

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 974
PROPOSED COMMITTEE SUBSTITUTE S974-PCS35328-RO-37

Short Title: Consumer Economic Protection Act of 2009.

(Public)

Sponsors:

Referred to:

March 26, 2009

A BILL TO BE ENTITLED

AN ACT TO ENACT THE CONSUMER ECONOMIC PROTECTION ACT OF 2009.

The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known and may be cited as the "Consumer Economic Protection Act of 2009."

SECTION 2. G.S. 45-21.16 reads as rewritten:

"§ 45-21.16. **Notice and hearing.**

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.



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- 1 (2) Any person obligated to repay the indebtedness against whom the holder
2 thereof intends to assert liability therefor, and any such person not notified
3 shall not be liable for any deficiency remaining after the sale.
- 4 (3) Every record owner of the real estate whose interest is of record in the
5 county where the real property is located at the time the notice of hearing is
6 filed in that county. The term "record owner" means any person owning a
7 present or future interest in the real property, which interest is of record at
8 the time that the notice of hearing is filed and would be affected by the
9 foreclosure proceeding, but does not mean or include the trustee in a deed of
10 trust or the owner or holder of a mortgage, deed of trust, judgment,
11 mechanic's or materialman's lien, or other lien or security interest in the real
12 property. Tenants in possession under unrecorded leases or rental
13 agreements shall not be considered record owners.
- 14 (c) Notice shall be in writing and shall state in a manner reasonably calculated to make
15 the party entitled to notice aware of the following:
- 16 (1) The particular real estate security interest being foreclosed, with such a
17 description as is necessary to identify the real property, including the date,
18 original amount, original holder, and book and page of the security
19 instrument.
- 20 (2) The name and address of the holder of the security instrument at the time
21 that the notice of hearing is filed.
- 22 (3) The nature of the default claimed.
- 23 (4) The fact, if such be the case, that the secured creditor has accelerated the
24 maturity of the debt.
- 25 (5) Any right of the debtor to pay the indebtedness or cure the default if such is
26 permitted.
- 27 (5a) The holder has confirmed in writing to the person giving the notice, or if the
28 holder is giving the notice, the holder shall confirm in the notice, that, within
29 30 days of the date of the notice, the debtor was sent by first-class mail at the
30 debtor's last known address a detailed written statement of the amount of
31 principal, interest, and any other fees, expenses, and disbursements that the
32 holder in good faith is claiming to be due as of the date of the written
33 statement, together with a daily interest charge based on the contract rate as
34 of the date of the written statement. Nothing herein is intended to authorize
35 any fees, charges, or methods of charging interest which is not otherwise
36 permitted under contract between the parties and other applicable law.
- 37 (5b) To the knowledge of the holder, or the servicer acting on the holder's behalf,
38 whether in the two years preceding the date of the statement any requests for
39 information have been made by the borrower to the servicer pursuant to
40 G.S. 45-93 and, if so, whether such requests have been complied with. If the
41 time limits set forth in G.S. 45-93 for complying with any such requests for
42 information have not yet expired as of the date of the notice, the notice shall
43 so state. If the holder is not giving the notice, the holder shall confirm in
44 writing to the person giving the notice the information required by this
45 subsection to be stated in the notice.
- 46 (6) Repealed by Session Laws 1977, c. 359, s. 7.
- 47 (7) The right of the debtor (or other party served) to appear before the clerk of
48 court at a time and on a date specified, at which appearance he shall be
49 afforded the opportunity to show cause as to why the foreclosure should not
50 be allowed to be held. The notice shall contain all of the following:

- 1 a. A statement that if the debtor does not intend to contest the creditor's
2 allegations of default, the debtor does not have to appear at the
3 hearing and that the debtor's failure to attend the hearing will not
4 affect the debtor's right to pay the indebtedness and thereby prevent
5 the proposed sale, or to attend the actual sale, should the debtor elect
6 to do so.
- 7 b. A statement that the trustee, or substitute trustee, is a neutral party
8 and, while holding that position in the foreclosure proceeding, may
9 not advocate for the secured creditor or for the debtor in the
10 foreclosure proceeding.
- 11 c. A statement that the debtor has the right to apply to a judge of the
12 superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any
13 legal or equitable ground that the court may deem sufficient prior to
14 the time that the rights of the parties to the sale or resale become
15 fixed, provided that the debtor complies with the requirements of
16 G.S. 45-21.34.
- 17 d. A statement that the debtor has the right to appear at the hearing and
18 contest the evidence that the clerk is to consider under
19 G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must
20 find the existence of: (i) valid debt of which the party seeking to
21 foreclose is the holder, (ii) default, (iii) right to foreclose under the
22 instrument, and (iv) notice to those entitled to notice.
- 23 d1. A statement that, if the debtor owns and occupies the real property as
24 his or her principal residence, the clerk may postpone the foreclosure
25 hearing if there is a reasonable likelihood of resolving the
26 delinquency without foreclosure.
- 27 d2. If the mortgagee or trustee has reason to believe that real estate
28 security is occupied by the debtor as a principal residence, a
29 statement briefly describing any efforts made to resolve the default or
30 delinquency with the debtor before pursuing foreclosure and the
31 results of any such efforts.
- 32 e. A statement that if the debtor fails to appear at the hearing, the
33 trustee will ask the clerk for an order to sell the real property being
34 foreclosed.
- 35 f. A statement that the debtor has the right to seek the advice of an
36 attorney and that free legal services may be available to the debtor by
37 contacting Legal Aid of North Carolina or other legal services
38 organizations.
- 39 (8) That if the foreclosure sale is consummated, the purchaser will be entitled to
40 possession of the real estate as of the date of delivery of his deed, and that
41 the debtor, if still in possession, can then be evicted.
- 42 (8a) The name, address, and telephone number of the trustee or mortgagee.
- 43 (9) That the debtor should keep the trustee or mortgagee notified in writing of
44 his address so that he can be mailed copies of the notice of foreclosure
45 setting forth the terms under which the sale will be held, and notice of any
46 postponements or resales.
- 47 (10) If the notice of hearing is intended to serve also as a notice of sale, such
48 additional information as is set forth in G.S. 45-21.16A.
- 49 (11) That the hearing may be held on a date later than that stated in the notice and
50 that the party will be notified of any change in the hearing date.

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

4 (c2) **(Expires October 31, 2010)** In any foreclosure filed on or after November 15,
5 2008, where the underlying mortgage debt is a subprime loan as defined in G.S. 45-101(4), the
6 notice required by subsection (b) of this section shall contain a certification by the filing party
7 that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were
8 provided in all material respects and that the periods of time established by Article 11 of this
9 Chapter have elapsed.

10 (d) **(Effective until October 31, 2010)** The hearing provided by this section shall be
11 held before the clerk of court in the county where the land, or any portion thereof, is situated. In
12 the event that the property to be sold consists of separate tracts situated in different counties or
13 a single tract in more than one county, only one hearing shall be necessary. However, prior to
14 that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where
15 any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the
16 evidence of the parties and may consider, in addition to other forms of evidence required or
17 permitted by law, affidavits and certified copies of documents. ~~If Subject to G.S. 45-21.16C, if~~
18 the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the
19 holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to
20 such under subsection (b), and (v) that the underlying mortgage debt is not a subprime loan as
21 defined in G.S. 45-101(4), or if the loan is a subprime loan under G.S. 45-101(4), that the
22 pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the
23 periods of time established by Article 11 of this Chapter have elapsed, then the clerk shall
24 authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or
25 trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A
26 certified copy of any authorization or order by the clerk shall be filed in any other county where
27 any portion of the property to be sold is located before the mortgagee or trustee may proceed to
28 advertise and sell any property located in that county. In the event that sales are to be held in
29 more than one county, the provisions of G.S. 45-21.7 apply.

30 (d) **(Effective October 31, 2010)** The hearing provided by this section shall be held
31 before the clerk of court in the county where the land, or any portion thereof, is situated. In the
32 event that the property to be sold consists of separate tracts situated in different counties or a
33 single tract in more than one county, only one hearing shall be necessary. However, prior to
34 that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where
35 any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the
36 evidence of the parties and may consider, in addition to other forms of evidence required or
37 permitted by law, affidavits and certified copies of documents. ~~If Subject to G.S. 45-21.16C, if~~
38 the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the
39 holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled
40 to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed
41 under the instrument, and the mortgagee or trustee can give notice of and conduct a sale
42 pursuant to the provisions of this Article. A certified copy of any authorization or order by the
43 clerk shall be filed in any other county where any portion of the property to be sold is located
44 before the mortgagee or trustee may proceed to advertise and sell any property located in that
45 county. In the event that sales are to be held in more than one county, the provisions of
46 G.S. 45-21.7 apply.

47 (d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be
48 appealed to the judge of the district or superior court having jurisdiction at any time within 10
49 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is
50 taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as
51 the clerk deems adequate to protect the opposing party from any probable loss by reason of

1 appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal. If the
2 appealing party owns and occupies the property to be sold as his or her principal residence, the
3 clerk shall require a bond not to exceed the amount of the current scheduled monthly payment
4 or periodic payments on the note or debt instrument; provided that the clerk may require a
5 higher bond if there is substantial evidence of the likelihood of waste or damage to the property
6 during the pendency of the appeal.

7 (e) In the event of an appeal, either party may demand that the matter be heard at the
8 next succeeding term of the court to which the appeal is taken which convenes 10 or more days
9 after the hearing before the clerk, and such hearing shall take precedence over the trial of other
10 cases except cases of exceptions to homesteads and appeals in summary ejectment actions,
11 provided the presiding judge may in his discretion postpone such hearing if the rights of the
12 parties or the public in any other pending case require that such case be heard first. In those
13 counties where no session of court is scheduled within 30 days from the date of hearing before
14 the clerk, either party may petition any regular or special superior court judge resident in a
15 district or assigned to hold courts in a district where any part of the real estate is located, or the
16 chief district judge of a district where any part of the real estate is located, who shall be
17 authorized to hear the appeal. A certified copy of any order entered as a result of the appeal
18 shall be filed in all counties where the notice of hearing has been filed.

19 (f) Waiver of the right to notice and hearing provided herein shall not be permitted
20 except as set forth herein. In any case in which the original principal amount of indebtedness
21 secured was one hundred thousand dollars (\$100,000), or more, any person entitled to notice
22 and hearing may waive after default the right to notice and hearing by written instrument
23 signed and duly acknowledged by such party. In all other cases, at any time subsequent to
24 service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or
25 trustee, shall mail to all other parties entitled to notice of such hearing a form by which such
26 parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing
27 the signatures of each such party and that of a witness to each such party's signature (which
28 witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his
29 discretion may dispense with the necessity of a hearing and proceed to issue the order
30 authorizing sale as set forth above.

31 (g) Any notice, order, or other papers required by this Article to be filed in the office of
32 the clerk of superior court shall be filed in the same manner as a special proceeding."

33 **SECTION 3.** Part 2 of Article 2A of Chapter 45 of the General Statutes is amended
34 by adding a new section to read:

35 **"§ 45-21.16C. Opportunity for parties to resolve foreclosure of owner-occupied**
36 **residential property.**

37 (a) At the commencement of the hearing, the clerk shall inquire as to whether the
38 debtor occupies the real property at issue as his or her principal residence. If it appears that the
39 debtor does currently occupy the property as a principal residence, the clerk shall further
40 inquire as to (i) what efforts the mortgagee, trustee, or loan servicer has made to communicate
41 with the debtor and to attempt to resolve the matter voluntarily before the foreclosure
42 proceeding and (ii) what the results of any such efforts have been.

43 (b) The clerk shall order the hearing continued if the clerk finds that there is good cause
44 to believe that additional time or additional measures have a reasonable likelihood of resolving
45 the delinquency without foreclosure. In determining whether to continue the hearing, the clerk
46 may consider (i) whether the mortgagee, trustee, or loan servicer has offered the debtor an
47 opportunity to resolve the foreclosure through forbearance, loan modification, or other
48 commonly accepted resolution plan appropriate under the circumstances, (ii) whether the
49 mortgagee, trustee, or loan servicer has engaged in actual responsive communication with the
50 debtor, including telephone conferences or in-person meetings with the debtor or other actual
51 two-party communications, (iii) whether the debtor has indicated that he or she has the intent

1 and ability to resolve the delinquency by making future payments under a foreclosure
2 resolution plan, and (iv) whether the initiation or continuance of good faith voluntary resolution
3 efforts between the parties may resolve the matter without a foreclosure sale. Where good
4 cause exists to continue the hearing, the clerk shall order the hearing continued to a date and
5 time certain, not less than 30 days and not more than 120 days from the date scheduled for the
6 original hearing."

7 **SECTION 4.** G.S. 58-70-15(b) reads as rewritten:

8 "(b) "Collection agency" includes:

- 9 (1) Any person that procures a listing of delinquent debtors from any creditor
10 and that sells the listing or otherwise receives any fee or benefit from
11 collections made on the ~~listing; and~~ listing.
- 12 (2) Any person that attempts to or does transfer or sell to any person not holding
13 the permit prescribed by this Article any system or series of letters or forms
14 for use in the collection of delinquent accounts or claims which by direct
15 assertion or by implication indicate that the claim or account is being
16 asserted or collected by any person, firm, corporation, or association other
17 than the creditor or owner of the claim or ~~demand; and~~ demand.
- 18 (3) An in-house collection agency, whereby a person, firm, corporation, or
19 association sets up a collection service for his or its own business and the
20 agency has a name other than that of the business.
- 21 (4) A 'debt buyer.' As used in this subdivision, the term 'debt buyer' means a
22 person or entity that is engaged in the business of purchasing delinquent or
23 charged-off consumer loans, consumer credit accounts, or other delinquent
24 consumer debt for collection purposes, whether it collects the debt itself or
25 hires a third party for collection or an attorney-at-law for litigation in order
26 to collect such debt."

27 **SECTION 5.** G.S. 58-70-115 reads as rewritten:

28 "**§ 58-70-115. Unconscionable means. Unfair practices.**

29 No collection agency shall collect or attempt to collect any debt by use of any
30 ~~unconscionable means. unfair practices.~~ Such ~~means~~ practices include, but are not limited to,
31 the following:

- 32 (1) Seeking or obtaining any written statement or acknowledgment in any form
33 containing an affirmation of any debt by a consumer who has been declared
34 bankrupt, an acknowledgment of any debt barred by the statute of
35 limitations, or a waiver of any legal rights of the debtor without disclosing
36 the nature and consequences of such affirmation or waiver and the fact that
37 the consumer is not legally obligated to make such affirmation or
38 ~~waiver; waiver.~~
- 39 (2) Collecting or attempting to collect from the consumer all or any part of the
40 collection agency's fee or charge for services rendered, collecting or
41 attempting to collect any interest or other charge, fee or expense incidental
42 to the principal debt unless legally entitled to such fee or ~~charge; charge.~~
- 43 (3) Communicating with a consumer whenever the collection agency has been
44 notified by the consumer's attorney that he represents said consumer.
- 45 (4) When the collection agency is a debt buyer or is acting on behalf of a debt
46 buyer, bringing suit or initiating an arbitration proceeding against the debtor
47 or otherwise attempting to collect on a debt when the collection agency
48 knows, or reasonably should know, that such collection is barred by the
49 applicable statute of limitations.
- 50 (5) When the collection agency is a debt buyer or acting on behalf of a debt
51 buyer, bringing suit or initiating an arbitration proceeding against the debtor,

1 or otherwise attempting to collect on the debt without (i) valid
2 documentation that the debt buyer is the owner of the specific debt
3 instrument or account at issue, and (ii) reasonable verification of the amount
4 of the debt allegedly owed by the debtor. For purposes of this subdivision,
5 reasonable verification shall include documentation of the name of the
6 original creditor, the name and address of the debtor as appearing on the
7 original creditor's records, the original consumer account number, a copy of
8 the contract or other document evidencing the consumer debt, and an
9 itemized accounting of the amount claimed to be owed, including all fees
10 and charges.

11 (6) When the collection agency is a debt buyer or acting on behalf of a debt
12 buyer, bringing suit or initiating an arbitration proceeding against the debtor
13 to collect on a debt without first giving the debtor written notice of the intent
14 to file a legal action at least 45 days in advance of filing. The written notice
15 shall include the name, address, and telephone number of the debt buyer, the
16 name of the original creditor and the debtor's original account number, a
17 copy of the contract or other document evidencing the consumer debt, and
18 an itemized accounting of all amounts claimed to be owed."

19 **SECTION 6.** This act becomes effective October 1, 2009, and applies to notices
20 issued and hearings conducted after that date.