

17:11B-14

LEGISLATIVE HISTORY CHECKLIST

NJSA: 17:11B-14

**(Mortgage loans-require payment to purchaser
by certified check at closing)**

LAWS OF: 1983

CHAPTER: 483

Bill No: S1028

Sponsor(s): Bornheimer and others

Date Introduced: February 25, 1982

Committee: Assembly: Banking and Industry

Senate: Labor, Industry & Professions

Amended during passage: Yes Amendments during passage
denoted by asterisks

Date of Passage: Assembly: January 5, 1984

Senate: July 22, 1982

Date of Approval: January 17, 1984

Following statements are attached if available:

Sponsor statement: Yes (Below)

Committee statement: Assembly Yes

Senate Yes

Fiscal Note: No

Veto Message: No

Message on Signing: No

Following were printed:

Reports: No

Hearings: No

Sponsor's statement:

The purpose of this legislation is to ensure that a mortgage loan banker presents a certified check for the proceeds of the loan to the purchaser or attorney for the purchaser at the time of the mortgage closing transaction.

Advisory opinion mentioned in statements--attached.

1-17-84

[SECOND OFFICIAL COPY REPRINT]

SENATE, No. 1028

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 25, 1982

By Senators BORNHEIMER, LYNCH, WEISS, BUBBA, DiFRANCESCO, STOCKMAN, GREGORIO, RUSSO, PERSKIE, O'CONNOR and DORSEY

Referred to Committee on Labor, Industry and Professions

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

Matter printed in italics *thus* is new matter.

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

*—Senate committee amendments adopted June 28, 1982.

**—Senate amendments adopted July 22, 1982.

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-
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 accord-
41 ance 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 *cashier's* check *or to arrange an electronic funds transfer* for the*
63 *proceeds of the loan to the purchaser*, acting on his own behalf,**
64 *or the attorney for the purchaser at *a reasonable time and place*
65 *prior to* the time of the mortgage closing transaction. *This sub-*
66 *section shall not prevent a person or licensee from utilizing any*
67 *method of payment which is agreed upon by the person or licensee*
68 *and the closing agent or any other means of payment which is*
69 *ethically permissible; nor shall it prevent the person or licensee*
70 *from assessing a reasonable charge **as set forth by regulation by*
70_Δ *the Commissioner of Banking** to reflect the additional cost to*
71 *the person or licensee for the issuance of a certified or cashier's*
72 *check, an electronic funds transfer, or any other means of payment*
73 *which is ethically permissible. Such reasonable charge shall be fully*
74 *disclosed at or prior to the issuance of the loan commitment.**

1 2. This act shall take effect immediately.

ASSEMBLY BANKING AND INSURANCE COMMITTEE

STATEMENT TO

SENATE, No. 1028

STATE OF NEW JERSEY

DATED: DECEMBER 8, 1983

This bill is in response to Ethics Opinion 454 (May 15, 1980) issued by the New Jersey Supreme Court's Advisory Committee on Professional Ethics. The opinion held 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 certified check or cashier's check. Bank certified checks, cashier's checks and electronic fund transfer have been found by the Advisory Committee to be satisfactory methods in that they entail minimal risk to the parties involved in the mortgage closing transaction.

This bill requires a mortgage banker to present a certified or cashier's check or arrange an electronic funds transfer for the proceeds on a mortgage loan to the purchaser, acting on his own behalf, or the attorney for the purchaser, at a reasonable time and place prior to the time of the mortgage closing transaction. A mortgage banker may, however, utilize any method of payment which is agreed upon by the mortgage banker and the closing agent or which is ethically permissible. The bill does not prohibit a mortgage banker from assessing a reasonable charge to reflect the additional cost to the mortgage banker for the issuance of a certified or cashier's check, an electronic funds transfer, or other means of payment which is ethically permissible.

SENATE LABOR, INDUSTRY AND
PROFESSIONS COMMITTEE

STATEMENT TO

SENATE, No. 1028

with Senate committee amendment

STATE OF NEW JERSEY

DATED: JUNE 28, 1982

This bill, as amended, provides 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, acting on his own behalf, or attorney for the purchaser at a reasonable time and place prior to the time of the mortgage closing transaction. However, this would not prevent a mortgage banker from utilizing any 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, nor would it prevent the mortgage banker from assessing a reasonable charge to reflect the additional cost to the mortgage banker for the issuance of a certified or cashier's check, an electronic funds transfer, or any other means of payment which is ethically permissible.

Because mortgage bankers and mortgage companies do not issue checks directly, as do mortgage lenders which are also depository institutions, they must present a third-party payment instrument at a closing on real property. Generally an attorney deposits this check in a separate trust account for funds of his clients and writes multiple trust checks against the account at the closing. 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 certified check or a 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 accomodating all clients. Such checks are the obligation of the bank and not simply of a private party. Drawing immediately upon their deposits entails a minimal risk."

This bill addresses the problem raised by the Court's Ethics Opinion.

It would be advisable for an attorney either to obtain the consent of the client before investing the funds or to notify him of such investment at the time the action is taken. It goes without saying that any such investment must be undertaken with the greatest of care, and only the most secure investments, such as in governmentally-insured bank accounts, should be made. However, it must be clearly understood that any interest or accretion is the property of the client.

**Attorney's Trust Account—
Immediate Drawing Upon
Depositing Client's Check**

OPINION NO. 454

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 his 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.