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# Ending the Uniformity of Residential Real Estate Brokerage Services

## ANALYZING THE NATIONAL ASSOCIATION OF REALTORS' MULTIPLE LISTING SERVICE UNDER THE SHERMAN ACT

### I. INTRODUCTION

Buying a home is frequently described as the most significant transaction people undergo during their lifetime.<sup>1</sup> Because the home-buying process can often be complicated and overwhelming, most buyers enlist the help of a real estate agent.<sup>2</sup> Similarly, most sellers hire a real estate agent to list and market their property.<sup>3</sup> As a result, real estate agents are involved in approximately eighty-one percent of all residential real estate closings in the United States.<sup>4</sup> Over \$60 billion were spent on brokerage services in 2005,<sup>5</sup> and the National Association of Realtors (“NAR”) is the largest professional

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<sup>1</sup> See, e.g., Robert W. Hahn et al., *Bringing More Competition to Real Estate Brokerage*, 35 REAL EST. L.J., Summer 2006, at 86-87; Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?*, 35 REAL EST. L.J., Summer 2006, at 11, 14 (noting that typical residential real estate transactions “involve[] a sales/purchase price that is well into six figures, and seven-figure transactions are becoming commonplace in many areas”).

<sup>2</sup> Eighty-five percent of homebuyers report using a real estate agent to locate properties at some point during their search. Karen Janisch, National Association of Realtors, Field Guide to Quick Real Estate Statistics, <http://www.realtor.org/libweb.nsf/pages/fg006> (last visited Nov. 20, 2007).

<sup>3</sup> Agents advise sellers on their asking price, list their property for sale, advise them on selling strategies, market the property, and assist at closing. See, e.g., Hahn et al., *supra* note 1, at 91.

<sup>4</sup> Ten percent of purchases result from dealings between a builder and purchaser directly, and only five percent of sales result from “for sale by owner” (“FSBO”) transactions. Janisch, *supra* note 2.

<sup>5</sup> *Residential Real Estate Brokerage Services: A Cockamamie System that Restricts Competition and Consumer Choice: Testimony Before the H. Financial Servs. Comm., and Housing & Community Opportunity Subcomm.*, 109th Cong. 1-2 (2006) (statement of Stephen Brobeck, Consumer Federation of America) [hereinafter Brobeck Testimony], available at [http://www.consumerfed.org/pdfs/CFA\\_Executive\\_Director\\_Brobeck\\_Testimony\\_on\\_Residential%20Real\\_Estate\\_Brokerage\\_Services.pdf](http://www.consumerfed.org/pdfs/CFA_Executive_Director_Brobeck_Testimony_on_Residential%20Real_Estate_Brokerage_Services.pdf).

association in the world.<sup>6</sup> The NAR's membership is at its all time high, with approximately 1.3 million enrolled members.<sup>7</sup>

Real estate agents exchange information regarding properties for sale through the Multiple Listing Service ("MLS"). The MLS, created over a hundred years ago, is a collective database of pooled real estate listings where brokers both list their clients' properties for sale and browse the listings of other brokers.<sup>8</sup> There are more than 900 MLSs operating across the United States today,<sup>9</sup> most of which are owned and controlled by local chapters of the NAR.<sup>10</sup> The MLS is widely recognized for increasing efficiency in the residential real estate market.<sup>11</sup> The MLS decreases transaction costs for brokers by allowing them to access property listings for an entire region just by "pointing and clicking," rather than having to spend time searching for "for sale" signs in neighborhoods.<sup>12</sup> Additionally, the MLS has been applauded for increasing broker competition by allowing real estate agents of

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<sup>6</sup> National Association of Realtors, How to Join NAR, <http://www.realtor.org/realtororg.nsf/pages/HowtoJoin> (July 6, 2007).

<sup>7</sup> *Id.*; National Association of Realtors, About NAR, [http://www.realtor.org/about\\_nar/index.html](http://www.realtor.org/about_nar/index.html) (reporting 1,363,493 members as of July 31, 2007) (last visited Aug. 29, 2007).

<sup>8</sup> White, *supra* note 1, at 15; see also Mariwyn Evans, *What's Next for the MLS?*, REALTOR MAG. ONLINE, June 1, 2006, [www.realtor.org/rmomag.NSF/pages/feature3juno6?OpenDocument](http://www.realtor.org/rmomag.NSF/pages/feature3juno6?OpenDocument).

<sup>9</sup> Evans, *supra* note 8.

<sup>10</sup> See PATRICK WOODALL & STEVEN BROBECK, CONSUMER FEDERATION OF AMERICA, NONTRADITIONAL REAL ESTATE BROKERS: GROWTH AND CHALLENGES 9 (2006), [http://www.consumerfed.org/pdfs/Nontraditional\\_Real\\_Estate\\_Brokers-Growth\\_and\\_Challenges.pdf](http://www.consumerfed.org/pdfs/Nontraditional_Real_Estate_Brokers-Growth_and_Challenges.pdf); see also Hahn et al., *supra* note 1, at 96; American Homeowners Grassroots Alliance, Comments at the U.S. Federal Trade Commission and the U.S. Department of Justice Public Workshop on Competition Policy and the Real Estate Industry (Oct. 25, 2005), available at <http://ftc.gov/os/comments/realestatecompetition/518795-00200.pdf>.

<sup>11</sup> See, e.g., Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1329-30 (1970); White, *supra* note 1, at 15 (noting that the MLS reduces the transaction costs for both the buyer and seller).

<sup>12</sup> See, e.g., Marianne M. Jennings, *Multiple Listing Services—Antitrust and Policy*, REAL ESTATE L.J., Fall 2003, at 140, 140 ("Rather than having to 'trawl neighborhoods' for 'For Sale' signs as a means of discovering the available inventory in the housing market, realtors, sellers, and buyers can point, click and scroll to discover the market in Chandler, Arizona or Bar Harbor, Maine." (citing *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1140 (9th Cir. 2003))); Evans, *supra* note 8 ("[C]onsumers had to visit every brokerage office in town to be sure of seeing all available properties. Brokers had to spend hours negotiating cooperative agreements with other companies before showing a listing." (describing the practice of a residential real estate broker before the advent of the MLS)).

different experience levels to compete in the same market.<sup>13</sup> Because of the dominance of the MLS, the Department of Justice describes real estate agent access to the MLS as “critical to compete in the local market.”<sup>14</sup> The Fifth Circuit calls it “essential to a broker’s ability to compete effectively.”<sup>15</sup> So while the MLS undeniably increases efficiency in the real estate market, the overwhelming dominance of the MLS also creates a risk that those in control of it, “having assumed significant power in the market, [will] also assum[e] the power to exclude other competitors from access to its pooled resources.”<sup>16</sup>

In fact, obtaining access to the MLS’s invaluable listings is often made conditional on the agent becoming a member of his or her state and local affiliate of the NAR<sup>17</sup> as well as the

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<sup>13</sup> See, e.g., *Oates v. E. Bergen County Multiple Listing Serv., Inc.*, 273 A.2d 795, 797 n. 3 (N.J. Super. Ct. Ch. Div. 1971) (“[T]he MLS provides ‘the small office with inventory and promotion potentials equal to those of the larger firms . . . .’” (quoting James R. Pickett, Note, *Arbitrary Exclusion from Multiple Listing: Common-Law and Statutory Remedies*, 52 CORNELL L.Q. 570, 570 (1967) (internal citation omitted))).

<sup>14</sup> Press Release, Department of Justice, Justice Department Sues National Association of Realtors For Limiting Competition Among Real Estate Brokers (Sept. 8, 2005) [hereinafter DOJ Sues NAR], available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/211008.pdf](http://www.usdoj.gov/atr/public/press_releases/2005/211008.pdf).

<sup>15</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); see also *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 315 (7th Cir. 2006) (“Access to this multiple listing service is a necessity for real estate agents and appraisers in this area.”); *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833, 842 (Cal. 1976) (noting the substantial market power of the local MLS, and stating that “[t]he problems of a nonmember of the board in competing against this colossus are manifest”); White, *supra* note 1, at 16 (noting that if a broker were not able to list on the MLS, he or she “would be at a substantial disadvantage.”).

<sup>16</sup> *Realty Multi-List*, 629 F.2d at 1370; see also White, *supra* note 1, at 16 (“[T]he ability of the collective members of a MLS to exclude rivals, especially if those rivals are ‘mavericks’ who are price-cutters with respect to commissions, can be a powerful way of enforcing a high-fee structure and thus of maintaining the collective exercise of market power.”).

<sup>17</sup> This Note will refer to state and local affiliates of the NAR as “Realtors Associations.” “Realtor” is the trademarked name for a real estate agent who is a member of the NAR. Although traditionally used to describe all brokers and agents, the NAR trademarked the term in 1947.

Some brokers and commentators believe that this is an illegal trademark. See, e.g., DAVID BARRY, NINE PILLARS OF THE CITADEL 39-44 (2005), available at <http://www.barryfirm.com/dnld/Nine-Pillars-Citadel.pdf>. (Barry is the pioneer of the “Open MLS” movement, advocating for public access of the MLS, and was lead attorney for three challenges to NAR practices in federal courts in 2006.) In one case, a plaintiff unsuccessfully challenged the Realtor trademark, complaining that she was injured after she withdrew from the Realtors association for being poorly treated and was no longer allowed to describe herself as a Realtor. *Pope v. Miss. Real Estate Comm’n*, 872 F.2d 127, 128-29, 133 (5th Cir. 1989).

NAR itself.<sup>18</sup> One study reports that eighty-four percent of the MLSs across the country require membership in a Realtors association in order to access the system.<sup>19</sup> Each NAR member must pay significant dues to the organization each year and agree to abide by its code of conduct.<sup>20</sup> Some brokers feel forced to join the NAR in order to access the MLS.<sup>21</sup> These brokers may not agree with the practices of the NAR, and would prefer to join a trade organization that is better suited to their own practice.<sup>22</sup> The NAR's expansive membership and abundant resources gives the organization power in shaping the market for residential real estate.<sup>23</sup> The NAR arguably uses this power to encourage dominance of the "traditional" model for brokerage, which in turn helps to maintain suspiciously high and constant commission rates for Realtors.<sup>24</sup>

This Note argues that requiring real estate brokers to purchase memberships in a NAR-affiliated association in order to access the MLS should be illegal.<sup>25</sup> First, it argues that

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<sup>18</sup> See, e.g., Glen Justice, *Lobbying to Sell Your House*, N.Y. TIMES, Jan 12, 2006, at C1. ("[The NAR] has an iron grip on its members. For access to property listings, individual agents and the brokers who employ them must belong to the national association and their state and local affiliates."); see also BARRY, *supra* note 17, at 25; Hahn et al., *supra* note 1, at 96-97.

<sup>19</sup> BARRY, *supra* note 17, at 25. This statistic was obtained by hiring a consultant to survey the top 100 MLS markets in the United States to determine whether they required Realtors association memberships in order to access the MLS. The data were then verified by a forensic accounting firm. *Id.* at 24.

<sup>20</sup> The plaintiff in one case spent \$449 a year in annual dues in order to join the local, state, and national association of realtors in order to obtain MLS access. *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 315 (7th Cir. 2006).

<sup>21</sup> See, e.g., *Reifert*, 450 F.3d at 315-16 (plaintiff real estate broker had "no desire" to maintain his membership in the local and national NAR, but maintained his membership in order to maintain his MLS access); *Buyer's Corner*, 410 F. Supp. 2d at 577 (plaintiff alleged that she continued her Realtor's Association membership solely in order to gain access to the MLS).

<sup>22</sup> See *Reifert*, 450 F.3d at 315-16 (plaintiff, an "exclusive buyer's agent," and member of the National Association of Exclusive Buyer's Agents, objected to being forced to comply with the NAR's code of ethics in order to access the MLS); *Buyer's Corner*, 410 F. Supp. 2d 574, 577 (plaintiff, an "exclusive buyer's agent," was a member of the National Association of Exclusive Buyer's Agents and "believ[ed] that NAR and its affiliates are unethical because they permit real estate brokers to represent both the buyer and the seller in a single transaction.").

<sup>23</sup> See Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 303 (1992).

<sup>24</sup> See discussion *infra* Part II.B and II.C.

<sup>25</sup> Historically, real estate agents alleging various antitrust grounds have sought with varying degrees of success to invalidate this practice as an illegal restraint on free competition in the industry. See, e.g., *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991) (challenging the practice on alternate group boycott, tying, and monopolization theories); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 806 (1st Cir. 1988) (challenging the conditional membership

requiring brokers to join the NAR is an antitrust violation under Section 1 of the Sherman Act<sup>26</sup> on two separate theories: (1) as an illegal “tying” arrangement and (2) as a group boycott.<sup>27</sup> Alternatively, this Note argues that absent a judicial remedy, state real estate commissions should adopt bright-line rules forbidding the practice for public policy reasons. However, because these commissions are often dominated by traditionalist Realtors,<sup>28</sup> they may be unwilling to limit NAR power. Therefore, it may be necessary for state or federal legislatures to prohibit the practice.

To understand how the NAR encourages preservation of the status quo in real estate brokerage, it is necessary to have a basic understanding of the nature of a broker’s role in the residential real estate transaction. Additionally, the fact-intensive nature of antitrust analysis requires an understanding of the industry to which it is being applied. Part II.A provides this background; it describes both traditional and new brokerage models for residential real estate. Part II.B discusses the current state of competition in the residential real estate industry. Part II.C demonstrates how Realtors association arrangements requiring NAR-affiliated association membership in order to access an MLS negatively affect competition in the residential real estate industry. Part II.D describes real estate agent membership associations that cater to alternative brokers.

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requirement as an illegal tying arrangement); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1358-59 (5th Cir. 1980) (challenging an association’s membership requirements as overly restrictive). There has been a recent resurgence of litigation regarding the practice. Three recent federal court cases challenged the arrangement, although none was successful. *Reifert*, 450 F.3d at 316, 321; *Prencipe v. Spokane Bd. of Realtors*, No. CIV-04-0319-LRS, 2006 WL 1310402, at \*3 (E.D. Wash. May 12, 2006); *Buyer’s Corner*, 410 F. Supp. 2d. at 577, 584.

<sup>26</sup> 15 U.S.C. § 1 (2000).

<sup>27</sup> A third possible theory, not discussed in this Note, is the essential facilities doctrine. The essential facilities doctrine is rooted in Section two of the Sherman Act. The doctrine forbids one competitor firm from controlling a facility “essential” to effective competition in the market and denying access to such facility to competitors when it is a service that cannot be easily duplicated. *See, e.g.*, *Montgomery County Ass’n of Realtors, Inc. v. Realty Photo Master Corp.*, 878 F. Supp. 804, 817 (D. Md. 1995). The Supreme Court has neither officially adopted nor repudiated the essential facilities doctrine. *See Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-11 (2004). No case attempting to apply the theory to this situation was found.

<sup>28</sup> *Braswell & Poe, supra* note 23, at 323; *see also Brobeck Testimony, supra* note 5, at 8 (describing a study that found that nearly four fifths of all state commissioners are practicing real estate brokers—one-fourth of which work for the four largest real estate brokerage firms in the country).

Part III introduces the Sherman Act and the applicable tying and group boycott theories. That Part illuminates how the law in these areas has changed over time, how it continues to change, and its current posture. Part IV argues that the NAR should not be permitted to require real estate agents to join a Realtors association in order to access an MLS because it is a tying arrangement in violation of the Sherman Act. Part V argues that the practice is an illegal group boycott under the Sherman Act. Part VI emphasizes that absent a judicial remedy, state real estate commissions or legislatures should create bright-line rules forbidding the arrangement.

## II. BACKGROUND

### A. *The Real Estate Agent's Role in the Residential Real Estate Transaction*

#### 1. The Traditional Brokerage Model

In the traditional model for conducting a residential real estate transaction (also known as “full service brokerage”),<sup>29</sup> the seller contracts with a broker to list his or her property for sale. The broker markets the property and helps the seller negotiate the deal.<sup>30</sup> This broker is called the “listing agent.”<sup>31</sup> The listing broker’s contract with the seller will usually be an “exclusive right to sell listing.”<sup>32</sup> In an exclusive listing agreement, the seller agrees not to seek the services of another broker, which limits his or her dealings with buyers to only the one listing agent.<sup>33</sup> Agency law governs the relationship between agents and their clients.<sup>34</sup> Therefore, a real estate agent owes a fiduciary duty to his or her client, including the duties of loyalty and good faith.<sup>35</sup>

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<sup>29</sup> Brobeck Testimony, *supra* note 5, at 4.

<sup>30</sup> See *supra* note 3 and accompanying text.

<sup>31</sup> Hahn et al., *supra* note 1, at 91.

<sup>32</sup> Braswell & Poe, *supra* note 23, at 272 (comparing the seller-beneficial dominant form of listing agreements of 60 years ago to today’s dominant “exclusive right to sell listing,” which favors brokers); Hahn et al., *supra* note 1, at 91 (“Home sellers are typically required to enter into an exclusive agreement with the agent trying to sell their home . . .”).

<sup>33</sup> See Hahn et al., *supra* note 1, at 91.

<sup>34</sup> Katherine A. Pancak, Thomas J. Miceli & C.F. Sirmans, *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, REAL EST. L.J., Spring 1997, at 346-47.

<sup>35</sup> *Id.*

Generally, the seller's agreement with the listing broker requires the broker to list the seller's property on the MLS.<sup>36</sup> All brokers with MLS access are then welcome to show the property to potential purchasers.<sup>37</sup> The agents who show the property to buyers—called “selling brokers” or “cooperating brokers”—are traditionally considered a mandatory sub-agent of the *seller*.<sup>38</sup> Therefore, under the traditional model, the broker who interacts with the buyer, showing them properties, is actually an agent of the *seller*. Accordingly, it is to the *seller* that the agent owes a fiduciary duty. The listing broker and the selling broker then split the commission, which the listing broker sets, and the buyer usually pays.<sup>39</sup>

This arrangement clearly has negative implications for the buyer.<sup>40</sup> A common buyer misconception is that the broker with whom they are working represents *their interests*.<sup>41</sup> As a result, the NAR changed its policy to allow listing brokers to offer “cooperation and compensation” to selling brokers, rather than mandating a seller's “sub agent” relationship.<sup>42</sup> This rule allows selling brokers to enter into separate agency agreements with buyers.<sup>43</sup> However, many agents desire to simultaneously represent the buyer and seller, acting as both the listing and the selling broker in order to retain the entire commission from the deal.<sup>44</sup> This common practice, called “dual agency,” raises many of the same problems of the sub-agency relationship.<sup>45</sup>

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<sup>36</sup> *Id.* at 347.

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

<sup>38</sup> *Id.* at 347-48.

<sup>39</sup> Hahn et al., *supra* note 1, at 91 (the listing broker splits their fee with the selling broker); RAY WILSON, BOUGHT, NOT SOLD: SINGLE AGENCY, BUYERS' BROKERS, FLAT FEES, AND THE CONSUMER REVOLUTION IN REAL ESTATE 7 (1998) (the buyer pays the fee). While in theory, the commission is negotiable, in practice this is rarely the case. See, e.g., Amy Hoak, *Do Your Homework Before Hiring a Real Estate Agent*, THOMPSON FINANCIAL NEWS, Aug. 23, 2006. Some commentators argue that “fee-splitting” will no longer be the norm if the industry becomes truly competitive; rather, buyers and sellers might compensate their individual brokers directly. E.g., White, *supra* note 1, at 27 (noting that the current arrangement might “be an incidental artifact of the current fixed-fee brokerage structure”).

<sup>40</sup> See WILSON *supra* note 39, at 7. Wilson describes this system as “a picture with a patent and compound unfairness painted over—the fact that those paying for [the agent] not only were unrepresented, but led into trusting an agent of the other side as their own!” *Id.*

<sup>41</sup> *Id.*; Pancak et al. *supra* note 34, at 349.

<sup>42</sup> Pancak et al. *supra* note 34, at 352.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., White, *supra* note 1, at 16.

<sup>45</sup> WILSON, *supra* note 39, at 6. Wilson describes the relationship as really one of “non agency” because adverse parties' interests simply cannot be protected by the same person in a transaction. *Id.* Because this situation by its nature violates



Surveys and studies, including an Federal Trade Commission study examining the residential real estate industry in 1983, show that buyers often believe that the selling broker represents them.<sup>46</sup> As a result of these studies, almost all states passed “disclosure laws” that require real estate agents to inform their clients who they represent.<sup>47</sup> Similarly, the NAR Code of Ethics now requires an agent who represents both the buyer and the seller in a transaction to disclose the potential conflict.<sup>48</sup> Nevertheless, recent reports note that the required disclosure does not happen as frequently as it should.<sup>49</sup> A study by the NAR found that one in five buyers did not sign a disclosure agreement, and one in five did not know if they had.<sup>50</sup> A quarter of first time buyers said they did not sign one.<sup>51</sup>

Thus, under the traditional model for real estate brokerage, the buyer’s interests are not sufficiently represented during negotiations. Furthermore, buyers are often *unaware* that the broker showing them properties does not represent them. Even new agency disclosure laws do not ensure that buyers are aware which party to the transaction the broker is really representing.

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traditional agency law, special legislation has been enacted to allow the practice. The NAR has recommended and lobbied for such “designated agency” statutes, and state Realtors associations have drafted model provisions. Thomas Early, Comments at Competition Policy and the Real Estate Industry Conference, hosted by the Department of Justice and Federal Trade Commission (Oct. 25, 2005), *available at* <http://www.usdoj.gov/atr/public/workshops/rewcom/213172.pdf>. This system also sometimes further contributes to agents setting higher standard commission rates and refusing to deal with agents on the other side of the transaction who charge a lower rate. White, *supra* note 1, at 16-17.

<sup>46</sup> See Braswell & Poe, *supra* note 23, at 281-83.

<sup>47</sup> Panacek et al., *supra* note 34, at 353.

<sup>48</sup> CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS, Standard of Practice 1-5 (2006) [hereinafter NAR CODE], *available at* <http://www.realtor.org/mempolweb.nsf/pages/2006code> (“[Realtors] may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties.”).

<sup>49</sup> Hoak, *supra* note 39; *see also* Kenneth R. Harney, *Agents Falling Short on Disclosure*, WASH. POST, Mar. 18, 2006, at F1 (stating that new NAR research shows that only thirty percent of buyers in 2005 received disclosures). Some advocates argue that in addition to being required to disclose the dual agency nature of the relationship, real estate agents should have to disclose to buyers that exclusive buyer agency is an option available to them. *See, e.g.*, Early, *supra* note 46.

<sup>50</sup> Hoak, *supra* note 39.

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

## 2. New Brokerage Models

Consumer demand and changing technology have resulted in the development of new service models for real estate brokerage.<sup>52</sup> The growing dominance of the Internet in society has increased public access to information and created pressure for the broker's role in the real estate transaction to change.<sup>53</sup> As a result, new brokers sometimes "unbundle" brokerage services by allowing clients to pick and choose the specific services traditionally included in full-service brokerage that they want.<sup>54</sup> Clients can then pay a lower commission rate based on which services they use.<sup>55</sup> This a la carte model caters to consumers of varying sophistication levels who desire different levels of service and do not necessarily require all of the services of a traditional real estate broker.<sup>56</sup> These brokers might provide very limited services, such as simply listing their clients' property for sale on the MLS for a flat fee.<sup>57</sup> Although a seller using a flat-fee listing broker will probably still need to offer the selling broker a commission to bring in a buyer, the seller could still save almost fifty percent over what he or she would need to pay under the traditional model.<sup>58</sup>

Another new type of broker is the exclusive buyer's agent. As a result of rising consumer awareness regarding the problem of dual agency, these agents are becoming more popular.<sup>59</sup> More homebuying guides and other mainstream media outlets are recommending that buyers consider using a

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<sup>52</sup> See, e.g., WOODALL & BROBECK, *supra* note 10, at 2, 4 (noting that, as housing prices and commissions grew, consumers demanded different pricing options and, as dual agency was "exposed," consumers increasingly sought out exclusive buyer agents); Hahn et al., *supra* note 1, at 97-101 (discussing how the internet has affected and will continue to affect real estate brokerage).

<sup>53</sup> Hahn et al., *supra* note 1, at 97-99. Traditionally, a major role of the broker was to locate the property for a buyer—now that consumers can access many listings online themselves, it is questionable whether this service is necessary. WOODALL & BROBECK, *supra* note 10, at 5.

<sup>54</sup> See, e.g., American Homeowners Grassroots Alliance, *supra* note 10.

<sup>55</sup> *Id.*

<sup>56</sup> WOODALL & BROBECK, *supra* note 10, at 5.

<sup>57</sup> Consumers cannot post their property themselves because they are not licensed real estate agents and cannot join a Realtors association; thus, they cannot access the MLS. Brobeck Testimony, *supra* note 5, at 5.

<sup>58</sup> Hahn et al., *supra* note 1, at 99.

<sup>59</sup> WOODALL & BROBECK, *supra* note 10, at 7 ("Membership in the National Association of Exclusive Buyer Agents tripled over the past decade rising from 221 in 1995 to over 700 in 2006.").

broker exclusive to their side of the transaction.<sup>60</sup> These agents market themselves as trustworthy alternatives to the traditional real estate agent who genuinely work for their clients' best interests.<sup>61</sup> Exclusive buyers' agents do not accept any listings, ensuring that they will avoid the inevitable conflict of interest that arises when a buyer client wants to buy the house of a selling client.<sup>62</sup>

A third new type of agent acts solely as a "lead generator" for other agents.<sup>63</sup> These lead generators assess the needs of a given customer and match them with an appropriate agency.<sup>64</sup> The referred agencies then give part of their commissions to the "lead generator."<sup>65</sup> The "lead generator" then passes part of this commission on to the consumer as a rebate.<sup>66</sup> Thus, the consumer is ultimately paying less in commission than under the traditional model.

These new brokerage models continue to develop and grow in popularity, enhancing consumer choice. As a result, consumers are able to pay less for brokerage services that are better tailored to their needs.

### *B. Competition in the Residential Real Estate Industry*

The Consumer Federation of America recently called the residential real estate industry "the last remaining unregulated cartel functioning in America."<sup>67</sup> This statement is just one small part of a resurgence of debate over the anticompetitive conditions in the residential real estate

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<sup>60</sup> See, e.g., WILSON, *supra* note 39, at 76; David Devoss, *Don't Assume Anything, and Nine Other Home-Buying Tips; Hire Pros But Learn Ins, Outs: Prune Price, Payments and Problems by Choosing the Best Ways and Times to Buy*, INVESTOR'S BUS. DAILY, June 14, 2006, at A5; *Top Things to Know*, CNNMONEY, June 18, 2006 ("Look for an exclusive buyer agent, if possible, who will have your interests at heart and can help you with strategies during the bidding process.")

<sup>61</sup> See, e.g., The National Association of Exclusive Buyer's Agents Home Page, <http://www.naeba.org> (last visited Oct. 11, 2007); Jane Becker, Home Team AdvantEdge, Before You Start Your Home Search, Find Out What You Need to Know About Real Estate Agency, <http://www.hometeamadvantedge.com/homebuying.html> (last visited Oct. 22, 2007).

<sup>62</sup> WOODALL & BROBECK, *supra* note 10, at 4.

<sup>63</sup> Hahn et al., *supra* note 1, at 98-99.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Group Decries Real Estate "Cartel,"* L.A. TIMES, June 20, 2006, at C6.

industry.<sup>68</sup> Discussion of the problem, however, is not a new phenomenon. In fact, the last half century has seen much similar debate, flush with both private and government litigation challenging various anticompetitive practices in the industry.<sup>69</sup> Several features of the real estate market that have troubled commentators remain today: broker commission rates have remained steadily high over time;<sup>70</sup> the traditional model for brokerage remains dominant even in a climate of alternative models for brokerage arguably more attractive to consumers;<sup>71</sup> and control of the MLS, an indispensable tool of the trade, remains largely in the hands of one trade association.<sup>72</sup>

Even as housing prices have changed over time and technological advances have arguably made the broker's job *easier*, commission rates in the industry have remained

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<sup>68</sup> See *id.* The Antitrust Division of the Department of Justice held a large conference on competition in the Real Estate Industry in October 2005, seeking input from various real estate professionals and academics, as well as the public. See Public Workshops, Antitrust Division, Competition Policy and the Real Estate Industry, [www.usdoj.gov/atr/public/workshops/reworkshop.htm](http://www.usdoj.gov/atr/public/workshops/reworkshop.htm); Press Release, Department of Justice, Justice Department/Federal Trade Commission to Host Joint Workshop on Competition Policy and the Real Estate Industry (Sept. 13, 2005), available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/211074.pdf](http://www.usdoj.gov/atr/public/press_releases/2005/211074.pdf). The Summer 2006 edition of the *Real Estate Law Journal* was devoted to an exploration of the problem. See, e.g., Hahn et al., *supra* note 1; White, *supra* note 1; John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as It Is*, REAL EST. L.J., Summer 2006, at 119. Also, in 2006, three separate district courts across the country heard cases that challenged the Realtors associations' practice of requiring membership in the NAR to access the MLS. See *supra* note 25.

<sup>69</sup> See, e.g., Norman W. Hawker, *Overview of AAI's Real Estate Competition Project: Highlights from the Existing Literature on Broker Competition*, REAL EST. L.J., Summer 2006 at 69-71 (noting that "competition issues in this industry have been a major concern for the last half century," and providing a comprehensive review of judicial decisions and government publications on the subject); see also *Unites States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950) (holding that the National Association of Real Estate Boards violated federal antitrust law by creating a formal schedule for commission rates); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988) (upholding the requirement that an agent join the Realtors association in order to access the MLS based on a finding that a substantial amount of commerce was not foreclosed as required by the Sherman Act); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1389 (5th Cir. 1980) (invalidating some MLS membership criteria as an unreasonable group boycott under the Sherman Act); *Marin County Bd. of Realtors v. Plasson*, 549 P.2d 833 (Cal. 1976) (invalidating an association's membership requirement under state antitrust law).

<sup>70</sup> See *infra* notes 73-74 and accompanying text.

<sup>71</sup> See *supra* Part II.A.2

<sup>72</sup> See *supra* notes 17-20 and accompanying text and discussion *infra* Part II.C.1.

remarkably steady at around five to six percent.<sup>73</sup> Such stable commission rates have led analysts to question whether there is some kind of “informal collusion” keeping commission rates at this level.<sup>74</sup> In fact, the traditional model does give a direct economic incentive to the listing and the selling broker to cooperate in maintaining a high commission rate because they will split the commission when the deal closes.<sup>75</sup> Even worse, the traditional model allows one broker to represent both sides of the transaction.<sup>76</sup> A dual agent clearly has an incentive to maintain the high commission rate because she will retain the entire fee.<sup>77</sup> Alternative brokerage models, on the other hand, offer consumers the opportunity to choose limited services for discount rates.<sup>78</sup>

Some commentators, however, argue that the dominance of the traditional model for brokerage suppresses the growth of alternative brokerage models. These commentators note that the “commonality of the structure [for brokerage services] . . . and its persistence over time suggest the possibility that alternative models have not had a fair chance to compete.”<sup>79</sup> Since the traditional brokerage method allows little opportunity for the consumer to negotiate the broker’s commission rate, alternative brokers have complained that consumers do not even know that they can shop around for different service packages and rates.<sup>80</sup> Additionally, discrimination against alternative brokers by traditionalist brokers may contribute to the limited growth of these types of brokers.<sup>81</sup> Traditional brokers do not want the industry to be infiltrated by brokers offering lower prices.<sup>82</sup> Therefore,

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<sup>73</sup> WOODALL & BROBECK, *supra* note 10, at 2; White, *supra* note 1, at 12. This commission rate is approximately 1.5% higher than that found in other developed countries. American Homeowners Grassroots Alliance, *supra* note 10.

<sup>74</sup> Hahn et al., *supra* note 1, at 92-93.

<sup>75</sup> For this reason, commentators sometimes describe the traditional model as one of “interdependence.” The system encourages cooperation and interdependence between brokers, in order to maintain a uniform high commission rate. Braswell & Poe, *supra* note 23, at 318.

<sup>76</sup> See *supra* notes 44-45 and accompanying text.

<sup>77</sup> Critics call this practice a “double dip.” The same effect can be achieved through “in-house” transactions whereby two brokers in the same brokerage firm represent the buyer and the seller. In this case, the entire commission profit accrues to the one brokerage. Early, *supra* note 45.

<sup>78</sup> See *supra* Part II.A.2.

<sup>79</sup> Hahn et al., *supra* note 1, at 92.

<sup>80</sup> See Braswell & Poe, *supra* note 23, at 315.

<sup>81</sup> See Hahn et al., *supra* note 1, at 90; see also *infra* Part II.C.2.

<sup>82</sup> See *infra* Part II.C.2.

traditionalists have an economic incentive to deal only with other traditionalists who work for the same standard commission rate.<sup>83</sup>

Analysts speculate that a truly competitive residential real estate industry would feature lower commission rates and “a greater range and variety of services [offered] at varying prices.”<sup>84</sup> Therefore, expansion and growth of the new alternative models for real estate brokerage should be encouraged.

*C. The NAR Actively Stifles the Development of Alternative Models of Real Estate Brokerage*

Rather than encouraging development of new brokerage models, the NAR and its local affiliates rigorously support the traditional model for real estate brokerage.<sup>85</sup> The NAR aggressively lobbies for legislation that ensures the dominance of the traditional model for brokerage.<sup>86</sup> In fact, the general counsel of the NAR has made it clear that this *is* the NAR’s agenda, stating recently that “Realtor associations have the right to lobby for legislative and regulatory action that they support—even if the effect of such action would be anti-competitive.”<sup>87</sup>

The NAR receives a vast amount of funding to pursue its lobbying activities through annual membership dues collected from its 1.3 million members. Membership dues generate around \$100 million annually.<sup>88</sup> In its 2005 annual report, the NAR stated that it used fifteen percent of

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<sup>83</sup> *Id.*

<sup>84</sup> White, *supra* note 1, at 13.

<sup>85</sup> The NAR and its local affiliates actively lobby for local legislation aimed at maintaining the traditional system for residential real estate. *See, e.g.*, WILSON, *supra* note 39, at 191; American Homeowners Grassroots Alliance, *supra* note 10. Such legislation includes “minimum service laws,” requiring all real estate brokers to provide a certain level of service to their clients—aimed at limiting the level of service provided by discount brokers. Brobeck Testimony, *supra* note 5, at 4. Such laws might require, for example, “all service providers to maintain physical offices or accompany prospective buyers on home visits.” *Id.*

<sup>86</sup> *See* Justice, *supra* note 18 (“The Realtors association is . . . one of the most powerful lobbies in Washington, spending nearly \$94 million annually.”); *see also supra* note 45 and accompanying text, discussing “designated agency” laws.

<sup>87</sup> *Id.*

<sup>88</sup> National Association of Realtors, Internal Revenue Service Form I-990 Filing, at 1, *available at* [www.guidestar.org](http://www.guidestar.org) (Line 3, Membership Dues and Assessments lists \$94,651,631 in membership fees for the tax year 2004).

membership dues for “public policy.”<sup>89</sup> Therefore, by forcing all real estate agents wishing to access the MLS to pay membership dues to the NAR, all real estate agents are in effect contributing money to be used in part to lobby against competitive changes in the industry. This is especially problematic for alternative brokers, who would probably prefer not to contribute to a fund that will be used in part to advocate for policies adverse to their interests.

The NAR and traditional brokers, however, have a great incentive to continue to advocate for adherence to the status quo in brokerage because any break in uniformity is likely to result in lower commission rates.<sup>90</sup> Additionally, the NAR clearly has strong incentives to require membership in the NAR in order for a broker to obtain MLS access—millions of dollars to use in forwarding its traditionalist agenda and the power to control who uses the MLS and on what terms.<sup>91</sup>

### 1. NAR Power over MLS Terms of Use Stifles Growth of Alternative Brokerage Models

By requiring membership in a Realtors association in order to access the MLS, the NAR controls the MLS’s terms of use.<sup>92</sup> Moreover, when an agent joins the NAR, they must agree to abide by the NAR’s Code of Ethics. These rules and standards are often criticized for stifling the development and expansion of alternative business models.<sup>93</sup> For example, the Code-mandated arbitration process for settling commission disputes is often criticized.<sup>94</sup> The panels that conduct the arbitration hearings largely consist of traditionalist NAR member brokers who themselves compete with the brokers involved in the disputes.<sup>95</sup> Therefore, these arbitrators have

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<sup>89</sup> NATIONAL ASSOCIATION OF REALTORS, 2005 ANNUAL REPORT 28 (2006), available at [http://www.realtor.org/realtororg.nsf/pages/2005\\_annual\\_report](http://www.realtor.org/realtororg.nsf/pages/2005_annual_report).

<sup>90</sup> See Hahn et al., *supra* note 1, at 101.

<sup>91</sup> Brobeck Testimony, *supra* note 5, at 7.

<sup>92</sup> One commentator describes the potential problem with this arrangement in this way: “[F]or most MLSs, the terms are coordinated through NAR’s national policy, and they can design it to keep membership limited to firms who will conduct their business in a particular manner.” Hahn et al., *supra* note 1, at 96. The NAR argues that membership in the association is necessary in order to regulate the MLS, and ensure that brokers are interacting ethically. One counterargument is that this is the duty of state licensing boards and real estate commissions—not a private trade association. Braswell & Poe, *supra* note 23, at 307-08.

<sup>93</sup> See, e.g., Braswell & Poe, *supra* note 23, at 305-06.

<sup>94</sup> NAR CODE, *supra* note 48, art. 17.

<sup>95</sup> Braswell & Poe, *supra* note 23, at 305-06.

little incentive to find in favor of a non-traditionalist broker whose practice is threatening to break up the status quo in real estate brokerage, potentially reducing commission rates.<sup>96</sup>

Additionally, in arbitration, the NAR uses the doctrine of “procuring cause” to settle commission disputes.<sup>97</sup> Under procuring cause, a commission belongs to the broker whose “*unbroken efforts . . .* were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable.”<sup>98</sup> Use of this doctrine can jeopardize an alternative broker’s right to his or her commission.<sup>99</sup> For example, buyers often begin their home search on their own today, perhaps searching for properties online. However, NAR policy ensures that pared-down online listings, unlike those in the Realtor-accessible MLS, do not contain enough information for a buyer to locate a property and contact the seller directly.<sup>100</sup> When an interested buyer calls the number on the listing, the buyer speaks with the listing broker, who will give the buyer more information or possibly show the property.<sup>101</sup> At this point, if the buyer is interested in the property and contacts a buyers-only broker to help negotiate the transaction, the buyers-only broker might be locked out of the commission since, technically, the listing broker is the agent who “originated the series of events leading to the closing.”<sup>102</sup> This doctrine, perpetuated by

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<sup>96</sup> *Id.* (describing this condition as “add[ing] significantly to the general pressures of uniformity” (quoting FEDERAL TRADE COMMISSION STAFF REPORT, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 126 (1983))).

<sup>97</sup> NAR CODE, *supra* note 48, art. 17, Standard of Practice 17-4.

<sup>98</sup> National Association of Realtors, Procuring Cause Factors, *available at* <http://www.realtor.org> (search “procause.doc” and download Word file) (last visited Nov. 27, 2007).

<sup>99</sup> *See* Early, *supra* note 45, at \*4.

<sup>100</sup> WOODALL & BROBECK, *supra* note 10, at 10; Brobeck Testimony, *supra* note 5, at 5.

<sup>101</sup> *See* WILSON, *supra* note 39, at 227-28 (warning buyers who want to work with an exclusive buyers agent that such agents “do not make specific appointments to see houses; do not visit listing agencies; and do not let listing agents escort you to houses; visit only during declared ‘open house’ hours when the homes are specifically open for general viewing”).

<sup>102</sup> *See* National Association of Realtors, Procuring Cause—An Introduction, *available at* [www.realtor.org](http://www.realtor.org) (search “pcai.doc” and download Word file) (last visited Nov. 27, 2007); *see also* WILSON, *supra* note 39, at 227 (“[Y]our visit to a home which eventually emerges as a purchase possibility could become the basis for a listing agent’s claim to be the procuring cause of your interest and, therefore, entitled to the buyerside portion of the commission.”).



the NAR, clearly encourages maintaining the traditional model of real estate brokerage.<sup>103</sup>

NAR policy is also discriminatory to online-based brokers. The NAR enacted rules that allow NAR members to withhold their listings from being displayed on the site of an online broker if they so choose.<sup>104</sup> Thus, the NAR's control over access to and terms of use of the MLS has discriminatory effects on alternative real estate brokers and may stifle the growth of these new forms of brokerage.

## 2. Realtors Associations Discriminate Against Alternative Brokers

In addition to the discriminatory effects caused by Realtor control of the MLS, Realtors associations do not generally foster an environment that supports or encourages the development of new models for real estate brokerage. In its code of ethics, the NAR states, "[Realtors] urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners."<sup>105</sup> However, in practice, Realtors do not seem to adhere to this policy. Discount brokers frequently complain that they are harassed or treated otherwise unfairly by Realtors.<sup>106</sup> Buyers-only brokers report similar harassment by traditionalist NAR members.<sup>107</sup>

One common complaint of alternative brokers is that traditional agents practice "steering."<sup>108</sup> Steering occurs when

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<sup>103</sup> Efforts are being made by exclusive buyer agents to educate the consumer to this fact so that they know they need to start with an exclusive buyer agent from the beginning of their home search process. *See, e.g., WILSON, supra* note 39, at 227-28; Becker, *supra* note 61.

<sup>104</sup> The Department of Justice ("DOJ") filed suit in September 2005 against the NAR over their rules governing website listings. The NAR allows NAR members to withhold their listings from being displayed on the websites of on-line brokers. The DOJ claims that this is a restraint on trade aimed at restraining competition from discount brokers. This case is currently in the discovery phase. DOJ Sues NAR, *supra* note 14, at 2-3; *see also* Hahn et al., *supra* note 1, at 88.

<sup>105</sup> NAR Code, *supra* note 48, Preamble.

<sup>106</sup> Braswell & Poe, *supra* note 23, at 315. Brokers have been largely unsuccessful in suits alleging such harassment by mainstream brokers, primarily because courts have found that the actions were perpetuated by a few brokers individually, not by the NAR or local affiliates as a whole. *See, e.g., Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1174 (7th Cir. 1990).

<sup>107</sup> *See infra* notes 111-113 and accompanying text.

<sup>108</sup> White, *supra* note 1, at 16-17.

traditional listing brokers make it difficult or impossible for non-traditional or “discount” brokers to bring potential buyers to the property.<sup>109</sup> Another complaint is that traditional selling brokers sometimes refuse to show a buyer property listed by a broker who works for less than a six percent commission.<sup>110</sup> Additionally, some traditional brokers create an environment unfriendly to alternative brokers by making disparaging remarks about non-traditional brokers in the media, through advertising to homebuyers and sellers and at Realtors workshops.<sup>111</sup> During the 2003 NAR convention, for example, discount brokers were referred to as “waging war on real estate commissions.”<sup>112</sup> At this conference, a video was screened that morphed the face of one well-known discount broker into that of Osama Bin Laden.<sup>113</sup>

Thus, despite the NAR’s professed commitment to the equal treatment of brokers, reports of harassment and unequal treatment from alternative brokers paint a different picture.

*D. Alternative Real Estate Associations in Competition with the NAR*

Alternative real estate professional membership associations have developed to cater to the expanding pool of non-traditional brokers. One of the largest alternative associations is the National Association of Exclusive Buyers Agents (“NAEBA”), whose members represent only the buyer in a transaction.<sup>114</sup> The National Association of Real Estate

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<sup>109</sup> See *id.*

<sup>110</sup> One flat-fee listing agent complained that a traditional agent refused to show his homes because of his lower commission rate, stating that the traditional broker told him, “Sorry, I don’t give discount services, so I don’t discount my commission. But if the seller is willing to do 3 percent I’ll show the property. That is pretty standard for real estate professionals.” WOODALL & BROBECK, *supra* note 11, at 11-12.

<sup>111</sup> One buyers-only broker (also a member of the NAR) alleges that while attending a Task Force of Buyer Agency Liability, the former NAR president, Sharon Millett “was openly hostile and rude every time [she] tried to add [her] view to the discussion.” E-mail from Janet Hagan, The Buyer’s Voice in Real Estate, to the Department of Justice (Nov. 10, 2005) [hereinafter Hagan e-mail], available at <http://www.usdoj.gov/atr/public/workshops/rewcom/213325.pdf>. Similarly, a well-respected member of the NAR Professional Standards Committee who spoke at the event called the NAEBA “radical insurgents.” *Id.*

<sup>112</sup> WOODALL & BROBECK, *supra* note 10, at 15 (quoting Jessica Swesy, *Fear Still Rules Real Estate Industry*, INMAN NEWS, Feb. 24, 2006).

<sup>113</sup> *Id.*

<sup>114</sup> See National Association of Exclusive Buyers Agents, <http://www.naeba.org> (last visited Jan. 27, 2007). There are also many local exclusive buyers agent

Consultants is an association representing flat-fee brokers.<sup>115</sup> A new trade association, the American Real Estate Broker Alliance (“AREBA”) was formed in 2006 to cater to flat-fee and discount brokers.<sup>116</sup> Although alternative agents are not excluded from joining the NAR (the NAR explicitly states that it “encourages innovation and competition in real estate brokerage, including different business models like fee-for-service”),<sup>117</sup> they often report being harassed and poorly treated by traditional Realtors.<sup>118</sup> Therefore, it is no surprise that these agents might prefer not to join the NAR. Additionally, it is likely that more agents *would* join an alternative association if they were not already “forced” to pay two or three membership fees (that is, the NAR and a local and state NAR affiliate) in order to access the MLS.<sup>119</sup>

Real estate agents should not be forced to join an association they do not wish to join, especially if they object to the organization’s practices on ethical grounds. In an age of consumer distrust of real estate agents<sup>120</sup> and widespread awareness of issues regarding representation,<sup>121</sup> it might be competitively beneficial for real estate agents to *not* identify themselves as traditional Realtors. Agents marketing themselves as an exclusive buyers agents separate from the NAR, for example, might attract a different consumer niche.

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associations. *See, e.g.*, Colorado Exclusive Buyer Agents Association, <http://www.homebuyerscolorado.org> (last visited Jan. 27, 2007); New Hampshire Association of Exclusive Buyer Agents, <http://www.nhaeba.org> (last visited Jan. 27, 2007).

<sup>115</sup> WOODALL & BROBECK, *supra* note 11, at 7.

<sup>116</sup> *Id.*

<sup>117</sup> *Real Estate Commission Debate Heats Up*, REALTOR MAG. ONLINE, Nov. 7, 2006, <http://www.realtor.org/rmodaily.nsf/pages/News2006110707?OpenDocument>.

<sup>118</sup> *See, e.g.*, Hagan e-mail, *supra* note 111 (claiming that she has been paying dues to the NAR since 1988, but her name is not listed on the NAR website); *see also supra* Part II.C.

<sup>119</sup> For example, in *Thompson*, there was evidence showing that “the expense of dual membership in trade groups can be prohibitive for some brokers, and . . . prospective . . . members [of Empire, an alternative real estate professional association] did not join Empire . . . because of the prohibitive cost. *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991); *see also* discussion *infra* Part II.A.; BARRY, *supra* note 17, at 26 (showing agent “non-join” rates in areas where joining a Realtors association not required to access the MLS).

<sup>120</sup> Real estate agent is ranked fairly low on a scale of “trustworthy” professions in Gallup polls. In a 2000 Gallup poll, only seventeen percent of respondents ranked real estate agents as “high” or “very high” on a standard of honesty and ethics. Blanche Evans, *How Do You Interpret the Gallup Poll’s Ranking of Real Estate Agents?*, REALTY TIMES, Nov. 30, 2000, [http://realtytimes.com/rtapages/20001130\\_ranking.htm](http://realtytimes.com/rtapages/20001130_ranking.htm).

<sup>121</sup> *See supra* notes 60-61 and accompanying text.

Thus, as new brokerage models continue to grow, it is likely that more broker-specific associations will develop. So long as the NAR is allowed to require membership in a Realtors association in order to access the MLS, however, the practice will constitute a barrier to entry for competitors.

### III. INTRODUCTION TO ANTITRUST LAWS APPLICABLE TO THE NAR'S CONTROL OF THE MULTIPLE LISTING SERVICE

The NAR's control of the MLS and the resulting anticompetitive consequences might fall within the scope of antitrust laws. Antitrust laws are generally concerned with fostering competition in the marketplace. The theory is that unrestricted buyers and sellers in a free market will result in the most efficient distribution of resources.<sup>122</sup> The primary economic purpose of antitrust laws is to "maximize consumer economic welfare"<sup>123</sup> by creating an efficient market resulting in the "lowest prices, the highest quality, and greatest material progress . . . ."<sup>124</sup> A secondary beneficiary of antitrust law is the competitor himself, who is assured a fair chance at competing in the marketplace.<sup>125</sup> Section 1 of the Sherman Act, one piece of antitrust legislation, states "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."<sup>126</sup>

Courts have invalidated several anticompetitive business practices under Section 1 of the Sherman Act, but only unreasonable restraints of trade are prohibited under the Act.<sup>127</sup> One practice found to violate Section 1 is "tying arrangements."<sup>128</sup> A tying arrangement occurs when a seller will "sell one product . . . only on the condition that the buyer

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<sup>122</sup> See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); Arthur I. Cantor, *Tying, Exclusive Dealing, and Franchising Issues*, in 47TH ANNUAL ANTITRUST LAW INSTITUTE, at 399, 405 (P.L.I. Corporate Law and Practice, Course Handbook Series, 2006).

<sup>123</sup> 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 103 (1st ed. 1978).

<sup>124</sup> *N. Pac. Ry.*, 356 U.S. at 4.

<sup>125</sup> *Id.*

<sup>126</sup> 15 U.S.C. § 1 (2000).

<sup>127</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 88 (1911).

<sup>128</sup> Cantor, *supra* note 122, at 405-06. One commentator describes tying law as "among the most controversial of antitrust principles." Stephen v. Bomse, *Tying 1992: Waiting for Kodak to Develop*, in 33RD ANNUAL ANTITRUST LAW INSTITUTE, at 869, 872, P.L.I. Corporate Law and Practice, Course Handbook Series No. 776, 1992).

also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.”<sup>129</sup> The desired product is called the “tying” product, and the secondary product is the “tied” product. Tying arrangements are subject to inquiry under the Sherman Act when the seller is either “an actual monopolist of the tying product or an actual or prospective monopolist of the tied product.”<sup>130</sup> Tying arrangements restrain trade not only by affecting competition between existing competitors, but also by barring entry to new firms in the market.<sup>131</sup> This effect is achieved because the monopolist seller of the tying product effectively extends their monopoly to the tied product.<sup>132</sup>

A second practice scrutinized under Section 1 of the Sherman Act is a “group boycott,” or “concerted refusal to deal.”<sup>133</sup> A group boycott occurs when a group of competitors collectively agree not to deal with a competitor or group of competitors who are not a member of the group.<sup>134</sup> As part of the boycott, the nonmember might be denied access to a “valuable business service” that it needs in order to be competitively effective.<sup>135</sup>

Traditionally, both tying arrangements and group boycotts were frequently invalidated, and courts often found each of them illegal per se.<sup>136</sup> The strict per se rule resulted from the common early belief that both tying arrangements and concerted refusals to deal had a “pernicious effect on competition” and lacked any “redeeming virtue.”<sup>137</sup> Since these

<sup>129</sup> *N. Pac. Ry.*, 356 U.S. at 5-6. The most recent Supreme Court tying cases continue to use this definition of tying. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461 (1992).

<sup>130</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 17.01e (3d ed. Supp. 2004).

<sup>131</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984).

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959).

<sup>134</sup> *Id.* at 212.

<sup>135</sup> *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 347 (1963).

<sup>136</sup> *See, e.g., N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (listing group boycotts and tying arrangements as among the practices “deemed to be unlawful in and of themselves”).

<sup>137</sup> *Id.* In another case, the Court noted that “tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way.” *Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I)*, 394 U.S. 495, 503 (1969); *see also U.S. Steel Corp. v. Fortner Enters., Inc. (Fortner II)*, 429 U.S. 610, 617 (1977) (noting that permitting tying arrangements was like condoning “the existence of power that a free market [will] not tolerate”). Tying arrangements would be invalidated so long as the seller had enough market power in the tying product market to restrain

arrangements were considered facially unreasonable, the Court applied the per se rule to avoid an “incredibly complicated and prolonged economic investigation . . . so often wholly fruitless when undertaken.”<sup>138</sup>

Critics have since argued that the per se rule sweeps too broadly and condemns practices that do not actually have negative competitive consequences.<sup>139</sup> Critics claimed that the rule was based too much on assumptions rather than actual market analysis.<sup>140</sup> These commentators shifted their view of tying arrangements and refusals to deal, and they now urge that there can be significant pro-competitive effects of such practices.<sup>141</sup> As a result of changing attitudes, courts have begun to import more economic analysis into determinations of whether the per se rule should apply, focusing more on the actual market conditions and less on assumptions.<sup>142</sup> Application of the less stringent “rule of reason” analysis is becoming the new standard for analysis of both tying arrangements and group boycotts.<sup>143</sup> The rule of reason requires courts to invalidate “any restraint whose anti-competitive effects outweigh its contributions to competition.”<sup>144</sup> There are two steps to the rule of reason analysis: courts must (1) determine that the challenged firm possesses sufficient

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trade in the market for the tied product. *Fortner I*, 394 U.S. at 499. Additionally, the tying arrangement must have had an effect on more than an “insubstantial amount of interstate commerce.” *Id.* Courts have traditionally inferred market power if the seller controlled a large share of the market. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). These courts also held the amount of interstate commerce affected to be “not insubstantial” if it was more than “de minimis.” *Fortner I*, 394 U.S. at 501.

<sup>138</sup> *N. Pac. Ry.*, 356 U.S. at 5.

<sup>139</sup> The Department of Justice stance on tying arrangements is now that they “generally do not have a significant anticompetitive potential.” Bomse, *supra* note 128, at 875 (quoting DEPARTMENT OF JUSTICE, VERTICAL RESTRAINTS GUIDELINES ¶ 5.1 (1985), but noting that the Guidelines were rescinded in 1993). Areeda states that most litigated tie-ins do not actually affect a substantial share of the tied market, yet most courts nevertheless condemn them. He argues that this is the area of tying law “most in need of reform.” 9 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1730 (1991). In *United States v. Realty Multi-List, Inc.*, the Fifth Circuit refused to invalidate a group boycott using the per se rule, acknowledging the many possible pro-competitive effects of the arrangement. 629 F.2d 1351, 1367-68 (5th Cir. 1980).

<sup>140</sup> See e.g. AREEDA, *supra* note 139.

<sup>141</sup> *Id.*

<sup>142</sup> See *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (“Over the years . . . this Court’s strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product.”).

<sup>143</sup> See *id.*

<sup>144</sup> *Realty Multi-List*, 629 F.2d at 1370.

market power to justify analysis of its practice and (2) consider whether there are pro-competitive justifications for the practice that outweigh the possible anticompetitive effects.<sup>145</sup>

#### IV. REQUIRING A REAL ESTATE AGENT TO JOIN A REALTORS ASSOCIATION IN ORDER TO OBTAIN ACCESS TO THE MLS IS AN ILLEGAL TYING ARRANGEMENT<sup>146</sup>

##### A. *The Applicable Standard for Tying Claims*

Although the United States Supreme Court has not entirely rejected the per se rule for tying arrangements,<sup>147</sup> the extent of economic analysis now required just to decide whether the per se rule *applies* greatly limits its reach.<sup>148</sup> An

<sup>145</sup> See, e.g., *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833, 842-44 (Cal. 1976) (“[W]e hesitate before mechanically applying a per se rule. Adopting such a rule would establish the activities of the board to be illegal without any regard to their economic effects or possible justification.”).

<sup>146</sup> It should be noted that it is important that the plaintiff challenging the Realtors association practice have standing to bring the claim. In one unsuccessful case in 2006, a plaintiff’s claim was dismissed on the grounds that she failed to show that she suffered an antitrust injury. *Buyer’s Corner Realty, Inc. v. N. Ky. Ass’n of Realtors*, 410 F. Supp. 2d 574, 580 (E.D. Ky. 2006), *aff’d*, 198 F. App’x 485 (6th Cir. 2007). In this case, the plaintiff broker, a member of both the NAR and the NAEBA, alleged that the only reason she joined the NAR was to access the MLS. *Id.* at 577. Because the plaintiff had in fact joined the NAEBA despite the NAR membership requirement, she failed to show how she was injured by the practice. *Id.* at 580.

In contrast, in *Thompson v. Metropolitan Multi-List*, one of the plaintiffs was an alternative real estate professional association alleging a loss in membership due to the tying arrangement, and the other plaintiff was an agent who had applied to for MLS access but was denied because he refused to join the Realtors association. *Thompson v. Metro. Multi-List, Inc.* 934 F.2d 1566, 1570 (11th Cir. 1991). Both plaintiffs were deemed to have standing. *Id.* at 1571, 1572. With regards to the individual broker, the court concluded that “[a]s long as a plaintiff made a reasonable attempt to enter the market . . . the plaintiff has standing to contest antitrust violations which create barriers to that market.” *Id.* at 1572.

<sup>147</sup> In *Jefferson Parish*, the court had the opportunity once again to reject the per se rule, but the majority chose to sustain it, stating that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

<sup>148</sup> Ironically, one of the very purposes of the original per se rule was to “avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive behavior.” *Id.* at 16; see also *Cantor*, *supra* note 122, at 410-11; *Smith Machinery Co. v. Hesston Corp.*, 1987-1 Trade Cas. ¶ 67,563 n.5 (D.N.M. 1987), *aff’d*, 878 F.2d 1290 (10th Cir. 1989) (“The means for deciding which tying agreements are ‘plainly anticompetitive’ enough to justify per se treatment has become so complex and difficult that the objectives of the per se rule are no longer being realized through its use.”); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (“Over the years . . . this Court’s strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the

essential characteristic of modern-day tying analysis is “leverage.”<sup>149</sup> To qualify as leverage, a seller must use its power in the market for the tying product to essentially force the consumer to purchase a tied product that they “either did not want at all, or might have preferred to purchase elsewhere on different terms.”<sup>150</sup> The per se rule will only be applied when the seller’s market power in the tying product market is substantial enough such that forcing is probable.<sup>151</sup> Courts conduct a fact-intensive analysis of the circumstances in each case.<sup>152</sup> Some factors courts consider include whether the seller possesses a predominant share of the market for the tying product,<sup>153</sup> whether the tying product is so unique that competitors are unable to offer it,<sup>154</sup> and the cross-elasticity of demand for the tying product.<sup>155</sup>

Additionally, the per se rule requires that the arrangement results in the substantial foreclosure of sales in the market for the tied product.<sup>156</sup> An amount will be considered substantial when it is more than de minimis.<sup>157</sup> The relevant figure is the total amount of sales tied by the arrangement being challenged, not just the amount attributable to the plaintiff challenging the practice.<sup>158</sup> At least one circuit court has found that an amount of just over \$10,000 was more than

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tying product.”). *Illinois Tool Works* ended the practice of automatic presumption of market power in cases involving a patented product. It did not however, reject the per se rule completely, and is the most recent Supreme Court consideration of the issue. *Id.* at 42, 43.

<sup>149</sup> *Jefferson Parish*, 466 U.S. at 12.

<sup>150</sup> *Id.* It should be noted that *Illinois Tool Works* is sometimes cited as abrogating *Jefferson Parish*. However, the case only reversed *Jefferson Parish* on one point of law, holding that the existence of a patent does not automatically implicate the per se rule for tying.

<sup>151</sup> *Id.* at 16.

<sup>152</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (“This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the ‘particular facts disclosed by the record.’”).

<sup>153</sup> In *Jefferson Parish*, a thirty percent share of the market for the tying product was not enough to be considered substantial in the tying context. *Jefferson Parish*, 466 U.S. at 26. (“Seventy per cent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. Thus East Jefferson’s ‘dominance’ over persons residing in Jefferson Parish is far from overwhelming.”).

<sup>154</sup> *Id.* at 17.

<sup>155</sup> *Eastman Kodak*, 504 U.S. at 469 (defining cross-elasticity of demand as “the extent to which consumers will change their consumption of one product in response to a price change in another”).

<sup>156</sup> *Jefferson Parish*, 466 U.S. at 16.

<sup>157</sup> *Fortner I*, 394 U.S. at 501.

<sup>158</sup> *Id.* at 502.



de minimis.<sup>159</sup> This requirement is meant to ensure that there is an actual possibility of anticompetitive effects of the tying arrangement.<sup>160</sup>

Courts have consistently further limited the application of the per se rule. For example, courts have held that if the buyer would not have purchased the tied product from *any seller* if he hadn't bought it as a result of the tying arrangement, the per se rule does not apply because no competitors are being harmed by the arrangement.<sup>161</sup> Additionally, some courts have held that if there is no actual or potential competitor in the market for a tied product, it cannot be shown that a substantial amount of commerce is foreclosed because the arrangement is not foreclosing the sales of any competitors.<sup>162</sup>

Therefore, the elements required to invalidate an arrangement under the per se rule are<sup>163</sup> (1) there are two separate and distinct products, and sale of the two products is tied;<sup>164</sup> (2) the seller has sufficient market power in the market for the tying product such that they can force the buyer to purchase the tied product and restrain trade in the market for the tied product;<sup>165</sup> and (3) a substantial amount of interstate commerce is foreclosed in the tied product market.<sup>166</sup> Additionally, some courts require that the seller must have an economic interest in the sale of the tied product or service, although the Supreme Court has not adopted this requirement.<sup>167</sup>

If an arrangement does not meet the requirements for per se invalidity, it can still be found illegal under a rule of

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<sup>159</sup> *E.g.* *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1419 (11th Cir. 1987).

<sup>160</sup> *Jefferson Parish*, 466 U.S. at 16.

<sup>161</sup> *See id.*

<sup>162</sup> *See, e.g.*, *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1291-92 (2d Cir. 1974).

<sup>163</sup> There is no recent Supreme Court case neatly listing the elements of a tying claim, so these elements are pieced together from the most recent cases. *Eastman Kodak*, 504 U.S. at 462, 464 (there must be two separate products, and there must be "appreciable economic power in the tying market"); *Jefferson Parish*, 466 U.S. at 16 (a substantial volume of commerce must be foreclosed).

<sup>164</sup> Package pricing, in which two items are sold together at a discount but are also available separately for a reasonable price, is not necessarily an illegal tying arrangement. *Jefferson Parish*, 466 U.S. at 24-25.

<sup>165</sup> *See supra* notes 149-155 and accompanying text.

<sup>166</sup> *See supra* notes 156-162 and accompanying text.

<sup>167</sup> *See, e.g.*, *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316 (7th Cir. 2006).

reason analysis.<sup>168</sup> For tying arrangements, the analysis focuses on the effects the arrangement has in the market for the *tied* product rather than the market for the tying product, as for the per se rule analysis.<sup>169</sup> This is a less rigorous standard than the per se rule, and it is unlikely that a practice upheld under the per se rule will violate the easier-to-satisfy rule of reason test.<sup>170</sup>

*B. A Tying Analysis of the NAR's Membership Requirements*

The NAR's practice of conditioning access to the MLS on membership in a Realtors-affiliated association satisfies even the modern per se rule's more stringent requirements for invalidating a tying arrangement.<sup>171</sup> First, the tying product (access to the MLS) is a product distinct and separate from the tied product (the Realtors association membership), and the two products are in fact tied together.<sup>172</sup> In determining whether two products are separate and distinct, courts consider not the functional differences between the two products, but the nature of the demand for them.<sup>173</sup> The two products must constitute separate product markets distinguishable to the consumer such that "[a]t least some consumers would purchase

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<sup>168</sup> Cantor, *supra* note 122, at 408.

<sup>169</sup> *Id.*; see also *Jefferson Parish*, 466 U.S. at 29 (finding that the per se rule did not invalidate the challenged practice and applying the rule of reason standard by inquiring into "the actual effect of the exclusive contract on competition").

<sup>170</sup> Cantor, *supra* note 122, at 409.

<sup>171</sup> Although three separate courts recently failed to find that the practice is an antitrust violation, all three cases had very similar facts. A slight variation in circumstances could lead to a different outcome, as Realtors have acknowledged. See, e.g., Brett M. Woodburn, *The MLS Membership Rule—Antitrust or Not? Wisconsin and Kentucky Say No!*, PA. ASS'N OF REALTORS, Feb. 2006, <http://www.parealtor.org/content/TheMLSMembershipRule.asp>. The Supreme Court has noted that "formalistic distinctions . . . are generally disfavored in antitrust law" and that the Court "has preferred to decide antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (quoting *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563, 579 (1925)).

<sup>172</sup> "[P]roducts are not tied unless the supplier refuses to accommodate those who prefer one without the other." AREEDA & HOVENKAMP, *supra* note 130, § 17.01i. Here, the NAR has refused to accommodate real estate agents who would prefer to access the MLS without joining the Realtors Association.

<sup>173</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984) (finding that there is a sufficient demand for anesthesiological services separate from hospital services such that they constitute two separate markets).

[one without the other].”<sup>174</sup> Factors considered include whether the two products *could* be sold separately if the seller did not insist on selling them as a package, whether the two products are billed for separately, and whether other sellers in fact do sell the two products separately.<sup>175</sup>

Several courts have previously determined that access to the MLS and a Realtors association membership are two separate and distinct products.<sup>176</sup> For example, in *Thompson v. Metropolitan Multi-List, Inc.*, the Eleventh Circuit noted that the bill for Realtors association membership dues is separate from the bill to purchase MLS access, that brokers are permitted to join the Realtors association without being required to access the MLS, and that there are indeed other real estate professional associations in existence that do not offer MLS access.<sup>177</sup>

Realtors associations have argued that there are not two separate markets for MLS access and real estate agent association memberships.<sup>178</sup> They argue that MLS services are useless without an association membership, so the two must be considered one product.<sup>179</sup> Indeed, some courts have expressed doubt regarding the existence of two products.<sup>180</sup> In *Wells Real Estate*, for example, the court stated that real estate boards are not really “‘sellers’ in the usual sense of the term.”<sup>181</sup> The court

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<sup>174</sup> *Eastman Kodak*, 504 U.S. at 463 (“At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service.”).

<sup>175</sup> See *Jefferson Parish*, 466 U.S. at 22-23 (finding that anesthesiological services are a separate and distinct product from hospital services because they could be provided separately, are billed separately, and are in fact sold separately by other hospitals).

<sup>176</sup> See *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) (finding, without discussion, that there was “no question” that the plaintiff demonstrated the existence of two separate products); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1575 (11th Cir. 1991); see also *People v. Nat’l Ass’n of Realtors*, 120 Cal. App. 3d 459, 471, 479 (Ct. App. 1981) (finding that MLS access and Association memberships were separate and distinct products and remanding for a determination on the existence of an illegal tying arrangement, but also invalidating the practice of conditioning MLS access on agreement to an exclusive-right-to-sell listing).

<sup>177</sup> *Thompson*, 934 F.2d at 1576 (both parties agreed that a broker was not permitted to use the multilisting service without joining the Realtors association).

<sup>178</sup> See, e.g., *id.* at 1575.

<sup>179</sup> *Id.*

<sup>180</sup> See *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988) (“We are unaware of any federal case that has characterized a multiple listing service as a tying arrangement.”). *But c.f.* *Thompson*, 934 F.2d at 1575-76 (finding that MLS access and real estate association memberships were in fact two separate products).

<sup>181</sup> *Wells Real Estate*, 850 F.2d at 815.

reasoned that MLS access was just an advantage gained by becoming an association member, not a separate product.<sup>182</sup> However, given the importance of the MLS to agents competing in the market for residential real estate,<sup>183</sup> MLS access can hardly be dismissed as just one of the many benefits gained by becoming an association member.

Additionally, since the NAR and its local affiliates still largely perpetuate the traditional model of real estate brokerage more brokers are likely to prefer to join associations that reflect their own professional ethics as newer models for real estate brokerage develop.<sup>184</sup> Non-traditional brokers who need access to the MLS in order to compete effectively, but who disagree with the ethics and practices of the NAR, might very well wish to purchase access to the MLS *without* purchasing a Realtors association membership.<sup>185</sup> Since “at least some” consumers are likely to purchase one of the products without purchasing the other, the two should be considered separate and distinct products for the purpose of tying law.

Second, the NAR and its local affiliates possess substantial power in the market for MLS access, and it is probable that this power is strong enough to force buyers to purchase Association memberships. Market power exists when a seller can raise prices without incurring a loss in sales and enjoys some protection against entry by competitors into the market.<sup>186</sup> Other factors used to determine whether the seller has substantial market power include (1) whether the tying product is so unique that competitors are unable to offer it<sup>187</sup> or (2) whether the seller possesses a predominant share of the market for the tying product.<sup>188</sup> The market power Realtors

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<sup>182</sup> *Id.*

<sup>183</sup> See notes 11-15 and accompanying text.

<sup>184</sup> See *supra* Part II.D.

<sup>185</sup> This assertion is evidenced directly by the fact that such real estate brokers *have* sued the NAR because they wish to obtain access to the MLS without joining an association they disagree with ethically. See, e.g., *Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors*, 410 F. Supp. 2d 574 (E.D. Ky. 2006), *aff'd*, 198 F. App'x 485 (6th Cir. 2007). In this case, the plaintiff was an exclusive buyers agent and member of the National Association of Exclusive Buyer Agents. She believed the NAR policy allowing dual agency is unethical, and she only joined the NAR to gain access to the MLS. The case was dismissed because the court determined that the plaintiff lacked standing, since no proper allegation of antitrust injury was made. *Id.* at 580.

<sup>186</sup> *AREEDA & HOVENKAMP, supra* note 130, § 5.01.

<sup>187</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984).

<sup>188</sup> *Eastman Kodak*, 504 U.S. at 464; see also *Jefferson Parish*, 466 U.S. at 26-27 (finding that the hospital did not have a sufficient share of the market such that forcing was probable). In this case, seventy percent of people living in the hospital's

associations enjoy for sales of MLS access is clearly substantial enough to warrant application of the per se rule for tying.<sup>189</sup>

The MLS is a product so unique that competitors are unable to offer it. The MLS is a tool widely recognized as a necessity to any real estate agent wishing to compete effectively.<sup>190</sup> The system has developed over many years, and would be extremely difficult to recreate at this point. In *Thompson v. Metropolitan Multi-List, Inc.*, the plaintiff noted that a new system would need to build a strong collection of listings before becoming effective, and this would be extremely difficult in the fast-paced residential real estate market.<sup>191</sup> Additionally, the MLS has built an “insurmountable amount of good will.”<sup>192</sup> The court noted that if these allegations were true, the MLS did have sufficient market power to justify application of the per se rule.<sup>193</sup> Similarly, in *Reifert*, the court noted that the local MLS was unique and that it contained “near-perfect market information.”<sup>194</sup> The court found that, because this information was not available anywhere else and it was impossible for a real estate agent to perform their job without the service,<sup>195</sup> the MLS had “sufficient market power to restrain competition.”<sup>196</sup>

Realtors associations possess a dominant share of the MLS market. One study found that Realtors affiliates have control over eighty-four percent of the MLSs in the United States.<sup>197</sup> Additionally, the market for MLS access has very low

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district in fact chose to enter other hospitals. Additionally the court determined that because every patient who received the anesthesiological services actually needed them, there was no evidence that anyone was being forced to accept the service. *Id.* at 28. Therefore, the court determined that the per se rule did not apply. *Id.* at 28-29.

<sup>189</sup> Note that the “relevant market” changes under this analysis depending on which particular MLS is challenged. For the purposes of this discussion on the practice generally, the relevant market consists broadly of all MLSs in the nation.

<sup>190</sup> See *supra* notes 11-15 and accompanying text.

<sup>191</sup> *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1577 (11th Cir. 1991). This was one argument made by the plaintiffs in *Thompson* regarding the market power of the MLS system. Plaintiffs also presented evidence that an individual actually did try to compete by starting his own listing service, but failed. *Id.* The Eleventh Circuit found that the plaintiffs raised a question of material fact as to whether the multilisting service had sufficient market power and remanded the case to the district court. The case settled before further proceedings, and an open MLS was the negotiated result. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* note 19 and accompanying text.

cross-elasticity of demand. If the NAR were to raise the price of access, it is unlikely sales would decrease because brokers *must have* access to the MLS in order to effectively do their job.<sup>198</sup> Since the MLS is a highly unique product that is difficult to replicate, the Realtors possess a dominant share of the market for MLS services, and there is low cross-price elasticity for demand in the MLS market, the Realtors associations have sufficiently substantial market power to satisfy the per se rule against tying arrangements.

Third, the amount of commerce tied in the market for association memberships is certainly more than “de minimis” and is therefore substantial. Assuming a nationwide challenge, the relevant figure is the total amount of sales for NAR and state and local affiliated memberships.<sup>199</sup> The court in *Thompson* determined that annual membership dues of \$30,000 to \$70,000 lost to the challenged association were “clearly substantial.”<sup>200</sup> The NAR’s annual membership fees alone are close to \$100 million.<sup>201</sup> Additional fees are also paid to local and sometimes state Realtors associations in order to access the MLS. There is no question that the total amount is substantial.

Therefore, millions of dollars are tied up in membership fees for the NAR, and many of these brokers might be joining the NAR only to obtain access to the MLS. When agents are forced to join state, local, and nationwide Realtors

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<sup>198</sup> *Thompson*, 934 F.2d at 1577; see also *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 470 (1992). Kodak argued that it did not have sufficient market power because raising prices for the tied products (parts and services) would result in a disastrous drop in sales for the tying product (photocopier and micrographic equipment). *Id.* However, the Court found that the evidence did not support this theory, noting that “[s]ervice prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.” *Id.* at 472. The Supreme Court upheld the appellate court’s reversal of summary judgment in favor of Kodak on the tying claim. *Id.* at 486.

<sup>199</sup> In *Thompson*, the court, although still finding that a not insubstantial amount of commerce was affected, took a different approach. One of the challenging plaintiffs was another real estate agent association that claimed it lost close to 400 members due to the tying arrangement. The court multiplied this number of members by the approximate annual dues those 400 members paid to Realtors Associations, in determining that \$30,000 to \$70,000 was a not insubstantial amount of commerce. *Thompson*, 934 F.2d at 1578. However, according to the rule from *Fortner I*, evidence of the actual dollar amount of sales is not necessary; an estimate of the amount of dollars tied up by the tying arrangement will suffice. *Fortner I*, 394 U.S. at 501.

<sup>200</sup> *Thompson*, 934 F.2d at 1578.

<sup>201</sup> See *supra* note 88 and accompanying text.

associations,<sup>202</sup> they might spend \$300 to \$500 a year on membership dues.<sup>203</sup> It seems likely that these brokers will be less willing or able to spend even more money to join an alternative real estate professional organization of their choice.<sup>204</sup> This reality will make it very difficult for the new, nontraditional associations to compete for members and effectively constricts expansion of these new models.

Several courts, however, have gone beyond this analysis and looked at the market for the *tied* product to find that there is in fact *no* market for association memberships, and therefore no trade in the tied product market can be restrained.<sup>205</sup> For example, in *Wells Real Estate v. Greater Lowell Board of Realtors*, the court dismissed the plaintiff's claim, stating that it had failed to show any anticompetitive effects in the tied market because there were no competitors for association memberships.<sup>206</sup> The court, however, was careful to note that under the *per se* rule, plaintiffs do not have to show the *actual scope* of the anticompetitive effects.<sup>207</sup> They must simply "make some minimal showing of real or potential foreclosed commerce caused by the tie . . . ."<sup>208</sup>

In *Reifert v. South Central Wisconsin MLS Corp.*, the court cited *Wells* in holding that there were no competitors for association memberships.<sup>209</sup> The plaintiff in *Reifert* offered a list of twelve other associations competing for members in the region, including the NAEBA, but the court dismissed these competitors as "unlikely substitutes" for the Realtors association.<sup>210</sup> These other associations were found to serve different purposes because they either catered to specific ethnic or racial groups, exclusive buyers agents, or only independent

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<sup>202</sup> Some critics have argued that this practice—requiring membership in all three levels of Realtor Associations, is an illegal tying arrangement in itself. *See, e.g.*, BARRY, *supra* note 18, at 53.

<sup>203</sup> *See supra* note 20.

<sup>204</sup> *See supra* note 21.

<sup>205</sup> These courts have arguably applied more of a rule of reason analysis. However, since the Supreme Court has been consistently eroding the *per se* rule, this Note assumes that the method used by these courts will be upheld and employs the same analysis.

<sup>206</sup> *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988).

<sup>207</sup> *Id.* at 815 n.11.

<sup>208</sup> *Id.*

<sup>209</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 319 (7th Cir. 2006).

<sup>210</sup> *Id.*

brokers.<sup>211</sup> The court also noted that since these other associations did not have cross-price elasticity of demand with national and local Realtors associations, they could not be competitors.<sup>212</sup>

In determining whether there are competitors for association memberships, courts should not define the relevant market as narrowly as the *Reifert* court. The *Reifert* court's assertion that there is no cross-price elasticity of demand between Realtors association memberships and those in other real estate professional organizations may be true. However, this lack of cross-price elasticity could very well be an effect of the tying arrangement. As a result of the strength of the tying arrangement, no real estate agent would purchase another association membership even if the NAR raised its membership prices because they *must* have access to the MLS.

The *Reifert* court's reliance on the *Wells* decision is misplaced. In *Wells*, the plaintiff did not present evidence of any other competitors.<sup>213</sup> The court stated that it is not that "a plaintiff necessarily must prove the actual scope of anticompetitive effects in the market—the per se rule eliminates such a requirement."<sup>214</sup> But the plaintiff must make [a] *minimal showing of real or potential* foreclosed commerce caused by the tie."<sup>215</sup> In *Reifert*, the plaintiff clearly made this minimal showing by listing twelve potential competitors. The *Reifert* court's requirement of showing the actual economic effects in the tied product market beyond this minimal showing is appropriate under a rule of reason analysis, but should not

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 319-20. The court distinguished *Thompson* because in that case the plaintiff was another association alleging a loss of members to the Realtors association as a result of the tie. Interestingly, the association in *Thompson* that was considered a competitor of the Realtors catered to African American real estate agents. See *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1570 (11th Cir. 1991). The *Reifert* court however, claimed that associations catering to a specific racial group cannot be competitors with Realtors associations. *Reifert*, 450 F.3d at 319.

<sup>213</sup> *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988).

<sup>214</sup> *Id.* at 815 n.11.

<sup>215</sup> *Id.*; see also *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1293 (2d Cir. 1974). *Coniglio* was similarly dismissed because the court found that the Plaintiff failed to show that there were any competitors in the market for the tied product. *Id.* at 1291. The plaintiff tried to define the relevant market extremely broadly in order to find competitors for a market selling tickets to a professional football league's games. *Id.* at 1292. The plaintiff argued that any other activity or event a person could attend on that night was a competitor of the football league, foreclosed by the tie. *Id.* This definition of the relevant market is clearly unreasonably broad, as the court held. *Id.*



be applied in this situation, where the probability of forcing is probable.

While it may have been true in the early years of the NAR that there were no competing associations, in the radically changing residential real estate industry of today, it is undeniable that there are now competing real estate agent membership associations.<sup>216</sup> Furthermore, commentators have noted that these new, smaller associations struggle to grow in the presence of the NAR because only the NAR allows brokers access to the MLS.<sup>217</sup> In fact, “the smaller association may suffer significant membership losses to the point of dissolution.”<sup>218</sup>

Therefore, the NAR practice requiring membership in a Realtor-affiliated association in order to obtain MLS access should be invalidated under the per se rule for tying arrangements under Section 1 of the Sherman Act.

V. EXCLUDING NON-NAR MEMBERS FROM ACCESSING THE MLS IS AN ILLEGAL GROUP BOYCOTT UNDER THE SHERMAN ACT

A. *The Applicable Standard for Group Boycott Claims*

For group boycott claims, the per se rule applies only when the challenged exclusion is “plainly anticompetitive” and “lacking . . . any redeeming virtue.”<sup>219</sup> A practice meets this test when it “can further none of the Act’s goals—when it operates to deny to consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency-producing economic activities.”<sup>220</sup> Under the rule of reason analysis for a group boycott, the challenged competitor must first be shown to possess sufficient market power such that a Sherman Act analysis of the exclusion policy is warranted.<sup>221</sup> The burden then shifts to the defendant to show that it had a legitimate business purpose for its refusal to

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<sup>216</sup> See *supra* Part II.D.

<sup>217</sup> Robert D. Butters, *Real Estate Brokers and Antitrust Laws*, REAL ESTATE BROKERS AND ANTITRUST LAWS (2006), at § 8.04 2.b.iv.

<sup>218</sup> *Id.*

<sup>219</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978); *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

<sup>220</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980).

<sup>221</sup> *Id.*

deal.<sup>222</sup> The rule therefore involves a determination of the “net effect” of the arrangement; if the net effect of the exclusion is pro-competitive, the exclusion will be allowed.<sup>223</sup>

*B. Application of the Group Boycott Theory*

Challenges to NAR-affiliated associations under the group boycott theory have historically been somewhat more successful than those based on a tying theory.<sup>224</sup> Courts are hesitant to apply the per se standard to a group boycott analysis of restrictions on MLS access.<sup>225</sup> Application of the per se rule in the group boycott context has different implications than using the per se rule in the tying context.<sup>226</sup> If a per se rule invalidated the membership requirement as a group boycott, the holding could be read to mean that any membership association providing a benefit to its members is required to provide that benefit to nonmembers.<sup>227</sup> However, one can argue that because the per se rule only invalidates plainly anticompetitive practices, and most association membership benefits are not plainly anticompetitive, this worry is unfounded.

Nevertheless, because courts generally use a rule of reason analysis when examining criteria excluding brokers from access to the MLS, this Note does the same. Under this standard, the NAR practice should be invalidated as a group boycott under the Sherman Act. First, the NAR-controlled MLSs have enough market power to justify scrutinizing any limitations put on broker access to them.<sup>228</sup> Second, the possible anticompetitive harm caused by excluding a broker from MLS access is high, and there is no pro-competitive justification for requiring NAR membership that outweighs this potential harm.<sup>229</sup>

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<sup>222</sup> *Id.* at 1374-75.

<sup>223</sup> *Id.* at 1370.

<sup>224</sup> *See, e.g., Realty Multi-List*, 629 F.2d at 1351; *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976) (invalidating the Realtors board rule denying access to the MLS by nonmembers under the rule of reason standard).

<sup>225</sup> *See Realty Multi-List*, 629 F.2d at 1367.

<sup>226</sup> In *Thompson v. Metropolitan Multi-List, Inc.*, for example, the court followed a per se analysis for the tying claim, but followed *Realty Multi-List* and applied a rule of reason analysis for the group boycott claim. 934 F.2d 1566, 1579-80 (11th Cir. 1991).

<sup>227</sup> *See, e.g., Palsson*, 549 P.2d at 839.

<sup>228</sup> *See infra* Part V.B.1.

<sup>229</sup> *See infra* Part V.B.2.

### 1. The MLS Has Sufficient Market Power to Justify Scrutinizing Membership Requirements Limiting Access to It

Market power exists if the MLS “is of ‘sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms.’”<sup>230</sup> The factors courts consider include the number and dollar amount of sales made through the MLS, the number of brokers in the market who use the MLS, and whether member brokers themselves acknowledge that MLS access is a competitive advantage.<sup>231</sup> The relevant market is the residential housing market in the geographic area where the MLS operates.<sup>232</sup> Courts generally agree that the MLS has sufficient market power to justify scrutiny of access restrictions.<sup>233</sup>

NAR-operated MLSs list the majority of residential properties bought and sold across the United States.<sup>234</sup> The relevant figure for determining market power will change depending on the geographic area covered by the particular MLS being challenged. One court found sufficient market power where the MLS accounted for “35% of the total dollar sales of all real property . . . and a presumably much higher percentage of the sales dollars for residential property [in the relevant geographic market].”<sup>235</sup> Another court found that because the MLS listings accounted for over \$50 million in sales, it was clear that nonmembers were “foreclosed from a not insignificant segment of the market.”<sup>236</sup> Recent complaints alleged that the amount of sales made through the challenged

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<sup>230</sup> *Realty Multi-List*, 629 F.2d at 1373 (quoting Austin, *supra* note 11, at 1346) (emphasis in original).

<sup>231</sup> *Id.* at 1374; *Thompson*, 934 F.2d at 1580.

<sup>232</sup> *See, e.g., Palsson*, 549 P.2d at 842.

<sup>233</sup> In *Palsson*, looking at statistics citing the dollar amount of sales attributable to the MLS, and considering the number of brokers using the system, the court concluded that the “problems of a nonmember of the board in competing against this colossus are manifest.” *Id.* at 842. In *Thompson*, the court stated that the dominating role of the MLS alleged by the plaintiffs was sufficient such that summary judgment was inappropriate on the market power prong of a group boycott analysis. *Thompson*, 934 F.2d at 1580-81.

<sup>234</sup> *See infra* notes 236-239 and accompanying text.

<sup>235</sup> *Palsson*, 549 P.2d at 842.

<sup>236</sup> *Realty Multi-List*, 629 F.2d at 1374.

MLSs in the relevant geographic area accounted for “[a]pproximately \$2.2 billion”<sup>237</sup> and “[n]early \$1 billion.”<sup>238</sup>

These amounts are clearly large enough to constitute sufficient market power. In finding sufficient market power, one court found it relevant that “a vast majority of the active residential real estate brokers” in the relevant geographic area use the MLS.<sup>239</sup> Another court similarly noted that “[t]hree-fourths of the brokers actively selling residential real property” use the system.<sup>240</sup> Recent complaints have alleged that the number of active residential real estate agents in the relevant geographic area that use the MLS to buy and sell real estate is “[a]pproximately 100%”<sup>241</sup> or “[o]ver 90%.”<sup>242</sup> As discussed above, access to the MLS is generally recognized as a practical necessity for a broker.<sup>243</sup>

These recent decisions, however, stated that because there is *no* competitive market for real estate agent association memberships, there is insufficient market power to warrant review of the membership requirements.<sup>244</sup> These courts did not analyze the proper market in making this determination. The relevant market should not be the market for association memberships, as in a rule of reason tying analysis.<sup>245</sup> The relevant market should be the market for residential real estate in the proper geographic area, as described above.<sup>246</sup>

Moreover, even using the market definition offered in these opinions, there is sufficient market power to warrant judicial review. Contrary to the courts’ findings, there *is* a competitive market for association memberships.<sup>247</sup> Alternative

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<sup>237</sup> First Amended Complaint at 1, *Reifert v. S. Cent. Wis. MLS Corp.*, No. 04-C-0969-S, 2005 U.S. Dist. LEXIS 23431 (W.D. Wis. Aug. 25, 2005) [hereinafter *Reifert* Complaint].

<sup>238</sup> First Amended Complaint at 1, *Prencipe v. Spokane Bd. of Realtors*, No. CV-04-0319-LRS, 2006 U.S. Dist. LEXIS 29828 (E.D. Wash. May 12, 2006) [hereinafter *Prencipe* Complaint].

<sup>239</sup> *Realty Multi-List*, 629 F.2d. at 1374.

<sup>240</sup> *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833, 842 (Cal. 1976).

<sup>241</sup> *Reifert* Complaint, *supra* note 237, at 1.

<sup>242</sup> *Prencipe* Complaint, *supra* note 238, at 1.

<sup>243</sup> See *supra* notes 11-15 and accompanying text.

<sup>244</sup> See *Reifert*, 450 F.3d at 321.

<sup>245</sup> One of these courts even stated, “To prove a group boycott, a plaintiff must establish that the membership requirement has had an adverse impact upon competition in the market for the tied product.” *Id.* This statement does not cite to any authority. This court seemed to confuse a rule of reason analysis for a tying claim with the analysis for a group boycott claim. See *id.*

<sup>246</sup> See *supra* notes 234-240 and accompanying text.

<sup>247</sup> See discussion *supra* Part II.D.

associations that cater to non-traditional methods of real estate brokerage are becoming more common.<sup>248</sup>

## 2. There Is No Legitimate Competitive Reason to Justify Prohibiting Non-Realtors from Accessing the MLS

The rule of reason analysis for group boycotts requires the balancing of any pro-competitive justifications for the exclusion of nonmembers with the potential anticompetitive effects of the practice.<sup>249</sup> The burden of proof would be on the Realtors association to show that the pro-competitive effects of the membership requirement outweigh the potential anticompetitive consequences.<sup>250</sup> Courts have recognized that “exclusion from the multiple listing service has pronounced anticompetitive effects; unless those effects are counterbalanced by some direct benefit to competition, the regulation must fail.”<sup>251</sup>

Limiting MLS access to Realtors has harmful anticompetitive effects on two levels. First, the requirement affects competition between brokers because excluding a broker from accessing the MLS would be competitively detrimental to that broker. Second, the membership requirement might ultimately affect consumers. The NAR encourages the perseverance of the traditional model for real estate brokerage.<sup>252</sup> Discouraging the growth of alternative models for brokerage limits consumer choice and helps to maintain steady commission rates.<sup>253</sup>

There are no pro-competitive justifications sufficient to outweigh these extensive anticompetitive effects. Courts have differed on this prong of the analysis. Only in California have courts decided that there is no legitimate competitive purpose for requiring a Realtors association membership to access the MLS. This jurisdiction holds that even “where membership in the board is open to all real estate licensees on reasonable and

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<sup>248</sup> See discussion *supra* Part II.D.

<sup>249</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375-76 (5th Cir. 1980).

<sup>250</sup> *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991).

<sup>251</sup> *Realty Multi-List*, 629 F.2d. at 1376.

<sup>252</sup> See *supra* Part IV.

<sup>253</sup> See *supra* Part IV; see also *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833, 843 (Cal. 1976) (describing how a “buyer or seller of a home also suffers by the board’s practices”).

nondiscriminatory terms,” nonmembers must be granted access to the MLS.<sup>254</sup> Other courts, while not invalidating the membership requirement altogether, have invalidated specific membership criteria as unreasonable for lacking a justifiable pro-competitive purpose.<sup>255</sup> The cases from 2006, including *Reifert*, did not even reach this step of the analysis. Instead, these courts rested their decisions on the arguably incorrect conclusion that there can be no group boycott in this situation because there is “no competitive market” for Realtors association memberships.<sup>256</sup>

Realtors associations commonly offer the justification that they need to maintain a level of professional conduct in MLS operation. The associations argue that this purpose is fulfilled by requiring all NAR members to adhere to its ethical code of conduct. Several arguments refute this theory. First, the MLS as a stand-alone entity could just create its own standards of professionalism that brokers would need to agree to before using the MLS. These rules could achieve the same effect as the NAR Code.<sup>257</sup> Second, state licensing commissions set professional standards that must be met in order to even obtain a license to practice real estate.<sup>258</sup> Accordingly,

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<sup>254</sup> *People v. Nat'l Ass'n of Realtors*, 155 Cal. App. 3d 578, 588 (Ct. App. 1984) (clarifying the scope of the holding in *Palsson*). Other courts, however, disagree with this analysis. Some courts refuse to find a group boycott, arguing that the membership requirements are not arbitrary or difficult to meet. These courts reason that since any broker wishing to join the service may do so, they are not actually being excluded. *See, e.g., Pomanowski v. Monmouth County Bd. of Realtors*, 446 A.2d 83, 92 (N.J. 1982) (“Where there are no exclusionary conditions attached to Realtor board membership, and there is no contention that the cost is prohibitively high, it is difficult to see any affront to competition.”).

<sup>255</sup> In *Realty Multi-List*, the court decided that in order for the MLS to function effectively, some membership criteria were necessary to ensure that those participating would adhere to a level of professional standards. 629 F.2d at 1381. However, the court ultimately decided that requiring a “favorable credit report and business reputation” was not narrowly tailored enough to any pro-competitive concern. *Id.* (citation omitted). Further, the standard was too subjective. *Id.* Additionally it was unreasonable to require the applicant to have an office “open during customary hours of business,” since the requirement was not necessary for a functioning MLS. *Id.* at 1383 (internal quotation marks and citations omitted). The court also invalidated the requirement that the applicant purchase one share of stock in the corporation at a fee set by the board—currently \$1000. *Id.* at 1389. The court stated that although such an association can charge a fee, it must be based on its legitimate operational needs. *Id.*

<sup>256</sup> *See supra* notes 244-248 and accompanying text.

<sup>257</sup> *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1581-82 (11th Cir. 1991) (“Such rules would not constitute a group boycott and would achieve the same ends that Metro claims the Realtor membership requirements achieve.”).

<sup>258</sup> In *Realty Multi-List*, the court required the MLS to “make a showing either that the legitimate needs of the service require protection in excess of that provided by

membership in a Realtors association is not necessary to ensure professionalism in MLS operation.

A second justification Realtors offer is that the arbitration to settle commission disputes mandated by the Realtors ethical code is pro-competition. The association claims that without an arbitration clause, Realtors would be less likely to use the MLS, as they would not feel secure that there is a method for resolving commission disputes. However, the arbitration process the NAR uses has actually been criticized as anticompetitive and discriminatory toward non-traditional brokers.<sup>259</sup> In addition, the same argument as above applies here—the MLS itself could mandate arbitration to settle disputes. There is no reason why separate membership in the NAR is necessary to achieve this result.

Brokers should not have to pay a fee to Realtors associations in excess of the amount used to maintain the MLS. Courts have stated that fees should be limited to what is needed for “maintenance and development” of the MLS.<sup>260</sup> In order to access the MLS, brokers generally must pay dues not just to the NAR, but also to the local and state chapter of the NAR. The fee paid to join the NAR and local associations clearly goes to more than just maintaining the MLS. In fact, a look at NAR’s 2005 annual report reveals that the lion’s share of membership dues were used for “PR and Communications” (27%), followed by “Public Policy” (15%).<sup>261</sup> Interestingly much of this “PR” might actually be spent to try and improve the public’s negative image of Realtors as unethical and dishonest.<sup>262</sup> Only 6% of the dues are allocated to “Technology,” and the report does not specify whether this even refers to the MLS.

Because the anticompetitive potential in requiring membership in the NAR to access the MLS outweighs any

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the state or that the state does not adequately enforce its own regulations.” 629 F.2d at 1380.

<sup>259</sup> See *supra* Part II.C.1.

<sup>260</sup> *Realty Multi-List*, 629 F.2d at 1386-87 (“In order to avoid running afoul of the antitrust laws, [the association] may not assume the power to set fees at a level greater than its legitimate needs.”).

<sup>261</sup> NATIONAL ASSOCIATION OF REALTORS, 2005 ANNUAL REPORT 28 (2006), available at [http://www.realtor.org/realtororg.nsf/pages/2005\\_annual\\_report](http://www.realtor.org/realtororg.nsf/pages/2005_annual_report). “Public policy” likely refers to NAR efforts to perpetuate the traditional model for residential real estate brokerage.

<sup>262</sup> See Blanche Evans, *Why Real Estate Agents Fell Off Gallup’s Honesty-Integrity List*, REALTY TIMES, Jan. 9, 2002, [http://realtytimes.com/rtapages/20020106\\_gallup.htm](http://realtytimes.com/rtapages/20020106_gallup.htm).

potential pro-competitive justifications for the requirement, the practice should be invalidated as a group boycott.

## VI. CONCLUSION

The once-uniform residential real estate industry is changing and real estate professionals should embrace and encourage new business models that serve consumer interests. The practice of requiring membership in a Realtor association in order to access the competitively necessary MLS should end. The arrangement constitutes both an illegal tying arrangement and a group boycott under the Sherman Act. Absent a judicial finding of an antitrust violation, there must be action by state real estate commissions<sup>263</sup> or legislatures to end the practice. However, since real estate commissions are frequently dominated by traditionalist Realtors with a strong interest in maintaining the status quo in the residential real estate industry,<sup>264</sup> it may be necessary for state or federal legislatures to become involved.<sup>265</sup> This change will encourage the development of a truly competitive industry for residential real estate in the future.

*Beth Nagalski*<sup>†</sup>

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<sup>263</sup> Largely in order to ensure consumer protection, all fifty states have created state agencies responsible for licensing real estate agents, and there is a similar national counterpart. White, *supra* note 1, at 19. Recent actions of many of these agencies, however, have actually been arguably anticompetitive, and anti-consumerist. For example, minimum service laws, which require all brokers to provide at least a certain level of service in order to obtain their license are aimed at thwarting the growth of the discount broker industry. *See, e.g.*, Hahn et al., *supra* note 1, at 88 (“Legislatures . . . have recently introduced or enacted bills to prohibit real estate agents from offering more limited service, which they can perform at a lower fee.”). Both the Department of Justice and Federal Trade Commission have publicly expressed their opposition to such laws. *Id.*

<sup>264</sup> *See* Brobeck Testimony, *supra* note 5; *see* Part II.C.

<sup>265</sup> Note, however, that the NAR is an extremely powerful lobbying force in Washington, so passing legislation that will directly affect the NAR’s financial status is not likely to be easy. *See supra* notes 85-87 and accompanying text.

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