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A Message from Jeffrey Chalmers:

"The More You Know..."

Class Action Suit Against MLS and a Possible DOJ Investigation

The housing crisis put the spotlight, legal and otherwise, on the ways in which home purchases were financed. Financial difficulties weeded out many marginal players as well as unethical ones in the housing finance space, and new regulations, as well as lawsuits over previous methods of doing business, changed the industry dramatically. Now, attention has turned toward the ways in which those homes are sold, and the companies involved in doing it.

Over the last few months there has been some legal activity, mostly directed at **multiple listing services (MLS)**, the entities that aggregate and display listings of homes for sale. These actions are aimed at determining how real estate sales commissions are established and shared and how this may limit competition..

At present, there are two legal fronts. **The first** is a lawsuit, Moehrl v. National Association of Realtors (NAR), et al. filed in March in the U.S. District Court for the Northern District of Illinois. The class action was filed on behalf of homeowners who paid a commission to one of four of the largest broker franchises in the country (Realty Holdings Corp., HomeServices of America, Inc., RE/MAX Holdings, Inc., and Keller Williams Realty, Inc.,) and whose homes were listed on one of 20 different MLS systems in multiple regions of the country that were also named as defendants. The plaintiffs maintain that the defendants conspired to require them to pay the agent representing the buyers of their homes an **inflated commission** in violation of federal antitrust laws.

All 20 of the MLSs named in the suit are controlled by local affiliates of NAR and access to the services is governed by rules set forth in NAR's published policy which includes a Buyer Broker Commission Rule. This rule requires all listing agents to make a blanket, non-negotiable offer of compensation to a cooperating buyer-agent.

National Average Mortgage Rates



	Rate	Change	Points
Mortgage News Daily			
30 Yr. Fixed	6.86%	-0.05	0.00
15 Yr. Fixed	6.31%	-0.02	0.00
30 Yr. FHA	6.32%	-0.06	0.00
30 Yr. Jumbo	7.04%	-0.03	0.00
5/1 ARM	6.53%	-0.02	0.00
Freddie Mac			
30 Yr. Fixed	6.78%	-0.08	0.00
15 Yr. Fixed	6.07%	-0.09	0.00
Mortgage Bankers Assoc.			
30 Yr. Fixed	7.00%	-0.03	0.60
15 Yr. Fixed	6.63%	+0.07	0.61
30 Yr. FHA	6.87%	-0.03	0.92
30 Yr. Jumbo	7.13%	+0.02	0.38
5/1 ARM	6.22%	-0.16	0.60

Rates as of: 7/26

Recent Housing Data

		Value	Change
Mortgage Apps	Jul 10	206.1	-0.19%
Building Permits	Mar	1.46M	-3.95%
Housing Starts	Mar	1.32M	-13.15%
New Home Sales	Mar	693K	+4.68%
Pending Home Sales	Feb	75.6	+1.75%
Existing Home Sales	Feb	3.97M	-0.75%

	Value	Change
Builder Confidence	51	+6.25%

The suit maintains that the MLS "**conspiracy**" forces sellers to assume costs that would belong to the buyer in a competitive market. It also forces them to agree to a high percentage commission because a lower one might disincentivize cooperating agents to show their homes where there are higher commission alternatives. The NAR rule prohibits buyers or their brokers from making home purchase offers contingent on reducing the commission and the agent cannot unilaterally reduce his or her own compensation. In a competitive market, the suit alleges, it would be buyers who paid their own agents' commissions and could negotiate those rates.

NAR recently filed a motion to dismiss the suit, calling it "baseless." The Association argues on its website that MLSs and their accompanying rules encourage both competition and cooperation among brokers to the benefit of the consumer. In a statement regarding the suit, NAR said, "The U.S. Courts have routinely found that Multiple Listing Services are **pro-competitive and benefit consumers** by creating great efficiencies in the homebuying and selling process."

Andrea Riquier, who has written a series of articles on MLS issues for *MarketWatch*, said, "If other home sellers joined the class action, the defendants could find themselves potentially liable for millions of dollars."

The **second front** opened (or at least was disclosed) in late May. The Department of Justice (DOJ) sent a "civil investigative demand (CID)" to CoreLogic requiring disclosure of information from MLS databases and answers to interrogatories. The information DOJ seeks under Section 1 of the Sherman Antitrust Act includes whether or not MLS members can search for properties by the amount or type of **co-broker commission** offered, and any data that may be used to determine how often such searches are done. It also seeks documentation of any rule or agreement that restricts CoreLogic's distribution of MLS data. The deadline for response was May 16.

Rob Hahn, a real estate management consultant and publisher of the *Red Dot* blog, speculates that DOJ and perhaps the Federal Trade Commission (FTC) is going to bring some kind of an enforcement action against some MLS systems, and possibly against NAR "alleging that most of the 'private information' on the MLS is anti-competitive." Why he asks, would the DOJ invoke the Sherman Anti-Trust Act otherwise?

Hahn says other MLS vendors received similar CIDs as that sent to CoreLogic. CoreLogic's came to light when the company disclosed its receipt to its clients only days before the deadline for compliance, warning them it had no choice but to release some of the proprietary information entrusted to them. Other MLS vendors do not appear to have done this, only rumors that they find themselves in the same DOJ boat.

These rather ominous legal activities are occurring in the midst of the emergence of a number of "disrupter" companies onto the real estate sales scene. Redfin, Zillow, and others are **testing new ways** to present properties for sale as well as new agent compensation and commission models. All of this is against the background of the recent expiration of a 10-year deal between DOJ and the NAR.

That settlement arose out of a 2000 suit by an Austin real estate agent, Aaron Farmer, against the Texas Real Estate Commission. Farmer had attempted to start a company which would offer a menu of a la carte services (entering a house into an MLS, designing brochures, supplying a lockbox, etc.) among which customers could pick and pay a fee **in lieu of paying a commission** for a full package of listing/selling services. Before Farmer could hang his shingle, the Commission passed a rule setting a minimum level of services agents could provide.

The case dragged on for some time during which the DOJ entered and negotiated a settlement with the State of Texas. It stopped anticompetitive practices such as limiting new business strategies and agent access to MLS data. That settlement expired last November. Riquier notes there has been some movement in Congress to explore the competitiveness issues and at least two members have called for hearings.

She writes, "The big question now, many industry participants say, isn't whether NAR affiliates will go back to practices that critics say hobbled individuals like Farmer before the settlement came into force. It's a more existential question: if the full weight of the Justice Department and a 10-year stretch of time during which the internet became the de facto way of doing most business hasn't dislodged the traditional practices still entrenched in real estate, is there anything that can?"

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