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SENATE BILL NO. 1104

Senate Amendments in [] — February 4, 1997

A *BILL to amend the Code of Virginia by adding in Title 6.1 a chapter numbered 1.3, consisting of sections numbered 6.1-2.19 through 6.1-2.28, relating to the Consumer Real Estate Settlement Protection Act; penalty.*

Patrons—Barry, Bolling, Chichester, Hawkins, Holland, Houck, Howell, Lambert, Lucas, Martin, Maxwell, Newman, Potts, Reasor, Saslaw, Schrock, Stosch, Ticer, Waddell, Wampler and Whipple; Delegates: Abbitt, Albo, Behm, Bloxom, Bryant, Callahan, Cantor, Christian, Connally, Cooper, Cox, Crittenden, Crouch, Darner, Diamonstein, Dickinson, Dillard, Drake, Dudley, Hall, Hamilton, Hargrove, Howell, Hull, Ingram, Jones, D.C., Keating, Marshall, May, McEachin, Moran, Morgan, Nelms, Nixon, O'Brien, Orrock, Parrish, Plum, Puller, Reid, Rhodes, Ruff, Scott, Sherwood, Shuler, Stump, Tata, Thomas, Van Yahres, Wagner, Wardrup, Watts, Way and Wilkins

Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 6.1 a chapter numbered 1.3, consisting of sections numbered 6.1-2.19 through 6.1-2.28, as follows:

*CHAPTER 1.3.**CONSUMER REAL ESTATE
SETTLEMENT PROTECTION ACT.*

§ 6.1-2.19. Title, purpose and applicability.

A. This Act shall be known as the Consumer Real Estate Settlement Protection Act.

B. The purpose of this Act is to authorize existing [~~regulatory~~ licensing] authorities in the Commonwealth of Virginia to require persons performing escrow, closing or settlement services to comply with certain consumer protection safeguards relating to licensing, financial responsibility and the handling of settlement funds.

C. This chapter applies only to transactions involving the purchase or financing of real estate containing not more than four residential dwelling units.

§ 6.1-2.20. Definitions.

["Appropriate licensing authority" means the Virginia State Bar, the Virginia Real Estate Board, or the Virginia State Corporation Commission.]

"Escrow" means written instruments, money or other items deposited by one party with a settlement agent for delivery to another party upon the performance of a specified condition or the happening of a certain event.

"Escrow, closing or settlement services" means the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include, but are not limited to, placing orders for title insurance, receiving and issuing receipts for money received from the parties, ordering loan checks and payoffs, ordering surveys and inspections, preparing settlement statements, determining that all closing documents conform to the parties' contract requirements, setting the closing appointment, following up with the parties to ensure that the transaction progresses to closing, ascertaining that the lenders' instructions have been satisfied, conducting a closing conference at which the documents are executed, receiving and disbursing funds, completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction, handling or arranging for the recording of documents, sending recorded documents to the lender, sending the recorded deed and the title policy to the buyer, and reporting federal income tax information for the real estate sale to the Internal Revenue Service.

["Licensing authority" shall mean the (i) State Corporation Commission acting pursuant to this Act, Title 6.1 or Title 38.2; (ii) the Virginia State Bar acting pursuant to this Act or Chapter 39 (§54.1-3900 et seq.) of Title 54.1; or (iii) The Virginia Real Estate Board acting pursuant to this Act or Chapter 21 (§54.1-2100 et seq.) of Title 54.1.]

"Party to the real estate transaction" means a lender, seller, purchaser or borrower with respect to that real estate transaction.

"Person" means a natural person, partnership, association, cooperative, corporation, limited liability company, trust or other legal entity.

"Settlement agent" means a person other than a party to the real estate transaction who provides any escrow, closing or settlement service in connection with a transaction related to real estate in this

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59 *Commonwealth.*

60 § 6.1-2.21. *Licensing requirements, standards and financial responsibility.*

61 A. A person shall not act in the capacity of a settlement agent, and a lender, seller, purchaser or
62 borrower may not contract with any person to act in the capacity of a settlement agent with respect to
63 real estate settlements in this Commonwealth unless the person is licensed as an attorney under Chapter
64 39 (§ 54.1-3900 et seq.) of Title 54.1, a title insurance company or title insurance agent under Title
65 38.2, a real estate broker under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or unless the person is a
66 financial institution authorized to do business in this Commonwealth under any of the provisions of Title
67 6.1 or under federal law, or is a subsidiary or affiliate of such financial institution.

68 B. Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with
69 the requirements of this Act or a party to the real estate transaction may provide escrow, closing or
70 settlement services and receive compensation for such services.

71 C. A settlement agent shall exercise reasonable care and comply with all applicable requirements of
72 this Act [and its licensing authority] regarding licensing, financial responsibility, errors and omissions
73 or malpractice insurance policies, fidelity bonds, employee dishonesty insurance policies, audits and
74 record retention.

75 D. A settlement agent other than a financial institution described in subsection A or title insurance
76 company as defined in § [–] 38.2-4601, shall maintain the following to the satisfaction of the
77 appropriate licensing authority:

78 1. An errors and omissions or malpractice insurance policy providing a minimum of [\$100,000
79 \$250,000] in coverage; and

80 2. A [blanket] fidelity bond or employee dishonesty insurance policy covering persons employed by
81 the settlement agent providing a minimum of \$100,000 in coverage. [When the settlement agent has
82 no employees except the owners, partners, shareholders or members, the settlement agent may apply to
83 the appropriate licensing authority for a waiver of this fidelity bond or employee dishonesty
84 requirement.

85 3. A surety bond of not less than \$100,000.]

86 E. 1. A settlement agent [, other than an attorney,] shall, at its expense, have an annual audit of
87 its escrow accounts conducted by an independent certified public accountant on a calendar year basis
88 by not later than six months after the close of the previous calendar year. The appropriate licensing
89 authority shall require the settlement agent to provide a copy of its audit report to the licensing
90 authority. A settlement agent that is a licensed title insurance agent under Title 38.2 shall also provide
91 a copy of the audit report to each title insurance company which it represents. [The Virginia State Bar
92 shall be vested with authority to audit the escrow accounts of attorney settlement agents.]

93 2. In lieu of such annual audit, a settlement agent that is licensed as a title insurance agent under
94 Title 38.2 shall allow each title insurance company for which it has an appointment to conduct an
95 annual audit of its escrow accounts on a calendar year basis by not later than six months after the
96 close of the previous calendar year. The title insurance company shall submit a copy of its audit report
97 to the appropriate licensing authority. With the consent of the title insurance agent, a title insurance
98 company may share the results of its audit with other title insurance companies that will accept the
99 same in lieu of conducting a separate audit.

100 3. A title insurance company shall retain a copy of the audit report for each title insurance agent it
101 has appointed and [~~all such reports shall be subject to financial examination under Title 38.2~~ such
102 reports and other records of the insurance company's activities as a settlement agent shall be made
103 available to the appropriate licensing authority when examinations are conducted pursuant to provisions
104 in Title 38.2.]

105 § 6.1-2.22. *Disclosure.*

106 All contracts involving the purchase of real estate containing not more than four residential dwelling
107 units shall include [in bold face, 10 point type] the following language:

108 Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of
109 this transaction. The settlement agent's role in closing your transaction involves the coordination of
110 numerous administrative and clerical functions relating to the collection of documents and the collection
111 and disbursement of funds required to carry out the terms of the contract between the parties. If part of
112 the purchase price is financed, your lender will instruct the settlement agent as to the signing and
113 recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide
114 legal advice to any party to the transaction except a settlement agent who is engaged in the private
115 practice of law [in Virginia] and who has been retained or engaged by a party to the transaction for
116 the purpose of providing legal services to that party.

117 § 6.1-2.23. *Conditions for providing escrow, closing, or settlement services and for maintaining*
118 *escrow accounts.*

119 A. All funds deposited with the settlement agent in connection with an escrow, settlement or closing
120 shall be [handled in a fiduciary capacity and] submitted for collection to or deposited in a separate

121 fiduciary trust account or accounts in a financial institution licensed to do business in this
 122 Commonwealth no later than the close of the next business day, in accordance with the following
 123 requirements:

124 1. The funds shall be the property of the person or persons entitled to them under the provisions of
 125 the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow,
 126 settlement, or closing in the records of the settlement agent in a manner that permits the funds to be
 127 identified on an individual basis; and

128 2. The funds shall be applied only in accordance with the terms of the individual instructions or
 129 agreements under which the funds were accepted.

130 B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or
 131 agreement specifying how and to whom such funds may be disbursed. A settlement statement in the form
 132 prescribed under the federal Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) which has
 133 been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the
 134 requirement of this subsection.

135 C. A settlement agent may not retain any interest received on funds deposited in connection with any
 136 escrow, settlement, or closing unless written disclosure is given to, and consent is obtained from, the
 137 purchaser or borrower [provided, however, that an attorney settlement agent shall maintain escrow
 138 accounts in accordance with applicable rules of the Virginia State Bar and the Supreme Court of
 139 Virginia] .

140 D. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time
 141 funds are available for disbursement with respect to a transaction, provided all parties consent to such
 142 recordation.

143 E. Nothing in this section is intended to amend, alter or supersede other sections of this Act, or the
 144 laws of this Commonwealth or the United States, regarding the duties and obligations of the settlement
 145 agent in maintaining escrow accounts.

146 § 6.1-2.24. Record retention requirements.

147 The settlement agent shall maintain sufficient records of its affairs so that the appropriate licensing
 148 authority may adequately ensure that the settlement agent is in compliance with all provisions of this
 149 Act. The settlement agent shall retain records pertaining to each settlement handled for a minimum of
 150 five years after the settlement is completed. The appropriate licensing authority may prescribe the
 151 specific record entries and documents to be kept.

152 § 6.1-2.25. Rules and regulations.

153 The appropriate licensing authority may issue rules, regulations and orders [, including educational
 154 requirements,] consistent with and necessary to carry out the provisions of this Act. A title insurance
 155 company [licensed under Chapter 46 (§ 38.2-4600, et seq.) of Title 38.2 domiciled in this
 156 Commonwealth or acting in the capacity of a settlement agent pursuant to this Act] shall account for
 157 funds held and income derived from escrow, closing or settlement services in accordance with the
 158 applicable instructions of, and the accounting practices and procedures manuals adopted by, the
 159 National Association of Insurance Commissioners when filing the annual statements and reports
 160 required under Chapter 13 (§ 38.2-1300, et seq.) of Title 38.2. [Escrow funds held by or on behalf of
 161 a title insurance company shall not become general assets of the title insurance company and shall be
 162 administered as secured creditor claims pursuant to Chapter 15 (§ 38.2-1500, et seq.) of Title 38.2.]

163 § 6.1-2.26. Penalties and liabilities.

164 A. If the appropriate licensing authority determines that the settlement agent or any other person has
 165 violated this Act, or any regulation or order promulgated thereunder, after notice and opportunity to be
 166 heard, the appropriate licensing authority may order:

167 1. A penalty not exceeding \$5,000 for each violation; and

168 2. Revocation or suspension of the applicable licenses.

169 B. Nothing in this section shall affect the right of the appropriate licensing authority to impose any
 170 other penalties provided by law or regulation.

171 § 6.1-2.27. Severability.

172 If any provision of this Act, or the application of the provision to any person or circumstance, shall
 173 be held invalid, the remainder of the Act, and the application of the provision to persons or
 174 circumstances other than those to which it is invalid, shall not be affected.

175 § 6.1-2.28. Compliance.

176 A settlement agent operating in this Commonwealth prior to the effective date of this Act shall have
 177 ninety days after the effective date of this Act to comply with requirements of §§ 6.1-2.21 and 6.1-2.23.