

House Bill 447

By: Representative Mitchell of the 88<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Part 4 of Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia  
2 Annotated, relating to foreclosures on personalty, so as to enact the "Foreclosure Rescue  
3 Fraud Prevention Act"; to provide for definitions; to provide for foreclosure rescue  
4 consultants and firms to be bonded; to provide for the application of certain state consumer  
5 protection laws to foreclosure rescue transactions; to provide that unfair foreclosure rescue  
6 transactions are unlawful and void; to provide for remedies; to provide for related matters;  
7 to provide for an effective date; to repeal conflicting laws; and for other purposes.

8 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

9 **SECTION 1.**

10 Part 4 of Article 7 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated,  
11 relating to foreclosures on personalty is amended by adding a new subpart to read as follows:

12 "Subpart 5

13 44-14-310.

14 This subpart shall be known and may be cited at the 'Foreclosure Rescue Fraud Prevention  
15 Act.'

16 44-14-311.

17 As used in this subpart, the term:

18 (1) 'Bond' means a written instrument, issued or executed by a bonding, surety, or  
19 insurance company licensed to do business in this state, guaranteeing that the person  
20 bonded shall faithfully fulfill the terms of the contract and provided to the commissioner  
21 for the benefit of persons sustaining loss resulting from the failure to fulfill the terms of  
22 the contract.

- 23 (2) 'Commission' means the Georgia Real Estate Commission created in Code Section  
 24 43-40-2.
- 25 (3) 'Commissioner' means the real estate commissioner for the commission.
- 26 (4) 'Foreclosure' means the process by which a person with a security interest in  
 27 residential property may foreclose on that security interest.
- 28 (5) 'Foreclosure related rescue service' means any good or service related to or promising  
 29 assistance in connection with:
- 30 (A) Stopping, avoiding, or delaying foreclosure proceedings concerning residential real  
 31 property; or
- 32 (B) Curing or otherwise addressing a default or failure to timely pay with respect to a  
 33 residential mortgage loan obligation.
- 34 (6) 'Foreclosure rescue consultant' means a person, business, firm, partnership, or  
 35 corporation that directly or indirectly makes a solicitation, representation, or offer to a  
 36 homeowner to provide or perform, in return for payment of money or other valuable  
 37 consideration, foreclosure related rescue services. The term shall not apply to:
- 38 (A) A person acting under the express authority or written approval of the United  
 39 States Department of Housing and Urban Development or other department or agency  
 40 of the United States or this state to provide foreclosure related rescue services;
- 41 (B) A charitable, nonprofit agency or organization, as determined by the United States  
 42 Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code, which  
 43 offers counseling or advice to an owner of residential real property in foreclosure or  
 44 loan default if the agency or organization does not contract for foreclosure related  
 45 rescue services with a for profit lender or person facilitating or engaging in foreclosure  
 46 rescue transactions;
- 47 (C) A person who holds or is owed an obligation secured by a lien or other instrument  
 48 against residential real property in foreclosure if the person performs foreclosure related  
 49 rescue services in connection with this obligation or lien, and the obligation or lien was  
 50 not the result of or part of a proposed foreclosure reconveyance or foreclosure rescue  
 51 transaction;
- 52 (D) A financial institution and any parent or subsidiary of the financial institution or  
 53 of the parent or subsidiary as such terms are defined in Code Section 7-1-4;
- 54 (E) A licensed mortgage broker, mortgage lender, correspondent mortgage lender, or  
 55 real estate agent that provides mortgage counseling or advice regarding residential real  
 56 property in foreclosure, which counseling or advice is provided without payment of  
 57 money or other consideration other than a mortgage brokerage commission; or
- 58 (F) An attorney or a law firm providing legal services or consultation.

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

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

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

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

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

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

79 43-14-312.

80 (a) No person, business, firm, partnership, or corporation shall lawfully engage in this state  
 81 in the business of acting as a foreclosure rescue consultant or providing foreclosure related  
 82 rescue services without first applying for and obtaining a license from the commissioner.  
 83 Any person, business, firm, partnership, or corporation commencing operation as a  
 84 foreclosure rescue consultant or commencing a business offering foreclosure related rescue  
 85 services shall, prior to obtaining a license, post a bond as required by this Code section.  
 86 The provisions of this Code section requiring the posting of a bond shall not apply to any  
 87 authorized agent of a person, firm, or corporation having posted the bond required by this  
 88 Code section when such agent is acting for and on behalf of such principal who has  
 89 obtained such a bond.

90 (b) No person, business, firm, partnership, or corporation shall act as a foreclosure rescue  
 91 consultant or provide foreclosure related rescue services unless such person, business, firm,  
 92 partnership, or corporation has then in force a bond in an amount of \$500,000.00.

93 (c) The commissioner shall be authorized to adopt rules and regulations for the  
 94 implementation and enforcement of the provisions of this Code section. The commissioner

95 may assess an application or license fee for the purpose of covering costs incurred in the  
 96 issuance of licenses required by this Code section.

97 43-14-313.

98 Unfair foreclosure rescue transactions shall be unlawful, void, and a violation of Part 2 of  
 99 Article 15 of Chapter 1 of Title 10, the 'Fair Business Practices Act of 1975.' A foreclosure  
 100 rescue transaction shall be deemed unfair if it meets any of the following criteria:

101 (1) The grantee has violated the provisions of Code Section 43-14-312 by failing to  
 102 obtain bonding;

103 (2) The grantee fails to pay the homeowner consideration amounting to at least 82  
 104 percent of the fair market value of the property; and

105 (3) The grantee fails to verify that the homeowner has or is likely to have a reasonable  
 106 ability to make any payments required under the foreclosure rescue transaction and to pay  
 107 for the subsequent reconveyance back to the homeowner of the full title previously held  
 108 by the homeowner based upon consideration of the homeowner's current and expected  
 109 income, current obligations, employment status, and other financial resources, other than  
 110 the homeowner's equity in the property that is the subject of the transaction, as verified  
 111 by documentation of all sources of income and corroborated by independent verification.

112 There shall be a rebuttable presumption that the grantee has not verified reasonable  
 113 payment ability if the grantee has not obtained any documents other than a statement by  
 114 the homeowner of assets, liabilities, and income. There shall be a rebuttable presumption  
 115 that a homeowner has a reasonable ability to pay if the grantee demonstrates that, at the  
 116 time the foreclosure rescue transaction is consummated, the homeowner's total monthly  
 117 debts, including amounts owed under the transaction, do not exceed 50 percent of the  
 118 homeowner's monthly gross income.

119 44-14-314.

120 A homeowner may bring an action for the recovery of damages and declaratory or  
 121 equitable relief for a violation of this part or on the grounds that an agreement entered into  
 122 with a foreclosure rescue consultant or a business, firm, partnership, or corporation  
 123 providing foreclosure related rescue services was breached by such party or was entered  
 124 into based on duress, fraud, or unfair consumer practices. Any contract entered into in  
 125 violation of this subpart or based on duress, fraud, or unfair consumer practices shall be  
 126 void as a matter of law. The court may award to a prevailing homeowner actual damages  
 127 plus reasonable attorney's fees, costs, and expenses. The court may increase the award to  
 128 an amount not to exceed three times the homeowner's actual damages if the court deems  
 129 such award proper. Any action brought pursuant to this subpart shall be commenced within

130 four years after the date of the alleged violation; provided, however, that a court may grant  
131 relief to void or otherwise reverse transfer of title from the homeowner only if the action  
132 is filed prior to the lawful sale of the real property that is the subject of the action."

133 **SECTION 2.**

134 This Act shall become effective on July 1, 2011.

135 **SECTION 3.**

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