

REAL ESTATE, GROUP BOYCOTTS AND ANTITRUST LAW

by Francis Ackerman 1/

State and federal antitrust laws are designed to protect and promote free competition in the marketplace. Free competition fosters innovation and fair prices for consumers. For example, the federal Sherman Act and Maine's "mini-Sherman Act" bar contracts or combinations "in restraint of trade". Certain types of restraint are viewed as so harmful that they are classified as "per se" violations of this prohibition, i.e., they cannot be justified by reference to their reasonableness in particular circumstances. One type of per se violation is known as the "group boycott".

The purpose of this article is to offer a brief discussion of the nature of group boycotts, both in general and in a real estate setting. Antitrust laws, of course, apply to real estate brokers as well as other lines of business and commerce.

A group boycott may be described as an organized refusal by competing businesses to deal with a particular "target" business or person. The purpose of such a boycott would be to force the target to change its way (e.g., to adopt higher prices) or to force it out of business. It should be emphasized that it is never illegal for one party to refuse to deal with another; however, as soon as two or more competitors acting in concert participate in a refusal to deal, their conduct crosses the line and becomes an antitrust violation. No particular form of words is required to constitute an agreement among the parties refusing to deal. Indeed, a concerted refusal may be found by a court even where there was no explicit agreement, but where a combination of words and actions suggest an implicit agreement among the parties.

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Like other business people, real estate brokers need to be aware of the "do's" and "don'ts" of antitrust law. In an area where both federal and state enforcement authorities are active, and where a violation can result in criminal as well as civil penalties, it pays to be at least as circumspect as Caesar's wife. Even where the person subjected to an investigation is ultimately vindicated, the process is anything but comfortable. Additionally, the target of a group boycott or other antitrust violation can sue the violators for treble damages -- three times the actual damages -- plus attorneys' fees. Simply put, the risks to those persons who choose to violate antitrust laws are immense.

How could a group boycott occur in a real estate setting? Unfortunately, quite easily. Brokers are, of course, very much dependent on each other. The chances of matching a buyer with a parcel of property obviously increase with the size of the pool of buyers and of real estate to which the broker has access -- hence the need for multiple listing services and cobroking arrangements. Conversely, a broker who, for whatever reason, is denied the ability to tap into a multiple listing service, or negotiate cobroke deals with colleagues, has a very long row to hoe. Without these reciprocal arrangements, indeed, it would be difficult for a broker to survive, let alone thrive.

Imagine a situation in which a group of brokers, for whatever reason, decide together to refuse to enter into cobrokes with another competing broker. The target of this practice may well end up being forced out of business. But its perpetrators may themselves end up being targets -- of an antitrust investigation. Their conduct constitutes a group boycott, and as such, violates antitrust law.

Few cases are as straightforward as this, of course. Suppose a group of brokers discuss the target. There are no words of agreement, but one participant remarks: "Well, I don't know about you, but I'm not doing any cobrokes with X." Nothing further is said, but all of those present refuse to enter cobrokes with X thereafter. What result? The answer will depend on a fuller account of the circumstances. But whatever the answer, all of the brokers present at the discussion have exposed themselves to the possibility of antitrust investigation and liability. If this discussion appears to you to be abstract or hypothetical, you are mistaken. Antitrust enforcement in the real estate profession is active and ongoing. For example, in July of this year the Antitrust Division of the United States Department of Justice sued nine real estate firms

and 17 individual realtors in Missouri for antitrust violations. Specifically, the Justice Department charged that the defendant realtors, among other things, had conspired to exclude a discount brokerage firm from the local Multiple Listing Service. Twenty-five of the 26 defendants agreed to settle the charges through a consent decree.

How can a broker protect himself from the prospect of investigation and liability? The answer is simple. If you are present at a meeting with colleagues, be aware of the antitrust implications of what is being said. Every proposal for concerted conduct by two or more competitors which targets any other person should raise a red flag of caution. When that red flag goes up, do not remain silent. Speak out, distinguish your position from that of others present, and then make a rapid and noisy departure from the room. Some antitrust defense counsel, for example, suggest smashing a plate or glass. The reason for this is that a dramatic exit is likely to be remembered, and the realtor will be better able to demonstrate that he did not join the anticompetitive conspiracy.

However, the dinnerware need not always be at risk. With an increase in antitrust awareness, such situations will be less likely to occur. Real estate brokers should take every opportunity to promote such awareness, in themselves and in colleagues.

What should you do if you believe you are the victim of an anticompetitive agreement or if you believe that others are engaged in such conduct aimed at another broker? While there is no required course of action, calling the Antitrust Division of the Attorney General's Office and discussing your situation with one of our attorneys is frequently the best choice. The Antitrust Division can be reached by phone at 289-3661 or by mail at the following address:

Attorney General
Consumer and Antitrust Division
State House Station #6
Augusta, Maine 04333

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