

Annual Antitrust Compliance Program and Other Matters

National Association of REALTORS® 2014 Annual Attorney Seminar
Ralph Holmen, Associate General Counsel

I. Department of Justice Antitrust Compliance

1. “An annual program for NAR Member Boards and their counsel that includes a discussion of the antitrust laws (as applied to Member Boards) and this Final Judgment.”

- All MLSs must have adopted the VOW Policy and Rules.
- NAR must direct MLSs to correct any application, adoption, or enforcement of VOW rules that violates the Final Judgment, and to deny insurance coverage from an MLS that fails to do so promptly.
- NAR must provide quarterly reports to DOJ copies of complaints of such violations.
- An MLS may not prohibit or restrict electronic transmission of information that may be provided to consumers in other ways, and may not “unreasonably disadvantage or discriminate against” brokers in their use of VOWs to provide information to consumers.

2. VOW Compliance Issues

- Compliance with and application of the “Participation Rule”:
“...actively endeavor(s) ... to list real property of the type listed on the MLS or to accept offers of cooperation and compensation”
- MLS delay in providing VOW datafeed.
- MLS not including all data on VOW datafeed.
- Issues involving the distribution or use of sold data.

II. MLS Antitrust Issues

A. Association Membership as a Prerequisite to MLS Participation

Summary of MLS Access Litigation:

http://www.realtor.org/law-and-ethics/mls-access-litigation-summary?om_rid=AAAZdw&om_mid=_BUEIqeB88UUt3t&om_ntype=INSWeekly

Marin County Board of REALTORS® v. Palsson, 549 P. 2d 833 (Cal. 1976), *Glendale Bd. of Realtors® v. Hounsell*, 139 Cal. Rptr. 830 (Cal. Ct. App. 1977). (Requiring REALTOR® association membership for MLS access violates the Cartwright (California antitrust) Act.)

Thompson v. Metropolitan Multilist, 934 F. 2d 1566 (11th Cir. 1991). (Requiring REALTOR® association membership for MLS access is an illegal group boycott and unlawful tying arrangement under the Sherman (Federal antitrust) Act if MLS has market power.)

Reifert v. REALTORS® Association of South Central Wisconsin, South Central Wisconsin MLS Corporation, et al, 450 F.3d 312 (7th Cir. 2006) (Requiring REALTOR® association membership for MLS access not an unlawful tying arrangement under Federal law where there are no competing associations; No unlawful group boycott absent evidence that plaintiff was in fact excluded from MLS participation); *Buyer's Corner Realty v. Northern Kentucky Association of REALTORS®*, 410 F.Supp.2d 574 (E.D. Ky. 2006), *aff'd* 2006 WL 2827684 (6th Cir. Oct. 4, 2006) (same); *Prencipe v. Spokane Association of REALTORS®, et al*, No. CV-04-319-LRS, 2006 WL 1310402 (E.D. Wash. May 12, 2006); 2006-1 Trade Cases ¶75,301 (same).

B. Exclusionary Practices

U.S. v. Realty Multi-List, Inc. 629 F.2d 1351 (5th Cir. 1980) (MLS membership requirements of a favorable credit report and business reputation, an active real estate office open during customary hours, and payment of \$1,000 fee for a share of stock are facially unreasonable restraints not justified by the needs of the MLS; but these restraints are unlawful only if MLS has market power in the relevant market.)

FTC v. Realcomp II, Ltd, 635 F.3d 815 (6th Cir. 2011). (Affirming Section 1 violation where MLS employed a “website policy (that) restricted the public dissemination of Realcomp real-estate listings (that) offer consumers limited-brokerage services at reduced costs”; no adequate procompetitive justification offered in defense of that website policy.)

U. S. v. National Association of Realtors®, No. 05C5140 (N.D. IL. Nov. 27, 2006). (Defendant's motion to dismiss denied where government alleged that NAR had adopted policies and bylaws “that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home buyers and sellers.”)

Robertson, et al v. Sea Pines Real Estate Companies, Inc., et al , 679 F.3d 278 (4th Cir. 2012). (Defendant’s motion to dismiss denied where plaintiffs alleged MLS maintained rules that excluded lower-cost brokerages from effectively competing. Those rules prohibited alternative terms in listing agreements and use of a “fee-for-service” business model, required a physical office location in the MLS area and office hours deemed reasonable by the MLS, and required brokers to hold their “primary” real estate license in South Carolina and to reside in the MLS service area. Also, Plaintiff’s allegation of a conspiracy against MLS Board members was sufficient even though the rules were implemented by the MLS, a single entity. Board members adopted the rules as “separate actors pursuing separate economic interests” and the rules are not wholly in accord with the MLS’s economic interests.)

C. Antitrust Standing/Injury

Keller v. Greater Augusta Ass'n of REALTORS®, Inc., 760 F.Supp.2d 1373, (S.D. Ga. 2011) (Granting defendant’s motion to dismiss antitrust claims where Plaintiff failed to allege sufficient injury to competition; Plaintiff alleged only legal conclusions and no facts supporting his claim that the MLS rule at issue adversely affected the relevant market, and also merely alleged harm to him and not to competition.)

TheMLSONLINE.com v. Regional Multiple Listing Service of Minnesota, Inc., 840 F.Supp.2d 1174 (D.MN. 2012) (Granting defendant’s motion to dismiss federal antitrust claims where Plaintiff’s claims that association and MLS breached certain settlement agreements and brokerage firms filed repeated ethics complaints failed to allege any anticompetitive effect, but instead allege only injury to the Plaintiff rather than to competition.)

III. FTC Antisolicitation Litigation/ REALTORS® Code of Ethics Article 16

In the Matter of National Association of Residential Property Managers, Inc., -
<http://www.ftc.gov/enforcement/cases-proceedings/141-0031/national-association-residential-property-managers-inc-matter>

In the Matter of National Association of Teachers of Singing, Inc., -
<http://www.ftc.gov/enforcement/cases-proceedings/131-0127/national-association-teachers-singing-inc-matter>

IV. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F. 3d 359 (4th Cir. 2013), cert granted, 134 S.Ct. 1491 (Mar. 4, 2014).

V. Neighborcity.com Litigation

- *Metro. Reg'l Info. Sys. v. Am. Home Realty Network*, 12-CV-00954-AW, (D. Md.).

Two rulings of particular significance:

722 F.3d 591 (4th Cir. 2013): Confirming that ownership of photos may be transferred to MLS via “click through” terms of use; no need to provide names of photographers on copyright registration application; also acknowledging sufficient creativity in MLS database to allow the database to be copyrightable as a compilation.

Unpublished decision further confirming that an MLS’s use of software it developed, owned, and used to input listing data and to select, coordinate, and arrange the MLS database involved sufficient creativity to allow the database to be copyrightable as a compilation. www.realtor.org/sites/default/files/handouts-and-brochures/2014/legal-seminar-program/12-0954-MRIS-Counterclaim-Decision.pdf

- *Reg'l Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, CIV. 12-965 JRT/FLN, (D. Minn.).

- *Preferred Carolinas Realty, Inc., v. American Home Realty Network, Inc., d/b/a NeighborCity.com*, Civ. Action No. 1:13-cv-00181 (M.D.N.C.).