

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE BILL 1374*
Committee Substitute Favorable 5/15/07
Third Edition Engrossed 5/16/07
Senate Judiciary I (Civil) Committee Substitute Adopted 7/26/07

Short Title: Protect Homeowners/Reduce Foreclosure.

(Public)

Sponsors:

Referred to:

April 10, 2007

A BILL TO BE ENTITLED

AN ACT TO OVERTURN THE SHEPARD CASE AND AMEND THE LIMITATION REGARDING ACTIONS TO RECOVER FOR USURY; TO OVERTURN THE SKINNER CASE AND AMEND THE LONG-ARM STATUTE TO ALLOW NORTH CAROLINA COURTS TO EXERCISE PERSONAL JURISDICTION OVER CERTAIN NONRESIDENT DEFENDANTS; TO REQUIRE THAT A NOTICE OF FORECLOSURE CONTAIN CERTAIN INFORMATION; AND TO PROVIDE FOR MORTGAGE DEBT COLLECTION AND SERVICING.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 1-53(2) reads as rewritten:

"(2) An action to recover the penalty for ~~usury.~~ usury, including an action regarding the financing of usurious points, usurious fees, or other usurious charges; the two-year period shall accrue with each payment made and accepted on the loan."

SECTION 2. G.S. 1-75.4(6) reads as rewritten:

"(6) Local Property. – In any action which arises out of:

- a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or
- b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

- 1 c. A claim that the defendant return, restore, or account to the
2 plaintiff for any asset or thing of value which was within this
3 State at the time the defendant acquired possession or control
4 over it.
- 5 d. A claim related to a loan made in this State or deemed to have
6 been made in this State under G.S. 24-2.1, regardless of the
7 situs of the lender, assignee, or other holder of the loan note and
8 regardless of whether the loan payment or fee is received
9 through a loan servicer, provided that: (i) the loan was made to
10 a borrower who is a resident of this State, (ii) the loan is
11 incurred by the borrower primarily for personal, family, or
12 household purposes, and (iii) the loan is secured by a mortgage
13 or deed of trust on real property situated in this State upon
14 which there is located or there is to be located a structure or
15 structures designed principally for occupancy of from one to
16 four families."

17 **SECTION 3.** G.S. 24-2.1 reads as rewritten:

18 **"§ 24-2.1. Transactions governed by Chapter.**

19 (a) For purposes of this Chapter, any extension of credit shall be deemed to have
20 been made in this State, and therefore subject to the provisions of this Chapter if the
21 lender offers or agrees in this State to lend to a borrower who is a resident of this State,
22 or if such borrower accepts or makes the offer in this State to borrow, regardless of the
23 situs of the contract as specified therein.

24 (b) Any solicitation or communication to lend, oral or written, originating outside
25 of this State, but forwarded to and received in this State by a borrower who is a resident
26 of this State, shall be deemed to be an offer or agreement to lend in this State.

27 (c) Any solicitation or communication to borrow, oral or written, originating
28 within this State, from a borrower who is a resident of this State, but forwarded to, and
29 received by a lender outside of this State, shall be deemed to be an acceptance or offer
30 to borrow in this State.

31 (d) Any oral or written offer, acceptance, solicitation or communication to lend
32 or borrow, made in this State to, or received in this State from, a borrower who is not a
33 resident of this State shall be subject to the provisions of this Chapter, applicable federal
34 law, law of the situs of the contract, or law of the residence of any such borrower as the
35 parties may elect.

36 (e) Any person who acquires a right by contract or by assignment to receive
37 payments under a loan made in this State to an individual or individuals who is a
38 resident of this State at the time of the loan and who benefits from the laws of this State
39 by having the loan secured by real property located in this State is deemed to have
40 consented to the courts of this State having jurisdiction over such person for any claim
41 under this Chapter and for any claim related to the loan instrument.

42 (f) The provisions of this section shall be severable and if any phrase, clause,
43 sentence or provision is declared to be invalid, the validity of the remainder of this
44 section shall not be affected thereby.

1 (g) It is the paramount public policy of North Carolina to protect North Carolina
2 resident borrowers through the application of North Carolina interest laws. Any
3 provision of this section which acts to interfere in the attainment of that public policy
4 shall be of no effect."

5 SECTION 4. G.S. 45-21.16 reads as rewritten:

6 "§ 45-21.16. Notice and hearing.

7 ...

8 (c) Notice shall be in writing and shall state in a manner reasonably calculated to
9 make the party entitled to notice aware of the following:

10 ...

11 (5a) The holder has confirmed in writing to the person giving the notice, or
12 if the holder is giving the notice, the holder shall confirm in the notice,
13 that, within 30 days of the date of the notice, the debtor was sent by
14 first-class mail at the debtor's last known address a detailed written
15 statement of the amount of ~~principal and interest~~ principal, interest,
16 and any other fees, expenses, and disbursements that the holder in
17 good faith is claiming to be due ~~claims in good faith is owed~~ as of the
18 date of the written statement, together with a daily interest charge
19 based on the contract rate as of the date of the ~~statement, and the~~
20 ~~amount of other expenses the holder contends it is owed as of the date~~
21 ~~of the statement.~~ written statement. Nothing herein is intended to
22 authorize any fees, charges, or methods of charging interest which is
23 not otherwise permitted under contract between the parties and other
24 applicable law.

25 (5b) To the knowledge of the holder, or the servicer acting on the holder's
26 behalf, whether in the two years preceding the date of the statement
27 any requests for information have been made by the borrower to the
28 servicer pursuant to G.S. 45-88 and, if so, whether such requests have
29 been complied with. If the time limits set forth in G.S. 45-88 for
30 complying with any such requests for information have not yet expired
31 as of the date of the notice, the notice shall so state.

32 (6) Repealed by Session Laws 1977, c. 359, s. 7.

33 (7) The right of the debtor (or other party served) to appear before the
34 clerk of court at a time and on a date specified, at which appearance he
35 shall be afforded the opportunity to show cause as to why the
36 foreclosure should not be allowed to be held. The notice shall contain a
37 ~~statement that if the debtor does not intend to contest the creditor's~~
38 ~~allegations of default, the debtor does not have to appear at the hearing~~
39 ~~and that his failure to attend the hearing will not affect his right to pay~~
40 ~~the indebtedness and thereby prevent the proposed sale, or to attend~~
41 ~~the actual sale, should he elect to do so.~~ all of the following:

42 a. A statement that if the debtor does not intend to contest the
43 creditor's allegations of default, the debtor does not have to
44 appear at the hearing and that the debtor's failure to attend the

1 hearing will not affect the debtor's right to pay the indebtedness
2 and thereby prevent the proposed sale, or to attend the actual
3 sale, should the debtor elect to do so.

4 b. A statement that the trustee, or substitute trustee, is a neutral
5 party and, while holding that position in the foreclosure
6 proceeding, may not advocate for the secured creditor or for the
7 debtor in the foreclosure proceeding.

8 c. A statement that the debtor has the right to apply to a judge of
9 the superior court pursuant to G.S. 45-21.34 to enjoin the sale,
10 upon any legal or equitable ground that the court may deem
11 sufficient prior to the time that the rights of the parties to the
12 sale or resale become fixed, provided that the debtor complies
13 with the requirements of G.S. 45-21.34.

14 d. A statement that the debtor has the right to appear at the hearing
15 and contest the evidence that the clerk is to consider under
16 G.S. 45-21.16(d), and that to authorize the foreclosure the clerk
17 must find the existence of: (i) valid debt of which the party
18 seeking to foreclose is the holder, (ii) default, (iii) right to
19 foreclose under the instrument, and (iv) notice to those entitled
20 to notice.

21 e. A statement that if the debtor fails to appear at the hearing, the
22 trustee will ask the clerk for an order to sell the real property
23 being foreclosed.

24 f. A statement that the debtor has the right to seek the advice of an
25 attorney and that free legal services may be available to the
26 debtor by contacting Legal Aid of North Carolina or other legal
27 services organizations.

28 (8) That if the foreclosure sale is consummated, the purchaser will be
29 entitled to possession of the real estate as of the date of delivery of his
30 deed, and that the debtor, if still in possession, can then be evicted.

31 (8a) The name, address, and telephone number of the trustee or mortgagee.

32 (9) That the debtor should keep the trustee or mortgagee notified in
33 writing of his address so that he can be mailed copies of the notice of
34 foreclosure setting forth the terms under which the sale will be held,
35 and notice of any postponements or resales.

36 (10) If the notice of hearing is intended to serve also as a notice of sale,
37 such additional information as is set forth in G.S. 45-21.16A.

38 (11) That the hearing may be held on a date later than that stated in the
39 notice and that the party will be notified of any change in the hearing
40 date.

41 (c1) The person giving the notice of hearing, if other than the holder, may rely on
42 the written confirmation received from the holder under ~~subdivision~~ subdivisions (c)(5a)
43 and (c)(5b) of this section and is not liable for inaccuracies in the written confirmation.

1 ~~Any dispute concerning the mailing or accuracy of the written statement described in~~
2 ~~subdivision (c)(5a) of this section shall not be considered in a hearing under this section.~~
3 ~~...."~~

4 **SECTION 5.** Chapter 45 of the General Statutes is amended by adding a
5 new Article to read:

6 "Article 10.

7 "Mortgage Debt Collection and Servicing.

8 **"§ 45-85. Definitions.**

9 As used in this Article, the following definitions apply:

- 10 (1) Home loan. – A loan secured by real property located in this State
11 used, or intended to be used, by an individual borrower or individual
12 borrowers in this State as a dwelling, regardless of whether the loan is
13 used to purchase the property or refinance the prior purchase of the
14 property or whether the proceeds of the loan are used for personal,
15 family, or business purposes.
- 16 (2) Servicer. – A 'servicer' as defined in the Real Estate Settlement
17 Procedures Act, 12 U.S.C. § 2605(i). A licensed attorney, who in the
18 practice of law or performing as a trustee, accepts payments related to
19 a loan closing, default, foreclosure, or settlement of a dispute or legal
20 claim related to a loan, shall not be considered a servicer for the
21 purposes of this Article.

22 **"§ 45-86. Assessment of fees; processing of payments; publication of statements.**

23 (a) A servicer must comply as to every home loan, regardless of whether the loan
24 is considered in default or the borrower is in bankruptcy or the borrower has been in
25 bankruptcy, with the following requirements:

- 26 (1) Any fee that is incurred by a servicer shall be both:
- 27 a. Assessed within 45 days of the date on which the fee was
28 incurred. Provided, however, that attorney or trustee fees and
29 costs incurred as a result of a foreclosure action shall be
30 assessed within 45 days of the date they are charged by either
31 the attorney or trustee to the servicer.
- 32 b. Explained clearly and conspicuously in a statement mailed to
33 the borrower at the borrower's last known address at least 30
34 days after assessing the fee, provided the servicer shall not be
35 required to take any action in violation of the provisions of the
36 federal bankruptcy code.
- 37 (2) All amounts received by a servicer on a home loan at the address
38 where the borrower has been instructed to make payments shall be
39 accepted and credited, or treated as credited, within one business day
40 of the date received, provided that the borrower has made the full
41 contractual payment and has provided sufficient information to credit
42 the account. If a servicer uses the scheduled method of accounting, any
43 regularly scheduled payment made prior to the scheduled due date
44 shall be credited no later than the due date. Provided, however, that if

1 any payment is received and not credited, or treated as credited, the
2 borrower shall be notified within 10 business days by mail at the
3 borrower's last known address of the disposition of the payment, the
4 reason the payment was not credited, or treated as credited to the
5 account, and any actions necessary by the borrower to make the loan
6 current.

7 (3) Failure to charge the fee or provide the information within the
8 allowable time and in the manner required under subdivision (1) of
9 subsection (a) of this section constitutes a waiver of such fee.

10 (4) All fees charged by a servicer must be otherwise permitted under
11 applicable law and the contracts between the parties. Nothing herein is
12 intended to permit the application of payments or method of charging
13 interest which is less protective of the borrower than the contracts
14 between the parties and other applicable law.

15 **"§ 45-87. Obligation of servicer to handle escrow funds.**

16 Any servicer that exercises the authority to collect escrow amounts on a home loan
17 held or to be held for the borrower for insurance, taxes, and other charges with respect
18 to the property shall collect and make all payments from the escrow account, so as to
19 ensure that no late penalties are assessed or other negative consequences result. The
20 provisions of this section shall apply regardless of whether the loan is delinquent or in
21 default unless the servicer has a reasonable basis to believe that recovery of these funds
22 will not be possible or the loan is more than 90 days in default.

23 **"§ 45-88. Borrower requests for information.**

24 The servicer shall make reasonable attempts to comply with a borrower's request for
25 information about the home loan account and to respond to any dispute initiated by the
26 borrower about the loan account, as provided in this section. The servicer shall
27 maintain, until the home loan is paid in full, otherwise satisfied, or sold, written or
28 electronic records of each written request for information regarding a dispute or error
29 involving the borrower's account. Specifically, the servicer is required to do all of the
30 following:

31 (1) Provide a written statement to the borrower within 10 business days of
32 receipt of a written request from the borrower that includes or
33 otherwise enables the servicer to identify the name and account of the
34 borrower and includes a statement that the account is or may be in
35 error or otherwise provides sufficient detail to the servicer regarding
36 information sought by the borrower. The borrower is entitled to one
37 such statement in any six-month period free of charge, and additional
38 statements shall be provided if the borrower pays the servicer a
39 reasonable charge for preparing and furnishing the statement not to
40 exceed twenty-five dollars (\$25.00) The statement shall include the
41 following information if requested:

42 a. Whether the account is current or, if the account is not current,
43 an explanation of the default and the date the account went into
44 default.

- 1 **b.** The current balance due on the loan, including the principal
2 due, the amount of funds (if any) held in a suspense account,
3 the amount of the escrow balance (if any) known to the
4 servicer, and whether there are any escrow deficiencies or
5 shortages known to the servicer.
- 6 **c.** The identity, address, and other relevant information about the
7 current holder, owner, or assignee of the loan.
- 8 **d.** The telephone number and mailing address of a servicer
9 representative with the information and authority to answer
10 questions and resolve disputes.
- 11 **(2)** Provide the following information and/or documents within 25
12 business days of receipt of a written request from the borrower that
13 includes or otherwise enables the servicer to identify the name and
14 account of the borrower and includes a statement that the account is or
15 may be in error or otherwise provides sufficient detail to the servicer
16 regarding information sought by the borrower:
- 17 **a.** A copy of the original note, or if unavailable, an affidavit of lost
18 note.
- 19 **b.** A statement that identifies and itemizes all fees and charges
20 assessed under the loan transaction and provides a full payment
21 history identifying in a clear and conspicuous manner all of the
22 debits, credits, application of and disbursement of all payments
23 received from or for the benefit of the borrower, and other
24 activity on the home loan including escrow account activity and
25 suspense account activity, if any. The period of the account
26 history shall cover at a minimum the two-year period prior to
27 the date of the receipt of the request for information. If the
28 servicer has not serviced the home loan for the entire two-year
29 time period the servicer shall provide the information going
30 back to the date on which the servicer began servicing the home
31 loan. For purposes of this subsection, the date of the request for
32 the information shall be presumed to be no later than 30 days
33 from the date of the receipt of the request. If the servicer claims
34 that any delinquent or outstanding sums are owed on the home
35 loan prior to the two-year period or the period during which the
36 servicer has serviced the loan, the servicer shall provide an
37 account history beginning with the month that the servicer
38 claims any outstanding sums are owed on the loan up to the
39 date of the request for the information. The borrower is entitled
40 to one such statement in any six-month period free of charge.
41 Additional statements shall be provided if the borrower pays the
42 servicer a reasonable charge for preparing and furnishing the
43 statement not to exceed fifty dollars (\$50.00).

1 (3) Promptly correct errors relating to the allocation of payments, the
2 statement of account, or the payoff balance identified in any notice
3 from the borrower provided in accordance with subdivision (2) of this
4 section, or discovered through the due diligence of the servicer or
5 other means.

6 **"§ 45-89. Remedies.**

7 In addition to any equitable remedies and any other remedies at law, any borrower
8 injured by any violation of this Article may bring an action for recovery of actual
9 damages, including reasonable attorneys' fees. The Commissioner of Banks, the
10 Attorney General, or any party to a home loan may enforce the provisions of this
11 section. With the exception of an action by the Commissioner of Banks or the Attorney
12 General, at least 30 days before a borrower or a borrower's representative institutes a
13 civil action for damages against a servicer for a violation of this Article, the borrower or
14 a borrower's representative shall notify the servicer in writing of any claimed errors or
15 disputes regarding the borrower's home loan that forms the basis of the civil action. The
16 notice must be sent to the address as designated on any of the servicer's bills,
17 statements, invoices, or other written communication, and must enable the servicer to
18 identify the name and loan account of the borrower. For purposes of this section, notice
19 shall not include a complaint or summons. Nothing in this section shall limit the rights
20 of a borrower to enjoin a civil action, or make a counterclaim, cross-claim, or plead a
21 defense in a civil action. A servicer will not be in violation of this Article if the servicer
22 shows by a preponderance of evidence that:

23 (1) The violation was not intentional or the result of bad faith; and

24 (2) Within 30 days after discovering or being notified of an error, and
25 prior to the institution of any legal action by the borrower against the
26 servicer under this section, the servicer corrected the error and
27 compensated the borrower for any fees or charges incurred by the
28 borrower as a result of the violation.

29 **"§ 45-90. Severability.**

30 The provisions of this Article shall be severable, and if any phrase, clause, sentence,
31 or provision is declared to be invalid or is preempted by federal law or regulation, the
32 validity of the remainder of this section shall not be affected thereby. If any provision of
33 this Article is declared to be inapplicable to any specific category, type, or kind of
34 points and fees, the provisions of this Article shall nonetheless continue to apply with
35 respect to all other points and fees."

36 **SECTION 6.** Sections 4 and 5 of this act become effective April 1, 2008. All
37 other sections of this act are effective when it becomes law.