

## **CHAPTER 6A**

### **GEORGIA FAIR LENDING ACT**

Sec.

7-6A-1. Short title.

7-6A-2. Definitions.

7-6A-3. Limitations of home loans.

7-6A-4. "Flipping" a home loan; costs and fees.

7-6A-5. Limitations of high-cost home loans.

7-6A-6. Affirmative claims and defenses against creditors; conditions for relief; actions intending to evade chapter prohibited.

7-6A-7. Violation of chapter.

7-6A-8. Enforcement of chapter; penalties for violations.

7-6A-9. Terms of insurer providing insurance through financed premiums.

7-6A-10. Severability of chapter.

7-6A-11. Municipality or county not able to regulate terms of home loans.

7-6A-12. Application; preemption by federal law.

7-6A-13. Promulgation of rules and regulations; creditor's good faith reliance on guidance from department constituting prima-facie evidence of compliance.

#### **7-6A-1. Short title.**

This chapter shall be known and may be cited as the "Georgia Fair Lending Act."

(Code 1981, § 7-6A-1, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**Cross references.** - Vehicle protection product warranty cannot be condition to car loan, § 33-34A-9.

**Editor's notes.** - Ga. L. 2003, p. 1, § 1, effective March 7, 2003, reenacted this Code section without change.

**Law reviews.** - For survey article on real property law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 397 (2003).

#### **7-6A-2. Definitions.**

As used in this chapter, the term:

(1) "Acceleration" means a demand for immediate repayment of the entire balance of a home loan.

(2) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in 12 U.S.C. Section 1841, et seq.

(3) "Annual percentage rate" means the annual percentage rate for the loan calculated at closing according to the provisions of 15 U.S.C. Section 1606, the regulations promulgated thereunder

by the Board of Governors of the Federal Reserve System, and the Official Staff Commentary on Regulation Z published by the Board of Governors of the Federal Reserve System.

(4) "Bona fide discount points" means loan discount points knowingly paid by the borrower for the express purpose of reducing, and which in fact do result in a bona fide reduction of, the interest rate applicable to the home loan; provided, however, that the undiscounted interest rate for the home loan does not exceed by more than one percentage point the required net yield for a 90 day standard mandatory delivery commitment for a home loan with a reasonably comparable term from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater.

(5) "Borrower" means any natural person obligated to repay the loan including a coborrower or cosigner.

(6) "Creditor" means a person who both regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments and is a person to whom the debt arising from the home loan transaction is initially payable. Creditor shall also mean any person brokering a home loan, which shall include any person who directly or indirectly for compensation solicits, processes, places, or negotiates home loans for others or offers to solicit, process, place, or negotiate home loans for others or who closes home loans which may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans, provided that creditor shall not include a person who is an attorney providing legal services in association with the closing of a home loan. A creditor shall not include: (A) a servicer; (B) an assignee; (C) a purchaser; or (D) any state or local housing finance agency or any other state or local governmental or quasi-governmental entity.

(7) "High-cost home loan" means a home loan in which the terms of the loan meet or exceed one or more of the thresholds as defined in paragraph (17) of this Code section.

(8) "Home loan" means a loan, including an open-end credit plan where the principal amount does not exceed the conforming loan size limit for a single-family dwelling as established by the Federal National Mortgage Association and the loan is secured by a mortgage, security deed, or deed to secure debt on real estate located in this state upon which there is located or there is to be located a structure or structures, including a manufactured home, designed principally for occupancy of from one to four families and which is or will be occupied by a borrower as the borrower's principal dwelling, except that home loan shall not include:

(A) A reverse mortgage transaction;

(B) A loan that provides temporary financing for the acquisition of land by the borrower and initial construction of a borrower's dwelling thereon or the initial construction of a borrower's dwelling on land owned by the borrower;

(C) A bridge loan made to a borrower pending the sale of the borrower's principal dwelling or a temporary loan made to a borrower and secured by the borrower's principal dwelling pending the borrower's obtaining permanent financing for such principal dwelling;

(D) A loan secured by personal property including, but not limited to, a motor vehicle, motor home, boat, or watercraft and also secured by the borrower's principal dwelling to provide the borrower with potential income tax advantages when such personal property is the primary collateral for such loan;

(E) A new loan secured by a borrower's principal dwelling as a result of a lien taken in connection with a debt previously contracted or incurred when the loan documents for such new

loan do not include a mortgage, security deed, or deed to secure debt expressly securing such new loan; or

(F) A loan primarily for business, agricultural, or commercial purposes.

(9) "Make" or "makes" means to originate a loan or to engage in brokering of a home loan including the soliciting, processing, placing, or negotiating of a home loan made or offered by a person brokering a home loan.

(10) "Manufactured home" means a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or 40 body feet or more in length or, when erected on site is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with a permanent foundation when erected on land secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities and includes the plumbing, heating, air-conditioning, and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the secretary of the United States Department of Housing and Urban Development and complies with the standards established under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. Section 5401, et seq. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property on which the manufactured home is located.

(11) "Open-end credit plan" or "open-end loan" means a loan in which (A) a creditor reasonably contemplates repeated transactions; (B) the creditor may impose a finance charge from time to time on an outstanding balance; and (C) the amount of credit that may be extended to the borrower during the term of the loan, up to any limit set by the creditor, is generally made available to the extent that any outstanding balance is repaid.

(12) "Points and fees" means:

(A) All items included in the definition of finance charge in 12 C.F.R. 226.4(a) and 12 C.F.R. 226.4(b) except interest or the time price differential. All items excluded under 12 C.F.R. 226.4(c) are excluded from points and fees, provided that for items under 12 C.F.R. 226.4(c)(7) the creditor does not receive direct or indirect compensation in connection with the charge and the charge is not paid to an affiliate of the creditor;

(B) All compensation paid directly or indirectly to a mortgage broker from any source, including a broker that originates a loan in its own name in a table funded transaction, including but not limited to yield spread premiums, yield differentials, and service release fees, provided that the portion of any yield spread premium that is both disclosed to the borrower in writing and used to pay bona fide and reasonable fees to a person other than the creditor or an affiliate of the creditor for the following purposes is exempt from inclusion in points and fees: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determination; appraisal fees; fees for inspection performed prior to closing; credit reports; surveys; attorneys' fees, if the borrower has the right to select the attorney from an approved list or otherwise; notary fees; escrow charges, so long as not otherwise included under subparagraph (A) of this paragraph; title insurance premiums; and fire and hazard insurance and flood insurance premiums, provided that the conditions set forth in 12 C.F.R. 226.4(d)(2) are met;

(C) Premiums or other charges for credit life, credit accident, credit health, credit personal property, or credit loss-of-income insurance, debt suspension coverage or debt cancellation coverage, whether or not such coverage is insurance under applicable law, that provides for

cancellation of all or part of a borrower's liability in the event of loss of life, health, personal property, or income or in the case of accident written in connection with a home loan and premiums or other charges for life, accident, health, or loss-of-income insurance without regard to the identity of the ultimate beneficiary of such insurance. In determining points and fees for the purposes of this paragraph, premiums or other charges shall only include those payable at or before loan closing and are included whether they are paid in cash or financed and whether the amount represents the entire premium for the coverage or an initial payment;

(D) The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents. Mortgage interest that may accrue in advance of payment in full of a loan made under a local, state, or federal government sponsored mortgage insurance or guaranty program, including a Federal Housing Administration program, shall not be considered to be a prepayment fee or penalty;

(E) All prepayment fees or penalties that are charged to the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor;

(F) For open-end loans, points and fees are calculated in the same manner as for loans other than open-end loans, based on the minimum points and fees that a borrower would be required to pay in order to draw on the open-end loan an amount equal to the total credit line; and

(G) Points and fees shall not include:

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

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

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

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

(13) "Process," "processes," or "processing" means to act as a processor.

(14) "Processor" means any person that prepares paperwork necessary for or associated with the closing of a home loan, including but not limited to promissory notes, disclosures, deeds, and closing statements, provided that processor shall not include persons on the grounds that they are engaged in data processing or statement generation services for home loans.

(15) "Servicer" means the same as set forth in 24 C.F.R. 3500.2.

(16) "Servicing" means the same as set forth in 24 C.F.R. 3500.2.

(17) "Threshold" means:

(A) Without regard to whether the loan transaction is or may be a "residential mortgage transaction" as that term is defined in 12 C.F.R. 226.2(a)(24), the annual percentage rate of the loan is such that it equals or exceeds that set out in Section 152 of the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. Section 1602(aa), and the regulations adopted pursuant thereto by the Federal Reserve Board, including Section 12 C.F.R. 226.32; or

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

(18) "Total loan amount" means the amount calculated as set forth in 12 C.F.R. 226.32(a) and under the Official Staff Commentary of the Board of Governors of the Federal Reserve System. For open-end loans, the total loan amount shall be calculated using the total credit line available under the terms of the home loan as the amount financed.

(Code 1981, § 7-6A-2, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**The 2003 amendment**, effective March 7, 2003, rewrote this Code section.

**Code Commission notes.** - Pursuant to Code Section 28-9-5, in 2002, a comma was inserted following "are excluded from points and fees " in subparagraph (13)(A) (now subparagraph (12)(A)).

### **7-6A-3. Limitations of home loans.**

All home loans shall be subject to the following limitations and prohibited practices:

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

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

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

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

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

(3) No creditor or servicer may charge a borrower a late payment charge unless the loan documents specifically authorize the charge, the charge is not imposed unless the payment is past due for ten days or more, and the charge does not exceed 5 percent of the amount of the late payment. A late payment charge may not be imposed more than once with respect to a particular late payment. If a late payment charge is deducted from a payment made on the home loan and such deduction results in a subsequent default on a subsequent payment, no late payment charge

may be imposed for such default. A lender may apply any payment made in the order of maturity to a prior period's payment due even if the result is late payment charges accruing on subsequent payments due; and

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

(Code 1981, § 7-6A-3, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**The 2003 amendment**, effective March 7, 2003, inserted a comma after "debt suspension coverage" in subparagraph (1)(A), substituted "monthly basis" for "periodic basis that are not added to the principal of the loan" near the end of the undesignated ending paragraph in paragraph (1), and rewrote paragraph (3).

**Code Commission notes.** - Pursuant to Code Section 28-9-5, in 2002, in paragraph (1), a semicolon was substituted for a comma in the introductory paragraph and "Any" was substituted for "any" at the beginning of subparagraphs (A) and (B).

#### **7-6A-4. "Flipping" a home loan; costs and fees.**

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

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

(c) Notwithstanding any provision to the contrary contained in this chapter regarding costs and attorneys' fees, in any action instituted by a borrower who alleges that the defendant violated this Code section, the borrower shall be entitled to costs and attorneys' fees only if the presiding judge, in the judge's discretion, allows reasonable attorneys' fees and costs to the borrower as prevailing party, such fees and costs to be taxed as a part of the court costs and payable by the losing party upon a finding by the presiding judge that the party charged with the violation has willfully engaged in the act or practice and there was unwarranted refusal by such party to fully

resolve the matter which constitutes the basis of such action.

(Code 1981, § 7-6A-4, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1; Ga. L. 2004, p. 631, § 7.)

**The 2003 amendment**, effective March 7, 2003, designated the existing provisions as subsections (a) and (b); in subsection (a), inserted "knowingly or intentionally" in the first sentence, in the second sentence, substituted "a home loan is the consummating of a high cost" for "occurs when a creditor makes a covered", and substituted "circumstances including, but not limited to," for "circumstances, including", and deleted "In addition, the" at the end; in subsection (b), in the first sentence, added "The" at the beginning and substituted "high-cost home" for "covered home" near the middle, and added the last sentence; and added subsection (c).

**The 2004 amendment**, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (a).

## JUDICIAL DECISIONS

**Preemption.** - Debtors' claims that a bank violated O.C.G.A. §§ 7-6A-4 and 7-6A-5 were preempted by federal law given an order issued by the Office of the Comptroller of the Currency clearly stating that the provisions of the Georgia Fair Lending Act, O.C.G.A. § 7-6A-1 et seq., affecting national banks' real estate lending were either preempted by federal law or were moot as a result of the preemption. *Salvador v. Bank of Am., N.A.* (In re *Salvador*), 456 Bankr. 610 (Bankr. M.D. Ga. 2011).

### **7-6A-5. Limitations of high-cost home loans.**

High-cost home loans shall be subject to the following limitations and prohibited practices:

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

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

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

(2) A high-cost home loan shall not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower;

(3) A high-cost home loan shall not include payment terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due;

(4) A high-cost home loan shall not contain a provision that increases the interest rate after default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided that the change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness;

(5) A high-cost home loan shall not include terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower;

- (6) Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a high-cost home loan agreement that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring the claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void;
- (7) A creditor shall not make a high-cost home loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development or the Georgia Housing and Finance Authority that the borrower has received counseling on the advisability of the loan transaction. No creditor, servicer, or its institution shall be required to contribute to the funding of any nonprofit organization that provides counseling required pursuant to this paragraph;
- (8) A creditor shall not make a high-cost home loan unless a reasonable creditor would believe at the time the loan is consummated that the borrower residing in the home will be able to make the scheduled payments associated with the loan based upon a consideration of his or her current and expected income, current obligations, employment status, and other financial resources, other than the borrower's equity in the collateral that secures repayment of the loan. There is a rebuttable presumption that the borrower residing in the home is able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, said borrower's total monthly debts, including amounts under the loan, do not exceed 50 percent of said borrower's monthly gross income as verified by tax returns, payroll receipts, and other third-party income verification;
- (9) A creditor or servicer shall not pay a contractor under a home improvement contract from the proceeds of a high-cost home loan unless:
- (A) The creditor or servicer is presented with an affidavit of the contractor that the work has been completed, which affidavit meets the requirements of Code Section 44-14-361.2; and
- (B) The proceeds are disbursed in an instrument payable to the borrower or jointly to the borrower and the contractor or, at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the drafter of the instrument, and the contractor prior to the disbursement;
- (10) A creditor or servicer shall not charge a borrower any fees or other charges to modify, renew, extend, or amend a high-cost home loan or to defer any payment due under the terms of a high-cost home loan;
- (11) A creditor who makes a high-cost home loan and who has the legal right to foreclose shall provide notice of the intent to foreclose to the borrower in writing by certified mail, return receipt requested, to the address of the borrower last known to the creditor. Such notice shall be sent to the borrower at least 14 days prior to the publication of the legal advertisement required by Code Section 44-14-162;
- (12) If a creditor or servicer asserts that grounds for acceleration of a high-cost home loan exist and requires the payment in full of all sums secured by the security instrument, the borrower or anyone authorized to act on the borrower's behalf shall have the right at any time, up to the time title is transferred by means of foreclosure by judicial proceeding and sale or otherwise, to cure the default and reinstate the high-cost home loan by tendering the total amount of principal, interest, late fees, and escrow deposits in arrears, not including any acceleration. Cure of default as provided in this paragraph shall reinstate the borrower to the same position as if the default

had not occurred and shall nullify as of the date of the cure any acceleration of any obligation under the security instrument or note arising from the default;

(13) (A) To cure a default under this Code section, a borrower shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default as provided for in this Code section, other than the fees specifically allowed by this Code section. The borrower shall not be liable for any attorneys' fees relating to the borrower's default that are incurred by the creditor or servicer prior to or during the 30 day period set forth in this paragraph, nor for any such fees in excess of \$100.00 that are incurred by the creditor or servicer after the expiration of the 30 day period but prior to the time the creditor or servicer files a foreclosure action or takes other action to seize or transfer ownership of the home. After the creditor or servicer files a foreclosure action or takes other action to seize or transfer ownership of the home, the borrower shall only be liable for attorneys' fees that are reasonable and actually incurred by the creditor or servicer based on a reasonable hourly rate and a reasonable number of hours plus any other reasonable and necessary expenses incurred by the creditor or servicer.

(B) If a default is cured prior to the initiation of any action to foreclose or to seize or transfer a home, the creditor or servicer shall not institute the foreclosure proceeding or other action for that default. If a default is cured after the initiation of any action to foreclose, the creditor or servicer shall take such steps as are necessary to terminate the foreclosure proceeding or other action.

(C) Before any action is filed to foreclose upon the home or other action is taken to seize or transfer ownership of a home, a notice of the right to cure the default must be delivered to the borrower informing the borrower of the following:

(i) The nature of the default claimed on the high-cost home loan and of the borrower's right to cure the default by paying the sum of money required to cure the default. If the amount necessary to cure the default will change during the 30 day period after the effective date of the notice due to the application of a daily interest rate or the addition of late fees as allowed by this chapter, the notice shall give sufficient information to enable the borrower to calculate the amount at any point during the 30 day period;

(ii) The date by which the borrower shall cure the default to avoid acceleration and initiation of foreclosure or other action to seize the home which date shall not be less than 30 days after the date the notice is effective and the name and address and phone number of a person to whom the payment or tender shall be made;

(iii) That, if the borrower does not cure the default by the date specified, the creditor or servicer may take steps to terminate the borrower's ownership in the property by commencing a foreclosure proceeding or other action to seize the home; and

(iv) The name and address of the creditor or servicer and the telephone number of a representative of the creditor or servicer whom the borrower may contact if the borrower disagrees with the creditor's or servicer's assertion that a default has occurred or the correctness of the creditor's or servicer's calculation of the amount required to cure the default;

(14) A high-cost home loan shall not contain nor shall a creditor or servicer enforce a provision that permits a creditor or servicer, in its sole discretion, to accelerate the indebtedness. This paragraph does not prohibit acceleration of the loan in good faith due to the borrower's failure to abide by the material terms of the loan; and

(15) All high-cost home loan documents that create a debt or pledge property as collateral shall contain the following notice on the first page in a conspicuous manner: "Notice: This is a mortgage subject to special rules under the 'Georgia Fair Lending Act.' Purchasers or assignees

of this mortgage may be liable for all claims and defenses by the borrower with respect to the mortgage."

(Code 1981, § 7-6A-5, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1; Ga. L. 2004, p. 631, § 7.)

**The 2003 amendment**, effective March 7, 2003, substituted "attorneys' fees" for "attorney fees" in the second and third sentences of subparagraph (13)(A).

**The 2004 amendment**, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, substituted "provided that the change" for "provided the change" near the middle of the second sentence of paragraph (4).

## JUDICIAL DECISIONS

**Preemption.** - Debtors' claims that a bank violated O.C.G.A. §§ 7-6A-4 and 7-6A-5 were preempted by federal law given an order issued by the Office of the Comptroller of the Currency clearly stating that the provisions of the Georgia Fair Lending Act, O.C.G.A. § 7-6A-1 et seq., affecting national banks' real estate lending were either preempted by federal law or were moot as a result of the preemption. *Salvador v. Bank of Am., N.A.* (In re Salvador), 456 Bankr. 610 (Bankr. M.D. Ga. 2011).

### **7-6A-6. Affirmative claims and defenses against creditors; conditions for relief; actions intending to evade chapter prohibited.**

(a) Notwithstanding any other provision of law, where a home loan was made, arranged, or assigned by a person selling home improvements to the dwelling of a borrower, the borrower may assert against the creditor all affirmative claims and any defenses that the borrower may have against the seller or home improvement contractor, provided that this subsection shall not apply to loans other than high-cost home loans unless applicable law requires a certificate of occupancy, inspection, or completion to be obtained and said certificate is not obtained.

(b) Notwithstanding any other provision of law, any person who purchases, is assigned, or otherwise becomes a holder of a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the high-cost home loan that the borrower could assert against the creditor of the high-cost home loan, unless the purchaser or holder demonstrates, by a preponderance of the evidence, that the purchaser or holder exercised reasonable due diligence at the time of purchase of the home loans, or within a reasonable time thereafter, intended to prevent the purchaser or holder from purchasing or taking assignment of high-cost home loans.

(c) The relief granted in an action pursuant to subsection (b) of this Code section:

(1) May be asserted by the borrower only in an individual action and shall not exceed the sum of the amount of all remaining indebtedness of the borrower under such loan and reasonable attorneys' fees in such individual action;

(2) May be sought by the borrower of a high-cost home loan after notice of acceleration or foreclosure of the high-cost home loan, asserting a violation of Code Section 7-6A-4 or 7-6A-5 in an individual action to enjoin foreclosure or to preserve or obtain possession of the home secured by the high-cost home loan; and

(3) Must be brought within one year from the date of the occurrence of the violation; provided, however, a borrower shall not be barred from asserting a violation of Code Section 7-6A-5 in an action to collect the debt which was brought more than one year from the date of the occurrence of such a violation as a matter of defense by recoupment or set-off in such action except as otherwise provided by law.

(d) It shall be a violation of this chapter for any person to attempt in bad faith to avoid the application of this chapter by dividing any loan transaction into separate parts or structuring a home loan transaction as an open-end loan for the purpose of evading the provisions of this chapter when the loan would have been a high-cost home loan if the loan had been structured as a closed-end loan or engaging in any other subterfuge with the intent of evading any provision of this chapter.

(Code 1981, § 7-6A-6, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**The 2003 amendment**, effective March 7, 2003, deleted ", any assignee, or holder in any capacity" following "against the creditor" in the middle of subsection (a); and rewrote subsections (b) and (c).

#### **7-6A-7. Violation of chapter.**

(a) Any creditor found by a preponderance of the evidence to have violated this chapter shall be liable to the borrower for the following:

(1) Actual damages, including consequential and incidental damages;

(2) Statutory damages equal to the recovery of two times the interest paid under the loan and forfeiture of interest under the loan for any violation of paragraph (1) or (2) of Code Section 7-6A-3, any violation of Code Section 7-6A-4, or any violation of Code Section 7-6A-5;

(3) Punitive damages subject to Code Section 51-12-5.1; and

(4) Costs and reasonable attorneys' fees.

(b) A borrower may be granted injunctive, declaratory, and such other equitable relief as the court deems appropriate in an action to enforce compliance with this chapter including, but not limited to, the following:

(1) Notwithstanding any other provision of law, a court shall have the discretion not to require a borrower of a high-cost home loan seeking injunctive or other equitable relief under the provisions of this chapter to make a tender upon a showing that the borrower has a reasonable likelihood of being successful on the merits. When tender is not required by the court, upon application to the court by the creditor, the court shall require the borrower to pay into the registry of the court all regularly scheduled home loan payments including property taxes and homeowners hazard insurance premiums if required by escrow agreement which are the responsibility of the borrower payable to the creditor or servicer under the terms of the home loan agreement which become due after the filing of the legal action, said home loan payments to be paid as such become due, and such other expenses provided under the home loan agreement as the court may deem just, provided that regularly scheduled payments shall not include any payments allegedly due under any acceleration provision of the home loan. If the creditor or servicer and the borrower disagree as to the amount of the home loan payments due, either or both of them may submit to the court any written home loan agreement for the purpose of establishing the amount of home loan payments to be paid into the registry of the court;

(2) If the borrower should fail to make any regularly scheduled payment under a high-cost home loan as it becomes due after the filing of this action, upon application to the court by the creditor or servicer, the court may issue an order denying the borrower's petition for injunctive or other equitable relief, and vacating any decree for injunctive or equitable relief previously entered by the court; and

(3) The court shall order the clerk of the court to pay to the creditor or any person the creditor may designate the payments claimed under the high-cost home loan agreement paid into the registry of the court as said payments are made; provided, however, that, if the borrower claims that he or she is entitled to all or any part of the funds and such claim is an issue of controversy in the litigation, the court shall order the clerk to pay to the creditor or any person the creditor may designate without delay only that portion of the funds to which the borrower has made no claim in the proceedings or may make such other order as is appropriate under the circumstances. That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court. If either party appeals the decision of the trial court, that part of the funds equal to any sums found by the trial court to be due from the creditor or servicer to the borrower shall remain in the registry of the court until a final determination of the issues. The court shall order the clerk to pay to the creditor or any person the creditor may designate without delay the remaining funds in court and all payments of future home loan payments made into court pursuant to paragraph (1) of this subsection unless the borrower can show good cause that some or all of such payments should remain in court pending a final determination of the issues.

(c) The remedies provided in this chapter shall be cumulative.

(d) Any violation of this chapter may be enforced pursuant to Code Section 9-11-23.

(e) The right of rescission granted and defined under 15 U.S.C. Section 1601, et seq., and a right of rescission for any violation of paragraph (1) or (2) of Code Section 7-6A-3, any violation of Code Section 7-6A-4, or any violation of Code Section 7-6A-5 shall be available to a borrower of a high-cost home loan at any time during the term of the loan not to exceed a period of five years after the consummation of the loan.

(f) The brokering of a home loan by a broker registered or licensed or required to be registered or licensed as a broker under the laws of this state or any other jurisdiction that violates the provisions of this chapter shall constitute a violation of such provisions.

(g) Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a home loan agreement that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring the claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

(h) An action under this chapter may be brought within five years after the date of the first scheduled payment by the borrower under the home loan.

(i) The remedies provided in this chapter are not intended to be the exclusive remedies available to a borrower nor must the borrower exhaust any administrative remedies provided under this chapter or any other applicable law before proceeding under this Code section.

(Code 1981, § 7-6A-7, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**The 2003 amendment**, effective March 7, 2003, in subsection (a), substituted "creditor" for "person" at the beginning and substituted "attorneys' fees" for "attorney fees" at the end of paragraph (a)(4); in

subsection (b), substituted "high-cost home" for "covered home" in the middle of the first sentence of paragraph (b)(1), inserted "under a high-cost home loan" near the beginning of paragraph (b)(2), and inserted "high-cost" near the middle of the first sentence of paragraph (b)(3); inserted "by a broker registered or licensed or required to be registered or licensed as a broker under the laws of this state or any other jurisdiction" in the middle of subsection (f); and, in subsection (h), deleted "four years of the date of the last payment made or" following "within" and deleted ", whichever is earlier," following "scheduled payment" near the end.

#### **7-6A-8. Enforcement of chapter; penalties for violations.**

(a) The Attorney General, the district attorneys of this state, and the commissioner of banking and finance shall have jurisdiction to enforce this chapter through their general regulatory powers and through civil process. The Commissioner of Insurance shall have like authority to enforce paragraph (1) of Code Section 7-6A-3.

(b) Any person, including members, officers, and directors of a creditor, who knowingly violates this chapter is guilty of a misdemeanor and, on conviction, is subject to a fine not exceeding \$1,000.00 for each violation or to imprisonment not exceeding six months, or both.

(Code 1981, § 7-6A-8, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**Editor's notes.** - Ga. L. 2003, p. 1, § 1, effective March 7, 2003, reenacted this Code section without change.

#### **OPINIONS OF THE ATTORNEY GENERAL**

**Offenses arising under O.C.G.A. ch. 7-6A and** designated as misdemeanors under O.C.G.A. § 7-6A-8 require fingerprinting. 2002 Op. Att'y Gen. No. 2002-7.

#### **7-6A-9. Terms of insurer providing insurance through financed premiums.**

A creditor or servicer or an insurer providing insurance through premiums financed by a creditor of a home loan who, when acting in good faith, fails to comply with the provisions of this chapter will not be deemed to have violated this chapter if the creditor or servicer or insurer providing insurance through premiums financed by a creditor establishes that either:

(1) Within 90 days of the loan closing and prior to receiving any notice from the borrower of the compliance failure, (A) the creditor or servicer has offered appropriate restitution to the borrower and appropriate adjustments are made to the loan or (B) to correct a compliance failure of paragraph (1) of Code Section 7-6A-3, an insurer providing insurance through premiums financed by a creditor may provide appropriate restitution to the borrower by returning premiums paid plus interest charged on the premiums to the borrower upon receipt of notice of the compliance failure; or

(2) Within 90 days of discovering a compliance failure and prior to receiving any notice of the compliance failure and the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, the

borrower is notified of the compliance failure, appropriate restitution is offered to the borrower, and appropriate adjustments are made to the loan. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this chapter is not a bona fide error.

(Code 1981, § 7-6A-9, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**Editor's notes.** - Ga. L. 2003, p. 1, § 1, effective March 7, 2003, reenacted this Code section without change.

#### **7-6A-10. Severability of chapter.**

The provisions of this chapter shall be severable and, if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this chapter shall not be affected thereby. If any provision of this chapter is declared to be inapplicable to any category of persons or any specific category, type, or kind of loan or portions thereof, the provisions of this chapter shall nonetheless continue to apply with respect to all other persons and all other loans or portions thereof.

(Code 1981, § 7-6A-10, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**Editor's notes.** - Ga. L. 2003, p. 1, § 1, effective March 7, 2003, reenacted this Code section without change.

#### **7-6A-11. Municipality or county not able to regulate terms of home loans.**

No municipality or county shall enact any ordinance or law that regulates the terms of home loans or that makes the eligibility of any person or entity to do business with the municipality or county dependent upon the terms of home loans originated or serviced by such person or entity.

(Code 1981, § 7-6A-11, enacted by Ga. L. 2002, p. 455, § 1; Ga. L. 2003, p. 1, § 1.)

**Editor's notes.** - Ga. L. 2003, p. 1, § 1, effective March 7, 2003, reenacted this Code section without change.

#### **7-6A-12. Application; preemption by federal law.**

The provisions of this chapter shall not apply to any bank, trust company, savings and loan, savings bank, credit union, or subsidiary thereof, respectively, that is chartered under the laws of this state or any other state only to the extent federal law precludes or preempts or has been determined to preclude or preempt the application of the provisions of this chapter to any federally chartered bank, trust company, savings and loan, savings bank, or credit union, respectively, and such federal preclusion or preemption shall apply only to the same type of state chartered entity as the federally chartered entity affected; provided, however, the provisions of

this chapter, including subsection (f) of Code Section 7-6A-7, shall be applicable to an independent mortgage broker for any loan originated or brokered by the broker that is initially funded by any state or federally chartered bank, trust company, savings and loan, savings bank, or credit union.

(Code 1981, § 7-6A-12, enacted by Ga. L. 2003, p. 1, § 1.)

**Effective date.** - This Code section became effective March 7, 2003.

**Law reviews.** - For note on the 2003 enactment of this Code section, see 20 Ga. St. U. L. Rev. 1 (2003).

**7-6A-13. Promulgation of rules and regulations; creditor's good faith reliance on guidance from department constituting prima-facie evidence of compliance.**

Without limitations on the power conferred by Chapter 1 of this title, the Department of Banking and Finance shall have the authority to promulgate rules and regulations not inconsistent with law for the enforcement of this chapter to effectuate the purposes of this chapter and to clarify the meaning of terms. In complying with this chapter, a creditor's good faith reliance on any formal or informal written guidance of the Department of Banking and Finance previously made available to the general public shall constitute prima-facie evidence of compliance with this chapter. The provisions of this Code section shall apply even if, following the reliance, such guidance is amended, rescinded, or determined by any judicial or other authority to be invalid.

(Code 1981, § 7-6A-13, enacted by Ga. L. 2003, p. 1, § 1.)

**Effective date.** - This Code section became effective March 7, 2003.

**Law reviews.** - For note on the 2003 enactment of this Code section, see 20 Ga. St. U. L. Rev. 1 (2003).

