March 2004

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# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

## Inside This Issue





# Antitrust Primer for Real Estate Practice

Federal and state antitrust laws require companies to compete in the marketplace. To ensure that consumer choice is not unreasonably restricted, the antitrust laws set two basic requirements: companies cannot agree to limit competition in ways that hurt consumers, and a single company cannot monopolize or try to monopolize an industry through unfair practices.

The antitrust laws prohibit certain kinds of agreements among businesses. Each company must establish prices or other terms on its own, without agreeing with a competitor or supplier. For example, a group of automobile dealers in a local market cannot agree on the price that they charge for cars. A clothing retailer cannot agree with a manufacturer about the minimum price the retailer will charge for clothing.

The nature of real estate practice makes REALTORS® particularly susceptible to antitrust challenges. Brokers vigorously compete to secure listings and buyer clients, but they also regularly cooperate with one another as subagents and buyers' agents to find buyers for those listings. This dual tradition of competition and cooperation presents frequent opportunities for intentional as well as inadvertent antitrust misconduct. There is a risk of an antitrust law violation when a group of REALTORS® boycotts other brokers using new business models, when licensees participate in Internet chat rooms where commission structures are discussed, when a group of real estate firms plans to boycott publishers or printers serving the real estate industry, and when brokers propose group meetings to develop new "market standards of practice."

Trade associations such as REALTOR® associations and multiple listing services (MLS) are also ripe grounds for antitrust conspiracies. By definition, associations are groups of competitors gathered together to promote their common business interests. These competitors may be inclined to want to achieve that objective by directly or indirectly agreeing 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 associations must vigilantly resist all such impulses or risk antitrust charges being brought against them.

This *Legal Update* examines the complicated world of federal

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antitrust law as it applies to real estate practice. The *Update* first evaluates a broker's potential risk exposure for antitrust law violations and then overviews the basic elements of a Sherman Act violation, focusing on those antitrust law violations that are especially egregious - the per se violations of price-fixing, group boycotts, and tying arrangements. The discussion includes REALTOR® practice tips for avoiding antitrust law violations and Legal Hotline questions and answers about antitrust law issues. The *Update* concludes with a summary of federal antitrust law enforcement agencies and penalties and a list of antitrust law reference materials.

## Potential Risk Exposure

Is it worthwhile for REALTORS® to spend time learning about antitrust law issues, establishing office antitrust policies, training the sales staff to guard against anticompetitive behavior, and assuring that local board procedures address antitrust concerns. Consider:

1. **E&O Insurance Coverage is Limited**. A broker's errors and omissions insurance policy is likely to only cover claims expenses, not damages arising from any restraint of trade or other antitrust violation. A broker may be covered for his or her attorney fees and costs only, and not for any damages awarded.

2. **Treble Damages in Private Actions**. If found liable in a private action for a violation of federal antitrust law, the liability of the defendant is equal to three times the actual damages (treble damages) plus payment of the plaintiff's reasonable attorney fees and costs.

3. **Criminal Penalties are Severe**. Criminal penalties for antitrust violations can be as much as $1 million and may include imprisonment of individuals in criminal cases where there are intentional per se violations.

4. **Defense Costs are High**. Estimates suggest that defense costs are from $50,000 to $100,000 for private lawsuits and up to $500,000 in actions brought by the federal government. This is the estimated cost for defendants without insurance who win.

The antitrust laws are complex, and the proof presented in antitrust lawsuits is typically complicated, detailed and voluminous. An antitrust lawsuit can easily go on for several years because of the complexity and volume of materials involved. While antitrust lawsuits may be relatively rare, the magnitude of liability and expense involved justifies taking appropriate precautions.

## Sherman Act

Antitrust law is intended to prevent competitors from conspiring together to eliminate competition in the free marketplace. Antitrust law is made up of a series of federal and state laws designed to preserve competition and prevent monopolies. The discussion in this *Update*, however, focuses on Section 1 of the Sherman Antitrust Act.

Almost all antitrust litigation alleges at least one violation of the Sherman Antitrust Act of 1890 (Sherman Act). Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

## Contract, Combination, or Conspiracy

A contract, combination, or conspiracy exists whenever two or more persons or entities act according to a common plan or scheme. Direct evidence of a formal written contract or even spoken words may not be required - a knowing wink may be all that is necessary. A showing that the parties acted pursuant to a common understanding or meeting of the minds is sufficient to establish a conspiracy. In one case a court found a conspiracy when one broker announced to others his intention to raise his commission rates and the other companies also raised their commissions within a short period of time. The court viewed the announcement as an invitation to conspire and the subsequent action by the other companies as an acceptance of that invitation. A conspiracy can be inferred even if the other companies had each already decided independently to change commission rates, but had not already done so.

Circumstantial evidence of an antitrust conspiracy often includes proof that two or more competitors act in a "consciously parallel manner." Consciously parallel behavior is similar activity by two or more competitors with full knowledge of each other's actions. However, simply presenting evidence of consciously parallel behavior that results in injury to another competitor is not enough to prove an antitrust conspiracy. If the companies acting in a similar way can show economically rational explanations for their conduct that are consistent with independent, unilateral business decisions, then additional evidence must be presented to show that the behavior results from a conspiracy and not unilateral conduct. There is no conspiracy if an action has been taken independently by each entity as a result of internal decision-making.

## Restraint of Trade

A restraint of trade occurs when an agreement between persons or separate economic entities has a limiting effect on competition or business practices within the market in which the persons or entities operate. The Sherman Act states that every combination or contract in restraint of trade is illegal. If the courts literally enforced the Sherman Act, virtually every business entity would be out of business because every business contract restrains the commercial activities of the parties to some extent. Fortunately, the U.S. Supreme Court interprets Section 1 of the Sherman Act under the rule of reason. The law is read and enforced as if it said that only those contracts or conspiracies that unreasonably restrain trade are illegal.

There are two broad categories of potential Sherman Act antitrust violations: "rule of reason" and "per se" violations.

### Rule of Reason

When evaluating a situation under the rule of reason to determine whether there is an illegal restraint of trade, a court looks at whether the restraint merely regulates or even promotes competition, or whether it suppresses or destroys competition. 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 the market. The court considers the nature of the restraint, its effect upon market conditions, and the intended purpose of the restraint. If the net effect is anti-competitive, the court will find that the restraint is unreasonable and illegal. On the other hand, persons engaged in conduct challenged as an unlawful restraint of trade may escape conviction if the pro-competitive benefits outweigh any anti-competitive consequences.

### Per Se Violations

Certain conduct is presumed to restrain trade in violation of the Sherman Act. These "per se" violations are inherently anticompetitive and usually are considered automatically illegal. These are typically the more blatant and obvious antitrust offenses and the perpetrators generally receive the most severe penalties.

With per se violations, there is no balancing of competitive versus anti-competitive effects and there is no justification, excuse or defense that a defendant may present to exonerate him or herself. If it is shown that the defendant participated in the alleged per se violation, the courts conclusively presume an anti-competitive effect in the marketplace. The only remaining question is the amount of damages and attorney fees that the defendant will pay. Per se categories of conduct include conspiracies for price fixing, certain group boycotts, and tying arrangements.

# Price Fixing

Anti-competitive agreements about price are potentially the most serious because price is the primary way that firms compete for consumers in the marketplace. Clear or blatant price-fixing may result in criminal prosecution. Simply stated, competitors cannot agree to charge the same fees or commissions to their clients and customers because this destroys competition. In the real estate industry, agreements between brokers in different firms that have the purpose or effect of fixing or stabilizing the com-

missions or fees charged to sellers or buyers, or the cooperative compensation offered or paid to cooperating brokers, are per se violations of the Sherman Act.

## Brokers and Commission Fixing

The antitrust prohibition on fixing commission rates means, simply, two or more real estate firms cannot jointly decide what commission rates they will charge clients. Not only must brokers not make agreements with other brokers on their commission rates, they must also take care to avoid any actions that even imply that they have discussed or reached an agreement on fees. Salespeople must also avoid any implication that the firm with which they are affiliated participates in any price-fixing agreements.

In the absence of broker agreements on commission, the commission rates charged to clients in many markets still tend to seek an equilibrium point with the result that the majority of the sellers in many markets are charged the same equilibrium point commission rate. The question then becomes whether the majority of brokers in the market are simply covertly agreeing on their fees, or whether the equilibrium is reached as a result of competitive market forces. Fortunately, new business models are bringing more diversity to commission structures and limiting the appearance that a "standard" commission exists.

An equilibrium point commission rate is likely in a market where there are: (1) a large number of participants, (2) a service or product that varies little from competitor to competitor, (3) low barriers that facilitate easy entry and exit in and from the market, and (4) price information that is widely known to all market participants (brokers, sellers, buyers). Accordingly, commission rate uniformity alone, with no direct evidence of conspiratorial conduct, is not likely to be sufficient as the basis for antitrust litigation. At the same time, any proof of a conspiracy in a market with substantially uniform commission rates may lead to a conviction for violation of antitrust laws.

## Commission Splits

An illegal price fixing conspiracy can involve not only the prices a broker charges clients, but also the commission splits paid to cooperating brokers who produce a ready, willing and able buyer for listed properties. If a broker in town introduces a new business model and competing companies collectively agree on how commissions should be split with that broker, another form of price fixing may have occurred. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be found to be per se illegal.

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 cooperating brokers may discuss or negotiate the commission in individual transactions, but these agreements are specific to the transaction and should not be shared with a third office.

## Terms and Conditions of Agency Agreements

Agreements concerning terms and conditions of listing agreements, other than commission, can serve as the basis for an illegal conspiracy in violation of the Sherman Act. A conspiracy will be treated as a price-fixing conspiracy if it has an effect on price, even if it does not directly involve price. Thus a conspiracy among real estate brokers to fix the term of listing contracts, the form of compensation, the services to be provided to clients or even the type of listings that will be accepted may also be illegal, 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. These agreements, however, will in many cases be analyzed under a rule of reason balancing test rather than a presumption of an anticompetitive effect.

## Broker Compensation to Salespersons

Price fixing can arise in other settings as well. If independent brokers within a franchise or competing brokers within a marketplace jointly agree to establish new (and identical) commission structures for their salespeople, then a potential price fixing scenario is present.

For example, one of the most critical services that brokers pay for are those of their sales associates. Brokers may become frustrated when they devote a great deal of time, money and other resources to train a new agent only to have the agent go to another company that offers a more attractive compensation package. This frustration could lead brokers to talk to other brokers in an effort to establish a standard agent compensation schedule. The effect of such an arrangement would reduce competition among brokers for the services of sales agents. Accordingly, this type of arrangement would easily be classified as a per se price-fixing scheme in violation of the Sherman Act.

## Brokers and their Suppliers

A price fixing conspiracy can be based upon the prices paid by brokers for goods and services as well as the prices charged by brokers. For example, it would be illegal for a group of brokers to agree upon the maximum rates that they will pay for classified ads, yard signs or computer services.

## REALTOR® Boards and Associations

In the 1970s numerous lawsuits were filed against REALTOR® boards and associations as well as individual brokers alleging that they had conspired to set commission rates via recommended fee schedules and other agreements. The National Association of REALTORS® responded by developing the "Fourteen Point Multiple Listing Policy" (the Fourteen Points). The Fourteen Points were designed to reconcile the needs of multiple listing services with the prohibitions of antitrust law. The Fourteen Points became the basis upon which the outstanding complaints against nine boards of REALTORS® were settled between 1972 and 1974. The Fourteen Points prohibit member boards and associations from:

a.) Fixing, establishing, or maintaining any rate or amounts of commissions or fees;

b.) Urging, recommending, or suggesting that any person adhere to any schedule or other recommendation concerning the rate or amount of commissions or fees;

c.) Adopting, suggesting, publishing, or distributing any schedule or other recommendation concerning the rate or amount of commissions or fees;

d.) Taking any punitive action against any person based on that person's failure or refusal to adhere to any schedule or other recommendation concerning the rate or amount of commission or fees;

e.) Fixing, maintaining, suggesting, or enforcing any percentage division of commissions between the selling and listing broker; and

f.) Establishing, maintaining, or enforcing any fees for membership in the board or MLS which are not related to the cost of maintaining the organization as a going concern.

Similarly, two or more boards may never agree among themselves as to the amount of dues or other fees to be charged. Even discussions of dues and fees should be avoided because they may create an "appearance of a conspiracy" to fix prices.

## REALTOR® Practice Tips for Avoiding the Appearance of Price Fixing

To avoid antitrust violations, each real estate company must act independently to set commissions charged to sellers and commissions offered to other brokers for sub-agency or buyer agency. All brokers and agents must remember that all party commissions and co-broke commissions are negotiable on a transaction-by-transaction basis and that there is no set or fixed amount of commission that must be offered. An independent office may set commissions or co-broke fees according to their own office policy without a violation occurring.

REALTORS® should strictly observe the following guidelines:

**REALTOR® Practice Tips**: All decisions concerning commissions or fees must be unilateral, independent business decisions made solely within the broker's office, without consultation or discussion with anyone from other real estate brokerage firms. However, a broker may make pricing decisions based upon the prices charged by competitors.

**REALTOR® Practice Tips**: REALTORS® must always avoid all communications and discussions with other brokers that relate in any way to the commission rates charged to sellers and buyers, the rates paid to other brokers for cooperative commissions, and the compensation paid to salespersons. If brokers reveal their intentions concerning fees or other competitive business activities to other brokers, they will have tainted the subsequent decisions of all brokers who were involved with or heard the discussion.

**REALTOR® Practice Tips**: The process by which a commission or fee is established should be carefully documented. Documentation might include spreadsheets to show business reasons and economic justification for the amount of any fee or fee increase, consultation with legal counsel before adopting any fee increase and a memo to licensees explaining commission decisions.

**REALTOR® Practice Tips**: Brokers should be sure that their sales agents and other staff are trained to explain the commissions and fees charged by the company in terms of independent decisions and competitive market forces and avoid giving the appearance of collusion among competing companies. Agents should never refer to the pricing policies of other companies, and never make statements like, "This is the rate every firm charges," or "commission rates are pretty standard."

**REALTOR® Practice Tips**: Brokers at local REALTOR® association meetings and events must keep alert for any discussions concerning commission rates, pricing structures, listing policies, or marketing practices of other brokers. A broker who finds him or herself in the middle of such a discussion should immediately ask that the subject be dropped and, if it is not, he or she should immediately leave. If minutes are being taken, he or she should insist that this protest and departure be noted for the record.

## Legal Hotline Questions and Answers: Commissions and Pricing Fixing

The following Legal Hotline question and answer section relates to the price-fixing concerns of REALTOR® members.

***Is it legal for a listing service to require that the listing commission be stated on the listing sheet that is submitted to the service?***

While the identification of the listing commission is not illegal per se, it does greatly increase the likelihood of the service and its members being accused of conspiring to fix commission rates in violation of antitrust law. For this reason, NAR does not allow these rates to be stated in MLS publications. Any member of this listing service should consult with legal counsel regarding his or her exposure to antitrust liability.

***When a REALTOR® co-brokes with agents outside the REALTOR®'s area and she asks them what their commission split is, they usually say that it is 60/40. Aren't they supposed to pay a percentage of the selling price (i.e. three percent) instead of 40 percent of the commission?***

Due to antitrust concerns, it is not advisable to discuss or negotiate commissions as 40 percent of a six percent commission or as just 60/40 because it implies a standard commission of six percent in the community. It is best to offer cooperation as a percentage of the purchase price, such as 2.4 percent of the sale price.

***An agent has been offering a 2.4 percent split on a seven percent listing, instead of 2.8 percent. There are no written agreements or policy letters between offices. One broker would like to not offer a 60/40 split with this agent's office. Can the broker do this?***

Each office must independently establish its own listing and commission policies. It would be an antitrust violation for the DRL, NAR, MLS, or broker competitors to set minimum/maximum listing or co-broke compensation amounts. The broker may determine his own listing policy and fees as well as what his office will offer for cooperating commissions. It should never be suggested that there is any standard commission rate in the board, MLS, region or municipality. It is prudent to choose words carefully when discussing commissions, because they may imply that there are set rates or standards for commissions or commission splits and this would raise antitrust concerns.

***Is it legal and ethical to state a commission rate in advertising for listings?***

There is no violation of antitrust or license law to advertise a company's commission rates. Antitrust concerns would arise if the rates were the result of an agreement between competitors.

***Re: Advertising. A buyer's broker is advertising in the newspaper: "List your home for just $275." It then goes on to state, "Don't pay 6% to list your home. Get listed in MLS for a one-time flat fee and avoid paying high traditional real estate commissions. Let thousands of REALTORS® work to sell your home for a suggested commission of 3%, sell it yourself and you pay no commission." Is this legal?***

This ad may strike some as confusing and misleading. It is not clear what a seller will get if they list their home for $275 – does that mean just the MLS listing? Under license law, for example, a listing agent would be obligated to inspect the property and disclose defects, and under federal law, would be responsible to ensure that LBP disclosures are made for target properties built before 1978.

The ad also arguably implies that the traditional real estate commission is six percent and it also references a suggested three percent commission. These items cause concern with respect to antitrust law violations.

The ad may also be confusing to sellers because they may not understand the difference between the $275 MLS listing fee and the three percent commission.

***A property was listed in the MLS, and the listing broker offered compensation of 2.1 percent of the purchase price to cooperating brokers. At the closing, the selling agent told the listing agent that she must pay the same co-broke fee as everyone else.***

The listing broker is free to offer any commission structure the broker wishes. If the cooperating agent is not satisfied with the compensation offered through the MLS, the issue should have been discussed prior to her submission of the offer. The cooperating agent may benefit from discussions with legal counsel familiar with antitrust law.

## Group Boycotts

A second type of per se antitrust violation is the group boycott. The objective of a group boycott is to induce a third party – another competitor, customer, or supplier – to change its practices and policies so that it conforms to the expectations and desires of the boycotters. A boycott occurs when competitors work together to exert pressure on a third party by collectively withholding, or inducing others to withhold, goods, services or patronage essential to the economic survival of the third party. Because real estate brokers, other real estate professionals and outside vendors (e.g. newspapers) depend a great deal upon one another's business, a group of real estate companies can collectively refuse to deal with the targeted firm until the targeted firm either conforms its business practices to the group's expectations or goes out of business.

This tactic might be used, for example, against a company introducing a new business model into a marketplace or a vendor who raises rates or conducts business in an unacceptable manner. Two or more real estate brokers may agree to refuse to cooperate, or to cooperate on less favorable terms, with a third company. Group boycotts may occur when the targeted company employs a "discount" or some other non-traditional compensation arrangement with clients, or when the company being targeted offers non-traditional property marketing services. The purpose of such a boycott is to eliminate the company as a competitor in the market, or to cause the company to abandon the discount or alternative marketing strategies. Boycotts like this are per se illegal.

Group boycotts for the express purpose of reducing or eliminating competition are treated as per se violations of the Sherman Act, regardless of any socially justifiable motives. It does not matter if the boycotters are incapable of having any significant impact upon competition in the relevant market and do not have sufficient market power to actually eliminate a competitor. Even if the target of the boycott is acting illegally, immorally, or unethically, or if the ends are legitimate and worthwhile, the per se rule applies when the means selected is an anti-competitive group boycott and the group will be found in violation of the Sherman Act.

Trade association conduct undertaken to upgrade industry standards or increase industry efficiency, on the other hand, will not be classified as a boycott. The "boycott-like effects" seen where a competitor cannot or will not comply with reasonable rules and regulations will be deemed permissible as long as the rules are reasonably related to achieving the association's industry improvement goals.

### Providers and Vendors

Brokers are free to decide how they will do business with other brokers and vendors in the marketplace provided that their decisions are made unilaterally. A broker's decision is still considered to be unilateral even if it is made with knowledge of similar decisions made by competitors. The fact that brokers behave in the same way when faced with similar facts and circumstances does not, alone, establish a conspiracy. The additional fact that the competitors made their individual decisions with knowledge of each other's actions is not enough to change this result.

In general, REALTORS® may not all agree to purchase particular products or services from a single service to the exclusion of others. For example, a group of REALTORS® shouldn't collectively agree to patronize a single Internet advertising provider to the exclusion of all others. All REALTORS® and real estate companies must determine individually what best serves their business interests and act accordingly.

Like price fixing, if the action to withhold goods, services or patronage is solely the result of independent decision-making, then there is no conspiracy, no boycott, and no antitrust violation has occurred. For example, several local real estate offices could place classified advertising with the same local newspaper. If the paper has notified the boards of a price increase, it would be an antitrust violation for the offices to agree among themselves to refuse to place any future ads with the newspaper unless the newspaper agreed to "roll back" its prices. On the other hand, if there is not any discussion with the other offices as to the price increase, an individual office can elect not to place any future ads with the newspaper based the broker's own independent business decision regarding cost-effective advertising.

The mere operation of an association advertising publication doesn't violate federal or state antitrust laws. However, an agreement among REALTORS® to terminate or limit their purchases of advertising from another particular publication and to confine their advertising purchases to the association's publication is almost certainly a group boycott and/or restraint of trade and would therefore be unlawful under the antitrust laws.

### MLS Issues

Conduct undertaken in furtherance of efforts to improve market condi-

tions that has the effect of a boycott is not necessarily going to be treated as a per se illegal group boycott. In a trade association scenario, the trade association exists to provide services and benefits to its members who meet the association's eligibility criteria. Persons elect to join trade associations because they view membership as a valuable asset in generating business and enabling them to compete more effectively in the marketplace. This is particularly true where the trade association operates a standards or certification program, adopts and enforces a code of ethics, or advertises generically in support of its members.

When the trade association also operates a cooperative buying program or an information exchange, like the MLS, a person who is expelled from the group or denied membership may find he or she is unable to compete with members on an equal terms and conditions. If the per se rule was applied every time a trade association denied a nonmember access to benefits or services, or expelled a member, then a trade association could never adopt and enforce membership criteria or codes of ethics, nor could it restrict benefits and services to members. The impact on nonmembers would be as if they were the targets of a group boycott.

The U.S. Supreme Court, however, has established that trade associations may operate an efficiency enhancing information exchange provided that membership standards are reasonable and non-discriminatory. Such associations are to be evaluated under the rule of reason rather than automatically being branded as illegal under the per se rule. An association of competitors that serves pro-competitive ends may create and enforce reasonable membership rules.

## REALTOR® Practice Tips for Avoiding Inadvertant Boycotts

A group boycott is analyzed in the same way as a price-fixing case with respect to the conspiracy requirement. If competitors discuss with one another, at a local association meeting or elsewhere, the "appropriate response" to a new competitor or another broker's marketing practices, then any subsequent actions of the competitors in response to the behavior of the "outsider" will be viewed as conduct pursuant to a conspiracy. This is true even if the conduct of the conspirators could have been explained in non-conspiratorial terms but for the prior consultations.

REALTORS® should strictly observe the following guidelines:

**REALTOR® Practice Tips**: Agents must avoid comments that infer boycott conspiracies such as: "Before you list with ABC 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 a professional company, they wouldn't let part-timers work for them," and "I bet they'd drop their discount program if we told them they couldn't sell our listings."

**REALTOR® Practice Tips**: Broker decisions to lower the compensation offered to one or more particular firms, such as a discount or alternative service firm, must be made unilaterally. Brokers should never change compensation after even casually discussing the "problem" with other firms because the inference may be drawn that this action was pursuant to a conspiracy to boycott the other firm.

## Legal Hotline Questions and Answers: Group Boycotts

The following Legal Hotline question and answer section covers the group boycott concerns of REALTOR® members.

***Re: Fly-by-night mortgage brokers. What can an agent do to help buyers avoid these types of unscrupulous mortgage brokers?***

Sellers may negotiate lender conditions in the offer to purchase. For example, a seller might consider requiring the lender to be authorized to do business in Wisconsin, to have brick and mortar offices in Wisconsin, to have funds available directly from the lender at the time of closing or to have been in business a minimum number of years. However, these types of conditions raise the possibility of antitrust concerns if other brokers also encourage sellers to impose these conditions. Legal counsel for the agent's company should review any such policies.

***A local group of REALTORS® publishes a buyer's guide. Is it a restraint of trade if it is made mandatory that a firm and its agents carry E&O insurance before they are allowed to advertise in the buyer's guide?***

This may possibly be an unreasonable restraint of trade. A contract, combination or conspiracy in restraint of trade and commerce may be a violation of antitrust law. A restraint is analyzed to determine whether it merely regulates and promotes competition, or whether it suppresses or destroys competition. The purpose and nature of the restraint are evaluated as well as its effect upon market conditions.

The E&O insurance requirement may restrain trade because it limits those who may advertise in the

buyer's guide. This may or may not be significant depending upon whether excluded brokers have other effective means to advertise at their disposal. The purpose of the requirement would be to decrease listing broker liability for uninsured subagents, which is laudable, but it is not really related to advertising. Thus, this limitation may not pass the "rule of reason" test. For a more definitive determination, the broker should consult with an attorney experienced in antitrust law.

***A new discount company wants to place an ad in a homes magazine. The publisher said that only those brokers who have homes listed in the MLS and who co-broke will be able to put ads in the magazine. The majority of the discount company's listed sellers do not want their listings placed in the MLS. However, the company does have some listings in the MLS and does co-broke. Is this restraint of trade?***

This requirement may be an antitrust violation if the publisher is bending to pressure from other brokers who advertise in the homes magazine or is operating in concert with them. The new discount broker should obtain a written statement of policy from the publisher and determine what happens to other brokers who do not meet the criteria.

***Re: A meeting of brokers from one city concerning newspaper advertising. The brokers in the area are looking for a different publication to advertise in and want to drop a media provider that they use. Are there any antitrust issues concerns in holding this meeting?***

Under the Sherman Act, every contract, combination or conspiracy that unreasonably restrains trade or commerce is illegal. Generally, three elements must be proven: (1) a contract, combination or conspiracy involving two or more separate business entities, (2) the contract, combination or conspiracy restrains trade and (3) the contract, combination or conspiracy is in or affects interstate commerce. There need not be formal proof of an actual contract. All that needs be shown is that two or more separate entities participated in a common scheme or design. A conspiracy can be established by inferences drawn from circumstantial evidence frequently found in consciously parallel conduct by two or more competitors (i.e., competitors which engage in similar competitive behavior with full knowledge of each other's actions).

The intended topic of the conversation at the broker's meeting suggests a potential group boycott that would be illegal under antitrust law. Brokers must make their business decisions independently, without concern as to competitors' practices.

## Tying Arrangements

The sale of one product on the condition that the customer also purchases a second product, which the customer may not want or can buy elsewhere at a lower price, is a tie-in. In the usual tying arrangement, a seller will condition the sale of a unique or desirable product, known as the "tying product," on the buyer's agreement to purchase a less desirable or less unique product, known as the "tied product." When the effect of a tying arrangement is to extend the seller's market power in the tying product to the market for the tied product, the tying arrangement is illegal per se under the antitrust laws. For example, an illegal tying arrangement would exist if a computer manufacturer tied the sale of its computers to the sale of the company's computer paper.

The elements of a per se illegal tying arrangement are:

1. Two distinct and separate products or services that are tied together, either by an express contract or by a course of dealing between the parties.
2. Market power in the tying product market sufficient to restrain competition in the tied product market.
3. A restraint upon the amount of commerce in the tied product market that is not insubstantial.

### Two Distinct Products

In a tying arrangement, there must be two separate and distinct products or services that have been tied together. This analysis must be addressed on a practical basis as a case-by-case determination, based upon whether buyers in the market demand the products separately or together on a package basis. Whether a package of goods or services constitutes a single product or separate products depends upon whether buyers demand the two items as a package, not upon whether the two items are functionally interrelated. For example, gasoline and automobiles are functionally interrelated but are not viewed as a package unit.

### Market Power in the Tying Product Market

Market power is the power of a firm to affect the price that will prevail in the market where the firm does business. This will depend upon the reaction of buyers to price changes initiated by the seller. The buyers' reactions, in turn, depend upon the availability of substitutes for seller's product. For example, a farmer selling wheat at market has no market power because buyers can readily get wheat

from other farmers. It must be proved that a seller has market power in the tying product market before a tying arrangement will be treated as per se illegal.

### A "Not Insubstantial" Amount of Commerce

This test is a measure of the amount of commerce that is affected by the tying arrangement.

### List Back Agreements

Any contract for the sale of land that requires the buyer to purchase other goods or services from the seller raises issues under tying law. Accordingly, REALTORS® should treat any such contracts with caution. For example, a typical "list back" sales contract for the sale of lots in a subdivision will condition the sale of a lot to a builder upon the builder's agreement to list the house the builder will construct upon the lot with the developer's real estate brokerage company for subsequent sale to a homeowner. Whether such a contract is an illegal tying arrangement usually depends upon whether the developer has market power in the sale of subdivision lots.

### License Law Tie-In Prohibition

Members should note that tying arrangements are addressed to a limited extent in Wis. Admin. Code § RL 24.075. Potential tying arrangements outside of these specific prohibitions must be evaluated under antitrust law.

One common example is the situation where the buyer of a vacant lot is required to agree to use the services of a specific builder. If the seller and builder are one-in-the-same, the tying arrangement is potentially in violation of the antitrust law. What often seems to be the case, however, is that the seller may not have sufficient market power for the arrangement to fall within the scope of antitrust law. REALTORS® with specific concerns about potential antitrust violations should, of course, consult with legal counsel and perhaps an antitrust attorney if the situation warrants.

## Legal Hotline Questions and Answers: Tying Arrangements

The following Legal Hotline question and answer section reflects the tie-in situations faced by REALTOR® members.

***A broker is thinking of developing some land and some builders are interested in the lots. Can the broker offer them a break on the price of the lots if they list with him?***

Provided the broker does not violate the Administrative Code prohibitions regarding tie-in arrangements, the broker may negotiate each purchase price independently with the buyers. Rather than discounting the purchase prices, the broker may also negotiate commission on future listings if the builders list the completed construction with the broker's company.

According to § RL 24.075 concerning tie-in arrangements, licensees shall not:

1. Condition the sale of real estate owned by the licensee or whose sale is effectively controlled by the licensee to a buyer upon the buyer's agreement to purchase another parcel or real estate.

2. Condition the sale of real estate owned by the licensee or whose sale is effectively controlled by the licensee upon the buyer's agreement to list real estate owned by the buyer with the licensee.

   **Note**: The following are two common examples of activities which would violate this subsection: (1) requiring a builder to list a speculation home with the licensee; and (2) requiring a buyer to list a present home with the licensee.

3. Condition the sale of vacant real estate owned by the licensee or whose sale is effectively controlled by the licensee upon the buyer's agreement to employ one or more specific builders to make improvements on the real estate unless:

   a.) The builder owns a bona fide interest in the real estate; and there is full disclosure as specified in § RL 24.05(3).

   b.) The builder and the licensee or the builder and the owner of the real estate are the same person or are commonly controlled corporations and whose business is selling improved property and not vacant land; and there is full disclosure as in § RL 24.05(3).

   c.) The agreement is a bona fide effort to maintain development quality or architectural uniformity and no consideration passes from contractor to licensee for soliciting this agreement.

***Is there some regulation about tying one contract into another? Is it correct that a broker cannot sell a lot and then require the builder to list with him or her? A buyer is purchasing a lot and entering into a building contract with the builder that owns the lot. A snag has come up in the transaction whereby the buyer may not have enough funds to pay the building contract this year. The buyer would like to purchase the lot this year and commit to the builder to build with him next year. Can this be done?***

A builder/owner of real estate may require a buyer to enter into a build-

ing contract with the builder/owner as a condition to the sale of the real estate.

***A broker has a listing that has been on the market for about three months. It is coming up for renewal and the seller was going to give the broker an extension. However, the seller has an offer in on another company's condominium development and they will not give her an extension on the contract unless she re-lists her property with that company. Is this legal and ethical?***

§ RL 24.075(2) provides that, "Licensees shall not:

(2) Condition the sale of real estate owned by the licensee or whose sale is effectively controlled by the licensee upon the buyer's agreement to list the real estate or other real estate owned by the buyer with the licensee."

Arguably this rule would apply equally to initial offers and to amendments necessary to keep a deal under contract.

***If a broker were to offer to list a property for a flat fee, can the broker make it contingent upon the seller purchasing their next home with the broker's company?***

This would not be an illegal tie-in under § RL 24.075. Such a promise, however, would be difficult to enforce.

## Antitrust Law Enforcement

The federal antitrust laws provide for some of the severest penalties available under federal law. In addition to civil and criminal prosecutions, individuals can sue for treble damages and reasonable attorney's fees.

### Department of Justice

The United States Department of Justice has exclusive authority to enforce the Sherman Act. A violation of the Sherman Act may be a felony punishable by fines up to $1 million for companies, and fines up to $100,000 for individuals. Individuals may also be imprisoned for up to three years. Generally these penalties are invoked in per se cases where criminal intent is proved. The Department of Justice may also bring civil actions to enforce the Sherman Act. This most often occurs in cases involving rule of reason violations.

### Federal Trade Commission Act

Congress enacted the Federal Trade Commission Act (FTC Act) in 1914. The FTC Act prohibits unfair methods of competition, and created the Federal Trade Commission (FTC) to enforce it. In 1938, the scope of the FTC Act was expanded to include a prohibition against "unfair or deceptive acts or practices." This is a broad prohibition that enables the FTC to prosecute parties who unreasonably limit competition or confuse or mislead consumers, even if the actions are not violations of the antitrust laws. The FTC, however, only has the authority to issue cease and desist orders directing that all restrictive or deceptive conduct be immediately stopped, and cannot recover damages and attorney's fees.

The FTC closely monitors the activities of real estate professionals. The FTC has investigated the activities of REALTOR® boards and associations, individual real estate brokers and multiple listing services not associated with REALTOR® boards.

The FTC has the power to engage in extensive investigations and can compel the production of documents, written answers to questions and sworn oral testimony. The FTC may also seek preliminary injunctions ordering the party under investigation to stop the conduct at issue until the administrative hearing is held. An administrative law judge (ALJ) initially hears FTC complaints. The decisions of an ALJ may be appealed to the full FTC and to the federal courts of appeal.

### Private Enforcement

Private individuals and units of government (person) may sue in federal court to recover damages for injuries to their businesses or property. The injury must result from a reduction in competition in the relevant market brought about by the defendant's violation of federal antitrust law. An antitrust injury might be money lost because prices were fixed at an artificially high level or because the injured person was forced to buy unwanted goods or services through a tying arrangement.

The injured person may recover treble damages, that is, three times the amount of actual damages that the injured person can prove. If successful, the injured person may also recover reasonable attorney's fees, regardless of the amount of damages, and the court may order the defendant to pay the injured person's attorney's fees where that party "substantially prevails," even if they don't ultimately win. Class actions may also be initiated, such as by a group of persons who paid an artificially high price that was fixed by the defendants.

### Antitrust Complaints to the FTC

REALTORS® who have a questions or a comment about an antitrust

issue, who wish to file a complaint, or who wish to provide information that may be helpful in an investigation may contact the FTC. Include a daytime telephone number in any correspondence for the best response.

- By mail: Office of Policy and Evaluation, Room 394, Bureau of Competition, FTC, 800 Pennsylvania Ave, NW, Washington, D.C. 20580, or your closest FTC regional office.
- By telephone: Call (202) 326-3300 for FTC headquarters or call the FTC Consumer Response Center at (877) 382-4357.
- By e-mail: send a message to antitrust@ftc.gov. Note that e-mail communications are not secured so confidential information should be sent by mail and marked "Confidential."
- On the Internet: An online FTC consumer complaint form is found at https://rn.ftc.gov/pls/dod/wsolcq$.startup?Z_ORG_CODE=PU01.

With few exceptions, FTC investigations are not public. Information provided and complaints will be kept confidential. Neither the information nor an informant's identity will be disclosed outside the FTC. The FTC cannot discuss investigations, or even confirm or deny their existence.

## Resources

For further information about antitrust law, see the following resources:

- NAR Field Guide to Antitrust Law: http://www.realtor.org/libweb.nsf/pages/fg704
- Federal Trade Commission's Antitrust Law Resources: http://www.ftc.gov/ftc/antitrust.htm
- Antitrust Division of the US Department of Justice: http://www.usdoj.gov/atr/
- *Legal Update 98.11*, "Antitrust Law, 1998," www.wra.org/ LU9811

## Conclusion

REALTORS® should never discuss their firm's commission rates, co-broke splits or other competitive business decisions with brokers or agents from other firms in the market. These discussions can convert the implementation of perfectly lawful business strategies into a violation of the Sherman Act. To protect against price fixing charges, all decisions concerning commissions or fees must be independent, fully documented business decisions made solely within the broker's office. If an action to withhold goods, services, or patronage is solely the result of internal decision-making, then there is no conspiracy and no antitrust violation has occurred. It is equally important for REALTORS® to avoid any conduct that creates even the appearance of a conspiracy.

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