Will the real estate industry go back to the Dark Ages after 2018?

Mark your calendars: one year from tomorrow, the way shoppers currently search for homes online, and the way brokerages like Redfin can present home listings to consumers, could change in significant ways.

That's because November 18, 2018, will mark the expiration of a critical agreement reached between America's preeminent real estate trade group, the National Association of Realtors (NAR), and the United States Department of Justice (DOJ), where I previously served in the Antitrust Division. Among the cases I worked on was the DOJ investigation into NAR.

To understand why the DOJ investigated and eventually sued NAR, a little recent history is in order: On May 17, 2003, after extended debate throughout the real estate industry, NAR adopted a policy to govern the use of listings data by brokers who wanted to serve listings and engage with consumers over the internet. Recall that this was just after the "dot com" boom, and the internet was still a relatively new platform to most businesses and consumers.

At this time, some of more forward-looking brokers sought to use what NAR called "virtual office websites" (or "VOWs") to manage interactions with customers. Today, consumers are more familiar with VOWs in the form of large multi-state online brokerages like Redfin and Compass, as well as smaller local brokerages, which allow consumers to search for homes for sale or rent in given location, see all the critical listing information we've now come to expect—prices, size in square footage, number of rooms, photos, etc—and comparison shop.

But NAR's-so called "VOW policy" imposed restrictions on how these VOW brokers could access listings data from the myriad multiple listing services (MLS) across the United States—the local and regional databases where brokers have long initially listed homes for sale or rent. At the same time, the VOW policy exempted other "traditional" brokers, those who weren't using VOWs, from these restrictions.

Given this disparity, the Antitrust Division of the U.S. Department of Justice ("DOJ") launched an investigation whether the VOW policy harmed competition and violated the antitrust laws, and eventually concluded that it had, suing NAR in 2005, to block implementation of its VOW policy and to ensure that innovative real estate brokers would be allowed by NAR and MLSs to compete on even footing with brokers operating in more traditional ways.

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The DOJ's litigation against NAR settled in 2008 only days before trial was scheduled to begin in federal court in Chicago. To settle the case, the DOJ and NAR negotiated a "consent decree" under which NAR committed that its affiliated MLSs would not discriminate against or impede the operations of brokers using VOWs to deliver brokerage services to customers. On November 18, 2008, the federal judge overseeing the case entered the consent decree as an enforceable court order, which meant that if NAR or its MLSs violated the terms established in it, NAR could be subject to penalties for being in contempt of court.

VOW, that's what I call real estate

In the late 1990s, as businesses in a variety of industries were discovering ways to harness the power of the Internet to deliver services in new and more-efficient ways, brokerages such as eRealty (later acquired by Prudential, now Berkshire Hathaway Home Services) and zipRealty (later acquired by Realogy) sought to do the same in the provision of residential real estate brokerage services.

Both Realty and zipRealty developed password-protected websites through which registered customers and prospective clients could submit requests to see information about properties listed in the brokers' MLSs, and through which both delivered search results–rather than conveying listings via methods used by traditional brokers (hand delivery, mail, fax, or e-mail).

These and other brokerages with similar websites–which NAR later began calling "VOWs"–discovered that, not only did many consumers appreciate the opportunity to conduct much of the initial market education and home-search process on their own, the use of VOWs made their agents significantly more productive.

With VOWs, agents no longer needed to spend as much time searching the MLS listings databases on behalf of their clients and, more importantly, their face-to-face engagement with buyers began at a time when clients were already educated about the market and were relatively close to making a purchase decision. Agents converted VOW-qualified leads into closed transactions at an unusually high rate.

How NAR used its VOW policy to disadvantage internet-savvy brokers

Predictably, the introduction of VOW-based business models raised concern in the real estate brokerage industry, with some predicting that innovative brokers rocking the boat would cause large brokers to leave MLSs by serving listings directly to consumers on the internet, and ultimately destroy the MLS system.

In Austin, Texas, the local MLS responded to the alarm by trying, without success, to shut down eRealty. NAR then instituted a legislative process to examine and develop policy positions concerning VOWs, which culminated in its adoption of the VOW Policy in May 2003.

In addition to imposing a number of specific requirements on the look and feel of brokers' VOWs and granting MLSs intrusive inspection rights, the VOW Policy also included significant restrictions that impaired the ability of brokers to rely on VOWs as a central component of their delivery of brokerage services.

Although NAR's MLS rules granted brokers operating without VOWs essentially unfettered rights to search the entire MLS listings database and share listings information with prospective buyer customers, the VOW Policy permitted listing brokers to "opt out" of allowing their listings to be delivered to customers through a VOW.

As the DOJ later alleged in its lawsuit, this opt-out right fundamentally undercut the efficiency benefits offered by the use of VOWs. Because potential buyers want to see all MLS listings meeting their search criteria, and would not be satisfied working with a broker who could supply only a subset of properties in which the buyer might be interested, brokers with VOWs would need

to separately find and deliver to buyers any opted-out listings.

The VOW Policy also took aim at the activities of brokers who generated more VOW-qualified leads than they could serve on their own, and who sought to refer those leads to other brokers, in some cases in return for a referral fee. NAR's VOW Policy flatly prohibited those brokers from charging referral fees for the extra VOW-qualified leads they gave away to their peers.

NAR's IDX sought complete control of online listings data

Although NAR attempted in its VOW Policy to constrain the use of VOWs, it also understood that consumers would increasingly expect to be able to use the Internet to find information about homes for sale. NAR's IDX ("Internet Data Exchange") policy attempted to address this growing consumer demand, but under conditions that kept the Internet display of listings under close control of MLSs.

In contrast to VOWs, through which brokers delivered brokerage services, including sharing complete listings information, NAR and its MLSs established IDX display as a vehicle through which listing brokers could advertise their property listings, much as they would in their local newspapers or on flyers posted in the windows of their offices.

Because the listing broker controls the public advertising of its own listings, consumers visiting brokers' IDX websites can see only listings authorized for display by listing brokers. Moreover, the breadth of information about each property that brokers can share with consumers through IDX sites can be restricted by MLS rules to only a subset of the information that is contained in the MLS, and that brokers are allowed to share with clients.

In practice, most brokers elect to allow their listings to be displayed on IDX websites and MLSs now offer for IDX display most of the data they collect–including even sold data. But because IDX coverage is not universal and always remains subject to limitations by listing brokers or restrictions by MLSs, IDX was not an adequate solution (and still remains an inadequate solution) for brokers seeking to build businesses around the delivery of brokerage services through VOWs.

How the consent decree created the modern home-shopping experience

The DOJ and NAR settled their lawsuit in 2008 when NAR agreed in the consent decree that its affiliated MLSs could not discriminate against the use of VOWs to deliver brokerage services, and that they were required to provide access to complete MLS listings information for delivery to consumers through their VOWs.

NAR also agreed not to restrict the referral by brokers of VOW-qualified buyers, and to allow

brokers to align with technology companies who could operate VOWs (using the complete listing data to which the brokers themselves were entitled) on their behalf.

On November 18, 2008, the federal judge in Chicago overseeing the DOJ's case against NAR signed the consent decree through which the DOJ and NAR settled their lawsuit. As with any federal court order, there can be serious penalties for noncompliance. For willful violations of the consent decree, the judge has the power to punish NAR by holding it in contempt and imposing sanctions. For less-egregious violations, the DOJ could ask the judge to order NAR to bring its (or MLSs') conduct into compliance.

NAR evidently understood the stakes and, in the nine years since the entry of the consent decree, the DOJ never sought the intervention of the court to ensure NAR's compliance. NAR appears to have upheld its part of the bargain in settling the lawsuit, and brokers (and related service providers with which they aligned) have generally succeeded in using VOWs to provide brokerage services–including access to complete MLS listings information–to customers. Whether each of NAR's over 700 affiliated MLSs are also doing their part is less certain and likely known only by brokers seeking to innovate and compete in their local markets. We can only hope so.

What consumers stand to lose come November 2018

On November 18, 2018, the ten-year consent decree will expire. At that point, NAR and its MLSs will no longer be compelled by federal court order to support VOW-based business models. A radical retreat from the status quo is unlikely. Consumers now expect to find information on the Internet about properties listed for sale and brokers and MLSs have undoubtedly also become accustomed to widespread dissemination of listings information as a market reality.

But the expiration of the consent decree will mean that NAR and its MLSs will face once again the test they failed in 2003. They could seek to impose narrow but substantive restrictions on the Internet delivery of brokerage services that don't apply equally to non-Internet based environments. This would be unwise.

The experience in the residential real estate industry since the settlement of the DOJ's litigation with NAR put to rest any serious claims that the dissemination of complete MLS data over the Internet was likely to lead to broker defection from MLSs and imperil the MLS system.

The results have instead been positive, with brokerages like Redfin offering state-of-the-art technology tools to consumers demanding a modern approach–without crowding out other more traditional business models and denying consumers looking for high-touch service the opportunity to find brokers willing to work with them in more traditional ways. Consumers have also benefitted as businesses involved in mortgage financing or other adjacent services have established relationships with real estate brokers with VOWs to facilitate a seamless end-to-end experience for homebuyers.

In addition to potentially inviting a new investigation and possible enforcement action by the antitrust agencies, the introduction of new impediments to the delivery of real estate brokerage services over the Internet could deny to consumers the benefits of continued innovation in the industry. In one year, NAR and its MLSs can decide for themselves whether to proceed down this perilous path to the past.

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