

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 15 FINANCIAL INSTITUTIONS - GENERAL
PART 7 HOME LOAN PROTECTION ACT - LIABILITY EXPOSURE OF CREDITORS AND ASSIGNEES

12.15.7.1 ISSUING AGENCY: Financial Institutions Division of the Regulation and Licensing Department.
[12.15.7.1 NMAC - N, 06/30/2004]

12.15.7.2 SCOPE: All creditors and assignees subject to the Home Loan Protection Act, Sections 58-21A-1 to -14 NMSA 1978 (2003 as amended through 2004) ("Act").
[12.15.7.2 NMAC - N, 06/30/2004]

12.15.7.3 STATUTORY AUTHORITY: Section 58-21A-13 NMSA 1978.
[12.15.7.3 NMAC - N, 06/30/2004]

12.15.7.4 DURATION: Permanent.
[12.15.7.4 NMAC - N, 06/30/2004]

12.15.7.5 EFFECTIVE DATE: June 30, 2004, unless a later date is cited at the end of a section.
[12.15.7.5 NMAC - N, 06/30/2004]

12.15.7.6 OBJECTIVE: The objective of this rule is to clarify the legal liability exposure of creditors and assignees for actions that may be brought for violations of the act.
[12.15.7.6 NMAC - N, 06/30/2004]

12.15.7.7 DEFINITIONS: For purposes of this rule, the definitions set forth in the act and regulations adopted pursuant to the act shall apply unless otherwise noted.
[12.15.7.7 NMAC - N, 06/30/2004]

12.15.7.8 LEGAL LIABILITY EXPOSURE OF CREDITORS AND ASSIGNEES:

A. The purpose of this rule is to clarify the inter-relationship of Sections 58-21A-9, 58-21A-11 and 58-21A-12 of the act and the various levels of exposure to legal liability and damages that may apply for violations of the act.

B. The legal liability of creditors, and assignees is set forth, variously, in Sections 58-21A-9, 58-21A-11 and 58-21A-12 of the act.

C. Subject to certain provisions regarding timely restitution and adjustments by a creditor, Section 58-21A-9 NMSA 1978 generally authorizes a borrower to bring a civil action for violations of the act. This section authorizes actual damages, specified statutory damages, punitive damages, costs and reasonable attorney fees, as well as injunctive, declaratory and other relief. The civil action authorized in Section 58-21A-9 NMSA 1978 is non-exclusive; it will lie in addition to any other action or remedy available to a borrower under applicable law. Punitive damages are recoverable under Section 58-21A-9 NMSA 1978 only if it is proven that the violation in question was malicious or reckless. In the sense that malicious and reckless, interpreted broadly, suggest the absence of either a good faith reason or of an innocent mistake, it follows that any person who, in good faith, exercises reasonable due diligence when seeking to comply with the act will not be liable for punitive damages under Section 58-21A-9 NMSA 1978.

D. Section 58-21A-11 NMSA 1978 limits the liability of a purchaser or assignee of a high-cost home loan where the purchaser or assignee demonstrates by a preponderance of the evidence that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan. Section 58-21A-11 NMSA 1978 also specifies circumstances under which a purchaser or assignee shall be deemed to have exercised due diligence. The circumstances listed in Section 58-21A-11 NMSA 1978 are not intended as exclusive proof of due diligence.

E. Section 58-21A-11 NMSA 1978 also provides the limiting time periods during which there may be individual actions brought against a creditor or any subsequent holder or assignee for certain violations of the act. Section 58-21A-11 NMSA 1978 further specifies that in an individual action that is authorized under this section the borrower may recover only the amounts necessary to reduce or extinguish the borrower's liability under the loan

plus costs and reasonable attorney fees. An action, claim or counterclaim under Subsection B of Section 58-21A-11 NMSA 1978 may be brought only in the borrower's individual capacity and not as a class action lawsuit. Subsection C of Section 58-21A-11 NMSA 1978 precludes a borrower from recovering punitive damages in an action brought under Subsection B of this section.

F. Section 58-21A-12 NMSA 1978 specifies that a violation of this act also constitutes an unfair or deceptive trade practice under the Unfair Practices Act (Sections 57-12-1 et seq. NMSA 1978) The maximum exposure for damages under the Unfair Practices Act is:

- (1) actual damages or the sum of \$100, whichever is greater; and
- (2) where the practice was willfully engaged in, the court may award up to three times actual damages or \$300, whichever is greater; plus
- (3) reasonable attorneys' fees and costs. See Section 57-12-10 NMSA 1978.

G. The trebling of damages under the Unfair Practices Act is permissible only when a "willful" violation of the act is proven. Willful conduct is generally interpreted as the intentional doing of an act with knowledge that harm may result. It follows, therefore, that any person who, in good faith, exercises reasonable due diligence when seeking to comply with the act will not be liable for treble damages or unspecified punitive damages under the Unfair Practices Act.

H. In any class action that is authorized under the Unfair Practices Act, the class members may only recover any actual damages that were suffered, while the named plaintiffs in the action may recover in addition up to three times the actual damages as specified above. See Subsections B and E of Section 57-12-10 NMSA 1978. Willful violations of the law may expose a person to a civil penalty of not more than \$5,000 for each violation.

I. While the Home Loan Protection Act allows a borrower to assert multiple types of claims, the borrower may not recover damages for the same injury or loss under Section 58-21A-11 NMSA 1978 and another cause of action. While multiple claims may be asserted in the same cause of action, only one recovery for the same injury or loss may be awarded.

[12.15.7.8 NMAC - N, 06/30/2004]

HISTORY OF 12.15.7 NMAC: [RESERVED]