

SENATE BILL 1787
By Herron

AN ACT relative to enacting the "Tennessee Homeowners'
Protection Act of 2005".

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

SECTION 1. This act shall be known and may be cited as the "Tennessee Homeowners' Protection Act of 2005".

SECTION 2. Tennessee Code Annotated, Title 47, Chapter 15, Part 1, is amended by deleting such part in its entirety and substituting instead Sections 3 through 9 of this act.

SECTION 3. The purpose of this act is to protect the equity and property of homeowners, provide needed consumer protections, and safeguard the economic vitality of our state.

SECTION 4. As used in this act, unless the context otherwise requires:

(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 amended from time to time;

(2) "Annual percentage rate" means the annual percentage rate for a loan, calculated according to the provisions of the federal Truth In Lending Act (15 U.S.C. § 1601. et seq.), and the regulations promulgated thereunder by the board of governors of the Federal Reserve System (as such act and regulations are amended from time to time);

(3) "Borrower" means any individual obligated to repay the loan, including a co-borrower, co-signer or guarantor;

(4) "Flipping" means knowingly refinancing an existing home loan when any of the following occurs:

(A) More than fifty percent (50%) of the prior debt refinanced bears a lower interest rate than the new loan;

(B) It will take more than five (5) years of reduced interest rate payments for the borrower to recoup the transaction's prepaid finance charges and closing costs; or

(C) Refinancing 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, or has nonstandard payment terms beneficial to the borrower, such as payments that vary with income or 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 or more of the benefits of the special mortgage.

(5) "High-cost home loan" means a home loan where:

(A) The total points and fees on the loan exceed five percent (5%) of the total loan amount; or

(B) The annual percentage rate of interest of the home loan equals or exceeds eight (8) percentage points over the yield on U.S. Treasury securities that have comparable periods of maturity to the loan maturity, as of the 15th day

of the month immediately preceding the month in which the application for credit is received by the lender.

(6) "Home loan" means a loan, other than a reverse mortgage transaction, where the principal amount of the loan does not exceed the conforming loan size limit for a single-family dwelling as established from time to time by the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, and the loan is secured by a mortgage or deed of trust on real estate upon which there is located or is to be located a structure or structures, designed principally for occupancy of from one (1) to four (4) families, which is or will be occupied by a borrower as the borrower's principal dwelling. Home loan does not include an open-end line of credit as defined in Part 226 of Title 12 of the Code of Federal Regulations;

(7) "Lender" means any entity that originated, or acted as a mortgage broker for more than five (5) home loans within the previous twelve (12) months;

(8) "Points and fees" means:

(A) All items required to be disclosed as finance charges under Sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, including the official staff commentary, as amended from time to time, except interest;

(B) All compensation and fees paid to mortgage brokers in connection with the loan transaction; and

(C) All items listed in Section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, only if the person originating the covered loan receives direct compensation in connection with the charge.

"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; or

(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: fees for tax payment services; fees for flood certification; fees for pest infestation and flood determinations; appraisal fees; fees for inspections performed prior to closing; credit reports; surveys; attorneys' fees (if the borrower has the right to select an attorney from an approved list or otherwise); notary fees; escrow charges, so long as not otherwise included under Section 4 subdivision (8)(A) through (C) of this act; title insurance premiums; and fire insurance and flood insurance premiums, provided that the conditions in section 226.4(d)(2) of Title 12 of the Code of Federal Regulations are met;

(9) "Reverse mortgage transaction" means a nonrecourse consumer credit obligation in which:

(A) A mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the consumer's principal dwelling; and

(B) Any principal, interest, or shared appreciation or equity is due and payable (other than in the case of default) only after:

(i) The consumer dies;

(ii) The dwelling is transferred; or

(iii) The consumer ceases to occupy the dwelling as a principal dwelling;

(10) "Total loan amount" means the same as in section 226.32 of Title 12 of the Code of Federal Regulations;

SECTION 5.

(a) No lender shall:

(1) Recommend or encourage non-payment of an existing loan or other debt prior to, and in connection with, the closing or planned closing of a home loan that refinances all or any portion of such existing loan or debt;

(2) Coerce, intimidate or directly or indirectly compensate an appraiser for the purpose of influencing such appraiser's independent judgment concerning the value of real estate that is to be covered by a home loan or is being offered as security according to an application for a home loan; or

(3) Leave blanks in any loan documents to be filled in after the documents are signed by the borrower.

(b) No lender shall require or allow the advance collection of a premium, on a single premium basis, for any credit life, credit disability, or credit unemployment, or the advance collection of a fee for any debt cancellation or suspension agreement or contract, in connection with any home loan, whether such premium or fee is paid directly by the consumer or is financed by the consumer through such loan. For purposes of this section, credit insurance does not include a contract issued by a

government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default.

SECTION 6.

(a) No high-cost home loan shall contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments during the first seven (7) years of the loan. This provision shall not apply to a payment schedule that is adjusted to the seasonal or irregular income of the borrower, or a bridge loan with a maturity of less than twelve (12) months that requires only payments of interest until the entire unpaid balance is due.

(b) No high-cost home loan shall contain a prepayment penalty of more than three percent (3%) of the original principal amount of the note in the first year, two percent (2%) in the second year, one percent (1%) in the third year, or any prepayment penalty beyond the third year.

(c) No high-cost home loan shall 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. This provision shall not apply to a payment schedule that is adjusted to the seasonal or irregular income of the borrower.

(d) No high-cost home loan shall contain a provision that increases the interest rate after default. This provision shall not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by a default or the acceleration of indebtedness.

(e) No high-cost home loan shall 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.

(f) No high-cost home loan shall contain a provision that permits the lender, in its sole discretion, to accelerate indebtedness. This provision shall not prohibit acceleration of the loan in good faith due to the borrower's failure to abide by the material terms of the loan.

(g) A lender shall not pay a contractor under a home improvement contract from the proceeds of a high-cost home loan unless 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 lender, and the contractor prior to disbursement.

(h) A lender shall not offer a high-cost home loan while engaged in the practice of flipping.

(i) A lender shall 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, except when the borrower is in default of the loan.

(j)

(1) A lender shall not originate a high-cost home loan without first receiving certification from a counselor approved by the U.S. department of housing and urban development, a state housing financing agency, or the regulatory agency

which has jurisdiction over the lender, that the borrower has received counseling on the advisability of the loan transaction.

(2) A lender shall provide notice to the borrower that the borrower must receive counseling on the advisability of the loan transaction from a counselor approved by the U.S. department of housing and urban development, a state housing financing agency, or the regulatory agency which has jurisdiction over the lender.

SECTION 7.

(a) Any person found by a preponderance of the evidence to have violated this act shall be liable to the borrower for the following:

(1) Actual damages, including consequential and incidental damages;

(2) Statutory damages equal to the recovery of two (2) times the interest paid under the loan and forfeiture of interest under the loan for any violation of this chapter;

(3) Punitive damages equal to twice the amount of actual damages in the case of willful violations or three (3) times the amount of actual damages in the case of knowing violations; and

(4) Costs and reasonable attorney fees.

(b) A borrower may be granted injunctive, declaratory, and other such equitable relief as the court deems appropriate in an action to enforce compliance with this chapter including, but not limited to, the following:

(1) Notwithstanding any other provision of law to the contrary, a court shall have the discretion not to require a borrower of a covered home loan seeking injunctive or other equitable relief under the provisions of this chapter to make a tender of payment upon a showing that the borrower has a reasonable likelihood of being successful on the merits. When tender of payment is not required by the court, upon application to the court by the creditor, the court shall require the borrower to pay into the registry of the court all regularly scheduled home loan payments including property taxes and homeowners hazard insurance premiums if required by escrow agreement which are the responsibility of the borrower payable to the creditor or servicer under the terms of the home loan agreement which become due after the filing of the legal action, such home loan payments to be paid as such become due, and such other expenses provided under the home loan agreement as the court may deem just, provided that regularly scheduled payments shall not include any payments allegedly due under any acceleration provision of the home loan. If the creditor or servicer and the borrower disagree as to the amount of the home loan payments due, either or both of them may submit to the court any written home loan agreement for the purpose of establishing the amount of home loan payments to be paid into the registry of the court;

(2) If the borrower should fail to make any regularly scheduled payment as it becomes due after the filing of this action, upon application to the court by the creditor or servicer, the court may issue an order denying the borrower's petition for injunctive or other equitable relief, and vacating any decree for injunctive or equitable relief previously entered by the court; and

(3) The court shall order the clerk of the court to pay to the creditor or any person the creditor may designate the payments claimed under the home loan agreement paid into the registry of the court as such payments are made; provided, however, that, if the borrower claims that such borrower is entitled to all or any part of the funds and such claim is an issue of controversy in the litigation, the court shall order the clerk to pay to the creditor or any person the creditor may designate without delay only that portion of the funds to which the borrower has made no claim in the proceedings or may make such other order as is appropriate under the circumstances. That part of the funds which is a matter of controversy in the litigation shall remain in the registry of the court until a determination of the issues by the trial court. If either party appeals the decision of the trial court, that part of the funds equal to any sums found by the trial court to be due from the creditor or servicer to the borrower shall remain in the registry of the court until a final determination of the issues. The court shall order the clerk to pay to the creditor or any person the creditor may designate without delay the remaining funds in court and all payments of future home loan payments made into court pursuant to subdivision (1) unless the borrower can show good cause that some or all of such payments should remain in court pending a final determination of the issues.

(c) The remedies provided in this act shall be cumulative.

(d) The right of rescission granted and defined under 15 U.S.C. § 1601, et seq., and a right of rescission for any violation of Section 5 of this act shall be available to a borrower of a high-cost home loan at any time during the term of the loan not to exceed a period of five (5) years after the consummation of the loan.

(e) The brokering of a home loan that violates the provisions of this act shall constitute a violation of such provisions.

(f) Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a home loan agreement that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring the claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

(g) An action under this act shall be brought no later than four (4) years from the date of the last payment made or five (5) years after the date of the first scheduled payment, whichever is earlier, by the borrower under the home loan.

(h) The remedies provided in this act 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 act.

SECTION 8.

(a) The attorney general and reporter shall have jurisdiction to enforce this act through civil process including, but not limited to, injunctive relief or declaratory judgment.

(b) The commissioner of the department of financial institutions shall have jurisdiction to enforce this act through the department's general regulatory powers

and through civil process. The commissioner of the department of commerce and insurance shall have like authority to enforce Section 5(b) of this act.

(c) Any person, including members, officers, and directors of a creditor, who knowingly violates this act commits a Class A misdemeanor.

(d) Any person, including members, officers, and directors of a creditor, who willfully violates this act commits a Class B misdemeanor.

SECTION 9.

(a) A creditor or servicer or an insurer providing insurance through premiums financed by a creditor of a home loan who, when acting in good faith fails to comply with the provisions of this act shall not be deemed to have violated this act if the creditor or servicer or insurer providing insurance through premiums financed by a creditor establishes by a preponderance of evidence that either:

(1) Within ninety (90) days of the loan closing and prior to receiving any notice from the borrower of the compliance failure:

(A) the creditor or servicer has offered appropriate restitution to the borrower and appropriate adjustments are made to the loan, or;

(B) to correct a compliance failure of Section 5(b) of this act, an insurer providing insurance through premiums financed by a creditor may provide appropriate restitution to the borrower by returning premiums paid plus interest charged on the premiums to the borrower upon receipt of notice of the compliance failure; or

(2) Within ninety (90) days of discovering a compliance failure and prior to receiving any notice 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 such errors, the borrower is notified of the compliance failure, appropriate restitution is offered to the borrower, and appropriate adjustments are made to the loan. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors. An error of legal judgment with respect to a person's obligations under this chapter is not a bona fide error.

SECTION 10. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 11. This act shall take effect July 1, 2005, and shall apply with respect to all home loans made or entered into on or after that date, the public welfare requiring it.