

Senate Bill 123

By: Senators Jackson of the 2nd and James of the 35th

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 44 of the Official Code of Georgia Annotated, relating to property, so as to
2 revise provisions relating to foreclosure of security deeds; to change provisions relating to
3 the transfer of security deeds; to require recording prior to foreclosure; to provide for owners'
4 rights to obtain payoff balances from creditors; to change provisions relating to the timing,
5 contents, and manner of delivery of foreclosure notices; to amend Title 16 of the Official
6 Code of Georgia Annotated, relating to crimes, so as to change provisions relating to the
7 crime of residential mortgage fraud; to provide for the crime of residential foreclosure fraud
8 and prescribe elements of the crime and penalties; to provide for other matters related to the
9 foregoing; to provide for an effective date and applicability; to repeal conflicting laws; and
10 for other purposes.

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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

13 Title 44 of the Official Code of Georgia Annotated, relating to property, is amended by
14 revising Code Section 44-14-64, relating to transfers of deeds to secure debt, as follows:

15 "44-14-64.

16 (a) All transfers of deeds to secure debt shall be in writing; shall be signed by the grantee
17 or, if the deed has been previously transferred, by the last transferee; and shall be witnessed
18 as required for deeds.

19 (b) Transfers of deeds to secure debt may be endorsed upon the original deed or by a
20 separate instrument identifying the transfer and shall be sufficient to transfer the property
21 therein described and the indebtedness therein secured, whether the indebtedness is
22 evidenced by a note or other instrument or is an indebtedness which arises out of the terms
23 or operation of the deed, together with the powers granted without specific mention thereof.

24 (c) Transfer of a deed to secure debt and the indebtedness therein secured may be made
25 in whole or in part; provided, however, that, where the transfer is made in part, that portion

26 of the deed and the indebtedness therein secured to be transferred shall be stated upon a
 27 separate instrument and not upon the original deed.

28 ~~(d) A transfer of a deed to secure debt and the indebtedness therein secured in whole or in
 29 part in accordance with subsections (a) through (c) of this Code section by a financial
 30 institution having deposits insured by an agency of the federal government or a transfer by
 31 a lender who regularly purchases or services residential real estate loans aggregating a
 32 minimum of \$1 million secured by a first deed to secure debt encumbering real estate
 33 improved or to be improved by the construction thereon of one to four family dwelling
 34 units, where the transferor retains the right to service or supervise the servicing of the deed
 35 or interest therein, need not be recorded if:~~

36 ~~(1) The original deed to secure debt has been recorded;~~

37 ~~(2) An agreement in writing exists on or before the date of the transfer between the
 38 transferor and the transferee and sets forth the terms of the transfer and the interests of
 39 the parties thereto; and~~

40 ~~(3) Possession of the deed, the instrument of indebtedness, and the instrument of transfer
 41 is taken by such new transferee for himself or in his representative capacity or by a
 42 representative of such transferee which may include the transferor or any other transferee,
 43 provided that the agreement in paragraph (2) of this subsection provides for such party
 44 to take possession.~~

45 (d) No later than 30 days after the date on which a deed to secure debt is transferred, the
 46 transferee shall notify the property owner in writing by certified mail, statutory overnight
 47 delivery, or personal service of such transfer, the identity, address, telephone number of the
 48 new creditor, the date of transfer, and the name of an agent or representative authorized to
 49 act on behalf of the new creditor.

50 ~~(e) As described in subsection (d) of this Code section, the transfer by a financial
 51 institution or lender of a deed to secure debt and the indebtedness therein secured in whole
 52 or in part without recording in accordance with this Code section shall be effective to
 53 provide the new transferee with priority over all subsequent claims against the deed and the
 54 indebtedness therein secured to the extent of the interest so transferred, and the priority
 55 shall not be lessened by the fact that the transfer is not recorded; provided, however, that
 56 a transfer, satisfaction, cancellation, release, quitclaim deed, or modification executed and
 57 recorded by the holder of record of the deed to secure debt shall be effective to transfer,
 58 satisfy, cancel, release, quitclaim, or modify, as the case may be, all interest of the holder
 59 of record of the deed to secure debt and all interest of all transferees claiming by, through,
 60 or under the holder of record of the deed to secure debt.~~

61 (e) The owner of property subject to a security deed shall be entitled to receive without
 62 charge a payoff balance from the holder of the deed to secure debt by making a written

63 request for such payoff balance. The grantor's request shall include the date or dates for
 64 which the payoff balance is requested and shall be sent to the holder of the deed to secure
 65 debt by certified mail or statutory overnight delivery. The holder of the deed to secure debt
 66 shall provide the payoff balance in writing within 30 days after receiving a written request.
 67 The payoff balance shall be delivered to the requesting owner by certified mail or statutory
 68 overnight delivery. If the request contains information insufficient to allow compliance,
 69 the holder of the deed to secure debt shall in the same manner provide the requesting owner
 70 with a written statement stating specifically what additional information is needed.

71 (f) ~~Reserved. Where the holder of the right to service or supervise the servicing of the~~
 72 ~~transferred deed to secure debt and the indebtedness therein secured is a financial~~
 73 ~~institution or lender as described in subsection (d) of this Code section, it shall have the~~
 74 ~~same rights, responsibilities, and obligations to act in all matters concerning the servicing,~~
 75 ~~administration, and cancellation of the deed and indebtedness as to third parties as if no~~
 76 ~~such transfer had taken place.~~

77 (g) A transfer of a deed to secure debt shall not be recorded unless it includes the mailing
 78 address of the last transferee thereof. Failure to comply with this provision shall not be a
 79 defense to any foreclosure or grounds to set aside any foreclosure of any deed to secure
 80 debt.

81 (h) ~~A grantor or his transferee shall be entitled to receive without charge a payoff balance~~
 82 ~~from the holder of a deed to secure debt on real property by requesting in writing said~~
 83 ~~balance and providing a self-addressed stamped envelope.~~

84 If all assignments of the security deed or mortgage have not been duly recorded with the
 85 land records in the Superior Court of the county in which the property is located, the
 86 trustee, or any substitute trustee, may not proceed with the sale of the property conveyed
 87 to him by the security deed or mortgage until: (1) the recordation of any assignments
 88 necessary to trace the interest of the person who asserts that he is the holder of the
 89 obligation secured by the security deed or mortgage to the original grantee or mortgagee
 90 or, if an intervening assignment cannot be recorded because the assignee no longer exists,
 91 the provision of an affidavit by the party secured to the trustee, or any substitute trustee,
 92 attesting under penalty of perjury that the person is the party secured under the deed of
 93 trust, and (2) the payment of all fees, taxes, and other costs applicable to the recording of
 94 the assignments. The person who asserts that he is the holder of the obligation secured by
 95 the security deed or mortgage is solely responsible for paying all such fees, taxes, and other
 96 costs.

97 (i) Any creditor who fails to comply with any requirement imposed under this Code
 98 section with respect to any person is liable to such person in an amount equal to the sum
 99 of:

- 100 (1) Any actual damage sustained by such person as a result of the failure; or
 101 (2) Exemplary damages in the amount of \$1,000.00 together with a reasonable attorney's
 102 fee as determined by the court."

103 **SECTION 2.**

104 Said title is further amended by revising Code Section 44-14-162.2 relating to notice of
 105 foreclosure, as follows:

106 "44-14-162.2.

107 (a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage,
 108 security deed, or other lien contract shall be given to the debtor by the secured creditor no
 109 later than ~~30~~ 60 days before the date of the proposed foreclosure. Such notice shall be in
 110 writing, shall include the name, address, and telephone number of the individual or entity
 111 who shall have full authority to negotiate, amend, and modify all terms of the mortgage
 112 with the debtor, and shall be sent by registered or certified mail or statutory overnight
 113 delivery, return receipt requested, to the property address or to such other address as the
 114 debtor may designate by written notice to the secured creditor. The notice required by this
 115 Code section shall be deemed given on the official postmark day or day on which it is
 116 received for delivery by a commercial delivery firm. Nothing in this subsection shall be
 117 construed to require a secured creditor to negotiate, amend, or modify the terms of a
 118 mortgage instrument.

119 (b) The notice required by subsection (a) of this Code section shall be given by ~~mailing~~
 120 ~~or~~ delivering to the debtor by certified mail, statutory overnight delivery, or personal
 121 service a copy of the notice of sale to be submitted to the publisher. A copy of the notice
 122 shall also be tacked to the property to be sold.

123 (c) In the case of residential real property, the notice of sale shall include:

124 (1) The name, address, and telephone number of the party secured and any agent of the
 125 party secured that can be contacted for inquiries concerning the notice, including
 126 inquiries regarding alternatives to foreclosure;

127 (2) The amount, if any, which the creditor will accept to cure the default and reinstate
 128 the loan, including all past due payments, penalties, and fees;

129 (3) An explanation of the Georgia foreclosure process and time line, as prescribed by
 130 Georgia Department of Banking and Finance;

131 (4) The date on which the default occurred and the nature of the default; and

132 (5) An abstract of the chain of title under which the foreclosing party holds the security
 133 deed, including deed book and page numbers for all recorded transfers and a copy of any
 134 unrecorded transfers.

135 (d) Any failure to comply with this Code section shall be grounds to set aside the
 136 foreclosure."

137 **SECTION 3.**

138 Title 16 of the Official Code of Georgia Annotated, the "Criminal Code of Georgia," is
 139 amended by revising Article 5 of Chapter 8 as follows:

140 "Article 5

141 16-8-100.

142 This article shall be known and may be cited as the 'Georgia Residential Mortgage Fraud
 143 and Foreclosure Fraud Act.'

144 16-8-101.

145 As used in this article, the term:

146 (1) Foreclosure means any process of judicial foreclosure of a residential mortgage loan
 147 or the exercise of a power of sale under a residential mortgage loan consisting of a
 148 security deed or similar document containing a power of sale.

149 ~~(1)~~(2) 'Mortgage lending process' means the process through which a person seeks or
 150 obtains a residential mortgage loan including, but not limited to, solicitation, application,
 151 or origination, negotiation of terms, third-party provider services, underwriting, signing
 152 and closing, and funding of the loan. Documents involved in the mortgage lending
 153 process include, but are not limited to, uniform residential loan applications or other loan
 154 applications; appraisal reports; HUD-1 settlement statements; supporting personal
 155 documentation for loan applications such as W-2 forms, verifications of income and
 156 employment, bank statements, tax returns, and payroll stubs; and any required
 157 disclosures.

158 ~~(2)~~(3) 'Pattern of residential mortgage fraud' means one or more misstatements,
 159 misrepresentations, or omissions made during the mortgage lending process that involve
 160 two or more residential properties, which have the same or similar intents, results,
 161 accomplices, victims, or methods of commission or otherwise are interrelated by
 162 distinguishing characteristics.

163 ~~(3)~~(4) 'Person' means a natural person, corporation, company, limited liability company,
 164 partnership, trustee, association, or any other entity.

165 ~~(4)~~(5) 'Residential mortgage loan' means a loan or agreement to extend credit made to
 166 a person, which loan is secured by a deed to secure debt, security deed, mortgage,
 167 security interest, deed of trust, or other document representing a security interest or lien

168 upon any interest in one-to-four family residential property located in Georgia including
 169 the renewal or refinancing of any such loan.

170 16-8-102.

171 (a) A person commits the offense of residential mortgage fraud when, with the intent to
 172 defraud, such person:

173 (1) Knowingly makes any deliberate misstatement, misrepresentation, or omission during
 174 the mortgage lending process with the intention that it be relied on by a mortgage lender,
 175 borrower, or any other party to the mortgage lending process;

176 (2) Knowingly uses or facilitates the use of any deliberate misstatement,
 177 misrepresentation, or omission, knowing the same to contain a misstatement,
 178 misrepresentation, or omission, during the mortgage lending process with the intention
 179 that it be relied on by a mortgage lender, borrower, or any other party to the mortgage
 180 lending process;

181 (3) Receives any proceeds or any other funds in connection with a residential mortgage
 182 closing that such person knew resulted from a violation of paragraph (1) or (2) of this
 183 Code section;

184 (4) Conspires to violate any of the provisions of paragraph (1), (2), or (3) of this Code
 185 section; or

186 (5) Files or causes to be filed with the official registrar of deeds of any county of this
 187 state any document such person knows to contain a deliberate misstatement,
 188 misrepresentation, or omission.

189 An offense of residential mortgage fraud shall not be predicated solely upon information
 190 lawfully disclosed under federal disclosure laws, regulations, and interpretations related to
 191 the mortgage lending process.

192 (b) A person commits the offense of residential foreclosure fraud when, with the intent to
 193 defraud, such person:

194 (1) Knowingly makes any deliberate misstatement, misrepresentation, or omission during
 195 the process of foreclosure of a residential mortgage loan with the intention that it be
 196 relied on by any other party to the foreclosure process or by the public in general;

197 (2) Knowingly uses or facilitates the use of any deliberate misstatement,
 198 misrepresentation, or omission, knowing the same to contain a misstatement,
 199 misrepresentation, or omission, during the process of foreclosure of a residential
 200 mortgage loan with the intention that it be relied on by any other party to the foreclosure
 201 process or by the public in general;

202 (3) Receives any proceeds or any other funds in connection with a residential mortgage
 203 loan foreclosure that such person knew resulted from a violation of paragraph (1) or (2)
 204 of this Code section;

205 (4) Conspires to violate any of the provisions of paragraph (1), (2), or (3) of this Code
 206 section; or

207 (5) Files or causes to be filed with the official registrar of deeds of any county of this
 208 state any foreclosure document such person knows to contain a deliberate misstatement,
 209 misrepresentation, or omission.

210 (c) The owner of the residential property subject to foreclosure has a civil cause action
 211 against a person who has violated subsection (b) of this Code section and shall be entitled
 212 to recover from such person compensatory damages in the amount of three times the
 213 damages incurred by the owner as a result of the violation in addition to reasonable
 214 attorney fees and costs for said action."

215 16-8-103.

216 For the purpose of venue under this article, any violation of this article shall be considered
 217 to have been committed:

218 (1) In the county in which the residential property for which a mortgage loan is being
 219 sought is located and in any county in which a residential mortgage loan is foreclosed;

220 (2) In any county in which any act was performed in furtherance of the violation;

221 (3) In any county in which any person alleged to have violated this article had control
 222 or possession of any proceeds of the violation;

223 (4) If a closing occurred, in any county in which the closing occurred; or

224 (5) In any county in which a document containing a deliberate misstatement,
 225 misrepresentation, or omission is filed with the official registrar of deeds.

226 16-8-104.

227 District attorneys and the Attorney General shall have the authority to conduct the criminal
 228 investigation and prosecution of all cases of residential mortgage fraud and residential
 229 mortgage foreclosure fraud under this article or under any other provision of this title.

230 Nothing in this Code section shall be construed to preclude otherwise authorized law
 231 enforcement agencies from conducting investigations of offenses related to residential
 232 mortgage fraud.

233 16-8-105.

234 (a) Any person violating this article shall be guilty of a felony and, upon conviction, shall
235 be punished by imprisonment for not less than one year nor more than ten years, by a fine
236 not to exceed \$5,000.00, or both.

237 (b) If a violation of this article involves engaging or participating in a pattern of residential
238 mortgage fraud or a conspiracy or endeavor to engage or participate in a pattern of
239 residential mortgage fraud, said violation shall be punishable by imprisonment for not less
240 than three years nor more than 20 years, by a fine not to exceed \$100,000.00, or both.

241 (c) Each residential property transaction and each foreclosure subject to a violation of this
242 article shall constitute a separate offense and shall not merge with any other crimes set
243 forth in this title.

244 16-8-106.

245 All real and personal property of every kind used or intended for use in the course of,
246 derived from, or realized through a violation of this article shall be subject to forfeiture to
247 the state. Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7.
248 District attorneys and the Attorney General may commence forfeiture proceedings under
249 this article."

250

SECTION 4.

251 This Act shall become effective upon its approval by the Governor or upon its becoming law
252 without such approval. With respect to foreclosures, this Act shall apply to foreclosures
253 conducted on or after July 1, 2011.

254

SECTION 5.

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