



U.S. Department of Justice

Antitrust Division

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

March 7, 2007

Senator William Walaska
Senate Corporations Committee, Chair
140 Aldrich Ave.
Warwick, RI 02889

Representative Roger Picard
House Corporations Committee, Vice Chair
764 Mendon Rd.
Woonsocket, RI 02895

Re: Rhode Island Senate Bill 370/House Bill 5432

Dear Senator Walaska and Representative Picard:

The Antitrust Division ("Division") is pleased to respond to your request to analyze the likely competitive effects of Rhode Island Senate Bill 370 ("SB 370" or "the Bill").¹ This Bill would change current law to require Rhode Island real estate professionals to provide certain services to their clients. This requirement will make it more difficult for real estate professionals to provide Rhode Island consumers with customized real estate brokerage services, and will likely decrease competition among real estate professionals. With less competition, Rhode Island consumers will have fewer options for real estate services, likely causing some home sellers and home buyers to pay thousands of dollars more in commissions to real estate brokers.

SB 370 would amend existing law governing the provision of real estate services in Rhode Island.² Among other amendments to this law,³ the Bill would require a real estate broker entering into an "exclusive representation contract" with a buyer or seller,

at a minimum, to provide the following services to his or her client:

- (i) Accept delivery of and present to a client or customer offers and counteroffers to buy, sell, lease, option, or exchange the client's real estate prior to the signing of a purchase and sales agreement or offer to purchase by all necessary parties;

¹ SB 370 was introduced on February 13, 2007. House Bill 5432 ("HB 5432"), introduced into the House on February 27, 2007, is an identical bill.

² Specifically, SB 370 would amend R. I. GEN. LAWS § 5-20.6 (2006).

³ The Division makes no comment on the portions of the Bill not related to minimum-service requirements.

(ii) Assist a client or customer with communicating, and presenting offers, counteroffers and notices that relate to these offers and counteroffers.⁴

The text of SB 370 indicates that the goal of the bill is not to require brokers and agents to provide an array of services but rather to provide consumers with choice.⁵ Real estate professionals who are willing to provide consumers more choice through a customized subset or menu of a la carte services have emerged in Rhode Island and throughout the country. These "fee-for-service" or "menu-driven" business models are currently legal under Rhode Island law and typically enable consumers to save thousands of dollars because the consumers pay only for those services they want. Contrary to the purposes of the bill, the proposed addition of § 5-20.6-12 would limit consumer choice by expanding the services that these brokers must provide to their customers and clients, regardless of whether the customer wishes to purchase those services.

As we read the Bill, the minimum service requirements of SB 370 § 5-20.6-12 would be triggered by any exclusive representation agreement between a broker and a customer or client, such as an exclusive listing agreement or an exclusive agency agreement. As a practical matter, this obligation to provide the prescribed set of services would apply to virtually every broker, since many Multiple Listing Service ("MLS") require that the listing brokers enter into an exclusive agreement before allowing a broker to market a property through the local MLS.⁶ Therefore, consumers who live in areas that are served by MLSs with such rules and who wish to have their house listed in the MLS must sign brokerage agreements that trigger the requirements of SB 370, and those consumers would therefore be barred from acquiring real estate brokerage services from a broker who does not provide the full set of services prescribed by the law.

This requirement would harm competition and increase costs to consumers. In Rhode Island and the rest of the country, many consumers, if given the option, prefer to acquire fewer than all of the services traditionally offered by a full-service broker. Some home sellers, for example, want the broker to list their home on the local MLS, but prefer to do the rest of the work of selling the home on their own. Real estate professionals who are willing to provide consumers more choice through a customized subset or menu of a la carte services have emerged as a competitive alternative to full-service brokers. These "fee-for-service" or "menu-driven" business models are currently legal under Rhode Island law and typically enable consumers to save thousands of dollars because the consumers pay only for those services they want. Contrary to the purposes of the bill, the proposed addition of § 5-20.6-12 would limit consumer choice by

⁴ See SB 370 § 5-20.6-12(b)

⁵ See SB 370 § 5-20.6-1(a)

⁶ The MLS in Rhode Island requires that all properties submitted to the MLS must meet the definition of an exclusive right to sell or exclusive right of agency agreement. See State-Wide Multiple Listing Service Inc., Rules and Regulations 2006 § 4.1.

expanding the services that these brokers must provide to their customers and clients, regardless of whether the customer wishes to purchase those services.

We have seen no evidence that consumers currently are harmed by fee-for-service real estate brokerage. Because the minimum service provisions in SB 370 § 5-20.6-12(b) do not appear to be necessary to address any demonstrated consumer harm, the Bill, if enacted, is likely to deprive Rhode Island home buyers and sellers of the benefits of competition without providing any countervailing benefits.

Other states have addressed the same issues underlying SB 370 through narrower approaches that preserve consumer choice. For example, if there were a concern that home sellers may mistakenly expect to receive more assistance from the fee-for-service real estate professionals with whom they have contracted, one could require that brokers offering fee-for-service options specifically delineate in writing those services the client will *and will not* receive. This disclosure requirement would allow consumers to make an informed choice of what to buy, without requiring that they buy services they do not want. Virginia adopted such an approach. Although we see no evidence indicating the need for any minimum service legislation, if the Rhode Island legislature nonetheless believes that the minimum service provisions in § 5-20.6-12 are necessary, we urge it to consider the Virginia approach, which puts the consumer in the driver's seat and significantly reduces the competitive harm that would stem from prohibiting alternatives to the full-service brokerage model.

Another approach was that adopted by Ohio. Ohio recently organized a task force that included members from all sides of the minimum service debate to study whether minimum service legislation should be enacted. The Ohio Task Force recommended that real estate agents be required to provide certain services, such as aiding in negotiating the sales price of the home, unless the client specifically waives performance of those services. Ohio ultimately passed a law including this waiver provision.⁷ This approach requires more effort on the part of the consumer, and thus is less desirable than the Virginia approach, but is far preferable from the standpoint of competition and consumer choice to the mandatory requirements embodied in SB 370.

Laws and market practices should encourage innovation and new developments. The growing success of providers of customized real estate brokerage services, as well as the statement of legislative purpose in SB 370 itself, demonstrate that significant numbers of Rhode Island consumers value the fee-for-service model of real estate brokerage. For consumers who live in an area in which the local MLS requires brokers to enter into exclusive agreements, the proposed amendment would eliminate that option by requiring consumers to purchase potentially unwanted services.

We appreciate this opportunity to present our view and would be pleased to address any other questions or comments regarding competition policies. If you have any further questions or

⁷ See OHIO CODE § 4735.621

would like for us to speak with your committees on this matter, please feel free to call Chris Ries at (202) 307-6351 or Bill Jones at (202) 514-0230.

Respectfully Submitted,

A handwritten signature in cursive script that reads "John R. Read".

John R. Read
Chief, Litigation III Section
Antitrust Division