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MLS nailed for price fixing

By Susan Romero
Inman News Features
Residential Real Estate News

The California 9th Circuit Court of Appeals ruled Monday that Sandicor MLS engaged in price fixing.

The regional MLS, which is owned by five Realtor associations in San Diego County, used a fixed fee structure to pay the five associations for the assistance they are contractually obligated to supply in connection with operating the MLS. The court ruled the fee scheme was anti-competitive and illegal.

"Rarely do antitrust defendants serve up their own heads on so shiny a silver platter," Circuit Judge Alex Kozinski wrote in his 36-page opinion.

The ruling was a victory for San Francisco-based attorney David Barry, who has made a career of suing the National Association of Realtors and state and local Realtor associations, including an ongoing attempt to strip NAR of the "Realtor" trademark.

Barry said the win could enable him to reinstate the initial request for class-action status on behalf of the plaintiffs, former Realtor Arleen Freeman in *Freeman vs. San Diego Association of Realtors.*

The lawsuit now will be returned to the district court, which will hear the plaintiff's request for an injunction and a trial to determine damages, according to Barry.

He is seeking $20 million in damages that under federal antitrust law could be tripled to $60 million. He also is seeking $3 million in attorney's fees for the 6,000 hours he said he has spent working on the case since 1997. He expects it drag on for a few more years unless the defendants decide to settle.

Barry said more than half of the country's 1,600 local Realtor boards have some kind of regional MLS and that in his opinion price fixing is commonplace. He thinks the California court's decision eventually will result in lower brokerage commissions because real estate practitioners will benefit from more competitive prices for MLS service and pass along those savings to home sellers.

The case dates back to 1998, when Freeman and another former Realtor James Alexander accused the Realtor boards of fixing MLS service prices. The alleged price-fixing scheme surfaced after the five Realtor associations merged their MLSs into one, Sandicor, a corporation owned by the associations. Sandicor overcharged its 8,000 members approximately $20 each a month or a total of $2 million a year, according to Barry.

Sandicor sells MLS services exclusively through the five Realtor associations, not directly to real estate agents. The associations charge their members (and non-Realtor real estate licensees who by law must be permitted to join the MLS in California) $45 a month for the services. That amount is then split with Sandicor.

The pricing scheme initially was set up to entice the two smaller associations to join Sandicor. Those associations at the time were operating MLS services that were less cost efficient than MLS services operated by the three larger associations. The judge said the resulting pricing arrangement was illegal.

"...some of the (associations) they wanted to include in (Sandicor) were so inefficient that they could survive only cartel pricing....Inefficiency is precisely what the market aims to weed out. (Federal antitrust law), to put it bluntly, contemplates some road kill on the turnpike to Efficiencyville," the judge wrote.

The associations agreed that none of them would discount the price of MLS services even if they continued to pay the same dollar amount to Sandicor. The judge said the discount ban supported his conclusions about the case.

"If associations were permitted to refund part of Sandicor's MLS fee to subscribers, they could compete on price notwithstanding the contractually fixed support fee. Without the ban, the price-fixing structure might well have collapsed. We can conceive of no legitimate justification for it, and defendants have offered none....

"The associations purposely fixed the support fee they charged Sandicor at a (higher than competitive) level. Sandicor passed on some portion of that inflated support fee to agents, who paid higher prices for the MLS as a result. This is precisely the type of injury the antitrust laws are designed to prevent," he wrote.

The principal defendants in the lawsuit were the California Association of Realtors, the North San Diego County Association of Realtors, Pacific Southwest Association of Realtors, East San Diego County Association of Realtors, Coronado Association of Realtors and Sandicor.

The judge Monday dropped C.A.R. from the lawsuit because the state association hadn't encouraged the associations to engage in illegal price-fixing practices.

Aside from that, C.A.R. General Counsel June Barlow said the association was disappointed with the judge's ruling reversal and disagreed with it.

"The remaining parties will undoubtedly seek review by the full Ninth Circuit Court of Appeals. The California Court of Appeals ruled in 1999 in *Freeman v. San Diego* that the same structure was not illegal under state antitrust laws and the Federal District Court had exonerated all parties," she said.

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