

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 84th General Assembly  
3 Regular Session, 2003  
4

As Engrossed: H3/20/03

# A Bill

HOUSE BILL 2598

5 By: Representatives Ledbetter, Chesterfield, Clemons, Dobbins, Eason, Elliott, Goss, C. Johnson, Jones,  
6 Lewellen, Penix, Thomas, White, L. Prater, Edwards, Lendall, Walters, Judy, Napper, Hathorn  
7 By: Senators Wilkins, Brown, Steele  
8  
9

## For An Act To Be Entitled

11 AN ACT TO PROHIBIT PREDATORY LENDING IN THE HOME  
12 MORTGAGE MARKET; AND FOR OTHER PURPOSES.  
13

### Subtitle

15 AN ACT TO PROHIBIT PREDATORY LENDING IN  
16 THE HOME MORTGAGE MARKET.  
17  
18

19 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
20

21 *SECTION 1. This act shall be known as the "Arkansas Home Loan*  
22 *Protection Act".*  
23

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

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

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

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

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

35 *(5) As long as there is sufficient equity in the home, an*  
36 *abusive lender benefits even if the borrower is unable to make the payments*



1 and is forced to refinance;

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

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

6 (8) While the marketplace appears to operate effectively for  
7 conventional mortgages, too many homeowners find themselves victims of  
8 overreaching lenders who provide loans with unnecessarily high costs and  
9 terms that are unnecessary to secure repayment of the loan; and

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

14 (b) This act shall be liberally construed to:

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

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

18  
19 SECTION 2. Definitions.

20 As used in this act:

21 (1) "Affiliate" means any company that controls, is controlled  
22 by, or is under common control with another company, as set forth in the Bank  
23 Holding Company Act of 1956, 12 U.S.C. § 1841 et seq., as it existed on March  
24 1, 2003, as of the effective date of this act;

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

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

36 (4) "Creditor" means any person or entity who participates in

1 the original making or approving of a high cost home loan; and

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

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

9 (ii) The borrower is a natural person;

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

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

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

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

28 (6) "Points and fees" means:

29 (A) All items required to be disclosed under sections  
30 226.4 (a) and 226.4 (b) of Title 12 of the Code of Federal Regulations, as  
31 they existed on March 1, 2003, except interest or the time-price  
32 differential, unless those items are exempt from disclosure under sections  
33 226.4(c), (d), (e), or (f) of Title 12 of the Code of Federal Regulations, as  
34 they existed on March 1, 2003, except for the items listed under section  
35 226.4(c)(7), as it existed on March 1, 2003, the inclusion or exclusion of  
36 which is governed by subsection (b) below;

1                   (B) All charges for items listed under section 226.4 (c)  
2 (7) of Title 12 of the Code of Federal Regulations, as they existed on March  
3 1, 2003, but only if the lender receives direct or indirect compensation in  
4 connection with the charge or the charge is paid to an affiliate of the  
5 lender, but only by the amount the charge exceeds the charge for comparable  
6 items provided by a non affiliate of the lender at the time the loan is made;  
7 otherwise, the charges are not included within the meaning of the phrase  
8 “points and fees”;

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

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

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

15                   (i) Taxes, filing fees, recording and other charges  
16 and fees paid or to be paid to public officials for determining the existence  
17 of or for perfecting, releasing, or satisfying a security interest; and

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

21                   (a) Fees for tax payment services;

22                   (b) Fees for flood certification;

23                   (c) Fees for pest infestation and flood  
24 determinations;

25                   (d) Appraisal fees;

26                   (e) Fees for inspections performed before  
27 closing;

28                   (f) Credit reports;

29                   (g) Surveys;

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

32                   (i) Notary fees;

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

35                   (k) Title insurance premiums; and

36                   (l) Fire insurance and flood insurance

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

3 (7) "Thresholds" means, without regard to whether the loan  
4 transaction is or may be a "residential mortgage transaction", as the term  
5 "residential mortgage transaction" is defined in section 226.2 (a) (24) of  
6 Title 12 of the Code of Federal Regulations, as they existed on March 1,  
7 2003, the annual percentage rate of the loan at the time the loan is  
8 consummated is such that the loan is a "mortgage" under section 152 of the  
9 Home Ownership and Equity Protection Act of 1994, Pub. Law 103-25, 15 U.S.C.  
10 § 1602(aa), and regulations adopted pursuant thereto by the Federal Reserve  
11 Board, including section 226.32 of Title 12 of the Code of Federal  
12 Regulations, as they existed on March 1, 2003:

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

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

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

22 (a) Up to and including two (2) bona fide loan  
23 discount points payable by the borrower in connection with the loan  
24 transaction, but only if the interest rate from which the loan's interest  
25 rate will be discounted does not exceed by more than one percentage point  
26 (1%) the required net yield for a ninety-day standard mandatory delivery  
27 commitment for a reasonably comparable loan from either Fannie Mae or the  
28 Federal Home Loan Mortgage Corporation, whichever is greater;

29 (b) Up to and including one (1) bona fide loan  
30 discount point payable by the borrower in connection with the loan  
31 transaction, but only if the interest rate from which the loan's interest  
32 rate will be discounted does not exceed by more than two (2) percentage  
33 points the required net yield for a ninety-day standard mandatory delivery  
34 commitment for a reasonably comparable loan from either Fannie Mae or the  
35 Federal Home Loan Mortgage Corporation, whichever is greater; and

36 (c) Prepayment fees and penalties which may be

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

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

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

13 (a) Insurance and debt cancellation agreements. No creditor making a  
14 high cost home loan shall finance, directly or indirectly, any credit life,  
15 credit disability, credit unemployment or credit property insurance, or any  
16 other life or health insurance, or any payments directly or indirectly for  
17 any debt cancellation or suspension agreement or contract, except that  
18 insurance premiums or debt cancellation or suspension fees calculated and  
19 paid on a monthly basis shall not be considered financed by the creditor.

20 (b)(1) Flipping. No creditor may engage in the unfair act or practice  
21 of "flipping" a home loan.

22 (2) "Flipping" a loan is the making of a high cost home loan to  
23 a borrower that refinances an existing home loan when the new loan does not  
24 have reasonable, tangible net benefit to the borrower considering all of the  
25 circumstances, including the terms of both the new and refinanced loans, the  
26 cost of the new loan, and the borrower's circumstances. In addition, the  
27 following home loan refinancings shall be presumed to be flippings if:

28 (A) The primary tangible benefit to the borrower is an  
29 interest rate lower than the interest rate(s) on debts satisfied or  
30 refinanced in connection with the home loan, and it will take more than four  
31 (4) years for the borrower to recoup the costs of the points and fees and  
32 other closing costs through savings resulting from the lower interest rate;  
33 or

34 (B) The new loan refinances an existing home loan that is  
35 a special mortgage originated, subsidized, or guaranteed by or through a  
36 state, tribal or local government, or nonprofit organization, which either

1 bears a below-market interest rate at the time the loan was originated, or  
2 has nonstandard payment terms beneficial to the borrower, such as payments  
3 that vary with income, are limited to a percentage of income, or where no  
4 payments are required under specified conditions, and where, as a result of  
5 the refinancing, the borrower will lose one (1) or more of the benefits of  
6 the special mortgage.

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

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

14 (2) This subsection (d) does not prohibit acceleration of the  
15 loan in good faith due to the borrower's failure to abide by the material  
16 terms of the loan;

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

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

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

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

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

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

1 payment terms under which the outstanding principal balance will increase at  
2 any time over the course of the loan because the regular periodic payments do  
3 not cover the full amount of interest due;

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

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

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

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

15 (k) No mandatory arbitration clause. No high cost home loan may be  
16 subject to a mandatory arbitration clause that limits in any way the right of  
17 the borrower to seek relief through the judicial process for any or all  
18 claims and defenses the borrower may have against the creditor, broker, or  
19 other party involved in the loan transaction.

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

26 (m) No lending without due regard to repayment ability. A creditor  
27 shall not make a high cost home loan unless the creditor reasonably believes  
28 at the time the loan is consummated that one or more of the obligors, when  
29 considered individually or collectively, will be able to make the scheduled  
30 payments to repay the obligation based upon a consideration of their current  
31 and expected income, current obligations, employment status, and other  
32 financial resources other than the borrower's equity in the dwelling which  
33 secures repayment of the loan;

34 (n) No financing prepayment fees or penalties. In making a high cost  
35 home loan, a lender may not directly or indirectly finance any prepayment  
36 fees of penalties payable by the borrower in a refinancing transaction if the



1 lender or an affiliate of the lender is the noteholder of the note being  
2 refinanced;

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

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

8 (2) The instrument is payable to the borrower or jointly to the  
9 borrower and the contractor, or, at the election of the borrower, through a  
10 third-party escrow agent in accordance with terms established in a written  
11 agreement signed by the borrower, the creditor, and the contractor before the  
12 disbursement.

13 (p) No modification or deferral fees. A creditor may not charge a  
14 borrower any fees or other charges to modify, renew, extend, or amend a high  
15 cost home loan or to defer any payment due under the terms of a high cost  
16 home loan.

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

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

25 (2)(A) Any person who purchases or is otherwise assigned a high  
26 cost home loan shall be subject to all affirmative claims and any defenses  
27 with respect to the loan that the borrower could assert against the original  
28 creditor or broker of the loan; however, if the purchaser or assignee  
29 demonstrates, by a preponderance of the evidence, that the purchaser or  
30 assignee exercised reasonable due diligence at the time of the purchase of  
31 the home loans, or within a reasonable time thereafter, intended to prevent  
32 the purchaser or assignee from purchasing or taking assignment of high cost  
33 home loans, then the purchaser or assignee shall have no liability to any  
34 person under this act.

35 (B) The liability of any person who purchases or is  
36 otherwise assigned a high cost home loan whose liability is established under

1 this subsection, but who did not personally participate in the making or  
2 approving of the high-cost home loan, shall be limited to the amount of all  
3 remaining indebtedness of the borrower and the total amount paid by the  
4 borrower in connection with the transaction.

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

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

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

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

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

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

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

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

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

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31 SECTION 5. Enforcement.

32 (a)(1) Any violation of this act constitutes an unconscionable or  
33 deceptive act or practice as defined under Arkansas Code §§ 4-88-101 thru 4-  
34 88-115.

35 (2) Except as provided in section 4(a)(2)(A) or (B) of this act,  
36 any person found by a preponderance of the evidence to have violated this act

1 shall be liable to the borrower for the following:

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

5 (B) Statutory damages equal to twenty five percent (25%)  
6 of the finance charges agreed to in the home loan agreement, plus ten percent  
7 (10%) of the amount financed;

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

10 (D) Costs and reasonable attorneys' fees;

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

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

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

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

28 (e)(1) Corrections and unintentional violations. A creditor in a home  
29 loan who, when acting in good faith, fails to comply with the provisions of  
30 this act, will not be deemed to have violated this section if the creditor  
31 establishes that either:

32 (A) Within thirty (30) days of the loan closing, and  
33 before receiving any notice from the borrower of the compliance failure, the  
34 creditor has made appropriate restitution to the borrower, and appropriate  
35 adjustments are made to the loan; or

36 (B) Within sixty (60) days of the loan closing and before

1 receiving any notice from the borrower of the compliance failure, and the  
2 compliance failure was not intentional and resulted from a bona fide error  
3 notwithstanding the maintenance of procedures reasonably adapted to avoid any  
4 errors, the borrower is notified of the compliance failure, appropriate  
5 restitution is made to the borrower, and appropriate adjustments are made to  
6 the loan; and

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

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

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

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14 /s/ Ledbetter, et al  
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