

SENATE, No. 1200

STATE OF NEW JERSEY

210th LEGISLATURE

INTRODUCED FEBRUARY 25, 2002

Sponsored by:

Senator BARBARA BUONO

District 18 (Middlesex)

Senator LEONARD LANCE

District 23 (Warren and Hunterdon)

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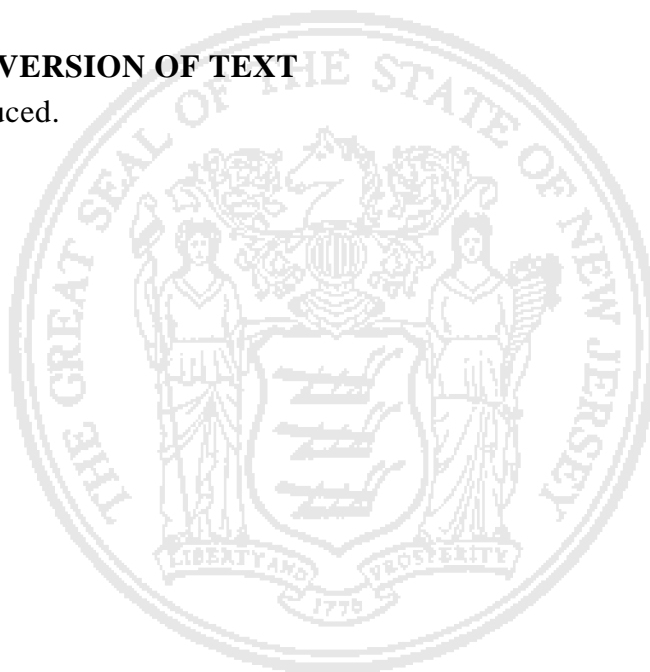
Senators Matheussen, Adler, Bennett, Martin, Palaia, Turner, Ciesla, Cafiero, McNamara, Sweeney, Furnari, Vitale, Codey, Connors, Bagger, Singer, Bucco, Girgenti, B.Smith, James and Charles

SYNOPSIS

The "Home Loan Protection Act."

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 10/1/2002)

1 AN ACT prohibiting certain abusive lending practices, amending
2 P.L.1996, c.157 and supplementing Title 46 of the Revised
3 Statutes.

4
5 **BE IT ENACTED** *by the Senate and General Assembly of the State*
6 *of New Jersey:*

7
8 1. (New section) This act shall be known and may be cited as the
9 "Home Loan Protection Act."

10
11 2. (New section) The Legislature finds and declares that abusive
12 mortgage lending has become an increasing problem in this State,
13 exacerbating the loss of equity in homes and causing the number of
14 foreclosures to increase in recent years. One of the most common
15 forms of abusive lending is the making of loans that are equity-based,
16 rather than income-based. The financing of points and fees in these
17 loans provides immediate income to the originator and encourages
18 lenders to repeatedly refinance home loans. The lender's ability to sell
19 loans reduces the incentive to ensure that the homeowner can afford
20 the payments of the loan. As long as there is sufficient equity in the
21 home, an abusive lender benefits even if the borrower is unable to
22 make the payments and is forced to refinance. The financing of high
23 points and fees causes the loss of precious equity in each refinancing
24 and often leads to foreclosure.

25 Abusive lending has threatened the viability of many communities
26 and caused decreases in home ownership. While the marketplace
27 appears to operate effectively for conventional mortgages, too many
28 homeowners find themselves victims of overreaching lenders who
29 provide loans with unnecessarily high costs and terms that are
30 unnecessary to secure repayment of the loan. The Legislature finds
31 and declares that as competition and self-regulation have not
32 eliminated the abusive terms from home-secured loans, the consumer
33 protection provisions of this act are necessary to encourage lending at
34 reasonable rates with reasonable terms.

35
36 3. (New section) As used in this act:

37 "Benchmark rate" is the interest rate which the borrower can reduce
38 by paying bona fide discount points; this rate shall not exceed the
39 weekly average yield of United States Treasury securities having a
40 maturity of five years, on the 15th day of the month immediately
41 preceding the month in which the loan is made, plus four percentage
42 points.

43 "Bona fide discount points" means loan discount points which are:

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 (1) Knowingly paid by the borrower;

2 (2) Paid for the express purpose of lowering the benchmark rate;

3 (3) In fact reducing the interest rate or time-price differential
4 applicable to the loan from an interest rate which does not exceed the
5 benchmark rate; and

6 (4) Recouped within the first four years of the scheduled loan
7 payments. Loan discount points will be considered to be recouped
8 within the first four years of the scheduled loan payments if the
9 reduction in the interest rate that is achieved by the payment of the
10 loan discount points reduces the interest charged on the scheduled
11 payments such that the borrower's dollar amount of savings in interest
12 over the first four years is equal to or exceeds the dollar amount of
13 loan discount points paid by the borrower.

14 "Borrower" means any natural person obligated to repay the loan,
15 including a coborrower, cosigner, or guarantor.

16 "Creditor" means a person who extends consumer credit that is
17 subject to a finance charge or is payable by written agreement in more
18 than four installments, and to whom the obligation is payable at any
19 time.

20 "High-cost home loan" means a home loan in which the terms of the
21 loan meet or exceed one or more of the thresholds as defined in this
22 section.

23 "Home loan" means a loan, including an open-end credit plan, other
24 than a reverse mortgage transaction, where the loan is secured by:

25 (1) A mortgage or deed of trust on real estate in this State upon
26 which there is located or there is to be located a one to six family
27 dwelling which is or will be occupied by a borrower as the borrower's
28 principal dwelling; or

29 (2) A security interest in a manufactured home which is or will be
30 occupied by a borrower as the borrower's principal dwelling.

31 "Points and fees" means:

32 (1) All items listed in 15 U.S.C. s.1605(a)(1) through (4), except
33 interest or the time-price differential;

34 (2) All charges listed in 15 U.S.C. s.1605(e);

35 (3) All compensation paid directly or indirectly to a mortgage
36 broker, including a broker that originates a loan in its own name in a
37 table-funded transaction;

38 (4) The cost of all premiums financed by the creditor, directly or
39 indirectly for any credit life, credit disability, credit unemployment or
40 credit property insurance, or any other life or health insurance, or any
41 payments financed by the creditor directly or indirectly for any debt
42 cancellation or suspension agreement or contract, except that
43 insurance premiums calculated and paid on a monthly basis shall not
44 be considered financed by the creditor;

45 (5) The maximum prepayment fees and penalties that may be
46 charged or collected under the terms of the loan documents; and

1 (6) All prepayment fees or penalties that are charged to the
2 borrower if the loan refinances a previous loan made by the same
3 creditor or an affiliate of the creditor.

4 (7) For open-end loans, the points and fees are calculated by
5 adding the total fees charged at closing plus the maximum additional
6 fees which can be charged pursuant to the loan documents during the
7 term of the loan.

8 "Rate" means the interest rate charged on the home loan, based on
9 an annual simple interest yield.

10 "Threshold" means any one of the following three items, as defined:

11 (1) "Rate threshold" means:

12 (a) For a first lien mortgage loan, the trigger rate equals or exceeds
13 six percentage points over the weekly average yield on five year
14 United States Treasury securities;

15 (b) For a subordinate mortgage lien or a mortgage secured solely
16 by a security interest in a manufactured home, the trigger rate equals
17 or exceeds eight percentage points over the weekly average yield on
18 five year United States Treasury securities;

19 (c) The trigger rate is calculated as follows:

20 (i) For fixed-rate loans in which the interest rate will not vary
21 during the term of the loan, the trigger rate is the rate as of the date of
22 closing;

23 (ii) For loans in which the interest varies according to an index, the
24 trigger rate is the sum of the index rate as of the date of the loan
25 closing plus the maximum margin permitted at any time under the loan
26 agreement;

27 (iii) For all other loans in which the rate may vary at any time
28 during the term of the loan, the trigger rate is the maximum rate that
29 may be charged during the term of the loan.

30 (2) "Total points and fees threshold" means the following,
31 excluding up to two bona fide discount points:

32 (a) For loans in which the total loan amount is \$30,000 or more,
33 the total points and fees on the loan, paid by the borrower at or before
34 closing, exceed 3% of the total loan amount;

35 (b) For loans in which the total loan amount is less than \$30,000,
36 the total points and fees on the loan, paid by the borrower at or before
37 closing, exceed the lesser of \$900 or 6% of the total loan amount.

38 (3) "Prepayment penalty threshold" means the home loan
39 agreement permits the lender to charge or collect payment penalties or
40 penalties more than 30 months after the loan closing or which exceed,
41 in the aggregate, more than 2% of the amount prepaid.

42 "Total loan amount" means the principal of the loan minus those
43 points and fees as defined in this section that are included in the
44 principal amount of the loan. For open-end loans, the total amount
45 shall be calculated using the total line of credit allowed under the
46 home loan.

1 4. (New section) a. No creditor making a home loan shall finance,
2 directly or indirectly, any credit life, credit disability, credit
3 unemployment or credit property insurance, or any other life or health
4 insurance, or any payments directly or indirectly for any debt
5 cancellation or suspension agreement or contract, except that
6 insurance premiums or debt cancellation or suspension fees calculated
7 and paid on a monthly basis shall not be considered financed by the
8 creditor.

9 b. No creditor may engage in the unfair act or practice of "flipping"
10 a home loan. "Flipping" a loan is the making of a home loan to a
11 borrower that refinances an existing home loan when the new loan
12 does not have reasonable, tangible net benefit to the borrower
13 considering all of the circumstances, including the terms of both the
14 new and refinanced loans, the cost of the new loan, and the borrower's
15 circumstances. In addition, the following home loan refinancings shall
16 be presumed to be flipping if:

17 (1) The primary tangible benefit to the borrower is an interest rate
18 lower than the interest rate on a debt satisfied or refinanced in
19 connection with the home loan, and it will take more than four years
20 for the borrower to recoup the costs of the points and fees and other
21 closing costs through savings resulting from the lower interest rate; or

22 (2) The new loan refinances an existing home loan that is a special
23 mortgage originated, subsidized, or guaranteed by or through a state,
24 tribal or local government, or nonprofit organization, which either
25 bears a below-market interest rate at the time the loan was originated,
26 or has nonstandard payment terms beneficial to the borrower, such as
27 payments that vary with income or are limited to a percentage of
28 income, or where no payments are required under specified conditions,
29 and where, as a result of refinancing, the borrower will lose one or
30 more of the benefits of the special mortgage.

31 c. No creditor shall recommend or encourage default on an existing
32 loan or other debt prior to and in connection with the closing or
33 planned closing of a home loan that refinances all or any portion of
34 that existing loan or debt.

35 d. No creditor may charge a late payment fee except according to
36 the following rules:

37 (1) The late payment fee may not be in excess of 4% of the amount
38 of the payment past due.

39 (2) The fee may only be assessed by a payment past due for 15
40 days or more.

41 (3) The fee may not be charged more than once with respect to a
42 single late payment. If a late payment charge is deducted from a
43 payment made on the loan, and such deduction causes a subsequent
44 default on a subsequent payment, no late payment charge may be
45 imposed for such default. If a late payment charge has been once
46 imposed with respect to a particular late payment, no such charge shall

1 be imposed with respect to any future payment which would have been
2 timely and sufficient, but for the previous default.

3 (4) No fee may be charged unless the creditor notifies the borrower
4 within 45 days following the date the payment was due that a late
5 payment charge has been imposed for a particular late payment. No
6 late payment charge may be collected from any borrower if the
7 borrower informs the creditor that nonpayment of an installment is in
8 dispute and presents proof of payment within 45 days of receipt of the
9 creditor's notice of the late charge.

10 (5) The creditor shall treat each and every payment as posted on
11 the same date as it was received by the creditor, servicer, creditor's
12 agent, or at the address provided to the borrower by the creditor,
13 servicer, or the creditor's agent for making payments.

14 e. No home loan may contain a provision that permits the creditor,
15 in its sole discretion, to accelerate the indebtedness. This provision
16 does not prohibit acceleration of the loan in good faith due to the
17 borrower's failure to abide by the material terms of the loan.

18 f. No creditor may charge a fee for informing or transmitting to any
19 person the balance due to pay off a home loan or to provide a release
20 upon prepayment. Payoff balances shall be provided within a
21 reasonable time, but in any event no more than two business days after
22 the request.

23
24 5. (New section) A high-cost home loan shall be subject to the
25 following additional limitations and prohibited practices:

26 a. No creditor making a high-cost home loan shall directly or
27 indirectly finance any points or fees.

28 b. No high-cost home loan may contain a scheduled payment that
29 is more than twice as large as the average of earlier scheduled
30 payments. This provision does not apply when the payment schedule
31 is adjusted to the seasonal or irregular income of the borrower.

32 c. No high-cost home loan may include payment terms under which
33 the outstanding principal balance will increase at any time over the
34 course of the loan because the regular periodic payments do not cover
35 the full amount of interest due.

36 d. No high-cost home loan may contain a provision that increases
37 the interest rate after default. This provision does not apply to interest
38 rate changes in a variable rate loan otherwise consistent with the
39 provisions of the loan documents, provided the change in the interest
40 rate is not triggered by the event of default or the acceleration of the
41 indebtedness.

42 e. No high-cost home loan may include terms under which more
43 than two periodic payments required under the loan are consolidated
44 and paid in advance from the loan proceeds provided to the borrower.

45 f. No high-cost home loan may be subject to a mandatory
46 arbitration clause that limits in any way the right of the borrower to

1 seek relief through the judicial process for any and all claims and
2 defenses the borrower may have against the creditor, broker, or other
3 party involved in the loan transaction.

4 g. A creditor may not make a high-cost home loan without first
5 receiving certification from a counselor, approved by the United States
6 Department of Housing and Urban Development, that the borrower
7 has received counseling on the advisability of the loan transaction.

8 h. A creditor may not make a high-cost home loan without due
9 regard to repayment ability. A creditor who follows the debt-to-
10 income ratio listed in 38 C.F.R. s.36.4337(c)(1) and as defined in 38
11 C.F.R. s.36.4337(d) and follows the residual income guidelines
12 established in 38 C.F.R. s.36.4337(e) and VA Form 26-6393 shall
13 benefit from a rebuttable presumption that the creditor made the loan
14 with due regard to repayment ability.

15 i. A creditor may not pay a contractor under a home-improvement
16 contract from the proceeds of a high-cost home loan, unless:

17 (1) The creditor is presented with a signed and dated completion
18 certificate showing that the home improvements have been completed;
19 and

20 (2) The instrument is payable to the borrower or jointly to the
21 borrower and the contractor, or, at the election of the borrower,
22 through a third-party escrow agent in accordance with terms
23 established in a written agreement signed by the borrower, the
24 creditor, and the contractor prior to the disbursement.

25 j. A creditor may not charge a borrower any fees or other charges
26 to modify, renew, extend, or amend a high-cost home loan or to defer
27 any payment due under the terms of a high-cost home loan.

28 k. Notwithstanding any other law to the contrary, a creditor
29 making a high-cost home loan that has the legal right to foreclose shall
30 use the judicial foreclosure procedures of the state in which the
31 property securing the loan is located. Notwithstanding any other law
32 to the contrary, the borrower shall have the right to assert in that
33 proceeding the nonexistence of a default and any other claim or
34 defense to acceleration and foreclosure, including any based on any
35 violations of this act, though those claims or defenses shall not be
36 deemed compulsory counterclaims.

37

38 6. (New section) a. Notwithstanding any other law to the contrary,
39 where a home loan was made, arranged, or assigned by a person
40 selling either a manufactured home, or home improvements to the
41 dwelling of a borrower, the borrower may assert all affirmative claims
42 and any defenses that the borrower may have against the seller or
43 home-improvement contractor against the lender, any assignee, holder,
44 or servicer, in any capacity.

45 b. Notwithstanding any other law to the contrary, the remedies
46 provided by this act apply to the creditor, any director, officer,

1 employee, or controlling stockholder of, or agent for, a creditor who
2 personally participated in the making or approving of a high-cost home
3 loan, and any other persons to whom this act applies and who violated
4 the requirements of this act. Any person who purchases or is
5 otherwise assigned a high-cost home loan shall be subject to all
6 affirmative claims and any defenses with respect to the loan that the
7 borrower could assert against the original creditor or broker of the
8 loan.

9 c. Notwithstanding any other law to the contrary, a borrower in
10 default more than 60 days or in foreclosure may assert a violation of
11 this act by way of offset:

12 (1) As an original action;

13 (2) As a defense or counterclaim to an action to collect amounts
14 owed; or

15 (3) To obtain possession of the home secured by the home loan.

16 d. It is a violation of this act for any person, in bad faith, to
17 attempt to avoid the application of this act by:

18 (1) Dividing any loan transaction into separate parts; or

19 (2) Any other such subterfuge, with the intent of evading the
20 provisions of this act.

21

22 7. (New section) a. Any violation of this act constitutes an
23 unlawful practice under the consumer fraud law, P.L.1960, c.39
24 (C.56:8-1 et seq.).

25 b. In addition to penalties under the consumer fraud law, including
26 any moneys or property ordered to be paid pursuant to section 2 of
27 P.L.1966, c.39 (C.56:8-14) or section 3 of P.L.1971, c.247 (C.56:8-
28 15):

29 (1) Any person found by a preponderance of the evidence to have
30 violated this act shall be liable to the borrower for the following:

31 (a) Statutory damages equal to the finance charges agreed to in the
32 home loan agreement, plus 10% of the amount financed.

33 (b) Punitive damages, when the violation was malicious or
34 reckless; and

35 (c) Costs and reasonable attorneys' fees.

36 (2) A borrower may be granted injunctive, declaratory, and such
37 other equitable relief as the court deems appropriate in an action to
38 enforce compliance with this act.

39 (3) The intentional violation of this act, or regulation thereunder,
40 renders the home loan agreement void, and the creditor shall have no
41 right to collect, receive, or retain any principal, interest, or other
42 charges whatsoever with respect to the loan, and the borrower may
43 recover any payments made under the agreement.

44 (4) The right of rescission granted under 15 U.S.C. s.1601 et seq.
45 for violations of that law and all other remedies provided hereunder
46 shall be available to a borrower by way of recoupment against a party

1 foreclosing on the home loan or collecting on the loan, at any time
2 during the term of the loan.

3 (5) The remedies provided in this section are not intended to be the
4 exclusive remedies available to a borrower, nor must the borrower
5 exhaust any administrative remedies provided under this act or any
6 other applicable law before proceeding under this section.

7 c. Any person, including members, officers, and directors of the
8 creditor, who knowingly violates this act is guilty of a disorderly
9 persons offense and, on conviction, is subject to a fine not exceeding
10 \$1,000 or to imprisonment not exceeding six months, or both.

11 d. A creditor in a home loan who, when acting in good faith, fails
12 to comply with the provisions of this act, will not be deemed to have
13 violated this section if the creditor establishes that either:

14 (1) Within 30 days of the loan closing, and prior to receiving any
15 notice from the borrower of the compliance failure, the creditor has
16 made appropriate restitution to the borrower, and appropriate
17 adjustments are made to the loan; or

18 (2) Within 60 days of the loan closing and prior to receiving any
19 notice from the borrower of the compliance failure, and the
20 compliance failure was not intentional and resulted from a bona fide
21 error notwithstanding the maintenance of procedures reasonably
22 adopted to avoid such errors, the borrower is notified of the
23 compliance failure, appropriate restitution is made to the borrower,
24 and appropriate adjustments are made to the loan.

25 Examples of bona fide errors include clerical, calculation, computer
26 malfunction and programming, and printing errors. An error of legal
27 judgment with respect to a person's obligations under this section is
28 not a bona fide error.

29 e. The remedies provided herein are cumulative.

30

31 8. (New section) The rights conferred by this act are independent
32 of and in addition to any other rights under other laws.

33

34 9. (New section) The law of the state in which the property is
35 located shall be applied to all transactions governed by this act. This
36 act shall apply to all loans made or entered into after the effective date
37 of this act.

38

39 10. Section 23 of P.L.1996, c.157 (C.17:11C-23) is amended to
40 read as follows:

41 23. a. Notwithstanding the provisions of any other law, a person
42 licensed as a mortgage banker or correspondent mortgage banker,
43 incidental to the origination, processing and closing of a mortgage loan
44 transaction, shall have the right to charge only the following fees: (1)
45 credit report fee; (2) appraisal fee; (3) application fee; (4) commitment
46 fee; (5) warehouse fee; (6) fees necessary to reimburse the mortgage

1 banker for charges imposed by third parties; and (7) discount points,
2 but only to the extent that the discount points are for the purpose of
3 reducing and, in fact, result in a bona fide reduction of the interest rate
4 or time-price differential of the mortgage loan.

5 b. Notwithstanding the provisions of any other law, a person
6 licensed as a mortgage broker, incidental to the brokering of a first
7 mortgage loan transaction, shall have the right to charge only the
8 following fees: (1) application fee; and (2) discount points, but only to
9 the extent that the discount points are for the purpose of reducing and,
10 in fact, result in a bona fide reduction of the interest rate or time-price
11 differential of the mortgage loan.

12 c. No person licensed as a mortgage banker, correspondent
13 mortgage banker or mortgage broker may charge any fee either not
14 expressly authorized by this section or authorized by the commissioner
15 by regulation.

16 d. For the purposes of this section, "bona fide reduction of the
17 interest rate or time-price differential of the mortgage loan" means :

18 (1) if the mortgage banker's or broker's most recently advertised
19 mortgage loan rate includes discount points, the paying of those points
20 will result in the advertised mortgage loan rate; or

21 (2) if the mortgage banker's or broker's most recently advertised
22 mortgage loan rate does not include discount points, the paying of
23 discount points will result in a mortgage loan rate below the advertised
24 rate.

25 (cf: P.L.1999, c.250, s.3)

26
27 11. This act shall take effect on the 90th day following enactment.

30 STATEMENT

31
32 This bill prohibits certain abusive practices in the making of home
33 loans. "Home loans" are defined to include loans secured by a
34 mortgage on real estate on which one to six dwelling units are located
35 or are to be located, or secured by a security interest in a
36 manufactured home, which is to be used as a principal dwelling.

37 The bill prohibits the following practices in conjunction with these
38 home loans:

- 39 • the financing of insurance or debt cancellation agreements;
- 40 • "flipping," meaning the refinancing of a loan and charging of
- 41 additional fees with no tangible benefit to the borrower;
- 42 • the recommending of default on a loan;
- 43 • the charging of late fees other than in certain enumerated
- 44 circumstances;
- 45 • the use of a provision enabling the creditor to accelerate the
- 46 indebtedness at the creditor's sole discretion; and

1 • the charging of a fee to provide information concerning a
2 borrower's payoff balance.

3 In addition, the bill prohibits certain practices in conjunction with
4 the making of "high-cost home loans," which are defined as loans that
5 meet certain thresholds enumerated in the bill. For these loans, the
6 following practices also are prohibited:

- 7 • the financing of points or fees;
- 8 • the scheduling of certain balloon payments;
- 9 • negative amortization, meaning loan terms under which the loan
10 principal balance will increase over time;
- 11 • the increase of the loan's interest rate after default;
- 12 • the inclusion of more than two advance payments;
- 13 • the use of a mandatory arbitration clause;
- 14 • lending without prior counseling for the borrower;
- 15 • lending without regard for the borrower's repayment ability;
- 16 • the payment of a home improvement contractor out of the loan
17 proceeds, except under certain circumstances;
- 18 • the charging of fees for modification or deferral of the loan; and
- 19 • provision for foreclosure other than by certain judicial procedures.

20 Additionally, the bill provides for liability for all parties involved in
21 the making and maintenance of high-cost home loans.

22 Finally, the bill makes violations subject to the consumer fraud law
23 and provides for additional penalties, and provides an opportunity for
24 lenders to cure good faith errors.