

RE11C20: Commercial Real Estate Commissions, Competition and Antitrust

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A description of antitrust in commercial real estate

A. Antitrust Laws

The purpose of the Antitrust laws is to promote competition in the marketplace such as commercial real estate. Competition benefits clients by keeping prices low and maintaining the quality of goods and services at a high level. In commercial real estate, competition with commission fees and services are not “standard” but highly negotiable. Services are negotiable as well as the skills and knowledge of commercial brokers.

1. Sherman Antitrust Act of 1890

The first American Antitrust law that forbids "contracts, combinations, conspiracies or agreements" in restraint of trade". It also prohibits monopolies or attempts to monopolize, such as can occur in commercial real estate.

2. Clayton Act of 1914 (tying, labor union exemption)

Outlaws business mergers which result in a non-competitive atmosphere. Unlike the Sherman Act which deals with current practices, the Clayton Act outlaws activities which may affect future restraint of trade. For example, commercial brokerage firms buying out other commercial brokerage firms in the same market and thus leaving only one firm to monopolize a market.

3. Robinson - Patman Act 1936

Forbids price discrimination among customers of the same class.

4. 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).

5. 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. For instance, if two large national commercial real estate brokerage firms wanted to merge then notice would need to be submitted.

6. Parens Patriae

Attorneys General were given the full strength of Federal antitrust powers under "parens patriae."

7. 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. Commercial real estate often experiences 93A alleged and active violations. In many firms, commission disputes or client promises are not upheld.

B. 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.

1. 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 event as an innocent discussion of commissions. If two commercial firms collaborated to charge the same commission fees then that would be an example of price fixing.

Another example, if a commercial real estate board had posted a schedule of fees that it's members agree to uniformly charge then this would be an example of price fixing. Even if a consumer agreed to pay reasonable "market standard fees" with a broker, it's a violation of Anti-Sherman.

Price Fixing can apply in the stream of interstate commerce and has an effect upon interstate commerce

2. 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 exists
- Participated in the boycott
- Conspiracy had a sufficient nexus with interstate commerce
- Conspiracy injured the plaintiff
- The approximately amount of damage

3. Dividing the Market - Allocation of customers among two or more competitors, whether the division is based on geography, product lines, astrological sign or other criterion. All licensed commercial brokerage firms can work in any market, any product and at any time.

Allocation of markets per competition is not allowed. Any company can work in any market that is in a state where they are licensed to conduct business.

4. 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:

- a. Two separate and distinct products, a "tying" and a "tied" product;
- b. The buyer being forced to buy the tied product to get the tying product;
- c. The seller possessing sufficient economic power in the tying market to coerce buyer acceptance of the tied product;
- d. Involvement of a 'not insubstantial' amount of interstate commerce in the market of the tied product;
- e. The tying company has an economic interest in the tied product (anti-competitive effect in tied market).

C. Three Elements to Anti-Trust Violations

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

D. Antitrust Laws are administered by:

1. Federal Trade Commission
2. Department of Justice
3. State Attorney General

E. Violations

1. 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 commercial real estate competition
 - agreement to fix commercial real estate compensation prices
 - tying one product to another
2. Rules of reason
 Is as its name suggests, 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.
 Examples:
 - a. customer/client
 - establishing commission rate
 - other listing policies
 - length of listing
 - type of listing
 - b. competitors
 - commission splits
 - boycotts
 - horizontal mergers and agreements

Due to these regulations, commercial real estate brokers should never state in a compensation letter or lease or purchase agreement that the brokerage fees will be determined at some later date and the compensation determination to a consumer should not be based on:

- “fees that are customary in this market”
- “standard rates”
- “market rates”
- “standard fee”
- “market standard fees”
- “as per the standard fees”
- Or any other similar language

For instance, there are no “standard” commercial real estate commissions. To determine fees after a transaction based on wording or similar wording listed above is a violation.

Other service providers

- tying arrangements
- vertical mergers and agreements

There should never be as a for instance, wording such as “market standard” rate or a “market standard rate” to be agreed to in the future between payor and commercial real estate broker (leases/sales, etc.).

All fees are negotiable and should be determined prior to any transaction.

As an example the Society of Industrial and Office Realtors (SIOR) Code of Ethics which encompasses NAR Code of Ethics, states in Standard Practice 4.1 Client’s Interests Come First, that “Adherents will not place their rights in or entitlement to a fee or commission before the interests of their client, customer, principal, or other party with whom they have a legally recognized professional or business relationship. This does not mean that Adherents must forgo their claim to compensations to which they are legally entitled. However, Adherents must not allow their entitlement to compensation to take precedence over the interest of such parties in their conduct.”

Standard of Practice 13.1-Terms of Cooperation, “Adherents have the right to establish the terms and conditions by which they will cooperate with other real estate professionals, and will (a) disclose those terms and conditions to their client, customer, principal or other party with whom they have a legally recognized professional or business relationship as soon as commercially practical when seeking authority to perform any real estate-related services on behalf of such party (which shall always prior to consummate of binding agreement); and (b) articulate these terms and conditions to other real estate professionals when soliciting their cooperation or upon inquiry from any real estate professional seeking cooperation.”

Standard of Practice 13.3 Seeking Cooperation or Compensation. Adherents who are seeking to be compensated by another real estate professional will determine the terms

of compensation as soon as commercially practical in the context of providing real estate related services to a client or customer. Adherents will not assume that another real estate professional's offer of cooperation is an offer of compensation.

Standard of Practice 13.4, Changes in Terms of Cooperation or Compensation. Adherents who have made an offer to compensate other real estate professionals have an affirmative obligation to promptly communicate any change in the terms of compensation to any parties to whom the previous terms were previously offered.

Standard of Practice 13.5, Negotiations to Change Terms of Compensation. Offer to compensate other real estate professionals, unless accepted, will not preclude Adherents from negotiating, in good faith, agreements that deviate from such terms. Further, even after the terms of compensation have been offered and accepted, Adherents may negotiate in good faith for a change in such terms.

F. Enforcement

1. Federal Violations

a. Sherman Act

- Criminal
 - Fines (not tax deductible):
 - Corporate: up to \$1,000,000
 - Corporate officers or directors: Up to \$5,000 and/or prison up to 1 year
 - Individual: Up to \$100,000 and/or prison up to 3 years
- Civil
 - Treble damages (two-thirds not tax deductible) available in actions by private persons
 - Award of attorney's fees available in actions by private persons
 - Court costs available in actions by private persons
 - Interest on actual damages available from date of complaint in actions by private persons or Government
 - Injunction available in action by Government
- Other
 - Loss of individual's right to vote in public elections for felony conviction
 - Possible loss of broker's or salesperson's license
 - Supervision of your business up to (10 years)

b. Clayton Act

- Civil remedies same as Sherman Act
- No criminal penalties

c. Federal Trade Commission (FTC) Act

- Cease and Desist Order: Prohibits unfair methods of competition or deceptive acts or practices by respondent.
- Trade Regulation Rule: Defines acts or practices that violate FTC Act
- Civil Penalties: Fines (not tax deductible): Up to \$10,000 for each violation of "A or "B" above

2. State Violations

- a. Common across the majority of the states
 - 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
 - Civil:
 - Forty-four states allow both the State and an individual to sue. Forty-six states provide for injunctions.
 - Parens Patriae

The Attorneys 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.

- b. Massachusetts
 - Criminal: Fines (not tax deductible)
 - Corporate: up to \$100,000
 - Individual: up to \$25,000 and/or prison up to 1 year
 - Civil
 - Treble damages
 - Award of reasonable attorney's fees
 - Court cost
 - Injunctive relief and stay

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

G. Risk reduction

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

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

The above examples are taken from NAR "Antitrust Compliance Program" booklet for residential and commercial brokerage.

If one member in your firm is a REALTOR then all members must abide to the NAR Code of Ethics.

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

- Do not discuss fees, charges, or business practices with competitors anywhere. This includes tennis courts, golf course or during a house party.
- Be clear and specific in all written correspondence.
- Be sure you know what you are talking about and to whom.
- Avoid conversations with other commercial firms about how commercial real estate commissions are negotiated or how your commercial firm reached its own office decisions. These matters can be discussed with in-house members of your own commercial real estate firm.
- Do not keep dual or secret files of documents.

References:

JLL New England LLC. vs 350 Waltham Associates LLC and 358 Waltham Associates LLC; C.A. #1:17-CV-11784-IT

Instructor to reference other court cases on this topic that may be known

Other Sources:

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