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BANKING AND FINANCE Credit or Loan Discrimination; Define and Prohibit Abusive Home Loan Practices; Provide for Prohibited Practices and Limitations for Covered Home Loans and High-Cost Home Loans Create Consumer Protections for Covered Home Loans and High-Cost Home Loans; Provide for Penalties and Enforcement; Provide Exceptions for Unintended Violations; Provide for Severability

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BANKING AND FINANCE

Credit or Loan Discrimination; Define and Prohibit Abusive Home Loan Practices; Provide for Prohibited Practices and Limitations for Covered Home Loans and High-Cost Home Loans Create Consumer Protections for Covered Home Loans and High-Cost Home Loans; Provide for Penalties and Enforcement; Provide Exceptions for Unintended Violations; Provide for Severability.

CODE SECTIONS: O.C.G.A. §§ 7-6A-1 to -11 (new)
BILL NUMBER: HB 1361
ACT NUMBER: 488
GEORGIA LAWS: 2002 Ga. Laws 455
SUMMARY: The Act defines and prohibits abusive home loan practices, commonly termed "predatory lending." It prohibits certain practices and limits others on covered home loans and high-cost home loans. It creates consumer protections regarding these loans and provides for penalties and enforcement while creating exceptions for unintended violations.

EFFECTIVE DATE: October 1, 2002

History

Recognizing predatory lending as a community problem, Senator Vincent Fort of the 39th District led many attempts prior to the 2002 Session of the Georgia General Assembly to pass a law addressing it.\(^1\) After the banking industry stopped his bill during the 2001 General Assembly Session,\(^2\) Senator Fort devised a two-prong strategy to pass a predatory lending bill in 2002.\(^3\) First, develop a confrontational media campaign to define predatory lending by banks

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3. Interview with Sen. Vincent Fort, Senate District No. 39 (May 2, 2002) [hereinafter Fort Interview].
and other lenders as a problem.\textsuperscript{4} Second, persuade Georgia Governor Roy Barnes to sponsor a bill that prohibits predatory lending.\textsuperscript{5} To achieve these goals, Senator Fort led a coalition of community agencies, including the American Association of Retired Persons (AARP) and Atlanta Legal Aid, in support of predatory lending legislation.\textsuperscript{6}

In 1998, a United States Housing and Urban Development study spotlighted predatory lending and its effects, which resulted in North Carolina’s passage of the nation’s first state law on the issue.\textsuperscript{7} Consequently, the banking industry devised an aggressive lobbying strategy to stop additional state legislation.\textsuperscript{8} As a result, the banking industry stopped the passing of any national legislation and challenged state and local legislation in both the legislatures and courts.\textsuperscript{9}

Eventually the Governor agreed to sponsor a bill.\textsuperscript{10} According to one of Governor Barnes’ House Floor Leaders, Representative Charlie Smith of the 175th District, the Governor was familiar with the banking and lending business.\textsuperscript{11} The number of complaints about predatory lending mounted, and the Governor and his staff decided it was time to reign in the most abusive practices.\textsuperscript{12}

Predatory lending is an umbrella term for a variety of unfair home loan practices.\textsuperscript{13} The AARP defined the problem of predatory lending as follows:

\textsuperscript{4} Id.
\textsuperscript{5} Fort Interview, supra note 3; Russell Grantham, \textit{Senator Targeting Predatory Lenders in Public Meeting}, ATLANTA. J. CONST., Nov. 30, 2002, at D8.
\textsuperscript{6} Fort Interview, supra note 3
\textsuperscript{8} See \textit{id}.
\textsuperscript{11} Interview with Rep. Charlie Smith, House District No. 175 (May 8, 2002) [hereinafter Smith Interview].
\textsuperscript{12} Id.
\textsuperscript{13} Fort Interview, supra note 3. For an overview of predatory lending and efforts to prohibit it, see Anne-Marie Motto, Note, \textit{Skirting the Law: How Predatory Mortgage Lenders are Destroying the American Dream}, 18 GA. ST. U. L. REV. 859 (2002).
Growing numbers of aggressive, dishonest lenders advertise their services to people in financial need—people who may have fallen behind on property taxes, or need money for medical bills, or face costly home repairs. Instead of offering a fair loan, these lenders use smooth-talking salespersons, high interest rates, outrageous fees, and unaffordable repayment terms. Homeowners can be tricked into taking out loans that they cannot afford to repay.\footnote{14}

Senator Fort defined predatory lending as loans with high interest rates and abusive practices designed to strip homeowners of their equity.\footnote{15} Predatory lenders often target elderly and poor homeowners who have equity in their home and low, fixed income.\footnote{16}

Another supporter, Senator Don Cheeks of the 23rd District, said the abusive practices of predatory lending included: yield spread premiums, which occur when brokers arrange loans at interest rates higher than the lowest available in order to increase their commission; financing insurance, which happens when a loan includes insurance and the borrower pays interest on the premiums; flipping, which occurs when a lender refinances a loan and increases the amount of the loan without any benefit to the borrower; and the balloon payment, which causes the borrower to owe a large balance at the end of the loan because the regular payments did not pay down the principle.\footnote{17} The AARP's Model State Statute also included excessive fees, financing fee payments, and prepayment charges as other abusive lending practices.\footnote{18}

Supporters of predatory lending legislation went to great lengths to differentiate predatory lending from legitimate home loan practices such as sub-prime lending.\footnote{19} Sub-prime lending involved above-prime-rate interest loans that are generally given to borrowers who have poor credit or are otherwise a greater risk.\footnote{20} According to Senator Cheeks, prohibitions on predatory lending do not affect

\begin{itemize}
  \item \footnote{14} Interview with Kathy Floyd, Lobbyist for the American Association of Retired Persons (Apr. 30, 2002) [hereinafter Floyd Interview]; AARP, \textit{Avoid Predatory Lenders}, at http://www.aarp.org/confacts/money/predlend.html.
  \item \footnote{15} \textit{Fort Interview, supra note 3.}
  \item \footnote{16} \textit{HOME LOAN PROTECTION ACT INTRODUCTION, § 3 (American Association of Retired Persons 2001)} [hereinafter AARP Model Statute].
  \item \footnote{17} Interview with Sen. Don Cheeks, Senate District No. 23 (May 2, 2002) [hereinafter Cheeks Interview].
  \item \footnote{18} AARP Model Statute.
  \item \footnote{19} See \textit{Fort Interview, supra note 3}; \textit{Cheeks Interview, supra note 17}.
  \item \footnote{20} See \textit{Fort Interview, supra note 3}; \textit{Cheeks Interview, supra note 17}.
\end{itemize}
"legitimate entrepreneurs."21 "If you are trying to help people and make a fair return on your investment, you'll be okay. But, if you are trying to gouge people, watch out. If you are violating an American Dream, older persons keeping their homes through their golden years, this bill will stop you."22

HB 1361

Introduction

Representatives Smith, Turnquest, and Dukes, of the 175th, 73rd, and 161st Districts, respectively, sponsored HB 1361.23 The House first read HB 1361 on February 12, 2002, and assigned it to its Banks and Banking Committee.24 That Committee favorably reported HB 1361, by substitute, on March 25, 2002.25 The House adopted the Committee substitute, adopted six floor amendments,26 and passed HB 1361, as amended, on March 26, 2002.27

The changes made in the House Committee on Banks and Banking were based on a compromise between the Banking Industry and the bill’s sponsors.28 Additionally, Governor Barnes personally lobbied many committee members and threatened to withdraw state money from banks that opposed the legislation.29 According to many, the House Amendments weakened HB 1361’s prohibitions on predatory lending.30

The Senate read HB 1361 for the first time on March 26, 2002, and assigned it to its Banks and Financial Institutions Committee.31

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21. Cheeks Interview, supra note 17.
22. Cheeks Interview, supra note 17.
25. Id.
28. Fort Interview, supra note 3.
30. Fort Interview, supra note 3; Cheeks Interview, supra note 17; Smith Interview, supra note 11; Barnini Chakraborty, Senate Committee Restores the Governor’s Predatory Lending Bill, ASSOCIATED PRESS, Mar. 28, 2002; Jim Salzer, Senate Panel Clears Amendments From Predatory Lending Measure, ATLANTA. J. CONST., Mar. 29, 2002, at C7; Staff, Editorial; State Senators Take Stand for Vulnerable Borrowers, ATLANTA. J. CONST., Mar. 29, 2002, at A17.
Senator Don Cheeks, chairman of the Committee, supported strong prohibitions.\textsuperscript{32} Senator Cheeks had his Senate Committee sit in on a presentation before the House Banks and Banking Committee where advocates of a strong bill presented the issue of predatory lending and the reforms needed to curb it.\textsuperscript{33} When the weakened bill came before Cheek’s Senate Banks and Financial Institutions Committee, the Committee restored HB 1361 to the House Committee version and quickly reported HB 1361 favorably,\textsuperscript{34} by substitute, on April 1, 2002.\textsuperscript{35}

The Senate adopted the Committee substitute and passed HB 1361, as amended, on April 3, 2002.\textsuperscript{36} Passage in the Senate was bipartisan, with Senator Stephens of the 51st District, organizing Republican support.\textsuperscript{37} The House insisted on its position on April 9, 2002, while the Senate insisted on its position on April 10, 2002.\textsuperscript{38} As a result, each chamber appointed members to a Conference Committee that day.\textsuperscript{39} The Conference Committee reported on April 12, 2002, and recommended adoption of its substitute.\textsuperscript{40} Each chamber adopted the Conference Committee Substitute on that day.\textsuperscript{41} The General Assembly forwarded the bill to Governor Roy Barnes, who signed HB 1361 on April 22, 2002.\textsuperscript{42}

\textit{Consideration by the House Banks and Banking Committee}

As introduced, Section 1 of HB 1361, created a new Chapter to Title 7, Banking and Finance, of the Georgia Code.\textsuperscript{43} HB 1361 designated the new chapter 7-6A-1 to 7-6A-10.\textsuperscript{44} The House Banks

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32. Cheeks Interview, \textit{supra} note 17.
33. \textit{Id.}
34. Cheeks Interview, \textit{supra} note 17; Fort Interview, \textit{supra} note 3; Smith Interview, \textit{supra} note 11; Barnini Chakraborty, \textit{Senate Committee Restores the Governor’s Predatory Lending Bill}, ASSOCIATED PRESS, Mar. 28, 2002; Staff, Editorial; \textit{State Senators Take Stand for Vulnerable Borrowers}, ATLANTA. J. CONST., Mar. 29, 2002, at A17.
35. \textit{Id.}
39. \textit{Id.}
40. \textit{Id.}
41. \textit{Id.}
42. \textit{Id.}
44. \textit{Id.}
and Banking Committee created an eleventh Code section, by making paragraph two of 7-6A-3, which prohibits loan flipping, its own Code section, 7-6A-4.\textsuperscript{45}

Code section 7-6A-1 named the new chapter the "Georgia Fair Lending Act."\textsuperscript{46}

Definitions

Code section 7-6A-2 defined numerous terms.\textsuperscript{47} As introduced, HB 1361 defined "acceleration" as a "demand for immediate repayment of the entire balance of a home loan."\textsuperscript{48} As introduced, HB 1361 defined "affiliate" in accordance with 12 U.S.C. § 1841, et seq.\textsuperscript{49} HB 1361, as introduced, defined "make" as "to originate a loan or to engage in brokering of a home loan."\textsuperscript{50}

As introduced, HB 1361 defined, and thereby calculated, "annual percentage rate" according to 15 U.S.C. § 1606 and the Federal Reserve System's regulations.\textsuperscript{51} The House Banks and Banking Committee changed the definition to the calculation at the closing of the loan, and moved the calculation of annual percentage rate for variable interest loans from the "threshold" definition to the "annual percentage rate" definition.\textsuperscript{52}

As introduced, HB 1361 defined "bona fide discount points" as points the borrower "knowingly" paid "for the express purpose of reducing the interest rate" on the loan, provided that the undiscounted loan did not exceed a cap.\textsuperscript{53} The House Banks and Banking Committee made grammatical changes.\textsuperscript{54}

As introduced, HB 1361 did not define "covered home loan."\textsuperscript{55} The House Banks and Banking Committee added three alternative

\textsuperscript{46} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{47} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{53} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{55} See HB 1361, as introduced, 2002 Ga. Gen. Assem.
First, the Committee defined the term as a first lien home loan the greater of “four percentage points above prime rate,” or “two percentage points above 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.”

The House Banks and Banking Committee further defined a covered home loan as a junior lien the greater of “five and one-half percentage points above prime rate,” or “three percentage points above 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.”

Second, a “covered home loan” could be a loan with “total points and fees payable in connection with the loan, excluding not more than two bona fide discount points, exceed 3 percent of the total loan amount.” The third alternate definition was a high-cost home loan, as defined elsewhere in the bill.

As introduced, HB 1361 defined “borrower” as “any natural person obligated to repay the loan including a coborrower, cosigner, or guarantor.” As introduced, HB 1361 defined “creditor” as a “person who extends consumer credit” subject to a finance charge or is payable, by written agreement, in more than four installments which included brokers, purchasers, assignees, and servicers of home loans. The House Banks and Banking Committee, however, excluded attorneys providing legal services from the definition.

As introduced, HB 1361 defined a “high-cost home loan” as a loan that exceeded any of the alternate defined “thresholds.” A loan crossed the first threshold when it equaled or exceeded the annual percentage rate set out in Section 152 of the Home Ownership and

58. Id.
59. Id.
60. Id.
62. Id.
Equity Protection Act of 1994, 15 U.S.C. § 1602(aa). The House Banks and Banking Committee made technical changes, and moved the definition of determination of annual percentage rate for variable loans to the "annual percentage rate" definition. The second threshold, as introduced, was "excluding not more than two bona fide discount points" the loan exceeded "(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."

As introduced, HB 1361 defined "home loan" as a loan on real estate within Georgia with a structure or future structure designed for occupancy of from one to four families, or a manufactured home which will be the borrower's primary residence, and the amount of the loan conforms with the Federal National Mortgage Association's "loan size limit" for a single family dwelling." The House Banks and Banking Committee re-organized the definition to more explicitly exclude loans for business purposes.

As introduced, HB 1361 defined "manufactured home" as structures eight or more feet wide and forty or more feet long when traveling and over 320 square feet when erected, or when the manufacturer files a certification with 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." Further, a "manufactured home" must have a permanent chassis "designed to be used as a dwelling with a permanent foundation and erected on land either owned or for which a security interest is granted by the borrower when connected to the required utilities." The House Banks and Banking Committee changed the last part of the definition to read "designed to be used as a dwelling with a permanent foundation when erected on land

65. Id.
68. Id.
71. Id.
secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property which the manufactured home is located.\textsuperscript{72}

As introduced, HB 1361 did not define “open-ended loan.”\textsuperscript{73} The House Banks and Banking Committee added a definition.\textsuperscript{74} An open-ended loan means

a loan in which 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 . . . is generally made available to the extent that any outstanding balance is repaid.\textsuperscript{75}

As introduced, HB 1361 had six definitions of “points and fees.”\textsuperscript{76} First, those items listed in 12 C.F.R. 226.4(a) and 12 C.F.R. 226.4(b), except interest or time price differential, and the items under 12 C.F.R. 226.4(c)(7) may be excluded from the definition of points and fees so long as “the creditor does not receive direct or indirect compensation in connection with the charge.”\textsuperscript{77} The House Banks and Banking Committee changed this definition to unquestionably exclude the items under 12 C.F.R. 226.4(c)(7).\textsuperscript{78}

The second definition of points and fees in HB 1361, as introduced, was “[a]ll compensation paid directly or indirectly to a mortgage broker from any source. . . .”\textsuperscript{79}

The third definition of points and fees in HB 1361 as introduced included the total amount of all premiums financed by the creditor


\textsuperscript{73} See HB 1361, as introduced, 2002 Ga. Gen. Assem.


\textsuperscript{76} HB 1361, as introduced, 2002 Ga. Gen. Assem.

\textsuperscript{77} Id.


\textsuperscript{79} HB 1361, as introduced, 2002 Ga. Gen. Assem.
for insurance or payments financed for debt cancellation or suspension agreement, unless calculated and paid on a monthly basis.\textsuperscript{80} As introduced, HB 1361 provided a list of such insurance.\textsuperscript{81} The House Banks and Banking Committee changed the definition to "[p]remiums or other charges . . . for cancellation of all or part of a borrower's liability . . . ."\textsuperscript{82} The House Committee definition retained a similar list of such insurance, but included only charges made "at or before closing."\textsuperscript{83}

The fourth definition of "points and fees" in HB 1361 as introduced was "maximum prepayment fees and penalties that may be charged or collected."\textsuperscript{84} The fifth definition of "points and fees" in HB 1361 as introduced was "prepayment fees or penalties that are charged to the borrower if the loan refinances a previous loan made or purchased by the same creditor or an affiliate of the creditor."\textsuperscript{85} The House Banks and Banking Committee made technical changes only.\textsuperscript{86}

The sixth and final definition of "points and fees" in HB 1361 as introduced defined the calculation of points and fees for open-ended loans.\textsuperscript{87} The definition was "the total fees charged at closing plus the maximum additional fees which can be charged . . . during the term of the loan."\textsuperscript{88} The House Banks and Banking Committee made the calculation of points and fees for open-ended loans the same as other loans.\textsuperscript{89} The calculation was based on "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 maintain the outstanding balance for the term of the loan."\textsuperscript{90}

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{83} Id.
\textsuperscript{84} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{85} Id.
\textsuperscript{87} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{88} Id.
As introduced, HB 1361 defined “total loan amount” as “the principal of the loan minus those points and fees. . . .”\(^91\) For open-end loans, it defined “total loan amount” as the amount “calculated using the total credit line available under the terms of the home loan.”\(^92\) The House Banks and Banking Committee changed the open-ended loan definition, by subtracting the points and fees.\(^93\)

HB 1361 as introduced did not have a definition of “variable rate loan.”\(^94\) The House Banks and Banking Committee defined it as “any home loan where the rate of interest charged may change . . . due to circumstances beyond the direct control of the creditor or servicer. . . .”\(^95\)

The House Banks and Banking Committee added five more definitions that HB 1361, as introduced, did not define.\(^96\) “Prime rate” was defined as the most recent bank prime loan rate published by the Board of Governors of the Federal Reserve System in statistical release H-15.\(^97\) In addition, “processor” was defined as any person that prepares paperwork necessary for or associated with the closing of a home loan, while “process” meant to act as a processor.\(^98\) Finally, “servicer” and “servicing” were defined as “set forth in 24 C.F.R. 3500.2.”\(^99\)

**Limits and Prohibitions on Home Loans**

As introduced, HB 1361 created a new Code section, 7-6A-3, that stated five limitations and prohibitions on home loan practices.\(^100\) First, HB 1361 prohibited home loans that financed insurance or debt cancellation agreements.\(^101\) Specifically, HB 1361 prohibited financed “credit life, credit disability, credit unemployment, or credit

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92. Id.
96. Id.
98. Id.
99. Id.
101. Id.
property insurance or any other life or health insurance.”\textsuperscript{102} However, insurance premiums or debt cancellation for suspension fees were allowed if calculated and paid on a monthly basis.\textsuperscript{103}

The House Banks and Banking Committee altered the prohibition by first adding that insurance which “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 an accident” may not be financed in a home loan.\textsuperscript{104} Second, the House Banks and Banking Committee prohibited any “life, accident, health, or loss-of-income insurance without regard to the identity of the ultimate beneficiary” unless the payments were calculated and made on a periodic basis.\textsuperscript{105}

HB 1361 also prohibited loan flipping.\textsuperscript{106} As introduced in HB 1361, flipping occurs when a creditor refinance a home loan without a “reasonable, tangible net benefit to the borrower” in the new loan.\textsuperscript{107} A transaction is presumed to be a flipping where the creditor refinance a special mortgage that originated from the government, tribe, or non-profit organization that provided a below-market interest rate, or had “nonstandard payment terms beneficial to the borrower,” with one of the benefits not present in the new loan.\textsuperscript{108} The House Banks and Banking Committee made the flipping prohibition a stand-alone section of the Georgia Fair Lending Act.\textsuperscript{109} Further, the Committee limited the applicability of the flipping prohibition to loans consummated within five years prior to the new loan.\textsuperscript{110}

The third home loan practice that HB 1361 prohibited was recommending or encouraging default while the fourth home loan practice limited late payment charges.\textsuperscript{111} Such charges were allowed when 1) the loan authorized them in writing; 2) the loan is past due

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{105} Id.
\textsuperscript{106} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{110} Id.
\textsuperscript{111} HB 1361, as introduced, 2002 Ga. Gen. Assem.
for at least ten days, and 3) the charge is not more than five percent of the payment.\textsuperscript{112} Also, a creditor may apply no more than one late charge to a payment, and may not apply a late charge to subsequent payments that “would have been timely but for the previous default or the imposition of the previous late payment charge.”\textsuperscript{113} The House Banks and Banking Committee expanded this prohibition to “servicers” in addition to the original “creditors.”\textsuperscript{114} Further, it changed the “would have been timely” phrase to “would have been a full payment” in regard to charges on subsequent late payments.\textsuperscript{115}

The fifth and last limitation on home loans was a limit on charges for requests for information.\textsuperscript{116} Generally a creditor could not charge for responding to a request for balance information or to provide a release upon prepayment.\textsuperscript{117} However, when a creditor responded by facsimile or when the request was within sixty days of a previous request, the creditor could charge five dollars.\textsuperscript{118} The House Banks and Banking Committee expanded this prohibition to “servicers” in addition to the original “creditors.”\textsuperscript{119} The Committee also increased the allowable charge to ten dollars.\textsuperscript{120}

\textit{Limits and Prohibitions on High-Cost Home Loans}

As introduced, HB 1361 created a new Code section, 7-6A-4, that stated fifteen limitations and prohibitions on high-cost home loan practices.\textsuperscript{121} The House Banks and Banking Committee re-designated this section as 7-6A-5.\textsuperscript{122} The first limit on high-cost loans was on prepayment fees and penalties.\textsuperscript{123} Specifically, such fees could be no more than two percent of the loan amount prepaid in the

\textsuperscript{112. Id.}
\textsuperscript{113. Id.}
\textsuperscript{115. Id.}
\textsuperscript{116. HB 1361, as introduced, 2002 Ga. Gen. Assem.}
\textsuperscript{117. Id.}
\textsuperscript{118. Id.}
\textsuperscript{120. Id.}
\textsuperscript{121. HB 1361, as introduced, 2002 Ga. Gen. Assem.}
\textsuperscript{123. HB 1361, as introduced, 2002 Ga. Gen. Assem.}
first twelve months after closing, and could be no more than one percent of the loan amount prepaid between twelve and twenty-four months after closing.\textsuperscript{124} Moreover, prepayment fees or penalties could not be assessed “after the last day of the twenty-fourth month following the loan closing.”\textsuperscript{125}

The second limit prohibited scheduled payments twice as large as the “average of earlier scheduled payments” unless the payment schedule is “adjusted to the seasonal or irregular income of the borrower.”\textsuperscript{126}

The third limit prohibited increases to the outstanding principle balance because the “regular periodic payments do not cover the full amount of interest due.”\textsuperscript{127} In addition, the fourth limit prevented increases in the interest rate after default unless the increase was a part of a variable rate loan and “not triggered by the event of default or the acceleration of the indebtedness.”\textsuperscript{128}

The fifth limit barred the consolidation of more than two periodic payments required under the loan and paid in advance from loan proceeds provided to the borrower.\textsuperscript{129}

The sixth limit prohibited mandatory arbitration clauses in high-cost home loans, or any clause limiting the borrower’s legal claims, defenses, judicial forum or judicial resource.\textsuperscript{130} The House Banks and Banking Committee changed this limit to prohibit any provision “requir[ing] 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” where the borrower could otherwise bring a claim or defense.\textsuperscript{131}

The seventh limit on high-cost home loans disallowed loans to borrowers who have not received counseling about the loan from a third-party nonprofit organization approved by the United States

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{130} Id.
Housing and Urban Development or the Georgia Housing and Finance Authority.\textsuperscript{122}

The eighth limit on high-cost home loans forbade loans where a reasonable creditor did not believe the borrower could make the payments.\textsuperscript{123} It was presumed that a borrower “residing in the home” could make the payments when the “borrower’s total monthly debts, including amounts under the loan, do not exceed 50 percent of said borrower’s monthly gross income.”\textsuperscript{124}

The ninth limit on high-cost home loans prevented creditor payments to contractors from the proceeds of a high-cost home loan unless the borrower and the contractor signed a completion certificate and the instrument was payable to the borrower or jointly to the borrower and contractor.\textsuperscript{125} The House Banks and Banking Committee changed the conditions to the borrower and contractor by including the signing of an affidavit of completion, drafted in accordance with Georgia Code Section 44-14-361.2.\textsuperscript{126}

The tenth limit on high-cost home loans prohibited charges to “modify, renew, extend, or amend,” or to defer payment.\textsuperscript{127} The House Banks and Banking Committee expanded this prohibition to include “servicers” as well as the original “creditors.”\textsuperscript{128}

The eleventh limit on high-cost home loans was a prohibition on “requir[ing] a borrower to waive his or her right to a judicial hearing.”\textsuperscript{129} Rather, the creditor must use Georgia Code Sections 44-14-49, 44-14-180, and 44-12-210 for a judicial foreclosure in equity, a judicial foreclosure of a mortgage, and a judicial foreclosure of a deed to secure debt, respectively.\textsuperscript{130} The House Banks and Banking Committee expanded this prohibition to “servicers” in addition to the

\textsuperscript{122} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{127} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{129} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{130} Id.
original "creditors" and also specified that creditors may seek a
deficiency judgment in accordance with 44-12-161.\footnote{141}

The twelfth limit on high-cost home loans gave borrowers the right
to cure a default after the creditor asserted grounds for acceleration
and required payment in full.\footnote{142} If the borrower cured the default, the
borrower is reinstated to the "same position as if the default had not
occurred."\footnote{143} The House Banks and Banking Committee expanded
this prohibition to "servicers" in addition to the original
"creditors."\footnote{144}

The thirteenth limit on high-cost home loans required that notice of
right to cure the default be delivered to a borrower before the action
to foreclose on or seize a house.\footnote{145} The notice must include the
nature of the default, the borrower's right to cure the default, the
amount necessary to cure, information necessary to calculate changes
in the amount, if applicable, the steps the creditor may take to
terminate the borrower's ownership of the home, and the name,
address, and phone number of the creditor.\footnote{146} Additionally, the
borrower is given thirty days to cure the default, and does not have to
pay fees other than those allowed in the Georgia Fair Lending Act.\footnote{147}
Most importantly, if a borrower cures the default, the creditor shall
refrain from initiating any foreclosure actions.\footnote{148} The House Banks
and Banking Committee expanded this requirement to include
"servicers" in addition to the original "creditors," and reorganized the
paragraph.\footnote{149}

The fourteenth limit on high-cost home loans was a prohibition on
a creditor's sole discretion to accelerate indebtedness, unless due to a
borrower's "failure to abide by the material terms of the loan."\footnote{150}
The House Banks and Banking Committee expanded this

\footnote{142}{\it Id.}
\footnote{143}{\it Id.}
\footnote{145}{\it Id.}
\footnote{146}{\it Id.}
\footnote{147}{\it Id.}
\footnote{148}{\it Id.}
\footnote{150}{\it Id.}
requirement to include "servicers" in addition to the original "creditors," and reorganized the paragraph. ¹⁵¹

The fifteenth and final limit on high-cost home loans required the inclusion of the following notice: "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."¹⁵²

Other Provisions

As introduced, HB 1361 created a new Code section, 7-6A-5, which stated four provisions.¹⁵³ The House Banks and Banking Committee re-designated this section as 7-6A-6.¹⁵⁴ The first provision stated that when a "person selling either a manufactured home or home improvements to the dwelling of a borrower," made, arranged, or assigned a home loan, the borrower may bring all claims and defenses the borrower may have against a seller or home improvement contractor against a "creditor, any assignee, holder or servicer in any capacity."¹⁵⁵ The House Banks and Banking Committee added a proviso so that this subsection applied only to high-cost loans and when a required certificate of occupancy, inspection, or completion was not obtained.¹⁵⁶

The second provision applied all Georgia Fair Lending Act remedies to "the creditor, any director, officer, employee, or controlling stockholder . . . who personally makes or participated in the making of a high-cost home loan," and "[a]ny person who purchases or is otherwise assigned a high-cost home loan."¹⁵⁷

The third provision stated that a borrower in default after sixty days or after receiving notice of acceleration or foreclosure may "assert a violation of this chapter by way of offset as an original

¹⁵³ Id.
action, as a claim to enjoin foreclosure, as a defense or counterclaim to an action to collect amounts owed, or to preserve or obtain possession of the home secured by the home loan.\textsuperscript{158}

The fourth and final provision stated that any person who divided a loan, structured a loan as open-ended, or used other "subterfuge with the intent of evading" the Georgia Fair Lending Act violated the Act.\textsuperscript{159}

\textit{Remedies}

As introduced, HB 1361 provided remedies in Code section 7-6A-6.\textsuperscript{160} The House Banks and Banking Committee re-designated the remedies Code section as 7-6A-7.\textsuperscript{161} First, a person may be found to have violated the Georgia Fair Lending Act by a preponderance of the evidence.\textsuperscript{162} As introduced, HB 1361 provided for cumulative remedies with enforcement pursuant to Georgia Code Section 9-11-23.\textsuperscript{163} Further, the remedies listed in the Georgia Fair Lending Act were not the exclusive remedies available to borrowers, nor "must the borrower exhaust any administrative remedies before proceeding."\textsuperscript{164}

Finally, as introduced, HB 1361 prohibited provisions in loans that waived or limited the rights of borrowers, or required a borrower to proceed in a forum less convenient, or more costly or dilatory.\textsuperscript{165} Such provisions were "unconscionable and void."\textsuperscript{166} However, the House Banks and Banking Committee changed this provision to allow for a "contractual authorization for a power of sale procedure" as long as the borrower did not waive other remedies or rights to discovery or appeal.\textsuperscript{167}

\begin{flushleft}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{162} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} HB 1361, as introduced, 2002 Ga. Gen. Assem.
\textsuperscript{166} \textit{Id.}
\end{flushleft}
As introduced, a person violating the Georgia Fair Lending Act was liable for actual damages, consequential and incidental, regardless of the borrower’s failure to demonstrate reliance.\(^{168}\) The House Banks and Banking Committee removed the phrase “the borrower shall not be required to demonstrate reliance in order to receive actual damages.”\(^{169}\) Further, a person violating the Georgia Fair Lending Act was liable for statutory damages “equal to the recovery of two times the interest paid under the loan and forfeiture of interest due under the loan for any violations of paragraph (1), (2) or (3) of Code Section 7-6A-3 or Code Section 7-6A-4.”\(^{170}\) Moreover, insurance financing, loan flipping, and encouraging default constituted a violation of the Act as well.\(^{171}\)

A person violating the Georgia Fair Lending Act was liable for punitive damages “when the violation was malicious or reckless.”\(^{172}\) The House Banks and Banking Committee removed this language and made the awarding of punitive damages subject to Code Section 51-12-5.1.\(^{173}\) Finally, a person caught violating the Georgia Fair Lending Act was also liable for “costs and reasonable attorney fees.”\(^{174}\)

HB 1361 also provided that a court could award a borrower injunctive, declaratory, and other equitable relief. However, if a borrower failed to make any regular payments and a creditor applied, the court could deny injunctive relief.\(^{175}\)

As introduced, HB 1361 did not require a borrower to make a tender.\(^{176}\) However, at a creditor’s request, the court could require a borrower to “pay into the registry of the court all regularly scheduled home loan payments.”\(^{177}\) The House Banks and Banking Committee changed HB 1361 to give the court discretion regarding whether to require that the borrower make a tender of “a reasonable likelihood

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175. Id.
176. Id.
177. Id.
of being successful on the merits.” 178 Further, the Committee expanded this requirement to “servicers” in addition to the original “creditors,” and added that a court may require payments into its registry for other expenses under the loan. 179

HB 1361, as introduced, also provided that the clerk of the court disburse funds paid into the registry by the borrower to the creditor. 180 The House Banks and Banking Committee expanded the payees to include the creditor’s designees in addition to the original “creditors.” 181

As introduced, HB 1361 provided that a borrower had the right of rescission under 15 U.S.C. § 1601, et. seq., and for violations of paragraphs (1), (2), and (3) of Code section 7-6A-3 or Code section 7-6A-4, “at any time during the term of the loan.” 182 However, the House Banks and Banking Committee limited this right to “a period of 15 years after the consummation of the loan.” 183

HB 1361 as introduced allowed an action under the Georgia Fair Lending Act “within four years of the date of the last payment made by the borrower under the home loan.” 184 The House Banks and Banking Committee changed that provision to allow an action within the earlier of four years after the last payment or fifteen years after the first payment. 185

Enforcement by State Officials

As introduced, HB 1361 provided for enforcement by state officials in Code section 7-6A-7. 186 The House Banks and Banking Committee re-designated the enforcement section as 7-6A-8. 187 As introduced, HB 1361 provided that the Georgia Attorney General,

179. Id.
180. Id.
183. Id.
district attorneys, and the commissioner of banking and finance could enforce the Georgia Fair Lending Act "through their general regulatory powers and through civil process."\(^{188}\) Violations of the Georgia Fair Lending Act were a misdemeanor and punishable by fine, up to $1,000.00, and six months imprisonment.\(^{189}\) The House Banks and Banking Committee changed the punishment so that each violation was subject to a fine of $1000.00 or six months imprisonment or both.\(^{190}\)

**Good Faith Exemptions**

As introduced, HB 1361 provided exemptions to creditors, when acting in good faith, failed to comply with the provisions of this chapter in Code section 7-6A-8.\(^{191}\) These exemptions occurred 1) if a creditor could establish that appropriate restitution and adjustments were made to the borrower prior to receiving any notice of compliance failure within 30 days of the loan closing, or 2) if a creditor could show that the failure was unintentional and the borrower was notified and appropriate restitution and adjustments were made within 60 days of the loan closing and prior to receiving any notice of the compliance failure from the borrower.\(^{192}\) The House Banks and Banking Committee re-designated this Code section as 7-6A-9.\(^{193}\) The Committee changed the time limit for each exemption application to "within ninety days."\(^{194}\)

**Severability & Preemption**

As introduced, HB 1361 provided in Code section 7-6A-9 that the provisions of the Georgia Fair Lending Act were severable and that if one provision was declared invalid or was preempted by federal law,

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189. Id.
the other provisions would remain unaffected.\textsuperscript{195} The House Banks and Banking Committee changed the designation to 7-6A-10.\textsuperscript{196} Also, as introduced, the Georgia Fair Lending Act preempted municipal and county laws and ordinances in Code section 7-6A-10.\textsuperscript{197} However, the House Banks and Banking Committee changed the designation to 7-6A-11.\textsuperscript{198}

\textit{Effective Date}

As introduced, Section 2 of HB 1361 provided that the Georgia Fair Lending Act applied to all home loans made or entered into after July 1, 2002.\textsuperscript{199} The House Banks and Banking Committee changed that date to October 1, 2002.\textsuperscript{200}

\textit{Consideration by the House}

\textit{Floor Debate and Amendments}

Representative Smith of the 175th District introduced and summarized HB 1361 on the House floor on March 26, 2002.\textsuperscript{201} After Representative Smith addressed a number of concerns, Representative Massey of the 86th District spoke from the well.\textsuperscript{202} Representative Massey offered two amendments to the definition of "point and fees."\textsuperscript{203} The first amendment would have taken prepayment penalties out of the point and fees definition.\textsuperscript{204} It failed 43-126.\textsuperscript{205} The second amendment exempted "[t]he portion of the

\textsuperscript{195} HB 1361, as introduced, 2002 Ga. Gen. Assem.  
\textsuperscript{197} HB 1361, as introduced, 2002 Ga. Gen. Assem.  
\textsuperscript{199} HB 1361, as introduced, 2002 Ga. Gen. Assem.  
\textsuperscript{202} Id. (remarks by Rep. Warren Massey).  
\textsuperscript{203} Id.  
\textsuperscript{204} Id.  
yield spread premium that is used to pay other third party fees” from the definition of points and fees in 7-6A-2(14)(B).\textsuperscript{206} This amendment initially failed, but the House voted to reconsider it, and upon reconsideration passed it 88-82.\textsuperscript{207}

Representative Hudgens of the 24th District spoke next.\textsuperscript{208} He supported the legislation, but offered an amendment.\textsuperscript{209} He proposed that home equity loans be removed from HB 1361.\textsuperscript{210} The amendment was defeated 69-100.\textsuperscript{211}

Representative Scheid of the 17th District spoke next and offered six amendments.\textsuperscript{212} The first amendment created a definition of loan originator, and though it initially failed, the House voted to reconsider it where it passed 95-71.\textsuperscript{213} Another Scheid Amendment defined “title insurance,”\textsuperscript{214} and it passed without objection.\textsuperscript{215} The definitions of loan originator and title insurance became Code sections 7-6A-2(10) and 7-6A-2(21), respectively.\textsuperscript{216}

A third Scheid Amendment changed the rebuttable presumption that a borrower residing in the home is able to make the scheduled payments.\textsuperscript{217} Before the monthly debt was no more than fifty percent of a borrower’s monthly gross income, the Scheid Amendment changed this to forty-eight percent.\textsuperscript{218} This Amendment passed without objection,\textsuperscript{219} and was inserted into Code section 7-6A-5(10).\textsuperscript{220}

\textsuperscript{206} House Audio, supra note 201 (remarks by Rep. Warren Massey).
\textsuperscript{208} House Audio, supra note 201 (remarks by Rep. Ralph Hudgens).
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} House Votes, supra note 205 (HV 1077).
\textsuperscript{212} House Audio, supra note 201 (remarks by Rep. Chuck Scheid).
\textsuperscript{214} House Audio, supra note 201 (remarks by Rep. Chuck Scheid).
\textsuperscript{215} House Audio, supra note 201.
\textsuperscript{217} House Audio, supra note 201 (remarks by Rep. Chuck Scheid).
\textsuperscript{219} House Audio, supra note 201.
Representative Epps of the 131st District spoke next. As the Chair of the Black Caucus, he said that he personally supported HB 1361 and that it was the Black Caucus’ number one agenda item in 2002. Representative O’Neal of the 139th District, who also supported the bill, followed. However, he offered an Amendment to clarify the necessary fees that result from non-predatory lending practices. The O’Neal Amendment passed without objection.

Representative Williams of the 83rd District spoke next. According to him, the fifteen year right of rescission in 7-6A-7(e) was too long, and he proposed lowering it to three years. Representative Williams said the fifteen year right would destroy a bank’s ability to sell the loan on the secondary market. Therefore, banks would have to keep the loans on their balance sheet. Federal regulators would not allow this, and these banks would be out of the home loan business. The Williams Amendment passed 91-75.

Representative Channell of the 111th District then spoke. He also said that he supported the bill, but offered two changes to alter the bill’s unintended consequences. First, he critiqued section 7-6A-5(11), which required every foreclosure to go through the “full court system.” This paragraph reversed the current system of non-judicial foreclosures. Representative Channell’s Amendment changed the paragraph to allow for non-judicial foreclosures and require notice of foreclosure by certified mail to the borrower.

222. Id.
224. Id.
225. House Audio, supra note 201.
227. Id.
228. Id.
229. Id.
230. Id.
233. Id.
234. Id.
235. Id.
236. Id.
This Amendment passed 100-69,\textsuperscript{237} and became part of 7-6A-5(11).\textsuperscript{238}

Representative Channel continued by remarking that the inclusion of a cause of action against sellers of manufactured homes was unfair because the seller has nothing to do with interest rates or the terms and conditions of the loan.\textsuperscript{239} Further, the bill contained no cause of action against site built homes.\textsuperscript{240} The second Channell Amendment removed sellers of manufactured homes from 7-6A-6(a).\textsuperscript{241} It passed 124-45.\textsuperscript{242}

Representatives Mobley and Deane of the 69th and 48th Districts, respectively, spoke in support of the bill and argued against some of the amendments.\textsuperscript{243} Representative Ragas of the 64th District followed.\textsuperscript{244} He passionately spoke about the bill, comparing Governor Barnes to a prosecutor, the predatory lenders as the defendants and the House of Representatives as the jury.\textsuperscript{245} He also read a letter from a Cobb County representative who called victims of predatory lenders “deadbeats.”\textsuperscript{246} Representative Ragas responded by saying that the predatory lenders were the real “deadbeats.”\textsuperscript{247} Representative Ragas also offered two Amendments, which the House rejected.\textsuperscript{248}

Next, Representative Orrock of the 56th District spoke in favor of HB 1361.\textsuperscript{249} He opposed at least some of the Amendments because they weakened the bill.\textsuperscript{250}

Representative Powell of the 23rd District spoke next.\textsuperscript{251} He was concerned that the credit counseling required by 7-6A-5(7) added a

\begin{itemize}
\item\textsuperscript{237} House Votes, \textit{supra} note 205 (HV 1087).
\item\textsuperscript{239} House Audio, \textit{supra} note 201 (remarks by Rep. Mickey Channell).
\item\textsuperscript{240} \textit{Id}.
\item\textsuperscript{242} House Votes, \textit{supra} note 205 (HV 1088).
\item\textsuperscript{244} House Audio, \textit{supra} note 201 (remarks by Rep. Arnold Ragas).
\item\textsuperscript{245} \textit{Id}.
\item\textsuperscript{246} \textit{Id}.
\item\textsuperscript{247} \textit{Id}.
\item\textsuperscript{248} House Votes, \textit{supra} note 205 (HV 1078 & 1086).
\item\textsuperscript{249} House Audio, \textit{supra} note 201 (remarks by Rep. Nan Orrock).
\item\textsuperscript{250} \textit{Id}.
\item\textsuperscript{251} House Audio, \textit{supra} note 201 (remarks by Rep. Alan Powell).
\end{itemize}
layer of bureaucracy to loans.\textsuperscript{252} He offered an Amendment to that paragraph that passed without objection.\textsuperscript{253} The Amendment stated that \textquoteright\textquoteleft
[no creditor, servicer, or their institutions\textquoteright\textquoteright would have to contribute money to a non-profit credit counseling organization.\textsuperscript{254} Representative Coleman of the 142nd District spoke in favor of HB 1361 next.\textsuperscript{255} Finally, Representative Smith of the 175th returned to the well and stated that he would object to most of the amendments.\textsuperscript{256}

The House then voted on the Amendments offered, and the votes were recorded as described above.\textsuperscript{257} The House then voted on HB 1361, and passed the Committee substitute as amended, 163-4.\textsuperscript{258}

\textit{Further Changes in the House}

The House also changed two more definitions. First, the House removed brokers from the definition of \textquoteleft\textquoteleft creditors\textquoteright in 7-6A-2(7), and replaced it with the phrase \textquoteleft\textquoteleft any person who closes home loans which may be in the person\textquotesingle s own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans.\textquoteright\textquoteright\textsuperscript{259}

Second, HB 1361 did not list items specifically excluded in the definition of points and fees.\textsuperscript{260} However, during debate on the floor, the House added such a list.\textsuperscript{261} Points and fees, according to the House definition, did not include \textquoteleft\textquoteleft[t]axes, filing fees, recording, and other charges \ldots paid \ldots to public officials for determining the existence of \ldots a security interest,\textquoteright nor \textquoteleft\textquoteleft[f]ees paid to a person other than a lender\textquoteright\textquoteright for services related to floods and fires, tax payments,
inspections, escrow accounts, insurance, appraisals and attorney’s fees.\textsuperscript{262}

The House also prohibited a loan originator or creditor from originating a home loan or high-cost home loan without certification from the Georgia Department of Banking and Finance.\textsuperscript{263}

Finally, the House changed Code section 7-6A-7(h) that stated the time frame for an action brought under the Georgia Fair Lending Act to two years after the date of the first mortgage payment.\textsuperscript{264}

\textit{Consideration by Senate Banks and Financial Institutions Committee}

The Senate Banks and Financial Institutions Committee changed a few definitions.\textsuperscript{265} First, it removed the definitions of “loan originator” and “title insurance.”\textsuperscript{266} Second, it returned the definition of “creditors” to the House Banking and Financial Institutions Committee’s version.\textsuperscript{267} Third, it returned the second definition of “points and fees” to the definition as introduced.\textsuperscript{268} Finally, it removed the list of items not included in the definition of “points and fees.”\textsuperscript{269}

In Code section 7-6A-5, the Senate Banks and Financial Institutions Committee reversed all of the changes made by the full House\textsuperscript{270} in accordance with the House Committee Banks and Banking Committee’s original submission.\textsuperscript{271} Thus, the Senate Committee removed the prohibition on contributions in paragraph (7); removed the certification requirements for loan originators and creditors; changed the percent of monthly debt to monthly income that establishes a rebuttable presumption that a borrower living in the

\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.}
\textsuperscript{268} \textit{Id.}
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.}
home can make the scheduled payments to no more than fifty percent in paragraph (8); removed the required notice of foreclosure and returned the requirement of a judicial hearing for foreclosure actions in paragraph (11); and removed the requirement to specify the amount of a fee paid to title insurance.\textsuperscript{272}

The Senate Banks and Financial Institutions Committee made similar changes in Code sections 7-6A-6 and 7-6A-7.\textsuperscript{273} In paragraph (a) of 7-6A-6 the Committee returned a borrowers cause of action against sellers of manufactured homes.\textsuperscript{274} In paragraph (e) of 7-6A-7 the Committee changed the borrower's right of rescission to "any time during the term of the loan not to exceed a period of 15 years after the consummation of the loan."\textsuperscript{275} Finally, in paragraph (h) of 7-6A-7, the Committee changed the time within which an action may be brought under the Georgia Fair Lending Act to four years after the last payment or 15 years after the first payment under the loan, whichever is earlier.\textsuperscript{276} These changes reversed the House Amendments\textsuperscript{277} and returned these sections to the House Banks and Banking Committee versions.\textsuperscript{278}

\textit{Consideration by the Senate}

Senator Thompson of the 33rd District, and one of Governor Barnes' Senate floor leaders, introduced and summarized HB 1361 on the Senate floor on April 3, 2002.\textsuperscript{279} Senator Thompson explained the bill and answered a few questions.\textsuperscript{280} Senator Fort of the 39th District spoke next, in support of HB 1361.\textsuperscript{281} Senator Fort pointed out some victims of predatory lending who were watching in the

\begin{flushleft}
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{280} Id.
\textsuperscript{281} Id. (remarks by Sen. Vincent Fort).
\end{flushleft}
gallery and explained their experience.\textsuperscript{282} The Senate passed HB 1361 by a vote of 52-2.\textsuperscript{283}

The Senate made two changes to HB 1361. First, paragraph (g) of Code section 7-6A-7 rendered unconscionable and void any provision of a loan that required a borrower to assert a claim in a forum “less convenient, more costly, or more dilatory” to the borrower.\textsuperscript{284} The Senate also removed a phrase that allowed authorizations for power of sale procedures so long as the borrower did not waive other remedies.\textsuperscript{285}

Second, the Senate added a new Code section, 7-6A-12, the “Prevention of Predatory Lending Through Education Act.”\textsuperscript{286} This section created the “Council for the Prevention of Predatory Lending Through Education” within the Governor’s Office of Consumer Affairs.\textsuperscript{287} The Governor, the Speaker of the House, and the President of the Senate could each appoint four members to the Council.\textsuperscript{288} Council members served without compensation, but were reimbursed for expenses.\textsuperscript{289} The Council were required to meet at least monthly, and its powers included designing and approving education programs and cooperating with community organizations to educate consumers about predatory lending; maintaining a toll-free hotline to receive complaints about predatory lending; referring victims to governmental agencies; cooperating with lenders to identify predatory lenders; and studying the causes of home loan default and foreclosure.\textsuperscript{290}

\textit{The Conference Committee}

After the Senate passed HB 1361, both chambers insisted on their positions and each appointed members to a Conference
Committee. The Conference Committee members were Senators Thompson, Fort and Cheeks of the 33rd, 39th and 23rd Districts, respectively, and Representatives Smith, Parrish, and Stallings of the 175th, 144th, and 100th Districts, respectively. The Conference Committee adopted a substitute, which was recommended to each chamber on April 12, 2002. Each chamber adopted the Conference Committee Substitute, and passed HB 1361 by substitute. The House vote was 165-4, and the Senate vote was 49-3.

First, the Conference Committee again changed the second definition of “points and fees” to exempt a list of “bona fide and reasonable fees [paid] to a person other than the creditor” disclosed to the borrower in writing. This change was similar to the change that the House had previously made. Second, the Conference Committee added to the list of covered insurance defined as “points and fees.”

Third, the Conference Committee changed the sixth definition of “points and fees,” by deleting the phrase “maintain the outstanding balance for the term of the loan.”

Fourth, the Conference Committee adopted a list of items not included in the definition of “points and fees” similar to that adopted by the House. The items were not included so long as the fees are:

295. House Votes, supra note 295 (HV 1304).
300. Id.
"bona fide and reasonable." Finally, the Conference Committee made technical changes to the definition of "variable rate loan." In paragraph (1) of Code section 7-6A-3, the Conference Committee added "debt suspension coverage" to the list of items that lenders may not finance in a loan. In Code section 7-6A-5 the Conference Committee made three changes. First, in paragraph (7), the Committee prohibited requiring creditors, servicers or its institutions to make contributions to nonprofit credit counseling agencies. This change was similar to the Powell Amendment in the House. Second, in paragraph (11), the Committee removed the requirement of judicial procedure for foreclosure and replaced it with a requirement of notice to foreclose. This change was similar to one of the Channell Amendments in the House. Finally, in paragraph (15), the Committee changed the types of loans on which a notice must appear to all "high-cost home loan documents that create a debt or pledge property as collateral."

In paragraph (a) of Code section 7-6A-6, the Conference Committee removed a borrower's cause of action against sellers of manufactured homes. This change was similar to one of the Channell Amendments in the House. In Code section 7-6A-7, the Committee made two changes. First, in paragraph (e), the Committee made the right of rescission available to borrowers for five years after the consummation of the loan. Second, in paragraph (h), the Committee made the time period within which an action under the

304. Id.
305. Id.
310. Id.
Georgia Fair Lending Act could be brought to four years after the last payment or five years after the first payment, whichever is earlier.  

In paragraph (1) of Code section 7-6A-9, the Committee amended the good faith exemption to allow lenders who violated 7-6A-3(1), financing insurance, to avoid liability by “returning premiums paid plus interest charged on the premiums to the borrower.” Finally, the Conference Committee removed Code section 7-6A-12, the Prevention of Predatory Lending Through Education Act. Senator Scott of the 36th District, Chairman of the Senate Rules Committee, was the sponsor of the Educational Act. When the Conference Committee agreed to remove the Education Act from the Conference substitute, the Governor’s office agreed to establish the Council by Executive Order.

After passage, proponents of the bill called it the strongest anti-predatory lending bill in the country. Modeled after Senator Fort’s bill and the AARP’s model statute, HB 1361 has lower triggers and therefore regulates more loans than North Carolina’s predatory lending law. Additionally, the remedies are stronger than North Carolina laws, particularly for assignee liability.

Proponents acknowledged some compromises, however. First, manufactured home sellers were excluded from liability. Second, the prohibition on loan flipping lasts for only five years after consummation of the loan. Third, a judicial process for foreclosure was not included in the final bill. Finally, HB 1361 preempts all non-preempted law.

313. Id.
314. Id.
315. Id.
316. Cheeks Interview, supra note 17; Russ Bynum, Georgia Senate Restores Predatory Lending Restrictions, ASSOCIATED PRESS, Apr. 3, 2002.
317. Cheeks Interview, supra note 17.
319. Smith Interview, supra note 11.
320. Floyd Interview, supra note 14.
321. Floyd Interview, supra note 14.
322. Floyd Interview, supra note 14.
323. Fort Interview, supra note 3; Floyd Interview, supra note 14; Staff, Editorial, Good Predatory Lending Bill Can Be Even Stronger, ATLANTA J. CONST., Apr. 4, 2002, at A15.
local ordinances regarding predatory lending, a compromise included from the bill’s original introduction.325

The Act

The Act, which may be cited as the “Georgia Fair Lending Act,”326 adds a new chapter, 6A, to the existing Code section that is intended to prohibit abusive home loan practices.327 The Act is divided into three sections. Code section 7-6A-2 of the Act provides definitions for certain words and phrases used in the Act.328 While some of the words defined are common in the home loan industry, like points and fees, including premiums for credit life, annual percentage rates, borrower, creditor, the Code section also defines what home loans are covered by the Act, what constitutes a high cost home loan, and how rates are determined.329

Code section 7-6A-3 of the Act outlines prohibited practices and other limitations on all home loans.330 Under these rules, creditors are not allowed to finance loans either directly or indirectly where any type of credit life insurance coverage provides for the cancellation of all or part of the borrower’s liability in the event of certain losses; or to finance loans where any life, accident, health, or loss-of-income insurance without regard to the identity of the ultimate beneficiary.331 However, the Act allows insurance premiums or other charges calculated on a periodic basis that are not added to the principal of the loan.332

In addition, Code section 7-6A-3 further bars a creditor from (1) encouraging or recommending default on an existing loan or debt prior to and in connection with the closing, planned or otherwise, of a loan that refines all and any portion of the exiting loan or debt; (2) charging a late charge that is not specifically authorized in the loan documents, or imposing a late charge if the payment is not past due

325. Fort Interview, supra note 3; Floyd Interview, supra note 14; Staff, Editorial, Good Predatory Lending Bill Can Be Even Stronger, ATLANTA J. CONST., Apr. 4, 2002, at A15.
327. Id.
331. Id.
332. Id.
for ten or more days, or imposing a late charge greater than five percent of the amount of the late payment.\footnote{333} Moreover, late payment charges can only be assessed once with respect to a single late payment and cannot be charged with respect to any subsequent payment that would have been a full payment but for the previous default or late payment charge.\footnote{334}

Finally, this Code section also prevents creditors from charging fees to inform a debtor of his or her total loan payoff amount and requires its release within a reasonable time (i.e., not more than five days), although a maximum $10 processing fee is permitted if the information is transmitted via facsimile or within 60 days of the fulfillment of a previous request for the same information.\footnote{335} Code section 7-6A-4 of the Act prohibits any creditor from engaging in the unfair practice of loan "flipping."\footnote{336} The "flipping" of a home loan occurs when the creditor makes a covered home loan to a borrower that refinances an existing home loan, consummated within the prior five years; however, the refinancing does not provide any tangible or reasonable net benefit to the borrower.\footnote{337} This Code section of the Act also describes additional practices that will be presumed to be "flipping" during refinancing transactions.\footnote{338}

Code section 7-6A-5 of the Act bars creditors from imposing any prepayment fees or penalties on high-cost home loans or from charging the borrower after the last day of the twenty-fourth month following the loan closing.\footnote{339} The same Code section also prevents high-cost home loan creditors from (1) scheduling payments which are more than twice as large as the average of earlier scheduled payments; (2) including payment terms under which the outstanding principle balance increases over the course of the loan because the regular periodic payments do not cover the full amount of interest due; (3) increasing the interest rate after borrower default; (4) including terms where more than two periodic payments are consolidated and paid in advance from the loan proceeds provided to

\footnote{333}{\textit{Id.}}
\footnote{334}{\textit{Id.}}
\footnote{335}{\textit{Id.}}
\footnote{336}{O.C.G.A. § 7-6A-4 (Supp. 2002).}
\footnote{337}{\textit{Id.}}
\footnote{338}{\textit{Id.}}
\footnote{339}{O.C.G.A. § 7-6A-5 (Supp. 2002).}
the borrower; (5) compelling the borrower to litigate and/or arbitrate claims (or defenses) in inconvenient, costly, or more dilatory forums or limiting any claim or defense, in any way, that the borrower may have.\footnote{340}

In addition, under this Code section, creditors may not make high-cost loans without first verifying that the borrower has received loan counseling advising him or her of the transaction from either the Georgia Housing and Finance Authority or a counselor with a third-party nonprofit organization approved by the U.S. Department of Housing and Urban Development.\footnote{341} Moreover, creditors are banned from making a high-cost home loan unless a reasonable creditor would believe that the borrower is able to make the payments at the time the loan is consummated given the borrower's current and expected income, current obligations, employment status, and other financial resources.\footnote{342} There is a rebuttable presumption in the Act that the borrower is able to make the payments if, at the time of loan consummation, the borrower's total monthly debts, including the amounts under the loan, do not exceed fifty percent of the borrower's monthly gross income.\footnote{343}

The Act further restricts creditors from paying contractors under a home improvement contract from the proceeds of a high-cost home loan unless the creditor receives an affidavit from the contractor indicating that the work is complete and the proceeds are distributed in an instrument payable to the borrower or jointly to the borrower and the contractor.\footnote{344} The borrower can also elect payment distribution through a third-party escrow agent.\footnote{345} The Act also prohibits the creditor from charging the borrower any fees to change, renew, extend, or defer any payment due under the terms of a high-cost home loan.\footnote{346}

The Act obligates the creditor to provide notice of intent to foreclose in writing by certified mail, return receipt requested, to the
borrower's last known address.\textsuperscript{347} It also requires the creditor to inform the borrower about his or her right to cure the default and its terms, including potential attorney fees, deadlines, and creditor contact information to dispute a foreclosure.\textsuperscript{348} However, if the borrower cures the default, the creditor must nullify any acceleration fee obligation imposed on the borrower and reinstate the borrower to the same position as if the default did not occur.\textsuperscript{349}

Finally, Code section 7-6A-5 further bars the creditor or loan servicer of a high-cost loan from enforcing any provision that permits it, in its sole discretion, to accelerate the indebtedness.\textsuperscript{350} It also mandates that all high-cost home loan documents that create a debt or a pledge property as collateral contain a notice, in a conspicuous manner, on the first page that informs all readers: "This is a mortgage subject to the 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 this mortgage."\textsuperscript{351}

Code section 7-6A-6 of the Act informs any creditor, assignee, or holder of a high-cost home loan of the potential liabilities it may face if a home loan is made, arranged, or assigned by a person selling home improvements.\textsuperscript{352} Under this part of the Act, the borrower may assert all affirmative claims and any defenses against the creditor, assignee, or holder in any capacity that the borrower may have against the seller or home improvement contractor.\textsuperscript{353} Moreover, any future purchasers of high-cost home loans are subject to all claims and defenses with respect to the loan that a borrower could assert against the original creditors of the loan.\textsuperscript{354} Code section 7-6A-6 also permits the borrower of a covered home loan to assert a violation of the Act against any creditor or servicer after the borrower receives notice of acceleration or foreclosure or if the borrower is in default more than sixty days.\textsuperscript{355} Subsection d of Code section 7-6A-6 also

\textsuperscript{347} Id. Such notice must be sent at least 14 days prior to the publication of the legal advertisement required by O.C.G.A. § 44-14-162 (2002).
\textsuperscript{348} Id.
\textsuperscript{349} Id.
\textsuperscript{350} Id.
\textsuperscript{351} O.C.G.A. § 7-6A-5 (Supp. 2002).
\textsuperscript{352} O.C.G.A. § 7-6A-6 (Supp. 2002).
\textsuperscript{353} Id.
\textsuperscript{354} Id.
\textsuperscript{355} Id.
makes it a violation of the Act for any person to divide a loan transaction into separate parts or structure a transaction as an open-ended loan to evade provisions of the Act.\footnote{356. Id.}

Code section 7-6A-7 of the Act outlines the type of damage liability expected in the event of a violation.\footnote{357. O.C.G.A. § 7-6A-7 (Supp. 2002).} Under this section, borrowers will be entitled to actual damages, including consequential and incidental damages; statutory damages equal to the recovery of two times the interest paid under the loan and forfeiture of interest for any violation of Paragraphs (1) or (2) of Code section 7-6A-3, 4, or 5; punitive damages subject to Code section 51-12-5.1; and costs and reasonable attorney fees.\footnote{358. Id.} Borrowers may also be granted injunctive, declaratory, or other equitable relief.\footnote{359. Id.}

The Act further provides borrowers with the right of rescission for any violation of paragraph (1) of (2) of Code section 7-6A-3, or any violation under Code sections 7-6A-4 or 7-6A-5 at any time during the term of the loan not to exceed a period of five years after the loan's consummation.\footnote{360. Id.} Moreover, any action sued under Chapter 6A may be brought, by the borrower, within four years of the date of the last payment made or five years after the date of the first scheduled payment, whichever is earlier.\footnote{361. Id.} Though the Code section provides monetary and possibly equitable remedies to the borrower, it also indicates that these are not exclusive remedies.\footnote{362. Id.} The borrower is also able to pursue any administrative remedies or other applicable law before proceeding under this Code section.\footnote{363. Id.}

Code section 7-6A-8 empowers the Attorney General, district attorneys, and banking and finance commissioners with jurisdictional authority to enforce all provisions of the Act.\footnote{364. O.C.G.A. § 7-6A-8 (Supp. 2002).} It also gives the Insurance Commissioner power to enforce the directives of paragraph (1) of Code section 7-6A-3.\footnote{365. Id.} Violations of this chapter are considered misdemeanors.\footnote{366. Id.} Persons who knowingly violate it are
subject to fines up to $1000 per violation, and/or imprisonment not to exceed six months.\textsuperscript{367}

However, Code section 7-6A-9 does not assign violations of the Act to creditors, servicers, or insurers, when, acting in good faith, they fail to comply with the chapter's provisions, as long as they establish that either (1) the creditor or servicer or insurer has offered appropriate restitution to the borrower within ninety days of loan closing and prior to receiving any notice from the borrower of the compliance failure; or (2) the borrower is notified of the compliance failure and appropriate restitution is offered to the borrower along with adjustments to the loan within ninety days of discovery of the compliance failure and prior to receiving notice.\textsuperscript{368}

Code section 7-6A-10 of the Act specifies that the chapter's provisions are severable and are not affected by the invalidation of any phrase, clause, sentence, or provision.\textsuperscript{369} Furthermore, Code section 7-6A-11 restricts any county or municipality from enacting any law or ordinance that regulates home loan terms or makes the eligibility of any person or entity to conduct business with the county of municipality dependent upon the terms of home loans originated or serviced by such person or entity.\textsuperscript{370}

\textit{Section 2}

The effective date of this Act is October 1, 2002, and will apply to all home loans made or entered into after that date.\textsuperscript{371}

\textit{Section 3}

This section of the Act repeals any other laws and parts of laws that are in conflict with this Act.\textsuperscript{372}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item O.C.G.A. § 7-6A-9 (Supp. 2002). Compliance failure must be unintentional and result from a bona fide error like clerical, calculation, computer malfunction and programming, and printing errors. \textit{Id.} Errors of legal judgment with respect to a person's obligations under this chapter are not bona fide errors. \textit{Id.}
\item O.C.G.A. § 7-6A-10 (Supp. 2002).
\item O.C.G.A. § 7-6A-11 (Supp. 2002).
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
Opposition

The banking and lending industry opposed HB 1361. This industry donated significant money to the major supporters of HB 1361, except Senator Fort. The industry donated $266,000 to Governor Barnes, $8000 to Senator Cheeks of the 23rd District, who was Chairman of the Senate Banks and Financial Institutions Committee, and $8000 to Representative Parrish of the 144th District, who was Chairman of the House Banks and Banking Committee. Additionally, Senator Thompson of the 33rd District and Representative Smith of the 175th District, both Floor leaders for the Governor and the sponsors of HB 1361 in their respective chambers, owned stock in banks.

The arguments against regulating predatory lending were varied. For instance, Senator Cagle of the 49th District argued that banking was already heavily regulated, though he voted for HB 1361. Representative O’Neal of the 139th District said that a predatory lending bill would diminish people’s access to loans and jeopardize the economy.

Some lobbyists opposed HB 1361. Jane Goodman, regional vice president of the Community Mortgage Services in Smyrna, said HB 1361 would harm first time homebuyers. B.J. VanGundy, lobbyist for mortgage brokers, said that HB 1361 made fees so low that brokers could not make money. Van Gundy also said that HB 1361 would discourage loans to poor people.

Still, not all bankers opposed HB 1361. Joe Brannen, president of the Georgia Bankers Association, supported the Senate Committee

374. Id.
375. Id.
378. Barnini Chakraborty, Senate Committee Restores the Governor’s Predatory Lending Bill, ASSOCIATED PRESS, Mar. 28, 2002.
version of HB 1361. Mo Thrash, a lobbyist with the Mortgage Bankers association of Georgia, said when HB 1361 was introduced that the Association "generally speaking . . . is in support of the Governor's bill." 

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381. Barnini Chakraborty, Senate Committee Restores the Governor's Predatory Lending Bill, ASSOCIATED PRESS, Mar. 28, 2002.