IN THE SUPREME COURT OF FLORIDA

SECURITIES ARBITRATION SPECIALISTS, INC.
RE: ADVISORY OPINION # 95-2
NON-LAWYER REPRESENTATION
IN SECURITIES ARBITRATION

CASE NO. 89,140

RESPONSE TO ANSWER BRIEF OF THE STANDING COMMITTEE OF THE FLORIDA BAR UPL COMMITTEE ON UNLICENSED PRACTICE OF LAW

Robert E. Karoly, President
Securities Arbitration Specialists, Inc.
1845 Fourteenth Avenue
Vero Beach, FL 32960
(561) 978-4300
FAX (561) 978-4333

RESPONSE

THIS "RESPONSE? SPECIFICALLY ADDRESSES REMARKS CONTAINED **IN** THE "CONCLUSION", **PAGE** 27, OF THE "ANSWER".

The Florida Bar, at a meeting with Security Arbitration Specialist, Inc. (SAS), counsel on October **15,** 1996, clearly agreed to take **"no action"** or give **"no opinion"** on the request for a **"run** off' period of from 12 to 18 months. This "run off" agreement was confirmed at a subsequent conference with the ethics committee.

There was never a discussion to require switching from one Florida Barred Attorney to another. (See attached report from SAS Counsel)

The **"run** off' **was** for the purpose of completing some 190 **SAS** open cases that have been represented by Florida Barred Attorneys from the onset and in some cases **,** this representation has covered more than one year.

The Florida Ear's intention to now require this switch from Florida Attorney to Florida Attorney would severely hamper the processing of these cases at the expense of the claimant and for no good purpose whatsoever.

The attached exhibits are the detailed reports of **SAS** counsel to **SAS immediately following** the extensive meetings with the Florida Bar Committees on October **15,** 1996. These reports clearly and accurately describe the "run off' **without** the senseless attorney switching. (Refer to exhibits)

The Florida Bars contention concerning the Unauthorized Practice of Law as defined in Opinion #95-2 is not shared by either the Federal Trade Commission or the Anti-Trust Division of the U.S. Department of Justice.

In the current paralleling attempts of the Virginia Bar to encroach on real estate closing, the Department of Justice has cautioned the Virginia Supreme Court, to reject the UPL proposal presented as Opinion #183, of the Virginia Bar. **This January 3,1997 rejection letter, signed by both the FTC and the U.S. Department of Justice, is attached.**

CONCLUSION

It is clear that Opinion #95-2 of the Florida Bar will be as hostile to the Federal Trade Commission and U.S. Department of Justice Anti-Trust Division as is, the Virginia Bars opinion #183. The Court should expect a similar rejection request from these federal agencies, on making Florida Bar Opinion #95-2, a Florida law.

The court should be appraised of the fact that the Virginia real estate community does **not** have the equivalent of the Federal Arbitration Act (FAA) to support their opposition to the Virginia Bars attempted encroachment. **The FAA does support opposition to Florida Bar Opinion #95-2.**

For the reason stated and the supporting exhibits presented, we respectfully request the court to reject Opinion #95-2 as clearly unconstitutional and an affront to the Federal Trade Commission and the **U.S.** Department of Justice. If Opinion #95-2 becomes a Florida Law the Department of Justice will surely intercede on behalf of the Federal Arbitration Act and wronged investors everywhere, who filed their claims in accordance with Federal Arbitration Act guidelines.

Respectfully submitted

Robert E. Karoly, President
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John A. Yanchunis & Lori S. Holcomb, C/O The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, Robert Pearce, 2888 East Oakland Park Boulevard, Ft. Lauderdale, Florida 33306; Richard A. Greenberg, Port Office Box 925, Tallahassee, Florida 32302; Brian J. Sheen, 2915 Banyan Boulevard Circle Northwest, Boca Raton, Florida 33431, and Karen F. Klausmeyer, Post Office Box 2344, Palm City, Florida 34991 this 15th day of January, 1997.

Robert E. Karoly, President

PHILIP E. VITELLO
ATTORNEY AT LAW
1460 Fern Court, #304
Vero Beach, Florida **32963**
Tel. **561**-231-1479
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October 22, 1996

Mr. Robert E. Karoly
Securities Arbitration Specialists, Inc.
5070 Highway AlA
Vero Beach, Florida 32963

RE: Florida Bar Opinion

Dear Mr. Karoly,

As per your request, **I** approached Lori **S.** Holcomb, Esq., counsel for the Unauthorized Practice of Law committee, and requested that she ascertain the position of the committee concerning a "run off" or grace period for your firm in the event the Supreme Court finds that your activities constitute the unauthorized practice of law in the state of Florida.

She spoke with John A. Yanchums, Esq.,the Chair of the Standing Committee on Unlicensed Practice of Law. The committee will not oppose the "run off" period. They **will** make no recommendation to the Court in the event t'he Bar Opinion is adopted.

I will keep you informed as to whether **or** not any **other** interested party files a brief in this matter. If no opposing briefs are filed by November 7, 1997, I will prepare and file a petition for leave to file a brief on your behalf and a petition for an extension of time in which to do so.

Sincerely,

Philip E.Vitello
pev/mn

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

January 3, 1997

David B. Beach, Clerk of Court
Supreme Court of Virginia
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 o Competition of the Federal Trade Commission[1] submit these comments in apposition to proposed Virginia State Bar UPL Opinion Number 183. The Justice Department and tbe Federal Trade Commission do not generally comment on proposed unauthorized practice of law rule-dings, 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. Ending competition from lay settlement services will very likely increase real estate closing costs for consumers and has not been justified by a showing of increased consumer protection.

The Interest And Experience Of The 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.

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[1] This letter presents the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are nor necessarily h e views of the Commission or of any individual Commissioner.

For more than 100 years, since the passage of the Sherman Antitrust Act, the United States Department of Justice bas 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 marker have the potential to harm consumers. The Justice Department's civil and criminal enforcement programs ate directed at eliminating such restraints. The Justice Department also encourages competition through advocacy letters such as this one.[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 stare-liceused professionals, including lawyers.[4] In addition, the staff has conducted d i e s of the effects of occupational regulation[5] and submitted comments about these issues to

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[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. American Bar Association, Civ. No. 95-1211 (CRR) (D.D.C. 1996); United States v. Brown University, et al., 1993-2 Trade Cas. (CCH) ¶ 70,391 (E.D. Pa. 1991); United States v. A. Lanoy Alston, D.M.D., P.C., Crim. No. 90-042-TUC (D. Ariz. 1990); United States v. American Institute of Architects, 1990-2 Trade Cases ¶ 69,256 (D.D.C., 1990); United States v. Association of Engineering Geologists, 1985-1 Trade Cas. (CCH) ¶ 66,349 (C.D. Cal. 1984); United States v. New York County Lawyers' Association, No. 80 Civ. 6129 (S.D.N.Y. 1981); United States v. Geneva County Bar Association, Civ. No. 80-113-S (M.D. Ala. 1980); United States v. Allen County Indiana Bar Association, Inc., Civ. No. F-79-0042 (N.D. Ind. 1979).

[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. Fe , 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.

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 #183

UPL Opinion #183 would declare real estate closings conducted by anyone other than an attorney to be the unauthorized practice of law.[8] The proposed Opinion would prohibit lay settlement services from conducting closings for real estate sales and for any loans secured by real estate. Although the proposed Opinion permits the closing attorney to delegate certain tasks *to* laypersons, it requires that the attorney "actively oversee all aspects of the closing." The closing attorney need not be present at the actual closing, however. The attorney's lay employees may conduct 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 to retain a lawyer instead.

UPL Opinion #183 was issued by The Standing Committee on the Unauthorized Practice of Law at the request of a member of the Virginia *State* Bar. It was opposed by more than *500* of the *622* comments filed with the State Bar Council. as well as by the State Bar Counsel who stated that the proposed rule is not "appropriate or helpful to consumers."[9] Nonetheless, the State Bar Council approved the proposed Opinion on October 17.

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[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] The Opinion indicates that the UPL prohibition applies only to third parties to a real estate closing. Consequently, a bank could use its employees to close a real estate loan to an unrepresented customer but could make no separate charge for the preparation of title documents. Opinion, p. 10.

[9] Virginia's Attorney General has advised that less restrictive means than the proposed Opinion should be considered. In commenting on a similar proposed opinion 16 years ago, the Attorney General noted "the manifest anticompetitive effect of the proposal."

The Public Interest Standard Should Guide Pronouncements About the Practice of Law

In considering whether to declare that a service constitutes the practice of law in Virginia, the Court should consider the public interest. The rules against the unauthorized practice of law are themselves intended to protect the public interest and should not be construed in a manner inconsistent with that purpose. Indeed, the Court's own Statement of these principles expressly provides that their ultimate aim is "the protection of the public." Va. S.Ct. R. Pt. 6. §I (Introduction).

In determining how best to protect the public and where the public interest ties, the Court should consider both the harm that might be caused by permitting lay persons to provide closing services and the harm that would be caused by prohibiting them from doing so. These harms should be balanced against each other. As the Supreme Court of New Jersey wrote, when considering the same issue:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, marc than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
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> . . .
>
> We determine the ultimate touchstone - the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26, 654 A.2d at 1345-46.

As we explain below, an assessment of the relative casts of permitting and prohibiting lay closings in Virginia provides no basis to believe that the public interest would be served by prohibiting purchasers and sellers of real estate in Virginia from choosing whether they wish to be represented by an attorney.

The Proposed Opinion Will Likely Adversely Affect The Public

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 bas been faith in the value of competition.'" National Society of Professional Engineers v. United States, 435 US. 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 insurmountable barrier against competition from lay settlement services, thereby depriving Virginia consumers of the choice of closing real estate transactions without the services of an attorney. The proposed Opinion could increase costs for consumers in two ways. First, by forcing consumers who would not otherwise hire an attorney for a real estate closing to do so, the restriction would adversely affect all consumers who prefer the combination of price, quality, and service that a lay settlement service offers.

A 1996 Media General study submitted by the Coalition for Choice in Real Estate found that lay closing services are significantly less costly than attorneys.

	Average Closing costs	Median Closing Costs
Attorneys	$ 366	$ 350
Lay Services	$ 208	$ 200

Residential Real Estate Closing Cost Survey, September 1996 at 5. Media General surveyed 425 law firms and 64 lay firms in Virginia. The survey also reported that total closing costs, including the title examination, averaged $451 for lawyer closing and $272 for lay settlements. Title examination cost figures were submitted by 165 law firms and 41 lay providers. We are informed that non-lawyers closed about 75% of the approximately 20,000 home sales in Northern Virginia in 1995, and estimate that lay settlement firms handled about one-half of the 60,000 Virginia real estate closings. Admittedly, these figures are estimations, but they indicate that the elimination of lay settlements could cost Virginia consumers over $5 million annually, even assuming that lawyers do not raise their fees once lay settlement firms have been eliminated.

Second, by eliminating competition from less costly lay settlement services, the proposed Opinion would likely cause the price of lawyers' settlement services to increase, since the availability of alternative, lower-cost lay settlement services restrains the fees that lawyers can charge. Thus, even consumers who prefer to retain a lawyer for a real estate settlement are likely to pay higher prices, if the proposed Opinion is approved. This has been the experience elsewhere. The New Jersey Supreme Court, in holding 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), even for consumers who chose attorney closings, than in the northern part of the State, where lawyers conducted almost all settlements. Southern New Jersey buyers represented by counsel throughout the entire transaction, including closing, paid on average, $650, while sellers paid $350. Northern New Jersey buyers, represented by counsel,

paid on average, $1,000 and sellers. $750. In re Opinion No. 26 of the Committee On The Unauthorized Practice of Law, 654 A.2d 1344. 1348-49 (N.J. 1995).

Consumers' settlement costs in Virginia have fallen since the Supreme Court's Goldfarb decision, supra,[10] and since lay settlement services began operating about 15 years ago. This was predicted in the Virginia Attorney General's 1981 Economic Impact Statement, analyzing a proposed UPL rule 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 casts *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).

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 bat association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. United States v. New York County Lawyers' A ; , 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, tbe

[10] The fee schedules challenged in Goldfarb fixed lawyer's fees for residential real estate closings at 1% of the selling price. See 421 U.S. at 776.

[11] 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.

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.

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. The UPL Opinion states that "both the potential and actual harm to consumers is very significant' when lay settlement companies are permitted to close real estate transactions.... This Committee has received many reports of specific instances of harm . , too numerous and detailed to set out in this opinion." UPL Opinion at 9-10 (October 17, 1996 draft) ("Opinion"). In a separate Report, the Standing Committee provided 3 1 examples of harm that lay settlement services have allegedly caused to consumers. Report of the Standing Committee on the Unauthorized Practice of Law Regarding Advisory UPL Opinion Number 183 (October 2, 1996). Exhibit 1, Examples of Problems Which Occur When Lay Settlement Companies Conduct Closings and Why Attorneys Are Necessary in Real Estate Transactions. The Committee's Report, however, provides an inadequate factual basis for the adoption of the proposed UPL Opinion.

The Committee states that "there is no requirement that the harm . . affect a significant segment of the population ." Committee Report at 4. In general, however, the antitrust laws and competition policy require that a sweeping restriction on competition be justified by a credible showing of need for the restriction and that the restriction is narrowly drawn to minimize its anticompetitive impact. See generally F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue . . . such an agreement Limiting consumer choice . . . cannot be sustained under the Rule of Reason"). As explained on page 5, the average closing costs for lawyer settlements in Virginia are $451, while the average costs for lay settlements are only $272, a difference of $179. If consumers were required to pay that difference for each of the estimated 30,000 Virginia real estate closings currently handled by non-lawyers! the additional direct cost to consumers would be over $5 million each year. Moreover, the total cost each year of eliminating lay settlements in Virginia is likely to be even higher because the elimination of lay settlements would also likely cause a substantial increase in lawyer settlement charges. In New Jersey, the percentage difference between average lawyer settlement charges in areas where lay settlements were allowed and in areas where they were not

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 3 1 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 3 1 examples produced consumer injury (e.g., #3 1 - 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 3 1 examples of alleged consumer harm is a minuscule fraction ofrhe tens of thousands of lay settlements in Virginia during the past 15 years and suggests a safety record that other industries tight envy.

We realize that conversions of settlement funds or misrecordations of title, however seldom, can he 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, St. in Tidewater" and Thomas Dameron in Northern Virginia." If the Supreme Court is concerned that the 3 1 examples of alleged harm from lay settlements are an indication of more widespread problems with lay settlements, it may wish to develop a more

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[12] As noted above, the New Jersey Supreme Court found that the average cost for lawyer assisted closings in Northern New Jersey, where legal representation was required, was $1,750, while the average cost for lawyer assisted closings in Southern New Jersey, where legal representation was not required, was only $1,000, a 75 percent difference. If the average cost of a lawyer assisted closing in Virginia were to increase by 75 percent, it would rise from $451 to $789, for an increase of $338 per closing. If the average closing cost rises by that amount and lawyers handle all of the estimated 60,000 annual Virginia real estate closings, costs to Virginia consumers would increase by $20.28 million (60,000 x $338). Thus, the total cost to Virginia consumers, including the more than $5 million in direct costs of eliminating lay settlement providers, could exceed $25 million.

[13] "See No Evil: How David Murray Got Away With It," The Daily Press (Newport News), November 15-19, 1992, p. A1, et seq.

[14] "Realty Attorney Sentenced To Prison In Fraud Case: Scheme Cost Home Sellers, Lenders $5 Million," The Washington Post, October 12, 1996, 1996 WL 13425939.

complete record from interested parties.[15] Despite the Committee's List of 3 1 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 requited 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. she "Horsley Committee" was formed to study UPL regulations and *review* specifically the proposed UPL rule prohibiting lay real estate settlements. In its April 3, 198 I 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 characterize the "practice of law" aspects involved in a typical real estate closing as "the unauthorized practice of law" in the degree needed today to justify a broad prior restraint.

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 3 I

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[15] Before rejecting a proposed UPL rule prohibiting lay settlements in 1995, the New Jersey Supreme Court retained a Special Master who conducted 16 days of hearings and submitted a report.

[16] An attorney for an interested party in this proceeding forwarded to the Justice Department a December 12, 1996 letter from the Senior Vice President of Lawyers Title Insurance Corporation, which issues thousands of Virginia title insurance policies annually. The letter notes that Lawyers Title "has experienced no greater incidents of problems arising from the conduct of a settlement by a lay entity than we have from an attorney" (appended as Attachment A). Additionally, the Virginia State Bar Commission Department of Professional Regulation has reported that ". . . the major complaints against attorneys continue to be in the areas of neglect and communications, and these complaints typically come from the fields of real estate, family law and criminal law." 57th Annual Report of the Virginia State Bar, p. 9. In each year From 1 99 I to 1995. between 10% and 14% of all complaints to the State Bar involved real estate -- over 200 each year. 57th Annual Report, pp. 8-13.

examples of alleged injury appended to the October 17 Committee letter fall far short of the standard set by the Horsley Committee."

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 tie Committee believes, jr is the practiced legal eye or the lawyer with attorney. Hence, if as 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 bis or her expertise.

[17] Its use also suggests due process concerns. We understand that the 31 examples were largely provided by lawyers with a real estate practice and that other commenters did not have the opportunity to respond to these 31 instances or to develop a record of settlement abuses by lawyers. When a proposed UPL rule prohibiting lay settlements was last before the Virginia Supreme Court, it required the Attorney General of Virginia to analyze the economic effect on competition of the proposed restraint supported by statistical data.

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

William J. Baer
Director
Randall Marks, Attorney
Federal Trade Commission
Bureau of Competition

cc: The Honorable Thomas A. Edmonds
Executive Director
Virginia State Bar

FROM

Lawyers Title Insurance Corporation

REGION 1 OFFICE
6630 W. BROAD STREET (23230)
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December 12, 1996

R. Brain Ball, Esquire
Williams, Mullen, Christian & Dobbins
P. 0. Box 1320
Richmond, VA 2321 0-1 320

Re: Virginia Non-Lawyer Closings

Dear Brian:

At your request, I have briefly summarized the non-lawyer real estate closing experience of Lawyers Title.

Lawyers Title Insurance Corporation is a national title insurance underwriter which conducts hundreds of thousands of closings across the United States every year. In Virginia, Lawyers Title conducts thousands of settlements annually, the integrity for which the Corporation is directly and totally responsible. Additionally, Lawyers Title, in its capacity as an Underwriter, is often financially responsible for the integrity of settlements conducted by our approved attorneys and lay settlement agents (via the closing protection letter, copy attached). In Virginia, the Corporation has experienced no greater incidents of problems arising from the conduct of a settlement by a lay entity than we have from an attorney.

Yours very truly,

Frank T. McCormick
Senior Vice President
and Regional Manager

FTM/ead

GOVERNMENT EXHIBIT A