

## IC 24-9-5

### Chapter 5. Claims, Defenses, Remedies

#### IC 24-9-5-1

##### **Purchaser or assignee subject to affirmative claims and defenses; claims available to borrower**

Sec. 1. (a) A person who purchases or is otherwise assigned a high cost home loan is subject to all affirmative claims and any defenses, except for an affirmative claim or defense pursuant to IC 24-9-3-7, with respect to the high cost home loan that the borrower could assert against a creditor or broker of the high cost home loan. However, this section does not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that a reasonable person exercising ordinary due diligence could not determine that the loan was a high cost home loan. A purchaser or an assignee is presumed to have exercised reasonable due diligence if the purchaser or assignee:

- (1) has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit the purchase or acceptance of the assignment of any high cost home loans;
- (2) requires by contract that a seller or an assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either:

- (A) the seller or assignor will not sell or reassign any high cost home loans to the purchaser or assignee; or
- (B) the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect;

- (3) exercises reasonable due diligence:

- (A) at the time of purchase or assignment of home loans; or
- (B) within a reasonable period after the purchase or assignment of home loans;

intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high cost home loans; or

- (4) satisfies the requirements of subdivisions (1) and (2) and establishes that a reasonable person exercising ordinary due diligence could not determine that the loan was a high cost home loan based on the:

- (A) documentation required by the federal Truth in Lending Act (15 U.S.C. 1601 et seq.); and
- (B) itemization of the amount financed and other disbursement disclosures.

(b) A borrower acting only in an individual capacity may assert against the creditor or any subsequent holder or assignee of a high cost home loan:

- (1) a violation of IC 24-9-4-2 as a defense, claim, or counterclaim, after:
  - (A) an action to enjoin foreclosure or to preserve or obtain

possession of the dwelling that secures the loan is initiated;  
(B) an action to collect on the loan or foreclose on the collateral securing the loan is initiated; or  
(C) the loan is more than sixty (60) days in default;  
within three (3) years after the closing of a home loan;  
(2) a violation of this article in connection to the high cost home loan as a defense, claim, or counterclaim in an original action within five (5) years after the closing of a high cost home loan; and  
(3) any defense, claim, counterclaim, or action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan, including a violation of this article after:  
(A) an action to collect on the loan or foreclose on the collateral securing the loan is initiated;  
(B) the debt arising from the loan is accelerated; or  
(C) the loan is more than sixty (60) days in default;  
at any time during the term of a high cost home loan.

(c) In an action, a claim, or a counterclaim brought under subsection (b), the borrower may recover only amounts required to reduce or extinguish the borrower's liability under a home loan plus amounts required to recover costs, including reasonable attorney's fees.

(d) The provisions of this section are effective notwithstanding any other provision of law. This section shall not be construed to limit the substantive rights, remedies, or procedural rights available to a borrower against any creditor, assignee, or holder under any other law. The rights conferred on borrowers by subsections (a) and (b) are independent of each other and do not limit each other.

*As added by P.L.73-2004, SEC.33. Amended by P.L.141-2005, SEC.6.*

#### **IC 24-9-5-2**

##### **Acceleration; reinstatement of high cost home loan after cure of default**

Sec. 2. (a) If a creditor asserts that grounds for acceleration under the terms of a high cost home loan exist and requires the payment in full of all sums secured by the security instrument, the borrower or a person authorized to act on the borrower's behalf at any time before the title is transferred by means of foreclosure, judicial proceeding and sale, or otherwise may cure the default and reinstate the high cost home loan by tendering the amount or performance as specified in the security instrument.

(b) If the borrower cures the default on a high cost home loan, the original loan terms shall be reinstated, and any acceleration of any obligation under the security instrument or note arising from the default is nullified as of the date of the cure.

*As added by P.L.73-2004, SEC.33.*

### **IC 24-9-5-3**

#### **Foreclosure proceedings**

Sec. 3. (a) A creditor making a high cost home loan that has the right to foreclose must use the judicial foreclosure procedures of the state in which the property securing the high cost home loan is located. The borrower has the right to assert in the proceeding the nonexistence of a default and any other claim or defense to acceleration and foreclosure, including any claim or defense based on any violations of this article.

(b) This section is not intended and shall not be construed to allow any claim or defense otherwise barred by any statute of limitation or repose.

*As added by P.L. 73-2004, SEC.33.*

### **IC 24-9-5-4**

#### **Liability for violation; exceptions; damages; equitable relief; recoupment; action by homeowner protection unit for deceptive act; statute of limitations; priority of damages over civil penalties**

Sec. 4. (a) This section does not apply to a violation of IC 24-9-3-7(c)(4), IC 24-9-3-7(c)(5), or IC 24-9-3-7(c)(6). A person who violates this article is liable to a person who is a party to the home loan transaction, mortgage transaction (as defined in IC 24-9-3-7(a)), or real estate transaction (as defined in IC 24-9-3-7(b)), as appropriate, that gave rise to the violation for the following:

(1) Actual damages, including consequential damages. A person is not required to demonstrate reliance in order to receive actual damages.

(2) Statutory damages equal to two (2) times the finance charges agreed to in a home loan agreement.

(3) Costs and reasonable attorney's fees.

(b) A person may be granted injunctive, declaratory, and other equitable relief as the court determines appropriate in an action to enforce compliance with this chapter.

(c) The right of rescission granted under 15 U.S.C. 1601 et seq. for a violation of the federal Truth in Lending Act (15 U.S.C. 1601 et seq.) is available to a person acting only in an individual capacity by way of recoupment as a defense against a party foreclosing on a home loan at any time during the term of the loan. Any recoupment claim asserted under this provision is limited to the amount required to reduce or extinguish the person's liability under the home loan plus amounts required to recover costs, including reasonable attorney's fees. This article shall not be construed to limit the recoupment rights available to a person under any other law.

(d) The remedies provided in this section are cumulative but are not intended to be the exclusive remedies available to a person. Except as provided in subsection (e), a person is not required to exhaust any administrative remedies under this article or under any

other applicable law.

(e) Before bringing an action regarding an alleged deceptive act under this chapter, a person must:

- (1) notify the homeowner protection unit established by IC 4-6-12-2 of the alleged violation giving rise to the action; and
- (2) allow the homeowner protection unit at least ninety (90) days to institute appropriate administrative and civil action to redress a violation.

(f) An action under this chapter must be brought within five (5) years after the date that the person knew, or by the exercise of reasonable diligence should have known, of the violation of this article.

(g) An award of damages under subsection (a) has priority over a civil penalty imposed under this article.

*As added by P.L.73-2004, SEC.33. Amended by P.L.3-2005, SEC.1; P.L.105-2009, SEC.10; P.L.114-2010, SEC.19.*

#### **IC 24-9-5-4.1**

##### **General assembly intent relating to certain amendments made to section 4 of this chapter**

Sec. 4.1. The general assembly intends the amendment of section 4(c) of this chapter made by P.L.3-2005 to:

- (1) be construed together with section 4(c) of this chapter as enacted by P.L.73-2004, SECTION 33; and
- (2) apply as if the language of section 4(c) of this chapter, as amended by P.L.3-2005, SECTION 1, had been part of section 4(c) of this chapter as first enacted.

*As added by P.L.220-2011, SEC.402.*

#### **IC 24-9-5-5**

##### **Unintentional or erroneous violations; corrections by creditors**

Sec. 5. (a) If the creditor or an assignee establishes by a preponderance of evidence that a violation of this article is unintentional or the result of a bona fide error of law or fact notwithstanding the maintenance of procedures reasonably adopted to avoid any such violation or error, the validity of the transaction is not affected, and no liability is imposed under section 4 of this chapter except in the case of a refusal to make a refund.

(b) Except as provided in subsection (c), a creditor in a high cost home loan who in good faith fails to comply with this article is not considered to have violated this article if the creditor does the following before receiving notice of the failure from the borrower:

- (1) Not later than ninety (90) days after the date of the loan closing:
  - (A) makes appropriate restitution to the borrower of any amounts collected in error; and
  - (B) takes necessary action to make all appropriate

adjustments to the loan to correct the error.

(2) Not later than one hundred twenty (120) days after the date of the loan closing, notifies the borrower of:

(A) the error; and

(B) the amount of the required restitution or adjustment.

(c) Subsection (b) does not apply unless the creditor establishes that the compliance failure was not intentional and resulted from a bona fide error of fact or law, notwithstanding the maintenance of procedures reasonably adopted to avoid the errors.

*As added by P.L.73-2004, SEC.33.*

#### **IC 24-9-5-6**

##### **Relation to other laws**

Sec. 6. The rights conferred by this article are in addition to rights granted under any other law.

*As added by P.L.73-2004, SEC.33.*