

PROPERTY LAW

Federal Court Certifies Class Against Real Estate Brokers

By

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In *Bafus v. Aspen Realty, Inc.* (D.Idaho 2006) 236 F.R.D. 652, the United States District Court certified a class of real estate purchasers who claimed real estate brokers violated the United States Sherman Antitrust Act in the calculation of commissions charged on the sale of undeveloped lots. Class certification was granted despite the defendants' arguments that common questions of law and fact could not predominate because of the unique real estate transactions involved.

Facts in *Bafus v. Aspen Realty*

The *Bafus* case involved four separate class actions, each alleging that the defendant real estate brokers violated the Sherman Antitrust Act by charging commissions on sales of undeveloped lots calculated based upon the prices of the undeveloped lots sold plus the anticipated construction costs of homes to be built on the lots in the future, as opposed to basing the commissions solely on the purchase prices of the undeveloped lots. Each action involved between 24 and 101 subdivisions and hundreds of putative class members. The four separate actions were consolidated for purposes of the district court's opinion on class certification.

The plaintiffs claimed that payment of commissions on the future costs of building homes on the undeveloped lots were illegally tied to the purchase of the lots in violation of the Federal Sherman Antitrust Act. In other words, plaintiffs alleged that in order for purchasers to be allowed to purchase the undeveloped lots, the defendant real estate agents required that commissions based on the purchase price of the lots plus the cost of unbuilt homes be paid.

The defendants asserted that they were entitled to calculate the commissions as they did because the buyers did not actually purchase undeveloped lots because the construction of homes was contemplated as part of each transaction. The court, however, disagreed and determined that the lots were "undeveloped" when the plaintiffs entered into purchase agreements and/or construction agreements with the sellers. The court also found that the evidence reflected that buyers were not allowed to purchase an undeveloped lot without being required to build a house. While the homebuilders, not the realtors, required the buyers to build houses on the lots, the court still ruled that did not "necessarily defeat plaintiffs' claim that they were required to pay defendants a commission based on the cost of the lot plus the cost of the house." *Bafus v. Aspen Realty, Inc.*, *supra*, 236 F.R.D. at 656. It also did not matter to the court that the sellers, as opposed to the buyers,

paid the commissions to the defendants, because the plaintiffs alleged they paid higher prices for the lots in order to cover the higher tied commissions.

Trial Court Decision

For purposes of class certification, the court agreed with plaintiffs that the common legal and factual issue was "whether defendants' alleged tying violations caused plaintiffs to suffer antitrust injuries." *Bafus v. Aspen Realty, Inc.*, *supra*, 236 F.R.D. at 656. The court also agreed with the defense argument "that each real estate transaction is unique, depending upon things such as negotiated commission percentages, division of commissions and services offered by the realtor." *Id.* at 656. Due to such differences in the sales transactions, the defendants contended that each individual claim would be too unique and individualized to permit common issues to predominate. As the court paraphrased their arguments:

[I]n order for each plaintiff to prove the alleged antitrust tying claim, each plaintiff must prove that a defendant coerced the plaintiff into buying the tied product in order to obtain the tying product. This, defendants contend, requires individualized proof.

Id. at 657.

The district court decided that common questions did predominate, in part, because coercion would not necessarily need to be proven individually by each plaintiff. Quoting Ninth Circuit precedent, *Moore v. Jas. H. Matthews & Co.* (9th Cir. 1977) 50 F.2d 1207, 1217, the district court noted that coercion could be implied from a showing that "an appreciable number of buyers have accepted burdensome terms, such as a tie in, and there exists sufficient economic power in the tying product market ... coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes." *Bafus v. Aspen Realty*, *supra*, 236 F.R.D. at 657, citing *Moore v. Jas. H. Matthews & Co.*, *supra*.

In coming to its conclusion that common questions of law and fact predominated over questions affecting only individual class members, the district court relied upon the plaintiffs' expert witness testimony by Ed Whitelaw, Ph.D., a professor of economics, and noted:

In brief, Dr. Whitelaw explains that based on documentation of the conditions of sale for members of the class group and members of a comparator group, he could describe, on a class wide basis, what differences exist between the economic effects of defendants' behavior and the economic effects of the behavior of brokers who did not engage in the alleged anticompetitive behavior. With Dr. Whitelaw's method of proving impact and damage through common proof, each plaintiff would not be required to submit individualized proof that a defendant coerced the plaintiff into buying the tied product in order to obtain the tying product.

Bafus v. Aspen Realty, *supra*, 236 F.R.D. at 658.

Accordingly, the court granted certification of the following described class in all four actions:

All persons who: (1) bought an undeveloped lot in a subdivision in the Boise, Idaho

greater metropolitan area in which defendant has or had the exclusive right to market or sell the subdivision lots on behalf of the developer; (2) were required to build a house on the lot in order to buy the lot; and (3) were required to pay defendant a commission based on the cost of the lot plus the actual or estimated cost of the house in order to buy the lot.

Id. at 658.

CONCLUSION

This case shows that class certification may be allowed in certain real estate cases despite the inherently unique and individualized characteristics of real estate transactions, as long as a common issue predominates. It also demonstrates the usefulness of persuasive expert testimony to achieving class certification.