

# Insights

## May Hoosier Banker: Compliance Connection with Partner Brett Ashton

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We received several questions about the Compliance Connection article that appeared in a recent edition of the Hoosier Banker,<sup>1</sup> providing guidance on the new TILARESPE Integrated Disclosure (TRID) requirements<sup>2</sup> that took effect Oct. 3, 2015, with respect to deficiency judgments. The question as to whether Indiana law provides protection for mortgagors from deficiency judgments, and how this is to be disclosed in the context of the new TRID, led to some confusion among bankers. For those who have not seen the October Compliance Connection article, the topic is summarized below:

**Premise:** If your lender forecloses on this property, and the foreclosure does not cover the amount of unpaid balance on this loan,

- State law may protect you from liability for the unpaid balance. If you refinance or take on any additional debt on this property, you may lose this protection and have to pay any debt remaining even after foreclosure. You may want to consult a lawyer for more information.
- State law does not protect you from liability for the unpaid balance.

*Explanation:* Provided the bank has the borrower sign a promissory note and security agreement, Indiana state law does not protect you from liability for the unpaid balance. The bank should check the second box indicating that state law does not protect the customer from liability for the unpaid balance.

Ind. Code § 32-30-10-7 provides: "If there is an express written agreement for the payment of the sum of money that is secured by a mortgage or separate instrument, the court shall direct in the order of sale that the balance due on the mortgage and costs that may remain unsatisfied after the sale of the mortgaged premises be levied on any property of the mortgage-debtor." In the unlikely event that your bank does not require the borrower to sign an express agreement, then the first box in the Closing Disclosure should be checked.

Some confusion existed as to whether the statutory authority provided by Ind. Code § 32-29-7-5 that allows a mortgagee to waive its right to a deficiency judgment in exchange for a mortgagor's agreement to waive the threemonth statutory "waiting period" required for issuance of process in a foreclosure action (for execution of a

judgment or decree of sale, i.e. the "sheriff's sale"), should be considered a "protection from liability" for a deficiency at the time of closing for purposes of the Closing Disclosure. Similar confusion existed over existing deficiency language with respect to short sales.<sup>3</sup>

Fortunately, at the request of the Indiana Bankers Association, the Indiana General Assembly recently enacted legislation to eliminate confusion as to how to correctly disclose this issue on the TRID. Senate Bill 372<sup>4</sup> added language to Indiana law with respect to deficiency judgments and short sales to several sections of the code that reads, in part: "This section is not intended to provide the owner or real estate subject to the issuance of process under a judgment or decree of foreclosure any protection or defense against a deficiency judgment for purposes of the borrower protections from liability that must be disclosed under 12 CFR 1026.38(p)(3)."

This language ensures that banks can disclose the presence or absence of a potential deficiency judgment based on the language in their loan documents. SB 372 was signed into law by Gov. Mike Pence on March 21, 2016, and became effective immediately.

<sup>1</sup> See Compliance Connection, October 2015 Hoosier Banker magazine, page 14.

<sup>2</sup> Amendments to the 2013 Integrated Mortgage Disclosures Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) and the 2013 Loan Originator Rule Under the Truth in Lending Act (Regulation Z).

<sup>3</sup> See Ind. Code §§ 24-4.4-2-202; 24-4.5-2-209; 24-4.5-3-209.

<sup>4</sup> Similar language was also contained in House Bill 1181 that was signed into law by Gov. Mike Pence on March 21, 2016.