

House Bill 1438

By: Representatives Thomas of the 55<sup>th</sup>, Abrams of the 84<sup>th</sup>, Beasley-Teague of the 65<sup>th</sup>, Mangham of the 94<sup>th</sup>, Jones of the 44<sup>th</sup>, and others

A BILL TO BE ENTITLED  
AN ACT

To amend Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mortgages, conveyances to secure debt, and liens, so as to enact the "Foreclosure Rescue Fraud Prevention Act"; to provide for legislative findings and intent; to provide for definitions; to provide that deeds or other conveyances of interests in property purporting to be an absolute conveyance of title but was made a security for the performance of an obligation shall be deemed to be an equitable mortgage; to provide for determinations of whether such deeds or other conveyances are equitable mortgages; to provide that holders of equitable mortgages shall not be authorized to evict a homeowner except through the foreclosure process; to provide for the application of certain state and federal laws to such mortgages; to provide that all foreclosure rescue transactions shall be deemed equitable mortgages; to provide for certain notices and recordations; to provide that unfair foreclosure rescue transactions are unlawful and voidable; to provide for remedies; to provide for certain rebuttable presumptions; to provide for reformation of equitable mortgages; to provide for obligations and payments under equitable mortgages; to provide for stays of eviction actions under certain circumstances; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**SECTION 1.**

Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mortgages, conveyances to secure debt, and liens, is amended by adding a new article to read as follows:

"ARTICLE 10

44-14-630.

This article shall be known and may be cited as the 'Foreclosure Rescue Fraud Prevention Act.'

H. B. 1438

1 44-14-631.

2 (a) The General Assembly finds that, when a homeowner transfers title to the home as part  
3 of a foreclosure rescue transaction, the homeowner's intent is merely to provide security  
4 for the loan of money to avoid foreclosure, not to transfer the home to the rescuer. The  
5 purpose of this article is to require that all foreclosure rescue transactions comply with  
6 lending laws; to provide a mechanism to restructure foreclosure rescue transactions and  
7 other equitable mortgages from a transfer of title into a loan to conform with the  
8 homeowner's intentions; to define and forbid certain unfair foreclosure rescue transactions;  
9 to set out factors that put a potential purchaser or lender on notice to inquire as to the rights  
10 of the person in possession of the property; and to set out remedies for a violation of this  
11 article.

12 (b) This article shall be liberally construed to effectuate its purpose, which is to prevent  
13 homeowners who are facing foreclosure from becoming the victims of persons who purport  
14 to help save the home while actually taking title to the home and the homeowner's equity.

15 44-14-632.

16 As used in this article, the term:

17 (1) 'Bona fide purchaser or lender' means anyone acting in good faith who purchases  
18 property, as defined in this Code section, from the grantee for valuable consideration or  
19 makes a mortgage loan to the grantee or a subsequent bona fide purchaser, provided that  
20 he or she had no prior notice of the homeowner's continuing interest, equity, or right to  
21 possess the property; of the facts deeming the deed or conveyance to be an equitable  
22 mortgage; or of any violation of this article. In addition to any other grounds for notice  
23 under state or federal law, a purported bona fide purchaser or lender is on inquiry notice  
24 as to the rights of any person in possession of the property if the purchaser or lender, or  
25 his or her agent, has notice:

26 (A) That the property is or was in foreclosure or default, or was in the previous 12  
27 months; and

28 (B) One or more of the following factors applies:

29 (i) The total consideration paid to the homeowner as described in paragraph (1) of  
30 subsection (f) of Code Section 44-14-635 was less than 82 percent of the fair market  
31 value of the property;

32 (ii) The homeowner intends to remain or has remained in the property after  
33 transferring title;

34 (iii) The grantee who seeks to sell or mortgage the property does not intend to live  
35 or is not living in the property after acquiring title;

(iv) The property was transferred from the homeowner through a quitclaim deed or power of attorney, or without a formal closing;

(v) The grantee seeks a purchase money loan and the purported bona fide lender failed to review the purchase and sale documents governing the grantee's acquisition of the property;

(vi) Encumbrances remain or will remain on the property for which the homeowner could be liable after transfer of title;

(vii) Any payments made upon the transfer of title from the homeowner are characterized as payoffs of liens or other encumbrances not on the title, are due to the homeowner but are assigned to another person, or violate the federal Real Estate Settlements Procedures Act, 12 U.S.C. Section 2601, et seq.;

(viii) The grantee is an inter vivos trust created after the default or foreclosure; or

(ix) The purchaser or lender has any other reason to know that the deed or conveyance is an equitable mortgage or that the homeowner intends to retain title to or possession of the property.

(2) 'Foreclosure' means the process by which a person with a security interest in residential property may foreclose on that security interest.

(3) 'Foreclosure rescue transaction' means a transaction that meets all of the following elements:

(A) Property subject to this article is conveyed by a homeowner to a grantee;

(B) The property is, or was at the time of the foreclosure rescue transaction, in default or foreclosure;

(C) The transaction is designed, intended, or promoted by the parties as a means to avoid or delay actual or anticipated foreclosure proceedings against the property while permitting the homeowner to maintain a legal or equitable interest in the property conveyed, including without limitation a lease interest, a right to possession, an option to acquire the property, or other interest in the property conveyed; and

(D) The grantee enters into the transaction for compensation or gain or for potential or contingent compensation or gain.

A transaction shall not be deemed to be a foreclosure rescue transaction merely because it provides the homeowner up to three months beyond the transfer date to vacate the property, provided that it is clear from all of the circumstances that the homeowner has no expectation of remaining in the property beyond the date to vacate. The term 'foreclosure rescue transaction' includes any contract, agreement, or arrangement, or any term thereof, between a grantee and a homeowner that is incident to a foreclosure rescue transaction. Parol evidence shall be admissible to show that a transaction is a foreclosure rescue transaction.

(4) 'Formal closing' means an in-person, face-to-face meeting with the homeowner conducted by and in the office of a closing agent who is not employed by or affiliated with the grantee to complete final documents incident to the sale or transfer of an interest in property, or the creation of a mortgage or equitable interest in property, during which the homeowner must be presented with a completed copy of any settlement statement required under state or federal law.

(5) 'Grantee' means any person who acquires title to property, as defined in this Code section. The term 'grantee' includes the grantee's representative as defined in this Code section, successor in interest, and any person acting in joint venture or joint enterprise with the grantee. The term 'grantee' does not include a person who acquires title as follows:

(A) By a deed as a result of a foreclosure sale;

(B) By a deed in lieu of foreclosure of any voluntary lien or encumbrance of record other than a lien or encumbrance created in connection with a foreclosure rescue transaction;

(C) At a short sale at which the outstanding obligations against the property, other than obligations created in connection with a foreclosure rescue transaction or equitable mortgage, are greater than the fair market value of the property;

(D) At any sale of property authorized by statute;

(E) By order or judgment of any court; or

(F) As a bona fide purchaser or lender as defined in this Code section.

(6) 'Homeowner' means a natural person who, at the time of the foreclosure rescue transaction or the creation of an equitable mortgage, held title to the property as defined in this Code section.

(7) 'In default' means a property whose owner is more than 90 days delinquent on any loan or debt, including real estate taxes, that is secured by the property.

(8) 'In foreclosure' means a property for which a secured party or taxing authority has initiated a foreclosure.

(9) 'Property' means residential property, whether real or personal, including condominiums, modular homes, or manufactured or mobile homes, consisting of from one to six dwelling units at least one of which is occupied or was occupied prior to the transfer of title to the property by the homeowner as a primary residence.

(10) 'Representative' means a person who in any manner solicits, induces, arranges, or causes a homeowner to transfer title or solicits any member of the homeowner's family or household to induce or cause a homeowner to transfer title to the property pursuant to a foreclosure rescue transaction.

(11) 'Title' means title to or ownership of the property as well as ownership of an interest in the property through a trust document.

44-14-633.

(a) Every deed or other conveyance of an interest in property that purports to be an absolute conveyance of title to property, but was made as security for the performance of an obligation, is deemed to be an equitable mortgage. The obligation may have been created prior to or contemporaneous with the conveyance and need not be the personal liability of any person.

(b) Intent that the deed or other conveyance serve as security may be inferred by a preponderance of the evidence from the totality of the circumstances, including, but not limited to, the following factors:

(1) Statements of the parties;

(2) The presence of a substantial disparity between the value received by the homeowner and the fair market value of the property at the time of the transaction;

(3) The fact that the homeowner retained possession of the property;

(4) The fact that the homeowner reserved or was assured an option to repurchase, retain, or regain the title to the property;

(5) The fact that the homeowner continued to pay real estate taxes on the property;

(6) The fact that the homeowner continued to pay or to be liable for other encumbrances on the property;

(7) The fact that the homeowner made postconveyance improvements to the property; and

(8) The nature of the parties and their relationship prior to and after the conveyance.

(c) Parol evidence shall be admissible to prove that a transaction is an equitable mortgage.

(d) The grantee of a deed or conveyance that is deemed to be an equitable mortgage is deemed to be a mortgagee and may not evict the homeowner nor cause the homeowner to quit involuntarily, other than by foreclosure pursuant to the procedures of state law, nor may the grantee transfer or encumber any interest in the property. Any such transfer or encumbrance shall be void as to anyone but a bona fide purchaser or lender.

(e) A transaction deemed to be an equitable mortgage shall comply with all applicable state and federal laws governing mortgages in property covered by this article.

(f) The provisions of this article are in addition to and do not preclude any rights or remedies relating to equitable mortgages under common law.

1 44-14-634.

2 (a) All foreclosure rescue transactions are conclusively deemed to be equitable mortgages  
3 subject to the provisions of Code Section 44-14-633 without further proof of the elements  
4 contained in that Code section.

5 (b) All deeds or other conveyances transferring title to property from a homeowner  
6 pursuant to a foreclosure rescue transaction shall carry the statement on the face of the deed  
7 or conveyance: 'This property is subject to the Foreclosure Rescue Fraud Prevention Act.'

8 (c) If the grantee records any deed or other conveyance transferring title from the  
9 homeowner pursuant to a foreclosure rescue transaction, the grantee shall also document  
10 and record with the clerk of superior court of the county in which the property is located  
11 any legal or equitable interest that the homeowner retains in the title of the property as  
12 described in paragraph (3) of Code Section 44-14-632. Failure to comply with  
13 subsection (b) of this Code section or this subsection shall not affect the homeowner's  
14 rights and remedies under this article.

15 (d) Unfair foreclosure rescue transactions shall be unlawful, void, and a violation of Part 2  
16 of Article 15 of Chapter 1 of Title 10, the 'Fair Business Practices Act of 1975.' A  
17 foreclosure rescue transaction is unfair if it meets any of the following criteria:

18 (1) The grantee has violated subsections (d) and (e) of Code Section 44-14-633;

19 (2) The grantee fails to pay the homeowner consideration amounting to at least 82  
20 percent of the fair market value of the property. Consideration shall include only those  
21 payments set forth in paragraph (1) of subsection (f) of Code Section 44-14-635;

22 (3) The grantee fails to verify that the homeowner has or is likely to have a reasonable  
23 ability to make any payments required under the foreclosure rescue transaction and to pay  
24 for the subsequent reconveyance back to the homeowner of the full title previously held  
25 by the homeowner based upon consideration of the homeowner's current and expected  
26 income, current obligations, employment status, and other financial resources, other than  
27 the homeowner's equity in the property that is the subject of the transaction, as verified  
28 by documentation of all sources of income and corroborated by independent verification.  
29 There shall be a rebuttable presumption that the grantee has not verified reasonable  
30 payment ability if the grantee has not obtained any documents other than a statement by  
31 the homeowner of assets, liabilities, and income. There is a rebuttable presumption that  
32 a homeowner has a reasonable ability to pay if the grantee demonstrates that, at the time  
33 the foreclosure rescue transaction is consummated, the homeowner's total monthly debts,  
34 including amounts owed under the transaction, do not exceed 50 percent of the  
35 homeowner's monthly gross income; and the grantee follows the residual income  
36 guidelines established in 38 C.F.R. Section 36.4337(e) and VA Form 26-6393 or their  
37 successors;

(4) The homeowner's cost to repurchase or to reacquire title to the property exceeds the consideration paid to the homeowner as set forth in paragraph (1) of subsection (f) of Code Section 44-14-635 by more than 10 percent if the repurchase is exercised within 24 months of the sale, by more than 15 percent if the repurchase is exercised more than 24 but within 36 months of the sale, or by more than 18 percent if the repurchase is exercised more than 36 months after the sale;

(5) The homeowner remains liable for an existing mortgage loan on the property;

(6) The transaction, restructured as an equitable mortgage pursuant to Code Section 44-14-635, is a mortgage referred to in 15 U.S.C. Section 1602(aa), the federal Home Owner's Equity Protection Act and its implementing regulations; or

(7) The foreclosure rescue transaction is otherwise unfair, deceptive, or commercially unreasonable.

(e) The criteria set forth in subsection (d) of this Code section are for the purpose of identifying unfair foreclosure rescue transactions and shall not limit a homeowner's damages against the grantee of an unfair foreclosure rescue transaction.

44-14-635.

(a) A deed or other conveyance that is deemed an equitable mortgage is voidable, except as to a bona fide purchaser or bona fide lender, and may be reformed into an equitable mortgage at any time while the homeowner remains in possession of the property or within three months after the homeowner's loss of possession of the property other than by way of foreclosure by a party other than the grantee.

(b) The homeowner may void a deed or conveyance that is deemed an equitable mortgage pursuant to Code Section 44-14-633 or subsection (a) of Code Section 44-14-634 and demand that the grantee reform the transaction into an equitable mortgage within the time set forth in subsection (a) of this Code section by giving written notice to the grantee or his or her successor in interest. The notice need not take any particular form and, however expressed, is effective if it indicates the intention of the homeowner to retain or regain title to the property.

(c) If the transaction is a foreclosure rescue transaction, the homeowner may record the demand to return title with the clerk of the superior court of the county in which the property is located within the time set forth in subsection (a) of this Code section. In order to be recorded, the notice shall contain the name of the homeowner and the grantee, shall particularly describe the property, and shall cite this article. The demand to return title shall expire and shall have no effect on the rights of a subsequent purchaser or lender if the homeowner has not recorded a lis pendens within 30 days after recording the demand to return title.

(d) Within 20 calendar days after receipt of a demand to return title, the grantee shall reconvey title to the homeowner subject to any equitable mortgage pursuant to subsections (f) and (g) of this Code section but free and clear of any encumbrances other than tax or utility obligations for which the homeowner would have been responsible had title not been transferred.

(e) The homeowner's right to void the deed or other conveyance and demand return of the title and the grantee's obligation to return title shall not be conditioned on the homeowner's repayment of any funds. The recording of the reconveyance may be accompanied by a notice of equitable mortgage asserting a mortgage in the amount due pursuant to subsection (f) of this Code section as follows:

'Notice of Equitable Mortgage: Notice is hereby given that \_\_\_\_\_ hereby asserts an equitable mortgage of \$\_\_\_\_\_ against this property pursuant to the Foreclosure Rescue Fraud Prevention Act.'

If the amount of the equitable mortgage asserted by the grantee does not conform to the requirements of subsection (f) of this Code section, the homeowner may bring an appropriate action to dispute it in court.

(f) If the grantee has paid any money to or on behalf of the homeowner, that money shall be deemed and held an equitable mortgage as follows:

(1) The following shall be deemed to be the principal of the equitable mortgage:

(A) Any money paid to the homeowner;

(B) Any money paid on behalf of the homeowner that reduced the homeowner's legal obligations secured by the property to persons unaffiliated with the grantee; and

(C) Any money paid on behalf of the homeowner to a person unaffiliated with the grantee that was necessary to prevent a foreclosure of the property.

(2) All other fees, charges, interest, or other costs paid by the homeowner as part of the transaction or for which the homeowner is obligated shall be treated as interest and charges on a loan of money secured by a lien on a home under state and federal law. If the equitable mortgage is an unfair foreclosure rescue transaction as defined in this article, all such fees, charges, interest, or other costs are void and shall be refunded by the grantee to the homeowner;

(3) Any payments that the homeowner has made in connection with the transaction deemed to be an equitable mortgage, including, but not limited to, any fees, charges, interest, rent, or other payments, shall be deemed payments on the equitable mortgage for purposes of state and federal law; and

(4) The balance of the equitable mortgage shall be further reduced by any damages or statutory penalties owed by the grantee to the homeowner under this Code section or any other state or federal law governing the transaction.



1 44-14-636.

2 (a) After the grantee has complied with subsection (d) of Code Section 44-14-635, the  
3 homeowner shall either tender the full balance of the equitable mortgage to the grantee  
4 within 120 days or make monthly payments to the grantee for one year in an amount based  
5 upon a 30 year amortization of the amount due pursuant to paragraph (1) of subsection (f)  
6 of Code Section 44-14-635 followed by payment of the remaining balance in full. Until  
7 paid, the balance on the equitable mortgage shall accrue interest at the legal rate prescribed  
8 by subparagraph (a)(1)(A) of Code Section 7-4-2 from the date of the grantee's compliance  
9 with subsection (d) of Code Section 44-14-635. The court shall not shorten the time for  
10 tender or condition the grantee's obligations under subsection (d) of Code Section  
11 44-14-635 on tender by the homeowner.

12 (b) The homeowner's failure to repay the balance of the equitable mortgage shall not  
13 invalidate the voiding of the deed or conveyance nor the reconveyance of the property. If  
14 the homeowner fails to repay the equitable mortgage as set forth in subsection (a) of this  
15 Code section, the grantee may recover the balance of the equitable mortgage by way of  
16 foreclosure pursuant to the procedures of state law.

17 44-14-637.

18 A homeowner may bring an action for the recovery of damages and declaratory or  
19 equitable relief for a violation of this article. The court may award to a prevailing  
20 homeowner actual damages plus reasonable attorney's fees, costs, and expenses. The court  
21 may increase the award to an amount not to exceed three times the homeowner's actual  
22 damages if the court deems such award proper. Any action brought pursuant to this article  
23 shall be commenced within six years after the date of the alleged violation; provided,  
24 however, that a court may grant relief to void or otherwise reverse transfer of title from the  
25 homeowner only if the action is filed within the time set forth in subsection (a) of Code  
26 Section 44-14-635.

27 44-14-638.

28 (a) A court hearing an eviction action against the homeowner shall stay the eviction action,  
29 without the imposition of a bond, if the homeowner has commenced an action asserting a  
30 violation of this article or has made a prima facie case that the evicting plaintiff is merely  
31 a mortgagee of an equitable mortgage and has no right to evict. Any court with jurisdiction  
32 over claims related to the equitable mortgage or foreclosure rescue transaction may issue  
33 a stay of any eviction action on the same grounds.

34 (b) A prima facie case shall consist of a showing that:

1 (1) The homeowner conveyed title to the property while the homeowner was in  
2 foreclosure or default;

3 (2) The homeowner retained possession of the property subsequent to conveying title;  
4 and

5 (3) The homeowner was given or assured an opportunity to retain or regain title to or  
6 possession of the property. Parol evidence shall be admissible to make this showing.

7 (c) The stay shall expire upon the later of:

8 (1) The failure of the homeowner to commence an action in a court of competent  
9 jurisdiction pursuant to this article within 90 days of the issuance of the stay; or

10 (2) The issuance of an order lifting the stay by a court hearing claims related to the  
11 equitable mortgage or foreclosure rescue transaction."

12 **SECTION 2.**

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