

ACT 137 – MORTGAGE RESCUE FRAUD PREVENTION ACT

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INTRODUCTION

Act 137, the Mortgage Rescue Fraud Prevention Act (“Act 137”), was passed by the legislature during the 2008 session and signed into law by the Governor on June 3, 2008. The purpose of Act 137 is “to protect Hawaii consumers from persons who prey on homeowners who face property foreclosures, liens, or encumbrances.”

The Act seeks to fulfill its purpose by: (1) establishing definitions for a new and special kind of residential real estate transaction to be called a “Distressed Property Conveyance”, and (2) establishing notice and disclosure obligations and other restrictions on all such transactions. Although the purpose of the Act was clearly to address scams and fraudulent schemes by persons with a criminal intent, the broad language of the Act cuts across a large number of legitimate transactions in the current market.

For that reason, it is essential that every real estate licensee familiarize himself or herself with the Act, and that every Brokerage Firm develop a clear policy for dealing with the Act, and provide education for their associates. HAR is providing this narrative summary and list of FAQs to assist in that regard. However, every Brokerage Firm is strongly advised to seek Hawaii legal counsel to advise how best to reduce the risk of violation of the Act.

[IMPORTANT NOTE: This Narrative Summary and Frequently Asked Questions replaces any and all information related to Act 137 previously published on this web site, with the exception of the newly published Distressed Property addenda and the introductory notice published with such forms. All such previously published information should be disregarded. Similarly, any publications of NAR or any other mainland resource dealing with either short sales or distressed property transactions should not be used without consulting with Hawaii legal counsel as such publications may not be in compliance with Act 137.]

THE ACT

The New Defined Terms

The Act defines new and important terms, without knowledge of which, one cannot hope to interpret the Act:

The term “**Distressed Property**” is defined as any residential real property that:

- (1) Is in foreclosure or at risk of foreclosure because payment of any loan that is secured by the residential real property is more than sixty days delinquent;
- (2) Had a lien or encumbrance charged against it because of nonpayment of any taxes, lease assessments, association fees, or maintenance fees;
- (3) Is at risk of having a lien or encumbrance charged against it because the payment of any taxes, lease assessments, association fees, or maintenance fees are more than ninety days delinquent;
- (4) Secures a loan for which a notice of default has been given; or
- (5) Secures a loan that has been accelerated.

The term “**Distressed Property Consultant**” is defined as any person who performs or makes any solicitation, representation, or offer to perform any of the following relating to a Distressed Property:

- (1) Stop or postpone the foreclosure sale or loss of any Distressed Property due to the nonpayment of any loan that is secured by the Distressed Property;
- (2) Stop or postpone the charging of any lien or encumbrance against any Distressed Property or eliminate any lien or encumbrance charged against any Distressed Property for the nonpayment of any taxes, lease assessments, association fees, or maintenance fees;
- (3) Obtain any forbearance from any beneficiary or mortgagee, or relief with respect to a tax sale of the Distressed Property;
- (4) Assist the owner to exercise any cure of default arising under Hawaii law;
- (5) Obtain any extension of the period within which the owner may reinstate the owner’s rights with respect to the Distressed Property;
- (6) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a Distressed Property or contained in the mortgage;
- (7) Assist the owner in foreclosure, loan default, or post-tax sale redemption period to obtain a loan or advance of funds;
- (8) Avoid or ameliorate the impairment of the owner’s credit resulting from the recording or filing of a notice of default or the conduct of a foreclosure sale or tax sale; or
- (9) Save the owner’s residence from foreclosure or loss of home due to nonpayment of taxes.

The term “**Distressed Property Consultant Contract**” is defined as any agreement or obligation between an owner or agent of an owner of a Distressed Property and a Distressed Property Consultant.

The term “**Distressed Property Conveyance**” is defined as the transfer of any interest in a Distressed Property effected directly or indirectly by or through a Distressed Property Consultant.

The term “**Distressed Property Conveyance Contract**” is defined as any agreement or obligation affecting a Distressed Property Conveyance.

The term “**Distressed Property Purchaser**” is defined as any person who acquires any interest in a Distressed Property directly or indirectly through a Distressed Property Conveyance Contract.

What The Act Does

Although it is always a risk to try to summarize a statute as comprehensive and complex as this, it is safe to say that the major focus of the Act is to protect owners of Distressed Property. In very general terms, the Act does this by requiring the following:

- (1) Whenever a residential real estate transaction involves a Distressed Property, as defined by the Act, any person providing any of the services described with respect to assisting the owner with any foreclosure, liens or encumbrances on the property will be considered to be a Distressed Property Consultant. A Distressed Property Consultant cannot provide such services without entering into a separate Distressed Property Consultant Contract with the seller, the specific terms and conditions of which are set forth in the Act. Thus, it is no longer possible for a real estate licensee (or anyone else, for that matter, unless they are specifically exempted from the Act) to assist or even coach an owner of Distressed Property with regard to lien holders, without entering into a Distressed Property Consultant Contract, which specifically defines notices that must be given, obligations and restrictions placed upon services to be rendered, and a limitation on the charges that can be made for such services.
- (2) Whenever a residential real estate transaction involves a Distressed Property and services provided by a Distressed Property Consultant, the transaction can only be completed using a Distressed Property Conveyance Contract, the specific terms and conditions of which are set forth in the Act. Such specific terms and conditions include, among other things, requirements of notice, disclosures, limitations on services, and rights of cancellation. Thus, whenever there is a Distressed Property Conveyance, any Purchase Contract then existing must be amended or replaced with a Distressed Property Conveyance Contract, or the transaction is null and void.
- (3) None of the provisions of the Act may be waived by the property owner.
- (4) Any person violating the Act shall be deemed to have engaged in an unfair or deceptive act or practice within the meaning of Section 480-2, Hawaii Revised Statutes, thereby subjecting the person to government prosecution and private civil actions for treble damages and attorneys’ fees.

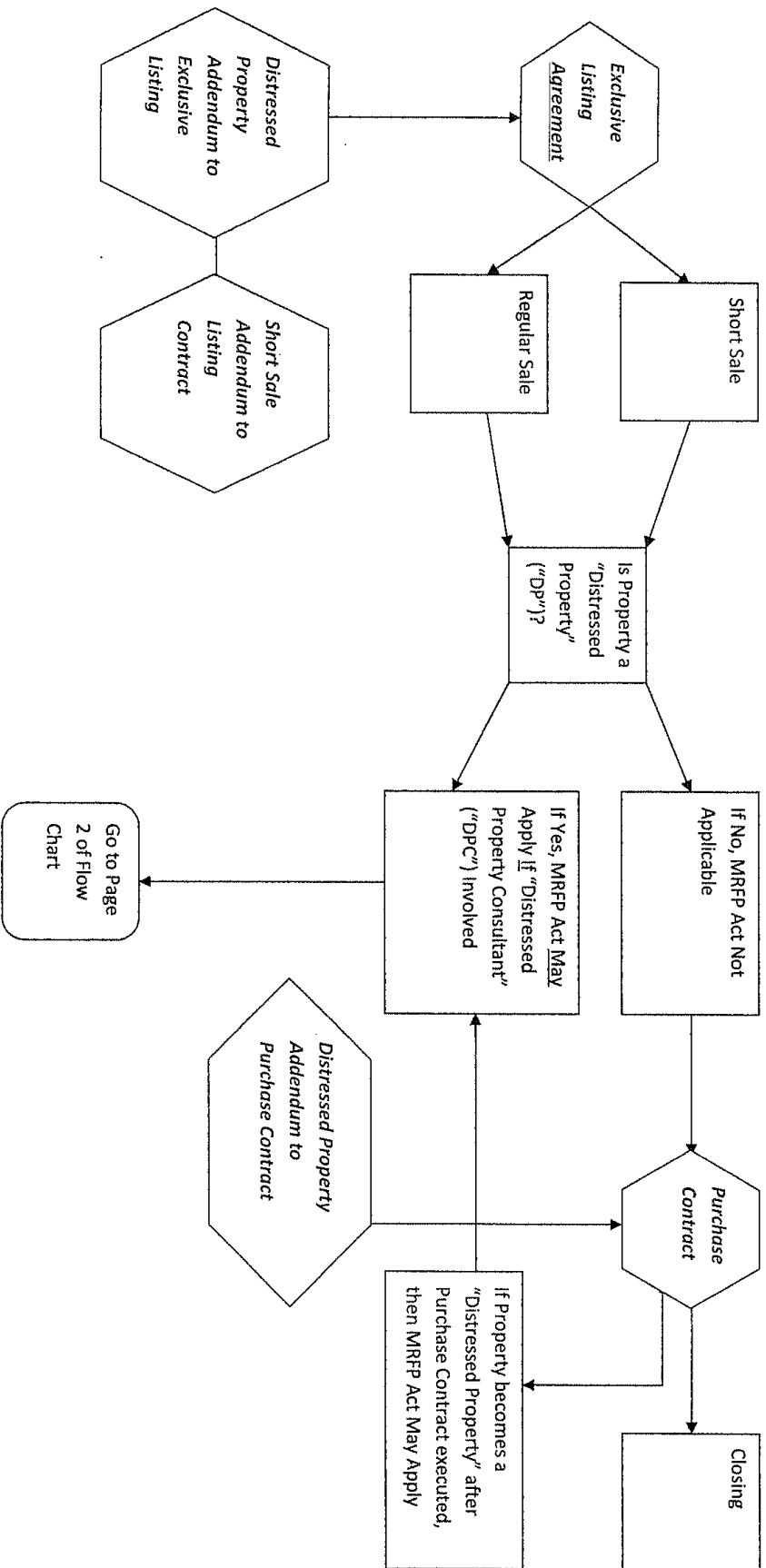
Frequently Asked Questions (FAQs)

- (1) How does the Act affect a real estate licensee? A real estate licensee becomes affected by the Act if, at any time during the course of engaging in the marketing for, solicitation of, or the providing of services for, a residential real estate transaction, the property becomes a Distressed Property under the Act. If that occurs, the licensee cannot perform any services related to dealing with, or coaching the owner to deal with, lien holders without entering into, and abiding by, a Distressed Property Consultant Contract. In addition, if there is both a Distressed Property and services provided by a Distressed Property Consultant, there cannot be a conveyance of the property without a Distressed Property Conveyance Contract, the terms and conditions of which are specified by the Act.
- (2) How does a Brokerage Firm protect itself from inadvertently violating the Act? You should consult with legal counsel and develop a policy to deal with this issue. Any such policy should include (1) requiring the owner client to notify the Brokerage Firm immediately if their property becomes a Distressed Property under the Act; and (2) a determination of whether licensees associated with the Brokerage Firm are permitted to perform services of a Distressed Property Consultant. Should the Brokerage Firm's policy not allow performance of such services, addenda to the Exclusive Right-To-Sell Listing Agreement and the Purchase Contract should be used to establish an agreement with the property owner recognizing that such services will not be provided. [NOTE: HAR has developed, and just published, Standard Form addenda for this purpose.] Should the Brokerage Firm consider adopting a policy to allow such services to be performed by their associated licensees, the Brokerage Firm is strongly advised to consider all legal implications of such a policy, and only put the policy in place with the advice of Hawaii legal counsel. Adoption of such a policy will necessitate the development by the Brokerage Firm of a Distressed Property Consultant Contract, a Distressed Property Conveyance Contract, and policies and other forms connected therewith.
- (3) Does every residential sale transaction involving a Distressed Property require a Distressed Property Conveyance Contract? According to the language of the Act, a Distressed Property Conveyance requiring a Distressed Property Conveyance Contract only exists where there is a Distressed Property and someone (the real estate licensee or anyone else) is providing the services of a Distressed Property Consultant. Thus, if there is a Distressed Property, but no Distressed Property Consultant, there is no need for a Distressed Property Conveyance Contract.
- (4) Should a Brokerage Firm put a Distressed Property Addendum on every Exclusive Right-To-Sell Listing Agreement? That is a matter for determination by the Brokerage Firm. Such a policy might be governed, in part, by a determination that a property being listed with no liens or encumbrances or only small liens or encumbrances may not be subject to becoming a Distressed Property. However, the Brokerage Firm should be aware that a Distressed Property can be created by the emergence of a tax lien or a lien placed due to a delinquent property maintenance fee, even if such maintenance fee is being disputed.

- (5) Are all short sale transactions subject to the Act? No. The Act only covers those short sale transactions which involve a property which falls within the definition of a Distressed Property under the Act.
- (6) Are there any services that a Brokerage Firm can perform to help a seller of a Distressed Property with his or her lien holders? Any services of any kind which would involve communication with the lien holder can arguably fall within the Act. In addition, the language of the Act is so broad as to prevent any advice or “coaching” for a seller of a Distressed Property who wants to personally deal with the lien holders.

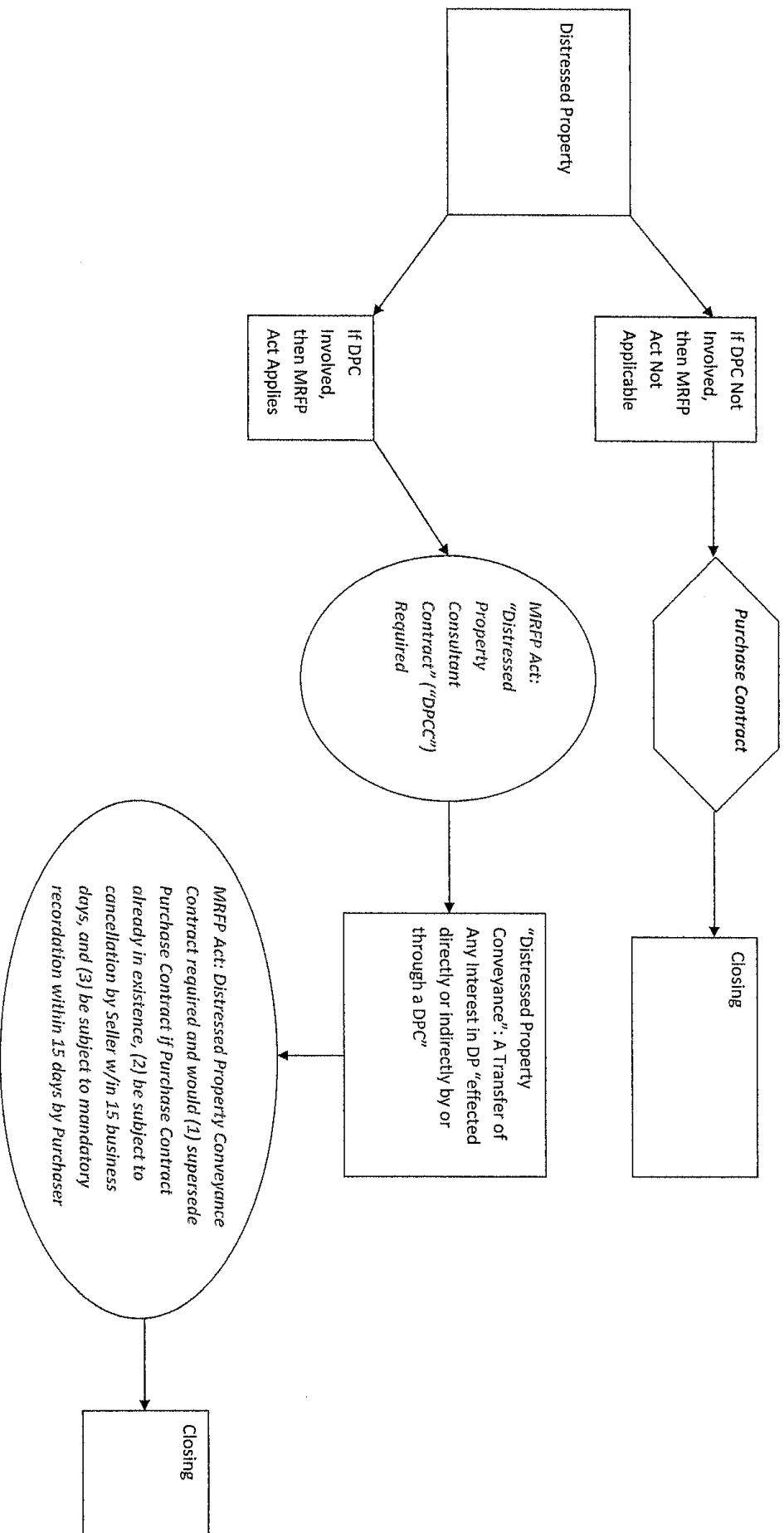
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James was born and raised in Hawai'i growing up in the rural communities of Hilo on the Big Island and Kailua on the Island of Oahu and graduated from the Kamehameha Schools. While at Kamehameha, he developed a deep appreciation for his Hawaiian heritage, an appreciation that has remained an important thread throughout his life.

In 1981, James enrolled in the University of Hawai'i at Manoa majoring in Hawaiian Studies and Political Science and earned a Bachelor of Arts degree in 1985.

While an undergraduate, James became involved in politics, serving as a legislative aid and committee clerk in the Hawaii State House of Representatives in 1983, 1984 and 1986. In 1984 and 1985, James worked for then Congressman Daniel K. Akaka in Washington D.C. as a legislative assistant concentrating on tax reform, budget and aerospace matters.

James' legislative work led him to develop an interest in a legal career and he entered the William S. Richardson School of Law at the University of Hawai'i in 1985. While in law school, James focused upon the area of real estate and he served as the President of the Ahahui o Hawai'i, the Hawaiian law student organization.

After graduating from law school in 1988, James began his law practice as a law clerk and associate in the Law Offices of Bradley A. Coates, emphasizing divorce and other family law matters. In 1990, James was appointed as a Deputy Prosecuting Attorney for the City and County of Honolulu and served with distinction on the Narcotics, Organized Crime and Sexual Assault special prosecution teams.

In 1993, James joined Pitluck & Kido as an associate and the firm's primary litigator. In 1995, James became a partner and the firm was renamed, Pitluck Kido Sato & Stone. Currently, James' practice emphasizes real estate, business, commercial litigation, risk reduction and the Americans with Disabilities Act. He is a regular contributor to the Hawaii REALTOR Journal and is a member of the American Bar Association, Hawaii State Bar Association (HSBA), and the HSBA Legislative Committee.

James is married with one daughter and one son. His wife is an attorney with the State of Hawai'i.