

Court throws out pocket listing lawsuit against NAR and MLSs

Judge says ThePLS.com failed to plausibly allege the National Association of Realtors' Clear Cooperation Policy harms competition and consumers. To the contrary, the policy has 'some plainly pro-competitive aspects'



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BY [ANDREA V. BRAMBILA](#)
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A federal court has permanently tossed an antitrust lawsuit filed by a [former pocket listing service](#) against the National Association of Realtors and three of the largest multiple listing services in the country, finding that the plaintiff's arguments are so flawed that the case cannot be saved.

In May 2020, The PLS, formerly a private listing network for real estate agents, filed a [federal antitrust lawsuit](#) against NAR and the California Regional MLS (CRMLS), Bright MLS and Midwest Real Estate Data (MRED) over a [policy designed to curb pocket listings](#).

The suit alleged the defendants had violated the federal Sherman Antitrust Act and California's Cartwright Act for adopting the Clear Cooperation Policy, also

known as MLS Policy Statement 8.0, which requires listing brokers to submit a listing to their MLS within one business day of marketing a property to the public.

Office exclusives, or listings marketed entirely within a brokerage without submitting them to an MLS, are exempt from the policy. Some real estate brokers have [threatened mutiny](#) over the office exclusives exception to the Clear Cooperation Policy, which they argue inadvertently benefits large, national brokerages at the expense of smaller, independent brokerages.

The [controversial](#) rule is meant to effectively end the growing practice of publicizing listings for days or weeks without making them universally available to other agents, in part to address fair housing concerns. The Clear Cooperation Policy went into effect on January 1, 2020, and its implementation deadline was May 1, 2020. [Some MLSs](#) have instituted hefty fines to enforce it.

In August, [NAR and the MLSs struck back](#) with motions to dismiss The PLS's lawsuit, arguing that antitrust laws do not exist to protect competitors, but rather consumers and competition, and PLS had not shown that the Clear Cooperation Policy harmed either.

In a Feb. 3 [opinion](#), U.S. District Judge John W. Holcomb agreed with the defendants that, while The PLS had alleged facts showing harm to its own business, the company did not plausibly allege harm to competition and consumers.

"On its face, the Clear Cooperation Policy does not preclude real estate professionals from offering pocket listing services, nor does it preclude them from marketing their listings on PLS," Holcomb wrote.

“Furthermore, there is no plausible inference from the alleged facts that the Clear Cooperation Policy has any such restrictive effect on the output of brokerage services to consumers. PLS does not allege any facts to show that real estate professionals have stopped (or will stop) offering pocket listings, or other types of listing services, when those services are demanded by consumers.

“To the contrary, sellers who desire to avoid listing their properties on an MLS may do so, for example, by working with an NAR-affiliated MLS member through the office exclusive exception or by engaging a real estate professional who does not belong to an NAR-affiliated MLS.”

Moreover, Holcomb pointed out that the Clear Cooperation Policy does not prevent agents from marketing pocket listings as they previously had: agent to agent — either in person, through phone calls or by email.

“Furthermore, the Clear Cooperation Policy does not proscribe real estate professionals from making a choice about the listing network platforms in which they choose to participate,” Holcomb said. “Of equal importance, consumers are not deprived of any choice in products or services.”

Rather, even accepting The PLS's allegations as true, the policy has "some plainly pro-competitive aspects," according to Holcomb.

"The Clear Cooperation Policy requires listings that are publicized by a member of an NAR-affiliated MLS to be reciprocally listed on an MLS for exposure to other MLS members," he wrote.

"This means that all MLS members have access to information about listings that are publicly marketed by other MLS members, which ultimately promotes competition among real estate professionals and home sellers and buyers.

"Basic economics dictates that increased information about market conditions stimulates more competition among real estate professionals, whose goal is, at least in part, to match a buyer and a seller as quickly and efficiently as possible. This effect minimizes transaction costs. Consumers also have access to more information regarding market conditions, enabling them to make better informed choices about the bundle of real estate brokerage services that will best serve their needs."

Importantly, given some pushback among brokers to the policy's office exclusives exception, Holcomb said that particular exception "is significant."

"PLS alleges that the presence of large brokerages operating across the nation increased demand for a nationwide listing network," he wrote. "Surely, then, marketing a private listing within a large nationwide brokerage under the office exclusive exception provides significant exposure of the property in an off-MLS setting.

"This is important in evaluating whether the Clear Cooperation Policy has the plausible effect of reducing output of services to consumers. It does not."

The PLS also failed to allege a plausible injury to participants on both sides of the real estate market — not just to sellers, but also to buyers, according to

Holcomb.

“It is, perhaps, telling that PLS’s allegations focus almost entirely on home sellers,” he wrote. “PLS makes no allegations regarding any demand for pocket listings by home buyers, no allegations explaining how pocket listings are beneficial to home buyers, and no allegations regarding how the Clear Cooperation Policy harms home buyers.

“PLS’s failure to address the buyer’s side of the market is not surprising given that the alleged inherent advantages of a pocket listing — e.g., increased privacy and security for a seller to market his home without the wide exposure of the MLS and the avoidance of the stigma from listing and then delisting a property from the MLS — appear to benefit the seller, almost exclusively.

“In contrast, home buyers stand to benefit from an increase in available information about the market (which increases price competition), not from a reduction in the provision of such information.”

Holcomb [dismissed](#) the case with prejudice, or permanently, and without leave to amend. “In view of the fundamental problems with PLS’s theory of antitrust injury discussed above, the Court finds that the complaint cannot be saved by amendment,” he wrote.

Last month, [NAR and the MLSs](#) filed a motion stay discovery in the case until the court decided whether or not to dismiss the suit. With this week’s order, Holcomb denied that motion as moot due to the dismissal.



Mantill Williams

In an emailed statement, NAR’s vice president of communications, Mantill Williams, said the 1.4 million-member trade group was “very pleased” with the court’s ruling.

“This outcome further emphasizes that the MLS system creates competitive, efficient markets that benefit home buyers and sellers alike,” Williams said. “In November 2019, NAR determined that the Clear Cooperation Policy (CCP) was needed as a crucial protection for consumers and it was overwhelmingly adopted.”

NAR is still fighting another antitrust lawsuit against the Clear Cooperation Policy brought by another pocket listing service, Top Agent Network, though in July a [court denied TAN's motion](#) for a preliminary injunction against the policy.

“We look forward to reaching the same outcome in the other, similar lawsuit against the CCP,” Williams said.

In an emailed statement, CRMLS CEO Art Carter said, “We’re very pleased with the judge’s decision, and we hope this brings this unfortunate matter to a close. We’ve believed CRMLS’s innocence and the importance of the Clear Cooperation Policy would show through, and we believe the judge’s decision makes it clear that CRMLS and the National Association of Realtors’ position is the right one.”



Art Carter



Rebecca Jensen

MRED President and CEO Rebecca Jensen told Inman that MRED had argued from the outset that The PLS had failed to prove harm to its business or to homesellers and homebuyers.

“We are gratified the judge saw through the argument that MRED was somehow trying to operate in an anti-competitive manner,” she said via email. “MRED has always worked closely with its brokers to provide an efficient, competitive business environment, and this decision underscores our efforts on that front.”

The PLS and Bright MLS did not respond to emailed requests for comment.

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