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# A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

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

1           SECTION 1. The legislature finds that Act 162, Session  
2 Laws of Hawaii 2010, created a mortgage foreclosure task force  
3 to undertake a study to develop both general and specific  
4 policies and procedures necessary to improve the manner in which  
5 mortgage foreclosures are conducted in the State. The  
6 legislature further finds that Act 162 directed the task force  
7 to submit two reports, a preliminary report for the regular  
8 session of 2011 and a final report for the regular session of  
9 2012.

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



1           The purpose of this Act is to implement the recommendations  
2 for proposed legislation that were adopted by the mortgage  
3 foreclosure task force and submitted in the preliminary report  
4 to the legislature for the regular session of 2011.

5           More specifically, the purpose of this Act is to accomplish  
6 the following:

- 7           (1) Require that for a foreclosure under power of sale,  
8           the notice of intent to foreclose be served, not less  
9           than twenty-one days before the date of sale, on all  
10          persons entitled to notice in the same manner as the  
11          service of a civil complaint under chapter 634, Hawaii  
12          Revised Statutes, and the Hawaii rules of civil  
13          procedure;
- 14          (2) Prohibit a mortgagee who completes a foreclosure under  
15          power of sale upon a mortgage on residential property  
16          from subsequently pursuing or obtaining a deficiency  
17          judgment against certain owner-occupants of that  
18          residential property;
- 19          (3) Authorize an owner-occupant of residential property  
20          that is being subjected to a foreclosure under power  
21          of sale to convert the action into a foreclosure by  
22          action;



- 1           (4) Authorize the mortgagee conducting a foreclosure under  
2           power of sale to record with the land court or the  
3           bureau of conveyances a copy of the notice of intent  
4           to foreclose, and to furthermore give the recorded  
5           copy of the notice the same effect as a notice of  
6           pendency of action in a civil action, such as the  
7           foreclosure by action;
- 8           (5) Authorize the land court to record the notice of  
9           intent to foreclose; and
- 10          (6) Adopt a portion of the 2005 ruling of the United  
11          States Bankruptcy Court for the District of Hawaii in  
12          *In re Hoopai*, 2005 WL 1156091 (Bankr. D. Hawaii  
13          January 12, 2005) (No. 04-02511), order affirmed by *In*  
14          *re Hoopai*, 2005 WL 2864748 (D. Hawaii October 14,  
15          2005) (No. CV.05-00186 DAE-KSC, CV.05-00187 HG-BMK),  
16          by specifying that for a foreclosure under power of  
17          sale, the mortgagor's interest is extinguished upon  
18          the recordation of the affidavit in the bureau of  
19          conveyances or in the land court, as the case may be,  
20          within thirty days of the date of sale.



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

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

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

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

17 **§667-D Notice of intent to foreclose; residential**  
18 **property; required statement on conversion.** (a) The notice of  
19 intent to foreclose nonjudicially that is served and posted as  
20 required under sections 667-5(a)(1)(A) and 667-5(b)(2) shall  
21 include, in addition to the contents required under section 667-



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

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

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



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

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

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



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

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

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

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



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



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

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

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

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

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



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

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

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

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



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

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

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

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

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



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

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

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

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

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

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



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

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



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

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

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

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



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

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

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

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

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

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

18 SECTION 12. This Act shall take effect on July 1, 2030.



**Report Title:**

Mortgage Foreclosures; Task Force

**Description:**

Implements recommendations of the mortgage foreclosure task force relating to service of notice, conversion from nonjudicial to judicial foreclosure, bar against deficiency judgments, notice of pendency of action, and extinguishment of a mortgagor's interest. Effective July 1, 2030. (HB879 HD1)

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

