I Don't Like Discount Brokers!

Real Estate In-Depth December, 2010
By Edward I. Sumber, Association Counsel

Antitrust and Group Boycotts

A good decision for Realtors® and Realtor® associations was issued in the Federal District Court for the Northern District of Illinois on October 22, 2010 in the matter of Hackman v. Dickerson REALTORS®, Inc. This case involved alleged group boycotts by certain Realtors® and the Rockford Area Association of Realtors® in Illinois as well as the Illinois Association of Realtors®. While the results are excellent, the case points out the difficulty, time and cost of defending allegations of group boycotts against brokers with uncommon business models.

What is a Group Boycott?

A group boycott occurs when two (2) or more business enterprises enter into a contract, combination or conspiracy to not do business or harm the business model of another enterprise. A group of brokers who choose not to do business with a particular firm and who agree to avoid cooperation with a firm that has a different business model (e.g. a virtual office, a discount commission or a fixed fee arrangement) would be deemed to be in violation of the antitrust laws and be subjected to serious civil and criminal liability. In the Hackman v. Dickerson REALTORS®, Inc. case, Gregory Hackman, the broker, owner of Gregory Hackman Realtors®, was a member of the Rockford Area Association of Realtors® and the Illinois Association of Realtors®. In 2000 Mr. Hackman opened a new office where he began offering discounted commission rates for new clients. He subsequently alleged that because of his low commission rates, five (5) competing brokerage firms entered into an agreement to retaliate against him by disparaging him and his business model and by refusing to show his listings. It took several years and significant legal costs to bring this matter to a conclusion. While the result for the Realtor® community is favorable, it demonstrates the danger of overreactions to alternative business models and the difficulties of defending oneself in federal court in costly litigation having potentially devastating consequences.

A discussion of this case, therefore, is useful to remind brokers that they must themselves refrain from any conversations with other firms about who they will and will not do business with, what they like or do not like about other brokerage models and importantly, how salespersons should be trained to avoid circumstances where they may be charged with conspiring to create a group boycott against a broker whose business model is different.

Per Se Illegality

The U.S. Supreme Court over the years has developed certain guidelines and indicated that certain forms of eliminating competition are unreasonable "***per se"***. *"Per se"* means "on its face". Price fixing, group boycotts, market allocations and tying agreements are considered to be *per se* illegal. Any group of two or more brokers who agree that they will not do business with another broker or particular enterprise would constitute a group boycott, as was alleged in Hackman v. Dickerson REALTORS, Inc.

Hackman v. Dickerson Realtors, Inc.

Gregory Hackman brought his action against certain Realtors® and the Rockford Area Association of Realtors® ("RAAR") and the Illinois Association of Realtors® ("IAR"). He alleged that the defendant REALTORS® who were also his competitors, were in violation of Sections 1 and 2 of the Sherman Act[1] alleging an unlawful conspiracy to boycott and exclude him from the market. Although the Court in 2007[2] rejected RAAR's and IAR's contention that the Sherman Act does not apply to non-profits, the Court dismissed the counts because Hackman failed to properly show that RAAR reached an actual agreement or conspired with any of the other defendants to engage in anticompetitive activity. The Court also found that the Associations did not possess monopoly power and further noted that Hackman could not provide evidence in support of his allegations that the defendants encouraged anti-competitive activity.

Hackman filed an amended complaint in response to the Court's 2007 Order and identified two concrete settings in which certain defendant REALTORS® allegedly made false statements about Hackman in furtherance of an agreement to conspire against and to "boycott" Hackman. The Court allowed these counts[3] against certain of the defendant REALTORS® to proceed. However, the amended complaint against RAAR, RAAR's president and IAR again failed because Hackman failed to allege facts sufficient to infer that either entity reached an actual agreement to conspire against or "boycott" Hackman or engaged in anti-competitive activity.

Hackman then filed a second amended complaint in response to the Court's 2008 Order. He attempted to overcome some of the defects found in the prior complaints, including an assertion that RAAR's president had knowledge of the alleged boycott by certain of the defendant REALTORS® and that she participated in a conversation at an RAAR REALTORS® meeting where defendant REALTORS® allegedly agreed not to do business with Hackman because of his discounted commission business model. In 2009 the Court ruled[4] that said conduct could be reasonably construed as furthering an

[1] Hackman also alleged violation of the Illinois Antitrust Act, the court's analysis of which paralleled the analysis applicable to the Sherman Act. The court's analysis is not discussed in this article.
[2] *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954.
[3] *Hackman v. Dickerson Realtors, Inc.*, 557 F. Supp. 2d 938.
[4] *Hackman v. Dickerson Realtors, Inc.*, 595 F. Supp. 2d 875.

anticompetitive agreement. Accordingly, the Court allowed that portion of the complaint to proceed against RAAR and its president.

The Hackman complaints contained counts for federal and state antitrust violations, a temporary injunction against RAAR and IAR regarding a pending ethics hearing against Hackman, a permanent injunction against RAAR and IAR to stop said ethics hearing, defamation, and tortious interference with business expectancy and contract. The Court in 2009 allowed several counts to proceed against the defendant REALTORS® regarding the defamation and tortious interference claims based in part on derogatory comments made to other REALTORS®, clients and other third parties.

In its final decision, the Federal Court[5], on October 22, 2010 after four (4) years of contentious and costly litigation (covering alleged conduct that began more than ten (10) years before), the Court finally dismissed all of Hackman's counts because the evidence produced during discovery failed to show any triable issues. The evidence was too weak to prove that the defendants violated federal or state antitrust laws or defamed Hackman or caused tortious interference with business expectancy or contract. The counts regarding the ethics complaints against Hackman had already been previously dismissed.

Flaws in Hackman's Case

Hackman's case had several flaws, including the fact that he had closed deals with REALTORS® from one of the defendant agencies, which belied his assertion that there was an unlawful group boycott during that time. Furthermore, his complaints in many instances lacked factual assertions. For those complaints (or portions thereof) that were permitted by the Court to proceed, discovery did not ultimately produce sufficient evidence to enable the Court to allow the case to move forward. Much of the alleged conduct occurred before the explosion of the electronic communication age. In today's environment where 'conversations' are often had by email or text message, it becomes much more likely that similar cases could prevail where Hackman's case failed. In any event, many of the counts set forth in Hackman's complaints, which occurred prior to the electronic communications boom, were permitted to proceed, and were in many instances based upon casual conversations held by REALTORS® to other REALTORS®, clients and other third parties. The length of time and the emotional and monetary cost to defend such litigation is obvious.

[5] *Hackman v. Dickerson Realtors, Inc. (2010),* Case No. 06 C 50240, (United States District Court, N.D. Illinois, Eastern Division).

Discussions Which REALTORS Should Avoid

Discussions amongst REALTORS® within a particular brokerage firm do not constitute violations of the Antitrust Laws. However, when REALTORS® in one firm speak with REALTORS® in another, certain phrases spoken to other REALTORS® or to members of the public should never be used:

1. "Everyone else charges X percent and that's why we do as well."

2. "Why does your firm offer discounted commissions? If you continue to do that I'm going to talk to the other people in the business about not co-broking with you."

3. "Did you hear about the new discount brokerage firm? They are charging a flat fee that is less than half of what my firm charges. No way are we going to cooperate with them!"

Statements such as these infer that competitors have colluded to create an anti-competitive result. The creation by competitors of formal or informal agreements, or even conversations that infer that a particular business practice should result in a refusal by the objecting brokers to deal with that entity, can place the participating parties at risk of criminal and civil prosecution. They can lead to both criminal and monetary penalties and costly litigation that are staggering to any individual or enterprise. The cost of defending oneself against this type of litigation can be incredibly burdensome. Errors and Omissions insurance policies provide no coverage where criminal activity is involved. REALTORS® and industry licensees should avoid any communication or conversation which might be construed as an attempt at a group boycott.

In my early years as counsel to WPAR, Antitrust Law education was the focus of our activities. Most REALTORS® are now fully aware of the impact of the Antitrust Laws and are very sensitive to these issues. It remains our duty to educate newcomers to our industry to be certain that in a high technology world, particularly in light of Hackman v. Dickerson Realtors, Inc., we have not forgotten the basics.

* * * *

Legal Column authors Edward I. Sumber, Esq. and John Dolgetta, Esq. are partners in the law firm of Edward I. Sumber, P.C. The firm has been counsel to the Westchester Putnam Association of Realtors, Inc. since 1974 and the firm was responsible for incorporating the Westchester-Putnam Multiple Listing Service, Inc. in 1976. For information about Edward I. Sumber, P.C. go to http://www.sumberlawpc.com/. Elyse L. Schajer, Esq., an attorney affiliated with the firm, assisted in the preparation of this article.