COMPLIANCE NOW! ACTIONABLE ANTITRUST ADVICE FOR THE RESIDENTIAL REAL ESTATE INDUSTRY

BY AARON GOTT & MOLLY DONOVAN[1]


1 Aaron Gott and Molly Donovan are both partners at the boutique antitrust firm Bona Law PC.

CPI ANTITRUST CHRONICLE March 2024

Visit www.competitionpolicyinternational.com for access to these articles and more!

COMPLIANCE NOW! ACTIONABLE ANTITRUST ADVICE FOR THE RESIDENTIAL REAL ESTATE INDUSTRY

By Aaron Gott & Molly Donovan

The residential real estate industry is attracting unprecedented scrutiny from government enforcers and private plaintiffs, with one jury in Missouri awarding a class of home seller plaintiffs a staggering $1.8 billion for a price-fixing scheme the jury found was sanctioned by the National Association of Realtors ("NAR"). The onslaught of litigations and investigations will likely cost the industry billions and it is already changing the industry's approach to doing business. This article reviews the most recent enforcement efforts against the residential real estate industry by highlighting three of the hottest spots: the payment of broker commissions, information sharing among competitors via third-party services, and group boycotts. It provides actionable compliance and risk-management tips that brokers, landlords, information services, and multiple listing services should consider in deciding how they will approach future business in this new era of antitrust scrutiny.

The residential real estate industry is attracting unprecedented scrutiny from government enforcers and private plaintiffs, with one jury in Missouri awarding a class of home seller plaintiffs a staggering $1.8 billion for a price-fixing scheme the jury found was sanctioned by the National Association of Realtors ("NAR"). The onslaught of litigations and investigations will likely cost the industry billions in legal fees, fines, settlements, and verdicts. And it is already changing the industry's approach to doing business.

Starting with commission payments, the class action in Missouri alleged that brokerages colluded with each other and with the NAR to require home sellers to pay the brokers representing the buyers of their homes fixed-rate, non-negotiable commissions. This was alleged to have resulted in suppressed competition among buyers' agents with home sellers paying inflated rates they would not have paid in a competitive market. After (and even before) the billion-plus verdict, numerous copycat class action lawsuits were filed against the NAR and dozens of brokerages across the country, including in Illinois, New York, Texas, and California. The litigation threatens the NAR's long-standing dominance in establishing and maintaining the accepted practices for paying commissions to sales agents.

A different wave of lawsuits has hit residential landlords and technology company RealPage, who class action lawyers and the Attorney General for the District of Columbia allege illegally agreed to fix prices, facilitated by using RealPage's software. The Antitrust Division of the Department of Justice filed a statement of interest against the defendants asserting that this "automated" anticompetitive scheme is *per se* unlawful: "competitors knowingly combine their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same."[2]

Finally, allegations of group boycotts that, for years, have plagued the residential real estate industry continue. One federal lawsuit alleges that incumbent multiple-listing services ("MLSs") affiliated with the NAR had enjoyed decades of little-to-no competition. But once threatened with an emerging listing service (called "PLS"), the incumbents committed per se unlawful antitrust violations by coercing sellers' agents not to supply listings to PLS. The alleged purpose was to prevent all competition in the relevant market.

Will the NAR survive these enforcement efforts? Will real estate brokerages adapt? If so, how? One answer: compliance now. Brokerages must evaluate antitrust compliance separately from the NAR and NAR-affiliated local groups to develop programs that assure their individual firms are antitrust compliant. While this may require brokerages to eschew long-accepted protocols for compensating the brokers (and their agents) who buy and sell homes, and to make the difficult decision to cut ties with the NAR and its many local chapters, it is the prudent approach at a time when class action law firms and government enforcers are watching this space closely.

Regardless of what you think of the verdict in Missouri or the copycat lawsuits elsewhere, whether or not these circumstances present antitrust violations is beside the point. This is about risk management, and to manage these risks, a compliance audit is a must.

This article reviews the most recent enforcement efforts against the residential real estate industry by highlighting three of the hottest spots: the payment of broker commissions, information sharing among competitors via third-party services, and group boycotts. It provides actionable compliance and risk-management tips that brokers, landlords, information services, and multiple listing services should consider in deciding how they will approach future business in this new era of antitrust scrutiny.

To be sure, each industry participant would be best served by individualized compliance advice tailored to its individual risks. And a good compliance system must be practical based on a particular company's given resources, with more resources devoted to high-risk areas with fewer or no resources devoted to low- or no-risk areas. The guidance in this article — broadly applicable to most in the industry — is merely a place to start.

I. DO NOT FIX BROKER COMMISSION RATES AND/OR WHO PAYS THEM

The Missouri class action centered on the NAR's rule automatically requiring *sellers* to pay a non-negotiable commission awarded to the *buyer*'s broker at a transaction's closing ("Mandatory Payment Rule"). For their part, brokerages allegedly compelled their agents to belong to the NAR and to adhere to the NAR's rules, including the Mandatory Payment Rule. The alleged result: no competition for buy-side commissions, causing inflated prices that were forced upon home sellers inevitably. Every brokerage in the industry allegedly understood that every other brokerage would comply with the NAR practice, resulting in tacit but very broadly accepted collusion.

The Mandatory Payment Rule allegedly made it difficult for small brokerages looking to attract sellers and buyers to compete with large, established brokerages because they could not compete on price — it was locked in. A seller's broker looking to compete for clients — by,

2 U.S. Dep't, Justice Department, Antitrust Division, Statement of Interest of the United States (Nov. 15, 2023) https://www.justice.gov/d9/2023-11/418053.pdf.

for example, trying to shift responsibility for the buy-side commission to the buyer — are unable to do so. And a broker looking to compete for buyer clients by offering a lower commission would make no traction because sellers, rather than the broker's would-be clients, pay the broker's commission. The NAR's rule was reinforced by alleged "steering" practices — where buyer brokers "steer" their clients toward homes attached to a non-negotiable buy-side commission. If a particular seller did not comply with the Mandatory Payment Rule, buyer brokers would shun their property in favor of homes attached to an automatic and fixed commission. In the end, emerging brokerages could not get their foot in the door through innovations by way of process and/or price competition.

Many commentators have noted that technology has enabled home buyers to search for homes without needing a broker's access or market knowledge. The buyer broker's role has increasingly been relegated to accessing lock boxes, providing fill-and-sign access to standard forms, and collecting the check — but under the NAR's rule, buy-side brokers continue to be awarded the same inflated commission rates despite their diminishing roles. Plaintiffs are alleging this would not happen in a competitive market.

So what can a brokerage do now to anticipate the coming sea change? Here is some high-level guidance that brokerages should consider:

- Some commentary suggests that disclosing to sellers and buyers that commissions are negotiable solves the problem. To mitigate the risk even more, in addition to disclosures, there should be an accessible process that prompts and facilitates bona fide arms-length negotiations over commissions.
- Commission negotiations should not be discouraged in any way.
- Disclosures to home sellers and buyers that commissions are negotiable should be understandable, easy to find and accompanied by an explanation of the process for negotiating.
- Whether the seller is made to pay the buy-side commission should be negotiated and determined on a case-by-case basis. Regardless, the buyer should not be led to believe that their broker's services are free (this misleads the buyer to believe that their offer is as good as it could be with or without a negotiated commission).
- Buy-side commissions should be commensurate with the "value add" brought by the buy-side broker — nothing else would exist in a truly competitive market. This may require detaching the buy-side commission from the sale price of the home and documenting the rationale behind the final rate chosen.
- Anti-steering policies should be adopted and followed.
- Sale-side brokers should give equal treatment to all potential buyers (represented by a broker or not). This includes giving equal access to lock boxes (the key to the front door) and presenting all offers to sellers.
- Brokerages should disconnect from local NAR groups that require adherence to anticompetitive rules in exchange for access to the MLS, or brokerages should negotiate new membership terms with their local NAR group.

II. EXERCISE EXTREME CAUTION BEFORE DISCLOSING COMPETITIVELY-SENSITIVE INFORMATION — EVEN TO A THIRD PARTY

Twenty-one lawsuits have been filed against RealPage and 34 property managers in six different federal courts. Those lawsuits are now consolidated in the Middle District of Tennessee. The District of Columbia's Attorney General also filed a lawsuit against RealPage in Superior Court of the District of Columbia.

Each lawsuit centers on RealPage's revenue management software. The complaints allege property managers and landlords in various jurisdictions nationwide have agreed not to compete on price, delegating price-setting authority to RealPage instead. To that end, property managers and landlords supply competitively sensitive data to RealPage, including the current rent prices they are charging. RealPage feeds this data into its software, which determines recommended rates through an algorithm. RealPage encourages "compliance" with its rent recommendations, and landlords adopt the recommendations more than 90% of the time. The software even allows landlords the option to automatically accept RealPage's recommended rents without oversight from the property manager or owner.

The complaints also allege that landlords discuss their competitively sensitive information with each other — not just with RealPage. For example, one complaint states that "[l]andlords are instructed by RealPage to gather [] non-public competitor data from direct conversations with their competitors. And the competing landlords agree to provide this data, to enable the [] algorithm to generate above-market rental prices for themselves and other cartel members." It also alleges that "[a] RealPage [] user manual states . . . 'You should gather information each week

from each competitor' such as 'rent charged for each unit type,' 'number of visits to the property that week,' and 'occupancy percent for the property.'"[3]

The DOJ filed a statement of interest asserting the scheme is per se unlawful — and regardless of whether the landlords communicated directly about price. The DOJ reasoned that the scheme is horizontal because it eliminates competition between actual or potential competitors; that RealPage *might* be vertical to landlords changes nothing: competitors "cannot simply get around antitrust liability by acting through an intermediary."[4]

The DOJ says two additional characteristics of the scheme mandate *per se* treatment: the landlords agreed to use a common pricing formula — conduct historically deemed *per se* illegal; and the landlords acted together to provide competitively sensitive and non-public pricing information to further the rent-inflation scheme.

The government has been active in enforcing the antitrust laws against third parties who facilitate industry-wide price-fixing agreements through algorithms and other machine learning tools and against the competitors who supply the information necessary to do so. For one example, the DOJ has brought cases centered on third-party data aggregator AgriStats as the facilitator of price- and wage-fixing schemes by competing agribusinesses.

While antitrust compliance in this area requires a bespoke approach, third parties and their customers should understand what is off-limits before gathering, providing, and/or exchanging price or other competitively sensitive data that competitors would not (or should not) share directly with each other.

- Do not supply pricing or output data. The information should not expose what your business is doing in real time or enable your competitors to predict your pricing or output decisions.
- Never supply current data of any kind, as competitors can easily coordinate on price when armed with current data.
- Hesitate to provide historical data. The government once said that data at least 3 months old is relatively safe to exchange, machine learning and complex algorithms have since increased the value of historical data — making it possible that competitors might be able to use even months-old data to discern future-facing strategies when it comes to price and/or availability of units.
- Don't supply the missing link. Even when the information exchanged is not comprehensive or detailed, make sure that it is not the missing piece that, when combined with information that "everyone knows," allows competitors to collude. Even after the information exchange, subscribers to third-party information services should still not be certain how their competitors will act and react.
- Watch out for asymmetry of information. It is suspicious if the third-party reports are available only to companies who compete at the same level of the supply chain — and not to consumers willing to pay for them. The "give to get" idea (i.e., you must be able to provide the relevant data to receive the relevant data) can suggest collusion.
- Complete or near-complete industry participation can suggest collusion. When every competitor participates, the information obtained may be crucial to success in the market — but also suggests a highly successful conspiracy. If the data being shared represents all or most of the relevant market and you believe it is relevant to your business, talk to counsel about risk mitigation.
- Third-party consultants should not advise competitors how to use the information to raise profits or tell one subscriber how other subscribers are using the information. Nor should reports identify opportunities to raise prices or restrict output.
- Subscribers should not automate price setting.
- Competitors should ensure their third-party data aggregators take antitrust compliance seriously.

III. DO NOT BOYCOTT EMERGING BROKERS AND MULTIPLE-LISTING SERVICES

In California federal court, a PLS claims that the incumbent MLSs controlled by the NAR jointly undertook an unlawful group boycott of the new competitor to prevent it from obtaining listings of homes for sale. The scheme was allegedly accomplished by coercing brokerages not to list on the PLS without also listing on a NAR-affiliated MSL or to list on the PLS only on unfavorable terms.

The Ninth Circuit ruled that the complaint sufficiently alleges a *per se* violation of the Sherman Act. It reasoned that a group boycott generally "falls into the *per se* category if 'the boycotting firms possess a dominant position in the relevant market,'" "cut off access to a

3 Compl., *District of Columbia v. RealPage, Inc., et al.* (D.C. Sup. Ct. Nov. 1, 2023) at 31.

4 U.S. Dep't, Justice Department, Antitrust Division, Memorandum of Law in Support of DOJ's Statement of Interest (Nov. 15, 2023) at 18, https://www.justice.gov/d9/2023-11/418053a.pdf.

supply" and/or the practice is "not justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive."[5]

The court was not persuaded by the MLSs' argument that the boycott was not *per se* illegal because, they asserted, PLS was not "cut off from anything," as, brokers remained free to list with PLS. The Ninth Circuit responded that "a group of competitors coercing a competitor's suppliers to sell to that competitor only on 'unfavorable terms' constitutes a group boycott even if the competitors do not completely cut off the competitor's access to inputs it needs. That is because businesses that can obtain those inputs only on unfavorable terms are unlikely to be able to compete." (citation omitted) Moreover, "agents who belong to a NAR-affiliated MLS may not list on PLS without also listing on an MLS." The scheme, therefore, "essentially *eliminates* competition for most sellers' agents' listings between NAR-affiliated MLSs and rival services."[6]

The fact that brokers could list on the PLS so long as they agreed to forfeit their MLS access was not convincing either. "In every group boycott, the dominant firms force their suppliers or customers to choose between assisting the dominant firms in injuring their competitors or working exclusively with those competitors, knowing that because of the dominant firms' market power very few suppliers or customers will be able to rely exclusively on the competitors." This is coercive even if the suppliers technically have some choice not to acquiesce.

Brokerages can take steps to reduce their risk of being caught up in a group boycott:

- Train salespeople not to steer buyers away from homes that are not listed on an MLS or not listed on an MLS affiliated with the NAR. Buyers should be presented with all homes that meet their criteria regardless of whether or where the homes are listed.
- Similarly, train salespeople not to steer buyers away from homes listed by a non-NAR brokerage. Buyers should be presented with all homes regardless of which brokerage is representing the seller.
- Any time one broker talks to another about who they should or should not do business with, red flags should go up. This applies to listing services and to brokerages.
- Don't make the same business moves that you learn others are making, particularly after a trade association or other industry meeting or event. For example: everybody stops using a particular listing service.
- Do not make false statements about other brokerages or listing services to try to box-out competition.
- Do not coerce others not to do business with anyone else, and if do not capitulate to any such coercion that seeks to gain your compliance with such a scheme. Threats and other forms of pressure raise antitrust concerns.

IV. CONCLUSION

While the existence of antitrust violations in these hotspots will continue to be litigated in the courts and debated by commentators, and there are viable defenses, the industry's responsible path forward is proactively avoiding even the appearance of antitrust violations in the future. Defending against antitrust litigation and investigations can cost millions of dollars and still carry the risk of costing even more to remedy. That is not to mention the human toll and other intangible downsides of litigation. Compliance will allow the industry to trade those costs for the far more limited pain of changing longstanding business practices.

5 *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 34 F.4th 824, 835 (9th Cir. 2022).

6 *Id.* at 835-36.

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.