

COR 1655

Core B: Legal Issues



**Disclosure and Antitrust Issues
In
Real Estate**

Outline

- I. Disclosure Issues**
 - A. Illinois Radon Awareness Act 30 minutes**
 - 1. Required Disclosure
 - 2. Exclusions
 - 3. Test and Remediation
 - B. Residential Lead-Based Paint Hazard Reduction Act 30 minutes**
 - 1. Required Disclosure
 - 2. Five Requirements for Seller, Landlords and Agents
 - C. Illinois Residential Real Property Disclosure Act 60 minutes**
 - 1. Public Act
 - 2. Exclusions
 - 3. Physical Defects – Required Disclosures
- II. Antitrust Issues**
 - A. History of Antitrust Laws 20 minutes**
 - B. Antitrust and Real Estate Licensees 20 minutes**
 - C. Guidelines for Compliance – Penalties 20 minutes**

Instructions

The student should review the materials in each section and then answer the review questions. If the student does not answer at least 4 out of 5 questions correctly, then the student should continue to review the materials. When the student has reviewed and studied the materials, the student should contact the provider to schedule the exam.

Sources and Resources

“Residential Real Property Disclosure Report”, Illinois Association of REALTORS®

“Radon, Radon Disclosure Requirements”, Illinois Association of REALTORS®

“Antitrust, Heard It on the Hotline: Antitrust”, Illinois Association of REALTORS®

Disclosure Issues

Illinois Radon Awareness Act

The Illinois Radon Awareness Act became effective on January 1, 2008. Prior to selling a residential real property in Illinois, a seller must provide a pamphlet titled, “*Radon Testing Guidelines for Real Estate Transactions*” and the disclosure, “*Illinois Disclosure of Information on Radon Hazards*” to the buyer of the property. The pamphlet and disclosure must be made before the buyer is bound to purchase the residential real estate. The required pamphlet is provided by the Illinois Emergency Management Agency.

The Act requires that the disclosure and pamphlet be provided on all residential real estate transactions of 4 units or less. At this time, that would include all condominiums, because all condominiums are considered to be a single unit. As it pertains to condominiums, it is anticipated that some changes may be made to this particular requirement.

The Act excludes the following:

- Transfers pursuant to a court order.
- Transfers from a mortgagor to a mortgagee in a foreclosure.
- Transfers in the administration of a decedent’s estate, trust or guardianship.
- Transfers from one co-owner to another co-owner.
- Transfers pursuant to succession in a will.
- Transfers from a spouse or other blood relative to another.
- Transfers from a relocation company, as long as the original seller provides the disclosure and pamphlet.
- Transfers from or to any government entity.

A seller must disclose any prior test or remediation on any home, but nothing in the Act requires the seller to test or remediate if any radon is found. While an agent does not have any specific requirements under this Act, they have the same obligation as with many required disclosures, in that, they have a duty to inform their clients of the need of this disclosure and pamphlet. In addition, a buyer's agent should make sure that all required disclosures are provided to their clients.



Lead Based Paint Disclosure

The Residential Lead-Based Paint Hazard Reduction Act-Title X requires that prior to executing a purchase or lease on a home or apartment that was built prior to 1978, a seller or landlord must disclose known information on lead-based paint and lead-based paint hazards to any buyer or renter. The United States Environmental Protection Agency and the United States Department of Housing and Urban Development have statutory responsibility in enforcing this Act.

***There are five requirements for sellers, landlords and agents:**

- Disclose the presence of known lead-based paint or lead-based hazards in residential dwellings built before 1978.
- Provide purchaser/lessees with copies of any available records or reports pertaining to the presence of lead-based paint hazards.
- Provide purchasers/lessees with a federally approved lead-based hazard information pamphlet.
- Provide purchasers with a period of up to 10 days (or other mutually agreed upon period), prior to becoming obligated under the purchase contract, during which time the purchaser may conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards. The purchaser may agree to

waive this testing opportunity, but the offer must not be conditioned upon the buyer waiving this opportunity.

- Sales and lease contracts must include certain specified disclosure and acknowledgement language.

*Source: “*The Lead-Based Paint Manual*”, Illinois Association of REALTORS®

Illinois Residential Real Property Disclosure Act

The Illinois Residential Real Property Act requires the seller to provide certain disclosures on residential properties from 1 to 4 units. This disclosure is required prior to an offer from a prospective purchaser. The disclosure is required on a standardized form as prescribed by the Act. In addition, to the standardized disclosure form the prospective purchaser should also receive a copy of the pertinent statute, as it pertains to the disclosure report.

RESIDENTIAL REAL PROPERTY DISCLOSURE ACT

AN ACT relating to disclosure by the seller of residential real property.

Section 1. Short title. This Act may be cited as the Residential Real Property Disclosure Act.

Section 5. As used in this Act, unless the context otherwise requires the following terms have the meaning given in this section:

“Residential real property” means real property improved with not less than one nor more than four residential dwelling units; units in residential cooperatives; or, condominium units including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

“Seller” means every person or entity who is an owner, beneficiary of a trust, contract purchaser or lessee of a ground lease, who has an interest (legal or equitable) in residential real property. However, “seller” shall not include any person who has both (i) never occupied the residential real property and (ii) never had the management responsibility for the residential real property nor delegated such responsibility for the residential real property to another person or entity.

“Prospective buyer” means any person or entity negotiating or offering to become an owner or lessee of residential real property by means of a transfer for value to which this Act applies.

Section 10. Except as provided in Section 15, this Act applies to any transfer by sale, exchange, installment land sale-contract, assignment of beneficial interest, lease with an option to purchase, ground lease or assignment of ground lease of residential real property.

Section 15. The provisions of this Act do not apply to the following:

- (1) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers between spouses resulting from a judgment of dissolution of marriage or legal separation, transfers pursuant to an order of possession, transfers by a trustee in bankruptcy, transfers by eminent domain and transfers resulting from a decree for specific performance.
- (2) Transfers from a mortgagor to a mortgagee by deed in lieu of foreclosure or consent judgement, transfer by judicial deed issued pursuant to a foreclosure sale to the successful bidder or the assignee of a certificate of sale, transfer by a collateral assignment of a beneficial interest of a land trust, or a transfer by a mortgagee or a successor in interest to the mortgagee's secured position or a beneficiary under a deed in trust who has acquired the real property by deed in lieu of foreclosure, consent judgement or judicial deed issued pursuant to a foreclosure sale.
- (3) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
- (4) Transfers from one co-owner to one or more other co-owners.
- (5) Transfers pursuant to testate or intestate succession.
- (6) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the sellers.
- (7) Transfers from an entity that has taken title to residential real property from a seller for the purpose of assisting in the relocation of the seller, so long as the entity makes available to all prospective buyers a copy of the disclosure form furnished to the entity by the seller.
- (8) Transfers to or from any governmental entity.
- (9) Transfers of newly constructed residential real property that has not been occupied.

Section 20. A seller of residential real property shall complete all applicable items in the disclosure document described in Section 35 of this Act. The seller shall deliver to the prospective buyer the written disclosure statement required by this Act before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real property.

Section 25. Liability of seller. (a) The seller is not liable for any error, inaccuracy, or omission of any information delivered pursuant to this Act if (i) the seller had no knowledge of the error, inaccuracy, or omission, (ii) the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected, or (iii) the error, inaccuracy, or omission was based on information provided by a public agency or by a licensed engineer, land surveyor, structural pest

control operator, or by a contractor about matters within the scope of the contractor's occupation and the seller had no knowledge of the error, inaccuracy or omission.

(b) The seller shall disclose material defects of which the seller has actual knowledge.

(c) The seller is not obligated by this Act to make any specific investigation or inquiry in an effort to complete the disclosure statement.

Section 30. Disclosure supplement. If prior to closing, any seller has actual knowledge of an error, inaccuracy, or omission in any prior disclosure document after delivery of that disclosure document to a prospective buyer, that seller shall supplement the prior disclosure document with a written supplemental disclosure.

Section 35. Disclosure report form. The disclosures required of a seller by this Act, shall be made in the following form:

Section 40. Material defect. If a material defect is disclosed in the Residential Real Property Disclosure Report, after acceptance by the prospective buyer of an offer or counter-offer made by a seller or after the execution of an offer made by a prospective buyer that is accepted by the seller for the conveyance of the residential real property, then the Prospective Buyer may, within three business days after receipt of that Report by the prospective buyer, terminate the contract or other agreement without any liability or recourse except for the return to prospective buyer of all earnest money deposits or down payments paid by prospective buyer in the transaction. If a material defect is disclosed in a supplement to this disclosure document, the prospective buyer shall not have a right to terminate unless the material defect results from an error, inaccuracy, or omission of which the seller had actual knowledge at the time the prior disclosure document was completed and signed by the seller. The right to terminate the contract, however, shall no longer exist after the conveyance of the residential real property. For purposes of this Act the termination shall be deemed to be made when written notice of termination is personally delivered to at least one of the sellers identified in the contract or other agreement or when deposited, certified or registered mail, with the United States Postal Service, addressed to one of the sellers at the address indicated in the contract or agreement, or, if there is not an address contained therein, then at the address indicated for the residential real property on the Report.

Section 45. This Act is not intended to limit or modify any obligation to disclose created by any other statute or that may exist in common law in order to avoid fraud, misrepresentation, or deceit in the transaction.

Section 50. Delivery of the Residential Real Property Disclosure Report provided by this Act shall be by:

- 1) personal or facsimile delivery to the prospective buyer;
- 2) depositing the report with the United States Postal Service, postage prepaid, first class mail, addressed to the prospective buyer at the address provided by the prospective buyer or indicated on the contract or other agreement, or
- 3) depositing the report with an alternative delivery service such as Federal Express, UPS, or Airborne, delivery charges prepaid, addressed to the Prospective buyer at the

address provided by the prospective buyer or indicated on the contract or other agreement. For purposes of this Act, delivery to one prospective buyer is deemed delivery to all prospective buyers. Delivery to authorized individual acting on behalf of a prospective buyer constitutes delivery to all prospective buyers. Delivery of the Report is effective upon receipt by the prospective buyer. Receipt may be acknowledged on the Report, in an agreement for the conveyance of the residential real property, or shown in any other verifiable manner.

Section 55. Violations and damages. If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract. A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.

Section 60. No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy or date of recording of an instrument of conveyance of the residential real property.

Section 65. A copy of this Act, excluding Section 35, must be printed on or as a part of the Residential Real Property Disclosure Report form.

Section 99. This Act takes effect on October 1, 1994.

PUBLIC ACT (88-111), REPRINTED IN ITS ENTIRETY

As amended, effective date 1-1-98

The required disclosures under the Illinois Residential Real Property Disclosure Act are:

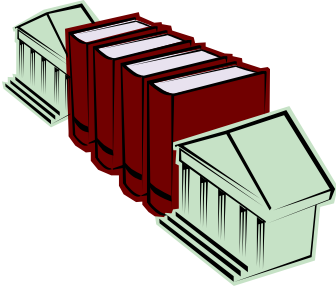
- Seller has occupied the property within the last 12 months. (No explanation is needed.)
- I am aware of flooding or recurring leakage problems in the crawlspace or basement.
- I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property.
- I am aware of material defects in the basement or foundation (including cracks and bulges).
- I am aware of leaks or material defects in the roof, ceilings or chimney.
- I am aware of material defects in the walls or floors.
- I am aware of material defects in the electrical system.
- I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool).

- I am aware of material defects in the well or well equipment.
- I am aware of unsafe conditions in the drinking water.
- I am aware of material defects in the heating, air conditioning, or ventilating systems.
- I am aware of material defects in the fireplace or woodburning stove.
- I am aware of material defects in the septic, sanitary sewer, or other disposal system.
- I am aware of unsafe concentrations of radon on the premises.
- I am aware of unsafe concentrations of or unsafe conditions relating to asbestos on the premises.
- I am aware of unsafe concentrations of or unsafe conditions relating to lead paint, lead water pipes, lead plumbing pipes or lead in the soil on the premises.
- I am aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.
- I am aware of current infestations of termites or other wood boring insects.
- I am aware of a structural defect caused by previous infestations of termites or other wood boring insects.
- I am aware of underground fuel storage tanks on the property.
- I am aware of boundary or lot line disputes.
- I have received notice of violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected.

Review Questions for Disclosure Issues

True or False

1. The agent is required to fill out the property disclosure report required under the Illinois Residential Real Property Disclosure Act.
2. The Lead-Based Paint Disclosure law is a federal law.
3. A landlord of a home that was built in 1962 is required to test for lead-based paint prior to renting the home.
4. The Radon Awareness Act applies to a landlord renting a home in a duplex.
5. The Residential Real Property Disclosure Report requires the disclosure to be made to a prospective purchaser prior to signing a purchase agreement.



Antitrust and Real Estate

The History of Antitrust Laws

In the 19th century, many states had passed laws restricting one company or corporation from owning stock in another to prohibit monopolizing any one industry under one corporate entity and control. Attorneys for Standard Oil Company then devised a new type of trust agreement, which allowed control of separate corporate entities under one controlling board of directors. This practice created a legal structure, which effectively, could monopolize any given industry and remove competition in that industry.

In 1890, the United States Congress passed the **Sherman Antitrust Act**, which provided that *"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"*. In addition, it also stated *"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ..."*.

The Sherman Antitrust Act was quite brief and not specific, which left the enforcement to the United State Department of Justice and the interpretation of the law to the courts. This court through its rulings have created two tests in determining violations of the Sherman Antitrust Act. The first being the *"rule of reason"*, which permits the court to examine the reasons a business' activities might create the appearance of an alleged restraint in trade, and whether that restraint is in fact adverse to providing a market condition that is beneficial to consumers. The second being *"per se illegal"*,

which establishes that certain business practices, which need not be examined on a case by case basis, but can be determined to be illegal on their face.

In the United States, illegal *per se* often refers to categories of anticompetitive behavior in antitrust law conclusively presumed to be an "unreasonable restraint on trade" and thus anticompetitive. The United States Supreme Court has, in the past, determined activities such as price fixing, geographic market division, group boycotts, and tying arrangements to be illegal *per se* regardless of the reasonableness of such actions. Traditionally, illegal *per se* anti-trust acts describe horizontal market arrangements among competitors.

A number of cases have subsequently raised doubts about the validity of the illegal *per se* rule. Under modern Antitrust theories, the traditionally illegal *per se* categories create more of a presumption of unreasonableness. The court carefully narrowed the *per se* treatment and began issuing guidelines. Courts and agencies seeking to apply the *per se* rule must:

1. show "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output";
2. show that the practice is not "one designed to 'increase economic efficiency and render markets more, rather than less, competitive'";
3. carefully examine market conditions; and
4. absent good evidence of anticompetitive behavior, avoid broadening *per se* treatment to new or innovative business relationships.

Antitrust and Real Estate Licensees

As in other professions and industries the government has from time to time examined the practices of individual real estate licensees and those practices and policies of groups of real estate professionals. There are four major areas of concern for real estate licensess as it pertains to antitrust laws:

1. **Price fixing** is an agreement between business competitors to sell the same product or service at the same price. In general, it is an agreement intended to ultimately push the price of a product or service as high as possible, leading to profits for all those business competitors.
 - An example of **price fixing** would be two or more real estate brokers agreeing to only list and sell real estate at a certain commission rate or percentage.

2. **Tying** is the practice of making the sale of one good or service (the tying good or service) conditional to the purchase of a second distinctive good or service (the tied good or service).
 - An example of **tying** would be a real estate broker, who also owns and operates a title company, will not provide brokerage services unless the consumer also utilizes the services of the title company in a real estate transaction.
3. **Dividing territories** (also **market division**) is an agreement by two companies to stay out of each other's way and reduce competition in the agreed-upon territories.
 - An example of **market division** would be two or more real estate brokers conspiring to provide brokerage services only within an agreed area or territory to reduce the competition.
4. **Boycotting** is the act of two or more businesses conspiring to voluntarily abstain from using, buying, or dealing with someone or some other organization to reduce competition.
 - An example of **boycotting** would be two or more real estate brokers conspiring to not cooperate or deal with another broker to reduce competition.

Guidelines for Compliance

To avoid violating antitrust laws for **price fixing**, brokerage firms should:

1. **Establish commission rates and fees unilaterally** without discussing those rates and fees with competitors.
 - Do not discuss your individual business plans or policies with a competitor.
2. Inform and train the broker's agents when discussing commission rates and fees with clients or potential clients that they **do not use phrases or words that might indicate collusion** among competitors.
 - Do not use phrases in discussions with clients, such as: *"All brokers in town charge _____ % for commission."*; or *"Our local MLS requires that we charge _____% commission."*

To avoid violating antitrust laws for **tying**, brokerage firms should:

1. Train the broker's agents that it **can be illegal to require tying** one service to another and it is prudent provide lists of those businesses providing other services in a real estate transaction.
 - Do not lead or coerce a client to utilize a particular third party for service in a transaction.

To avoid violating antitrust laws for **market division**, brokerage firms should:

1. Not conspire with another brokerage firm to **only work within a designated geographical area to limit a consumer's choice** to employ a real estate broker.
 - Do not create artificial boundaries to protect specific geographical areas.

To avoid violating antitrust laws for **boycotting**, brokerage firms should:

1. Never conspire with another real estate firm to **boycott another brokerage firm or another firm or person that may provide services in a real estate transaction**.
 - Avoid phrases such as: *“No other brokers will show “Broker A’s” properties.”*; or *“No other brokers will use “Home Inspector B”, because he always kills transactions.”*
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Penalties for Violation of Antitrust Laws

The Antitrust Penalty Enhancement Act was signed into law by the President on June 22, 2004. The increased maximum penalties for violating the Sherman Antitrust Act are:

Maximum term of imprisonment from 3 years to 10 years.

Maximum fines for corporations from \$10,000,000 to \$100,000,000.

Maximum fines for individuals from \$350,000 to \$1,000,000.

Review Questions for Antitrust

True or False

1. The Sherman Antitrust Act was originally adopted in 1890 to prevent corporations from owning other corporations to monopolize an industry.
2. It is acceptable for a real estate agent to explain their commission rates by saying, “The standard commission rate in this area __%.”
3. Per se violations of the Sherman Antitrust Act are those violations that must be investigated on a case by case basis.
4. An example of a “market division” antitrust violation would be offering services as a commercial real estate broker when the broker is only qualified to list and sell residential properties.
5. A corporation can be fined up to a maximum of \$100,000,000 for violating the Sherman Antitrust Act.

Review Questions – Answer Key

Disclosure Issues

1. F
2. T
3. F
4. F
5. T

Antitrust Issues

1. T
2. F
3. F
4. F
5. T