

P.L. 2004, CHAPTER 84, *approved July 6, 2004*

Senate Committee Substitute for
Senate, No. 279

1 AN ACT concerning certain abusive lending practices and amending
2 P.L.2003, c. 64.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. Section 2 of P.L. 2003, c. 64 (C. 46:10B-23) is amended to
8 read as follows:

9 2. The Legislature finds and declares that:

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

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

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

33 d. Pursuant to this 2004 amendatory act, the "New Jersey Home
34 Ownership Security Act of 2002," P.L.2003, c.64 (C.46:10B-22 et
35 seq.) was amended to delete the covered home loan category and the
36 provisions of subsection b. of section 4 of P.L.2003, c.64 (C.46:10B-
37 25) which prohibited flipping a home loan. The deletions of the
38 covered home loan category and of the prohibition on flipping shall
39 create no presumption that any home loan that has been refinanced is
40 not unconscionable, and the deletions of the covered home loan
41 category and of the prohibition on flipping shall create no presumption

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

Matter underlined thus is new matter.

1 that any home loan that is refinanced does not constitute an unlawful
2 practice under P.L.1960, c.39 (C.56:8-1 et seq.).

3 (cf: P.L.2003, c.64, s.2)

4
5 2. Section 3 of P.L.2003, c.64 (C.46:10B-24) is amended to read
6 as follows:

7 3. As used in this act:

8 "Affiliate" means any company that controls, is controlled by, or
9 is under the common control with any company, as set forth in 12
10 U.S.C. s.1841 et seq.

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

12 (1) Knowingly paid by the borrower;

13 (2) Paid for the express purpose of reducing, and which result in
14 a reduction of, the interest rate or time-price differential applicable to
15 the loan;

16 (3) In fact reducing the interest rate or time-price differential
17 applicable to the loan from an interest rate which does not exceed the
18 conventional mortgage rate for a home loan secured by a first lien, by
19 more than two percentage points, or for a home loan secured by a
20 junior lien, by more than three and one half percentage points; and

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

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

31 "Commissioner" means the Commissioner of Banking and
32 Insurance.

33 "Conventional mortgage rate" means the most recently published
34 annual yield on conventional mortgages published by the Board of
35 Governors of the Federal Reserve System, as published in Statistical
36 Release H.15 or any publication that may supersede it, as of the
37 applicable time set forth in 12 C.F.R. 226.32(a)(1)(i).

38 "Conventional prepayment penalty" means any prepayment penalty
39 or fee that may be collected or charged in a home loan, and that is
40 authorized by law other than by this act, provided the home loan (1)
41 does not have an annual percentage rate that exceeds the conventional
42 mortgage rate by more than two percentage points; and (2) does not
43 permit any prepayment fees or penalties that exceed two percent of the
44 amount prepaid.

45 ["Covered home loan" means a home loan in which:

46 (1) The total points and fees payable in connection with the loan,
47 excluding either a conventional prepayment penalty or not more than

1 two bona fide discount points, exceed 4 percent of the total loan
2 amount, or 4.5 percent of the total loan amount if the total loan
3 amount is \$40,000 or less, and 4.5 percent of the total loan amount if
4 the loan is insured by the Federal Housing Administration or
5 guaranteed by the federal Department of Veterans Affairs; or

6 (2) The home loan is such that it is considered a high-cost home
7 loan under this act.】

8 "Creditor" means a person who extends consumer credit that is
9 subject to a finance charge or is payable by written agreement in more
10 than four installments, and to whom the obligation is payable at any
11 time. Creditor shall also mean any person brokering a home loan,
12 which shall include any person who directly or indirectly solicits,
13 processes, places, or negotiates home loans for others or who closes
14 home loans which may be in the person's own name with funds
15 provided by others and which loans are thereafter assigned to the
16 person providing the funding of such loans, provided that creditor shall
17 not include a person who is an attorney providing legal services to the
18 borrower or a person or entity holding an individual or organization
19 insurance producer license in the line of title insurance or a title
20 insurance company, as defined by subsection c. of section 1 of
21 P.L.1975, c.106 (C.17:46B-1), or any officer, director or employee
22 thereof, providing services in the closing of a home loan who is not
23 also funding the home loan and is not an affiliate of the creditor or an
24 assignee that is subject to the provisions of section 6 of this act.

25 "Department" means the Department of Banking and Insurance.

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

32 "Home loan" means an extension of credit primarily for personal,
33 family or household purposes, including an open-end credit plan, other
34 than a reverse mortgage transaction, in which the loan is secured by:

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

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

41 "Manufactured home" means a structure, transportable in one or
42 more sections, which in the traveling mode is eight body feet or more
43 in width or 40 body feet or more in length or, when erected on site is
44 320 or more square feet and which is built on a permanent chassis and
45 designed to be used as a dwelling with a permanent foundation when
46 erected on land secured in conjunction with the real property on which
47 the manufactured home is located and connected to the required

1 utilities and includes the plumbing, heating, air-conditioning and
2 electrical systems contained therein; except that such term shall
3 include any structure which meets all the requirements of this
4 paragraph except the size requirements and with respect to which the
5 manufacturer voluntarily files a certification required by the Secretary
6 of the United States Department of Housing and Urban Development
7 and complies with the standards established under the federal National
8 Manufactured Housing Construction and Safety Standards Act of
9 1974, 42 U.S.C. s.5401 et seq. Such term does not include rental
10 property or second homes or manufactured homes when not secured
11 in conjunction with the real property on which the manufactured home
12 is located.

13 "Points and fees" means:

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

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

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

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

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

29 (6) All prepayment fees or penalties that are incurred by the
30 borrower if the loan refinances a previous loan made or currently held
31 by the same creditor or an affiliate of the creditor, except that this
32 paragraph shall not apply to a loan which refinances a previous loan
33 made by the same broker and funded by another creditor; and

34 (7) For open-end loans, the points and fees are calculated by
35 adding the total points and fees known at or before closing, including
36 the maximum prepayment penalties which may be charged or collected
37 under the terms of the loan documents if prepayment penalties are
38 authorized by law other than by this act, plus the minimum additional
39 fees the borrower would be required to pay to draw down an amount
40 equal to the total credit line.

41 "Points and fees" shall not include the following items: title
42 insurance premiums and fees, charges and premiums paid to a person
43 or entity holding an individual or organization insurance producer
44 license in the line of title insurance or a title insurance company, as
45 defined by subsection c. of section 1 of P.L.1975, c.106 (C.17:46B-1);
46 taxes, filing fees, and recording and other charges and fees paid or to
47 be paid to public officials for determining the existence of or for

1 perfecting, releasing, or satisfying a security interest; and reasonable
2 fees paid to a person other than a creditor or an affiliate of the creditor
3 or to the mortgage broker or an affiliate of the mortgage broker for
4 the following, provided that the conditions in 12 C.F.R. s.226.4(c)(7)
5 are met: fees for tax payment services; fees for flood certification; fees
6 for pest infestation and flood determinations; appraisal fees; fees for
7 inspections performed prior to closing; fees for credit reports; fees for
8 surveys; attorneys' fees; notary fees; escrow charges; and fire and
9 flood insurance premiums, provided that the conditions in 12 C.F.R.
10 s.226.4(d)(2) are met.

11 "Rate" means that annual percentage rate for the loan calculated at
12 closing based on the points and fees set forth in this act and according
13 to the provisions of 15 U.S.C. s.1601 et seq. and the regulations
14 promulgated thereunder by the Federal Reserve Board.

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

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

24 (2) "Total points and fees threshold" means that the total points
25 and fees payable by the borrower at or before the loan closing,
26 excluding either a conventional prepayment penalty or up to two bona
27 fide discount points, exceed:

28 (a) ~~5%~~ 4.5% of the total loan amount if the total loan amount
29 is \$40,000 or more; or

30 (b) the lesser of 6% of the total loan amount or \$1,000, if the total
31 loan amount is less than \$20,000, and 6% if the total loan amount is
32 \$20,000 or more but less than \$40,000.

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

38 (cf: P.L.2003, c.64, s.3)

39

40 3. Section 4 of P.L.2003, c.64 (C.46:10B-25) is amended to read
41 as follows:

42 4. a. No creditor making a home loan shall finance, directly or
43 indirectly, any credit life, credit disability, credit unemployment or
44 credit property insurance, or any other life or health insurance, or any
45 payments directly or indirectly for any debt cancellation or suspension
46 agreement or contract, except that insurance premiums or debt
47 cancellation or suspension fees calculated and paid on a monthly basis

1 shall not be considered financed by the creditor.

2 b. [No creditor shall engage in the unfair act or practice of
3 "flipping" a home loan. "Flipping" occurs when a creditor makes a
4 covered home loan to a borrower that refinances an existing home loan
5 that was consummated within the prior 60 months when the new loan
6 does not have reasonable, tangible net benefit to the borrower
7 considering all of the circumstances, including the terms of both the
8 new and refinanced loans, the economic and noneconomic
9 circumstances, the purpose of the loan, the cost of the new loan, and
10 the borrower's circumstances. In addition, the following home loan
11 refinancings shall be presumed to be flipping if:

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

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

26 Without limiting the foregoing, it is hereby declared that subsection
27 b. of this section shall create no presumption that any home loan that
28 is not a covered home loan or a high-cost home loan, and any
29 refinancing outside the durational limits set forth above, is not
30 unconscionable, and it is hereby further declared that subsection b. of
31 this section shall create no presumption that any home loan that is not
32 a covered home loan or a high-cost home loan, and any refinancing
33 outside the durational limits set forth above, shall not constitute an
34 unlawful practice under P.L.1960, c.39 (C.56:8-1 et seq.), based on
35 factors including those set forth in subsection b. of this section alone
36 or in conjunction with any other circumstances.] (Deleted by
37 amendment, P.L. , c.).

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

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

44 (1) The late payment fee may not be in excess of 5% of the amount
45 of the payment past due.

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

1 (3) The fee may not be charged more than once with respect to a
2 single late payment. If a late payment fee is deducted from a payment
3 made on the loan, and such deduction causes a subsequent default on
4 a subsequent payment, no late payment fee may be imposed for such
5 default. If a late payment fee has been once imposed with respect to
6 a particular late payment, no such fee shall be imposed with respect to
7 any future payment which would have been timely and sufficient, but
8 for the previous default.

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

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

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

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

28 (cf: P.L.2003, c.64, s.4)

29
30 4. Section 6 of P.L.2003, c.64 (C.46:10B-27) is amended to read
31 as follows:

32 6. a. Notwithstanding any other law to the contrary, if a home
33 loan was made, arranged, or assigned by a person selling either a
34 manufactured home, or home improvements to the dwelling of a
35 borrower, or was made by or through a creditor to whom the
36 borrower was referred by such seller, the borrower may assert all
37 affirmative claims and any defenses that the borrower may have against
38 the seller or home-improvement contractor limited to amounts
39 required to reduce or extinguish the borrower's liability under the
40 home loan, plus the total amount paid by the borrower in connection
41 with the transaction, plus amounts required to recover costs, including
42 reasonable attorney's fees against the creditor, any assignee or holder,
43 in any capacity.

44 b. Notwithstanding any other provision of law, any person who
45 purchases or is otherwise assigned a high-cost home loan shall be
46 subject to all affirmative claims and any defenses with respect to the
47 loan that the borrower could assert against the original creditor or

1 broker of the loan; provided that this subsection shall not apply if the
2 purchaser or assignee demonstrates, by a preponderance of the
3 evidence, that a reasonable person exercising reasonable due diligence
4 could not determine that the mortgage was a high-cost home loan. It
5 shall be presumed that a purchaser or assignee has exercised such due
6 diligence if the purchaser or assignee demonstrates by a preponderance
7 of the evidence that it: (1) has in place at the time of the purchase or
8 assignment of the loan, policies that expressly prohibit its purchase or
9 acceptance of assignment of any high-cost home loan; (2) requires by
10 contract that a seller or assignor of home loans to the purchaser or
11 assignee represents and warrants to the purchaser or assignee that
12 either (a) it will not sell or assign any high-cost home loan to the
13 purchaser or assignee or (b) that the seller or assignor is a beneficiary
14 of a representation and warranty from a previous seller or assignor to
15 that effect; and (3) exercises reasonable due diligence at the time of
16 purchase or assignment of home loans or within a reasonable period
17 of time thereafter intended by the purchaser or assignee to prevent the
18 purchaser or assignee from purchasing or taking assignment of any
19 high-cost home loan.

20 c. Notwithstanding any other law to the contrary, but limited to
21 amounts required to reduce or extinguish the borrower's liability under
22 the home loan plus amounts required to recover costs including
23 reasonable attorney's fees, a borrower acting only in an individual
24 capacity may assert against the creditor or any subsequent holder or
25 assignee of the home loan:

26 (1) within six years of the closing of a [covered] high-cost home
27 loan, a violation of this act in connection with the loan as an original
28 action[, or as a defense, claim or counterclaim after an action to
29 collect on the home loan or foreclose on the collateral securing the
30 home loan has been initiated or the debt arising from the home loan
31 has been accelerated or the home loan has become 60 days in default];
32 and

33 (2) at any time during the term of a high-cost home loan after an
34 action to collect on the home loan or foreclose on the collateral
35 securing the home loan has been initiated or the debt arising from the
36 home loan has been accelerated or the home loan has become 60 days
37 in default, any defense, claim or counterclaim.

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

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

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

43 e. Nothing in this section shall be construed to limit the
44 substantive rights, remedies or procedural rights, including, but not
45 limited to, recoupment rights under the common law, available to a
46 borrower against any creditor, assignee or holder under any other law.
47 The limitations on assignee liability in subsection b. of this section

1 shall not apply to the assignee liability in subsections a., c. and d. of
2 this section.

3 (cf: P.L.2003, c.64, s.6)

4

5 5. Section 8 of P.L.2003, c.64 (C.46:10B-29) is amended to read
6 as follows:

7 8. a. (1) Any violation of this act constitutes an unlawful practice
8 under P.L.1960, c.39 (C.56:8-1 et seq.). Any borrower may seek
9 damages under the provisions of section 7 of P.L.1971, c.247
10 (C.56:8-19) or subparagraph (a) of paragraph (1) of subsection b. of
11 this section, but not both.

12 (2) Notwithstanding any provision of P.L.2003, c.64 (C.46:10B-
13 22 et seq.) or other law to the contrary, any borrower who asserts any
14 defense, claim or counterclaim pursuant to subsection c. of section 6
15 of P.L.2003, c.64 (C.46:10B-27) may do so only in an individual
16 capacity and may not assert that defense, claim or counterclaim in a
17 class action.

18 b. Except as provided in subsection a. of this section and, where
19 applicable, subject to any limitation on the amounts recoverable
20 against a holder or assignee pursuant to section 6 of this act, in
21 addition to the remedies available to a borrower under P.L.1960, c.39
22 (C.56:8-1 et seq.) and without limiting those remedies:

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

25 (a) For material violations, statutory damages equal to the finance
26 charges agreed to in the home loan agreement, plus up to 10% of the
27 amount financed;

28 (b) Punitive damages, when the violation was malicious or
29 reckless in appropriate circumstances as determined by the fact-finder;
30 and

31 (c) Costs and reasonable attorneys' fees.

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

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

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

42 (1) Within 45 days of the loan closing, the creditor has made
43 appropriate restitution to the borrower, and appropriate adjustments
44 are made to the loan; or

45 (2) Within ~~[90]~~ 365 days of the loan closing and prior to
46 receiving any notice from the borrower of the compliance failure, and
47 the compliance failure was not intentional and resulted from a bona

1 bona fide error notwithstanding the maintenance of procedures reasonably
2 adopted to avoid such errors, the borrower is notified of the
3 compliance failure, appropriate restitution is made to the borrower,
4 and appropriate adjustments are made to the loan.

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

9 d. The remedies provided in this section are cumulative.

10 (cf: P.L.2003, c.64, s.8)

11
12 6. Section 14 of P.L.2003, c.64 (C.46:10B-35) is amended to read
13 as follows:

14 14. The Commissioner of Banking and Insurance, in consultation
15 and collaboration with the Director of the Division of Consumer
16 Affairs in the Department of Law and Public Safety, shall promulgate
17 regulations pursuant to the "Administrative Procedure Act," P.L.1968,
18 c.410 (C.52:14B-1 et seq.) necessary to effectuate the provisions of
19 [subsections f. and g. of section 5 and section 11 of this act except
20 that prior to the effective date of this act the commissioner may take
21 those actions and promulgate those regulations necessary to implement
22 these provisions] P.L.2003, c.64 (C.46:10B-22 et seq.).

23 (cf: P.L.2003, c.64, s.14)

24
25 7. This act shall take effect immediately.

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29
30 Makes various revisions to the "New Jersey Home Ownership Security
31 Act of 2002."