

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE BILL 1817
Committee Substitute Favorable 5/16/07
Senate Commerce, Small Business and Entrepreneurship Committee Substitute
Adopted 7/28/07

Short Title: Protect Consumers - Covered Loans.

(Public)

Sponsors:

Referred to:

April 19, 2007

A BILL TO BE ENTITLED

AN ACT TO PROTECT CONSUMERS REGARDING COVERED LOANS AND TO
INCREASE THE COMMISSIONER'S DISCIPLINARY AUTHORITY OVER
LICENSEES UNDER THE MORTGAGE LENDING ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 24-1.1E(a)(5) reads as rewritten:

"(5) "Points and fees" is defined as provided in this subdivision.

a. The term includes all of the following:

1. All items required to be disclosed under sections 226.4(a) and 226.4(b) of Title 12 of the Code of Federal Regulations, as amended from time to time, except interest or the time-price differential.
2. All charges for items listed under section 226.4(c)(7) of Title 12 of the Code of Federal Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender; otherwise, the charges are not included within the meaning of the phrase "points and fees".
3. ~~All compensation paid directly by the borrower to a mortgage broker not otherwise included in sub-subdivision a.1. or a.2. of this subdivision.~~To the extent not otherwise included in sub-subdivision a.1. or a.2. of this subdivision, all compensation paid from any source to a mortgage broker, including compensation paid to a mortgage broker in a table-funded transaction. A bona fide sale of a loan in the secondary mortgage

1 market shall not be considered a table-funded
2 transaction, and a table-funded transaction shall not be
3 considered a secondary market transaction.

4 4. The maximum prepayment fees and penalties which may
5 be charged or collected under the terms of the loan
6 documents.

7 b. Notwithstanding the remaining provisions of this subdivision,
8 the term does not include (i) taxes, filing fees, recording and
9 other charges and fees paid or to be paid to public officials for
10 determining the existence of or for perfecting, releasing, or
11 satisfying a security interest; and (ii) fees paid to a person other
12 than a lender or an affiliate of the lender or to the mortgage
13 broker or an affiliate of the mortgage broker for the following:
14 fees for tax payment services; fees for flood certification; fees
15 for pest infestation and flood determinations; appraisal fees;
16 fees for inspections performed prior to closing; credit reports;
17 surveys; attorneys' fees (if the borrower has the right to select
18 the attorney from an approved list or otherwise); notary fees;
19 escrow charges, so long as not otherwise included under
20 sub-subdivision a. of this subdivision; title insurance premiums;
21 and ~~fire~~ premiums for insurance against loss or damage to
22 property, including hazard insurance and flood insurance
23 premiums, provided that the conditions in section 226.4(d)(2) of
24 Title 12 of the Code of Federal Regulations are met.

25 c. For open-end credit plans, the term includes those points and
26 fees described in sub-subdivisions a.1. through a.3. of this
27 subdivision that are charged at or before loan closing, plus (i)
28 the minimum additional fees the borrower would be required to
29 pay to draw down an amount equal to the total loan amount, and
30 (ii) the maximum prepayment fees and penalties which may be
31 charged or collected under the terms of the loan documents."

32 **SECTION 2.** G.S. 24-1.1E(a) is amended by adding the following new
33 subdivisions to read:

34 "(4a) "Mortgage broker" is as defined in G.S. 53-243.01(14).

35 ...

36 (5a) A "table-funded transaction" is a loan transaction closed by a mortgage
37 broker in the mortgage broker's own name with funds advanced by a
38 person other than the mortgage broker in which the loan is assigned
39 contemporaneously or within one business day of the funding of the
40 loan to the person that advanced the funds."

41 **SECTION 3.** G.S. 24-1.1E is amended by adding a new subsection to read:

42 "(g) A mortgage broker who brokers a high-cost home loan that violates any
43 provisions of subsection (b) or (c) of this section shall be jointly and severally liable
44 with the lender."

1 **SECTION 4.** Article 1 of Chapter 24 of the General Statutes is amended by
2 adding a new section to read:

3 **"§ 24-1.1F. Rate spread home loans.**

4 "(a) Definitions.–The following definitions apply for purposes of this section:

5 (1) Annual percentage rate. – The annual percentage rate for the loan
6 calculated according to the provisions of the federal Truth-in-Lending
7 Act (15 U.S.C. § 1601, et seq.) and the regulations promulgated
8 thereunder by the Federal Reserve Board, as that Act and regulations
9 are amended from time to time.

10 (2) Closed-end loan. – A loan other than an open-end credit plan as
11 defined in this section.

12 (3) Home loan. – A loan that has all of the following characteristics:

13 a. The loan is not an equity line of credit as defined in
14 G.S. 24-9(a)(2), a construction loan as defined in G.S. 24-10(c),
15 or a reverse mortgage transaction.

16 b. The borrower is a natural person.

17 c. The debt is incurred by the borrower primarily for personal,
18 family, or household purposes.

19 d. The principal amount of the loan does not exceed the
20 conforming loan size limit for a single-family dwelling as
21 established from time to time for Fannie Mae.

22 e. The loan is secured by (i) a security interest in a manufactured
23 home, as defined in G.S. 143-147(7), in the State which is or
24 will be occupied by the borrower as the borrower's principal
25 dwelling, (ii) a mortgage or deed of trust on real property in the
26 State upon which there is located an existing structure designed
27 principally for occupancy of from one to four families that is or
28 will be occupied by the borrower as the borrower's principal
29 dwelling, or (iii) a mortgage or deed of trust on real property in
30 the State upon which there is to be constructed using the loan
31 proceeds a structure or structures designed principally for
32 occupancy of from one to four families which, when completed,
33 will be occupied by the borrower as the borrower's principal
34 dwelling.

35 f. A purpose of the loan is to (i) purchase the dwelling, (ii)
36 construct, repair, rehabilitate, remodel, or improve the dwelling
37 or the real property on which it is located, (iii) satisfy and
38 replace an existing obligation secured by the same real
39 property, or (iv) consolidate existing consumer debts into a new
40 home loan.

41 (4) Mortgage broker. – A mortgage broker as defined in
42 G.S. 53-243.01(14).

43 (5) Obligor. – Each borrower, co-borrower, cosigner, or guarantor
44 obligated to repay a rate spread home loan.

- 1 (6) Open-end credit plan. – Credit extended by a lender under a plan in
2 which (i) the lender reasonably contemplates repeated transactions, (ii)
3 the lender may charge interest or otherwise impose a finance charge
4 from time to time on an outstanding unpaid balance, and (iii) the
5 amount of credit that may be extended to the obligor during the term of
6 the plan, up to any credit limit set by the lender, is generally made
7 available to the extent that any outstanding balance is repaid.
- 8 (7) Rate spread home loan. – A home loan in which all the following
9 apply:
- 10 a. The difference between the annual percentage rate for the loan
11 and the yield on U.S. Treasury securities having comparable
12 periods of maturity is either equal to or greater than (i) 3
13 percentage points (3%), if the loan is secured by a first lien
14 mortgage or deed of trust, or (ii) 5 percentage points (5%), if
15 the loan is secured by a subordinate lien mortgage or deed of
16 trust. Without regard to whether the loan is subject to or
17 reportable under the provisions of the Home Mortgage
18 Disclosure Act (12 U.S.C. § 2801, et seq.) (HMDA), the
19 difference between the annual percentage rate and the yield on
20 Treasury securities having comparable periods of maturity shall
21 be determined using the same procedures and calculation
22 methods applicable to loans that are subject to the reporting
23 requirements of HMDA, as those procedures and calculation
24 methods are amended from time to time.
- 25 b. The difference between the annual percentage rate for the loan
26 and the conventional mortgage rate is either equal to or greater
27 than (i) 1.75 percentage points (1.75%), if the loan is secured by
28 a first lien mortgage or deed of trust, or (ii) 3.75 percentage
29 points (3.75%), if the loan is secured by a subordinate lien
30 mortgage or deed of trust. For purposes of this calculation, the
31 "conventional mortgage rate" means the most recent daily
32 contract interest rate on commitments for fixed-rate first
33 mortgages published by the Board of Governors of the Federal
34 Reserve System in its Statistical Release H.15, or any
35 publication that may supersede it, during the week preceding
36 the week in which the interest rate for the loan is set.
- 37 (8) Table-funded transaction. – A home loan transaction closed by a
38 mortgage broker in the mortgage broker's own name with funds
39 advanced by a person other than the mortgage broker in which the loan
40 is assigned contemporaneously or within one business day of the
41 funding of the loan to the person that advanced the funds. A bona fide
42 sale of a loan in the secondary mortgage market shall not be
43 considered a table-funded transaction, and a table-funded transaction
44 shall not be considered a secondary market transaction.

1 (b) No prepayment fees or penalties shall be charged or collected on a rate spread
2 home loan.

3 (c) No lender shall make a rate spread home loan unless the lender reasonably
4 and in good faith believes at the time the loan is consummated that one or more of the
5 obligors, when considered individually or collectively, has the ability to repay the loan
6 according to its terms and to pay applicable real estate taxes and hazard insurance
7 premiums. If a lender making a rate spread home loan knows that one or more mortgage
8 loans secured by the same real property will be made contemporaneously to the same
9 borrower with the rate spread home loan being made by that lender, the lender making
10 the rate spread home loan must document the borrower's ability to repay the combined
11 payments of all loans on the same real property.

12 (1) A lender's analysis of an obligor's ability to repay a rate spread home
13 loan according to the loan terms and to pay related real estate taxes and
14 insurance premiums shall be based on a consideration of the obligor's
15 credit history, current and expected income, current obligations,
16 employment status, and other financial resources other than the
17 obligor's equity in the real property that secures repayment of the rate
18 spread home loan.

19 (2) In determining an obligor's ability to repay a rate spread home loan,
20 the lender shall take reasonable steps to verify the accuracy and
21 completeness of information provided by or on behalf of the obligor
22 using tax returns, payroll receipts, bank records, reasonable alternative
23 methods, or reasonable third-party verification.

24 (3) In determining an obligor's ability to repay a rate spread home loan
25 according to its terms when the loan has an adjustable rate feature, the
26 lender shall take into consideration any balance increase that may
27 accrue from any negative amortization provision. The lender shall
28 calculate the monthly payment amount for principal and interest by
29 assuming (i) the loan proceeds are fully disbursed on the date of the
30 loan closing, (ii) the loan is to be repaid in substantially equal monthly
31 amortizing payments of principal and interest over the entire term of
32 the loan, with no balloon payment, and (iii) the interest rate over the
33 entire term of the loan is a fixed rate equal to the fully indexed interest
34 rate at the time of the loan closing, without considering any initial
35 discounted rate. The "fully indexed interest rate at the time of the loan
36 closing" is the interest rate that would have applied at the time of the
37 closing had the initial interest rate been determined by the application
38 of the same interest rate formula, (for example, an interest rate index
39 plus or minus a margin) that applies under the terms of the loan
40 documents to subsequent interest rate adjustments, disregarding any
41 limitations on the amount by which the interest rate may change at any
42 one time.

43 (d) Subject to the provisions of this subsection, a lender is jointly and severally
44 liable to the borrower for the wrongful acts and omissions of a mortgage broker in the

1 origination of a rate spread home loan if (i) the lender compensates the mortgage broker
2 in that specific rate spread home loan transaction, and (ii) either (a) the mortgage broker
3 sells or delivers that rate spread home loan to the lender in a table-funded transaction, or
4 (b) that rate spread home loan is closed in the lender's name.

5 (1) For purposes of this subsection, a yield-spread premium paid to or
6 retained by the mortgage broker shall be considered compensation paid
7 by the lender to the mortgage broker if either (i) the mortgage broker
8 sells or delivers that rate spread home loan to the lender in a
9 table-funded transaction, or (ii) the rate spread home loan is closed in
10 the lender's name.

11 (2) A lender's liability and a borrower's remedies against a lender for the
12 wrongful acts or omissions of a mortgage broker under this subsection
13 shall be specific to the rate spread home loan in question and shall be
14 subject to the following:

15 a. If the rate spread home loan violates the provisions of
16 subsection (b) or (c) of this section, the lender shall, at the
17 borrower's option, either (i) make the rate spread home loan
18 comply with the provisions of subsection (b) or (c) of this
19 section, or (ii) change the terms of the loan in a manner
20 beneficial to the borrower so that the loan will no longer be
21 considered a rate spread home loan subject to the provisions of
22 this section.

23 b. If the rate spread home loan does not violate subsection (c) of
24 this section, but the mortgage broker materially misrepresented
25 to the lender the obligor's ability to repay, the lender shall adjust
26 the interest rate and payment terms, if necessary, to make the
27 loan meet the underwriting standards of subsection (c) of this
28 section based on the obligor's actual ability to repay as of the
29 time the loan was closed.

30 c. The lender shall make appropriate restitution. However, the
31 total amount the borrower may recover from the lender in the
32 form of restitution, monetary damages, and/or a reduction in the
33 loan principal under this subsection shall not exceed in the
34 aggregate the sum of all finance charges and fees actually paid
35 by the borrower in connection with that loan transaction. A
36 reduction in the amount of interest to be paid by the borrower in
37 the future as a consequence of any reduction in the interest rate
38 shall not be considered restitution, monetary damages, or a
39 reduction in the loan principal for purposes of this provision.

40 d. Any prepayment penalty contained in the loan documents shall
41 be unenforceable.

42 e. The borrower shall be entitled to recover the costs of the action
43 and, in the discretion of the court, the borrower's reasonable
44 attorneys' fees.

- 1 (3) A lender liable for the wrongful acts or omissions of a mortgage
2 broker under this subsection shall, to the extent of such liability, have a
3 right of contribution from the mortgage broker and be subrogated to
4 the rights of each obligor against the mortgage broker.
- 5 (4) Nothing in this subsection shall be construed as exempting any
6 mortgage broker from liability or limiting a mortgage broker's liability
7 for that mortgage broker's wrongful acts or omissions.
- 8 (5) This subsection applies without regard to whether the rate spread home
9 loan violates subsection (b) or (c) of this section.
- 10 (6) In determining a lender's liability under this subsection, a court shall
11 take into account all of the facts and circumstances pertaining to the
12 making of the rate spread home loan in question.
- 13 (7) A lender shall have no liability under this subsection if the obligor has
14 engaged in fraud or other intentional material wrongdoing in obtaining
15 the rate spread home loan.

16 (e) The making of a rate spread home loan which violates subsection (b) or (c) of
17 this section is hereby declared usurious in violation of the provisions of this Chapter. In
18 addition, any prepayment penalty in violation of this section shall be unenforceable.
19 However, an obligor shall not be entitled to recover twice for the same wrong. To the
20 extent an obligor recovers damages from a lender or a mortgage broker under
21 subsection (d) of this section, the recovery shall be credited to the lender's and mortgage
22 broker's liability under this subsection. The Attorney General, the Commissioner of
23 Banks, or any party to a rate spread home loan may enforce the provisions of this
24 section. This section establishes specific consumer protections in rate spread home loans
25 in addition to other consumer protections that may be otherwise available by law. A
26 mortgage broker who brokers a rate spread home loan that violates the provisions of this
27 section shall be jointly and severally liable with the lender.

28 (f) The provisions of this section shall apply to any person who in bad faith
29 attempts to avoid the application of this section by (i) dividing any loan transaction into
30 separate parts for the purpose and with the intent of evading the provisions of this
31 section, or (ii) any other such subterfuge.

32 (g) A lender in a rate spread home loan who, when acting in good faith, fails to
33 comply with this section, will not be deemed to have violated this section if the lender
34 establishes that either:

- 35 (1) Within 90 days of the loan closing and prior to the institution of any
36 action against the lender under this section, the borrower was notified
37 of the compliance failure, the lender tendered appropriate restitution,
38 the lender offered, at the borrower's option, either to (i) make the rate
39 spread home loan comply with subsection (b) or (c), or (ii) change the
40 terms of the loan in a manner beneficial to the borrower so that the
41 loan will no longer be considered a rate spread home loan subject to
42 the provisions of this section, and within a reasonable period of time
43 following the borrower's election of remedies, the lender took
44 appropriate action based on the borrower's choice; or

1 (2) The compliance failure was not intentional and resulted from a bona
2 fide error notwithstanding the maintenance of procedures reasonably
3 adopted to avoid such errors, and within 120 days after the discovery
4 of the compliance failure and prior to the institution of any action
5 against the lender under this section or the lender's receipt of written
6 notice of the compliance failure, the borrower was notified of the
7 compliance failure, the lender tendered appropriate restitution, the
8 lender offered, at the borrower's option, either to (i) make the rate
9 spread home loan comply with subsection (b) or (c) of this section, or
10 (ii) change the terms of the loan in a manner beneficial to the borrower
11 so that the loan will no longer be considered a rate spread home loan
12 subject to the provisions of this section, and within a reasonable period
13 of time following the borrower's election of remedies, the lender took
14 appropriate action based on the borrower's choice. Examples of a bona
15 fide error include clerical, calculation, computer malfunction and
16 programming, and printing errors. An error of legal judgment with
17 respect to a person's obligations under this section is not a bona fide
18 error.

19 (h) The provisions of this section shall be severable, and if any phrase, clause,
20 sentence, or provision is declared to be invalid or is preempted by federal law or
21 regulation, the validity of the remainder of this section shall not be affected thereby.

22 (i) This section applies to rate spread home loans made on or after October 1,
23 2007."

24 **SECTION 5.** G.S. 24-10.2 is amended by adding a new subsection to read:

25 "(h) A mortgage broker who brokers a consumer home loan that violates the
26 provisions of this section shall be jointly and severally liable with the lender."

27 **SECTION 6.** G.S. 53-243.04 reads as rewritten:

28 "**§ 53-243.04. Rule-making authority.**

29 The ~~Banking Commission~~Commissioner may adopt any rules when—it—that the
30 Commissioner deems necessary to carry out the provisions of this Article, to provide for
31 the protection of the borrowing public, and to instruct mortgage lenders or brokers in
32 interpreting this Article, and to implement and interpret the provisions of
33 G.S. 24-1.1E, 24-1.1F, and 24-10.2 as they apply to licensees under this Article."

34 **SECTION 7.** G.S. 53-243.10 reads as rewritten:

35 "**§ 53-243.10. Mortgage broker duties.**

36 A mortgage broker, including any mortgage broker licensee and any person required
37 to be licensed as a mortgage broker under this Article, shall, in addition to duties
38 imposed by other statutes or at common law, shall do all of the following:

39 (1) Safeguard and account for any money handled for the
40 ~~borrower;~~borrower.

41 (2) Follow reasonable and lawful instructions from the
42 ~~borrower;~~borrower.

43 (3) Act with reasonable skill, care, and ~~diligence;~~and diligence.

- 1 (4) ~~Make reasonable efforts, with lenders with whom the broker regularly~~
2 ~~does business~~ to secure a loan that is reasonably advantageous to the
3 borrower considering all the circumstances, including the rates,
4 charges, and repayment terms of the loan and the loan options for
5 ~~which the borrower qualifies with such lenders.~~ loan.
- 6 (5) Owe a duty of loyalty to the borrower.
- 7 (6) Timely and clearly disclose to the borrower material information that
8 may be expected to influence the borrower's decision and is reasonably
9 accessible to the mortgage broker, including the total compensation the
10 mortgage broker expects to receive from any and all sources in
11 connection with each loan option presented to the borrower.
- 12 (7) If the mortgage broker knows that more than one mortgage loan will
13 be made by different lenders contemporaneously to a borrower secured
14 by the same real property, the mortgage broker shall, prior to closing,
15 notify each lender of the particulars of each of the other lender's
16 loans."

17 **SECTION 8.** G.S. 53-243.11 reads as rewritten:

18 **"§ 53-243.11. Prohibited activities.**

19 In addition to the activities prohibited under other provisions of this Article, it shall
20 be unlawful for any person in the course of any mortgage loan transaction:

- 21 (1) To misrepresent or conceal the material facts or make false promises
22 likely to influence, persuade, or induce an applicant for a mortgage
23 loan or a mortgagor to take a mortgage loan, or to pursue a course of
24 misrepresentation through agents or otherwise.
- 25 (2) To refuse improperly to issue a satisfaction of a mortgage.
- 26 (3) To fail to account for or to deliver to any person any funds, documents,
27 or other thing of value obtained in connection with a mortgage loan,
28 including money provided by a borrower for a real estate appraisal or a
29 credit report, which the mortgage banker, broker, or loan officer is not
30 entitled to retain under the circumstances.
- 31 (4) To pay, receive, or collect in whole or in part any commission, fee, or
32 other compensation for brokering a mortgage loan in violation of this
33 Article, including a mortgage loan brokered by any unlicensed person
34 other than an exempt person.
- 35 (5) To charge or collect any fee or rate of interest or to make or broker any
36 mortgage loan with terms or conditions or in a manner contrary to the
37 provisions of Chapter 24 of the General Statutes.
- 38 (6) To advertise mortgage loans, including rates, margins, discounts,
39 points, fees, commissions, or other material information, including
40 material limitations on the loans, unless the person is able to make the
41 mortgage loans available to a reasonable number of qualified
42 applicants.
- 43 (7) To fail to disburse funds in accordance with a written commitment or
44 agreement to make a mortgage loan.

- 1 (8) To engage in any transaction, practice, or course of business that is not
2 in good faith or fair dealing or that constitutes a fraud upon any
3 person, in connection with the brokering or making of, or purchase or
4 sale of, any mortgage loan.
- 5 (9) To fail promptly to pay when due reasonable fees to a licensed
6 appraiser for appraisal services that are:
7 a. Requested from the appraiser in writing by the mortgage broker
8 or mortgage banker or an employee of the mortgage broker or
9 mortgage banker; and
10 b. Performed by the appraiser in connection with the origination or
11 closing of a mortgage loan for a customer or the mortgage
12 broker or mortgage banker.
- 13 (10) To broker a mortgage loan ~~which that~~ contains a prepayment penalty if
14 the principal amount of the loan is one hundred fifty thousand dollars
15 (\$150,000) or ~~less~~ or if the loan is a rate spread home loan as
16 defined in G.S. 24-1.1F.
- 17 (11) To improperly influence or attempt to improperly influence ~~through~~
18 ~~coercion, extortion, or bribery,~~ the development, reporting, result, or
19 review of a real estate appraisal sought in connection with a mortgage
20 loan. Nothing in this subdivision shall be construed to prohibit a
21 mortgage broker or mortgage banker from asking the appraiser to do
22 one or more of the following:
23 a. Consider additional appropriate property information.
24 b. Provide further detail, substantiation, or explanation for the
25 appraiser's value conclusion.
26 c. Correct errors in the appraisal report.
- 27 (12) To fail to comply with the mortgage loan servicing transfer, escrow
28 account administration, or borrower inquiry response requirements
29 imposed by sections 6 and 10 of the Real Estate Settlement Procedures
30 Act (RESPA), 12 U.S.C. § 2605 and § 2609, and regulations adopted
31 there under by the Secretary of the Department of Housing and Urban
32 Development.
- 33 (13) To broker an adjustable rate mortgage loan without disclosing to the
34 borrower the terms and costs associated with a fixed rate loan from the
35 same lender at the lowest annual percentage rate for which the
36 borrower qualifies.
- 37 (14) To fail to comply with applicable federal laws and regulations related
38 to mortgage lending.
- 39 (15) To engage in unfair, misleading, or deceptive advertising related to a
40 solicitation for a mortgage loan."

41 **SECTION 9.** G.S. 53-243.12 is amended by adding a new subsection to

42 read:

43 "(m) Subject to the provisions of G.S. 53-243.03, the Commissioner may, by order,
44 prohibit licensees under this Article from engaging in acts and practices in connection

- 1 with mortgage loans that the Commissioner finds to be unfair, deceptive, designed to
2 evade the laws of this State, or that are not in the best interest of the borrowing public."
3 **SECTION 10.** This act becomes effective October 1, 2007. Section 1 of this
4 act applies to consumer home loans entered into on or after that date.