



**Why real estate compensation issues  
just won't go away.**

# **Antitrust: *Is It the Real Issue?***

BY MARIE SPODEK

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**S**everal years ago, I authored a turn-key course, "Caught on Camera: Antitrust in the 21st Century." The core feature of this course is the 30+ videos made on the advice of an attorney for a discount broker who sued competitors over their anti-competitive practices. The video evidence never made it to court since the case was settled out of court. In the videos, more than two dozen salespeople and brokers, by their conversations, misled the consumers consistently in several ways by:

- misrepresenting the discount broker's MLS offer to pay cooperating brokers;
- appearing to indicate that cooperating brokers were in agreement to NOT show the discount broker's listings; and
- indicating that cooperating brokers who worked with buyers (and who represented the buyers) would only show listings that paid the most amount to their agents.

Antitrust issues seem to go in cycles, at least in the real estate industry. Initially, the flurry involved alleged "invitations to fix prices" (mid-1970s) and then in the 1980s, allegations of group boycotts, and now in the mid-2000s, allegations of restrictions of trade. As important as these issues are, I think that other forces are more likely to affect our industry in the next couple of years.

Alternative methods of providing real estate services, such as those offered by electronic real estate brokerage firms and buyer brokerages, are gaining ground. As real estate values continue to skyrocket in many U.S. markets, consumers simply cannot figure out what the licensee brings to the table for the thousands of dollars of commission involved. One might conclude that at the minimum, these multi-thousand dollar fees would more than cover the costs of doing business and then some, but

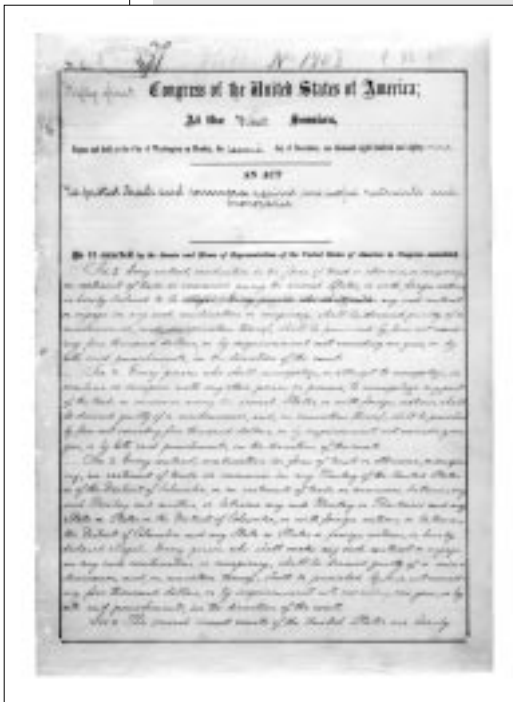
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many brokerages are now charging hundreds of dollars for add-on services, over and above the commission paid on the sale price. As one attorney said to me, "Tomorrow, I am going to closing and paying \$18,000 to a broker who put a sign in the ground and within hours brought competing offers to me. Even I don't make that kind of money...I only listed with a broker because my business is with real estate licensees. My house is priced right, in the right neighborhood...I am designating the \$18,000 as marketing, certainly not for services!" Recent unflattering articles about real estate practitioners' fee structure<sup>1</sup> have sensitized the public's awareness to conflicts of interests within the industry.

For the past few years, the real estate industry has been abuzz about Department of Justice (DOJ) lawsuits against both real estate regulatory agencies and the National Association of REALTORS® (NAR). The industry was shocked last spring when the U.S. Department of Justice filed suit against the Kentucky Real Estate Commission "for limiting competition among real estate brokers... the Commission's regulations restrict competition and cause consumers to pay higher prices for certain real estate services," a violation of Section 1 of the Sherman Antitrust Act (see sidebar).

## The Sherman Act

The Sherman Act of 1890 prohibits any agreement among competitors to fix prices, rig bids, engage in any anti-competitive activity, or establish monopolies. Contracts, including those of trusts, entered into to restrain trade or commerce are illegal. Most real estate infractions include allegations of price-fixing and boycotts of competitors.



According to the Department of Justice (DOJ) website, "Competition, not cartel pricing, best ensures quality products and services, regardless of any empirical evidence to the contrary. The "fairness" of uniform pricing is not relevant; consumers will seek lower prices rather than [the] satisfaction of paying the same [inflated] price as everyone else." The 1914 Clayton Act amended Sherman and prohibits the unfair price cutting of local prices in order to freeze out competitors. Additionally, competitors cannot justify anti-competitive behavior by using the defense that agreed-upon prices were reasonable or necessary; in other words, competitors cannot justify their actions by ensuring that each party has fair share of the market.

The Bureau of Competition of the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) share responsibility for enforcing laws that promote competition in the marketplace. Competition benefits consumers by keeping prices low and the quality of goods and services high. Consult either or both of these websites for additional information:

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[www.pueblo.gsa.gov/cic\\_text/misc/antitrust/antitrus.htm](http://www.pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm)  
and  
[www.ftc.gov/bc/compguide/index.htm](http://www.ftc.gov/bc/compguide/index.htm)

In the complaint, the DOJ quoted brokers who said that the rebate ban “inhibits free trade” and avoids a “bidding war” among brokers that

are antitrust issues within the REALTOR® MLS systems. Earlier this year, after nearly eight years of court wrangling, the Sandicor MLS,

platter.” The lawsuit will be returned to the district court which will consider an injunction and trial to determine damages and court costs—a possible multi-million dollar settlement.

In May, 2005, the DOJ filed suit against the NAR, contending that competing real estate companies are in collusion to “restrain trade” when they share information (e.g., listings, prices) and withhold that information from consumers or other “non-traditional” brokers. Since then, the DOJ amended its original complaint, “charging that the group’s modified policy continues to prevent Internet-based real estate brokers from offering better services and lower costs to consumers...The new

**The business model that worked  
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could “lessen [broker] profits.” A settlement was reached several months later permitting real estate brokers to offer rebates and inducements to consumers. Other state real estate commissions also heard from the DOJ regarding similar regulatory attempts to limit competition.

Also highlighting the problem

owned by five REALTOR® organizations in San Diego County (CA), was dealt a further blow when the California 9th Circuit Court of Appeals ruled that Sandicor MLS engaged in price-fixing. Circuit Judge Alex Kozinski wrote, “Rarely do antitrust defendants serve up their own heads on so shiny a silver

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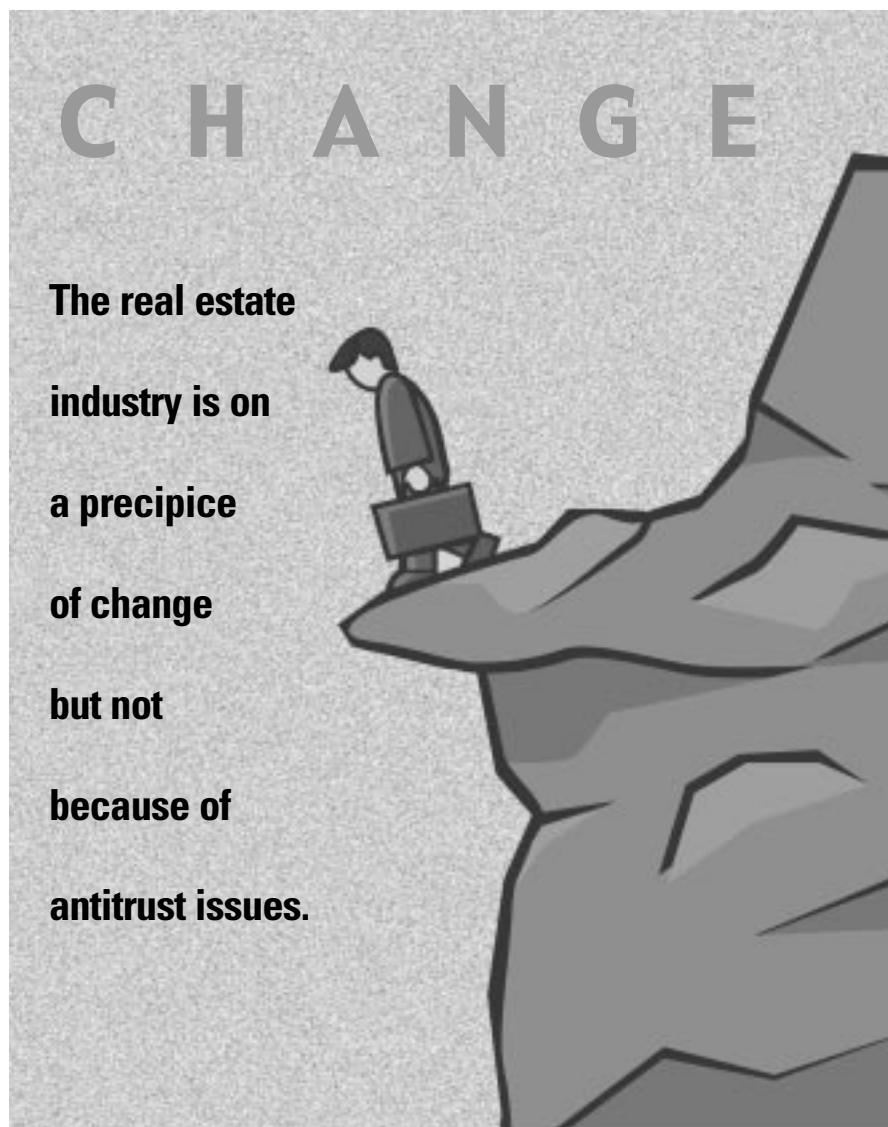
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complaint addresses how NAR's changes to its rules still obstruct competition, threaten to lock in outmoded business models and inflate prices in the industry. ... [The rule] continues to provide "brick-and-mortar" brokers with the power to inhibit the growth of Internet-based business models."<sup>2</sup>

The response of the National Association of REALTORS® (NAR) is to affirm that "REALTORS® should be free to market their customers' properties as they see fit and that consumers who wish to have their property listed in the MLS should have the right to choose whether their homes are displayed on the Internet or not. After all, MLSes are not public utilities; they are private databases created for and maintained by real estate professionals for real estate professionals. ... The government...believes every property included in the MLS must also be available for display on hundreds of websites, even if listing brokers, with the property owner's consent, choose not to do so."<sup>3</sup>

It's likely that the costly MLS databases set up and maintained by REALTORS® are going to remain the protected property of the REALTORS® to use as they deem appropriate. In December 2005, the Northern Kentucky Association of REALTORS® won a court battle, allowing it to require REALTOR® membership to gain access to its MLS.

It's possible, however, that traditional brokerage firms and practitioners are somehow missing the real issue: the business model that



worked for so many years is now *failing to deliver what consumers actually want*. Real estate practitioners are at a real crossroads of opportunity or perhaps are on the verge of demise. They must make fundamental changes to their collective mindset: the rules have changed! As Pogo said in one of Walt Kelly's famous cartoon strips, "I has seen the enemy, and they is us!"

The real estate industry is on a precipice of change but not because of antitrust issues. The industry is going to break down when others, perhaps not even within the industry,

meet consumers' new expectations and needs. The Internet, not the DOJ, is the driving force. There have been incredible changes in the travel, bookseller, stock brokerage, and many other industries resulting from the Internet. For example, there are still travel agents in the business, but they are few and far between.<sup>4</sup> The survivors must definitely provide more "service" than simply printing tickets. Guess what? Real estate licensees too face the same issues. They too must provide higher quality at lower costs and become value-added providers.

## U.S. Antitrust Law Up For Debate: Possible Changes To “State Action Doctrine” Could Impact Real Estate Measures

Glenn Roberts Jr., *Inman News*

While the largest national real estate trade group mounts its defense against an antitrust lawsuit brought by the U.S. Department of Justice, a commission created by Congress is evaluating whether federal antitrust laws require remodeling.

The Antitrust Modernization Commission, formed in April 2004, is tasked to study “whether the need exists to modernize U.S. federal antitrust laws,” and to seek input and prepare a report to Congress and the president that includes findings, conclusions and “recommendations for legislative or administrative action.”

The real estate industry is no stranger to antitrust complaints, and some industry participants have watched the Antitrust Modernization Commission's progress. The commission's focus is not industry-specific, though some topics that the commission is considering have relevance to the real estate industry.

For example, the commission has hosted discussions on the topic of the “state action doctrine” provision of federal law, which extends some immunity to states for federal antitrust law violations. Such discussions are potentially relevant to measures that numerous state legislatures and real estate regulators have passed requiring real estate professionals to provide a minimum level of service to consumers while effectively banning some forms of real estate business models that do not provide these services.

These so-called minimum-service measures, backed by REALTOR® trade groups, have in several cases led the U.S. Justice Department and Federal Trade Commission to send out advocacy letters urging state officials not to pass the measures as they potentially could limit consumer choice and harm competition in the real estate industry.

Federal officials have opposed REALTOR®-backed minimum-service measures in Alabama, Missouri, Oklahoma and Texas, charging that the legislation was anticompetitive and anti-consumer, though legislators and governors in all four states passed the measures last year despite these objections, and other states are considering similar measures.

Laurie Janik, general counsel for the National Association of REALTORS®, in April 2005 issued a memo to all state REALTOR® association executives advising them that the Justice Department and FTC cannot successfully challenge such minimum-service laws once they are enacted because of protections provided in federal antitrust law. These protections are among those the Antitrust Modernization Commission is revisiting.

A study group formed by the Antitrust Modernization Commission has considered whether the state action doctrine, which generally shields states from federal antitrust actions, should “be clarified or otherwise changed.”

A 2003 report by the State Action Task Force, a group formed by the FTC, recommended that there be “clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers.”

*Continued, page 40*



### THE TRADITIONAL REAL ESTATE MODEL

The traditional real estate model worked well when every licensee represented every seller and *no one* ever represented the buyer. The sales commission, based on a percentage of the sale price, offered a great incentive for the listing agent to encourage the buyer to pay the list price. Historically and presently, the whole industry is kept alive by the commissions charged to the sellers whose properties actually sell. These commissions pay for all of the unproductive time and money that agents spend marketing overpriced listings and schlepping buyers who are never going to buy to properties they do not want to see. Office profitability is down because brokers are giving away more of the commission to top producers, requiring many offices to now charge additional fees, what one columnist labels “junk fees.”

## What Do Sellers Want?

Let's consider seller wants and needs. Can anyone argue against the fact that sellers want the greatest number of potential buyers to know about their properties for sale? A buyer who is considering a move to a new area is likely to "Google" for available properties for sale. At the present time, most of the offerings are available only through registering at brokers' sites or website names purchased by the listing agents.

Since there is no simple way to view all of the available properties, buyers must laboriously wade through "registrations" or the like with each listing broker. The effect of this marketing is to encourage buyers to view properties from the listing agent with two apparent outcomes: the buyer is not represented (or has limited representation), and the listing agent can collect "both sides" of the listing commission. There is also a strong possibility that through this "hit or miss" method, the right buyer will not be aware of the *right* property for sale.



Many brokers are now offering discounted fees to sellers *if* the sellers agree to exclusive representation where only the listing broker may show the property. Sellers often do not realize that exclusive representation may limit access to buyers

against the seller, not against each other: buyers seek to see how little the seller will accept. Even in a hot market, with multiple bids, licensees go through all sorts of charade-like activities to keep the buyers from being aware of what other buyers are offering. The net effect to sellers may be a lower price.

**Since the advent of buyer representation, most licensees and their brokers have the mistaken notion that the only way they can receive both sides of the commission is to provide the seller and buyer with the illusion that they are going to be represented equally and fairly.**

## Working with Buyers

Back in the 70s, when I first obtained my real estate license, real estate professionals were (generally) a lot clearer about whom we represented. At least in my office, the FTC study in the early 1980s notwithstanding, we were taught that we represented the seller—and only the seller—and that the buyer was a customer. We said to the customer, "The

seller has hired our office to represent the seller, and it is our duty to get the best possible price for our sellers. You should not share any information that you do not want the seller to know. We are obligated to share any information that you give us with the seller to assist the seller in making a decision." A co-op broker was truly a cooperating broker, since the co-op broker also represented the seller. By the way, we happily collected both sides of the commission when we worked the buyers' side as well.

represented by other licensees. Sometimes, the listing broker offers a discount *if* the seller and buyer both work through the same agency utilizing ancillary products (often money-making) offered by the broker, such as insurance, loans, home inspections, etc.

Some discount brokers have further harmed their sellers when they encourage sellers to "agree" to not paying more than a stipulated fee. This practice discourages buyer representatives from making offers with the buyer agent fee coming from the closing costs.

Another flaw with the present real estate model is the method of making offers. Essentially, buyers bid

In those days, buyers were not represented in the transaction, and to be honest, that is a lot more honesty than we see today. Since the

### ***U.S. Antitrust Law Up For Debate, Continued***

While this doctrine generally shields sovereign activities of states, including the actions of legislatures, governors and state supreme courts instances, the task force stated that "some courts now apply the doctrine with little or no evidence that the state intended to restrain competition."

And while the state action doctrine extends to state regulatory commissions and licensing boards, the task force noted that these state entities must show that their conduct "is in conformity with a clearly articulated state policy and has been actively supervised by the state" to be immune from federal antitrust laws.

Steve Cook, a spokesman for the National Association of REALTORS®, said the trade group has not made any comments to the Antitrust Modernization Commission "and has no plans to do so."

In September 2005, the Justice Department announced that it was suing the trade group for antitrust violations, charging that the group's policies relating to the online display and sharing of property listings restrict competition.

The antitrust commission is scheduled to adopt its findings and recommendations, and to complete a draft of its report to Congress by December 6, to submit its report by April 2, 2007, and to end its work in May 2007.

In September 2005, Maureen K. Ohlhausen, director of the Office of Policy Planning for the FTC, presented testimony to the commission about the state action doctrine. "As you know, in recent years the FTC has been examining certain state and local regulations that may restrain competition. This effort has necessarily entailed a reexamination of the state action doctrine," she said.

While the doctrine is clear that the federal antitrust laws were "not intended to reach the conduct of a state legislature," she said, "it is less clear that it was not intended to reach, for example, the conduct of a board of professional licensure, which may be dominated by market participants with a vested financial interest in particular regulatory outcomes." Ohlhausen said that some courts have "expanded the protection of the state action doctrine well beyond its original scope," and she referenced the State Action Task Force recommendations.

R. Hewitt Pate, then-assistant attorney general for the Justice Department's Antitrust Division, also offered a comment to the Antitrust Modernization Commission about the state action doctrine. "Government-created impediments to competition are the most durable and harmful, and state-created impediments that impose harm on consumers in other states can be especially pernicious," he stated. The commission should study, he said, how the doctrine could be "cabined to avert anticompetitive harm while preserving (its) legitimate purposes." For example, the commission might consider how to exclude "quasi-governmental self-regulatory organizations and the activities of states as market participants" from protection under the doctrine, he said.

The Justice Department has taken action against state real estate regulatory agencies. For example, the department's Antitrust Division filed a civil antitrust lawsuit in March 2005 against the Kentucky Real Estate Commission, charging that the state commission was enforcing a real estate rebate policy that was anti-consumer and anti-competitive.

*Continued, page 42*

advent of buyer representation, most licensees and their brokers have the mistaken notion that the only way they can receive both sides of the commission is to provide the seller and buyer with the illusion that they are going to be represented equally and fairly.

Only a couple of states get it right: South Dakota and others refer to this practice of representing both parties as *limited agency*, since agents are limited in the information they can provide to either or both clients (nothing that will put the other party at a disadvantage). Florida and Kansas get it even more right by saying that it is a misnomer that a licensee "represents" both parties. Both states require a default to *transaction brokerage* (TB), a relationship where licensees may not provide advice, judgment, or counsel to either party.

### **NEW EXPECTATIONS**

If an agent is unaware of what the agent has to offer, then the consumer can hardly be expected to know. If the consumer cannot differentiate among licensees and their services, consumers will go for CHEAP. In *Freakonomics*, authors Steven D. Levitt and Stephan J. Dubner postulate that for an agent who is selling a \$600,000 house, by the time the commission is split, an extra \$10,000 to the seller results in about \$150 to the listing agent, which may not be enough compensation to induce the listing agent to work a little harder for a little longer. Their research in a Chicago suburb seemed to indicate that

licensees who sell their own homes get three to four percent more for their homes by leaving them on the market longer.<sup>5</sup>

According to a 2003 NAR study, 4% of the unrepresented sellers (FSBOs) were licensees not willing to pay for representation and 46% of FSBOs did so to avoid paying a commission. Another 35% sold to friends, relatives, or other buyers they had in hand (property was not really on the market). About 8% did not want to work with a licensee, perhaps because of a previous bad experience and 7% had other reasons.

In the past, REALTORS® controlled all information relevant to property transfer (e.g., listings, offers, sales, client base). However, within just a few years, consumer access to listings, local deed and tax information, maps, crime statistics, satellite images, and similar resources has exploded. The Internet allows buyers to stay in the comfort of their own homes while gathering the information, look for properties, obtain initial impressions of the homes, study the neighborhoods, and compare prices.

Consumers also expect super-fast service when making Internet purchases. They can easily find items, compare prices before making a purchase, and have the item delivered the next day. Many consumers manage their own investments, trading stock without any assistance from a stock broker and paying far less in fees. Many more shop for and buy discount airfares using the Internet. Now consumers are asking why it is

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so difficult to gain information about properties for sale. Granted, purchasing a house is not the same as buying a book, but consumers definitely feel hampered when they cannot just as easily access listing information about properties.

### **The Unbundled Age**

The traditional real estate marketing model assumes that real estate providers know what consumers want and how they want it, and that a percentage of the sale price is an appropriate method to charge for those services. Today, consumers are seeking more opportunities to pick and choose. For example, a seller recently asked one of my students, “You are charging me \$12,000 to sell my home and \$6,000 to sell a friend’s home that will sell for one half the price of mine. Please tell me

what services that I am receiving that my friend is not.” It remains to be seen that consumers will be willing to pay more for higher quality.

The most recent industry to feel this pressure to “unbundle” is cable television. The industry giants, Comcast and Time Warner, are now offering a “family tier” package of cable channels, coming quickly on the heels of the FCC Kevin Martin’s statement that cable consumers would be better off with “à la carte,” choosing channel by channel instead of cable packages. Consumers can now view episodes of several popular TV shows on the newest iPod® product, and more than a million videos/songs were sold in its first 20 days.

About five years ago, real estate educator Julie Garton-Good observed, “The good news is that consumers

### ***U.S. Antitrust Law Up For Debate, Continued***

And a separate Justice Department investigation last year prompted the South Dakota Real Estate Commission to repeal and cancel earlier rulings that related to real estate rebates in that state.

Mason Kalfus, an antitrust law expert, said he has followed the Antitrust Modernization Commission's progress. "I would hope that the commission would come out with a solution to deal with the problem of state agencies that are supporting monopolization of real estate services," Kalfus said.

The state action doctrine "is outdated and completely unneeded. Antitrust laws are supposed to protect consumers, not industries that are good at lobbying," he added, and the doctrine has become "a tool of interest groups" including real estate and healthcare, among other industries.

David Barry, a San Francisco lawyer who has filed numerous antitrust lawsuits against REALTOR® organizations across the country, said the Antitrust Modernization Commission could address whether to strengthen the state action doctrine to require state entities to provide more justification for taking action that is potentially a violation of federal antitrust law. For example, he said, a real estate board or commission might be required to provide specific findings before passing laws that require real estate professionals to perform more services.

The antitrust commission could recommend that state entities be required "to actually make some supported findings showing there is a problem in the first place," Barry said.

The American Antitrust Institute, a non-profit education, research, and advocacy organization that promotes competition and the "vigorous use of antitrust," issued a comment to the Antitrust Modernization Commission that supports "clarification and revision" of the state action doctrine, alleging that courts have expanded the doctrine "beyond its intended reach, (which) could potentially lead to more ambitious anticompetitive conduct."

Attorneys general for 42 U.S. jurisdictions also offered comment to the commission, and supported the continuing role of states as active enforcers of antitrust laws.

"Particularly in the aftermath of the Microsoft litigation, state attorneys general have been criticized for playing an enforcement role that either duplicates or is inconsistent with that of the federal government," the attorneys general wrote. "Yet, recognizing the sovereignty of the states, our system of antitrust jurisdiction contemplates that federal and state enforcers will exercise independent judgment in determining which activities present the greatest risk of harm to competition."

In all, the Antitrust Modernization Commission has selected about 25 major issues for study, and commissioners have sought public comment and comments from antitrust lawyers, according to Andrew J. Heimert, executive director and general counsel for the commission. While the formal public comment period has expired, the commission is still welcoming public input, he said.

An act passed by Congress in November 2002 led to the formation of the commission. The act was passed in the same month that the federal government announced a final judgment in its contentious antitrust case against technology powerhouse Microsoft Corp. That case, launched in 1998 by the U.S. Justice Department and 20 states, was one of the largest antitrust cases of the century.

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want what they want and will compensate experts who provide it to them. The bad news is that real estate consumers want what they want and will gravitate to professionals who provide it. And since the real estate industry is the last of the financial industries to unbundle services, it's merely a matter of time before empowered consumers vote with their feet, and their wallets, in the move to unbundled, results-oriented, cost-effective real estate answers."<sup>6</sup>

As a recent example, in December 2005, the *Wall Street Journal Online* reported that a real estate company in Nantucket, MA is suing to recover more than a \$300,000 commission "for finding the buyers and whetting their interest in the property." After spending some time with the agent, the buyer had tried to limit the commission to \$200,000. When the agent refused, the buyer went to her Boston attorney who charged by the hour and could give "unbiased advice," so negotiations "were not motivated by any personal stake in earning a commission."<sup>7</sup> Apparently, one size fits all didn't sit so well with this buyer.

## **ALTERNATIVES**

At the very least, it may be more sensible to break down the cost of selling properties into two separate, distinct fees: a *marketing fee*, which could continue to be based on a percentage of the sale price, and a *locator fee*, a fixed-rate fee based on services provided to the buyer client. This fee structure is being used in some markets.

## The Auction Model

Largely dismissed by many, auctions are gaining popularity. According to a story on NPR's Morning Edition, residential auction sales have increased by 14% over 2003<sup>8</sup>. To my way of thinking, the auctioneer is truly a single agent representing the seller. The auctioneer needs only two buyers present to bid against each other, the direct opposite of the traditional real estate model previously described. Moreover, auctioneers are charging a "buyers premium" at many sales. The "premium" is a percentage of the bid; it represents the commission to the auctioneer and is paid by the buyer! Auctions are used for higher-

priced properties in Sydney, Australia, East Coast properties, and for choice farm land in the Midwest.



It works on the Internet as well: eBay® Real Estate, the online auction website, claims that its sellers have on average 1,800 viewings in a ten-day period?

## Buyer Representation

Under the present system, most licensees still "want to put deals together" without really understanding buyer representation. Buyer agents need to know what their buyers need to know before their buyers need to know the information. It is simply too late for the buyer to learn something from the neighbors who come calling the day after the buyer moves in. Buyers need to be educated and licensees should be bringing up concerns to the buyer, even if it means that the buyer "passes" on a particular property.

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### **Conditions that increase probability of price-fixing:**

- *The more standardized the product, the easier to reach common price structure*
- *Competitors know each other well through social connections, trade associations, legitimate business contacts*
- *Shifting employment from one company to another*

### **Evidence of price-fixing:**

- *Price increases unsupported by increased costs*
- *Prices that stay identical for long periods*
- *Elimination or reduction of discounts*
- *Adoption of a standard pricing formula*
- *Holding prices firm*

### **How price-fixing is detected:**

- *Secret agreements*
- *Employees suggest possibility of collusion*
- *Salesperson refers to industry-wide or trade association price schedules, such as "We all charge 6%."*
- *Any statement that vendors have discussed prices among themselves*
- *Any statement that vendors have reached an understanding about prices*

Presently, the majority of buyers are only shown properties that are already listed by licensees, which may or may not be the right properties, generally because the licensee is unaware of how to get paid. We need to change that mind-set as well, since an appropriate property could be on the market by owner, or one that isn't even on the market.

Inasmuch as buyer agents are usually compensated by a split of the listing commission, even most buyer

agent compensation is a potential conflict of interest. Almost all commissions are based on a percentage of the sale price: in other words, the more the buyer spends, the more the

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licensee makes! Although many licensees have emphasized that they would *never* jeopardize their licenses by looking at their commissions

before showing properties, the video evidence in "Caught on Camera" would say otherwise. Over and over again, those videotaped licensees kept emphasizing that no one wants to show properties if they are not going to be adequately compensated (by the discount broker). Anyone viewing those tapes must wonder if these agents disclosed to their buyers, "I am only going to show you properties that bring me the most amount of money."

### **Minimum Services**

A recent trend is for traditional brokers and real estate regulatory bodies to attempt to regulate "minimum services." First, minimum services must be defined, and then legislated. Some states have moved toward legislation prohibiting anything less than "full service"—whatever that is. These efforts have been opposed by federal agencies, including the DOJ and the U.S. Federal Trade Commission (FTC), who feel that these restrictions limit consumer choice and potentially lead to less competition and higher prices for real estate services.

However, change is taking place, albeit little by little. According to R. Scott Brunner, CEO for the Virginia Association of REALTORS® (VAR), VAR's recent proposal "absolutely legitimizes the discount brokerage model that has taken such flack in other states, and gives standing to different business models under Virginia law," Brunner said. "The whole idea of this is to

make sure that consumers understand what they're getting. We believe that consumers can contract for whatever service they want to," Brunner said, and to ensure that consumers know exactly what services they will receive and won't receive in a real estate transaction.<sup>10</sup>

### Internet Offerings

Search engines such as Google have matured to a point where it is easier to find something on the Internet than it is to ask the person next to you, and certainly easier than heading off to a library. Unfettered, freely available information has changed marketing forever. Google's recent announcement that it has linked its product and service searches to its online mapping software has put fear into the hearts of even giants like Wal-Mart. That software makes it possible for consumers to see if Wal-Mart's price for an item is better than the price at the K-Mart three blocks away. Google just targeted REALTORS® when it announced a new site under development, on which owners can list their properties for sale. According to RedHerring.com, in October 2005, Google had a site, [www.base.google.com](http://www.base.google.com), quickly shut down, which could have sent Google on a collision course with "eBay, Amazon, and Craig's List"<sup>11</sup> by allowing users to list everything from used cars to real estate."<sup>12</sup>

On the plus side, brokerage office websites have been around for several years and are starting to gain a

significant amount of traffic and business. They offer online listings, virtual house tours, search engines to find properties, and all services needed to finalize a sale. These can

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**Consumers will pay something, but they are not willing to pay a lot of money simply for accessing listing information.**

often be purchased à la carte or bundled into complete packages.

### WHERE THINGS ARE HEADED

I hate to be the one to break the bad news, but "the emperor has no clothes." The trend is clear. The traditional model is not perceived as efficient nor price effective, nor does it meet new consumer expectations. One hundred percent of nothing is still nothing!

Consumers will pay something, but they are not willing to pay a lot of money simply for accessing listing information. Assuming they will do so is like asking people to pay Wal-Mart for entering their stores (although warehouse stores like Costco and Sam's Club do that in exchange for a significant discount on products). Percentage commission fee structures on sales



will become a thing of the past, as they have for stock brokerages. These will be replaced with a fee-for-service system predicated on choice and values received. This structure will rid the industry of part-time and weak agents who presently survive on the lottery mentality of commission bonanzas. The remaining brokers and agents will be fewer in number, but they should earn more with increased volume and efficiency; i.e., far fewer unconsummated showings and listing presentations. The reduced cost of selling and buying homes should increase the number of sales (turnover).

## WHAT TO DO

The good news is that real estate licensees are in an ideal spot to capitalize on advantages the Internet offers. Specifically, REALTORS® have brand recognition, an existing network of brokers and agents, the largest home sales market share, and

the largest collective database of properties for sale anywhere. What we don't have is a lot of time to overcome the existing pricing model mindset. We must become

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the eBay® of real estate ASAP. Here are some thoughts on how the new model might work and what is needed to get there.

In my opinion, NAR should rethink its policy of restricting access to MLS data and instead, develop and manage a nationwide, state-of-the-art, easily accessible and searchable MLS Internet store. The MLS should become the iTunes® store of real estate, where users can find and download songs (listings) à la carte for only 99¢ each. Apparently, several major real estate franchises are already paying between \$1 and

\$2 a click to Google for real estate ads in some cities.<sup>13</sup> An online MLS could offer free, unlimited access to abstracts and thumbnail photos of all properties that meet potential buyers' search criteria. For a small per listing fee, or a higher flat fee, users could download detailed information, photos, and specifications for as many properties as they choose.

The downloads would include links and contact information for REALTORS® in the vicinity of the listing and feature the brokerage where the listing originated. Perhaps other non-REALTOR® websites that link to the MLS might share in the process. Some listings would be sold on an auction basis with minimum, much like many of eBay®'s listings.

The national MLS site could also include information on all REALTORS®, brokers, and agents, including places for client reviews. Consumers could have access to the experiences of other consumers when preparing to hire an agent. As a result, brokers and their affiliated licensees too must change their business models and become more value-added, fee-for-service providers.

Broker and agent websites would become like that of Dell™ computers, where users check off a list of items they wish to purchase. Each item would have its own fee, or optionally, the customer/client could purchase bundled packages. For sellers, the first options would be:



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- Assist me in preparing my home for sale \$ \_\_\_\_\_
- Help me determine a competitive asking price \$ \_\_\_\_\_
- List my property on the National Listing Service \$ \_\_\_\_\_

The MLS listing fee would be large enough to cover an agent's time to inspect the property, offer pricing advice, fill out forms, enter it into the system, etc. Other fees would cover things like pre-sale consulting, escorting and scheduling of buyer viewings, additional marketing efforts, search engine placement preferences for their property, and many more. For buyers, the itemized list would include even more services starting with:

- Intake Interview \$ \_\_\_\_\_
- Fee to show five properties \$ \_\_\_\_\_
- Appointment to show me this property \$ \_\_\_\_\_

## CONCLUSION

Real estate licensees, and REALTORS® in particular, are at a rare crossroads of opportunity to chart their business success for years to come. But they must earn consumer business under new dimensions which have surfaced in the industry. They must demonstrate that they are the highest quality, lowest-cost provider for all real estate transactions. In the process, they will nullify the DOJ's antitrust actions and earn the public's trust.



# Call for Journal Articles

The Publications Committee is looking for a few good authors for the following topics/titles for our 2006 *Journal* issues:

1. Buying Your Next Laptop
2. What *Freakanomics* Tells Us About Real Estate Agents' Pricing Practices
3. Games Teachers Play
4. What You Should Know (and Be Able to Teach) about Virtual Office Websites (VOWs)
5. School Registration Software: Some Tips for Selection
6. Teaching Generation X Students
7. How I Became a National Trainer
8. Is There Intelligent Design in Real Estate Curriculum?
9. Can Ethics Be Taught?
10. Single Licensure: Is It Working?

If you are interested in contributing an article on these topics (or others), please contact Editor Debbie Long at [d\\_long@mindspring.com](mailto:d_long@mindspring.com).

## ENDNOTES

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- <sup>2</sup> United States Department of Justice (2005, October 4). *Department of Justice amends anti-trust lawsuit against National Association of REALTORS®: NAR's modified policy continues to obstruct Internet-based competition*. Retrieved from [http://www.usdoj.gov/atr/public/press\\_releases/2005/211754.htm](http://www.usdoj.gov/atr/public/press_releases/2005/211754.htm)
- <sup>3</sup> National Association of REALTORS® (n.d.). *What REALTORS® need to know about the DOJ lawsuit against NAR*. Retrieved from [http://www.realtor.org/law\\_and\\_policy/mls/ild/what\\_it\\_means.html](http://www.realtor.org/law_and_policy/mls/ild/what_it_means.html)
- <sup>4</sup> Since a peak of 24,000 travel agencies in 1994, more than a third have disappeared, according to a study by the National Commission to Ensure Consumer Information and Choice in the Airline Industry: Jackman, B. & Slater, S. (2001). *Commission announces findings on impact on changes in airline ticket distribution system on agents and consumers*. Retrieved from the University of North Texas Libraries Government Documents website: [http://govinfo.library.unt.edu/nceic/press/Commission\\_Findings\\_Final.pdf](http://govinfo.library.unt.edu/nceic/press/Commission_Findings_Final.pdf)
- <sup>5</sup> Levitt, S.D. & Dubner, S.L. (2005). *Freakonomics: A rogue economist explains the hidden side of everything*. New York: William Morrow.
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- <sup>10</sup> Law lets consumers opt out of real estate services. (2005, December 14). Retrieved from REALTOR® Magazine Online website: <http://www.realtor.org/rmodaily.nsf/0/d76f15f97f547466862570d70056d5d3?OpenDocument>
- <sup>11</sup> Sites active in many metropolitan areas offer an online version of what amounts to an entire classified ad section of a newspaper. Craig's List, for example, covers real estate, automotive, services, help wanted, personals, and more. They are all easily searchable: <http://www.craigslist.com>
- <sup>12</sup> Google may take on eBay. (2005, October 25). Retrieved from *Red Herring* website: <http://www.redherring.com/Article.aspx?a=14154&hed=Google+Eyeing+Hosted+Database&sector=Industries&subsector=InternetAndServices>
- <sup>13</sup> Outing, S. (2005, July 28). First Craigslist, now Google: Newspaper classifieds woes worsen. Message posted to Poynter Online E-Media Tidbits: <http://www.poynter.org/column.asp?id=31&aid=86186>

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Marie Spodek—nationally regarded real estate educator, author and former real estate agent—brings a wealth of energy, enthusiasm and “practical experience” to her seminars. She has held the Real Estate Educators Association’s DREI designation since 1988, and was awarded its “Jack Wiedemer Distinguished Career” award in 2001. Marie’s “Caught on Camera” antitrust course was named REEA’s 2004 Course of the Year. She is a senior instructor of REEA’s Instructor Development Workshop (IDW), RealNet’s Certified Buyer Representative course (CBR) and authored REEA’s Course Development Workshop (CDW). Her husband and business partner, Bill Magargal, the former information technology director for Asten Group, assisted with this article.

