

## CHAPTER 84

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

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

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

C.46:10B-23 Findings, declarations relative to abusive lending practices.

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.

d. Pursuant to this 2004 amendatory act, the "New Jersey Home Ownership Security Act of 2002," P.L.2003, c.64 (C.46:10B-22 et seq.) was amended to delete the covered home loan category and the provisions of subsection b. of section 4 of P.L.2003, c.64 (C.46:10B-25) which prohibited flipping a home loan. The deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that has been refinanced is not unconscionable, and the deletions of the covered home loan category and of the prohibition on flipping shall create no presumption that any home loan that is refinanced does not constitute an unlawful practice under P.L.1960, c.39 (C.56:8-1 et seq.).

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

C.46:10B-24 Definitions relative to abusive lending practices.

3. As used in this act:

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

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

(1) Knowingly paid by the borrower;

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

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

(4) Recouped within the first five years of the scheduled loan payments. Loan discount points will be considered to be recouped within the first five 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 five 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.

"Commissioner" means the Commissioner of Banking and Insurance.

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

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

"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. Creditor shall also mean any person brokering a home loan, which shall include any person who directly or indirectly solicits, processes, places, or negotiates home loans for others or who closes home loans which may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans, provided that creditor shall not include a person who is an attorney providing legal services to the borrower or a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by subsection c. of section 1 of P.L.1975, c.106 (C.17:46B-1), or any officer, director or employee thereof, providing services in the closing of a home loan who is not also funding the home loan and is not an affiliate of the creditor or an assignee that is subject to the provisions of section 6 of this act.

"Department" means the Department of Banking and Insurance.

"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 an extension of credit primarily for personal, family or household purposes, 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.

"Manufactured home" means a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or 40 body feet or more in length or, when erected on site is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with a permanent foundation when erected on land secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities and includes the plumbing, heating, air-conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of the United States Department of Housing and Urban Development and complies with the standards established under the federal National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. s.5401 et seq. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property on which the manufactured home is located.

"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;

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

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

"Points and fees" shall not include the following items: title insurance premiums and fees, charges and premiums paid to a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by subsection c. of section 1 of P.L.1975, c.106 (C.17:46B-1); taxes, filing fees, and recording and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; and reasonable fees paid to a person other than a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker for the following, provided that the conditions in 12 C.F.R. s.226.4(c)(7) are met: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; fees for credit reports; fees for surveys; attorneys' fees; notary fees; escrow charges; and fire and flood insurance premiums, provided that the conditions in 12 C.F.R. s.226.4(d)(2) are met.

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

"Threshold" means any one of the following two 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 either a conventional prepayment penalty or up to two bona fide discount points, exceed:

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

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

"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 loan amount shall be calculated using the total line of credit allowed under the home loan.

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

C.46:10B-25 Creditors, prohibited practices relative to home loans.

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. (Deleted by amendment, P.L.2004, c.84).

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 5% 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.

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

C.46:10B-27 Affirmative claims, defenses by borrower.

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, or was made by or through a creditor to whom the borrower was referred by such seller, the borrower may assert all affirmative claims and any defenses that the borrower may have against the seller or home-improvement contractor limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity.

b. Notwithstanding any other provision of law, 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; provided that this subsection shall not apply if the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan. It shall be presumed that a purchaser or assignee has exercised such due diligence if the purchaser or assignee demonstrates by a preponderance of the evidence that it: (1) has in place at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home loan; (2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (a) it will not sell or assign any high-cost home loan to the purchaser or assignee or (b) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and (3) exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time thereafter intended by the purchaser or

assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home loan.

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

(1) within six years of the closing of a high-cost home loan, a violation of this act in connection with the loan as an original action; and

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

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.

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

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

C.46:10B-29 Violations, remedies, liability.

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

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

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

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

(b) Punitive damages, when the violation was malicious or reckless in appropriate circumstances as determined by the fact-finder; 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 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. 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 45 days of the loan closing, the creditor has made appropriate restitution to the borrower, and appropriate adjustments are made to the loan; or

(2) Within 365 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.

d. The remedies provided in this section are cumulative.

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

C.46:10B-35 Regulations.

14. The Commissioner of Banking and Insurance, in consultation and collaboration with the Director of the Division of Consumer Affairs in the Department of Law and Public Safety, 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 P.L.2003, c.64 (C.46:10B-22 et seq.).

7. This act shall take effect immediately.

Approved July 6, 2004.