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HB 153 – Courts: Attorneys

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COURTS

Attorneys: Amend Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated, Relating to the Regulation of the Practice of Law, so as to Authorize Certain Activities Involving Real Estate Transactions; Provide for a Civil Action for Damages; Provide for Exceptions; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

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|-----------------|--|
| CODE SECTIONS: | O.C.G.A. §§ 15-19-59, -60 (new) |
| BILL NUMBER: | HB 153 |
| ACT NUMBER: | 76 |
| GEORGIA LAWS: | 2015 Ga. Laws 550 |
| SUMMARY: | The Act prohibits anyone other than a State Bar of Georgia active member in good standing from closing a residential real estate transaction or from expressing, rendering, or issuing a legal opinion as to the status of the title to real or personal property. The Act also provides a civil cause of action for damages to any consumer who is a party to a one-to-four family residential transaction, consumer debtor, or trustee of a consumer debtor in a bankruptcy case that involves a one-to-four family residential real property who is harmed by a violation of this article or violation of the Supreme Court's rules or opinions governing the unlicensed practice of law. |
| EFFECTIVE DATE: | July 1, 2015 |

History

House Bill (HB) 153 was initially introduced to codify portions of the Georgia Supreme Court's advisory provisions relating to civil

damages and the unauthorized practice of law.¹ The bill, however, was later refined to apply only when the unauthorized practice of law occurred within a real estate closing of a one-to-four family residence.² The bill was designed as a “consumer protection piece of legislation” to provide a practical remedy for consumers injured by the unauthorized practice of law in connection with a residential real estate transaction.³ The unauthorized practice of law in connection with a real estate transaction occurs an individual other than an active member in good standing with the State Bar of Georgia closes a residential real estate transaction “or expresse[s], render[s], or issue[s] a legal opinion as to the status of the title to real or personal property.”⁴

Prior to the enactment of HB 153, thousands of residential real estate transactions occurred every year in Georgia with little or no involvement from a licensed Georgia attorney, and limited avenues of relief were available to consumers injured from such transactions.⁵ Consumers were forced to choose between two potential avenues of relief.⁶ First, they could elect to file a complaint with the State Bar of Georgia, which could issue a cease and desist letter or an injunction.⁷ Second, consumers could file a criminal complaint with the State Solicitor in the county where the property is located.⁸ Injured consumers, however, were unable to seek any civil remedy for a violation.⁹ In order to combat the largely unregulated issue of the unauthorized practice of law in the residential real estate setting and provide consumers with a more practical remedy when a violation

1. See Telephone Interview with Christine Butcher, Aide to Sen. Jesse Stone (R-23rd) (Apr. 9, 2015).

2. See Telephone Interview with Rep. Tom Weldon (R-3rd) (Apr. 15, 2015) [hereinafter Weldon Interview]; see also Audio Recording of Senate Judiciary Committee, Mar. 24, 2015 at 5 min., 23 sec. (remarks by Rep. Tom Weldon (R-3rd)) (on file with the Georgia State University Law Review) [hereinafter Senate Committee Recording].

3. Senate Committee Recording, *supra* note 2, at 10 min., 20 sec. (remarks by Attorney William L. Phalen III, Partner with Sherman & Phalen, LLC); see Weldon Interview, *supra* note 2 (discussing problems involving out of state title and loan companies coming into the State of Georgia and improperly closing real estate transactions with an unlicensed professional).

4. O.C.G.A. § 15-19-59(c) (2015).

5. Senate Committee Recording, *supra* note 2, at 11 min., 19 sec. (remarks by Attorney William L. Phalen, III, partner with Sherman & Phalen, LLC).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

has occurred, HB 153 was introduced during the 2015 legislative session.¹⁰

Bill Tracking of HB 153

Consideration and Passage by the House

Representatives Tom Weldon (R-3rd), Wendell Willard (R-51st), Bert Reeves (R-34th), Trey Kelley (R-16th), Mary Margaret Oliver (D-82nd), and Andrew Welch (R-110th) sponsored HB 153.¹¹ The House read the bill for the first time on January 29, 2015.¹² Speaker David Ralston (R-7th) then assigned the bill to the House Judiciary Committee.¹³ The House Judiciary Committee read the bill for the second time on February 2, 2015.¹⁴ On February 11, 2015, the bill was withdrawn from the House Judiciary Committee and recommitted to the Regulated Industries Committee,¹⁵ which recommended substantial changes to the bill.¹⁶ The Committee favorably reported the bill by substitute on March 11, 2015.¹⁷

Differing significantly from the bill as first introduced, the Committee substitute contained changes that converted the bill's scope of regulation from the general unauthorized practice of law to solely the unauthorized practice of law in the residential real estate context.¹⁸ Originally the bill only contained one new Code section, 15-19-59.¹⁹ The House Regulated Industries Committee changed this section from merely providing a civil action for any person damaged by a violation of this article to providing a list of permissible broker activities.²⁰ Moreover, Committee changes prohibited brokers from

10. See HB 153, as introduced, 2015 Ga. Gen. Assem.

11. Georgia General Assembly, HB 153, Bill Tracking, <http://legis.ga.gov/legislation/en-US/Display/20152016/HB/153>.

12. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

13. See *id.*

14. *Id.*

15. *Id.*

16. Compare HB 153, as introduced, 2015 Ga. Gen. Assem., with HB 153 (HCS), 2015 Ga. Gen. Assem.

17. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

18. Compare HB 153, as introduced, 2015 Ga. Gen. Assem., with HB 153 (HCS), 2015 Ga. Gen. Assem.

19. HB 153, as introduced, 2015 Ga. Gen. Assem.

20. HB 153 (HCS), § 1, p. 1, ln. 13–25, 2015 Ga. Gen. Assem.

expressing legal opinions regarding title to real or personal property or closing a residential real estate transaction—qualifying either behavior as the unauthorized practice of law.²¹ The House Committee also added another new Code section, 15-19-60, which provides for a civil action for consumers to recover damages when harmed by a violation of Code section 5-19-59.²² The House read the Committee substitute as amended on March 13, 2015.²³ The House passed the Committee substitute by a vote of 164 to 5.²⁴

Consideration and Passage by the Senate

Senator Jesse Stone (R-23rd) sponsored HB 153 in the Senate.²⁵ The bill was first read on March 18, 2015, and was assigned to the Senate Judiciary Committee.²⁶ The Senate Judiciary Committee offered several changes to the bill to clarify who may close a residential real estate transaction²⁷ and who may seek civil damages as a result of a violation.²⁸ The Committee sought to ensure that only members in good standing with the State Bar of Georgia are permitted to close residential real estate transactions occurring within the State.²⁹ The Senate read the Committee's substitute on March 25, 2015.³⁰ The bill was read for a third time on March 27, 2015, and an adopted floor amendment added “the employee of a seller of real property” to the list of entities regulated by this Code section.³¹ The Senate passed the Committee substitute with the floor amendment on March 27, 2015, by a vote of 48 to 0.³² The bill was then sent back to the House.³³ On March 31, 2015, the House agreed to the Senate

21. *Id.* § 1, p. 2, ln. 26–30.

22. *Id.* § 1, p. 2, ln. 31–40.

23. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

24. Georgia House of Representatives Voting Record, HB 153 (Mar. 13, 2015).

25. Georgia General Assembly, HB 153, Bill Tracking, <http://legis.ga.gov/legislation/en-US/Display/20152016/HB/153>.

26. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

27. HB 153 (SCS), § 1, p. 2, ln. 26–27, 2015 Ga. Gen. Assem.

28. HB 153 (SCS), § 1, p. 2, ln. 35–37, 2015 Ga. Gen. Assem.

29. Senate Committee Recording, *supra* note 2, at 8 min., 9 sec. (remarks by Rep. Tom Weldon (R-3rd)).

30. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

31. HB 153 (SCSFA), § 1, p. 1, ln. 14, 2015 Ga. Gen. Assem.

32. Georgia Senate Voting Record, HB 153 (Mar. 27, 2015).

33. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

Committee substitute and floor amendment by a vote of 168 to 1.³⁴ HB 153 was sent to Governor Nathan Deal (R) on April 7, 2015, and signed into law on May 5, 2015.³⁵

The Act

The Act amends Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated, for the purpose of regulating the practice of law, authorizing certain activities involving real estate transactions, and providing for a civil action for damages for those harmed by the violation of the unlicensed practice of law in certain situations.³⁶

Section 1 of the Act provides for the addition of two new Code sections, 15-19-59³⁷ and 15-19-60.³⁸ Code section 15-19-59 provides a list of activities in which brokers, associate brokers, licensed salespersons, sellers of real property, and employees of property management companies may partake.³⁹ While these persons may provide pre-prepared legal forms and general information to their clients,⁴⁰ they are not authorized to express a legal opinion regarding the status of title to real or personal property.⁴¹ Therefore, this section prohibits anyone other than an active member in good standing with the State Bar of Georgia from closing a residential real estate transaction.⁴²

Code section 15-19-60 introduces a significant change from the current law.⁴³ This section creates a civil action remedy for those injured by the unauthorized practice of law in a residential real estate transaction.⁴⁴ This remedy is available to any consumer who is a party to a one-to-four family residential real estate transaction, consumer debtor, or trustee of a consumer debtor “who is damaged

34. Georgia House of Representatives Voting Record, HB 153 (Mar. 31, 2015).

35. State of Georgia Final Composite Status Sheet, HB 153, May 14, 2015.

36. 2015 Ga. Laws 550, at 550.

37. 2015 Ga. Laws 550, § 1, at 550–51.

38. *Id.* at 551.

39. O.C.G.A. § 15-19-59(a) (2015).

40. O.C.G.A. § 15-19-59(b) (2015).

41. O.C.G.A. § 15-19-59(c) (2015).

42. *Id.*

43. *See* O.C.G.A. § 15-19-60 (2015).

44. *Id.*

by a violation of this article or a violation of the Supreme Court's rules or opinions governing the unlicensed practice of law."⁴⁵ Under this section, these parties may "recover damages, treble damages, reasonable attorney's fees, and expenses of litigation."⁴⁶ Such a lawsuit, however, may only be asserted in an individual action and not as a class action lawsuit.⁴⁷

Analysis

The Unauthorized Practice of Law

First and foremost, the Act regulates unauthorized practice of law and provides recourse to those who suffer as a result of non-attorney mistakes.⁴⁸ Representative Tom Weldon (R-3rd) stated that this Act was intended to be "a realtor's bill, not a lawyer's bill," but the Act significantly limits the work that a non-attorney can perform in a residential real estate closing.⁴⁹ Unauthorized practice of law statutes regarding the conveyance of residential real estate have long been debated and contested.⁵⁰ Proponents argue that performing a real estate closing embodies the practice of law, and only licensed attorneys can navigate the complicated legal issues which may arise during a closing.⁵¹ Others contend that an attorney's role in the process of residential closings is so limited that an attorney's presence or supervision is not necessary.⁵² However, this question

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* The unauthorized practice of law occurs when a lawyer practices law in a jurisdiction where he or she is not authorized to practice or when a non-lawyer, who is not licensed to practice law, poses as a lawyer and offers legal advice or counsel. *See* GA. RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (2013). The definition of the "practice of law" varies in different jurisdictions. *Id.* at R. 5.5 cmt. 2. However, "limiting the practice of law to members of the bar protects the public against [the] rendition of legal services by unqualified persons." *Id.*

49. Weldon Interview, *supra* note 2; *see* O.C.G.A. § 15-19-59(b) (2015). The Act states that non-attorneys may: (1) provide information and advice regarding certain matters; (2) prepare special stipulations to forms prepared by attorneys; (3) provide legal instruments prepared by attorneys; and (4) complete legal instruments prepared by attorneys. O.C.G.A. § 15-19-59(b) (2015). However, a broker, associate broker, or salesperson cannot close a real estate transaction. O.C.G.A. § 15-19-59(c) (2015).

50. Margaret Onys Rentz, *Laying Down The Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 299 (2005).

51. *Id.*

52. *Id.* at 310–11 (citing a study from 1997 which demonstrated that 75% of residential real estate

has already been settled in Georgia.⁵³ The Supreme Court of Georgia reiterated in 2006 that conducting a residential real estate closing constitutes the practice of law, and therefore, in order to protect consumers, such closings must involve an attorney licensed in that jurisdiction.⁵⁴

Effect on Consumers

The original purpose of the Act was to protect consumers despite any unintended beneficial effect the Act might have on realtors or attorneys.⁵⁵ In the past, thousands of residential real estate closings occurred every year without the assistance of licensed attorneys and without any repercussions for realtors or insurance brokers who “practiced law.”⁵⁶ Many of these residential closings had negative impacts on homebuyers around the state as a result of the improper execution of important paperwork—such as security deeds, promissory notes, and loan documents.⁵⁷ In some circumstances, mistakes on the part of a real estate agent or broker who fails to consult a licensed attorney when performing a closing could lead to a homeowner losing his or her property or having to refinance a newly purchased home.⁵⁸ The Act provides consumers with a remedy when a professional who is not a licensed attorney performs a real estate closing of a one-to-four family residence⁵⁹ and also provides that only members in good standing with the State Bar of Georgia may execute such transactions.⁶⁰ Essentially, the Act codified the Supreme

attorneys only become involved in a closing after the buyer signs a sales contract, and a trend existed among the states showing that attorneys were not necessary to effectuate a title change and residential closing).

53. See Formal Advisory Opinion 04–1, 280 Ga. 227, 228, 626 S.E.2d 480, 481 (2006).

54. *Id.* “The closing of a real estate transaction in this State constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law.” *Id.* (citing *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E.2d 741 (2003)).

55. Weldon Interview, *supra* note 2.

56. *Id.*

57. *Id.*

58. *Id.* (discussing the story of an elderly couple who was forced to refinance their home when an unlicensed professional advised them not to sign a document and the deadline for filing passed).

59. O.C.G.A. § 15-19-60 (2015).

60. O.C.G.A. § 15-19-59(c) (2015).

Court's rulings in 2003 and 2006, which indicated that a residential closing amounts to the practice of law.⁶¹

Effect on Real Estate Brokers, Licensed Professionals, and Title Companies

Attorneys typically allege that statutes prohibiting the unauthorized practice of law protect the public from non-lawyers' lack of knowledge and experience.⁶² On the other hand, real estate brokers, licensed salespeople, and title companies argue that such laws are "monopolistic and protect only attorneys' pocketbooks."⁶³ Proponents of the position that residential real estate closings can be settled by either attorneys or licensed brokers, lenders, and title companies argue that restricting closings in such a way reduces competition, thereby reducing options for consumers and increasing costs.⁶⁴ Involving attorneys in real estate closings can also affect the efficiency of the transaction, as attorneys often have busy schedules that can delay or even dissolve the deal.⁶⁵

As originally written and introduced, the Act may have subjected realtors to litigation and civil damages simply for providing clients with advice or guidance when closing a residential deal.⁶⁶ HB 153 was introduced in order to address a recent increase in "witness only" closings, when "an individual presides over the execution of deeds of conveyance and other closing documents but purports to do so merely as a witness and notary, not as someone who is practicing law."⁶⁷ The Supreme Court of Georgia found that a lawyer may not ethically conduct "witness only" closings, and attorneys must be

61. Formal Advisory Opinion 04-1, 280 Ga. 227, 228, 626 S.E.2d 480, 481 (2006); *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 473, 588 S.E.2d 741, 741-42 (2003).

62. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 428-29 (1999).

63. *Id.* at 429-30.

64. Rentz, *supra* note 50, at 299-300.

65. *Id.* at 300.

66. *Law Protecting Legal Rights of REALTORS® Passes Senate*, ATLANTA BD. OF REALTORS (Apr. 3, 2015), <http://www.abr.org/Legislative/news-page.aspx?ItemPath=%2fGlobal%2fNews+Content%2fGovernment%2fGA-REALTORS-legal-rights> [hereinafter ATLANTA BD. OF REALTORS].

67. *In Re Formal Advisory Opinion No. 13-1*, 295 Ga. 749, 750, 763 S.E.2d 875, 876 (2014) (citing *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E.2d 741 (2003)).

involved in the process of a residential real estate closing from start to finish to avoid professional malpractice and protect the public.⁶⁸

As passed, however, the Act helps protect realtors from lawsuits.⁶⁹ The Senate amendment addressed some of the unintended consequences of the bill and afforded greater protection to realtors and licensed professionals.⁷⁰ The new language added to the Act permits realtors to advise clients, as well as write special stipulations in real estate contracts, while avoiding misleading “witness only closings” and protecting the financial well-being of consumers.⁷¹

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68. *Id.* (stating a “[l]awyer’s failure to review closing documents can facilitate foreclosure fraud, problems with title, and other errors that may not be detected until years later when the owner of a property attempts to refinance, sell or convey it”).

69. ATLANTA BD. OF REALTORS, *supra* note 66.

70. *See id.*

71. *See* O.C.G.A. § 15-19-59, -60 (2015); ATLANTA BD. OF REALTORS, *supra* note 66 (expressing the Atlanta Board of Realtors’ approval of the state legislature’s efforts to protect both consumers and Realtors by amending House Bill 153 and passing the current version).

