



# LEGAL ISSUES FOR NEW YORK STATE REALTOR<sup>®</sup> ASSOCIATIONS, MLSs, AND REALTORS<sup>®</sup>

Presented to the New York State Association of Realtors<sup>®</sup>

Jack R. Bierig  
ArentFox Schiff  
jack.bierig@afslaw.com

Saratoga Springs, New York  
July 9, 2024

#221090925.1

# Two Separate Topics – Each Divided Into Two Parts

1. General Legal Issues
  - A. Antitrust Issues
  - B. Other Issues
  
2. Post NAR Settlement Issues
  - A. On-Going Developments
  - B. Required Changes in Forms

# Basic Antitrust Issues – Summary

The antitrust laws prohibit any concerted action that suppresses competition unless an exception applies.

A Realtor<sup>®</sup> association and an MLS are single entities for corporate purposes. However, since they are comprised of competing brokers and agents, their actions are considered concerted action for antitrust purposes.

Thus, unless an exception applies, the question in every case is whether the challenged conduct promotes or suppresses competition -- or whether it is competitively neutral.

# Basic Antitrust Issues – Method For Judging Competitive Effect

There are two basic analytical methods for determining competitive effect.

1. The basic approach is the so-called “Rule of Reason.” Despite its name, this methodology doesn’t ask whether the conduct was “reasonable” in the normal sense of that word. Rather, it involves a detailed factual and economic analysis to determine competitive consequences.
2. But certain conduct is considered so clearly anticompetitive that it is condemned without any economic analysis. These types of conduct include price fixing, territorial divisions, and certain boycotts. They are said to be illegal per se – without any economic analysis.
3. Everyone knows that price fixing is illegal per se. But no one agrees on what constitutes price fixing.

# Basic Antitrust Issues – What Constitutes An Agreement?

Several members of the Montgomery County Board of Realtors® attend a dinner hosted by one of them, Mr. John Foley.

At the dinner, Mr. Foley announces that his firm is going to raise its desired commission from 6% to 7%, but each firm should independently decide what it wants to do about commissions. Within the next couple of months, each firm that was represented at the dinner raises its commission to 7%.

Does this conduct amount to an agreement for antitrust purposes, and does it violate the antitrust laws? United States v. Foley, 598 F.2d 1323 (4th Cir. 1979)

# Specific Antitrust Issues

# 1. MLS Membership Criteria

Can an MLS condition membership in the MLS on a broker (1) having a favorable credit report and business reputation and (2) maintaining an office in the geographic area covered by the MLS that is kept open during customer business hours?

United States v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980)

## 2. MLS Requirement of Membership in a Realtor<sup>®</sup> Association

Can a Realtor<sup>®</sup> association deny membership in its MLS to brokers who are not members of the Association?

Thompson v. Metropolitan Multilist, 934 F.2d 1566 (11th Cir. 1991)

Reifert v. South Central Wisconsin MLS, 450 F.3d 312 (7th Cir. 2006)



### **3. Denial of Lock Box Access to non-members of Realtor<sup>®</sup> Associations**

DOJ has asserted that limiting access to lockboxes only to Realtors<sup>®</sup> and/or MLS members is anticompetitive.

NAR entered into a proposed consent decree with DOJ by which non-Realtor<sup>®</sup> brokers and agents would be given access to lockboxes. Although the consent decree was never finalized, the position taken by NAR remains the position of NAR.

What sort of restrictions, if any, should be placed on access to lock boxes by non-Realtors?

## 4. Formation of Groups of Firms that Exchange Offers of Cooperation and Compensation

The NAR Settlement Agreement prohibits MLSs that opt in from publishing offers of cooperative compensation by the listing broker or agent.

Can a group of brokerage firms get together and exchange offers of compensation?

## 5. Ethics Training By Non-Realtor Entities

All Realtors<sup>®</sup> are required by NAR to take periodic ethics courses that meet NAR standards. Those courses are generally given by state or local Realtor<sup>®</sup> associations. Can a Realtor<sup>®</sup> association prevent its members from taking a course offered by a non-Realtor<sup>®</sup> entity where that entity claims that its course is just as good as courses offered by a Realtor<sup>®</sup> association?

## 6. Refusal To Allow Advertisements by Non-Realtor<sup>®</sup> Brokers or Agents

Can a Realtor<sup>®</sup> association refuse to accept ads in its publications from non-Realtor<sup>®</sup> brokers or agents?

Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566 (2nd Cir. 1990) (Refusal by company that sold nutritional supplements and that owned the two magazines with the greatest circulation among body builders to accept ads from a rival nutritional supplement marketer)

# 7. Other Antitrust Questions

# Other Legal Issues

# 1. Revocation of Membership

Before suspending or revoking a Realtor's membership in a local Association, that member must be given due process.

Due process requires that the member be given notice of the reason(s) for the proposed revocation, the right to indicate in writing why a sanction should not be imposed, and the right to make an oral presentation to the appropriate body.

The Board of Directors of the Association should always have the final say.

## 2. Resolution of Disputes Between a Realtor<sup>®</sup> and a Client

It is very important for brokers to have a dispute resolution procedure in their contracts with clients.

At a minimum, I recommend that the contract provide (a) that disputes be resolved by arbitration rather than by litigation and (b) that each party waives the right to bring a lawsuit based on the transaction and also waives the right to join, or be part of, any class action or any other legal action relating to claims arising from the transaction.

But there are several other issues that need to be addressed.



### 3. Questions to be Considered in Dispute Resolution Provisions

- a. Should the provision provide for mediation before submission to arbitration?
- b. Should the mediation and/or arbitration be conducted in accordance with procedures of the local Realtor<sup>®</sup> association - - or should they be conducted by an independent entity?
- c. Should the prevailing party in the arbitration be able to recover its fees and costs, or should each party bear its own costs?
- d. Should the amount that can be recovered from the broker be limited to the amount of compensation received by the broker in connection with the transaction?

## 4. Sample Dispute Resolution Provisions

- A. Any dispute concerning the terms and conditions of this Agreement that cannot be amicably resolved by the parties shall first be submitted to mediation proceedings conducted in accordance with the rules of the local Realtor<sup>®</sup> association - - or, if that association does not provide for mediation, by a mediator mutually agreed upon by the parties. Mediation fees and costs, if any, shall be borne by each party.
- B. If the dispute is not timely resolved through mediation, either party may submit the dispute to binding arbitration before a single arbitrator in the county in which the property is located in accordance with the then governing rules of the American Arbitration Association. The decision of the arbitrator shall not be appealable. Each party shall bear its own fees and costs, and the fees of the arbitration shall be borne equally by the parties.

## 4. Sample Dispute Resolution Provisions

- C. Arbitration as set forth above shall be the exclusive procedure for resolution of all disputes that cannot be resolved through mediation. Each party hereby waives the right to bring any lawsuit relating to any transaction covered by this Agreement and further waives the right to join, or be part of, any class action relating to claims arising from any such transaction.
- D. If Broker is held liable for any matter arising from the transaction, the maximum liability of Broker shall not exceed the amount of compensation received by the Broker from the transaction.

## 5. Objectionable Social Media Posts

Policy Statement 29 of the NAR Code of Ethics provides as follows: “A Realtor<sup>®</sup> shall be subject to disciplinary action under the Code of Ethics with respect to all of their activities”.

Standard of Practice 10-5 provides that “Realtors<sup>®</sup> must not use harassing speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation or gender identity”.

Given these statements, should a Realtor<sup>®</sup> association take action against a member who posts objectionable social media posts?

## 6. Objectionable Social Media Posts – Examples

- A. “There is no systemic racism in real estate. The constant preaching about diversity, equity, and inclusion is itself racist. We should pay no attention to historic inequities that no longer exist.”

John White, Realtor”

- B. “From the river to the sea, Palestine shall free. Israel is a war-mongering country that should not be allowed to exist.”

Leila Abdul, Main Street Realty

# Post NAR Settlement Issues

1. On-Going Developments
2. Required Changes in Forms

# On-Going Developments

The vast majority of NAR-affiliated MLSs have opted in to the NAR Settlement. However, at least five matters are worthy of note:

1. Northwest MLS
2. MLS – PIN litigation
3. Grace v. ReMax Holding
4. Batton v. NAR
5. Other Buyer Cases

# 1. Northwest MLS

Northwest MLS in the State of Washington was one of the first MLSs, if not the first, to amend its rules to permit a listing broker or agent to indicate an offer of zero compensation to the successful buyer broker.

As far as I know, Northwest MLS has decided not to opt-in to the NAR Settlement. Why?

I believe that Northwest MLS was able to get a statute enacted by the Washington legislature that explicitly permits an MLS to include a field for the offer of compensation to the MLS participant who produces the buyer for the property. The statute makes the arrangement subject to supervision by a state agency.

This statute may well protect the MLS under the so-called state action exemption from the antitrust laws.



## 2. MLS PIN Litigation

MLS PIN is not affiliated with NAR. In Nosalek v. MLS PIN in the federal district court in Boston, the parties entered into a proposed settlement agreement that would permit the MLS to publish offers of cooperative compensation that could be as little as zero.

If this settlement is approved, MLS PIN would have judicial approval to include offers of compensation on the MLS. However, the Antitrust Division of the Department of Justice intervened in the case to oppose the proposed settlement. It has taken the position that MLSs should not be permitted to publish any offers of compensation.

The federal judge handling the case has decided to hold off on whether to approve this settlement pending the decision of the Missouri court on whether to give final approval to the NAR Settlement Agreement.

### 3. Grace v. ReMax Holdings

In Grace v. ReMax Holdings, (N.D. Cal. No. 23-cv-06352), the federal court in San Francisco dismissed the Bay Area Real Estate Information Services, Inc. (BAREIS) from a case challenging its requirement that a listing broker on the MLS make an offer of compensation to the successful buyer broker.

The requirement (BAREIS Rule 11.2) provided as follows:

“By submitting a listing . . . the Listing Broker is making a blanket, unilateral contractual offer of compensation, if any, to the other Broker Participants . . . for their services in selling the property.”

The Court concluded (at p. 6) that “Plaintiff has not plausibly alleged that the allegedly anticompetitive arrangement flows from the language.” Accordingly, it dismissed the MLS from the litigation. If ultimately upheld on appeal, this could be a very important precedent.

## 4. Batton v. NAR

This is a case in federal court in Chicago brought by a class of home buyers claiming millions of dollars in damages against NAR and several corporate defendants.

The district court held that home buyers are indirect purchasers from the defendant realty firms where they do not pay their broker -- and therefore cannot sue for damages under the federal antitrust laws. However, buyers can seek an injunction under those laws, and they can sue for damages under the antitrust laws of the 28 states that permit actions by indirect purchasers. They can also seek damages under 25 state consumer protection laws.

Significantly, however, the NAR Settlement Agreement precludes actions by any buyer who was also a seller within the past five to eight years.

## 5. Other Buyer Cases

In Wallach v. Silvercreek Realty, a buyer who purchased a home in Idaho in 2016 using a Silvercreek agent has brought a class action in federal court in Chicago on behalf of all buyers who purchased a home using a Silvercreek agent during the relevant time period.

This is one of several class action cases brought by home buyers against large brokerage firms in an effort to get substantial settlements from their brokers in return for dismissal of all similar claims by buyers against the defendant brokerage firm. Silvercreek has moved to dismiss, but there has been no decision.

Recently, in late April, a class of buyers sued Home Services in federal court in Miami, and there are several similar cases around the country.

# Required Changes in Forms

## Five Rules That Brokers Must Follow

1. An agreement between the buyer and the broker must be signed before the first showing of a property. The agreement must include the amount that the broker will receive from any source.
2. The agreement with a buyer cannot represent that services are “free” or “available at no cost” unless the broker receives no compensation from any source.
3. The buyer broker may not filter or restrict listings communicated to a client based on the compensation offered to the broker.
4. The seller must approve in writing any offer to share compensation.
5. Agreements both with sellers and with buyers must disclose that commissions are not set by law and are fully negotiable.

## How Can The Buyer Broker Know The Amount of Compensation?

When the broker enters into an agreement with the buyer, that broker may not know how much compensation different listing brokers may be offering for various properties that the buyer might be interested in. But the agreement with the buyer client must specify the amount that the buyer will receive from any source. How can that be done?

One possibility:

“Buyer shall pay Broker  \$\_\_\_\_\_ or  \_\_% of the purchase price (check one) for Broker’s services in finding the property purchased by Buyer and in facilitating the closing of the transaction. However, this amount shall be reduced by whatever payment Broker receives from the Seller or the Seller’s Agent in connection with the transaction.

But what if the Seller/Listing Broker offers more than what the Buyer has agreed to pay? This may require an amendment to the agreement with the Buyer. It may result in a rebate to the Buyer.

## More Provisions in Buyer Representation Agreement

1. “The commission is fully negotiable. It is not set by law, by any association, or by any MLS.”
2. “Buyer may choose to negotiate that the commission be paid, in whole or in part, by the Seller at closing as a credit/concession to Buyer and/or by the Seller directly to Broker’s firm. As instructed by Buyer, Broker will include either or both of these alternatives in Buyer’s offer to purchase a Property. Broker will not retain from the transaction any amount that exceeds the amount set forth above without the written consent of Buyer.



# Exclusive Listing Contract

1. “The commission is fully negotiable. It is not set by law, by any association, or by any MLS. Seller hereby approves the commission set forth above.”
2. “Seller understands that Broker will not include in the listing on the MLS the amount that is being offered to the successful buyer broker.”
3. “Disclosed Dual agency. Broker and Broker’s firm are authorized to act for both Seller and Buyer in any transaction. If this situation arises, Broker shall disclose to Seller the intention to act as a disclosed dual agent. Seller hereby consents to the disclosed dual agency and agrees to allow Broker and Broker’s firm to collect compensation from the Buyer as well as from the Seller. Broker shall not act in a manner that adversely affects the Seller or the Buyer in any way. Seller has read this provision and understands the concept of Disclosed Dual Agency.”

# FINAL QUESTIONS

