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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Challenging the Practices Of Multiple Listing Services

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Antitrust enforcement has recently surged in hot-button areas like big tech and labor, and we can now add housing to the mix. In the past two years, the private bar has brought at least eight lawsuits challenging various practices by multiple listing services (MLSs) in the residential real estate brokerage industry. The Department of Justice (DOJ) has also increased its investigation of such practices. These enforcement actions apply both traditional and novel antitrust concepts to one of the most important financial transactions people make in their lives.

Most homes for sale in the United States are listed on an MLS, a database used by real estate brokers to share information about the homes and facilitate purchases thereof. MLSs are owned and operated by regional associations of real estate brokers, and these regional associations are overseen by the National Association of Realtors (NAR). The regional associations require member-brokers to adopt the NAR's rules in exchange for accessing their MLSs. At least three of these rules—commission sharing, "clear cooperation policies" and Internet data exchange rules—are being challenged in federal courts today because they allegedly distort home prices and deprive home buyers and sellers of non-MLS alternatives.

Commission Sharing

In a typical real estate transaction, the home seller retains a seller-broker and the home buyer separately retains a buyer-broker. In a non-MLS listing, the home seller and buyer separately pay and negotiate their broker fees. By contrast, a common MLS rule requires the seller-broker to make a predetermined offer of compensation to the buyer-broker, that is, to "share" its commission with the buyer-broker. This means that the home seller pays the commissions of both the seller-broker and buyer-broker. Other MLS rules prohibit the home seller and buyer from later modifying that commission.

Home sellers claim that these rules artificially inflate the commissions they pay to brokers in violation of §1 of the Sherman Act. Three district court judges have agreed, allowing such claims to proceed to discovery. In *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020), home sellers plausibly stated a conspiracy claim against the NAR and brokerage firms because the commissions remained the same "regardless of the buyer-broker's experience or the value of [his or her] services."

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Id. at 784. Similarly, home sellers in Missouri plausibly stated a §1 claim because NAR-affiliated MLSs controlled much of the residential brokerage market and the rules created a "skewed compensation structure." See *Sitzer v. Nat'l Ass'n of Realtors*, 420 F. Supp. 3d 903, 915 (W.D. Mo. 2019). Massachusetts home sellers plausibly stated similar claims, but unlike *Moehrl* and *Sitzer*, they directly sued the regional realtor association rather than the NAR. See *Nosalek v. MLS Prop. Info. Network*, No. 20-CV-12244-PBS, 2021 WL 5868252, at *5 (D. Mass. Dec. 10, 2021).

Proponents believe that MLSs benefit competition because they facilitate the exchange of information that results in more welfare-maximizing real estate transactions. But these district court opinions draw the line at arrangements that remove the consumer (home seller) from the "ordinary give and take of the market place." *Moehrl*, 492 F. Supp. 3d at 785 (internal citation omitted). Businesses seeking to implement similar digital innovations should understand such antitrust limitations.

'Clear Cooperation' Policy

A second MLS practice—the "clear cooperation policy"—requires member brokers who advertise listings to the public to enter those listings in the MLS within a specified period of time. A pocket listing, also referred to as an "off-market listing," is a property that is not listed on the MLS, but is instead marketed to potential buyers by word-of-mouth or through private listing services that limit the information disclosed about the property.

Two major private listing services, PLS.com and TAN, brought separate suits challenging the NAR's clear cooperation policy as a per se group boycott in violation of §1 of the Sherman Act. The district judges in both lawsuits held that plaintiffs failed to allege antitrust injury. See *PLS.com v. Nat'l Ass'n of Realtors*, No. 22-CV-04790-JWH, 516 F. Supp. 3d 1047, 1060-61 (C.D. Cal. Feb. 3, 2021), rev'd and remanded, 32 F.4th 824 (9th Cir. 2022) (finding that private listing service only alleged harm to the realtors and not to the ultimate "consumers" of home buyers and sellers); *Top Agent Network v. Nat'l Ass'n of Realtors*, 554 F. Supp. 3d 1024, 1034 (N.D. Cal. 2021) (finding that the alleged harm of declining membership did not result from the anticompetitive aspects of NAR's policy). But on April 26, 2022, the Ninth Circuit reversed the dismissal in *PLS*. It first held that the district court erred because the only harm plaintiff had to allege was of the realtors, not the ultimate home buyers and sellers. *PLS.com v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 833-34 (9th Cir. 2022). It then held that plaintiff's allegations had "all the hallmarks of a group boycott": PLS's competitors coerced its realtors not to supply PLS with listings or to do so only on highly unfavorable terms for the express purpose of preventing PLS, a new entrant to the market after decades of little to no competition, from competing with the MLSs. Id. at 834-35. Top Agents Network appealed the dismissal of its case in September 2021 and is no doubt encouraged by the Ninth Circuit's *PLS* decision.

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The Ninth Circuit's decision discussed whether, but declined to conclude that, an MLS constitutes a two-sided market subject to the Supreme Court's *Amex* holding. Defendants argued that *Amex* applies because MLSs showed strong indirect network effects, but PLS argued that Amex does not apply because MLSs do not process *simultaneous* transactions. *PLS.com*, 32 F.4th at 839. The panel held that regardless of the test, plaintiffs satisfied *Amex*'s requirements because the policy harmed both sellers' agents and buyers' agents (while making it clear that harm to both

sides of the market was not always required to state a claim). Id. at 839-40. Antitrust attorneys could apply these principles to platform cases in other subject matter areas.

Internet Data Exchange (IDX) Rules

A third challenged practice—Internet data exchange (IDX) rules—requires brokers to list non-MLS listings separately from MLS listings. A Texas real estate broker, REX, sued the NAR and the consumer-facing website Zillow in March 2021, claiming that Zillow partnered with NAR and MLSs to redesign its website to separate NAR listings (called Agent listings) from non-NAR listings (called Other listings) in violation of §1 of the Sherman Act. The district judge held that REX plausibly stated an anticompetitive agreement because Zillow "affirmatively … *enforced* an allegedly misleading labeling system." *REX-Real Est. Exch. v. Zillow*, No. 21-CV-312 TSZ, 2021 WL 3930694, at *5 (W.D. Wash. Sept. 2, 2021) (emphasis added). REX also plausibly stated anticompetitive harm to home sellers of non-NAR listings: Zillow's preferential display of NAR listings caused non-NAR listings to remain unsold on the website longer, which caused non-NAR brokers to accept lower offers for their home selling clients. See id. at *7. Discovery on the antitrust claims is pending.

This case is significant because it extends conspiracy liability from one platform (the MLS) to another (Zillow's website), rejecting defendants' characterization that Zillow merely acted in its capacity as a data aggregator separate from the brokerage market. Id. at *6. It also serves as a reminder to trade associations like NAR that enforcement of private product standards can result in antitrust liability.

Other Practices

In November 2020, the DOJ sued NAR for various other policies, including one that enabled a buyer broker to conceal from its client the percentage commission it would receive at closing on an MLS listing. The parties settled the claims, but DOJ then withdrew the settlement on July 1, 2021. This action coincided with President Biden's executive order requesting that the Federal Trade Commission (FTC) adopt rules to address anticompetitive practices in the real estate industry, which likely influenced the DOJ's decision to withdraw. See Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021) (addressing "unfair tying practices or exclusionary practices in the brokerage or listing of real estate"). The NAR thereafter took the rare step of suing the DOJ in September 2021 to reverse the withdrawal and set aside the investigation. Compl., *National Association of Realtors v. United States*, No. 1:21-cv-02406-TJK (D.D.C. Sept. 13, 2021). Two months later, the NAR implemented the changes they had agreed to under the withdrawn settlement, such as opening up MLS access to non-MLS subscribers with the home seller's approval. It remains to be seen what other practices the DOJ seeks to challenge.

Real estate professionals, antitrust attorneys, and consumers alike should play close attention as the cases progress.

Conclusion

These cases will need time to complete fact discovery and reach summary judgment, where the law will likely further develop. Because buying or selling a home is one of the most important financial transactions people make in their lives, and MLSs are major platforms that facilitate such transactions, real estate professionals, antitrust attorneys, and consumers alike should play close attention as the cases progress.

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