U.S. Department of Justice

Antitrust Division

Liberty Place Building
325 Seventh Street, NW, Suite 300
Washington, DC 20530-0001

September 21, 2005

Oklahoma Real Estate Commission
Shepherd Mall
2401 N.W. 23rd, Suite 18,
Oklahoma City, Oklahoma 73107

Re: Website Notice Regarding SB 673

Dear Commissioners:

I am writing to follow up on a conversation my staff had with Executive Director Anne Woody regarding the rules and website notices related to recently enacted Senate Bill 673 ("SB 673") that the Oklahoma Real Estate Commission ("OREC") is considering.

I understand that OREC will not be adopting the "Emergency Rule Additions for 2005" at this time. We commend OREC for that decision because the proposed rule additions would not be consistent with SB 673 and are anticompetitive.

Additionally, Executive Director Woody has asked us to comment on a notice OREC posted on its website on August 24, 2005, relating to SB 673. That notice states "that a listing broker cannot refuse to receive a written offer or counteroffer from another broker, even if the seller instructs the listing broker that he/she wants to receive offers or counteroffers directly."

The posted notice, at least as it relates to transaction brokers, contradicts the letter and intent of SB 673. The initial draft of SB 673 had stated that no *party* to the transaction – even the seller – could waive certain duties owed by the broker, such as the duty to receive offers. However, the Oklahoma Legislature changed that language and ultimately decided to pass SB 673 with the more limited words "transaction broker" instead of "party." SB 673 now reads, in part: "a transaction broker shall have the following duties and responsibilities, which are mandatory and may not be abrogated or waived *by a transaction broker*." (emphasis added).

Under the modified language, the transaction broker clearly is not allowed to waive any of the mandatory duties and responsibilities prescribed by SB 673. But, by limiting that waiver prohibition to the *transaction broker* only, and not to any *party* to the transaction, SB 673 by its terms now allows the consumer to waive the broker's obligation to receive an offer or counteroffer on his or her behalf, if, for example, the consumer would rather receive the offer directly from the other party.

OREC's notice is also inconsistent with the legislative history of SB 673. According to the Conference Committee Report for SB 673, the Committee "removed language that said

duties and responsibilities couldn't be waived by a party to a transaction [because] OREC does not have jurisdiction over consumers, only licensees." Rather than give OREC the power to enforce rules against consumers, the legislature amended the statute to avoid taking away a consumer's right to waive certain duties owed by his/her broker. Given this legislative history, OREC should not now post a notice that denies consumers the ability to waive, in order to reduce costs or have more control over the negotiations, certain responsibilities and duties that transaction brokers must otherwise provide.

As set forth in our letter to the Oklahoma Legislature (copy attached), preventing consumers from purchasing only the services they want would restrict competition for the sale of brokerage services, reduce consumer choice, and cause Oklahoma consumers to pay more for real estate services. In fact, after the Texas Legislature enacted a law that reduced the ability of Texans to pick the specific real estate services they wanted, some Texas brokers raised their prices for limited real estate services and attributed the increase directly to the new law.

We applaud OREC for its efforts to educate consumers and brokers of the changes in the law caused by SB 673. We agree that posting a notice describing the changes in the law will help consumers and brokers make more informed choices. We therefore recommend that OREC post a notice on its website that is consistent with the letter of SB 673 and the intent of the Oklahoma Legislature. We suggest the following language: "Unless the client instructs otherwise, a listing transaction broker cannot refuse to receive a written offer or counteroffer from another broker."

We appreciate this opportunity to present our views and would be pleased to address any other questions or comments regarding competition policies.

Respectfully Submitted,

John R. Read
Chief, Litigation III Section
Antitrust Division

cc: Attorney General W.A. Drew Edmondson

Enclosure

DEPARTMENT OF JUSTICE
Antitrust Division

R. HEWITT PATE
Assistant Attorney General

Main Justice Building - Room 3109
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)
E-mail: antitrust@usdoj.gov
Web site: http://www.usdoj.gov/atr

April 8, 2005

The Honorable Todd Hiett
Speaker of the House of Representatives
2300 North Lincoln Boulevard, Room 400
Oklahoma City, OK 73105

The Honorable Jari Askins
Democratic Leader, House of Representatives
2300 North Lincoln Boulevard, Room 548
Oklahoma City, OK 73105

The Honorable Mike Morgan
Senate President Pro Tempore
2300 North Lincoln Boulevard, Room 422
Oklahoma City, OK 73105

The Honorable Glenn Coffee
Senate Minority Floor Leader
2300 North Lincoln Boulevard, Room 531
Oklahoma City, OK 73105

The Honorable Jay Paul Gumm
Senate
2300 North Lincoln Boulevard, Room 424
Oklahoma City, OK 73105

The Honorable Earl Garrison
Senate
2300 North Lincoln Boulevard, Room 415
Oklahoma City, OK 73105

The Honorable Doug Miller
House of Representatives
2300 North Lincoln Boulevard, Room 400
Oklahoma City, OK 73105

Dear Senators and Representatives:

We understand that the Oklahoma State Legislature will vote on Monday, April 11, 2005, on Oklahoma Senate Bill 673. If enacted, this bill will prohibit real estate professionals from providing their customers with the freedom to purchase only real estate brokerage services that they prefer. Such a law will decrease competition among real estate professionals[1] and will result in Oklahoma home buyers and sellers paying higher real estate commissions. The United States Department of Justice ("Department of Justice") urges the Oklahoma Legislature to reject this proposed legislation.

[1]As used in this letter, the term "real estate professionals" is intended to refer to those persons and entities authorized by the state of Oklahoma to provide real estate brokerage services.

The Interest and Experience of the United States Department of Justice

The Department of Justice is entrusted with enforcing this nation's antitrust laws. For more than 100 years, since the passage of the Sherman Antitrust Act, the Department of Justice has worked to promote free and unfettered competition in all sectors of the American economy. Restraints on competition have the potential to injure consumers by raising prices or reducing the quality or choice of available goods or services. For this reason, the Department of Justice's civil and criminal enforcement programs are directed at eliminating such restraints. As part of those efforts, the Department of Justice encourages competition through advocacy letters such as this one.

The Department of Justice has a long history of enforcement efforts in the real estate area. We have observed that, in this area, as in many other industries, well-established businesses often wish to avoid competition from new approaches to business practices. The established businesses worry that these new competitors will steal sales from them and put pricing pressure on their business models. Sometimes, instead of responding in the marketplace, these businesses turn to legislatures for laws or regulations for protection. The established businesses will argue that government regulation is necessary to protect consumers from unscrupulous business practices, but the effect is frequently to harm consumers by depriving them of the benefits of competition and choice. The Department of Justice believes that this proposed measure is one that will unnecessarily reduce competition among real estate professionals and therefore is anti-consumer, not pro-consumer.

Industry Background

When retained by a seller, real estate professionals traditionally have performed virtually all services relating to the sale of a home. The key tasks involved in selling a house include marketing it, negotiating with potential buyers, and closing the transaction. Marketing includes listing the property in the local multiple listing service ("MLS"), placing advertisements in local advertising media and on the Internet, and conducting open houses. When providing services relating to the task of contract negotiation, real estate professionals may provide advice on pricing, home inspections, or other contractual terms. When providing services relating to closing, real estate professionals assist with title and abstract services and are present at the closing. For these efforts, the real estate professionals are typically paid a commission based on a percentage of the sales price of the home.

It is becoming increasingly common for consumers to try to buy some, but not all, of these brokerage services. For example, some consumers may want help advertising their homes, but would prefer to show their property to potential buyers without the assistance of a real estate professional. Such consumers may prefer to pay a real estate professional only for the service of listing their homes in the local MLS and placing other advertisements. Other consumers may find buyers without assistance, but would like to hire a real estate professional to assist them with the negotiation of the sales price or with the paperwork required to close the transaction. The marketplace is evolving in response to these consumers who want to perform some of the steps involved in selling their homes on their own. Real estate professionals who are willing to provide only those services that the consumer needs have emerged in Oklahoma and throughout the country. These "fee-for-service" or "menu-driven" business models are currently legal under Oklahoma law and typically allow consumers to save thousands of dollars because the consumers pay the real estate professional only for those services they want.

The Proposed Legislation

The proposed measure, Senate Bill 673, would amend legislation relating to Oklahoma Real Estate License Code, 59 O.S. 2001, §§ 858-351-4, which currently permits fee-for-service business models. We understand that this proposed measure, if passed, would prohibit a real estate professional from "abrogating" or "waiving" any of an enumerated list of real estate services so that the consumer can perform those services for himself. In effect, the proposed measure would ban fee-for-service arrangements that some consumers have found to be an attractive alternative. Although some have cited consumer protection as motivation for the proposal,[2] we believe the proposed amendments cause harm by limiting consumers' freedom of choice and increasing costs associated with real estate services without creating any significant consumer benefit.

The Proposed Legislation Would Likely Harm Consumers With No Countervailing Benefits

Competition provides substantial benefits to consumers. As the Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services."[3] Indeed,

> [t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[4]

If the Oklahoma Legislature enacts Senate Bill 673, Oklahoma real estate professionals will not be able to waive any of the duties associated with the statutorily-defined real estate transaction and will have to provide (and charge for) all the services listed in the proposed statute. This will reduce competition and harm Oklahoma consumers in two significant ways.

First, consumers who want to perform themselves some of the steps involved in selling or buying a home in Oklahoma will have to pay real estate professionals more than they do today. For example, based on discussions with and an informal review of websites of Oklahoma real estate professionals who offer fee-for-service pricing, an Oklahoma home seller may pay from $300 to $500 for a brokerage service contract that only lists his or her house in the MLS but leaves marketing and negotiating to the seller. If a buyer pays $150,000 for the seller's house, a seller who contracted with a fee-for-service real estate professional for $500, and agreed to pay a three-percent commission to a buyer's real estate professional, would pay a total of $5,000 in brokerage fees to sell his or her home. In contrast, if the same seller were forced to buy the full set of services for a typical six-

---

[2] *Oklahoma Senate Passes Minimum Service Bill for Real Estate*, Inman News, March 21, 2005. <http://www.inmam.com/inmannews.aspx?ID=45341>

[3] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted).

[4] *Id.* at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

percent commission, to be split between the buyer and seller broker, the seller would pay a total of $9,000 to real estate professionals to sell the house. In this example, Oklahoma's proposed measure would require the home seller to buy $4,000 more in services from a realtor than he or she needed or wanted. Under the proposed measure, consumers will no longer have the option of choosing to work with a professional who will accommodate their desire to buy only selected services. Consumers would have to choose between using no real estate brokerage services at all or more expensive full service, with nothing in between.

Second, the passage of Senate Bill 673 will also harm consumers because fee-for-service real estate professionals and consumers willing to perform some services on their own provide a competitive constraint on the pricing of real estate professionals who offer only a single bundle of services to customers as a package. By prohibiting fee-for-service pricing, Senate Bill 673 will protect real estate professionals who tie together the full complement of services from having to compete with other licensed real estate professionals who are willing to respond to changes in the marketplace and offer consumers more choices in the quantity and types of services provided. Because of this reduced competition, even those consumers who prefer to purchase the full range of services from traditional real estate service professionals will likely pay higher prices.[5]

We do recognize that laws that limit forms of competition may be beneficial when they address specific market failures that have been shown to harm consumers. Even where consumer harm has been shown, however, such restraints should be drawn narrowly to minimize the lost benefits of competition.

As previously stated, we recognize that some Oklahomans have claimed that the proposed measure is necessary to protect consumers. The proposed measure, however, limits competition far more than is necessary to address any plausible consumer protection concerns. In any event, before the Legislature passes Senate Bill 673, or any other similar measure, it should take steps to confirm that consumers have been harmed by contracting with real estate professionals who charge less and allow consumers to perform some services for themselves. We are aware of no evidence of consumer harm caused by allowing fee-for-service pricing.

One alternative to passing the proposed amendment is to pass a study bill to see if there is evidence of actual consumer harm from the fee-for-service business model. If it appears necessary to protect consumers from fraud or confusion, a more appropriate remedy that would not diminish competition may be to require written disclosure of those duties that will and will not be performed

---

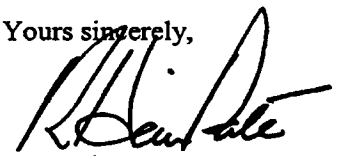
[5]For example, in the analogous case of real estate settlement services, both the New Jersey and the Kentucky Supreme Courts have observed that the settlement services offered by non-attorneys at closing put competitive pressure on the services provided by attorneys at closing. In New Jersey, the Supreme Court found that real estate closing fees charged by lawyers were much lower where they had significant competition from non-lawyers (lawyers charged $350 on average in such areas), than where non-lawyers offered little competition (lawyers able to charge $750 on average in such areas). *See In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995). In Kentucky, in the course of rejecting a Kentucky Bar opinion that would have greatly restricted the ability of title companies to perform settlement services, the Supreme Court of Kentucky noted that "before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher – in some areas as much as 1% of the loan amount plus additional fees." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003). Further, the court noted that "the presence of title companies encourages attorneys to work more cost-effectively." *Id.*

by the real estate professional. If it appears necessary to protect consumers from choosing a fee-for-service real estate professional who is unprofessional or unqualified in skill or training, then a more appropriate remedy may be to improve real estate licensing requirements. But, in no event, is the wholesale elimination of a class of business models the answer – especially one that is evolving to meet consumers' needs for more choice and flexibility in their real estate service purchases.

Conclusion

Enacting the proposed changes to the Oklahoma Business Real Estate Code is likely to harm Oklahoma consumers by depriving them of competition between the full line of services and menu driven services. Accordingly, we urge the Oklahoma Legislature not to enact the proposed bill. The Department of Justice appreciates this opportunity to present its views and would be pleased to address any questions or comments regarding competition policies.

Yours sincerely,



R. Hewitt Pate