American Antitrust Institute Real Estate Competition Project

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***Norman W. Hawker*[1]**

1 The author is a Senior Fellow at the American Antitrust Institute and was chair of the symposium. Further biographical information on Professor Hawker and the other participants may be found in Appendix I.

INTRODUCTION

On November 8, 2005, the American Antitrust Institute (AAI) held a symposium on Competition in the Residential Real Estate Brokerage Industry. The papers presented by the participants examined the industry from legal, economic, work practices, and political perspectives.[2]

Considering the large number of real estate firms and the low barriers to entry, one may expect that the brokerage industry would be a highly competitive market. However, the brokerage industry has a documented history of collusion to raise prices and exclude rivals. While such naked restraints of trade by real estate brokers are largely a thing of the past, significant but perhaps less obvious anticompetitive conduct and harm can occur. The Symposium papers identified three areas of concern in the residential real estate market: (1) commission rates, (2) the Multiple Listing Service (MLS), and (3) anticompetitive regulation, especially at the state level.

A BRIEF OVERVIEW OF THE PRESENTATIONS' SUBSTANCE

First, most observers believe brokerage firms charge a commission rate of between 5 and 6 percent with little variance among firms or housing markets. However, neither the quantity nor the quality of publicly available data and empirical analysis is sufficient to support any conclusion about the current level of commission rates, and whether they are rigid or flexible. Even if the lowest estimates of 5.1 percent prove correct, this would still be considerably above the 1.5 to 3 percent commission rate that one might expect, based on comparisons with price levels in other countries. Moreover, any reduction in average commission might simply reflect those paid on the highest priced properties, where sellers have the most

2 The papers by Bush; Hahn, Litan and Gurman; Hawker; Weicher; and White have been accepted for publication in 35 Real Est. L.J. 11, et seq. (2006). The remaining papers are under submission or published as noted *infra*.

sophistication and leverage to negotiate a lower commission. Given that the broker's costs do not increase significantly with the selling price of the home, commission rates in a competitive market should vary inversely with the home's price rather than remaining constant.

Second, although the use of MLS's greatly enhances the efficiency of the residential real estate market, it also raises some antitrust concerns. Access to the MLS is essential for any broker to survive, making it one of the reasons for the incredible organizational and political success of the list's controller— the National Association Realtors (NAR). Incumbent firms control the MLS through local boards affiliated with the NAR and can limit the ways in which other firms use MLS data. The Department of Justice (DOJ) is currently challenging the NAR rule allowing a listing broker to prohibit competing brokers from posting the MLS data on their websites.[3]

Third, for a variety of reasons, the NAR and its affiliates have had exceptional success as an advocacy group. Although Professor Gray's political science-based presentation did not report on any state regulations, she demonstrated the NAR and its affiliates have resources typically associated with powerful groups. Her work may help other scholars explain some of the anticompetitive regulations that have been proposed and, in some cases, enacted. For example, a number of states have or are considering regulation that would prohibit brokers from rebating a portion of their commission to consumers. Similarly, "minimum service" laws require consumers to pay for many or all of the full package of services offered by brokers regardless of the particular consumer's needs or preferences.

A number of recommendations might be derived from the discussions at the symposium. No votes were taken and a wide range of interests were present. The following conclusions reflect the views of the author, who played the lead role in organizing the symposium. First, the need for more empirical data regarding commission rates cannot be overstated, and the Federal Trade Commission (FTC) is in the best position to collect this data. Second, the DOJ should continue to scrutinize the use of the MLS as exclusionary devices. Third, the DOJ, FTC, and others should continue to lobby state legislatures and agencies to undertake pro-competitive actions that would allow new types of firms with new business models into the market. Similarly, at the federal level, pro-competitive actions would include adoption of regulations to allow banks and other financial institutions entry into the brokerage market.[4]

DISCUSSION

Anticompetitive Conduct in Otherwise Competitive Markets

Price-fixing agreements, group boycotts and other naked forms of anticompetitive behavior normally occur in markets with a limited number of competitors. As the number of competitors increases, it also becomes increasing difficult for the competitors to coordinate their behavior, monitor each other's compliance with the agreement, and discipline cheaters. The residential real estate brokerage industry lacks many of the characteristics that facilitate these traditional forms of collusion. For example, this market has a vast number of firms and few barriers to entry — characteristics that are normally associated with robust competition.

Lande and Marvel,[5] however, provide an analysis of collusive behavior that may explain the lack of price competition among brokers— what they call "Type III" collusion. Traditionally, the

3 *See* Amended Complaint, United States v. National Association of Realtors, Civil Action No. 05C-5140 (N.D. Ill. 2005), *available at* <http://www.usdoj.gov/atr/cases/f211700/211751.htm>.

4 As discussed *infra*, two of the papers advocate entry by banks. The GAO report, however, found that entry of state chartered banks into the market has yet to have a significant impact on competitive conditions. While entry by nationally chartered banks would clearly be pro-competitive in terms of bringing in new competitors with new strategies, other legitimate political and economic goals may also be relevant to the public policy considerations at stake.

5 Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941, (2005). (At the Symposium, Professor Lande spoke about the implications of this previously published research).

courts have focused most attention on only two types of collusion. Classic or "Type I" collusion occurs when competitors agree to raise prices or divide markets. Competitors can also collude to discipline rivals or raise their costs. By disadvantaging rivals, "Type II" forces these rivals to raise their prices, which in turn enables the colluding firms to raise their prices or expand market share at the expense of higher-priced rivals.

Both legal precedent and economic analysis suggest the existence of a third type of collusive behavior that does not depend on the existence of the market characteristics associated with Type I and Type II collusion. Lande and Marvel indicate this Type III collusion arises in "anomalous cases" that typically involve heterogeneous products, "individually negotiated or otherwise non-transparent prices," and "[m]ost importantly,…cartel members continue to set prices and output independently." Type III cartels do not aim to directly control prices or discipline maverick rivals. Instead, Type III collusion **sets the rules of competition** "in a manner that lessens [even if it does not eliminate] price competition among cartel members." Type III collusion often involves the maintenance or creation of information asymmetries between consumers and sellers. These asymmetries include agreements to limit advertising in ways that "make consumer comparisons of the products offered by rivals suppliers more difficult," agreements that increases consumers' search costs, and agreements not to solicit customers of rivals. Type III collusion also includes agreements that facilitate price discrimination.

Well established economic analysis of Type I and Type II collusion demonstrates their harmful effects on consumer welfare, and courts generally condemn these agreements as illegal per se. Lande and Marvel point out that the "welfare effects of Type III cartels are even more numerous and complex" than Type I and Type II cartels. The economic analysis of Type III collusion that controls the flow of information to consumers or inhibits consumers' ability to collect information also has a clearly deleterious effect on consumer welfare. Like price discrimination itself, Type III collusion that facilitates price discrimination may, under certain circumstances, "result in lower prices for some consumers." On balance, however, Lande and Marvel believe the presumption should be that "the agreements are anticompetitive in intent and effect." With respect to all forms of Type III collusion, the harm to competition and consumer welfare does not result from replacing competition with monopoly cooperation, but from the shaping and softening of competition among the cartel members. Consequently, the legality of Type III cartels "should not be judged by whether they ultimately contribute to the formation of price fixing or of any type of traditional stable cartel, but rather in terms of their immediate impact on prices and resource allocation."

It appears that the Lande/Marvel concept of Type III cartels is useful in explaining how the fragmented residential brokerage community can come together to act in ways that have an anticompetitive effect.

Pricing in the Residential Real Estate Brokerage Services Market

As the cases and literature cited by Hawker[6] reveal, notwithstanding the ease of entry and fragmented structure of the brokerage industry, the industry has in the past been able to maintain uniform commissions through **overt** agreement, i.e., what Lande and Marvel would characterize as Type I collusion. By the early 1980's, however, both the case law and the secondary literature suggest that aggressive antitrust enforcement against the industry had all but completely eliminated the practice of naked price-fixing.

Lande and Marvel conjecture when firms cannot eliminate price competition, they may attempt to limit or soften price competition.

6 Norman W. Hawker, *Overview of AAI's Real Estate Competition Project: Highlights from the Existing Literature on Broker Competition,* in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

As also noted in Weicher,[7] "[t]here is a fairly widespread view that brokerage is not a competitive industry." Weicher attempted to test this perception against the empirical data. He found that the appalling lack of data regarding real estate commissions makes it difficult to reach any firm conclusions.

The REAL Trends annual survey is the most significant source available for measuring real estate commissions. It shows "a downward trend in the average commission rate between 1991 and 2004."[8] Weicher found, however, that after adjusting for inflation, "the average commission *in real dollars* increased by 11 percent."

Weicher identified a number of other concerns about the conclusions suggested by the REAL Trends survey. First, REAL Trends treats the underlying data in the survey as confidential, proprietary information. Since REAL Trends does not publish underlying data, it is impossible to test the conclusions reached by REAL Trends. Second, given that it "appears that the survey is weighted toward more expensive homes as well as larger brokers," there is doubt as to whether it accurately reflects trends in the market as a whole. That is, if there is, as may be suspected, more sophisticated negotiations with respect to more expensive homes, then REAL Trends would tend to indicate unduly low transaction prices. Third, Weicher found possible inconsistencies in the data that is reported by REAL Trends itself, as well as discrepancies among the secondary sources quoting information provided by REAL Trends.

Weicher found the four extant academic studies equally problematic. Three of the four focused on local, college-town markets. Only one included data for more than one metropolitan area.

7 John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as It Is,* in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

8 John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as It Is,* in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

Average Real Estate Commission from REAL Trends Survey

YEAR	AVERAGE COMMISSION	SOURCE
1988	–	
1989	–	
1990	–	
1991	6.2%	Hahn, Litan and Gurman
1992	–	
1993	–	
1994	–	
1995	5.98%	Lehmann
1996	–	
1997	–	
1998	5.5%	U.S. Government Accountability Office
1999	–	
2000	5.48%	Lehmann
2001	5.4%	Roberts and Mara
2002	5.1%	Roberts and Mara
2003	5.1%	Roberts and Mara; Lehmann
2004	5.1%	Hahn, Litan and Gurman; U.S. Government Accountability Office

Source: Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such As It Is,* 35 Real Est. L.J. Table 1

Commission Rates by Firm Size and Region, 2002-2003

FIRM CATEGORY: SIZE OF FIRM	2002 AVERAGE COMMISSION	2003 AVERAGE COMMISSION
Top 50	5.04%	5.06%
Top 100	5.08%	5.07%
Top 101-500	5.26%	5.24%
Up-and-Comers	6.20%	5.36%
FIRM CATEGORY: REGION		
Northeast	5.20%	5.14%
Middle Atlantic	4.78%	4.78%
Southeast	5.50%	5.38%
Midwest	5.62%	5.38%
Southwest/Mountain	5.16%	5.26%
Far West	4.92%	5.00%

Source: Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such As It Is,* 35 Real Est. L.J. Table 3

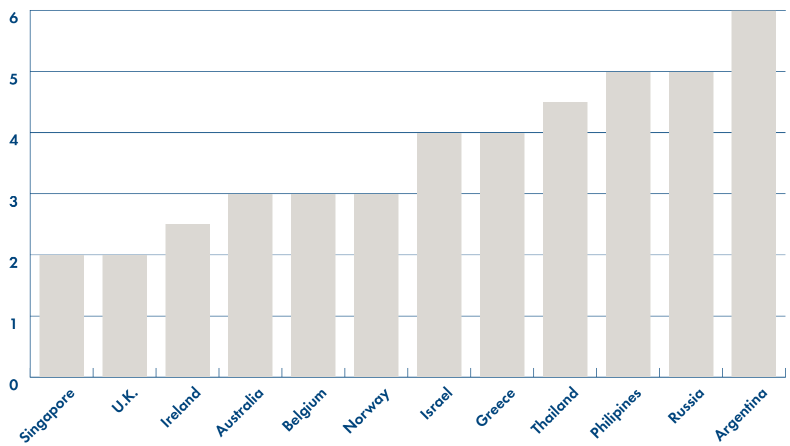
The academic studies examined by Weicher suggest that the "popular view that all commissions are six percent…is surely incorrect," but that commission rates in a given market do cluster rather tightly around a single number, and there is no evidence that rates are becoming more variable over time. Also, brokers seem to receive lower commission rates on new homes and higher priced homes. Weicher concluded from this that "it is not clear how much the rate dispersion in these studies results from the variability in the transactions and how much from actual variability in commission rates."

The lowest reported average of commission rate, 5.1 percent, comes from REAL Trends. Yet even this rate appears to be above competitive levels. Using data from 1999, Delcoure and Miller[9] compared real estate commissions as well as broker productivity from around the world with those in the United States. Commission rates in other industrialized countries tended to be less than 5 percent. In the United Kingdom, for example, Delcoure and Miller found that "1-2 percent is typical; in very competitive areas 0.5-0.75 percent; in low priced areas as high as 3.5 percent." Ultimately, they concluded, "based on global data, the U.S. residential brokerage fees should run closer to 3.0 percent." The volume of sales per broker tends to be higher in other highly industrialized countries. While there may be other differences between the U.S. industry and the brokerage industry elsewhere which might account for higher commission rates in the U.S., what those differences are is not obvious.

Delcoure and Miller also observed that in more competitive markets such as the United Kingdom, commission rates tended to vary inversely with the selling price of the home. Similarly

9 Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry,* 5 International Real Estate Review 12 (2002), reprinted in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

% Brokerage Fees Vary



Source: Miller, Comparable prices for real estate brokerage services in other developed nations, *available at* www.antitrustinstitute.org

White[10] stressed that the apparent failure of commission rates to vary inversely with the home sales price in the U.S. market was particularly troublesome. "If the agents' costs of selling the two houses were approximately the same…, then we would expect that competitive pressures would cause agents' fees to approximate those costs…, thus leading to a tapering of the percentage fee with respect to higher-value houses." White noted that entry into real estate brokerage surges when housing prices boom. When coupled with fee rigidity, this "suggests something less than vigorous price (fee) competition among real estate agents."

The problematic nature of the quantity and quality of extant data makes it impossible to draw firm conclusions about the level and nature of pricing for brokerage services. Weicher, therefore, ultimately calls for additional research, noting that "we first need data…in order to do the research." Hahn, Litan and Gurman

10 Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?, in* American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

encountered the same problems resulting from the lack of pricing data as Weicher, and like Weicher, they were unable to reach any definitive conclusions regarding commission rates, stating that "[c]learly there is a need for more data to be collected, especially by an impartial source."

Getting the data needed will be no small task, but as Bush noted,[11] the FTC has a number of tools at its disposal, including the authority to request annual or special reports, a technique that requires clearance from the Office of Management and Budget. But, there is no other feasible mechanism to collect the data since, as Bush pointed out, the data will almost certainly have to come from multiple local real estate boards and "there is a lot of data in each potential relevant market."

The Role of the National Association of Realtors

Although Lande and Marvel concentrate on establishing the existence of Type III collusion and the harm it does to consumer welfare, one cannot help but notice the frequent involvement of trade associations in the cases cited by Lande and Marvel. For example, trade associations played important roles in all three of the leading Type III cases used by Lande and Marvel as examples of agreements to limit advertising. While the presence of a trade association does not, by itself, trigger Type III collusion in any given market, trade associations seem to have a great potential for facilitating Type III collusion in markets where competitors are looking for ways "to manipulate the rules under which the independent decisions of the colluding firms were made."

As Gray demonstrates, one of the things that distinguishes the residential real estate brokerage market is the presence of an exceptionally strong and influential trade association, the NAR.

11 Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy, in* American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

Gray points out that free riding or the "collective action problem" is as much a problem for trade associations as it is for business firms. Furthermore, most trade associations do not survive for long. Yet the NAR has overcome the collective action problem and flourished for nearly 100 years.

Gray attributes NAR's success at solving the collective action problem to the selective and solidary benefits NAR membership offers. First, there is the designation as a Realtor, a registered trademark of the NAR that carries "earnings potential that could only be gotten by joining the organization." The federated structure of the NAR meant that local boards could "put a lot of social pressure on agents and brokers to join" as well as offering social functions with a fraternal atmosphere and a shared "aspiration to make selling real estate a profession and thereby achieve middle-class status for realtors." Other benefits created by the NAR and the local boards include "the commission fee structure, a code of ethical business practices, and, most importantly, the multiple-listing [service] (MLS)."

Many of the benefits of NAR membership are laudable and perhaps even pro-competitive. But others have served as flash points for antitrust concern and litigation. As Hawker noted, from the end of World War II to the mid-1970's, the federal government engaged in repeated and successful challenges to the commission fee structure as illegal per se. Social pressures and allegedly specious ethics violations against discount brokers have served as the basis of private antitrust suits. Similarly, courts have struck down restrictions on access to the MLS, and the DOJ is currently challenging the NAR's rules governing the use of MLS data on the Internet. Whether by design or accident, part of the NAR's attractiveness may be the ways in which it can restrain competition.

According to Gray, the NAR's extraordinary longevity results from its ability "to fully occupy its niche space" as the industry's trade association. Gray found that while estimates on the number of active brokers and agents varied widely, the "NAR has captured half or all of the real estate workforce," depending on the estimate used. Rivals have not emerged partly as a result of the various benefits provided by NAR membership and partly because there have been no divisive issues within NAR.

Gray found that the NAR has a "quite single-minded…focus on their core business,…'to help its members become more profitable and successful,'…a simple and straightforward [purpose] on which all members can agree."

Not only has the NAR avoided divisive issues, "it has effectively managed its lobbying and in so doing has captured its niche space" as *the* trade association for the real estate brokers and agents. In pursuit of its narrow range of issues, the NAR has employed all three of the major resources that trade associations typically offer legislators: information, votes and money. When it comes to votes, Gray noted that NAR has members in every politician's district. Although Gray found the real estate industry makes significant contributions in political races, her study suggests that the NAR places more emphasis on the information and lobbying functions. The financial resources devoted to lobbying in the state and federal capitals is dramatically enhanced by the NAR's "grassroots online communications system" that can effectively mobilize its members to contact their representatives regarding votes on specific legislation, and "[R]ealtors are persuasive communicators who know how to present a case."

The issues pursued by the NAR have also served as flash points for antitrust concern. Recently, the FTC and the DOJ have expressed concern over "minimum service" legislation pushed by the NAR and its affiliates in Missouri, Texas and other states. In Kentucky, the DOJ successfully pursued a lawsuit against the Real Estate Commission to prevent a ban on real estate commission rebates. At the federal level, the NAR has thus far successfully lobbied Congress to deny funding for the adoption of regulatory rules which would allow banks and other financial institutions to enter the brokerage industry.

Multiple Listing Services as a Source of Concern

In a study funded by the National Science Foundation and the National Association of Realtors, Sawyer, Wigand and Crowston,[12] examined the roles of information and communications technologies in the processes of buying or selling a home. Their findings make clear that online availability of the MLS and its data have changed the ways in which buyers, sellers and agents access this resource. Usually, the local realtor organization or board owns the MLS, and membership in both the board and the NAR is required for access. Sawyer, Wigand and Crowston indicate that having a property entered into the MLS is contingent on the seller's agreement to pay "to any agent who introduces the buyer [to the seller] one-half of the total agent commission." Thus, "the MLS goes far beyond a simple information conduit to include these agreements."

The MLS also enables brokers to play a crucial role in the buyer's search for a home since only agents who belong to the MLS "can search the MLS database for properties that fit their clients' needs." MLS membership also gives a broker access to the "lock box" which in turn gives the broker physical access to the property and which records "who has viewed the property." As Sawyer, Wigand and Crowston note, "the MLS is more than just an information repository since it includes services and agreements that shape the relationship among agents and becomes an important element within the value chain."

Hahn, Litan and Gurman pointed out that "the MLS delivers substantial efficiency gains to all who use it," and "the cooperative networking relationship among agents in a regional MLS has the

12 Steve Sawyer et al., *Redefining Access: Uses and Roles of Information and Communications Technologies in the U.S. Residential Real Estate Industry from 1995-2005*, *in* American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

potential to give rise to uniformity in services provided and fees charged." While express agreements on commissions have been held illegal since 1950, Hahn, Litan and Gurman noted the MLS could easily facilitate tacit collusion. For example, the terms of admission to most MLS's are coordinated through the NAR's national policy, "and they can design it to keep membership limited to firms who will conduct their business in a particular manner." Furthermore, as White suggested, "the ability of the collective members of a MLS to exclude rivals…can be a powerful way of enforcing a high-fee structure and thus of maintaining the collective exercise of market power."

"The Internet could, and probably should, have a radical impact on real estate brokerage services," according to Hahn, Litan and Gurman, yet access to the MLS has impeded firms that have attempted to capitalize on the Internet's ability to lower search and brokerage overhead costs. The NAR's "opt-out" policy gives brokers the power to prevent cooperating brokers from distributing the listings to potential home buyers through the web. Not only does this allow the listing broker "to fend off unwanted competition" (a clear antitrust concern, according to Hahn, Litan and Gurman), it also raises ethical and fiduciary concerns since the listing broker has a "duty to promote the home seller's interests, which in most cases surely means giving the seller's listing maximum exposure, to get the highest price possible or the quickest sale." Hahn, Litan and Gurman also point to prohibitions of listings by "network brokers" who refer customers to agents as an example of anticompetitive and unjustified local MLS requirements.

Sawyer, Wigand and Crowston[13] confirm that the Internet is having an impact on the process of buying and selling a home. Even with the current restrictions, access to MLS data over the Internet is shifting more of the search function to buyers as well as making buyers and sellers "more knowledgeable about local comparisons with price, location, schools, etc." Although one might expect these trends to enable consumers to by-pass brokers the way it has enabled consumers to by-pass intermediaries in other industries, "FSBO [for sale by owner] sales have stayed relatively constant over the past 10 years." Thus far, the shift of the search function from the broker to the buyer has "just altered the roles played by the agents and the MLS," with the buyer contacting the broker after the search and the broker then taking "on the traditional role of linking buyer and seller."

It is not entirely clear why disintermediation has not followed the shift in the search function to buyers. Sawyer, Wigand and Crowston point out that the industry is experimenting with new business models but real estate transactions still "take place through an intricate set of social networks…primarily driven by the professional ties that real estate agents develop in their work." Although Sawyer, Wigand and Crowston believe changes in information access and control, "including the form and standards for shar[ing] and the ownership and fair uses of both property and transaction data" seem "dangerous," they note current "NAR policy makes it difficult for those not a member of the NAR to gain full access to the database." And the U.S. Government Accountability Office (GAO)[14] noted in its study of competition in the industry that access to MLS data was a key factor limiting "the extent to which the Internet is used in real estate transactions." One cannot help but wonder that if consumers had full access to the MLS database, the need to pay brokers for information intermediation would be dramatically reduced. And if this is true, then it would seem that the agreements among brokers to limit access to the MLS database constitute Type III collusion.

13 Steve Sawyer et al., *Redefining Access: Uses and Roles of Information and Communications Technologies in the Residential Real Estate Industry From 1995-2005*, 20 J. Info. Tech. 3 (2005).

14 U.S. Government Accountability Office, Real Estate Brokerage: Factors That May Affect Price Competition (2005), *reprinted in* American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

ANTICOMPETITIVE REGULATION

White noted that all fifty states have agencies or commissions with some regulatory authority over brokers. While the "primary goal of these agencies is consumer protection,... in some instances the agencies have adopted regulatory requirements... that clearly favor incumbent full-service real estate agents at the expense of agents who would provide more price competition." For example, prohibitions on commission rebates to consumers and mandatory minimum service requirements for listing agents have the effect of "eliminating competition from discount brokers whose primary service would be to provide access to a MLS."

According to the GAO, ten states have or are considering minimum service requirements for brokers. Hahn, Litan and Gurman point out that not only is there "no reason to believe that agents who offer more narrowly tailored services and charge accordingly will do any worse of a job or harm consumers," but that these maverick agents "have the potential to better serve consumer demand and make the market for services more efficient."

The GAO also found at least fourteen states "appear to prohibit, by law or regulation, real estate brokers from giving consumers rebates on commissions or to place restrictions on this practice." Hahn, Litan and Gurman note that commission rebates to consumers "have a positive impact on consumer welfare." Even if "higher commissions are necessary to ensure the quality of service most customers want; this result, however, should be determined by consumers and producers via the market," rather than by state laws and regulations.

White, along with Hahn, Litan and Gurman, pointed out the NAR has strongly, and thus far successfully, lobbied Congress to prevent the adoption of regulatory changes need to allow banks to enter the real estate brokerage market. The GAO, however, found that where state chartered banks were allowed to enter the real estate brokerage industry, the impact had been limited.

OTHER SOURCES OF CONCERN

Although brokers have incentives to compete on price and there is relatively free entry into the industry, the fragmented structure of the industry nationally is not replicated in all geographic markets. Hahn, Litan and Gurman found that "there are relatively few large brokerages in many areas," including some large cities. Furthermore, they note that since brokers generally "control the fee policies among their agents, sustaining collusive behavior is easier than if each agent sets his own fee."

White noted any given broker operates on both the buyer and seller side of transactions and frequently interacts cooperatively with competitors in these transactions. "This sell-side/buy-side reversible interaction provides a concrete means whereby agents who are the upholders of high fees can threaten to or actually discipline price-cutting rivals, even in the absence of a MLS." For example, a high-price agent can steer buyers away from properties listed by discounters, and this "can happen without any formal agreement among the agents to maintain high fee levels, especially in a social climate where the importance of maintaining high fees is frequently discussed and remarked upon in informal settings."

The GAO and Delcoure and Miller made similar observations. The GAO concluded "even without formal policies to maintain uniform rates, individual brokers' reliance on the cooperation of other brokers to bring buyers to listed properties may help maintain a standard commission rate within a local area." And while Delcoure and Miller explained that to the extent "firms depend on one another to share the total demand for their services, imitative pricing will be the rule of survival in local markets," they nonetheless predicted that "if a few of the larger firms make a successful break from the common pattern of uniform commission rates, they could trigger a price revolution in the brokerage industry."

WHAT WOULD MORE VIGOROUS COMPETITION LOOK LIKE?

White suggests the experience of invigorating competition in the securities brokerage industry provides a basis for predicting what would happen if more vigorous price competition came about in the residential real estate brokerage market. Many of the same arguments against competition in the real estate setting were also made regarding securities brokerage. For example, the opponents of competitive pricing in securities argued that competition on price "would mean that customers would not be provided with the services that they needed." A similar argument has been made in defense of minimum service requirements for real estate brokers. As the SEC loosened restrictions on competitive pricing in the securities brokerage industry, prices fell, but "virtually all of the fears raised by the NYSE in its struggle to maintain its system of fixed and non-competitive commissions (except its argument concerning cross-subsidization [of small orders by large orders]) turned out to have little validity."

The experience of the securities industry led White to suggest that vigorous price competition among real estate brokers would bring about the following:

- The "general level of commissions would surely fall."
- A greater variety of services and prices would be available to sellers.
- New arrangements between buyers and brokers would likely arise.
- The industry would readily embrace new technologies for selling and buying homes as those technologies became feasible.
- Since competitive commissions would react flexibly to changes in housing prices, "the surges of people into (and out of) real estate brokerage should be considerably muted."
- The industry would undergo some consolidation, although many local brokerage firms would survive "since local expertise is surely valuable but difficult to maintain and value in a larger national organization." Consequently, unless the barriers to entry significantly increase, "the levels of concentration in any local market should remain moderate and should present little structural antitrust concern."

Delcoure and Miller reached similar conclusions based on their study of the brokerage industry in other countries.

POLICY RECOMMENDATIONS

Hahn, Litan and Gurman offered three policy recommendations. First, federal and state antitrust authorities "should carefully scrutinize efforts to limit competition in the residential real estate brokerage market," especially efforts to deny any legitimate market player access to the MLS. Second, state legislatures and real estate commissions should not enact laws or rules that impede competition in real estate brokerage, e.g., rebate bans and minimum service requirements. Finally, "Congress should not prevent the Federal Reserve Board and the Treasury Department from allowing banks to offer residential real estate brokerage services through separately capitalized affiliates."

White also made three specific recommendations on how to achieve vigorous price competition in the real estate brokerage industry:

- Banks should be allowed to enter into the market. As new entrants from outside the current industry culture, banks "would be extremely valuable for introducing aggressive competition into this industry." Banks often chose to enter the securities brokerage industry as discounters. Given the relative rarity of discount brokerage in residential real estate today, "having banks (with their brand name recognition) as purveyors of this form of service (if that is the route they choose) would likely be an extra benefit."
- Antitrust enforcement authorities "should maintain a high level of scrutiny with respect to the use of MLS's as exclusionary devices and with respect to local groups of real estate agents excluding mavericks."

- Vigorous lobbying of and, where appropriate, litigation against the states should continue "so as to urge pro-competitive actions on the part of their licensing agencies."

As a final caution, White noted successful efforts to bring about vigorous price competition would produce unintended consequences in the real estate brokerage industry just as they had in the securities brokerage industry. While predicting unintended consequences is difficult, White suggested that "one possible reaction of the industry to heightened competition could be a lobbying effort to convince the states to tighten licensing procedures severely so as to restrict entry into the industry."

CONCLUSION

Lande and Marvel have demonstrated that anticompetitive conduct can occur in industries where naked restraints of trade such as price fixing would be difficult to create and all but impossible to enforce. Therefore, the ease of entry into the residential real estate brokerage market and the low level of concentration in the brokerage market do not end the antitrust enquiry, especially given the industry's history of antitrust problems.

Consistent with the insights of Lande and Marvel, the AAI symposium identified a number of antitrust concerns. First, while additional empirical data are needed, the available evidence strongly suggests that prevailing commission rates far exceed competitive levels. Second, the rules governing access to and use of MLS data are skewed against innovative maverick firms that would compete on price. Third, a number of current and proposed regulations impede the entry of banks, internet firms, and other alternative business into the brokerage market.

Consumers stand to reap significant benefits from more vigorous competition. In addition to lower commission rates, vigorous competition can be expected to produce a greater variety of services and new models for bringing home sellers and buyers together.

Appendix I: Biographies of Presenters

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DARREN BUSH is an Assistant Professor of Law at the University of Houston Law Center. Professor Bush received his Ph.D. in economics from the University of Utah, where he focused primarily on competition policy as applied to regulated industries. While completing his J.D. at Utah, he consulted on issues regarding state "deregulation" of electric utilities, interned at the U.S. Department of Justice's Antitrust Division, taught various economics courses, and received a Marriner S. Eccles Fellowship in Political Economy. After receiving his J.D., Professor Bush served as an Attorney General's Honor Program Trial Attorney at the Antitrust Division's Transportation, Energy, and Agriculture Section, where his primary focus was the investigation of mergers and anticompetitive conduct in wholesale and retail energy markets. In 2001, Professor Bush returned to Utah as a Visiting Associate Professor, where he taught antitrust, law and economics, business organizations, and professional responsibility and consulted on numerous antitrust matters. His primary research interests are in antitrust and regulated industries (and the intersection of the two), energy (particularly electricity markets), intellectual property, and law and economics. Dr. Bush is a member of the AAI Advisory Board.

VIRGINIA GRAY (Ph.D., Washington University) is the Robert Watson Winston Distinguished Professor of Political Science at the University of North Carolina at Chapel Hill and previously taught at the University of Minnesota for many years. She teaches and does research on state politics and public policy and on interest groups. She has published 40 refereed articles about interest groups, co-authored with David Lowery and various graduate students; two of these papers won national awards from scholarly associations. She and Professor Lowery also wrote *The Population Ecology of Interest Representation* (1996). Their current research, funded by the Robert Wood Johnson Foundation, is on the role of interest groups in health reforms at the state level.

ROBERT HAHN is co-founder and Executive Director of the American Enterprise Institute-Brookings Joint Center, which focuses on regulation and antitrust. Previously, he worked for the Council of Economic Advisers. Dr. Hahn also has served on the faculties of Harvard University and Carnegie Mellon University. He frequently contributes to leading scholarly journals and general-interest periodicals, including the *American Economic Review, Yale Law Journal, Science,* and the *New York Times.* He is the author of *Reviving Regulatory Reform: A Global Perspective Rhode Island,* that provides opportunities for disadvantaged youth to achieve their full potential.

NORMAN HAWKER is a Senior Research Fellow at the American Antitrust Institute and an Associate Professor at Western Michigan University's Haworth College of Business. Professor Hawker teaches courses in Strategic Management, Business Ethics and Business Law. His research for the AAI has focused on the use of business scholarship in antitrust law as well as the real estate brokerage and information technology industries. Professor Hawker received his B.B.A. and J.D. degrees from the University of Michigan. Prior to joining the business faculty at Western Michigan University, he served as an Assistant Attorney General for the State of Michigan. Professor Hawker has also served as a visiting professor at the University of Toledo College of Law, Thomas M. Cooley Law School, and the University of Michigan Business School. Professor Hawker was a contributor the AAI's recent book, "Network Access, Regulation and Antitrust" (2005), and he has published articles on a variety of antitrust law topics in numerous business journals and law reviews, including the *Baylor Law Review, the Journal of Contemporary Business Issues, the Journal of Public Policy and Marketing,* and the *Rutgers Law Review.*

ROBERT H. LANDE, the Venable Professor of Law at the University of Baltimore, is a Director, co-founder, and Senior Fellow of the AAI; before this he worked at the Federal Trade Commission and at Jones, Day, Reavis & Pogue. Professor Lande has participated in a number of projects of concern to AAI, including Illinois Brick reform, the merger incipiency doctrine, the Microsoft case, the BP/Arco case and many other mergers, international antitrust issues, a study of private antitrust enforcement, and a wide variety of consumer choice issues and collusion issues.

ROBERT LITAN is Senior Fellow of Economic Studies at The Brookings Institution. Litan has been affiliated with The Brookings Institution for nearly 20 years, first as a Senior Fellow and since 1996 as director of Economic Studies and holder of Cabot Family Chair in Economics. At Brookings, he led a team of economists monitoring the global economy and seeking answers to economic policy issues in the U.S. and around the world. Litan has authored or co-authored more than 25 books and 200 articles for professional journals and magazines. He co-founded and serves as the Director of the AEI-Brookings Joint Center on Regulatory Studies. Litan has served on the staff of the Council of Economic Advisers (1977-79), as Deputy Assistant Attorney General in the Antitrust Division of the Justice Department (1993-95), and Associate Director of the Office and Management and Budget (1995-96). He also has been a consultant to the Treasury Department on financial policy issues. Litan received his B.S. degree in Economics, graduating summa cum laude, from the Wharton School Department of Finance at the University of Pennsylvania; his J.D. from Yale Law School; and both a Master of Philosophy and Ph.D. in Economics from Yale University. He is a member of the AAI Advisory Board.

NORM MILLER is the Director of the Real Estate Center and holder of the West Shell, Jr. Professorship at the University of Cincinnati. He received his Ph.D. from the Ohio State University in 1977. He is active on the Editorial Board of several national/international journals. Dr. Miller has numerous academic articles, books and articles in trade market publications. His first textbook published in 2001, *Commercial Real Estate Analysis and Investment,* with David Geltner, is now the leading book for graduate level real estate courses. A new book *"Real Estate Principles for the New Economy"* has just been released. He has worked extensively with various trade associations and became one of the first "Distinguished Fellows" of NAIOP in 2002 as well as the primary instructor for NAIOP programs on "Commercial Real Estate Development". He is currently the national Educational Consultant for CCIM working with the CCIM Instructors, and the President Elect of ARES, the American Real Estate Society. As a Homer Hoyt Land Use Institute Faculty and Board member, based in North Palm Beach Florida he is involved with some premier thought leaders among academics and industry professionals in an international think tank setting for annual conferences on real estate issues and trends.

STEVE SAWYER is a founding member and an Associate Professor at the Pennsylvania State University's School of Information Sciences and Technology. Sawyer holds affiliate appointments in Management and Organizations; Labor Studies and Industrial Relations; and the Science, Technology and Society. Steve does social and organizational informatics research with a particular focus on people working together using information and communication technologies. Some of his work on real estate has been underwritten by the NAR.

JOHN C. WEICHER is the Director of the Center for Housing and Financial Markets at the Hudson Institute in Washington, D.C. From 2001 to 2005 he served as Assistant Secretary for Housing and Federal Housing Commissioner at HUD. He previously served as Assistant Secretary for Policy Development and Research at HUD from 1989 to 1993, and as Chief Economist at both HUD (1975-1977) and OMB (1987-1989). He has managed research staffs and projects in both government agencies and policy research institutes, including the Urban Institute, the American Enterprise Institute, and previously at the Hudson Institute (1993-2001). He has been a member of the Millennium Housing Commission, the Census Advisory Committee on Population Statistics, and the Committee on Urban Policy of the National Academy of Sciences. He holds an A.B. in English from the University of Michigan and a Ph.D. in economics from the University of Chicago, and was associate professor of economics at The Ohio State University. He was President of the American Real Estate and Urban Economics Association in 1982, and received the Association's George Bloom Award for Career Achievement in 1993. He is the author or editor of twelve books, and the author of numerous popular and scholarly articles.

LAWRENCE J. WHITE is Arthur E. Imperatore Professor of Economics at New York University's Stern School of Business and Deputy Chair of the Economics Department at Stern. During 1986-1989 he was on leave to serve as Board Member, Federal Home Loan Bank Board, and during 1982-1983 he was on leave to serve as Director of the Economic Policy Office, Antitrust Division, U.S. Department of Justice. He is currently the General Editor of *The Review of Industrial Organization*. Prof. White received the B.A. from Harvard University (1964), the M.Sc. from the London School of Economics (1965), and the Ph.D. from Harvard University (1969). He is the author or editor of numerous books and articles in leading economics and law journals. For example, with John Kwoka he has edited four editions of *The Antitrust Revolution: Economics, Competition, and Policy*. He was the North American Editor of *The Journal of Industrial Economics,* 1984-1987 and 1990-1995. He is a member of the AAI Advisory Board.

Appendix II: Symposium Agenda

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NOVEMBER 8, 2005 — **WESTIN GRAND HOTEL, WASHINGTON, D.C.**

8:30 *to* 8:45 a.m.	**Welcome** Albert Foer *President, American Antitrust Institute*
8:45 *to* 9:15	**Overview of AAI's Real Estate Competition Project** Norman Hawker *Senior Research Fellow, American Antitrust Institute and Associate Professor, Haworth College of Business, Western Michigan University*
9:15 *to* 9:45	**What is the State of Knowledge About Residential Real Estate Broker Commissions?** John Weicher *Senior Fellow at the Hudson Institute and Former Federal Housing Administration Commissioner*
9:45 *to* 10:15	**On the Political Power of the ® in Realtors®: What are the Lobbying Resources of Full-Service Real Estate Brokers?** Virginia Gray *Robert Watson Winston Distinguished Professor of Political Science, University of North Carolina Chapel Hill*
10:15 *to* 10:30	**Break**

10:30 *to* 11:00

How Can They Possibly Fix Prices When There Are So Many Realtors?

Robert Lande
Venable Professor of Law, University of Baltimore Law School, and Senior Research Fellow, American Antitrust Institute

11:00 *to* 12:30

Is Competition Robust or Restrained Among Realtors?

Steven Sawyer
Associate Professor of Information Sciences and Technology, The Pennsylvania State University

Robert Litan
Brookings Institution

Robert Hahn
Executive Director, AEI-Brookings Joint Center

12:30

Luncheon: A Journalist's Perspective

Alan Murray
The Wall Street Journal

2:00 *to* 2:30

How Would Increased Competition Affect Residential Real Estate?

Lawrence White
Arthur E. Imperatore Professor of Economics, The Stern School of Business, New York University

2:30 *to* 3:30

Breakout Sessions

Session A: What Information is Still Needed to Understand the Industry?

Moderator:
Lawrence J. White
Arthur E. Imperatore Professor of Economics, The Stern School of Business, New York University

The GAO's Report on Real Estate Brokerage
David Wood
Director, Financial Markets and Community Investment, U.S. GAO

Comparable Prices for Real Estate Brokerage Services in Other Developed Nations
Norm Miller
Director of Real Estate Center, University of Cincinnati

Avenues for Data Collection
Darren Bush
Assistant Professor, University of Houston Law Center

Session B: How Can Internet and Other New Business Models Affect Competition?

Moderator:
Norman Hawker
Senior Research Fellow, American Antitrust Institute and Associate Professor, Haworth College of Business, Western Michigan University

Panelists:
Markham Erickson
General Counsel, Netcoalition

Lala Wang
CEO, MLX.com

Philip Henderson
Director of Government Affairs, Lendingtree.com

Steve Delbianco
Executive Director, Netchoice

3:30 *to* 3:45 **Break**

3:45 *to* 5:00 **What Does the Future Hold for Antitrust Enforcement in the Real Estate Industry?**

Moderator:
Albert Foer
President, American Antitrust Institute

Panelists:
Maureen Ohlhausen
Director, Office of Policy Planning, Federal Trade Commission

Blake Harrop
Chair of The National Association of Attorneys General Real Estate Working Group

Robert Litan
Brookings Institution

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