

Senate Bill 365

By: Senator Hamrick of the 30th

A BILL TO BE ENTITLED  
AN ACT

1 To amend Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated,  
2 relating to the regulation of the practice of law, so as to define a term; to provide for a private  
3 cause of action; to amend Chapter 14 of Title 44 of the Official Code of Georgia Annotated,  
4 relating to mortgages, conveyances to secure debt, and liens, so as to change provisions  
5 relating to collected funds; to provide for penalties; to provide for persons borrowing money  
6 for a mortgage on residential real property that includes the possibility of nonjudicial power  
7 of sale upon foreclosure to sign an acknowledgment and waiver of borrower's rights; to  
8 provide for a form; to require an attorney to attest that a borrower knowingly, intentionally,  
9 and willingly executed such form; to provide that mortgages shall be voidable if a waiver of  
10 borrower's rights and attorney attestation is not completed for a residential real property  
11 mortgage; to provide for related matters; to repeal conflicting laws; and for other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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

14 Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated, relating to the  
15 regulation of the practice of law, is amended by revising Code Section 15-19-50, relating to  
16 the definition of the practice of law, as follows:

17 "15-19-50.

18 (a) The practice of law in this state is defined as:

- 19 (1) Representing litigants in court and preparing pleadings and other papers incident to  
20 any action or special proceedings in any court or other judicial body;
- 21 (2) Conveyancing;
- 22 (3) The preparation of legal instruments of all kinds whereby a legal right is secured;
- 23 (4) The rendering of opinions as to the validity or invalidity of titles to real or personal  
24 property;
- 25 (5) The giving of any legal advice; and
- 26 (6) Any action taken for others in any matter connected with the law.

27 (b) As used in this Code section, the term 'conveyancing' means the entire series of events  
 28 through which title to land is conveyed from one party to another."

29 **SECTION 2.**

30 Said article is further amended by adding a new Code section to read as follows:

31 "15-19-59.

32 Any person damaged by a person, firm, or corporation acting in violation of this article  
 33 shall be entitled to maintain a civil action to recover damages and reasonable attorney's  
 34 fees."

35 **SECTION 3.**

36 Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mortgages,  
 37 conveyances to secure debt, and liens, is amended by revising Code Section 44-14-13,  
 38 relating to disbursement of settlement proceeds, delivery of loan funds to settlement agent  
 39 by lender, and damages, as follows:

40 "44-14-13.

41 (a) As used in this Code section, the term:

42 (1) 'Borrower' means the maker of the promissory note evidencing the loan to be  
 43 delivered at the loan closing.

44 (2) 'Collected funds' means funds deposited, finally settled, and credited to the settlement  
 45 agent's escrow account.

46 (3) 'Disbursement of settlement proceeds' means the payment of all proceeds of the  
 47 transaction by the settlement agent to the persons entitled thereto.

48 (4) 'Lender' means any person or entity regularly engaged in making loans secured by  
 49 mortgages or deeds to secure debt on real estate.

50 (5) 'Loan closing' means the time agreed upon by the borrower and the lender when the  
 51 execution and delivery of loan documents by the borrower occurs.

52 (6) 'Loan documents' means the note evidencing the debt due to the lender, the deed to  
 53 secure debt or mortgage securing the debt due to the lender, and any other documents  
 54 required by the lender to be executed by the borrower as part of the transaction.

55 (7) 'Loan funds' means the gross or net proceeds of the loan to be disbursed by or on  
 56 behalf of the lender at the loan closing.

57 (8) 'Party' or 'parties' means the seller, purchaser, borrower, lender, and settlement agent,  
 58 as applicable to the subject transaction.

59 (9) 'Settlement' means the time when the settlement agent has received the duly executed  
 60 deed to secure debt and other loan documents and funds required to carry out the terms  
 61 of the contracts between the parties.

62 (10) 'Settlement agent' means the person responsible for conducting the settlement and  
63 disbursement of the settlement proceeds and includes any individual, corporation,  
64 partnership, or other entity conducting the settlement and disbursement of the loan funds.

65 (b) This Code section applies only to transactions involving purchase money loans made  
66 by a lender, or loans made to refinance, directly or indirectly, a purchase money loan made  
67 by another lender, which loans will be secured by deeds to secure debt or mortgages on real  
68 estate containing not more than four residential dwelling units, whether or not such deeds  
69 to secure debt or mortgages have a first-priority status.

70 (c) Except as otherwise provided in this Code section, a settlement agent shall not cause  
71 a disbursement of settlement proceeds unless such settlement proceeds are collected funds.  
72 A settlement agent may disburse settlement proceeds from its escrow account after receipt  
73 of any of the following negotiable instruments even though the same are not collected  
74 funds:

75 (1) A cashier's check, as defined in subsection (g) of Code Section 11-3-104, from a  
76 federally insured bank, savings bank, savings and loan association, or credit union and  
77 issued by a lender for a closing or loan transaction, provided that such funds are  
78 immediately available and cannot be dishonored or refused when negotiated or presented  
79 for payment;

80 (2) A check drawn on the escrow account of an attorney licensed to practice law in the  
81 State of Georgia or on the escrow account of a real estate broker licensed under Chapter  
82 40 of Title 43, if the settlement agent has reasonable and prudent grounds to believe that  
83 the check will constitute collected funds in the settlement agent's escrow account within  
84 a reasonable period;

85 (3) A check issued by the United States of America or any agency thereof or the State  
86 of Georgia or any agency or political subdivision, as such term is defined in Code Section  
87 50-15-1, of the State of Georgia; or

88 (4) A check or checks in an aggregate amount not exceeding \$5,000.00 per loan closing.  
89 For purposes of this Code section, the instruments described in paragraphs (1) through (4)  
90 of this subsection are negotiable instruments if they are negotiable in accordance with the  
91 provisions of Code Section 11-3-104.

92 (d) The lender shall at or before the loan closing deliver loan funds to the settlement agent  
93 in the form of collected funds or in the form of a negotiable instrument described in  
94 subsection (c) of this Code section; provided, however, that in the case of refinancing, or  
95 any other loan where a right of rescission applies, the lender shall, prior to the disbursement  
96 of the settlement proceeds and no later than 11:00 A.M. eastern standard time or eastern  
97 daylight time, whichever is applicable, of the next business day following the expiration  
98 of the rescission period required under the federal Truth in Lending Act (15 U.S.C. Section

99 1601, et seq.), deliver loan funds to the settlement agent in one or more of the forms set  
100 forth in this Code section.

101 (e) Any party violating this Code section shall be liable to any other party suffering a loss  
102 due to such violation for such other party's actual damages plus reasonable attorneys' fees.  
103 In addition, any party violating this Code section shall pay to the borrower an amount of  
104 money equal to \$1,000.00 or double the amount of interest payable on the loan for the first  
105 60 days after the loan closing, whichever is greater.

106 (f)(1) Collected funds held by a settlement agent, who is not a lender, shall be deposited,  
107 finally settled, and credited to a licensed Georgia attorney's Interest on Lawyers Trust  
108 Account (IOLTA).

109 (2) Any person who violates paragraph (1) of this subsection shall pay to the State Bar  
110 of Georgia's Clients' Security Fund an amount equal to \$1,000.00 or double the amount  
111 of interest payable on the loan for the first 60 days after the loan closing, whichever  
112 amount is greater."

#### 113 SECTION 4.

114 Said chapter is further amended by revising Article 2 of said chapter, relating to mortgages,  
115 by adding a new Code section to read as follows:

116 "44-14-31.1.

117 (a)(1) A mortgage on residential real property which provides for power of sale  
118 foreclosure shall include a waiver of the borrower's rights as provided in paragraph (2)  
119 of this subsection, which shall be executed by the borrower, in which the borrower  
120 knowingly and voluntarily waives his or her rights which he or she may have under the  
121 Fifth and Fourteenth Amendments to the Constitution of the United States, the various  
122 provisions of the Georgia Constitution, or any other applicable law, except as otherwise  
123 provided for under this article, to notice and to judicial hearing prior to the exercise by  
124 the mortgagee of any right or remedy contained in the mortgage or security instrument.

125 (2) The form for the waiver of the borrower's rights shall conform substantially to the  
126 following:

#### 127 ACKNOWLEDGMENT AND WAIVER OF BORROWER'S RIGHTS

128 By execution of this form, borrower expressly:

129 (A) Acknowledges the right to accelerate the debt and the power of attorney given in  
130 the mortgage or security instrument to mortgagee to sell the property by nonjudicial  
131 foreclosure upon default by borrower without any judicial hearing and without any  
132 notice other than such notice as is required to be given pursuant to Article 7 of Chapter  
133 14 of Title 44 of the Official Code of Georgia Annotated;

134 (B) Waives any and all rights which borrower may have under the Fifth and Fourteenth  
135 Amendments to the Constitution of the United States, the various provisions of the  
136 Georgia Constitution, or any other applicable law to notice and to judicial hearing prior  
137 to the exercise by mortgagee of any right or remedy given in the mortgage or security  
138 instrument to mortgagee, except such notice as is specifically required to be provided  
139 in this form;

140 (C) Acknowledges that borrower has read this mortgage or security instrument and  
141 specifically this form and any and all questions regarding the legal effect of the  
142 mortgage or security instrument and its provisions have been explained fully to  
143 borrower and borrower has been afforded an opportunity to consult with counsel of  
144 borrower's choice prior to executing this mortgage or security instrument;

145 (D) Acknowledges that all waiver of the rights of borrower have been made  
146 knowingly, intentionally, and willingly by borrower as part of a bargained for loan  
147 transaction; and

148 (E) Agrees the provisions of this form are incorporated into and made a part of the  
149 mortgage or security instrument.

150 (b) An attorney licensed in this state shall affirm under oath the borrower's knowing,  
151 intentional, and willing execution of the waiver of the borrower's constitutional rights to  
152 notice and judicial hearing prior to any nonjudicial foreclosure. The attorney's name shall  
153 be clearly stated and his or her signature shall include his or her State Bar of Georgia  
154 membership number.

155 (c) Failure to include in a mortgage on residential real property which provides for power  
156 of sale foreclosure either the waiver of borrower's rights or a Georgia attorney's affirmation  
157 of waiver as prescribed by this Code section shall render the mortgage voidable as a lien  
158 on the residential real property."

159 **SECTION 5.**

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