

OUR GOVERNMENT AT WORK: JUSTICE DEPARTMENT SUES NAR

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The National Association of Realtors ("NAR") has been in negotiation with the United States Department of Justice ("DOJ" or "Justice Department") regarding its IDX and VOW policies for some time. IDX, also known as the Internet Data Exchange policy, refers to the Internet data display of listings, in advertising format, of all of the Brokers affiliated with the Multiple Listing Service ("MLS"). VOWs refer to the business model referred to as "Virtual Office Websites" which have been the subject of several articles written in this column.

NAR Creates New VOW Policy

In response to extensive negotiations between NAR and the Justice Department regarding concerns of the Justice Department that NAR's proposed VOW Rules and Regulations and IDX Rules and Regulations were anti-competitive, NAR developed a revised policy known as the Internet Listing Display ("ILD") policy. The new ILD policy would provide for a blanket opt-in or opt-out by a Broker, i.e., the Broker could choose to put all of his or her listings in or none of the listings into the IDX or VOW formats while preserving for homeowners the right to advise the Broker that they wish to have their particular property publicly displayed on the websites of any affiliate of the MLS. In response, the DOJ has commenced an action against NAR indicating that NAR's previous IDX and VOW policies and the newly adopted ILD policy, which was to have gone into effect as of July 1, 2006, are anti-competitive.

Press Releases Announcing the New ILD Policy

Various press releases were issued by NAR on September 8, 2005 proudly announcing its new ILD Policy and the advances which NAR perceives it reflects. Nevertheless, the Justice Department felt otherwise as is evident by the complaint filed by it against NAR in United States District Court. It has been the Justice Department's position over the past several months that alternative business models should be accommodated in multiple listing services and believes that NAR's Rules are restrictive of innovations in the marketplace.

NAR's position is that the complaint filed by the DOJ is not appropriate. NAR believes that the DOJ's complaint focuses on the old IDX Rules and VOW Rules and not on the newly released ILD Policy. The DOJ is focusing on issues that no longer exist or have

been modified in accordance with the DOJ's wishes, according to NAR, and that the new ILD Policy addresses the concerns the DOJ had with the previous versions.

The Department of Justice Complaint

The complaint prepared and filed by the DOJ on September 8, 2005 requests injunctive relief from the Court, i.e. that NAR be prohibited and enjoined from "requiring or permitting its member boards or the MLS with which they are affiliated to adopt rules implementing" these policies alleging that these policies unreasonably restrain trade, are anti-competitive and are ultimately in violations of the Anti-Trust Law. To view the DOJ complaint please visit <http://www.usodj.gov/atr/cases/f211000/211009.htm>.

The "Opt-Out" Issue

The first issue that the DOJ addresses in its complaint is the "Opt-out" issue. Referring to Section I.3 of the VOW Policy, the DOJ points out that it "...contained an 'opt-out' provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any VOW (a 'blanket opt-out') or on a particular competing broker's VOW (a 'selective opt-out')."

The DOJ explains in the complaint that prior to any implementation or development of the IDX or VOW policy by NAR "...a broker could provide any relevant listing in the MLS database to any customer - by whatever method the customer or broker preferred, including via the Internet." The DOJ further points out that prior to its development of these Internet listing policies "NAR did not permit any broker to withhold his or her client's listings from a rival."

The DOJ provides an example where "...at least in one such instance, an innovative broker discontinued operation of his website because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site." Basically, according to the DOJ, a broker, prior to the implementation of these new policies, could offer his or her customer access to listings via fax delivery, email, personal delivery, regular mail or other means but are now being restricted from doing so as a result of NAR's Policies.

"Anti-Referral" Provision: Not Good!

The second issue that the DOJ addresses in its complaint relates to the “anti-referral” provisions contained in the VOW Policy. The DOJ points out that “Section 11.4.g of the VOW policy contains an ‘anti-referral’ provision that, with minor exceptions, forbids VOW operators from referring their customers to ‘any other entity’ for a fee.” However, the DOJ does point out that there exists a present NAR rule that “...limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet.”

DOJ’s main concern with the “anti-referral” provision is that the VOW policy includes provisions that treat brokers with an Internet-based business model differently from the traditional brick-and-mortar brokers. According to the Justice Department, NAR’s policies simply impose “greater restrictions and limitations” on those brokers who choose to use the Internet to engage in real estate brokerage activities and such restrictions are illegal.

Limitation of Advertising: The “Clean Page” Rule

The third issue the DOJ focuses on in its complaint is the fact that the VOW Policy allows for restrictions in advertising. The complaint cites Section IV.1.b of the VOW Policy which provides that “NAR’s member boards may forbid VOW operators from displaying advertising on any website on which MLS listings information is displayed.” Again, the DOJ points out that there exists “...no NAR rule limit[ing] the ability of traditional brokers to include advertisements in packages of printed listings they provide to their customers.” This restriction, also referred to as the “clean page” rule, treats those brokers who operate Internet VOWs differently from those who do not.

DOJ Is Opposed to Mandatory Provisions and Penalties

One final concern the DOJ addresses in its complaint deals with those provisions in NAR’s IDX, VOW and ILD Policies that “make [the Policies] obligatory and enforceable.” The complaint refers to Section I.4 of the VOW Policy which “expressly forbids NAR’s member boards from adopting rules ‘more or less restrictive than, or otherwise inconsistent with’ the VOW Policy, including the opt-out provisions and the anti-referral provision.” Further, it is apparent from the complaint that the DOJ, in referring to Appendix A to the VOW Policy, is not in favor of terms contained therein which provide “...for remedies and sanctions for violation of the Policy, including financial penalties and termination of MLS privileges.”

The DOJ has made its position very clear. It believes that the NAR’s policies are anticompetitive. The Justice Department states that NAR’s policies

“prevent brokers from guaranteeing customers access through the Internet to all relevant listing information, increases the business risk and other costs associated with operating an efficient, Internet-intensive brokerage, denies brokers a source of high-quality referrals, and withholds from Internet brokers revenue streams permitted to other participants in the MLS. Moreover, the opt-out provisions provide brokers an effective tool to individually or collectively punish aggressive competition by any Internet-based broker.”

Notwithstanding the fact that the VOW and IDX Policies have been replaced by NAR’s new ILD Policy, the Justice Department states that even “NAR’s revised [ILD] policies continue to discriminate against brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers.”

The Justice Department’s complaint basically alleges that “NAR’s adoption of the above-referenced provisions in its VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.”

The DOJ further alleges in its complaint that such behavior by NAR and its members “...will continue to have anticompetitive effects in the relevant markets, including: a) suppressing technological innovation; b) reducing competition on price and quality; c) restricting efficient cooperation among brokers; d) making express or tacit collusion more likely; and e) raising barriers to entry.”

NAR’s Reaction to the DOJ Lawsuit

Laurie Janik, NAR’s chief counsel, states in an article published in Realtor Magazine Online that “[t]he new policy results in part from the discussions NAR held with the Justice Department....” She further states that “[NAR] listened to what [the DOJ] had to say and they helped us come up with a significantly better policy. We’re shocked and disappointed that after all these discussion, they would sue us over a policy that no longer exists.”

According to NAR, the new ILD Policy was created in direct response to the DOJ’s concerns and that it has replaced both the VOW and IDX policies which no longer exist. NAR points out that the entire complaint, except for one sentence referring to the new ILD Policy, refers to concerns that were evident in the IDX and VOW Policies, which have been superseded by the new ILD policy. NAR in a Press Release stated that “[a]fter many months of negotiations, we are at a loss to understand why the Department of Justice would bring a legal action. Many of the changes incorporated in

the new policy are in direct response to concerns they have raised over the course of the two year investigation.”

In response to the Complaint of the Justice Department, the National Association of Realtors has indicated that although it believes it will ultimately prevail in this lawsuit, it recommends that “MLSs will need to wait to adopt the ILD Policy. MLSs that have adopted VOW Rules will need to suspend application and enforcement of the three provisions at issue in the litigation.” Nevertheless, NAR believes that “the new ILD policy is fair, pro-consumer, pro-competitive and accommodates innovation.”

What Does This Foretell for the Future?

Whether or not the Justice Department succeeds in its efforts with respect to this law suit, Realtors are forewarned that the Justice Department is going to continue to pursue its agenda, i.e., to allow all forms of business models to be implemented in the real estate brokerage industry. It is the perception of the Department of Justice that Brokers have a lock on their marketplace which gives them an anti-competitive advantage at the expense of consumers.

Those of us who have been in the business long enough to have seen up markets and down markets know that in markets where real estate is not actively being sold, making a living, let alone staying above water, can be difficult. There appears to be little recognition that the real estate market with whatever faults that it has, has actually sustained the economy during a period of very difficult economic circumstances in various sectors including oil production, lumber and manufactured goods, particularly when viewed in the light of the impact of the manufacturing capabilities in China and the movement of manufacturing to foreign outsourcing. One must wonder why our governmental policy is attempting to crush or impair an industry which has been so supportive of the economy as a whole.