

ANTITRUST



WHY CARE ABOUT ANTITRUST LAWS



Private and Government Enforcement



Civil and Criminal Penalties



Treble Damages and Attorneys Fees

KEY TAKEAWAY



Make business decisions unilaterally and independently.

FOUNDATION OF ANTITRUST LAW

SHERMAN ACT OF 1890

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


ANTITRUST LAW BASICS

- An antitrust violation occurs when: 1) there is an agreement, an understanding or a conspiracy among competitors that 2) unreasonably restrains competition
- Per Se v. Rule of Reason
- Most common per se restraints in real estate:
 - price fixing
 - group boycotts
- Does not need to be expressly agreed upon to form an illegal agreement


Price Fixing

- Conspiracy to fix prices, such as real estate commission rates, or other terms and conditions of the broker-client relationship.
- Per se violation.
- Usually unwritten.
- Often implied.


EXAMPLES OF ILLEGAL AGREEMENTS WITH COMPETITORS




Listing properties only on the same terms and conditions.



Representing buyers only on the same terms and conditions.



Offering the same co-op compensation through the MLS.



Only offering certain types of listing agreements.

QUESTION: You belong to the North Shore Swells Club, an exclusive group of brokers who all sell million dollar homes. Once a month you meet to discuss how to market them better.

Can the members of that group agree to offer each other a higher commission split than they offer to other brokers?



ANSWER: No.

That would be price fixing. Consider disbanding – or at least dropping out of the group.

Group Boycotts

- Agreement among competitors to engage with a particular competitor (or vendor) on the same terms or not to cooperate with a particular competitor (or vendor).
- May include agreements to:
 - Not cooperate with a particular broker.
 - Put a competitor out of business.
 - Not showing a certain broker's listings.
 - Not advertise in certain media.
 - Not use particular suppliers or vendors.
- There is no obligation to give any vendor or supplier your business, however you cannot ask or encourage your competitors to do the same.



QUESTION: If a multiple listing service creates its own real estate listing website, “newspaper” or “magazine” for its participants to publish their listings, this could be considered an antitrust violation. True or False?

ANSWER: False.

Offering alternative ways to advertise their listings is a completely appropriate way for an MLS to serve its members, as long as there is not an agreement among the participants to advertise only in the MLS's paper or on its website, and not to advertise elsewhere.

QUESTION: A group boycott is allowed under the following conditions:

- A. The boycotted firm is not a member of NAR.
- B. The boycotted firm advertises its flat-rate commission structure.
- C. Everyone agrees the boycotted firm is too aggressive and “unprofessional”.
- D. None of the above.



ANSWER: D. None of the above.

There are NO conditions under which a group may agree not to do business with another firm under antitrust law.

COOPERATIVE AGREEMENTS

- Permissible to unilaterally change the compensation offered to one or more firms.
- Must be determined unilaterally and independently.
- Cooperative commission can be expressed as % of sales price or flat fee.
- Keep COE Article 1 duty to act in a client's best interests in mind.

ANTITRUST COMPLIANCE PROGRAM



Have a written office-wide antitrust compliance program.



Require staff and salespeople to periodically attend an antitrust education program.



Require sales people to report any suspected antitrust violations.



Teach salespeople how to respond to clients and consumers questions about firm's pricing and practices.

SOCIAL MEDIA BEST PRACTICES



Don't answer email or make comments on websites/posts that disparage other companies or competitors.



Avoid statements like “it’s the rate we all charge” when referring to commission rates.



Don't get into discussions in forums that are disrespectful to other firms or people.

Protect Yourself from Antitrust Allegations

- Make unilateral and independent business decisions.
- Don't participate in discussions with competitors that involves how to do business with other competitors or service providers.
- Consult legal counsel.

NAR RESOURCES

- NAR's Antitrust Topic Page
 - <https://www.nar.realtor/antitrust>
- Antitrust 101 for Real Estate Professionals Video
 - <https://store.realtor/antitrust-101-for-real-estate-professionals-download/>
- Antitrust Pocket Guide for Real Estate Professionals
 - <https://store.realtor/antitrust-pocket-guide-for-realtors/>

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