STATE REGULATION IMPEDING COMPETITION ON THE INTERNET FOR REAL ESTATE SETTLEMENT AND INFORMATION SERVICES

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I appreciate the Federal Trade Commission's interest in fostering competition among providers of real estate settlement and information services. My company is a leading national provider of title insurance, title information, real estate appraisal and evaluation information and real estate settlement services. The ability to provide faster turn-around times is very significant to our customers. We rely heavily on facsimile technology and couriers. Many of our services use the Internet. It is safe to say that our industry is moving rapidly towards providing faster and cheaper service across the Internet.

At the same time, the Internet represents a significant challenge to the way real estate settlement and information services have been provided. Historically, real estate services have been provided locally. A consumer used a local realtor, obtained a loan from a local lender, and obtained title services from a local lawyer or agent. The appraisal and abstract were obtained from local providers. In many instances, these local providers are protected by state laws that prevent or impede non-local, out-of-state and national competition as well as competition from non-professionals.

Delivery of real estate appraisal and evaluation services, title information services and real estate settlement services can be improved through use of the Internet. State laws and regulations, however, impede the development of Internet applications for these services.

A. Appraisals and Evaluations

Title XI of the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 3331, *et seq.*, and implementing regulations required states to establish appraisal boards for the purposes of licensing appraisers according to federally mandated minimum standards. Significantly, federal banking regulators, acting pursuant to FIRREA, exempted twelve categories of mortgage lending transactions from the requirement that an appraisal be performed by a licensed appraiser. Three of these exempted categories, including mortgage loans under $250,000 and most refinancings, require an "evaluation" not meeting the federally mandated minimum standards. There are several types of "evaluation" products in common use today. Most notably automated valuation models ("AVMs"), drive-bys and broker price opinions ("BPOs"). AVMs are evaluations based on computerized models of real estate values. Drive-bys are exterior inspections of properties with reference to comparable sales.

BPOs are opinions of value provided by real estate brokers. Despite the federal exemption, in at least two instances state appraisal boards have sought to require that licensed appraisers provide evaluations. The state appraisal boards in Oregon and Pennsylvania have asserted that licensed appraisers only can provide AVMs. The issue was resolved in Oregon after federal court litigation in favor of non-appraisers providing AVMs. In Pennsylvania, the issue is the subject of a declaratory judgment action recently filed against the state appraisal board. *Fidelity National information Solutions, Inc. and Market Intelligence, Inc. v. George D. Sinclair, et al* [the members of the Pennsylvania State Board of Certified Real Estate Appraiser], (E.D. Pa.).

Significantly, AVMs are typically provided by out-of-state firms and can easily be transmitted via the Internet. These products meet the requirements of federal law, federal regulators and lenders. Typically, the borrower is required to pay for the appraisal or evaluation. AVMs, drive-bys, BPOs and similar products are available at a fraction of the cost of a full appraisal. Clearly, the opposition to them at the state level is anti-competitive and harmful to the consumer.

B. Settlement Services

State unauthorized practice of law provisions are a major obstacle to competition in residential real estate settlement services. In states such as Connecticut, Delaware, Massachusetts, North Carolina, South Carolina and West Virginia, state legislation, state court decisions or state bar rules require that local lawyers perform some part or all of the settlement process. For example, a recent decision of the South Carolina Supreme Court held that a South Carolina lawyer must supervise the preparation of a title search and examination, prepare real estate loan documents and real estate instruments, supervise real estate closings including disbursements and the recording of instruments. *John Doe v. Charles M. Condon, Attorney General for the State of South Carolina*, No. 25508 (SC August 5, 2002) (rehearing granted September __, 2002). The FTC recently opposed similar provisions in North Carolina and Rhode Island. *See FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar*, December 14, 2001, *and FTC/DOJ Letter to the Rhode Island House of Representatives*, March 29, 2002.

These unauthorized practice of law provisions limit competition from title companies, vendor management companies, realtors, lenders and notaries. These service providers are often innovative and less expensive than lawyers. Competition from these service providers should bring costs down. Moreover, these lay service providers are frequently more willing to accommodate the schedules of consumers. Many lenders and consumers prefer to offer a safe, less costly "signing" alternative. The exclusion of lay settlement service providers and the requirement that a lawyer perform parts of the transaction inhibit innovation. For example, a loan closing is not likely to occur by mail or over the Internet if a lawyer is required to be present at the closing.

The involvement of a lawyer in title and settlement services may be desirable and certainly consumers should have the choice to involve lawyers. There is, however, no empirical evidence to support the hypothesis that lay settlement service providers are more likely than lawyers to make mistakes in the preparation of documents or in

abstracting. Similarly, there is no empirical evidence to support anecdotal claims of bar associations that non-lawyers are more likely to embezzle settlement funds or allow predatory lending. Indeed, the leading academic study of this issue concluded, "the public does not bear sufficient risk from lay provision of real estate settlement services to warrant a blanket prohibition of those services under the auspices of preventing the unauthorized practice of law." J. Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, Conn. L. Rev. (Winter 1999).

C. Title Information Services

Title insurance depends on access to title information. In most states, title information is available at the courthouse and an abstract can be obtained on a transaction basis at a reasonable cost. Several western states, however, have adopted title plant or abstract plant laws for title agents. These laws require a large capital expense either for building a plant of for buying into an existing plant.

In Texas, "Title Insurance Agent" is defined as "a person, firm, association, or corporation owning or leasing and controlling an abstract plant as defined by the Board, or as a participant in a bona fide joint abstract plant operation . . .." Texas Title Insurance Act, Article 9.02. Similar statutes govern title agents in New Mexico (NMAC § 13.14.2.8(A), Arizona (Az. Rev. Stat. 20-1567), Oregon (Or. Stat. § 731.438), Washington (Wash. Stat. § 48.29.040). Oklahoma has a different approach, which achieves a similar result. Oklahoma requires an abstract of title to be prepared before a title policy can be issue. The abstractor (instead of the title agent) is required to maintain an abstract plant.

These states have taken public information and made it available only through private businesses. Moreover, by requiring that the provider of title services own title information through a plant, these states effectively bar many providers from the market. The investment in a title plant does not protect the customer as capitalization requirements for title underwriters or bonding requirements for title agents might. Also, there is no evidence that requiring title plants provides greater protection to the customer.

In each of these real estate services, state laws affect the availability and the cost of the services. While there may have been a valid public interest served by the particular barrier to entry when it was enacted, there is no empirical evidence to support these restraints on trade today. These laws serve to protect entrenched concerns - licensed appraisers, lawyers, and investors in title plants – without a demonstrated public benefit.

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