

# Competition in the Real Estate Brokerage Industry

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My comments and views are not purported to reflect the views of the Department of Justice, but those of an attorney involved in enforcement of the antitrust laws.



# Second Disclaimer

- This will be the most unsophisticated Powerpoint presentation you have ever seen.



# Here's Where We're Going

- Define antitrust
- DOJ's role is to protect consumers
- MLSs help consumers
- Some MLS rules can harm consumers
- What has DOJ been doing to protect consumers by protecting competition



# What Is Antitrust?

- The goal of antitrust law: to protect & promote competition.
- Competition ensures low prices and new and better products and services for consumers.



# The Antitrust Division: Committed To Free and Open Competition

- DOJ is one of two federal agencies charged with enforcing the nation's competition laws, we have a deep commitment to America's free market economy.
- We pursue our mission in two ways.
  - The Sword: Enforcement Actions
  - The Shield: Competition Advocacy



# New Business Models Are Emerging In Real Estate

- Technological innovations that permit brokers to pass along savings to their customers.
- Fee for service brokers
- Brokers offering rebates or discounts



# Ways MLSs Benefit Consumers

- MLSs benefit brokers ultimately consumers by lowering some effort and cost of doing business by:
  - centralizing listings
  - communicating offers to compensate cooperating brokers
  - compiling and distributing market statistics



# MLSs In The Information Age

- Even with all of these innovations, “it is impossible to perform the tasks of a real estate agent” without using an MLS.
  - *Reifert v. South Central Wisconsin MLS Corp.*  
450 F.3d 312, 317 (7<sup>th</sup> Cir. 2006)



# Enforcement Actions: MLSs and Antitrust

- MLSs are a Joint Venture—access to which is critical to a broker’s success.
  - Most home buyers and sellers use a broker for their real estate transaction.
  - MLS is the only place from which to get this information.
  - In most areas, there is only one MLS.
- Therefore, MLSs have “market power.”



# Market Power

Antitrust laws protect against abuse of market power, which is the power to set above-competitive prices or exclude competitors. The antitrust laws also limit how market power can be obtained, preserved and extended.



# Sherman Act Section 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.”

15 U.S.C. § 1



# MLS Rules That May Have Implicated The Antitrust Laws

- restrict how brokers do business
- favor one business model over another
- dictate compensation or services to be performed



# Anticompetitive MLS Rules Checklist

- ✓ Is the rule exclusionary or restrict competition among brokers?
- ✓ Is there a pro-competitive justification for the rule?
- ✓ If there is, is it narrowly tailored to minimize the effects on competition and maximize the benefits to consumers?
- ✓ Balance good and bad.



# How Do These Rules Affect Competition?

- Raise entry barriers for potential competitors
- Maintain the price of brokerage services by dictating services all brokers must provide
- Limit consumer choice by preventing new business models from entering the market



# The Sword: Summary

- Antitrust laws protect competition, not competitors.
- New business models are emerging that benefit consumers.
- MLSs have market power.
- MLS rules produce benefits but also may negatively affect competition and consumers.



# The Shield: Competition Advocacy



# Competition Advocacy

We have focused on two types of anti-competitive legislation and regulations in real estate:

Rebate Bans: prohibiting brokers from soliciting business by “offering gifts, rebates or promotional items.”

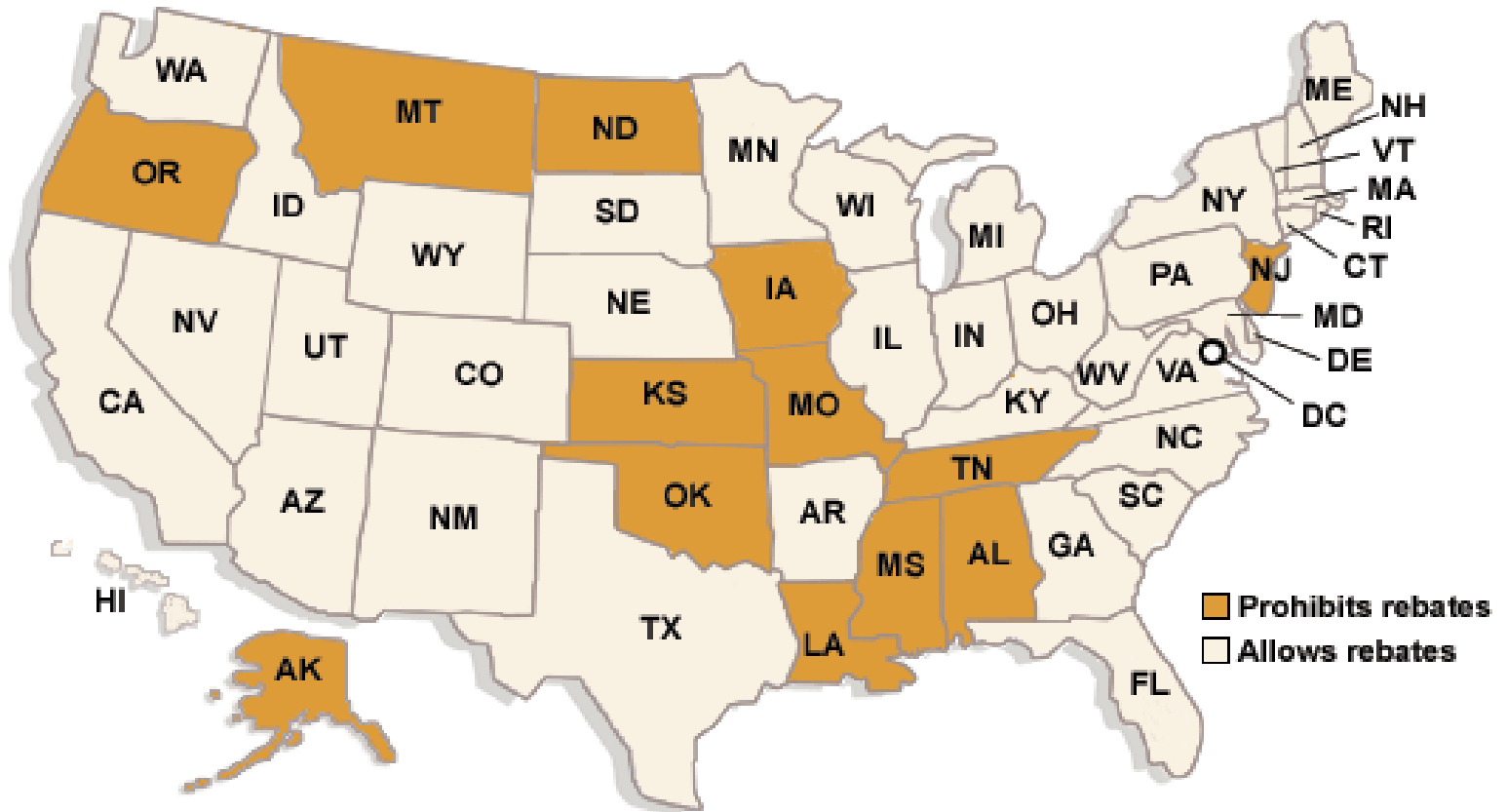
Minimum Services: mandate services such as transmission and delivery of offers/counteroffers; answer questions relating to offers.



# Rebate Bans



# States with Rebate Bans



# Rebate Bans' Anticompetitive Effect

Only viable way for a broker working with a buyer to compete for business on price.

Bans on brokers paying rebates impede real estate brokers from competing on price, which in turn would cause consumers to pay more in real estate broker commissions.



# Quotations from Brokers on the Effect of Rebate Bans

- “If we give rebates and inducements, it would get out of control and all clients would be wanting something. The present law keeps it under control.”
- Lifting the rebate ban “would turn into a bidding war, lessen our profits, and cheapen our ‘so-called’ profession.”
- Rebates “could lead to competitive behavior.”



# Competition Flourished After Kentucky Lifted Its Rebate Ban

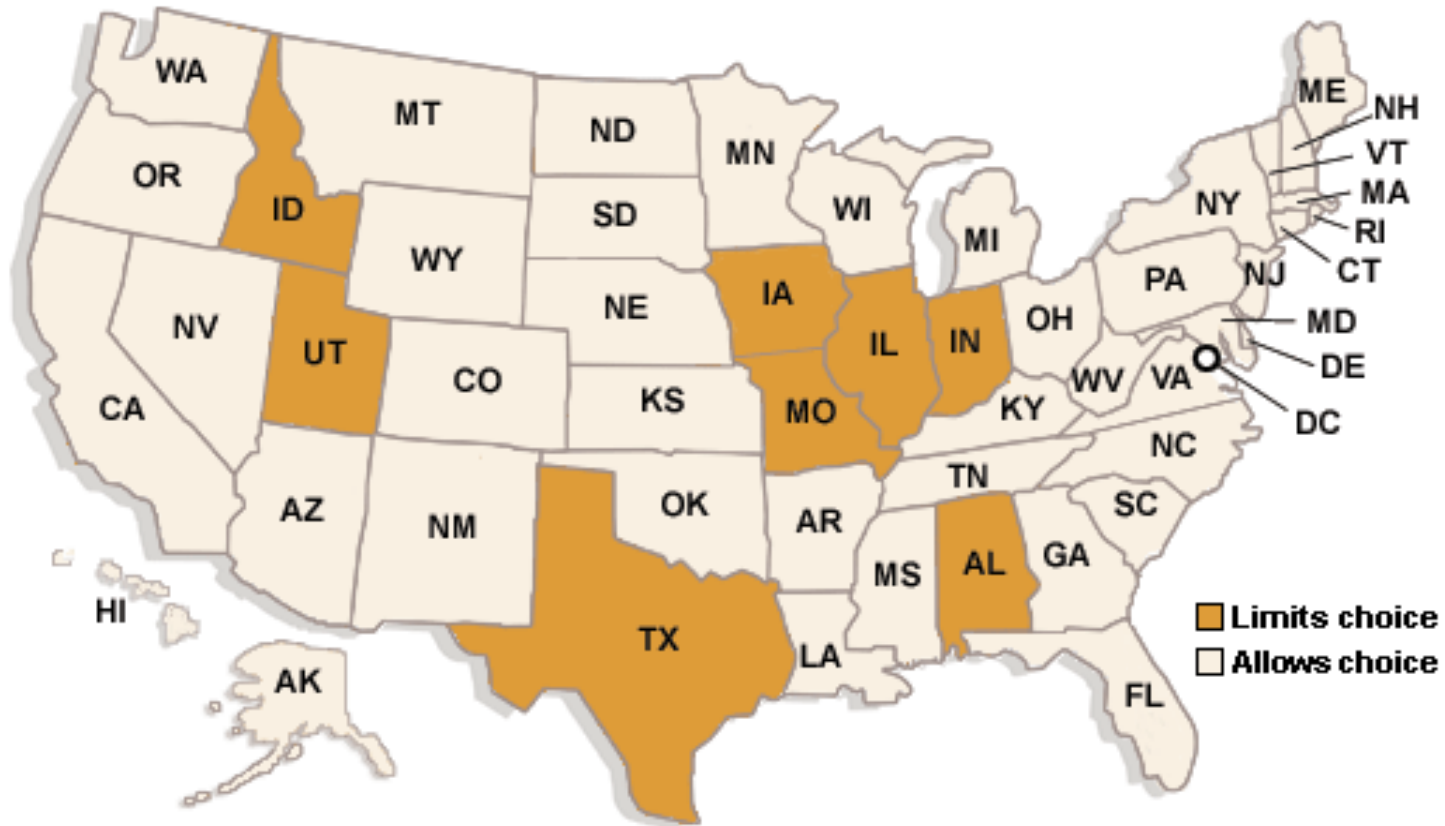
- One realty company now offers a 1 percent cash back rebate.
- Another offers rebates worth up to \$2,250 in the form of gift cards.
- Another offers to pay moving costs up to \$1,500.
- Two others operate a program that rebates up to \$3,000 for the sale or purchase of a home, or \$6,000 when a customer buys one property and sells another through the program.



# Minimum Service Provisions



# States that Prevent Home Sellers from Choosing Fee-for-Service Broker Options



# How Minimum Service Laws Work

- Some states have enacted laws requiring consumers to purchase a full array of real estate services from their listing broker.
- These services must be purchased whether the consumer wants them.



# Example of Cost Savings with Fee-for-Service Broker

- On the sale of a median-priced \$225,334 home, a fee-for-service broker may charge \$500 to market the home in the MLS, with the seller performing the rest of the tasks related to selling the home.
- Assuming the listing broker still pays the buyer's broker a 2.5 percent commission (\$5,633), the total cost for the consumer to sell the home is \$6,133.
- That is \$5,133 less than the \$11,266 a home seller would pay to a full service broker charging 5 percent.

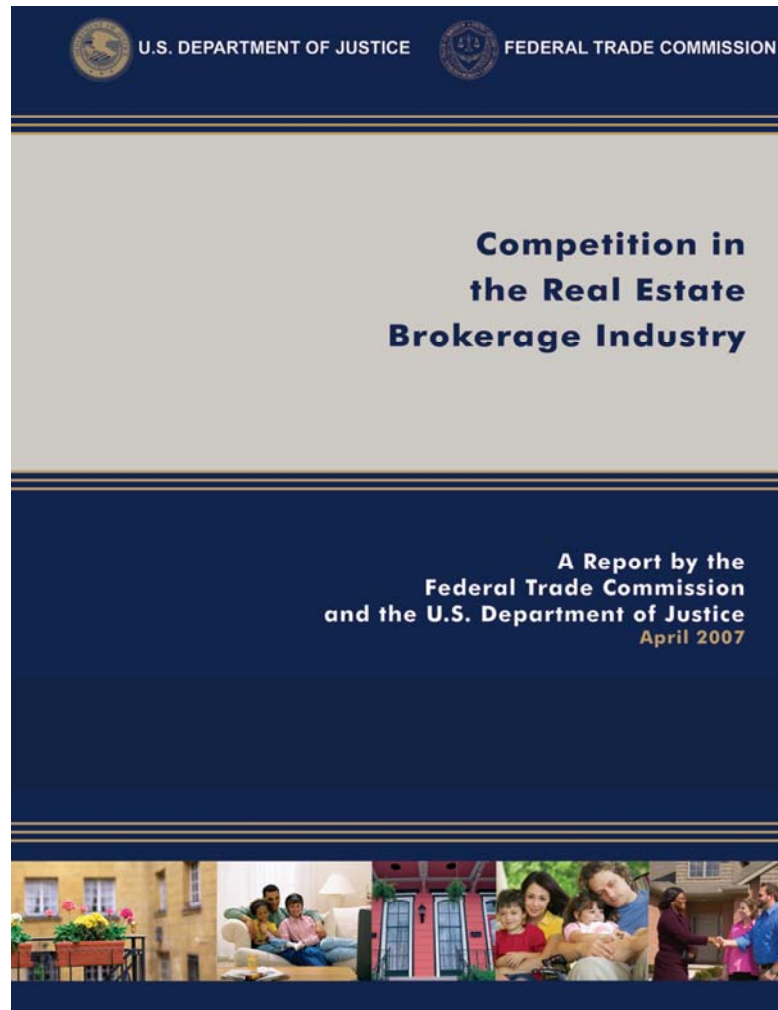


# How Minimum Service Laws Harm Consumers

- They reduce consumer choice by discouraging new brokerage models.
- They raise consumer costs by forcing them to buy services they may not want or need.
- They reduce competitive pressures on traditional brokers.



# Additional Resources



Available at:  
[www.usdoj.gov/atr/public/reports/223094.pdf](http://www.usdoj.gov/atr/public/reports/223094.pdf)



# Additional Resources

[http://www.usdoj.gov/atr/public/real\\_estate/index.htm](http://www.usdoj.gov/atr/public/real_estate/index.htm)



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## COMPETITION and REAL ESTATE

### ANTITRUST DIVISION

#### The Importance of Competition in Real Estate to Consumers



Buying or selling a home is the largest financial transaction most Americans will ever undertake. The median priced home cost \$225,334 in 2006, and the median commission paid to real estate brokers came to \$11,672. Overall, Americans paid more than \$93 billion for brokerage services.

- ▶ [Home prices and commissions over time](#) 
- ▶ [Competing models of real estate brokerage](#)

#### More Competition Could Reduce Commissions



New business models are emerging that allow consumers to save thousands of dollars when they buy or sell a home. Where these practices are allowed, some buyers' brokers are offering refunds on commissions, and some sellers' brokers are charging only for services actually used.

- ▶ [Consumers can save thousands of dollars in commissions](#) 
- ▶ [Calculate how much you can save](#) 

#### Barriers to a More Competitive Brokerage Market



Twelve states forbid buyers' brokers from rebating a portion of the sales commission to the consumer. Eight states require consumers to buy more services from sellers' brokers than they may want, with no option to waive the extra items.

- ▶ [What are the laws in your state?](#) 
- ▶ [Buying? State laws on \*\*rebates\*\* increase prices](#)
- ▶ [Selling? State laws on \*\*brokerage services\*\* increase prices](#)



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