

Hawaii Revised Statutes: Chapter 667 – Mortgage Foreclosures

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As to procedural statutes superseded by the rules of court, see note preceding Title 32.

Law Journals and Reviews

Timesharing in the 1990s. I HBJ No. 13, at pg. 89.

PART I. FORECLOSURE BY ACTION OR FORECLOSURE BY POWER OF SALE

Note

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

Law Journals and Reviews

Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai‘i. 24 UH L. Rev. 245.

§667-1 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)]

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.

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.

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Burden of guarantor sued for deficiency after foreclosure to show foreclosure price paid by mortgagee inadequate. 31 H. 34. Economic depression alone not enough to refuse remedy of foreclosure. 32 H. 835. Upset price. Id.

Decree of foreclosure is a final judgment for purposes of appellate review. 55 H. 414, 520 P.2d 431; 57 H. 557, 560 P.2d 488.

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.

See 33 H. 1; 34 H. 283. Cited: 40 H. 269, 274.

§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 19-21.

Case Notes

See 5 H. 397.

§667-3 Proceeds, how applied. Mortgage creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and judgments of foreclosure shall operate to extinguish the liens of subsequent mortgages of the same property, without forcing prior mortgagees to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage, and so on to the payment, wholly or in part, of mortgages 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)]

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.

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

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

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.

See 33 H. 1; 35 H. 482.

§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.

§667-5 Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

(1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice 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 having a general circulation in the county in which the mortgaged property lies; and

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

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

(1) Filed with the state director of taxation; and

(2) Posted on the premises not less than twenty-one days before the day of sale.

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

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

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

(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is cancelled, information that the auction was cancelled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

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

(f) This section is inapplicable if the mortgagee is foreclosing as to personal property only. [L 1874, c 33, §1; am L 1907, c 59, §1; am L 1911, c 108, §1; am L 1915, c 121, §1; RL 1925, §2879; RL 1935, §4724; am L 1937, c 138, §1; RL 1945, §12424; RL 1955, §336-5; am L 1967, c 256, §1; HRS §667-5; am L 1972, c 90, §9(e); gen ch 1985; am L 1989, c 20, §5; am L 2008, c 138, §1]

Cross References

Publication, how made, see §601-13.

Further provisions as to notice, affidavit, see §667-7.

Law Journals and Reviews

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

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

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Case Notes

Mortgagee in exercising power must not oppress debtor or sacrifice the estate. 5 H. 262. As to duty to sell in parcels, see 17 H. 49. Foreclosure not barred because statute of limitations has run against note but no deficiency judgment can be entered. 17 H. 49; 20 H. 620. Foreclosure barred, by analogy, by statute applicable to real actions. 15 H. 507. Ejectment and not bill in equity proper remedy for purchaser at sale under power, to obtain possession. 14 H. 515. Mere filing of bankruptcy petition between date of publication and date of sale does not invalidate sale but bankruptcy court may enjoin sale. 7 F.2d 576.

Plaintiff-appellant challenged this statute as violating the due process clause of the Fourteenth Amendment; district court's dismissal of the case for failure to state a claim because the sale was a purely private remedy and involved no state action, affirmed. 324 F.3d 1091.

Acts to be done by mortgagee not required to be done personally. 8 H. 108.

Publication in Hawaiian no longer required. 22 H. 183.

Constitutionality. 17 H. 49; 17 H. 528, 534. Validity of sale; provisions of power of sale must be followed. 5 H. 262; 17 H. 49. Redemption; no statute authorizes redemption after sale, and hence no right of redemption exists. 15 H. 271.

Chattel mortgages, duty to obtain best price. 35 H. 158.

§667-5.5 Foreclosure notice. Notwithstanding any law or agreement to the contrary, any person who forecloses on a property within a planned community association, a condominium apartment, 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 apartment owners of the condominium, or the cooperative housing project in which the property to be foreclosed is located, of the foreclosure at the time foreclosure proceedings are begun. The notice, at a minimum, shall identify the property, condominium apartment, or cooperative apartment which is the subject of the foreclosure and identify the name or names of the person or persons bringing foreclosure proceedings. This section shall not apply when the planned community association, condominium association, 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 apartment owners, or cooperative housing corporation. [L 1984, c 204, §1; am L 1988, c 166, §1; am L 2006, c 275, §2]

[§667-5.7] Public sale. At any public sale pursuant to section 667-5, the successful bidder at the public sale, as the purchaser, shall not be required to make a down payment to the foreclosing mortgagee of more than ten per cent of the highest successful bid price. [L 2006, c 275, §1]

§667-6 Notice to mortgage creditors. Whenever a mortgage creditor having a mortgage lien on certain premises desires notice that another mortgage creditor having a mortgage lien on the same premises intends to foreclose the mortgage and sell the mortgaged property pursuant to a power of sale under section 667-5, the mortgage creditor may submit a written request to the

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mortgagee foreclosing or who may foreclose the mortgage by power of sale, to receive notice of the mortgagee's intention to foreclose the mortgage under power of sale. This request for notice may be submitted any time after the recordation or filing of the subject mortgage at the bureau of conveyances or the land court, but must be submitted prior to the completion of the publication of the mortgagee's notice of intention to foreclose the mortgage and of the sale of the mortgaged property. This request shall be signed by the mortgage creditor, or its authorized representative, desiring to receive notice, specifying the name and address of the person to whom the notice is to be mailed. 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 date of sale.

No request for 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 real property 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 property described in the mortgage referred to therein. [L 1967, c 83, §1; HRS §667-6; am L 1972, c 90, §9(f); gen ch 1993]

§667-7 Notice contents; affidavit. (a) The notice of intention of foreclosure shall contain:

(1) A description of the mortgaged property; and

(2) A statement of the time and place proposed for the sale thereof at any time after the expiration of four weeks from the date when first advertised.

(b) The affidavit described under section 667-5 may lawfully be made by any person duly authorized to act for the mortgagee, and in such capacity conducting the foreclosure. [L 1890, c 9, §1; am L 1915, c 121, §2; RL 1925, §2880; RL 1935, §4725; RL 1945, §12425; RL 1955, §336-6; HRS §667-7; am L 2008, c 138, §2]

Case Notes

Mortgagee may act by someone duly authorized. 8 H. 108.

§667-8 Affidavit as evidence, when. If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. [L 1874, c 33, §2; RL 1925, §2881; RL 1935, §4726; RL 1945, §12426; RL 1955, §336-7; HRS §667-8; am L 1972, c 90, §9(g); gen ch 1985]

§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

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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 chapter, the remainder of the proceeds, if any, shall be paid over to the owner of the mortgaged property, after deducting the amount of claim 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)]

Case Notes

Surplus: Upon foreclosure sale after death of mortgagor surplus goes to administrator if required to pay debts. 17 H. 453 (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.

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

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

[PART II.] ALTERNATE POWER OF SALE FORECLOSURE PROCESS

Law Journals and Reviews

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

[§667-21] Alternate power of sale process; definitions. (a) The process in this part is an alternative power of sale process to the foreclosure by action and the foreclosure by power of sale in part I.

(b) As used in this part:

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

"Foreclosing mortgagee" means the mortgagee that intends to conduct a power of sale foreclosure; provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1.

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"Mailed" means to be sent by regular mail, postage prepaid, and by certified, registered, or express mail, postage prepaid and return receipt requested.

"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.

"Open house" means a public showing of the mortgaged property during a scheduled time period.

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure under this part 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" or "recorded" means a document is recorded or filed with the office of the assistant registrar of the land court under chapter 501 or recorded with the registrar of conveyances under chapter 502, or both, as applicable.

"Served" means to have service of the notice of default 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. [L 1998, c 122, pt of §1]

Rules of Court

Service, see HRCF rules 4, 5.

[§667-22] Notice of default; 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

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written notice of default addressed to the mortgagor, the borrower, and any guarantor. The notice of default shall state:

- (1) The name and address of the current mortgagee;
- (2) The name and last known address of the mortgagor, the borrower, and any guarantor;
- (3) The address or a description of the location of the mortgaged property, and the tax map key number of the mortgaged property;
- (4) The description of the default, and if the default is a monetary default, an itemization of the delinquent amount shall be given;
- (5) The action that must be taken to cure the default, including the amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default by the deadline date;
- (6) The date by which the default must be cured, which deadline date shall be at least sixty days after the date of the notice of default;
- (7) That if the default is not cured by the deadline date stated in the notice of default, the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will be 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; and
- (8) The name, address, including 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.

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

"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.

AFTER THE DEADLINE DATE IN THIS NOTICE, TWO PUBLIC SHOWINGS (OPEN HOUSES) OF THE PROPERTY BY THE LENDER WILL BE HELD, BUT ONLY IF ALL MORTGAGORS (OWNERS) OF THE PROPERTY SO AGREE. TO SHOW THAT ALL OWNERS AGREE TO ALLOW TWO OPEN HOUSES BY THE LENDER, ALL OWNERS

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MUST SIGN A LETTER SHOWING THEY AGREE. ALL OWNERS MUST SEND THE SIGNED LETTER TO THIS OFFICE AT THE ADDRESS GIVEN IN THIS NOTICE.

THIS OFFICE MUST ACTUALLY RECEIVE THE SIGNED LETTER BY THE DEADLINE DATE IN THIS NOTICE. THE SIGNED LETTER MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED.

IF THE SIGNED LETTER IS NOT RECEIVED BY THIS OFFICE BY THE DEADLINE DATE, THE PROPERTY WILL THEN BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

EVEN IF THIS OFFICE RECEIVES THE SIGNED LETTER TO ALLOW THE LENDER TO HOLD TWO OPEN HOUSES OF THE PROPERTY, IF ALL OWNERS LATER DO NOT COOPERATE TO ALLOW THE OPEN HOUSES, THE PROPERTY WILL BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

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 foreclosing mortgagee shall have the notice of default served on:

- (1) The mortgagor and the borrower;
- (2) Any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23;
- (3) The state director of taxation;
- (4) The director of finance of the county where the mortgaged property is located; and
- (5) Any other person entitled to receive notice under section 667-5.5. [L 1998, c 122, pt of §1; am L 2008, c 138, §3]

[§667-23] Recordation of notice of default. Before the deadline date in the notice of default, the notice of default in a recordable form shall be recorded 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 shall have the same effect as a notice of pendency of action. From and after the recordation of the notice of default, 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]

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[§667-24] Cure of default. (a) If the default is cured as required by the notice of default, the foreclosing mortgagee shall rescind the notice of default. Within fourteen days of the date of the cure, the foreclosing mortgagee shall so notify any person who was served with the notice of default. If the notice of default was recorded, a release of the notice of default shall be recorded.

(b) If the default is not cured as required by the notice of default, 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]

[§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 in the county where the mortgaged property is located. However, if the borrower, the mortgagor, and the foreclosing mortgagee all agree in writing, the public sale may be held in a different county in the State. 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]

[§667-26] Public showing of mortgaged property. (a) If the default is not cured as stated in the notice of default, the foreclosing mortgagee shall conduct two open houses of the mortgaged property before the public sale; provided that the foreclosing mortgagee timely received the signed letter of agreement from the mortgagor as required by the notice of default. Only two open houses shall be required even if the date of the public sale is postponed.

(b) Even if the signed letter of agreement is timely received, if there is no subsequent cooperation by the mortgagor to allow two open houses, the public sale may be held without any open houses of the mortgaged property. If the public notice of the public sale advertised the dates and times of the open houses, but there were no open houses because of the lack of cooperation by the mortgagor, the public sale may still be held as advertised, and the public notice of the public sale may not need to be republished. [L 1998, c 122, pt of §1]

[§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;

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(2) The dates and times of the two open houses of the mortgaged property, or if there will not be any open houses, the public notice shall so state;

(3) The unpaid balance of the moneys owed to the mortgagee under the mortgage agreement;

(4) A description of the mortgaged property, including the address or description of the location of the mortgaged property, and the tax map key number of the mortgaged property;

(5) The name of the mortgagor and the borrower;

(6) The name of the foreclosing mortgagee;

(7) The name of any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23;

(8) 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

(9) 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, 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 under section 667-23;

(3) Mailed or delivered to the state director of taxation;

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(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.

(d) The foreclosing mortgagee shall have the public notice of the public sale published in the classified section of a daily newspaper of general circulation in the county where the mortgaged property is located. The public notice shall be published once each week for three consecutive weeks (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. [L 1998, c 122, pt of §1]

[§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, upon request, to any other person who is entitled to receive the notice of default under section 667-22(c).

(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. No sooner 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 such other 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 667-27.

(c) 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]

[§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

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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 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]

[§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 sign the conveyance document on his or her own behalf.

(b) From the sale proceeds, after paying all liens and encumbrances in the order of priority as a matter of law, 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]

[§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;

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- (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
- (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 mortgagee) ("foreclosing mortgagee") 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 II, Hawaii Revised Statutes);

(2) The foreclosing mortgagee is a "foreclosing mortgagee" as defined in the power of sale foreclosure law;

(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 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 was served on the mortgagor, the borrower, and the following person: _____. The notice of default was served on the following date and in the following manner: _____;

(B) The date of the notice of default 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 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;

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(E) A public notice of the public sale was initially published in the classified section of the _____, a daily newspaper of general circulation in the county where the mortgaged property is located, 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 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) Two public showings (open houses) of the mortgaged property were held (or were not held because the mortgagor did not cooperate);

(I) 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

(J) 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]

Revision Note

Subsection (b)(5) redesignated pursuant to §23G-15(1).

[§667-33] Recordation of affidavit, conveyance document; effect. (a) The affidavit required under section 667-32 and the conveyance document shall be recorded at any time 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

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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 ejectment. The purchaser may bring an action in the nature of summary possession under chapter 666, ejectment, 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]

[§667-34] Foreclosure sale; conclusive presumptions. Unless an appeal is taken as set forth in section 667-35, any foreclosure sale held in accordance with this part shall be conclusively presumed to have been conducted in a legal, fair, and reasonable manner. The sale price shall be conclusively presumed to be reasonable and equal to the fair market value of the property based on the circumstances and on the economic conditions at the time of the sale. The statements in the recorded affidavit shall be conclusive evidence as to the facts stated therein for any purpose, in any court and in any proceeding, and in favor of bona fide purchasers and encumbrancers for value without notice. The purchaser of the mortgaged property shall be conclusively presumed to be a bona fide purchaser. Encumbrancers for value include liens placed by lenders who provide the purchaser with purchase money in exchange for a mortgage or other security interest in the newly-conveyed property. [L 1998, c 122, pt of §1]

[§667-35] Appeal to circuit court. The borrower, the mortgagor, and any creditor having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23, shall have the right to file an appeal in the circuit court where the mortgaged property is located to contest the presumptions set forth in section 667-34, and the statements contained in the affidavit required by section 667-32. No appeal shall be filed later than thirty days after the recordation of the affidavit. Failure to timely appeal shall result in the statements in the affidavit and the presumptions set forth in section 667-34 becoming conclusive in accordance with the terms of that section. [L 1998, c 122, pt of §1]

[§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]

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[§667-37] Judicial action of foreclosure before public sale. This part shall not prohibit the borrower, 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. While that circuit court foreclosure action is pending, the power of sale foreclosure process shall be stayed. [L 1998, c 122, pt of §1]

[§667-38] Recordation; full satisfaction of debt by borrower. The recordation of both the conveyance document and the affidavit shall operate as full satisfaction of the debt owed by the borrower to the foreclosing mortgagee even if the foreclosing mortgagee receives nothing from the sale proceeds, unless the debt is secured by other collateral, or except as otherwise provided by law. The debts of other lien creditors are unaffected except as provided in this part. [L 1998, c 122, pt of §1]

[§667-39] Right to enforce this part. The foreclosing mortgagee, any other creditor having a recorded lien on the mortgaged property before the recordation of the notice of default 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. [L 1998, c 122, pt of §1]

[§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 requirement. 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 also develop informational materials to educate and inform borrowers and mortgagors. These materials shall be made available to the public, including the borrowers at the time of application for a mortgage or loan, or other contract containing a power of sale foreclosure provision. These materials, among other things, shall inform the borrower that the financial institution and other business entities and persons who are authorized under this part to exercise the power of sale foreclosure, in the event of the borrower's default, have the option of pursuing either a judicial or nonjudicial foreclosure as provided by law. These informational materials shall fully and completely explain these remedies. [L 1998, c 122, pt of §1]

[§667-42] Application of this part. The requirements of this part shall apply only to new mortgages, loans, agreements, and contracts containing power of sale foreclosure language executed by the borrowers or mortgagors after July 1, 1999. [L 1998, c 122, pt of §1]

[PART III. OTHER PROVISIONS]

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Revision Note

Part heading added by Revisor.

[§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]

[§667-62] 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 do all such acts as are authorized or required by the power contained in the mortgage.

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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]

[§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 foreclosing or who may foreclose the mortgage by power of sale, 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 or filing of the subject mortgage at the bureau of conveyances or the land court, but shall be 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]

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[§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 IV. TIME SHARE INTEREST FORECLOSURES]

Note

Part heading added by Revisor.

[§667-61] Definitions. For the purposes of sections 667-62 to 667-65, "time share interest" shall have the same meaning as in section 514E-1. [L 2005, c 82, pt of §1]