



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

July 11, 2002

E. Fitzgerald Parnell III
President, North Carolina State Bar
Poyner & Spruill LLP
100 North Tryon Street
Suite 4000
Charlotte, North Carolina 28202-4010

Re: Proposed North Carolina State Bar Opinions Concerning
Non-Attorneys' Involvement In Real Estate Transactions

Dear Mr. Parnell:

The United States Department of Justice and Federal Trade Commission urge the North Carolina State Bar Council to adopt two opinions proposed by the Special Committee on Real Estate Closings of the North Carolina State Bar: the Authorized Practice Advisory Opinion on Real Estate Transactions and the Ethics Opinion in Response to the FTC/DOJ Advocacy Letter of December 14, 2001. The Ethics Opinion would permit lawyers to delegate real estate closing tasks to their employees working under their supervision. Under the proposed Authorized Practice Opinion, so long as non-lawyers did not give out legal advice, they would be authorized to perform the ministerial functions of closing a real estate deal: overseeing the execution of documents and disbursement of funds. This Opinion will allow North Carolina consumers to enjoy the fruits of competition between attorneys and non-lawyers: lower prices and more choices in how and when closing services are provided.¹

¹ As we said in our December 14, 2001 joint letter, parties should also be able to conduct their closings unrepresented by counsel if they so choose. Any opinion declaring real estate closings to be the practice of law has the potential to harm North Carolina consumers. We intended the views expressed in

North Carolinians are likely to pay lower prices for real estate closings for at least two reasons. First, consumers who hire lay closers will likely pay less for closing than those who hire lawyers. Second, consumers who hire lawyers will also likely pay less, as competition between lawyers and non-lawyers will likely keep legal fees down. As we explained in our December 14 letter, fees paid by consumers in other States are substantially lower when there is competition from lay closers.² Furthermore, competition between lawyers and non-lawyers will likely increase the choice of services available to North Carolinians: lay closers often settle loans when consumers are off work or at their homes or other convenient locations, which may be particularly important for rural consumers.³

As we said in the December letter, the issue of unauthorized practice of law is one of protecting the public interest. Antitrust law and policy are important forms of consumer protection. The two Opinions adopted by the Bar last fall, Opinions 2001-4 and 2001-8, barely touched on the issue of consumer protection and provided no factual data to support banning all lay closings. Moreover, if a closing is conducted by a lawyer representing the lender, that lawyer has no obligation to advise the buyer about whether the deal is in his or her interest or to provide independent advice to the consumer. The assistance of a lawyer at closing may be desirable in some circumstances, but the choice of whether to hire a lawyer should be the consumer's, as the North Carolina Special Committee on Real Estate Closings has recommended.⁴

Closing loans by mail or the Internet is a common practice for consumers buying property or refinancing loans in North Carolina's beach and mountain resort areas. For these consumers, both the Authorized Practice of Law Opinion stating that lay closings are not prohibited and the Ethics Opinion stating that lawyers need not be physically present to close real estate transactions are important. Together, these Opinions would remove significant barriers to electronic commerce in North Carolina. In addition, out-of-state lenders who may not have facilities in North Carolina to close loans have used North Carolinian lay closing agents for refinancings. The proposed Opinions together would enable them to continue doing so.⁵

The Justice Department and FTC strongly urge the North Carolina State Bar to adopt both Opinions. We do not believe North Carolina consumers would be well served by adopting

our December 14 letter to apply not only to Opinions 2001-4 and 2001-8 but also to the general issue of lay closings, which we understood the North Carolina State Bar was considering addressing in an omnibus opinion. *See* Letter from U.S. Department of Justice and Federal Trade Commission to Ethics Committee of the North Carolina State Bar ("DOJ/FTC Letter") (Dec. 14, 2001).

²*See* DOJ/FTC Letter (Dec. 14, 2001).

³*Id.*

⁴For a fuller discussion of these issues, see DOJ/FTC Letter (Dec. 14, 2001).

⁵*See* DOJ/FTC Letter (Dec. 14, 2001).

only the Ethics Opinion that would allow attorneys to use their lay employees to close deals. It is our judgment that actions short of allowing lay persons to compete with lawyers for the closing business would be insufficient to protect consumers. For this reason, we have opposed attempts in other States to declare real estate closings to be the practice of law while permitting attorneys to have their lay employees conduct the closings.⁶

Free and unfettered competition is at the heart of the American economy. 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.'"⁷ The unauthorized practice of law opinions that have been adopted by the North Carolina State Bar have erected a serious barrier against competition from lay closing services. Because competition from lay closing services will likely benefit North Carolinian consumers of real estate closing services, we urge the Council to adopt both the proposed Ethics Opinion and the Authorized Practice Opinion that permits non-lawyer competition.

The Justice Department and FTC appreciate this opportunity to present our views and would be pleased to address any additional 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

By Order of the Federal Trade Commission,

/s/
Timothy J. Muris
Chairman

/s/
Ted Cruz, Director
Office of Policy Planning

cc: Everett J. Bowman, Esquire

⁶ See Letter from U.S. Department of Justice to Board of Governors, Kentucky Bar Association (June 10, 1999); Letter from U.S. Department of Justice and Federal Trade Commission to Supreme Court of Virginia (January 3, 1997).

⁷*National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)).