

# CONSUMERS LEAGUE OF NEW JERSEY NEWSLETTER

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## **N.J. Predatory Lending Bill Enacted**

Governor McGreevy signed the New Jersey bill intended to curb abuses in predatory mortgages lending. In a related development, the federal Office of Thrift Supervision issued its "preemption" opinion that federal savings and loan associations and their subsidiaries do not have to obey most of the N.J. law. (see page 3).

The N.J. Home Ownership Security Act , N.J.S.A. 46:10B-22 et seq., represents a compromise between consumer and lender interests. Attorneys need to read the full text, what follows is a summary which leaves out many fine distinctions.

The Act defines three types of home mortgages: "high-cost" home loans, "covered" home loans, and "home loans," with different rules for each type. A home loan is basically a mortgage on residential real estate, or a loan secured by a mobile home. A "covered" home loan is one where the points and fees exceed 4% of the total loan amount. However two bona fide discount points are allowed in addition, so think of the covered home loan as having more than 6% in points and fees. Bona fide discount points must actually result in a reduced interest rate.

A "high-cost home loan" is one where the points and fees exceed 7% of the total loan amount (5% plus two bona fide discount points) or exceeds the federal HOEPA Act interest rate trigger (i.e., an APR greater than the Treasury securities rate plus 8%). The hope here is that this standard reduces fees below this standard, saving low income homeowners 1% each.

The Act prohibits, in "high-cost" home loans: balloon payments, negative amortization, increases in the interest rate after default, no costly arbitration clause. In a high-cost loan, the consumer must get a warning Notice. Loan proceeds may not be paid directly to a home repair (See page 2)

## **Patricia Royer To Be Installed As CLNJ President**

The September 5 meeting of the CLNJ Board of Directors is expected to ratify the choice by the executive search committee to name Patricia Royer as President of the Consumers League of New Jersey.

Mrs. Royer is well known as the person Governor Florio turned to be his first Director of the Division of Consumer Affairs.

Mrs. Royer's first day as Director was more active than most, because she attended a New Jersey legislative hearing and testified against an industry proposal to legalize unlimited interest rates for "rent to own" sales of goods on credit. After the hearing, Mrs. Royer was sworn in as Director by the Governor, and then filled him in on why the industry bill was a wolf in sheep's clothing. To date, New Jersey remains one of only a handful of states where the rent to own industry has not gotten their "legalization" bill passed. Mrs. Royer's time as Director of the New Jersey Division of Consumer Affairs was marked by her tireless travel around the state to promote consumer education and enforcement of the N.J. consumer protection laws.

Patricia Royer has also been a director of the National Consumers League, Washington DC, for many years, as well as a long time Director of the Consumers League of New Jersey. In addition to public achievement, Mrs. Royer has previously been employed in industry as vice president for consumer affairs.

Patricia Royer was the dinner chair and organizer of the Consumers League of New Jersey's anniversary dinner in 2000, celebrating our first one hundred years, 1900-2000. If the success of that dinner is any indication, then Consumers League expects to achieve similar achievement under President Patricia Royer.

## Predatory Lending Act (Continued)

contractor. No fees and points are allowed when a creditor refinances a high-cost loan it holds. Credit counseling is needed if fees and points are financed otherwise, and only 2% may be financed. The likely result of these prohibitions is that creditors will attempt to get their fees and points below the N.J. "high-cost" limits, saving consumers 1% as opposed to the federal HOEPA law. However, the N.J. law excludes quite a few third party fees from the definition of "fees and points." This is a loophole.

For "covered" home loans, i.e. 6% fees and points, there are rules intended to discourage the practice of flipping, i.e., making repeated loans to the same borrower to get repeated fees. Flipped loans must provide a reasonable tangible benefit to the borrower.

For all home loans, creditors may not finance the lump-sum payment of credit insurance premiums, nor pyramid late charges (i.e. only one late charge permitted per late payment), nor encourage consumers to default in getting a new loan. Payments must be posted on the day received. A creditor may not accelerate because of perceived insecurity. No fee may be charged for telling a homeowner the payoff balance, and such information must be provided within seven days.

There are significant penalties if the Act is violated. A borrower may sue for triple damages under the N.J. Consumer Fraud Act, or under this Act for an amount equal to the finance charge plus 10% of the amount financed. In mortgages, this would be a large amount. Attorneys fees would be allowed also, and punitive damages in cases of malicious action. There is a good faith defense for lenders. The remedies of the Act are declared to be cumulative, i.e., they are not supposed to take the place of rights consumers already have. For example, the law says that the mere fact that a mortgage does not violate this act, does not create a presumption that the loan is not unconscionable. Consumers can raise other laws, not just this one.

The most complex part of the Act is section 6, about when the Act may be raised as a defense. Virtually all predatory mortgages are made by one party, a broker, for example, then sold to an investor who collects the payments. Some mortgages are bundled into trusts, and the ownership of the trusts sold like shares of stock to many investors. Section 6 has several parts. Section (a) says that in the case of home repairs, mobile homes, or loans made where the seller referred the lenders, then the borrower may always use violations of the Act to extinguish the debt (when he or she has been cheated or victimized, for example.) Section (b) states that the homeowner can assert his defenses against "high-cost" loans (i.e., that he did not actually get the loan money) against assignees, but there is an assignee loophole if the assignee has done "due diligence" and the lender assured the assignee that this loan was not a high-cost loan. Section (b) ought to be repealed, or limited by the courts, because homeowners should always be allowed to assert they do not really owe the money claimed. Subsection (c) applies to "covered" and "high-cost" home loans, and allows the homeowner to assert his defenses, to extinguish the mortgage, and collect attorney fees, in an individual case against the assignee, for 6 years for a "covered" loan, and at any time for a "high-cost" home loan in response to foreclosure. Section (e) says that (c) overrides (b). Not mentioned in section 6 is the case of the plain "home loan," i.e. one that does not have enough fees and points to be "covered" or "high-cost." Hence we think that in such home loans, assignees will continue to be subject to the defenses of homeowners, unless the assignee meets the technical requirements of a "holder in due course." The better rule for New Jersey's homeowners is that the Legislature should enact a plain statement that assignees of mortgages are always subject to defenses which the borrower has against the lender. Letting assignees foreclose in cases of unconscionability, fraud or predatory lending would defeat the laudable purposes of this recent New Jersey law. It will fall to the Courts how to interpret this Act, and CLNJ expects that the Courts will look to the primary intent of the Act, which is to protect homeowners from predatory lending.

## Federal Agency Says Some Lenders Need Not Obey N.J.'s New Law

The ink on the N.J. predatory lending act hardly had dried when the U.S. Office of Thrift Supervision issued its opinion that the federal savings and loan companies it regulates, and their subsidiaries, do not have to obey the N.J. Home Ownership Security Act. Notwithstanding lip service of all the federal banking agencies, who piously state they wish to discourage predatory lending by all creditors, the OTS has brazenly claimed that only the OTS can pass any law regulating its federally chartered S&L associations. The OTS did not point to any statute of Congress which authorizes or encourages predatory lending by any creditor. If Congress had wished to authorize predatory lending, it could pass a law to encourage it. In fact Congress has passed the HOEPA law to discourage predatory lending, and the N.J. law copies from HOEPA and makes a few New Jersey requirements. It is certainly possible for a lender to obey HOEPA and to obey the new N.J. law. There is no conflict between the statutes. If there were, then federal law prevails.

What the OTS did is the attempt of unelected federal agencies to negate the reasonable attempts of states to protect their citizens from predatory lending. Previously the OTS opined that the predatory lending statutes of New York and Georgia did not apply to federal S&L Associations. What is going on here is more political than law. The OTS is seeking to protect banks from consumers, when it should instead be protecting consumers from predatory lenders. The best way to end predatory lending is to make it too expensive to be profitable. Banks should not be encouraged to finance fraud.

To allow federal agencies to nullify consumer protection laws exceeds their authority. New Jersey's Appellate Division held exactly that in the recent *Glukowsky v. Equity One* case. The Court said that the OTS did not have the authority to permit mortgage prepayment penalties which were illegal under New Jersey law when the consumer paid off a mortgage early. CLNJ says government should protect consumers, not help fleece them.

## Looking Back and Forward

Some of the accomplishments of CLNJ over the last eighteen years are collected on [www.clnj.org](http://www.clnj.org) in our April 2000 Newsletter.

Consumers League has taken the cause of persons who were not represented, such as borrowers, bankrupts, homeowners, credit card users. We have tried to get the government to enact, and business to follow, basic principles of consumer fairness. The oldest consumer protection laws prohibited usury, excessive interest. CLNJ has worked with many friends to keep New Jersey from legalizing the excessive interest (100% to 300%) of rent to own stores. Several Court decisions and a class action went favorably to consumers because no RTO legalization law was passed. CLNJ has appeared in the halls of Congress and in Trenton. Congress adopted our idea to prohibit "rate rise surprise" in home equity loans. Congress in 1994 amended the Bankruptcy Act to allow N.J. homeowners to pay their mortgages in a chapter 13 payment plan. New Jersey passed the Fair Foreclosure Act, the good half being written by CLNJ. The Consumers League has appeared as *amicus curiae* in several lawsuits seeking basic justice for N.J. borrowers. CLNJ has tried to educate the public via the Rent to Own Rap (still available on [www.clnj.org](http://www.clnj.org) as an MP3 music file), and groups still request our poster and pamphlet on rent to own.

This Century's threats to consumers are schemes to deny consumers their rights, or to deny consumers an opportunity to get their day in Court. The modern predators, such as payday lenders who charge 300% to 700% on two week loans, go directly to the legislatures to get permission in advance for consumer frauds. Federal agencies such as OTS attempt to nullify state laws with one letter. The U.S. Supreme Court denies citizens the right to sue states. Arbitration clauses inserted in consumer contracts attempt to deny you a day in the Courts your taxes support – instead you pay \$2,000 a day for an arbitrator who may come from the industry you are suing. Notwithstanding the present clouds, continuing to expose the truth will in the long run ensure the triumph of the consumer movement.

**■ \$100 for the next 100 Years! ■**  
**Consumers League of New Jersey is in second century of service!**  
**We have a simple plea: if you can,**  
**please send us \$100 for our next 100 years!**

**MEMBERSHIP RENEWAL/APPLICATION:** I wish to continue as, or to become a member of the Consumers League of New Jersey, and/or the Consumers League Education Fund. Annual dues of \$20 include a subscription to the Consumers League Newsletter. Contributions to the Education Fund are tax deductible. Thank you for your contribution.

- \_\_\_\_\_ Consumers League Millennium Circle, \$2,000
- \_\_\_\_\_ Consumers League Life Member, \$1,000
- \_\_\_\_\_ Consumers League Century Club, \$100
- \_\_\_\_\_ Consumers League of New Jersey, annual membership, \$20
- \_\_\_\_\_ Consumers League Education Fund, \$20
- \_\_\_\_\_ Newsletter subscription only, \$10 (irregular schedule; not a member)
- \_\_\_\_\_ I want to do more to help CLNJ, enclosed is an additional:  
\_\_\_\_\_ \$1,000, \_\_\_\_\_ \$100, \_\_\_\_\_ \$50, \_\_\_\_\_ \$25, \_\_\_\_\_ other.

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