

Senate Bill 57

By: Senators Hamrick of the 30th, Harbison of the 15th, Hudgens of the 47th, Tarver of the 22nd, Orrock of the 36th and others

A BILL TO BE ENTITLED

AN ACT

1 To amend provisions of the Official Code of Georgia Annotated relating to mortgages,
 2 foreclosures, and evictions; to amend Chapter 6A of Title 7 of the Official Code of Georgia
 3 Annotated, relating to the "Georgia Fair Lending Act," so as to provide for definitions; to
 4 provide for limitations on home loans; to provide for limitations on high-cost home loans;
 5 to amend Code Section 15-6-77 of the Official Code of Georgia Annotated, relating to fees
 6 to be collected by clerks of the superior courts, so as to provide for fees for filing documents
 7 and other instruments pertaining to a deed under power more than 30 days following the
 8 exercise of a power of sale in a mortgage, security deed, or other lien contract; to amend
 9 Code Section 44-7-55 of the Official Code of Georgia Annotated, relating to the writ of
 10 possession, so as to provide that a tenant with a valid lease can stay in a foreclosed property
 11 for 60 days; to amend Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia
 12 Annotated, relating to foreclosure on mortgages, so as to provide for examples of when an
 13 instrument of conveyance will be an equitable mortgage; to provide for recording of
 14 documents relating to sales under power; to provide for notice to the occupant of the property
 15 of an impending sale of the property; to provide for related matters; to provide for an
 16 effective date; to repeal conflicting laws; and for other purposes.

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

18 **SECTION 1.**

19 Chapter 6A of Title 7 of the Official Code of Georgia Annotated, relating to the "Georgia
 20 Fair Lending Act," is amended in Code Section 7-6A-2, relating to definitions, by revising
 21 subparagraph (G) of paragraph (12) and subparagraph (B) of paragraph (17) and adding
 22 paragraphs (6.1), (10.1), and (16.1), as follows:

23 "(6.1) 'Excluded points and fees' means, in connection with a home loan, 1 percent of the
 24 total loan amount attributable to bona fide fees paid to a federal or state government
 25 agency that insures payment of some portion of a residential mortgage loan plus an
 26 amount not to exceed 2 percent of the total loan amount attributable to bona fide discount
 27 points."

28 "(10.1) 'Non-traditional home loan' means a home loan that allows borrowers to defer
 29 repayment of principal or interest as set forth in the 'Interagency Guidance on
 30 Nontraditional Mortgage Product Risks, 71 C.F.R. Section 58609; provided, however,
 31 an open-ended credit plan shall only be considered a nontraditional mortgage if it is
 32 originated contemporaneously with a nontraditional mortgage or subprime loan."

33 "(G) Points and fees shall not include:

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

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

46 ~~(iii) Bona fide fees paid to a federal or state government agency that insures payment~~
 47 ~~of some portion of a home loan, including, but not limited to, the Federal Housing~~
 48 ~~Administration, the Department of Veterans Affairs, the United States Department of~~
 49 ~~Agriculture for rural development loans, or the Georgia Housing and Finance~~
 50 ~~Authority; and~~

51 ~~(iv) Notwithstanding any provision to the contrary in this chapter, compensation in~~
 52 ~~the form of premiums, commissions, or similar charges paid to a creditor or any~~
 53 ~~affiliate of a creditor for the sale of: (I) title insurance; or (II) insurance against loss~~
 54 ~~of or damage to property or against liability arising out of the ownership or use of~~
 55 ~~property, provided that the conditions in 12 C.F.R. 226.4(d)(2) are met."~~

56 "(16.1) 'Subprime home loan' means a home loan subject to the additional reporting
 57 requirements as set forth in 12 C.F.R. Section 203.4."

58 "(B) The total points and fees payable in connection with the loan, ~~excluding not more~~
 59 ~~than two bona fide discount points less any excluded points and fees, exceed: (i) 5~~
 60 percent of the total loan amount if the total loan amount is \$20,000.00 or more or (ii)
 61 the lesser of 8 percent of the total loan amount or \$1,000.00 if the total loan amount is
 62 less than \$20,000.00."

63

SECTION 2.

64 Said chapter is further amended by revising Code Section 7-6A-3, relating to limitations on
65 home loans, as follows:

66 "7-6A-3.

67 All home loans shall be subject to the following limitations, standards, and prohibited
68 practices:

69 (1) No creditor shall make a home loan that finances, directly or indirectly:

70 (A) Any credit life, credit accident, credit health, credit personal property, or credit
71 loss-of-income insurance, debt suspension coverage, or debt cancellation coverage,
72 whether or not such coverage is insurance under applicable law, that provides for
73 cancellation of all or part of a borrower's liability in the event of loss of life, health,
74 personal property, or income or in the case of accident written in connection with a
75 home loan; or

76 (B) Any life, accident, health, or loss-of-income insurance without regard to the
77 identity of the ultimate beneficiary of such insurance;

78 provided, however, that for the purposes of this Code section, any premiums or charges
79 calculated and paid on a monthly basis shall not be considered financed directly or
80 indirectly by the creditor;

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

84 (3) No creditor or servicer may charge a borrower a late payment charge unless the loan
85 documents specifically authorize the charge, the charge is not imposed unless the
86 payment is past due for ten days or more, and the charge does not exceed 5 percent of the
87 amount of the late payment. A late payment charge ~~may~~ shall not be imposed more than
88 once ~~with respect to~~ on a particular late payment. If a late payment charge is deducted
89 from a payment made on the home loan and such deduction results in a subsequent
90 default on a subsequent payment, no late payment charge ~~may~~ shall be imposed for such
91 default. A lender may apply any payment made in the order of maturity to a prior
92 period's payment due even if the result is late payment charges accruing on subsequent
93 payments due; ~~and~~

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

100 (5) No prepayment fees or penalties shall be charged or collected under the terms of a
101 subprime home loan. Any prepayment penalty in violation of this paragraph shall be
102 unenforceable;

103 (6) No person may provide, and no mortgage broker may receive, directly or indirectly,
104 any compensation that is based on, or varies with, the terms of any subprime home loan;

105 (7)(A) No creditor shall make a home loan to a borrower unless a reasonable creditor
106 would believe at the time the loan is closed that the borrower residing in the home will
107 be able to make the scheduled loan payments, real estate tax payments, and insurance
108 payments associated with the loan.

109 (B) The determination of a borrower's reasonable ability to repay a subprime home
110 loan or nontraditional home loan shall include, without limitation, consideration of: the
111 borrower's income; credit history; current obligations and employment status; the
112 debt-to-income ratio of the borrower's monthly gross income inclusive of all debt
113 payments and total monthly housing payments including taxes, insurance, any required
114 homeowner or condominium fees, and any subordinate mortgages including those that
115 will be made contemporaneously to the same borrower; and other available financial
116 resources other than the borrower's equity in the principal dwelling that secures or
117 would secure the subprime or nontraditional home loan.

118 (C) The calculation assumptions used in evaluating the ability to repay for
119 nontraditional mortgages and subprime loans shall include:

120 (i) The monthly payment amounts based on, at a minimum, the fully indexed rate,
121 assuming a fully amortizing repayment schedule;

122 (ii) Verification of all sources of income by tax returns, payroll receipts, bank
123 records, or other similar reliable documentation. Verification shall be based on the
124 most appropriate form of documentation; and

125 (iii) For products that permit negative amortization, the repayment analysis based
126 upon the initial loan amount plus any balance increase that may accrue from the
127 negative amortization provision; and

128 (8) A mortgage broker, in addition to duties imposed by other statutes or at common law,
129 shall be considered an agent of the borrower in all cases and shall:

130 (A) Act in the borrower's best interest and in the utmost good faith toward the borrower
131 and shall not compromise a borrower's right or interest in favor of another's right or
132 interest, including a right or interest of the mortgage broker;

133 (B) Safeguard and account for any money handled for the borrower;

134 (C) Follow reasonable and lawful instructions from the borrower;

135 (D) Use reasonable skill, care, and diligence;

136 (E) Clearly disclose to the borrower, in a timely fashion, all material information that
 137 might reasonably affect the borrower's rights, interests, or ability to receive the borrower's
 138 intended benefit from the home loan, including total compensation the broker would
 139 receive from any of the loan options the broker presents to the borrower; and
 140 (F) Make reasonable efforts to secure a loan that is in the best interests of the borrower
 141 considering all the circumstances, including the product type, rates, charges, and
 142 repayment terms of the home loan."

143 **SECTION 3.**

144 Said chapter is further amended by repealing Code Section 7-6A-4, relating to flipping a
 145 home loan, and designating it as "Reserved."

146 "7-6A-4.

147 ~~(a) No creditor may knowingly or intentionally engage in the unfair act or practice of~~
 148 ~~'flipping' a home loan. Flipping a home loan is the consummating of a high-cost home loan~~
 149 ~~to a borrower that refinances an existing home loan that was consummated within the prior~~
 150 ~~five years when the new loan does not provide reasonable, tangible net benefit to the~~
 151 ~~borrower considering all of the circumstances including, but not limited to, the terms of~~
 152 ~~both the new and refinanced loans, the cost of the new loan, and the borrower's~~
 153 ~~circumstances.~~

154 ~~(b) The home loan refinancing transaction shall be presumed to be a flipping where a~~
 155 ~~high-cost home loan refinances an existing home loan that was consummated within the~~
 156 ~~prior five years and that is a special mortgage originated, subsidized, or guaranteed by or~~
 157 ~~through a state, tribal, or local government or a nonprofit organization, which either bears~~
 158 ~~a below-market interest rate at the time the loan was originated or has nonstandard payment~~
 159 ~~terms beneficial to the borrower, such as payments that vary with income, are limited to~~
 160 ~~a percentage of income, or where no payments are required under specified conditions and~~
 161 ~~where, as a result of the refinancing, the borrower will lose one or more of the benefits of~~
 162 ~~the special mortgage. Notwithstanding any provision to the contrary contained in this~~
 163 ~~chapter, home loan refinancing transactions of first mortgage loans originated by,~~
 164 ~~purchased by, or assigned to the Georgia Housing and Finance Authority shall not be~~
 165 ~~presumed to be a flipping under this subsection.~~

166 ~~(c) Notwithstanding any provision to the contrary contained in this chapter regarding costs~~
 167 ~~and attorneys' fees, in any action instituted by a borrower who alleges that the defendant~~
 168 ~~violated this Code section, the borrower shall be entitled to costs and attorneys' fees only~~
 169 ~~if the presiding judge, in the judge's discretion, allows reasonable attorneys' fees and costs~~
 170 ~~to the borrower as prevailing party, such fees and costs to be taxed as a part of the court~~
 171 ~~costs and payable by the losing party upon a finding by the presiding judge that the party~~

172 ~~charged with the violation has willfully engaged in the act or practice and there was~~
173 ~~unwarranted refusal by such party to fully resolve the matter which constitutes the basis of~~
174 ~~such action Reserved.~~"

175

176

SECTION 4.

177 Said chapter is further amended in Code Section 7-6A-5, relating to limitations on high-cost
178 home loans, by revising paragraph (1) as follows:

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

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

184 (B) ~~In the second 12 months after the loan closing, more than 1 percent of the amount~~
185 ~~prepaid;"~~

186

SECTION 5.

187 Code Section 15-6-77 of the Official Code of Georgia Annotated, relating to fees to be
188 collected by clerks of the superior courts, is amended by adding new subsections to read as
189 follows:

190 "(p) Additional sums for filing documents and other instruments pertaining to a deed under
191 power more than 30 days following the exercise of a power of sale in a mortgage, security
192 deed, or other lien contract, shall be as follows:

193 (1) Filing a deed under power more than 30 days but less than
194 60 days following the exercise of a power of sale in a mortgage,
195 security deed, or other lien contract \$500.00

196 (2) Filing a deed under power more than 60 days but less than
197 90 days following the exercise of a power of sale in a mortgage,
198 security deed, or other lien contract \$2,000.00

199 (3) Filing a deed under power more than 90 days
200 following the exercise of a power of sale in a mortgage, security deed, or other lien
201 contract \$10,000.00

202 (q) The sums provided for in subsection (p) of this Code section shall be assessed and
203 collected by the clerks of the superior courts and shall be paid monthly:

204 (1) To the governing authority of the county in which such property is located, if such
205 property is located in the unincorporated area of the county, for use in code
206 enforcement, public safety, or community development purposes; or

207 (2) To the governing authority of the municipality in which such property is located,
 208 if such property is located within municipal limits, for use in code enforcement, public
 209 safety, or community development purposes.

210 Such funds shall be paid in addition to rather than in lieu of any other such funds. The
 211 court officer charged with the duty of collecting moneys required by subsection (p) of this
 212 Code section shall receive and distribute the funds collected to the appropriate local
 213 governing authority by the last day of the month after the month in which the funds are
 214 received; provided, however, that the court officer shall be authorized to retain an amount
 215 not to exceed 1 percent of such funds for the purposes of defraying the costs of
 216 administration. The court officer shall submit a monthly report of the collection and
 217 distribution of such funds to the Georgia Superior Court Clerks' Cooperative Authority."

218 **SECTION 6.**

219 Code Section 44-7-55 of the Official Code of Georgia Annotated, relating to the writ of
 220 possession, is amended by revising subsections (a) and (b) as follows:

221 "(a)(1) If, on the trial of the case, the judgment is against the tenant, judgment shall be
 222 entered against the tenant for all rents due and for any other claim relating to the dispute.
 223 The court shall issue a writ of possession, both of execution for the judgment amount and
 224 a writ to be effective at the expiration of seven days after the date such judgment was
 225 entered, except as otherwise provided in Code Section 44-7-56.

226 (2) However, if, on trial of the case, the tenant presents proof that he or she is a tenant
 227 pursuant to a valid lease in which the landlord on the lease was foreclosed upon for the
 228 property at issue, then the writ of possession shall be effective at the expiration of 60 days
 229 so long as the tenant tenders one month's rent to the court registry within seven days of
 230 the trial of the case and tenders a second month's rent within 30 days of the trial.

231 (b) If the judgment is for the tenant, ~~he~~ the tenant shall be entitled to remain in the
 232 premises and the landlord shall be liable for all foreseeable damages shown to have been
 233 caused by ~~his~~ the landlord's wrongful conduct. Any funds remaining in the registry of the
 234 court shall be distributed to the parties in accordance with the judgment of the court. Funds
 235 paid into the registry of the court pursuant to paragraph (2) of subsection (a) of this Code
 236 section shall be distributed to the purchaser of a deed under power in a foreclosure sale
 237 within seven days of being received into the registry of the court."

238 **SECTION 7.**

239 Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to
 240 foreclosure on mortgages, is amended by revising Code Section 44-14-32, relating to the use
 241 of parol evidence to prove an apparent deed is a mortgage, as follows:

242 "44-14-32.

243 ~~A deed or bill of sale which is absolute on its face and which is accompanied with possession~~
 244 ~~of the property shall not be proved, at the instance of the parties, by parol evidence to be a~~
 245 ~~mortgage only unless fraud in its procurement is the issue to be tried. An instrument of~~
 246 ~~conveyance which purports on its face to be a deed, or a series of contracts which may~~
 247 ~~include a deed of conveyance, a lease, or a right of repurchase, shall be held to be an~~
 248 ~~equitable mortgage when the evidence demonstrates that the essential transaction is to~~
 249 ~~transfer an interest in real property as security for the performance of an obligation. The~~
 250 ~~factors relevant to the determination of whether at law and in equity a transaction shall be~~
 251 ~~deemed to be an equitable mortgage include, but are not limited to:~~

252 (1) The adequacy of the consideration;

253 (2) The retention of possession by the prior owner;

254 (3) The representation of all parties by legal counsel;

255 (4) The existence of indebtedness that was in default prior to the transaction;

256 (5) The relative size of the debt in default to the fair market value of the property; and

257 (6) The avoidance of the equity of redemption.

258 If a deed that is absolute on its face, or a series of contracts taken collectively, is found to
 259 be an equitable mortgage, the rights of the transferee shall be as the holder of a mortgage
 260 at law securing only such indebtedness as is judicially determined."

261 **SECTION 8.**

262 Said article is further amended by revising Code Section 44-14-160, relating to recording of
 263 foreclosure and deed under power and notations of sale in records, as follows:

264 "44-14-160.

265 When the holder of a deed to secure debt or a mortgage forecloses the same and sells the
 266 real property thereby secured under the laws of this state governing foreclosures and sales
 267 under power and the purchaser thereof presents to the clerk of the superior court his or her
 268 deed under power to have the same recorded, the clerk shall write in the margin of the page
 269 where the deed to secure debt or mortgage foreclosed upon is recorded the word
 270 'foreclosed' and the deed book and page number on which is recorded the deed under power
 271 conveying the real property; provided, however, that, in counties where the clerk keeps the
 272 records affecting real estate on microfilm, the notation provided for in this Code section
 273 shall be made in the same manner in the index or other place where the clerk records
 274 transfers and cancellations of deeds to secure debt. The purchaser shall present the deed
 275 under power to the clerk of the superior court to have the same recorded no later than 30
 276 days following the date of the exercise of a power of sale in a mortgage, security deed, or

277 other lien contract. Failure to record the deed shall result in a late filing penalty pursuant
 278 to subsection (p) of Code Section 15-6-77."

279 **SECTION 9.**

280 Said article is further amended in Code Section 44-14-162.2, relating to sales made on
 281 foreclosures under power of sale, by adding a new subsection to read as follows:

282 "(c) No later than 30 days before the date of a proposed foreclosure, the secured creditor
 283 shall send by registered or certified mail or statutory overnight delivery, return receipt
 284 requested, addressed to 'Occupant' at the address of the property a notice in substantially
 285 the following form:

286 **NOTICE**

287 An action to foreclose the (mortgage/deed of trust/land installment contract) on the
 288 property located at (insert address) has been filed in the (insert type of court) Court of
 289 (insert county).

290 A foreclosure sale of the property may occur at any time after 30 days from the date of this
 291 notice. You may want to consult with an attorney because you could be evicted, even if
 292 you are a tenant who has fully paid rent and complied with your lease. If, during a
 293 dispossessory proceeding for eviction, you can prove that you have a valid lease to rent this
 294 property, you will have a right to remain on the property for up to 60 days so long as you
 295 pay the monthly rent to the clerk of court. For further information, you can review the file
 296 in the office of the Clerk of the (insert type of court) Court of (insert county)."

297 **SECTION 10.**

298 This Act shall become effective on July 1, 2009.

299 **SECTION 11.**

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