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Point2 NLS White Paper DOJ v. NAR: A Third Way

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1. Executive Summary

Limited service brokers, 60 Minutes, the financial press, the US Federal Trade Commission and the U.S. Department of Justice (“DOJ”) have joined together to take aim at the REALTOR® commission. Specifically, the DOJ has filed suit against the National Association of REALTOR®s (“NAR”), alleging that policies they have established are potentially anti-competitive. If the relief requested is granted, listings entered into the MLS may no longer be a marketing asset owned by the listing broker, but rather a public asset accessible by anyone who wants to use it as a marketing tool.

DOJ success may have a number of implications for the industry including the following:

- a) The withdrawal of brokers from MLS
- b) Disintermediation of consumers by users of the public asset listings
- c) A reduced incentive for brokers to produce and enter rich listing data into the MLS

Point2 National Listing Service (“Point2 NLS”) serves over 130,000 brokers and agents in 85 countries. It provides NAR and its members with a platform neutral to the outcome of the DOJ suit. Point2 NLS preserves the listing as a marketing asset of the listing broker by providing complete choice and control over exactly where their listing is advertised on the Internet.

If NAR is successful in its defense, MLS and franchises can use Point2 NLS to allow distribution of listings as determined by each broker and facilitate communication between the MLS or franchise and its members.

If the DOJ is successful, Point2 NLS, in addition to its listing syndication capabilities, connects brokers, agents, and their listings without regulatory interference.

This white paper aims to simplify and help readers to more quickly understand the single fundamental legal issue behind the DOJ case against NAR, which seems to get lost in the myriad of documents that have been published on the subject.

2. Background

2.1. Commissions and NAR policies

The primary target of the DOJ is the NAR policy on virtual office websites or VOWs (the “Policy”). Two policies have been created. The “Initial” Policy has been repealed by NAR and a “Modified” Policy has replaced it. The Initial Policy allowed MLSs to implement a listing distribution “opt out” capacity for their members. If implemented, the member may choose to “opt out” of the distribution of their listing generally or to specific members.

Secondary targets are policies or laws against referrals, minimum service requirements and co-mingling of listing data.

2.2. DOJ objectives and concerns

The DOJ has targeted the REALTOR® commission. They argue the efficiency of the Internet should rapidly reduce the REALTOR® commission. Seemingly, they believe supporting limited service brokers facilitates this objective.

Specifically, the DOJ believes that:

- a) Innovation and technology in the real estate industry is suppressed;
- b) Consumers cannot negotiate fair commissions for buying and selling a home;

- c) Home buyers need access to all listings on each and every website with listings to acquire a home for a competitive price; and
- d) Listings are not owned by the listing broker, but effectively a public asset.

2.3. Commentary on DOJ concerns/beliefs

a) Innovation and technology in the real estate industry is suppressed.

Those involved in the real estate industry for the past 5 to 10 years has witnessed extensive innovation and new technology. Information technology suppliers' products have been assertively adopted by real estate professionals. The high turnover of real estate professionals, approximately 15 percent per year, ensures that competition is fierce and, as a result, new technology is embraced.

b) Consumers cannot negotiate fair commissions for buying and selling a home.

This belief is inconsistent with the limited service broker's argument that consumers are sophisticated enough to set the price to buy or sell their home without a professional. Nonetheless, the DOJ alleges that the same consumer is not sophisticated enough to negotiate a fair commission. It seems consumers should be framed consistently by the DOJ given that they are effectively "choosing winners" through government intervention.

c) Home buyers need access to all listings on every website with listings to acquire a home for a competitive price

There are thousands of places on the Internet where listings can be accessed. It is very likely that a given real estate listing exists on at least one, if not hundreds of public websites. Consumers can easily utilize search engines to identify listings in the relevant area or price range.

So why do sites such as Google, Trulia, Yahoo! and Craigslist have so many listings voluntarily posted by real estate professionals? It is because they provide widespread exposure without trying to divert the consumer from the listing asset owner. They maximize efficiency by sending the consumer directly to the listing broker who can provide the most information about the listing.

Competition may result in limited service brokers' business models being unsustainable because large marketplaces provide a better return to the listing owner. It seems the DOJ would be wise to allow this competition to occur naturally and rationally, versus picking winners. History has proven many times that if markets are allowed to operate without intervention, they will become increasingly efficient and effective.

d) Listings are not owned by the listing broker, but effectively a public asset

Most listing contracts explicitly or implicitly state that the listing is property of the listing broker. In essence, the DOJ supports government intervention so a real estate listing becomes a public asset. The fundamental problem with a public asset is market failure. "Free riders" take advantage of public assets without contributing to it. Market failure results from insufficient incentive to produce the public asset.

3. DOJ v. NAR

3.1. Case description

To paraphrase, the DOJ alleges that an association of real estate brokers (NAR) acting in concert are maintaining and enforcing a Policy that could restrain competition. The DOJ cites new business models (limited service brokers) that use the Internet to display listings from NAR members for consumers as the potential victim of the Policy. The DOJ argues the Policy limits exposure of listings and sellers may not be aware of such.

The DOJ case is based on apparent evidence of a few NAR members, specifically those who were part of developing the Policy, stating they want to limit delivering listings to and competition from limited service brokers. From this limited basis, the DOJ assumes a majority of members and NAR itself will advocate such discrimination.

The DOJ believes that, if in fact discrimination does occur, it will suppress technology, innovation and raise barriers to entry.

Secondary DOJ targets include:

- a) Section II.4.g of the Policy that contains an “anti-referral” provision;
- b) Section IV.1.b of the Policy that allows boards to establish a “No-commingling” of listing data policy; and
- c) Minimum service legislation in certain states.

3.2. Potential outcome

Based on the court’s denial of NAR’s Motion to Dismiss, it appears the DOJ crusade may be successful. The key findings in the courts denial of the Motion to Dismiss are:

- a) The motion to dismiss was unsuccessful because if the DOJ proves the material allegations in their favor, the claim will be successful;
- b) The court determined NAR conceded that the Initial Policy was anti-competitive;
- c) The Modified Policy lets MLSs downgrade the quality of the data feed, thereby limiting consumer services;
- d) The Modified Policy denies MLS membership to referral services so Internet based brokers cannot refer customers to other brokers for a fee;
- e) “...NAR regime is backed up by sanctions and...is alleged to promote...express and tacit anti-competitive collusion and to provide a NAR created mechanism to punish overly aggressive competition from any Internet based broker”; and
- f) “Advantages already in hand may be held by methods more subtle and informed, and more difficult to prove...” and “makes express or tacit collusion more likely.”

3.3. Implications

The specific relief the DOJ seeks is that NAR be stopped from:

- a) Requiring or permitting a MLS to adopt rules and implement opt-out provisions;
- b) Requiring rules be implemented about anti-referral provisions; and
- c) Adopting rules that restrict how a broker interacts with his customers, competitors and other entities.

3.4. Listings as a public asset

If the relief is granted, listings entered in the MLS seem to become a public asset. This occurs because the MLS is forced to distribute all listings to all members and nearly any entity with a real estate license can become a member.

This could result in the following:

- a) Withdrawal of brokers from the MLS;
- b) Disintermediation of consumers by users of the public asset listings who are not required to provide value to the real estate transaction process; and/or
- c) A substantially reduced incentive for brokers to produce and enter rich listing data into the MLS.

4. A Third Way: Point2 NLS (Point2 National Listing Service) Remedy of effects

4.1. REALTOR® use of Internet

Point2 NLS is built for real estate professionals to effectively market their listings and themselves on the Internet. It is premised on real estate professionals using the Internet to efficiently and effectively deliver services to consumers. Point2 NLS believes the Internet is the lifeblood of effective brokers. While there may be successful brokers who resist the Internet, it is not a sustainable perspective.

4.2. Listing as an (online) marketing asset

Point2 NLS is based on the fundamental principle that a real estate listing is a marketing asset owned by the listing broker. This maintains an incentive for brokers to acquire, produce and distribute rich listing data to ensure consumers have access to listings that enable effective decision making.

4.3. Point2 NLS Exposure Engine: complete choice and control

With Point2 NLS the listing broker has complete control and choice where any and all their listings are displayed. A member of the Point2 NLS can, if they choose, advertise their listings on any other member site or on the websites of a growing number of syndication partners (23 at present), the likes of which include Google, Craigslist, eBay and Trulia. If members do not want to advertise their listing on a site, they simply uncheck the box beside the member or partner in their Point2 NLS online office.

4.4. Listing Statistics Tracking

When a listing broker advertises their listing on other member and syndication partner websites, Point2 NLS tracks the listing exposure and provides reports to the listing broker. As a result, the listing broker can see which members and partners provide advertising value. The listing broker can then make an informed decision about where they should advertise their listings.

4.5. Seller involvement

Point2 NLS enables seller involvement in the selling process. Listing brokers can provide sellers with a “seller login” to their listing in the Point2 NLS Online Office. Once logged in, the seller can view their listing, augment it with information (text, video, pictures) and review the listing’s success through the Point2 NLS Exposure Engine. This streamlines the communication between the listing broker and the seller.

5. Conclusion

The real estate industry may need to change but this is true of all industries at any time. However, the DOJ is attempting to artificially change the industry. Artificial change is rarely effective in the long-term. Regardless of the outcome, Point2 NLS is available to facilitate the change necessary in the industry.

If NAR is successful in its defence, MLSs and franchises can use Point2 NLS to facilitate the distribution of listings as determined by each broker. It also establishes a real-time communication tool between the MLS/franchise and its members.

If the DOJ is successful, Point2 NLS is available for NAR's franchise, broker and agent members to maintain control of their listings.

MLSs or Franchises can use Point2 NLS at no cost. In fact, they earn revenue through the distributor program. This turns what has traditionally been a cost center into a revenue center for the organization.

Contact Info

For more information on how MLSs or Franchises can utilize Point2 NLS contact:

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