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VIA TELECOPIER AND REGULAR MAIL

Ms. Carol Johnston, Secretary
Advisory Committee on Professional Ethics
Administrative Offices of the Courts
Hughes Justice Complex
25 West Market Street
P.O. Box 037
Trenton, New Jersey 08625

**RE: Application for a Stay Pending Clarification or
Reconsideration of Advisory Committee on
Professional Ethics Opinion 710**

Dear Ms. Johnston:

Our law firms represent the Mortgage Bankers Association of New Jersey ("MBANJ"), which is an organization dedicated to promoting growth and ethical business practices among its 165 plus members from New Jersey's real estate finance industry. MBANJ submits this application requesting that the Advisory Committee on Professional Ethics ("Committee") clarify or reconsider Ethics Opinion 710 and stay the Opinion's effect pending clarification or reconsideration.

MBANJ requests clarification or reconsideration and a stay because of the serious unforeseen consequences of Opinion 710. The Opinion is premised on the facts provided

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which had a seller and buyer of residential real estate asking their attorneys to amend the existing contract of sale to increase the purchase price and the mortgage contingency in the same amount and for the seller to give the buyer a credit in that same amount at closing. The Opinion found that this was deceptive in that the credit to the buyer was not justified either by having additional property or rights sold to the buyer or "...by a legitimate charge against the seller on account of any actual costs assumed by it and otherwise payable by the buyer."

This language may have been intended to indicate that an increase in the purchase price to provide for a seller's concession which permits for the payment of a buyer's closing or other costs was not deceptive and, therefore, not covered by the Opinion. However, the balance of the Opinion obscures the language sufficiently so that attorneys around the State are now refusing to close mortgage loans containing seller's concessions of any kind! It appears that the emphasis in the Opinion on the alleged misrepresentations in the contract relied upon by investors in determining the size of the mortgage loan is causing this overly broad interpretation of the Opinion.

Unfortunately, the inquirer requesting the opinion did not inform the Committee of the industry standards and practices in New Jersey, as well as nationally, which provide for seller concessions of various types reflected in an increase in the purchase price of the real estate (which must always be justified by an appraisal on a residential mortgage loan). In this regard, one of the most widespread uses of sellers' concessions is in assisting borrowers in the payment of closing costs. These include title costs, commitment fees, surveys, escrows, mortgage application fees, discount points and others. Unfortunately, borrowers cannot always assemble all the money they need for the cash required to pay closing costs as they anticipated and may need to have the purchase price increased to provide the mortgage financing to cover them. The consumers more likely to use seller concessions for closing costs are lower income borrowers and first time homebuyers, who are now being severely impacted because their loans are not being closed in New Jersey.

In terms of the purchase price, it must always be supported by an independent appraisal of the real estate so

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that it is always reflective of the market value of the property. In this regard, the negotiations of price between buyer and seller incorporate many factors and concessions (a seller may allow a buyer credit for certain repairs, their may be various items included in the sale that would be reflected in the price, etc.) and the issue of market value is resolved for investors by the independent appraisal. If the property does not appraise for the contract price or greater, the mortgage loan will not be closed in the first instance. Therefore, the independent appraisal required by all lenders protects those lenders and any secondary investors from any purported deceit as to the true market price of a home.

It is also significant that Fannie Mae and Freddie Mac, the Government Sponsored Agencies (GSE'S) that purchase a large percentage of residential mortgage loans in the United States, specifically allow a seller to contribute up to 3% of the selling price as a seller concession when the Loan To Value Ration (LTV) is 90.1% to 95% (with an increase in the purchase price) and up to 6% when the LTV is 90% or less. In addition, HUD through its FHA program allows a seller contribution of 6% regardless of LTV (with an increase in the purchase price). Therefore, secondary investors are further protected from any purported deceit because they are investing in a market in which they are aware of the nature of the loans and the express permissibility of seller's concessions.

Given these facts, it is imperative that Opinion 710 be stayed pending reconsideration or clarification of the extent to which the Opinion should effectively prevent attorneys from closing mortgage loans containing seller concessions and purchase price increases. See Supplement to Opinion 621, 124 N.J.L.J 1450 (Dec. 14, 1989) (Committee assenting to request for reconsideration and stay of Opinion's effect pending reconsideration). The public harm currently impacting many homebuyers and borrowers, especially low income and first-time home purchasers, greatly outweighs any detriment possibly caused by a stay of the Opinion. This is an emergent situation with attorneys throughout the State refusing to close loans which, prior to the Opinion, were commonplace. Therefore, we respectfully request that the Committee stay the effect of Opinion 710 and permit MBANJ to submit papers in further

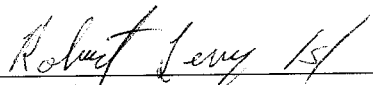
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support of the application for clarification or
reconsideration.

Very truly yours,



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