

JAN 21 2011

A BILL FOR AN ACT

RELATING TO FORECLOSURE.

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

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

4 "PART . MANDATORY FORECLOSURE MEDIATION

5 §667-A Definitions. As used in this part:

6 "Mortgage mediation administrator" means the mortgage
7 mediation administrator of the center for alternative dispute
8 resolution established by section 613-2.

9 §667-B Mediation required before foreclosure. (a) Before
10 a circuit court may order a judgment of foreclosure pursuant to
11 section 667-1 or before a public sale may be conducted pursuant
12 to section 667-5 or 667-25 for a residential property that is
13 occupied by the mortgagor as a primary residence, the
14 foreclosing mortgagee shall, at the election of the mortgagor,
15 participate in mediation pursuant to this part to attempt to
16 avoid foreclosure.



1 (b) Mediation required by this part shall be conducted
2 through the center for alternative dispute resolution
3 established by section 613-2.

4 **§667-C Notice of mediation required.** (a) Notice of a
5 foreclosure action in circuit court pursuant to section 667-1,
6 notice of a power of sale foreclosure filed or posted pursuant
7 to section 667-5(b), or notice of default served pursuant to
8 section 667-22(c) shall include notice that the foreclosing
9 mortgagee is required, at the election of the mortgagor, to
10 participate in mediation pursuant to this part for the purpose
11 of attempting to avoid foreclosure.

12 (b) The notice required by subsection (a) shall include:

13 (1) The name and contact information of a person or entity
14 with the authority to negotiate a loan modification on
15 behalf of the mortgagee;

16 (2) Contact information for at least one local housing
17 counseling agency approved by the United States
18 Department of Housing and Urban Development; and

19 (3) A form for the mortgagor to use to indicate election
20 to enter into or to waive mediation pursuant to this
21 part which shall contain the mailing address of the
22 mortgage mediation administrator and instructions for



1 the return of the form to the mortgage mediation
2 administrator.

3 §667-D Election of mediation; stay of foreclosure

4 proceedings. (a) No later than thirty days after receipt of
5 notice of mediation under section 667-C, a mortgagor shall
6 contact the mortgage mediation administrator to indicate whether
7 or not the mortgagor elects to pursue mediation pursuant to this
8 part.

9 (b) Upon receipt of notice that a mortgagor has elected to
10 pursue mediation, the mortgage mediation administrator shall
11 assign the matter to a mediator and schedule the matter for
12 mediation through the center for alternative dispute resolution
13 according to the rules and procedures of the center for
14 alternative dispute resolution. All foreclosure proceedings
15 shall be stayed effective upon the mortgage mediation
16 administrator's receipt of notice of election to pursue
17 mediation pending the outcome of the mediation process.

18 (c) If a mortgagor elects to waive mediation or fails to
19 give notice within the time specified to the mortgage mediation
20 administrator of the mortgagor's election to pursue mediation,
21 the mortgage mediation administrator shall notify the court, the



1 bureau of conveyances, or the land court, as appropriate, and
2 the foreclosure process shall proceed pursuant to statute.

3 **§667-E Mediation process; requirements.** (a) Parties to a
4 mediation process conducted pursuant to this part shall consist
5 of the mortgagor or the mortgagor's representative and the
6 mortgagee or the mortgagee's representative; provided that any
7 representative of the mortgagee who participates in the
8 mediation shall be authorized to negotiate a loan modification
9 on behalf of the mortgagee or shall have direct access at all
10 times during the mediation process to a person who is so
11 authorized. All parties may be represented by counsel at the
12 mediation.

13 (b) The mortgagee or mortgagee's representative shall
14 bring to the mediation the original or a certified copy of the
15 mortgage instrument and each assignment of the mortgage
16 instrument.

17 (c) If the mortgagee fails to attend the mediation, fails
18 to bring the documentation required by subsection (b), fails to
19 participate in the mediation in good faith as determined by the
20 assigned mediator, or participates through a representative that
21 does not meet the requirements of subsection (a), the mediator
22 shall notify the court, the bureau of conveyances, or the land



1 court, as appropriate. After receipt of notice pursuant to this
2 subsection, the court shall not issue a judgment of foreclosure
3 and neither the land court nor the bureau of conveyances shall
4 record a notice of sale or other conveyance document for the
5 subject property.

6 (d) If the mortgagor fails to attend the mediation, the
7 mediator shall notify the court, the bureau of conveyances, or
8 the land court, as appropriate, and the foreclosure process
9 shall proceed pursuant to statute.

10 (e) If the mediator determines that, despite the good
11 faith participation of the mortgagor and mortgagee in the
12 mediation process, the parties are not able to come to an
13 agreement, the mediator shall notify the court, the bureau of
14 conveyances, or the land court, as appropriate, that the
15 requirements of this part have been met. Upon receipt of notice
16 pursuant to this subsection, the foreclosure process shall
17 proceed pursuant to statute.

18 **§667-F Fee.** The center for alternative dispute resolution
19 may charge a fee, not to exceed \$1,000, for mediation services
20 provided pursuant to this part. Any fee for mediation services
21 shall be divided equally between the mortgagee and the
22 mortgagor.



1 **§667-G Applicability.** This part shall apply to
2 foreclosures, whether by action or by power of sale, of
3 residential real property that is occupied by the mortgagor as a
4 primary residence.

5 **§667-H Rules.** The chief justice of the supreme court or
6 chief justice's designee, in the capacity of administrative
7 manager of the center for alternative dispute resolution
8 pursuant to section 613-2, shall adopt rules pursuant to chapter
9 91 for the administration of this part including rules to:

- 10 (1) Ensure that mediations occur in an orderly and timely
11 manner;
- 12 (2) Require each party to provide any information that the
13 mediator deems necessary; and
- 14 (3) Protect the mediation process from abuse and ensure
15 that each party to the mediation acts in good faith."

16 SECTION 2. Section 613-2, Hawaii Revised Statutes, is
17 amended to read as follows:

18 " ~~[+] §613-2 [.]~~ **Establishment of the center for alternative**
19 **dispute resolution.** (a) There is established within the
20 judiciary the center for alternative dispute resolution. The
21 center shall facilitate the effective, timely, and voluntary
22 resolution of disputes [~~Through these resolutions, it shall]~~



1 in order to help reduce public and private costs of litigation
2 and increase satisfaction with the justice system. The center
3 shall accomplish its purposes by:

4 (1) Providing, where feasible and agreed to by the
5 parties, the consultative resources and technical
6 assistance needed to achieve voluntary resolutions for
7 cases that affect the public interest or the work of
8 state and county agencies [~~. These cases shall include~~
9 ~~but not be limited to:~~], including:

10 (A) Public disputes involving actual or threatened
11 court actions over the allocation or management
12 of public resources or the siting of public
13 facilities;

14 (B) Complex litigation cases in which a court or a
15 regulatory or administrative agency has
16 determined that the dispute involves multiple
17 parties [~~or~~], formidable technical, procedural,
18 or factual issues, or both;

19 (C) Policy roundtables in which the center, at the
20 request of an executive, legislative, or judicial
21 decisionmaker, convenes and chairs advisory



1 discussions on matters pertaining to standards or
2 rules; [and]

3 (D) Other cases directly referred by judges,
4 legislators, agency heads, or appointed
5 government officials; and

6 (E) Foreclosures subject to part _____ of chapter
7 667;

8 (2) Promoting in a systematic manner the appropriate use
9 of alternative dispute resolution; and

10 (3) Disseminating to government agencies and to the
11 community at large up-to-date information on the
12 methods and applications of alternative dispute
13 resolution.

14 (b) The center shall be organized, guided, and
15 administratively maintained by the chief justice or the chief
16 justice's designee. The chief justice shall appoint a director
17 of the center. The director may hire staff necessary to
18 accomplish the purposes of this chapter, including but not
19 limited to an assistant director [and], a program specialist[-],
20 and a mortgage mediation administrator. The director, assistant
21 director, [and] program specialist, and mortgage mediation
22 administrator shall have substantial experience, training, and



1 education in the methodologies of alternative dispute
2 resolution. Employees of the center shall be exempt from
3 chapter 76[7] and shall not be considered civil service
4 employees, but shall be entitled to any employee benefit plan
5 normally inuring to civil service employees."

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

8 "**§667-1 Foreclosure by action.** The circuit court may
9 assess the amount due upon a mortgage, whether of real or
10 personal property, without the intervention of a jury[7] and,
11 subject to the requirements of part _____, shall render judgment
12 for the amount awarded[7] and the foreclosure of the mortgage.
13 Execution may be issued on the judgment[7] as ordered by the
14 court."

15 SECTION 4. Section 667-5, Hawaii Revised Statutes, is
16 amended as follows:

17 1. By amending subsection (a) to read:

18 "(a) When a power of sale is contained in a mortgage[7]
19 and where the mortgagee, the mortgagee's successor in interest,
20 or any person authorized by the power to act in the premises[7]
21 desires to foreclose under power of sale upon breach of a
22 condition of the mortgage, the mortgagee, successor, or person



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

4 (1) Give notice of the mortgagee's, successor's, or
5 person's intention to foreclose the mortgage, the
6 notice of the mortgagor's right to elect mediation as
7 required by section 667-C, and of the sale of the
8 mortgaged property[7] by publication of the notice
9 once in each of three successive weeks [+],
10 constituting three publications[7] with the last
11 publication to be not less than fourteen days before
12 the day of sale, in a newspaper having a general
13 circulation in the county in which the mortgaged
14 property lies; and

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

17 2. By amending subsection (e) to read:

18 "(e) [The] Subject to the requirements of part , the
19 affidavit and copy of the notice shall be recorded and indexed
20 by the registrar, in the manner provided in chapter 501 or 502,
21 as the case may be."

1 SECTION 5. Section 667-22, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) When the mortgagor or the borrower has breached the
4 mortgage agreement, and when the foreclosing mortgagee intends
5 to conduct a power of sale foreclosure under this part, the
6 foreclosing mortgagee shall prepare a written notice of default
7 addressed to the mortgagor, the borrower, and any guarantor.

8 The notice of default shall state:

- 9 (1) The name and address of the current mortgagee;
- 10 (2) The name and last known address of the mortgagor, the
11 borrower, and any guarantor;
- 12 (3) The address or a description of the location of the
13 mortgaged property~~[,]~~ and the tax map key number of
14 the mortgaged property;
- 15 (4) The description of the default~~[, and]~~; provided that
16 if the default is a monetary default, an itemization
17 of the delinquent amount shall be given;
- 18 (5) The action [~~that must be taken~~] required to cure the
19 default, including the delinquent amount [~~to cure the~~
20 ~~default~~], together with the estimated amount of the
21 foreclosing mortgagee's attorney's fees and costs, and
22 all other fees and costs estimated to be incurred by



- 1 the foreclosing mortgagee related to the default by
2 the deadline date;
- 3 (6) The date by which the default must be cured, which
4 ~~[deadline date]~~ shall be at least sixty days after the
5 date of the notice of default;
- 6 (7) ~~[That]~~ A statement that if the default is not cured by
7 the ~~[deadline]~~ date stated in the notice of default,
8 the entire unpaid balance of the moneys owed to the
9 mortgagee under the mortgage agreement will ~~[be]~~
10 become due, that the mortgagee intends to conduct a
11 power of sale foreclosure to sell the mortgaged
12 property at a public sale without any court action and
13 without going to court, and that the mortgagee or any
14 other person may acquire the mortgaged property at the
15 public sale; ~~[and]~~
- 16 (8) The name, address, ~~[including]~~ electronic address, and
17 telephone number of the attorney who is representing
18 the foreclosing mortgagee; provided that the attorney
19 shall be licensed to practice law in the State and
20 physically located in the State~~[-]~~; and
- 21 (9) Notice of the mortgagor's right to elect mediation as
22 required by section 667-C."



1 SECTION 6. Section 667-24, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "[~~H~~] §667-24 [~~H~~] **Cure of default.** (a) If the default is
4 cured as required by the notice of default [~~7~~] or if the parties
5 have reached a mediated agreement to avoid foreclosure, the
6 foreclosing mortgagee shall rescind the notice of default.
7 Within fourteen days of the date of the cure [~~7~~] or the mediated
8 agreement, the foreclosing mortgagee shall [~~se~~] notify any
9 person who was served with the notice of default. If the notice
10 of default was recorded, a release of the notice of default
11 shall be recorded.

12 (b) If the default is not cured as required by the notice
13 of default [~~7~~] or if the parties have not reached a mediated
14 agreement to avoid foreclosure, the foreclosing mortgagee,
15 without filing a court action and without going to court, may
16 foreclose the mortgage under power of sale to sell the mortgaged
17 property at a public sale."

18 SECTION 7. Section 667-25, Hawaii Revised Statutes, is
19 amended by amending subsection (a) to read as follows:

20 "(a) [~~The~~] Subject to the requirements of part ,
21 public sale of the mortgaged property shall take place on the
22 later of the following:



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

6 SECTION 8. There is appropriated out of the general
 7 revenues of the State of Hawaii the sum of \$, or so
 8 much thereof as may be necessary for fiscal year 2011-2012, to
 9 establish the position of mortgage mediation administrator in
 10 the center for alternative dispute resolution.

11 The sum appropriated shall be expended by the judiciary.

12 SECTION 9. In codifying the new sections added by section
 13 1 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 10. This Act does not affect rights and duties
 17 that matured, penalties that were incurred, and proceedings that
 18 were begun before its effective date.

19 SECTION 11. Statutory material to be repealed is bracketed
 20 and stricken. New statutory material is underscored.

21



S.B. NO. 576

1 SECTION 12. This Act shall take effect on July 1, 2011.

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INTRODUCED BY:

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Report Title:

Mortgage Foreclosure; Mandatory Mediation

Description:

Requires mediation for the purpose of attempting to avoid foreclosure before foreclosure by action or by power of sale may take place; makes conforming amendments; creates and funds the position of mortgage mediation administrator in the center for alternative dispute resolution.

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

