
SENATE BILL 6747

State of Washington 57th Legislature

2002 Regular Session

By Senators Prentice, Gardner, Keiser and Kline

Read first time 01/31/2002. Referred to Committee on Labor, Commerce & Financial Institutions.

1 AN ACT Relating to abusive mortgage lending; adding a new chapter
2 to Title 61 RCW; and prescribing penalties.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** This chapter may be known and cited as the
5 home loan protection act.

6 NEW SECTION. **Sec. 2.** (1) The legislature finds that abusive
7 mortgage lending has become an increasing problem in this state,
8 exacerbating the loss of equity in homes and causing the number of
9 foreclosures to increase in recent years. One of the most common forms
10 of abusive lending is the making of loans that are equity-based, rather
11 than income-based. The financing of points and fees in these loans
12 provides immediate income to the originator and encourages lenders to
13 repeatedly refinance home loans. The lender's ability to sell loans
14 reduces the incentive to ensure that the homeowner can afford the
15 payments of the loan. As long as there is sufficient equity in the
16 home, an abusive lender benefits even if the borrower is unable to make
17 the payments and is forced to refinance. The financing of high points

1 and fees causes the loss of precious equity in each refinancing and
2 often leads to foreclosure.

3 Abusive lending has threatened the viability of many communities
4 and caused decreases in homeownership. While the marketplace appears
5 to operate effectively for conventional mortgages, too many homeowners
6 find themselves victims of overreaching lenders who provide loans with
7 unnecessarily high costs and terms that are unnecessary to secure
8 repayment of the loan. The legislature finds that as competition and
9 self-regulation have not eliminated the abusive terms from home-secured
10 loans, the consumer protection provisions of this chapter are necessary
11 to encourage lending at reasonable rates with reasonable terms.

12 (2) This chapter shall be liberally construed to effectuate its
13 purpose of protecting the homes and the equity of individual borrowers.
14 This chapter is to be construed as a consumer protection statute for
15 all purposes.

16 NEW SECTION. **Sec. 3.** Unless the context clearly requires
17 otherwise, the definitions in this section apply throughout this
18 chapter.

19 (1) "Benchmark rate" is the interest rate which the borrower can
20 reduce by paying bona fide discount points; this rate shall not exceed
21 the weekly average yield of United States treasury securities having a
22 maturity of five years, on the fifteenth day of the month immediately
23 preceding the month in which the loan is made, plus four percentage
24 points.

25 (2) "Bona fide discount points" means loan discount points which
26 are:

27 (a) Knowingly paid by the borrower;

28 (b) Paid for the express purpose of lowering the benchmark rate;

29 (c) In fact reducing the interest rate or time-price differential
30 applicable to the loan from an interest rate which does not exceed the
31 benchmark rate; and

32 (d) Recouped within the first four years of the scheduled loan
33 payments. For purposes of assessing compliance with this subsection
34 (2)(d), loan discount points will be considered to be recouped within
35 the first four years of the scheduled loan payments if the reduction in
36 the interest rate that is achieved by the payment of the loan discount
37 points reduces the interest charged on the scheduled payments such that
38 the borrower's dollar amount of savings in interest over the first four

1 years is equal to or exceeds the dollar amount of loan discount points
2 paid by the borrower.

3 (3) "Borrower" means any natural person obligated to repay the
4 loan, including a coborrower, cosigner, or guarantor.

5 (4) "Creditor" means a person who extends consumer credit that is
6 subject to a finance charge or is payable by written agreement in more
7 than four installments, and to whom the obligation is payable at any
8 time.

9 (5) "High-cost home loan" means a home loan in which the terms of
10 the loan meet or exceed one or more of the thresholds as defined in
11 subsection (9) of this section.

12 (6) "Home loan" means a loan, including an open-end credit plan,
13 other than a reverse mortgage transaction, where the loan is secured
14 by:

15 (a) A mortgage or deed of trust on real estate in this state upon
16 which there is located or there is to be located a structure or
17 structures designed principally for occupancy of from one to four
18 families which is or will be occupied by a borrower as the borrower's
19 principal dwelling; or

20 (b) A security interest on a manufactured or mobile home in this
21 state which is or will be occupied by a borrower as the borrower's
22 principal dwelling.

23 (7)(a) "Points and fees" means:

24 (i) All items listed in 15 U.S.C. Sec. 1605(a)(1) through (4),
25 except interest or the time-price differential;

26 (ii) All charges listed in 15 U.S.C. Sec. 1605(e);

27 (iii) All compensation paid directly or indirectly to a mortgage
28 broker, including a broker that originates a loan in its own name in a
29 table-funded transaction;

30 (iv) The cost of all premiums financed by the creditor, directly or
31 indirectly for any credit life, credit disability, credit unemployment,
32 or credit property insurance, or any other life or health insurance, or
33 any payments financed by the creditor directly or indirectly for any
34 debt cancellation or suspension agreement or contract, except insurance
35 premiums calculated and paid on a monthly basis shall not be considered
36 financed by the creditor;

37 (v) The maximum prepayment fees and penalties that may be charged
38 or collected under the terms of the loan documents; and

1 (vi) All prepayment fees or penalties that are charged the borrower
2 if the loan refinances a previous loan made by the same creditor or an
3 affiliate of the creditor.

4 (b) For open-end loans, the points and fees are calculated by
5 adding the total fees charged at closing plus the maximum additional
6 fees which can be charged pursuant to the loan documents during the
7 term of the loan.

8 (8) "Rate" means the interest rate charged on the home loan, based
9 on an annual simple interest yield.

10 (9) "Threshold" means any one of the following three items:

11 (a) "Rate threshold" means:

12 (i) For a first lien mortgage loan, the trigger rate equals or
13 exceeds six percentage points over the weekly average yield on five-
14 year United States treasury securities;

15 (ii) For a subordinate mortgage lien or a mortgage secured solely
16 by a security interest in a manufactured or mobile home, the trigger
17 rate equals or exceeds eight percentage points over the weekly average
18 yield on five-year United States treasury securities;

19 (iii) The trigger rate is calculated as follows:

20 (A) For fixed-rate loans in which the interest rate will not vary
21 during the term of the loan, the trigger rate is the rate as of the
22 date of closing;

23 (B) For loans in which the interest varies according to an index,
24 the trigger rate is the sum of the index rate as of the date of loan
25 closing plus the maximum margin permitted at any time under the loan
26 agreement;

27 (C) For all other loans in which the rate may vary at any time
28 during the term of the loan, the trigger rate is the maximum rate that
29 may be charged during the term of the loan;

30 (b) "Total points and fees threshold" means the following,
31 excluding up to two bona fide discount points:

32 (i) For loans in which the total loan amount is thirty thousand
33 dollars or more, the total points and fees on the loan, paid by the
34 borrower at or before closing, exceed three percent of the total loan
35 amount;

36 (ii) For loans in which the total loan amount is less than thirty
37 thousand dollars, the total points and fees on the loan, paid by the
38 borrower at or before closing, exceed the lesser of nine hundred
39 dollars or six percent of the total loan amount; and

1 (c) "Prepayment penalty threshold" means the home loan agreement
2 permits the lender to charge or collect payment penalties or penalties
3 more than thirty months after the loan closing or which exceed, in the
4 aggregate, more than two percent of the amount prepaid.

5 (10) "Total loan amount" means the principal of the loan minus
6 those points and fees as defined in subsection (7) of this section that
7 are included in the principal amount of the loan. For open-end loans,
8 the total loan amount shall be calculated using the total line of
9 credit allowed under the home loan.

10 NEW SECTION. **Sec. 4.** (1) No creditor making a home loan shall
11 finance, directly or indirectly, any credit life, credit disability,
12 credit unemployment, or credit property insurance, or any other life or
13 health insurance, or any payments directly or indirectly for any debt
14 cancellation or suspension agreement or contract, except that insurance
15 premiums or debt cancellation or suspension fees calculated and paid on
16 a monthly basis shall not be considered financed by the creditor.

17 (2) No creditor may engage in the unfair act or practice of
18 flipping a home loan. Flipping a loan is the making of a home loan to
19 a borrower that refinances an existing home loan when the new loan does
20 not have reasonable, tangible net benefit to the borrower considering
21 all of the circumstances, including the terms of both the new and
22 refinanced loans, the cost of the new loan, and the borrower's
23 circumstances. In addition, the following home loan refinancings are
24 presumed to be flippings if:

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

31 (b) The new loan refinances an existing home loan that is a special
32 mortgage originated, subsidized, or guaranteed by or through the
33 federal government, or a state, tribal, or local government, or
34 nonprofit organization, which either bears a below-market interest rate
35 at the time the loan was originated, or has nonstandard payment terms
36 beneficial to the borrower, such as payments that vary with income, are
37 limited to a percentage of income, or where no payments are required
38 under specified conditions, and where, as a result of the refinancing,

1 the borrower will lose one or more of the benefits of the special
2 mortgage.

3 (3) No creditor shall recommend or encourage default on an existing
4 loan or other debt prior to and in connection with the closing or
5 planned closing of a home loan that refinances all or any portion of
6 such existing loan or debt.

7 (4) No creditor may charge a late payment fee except according to
8 the following rules:

9 (a) The late payment fee may not be in excess of four percent of
10 the amount of the payment past due.

11 (b) The fee may only be assessed for a payment past due for fifteen
12 days or more.

13 (c) The fee may not be charged more than once with respect to a
14 single late payment. If a late payment charge is deducted from a
15 payment made on the loan, and the deduction causes a subsequent default
16 on a subsequent payment, no late payment charge may be imposed for
17 default. If a late payment charge has been once imposed with respect
18 to a particular late payment, no charge shall be imposed with respect
19 to any future payment which would have been timely and sufficient, but
20 for the previous default.

21 (d) No fee may be charged unless the creditor notifies the borrower
22 within forty-five days following the date the payment was due that a
23 late payment charge has been imposed for a particular late payment. No
24 late payment charge may be collected from any borrower if the borrower
25 informs the creditor that nonpayment of an installment is in dispute
26 and presents proof of payment within forty-five days of receipt of the
27 creditor's notice of the late charge.

28 (e) The creditor shall treat each payment as posted on the same
29 date as it was received by the creditor, servicer, creditor's agent, or
30 at the address provided to the borrower by the creditor, servicer, or
31 the creditor's agent for making payments.

32 (5) No home loan may contain a provision that permits the creditor,
33 in its sole discretion, to accelerate the indebtedness. This provision
34 does not prohibit acceleration of the loan in good faith due to the
35 borrower's failure to abide by the material terms of the loan.

36 (6) No creditor may charge a fee for informing or transmitting to
37 any person the balance due to pay off a home loan or to provide a
38 release upon prepayment. Payoff balances shall be provided within a

1 reasonable time, but in any event no more than seven business days
2 after the request.

3 NEW SECTION. **Sec. 5.** A high-cost home loan is subject to the
4 following additional limitations and prohibited practices:

5 (1) No creditor making a high-cost home loan shall directly or
6 indirectly finance any points or fees.

7 (2) No prepayment fees or penalties shall be included in the loan
8 documents for a high-cost home loan or charged the borrower which
9 exceed in the aggregate:

10 (a) In the first twelve months after the loan closing more than two
11 percent of the loan amount prepaid; or

12 (b) In the second twelve months after the loan closing, more than
13 one percent of the amount prepaid. No prepayment penalty shall be
14 contracted for after the second year following the loan closing.

15 (3) No high-cost home loan may contain a scheduled payment that is
16 more than twice as large as the average of earlier scheduled payments.
17 This provision does not apply when the payment schedule is adjusted to
18 the seasonal or irregular income of the borrower.

19 (4) No high-cost home loan may include payment terms under which
20 the outstanding principal balance will increase at any time over the
21 course of the loan because the regular periodic payments do not cover
22 the full amount of interest due.

23 (5) No high-cost home loan may contain a provision that increases
24 the interest rate after default. This provision does not apply to
25 interest rate changes in a variable rate loan otherwise consistent with
26 the provisions of the loan documents, provided the change in the
27 interest rate is not triggered by the event of default or the
28 acceleration of the indebtedness.

29 (6) No high-cost home loan may include terms under which more than
30 two periodic payments required under the loan are consolidated and paid
31 in advance from the loan proceeds provided to the borrower.

32 (7) No high-cost home loan may be subject to a mandatory
33 arbitration clause that limits in any way the right of the borrower to
34 seek relief through the judicial process for any and all claims and
35 defenses the borrower may have against the creditor, broker, or other
36 party involved in the loan transaction.

37 (8) A creditor may not make a high-cost home loan without first
38 receiving certification from a counselor approved by the United States

1 department of housing and urban development, a state housing financing
2 agency, or the regulatory agency which has jurisdiction over the
3 creditor, that the borrower has received counseling on the advisability
4 of the loan transaction.

5 (9) A creditor may not make a high-cost home loan without due
6 regard to repayment ability. A creditor who follows the debt-to-income
7 ratio listed in 38 C.F.R. Sec. 36.4337(c)(1) and as defined in 38
8 C.F.R. Sec. 36.4337(d) and follows the residual income guidelines
9 established in 38 C.F.R. Sec. 36.4337(e) and VA Form 26-6393 shall
10 benefit from a rebuttable presumption that the creditor made the loan
11 with due regard to repayment ability.

12 (10) A creditor may not pay a contractor under a home-improvement
13 contract from the proceeds of a high-cost home loan, unless:

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

16 (b) The instrument is payable to the borrower or jointly to the
17 borrower and the contractor, or at the election of the borrower,
18 through a third-party escrow agent in accordance with terms established
19 in a written agreement signed by the borrower, the creditor, and the
20 contractor prior to the disbursement.

21 (11) A creditor may not charge a borrower any fees or other charges
22 to modify, renew, extend, or amend a high-cost home loan or to defer
23 any payment due under the terms of a high-cost home loan.

24 (12) Any creditor making a high-cost home loan that has the legal
25 right to foreclose must use this state's judicial foreclosure
26 procedures. The borrower has the right to assert in the proceeding the
27 nonexistence of a default and any other claim or defense to
28 acceleration and foreclosure, including any based on any violations of
29 this chapter, though no claim or defense shall be deemed a compulsory
30 counterclaim.

31 NEW SECTION. **Sec. 6.** (1) If a creditor asserts that grounds for
32 acceleration exist and requires the payment in full of all sums secured
33 by the security instrument, the borrower, or anyone authorized to act
34 on the borrower's behalf, shall have the right at any time, up to the
35 time title is transferred by means of foreclosure, by judicial
36 proceeding and sale or otherwise, to cure the default, and reinstate
37 the home loan by tendering the amount or performance as specified in
38 this section. Cure of default shall reinstate the borrower to the same

1 position as if the default had not occurred and shall nullify, as of
2 the date of the cure, any acceleration of any obligation under the
3 security instrument or note arising from the default.

4 (2) Before any action filed to foreclose upon the home or other
5 action is taken to seize or transfer ownership of the home, a notice of
6 the right to cure the default must be delivered to the borrower
7 informing the borrower of the following:

8 (a) The nature of default claimed on the home loan, and of the
9 borrower's right to cure the default by paying the sum of money
10 required to cure the default, as long as a creditor or servicer may not
11 refuse to accept any partial payment made or tendered in response to
12 the notice. If the amount necessary to cure the default will change
13 during the thirty-day period after the effective date of the notice,
14 due to the application of a daily interest rate or the addition of late
15 fees, as allowed by this chapter, the notice shall give sufficient
16 information to enable the borrower to calculate the amount at any point
17 during the thirty-day period;

18 (b) The date by which the borrower shall cure the default to avoid
19 acceleration and initiation of foreclosure, or other action to seize
20 the home, which date shall not be less than thirty days after the date
21 the notice is effective, and the name, address, and telephone number of
22 a person to whom the payment or tender shall be made;

23 (c) That if the borrower does not cure the default by the date
24 specified, the creditor may take steps to terminate the borrower's
25 ownership in the property by requiring payment in full of the home loan
26 and commencing a foreclosure proceeding or other action to seize the
27 home; and

28 (d) The name and address of the creditor and the telephone number
29 of a representative of the creditor whom the borrower may contact if
30 the borrower disagrees with the creditor's assertion that a default has
31 occurred or the correctness of the creditor's calculation of the amount
32 required to cure the default.

33 (3) To cure a default under this subsection, a borrower shall not
34 be required to pay any charge, fee, or penalty attributable to the
35 exercise of the right to cure a default as provided for in this
36 section, other than the fees specifically allowed by this section. The
37 borrower shall not be liable for any attorneys' fees relating to the
38 borrower's default that are incurred by the lender prior to or during
39 the thirty-day period set forth in subsection (2)(b) of this section,

1 nor for any fees in excess of one hundred dollars that are incurred by
2 the lender after the expiration of the thirty-day period, but prior to
3 the time the lender files a foreclosure action or takes other action to
4 seize or transfer ownership of the home. After the lender files a
5 foreclosure action or takes other action to seize or transfer ownership
6 of the home, the borrower shall only be liable for attorneys' fees that
7 are reasonable and actually incurred by the lender, based on a
8 reasonable hourly rate and a reasonable number of hours.

9 (4) If a default is cured prior to the initiation of any action to
10 foreclose or to seize the residence, the creditor shall not institute
11 the foreclosure proceeding or other action for that default. If a
12 default is cured after the initiation of any action to foreclose, the
13 creditor shall take steps necessary to terminate the foreclosure
14 proceeding or other action. Any creditor making a home loan who has
15 the legal right to foreclose must use the judicial foreclosure
16 procedures of the state where the property securing the loan is
17 located. The borrower shall have the right to assert in a judicial
18 foreclosure proceeding or other action the nonexistence of a default
19 and any other claim or defense to acceleration and foreclosure,
20 including any based on violations of this chapter, though no such claim
21 or defense shall be deemed a compulsory counterclaim.

22 NEW SECTION. **Sec. 7.** (1) Notwithstanding any other provision of
23 law, where a home loan was made, arranged, or assigned by a person
24 selling either a manufactured or mobile home, or home improvements to
25 the dwelling of a borrower, the borrower may assert all affirmative
26 claims and any defenses that the borrower may have against the seller
27 or home improvement contractor against the lender, any assignee,
28 holder, or servicer, in any capacity.

29 (2) Notwithstanding any other provision of law, the remedies
30 provided in this chapter apply to the creditor, any director, officer,
31 employee, or controlling stockholder of, or agent for, a creditor who
32 personally participated in the making or approving of a high-cost home
33 loan, and any other persons to whom this chapter applies and who
34 violated the requirements of this chapter. Any person who purchases or
35 is otherwise assigned a high-cost home loan is subject to all
36 affirmative claims and any defenses with respect to the loan that the
37 borrower could assert against the original creditor or broker of the
38 loan.

1 (3) Notwithstanding any other provision of law, a borrower in
2 default more than sixty days or in foreclosure may assert a violation
3 of this chapter by way of offset:

4 (a) As an original action;

5 (b) As a defense or counterclaim to an action to collect amounts
6 owed; or

7 (c) To obtain possession of the home secured by the home loan.

8 (4) It is a violation of this chapter for any person in bad faith
9 to attempt to avoid the application of this chapter by:

10 (a) Dividing any loan transaction into separate parts for this
11 purpose; or

12 (b) Engaging in any other subterfuge with the intent of evading the
13 provisions of this chapter.

14 NEW SECTION. **Sec. 8.** (1) Any violation of this chapter
15 constitutes an unfair or deceptive act or practice under the provisions
16 of chapter 19.86 RCW.

17 (2) Any person found by a preponderance of the evidence to have
18 violated this chapter is liable to the borrower for the following:

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

22 (b) Statutory damages equal to the finance charges agreed to in the
23 home loan agreement, plus ten percent of the amount financed;

24 (c) Punitive damages, when the violation was malicious or reckless;
25 and

26 (d) Costs and reasonable attorneys' fees.

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

30 (4) The intentional violation of this chapter, or rule thereunder,
31 renders the home loan agreement void, and the creditor has no right to
32 collect, receive, or retain any principal, interest, or other charges
33 whatsoever with respect to the loan, and the borrower may recover any
34 payments made under the agreement.

35 (5) The right of rescission granted under 15 U.S.C. 1601 et seq.
36 for violations of that law and all other remedies provided in this
37 section are available to a borrower by way of recoupment against a

1 party foreclosing on the home loan or collecting on the loan, at any
2 time during the term of the loan.

3 (6) The remedies provided in this section are not intended to be
4 the exclusive remedies available to a borrower, nor must the borrower
5 exhaust any administrative remedies provided under this chapter or any
6 other applicable law before proceeding under this section.

7 (7) Any person, including members, officers, and directors of the
8 creditor, who knowingly violates this chapter is guilty of a gross
9 misdemeanor.

10 (8) A creditor in a home loan who, when acting in good faith, fails
11 to comply with the provisions of this chapter, will not be deemed to
12 have violated this section if the creditor establishes that either:

13 (a) Within thirty days of the loan closing, and prior to receiving
14 any notice from the borrower of the compliance failure, the creditor
15 has made appropriate restitution to the borrower, and appropriate
16 adjustments are made to the loan; or

17 (b) Within sixty days of the loan closing, and prior to receiving
18 any notice from the borrower of the compliance failure, and the
19 compliance failure was not intentional and resulted from a bona fide
20 error notwithstanding the maintenance of procedures reasonably adapted
21 to avoid these errors, the borrower is notified of the compliance
22 failure, appropriate restitution is made to the borrower, and
23 appropriate adjustments are made to the loan.

24 Examples of bona fide errors include clerical, calculation,
25 computer malfunction and programming, and printing errors. An error of
26 legal judgment with respect to a person's obligations under this
27 section is not a bona fide error.

28 (9) The remedies provided in this section are cumulative.

29 NEW SECTION. **Sec. 9.** The rights conferred by this section are
30 independent of and in addition to any other rights under other laws.

31 NEW SECTION. **Sec. 10.** The provisions of this chapter are
32 severable, and if any phrase, clause, sentence, or provision is
33 declared to be invalid or is preempted by federal law or regulation,
34 the validity of the remainder of this chapter shall not be affected
35 thereby. If any provision of this chapter is declared to be
36 inapplicable to any specific category, type, or kind of loan or points

1 and fees, the provisions of this chapter shall nonetheless continue to
2 apply with respect to all other loans and points and fees.

3 NEW SECTION. **Sec. 11.** The law of this state shall be applied to
4 all transactions governed by this chapter. This chapter shall apply to
5 all loans made or entered into after the effective date of this act.

6 NEW SECTION. **Sec. 12.** Sections 1 through 11 of this act
7 constitute a new chapter in Title 61 RCW.

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