



## CLAIMPREVENT® BLOG

# What Real Estate Brokers Need to Know About Anti-Competitive Behavior

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Real estate brokers have an ethical and legal responsibility to ensure your business complies with antitrust laws. Avoiding anti-competitive behavior, or anything that may be perceived as anti-competitive, will help you to avoid a lawsuit in the future. If you don't, you could face severe consequences. An antitrust lawsuit could see your reputation in tatters, and it could be the end of your business. Court costs are expensive and you could face hefty fines (and in some cases imprisonment).

In our latest blog post, we explore key aspects of United States antitrust laws that are designed to protect consumers. We'll also look at three of the main areas of anti-competitive behavior which have come up in previous real estate lawsuits. These are:

- Price-fixing
- Market allocation
- Inequitable access to or misuse of a Multiple Listing Service (MLS)

## Antitrust Laws in the US

Antitrust laws are designed to prevent monopolies and promote fair competition. They protect the interests of consumers, so they have a choice in the market, uninfluenced by anti-competitive behavior.

As a real estate broker, it is crucial that you familiarize yourself with the key aspects of the Federal antitrust laws: Sherman Antitrust Act; The Clayton Act; and Federal Trade Commission Act. Depending on where your business is operating, there may also be state antitrust laws that you need to comply with.

Here are three important aspects of the laws to be aware of as they relate to real estate.

### Price-Fixing

Price-fixing occurs if real estate brokers or licensees from competing companies conspire when it comes to pricing and commissions. An example of this is where there are multiple real estate brokerages in a small town that all agree to charge the same percentage commission. Or they might set a minimum price that all competitors agree to stay above, so prices remain artificially high in the area. Collaborating with your competition to fix prices not only limits consumer choice, it is a clear violation of antitrust laws as it promotes restraint of trade.

Recently, in October 2023, the judgment for a class action lawsuit based on alleged price-fixing against the National Association of REALTORS® and two Missouri brokerage firms was announced. The judge found them liable to pay nearly \$1.8 billion in damages for conspiring to keep their commissions high.

Media coverage surrounding the decision stated that appeals were expected to be lodged for this case. However, it is a good example of the significant consequences real estate brokers can be subjected to if a price-fixing claim is made against you.

What to do:

1. Establish your fees for services without discussing or even announcing those fees to your competitors.
2. Create a company policy for any commission splits, without discussing your policy with the competition.
3. When talking with clients, emphasize that your fees and policies are established by your brokerage. Be sure your licensees do not imply that “all real estate agents” do something, or local associations require something.

Note that price fixing refers to “any economic term” of a listing agreement — listing term as well as commission rate.

## Inequitable Access to or Misuse of a Multiple Listing Service (MLS)

There's no doubt that an MLS is a valuable tool in real estate. It is a centralized system that helps brokers and licensees share property information, and it streamlines the buying and selling process. It also increases exposure for properties because they are seen by a larger network of real estate professionals, boosting the chances of a sale. Despite the benefits, inequitable access to or misuse of a MLS can result in legal ramifications because they undermine fair competition. This includes:

- Manipulating property data, which can lead to misinformation and unduly influence a seller or a buyer.
- Selectively excluding properties or clients in a discriminatory manner
- Implying that the MLS won't accept the listing due to lower fees or other terms

- Implying other licensees won't show the house if the clients list with certain companies or licensees

To avoid an antitrust lawsuit, expensive fines, or even a suspension of your real estate license, you must promote equal access to MLS information for everyone in the marketplace. Inclusiveness, honesty, and transparency, are all positive characteristics that will go a long way to making your real estate business a trusted one in the marketplace.

## Market Allocation

Dividing markets or territories with your competitors is another example of an antitrust breach. You cannot simply make an arrangement with a competitor to not compete — this is unlawful whether you have a formal or informal agreement. That means you can't say to your competitor: "You take North of downtown, and I'll take the South" or "Don't sell in my market, and I won't sell in yours". There are extremely tough penalties for market allocation. You may even face criminal prosecution, which could lead to significant fines and imprisonment.

## Tips for Real Estate Brokers to Avoid an Anti-competitive Behavior Lawsuit

### **Familiarize yourself with the legislation**

When was the last time you read through the legislation or checked to see if anything had changed? It's essential real estate brokers are proactive and keep informed about antitrust laws both federally and in the state where you run your business.

Many real estate associations offer resources and guides that can help brokers and licensees to navigate anti-competitive behavior and ensure compliance. Even if you're not a member of an association, there are many resources published on the internet from real estate associations that may be of use.

## **Keep updated**

Been in the business for a while? Even if you feel you know the antitrust legislation well, continuing education is important. If you get the chance to attend workshops, seminars, or webinars on the topic, these can be a useful refresher. They are a great opportunity to broaden your knowledge and find out about any important updates.

## **Establish anti-trust compliance policies within your brokerage**

Develop internal policies that outline your brokerage's approach to compliance for antitrust laws and anti-competitive behavior. Your office needs a written antitrust compliance policy.

## **Educate your team**

Of course, policies are not useful at all unless they are communicated effectively to your team. Run regular education sessions for your team to ensure they are all aware of the relevant antitrust laws. They also need to understand the impact of anti-competitive behavior and the serious consequences of non-compliance.

Do not assume that long-time real estate licensees are up-to-date on the latest antitrust laws. Running through a simple refresher in a meeting by talking about problem phrases and practices can help avoid problems.

## **Seek advice from a qualified real estate attorney**

Navigating the antitrust legal landscape and anti-competitive behavior can be complex for brokers. If you do encounter issues within your brokerage that you think may constitute anti-competitive behavior, obtain legal advice. A qualified legal professional who specializes in real estate can provide you with trusted advice tailored to your specific needs. Even if you just have a small question about antitrust laws and compliance, seek professional legal advice to ensure you don't find yourself on the wrong side of the law.

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