

ANTITRUST COMPLIANCE WARNING

In the area of risk reduction, antitrust liability poses one of the greatest, yet least understood risks for REALTORS®. Below is a summary of the basics on Antitrust.

Basic Prohibitions

The Sherman Act prohibits any contact, combination or conspiracy in restraint of trade. In order to establish a violation of the antitrust laws, it must be shown that two or more persons or business entities participated in a common plan or scheme and that the effect of that plan or scheme was to restrain trade.

Typically the required contract, plan, or scheme is proven by circumstantial evidence. That circumstantial evidence must exclude the possibility that the parties acted alone. If it is equally possible to conclude from the evidence that the parties acted alone (i.e., each made independent business decisions) then the circumstantial evidence is insufficient to establish an antitrust violation.

To violate the antitrust laws, the restraint of trade caused by the conspiracy or common plan must be unreasonable. The restraint will be considered unreasonable if its anti-competitive effects are not outweighed by any counteracting pro-competitive effects. This is referred to as the "Rule of Reason."

Per Se Violations - Although the Rule of Reason is the primary test used to determine if a restraint is unlawful, some restraints are considered to be so destructive that they are presumed to be anticompetitive under the Sherman Act. These are referred to as "per se" violations. The per se violations that are most common in the real estate industry are price fixing, group boycotts, and certain tying arrangements.

Price Fixing

It is a per se violation for two or more brokers to agree, conspire, etc. regarding the amount that will be charged the public for their services. Brokers and their agents should avoid any language that suggests that fees are the product of an agreement between brokers (i.e., the "prevailing rate", the "standard" commission). There is no prohibition against a broker advertising the rate of commission he charges the public.

Commission Splitting - The price fixing prohibition also applies to cooperative commissions that are offered to other brokers; two or more brokers cannot agree and should not discuss what they will pay to another broker(s).

Other Terms of Services/Compensation - Price fixing violations can be based on any agreement to fix or regulate any economic term. Thus, brokers cannot agree to fix such terms in a listing as the length or type of listing or the form of compensation (i.e., flat fee v. commission).

Boycotts

A boycott is an arrangement by two or more businesses to withhold patronage or to deal on unfavorable terms with a third party for purposes of reducing competition. A group boycott is frequently alleged where it is claimed that two or more brokers conspired to refuse to cooperate or to cooperate on discriminatory terms with another broker; usually that other broker is perceived as being a "discount" broker offering a lower commission rate than the alleged boycotters. To avoid allegations of participating in an illegal boycott, brokers must be careful not to discuss with one another or announce at either social or professional meetings how they will respond to the entry of a new competitor in the market.

Outside Providers - Occasionally, a claim of a boycott by brokers can involve providers of other related services. For example, such an allegation may be raised where two or more brokers agree to withhold advertising from a local newspaper because they were dissatisfied with the paper's rates.

Tying Arrangements

A tying arrangement is an agreement by a vendor to only sell a product or service to a person if that person(s) agrees to also purchase a different product or service from the vendor. In order for such a tying arrangement to violate the antitrust laws, it must be proven that the vendor will derive income from the sale of both products or services and that he possesses sufficient market power to restrain competition. The most typical example of a tying arrangement is that of a "list/back" agreement. This occurs where a builder who also holds a broker's license or owns a brokerage firm will only agree to build a home for a buyer if he agrees to list his existing home with the builder's brokerage firm. Whether such list/back agreements constitute a tying arrangement in violation of the antitrust law usually depends upon whether the builder/broker possesses sufficient market power in the area to restrain competition.

Penalties

Violation of federal antitrust laws can result in one or more of the following sanctions:

- Damages of up to three times the plaintiff's actual losses, as well as payment of attorney's fees and costs.
- Injunctive relief, which can include court supervision of the defendant's business for ten years or longer.
- Criminal penalties