

From: mraddatz@creditors-law.com [mailto:mraddatz@creditors-law.com]  
Sent: Monday, November 28, 2005 5:19 PM  
To: ATR-Real Estate Workshop  
Subject: Emailing: Antitrust complaint letter Nov 28 05.doc

Kindly See Attached

Thank You

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Washington, DC 20009  
(202) 466-8001

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November 28, 2005

ATTN: Lee Quinn  
Antitrust Division  
U.S. Department of Justice  
Liberty Place, Suite 300  
325 7th Street NW  
Washington, DC 20530

Federal Trade Commission  
Office of the Secretary  
Room 135-H (Annex F)  
600 Pennsylvania Avenue NW  
Washington, DC 20580

RE: Competition and Real Estate Workshop - Comment, Project No. V050015

Ladies and Gentlemen:

I am writing to provide comments on perceived anti-competitive behavior engaged in by Maryland real estate brokers. It is my belief that real estate brokers in the State of Maryland have acted intentionally, and to the detriment of the persons they are charged with representing, by inserting language into their standard form residential real estate sales contracts, which relieve them of all obligations in the transaction. In my opinion, such unilateral relief via standardized documents prevents true competitive choice for consumers when choosing a real estate broker, and chills a consumer's right to seek legal redress when faced with misrepresentations and even fraud by their broker.

As you may know, several large real estate brokers ("Members") belong to the Maryland Association of Realtors ("MAR"). One of the activities of MAR is to publish form contracts for the sale of residential real estate (the "Form Agreement"). MAR limits access to this form agreement to its Members (i.e., only Members are able to access the

Form Agreement on MAR's website and the Form Agreement includes the following limitation: "For use by REALTOR® members of the Maryland Association of REALTORS® only").

Presumably, as a product of MAR, the contents of the Agreement are agreed upon and endorsed by all Members. It is likewise my understanding that the Members complete the Agreement when a consumer contracts for the sale of a property, playing in many regards, the same role that an attorney would typically play in a sales transaction.<sup>1</sup>

Under Section 17-405 of the Maryland Business Occupations and Professions Code, real estate licensees are required to disclose to consumers that they are protected by the Guarantee Fund (administered by the Real Estate Commission) for an act or an omission by a licensee that constitutes fraud or misrepresentation. This law would allow a consumer to obtain compensation if a licensee does not disclose a material fact about a property to a consumer.

It is my belief that Members of MAR have attempted undercut the consumer protection of Maryland law in two ways. First, they have inserted a clause into the Agreement that disclaims any liability for misrepresentation or material omissions regarding a property – even if made by the broker. This clause directly conflicts with the fiduciary and other duties of real estate brokers to their clients, and has no legitimate purpose, other than to limit their own liability, in a sale agreement between a buyer and seller. Below is a copy of the Broker Liability clause:

**Broker Liability:** Brokers, their agents, subagents, and employees do not assume responsibility for the condition of the Property or for the performance of this Contract by any or all Parties hereto. By signing this Contract, Buyer and Seller acknowledge that they have not relied on any representations made by Broker(s), or any agents, subagents or employees of Broker(s), except those representations expressly set forth in this Contract. (Emphasis Added)

The second and more troubling provision inserted into the Agreement by broker Members requires both the buyer and seller to indemnify the Member for any and all claims made against the Member. As you will note, this indemnification is contained in the "Attorney Fees" clause that also provides that the prevailing party in a suit between the buyer and seller will be entitled to attorney's fees from the losing party ("Buyer/Seller Attorney Fee Rule"). While the Buyer/Seller Attorney Fee rule has a legitimate place in a contract between a buyer and seller, there is no legitimate reason for a one-sided indemnification clause in such a contract. This is especially true when the one-sided broker indemnification dominates the Attorney's Fees clause (over 80% of paragraph is dedicated to protecting the third party Broker).

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<sup>1</sup> Whether or not certain behavior constitutes the unauthorized practice of law is for the State Bar of Maryland and the Court of Appeals of Maryland to determine and regulate. There is no accusation nor implication whatsoever in this letter that the act(s) of a broker in completing the Agreement constitutes the unauthorized practice of law, but is brought to attention only for purposes of understanding the broker-consumer relationship.

**Attorney's Fees:** In any action or proceeding between buyer and seller based, in whole or in part, upon the performance or non-performance of the terms and conditions of this Contract, including, but not limited to, breach of contract, negligence, misrepresentation or fraud, the prevailing party in such action or proceeding shall be entitled to receive reasonable attorney's fees from the other party as determined by the court or arbitrator. In any action or proceeding between Buyer and Seller and/or between Buyer and Broker(s) and/or Seller and Broker(s) resulting in Broker(s) being made party to such action or proceeding, including, but not limited to, any litigation, arbitration, or complaint and claim before the Maryland Real Estate Commission, whether as defendant, cross-defendant, third party defendant or respondent, Buyer and Seller jointly and severally, agree to indemnify and hold Broker(s) harmless from and against any and all liability, loss, cost, damages or expenses (including filing fees, court costs, service of process fees, transcript fees and attorney's fees) incurred by Broker(s) in such action or proceeding, provided that such action or proceeding does not result in a judgment against Broker(s).

As used herein, the term "Broker(s)" shall mean (a) the two (2) Brokers as identified on the top of Page 1 of this Contract; (b) the two (2) named Sales Associates as identified on the top of Page 1 of this Contract; and, (c) each agent, subagent, salesperson, independent contractor, and/or employee(s) of Broker(s). The term "Broker(s)" shall also mean, in the singular, any of either of the named Broker(s) and/or Sales Associate(s) as identified or, in plural, both of the named Brokers and Sales Associates as identified.

This Paragraph 28 shall apply to any and all such action(s) or proceeding(s) against Broker(s) including those action(s) or proceeding(s) based, in whole or in part, upon any alleged action(s) or omission(s) by Broker(s), including, but not limited to, any alleged act of misrepresentation, fraud, non-disclosure, negligence, violation of any statutory or common law, or breach of fiduciary duty by Broker(s). The provision of this Paragraph 28 shall survive [closing] and shall not be deemed to have been extinguished by merger with the deed. [356 words; 67 for buyer/seller].

Under Maryland and federal law, a person commits an anti-trust violation when he "[b]y contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce." Md. Com. Law § 11-204. It is my belief that the MAR and its Members' use of the Broker Liability and Broker Indemnification clauses constitute violations of Maryland's antitrust law, as Members have acted in concert to limit their own liability to the detriment of the person(s) for whom they have undertaken an obligation, and have restrained consumers' right to commercially negotiate fair and reasonable terms for a broker/consumer relationship.

The actions addressed above are real and verifiable. Without disclosing any confidences, I can state that my office has seen the Agreement language noted above used against consumers who believe that they were misled by their broker in the sales process. Often the first call to a broker or his/her lawyer in the event of a questionable transaction leads to an immediate invocation of the indemnity and attorney fee provisions in the Agreement as a deterrent to any further questioning or exercise of consumer rights. Such consumers are rarely willing to pursue their claims, even when truly aggrieved, in light of the language in the Agreement. Given that the home sale process in an increasingly fast-paced market is becoming a process of “sign here if you want a chance at this house,” action is needed.

Given your history in investigating and rectifying circumstances as detailed above, I respectfully request that you inquire further into these actions, and propound such corrective measures as are necessary to protect all consumers. Please do not hesitate to contact me if you have any questions about this issue. My phone number is 202-466-8001.

Sincerely,

Mark Raddatz, Esq.