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CRIMES AND OFFENSES

Foreclosure Fraud: Provide Definitions and Penalties; Amend Fair Business Practices Act

CODE SECTIONS:	O.C.G.A. §§ 10-1-393, -397, -399 (amended), 16-9-60 (new)
BILL NUMBERS:	SB 647, 648
ACT NUMBERS:	1374, 1308
SUMMARY:	Together, the Acts strengthen the law relating to foreclosure fraud. SB 647 adds a new Code section making foreclosure fraud a felony. SB 648 amends the Fair Business Practices Act.
EFFECTIVE DATE:	July 1, 1988

History

Foreclosure fraud occurs when a lender provides funds to a homeowner and represents that the funds are a loan when, in fact, the lender is purchasing the home or a property interest in the home.¹ Although foreclosure fraud is prohibited under the Fair Business Practices Act (FBPA),² complaints of violations have been received by Atlanta Legal Aid, the Fair Housing Authority, and by the sponsor of SB 647 and SB 648; these complaints prompted the new legislation.³ SB 647 attempts to deter foreclosure fraud by providing criminal penalties.⁴ SB 648 makes it easier for a debtor to find relief in the courts by relaxing certain FBPA notice provisions and by putting “more teeth” into the FBPA section regarding foreclosure fraud.⁵

SB 647

The Act adds a new section defining foreclosure fraud to Article 4, Chapter 9, Title 16 of the Code, which relates to fraud and fraud-related

1. O.C.G.A. § 10-1-393(b)(20)(A) (Supp. 1988); O.C.G.A. § 16-9-60(a) (1988). Most of these homeowners are in danger of losing their homes because of a current default. Telephone interview with Senator Eugene Walker, Senate District No. 43 (Apr. 17, 1988) [hereinafter Walker Interview].

2. O.C.G.A. § 10-1-393(b)(20) (Supp. 1988).

3. Walker Interview, *supra* note 1. Senator Walker sponsored both SB 647 and SB 648.

4. *Id.* See *infra* text accompanying notes 6—14.

5. Walker Interview, *supra* note 1; see *infra* text accompanying notes 15—26.

offenses.⁶ The new section provides that foreclosure fraud or attempted foreclosure fraud is a felony⁷ punishable by imprisonment from one to three years or by a fine of \$1000 to \$5000, or both.⁸

As introduced, the bill did not contain a separate definition of "foreclosure fraud" or designate that the listed acts would be labeled as such.⁹ Rather, the bill described certain acts which would be felonious if done by means of false statement, failure to disclose, or some other fraudulent scheme.¹⁰ This section was amended on the Senate floor by replacing the list of proscribed acts with "foreclosure fraud," or purchasing or attempting to purchase residential property by means of a "fraudulent scheme."¹¹ Finally, the House Committee on Judiciary offered a substitute to SB 647 which defined foreclosure fraud. The substitute focused on the practice of purchasing a debtor's home by misrepresenting that the funds provided were intended as a loan.¹²

The original bill also contained a section providing more severe penalties when persons sixty-five years of age or older were defrauded.¹³ The House committee deleted this section to avoid equal protection challenges.¹⁴

SB 648

The Act amends several provisions of the FBPA.¹⁵ Prior to the passage

6. O.C.G.A. § 16-9-60 (1988).

7. O.C.G.A. § 16-9-60(b) (1988).

8. O.C.G.A. § 16-9-60(c) (1988).

9. SB 647, as introduced, 1988 Ga. Gen. Assem.

10. *Id.* The original bill provided:

Any person who purchases or attempts to purchase residential property, who knowingly or intentionally aids or abets such person in purchasing or attempting to purchase said property, or who arranges or attempts to arrange the sale of said property by means of a false statement, failure to disclose information, impersonation, or other fraudulent scheme or device shall be guilty of a felony.

Id.

11. SB 647 (SFA), 1988 Ga. Gen. Assem. The floor amendment reads: "Any person who by foreclosure fraud purchases or attempts to purchase residential property by means of such fraudulent scheme, shall be guilty of a felony."

12. SB 647 (HCS), 1988 Ga. Gen. Assem. This substitute was ultimately enacted and codified at O.C.G.A. § 16-9-60(a) (1988). Foreclosure fraud is defined as follows:

"[F]oreclosure fraud" shall include any of the following: knowingly or willfully representing that moneys provided to or on behalf of a debtor . . . in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property or such debtor's interest therein; or knowingly or willfully making fraudulent representation to a debtor about assisting a debtor in connection with said property.

Id.

13. SB 647, as introduced, 1988 Ga. Gen. Assem. The original bill provided punishment "of not less than five years nor more than ten years."

14. Walker Interview, *supra* note 1.

15. See O.C.G.A. §§ 10-1-393, -397, -399 (Supp. 1988).

of SB 648, Code section 10-1-393(b)(20)(A) made unlawful the representation that money provided on behalf of a debtor in connection with a dwelling was a loan when, in fact, the money was used to effect a purchase by the "lender."¹⁶ The Act adds that if a debtor has executed a quitclaim or warranty deed because of such misrepresentation, the debtor may bring an action to reform the deed into a deed to secure debt.¹⁷ The debtor may also cancel the deed pursuant to O.C.G.A. §§ 23-2-2 or 23-2-60.¹⁸ The Act also prohibits advertising to assist debtors currently in default on home loans when the advertiser has no intent to assist the debtors as advertised or makes false or misleading representations about such assistance.¹⁹

The Act requires a buyer to notify the seller-debtor of a ten-day right of cancellation.²⁰ This ten-day right of cancellation provision, in addition to other consumer protection measures, is required of a buyer only if (1) the loan in default is for property used as a dwelling place; (2) the debtor transfers title to the property; and (3) the debtor remains in possession of the property, either as a lessor or, as added by the Act, as a tenant at will.²¹

The Act also amends Code section 10-1-397; this section required the administrator of the FBPA to give written notice to a violator prior to the commencement of legal action.²² The Act provides that the required notice need not be given if the administrator seeks a temporary restraining order to redress or prevent an injury which results from the violation of section 10-1-393(b)(20).²³ Giving notice that an action is contemplated may result in further harm because the violator may dispose of funds, leave the state, or engage in further deceptive acts.²⁴

For the same reason, the Act amends Code section 10-1-399(b) so that a debtor need not give notice, by means of a "demand for relief," to the violator prior to bringing a private action seeking a temporary restraining order.²⁵ The debtor must, however, attempt to give the violator notice within twenty-four hours of the scheduled hearing.²⁶

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16. 1987 Ga. Laws 794.

17. O.C.G.A. § 10-1-393(b)(20)(A) (Supp. 1988).

18. *Id.* O.C.G.A. § 23-2-2 (1982) (permitting a contract to be set aside for inadequate consideration); O.C.G.A. § 23-2-60 (Supp. 1988) (permitting a conveyance to be annulled if the conveyance was obtained fraudulently).

19. O.C.G.A. § 10-1-393(b)(20)(B) (Supp. 1988).

20. O.C.G.A. § 10-1-393(b)(20)(C)(iv) (Supp. 1988).

21. O.C.G.A. § 10-1-393(b)(20)(D) (Supp. 1988).

22. 1975 Ga. Laws 376 (formerly found at O.C.G.A. § 10-1-397(b) (1982)).

23. O.C.G.A. § 10-1-397(b) (Supp. 1988).

24. Walker Interview, *supra* note 1.

25. O.C.G.A. § 10-1-399(b) (Supp. 1988).

26. *Id.*