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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 the number of  
2 residential mortgage foreclosures in Hawaii has increased so  
3 rapidly during this current period of economic recession that  
4 Hawaii has gained the unfortunate distinction of having one of  
5 the highest foreclosure rates in the nation. The legislature  
6 finds that, all too often, homeowners who try to take steps to  
7 avoid foreclosure through negotiations with lenders are stymied  
8 by mortgage lenders or servicers who may not have a local  
9 presence to enable direct communication and who employ strategic  
10 delay tactics or other unfair practices to thwart good faith  
11 negotiations. Federal programs do exist to assist homeowners in  
12 avoiding foreclosure. However, the federal programs create a  
13 dual-track process that does not compel compliance by lenders  
14 and allows the foreclosure process to continue while  
15 negotiations or loan modifications are ongoing. In many  
16 instances, homeowners may still lose their homes even while they  
17 are in compliance with the terms of a foreclosure avoidance or  
18 mitigation program.



1           The legislature further finds that several other states and  
2 municipalities have enacted mandatory foreclosure dispute  
3 resolution programs to respond to their own high rates of  
4 foreclosure. Many of these programs have been successful in  
5 allowing families to stay in their homes or to reach some  
6 agreement that mitigates damages in the cases where foreclosure  
7 is inevitable. Nevada's foreclosure mediation program is widely  
8 seen as one example of such a successful program. Since the  
9 start of the Nevada program in September 2009, approximately  
10 4,200 mediations have been conducted between homeowners and  
11 foreclosing mortgagees. In forty-six per cent of these  
12 mediations, homeowners have been able to reach an agreement to  
13 remain in the home and in an additional sixteen per cent of  
14 cases, homeowners have been able to reach an agreement that  
15 mitigates damage and preserves their dignity. The legislature  
16 finds that Nevada's foreclosure mediation program serves as a  
17 useful model for a similar program in Hawaii.

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

21           "PART           .   MANDATORY FORECLOSURE DISPUTE RESOLUTION

22           §667-A   Definitions. As used in this part:



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

3 "Dispute resolution" means a facilitated negotiation  
4 between a mortgagor and mortgagee for the purpose of reaching an  
5 agreement for mortgage loan modification or other agreement in  
6 an attempt to avoid foreclosure or to mitigate damages in the  
7 event that foreclosure is unavoidable.

8 "Facilitator" means the person assigned to facilitate the  
9 dispute resolution process required by this part.

10 **§667-B Dispute resolution required before foreclosure.**

11 (a) Before a circuit court may order a judgment of foreclosure  
12 pursuant to section 667-1 or before a public sale may be  
13 conducted pursuant to section 667-5 or 667-25 for a residential  
14 property that is occupied by the mortgagor as a primary  
15 residence, the foreclosing mortgagee shall, at the election of  
16 the mortgagor, participate in dispute resolution pursuant to  
17 this part to attempt to reach a negotiated agreement to avoid  
18 foreclosure or to mitigate damages where foreclosure is  
19 unavoidable.

20 (b) Dispute resolution required by this part shall be  
21 conducted through the center for alternative dispute resolution  
22 established by section 613-2.



1           **§667-C Notice of dispute resolution required.** (a) Notice  
2 of a foreclosure action in circuit court pursuant to section  
3 667-1, notice of a power of sale foreclosure filed or posted  
4 pursuant to section 667-5(b), or notice of default served  
5 pursuant to section 667-22(c) shall include notice that the  
6 foreclosing mortgagee is required, at the election of the  
7 mortgagor, to participate in dispute resolution pursuant to this  
8 part for the purpose of attempting to avoid foreclosure.

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

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

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

16           (3) A form for the mortgagor to use to elect or to waive  
17           dispute resolution pursuant to this part which shall  
18           contain the mailing address of the center for  
19           alternative dispute resolution and instructions for  
20           the return of the form to the center for alternative  
21           dispute resolution; and



1 (4) A description of the information that the mortgagor is  
2 required to provide to the center for alternative  
3 dispute resolution.

4 **§667-D Election of dispute resolution; stay of foreclosure**  
5 **proceedings.** (a) No later than thirty days after receipt of  
6 notice of dispute resolution under section 667-C, a mortgagor  
7 shall contact the center for alternative dispute resolution to  
8 indicate whether or not the mortgagor elects to pursue dispute  
9 resolution pursuant to this part.

10 (b) Upon receipt of notice that a mortgagor has elected to  
11 pursue dispute resolution, the center for alternative dispute  
12 resolution shall process the notice, assign the matter to a  
13 facilitator, and schedule the dispute resolution no later than  
14 one hundred thirty-five days after receipt of the mortgagor's  
15 election to pursue dispute resolution according to rules adopted  
16 by the supreme court. All foreclosure proceedings shall be  
17 stayed effective upon the center for alternative dispute  
18 resolution's receipt of notice of election to pursue dispute  
19 resolution pending the outcome of the dispute resolution  
20 process.

21 (c) If a mortgagor elects to waive dispute resolution or  
22 fails to give notice within the time specified to the center for



1 alternative dispute resolution of the mortgagor's election to  
2 pursue dispute resolution, the center for alternative dispute  
3 resolution shall notify the court, the bureau of conveyances, or  
4 the land court, as appropriate, and the foreclosure process  
5 shall proceed pursuant to statute.

6 **§667-E Dispute resolution process; requirements.** (a)

7 Parties to a dispute resolution process conducted pursuant to  
8 this part shall consist of the mortgagor or the mortgagor's  
9 representative and the mortgagee or the mortgagee's  
10 representative; provided that any representative of the  
11 mortgagee who participates in the dispute resolution shall be  
12 authorized to negotiate a loan modification on behalf of the  
13 mortgagee or shall have direct access by telephone or other  
14 immediately available communications medium at all times during  
15 the dispute resolution process to a person who is so authorized.  
16 All parties may be represented by counsel in the dispute  
17 resolution process; provided that the mortgagor may be  
18 represented by a housing counselor who is certified by the  
19 United States Department of Housing and Urban Development.

20 (b) Prior to a dispute resolution process scheduled  
21 pursuant to this part, the mortgagor and the mortgagee shall  
22 provide the center for alternative dispute resolution with any



1 information that the center may request. Information required  
2 by this subsection shall include financial and employment  
3 information to be provided by the mortgagor and loan  
4 information, including the original or a certified copy of the  
5 mortgage instrument and promissory note, provided by the  
6 mortgagee.

7 (c) A dispute resolution pursuant to this part shall take  
8 place at a community mediation center or other site specified by  
9 the center for alternative dispute resolution and shall consist  
10 of one four-hour meeting of the parties and the facilitator  
11 during which the parties shall present the dispute and attempt  
12 to conclude the dispute resolution process. The facilitator may  
13 extend the time allowed for the dispute resolution at the  
14 facilitator's discretion.

15 (d) If the mortgagee fails to attend the dispute  
16 resolution, fails to comply with the requirements of this part  
17 or the rules of the supreme court adopted pursuant to this part,  
18 or participates through a representative that does not meet the  
19 requirements of subsection (a), the facilitator shall notify the  
20 court, the bureau of conveyances, or the land court, as  
21 appropriate. After receipt of notice pursuant to this  
22 subsection, the court shall not issue a judgment of foreclosure



1 and neither the land court nor the bureau of conveyances shall  
2 record a notice of sale or other conveyance document for the  
3 subject property; provided that in the case of a judicial  
4 foreclosure, the court may order a loan modification according  
5 to terms determined proper by the court.

6 (e) If the mortgagor fails to attend the dispute  
7 resolution or fails to comply with the requirements of this part  
8 or the rules of the supreme court adopted pursuant to this part  
9 the facilitator shall notify the court, the bureau of  
10 conveyances, or the land court, as appropriate, that the  
11 requirements of this part have been met and the foreclosure  
12 process shall proceed pursuant to statute.

13 (f) If, despite both parties' participation in the dispute  
14 resolution process and compliance with the requirements of this  
15 part and the rules of the supreme court adopted pursuant to this  
16 part, the parties are not able to come to an agreement, the  
17 facilitator shall notify the court, the bureau of conveyances,  
18 or the land court, as appropriate, that the requirements of this  
19 part have been met. Upon receipt of notice pursuant to this  
20 subsection, the foreclosure process shall proceed pursuant to  
21 statute.





1 (g) If the parties to a dispute resolution come to an  
2 agreement to resolve the matters at issue in the dispute  
3 resolution before the dispute resolution scheduled pursuant to  
4 this section, the parties shall notify the facilitator of the  
5 resolution no later than two business days before the scheduled  
6 dispute resolution. No fees shall be refunded if the parties  
7 come to an agreement prior to or outside of a dispute resolution  
8 conducted pursuant to this part.

9 **§667-F Outcome of dispute resolution.** (a) When the  
10 parties to dispute resolution have complied with the  
11 requirements of this part and the rules of the supreme court  
12 adopted pursuant to this part and have reached an agreement, the  
13 agreement shall be memorialized in a resolution document which  
14 shall be filed with the circuit court, the land court, or the  
15 bureau of conveyances, as appropriate. The resolution document  
16 shall be a contract between the parties and shall be enforceable  
17 in a private contract action in a court of appropriate  
18 jurisdiction in the event of breach by either party. If the  
19 resolution document allows for foreclosure or other transfer of  
20 the subject property, the court shall order foreclosure and the  
21 land court or bureau of conveyances shall record a notice of



1 sale or other conveyance document upon presentation by the  
2 mortgagee, as appropriate.

3 (b) The parties to a dispute resolution may enter into a  
4 temporary modification agreement as an outcome of a dispute  
5 resolution conducted pursuant to this part; provided that any  
6 temporary modification agreements shall include an expiration  
7 date, which shall be a date certain upon which the parties shall  
8 have complied with their respective obligations under the  
9 agreement. A temporary modification agreement shall be a  
10 private contract memorialized, filed, and enforceable according  
11 to subsection (a).

12 **§667-G Confidentiality.** Personal financial information  
13 and other sensitive personal information disclosed in the course  
14 of foreclosure dispute resolution pursuant to this part shall be  
15 confidential and not subject to public disclosure.

16 **§667-H Facilitator qualifications.** The supreme court  
17 shall adopt rules for qualifications and training of  
18 facilitators for foreclosure dispute resolution pursuant to this  
19 part; provided that facilitators shall possess sufficient  
20 knowledge in the areas of law, real estate, or finance and shall  
21 receive sufficient training to be able to effectuate the  
22 purposes of this part.



1           **§667-I Fee.** The center for alternative dispute resolution  
2 may charge a fee not to exceed \$400 for dispute resolution  
3 services provided pursuant to this part. Any fee for dispute  
4 resolution services shall be divided equally between the  
5 mortgagee and the mortgagor. All fees collected pursuant to  
6 this section shall be deposited into the foreclosure dispute  
7 resolution special fund established by section 667-L.

8           **§667-J Applicability.** This part shall apply to  
9 foreclosures, whether by action or by power of sale, of  
10 residential real property that is occupied by the mortgagor as a  
11 primary residence; provided that this part shall not apply to  
12 actions by an association to foreclose on a lien for amounts  
13 owed to the association.

14           **§667-K Rules.** The chief justice of the supreme court may  
15 adopt rules for the administration of this part including rules  
16 to:

- 17           (1) Ensure that dispute resolution occurs in an orderly  
18           and timely manner;
- 19           (2) Require each party to provide any information that the  
20           facilitator deems necessary;
- 21           (3) Protect the dispute resolution process from abuse and  
22           ensure that each party complies with this part and the



1 rules adopted by the supreme court pursuant to this  
2 part;

3 (4) Establish qualifications and training requirements for  
4 facilitators; and

5 (5) Protect personal financial information and other  
6 sensitive personal information obtained in the course  
7 of foreclosure dispute resolution from disclosure.

8 **§667-L Foreclosure dispute resolution special fund. (a)**

9 There is established outside of the state treasury a special  
10 fund to be known as the foreclosure dispute resolution special  
11 fund to be administered by the judiciary to implement the  
12 mandatory dispute resolution in foreclosure proceedings required  
13 by this part. The fund shall consist of contributions from the  
14 sources identified in subsections (c) and (d). Interest earned  
15 from the balance of the fund shall become a part of the fund.  
16 The judiciary shall adopt rules regarding the distribution of  
17 moneys from the fund.

18 (b) The judiciary may allow expenditure of moneys from the  
19 fund directly by the center for alternative dispute resolution.

20 (c) All persons who bring an action in the circuit court  
21 for foreclosure pursuant to section 667-1, who record an  
22 affidavit in the land court pursuant to section 501-118, or who



1 record a conveyance document in the bureau of conveyances for a  
2 property subject to a nonjudicial power of sale foreclosure  
3 shall pay a fee of \$                    for deposit into the foreclosure  
4 dispute resolution special fund. The fee established pursuant  
5 to this subsection shall be assessed only one time for each  
6 subject property, regardless of the number of filings related to  
7 the subject property.

8        (d) Fees for foreclosure dispute resolution charged  
9 pursuant to section 667-I shall be deposited into the  
10 foreclosure dispute resolution special fund."

11        SECTION 3. Section 613-2, Hawaii Revised Statutes, is  
12 amended by amending subsection (a) to read as follows:

13        "(a) There is established within the judiciary the center  
14 for alternative dispute resolution. The center shall facilitate  
15 the effective, timely, and voluntary resolution of disputes[  
16 ~~Through these resolutions, it shall~~] in order to help reduce  
17 public and private costs of litigation and increase satisfaction  
18 with the justice system. The center shall accomplish its  
19 purposes by:

20        (1) Providing, where feasible and agreed to by the  
21 parties, the consultative resources and technical  
22 assistance needed to achieve voluntary resolutions for



1 cases that affect the public interest or the work of  
2 state and county agencies [~~These cases shall include~~  
3 ~~but not be limited to:~~], including:

4 (A) Public disputes involving actual or threatened  
5 court actions over the allocation or management  
6 of public resources or the siting of public  
7 facilities;

8 (B) Complex litigation cases in which a court or a  
9 regulatory or administrative agency has  
10 determined that the dispute involves multiple  
11 parties or formidable technical, procedural, or  
12 factual issues, or both;

13 (C) Policy roundtables in which the center, at the  
14 request of an executive, legislative, or judicial  
15 decisionmaker, convenes and chairs advisory  
16 discussions on matters pertaining to standards or  
17 rules; [and]

18 (D) Other cases directly referred by judges,  
19 legislators, agency heads, or appointed  
20 government officials; and

21 (E) Foreclosures subject to part of chapter  
22 667;



- 1 (2) Promoting in a systematic manner the appropriate use  
2 of alternative dispute resolution; and
- 3 (3) Disseminating to government agencies and to the  
4 community at large up-to-date information on the  
5 methods and applications of alternative dispute  
6 resolution."

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

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

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

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

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



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

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

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

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

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





1 SECTION 6. 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[7] and the tax map key number of  
14 the mortgaged property;
- 15 (4) The description of the default [~~7~~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



1        (9) Notice of the mortgagor's right to elect to  
2                    participate in a dispute resolution process as  
3                    required by section 667-C."

4            SECTION 7. Section 667-24, Hawaii Revised Statutes, is  
5 amended to read as follows:

6            "[+]§667-24[+] **Cure of default.** (a) If the default is  
7 cured as required by the notice of default[7] or if the parties  
8 have reached an agreement to avoid foreclosure pursuant to part  
9 \_\_\_\_\_, the foreclosing mortgagee shall rescind the notice of  
10 default. Within fourteen days of the date of the cure[7] or an  
11 agreement reached by the parties through a dispute resolution  
12 process pursuant to part \_\_\_\_\_, the foreclosing mortgagee shall  
13 so notify any person who was served with the notice of default.  
14 If the notice of default was recorded, a release of the notice  
15 of default shall be recorded.

16            (b) If the default is not cured as required by the notice  
17 of default[7] or if the parties have not reached an agreement to  
18 avoid foreclosure pursuant to part \_\_\_\_\_, the foreclosing  
19 mortgagee, without filing a court action and without going to  
20 court, may foreclose the mortgage under power of sale to sell  
21 the mortgaged property at a public sale."



1 SECTION 8. Section 667-25, Hawaii Revised Statutes, is  
2 amended by amending subsection (a) to read as follows:

3 "(a) [The] Subject to the requirements of part ,  
4 public sale of the mortgaged property shall take place on the  
5 later of the following:

6 (1) At least sixty days after the public notice of the  
7 public sale is distributed under section 667-27; or

8 (2) At least fourteen days after the date of the  
9 publication of the third public notice advertisement  
10 under section 667-27."

11 SECTION 9. There shall be a moratorium on foreclosure  
12 actions for property located in this State. No foreclosure by  
13 action or by power of sale shall proceed, no court shall issue  
14 an order for foreclosure pursuant to section 667-1, the  
15 registrar of the land court shall not record an affidavit  
16 pursuant to section 501-118, and the registrar of the bureau of  
17 conveyances shall not record a conveyance document with the  
18 bureau of conveyances following a power of sale foreclosure  
19 during the moratorium period established by this Act.

20 SECTION 10. There is appropriated out of the general  
21 revenues of the State of Hawaii the sum of \$ or so  
22 much thereof as may be necessary for fiscal year 2011-2012 to



1 pay for the initial costs associated with establishing a dispute  
2 resolution program for use by mortgagors and mortgagees to  
3 attempt to avoid or mitigate the damages of foreclosure in the  
4 center for alternative dispute resolution.

5 The sum appropriated shall be deposited into the  
6 foreclosure dispute resolution special fund established pursuant  
7 to section 667-L and shall be expended by the judiciary for the  
8 purposes of this Act; provided that upon receipt of sufficient  
9 moneys to sustain its purpose, the foreclosure dispute  
10 resolution special fund shall reimburse the general fund for the  
11 appropriation made pursuant to this Act.

12 SECTION 11. This Act shall take effect upon its approval;  
13 provided that section 9 of this Act shall be repealed six months  
14 after its effective date.

15



**Report Title:**

Mortgage Foreclosures; Dispute Resolution; Appropriation

**Description:**

Requires foreclosing mortgagees to engage in a dispute resolution process at the election of a mortgagor before carrying out a judicial or nonjudicial power of sale foreclosure; authorizes the supreme court to adopt rules for dispute resolution; establishes a special fund for foreclosure dispute resolution to be expended by the judiciary; makes appropriation. (SD1)

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

