



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

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Washington, DC 20580

Department of Justice  
Washington, DC 20530

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concerned about attempts to restrict non-lawyer competition in real estate closings. The Department has urged Kentucky and Virginia to reject such opinions, through letters to their State Bars and an *amicus curiae* brief filed with the Kentucky Supreme Court last year.(1)

Congress created the Federal Trade Commission in 1914 to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Federal Trade Commission is concerned about restrictions that may adversely affect the competitive process and raise prices or decrease quality. 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 its 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. In addition, the staff has conducted studies of the effects of occupational regulation(2) and submitted comments about these issues to state legislatures, administrative agencies, and others. The Commission also has had significant experience in analyzing and challenging restrictions on competition in the real estate industry.(3)

### The Opinions

Broadly speaking, there are two type0 0 9 72k</MCID 3 >3(o h)13(asb7-1(n)x)24(t4(e aeDe /H4 <</MCID 2 >>BDC 1 sche >>BDC 1

should not be construed in a manner inconsistent with that purpose. As the North Carolina Supreme Court concluded

lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

Third, the Opinion could reduce competition from out-of-state mortgage lenders, harming consumers who find lower interest rates or more attractive refinancing packages with these lenders. Out-of-state lenders may not have facilities in North Carolina to close loans and often have contracted with in-

important. Consumers would lose this convenience under the Opinions; our understanding is that most lawyers are less likely to accommodate consumers in this manner.

The Goal of Increasing Consumer Protection  
Does Not Warrant Adopting this Opinion

The Opinions offer little explanation as to why their adoption is necessary to protect consumers and no factual data to support the draconian measure of eliminating lay settlements. Antitrust law and policy are themselves very important

The assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, provide advice, 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 no reason to eliminate lay closing services as an alternative. *In re Opinion No. 26*, 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. *Id.*

### Less Restrictive Measures May Protect Consumers

Prohibiting lay services from closing refinancing loans may impose substantially higher closing costs on North Carolina consumers. These costs should not be imposed without a convincing showing that lay closings have not only injured consumers, but that less drastic measures cannot remedy the perceived problem. Indeed, North Carolinians can be protected by measures that restrain competition less than a complete ban on lay settlement. In permitting lay settlements, the New Jersey Supreme Court requires written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. *In re Opinion No. 26*, 654 A.2d at 1363. This measure permits consumers to make an informed choice about whether to use lay settlement services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (West 2001). This statute permits consumers to choose lay settlement providers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds. Though more regulatory than the New Jersey approach, the Virginia approach it is clearly a more pro-competitive approach than a ban on lay closings.(5)

### The Committee Should Adopt the Proposed Omnibus Opinion Clarifying the Limits of the Opinions

According to Assistant Ethics Counsel Deanna Brocker, the Committee is considering writing an omnibus opinion clarifying 2001-4 and 2001-8. Among other things, it would state that the Opinions were not intended to require the presence of a lawyer at a refinancing or purchase closed by mail, one closed with powers of attorneys, or one at which neither buyer nor seller is re 392.2a1(c)-.56 470.2eed by col.-0.013 Tc 0.013 Twl, on13(l)-1 eC3(hi)--2(an scp-15(eu9m)- rbu)2-

Other states' experience suggests that the Opinions will likely cause consumers to pay more for real estate closings. For example, in Virginia, median lay closing costs were \$150 less. In parts of New Jersey where lay closings are prevalent, buyers on average paid \$350 less for lay closings, and sellers paid \$400 less. In addition, the Opinions could curtail competition from out-of-state and Internet-based lenders, potentially increasing costs and reducing the convenience of the loan application and approval process. The Opinions make no showing of harm to consumers from lay settlements that would justify these reductions in competition; indeed, they hardly even mention the subject.

The Justice Department and FTC appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

/s/

Charles A. James  
Assistant Attorney General

/s/

Jessica N. Butler-Arkow  
Attorney  
United States Department of Justice  
Antitrust Division

/s/

By Order of the  
Federal Trade Commission,

/s/

Timothy J. Muris  
Chairman

/s/

Ted Cruz, Director  
Office of Policy Planning

[Endnotes:]

1. In addition, the Justice Department has challenged attempts by county bar associations to adopt restraints similar to the North Carolina Opinions. For example, the Justice Department sued and obtained a judgment against one bar association that had 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 of their 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).

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

3. *Port Washington Real Estate Board*, 120 F.T.C. 882 (1995) (consent order); *Industrial Multiple and American Industrial Real Estate Association*, 116 F.T.C. 704 (1993) (consent order); *United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System)*, 116 F.T.C. 972 (1993) (consent order); *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).

4. In South Jersey, about 40% 9 72de4bu2( ab)13 0 Td (ey)11(,)