



Competition Policy and the Real Estate Industry

**A Public Workshop on Competition Policy and the Real Estate Industry Co-hosted
by the Antitrust Division of the United States Department of Justice and the Federal
Trade Commission**

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**White Paper
Submitted by
Thomas A. Early, President
National Association of Exclusive Buyer Agents (NAEBA)
www.NAEBA.org**

INTRODUCTION

The National Association of Exclusive Buyer Agents (NAEBA) would like to thank both the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission for hosting this important workshop on the issues affecting competition among buyer's brokers. You may be asking yourself the question, "What is an Exclusive Buyer Agent (EBA)?" An EBA is a real estate licensee who provides fiduciary level Agency representation to real estate buyers exclusively, and who works for a real estate brokerage which does not represent sellers or list properties for sale. By not listing properties for sale or representing sellers, EBAs can provide their buyer clients with 100% undivided representation, without conflicts of interest.

Exclusive Buyer Agency has long been recognized by consumer advocates as a preferred agency choice for real estate buyers. As recently as the May, 2005 issue of Consumer Reports, in an article entitled "**Your Home - Buying, Owning, Selling - How to Protect Your Biggest Investment**", EBAs were recognized as the "true" and "genuine" buyer's agents. EBAs are dedicated to finding their clients the right home at the best price and on the best terms possible. However, despite the obvious advantages of utilizing an EBA when making a real estate purchase, exclusive buyer agency remains a well kept secret within the real estate industry. This is due in large part to the industry's systematic suppression of exclusive buyer agency as an agency option available to consumers.

From its coordinated "minimum service legislation" response to the emergence of discount listing brokers, it is dramatically evident that the real estate industry will take great pains to protect itself from any perceived competitive threats. Exclusive Buyer Agency is perceived by organized real estate as a threat to the status quo as it challenges the sanctity of one of the holy grails of the industry--the in house transaction known within the industry as a "double dip"--where a brokerage represents both the buyer and the seller in the same transaction, thereby doubling commission revenues. NAEBA believes that much of what is occurring in the real estate industry today is tantamount to legalized insider trading. As a result, organized real estate has suppressed the growth

of exclusive buyer agency, and thereby inhibited free and fair competition among buyer's brokers, by means of the following: (1) the failure to acknowledge Exclusive Buyer Agency as an agency choice worthy of consumer disclosure (2) the legalization of Dual Agency (where a broker "represents" both the buyer and the seller in the same transaction) by means of "Designated Agency" legislation which has now been pushed through in over half of the states; (3) the subjection of buyer brokers to the antiquated sales doctrine of "Procuring Cause"; and (4) discriminatory treatment of Exclusive Buyer Agents by the National Association of Realtors® and its affiliates.

Failure to Acknowledge Exclusive Buyer Agency as an Agency Choice Subject to Consumer Disclosure

The growth of buyer agency has been due in large part to the watershed study completed by the Federal Trade Commission in 1983, in which 71% of buyers surveyed thought that the "subagent/seller's agent" showing them a property was actually "their" agent. As a result of the FTC's involvement, agency disclosure to consumers came into being. Unfortunately, compliance with state mandated agency disclosure has been abysmal. Compliance has been so problematic that a number of states no longer even require agency disclosure at first substantive contact, and now only require agency disclosure "as soon as practicable but no later than the writing of an offer." NAEBA's question is, "Practicable for whom?" This is just another instance of the real estate industry responding to widespread noncompliance with the laws by changing the laws themselves, thereby legalizing previously unlawful behavior. What a concept!

Disclosure of agency relationships will disappear in the State of Florida next year; they have apparently decided it's just not needed. By the time agency disclosure is made (if ever, as evidenced by a sting operation conducted by the Massachusetts Attorney General), buyers have in many instances already provided confidential information to an agent who is duty bound to use that information to the seller's advantage.

When State mandated agency disclosure is provided, consumers oftentimes have no idea that Exclusive Buyer Agency is even an option. Despite the fact that the National Association of Realtors® (NAR) defined Exclusive Buyer Agency in 1993 in its Agent's Guide entitled "Agency: Choices, Challenges & Opportunities", not a single State requires disclosure of Exclusive Buyer Agency as an agency option. In 2005, ten years after NAEBA was founded, the State of Ohio also recognized EBA as an agency option. However, neither Ohio nor any of the other states require disclosure of Exclusive Buyer Agency as an option, rationalizing that Exclusive Buyer Agency is nothing more than a "business model". NAR has also taken the position that rather than being an agency option, the practice of Exclusive Buyer Agency is merely a "business practice", which should not be promoted to the exclusion of any other business practice or business model. Yet NAR does, however, promote business practices which protect the entrenched position of the bulk of its membership, such as Dual Agency and Designated Agency, which while lucrative for its Realtor® membership, have the potential to be harmful to consumers. NAEBA believes that the double standards should end now, and that Exclusive Buyer Agency, which can oftentimes be a buyer's best agency option, should be disclosed to all consumers.

The state legislatures, which are dominated by industry interests, have utterly failed to protect consumers by mandating meaningful disclosure of agency relationships. NAEBA would urge NAR to consider a minimum uniform agency disclosure standard including Exclusive Buyer Agency as an agency option. If NAR will not do so voluntarily we would urge the Federal Trade Commission to consider this issue as a very high priority. NAEBA feels that a meaningful minimum standard for the disclosure of agency relationships in the industry could both protect consumers and foster real competition among buyer's brokers.

Legalization of Dual Agency by Passage of “Designated Agency” Legislation

Under the common law of agency, a real estate brokerage acts as the agent for its principal, and is duty bound to fulfill fiduciary obligations of **loyalty, confidentiality, obedience, reasonable care, accounting and disclosure** to its clients. It is impossible for a broker to provide the full range of fiduciary obligations in a dual agency situation, where the brokerage represents both the buyer and the seller in the same transaction. Due to the demand for buyer representation and the legal pitfalls associated with Dual Agency, the real estate industry has devised a statutory creation called “Designated Agency” which allows a brokerage to represent both buyers and sellers in the same transaction, in derogation of the common law of agency. Designated Agency legislation is recommended by NAR, written by its state associations, and pushed through with the help of Realtor® PAC dollars. Through Designated Agency, a brokerage can legally “represent” both parties in the same transaction, and thereby keep the entire commission for itself. Designated Agency is a wolf in sheep’s closing. NAEBA is adamantly opposed to Designated Agency, which we believe to be nothing more than undisclosed Dual Agency. The real estate industry is steering consumers toward potentially harmful representation schemes such as Designated Agency to the detriment of EBAs, who provide true buyer representation. Both Dual Agency and Designated Agency are business practices being used by listing brokers, who control the industry, to collect commissions on both sides of a transaction.

The Doctrine of Procuring Cause

Procuring Cause is a doctrine propped up by NAR to determine a Realtor’s® entitlement to a “sales” commission. A true buyer’s agent is not a “salesperson”, and procures neither a sale nor a buyer for the seller. To the contrary, an EBA’s job is to procure a home for their buyer client, steering their client away from homes which may be overpriced or have defects, rather than simply trying to make a sale. Nevertheless, NAR’s Procuring Cause rules apply even to EBA’s who have a written agency agreement with and who are compensated directly by their client. As a result,

buyers in many instances, after unwittingly contacting a listing/seller's agent for information regarding a home, find that they are unable to obtain representation from a buyer's agent due to the doctrine of "Procuring Cause".

Consumers are being systematically and meaningfully denied buyer agency representation simply because they viewed property with a listing/seller's agent, without any idea as to the consequences of their actions. EBAs, who are required to join NAR and its state associations to obtain access to the housing inventory contained in many multiple listing services, are required to subject themselves to binding arbitration in the event of a commission dispute, in which NAR's rules regarding Procuring Cause apply. NAR, through its state and local associations, should not be allowed to interfere with contractual relationships between a buyer and their broker by means of insidious rules which were originally intended to apply only to salespersons.

Discriminatory Treatment of Exclusive Buyer Agents by the National Association of Realtors and Its Affiliates

NAR is urging its members to submit comments to the hosts of this workshop, preparing three letters for its members to tell any of the following three stories: (1) real estate is a model of competition; (2) MLSs are cooperatives, NOT public utilities; (3) the new ILD policy is a win-win for consumers and Realtors®.

NAEBA couldn't agree more with the statement contained in one of NAR's letters that "nothing encourages a competitive business environment more than providing consumers with choice." However, NAR has systematically discriminated against Exclusive Buyer Agency to the point that many consumers have effectively been denied the choice of engaging the services of an EBA.

EBAs, though mostly Realtors®, have been deliberately excluded from any meaningful policy making discussions within NAR with respect to buyer agency issues. Through its state associations, NAR has effectively prevented Exclusive Buyer Agency from being presented to consumers as an agency option on state mandated real estate agency disclosure forms. Its wholly-

owned subsidiary, the Real Estate Buyer's Agent Council, Inc. (REBAC), which until recently recognized Exclusive Buyer Agency as an agency choice, now refuses to make any distinction between EBAs and ordinary agents who work for brokers who represent both buyers and sellers. EBAs are not recognized on NAR's official website, Realtor.com. Many state Realtor® associations have adopted buyer agency agreements with confusing names such as "Exclusive Buyer Agency Agreement", when in actuality such agreements have nothing to do with Exclusive Buyer Agency as defined by NAR. In fact, the real reason for such contracts is to tie the Buyer to a brokerage which then maintains the right to act as a Dual or Designated Agent.

NAR has taken the position that real estate listings are the property of the listing agent, and that EBAs, who may be both Realtors® and members of a multiple listing service, but who have no listings, must depend on permission from listing brokers to display MLS information over the internet. NAR's most recent proposed guidelines concerning MLS participation imply that a firm must both offer and accept compensation to be eligible to participate. EBA's do not list properties for sale, have no listings in the MLS, and therefore never offer compensation. Many EBAs look to their own clients for compensation rather than accepting compensation from listing Brokers. Is NAR now attempting to exclude EBAs from MLS participation?

NAEBA strongly believes that any limitation on a broker's right to display basic listing information over the internet, except in extraordinary cases, where a seller client has given informed consent to not have their listing information displayed anywhere on the internet (including the listing broker's website), would be an illegal restraint of trade. Forcing buyers to go to a listing broker for information is both anti-competitive and anti-consumer, and negatively impact an EBA's ability to properly represent their Buyer client.

CONCLUSION

Although there may be more than 76,000 brokerage firms and more than 1.2 million Realtors® in the United States, real competition among buyer's brokers is seriously lacking because of the discriminatory practices of the National Association of Realtors® and its state associations. Consumers are being systematically deprived of the very real choice of Exclusive Buyer Agency, a consumer friendly agency option which should be available to all home buyers. In an effort to fulfill their obligation to protect the consumers in this country the Department of Justice and the Federal Trade Commission may need to take the action to encourage competition in the real estate industry.