

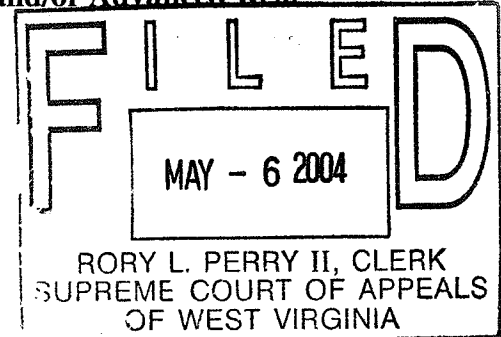
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31706

LORRIE MCMAHON, individually
and As the representative of
THE CLASS OF ALL SIMILARLY SITUATED INDIVIDUALS,
Petitioners

v.

ADVANCED TITLE SERVICES COMPANY OF WEST VIRGINIA,
a West Virginia corporation,
ADVANCED REAL ESTATE SERVICES CORPORATION OF AMERICA,
a Pennsylvania corporation,
NATIONS OF PENNSYLVANIA, INC.,
a foreign corporation authorized to do business in the State of West Virginia, successor in
interest to Advanced Title Services Company of West Virginia and/or Advanced Real
Estate Services Corporation of America,
BRIAN C. UANOWICZ,
PENNY L. ROSE and
JAMES MONROE WHITECOTTON,
Respondents.



JOINT MOTION OF
THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC., AND
THE WEST VIRGINIA BANKERS ASSOCIATION, INC.
FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

COME NOW Your *Amici*, the West Virginia Association of Community Bankers, Inc., (WVACB), and the West Virginia Bankers Association, Inc. (WVBA), pursuant to Rule of Appellate Procedure 19, and move this Court for leave to jointly file an *Amici Curiae* brief in support of Respondents in the above-styled case. As grounds for this motion, your *Amici* aver as follows:

The WVACB and the WVBA each represent the interests of approximately eighty (80) federally-insured lending institutions in West Virginia. All of the members of both the WVACB and the WVBA provide the type of mortgage loan services which are at issue in this

proceeding regarding the unauthorized practice of law. Accordingly, this Court's rulings on the certified questions presented, and the resulting role which attorneys are required to play in West Virginia real estate transactions, will significantly affect the day-to-day business practices and expenses of members of the WVACB and the WVBA.

The members of the WVACB and the WVBA have a vital interest in the Court's ruling on the certified questions presented and wish to bring to the Court's attention important additional circumstances and policy concerns. The Associations believe that their perspectives will be of assistance to this Court in the resolution of the matters before the Court.

In particular, the financial institution members of the WVBA and the WVACB are concerned that this Court's decision could disrupt a well-established, economically-efficient and highly standardized real estate lending process. The use of attorneys in this process has evolved in complete conformity with existing statutory requirements and, with the exception of its recent opinion, the interpretations of the West Virginia State Bar concerning the unauthorized practice of law.

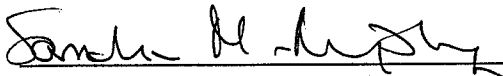
WHEREFORE, your *Amici* request that they be granted leave to file an *Amici Curiae* brief in support of Respondents as the resolution of the issues involved in this appeal will directly effect the Associations' members.

THE WEST VIRGINIA ASSOCIATION OF
COMMUNITY BANKERS, INC.

By Counsel

WEST VIRGINIA BANKERS
ASSOCIATION, INC.

By Counsel.



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Counsel for *Amici*

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 6th day of May, 2004, she served a true and exact copy of the foregoing "JOINT MOTION OF THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC., AND THE WEST VIRGINIA BANKERS ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF OF AMICI CURIAE" via United States mail, postage prepaid, and addressed as follows:

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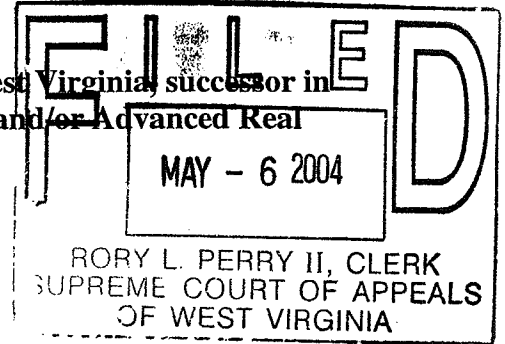
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Estate Services Corporation of America,

BRIAN C. UANOWICZ,
PENNY L. ROSE and
JAMES MONROE WHITECOTTON,
Respondents.



MOTION FOR LEAVE TO EXCEED PAGE LIMITATION
ON BEHALF OF *AMICI CURIAE*

THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. AND
THE WEST VIRGINIA BANKERS ASSOCIATION, INC.

Your *Amici*, the West Virginia Association of Community Bankers (WVACB) and the West Virginia Bankers Association (WVBA), by counsel, move this Court pursuant to Rule 10 of Rules of Appellate Procedure West Virginia Supreme Court of Appeals for leave to exceed the page limitation on their *Amici Curiae* brief. In support of this motion, the WVACB and the WVBA state as follows:

1. The Brief *Amici Curiae*, seeks to have certain of the questions certified to this Court by the September 26, 2003, Order of the Circuit Court of Brooke County, West Virginia, answered negatively so that the financial institution members of the WVBA and the WVACB can continue to conduct their mortgage loan business in their current manner.

2. The Brief *Amici Curiae* quotes and cites several letters from the United States Department of Justice and the Federal Trade Commission to various state bar organizations and others regarding issues similar to and identical to the certified questions in this case.

3. The WVBA and the WVACB respectfully suggests that providing copies of those letters, and other documentation, as an appendix to the *Amici* brief would be useful to the Court but would require the *Amici* brief to exceed the page limitation set forth in Rule 10.

4. The *Amici* brief itself is only approximately 27 pages in length, and therefore the page limitation would be exceeded only for purposes of providing the Court with the appendix.

WHEREFORE, for the foregoing reasons and for reasons that may appear to the Court, the West Virginia Association of Community Bankers and the West Virginia Bankers Association respectfully requests leave to file an *Amici Curiae* brief that exceeds the fifty-page limitation, including addendum.

Respectfully submitted,

THE WEST VIRGINIA ASSOCIATION
OF COMMUNITY BANKERS, INC.

By Counsel

WEST VIRGINIA BANKERS
ASSOCIATION, INC.

By Counsel.

Sandra M. Murphy

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 6th day of May, 2004, she served a true and exact copy of the foregoing "MOTION FOR LEAVE TO EXCEED PAGE LIMITATION ON BEHALF OF *AMICI CURIAE* THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. AND THE WEST VIRGINIA BANKERS ASSOCIATION, INC." via United States mail, postage prepaid, and addressed as follows:

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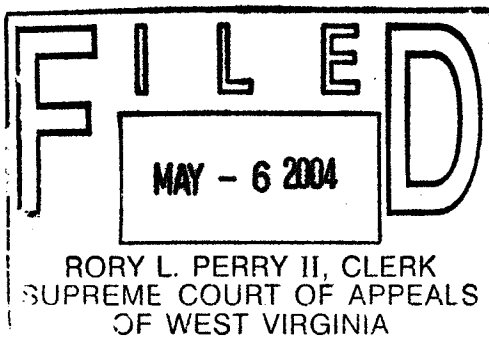
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BRIEF *AMICI CURIAE* ON BEHALF OF
THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. AND THE
WEST VIRGINIA BANKERS ASSOCIATION, INC.



Submitted by:

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I. STATEMENT OF INTEREST

The West Virginia Association of Community Bankers (WVACB) and the West Virginia Bankers Association (WVBA) each represent the interests of approximately eighty (80) federally-insured lending institutions in West Virginia. All of the members of both the WVACB and the WVBA provide the type of mortgage loan services which are at issue in this proceeding regarding the unauthorized practice of law. Accordingly, this Court's rulings on the certified questions presented will significantly affect the day-to-day business practices and expenses of members of the WVACB and the WVBA. The members of the WVACB and the WVBA have a vital interest in the Court's ruling on the certified questions presented and wish to bring to the Court's attention important additional circumstances and policy concerns. The Associations believe that their perspectives will be of assistance to this Court in the resolution of the matters before the Court.

A. The Answers to the Certified Questions Below and the Advisory Opinion of the West Virginia State Bar are Overly Broad and, If Allowed to Stand, Will Dramatically Increase Cost to the Public-At-Large with Little Compensating Benefit or Protection

The WVACB and the WVBA believe that the answers to the certified questions below, and to the extent it is relied on by the Court, the advisory opinion of the West Virginia State Bar, are overly broad. If allowed to stand, these pronouncements will dramatically increase the cost, both financial and non-financial, to the public-at-large, with little compensating benefit to or protection of society.

The financial institution members of the WVBA and the WVACB are concerned that this Court's decision could disrupt a well-established, economically-efficient and highly

standardized real estate lending process. The use of attorneys in this process has evolved in complete conformity with existing legal and statutory requirements, and with the exception of its recent opinion, the interpretations of the West Virginia State Bar concerning the unauthorized practice of law.

B. Activities That Occur in a Typical Real Estate Loan Closing.

To assist the Court in analyzing the certified questions, the WVBA and the WVACB believe that it would be useful to begin by describing in detail the activities that occur in the vast majority of real estate loan transactions. Generally, West Virginia banks make two types of loans involving a lien on the borrower's real estate: loans that are used for the purpose of purchasing the property and involving the transfer of title (a "purchase money mortgage loan"), and loans that are secured by the equity in real estate the borrower already owns where the purpose of the loan is other than purchasing the property and no transfer of title is involved (a "home equity mortgage loan").

A typical real estate loan transaction involving a purchase money mortgage loan actually involves two closings which occur simultaneously: (i) the real estate closing in which the seller of the property transfers title to the borrower and (ii) the loan closing in which the borrower borrows money from the bank to complete the real estate purchase. As discussed more fully below, with respect to the real estate closing between the buyer and seller, banks do not prepare **any** legal documents. The real estate purchase agreement is executed prior to closing typically on a legal form completed by the real estate agent, the seller, and the buyer. The deed transferring the property is prepared by an attorney who typically performs the title work. With respect to the loan closing, as discussed further below, banks will fill in blanks in preprinted

legal forms. Banks also usually complete a business form known as the HUD-1 settlement statement. These two closings, the real estate purchase and the loan, occur simultaneously.

More specifically, the following activities are typical in closing a purchase money mortgage loan, all in compliance with established statutory requirements and, until its recent pronouncement, the advisory opinions of the West Virginia State Bar:

- (i) The financial institution will complete blanks in standardized loan forms which have been reviewed by an attorney, including a note and deed of trust. *See*, W. Va. State Bar Advisory Opinions 93-002 and 93-003 (holding that completion of blanks in a preprinted legal form that does not require any knowledge or skill beyond that possessed by the ordinarily experienced and intelligent layman is not the unauthorized practice of law.)
- (ii) **An attorney** will prepare the deed and conduct a title search. *See*, Committee on Unlawful Practice of Law, Advisory Opinion 2002-01 (holding that title exams, title searches and title opinions are the practice of law). *See*, also, West Virginia State Advisory Opinion 2002-01 (distinguishing the gathering of factual information that appears in the public records from “title exams,” “title searches,” and “title opinions”).
- (iii) If the bank requires title insurance in connection with the loan, the title insurance is issued only after an opinion as to title is obtained from an **attorney** licensed to practice law in West Virginia. *See*, W. Va. Code § 33-11A-11 (statutory requirement applicable only to financial institutions

mandating the use of W. Va. attorneys in connection with the issuance of title insurance).

- (iv) The loan closing will typically involve the tasks of executing completed loan forms. The two closings are conducted with the buyer/borrower, the seller and the bank or its attorney present. One or more realtors also usually attend. *See*, West Virginia State Bar Advisory Opinions 93-002 and 93-003.
- (v) The real estate purchase closing, in which seller transfers title to the borrower typically involves (i) seller's execution of the deed prepared by an attorney, (ii) presentation of the executed real estate purchase agreement, (iii) review and execution of the HUD-1 settlement statement by the buyer and seller, and (iv) disbursement of proceeds pursuant to the HUD-1 settlement statement.

If the loan is a home equity mortgage loan, only a loan closing occurs. There is no real estate purchase involving a buyer and seller. A financial institution will undertake the following activities in closing a home equity loan, all in compliance with established statutory requirements, and until its recent pronouncement, the advisory opinions of the West Virginia State Bar:

- (i) Have a bank employee or a third party contractor report on liens of record in the real estate records. *See*, Definition of the Practice of Law, West Virginia Code, State Court Rules at 705 (providing that legal services performed for the benefit of employer is not the practice of law); W.Va.

State Bar Advisory Opinion 2002-01 (distinguishing the gathering of factual information that appears in the public records from “title exams” “title searches” and “title opinions”);

- (ii) Complete pre-printed loan forms previously reviewed by an attorney; *See*, W. Va. State Bar Advisory Opinions 93-002 and 93-003; and
- (iii) Arrange for execution of the loan documents either at a formal closing or by the borrower for delivery to the bank. *See*, W. Va. State Bar Advisory Opinion 2003-01 (holding simple execution of documents is ministerial and clerical function); and
- (iv) File or arrange for filing of a deed of trust to secure its lien. *See*, Definition of Practice of Law, West Virginia State Rules at 705.

Banks and other financial institutions have prepared their own loan documents and conducted their own loan closings throughout the history of West Virginia. The *Amici* are aware of no statutory or legal authority prohibiting the preparation of pre-printed loan forms by a bank employee or the conducting of real estate loan closings by a bank employee. On the contrary, as demonstrated above, legal precedent establishes the typical activities undertaken by the bank at a real estate loan closing are permitted. Similarly, with respect to title services, the typical activities undertaken by banks do not constitute the unauthorized practice of law. In making a purchase money mortgage loan, banks do not opine as to the status or marketability of title to third parties. In situations where a title opinion is required, banks ensure that a West Virginia attorney is retained. If title insurance is required, West Virginia law mandates that a West Virginia attorney opine as to the status of title. In a home equity mortgage loan, banks

retain third parties or use bank employees to report on liens of record for use by the bank. Banks also routinely file their own home equity loan documents.

C. Potential Financial and Non-Financial Costs if the Answers to the Certified Questions, below, and the Advisory Opinion of the West Virginia State Bar are Allowed to Stand.

The WVBA and the WVACB urge the Court to weigh carefully the current practices of West Virginia financial institutions and the ultimate cost to the consumer of requiring attorneys to conduct real estate loan closings and perform all title services. As demonstrated above, attorneys are appropriately involved in preparing the significant legal documents for a real estate loan closing, i.e. the deed and the title opinion. Moreover, banks do not engage in the title insurance services described in the third certified question. In a purchase money mortgage loan, an attorney or a lay person supervised by an attorney perform these services. In a home equity mortgage loan, no title insurance services are typically required because the borrower already has title to the property. The bank or a third party retained by the bank obtains a summary of factual information from the public records in the form of a title report to confirm the borrower's ownership and the bank's lien position. If a bank or the company providing these services must use an attorney, the financial and non-financial cost will be borne by the public-at-large.

First, actual cost would increase. Consumers who would not otherwise pay for the services of a lawyer at closing, or for a lawyer to provide information as to factual matters of record, would be required to do so. In the alternative, these increased costs may be factored into the borrower's interest rate when the bank prices the loan.

Second, non-financial costs would increase. Currently, home equity mortgage loans are sometimes completed without an actual loan closing. Having already purchased the real estate, borrowers enjoy and expect the convenience of obtaining a home equity loan without having to attend a second closing. The Court must consider the loss of time and convenience to the public-at-large that would inevitably result if attorneys must close every home equity loan.

An equally important factor for the Court to consider is the potential impact its decision may have on industries other than the banking industry and on transactions other than real estate loan transactions. If the court finds that the activities undertaken at a real estate loan closing are the unauthorized practice of law, by logical extension, such activities must also be the unauthorized practice of law in other contexts. For example, it is a well-established practice for real estate agents to complete prepared forms to contract for listing agreements and real estate purchase agreements on behalf of buyers and sellers in the real estate industry. No lawyer is directly involved in these legal transactions. Similarly, car dealers routinely prepare automobile sales agreements and related financing documents, including liens on title, and close automobile purchase transactions without the involvement of attorneys. These transactions are completed through the use of legal forms previously reviewed by West Virginia attorneys. If problems arise in these transactions or in a real estate loan transaction, the parties have established remedies under the West Virginia Consumer Credit and Protection Act, common law negligence claims, and under a variety of existing regulatory structures. *See, e.g.* West Virginia Consumer Credit and Protection Act 46A-1-101 et seq., the West Virginia Residential Mortgage Lender, Broker and Service Act § 31-17-1 et. seq., Real Estate Settlement Procedures Act 12 U.S.C. 2601 et. seq., Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 et. seq., the Truth-in-Lending Act, 15 U.S.C. § 1601 et. seq., The Home Equity Loan Consumer Protection Act of 1988, 15

U.S.C. 1631, The Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1602. Moreover, banking laws and regulations impose stringent consumer credit protection requirements on banks, regulate interest rate and fee disclosure, and include model disclosure forms developed specifically to address consumer protection concerns. *Id. See also*, Regulation Z, 12 C.F.R. § 226.

Historically, the public-at-large has benefited when this Court has judiciously and appropriately recognized that the greater public good is served in permitting lay persons to complete many transactions and engage in certain lending activities without the involvement of a lawyer. The *Amici* urge the Court exercise similar restraint in considering the certified questions.

II. THE CERTIFIED QUESTIONS AND RULINGS

The WVBA and the WVACB will only address the following certified questions which were answered by the Brooke County Circuit Court as follows:

1. Is a lay person, not under the direct supervision or control of an attorney licensed to practice law in the State of West Virginia, engaged in the unlawful practice of law when performing a title examination, search, review or inspection of records, and providing any certificate, notes (handwritten or otherwise), abstract, summary, opinion, guarantee, verbal verification and/or report of any kind or nature as to the status or marketability of real estate title and/or reflecting matters of record?

Answer: Yes

2. Is a lay person, not under the direct supervision or control of an attorney licensed to practice law in the State of West Virginia, engaged in the unlawful practice of law by performing the function of a "closing agent" for mortgage financing or real estate transactions when part of his or her responsibilities as closing agent consist of: (1) explaining, interpreting, giving an opinion and/or advising another on the meaning of terms or principles (legal or otherwise) relevant to the mortgage transaction, or in matters involving the application of legal principles to particular facts, purposes or desires; (2) instructing clients in the manner in which to execute legal documents; and (3) preparing the HUD-1 Settlement Statement, and at times, other instruments related to mortgage loans and transfers of real property?

Answer: Yes

3. Does the preparation of documents evidencing title insurance services [i.e., binders, commitments or policies (owners or lenders)] constitute the preparation of "legal instruments of any character" and/or involve the application of legal principles to facts, purposes, and desires that, subject to the exception provided hereafter, can only be accomplished by attorneys licensed to practice in the State of West Virginia?

Answer: Yes

a. Can a non-lawyer engage in title insurance services if he or she complies with the provisions of West Virginia Code 33-1-10(f)(4) and UAL Opinion 01-02?

Answer: Yes

b. Is a lay person, not under the direct supervision or control of an attorney licensed to practice law in the State of West Virginia, engaged in the unlawful practice of law by

mailing or hand-carrying instruments to the courthouse after the real estate closing for recording when the recordation of instruments takes place as a part of a real estate transfer?

Answer: Yes

III. ARGUMENT

A. With Respect to the First Certified Question, the Court Must Distinguish (i) Between Lay Employees of West Virginia Lenders that Perform Title Services for Their Own Benefit, and Title Services Rendered To or For Others, and (ii) Between Lay Persons That Provide Factual Information to Financial Institutions for Their Own Benefit, and Title Services Rendered to Others

The first certified question asks whether a lay person who performs two specific tasks, while not under the supervision of a licensed West Virginia attorney, is engaged in the unauthorized practice of law. The two tasks at issue are: (i) performing a title examination, search, review or inspection of records, *and* (ii) providing any certificate, notes (handwritten or otherwise), abstract, summary, opinion, guarantee, verbal verification and/or report of any kind or nature as to the status or marketability of real estate title and/or reflecting matters of records. *See*, Order and Certificate of the Circuit Court of Brooke County, West Virginia, September 30, 2003. In considering the questions, the Court must distinguish between title services provided by a lay employee of a bank for use by the bank and those provided to or for the benefit of others. The Court must also distinguish between lay persons retained by a bank as third party contractors to provide factual information in the real estate records for the use by the bank and not for the benefit of others.

In promulgating the definition of the practice of law, the Supreme Court of Appeals of West Virginia found that “[n]othing in this paragraph [defining the practice of law]

shall be deemed to prohibit a . . . bona fide full-time lay employee from performing legal services for his regular employer . . . in matters relating solely to the internal affairs of such employer, as distinguished from such services rendered to or for others.” *See*, Definition of the Practice of Law, West Virginia Code, State Court Rules, 2004 edition at 705. The Court has clearly recognized that there are certain legal services when performed for the benefit of an employer by its lay employee which do not involve the practice of law. West Virginia financial institutions often use lay employees to verify the status of their lien position prior to making a loan. As discussed above, this often occurs when a lender makes a home equity mortgage loan. In this case, the lender’s employee examines the real estate records solely to ensure the bank’s lien position. Similar practices are routinely followed in the case of UCC searches and in connection with liens on personal property (accounts, inventory, machinery, etc.).

When a lender’s lay employee conducts a search or review of real estate records, the lender is not conducting the search “to or for others”. *Id.* Any certificate, notes, abstract, summary, opinion, guarantee, verbal verification and/or report generated as a result of a lender’s search of the real estate records is for internal use only by the lender. The lender’s review of real estate records is necessarily incidental to the loan transaction to which the lender is a party. Accordingly, while the lender may be performing the first of two tasks set forth in the first certified question, – reviewing the real estate records – the lender is certainly not engaging in the second task, providing a report or opinion regarding the marketability or status of real estate title for the benefit of others. *See*, Definition of the Practice of Law, West Virginia Code, State Court Rules, 2004 edition at 705.

In making home equity loans, some banks retain third party contractors to report matters of record to the bank. This activity is not the unauthorized practice of law. In Advisory

Opinion 2002-01, the West Virginia State Bar was “compelled to distinguish the reporting of factual matters of record . . . from the report of legal effect or significance of matters that may affect title to real estate The Committee is of the opinion that gathering factual information that appears in the public records, such as the names of grantors and grantees, dates, prior instruments, or the purport or substance of instruments is **not the practice of law.**” (emphasis added).

More important, in West Virginia, financial institutions and title insurance companies must engage a lawyer if the financial institution requires title insurance in connection with a loan. By statute, a title insurance policy may be issued only if “the title insurance company has obtained a title opinion of an attorney licensed to practice law in West Virginia, which attorney is not an employee, agent, or owner of the insured bank or its affiliates.” W. Va. Code § 33-11A-11(c). In this instance, the legislature has recognized that only attorneys licensed to practice law in West Virginia should opine as to the marketability of title for purposes of underwriting title insurance policies issued for the benefit of a financial institution in connection with real estate collateral. Since arguably the determination of marketability of title requires the application of legal principles to facts, and is therefore the practice of law, West Virginia attorneys perform this service.

B. Lay Employees of West Virginia Financial Institutions, Not Under The Direct Supervision or Control of an Attorney Licensed to Practice Law in The State of West Virginia, Are Not Engaged in The Unlawful Practice of Law by Performing The Function of a “Closing Agent” For Mortgage Financing or Real Estate Transactions

Contrary to the holding below, your *Amici* assert that a lay person may conduct real estate loan closings in West Virginia without engaging in the unauthorized practice of law.

Several sister states agree and hold that real estate activities are not the practice of law.¹ Others classify these activities as the practice of law and then grant non-attorneys limited authority to engage in them.² Nevertheless, Petitioners contend that real estate loan closings conducted by a lay person are the unauthorized practice of law in West Virginia. Similarly, the West Virginia State Bar's Committee on Unauthorized Practice of Law is of the opinion that "in West Virginia, generally, real estate closings constitute the practice of law." West Virgin State Bar UPL Advisory Opinion No. 2003-01.

The WVBA and the WVACB believe this is a gross over-generalization that does not take into account the routine nature of most real estate loan closings. Real estate lending in West Virginia and other states is a highly standardized process. Most consumer real estate loan closings are completed using forms that have been thoroughly reviewed by lawyers to ensure compliance with federal and state law. With respect to title matters, West Virginia law requires that title insurance issued in connection with a loan by a West Virginia bank must include a title opinion from a West Virginia attorney before a title insurance policy is issued. In a purchase money real estate mortgage, credit underwriting standards of West Virginia banks require that title work be performed by an attorney even if title insurance is not being issued. West Virginia

¹ See, *Miller v. Vance*, 463 N.E.2d 250, 253 (Ind. 1984); *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 52 N.E.2d 27, 31 (Mass. 1943); *State Bar v. Kupris*, 366 Mich. 688, 116 N.W.2d 341, 343 (Mich. 1962); *State ex rel. Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381, 385 (Neb. 1941); *Pioneer Title Ins. & Trust Co. v State Bar*, 74 Nev. 186, 326 P.2d 408, 411 (Nev. 1958); *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 575 P.2d 943, 949 (N.M. 1978); *Cain v. Merchants Nat'l Bank & Trust*, 66 N.D. 746, 268 N.W. 719, 723 (N.D. 1936); *Oregon State Bar v. Security Escrows*, 233 Ore. 80, 377 P.2d 334, 340 (Or. 1962).

² See, *Pope Co. Bar Ass'n v. Suggs*, 274 Ark. 250, 624 S.W.2d 828, 830-1 (Ark. 1981); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998, 1005 (Colo. 1957); *Federal Intermed. Credit Bank v. Kentucky Bar Ass'n*, 540 S.W.2d 14, 16 (Ky. 1976); *State Bar Ass'n v. Ass'n of Realtor Bds.*, 93 N.J. 470, 461 A.2d 1112, 1114 (N.J. 1983); *La Brum v. Commonwealth Title Co.*, 358 Pa. 239, 56 A.2d 246, 249 (Penn. 1948); *Bar Ass'n v. Union Planters Title Guar. Co.*, 46 Tenn. App. 100, 326 S.W.2d 767, 781 (Tenn. 1959); *Cultum v. Heritage House Realtors*, 103 Wash.2d 623, 694 P.2d 630, 635 (Wash. 1985); *State ex rel. Reynolds v. Dinger*, 14 Wis.2d 193, 109 N.W.2d 685, 689-90 (Wis. 1961).

financial institutions will not make a real estate purchase money loan unless their intended lien position, usually a first lien, is ensured. Attorneys are used appropriately to protect the banks interest and the interest of the public-at-large during the title work phase of a real estate loan transaction. In a real estate purchase financed by a bank, an attorney is fully involved in determining whether a consumer has marketable title. As discussed more fully below, requiring an attorney to also be present at real estate loan closings does little to further the policy of protecting the public-at-large.

(1) **Requiring an Attorney Licensed to Practice Law in The State of West Virginia to be Present at All Real Estate Closings Will Not Afford the Public Additional Protection.**

The Petitioners devote one section of their brief to identifying and defining the public policy reasons underlying the preclusion of lay persons from the practice of law. *See*, Brief on behalf of Petitioners § C. at 17 (“Petitioners’ Brief”). Among the policy reasons identified by Petitioners are: the “protection of society . . .”; to “protect the public”; to “serve the public right to protection against unlearned and unskilled advice and service in relation to legal matters”; and to establish a legal standard “by which the rights of persons may not be jeopardized or sacrificed by counsel and advice of unlicensed and incompetent persons” Petitioners’ Brief at 17 citing *West’s Annotated Code of West Virginia, State Court Rules*, 2004 and *West Virginia State Bar v. Earley*, 114 W. Va. 504, 109 S.E.2d 420 (1959).

Despite Petitioners’ reliance on the public policy of protecting society, Petitioners fail to cite a single example of harm to the public as the result of a lay person overseeing or participating in a mortgage loan closing. In its most recent opinion regarding many of the issues *sub judice*, including real estate closings, the West Virginia State Bar Committee on

Unauthorized Practice of Law, (“Committee”), also failed to cite any examples of harm to the general public as a result of a lay person’s involvement in a real estate loan closing. Instead, the Committee blithely “presumes that significant harm to the public occurs just by the practice of law by lay persons and holds such practice to be the unauthorized practice of law.” West Virginia State Bar UPL Advisory Opinion No. 2003-01. In contradictory fashion, while discussing its hypothesis of potential harm to the public resulting from lay closings, the Committee states in the same Opinion:

it is recommended [that] the Committee specifically recognize that if it is going to proscribe lay persons from providing real estate closing services to the public for [the public’s] 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.

Id. at Appendix B. The Committee further reasoned that “[t]he Committee must also look at closings by lenders who are a party to the transaction and perhaps distinguish between closings conducted by lenders as opposed to closings conducted by third parties who are not a party to the transaction.” *Id.* Unfortunately, the Committee ignored its own recommendations and neither analyzed the harm to the public from lay closings nor considered whether lenders should be exempted from UPL Opinion No. 2003-01.

The reason Petitioners and the Committee fail to cite any support whatsoever for the proposition that the public is harmed by a lay person’s involvement in a mortgage loan closing is because support for this proposition does not exist. At least one study indicates that requiring an attorney at real estate loan closings does not significantly reduce claims under title insurance policies. The study illustrated that “[t]itle insurers responding had received claims on 19% of the homeowners’ title insurance policies they had issued in the years 1992 to 1996 in our

attorney-closing states and [received claims] on 16% of the homeowners' [title] policies they had issued in our title company-closing states." Joyce Palomar, Professor of Law and Presidential Professor, University of Oklahoma, *The War Between Attorneys and Lay Conveyancers-Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423.

Similarly, the United States Department of Justice and Federal Trade Commission have challenged the assumption that a consumer is harmed if a lay person conducts a real estate closing. In their March 20, 2003 joint letter to The State Bar of Georgia Standing Committee on the Unlicensed Practice of Law, the Department of Justice and Federal Trade Commission observed that "[m]any of the proposed unauthorized practice of law opinions that our agencies have reviewed set forth no factual evidence and little evaluation of how the availability of lay services had actually hurt consumers."³ The Department of Justice believes that preventing lay persons from conducting real estate closings will actually hurt the consumer in at least two ways:

[f]irst, it would force [consumers] who would not otherwise pay for the services of a lawyer at closing to do so Second, the Opinion, by eliminating competition from lay providers, would

³ In support of this statement the Department of Justice and the Federal Trade Commission cites the following letters and the briefs cited therein: Letter from the DOJ and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002) available at <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>; letter from the DOJ and the FTC to Speaker of the Rhode Island House of Representatives, et al. (March 29, 2002); letter from the DOJ and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the DOJ and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Brief Amicus Curiae of the United States of America in Support of Movants Kentucky Land Title Ass'n in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000); letters from the DOJ to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997); letter from the DOJ and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the DOJ and the FTC to Virginia State Bar (Sept. 20, 1996). The letters to the American Bar Association, Rhode Island, North Carolina, and Virginia may be found on the Department of Justice web site at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the FTC's web site, <http://www.ftc.gov>. The DOJ letter to the Kentucky Bar Association is available at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the Brief to the Kentucky Supreme Court at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>. See Appendix.

likely increase the price of lawyers' settlement services, since the availability of alternative, lower-cost lay services currently restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

Letter from Department of Justice to the Board of Governors, Kentucky Bar Association at 4 (June 10, 1999). Prohibiting lay persons from conducting mortgage closings may actually be detrimental to the public:

There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it -- there is a point when that institution must wonder whether it is providing protection or imposing its will.

In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 139 N.J. 323, 357, 654 A.2d 1344, 1360-61 (N.J., 1995) (emphasis added).

Petitioners have cited no support for their assertion that permitting lay persons to conduct real estate loan closings is harmful to the public. As noted above, trained employees of West Virginia financial institutions historically have closed real estate loan transactions without an attorney present unless the bank or borrower chooses to require an attorney. Attorneys are appropriately involved when the marketability of title is involved, which is the point at which the greatest potential harm to the public exists. The *Amici* urge the Court not to require attorneys at real estate loan closings, based on the mistaken belief that such a prohibition is in the public interest.

- (2) **Lay Persons and Lay Employees Can Conduct Mortgage Loan Closings Without Interpreting, Giving an Opinion and/or Advising Another on The Meaning of Legal Terms or Principles Relevant to the Mortgage Transactions.**

Petitioners assert that “[t]he potential legal questions present in a closing are endless.” Petitioners’ Brief at 22. In addition, apparently based on the “endless” *potential* legal questions, the Petitioners assert that “[i]t is inevitable that issues involving legal advice will be raised at a closing.” Petitioners’ Brief at 22. This assumption is flawed and reflects a basic misunderstanding of the typical real estate loan closing. Most activities at a real estate loan closing involve ministerial functions such as the execution of form documents previously reviewed by an attorney, disbursement of loans proceeds, issuance of the title insurance commitment and related administrative matters. The vast majority of real estate loan closings occur without any legal questions being asked.

This point was emphasized by the Kentucky Supreme Court in *Countrywide Home Loans, Inc., et al. v. Kentucky Bar Association, et al.*, 113 S.W.3d 105 (Ky. 2003), wherein the Kentucky Bar Association (“KBA”) attempted to defend its advisory opinion requiring lawyers to be present at real estate closings by arguing that legal questions will inevitably be raised. The Kentucky Supreme Court rejected the KBA’s argument and stated that “[t]he KBA argues that th[e] potential [for legal questions] renders any conduct at the real estate closing by a [lay] person not a party to the transaction the unauthorized practice of law. We disagree.” *Countrywide Home Loans, Inc.*, 113 S.W.3d at 122.

Like the Petitioners in this case, the KBA argued that “it is unrealistic and naive to assume that . . . the settlement agent can present important legal documents to the seller, buyer, borrower, and/or lender at a closing without legal questions being asked and without giving legal advice.” *Id.* To the contrary, the Supreme Court of Kentucky declared that “[t]his statement is a broad overgeneralization, and the evidence described above has exposed its inaccuracy by illustrating that many closings occur without even one question being asked.” *Id.*

The Court further confirmed that “even when questions are asked, most of them concern the financial terms of the mortgage and not the legal consequences of the transfer of property.” *See, Countrywide Home Loans, Inc.*, 113 S.W.3d 105. The Court also made clear that where actual legal questions arise, the lay persons conducting the closings were trained to instruct the questioning party that they should consult counsel and delay the closing until the party has an opportunity to do so. *Id.*

The Supreme Court of Kentucky noted a lay closing agent’s accountability to the parties under agency and tort laws. *See, Countrywide Home Loans, Inc.*, 113 S.W.3d 105. In addition, lay closing agents “who actually answer legal questions or encourage parties to continue with a closing in the face of significant legal issues – i.e., those who *actually engage in the practice of law* – can be criminally sanctioned for the unauthorized practice of law.” *Countrywide Home Loans, Inc.*, 113 S.W.3d at 124 (emphasis in original). Furthermore, “[w]hat we commonly refer to as a ‘malpractice claim,’ is nothing more than a legal negligence claim, and lay closing agents are equally subject to common law negligence claims if their negligence results in damages.” *Id.* at 120. These same remedies are available to West Virginia consumers.

(3) Lay Persons and Lay Employees Who Instruct the Parties to a Real Estate Loan Closing in The Manner in Which to Execute Legal Documents Are Not Engaged in The Unlawful Practice of Law.

Instructing the parties to a real estate closing regarding the manner in which to sign the legal documents involved is not the practice of law. In West Virginia, the definition of the practice of law clarifies that “[i]n general, one is deemed to be practicing law whenever he [or she] or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill.” Definition of the Practice of Law, West

Virginia Code, State Court Rules, 2004 edition at 705. There is no special skill required or need for a legal education to simply instruct another person regarding the execution of a legal document.

Even the Committee agrees that the mere execution of documents at closing is a ministerial or clerical task. In UPL Opinion No. 2003-01, the Committee admitted that “some ministerial and clerical functions occur as part of a real estate closing, i.e., . . . simple execution of documents” West Virginia State Bar UPL Advisory Opinion No. 2003-01 at 5. Similarly, the Supreme Court of Kentucky recognized that “closing events, such as directing a party where to sign a particular document or delivering copies of the signed documents, are equally ministerial in nature.” *Countrywide Home Loans, Inc.*, 113 S.W.3d at 122. The Supreme Court of Michigan agrees, holding that where a lender charges a fee for the completion of standard mortgage documents it “does not constitute the practice of law” *Dressel v. Ameribank*, 468 Mich. 557, 568, 664 N.W.2d 151, 157 (Mich. 2003). See also, *Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864 (Minn. 1988) (holding that a real estate broker did not engage in the unauthorized practice of law by drafting closing documents, providing real estate closing services and charging a fee therefore); *The State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 575 P.2d 943 (N.M. 1978) (filling in the blanks on standard, attorney prepared real estate documents is not the practice of law).

Plainly, instructing the parties to a real estate loan closing regarding the execution of legal documents is a ministerial task requiring no special skill or knowledge and is not “furnish[ing] to another advice or service[s] under circumstances which imply the possession or use of legal knowledge and skill.” Definition of the Practice of Law, West Virginia Code, State Court Rules, 2004 edition at 705. Accordingly, lay persons overseeing the execution of legal

documents by the parties to a mortgage loan closing are not engaging in the unauthorized practice of law.

(4) Lay Persons or Lay Employees Who Mail or Hand Carry Instruments to The Courthouse For Recording When The Recordation of Instruments Takes Place as Part of a Real Estate Transfer Are Not Engaged in The Unauthorized Practice of Law.

The process of mailing or carrying instruments to the courthouse after a real estate closing requires no special skill or knowledge and is, therefore, not the practice of law or the unlawful practice of law. The Minnesota Supreme Court held that a lay person's involvement in ordinary conveyances is not the practice of law. *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 868 (Minn. 1988). As Delaware Justice David A. Jenkins stated in his dissent from the majority opinion in *In re: Mid-Atlantic Settlement Services* "recording the deed and mortgage [does not] involve an exercise of judgment on a legal matter, and thus are not the practice of law." 755 A.2d 389 (Del. 2000). Moreover, when lenders mail or carry documents to the courthouse for recordation as part of a real estate closing, they do so exclusively for themselves to protect their security interests. This Court has expressly recognized that this is not the unauthorized practice of law. See, Definition of the Practice of Law, West Virginia Code, State Court Rules, 2004 edition at 705. In West Virginia, there is no question that lay persons of financial institutions have the authority to file financing statements and related documents under the Uniform Commercial Code. W. Va. Code § 46-9-509. The preparation and filing of these financing statements by lay persons have the same effect as when they are prepared and filed by an attorney. As in the case of real estate loans, prudent lenders use counsel in UCC matters where more complicated lien filings are involved.

From both the lenders' and public's perspective, the filing of a UCC financing statement is as important as the filing of real estate documents in connection with a mortgage loan closing. Nevertheless, the filing of UCC financing statements is not and should not be deemed the practice of law in West Virginia, since there is no special skill or legal knowledge required. Similarly, there is no special skill required in mailing or carrying real estate closing documents to the courthouse for recording as part of a mortgage closing. Accordingly, a lay person is not engaged in the unauthorized practice of law when he or she mails or carries documents to the courthouse for recording as part of a real estate closing.

C. A Lay Person or Lay Employee Who, in Connection With a Mortgage Loan Closing, Prepares a HUD-1 Settlement Statement and Certain Other Instruments Related to Mortgage Loans And Transfers is Not Engaged in The Unauthorized Practice of Law.

In West Virginia, when a lay person "prepar[es] for clients . . . documents requiring knowledge of legal principles which is not possessed by an ordinary layman" it is the unauthorized practice of law. *West Virginia State Bar v. Earley*, 144 W. Va. 504, 520, 109 S.E.2d 420, 431 (1959). However, even the Committee noted in its most recent advisory opinion, "some ministerial and clerical functions occur as part of a real estate closing, i.e., **preparation of the HUD settlement statements . . .**" West Virginia State Bar UPL Advisory Opinion No. 2003-01 at 5 (emphasis added).

Your *Amici* agree that in most cases, the drafting of complex legal documents is the practice of law requiring a trained and skilled licensed attorney to complete the task properly. For this reason, loan documents requiring specialized legal knowledge are prepared by an attorney (e.g. the deed and title opinion). However, where the "drafting" involves the task of filling in blanks on HUD settlement statements or other standardized mortgage loan documents,

no special **legal** skill or **legal** training is required and, thus, it is not the practice of law. Moreover, the HUD-1 settlement statement is a business form, not a legal form. Although some might argue these forms are complicated to complete, they do not require specialized **legal** training.

The Committee has previously addressed this issue and held in Advisory Opinions 93-002 and 93-003 that the filling in of blanks in pre-printed forms for deeds of trust, or other loan documents which does not require knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman is not the unauthorized practice of law. The Indiana Supreme Court also agrees and held that “[i]t is appropriate for bank employees to fill in the blanks on approved mortgage forms which have been prepared by attorneys” *Miller v. Vance*, 463 N.E.2d 250, 252 (Ind, 1984). *See also, Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864 (Minn, 1988).

It is undisputed that mortgage lenders today regularly fill in blanks on form documents that have been drafted or developed by federal agencies, secondary market loan purchasers, and the lenders’ counsel. Filling in the blanks on these pre-drafted forms with information such as the borrower’s and lender’s names, addresses, the interest rate and term of the loan, simply does not pose the same risks as where lay persons actually draft these legal documents. Simply put, the purely ministerial task of filling in of blanks on these types of documents does not rise to the level of the practice of law.

In *State Bar of Michigan v. Kupris*, the Michigan Supreme Court declined to enjoin a real estate broker from filling in the blanks on a standard form. 366 Mich. 688, 694, 116 N.W.2d 341, 343 (1962). The *Kupris* Court said

[i]s the filling out of blanks in standard forms used in property transactions the practice of law in the general acceptance of the term? Clearly one who limits his activities in the manner indicated [filling out standard documents] may scarcely be said to be engaged in the law business or to be holding himself out to the public as an attorney at law.

Id.

Where a mortgage lender completes the blanks in real estate loan transaction forms, the lender does so on its own behalf rather than for others. These documents are prepared to protect the bank's ability to enforce the repayment obligation, to comply with the federal or state regulations imposed on the lender, and to provide the lender with the option of later selling the loan on the secondary market.

In addition, it is against the public interest to require lawyers to fill in form documents. If the banks are required to employ attorneys to fill in the blanks on standard loan documents, the attorneys' fees and related expenses will be passed along to the borrower. Many other jurisdictions have held that "the drafting of documents, when it is incidental to the work of a specific occupation [as where lenders' lay employees fill in of blanks on standard loan documents], is not generally considered to be the practice of law." *Miller v. Vance*, 463 N.E.2d 250, 253 (Ind., 1984) citing *Pope County Bar Association, Inc. v. Suggs*, 274 Ark. 250, 624 S.W.2d 828 (1981); *State Bar v. Guardian Abstract and Title Company, Inc.*, 91 N.M. 434, 575 P.2d 943 (1978); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or. 80, 377 P.2d 334 (1962); *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961); *Ingham County Bar Association v. Walter Neller Company*, 342 Mich. 214, 69 N.W.2d 713 (1955); *La Brum v. Commonwealth Title Co. of Philadelphia*, 358 Pa. 239, 56 A.2d 246 (1948). Therefore, contrary to the holding of the Circuit Court of Brooke County below, completing HUD-1 settlement

statements or filling out the blanks on standardized mortgage documents is not the practice of law.

IV. CONCLUSION

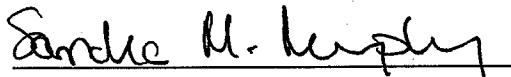
The WVBA and the WVACB urge the Court to consider the important additional circumstances and policy concerns set forth herein when it answers the certified questions presented. The Court's decision could disrupt a well-established, economically efficient and highly standardized real estate lending process without a compelling benefit to the public-at-large. The Court's decision could also affect industries other than the banking industry and transactions other than loan transactions. Moreover, remedies other than expanding the definition of the unauthorized practice of law currently exist under the West Virginia Consumer Credit Protection Act, common law negligence claims, and under a variety of existing federal and regulatory structures. For these reasons, the Court should exercise restraint in answering the certified questions.

THE WEST VIRGINIA ASSOCIATION OF
COMMUNITY BANKERS, INC.

By Counsel

WEST VIRGINIA BANKERS
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 6th day of May, 2004, she served a true and exact copy of the foregoing "BRIEF *AMICUS CURIAE* ON BEHALF OF THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. AND THE WEST VIRGINIA BANKERS ASSOCIATION, INC., via United States mail, postage prepaid, and addressed as follows:

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