

17:11B-14

LEGISLATIVE HISTORY CHECKLIST

NJSA: 17:11B-14 (Mortgage closing-define and authorize use of bank checks)

LAWS OF: 1985 CHAPTER: 23

Bill No: A1152

Sponsor(s): Deverin and Long

Date Introduced: February 6, 1984

Committee: Assembly: Banking and Insurance

Senate: Labor, Industry and Professions

Amended during passage: Yes Amendments during passage denoted by asterisks.

Date of Passage: Assembly: Jun. 18, 1984

Senate: Nov. 29, 1984

Date of Approval: January 25, 1985

Following statements are attached if available:

Sponsor statement: Yes (Also attached--Senate amendments, adopted 11/29/84, with statement.)

Committee statement: Assembly Yes

Senate Yes

Fiscal Note: No

Veto Message: No

Message on Signing: Yes

Following were printed:

Reports: No

Hearings: No

Sponsors' statement:
This bill authorizes the use of bank checks in mortgage closing transactions. Bank check is defined in the bill. The inclusion of bank checks is consistent with Ethics Opinion 454 of the Supreme Courts' Advisory Committee on Professional Ethics.

Ethics Opinion, 454--attached.

[SECOND OFFICIAL COPY REPRINT]

ASSEMBLY, No. 1152

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 6, 1984

By Assemblymen DEVERIN and LONG

AN ACT to amend "An act providing for the regulation and licensing of mortgage bankers and mortgage brokers by the Commissioner of Banking, defining the powers and duties of the commissioner in connection therewith, and prescribing penalties for violations thereof and making an appropriation therefor," approved February 4, 1981 (P. L. 1981, c. 18).

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. Section 14 of P. L. 1981, c. 18 (C. 17:11B-14) is amended
2 to read as follows:

3 14. a. No person or licensee shall advertise, print, display, pub-
4 lish, distribute, telecast or broadcast, or cause or permit to be
5 advertised, printed, displayed, published, distributed, televised or
6 broadcast, in any manner, any statement or representation with
7 regard to the rates, terms or conditions pertaining to the making,
8 negotiating, or sale of loans, which is false, misleading or deceptive.
9 No person who is not licensed under this act or not exempt under
10 section 3 of this act shall use the word "mortgage" or similar
11 words in any advertising, signs, letterheads, cards, or like matter
12 which tend to represent that he arranges real estate mortgage loans.
13 No person licensed under this act shall be granted a license in a
14 name containing such words as "insured," "bonded," "guar-
15 anteed," "secured" and the like.

16 b. No person or licensee shall, in connection with or incidental
17 to the making of a mortgage loan, require or permit the mortgage
18 instrument or bond or note to be signed by a party to the trans-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

*—Assembly committee amendments adopted May 7, 1984.

**—Senate committee amendments adopted October 18, 1984.

***—Senate amendment adopted November 29, 1984.

19 action if the instrument contains any blank spaces to be filled in
20 after it has been signed, except blank spaces relating to recording.

21 c. No person or licensee shall charge or exact directly or indi-
22 rectly from the mortgagor or any other person fees, commissions
23 or charges determined to be excessive in accordance with subsec-
24 tion b. of section 13 of this act.

25 d. No person not licensed or not exempt from licensure under
26 this act shall receive any commission, bonus or fee in connection
27 with arranging or originating a mortgage loan for a borrower,
28 except that a mortgage solicitor can receive such commission, bonus,
29 or fee from his employer.

30 e. No person or licensee shall pay any commission, bonus or fee
31 to any person not licensed or not exempt under the provisions of
32 this act in connection with arranging for or originating a mortgage
33 loan for a borrower except that a mortgage solicitor may be paid
34 such bonus, commission, or fee by his employer.

35 f. No person shall obtain or attempt to obtain a license by fraud
36 or misrepresentation.

37 g. No person or licensee shall misrepresent, circumvent, or con-
38 ceal the nature of any material particular of any transaction to
39 which he is a party.

40 h. No person or licensee shall fail to disburse funds in accor-
41 dance with his agreements, unless otherwise ordered by the com-
42 missioner or a court of this State or of the United States.

43 i. No person or licensee shall fail without good cause to account
44 or deliver to any person any personal property, money, fund, de-
45 posit, check, draft, mortgage, document or thing of value, which
46 is not his property, or which he is not in law or equity entitled to
47 retain under the circumstances, at the time which has been agreed
48 upon, or is required by law or, in the absence of a fixed time, upon
49 demand of the person entitled to such accounting and delivery.

50 j. No person or licensee shall fail to place in escrow, immediately
51 upon receipt, any money, fund, deposit, check or draft entrusted
52 to him by any person dealing with him as a mortgage banker or
53 mortgage broker, in a manner approved by the commissioner, or
54 to deposit the funds in a trust or escrow account maintained by
55 him with a financial institution the deposits of which are insured
56 by the Federal Deposit Insurance Corporation or the Federal Sav-
57 ings and Loan Insurance Corporation, wherein the funds shall be
58 kept until the disbursement thereof is properly authorized.

59 k. No person licensed under this act shall change the address
60 of his place of business without notice to the commissioner.

61 l. No person or licensee shall fail **(1)** to present a certified **[or]**

62 *check, cashier's check or bank check **for the proceeds of the loan**,
63 ***[or]*** **(2)* to arrange an electronic funds transfer for the pro-
64 ceeds of the loan *or (3) to provide for payment by any other means
65 which is ethically permissible,* to the purchaser, acting on his own
66 behalf, or the attorney for the purchaser at a reasonable time and
67 place prior to the time of the mortgage closing transaction. This
68 subsection shall not prevent a person or licensee from utilizing any
69 method of payment which is agreed upon by the person or licensee
70 and the closing agent ***[or any other means of payment which is
71 ethically permissible]***; nor shall it prevent the person or licensee
72 from assessing a reasonable charge as set forth by regulation by the
73 Commissioner of Banking to reflect the additional cost to the person
74 or licensee for the issuance of a certified **[or]**, cashier's *or bank
75 check, an electronic funds transfer, or any other means of payment
76 which is ethically permissible. Such reasonable charge shall be
77 fully disclosed at or prior to the issuance of the loan commitment.
78 A "bank check" means a negotiable instrument drawn by a state or
79 federally chartered bank, savings bank or savings and loan associa-
80 tion **on itself or** on its account in another state or federally
81 chartered bank, savings bank or savings and loan association ***do-
82 ing business in this State***.***

1 2. This act shall take effect immediately.

ASSEMBLY, No. 1152

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 6, 1984

By Assemblymen DEVERIN and LONG

AN ACT to amend "An act providing for the regulation and licensing of mortgage bankers and mortgage brokers by the Commissioner of Banking, defining the powers and duties of the commissioner in connection therewith, and prescribing penalties for violations thereof and making an appropriation therefor," approved February 4, 1981 (P. L. 1981, c. 18).

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. Section 14 of P. L. 1981, c. 18 (C. 17:11B-14) is amended
2 to read as follows:

3 14. a. No person or licensee shall advertise, print, display, pub-
4 lish, distribute, telecast or broadcast, or cause or permit to be
5 advertised, printed, displayed, published, distributed, televised or
6 broadcast, in any manner, any statement or representation with
7 regard to the rates, terms or conditions pertaining to the making,
8 negotiating, or sale of loans, which is false, misleading or deceptive.
9 No person who is not licensed under this act or not exempt under
10 section 3 of this act shall use the word "mortgage" or similar
11 words in any advertising, signs, letterheads, cards, or like matter
12 which tend to represent that he arranges real estate mortgage loans.
13 No person licensed under this act shall be granted a license in a
14 name containing such words as "insured," "bonded," "guar-
15 anteed," "secured" and the like.

16 b. No person or licensee shall, in connection with or incidental
17 to the making of a mortgage loan, require or permit the mortgage
18 instrument or bond or note to be signed by a party to the trans-

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.**

Matter printed in italics *thus* is new matter.

19 action if the instrument contains any blank spaces to be filled in
20 after it has been signed, except blank spaces relating to recording.

21 c. No person or licensee shall charge or exact directly or indi-
22 rectly from the mortgagor or any other person fees, commissions
23 or charges determined to be excessive in accordance with subsec-
24 tion b. of section 13 of this act.

25 d. No person not licensed or not exempt from licensure under
26 this act shall receive any commission, bonus or fee in connection
27 with arranging or originating a mortgage loan for a borrower,
28 except that a mortgage solicitor can receive such commission, bonus,
29 or fee from his employer.

30 e. No person or licensee shall pay any commission, bonus or fee
31 to any person not licensed or not exempt under the provisions of
32 this act in connection with arranging for or originating a mortgage
33 loan for a borrower except that a mortgage solicitor may be paid
34 such bonus, commission, or fee by his employer.

35 f. No person shall obtain or attempt to obtain a license by fraud
36 or misrepresentation.

37 g. No person or licensee shall misrepresent, circumvent, or con-
38 ceal the nature of any material particular of any transaction to
39 which he is a party.

40 h. No person or licensee shall fail to disburse funds in accor-
41 dance with his agreements, unless otherwise ordered by the com-
42 missioner or a court of this State or of the United States.

43 i. No person or licensee shall fail without good cause to account
44 or deliver to any person any personal property, money, fund, de-
45 posit, check, draft, mortgage, document or thing of value, which
46 is not his property, or which he is not in law or equity entitled to
47 retain under the circumstances, at the time which has been agreed
48 upon, or is required by law or, in the absence of a fixed time, upon
49 demand of the person entitled to such accounting and delivery.

50 j. No person or licensee shall fail to place in escrow, immediately
51 upon receipt, any money, fund, deposit, check or draft entrusted
52 to him by any person dealing with him as a mortgage banker or
53 mortgage broker, in a manner approved by the commissioner, or
54 to deposit the funds in a trust or escrow account maintained by
55 him with a financial institution the deposits of which are insured
56 by the Federal Deposit Insurance Corporation or the Federal Sav-
57 ings and Loan Insurance Corporation, wherein the funds shall be
58 kept until the disbursement thereof is properly authorized.

59 k. No person licensed under this act shall change the address
60 of his place of business without notice to the commissioner.

61 l. No person or licensee shall fail to present a certified **[or]**

62 *check, cashier's check or bank check, or to arrange an electronic*
63 *funds transfer for the proceeds of the loan to the purchaser, acting*
64 *on his own behalf, or the attorney for the purchaser at a reasonable*
65 *time and place prior to the time of the mortgage closing transac-*
66 *tion. This subsection shall not prevent a person or licensee from*
67 *utilizing any method of payment which is agreed upon by the person*
68 *or licensee and the closing agent or any other means of payment*
69 *which is ethically permissible; nor shall it prevent the person or*
70 *licensee from assessing a reasonable charge as set forth by regula-*
71 *tion by the Commissioner of Banking to reflect the additional cost*
72 *to the person or licensee for the issuance of a certified [or] ,*
73 *cashier's or bank check, an electronic funds transfer, or any other*
74 *means of payment which is ethically permissible. Such reasonable*
75 *charge shall be fully disclosed at or prior to the issuance of the loan*
76 *commitment. A "bank check" means a negotiable instrument drawn*
77 *by a state or federally chartered bank, savings bank or savings and*
78 *loan association on its account in another state or federally*
79 *chartered bank, savings bank or savings and loan association.*

1 2. This act shall take effect immediately.

STATEMENT

This bill authorizes the use of bank checks in mortgage closing transactions. Bank check is defined in the bill. The inclusion of bank checks is consistent with Ethics Opinion 454 of the Supreme Court's Advisory Committee on Professional Ethics.

ASSEMBLY BANKING AND INSURANCE COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1152

with Assembly committee amendments

STATE OF NEW JERSEY

DATED: MAY 7, 1984

Assembly Bill No. 1152 authorizes the use of bank checks in mortgage closing transactions. Bank check is defined as a negotiable instrument drawn by a federally chartered bank, savings bank or savings and loan association on its account in another state or federally chartered bank, savings bank or savings and loan association.

The provision of law amended by this bill, enacted by P. L. 1983, c. 483, was drafted in response to Ethics Opinion 454 (1980) of the Supreme Court's Advisory Committee on Professional Ethics. That opinion held that it would no longer be ethical for attorneys to write trust checks against a check deposited in their trust accounts, if the deposited check had not cleared the issuing bank. Consistent with the Ethics Opinion, chapter 483 authorized the use of certified or cashier's checks or electronic funds transfers, as well as any other method agreed to by the person, mortgage banker or broker and the closing agent, or any other ethically permissible method.

The provisions of this bill add bank checks to the list of specifically authorized methods. Bank checks are singled out in the opinion as an acceptable method, and satisfy the court's requirement that the check be an obligation of a bank and not of a private party.

The committee amendments are purely of a technical nature.

SENATE LABOR, INDUSTRY AND PROFESSIONS
COMMITTEE

STATEMENT TO
ASSEMBLY, No. 1152

[OFFICIAL COPY REPRINT]
with Senate committee amendments

STATE OF NEW JERSEY

DATED: OCTOBER 18, 1984

This bill allows mortgage bankers licensed under the provisions of P. L. 1981, c. 18 to use bank checks in mortgage closing transactions. A bank check is a negotiable instrument drawn by a State or federally chartered bank, savings bank or savings and loan association on itself or on its account in another State or federally chartered bank, savings bank or savings and loan association.

On May 15, 1980 the Supreme Court's Advisory Committee on Professional Ethics issued Ethics Opinion No. 454, in which they declared that it would no longer be ethical for attorneys to write trust checks against a check deposited in their trust account if the deposited check had not cleared the issuing bank or if the check was not a bank check, certified check or cashier's check. The committee stated that, "the use of bank, certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposits entails a minimal risk."

In response to Ethics Opinion No. 454, P. L. 1983, c. 483 provided that a mortgage banker must present a certified or cashier's check or arrange an electronic funds transfer for the proceeds of the loan to the purchaser in a mortgage closing transaction. It also provided that a mortgage banker may utilize any other method of payment which is agreed upon by the mortgage banker and the closing agent or any other method of payment which is ethically permissible. Consistent with the Ethics Opinion, this bill adds bank checks to the list of acceptable forms of payment in this situation.

Amendments made to the Senate version of the
original bill ~~the print~~

ok
Hick
11/29/84
TK

ADOPTED

NOV 29 1984

Amend:

Senate Amendments
Proposed by Senator Lesniak
to

Assembly Bill No. 1152 (O.C.R., S.R.)
Sponsored by Assemblyman Daves

Page	Sec.	Line
3	1	81

After "association" insert "doing
business in this State"

STATEMENT

This amendment makes a technical change
in the definition of "bank check".

BILLS SIGNED
PAGE TWO
JANUARY 25, 1985

S-1782, sponsored by State Senator Wayne Dumont, Jr., R-Warren, which permits assistance for voters who are unable to read or mark their ballot without assistance.

S-2114, sponsored by State Senator John P. Caufield, D-Essex, which grants to the Department of Community Affairs the authority to enforce, locally, the State Uniform Construction Code, and to prosecute violators of the code, or of the State Uniform Construction Code Act. It also allows the Commissioner of Community Affairs to monitor the compliance of local enforcing agencies and order corrective action.

A-1152, sponsored by Assemblyman Thomas J. Deverin, D-Middlesex, which amends the law regulating mortgage bankers and brokers to permit the use of bank checks to pay the proceeds of a mortgage loan to a buyer prior to the mortgage closing transaction. Previously, the law permitted only the use of a certified or cashiers check or an electronic transfer.

A-2282/S-2257, sponsored by Assemblyman John S. Watson, D-Mercer, and State Senator Gerald R. Stockman, D-Mercer, which exempts from the sales and use tax advertising and promotional materials prepared for distribution by a New Jersey direct mail firm to out-of-state customers.

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ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
APPOINTED BY THE SUPREME COURT OF NEW JERSEY

OPINION NO. 454

ATTORNEY'S TRUST ACCOUNT -
IMMEDIATE DRAWING UPON
DEPOSITING CLIENT'S CHECK

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

Rule 1:21-6(a)(1) and DR 9-102 require that an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," i.e. funds which represent checks deposited

in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handling of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in

advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank-mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so

(well known and widespread, it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that that client, if involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to make special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the

settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the same amount may be large in relation to other trust accounts. Drawing against such personal checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.