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Litigators of the Week: DOJ Can't Reopen a Previously-Settled Antitrust Case Against the National Association of Realtors

By Ross Todd
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A deal is a deal.

Until it isn't.

That's the reality that **Bill Burck** and **Mike Bonanno** of **Quinn Emanuel Urquhart & Sullivan** and **Ethan Glass** of **Cooley** faced in July as the Department of Justice announced it was walking back from a proposed settlement with the National Association of Realtors. The deal, reached at the end of the Trump administration, wrapped up a multi-year antitrust investigation.

But rather than respond to the government's renewed civil investigative demands, NAR's lawyers sued to block them.

This week U.S. District Judge Timothy Kelly sided with NAR and set aside the DOJ's demands, citing the Antitrust Civil Process Act.

"The government, like any party, must be held to the terms of its settlement agreements, whether or not a new administration likes those agreements," Kelly wrote.

Litigation Daily: Who was your client and what was at stake?

Ethan Glass: Our client is the National Association of REALTORS®, the country's largest trade association. NAR and its members help consumers achieve the American dream of home ownership. At the heart of NAR is the primary requirement that its members must adhere to a strict code of ethics that requires them to place their clients' interests above their own. NAR also provides support to local multiple listing services, which are platforms that facilitate home sales by efficiently connecting buyers and sellers, and that make information about homes for sale available to everybody. At stake was the system of real estate as we know it, which accounts for 17% of the U.S. GDP and is the foundation for much of our personal financial growth.

Courtesy photos

(L-R)Bill Burck and Mike Bonanno of Quinn Emanuel and Ethan Glass of Cooley.

Who was on your team and how have you divided the work?

Mike Bonanno: The three of us are former DOJ lawyers. When we worked in the government, we shared the common experience of working on leanly staffed teams where even the most junior attorneys are expected to make significant contributions. That approach has carried over to how we staff our cases today. It is important to us to have agile teams that promote efficiency for our clients and provide opportunities for our associates to take on meaningful responsibilities. In this case, we were fortunate to have help from two of our superstar associates, **Peter Benson** and **Kat Lanigan**, who made our jobs much easier.

Briefly walk me through NAR's Participation Rule and Clear Cooperation Policy and how they came under scrutiny from the Antitrust Division.

Glass: The Participation Rule is part of a set of publicly available policies that make widely

available various information necessary to transact real estate. Following the century-old practice where brokers selling a home share some of their commissions with the broker who brings the buyer, under the Participation Rule, the broker selling the home simply identifies how much she will share—which can be as little as a dollar. This benefits both buyers and sellers of real estate; and it ensures that a real estate broker who brings the buyer knows how much commission she will be paid by the broker selling the home. Importantly, and contrary to what has been alleged in some pending private cases and in the press, the Participation Rule does not require either a seller or buyer pay anything to her broker, it does not set how much brokers pay each other, and it does not impact commissions or other prices.

The Clear Cooperation Policy ensures that brokers who choose to use multiple listing services do not withhold from other multiple listing participants any homes for sale, except in certain limited circumstances to protect the seller. It ensures that all members of a multiple listing service (and their clients) have broad access to information about homes for sale in their search area, and that there is not a group of "haves" and a group of "have-nots" when it comes to that information. That is good for everyone; it promotes fair housing, transparency, and efficiency, which reduces costs for consumers.

How did this matter initially come to you?

Burck: We take great pride in the fact that much of our work comes from referrals from current or former clients. It is a validation that we are doing a good job advocating for our clients. That is what happened here. Another client who I successfully represented in a particularly challenging investigation referred NAR's team to us when the DOJ's investigation started to pick up speed. We spoke to the team about our proactive approach to DOJ investigations and presented some options for how to respond to the DOJ's inquiries while demonstrating the benefits of multiple listing services to DOJ staff. Notwithstanding the ups and downs of this investigation, we followed through on that plan and have been able to achieve a favorable result for NAR.

In the initial proposed settlement, NAR insisted on getting a letter confirming the DOJ's investigation into those policies was closed and that NAR had no obligation to respond to the still-pending civil investigative demands from the government. That wasn't explicitly spelled out in the consent judgment filed with the court. How typical is it in this sort of investigation to have a deal with the government that goes beyond the four corners of the proposed final judgment filed with the court?

Glass: While the closing letter was somewhat unique, our position was the same with or without the closing letter: the DOJ agreed to close its investigation into the Participation Rule and Clear Cooperation Policy without any changes to them, in exchange for clarifications to other NAR policies.

We pushed for a closing letter because it was important for us to give NAR the greatest possible assurance that it would have total peace with the DOJ following the settlement. Unfortunately, NAR is, unfairly, a frequent target of antitrust accusations, from both the government and private plaintiffs, and we wanted to insulate NAR from seriatim investigations and private plaintiff arguments about the closed investigations. While the DOJ decision to claim it was not bound by a settlement agreement was a surprise, I am glad we were careful to think a few steps ahead to get as much protection for our client as we could.

You wrote in your petition: "These actions by the Antitrust Division are unprecedented." I'm guessing that means that your own pursuit of this petition was unprecedented to a certain degree. How did you figure out how to go about challenging the government's renewed civil investigative demand?

Bonanno: The circumstances that confronted NAR were truly unprecedented. We are not aware of any other time that the Antitrust Division has even attempted to withdraw from a settlement in a civil case in which the defendant satisfied its own obligations. And no other company has ever tried to stop a live Antitrust Division investigation through court intervention.

Even without clear precedent, however, we knew the DOJ was wrong. A deal is a deal. Once the parties

reached an agreement, the government had to hold up its end of the bargain. As we started to line up the facts, it was clear we had a compelling basis to argue the pursuit of the investigation was a material breach of the settlement agreement. All we needed was a way to seek relief from a court.

The Antitrust Civil Process Act, which gives the Antitrust Division the ability to issue civil investigative demands, gave us the hook we needed. The statute provides limited rights for a CID recipient to petition a district court to quash a CID. The process is rarely used, and when it is, the government normally wins. That did not discourage us, however, because we planned to present unique arguments that had never been litigated before. The statute provided a way for us to seek relief from a district court, which is all that we needed.

What can other organizations and companies take from NAR's experience here?

Burck: As Mike mentioned, the three of us are former DOJ lawyers. We have tremendous respect for the organization and our former colleagues who still work there. While the DOJ is a formidable adversary, it is not infallible. DOJ lawyers are human beings so they sometimes make well-intentioned mistakes, which could be based on a misinformed view of the facts, an erroneous view of the law, or a mistaken policy judgment. If a company is confronted with any of these scenarios, it does not have to just accept the consequences as a cost of doing business. You have options to challenge the DOJ and correct its missteps, and under some circumstances, going to court is your best option. Some are reluctant to challenge the DOJ, either out of deference to the organization or the belief that DOJ has limitless power. This decision shows that just like everyone else the DOJ is accountable under the law.

What message do you hope the government takes from the decision?

Bonanno: I hope the decision serves as a reminder that there are meaningful limits on the power of the DOJ. We are fortunate to have a client that was willing to stand up and force the DOJ to hold up its end of the bargain. Few companies have the courage to pursue such a bold strategy. That is why it is critical for DOJ lawyers to think carefully about the scope of their authority and the potential implications of their actions before opening an investigation or taking an enforcement action.

What will you remember most about this matter?

Glass: I will always remember how great of a client NAR is, and how much I appreciate the trust NAR placed in our team to stand up to DOJ. That was not an easy decision. As a membership organization, NAR's leadership must account for the views of many different constituencies. I am confident that at least some of them may have questioned whether our approach was a wise strategy. It took great courage on the part of **Katie Johnson**, NAR's General Counsel, and NAR's leadership team, to stay the course, and I will always be grateful for her support.

Burck: I am proud of how our client and our team handled adversity. When the DOJ first approached us and asked NAR to agree to modify the settlement agreement, it made the three of us uneasy. But at the time we had no idea that the DOJ intended to withdraw from the deal and reopen the same investigation it had just agreed to close. That revelation came suddenly—DOJ gave us only about 24 hours to consider their position. Within a span of days, we went from winding down the matter to pulling together our strategy for litigation, and our client and our team met the challenge well.

Bonanno: I remember we had a call to discuss our options shortly after DOJ issued its latest CID to NAR. The three of us seemed to just take turns saying that the DOJ's actions were completely unprecedented and could not possibly be right. At the time, I wasn't sure exactly how we would force DOJ to hold up its end of the bargain, but I was confident that we would figure it out. That is what is great about our firm—our clients trust us to develop creative solutions to complex problems, and we have exceptional lawyers who are up to task. This case will always stand out to me as a perfect example of that dynamic.