

You Can't Say That!: Antitrust in Real Estate

Antitrust

Since 2020 dozens of lawsuits have been filed challenging various practices by Multiple Listing Services. The majority of these cases focus on four issues: 1) commission sharing, 2) the 'clear cooperation' policy of the National Association of REALTORS® (NAR), 3) the 'IDX or internet data exchange policy' of NAR, and 4) the Virtual Office Website (VOW) policy of NAR.

Sherman Act 15 U.S.C. 1

"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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court".

Criminal Penalties

- Individuals: Fine of not more than \$1million, imprisonment up to 10 years.
- Corporations: Fine of not more than \$100 million

Volume of commerce drives the sentence for both.

Restitution paid to identified victims.

Civil lawsuits claiming up to 3 times the damages.

Elements of a Violation

1. The charged conspiracy was knowingly formed and was in existence at or about the time alleged,
2. The defendant knowingly joined the charged conspiracy, or intended to agree, and
3. The charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of commerce.
4. Statute of limitations: generally, 5 years.

Price Fixing

Includes agreements to:

- Charge the same price, raise prices together
- Add fees or surcharges
- Eliminate discounts or have uniform discounts
- Establish minimum prices
- Establish a standard pricing formula
- Coordinate and not compete on other commercial terms.

Boycott/ Refusal to Deal

As explained by the Federal Trade Commission:

"Any company may, on its own, refuse to do business with another firm, but an agreement among competitors not to do business with targeted individuals or businesses may be an illegal boycott, especially if the group of competitors working together has market power."

If done with intent to harm the boycotted party it is a *per se* violation.

Tying Agreements

Elements:

- 1) Two distinct products or services,
- 2) A conditional sale (you can't have one without the other)
- 3) Market power in the tying product,
- 4) A substantial impact in terms of sales in the market for the tied product.
- 5) The 9th circuit (includes Idaho) requires plaintiffs to prove the tying seller has some direct economic interest in the sales of the tied product.

Not a *per se* violation, this requires a "full market analysis"

Executive Order on Promoting Competition in the American Economy

EO 14036

(h) To address persistent and recurrent practices that inhibit competition, the Chair of the Federal Trade Commission, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:

(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate.

Case Study (based loosely on *Connecticut v. Candlewood Shores Estates, Inc.*, CV-78-170142):

Betty Buyer wants to buy a property in the Evans Estates subdivision. Properties don't come on the market in that subdivision very often, so when Betty sees a listing show up on REALTOR.com, she calls the listing agent immediately. Betty tours one of the properties accompanied by the listing agent, Ella Evans of Evans Realty who explains that a requirement of purchasing a home in the subdivision is to agree that if the property is ever sold, it will be listed with Evans Realty. When Betty comments that she would probably paint the exterior of the property, Ella points out that all colors must be approved by the Homeowners Association and the work is to be completed by Evans Painting.