Antitrust

The antitrust laws are designed and intended to protect competition and prevent monopolies. Awareness of and sensitivity to the antitrust laws is imperative for real estate brokers in today's marketplace. Real estate and housing issues are a vital concern of government at all levels. This means that the real estate brokerage business may be often under scrutiny, and any anti-competitive conduct is likely to be detected and prosecuted.

The nature of real estate practice makes real estate brokers particularly susceptible to antitrust challenges. Brokers vigorously compete to secure property listings to offer for sale, but they also regularly cooperate with one another, as subagents, buyers' agents or "facilitators," to identify ready, willing and able buyers for those listings. This dual tradition of competition and cooperation, which exists in few other professions, presents frequent opportunities for antitrust misconduct, whether intentional or inadvertent. In today's business environment, it is a prerequisite to survival that brokers be conscious of and abide by the requirements of antitrust law.

1. Federal Antitrust Law

Over 100 years ago Congress adopted the Sherman Act as the foundation of federal antitrust law. Virtually all federal antitrust litigation alleges one or more violations of the Sherman Act. Section 1 of the Sherman Act simply states that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade…is hereby declared illegal.

The literal language of the Sherman Act sets forth two basic elements of any Section 1 violation: There must be (1) a contract, combination, or conspiracy that (2) restrains trade.

The conspiracy element is satisfied whenever two or more persons or entities carry out a common scheme or plan. If adherence to a common scheme or plan can be shown, the only remaining issue is whether or not the effect of the scheme or plan is to restrain trade.

Shortly after the Sherman Act was passed the Supreme Court held that the Act did not literally prohibit every contract that restrained participants in the marketplace. If the Act were interpreted in that literal fashion it would outlaw all commercial contracts since every contract restrains the parties to some extent. Instead, the Supreme Court declared that the Sherman Act prohibits only those contracts or combinations that unreasonably restrain trade.

The Supreme Court subsequently also identified certain types of restraints deemed to be so inherently anti-competitive that their anti-competitive effects on trade are presumed without a need for the plaintiff to prove, or even introduce evidence of, the restraint's impact on the market. Such restraints are called per se offenses. In a case alleging a per se offense the defendant is not permitted to introduce evidence to show the reasonableness of the restraint

because its unreasonable anti-competitive nature is presumed and conclusively established. Accordingly, in a per se case, the only issue to be addressed in determining whether a defendant violated the Sherman Act is if he actually participated in the conspiracy.

Restraints not characterized as per se violations are analyzed under the "Rule of Reason." The Rule of Reason is a "balancing test" that weighs the pro-competitive and anti-competitive aspects of a practice that may adversely affect competition in some way. Conduct challenged as unlawfully restraining competition may escape condemnation if the pro-competitive benefits outweigh the anti-competitive implications.

2. Antitrust Issues in Real Estate

A. Unlawful Per se Restraints

Two per se restraints have particular relevance to real estate brokers:
conspiracies to fix prices, such as real estate commission rates, or to fix other terms or conditions of the broker-client relationship;
group boycotts, or concerted refusals to deal, with another competitor or a supplier.

1. Price/Commission Fixing. Antitrust problems most frequently arise out of agreements – conspiracies – among competitors which have the purpose or effect of eliminating or restricting competition between the parties to the agreement. A common subject of such agreements is the price or fee each competitor charges its customers for its products or services. Real estate brokerage firms are no different, and in the real estate profession, that usually means commission rates. A commission is the charge to a seller for successfully procuring a ready, willing and able buyer for the seller's property on terms set forth in a listing agreement, or other such terms as the seller is willing to accept. Another form of commission is the charge to the buyer by a buyer's agent for assisting the buyer in locating and acquiring suitable property.

The antitrust prohibition on fixing commission rates means, simply, two or more real estate firms may not agree on the commission rate that each will charge. As noted earlier, price-fixing is a per se violation of the antitrust laws. Brokers must not agree with others on commission rates, and must take care to avoid even implying that they have discussed and/or reached agreement on fees. Salespeople must exercise similar caution to avoid the implication that the firm with which they are affiliated is part of a price-fixing conspiracy.

2. Fixing Commission Splits. A per se illegal price fixing conspiracy can involve not only the prices a firm charges customers or clients, but also the fees it pays for goods and services. In particular, listing brokers may not agree on the commission "split" to be paid to compensate cooperating brokers who produce a ready, willing and able buyer for a listed property. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be deemed per se illegal. For this reason, brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients. Listing and selling brokers may, of course, have occasion to discuss or

negotiate the compensation they will pay to each other in connection with individual transactions. These negotiations, however, generally take place before an offer to purchase has been procured by the cooperating office, and in any event should never include a representative of a third office.

3. Agreements As To Other Listing Terms. Antitrust law also condemns agreements among competitors regarding other terms or conditions of a listing agreement, such as the length of the listing, the type of listing accepted, or the marketing services to be provided by the listing broker, although such agreements may not be treated as per se violations. Any express or "understood" agreements as to the terms and conditions of listing agreements or other broker-client agreements raise serious antitrust concerns. The lawfulness of such agreements will in many cases be analyzed under the Rule of Reason, which balances the pro-competitive effects of the agreement, if any, against the anti-competitive consequences.

4. Boycotts. A practice that is in a sense directly at odds with cooperation is group boycotting. Like price-fixing, group boycotting is generally characterized as a per se violation of the antitrust laws, although certain boycott activities may be addressed under the Rule of Reason. A group boycott is a concerted refusal to deal with a particular party, such as when two or more businesses agree to refuse to deal with another competitor in order to force a change in a competitor's behavior or to attempt to drive the competitor out of business. As with price-fixing agreements, treatment of a group boycott as a per se violation of the antitrust laws results in the alleged conspirators being denied the opportunity to offer pro-competitive or other justifications for the conduct.

The typical group boycott allegation in the real estate brokerage business involves a claim that two or more real estate firms have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third firm. Often the target of the alleged boycott is a broker that employs a "discount," " alternative," or other non-traditional commission/compensation arrangement with clients. In some cases targets of alleged boycotts are real estate firms that offer non-traditional property marketing services. The purpose of the boycott, either explicitly or implicitly, is to eliminate the firm as a competitor in the market, or to cause the firm to abandon the discount or alternative marketing strategies. The antitrust laws are clearly make boycotts such as these per se illegal.

Real estate firms or professionals may also be accused of boycotting service providers to the real estate firms. Such a group boycott may target a supplier or purchaser, rather than a competitor, of the brokers alleged to be the conspirators. Concerted refusals to deal will be treated as per se illegal whenever they involve the purposeful elimination or limitation of competition, regardless of the ultimate motive or objective of the alleged conspirators. Real estate brokers may, for instance, agree not to patronize a provider of goods or services necessary or beneficial to the practice of real estate brokerage. For example, an agreement among several real estate firms not to employ the services of a particular printer to produce marketing materials, or to refuse to purchase advertising in a certain publication, may be an unlawful boycott of this type. The most effective and obvious way to avoid antitrust liability for such boycott activities is for each firm to unilaterally and without consulting any other firm determine the service providers it will use and the terms and conditions of using such suppliers.

B. Participation in the Association of REALTORS®

1. Association Meetings. Trade associations are ripe grounds for antitrust conspiracies. By definition associations consist of groups of competitors gathered together to promote their common business interests. As discussed above competitors occasionally seek to achieve that objective by agreeing, directly or indirectly, to act in a concerted fashion to repel a perceived threat to the success of their firms, such as the innovative business practices of a new competitor. Trade association activities are common venues for hatching such unlawful conspiracies since by definition they involve collective action by the competitors who are members of the organization. A broker who participates in the affairs of an association of REALTORS® must always be alert to discussions at association meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other brokers. A broker who finds himself in the midst of such a discussion should immediately suggest that the topic is changed and, if unsuccessful, he should promptly leave the meeting. If minutes are being taken, he should insist that his departure be noted for the record.

2. Use and abuse of the NAR Code of Ethics. The U.S. Supreme Court has held that industry self-regulation through codes of ethics is a legitimate trade association function so long as the code can be shown to promote competition by improving industry performance or efficiency. At the same time, industry codes of ethics can be and have been used to condemn or inhibit the practices of particularly successful or creative competitors in order to resist the competitive threat posed by such competitors. It is quite clear, however, that the antitrust laws forbid use of industry codes of ethics to discourage or eliminate competition in any way.

The REALTORS® Code of Ethics is no exception. The Code does not regulate pricing, otherwise lawful listing policies, or truthful advertising, nor may the Code ever be used to regulate or "outlaw" innovative or new business practices that cannot be shown to have legitimate unethical implications. REALTORS® who initiate grievances for the purpose or with the effect of limiting the freedom of other competitors in regard to such practices are misusing the Code of Ethics. Associations that permit the Code to be applied in that way create substantial exposure to antitrust liability for the members, the staff and the associations themselves.

3. Penalties for Antitrust Violations

Both civil and criminal penalties may be imposed for antitrust violations. These penalties include in civil cases, liability for three times the plaintiff's actual damages and payment of the plaintiff's reasonable attorney fees and costs, and in criminal cases criminal penalties including fines and prison terms and court supervision of the defendant's business for as long as 10 years;

4. Avoiding Antitrust Problems

A. Perception and Reality
Real estate professionals can limit their exposure to claims of antitrust violations by avoiding the conduct described above as unlawful. In addition, however, real estate professionals should recognize that the outcome of courtroom trials in general, and antitrust trials in particular, does not necessarily depend upon the actual facts regarding the conduct alleged to violate the law.

Rather, the outcome of trials depends entirely upon what the judge or jury believes, based on the evidence presented at trial, to have happened at the relevant time. Moreover, price fixing or other antitrust conspiracies are rarely created or proved by direct evidence of an agreement, such as a document signed by all parties to the conspiracy. Rather, antitrust conspiracies are most commonly proven by inferences drawn from the actions of competitors, such as private discussions about prices and subsequent uniformity of the prices charged by the participants to such discussions. For this reason, antitrust compliance programs are addressed as much to avoiding conduct that creates the appearance of a conspiracy as to avoiding conduct that actually consummates or advances that conspiracy.

1. Price-fixing. To avoid antitrust vulnerability for a price-fixing claim, such as two or more brokers or firms having agreed to charge the same commission rate, real estate firms should:
establish their fees unilaterally without consultation or discussion with persons affiliated with other competing firms;
insure that when the company's brokers or salespeople discuss fees with actual or potential clients they use words that indicate to the listener that the services were priced independently, and that they judiciously avoid words suggesting otherwise.

In determining its commission or fee structure, real estate firms must recognize and be conscious that antitrust conspiracies have been established without any direct evidence that alleged conspirators actually consulted with each other before making a competitive business decision, such as establishing a fee structure. In one infamous case a court found that an unlawful agreement had been reached when one competitor announced to others his intention to raise his commission rates and the other competitors adopted the same course of action within a short period of time. The court construed the announcement as an invitation to conspire and the subsequent action by the other competitors as acceptance of that invitation. An inference of conspiracy can be drawn even if the other competitors had each already decided independently to implement the particular policy, but had not already done so.

It is therefore imperative that brokers never discuss with or reveal to competitors their intentions concerning fees or other competitive business activities. Such actions will "taint" not only the subsequent decisions made by the broker who raised the subject, but also the decisions of all other competitors to whom the discussions or announcements were directed. Not only must brokers avoid any discussions that could imply that commissions or commission splits are the result of agreement or collusion, but they should also take positive steps to establish that their commission rates and splits are determined unilaterally. Such supporting documentation might include:

- spread sheets to show business reasons and justification for the amount of the fee or any increase;
- a memo to licensees explaining those reasons;
- discussions with counsel prior to adoption of any increase in the fees; and
- maintenance of correspondence and appointment logs that show that other firms were not consulted in connection with any fee increase(s).

Once pricing decisions are made, it is equally essential that the firm's salespeople present prices to clients in a manner that confirms that the fees were established independently. This means never responding to a question about fees by referring to the pricing policies of other competitors or to a policy of a local association of REALTORS® that supposedly prohibits or discourages price competition. Licensees should never use statements like:

- "This is the rate every firm charges."
- "I'd like to lower the commission, but no one else in the MLS will show your house unless the commission is X%"
- "Commission rates are pretty standard."

Salespeople who make these statements seriously jeopardize themselves and their firms. Brokers and salespersons must learn to explain and, if necessary, defend their firm's prices and other competitive business decisions in terms that are consistent with competition, not conspiracy. If the firm cannot or will not reduce its commission upon a client's request, the firm's salespeople should be prepared to point out the value of the services the client will receive for the fee charged, as well as how these services will most likely lead to a transaction at a fair price within the shortest period of time. A fast and efficient transaction can often save a client much more than the commission.

2. Boycotts. As with price fixing conspiracies, real estate brokers or salespeople who act as if there is a conspiracy among competitors not to cooperate with another competitor, or to deal with them only on terms established by the conspirators, are as vulnerable to an antitrust lawsuit as those who actually do conspire. Salesperson comments that create such troublesome inferences of boycott conspiracies include:

- "Before you list with XYZ Realty, you should know that nobody works on their listings."
- "The MLS will not accept their listings because they charge a flat fee."
- "If they were truly professional, they would not allow part-timers to work for them."
- "I bet they'd drop their 'discount' program if we told them they couldn't market or sell our listings."

Brokers whose salespeople make comments such as these to buyers, sellers, or persons affiliated with other firms will find their ability to adjust the terms and conditions upon which they cooperate with other firms severely restricted. Case law clearly establishes that brokers are free to choose unilaterally to lower the compensation offered to one or more particular firms, including "discount" or "alternative service" firms. But if a broker does so only after discussing the "problem," even casually, with other firms, the inference may be drawn that this action was pursuant to a conspiracy to boycott the other firm. This is especially true if, as is often the case, other firms in the market make similar contemporaneous decisions to lower their compensation offers to the same firm.

Licensees asked to compare their firm's commission split policies with those of other firms should explain that the amount of cooperative compensation is designed to maximize the incentive of cooperating offices to sell the listing. On the other hand, a licensee who works for a firm which offers a lesser amount to cooperating firms than may be "typical" for that market

must be prepared to explain why this difference will not detract from the objective of attracting the efforts of cooperating brokers and securing a satisfactory transaction in the shortest period of time.

3. Listing Agreement Policies. A real estate firm must also make sure that its listing agreement policies are established unilaterally, and that salespeople are prepared to explain those policies to clients in terms of how these policies will help the client achieve his real estate goals. If a firm's policies cannot be justified and explained in these terms, competitive forces may ultimately compel the firm to modify its policies, or, alternatively, drive it out of business. The purpose of antitrust laws is to preserve the efficient operation of these competitive market forces, for the ultimate benefit of consumers and competitors alike.

For this reason, care must be taken to avoid implying that the provisions of the listing agreement are not established unilaterally by the broker using the agreement. Under no circumstances should a client be told that the firm's terms must be accepted because "this is what all brokers do," or "no one else will cooperate unless you accept the listing on these terms," or "I'd like to shorten the listing term, but if I do the MLS won't accept the listing."

B. Office Antitrust Compliance Program

Another important safeguard against antitrust violations is for a real estate brokerage firm to adopt and rigorously apply a written office-wide antitrust compliance program. This program should be extended to every employee and independent contractor – brokers, salespeople, and administrative staff alike. The firm should set aside time, twice a year, to review with everyone the antitrust compliance program. An antitrust compliance program is a business necessity, because brokers are responsible for conduct of their salespeople and other staff. A brokerage firm cannot avoid antitrust liability because it did not authorize, for example, the price-fixing scheme undertaken by its salespeople.

Components of an antitrust compliance program may include the following:

1. Salesperson Education. A real estate broker's ability to keep his firm from violating the antitrust laws is in direct proportion to his ability and willingness to educate his salespeople. This commitment to education is imperative because, like it or not, brokers are and will be held accountable and liable under the law for the actions and statements of their salespeople, whether they are independent contractors or employees.

The broker should be sure the salespeople and staff understand how the antitrust laws apply to the real estate industry. A broker should insist that each salesperson attend an antitrust legal education program at least once every two years. This antitrust education program could be offered by the local association, conducted by the broker, the firm's sales manager, or legal counsel. In addition, all new salespeople should be required to attend a company orientation program that includes a presentation on antitrust compliance.

2. Monitoring Salesperson Performance. Brokers should not only alert the salespeople to the dangers of antitrust noncompliance and the consequences that can flow from inaccurate or incriminating statements, but they should also monitor their salespeople's compliance

performance. Salespeople should be instructed to report to their broker any suggestions by salespeople from other firms that could be interpreted as an invitation to fix commissions or boycott another competitor. Salespeople should also be taught, through simulated listing presentations, the proper way to distinguish the services of a competitor or respond to a seller's request for a lower commission rate. These responses should never take the form of a suggestion that commissions are established by agreement among brokers, or that an individual competitor is the object of a boycott.

3. Communications with Counsel. Every real estate firm should have access to competent legal counsel. If the firm's corporate counsel does not have antitrust expertise, the counsel should be asked to identify other counsel to be consulted when antitrust issues arise. Antitrust legal advice should be sought whenever the firm intends to adjust its commission rates, fees paid to cooperating firms, or whenever the firm plans to implement a business strategy that may adversely affect its competitor.

In addition, correspondence and records of communications with the firm's attorney should be kept in a segregated file, and should not be disseminated outside the firm without prior consultation with the attorney. Limited distribution of attorney-related documents is necessary to preserve the attorney-client privilege of confidentiality.

4. Standard Form Contracts. Standard form listing contracts should not contain certain information preprinted on the form, including the following:

- commission rates;
- predetermined listing periods;
- automatic renewal clauses;
- predetermined protection periods;

Brokers may also wish to include on the form an affirmative statement that commission rates and cooperative splits are independently established.

C. Responding to an Antitrust Investigation or

Complaint

Despite a broker's efforts to ensure that he and his salespeople are complying with the antitrust laws, he may nevertheless be the object of an antitrust investigation or complaint. Most actions initiated by government antitrust enforcement agencies begin with an investigation of the person or firm that the agency suspects may have violated the law. Brokers should require salespersons to refer all requests for information from a government antitrust enforcement agency to the broker or sales manager.

If a representative of an antitrust enforcement agency inquires about the business affairs of a broker or a firm, or if a formal subpoena or complaint is received, the matter should be referred immediately to the firm's attorney. All subsequent correspondence and communication with the government agency or plaintiff should be through the firm's attorney.

5. Conclusion The antitrust laws apply to prohibit collective action by real estate professionals that restraint trade. Real estate practitioners and firms must take care not only to avoid conduct that does violate the law, but also conduct that supports an inference of an unlawful agreement with other real estate professionals in restraint of trade. It is essential that real estate firms conduct training and practice vigilance to insure that their activities and that of their salespeople and staff does imply unlawful activity.