

Client Alert

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National Association of Realtors To Face Sherman Act Section 1 Claim By Antitrust Division Despite Modifications To Challenged Policy

A United States District Court has allowed the U.S. Department of Justice's Antitrust Division to proceed with a civil antitrust suit filed against the National Association of Realtors for violation of Section 1 of the Sherman Act.¹ In its suit, the Antitrust Division alleged that a policy instituted by the Association favors traditional brick and mortar real estate brokers over internet-based discount brokers, known as virtual office websites or VOWs. The suit claims that Association policies stifle competition from VOWs and deprive consumers of the benefit of competition from an important segment of the brokerage business. The Association sought the dismissal of the claims based on the fact it rescinded and amended one of the policies in question after the Antitrust Division informed the Association that it would sue. The Association also sought dismissal of claims relating to the resulting modified policy on the basis that anticompetitive effects stemming from the modified policy had not been adequately pled.²

According to the complaint, in response to concern by the Association's traditional brokers that VOWs would place downward pressure on commission rates, the Association adopted a policy in May 2003 designed to

limit VOWs' access to Multiple Listing Services ("MLS"). An MLS pools information about property listings from brokers in a particular geographic area and makes the information available to other member brokers, thus giving a property listing wider reach. In most real estate transactions that involve brokers, an MLS listing of the property is a critical element in the property's exposure to the market.

The policy in question, later revised, restricted brokers from providing online MLS listings to their customers without the permission of the broker that submitted the listing to the MLS (the "VOW Policy"). The policy allowed listing brokers to restrict such access to all of their listings, or to restrict access to particular brokers or groups of brokers.

The VOW Policy allegedly made it difficult for VOWs to provide online MLS access to a wide range of listings in a particular geographic area because VOWs would be prohibited from providing online access to information about listings entered by brokers who restricted access to their listings. Prior to the implementation of the VOW Policy, virtually all broker listings submitted to an MLS were shared without restriction and brokers generally were not permitted to withhold their listings from rival brokers.

The Antitrust Division informed the Association in August 2005 of its intention to bring suit challenging the VOW Policy. In response, the Association amended the VOW Policy so that brokers could no longer restrict access to particular brokers or groups of brokers. Under the revised policy, brokers would be required to restrict or permit access to all of their listings, without discriminating against particular brokers or groups of brokers (the "Modified VOW Policy").

¹ *U.S. v. Nat'l Ass'n of Realtors*, E.D. Ill. (Eastern Div.), November 27, 2006 (Case No. 05 C 5140). Available at <http://www.usdoj.gov/atr/cases/f219800/219889.htm>.

² The Association did not seek dismissal of additional claims in the suit concerning alleged degradation of the quality of data-feeds provided to brokers, interference with co-branding relationships, and membership rules limiting access to listings to brokers operating referral services.

Not dissuaded, the Antitrust Division filed suit in September 2005 claiming that both the VOW Policy and the Modified VOW Policy are conspiracies in restraint of trade that violate Section 1 of the Sherman Act. In its suit, the Antitrust Division asked the Court to enjoin the Association from implementing the policies or otherwise engaging in practices that restrict the methods by which brokers may interact with their customers or competitors. The Association moved to dismiss these claims.

The Court refused to dismiss claims relating to the VOW Policy for the following reasons: (i) the Antitrust Division claimed that the two policies are viewed more correctly as parts of one continuing conspiracy among the Association and its members to restrain competition from VOW brokers, (ii) the effects of the VOW Policy likely will continue to impact the competitive landscape despite the fact that it has been rescinded, and (iii) absent an injunction, the potential exists that the policy could be reinstated by the Association.

The Court similarly refused to dismiss the claims relating to the Modified VOW Policy and found that anticompetitive effects had been pled adequately. The Court found that the complaint defined relevant markets and properly pled the Association's market power in those markets. The Court noted that prior to the adoption of the policies, brokers could provide MLS listings to their customers by whatever means they chose, and that the complaint alleged that the Modified VOW Policy substantially altered the pre-existing competitive landscape among brokers. The complaint also included allegations that the policies would make collusion more likely, would provide brokers with a means to punish aggressive competition by VOWs, and were developed with anti-competitive objectives and with recognition of the likely harm to consumers.

The Antitrust Division did not allege that the policies in question are *per se* illegal under the Sherman Act. The claims will proceed instead under a rule-of-reason analysis. Under the rule-of-reason analysis, the Court will make a determination of whether the practices are restrictive, whether they have any pro-competitive justifications, and whether on balance they should be prohibited as imposing an unreasonable restraint on competition.

The Antitrust Division, in response to the Court's ruling, has said that it looks forward to presenting the case at trial and is committed to preserving competition in the real estate brokerage business. The decision is an important development in a case being watched closely by the real estate industry, but has wider implications.

Trade groups and associations in all sectors should look closely at their own policies to be certain that none

intentionally, or unintentionally, limit competition by discriminating against certain classes of market participants. As evidenced by this case, the Antitrust Division, and indeed affected competitors, will continue to follow closely restrictive actions taken by trade groups and will bring suit in appropriate cases. The case is also an important reminder that a trade association may not be able to forestall a government lawsuit by altering a problematic policy if the revision is made only in response to the investigation.

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