

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.

State of Arkansas

As Engrossed: H3/20/03 H3/31/03

84th General Assembly

A Bill

Act 1340 of 2003

Regular Session, 2003

HOUSE BILL 2598

By: Representatives Ledbetter, Chesterfield, Clemons, Dobbins, Eason, Elliott, Goss, C. Johnson, Jones, Lewellen, Penix, Thomas, White, L. Prater, Edwards, Lendall, Walters, Judy, Napper, Hathorn

By: Senators Wilkins, Brown, Steele

For An Act To Be Entitled

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

Subtitle

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

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

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



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 or indirectly by the
10 borrower to a mortgage broker not otherwise included in subsections (a) or
11 (b) of this subsection;

12 (D) The maximum prepayment fees and penalties which may be
13 charged or collected under the terms of the loan documents but only if the
14 prepayment fees or penalties exceed three percent (3%) of the principal loan
15 amount remaining on the date of the prepayment, if the prepayment is made
16 within the first twelve-month period immediately following the date the loan
17 was made; or two percent (2%) of the principal loan amount remaining on the
18 date of the prepayment, if the prepayment is made within the second twelve-
19 month period immediately following the date the loan was made; or one percent
20 (1%) of the principal loan amount remaining on the date of the prepayment, if
21 the prepayment is made within the third twelve-month period following the
22 date the loan was made;

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

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

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

30 (a) Fees for tax payment services;

31 (b) Fees for flood certification;

32 (c) Fees for pest infestation and flood
33 determinations;

34 (d) Appraisal fees;

35 (e) Fees for inspections performed before
36 closing;

1 (f) Credit reports;
2 (g) Surveys;
3 (h) Attorney's fees, if the borrower has the
4 right to select the attorney from an approved list or otherwise;
5 (i) Notary fees;
6 (j) Escrow charges, so long as not otherwise
7 included under subsection (a) of this subsection;
8 (k) Title insurance premiums; and
9 (l) Fire insurance and flood insurance
10 premiums, if the conditions in section 226.4(d) (2) of Title 12 of the Code
11 of Federal Regulations, as they existed on March 1, 2003, are met;

12 (7)(A) "Thresholds" means, without regard to whether the loan
13 transaction is or may be a "residential mortgage transaction", as the term
14 "residential mortgage transaction" is defined in section 226.2 (a) (24) of
15 Title 12 of the Code of Federal Regulations, as they existed on March 1,
16 2003;

17 (i) The annual percentage rate of the loan at the
18 time the loan is consummated is such that the loan is a "mortgage" under
19 section 152 of the Home Ownership and Equity Protection Act of 1994, Pub. Law
20 103-25, 15 U.S.C. § 1602(aa), and regulations adopted pursuant thereto by the
21 Federal Reserve Board, including section 226.32 of Title 12 of the Code of
22 Federal Regulations, as they existed on March 1, 2003; or

23 (ii) The total points and fees payable by the borrower at
24 or before the closing exceed five percent (5%) of the total loan amount if
25 the loan amount is seventy-five thousand dollars (\$75,000) or more; or exceed
26 six percent (6%) of the total loan amount if the total loan amount is more
27 than twenty thousand dollars (\$20,000), but less than seventy-five thousand
28 dollars (\$75,000); or exceed 8% of the total loan amount if the total loan
29 amount is twenty thousand dollars (\$20,000) or less.

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

33 (i) Up to and including two (2) bona fide loan
34 discount points payable by the borrower in connection with the loan
35 transaction, but only if the interest rate from which the loan's interest
36 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; and

(ii) 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

(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

1 (4) years for the borrower to recoup the costs of the points and fees and
2 other closing costs through savings resulting from the lower interest rate;
3 or

4 (B) The new loan refinances an existing home loan that is
5 a special mortgage originated, subsidized, or guaranteed by or through a
6 state, tribal or local government, or nonprofit organization, which either
7 bears a below-market interest rate at the time the loan was originated, or
8 has nonstandard payment terms beneficial to the borrower, such as payments
9 that vary with income, are limited to a percentage of income, or where no
10 payments are required under specified conditions, and where, as a result of
11 the refinancing, the borrower will lose one (1) or more of the benefits of
12 the special mortgage.

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

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

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

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

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

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

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

1 principal dwelling;

2 (g) No negative amortization. No high cost home loan may include
3 payment terms under which the outstanding principal balance will increase at
4 any time over the course of the loan because the regular periodic payments do
5 not cover the full amount of interest due;

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

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

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

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

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

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

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

36 (m) No financing prepayment fees or penalties. In making a high cost

1 home loan, a lender may not directly or indirectly finance any prepayment
2 fees of penalties payable by the borrower in a refinancing transaction if the
3 lender or an affiliate of the lender is the noteholder of the note being
4 refinanced;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32
33 SECTION 5. Enforcement.

34 (a)(1) Any violation of this act constitutes an unconscionable or
35 deceptive act or practice as defined under Arkansas Code §§ 4-88-101 thru 4-
36 88-115.

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

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

7 (B) Statutory damages equal to twenty five percent (25%)
8 of the finance charges agreed to in the home loan agreement, plus ten percent
9 (10%) of the amount financed;

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

12 (D) Costs and reasonable attorneys' fees;

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

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

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

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

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

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

1 adjustments are made to the loan; or

2 (B) Within sixty (60) days of the loan closing and before
3 receiving any notice from the borrower of the compliance failure, and the
4 compliance failure was not intentional and resulted from a bona fide error
5 notwithstanding the maintenance of procedures reasonably adapted to avoid any
6 errors, the borrower is notified of the compliance failure, appropriate
7 restitution is made to the borrower, and appropriate adjustments are made to
8 the loan; and

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

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

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

15
16 /s/ Ledbetter, et al
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19 APPROVED: 4/14/2003
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