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## BANKING AND FINANCE Georgia Fair Lending Act: Amend the Georgia Fair Lending Act; Provide for Changes in Limitations on Late Payment Charges; Clarify that Certain Home Loan Refinancing Shall Not Be Presumed to Be a Flipping; Specify When and Against Whom a Borrower May Assert Claims and Defenses for Violations of the Act Under Certain Circumstances; Provide the Department of Banking and Finance with Express Authority to Promulgate Rules and Regulations; Provide for Good Faith Reliance on Guidance from the Department of Banking and Finance

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## BANKING AND FINANCE

***Georgia Fair Lending Act: Amend the Georgia Fair Lending Act; Provide for Changes in Limitations on Late Payment Charges; Clarify that Certain Home Loan Refinancing Shall Not Be Presumed to Be a Flipping; Specify When and Against Whom a Borrower May Assert Claims and Defenses for Violations of the Act; Provide for Limits on Liability for Violations of the Act Under Certain Circumstances; Provide the Department of Banking and Finance with Express Authority to Promulgate Rules and Regulations; Provide for Good Faith Reliance on Guidance from the Department of Banking and Finance***

CODE SECTIONS:	O.C.G.A. §§ 7-6A-1 to -11 (amended), -12, -13 (new)
BILL NUMBER:	SB 53
ACT NUMBER:	1
GEORGIA LAWS:	2003 Ga. Laws 1
SUMMARY:	The "Act amends the 'Georgia Fair Lending Act' by revising certain definitions including 'annual percentage rate,' 'creditor,' 'home loan,' and 'points and fees.' The Act changes the limitations on late payment charges, clarifies when a home loan refinancing transaction shall be presumed to be a flipping, and provides for the awarding of costs and attorneys' fees for willfully engaging in flipping or an unwarranted refusal to resolve the matter. The Act provides for certain limits on liability for persons who purchase, are assigned, or become a holder of a high-cost home loan. The Act further provides for exemptions for state banks and other financial institutions to the same extent federal law preempt[s] federally chartered

banks and financial institutions and makes the Act applicable to independent mortgage brokers who originate or broker a loan initially funded by state or federally chartered bank, trust company, savings and loan, or credit union [sic]. The Act authorizes the Department of Banking and Finance to promulgate rules and regulations to enforce the Act and provides that a creditor's good faith reliance on written guidance by the department shall constitute prima-facie [sic] evidence of compliance with the Act."<sup>1</sup>

EFFECTIVE DATE: March 7, 2003

### *History*

The Georgia General Assembly passed the Georgia Fair Lending Act ("GAFLA") during the 2002 session.<sup>2</sup> GAFLA went into effect on October 1, 2002.<sup>3</sup> Members of the General Assembly designed GAFLA to protect consumers from certain abuses in the lending industry, commonly referred to as "predatory lending" practices.<sup>4</sup> The most common abuses are (1) loan flipping (repeated refinancing that "strip" a borrower's equity), (2) charging excessive or hidden fees, (3) making economically unjustifiable loans to those who cannot repay, and (4) "us[ing] deceptive or high-pressure sales tactics."<sup>5</sup> Frequently, those lenders engaging in predatory lending practices

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1. LEGISLATIVE SERVICES COMMITTEE, SUMMARY OF GENERAL STATUTES ENACTED AT THE 2003 SESSION OF THE GENERAL ASSEMBLY OF GEORGIA 3.

2. See 2002 Ga. Laws 455 (formerly found at O.C.G.A. §§ 7-6A-1 to -11 (2002)).

3. See *id.*

4. See *id.*; Henry Unger & Robert Luke, *Lending Law Overhaul: Georgia's Action on Legislation Watched Closely*, ATLANTA J. CONST., Mar. 2, 2003, at Q1, available at 2003 WL 13243257.

5. See Staff, *Predatory Loans Prey Upon the Naïve*, ATLANTA J. CONST., Mar. 2, 2003, at Q1, available at 2003 WL 13243260.

target vulnerable and less-sophisticated consumers, such as the elderly and the poor.<sup>6</sup>

Some hailed GAFLA as the toughest predatory lending law in the nation and as a “model for other states.”<sup>7</sup> While consumer advocacy groups such as the American Association of Retired Persons (“AARP”) were pleased with GAFLA, members of the banking and lending industry feared that the law was too stringent.<sup>8</sup> Some even described GAFLA as “draconian”<sup>9</sup> and “very dangerous.”<sup>10</sup> GAFLA provisions that worried lenders most were those assigning unlimited liability for GAFLA violations “to every company in the mortgage process, from the original lender through investors buying bundled mortgages.”<sup>11</sup> Under the law, borrowers could sue all parties to their loan transaction and could even “exact punitive damages from the investors in the securities backed by the loans.”<sup>12</sup> Several mortgage associations prepared a report that summarized the problems associated with extending liability into the secondary market and why they felt additional legislative action was necessary:

Because the mortgage lending business is national in scope, the secondary market is integral to the process. The secondary market purchases loans made by lenders and securitizes these loans for investors. Without the secondary market, the volume of capital available for mortgage lending in Georgia would be quite limited. Further, without the secondary market, traditional mortgage lending would not exist—the risk to make long-term

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6. See Thomas A. Fogarty, *Greenspan Condemns Predatory Home Loans*, USA TODAY, Mar. 23, 2000, at B1, available at 2000 WL 5772975; Unger & Luke, *supra* note 4.

7. See Don Reichardt, *Back in Business: Gov. Sonny Perdue Has Signed a New Predatory Lending Act*, ATLANTA BUS. CHRON., Mar. 17, 2003, available at <http://atlanta.bizjournals.com/atlanta/stories/2003/03/17/focus1.html>; Unger & Luke, *supra* note 4.

8. See Reichardt, *supra* note 7.

9. Erick Bergquist, *Ga. Amended Predator Law After Preapproval by S&P*, THE AM. BANKER, Mar. 11, 2003, at 1, available at 2003 WL 3344480; Christian Murray, *A Struggle for Loan Protection: Consumer Groups Combat a Federal Proposal That Would Relax So-Called Predatory Lending Laws While Reducing Risk for the Investment Industry*, NEWSDAY, Mar. 7, 2003, at C6, available at 2003 WL 15419246.

10. Shell L. Rutledge, *Georgia Anti-Predatory Lending Act Burdensome to Lenders*, USFN: AM. BANKING INDUS. ATT'YS, at <http://www.usfn.org/topics/cases.html>.

11. Reichardt, *supra* note 7.

12. Agnes T. Crane, *Moody's Spurns Georgia Mortgages*, WALL ST. J., Jan. 31, 2003, at C11, available at 2003 WL-WSJ 3958059; see also 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(a) (2002)).

mortgage loans and to retain these loans in a lender's portfolio is simply too great.

The reaction to GAFLA by the secondary market has been unprecedented and negative. Mortgage loans made in Georgia are looked upon with suspicion and a number of large secondary market investors are no longer interested in doing business in our state.

GAFLA was not intended to effect [sic] traditional borrowers or create a negative reaction from the secondary market. The 2003 General Assembly should take immediate action to pass legislation to correct these unintended consequences, restore credit availability and regain the confidence of the secondary market in mortgage loans originated in Georgia. All this can be accomplished while preserving the intent of the Act and maintaining strong consumer protections and remedies.<sup>13</sup>

Although GAFLA was a topic of controversy from the start, several events prompted some Georgia lawmakers to seriously consider amending the law.<sup>14</sup> In January 2003, two major bond rating agencies, Standard and Poor's and Moody's, announced that they would no longer rate mortgage-backed securities containing home loans originating in Georgia.<sup>15</sup> A third major rating agency, Fitch's, followed suit in February.<sup>16</sup> If followed through, these policies would have a disastrous effect on Georgia's economy.<sup>17</sup> Also, Georgia's newly elected Governor, Republican Sonny Perdue, appeared more sympathetic to the mortgage and banking industry than his

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13. Industry Report, *Georgia Fair Lending Act: The Unintended Consequences*, Jan. 2003, at 2, at [http://www.mbaa.org/industry/reports/03/ga-aba\\_0210.pdf](http://www.mbaa.org/industry/reports/03/ga-aba_0210.pdf). The Georgia Credit Union Affiliates, the Community Bankers Association of Georgia, and the Georgia Bankers Association prepared the Report. *Id.*

14. See Henry Unger & Rhonda Cook, *Predatory Lending Law to Be Tweaked*, ATLANTA J. CONST., Jan. 24, 2003, at F1, available at 2003 WL 8964457; Henry Unger & Robert Luke, *Stakes Increase on Lending Law: Second Bond Rating Agency Balks*, ATLANTA J. CONST., Jan. 31, 2003, at F1, available at 2003 WL 8965455.

15. See Agnes T. Crane, *S&P Won't Rate Some Mortgages*, WALL ST. J., Jan. 20, 2003, at B8, available at 2003 WL-WSJ 3956880; Crane, *supra* note 12.

16. See Henry Unger & Robert Luke, *Lending Bill Sent to State Senate: No Opposition: State House Votes 175-0 to Change Law After Third Rating Agency Balks*, ATLANTA J. CONST., Feb. 5, 2003, at D1, available at 2003 WL 8966015 [hereinafter *No Opposition*].

17. Reichardt, *supra* note 7.

predecessor, former Governor Roy Barnes.<sup>18</sup> Former Governor Barnes was considered a “champion” of GAFLA.<sup>19</sup>

Armed with a supportive Governor and the threat of impending economic disaster, lenders and mortgage brokers began their assault on GAFLA.<sup>20</sup> In the weeks that followed, lawmakers, consumer advocates, lenders, and lobbyists engaged in a heated and controversial battle.<sup>21</sup> In the end, the mortgage and banking industry claimed victory.<sup>22</sup>

### SB 53

#### *Consideration by the Senate*

Senators Don Cheeks, Terrell Starr, and Mike Crotts of the 23rd, 44th, and 17th districts, respectively, sponsored SB 53.<sup>23</sup> The Senate first read SB 53 on January 29, 2003.<sup>24</sup> The bill was assigned to the Senate Banking and Financial Institutions Committee on the same day.<sup>25</sup> The Senate Committee favorably reported the bill, by substitute, on February 10, 2003.<sup>26</sup>

The bulk of the proposed modifications to GAFLA concerned redefining the word creditor and eliminating provisions “extend[ing] liability to other companies that purchase mortgages from the original lender or to investors in the . . . secondary mortgage market . . . .”<sup>27</sup> Prior to SB 53’s introduction, Senator Cheeks and Lieutenant Governor Mark Taylor “spent hours in negotiations . . . with

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18. For example, the *Atlanta Journal-Constitution* reported that Governor Perdue received roughly \$175,000 from the banking lobby in the months after his election, while former Governor Barnes had been a strong supporter of GAFLA. James Salzer & Henry Unger, *Legislature 2003: Bank Ties at Capitol Prevail in Loan Fight*, ATLANTA J. CONST., Mar. 9, 2003, at C1, available at 2003 WL 13244390.

19. Reichardt, *supra* note 7.

20. See Unger & Luke, *supra* note 4.

21. See *id.*

22. For example, the Legislative Chairman of the Georgia Association of Mortgage Brokers announced in a letter addressed to mortgage professionals: “On March 7, the mortgage industry won a very important victory when Governor Sonny Perdue signed [SB 53] into law.” Letter from Bob Long, Legislative Chairman, Georgia Association of Mortgage Brokers, to mortgage professionals (on file with the Georgia State University Law Review) [hereinafter GAMB letter].

23. SB 53, as introduced, 2003 Ga. Gen. Assem.

24. State of Georgia Final Composite Status Sheet, SB 53, Apr. 25, 2003.

25. See *id.*

26. See *id.*

27. Unger & Cook, *supra* note 14. Compare SB 53, as introduced, 2003 Ga. Gen. Assem., with SB 53 (SCS), 2003 Ga. Gen. Assem.

[Standard and Poor's]" in an effort to incorporate the changes the rating agency required.<sup>28</sup> According to Senator Cheeks, these modifications would make rating agencies "comfortable rating securities backed by Georgia mortgages."<sup>29</sup>

### *Definition of Creditor*

Code subsection 7-6A-2(7) originally defined a creditor as "a person who extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments or a person who purchases or is assigned a home loan."<sup>30</sup> The original Code subsection specifically included purchasers and assignees within the definition of creditor.<sup>31</sup> As introduced, SB 53 would have removed purchasers and assignees from the definition.<sup>32</sup> Each subsequent version of the bill, including the Act, retained this change.<sup>33</sup> The Senate Committee added two additional modifications to the definition of creditor.<sup>34</sup> In the Senate Committee's version, a "[c]reditor" means a person who *both regularly* extends consumer credit . . . *and* is a person to whom the debt arising from a home loan transaction is initially payable."<sup>35</sup> Each subsequent version of SB 53, including the Act, retained the change.<sup>36</sup>

SB 53, as introduced, also proposed to specifically exclude servicers, purchasers, assignees, and certain local and state entities from the definition of creditor.<sup>37</sup> The Senate Committee withdrew purchasers and assignees from this proposed specific exclusion.<sup>38</sup>

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28. Henry Unger & Robert Luke, *Compromise Reached on Ga. Lending Law: Legislature to Move Quickly on Deal with Rating Agency*, ATLANTA J. CONST., Feb. 1, 2003, at F1, available at 2003 WL 8965578 [hereinafter *Compromise Reached*].

29. Unger & Cook, *supra* note 14.

30. See 2002 Ga. Laws 455, § 1, at 456 (formerly found at O.C.G.A. § 7-6A-2(7) (Supp. 2002)).

31. See *id.*

32. See SB 53, as introduced, 2003 Ga. Gen. Assem.

33. See *id.*; SB 53 (SCS), 2003 Ga. Gen. Assem.; SB 53 (SCSFA), 2003 Ga. Gen. Assem.; SB 53 (HCS), 2003 Ga. Gen. Assem.; SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-2(6) (Supp. 2003).

34. See SB 53 (SCS), 2003 Ga. Gen. Assem.

35. See *id.* (emphasis added).

36. See *id.*; SB 53 (SCSFA), 2003 Ga. Gen. Assem.; SB 53 (HCS), 2003 Ga. Gen. Assem.; SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-2(6) (Supp. 2003).

37. See SB 53, as introduced, 2003 Ga. Gen. Assem.

38. Compare SB 53, as introduced, 2003 Ga. Gen. Assem., with SB 53 (SCS), 2003 Ga. Gen. Assem.

However, the House Committee on Banks and Banking reinserted this exclusion.<sup>39</sup> The specific exclusion is part of the Act.<sup>40</sup>

### *Purchaser and Assignee Liability*

#### *High-Cost Home Improvement Loans*

The bill, as introduced, proposed to restrict the affirmative claims and defenses available to borrowers of high-cost home improvement loans by striking the “any assignee” and “holder in any capacity” language from Code subsection 7-6A-6(a).<sup>41</sup> This was the only change made to Code subsection 7-6A-6(a) during SB 53’s progression through the General Assembly and is reflected in the Act.<sup>42</sup>

#### *High-Cost Loans*

The bill, as introduced, would have eliminated all liability for assignees or purchasers of high-cost home loans.<sup>43</sup> Code subsection 7-6A-6(b) originally provided that *purchasers and assignees* of high-cost home loans “shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor or creditors of the loan[s].”<sup>44</sup> This comprehensive elimination of purchaser and assignee liability did not survive, as the Senate Committee felt maintaining at least some form of redress against purchasers and assignees of high-cost loans was necessary.<sup>45</sup>

The Senate Committee substitute would have kept all of Code subsection 7-6A-6(b)’s original language, dealing with purchaser and assignee liability pertaining to high-cost loans, but would have added

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39. Compare SB 53, as introduced, 2003 Ga. Gen. Assem., with SB 53 (SCS), 2003 Ga. Gen. Assem., and SB 53 (HCS), 2003 Ga. Gen. Assem.

40. See O.C.G.A. § 7-6A-2(6) (Supp. 2003).

41. Compare SB 53, as introduced, 2003 Ga. Gen. Assem., with 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(a) (Supp. 2002)).

42. See SB 53, as introduced, 2003 Ga. Gen. Assem.; SB 53 (SCS), 2003 Ga. Gen. Assem.; SB 53 (SCSFA), 2003 Ga. Gen. Assem.; SB 53 (HCS), 2003 Ga. Gen. Assem.; SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-2(6) (Supp. 2003).

43. See SB 53, as introduced, 2003 Ga. Gen. Assem.

44. See 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(b) (Supp. 2002)).

45. See SB 53 (SCS), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-6(b) (Supp. 2003).



an important qualification.<sup>46</sup> The Senate Committee substitute would have provided a means for purchasers and assignees of high-cost home loans to escape liability by demonstrating “by a preponderance of the evidence that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan.”<sup>47</sup> The language presumed due diligence if the purchaser or assignee could show

(1) [it had] in place at the time of the acquisition of the subject loan, policies that expressly prohibit[ed] its purchase or acceptance of assignment of any high-cost home loan; (2) [it required] by contract that a seller or assignor of the home loan to the purchaser or assignee represent[ed] and warrant[ed] to the purchaser or assignee that either (A) the seller or assignor w[ould] not sell or assign any high-cost home loan to the purchaser or assignee or (B) that such seller or assignor [was] the beneficiary of such a representation and warranty from a previous seller or assignor; and (3) [it exercised] reasonable due diligence at the time of purchase or assignment of the home loan, or within a reasonable period of time from the purchase or assignment of the home loan thereafter, intended to determine that the home loan [was] not a high-cost home loan . . . .<sup>48</sup>

A purchaser or assignee could have also obtained the presumption of due diligence by meeting conditions (1) and (2) above and establishing “that a reasonable person exercising ordinary due diligence could not determine . . . that the loan was a high-cost home loan.”<sup>49</sup> While the Act generally reflects the concept of due diligence, the House made further adjustments.<sup>50</sup>

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46. See SB 53 (SCS), 2003 Ga. Gen. Assem.

47. See *id.*

48. See *id.*

49. *Id.*

50. Compare SB 53 (SCS), 2003 Ga. Gen. Assem., with SB 53 (HCS), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-6(b) (Supp. 2003).

### *Other Changes Pertaining to Liability*

Code subsection 7-6A-6(c) originally provided that borrowers of covered loans who were either given a notice of acceleration or foreclosure, or who were in default for more than 60 days, “may assert a violation of this chapter against any [c]reditor or servicer . . . .”<sup>51</sup> As introduced, the bill’s only change to Code subsection 7-6A-6(c) would have eliminated the phrase “or servicer.”<sup>52</sup>

The Senate Committee removed this minor redaction and instead proposed completely revamping Code subsection 7-6A-6(c).<sup>53</sup> First, the Senate Committee substitute proposed allowing suits brought by those “acting only in an individual capacity.”<sup>54</sup> Second, in the context of covered loans, the Senate Committee version proposed allowing an individual to plead a violation of the Act defensively or as an affirmative claim against “the creditor or any subsequent holder or assignee of the covered home loan,” as long as the individual does so within five years of closing on the covered loan.<sup>55</sup> The Senate Committee version proposed allowing individuals with high-cost home loans to assert the same claims and defenses as those with covered home loans “[a]t any time during the term of [the] high-cost home loan.”<sup>56</sup> Third, the borrower could bring the affirmative claim or defense under the Senate Committee version only (1) after actions to collect on the covered or the high-cost home loan, (2) after the lender initiates foreclosure actions on the collateral securing the covered or the high-cost home loan, (3) after the lender accelerates the debt arising from the covered or the high-cost home loan, or (4) after the covered or the high-cost home loan remains in default for 60 days.<sup>57</sup> Fourth, and perhaps most dramatically, the Senate Committee substitute proposed limiting violator liability to “amounts required to reduce or extinguish the borrower’s liability under the home loan plus

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51. See 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(c) (Supp. 2002)).

52. See SB 53, as introduced, 2003 Ga. Gen. Assem.

53. Compare SB 53, as introduced, 2003 Ga. Gen. Assem., with SB 53 (SCS), 2003 Ga. Gen. Assem.

54. SB 53 (SCS), 2003 Ga. Gen. Assem.

55. *Id.*

56. *Id.*

57. See 2003 Ga. Laws 1, § 2, at 5.

amounts required to recover costs including reasonable attorneys' fees . . . ."<sup>58</sup> The Act reflects several of these proposed changes.

### *Parity Provision*

The Senate Committee substitute proposed adding new Code section 7-6A-12.<sup>59</sup> This section would have provided that any state-chartered institution or subsidiary thereof would enjoy the same federal preemption that federal law affords the analogous federally-chartered institution.<sup>60</sup> This new section remains in the Act, although the Senate and the House Committee altered the language.<sup>61</sup> The drafters designed this new section to level the playing field for state banks that GAFLA subjected to more stringent state regulation than federally-chartered savings and loans and credit unions.<sup>62</sup> According to Joe Brannen, President of the Georgia Bankers Association, GAFLA created a circumstance where "similar institutions [were] making identical loans, but complying with different rules and regulations."<sup>63</sup> While the change would benefit the banking industry, Senator Vincent Fort of the 39th district observed that "[s]everal hundred banks and their branches . . . will be exempt from the reach of this bill."<sup>64</sup> Senator Fort noted "[t]hat's a tough pill to swallow from the consumer's side."<sup>65</sup>

### *Other Provisions*

The bill, as introduced, proposed adding a new exclusion from the definition of points and fees.<sup>66</sup> The bill, as introduced, provided:

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58. *Id.*

59. See SB 53 (SCS), 2003 Ga. Gen. Assem.

60. *Id.*

61. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCS), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-12 (Supp. 2003).

62. See Rob Blackwell & Erick Bergquist, *OTS Blocks Most of Ga. Predator Statute*, THE AM. BANKER, Jan. 23, 2003, at 1, available at 2003 WL 3343396; Ernest Holsendolph & Robert Luke, *Mortgage Lenders Push to Rewrite Fair Lending Act*, ATLANTA J. CONST., Jan. 23, 2003, at A1, available at 2003 WL 8964362.

63. Holsendolph & Luke, *supra* note 62.

64. See Audio Recording of Senate Proceedings, Feb. 12, 2003 (remarks by Sen. Vincent Fort), at [http://www.georgia.gov/00/channel/0,2141,4802\\_6107105,00.html](http://www.georgia.gov/00/channel/0,2141,4802_6107105,00.html) [hereinafter Senate Audio].

65. See *id.*

66. See SB 53, as introduced, 2003 Ga. Gen. Assem.

Points and fees shall not include . . . [b]ona 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 [(“FHA”)], the Department of Veterans Affairs [(“VA”)], the United States Department of Agriculture for rural development loans, or the Georgia Housing and Finance Authority.<sup>67</sup>

All subsequent versions of the bill, including the Act, retained the change.<sup>68</sup> John Reveal, an attorney and bank regulation specialist, pointed out that one of GAFLA’s errors was including these fees, causing some lenders to cease making FHA and VA loans in Georgia.<sup>69</sup>

The original bill would have qualified Chapter 6A’s applicability to brokers.<sup>70</sup> Originally, Code subsection 7-6A-7(f) provided that Chapter 6A applied to anyone brokering a home loan.<sup>71</sup> The bill, as introduced, would have subjected only brokers “registered or licensed, or required to be registered or licensed, under the laws of [Georgia] or any other jurisdiction” to Chapter 6A’s provisions.<sup>72</sup> The Senate Committee eliminated this change, although the House reinstated it, and it is part of the Act.<sup>73</sup>

The Senate Committee substitute would have added subsection (e) to Code section 7-6A-6, dealing with a borrower’s “substantive rights, remedies, or procedural rights available . . . against any creditor, assignee, or holder under any other law.”<sup>74</sup> The House dispensed with the proposed subsection, and it is not part of the Act.<sup>75</sup>

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67. *See id.*

68. *See* SB 53 (SCS), 2003 Ga. Gen. Assem.; SB 53 (SCSFA), 2003 Ga. Gen. Assem.; SB 53 (HCS), 2003 Ga. Gen. Assem.; SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-2(12)(G)(iii) (Supp. 2003).

69. *See* Unger & Luke, *supra* note 4.

70. *See* SB 53, as introduced, 2003 Ga. Gen. Assem.

71. *See* 2002 Ga. Laws 455, § 1, at 466 (formerly found at O.C.G.A. § 7-6A-7(f) (Supp. 2002)).

72. *See* SB 53, as introduced, 2003 Ga. Gen. Assem.

73. *Compare* SB 53 (SCS), 2003 Ga. Gen. Assem., *with* SB 53 (HCS), 2003 Ga. Gen. Assem., *and* O.C.G.A. § 7-6A-7(f) (Supp. 2003).

74. *See* SB 53 (SCS), 2003 Ga. Gen. Assem.

75. *Compare* SB 53 (SCSFA), 2003 Ga. Gen. Assem., *with* O.C.G.A. § 7-6A-7 (Supp. 2003).

### *Floor Amendment*

Senator Cheeks offered an amendment to the Senate Committee substitute.<sup>76</sup> The amendment made three relatively minor changes. First, the floor amendment slightly modified the Senate Committee substitute's due diligence language.<sup>77</sup> Second, the amendment, as previously mentioned, changed the language of new Code section 7-6A-12 added by the Senate Committee.<sup>78</sup> Third, the amendment inserted a new provision providing that the Act would become effective "upon its approval by the Governor or upon its becoming law without such approval."<sup>79</sup>

### *Passage by the Senate*

By a 52-to-0 vote,<sup>80</sup> the Senate adopted the Senate Committee substitute, adopted the floor amendment, and passed SB 53, as amended, on February 12, 2003.<sup>81</sup> The Senate immediately transmitted SB 53 to the House for consideration.<sup>82</sup>

On the day of the vote, there was virtually no debate on SB 53.<sup>83</sup> Perhaps indicating the Senate's sense of urgency, the floor proceedings lasted less than 15 minutes.<sup>84</sup> Senator Cheeks spoke first.<sup>85</sup> He began with the warning, "[w]ithout the passage of this bill, you will see the building industry in this state come to a screeching halt."<sup>86</sup> He then briefly summarized the Senate Committee substitute and the amendment.<sup>87</sup> According to Senator Cheeks, the bill did "very little, but [was] very great."<sup>88</sup>

Senator Fort was the second and final Senator to speak.<sup>89</sup> He was the driving force behind GAFLA's passage in 2002.<sup>90</sup> Senator Fort

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76. See SB 53 (SFA), 2003 Ga. Gen. Assem.

77. See *id.*

78. See *id.*

79. See *id.*

80. Georgia Senate Voting Record, SB 53 (Feb. 12, 2003).

81. State of Georgia Final Composite Status Sheet, SB 53, Apr. 25, 2003.

82. Senate Audio, *supra* note 64 (remarks by Sen. Don Cheeks and Lt. Gov. Mark Taylor).

83. See *id.*

84. See *generally id.*

85. See *id.*

86. *Id.* (remarks by Sen. Don Cheeks).

87. See Senate Audio, *supra* note 64.

88. See *id.*

89. See *id.*

expressed his belief that SB 53 represented a compromise between the lending and banking industry and consumers.<sup>91</sup> Although the compromise would result in a cost to consumers, Senator Fort stated he would vote yes to SB 53 “with a clear and clean conscience.”<sup>92</sup> He also contended that Georgia needed to “maintain a strong law” because the state’s predatory lending problem was growing worse.<sup>93</sup> Senator Fort closed by expressing his disagreement with those alleging that lenders were denying consumers loans because of GAFLA.<sup>94</sup>

After the Senate passed the amended substitute to SB 53, the Senate President, Lieutenant Governor Mark Taylor, announced, “this is a proud day for the state Senate and the people of Georgia; let’s hold fast for this compromise.”<sup>95</sup> Senate President Taylor later commented that he was “ecstatic about [the] bipartisan effort [in the Senate]” to address the problems posed by rating agencies’ threat to stop rating Georgia mortgages.<sup>96</sup>

### *Consideration by the House*

The House read SB 53 for the first time on February 13, 2003, and the Speaker assigned it to the House Committee on Banks and Banking.<sup>97</sup> The House Committee favorably reported the bill, by substitute, on February 26, 2003.<sup>98</sup> The House adopted the Committee substitute, adopted one floor amendment, and passed SB 53, as amended, on March 4, 2003, by a 148-to-25 vote.<sup>99</sup>

Prior to SB 53’s arrival in the House, the House had sent its own bill to the Senate, HB 142.<sup>100</sup> HB 142 would have made far more

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90. See Letra Harris & Brian Nichols, *Review of Selected 2002 Georgia Legislation*, 19 GA. ST. U. L. REV. 14 (2002).

91. See Senate Audio, *supra* note 64.

92. See *id.* (remarks by Sen. Vincent Fort).

93. See *id.*

94. See *id.*

95. See *id.*

96. *Compromise Reached*, *supra* note 28.

97. State of Georgia Final Composite Status Sheet, SB 53, Apr. 25, 2003.

98. *Id.*

99. See State of Georgia Final Composite Status Sheet, SB 53, Apr. 25, 2003; Georgia House of Representatives Voting Record, SB 53 (Mar. 4, 2003).

100. See HB 142 (HCSFA), 2003 Ga. Gen. Assem. The bill passed the House unanimously. Georgia House of Representatives Voting Record, HB 142 (Feb. 4, 2003); see also *No Opposition*, *supra* note 16.

changes to GAFLA than those proposed by the SB 53 version passed by the Senate.<sup>101</sup> While Senator Cheeks, Senator Fort, and Senate President Taylor worked diligently to compromise on a bill narrowly tailored to meet the ratings agencies' demands, it quickly became apparent that the House intended the bill to do more.<sup>102</sup> The House Committee altered SB 53 to resemble HB 142.<sup>103</sup> Representative Johnny Floyd of the 132nd district, one of HB 142's sponsors, commented on the floor that HB 142 and the House Committee substitute of SB 53 were "pretty well identical."<sup>104</sup> Because the Senate ultimately agreed to the House's changes, the Act includes all of the House Committee's revisions.<sup>105</sup>

The version of SB 53 that passed the Senate would have maintained the differentiation of home loans set forth in GAFLA, which was comprised of home loans,<sup>106</sup> covered loans,<sup>107</sup> and high-cost home loans.<sup>108</sup> The House, on the other hand, greatly restricted the lending law's applicability by removing the covered home loans category altogether.<sup>109</sup> Thus, for example, the consumer friendly anti-flipping<sup>110</sup> provision now applies only to those loans qualifying as high-cost home loans.<sup>111</sup> Further, the elimination of the covered loan

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101. Compare HB 142 (HCSFA), 2003 Ga. Gen. Assem., with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

102. See *Compromise Reached*, *supra* note 28; Henry Unger, *Differing Predatory Lending Bills Clash: Senate's Version Limits Changes*, ATLANTA J. CONST., Feb. 13, 2003, at E1. Compare HB 142 (HCSFA), 2003 Ga. Gen. Assem., with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

103. Compare HB 142 (HCS), 2003 Ga. Gen. Assem., with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

104. Audio Recording of House Proceedings, Mar. 4, 2003 (remarks by Rep. Johnny Floyd), at [http://www.georgia.gov/00/channel/0,2141,4802\\_6108105,00.html](http://www.georgia.gov/00/channel/0,2141,4802_6108105,00.html) [hereinafter House Audio].

105. Compare SB 53 (HCSFA), 2003 Ga. Gen. Assem., with O.C.G.A. §§ 7-6A-1 to -13 (Supp. 2003).

106. Compare 2002 Ga. Laws 455, § 1, at 457 (formerly found at O.C.G.A. § 7-6A-2(9) (Supp. 2002)), with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

107. Compare 2002 Ga. Laws 455, § 1, at 456 (formerly found at O.C.G.A. § 7-6A-2(6) (Supp. 2002)), with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

108. Compare 2002 Ga. Laws 455, § 1, at 457 (formerly found at O.C.G.A. § 7-6A-2(8) (Supp. 2002)), with SB 53 (SCSFA), 2003 Ga. Gen. Assem.

109. Compare 2002 Ga. Laws 455, § 1, at 456 (formerly found at O.C.G.A. § 7-6A-2(6) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2 (Supp. 2003).

110. See O.C.G.A. § 7-6A-4(a) (Supp. 2003). "Flipping" occurs when a high-cost home loan refinances an existing home loan within five years if the new loan does not provide a reasonable, tangible net benefit to the borrower. The House also added language providing redress only against those who flip loans "knowingly or intentionally." *Id.*

111. Compare 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-4 (Supp. 2003).

category greatly reduces the potential liability extending to purchasers, assignees, and even originators.<sup>112</sup>

The House also raised the existing thresholds used to determine which loans are high-cost home loans.<sup>113</sup> Excluding certain points and fees,<sup>114</sup> setting forth a new method to calculate total loan amount,<sup>115</sup> and lowering the annual percentage rate threshold accomplished this change.<sup>116</sup> The House retained the Senate's exclusion for points and fees paid to the government pursuant to the terms of the VA, the FHA, and certain other loans.<sup>117</sup> In addition, the House exempted certain types of home loans from the Act's reach.<sup>118</sup> Exempted home loans include: (1) loans providing temporary financing for the acquisition of land, (2) bridge loans, (3) tax advantage loans, and (4) cross-collateralized loans.<sup>119</sup>

The House significantly modified the Senate's provisions dealing with purchaser and assignee liability.<sup>120</sup> While the House did not completely eliminate all assignee and purchaser liability, the House, as mentioned previously, limited the scope of purchaser and assignee liability to those loans deemed high-cost loans.<sup>121</sup> The House also maintained the Senate's measure for due diligence but simplified it by redacting the Senate's provisions specifying under what circumstances the law would presume the exercise of due

112. See, e.g., O.C.G.A. § 7-6A-6 (Supp. 2003).

113. Compare, e.g., 2002 Ga. Laws 455, § 1, at 458 (formerly found at O.C.G.A. § 7-6A-2(13) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(12) (Supp. 2003); compare, e.g., 2002 Ga. Laws 455, § 1, at 459 (formerly found at O.C.G.A. § 7-6A-2(20) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(18) (Supp. 2003); compare, e.g., 2002 Ga. Laws 455, § 1, at 455 (formerly found at O.C.G.A. § 7-6A-2(3) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(3) (Supp. 2003).

114. Compare, e.g., 2002 Ga. Laws 455, § 1, at 458 (formerly found at O.C.G.A. § 7-6A-2(13) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(12) (Supp. 2003).

115. Compare 2002 Ga. Laws 455, § 1, at 459 (formerly found at O.C.G.A. § 7-6A-2(20) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(20) (Supp. 2003).

116. Compare 2002 Ga. Laws 455, § 1, at 455 (formerly found at O.C.G.A. § 7-6A-2(3) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(3) (Supp. 2003).

117. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(12)(G)(iii) (Supp. 2003).

118. Compare 2002 Ga. Laws 455, § 1, at 457 (formerly found at O.C.G.A. § 7-6A-2(9) (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-2(8) (Supp. 2003).

119. See O.C.G.A. § 7-6A-2 (Supp. 2003).

120. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-6 (Supp. 2003).

121. Compare 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6 (Supp. 2002)), with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-6 (Supp. 2003).



diligence.<sup>122</sup> Most importantly, the House shortened the amount of time for borrowers to assert a cause of action against a purchaser or assignee.<sup>123</sup> Under the version of SB 53 that passed the Senate, a borrower could sue a purchaser or assignee of a high-cost loan at any time during the term of that loan.<sup>124</sup> Under the House's version, and subsequently the Act, a borrower may only assert a claim against a purchaser or assignee within one year of the alleged violation of the Act.<sup>125</sup>

The House also added a new section to SB 53.<sup>126</sup> The section, now designated as Code section 7-6A-13, grants the Department of Banking and Finance authority to promulgate rules and regulations to effectuate the Act's purposes and to clarify the meaning of its terms.<sup>127</sup> The section also provides that a creditor's good faith reliance on the Department's written guidance, even if a court deems it invalid, constitutes prima facie evidence of compliance.<sup>128</sup>

The House's changes to SB 53 displeased certain lawmakers and consumer advocates.<sup>129</sup> For example, Senator Cheeks, a sponsor of SB 53, expressed his disappointment and commented that the changes "really gut[ted] the bill."<sup>130</sup> Kathy Floyd, an AARP lobbyist, stated that the AARP was "disappointed that some of the real issues and protections for the elderly and the poor were swept under the rug . . . [i]t is so hard to be a consumer advocate at this capitol."<sup>131</sup> Other lawmakers considered the changes to be a fair compromise between consumers and the mortgage industry.<sup>132</sup>

122. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-6(b) (Supp. 2003).

123. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-6(c)(3) (Supp. 2003).

124. See SB 53 (SCSFA), 2003 Ga. Gen. Assem.

125. See SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-6(c)(3) (Supp. 2003).

126. Compare SB 53 (SCSFA), 2003 Ga. Gen. Assem., with SB 53 (HCSFA), 2003 Ga. Gen. Assem., and O.C.G.A. § 7-6A-13 (Supp. 2003).

127. See SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-13 (Supp. 2003).

128. See SB 53 (HCSFA), 2003 Ga. Gen. Assem.; O.C.G.A. § 7-6A-13 (Supp. 2003).

129. See generally House Audio, *supra* note 104; Henry Unger, *House Passes Lending Bill: Disappointed Consumer Advocates Switch Focus to Senate*, ATLANTA J. CONST., Mar. 5, 2003, at D1, available at 2003 WL 13243584 [hereinafter *House Passes Lending Bill*].

130. See *House Passes Lending Bill*, *supra* note 129.

131. See *No Opposition*, *supra* note 16. Ms. Floyd also commented later that, although she would have preferred that GAFLA remain in place without alteration, she was content with the changes made initially in the Senate. See Interview with Kathy Floyd, Advocacy Director, AARP (Apr. 8, 2003) [hereinafter *Floyd Interview*].

132. See *House Passes Lending Bill*, *supra* note 129.

*Agreement by the Senate*

Given the vast differences between the House and the Senate versions of SB 53, Senate agreement to all of the House's changes seemed unlikely.<sup>133</sup> In fact, Senator Cheeks stated that "[his] inclination [was] to send [the House] back [his] original bill."<sup>134</sup> But on March 6, 2003, by a narrow vote of 29 to 25,<sup>135</sup> the Senate agreed to the House substitute.<sup>136</sup> The General Assembly forwarded the bill to Governor Perdue, who signed SB 53 on March 7, 2003.<sup>137</sup>

Many wondered if supporters obtained the deciding votes in the Senate by deception.<sup>138</sup> The controversial statements stemmed from comments made on the Senate floor by Senator Bill Stephens of the 51st district, the Governor's floor leader, who announced that he was expecting to receive an important letter from Freddie Mac in 30 minutes.<sup>139</sup> Freddie Mac is one of the largest home loan purchasers in Georgia.<sup>140</sup> According to Senator Stephens, the letter was to disclose Freddie Mac's intention to suspend its operations in Georgia within 48 hours unless the General Assembly acted.<sup>141</sup> After Senator Stephens urged the Senate to act immediately to avoid missing another deadline, the Senate agreed to the House substitute.<sup>142</sup>

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133. See *id.* Senator Cheeks "wanted to delay a vote and discuss whether the House version provided enough protections for consumers." Michelle Golden, *Senate Passes Lending Revision: Perdue-backed Bill Narrowly Clears; Will Limit Fair Lending Act*, MACON TEL., Mar. 7, 2003, at 1, available at 2003 WL 2556701.

134. See *House Passes Lending Bill*, *supra* note 129.

135. Georgia Senate Voting Record, SB 53 (Mar. 6, 2003).

136. State of Georgia Final Composite Status Sheet, SB 53, Apr. 25, 2003.

137. See 2003 Ga. Laws 1, § 3, at 15.

138. See Rhonda Cook & Nancy Badertscher, *Charges Fly After Lending Revision*, ATLANTA J. CONST., Mar. 24, 2003, at B1, available at 2003 WL 16548243; Editorial, *Our Opinions: To the Letter, Perdue Team Misled Us on Lending Law*, ATLANTA J. CONST., Mar. 19, 2003, at A18, available at 2003 WL 16547409 [hereinafter *Our Opinions*].

139. Audio Recording of Senate Proceedings, Mar. 6, 2003 (remarks by Sen. Bill Stephens), at [http://www.georgia.gov/00/channel/0,2141,4802\\_6107105,00.html](http://www.georgia.gov/00/channel/0,2141,4802_6107105,00.html) [hereinafter *Senate Audio Two*].

140. See Cook & Badertscher, *supra* note 138. Freddie Mac is a federally chartered mortgage entity that "purchases mortgages from lenders across the country and packages them into securities that can be sold to investors. Through this securitization process, [Freddie Mac] ultimately provide[s] low- to middle-income homeowners and renters with lower housing costs and better access to home financing." See Freddie Mac, *Why Freddie Mac? Our Mission—Our Commitment*, at [http://www.freddiemac.com/vital\\_role](http://www.freddiemac.com/vital_role).

141. Senate Audio Two, *supra* note 139 (remarks by Sen. Bill Stephens); Cook & Badertscher, *supra* note 138.

142. Georgia Senate Voting Record, SB 53 (Mar. 6, 2003); Senate Audio Two, *supra* note 139; see also Tom Baxter, *Legislature 2003: Haste Lays Waste to Lending Bill*, ATLANTA J. CONST., Mar. 9, 2003, at C4, available at 2003 WL 13244326.

The letter from Freddie Mac did not arrive when Senator Stephens said that it would.<sup>143</sup> When the letter finally did arrive five days later, some were shocked at what it said.<sup>144</sup> The letter, written by Freddie Mac Senior Vice President Mitchell Delk, “criticize[d] the House bill for going too far and for unnecessarily weakening consumer protections.”<sup>145</sup> Mr. Delk also stated that the “political scramble” to pass SB 53 “resulted from the [General Assembly’s] inability to resolve [the] issue—rather than an 11th hour ultimatum by the secondary mortgage market.”<sup>146</sup> Mr. Delk went on to say that the version of SB 53 that originally passed the Senate adequately addressed the mortgage industry’s concerns.<sup>147</sup>

Senator Stephens blamed Freddie Mac for the discrepancy between his comments on the floor and the subsequent letter.<sup>148</sup> According to Senator Stephens, Freddie Mac called the Governor’s office prior to the floor debate, promising to fax a letter “confirming [Freddie Mac’s] decision to exit the Georgia mortgage market.”<sup>149</sup> Senator Stephens stated that the “debate concluded with Freddie Mac having failed to transmit the letter as previously discussed.”<sup>150</sup> Senator Stephens added,

In a way [that] only a federally financed entity can manage, the promised tone and content [of the letter] had been modified with the benefit of hindsight and Monday morning quarterbacking precision. The letter’s weakened tone was disappointing to the [G]overnor, legislative leaders and those on both sides who fought nobly for what they believed to be the right policy. So, were legislators coerced to pass the modified version of [GAFLA]? Absolutely not.<sup>151</sup>

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143. See Cook & Badertscher, *supra* note 138; *Our Opinions*, *supra* note 138.

144. See, e.g., Cook & Badertscher, *supra* note 138.

145. *Our Opinions*, *supra* note 138. The article reproduces the Delk letter in its entirety. *Id.*

146. See *id.*

147. See *id.*

148. See Bill Stephens, *Mortgage Agency Did the Misleading*, ATLANTA J. CONST., Mar. 19, 2003, at A19, available at 2003 WL 16547415.

149. See *id.*

150. *Id.*

151. *Id.*

Senator Stephens' explanation did not satisfy Senator Fort.<sup>152</sup> Senator Fort even asked State Inspector General James Sehorn for an investigation.<sup>153</sup> Senator Fort stated, "I'm not going to let it go . . . [i]f [S]enators had not been misled, they might have voted differently. We should be able to depend on the [G]overnor's office to give us correct information."<sup>154</sup> Senator Stephens, perhaps in response to Senator Fort's request for an investigation, said, "I think some people like to talk about a single pitch in the last inning of a game that never should have been played, instead of the reality that Georgia's financial markets were being greatly damaged."<sup>155</sup>

While legislators continue to fire allegations and struggle with what is undoubtedly a tough and complex issue, one thing is certain: the debate will continue. As Bob Long, Legislative Chairman of the Georgia Mortgage Brokers Association, stated, "Though victory is ours at the moment, the AARP and others are not going away with the passage of this bill. . . . Our foes are sure to return."<sup>156</sup>

## *The Act*

### *Section 1*

Section 1 of the Act amends Code sections 7-6A-1 to 7-6A-11 and adds new Code sections 7-6A-12 and 7-6A-13.<sup>157</sup>

### *Definitions*

The Act eliminates certain means formerly employed to calculate the Annual Percentage Rate of variable rate loans.<sup>158</sup> The Act strikes Code paragraphs 7-6A-2(3)(A), 7-6A-2(3)(B), and 7-6A-2(3)(C) in their entirety.<sup>159</sup>

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152. See Cook & Badertscher, *supra* note 138.

153. See *id.*

154. See *id.*

155. See *id.*

156. GAMB letter, *supra* note 22.

157. Compare 2002 Ga. Laws 455, § 1, at 455-68 (formerly found at O.C.G.A. §§ 7-6A-1 to -11 (Supp. 2002)), with O.C.G.A. §§ 7-6A-1 to -13 (Supp. 2003).

158. Compare 2002 Ga. Laws 455, § 1, at 455-56 (formerly found at O.C.G.A. § 7-6A-2(3)(A) to (C) (Supp. 2002)), with O.C.G.A. § 7-6A-2 (Supp. 2003).

159. Compare 2002 Ga. Laws 455, § 1, at 455-56 (formerly found at O.C.G.A. § 7-6A-2(3)(A) to (C) (Supp. 2002)), with O.C.G.A. § 7-6A-2 (Supp. 2003).

The Act also completely eliminates the provision defining a covered home loan.<sup>160</sup> The Act consequently strikes all references to covered home loans and eliminates any distinction between covered home loans and high-cost home loans.<sup>161</sup>

The Act modifies the definition of creditor.<sup>162</sup> The Act defines a creditor as “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.”<sup>163</sup> The Act also provides that a creditor shall not include servicers, assignees, purchasers, or certain state and local government agencies.<sup>164</sup> The Act retains the original exclusion for attorneys “providing legal services in association with the closing of a home loan.”<sup>165</sup> The Act also retains brokers within the definition of creditor but restricts the definition to those brokers who perform their services for compensation.<sup>166</sup>

The Act provides changes to the types of loans excluded from the definition of home loan.<sup>167</sup> Under the Act, the following types of loans are not considered home loans:

- (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

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160. Compare 2002 Ga. Laws 455, § 1, at 456 (formerly found at O.C.G.A. § 7-6A-2(6) (Supp. 2002)), with O.C.G.A. § 7-6A-2 (Supp. 2003).

161. Compare 2002 Ga. Laws 455, § 1, at 455-68 (formerly found at O.C.G.A. §§ 7-6A-1 to -11 (Supp. 2002)), with O.C.G.A. §§ 7-6A-1 to -13 (Supp. 2003).

162. Compare 2002 Ga. Laws 455, § 1, at 456-57 (formerly found at O.C.G.A. § 7-6A-2(7) (Supp. 2002)), with O.C.G.A. § 7-6A-2(6) (Supp. 2003).

163. O.C.G.A. § 7-6A-2(6) (Supp. 2003).

164. *Id.*

165. Compare 2002 Ga. Laws 455, § 1, at 456-57 (formerly found at O.C.G.A. § 7-6A-2(7) (Supp. 2002)), with O.C.G.A. § 7-6A-2(6) (Supp. 2003).

166. Compare 2002 Ga. Laws 455, § 1, at 456-57 (formerly found at O.C.G.A. § 7-6A-2(7) (Supp. 2002)), with O.C.G.A. § 7-6A-2(6) (Supp. 2003).

167. Compare 2002 Ga. Laws 455, § 1, at 457 (formerly found at O.C.G.A. § 7-6A-2(9) (Supp. 2002)), with O.C.G.A. § 7-6A-2(8) (Supp. 2003).

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.<sup>168</sup>

The Act provides several changes to the definition of points and fees.<sup>169</sup> Prior to the Act, points and fees included “[t]he maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents.”<sup>170</sup> The Act retains this language but adds “[m]ortgage 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 FHA program, shall not be considered to be a prepayment fee or penalty.”<sup>171</sup>

The Act provides two additional exclusions from points and fees.<sup>172</sup> The first of these exclusions is for “[b]ona 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 FHA, the VA], the United States Department of Agriculture for rural development loans, or the Georgia Housing and Finance Authority.”<sup>173</sup> The Act's second additional exclusion is for “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

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168. O.C.G.A. § 7-6A-2(8) (Supp. 2003).

169. *Compare* 2002 Ga. Laws 455, § 1, at 458-59 (formerly found at O.C.G.A. § 7-6A-2(13) (Supp. 2002)), *with* O.C.G.A. § 7-6A-2(12) (Supp. 2003).

170. 2002 Ga. Laws 455, § 1, at 458 (formerly found at O.C.G.A. § 7-6A-2(13)(D) (Supp. 2002)).

171. O.C.G.A. § 7-6A-2(12)(D) (Supp. 2003).

172. O.C.G.A. § 7-6A-2(12) (Supp. 2003).

173. O.C.G.A. § 7-6A-2(12)(G)(iii) (Supp. 2003).

property or against liability arising out of the ownership or use of property . . . .”<sup>174</sup>

The Act modifies the definition of total loan amount.<sup>175</sup> The Act defines total loan amount as “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.”<sup>176</sup> “For open-end loans, the total loan amount shall be calculated using the total credit line available under the terms of the home loan . . . .”<sup>177</sup> Prior to the Act, the total loan amount was calculated by subtracting the points and fees from the principal of the loan, or, in the case of an open-end loan, from the total available credit line.<sup>178</sup> The Act also strikes the Code sections that defined a variable rate loan<sup>179</sup> and the prime rate.<sup>180</sup>

### *Home Loan Limitations and Prohibited Practices*

The Act amends Code subsections 7-6A-3(1) and 7-6A-3(3), dealing with home loan limitations and prohibited practices.<sup>181</sup> Prior to the Act, Code paragraph 7-6A-3(1)(B) provided that “[n]o creditor shall make a home loan that finances, directly or indirectly . . . [a]ny life, accident, health, or loss-of-income insurance without regard to the identity of the ultimate beneficiary of such insurance . . . .”<sup>182</sup> The Act retains this admonition but provides “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

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174. O.C.G.A. § 7-6A-2(12)(G)(iv) (Supp. 2003).

175. Compare 2002 Ga. Laws 455, § 1, at 459-60 (formerly found at O.C.G.A. § 7-6A-2(20) (Supp. 2002)), with O.C.G.A. § 7-6A-2(18) (Supp. 2003).

176. O.C.G.A. § 7-6A-2(18) (Supp. 2003).

177. *Id.*

178. 2002 Ga. Laws 455, § 1, at 459-60 (formerly found at O.C.G.A. § 7-6A-2(20) (Supp. 2002)).

179. Compare 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-2(21) (Supp. 2002)), with O.C.G.A. § 7-6A-2 (Supp. 2003).

180. Compare 2002 Ga. Laws 455, § 1, at 459 (formerly found at O.C.G.A. § 7-6A-2(14) (Supp. 2002)), with O.C.G.A. § 7-6A-2 (Supp. 2003).

181. Compare 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-3(1)(B) (Supp. 2002)), with O.C.G.A. § 7-6A-3(1)(B) (Supp. 2003).

182. 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-3(1)(B) (Supp. 2002)).

by the creditor.”<sup>183</sup> The Act also altered the circumstances in which lenders may impose late payment charges.<sup>184</sup> The Act now provides:

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.<sup>185</sup>

### *Flipping Provisions*

The Act maintains former Code section 7-6A-4’s prohibition on loan flipping, with several changes.<sup>186</sup> The Act prohibits creditors from “knowingly or intentionally” flipping a home loan.<sup>187</sup> The former Code section made no such reference to the creditor’s state of mind.<sup>188</sup> The Act also redefined what constitutes a flipping.<sup>189</sup> Under the Act,

[f]lipping 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.<sup>190</sup>

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183. Compare 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-3(1)(B) (Supp. 2002)), with O.C.G.A. § 7-6A-3(1)(B) (Supp. 2003).

184. Compare 2002 Ga. Laws 455, § 1, at 460 (formerly found at O.C.G.A. § 7-6A-3(3) (Supp. 2002)), with O.C.G.A. § 7-6A-3(3) (Supp. 2003).

185. O.C.G.A. § 7-6A-3(3) (Supp. 2003).

186. Compare 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)), with O.C.G.A. § 7-6A-4 (Supp. 2003).

187. O.C.G.A. § 7-6A-4(a) (Supp. 2003).

188. Compare 2002 Ga. Laws 455, § 1, at 460-61 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)), with O.C.G.A. § 7-6A-4 (Supp. 2003).

189. Compare 2002 Ga. Laws 455, § 1, at 460-61 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)), with O.C.G.A. § 7-6A-4(a) (Supp. 2003).

190. O.C.G.A. § 7-6A-4(a) (Supp. 2003).



Prior to the Act, this Code section prohibited the flipping of both covered home loans and high-cost home loans.<sup>191</sup>

The Act retains the provisions illustrating the circumstances under which the law presumes a loan to be a flipping but adds that “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.”<sup>192</sup>

The Act also adds a provision concerning a borrower’s costs and attorneys’ fees incurred in a suit against a person alleged to have unlawfully flipped a loan.<sup>193</sup> A court may award these costs and attorneys’ fees only if (1) the borrower prevails, (2) the judge finds that the defendant willfully engaged in flipping, and (3) the defendant refused without warrant to fully resolve the matter which constituted the flipping.<sup>194</sup>

### *Causes of Action, Defenses, and Remedies for Violations of the Act*

Prior to the Act, a borrower of a home improvement loan could “assert against the creditor, any assignee, or holder in any capacity all affirmative claims and any defenses that the borrower may have against the seller or home improvement contractor . . . .”<sup>195</sup> The Act limits the applicability of this provision to creditors and strikes the “any assignee” and “holder in any capacity” language.<sup>196</sup>

The Act modifies Code subsection 7-6A-6(b)’s provisions dealing with assignee, purchaser, and holder liability in the context of high-cost home loans.<sup>197</sup> The Act provides that “any person who purchases, is assigned, or otherwise becomes a holder of a high-cost

191. 2002 Ga. Laws 455, § 1, at 460-61 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)).

192. Compare 2002 Ga. Laws 455, § 1, at 460-61 (formerly found at O.C.G.A. § 7-6A-4 (Supp. 2002)), with O.C.G.A. § 7-6A-4 (Supp. 2003).

193. O.C.G.A. § 7-6A-4(c) (Supp. 2003).

194. *Id.*

195. 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(a) (Supp. 2002)).

196. Compare 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(a) (Supp. 2002)), with O.C.G.A. § 7-6A-6(a) (Supp. 2003).

197. Compare 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(b) (Supp. 2002)), with O.C.G.A. § 7-6A-6(b) (Supp. 2003).

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 . . . .”<sup>198</sup> However, this provision comes with an important new qualification.<sup>199</sup> The purchaser or holder may escape liability if

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.<sup>200</sup>

The Act strikes all language formerly found in Code subsection 7-6A-6(c) and replaces it with language specifying when and under what circumstances a borrower may obtain relief against purchasers, assignees, and holders of high-cost home loans pursuant to Code subsection 7-6A-6(b), as amended by the Act.<sup>201</sup> First, the Act mandates that borrowers may only seek relief in their individual capacities and may recover no more than “the sum of the amount of all remaining indebtedness of the borrower under [the] loan and reasonable attorneys’ fees . . . .”<sup>202</sup> Second, a borrower of a high-cost home loan may seek relief “after notice of acceleration or foreclosure of the high-cost home loan, asserting a violation of Code [s]ection 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.”<sup>203</sup> Third, the borrower of a high-cost home loan must seek relief

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 [s]ection 7-6A-5 in an action to collect the

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198. O.C.G.A. § 7-6A-6(b) (Supp. 2003).

199. *Id.*

200. *Id.*

201. Compare 2002 Ga. Laws 455, § 1, at 464 (formerly found at O.C.G.A. § 7-6A-6(c) (Supp. 2002)), with O.C.G.A. § 7-6A-6(c) (Supp. 2003).

202. O.C.G.A. § 7-6A-6(c) (Supp. 2003).

203. *Id.*

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.<sup>204</sup>

The Act leaves Code section 7-6A-7 almost completely intact.<sup>205</sup> The Act only changes Code subsection 7-6A-7(a) to provide damage remedies to borrowers for a creditor's violation of Chapter 6A; formerly, Code subsection 7-6A-7(a) provided these damages for "[a]ny person['s]" violation of Chapter 6A.<sup>206</sup> The Act also restricts the applicability of the equitable relief provisions in Code subsection 7-6A-7(b).<sup>207</sup> These provisions, under the Act, only provide equitable relief to borrowers of high-cost home loans.<sup>208</sup>

Prior to the Act, Code subsection 7-6A-7(f) provided that "[t]he brokering of a home loan that violates the provisions of [Chapter 6A] shall constitute a violation of such provisions."<sup>209</sup> The Act renders this provision applicable only to those brokers "registered or licensed or required to be registered or licensed as a broker under the laws of [Georgia] or any other jurisdiction."<sup>210</sup>

The Act dictates that "[a]n action under this [C]hapter may be brought within five years after the date of the first scheduled payment by the borrower . . . ."<sup>211</sup> Formerly, Code subsection 7-6A-7(h) permitted a borrower to bring an action within four years of the date of the last payment, provided the borrower brought the action within five years of the first scheduled payment.<sup>212</sup>

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204. *Id.*

205. *Compare* 2002 Ga. Laws 455, § 1, at 465-66 (formerly found at O.C.G.A. § 7-6A-7 (Supp. 2002)), *with* O.C.G.A. § 7-6A-7 (Supp. 2003).

206. *Compare* 2002 Ga. Laws 455, § 1, at 465 (formerly found at O.C.G.A. § 7-6A-7(a) (Supp. 2002)), *with* O.C.G.A. § 7-6A-7(a) (Supp. 2003).

207. *Compare* 2002 Ga. Laws 455, § 1, at 465-66 (formerly found at O.C.G.A. § 7-6A-7(b) (Supp. 2002)), *with* O.C.G.A. § 7-6A-7(b) (Supp. 2003).

208. O.C.G.A. § 7-6A-7(b) (Supp. 2003).

209. 2002 Ga. Laws 455, § 1, at 466 (formerly found at O.C.G.A. § 7-6A-7(f) (Supp. 2002)).

210. O.C.G.A. § 7-6A-7(f) (Supp. 2003).

211. O.C.G.A. § 7-6A-7(h) (Supp. 2003).

212. 2002 Ga. Laws 455, § 1, at 466 (formerly found at O.C.G.A. § 7-6A-7(h) (Supp. 2002)).

*Parity Provision*

The Act adds a new section entitling any state-chartered institution or subsidiary thereof to rely on the same federal preemption that the analogous federally-chartered institution enjoys under federal law.<sup>213</sup>

*Regulatory Authority*

The Act adds a new section vesting the Department of Banking and Finance with the authority to promulgate rules and regulations to effectuate the Act's purposes and to clarify the meaning of its terms.<sup>214</sup> The section also provides that a creditor's good faith reliance on the Department's written guidance, even if deemed to be invalid, constitutes prima facie evidence of compliance.<sup>215</sup>

*Section 2*

Section 2 of the Act specifies that the Act "shall become effective upon its approval by the Governor or upon its becoming law without such approval."<sup>216</sup>

*Section 3*

Section 3 of the Act repeals "[a]ll laws and parts of laws in conflict with [the] Act."<sup>217</sup>

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213. O.C.G.A. § 7-6A-12 (Supp. 2003).

214. O.C.G.A. § 7-6A-13 (Supp. 2003).

215. *See id.*

216. 2003 Ga. Laws 1, § 2, at 15.

217. *Id.*