

RESTRICTIONS ON OUT-OF-STATE REAL ESTATE BROKERS BEING CHALLENGED IN NEVADA

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For years, the Nevada Real Estate Division (“NRED”) and its sub-entity, the Nevada Real Estate Commission (“NREC”), have been tasked with administering the licensing procedures applicable to real estate professionals in Nevada, as well as enforcement of the regulations governing business practices, advertising, commissions, license maintenance, and a host of other day-to-day parameters within which the profession operates. Within the past five years, however, the NREC has tasked itself with the publicly stated goal of “protecting” Nevada real estate licensees and the commissions they earn from out-of-state real estate professionals seeking to do business in the Silver State. While efforts to preserve local real estate opportunities for local brokers might seem sound, an international brokerage firm is challenging the foundation of that structure. If they win, the outcome could have huge implications on the real estate industry in Nevada. Businesses, here’s a breakdown of the existing structure and what the challenge is all about.

The Existing Regulatory Structure

Through amending their own regulations, the NRED and NREC have created a regulatory structure that:

- Prohibits any non-Nevada licensed real estate broker from representing any seller (Nevada based or non-Nevada based) of any Nevada real estate;
- Prohibits any non-Nevada licensed real estate broker from representing any Nevada resident in the purchase of Nevada real estate; and
- Allows non-Nevada licensed real estate brokers to represent non-Nevada purchasers of Nevada real estate only if the out-of-state broker formally affiliates (and therefore shares commissions with) a resident Nevada-licensed broker.

Problems Created by the Current Nevada System

Many real estate brokers and brokerages conduct their businesses on a national and even international scale. While most states have established certain parameters governing the ability of out-of-state licensees to conduct business within that state, few if any have imposed systems as onerous as Nevada’s. Real estate professionals who have loyal investment clients and are otherwise attuned to straightforward and at times even informal arrangements with local brokers in other jurisdictions face fines and attempted disciplinary action for attempting to conduct business in the same manner in Nevada. Within large national brokerages, there have even been instances of Nevada-licensed professionals incurring punitive fines and licensing suspensions for assisting non-Nevada licensed professionals within the same brokerage with Nevada real estate transactions. Considering that the Commissioners comprising the NREC are all Nevada-licensed brokers themselves, oftentimes in competition with those against whom they seek to enforce these regulations, the specters of conflicts of interest and bad faith are clearly implicated.



A Legal Challenge to the Current Nevada System

In December 2018, the large international commercial real estate brokerage of Marcus & Millichap filed suit against the NREC, its individual Commissioners, and the NRED in Federal Court in Nevada, alleging that the Nevada regulatory structure applied to out-of-state brokers violates federal and state anti-trust laws, RICO statutes, civil rights statutes, and constitutes a deceptive trade practice. According to the allegations of the Complaint, the NREC has imposed various fines and commission disgorgement orders upon Marcus & Millichap of nearly \$1 million over the past three years for allegedly participating unlawfully in Nevada real estate transactions, despite the fact that the brokerage maintains a Nevada office and employs numerous Nevada-licensed professionals who are physically present in Nevada on a continuous basis.

The Complaint also points out that the individual members of the NREC are direct competitors of Marcus & Millichap and that the rules applied to out-of-state brokers in the name of “protecting” Nevada licensees creates an unreasonable barrier to entry into the Nevada real estate market, thereby stifling free trade and violating the Interstate Commerce Clause.

What to Watch For

The Marcus & Millichap case is currently winding through initial procedural formalities and, indeed, neither the NRED, the NREC, nor any of the individually named defendants have yet filed a response. The potential outcomes of this case, however, loom large for the real estate industry in Nevada and for those who wish to do business here. If the Court upholds the current system, then out-of-state brokers wishing to change it will find themselves compelled to lobby the Nevada Legislature for easier access to the Nevada real estate market. If, on the other hand, the Court sides with Marcus & Millichap, Nevada may see its doors opened to brokers who do business on a multi-state or even national scope. The shake-up to the NRED and NREC that will likely be caused by the defense of the lawsuit itself is undoubtable. As we continue to watch this case, we likewise continue to counsel our real estate clients in the most up-to-date practices in navigating the complex, and now uncertain, regulatory scheme in Nevada real estate.

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