



Inman News: West Penn MLS agrees to settlement with the FTC – January 21, 2009

A Pittsburgh-area multiple listing service has agreed to a proposed settlement with the Federal Trade Commission over charges that the MLS violated antitrust laws in restricting some real estate service contracts. FTC officials alleged in a complaint that member-owned West Penn Multi-List Inc., an MLS with about 6,000 members in the Pittsburgh area, adopted policies that excluded certain properties from entry into the MLS database, "based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property."

"These rules," FTC officials alleged, "discriminate against certain kinds of lawful contracts ... and lack any pro-competitive justification."

The FTC has entered into several similar settlement agreements with MLSs across the country, and in 2006 launched a so-called "real estate competition sweep" (see Inman News).

All but one of the seven MLSs targeted in that enforcement effort have entered into settlement agreements with the FTC, and a lawsuit that the FTC pursued against the loan challenger -- Detroit-area Realcomp II MLS -- awaits final judgment (see Inman News).

Fred C. Jug Jr., a lawyer representing the West Penn MLS, said Tuesday that the MLS board considered the potentially high cost of legal fees in agreeing to settle with the FTC.

"The board had no objection to modifying the rules," Jug said. The Federal Trade Commission will consider whether to formally accept the settlement agreement

Jug said he was hopeful that the Realcomp II case would be resolved prior to West Penn's decision to settle its matter with the FTC. "We didn't have the option of waiting. (There was) the choice of our subscribers incurring these (legal) fees or agreeing to these terms," he said.

The FTC alleges in its complaint that West Penn MLS rules had excluded "exclusive agency" listing agreements from the MLS -- these listing agreements, which are legal by law, provide that a home seller can pay no commission or a reduced commission in selling a property without assistance from their listing broker.

Exclusive agency listing agreements can be used by brokers to offer discounted and menu-based real estate services to consumers, the FTC states in its complaint. The FTC also notes that the MLS did not place similar restrictions on the more common "exclusive right to sell" form of listing contracts, which provide that a seller is obligated to pay the broker a commission regardless of whether the seller or broker locates a buyer for the home.

The FTC charged that in addition to excluding exclusive agency listings, West Penn policies also prevented brokers from making revisions, deletions or amendments to the

mandated "West Penn Exclusive Right to Sell" contract, required that "all original listing contracts ... be collected and retained" by the MLS. Also, the MLS required all listing contracts between a broker and a seller last 365 days.

Jug said that the MLS had made some rule changes prior to the settlement agreement -- "We basically agreed to do something we had already done. We're firm in our belief that West Penn had never done anything wrong," he said. "A few words were changed in our rules and we'll no longer retain documents for as long as we have."

Christopher J. Carr, broker-owner of Simple Choice Realty, a flat-fee real estate company based in Conshohocken, Pa., said that he had communicated with FTC officials about the West Penn MLS rules, which he believed restricted his ability to do business.

Carr said that he is a member of about seven MLSs in Pennsylvania, and West Penn was the only MLS he encountered that refused to accept exclusive agency listings.

"Once I (joined) I saw the way we had to operate under their guidelines and I was kind of shocked. We tried to work around (the rules) as best as we could," Carr said, and the company would instruct its sellers to sign both the West Penn MLS exclusive listing contract as well as the company's own listing contract.

He said that in the event the company was entitled to a full commission under the West Penn MLS rules, his company "would not take the commission" and instead would terminate its relationship with the seller.

Carr said his company did require sellers to sign a 1-year listing contract, as provided by the West Penn MLS, but allowed sellers to terminate the contract at any point in time. As for the settlement agreement, Carr said, "I'm actually very happy about it." He said that the MLS still requires participants to use its listing agreement when entering into a contract with their clients.

An order in the proposed settlement provides that West Penn MLS cannot prevent participants from offering or accepting exclusive agency listings, cannot prevent subscribers from publishing information about those properties to approved Web sites, and cannot treat exclusive agency listings or other lawful forms of listings "in a less advantageous manner" to exclusive right to sell listings, among other requirements.