SENATE, No. 1540

STATE OF NEW JERSEY

210th LEGISLATURE

INTRODUCED MAY 16, 2002

Sponsored by:
Senator SHIRLEY K. TURNER
District 15 (Mercer)
Senator JOSEPH CONIGLIO
District 38 (Bergen)

SYNOPSIS

"New Jersey Home Ownership Security Act of 2002."

CURRENT VERSION OF TEXT

As introduced.

AN ACT prohibiting certain abusive lending practices and supplementing Title 46 of the Revised Statutes.

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

1. This act shall be known and may be cited as the "New Jersey Home Ownership Security Act of 2002."

2. The Legislature finds and declares that:

a. Abusive mortgage lending has become an increasing problem in this State, exacerbating the loss of equity in homes and causing an increase in the number of foreclosures in recent years. One of the most common forms of abusive lending is the making of loans that are equity-based, rather than income-based. The financing of points and fees in these loans provides immediate income to the originator and encourages the repeated refinancing of home loans. The lender's ability to sell loans reduces the incentive to ensure that the homeowner can afford the payments of the loan. As long as there is sufficient equity in the home, an abusive lender benefits even if the borrower is unable to make the payments and is forced to refinance. In addition, the financing of high points and fees causes the loss of precious equity in each refinancing and often leads to foreclosure.

b. Abusive lending has threatened the viability of many communities and caused decreases in home ownership. While the marketplace appears to operate effectively for conventional mortgages, too many homeowners find themselves victims of overreaching lenders who provide loans with unnecessarily high costs and terms that are unnecessary to secure repayment of the loan.

c. As competition and self-regulation have not eliminated the abusive terms from loans secured by a consumer's home, the consumer protection provisions of this act are necessary to encourage lending at reasonable rates with reasonable terms.

3. As used in this act:

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

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

(1) Knowingly paid by the borrower;

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

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

benchmark rate; and

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

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

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

"High-cost home loan" means a home loan for which the principal amount of the loan does not exceed $350,000, which amount shall be adjusted annually to include the last published increase of the housing component of the national Consumer Price Index, New York-Northeastern New Jersey Region, in which the terms of the loan meet or exceed one or more of the thresholds as defined in this section.

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

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

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

"Points and fees" means:

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

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

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

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

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

(6) All prepayment fees or penalties that are charged to the

borrower if the loan refinances a previous loan made by the same creditor or an affiliate of the creditor.

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

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

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

(1) "Rate threshold" means the annual percentage rate of the loan at the time the loan is consummated such that the loan is considered a "mortgage" under section 152 of the federal "Home Ownership and Equity Protection Act of 1994," Pub.L. 103-325 (15 U.S.C. s.1602(aa)), and the regulations promulgated by the Federal Reserve Board, including 12 C.F.R. s.226.32, without regard to whether the loan transaction is or may be a "residential mortgage transaction," as defined in 12 C.F.R. s.226.2(a)(24).

(2) "Total points and fees threshold" means that the total points and fees payable by the borrower at or before the loan closing, excluding up to two bona fide discount points, exceed:

(a) 5% of the total loan amount if the total loan amount is $20,000 or more; or

(b) the lesser of 8% of the total loan amount or $1,000, if the total loan amount is less than $20,000; provided, the following discount points and prepayment fees shall be excluded from the calculation of the total points and fees payable by the borrower:

(i) Up to and including two bona fide loan discount points payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed, by more than one percentage point, the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater;

(ii) Up to and including one bona fide loan discount point payable by the borrower in connection with the loan transaction, but only if the interest rate from which the loan's interest rate will be discounted does not exceed, by more than two percentage points, the required net yield for a 90-day standard mandatory delivery commitment for a reasonably comparable loan from either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, whichever is greater.

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

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

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

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

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

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

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

d. No creditor shall charge a late payment fee in relation to a home loan except according to the following rules:

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

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

(3) The fee may not be charged more than once with respect to a

single late payment. If a late payment fee is deducted from a payment made on the loan, and such deduction causes a subsequent default on a subsequent payment, no late payment fee may be imposed for such default. If a late payment fee has been once imposed with respect to a particular late payment, no such fee shall be imposed with respect to any future payment which would have been timely and sufficient, but for the previous default.

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

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

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

f. No creditor shall charge a fee for informing or transmitting to any person the balance due to pay off a home loan or to provide a release upon prepayment. Payoff balances shall be provided within seven business days after the request.

5. A high-cost home loan shall be subject to the following additional limitations and prohibited practices:

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

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

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

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

e. No high-cost home loan shall be subject to a mandatory arbitration clause that limits in any way the right of the borrower to seek relief through the judicial process for any and all claims and defenses the borrower may have against the creditor, broker, or other party involved in the loan transaction.

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

g. A creditor shall not make a high-cost home loan without due regard to repayment ability. A creditor shall not make a high-cost home loan unless the creditor reasonably believes at the time the loan is consummated that one or more of the borrowers, when considered individually or collectively, will be able to make the scheduled payments to repay the obligation, based upon a consideration of their current and expected income, current obligations, employment status and other financial resources, other than the borrower's equity in the dwelling which secures repayment of the loan. A borrower shall be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the borrower's total monthly debts, including amounts owed under the loan, do not exceed 50% of the borrower's monthly gross income as verified by the credit application, the borrower's financial statement, a credit report, financial information provided to the creditor by or on behalf of the borrower, or any other reasonable means. Notwithstanding the foregoing, no presumption of inability to make the scheduled payments to repay the obligation shall arise solely from the fact that, at the time the loan is consummated, the borrower's total monthly debts, including amounts owed under the loan, exceed 50% of the borrower's monthly gross income. A creditor who follows the residual income guidelines established in 38 C.F.R. s.36.4337(e) and VA Form 26-6393 shall benefit from a rebuttable presumption that the creditor made the loan with due regard to repayment ability.

h. A creditor shall not pay a contractor under a home-improvement contract from the proceeds of a high-cost home loan, unless the instrument is payable to the borrower or jointly to the borrower and the contractor, or, at the election of the borrower, through a third-party escrow agent in accordance with terms established in a written agreement signed by the borrower, the creditor, and the contractor prior to the disbursement.

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

j. A creditor shall not charge a borrower points and fees in connection with a high-cost home loan if the proceeds of the high-cost home loan are used to refinance an existing high-cost home loan held by the same creditor as note holder.

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

6. a. Notwithstanding any other law to the contrary, if a home loan was made, arranged, or assigned by a person selling either a manufactured home, or home improvements to the dwelling of a borrower, the borrower may assert all affirmative claims and any defenses that the borrower may have against the seller or home-improvement contractor against the creditor, any assignee, holder, or servicer, in any capacity.

b. Notwithstanding any other law to the contrary, the remedies provided by this act apply to the creditor, any director, officer, employee, or controlling stockholder of, or agent for, a creditor who personally participated in the making or approving of a high-cost home loan, and any other persons to whom this act applies and who violated the requirements of this act. Any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor or broker of the loan.

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

(1) As an original action;

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

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

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

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

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

7. a. Any violation of this act constitutes an unlawful practice under P.L.1960, c.39 (C.56:8-1 et seq.).

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

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

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

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

(c) Costs and reasonable attorneys' fees.

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

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

(4) The right of rescission granted under 15 U.S.C. s.1601 et seq. for violations of that law and all other remedies provided hereunder shall be available to a borrower by way of recoupment against a party foreclosing on the home loan or collecting on the loan, at any time during the term of the loan.

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

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

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

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

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

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

e. The remedies provided in this section are cumulative.

8. The rights conferred by this act are independent of and in addition to any other rights under other laws.

9. The law of the state in which the property is located shall be applied to all transactions governed by this act regardless of where those transactions originated. This act shall apply to all loans made or entered into after the effective date of this act.

10. The Director of the Division of Banking in the Department of Banking and Insurance, in consultation with the Director of the Division of Consumer Affairs in the Department of Law and Public Safety, shall develop and implement a program of consumer counseling and awareness designed to inform the public about the methods by which predatory lenders impose unconscionable and noncompetitive fees and charges as part of complex home mortgage transactions, to protect the public from incurring those fees and charges, and otherwise to encourage the informed and responsible use of credit.

11. The Commissioner of Banking and Insurance shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) necessary to effectuate the provisions of this act.

12. This act shall take effect on the 90th day following enactment.

STATEMENT

This bill prohibits certain abusive lending practices commonly known as "predatory lending," and directs the Department of Banking and Insurance and the Division of Consumer Affairs to develop and implement a program of consumer education to protect vulnerable consumers against predatory lending practices.

Initially, the bill prohibits certain practices in conjunction with the making of "high-cost home loans," which are defined as loans that meet certain thresholds enumerated in the bill. For these loans, the bill provides that the following practices are prohibited:

- financing of points or fees;
- certain balloon payments;
- negative amortization, meaning loan terms under which the loan principal balance will increase over time;
- increase of the interest rate after default;
- requiring more than two advance payments;
- inclusion of a mandatory arbitration clause;

• lending without prior counseling for the borrower;
• lending without regard for the borrower's repayment ability;
• restriction on the payment to home improvement contractors out of the loan proceeds;
• the charging of fees for modification or deferral of the loan; and
• provision for foreclosure other than by certain judicial procedures.

In addition, the bill prohibits certain abusive practices in the making of certain home loans. A "home loan" is defined as a loan, including an open-end credit plan, secured by a mortgage on real estate on which one to six dwelling units are located or are to be located, or secured by a security interest in a manufactured home, which is to be used by the borrower as the borrower's principal dwelling.

Those prohibited practices with respect to home loans include the following:
• financing of certain credit insurance premiums or debt cancellation agreements;
• "flipping," or the refinancing of a loan and charging additional fees with no tangible benefit to the borrower;
• recommending or encouraging default on an existing loan;
• charging of late payment fees other than in certain circumstances enumerated in the bill;
• acceleration of the indebtedness at the creditor's sole discretion; and
• charging a fee for information concerning a borrower's payoff balance.

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

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