



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Department Of Justice
Washington, DC 20530**

September 20, 1996

The Honorable **Thomas A. Edmonds**
Executive Director
Virginia State Bar
707 E. Main Street
Suite 1500
Richmond, Virginia 23219

Re: Proposed UPL Opinion #183 (Non-Lawyers Conducting Real Estate Closings)

Dear Mr. Edmonds:

The United States Department of Justice and the Bureau of Competition of the Federal Trade Commission⁽¹⁾ write to offer comments on proposed Virginia State Bar UPL Opinion Number 183. The proposed Opinion would prevent anyone other than lawyers from conducting closings for real estate purchases and sales or for loans secured by real estate (such as second mortgages and home equity loans). This would deprive Virginia consumers of the choice to use a lay settlement service, an option they have had for nearly 15 years. By ending competition from lay settlement services, the Opinion would likely increase the cost of real estate closings for consumers. Accordingly, the Department of Justice and the Federal Trade Commission staff urge the Virginia State Bar Council to reject this Opinion.

**The Interest And Experience Of The U.S. Department
of Justice And The Federal Trade Commission**

The United States Department of Justice and the Federal Trade Commission are entrusted with enforcing this nation's antitrust laws.

For more than 100 years, since the passage of the Sherman Antitrust Act, the United States Department of Justice has worked to promote free and unfettered competition in all sectors of the American economy. Restraints on competition can force consumers to pay higher prices or accept goods and services of lower quality. Accordingly, such restraints are of significant concern, whether they are imposed by a "smokestack" industry or by a profession. Restraints on competition in any market have the potential to harm consumers. The Justice Department's civil and criminal enforcement programs are directed at eliminating such restraints. The Justice Department also encourages competition through advocacy letters such as this.⁽²⁾

Congress has directed the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽³⁾ The Federal Trade Commission has particular concern about restrictions that may adversely affect the competitive process and raise prices (or decrease quality or services) to consumers. Because the Commission has broad responsibility for consumer protection, it is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception. Pursuant to this statutory mandate, the Federal Trade Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. The Commission has challenged

anticompetitive restrictions on the business practices of state-licensed professionals, including lawyers.(4) In addition, the staff has conducted studies of the effects of occupational regulation(5) and submitted comments about these issues to state legislatures, administrative agencies, and others.(6) The Commission also has had significant experience in analyzing and challenging restrictions on competition in the real estate industry.(7)

UPL Opinion No. 183

UPL Opinion Number 183 would declare the conduct of real estate closings by anyone other than an attorney to be the unauthorized practice of law. The proposed Opinion would prohibit lay settlement services from conducting closings for real estate sales and for any loans secured by real estate, such as home equity loans and refinancings. Although the proposed Opinion permits the closing attorney to delegate certain tasks to lay people, it requires that the attorney "actively oversee all aspects of the closing." Moreover, the proposed Opinion would bar a Virginia attorney who is employed by a title agency from performing real estate closings. Consequently, the proposed Opinion would require a consumer who otherwise might retain a real estate agent, title company, bank or other lay settlement service for a closing instead to hire his or her own lawyer.

UPL Opinion No. 183 was issued by The Standing Committee on the Unauthorized Practice of Law at the request of a member of the Virginia State Bar. The Virginia State Bar Council and the Supreme Court of Virginia must approve the Opinion to make it binding authority.

The Proposed Opinion Will Likely Adversely Affect Consumers

Free and unfettered competition is at the heart of the American economy. As the United States Supreme Court has observed, "ultimately competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); accord Superior Court Trial Lawyers' Association, 493 U.S. 411, 423 (1990). Competition benefits consumers of both traditional manufacturing industries and the learned professions. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); National Society of Professional Engineers, 435 U.S. at 689.

The proposed Opinion would restrain competition by erecting an artificial barrier to competition from lay settlement services and would deprive Virginia consumers of the option of closing real estate transactions without the services of an attorney. The proposed Opinion has the potential to increase costs for consumers in two ways. First, it would force consumers who would not otherwise hire an attorney for a real estate closing to do so. The restriction would adversely affect all consumers who might prefer the combination of price, quality, and service that a lay settlement service offers. It would particularly affect consumers who are obtaining home equity loans or refinancing existing real estate loans. A number of banks currently handle such closings without charge. Second, the proposed Opinion, by eliminating competition from lay settlement services, would likely cause the price of lawyers' settlement services to increase. Even consumers who choose a lawyer over a settlement company would likely pay higher prices.

This has been the experience elsewhere. The New Jersey Supreme Court, in holding last year that non-lawyers may conduct closings and settlements, found that real estate closing fees were lower in southern New Jersey, where lay settlements were commonplace, than in the northern part of the State, where lawyers conducted almost all settlements. Southern New Jersey buyers who were represented by counsel throughout the entire transaction, including closing, paid, on average, \$650, while sellers there paid \$350. Northern New Jersey sellers paid \$750 in lawyers' fees on average and buyers, \$1,000. In re Opinion No. 26 of the Committee On The Unauthorized Practice of Law, 654 A.2d 1344, 1348-49 (N.J. 1995).(8)

There is no reason to expect Virginia's experience to be different. In 1981, the Attorney General of Virginia issued an Economic Impact Statement analyzing proposed UPL rules that would have permitted only lawyers to conduct real estate closings and would have required title insurance companies to issue policies only through attorneys. The Attorney General found that there was "significant evidence that costs to the consumer will remain higher in Virginia

than they otherwise might be." He based his conclusion, in part, on data from 1979-80 HUD studies that appeared to show that consumers pay more when lawyers are involved in all residential real estate closings. Attorney General of Virginia, Economic Impact Statement, 1980-81 Op. Atty. Gen. Va. 427 (March 12, 1981). Moreover, according to information the staff has gathered from industry representatives, costs for settlement in Virginia have fallen since lay settlement services began operating about 15 years ago.

During the past 15 years, the use of lay closing services has grown steadily in Virginia. In northern Virginia, lay settlement services now perform a large number of closings. In the Richmond area, they perform a substantial number, and in the Norfolk-Virginia Beach area, the number is growing. In many other States as well, lay settlement services and attorneys compete in the provision of real estate closings.

Notwithstanding the popularity of lay settlement services, in many situations, the assistance of a licensed lawyer is necessary. A consumer might choose an attorney to answer legal questions, negotiate disputes, or offer various protections. Consumers who hire attorneys may get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is not a reason to eliminate lay closing services as an alternative for consumers who wish to utilize them. In re Opinion No. 26, 654 A.2d at 1360. Rather, the choice of using a lawyer or a non-lawyer should rest with the consumer. Id. As the United States Supreme Court noted,

The assumption that competition is the best method of allocating resources in a free market recognizes that **all elements of a bargain - quality, service, safety, and durability** - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); accord Superior Court Trial Lawyers' Association, 493 U.S. at 423. Permitting competition by lay services allows consumers to consider more relevant factors in selecting a provider of settlement services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient.

Restraints similar to the one proposed here have been adopted in the past, with similar anticompetitive effects. For example, the Justice Department obtained a judgment against a county bar association that restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations in real estate transactions. United States v. Allen County Indiana Bar Association, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. United States v. New York County Lawyers' Association, No. 80 Civ. 6129 (S.D.N.Y. 1981).⁽⁹⁾

The basis for the proposed Opinion -- and for all regulation of the unauthorized practice of law -- is the risk that a lay person will make a mistake that a lawyer would not and thereby harm a consumer. Significantly, the proposed Opinion cites no actual instances of consumer injury. Instead, it relies upon hypotheticals. Hypotheses alone are an insufficient basis for restricting competition in a way that is likely to harm consumers, especially in the face of 15 years of favorable experience with lay services in Virginia. One reason for the absence of problems may be the increasing use of standardized loan forms, now necessary for reselling a mortgage in the secondary market. These reduce the likelihood of error and the need for independent legal judgment. In addition, a substantial number of closings now involve home equity loans or refinancings of existing loans. Because a related transaction has already gone through the closing process once, legal questions are less likely to arise.

Moreover, uninformed consumers could be protected by measures far less anticompetitive than an outright ban on non-lawyer closings. For example, the New Jersey Supreme Court required written notice of the risk involved in proceeding with a real estate transaction without an attorney. In re Opinion No. 26, 654 A.2d at 1363. Disclosure, and an appropriate opportunity for consumer waiver, would appear to address the possibility of a conflict of interest on the part of the settlement company (see page 4 of the proposed Opinion). Alternatively, the State may wish to regulate

lay settlement services more closely. We urge the Council to consider these alternatives if it deems additional consumer protections warranted.

Conclusion

In sum, proposed UPL Opinion Number 183, which would prevent non-lawyers from conducting settlements, is likely to have significant anticompetitive consequences. Consumers are likely to pay higher prices and face restricted choice without obtaining significant countervailing benefits. Accordingly, we urge the Council to reject the proposed Opinion.

We appreciate the opportunity to present our views. Please contact us if you have any questions or if we can help in any way.

Sincerely yours,

Anne K. Bingaman

Assistant Attorney General
Jessica N. Cohen, Trial Attorney
United States Department of Justice
Antitrust Division

William J. Baer

Director
Randall Marks, Attorney
Federal Trade Commission
Bureau of Competition

1. This letter presents the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner.

2. See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); United States v. American Medical Association, 130 F.2d 233 (D.C. Cir. 1939), aff'd, 317 U.S. 519 (1939); United States v. Allen County Indiana Bar Association, Inc., Civ. No. F-79-0042 (N.D. Ind. 1979); United States v. Geneva County Bar Association, Civ. No. 80-113-S (M.D. Ala. 1980); United States v. New York County Lawyers' Association, No. 80 Civ. 6129 (S.D.N.Y. 1981); United States v. Association of Engineering Geologists, 1985-1 Trade Cas. (CCH) 66,349 (C.D. Cal. 1984); United States v. American Institute of Architects, 1990-2 Trade Cases 69,256 (D.D.C., 1990); United States v. A. Lanoy Alston, D.M.D., P.C., Crim. No. 90-042-TUC (D. Ariz. 1990); United States v. Brown University, et al., 1993-2 Trade Cas. (CCH) 70,391 (E.D. Pa. 1991); United States v. American Bar Association, Civ. No. 95-1211 (CRR) (D.D.C. 1996).

3. 15 U.S.C. 41 et seq.

4. See, e.g., California Dental Association, D-9259 (decision and order issued March 25, 1996); Superior Court Trial Lawyers' Association, 107 F.T.C. 562 (1986), aff'd in part, rev'd in part sub nom., Superior Court Trial Lawyers' Association v. Federal Trade Commission, 856 F.2d 226 (D.C. Cir. 1988), aff'd in part, rev'd in part, 493 U.S. 411 (1990); American Medical Association, 94 F.T.C. 701 (1979), aff'd sub nom., American Medical Association v. Federal Trade Commission, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 476 (1982).

5. Carolyn Cox, Susan Foster, "The Costs and Benefits of Occupational Regulation," Bureau of Economics, FTC, October 1990.

6. Recent recipients of Commission staff comments about lawyer advertising include the American Bar Commission on Advertising, June 24, 1994; Supreme Court of Mississippi, January 14, 1994; Supreme Court of New Mexico, July 29, 1991; State Bar of Arizona, April 17, 1990.

7. Port Washington Real Estate Board, C-3625 (November 6, 1995); Industrial Multiple and American Industrial Real Estate Association, C-3449 (consent order issued July 6, 1993, 58 Fed. Reg. 42,552 (Aug. 10, 1993)); United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System), C-3461 (consent order issued Sept. 27, 1993, 58 Fed. Reg. 59,042 (Nov. 5, 1993)); Bellingham-Whatcom County Multiple Listing Bureau, 113 F.T.C. 724 (1990) (consent order); Puget Sound Multiple Listing Association, 113 F.T.C. 733 (1990) (consent order).

8. Before rendering its opinion, the New Jersey Supreme Court had referred the matter to a Special Master who conducted 16 days of evidentiary hearing on this issue and others.

9. If the Supreme Court of Virginia approves the proposed Opinion, the state action doctrine would likely exempt it from federal antitrust challenge. Parker v. Brown, 317 U.S. 341 (1943); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). This doctrine immunizes some state government actions that, if taken by private parties, could violate the antitrust laws.