

COMING SOON

Hello, Michigan Realtors® and welcome back to the “Letter of the Law”, a monthly video series designed to provide a primer on various legal issues impacting your industry. I’m Brian Westrin and today’s legal primer will be on the topic of the “coming soon” marketing method.

In order to intelligently discuss the pros and cons of the “coming soon” marketing method, it is important to understand what it is. While there is no legal definition of the “coming soon” marketing method, it would appear to take one of two forms. In the first scenario, the Realtor® begins marketing the property prior to entering into a listing agreement with the seller. As soon as a written listing agreement is signed, it is submitted to the MLS within the time period specified in the MLS Rules and Regulations. In the second “coming soon” scenario, the Realtor® has an agreement with the seller that the property will not be shown for a period of time after entering into the listing agreement. This second scenario is often used to give the seller time to prepare the property for showings. In both “coming soon” scenarios, the property is marketed during the “coming soon” period, for example, through social media, through a network of buyer’s agents, and/or with a yard sign and other print advertising.***

Several associations and MLSs around the country have considered adopting rules and regulations which would limit the use of the “coming soon” marketing method. Typically the rules would either prohibit MLS participants from advertising a property until a few days before the listing is submitted to the MLS or would prohibit a Realtor® from showing the property to any prospective buyers during the “coming soon” period. Associations of Realtors® and MLSs must take great care when considering these types of rules. Proponents of the

“coming soon” marketing method view such rules as an improper restriction on the way they do business.

The Sherman Act outlaws “every contract, combination or conspiracy and restraint of trade.” However, the United States Supreme Court has previously held that the Sherman Act “does not prohibit every restraint of trade, but only those that are unreasonable.” Violations of the Sherman Act can subject the violators both to civil damages (including treble damages) and criminal prosecution. Similarly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Violations of the Sherman Act violate the FTC Act. Thus, the question becomes whether a court or the FTC would view a limitation on advertising or showings during the “coming soon” marketing period to be an unreasonable or unfair restriction on trade.***

When considering this question, an initial determination would be made as to whether a restriction on the “coming soon” marketing method benefits or harms the consumer, in this case, the seller.

Realtors® who object to the “coming soon” marketing method argue that the “coming soon” marketing method deprives the seller of the benefits of maximum exposure to the market. Critics also argue that the “coming soon” marketing method adversely affects the integrity of MLS aggregate data at least with respect to a determination of days on the market of a property. Finally, critics point to the fact that there are mechanisms available through the MLS to accommodate sellers who wish to delay or forgo the submission of their listing to be submitted to the MLS. Most MLSs simply require the seller to sign a letter or other form indicating their desire that their listing not be submitted to the MLS.

On the other hand, proponents of the “coming soon” marketing method argue that the interest generated prior to listing using various targeted media results in more traffic when the listing is finally submitted to the MLS. Proponents argue further that upon completion of the “coming soon” marketing period, the property is listed in the MLS and is exposed to all of the participants of a MLS which ultimately results in obtaining fair market value. It is also argued that the aggregate data for the MLS is enhanced, not harmed through the use of the “coming soon” marketing method. Finally, proponents argue that the “coming soon” marketing method helps eliminate the use of pocket listings, a far more harmful practice.****

While we are aware of no reported cases directly addressing this issue, associations or MLSs who are considering a rule prohibiting advertising or showings of property during a “coming soon” marketing period should proceed cautiously. Any such prohibition may be challenged as an unreasonable restraint of trade under the Sherman Act and/or the FTC Act. It is certainly the case that in certain parts of the country this marketing method has been used for many years by proponents who sincerely believe that it enhances the sale of a seller’s property once it is submitted to the MLS.

Opponents of “coming soon” marketing may, in the absence of a MLS rule, think about engaging in self-help. They may decide to simply not do business with Realtors® who use the “coming soon” marketing method. They may do so by themselves, but if they agree or work with other competitors not to do business with a Realtor® using the “coming soon” marketing method, they will be setting themselves up for criminal and civil litigation under antitrust laws for an illegal group boycott.

It should be noted that there is a significant risk for Realtors® who use the “coming soon” marketing method. If the Realtor® does not have an exclusive right to sell listing

in place with the owner during the “coming soon” marketing period, any other Realtor® may ethically and lawfully approach that seller with respect to representation of the seller. Moreover, a buyer’s agent and a buyer could be attracted to the owner’s property during the “coming soon” marketing period. If the owner enters into a purchase agreement with such a buyer during that period, the Realtor® engaged in the “coming soon” marketing method would have no legal entitlement to a commission. ****

Final Thoughts

Finally, it appears undisputed that a Realtor® using a “coming soon” marketing method has a fiduciary duty and ethical obligation to the seller to explain that the seller’s property may not receive maximum exposure to the market until it is placed in the MLS. Realtors® who use the “coming soon” method will want to make certain that they get the informed consent of their seller-clients. So long as the Realtor® meets this obligation, there does not appear to be any ethical or legal prohibition against the “coming soon” marketing method so long as the Realtor® has authority from the owner to advertise the property and timely submits a written listing agreement with the owner to the MLS when such an agreement exists.

As always, thank you for tuning in and watching this legal video primer. If you have questions or would like to suggest topics for future videos, please send suggestions to the email below. Again, thanks for watching and see you next time.

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