

COMING SOON LISTINGS: GOOD OR EVIL?

In discussing the issues with so-called “coming soon” listings, it is sometimes difficult to determine whether the parties are discussing the same business practice.

When some Realtors® see a “coming soon” for sale sign in a front yard or posted on the internet, they review it as irrefutable evidence of a “pocket listing” held by the Realtor® who placed the “coming soon” advertisement. These opponents of the practice are certain that the Realtor® who placed the advertisement has already entered into a listing agreement and that during the “coming soon” period, the Realtor® with the listing agreement will be pursuing buyers. Other Realtors® who would like to show the property to prospective clients will be unable to do so. Ultimately, the listing Realtor® will find a purchaser for the property at which time the listing agreement will be submitted to the MLS. The property will be immediately sold to the buyer found during the “coming soon” period.

One of the primary concerns of Realtors® who oppose the “coming soon” marketing method as described above is that the failure to submit the seller’s listing to the MLS, deprives the seller of the potential economic benefits from having her property receive the maximum exposure to participants in the MLS and the buyers whom they represent. When the “coming soon” method results in a purchase agreement upon the submission of a listing agreement, the seller is deprived of the benefits of maximum exposure to the market.

Another primary concern about the “coming soon” marketing method is that it can adversely affect the integrity of MLS aggregate data, at least with respect to a determination of days on the market of a property. If a listing is in a “coming soon” mode for 30 days during which the Realtor® holding the listing is actively seeking buyers, but the listing is not submitted

to the MLS until a buyer submits an offer acceptable to seller, statistically it will look like the property was on the market for a single day.

Proponents of “coming soon” marketing method describe a slightly different situation. When they place a “coming soon” for sale sign on a property or advertise property as “coming soon” on the internet, there is no exclusive right to sell listing agreement in place. Instead, they have thoroughly discussed the timing for submission of the property to an MLS with the seller and the seller has agreed that pre-marketing may well result in greater economic benefit to the seller. The proponents of “coming soon” marketing claim its benefits outweigh any detriment to consumers.

First, proponents argue that the use of the “coming soon” marketing method generates more traffic upon submission of the listing to the MLS. This interest is generated prior to listing using various media (*e.g.*, for sale signs, Zillow, targeted email solicitations to top producers and similar marketing). Proponents describe a scenario where during the “coming soon” marketing period, multiple Realtors® are made aware of the property and advised that the property will be listed and available for showing on a specified date in the future. It is claimed that in many instances it generates multiple offers and bidding wars beneficial to the seller.

Second, the proponents contend that the “coming soon” marketing method is particularly desirable for sellers who do not wish to deal with repetitive showings of their property over a substantial period of time. In other words, if the “coming soon” marketing method results in showings to multiple buyers over a one or two day period, sellers benefit from the shortened period of time they are required to accommodate showings.

Third, proponents claim the “coming soon” marketing method does not harm the operation and procompetitive characteristics of the MLS. Upon completion of the “coming

soon” marketing method, the property is listed in the MLS and is exposed to all of the participants of the MLS which ultimately results in obtaining fair market value. In this way, the aggregate data for the MLS is enhanced, not harmed, through the use of the “coming soon” marketing method.

Finally, proponents of the “coming soon” marketing method contend that it helps eliminate a practice more harmful to an MLS, *i.e.*, the use of pocket listings.

There is no blueprint for the “coming soon” marketing method; thus, it is difficult to provide any hard and fast conclusions with respect to the propriety of its use. There are, however, a few rules.

First, if the “coming soon” marketing method is used, there cannot be an exclusive right to sell listing agreement in effect between the Realtor® and the seller. Obviously, barring a written statement from the seller that the property not be submitted to the MLS, the listing would have to be submitted to the MLS within the time period prescribed by MLS Rules. Further, the use of the description “coming soon” in a situation where a binding listing agreement was already in place could well constitute a violation of Article 12 of NAR’s Code of Ethics.

Second, in some instances Realtors® place a for sale sign on property with the seller’s authorization but without a listing agreement in effect and without any designation of “coming soon.” It can be strongly argued that the placement of the for sale sign without “coming soon” on the sign is a representation to the public and other Realtors® that the property is listed and is currently available for purchase through the Realtor® named on the sign. This practice would appear to be a violation of Article 12 of the Code of Ethics, although there is no law which would prohibit this practice. Some Realtors® who engage in this practice (*i.e.*, placing a for sale sign on property without any “coming soon” verbiage) attempt to address the issue by executing

a listing agreement but not dating it. This probably does not eliminate the problem. A listing agreement without a beginning date is arguably not a binding agreement. If it is not, then the problem with a potential Article 12 violation persists. If a listing agreement without a beginning date is enforceable, then the Realtor® is in violation of MLS Rules.

If a Realtor® truly has an arrangement with a seller under which the Realtor® has been authorized to prospectively advertise the coming availability of the seller's property under a future listing agreement (or an existing listing agreement which is dated to become effective at a future date), there would appear to be nothing in the Code of Ethics or the NAR Handbook on MLS policy which requires the Realtor® to do anything more. Again, if the Realtor® is advertising a property as a future listing, when in fact an actual exclusive right to sell listing agreement exists, then the Realtor® would be in violation of both the Code of Ethics and typical MLS Rules.

Many Realtors® have suggested various ways to regulate or curb the "coming soon" marketing method. The suggestions range from an outright prohibition to requiring a Realtor® using the "coming soon" marketing method to obtain an authorization letter from the seller which would be submitted to the MLS and would establish time limitations on when a property can be marketed as "coming soon." Any Realtors® or associations considering such rules must understand that any limitation on marketing or advertising could be branded as a restraint on trade. Obviously, there are many restraints on trade that are perfectly permissible (*e.g.*, requiring that a MLS participant submit all exclusive right to sell listing agreements to the MLS within a specified period of time and in a specified format). The real question is whether any limitation in the "coming soon" marketing method could be deemed an "unlawful" restraint of trade.

The Sherman Act outlaws “every contract, combination or conspiracy in restraint of trade” and “monopolization, attempted monopolization or conspiracy or combination to monopolize.” However, the United States Supreme Court has previously held that the Sherman Act does not prohibit every restraint of trade – only those that are quote “unreasonable.” There are certain acts which are illegal “per se” (*i.e.*, indefensible) under the Sherman Act such as price fixing, dividing markets or rigging bids, but none of those would appear to apply to proposed restraints on the “coming soon” marketing method. Thus, the legal issue would likely be whether the restraint on “coming soon” listings is an unreasonable restraint of trade. Remember that violations of the Sherman Act can subject the violators both to civil damages (including treble damages) and criminal prosecution.

Also, the Federal Trade Commission Act (“FTC Act”) bans “unfair methods of competition” and “unfair or deceptive acts or practices.” The United States Supreme Court has held that all violations of the Sherman Act also violate the FTC Act. While the FTC does not enforce the Sherman Act, it brings acts under the FTC Act for the same activities that violate the Sherman Act. The FTC also attempts to reach other practices that are in competition which would not technically be a violation of the Sherman Act. Thus, any local association considering adopting a rule to prohibit or limit the “coming soon” marketing method, should be mindful that it could attract the attention of the Department of Justice or the FTC, which in turn can attract the interest of the plaintiff’s contingency fee bar.

As a final note, there is no requirement that a written agreement exist between the owners and a Realtor® with respect to any promise that the owners will list their property with the Realtor® at the conclusion of the “coming soon” marketing period. If no written agreement exists, however, the Realtor® is risking that the owners will not honor the oral agreement to list

their property and pay the Realtor® a commission upon its sale. Such an oral agreement is wholly unenforceable under Michigan law. Even if the Realtor® has a written agreement with the owners which authorizes the “coming soon” advertising and contains a promise that the owners will list the property with the Realtor® in the future, upon the owners’ breach of such an agreement (*i.e.*, refusal to list), the Realtor® may be unable to get a court to compel the owners to sign a listing agreement. Further, any damage claim for the breach would be pretty speculative. Additional risk to the Realtor® would be that the “coming soon” advertising is effective in delivering a buyer to the owners prior to the execution of a listing agreement. Again, in this situation the advertising Realtor® would have no claim for compensation.

In conclusion, the “coming soon” marketing method as described by its proponents does not appear to violate the Code of Ethics, MLS Rules or any Michigan law. That being said, Realtors® utilizing the “coming soon” marketing method must assume the risk inherent in the practice, *i.e.*, a seller’s refusal to ultimately sign a listing agreement or a buyer appearing to purchase the property prior to a binding listing agreement.