

NEXSEN | PRUET

# ANTITRUST AND THE MLS

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# WHAT WE WILL TALK ABOUT

- Overview of MLS and anti-competitive issues
- History NAR and the Justice Department
- How NAR affiliated MLS operate today
- Columbia and Hilton Head and the issues found in those cases

# MLS—Efficient Market

- The MLS shares listing data to create an efficient real estate market and to provide for commission sharing
- Such cooperation between competitors is automatically suspect to anti-trust regulators
- Participants must never talk about commissions or pricing for services in the MLS context nor should the MLS become involved in those issues
- Requiring services above those mandated by state law can also be a trigger issue



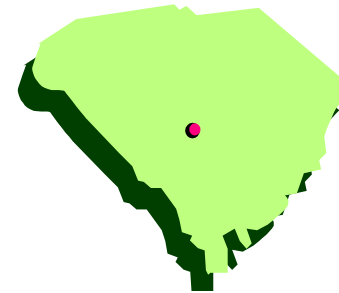
# History-Barriers to Competition

- Government believed savvy internet consumers would use less agent time
- Agents provide internet services at lower commission
- Statements by NAR members and studies by economists seemed to support



# Columbia and Hilton Head

- Government believed initiation fees were “not tied to costs” and randomly raised to present barrier to entry
- Funding the established brokers issue
- Government believed there was discrimination against out-of-area brokers
- Not NAR affiliated so not covered by the Settlement

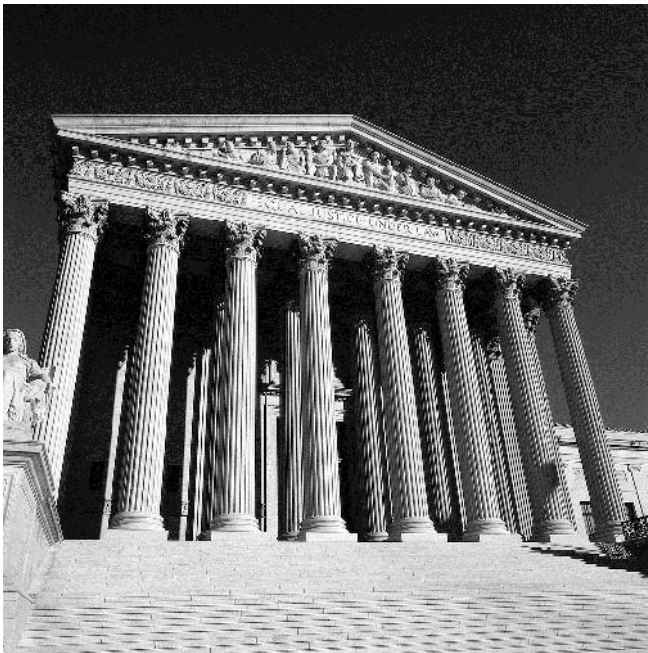


# Background-NAR CASE

- NAR proposed a VOW policy
- Government believed too restrictive, disadvantaged “internet only” brokers and agents
- Negotiations failed



# Lawsuit

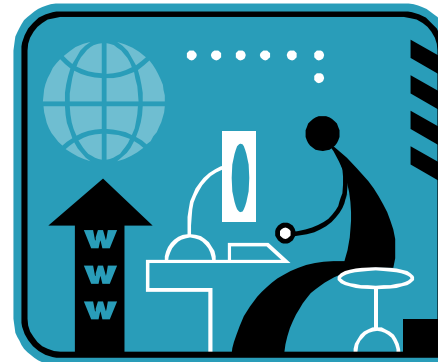


- Filed 2005
- Vigorous litigation
- Lots of costs, set for trial July 2008
- On eve of trial, settlement
- Settlement contains a proposed VOW policy that government believes gives equal treatment



# What is a VOW?

- A virtual agent's office
- Allows consumer to search listing information and customize list of possible properties to view/buy
- Idea is consumer gets a narrowed list of what she wants with less agent time



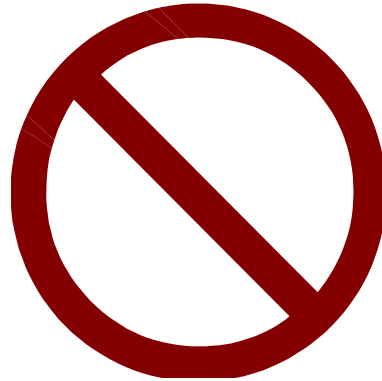
# The Cardinal Principle in NAR Settlement

- Treat VOWs the same way
- If a brick and mortar broker or agent can do something, then a VOW broker or agent can do it
- If a rule is not enforced when broken by a member face-to-face with a consumer, then it should not be enforced when done via VOW
- Remember this principle throughout

# Requirements

- Repeal old ILD/VOW policy within ninety days of settlement
- Review and Change if Needed—
  - Rules on Display
  - Rules on Limitation on Use
  - Rules on IDX—to comply
- Adopt new VOW policy attached to consent decree within ninety days

# Prohibitions in Settlement



- MLS rules cannot
  - Prohibit a broker from operating a VOW
  - Prohibit a broker from providing listing information to customers over VOW that broker could provide by other means of delivery
  - Prohibit/restrict/set \$\$ for referral of customers obtained through a VOW
  - Impose any additional fees for a VOW except “reasonably estimated actual costs” associated with VOW feed

# NAR as NARC



- Settlement changes relationship between NAR and member owned MLS
- NAR must report certain conduct to U.S. DOJ
- Must take greater care in communication with NAR, although for now NAR says informal communications and advice letters not covered, settlement seems very broad

# The New VOW Policy-Participants

- MLS can require certain items in terms of use such as acknowledging MLS ownership of data, copyright, non-commercial use
- May be able to put consent to jurisdiction and injunction in as well



# The New VOW Policy-Participants

- Participants contact information must be prominently displayed on VOW
- Participant must be willing to answer consumer contact/questions
- Must make VOW readily accessible to MLS for monitoring and enforcement



# The New VOW Policy-Participants

- Participants can co-brand
- Participants can refer to other service providers
- Participants can operate more than one VOW (no feed restrictions)
- Participants can allow an Affiliated VOW Partner (AVP) to operate site





# The New VOW Policy-Participants

- Policy contemplates that operator can provide automated valuation plug ins at site
- Policy contemplates blogs and comments by those viewing homes (user provided comment)
- VOW must have reasonable protections against “data scraping” other intrusions on MLS data



# The New VOW Policy-Consumers

- Consumer must register
- Consumer must have a valid consumer-broker relationship under applicable state law
- Registration must include name and e-mail



# The New VOW Policy-Consumers

- Consumer must acknowledge contract with broker
- Consumer must acknowledge bona fide interest in buying real estate
- Cannot copy or redistribute listing information



# New VOW Policy—the Seller



- Seller can opt out of ANY internet listing, but not just VOW (so no realtor.com, broker site, etc.)
- Seller can opt out of user provided content
- Seller can opt out of automated valuation features

# KEY CHANGE

No more broker or agent opt outs from VOW or internet, only the seller can do it and must be for all internet display

Query to all of you--

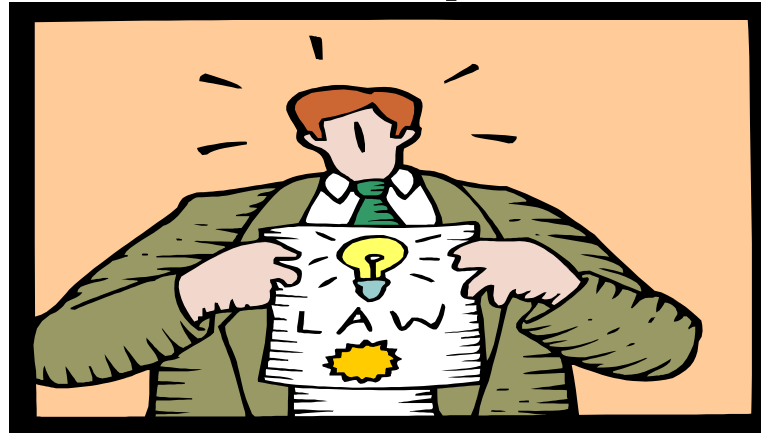
Has this practically changed anything in your dealings with the NAR affiliated MLS in your area?

# What the MLS is Required to Offer

- A persistent feed of all non-confidential listing data
- Confidential means only the data which participants cannot give out by other means
- AVP must be treated the same as a participant



# MLS Options



- MLS need not provide expired, withdrawn, or pending listings (unless bricks and mortar broker can)
- Need not provide sold data (unless available from public record—it is in both Carolinas)
- No compensation offered, listing agreement, seller contact information **UNLESS** non-VOW participants can make these available to consumers
- Pass on reasonably estimated actual costs



# Focus of Hilton Head and Columbia Lawsuits

- Different from NAR lawsuit, virtual office issues raised but only as part of case
- Real focus more traditional barrier to entry case
- Accused of unreasonable entry and maintenance fee
- Discrimination against outsiders and discounters



# The Final Issues for Settlement

- In Columbia it was “discriminatory rules”
- Required brokers to perform a prescribed set of services even if the broker’s customer didn’t want him to in order to save \$\$
- Gave MLS ability to exclude brokers from outside Columbia who could offer innovative brokerage options—the committee interview
- Only charge reasonable fees for initiation and other services
- Settlement eliminated these rules and enjoined adoption of similar ones in future

# Final Issues for Settlement

- In Hilton Head it was also rules, but of a different sort
- Member must have a physical office, reside in service area, and operate MLS approved hours
- Entrance requirements on background, recommendation from three members
- MLS Board could adopt commission guidelines (per se) and discriminate against on-line only brokerages
- Consent decree to abandon these rules and not put similar ones in place

# Settlement not the End

- In January of last year the United States filed a motion to enforce settlement and have CMLS decrease its initiation fee
- Fee dropped from \$2500 to \$700
- DOJ stated investigating Hilton Head's fee as well
- Idea here—fee must be tied to reasonable estimate of cost to add a member



# Follow on Private Lawsuits



- Not unusual for private class actions to follow US DOJ enforcement
- Abney v. MLS of Hilton Head Island
- Boland v. CMLS
- One dismissed with leave to re-file, the other nothing filed since July
- Stay tuned for more...

# General Discussion/Questions



- What do you think?
- Questions?

# Thank You!

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