IN THE

SUPREME COURT OF APPEALS

OF THE

STATE OF WEST VIRGINIA

LORRIE McMAHON, *et al*.,	)	
	)	
Petitioners,	)	
	)	**No. 31706**
v.	)	
ADVANCED TITLE SERVICES COMPANY OF WEST VIRGINIA, *et al*.,	)	
	)	
Respondents.	)	

BRIEF AMICI CURIAE OF THE FEDERAL TRADE COMMISSION AND THE UNITED STATES OF AMERICA

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INTRODUCTION

In 2003, the West Virginia State Bar Committee on Unauthorized Practice of Law ("UPL Committee") issued Opinion No. 2003-01, which stated that only attorneys licensed to practice in the state of West Virginia, or persons acting under the supervision of such attorneys, could perform title searches and examinations, provide title reports or opinions, perform real estate closings, or deliver closing documents (collectively, "settlement services"). After the issuance of Op. No. 2003-01, the plaintiff in this case used defendants' services to settle a real estate transaction and, without any allegation that she suffered harm as a result, subsequently sued the defendant for, *inter alia*, the unauthorized practice of law. In *McMahon v. Advanced Title Servs. Co.*, Civ. Act. No. 01-C-121 (Brooke Cty. Cir. Sept. 26, 2002), the Circuit Court of Brooke County, relying on Op. No. 2003-01, held that the non-attorney defendants who had provided settlement services had engaged in the unauthorized practice of law. In its Order, the court certified questions to the Supreme Court of Appeals of West Virginia, so that this Court could determine whether and to what extent Op. No. 2003-01's

sweeping restrictions on the lay provision of settlement services should be adopted. [1] *Id*. at 14-16.

As the UPL Committee was aware when it issued Op. No. 2003-01, this Court "recognizes the public interest as a factor to be considered" when determining what constitutes the practice of law. Op. No. 2003-01, App. B at 6. Accordingly, when determining whether settlement services are the practice of law – and thus may be performed only by attorneys licensed to practice in West Virginia, or by persons acting under the supervision of such attorneys – this Court must consider whether it would be in the public interest to preclude lay persons from conducting these tasks.

To answer this question, this Court must balance the harm to West Virginia consumers that attends the sweeping restrictions on competition found in Op. No. 2003-01 against the harm to consumers that might be caused by allowing lay provision of real estate settlement services. We respectfully submit that the balance weighs heavily in favor of allowing non-attorneys to perform these tasks. Because it will restrict competition, adopting Op. No. 2003-01 is likely to harm West Virginia consumers by

[1] This brief addresses only certified questions 1 - 4. We recognize that West Virginia statutory law requires that certain title insurance companies obtain "a title opinion of an attorney licensed to practice law in West Virginia" before issuing title insurance. W. VA. CODE ANN. § 33-11A-11. This brief does not address the requirements of this provision.

reducing consumer choice and resulting in higher prices for settlement services. At the same time, prohibiting non-attorneys from providing settlement services is unlikely to provide West Virginia consumers with any countervailing benefits.

ARGUMENT

The West Virginia Supreme Court of Appeals has the power to determine whether preventing non-attorneys from performing settlement services serves the public interest. We respectfully submit that a prohibition on lay settlement services does not serve the public interest.

A. THIS COURT CONSIDERS THE PUBLIC INTEREST WHEN DETERMING WHETHER CERTAIN PRACTICES ARE THE PRACTICE OF LAW

The West Virginia Supreme Court of Appeals has the sole power to define the practice of law. *See Lawyer Disciplinary Board v. Allen*, 198 W. Va. 8, 479 S.E.2d 317 (1996); *State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959); W. Va. Code § 51-1-4a (2003). This Court has defined the practice of law as follows:

> In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge or skill.

> More specifically, but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures.

W. VA. COURT RULES ANN., *W. Va. Definition of the Practice of Law* (Michie 2003). This Court, moreover, considers the public interest when determining what constitutes the practice of law. *See id*. ("[t]he principles underlying a definition of the practice of law have been developed through the years in *social needs* and have received recognition in the courts") (emphasis added). As the State Bar argues persuasively in Op. No. 2003-01:

> [T]he definition of the practice of law promulgated by our Supreme Court recognizes the public interest as a factor to be considered. . . . Thus, our Supreme Court has recognized there may be circumstances where the public interest does not demand that certain legal practices always be provided by a licensed attorney.

Op. No. 2003-01 at App. B.

In determining whether the public interest is served by defining a task as "the practice of law," this Court has shown concern about the costs imposed upon West Virginia consumers when they are required to hire an attorney. For example, this Court explicitly has carved out from its definition of the practice of law representation before a justice of the peace and a magistrate. *See W. Va. Definition of the Practice of Law* ("Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as agent before a justice of the peace."); *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 285 S.E.2d 641, 654 (1981) (magistrate courts were designed to be "the people's courts, the purpose of which was to provide the ordinary person involved in small claims litigation with an accessible forum for resolution of disputes, unburdened by the expense and delay usually associated with litigation"). Clear in these decisions is recognition that (1) requiring the public to hire an attorney to perform certain tasks raises costs and concomitantly decreases access to the legal system, and (2) this Court should impose such costs on West Virginians only when the public harm from lay representation justifies it. *See* Op. No. 2003-01 at App. B. ("the Court implies that in this circumstance harm to the public that may result from lay representation before a justice of the peace is not significant or substantial enough to require individuals to hire attorneys"); *id*. ("in

magistrate court, the interests at stake are not so significant that the protection of the public requires that representation of others only be provided by attorneys").

This sound approach, moreover, is consistent with that taken by the courts of other states. The New Jersey Supreme Court, for example, rejected a proposed unauthorized practice of law opinion similar to Op. No. 2003-01 and observed the importance of considering the public interest when deciding whether to restrict non-attorneys from performing real estate settlement functions:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more 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*.
>
> * * *
>
> 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 other words, like all of our powers, this power over the practice of law must be exercised in the public interest; more specifically*, it is not a power given to us in order to protect lawyers, but in order to protect the public*, in this instance by preserving its right to proceed without counsel.

In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995) (emphasis added). *Accord Perkins v. CTX Mortgage Co*., 969 P.2d 93, 99 (Wash. 1999) (resolution "depends on balancing the competing public interests of (1) protecting the public from the harm of the lay exercise of legal discretion and (2) promoting convenience and low cost"); *Frazee v. Citizens Fidelity Bank & Trust Co*., 393 S.W.2d 778, 782 (Ky. 1964) ("The basic consideration in suits involving unauthorized practice of law is the public interest."); *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943) ("The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public . . . .").

B. IT IS IN THE PUBLIC INTEREST TO PERMIT NON-ATTORNEYS TO PERFORM REAL ESTATE SETTLEMENT SERVICES

Competition is the hallmark of America's free market 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.'" *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679,

695 (1978) (citation omitted). The benefits competition brings to consumers of services provided by the "learned professions" are no different from the benefits derived from competition in manufacturing and service industries. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *Nat'l Soc'y Prof'l Eng'rs*, 435 U.S. at 689. When non-lawyers are permitted to compete with lawyers to provide real estate services, consumers are able to choose for themselves their preferred mix of cost, convenience, and the degree of assurance that the service is performed adequately. Indeed,

> [t]he 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.

Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

In a majority of states, non-lawyers compete with lawyers to provide services related to the preparation and execution of a deed, including title searching and issuing title reports, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds. *See*, *e.g.*, Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says "Cease Fire*," 31

CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 264-65 (1997) (reporting that in only eight states is it customary for an attorney to be involved in settlement).

If adopted by this Court, Op. No. 2003-01 and the circuit court's answers to certified questions 1-4 would erect an insurmountable barrier against non-attorney provision of settlement services, depriving West Virginians of the benefits of competition. In general, antitrust laws and competition policy require that such expansive restrictions on competition be justified by a valid need for the restriction and require that the restriction be narrowly drawn to minimize its anticompetitive impact. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986). A prohibition on lay provision of real estate settlement services is not necessary to protect consumers from harm. There is no persuasive evidence that allowing non-attorneys to conduct settlement services has harmed West Virginia consumers in any fashion. Indeed, in the instant case the plaintiff has never alleged that the settlement services performed by the defendants were in any way inferior to those an attorney would provide, or in any way resulted in

any cloud on her title. At bottom, although they may serve to protect West Virginia attorneys' economic interests, the sweeping restrictions on competition found in Op. No. 2003-01 are not justified under a public interest standard.

1. Prohibiting lay provision of real estate settlement services is likely to cause West Virginia consumers to pay higher prices and to have less choice

First, consumers who, but for the prohibitions in Op. No. 2003-01, would choose to hire non-attorneys to perform settlement services will be required to hire an attorney. These consumers are harmed because they are unable to choose the combination of price, quality, and service that they prefer.[2]

For instance, lay settlement services have operated in Virginia since 1981, when the state rejected a proposed bar opinion declaring lay settlements to be the unauthorized practice of law. In 1997, Virginia codified the right of consumers to continue using lay settlement services by enacting the Consumer Real Estate Protection Act, VA. CODE ANN. §§ 6.1-2.19 to 6.1-2.29 (Michie 2003). Proponents of that enactment pointed to

[2] Moreover, not only is Op. No. 2003-01 likely to harm buyers and sellers of real estate, but it also would damage those obtaining closed-end home equity loans or refinancing existing real estate loans. Some lenders for these loans handle settlement services internally without an additional charge.

survey evidence suggesting that lay settlements – including title examinations – in Virginia were substantially less expensive than attorney settlements:

Virginia Settlement Costs			
	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, *Residential Real Estate Closing Cost Survey*, at 5 (Sept. 1996).

In addition to charging lower prices, some lay service providers compete with attorneys on the basis of convenience to close loans at non-traditional times (such as evenings and weekends) and locations (such as the consumer's home). *See Perkins*, 969 P.2d at 100 ("permitting mortgage lenders to prepare loan documents in the way the CTX does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents"); *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money."). *See also* Palomar, 31 CONN. L. REV. at 439-40 ("Home buyers, sellers, realtors, and title professionals

also are reluctant to involve attorneys in residential real estate transactions because they fear the attorney will slow the transaction."). A ban on lay competition could hurt consumers by denying them the right to choose a lay service provider that offers a more attractive mix of services than an attorney.

Second, by curtailing the competitive constraint that lay service providers furnish, Op. No. 2003-01 is likely to enable attorneys to charge more for their services. This means that even consumers who otherwise would choose an attorney over a lay service provider will likely pay higher prices. For example, the New Jersey Supreme Court – after a 16-day evidentiary hearing conducted by a special master – found that real estate closing fees were much lower in southern New Jersey, where lay settlements were commonplace, than in northern New Jersey, where lawyers conducted almost all settlements. Specifically, southern New Jersey buyers unrepresented by counsel paid no legal fees as a part of closing costs, while unrepresented sellers paid about $90; southern New Jersey buyers represented by counsel throughout the entire transaction – including closing – paid on average $650, while sellers paid $350. Contrast this to northern New Jersey, where buyers and sellers represented by counsel paid on

average $1,000 and $750, respectively. *See In re Op. No. 26*, 654 A.2d at 1349.

The Supreme Court of Kentucky also has observed lay closers providing a competitive restraint on attorneys' pricing. In the course of rejecting a Kentucky Bar opinion similar to Op. No. 2003-01, the court observed that "before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher – in some areas as much as 1% of the loan amount plus additional fees." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003). Further, the court noted that "the presence of title companies encourages attorneys to work more cost-effectively." *Id*.

Third, requiring the employment of a West Virginia attorney to perform settlement services is likely to discourage competition from out-of-state lenders and title companies. Lenders outside of West Virginia that compete with in-state lenders for West Virginians' business – such as online lenders – may lack facilities in West Virginia. Instead, these lenders may hire out-of-state providers to prepare deeds and may contract with lay providers in West Virginia to facilitate the closing of the real estate transaction. A ban on competition from anyone other than a licensed West Virginia attorney may attenuate competition among lenders, potentially

leading to higher loan rates for West Virginia consumers. Further, to the extent that Op. No. 2003-01 diminishes competition from online lenders, West Virginia consumers who value the convenience of conducting their entire loan application and approval process via the Internet will be harmed.

2. Prohibiting the lay provision of settlement services is not necessary to protect West Virginia consumers

Perhaps Op. No. 2003-01's sweeping restrictions on competition could be justified on public interest grounds if it were shown that prohibiting lay provision of real estate settlement services protects West Virginia consumers from some type of harm. In fact, in Op. No. 2003-01 the West Virginia Bar recognized that if

> it is going to proscribe lay persons from providing real estate closing services to the public for its own good, *then the harm must be known* and the significance of the harm weighed in the balance of determining what the public interest requires.

Op. No. 2003-01, App. B at 1 (emphasis added).[3] Remarkably, however, in their briefs before this Court and in Op. No. 2003-01, neither plaintiff nor the West Virginia Bar has cited to a single example of consumer harm.[4]

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[3] *See also id*. at 7 ("this Committee should determine exactly what harm to the public and to what risks individuals are exposed when attorneys do not conduct real estate closings").

[4] The West Virginia State Bar merely asserts that "[f]or the protection of the citizens of this State," the Court should agree with Op. No. 2003-01 and prohibit lay persons from

Indeed, when it issued Op. No. 2003-01, the Bar conceded that "[s]o far the Committee has heard only anecdotes." Op. No. 2003-01, App. B at 7. [5]

One of the important justifications for banning lay settlements asserted by the West Virginia Bar was a generalized concern that "buyers and sellers will have questions about the transaction and the documents." Op. No. 2003-01, App. B at 3. This contention lacks any empirical support. Moreover, neighboring Kentucky considered this very issue and – contrary to the Kentucky Bar's assertion that attorneys need to be present at closing to answer legal questions – found that "few, if any, significant legal questions arise at most residential closings." *Countrywide Home Loans,* 113 S.W.3d at 119. Further, the court noted that a list of "typical questions" at a real estate closing – which was nearly identical to one submitted by plaintiff in her summary judgment motion in the instant case[6] – was "excessive," and that "[m]any of the questions listed are similar in that they concern the nature of the estate that will be taken by the buyer, i.e., whether there are covenants, easements, or zoning restrictions involved." *Id*. at 119. The

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performing title examination-related services. Amicus Curiae Br. of the West Virginia State Bar at 11.

[5] Instead, the Bar decided to "*presume*[] that significant harm to the public occurs just by the practice of law by lay persons . . . ." Op. No. 2003-01, App. B at 8 (emphasis added).

[6] *Compare* Pls. Mot. for Sum. J., Ex. G *with Countrywide Home Loans*, 113 S.W.3d at 111-12.

court remarked, moreover, that "most of the witnesses conceded that questions of the nature of those listed . . . are asked, if ever, before the closing, when there is time to resolve any problems."[7] *Id*.

Not surprisingly, other states that have considered this issue have found evidence of consumer harm from lay settlement services lacking. *See In re Op. No. 26*, 654 A.2d at 1346 ("The record fails to demonstrate that the public interest has been disserved by the South Jersey practice [of allowing non-attorneys to perform settlement services, including title examinations and closings] over the many years it has been in existence."); *Perkins*, 969 P.2d at 100 ([T]he risk of public harm is low. Indeed, the Perkinses have never alleged that their loan documents were deficiently drafted or that their legal rights were prejudiced in the least.");[8] *Guardian Abstract & Title*, 575 P.2d at 945, 949 (in county where title companies handled approximately 90 percent of the real estate closings and had been performing service for 20 years, "[t]here was no convincing evidence that the massive changeover in the performance of this service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or

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[7] Importantly, because the vast majority of these questions concern solely "the nature of the estate that will be taken by the buyer," it is unclear how such questions would arise in a home equity loan or refinancing context.

[8] As noted earlier, plaintiff here also never alleged such deficiencies in the services performed by defendant.

inconvenience to the public"); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 1007 (Colo. 1957) ("we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined"). We are aware of no case to the contrary.[9]

Scholarship also supports the conclusion that consumers face no additional risk of harm from turning to lay providers to perform real estate settlement services. One recent study, for example, compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibit lay provision of these settlement services. The specific "goal" of this study was to determine "the threshold question . . . whether members of the public *suffer actual harm* from lay provision of real estate settlement services."

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[9] Although the Georgia Supreme Court recently held that real estate closings are the practice of law, it reached its conclusion without any analysis of the benefits or costs to the public of such a prohibition. *In re UPL Advisory Opinion 2003-2*, 588 S.E.2d 741 (Ga. 2003). Instead, the Court merely asserted that prohibiting lay closings was in the public interest. *See id.* at 742. Nor do other states' decisions to prohibit lay settlement services (cited by the West Virginia Bar in its brief before this Court and in Op. No. 2003-01) contain any evidence that non-attorneys are any more likely than attorneys to harm consumers with shoddy or dishonest service. *See*, *e.g.*, *Ex parte Watson*, 589 S.E.2d 760 (S.C. 2003); *Doe v. McMaster*, 585 S.E.2d 773 (S.C. 2003); *Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc.*, 2001 Mass. Super. LEXIS 431 (Super. Ct. Mass. June 5, 2001); *In re Mid-Atl. Settlement Servs., Inc*., 755 A.2d 389 (Del. 2000); *State v. Buyers Serv. Co., Inc*., 357 S.E.2d 15 (S.C. 1987).

Palomar, 31 CONN. L. REV. at 477 (emphasis added). Based on her empirical findings, the author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law." *Id*. at 520; *accord* Braunstein, 62 MO. L. REV. at 274-75 (discussing a 1989 Ohio study that "indicate[d] that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions").

Of course, some West Virginia consumers may prefer to hire an attorney to provide them with advice or answer legal questions during the settlement process, and it should unquestionably be their right to do so. However, as the New Jersey Supreme Court has concluded, this fact does not justify the complete elimination of lay settlement services as an alternative for consumers. *In re Op. No. 26*, 654 A.2d at 1360. Instead, the consumer deserves the right to evaluate all elements of the bargain and to choose whether to hire a lawyer or a non-lawyer.

3. Op. No. 2003-01 does not guarantee that consumers will receive legal representation

The West Virginia Bar UPL Committee ostensibly issued Op. No. 2003-01 to address concerns that consumers who choose lay settlement providers do not receive adequate legal representation. *See* Op. No. 2003-01 at 5 ("Most importantly, however, it is inherent at the closing itself that buyers and sellers will have questions about the transaction and the documents, which answers necessarily go to their respective legal rights."). Op. No. 2003-01, however, does nothing to guarantee consumers the type of protection the Bar believes they need because it does not require consumers to hire their own attorneys. Rather, it requires only that *some* attorney perform the settlement services.

In most instances where an attorney performs the settlement services, the attorney is likely to represent the lender, not the buyer or seller. *See*, *e.g.*, *Countrywide Home Loans*, 113 S.W.3d at 122 ("the attorney almost invariably works for the lender"). Accordingly, this attorney would not be

in a position to advise consumers with respect to any legal questions that may arise during the course of settlement.[10]

In rejecting a state bar opinion similar to Op. No. 2003-01, the New Jersey Supreme Court noted the problems that could arise if a lawyer conducting a closing offered legal advice to a participant he or she did not represent:

> We note that . . . where the attorneys [advising the buyer or seller] are employed by the title company . . . the basic evil is that the person performing the legal service is in no sense doing it for the *party*, but rather in the interest of the employer, the title company, neither of them (the lawyer or the title company) representing the party, be it seller, buyer or lender. . . . [Such] practice of law would be unauthorized, impermissible, for it is only an attorney retained by and actually representing the client who is authorized to practice law on the client's behalf. What is involved is not simply the license to practice, but the professional duty of loyalty that is included in the concept of permissible representation. Depending on the circumstances, attorneys who act purportedly on behalf of those they do not represent may be engaged in the unauthorized practice of law, or unethical professional conduct, or both.

In re Op. No. 26, 654 A.2d at 1352 n.3 (emphasis in original).[11] Similarly, in the course of rejecting a bar opinion that would have banned lay closings, the Kentucky Supreme Court observed:

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[10] For instance, the lender's attorney would be unable to offer advice with regard to any of the "common legal questions" that petitioner asserts are likely to arise during closing. *See* Ex. G to Pls. Mot. for Sum. J.

> [T]he attorney almost invariably works for the lender, and, therefore, the only attorney-client relationship in the typical . . . closing is between the attorney and the lender. This relationship offers no greater protection to the best interests of either the buyer or the seller.

Countrywide Home Loans, 113 S.W.3d at 122-23.

The mere fact of having an attorney perform settlement functions does not provide buyers or sellers with access to the independent legal advice that the West Virginia Bar appears to consider so important. Consequently, without requiring buyers and sellers to hire independent counsel for real estate transactions, it is unclear how Op. No. 2003-01 will provide West Virginia consumers any greater protection than they already enjoy.

C. THERE ARE LESS RESTRICTIVE ALTERNATIVES THAN AN OUTRIGHT BAN ON LAY SETTLEMENT SERVICES TO PROTECT WEST VIRGINIA CONSUMERS

As a threshold matter it is important to recognize that there already exist safeguards to protect the public from shoddy or dishonest lay settlement service providers. For instance, just as attorneys are subject to malpractice claims – which are "nothing more than . . . legal negligence

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[11] Thus, it is unclear how, as the State Bar argues, it can be the case that "[o]ne of the obligations of *the attorney at the closing* is to be certain that the purchasers or borrowers, many of whom are not sophisticated, understand the documents that they are signing and the legal import of these documents." Amicus Curiae Br. of the West Virginia State Bar at 15 (emphasis added).

claim[s]" – lay service providers are subject to common law claims if their negligence results in consumer harm. *Countrywide Home Loans, Inc*., 113 S.W.3d at 121. Likewise, the market itself acts to assure that lay service providers give consumers the level of quality for which they bargained. As the Supreme Court of Kentucky noted in this regard:

> [T]he nature of our economy is such that incompetent and unethical closing agents, whether attorneys or non-attorneys, will be nudged aside by consumers who will choose the most effective and efficient providers. . . . [W]e recognize that lay closing agents earn their livelihoods from continued business. If they fail to act ethically and professionally, they risk that livelihood.

Id. at 120, 121.

If this Court deems that West Virginia consumers require additional safeguards beyond what the legal system and market already provide, there are alternative ways to protect consumers that restrict competition less than a full-scale ban on lay settlement services. For example, when the New Jersey Supreme Court decided to permit lay settlements, it required written notice that informed the buyer and seller that neither will receive any legal advice during the transaction unless they hire their own attorney; identified the risks inherent in buying or selling real estate without a lawyer's assistance; and explained to them that any decision to hire a lawyer is totally within their discretion. *In re Op. No. 26*, 654 A.2d at 1361-64. Similarly, Virginia

adopted the Consumer Real Estate Protection Act in 1997. VA. CODE ANN. §§ 6.1-2.19 to 6.1-2.29 (Michie 2003). This act permits consumers to choose lay settlement providers that are regulated by the state.

Importantly, both the New Jersey and Virginia measures allow consumers to continue to enjoy the benefits of competition while protecting consumers' ability to choose between using an attorney or a lay settlement service.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should reverse the decision of the circuit court, and that this Court should not adopt the ban on the lay provision of settlement services promulgated by the West Virginia State Bar Committee on Unauthorized Practice of Law in Op. No. 2003-01.

Respectfully submitted,

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