

House Bill 1361 (AS PASSED HOUSE AND SENATE)

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

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, as of noon ten business days prior  
26 to such consummation, (i) for a home loan secured by a first lien, the higher of (I) four  
27 percentage points above prime rate or (II) two percentage points above the required net  
28 yield for a 90 day standard mandatory delivery commitment for a home loan with a  
29 reasonably comparable term from either the Federal National Mortgage Association or  
30 the Federal Home Loan Mortgage Corporation, whichever is greater, or (ii) for a home  
31 loan secured by a junior lien, the higher of (I) five and one-half percentage points above  
32 prime rate or (II) three percentage points above the required net yield for a 90 day  
33 standard mandatory delivery commitment for a loan with a reasonably comparable term  
34 from either the Federal National Mortgage Association or the Federal Home Loan  
35 Mortgage Corporation, 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 brokering a  
6 home loan, which shall include any person who directly or indirectly solicits, processes,  
7 places, or negotiates home loans for others or offers to solicit, process, place, or negotiate  
8 home loans for others or who closes home loans which may be in the person's own name  
9 with funds provided by others and which loans are thereafter assigned to the person  
10 providing the funding of such loans, provided that creditor shall not include a person who  
11 is an attorney providing legal services in association with the closing of a home loan.

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

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

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

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

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

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

10 (13) 'Points and fees' means:

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

16 (B) All compensation paid directly or indirectly to a mortgage broker from any source,  
17 including a broker that originates a loan in its own name in a table funded transaction,  
18 including but not limited to yield spread premiums, yield differentials, and service  
19 release fees, provided that the portion of any yield spread premium that is both  
20 disclosed to the borrower in writing and used to pay bona fide and reasonable fees to  
21 a person other than the creditor or an affiliate of the creditor for the following purposes  
22 is exempt from inclusion in points and fees: fees for tax payment services; fees for  
23 flood certification; fees for pest infestation and flood determination; appraisal fees; fees  
24 for inspection performed prior to closing; credit reports; surveys; attorneys' fees, if the  
25 borrower has the right to select the attorney from an approved list or otherwise; notary  
26 fees; escrow charges, so long as not otherwise included under subparagraph (A) of this  
27 paragraph; title insurance premiums; and fire and hazard insurance and flood insurance  
28 premiums, provided that the conditions set forth in 12 C.F.R. 226.4(d)(2) are met;

29 (C) Premiums or other charges for credit life, credit accident, credit health, credit  
30 personal property, or credit loss-of-income insurance, debt suspension coverage or debt  
31 cancellation coverage, whether or not such coverage is insurance under applicable law,  
32 that provides for cancellation of all or part of a borrower's liability in the event of loss  
33 of life, health, personal property, or income or in the case of accident written in  
34 connection with a home loan and premiums or other charges for life, accident, health,  
35 or loss-of-income insurance without regard to the identity of the ultimate beneficiary  
36 of such insurance. In determining points and fees for the purposes of this paragraph,  
37 premiums or other charges shall only include those payable at or before loan closing

1 and are included whether they are paid in cash or financed and whether the amount  
2 represents the entire premium for the coverage or an initial payment;

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

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

8 (F) For open-end loans, points and fees are calculated in the same manner as for loans  
9 other than open-end loans, based on the minimum points and fees that a borrower  
10 would be required to pay in order to draw on the open-end loan an amount equal to the  
11 total credit line; and

12 (G) Points and fees shall not include:

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

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

24 (14) 'Prime rate' means the bank prime loan rate published by the Board of Governors  
25 of the Federal Reserve System, as published in statistical release H.15 or any publication  
26 that may supersede it.

27 (15) 'Process,' 'processes,' or 'processing' means to act as a processor.

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

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

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

35 (19) 'Threshold' means:

36 (A) Without regard to whether the loan transaction is or may be a 'residential mortgage  
37 transaction' as that term is defined in 12 C.F.R. 226.2(a)(24), the annual percentage rate

1 of the loan is such that it equals or exceeds that set out in Section 152 of the Home  
 2 Ownership and Equity Protection Act of 1994, 15 U.S.C. Section 1602(aa), and the  
 3 regulations adopted pursuant thereto by the Federal Reserve Board, including Section  
 4 12 C.F.R. 226.32; or

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

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

14 (21) 'Variable rate loan' means a home loan where the rate of interest charged may  
 15 change during the term of the loan, pursuant to a rate that is calculated only by using an  
 16 index that can change due to circumstances beyond the direct control of the creditor or  
 17 servicer and adding a margin that may change.

18 7-6A-3.

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

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

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

34 (3) No creditor or servicer may charge a borrower a late payment charge unless the loan  
 35 documents specifically authorize the charge, the charge is not imposed unless the  
 36 payment is past due for ten days or more, and the charge does not exceed 5 percent of the

1 amount of the late payment. A late payment charge may not be imposed more than once  
2 with respect to a single late payment and no late payment charge may be charged with  
3 respect to any subsequent payment that would have been a full payment but for the  
4 previous default or the imposition of the previous late payment charge; and

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

11 7-6A-4.

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

26 7-6A-5.

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

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

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

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

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

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

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

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

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

22 (7) A creditor shall not make a high-cost home loan without first receiving certification  
23 from a counselor with a third-party nonprofit organization approved by the United States  
24 Department of Housing and Urban Development or the Georgia Housing and Finance  
25 Authority that the borrower has received counseling on the advisability of the loan  
26 transaction. No creditor, servicer, or its institution shall be required to contribute to the  
27 funding of any nonprofit organization that provides counseling required pursuant to this  
28 paragraph;

29 (8) A creditor shall not make a high-cost home loan unless a reasonable creditor would  
30 believe at the time the loan is consummated that the borrower residing in the home will  
31 be able to make the scheduled payments associated with the loan based upon a  
32 consideration of his or her current and expected income, current obligations, employment  
33 status, and other financial resources, other than the borrower's equity in the collateral that  
34 secures repayment of the loan. There is a rebuttable presumption that the borrower  
35 residing in the home is able to make the scheduled payments to repay the obligation if,  
36 at the time the loan is consummated, said borrower's total monthly debts, including  
37 amounts under the loan, do not exceed 50 percent of said borrower's monthly gross

1 income as verified by tax returns, payroll receipts, and other third-party income  
2 verification;

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

5 (A) The creditor or servicer is presented with an affidavit of the contractor that the  
6 work has been completed, which affidavit meets the requirements of Code Section  
7 44-14-361.2; and

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

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

15 (11) A creditor who makes a high-cost home loan and who has the legal right to  
16 foreclose shall provide notice of the intent to foreclose to the borrower in writing by  
17 certified mail, return receipt requested, to the address of the borrower last known to the  
18 creditor. Such notice shall be sent to the borrower at least 14 days prior to the publication  
19 of the legal advertisement required by Code Section 44-14-162;

20 (12) If a creditor or servicer asserts that grounds for acceleration of a high-cost home  
21 loan exist and requires the payment in full of all sums secured by the security instrument,  
22 the borrower or anyone authorized to act on the borrower's behalf shall have the right at  
23 any time, up to the time title is transferred by means of foreclosure by judicial proceeding  
24 and sale or otherwise, to cure the default and reinstate the high-cost home loan by  
25 tendering the total amount of principal, interest, late fees, and escrow deposits in arrears,  
26 not including any acceleration. Cure of default as provided in this paragraph shall  
27 reinstate the borrower to the same position as if the default had not occurred and shall  
28 nullify as of the date of the cure any acceleration of any obligation under the security  
29 instrument or note arising from the default;

30 (13)(A) To cure a default under this Code section, a borrower shall not be required to  
31 pay any charge, fee, or penalty attributable to the exercise of the right to cure a default  
32 as provided for in this Code section, other than the fees specifically allowed by this  
33 Code section. The borrower shall not be liable for any attorney fees relating to the  
34 borrower's default that are incurred by the creditor or servicer prior to or during the 30  
35 day period set forth in this paragraph, nor for any such fees in excess of \$100.00 that  
36 are incurred by the creditor or servicer after the expiration of the 30 day period but prior  
37 to the time the creditor or servicer files a foreclosure action or takes other action to

1 seize or transfer ownership of the home. After the creditor or servicer files a foreclosure  
2 action or takes other action to seize or transfer ownership of the home, the borrower  
3 shall only be liable for attorney fees that are reasonable and actually incurred by the  
4 creditor or servicer based on a reasonable hourly rate and a reasonable number of hours  
5 plus any other reasonable and necessary expenses incurred by the creditor or servicer.

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

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

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

21 (ii) The date by which the borrower shall cure the default to avoid acceleration and  
22 initiation of foreclosure or other action to seize the home which date shall not be less  
23 than 30 days after the date the notice is effective and the name and address and phone  
24 number of a person to whom the payment or tender shall be made;

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

28 (iv) The name and address of the creditor or servicer and the telephone number of a  
29 representative of the creditor or servicer whom the borrower may contact if the  
30 borrower disagrees with the creditor's or servicer's assertion that a default has  
31 occurred or the correctness of the creditor's or servicer's calculation of the amount  
32 required to cure the default;

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

1 (15) All high-cost home loan documents that create a debt or pledge property as  
2 collateral shall contain the following notice on the first page in a conspicuous manner:  
3 'Notice: This is a mortgage subject to special rules under the "Georgia Fair Lending Act."  
4 Purchasers or assignees of this mortgage may be liable for all claims and defenses by the  
5 borrower with respect to the mortgage.'

6 7-6A-6.

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

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

18 (c) Notwithstanding any other provision of law, a borrower of a covered home loan, after  
19 notice of acceleration or foreclosure of the loan or if in default more than 60 days, may  
20 assert a violation of this chapter against any creditor or servicer by way of offset in an  
21 original action, as a claim to enjoin foreclosure, as a defense or counterclaim to an action  
22 to collect amounts owed, or to preserve or obtain possession of the home secured by the  
23 home loan.

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

30 7-6A-7.

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

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

34 (2) Statutory damages equal to the recovery of two times the interest paid under the loan  
35 and forfeiture of interest under the loan for any violation of paragraph (1) or (2) of Code

1 Section 7-6A-3, any violation of Code Section 7-6A-4, or any violation of Code Section  
2 7-6A-5;

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

4 (4) Costs and reasonable attorney fees.

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

8 (1) Notwithstanding any other provision of law, a court shall have the discretion not to  
9 require a borrower of a covered home loan seeking injunctive or other equitable relief  
10 under the provisions of this chapter to make a tender upon a showing that the borrower  
11 has a reasonable likelihood of being successful on the merits. When tender is not  
12 required by the court, upon application to the court by the creditor, the court shall require  
13 the borrower to pay into the registry of the court all regularly scheduled home loan  
14 payments including property taxes and homeowners hazard insurance premiums if  
15 required by escrow agreement which are the responsibility of the borrower payable to the  
16 creditor or servicer under the terms of the home loan agreement which become due after  
17 the filing of the legal action, said home loan payments to be paid as such become due,  
18 and such other expenses provided under the home loan agreement as the court may deem  
19 just, provided that regularly scheduled payments shall not include any payments allegedly  
20 due under any acceleration provision of the home loan. If the creditor or servicer and the  
21 borrower disagree as to the amount of the home loan payments due, either or both of  
22 them may submit to the court any written home loan agreement for the purpose of  
23 establishing the amount of home loan payments to be paid into the registry of the court;

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

29 (3) The court shall order the clerk of the court to pay to the creditor or any person the  
30 creditor may designate the payments claimed under the home loan agreement paid into  
31 the registry of the court as said payments are made; provided, however, that, if the  
32 borrower claims that he or she is entitled to all or any part of the funds and such claim is  
33 an issue of controversy in the litigation, the court shall order the clerk to pay to the  
34 creditor or any person the creditor may designate without delay only that portion of the  
35 funds to which the borrower has made no claim in the proceedings or may make such  
36 other order as is appropriate under the circumstances. That part of the funds which is a  
37 matter of controversy in the litigation shall remain in the registry of the court until a

1 determination of the issues by the trial court. If either party appeals the decision of the  
2 trial court, that part of the funds equal to any sums found by the trial court to be due from  
3 the creditor or servicer to the borrower shall remain in the registry of the court until a  
4 final determination of the issues. The court shall order the clerk to pay to the creditor or  
5 any person the creditor may designate without delay the remaining funds in court and all  
6 payments of future home loan payments made into court pursuant to paragraph (1) of this  
7 subsection unless the borrower can show good cause that some or all of such payments  
8 should remain in court pending a final determination of the issues.

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

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

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

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

18 (g) Without regard to whether a borrower is acting individually or on behalf of others  
19 similarly situated, any provision of a home loan agreement that allows a party to require  
20 a borrower to assert any claim or defense in a forum that is less convenient, more costly,  
21 or more dilatory for the resolution of a dispute than a judicial forum established in this state  
22 where the borrower may otherwise properly bring the claim or defense or limits in any way  
23 any claim or defense the borrower may have is unconscionable and void.

24 (h) An action under this chapter may be brought within four years of the date of the last  
25 payment made or five years after the date of the first scheduled payment, whichever is  
26 earlier, by the borrower under the home loan.

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

31 7-6A-8.

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

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

5 7-6A-9.

6 A creditor or servicer or an insurer providing insurance through premiums financed by a  
7 creditor of a home loan who, when acting in good faith, fails to comply with the provisions  
8 of this chapter will not be deemed to have violated this chapter if the creditor or servicer  
9 or insurer providing insurance through premiums financed by a creditor establishes that  
10 either:

11 (1) Within 90 days of the loan closing and prior to receiving any notice from the  
12 borrower of the compliance failure, (A) the creditor or servicer has offered appropriate  
13 restitution to the borrower and appropriate adjustments are made to the loan or (B) to  
14 correct a compliance failure of paragraph (1) of Code Section 7-6A-3, an insurer  
15 providing insurance through premiums financed by a creditor may provide appropriate  
16 restitution to the borrower by returning premiums paid plus interest charged on the  
17 premiums to the borrower upon receipt of notice of the compliance failure; or

18 (2) Within 90 days of discovering a compliance failure and prior to receiving any notice  
19 of the compliance failure and the compliance failure was not intentional and resulted  
20 from a bona fide error notwithstanding the maintenance of procedures reasonably adapted  
21 to avoid such errors, the borrower is notified of the compliance failure, appropriate  
22 restitution is offered to the borrower, and appropriate adjustments are made to the loan.  
23 Examples of a bona fide error include clerical, calculation, computer malfunction and  
24 programming, and printing errors. An error of legal judgment with respect to a person's  
25 obligations under this chapter is not a bona fide error.

26 7-6A-10.

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

1 7-6A-11.

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

6 **SECTION 2.**

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

9 **SECTION 3.**

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