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I. TWO VIEWS OF INFORMATION

Let me start this short paper on the antitrust law governing multiple listings in the real estate brokerage industry with a conventional account. Thereafter I shall try to explain why this account, while not wholly wrong, is in at least one important respect incomplete. This two-part journey addresses some of subtleties that are involved in cases of horizontal price-fixing in information markets, where intermediaries play a critical role in bringing together diffuse buyers and sellers on the opposite side of the same market.[1] The antitrust case law on this issue is something of a jumble. Early cases on information exchange recognized that the sharing of information could both aid and restrict competition simultaneously.[2] They are not all that clear in specifying exactly which forms of information-sharing among firms had which predominant effect.

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[1] For an earlier analysis from which I have much profited, *see* Thomas Brown & Kevin Yingling, *Antitrust and Real Estate: A Two-Sided Approach,* 3(1) COMPETITION POL'Y INT'L 225 (Spring 2007).

[2] *See, e.g.,* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925) (information sharing); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925) (self-help; information sharing); Appalachian Coals v. United States, 288 U.S. 344 (1933); United States v. Container Corp. of Am., 393 U.S. 333 (1969) (information sharing); and United States v. U.S. Gypsum Co., 438 U.S. 422 (1978).

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The reason for this persistent duality is not hard to fathom. Reliable information that is shared among competitors can facilitate the fixing of prices and the division of markets, both of which count as per se offenses under Section 1 of the Sherman Act. Yet by the same token, the sharing of information could allow for more efficient transactions among firms located at the same level inside the marketplace.[3] The question is how to draw the appropriate lines between these two scenarios. As in all antitrust areas, there is no free lunch, for errors in both directions are costly. Failing to identify and correct cartelization schemes can lead to the usual deadly trio of antitrust law sins: increased prices; reduced quantities; and deadweight social losses, where the last element (a consequence of the first two) is the ultimate measure. But the converse proposition is also true. The imposition of excessive antitrust liability can result in diminished forms of efficiency by burdening firms that seek to introduce efficient forms of communication and coordination. To give but one simple example, it is surely wrong to allow competitors to fix prices for similar products. But it is important to allow them to combine to set industry standards for their various products, whether they are for insurance policies or Internet protocols. Standardization reduces search costs by making it easier to compare products, such that information about price offers a stronger signal about the relative desirability of the two alternatives. There are strong arguments why a rule of per se legality should apply to these organizational efforts.[4]

[3] United States v. Citizens and S. Nat'l Bank, 422 U.S. 86, 114-15 (1975).

[4] Patrick Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 1001 (2003).

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II. MULTIPLE LISTING LITIGATION

A. Allocation and Entry

It is against this general background that the U.S. Department of Justice (DOJ) has brought two visible antitrust lawsuits addressed to the industry wide practice in the residential real estate brokerage market in multiple listings. The first is the DOJ's suit against the National Association of Realtors (NAR), which has been settled by a consent decree that has largely vindicated the government's position.[5] The second involves the more recent complaint that the DOJ filed in May 2008 against Consolidated Multiple Listing Service, Inc. (CMLS), for its practices in the Columbia, South Carolina residential real estate market.[6]

These two actions are no real surprise because antitrust scrutiny of the residential brokerage industry dates back at least to 1950, when the U.S. Supreme Court held in *United States v. National Association of Real Estate Boards*[7] that standardized brokerage fees set in the industry were a per se violation of Section 1 of the Sherman Act.[8] The conventional theory behind the cases is sufficiently straightforward. There are huge numbers of real estate brokers in virtually all local markets. In the absence of collusion among these firms, we should expect to see spirited competition in both price and service, with strong levels of innovation intended to gain market share at the expense of competitors. Any effort to fix informally either price or quality of service is destined to

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[5] Proposed Final Judgment, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. filed May 27, 2008).

[6] Complaint, United States v. Consol. Multiple Listing Serv., Inc., 3:08-cv-01786-SB (D.S.C. filed May 2, 2008).

[7] 339 U.S. 485 (1950).

[8] *Id*. at 488-89.

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failure in the face of widespread cheating. In this competitive maelstrom, successful cartelization requires some formal system of control.

One function of associations such as the NAR or CMLS is to provide the formal mechanisms needed to enforce whatever restrictions on price and service to which their members agree. As the conventional theory predicts, this battle will be waged in two separate ways: among its members and with outsiders. The first deals with the allocation of business among existing firms. The second deals with the entry of new firms.

First, on internal coordination, cartels seek ways to stabilize the business among their members so that they do not compete for profits down to the competitive level. The standardization of terms, when coupled with the standardization of price, helps to achieve this goal. The results are not perfect because the firms in question can still compete on quality of service, which is of course more difficult for the cartel to monitor than for consumers to observe. Even so, these industry wide prohibitions do not have to be perfectly effective to constitute a violation of the antitrust laws. It is sufficient that they move the market partway toward cartelization. This conclusion does not, however, necessarily hold with respect to information-sharing among members of a single industry. This information-sharing, if properly structured, could work to reduce the costs of cooperation among members of the trade association, which redounds to the benefit of consumers. This function is particularly important in the brokerage market, where matching buyers with sellers is a major task. In this case, but not necessarily in other two-sided market situations, the fragmentation in the brokerage industry means that a single

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firm, acting alone, cannot be an effective platform for linking the two sides. Its market base is too small to be effective in securing ideal matches. Accordingly, some cooperation among brokers will expand the number of available trading partners, and thus is a pro-competitive form of cooperation. Yet care must be taken to see that coordination with respect to listings does not lead to coordination with respect to price. The hard task is to make sure that information flows are used only for desirable, not collusive, purposes.

Yet the complex structures of different markets makes generalization difficult, even within the class of two-sided markets. Cooperation problems do not arise in all two-sided markets, for in many cases the middlemen are able to function well without cooperating with each other. For example, a large bookseller like Amazon.com can match titles with customers without cooperating with Borders, simply because it can stock as many titles as it wishes. Communication therefore has very little positive value in the bookselling market, so we are better off with a legal regime in which they do not exchange price-sensitive information on a routine basis. As with all antitrust areas, we need to acquire much industry-specific knowledge to decide whether to apply some per se rule or rule of reason. The latter, contextual judgments may often determine whether antitrust liability will be imposed.

Second, on new entry, it is clear that no agreement among members of a cartel will stabilize prices in the face of a new entry that can bid services down to the competitive levels. It follows therefore that cartels should seek devices that prevent these

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new entrants from gaining a toehold in the marketplace, where they can disrupt the agreement among cartel members. But once again it is critical to be attentive to the flip side. It is one thing for members of a cartel to prevent the outsiders from organizing their own businesses to compete with the incumbent system. Thus, to take the payment card example, the acquiring banks (which deal with merchants) and the issuing banks (which deal with consumers) that operate on one platform—call it Visa—should not be allowed to collude in order to prevent the introduction of a competitive platform—call it MasterCard.[9]

It is, however, a much more difficult antitrust issue whether the new entrant should have access as of right to the preexisting system that the defendants have created cooperatively at their own expense. At one time there was some support for a limited antitrust duty to enter into agreements under the antitrust laws.[10] But more recent decisions have taken a more cautious attitude toward this question, noting that the judicial administration of the antitrust laws is not a good way to set rates.[11] Indeed there is good reason to believe that even rate setters are not always effective at setting rates for various kinds of forced cooperation, which is one lesson learned from the disastrous effort under the Telecommunications Act of 1996 to force the incumbent local exchange carriers to

[9] For a discussion of this point in connection with the real estate cases, *see* Brown & Yingling (2007), *supra* note 1, at 231-32. For the complex issues that arose on the question of whether Visa and MasterCard could (when both operated as mutual associations) adopt "governance duality" rules whereby any bank that was a member of the board of directors of one network could sit on the board of directors of the other, *see* United States v. Visa U.S.A., Inc., 163 F. Supp.2d 322, 327-29 (S.D.N.Y. 2001). Yet the court forbade either association from maintaining a policy that forbade member banks from issuing cards of third parties including American Express and Discover.

[10] *See, e.g.,* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 U.S. (1985).

[11] *See, e.g.,* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414-15 (2004).

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sell unbundled network elements (UNEs) to their new competitive entrants.[12] The key error here was that the regulators wanted to give the incumbent only TELRIC (total element long run incremental costs), which meant that the incumbent could not recover its full historical costs even if it were forced to sell each and every element to its new entrant competitors. The system thus created massive subsidies for the new entrants, which resulted in losses to the incumbents without offering any long-term benefits to the new entrants, which promptly competed away the regulatory subsidy.[13]

In the telecommunications industry, the justification offered for imposing the forced sale of UNEs to outsiders was the (quickly eroding) monopoly position of the then-entrenched local exchange carriers. That institutional framework bears no relationship to the highly competitive residential real estate brokerage industry. In this setting, it is possible to have extensive levels of competition if the firms that share a common business platform compete heavily with each other in the acquisition of new clients. Accordingly, with the market already saturated, there is little reason to think that new entry at the firm level can increase the level of competition. Entry into the brokerage business is easy and thousands of firms are vying for customers in the market. Yet by the same token, as Brown and Yingling stress, much could be obtained if the spate of new firms who are denied access to a preexisting platform could be induced to create a rival platform system of their own.[14] Put otherwise, a market looks to be more competitive if

[12] *See* Telecommunications Act of 1996, 47 U.S.C. §§ 251, 252 (2000).

[13] For a discussion, *see* Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired,* 22 YALE J. REG. 315 (2005).

[14] Brown & Yingling (2007), *supra* note 1, at 233-34.

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there are two upstream players than if there is only one upstream player to whom all downstream players have to turn on either a voluntary or compulsory basis.

B. The Two Lawsuits

These observations offer a convenient jumping off point to examine the two recent government actions against the real estate brokerage industry. Let us begin with the suit against the NAR, which has already been subject to a consent decree. The NAR practices that sparked the government's antitrust suit involved behavior that took place on the buyer side of the market. In general, that side of the market is somewhat less organized than the seller side if only because the fraction of buyers who retain brokers in the marketplace is smaller than the percentage of sellers who obtain such assistance, even if the buyer does not have to pay additional moneys to enlist the services of a broker. This is likely the case for two reasons. First, sellers are interested in net sales, so they do not have to examine personally the premises they wish to sell. Buyers have to look themselves, with or without a broker. Second, potential buyers (who tend to devote short bursts of energy to their search) can make direct calls to the brokers of sellers, without having to involve a buyer broker. Either way the costs are the same to the potential buyer, so that the issue is one of general convenience. Nonetheless, when the buyer does have a broker, it is a common practice for that broker to share in the commission paid once the transaction is consummated. The broker's share is set according to the amount specified in the original seller listing, or failing that, in accordance with some standardized industry rate, usually half.

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The question is who gets to share information about the buyer side of the market. The National Association of Realtors is the dominant industry group that controls about 80 percent of the Multiple Listing Service (MLS). Before the advent of the Internet, agents had to rely on massive books of listings that had to be periodically updated, and whose content could only be shared in relatively laborious ways: in person, by mail, or by fax. The rise of the Internet permits of course the nearly instantaneous dissemination of these listings across the entire industry. The change in scale effects led the NAR to adopt a policy whereby any listing (seller) broker could prohibit any other broker who received that listing from posting it on the Internet for all to see, so that buyers could check out listings online, thus bypassing a trip to a real estate office. One critical and intended effect of this no-listing policy was to freeze out of the buyer side of the market those new brokers who entered the industry solely on the Internet, or those firms that had Virtual Office Websites (VOWs) without any brick and mortar business. The DOJ alleged that this practice was anticompetitive because it necessarily excluded new brokers from the market who could compete with the established brokers, thereby exerting a downward effect on prices across the industry.[15]

The consent decree represented a complete victory for the government and had two key provisions. First, the consent decree makes it impossible for any firm to:

> adopt, maintain, or enforce […] any agreement or practice, that directly or indirectly (a) prohibits a Broker from using a VOW […] from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other method of delivery…[16]

[15] For a discussion of the government's arguments in the NAR case, *see* Brown & Yingling (2007), *supra* note 1, at 231.

[16] Proposed Final Judgment, Nat'l Ass'n of Realtors, No. 05C-5140, at ¶4.

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In effect it is no longer permissible to discriminate against the online brokers.

The second key provision explains the terms and conditions on which that forced distribution of service is required, for it likewise states that no brokerage firm shall:

> adopt or enforce any agreement or practice that directly or indirectly that … imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW-related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same to the Broker.[17]

At this point, it is possible to see where the consent decree has gone wrong with respect to this practice. Initially it pays no attention to the possibility that the VOWs and their supporters could organize a second platform. It then adopts a cost-sharing device that requires the established firms to *subsidize* their new competitors by allowing the network to recover from the new entrants only the marginal costs of hooking that entrant in. To see why this system looks misguided, recall that the creation of any network requires the expenditure of both front-end costs to set up the system and marginal costs to extend its operation to new members. The hard question in all of these cases is how to allocate the front-end costs of the system for the simple reason that the system cannot survive if all users are required to pay for only their marginal costs. There is no unique formula for allocating these front-end costs among the existing players, which is why the

[17] *Id.* at ¶4.

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marginal cost controversy has proved so difficult to solve.[18] By the same token, there is no reason to think that all of those costs should be borne by the established firms and none of them should be borne by their VOW competitors.

As in so many cases, the real risk with the antitrust law is that it will impose burdens on one set of firms that distort the competitive process, in this instance in favor of the new entrants.[19] The distortion in this case could lead firms to reduce their willingness to share commissions, or to join in the basic network, or, more likely, invest in its improvement. After all, under the previous arrangement, each firm that posted a listing knew that it was dealing with firms that offered them a piece of the buyer-side business. But it is far from clear in this case that the VOWs generated any new customers in the first place. If they did, their case for inclusion, at a fair allocated cost, would be stronger than it would be if they generate no such business. The consent decree, however, does not address any of these issues, so that it is hard to see that it has correctly analyzed the situation.

This critique of the NAR litigation does not necessarily imply that the United States was entirely off base in its litigation against CMLS for the alleged cartelization of the Columbia, South Carolina residential brokerage market. As before, everything depends on which practices are targeted. The initial point to note is that the Columbia

[18] Ronald Coase, *The Marginal Cost Controversy*, 13 ECONOMICA 169, 181 (1946); for a modern update, *see* John Duffy, *The Marginal Cost Controversy in Intellectual Property*, 71 U. CHI. L. REV. 37, 56 (2004). Coase spoke about the problem of how to allocate costs in the context of a bridge with a high fixed cost and zero marginal cost. One solution is to charge only marginal cost, so that all users can get on it. But this approach requires someone to make a political judgment as to whether to the bridge should be built at all. But once some fees are charged, then there is always some exclusion at the margin. Duffy explained how the dilemma remains in the context of patent monopolies.

[19] *See, e.g.,* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

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local residential real estate market was highly un-concentrated with over 370 competitive firms.[20] The first count of this complaint challenges the organization for its exclusion of non-members from the database which allows for the efficient matching.[21] That portion of the complaint looks to be defective because it suggests that there is an excessive concentration of firms in the market, when there is not. And it suffers from the same defect as the NAR settlement insofar as it mandates the undesirable cross-subsidy by forcing the group to take in members who have not paid for their aliquot portion of the common front end expenses.[22] It also acts as though the existence of the single platform is an unavoidable condition in the state of nature, when it claims that "CMLS is the only provider of [such] brokerage services in the Columbia Area. Therefore, brokers seeking to provide service in the Columbia Area need to be members of CMLS."[23] The prospect that they could collectively develop some other platform is not discussed.

Nonetheless, other allegations in the complaint are much more cogent. Given what was said in the previous paragraph of the analysis, the want of new entry from outsiders means that all current members should be free to compete on any and all dimensions on which they offer service. It follows therefore that any effort of CMLS to restrict the kinds of packages that members offer for their services, or the rates that they charge, should be regarded as per se offense under the Sherman Act. Accordingly, it is improper to allow member firms only to offer the full line of services, when some clients may well prefer an arrangement whereby they pay the broker a fixed fee for the initial

[20] Complaint, Consol. Multiple Listing Serv., Inc., 3:08-cv-01786-SB, at ¶4.

[21] *Id.* at ¶2.

[22] *Id.* at ¶3.

[23] *Id.*

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listing, but can avoid any further fees if they are thereafter able to sell the property without further broker assistance.[24]

The ultimate solution to the problem therefore takes these lines. The advances in technology have improved the infrastructure for the quick dissemination of information about potential buyers and sellers. The lower cost of assembling information means first that there is a higher likelihood of a better match between buyers and sellers who are already in the market. But there is a second desirable effect as well. As Brown and Yingling imply, the higher chances of success should at the margin introduce additional individuals to enter the housing market, knowing that the chances of a good match have improved.[25] Their arrival means that the ideal pairing should improve so that additional entry on the customer side produces not only better matches among the preexisting players, but a thicker market that improves the ideal matches for all entrants, both old and new. The risk of the government position is that it will make the wrong trade-off between expanding the number of brokers and expanding the number of entrants. The former produces lower returns than the latter, which is why one half of the government's case against CMLS seems misconceived.

III. CONCLUSION

This analysis of multiple listings yields a somewhat surprising result. In most cases, new entry is a powerful antidote against the abuses of the incumbent firm. But in this instance, new entry into the brokerage business is not the issue, given that the market is so highly unconcentrated to begin with. The real change would be the introduction of a

[24] *Id.* at ¶4.

[25] Brown & Yingling (2007), *supra* note 1, at 229.

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new platform that could go into competition with the platforms in place. But that change is improbable under current circumstances because there seems to be no increasing returns to scale in running the single platform, hence there are likely not sufficient incentives to justify the cost of launching a competing platform. In the current situation, therefore, the key issue is how best to allocate the joint costs of common infrastructure on which the competitive markets move. As such the problem is similar to that which arises in deciding what system of special assessments should be used to allocate the costs of local real estate improvements, or how to allocate the cost of creating new infrastructure in telecommunications, or in figuring out how much money should be charged to customers of a patented pharmaceutical product. In all of these cases, there is no unique solution to the problem of how to allocate the fixed costs. This is a conclusion that arises in connection with the analysis of two-sided markets, which now turns out to be just a special, if important case, of the familiar marginal cost controversy.

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