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Sent: Sunday, September 25, 2005 11:03 PM  
To: RealEstatePanelistRequest@ftc.gov  
Cc: ATR-Real Estate Workshop  
Subject: Request to Participate, 'Competition Policy in Real Estate Industry' hearing

Competition Policy in the Real Estate Industry--Request to Participate, Project No. V050015.

Your most important anti-trust issue is Realtors' introduction and promotion into most states of dual agency, which deceives consumers and has vast potential for insider trading by real estate agents. Your Department of Justice investigation of competition policy should not be narrowly limited to just Realtors' attempts (a) to outlaw lower-cost limited-brokerage service and (b) to permit listing firms denial of Multiple Listing Service access to online competitors.

For over a decade, the National Association of Realtors has been lobbying state legislatures for legislation to help agencies represent both the seller and the buyer of the very same house at the very same time.

This action has resulted in radical dilution and negation of traditional fiduciary duties. Real estate agents, like lawyers and investment officers, are fiduciaries, meaning they are given the trust of clients and are empowered to act for them. Because of the degree of trust involved, fiduciaries have always been charged, under common law, to avoid any conflicts of interest scrupulously. That's why law firms, for example, never represent both the plaintiff and the defendant in the same lawsuit.

But the National Association of Realtors and its affiliates have promoted a radical reinterpretation of fiduciary responsibilities, misleadingly called 'designated agency', shifting fiduciary duty from the agency/firm onto just one individual agent. That fundamental shift deceives the public while enabling the firm, at great profit, to represent both sides, the seller and the buyer, of the property at the same time.

It's as though you got an undercooked hamburger at your local McDonald's, complained to its manager, and were told, "Oh, your food is the responsibility of your designated individual cook, Joe. And he's not doing so well today."

This shift of agency onto one individual agent is anti-consumer, because the public does not readily comprehend this fundamental shift of a long-established legal concept. Consumers see extensive advertising for Coldwell Banker or Century 21 or some other large firm, and assume that, as with any other product or service, that they will be dealing with and serviced by the whole company. Home sellers simply do not understand that, when they call a large 'designated agency' firm, they are paying for a whole company but receiving just one individual agent, and all the other agents in the firm can and will be working against them...representing buyers, seeking a lower, not a higher, price for their home.

Real estate offices all have common phone lines, conference rooms, staff meetings, fax machines and computers. Sellers who are giving confidential information about, say, their need to sell

quickly (for example, because of a pending divorce) and their bottom line, for strategizing with their listing agent do not understand that their confidential communications could be easily overheard or overseen by the buyer agents in the same office. Nor do they understand the temptation for the agents on opposing sides to "do a deal quickly", while selling both clients down the river.

The Realtors promote this change in agency policy as 'freedom of choice for the consumer'. But consumers are not given free choice for other dangerous products and services. For example, if you visit a tattoo parlor, you are not allowed a choice of receiving unsterilized needles. That's because the consumer cannot ever be presumed to have knowledge about the complex and not very visible subject of bacteriology.

But neither can or should a consumer be assumed to have knowledge of the difficult and barely visible legal subject of agency and fiduciary duty. Agency truly is a difficult subject to comprehend, because it is, in a sense, unnatural. An agency, like any fiduciary, is charged to pursue the client's interest over its own interest. That unselfishness is unnatural, but is exactly what the profession of real estate agency has always required. The Realtors' are now exploiting the public's lack of understanding of the profession to their own advantage, seeking to receive monies, under the guise of law, from representing both sides of a transaction, to their great profit, at enormous consumer expense.

The most recent example was this year, in Massachusetts, where, as in most states, the law encouraging 'designated agency' was passed without any public hearings at all. Through clever manoeuvring by Realtor lobbyists, it was attached to a near-final version of the state budget, which, under parliamentary rules, was not subject to any amendment or discussion from the floor.

Under common law, a client, to give informed consent to conflicts of interest by their fiduciary, must actually understand the extent of, and the meaning of, the conflicts. The test is subjective: "You understood the conflict". The Realtors have replaced this with an oversimplified and inadequate objective standard: "You signed the fine print on our consent form" (which your trusted agent asked you to sign).

Under common law, the burden of achieving understanding of a conflict of interest rests not upon the unsophisticated consumer, but upon the knowledgeable fiduciary who will benefit from the conflict of interest. The Realtors have moved this traditional educational burden from the fiduciary onto the poor consumer, who must now somehow know to beware before signing a simple-looking, state-encouraged consent form.

I do not claim to be any expert on antitrust law, but I cannot see how the anti-consumer and anti-competitive nature of this promotion of dual agency can pass federal scrutiny. As Benjamin Franklin said (in the context of counterfeit money), "Bad pennies drive out the good". This is exactly what is now happening with agency. The larger firms, which practice pseudo agency, representing both sides, have made themselves indistinguishable as real estate agencies from the good smaller firms practicing true agency, which limit their practice to representing only sellers or only buyers (but never both).

The only actions firms with undivided loyalty can take to counter this deceit is to attempt to educate the public on this complicated, difficult and unnatural subject of agency duty. This is an enormous educational burden small firms simply cannot bear on their own, without help from the governmental agencies which work to protect the public from fraud.

I write this as someone who has owned and managed a real estate brokerage company for 42 years, in Harvard Square, Cambridge, Massachusetts. I have been president of the Cambridge, Greater Boston, and Massachusetts Associations of Realtors, and a director of the National Association of Realtors. Last year, I resigned as a director of the Massachusetts Association of Realtors, to protest the frauds the organization is foisting on the public.

I am co-chair of a non-profit educational corporation organized to try to educate the public about the duties of the real estate agents, which are so little understood by the public. We have many explanatory materials on our website, [www.agencyinformation.org](http://www.agencyinformation.org). I will not attempt to repeat the abundant agency information there in this request.

Please advise if you have any questions, or need further materials from me or our organization. I look forward to testifying at your hearing.

Sincerely,

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