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HOUSE BILL 994

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Joseph Cervantes

AN ACT

RELATING TO HOME LOANS; REVISING DEFINITIONS; AMENDING
PROVISIONS OF THE HOME LOAN PROTECTION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 58-21A-1 NMSA 1978 (being Laws 2003,
Chapter 436, Section 1) is amended to read:

"58-21A-1. SHORT TITLE.--~~[Sections 1 through 14 of this
act]~~ Chapter 58, Article 21A NMSA 1978 may be cited as the
"Home Loan Protection Act"."

Section 2. Section 58-21A-3 NMSA 1978 (being Laws 2003,
Chapter 436, Section 3) is amended to read:

"58-21A-3. DEFINITIONS.--As used in the Home Loan
Protection Act:

A. "affiliate" means a person that controls, is
controlled by or is under common control with another person;

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1 B. "bona fide discount points" means loan discount
2 points that are knowingly paid by the borrower for the express
3 purpose of reducing, and which in fact do result in a bona fide
4 reduction of, the [~~annual percentage~~] periodic interest rate
5 otherwise applicable to the home loan; provided, however that
6 discount points are not "bona fide discount points" if the
7 [~~annual percentage~~] periodic interest rate otherwise applicable
8 to the home loan exceeds the conventional mortgage rate by more
9 than:

10 (1) one and one-half percentage points for a
11 home loan secured by a first lien; or

12 (2) three percentage points for a home loan
13 secured by a junior lien;

14 C. "borrower" means a natural person obligated to
15 repay a home loan, including a co-borrower, cosigner or
16 guarantor;

17 D. "bridge loan" means:

18 (1) a loan with a term not exceeding eighteen
19 months made to a borrower pending the sale of the borrower's
20 principal dwelling; or

21 (2) a temporary loan made to a borrower and
22 secured by the borrower's principal dwelling pending the
23 borrower's obtaining permanent financing for that principal
24 dwelling;

25 E. "construction loan" means a loan for the initial

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1 construction of a borrower's principal dwelling on land owned
2 by the borrower with a maturity of less than eighteen months
3 that only requires the payment of interest until the entire
4 unpaid balance is due and payable;

5 ~~[E-]~~ F. "conventional mortgage rate" means the most
6 recently published annual yield on conventional mortgages
7 published by the board of governors of the federal reserve
8 system as of the fifteenth day of the month immediately
9 preceding the month in which the application for the extension
10 of credit is received by the creditor;

11 ~~[F-]~~ G. "conventional prepayment penalty" means a
12 prepayment penalty or fee that may be collected in a home loan
13 and that is authorized by federal law; provided that a
14 prepayment penalty is not a "conventional prepayment penalty"
15 if the home loan:

16 (1) has an annual percentage rate, as that
17 term is defined in 15 U.S.C. 1606, that exceeds the
18 conventional mortgage rate by more than two percent; or

19 (2) permits prepayment fees or penalties that
20 exceed two percent of the amount prepaid;

21 ~~[G-]~~ H. "creditor" means a person who regularly
22 makes a home loan and includes a loan broker;

23 ~~[H-]~~ I. "high-cost home loan" means a home loan in
24 which:

25 (1) the ~~[contract]~~ annual percentage rate

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1 exceeds the rates threshold; or

2 (2) the total points and fees exceed the total
3 points and fees threshold;

4 [~~F.~~] J. "home loan" means a loan, including an
5 open-end credit plan, other than a reverse mortgage
6 transaction, a construction loan or a bridge loan, where the
7 principal amount does not exceed the first mortgage conforming
8 loan size limit for a single-family dwelling as established by
9 the federal national mortgage association and where the loan is
10 secured by:

11 (1) a mortgage or deed of trust on real estate
12 in this state upon which there is located or there is to be
13 located a structure:

14 (a) designed principally for occupancy
15 by one to four families; and

16 (b) that is or will be occupied by a
17 borrower as the borrower's principal residence; or

18 (2) a security interest on a manufactured home
19 that is or will be occupied by a borrower as the borrower's
20 principal residence;

21 [~~J.~~] K. "manufactured home" means a structure,
22 transportable in one or more sections, which in the traveling
23 mode is eight body feet or more in width or forty body feet or
24 more in length or, when erected on site is three hundred twenty
25 or more square feet and which is built on a permanent chassis

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1 and designed to be used as a dwelling with a permanent
2 foundation when erected on land secured in conjunction with the
3 real property on which the manufactured home is located and
4 connected to the required utilities and includes the plumbing,
5 heating, air conditioning and electrical systems contained
6 therein. "Manufactured home" includes any structure that meets
7 all the requirements of this subsection except the size
8 requirements and with respect to which the manufacturer
9 voluntarily files a certification required by the secretary of
10 the United States department of housing and urban development
11 and complies with the standards established under the federal
12 National Manufactured Housing Construction and Safety Standards
13 Act of 1974. "Manufactured home" does not include rental
14 property or second homes or manufactured homes when not secured
15 in conjunction with the real property on which the manufactured
16 home is located;

17 [~~K-~~] L. "points and fees" means:

18 (1) all amounts payable by a borrower at or
19 before the closing of a home loan, exclusive of any interest or
20 time-price differential due at closing, [~~on the loan proceeds,~~
21 ~~including:~~

22 ~~(a) loan discount points or other~~
23 ~~discounts;~~

24 ~~(b) loan fees, finder's fees or similar~~
25 ~~charges; and~~

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1 ~~(c) fees for preparation of loan-related~~
2 ~~documents; but~~

3 ~~(d) does not include fees for the~~
4 ~~following purposes]~~ that are determined in accordance with 12
5 C.F.R. s.226.4(a) and 226.4(b); provided, however, that points
6 and fees do not include the following fees and charges;

7 (a) excludable fee or charges under
8 C.F.R. 226.4(c);

9 (b) fees paid to a federal or state
10 agency, including fees that insure payment of some portion of a
11 home loan; and

12 (c) to the extent not otherwise provided
13 for and if the amounts are bona fide and reasonable and paid to
14 a person other than the creditor [~~or an affiliate of the~~
15 creditor]: 1) service or carrying charges; 2) credit reports;
16 3) title exam, title insurance or similar purposes; 4) escrow
17 charges for future payments of taxes and insurance; 5) fees for
18 notarizing deeds and other documents; 6) appraisals, including
19 fees related to any pest infestation or flood hazard
20 inspections conducted prior to closing; 7) inspection performed
21 prior to closing; 8) attorney fees, if the borrower has the
22 right to select the attorney from an approved list or
23 otherwise; 9) fire and hazard insurance and flood insurance
24 premiums if the conditions in 12 C.F.R. s.226.4(d)(2) are met;
25 10) tax payment services; 11) surveys; 12) flood certification;

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1 and 13) pest infestation and flood determination;

2 (2) all compensation paid directly or
3 indirectly to a mortgage broker, including a broker that
4 originates a loan in its own name in a table-funded
5 transaction;

6 (3) the maximum prepayment fees and penalties
7 that may be charged or collected under the terms of the home
8 loan documents;

9 (4) all prepayment fees or penalties that are
10 incurred by the borrower if the loan refinances a previous loan
11 made or currently held by the same [~~creditor or an affiliate of~~
12 ~~the creditor~~] lender;

13 (5) the cost of all premiums financed by the
14 creditor, directly or indirectly, for any credit life, credit
15 disability, credit unemployment or credit property insurance,
16 or any other life or health insurance, or any payments financed
17 by the creditor, directly or indirectly, for any debt
18 cancellation or suspension agreement or contract, except that
19 insurance premiums calculated and paid on a monthly basis shall
20 not be considered financed by the creditor; and

21 (6) for open-end loans, the points and fees
22 included in Paragraphs (1) through (5) of this subsection that
23 are known at or before closing plus the minimum additional fees
24 the borrower would be required to pay to draw down an amount
25 equal to the total credit line;

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1 M. "principal loan amount" means, for an open-end
2 loan, the amount of the credit line;

3 ~~[E.]~~ N. "rate threshold" means:

4 ~~[(1) for a first lien mortgage home loan, an~~
5 ~~interest rate equal to seven percentage points over the weekly~~
6 ~~average yield on comparable United States treasury securities~~
7 ~~on the fifteenth day of the month immediately preceding the~~
8 ~~month in which the loan is made; and~~

9 ~~(2) for a subordinate mortgage lien, an~~
10 ~~interest rate equal to nine percentage points over the weekly~~
11 ~~average yield on comparable United States treasury securities~~
12 ~~on the fifteenth day of the month immediately preceding the~~
13 ~~month in which the loan is made;]~~

14 (1) for a first lien mortgage home loan, an
15 annual percentage rate, as defined in 15 U.S.C. 1606, at
16 consummation equal to seven percentage points over the yield on
17 United States treasury securities having comparable periods of
18 maturity to the loan maturity as of the fifteenth day of the
19 month immediately preceding the month in which the application
20 for the extension of credit is received by the creditor; and

21 (2) for a subordinate mortgage lien mortgage
22 home loan, an annual percentage rate, as defined in 15 U.S.C.
23 1606, at consummation equal to nine percentage points over the
24 yield on United States treasury securities having comparable
25 periods of maturity to the loan maturity as of the fifteenth

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1 day of the month immediately preceding the month in which the
2 application for the extension of credit is received by the
3 creditor;

4 [M-] O. "total points and fees" means the result
5 obtained by subtracting the sum of the conventional prepayment
6 penalties and the bona fide discount points paid from the sum
7 of the points and fees, except that if the sum of the
8 conventional prepayment penalties and the bona fide discount
9 points paid exceeds two points, then only the amount that
10 represents two points shall be subtracted; and

11 [N-] P. "total points and fees threshold" means:

12 (1) for a home loan in which the total
13 principal loan amount is twenty thousand dollars (\$20,000) or
14 more, an amount equal to five percent of the total principal
15 loan amount; and

16 (2) for a home loan in which the [~~total~~]
17 principal loan amount is less than twenty thousand dollars
18 (\$20,000), an amount equal to the lesser of one thousand
19 dollars (\$1,000) or eight percent of the total principal loan
20 amount."

21 Section 3. Section 58-21A-9 NMSA 1978 (being Laws 2003,
22 Chapter 436, Section 9) is amended to read:

23 "58-21A-9. CIVIL ACTION.--

24 A. A borrower harmed by a violation of the Home
25 Loan Protection Act may bring a civil action against the

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1 creditor to recover:

2 (1) actual damages, including consequential
3 and incidental damages;

4 (2) statutory damages equal to two times the
5 finance charge paid under the loan and forfeiture of the
6 remaining interest under the loan;

7 (3) punitive damages, when the violation was
8 malicious or reckless;

9 (4) costs and reasonable attorney fees; and

10 (5) injunctive, declaratory and such other
11 equitable relief as the court deems appropriate in an action to
12 enforce compliance with the Home Loan Protection Act.

13 B. The civil action and remedies provided in this
14 section are not exclusive and are in addition to any other
15 action or remedies available to a borrower under applicable
16 law.

17 C. A creditor is not liable in an action brought
18 pursuant to this section if:

19 (1) within thirty days of the home loan
20 closing and prior to receiving any notice from the borrower of
21 the violation, the creditor has made appropriate restitution to
22 the borrower, and appropriate adjustments are made to the loan;
23 or

24 (2) the violation was not intentional and
25 resulted from a bona fide error in fact notwithstanding the

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1 maintenance of procedures reasonably adopted to avoid such
2 errors and within sixty days of the loan closing and prior to
3 receiving any notice from the borrower of the violation, the
4 borrower is notified of the violation, appropriate restitution
5 is made to the borrower and appropriate adjustments are made to
6 the loan."

7 Section 4. Section 58-21A-11 NMSA 1978 (being Laws 2003,
8 Chapter 436, Section 11) is amended to read:

9 "58-21A-11. ACTIONS BASED ON HOME LOANS.--

10 A. Notwithstanding any other provision of law, any
11 person who purchases, [~~or is otherwise assigned~~] is assigned or
12 otherwise becomes a holder of a high-cost home loan shall be
13 subject to all affirmative claims and any defenses with respect
14 to the loan that the borrower could assert against the original
15 creditor of the loan; provided that this subsection shall not
16 apply if the purchaser, [~~or~~] assignee or holder demonstrates by
17 a preponderance of the evidence that a reasonable person
18 exercising reasonable due diligence could not determine that
19 the mortgage was a high-cost home loan. A purchaser, [~~or~~]
20 assignee or holder has exercised such due diligence if the
21 purchaser, [~~or~~] assignee or holder:

22 (1) has in place at the time of the purchase,
23 [~~or~~] assignment or other transfer of the subject loans,
24 policies that expressly prohibit its purchase or acceptance of
25 an assignment of any high-cost home loans;

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1 (2) requires by contract that a seller or
2 assignor of the home loans to the purchaser, [~~or~~] assignee or
3 holder represents and warrants to the purchaser, [~~or~~] assignee
4 or holder that either:

5 (a) the seller or assignor will not
6 sell, [~~or~~] assign or otherwise transfer any high-cost home
7 loans to the purchaser, [~~or~~] assignee or holder; or

8 (b) that such seller or assignor is the
9 beneficiary of such a representation and warranty from a
10 previous seller or assignor; and

11 (3) exercises reasonable due diligence at the
12 time of purchase, [~~or~~] assignment or other transfer of home
13 loans or within a reasonable period of time thereafter intended
14 by the purchaser, [~~or~~] assignee or holder to prevent the
15 purchaser, [~~or~~] assignee or holder from purchasing or [~~taking~~
16 ~~assignment of~~] accepting any high-cost home loans; or

17 (4) satisfies the requirements in Paragraphs
18 (1) and (2) of this subsection and establishes that a
19 reasonable person exercising ordinary due diligence could not
20 determine, based on the documentation required by the federal
21 Truth in Lending Act and the itemization of the amount financed
22 and other disclosure disbursements, that the loan was a high-
23 cost home loan.

24 B. Notwithstanding any other law to the contrary, a
25 borrower acting only in an individual capacity may assert

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1 against the creditor or any subsequent holder or assignee of
2 the home loan:

3 (1) within six years of the closing of a high-
4 cost home loan, a violation of the Home Loan Protection Act in
5 connection with the loan as an original action; or

6 (2) at any time during the term of a high-cost
7 home loan, any defense, claim or counterclaim, or action to
8 enjoin foreclosure or to preserve or obtain possession of the
9 dwelling that secures the loan, including but not limited to a
10 violation of the Home Loan Protection Act, after an action to
11 collect on the home loan or foreclose on the collateral
12 securing the home loan has been initiated or the debt arising
13 from the home loan has been accelerated or the home loan has
14 become sixty days in default [~~or~~

15 ~~(3) within three years of the closing of a~~
16 ~~home loan, a violation of Subsection B of Section 4 of the Home~~
17 ~~Loan Protection Act as a defense, claim or counterclaim or as~~
18 ~~an action to enjoin foreclosure or to preserve or obtain~~
19 ~~possession of the dwelling that secures the loan, after an~~
20 ~~action to collect on the home loan or foreclose on the~~
21 ~~collateral securing the home loan has been initiated or the~~
22 ~~debt arising from the home loan has been accelerated or the~~
23 ~~home loan has become sixty days in default].~~

24 C. In an action, claim or counterclaim brought
25 pursuant to Subsection B of this section, the borrower may

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1 recover only amounts required to reduce or extinguish the
2 borrower's liability under the home loan plus amounts required
3 to recover costs and reasonable attorney fees.

4 D. Nothing in this section shall limit the
5 substantive rights, remedies or procedural rights available to
6 a borrower against a creditor, assignee or holder that are
7 otherwise provided by law."