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Antitrust and Real Estate: A Two-Sided Approach

Thomas P. Brown and Kevin L. Yingling

When John Jacob Astor died in 1848, he was the wealthiest man in the United States. Like so many people since, Mr. Astor made his fortune speculating on real estate, specifically undeveloped land on the fringe of the city then growing on the island of Manhattan. Mr. Astor did not start out in the industry. He turned to it only after a shift in fashion diminished the prospects for his fur trading business. On his deathbed, his only regret was that he had not bought more.[1] Over the last decade, Americans have taken Mr. Astor's regret to heart. From 1996 to 2005, the residential real estate industry witnessed the greatest run-up in prices ever seen. In 2005, sales of existing homes hit an all-time high of 7 million units.[2] This should have been the best of times for people in the business of buying and selling houses, but to hear most residential real estate agents tell it, the boom passed them by.

1 Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898 449 (1999) (noting that Astor is reported to have said just before he died that "[c]ould I begin life again, knowing what I now know, and had money to invest, I would buy every foot of land on the Island of Manhattan").

2 National Association of Realtors, *Existing Home Sales* (2006), *available at* http://www.realtor.org/Research.nsf/files/EHSreport.pdf/$FILE/EHSreport.pdf.

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According to most residential real estate agents, there was simply too much competition.[3] Real estate may be the easiest profession to enter. Real estate agents do not need to go to college, let alone graduate school. In virtually every state, anyone with a clean criminal record can get a license to sell real estate by spending a few hours in a class and passing a short exam. As a result, in many parts of the country, the annual growth in the number of brokers has outpaced year-over-year increases in the total value of real estate sold. Even over the period that witnessed the greatest price increase in the history of the industry, the expected income for real estate agents in some of the more torrid U.S. markets actually declined.[4] The industry is also remarkably unconcentrated—the top one hundred residential brokerage firms account for just 17 percent of all sales.[5]

But neither the Antitrust Division of the U.S. Department of Justice (DOJ) nor the U.S. Federal Trade Commission (FTC) subscribes to the view that there is too much competition in the real estate industry. At the moment, both agencies are pursuing cases, with the Antitrust Division focusing on the buyer side and the FTC pursuing the seller side.[6] Although the agencies have different targets, they are advancing a common theory. They regard the real estate industry as a poorly functioning cartel, and they claim that real estate brokers are fixing the price of their services at an artificially high level.[7]

The agencies have not climbed out on a limb in reaching this view. Scorn for the industry is not merely conventional wisdom; it is a universally held belief. Economists regard the real estate brokerage industry with the same skepticism as the DOJ's Antitrust Division and the FTC. Even Steven D. Levitt, co-author of *Freakonomics* and holder of the John Bates Clark medal (an award bestowed once every two years to the top U.S. economist under 40), describes the industry as "a cross between a cartel and a mafia" and has put it on the endangered species list.[8]

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3 *See, e.g.*, National Association of Realtors: Research Division, *Structure, Conduct, and Performance of the Real-estate Brokerage Industry* at 1 (Nov. 2005), *available at* http://www.realtor.org/Research.nsf/files/Structure%20Paper%20FINAL%2011-28-05.pdf/$FILE/Structure%20Paper%20FINAL%2011-28-05.pdf.

4 *Id.* at 16.

5 *Id.* at 2.

6 *See* Press Release, U.S. Department of Justice, Justice Department Sues National Association of Realtors for Limiting Competition Among Real-estate Brokers (Sept. 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/211008.htm; Press Release, U.S. Federal Trade Commission, FTC Charges Real-estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real-estate Services (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realesstatesweep.htm.

7 *See id.*

8 Stephen J. Dubner & Steven D. Levitt, *Endangered Species*, N.Y. Times, Mar. 5, 2006, § 6 (magazine), at 24.

The public seems to agree. As Levitt and Dubner observe, "it is hard to think of an occupation that garners less goodwill these days than the real estate agent."[9]

Given the animosity directed at the industry, we thought that it would be interesting (if slightly foolhardy) to examine the industry somewhat sympathetically for this symposium. The real estate industry shares some characteristics with another industry that we know fairly well, the payment card industry. That industry has also seen a steady stream of antitrust litigation. Like the antitrust litigation against the real estate industry, antitrust litigation involving the payment card industry operates on the premise that the industry is a poorly functioning cartel. We regard the attacks on the payment card industry as misguided. As our colleague and former FTC Chairman Tim Muris has explained, the cases against the payment card industry fail to appreciate the economics of the industry, namely the economics of operating a business in a platform or two-sided industry.[10] With that background, we wonder whether the cases against the real estate industry might be similarly flawed.

WE WONDER WHETHER THE CASES AGAINST THE REAL ESTATE INDUSTRY MIGHT BE SIMILARLY FLAWED.

We have not reached a definite view about the cases against the real estate industry. We do, however, have some preliminary thoughts. The real estate industry does seem to be a two-sided industry. The cases against the industry, the current set as well as the many preceding rounds of litigation, generally do not take into account how the economics of operating a two-sided industry might shape the real estate market. We think that the increasingly familiar concept of a two-sided market provides an interesting perspective on the chronic antitrust issues.

I. Real Estate Brokers Compete in a Two-Sided Market

The concept of a two-sided market is, at this point, well understood. Two-sided markets have three characteristics:

(1) they involve two distinct groups of users;

(2) an intermediary connects one group of users to the other; and

(3) demand for the service provided by the intermediary on one side of the market increases as the number of participants on the other side increases (i.e., demand is interdependent).[11]

9 *Id.*

10 Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 Colum. Bus. L. Rev. 515 (2005).

11 *Id.* at 517-18.

Newspapers, payment card systems, and computer operating systems all compete in two-sided markets. Newspapers connect advertisers to subscribers. Payment card systems connect merchants to cardholders. Computer operating systems connect users of programs with developers of programs. In each case, the value of the service provided to one of the sides increases as the number of participants on the other side increases. A payment card system, for example, becomes more valuable to cardholders as the number of merchants accepting the card increases.

The residential real estate business is not as clearly a two-sided market as these more classic examples. The first two criteria, multiple parties and an intermediary, are easy to spot. In order for a house to sell, there must be two parties, a seller and a buyer, and real estate agents clearly connect the two. The third criteria, interdependent demand, is a bit trickier. The demand of a given buyer for the services provided by her agent does not obviously increase with the number of home sellers. The interdependence in the industry arises from how agents on both sides interact with each other and their respective clients.

The dominant feature of the residential real estate market in the United States is the local multiple listing service (MLS). Real estate agents control access to the MLS for both sellers and buyers. Real estate agents use MLSs to pool their property listings.[12] By posting a house on an MLS, an agent representing a seller can communicate with all agents, thus increasing the pool of potential buyers beyond those who happen to be known to the listing agent. Buyer's agents, meanwhile, gain access to the entire inventory of houses.[13] More sellers mean more demand for access by buyers, and more buyers mean more demand for access by sellers.

Most of the information posted on the MLS comes from the agreement signed between the seller and the seller's agent, known in the trade as a listing agreement.[14] Listing agreements identify the property up for sale, the seller's asking price, and the agent's commission. Agents post this information along with the portion of the commission that they are willing to share with the buyer's agent on the MLS.

12 *See* Owen R. Phillips & Henry N. Butler, *The Law and Economics of Residential Real-estate Markets in Texas: Regulation and Antitrust Implications*, 36 Baylor L. Rev. 623, 626-27 (1984).

13 William C. Erxleben, *In Search of Price and Service Competition in Residential Real-estate Brokerage: Breaking the Cartel*, 56 Wash L. Rev. 179, 184 (1981).

14 *Id.* at 181.

II. The Real Estate Industry Reacts to the Internet

MLS services are obviously powerful tools for increasing liquidity in local real estate markets. Not surprisingly, they lie at the heart of the antitrust issues afflicting the real estate industry. Local real estate brokerages usually own MLS services on a cooperative basis, and they have changed the rules of access as the Internet has disrupted traditional ways of doing business. The DOJ's Antitrust Division and the FTC have taken issue with some of these changes.[15]

By connecting virtually everyone at all times, the Internet has posed real challenges for people operating in traditional two-sided businesses. Newspapers, phone companies, and even convention centers have all had to react as their customers have found ways to bypass their services. People who want to make long distance phone calls no longer need to rely on a traditional long distance carrier to make a circuit available. So long as the people on both ends of the call have an Internet connection, a microphone, and an ear piece, they can talk to one another through a virtual circuit supported by the Internet.

The ability of the Internet to disrupt two-sided businesses has not been limited to telecommunications. Prior to the Internet, buyers and sellers of specialized products—like specialized books and collectibles—struggled to find each other. The Internet has enabled them to overcome geographic separation. Instead of relying on classified ads, catalogs, and conventions, they can gather virtually on eBay, creating larger markets than was possible before the Internet.

From the days that the Internet first opened to commercial traffic, the real estate industry has kept a wary eye on it. Theoretically, buyers and sellers of real estate could use the Internet to bypass real estate agents and the listing services in the same way that buyers and sellers of baseball cards now skip Beckett's card guide in favor of eBay. And a number of firms have created websites encouraging them to do precisely that. To this point, however, most buyers and sellers of real estate have not abandoned real estate agents and the traditional customs of the industry (i.e., MLS listings, commissions, open houses) in favor of web sales.

Although the Internet has not supplanted MLSs as the preferred meeting place for buyers and sellers of residential real estate, it has put pressure on some traditional business practices. Historically, the vast majority of residential real estate

15 *See* Press Release, U.S. Department of Justice, Justice Department Sues National Association of Realtors for Limiting Competition Among Real-estate Brokers (Sept. 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/211008.htm; Press Release, U.S. Federal Trade Commission, FTC Charges Real-estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real-estate Services (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realesstatesweep.htm.

sales have taken place under exclusive right-to-sell arrangements.[16] Under an exclusive right-to-sell agreement, a real estate agent collects a commission if the house sells within a set period of time, typically 60 to 90 days, regardless of whether the agent generates the sale. Home sellers have sought to capitalize on the development of the Internet by pushing for exclusive agency agreements.[17] Under an exclusive agency agreement, an agent typically collects an upfront fee but does not collect a commission unless their actions yield a sale.

Real estate agents in some communities have tried to combat this trend by changing the rules of access to MLSs. In the past, although most sales have involved right-to-sell agreements, some MLSs have allowed agents to post listings regardless of the nature of the agency relationship. The move toward exclusive agency agreements prompted a change in policy in at least seven communities around the country. In those communities, MLS boards decided to limit MLS posts to listings secured under exclusive right-to-sell arrangements.[18]

Similar issues have arisen on the buyer side. Relationships on the buyer side tend to be less formal than relationships on the seller side. Buyers generally do not sign contracts with the agents representing them. Nevertheless, agents representing buyers have traditionally required buyers to visit their offices before providing MLS listings. When the Internet opened a new channel of communication, technology-savvy agents responded by making listings available to buyers who visited their websites. Some offered listings to anyone who visited their sites. Others password protected the listings. As the availability of listings on the Internet became more widespread, a few agents began offering commission rebates to prospective buyers who agreed to access listings through their websites.

Again, MLS owners have tried to limit the practice. The rules on the buyer side have been a bit more subtle than those on the seller side. Basically, the National Association of Realtors (NAR)—a national trade association of real estate agents that controls 80 percent of the nation's MLSs—created a special opt-out right for Internet distribution of MLS listings.[19] Historically, all MLS listings have been available to all participating agents. Under the policy adopted by NAR, a real estate agent who posts a listing on the MLS can forbid another agent from distributing that listing on the Internet.

16 *See* Federal Trade Comm'n, Residential Real-estate Brokerage Industry 30 n.17 (Dec. 1983) ("Most MLSs will accept and disseminate information relating *only* to exclusive right-to-sell listings.") (emphasis in original).

17 Press Release, U.S. Federal Trade Commission, FTC Charges Real-estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real-estate Services (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realesstatesweep.htm.

18 *Id.*

19 Press Release, U.S. Department of Justice, Justice Department Sues National Association of Realtors for Limiting Competition Among Real-estate Brokers (Sept. 8, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/211008.htm.

III. The Reactions Have Led to a New Round of Antitrust Litigation

As noted above, the FTC and the DOJ's Antitrust Division have taken issue with these industry developments. The FTC is pursuing the seller side, and the Antitrust Division has sued NAR. The cases, although they challenge different practices, are carbon copies of one another. They are also of piece with nearly five decades worth of antitrust litigation.

The FTC's administrative complaints against the local real estate boards contain essentially three allegations. The FTC alleges the following:

(1) some real estate agents were posting listings collected under exclusive agency relationships;

(2) local real estate agents acted collectively to stop the practice by changing the rules of access to their MLSs; and

(3) the change in practice will lead to higher prices for the services provided with no apparent offsetting efficiency rationale.[20]

The Antitrust Division's complaint against NAR is longer than the barebones administrative complaints filed by the FTC. But the Division's theory of the case, as reflected in the complaint and its opposition to the defendant's motion to dismiss, is quite similar. The Division advances a three-pronged argument:

(1) new brokerage business models have begun to communicate listings information to their customers through the Internet, rather than traditional ways such as in person or by mail or fax, but

(2) the new NAR rules allow traditional brokers to withhold their MLS listings information from the websites of these new competitors, although no such rule limits traditional brokerage models, and

(3) this undercuts competition from these new brokers, which offer innovative service at lower cost.[21]

These straightforward claims of anticompetitive conduct against the real estate industry are not new. Real estate agents have faced nearly fifty years of litigation over their practices. In 1950, the U.S. Supreme Court declared one real estate board's code of ethics, which provided that brokers should not deviate

20 *See, e.g.*, Complaint, *In re* Realcomp II Ltd., Doc. No. 9320, FTC File No. 061 0088 (issued Oct. 10, 2006); Complaint, *In re* MiRealSource, Inc., Doc. No. 9321, FTC File No. 061 0266 (issued Oct. 10, 2006).

21 Complaint, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. filed Sept. 8, 2005); Memorandum of the United States in Opposition to Defendant's Motion to Dismiss, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. filed Feb. 6, 2006).

from standard commission rates, to be per se illegal price-fixing.[22] Since then, a number of courts have viewed conduct by the real estate industry as price-fixing. Most recently, the U.S. Court of Appeals for the Ninth Circuit found a per se violation against a group of real estate associations that set support fees for a common MLS.[23] In addition to price-fixing theories, another line of complaints has alleged group boycotts by members of the MLSs. These cases have ranged from the mundane to the sinister. Two cases from the U.S. Court of Appeals for the Fifth Circuit are illustrative. In one case, the court found that the MLS's membership requirements, including maintaining a real estate office with regular business hours, were unreasonable.[24] In the other, the court sustained a jury verdict finding a group boycott where a flat-fee broker was subject to punitive commission splits, refusals to show his listings, disparaging remarks, and having his customers harassed by anonymous phone calls.[25]

On the surface, the cases against the real estate industry seem to be very straightforward. Otherwise competing real estate agents set the rules for the jointly owned listing services. The agreement, which is so often the hurdle in a U.S. Sherman Act § 1 case, is a given. The only challenge is demonstrating that the particular practice threatens to increase the price of the services that real estate agents or the MLS offer. This, too, may be relatively easy to establish. In fact, with regard to the restrictions that triggered the current wave of scrutiny, they seem to have been designed with this outcome in mind. Viewed in this way, the industry seems certain to lose.

So far anyway, the real estate industry seems to be dealing with these cases at that level. Neither NAR nor the local MLS boards have made any public effort to defend the practices.[26] In fact, the litigation strategy of NAR seems deliberately designed to change the subject. In moving to dismiss the Antitrust Division's complaint, NAR basically argues that the case is premature because the policy has been suspended pending resolution of the litigation.[27] As the Antitrust Division points out in its opposition, this seems like a strange argument given that NAR suspended the policy only after it was threatened with a lawsuit chal-

22 United States v. Nat'l Ass'n of Real-estate Bds., 339 U.S. 485 (1950).

23 Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003).

24 United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

25 Park v. El Paso Bd. of Realtors, 764 F.2d 1053 (5th Cir. 1985).

26 *See* Decision and Order, *In re* MiRealSource, Inc., Docket No. 9321, FTC file No. 061 0266 (issued Feb. 5, 2007) (announcing consent order putting an end to the challenged conduct).

27 Memorandum of Law in Support of Defendant's Motion to Dismiss, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. filed Dec. 6, 2005).

lenging it.[28] The current approach, however, is in line with prior defensive tactics. Following the first case striking down as per se illegal agreements to fix commission rates, the industry spent thirty years arguing that real estate was a local business and, thus, not subject to the Sherman Act.

IV. Perhaps There Is Room for a Different View

The striking thing about the real estate industry when viewed through the two-sided market lens is the lack of any competition at the platform level. Two-sided industries are generally characterized by competition among platforms: American Express, Visa, MasterCard, and Discover all battle it out in the payment card industry; Sony, Microsoft, and Nintendo vie for preeminence in the videogame console industry; the New York Times, ESPN, and TV Guide all compete for allegiance among advertisers and subscribers. In the real estate industry, by contrast, only one platform seems to exist—the MLS.

THE STRIKING THING ABOUT THE REAL ESTATE INDUSTRY WHEN VIEWED THROUGH THE TWO-SIDED MARKET LENS IS THE LACK OF ANY COMPETITION AT THE PLATFORM LEVEL.

The U.S. antitrust agencies do not quibble with the absence of platform competition. In their complaints, they concede the efficiency of the MLS system. Indeed, the agencies have premised their attacks on how irreplaceable the MLS system is. The agencies argue, essentially, that the MLS system is so efficient that rational buyers and sellers of real estate will not attempt to circumvent it. Yet, the cases do not push for the creation of an alternative platform. They seek to reduce the price that buyers and sellers pay for access to the existing system. The theory seems to be that competition among real estate agents is a substitute for competition among platforms.

However, the residential real estate industry exhibits a couple of features not ordinarily associated with a lack of competition. Concentration is low, and entry is easy. The industry attracted so many new agents that mean compensation for agents declined even in a period of skyrocketing home prices. The problem, if one exists, lies not with the amount of competition among agents but rather with the nature of that competition. Historically, agents have not competed for listings or buyers by offering to reduce their commissions. Instead, agents have competed on the basis of what they describe as service and what others, more pejoratively, criticize as glad-handing.

The U.S. antitrust agencies have taken a rather formalistic approach to changing the nature of competition among real estate agents. In bringing these cases, the agencies use to their advantage the fact that they are attacking a collaborative enterprise. Although the gap in treatment has narrowed, joint ventures and

28 Memorandum of the United States in Opposition to Defendant's Motion to Dismiss, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. filed Feb. 6, 2006).

other legitimate collaborations of competitors remain subject to different rules than their more traditionally organized competitors.[29] Consequently, the agencies attack on horizontal conspiracy grounds practices that, but for the collaborative ownership, look like garden-variety vertical restraints.

If MLSs were independently owned, it would be more difficult to argue that the restraints at issue pose a significant antitrust problem. The ban on wholesale distribution of listings via the Internet makes considerable sense from the standpoint of the upstream owner of such listings. Internet distribution of listings makes it difficult for the downstream agents to differentiate themselves from one another, reducing the incentive that agents have to collect listings. The other two restraints, the ban on exclusive agency contracts and the ban on discounted buyer-side commissions, simply combat discounting among distributors of the service created by the MLS. Although *Dr. Miles* remains good law,[30] Ben Klein and others have shown that vertical price restraints are both rational from the standpoint of the upstream party and welfare-enhancing.[31]

The U.S. antitrust agencies also seem to ignore the two-sided nature of the industry. The agencies accept as true the criticism that real estate agents earn lots of money for doing very little work. To be sure, at the level of particular transactions, this criticism seems valid. Real estate agents do seem to collect far more money on the sale of particular homes than the work put into that sale warranted. On this view, real estate agents just increase the transaction costs associated with the transfer of real estate, and consumers should benefit from the effort to reduce those costs.

IF THEIR SEARCH FOR CLIENTS ACTUALLY LEADS PEOPLE WHO WOULD NOT OTHERWISE BUY OR SELL HOMES TO ENTER THE ACTIVE MARKET, THEN THE STRUCTURE OF THE INDUSTRY MIGHT ACTUALLY BENEFIT CONSUMERS.

There is, however, another way to look at the role of the real estate agent. For an industry marked by few repeat players, the residential real estate industry in the United States seems remarkably liquid. The question becomes whether real estate agents have anything to do with the apparent liquidity in the residential real estate market. Ironically, one of the more well-worn criticisms of the industry suggest that they do: the observation, by Levitt and others, that real estate agents spend nearly all of their time looking for clients and relatively little actually working on par-

29 *See* Texaco v. Dagher, 126 S. Ct. 1276, 1280 (2006) ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells . . .").

30 With the U.S. Supreme Court having granted certiorari in Leegin Creative Leather Products, Inc. v. PSKS, Inc., No. 06-480 (Dec. 7, 2006), *Dr. Miles* may be headed for the chopping block.

31 *See* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119 (2003); Benjamin Klein, *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003).

ticular transactions. If this is right and if their search for clients actually leads people who would not otherwise buy or sell homes to enter the active market, then the structure of the industry might actually benefit consumers.

This view, if it were adopted, would create a real challenge for the U.S. antitrust agencies. The impact is particularly easy to see with the alleged efforts to restrict the ability of buyer side agents to rebate their commissions to clients. Viewed solely from the standpoint of buyers, this restraint seems unambiguously bad. It increases the cost of buying a house. Sellers, however, may take a different view. Sellers want to maximize the pool of potential buyers. They could reasonably conclude that offering larger commissions to agents will do more to increase the pool of potential buyers than providing a small discount. On this view, the practice seems eminently reasonable.

V. Conclusion

As we noted at the outset, we have not made up our minds about this industry or the cases that the U.S. antitrust agencies have filed. Our observations may fall short of a ringing defense. The claim that the current structure of the industry may benefit consumers contains a heroic assumption, namely that marketing efforts by real estate agents expand the set of willing buyers and sellers. We have simply teed up the empirical question that should be at the heart of the current round of cases—whether consumers would be better off if the agencies were to prevail. We are not, however, optimistic that the cases will answer this question. The agencies appear to have assumed that the answer to this question is yes, and the industry, at least thus far, has ignored it altogether.