Antitrust and Realtors®

Real Estate In-Depth November, 2013

By: Edward I. Sumber
Board Counsel

On October 4, 2013 I had the privilege of attending the legal seminar sponsored by the Legal Affairs Department of the National Association of Realtors®. At this exceptional forum for attorneys who represent Realtor® associations and their state associations, Associate General Counsel Ralph Holmen presented the material on antitrust law. He reminded all attendees that the Department of Justice and National Association of Realtors® stipulation of settlement regarding virtual office websites included a commitment that National Association of Realtor® member boards and their counsel would receive annual updates regarding antitrust law including information about the "final judgment" agreed upon by both sides. This article will address certain potential violations of the antitrust law which appear to be applicable to Realtors® and Realtor® firms in the current environment. These are:

1. Group boycotts; and
2. Tying arrangements

What is a Group Boycott?

A group boycott is what is known as a "per se" (on its face) violation of the antitrust laws. What it amounts to is an effort by a group or even just two separate Realtor® entities to engage in discussions involving a refusal to deal with a particular party. When two or more separate business enterprises agree that they will refuse to deal with a newspaper, another competitor, an MLS or a lockbox vendor, the two parties are deemed to be engaged in a group boycott. In most instances, the objective is to enforce a change in the behavior of the targeted entity or to attempt to drive that entity out of business. Despite the "intentions" of the parties engaged in the discussion to be pro-competitive, group boycotts are still considered a "per se" violation. The alleged conspirators would be conducting themselves in an illegal manner.

Tying Arrangements

An enterprise with more than one product may seek to tie the sale of one product which its customers wish to acquire, with another product (presumably a product that may be less desirable to the consumer). Tie-in arrangements are governed by the Sherman Act as well as Section 3 of the Clayton Antitrust Act. These Acts prohibit tying arrangements if the likely result will be to reduce competition. Tie-in arrangements are also considered to be "per se" illegal if the person engaged in the activity possesses "sufficient market power" in the tying product. If the enterprise with market power coerces the buyer to take the tied product as a condition to obtaining the desired product, a tie-in has occurred, which may well be illegal.

In our courses to train licensed real estate brokers and broker associates we have often used the example of the large copy machine company which theoretically could decide that you can only buy the copy machine at a favorable price if you also agree to buy all of your paper and toner from the same company. Such an arrangement prohibits the consumer from seeking alternative sources for paper and toner which might be cheaper and equally usable.

The antitrust concept is the power of the entity in the marketplace to connect the purchase of one desired product with a somewhat less desired product in a coercive format.

What Does it Take to Get into Trouble?

Trade Associations are a perfect vehicle for antitrust conspiracies. Our Association of Realtors® brings together a group of competitors for the purpose of promoting common business interests. The reason that Realtors® do not go to jail for violations of the antitrust laws is that for the most part, by following the guidance of the National Association of Realtors® in the development of policies and procedures, the organizations act in a manner which benefits the public, promotes an orderly marketplace, encourages innovative business practice and invites any new competitors to join the crowd.

One of the great privileges of being part of our Realtor® community is the opportunity to serve on the multiple listing service or association board of directors. There a person can learn of innovations in the marketplace and participate in decisions which promote the advancement of the Realtor® Code of Ethics, new innovations and professionalism in the industry. When an individual takes on the office of director or becomes an officer of one of our association entities, the awareness of antitrust laws becomes an essential part of the learning process. Each year our Association holds an orientation at which all directors and officers are provided with background material about the antitrust laws and about what is permitted or not permitted from an antitrust perspective.

Innocent Discussions

Realtors® and real estate firms can easily become innocently engaged in discussions which become the basis for a group boycott. For example, when Realtors® from two firms discuss their reluctance to advertise in a newspaper, journal or other publication because of the editorial policies of that publication, such activity can be deemed to be a "group boycott" or a "refusal to deal". Either activity would be considered "per se" illegal. Motive and objectives are irrelevant. Just as Realtors® have been warned repeatedly to avoid discussions about commission rates charged to consumers, any discussion about who or who not to do business with, must be reemphasized. Any firm can independently choose not to deal with a particular vendor by making its own (unilateral) decision. When two firms however talk about the very same decision, it constitutes a "per se" violation of the antitrust laws, the penalties for which are severe.

Penalties for Antitrust Violations

The antitrust laws have both civil and criminal components. The Clayton Antitrust Act gives plaintiffs in antitrust complaints the right to seek "treble damages." Treble damages simply means that the liability for an unsuccessful defendant would be equal to three times the plaintiff's actual damages. Equally burdensome is the plaintiff's right to obtain reasonable attorney fees and costs incurred by the plaintiff in pursuing the action. There are also myriad criminal penalties for antitrust violations including fines, prison terms and court supervision of a defendant's business for as long as ten years.

Blogs and other Internet Media

While in the past we spoke about individuals who had "the gift of gab", a compulsive need to express one's point of view on blogs and other media over the internet is now familiar to all. Salespersons, broker associates and persons affiliated with brokerage firms can make statements which infer that a group boycott has been initiated even when one has not. The National Association of Realtors®, on its website, points out that such inferences may be made from statements such as:

- **"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 that they couldn't market or sell our listings."**

Antitrust Compliance Programs

Every real estate brokerage firm should adopt and rigorously maintain a written office policy about antitrust compliance. Persons affiliated with a brokerage firm including employees, independent contractors, administrative staff and the principals themselves should be included in the effort to make everyone aware of the nature of the antitrust laws and the potential liabilities which emanate from them. The National Association of Realtors® recommends that twice yearly each firm set aside time to review with every person affiliated with the firm, the enterprise's antitrust compliance program. Our Realtor® association will soon be welcoming its officers and directors for 2014. At that time, after a presentation on the antitrust laws, each director and officer will be asked to affirm that they have been provided with materials about the antitrust laws, that they understand the implications of the various prohibitions and that they will avoid any activity that may potentially result in antitrust liability.

* * * *

Legal Column author Edward I. Sumber, Esq. is the principal attorney in the law firm of Edward I. Sumber, P.C. The firm has been counsel to the Hudson Gateway Association of Realtors, Inc. since 1974 and the firm was responsible for incorporating the Hudson Gateway Multiple Listing Service, Inc. in 1976. For information about Edward I. Sumber, P.C. go to http://www.sumberlaw.com/.