

House Bill 1361 (COMMITTEE SUBSTITUTE) (AM)

By: Representatives Smith of the 175th, Turnquest of the 73rd and Dukes of the 161st

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 7 of the Official Code of Georgia Annotated, relating to banking, so as to
2 enact the "Georgia Fair Lending Act"; to prohibit abusive home loan practices; to provide
3 for definitions; to provide for prohibited practices and limitations relating to covered home
4 loans and high-cost home loans; to create specific and numerous consumer protections for
5 covered home loans and high-cost home loans; to provide for penalties and enforcement; to
6 provide for exceptions for unintentional violations; to provide for related matters; to provide
7 for severability; to provide for legislative intent; to provide for applicability and an effective
8 date; to repeal conflicting laws; and for other purposes.

9 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

10 style="text-align:center">**SECTION 1.**

11 Title 7 of the Official Code of Georgia Annotated, relating to banking, is amended by adding
12 a new Chapter 6A to read as follows:

13 style="text-align:center">"CHAPTER 6A

14 7-6A-1.

15 This chapter shall be known and may be cited as the 'Georgia Fair Lending Act.'

16 7-6A-2.

17 As used in this chapter, the term:

18 (1) 'Acceleration' means a demand for immediate repayment of the entire balance of a
19 home loan.

20 (2) 'Affiliate' means any company that controls, is controlled by, or is under common
21 control with another company, as set forth in 12 U.S.C. Section 1841, et seq.

22 (3) 'Annual percentage rate' means the annual percentage rate for the loan calculated at
23 closing according to the provisions of 15 U.S.C. Section 1606, the regulations

1 promulgated thereunder by the Board of Governors of the Federal Reserve System, and
2 the Official Staff Commentary on Regulation Z published by the Board of Governors of
3 the Federal Reserve System. For purposes of this chapter, the annual percentage rate
4 shall be determined as follows:

5 (A) For a variable rate loan with a temporary initial rate that is lower than the rate that
6 will apply after the temporary rate expires, the annual percentage rate shall not include
7 such temporary initial rate;

8 (B) For a variable rate loan, the annual percentage rate shall be determined by using
9 the index rate and adding the maximum margin permitted during the term of the loan;
10 and

11 (C) For all other home loans with rates that may later increase, the rate shall be
12 determined based on the maximum interest rate permitted during the term of the loan.

13 (4) 'Bona fide discount points' means loan discount points knowingly paid by the
14 borrower for the express purpose of reducing, and which in fact do result in a bona fide
15 reduction of, the interest rate applicable to the home loan; provided, however, that the
16 undiscounted interest rate for the home loan does not exceed by more than one percentage
17 point the required net yield for a 90 day standard mandatory delivery commitment for a
18 home loan with a reasonably comparable term from either the Federal National Mortgage
19 Association or the Federal Home Loan Mortgage Corporation, whichever is greater.

20 (5) 'Borrower' means any natural person obligated to repay the loan including a
21 coborrower or cosigner.

22 (6) 'Covered home loan' means a home loan in which:

23 (A) Without regard to whether the loan transaction is or may be a 'residential mortgage
24 transaction' as that term is defined in 12 C.F.R. 226.2(a)(24), the annual percentage rate
25 of the loan at consummation is such that it exceeds (i) for a home loan secured by a first
26 lien, the higher of (I) four percentage points above prime rate or (II) two percentage
27 points above the required net yield for a 90 day standard mandatory delivery
28 commitment for a home loan with a reasonably comparable term from either the
29 Federal National Mortgage Association or the Federal Home Loan Mortgage
30 Corporation, whichever is greater, or (ii) for a home loan secured by a junior lien, the
31 higher of (I) five and one-half percentage points above prime rate or (II) three
32 percentage points above the required net yield for a 90 day standard mandatory delivery
33 commitment for a loan with a reasonably comparable term from either the Federal
34 National Mortgage Association or the Federal Home Loan Mortgage Corporation,
35 whichever is greater;

36 (B) The total points and fees payable in connection with the loan, excluding not more
37 than two bona fide discount points, exceed 3 percent of the total loan amount; or

1 (C) The home loan is such that it is considered a high-cost home loan under this
2 chapter.

3 (7) 'Creditor' means a person who extends consumer credit that is subject to a finance
4 charge or is payable by written agreement in more than four installments or a person who
5 purchases or is assigned a home loan. Creditor shall also mean any person who closes
6 home loans which may be in the person's own name with funds provided by others and
7 which loans are thereafter assigned to the person providing the funding of such loans,
8 provided that creditor shall not include a person who is an attorney providing legal
9 services in association with the closing of a home loan.

10 (8) 'High-cost home loan' means a home loan in which the terms of the loan meet or
11 exceed one or more of the thresholds as defined in paragraph (19) of this Code section.

12 (9) 'Home loan' means a loan, including an open-end credit plan where the principal
13 amount does not exceed the conforming loan size limit for a single-family dwelling as
14 established by the Federal National Mortgage Association and the loan is secured by a
15 mortgage, security deed, or deed to secure debt on real estate located in this state upon
16 which there is located or there is to be located a structure or structures, including a
17 manufactured home, designed principally for occupancy of from one to four families and
18 which is or will be occupied by a borrower as the borrower's principal dwelling, except
19 that home loan shall not include a reverse mortgage transaction, a loan that provides
20 bridge financing for the initial construction of a borrower's dwelling on land owned by
21 the borrower, or a loan primarily for business, agricultural, or commercial purposes.

22 (10) 'Loan originator' means a person brokering a home loan, which shall include any
23 person who directly or indirectly solicits, processes, places, or negotiates home loans for
24 others or offers to solicit, process, place, or negotiate home loans for others.

25 (11) 'Make' or 'makes' means to originate a loan or to engage in brokering of a home loan
26 including the soliciting, processing, placing, or negotiating of a home loan made or
27 offered by a person brokering a home loan.

28 (12) 'Manufactured home' means a structure, transportable in one or more sections,
29 which in the traveling mode is eight body feet or more in width or 40 body feet or more
30 in length or, when erected on site is 320 or more square feet and which is built on a
31 permanent chassis and designed to be used as a dwelling with a permanent foundation
32 when erected on land secured in conjunction with the real property on which the
33 manufactured home is located and connected to the required utilities and includes the
34 plumbing, heating, air-conditioning, and electrical systems contained therein; except that
35 such term shall include any structure which meets all the requirements of this paragraph
36 except the size requirements and with respect to which the manufacturer voluntarily files
37 a certification required by the secretary of the United States Department of Housing and

1 Urban Development and complies with the standards established under the National
2 Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C.
3 Section 5401, et seq. Such term does not include rental property or second homes or
4 manufactured homes when not secured in conjunction with the real property on which the
5 manufactured home is located.

6 (13) 'Open-end credit plan' or 'open-end loan' means a loan in which (A) a creditor
7 reasonably contemplates repeated transactions; (B) the creditor may impose a finance
8 charge from time to time on an outstanding balance; and (C) the amount of credit that
9 may be extended to the borrower during the term of the loan, up to any limit set by the
10 creditor, is generally made available to the extent that any outstanding balance is repaid.

11 (14) 'Points and fees' means:

12 (A) All items included in the definition of finance charge in 12 C.F.R. 226.4(a) and 12
13 C.F.R. 226.4(b) except interest or the time price differential. All items excluded under
14 12 C.F.R. 226.4(c)(7) are excluded from points and fees provided that the creditor does
15 not receive direct or indirect compensation in connection with the charge and the charge
16 is not paid to an affiliate of the creditor;

17 (B) All compensation paid directly or indirectly to a mortgage broker from any source,
18 including a broker that originates a loan in its own name in a table funded transaction,
19 including but not limited to yield spread premiums, yield differentials, and service
20 release fees. The portion of the yield spread premium that is used to pay other
21 third-party fees for the borrower including but not limited to appraisal, credit report,
22 lender required fees, or any other fee not retained by the broker is exempt from
23 inclusion in the points and fees;

24 (C) Premiums or other charges for credit life, credit accident, credit health, credit
25 personal property, or credit loss-of-income insurance or debt cancellation coverage,
26 whether or not the debt cancellation coverage is insurance under applicable law, that
27 provides for cancellation of all or part of a borrower's liability in the event of loss of
28 life, health, personal property, or income or in the case of accident written in connection
29 with a home loan and premiums or other charges for life, accident, health, or
30 loss-of-income insurance without regard to the identity of the ultimate beneficiary of
31 such insurance. In determining points and fees for the purposes of this paragraph,
32 premiums or other charges shall only include those payable at or before loan closing
33 and are included whether they are paid in cash or financed and whether the amount
34 represents the entire premium for the coverage or an initial payment;

35 (D) The maximum prepayment fees and penalties that may be charged or collected
36 under the terms of the loan documents;

1 (E) All prepayment fees or penalties that are charged to the borrower if the loan
 2 refinances a previous loan made or currently held or serviced by the same creditor or
 3 an affiliate of the creditor; and

4 (F) For open-end loans, points and fees are calculated in the same manner as for loans
 5 other than open-end loans, based on the minimum points and fees that a borrower
 6 would be required to pay in order to draw on the open-end loan an amount equal to the
 7 total credit line and maintain the outstanding balance for the term of the loan.

8 (G) Points and fees shall not include:

9 (i) Taxes, filing fees, recording, and other charges and fees paid or to be paid to
 10 public officials for determining the existence of or for perfecting, releasing, or
 11 satisfying a security interest; and

12 (ii) Fees paid to a person other than a lender or an affiliate of the lender or to the
 13 mortgage broker or to an affiliate of the mortgage broker for the following: fees for
 14 tax payment services; fees for flood certification; fees for pest infestation and flood
 15 determination; appraisal fees; fees for inspections performed prior to closing; credit
 16 reports; surveys; attorneys' fees, if the borrower has the right to select the attorney
 17 from an approved list or otherwise; notary fees; escrow charges, so long as not
 18 otherwise included under subparagraph (A) of this paragraph; title insurance
 19 premiums; and fire and hazard insurance and flood insurance premiums, provided that
 20 the conditions in Section 226.4(d)(2) of Title 12 of the Code of Federal Regulations
 21 are met.

22 (15) 'Prime rate' means the most recent bank prime loan rate published by the Board of
 23 Governors of the Federal Reserve System, as published in statistical release H-15 or any
 24 publication which may supersede it, as of the day a home loan is consummated.

25 (16) 'Process,' 'processes,' or 'processing' means to act as a processor.

26 (17) 'Processor' means any person that prepares paperwork necessary for or associated
 27 with the closing of a home loan, including but not limited to promissory notes,
 28 disclosures, deeds, and closing statements, provided that processor shall not include
 29 persons on the grounds that they are engaged in data processing or statement generation
 30 services for home loans.

31 (18) 'Servicer' means the same as set forth in 24 C.F.R. 3500.2.

32 (19) 'Servicing' means the same as set forth in 24 C.F.R. 3500.2.

33 (20) 'Threshold' means:

34 (A) Without regard to whether the loan transaction is or may be a 'residential mortgage
 35 transaction' as that term is defined in 12 C.F.R. 226.2(a)(24), the annual percentage rate
 36 of the loan is such that it equals or exceeds that set out in Section 152 of the Home
 37 Ownership and Equity Protection Act of 1994, 15 U.S.C. Section 1602(aa), and the

1 regulations adopted pursuant thereto by the Federal Reserve Board, including Section
2 12 C.F.R. 226.32; or

3 (B) The total points and fees payable in connection with the loan, excluding not more
4 than two bona fide discount points, exceed: (i) 5 percent of the total loan amount if the
5 total loan amount is \$20,000.00 or more or (ii) the lesser of 8 percent of the total loan
6 amount or \$1,000.00 if the total loan amount is less than \$20,000.00.

7 (21) 'Title insurance' means insurance against loss by encumbrance, defective titles,
8 invalidity, adverse claim to title, or unmarketability of title by reason of encumbrance or
9 defects not excepted in the insurance contract, which contract shall be written only upon
10 evidence or opinion of title obtained and preserved by the insurer. Title insurance is used
11 as security for home loans, covered home loans, or high-cost home loans with the cost
12 of such insurance added to the cost of the loan by the closing attorney on behalf of the
13 creditor or borrower.

14 (22) 'Total loan amount' means the principal of the loan minus those points and fees as
15 defined in paragraph (13) of this Code section that are included in the principal amount
16 of the loan. For open-end loans, the total loan amount shall be calculated using the total
17 credit line available under the terms of the home loan minus those points and fees as
18 defined in paragraph (13) of this Code section that are included in the total credit line.

19 (23) 'Variable rate loan' means any home loan where the rate of interest charged may
20 change during the term of the loan, provided such rate is calculated by using an index that
21 can change due to circumstances beyond the direct control of the creditor or servicer and
22 adding a margin.

23 7-6A-3.

24 All home loans shall be subject to the following limitations and prohibited practices:

25 (1) No creditor shall make a home loan that finances, directly or indirectly, (A) any
26 credit life, credit accident, credit health, credit personal property, or credit loss-of-income
27 insurance or debt cancellation coverage, whether or not the debt cancellation coverage
28 is insurance under applicable law, that provides for cancellation of all or part of a
29 borrower's liability in the event of loss of life, health, personal property, or income or in
30 the case of accident written in connection with a home loan; or (B) any life, accident,
31 health, or loss-of-income insurance without regard to the identity of the ultimate
32 beneficiary of such insurance; provided, however, that for the purposes of this Code
33 section, any premiums or charges calculated and paid on a periodic basis that are not
34 added to the principal of the loan shall not be considered financed directly or indirectly
35 by the creditor;

1 (2) No creditor or servicer shall recommend or encourage default on an existing loan or
2 other debt prior to and in connection with the closing or planned closing of a home loan
3 that refinances all or any portion of such existing loan or debt;

4 (3) No creditor or servicer may charge a borrower a late payment charge unless the loan
5 documents specifically authorize the charge, the charge is not imposed unless the
6 payment is past due for ten days or more, and the charge does not exceed 5 percent of the
7 amount of the late payment. A late payment charge may not be imposed more than once
8 with respect to a single late payment and no late payment charge may be charged with
9 respect to any subsequent payment that would have been a full payment but for the
10 previous default or the imposition of the previous late payment charge; and

11 (4) No creditor or servicer may charge a fee for informing or transmitting to any person
12 the balance due to pay off a home loan or to provide a release upon prepayment. When
13 such information is provided by facsimile or if it is provided upon request within 60 days
14 of the fulfillment of a previous request, a creditor or servicer may charge a processing fee
15 up to \$10.00. Payoff balances shall be provided within a reasonable time but in any event
16 no more than five business days after the request.

17 7-6A-4.

18 No creditor may engage in the unfair act or practice of 'flipping' a home loan. Flipping
19 occurs when a creditor makes a covered home loan to a borrower that refinances an
20 existing home loan that was consummated within the prior five years when the new loan
21 does not provide reasonable, tangible net benefit to the borrower considering all of the
22 circumstances, including the terms of both the new and refinanced loans, the cost of the
23 new loan, and the borrower's circumstances. In addition, the home loan refinancing
24 transaction shall be presumed to be a flipping where a covered home loan refinances an
25 existing home loan that was consummated within the prior five years and that is a special
26 mortgage originated, subsidized, or guaranteed by or through a state, tribal, or local
27 government or a nonprofit organization, which either bears a below-market interest rate at
28 the time the loan was originated or has nonstandard payment terms beneficial to the
29 borrower, such as payments that vary with income, are limited to a percentage of income,
30 or where no payments are required under specified conditions and where, as a result of the
31 refinancing, the borrower will lose one or more of the benefits of the special mortgage.

32 7-6A-5.

33 High-cost home loans shall be subject to the following limitations and prohibited practices:

1 (1) No prepayment fees or penalties shall be provided for in the loan documents for a
2 high-cost home loan or charged the borrower after the last day of the twenty-fourth month
3 following the loan closing or which exceed in the aggregate:

4 (A) In the first 12 months after the loan closing, more than 2 percent of the loan
5 amount prepaid; or

6 (B) In the second 12 months after the loan closing, more than 1 percent of the amount
7 prepaid;

8 (2) A high-cost home loan shall not contain a scheduled payment that is more than twice
9 as large as the average of earlier scheduled payments. This provision does not apply when
10 the payment schedule is adjusted to the seasonal or irregular income of the borrower;

11 (3) A high-cost home loan shall not include payment terms under which the outstanding
12 principal balance will increase at any time over the course of the loan because the regular
13 periodic payments do not cover the full amount of interest due;

14 (4) A high-cost home loan shall not contain a provision that increases the interest rate
15 after default. This provision does not apply to interest rate changes in a variable rate loan
16 otherwise consistent with the provisions of the loan documents, provided the change in
17 the interest rate is not triggered by the event of default or the acceleration of the
18 indebtedness;

19 (5) A high-cost home loan shall not include terms under which more than two periodic
20 payments required under the loan are consolidated and paid in advance from the loan
21 proceeds provided to the borrower;

22 (6) Without regard to whether a borrower is acting individually or on behalf of others
23 similarly situated, any provision of a high-cost home loan agreement that allows a party
24 to require a borrower to assert any claim or defense in a forum that is less convenient,
25 more costly, or more dilatory for the resolution of a dispute than a judicial forum
26 established in this state where the borrower may otherwise properly bring the claim or
27 defense or limits in any way any claim or defense the borrower may have is
28 unconscionable and void;

29 (7) A creditor shall not make a high-cost home loan without first receiving certification
30 from a counselor with a third-party nonprofit organization approved by the United States
31 Department of Housing and Urban Development or the Georgia Housing and Finance
32 Authority that the borrower has received counseling on the advisability of the loan
33 transaction. No creditor, servicer, or their institutions shall be required to contribute to
34 the funding of any nonprofit organization that provides counseling required pursuant to
35 this paragraph;

36 (8) No loan originator shall originate a covered home loan or a high-cost home loan
37 unless such loan originator has been certified by the state Department of Banking and

1 Finance which certification requirements shall be established by the such department and
2 shall include four hours of continuing education obtained before October 1, 2003, and
3 four hours of continuing education each year thereafter;

4 (9) No creditor may accept a covered home loan or a high-cost home loan from any loan
5 originator who has not been certified by the state Department of Banking and Finance and
6 whose certification number is not included on the loan documents;

7 (10) A creditor shall not make a high-cost home loan unless a reasonable creditor would
8 believe at the time the loan is consummated that the borrower residing in the home will
9 be able to make the scheduled payments associated with the loan based upon a
10 consideration of his or her current and expected income, current obligations, employment
11 status, and other financial resources, other than the borrower's equity in the collateral that
12 secures repayment of the loan. There is a rebuttable presumption that the borrower
13 residing in the home is able to make the scheduled payments to repay the obligation if,
14 at the time the loan is consummated, said borrower's total monthly debts, including
15 amounts under the loan, do not exceed 48 percent of said borrower's monthly gross
16 income as verified by tax returns, payroll receipts, and other third-party income
17 verification;

18 (11) A creditor or servicer shall not pay a contractor under a home improvement contract
19 from the proceeds of a high-cost home loan unless:

20 (A) The creditor or servicer is presented with an affidavit of the contractor that the
21 work has been completed, which affidavit meets the requirements of Code Section
22 44-14-361.2; and

23 (B) The proceeds are disbursed in an instrument payable to the borrower or jointly to
24 the borrower and the contractor or, at the election of the borrower, through a third-party
25 escrow agent in accordance with terms established in a written agreement signed by the
26 borrower, the drafter of the instrument, and the contractor prior to the disbursement;

27 (12) A creditor or servicer shall not charge a borrower any fees or other charges to
28 modify, renew, extend, or amend a high-cost home loan or to defer any payment due
29 under the terms of a high-cost home loan;

30 (13) A creditor who makes a high-cost home loan and who has the legal right to
31 foreclose shall provide notice of the intent to foreclose to the borrower in writing by
32 certified mail, return receipt requested, to such address as the borrower may designate by
33 written notice to the creditor. Such notice shall be sent to the borrower prior to the
34 publication of the legal advertisement required by Code Section 44-14-162;

35 (14) If a creditor or servicer asserts that grounds for acceleration of a high-cost home
36 loan exist and requires the payment in full of all sums secured by the security instrument,
37 the borrower or anyone authorized to act on the borrower's behalf shall have the right at

1 any time, up to the time title is transferred by means of foreclosure by judicial proceeding
2 and sale or otherwise, to cure the default and reinstate the high-cost home loan by
3 tendering the total amount of principal, interest, late fees, and escrow deposits in arrears,
4 not including any acceleration. Cure of default as provided in this paragraph shall
5 reinstate the borrower to the same position as if the default had not occurred and shall
6 nullify as of the date of the cure any acceleration of any obligation under the security
7 instrument or note arising from the default;

8 (15)(A) To cure a default under this paragraph a borrower shall not be required to pay
9 any charge, fee, or penalty attributable to the exercise of the right to cure a default as
10 provided for in this Code section, other than the fees specifically allowed by this Code
11 section. The borrower shall not be liable for any attorney fees relating to the borrower's
12 default that are incurred by the creditor or servicer prior to or during the 30 day period
13 set forth in this paragraph, nor for any such fees in excess of \$100.00 that are incurred by
14 the creditor or servicer after the expiration of the 30 day period but prior to the time the
15 creditor or servicer files a foreclosure action or takes other action to seize or transfer
16 ownership of the home. After the creditor or servicer files a foreclosure action or takes
17 other action to seize or transfer ownership of the home, the borrower shall only be liable
18 for attorney fees that are reasonable and actually incurred by the creditor or servicer
19 based on a reasonable hourly rate and a reasonable number of hours plus any other
20 reasonable and necessary expenses incurred by the creditor or servicer.

21 (B) If a default is cured prior to the initiation of any action to foreclose or to seize or
22 transfer a home, the creditor or servicer shall not institute the foreclosure proceeding
23 or other action for that default. If a default is cured after the initiation of any action to
24 foreclose, the creditor or servicer shall take such steps as are necessary to terminate the
25 foreclosure proceeding or other action.

26 (C) Before any action is filed to foreclose upon the home or other action is taken to
27 seize or transfer ownership of a home, a notice of the right to cure the default must be
28 delivered to the borrower informing the borrower of the following:

29 (i) The nature of the default claimed on the high-cost home loan and of the
30 borrower's right to cure the default by paying the sum of money required to cure the
31 default. If the amount necessary to cure the default will change during the 30 day
32 period after the effective date of the notice due to the application of a daily interest
33 rate or the addition of late fees as allowed by this chapter, the notice shall give
34 sufficient information to enable the borrower to calculate the amount at any point
35 during the 30 day period;

36 (ii) The date by which the borrower shall cure the default to avoid acceleration and
37 initiation of foreclosure or other action to seize the home which date shall not be less

1 than 30 days after the date the notice is effective and the name and address and phone
2 number of a person to whom the payment or tender shall be made;

3 (iii) That, if the borrower does not cure the default by the date specified, the creditor
4 or servicer may take steps to terminate the borrower's ownership in the property by
5 commencing a foreclosure proceeding or other action to seize the home; and

6 (iv) The name and address of the creditor or servicer and the telephone number of a
7 representative of the creditor or servicer whom the borrower may contact if the
8 borrower disagrees with the creditor's or servicer's assertion that a default has
9 occurred or the correctness of the creditor's or servicer's calculation of the amount
10 required to cure the default;

11 (16) A high-cost home loan shall not contain nor shall a creditor or servicer enforce a
12 provision that permits a creditor or servicer, in its sole discretion, to accelerate the
13 indebtedness. This paragraph does not prohibit acceleration of the loan in good faith due
14 to the borrower's failure to abide by the material terms of the loan;

15 (17) All high-cost home loan agreements shall contain the following notice: 'Notice:
16 This is a mortgage subject to special rules under the "Georgia Fair Lending Act."
17 Purchasers or assignees of this mortgage may be liable for all claims and defenses by the
18 borrower with respect to the mortgage;' and

19 (18) The closing statement for covered home loans, or high-cost home loans shall specify
20 within the cost for title insurance the amount of the payment fee paid to the closing
21 attorney and the amount paid to the title insurance company.

22 7-6A-6.

23 (a) Notwithstanding any other provision of law, where a home loan was made, arranged,
24 or assigned by a person selling home improvements to the dwelling of a borrower, the
25 borrower may assert against the creditor, any assignee, or holder in any capacity all
26 affirmative claims and any defenses that the borrower may have against the seller or home
27 improvement contractor, provided that this subsection shall not apply to loans other than
28 high-cost home loans unless applicable law requires a certificate of occupancy, inspection,
29 or completion to be obtained and said certificate is not obtained.

30 (b) Notwithstanding any other provision of law, any person who purchases or is otherwise
31 assigned a high-cost home loan shall be subject to all affirmative claims and any defenses
32 with respect to the loan that the borrower could assert against the original creditor or
33 creditors of the loan.

34 (c) Notwithstanding any other provision of law, a borrower of a covered home loan, after
35 notice of acceleration or foreclosure of the loan or if in default more than 60 days, may
36 assert a violation of this chapter against any creditor or servicer by way of offset in an

1 original action, as a claim to enjoin foreclosure, as a defense or counterclaim to an action
2 to collect amounts owed, or to preserve or obtain possession of the home secured by the
3 home loan.

4 (d) It shall be a violation of this chapter for any person to attempt in bad faith to avoid the
5 application of this chapter by dividing any loan transaction into separate parts or structuring
6 a home loan transaction as an open-end loan for the purpose of evading the provisions of
7 this chapter when the loan would have been a high-cost home loan if the loan had been
8 structured as a closed-end loan or engaging in any other subterfuge with the intent of
9 evading any provision of this chapter.

10 7-6A-7.

11 (a) Any person found by a preponderance of the evidence to have violated this chapter
12 shall be liable to the borrower for the following:

13 (1) Actual damages, including consequential and incidental damages;

14 (2) Statutory damages equal to the recovery of two times the interest paid under the loan
15 and forfeiture of interest due under the loan for any violation of paragraph (1) or (2) of
16 Code Section 7-6A-3, any violation of Code Section 7-6A-4, or any violation of Code
17 Section 7-6A-5;

18 (3) Punitive damages subject to Code Section 51-12-5.1; and

19 (4) Costs and reasonable attorney fees.

20 (b) A borrower may be granted injunctive, declaratory, and such other equitable relief as
21 the court deems appropriate in an action to enforce compliance with this chapter including,
22 but not limited to, the following:

23 (1) Notwithstanding any other provision of law, a court shall have the discretion not to
24 require a borrower of a covered home loan seeking injunctive or other equitable relief
25 under the provisions of this chapter to make a tender upon a showing that the borrower
26 has a reasonable likelihood of being successful on the merits. When tender is not
27 required by the court, upon application to the court by the creditor, the court shall require
28 the borrower to pay into the registry of the court all regularly scheduled home loan
29 payments including property taxes and homeowners hazard insurance premiums if
30 required by escrow agreement which are the responsibility of the borrower payable to the
31 creditor or servicer under the terms of the home loan agreement which become due after
32 the filing of the legal action, said home loan payments to be paid as such become due,
33 and such other expenses provided under the home loan agreement as the court may deem
34 just, provided that regularly scheduled payments shall not include any payments allegedly
35 due under any acceleration provision of the home loan. If the creditor or servicer and the
36 borrower disagree as to the amount of the home loan payments due, either or both of

1 them may submit to the court any written home loan agreement for the purpose of
2 establishing the amount of home loan payments to be paid into the registry of the court;

3 (2) If the borrower should fail to make any regularly scheduled payment as it becomes
4 due after the filing of this action, upon application to the court by the creditor or servicer,
5 the court may issue an order denying the borrower's petition for injunctive or other
6 equitable relief, and vacating any decree for injunctive or equitable relief previously
7 entered by the court; and

8 (3) The court shall order the clerk of the court to pay to the creditor or any person the
9 creditor may designate the payments claimed under the home loan agreement paid into
10 the registry of the court as said payments are made; provided, however, that, if the
11 borrower claims that he or she is entitled to all or any part of the funds and such claim is
12 an issue of controversy in the litigation, the court shall order the clerk to pay to the
13 creditor or any person the creditor may designate without delay only that portion of the
14 funds to which the borrower has made no claim in the proceedings or may make such
15 other order as is appropriate under the circumstances. That part of the funds which is a
16 matter of controversy in the litigation shall remain in the registry of the court until a
17 determination of the issues by the trial court. If either party appeals the decision of the
18 trial court, that part of the funds equal to any sums found by the trial court to be due from
19 the creditor or servicer to the borrower shall remain in the registry of the court until a
20 final determination of the issues. The court shall order the clerk to pay to the creditor or
21 any person the creditor may designate without delay the remaining funds in court and all
22 payments of future home loan payments made into court pursuant to paragraph (1) of this
23 subsection unless the borrower can show good cause that some or all of such payments
24 should remain in court pending a final determination of the issues.

25 (c) The remedies provided in this chapter shall be cumulative.

26 (d) Any violation of this chapter may be enforced pursuant to Code Section 9-11-23.

27 (e) The right of rescission granted and defined under 15 U.S.C. Section 1601, et seq., and
28 a right of rescission for any violation of paragraph (1) or (2) of Code Section 7-6A-3, any
29 violation of Code Section 7-6A-4, or any violation of Code Section 7-6A-5 shall be
30 available to a borrower of a high-cost home loan at any time during the term of the loan not
31 to exceed a period of 3 years after the consummation of the loan.

32 (f) The brokering of a home loan that violates the provisions of this chapter shall constitute
33 a violation of such provisions.

34 (g) Without regard to whether a borrower is acting individually or on behalf of others
35 similarly situated, any provision of a home loan agreement that allows a party to require
36 a borrower to assert any claim or defense in a forum that is less convenient, more costly,
37 or more dilatory for the resolution of a dispute than a judicial forum established in this state

1 where the borrower may otherwise properly bring the claim or defense or limits in any way
 2 any claim or defense the borrower may have is unconscionable and void. A contractual
 3 authorization for a power of sale procedure shall be enforceable under this chapter with
 4 respect to a home loan other than a high-cost home loan so long as the borrower has not
 5 waived other remedies available in law or equity, whether acting individually or on behalf
 6 of others similarly situated, or rights to civil discovery or appeal.

7 (h) An action under this chapter may be brought within two years after the date of the first
 8 scheduled payment by the borrower under the high-cost home loan or covered home loan.

9 (i) The remedies provided in this chapter are not intended to be the exclusive remedies
 10 available to a borrower nor must the borrower exhaust any administrative remedies
 11 provided under this chapter or any other applicable law before proceeding under this Code
 12 section.

13 7-6A-8.

14 (a) The Attorney General, the district attorneys of this state, and the commissioner of
 15 banking and finance shall have jurisdiction to enforce this chapter through their general
 16 regulatory powers and through civil process. The Commissioner of Insurance shall have
 17 like authority to enforce paragraph (1) of Code Section 7-6A-3.

18 (b) Any person, including members, officers, and directors of a creditor, who knowingly
 19 violates this chapter is guilty of a misdemeanor and, on conviction, is subject to a fine not
 20 exceeding \$1,000.00 for each violation or to imprisonment not exceeding six months, or
 21 both.

22 7-6A-9.

23 A creditor or servicer of a home loan who, when acting in good faith, fails to comply with
 24 the provisions of this chapter will not be deemed to have violated this chapter if the creditor
 25 or servicer establishes that either:

26 (1) Within 90 days of the loan closing and prior to receiving any notice from the
 27 borrower of the compliance failure, the creditor or servicer has offered appropriate
 28 restitution to the borrower and appropriate adjustments are made to the loan; or

29 (2) Within 90 days of discovering a compliance failure and prior to receiving any notice
 30 of the compliance failure and the compliance failure was not intentional and resulted
 31 from a bona fide error notwithstanding the maintenance of procedures reasonably adapted
 32 to avoid such errors, the borrower is notified of the compliance failure, appropriate
 33 restitution is offered to the borrower, and appropriate adjustments are made to the loan.

34 Examples of a bona fide error include clerical, calculation, computer malfunction and

1 programming, and printing errors. An error of legal judgment with respect to a person's
2 obligations under this chapter is not a bona fide error.

3 7-6A-10.

4 The provisions of this chapter shall be severable and, if any phrase, clause, sentence, or
5 provision is declared to be invalid or is preempted by federal law or regulation, the validity
6 of the remainder of this chapter shall not be affected thereby. If any provision of this
7 chapter is declared to be inapplicable to any category of persons or any specific category,
8 type, or kind of loan or portions thereof, the provisions of this chapter shall nonetheless
9 continue to apply with respect to all other persons and all other loans or portions thereof.

10 7-6A-11.

11 No municipality or county shall enact any ordinance or law that regulates the terms of
12 home loans or that makes the eligibility of any person or entity to do business with the
13 municipality or county dependent upon the terms of home loans originated or serviced by
14 such person or entity."

15 **SECTION 2.**

16 This Act shall become effective October 1, 2002, and shall apply with respect to all home
17 loans made or entered into after that date.

18 **SECTION 3.**

19 All laws and parts of laws in conflict with this Act are repealed.