**South Carolina General Assembly**

119th Session, 2011-2012

**S. 702**

**STATUS INFORMATION**

General Bill

Sponsors: Senators Rose, Ford, Thomas, Hayes, O'Dell, Anderson, Matthews, Pinckney, Lourie, Fair, McGill, Cromer, Sheheen, Cleary, Rankin, L. Martin, Reese, Hutto, Williams, Leventis, Verdin, Land, Nicholson, Elliott and Scott

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Introduced in the Senate on March 17, 2011

Currently residing in the Senate Committee on **Banking and Insurance**

Summary: Requirements for mortgage servicers

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

3/17/2011 Senate Introduced and read first time ([Senate Journal‑page 2](file:///h:\sj%20archive\2011\03-17-11.docx))

3/17/2011 Senate Referred to Committee on **Banking and Insurance** ([Senate Journal‑page 2](file:///h:\sj%20archive\2011\03-17-11.docx))

**VERSIONS OF THIS BILL**

[3/17/2011](file:///p:\pprever\2011-12\702_20110317.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 7 TO CHAPTER 23, TITLE 37 SO AS TO PROVIDE REQUIREMENTS FOR A MORTGAGE SERVICER; AND TO AMEND SECTION 37‑23‑20, AS AMENDED, RELATING TO DEFINITIONS APPLICABLE TO HIGH‑COST AND CONSUMER HOME LOANS, SO AS TO DEFINE THE TERMS “SERVICING AGENT” AND “SERVICER”.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 23, Title 37 of the 1976 Code is amended by adding:

“Article 7

Mortgage Servicers

Section 37‑23‑90. A servicer or servicing agent owes to the homeowner a duty of utmost care, honesty, and loyalty in all transactions, including the duty of full disclosure of all material facts, and shall:

(1) credit homeowners’ monthly loan payments promptly and correct any misapplication of these funds in a timely manner;

(2) engage in loan modifications, including reductions in the payment amount and principal balance, to address a reasonably foreseeable and unavoidable default when a homeowner can make a reasonable payment and it is economically feasible to make a reasonable payment;

(3) ensure the commingling of homeowners’ monthly mortgage payments with servicers assets does not occur except for the time necessary to clear the payments received, which must not exceed two business days;

(4) be accountable for lost paperwork on loan modifications and for failing to suspend the foreclosure process when a homeowner is actively engaged in the loan modification process;

(5) mitigate losses on residential mortgages by taking appropriate action to maximize the net present value of the mortgages for the benefit of all investors in a securitization rather than the benefit of a particular class of investors; and

(6) disclose to the homeowner an ownership interest of the servicer or an affiliate of the servicer in other whole loans secured by the same real property that secures a loan included in a given pool of mortgages used in a securitization.

Section 37‑23‑100. A servicer or servicing agent shall act on behalf of and as the agent of the mortgage holder or investor of the mortgage. The mortgage holder or investor is liable for an action of the servicer that violates a provision of this article.

Section 37‑23‑110. (A) At least fifteen days before the date on which a servicer begins accepting payments from a borrower on a loan being serviced, the servicer must provide the borrower written notice including the:

(1) names, addresses, and telephone numbers of state and federal agencies that regulate the servicer; and

(2) name and mailing address of the owner of the mortgage or investor on the loan being serviced.

(B) A servicer on a mortgage loan serviced before the effective date of this section shall provide the notices provided in subsection (A) to the borrower within thirty days after the effective date of this section.

(C) A written notice required in this section must be sent to the borrower by United States mail at the address designated on the mortgage loan documents.

Section 37‑23‑120. (A) At least fifteen days before a transfer of a servicing function, the transferor lender or servicer must provide the borrower written notice including:

(1) the name, address, and toll free telephone number of the new servicer;

(2) a detailed financial breakdown of the mortgage loan, including, but not limited to, the mortgage loan balance on the date of transfer, interest rate, whether the rate is fixed or adjustable, the reset date for the loan if it has an adjustable rate, monthly principal amount, interest payment amount, monthly escrow amount if included in the monthly payment, current escrow balance, and monthly payment due date; and

(3) the date the new servicer will begin accepting payments from the borrower.

(B) A payment timely made by a borrower to the transferor servicer within sixty days after the loan transfer:

(1) may not be treated as a payment made late;

(2) may not be subject to a fee or other penalty associated with a payment made late;

(3) may not be reported as a late payment to a credit credit‑reporting agency as defined in Section 37‑20‑110(2); and

(4) must be credited for full and timely payment of the loan installment.

Section 37‑23‑130. A servicer that contracts for servicing responsibilities with a transferring lender or servicer is bound by all written temporary or written permanent mortgage modification agreements entered into by previous lenders or servicers.

Section 37‑23‑140. At least forty‑five days before the filing of an action to foreclose on a primary residence, the servicer of the mortgage subject to foreclosure shall send written notice by certified mail, return receipt requested, to the last known address of the borrower to inform him of the availability of resources to avoid foreclosure, including:

(1) an explanation of the foreclosure process written in language targeted at a fifth grade reading level on the Flesch‑Kinkaid reading scale;

(2) an itemization of all past due amounts causing the loan to be in default;

(3) an itemization of other charges that must be paid to bring the loan current;

(4) a statement that the borrower may have options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the United States Department of Housing and Urban Development;

(5) the address, telephone number, email address, and other contact information for the mortgage lender, the mortgage servicer, and the agent for either of them who is authorized to help the borrower avoid foreclosure;

(6) the name, address, telephone number, email address, and other contact information for one or more counseling agencies approved by the United States Department of Housing and Urban Development to help borrowers in this state avoid foreclosure; and

(7) the address, telephone number, and other contact information for the consumer complaint section of the Board of Financial Institutions, or, alternatively, if the loan is serviced by a credit union, the address, telephone number and other contact information for the complaint section for the credit union.

Section 37‑23‑150. (A) When a foreclosure action is served on a homeowner, the party bringing the foreclosure action shall attach written notice to the front of the summons and complaint to explain that those documents are pleadings that commence a legal action against the homeowner, and advising the consumer:

(1) to consult an attorney, and provide the consumer with the telephone number of South Carolina Legal Services, the South Carolina Bar, or other appropriate sources of referral to a licensed attorney in this State;

(2) that an answer to the pleadings must be sent to the court within thirty days after receiving the pleadings and a copy must be sent to the attorney representing the lender;

(3) that failure to respond as required in the pleadings may cause the consumer to lose his right to defend himself in court, even if the consumer is negotiating with the lender or attempting to modify the loan; and

(4) that his case may be referred by the court to a mediator.

(B) Notice required under subsection (A) must be written in language targeted at a fifth grade reading level on the Flesch‑Kinkaid reading scale.

(C) The party providing notice required in subsection (A)(2) shall provide a copy of this correspondence to the attorney representing the lender.

Section 37‑23‑160. The Court shall accept a written response in the format filed by a defendant homeowner representing himself in the action as proper answer to the summons and complaint and will not be found in default if the format is not in compliance with the South Carolina Rules of Civil Procedure. The response must be filed in a timely manner pursuant to the South Carolina Rules of Civil Procedure.

Section 37‑23‑170. A party may not file a foreclosure action until he files an affidavit in which he attests in detail of his compliance with the requirements of Sections 37‑23‑110, 37‑23‑140, and 37‑23‑150. The plaintiff shall attached a copy of all written information and notices provided in accordance with Sections 37‑23‑110, 37‑23‑140 and 37‑23‑150 to this affidavit. This affidavit must be filed in a county of appropriate venue for filing or initiating the action and is subject to the affidavit requirements of Section 15‑36‑100.

Section 37‑23‑180. (A)(1) A summary judgment hearing or a final hearing on the merits for a residential foreclosure action may not occur until the parties to the action participate in a mediation conference:

(a) if the defendant homeowner has filed a written response to the action, contacted the court concerning the action, or attended a hearing regarding the action; or

(b) as otherwise directed at the discretion of the court.

(2) The Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference govern the mediation process except to the extent they conflict with the provisions of this section, in which case the provisions of this section prevail and apply.

(B) Counsel for the servicer or mortgage holder shall coordinate and schedule the case for a mediation required under subsection (A). The mediation may be scheduled with a Supreme Court Certified Civil Mediator or through a designated and approved alternative dispute resolution provider agency, subject to the approval of all parties to the action. The court may appoint a mediator if the parties are unable to agree on the choice of a mediator.

(C) When considering the appointment of a mediator, the court should give preference to mediators with knowledge of and experience with the foreclosure process and this chapter, when practicable.

(D) The payment of mediation fees must be divided equally by both parties, unless the mediation determines otherwise. The mediation fee may be applied by the court as a reasonable cost of litigation in the final judgment of foreclosure if the matter is not resolved at mediation.

(E) The attorney for the servicer or mortgage holder shall make a reasonable effort to coordinate the mediation with all parties and shall give the defendant homeowner and any undefaulted inferior lien holders reasonable advance notice of the date, time, and place of the mediation. Prior to mediation, the attorney also shall give written notice identifying the representative of the lender and attesting to the authority of this representative to participate in mediation and settle on behalf of the lender.

(F) Nothing in this section is intended to prevent the servicer or mortgage holder from filing all pleadings necessary to proceed to final or summary judgment, but a hearing on a motion for summary judgment may not be scheduled prior to the conclusion of the scheduled mediation session.

(G) The servicer, mortgage holder, or a representative of the servicer or mortgage holder who has full authority to settle the matter must participate in the mediation or a court of competent jurisdiction shall dismiss the case without prejudice at the motion of the defendant homeowner. A representative may attend the mediation by telephone if he provides notice that he intends to attend by telephone in the mediation notice and provides a toll‑free telephone number for use in accessing the representative during the mediation. A representative who attends by telephone must be available continuously throughout the mediation session. A defendant homeowner and the attorney of a defendant homeowner, if any, shall appear at the mediation in person. Prior to the mediation, the attorney representing the mortgage holder or the attorney representing the servicer must file with the court a certificate identifying the representative of the lender. This certificate must specify the position or relationship of the representative to the lender and specifically certify that the lender has fully authorized the representative to resolve the foreclosure suit without the need to seek other authorization.

(H) The defendant homeowner shall furnish updated financial information to the attorney for the mortgage holder or the attorney for the servicer within ten days after receiving notice of the mediation session.

(I) A hearing on a motion for summary judgment or a final hearing on the merits of the case may be promptly noticed if:

(1) the defendant homeowner fails to appear at a properly noticed mediation or the matter reaches an impasse at mediation; and

(2) a Proof of Alternate Dispute Resolution is filed with the clerk of court pursuant to Rule 7(f) of the Alternate Dispute Resolution Rules.

(J) The mediator shall file a report detailing the results of the mediation to the court. If the case fails to be successfully mediated, this report must detail why the action could not be settled by mediation.

(K) A lender may not enter presuit mediation to expedite the process unless the parties have unsuccessfully participated in a presuit mediation through designated approved alternate dispute resolution providers or with a Supreme Court Certified Civil Mediator.

Section 37‑23‑190. (A) A person seeking to acquire a foreclosed property by bid only must pay the amount he actually bid and may not be required to pay interest or any other costs or fees.

(B) A lender, servicer, mortgage holder, or representative of a lender, servicer, or mortgage holder may not use intimidation, persuasion, argument, or other means to attempt to restrict, limit, direct, control, or negatively influence the amount bid on property being auctioned pursuant to foreclosure.

(C) An attorney who brings a foreclosure action only may be awarded fees or costs for that action upon specific, written findings of the court:

(1) in the amount specifically stated in the contract between the homeowner and the lender; or

(2) if payment of attorney’s fees and costs is provided in the contract between the homeowner and the lender but no specific amount of payment is stated in the contract, in an amount that is reasonable and supported by evidence affirmed by an affidavit of the attorney. If the court awards attorney’s fees and costs under this item, it must make specific findings of fact supported by the attorney’s affidavit concerning the:

(a) nature, extent, and difficulty of the legal services rendered;

(b) time and labor devoted to the case;

(c) professional standing of counsel;

(d) contingency of compensation;

(e) fee customarily charged in the locality for similar services; and

(f) beneficial results obtained.

(D) The attorney must disclose whether there is a fee contract with the mortgage holder or servicer and the amount of remuneration in the contract. Notwithstanding subsection (C)(2), there is a conclusive presumption that attorney’s fees and costs awarded by the court should be the amount for which the mortgage holder or servicer contracted, except that the court may award a greater amount of fees and costs if and to the extent the contract between the lender and the homeowner specifically quantifies this amount.

Section 37‑23‑200. (A) If the court finds as a matter of law that the servicer or mortgage holder violated a provision of this article when the mortgage was made, the court may:

(1) refuse to enforce the note and mortgage, or a term or part of the transaction that the court finds unlawful; and

(2) award to the borrower:

(a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge; or

(b) not more than double the amount of excess loan finance charge or other charges or fees actually received by the lender or paid by the borrower to a third party.

(B) In an action in which the court finds that a lender has violated this chapter, the court shall award to the borrower the costs of the action and to his attorneys their reasonable fees, using the same criteria stated in Section 37‑23‑170(C) and (D). In determining attorney’s fees, the amount of the recovery on behalf of the borrower is not controlling.

(C) This article establishes specific consumer protections in consumer home loans in addition to other consumer protections that may be otherwise available by law.

(D) The Administrator of the Department of Consumer Affairs, the Attorney General, the Commissioner of Banking, the Director of the Consumer Finance Division, or any party to a Consumer Home Loan may enforce the provisions of this article. The penalties and remedies provided in this article are in addition to and cumulative of penalties and remedies available pursuant to other provisions of law.”

SECTION 2. Section 37‑23‑20 of the 1976 Code, as last amended by Act 67 of 2009, is further amended by adding an item at the end to read:

“(18) ‘Servicer’ and ‘servicing agent’ means a person who for remuneration:

(a) receives or collects payment from a borrower pursuant to the terms of a mortgage loan agreement, including funds for an escrow account; and

(b) pays principal, interest, or other payments related to the amounts received or allocated from a borrower pursuant to the terms of a mortgage loan agreement, the mortgage servicing loan documents, or a servicing contract.”

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect six months after approval by the Governor.

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