

**CHAPTER 30
PREDATORY LENDING**

Authority

N.J.S.A. 17:1-8, 17:1-15e, and 46:10B-22 et seq.; and P.L. 2004 c.84.

Source and Effective Date

R.2006 d.298, effective August 21, 2006.
See: 37 N.J.R. 3102(a), 38 N.J.R. 3293(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 30, Predatory Lending, expires on February 17, 2014. See: 45 N.J.R. 2063(a).

Chapter Historical Note

Chapter 30, Capital, was adopted pursuant to authority delegated at N.J.S.A. 17:12B-133 and became effective March 9, 1981 as R.1981 d.90. See: 13 N.J.R. 61(c), 13 N.J.R. 185(a). Amendments became effective October 17, 1983 as R.1983 d.459. See: 15 N.J.R. 1207(b), 15 N.J.R. 1754(e). Subchapter 2, Reserve Requirements, was repealed effective April 15, 1985 by R.1985 d.172. See: 17 N.J.R. 142(a), 17 N.J.R. 904(b). Pursuant to Executive Order No. 66(1978), Chapter 30, Capital, expired on October 17, 1988.

Chapter 30, Predatory Lending, was adopted as new rules by R.2006 d.298, effective August 21, 2006. See: Source and Effective Date.

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 30, Predatory Lending, was scheduled to expire on August 21, 2013. See: 43 N.J.R. 1203(a).

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL PROVISIONS

- 3:30-1.1 Purpose
- 3:30-1.2 Scope
- 3:30-1.3 Definitions

SUBCHAPTERS 2 THROUGH 4. (RESERVED)

SUBCHAPTER 5. HOME LOANS

- 3:30-5.1 Posting payments received

SUBCHAPTERS 6 THROUGH 7. (RESERVED)

SUBCHAPTER 8. AFFIRMATIVE CLAIMS AND DEFENSES

- 3:30-8.1 Loans in which sellers, including sellers of manufactured homes and home improvements, are involved
- 3:30-8.2 Purchaser and assignee liability under N.J.S.A. 46:10B-27

SUBCHAPTER 9. ENFORCEMENT

- 3:30-9.1 Rights, remedies, prohibitions declared additional, cumulative

SUBCHAPTER 1. GENERAL PROVISIONS

3:30-1.1 Purpose

The purpose of this chapter is to implement the New Jersey Home Ownership Security Act of 2002, N.J.S.A. 46:10B-22 et seq.

3:30-1.2 Scope

This chapter shall apply to all creditors and borrowers as defined in N.J.A.C. 3:30-1.3.

3:30-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Affiliate” means any company that controls, is controlled by, or is under the common control with any company, as set forth in 12 U.S.C. §§1841 et seq.

“Banking day” means the part of a day on which a depository institution is open to the public for carrying on substantially all of its banking functions.

“Bona fide discount points” means loan discount points that:

1. Are knowingly paid by the borrower;
2. Are paid for the express purpose of reducing, and which result in a reduction of, the interest rate or time-price differential applicable to the loan;
3. Reduce the interest rate or time-price differential applicable to the loan from an interest rate that does not exceed the conventional mortgage rate for a home loan secured by a first lien, by more than two percentage points, or for a home loan secured by a junior lien by more than three and one half percentage points; and
4. Are recouped within the first five years of the scheduled loan payments. Loan discount points will be considered to be recouped within the first five years of the scheduled loan payments if the reduction in the interest rate that is achieved by the payment of the loan discount points reduces the interest charged on the scheduled payments such that the borrower’s dollar amount of savings in interest over the first five years is equal to or exceeds the dollar amount of loan discount points paid by the borrower.

“Borrower” means any natural person obligated to repay the loan, including a coborrower, cosigner, or guarantor.

“Business day” means any day on which the office or offices of the creditor are open to the public to provide financial services.

“Business hours” means the hours during which a creditor, agent or servicer processes payments of the type received from the borrower.

“Commissioner” means the Commissioner of the New Jersey Department of Banking and Insurance.

“Construction loan” means a loan to a natural person having a term of two years or less, that is used to finance the

construction of buildings or other structures and that does not automatically convert to permanent financing.

“Consumer credit” means a home loan to a borrower.

“Conventional mortgage rate” means the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in Statistical Release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 226.32(a)1(i).

“Conventional prepayment penalty” means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than by N.J.S.A. 46:10B-22 et seq., provided the home loan:

1. Does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage points; and
2. Does not permit any prepayment fees or penalties that exceed two percent of the amount prepaid.

“Creditor” means a person who extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments, and to whom the obligation is payable at any time. Creditor shall also mean any person brokering a home loan, which shall include any person who directly or indirectly solicits, processes, places, or negotiates home loans for others or who closes home loans that may be in the person’s own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans, provided that creditor shall not include a person who is an attorney providing legal services to the borrower or a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by N.J.S.A. 17:46B-1, or any officer, director or employee thereof, providing services in the closing of a home loan who is not also funding the home loan and is not an affiliate of the creditor or an assignee that is subject to the provisions of N.J.S.A. 46:10B-27.

“Department” means the New Jersey Department of Banking and Insurance.

“Depository institution” means any bank, savings bank, savings and loan association or credit union chartered by this or another state, the Federal government or a foreign jurisdiction.

“Escrow” means monies deposited by the borrower for payment of real estate taxes and homeowner’s insurance expenses in conjunction with a home loan. Escrow monies shall be passed through dollar for dollar to the tax collector or insurance company or agent and are not a point or fee for the purpose of calculating the total points and fees threshold.

“Escrow charge” means a reasonable fee for maintaining or managing an escrow paid to a person other than a creditor or

an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker that meets the conditions set forth in 12 CFR 226.4(c)7 and 226.4(d)2.

“High-cost home loan” means a home loan for which the principal amount of the loan did not exceed \$350,000, in the first year following enactment of the Act, which amount was, pursuant to N.J.S.A. 46:10B-24, adjusted effective January 1, 2005 and shall thereafter be adjusted annually to include the last published increase of the housing component of the national Consumer Price Index, New York — Northeastern New Jersey Region, in which the terms of the loan meet or exceed one or more of the thresholds as defined in this chapter.

“Home improvements” means the remodeling, altering, painting, repairing, or modernizing of a principal dwelling or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement, or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, windows, doors, cabinets, kitchens, bathrooms, garages, basements and basement waterproofing, fire protection devices, security protection devices, central heating and air conditioning equipment, water softeners, heaters, and purifiers, solar heating or water systems, insulation installation, aluminum siding, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs, or improvements made in or on, attached to or forming a part of the principal dwelling.

“Home loan” means an extension of credit primarily for personal, family or household purposes, and includes an open-end credit plan, but shall not include a reverse mortgage transaction or a construction loan, in which the loan is secured by:

1. A mortgage or deed of trust on real estate in this State upon which there is located or there is to be located a one to six family dwelling which is or will be occupied by a borrower as the borrower’s principal dwelling; or
2. A security interest in a manufactured home which is or will be occupied by a borrower as the borrower’s principal dwelling.

“Manufactured home” means a structure, transportable in one or more sections, that in the traveling mode is eight body feet or more in width or 40 body feet or more in length or, when erected on site is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with a permanent foundation when erected on land, secured in conjunction with the real property on which the manufactured home is located and connected to the required utilities and includes the plumbing, heating, air-conditioning and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of the United States Depart-

ment of Housing and Urban Development and complies with the standards established under the Federal National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§5401 et seq. Such term does not include rental property or second homes or manufactured homes when not secured in conjunction with the real property on which the manufactured home is located.

“Mortgage insurance premiums” or “private mortgage insurance” mean premiums for insurance protecting the lender against the borrower’s default or other credit loss.

“Points and fees” means:

1. All items listed in 15 U.S.C. §§1605(a)(1) through (4), except interest or the time-price differential;
2. All charges listed in 15 U.S.C. §1605(e);
3. All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction;
4. The cost of all premiums financed by the creditor, directly or indirectly, for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums calculated and paid on a monthly basis shall not be considered financed by the creditor;
5. The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents;
6. All prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor, except that this paragraph shall not apply to a loan which refinances a previous loan made by the same broker and funded by another creditor; and
7. For open-end loans, the points and fees are calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties which may be charged or collected under the terms of the loan documents if prepayment penalties are authorized by law other than by N.J.S.A. 46:10B-22 et seq., plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

“Points and fees” shall not include the following items: title insurance premiums and fees, charges and premiums paid to a person or entity holding an individual or organization insurance producer license in the line of title insurance or a title insurance company, as defined by N.J.S.A. 17:46B-1; taxes, filing fees, and 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; and reasonable fees paid to a person other than

a creditor or an affiliate of the creditor or to the mortgage broker or an affiliate of the mortgage broker for the following, provided that the conditions in 12 C.F.R. 226.4(c)(7) are met; 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; fees for credit reports; fees for surveys; attorneys’ fees; notary fees; escrow charges; fire and flood insurance premiums, provided that the conditions in 12 C.F.R. 226.4(d)(2) are met.

“Rate” means that annual percentage rate for the loan calculated at closing based on the points and fees set forth in this chapter and according to the provisions of 15 U.S.C. §§1601 et seq. and the regulations promulgated thereunder by the Federal Reserve Board.

“Received” means the actual receipt at any office designated by the creditor as a place to which the payments may be submitted or by a person designated by the creditor as a person to whom the payments may be submitted or, if no such place or person is so designated, at the creditor’s principal office or any of its branch offices.

“Seller” means a seller as defined in the Federal Trade Commission (FTC) Holder Rule at 16 C.F.R. 433.1(J), incorporated herein by reference, and includes sellers, as defined therein, of manufactured homes and home improvements.

“Threshold” means any one of the following two items, as defined:

1. “Rate threshold” means the annual percentage rate of the loan at the time the loan is consummated such that the loan is considered a “mortgage” under section 152 of the federal Home Ownership and Equity Protection Act of 1994, P.L. 103-325 (15 U.S.C. §1602(aa)), and the regulations promulgated by the Federal Reserve Board, including 12 C.F.R. 226.32, without regard to whether the loan transaction is or may be a “residential mortgage transaction,” as defined in 12 C.F.R. 226.2(a)(24). The definition of “points and fees” in 15 U.S.C. §1605 shall be used for this determination. This section of Federal law shall also be used for determining the rate of interest on variable rate loans.
2. “Total points and fees threshold” means that the total points and fees payable by the borrower at or before the loan closing, excluding either a conventional prepayment penalty or up to two bona fide discount points, exceed:
 - i. Four and one half percent of the total loan amount if the total loan amount is \$40,000 or more; or
 - ii. The lesser of six percent of the total loan amount or \$1,000, if the total loan amount is less than \$20,000, and six percent if the total loan amount is \$20,000 or more but less than \$40,000.

“Total amount paid by the borrower in connection with the transaction” means all amounts paid by the borrower to the

original creditor, including principal and interest, and all amounts paid to subsequent holders. Payments made to a seller who is not also the original creditor, such as a down payment or trade-in, are not part of the credit transaction and as such are not considered to be part of the "total amount paid in connection with the transaction." Where the seller also acts as the original creditor, down payments, deposits, periodic payments, late fees, and other payments to the seller are included in the calculation of the maximum amount a borrower may recover through a claim brought pursuant to N.J.S.A. 46:10B-27.a.

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

SUBCHAPTERS 2. THROUGH 4. (RESERVED)

SUBCHAPTER 5. HOME LOANS

3:30-5.1 Posting payments received

(a) When a creditor that is a depository institution receives a home loan payment, the creditor shall treat the payment as posted on the banking day that the payment is received. For purposes of the posting requirements in this section, payments received by a servicer or agent of a depository institution shall be treated as received by the depository institution.

(b) A payment received by a creditor that is not a depository institution shall, if received before the end of business hours, be posted on the business day that it is received or, if received after the end of business hours, on the next business day. For purposes of the posting requirements in this section, payments received by a servicer or agent of a non-depository entity shall be treated as received by the non-depository entity.

SUBCHAPTERS 6. AND 7. (RESERVED)

SUBCHAPTER 8. AFFIRMATIVE CLAIMS AND DEFENSES

3:30-8.1 Loans in which sellers, including sellers of manufactured homes and home improvements, are involved

(a) If a home loan was made, arranged or assigned by a seller of manufactured homes or of home improvements to

the dwelling of a borrower, or was made by or through a creditor to whom the borrower was referred by such a seller, the borrower may assert against the original creditor and any person who purchases or is otherwise assigned the loan all affirmative claims and any defenses that the borrower may have against such a seller of manufactured homes or home improvements, including any claims and defenses available under N.J.S.A. 46:10B-22 et seq. against a home improvement contractor retained by the seller of home improvements to make home improvements on the borrower's dwelling. The amounts of any such affirmative claims and defenses shall be limited to amounts required to reduce or extinguish the borrower's liability under the home loan, plus the total amount paid by the borrower in connection with the transaction, plus amounts required to recover costs, including reasonable attorney's fees against the creditor, any assignee or holder, in any capacity.

(b) If a loan covered by (a) was made by the seller or assigned to a creditor by the seller, all payments made to the seller including down payments, deposits, periodic payments, late fees and other payments are considered paid in connection with the transaction.

(c) If a loan covered by (a) was made by a creditor by way of a referral or arrangement through the seller, down payments, deposits, periodic payments, late fees and other payments made to the seller are not considered paid in connection with the transaction.

3:30-8.2 Purchaser and assignee liability under N.J.S.A. 46:10B-27

(a) Pursuant to N.J.S.A. 46:10B-27b, any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower may assert against the original creditor or broker of the loan; except that the liability thereunder shall not arise if the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising reasonable due diligence could not determine that the loan was a high-cost home loan.

1. In any administrative action commenced under N.J.S.A. 46:10B-22 et seq. or this chapter, it shall be presumed by the Department that a purchaser or assignee of a high cost home loan has exercised such due diligence if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

i. Has in place, at the time of the purchase or assignment of the loan, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost loan;

ii. Requires by contract that all sellers or assignors of home loans represent and warrant to the purchaser or assignee that either:

(1) It will not sell or assign any high-cost home loan to the purchaser or assignee; or

(2) That the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and

iii. Exercises reasonable due diligence at the time of the purchase or assignment of home loans or within a reasonable period of time thereafter, which due diligence is intended by the purchaser or assignee to prevent it from purchasing or taking assignment of any high-cost loan.

(b) With respect to a claim brought under N.J.S.A. 46:10B-27c, notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may, within six years of the closing of a high-cost home loan, assert against the creditor or any subsequent holder or assignee of the home loan a violation of N.J.S.A. 46:10B-22 et seq. in connection with the loan as an original action.

(c) With respect to a claim brought under N.J.S.A. 46:10B-27c, notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may, at any time during the term of a high-cost home loan after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, assert against the creditor or any subsequent holder or assignee of the high-cost home loan any defense, claim or counterclaim.

(d) Pursuant to N.J.S.A. 46:10B-27c, the damages sought in any original action as referenced in (b) above, or in any claim or counterclaim as referenced in (c) above, shall be limited to amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs, including reasonable attorney's fees not included in the principal amount of the loan.

(e) No person shall, in bad faith or otherwise in an attempt to avoid the application of N.J.S.A. 46:10B-22 et seq.:

1. Divide any loan transaction into separate parts; or
2. Undertake any other such subterfuge, with the intent of evading the provisions of N.J.S.A. 46:10B-22 et seq.

(f) The limitations on assignee liability with respect to high cost home loans as set forth in (a) above shall not apply to assignee liability asserted on any ground other than N.J.S.A. 46:10B-27.b.

(g) The limitations in this chapter shall apply to any assignee liability arising under N.J.S.A. 46:10B-27 regardless of whether an individual asserting assignee liability pursuant to this chapter chooses to pursue such an action under the Consumer Fraud Act, as authorized under N.J.S.A. 46:10B-29a, or under the Act, as authorized under N.J.S.A. 46:10B-29b. Regardless of which alternative method for seeking damages against an assignee the borrower chooses to pursue, whenever a borrower alleges assignee or holder liability pursuant to N.J.S.A. 46:10B-27, the limitations and conditions

set forth in the applicable subsections of N.J.S.A. 46:10B-27 shall apply to such assignee liability.

(h) Any borrower asserting a claim under N.J.S.A. 46:10B-22 et seq. may, in appropriate circumstances, recover damages under both N.J.S.A. 46:10B-27.a and 27.c from one assignee on the basis of separate claims brought simultaneously under N.J.S.A. 46:10B-27.a and 27.c in connection with the same loan transaction. In such a case the limitations on damages set forth in N.J.S.A. 46:10B-27 would apply to the respective claims made under N.J.S.A. 46:10B-27.a and 27.c.

(i) The limitations upon and conditions for assignee liability prescribed by N.J.S.A. 46:10B-27 may not be avoided by a borrower seeking to obtain separate compensatory and punitive damages against the same assignee. The limitations on damages set forth in N.J.S.A. 46:10B-27 apply to the total of all types of damages.

(j) If a seller of home improvements or manufactured homes is not otherwise involved in the transaction as specified in N.J.S.A. 46:20B-27.a, the loan shall not give rise to assignee liability pursuant to N.J.S.A. 46:10B-27.a. This rule applies irrespective of whether the loan is secured by a first lien, or by a second or subsequent lien (sometimes referred to as a "junior lien"), whether the transaction is a cash-out refinance, and whether the proceeds of the loan are used to pay for home improvements or to purchase a manufactured home.

1. A seller of manufactured homes or home improvements who has referred a borrower to a creditor shall be deemed to be otherwise involved as set forth in N.J.S.A. 46:10B-27.

2. Where a borrower refinances without the involvement of a seller of manufactured homes or home improvements as set forth in N.J.S.A. 46:10B-27.a and subsequently uses the funds obtained in the process to pay for a manufactured home or for home improvements, the seller of manufactured homes or home improvements shall not be deemed to be otherwise involved in the transaction.

(k) The exercise of reasonable due diligence as referenced in N.J.S.A. 46:10B-27.b(3) does not, in all cases, require compliance review of one hundred percent of the loans being acquired. Depending upon the size of the loan pool being purchased or acquired by an assignee and/or the assignee being aware of information material to the determination of whether a lender engages in making high-cost home loans, including but not limited to any indication of the presence of high cost home loans in a loan pool, sampling, if properly performed, shall be considered reasonable due diligence by the Department. In order for sampling to be considered reasonable due diligence by the Department, purchasers or assignees shall, at a minimum, conduct quality control review of appropriate loan documentation at the beginning of the buyer/seller relationship, whenever a particular problem is identified, and throughout the relationship by random sampling. When a loan pool is very small or initial review has

uncovered a high number of high cost loans, more extensive review is required to meet the reasonable due diligence standard.

(l) Creditors may utilize third party software packages or internally developed computer programs to comply with the requirements of N.J.S.A. 46:10B-27.b(3) or to determine whether loans are home loans or high cost home loans. Such software programs shall be calibrated and tested prior to use and periodically tested as part of an ongoing compliance review process. Periodic manual oversight and monitoring shall be done to ensure that the software is performing adequately and to evaluate matters not addressed by the software.

(m) A creditor may secure documentation from the borrower in which the borrower represents that no contractor or seller referred the borrower to the creditor, arranged the loan or was otherwise involved in facilitating the loan transaction. The Department shall consider such documentation when contemplating the exercise of its administrative authority pursuant to the Act.

are hereby declared to be in addition to and cumulative of any other right, remedy, or prohibition accorded by the common law or statutes of the United States or of this State, and nothing herein shall be construed to deny, abrogate, or impair any such common law or statutory right, remedy, or prohibition. Without limiting the foregoing, the rights, remedies and prohibitions accorded by this chapter are hereby further declared to create no presumption that any home loan or any term in a home loan is not unconscionable, whether or not the home loan or loan term, alone or in conjunction with other terms of the loan, violates the provisions of this chapter.

(b) In accordance with N.J.S.A. 46:10B-23.d, the amendments in P.L. 2004, c. 84 to the New Jersey Home Ownership Security Act of 2002, N.J.S.A. 46:10B-22 et seq., deleting the covered home loan category from N.J.S.A. 46:10B-25 and the prohibition on flipping a home loan, shall create no presumption that any home loan that has been refinanced is not unconscionable. The deletions of the covered home loan category and of the prohibition on flipping from N.J.S.A. 46:10B-25 shall also create no presumption that any home loan that is refinanced does not constitute an unlawful practice under the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.

SUBCHAPTER 9. ENFORCEMENT

3:30-9.1 Rights, remedies, prohibitions declared additional, cumulative

(a) Pursuant to N.J.S.A. 46:10B-30, the rights, remedies, and prohibitions accorded by the provisions of this chapter