

## SOME ANTITRUST PROBLEMS AND RELATED ECONOMIC ISSUES IN REAL ESTATE BROKERAGE, PROFESSIONAL LICENSING FOR REAL ESTATE WEBSITES AND RENT-CONTROL/RENT-STABILIZATION

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### Abstract

In the US, MLS systems, professional licensing regimes for Real Estate Websites and rent-control/rent-stabilization statutes constitute violations of antitrust laws. Recent orders and proposed settlements in lawsuits instigated by government agencies have not resolved the underlying antitrust problems. Many of these antitrust issues influenced psychological reactions among market participants, which in turn caused the rapid price increases in some US real estate markets during 1995-2004. Thus, all existing housing demand models and housing price forecast models are grossly mis-specified primarily because they don't incorporate legal factors.

**Keywords:** Housing-demand models; antitrust; rent control and rent stabilization; real estate and internet law, complexity; prices; capital markets; household economics

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### Introduction

The structural changes and rapid price increases that occurred in the US housing market between 1995-2003 created some important legal issues, and were partly the product of legal issues. Multiple Listing Services ("MLS") were a major factor in the volume of property sales, and provided much more exposure for properties, and perhaps increased transparency in some real estate markets. However, MLS systems have inherent antitrust and constitutional law problems. Rent Control (and Rent Regulation) was a moderating factor in some housing markets, but some landlords got around these laws, and some cities renewed/extended rent control laws. In an environment of rapidly rising rents and prices, rent control became a form of regulatory takings.

### I. NAR And Multiple Listing Services (MLS) –Anti-trust Issues

The NAR is a national organization that wields substantial control over real estate brokers in the US. Hence the NAR has 'federal-government type' power and control over the US real estate brokerage industry, and such power is essentially the same as government control and or 'state-action' required to prove violations of the US Constitution.

Hence a new antitrust doctrine named "Substantial Control" is introduced here. The element of the doctrine are: a) a national organization, or state organization, b) market participants cannot conduct business unless they are affiliated with this organization; c) the rules of the organization are binding on its members; c) the organization has

significant effect on the transparency of the market, and the price formation processes; d) all members of the organization must contribute all their market data to the organization, for sharing among local or state sub-groups; e) the organization performs rule-making, enforcement/investigation and dispute adjudication functions.

The Multiple Listing Service ("MLS") lists virtually all homes for sale through a participating broker, and thus serves as a comprehensive compilation of listings.<sup>19</sup> The configuration of MLS systems has evolved from a printed MLS book (1920s) to faxed MLS listings to Internet-based MLS systems. Brokers have introduced Virtual Office Web Sites ("VOWs") for use by clients that seek information. There are at least 850 MLS systems in the US. The advent of Web-based MLS systems created a new business model: the discount real estate brokers who gave their clients password-protected access to the local MLS on the Internet. Web-based Discount Brokers encourage property-buyers to research properties on the Internet, and this reduces the brokers' workloads, and result in buyers paying

<sup>19</sup> See: Austin A. D. (1973). The Antitrust Threat to Real Estate Brokerage. *Real Estate Review*, 2: 9-14.

See: Miller, N.G. & Shedd P (Fall 1979). Do Antitrust Laws Apply To the Real Estate Brokerage Industry? *American Business Law Journal*, 17/3: \_\_\_\_\_.

See: Owen B. M. & Kickbacks M. (1977). Specialization, Price Fixing, and Efficiency In Residential Real Estate Markets. *Stanford Law Review*, 29:931-967.

See: Wu C & Colwell P (1986). Equilibrium Of Housing And Real Estate Brokerage Markets Under Uncertainty. *AREUEA Journal*, 14(1):1-23.

lower sales commissions. On Sept. 8 2005, the NAR announced a set of rules called "Internet Listing Display," or ILD. Unlike a previously proposed rule, the ILD policy doesn't permit brokers to selectively withhold listings from competitors they dislike, but it allows brokers to withhold listings from all of their rivals' Web sites. This rule, called "blanket opt-out," had been in effect for three years, without any investigation by the US Justice Department. But the ILD policy also allows sellers to "selectively opt-in" – thus, even when a Web-based Broker uses the blanket opt-out, an owner-seller can ask to have a home listed on the Web-based Broker's competitors' Web sites.

### 1.1 Existing Literature

The existing literature on antitrust in real estate brokerage industry is extensive<sup>20</sup>, and there has also

- <sup>20</sup> See: Austin A.D. (1973). The Antitrust Threat to Real Estate Brokerage. *Real Estate Review*, 2: 9-14.  
 See: Bardsley N & Sausgruber R (2005). Conformity And Reciprocity In Public Goods Provision. *Journal Of Economic Psychology*, 26:664-681.  
 See: Miller, N.G. & Shedd. P (1979). Do Antitrust Laws Apply To the Real Estate Brokerage Industry? *American Business Law Journal*, 17/3, Fall.  
 See: Murr M (1980). The Professionalization Of Real Estate Brokerage And The Problem Of Multiple Listing Service Exclusion: A Sherman Act Analysis. *Texas Law Review*, 59(1):125-154.  
 See: Pollakoski H & Ray T (1997). Housing Price Diffusion Patterns At Different Aggregation Levels: An Examination Of Housing Market Efficiency. *Journal of Housing Research*, 8(1):107-117.  
 See: Trombetta W (1980). Using Antitrust Law To Control Anticompetitive Real Estate Industry Practices. *Journal Of Consumer Affairs*, 14(1):142-152.  
 See: Crockett J (1982). Competition And Efficiency In Transacting: The Case Of Residential Real Estate Brokerage. *Real Estate Economics*, 10(2):209-227.  
 See: Zorn T & Larsen J (1986). The Incentive Effects Of Flat-Fee And percentage Commissions For Real Estate Brokers. *Real Estate Economics*, 14(10):24-34.  
 See: Wu C & Colwell P (1986). Equilibrium Of Housing And Real Estate Brokerage Markets Under Uncertainty. *Real Estate Economics*, 14(1):1-10.  
 See: Owen B. (1977). Kickbacks, Specialization, Price Fixing, and Efficiency In Residential Real Estate Markets. *Stanford Law Review*, 29:931-967.  
 See: Pollakowski H & Ray T (2000). Housing Price Diffusion Patterns At Different And Aggregation Levels: An Examination Of Housing Market Efficiency. *Journal Of Housing Research*, 8(1): 107-117.  
 See: Whinston M (2003). On The Transaction Cost Determinants Of Vertical Integration. *Journal Of Law, Economics & Organization*, 19:1-23.  
 See: Weingast B (1995). The Economic Role Of Political Institutions: Market Federalism And Economic Development. *Journal Of Law, Economics & Organization*, 11:1-31.  
 See: White L (2006). *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?* New York University, Law & Economics Working Papers, Paper #51.  
 See: Federal Trade Commission (FTC)(1983). *The Residential Real Estate Brokerage Industry*. Washington DC.  
 See: US Government Accountability Office (GAO)(August 2005). *Real Estate Brokerage: Factors That May Affect Competition*. Report To The Committee On Financial Services, US House Of Representatives, #GAO-05-947, August 2005.

- See: Austin A (1970). Real Estate Boards And Multiple Listing Systems As Restraints Of Trade. *Columbia Law Review*, \_\_\_\_\_.
- See: Schmahmann D & Finch J (1997). The Unconstitutionality Of State And Local Enactments In The US Restricting Business Ties With Burma. *Vanderbilt Journal Of Transnational Law*, 30: \_\_\_\_\_.
- See: Hahn R, Litan R & Gurman J (June 2005). *Paying Less For Real Estate Brokerage: What Can Make It Happen?* AEI-Brookings Joint Center For Regulatory Studies, Working paper #05-11.
- See: Hsieh C & Moretti E (October 2003). Can Free Entry Be Efficient: Fixed Commission And Social Waste In The Real Estate Industry. *Journal Of Political Economy*, 111:1076-1122.
- See: Nadel M (March 2006). *A Critical Assessment Of The Standard, Traditional Real Estate Broker Commission Rate Structure*. Mimeo.
- See: Weicher J (Nov. 2005). *The Price Of Residential Real Estate Brokerage Services: A Review Of The Evidence, Such As It Is*. Presented At The American Antitrust Institute's Symposium On Competition In The Residential Real Estate Brokerage Industry, Washington, DC, November 8, 2005.
- See: U.S.C. Subsection 1, et seq. (Supp. 1982).  
 See: *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980).  
 See: *United States v. Standard Oil Corp.*, 221 U.S. 1 (1911)("rule of reason").  
 See: *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950).  
 See: *Park v. El Paso Bd. of Realtors*, 1985-1 Trade Cases (CCH) Paragraph 66, 659 (5th Cir. 1985).  
 See: Federal Trade Commission Staff Report (1983). *The Residential Real Estate Brokerage Industry*. 1:195-202 (1983).  
 See: *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 783 F. Supp. 952, 955 (D. Md. 1992).  
 See: *Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (the features and information available through the MLS at issue were not available through any other service).  
 See: *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).  
 See: *ForSaleByOwner.com Corp. v. Zimmernann*, 347 F. Supp. 2d 868, 870-71 (E.D. Cal. 2004) (providing a general description of the ForSaleByOwner.com business model).  
 See: *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1003 (6th Cir. 1999).  
 See: *Mid-America Real Estate Co. v. Iowa Realty Co.*, No. 4:04-CV-10175, 2004 WL 1280895, at \*8-\*9 & n.5 (S.D. Iowa 2004), *rev'd on other grounds*, 406 F.3d 969 (8th Cir. 2005).  
 See: Amended Final Judgment and Order, *United States v. Kentucky Real Estate Comm'n*, Civ. Action No. 3:05CV188-H. Available at <http://www.usdoj.gov/atr/cases/f210100/210142.htm>. <http://www.usdoj.gov/atr/cases/f208300/208393.htm>.  
 See: Clayton Act - Section 4 of the Clayton Act (15 USC s. 15) provides a private right of action for antitrust violations.  
 See: <http://www.nytimes.com/2008/05/28/business/28realty.html?partne r=rssnyt>. (Real estate agents earned \$93 billion in commissions in 2006, with a median commission of about \$11,600; and Internet brokers, offered pared-down services, and provided average rebates of one percent on commissions that were normally 5 -6 Percent).  
 See: [http://www.nytimes.com/2008/05/12/technology/12ecom.html?\\_r= 1&scp=3&sq=&st=nyt&oref=slogin](http://www.nytimes.com/2008/05/12/technology/12ecom.html?_r= 1&scp=3&sq=&st=nyt&oref=slogin).  
 See: Real estate websites - Zillow, Terabit, ZipRealty, Redfin; <http://www.forsalebyowner.com>; <http://www.fsbo.com>; <http://www.homesbyowner.com>; <http://www.justrealestate.org>; <http://www.mortgage101.com>.  
 See: DOJ, *South Dakota Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Inducements* (Aug. 17, 2005), available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/210637.htm](http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm);  
 See: DOJ, *West Virginia Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Other Discounts* (May 4,

been some more specific analysis on antitrust pertaining to prices of real estate brokerage services.

2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215961.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215961.htm).

See: Alabama CODE § 34-27-36 (1975); ALASKA STAT. § 08.88.401 (Michie 2005); Kansas STAT. ANN. § 58-3062 (2006); Louisiana Revised Statutes Annotated § 37:1455 (West 2006); Mississippi Code Annotated § 73-35-21 (2006); Missouri Revised Statutes § 339.150 (2006); New Jersey Statutes Annotated § 45:15-3.1 (West 2006); North Dakota CENT. CODE § 43-23-11.1 (2006); Oklahoma Statutes Annotated tit. 59, § 858-312 (West 2006); Oregon Revised Statutes § 696.290 (2005); Iowa Code § 543B.60A (2005); Delaware Code tit.24 § 2973; Florida Statutes § 475.278; Ohio Code § 4735.621; Oklahoma Statutes Title 59 § 858-353; Tennessee Code - Title 62-13-403; Wisconsin Code § 452.133; Virginia Code § 54.1-2138.1.

See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (entity claiming state action immunity from federal antitrust laws must demonstrate that its actions are (1) pursuant to a clearly articulated state policy intentionally displacing competition with an alternative regulatory scheme and (2) actively supervised by the state or a qualified government agency or official).

See: FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (analyzing state action immunity doctrine).

See: *Murphy v. Alpha Realty, Inc.*, 1978-2 Trade Cases (CCH) Paragraph 62,388 (N.D. III. 1978).

See: *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (CA5, 1980).

See: *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (CA5, 1989).

See: *Hartrampf v. First Multiple Listing Service, Inc.*, 1983-2 Trade Cases (CCH) Paragraph 65,518 (N.D. Ga. 1983) (termination of an MLS member for subscribing to a competitive MLS system was found to be illegal);

See: *Penne v. Greater Minneapolis Bd. of Realtors*, 604 F.2d 1143 (CA8, 1979) (discount commission broker was discriminated against under MLS rules pursuant to "punitive commission splits," and the practice was deemed illegal). See: *US v. NAR*, #05-C-5140 (US District Court For The Northern District of Illinois; Filip J.) (order denying NAR's Motion To Dismiss).

See: *S. Austin Coalition Committee Council v. SBC Comm. Inc.*, 274 F3d 1168 (CA7, 2001) (there are no factual pleading or heightened pleading requirements for antitrust claims).

See: *Wilk v. American Medical Association*, 895 F2d 352 (CA7, 1990) (injunction issued against group boycott).

See: *Trabert & Hoefler Inc. v. Piaget Watch Corp.*, 633 F2d 477 (CA7, 1980).

See: *National Society Of Professional Engineers v. US*, 435 US 679 (1978) (professional society violated antitrust laws).

See: *US v. Ward Baking*, 376 US 327 (1964).

See: *Ford Motor Co. v. US*, 405 US 562 (1972).

See: *Associated Press v. US*, 326 US 1 (1945).

See: *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 US 85 (1984).

See: *National Collegiate Athletic Association v. Board Of Regents Of The University Of Oklahoma*, 468 US 85 (1984).

See: *Austin Board Of Realtors v. E-Realty Inc.*, No. Civ.-A-00-CA-154-JN, 2000 WL 342391114 (W.D.Tex., March 20, 2000) (court issued a preliminary injunction against realty board's practices for MLS access for internet-based real estate company).

See: *Schachar v. American Academy Of Ophthalmology*, 870 F2d 397 (CA7, 1989).

Contrast: *Consolidated Meal Products v. American petroleum Institute*, 846 F2d 284 (CA5, 1988).

See: *US v. Rockport Memorial Corporation*, 898 F2d 1278 (CA7, 1990).

The securities industry has attempted to address some of the antitrust issues that the real estate brokerage industry now faces<sup>21</sup>. The gaps in the existing literature are as follows:

1. Antitrust in the real estate industry has not been analyzed within the context of two-sided markets<sup>22</sup>.
2. Antitrust in the real estate industry has not been analyzed within the context of network effects<sup>23</sup>.
3. Most of the studies erroneously assume constant knowledge among brokers and groups of brokers.
4. The studies don't fully incorporate transaction costs and opportunity costs.
5. Many of the studies don't consider the growth and effect of 'for-sale-by-owner' websites, and

<sup>21</sup> See: Christie W & Schultz P (Summer 1995). Did NASDAQ Market makers Implicitly Collude? *Journal Of Economic Perspectives*, 9:199-208.

See: Friend I & Blume M (1973). Competitive Commission On The New York Stock Exchange. *Journal Of Finance*, 28:795-819.

See: Baxter W (1970). NYSE Fixed Commission Rates: A Private Cartel Goes Public. *Stanford Law Review*, 22:675-812.

See: Jarell G (1984). Change At The Exchange: The Causes And Effects of Deregulation. *Journal Of Law & Economics*, 27:273-312.

See: Manne M (2005). "The New York Stock Exchange: A Cartel At The End Of Its Reign", In Almarin P (ed.) "Promoting Competition In Regulated Markets". Washington DC: Brookings, 2005, pp. 301-327.

See: Matthews J (1994). Struggle And Survival On Wall Street: The Economics Of Competition Among Securities Firms. (New York: Oxford University Press, 1994).

See: Stoll H, "Revolution In The Regulation Of Securities Markets: An Examination Of The Effects Of Increased Competition" In Leonard Weiss, & Michael Klass, (eds.), Case Studies In Regulation: Revolution And Reform". (Boston, Little, Brown, 1981), pp. 12-51.

See: Tinic S & West R (1980). The Securities Industry Under Negotiated Brokerage Commissions: Changes In The Structure And Performance Of New York Stock Exchange Member Firms. *Bell Journal Of Economics*, 11:29-41.

See: Miller N.G. & Shedd P (1979). Do Antitrust Laws Apply To The Real Estate Brokerage Industry? *American Business Law Journal*, 17(3): \_\_\_\_\_.

See: Owen B. M. & Kickbacks M. (1977). Specialization, Price Fixing, and Efficiency In Residential Real Estate Markets. *Stanford Law Review*, 29:931-967.

<sup>22</sup> See: Evans D (Sept. 2002). *The Antitrust Economics Of Two-Sided Markets*. AEI-Brookings Joint Center For Regulatory Studies, Washington DC.

See: Rochet J & Tirole J (Nov. 2001). Platform Competition In Two-Sided Markets. Financial markets Group Discussion paper #DP0409, [www.idea.asso.fr](http://www.idea.asso.fr).

See: Caillaud J & Jullien B (April 2001). *Chicken And Egg: Competing Match-makers*. CEPR Working Paper #2885.

See: Schmalensee R (June 2002). Payment Systems And Interchange Fees. *Journal of Industrial Economics*, 2:103-113.

See: Baxter W F (1983). Bank Interchange Of Transactional Paper: Legal And Economic Perspectives. *Journal Of Law & Economics*, 23(3):541-551.

<sup>23</sup> See: Katz M & Shapiro C (1985). Network Externalities, Competition, And Compatibility. *American Economic Review*, 75:424-434.

See: Chou C & Shy O (1990). Network Effects Without Network Externalities. *International Journal Of Industrial Organization*, 85:259-269.

See: Leibowitz S J & Margolis S E (1994). Network Externality: An Uncommon Tragedy. *Journal Of Economic Perspectives*, 8(2): 133-143.

e-commerce websites where owners can sell directly to buyers without intermediary brokers.

6. The studies have not analyzed whether MLS systems (as mechanisms, and independent of NAR policies), constitute violations of antitrust laws.

## 1.2 MLS Systems Constitute Violations Of Federal Antitrust Statutes

The MLS system as a market mechanism (and independent of NAR Policies on MLS systems), constitutes violations of antitrust laws.<sup>24</sup> The MLS system has significant market power and alters the nature of competition in local brokerage markets, because it excludes certain market participants, creates artificial prices for services and harms consumers and society in general by supporting high prices, reducing competition, increasing market-entry costs for prospective competitors, and forcing participating members to disclose all or most of their listing. The single-entity rule does not apply to MLS systems, because most of the participating brokers are distinct entities and compete with each other.<sup>25</sup>

### 1.2.1 Tying

<sup>24</sup> Contrast: *Freeman v. San Diego Association of Realtors*, 91 Cal.Rptr.2d 534 (Ct. App., Calif., 1999).  
 See: *Freeman et al v. San Diego Association Of Realtors*, 322 F3d 1133 (CA9, 2003).  
 See *Marin County Bd. of Realtors v. Palsson*, 16 Cal.3d 920, 937-38, 130 Cal.Rptr. 1, 549 P.2d 833 (1976).  
 See: *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985).  
 See: *Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop, Inc.*, 942 F.2d 1457 (CA9, 1991).  
 See: *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).  
 See: *Cont'l T.V.*, 433 U.S. at 59.  
 See: *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (CA1, 2002).  
 See: *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C.Cir., 2001).  
 See: Katz M L & Shapiro C (1985). Network Externalities, Competition, and Compatibility. *American Economic Review*, 75: 424-434.  
 See: *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).  
 See: *Arizona v. Maricopa County Med. Society*, 457 U.S. 332 (1982).  
 See: *Business Electronics. Corp. v. Sharp Electronics. Corp.*, 485 U.S. 717, 724 (1988) (price fixing).  
 See: *Plymouth Dealers' Association v. United States*, 279 F.2d 128 (CA9, 1960)(price fixing).  
<sup>25</sup> Contrast: *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268 (CA8, 1988)(a joint venture of independently owned regional electric cooperatives was a single entity).  
 See: *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (CA9, 1984)(NFL teams are not a single entity).  
 See: *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).  
 See: *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).  
 See: *United States v. Topco Assocs.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).  
 See: *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967).  
 See: Von Kalinowski J, et. al. (2000). *Antitrust Laws and Trade Regulation* § 11.02[2], at 11-17 (2d ed.2000).

The MLS is anti-competitive because it forces participating brokers to disclose all or most of their listings in the MLS; regardless of the stage service (initial discussions, versus pre-closing arrangements) and the state of the broker's relationships with the client. An originating broker that has just begun a relationship with a client is subject to a loss of significant income, if another participating broker intercedes and provides a matching buyer/seller. Similarly, an originating Broker who has invested a lot of effort with a client, may also lose most of the benefits of the transaction by disclosing the listing, if another broker presents a matching buyer/seller. A broker's primary asset is information. Hence, a broker should have and retain the right to decide if and when to disclose a listing in an MLS system.

Forcing the broker to disclose all its listings in MLS systems gives the broker strong incentives to: a) reduce the actual quality and amount of services provided to customers, b) focus on obtaining a price at which the transaction will clear, instead of addressing other elements of the transaction such as the mortgage terms, contingencies, outstanding liens, etc..

Secondly, forcing brokers to disclose all their listing in MLS systems, causes over-statements of the level of the activity in MLS systems, particularly in markets where non-exclusive brokerage contracts are common. This effect is likely to create artificial price supports in time of rising prices, and also create artificial price caps in times of falling prices; all of which are not beneficial to consumers.

### Price Fixing

Most MLS systems have illegal express or implied agreements among their members which require that they should not offer price discounts on brokerage fees to property buyers and sellers. Such agreements also typically specify the fees that the Referring Broker will charge the Originating Broker. Its well settled that under *Catalano* (1980)<sup>26</sup> that any Agreement not to offer price-discounts constitute violations of Section-1 of the Sherman Act.

### Illegal Division Of Markets

One major net effect of the MLS system is that it effectively divides local markets<sup>27</sup> into sub-markets, which constitutes a violation of antitrust laws. Under *Maricopa County Medical Society*, these divisions

<sup>26</sup> See: *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980).  
 See: *Freeman et al v. San Diego Association Of Realtors*, 322 F3d 1133 (CA9, 2003).  
 See *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir.1980) (MLS operator enforced illegal "reasonably ancillary restraints").  
 See: *Penne v. Greater Minneapolis Bd. of Realtors*, 604 F.2d 1143 (CA8, 1979) (discount commission broker was discriminated against under MLS rules pursuant to "punitive commission splits," and the practice was deemed illegal).  
 See: *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

<sup>27</sup> See: *Maricopa County Med. Society*, 457 U.S. at 344 n. 15 (division of markets is illegal).

define distinct sub-markets within the local market and are between: a) brokers who participate in MLS systems and brokers who don't participate in the MLS, b) non-brokers who retain brokers and non-brokers who don't retain brokers and hence, don't have access to MLS systems, c) customers who retain broker-members and can use the internet, and customers who don't or cannot afford to retain brokers; d) MLS members who provide services and data via websites, and MLS members who provide services and data without using the internet; e) .

These classifications of sub-markets are prevalent in MLS systems, and can have significant effects on property prices, quality of service and brokerage fees.

#### *Restraint On Trade*

In most instances, MLS systems determine the type, nature and quality of many services offered by participating member-brokers – hence the MLS effectively determines prices for brokerage services, and the “perceived value” that customers get in their interactions with brokers. By excluding certain individuals and brokers, and by setting brokerage prices and mandatory usage-of-trade, MLS systems effectively function as restraints on trade<sup>28</sup>.

#### *Monopoly And Excessive Market Power.*

The MLS maintains a near monopoly, and exerts illegal excessive market power because most brokers that operate in the local Market-Area are mandatorily required to participate in MLS systems. Such member-brokers are also required to disclose all or most of their listings in the MLS. Since most brokers have to participate in MLS systems, the MLS effectively constitutes the “market”, establishes the major terms of trade and usage of trade, and hence, has a substantial effect on the price formation process for property transactions by determining: a) the amount and type of information that is presented to a certain group of buyers, sellers, and brokers; and b) determining who has access to such information, c) determining the customers' perception of market liquidity and prices, d) determining the speed at which changes in prices are internalized in local markets. Thus, brokers and non-brokers who don't participate in MLS systems (directly or indirectly) are effectively shut out from a substantial portion of information and potential transactions in the market.

Similarly, MLS systems also exert significant influence on brokerage fees in local markets, by determining or influencing: a) the effectiveness of Referral brokers, b) customers' perceptions of the quality of services rendered by brokers, d) the nature and types of services provided by brokers, e) the actual brokerage commission rate for Originating Brokers, f) the actual brokerage commission rate for

Referral Brokers (which should be negotiated by the originating Broker and the Referral Brokers), g) the types of price discounts and rebates that the buyer/seller may get for brokerage fees.

#### *Market-Exclusion And Group Boycott*

The MLS system is anti-competitive and constitutes a market-exclusion mechanism because:

a) It expressly excludes some brokers who don't agree to abide by its terms.

b) It illegally excludes buyers and sellers, who are a major component of the market - under this theory of illegality, property buyers and sellers perform some of the functions of a real estate broker (such as search, price-formation, negotiation, contract review, etc.) and hence, are quasi-brokers. The advent of the Internet has made buyers and seller even more like brokers. Buyers and sellers are the actual creators and catalysts of MLS systems – by conveying their buy and or sell requests to brokers. In order to increase social welfare, buyers and sellers should have the same access to MLS data as brokers – non-brokers should be able to pay a fee to access MLS systems.

Murr (1980)<sup>29</sup> addresses three issues: (1) whether local real estate board rules that exclude non-member agents/brokers constitutes a group boycott under antitrust laws, (2) whether the goal of professionalization is a legitimate objective under the antitrust laws, and (3) what antitrust test should be applied to MLS exclusion cases. Murr (1980) found that professionalization is a legitimate goal under the antitrust law but that it does not justify unreasonably anticompetitive behavior, and MLS exclusion is a group boycott under the antitrust laws, and also that since professionalization is attainable without MLS exclusion, MLS systems constitutes a violation of antitrust laws. Murr's (1980)<sup>30</sup> analysis remains valid, and is even more appropriate now given the increasing use of the internet which continues to increase the volume of interstate transactions – more out-of-state buyers and brokers are likely to be interested in in-state properties, and vice-versa.

### **1.3 NAR's Policies Pertaining To MLS Systems Constitute Violations Of Federal Antitrust Statutes**

The National Association of Realtors (“NAR”) is a US trade association that has more than 1.2 million residential real-estate brokers as members. In most parts of the US, real estate brokers have organized MLSs, and more than 80 percent of the 1,000 MLSs in the U.S. are affiliated with NAR (source: DOJ;

<sup>28</sup> See *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir.1980) (MLS operator enforced “reasonably ancillary restraints”).

See: *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>29</sup> See: Murr M (1980). The Professionalization of Real Estate Brokerage And The Problem Of Multiple Listing Service Exclusion: A Sherman Act Analysis. *Texas Law Review*, 59(1):125-154.

<sup>30</sup> See: Murr (1980)(*supra*).

industry publications). In the 1990s, NAR members began creating password-protected Web sites known as Virtual Office Web sites (VOWs) that enabled potential home-buyers to search the Market-Area's MLS database, provided they registered as customers of the broker and agreed to certain restrictions. For many brokers with internet business models, VOWs have replaced traditional search, and resulted in lower brokerage fees for the customer. In response to concerns raised by certain NAR members competition from internet based real estate brokers, NAR's Board of Directors voted on May 17, 2003, to adopt the VOW Policy, a "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Websites')." NAR implemented policies related to the use of MLS which are anti-competitive (collectively, the "NAR Policy"). However, NAR has been opposed to use of VOWs, because it believes that Internet-based business models were a major competitive challenge to those brokers that use only traditional methods of providing information to their customers. NAR implemented a policy on the use of VOWs by MLS participants (the "Policy" or "NAR Policy"), and requested that its member boards (1,600 boards) implement the VOW Policy by January 1, 2006. As of December 2005, at least two hundred member boards had received NAR's approval of their implementing rules.

Section I.3 of the NAR Policy contains an opt-out provision that forbids any broker from participating in an MLS if they convey a listing to his or her customers via the Internet without the permission of the listing broker. The NAR Policy allows a traditional broker to block other broker's customers from using the Internet/VOW to review the same set of MLS listings provided by the traditional broker. Before the implementation of the NAR Policy, a broker could choose the method by which it conveyed MLS information to its customer (internet or physical contact), but the NAR Policy restricts the manner in which brokers with efficient, Internet-based models may provide listings to their customers. Where the broker chooses not to use VOWs, the NAR Policy does not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the brokers' opt-out decision.

### 1.3.1 Technological Innovation

Internet penetration has reach 70% and broadband penetration has exceeded 60% in the US. Internet is increasingly used in business transactions. Much of the time-consuming processes in real estate transactions involves searches and comparison, which can be made much more efficient and cheaper with the Internet.<sup>31</sup>

*Home Buying: How IT Can Empower Individuals, Slash Costs, and Transform the Real Estate Industry,*" Progr. Pol. Inst., Policy Report, March 2003, at 1.

See: US Federal Trade Commission & US Department Of Justice (April 2007). *Competition On The Real Estate Brokerage Industry*. <http://www.usdoj.gov/atr/public/reports/223094.pdf>; <http://www.usdoj.gov/atr/public/reports/223094.htm#II>.

See: *The Changing Real Estate Market: Hearing Before the House Financial Services Subcommittee on Housing and Community Opportunity*, 109th Cong. 1 (2006) (testimony of David G. Wood, Director, Financial Markets and Community Investment, Government Accounting Office), available at <http://financialservices.house.gov/media/pdf/072506dgdw.pdf>. In 2006, real estate brokers' commissions in the US exceeded \$60 billion.

See: National Association Of Realtors (2006). *NATIONAL ASSOCIATION OF REALTORS Profile of Home Buyers and Sellers*; 34, 38. (for the 12-month period that ended in June 2006). According to this survey, in 2006, Eighty Percent of home buyers used the Internet during their home search in 2006, and Twenty-Four Percent of home buyers used the Internet to locate the home that they purchased (compared to only Two Percent of home buyers that used the Internet to find the home that they purchased in 1997).

See: Ohlhausen M (March 2006). Minimum-Service Requirements in Real Estate Brokerage: A Reply to Darryl Anderson. *Antitrust Source*. (the hold-up theory does not apply to fee-for-service real estate brokerage).

See: Pancak K A, *et al.* (1997). Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers. *Real Estate Law Journal*, 25: 345-355.

See: Evans B (Feb. 24, 2005). *Where Real Estate Associations Stand On MLS-Entry-Only Listings*. *Realty Times*, Feb. 24, 2005, available at [http://realtytimes.com/rtapages/20050224\\_mlsentryonly.htm](http://realtytimes.com/rtapages/20050224_mlsentryonly.htm).

See: Woodall P & Brobeck S (Consumer Federation Of America)(June 2006). *How The Real Estate Cartel Harms Consumers And How Consumers Can Protect Themselves*. Available at [http://www.consumerfed.org/pdfs/Real\\_Estate\\_Cartel\\_Study061906.pdf](http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf).

See: Sirmans C & Turnbull G K (1997). Brokerage Pricing Under Competition. *Journal of Urban Economics*, 41:102-110.

See: U.S. Department of Housing and Urban Development (Nov. 2006). *U.S. Housing Market Conditions*. Available at: [http://www.huduser.org/periodicals/ushmc/fall06/USHMC\\_Q306.pdf](http://www.huduser.org/periodicals/ushmc/fall06/USHMC_Q306.pdf).

See: Benjamin J, Jud G & Sirmans G S (2000). What Do We Know About Real Estate Brokerage ? *Journal of Real Estate Research*, 20:5-15.

See: Delcours N & Miller N G (2002). International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry. *International Real Estate Review*, 5:12-29.

See: Yavas A (2001). Impossibility Of A Competitive Equilibrium in the Real Estate Brokerage Industry. *Journal Of Real Estate Research*, 21:187-197.

See: Buttner R J (1998). A Contingent Claims Analysis of Real Estate Listing Agreements. *Journal Of Real Estate Finance & Economics*, 16: 257-267.

See: Weicher J C (Nov. 2005). *The Price Of Residential Real Estate Brokerage Services: A Review of the Evidence, Such As It Is*. Presented at AAI Conference on Competition In The Residential Real Estate Brokerage Industry; Nov. 8, 2005.

See: Turnbull G K (1996). Real Estate Brokers, Non-Price Competition And the Housing Market. *Real Estate Economics*, 24:293-303.

See: Sawyer S (2005). Local Real Estate Market Competition: Evidence And Insight From An Analysis Of Twelve Local Markets. (available at <http://www.realtor.org/publicaffairsweb.nsf/Pages/Sawyer05?OpenDocument>).

<sup>31</sup> See: Danielle Reed, "Armed to Buy: Home Buyers Hunting Deals Go Online for Ammunition," *The Wall Street Journal*, May 2, 2003, at W10; Shane Ham and Robert D. Atkinson, "Modernizing

Hence, the NAR Policy violates US antitrust laws because it unnecessarily reduces the use of an efficiency-increasing mechanism (the Internet) in transactions, and its an express and implied restriction on trade, innovation and necessary technological advancement. Real estate licensing and regulatory bodies should incorporate technology into brokerage processes in order to conserve resources and encourage competition while at the same time, adopting measures to safeguard the public. The NAR Policy expressly discourages entrepreneurs from building effective web-based real estate search and transaction systems.

### 1.3.2 Restraints On Trade; Brokerage Fee Issues

The NAR Policy reduces competition among brokers because it effectively creates and supports an inefficient business model (offline brokerage services) that: **a)** reduces availability of information to buyers and sellers, **b)** discriminates against one form business method (Internet brokerage); **c)** increases information asymmetry and buyer/seller search costs; **d)** discriminates between those that know how to search

on the internet or can afford search services and those that cannot; **e)** prevents the use of a business model that results in lower brokerage fees for home-sellers. All these results are the direct effects of the NAR Policy and create liability under the Sherman Act.

### 1.3.3 Property Price, Artificial Prices and Quality

The NAR policy facilitates price fixing because in the physical transactions model, sellers don't have access to all available information in formats that are easily comprehended – information asymmetry facilitates price-fixing. Hence, owner-sellers face a time/price tradeoff because they cannot list their properties forever while waiting for the right price; and sellers incur search costs and carrying costs while trying to sell their property. In physical-space transactions, Brokers have strong incentives to artificially maintain property prices in order to maximize their commissions. In physical-space transactions, Brokers have excessive discretion about the transaction processes; brokers have excessive influence on the price setting process because brokers can vary the amount/quality of information disclosed to buyer or seller; Brokers will typically control access to MLS listings, and engage in physical dialogue with sellers to convince them about certain price levels, etc.

### 1.3.4 Barriers To Entry

The NAR policy un-necessarily raises the barriers to entry into the real estate brokerage business because the Internet reduces search costs and operating costs of brokers. Operating in physical space requires substantially more physical space, more staff and more resources (than internet operations), all of which increase the cost of starting a new brokerage business. The NAR policy is anti-competitive because it statutorily and mandatorily precludes a very viable, cheaper and more efficient business model which is normal and justifiable given the increasing use of the internet in business transactions worldwide.

- See: Hsieh C & Moretti E (2003). Can Free Entry Be Inefficient? Fixed Commissions And Social Waste in the Real Estate Industry. *Journal of Political Economy*, 111:1076-1098.
- See: Yun L., PHD, Senior Economist, National Association of Realtors; Presentation at the Federal Trade Commission & US Department of Justice Public Workshop: *Competition Policy and the Real Estate Industry, Real Estate Brokerage Industry: Structure-Conduct-Performance*, at 9 (Oct. 25, 2005), available at <http://www.ftc.gov/opp/workshops/comprealestate/yun.pdf>.
- See: Anglin P & Arnott R (1999). Are Brokers' Commission Rates On Home Sales Too High? A Conceptual Analysis. *Real Estate Economics*, 27: 719-721.
- See: Sawyer S., et al. (2005). Redefining Access: Uses And Roles of Information and Communication Technologies In The US Residential Real Estate Industry from 1995 to 2005. *Journal Of Information Technology*, 20:213-223.
- See: Rutherford R. C., et al. (2005). Conflicts Between Principals and Agents: Evidence From Residential Brokerage. *Journal of Financial Economics*, 76:627-637.
- See: Levitt S D & Syverson C (2005). *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate*. NBER Working Paper 11053, 2005); available at <http://www.nber.org/papers/w11053>.
- See: Olazabal A M (2003). Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses. *Harvard Journal On Legislation*, 40:65-75.
- See: Erxleben W (1981). In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel. *Washington Law Review*, 56: 179-185.
- See: Nadel M S (Oct. 2006). *A Critical Assessment of the Standard, Traditional Residential Real Estate Broker Commission Rate Structure*. American Enterprise Institute-Brookings Joint Center for Regulatory Studies (Oct. 2006), available at <http://www.aei-brookings.org/publications/abstract.php?pid=1119>.
- See: de R. Barondes R & Slawson V C (2005). *Examining Compliance With Fiduciary Duties: A Study of Real Estate Agents*. *Oregon Law Review*, 84: 681-689.
- See: Miceli T, et al. (2000). Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis. *Journal Of Real Estate Research*, 20: 34-39.
- See: Curran C & Schrag J. (2000). Does it Matter Whom and Agent Serves? Evidence from Recent Changes in Real Estate Agency Law. *Journal Of Law & Economics*, 43:265-269.

**Table 1. Brokerage Options and Potential Savings on Home Sold for \$225,334**

Option	Seller's Broker Commission	Buyer's Broker Commission	Total Commission	Saving
Full-Service (5.18% commission)	\$5,836	\$5,836	\$11,672	\$0
Option 1: Buyer's Broker Rebate (1%)	\$5,836	\$3,583	\$9,419	\$2,253
Option 2: Fee-for-Service, MLS Only	\$500	\$5,836	\$6,336	\$5,336
Options 1 and 2 Combined	\$500	\$3,583	\$4,083	\$7,589

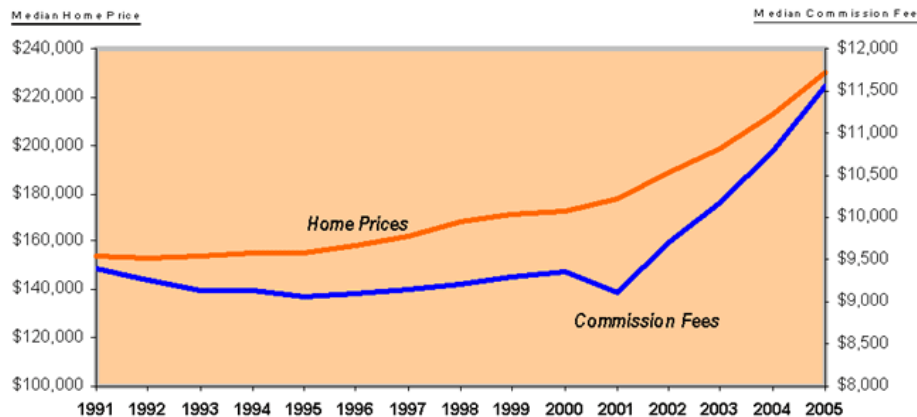
Source: US Department Of Justice, [http://www.usdoj.gov/atr/public/real\\_estate/commission\\_table.htm](http://www.usdoj.gov/atr/public/real_estate/commission_table.htm).

**Table 2. Commission Rates and Real Commission Fees: 1991-2005**

Year	Commission Rates	Median Home Prices		Commission Fees	
		2006 Dollars	% Change	2006 Dollars	% Change
1991	6.10%	\$153,925		\$9,389	
1992	6.04%	\$153,235	-0.45%	\$9,255	-1.43%
1993	5.94%	\$153,632	0.26%	\$9,126	-1.40%
1994	5.88%	\$155,145	0.98%	\$9,123	-0.04%
1995	5.83%	\$155,365	0.14%	\$9,058	-0.71%
1996	5.75%	\$158,029	1.71%	\$9,087	0.32%
1997	5.64%	\$162,168	2.62%	\$9,146	0.66%
1998	5.48%	\$167,881	3.52%	\$9,200	0.59%
1999	5.44%	\$171,031	1.88%	\$9,304	1.13%
2000	5.42%	\$172,427	0.82%	\$9,346	0.45%
2001	5.12%	\$177,939	3.20%	\$9,110	-2.52%
2002	5.14%	\$188,634	6.01%	\$9,696	6.42%
2003	5.12%	\$198,557	5.26%	\$10,166	4.85%
2004	5.08%	\$212,655	7.10%	\$10,803	6.26%
2005	5.02%	\$230,059	8.18%	\$11,549	6.91%

Sources: Commission rates are from *REAL Trends 500*®; real median home prices are from U.S. Department of Housing and Urban Development, *U.S. Housing Market Conditions*, 4th Quarter 2006, Tables 6-9 (Feb. 2007), and are a weighted average of new and existing home prices, based on annual sales; median home prices are converted into 2006 dollar with consumer price index for all goods for all urban consumers (CPI-U) from Bureau of Labor Statistics (<http://data.bls.gov/PDQ/servlet/SurveyOutputServlet>); commission fees are calculated by multiplying commission rates by real median home prices.

**Table 3. Median Home Prices And Median Commission Fees Per Transaction (US)**





### 1.3.5 Collusion

The NAR policy encourages collusion among local brokers to set artificial prices for specific types of properties<sup>32</sup>. Explicit, implicit, intended and unintended Collusion occur or can reasonably be construed to occur in MLS systems because:

a) The universe of brokers is relatively small and restricted.

b) The volume of information is reduced drastically.

c) Brokers who operate only in physical space use printed MLS and can change customer (homeowner and buyer) perceptions of offering terms and prices more quickly than those that operate via VOWs.

d) It encourages physical-space brokers to refer some purchase/sale transactions to internet-space brokers and vice versa, depending on the size, composition, location, tenancy, ownership, price, expected time-on-the-market, and quality of the property;

e) It encourages physical-space brokers to reject some otherwise viable seller-customers and to provide unreasonable sales price estimates;

f) It encourages both internet-space and physical space brokers to provide biased advice to seller-customers because broker effort and broker compensation is determined by property 'exposure' and are more mismatched under the NAR Policy than without the NAR Policy. That is:

$$[(\partial C_i / \partial E_i) - (\partial C_p / \partial E_p)] > [(\partial C_{in} / \partial E_{in}) - (\partial C_{pn} / \partial E_{pn})]$$

$C_i$  = compensation payable to real estate broker if VOW is used.

$E_i$  = broker's effort for transaction if VOW is used. Effort is measured in terms of hours monetary value of spent.

$C_p$  = compensation payable to real estate broker if transaction is done in physical space.

$E_p$  = broker's effort for transaction if transaction is done in physical space. Effort is measured in terms of hours monetary value of spent.

$C_{in}$  = Compensation payable to broker if VOW is used, and there is no NAR Policy.

$E_{in}$  = broker's effort for transaction if VOW is used, and there is no NAR Policy. Effort is measured in terms of monetary value of hours spent and thought product.

$C_{pn}$  = compensation payable to broker if transaction is done in physical space, and there is no NAR Policy.

$E_{pn}$  = broker's effort for transaction if transaction is done in physical space, and there is no NAR Policy. Effort is measured in terms of monetary value of hours spent and thought product.

The NAR Policy reduces availability of information<sup>33</sup>, and in any local market, encourages brokers who operate only in physical space to band together to determine prices.

### 1.3.6 Exclusion And Group Boycott

As discussed above, Murr (1980)<sup>34</sup> found that professionalization does not justify unreasonably anticompetitive behavior, and MLS exclusion is an illegal group boycott under the antitrust laws, and also that since professionalization is attainable without MLS exclusion, MLS systems constitutes a violation of antitrust laws. Murr's (1980) analysis remains valid and renders the NAR Policy invalid, and is even more appropriate now given the increasing use of the Internet and increasing volumes of interstate transactions.

### 1.4 The US DOJ's Lawsuit Against NAR

On September 8, 2005, the US Department of Justice (DOJ) filed a civil lawsuit pursuant to Section 4 of the Sherman Act to enjoin NAR from maintaining and enforcing its policy pertaining to MLS and VOWs (*United States of America v. National Association of Realtors*<sup>35</sup>). The DOJ argued that the NAR Policy

<sup>33</sup> See: Dolde W & Tirtiroglu D (1997). Temporal And Spatial Information Diffusion In Real Estate Price Changes And Variances. *Real Estate Economics*, 25(4): 539-565.

See: Pollakowski H & Ray T (2000). Housing Price Diffusion Patterns At Different And Aggregation Levels: An Examination Of Housing Market Efficiency. *Journal Of Housing Research*, 8(1): 107-117.

<sup>34</sup> See: Murr M (1980). The Professionalization of Real Estate Brokerage And The Problem Of Multiple Listing Service Exclusion: A Sherman Act Analysis. *Texas Law Review*, 59(1):125-154.

<sup>35</sup> See: *United States of America v. National Association of Realtors*, \_\_\_ F3d \_\_\_ (2005).

See:

[http://www.usdoj.gov/atr/public/press\\_releases/2005/211008.htm](http://www.usdoj.gov/atr/public/press_releases/2005/211008.htm);  
<http://nationalrealtynews.com/content/templates/standard.aspx?articleid=1014&zoneid=1>;

[http://www.realtor.org/law\\_and\\_policy/the\\_department\\_of\\_justice\\_lawsuit](http://www.realtor.org/law_and_policy/the_department_of_justice_lawsuit);

See: DOJ's original complaint - *United States v. Nat'l Ass'n of Realtors*, Civ. Action No.05C-5140 (N.D. Ill. filed Sept. 8, 2005), available at <http://www.usdoj.gov/atr/cases/f211000/211009.pdf>.

[http://www.realtor.org/MemPolWeb.nsf/214c1520b27c9ee286256b2600557d81/3461f097f47812b686257076004de7ac/\\$FILE/Complaint.PDF](http://www.realtor.org/MemPolWeb.nsf/214c1520b27c9ee286256b2600557d81/3461f097f47812b686257076004de7ac/$FILE/Complaint.PDF);

See: Press Release, Department of Justice, Department of Justice Amends Antitrust Lawsuit Against National Association of Realtors (Oct. 4, 2005) available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/211754.htm](http://www.usdoj.gov/atr/public/press_releases/2005/211754.htm).

See: NAR's Motion To Dismiss - <http://www.realtor.org/realtororg.NSF/pages/NARFilesMotion>;  
[http://www.realtor.org/realtororg.nsf/files/NAR\\_Motion\\_to\\_dismiss\\_lawsuit.pdf/\\$FILE/NAR\\_Motion\\_to\\_dismiss\\_lawsuit.pdf](http://www.realtor.org/realtororg.nsf/files/NAR_Motion_to_dismiss_lawsuit.pdf/$FILE/NAR_Motion_to_dismiss_lawsuit.pdf);

See: May 2008 Proposed Settlement - <http://www.inman.com/news/2008/05/28/industry-reacts-doj-vs-nar-settlement-proposal>.

<sup>32</sup> See: *Arizona v. Maricopa County Medical Society*, \_\_\_ US \_\_\_ (1982); See: *Federal Trade Commission v. Superior Court Trial Lawyers Association*, \_\_\_ US \_\_\_ (1990); See: *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, \_\_\_ US \_\_\_ (1979); See: *NCAA v. Board of Regents*, \_\_\_ US \_\_\_ (1984). S

See: Federal Trade Commission and U.S. Department of Justice, *Draft Antitrust Guidelines for Collaborations Among Competitors* (Oct. 1, 1999).

suppresses technological innovation, discourages competition on price and quality, raises barriers to entry and harms consumers. The presiding judge dismissed NAR's Motion-To-Dismiss. On or around May 30, 2008, DOJ and NAR submitted a Proposed Settlement to the Court, which the Court was to consider<sup>36</sup>. Under the proposed settlement: a) NAR would not admit any guilt, and would agree to enforce certain practices for ten years; b) NAR will not treat Internet-based brokerage companies differently from traditional brokers, c) Brokers participating in a MLS will not be permitted to withhold their listings from brokers who serve their customers through virtual office Web sites; d) Brokers will be able to use virtual offices to educate consumers, make referrals, and conduct brokerage services; e) NAR will implement antitrust-compliance training programs that will instruct real estate groups about the antitrust laws and the requirements of the proposed settlement; f) NAR will report any allegations of non-compliance to the US Department of Justice.

The key issues pertaining to *US v. NAR*, and the proposed settlement<sup>37</sup> are that:

a) The judicial forum may be the wrong enforcement mechanism for anti-trust violations in the real estate brokerage industry. Firstly, the cost of enforcing any judge's orders will be significant – 1) NAR does not have any prosecutorial or investigative power, 2) only the US DOJ and state agencies can prosecute antitrust violations or violations of any Settlement Agreement. The court proceedings will be subject to federal rules of evidence, which may exclude inferences, circumstantial evidence, and evidence deemed to be obtained illegally – all of which will reduce enforcement efforts.

The Proposed Settlement in *US v. NAR* does not address the effects of internet based disintermediation of real estate brokers. There are many websites on which owner-sellers can list their properties for sale (in addition to exclusive and non-exclusive sale agreements with brokers). The MLS can prohibit buyers and sellers who contract with a broker, from listing their property on non-MLS websites. In the case of exclusive brokerage agreements and super-exclusive brokerage agreements, and where the MLS systems requires that the broker post all its listings in the MLS system, the MLS system constitutes: a) an un-constitutional mechanism that violates the buyers/sellers right to contract because the property may be exposed to un-intended recipients in the MLS system, b) an un-constitutional restraint on the buyers/sellers and broker's freedom-of-speech because the MLS system compels a specific pattern of speech, and also restricts the broker's speech and the buyer's/seller's speech, and the MLS system is sanctioned by states and by the Proposed Settlement Agreement; c) an illegal restraint on trade because the buyer/seller is forced to present his/her property to persons that he/she may not desire. The Proposed Settlement Agreement is essentially a "State action" that is likely to trigger constitutional law litigation challenges of NAR and the MLS systems.

The Proposed Settlement in *US v. NAR* does not address the effects of internet based disintermediation of MLS systems. MLS member-brokers can list properties in auction websites, and on real estate advertising websites. MLS systems can prohibit

See: Civil Action #3:05-cv-00188-S; *United States Of America v. Kentucky Real Estate Commission* (WDKY, 2005).

See: Department Of Justice, Press Release #05-422 (August 17, 2005); Press Release #05-371 (July 13, 2005); Press Release # 05-261 (May 12, 2005).

See: *Lafayette v. Louisiana Power & Light Co*, 435 U.S. 389 (1977).

See: *Arizona v. Maricopa County Medical Society*, \_\_\_ US \_\_\_ (1982);

See: *Federal Trade Commission v. Superior Court Trial Lawyers Association*, \_\_\_ US \_\_\_ (1990);

See: *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, \_\_\_ US \_\_\_ (1979);

See: *NCAA v. Board of Regents*, \_\_\_ US \_\_\_ (1984).

<sup>36</sup> See: Proposed Settlement Order (May 30, 2008) - <http://www.usdoj.gov/atr/cases/f233600/233607.pdf> or <http://www.usdoj.gov/atr/cases/f233600/233607.htm>.

<sup>37</sup> See: Olazabal A M (2003). Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses. *Harvard Journal On Legislation*, 40:65-75.

See: US Federal Trade Commission & US Department Of Justice (April 2007). *Competition On The Real Estate Brokerage Industry*. <http://www.usdoj.gov/atr/public/reports/223094.pdf>; <http://www.usdoj.gov/atr/public/reports/223094.htm#II>.

See: *The Changing Real Estate Market: Hearing Before the House Financial Services Subcommittee on Housing and Community Opportunity*, 109th Cong. 1 (2006) (testimony of David G. Wood, Director, Financial Markets and Community Investment, Government Accounting Office), available at <http://financialservices.house.gov/media/pdf/072506dgw.pdf>. In 2006, real estate brokers' commissions in the US exceeded \$60 billion.

See: National Association Of Realtors (2006). *NATIONAL ASSOCIATION OF REALTORS Profile of Home Buyers and Sellers*; 34, 38. (for the 12-month period that ended in June 2006). According to this survey, in 2006, Eighty Percent of home buyers used the Internet during their home search, and Twenty-Four Percent of home buyers used the Internet to locate the home that they purchased (a significant increase from the Two Percent of home buyers that used the Internet to find the home that they purchased in 1997).

See: Pancak K A, et al. (1997). Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers. *Real Estate Law Journal*, 25: 345-355.

See: Woodall P & Brobeck S (Consumer Federation Of America)(June 2006). *How The Real Estate Cartel Harms Consumers And How Consumers Can Protect Themselves*. Available at [http://www.consumerfed.org/pdfs/Real\\_Estate\\_Cartel\\_Study061906.pdf](http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf).

See: Yavas A (2001). Impossibility Of A Competitive Equilibrium in the Real Estate Brokerage Industry. *Journal Of Real Estate Research*, 21:187-197.

See: Hsieh C & Moretti E (2003). Can Free Entry Be Inefficient? Fixed Commissions And Social Waste in the Real Estate Industry. *Journal of Political Economy*, 111:1076-1098.

See: Miceli T, et al. (2000). Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis. *Journal Of Real Estate Research*, 20: 34-39.

See: DOJ's competitive Impact Statement in *US v. NAR*. <http://trclaw.googlepages.com/HHICIS.pdf>.

participating brokers from listing some or all of their contracted properties on other types of non-MLS websites.

In *US v. NAR*, the Proposed Settlement (and perhaps any Court Order) does not solve the basic issue of the appropriateness, fairness and magnitude of real estate brokerage commissions, and the methods that such commissions are established. The MLS systems typically establishes fixed brokerage commission rates for originating Brokers and Referral Brokers. Hence, there is no competitive market for brokerage commissions. This creates a significant mismatch between broker effort and broker compensation which is detrimental to social welfare and is illegal and is supported by MLS systems, even where state statutes have specified the minimum levels of services that should be provided by real estate brokers. Buyers and sellers should be allowed to determine brokerage commissions based on the value they get from brokers' services. Some REWs have implemented flat-rate fees and variable percentage fees for real estate brokerage services.

In *US v. NAR* (and any court action), any Court order cannot not address differences among exclusive brokerage contracts, super-exclusive brokerage contracts, and non-exclusive brokerage contracts. These three types of contracts represent very different states of the world; and hence have dramatically different value to any one pair of consumer and broker. Hence, the inability to address these three regimes in any Court order effectively renders any Court order or court-mandated settlement as anti-competitive, because it would restrain trade under any one regime. In addition there are three other dimensions which add more complexity – physical brokerage, web-only brokerage and mixed/hybrid brokerage (various combinations of web and physical brokerage). Given the advent of the internet and 70%+ internet penetration, its obvious that the Mixed/hybrid model is becoming more prevalent – and even though some states have specified the minimum level of services that brokers should provide to customers (see Table-3), the variations in the brokers' combinations of web and physical brokerage services effectively renders traditional judicial actions redundant.

NAR member boards control the MLS systems, and will determine what is proper and improper conduct. NAR and the real estate brokerage business depend on social capital to attract and retain customers. NAR has very strong incentives to under-report any misconduct to the US Department of Justice, as required by the Proposed Settlement Agreement.

As organized and structured today, the MLS itself constitutes a violation of antitrust laws: 1) it places excessive power over the local and regional real estate markets in the hands of some real estate brokers; 2) it reduces transparency to buyers and sellers who cannot afford to or don't want to recruit brokers; 3) it forces market participants to conform to specific rules and

norms that are not beneficial and increases their transaction costs.

The efficiency of the MLS and its contribution to, or reduction of social welfare (and hence the usefulness of any government expenditure on monitoring and enforcement) is an inverse (and perhaps exponential) function of the growth of "alternative systems" (such as "for-sale-by-owner" sites, auction websites, real estate advertising websites and other ecommerce sites). While Courts and the government are focusing their efforts on regulating MLS systems, an increasing number of transactions are, and will be occurring outside MLS systems because of the Internet. Most parts of the US have IDX (Internet Data Exchange) solutions and most homes are listed on the IDX. IDX sites allow MLS member-brokers to publicly display property listings on the Web that is shared by other MLS members without requiring consumers to register to view this content. For example RE/MAX's own IDX website provides free access to about 4.5 million property listings without registration; and there are many similar IDX websites and other websites that provide free property information. The Proposed Settlement would require consumers to supply a verified e-mail address in order to access potentially richer MLS data at VOW Web sites. See: <http://www.inman.com/news/2008/05/28/blogosphere-reacts-proposed-nardoj-settlement>.

In *US v. NAR*, the Proposed Settlement Agreement still leaves room for NAR to require MLSs to adopt rules that restrict (or condition MLS access rights on) the method by which a broker interacts with his or her customers, competing brokers, or other persons or entities;

Hence, the US DOJ lawsuit and the Proposed Settlement Agreement are probably redundant

## **II. Professional Licensing Requirements For Real Estate Websites ("REWs") Constitutes A Violation Of Antitrust Laws**

The state-law professional licensing requirements for real estate websites ("REWs") constitute violations of US federal antitrust laws. See Table-3 below. During 1995-2003, Real estate transactions websites ("REWs" – such as [www.ziprealty.com](http://www.ziprealty.com), [www.forsalebyowner.com](http://www.forsalebyowner.com), [www.homestore.com](http://www.homestore.com), [ForSaleByOwner.com](http://ForSaleByOwner.com), [BuyOwner.com](http://BuyOwner.com), [PrivateSale.com](http://PrivateSale.com), [FSBO.com](http://FSBO.com), etc.) played an important role in transmission of information about home prices and macroeconomic indicators, and in improving market transparency, and providing transaction support/processing<sup>38</sup>. These REWs

<sup>38</sup> See: Pollakowski H & Ray T (2000). Housing Price Diffusion Patterns At Different And Aggregation Levels: An Examination Of Housing Market Efficiency. *Journal Of Housing Research*, 8(1): 107-117.

See: [http://www.ij.org/first\\_amendment/nh\\_free\\_speech/4\\_1\\_08pr.html](http://www.ij.org/first_amendment/nh_free_speech/4_1_08pr.html).

collectively, represent at least twenty percent of housing market activity in the US. Prospective home buyers can obtain information from the REWs and other websites about mortgages, property insurance, home repair costs, recent home sales, insurance, appraisals, comparable properties, and about most elements of the home purchase/sale decision. The Progressive Policy Institute estimates that using information technology to its full potential could reduce the transaction costs of home buying by Fifty Percent, and save homeowners nearly \$40 billion a year (2004)<sup>39</sup>.

The legislative history of most of these licensing statutes show that the public policy goals were to protect the public from fraud and unfair business practices by online website operators.<sup>40</sup> For the same reasons state above, the state laws that require professional licensing of REWs constitute violations of antitrust laws.

Courts seem to have defined a 'real estate broker' in similar ways<sup>41</sup>. According to the US Department of Justice and industry sources, real estate brokers have performed virtually all services related to buying and selling a home, such as the following:

a) Determining the needs of buyers and sellers; and their financial and borrowing capacity. Providing prospective buyers and sellers with data

about a community such as relative property values and property taxes, and financing alternatives.

b) Locating Property for buyers and sellers.

c) Marketing the home - services include listing the property in the local multiple listing service (MLS), advertisements in local media and on the Internet, sending flyers, and hosting open houses.

d) Reviewing contracts - this may include providing advice on pricing, home inspections or other contractual terms.

e) Negotiating with potential home buyers and sellers.

f) Arranging for prospective buyers to inspect properties.

g) Assisting in the formation and negotiation of offers, counter offers, and acceptances.

h) Assisting with the closing of the transaction - such as assistance paperwork.

The use of the Internet has reduced the search efforts that brokers were previously responsible for.

On or around March 30, 2008, a New Hampshire Federal District Court ruled that a REW (ZeroBrokerFees.com) did not have to obtain a real estate license in order to serve online customers<sup>42</sup>. Although the plaintiff's claims were based on constitutional issues (First Amendment Rights; free speech), the Court's ruling did not address any constitutional issues (First Amendment Rights) and did not address antitrust issues, but merely found that the REW was exempted from the provisions of the professional licensing statute based on statutory interpretation.

In *Zerobrokerfees.com*, the Court reasoned that:

".....The record here readily demonstrates that plaintiff does not conduct its business as any sort of agency arrangement with its clientele. The undisputed facts are that plaintiff does not advance the interests of either the seller or buyer, other than by facilitating the transmission of information.

<sup>39</sup> See: Danielle Reed, "Armed to Buy: Home Buyers Hunting Deals Go Online for Ammunition," *The Wall Street Journal*, May 2, 2003, at W10;

See: Shane Ham and Robert D. Atkinson (March 2003). *Modernizing Home Buying: How IT Can Empower Individuals, Slash Costs, and Transform the Real Estate Industry*. Progressive Policy Institute - Policy Report, March 2003, at 1.

See: Bridget McCrea, "Dream on: FSBOs aren't dead," *Inman News Features*, September 6, 2002.

See: Lesley Mitchell, "For Sale by Owner a Growing Trend in Housing Market," *The Salt Lake Tribune*, March 17, 2003.

See: Sue Levin, "Doing homework on Web can make home-buying easier," *The Columbus Dispatch*, March 3, 2003.

See: Benita Newton, "4 Sale By Web Site," *Newsweek*, September 23, 2002.

See: Kelly Zito, "The 6% solution: Home sellers looking for ways around the usual real estate commission," *The San Francisco Chronicle*, March 9, 2003.

See: "Fewer Californians Able to Afford Homes," *Inman News Features*, May 8, 2003.

See: Steve Kerch (August 23, 2002). "Signs of the Times: Ten tips for selling homes on your own," *The San Francisco Examiner*, August 23, 2002.

See: The Freddie Mac Reporter Fact Book, 2002-2003 at 7, 21, 48 and 63, (available at <http://www.freddiemac.com>) (compiling statistics on national housing market from census and other data sources).

<sup>40</sup> See: *Corkin v. Elger Corp.*, 106 N.H. 522, 523, 214 A.2d 740, 741 (1965).

See: *Blackthorne Group, Inc. v. Pines of Newmarket, Inc.*, 150 N.H. 804, 806, 848 A.2d 725, 728 (2004)

See: *Suburban Realty, Inc.*, 131 N.H. at 692, 559 A.2d at 1334.

<sup>41</sup> See: *In re Wehringer's Case*, 130 N.H. 707, 720, 547 A.2d 252 (1988).

See: *Crowley v. Global Realty, Inc.*, 124 N.H. 814, 819, 474 A.2d 1056, 1059 (1984).

<sup>42</sup> See: *Skynet Corporation, d/b/a ZeroBrokerFees.com v. Arthur Slattery, et. al.*, Civil No. 06-cv-218-JM, (US District Court For New Hampshire, 2008). <http://rerclaw.googlepages.com/3-31-08SkynetvSlattery-Opinion.pdf>.

See: *ForSaleByOwner.com v. Zinneman*, 347 F.Supp.2d 868, 877 (E.D. Cal., 2004). [http://www.ij.org/first\\_amendment/ca\\_internet\\_real\\_estate/bac kgrounder.html](http://www.ij.org/first_amendment/ca_internet_real_estate/bac kgrounder.html).

See: *Taucher v. Born*, 53 F.Supp.2d 464 (D.D.C. 1999).

See: *Virginia State Board of Pharmacy*, 425 US at 748 (1976).

See: *Central Hudson Gas & Electric Corp. v. Public Service Commission Of NY*, 447 US 557 (1980).

See: *Thompson v. Western States Medical Center*, 122 S.Ct. 1497 (2002).

See: *City of Cincinnati v. Discovery Network Inc.*, 507 US 410 (1993).

See: *Greater New Orleans Broadcasting Association Inc. v. United States*, 527 US 173 (1999).

See: *Western States Medical Center*, 122 SCT 1507.

See: *R.A.V. v. City Of St. Paul, Minnesota*, 505 US 377 (1992).

See: *Chicago Lawyers Committee for Civil Rights Under Law v. Craigslit*.

[http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=rss\\_sho&shof ile=07-1101\\_021.pdf](http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=rss_sho&shof ile=07-1101_021.pdf)

Neither plaintiff nor any of its employees hold themselves out to be real estate brokers or agents. Plaintiff's website clearly states: "You sell your home. You keep the broker fee." Plaintiff and its employees do not give advice about any property transactions and do not purport to exercise judgment on behalf of either sellers or buyers at any stage of a transaction. Plaintiff clearly represents itself to the public as a "For Sale By Owner" operation, actively distancing and distinguishing itself from a real estate broker or agent. These characteristics demonstrate that while plaintiff's business activities may satisfy a literal reading of brokerage activity set forth in RSA 331-A:2, III, in reality, plaintiff does not "act for another" within the meaning of the REPA, so as to definitively qualify as a broker. The second critical component of the definition of a broker, as highlighted above, is that the broker receive compensation for acting for another. It is undisputed that plaintiff receives compensation for the services it provides in the form of advance fees. While plaintiff again satisfies the literal definition of a "broker," the REPA separately defines "advance fees." Because statutes must be read in their entirety, recognizing that the legislature did not use redundant or

superfluous words, the definition of "broker" necessarily is circumscribed by the definition of "advance fees."....."

However, most of the Court's reasoning on the exemption from professional licensing also pertain to antitrust violations – a) the REW was merely a publisher of information, and hence, cannot be classified as a broker, b) the REW was not acting as an agent in any capacity, c) the REW did not provide any of the services that are typically provided by brokers to buyers/sellers, d) even if the REW had earned fees for referrals and contacts made through its web-pages, the mere fact that

The state professional licensing requirements constitute an illegal restraint on trade for REWs that don't provide brokerage services, but merely list properties and related information. (See cases cited above). The licensing requirement effectively and unfairly prevents REWs from conducting any real estate business.

The state professional licensing requirement also constitutes an illegal government sponsored group boycott of REWs. In this instance, the government is the instigator of the group boycott.

**Table 3.** Summary Of US State Laws Pertaining To Real Estate Brokerage Services (US Dept. Of Justice; 2008)

State	Allows Choice Of Brokerage Services	Allows Brokers To offer Rebates To Consumers	Other
Alabama	No	No	Alabama law requires real estate brokers to perform a host of services for consumers, including accepting and presenting offers and counteroffers, as well as answering their clients' questions, in every transaction involving an agreement to list an owner's property for sale. Brokers must perform these services whether consumers want them or not. Brokers cannot offer and consumers cannot purchase MLS-listing-only and other à la carte services. Alabama law also prohibits brokers from offering consumers rebates. In practice, the Alabama Real Estate Commission permits rebates before closing but forbids cash payments or other incentives offered after closing.
Alaska	Yes	No	Alaska law prohibits real estate brokers from sharing their commissions with unlicensed individuals and, since consumers are not licensed real estate brokers, home buyers and sellers in Alaska cannot benefit from consumer rebates.
Arizona	Yes	Yes	
Arkansas	Yes	Yes	
California	Yes	Yes	
Colorado	Yes	Yes	
Connecticut	Yes	Yes	
Delaware	Yes	Yes	Delaware law allows consumers to choose the brokerage services they want by allowing them to waive, in writing, certain minimum services otherwise required by law.
District of Columbia	Yes	Yes	
Florida	Yes	Yes	Florida law requires brokers to present all offers, but allows consumers to waive that requirement. This written waiver preserves consumers' ability to choose the brokerage services they want, including MLS-listing-only services or other à la carte services.
Georgia	Yes	Yes	A task force created by the Georgia Real Estate Commission studied whether to recommend the Real Estate Commission request that the Georgia Legislature impose minimum service requirements on consumers who use brokers in Georgia. The task force decided not to recommend the Real Estate Commission seek a minimum service provision—preserving choice for consumers in Georgia.
Hawaii	Yes	Yes	

Idaho	Yes	Yes	In 2007, Idaho enacted a minimum service law, supported by the Idaho Association of Realtors. Idaho Statute § 54-2087(3) requires brokers hired by consumers "to be available to the client to receive and timely present all written offers." The new law prohibits consumers from waiving the required service, even if the consumer and the broker agree that the consumer does not want to purchase the service and the broker does not want to provide the service.
Illinois	Limits Choice.	Yes	Illinois's minimum service provision requires real estate brokers entering into exclusive brokerage agreements to accept and present offers and counteroffers, and answer their clients' questions in every real estate transaction. Many MLSs in Illinois have now passed rules requiring brokers to enter into exclusive brokerage agreements, so brokers in those MLSs are prevented from offering, and their clients are prevented from buying, MLS-listing-only services. In 2008, a bill prohibiting broker rebates was introduced into the General Assembly. The Department of Justice wrote a letter on February 21, 2008 opposing the bill.
Indiana	Limits Choice.	Yes	Indiana law requires real estate brokers to accept and present offers and counteroffers and answer their clients' questions in every real estate transaction. Consumers can no longer purchase and brokers can no longer offer MLS-listing-only and other à la carte services.
Iowa	Limits choice.	No	Iowa law requires real estate brokers to accept and present offers and counteroffers, and answer their clients' questions in every real estate transaction, even if consumers do not wish to buy these services. Consumers can no longer purchase and brokers can no longer offer MLS-listing-only and other à la carte services. Iowa law prohibits consumers from receiving consumer rebates when more than one broker assists them to buy or sell property. For example, two brokers may believe that each has a specialty in particular parts of the real estate transaction and wish to divide up the work to focus on what each does best. In such a situation, the home buyer may not receive a rebate.
Kansas	Yes	No	Kansas law prohibits real estate brokers from competing with each other by offering consumer rebates. This reduces the ability of consumers to benefit from competition among brokers. However, according to the Kansas Real Estate Commission, real estate brokers may offer their customers use of moving vans, charitable donations, coupons, closing costs, homeowner warranties, inspections, home repairs, and insurance among other things in the course of the real estate transaction.
Kentucky	Yes	Yes	Through a settlement reached between the Kentucky Real Estate Commission and the U.S. Department of Justice in 2005, real estate brokers may now offer rebates and other inducements to consumers. The Commission suspended enforcement of its regulation banning rebates, and in February 2006 the Commission instituted an emergency regulation to comply with the terms of the settlement. In January 2007, the Kentucky House of Representatives introduced House Bill 86 formally repealing the ban on rebates. The legislation is pending. The Antitrust Division has also commented to the Kentucky state bar about the benefits that consumers realize when non-attorneys are allowed to compete with attorneys to provide real estate closing services.
Louisiana	Yes	No	Louisiana law prohibits real estate brokers from paying rebates to home buyers and sellers and insulates real estate brokers from competing with each other to offer services to consumers at competitive prices.
Maine	Yes	Yes	
Maryland	Yes	Yes	
Massachusetts	Yes	Yes	The Antitrust Division has commented to the Massachusetts legislature about the benefits consumers could realize if non-attorneys are permitted to perform certain real estate settlement services, such as drafting deeds, mortgages, leases and agreements, examining titles, issuing title certification or policy of title insurance, and representing lenders as their closing agents.

Michigan	Yes	Yes	In May 2005, minimum service bills (H.B. 4849 and 4850) were proposed in the Michigan House of Representatives. The bills would have reduced consumer choice by prohibiting home sellers who enter into "exclusive service provision agreements" from choosing the services they wish to purchase. Under exclusive service provision agreements, the broker must perform all of the following services, even if the seller does not want them: 1) accept and deliver all offers and counteroffers; 2) assist in developing offers, counteroffers, and other materials until a purchase or lease agreement is executed and all contingencies are waived; and 3) furnish the closing statement to the seller. H.B. 4849 and 4850 died in December 2006 when the Michigan Senate took no action on them. In March 2007, new minimum services bills (H.B. 4416 and 4417) were proposed in the Michigan House of Representatives. Unlike their predecessors, these bills would allow consumers to waive services they do not wish to purchase, with the exception of receiving detailed closing statements. The bills were passed into law on April 9, 2008 and became Public Acts 90-08 and 91-08, respectively.
Minnesota	Yes	Yes	
Mississippi	Yes	No	Mississippi law prohibits real estate brokers from paying rebates to home buyers and sellers. If any real estate broker attempts to compete on price by offering consumer rebates, the Mississippi Real Estate Commission is allowed to suspend or revoke a broker's license.
Missouri	Limits choice.	No	Missouri law requires real estate brokers entering into exclusive brokerage agreements to accept and present offers and counteroffers, and answer their clients' questions in every real estate transaction. Many MLSs in Missouri have now passed rules requiring brokers to enter into exclusive brokerage agreements, so brokers in those MLSs are prevented from offering, and their clients prevented from buying, MLS-listing-only services. Missouri law, according to the Missouri Real Estate Commission, prohibits consumer rebates. The law prohibits unlicensed individuals from receiving part of the real estate commission and, since consumers are not licensed brokers, they cannot receive a rebate in Missouri.
Montana	Yes	Yes	In August 2007, the Board of Realty Regulation adopted a new regulation prohibiting brokers from rebating part of their commission to their clients. Montana Administrative Rule § 24.210.641(5)(z) prevented brokers from soliciting customers by offering "gifts, rebates, or promotional items." In February 2008, the Board announced a proposal to change the rule to reverse the ban on brokers offering rebates. On April 1, 2008, the Board voted to adopt the final amended rule. It became effective after publication in the April 24, 2008 edition of the Montana Administrative Register.
Nebraska	Yes	Yes	
Nevada	Yes	Yes	In 2006, a minimum service task force established by the Nevada Real Estate Commission proposed a series of regulatory and legislative measures to establish minimum services in Nevada, and, at the same time, to preserve consumer choice by allowing consumers to waive those services. In early 2007, the Nevada Real Estate Commission enacted a regulation establishing minimum services by defining the term "presenting all offers" as used in Nev. Rev. Stat. § 645.254 to mandate that brokers provide certain services. The regulation, T645-02, specifically requires brokers to: a) Accept delivery of and convey offers and counteroffers; b) Answer a client's questions regarding offers and counteroffers; and c) Assist a client in preparing, communicating, and negotiating offers and counteroffers. In May 2007, Governor Gibbons signed Senate Bill 69 into law, which embodies the waiver as recommended by the minimum service task force. Specifically, Senate Bill 69 permits consumers to waive the requirement that brokers present all offers as long as the consumer signs a proper waiver form. As a result, Nevada continues to allow consumer choice in brokerage services.
New Hampshire	Yes	Yes	
New Jersey	Yes	No	New Jersey law explicitly prohibits real estate brokers from offering rebates to consumers. New Jersey consumers are unable to benefit from rebates that consumers in other states may receive. In October 2006, Bill A3567 was introduced in the New Jersey Assembly. Bill A3567, if enacted, would allow brokers to offer rebates in New Jersey.

New Mexico	Yes	Yes	On February 23, 2006, the New Mexico Real Estate Commission adopted a minimum service regulation that required consumers who use brokers to have their brokers develop and communicate offers and counteroffers, even if the consumer did not want to purchase those services from brokers. On July 13, 2006, the Real Estate Commission decided not to implement the minimum service regulation, but instead decided to form a task force to study the issue.
New York	Yes	Yes	
North Carolina	Yes	Yes	
North Dakota	Yes	Yes	
Ohio	Yes	Yes	Ohio law contains minimum service provisions, but it allows home sellers to choose the services they wish their broker to perform by including a provision allowing for waiver of the performance of certain services. In 2005, the Ohio Association of Realtors formed a task force to investigate the needs of their consumers. The task force determined that, while Ohio law should require that brokers provide certain minimum services, consumers should also have the option to waive those services.
Oklahoma	Yes	No	Oklahoma law allows consumers who use brokers to instruct them that they do not want certain minimum services otherwise required by Oklahoma law. In this way, Oklahoma law preserves for consumers the choice of brokerage services they wish to purchase. Oklahoma law prohibits real estate brokers from paying part of their commission to unlicensed individuals. Because consumers do not have real estate licenses, Oklahoma law prevents them from receiving rebates. Oklahoma consumers are unable to benefit from rebates that customers in other states may receive.
Oregon	Yes	No	Oregon law prohibits real estate brokers from paying part of their commission to unlicensed persons. As a result, because consumers do not have real estate licenses, Oregon law prevents them from receiving rebates. Oregon consumers are unable to benefit from rebates that consumers in other states may receive. In the 2007 legislative session, Senate Bill 673 was introduced, addressing the ability of brokers to offer rebates. The legislative session ended without passage of SB 673.
Pennsylvania	Yes	Yes	Pennsylvania law allows consumers to choose the brokerage services they want by allowing them to waive, in writing, certain minimum services otherwise required by law. This written waiver preserves consumers' ability to choose the brokerage services they want: Pennsylvania Statutes, Title 63, Section 455.606a.
Rhode island	Yes	Yes	In February 2007, identical bills were introduced in the Rhode Island Senate and House of Representatives (S. 370 and H. 5432) that included minimum service requirements for real estate brokers who enter exclusive agreements with clients. The MLS in Rhode Island requires that brokers enter into exclusive agreements with clients. The Antitrust Division sent letters to the sponsors of the bills detailing the benefits consumers can realize when they are permitted to choose the services they wish to purchase from their real estate broker. Ultimately, the bill sponsors engaged in discussions with the Rhode Island Association of Realtors and the Rhode Island Department of Business Regulation, and substitute bills eliminating the minimum service requirements (S. 370A and H. 5432A) were introduced. The substitute bills became law in July 2007.
South Carolina	Yes	Yes	Previously, South Carolina state law prohibited a real estate broker from paying a rebate to any unlicensed individual, apparently to prevent unlicensed individuals from acting as real estate brokers. In June 2006, the South Carolina Legislature changed the law, which now clarifies that real estate brokers may pay consumers rebates as long as they do not pay unlicensed persons to perform real estate services.
South Dakota	Yes	Yes	In response to a U.S. Department of Justice investigation, the South Dakota Real Estate Commission unanimously voted to repeal two previous Declaratory Rulings that prohibited real estate brokers from paying rebates to customers. Because of the South Dakota Real Estate Commission's action, consumers in that state may now benefit from increased price competition in the form of consumer rebates.
Tennessee	Yes	No	Tennessee law allows home sellers to choose the services they wish their broker to perform by including a provision allowing them to waive their broker's performance of certain required minimum services. In 2007, Tennessee passed a bill (H.B. 2095/S.B. 1160) that would prohibit payment of cash rebates to buyers and sellers of real estate. This action effectively overruled the decision by the Tennessee Real Estate Commission to permit such rebates. Tennessee consumers are thus unable to benefit from rebates that consumers in other states may receive.



Texas	No	Yes	Texas law requires real estate brokers to accept and present offers and counteroffers and answer their clients' questions in every real estate transaction, even if consumers do not wish to buy these services.
Utah	No	Yes	Utah law requires real estate brokers entering into exclusive brokerage agreements to accept and present offers and counteroffers, and answer their clients' questions for consumers in every real estate transaction. Many MLSs in Utah have now passed rules requiring brokers to enter into exclusive brokerage agreements, so brokers in those MLSs are prevented from offering, and their clients prevented from buying, MLS-listing-only services.
Vermont	Yes	Yes	
Virginia	Yes	Yes	Virginia law allows brokers the option to offer à la carte services to consumers, as long as those brokers disclose to the consumers what services the broker will provide and what services standard agents provide under Virginia law. This disclosure preserves the ability of consumers to choose the brokerage services they want. In addition, the Antitrust Division has commented to the Virginia Supreme Court about the benefits that consumers realize if non-attorneys are allowed to compete with attorneys to provide real estate closing services.
Washington	No	Yes	Washington law requires that licensees "present all offers, written notices and other written communications" to and from either party to a real estate transaction.
West Virginia	Yes	Yes	In response to a U.S. Department of Justice investigation, the West Virginia Real Estate Commission voted to repeal its administrative regulation that prohibited real estate brokers from paying rebates to customers. Starting in May 2006, real estate brokers in West Virginia became free to offer consumer rebates. Because of the West Virginia Real Estate Commission's action, consumers in that state may now benefit from increased price competition in the form of consumer rebates.
Wisconsin	Yes	Yes	
Wyoming	Yes	Yes	

### III. Rent Control And Rent Stabilization ("RC-RS") Constitute Violations Of Antitrust Laws

Rent Control And Rent Stabilization ("RC-RS") constitute violations of federal antitrust laws. In *Fisher v. Berkeley* (1986)<sup>43</sup> the US Supreme Court

<sup>43</sup> See: *Fisher v. City of Berkeley*, (1986) 475 U.S. 260, 106 S.Ct. 1045 (The Berkeley rent control ordinance did not conflict with the Sherman Act and, therefore, was not preempted by the federal antitrust laws).

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=475&page=260>.

See: *Fisher v. City of Berkeley*, 475 U.S. 260 (1986)(Justice Brennan dissenting).

See: *Brunetti v. New Milford*, 68 N.J. 576, 594, 350 A.2d 19,28 (1975).

See: *Hutton Park Gardens v. West Orange*, 68 N.J. 543, 564, 350 A.2d1, 12 (1975).

See: *Troy Hills Village v. Parsippany*, 68 N.J. 604 350 A.2d 34 (1975).

See: Brennan T (1988). Rights, Market Failure, and Rent Control: A Comment on Radin. *Philosophy and Public Affairs*, 17(1): 66-79.

See: Wiley J (1986). The Berkeley Rent Control Case: Treating Victims as Villains. *The Supreme Court Review*, pp. 157-173.

See: Block W (2002). A Critique And Philosophical Case For Rent Control. *Journal of Business Ethics*, 40(1):75-90.

See: *Chevron v. Lingle*, \_\_\_ US \_\_\_ (2002).

Contrast: *Yee v. City of Escondido*, 503 U.S. 519 (1992) (the US Supreme Court court also noted that rent control law may transfer wealth from the mobile home park owners to the mobile home owners, because the mobile home owners would benefit from the lower-than-market rental rates).

found that local rent-control ordinances did not violate, and were not preempted by Section 1 of the Sherman Act, even if such rent control statutes were not authorized by state law. The US Supreme Court had previously held that states and municipalities, acting under explicit state authorization, are immune from antitrust suits (the "state-action" exemption). *Fisher v. Berkeley* remains the controlling case in antitrust and rent-control issues.

*Fisher v. Berkeley* was a pre-emption case and did not fully consider the issue of antitrust violations on the merits, and did not fully consider the following factors:

a) The pervasive effect of the state/municipal government in housing markets – financing, development, and management.

b) The state/local governments are active competitors in local housing markets, and have strong

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=503&invol=519>.

See: *Hall v. Santa Barbara*, 833 F.2d 1270 (CA9 1987)(cert. denied) 485 U.S. 940 (1988)(a mobile home rent control ordinance effected a physical taking).

See: *Parker v. Brown*, 317 U.S. 341 (1943)("state-action" exemption).

See: *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

See: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

See: *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

See: *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

incentives to force their competitors to lower prices, to their detriment.

c) See Sections 4 & 16 of the Clayton Act, and 15 U.S.C. 15 and 26. The process by which the typical Rent Stabilization Ordinance/statute is passed renders the Ordinance the product of an illegal contract or conspiracy.

d) RC-RS statutes are not exempt from antitrust scrutiny under the state action doctrine<sup>44</sup>, because elected and local officials of state/local governments are subject to concerted and coordinated private action in the form of campaign contributions and lobbying; and because the government is an active participant in the housing market, and hence functions like a private competitor, whose actions have significant political ramifications.

### Collusion

RC-RS constitutes collusion. The state government and local government are active participants in local and regional housing markets – they finance, build, buy and sell housing units. Governments often have to allocate resources to affordable housing – this allocation process is often a political issue with significant consequences for elected officers. Thus, elected officers are faced with the critical choice of either re-allocating the government’s resources to provide more affordable housing and or housing benefits (vouchers, allowances, etc.) or shifting the burden of providing affordable housing to the private sector by enacting rent-control laws.

The electoral process allows private entities to lobby state and local governments to change their allocation of resources for housing. The electoral process and the process for appointing public officials allows private entities to lobby state/local governments and Rent-Stabilization boards and Rent Control Boards - hence, there is some private control or influence over RC-RS ordinances. In *Fisher v. City of Berkeley*, the US Supreme Court stated in part, “.....There may be cases in which what appears to be a state- or municipality-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a "gauzy cloak of state involvement," *Midcal, supra*, at 106. This might occur even where prices are ostensibly under the absolute control of government officials.....” [citing *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)]. In *Rice v. Norman Williams Co.*, 458 U.S. at 661 (1982), the US Supreme Court held that “.....a state statute "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under 1 of the Sherman Act when the conduct contemplated

by the statute is in all cases a per se violation." [475 U.S. 260, 275].....”

Hence, there are ample opportunities for: a) collusion between private entities and elected officials, b) collusion between the state and local governments and landlords who want to increase the supply of luxury apartments, c) state/local governments and politicians who indirectly participate in housing markets.

The RC\_RS laws encourages collusion among: 1) municipal government officers, 2) powerful landlords that own many units, 3) political action groups, 4) neighborhood activist organizations; in order to set artificial prices for specific types of properties<sup>45</sup>. Explicit, implicit, intended and un-intended Collusion occurs or can reasonably be construed to occur in the process of setting RC-RS rents and administering RC-RS laws because:

a) The government controls the processes, and in most cases, the process is not transparent.

b) The government officials have close relationships with developers and property owners - by virtue of tax processes, building permit and zoning processes and compliance processes.

c) Most governments don’t want to go into the business of building or managing residential properties, and hence, rely on developers and landlord for provision of what is deemed an important “social service” that can affect political fortunes of most politicians. Hence, municipal governments have strong incentives to cooperate and collude with these real estate professionals, many of whom can easily relocate their operations.

d) The RC-RS laws reduce the availability of information<sup>46</sup>, and in any local market, encourages brokers who operate only in physical space to band together to determine prices.

The collusion is manifested by the following: a) there is no clear pattern of allocation of state government or municipal government resources to housing in the US, b) the relationships between changes in RC-RS laws and private sector contributions to political campaigns, c) the effects of political action groups.

<sup>45</sup> See: *Arizona v. Maricopa County Medical Society*, \_\_\_ US \_\_\_ (1982); See: *Federal Trade Commission v. Superior Court Trial Lawyers Association*, \_\_\_ US \_\_\_ (1990); See: *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, \_\_\_ US \_\_\_ (1979); See: *NCAA v. Board of Regents*, \_\_\_ US \_\_\_ (1984). See: *Federal Trade Commission and U.S. Department of Justice, Draft Antitrust Guidelines for Collaborations Among Competitors* (Oct. 1, 1999).

<sup>46</sup> See: *Dolde W & Tirtiroglu D* (1997). *Temporal And Spatial Information Diffusion In Real Estate Price Changes And Variances. Real Estate Economics*, 25(4): 539-565. See: *Pollakowski H & Ray T* (2000). *Housing Price Diffusion Patterns At Different And Aggregation Levels: An Examination Of Housing Market Efficiency. Journal Of Housing Research*, 8(1): 107-117.

<sup>44</sup> See: *Hallie v. Eau Claire*, 471 U.S. 34 (1985).

## RC-RS Statutes Forces Landlords To Participate In Anti-Competitive Conduct

RC-RS statutes place substantial pressure on private parties to violate the antitrust laws in order to comply with the statutes, and hence constitute violations of antitrust statutes. The RC-RS statutes force landlords to incur significant losses. The landlord's operating costs often increase at faster rates than annual inflation rates. Typical examples are the costs of oil, heat and labor. For landlords to survive and comply with RC-RS laws, a) landlords have to enter into exclusive supply agreements with vendors in order to obtain what they deem are low prices, b) landlords have to coordinate with other landlords to organize protests and lobbying efforts to change the rent caps mandated by RC-RS laws – efforts are anti-competitive because they are a form of price-fixing and collusion, c) landlords limit the types of tenants to whom they can rent their housing units, d) some landlord have to participate in "tying" arrangements in which tenants are forced to also purchase utility services (heat, and or hot water, and or electricity) from the landlord, e) landlords fix their rents, and such price fixing constitutes a violation of the Sherman Act, and also affects the sale values of residential properties – the RC-RS statutes have the same effect as a private conspiracy by landlords to fix rents.

## Restraints On Trade; Brokerage Fee Issues

The RC-RS laws reduce competition among brokers and landlords because it effectively creates and supports an inefficient business model - the elements of this business model are capped rents, forced one-sided contracts, limited remedies and restricted/static tenancy.

This inefficient business model:

a) reduces availability of information to buyers and sellers.

b) discriminates against free-market forces (market rents, landlord's right to terminate leases, pass-through of expenses, etc.);

c) increases information asymmetry - 1) the true value of property is more difficult to ascertain because its not operating at "market terms", 2) the landlord has less incentives to manage the property appropriately and this sometimes results in deterioration and abandonment which have significant social costs, 3) divergencies among perceptions of various market participants increases.

d) Increases buyer/seller search costs – 1) the prospective buyer expends more resources to ascertain true market value and appropriate operating conditions of subject property, 2) the prospective selling landlord expends more resources to determine the property's true market value;

e) Discriminates between those that know how to search on the internet for RC-RS properties and can afford search services, and on the other hand,

those that cannot afford search services and or don't know how to search for RC-RS properties.

All these results are the direct effects of the RC-RS policy and create antitrust liability under the Sherman Act. Furthermore, the fact that most RC-RS statutes don't enable the landlords to recover their full operating costs – which often increases faster than inflation – constitutes a significant restraint on trade.

## Property Prices And Artificial Prices

RC-RS statutes create artificial property prices, because property prices that are derives from below-market rents don't reflect trust market values. The RC-RS is an artificial government sponsored system, over which the government has excessive influence – the magnitude of such influence and the magnitude of economic loss imposed by RC-RS laws are the main elements of anti-trust liability.

## Price Fixing

The RC-RS laws facilitates price fixing because: 1) property rents are typically established through "closed" and highly political processes controlled almost entirely by municipal officials, 2) there are no built-in due process guarantees in the procedures used for setting property rents; 3) the rent-setting typically occurs annually, which is insufficient; 4) landlords and some government officials cannot act (raise rents, sell properties, condemn properties, etc.) regardless of how much information they can get or analyze – this type of action-constrained information asymmetry facilitates price-fixing.

Justice Brennan's dissent in *Fisher v. City of Berkeley*, analyzes the *Midcal* decision, and provides some useful insights. In *Midcal* [*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)], the challenged statute compelled wine wholesalers to charge prices that were established by wine producers, and similarly, the RC-RS statutes forces landlords to charge prices that are set by the city government, and the city government is a "producer" of housing units because: a) from an economic psychology perspective, the "housing unit" is a bundled product that consists not only of the actual physical housing unit, but also the associated tangible and intangible goods such as the local transportation network, public transportation (buses, and trains), utilities, social services, police services, community, parks, and other goods, b) the City produces components of the "housing unit" such as public transportation, utilities, social services, parks, public schools, etc., c) the city and state governments grant Tax Credits (to real estate developers) which are used in financing the construction of affordable housing and general housing units, d) the city government typically builds and maintains housing units, e) the city government provides housing allowances and housing vouchers to its residents. Under *Midcal*, RC-RS statutes constitute illegal price fixing.

### **Barriers To Entry**

The RC-RS policy un-necessarily raises the barriers to entry into the residential real estate business because: 1) prospective landlords must be willing to operate properties at a significant loss – where rents don't cover operating expenses or the annual rental increases are insufficient; 2) prospective landlords must be willing to endure and afford substantial transaction costs inherent in tenant evictions; 3) real estate acquisition is very much reliant on debt financing (loan-to-value ratios are typically 75-90%) and RC-RS properties are more likely to be viewed as riskier by lenders, and hence will require higher lending rates.

Similar, the RC-RS laws negatively affect ancillary businesses (such as janitorial companies, maintenance companies, property management companies, landscaping companies and construction companies) that seek to do business with RC-RS

properties – the barriers-to-entry for these ancillary companies are raised by RC-RS laws because RC-RS properties are less likely to pay, and are more likely to pay lower fees for any given service.

Hence, the RC-RS policy is anti-competitive because it statutorily and mandatorily raises barriers to entry into segments of the real estate sector.

### **IV. Conclusion**

Multiple Listing Systems, Rent-Control/Rent-Stabilization statutes, and professional licensing requirements for real estate websites all constitute violations of US Antitrust laws. Hence, all existing housing demand models and housing price models are inaccurate, because most don't incorporate these factors.