



LEGAL AID
SOCIETY OF HAWAI'I



FORECLOSURE:

UNDERSTANDING THE LEGAL PROCESS

This brochure may be helpful to you if:

- You are paying a mortgage on your home, AND;
- You are or will soon be falling behind on your payments.

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Foreclosure: Understanding the Legal Process.



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I. The Basics of the Foreclosure Process

If you are behind on your mortgage payments and have not yet negotiated a settlement with your lender or filed for bankruptcy, your lender may begin the foreclosure process to take possession of your home.

In Hawaii, a lender may foreclose through either a non-judicial process (sometimes also called foreclosure under power of sale), or a judicial foreclosure process, depending on what you agree to when you secured your mortgage. Below is a basic comparison of the two processes:

<u>Non-Judicial Power of Sale</u>	<u>Judicial Foreclosure</u>
<ul style="list-style-type: none">• No Court Process• Happens quickly – could happen in one month• Cannot reopen the bidding after the auction • Approximately 30 days to move out after the auction is completed• No deficiency, even if there is negative equity	<ul style="list-style-type: none">• Court Process• Takes 4-6 months or more to complete• Can reopen bidding after the auction before the court confirms the sale• Approximately 30 days to move out after confirmation of sale• Possible deficiency and judgment against the homeowner

What is a Deficiency?

A “deficiency” is the difference between what you owe on your mortgage, and the amount that is received from the sale of your home. What you owe on your mortgage could be increased by attorneys fees and other costs related to the foreclosure.

Example:

What You Owe (minus)	Sale Proceeds	(equals)	Deficiency
\$100,000	- \$80,000	=	\$20,000

If your lender chooses to write the deficiency off, you may receive a 1099-C Cancellation of Debt tax form from your lender. The amount on the 1099-C form may be considered taxable income for income tax purposes. If you receive this form, contact Legal Aid or a tax professional to learn more.

II. Determining Which Process You Are In

Since the passage of Act 182 in June 2012, almost all mortgage foreclosures are done judicially, meaning that they go through the court process. So, if you are being foreclosed on by the lender, you are probably

going through the judicial process. Non-judicial foreclosures are most commonly seen when a condominium or homeowner's association is foreclosing against the property. For more information on foreclosures by an association or other lien holder, refer to Legal Aid's Brochure *C29. Association Foreclosure: Understanding Your Rights and Responsibilities*.

To determine which process you are going through, you will need to look at the documents you have received. A non-judicial foreclosure process is started when you are served with a "Notice of Intent to Foreclose Under Power of Sale" or "Notice of Non-Judicial Foreclosure." If you have received this document, or a similar document, refer to the next section on the non-judicial process.

A judicial foreclosure process is started when you are served with a "Complaint for Foreclosure." This will be an official court document. If you have received a "Complaint for Foreclosure," skip the next section on the non-judicial process and read Section IV on the Judicial Foreclosure Process.

III. Non-Judicial Foreclosure Process

The non-judicial foreclosure process has changed a lot within the past few years. Because of the new laws, most mortgage lenders no longer use the non-judicial foreclosure process. This section outlines how the non-judicial foreclosure process works for a mortgage lender. Keep in mind that if you are being foreclosed upon by a condominium association (AOAO) or homeowner's association (HOA), different rules apply to the non-judicial process. For more information, refer to Legal Aid's Brochure *C29. Association Foreclosure: Understanding Your Rights and Responsibilities*.

If you have received a "Notice of Intent to Foreclose Under Power of Sale" or "Notice of Non-Judicial Foreclosure," this means that you are in the non-judicial process. The process used to be completed very quickly, with little opportunity for you to negotiate with the lender, and with no court oversight. However, under the revised laws, homeowners now have additional rights in the non-judicial process. Homeowners may elect for ONE of the following options:

A. Mortgage Foreclosure Dispute Resolution (MFDR)

MFDR is an optional process you can choose if you would like to have a third party neutral (who is a dispute resolution specialist assigned to facilitate the dispute resolution process) attempt to help you and your lender work out an alternative to foreclosure. **Remember, a decision must be made before you choose MFDR or conversion because once you choose one you can't change your mind and choose the other.**

MFDR is an option only if you meet all 3 of the following requirements:

- You are facing a non-judicial, power-of-sale foreclosure; AND
- You are the owner and occupant of your home (which is your residence); AND
- You have lived in your home for at least 200 consecutive days.

MFDR Process:

1. Your lender tells the State that they are starting a non-judicial foreclosure on your home.
2. The foreclosure process is suspended from the time the State receives notice of the non-judicial foreclosure.
3. The State will send you a packet with information on the MFDR Program.
4. If you choose MFDR, you will have 30 days after receiving notice from the State to tell the State that

you elect to use the MFDR program and pay a \$300 program fee.

5. If you decide not to use the program or do not inform the State that you want to use the program within 30 days, the foreclosure will continue.
6. If you tell the State that you want to use the program, the State has 20 days to notify you, your lender, and neutral about the date, time, and location of the meeting, which must be scheduled between 30 and 60 days from the State's notification date.
7. You must consult with an approved housing counselor or approved budget and credit counselor at least 30 days prior to the scheduled meeting with your lender and the neutral.
8. You and your lender must give all necessary documents to each other (and to the State) at least 15 days before the scheduled meeting with your lender and the neutral.
9. If parties are able to reach an agreement in the MFDR program, foreclosure is terminated.
10. If parties are unable to reach an agreement in the MFDR program, foreclosure continues.

Meeting with the Lender and Neutral:

- There must be at least one meeting, and the meeting must be less than 3 hours long.
- The neutral can extend the meeting for up to another 3 hours; the extended meeting can be on a different day or on the same day as the first meeting but needs to be within 60 days of the first meeting unless the neutral extends the deadline.
- You and your lender must be present at the meeting unless unforeseen circumstances prevent you or your lender from attending, in which case a request to meet by phone or video must be given to the State at least 14 days before the scheduled meeting.
- Both you and your lender are required to participate in good faith and with honest intentions.

B. Non-Judicial to Judicial Conversion

You may also elect to change from a non-judicial foreclosure to a judicial foreclosure. This is called "conversion." **Remember, a decision must be made before you choose MFDR or conversion because once you choose, you can't change your mind and choose the other option.**

Why convert a foreclosure from non-judicial to judicial?

If you have a legitimate legal defense to the foreclosure or your lender has done something wrong, a judicial foreclosure may be better than a non-judicial foreclosure because you would have an opportunity to tell a judge your side of the story.

Why keep a foreclosure in the non-judicial process?

In a non-judicial foreclosure, if your property is sold and you still owe your lender money after the sale is completed (in other words, there is a "deficiency"), your lender cannot try to collect the money still owed unless the debt is secured by other collateral, or as otherwise provided by law. In a judicial foreclosure there is a greater chance that your lender will try to collect a deficiency from you.

The Conversion Process

- You have 30 days from the time you receive your non-judicial foreclosure notice to file a petition telling the court that you want a judicial foreclosure instead of a non-judicial foreclosure.
- The fee for filing a Petition for Conversion is \$250.
- After you file your petition with the Circuit Court, you and everyone who has an interest in the property and/or is on the mortgage (including any co-signors) must agree to participate in the judicial foreclosure within 45 days.

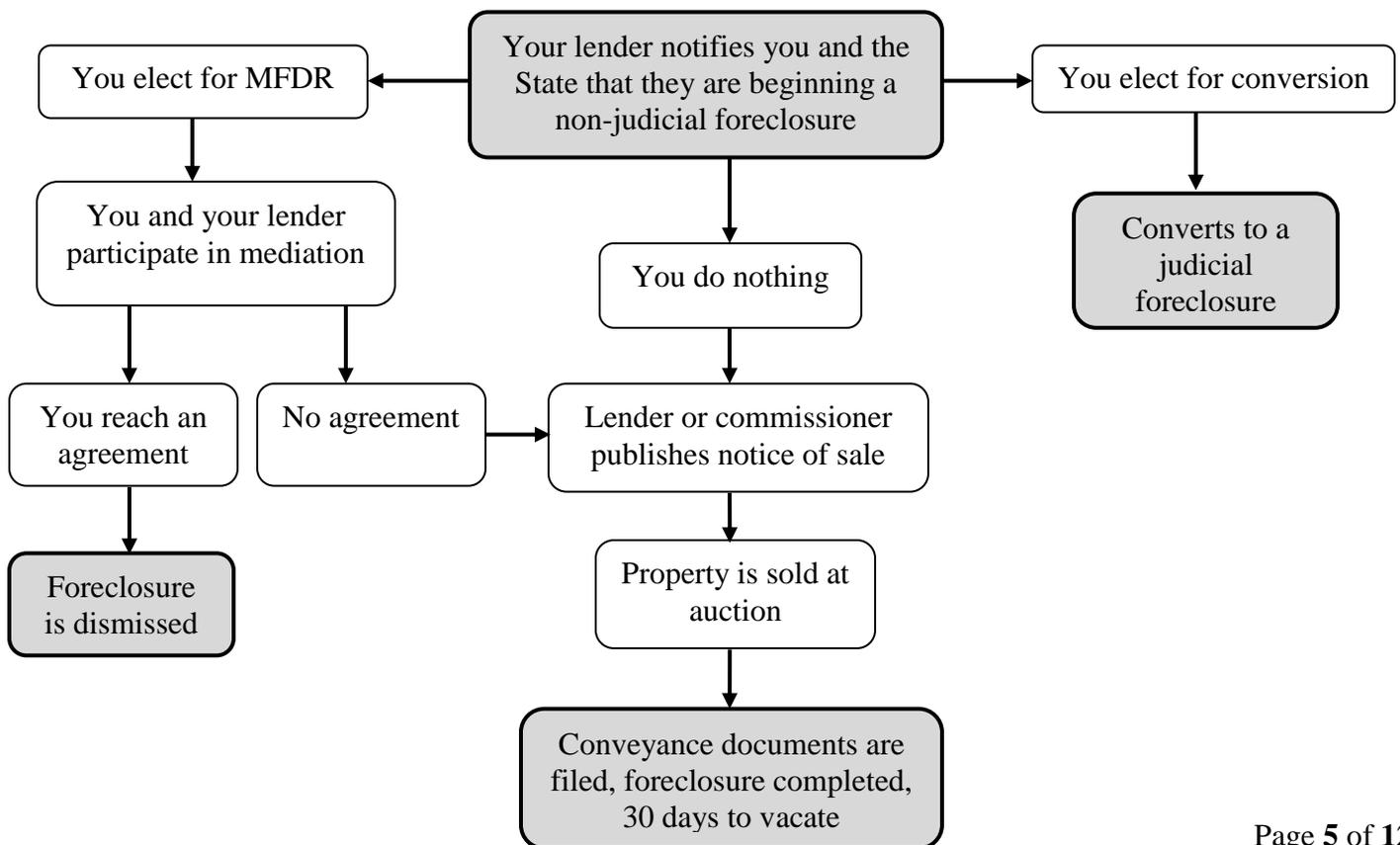
- If everyone doesn't agree or doesn't file their agreement with the court within 45 days, the court can dismiss the petition for judicial foreclosure and order that no other petitions for switching to judicial foreclosure are allowed for your mortgage.
- If everyone agrees and informs the court within 45 days, the non-judicial foreclosure is put on hold.
- Everyone who agreed to the judicial foreclosure has a chance to explain their side of the story to the court and to present any defenses and counter-claims.

If you do not come to a resolution through MFDR or do not elect to have the foreclosure converted to a judicial proceeding, the non-judicial process will continue. The lender will notify you of the auction date and post a notice on your house. The lender's attorney or the commissioner handling the foreclosure may contact you for permission to hold one or two open houses.

- Notice must be published in the newspaper for 3 consecutive weeks
- The sale date should not be sooner than 14 days after the last publication date
- Copies of the notice shall be filed with state director of taxation and shall be posted on the premises not less than twenty-one days before the day of the sale.
- If there is any equity in the property (meaning that your property is worth more than what you owe the lender), you will likely lose it. However, if you have negative equity (meaning that your property will sell for less than what you owe), you will not have a deficiency judgment.

Once the home is sold at auction, you will have approximately 30 days to move out. If you do not leave, the new owner can go to court to have you evicted from the property. If this happens, you will most likely be ordered to pay the cost of the court and attorney fees for the eviction.

The Non-Judicial Process



IV. Judicial Foreclosure Process

Since the passage of Act 182, mortgage lenders are almost exclusively using the judicial foreclosure process. If you are served with a “Complaint for Foreclosure,” you are in the judicial foreclosure process, which can take 4-6 months or more to complete.

A. Step One: Answering the Complaint

Once you receive the complaint, you will have twenty (20) days to file an “Answer to Complaint for Foreclosure” and serve it to the lender’s attorney. Calling your lender or the lender’s attorney is not sufficient. For information on how to file an answer, see Legal Aid’s Brochure *H24A. Foreclosure: What to do if You Receive Court Documents About Foreclosure*.

What is an “answer”?

An answer is simply a document in which you can respond to the allegations made in the complaint. It is your opportunity to inform the court of your position on each of the allegations in the complaint. It is also an opportunity for you to formally allege any defenses and/or any counterclaims that you might have against the lender.

Why should you file an answer?

- Filing an answer is the best way to preserve your rights.
- It may give you more time to work out a repayment plan with your lender.
- It entitles you to be kept informed of anything happening in your case.
- It allows you to assert any affirmative defenses you may have, and to tell your lender the reasons that you do not agree with any of the allegations.
- It allows you to assert any counterclaims you may have – things that you think your lender has done wrong and what remedies you are seeking in return (if counterclaims are not filed at this time, you will have to request permission from the Court to do so at a later date, which may or may not be granted).

What happens if you do not file an answer on time?

- Your lender’s attorney may ask the court to grant a default against you. Note: To have the default legally set aside, you would have to file a motion to set aside the entry of default, and show good cause for not having filed an answer. Not knowing that you had to file an answer or not knowing how to do so is NOT an acceptable excuse to the court.
- You may no longer be entitled to be notified of anything happening in your case, meaning that the court can proceed without any involvement by you or notification to you of the proceedings.
- You may lose your right to assert any defenses you may have against the foreclosure.

B. THIRD CIRCUIT (BIG ISLAND) ONLY – Requesting Mediation

If your property is located in the Third Circuit (on the Big Island), you have the option to request court-ordered mediation between you and your lender. This is a pilot project that is currently ONLY

AVAILABLE on the Big Island.

The court papers that you are served with will include a form to indicate that you are requesting mediation. You have fifteen (15) days from the date you are served to file the request for mediation. Keep in mind that the court is only required to order mediation in certain cases. Some of the requirements for court-ordered mediation include:

- You must be an owner-occupant (i.e. you must live in the property that is being foreclosed upon).
- Typically, all parties must agree to participate in the mediation. This means that if you have co-signers or other people on the title to the property, they must ALL agree to participate in the mediation process.

Once you file and serve the request for mediation, your time to file the Answer to Complaint for Foreclosure is stayed, which is like hitting a pause button on the 20 day deadline. The court will schedule a hearing to determine whether or not your case should be referred to mediation. If you meet all the requirements, your court case will be placed on hold while you and your lender try to negotiate some kind of agreement through mediation.

Keep in mind that the underwriting standards for the lender still apply. Just because you are now participating in mediation does not mean that the bank has to offer you a modification. You will submit your documents for the lender's consideration, and they will make an offer (if possible) for options that they determine you are eligible for. Not all agreements will involve you staying in the home. Sometimes during mediation the lender will offer you the opportunity to short-sell the home, or agree to a deed-in-lieu of foreclosure.

If you reach an agreement, the lender's attorney will inform the court, and the foreclosure case will likely be dismissed. If you cannot reach an agreement, or do not comply with the mediation process, the court will remove your case from the mediation and the judicial foreclosure will pick up where it left off. If you did not file an answer prior to beginning mediation, a new deadline will be ordered for you to file your answer so that you can inform the court of your position.

C. Step Two: Motion for Default Judgment and/or Summary Judgment and Interlocutory Decree of Foreclosure

- If you do not file an answer and a default was entered, the lender's attorney will then file a "Motion for Default Judgment, Summary Judgment, and Interlocutory Decree of Foreclosure."
- If you did file an answer, the lender's attorney will file a "Motion for Summary Judgment and Interlocutory Decree of Foreclosure."
- If you filed an answer and asserted any counterclaims, the lender's attorney will file its "Answer to the Counterclaim" along with the other motions.

The motion for summary judgment is usually filed 1 to 2 weeks after the answer date, although it can happen immediately after the answer is filed. The hearing date for the motion will be set for another 2 to 3 weeks after the motion is filed. The motion alleges that there are no material issues of fact and the judge should grant its motion and appoint a commissioner to sell the property. Even if the amount of money that you owe is disputed or at issue, it will not stop the foreclosure if your lender can show that you owe something.

D. Step Three: Motion for Summary Judgment and Interlocutory Decree of Foreclosure Hearing

You will receive a Notice of Hearing informing you of the location, date and time for the hearing on the Plaintiff's Motion for Summary Judgment and Interlocutory Decree of Foreclosure, provided you filed an Answer to the initial Complaint. It is in your best interest to attend this hearing, especially if you think it is still possible to work out a repayment plan with your lender, but need more time to negotiate the terms. If so, you may ask for a continuance at this hearing. Be prepared to clearly and completely explain why you are requesting the continuance (e.g. the house is listed for sale and you anticipate a sale price which will pay off your lender; you fell behind because of temporary disability and can catch up in the future because you are working against and can show your ability to pay in full or through a payment plan with a little time; you are making payments under a modification trial payment period and will be permanently modified once the trial is complete; etc.)

If your request is granted, your hearing will be postponed to a later date, usually in 30-90 days (or up to 6 months if the plaintiff is a condo or homeowner's association and you are current on your mortgage and can show that you will be able to catch up). Your lender's motion may or may not be granted, but your lender may not file anything with the Court for the period of time in which the extension was given. If payment in full is not made by that date, either your lender's motion will be granted at the continued hearing, or your lender will then file its Order granting its motion and proceed with the foreclosure. Note: A continuance is granted at the Judge's discretion; a Judge is NOT REQUIRED to give you a continuance.

If your request is denied, your lender's motion will be granted at the hearing and your lender will file an Order granting its motion for summary judgment and proceed to the next step. This judgment and decree mean that the court has decided that the lender has the right to foreclose on the property. This doesn't mean that the process is over, or that you have no further opportunity to remain in the property. In most cases, the lender will allow you to cure the loan up to the sale date; however, it is not required that the bank allow this. The judgment does not mean that you have to move out of your house immediately, you are allowed to remain in the property up until the title is transferred to the new owner.

The remainder of the process has to do with determining damages (how much money you will owe) and what happens to the property following the foreclosure (who will become the new owner).

E. Step Four: The Commissioner

Once the Order is filed with the Court, a commissioner will be appointed, which takes approximately two weeks. You are ultimately responsible for payment of the commissioner's fees and costs, as well as payment of your lender's attorney's fees (usually provided for in the mortgage contract or under H.R.S. §514A for condo associations).

A commissioner's fees typically run around \$3,000 to \$4,000 for a simple foreclosure (including advertising costs) from start to finish. Attorney's fees and costs for each of the lenders also run in the \$3,000 to \$4,000 range, so if you want to save your home, it is best to try and make arrangements to pay as early as possible, before all the fees and costs make it too difficult to catch up.

What is a commissioner?

The commissioner is a person appointed by the Court who will contact you and/or your tenants

to make arrangements to hold a minimum of two open houses before the auction of the property.

Although the commissioner is appointed by the Court, he/she works under the direction of the Plaintiff. However, he/she is trying to get the best price possible for the property, which will ultimately benefit you, so it is a good idea to work with the commissioner.

If you are occupying the property the commissioner does NOT have the right to force you to leave at this point, and must work with you to schedule viewings. However, if there are tenants renting your property the commissioner may collect monthly rental payments on behalf of the Plaintiff, if applicable, until the property is sold.

If the commissioner is not able to contact you or if you refuse to allow the open house(s), the commissioner will have to ask the Court for permission to sell the property without holding the open houses by filing a "Motion to Hold Sale Without Open Houses." Once this motion has been filed, it will take a couple of weeks to be heard. Although this might buy you a little more time, it will increase the commissioner's fees. Additionally, if no one can see the inside of the property, you are less likely to get many bidders or a good price at the auction, which means that you may either have: 1) a larger deficiency judgment entered against you if the proceeds from the sale are less than what you owe, or 2) a much lower margin of profit if the proceeds from the sale are more than what owe.

How is the property advertised?

The commissioner is required to advertise the property in the local newspaper for three consecutive weeks. It is usually advertised on Sundays because that gets the highest turnout. The advertisement usually announces two open houses for the second and third week of advertisement.

F. Step Five: The Auction

The auction is usually held at noon on the Circuit Court steps at the Ewa end of the building. The owners are allowed to bid, but must comply with the requirements for bidders:

- Bidders must have a cashier's check for 10% of the bid price made out to the commissioner.
- **WARNING:** If a bidder cannot complete the purchase of the property (e.g. change his/her mind, couldn't get financing), the bidder will most likely lose the entire 10% down and would have to make a motion to the Court to get their money back. Such motions are difficult to win; bidders are expected to have been pre-qualified for a loan to satisfy the remaining amount of the purchase price.

If there are no bidders, the property would need to be re-advertised, and if that is unsuccessful the Commissioner would need to seek further instructions from the Plaintiff and/or the Court as to how to proceed. However, re-advertising is highly unlikely as the Plaintiff will most often bid on the property. The Plaintiff usually makes a request to the Court to use an offset of the amount owed for their 10% down (i.e. the Plaintiff is not required to show up with a check if the amount owed to the Plaintiff is more than 10% of the bid price).

G. Step Six: Confirmation of the Sale

Once there has been a successful bidder at the auction, you have only two options to try to save your

home:

1. re-open the bidding; or
2. consult an attorney about filing bankruptcy

If it is appropriate, filing a chapter 7 or chapter 13 bankruptcy may stall the process to give you time to negotiate a repayment agreement with your lender. However, bankruptcy will not automatically save your home.

If there is a successful bidder and you have not filed for bankruptcy, the commissioner will file a "Motion for Confirmation of Sale" (usually filed within one week and set for hearing about two to three weeks after filing). At the hearing, anyone, including you, the owner, may show up and offer to pay 5% above the bid price. This will re-open the bidding as long as they have a cashier's check for 10% of the bid. The parties will then come back into the courtroom for approval.

The Court will grant the motion for confirmation unless the highest bid price is so low that the Court thinks re-advertising is appropriate, which does not happen very often.

Example:

Auction Price.....	\$200,000
5% Over the Auction Price.....	\$210,000
10% of the new bid, need check for this amount.....	\$ 21,000

NOTE: Offering 5% over the auction price does not mean you will get the property. It only re-opens the bidding. Someone else may still out bid you for the property.

H. Step Seven: After the Confirmation of Sale

After the hearing, the commissioner will file its Order granting the motion for confirmation of sale. The commissioner will then prepare a conveyance deed which will be filed with either the Bureau of Conveyances or Land Court (whichever is appropriate). This usually takes about two to four weeks from the entry of the Order granting confirmation of sale.

The successful purchasers are expected to close escrow within 30 days from the date of the confirmation. Once the deed has been filed, the property transfer is effective and you will no longer have any interest in the property. You will be considered a trespasser if you are still on the property. The new homeowner may obtain a Writ of Possession from the court and have a sheriff evict you. Hawaii does not recognize the right of redemption for private residential property.

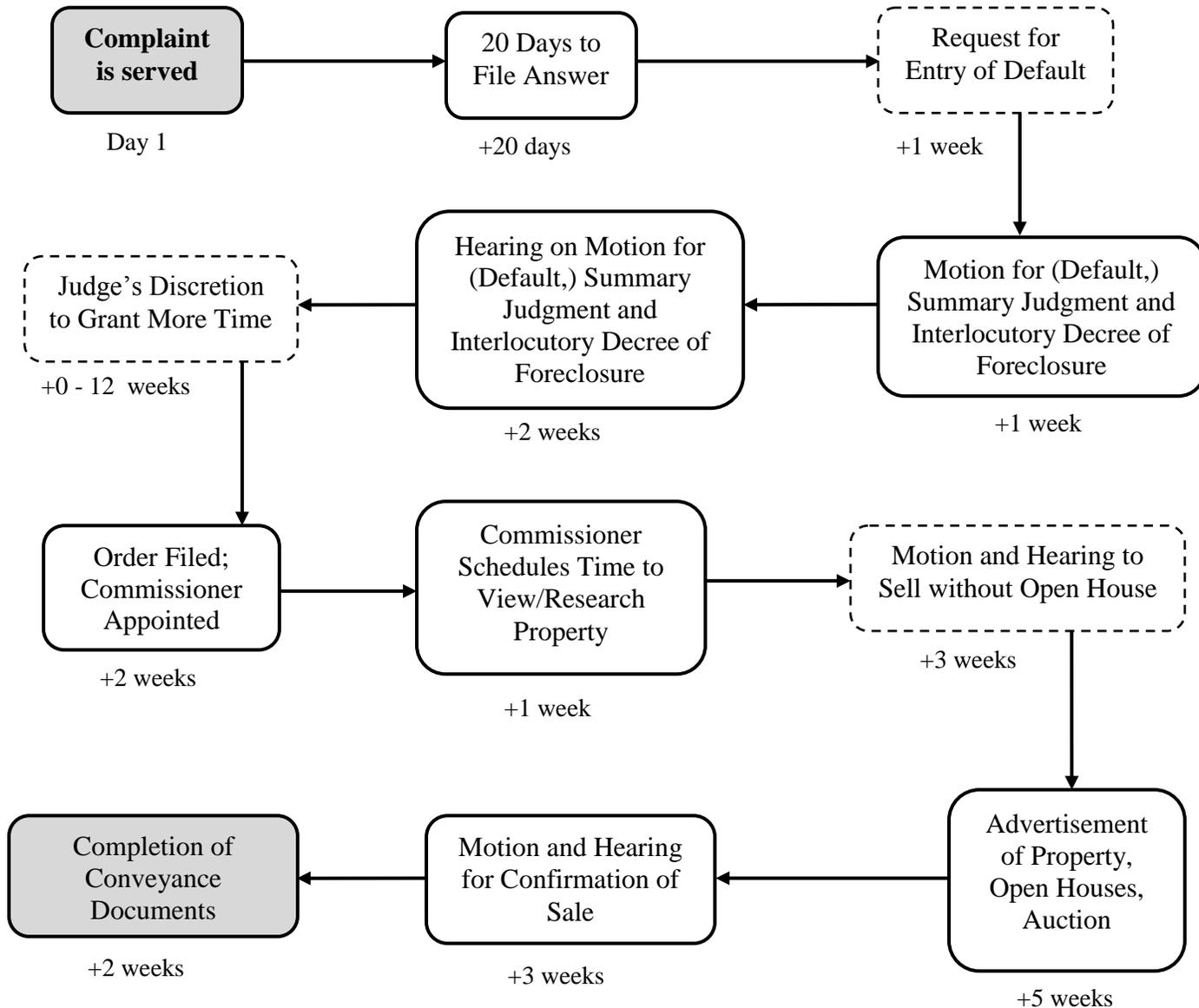
Financial Obligations after the Sale

If there is any money from the sale left over after paying back your lender, including the cost of commissioner and attorney fees, it is distributed amongst any other junior lien holders (e.g. second mortgage lender, AOA or HOA, satisfying a tax lien, etc.). If there is still money left over after all liens are settled, the remaining money from the sale is distributed to the previous homeowners according to each of their respective interests in the property.

If the proceeds from the sale are not enough to cover the entire sum owed, a deficiency judgment will be entered against you and any other defendants for the amounts owed. The judgment will accrue interest at a rate of 10% per year. Once the judgment is entered, the Plaintiff is able to pursue the amount owed using any legal collection procedure, including garnishment of bank accounts and pay checks. For more information on collection actions, see Legal Aid’s Brochure *C8. Debt Collection*.

The Judicial Foreclosure Timeline

Below is a general depiction of how long the judicial foreclosure process takes. The timeline varies in each case. This timeline is meant to show the minimum amount of time the process takes to complete. Boxes outlined with dashed lines indicate that the step does not exist for all cases. Please refer to the previous section for a detailed explanation of each step.



REMEMBER: This pamphlet is meant to give you general information and not to give you specific legal advice about your case. The law often changes. Each case is different.

For more information or assistance call Legal Aid at 1-800-449-4302
or access additional information at <http://www.legalaidhawaii.org>.