

# DO ANTITRUST LAWS APPLY TO THE REAL ESTATE BROKERAGE INDUSTRY?\*

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## INTRODUCTION

Since the beginning of organized real estate brokerage practice, real estate brokers have enjoyed fairly uniform commission rates.<sup>1</sup> During the past decade, they also have relied heavily on their multiple listing services as a central clearinghouse and source of market information. The multiple listing service and uniform commission rates have stimulated extensive antitrust litigation. Nevertheless, legal pressures against antitrust violations have had a relatively minor impact on the real estate brokerage industry. This article examines (1) the bases for the legal issues that have been raised and (2) the economic environment as an explanation why the brokerage commission schedule has been un-

\* The authors wish to thank Robert Corley, Hugh Nourse, and Lee Reed for their helpful discussion and criticisms.

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<sup>1</sup> For example, in 1962 a popular real estate text stated the following: "All real estate boards have regular schedules of commissions for most types of deals and contingencies. A newcomer to the business should immediately get in touch with his nearest board, secure a copy of the commission schedule, and abide by it." S. McMICHAEL, *How To Operate A Real Estate Business* 333 (1962). As a result of the legal pressures discussed within this paper, similar statements are less likely to appear in the real estate texts of today.

changed by legal action. Two possible antitrust violations within the brokerage industry will be discussed. First, can market information gained from the multiple listing service be reserved only for the members of the local realty board who have joined the multiple listing service?<sup>2</sup> Second, does the existence of uniform commission rates necessarily indicate illegal price fixing?<sup>3</sup>

## THE MULTIPLE LISTING SERVICE

Most local Boards of Realtors<sup>4</sup> have formed a multiple listing service (MLS), wherein Realtors can share information concerning the various properties each has listed. Traditionally, access to MLS information was strictly limited to the local Board members who joined the MLS.<sup>5</sup> If membership in the local Board was not open to all brokers, nonmember brokers were automatically excluded from sharing MLS information. Several lawsuits have dealt with the restrictive access to the MLS system because that information is vital to small firms and sole brokers.<sup>6</sup>

Indeed, restrictions on joining the local Board of Realtors can, in essence, result in a firm's or broker's inability to compete fairly. This is especially true when there are few brokers in a given

<sup>2</sup> Several plaintiffs have argued that similar restrictions to the multiple listing service's information is a concerted refusal to deal in restraint of trade. For a full discussion of this subject, see notes 5-17 *infra*, and the accompanying text.

<sup>3</sup> See notes 21-52 *infra*, and accompanying text.

<sup>4</sup> Realtors are real estate brokers who are members of the Realtor association. "Realtor" is a tradename used by members only.

<sup>5</sup> See Minard, *Real Estate*, *FORBES*, Sept. 4, 1978, at 43-44, (hereinafter cited as Minard) wherein he writes:

All the coziness (between MLS members and the National Association of Realtors) ended, legally, in the late 1960's, when the courts struck down both NAR's requirements that MLS members be NAR members and that commissions be fixed. But the legacy lives on. Local MLS boards continue to be dominated by NAR loyalists who also tend to be executives in well-established realty firms. According to an executive at one Chicago MLS, the area's Northwest Suburban Board of Realtors limits membership in the Northwest Suburban MLS to its members—who must be realtors. "If you're not a realtor, you can't join," says the executive. Even in more enlightened MLS systems the Old Guard must approve your application. Naturally they prefer their own kind. Says a nationally known realtor who asks that his name not be used: "The interaction between the NAR and the local MLS today is no longer exactly nepotism, but it's the next thing to nepotism."

<sup>6</sup> For an excellent discussion of this subject, see Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970).

locale. The California Court of Appeals expressed this result as follows:

There are very few brokers in Glendale involved professionally in the selling and buying of single-family residences in any significant quantity who are not members of the Board. In fact, in the expert opinion of a long-time leading Glendale realtor, a real estate broker practicing his profession in Glendale must have access to the Board's multiple listing service if he or she is to compete effectively against fellow brokers enjoying such access.<sup>7</sup>

The majority of state courts that have considered the legality of restricting access to a MLS have concluded that such restraints are illegal due to unreasonableness. Very few courts have held that such a restraint of trade was lawful, and these decisions were based on unusual circumstances. Prior to discussing these uncommon cases, the majority position is described first.

### *Illegal Restraints of Trade—Restricting Access to MLS*

The first case to deal with the propriety of an MLS controlled by a realty board was *Grillo v. Board of Realtors of Plainfield Area*.<sup>8</sup> This case is representative of the analysis that most courts have followed. In *Grillo*, a New Jersey broker who was a nonmember of the Plainfield Area's Board sought to enjoin the prohibition of nonmembers from using the Board's MLS. This plaintiff also sought a declaration that the Board was an unlawful association in restraint of trade, in addition to actual and punitive damages. Although the court felt that the MLS concept was useful, it held that the restrictive use was suspect as a concerted refusal to deal. The court wrote:

The multiple listing service can potentially stimulate competition in the real estate field by placing listings in the hands of all brokers in the area. Yet under the rules and regulations governing multiple listing each member of the Board has agreed that he will not supply information about properties for which he has obtained sale listings to non-

<sup>7</sup> *Glendale Bd. of Realtors v. Hounsell*, 72 Cal. App. 3d 210, 213, 139 Cal. Rptr. 830, 832 (1977). This court concluded this Board's restrictive tie between Board membership and access to its MLS was an illegal restraint of trade.

<sup>8</sup> 91 N.J. Super. 202, 218-19, 219 A.2d 635 (1966). For a detailed discussion of this case, see Comment, *Restraint of Trade—Private Associations—Exclusive Multiple Listing Service as a Concerted Refusal to Deal and a Tortious Interference with Nonmember Broker's Right to Practice His Profession*, 21 *RUTGERS L. REV.* 547 (1967).

member brokers, but only to other members of the Board through the multiple listing service. The commitment to furnish information about properties for sale only to fellow members may be characterized as a concerted refusal to deal with nonmembers, or as a group boycott.<sup>9</sup>

After discussing the landmark federal Sherman Act cases dealing with the principle of concerted refusal to deal,<sup>10</sup> the court held this Board's MLS to be a restraint of trade.

Before deciding the fate of this restraint of trade, the court held that the rule of reason applied rather than the *per se* doctrine.<sup>11</sup> Even under the rule of reason, the board's requirement that only members share the MLS information was found unreasonable and, thus, illegal. The realty Board argued that it was attempting to assure that only qualified salespeople and brokers became board members. This argument was rejected since the state's licensing requirements had pre-empted the local Board's regulations on qualifications.<sup>12</sup>

The New Jersey Superior Court enjoined the operation of the Board's MLS until all nonmembers of the realty Board were permitted to participate without restraint (other than reasonable cost) in the Board's MLS. The court awarded actual damages but denied punitive damages because there was no evidence of malice in the Board's actions.

Reliance on the rule of reason to determine the legality of a restraint of trade has been the most common analysis used by state courts in MLS cases.<sup>13</sup> However, at least one court held that

<sup>9</sup> 91 N.J. Super. 202, 218-19, 219 A.2d 635, 644 (1966).

<sup>10</sup> See *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1944).

<sup>11</sup> The *per se* doctrine means that an act, such as a restraint of trade, is illegal regardless of any benefit it might provide society. See, e.g., *United States v. Trenton Potteries*, 273 U.S. 392, 395-402 (1927), wherein the Court held that any attempt to fix even a price below the market value is *per se* illegal. Rule of reason differs from *per se* analysis in that restraints of trade must be found unduly and unreasonably restrictive of competition before they are declared illegal. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

<sup>12</sup> The court wrote: "Insofar as the Board seeks through its combination to protect the public in real estate dealings, it is proceeding as an extra-governmental body in a pre-empted field. The grounds stated by the Board do not justify the combination." 91 N.J. Super. 202, 225, 219 A.2d 635, 648 (1966). For similar holdings on this pre-emption of brokers' and salespeople's qualification, see *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal.3d 920, 939, 130 Cal. Rptr. 1, 12-13, 549 P.2d 833, 844-845 (1976); *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 351, 304 A.2d 493, 497 (1973), *cert. denied* 414 U.S. 979 (1973).

<sup>13</sup> See *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 932-38, 130 Cal.

excluding nonmembers from participating in a MLS was a restraint of trade that was illegal *per se*.<sup>14</sup>

### *Legal Restraints of Trade—Restricting Access to MLS*

Very few reported cases hold that restricted MLS access is permissible. The factual settings of these cases are readily distinguishable from the more typical case. For example, in *Grempler v. Multiple Listing Bureau of Hartford County, Inc.*, the Maryland Court of Appeals held that the by-laws of the Multiple Listing Bureau of Hartford County reasonably restricted membership to brokers who had a business office in Hartford County. The court, therefore, ruled that the appellant-broker who maintained her office in adjoining Baltimore County was reasonably excluded from this MLS Bureau.<sup>15</sup> This result appears proper since it would stretch the realm of reasonableness to require a rural, smalltown real estate Board and its MLS to accept all applicants from the adjoining metropolitan area of Baltimore.

A second favorable decision for the real estate Board was *Barrow v. Grand Rapids Real Estate Board*.<sup>16</sup> As is typical, a nonmember of the local Board sought to enjoin that Board's restriction of its MLS to members only. This apparently was a poor case to challenge limited access to a MLS. The Grand Rapids Board of Realtors had rejected only nine applicants over a twelve year period. Furthermore, only 50% of all real estate sales were made through the MLS, and many Grand Rapids' real estate brokers were not Board members. In other words, competition between participants and non-participants of Grand Rapids'

Rptr. 1, 8-12, 549 P.2d 833, 840-844 (1976); *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 348-50, 304 A.2d 493, 496 (1973); *Glendale Bd. Realtors v. Hounsell*, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977); *Pomanowski v. Monmouth County Bd. of Realtors*, 152 N.J. Super. 100, 106-07, 377 A.2d 791, 794-795 (1977).

<sup>14</sup> *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 113 N.J. Super. 371, 382-87, 273 A.2d 795, 801-803 (1971). See also *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 353-58, 304 A.2d 493, 501-504 (1973) (concurring opinion).

<sup>15</sup> *Grempler v. Multiple Listing Bureau of Hartford County, Inc.*, 258 Md. 419, 266 A.2d 1 (1970). See also *United States v. Realty Multi-List, Inc.*, 1978-1 Trade Cases ¶ 62,091 (CCH) (M.D. Ga. 1978).

<sup>16</sup> 51 Mich. App. 75, 214 N.W.2d 532 (1974). See also *Brown v. Indianapolis Bd. of Realtors*, 1977-1 Trade Cases ¶ 61,435 (CCH) (S.D. Ind. 1977).

MLS was healthy and vigorous. Therefore, the court found that any restraint of trade that may have existed was not illegal.<sup>17</sup>

### *Do Antitrust Laws Apply to the MLS System?*

From the foregoing discussion, the question posed in the sub-heading can be answered with an emphatic "yes." The vast majority of decided cases on this point held that participation in a MLS cannot be limited to local Realtors if membership in their local Board is not open to all qualified brokers. Courts have called this restrictive nature of the MLS concept an unreasonable restraint of trade in that it amounts to an illegal concerted refusal to deal.<sup>18</sup>

### SETTING THE COMMISSION RATE

The phenomenon of uniform real estate commission rates often results in charges that brokers are guilty of price fixing. Several court decisions which deal with this issue are discussed *infra*.<sup>19</sup> Most commonly, claims of price fixing against real estate brokers and salespeople have been brought pursuant to the federal Sherman Antitrust Act.<sup>20</sup>

### *The Sherman Act*

Section one of the Sherman Act provides that any contract, conspiracy, or other combination that results in a restriction of interstate trade is illegal.<sup>21</sup> Collusion between competitors on prices to be charged likely will result in a *per se* antitrust viola-

<sup>17</sup> See *Barrow v. Grand Rapids Real Estate Bd.*, 51 Mich. App. 75, 93-95, 214 N.W.2d 532, 542 (1974).

<sup>18</sup> See notes 6-17 *supra*, and accompanying text.

<sup>19</sup> See notes 22-52 *infra*, and accompanying text.

<sup>20</sup> 15 U.S.C. § 1, *et seq.*

<sup>21</sup> Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

tion.<sup>22</sup> The real estate Boards and brokers charged with a federal antitrust violation have moved to dismiss on the ground that courts lack subject matter jurisdiction, that is, they are exempt from the Sherman Act's application.

### *Claimed Bases for Exemption*

This exemption defense has three possible alternatives: (1) Real estate brokers are members of a profession; (2) they are pervasively regulated by their respective states; or (3) they are not engaged in interstate commerce.<sup>23</sup> The first two exemptions are not expressly stated in the Sherman Act and are of very little benefit to defendant Boards or brokers.

In 1950, the United States Supreme Court held that real estate brokers are not members of a profession and, therefore, are subject to the Sherman Act's provisions.<sup>24</sup> The court wrote:

The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of §3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition "in the marketing of goods and services."<sup>25</sup>

The Supreme Court removed any lingering doubt about the implied professional exemption in the landmark case of *Goldfarb v. Virginia State Bar*.<sup>26</sup> In *Goldfarb*, the court found the minimum fee schedule prepared by the attorneys of the Fairfax County Bar Association to be an illegal restraint of trade despite the involvement of the legal profession.

<sup>22</sup> In perhaps the best known rate setting case involving real estate brokers, the United States Supreme Court wrote:

Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.

*United States v. Nat'l. Ass'n. of Real Estate Bds.*, 339 U.S. 485, 489 (1950).

<sup>23</sup> For cases wherein these exemptions were argued, see *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), *reh. denied* 423 U.S. 886 (1975); *United States v. Nat'l. Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950). See also, *Dunfee, Sherman Act Applicability to Real Estate Boards*, 10 Am. Bus. L. J. 139, 140 (1972).

<sup>24</sup> *United States v. Nat'l. Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950).

<sup>25</sup> *Id.* at 490. Section 3 of the Sherman Act is identical to § 1, *supra* note 21, except that § 3 is applicable to those restraints of trade in the District of Columbia.

<sup>26</sup> 421 U.S. 773, 786-788 (1975).

The second implied exemption, that activities regulated by the states are not within the Sherman Act's coverage, is based on *Parker v. Brown*.<sup>27</sup> In *Parker v. Brown*, the United States Supreme Court held that state employees could properly enforce the California Agricultural Prorate Act even when such enforcement imposed production limitations on raisin producers to the extent that prices were maintained above a free market level. In other words, the California law was upheld even though it diminished competition among raisin growers. The court stated that this anticompetitive state action was not necessarily within the scope of the Sherman Act.<sup>28</sup>

With regard to setting commission rates, real estate Boards and brokerage firms have substantial difficulty falling within the *Parker* exemption. Although states regulate the licensing of real estate brokers and salespeople, no state requires brokers to fix minimum or maximum commission rate schedules. Therefore, the absence of this explicit state anticompetition requirement means the state action exemption of *Parker v. Brown* is of no avail.<sup>29</sup>

The real estate brokers' best defense, to date, in a federal anti-trust case has been to argue that they neither engage in nor affect interstate commerce, and, therefore, the courts lack subject matter jurisdiction.<sup>30</sup> This third defense has resulted in differing decisions by the courts. Cases that have held real estate brokers to be engaged in or to substantially affect interstate commerce will be discussed first, followed by those that held the opposite. While reviewing these cases, it must be remembered that each one was

<sup>27</sup> 317 U.S. 341 (1943).

<sup>28</sup> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51.

<sup>29</sup> See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). See also *Hewitt and Richards, Will Detroit Edison Turn Off Parker's Power?*, 15 AM. BUS. L. J. 379 (1978); *Dunfee, Sherman Act Applicability to Real Estate Boards*, 10 AM. BUS. L. J. 139, 141 (1972).

<sup>30</sup> For cases where this argument has been successful, see *McLain v. Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315 (5th Cir. 1978); *Diversified Brokerage Services, Inc., v. Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975); *Marston v. Ann Arbor Property Managers (Management) Ass'n.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd* 422 F.2d 836 (6th Cir. 1970), *cert. denied* 399 U.S. 929 (1970); *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964).

decided on its own merits; therefore, the sufficiency or insufficiency of facts pled by the plaintiff was crucial in determining the impact, if any, on interstate commerce.

### *Real Estate Brokers in Interstate Commerce*

In the *Goldfarb* case,<sup>31</sup> the United States Supreme Court recognized the possible interstate commerce effect of real estate transactions. The court stated:

As the District Court found, "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia," and "significant amount of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia." Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions.<sup>32</sup>

Like the legal services in *Goldfarb*, real estate brokerage services typically are part of an inseparable larger transaction in interstate commerce. In our ever increasingly mobile society, common sense tells us that almost every active real estate firm deals with some buyers from out-of-state, some sellers who move to another state, and other services, such as financing or insurance purchases, related to a real estate transaction affecting interstate commerce.

Indeed, the issue of the Sherman Act's applicability does not rest on a finding that the broker is actually and directly engaged in interstate commerce. In a case involving the legality of the multiple listing service of Crystal Lake, Illinois, the United States District for the Northern District of Illinois quoted the plaintiff's extensive allegations of the defendant's interstate activities and wrote: "[T]he question is not whether the acts complained of affect a business engaged in interstate commerce, but rather, whether that conduct affects the interstate commerce of that business."<sup>33</sup> The following two tests have been used to determine

<sup>31</sup> *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). Specifically this case involved alleged fee fixing by attorneys who performed title searches in real estate transfers. The court found a conspiracy to fix these attorneys' fees and held that a Sherman Act violation existed.

<sup>32</sup> *Id.* at 783-784.

<sup>33</sup> *Gateway Associates, Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089, 1092-1093 (N.D. Ill. 1974).

whether interstate commerce is involved: either "(1) . . . the acts complained of occurred within the flow of interstate commerce, or (2) . . . the acts, although wholly intrastate, substantially affect interstate commerce."<sup>34</sup>

Since a factual situation need meet only one of these alternative tests, courts should be willing to deny a defendant's motion to dismiss for lack of subject matter jurisdiction as long as the aggrieved plaintiff alleges that interstate commerce is substantially affected by the defendant's business activities. Satisfaction of this allegation can be by a statement in the plaintiff's complaint pleading that the defendant broker deals with buyers from out-of-state and sellers who may leave the state or by enumerating transactions in or affecting interstate commerce that create a need for the broker's services.<sup>35</sup>

Many cases against real estate brokers charging Sherman Act violations of the types mentioned have resulted in settlements.<sup>36</sup> Implicit in settlements and consent orders is an acknowledgment by the brokers either that they engage in or affect interstate commerce or of their reluctance to go to trial on that issue. In typical rate fixing settlements, the real estate Board agrees to refrain from (1) fixing brokerage fees, (2) urging any member to

<sup>34</sup> *Id.* at 1093. See also, *Burke v. Ford*, 389 U.S. 320, 321 (1967).

<sup>35</sup> See *Forbes v. Greater Minneapolis Bd. of Realtors*, 1973-2 Trade Cases ¶ 74,696 (CCH) (D. Minn. 1973); *United States v. Atlanta Real Estate Bd.*, 1972 Trade Cases ¶ 73,825 (CCH) (N.D. Ga. 1971); *Contract Buyers League v. F&F Investment*, 300 F. Supp. 210, 216-218 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970). All these cases involved decisions by the respective courts to rule on the defendant's motion to dismiss only after a trial on the merits was held.

<sup>36</sup> See *McKerall v. Huntsville Real Estate Bd.*, 1976-1 Trade Cases ¶ 60,709 (CCH) (N.D. Ala. 1976); *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449 (N.D. Ala. 1974), *aff'd* 511 F.2d 1400 (5th Cir. 1975); *United States v. Real Estate Bd. of Rochester, N.Y.*, 1974-2 Trade Cases ¶ 75,355 (CCH) (W.D. N.Y. 1974); *United States v. Real Estate Bd. of Metropolitan St. Louis*, 1973-2 Trade Cases ¶ 74,744 (CCH) (E.D. Mo. 1973); *United States v. Multiple Listing Service, Realtors of Portland*, 1973-1 Trade Cases ¶ 74,515 (CCH) (D. Ore. 1973); *United States v. Greater Pittsburgh Bd. of Realtors*, 1973-1 Trade Cases ¶ 74,454 (CCH) (W.D. Pa. 1973); *United States v. Los Angeles Realty Bd.*, 1973-1 Trade Cases ¶ 74,366 (CCH) (C.D. Cal. 1973); *United States v. Memphis Bd. of Realtors*, 1972 Trade Cases ¶ 74,056 (CCH) (W.D. Tenn. 1972); *United States v. Cleveland Real Estate Bd.*, 1972 Trade Cases ¶ 74,020 (CCH) (N.D. Ohio 1972); *United States v. Atlanta Real Estate Bd.*, 1972 Trade Cases ¶ 73,787 (CCH) (N.D. Ga. 1972); *People of the State of Ill., ex rel. Scott v. Baird & Warner, Inc.*, 1977-1 Trade Cases (CCH) ¶ 61,398 (Ill. Cir. Ct. 1977).

adhere to a recommended fee schedule, (3) adopting, publishing, or distributing any proposed fee schedule, and (4) taking punitive action against any broker who refuses to adhere to any recommended fee schedule. Generally, the Board also agrees to adopt a by-law provision that all its members are to negotiate fees with their clients for the sale, lease, or management of real estate. The fact that real estate Boards in at least nine of this country's large metropolitan areas have agreed not to engage in rate setting indicates that a possible finding of antitrust violations is a major concern to Boards and brokerage firms.<sup>37</sup>

### *Real Estate Brokers Not in Interstate Commerce*

In only a few reported decisions has a realty board or association been successful in having a plaintiff's antitrust case dismissed for lack of subject matter jurisdiction. The courts have based these dismissals on the plaintiffs' failure to show that interstate commerce was directly affected. The first of these cases was decided in 1964.<sup>38</sup> The Federal District Court for the Eastern District of Michigan found that Detroit real estate brokers often sent surveys of other housing information to prospective out-of-state buyers and transmitted federal housing forms to Washington, D.C. or other out-of-state officers of federal housing agencies. Despite these explicit findings the court held that the defendants were not engaged in interstate commerce. Therefore, the real estate board's motion to dismiss was granted.<sup>39</sup>

The second pre-trial dismissal case arose five years later in the same Federal District.<sup>40</sup> In *Marston v. Ann Arbor Property Managers (Management) Ass'n*, a class action was brought on behalf of University of Michigan students alleging that members of the

<sup>37</sup> *Id.*

<sup>38</sup> *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964).

<sup>39</sup> In dismissing plaintiff's complaint, which was based on § 1 of the Sherman Act, the court stated:

The effect on interstate commerce must be direct and not remote and must be the result of intent to restrain interstate commerce, or there must be substantial and actual restraint of interstate commerce; and any conspiracy which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of this section.

303 F. Supp. 850, 854 (E.D. Mich. 1964).

<sup>40</sup> *Marston v. Ann Arbor Property Managers (Management) Ass'n*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd* 422 F.2d 836 (6th Cir. 1970), *cert. denied* 399 U.S. 929 (1970).

defendant association conspired to fix prices of rental apartments and to control the supply of new rental units. The plaintiff class asserted that this was a conspiracy in restraint of trade in violation of the Sherman Act, section one. Again, the court did not find that this defendant association was engaged in interstate commerce. Rather than ruling absolutely that no Ann Arbor real estate broker was subject to the Sherman Act's provisions, the court based its decision solely on the facts presented in the case. The court reasoned:

Unless interstate or foreign commerce has been directly and unreasonably restrained, there can be no violation of the Sherman Act and no private cause of action under the Clayton Act. The court is aware that a business of which the ultimate object is the operation of intrastate activities, such as local apartment construction and rental, may make such a utilization of the channels of interstate trade and commerce that the business itself assumes some minor interstate character. However, the court does not find defendants conducting such a business. Defendants' business is not of such an interstate character as intended by the Act.<sup>41</sup>

The university students also argued that since some of them were from out-of-state, interstate commerce was sufficiently influenced because high rentals would discourage nonresident students from attending the University of Michigan. The court simply refused to accept jurisdiction based on some plaintiffs' out-of-state residencies;<sup>42</sup> therefore, this case was also dismissed upon defendant's motion.

The third case to be dismissed was *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*.<sup>43</sup> This plaintiff, an independent real estate broker, sought and was refused admission to the Des Moines Board of Realtors. Admission was necessary to participate in the Board's multiple listing service. A survey of sixteen percent of the realty board members' listings showed that five buyers were from out-of-state and that some sellers intended to leave Iowa.<sup>44</sup> The Eighth Circuit Court of Appeals concluded that there was insufficient evidence to show an interstate commerce connection that would justify this Sherman

<sup>41</sup> 302 F. Supp. 1276, 1279.

<sup>42</sup> *Id.* at 1280.

<sup>43</sup> 521 F.2d 1343 (8th Cir. 1975).

<sup>44</sup> *Id.* at 1345.

Act suit.<sup>45</sup> Even after studying the effect of interstate commerce found in *Goldfarb v. Virginia State Bar*<sup>46</sup> under apparently similar factual allegations,<sup>47</sup> this appeals court granted the defendants' motion to dismiss.

Most recently, the Fifth Circuit Court of Appeals in *McLain v. Real Estate Board of New Orleans, Inc.*,<sup>48</sup> thoroughly analyzed the requisites for showing an impact on interstate commerce and affirmed the dismissal of a price fixing action against New Orleans' brokers. After considering the plaintiffs' complaint, the appellate court held that there was no allegation that the defendants were engaged in or substantially affected interstate commerce. Rather than condemning the court's analysis, the insufficiencies in the plaintiffs' pleadings must be examined.

First, the complaint stated that defendants' customers were "persons moving into and out of the Greater New Orleans area."<sup>49</sup> Obviously, this statement is inadequate to show an impact on interstate commerce. The court recognized that its decision likely might have been quite different if the allegation had not been so narrowly drafted.<sup>50</sup> Second, plaintiffs contended that defendant's activities in securing home financing and title insurance from sources outside of Louisiana satisfied the interstate commerce requirement.<sup>51</sup> However, the Fifth Circuit Court of Appeals agreed with the district court's findings that these brokers did not secure financing or title insurance as part of their services.<sup>52</sup> Therefore, *McLain* emphasizes the need for sufficient factual allegations that the defendant brokers were engaged in or substantially affected interstate commerce if the Sherman Act is to be found applicable.

These four cases, resulting in dismissal, were decided solely on

<sup>45</sup> *Id.* at 1347.

<sup>46</sup> 421 U.S. 773 (1975).

<sup>47</sup> *Id.* at 783-786. See note 31 *supra*.

<sup>48</sup> 583 F.2d 1315 (5th Cir. 1978). The United States Supreme Court has granted certiorari in this case. Apparently the case will be considered sometime in the Fall. See 47 U.S.L.W. 1175-76 (May 15, 1979).

<sup>49</sup> 583 F.2d at 1319.

<sup>50</sup> The court wrote: "[W]e emphasize the limited scope of our holding. Here we are not considering pleadings that allege price fixing in appreciable sales of realty to out-of-state buyers. That might be a different matter." *Id.*

<sup>51</sup> *Id.* at 1320.

<sup>52</sup> *Id.* at 1321-1323.

the jurisdictional issue. None of the courts considered the substantive merits of the plaintiffs' antitrust claims. Therefore, the plaintiffs were unable to raise the ultimate issue of illegal price fixing or other antitrust violation. The courts concentrated on only the preliminary issue of whether the defendants were engaged in or substantially affected interstate commerce.

### *Do Antitrust Laws Prevent Uniform Real Estate Commission Rates?*

Before asking this question, a federal court must find that the Sherman Act's interstate commerce requirement is satisfied. If this prerequisite is not met, the answer to the question is no. Assuming that real estate brokers are engaged in or substantially affect interstate commerce, proof of a consensual agreement to set prices is essential.<sup>53</sup> Finding a conspiracy is also essential to a charge of price fixing under state antitrust laws, but the existence of uniform real estate commission rates does not automatically mean collusion is present. Indeed, interdependency among brokers is an economic factor that encourages uniform rates. These economic pressures on brokerage fees are now discussed.<sup>54</sup>

<sup>53</sup> See note 22 *supra*. See also, *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965), wherein the court stated:

An accidental or incidental price uniformity, or even pure conscious parallelism of prices is, standing alone, not unlawful. Nor is an individual competitor's sole decision to follow a price leadership, standing alone, a violation of law. . . . And we agree that decisional law, not the statute, makes it clear there must be an *element of agreement*—that an agreement is the gist of the offense of price fixing.

*Id.* at 1007. (Court's emphasis.) The court continued by defining what is meant by an agreement, as follows:

It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to that arrangement. . . . Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. . . . An exchange of words is not required. . . . Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy.

*Id.* at 1008 (Citations omitted.)

<sup>54</sup> For a general discussion of the economic environment of the real estate industry, see Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STANFORD L. REV. 931 (1977).

## THE ECONOMIC ENVIRONMENT

Despite the legal pressures against rate setting, real estate commissions remain reasonably standardized. Therefore, the question that must be asked is what factors in the environment of the real estate brokerage industry tend to immunize the industry from the legal pressures for change. Two possibilities are that: (1) brokers are charging fair fees and the organizational structure of the industry does not inhibit healthy competition, or (2) the economic pressures that inhibit change are so great that brokers can not afford to change, i.e., they would be driven out of business. Consideration of both possibilities must begin with a discussion of the demand for brokerage services and related pricing practices.

### *Characterizing the Brokerage Industry*

Most residential sales take place through brokers.<sup>55</sup> Although this alone may be an indication that commission rates are not excessive, the numerous instances of sellers who initially try to sell their own homes gives the impression of a reluctant rather than a willing purchaser of brokerage services.<sup>56</sup>

Over the last three decades the typical commission for selling residential property has moved from five to six, and, now in many cities, to seven percent of the selling price. At the same time the selling price of existing and new homes has risen nationally at an annual average rate of near ten percent since 1970.<sup>57</sup> The inflation

<sup>55</sup> In a 1968 random sample of 140 residential sales in Oakland, California, 129 or 92.1% were through real estate agents. See BECKER, *ECONOMIC ASPECTS OF REAL ESTATE BROKERAGE* 61 (The Center for Real Estate and Urban Economics, Research Report 36, 1972) (hereinafter cited as Becker). In a 1973 random sample of 396 residential sales in Columbus, Ohio, over 93% were through real estate agents. See R. Zerbst, *The Determinants of Single Family Residential Property Values* (Ph.D. Dissertation, The Ohio State University, 1974). At the Fall, 1978, Realtor's meeting, the Executive Director of the Dallas County, Texas, Board of Realtors claimed over 90% of all residential sales went through members of the MLS, indicating a similarly low percentage of successful sales by owners.

<sup>56</sup> In order to check for the percentage of direct sales which are attempted a sample of 600 property newspaper advertisements were taken from the 1973 Sunday Columbus Dispatch (Ohio) papers. The result was 105 or 17.5% were listed as "for-sale-by-owners". This figure is over double the success rate indicated by Zerbst over this same time period. See note 55 *supra*.

<sup>57</sup> The median sales prices of new homes increased by 173.5 percent from 1970 to July 1979, with existing home prices not far behind. See BUREAU OF THE CENSUS, U.S. DEP'T OF

rate on homes has exceeded the average increase in the Consumer Price Index since 1970.<sup>58</sup> Thus, price inflation on homes, which would alone have increased the brokers' commissions, combined with rising percentage brokerage fees, has resulted in brokers' fees that exceed the overall rate of inflation.

In a 1972 Research Report, Boris Becker stated:

If in actuality, individuals are at the mercy of the real estate industry, it is possible that the present commission (six percent) is nowhere near the upper limit that might be tolerated in the aggregate. Discovery of this fact could lead the industry to adopt an even higher commission fee, a move that would not be surprising.<sup>59</sup>

As Becker wrote those words a move from six to seven percent commission rates was beginning in many cities throughout the United States. As these words are being written, it is possible that commissions may be on their way to eight percent in some cities.

One explanation for the ability of an industry to raise prices, while providing essentially the same good or service, is that the demand for brokerage services is inelastic, i.e., with a 10% increase in price the quantity demanded declines *less* than 10%. With a constant level of competition, increasing prices in such industries merely leads to greater profits. But when ease of entry is present, as is the case in the real estate brokerage industry, raising prices results in a greater supply of the product or service that in turn negates the possibility of excess earnings per supplier of the service. New agents would continue to enter the industry as long as income potentials were above previous equilibrium levels.<sup>60</sup> Thus, increases in profit margins because of higher prices are negated by the effect of more firms and agents sharing the higher priced brokerage business.

Evidence that such an increase in supply has occurred in the real estate brokerage industry, in response to higher fees, can be seen by examining the per capita increase in the number of active

COMMERCE, NEW FAMILY HOMES SOLD AND FOR SALE, Series C25-79-10 (Oct. 1979); Weicher, *The Affordability of New Homes*, 5 AM. REAL ESTATE AND URBAN ECON. ASSOC. J. 209, 211 (1977).

<sup>58</sup> Between 1970 and July, 1979, the cost of all consumer products rose 102.6 percent compared to a 173.5 percent increase in the cost of homeownership. See 65 FED. RESERVE BULL. A51 (Oct. 1979).

<sup>59</sup> See Becker, *supra* note 55, at 74.

<sup>60</sup> See Appendix, Exhibit 1 and accompanying discussion, pp. 337-39 *infra*.

sales licenses in the United States from 1966 to 1976. The average number of licensees (brokers and salespersons) per 1000 population in the United States was 4.11 in 1966 and over 7.3 in 1976.<sup>61</sup> An increase in the per capita supply of brokerage services because of rising prices relative to costs implies an excess supply which can only exist if the higher prices were somehow maintained.<sup>62</sup>

If the above analysis does in fact characterize the real estate brokerage industry then two questions must be addressed: (1) Is the demand for brokerage services inelastic? and (2) How can prices be maintained at levels above the most efficient perfectly competitive levels in an industry that has ease of entry? These questions will be addressed in turn.

### *The Demand for Real Estate Brokerage Services*

The elasticity of demand for real estate brokerage services depends on the owners' perceptions of the difficulty in selling their properties. The problem for the seller is how most economically to attract potential buyers. The seller's costs include both actual selling costs, such as advertising costs or brokerage costs, as well as the costs of time (opportunity costs). At the same time the seller must consider if the expected proceeds of the sale through a broker are more or less than the expected proceeds from using their own efforts and skill, and trade this difference against their actual selling costs and time. Although the decision is theoretically clear and simple, hard empirical evidence concerning the seller's costs is scarce.<sup>63</sup>

The owners' difficulties in selling their own properties can also be considered in the light of buyers' decisions in searching for a property. In seeking an acceptable property, buyers initially utilize varied sources of information, such as newspapers, for sale signs, and so forth. A personal search procedure is generally nec-

<sup>61</sup> See NAT'L ASS'N OF R.E. LICENSE LAW OFFICIALS, 1966-1967 SUMMARY OF LICENSE LAW STATISTICS (1968); NAT'L ASS'N OF R.E. LICENSE LAW OFFICIALS, NARELLO ANNUAL REPORT at 53-57 (1979).

<sup>62</sup> See Appendix, p. 337 *infra*, for a graphical illustration and further discussion of the demand for and supply of brokerage services.

<sup>63</sup> In a 1976 study conducted in Columbus, Ohio, no significant price differentials could be found between direct owner sales and broker sales. See N. Miller, *The Influence of Market Transaction Phenomena on Residential Property Values* 87 (Ph.D. Dissertation, The Ohio State University, 1977) (hereinafter cited as Miller.)

essary in order to inspect and evaluate the alternative properties for sale. Most initial contacts involve a broker-listed property, unless these are specifically avoided by the buyer.<sup>64</sup> Some buyers may expect *all* the properties listed by brokers to be at prices above what would be asked for similar "for-sale-by-owner" properties, and therefore purposely avoid broker-listed properties in favor of directly offered properties. However, no empirical evidence is available to suggest that significant price differentials exist.<sup>65</sup> In addition, there is no theory to explain how significant price differentials could exist in the absence of a factor that might affect the expected future cost of homeownership (as with less expensive FHA and VA financing).<sup>66</sup> Most brokers, such as MLS members, are able to show buyers a large portion of the market, which results in a greater probability of finding an acceptable property. Therefore it seems reasonable to assume that most buyers will request brokers to aid them in their search process, with the result that a private sale is made more difficult for owners. An owner advertising his single property is not sufficient to attract the numerous potential buyers needed in order to be fairly confident of a sale within a typical marketing time.<sup>67</sup> The fact that brokers control a majority of the available properties implies their indirect control over all but the most casual buyers or buyers who avoid brokers because they believe that significant price savings can be achieved beyond their additional personal search costs. Certainly, some buyers seek directly available properties, as evidenced by the small but significant portion of successful private sales.<sup>68</sup> However, owners who require typical or shorter selling periods on the market will find greater difficulty in attracting a potential buyer with their single property for sale than will the typical broker. A broker, especially an MLS member, with many ways to attract a greater total number of buyers will have substantial advantages over the average owner-seller.<sup>69</sup>

<sup>64</sup> See note 55 *supra*.

<sup>65</sup> See Miller, *supra* note 63.

<sup>66</sup> See Zerbst and Brueggeman, *FHA and VA Mortgage Discount Points and Housing Prices*, 32 J. OF FINANCE 1766 (1977).

<sup>67</sup> Typical marketing periods for most residential properties run 60 to 120 days. See Miller, *Time on the Market and Selling Price*, 6 AM. REAL ESTATE AND URBAN ECON. ASSOC. J. 164 (1978).

<sup>68</sup> See note 55 *supra*.

<sup>69</sup> The phenomenon of being able to attract a much larger market per seller because of

The authors are not trying to assess the exact degree of difficulty of a private sale, nor are they implying that it is impossible for owners to sell within typical selling periods; these are empirical questions. Rather, the above discussion is intended as a rational explanation for the significant difficulty that sellers have in marketing their own properties and the resulting inelasticity in the demand for brokerage services.

### *Imitative Pricing and Economic Coercion*

In addressing the second question of how prices can be maintained at above competitive levels in an industry with ease of entry, we must examine the relationships and behavior of brokers toward one another.

A significant portion of residential real estate sales involve two separate brokerage firms; one the seller's agent and the other the buyer's agent. Such transactions, referred to as cooperative or "co-op" sales, are encouraged by Realtor associations.<sup>70</sup> In fact those brokers who are MLS members, and nearly all Realtors are,<sup>71</sup> must allow access to their listings by other MLS members, unless specifically prohibited by the owner. Cooperative sales often avoid losses which would result when no fees are collected because the listings do not sell within the required listing period. Of course, the percentage of cooperative transactions of a firm's total business varies among brokerage firms; however, even a small percentage of "co-op" sales generally has significant impact

the grouping of alternatives is similar to the agglomerative economics which may result in competing businesses locating near each other. For example, several shoe stores together may attract so much larger a total market that each may survive while alone they would falter. By locating together their market attraction is more powerful than the sum of the market power when alone. This same reasoning applies to the broker's buyer-attracting power versus the direct owner sellers out on their own.

<sup>70</sup> With respect to cooperation between Realtor brokers, Article 22 of the National Association of Realtors' Code of Ethics states: "In the sale of property which is exclusively listed with a Realtor, the Realtor shall utilize the services of other brokers upon mutually agreed upon terms when it is in the best interests of the client." At this writing there are over 700,000 Realtor members in the United States according to the National Association of Realtors. Although there are approximately 1.5 million licensed real estate brokers or salespeople, only one third of these are "really active." See Minard, *supra* note 5, at 43. Therefore, it is clear that Realtors account for the vast majority of the residential real estate sales and will collect the major portion of the commissions earned.

<sup>71</sup> See Minard, *supra* n. 5, at 42.

on most firms' net incomes.<sup>72</sup>

The typical commission split is three percent to the buyer's broker with the balance, usually three or four percent, going to the seller's broker. Despite the far greater profit on sales by the listing office, there is little doubt of the need to have the goodwill of other brokers.<sup>73</sup> The very survival of a firm may depend upon the marginal revenue or avoidance of loss that cooperative sales provide.<sup>74</sup> It should be obvious that brokers who charge a commission other than the going rate are held in ill favor by other brokers, and they may soon find themselves out of business.

Brokers and agents will tend to show their own listings to potential buyers first, since commission profits are greatest if a sale occurs. However, rather than lose a possible commission the brokers will show buyers the listings of other brokers. Brokers have sufficient economic incentive to show primarily those listed properties of other firms on which they are assured of the standard commission split. Properties where less than the standard, "going rate," split is possible are shown last, if at all.<sup>75</sup> In addition, the great number of single unit offices,<sup>76</sup> has meant that subtle discrimination against brokers with "non-standard" fees would be difficult for the consumer, using a broker's services, to detect.

<sup>72</sup> It is apparent from discussions with Realtors around the country that co-op sales, even if only a small fraction of total business, are vital in avoiding losses on listings which otherwise might not have sold. In a 1976 study by the Department of Economics and Research of the National Association of Realtors it was stated: "On the average, 58 percent of a firm's Gross Income was paid out in fees or distributed in commissions to salespersons and co-brokering firms." *Real Estate Brokerage Income, Expenses, Profits, 1976*, NAT'L ASS'N OF REALTORS at 10 (1976). With average net income estimated at only 12.8 percent of the company's collected dollar, losing even 5 to 10 percent of total sales through a loss of co-op sales would have a significant impact on most firms. *Id.* at 12.

<sup>73</sup> For numerous examples of brokers being denied MLS access because they undercut the going commission rate, see Minard, *supra* note 5, at 44.

<sup>74</sup> "Real Estate 1200," a firm in Cincinnati, Ohio, charged a flat \$1200 dollar fee and lasted only two years before bowing out. The owners of "Real Estate 1200" stated: "[O]ther firms would not cooperate on sales listed by 'Real Estate 1200' and other firms would tell sellers not to list with 'Real Estate 1200' because of this reason." *Cincinnati Enquirer*, June 14, 1978, § E, at 1.

<sup>75</sup> It is the opinion of author Miller, based on experiences during two years of managing a brokerage office, that most brokers would boycott any office which offered less than the going-rate commission split, even if this meant foregoing some potential income altogether.

<sup>76</sup> An estimated 80 percent of the roughly 150,000 brokerage firms in the United States are single office outfits. See Burck, *Why Merrill Lynch Wants to Sell You a House*, *FORTUNE*, Jan. 29, 1979, at 87 (hereinafter cited as Burck.).

This is because buyers are unaware of properties they are not shown because of such factors as a lower cooperative fee split to their agent. There are simply too many other firms and properties available in most markets which may satisfy a buyer for them to detect subtle elimination of a few alternatives. Such discrimination against "discount" brokerage firms could only be overcome by their gaining such a significant portion of the market that buyers would be aware of some of their listings and insist on seeing them.

Independent of what the actual fees are, six, seven, or even eight percent, interdependence among brokers ultimately requires them to follow imitative pricing practices within a local market. Pressures to maintain working relationships with other brokers are so great that commission rates remain fairly uniform. In other words, the economic structure and pressures have overpowered the legal actions that so far have had impact on the pricing of brokerage services.

Collusion and monopoly power are most often cited as causes of non-competitive price setting. Due to the ease of entry into the brokerage business, collusion is not the only possible explanation for non-competitive rate setting. Furthermore, given the current economic structure and prevailing interdependence of the brokerage industry, collusion is not even essential to maintain noncompetitive pricing practices within the industry.

### *The New Environment*

In the 1950's and 1960's the small real estate office, with fewer than ten agents, was a ubiquitous phenomenon throughout the United States. Today, the small office is a dwindling species. Larger firms have emerged primarily as a result of operating efficiencies achieved by training salespeople and by advertising for listings. Larger firms can afford specialized personnel to handle specific tasks such as training, advertising, and office management. Additionally, larger firms keep a greater proportion of their sales "inhouse," where commissions need not be split with another firm. The franchise affiliation trend also has emerged for reasons of operating efficiencies. In addition, these affiliations aid in capturing the important intercity mover market. Small to medium size firms can, through franchise affiliation, gain efficiencies by sharing promotional expenditures and by jointly spon-

soring training programs for their personnel.

There are currently about thirty franchisors. The biggest, Century 21 Real Estate Corporations, has grown from 150 franchisees in 1972 to over 6,000 in 1978.<sup>77</sup> Evidence of either the lucrativeness of the intercity mover market or excessive brokerage fees is shown by the number of large corporations which have begun to handle their own intercity corporate transfers.<sup>78</sup> In addition, Merrill Lynch's desire to enter the residential brokerage business may be indicative of a major evolutionary change for the real estate brokerage industry.<sup>79</sup>

Beginning some time soon, a growing number of Americans will find that Merrill Lynch and Co. has become their broker—their real estate broker, that is. The bulls are being sent out to graze on the lush lawns of the residential brokerage business, and real estate brokers around the country agree that the invasion is a major event for their industry.<sup>80</sup>

The implications of larger brokerage firms, franchise affiliations, and new corporate competition are far reaching. The local multiple listing services that have enabled small firms to provide better service to their buyer-clients are not nearly as essential for firms with several hundred or even thousands of listings and intercity affiliations. The result is to weaken the interdependence of the brokerage firms on one another. Imitative pricing and the goodwill of fellow brokerage firms becomes less critical as cooperative sales become rarer. However, larger brokerage firms in the future, due to operating efficiencies and intercity affiliations, will make entry into the brokerage industry more difficult. The greater the difficulty of entry into the industry and the fewer the firms the greater the possibility of collusion with respect to fee setting.<sup>81</sup> Thus, the emerging economic structure of residential

<sup>77</sup> See Minard, *supra* note 5, at 42.

<sup>78</sup> Examples of large corporations with in house services for movers include Merrill Lynch and Sears, among others. Merrill Lynch is also beginning to undertake operations to purchase major real estate brokerage firms throughout the nation. See Wall St. J., Sept. 22, 1978, at 19, col. 2.

<sup>79</sup> See Burck, *supra* note 76, at 80-89.

<sup>80</sup> *Id.* at 86.

<sup>81</sup> In a recent article on the franchise boom in real estate, the author wrote: "In just five years, most of those involved expect that seventy percent to eighty percent of the sales of single family homes will be controlled by fewer than 10 big companies." Kilborn, *National Chains Have Upended Real Estate Business*, The Atlanta Constitution, Feb. 8, 1979, § D, at 13, col. 1.

brokerage may be nearly as price-competition proof as the past economic structure. The question, however, becomes "how antitrust-proof is the emerging structure?"

## CONCLUSION

Since 1890, when the Sherman Antitrust Act was first adopted, antitrust laws have been aimed at preventing monopolies and restraints of trade that lessen competition. Antitrust cases against real estate Boards, firms, and brokers generally have either attacked the restrictive membership of the local multiple listing service or the uniformity of commission rates. Restricting membership in the local multiple listing service has been successfully questioned in several cases.<sup>82</sup>

A major emphasis of the antitrust laws is to assure adequate price competition. Collusion or agreement among competitors to fix prices is a *per se* violation of the Sherman Act and state antitrust laws. Nevertheless, real estate brokers have generally charged uniform commission rates on residential property. Despite the existence of these uniform rates, federal courts have not always found illegal price fixing because the brokers' effect on interstate commerce has not necessarily been proven. Furthermore, collusion to set uniform commission rates has not always been demonstrated in past cases.

The interstate commerce jurisdictional issue has been a major stumbling block for courts in the past. If uniform pricing practices are perpetuated by the newer larger firms and franchise affiliations, with a significant proportion of clients moving between cities, the likelihood of courts holding that these firms are engaged in or substantially affect interstate commerce greatly increases.<sup>83</sup>

<sup>82</sup> See notes 5-17 *supra* and accompanying text.

<sup>83</sup> For example, the Federal Trade Commission is conducting "an in-depth, nationwide investigation into possible anticompetitive abuses by the nation's realtors." See Minard, *supra* note 5, at 46; The Atlanta Constitution, Feb. 9, 1979, § A, at 8, col. 2. In addition, the Department of Justice has charged six real estate companies and three individuals under the criminal provisions of the Sherman Act with conspiring to fix; raise and maintain commission rates on sales of residential property located in Montgomery County, Maryland. The defendant's motions to dismiss on the ground they were not engaged in interstate commerce were denied. The District Court of Maryland found that these defendants do substantially affect interstate commerce, even though their business is princi-

Uniform prices without consent or collusion among competitors is not in itself illegal. Imitative pricing practices, even as a result of conscious parallelism, may be entirely proper. Even without collusion, the uniform commission rates found in the real estate brokerage industry have been necessitated by the interdependency of the traditionally small brokerage firms. Certainly if real estate brokers or salespersons contemplated or fixed commission rates, either through written or oral agreements, and their conduct conformed to that arrangement, an antitrust violation would exist.

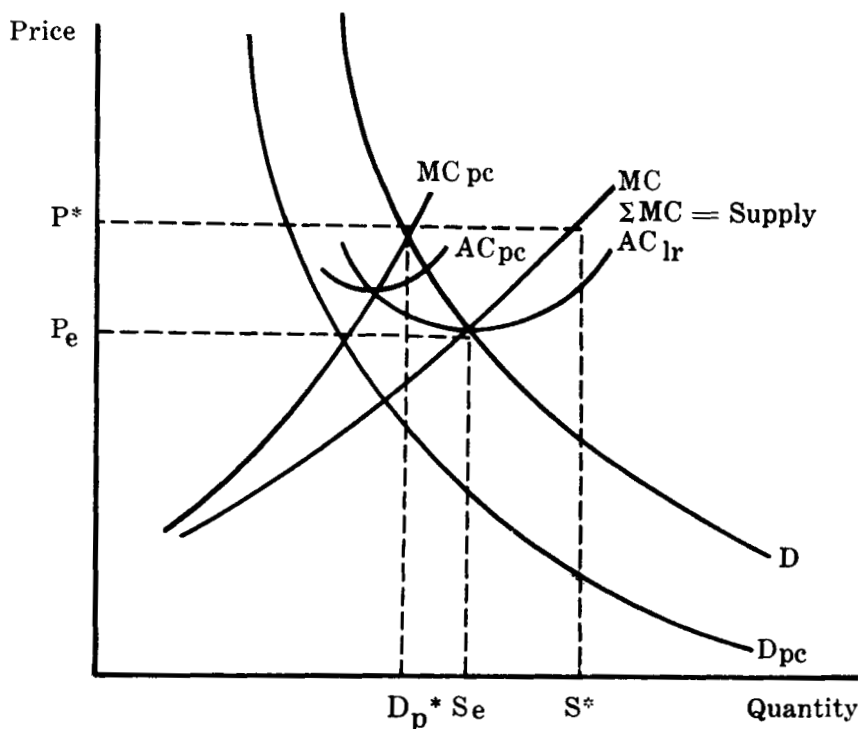
The sheer number of small independently operated brokerage firms that has existed in the past has made collusion or consenting agreements with respect to commission rates difficult to prove. As brokerage firms continue to grow larger and franchise affiliations increase, collusion among a fewer number of firms becomes easier and subject to increasing scrutiny.

The real estate brokerage industry seems to be undergoing an evolution of great significance to the traditionally small firm and the consumer of brokerage services. The increasing size of brokerage firms and franchise affiliations has weakened the influence and power of multiple listing services as well as the interdependency among firms. The potential gain in business from price cutting may begin to outweigh the expense of lost cooperation from other brokerage firms. Indeed, a successful break from the common pattern of uniform commission rates, by a few of the larger firms, may trigger a price revolution in the brokerage industry.

pally intrastate. *United States v. Jack Foley Realty, Inc.*, 1977-2 Trade Cases ¶ 61,678 (CCH) (D. Md. 1977), *aff'd* 47 U.S.L.W. 2713 (4th Cir. April 19, 1979). *See also*, *United States v. Greater Syracuse Bd. of Realtors, Inc.*, 1978-1 Trade Cases ¶ 62,008 (CCH) (N.D. N.Y. 1978).

# APPENDIX EXHIBIT 1 DEMAND AND SUPPLY OF BROKERAGE SERVICES

## EXHIBIT (1) DEMAND AND SUPPLY OF BROKERAGE SERVICES



$P^*$  = actual price or commission rate.

$P_e$  = long run competitive equilibrium price.

$D_p^*$  = the quantity of brokerage service demanded at price  $P^*$ .

$S_e$  = long run competitive equilibrium supply.

$S^*$  = actual supply given price  $P^*$ .

$D_t$  = the share of total demand for an individual firm.

$D_{pc}$  = the share of total demand for a price cutter firm.

$MC$  = marginal cost curve for an average firm in the industry,

$MC = \text{Supply}$ .

AClr = long run average cost curve for an average firm in the industry.

MCpc = marginal cost curve for an individual firm (in this case that of the price cutter).

ACpc = average cost curve for an individual firm with marginal cost curve MCpc.

Exhibit 1 is a theoretical depiction of the demand for and supply of brokerage services comparing perfectly competitive prices to rigid price setting practices. Under perfect competition, price,  $P_e$ , is determined by the intersection of the demand curve,  $D_t$ , and the long run average cost curve, AClr. The marginal cost curve, MC, is essentially a supply curve which mathematically must pass through the minimum point on the average cost curve. The total quantity supplied of brokerage services is limited to the competitively determined supply,  $S_e$ , since marginal costs exceed price beyond this point.

When price is set above  $P_e$ , at say  $P^*$ , the quantity supplied increases along the marginal cost curve until  $P^*$  no longer exceeds MC, at  $S^*$ . The difference between  $S_e$  and  $S^*$  can be referred to as "excess supply." Note that excess profits for the average firm will not exist even with a non-competitive price above  $P_e$ . Rather the increase in supply absorbs the increased profit margin until  $P = MC$  in equilibrium again.

Excess supply would not exist except for some enforcement mechanism preventing most firms from charging below  $P^*$ . Take the case of an individual firm which has marginal cost, MCpc, and average cost, ACpc, curves as in Exhibit 1. Seeing that  $P^*$  exceeds MC at the AC minimum, the firm decides to become a price cutter, pc, and lower the price to somewhere below  $P^*$  and above or at  $MC = AC$ . If such a move increased the price cutting firm's demand, other firms would follow with similar price moves competitively driving the price down to  $P_e$ . However, when such price cutting behavior reduces the price cutting firm's share of total demand as shown by  $D_{pc}$  to a level below AC, then such a price move would mean going out of business.

How the price cutting firm's share of demand can move from  $D_t$  to  $D_{pc}$  can be explained by the recognition that a significant portion of  $D_t$  involves two cooperating brokers. That is, a firm's share of  $D_t$  is not only dependent on the public but to a signifi-

cant degree (10 percent or more) on other firms. When a price cutter reduces the commission rate it affects not only their own profit margin on those successful sales but also reduces the portion available for other cooperative firms providing buyers. The shift from Dt to Dpc is the result of the loss of cooperative business by the price cutting firm. When cooperative sales represent a significant portion of the firm's business such price cutting behavior is not economically feasible. To the extent firms are dependent on each other to share the total demand for their services imitative pricing will be the rule of survival.

As firms grow larger and as the dependency on other firms to share in the demand for the services declines, the move from Dt to Dpc will be less significant. Such an environment would produce price cutters unless collusion or other factors would explain rigid pricing practices.

Current pricing systems maintain excess supply and indicate the existence of gross inefficiencies in the brokerage industry as a whole.