

NOT GERMANE

1 Senators Fort of the 39th, Brown of the 26th, Tate of the 38th and Henson of the 41st offered
2 the following amendment:

3 Amend SB 100 by striking it in its entirety and substituting the following in its place the
4 following:

5 **"A BILL TO BE ENTITLED**

6 **AN ACT**

7 To amend Chapter 6A of Title 7 of the Official Code of Georgia Annotated, relating to
8 banking, so as to repeal and reenact the 'Georgia Fair Lending Act'; to prohibit abusive home
9 loan practices; to provide for definitions; to provide for prohibited practices and limitations
10 relating to covered home loans and high-cost home loans; to create specific and numerous
11 consumer protections for covered home loans and high-cost home loans; to provide for
12 penalties and enforcement; to provide for exceptions for unintentional violations; to provide
13 for related matters; to provide for severability; to provide for legislative intent; to provide for
14 applicability and an effective date; to repeal conflicting laws; and for other purposes.

15 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

16 **SECTION 1.**

17 Title 7 of the Official Code of Georgia Annotated, relating to banking and finance, is
18 amended by repealing Chapter 6A, the 'Georgia Fair Lending Act' and designating said
19 chapter as reserved.

20 **SECTION 2.**

21 Title 7 of the Official Code of Georgia Annotated, relating to banking and finance, is
22 amended by striking Chapter 6A which is reserved and adding in lieu thereof a new Chapter
23 6A to read as follows:

24 **'CHAPTER 6A**

25 7-6A-1.

26 This chapter shall be known and may be cited as the "Georgia Fair Lending Act."

1 7-6A-2.

2 As used in this chapter, the term:

3 (1) "Acceleration" means a demand for immediate repayment of the entire balance of a
4 home loan.

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

7 (3) "Annual percentage rate" means the annual percentage rate for the loan calculated at
8 closing according to the provisions of 15 U.S.C. Section 1606, the regulations
9 promulgated thereunder by the Board of Governors of the Federal Reserve System, and
10 the Official Staff Commentary on Regulation Z published by the Board of Governors of
11 the Federal Reserve System. For purposes of this chapter, the annual percentage rate
12 shall be determined as follows:

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

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

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

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

28 (5) "Borrower" means any natural person obligated to repay the loan including a
29 coborrower or cosigner.

30 (6) "Covered home loan" means a home loan in which:

31 (A) Without regard to whether the loan transaction is or may be a "residential mortgage
32 transaction" as that term is defined in 12 C.F.R. Section 226.2(a)(24), the annual
33 percentage rate of the loan at consummation is such that it exceeds, as of noon ten
34 business days prior to such consummation, (i) for a home loan secured by a first lien,
35 the higher of (I) four percentage points above prime rate or (II) two percentage points
36 above the required net yield for a 90 day standard mandatory delivery commitment for
37 a home loan with a reasonably comparable term from either the Federal National

1 Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is
2 greater, or (ii) for a home loan secured by a junior lien, the higher of (I) five and
3 one-half percentage points above prime rate or (II) three percentage points above the
4 required net yield for a 90 day standard mandatory delivery commitment for a loan with
5 a reasonably comparable term from either the Federal National Mortgage Association
6 or the Federal Home Loan Mortgage Corporation, whichever is greater;

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

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

11 (7) "Creditor" means a person who both regularly extends consumer credit that is subject
12 to a finance charge or is payable by written agreement in more than four installments and
13 is a person to whom the debt arising from a home loan transaction is initially payable.
14 Creditor shall also mean any person brokering a home loan, which shall include any
15 person who directly or indirectly solicits, processes, places, or negotiates home loans for
16 others or offers to solicit, process, place, or negotiate home loans for others or who closes
17 home loans which may be in the person's own name with funds provided by others and
18 which loans are thereafter assigned to the person providing the funding of such. Creditor
19 shall not include: (A) a servicer; (B) any state or local housing finance agency or any
20 other state or local governmental or quasi-governmental entity; or (C) a person who is an
21 attorney providing legal services in association with the closing of a home loan.

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

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

34 (10) "Make" or "makes" means to originate a loan or to engage in brokering of a home
35 loan including the soliciting, processing, placing, or negotiating of a home loan made or
36 offered by a person brokering a home loan.

1 (11) "Manufactured home" means a structure, transportable in one or more sections,
2 which in the traveling mode is eight body feet or more in width or 40 body feet or more
3 in length or, when erected on site is 320 or more square feet and which is built on a
4 permanent chassis and designed to be used as a dwelling with a permanent foundation
5 when erected on land secured in conjunction with the real property on which the
6 manufactured home is located and connected to the required utilities and includes the
7 plumbing, heating, air-conditioning, and electrical systems contained therein; except that
8 such term shall include any structure which meets all the requirements of this paragraph
9 except the size requirements and with respect to which the manufacturer voluntarily files
10 a certification required by the secretary of the United States Department of Housing and
11 Urban Development and complies with the standards established under the National
12 Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C.
13 Section 5401, et seq. Such term does not include rental property or second homes or
14 manufactured homes when not secured in conjunction with the real property on which the
15 manufactured home is located.

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

21 (13) "Points and fees" means:

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

27 (B) All compensation paid directly or indirectly to a mortgage broker from any source,
28 including a broker that originates a loan in its own name in a table funded transaction,
29 including but not limited to yield spread premiums, yield differentials, and service
30 release fees, provided that the portion of any yield spread premium that is both
31 disclosed to the borrower in writing and used to pay bona fide and reasonable fees to
32 a person other than the creditor or an affiliate of the creditor for the following purposes
33 is exempt from inclusion in points and fees: fees for tax payment services; fees for
34 flood certification; fees for pest infestation and flood determination; appraisal fees; fees
35 for inspection performed prior to closing; credit reports; surveys; attorneys' fees, if the
36 borrower has the right to select the attorney from an approved list or otherwise; notary
37 fees; escrow charges, so long as not otherwise included under subparagraph (A) of this

1 paragraph; title insurance premiums; and fire and hazard insurance and flood insurance
2 premiums, provided that the conditions set forth in 12 C.F.R. Section 226.4(d)(2) are
3 met;

4 (C) Premiums or other charges for credit life, credit accident, credit health, credit
5 personal property, or credit loss-of-income insurance, debt suspension coverage or debt
6 cancellation coverage, whether or not such coverage is insurance under applicable law,
7 that provides for cancellation of all or part of a borrower's liability in the event of loss
8 of life, health, personal property, or income or in the case of accident written in
9 connection with a home loan and premiums or other charges for life, accident, health,
10 or loss-of-income insurance without regard to the identity of the ultimate beneficiary
11 of such insurance. In determining points and fees for the purposes of this paragraph,
12 premiums or other charges shall only include those payable at or before loan closing
13 and are included whether they are paid in cash or financed and whether the amount
14 represents the entire premium for the coverage or an initial payment;

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

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

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

24 (G) Points and fees shall not include:

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

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

1 (iii) Bona fide fees paid to a federal or state government agency that insures payment
2 of some portion of a home loan including, but not limited to, the Federal Housing
3 Administration, the Department of Veterans Affairs, the United States Department of
4 Agriculture for rural development loans, or the Georgia Housing and Finance
5 Authority.

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

9 (15) "Process," "processes," or "processing" means to act as a processor.

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

15 (17) "Servicer" means the same as set forth in 24 C.F.R. Section 3500.2.

16 (18) "Servicing" means the same as set forth in 24 C.F.R. Section 3500.2.

17 (19) "Threshold" means:

18 (A) Without regard to whether the loan transaction is or may be a "residential mortgage
19 transaction" as that term is defined in 12 C.F.R. Section 226.2(a)(24), the annual
20 percentage rate of the loan is such that it equals or exceeds that set out in Section 152
21 of the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. Section
22 1602(aa), and the regulations adopted pursuant thereto by the Federal Reserve Board,
23 including Section 12 C.F.R. Section 226.32; or

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

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

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

1 7-6A-3.

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

3 (1) No creditor shall make a home loan that finances, directly or indirectly, (A) any
4 credit life, credit accident, credit health, credit personal property, or credit loss-of-income
5 insurance, debt suspension coverage or debt cancellation coverage, whether or not such
6 coverage is insurance under applicable law, that provides for cancellation of all or part
7 of a borrower's liability in the event of loss of life, health, personal property, or income
8 or in the case of accident written in connection with a home loan; or (B) any life,
9 accident, health, or loss-of-income insurance without regard to the identity of the ultimate
10 beneficiary of such insurance; provided, however, that for the purposes of this Code
11 section, any premiums or charges calculated and paid on a periodic basis that are not
12 added to the principal of the loan shall not be considered financed directly or indirectly
13 by the creditor;

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

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

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

30 7-6A-4.

31 No creditor may engage in the unfair act or practice of "flipping" a home loan. Flipping
32 occurs when a creditor makes a covered home loan to a borrower that refinances an
33 existing home loan that was consummated within the prior five years when the new loan
34 does not provide reasonable, tangible net benefit to the borrower considering all of the
35 circumstances, including the terms of both the new and refinanced loans, the cost of the

1 new loan, and the borrower's circumstances. In addition, the home loan refinancing
2 transaction shall be presumed to be a flipping where a covered home loan refinances an
3 existing home loan that was consummated within the prior five years and that is a special
4 mortgage originated, subsidized, or guaranteed by or through a state, tribal, or local
5 government or a nonprofit organization, which either bears a below-market interest rate at
6 the time the loan was originated or has nonstandard payment terms beneficial to the
7 borrower, such as payments that vary with income, are limited to a percentage of income,
8 or where no payments are required under specified conditions and where, as a result of the
9 refinancing, the borrower will lose one or more of the benefits of the special mortgage.

10 7-6A-5.

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

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

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

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

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

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

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

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

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

1 established in this state where the borrower may otherwise properly bring the claim or
2 defense or limits in any way any claim or defense the borrower may have is
3 unconscionable and void;

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

11 (8) A creditor shall not make a high-cost home loan unless a reasonable creditor would
12 believe at the time the loan is consummated that the borrower residing in the home will
13 be able to make the scheduled payments associated with the loan based upon a
14 consideration of his or her current and expected income, current obligations, employment
15 status, and other financial resources, other than the borrower's equity in the collateral that
16 secures repayment of the loan. There is a rebuttable presumption that the borrower
17 residing in the home is able to make the scheduled payments to repay the obligation if,
18 at the time the loan is consummated, said borrower's total monthly debts, including
19 amounts under the loan, do not exceed 50 percent of said borrower's monthly gross
20 income as verified by tax returns, payroll receipts, and other third-party income
21 verification;

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

24 (A) The creditor or servicer is presented with an affidavit of the contractor that the
25 work has been completed, which affidavit meets the requirements of Code Section
26 44-14-361.2; and

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

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

34 (11) A creditor who makes a high-cost home loan and who has the legal right to
35 foreclose shall provide notice of the intent to foreclose to the borrower in writing by
36 certified mail, return receipt requested, to the address of the borrower last known to the

1 creditor. Such notice shall be sent to the borrower at least 14 days prior to the publication
2 of the legal advertisement required by Code Section 44-14-162;

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

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

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

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

34 (i) The nature of the default claimed on the high-cost home loan and of the
35 borrower's right to cure the default by paying the sum of money required to cure the
36 default. If the amount necessary to cure the default will change during the 30 day
37 period after the effective date of the notice due to the application of a daily interest

1 rate or the addition of late fees as allowed by this chapter, the notice shall give
 2 sufficient information to enable the borrower to calculate the amount at any point
 3 during the 30 day period;

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

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

11 (iv) The name and address of the creditor or servicer and the telephone number of a
 12 representative of the creditor or servicer whom the borrower may contact if the
 13 borrower disagrees with the creditor's or servicer's assertion that a default has
 14 occurred or the correctness of the creditor's or servicer's calculation of the amount
 15 required to cure the default;

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

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

25 7-6A-6.

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

33 (b) Notwithstanding any other provision of law, any person who purchases or is otherwise
 34 assigned a high-cost home loan shall be subject to all affirmative claims and any defenses
 35 with respect to the loan that the borrower could assert against the original creditor or
 36 creditors of the loan, provided that this subsection shall not apply if the purchaser or

1 assignee demonstrates by a preponderance of the evidence that a reasonable person
2 exercising reasonable due diligence could not determine that the mortgage was a high-cost
3 home loan. It shall be presumed that a purchaser or assignee has exercised such due
4 diligence if the purchaser or assignee demonstrates by a preponderance of the evidence that
5 the purchaser or assignee:

6 (1) Has in place at the time of the acquisition of the subject loans, policies that expressly
7 prohibit its purchase or acceptance of assignment of any high-cost home loans;

8 (2) Requires by contract that a seller or assignor of the home loans to the purchaser or
9 assignee represents and warrants to the purchaser or assignee that either (A) the seller or
10 assignor will not sell or assign any high-cost home loans to the purchaser or assignee or
11 (B) that such seller or assignor is the beneficiary of such a representation and warranty
12 from a previous seller or assignor; and

13 (3) Exercises reasonable due diligence at the time of purchase or assignment of any
14 home loans, or within a reasonable period of time from the purchase or assignment of
15 home loans thereafter, intended to prevent the purchaser or assignee from purchasing or
16 taking assignment of any high-cost home loans; or

17 (4) Satisfies the requirements in paragraphs (1) and (2) of this subsection and establishes
18 that a reasonable person exercising ordinary due diligence could not determine, based on
19 the documentation required by 15 U.S.C. Section 1601, et seq., and the itemization of the
20 amount financed and other disclosure disbursements, that the loan was a high-cost home
21 loan.

22 (c) Notwithstanding any other provision of law, but limited to amounts required to reduce
23 or extinguish the borrower's liability under the home loan plus amounts required to recover
24 costs including reasonable attorneys' fees, a borrower acting only in an individual capacity
25 may assert against the creditor or any subsequent holder or assignee of the covered home
26 loan:

27 (1) Within five years of the closing of a covered home loan, a violation of this chapter
28 in connection with the loan as an original action or as a defense, claim, or counterclaim
29 after an action to collect on the home loan or foreclose on the collateral securing the
30 home loan has been initiated, the debt arising from the home loan has been accelerated,
31 or the home loan has become 60 days in default; and

32 (2) At any time during the term of a high-cost home loan, after an action to collect on the
33 home loan or foreclose on the collateral securing the home loan has been initiated, the
34 debt arising from the home loan has been accelerated, or the home loan has become 60
35 days in default any defense, claim, or counterclaim.

36 (d) It shall be a violation of this chapter for any person to attempt in bad faith to avoid the
37 application of this chapter by dividing any loan transaction into separate parts or structuring

1 a home loan transaction as an open-end loan for the purpose of evading the provisions of
2 this chapter when the loan would have been a high-cost home loan if the loan had been
3 structured as a closed-end loan or engaging in any other subterfuge with the intent of
4 evading any provision of this chapter.

5 (e) Nothing in this Code section shall be construed to limit the substantive rights,
6 remedies, or procedural rights available to a borrower against any creditor, assignee, or
7 holder under any other law. The limitations on assignee liability in subsection (b) of this
8 Code section shall not apply to the assignee liability in subsection (c) of this Code section.

9 7-6A-7.

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

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

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

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

18 (4) Costs and reasonable attorneys' fees.

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

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

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

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

10 7-6A-8.

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

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

19 7-6A-9.

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

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

32 (2) Within 90 days of discovering a compliance failure and prior to receiving any notice
33 of the compliance failure and the compliance failure was not intentional and resulted
34 from a bona fide error notwithstanding the maintenance of procedures reasonably adapted
35 to avoid such errors, the borrower is notified of the compliance failure, appropriate

1 restitution is offered to the borrower, and appropriate adjustments are made to the loan.
2 Examples of a bona fide error include clerical, calculation, computer malfunction and
3 programming, and printing errors. An error of legal judgment with respect to a person's
4 obligations under this chapter is not a bona fide error.

5 7-6A-10.

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

12 7-6A-11.

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

17 7-6A-12.

18 The provisions of this chapter shall not apply to any bank, trust company, savings and loan,
19 savings bank, or credit union, respectively, that is chartered under the laws of this state or
20 any other state only to the extent federal law precludes or preempts or has been determined
21 to preclude or preempt the application of the provisions of this chapter to any federally
22 chartered bank, trust company, savings and loan, savings bank, or credit union,
23 respectively, and such federal preclusion or preemption shall apply only to the same type
24 of state chartered entity as the federally chartered entity affected; provided, however, that
25 the provisions of this chapter, including subsection (f) of Code Section 7-6A-7, shall be
26 applicable to an independent mortgage broker for any loan originated or brokered by the
27 broker that is initially funded by any state or federally chartered bank, trust company,
28 savings and loan, savings bank, or credit union.'

29 **SECTION 2.**

30 This Act shall become effective on July 1, 2005, and shall apply with respect to all home
31 loans made or entered into after that date.

SECTION 3.

1
2 All laws and parts of laws in conflict with this Act are repealed."