

Hall of the House of Representatives

84th General Assembly - Regular Session, 2003

Amendment Form

Subtitle of House Bill No. 2598

"AN ACT TO PROHIBIT PREDATORY LENDING IN THE HOME MORTGAGE MARKET."

Amendment No. 1 to House Bill No. 2598.

Amend House Bill No. 2598 as originally introduced:

Delete everything after the enacting clause and substitute:

"SECTION 1. This act shall be known as the "Arkansas Home Loan Protection Act".

SECTION 2. (a) The General Assembly finds that:

(1) Abusive mortgage lending has become an increasing problem in this state, exacerbating the loss of equity in homes and causing the number of foreclosures to increase in recent years.

(2) One of the most common forms of abusive lending is the making of loans that are equity based, rather than income based;

(3) The financing of points and fees in the loans provides immediate income to the originator and encourages lenders to repeatedly refinance home loans;

(4) The lender's ability to sell loans reduces the incentive to ensure that the homeowner can afford the payments of the loan;

(5) 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;

(6) The financing of high points and fees causes the loss of precious equity in each refinancing and often leads to foreclosure;

(7) Abusive lending has threatened the viability of many communities and caused decreases in homeownership;

(8) 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; and

(9) As competition and self regulation have not eliminated the abusive terms from home secured loans, the consumer protection provisions of this act are necessary to encourage lending at reasonable rates with reasonable terms.

(b) This act shall be liberally construed to:

(1) Effectuate its purpose of protecting the homes and the equity of individual borrowers; and



(2) As a consumer protection statute for all purposes.

SECTION 2. Definitions.

As used in this act:

(1) "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq., as it existed on March 1, 2003, as of the effective date of this act;

(2) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-Lending Act, 15 U.S.C. § 1601, et seq., as it existed on March 1, 2003, and the regulations promulgated thereunder by the Federal Reserve Board;

(3) "Bona fide loan discount points" means loan discount points knowingly paid by the borrower for the purpose of reducing, and which in fact result in a bona fide reduction of the interest rate or time price differential applicable to the loan, provided the amount of the interest rate reduction purchased by the discount points is reasonably consistent with established industry norms and practices for secondary mortgage market transactions;

(4) "Creditor" means any person or entity who participates in the original making or approving of a high cost home loan; and

(5)(A) "High cost home loan" means a loan, including an open end credit plan, but other than a reverse mortgage transaction, bridge or construction loan, or a loan made for the purchase of a one (1) to four (4) family residential structure that is secured by a first lien on the structure, in which:

(i) The total loan amount does not exceed one hundred fifty thousand dollars (\$150,000);

(ii) The borrower is a natural person;

(iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;

(iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located a structure or structures designed principally for the occupancy of from one (1) to four (4) families which is or will be occupied by the borrower as the borrower's principal dwelling; and

(v) The terms of the loan meet or exceed one or more of the thresholds as defined in subsection (7) of this section;

(B) "High cost home loan" does not include any loan which within sixty (60) days after closing will be insured by, securitized for, or sold to a government agency or government sponsored enterprise, including the Department of Housing and Urban Development, the Department of Veterans Affairs, Federal Home Loan Mortgage Corp., Federal National Mortgage Association, the Arkansas Development Finance Authority, and the United States Department of Agriculture, or that the lender can demonstrate was in good faith intended to be so insured by, securitized for, or sold to the government agency or government sponsored enterprise.

(6) "Points and fees" means:

(A) All items required to be disclosed under sections 226.4 (a) and 226.4 (b) of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, except interest or the time-price differential, unless those items are exempt from disclosure under sections

226.4(c), (d), (e), or (f) of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, except for the items listed under section 226.4(c)(7), as it existed on March 1, 2003, the inclusion or exclusion of which is governed by subsection (b) below;

(B) All charges for items listed under section 226.4 (c) (7) of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender, but only by the amount the charge exceeds the charge for comparable items provided by a non affiliate of the lender at the time the loan is made; otherwise, the charges are not included within the meaning of the phrase “points and fees”;

(C) All compensation paid directly by the borrower to a mortgage broker not otherwise included in subsections (a) or (b) of this subsection;

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

(E) “Points and fees” shall not include:

(i) Taxes, filing fees, 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

(ii) Fees paid to a person other than a lender or an affiliate of the lender or to the mortgage broker or an affiliate of the mortgage broker for the following:

(a) Fees for tax payment services;

(b) Fees for flood certification;

(c) Fees for pest infestation and flood

determinations;

(d) Appraisal fees;

(e) Fees for inspections performed before

closing;

(f) Credit reports;

(g) Surveys;

(h) Attorney’s fees, if the borrower has the right to select the attorney from an approved list or otherwise;

(i) Notary fees;

(j) Escrow charges, so long as not otherwise included under subsection (a) of this subsection;

(k) Title insurance premiums; and

(l) Fire insurance and flood insurance premiums, if the conditions in section 226.4(d) (2) of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, are met.

(7) “Thresholds” means, without regard to whether the loan transaction is or may be a “residential mortgage transaction”, as the term “residential mortgage transaction” is defined in section 226.2 (a) (24) of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, the annual percentage rate of the loan at the time the loan is consummated is such that the loan is a “mortgage” under section 152 of the Home Ownership and Equity Protection Act of 1994, Pub. Law 103-25, 15 U.S.C. § 1602(aa), and regulations adopted pursuant thereto by the Federal Reserve Board, including section 226.32 of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003:

(A) The total points and fees payable by the borrower at or before the loan closing exceed five percent (5%) of the total loan amount if the total loan amount is twenty thousand dollars (\$20,000) or more, or

(B)(i) The lesser of eight percent (8%) of the total loan amount or one thousand dollars (\$1,000), if the total loan amount is less than twenty thousand dollars (\$20,000);

(ii) The following discount points and prepayment fees and penalties shall be excluded from the calculation of the total points and fees payable by the borrower:

(a) Up to and including two (2) 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 (1%) the required net yield for a ninety-day standard mandatory delivery commitment for a reasonably comparable loan from either Fannie Mae or the Federal Home Loan Mortgage Corporation, whichever is greater;

(b) Up to and including one (1) 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 (2) percentage points the required net yield for a ninety-day standard mandatory delivery commitment for a reasonably comparable loan from either Fannie Mae or the Federal Home Loan Mortgage Corporation, whichever is greater; and

(c) Prepayment fees and penalties which may be charged or collected under the terms of the loan documents which do not exceed one percent (1%) of the amount prepaid, provided the loan documents do not permit the lender to charge or collect any prepayment fees or penalties more than thirty (30) months after the loan closing.

(8) "Total loan amount" means the same as the term "total loan amount" as used in section 226.32 of Title 12 of the Code of Federal Regulations, as they existed on March 1, 2003, and the same shall be calculated in accordance with the Federal Reserve Board's Official Staff Commentary thereto.

SECTION 3. Prohibited acts and practices regarding high cost home loans.

(a) Insurance and debt cancellation agreements. No creditor making a high cost 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)(1) Flipping. No creditor may engage in the unfair act or practice of "flipping" a home loan.

(2) "Flipping" a loan is the making of a high cost 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 flippings if:

(A) The primary tangible benefit to the borrower is an

interest rate lower than the interest rate(s) on debts satisfied or refinanced in connection with the home loan, and it will take more than four (4) 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

(B) 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, are limited to a percentage of income, or where no payments are required under specified conditions, and where, as a result of the refinancing, the borrower will lose one (1) or more of the benefits of the special mortgage.

(c) Recommendation of default. No creditor shall recommend or encourage default of an existing loan or other debt before and in connection with the closing or planned closing of a high cost home loan that refinances all or any portion of the existing loan or debt;

(d)(1) Call provision prohibition. No high cost home loan may contain a provision that permits the creditor, in its sole discretion, to accelerate the indebtedness.

(2) This subsection (d) 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;

(e)(1) Fee for balance. No creditor, nor any assignee, may charge a fee in excess of twenty dollars (\$20) for transmitting to any person the balance due to pay off a high cost home loan or to provide a release upon prepayment.

(2) Payoff balances shall be provided within a reasonable time, but in any event no more than seven (7) business days after the request;

(f) Prepayment penalties limited. No prepayment penalties shall be included in the loan documents for a high cost home loan or charged to the borrower which exceed two percent (2%) of the loan amount prepaid, nor shall the penalties be imposed after two (2) years after the loan is closed;

(g)(1) No balloon payment. A high cost home loan having a term of less than ten (10) years may not include terms under which the aggregate amount of the regular periodic payments would not fully amortize the outstanding principal balance.

(2) This prohibition does not apply when the payment schedule is adjusted to account for the seasonal or irregular income of the obligor or if the purpose of the loan is a bridge loan connected with, or related to, the acquisition or construction of a dwelling intended to become the obligor's principal dwelling;

(h) No negative amortization. No high cost home loan may 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;

(i)(1) No increased interest rate. No high cost home loan may contain a provision that increases the interest rate after default.

(2)(A) This subsection (i) does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents.

(B) The change in the interest rate is not triggered by the event of default or the acceleration of the indebtedness;

(j) No advance payments. No high cost home loan may include terms under which more than two (2) periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower;

(k) No mandatory arbitration clause. No high cost home loan may 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 or all claims and defenses the borrower may have against the creditor, broker, or other party involved in the loan transaction.

(l) No lending without homeownership counseling. A creditor may not make a high cost home loan without first receiving certification from a third party counselor approved by the United States Department of Housing and Urban development (HUD), a state housing financing agency, or the regulatory agency which has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction;

(m) No lending 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 obligors, 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;

(n) No financing prepayment fees or penalties. In making a high cost home loan, a lender may not directly or indirectly finance any prepayment fees of penalties payable by the borrower in a refinancing transaction if the lender or an affiliate of the lender is the noteholder of the note being refinanced;

(o) Home-Improvement Contracts. A creditor may not pay a contractor under a home-improvement contract from the proceeds of a high cost home loan, unless:

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

(2) 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 before the disbursement.

(p) No modification or deferral fees. A creditor may 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.

SECTION 4. Preservation and enforcement of claims and defenses, no subterfuge.

(a)(1) Liability of assignees and other holders in high-Cost home loans. Notwithstanding any provision of any other law, the remedies provided in this act apply to any person or entity who personally participated in the making or approving of the high cost home loan and who violated the requirements of this act.

(2)(A) 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; however, if the purchaser or assignee demonstrates, by a preponderance of the evidence, that the purchaser or assignee exercised reasonable due diligence at the time of the purchase of the home loans, or within a reasonable time thereafter, intended to prevent the purchaser or assignee from purchasing or taking assignment of high cost home loans, then the purchaser or assignee shall have no liability to any person under this act.

(B) The liability of any person who purchases or is otherwise assigned a high cost home loan whose liability is established under this subsection, but who did not personally participate in the making or approving of the high-cost home loan, shall be limited to the amount of all remaining indebtedness of the borrower and the total amount paid by the borrower in connection with the transaction.

(C) Any person incurring liability as an assignee is entitled to full recourse against any previous assignee or against any person or entity who personally participated in making or approving the home loan for the full amount of liability sustained by the assignee.

(b) Liability of assignees in foreclosure action. Notwithstanding any provision of any other law, a borrower in default more than sixty (60) days or in foreclosure may assert a violation of this act by way of offset:

(1)(A) As an original action, in an individual action only, brought within two (2) years from the date of the occurrence of the violation;

(B) A borrower shall not be barred from asserting a violation in an action to collect the debt which was brought more than one (1) year from the date of the occurrence of the violation as a matter of defense by recoupment or set off in the action except as otherwise provided by law;

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

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

(c) No subterfuge. It is a violation of this act, for any person, who in bad faith attempts to avoid the application of this act by:

(1) Dividing any loan transaction into separate parts for this purpose, or

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

SECTION 5. Enforcement.

(a)(1) Any violation of this act constitutes an unconscionable or deceptive act or practice as defined under Arkansas Code §§ 4-88-101 thru 4-88-115.

(2) Except as provided in section 4(a)(2)(A) or (B) of this act, any person found by a preponderance of the evidence to have violated this act shall be liable to the borrower for the following:

(A) Actual damages, including consequential and incidental damages; the borrower shall not be required to demonstrate reliance in order to receive actual damages;

(B) Statutory damages equal to twenty five percent (25%) of the finance charges agreed to in the home loan agreement, plus ten percent (10%) of the amount financed;

(C) Punitive damages, when the violation was malicious or reckless; and when otherwise allowable by applicable law;

(D) Costs and reasonable attorneys' fees;

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

(b) The intentional violation of this act renders the high cost home loan agreement void, and the creditor shall have no right to collect, receive, or retain any principal, interest, or other charges at all with respect to the loan, and the borrower may recover any payments made under the agreement;

(c) The right of rescission granted under 15 U.S.C. 1601 et seq., as they existed on March 1, 2003, for violations of that law and all other remedies provided under this act shall be available to a borrower by way of recoupment against a party foreclosing on the high cost home loan or collecting on the loan, at any time during the term of the loan;

(d) 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;

(e)(1) Corrections and unintentional violations. 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:

(A) Within thirty (30) days of the loan closing, and before 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

(B) Within sixty (60) days of the loan closing and before 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 adapted to avoid any errors, the borrower is notified of the compliance failure, appropriate restitution is made to the borrower, and appropriate adjustments are made to the loan; and

(2)(A) Examples of bona fide errors include clerical, calculation, computer malfunction and programming, and printing errors.

(B) An error of legal judgment with respect to a person's obligations under this section is not a bona fide error.

(f) Cumulative. The remedies provided under this act are cumulative and independent of and in addition to any other rights under other laws."

The Amendment was read _____
By: Representative Ledbetter
PBB/APK - 031920031446
ONE352 _____ Chief Clerk