

## RE11RC07: Antitrust

### 1. Anti-Trust Laws

Purpose - The purpose of the Anti-trust laws is to promote competition in the marketplace. Competition benefits consumers by keeping prices low and the quality of goods and services high.

- a. Sherman Anti-Trust Act of 1890  
The first American Anti-trust law that forbids "contracts, combinations, conspiracies or agreements" in restraint of trade". It also prohibits monopolies or attempts to monopolize.
- b. Clayton Act of 1914 (tying, labor union exemption)  
Outlaws business mergers which result in a non-competitive atmosphere. Unlike Sherman Act which deals with current practices, the Clayton Act outlaws activities which may affect future restraint of trade.
- c. Robinson - Patman Act 1936  
Forbids price discrimination among customers of the same class.
- d. Federal Trade Commission Act of 1914 (amended in 1930s and 1970s)  
Allows the law to move against unfair or deceptive practices, or unfair competition without waiting for someone to actually be harmed by them (current & future).
- e. Hart-Scott-Rodino Act - section 7A of the Clayton Act, called Hart-Scott-Rodino Act, requires prior notification of large mergers to both FTC & Justice Department
- f. Parens Patriae –  
Attorneys General were given the full strength of Federal antitrust powers under "parens patriae".
- g. MGL Chapter 93 Section 1-14A  
The purpose of the "Massachusetts Antitrust Act" is to encourage free and open competition in the interest of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth. This Act shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable.

### 2. Four Common Anti-Trust Real Estate Violations

All four are illegal under the "Per Se" rule and no defense of ignorance or lack of illegal intent will be accepted. The law presumes that they are violations and condemns them automatically.

- a. Price Fixing - an agreement, combination, or conspiracy involving at least two persons who are nominal competitors to fix, set or rig prices (or commissions or fees). There is no such thing as an innocent discussion of commissions.
  - i. In the stream of interstate commerce
  - ii. Has an effect upon interstate commerce

- b. Group Boycott (must prove) Individual refusals to deal are illegal. Violation of the law even if two or more businesses just agree to a boycott... or some coercion of a third competitor. Even a group boycott of someone perceived to be "unethical" is a problem... violation of the Realtor Code of Ethics should be filed as a grievance... not discussed among competitors.

Consideration to determining violation:

- A conspiracy to boycott exist
  - Participated in the boycott
  - Conspiracy had a sufficient nexus with interstate commerce
  - Conspiracy injured the plaintiff
  - The approximately amount of damage
- c. Dividing the Market –
    - i. Allocation of customers among two or more competitors, whether the division is based on geography, product lines, astrological sign or other criterion.
    - ii. Allocation of markets
  - d. Tying Arranging  
Dominance in the market that forces consumers into purchasing a "tied" product in order to obtain the "tying" product  
5 elements of a per se tying claim:
    - i. Two separate and distinct products, a "tying" and a "tied" product;
    - ii. The buyer being forced to buy the tied product to get the tying product;
    - iii. The seller possessing sufficient economic power in the tying market to coerce buyer acceptance of the tied product;
    - iv. Involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product;
    - v. The tying company has an economic interest in the tied product (anti-competitive effect in tied market).

### **3. Three Elements to Anti-Trust Violations**

- a. Combination or Conspiracy
  - i. Existence of concerted action by knowing participant
  - ii. A specific intent to monopolize
  - iii. An overt action
- b. In Restraint of Trade  
Limits ability to do business
- c. Which is Unreasonable  
Causing damage to injured party

### **4. Anti-Trust Laws are Administered by:**

- a. Federal Trade Commission
- b. Department of Justice
- c. State Attorney General

## 5. Violations

### a. Per se

Illegal on the face - anti-competitive effect need not exist, only an agreement is needed. Example would be a verbal or written agreement between two competitors to fix prices and /or divide the market. For this, one does not have to establish an anti-competitive effect... just the agreement itself is enough to determine a violation.

Per se rules require the court to make broad generalizations about the social utility of particular commercial practices. The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its' pro-competitive consequences.

- agreement to boycott competition
- agreement to fix prices
- tying one product to another

### b. Rules of reason

Is as its' name suggest, the rule of reason requires the fact finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint of trade.

Cannot be overly subjective which would exclude otherwise qualified.....

Only a court may declare an action illegal under the Rule of Reason.

#### i. customer/client

- establishing commission rate
- other listing policies
- length of listing
- type of listing

#### ii. competitors

- commission splits
- boycotts
- horizontal mergers and agreements

#### iii. other service providers

- tying arrangements
- vertical mergers and agreements

## 7. Enforcement

### a. Federal Violations

#### i. Sherman Act

##### 1. Criminal

- a. Fines (not tax deductible):
- b. Corporate: up to \$1,000,000
- c. Corporate officers or directors: Up to \$5,000 and/or prison up to 1 year
- d. Individual: Up to \$100,000 and/or prison up to 3 years

- 2. **Civil**
  - a. Treble damages (two-thirds not tax deductible) available in actions by private persons
  - b. Award of attorney's fees available in actions by private persons
  - c. Court costs available in actions by private persons
  - d. Interest on actual damages available from date of complaint in actions by private persons or Government
  - e. Injunction available in action by Government
- 3. **Other**
  - a. Loss of individual's right to vote in public elections for felony conviction
  - b. Possible loss of broker's or salesperson's license
  - c. Supervision of your business up to (10 years)
- ii. Clayton Act
  - 1. Civil remedies same as Sherman Act
  - 2. No criminal penalties
- iii. Federal Trade Commission (FTC) Act
  - 1. Cease and Desist Order: Prohibits unfair methods of competition or deceptive acts or practices by respondent.
  - 2. Trade Regulation Rule: Defines acts or practices that violate FTC Act
  - 3. Civil Penalties - Fines (not tax deductible): Up to \$10,000 for each violation of "A or "B" above
- b. State Violations
  - i. Criminal
 

Forty-eight states have criminal anti-trusts laws, some of which allow for fines up to \$1,000,000 for corporations and \$100,000 for individuals, and prison terms up to 3 years
  - ii. Civil
    - 1. Forty-four states allow both the State and an individual to sue. Forty-six states provide for injunctions.
    - 2. Parens Patriae
 

Attorney General of any state may bring a civil suit on behalf of the citizens of the state seeking damages identical to those available to any private person.
  - iii. Massachusetts
    - 1. Criminal
 

Fines (not tax deductible)

      - a. Corporate: up to \$100,000
      - b. Individual: up to \$25,000 and/or prison up to 1 year
    - 2. Civil
      - a. Treble damages

- b. Award of reasonable attorney's fees
- c. Court cost
- d. Injunctive relief and stay

Any individual harmed may bring private action - need not be the Atty. General.

## 7. Risk reduction

The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers/salespeople are engaged in an illegal conspiracy:

- a. I'd like to lower the commission rate, but our professional association has a rule....
- b. "This is the rate that everyone charges."
- c. The Listing Service will not accept less than a 120-day listing.
- d. "Before you list with XYZ Realty, you should know that nobody works on their listings."
- e. If John Doe was really professional (or ethical), he would have joined our professional association.
- f. "The best way to deal with John Doe is to boycott him."
- g. No member of our professional association will accept a listing for less than ninety days.
- h. "Let him stay in his own market. This is our territory."

*The above examples are taken from NAR "Antitrust Compliance Program" booklet*

Some of the examples are not literal but capture the essence of the publication.

- i. Do not discuss fees, charges, or business practices with competitors anywhere. This includes tennis courts, golf course or during a house party.
- j. Be clear and specific in all written correspondence.
- k. Be sure you know what you are talking about and to whom.
- l. Avoid conversations about how commissions were negotiated and how you reached your own office decisions with anyone but the folks in your own firm.
- m. Do not keep dual or secret files of documents.

## Reference Material

- NAR Antitrust Compliance Guide for Realtors® and Realtor®-Associates.  
NAR "Antitrust and Real Estate Manuals" Volume I & II  
NAR CD "Antitrust and Real Estate"
- <http://www.mass.gov/legis/laws/mgl/gl-93-toc.htm>
- <http://www.realtor.org/libweb.nsf/pages/fg704>
- <http://www.realtor.org/rmtoolkits.nsf/pages/brokerrisk17>

