Michigan Realtor®
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ANTITRUST REFRESHER

A federal antitrust action has two basic elements: (1) a contract or conspiracy that (2) unreasonably restrains trade. The "conspiracy" element is satisfied wherever two or more persons/entities carry out a common plan. If there is a "common plan," then the only question is whether the effect of that common plan "unreasonably restrains trade."

Many of you are aware of the antitrust class action filed against NAR in the Spring of 2019. The essence of that complaint is that the NAR MLS rule by which listing brokers are required to make blanket offers of compensation to buyer's brokers unreasonably restrains trade. The result of this requirement, the Plaintiffs in this case argue, is that the commissions being charged in the industry are much higher than they would be if buyers paid their own agents.

NAR's position is that this MLS rule does not unreasonably restrain trade, and in fact is actually procompetitive. In responding to this Complaint, NAR has emphasized that under the NAR MLS rule, the compensation offered can be any amount – even a nominal amount. NAR has filed a motion asking the Court to throw out the case. NAR has said publicly that if the case is not thrown out, there is little likelihood of settlement because "the lawsuit strikes at the heart of the MLS system that has greatly benefitted literally millions of home buyers and sellers for 100 years." The Court has not yet ruled on NAR's motion asking that the case be thrown out.

The existence of this case presents a good opportunity to briefly review antitrust law. As stated above, the issue in the NAR case is whether the "common plan" as set forth in the MLS rule unreasonably restrains trade. Under federal antitrust law, there are some types of "common plans" that are illegal on their face. In other words, these types activities are illegal whether or not someone can prove that they unreasonably restrain trade. One of these types of illegal activities involves conspiracies to fix prices – or in the case of Realtors®, conspiracies to fix commissions.

Another example of a "common plan" that is illegal on its face is a group boycott. A group boycott occurs where two or more businesses agree to refuse to do business with a third person. The third person could be a competitor, for example, where two Realtor® firms agree not to do business with another Realtor® firm. The third person can also be a service provider to the Realtor® firms, for example, a title company or a home inspector. The purpose of a group boycott is typically to force a change in the third party's business practices or to drive the third party out of business.

An Alabama case from the 1980's provides a good example of an alleged group boycott in the real estate industry.[1] In that case, a real estate firm, Orval Sheppard Real Estate Company, Inc. ("Sheppard"), adopted a flat fee commission structure whereby all sellers were charged a $1,995 commission, irrespective of the sale price. The Sheppard firm offered $1,000 of its flat fee to any cooperating broker and, in addition, agreed to take only $1,000 on any transaction in which it was the cooperating broker, regardless of the actual amount being offered through the MLS. Upon learning of this fee structure, a number of large brokerage firms in the area decided not to cooperate with the Sheppard firm. The Sheppard firm's listings fell dramatically. The owner of the company sold the Sheppard firm to others who immediately abandoned the flat fee structure. After selling his company, the former owner of the company brought an antitrust suit against the large brokerage firms who had refused to do business with it.

The defendant brokerage firms were successful in this case because the Sheppard firm could not prove that the different firms had consulted with one another about their decision to stop cooperating with the Sheppard firm. In other words, the Court found that there was, in fact, no

[1] *Orval Sheppard Real Estate Co, Inc v Valinda Freed & Assoc, Inc,* 608 F Supp 354 (MD Ala SD, 1985).

"common place." The Court noted that under the law generally, any real estate firm has the right to refuse to cooperate with another real estate firm as long as its "refusal stems from independent decision and not from some agreement tacit or expressed:"

> Here, the court finds that the defendant [real estate companies] refused to co-broker with Sheppard Real Estate without consulting with one another. They acted immediately, almost without time to consult with one another and engage in a concerted plan.

Since there was no evidence that the defendant brokerage firms had consulted with one another, there was no antitrust violation.

Realtors® should keep in mind that meetings of trade associations, such as State and local Realtor® associations, are ripe grounds for antitrust conspiracies. A broker or agent who participates in the affairs of an association of Realtors® should never participate in any discussion of the business practices of another Realtor® or Realtor® firm. And this is true even if the focus of the discussion is how the actions of this Realtor® reflect badly on the Realtor® brand. Under no circumstances, for example, should a topic of a local association's board of directors meeting include a discussion of Realtor® "Y's" complaints about Realtor® "X's" business practices. A director who finds himself/herself in the middle of such a discussion should change the topic, and if unsuccessful, leave the meeting.

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