owner; provided that the full amount of the unit owner's delinquency shall be calculated by deducting the total net rental proceeds collected by the association, if any, from the unit owner's delinquency. [L 2012, c 182, pt of §3(2); am L 2014, c 4, §1]

" **[\$667-93] Recordation of notice of default and intention to foreclose.** Before the deadline date in the notice of default and intention to foreclose, the notice may be recorded in a recordable form in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice of default and intention to foreclose shall have the same effect as a notice of pendency of action. From and after the recordation of the notice of default and intention to foreclose, any person who becomes a purchaser or encumbrancer of the unit shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure. [L 2012, c 182, pt of §3(2)]

" **[\$667-94] Cure of default.** (a) If the default is cured as required by the notice of default and intention to foreclose, or if the parties have agreed on a payment plan, the association shall rescind the notice of default and intention to foreclose. Within fourteen days of the date of the cure or an agreement on a payment plan, the association shall so notify any person who was served with the notice of default and intention to foreclose. If the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default and intention to foreclose, or the parties have not agreed on a payment plan, the association, without filing a court action and without going to court, may foreclose the association's lien under power of sale to sell the unit at a public sale. [L 2012, c 182, pt of §3(2)]

" **[\$667-95] Date of public sale of unit; place of sale.** (a) The public sale of the unit shall take place on the later of the following:

- (1) At least sixty days after the public notice of the public sale is distributed under section 667-96; or
- (2) At least fourteen days after the date of the publication of the third public notice advertisement under section 667-96(d).

(b) The public sale of the unit shall be held only in the county where the unit is located; provided that the public sale shall be held only on grounds or at facilities under the administration of the State, as follows:

- (1) At the state capitol, for a public sale of a unit located in the city and county of Honolulu;
- (2) At a state facility in Hilo, for a public sale of a unit located in the districts of Hamakua, north Hilo, south Hilo, or Puna;
- (3) At a state facility in Kailua-Kona, for a public sale of a unit located in the districts of north Kohala, south Kohala, north Kona, south Kona, or Kau;
- (4) At a state facility in the county seat of Maui, for a public sale of a unit located in the county of Maui; and
- (5) At a state facility in the county seat of Kauai, for a public sale of a unit located in the county of Kauai; as designated by the department of accounting and general services; provided further that no public sale shall be held on grounds or at facilities under the administration of the judiciary. The public sale shall be held during business hours on a business day.

(c) The public sale of the unit shall be conducted by the association on the date, at the time, and at the place described in the public notice of the public sale. [L 2012, c 182, pt of §3(2)]

" **[\$667-96] Public notice of public sale; contents;**

distribution; publication. (a) The association shall prepare the public notice of the public sale. The public notice shall state:

- (1) The date, time, and place of the public sale;
- (2) The unpaid balance of the moneys owed to the association;
- (3) A description of the unit, including the address and the tax map key number of the unit;
- (4) The name of the unit owner;
- (5) The name of the association;
- (6) The name of any prior or junior creditors having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-93;
- (7) The name, the address in the State, and the telephone number in the State of the person in the State conducting the public sale; and
- (8) The terms and conditions of the public sale.

(b) The public notice shall also contain wording substantially similar to the following in all capital letters:

"THE DEFAULT UNDER THE ASSOCIATION DOCUMENTS MAY BE CURED NO LATER THAN THREE BUSINESS DAYS BEFORE THE DATE OF THE PUBLIC SALE OF THE UNIT BY PAYING THE ENTIRE AMOUNT THAT WOULD BE OWED TO THE ASSOCIATION PLUS THE ASSOCIATION'S ATTORNEY'S FEES AND COSTS, AND ALL OTHER FEES AND COSTS INCURRED BY THE FORECLOSING ASSOCIATION RELATED TO THE DEFAULT, UNLESS OTHERWISE AGREED TO BETWEEN THE ASSOCIATION AND THE UNIT OWNER. THERE IS NO RIGHT TO CURE THE DEFAULT OR ANY RIGHT OF REDEMPTION AFTER THAT TIME. IF THE DEFAULT IS SO CURED, THE PUBLIC SALE SHALL BE CANCELED."

(c) If the default is not cured as required by the notice of default and intention to foreclose, the association shall have a copy of the public notice of the public sale of the unit:

- (1) Mailed or delivered to the unit owners at their respective last known addresses;
- (2) Mailed or delivered to any prior or junior creditors having a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-93;
- (3) Mailed or delivered to the state director of taxation;
- (4) Mailed or delivered to the director of finance of the county where the unit is located;
- (5) Posted on the unit or on such other real property of which the unit is a part; and
- (6) Mailed or delivered to any other person entitled to receive notice under section 667-5.5 or 667-21.5.

(d) The association shall have the public notice of the public sale:

- (1) Printed in not less than seven-point font and published in the classified section of a newspaper that is published at least weekly and having a general circulation in the county in which the unit is located. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement; or

- (2) Not less than twenty-eight days before the date of the public sale, published on a state website at the discretion of the agency that maintains the website; provided that the public notice shall be published at least once in the format described in paragraph (1) at least fourteen days prior to the public sale. [L 2012, c 182, pt of §3(2), §§62, 69(5)]

" **[\$667-97] Postponement, cancellation of sale.** (a) The public sale may be either postponed or canceled by the association. Notice of the postponement or the cancellation of the public sale shall be:

- (1) Announced by the association at the date, time, and place of the last scheduled public sale; and
- (2) Provided to any other person who is entitled to receive the notice of default under section 667-92.

(b) If there is a postponement of the public sale of the unit, a new public notice of the public sale shall be published once in the format described in section 667-96. The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before the date of the public sale, a copy of the new public notice shall be posted on the unit or on another real property of which the unit is a part, and it shall be mailed or delivered to the unit owner and to any other person entitled to receive notice under section 667-92(e).

(c) Upon the fourth postponement of every series of four consecutive postponements, the association shall follow all of the public notice of public sale requirements of section 667-96, including the requirements of mailing and posting under section 667-96(c) and of publication under section 667-96(d).

(d) The default under the association documents may be cured no later than three business days before the date of the public sale of the unit by paying the entire amount that would be owed to the association if the payments under the association documents had not been accelerated, plus the association's attorney's fees and costs, and all other fees and costs incurred by the association related to the default, unless otherwise agreed to between the association and the unit owner. There is no right to cure the default or any right of redemption after that time. If the default is so cured, the public sale shall be canceled. [L 2012, c 182, pt of §3(2)]

" **[\$667-98] Authorized bidder; successful bidder.** Any person, including the association, shall be authorized to bid for the unit at the public sale and to purchase the unit. The

highest bidder who meets the requirements of the terms and conditions of the public sale shall be the successful bidder. The public sale shall be considered as being held when the unit is declared by the association as being sold to the successful bidder. When the public sale is held, the successful bidder at the public sale, as the purchaser, shall make a nonrefundable downpayment to the association of not less than ten per cent of the highest successful bid price. If the successful bidder is the association, the downpayment requirement may be satisfied by offset and a credit bid up to the amount of the lien debt. [L 2012, c 182, pt of §3(2)]

" **[\$667-99] Successful bidder's failure to comply; forfeiture of downpayment.** If the successful bidder later fails to comply with the terms and conditions of the public sale or fails to complete the purchase within forty-five days after the public sale is held, the downpayment shall be forfeited by that bidder. The forfeited downpayment shall be credited by the association first towards the association's attorney's fees and costs, then towards the fees and costs of the power of sale foreclosure, and any balance towards the moneys owed to the association. The association, in its discretion, may then accept the bid of the next highest bidder who meets the requirements of the terms and conditions of the public sale or may begin the public sale process again. [L 2012, c 182, pt of §3(2)]

" **[\$667-100] Conveyance of property on payment of purchase price; distribution of sale proceeds.** (a) After the purchaser completes the purchase by paying the full purchase price and the costs for the purchase, the unit shall be conveyed to the purchaser by a conveyance document. The conveyance document shall be in a recordable form and shall be signed by the association in the association's name. The unit owner shall not be required to sign the conveyance document.

(b) From the sale proceeds, after paying in the following order:

- (1) The association's attorney's fees and costs;
- (2) The fees and costs of the power of sale foreclosure;
- (3) The moneys owed to the association; and
- (4) All other liens and encumbrances in the order of priority as a matter of law,

the balance of the sale proceeds shall be distributed by the association to junior creditors having valid liens on the unit in the order of their priority and not pro rata. Any remaining surplus after payment in full of all valid lien creditors shall be distributed to the unit owner.

(c) Lien creditors prior to the association shall not be forced to their right of recovery. However, the association and any prior lien creditor may agree in writing that the proceeds from the sale will be distributed by the association to the prior lien creditor towards the payment of moneys owed to the prior lien creditor before any moneys are paid to the association. [L 2012, c 182, pt of §3(2)]

" **[§667-101] Affidavit after public sale; contents.** (a) After the public sale is held, the association shall sign an affidavit under penalty of perjury:

- (1) Stating that the power of sale foreclosure was made pursuant to the power of sale provision in the law or association documents;
- (2) Stating that the power of sale foreclosure was conducted as required by this part;
- (3) Summarizing what was done by the association;
- (4) Attaching a copy of the recorded notice of default and intention to foreclose; and
- (5) Attaching a copy of the last public notice of the public sale.

(b) The recitals in the affidavit required under subsection (a) may, but need not, be substantially in the following form:

- "(1) I am duly authorized to represent or act on behalf of _____ (name of association) ("association") regarding the following power of sale foreclosure. I am signing this affidavit in accordance with the alternate power of sale foreclosure law (Chapter 667, Part VI, Hawaii Revised Statutes);
- (2) The association is an "association" as defined in the power of sale foreclosure law;
- (3) The power of sale foreclosure is of an association lien. If the lien was recorded, the lien was dated _____, and recorded in the _____ (bureau of conveyances or office of the assistant registrar of the land court) as _____ (recordation information). The unit is located at: _____ (address or description of location) and is identified by tax map key number: _____. The legal description of the property, including the certificate of title or transfer certificate of title number if registered with the land court, is attached as Exhibit "A";

- (4) Pursuant to the power of sale provision of law or association documents, the power of sale foreclosure was conducted as required by the power of sale foreclosure law. The following is a summary of what was done:
- (A) A notice of default and intention to foreclose was served on the unit owner and the following person: _____. The notice of default and intention to foreclose was served on the following date and in the following manner: _____;
 - (B) The date of the notice of default and intention to foreclose was _____ (date). The deadline in the notice for curing the default was _____ (date), which deadline date was at least sixty days after the date of the notice;
 - (C) The notice of default and intention to foreclose was recorded before the deadline date in the _____ (bureau of conveyances or office of the assistant registrar of the land court). The notice was recorded on _____ (date) as document no. _____. A copy of the recorded notice is attached as Exhibit "1";
 - (D) The default was not cured by the deadline date in the notice of default and intention to foreclose;
 - (E) A public notice of the public sale was initially published in the classified section of the _____, in accordance with section 667-96(d), Hawaii Revised Statutes, once each week for three consecutive weeks on the following dates: _____. A copy of the affidavit of publication for the last public notice of the public sale is attached as Exhibit "2". The date of the public sale was _____ (date). The last publication was not less than fourteen days before the date of the public sale;
 - (F) The public notice of the public sale was sent to the unit owner, to the state director of taxation, to the director of finance of the county where the unit is located, and to the following: _____. The public notice was sent on the following dates and in the following manner: _____. Those dates were after the deadline date in the notice

of default and intention to foreclose, and those dates were at least sixty days before the date of the public sale;

(G) The public notice of the public sale was posted on the unit or on such other real property of which the unit is a part on _____ (date). That date was at least sixty days before the date of the public sale;

(H) A public sale of the unit was held on a business day during business hours on: _____ (date), at _____ (time), at the following location: _____. The highest successful bidder was _____ (name) with the highest successful bid price of \$_____ ; and

(I) At the time the public sale was held, the default was not cured; and

(5) This affidavit is signed under penalty of perjury."

[L 2012, c 182, pt of §3(2)]

" **[\$667-102] Recordation of affidavit, conveyance document; effect.** (a) The affidavit required under section 667-101 and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. After the recordation, the association shall mail or deliver a recorded copy to those persons entitled to receive the public notice of the public sale under section 667-96(c).

(b) When both the affidavit and the conveyance document are recorded:

- (1) The sale of the unit is considered completed;
- (2) All persons claiming by, through, or under the unit owner and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law;
- (3) The lien of the association and all liens junior in priority to the lien of an association shall be automatically extinguished from the unit; and
- (4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

(c) The unit owner and any person claiming by, through, or under the unit owner and who is remaining in possession of the unit after the recordation of the affidavit and the conveyance document shall be considered a tenant at sufferance subject to eviction or ejection. The purchaser may bring an action in the nature of summary possession under chapter 666, ejection, or trespass or may bring any other appropriate action in a court where the unit is located to obtain a writ of possession, a writ of assistance, or any other relief. In any such action, the court shall award the prevailing party its reasonable attorneys' fees and costs and all other reasonable fees and costs, all of which are to be paid for by the non-prevailing party. [L 2012, c 182, pt of §3(2)]

" **[§667-103] Recordation; full satisfaction of debt by unit owner.** Except as provided in section 667-92(f)(2), the recordation of both the conveyance document and the affidavit shall not operate as full satisfaction of the debt owed by the unit owner to the association unless the sale proceeds from the unit or the amounts paid by a purchaser under the special assessment permitted by section 421J-10.5 or 514B-146 are sufficient to satisfy the unit owner's debt to the association, including the association's legal fees and costs. The debts of other lien creditors are unaffected except as provided in this part. [L 2012, c 182, pt of §3(2)]

" **[§667-104] Prohibited conduct.** It shall be a prohibited practice for any association to engage in any of the following practices:

- (1) Holding a public sale on a date, at a time, or at a place other than that described in the public notice of the public sale or a properly noticed postponement;
- (2) Specifying a fictitious place in the public notice of the public sale;
- (3) Conducting a postponed public sale on a date other than the date described in the new public notice of the public sale; or
- (4) Completing or attempting to complete nonjudicial foreclosure proceedings against a unit owner in violation of section 667-92(c). [L 2012, c 182, pt of §3(2)]