



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

Department Of Justice
Washington, DC 20 530

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



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

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

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

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.