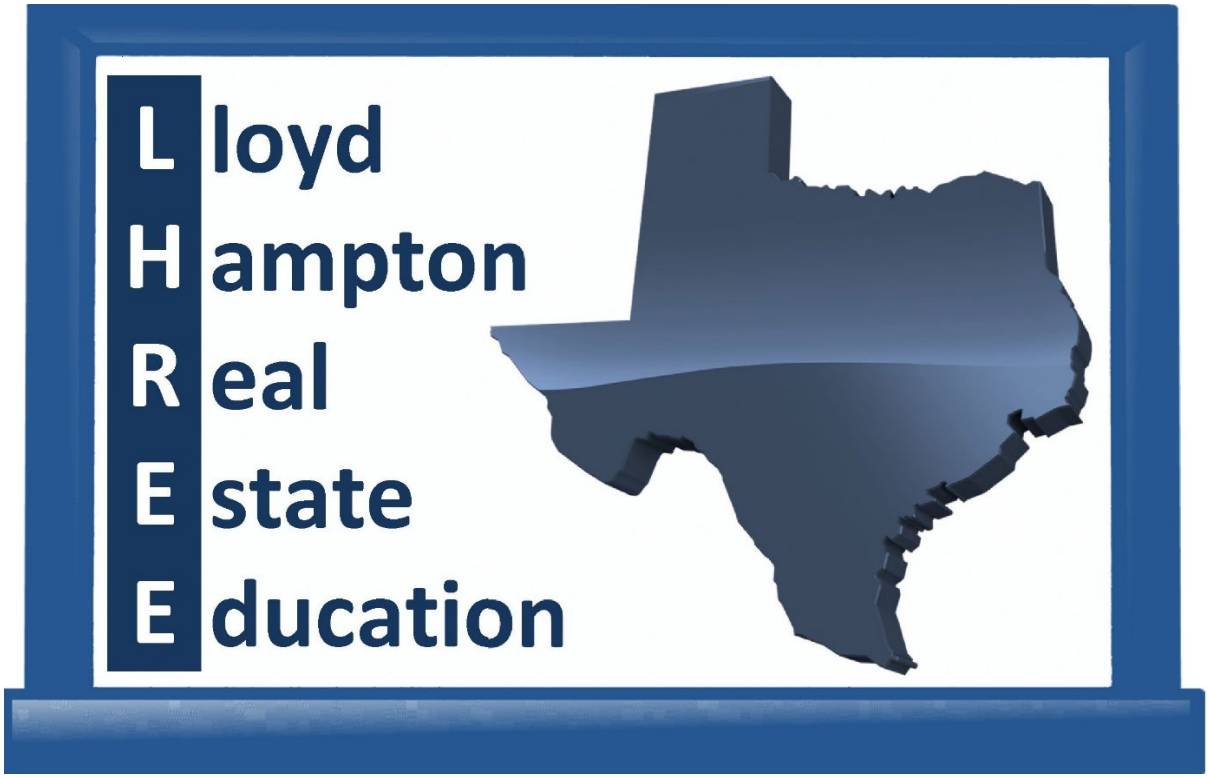

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Texas Deceptive Trade Practices And Consumer Protection Act

BUSINESS AND COMMERCE CODE

CHAPTER 17. DECEPTIVE TRADE PRACTICES

SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION

Sec. 17.41. SHORT TITLE.
This subchapter may be cited as the Deceptive Trade Practices-Consumer Protection Act.

Sec. 17.42. WAIVERS: PUBLIC POLICY.
(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

(1) the waiver is in writing and is signed by the consumer;

(2) the consumer is not in a significantly disparate bargaining position; and

(3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

(b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:

(1) conspicuous and in bold-face type of at least 10 points in size;

(2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and

(3) in substantially the following form:

"I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

Sec. 17.44. CONSTRUCTION AND APPLICATION.
(a) This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

Sec. 17.45. DEFINITIONS.

As used in this subchapter:

(3) "Person" means an individual, partnership, corporation, association, or other group, however organized.

(4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

(5) "Unconscionable action" means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

(9) "Knowingly" means actual awareness, at the time of the act complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim.

(10) "Business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use.

(11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(12) "Residence" means a building:

(A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and

(B) that is occupied or to be occupied as the consumer's residence.

(13) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness.

Sec. 17.46. DECEPTIVE TRADE PRACTICES UNLAWFUL.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;

(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(20) representing that a guaranty or warranty confers or involves rights or remedies which it does not have or involve,

(22) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(24) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

Sec. 17.49. EXEMPTIONS.

(c) Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill.

(i) Nothing in this subchapter shall apply to a claim against a person licensed as a broker or salesperson under Chapter 1101, Occupations Code, arising from an act or omission by the person while acting as a broker or salesperson. This exemption does not apply to:

(1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion;

(2) a failure to disclose information in violation of Section 17.46(b)(24); or

(3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion.

Sec. 17.50. RELIEF FOR CONSUMERS.

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of **economic damages** found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly or intentionally, the consumer may also recover damages for **mental anguish**, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages;

(2) an **order enjoining such acts** or failure to act;

(3) **orders necessary to restore** to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

(4) **any other relief which the court deems proper**,

(c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

(d) Each consumer who prevails shall be awarded **court costs** and reasonable and necessary **attorneys' fees**.

Sec. 17.505. NOTICE; INSPECTION.

(a) As a prerequisite to filing a suit a consumer shall give written notice to the person at least 60 days before filing advising the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim. During the 60-day period a written request to inspect, at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer.

(c) A person against whom a suit is pending who does not receive written notice, as required by Subsection (a), may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending.

Sec. 17.5051. MEDIATION.

(a) A party may, not later than the 90th day after the date of service of a pleading in which relief under this subchapter is sought, file a motion to compel mediation of the dispute in the manner provided by this section.

(b) The court shall, not later than the 30th day after the date a motion under this section is filed, sign an order setting the time and place of the mediation.

(c) If the parties do not agree on a mediator, the court shall appoint the mediator.

(d) Mediation shall be held within 30 days after the date the order is signed, unless the parties agree otherwise or the court determines that additional time, not to exceed an additional 30 days, is warranted.

(e) Except as agreed to by all parties who have appeared in the action, each party who has appeared shall participate in the mediation and, except as provided by Subsection (f), shall share the mediation fee.

(f) A party may not compel mediation under this section if the amount of economic damages claimed is less than $15,000, unless the party seeking to compel mediation agrees to pay the costs of the mediation.

Sec. 17.5052. OFFERS OF SETTLEMENT.

(a) A person who receives notice may tender an offer of settlement at any time beginning on the date the notice is received and ending on the 60th day after that date.

(b) If a mediation is not conducted, the person may tender an offer of settlement at any time during the period beginning on the date an original answer is filed and ending on the 90th day after.

(c) If a mediation is conducted, a person against whom a claim under this subchapter is pending may tender an offer of settlement during the period beginning on the day after the date that the mediation ends and ending on the 20th day after that date.

(d) An offer of settlement must include an offer to pay the following amounts of money, separately stated:

(1) an amount of money as settlement of the consumer's claim; &

(2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorneys' fees incurred as of the date of the offer.

(e) Unless both parts of an offer of settlement are accepted not later than the 30th day after the date the offer is made, the offer is rejected.

(f) A settlement offer tendered by a person against whom a claim under this subchapter is pending that complies with this section and that has been rejected by the consumer may be filed with the court with an affidavit certifying its rejection.

(g) If the court finds that the amount tendered in the settlement offer for damages under Subsection (d)(1) is substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of the lesser of:

(1) the amount of damages tendered in the settlement offer; or

(2) the amount of damages found by the trier of fact.

(k) An offer of settlement is not an admission of engaging in an unlawful act or practice or liability under this subchapter. Except as otherwise provided by this section, an offer or a rejection of an offer may not be offered in evidence at trial for any purpose.

Sec. 17.506. DAMAGES: DEFENSES.

(a) It is a defense to the award of any damages or attorneys' fees if the defendant proves that before consummation of the transaction he gave timely written notice to the plaintiff of the defendant's reliance on:

(1) written information relating to the particular goods or service in question obtained from **official government records** if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;

(2) written information relating to the particular goods or service in question obtained **from another source** if the information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information;

(b) In asserting a defense under Subsection (a) above, the defendant shall prove the written information was a producing cause of the alleged damage.

(c) In a suit where a defense is asserted under Subdivision (2) of Subsection (a) of Section 17.506 above, suit may be asserted against the third party supplying the written information without regard to privity where the third party knew or should have reasonably foreseen that the information would be provided to a consumer.

(d) In an action brought under Section 17.50 of this subchapter, it is a defense to a cause of action if the defendant proves that he received notice from the consumer advising the defendant of the nature of the consumer's specific complaint and of the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant, and that within 30 days after the day on which the defendant received the notice the defendant tendered to the consumer:

(1) the amount of economic damages and damages for mental anguish claimed; and

(2) the expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.

Sec. 17.565. LIMITATION.

All actions brought under this subchapter must be commenced within two years after the date on which the deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

BUSINESS AND COMMERCE CODE

Sec. 27.01. FRAUD IN REAL ESTATE TRANSACTIONS.

(a) Fraud in a transaction involving real estate consists of a

(1) false representation of a past or existing material fact when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for **actual damages**.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud and is liable to the person defrauded for **exemplary damages**.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary **attorney's fees, expert witness fees, costs for copies of depositions, and costs of court**.

Federal Antitrust Law

From the National Association of REALTORS®

The antitrust laws are designed and intended to protect competition and prevent monopolies. Awareness of and sensitivity to the antitrust laws is imperative for real estate brokers in today's marketplace. Real estate and housing issues are a vital concern of government at all levels. This means that the real estate brokerage business may be often under scrutiny, and any anti-competitive conduct is likely to be detected and prosecuted.

The nature of real estate practice makes real estate brokers particularly susceptible to antitrust challenges. Brokers vigorously compete to secure property listings to offer for sale, but they also regularly cooperate with one another, as subagents, buyers' agents or "facilitators," to identify ready, willing and able buyers for those listings. This dual tradition of competition and cooperation, which exists in few other professions, presents frequent opportunities for antitrust misconduct, whether intentional or inadvertent. In today's business environment, it is a prerequisite to survival that brokers be conscious of and abide by the requirements of antitrust law.

1. Federal Antitrust Law

Over 100 years ago Congress adopted the Sherman Act as the foundation of federal antitrust law. Virtually all federal antitrust litigation alleges one or more violations of the Sherman Act. Section 1 of the Sherman Act simply states that:

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

The literal language of the Sherman Act sets forth two basic elements of any Section 1 violation: There must be (1) a contract, combination, or conspiracy that (2) restrains trade.

The conspiracy element is satisfied whenever two or more persons or entities carry out a common scheme or plan. If adherence to a common scheme or plan can be shown, the only remaining issue is whether or not the effect of the scheme or plan is to restrain trade.

Shortly after the Sherman Act was passed the Supreme Court held that the Act did not literally prohibit every contract that restrained participants in the marketplace. If the Act were interpreted in that literal fashion it would outlaw all commercial contracts since every contract restrains the parties to some extent. Instead, the Supreme Court declared that the Sherman Act prohibits only those contracts or combinations that unreasonably restrain trade.

The Supreme Court subsequently also identified certain types of restraints deemed to be so inherently anti-competitive that their anti-competitive effects on trade are presumed without a need for the plaintiff to prove, or even introduce evidence of, the restraint's impact on the market. Such restraints are called **per se offenses**. In a case alleging a per se offense the defendant is not permitted to introduce evidence to show the reasonableness of the restraint because its unreasonable anti-competitive nature is presumed and conclusively established. Accordingly, in a per se case, the only issue to be addressed in determining whether a defendant violated the Sherman Act is if he actually participated in the conspiracy.

Restraints not characterized as per se violations are analyzed under the "**Rule of Reason**." The Rule of Reason is a "balancing test" that weighs the pro-competitive and anti-competitive aspects of a practice that may adversely affect competition in some way. Conduct challenged as unlawfully restraining competition may escape condemnation if the pro-competitive benefits outweigh the anti-competitive implications.

2. Antitrust Issues in Real Estate

A. Unlawful Per se Restraints

Two per se restraints have particular relevance to real estate brokers:
conspiracies to fix prices, such as real estate commission rates, or to fix other terms or conditions of the broker-client relationship;
group boycotts, or concerted refusals to deal, with another competitor or a supplier.

1. Price/Commission Fixing

Antitrust problems most frequently arise out of agreements – conspiracies – among competitors which have the purpose or effect of eliminating or restricting competition between the parties to the agreement. A common subject of such agreements is the price or fee each competitor charges its customers for its products or services. Real

estate brokerage firms are no different, and in the real estate profession, that usually means commission rates. A commission is the charge to a seller for successfully procuring a ready, willing and able buyer for the seller's property on terms set forth in a listing agreement, or other such terms as the seller is willing to accept. Another form of commission is the charge to the buyer by a buyer's agent for assisting the buyer in locating and acquiring suitable property.

The antitrust prohibition on fixing commission rates means, simply, two or more real estate firms may not agree on the commission rate that each will charge. As noted earlier, price-fixing is a per se violation of the antitrust laws. Brokers must not agree with others on commission rates, and must take care to avoid even implying that they have discussed and/or reached agreement on fees. Salespeople must exercise similar caution to avoid the implication that the firm with which they are affiliated is part of a price-fixing conspiracy.

2. Fixing Commission Splits

A per se illegal price fixing conspiracy can involve not only the prices a firm charges customers or clients, but also the fees it pays for goods and services. In particular, listing brokers may not agree on the commission "split" to be paid to compensate cooperating brokers who produce a ready, willing and able buyer for a listed property. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be deemed per se illegal. For this reason, brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients. Listing and selling brokers may, of course, have occasion to discuss or negotiate the compensation they will pay to each other in connection with individual transactions. These negotiations, however, generally take place before an offer to purchase has been procured by the cooperating office, and in any event should never include a representative of a third office.

3. Agreements As To Other Listing Terms

Antitrust law also condemns agreements among competitors regarding other terms or conditions of a listing agreement, such as the length of the listing, the type of listing accepted, or the marketing services to be provided by the listing broker, although such agreements may not be treated as per se violations. Any express or "understood"

agreements as to the terms and conditions of listing agreements or other broker-client agreements raise serious antitrust concerns. The lawfulness of such agreements will in many cases be analyzed under the Rule of Reason, which balances the pro-competitive effects of the agreement, if any, against the anti-competitive consequences.

4. Boycotts

A practice that is in a sense directly at odds with cooperation is group boycotting. Like price-fixing, group boycotting is generally characterized as a per se violation of the antitrust laws, although certain boycott activities may be addressed under the Rule of Reason. A group boycott is a concerted refusal to deal with a particular party, such as when two or more businesses agree to refuse to deal with another competitor in order to force a change in a competitor's behavior or to attempt to drive the competitor out of business. As with price-fixing agreements, treatment of a group boycott as a per se violation of the antitrust laws results in the alleged conspirators being denied the opportunity to offer pro-competitive or other justifications for the conduct.

The typical group boycott allegation in the real estate brokerage business involves a claim that two or more real estate firms have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third firm. Often the target of the alleged boycott is a broker that employs a "discount," " alternative," or other non-traditional commission/compensation arrangement with clients. In some cases targets of alleged boycotts are real estate firms that offer non-traditional property marketing services. The purpose of the boycott, either explicitly or implicitly, is to eliminate the firm as a competitor in the market, or to cause the firm to abandon the discount or alternative marketing strategies. The antitrust laws are clearly make boycotts such as these per se illegal.

Real estate firms or professionals may also be accused of boycotting service providers to the real estate firms. Such a group boycott may target a supplier or purchaser, rather than a competitor, of the brokers alleged to be the conspirators. Concerted refusals to deal will be treated as per se illegal whenever they involve the purposeful elimination or limitation of competition, regardless of the ultimate motive or objective of the alleged conspirators. Real estate brokers may, for instance, agree not to patronize a provider of goods or services necessary or beneficial to the practice of real estate brokerage. For example, an agreement among several real estate firms not to employ the services of a

particular printer to produce marketing materials, or to refuse to purchase advertising in a certain publication, may be an unlawful boycott of this type. The most effective and obvious way to avoid antitrust liability for such boycott activities is for each firm to unilaterally and without consulting any other firm determine the service providers it will use and the terms and conditions of using such suppliers.

B. Participation in the Association of REALTORS®

1. Association Meetings

Trade associations are ripe grounds for antitrust conspiracies. By definition associations consist of groups of competitors gathered together to promote their common business interests. As discussed above competitors occasionally seek to achieve that objective by agreeing, directly or indirectly, to act in a concerted fashion to repel a perceived threat to the success of their firms, such as the innovative business practices of a new competitor. Trade association activities are common venues for hatching such unlawful conspiracies since by definition they involve collective action by the competitors who are members of the organization. A broker who participates in the affairs of an association of REALTORS® must always be alert to discussions at association meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other brokers. A broker who finds himself in the midst of such a discussion should immediately suggest that the topic is changed and, if unsuccessful, he should promptly leave the meeting. If minutes are being taken, he should insist that his departure be noted for the record.

2. Use and abuse of the NAR Code of Ethics

The U.S. Supreme Court has held that industry self-regulation through codes of ethics is a legitimate trade association function so long as the code can be shown to promote competition by improving industry performance or efficiency. At the same time, industry codes of ethics can be and have been used to condemn or inhibit the practices of particularly successful or creative competitors in order to resist the competitive threat posed by such competitors. It is quite clear, however, that the antitrust laws forbid use of industry codes of ethics to discourage or eliminate competition in any way.

The REALTORS® Code of Ethics is no exception. The Code does not regulate pricing, otherwise lawful listing policies, or truthful advertising, nor may the Code ever be used to

regulate or “outlaw” innovative or new business practices that cannot be shown to have legitimate unethical implications. REALTORS® who initiate grievances for the purpose or with the effect of limiting the freedom of other competitors in regard to such practices are misusing the Code of Ethics. Associations that permit the Code to be applied in that way create substantial exposure to antitrust liability for the members, the staff and the associations themselves.

3. Penalties for Antitrust Violations

Both civil and criminal penalties may be imposed for antitrust violations. These penalties include in civil cases, liability for three times the plaintiff’s actual damages and payment of the plaintiff’s reasonable attorney fees and costs, and in criminal cases criminal penalties including fines and prison terms and court supervision of the defendant’s business for as long as 10 years;

(The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.)

4. Avoiding Antitrust Problems

A. Perception and Reality

Real estate professionals can limit their exposure to claims of antitrust violations by avoiding the conduct described above as unlawful. In addition, however, real estate professionals should recognize that the outcome of courtroom trials in general, and antitrust trials in particular, does not necessarily depend upon the actual facts regarding the conduct alleged to violate the law. Rather, the outcome of trials depends entirely upon what the judge or jury believes, based on the evidence presented at trial, to have happened at the relevant time. Moreover, price fixing or

other antitrust conspiracies are rarely created or proved by direct evidence of an agreement, such as a document signed by all parties to the conspiracy. Rather, antitrust conspiracies are most commonly proven by inferences drawn from the actions of competitors, such as private discussions about prices and subsequent uniformity of the prices charged by the participants to such discussions. For this reason, antitrust compliance programs are addressed as much to avoiding conduct that creates the appearance of a conspiracy as to avoiding conduct that actually consummates or advances that conspiracy.

1. Price-fixing. To avoid antitrust vulnerability for a price-fixing claim, such as two or more brokers or firms having agreed to charge the same commission rate, real estate firms should:
- establish their fees unilaterally without consultation or discussion with persons affiliated with other competing firms;
- ensure that when the company's brokers or salespeople discuss fees with actual or potential clients they use words that indicate to the listener that the services were priced independently, and that they judiciously avoid words suggesting otherwise.

In determining its commission or fee structure, real estate firms must recognize and be conscious that antitrust conspiracies have been established without any direct evidence that alleged conspirators actually consulted with each other before making a competitive business decision, such as establishing a fee structure. In one infamous case a court found that an unlawful agreement had been reached when one competitor announced to others his intention to raise his commission rates and the other competitors adopted the same course of action within a short period of time. The court construed the announcement as an invitation to conspire and the subsequent action by the other competitors as acceptance of that invitation. An inference of conspiracy can be drawn even if the other competitors had each already decided independently to implement the particular policy, but had not already done so.

It is therefore imperative that brokers never discuss with or reveal to competitors their intentions concerning fees or other competitive business

activities. Such actions will "taint" not only the subsequent decisions made by the broker who raised the subject, but also the decisions of all other competitors to whom the discussions or announcements were directed. Not only must brokers avoid any discussions that could imply that commissions or commission splits are the result of agreement or collusion, but they should also take positive steps to establish that their commission rates and splits are determined unilaterally. Such supporting documentation might include:

- spread sheets to show business reasons and justification for the amount of the fee or any increase;
- a memo to licensees explaining those reasons;
- discussions with counsel prior to adoption of any increase in the fees; and
- maintenance of correspondence and appointment logs that show that other firms were not consulted in connection with any fee increase(s).

Once pricing decisions are made, it is equally essential that the firm's salespeople present prices to clients in a manner that confirms that the fees were established independently. This means never responding to a question about fees by referring to the pricing policies of other competitors or to a policy of a local association of REALTORS® that supposedly prohibits or discourages price competition. Licensees should never use statements like:

- "This is the rate every firm charges."
- "I'd like to lower the commission, but no one else in the MLS will show your house unless the commission is X%"
- "Commission rates are pretty standard."

Salespeople who make these statements seriously jeopardize themselves and their firms. Brokers and salespersons must learn to explain and, if necessary, defend their firm's prices and other competitive business decisions in terms that are consistent with competition, not conspiracy. If the firm cannot or will not reduce its commission upon a client's request, the firm's salespeople should be prepared to point out the value of the services the client will receive for the fee charged, as well as how these services will most likely lead to a transaction at a fair price within the shortest period of time. A fast and efficient transaction can often save a client much more than the commission.

2. Boycotts. As with price fixing conspiracies, real estate brokers or salespeople who act as if there is a conspiracy among competitors not to cooperate with another competitor, or to deal with them only on terms established by the conspirators, are as vulnerable to an antitrust lawsuit as those who actually do conspire. Salesperson comments that create such troublesome inferences of boycott conspiracies include:

- "Before you list with XYZ Realty, you should know that nobody works on their listings."
- "The MLS will not accept their listings because they charge a flat fee."
- "If they were truly professional, they would not allow part-timers to work for them."
- "I bet they'd drop their 'discount' program if we told them they couldn't market or sell our listings."

Brokers whose salespeople make comments such as these to buyers, sellers, or persons affiliated with other firms will find their ability to adjust the terms and conditions upon which they cooperate with other firms severely restricted. Case law clearly establishes that brokers are free to choose unilaterally to lower the compensation offered to one or more particular firms, including "discount" or "alternative service" firms. But if a broker does so only after discussing the "problem," even casually, with other firms, the inference may be drawn that this action was pursuant to a conspiracy to boycott the other firm. This is especially true if, as is often the case, other firms in the market make similar contemporaneous decisions to lower their compensation offers to the same firm.

Licensees asked to compare their firm's commission split policies with those of other firms should explain that the amount of cooperative compensation is designed to maximize the incentive of cooperating offices to sell the listing. On the other hand, a licensee who works for a firm which offers a lesser amount to cooperating firms than may be "typical" for that market must be prepared to explain why this difference will not detract from the objective of attracting the efforts of cooperating brokers and securing a satisfactory transaction in the shortest period of time.

3. Listing Agreement Policies. A real estate firm must also make sure that its listing agreement policies are established unilaterally, and that salespeople are prepared to explain those policies to clients in terms of how these policies will help the client achieve his real estate goals. If a firm's policies cannot be justified and explained in these terms, competitive forces may ultimately compel the firm to modify its policies, or, alternatively, drive it out of business. The purpose of antitrust laws is to preserve the efficient operation of these competitive market forces, for the ultimate benefit of consumers and competitors alike.

For this reason, care must be taken to avoid implying that the provisions of the listing agreement are not established unilaterally by the broker using the agreement. Under no circumstances should a client be told that the firm's terms must be accepted because "this is what all brokers do," or "no one else will cooperate unless you accept the listing on these terms," or "I'd like to shorten the listing term, but if I do the MLS won't accept the listing."

B. Office Antitrust Compliance Program

Another important safeguard against antitrust violations is for a real estate brokerage firm to adopt and rigorously apply a written office-wide antitrust compliance program. This program should be extended to every employee and independent contractor – brokers, salespeople, and administrative staff alike. The firm should set aside time, twice a year, to review with everyone the antitrust compliance program. An antitrust compliance program is a business necessity, because brokers are responsible for conduct of their salespeople and other staff. A brokerage firm cannot avoid antitrust liability because it did not authorize, for example, the price-fixing scheme undertaken by its salespeople.

Components of an antitrust compliance program may include the following:

1. Salesperson Education. A real estate broker's ability to keep his firm from violating the antitrust laws is in direct proportion to his ability and willingness to educate his salespeople. This commitment to education is imperative because, like it or not, brokers are and will be held accountable and liable

under the law for the actions and statements of their salespeople, whether they are independent contractors or employees.

The broker should be sure the salespeople and staff understand how the antitrust laws apply to the real estate industry. A broker should insist that each salesperson attend an antitrust legal education program at least once every two years. This antitrust education program could be offered by the local association, conducted by the broker, the firm's sales manager, or legal counsel. In addition, all new salespeople should be required to attend a company orientation program that includes a presentation on antitrust compliance.

2. Monitoring Salesperson Performance. Brokers should not only alert the salespeople to the dangers of antitrust noncompliance and the consequences that can flow from inaccurate or incriminating statements, but they should also monitor their salespeople's compliance performance. Salespeople should be instructed to report to their broker any suggestions by salespeople from other firms that could be interpreted as an invitation to fix commissions or boycott another competitor. Salespeople should also be taught, through simulated listing presentations, the proper way to distinguish the services of a competitor or respond to a seller's request for a lower commission rate. These responses should never take the form of a suggestion that commissions are established by agreement among brokers, or that an individual competitor is the object of a boycott.

3. Communications with Counsel. Every real estate firm should have access to competent legal counsel. If the firm's corporate counsel does not have antitrust expertise, the counsel should be asked to identify other counsel to be consulted when antitrust issues arise. Antitrust legal advice should be sought whenever the firm intends to adjust its commission rates, fees paid to cooperating firms, or whenever the firm plans to implement a business strategy that may adversely affect its competitor.

In addition, correspondence and records of communications with the firm's attorney should be kept in a segregated file, and should not be disseminated

outside the firm without prior consultation with the attorney. Limited distribution of attorney-related documents is necessary to preserve the attorney-client privilege of confidentiality.

4. Standard Form Contracts. Standard form listing contracts should not contain certain information preprinted on the form, including the following:

- commission rates;
- predetermined listing periods;
- automatic renewal clauses;
- predetermined protection periods;

Brokers may also wish to include on the form an affirmative statement that commission rates and cooperative splits are independently established.

C. Responding to an Antitrust Investigation or Complaint

Despite a broker's efforts to ensure that he and his salespeople are complying with the antitrust laws, he may nevertheless be the object of an antitrust investigation or complaint. Most actions initiated by government antitrust enforcement agencies begin with an investigation of the person or firm that the agency suspects may have violated the law. Brokers should require salespersons to refer all requests for information from a government antitrust enforcement agency to the broker or sales manager. If a representative of an antitrust enforcement agency inquires about the business affairs of a broker or a firm, or if a formal subpoena or complaint is received, the matter should be referred immediately to the firm's attorney.

Conclusion

The antitrust laws apply to prohibit collective action by real estate professionals that restraint trade. Real estate practitioners and firms must take care not only to avoid conduct that does violate the law, but also conduct that supports an inference of an unlawful agreement with other real estate professionals in restraint of trade. It is essential that real estate firms conduct training and practice vigilance to insure that their activities and that of their salespeople and staff does imply unlawful activity.