100 N. 9th Street, Fourth Floor
Richmond, Virginia 23219

Re: Proposed UPL Opinion #183

Dear Mr. Beach:

The United States Department of Justice and the Bureau of Competition of the Federal Trade Commission(1) submit these comments in opposition to proposed Virginia State Bar UPL Opinion Number 183. The Justice Department and the Federal Trade Commission do not generally comment on proposed unauthorized practice of law rule-makings, but offer these comments to prevent harm to competition and consumers. The proposed Opinion would generally prevent anyone other than lawyers from conducting closings for real estate purchases and sales or for loans secured by real estate. Adoption of the proposed Opinion will deprive Virginia consumers of the choice to use a lay settlement service, a choice they have had, and have increasingly exercised, for 15 years. ET3 plng(c)-3(i)-1(s) 3((a7oe(i)-1(t)2(i(e)13(d 1[o8Td (-1

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

The use of lay closing services has grown steadily in Virginia during the past 15 years. We are informed that, in Northern Virginia, lay settlement services perform most residential closings, and in the Hampton Roads area, about half. In this respect, the Virginia experience is shared by nearly all the other States. Only in South Carolina are lawyer settlements required by a UPL rule.

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).(11)

Notwithstanding the popularity of lay settlement services, the assistance of a licensed lawyer is necessary in many situations. 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 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:

Jersey, the percentage difference between average lawyer settlement charges in areas where lay settlements were allowed and in areas where they were not was 75 percent. If the same difference applies in Virginia, and average lawyer settlement costs increased 75 percent with the adoption of UPL Opinion Number 183, then the proposed opinion would cost Virginia consumers more than $20 million in increased legal fees, and the total cost to Virginia consumers annually could exceed $25 million.(12) To justify UPL Opinion Number 183, the Virginia State Bar should demonstrate that any harm resulting from lay settlements exceeds the likely substantial cost of the proposed regulation.

A showing of harm is particularly important where, as here, the proposed Opinion radically changes the status quo by eliminating consumers' opportunity to use an entire class of providers. However, the Committee provided no studies or statistics showing the proportion of lay settlements that are problematic as opposed to the proportion of problematic attorney settlements. Instead, it relied entirely on anecdotal information, illustrated in the 31 examples of alleged harm from lay settlement services, all or nearly all of which were provided by members of the real estate bar seeking protection from competition from lay services.

Whether or not the 31 examples produced consumer injury (e.g., #31 - the withholding of a broker's commission by a settlement agency pending a dispute between the broker and the home builder may have been prudent), or even whether the retention of a lawyer would have made a difference (e.g., #2 - in which attorneys represented both buyer and seller) are unanswered questions. What is clear, however, is that 31 examples of alleged consumer harm is a minuscule fraction of the tens of thousands of lay settlements in Virginia during the past 15 years and suggests a safety record that other industries might envy.

We realize that conversions of settlement funds or misrecordations of title, however seldom, can be a terribly serious matter to consumers whose single most important investment is their home. Retaining a lawyer may be prudent, but it is no guarantee of safety. The greatest frauds involving Virginia real estate settlements in the 1990s were probably perpetrated by attorneys David Murray, Sr. in Tidewater(13) and Thomas Dameron in Northern Virginia.(14) If the Supreme Court is concerned that the 31 examples of alleged harm from lay settlements are an indication of more widespread problems with lay settlements, it may wish to develop a more complete record from interested parties.(15) Despite the Committee's list of 31 examples, one cannot conclude that consumer harm is a more prevalent result from lay settlements or lawyer settlements.(16) Approval of the proposed Opinion may impose substantial additional closing costs on Virginia consumers. These additional costs should not be imposed without a convincing showing that lay settlements have imposed injuries on consumers that cannot be cured by a less drastic measure.

In addition, even if substantial harm could be shown to result from lay settlements, the high cost of the proposed UPL Opinion would seem to require consideration of the possibility that such harm could be avoided by a remedy less restrictive of competition. Consumers can be protected by measures that restrain competition less than a complete ban on lay real estate settlements. For example, the New Jersey Supreme Court required written notice of the risks involved in proceeding with a real estate transaction without an attorney. In re Opinion No. 26, 654 A.2d at 1363. Alternatively, the Commonwealth may wish to regulate lay and lawyer settlement services more closely. The Supreme Court should consider the availability of these alternatives in passing on the proposed UPL Opinion.

When, in 1978, segments in the Virginia bar previously proposed to ban lay settlements through a UPL rule, the "Horsley Committee" was formed to study UPL regulations and review specifically the proposed UPL rule prohibiting lay real estate settlements. In its April 3, 1981 report, the Horsley Committee stated that:

The guiding principle for adopting UPL regulations in a free enterprise society should be whether limiting the activity of non-lawyers is needed to provide protection to a significant segment of the public. This Committee declines to

That "guiding principle" is an even more appropriate standard today, after tens of thousands of Virginia lay settlements, than it was 15 years ago. Adopting a draconian UPL rule that eliminates a service chosen by thousands of Virginia consumers and terminates the businesses of lay settlement firms should be undertaken only after a clear showing of consumer injury. The 31 examples of alleged injury appended to the October 17 Committee letter fall far short of the standard set by the Horsley Committee.(17)

Some other factors should be considered with respect to the proposed Opinion. Even under the proposed UPL Opinion, lawyers need not be present at the actual closing. Rather, the closing can be handled by a paralegal or other lay person employed by the attorney. Hence, if, as the Committee believes, it is the "practiced legal eye" of the lawyer that protects consumers at closing, this eye does not witness the actual closing. No lawyer need be present to see that a consumer may be having legal problems that only the lawyer can identify and understand. Instead, the consumer receives protection similar to that from a lay settlement agent. In both situations, the lay person conducting the closing must determine whether to call a lawyer because a question is outside his or her expertise.

Conclusion

By prohibiting lay settlements, proposed UPL Opinion #183 will likely reduce competition and raise prices to consumers, without having demonstrated that lay settlements harm consumers in a way that would be prevented by restricting real estate closings to lawyers. Accordingly, we recommend that the Supreme Court of Virginia reject the proposed UPL Opinion.

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

Sincerely yours,

Joel I. Klein
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Jessica N. Cohen, Attorney
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Antitrust Division

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Director
Randall Marks, Attorney
Federal Trade Commission
Bureau of Competition

cc: The Honorable Thomas A. Edmonds

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

4. See, e.g.,

15.