A Critical Assessment of the Traditional Residential Real Estate Broker Commission Rate Structure (Unabridged)

By Mark S. Nadel*

While real estate brokers have long set their fee as a straight percentage of a home's sale price, this formula is an anomaly and a primary reason why such fees may be inflated by more than $30 billion annually. Although competitive pressures ordinarily force an industry's fee structure to reflect its costs, real estate broker commissions are strangely unrelated to either the quantity or quality of the service rendered or even to the value provided. Rather, this fee has been based solely on the price of the home. (It is as if tax preparers set their fee as a flat percentage of a client's gross income, irrespective of how difficult the return was to prepare or how much their efforts saved the taxpayer). Oddly, not only is there no evidence that it is any more costly to sell higher-priced homes than median-priced properties, but it is possible that the opposite may be true! Furthermore, the straight percentage fee formula creates little incentive for real estate agents to provide home buyers or sellers with additional value.

The article analyzes five elements of the traditional residential real estate broker rate structure, the most important of which are: 1) setting fees as a percentage-of-sale-price, 2) letting the seller's broker set the fee received by the buyer's broker, and 3) refusing to unbundle the price of a full package of services. After analyzing the conditions under which such rate elements would be justified, this article finds that those conditions do not generally exist in the real estate brokerage market. Moreover, it identifies more than a half dozen harms that the rate elements cause to home buyers and sellers. For example, buyers are often not alerted to attractive homes because the rate structure leads traditional agents to intentionally avoid showing them. Meanwhile, many buyers do not even consider negotiating the fee paid to their broker because the rate structure causes them to believe their brokers' services cost them nothing.

The article suggests that consumers would benefit most from a fee-for-service approach - combining primarily flat fees, hourly rates (for buyers who prefer this), and bonuses where practical, including percentages of extra value created - and it identifies currently available examples of some of these options. After reviewing eight reasons why incumbents are able to protect the current structure, the article proposes four short questions for consumers to ask to help defeat the industry's protectionist practices.

Note: The author seeks constructive criticism of this draft article, which is being submitted for publication in a law journal. Please send comments to msnadel@gmail.com

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I. Introduction

Residential real estate brokers and salespersons (agents of brokers)[1] have long quoted their fees as a straight percentage of a home's sale price. This traditional formula, however, ill serves the interests of both home buyers and sellers, and is a primary reason why such fees may be inflated by $30 billion annually.[2] Although competitive pressures in an industry ordinarily force competitors to adopt fee structures that reflect their costs, this has not occurred for real estate broker fees. Despite the intensely competitive local real estate brokerage markets, broker fees are usually set without regard to either the quantity or quality of service rendered. Rather, fees are based solely on the price of the home. It is as if tax preparers set their fee as a flat percentage of a client's gross income, irrespective of how difficult the return was to prepare or how much their efforts saved the taxpayer. This occurs although there is no evidence that higher-priced homes are any more costly to sell than median-priced properties, and it is possible that the reverse is true! Furthermore, the fee formula creates very little incentive for agents to provide consumers with the full value-enhancing services that many could offer.[3]

A traditional seller's (or listing) broker will typically charge the owner of a $200,000 residence a six percent commission to provide "full service." This generally includes helping to price the home, to "stage" it effectively, showing it, and negotiating with potential buyers, as well as handling the closing. Yet the listing broker usually retains only half of that fee (three percent) for providing those services and generally offers the other three percent to the broker of the agent who finds a buyer.[4] Meanwhile, both brokers split their fees with their agents and the agents may end up with anywhere from about 40 to 100 percent of the commission.[5] With a 70-30 split, the traditional listing agent will receive about $4,200 of the $12,000 commission on a $200,000 home.

Brokers justify using a percentage-of-sale-price formula with the claim that it aligns incentives of brokers with those of sellers; yet given the splits just indicated, the listing

[1] A real estate agent is someone who has passed a state real estate licensing exam and works as an agent for a state-licensed real estate "broker." The latter, who set the fee structure and level, must meet higher educational standards or have more experience than a salesperson or both. Government Accountability Office, Real Estate Brokerage: Factors That May Affect Price Competition 6 (2005) [hereinafter GAO 2005 Rep.]. Agents are not necessarily legal agents of (and with fiduciary duties to) home buyers and sellers. National Assoc. of Realtors, Structure, Conduct, and Performance of the Real Estate Brokerage Industry 5-6 (Nov. 2005) http://www.realtor.org /Research.nsf/files/Structure%20Paper%20FINAL%2011-28-5.pdf/$FILE/Structure%20Paper %20FINAL%2011-28-05.pdf. Also, the National Association of Realtors (NAR) has trademarked the term Realtor® for its members.

[2] *See infra* note 28.

[3] A similar disconnect exists for the fees charged by home mortgage brokers, although that is beyond the scope of this article. *See* Jack Guttentag, "How Much Do Mortgage Brokers Make?" Apr. 9, 2001, http://www.mtgprofessor.com/A%20-%20Mortgage%20Brokers/how_much_do_mortgage_brokers_make.htm; Jack Guttentag, "Another View of Predatory Lending," Aug. 21, 2000, http://fic.wharton.upenn.edu/fic/papers/01/0123.pdf

[4] Adverse splits are addressed *infra* note 180 and accompanying text.

[5] Splits between brokers and agents vary widely. Brokers typically pay new agents 50 percent of the commissions on their transactions and successful agents may collect as much as 90 or even 100 percent. *See* Inman News, The State of Real Estate Commissions: 2006 4, 21 (2006) (Inman Commissions 2006); Jamie Baylis, *The Big Split,* Wash. Post, Dec. 30, 2000, at G1. Under an "agent service bureau" model agents retain their full commissions and pay their brokers only a monthly fee for desk costs or other overhead. *See* Nat'l Assoc. of Realtors, The Future of Real Estate Brokerage 37 (2003) [hereinafter 2003 NAR Report].

agent will earn only 2.1 percent of any additional value he or she can create by increasing the sale price of the home. This is a very weak motivator. For example, if the investment of 20 hours of extra effort by the agent would increase the selling price by $10,000, the potential for only 2.1 percent of that ($210) in additional net commission ($10.50/hour) is unlikely to yield a sufficient incentive for the agent.[6] In addition, the formula induces buyers' brokers' agents to encourage their clients to make higher bids rather than trying to negotiate a lower purchase price.

Meanwhile, despite being willing and economically able to provide full service for an average $12,000 total commission, listing brokers commonly seek and receive many times that amount even when they expect to expend significantly less than the average level of effort and resources (and have a lower risk of failure). Thus, a seller's broker for a $1 million dollar home is apt to charge a five percent fee ($50,000),[7] even when a hot market suggests that it will be easy to obtain the asking price or more, and the sale will require less than ten hours of work. Moreover, such brokers' agents commonly disparage brokers offering to provide full service for only a four percent ($40,000) commission, implying that such discount brokers will have to skimp on service because it is economically impractical to provide "full service" for only $40,000.

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The situation is even odder for the agents who assist buyers. Certainly an agent with 30 years of knowledge regarding all aspects of the neighborhoods in a community may be worth $500 an hour or more to help buyers find the home best able to satisfy all their future desires. Yet in other cases, astronomical fees are paid with little, if any, justification. For example, even where buyers did all the searching on their own and called the listing broker, clearly stating that they did not want the assistance of a buyer's agent, if the listing agent's colleague answered their call and provided services normally provided by the listing broker, that agent's broker may demand and receive half of the six percent commission.[8] Even when prospective buyers at an open house merely chat with the listing broker's associate (who may be one of the hundreds of thousands of novices, who have passed the state licensing exam after only 25 to 60 hours of study in the early 2000s[9]), that agent's broker may be entitled to receive a full three percent

6 Many scholars have recognized that a six percent commission gives an agent little incentive to invest in generating incremental value. *See* Steven D. Levitt & Stephen J. Dubner, Freakonomics 8-9, 72-73 (2005); Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards,* 36 J. L. & Econ. 503, 506 n.7 (1993). Furthermore, other data indicates that agents splitting their commission with a broker generate the same results as those who keep the entire amount. *See* Henry J. Munneke & Abdullah Yavas, *Incentives and Performance in Real Estate Brokerage,* 22 J. Real Est. Fin. & Econ. 5 (2001). *See also infra* note 47.

7 *See,* Damon Darlin, *The 6 Percent Solution: Skip Real Estate Agents,* N.Y. Times, Sept. 17, 2005, at C1 (To sell their $1 million home, "[t]hey tried to negotiate a lower [than 6 percent] commission with prospective agents . . ., but the best they could get was 4.5 percent – and 5.5 percent if the agent had to share the commission with a buyer's agent.").

8 *See* Blanche Evans, *Buyers Mad They Can't Cut Threshold Agent Out of the Deal,* Realty Times.com, Aug. 24, 2005 (contending that an agent deserves to receive the standard buyer's agent portion of the commission even after the buyer called the listing agent to view a home and the buyers expressly stated that they did not want to pay for, i.e., employ, a buyer's agent, but the listing agent's colleague still enabled the buyers to view the home and provided additional information).

9 *See* Tracy McNamara, *A Hot Housing Market Leads to Agent Burnout,* RealEstateJournal.com, July 14, 2005, http://www.realestatejournal.com/buysell/agentsandbrokers/20050714-mcnamara.html (most states require only 30 to 60 hours of classroom instruction to earn a general real-estate sales license); James R. Hagerty, *Feet in the Door: As Home Sales Cool, Ranks of Realtors Grow Crowded,* Wall St. J., Jan. 20, 2004, at A1. *See also* Julie Garton-Good, Real Estate a la Carte: Selecting the Services You Need, Paying What They're Worth 11 (2001) ("entry level education requirements to obtain a real estate license

commission.[10] Finally, although a buyer discharged her Nantucket buyer's broker after he refused to accept a $200,000 cap on his fee, and then used her lawyers to purchase a $15.5 million home, the broker (who had introduced the property to her) still sued the listing broker for his half of the $620,000 commission.[11]

In many ways, the residential real estate brokerage industry resembles the American funeral industry that Jessica Mitford expertly exposed in 1963 in *The American Way of Death:*[12] Families arranging for funerals were regularly asked to pay a single price for a bundle of services, many of which they did not need or want.[13] The words of the 1983 Federal Trade Commission (FTC)'s multi-year study of the residential real estate brokerage industry still stand: "the market for real estate brokerage service does not accord with the customary model of competitively functioning markets."[14]

The strange nature of the fee structure has also led the industry and press to report that average commission rates have "fallen" from about 6 percent to 5.1 percent between 1991 and 2004. Those figures, however, are somewhat suspect[15] and misleading. Even accepting them, the average commission has still *increased in dollars* over that period, even after adjusting for inflation.[16] Furthermore, any decrease in the *rate* appears

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in most states are only a fraction of the hours demanded of barbers and cosmetologists."). It is important to note, however, that the industry has strongly resisted the entry of banks into real estate brokerage. *See* Lew Sichelman, *Bill Would Allow Banks in Real Estate,* Realty Times, June 8, 2005; Patrick Barta, *Realtors Organize to Stop a Threat from Banks,* Wall St. J., Jan. 25, 2001, at A2. *See also infra* note 370, on support for such entry.

10 *See* James R. Hagerty, *When Realtors Fight About Commissions, Things Can Get Ugly,* Wall St. J., Dec. 20, 2005, at A1.

11 *See* Hagerty, *supra* note 10 (discussing the sale of a home on Nantucket in 2005). *But see* Roger Slade, *Protecting and Avoiding Brokerage Commissions,* Real Est. Fin., Dec. 2006, at 31, 32 ("it is not enough for the broker to just have brought the buyer and seller together").

12 *See* Jessica Mitford, The American Way of Death Revisited (1998) (updating original 1963 version).

13 Id. In response, the FTC adopted its "Funeral Rule," which required funeral homes to provide consumers with itemized price lists and other data to help them to purchase only the specific services they desired. *See* Funeral Industry Practices, 47 Fed. Reg. 42260 (1982).

14 From 1978 through 1981 the Los Angeles Regional Office of the Federal Trade Commission (FTC), working in conjunction with the Seattle Regional Office and the FTC's Bureau of Economics, conducted a nationwide investigation of the residential real estate brokerage industry. The investigation was coordinated with the FTC's Bureaus of Competition and Consumer Protection, under their general sponsorship. Federal Trade Commission Staff Report, The Residential Real Estate Brokerage Industry (1983) Vol. I (hereinafter FTC 1983 Report), at 11, *available at* http://www.ftc.gov/bc/realestate/workshop/index.htm#ftcstaffreport1983.

15 *See* John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such As It Is*, 35 Real Est. L.J. 119, 122-24 (2006), questioning whether the 5.1% figure may be too low. The data may also include the commissions paid on new homes, which include the fee paid to buyers' agents, but not any amounts that builders pay to their own marketing departments, which serve as listing agents. Then again, those data do not appear to take into account commission rebates, closing cost assistance, and other in-kind rebates, like free moving truck services. *See* Lawrence Yun, Real Estate Brokerage Industry: Structure-Conduct-Performance, Oct. 25, 2005, at 11, http://www.ftc.gov/opp/workshops/comprealestate/yun.pdf (Yun NAR report). It would also likely omit rebates that agents prefer to hide. *See* Glenn Roberts, Jr., *'Secret Agents' Quietly Offer Real Estate Rebates,* Inman News, Mar. 7, 2006. *See also* Realogy 2007 Annual Report 54 (reporting average effective commission rates of between 5.06 and 4.69 percent from 2002 to 2006).

16 Net increase in fees appears to be somewhat greater than inflation, *See* U.S. Department of Justice & Federal Trade Commission, Competition in the Real Estate Brokerage Industry 38-45 (2007)(2007 DOJ/FTC Report); GAO 2005 Rep., *supra* note 1, at 10-11; Weicher, *supra* note 15, at 124 (11 percent increase between 1991 and 2004 after adjusting for inflation); Robert W. Hahn, et al, *Bringing More Competition to*

to be primarily due to brokers' willingness to charge somewhat lower rates for the increasing number of much higher-priced listings.[17] One would have expected that an information and communication-based industry, like real estate brokerage, would enjoy tremendous cost efficiencies from the development of the Internet, databases, and other communication technologies.[18] Yet it appears that traditional brokers generally have not passed on their cost savings to consumers in the form of lower fees.[19]

Rather, until the early 2000s, an upward trend and downward inflexibility in traditional broker commission rates has been the norm.[20] For example, in the spring of 1998, the Washington, D.C. metropolitan area's largest brokerage firm, Long & Foster,

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Real Estate Brokerage, 35 Real Est. L.J. 86, 94 n.28 (2006). *See also* Inman Commissions 2006, *supra* note 5, at 5. For a comparison of home price increases and the change in the consumer price index in the hottest housing markets, *see* American Bankers Assoc., Lack of Competition in Real Estate Commissions, spring 2005, http://www.ftc.gov/os/comments/realestatecompetition/518795-00400.pdf, at 5.

[17] *See* GAO 2005 Rep., *supra* note 1, at 12; Weicher, *supra* note 15, at 133-37, citing C.F. Sirmans & Geoffrey K. Turnbull, *Brokerage Pricing Under Competition,* 41 J. Urb. Econ. 102 (1997); Michael Carney, *Costs and Pricing of Home Brokerage Services,* 10 J. Am. Real Est. & Urb. Econ. Ass'n 331, 335-36 (1982) (reporting that tapered commission rates, e.g., 6 percent of the first $25,000, 5 percent of the next $75,000, and 2½ percent of the rest, were common in the U.S.); *Do Real-Estate Agents Help?*, 55 Consum. Rep. 460, 462 (July 1990) (hereinafter *Consumer Rep.*); *Why Does it Cost So Much to Sell a House?,* Forbes, Oct. 15, 1972, at 35 (hereinafter 1972 Forbes Cover Story). This also probably explains why a 2000 survey by Gomez Advisors of 4,000 brokers, found that about 30 percent said they discounted fees "on a regular basis." *See* Motoko Rich, *Residential Brokers Cope with Threats Online,* Wall St. J., Dec. 13, 2000, at B12. *See also infra* note 67 (higher rates for lower-priced properties). Yet there is often resistance to rate reductions.

[18] *See infra* note 204, and accompanying text; U.S. v. NAR, Civil Action No. 05C-5140, Amended Complaint, Oct. 10, 2005 (DOJ 2005 Amended Complaint), http://www.usdoj.gov/atr/cases/f211700/211751.htm, at ¶¶ 3, 27 (referencing multiple admissions by NAR members of lower cost structures of brokers who use the Internet). In addition a number of studies have found that that the use of computer technology and the Internet have improved the productivity and profit margins of brokers. *See* John D. Benjamin et al, *Technology and Real Estate Brokerage Firm Financial Performance,* 27 J. Real Est. Res. 409 (2004). *See also* Steve Sawyer, et al, *Redefining Access: Uses and Roles of Information and Communication Technologies in the Residential Real Estate Industry from 1995-2005,* 20 J. Info. Tech. 213, 217-19 (2005). *But see* Geoff Lewis, Competition in the Residential Real Estate Brokerage Industry (Oct. 6, 2005 draft), http://img.realtytimes.com/rtimages/article_20051010_blanche/ $file/remaxposition.pdf at 7 (claiming broker costs are increasing dramatically).

[19] Some traditional brokers have, however, matched lower priced brokers on an ad hoc basis and more. For example, Century 21 created Century 21 Clickit, which started in Georgia in 2000 and had expanded to five states by 2005. *See* Glenn Roberts, Jr., *Flat-Fee Century 21 Brokerage Clicks with Consumers,* Inman News, June 30, 2005. Also, Coldwell Banker started a discount brokerage division called Blue Edge Realty that offers to list properties for a 2 percent commission. *See* Lewis, *supra* note 18 at 10; Blanche Evans, *Everybody Discounts, As far back as 2000, Century 21 was already showing agents how to offer an à la carte menu of options to meet their Grumbles New Agent,* Realty Times, Nov. 1, 2005. *See also* Nat'l Ass'n. of Realtors, The Consumer: Catalyst of Change 9 (2006) (NAR Catalyst) (noting that many brokers are offering multiple service options). As far back as 2000, Century 21 was already showing agents how to offer an à la carte menu of options to meet their competition. *See* Rich, *supra* note 17. *See also Real Estate Commission Under Pressure,* Inman News, April 12, 2005 (4 part series). Others resist adopting most new technologies. *See also infra* note 204, and accompanying text.

[20] It appears that the prevailing rate in the 1920s was on the order of two to three percent commissions, while five percent appears to have been the prevailing rate in the 1950s. *See* John H. Crockett, *Competition and Efficiency in Transacting: The Case of Residential Real Estate Brokerage,* 10 J. Am. Real Est. & Urb. Econ. Ass'n 209, 210 (1982). Studies in the 1970s and 1980s found that communities generally settled on a rate of either six or seven percent. *See* GAO 2005 Rep., *supra* note 1, at 9 n.11. In fact, one antitrust enforcement official observed in 1980 that, despite "rapidly increasing home values, commission percentages remain stable and are even inching up to 7 percent, 7½ percent, and even 8 percent." William L. Trombetta, *Using Antitrust Law to Control Anticompetitive Real Estate Industry Practices,* 14 J. Consumer Aff. 142, 146 (1980).

actually raised its commission rate from six to seven percent, although that increase was retracted when competitors did not match it.[21] Furthermore, brokers willing to charge less than the standard rate often only agree to do so subject to a confidentiality agreement, out of fear of retaliation.[22]

The 1983 FTC study focused on the apparent lack of price competition in the industry, which still continues despite fierce non-price competition.[23] As an illuminating 2003 article by Chang-Tai Hsieh and Enrico Moretti[24] explained, the industry has channeled competition towards providing consumers with two, dubious benefits: 1) a surplus of new, inexperienced agents (leading to a record high of more than 2.6 million licensed —and as many as 1.3 million active—agents),[25] and 2) free promotional gifts, such as Halloween pumpkins or refrigerator magnets and the like, personalized with agents' names.[26] Estimates of how much of the approximately $65 billion (in 2005)[27] of annual broker fees consumers might save if there was effective price competition suggests as much as $30 billion or more annually.[28]

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21 *See* Baylis, *supra* note 5. *Cf.* United States v. Foley 598 F.2d 1323 (4th Cir. 1979).

22 *See* Roberts, *supra* note 15. Rebates made by a buyer's broker or third party, e.g. credit union, are generally not disclosed on the standard HUD-1 form used at closing.

23 For evidence of fierce competition, *see* Steve Sawyer, Local Real Estate Market Competition: Evidence and Insight from an Analysis of 12 Local Markets, 17 August 2005, at 8, http://www.realtor.org/publicaffairsweb.nsf/files/SawyerStudy.pdf/$File/SawyerStudy.pdf.

24 *See* Chang-Tai Hsieh & Enrico Moretti, *Can Free Entry be Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry,* 111 J. Pol. Econ. 1076 (2003).

25 *See* Blanche Evans, *ARELLO Announces Number Of Licensees For 2005*, Realty Times, Jan. 12, 2006 (reporting 2.6 million licensees); David Barry, Nine Pillars of the Citadel 13-33 (2005) http://www.barryfirm.com/dnld/Nine-Pillars-Citadel.pdf (about 97 percent of active real estate agents join the NAR, usually to obtain access to local MLSs); Yun NAR report, *supra* note 15, at 3 (1.3 million NAR members); GAO 2005 Rep., *supra* note 11, at 8; David Streitfeld, *A Glut in the Market for Homes,* L.A. Times, May 20, 2005, at A1; Nadine Brozan, *So Few Properties, So Many Brokers,* N.Y. Times, Nov. 27, 2005, §11, at 1. A large number of agents, however, are either part-time or obtained their licenses solely to work in mortgage brokerage. Also, experts estimate that an average agent works from about 28 hours per week (*see* Norm Miller, The US Residential Real Estate Brokerage Industry's Resistance to Commission Rate Competition with some Speculating on the Future of the Industry, presented at AAI, Washington, D.C., Nov. 8, 2005, http://www.antitrustinstitute.org/recent2/464f.pdf at slide 8) to about five hours per week on successful sales (*see* Barry, *supra* at 1. *But see* Blanche Evans, *NAR Member Survey Shows Commissions Haven't Gone Down,* Realty Times, Aug. 30, 2005 (reporting that an NAR survey found that members work an average of 46 hours per week).

26 These marketing efforts are called "farming" or "prospecting" for clients. *See* Hsieh & Moretti, *supra* note 24, at 1088-89; FTC 1983 Report, *supra* note 14, at 63-64; Geoffrey K. Turnbull, *Real Estate Brokers, Nonprice Competition and the Housing Market,* 24 Real Est. Econ. 293 (1996); Streitfeld, *supra* note 25; Brozan, *supra* note 25. An environment with lottery-like payoffs for successes generally leads to rent seeking behavior, whereby competitive marketing efforts dissipate any surplus value associated with a success. *Cf.* Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing,* 19 Berkeley Tech L.J. 785, 797-803 (2004) (*Financing Creative Output*).

27 *See* Testimony of David Wood, GAO, to Subcomm. on Housing and Community Opportunity, House Comm. on Financial Services, July 25, 2006, http://financialservices.house.gov/media/pdf/072506dgw.pdf at 1. *See also* GAO 2005 Rep, *supra* note 1, at 6; Hahn, et al, *supra* note 16, at 87 n.3; James R. Hagerty, *Discount Real-Estate Brokers Spark a War Over Commissions,* Wall St. J., Oct. 12, 2005, at A1.

28 Hsieh & Moretti estimated that the social loss represented more than half of the total commissions earned in 1990, Hsieh & Moretti, *supra* note 24, at 1116, suggesting that more than half of current commissions might be eliminated by competition. One 2003 study estimated the total *excess* charges to home buyers for brokerage mortgage, and related services at $39 billion annually, about $14 billion for real estate agents services. *See* Shane Ham & Robert D. Atkinson, Modernizing Home Buying: How IT Can Empower Indi-

This article, however, is only indirectly concerned about commission levels in the industry. It focuses primarily on why the traditional fee *structure* sets prices based solely on the sale price of the home, without consideration of either the quantity or quality of service desired. It views the industry's traditional one-dimensional fee structure as very similar to the illogical, inefficient formula previously used by travel agents and stock brokers through the early 1970s—setting a fixed rate, which did not vary with the size of a sale (whether in dollars or shares of stock).[29]

The more recent transformation of travel agent commissions on air travel is probably most suggestive of the future for agents even though good real estate agents play a much greater and important role interpreting data for clients. That revolution in the travel industry was also significantly triggered by easier customer access to the information in databases via the Internet. Through the mid-1990s, airlines generally paid travel agencies ten percent commissions on the airline tickets they sold, but in the late 1990s the airlines began eliminating these payments.[30] As a result, today most travel agents are forced to bill clients separately and explicitly for the research and ticketing services they provide.[31]

This Article addresses five separate elements of the traditional residential real estate broker rate structure in sections II through VI:

(II) the use of a percentage-of-sale-price metric
(III) the setting of the buyer's broker's fee by the seller's broker
(IV) the refusal to offer unbundled services
(V) the lack of any price difference based on agent expertise or the difficulty of a task
(VI) prohibitions against rebates (in some states).

Each section considers where else in the economy that aspect of the rate structure exists, why it may be efficient and socially valuable in those contexts, and why the rate element does not appear appropriate for the residential real estate brokerage market.

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viduals, Slash Costs, and Transform the Real Estate Industry, Mar. 2003, PPI, at 2, *available at* http://www.ppionline.org/documents/Real_Estate_0303.pdf. Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the U.S. Brokerage Industry,* 5 Int'l Real Est. Rev. 12, 29 (2002) found that U.S. broker fees should equal something closer to three percent versus six to seven percent, implying excess fees of as much as $30 billion or more annually. *See also* Daniel Kadlec, *The Commission Squeeze,* Time, Jan. 31, 2005, at 50 (quoting University of California, Berkeley professor Peter Sealey's prediction that commissions will ultimately be cut in half); Elizabeth Lesly, *How Your Realtor Rips You Off,* Wall St. J., Nov. 30, 1990, at A14 (reporting that an FTC official reported being told by a former president of the California Board of Realtors that "2 percent is closer to what a competitive rate would be if there were not these artificial structures in the real estate industry").

[29] Stock broker commissions, however, began to be priced competitively in 1975, when the Securities and Exchange Commission ended its protection of fixed commissions and permitted order processing to be unbundled from research. Customers who did their own research increasingly opted for the dramatically lower prices offered for "no frills" service. *See generally* Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?,* 35 Real Est. L.J. 11, 20-26 (2006).

[30] Airlines began by capping domestic commissions at $50 (Feb. 1995), cutting rates to eight percent (Sept. 1997), then five percent (Oct. 1999) and then eliminating them.(Mar. 2002). *See* http://www.astanet.com/about/faq.asp#12.

[31] *See* http://www.astanet.com/about/faq.asp#13; Martha Brannigan & Jesse Drucker, *Travel Agents Change Fee Structure,* Wall St. J., Apr. 10, 2002, at D5. Medicare is also moving in that direction: recognizing that doctors should be compensated directly for the services they provide, rather than indirectly as a share of inflated drug prices. *See* Reed Abelson, *Pay Method Said to Sway Drug Choices of Oncologists,* N.Y. Times, Mar. 8, 2006, at C3. One would also expect a flat fee pricing model to emerge for independent insurance brokers.

Each section also explains significant harms that each element of the rate structure can cause to a competitive real estate brokerage market. For example, leaving buyer brokers' fees up to selling agents often leads traditional agents to steer away from homes not represented by other traditional brokers.

Section VII then reviews the services that home buyers and sellers desire and how they are now being priced or would likely be priced in a competitive market. It predicts that competitive pressures should lead brokers to set hourly or flat fees (for individual or bundles or services) based on the level and type of their skills and on whether market conditions favor buyers or sellers. The single price charged by traditional brokers for providing a "full service" bundle of services, but at average quality, also conceals the fact that it often greatly exceeds the total price of purchasing the same bundle of services à la carte from experts at each task. Section VIII attempts to explain why the proposed rate structure has not displaced the status quo. It reviews the many conditions exposed by the 1983 FTC Report and explains how traditional residential real estate brokers are able to maintain their dominant standard rate structures and rate levels against the rate structures of non-traditional entrants. Most significant among these is denying newcomers the full cooperation they need to function effectively.

Section IX then suggests four short questions that home buyers and sellers should ask to help shift the industry's standard rate structure to the one discussed in section VII. Before engaging a broker, buyers should ask whether the broker's agent may fail to show them an ideal home due to the seller's choice of broker or the fee offered to them. Buyers should also ask the broker what dollar amount they expect to be paid for helping to close the sale and how many hours of work they expect the task to require. Sellers should ask whether they can direct some or all of the fee offered to a buyer's agent to the buyer instead, if the buyer has made alternative arrangements. Sellers should also ask whether the listing broker will seek to limit the dissemination of their listing by competing brokers.

"The single price charged by traditional brokers for providing a "full service" bundle of services, but at average quality, also conceals the fact that it often greatly exceeds the total price of purchasing the same bundle of services à la carte from experts at each task."

II. Charging a Percentage of the Sale Price of a Related Item

Most professionals, such as doctors and lawyers, set their fees based on the quantity and quality of their efforts. They charge hourly rates, although for many routine tasks, which normally require a fixed duration to complete, they quote a flat fee. This serves administrative convenience as well as buyer preference for certainty.

Under some conditions, however, service providers receive compensation based on other formulas, such as a percentage of the sale price of items sold or of funds recovered. In fact, about 90 percent of real estate brokers, including most buyers' brokers, are paid based on the sale price of a home.[32] Even non-traditional brokers, like eRealty, zipRealty, and Foxton's, set their fees as a percentage of a home's sale price.[33] While some scholars have offered detailed economic explanations for percentage rate commissions; most have focused on the finding that the structure encourages agents with scarce time to favor the

[32] 2003 NAR Report, *supra* note 5, at 6.

[33] The former two both began at 4.5 percent, *see* David Wessel, *Web May Soon Work Magic in Real Estate,* WALL ST. J. , Oct. 31, 2002, at A2, but in 2003, eRealty moved to individually negotiated fees and zipRealty commissions went up to about 4.75 percent. *See* James R. Hagerty, *Real-Estate Sites Raise Commissions,* WALL ST. J. ,Dec. 24, 2003, at D1.

highest-value sales.[34] A careful analysis of the six rationales that justify percentage-of-sale-price rate elements for other service providers finds that none justify a straight percentage-of-sale-price fee for real estate brokers.

A. Offering a Share of Incremental Value Produced Motivates Providers

Many employers seek to obtain optimal performance by offering their salespeople commissions: a specific percentage of their total sales revenues. They are happy to pay a salesperson twice as much in commissions for generating twice as much in total sales, because they have generated twice as much profit for the firm. Furthermore, however, that although salespeople are generally paid a percentage of the *sale price*, employers set commission rates based on the *incremental value* the firms gain from the sales.[35] Thus, firms with very large gross profit margins (gross incremental value, before accounting for the salesperson's fee) generally offer salespeople a relatively large percentage of the sale price. On the other hand, if profit margins are razor thin, employers are apt to offer commissions of only a small percentage of the sale price. (That may still be a strong motivator if total sales revenues are correspondingly high.) Employers will rarely offer to pay salespeople more than the incremental value that they create.

In many cases, however, it is impossible to compute a commission rate on total sales that represents a set percentage of the incremental value produced. This is due to difficulties with: 1) quantifying the incremental value generated, 2) deciding what share of that added value to offer to the salesperson, and 3) expressing that share of value as a percentage commission. The major difficulty with quantifying the incremental value produced is setting an appropriate *baseline* against which to measure results. Sometimes a reasonable one is available, as when the cost of an item is relatively fixed and the value or gross profit is the difference between that cost and the selling price. Similarly, if an accident victim has been offered a reasonable settlement before retaining a lawyer, a personal injury attorney's incremental value would be any increase the attorney could obtain above that offer. Sometimes there are creative ways to set such baselines,[36] but

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[34] *See* Michael S. Knoll, *Uncertainty, Efficiency, and the Brokerage Industry,* 31 J. L. & Econ. 249, 251 (1988); John R. Schroeter, *Competition and Value-of-Service Pricing in the Residential Real Estate Brokerage Market,* 27 Q. Rev. Econ. & Bus. 29 (1987); Levmore, *supra* note 6, at 506; Alan O. Sykes, *Some Thoughts on the Real Estate Puzzle, Comment on Levmore,* 36 J. L. & Econ. 541 (1993); Wayne Carroll, *Fixed-Percentage Commissions and Moral Hazard in Residential Real Estate Brokerage,* 2 J. Real Est. Fin. & Econ. 349 (1989). Schroeter and Knoll offer formal mathematical analyses of why a uniform percentage rate structure is not necessarily anticompetitive, but they both assume that brokers are using the mechanism to efficiently allocate their time among competing customers (favoring the higher-priced homes where their service provides higher value). Given the apparent excess capacity of brokers, as discussed *supra* notes 25 & 26 and accompanying text, however, agents appear to spend most of their time prospecting for new clients rather than juggling their time to handle competing customer demands. Levmore suggests that the rate structure is a compromise "between the need to solve conflicts [among sellers of real estate competing for an agent's attention] and the advantage of aligning the interests of agents and principals," Levmore, *supra* at 508. Yet Levmore acknowledges that low commission rates fail to provide much alignment of interests, *see supra* note 6 and accompanying text, and, as just noted, most agents have excess time. The analyses of these scholars is relevant, however, to fees for allocating truly scarce elite agents, as discussed *infra* section II.B.

[35] *See, e.g.,* Levmore, *supra* note 6, at 534 ("automobile sales commissions are usually figured on the basis of a percentage of the dealer's net revenue").

[36] *See, e.g.,* Auction Houses Antitrust Litigation, 197 F.R.D. 71, 83-84 (S.D.N.Y. 2000) (where attorneys bid the recovery amount that they would treat as the benchmark, below which they would receive no fee and above which they would collect one quarter of the incremental value they helped obtain).

often, as for chief executive officers, a performance baseline is very difficult to estimate, frustrating efforts to estimate the incremental value produced.[37]

The second issue is what share of incremental value should be offered to employees to achieve optimal results. This is generally discussed by economists as the principal-agent issue: What is the minimum fee level(s) an employer (principal) can offer to align the interests of a service provider (agent) with the employer's interests?[38]

Even when one can calculate the incremental value provided by an employee, and decide what share to give the salesperson, say 50 percent, there is the third matter of translating share of incremental value into a commission rate. This is easy when salespeople sell items at fixed unit prices with uniform profit margins. Otherwise, this may be impossible. For example, if a client desired to motivate a personal injury attorney by offering a fee equal to half of the incremental value produced, it would not be possible to phrase that offer in terms of a straight percentage of the settlement amount. That is, suppose there had been an initial, reasonable settlement offer of $750,000 and the attorney incurred $50,000 in outside expenses to secure the result. A $888,000 award would represent $88,000 in incremental value, half of that amount would be $44,000, which would represent about five percent of the total settlement. On the other hand, if the settlement yielded $1.2 million ($400,000 in incremental value), the attorney's $200,000 share of the incremental value would represent almost seventeen percent of the total settlement. Further, a $3.2 million award would translate into a fee of almost thirty-eight percent of the settlement to cover the attorney's share of incremental value. Therefore, to motivate a service provider to generate higher revenues when there is no fixed price, it makes more sense to offer a fee set as a share of incremental value, not a commission on total revenues.

Despite these three challenges, it seems reasonable to motivate real estate listing agents by offering them a share of any incremental value that they can obtain for sellers.[39] Incremental value could come in two forms: a net increase in the sale proceeds and a faster sale (if that was desired). In a stable market, incremental value might be measured from a baseline based on an average of some set of comparative market analyses; it would be harder to measure in a volatile market. Rewards for quick sales might be measured against a benchmark of the average time comparable homes have taken to sell in the previous few months.

Sellers would generally want agents to take three actions to increase the net sale price of the property: 1) make all cost-effective efforts to "stage" their homes to lead potential buyers to offer higher prices;[40] 2) reach the maximum number of bona fide

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[37] Usually it is quite difficult to establish a baseline for measuring some minimally satisfactory level of performance of a senior executive. A companies stock price appears to be the most common metric, although this is terribly flawed unless adjustments are made to offset factors unrelated to the executive's performance. *Cf,* Gretchen Morgenson, *Rising Prices Lift All Bonuses,* N.Y. Times, Feb. 5, 2006, §3, at 1; Lucian Bebchu & Jesse Fried, Pay Without Performance (2004). It is probably best to compare an executive's performance to benchmarks that reflect average or superior performance of similarly situated executives.

[38] *See infra* note 47.

[39] *See* Hsieh & Moretti, *supra* note 26, at 1087 n.17; *infra* note 48. *Cf* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees,* 81 Wash. U.L.Q. 653, 659-60 n.12 (2003).

[40] Staging is discussed *infra* sections VII.A.5.

potential buyers via all cost effective media;[41] and 3) advise them on what price to set and whether to accept a given bid or to wait in hopes of a better offer.[42] Although all three matter, most commentators have ignored the first when evaluating how well the interests of sellers and agents are aligned (generally referred to as the "principal-agent" issue).[43]

Even a full three percent commission appears much too small to align the incentives of listing agents with sellers with respect to the seller's first two goals: investing optimal effort to maximize the value of the home and to market it. Consider a home with an estimated fair market value of $500,000. Assume an agent expects that by doing a standard, satisfactory job she can obtain a $500,000 offer. She also estimates that after spending 40 more hours on extensive staging, on carefully targeted marketing, and other enhancements, she will be able to obtain a bid of $540,000. Given the seller's strong interest in obtaining the highest price, one would expect the fee structure to strongly encourage the latter effort. Yet, under the traditional fee structure, the effort indicated would only increase the typical broker commission by $2,400 and thus her net pay by no more than $1,200, translating into $30 per hour—a relatively weak incentive for an effort that generates $1,000 per hour for the seller.

To motivate agents to create incremental value, they should be paid more like 30 percent of any net price increase they can produce, and the percentage should go to the agent without any splits. In the example just mentioned, even if there were $20,000 in expenses to deduct, this would still yield the agent $6,000 or $150 per hour for producing a $20,000 price increase net of expenses. Granted, it would often be difficult to set a baseline with any precision, particularly in volatile markets. Still, good agents may be willing to accept slightly excessive baselines if they would receive a large share of the incremental value generated and they had a plan that they expected to substantially raise the selling price. And one broker/blogger has proposed a phased-in baseline.[44] Meanwhile, buyers eager could motivate their negotiators by offering them a bonus of as much as half of any additional savings secured below some benchmark price they set for the home.[45]

On the other hand, agents deserve no percentage, but merely a minimal flat fee, for a poor performance. Certainly, an agent who is responsible for allowing a $3 million home to go for what buyers view as a "steal" at $2.9 million, does not deserve a reward at all, not to mention at least five times the fee of an agent who performed well: one who enabled a seller to collect $10,000 more than any comparables, albeit, only $300,000 for a home.

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41 This would include being available to show the home to all interested potential buyers. Special marketing efforts are discussed *infra* sections VII.A.4, 6 & 7. *See also infra* note 275 and accompanying text (discussing following up leads even when callers may not leave a message!).

42 *See infra* sections VII.A.7.

43 *See* scholars referenced *infra* note 47.

44 *See* Kevin Boer, *Part 2: If a Monkey Can Sell a $1M Home for $950K, Does He Deserve 3%?,* Three Oceans Real Estate Blog, Oct. 17, 2006, http://3oceansrealestate.com/blog/part-2-if-a-monkey-can-sell-a-1m-home-for-950k-does-he-deserve-3.html.

45 Currently, some entities offer to help homeowners obtain reductions in their property tax assessments in return for a share of the tax savings; others offer to review rents for those in rent regulated buildings for a share of any savings.

Clients should not pay any percentage on the portion of revenues obtained that should be "easy" to secure. Rather, if a $12,000 commission payout is sufficient to cover the standard costs to brokers and agents—including their time—to sell a $200,000 home, it should be a sufficient incentive to motivate them to sell a $400,000 or even an $800,000 home, if they do not make any special efforts that produce incremental value.[46] That would not apply to agents if other sellers were bidding higher for their services (as discussed in II.B, below), but given the surplus of agents and the ability of good agents to provide excellent service while working simultaneously with multiple sellers, it would seem to represent a reasonable norm.

When considering this third element of service—recommending that the seller accept or reject an offer—agents are apt to consider two factors. First, they would estimate the incremental value that they and their client might gain by waiting—the probabilities of the higher bids available (or lower bids that might have to be accepted) multiplied by the incremental values of each, discounted by the additional time before the bids would be accepted. Second there would be the cost to the agent in terms of additional time and expense required in the interim and the opportunity cost of earlier access to his or her fee by accepting the bid offered. A flat fee gives agents no incentive to recommend against accepting a bid that might be less than optimal, but even a net three percent commission on the sale price seems unlikely to create a sufficient benefit to outweigh the value to the agent of receiving a large fee without any further work.[47] The value of quick receipt of a relatively large fee is likely to override the incentive to earn an additional small amount. To obtain more useful advice, a seller might offer the listing broker's agent (alone, not split with any others), a substantial portion, e.g., 20 to 50 percent, of any increase in the sale price above some benchmark. The difficulty of setting that baseline, however, leads

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46 *See* Hal Cohen, *Death of a Sales Commission,* Business Report, Feb. 14, 2006 http://www.businessreport.com/newsDetail.cfm?aid=7962 (quoting broker Brandy Farris).

47 *See supra* text accompanying note 6. There does not appear to be any scholarly research that demonstrates that the pricing structure motivates agents to obtain higher prices. *See* Ron C. Rutherford et al, *Conflicts Between Principals and Agents: Evidence from Residential Real Brokerage,* 76 J. Fin. Econ. 627 (2005) (finding that agent-owned houses sell no faster than client-owned homes, but at about a 4.5 percent higher price); Steven D. Levitt & Chad Syverson, Market Distortions When Agents are Better Informed: The Value of Information in Real Estate Transactions, NBER Working Paper #11053, Jan. 2005, *available at* http://www.nber.org/papers/w11053; Thomas S. Zorn & James E. Larsen, *The Incentive Effects of Flat-Fee and Percentage Commissions for Real Estate Brokers*, 14 J. Am. Real Est. & Urb. Econ. Ass'n 24 (1986) (finding that a flat fee and percentage fee provide equivalent incentives); Glenn Roberts, Jr., *'Freaky' Side of Real Estate Economics*, Inman News, June 23, 2006 (ditto, based on unpublished research by Steven Levitt); Munneke & Yavas, *supra* note 6 (finding that effectively doubling agents' net percentage commissions did not seem to have any effect on agent performance). *But see* Michael A. Arnold, *The Principal-Agent Relationship in Real Estate Brokerage Services,* 20 J. Am. Real Est. & Urb. Econ. Ass'n 89 (1992) (concluding that, unlike a fixed-price fee, a percentage fee may lead a broker considering serial bids to wait for the best for the seller, although the latter fee structure does not guarantee that result); Joseph T. Williams, *Agency and Brokerage of Real Assets in Competitive Equilibrium,* 11 Rev. Fin. Econ. 239 (1998) (contending that agent and seller interests are aligned); Lynn M. Fisher & Abdullah Yavas, A Case for Percentage Commission Contracts: The Impact of a "Race" Among Agents, (Aug. 2006 draft) (concluding that percentage fees align interests of agents and principals where there is no listing broker and the broker who delivers the buyer is working for the seller).

some to reject this approach.[48] Yet it may be the least undesirable alternative.[49]

Agents working with buyers should also receive only basic flat fees or hourly rates —but no bonuses—for efforts that produced no extra value, although "extra value" may be hard to measure in a sellers' market.

In conclusion, then, the most appropriate fee structure for motivating agents to best serve home sellers would appear to consist of as many as three parts: 1) a base lump sum fee, based on the degree of difficulty given the state of the market, for selling the home at an agreed upon minimum price, although the fee could depend on the number of hours of effort instead; 2) a substantial percentage, e.g, 20 to 50 percent (for the agent alone), of any incremental value created in terms of securing a higher price for a seller (or a lower price for a buyer); 3) a specific bonus for securing a suitable deal by a deadline.[50]

B. Provider's Special Ability and Effort Justify an Equity Stake

Some service providers have rare abilities that enable them to add great value to a customer's project. They can convert an economic "rent" on their talents into an equity stake. Service providers in this group would include top sports or entertainment agents, whose credibility and relationships enable them to negotiate contracts for their clients with higher pay levels and special terms unobtainable by others. Top plaintiff tort litigators are in this class—probably viewing their cases as personal projects.[51] Talents specially recruited for new Internet ventures often demand equity stakes. And the

"Agents working with buyers should also receive only basic flat fees or hourly rates – but no bonuses – for efforts that produced no extra value, although "extra value" may be hard to measure in a sellers' market."

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[48] In fact, although Levmore, *supra* note 6, at 504, recognizes the benefit of progressive rates, he rejects them due to the difficulty of setting the relevant benchmark, because "[i]n the absence of focal points for triggers, a trigger of zero with a low (6 percent) percentage commission above zero may be an equilibrium arrangement." Id. at 517. In fact, so far, scholars have been unable to identify any fee structure that would 1) align the interests of both the buyer and buyer's agent and the seller and seller's agent and 2) permit the seller to expect an optimal sale price. *See, e.g.,* id. at 512-14 (discussing two–dimensional auctions); Abdullah Yavas & Peter Colwell, *Buyer Brokerage: Incentive and Efficiency Implications,* 18 J. Real Est. Fin. & Econ. 259 (1999) (suggesting the use of a fixed fee based on the assessed price of a home divided among agents based on the sale price of the home); Timothy E. Jares et al, *An Optimal Incentive System for Real Estate Agents,* 20 J. Real Est. Res. 49 (2000) (proposing that the listing agent purchase the home with an option to resell it back to the current seller at the original price). *See also See* Steve Perlstein, Real Estate Commissions, Washingtonpost.com transcript, May 18, 2005, at 2005 WLNR 8383582 ("in Washington . . . my experience is that when you try to suggest something less [than 5 percent], or a more creative structure with a base of 4 and some add-on incentives, [agents] just won't talk to you.").

[49] One expert suggests that agents compile statistics to demonstrate their production of incremental value, *see, e.g.,* Bernice L. Ross, Waging War on Real Estate's Discounters 169-79, 194 (2005), but that approach appears too susceptible to distortion. *See, e.g.* Comments on *What's Reduced,* Walk-Through, June 16, 2006, 7:49pm, http://walkthrough.nytimes.com/?p=609#comments (noting how agents can retroactively reduce the asking price).

[50] Bonuses could include vacations, cars, etc., like those mentioned *infra* note 114. *But see* D. Geltner, B. Kluger & N. G. Miller, *Incentive Commissions in Residential Real Estate Brokerage,* 2 J. Housing Econ. 139 (1992) (finding that time incentive contracts are not superior to fixed percentage commissions); Perlstein, *supra* note 48.

[51] Noting that the top tier (about one percent) of contingent-fee lawyers appear to earn substantially higher effective hourly rates due to their expertise and ability to select the most profitable cases to pursue. *See* Herbert M. Kritzer, *Advocacy and Rhetoric v. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman,* 82 Wash. U.L.Q. 477, 486-88 (2004).

matter may be as much psychological as financial.[52] Top auction houses with preferred access to potential buyers can also justify such fees.

This rationale for commissions would only appear applicable to real estate agents to the extent that it overlapped with their ability to produce significant incremental value. Those eligible would include listing agents with extensive files of (and relationships with) wealthy clientele apt to be interested in purchasing prime properties and less likely to consider the home if it were marketed by most other agents.[53] It could also include agents who had a special plan likely to significantly increase the sale price of the home or any agent with more customers than time.[54]

On the other side, buyers might offer large hourly fees or even percentage fees to bid for the scarce services of agents with such detailed knowledge of individual neighborhoods and residents that they would be uniquely able to help buyers identify the streets on which they would be most comfortable or know of relevant homes not yet on the market.[55] This group might also include agents perceptive enough to quickly and accurately diagnose the buyer's needs and desires and thus the most relevant criteria for identifying the buyer's ideal home.[56] While these providers might be able to demand a percentage fee, one would expect most of them to be equally comfortable with a very high hourly wage reflecting the value of their knowledge.

C. Provider is Also Asked to Make a Substantial High-Risk Investment

In some cases, individuals are asked to provide a valued service even though their employers are unwilling or unable to pay them their regular price for those services. Service providers asked to make a substantial, high risk investment in the customer's venture can demand an equity stake.

This is the situation faced by high-risk tort litigation firms, like those portrayed in the films "Erin Brokovich" and "A Civil Action."[57] While the former succeeded and earned a large percentage of the recovery to compensate for its high risk investment, the latter lost its entire investment of time and expenses. Other similarly situated service

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[52] Behavioral economists have shown that many individuals will veto a payout scheme—even at the cost to themselves—if they view it as unfairly enriching others at their expense. *See* Nina Mazar & Dan Ariely, Dishonesty in Everyday Life and its Policy Implications, Jan. 2006 at 7-8 (draft available at www.ssrn.com/abstract=887529) (discussing the research of economists Ernst Fehr and James Andreoni and the ultimatum game). Similarly, when Leverage Buy Out (LBO) firms sought to motivate the top executives they sought to employ, they treated them as peers with equity positions rather than merely offering high salaries.

[53] *See* Mimi Swartz, *The Matchmaker,* N.Y. Times, [Key Magazine, fall 2006], Sept 10, 2006, at 90 (discussing Janie Miller); Kenneth R. Harney, *Let's Get Real on Sales Agent Commission Rates,* Wash. Post, Apr. 20, 2002, at H1 (reporting that "one East Coast-based company that specializes in exotic, high-end properties that require lavish advertising outlays to reach small numbers of wealthy target purchasers averages... 11.8 percent [commission]").

[54] The latter agents appear to be those implicitly the subject of the analyses discussed *supra* note 34.

[55] These valuable services are discussed in more detail *infra* section VII.B.2 & 3.

[56] *See* Swartz, *supra* note 53.

[57] To the extent that all but the elite tort litigators are generally willing to work for their standard hourly fees, the equity share should reflect the real risk of underpayment they assume, although there is significant evidence that the standard percentage rates do not match the particular levels of risk involved. *See, e.g.,* Derek Bok, The Cost of Talent 139-40 (1993); David Giacalone, The Use of Contingency Fees in Personal Injustry Cases (4 parts, April 2006), http://blogs.law.harvard.edu/ethicalesq/contingency-fees-pt-1-of-4-market-failures/.

providers are those highly talented people hired by start-up companies with limited capital who offer compensation in the form of equity or stock options that may become either tremendously valuable or worthless. Book publishers, film studios, and music recording firms are also in this situation due to the likelihood that their investment in production and marketing of a creative work will lose a large amount of money.[58]

Certainly some home buyers and sellers will fail to complete a transaction—and therefore produce no fee—but that does not give real estate agents the same status as those mentioned above who take high risks on large investments. Competent agents should be able to quickly identify and avoid sellers who are seeking unreasonably high prices and resistant to appropriate price reductions.[59] Similarly, agents should have little difficulty identifying buyers too picky or unrealistic about the market to represent worthwhile clients in less than 10 hours, and thus terminate the relationship before making any large investment of time,[60] unless they are treated as co-investors. Meanwhile, those compelled to move by a particular date—and thus almost certain to close—should also be easy to recognize. Clients who appear reasonable, but indecisive and apt to take a long time, even years, to make a bid might represent a medium risk in that they will require substantial time over a long period for an uncertain payoff. Yet real estate agents would seem capable of limiting their investments in those clients to periods when they had no more promising prospects to focus on.

Real estate agents do face a risk of non-payment by customers who, after milking them for lots of useful information, terminate their relationships before making a purchase.[61] Listing agents may also be terminated after a contract term expires, despite their investments of time and marketing costs. Yet a percentage fee does not deter such free riding. The best way to address this problem might be for brokers to charge buyers and sellers some nominal flat retainer or hourly fee, or at least pre-payment of expenses,[62] which would not be due until purchase or sale, but which would survive termination of the relationship. Clients of lawyers and psychiatrists who become dissatisfied with the relationship must still pay for the unsatisfactory services already delivered before moving on.

D. Proxy for Provider's Costs or Efforts

Basing a service provider's compensation on sale price also makes sense if that sale price is highly correlated with the quantity or quality of service provided. For example,

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58 *See* Nadel, *Financing Creative Output, supra* note 26, at 821-22.

59 *See* Matt Carter, *Wrestling the Unrealistic Seller,* Inman News, Oct. 31, 2006; *Cf* Brickman, *supra* note 57, at 696-97 n.149. The situation is very different from the "nobody knows anything" difficulty faced in many media markets. *See* Nadel, *Financing Creative Output, supra* note 26, at 817-18.

60 *See* Susan M. Wachter, *Residential Real Estate Brokerage: Rate Uniformity and Moral Hazard* in 10 Research in Law and Economics: The Economics of Urban Property Rights 189, 197 (Austin J. Jaffe ed. 1987) (Jaffe) (buyer agents extend implicit insurance to prospective buyers).

61 A buyer can now work with an agent for many hours, identifying the neighborhoods and types of homes of most interest, but then avoid a fee by terminating or simply not renewing the broker agreement, before seeking to purchase the next suitable new home on the market. *See* Wachter, *supra* note 60, at 190, 198-200. Agents working with buyers now rely on buyers' sense of fairness, time pressures, or that the buyer has already invested substantial time educating the agent about their needs, desires, and tastes.

62 *See id.* at 190. [Wachter, *supra* note 60]. For example, one broker charged sellers a monthly advertising fee, *see* Rick Maylone, (Letter), Inman News, May 2, 2005, and some high-end brokers have charged sellers a one percent fee up front to cover extensive marketing expenses. Conversation with Bill Wendel, Sept. 12, 2006.

tips based on restaurant bills make some economic sense because higher bills generally reflect a greater quantity or higher quality of service or both.[63] Similarly, the higher nominal fees received by the agents of entertainers and athletes may compensate for greater demands for both financial negotiations and responses to requests from the press, charities, and others. The greater the recovery sought by a tort lawyer, the greater the likely resistance. Yet while the costs to the service provider may increase on average as the revenues involved grow, that increase does not appear to be proportional to the revenues.[64]

So what about the correlation between a home's sale price and a broker's costs in assisting the sale? Some believe that a three percent commission is reasonable for the typical amount that a broker and agent invest on a transaction,[65] at least for low to median-level-priced homes,[66] although maybe not for the lowest priced homes.[67] Still, it appears that most of the costs entailed in effectively selling a home are unrelated to the sale price and the remainder are as likely to be *inversely* as directly correlated to the price, at least for homes priced above the local median.[68]

Brokers for sellers may assert that higher priced homes require more extensive advertising, more expensive staging, or the like, but this position is hard to defend. For example, consider the relative value of special advertisements or agent open houses to the sale of homes priced at the mean for a community as compared to those substantially above the mean. The higher a home is priced above the community average, the fewer

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63 Competition to work at more expensive restaurants generally enables them to employ superior quality servers. Research indicates, however, that the reason that diners and the highest paid entertainers pay their service providers a percentage fee may be more out of a sense of generosity to lower-income food servers and gratitude to faithful agent/partners. *See* Ofer H. Azar, *Who Do We Tip and Why? An Empirical Investigation,* 37 App. Econ 1871, 1876-77 (2005). *See generally* Nadel, *Financing Creative Output, supra* note 26, at 839 & 841.

64 For example, the burdens on an agent for athletes or entertainers is likely to vary more based on their maturity rather than their salaries, and much of it is likely to require only the attention of an agent's lower-cost assistant.

65 *See* Ray Wilson, Bought, Not Sold: Single Agency, Buyers' Brokers, Flat Fees, and the Consumer Revolution in Real Estate 99-100 (1998). *See also supra* note 28; Paul Anglin & Richard Arnott, *Are Broker Commission Rates on Home Sales Too High? A Conceptual Analysis,* 27 Real Est. Econ. 719, 736 (1999) (2.8 percent).

66 *See* Kiplinger Staff, Kiplinger's Guide to Buying & Selling a Home 95 (1996).

67 *See* Harney, *supra* note 53 (reporting that an agent who generally charges six percent will ask seven percent for lower-cost homes); Mary McAleer Vizard, *For Brokers' Commissions, It's Not Just a 6 Percent Solution,* N.Y. Times, May 28, 1995, §9 at 1 (reporting that for Manhattan homes in the mid-1990s, one broker made it company policy to charge commissions higher than 6 percent on all properties with sale prices of less than $150,000).

68 Inman Commissions 2006, *supra* note 5, at 48 (one agent explained "I find it easier to sell a $500,000 home than one for $225,000, which is entry level in our area."); Cohen, *supra* note 46 (quoting broker Herb Gomez "It can be much harder to sell a $120,000 house than a $500,000 house."); James Caverly, *Broker Converts Her Business into a Flat-Fee Franchise,* RealEstateJournal.com, May 30, 2006 (Austin, TX realtor Donna Chance recognizing that it is the same amount of work marketing higher or lower priced homes); Ardell DellaLoggia, *The "Goldilocks" Principle,* Seattle's Rain City Real Estate Guide, Mar. 23, 2006, at http://www.raincityguide.com/2006/10/05/the-goldilocks-principle/ at Comment 12 (Eric Rojas, Oct. 9, 2006) ("I will spend more time and effort to sell a one bedroom $178,000 Lake Shore Drive condo then a three bedroom $600,000 duplex (two level) condo in the Lakeview neighborhood. At the later, I will also meet higher end buyers…"). This might not apply for the very highest-priced homes in a community, since few if any potential buyers might even think to look for them there. Those homes would require more extensive, marketing efforts. *See supra* note 53 and *infra* text accompanying note 261.

its likely "competitors," and the more likely that home buyers (or the agents aiding them) will consider, if not visit, *all* relevant options as long as the homes are listed in the MLS.[69] On the other hand, there will likely be many more homes available around the mean. Thus, buyers of average-priced homes are more likely to make a bid before carefully viewing all their options. Therefore, it is more important for agents representing average-priced homes to attract early attention from such buyers. Furthermore, a 2006 *Inman News* survey of brokers found that the amount brokers "spen[d] to market listings doesn't generally increase" with the price of the home.[70] In fact, much expensive advertising may primarily benefit listing brokers in their efforts to place their names, repeatedly, in view of future buyers to recruit them as clients.

On average, the need for staging also appears to decrease as the price of a home increases. Wealthier owners are more likely to have used decorators, made necessary repairs, and to use house cleaners on a regular basis than those with lower-priced homes. And even if the "out of pocket" cost of desirable staging correlated with the price of a home, that cost would not justify a higher broker fee because it does not ordinarily come out of the broker's pocket. Rather agents advise sellers to make such investments, irrespective of the home's price. [71] Some agents might offer to pay a portion of the staging costs, but only if they were embarrassed to ask the seller to pay more on top of an otherwise excessive fee.[72]

Three counter-arguments on this point also deserve a response. First, the higher priced homes will attract the most skilled and experienced (and implicitly expensive) agents. Yet those buyers or sellers might not need or want to pay high rates for expert advice. Second, higher-priced homes might remain on the market significantly longer than lower-priced homes, requiring more advertising, if not other effort, although the limited empirical data reported on such timing does not reach this conclusion.[73] Third, a relative scarcity of buyers for the highest priced homes might create a greater risk to agents of losing the listing to another agent or a "for sale by owner" ("FSBO") before it sells.[74] Brokers might claim that this higher risk justifies a higher fee, but a shift among brokers is as likely to help as to hurt them and wealthier owners appear least likely to shift from a broker to a FSBO.

In conclusion, then, there appears to be little evidence that the cost of marketing

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[69] Still, owners of the very highest priced homes would need to spend more 1) to tempt individuals who were not actively shopping for a home by presenting them with something exceptional that they might feel they wanted to have or 2) to reach home shoppers who were looking to buy, but without a focus on any particular location.

[70] *See* Inman Commissions 2006, *supra* note 5, at 7.

[71] Thus, the $7,500 cost of repairs to and the staging of a $2 million property in Orange County was paid by the seller, not the agent. *See* Blanche Evans, *Provide Make Ready Services to Maximize Seller's Take, Says Realtor,* Realty Times, Mar. 6, 2006.

[72] Many agents had this reaction when their brokers asked them to assess administrative fees on top of commissions. *See* Kenneth R. Harney, *New Brokerage Fees Coming Under Fire,* Wash. Post, Apr. 6, 2002, at H1 (quoting one broker as reporting "How can we possibly explain to our customers that a 6 percent commission isn't enough?").

[73] *See* Hsieh & Moretti, *supra* note 24, at 1111. Buyer agents appeared to spend more time aiding buyer searches for higher priced homes, although the relationship between price and search time appeared to be small. Id. at 1113.

[74] For a review of the share of homes that FSBOs represent *see infra* note 143 and accompanying text.

higher-priced homes justifies higher broker commissions. The cost of effectively marketing a home appears no more likely to correlate with the price of the home than the costs that travel agents incur to ticket air travelers correlates with the price of their airline tickets or the effort that a doctor expends in a physical exam is related to the total price of any prescriptions prescribed. Instead, it seems that brokers and their agents may spend more for marketing higher priced homes *because* they feel the need to justify the higher fee they will earn.

E. Setting Fees Based on Wealth or Income

Income and property taxes and other fees to finance government services are generally set as a percentage of an individual's or household's income or wealth, but this approach is based on the political view that those with the highest incomes or most wealth should contribute to the cost of government in proportion (if not in greater proportion) to that income or wealth. It is also supported by the view that the marginal utility of income diminishes as it increases. While public policies might justify a cross-subsidy from those most advantaged to those most disadvantaged, there is no reason to expect private entities to mimic these practices, absent price or profit regulation. In particular, there is no reason to believe that real estate brokers use the percentage-of-sale-price rate element to overcharge buyers and sellers of higher-priced homes so that they can undercharge buyers and sellers of lower-priced homes. Rather, such a pricing mechanism merely appears to confirm the market power that permits such value-based pricing.[75]

F. Avoiding Some Harmful Effects of Hourly Rates

Basing compensation on a percentage-of-sales-price also avoids some drawbacks of paying fees based on hours of input, particularly that the latter creates a perverse incentive—employees are encouraged to spend more time than necessary on a project and to overstate the time spent. Hourly rates may also deter customers from communicating freely because they feel that they are "on the meter." Many sellers may be reluctant to pay for time to fully explain an important matter out of a false belief that it was not worth the cost of discussing it. Whatever the disadvantage of hourly rates, however, it is important to recognize that they can be avoided by employing any one of multiple alternatives, including flat fees.

G. Harms

Although a percentage-of-sale-price fee leads a listing agent to share a seller's desire to obtain the highest price possible for a home, the rate element gives agents aiding buyers an incentive, albeit quite small, to act opposite to their client's interests: to coax buyers to bid higher than justified.[76] This adds to the agent's general bias toward a quick

"The cost of effectively marketing a home appears no more likely to correlate with the price of the home than the costs that travel agents incur to ticket air travelers correlates with the price of their airline tickets or the effort that a doctor expends in a physical exam is related to the total price of any prescriptions prescribed."

[75] *See* John Yinger, *A Search Model for Real Estate Broker Behavior,* 71 Am. Econ. Rev. 591, 603 (1981).

[76] Some data indicates that when listing brokers offered higher commission rates to buyer brokers it resulted in a higher selling price, although only for small to medium-sized homes. *See* Joachim Zietz & Bobby Newsome, *Agency Representation and the Sale Price of Houses,* 24 J. Real Est. Res. 165, 185 (2002) (finding that an increase in commission of one percent for small to medium-sized properties increased the sale price by an average of 2.9 percent or about $3,819). Other data indicate, however, that buyers represented by buyer agents do not pay more for homes than those who are not represented. *See* Harold W. Elder, et al, *Buyer Brokers: Do They Make a Difference?, Their Influence on Selling Price and Search Duration,* 28 Real Est. Econ. 337, 360-61 (2000); Christopher Curran & Joel Schrag, *Does it Matter Whom an Agent Serves? Evidence From Recent Changes in Real Estate Agency Law*, 43 J. L. & Econ. 265 (2000) (finding the use of buyer agents reduced buyer search time for buyers of high and low priced properties and led to

sale,[77] and against discouraging offers based on an apparent irrational infatuation likely to fade in the long run.[78] Still, this may be offset by the agent's desire to gain referral business. The current percentage rate also probably deters agents from advising sellers to seriously consider remodeling instead of selling.[79]

III. Sellers Set the Fee For and Pay the Agents Assisting the Buyers

A. General Justifications

The norm in retailing is for buyers to be advised by salespeople loyal to sellers. While the salespeople typically help buyers find suitable choices, they are often biased by the potential for a raise, higher commissions, or a free trip associated with sales of particular items. Thus, salespeople will generally not inform a customer that her best choice is something that the seller does not carry, unless the seller has no suitable alternative. The Macy's Santa Claus in the classic film *Miracle on Thirty-Fourth Street* —who placed consumers' interests first—was exceptional in this respect. Hence, for most purchases, consumers make their choices without objective advice, often relying on biased salespeople for factual information and frequently settling for a merely satisfactory selection ("satisficing"[80]).

Where buyers desire unbiased advice they can pay for it directly by consulting impartial advisors, like Consumer Reports, but only a small minority subscribe to such services. Many wealthy shoppers have long paid personal shopping consultants for unbiased advice rather than relying on the free personal shoppers paid by and loyal to their stores.[81] Now that travel agents are paid directly by air travelers rather than

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significantly lower prices on high priced properties); Vivian Marino, *Buyer-Broker Transactions on Rise Across Nation*, Chi. Trib., May 16, 1993, at 2R (A 1992 survey by U.S. Sprint reported that 232 relocating employees who hired buyers' brokers paid on average 91 percent of a home's list price, while those using traditional agents paid 96.5 percent of the list price).

[77] *See* Wilson, *supra* note 65, at 87-89; J.D. House, Contemporary Entrepreneurs: The Sociology of Residential Real Estate Agents 5-6 (1977) (quoting a broker to say: "The customers' needs are taken into account. Of course, only up to a point. . . If you looked at five or six houses and decided on one and asked me if it was good, I'd be a fool not to say yes, even though I'd never buy it for myself.").

[78] Marjorie B. Garber, Sex and Real Estate: Why We Love Houses 14 (2000) recognizes many similarities between selecting a home and selecting a romantic partner, including the danger that buyers will act on infatuation.

[79] Then again, the agent probably does have an incentive to offer her assessment during the agent selection process for it may give her special credibility and the seller may disagree or contact her years later when there is justification for a sale. Meanwhile, the loss would be the possibility of a commission, not one already in hand.

[80] Herbert Simon coined this term for settling for a merely satisfactory option, rather than investing extra effort to find a superior choice. *See* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. Econ. 99 (1955). Also, the Internet is beginning to change this. *See* Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options,* 14 Harv. J. L. & Tech. 183 (2000) *revised version available at* www.ssrn.com/abstract=247818 (hereinafter Nadel, *Selection Process*).

[81] Some examples of the free shoppers provided by stores is discussed in Amy Kover, *An Answer to the Harried Life: Personal Shoppers,* N.Y. Times, Dec. 25, 2005, §3, at 6.

by airlines,[82] they have a greater incentive to find air travelers the best deal. Similarly, doctors are less likely to be biased in recommending drugs for patients if the doctors are paid by patients rather than by drug companies.[83]

Why are there so few examples of unbiased selection assistants? One would expect that consumers would prefer to pay market niche experts directly for unbiased advice rather than paying indirectly for biased salespeople. Yet for lower-and moderately-priced items, administrative costs make this impractical. And even if the Internet alleviates this difficulty,[84] shoppers appear to strongly prefer the illusion of free service —an entitlement reinforced in the dot.com explosion in the late 1990s[85]—even if it is harmful in the long term.[86]

B. Application to Broker Fees

Most home buyers have accepted the pervasive myth that their brokers' services cost them nothing,[87] thus reducing their incentive to negotiate over fees. Yet the fees paid to their brokers are an avoidable cost ultimately paid by buyers, as easily illustrated by a simple example.

A seller willing to accept a bid of $500,000 and to pay a six percent broker commission ($30,000, which is typically split evenly between the seller's and buyer's brokers' firms) is, therefore, willing to accept net proceeds of $470,000. Since the seller's broker's firm has agreed to accept a net $15,000 commission for its own services, the seller should accept a $485,000 bid if there is no buyer's broker to compensate.[88] If, however, a buyer's broker's firm must be paid $15,000 by the seller, then the seller must demand $15,000

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[82] *See supra* notes 30-31 and accompanying text. Independent insurance agents might be next to go this route.

[83] There is some concern, however, that some doctors are unreasonably influenced by gifts and attention they receive from drug companies or their own partial ownership of some medical equipment. *See* Troyen A. Brennan et al, *Health Industry Practices That Create Conflicts of Interest,* 295 JAMA 429 (2006); Reed Abelson, *Whistle-Blower Suit Says Device Maker Generously Rewards Doctors,* N.Y. Times, Jan. 24, 2006, at C1.

[84] For a discussion of the possible emergence of a new class of consumer product selection assistants *See* Nadel, *Selection Process*, *supra* note 80; Philip Evans & Thomas S. Wurster, Blown to Bits: How the New Economics of Information Transforms Strategy (1999).

[85] Because securities investors in the 1990s were willing to finance free Internet content to attract an audience, individuals became accustomed to free content, making it difficult for websites seeking to operate economically viable businesses by charging for the valuable information they provide. *See* Nadel, *Selection Process, supra* note 80, at 202-04; Michael E. Porter, *Strategy and the Internet,* Harv. Bus. Rev., Mar. 2001, at 63, 76-77.

[86] The most important example in the US may be the financing of political campaigns. Many voters oppose full and adequate public funding of political campaigns, preferring to avoid the expected higher taxes. Yet reliance on private financing places tremendous pressure on candidates to meet with and please potential donors. Moreover, it is almost certain that the legislated expenditures resulting from the need to please potential donors, if not solely the earmarked "pork" expenditures, exceed the cost of public financing many times over. Until someone attempts to precisely quantify this latter cost to taxpayers, however, it will remain easier for voters to effectively ignore it.

[87] *See* Greg Swann, *Securing the Home-Buyer's Place at the Table,* Sept. 6, 2006, http://www.bloodhoundrealty.com/ BloodhoundBlog/?p=296. *See also* homepage of DROdio Realty, http://www.drodio.com (informing buyers: "Learn how we can help you at no cost."); http://www.assist2sell.com/buyers.aspx ("at no cost to you"). NAR Standard of Practice 12-2 permits realtors to represent their services as "free" or without cost if the potential for pay from another source is disclosed.

[88] Some important points regarding this situation are discussed further in section IX.D, *infra. Cf.* Blanche Evans, *Agents Can Win the Discount Game,* Realty Times, Apr. 20, 2006 (instead of seeking rebates of the commission their broker collects, "buyers can come out just as well by asking for the same percentage off the cost of the home").

more from the buyer to clear $470,000. Thus, the commission to the buyer's broker is an "avoidable cost," which sellers fully shift to the buyer.[89, 90]

Against this background, one would expect home buyers to choose to pay a broker directly for unbiased advice. Until the 1990s, however, buyers were generally content to work with agents paid by—and recognized by the law as subagents of—the listing agent's firm,[91] with the latter using the MLS to make a blanket offer of subagency to the agent who found a buyer. And as subagents of the seller, agents working with buyers were duty-bound to pass on to sellers' agents any secrets buyers shared with them about how high they would bid.[92] Still, circa 1980, more than 70 percent of buyers *and sellers* believed that the agent aiding the buyer was representing the buyer's interests and thus some courts interpreted the common law of agency to that effect.[93] Yet when litigation led listing brokers to be held liable for the services of buyer brokers,[94] the industry quickly shifted to require agents to disclose who their primary client was (although

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89 At least a few courts appear to understand this. *See* Matthew M. Collette, *Note, Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality,* 61 S. CAL. L. REV. 399, 440-41 n.218 (1988). *See also* James R. Frew & G. Donald Jud, *Who Pays the Real Estate Broker's Commission?,* in Jaffe, *supra* note 60, at 177; G.Donald Jud & James R. Frew, *Real Estate Brokers, Housing Prices, and the Demand for Housing,* 23 URB. STUD. 21 (1986) (finding that brokers produce higher selling prices and shift some of their fee to buyers). While the buyer's broker's fee appears to come solely from the buyer, the seller's broker's fee may come out of the buyer or seller's pocket, depending on the elasticity of demand.

90 Some might challenge the implication of this view—that buyers who can avoid or reduce the costs of buyer brokerage services deserve any resulting cost savings. After all, under this rationale shoppers should be able to deduct that share of the price attributable to compensation for salespeople from the price if they want to purchase without assistance. Yet, the administrative and other costs of monitoring make such discounting impractical, unless the entire store operates on a minimal service, quasi-wholesale basis, like retailers like Costco.

91 *See* Collette, *supra* note 89, at 406-08.

92 The law of agency then required the agent working with the buyer to serve the best interests of the seller, including reporting to the seller's agent how high a buyer was willing to bid on a property! *See* WILSON, *supra* note 65, at 83; Ann Morales Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. LEG. 65, 113-14 (2003). One mid-1980s survey, however, found that agents working with buyers only passed on the highest price buyers would pay about half the time and, furthermore, selling agents who knew the lowest price that sellers would accept passed this on to buyers half the time! *See* Royce de R. Barondes & V. Carols Slawson, Jr., *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents,* 84 OR. L. REV. 681, 693-94 (2005); FTC 1983 Report, *supra* note 14, at 23-24 (finding that 66 percent of sellers surveyed indicated that brokers had told them how high they thought particular buyers would go).

93 For example, the 1983 FTC report found that more than 70 percent of buyers (and sellers) thought that the broker working with the buyer was "representing" the buyer, FTC 1983 Report, *supra* note 14, at 14, although state laws of sub-agency held otherwise. On the other hand, some state court decisions found that buyers were due common law agency duties of agents, *See* Barondes & Slawson, *supra* note 92, at 691-93 (discussing common law and other principles); Ronald Benton Brown, et al, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25,35-36 (1995) referencing Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 REAL EST. L.J. 201, 205 (1994) (discussing the creation of "accidental agency" and referencing Hale v. Wolfsen, 276 Cal. App. 2d 285, 290-91 (1968) and Gray v. Fox, 151 Cal. App. 3d 482, 489 (1984)); Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560 (1987); FTC 1983 Report, *supra* note 14, at 180-81.

94 The trigger point litigation was probably the $18.2 million loss by a Minnesota Real Estate broker. *See* Dismuke v. Edina Realty, Inc., No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. June 17, 1993); Bokusky v. Edina Realty, Inc., No. 3-92 CIV 223, 1993 WL 515827 (D.Minn. Aug. 6, 1993). And other lawsuits followed. *See* Brown, et al, *supra* note 93, at 45-50.

such disclosures are surprisingly neglected today[95]). The concept of "buyer's brokers," which Bill Broadbent had introduced in the late 1970s, quickly gained attention, and it appears that today about 63 percent of buyers use some variety of agents who commit to work for buyers.[96]

When Broadbent introduced the buyer broker concept he expected that buyers would negotiate to set buyers' brokers' fees,[97] an arrangement many recognize as appropriate;[98] yet that practice did not catch on.[99] Moreover, most buyer brokers—exclusive or not —appear to prefer to rely on the fees offered by listing brokers, rather than to raise the topic directly with buyers.[100] Prohibitions against rebates also hinder the growth of flat or hourly fees in the dozen or so states that prohibit rebates.[101] Finally, buyer brokers— particularly those targeted for adverse splits[102] —may fear that uncooperative traditional brokers will hinder their clients' desire to amortize their broker fee by rolling it into the mortgage.[103]

Some claim that the "seller pays" concept also satisfies the desire of buyers to avoid paying a fee when there is no sale—i.e., a contingent fee.[104] Yet despite the substantial

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95 *See* National Assoc. of Realtors, 2005 Profile of Home Buyers and Sellers __ (2006) (2005 NAR Survey) (reporting that less than one third of buyers in 2005 were told by their agents at their first meeting who the agent represented); Kenneth R. Harney, *Agents Falling Short on Disclosure,* Wash. Post, Mar. 18, 2006, at F1.

96 *See* 2005 NAR Survey, *supra* note 95, at 45. It remains important for consumers to understand who has fiduciary duties to whom. *See* Maureen F. Glasheen, *Real Estate Agents: Get Your Money's Worth,* Consumers' Research, Feb. 1994, at 10.

97 *See* Wilson, *supra* note 65, at 9-10, 79, 89-95.

98 This aspect of the fee-for-service model, advocated by Julie Garton-Good, is also supported by many others. *See, e.g.,* Brian Larson, *The End of MLS as We Know it,* (part 1 of 3-part article) Inman News, Aug. 15, 2006; Swann, *supra* note 87; Wilson, *supra* note 65, at 92; Ross, *supra* note 49, at 291; Wachter, *supra* note 60, at 206; Yavas & Colwell, *supra* note 48, at 262; 1972 Forbes Cover Story, *supra* note 17, at 36 (quoting Williams Farnsworth, executive in the Beverly Hills office of Coldwell, Banker); Marcie Geffner, *Secret Rebates Point to Larger Commission Structure Problems,* Inman News, Mar. 21, 2006. Mark Bagnoli & Naveen Khanna, *Buyers' and Sellers' Agents in the Housing Market,* 4 J. Real Est. Fin. & Econ. 147 (1991) concludes that society is better off if buyers' agents are paid by sellers, but it ignores the bias that is introduced when the seller pays. Still, courts have not found it improper for an agent whose duty is to serve the buyer to be paid by the seller's agent. *See* Brean v. North Campbell Professional Building, 548 P.2d 1193, 1197 (Az. 1976); Duffy v. Setchell, 347 N.E.2d 218, 221 (Ill. App. 1976).

99 *See, e.g. supra* note 33, and accompanying text. The FTC's circa 1980 survey found that non-traditional brokers typically charged a sale-price-based commission, although about a quarter charged a flat fee. (This figures include buyer and seller brokers). *See* FTC 1983 Report, *supra* note 14, at 154. *But see infra* note 205 and accompany text.

100 *See* Larson, *supra* note 98 (in an informal survey, less than a third of agents raised the issue with buyers); Robert J. Ringer, *Salting the Record,* Realty Times, Feb. 6, 2006; Gillespie, *supra* note 108. *But see* Bryant Tutas, *Taxi!, Taxi! Sorry, Not Me, I'm a Professional Realtor,* http://activerain.com/blogsview/Taxi-Taxi-Sorry-not-me-I-m-a-professional-Realtor-?13005, Oct. 7, 2006 (advocating that brokers should not proceed beyond preliminary stages with buyers who do not sign buyer broker agreements that spell out fees).

101 *See* section VI, *infra.*

102 Adverse splits are discussed *infra* note 179, and accompanying text.

103 *See infra* note 403.

104 The advantages of a contingent fee are independent of whether the fee is paid by the seller or buyer. *See* Knoll, *supra* note 34, at 260-61 (observing that brokers can better diversify the risk of no sale).

danger of free riding,[105] most buyers' brokers already defer collection of their fee until a sale has closed.[106]

C. Harms

1. Agents May Fail to Show Buyers Some Attractive Options

Leaving the payment of buyer brokers to sellers or their brokers can lead agents with buyers to withhold options from buyers, despite fiduciary duties, if 1) the co-op fee offered to the buyer's broker for a home is too low, 2) the seller appears to expect free assistance from the buyer's broker, or 3) the agent wants to discourage price competition.

Most home buyers appear unaware that, like most salespeople, agents aiding buyers are apt to make a greater effort to sell those listings that offer them the highest fee.[107] For example, agents are likely to favor MLS listings that offer commissions of more than the "going rate" commission in the locality, e.g., three percent,[108] while neglecting listings that offer less.[109] Recognizing this, many discount brokers representing sellers offer to pay buyer brokers the going rate in the market, limiting discounting to reductions in their own share of the commission.[110] Jim Gillespie, a real estate agent "coach" from Temecula, Calif., told *Money Magazine* that he advises agents to use the specter of boycotts to dissuade sellers from listing with discounters.[111]

"Most home buyers appear unaware that, like most salespeople, agents aiding buyers are apt to make a greater effort to sell those listings that offer them the highest fee."

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105 *See supra* notes 61 & 62 and accompanying text.

106 *See* Collette, *supra* note 89, at 441 (calling this a "carryback commission").

107 In the 1980s, most buyers believed that the agent working with them was trying to serve their best interests. *See* FTC 1983 Report, *supra* note 14, at 183-84, 192 n.580, and that still appears to be the case.

108 *See* Peter Coy, *Home Buyer, Beware,* Businessweek.com, Dec. 14, 2006; Robert J. Bruss, *Realtor Says Raising the Commission Pays Off,* Inman News, July 17, 2006 (offering a four percent commission to the buyer's agent did the trick); Vizard, *supra* note 67 (quoting a Manhattan broker admitting that "Let's say I have 10 studios, one at 10 percent, one at 6, one at 4 and one at 2, . . . Which one do you think I'll show?"); Jim Gillespie, *Surveying Your Right to a Full Commission,* Realty Times, Sept. 29, 2005; *infra* note 112, and accompanying text.

109 *See* Re/Max International v. Realty One, 173 F.3d 995, 1010 (6th Cir. 1999); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 1983-2 Trade Cas. ¶ 65,718, 1983 WL 2199 at *3, *5 (C.D. Cal.), aff'd 786 F.2d 1400 (9th Cir. 1986); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985); 2007 DOJ/FTC Report, *supra* note 16, at 66-69; FTC 1983 Report, *supra* note 14, at 12, 14, 39-40, 75; Patrick Woodall & Stephen Brobeck, Nontraditional Real Estate Brokers: Growth and Challenges, Dec. 13, 2006 (Consumer Fed. of America), at 11-13; Setting the Buyers Agent Commission, http://www.progressivehomesellers.co m/_commission.html; Russ Cofano, *You Have to Wonder*, Seattle's Rain City Real Estate Guide, July 17, 2006, with comments, http://www.raincityguide.com/2006/07/17/you-have-to-wonder/#comments; *Consumer Rep. supra* note 17, at 462; Blanche Evans, *Buyer Wants to Know Why Broker is Showing Agency Listings Only,* Realty Times, July 1, 2005; Robert J. Bruss, *Home Sale Goes South When Sellers List with Broker Friend,* Inman News, Aug. 15, 2005; Robert J. Bruss, *Adding Offspring to Real Estate Title May be Risky,* Inman News, June 27, 2005. This can also arise when traditional brokers discriminate against new entrants by offering them only an "adverse split" of the total commission. *See infra* note 180.

110 *See, e.g., See* FTC 1983 Report, *supra* note 14, at 154 (most lower-priced brokers split their commissions 50-50 with buyer agents, but many offer cooperating agents the going rate); Hagerty, *supra* note 27 (discussing Sharon Jebavy); Cohen, *supra* note 46 (quoting broker David LaPointe).

111 *See* Jon Birger & Joan Caplin, *The 4½ % Solution,* Money, Oct. 2004, at 105. Such statements are likely to deter risk-averse buyers from using discount brokers. *See* Wachter, *supra* note 60, at 195, 204-05. The statements are also known to be made to sellers who have listed with non-traditional brokers in an effort to get them to switch brokers. *See* FTC 1983 Report, *supra* note 14, at 156. Still, such statements risk triggering prosecutions for illegal boycotts, and so other coaches discourage such statements. *See* Ross, *supra*

Alexander Perriello, President and chief executive officer of Realogy (then Cendant) Real Estate Franchise Group (the largest franchiser of residential and commercial real estate brokerage offices in the world), explained at an October 25, 2005 U.S. Department of Justice (DOJ)/FTC workshop on real estate competition how buyers can be steered. Rather than offering the broker whose agent worked with the buyer only half the total commission, he might offer it as much as a five percent commission if he believed it was difficult to attract buyers in that market.[112] If Perriello was willing to give up an additional two percent of the selling price, then he could have reduced his asking price by two percent.[113] His experience in the industry, however, apparently leads him to believe it more effective to favor the financial interests of agents working with buyers rather than buyers themselves.[114]

Buyers could attempt to correct for the pressures leading agents to fail to show them attractive options by offering to make up the difference between the fee a seller offered and the going rate; yet most buyers appear unaware of the current fee mechanism. While agents working with buyers could raise the issue,[115] most appear reluctant to impose on buyers by requiring them to sign an agreement guaranteeing the broker a minimum fee upon a purchase.[116] In addition, arranging to amortize such payments currently adds a complication.[117]

Even if buyers' brokers are offered fees at the going rate, agents may also avoid showing buyers homes out of fear that the seller will require the agent to handle all the tasks ordinarily done by the seller's agent because the seller is not using a full service broker.[118] Agents could demand to be paid for any extra work for sellers, but most prefer

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note 49, at 48-49, 51-52.

112 *See* DOJ/FTC Competition Policy and Real Estate Industry Oct. 25, 2005 Workshop Transcript, at 194-95. http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf (DOJ/FTC 2005 Workshop Transcript).

113 *See* Ardell DellaLoggia, *Zero Commission,* Seattle's Rain City Real Estate Guide, Mar. 23, 2006, at http://www.raincityguide.com/2006/03/23/zero-commission/ at item 11 (Mar. 25, 2006) (sellers should offer enticements to buyers, not buyers' agents). The FTC found that non-traditional brokers often encourage sellers to split some of their savings on brokerage fees with buyers by reducing the selling price of their home.

114 This includes offering buyer agents higher commissions, vacations, and other gifts. *See* FTC 1983 Report, *supra* note 14, at 75; Robert Irwin, Tips and Traps When Selling a Home 176 (3rd ed. 2004); James R. Hagerty & Ruth Simon, *Do Real-Estate Agents Have a Secret Agenda?,* Wall St. J., Nov. 9, 2006, at D1; Robert J. Bruss, *Sell My Home, Win Vacation, Electronics,* Inman News, Oct. 2, 2006; Elsa Brenner, *Enticing Buyers, and Brokers to Act,* N.Y. Times, Sept. 10, 2006, §11, at 13; Lisa Prevost, *Sweetening the Pot for Home Buyers,* N.Y. Times, Oct. 1, 2006, §11 at 13; Damon Darlin, *Location, Location, Location. Research, Research,* N.Y. Times, Nov. 5, 2005, at C1; Alisa Hagner, *Letter to the Editor,* Inman News, Mar. 24, 2006.

115 *See* Pamela J. Young (letter to the editor), *Agent 'Breaches Duty' on Commission Split,* Inman News, June 27, 2005.

116 *See supra* note 100. *See generally* Phoebe Chongchua, *Buyer Broker Agreement a Win-Win?,* Realty Times, Aug. 9, 2004.

117 If a buyer has agreed to pay a specific fee to the buyer's agent then the seller should be willing to add that fee to the price of the house and agree to pay it to the buyer's broker, and thus allow it to be amortized in the mortgage, but some sellers and their agents might resist this. Mortgage lenders also appear uncomfortable. *See infra* note 403.

118 *See* Blanche Evans, *New Study with Implications for MLSs Shows Freeloaders Unwelcome,* Realty Times, Apr. 10, 2006; Lewis, *supra* note 18, at 16-17; Eric Tyson & Ray Brown, House Selling for Dummies 134 (2d ed. 2002); Paul Sigurdson, *Limited-Service Debate About Representation,* Inman News, May 11, 2005.

to avoid the current awkwardness of such requests. Although not due to the traditional rate structure, traditional agents may also avoid homes represented by entities that threaten the stability of the traditional system (favoring cooperation over price competition[119]), as discussed further in VIII.A, below. Thus, traditional agents willing to offer rebates to customers (only from the broker's own share of the commission) feel pressure to act secretly out of fear of being shunned by their colleagues, if not fired by their broker![120] Although such practices resemble a quasi-boycott, the lack of an explicit agreement has allowed them to avoid antitrust prosecutions.[121]

A 2005 *Wall Street Journal* editorial complains that such practices represent "a clear breach of the fiduciary duty of the agent to find the best home at the lowest price for clients."[122] Not only do the practices violate duties imposed by state laws of agency, but they conflict with the first principle of loyalty in the National Association of Realtors® (NAR's) "stringent, enforceable" code of ethics.[123] Yet, the *Journal* observes: "To our knowledge, neither the National Association of Realtors nor the state real estate commissions have ever sanctioned a real estate agent for this breach of ethics."[124]

Some claim that the effect of steering is minor. After all, 77 percent of buyers do research on the Internet even before working with a broker.[125] Yet there are at least four flaws in this response. First, about a quarter of home buyers do not use the Internet. Second, not all homes are easy to find online, particularly those not represented by traditional brokers.[126] Third, many who begin their research on the Internet are soon discouraged either by their inability to locate any of what they want or by the overwhelming level of data available. Both types may conclude that it is more cost effective to employ an agent with experience retrieving the relevant data to best meet their needs. Fourth, once they

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119 *See* GAO 2005 Rep., *supra* note 1, at 13; FTC 1983 Report, *supra* note 14, at 40, 75, 184-85, 187 n.555.

120 *See* Roberts, *supra* note 15; Glenn Roberts, Jr., *Brokerage Terminates Agent Who Founded Rebate Network,* Inman News, Mar. 9, 2006; Timothy J. Mullaney, *Real Estate Brokers Are Racing for Shelter,* Bus. Week, Apr. 10, 2006, at 75.

121 Although group boycotts are violations of section 1 of the Sherman Act, N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985); Fashion Originators' Guild of Am. V. FTC, 312 U.S. 457 (1941), mere conscious parallel conduct alone, is not enough, although inferences about group understandings may be drawn. *See* ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 555 (8th Cir. 1991); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1060-61 (5th Cir. 1985); Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform,* 30 Am. Bus. L.J. 271, 319-20 (1992); Trombetta, *supra* note 20, at 147-48; Owen R. Phillips & Henry N. Butler, *The Law and Economics of Residential Real Estate Markets in Texas: Regulation and Antitrust Implications,* 36 Baylor L. Rev. 623, 649 (1984).

122 Editorial, *The Realtor Racket,* Wall St. J., Aug. 12, 2005, at A8. *See also* Fiduciary Duties Of A Real Estate Agent http://www.realestatebuyersagents.com/duties.htm.

123 *See* Bruce Aydt, *Ethics: Q&A: In Whose Interest?,* Realtor Magazine Online, Jun. 1, 2006, (observing that the National Association of Realtor Code of Ethics and Standards of Practice requires its members to put their clients' interests ahead of their own interests. http://www.realtor.org/rmomag.NSF/pages/ethicsjun06?OpenDocument.

124 editorial, *supra* note 122. This may, however, may be due to a state's failure to authorize prosecutions of such anticompetitive actions. *See* ARELLO, Impact of Industry Members Serving on Real Estate Commissions on Boards, July 2006, http://img.realtytimes.com/rtimages/article_20070628_blanche/$file/arelloposition.pdf at Point 2. There have also been private lawsuits. *See* Cohen, *supra* note 46 (describing broker Brandy Farris's lawsuit).

125 *See* 2005 NAR Survey, *supra* note 95, at 29 (finding that 77 percent of home buyers use the Internet).

126 *See infra* section VII.B.3.a.

have hired a broker who is paid for providing full service, buyers with scarce free time are apt to forgo duplicating what their agent is already doing, although, admittedly, many individuals are inclined to continue to monitor homes online.

2. Reducing Buyers' Incentive to Negotiate

As noted above, by encouraging buyers to believe that it costs them nothing to use a broker, the current fee arrangement deters most buyers from negotiating over their agent's broker's fee.[127] Hence, there is little pressure to reduce the fee paid to buyer brokers from half of the "going rate," e.g., half of six percent, which sellers and agents believe is necessary to avoid the chance that their listing will be neglected, as just discussed, and this is what most MLS listings offer buyers' brokers.[128] The situation is changing, however, due to the emergence of referral firms, like LendingTree and an increasing number of brokers who offer buyers a rebate from the commission paid by listing brokers, as discussed in more detail in section VI, below. As buyers discover that even "full service" buyer brokers are willing to rebate a portion of their commission, more are likely to demand lower fees.[129]

3. Unnecessary Fees Allocated to Pay Buyer Brokers

When listing brokers are asked to defend their commission requests, most explain that they "must" offer buyer's brokers a co-op commission at the "going rate," e.g., three percent, to avoid the harm discussed in III.C.1, above. Yet even those who acknowledge that the buyer may have no broker, generally only offer to reduce the total commission by one percent of the three they "needed" to offer. Certainly if sellers want the listing agent to handle tasks for which agent aiding the buyer is generally responsible then the listing broker is certainly entitled to some extra pay,[130] but not when the buyer has already hired an attorney or consultant to handle tasks for buyers or two percent of the sale price for the usually routine tasks described in section VII.B.1.

Those who buy homes without a broker's help usually ask sellers to reduce the sale price by the amount that would have been paid to the buyer's broker.[131] Sellers may desire to comply, but listing agreements usually give the listing broker the right to keep the full fee.[132] Since buyers who are real estate agents can avoid this problem, and

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127 *See supra* note 87 and accompanying text. Many buyers assume that traditional broker rates are basically fixed and that the quality of service provided by lower-priced providers must be inferior. *See also infra* section VIII.

128 FTC 1983 Report, *supra* note 14, at 136-37 (finding that the "splits" offered to cooperating brokers by listing brokers are highly uniform within any local MLS market). The NAR handbook recommends that splits be designed to "encourage cooperation," as opposed to competition. Id. at 139. *Cf* note 351, *infra.*

129 Pressure may also mount if more sellers list their homes with firms like Foxtons and Catalist (which offer brokers for buyers only 1.0 and 1.5 percent commissions, respectively). *See* Jessica Swesey, *Real Estate Discounters Gaining Traction,* Inman News, April 12, 2005 (Southern California-based Catalist); Glenn Roberts, Jr., *Discount Pioneer Back in Business,* Inman News, May 2, 2005.

130 *See infra* section VII.B.1. *Cf.* Evans, *supra* note 118 (suggesting that brokers charge fees for the services they provide to those their clients are buying from or selling to).

131 Then again, as described above, current listing contracts often force listing brokers to pay brokers of buyer agents even when buyers thought that they had no agent. *See supra* text accompanying notes 8-10.

132 Listing brokers may actually expect to work for three percent most of the time (where buyers have agents), but with the expectation that they will keep all six percent (or at least five) about 20 percent of the time.

the cost of becoming a licensed agent is so low,[133] this may be one reason why so many individuals have become real estate agents![134]

IV. Refusing Reductions to the Bundled Price for Those Desiring Much Less Service

A. General Justifications and Their Application to Broker Fees

There are many reasons why sellers may require buyers to purchase products as part of a bundle rather than offering them on a stand alone basis at reasonable prices. Sellers with market power may use bundling to capture a greater share of the surplus value created by an item or use it to increase the entry barriers to the industry.[135] This may even benefit society if it permits the production of offerings that would not be profitable to sell except as part of a bundle.

Sellers without market power may also have good reason to set a single price for a bundle and refuse to give discounts for subsets of the bundled items. First, it might be cheaper to produce only one popular bundle of basic features. As Nobel Prize winner William Vickery often observed, auto makers would not give a discount to a buyer who only drove during daylight and therefore requested a car without headlights, since it would actually be more expensive to provide one. Second, the bundle might represent a "loss leader" created primarily as a marketing device. Once a dinner or travel package special has attracted a customer's attention, the firm offering it might want to shift the customer to a much more profitable option and thus be unwilling to modify the advertised bundle. Third, a service provider's professional preference may be to handle only whole tasks. For example, many doctors and criminal lawyers may be uninterested in handling only a part of a case, preferring to manage the whole case or nothing.

None of these latter three conditions appear to apply directly to the real estate brokerage market. While there are probably economies of scope in providing a set of real estate services,[136] the tasks discussed in section VII appear relatively distinct and the costs of each appear to be easily avoidable, which is why at least some buyer and seller brokers are offering them à la carte. Meanwhile, most agents expect to cooperate with another agent on a purchase.

Nevertheless, traditional brokers, contending that the public expects an "agent" to provide some minimum set of services,[137] such as delivering offers, have successfully

133 *See supra* note 9. Still, to collect fees, agents must become or work for a broker and incur other related fees.

134 Obtaining a real estate license may be a wise investment for those expecting to buy homes on their own (and interested in helping out family and friends in the same boat). *See* Jim Gillespie, *Splitting Commissions,* Realty Times, Mar. 10, 2006.

135 *See* Barry Nalebuff, Bundling as a Way to Leverage Monopoly, www.ssrn.com/abstract=586648; Barry Nalebuff, *Bundling as a Barrier to Entry,* 119 Q. J. Econ. 159 (2004); Timothy J. Brennan, Is Competition the Entry Barrier? Consumer and Total Welfare Benefits of Bundling (2005), http://www.aei.brookings.org/publications/ abstract.php?pid=944. Such practices may enable the seller to distort competitive marketplaces and decrease the opportunity for others to compete in its monopoly market, leading the courts to look unfavorably on such bundling or tying. *See, e.g,* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

136 It does not appear that there would be any more cost savings from bundling by real estate brokers than the FTC expected to see from "economies of packaging" in the funeral industry. *See* Funeral Industry Practices, 47 Fed. Reg. 42260, 42298 (1982).

137 *See, e.g.,* Wayne Thorburn, Public and Private Restraints to Alternative Business Models for Consumers, Oct. 25, 2005, http://www.ftc.gov/opp/workshops/comprealestate/thorburn.pdf.

helped to pass laws in at least 18 states that require brokers to provide some minimum set of services.[138] Yet this prevents a seller from paying solely to engage a broker to place a listing on the local MLS,[139] just as they now pay a newspaper for placing a classified ad and nothing more. If policy makers were truly concerned that consumers might be denied a service they expected, an effective disclosure and/or a waiver option would be the appropriate response to this, as noted by the DOJ, the FTC, and the *Wall Street Journal*,[140] among others, but only about five of the 17 states now permit sellers to waive state minimum service requirements.[141] If the laws were really intended to ensure that consumers received all the services that they expected, they would explicitly require listing brokers to support the widest dissemination of the seller's listing, and brokers engaged to show buyers homes to disclose all the homes meeting the buyer's search criteria. These are services that consumers are now often being denied, without their knowledge, and to their detriment![142]

B. Harms

1. Bundling Denies Consumers the Option of Lower Fees for Limited Service

Although some home buyers and sellers want the entire bundle of services offered by traditional brokers, many others desire to save money by handling many tasks themselves, even if the lack of unbundled services forces them to go completely FSBO(around 20 percent do[143]) or to purchase without a broker (more than 20 percent

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138 *See* ALA CODE § 34-27-84 (c); DEL. CODE ANN. tit. 24 § 2979; FLA. STAT. ANN. § 475.278; GA. CODE ANN. § 10-6A-4; Idaho (H.B. 135, 2007 Leg., 59th Sess. (2007)); 225 ILL. COMP. STAT. ANN. 454/ 15-75; IND. CODE ANN. § 25-34.1-10-9.5 (b); IOWA CODE ANN. § 543B.56A; MO. ANN. STAT. § 339.780(7); OHIO REV. CODE ANN. §§ 4735.62-65; OKLA. STAT. tit. 59 § 858-352, -353(A)(2), -354(B)(2); 63 PA. CONS. STAT. ANN. § 455.606a(a)(3); ?SC 40-57-145?; TENN. CODE ANN. § 62-13-404(3); TEX. OCC. CODE ANN. § 1101.557(b); UTAH CODE § 61-2-27(2)(a); VA. CODE ANN. § 54.2131(A)(2)(b),(c); WASH. REV. CODE ANN. § 18.86.030(1)(c); WIS. STAT. §§ 452.133(2)(am), (2)(d), (6). *See also* 2007 DOJ/FTC Report, *supra* note 16, at 54.

139 *See infra* notes 150 & 223, and accompanying texts.

140 *See* http://www.usdoj.gov/atr/public/workshops/reworkshop_atrcomments.htm; editorial, *supra* note 122; editorial, *Justice v. Realtors,* WALL ST. J., Sept. 14, 2005 at A20.

141 *See* GA. CODE ANN. § 10-6A-4(a); OHIO REV. CODE ANN. §§ 4735.621; OKLA. STAT. tit. 59 § 858-353(D), -354(F); TENN. CODE ANN. § 62-13-404(3); VA. CODE ANN. § 54.2138.1. Other states permit waivers to be granted for some of the minimum services. *See* FLA. STAT. ANN. § 475.278(2)(a)(5); 63 PA. CONS. STAT. ANN. § 455.606a(a)(12) (communicating oral offers); Glenn Roberts, Jr., *More States Plan Minimum-Service Real Estate Laws,* INMAN NEWS, Sept. 19, 2005; Glenn Roberts, Jr., *Law Would Allow Consumers to Opt Out of Real Estate Services*, INMAN NEWS, Dec. 13, 2005.

142 The real need for these two requirements are discussed in sections III.C.1 and IV.B.2, *supra,* respectively.

143 It appears that approximately 20 percent of sellers use the FSBO option. *See* Amanda Gengler, *They Got How Much?*, MONEY, Apr. 2007, at 35 (referencing Real Trends data for 2006); Blanche Evans, *Houston Association Conducts First-time Survey of Local Buyers, Sellers,* REALTY TIMES, June 23, 2006 (reporting that more than 25 percent of sellers did not use a realtor); Thomas Grillo, *Should I Hire a Broker or Do it Myself?,* BOST. GLOBE, May 9, 2004, at H1 (reporting that a study of deeds found almost 25 percent were FSBOs); TYSON & BROWN, *supra* note 118, at 87 (estimating 20 percent); Colby Sambrotto, slides for October DOJ/FTC Workshop, Oct. 2005 at 5, http://www.ftc.gov/opp/workshops/comprealestate/sambrotto.pdf. (FSBO Slides) (more than 20 percent - citing Realty Viewpoint finding). *But see infra* note 184, and accompanying text. Furthermore, *Consumer Reports* found that almost all of the many who used the option would definitely or probably do it again. FSBO Slides, at 3 (finding that 94 percent of those using FSBO

do[144]). Even though such customers generally require substantially less time and effort from agents,[145] the current dominant, standard rate structure used by traditional brokers demands that consumers choose all or nothing. Those expecting to pay $600,000 for a home will also expect to pay about $18,000 (half of six percent) to a buyer's broker even if they only want 10 hours worth of assistance with paperwork and routine closing tasks. The situation is similar to that which occurred in the funeral industry in the 1970s, where "industry practice was to quote a package price based on a multiple of the cost of the casket, stating that 'this includes our full range of services.'"[146]

Traditional brokers claim that the small market share of "fee for service" or à la carte services[147] (which they claim are now widely available[148]), indicates little consumer demand, but that result appears to be largely due to the anticompetitive, if not illegal, tactics of traditional brokers. In addition to the practices discussed in section VIII, the primary problem in this area for sellers has historically been their inability to place their listings in the relevant local MLS.[149] Although, there are now brokers in most local

"Even though such customers generally require substantially less time and effort from agents, the current dominant, standard rate structure used by traditional brokers demands that consumers choose all or nothing."

would do it again). Finally, Murray Consulting, Inc.'s 2005 Real Estate Consumer Service Model Survey found that 33 percent of sellers (up from 18 in 2002) were confident that they could sell their own homes. Jeremy Conaway, What Role Will Associations Play in Addressing the Ultimate Question, Oct. 26, 2005, presentation at ICONN, San Francisco, http://www.reconis.com/recon/docs/ Industry%20Update%20for%20ICONN%2010.26.05.pdf at 27. One Canadian study found that FSBO rates in Canada were more than twenty-six percent, and that was in a buyer's market. *See* Michael A. Goldberg & Peter J. Horwood, *The Costs of Buying and Selling Houses: Some Canadian Evidence,* in Jaffe, *supra* note 60, at 143, 147.

144 *See* 2005 NAR Survey, *supra* note 95, at 39 (finding that 77 percent of home buyers purchase through an agent); Evans, *supra* note 143 (reporting that only fifty-seven percent of buyers used a realtor).

145 *See* Jayne O'Donnell & Sue Kirchhoff, *Discounters Setting Sights on Traditional Real Estate Market,* USA Today, June 9, 2005, at 1B (one ZipRealty executive reports that letting home buyers review properties online leads them to eliminate half of those they would otherwise have visited with a traditional firm's agent); Kadlec, *supra* note 28 (reporting that, according to the California Assoc. of Realtors, consumers who use the Internet average spending less than two weeks looking at homes and visiting six homes, while those who don't spend more than seven weeks and look at fifteen homes [although this may partly because buyers are looking on their own for 14 months, *see infra* note 304, and partly due to an exceptional sellers' market]); Jeremy Conaway, Brokerage Design, Nov. 5, 2005, http://www.reconis.com/recon/docs/Brokerage%20Design%20Bullets%20November%202005.pdf at 2 ("Internet empowered consumers require about half as much effort when dealing with a real estate service provider.").

146 *See* Mitford, *supra* note 12, at 176. Many firms refused to reduce prices when consumers asked to forgo items. *See* Funeral Industry Practices, 47 Fed. Reg. 42260, 42267 (1982), even though many in the business recognized that price reductions were justified. Id. at 42281-82. The FTC responded by requiring itemized pricing, id. at 42271, 42274-45, 42279. Most of the value of this rule was obliterated, however, by a June 1994 amendment to the rule, which permitted sellers to include a large minimum fee for overhead. Mitford, *supra,* at 182-83, 198-99, 203.

147 The market share of non-traditional brokers appears to be about 10 to 17 percent. *See* National Assoc. of Realtors, 2006 Profile of Home Buyers and Sellers __ (2006) (2006 NAR Survey) (reporting that 9 percent of sellers who use brokers use limited service brokers and 8 percent minimal service brokers); Dina ElBoghdady, *New Math on the Old Commission,* Wash. Post, Nov. 11, 2006, at F01 (reporting that Steve Murray of Real Trends estimated that "discounters" captured about 8 percent of home sellers this year, about 11 percent last year, up from 2 percent four years ago). Non-traditional brokers include many who don't consider themselves "discounters."

148 *See* Lewis, *supra* note 18, at 5 (claiming tremendous competition). The emergence of the fee-for-service model is discussed *infra* sections IV.B.2 and VII. Services especially targeted to FSBOs are discussed in Perri Capell, *Mistakes to Avoid When Selling Your Own Home,* RealEstateJournal.com, June 24, 2003, http://www.realestatejournal.com/buysell/agentsandbrokers/20030624-capell.html.

149 *See* sections VII.A.1 and VIII.D, *infra*.

markets willing to place listings on their local MLSs for a nominal fee,[150] traditional brokers are now resisting non-traditional competitors by failing to inform their clients about listings handled by non-traditional brokers, as discussed in section III.C, above. Some MLSs also refused to pass listings on to realtor.com if they did not include the "exclusive right to sell" agreements used by traditional brokers,[151] but the FTC cracked down on this practice in summer 2006.[152] Still, as long as traditional brokers dominate local markets and provide inferior cooperation to non-traditional brokers, buyers and sellers who want to avoid being discriminated against by the dominant "old boys club" and the resulting harms[153] will feel compelled to forsake the fee-for-service options offered by non-traditional brokers.[154]

2. Bundling Aids Brokers' Selfish Efforts to Constrain Seller Marketing

Sellers generally desire to reach as many bona fide potential buyers as possible, using all cost-effective media, including all bona fide websites.[155] Under the standard price structure, however, sellers who desire an "association with a traditional broker" must sign a contract that grants their listing broker full control over their "listing,"[156] and some traditional brokers contend that this gives them "ownership" of the listing.[157]

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150 *See New Flat-Fee Real Estate Company Offers Leads,* Inman News, Sept. 14, 2006,(discussing IHSRealty.com, which will list homes in MLSs in six states (and the other 44 through affiliates, plus other services) for as little as $399) (hereinafter IHS) ; Darlin, *supra* note 7 ($300 to $800 in almost every community); http://www.realestatebyownerinc.com/services.html ($199 for listing in Virginia/Maryland/DC MLS plus other services); Glenn Roberts, Jr., *Technology Fuels Flat-Fee Real Estate,* Inman News, May 25, 2005 (discussing Amerisellrealty.com, which offers MLS + website listings for $260-$500); Jeff Bailey, *Owners' Web Gives Realtors Run for Money,* N.Y. Times, Jan. 3, 2006, at A1 ($399); Carol Hazard, *Squeeeeezzzzing Commissions Playing the Percentages,* Richmond Times, Aug. 1, 2005, at D14 ($299); Andrea Jares, *Chipping Away at Commissions,* Ft. Worth Star-Telegram, June 5, 2005, at F1 (as little as $99); Linda Rawls, *A Cheaper Way to Sell,* Palm Beach Post, Sept. 2002, at 1F ($495); http://www.fsboadvertisingservice.com/flat-fee-mls-MLSMO.asp.

151 *See* James R. Hagerty, *Realtors Raise Pressure on Discounters,* Wall St. J., July 18, 2005, at A2 (reporting that MLS boards in Austin, Indianapolis, Cleveland, and Wilmington, N.C. refuse to pass on "exclusive agency" listings to realtor.com); Jessica Swesey, *FTC Charges Austin Realtors with Restraining Competition,* Inman News, July 13, 2006 (ditto for Heartland, Kan., and Monmouth-Ocean, NJ).

152 *See* FTC Press Release, Oct. 12, 2006, http://www.ftc.gov/opa/2006/10/realestatesweep.htm. Glenn Roberts, Jr., *FTC Targets Real Estate for Alleged Unfair Practices,* Inman News, Oct. 12, 2006 (many MLSs have eliminated such discriminatory policies, but two Michigan MLSs plan to defend them).

153 *See, e.g.,* the practices discussed *supra* section III. C.1; *infra* text accompanying note 180; section VIII. H. It appears that the only empirical data on this issue found that non-traditional brokers closed on less than 60 percent of their listings while traditional agents closed on about 88 percent. FTC 1983 Report, *supra* note 14, at 152.

154 Consumers may feel constrained until alternative brokers reach a tipping point, such as when a local FSBO database includes 30 percent of the homes for sale in a community. *See* Bailey, *supra* note 150. Again, this situation has significant similarities to funeral industry pricing. *See supra* note 146, and accompanying text.

155 *See* Ross, *supra* note 49, at 134, 244, 252; Bernice Ross, *Free Web Sites Can Maximize Real Estate Marketing,* Inman News, Mar. 3, 2006; FTC 1983 Report, *supra* note 14, at 28. In fact, sellers' desire for maximum exposure prior to the establishment of MLSs led them to prefer "open listings," which offered the whole commission to the buyer's broker. *See* FTC 1983 Report, *supra* note 14, at 112.

156 *See* Thomas Kunz, President and chief executive officer of Century 21 Real Estate, DOJ/FTC 2005 Workshop Transcript *supra* note 112, at 127-28.

157 In the words of NAR vice president Steve Cook, "the sellers don't own their listings. The data did not exist before the broker." *See* Clay Risen, Realtors v. the Internet, New Republic, May 2, 2005, at 14,

This leads many traditional brokers to compromise the interests of sellers[158] by limiting the dissemination of listings so as to enhance the listing's value as bait for attracting new buyer clients.[159] Listing brokers want buyers to come to a website affiliated with their firm to see listings so that their firm will have the best chance to gain those buyers as clients even if they do not buy the particular listing that attracts them. If other entities post the same listings on their competing websites, buyers may make first contact with the listing firm's competitors and be more inclined to employ one of them for aiding their home search.[160] In the same vein, brokers frequently withhold a listing from other brokers until their agents have had the chance to expose it to their own buyer clients ("pocketing" a listing[161]), so that they might collect both halves of the commission ("double-ending"),[162] even though such "in house" sales often deny sellers the chance to benefit from higher bids that might be offered by buyers represented by other brokers.

When in May 2003, the NAR adopted a policy that listing brokers be permitted to restrict the online republication of their listings by competing brokers,[163] the DOJ became concerned. Despite several rounds of NAR revisions, in September 2005 the DOJ brought suit against the NAR for its most recent version of the policy.[164] Among other things, the DOJ pointed out that the chairman of the NAR's working group on the rules admitted that refusing to share a listing with others "'may not be in the seller[']s best interest,'" and that "he took comfort in the fact that the rule did not require brokers to disclose to

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15; Glenn Roberts, Jr., *NAR Takes More Time to Review Listings Ownership Issues*, Inman News, Nov. 1, 2005.

158 As one REMAX broker admitted "I believe that if a homeowner who was trying to sell his or her home knew how we [realtors] were protecting all the listings, he or she would be incensed." Doug Palin, *Letters to the Editor,* Inman News, Mar. 4, 2005.

159 Similarly, Brokers see listings as their valuable assets. *See* Trulia, The Truth About Real Estate Search: Optimizing the Assets of the Residential Real Estate Industry on the Internet 4, 9 (Mar. 2006) http://www.trulia.com/resources/Trulia-The_Truth_About_Real_Estate_Search_White_Paper.pdf. Listing brokers have long recognized that the primary value of an initial open house is to attract new buyer clients. *See* Wilson, *supra* note 65, at 44-52; Robert J. Bruss, *Is Open House Effective Way to Market Real Estate*?, Inman News, Dec. 29, 2005. About seven percent of buyers meet their agent at an open house. 2005 NAR Survey, *supra* note 95, at 41; *infra* note 273 and accompanying text.

160 Thus, one realtor association sued to prevent a broker from selling home shoppers relevant pages from the MLS. *See* C. Christian Hill, *Gina Williams Outrages Brokers by Cutting Fees*, Wall St. J., Aug. 13, 1980, at 29.

161 *See* FTC 1983 Report, *supra* note 14, at 179; Carney, *supra* note 17, at 343, 352 n.22; Tracie Rozhon, *Agents Play Hide-and-Seek as the Market Quickens,* N.Y. Times, Apr. 4, 2002 at D10; Irwin, *supra* note 114, at 45, 61.

162 *See* Glenn Roberts, Jr, *SoCal Real Estate Company Wants Both Sides of the Transaction,* Inman News, Oct. 4, 2005. Most MLSs, however, require members to submit their listings within 72 hours or some such period. *See* Glenn Roberts, Jr., *Real Estate Agents Face Fines for Not Sharing Listings Data,* Inman News, Oct. 14, 2005. Still, U.S. Bancorp Piper Jaffray analyst, Jeff Evanson said "in a hot market, most homes get sold before they reach the Web," *see* David A. Patton, *The Best Way to...House Hunt: The Web Can Make Your Search for a New Home a Lot More Efficient*, Wall St. J., Dec. 6, 1999, at R43 (*see also* Kiplinger Staff, *supra* note 66, at 93).

163 *See* Patrick Barta & John R. Wilke, *Realtors' Limits on Web Listings Face a Federal Antitrust Inquiry,* Wall St. J, Oct. 24, 2003, at A1. Back in 2001, the NAR lobbied Congress to make it harder for non-members of the NAR to place MLS listings on their websites. *See* Patrick Barta, *Home Rules: Real-Estate Listings on the Web are Loosening the Grip Realtors Have Long Had on the Market,* Wall St. J, Oct. 29, 2001, at R12.

164 *See* DOJ 2005 Amended Complaint, *supra* note 18, at ¶¶ 7, 34 and 39. For a timeline of the events that led to the lawsuit, *see* Glenn Roberts, Jr., *NAR Online Listing Policy: Two Years in the Making,* Inman News, Sept. 9, 2005, http://www.inman.com/InmanNews.aspx?ID=47868.

clients that their listings would be withheld from some prospective purchasers . . ."[165] Independently, a California court also refused an MLS's request to issue an injunction to prevent a rival from publishing data included in its listing.[166]

The industry offers three defenses of its policy. First, it notes that MLSs were established and remain as a business-to-business resource for brokers to share information cooperatively[167] among themselves, not as a retail service for buyers and sellers. While this is historically accurate,[168] it does not justify denying sellers the chance to make their listings directly available to all home shoppers now that this is technologically practical, especially since a large number of buyers do not use brokers. One industry advocate complains that giving consumers direct access to the MLS would be like giving clothes shoppers direct access to designer showrooms.[169] Yet while it is impractical to modify designer showrooms to handle crowds of retail customers and the sellers do not want this, it is relatively easy to modify MLS databases to accommodate direct buyer access, and sellers would welcome and benefit from this.

Brokers should consider how technological change affected the airline reservation business. Airlines happily offer consumers the chance to discover ticket availability and make a direct purchase without the involvement of a travel agent. The airline-created Orbitz provides this. If the dominant airline reservation systems had been owned by traditional travel agents, however, they might well have acted like traditional real estate brokers, limiting consumer access to airline listings, forcing buyers to work with an agent, at least to make a reservation. Intermediaries who refuse to serve buyers' and sellers' best interests by offering them the access they desire, seriously risk being displaced by a new entrant that will offer such access.[170]

A second contention raised by one advocate for the brokerage industry is that listing brokers deserve the same rights as retailers like Neiman-Marcus: to enjoy the ancillary benefits of the traffic that "their" inventory attracts.[171] This position is somewhat analogous to the one taken by online auction site eBay when "aggregator" firms, like Bidder's Edge sought to attract buyers by offering a single aggregated list of all of the offerings in a product category (available from many, if not all, auction sites), including eBay.[172] eBay sued the aggregators to prevent them from using eBay's listings to attract

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165 DOJ 2005 Amended Complaint, *supra* note 18, at ¶ 7; *supra* note 158.

166 *See* Jessica Swesey, *Brokers Lose Grip on Real Estate Listings Control,* Inman News, June 17, 2005.

167 That is, the MLS was established to promote cooperation in place of competition. *See infra* note 351, and accompanying text. *See also supra* note 128, concerning cooperation in setting splits in the MLS.

168 Thus, the California legislature defined the MLS as "a facility of cooperation of agents, operating through an intermediary which does not itself act as an agent, through which agents establish express or implied legal relationships with respect to listed properties." Cal. Civ. Code § 1087 (West Supp. 1987) (emphasis added) cited in Collette, *supra* note 89, at 414. *See generally,* id, at 409-15.

169 *See* Blanche Evans, *Are Minimum Service Rules a Disservice to Consumers?,* Realty Times, Mar. 8, 2005, http://realtytimes.com/rtapages/20050308_disservice.htm.

170 *See infra* notes 255-258, and accompanying text, suggesting Google among other candidates for this service.

171 *See* Blanche Evans, *The Threat of a Collapsing MLS System is Real,* Realty Times, May 10, 2005; David Bank, *Microsoft Offers Home Buyers On-Line Site,* Wall St. J., July 13, 1998, at B6 (quoting Laurie Janik, general counsel of the NAR, as stating "[d]o you think a broker wants consumers to come to a site that's made valuable as a result of his hard work and then be shuttled off to another escrow company or another mortgage broker? That's not in his best interest.").

172 *See* eBay, Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058 (N.D. Cal. 2000).

shoppers interested in those listings to their sites rather than to eBay. Although eBay won a court victory, the court's holding focused on its concern that aggregators could cause harmful congestion to eBay's computers,[173] a concern that would not apply to MLS listings.[174] If buyers want one-stop access to an aggregated and easily searchable set of available homes of all kinds, then brokers should compete to offer that.[175] Home sellers do not grant brokers exclusive rights to their listing in order to allow them to affirmatively limit its dissemination to potential bona fide buyers.[176]

Finally, some industry supporters argue that since brokers compose the listings, republication of listings is a violation of the broker's copyright.[177] Setting aside the fact that copyright law does not protect facts about a listing *per se*,[178] there is the more fundamental matter that brokers' fiduciary duty to sellers certainly prohibits them compromising their clients' interests like this.[179]

Listing brokers also injure the interests of sellers when they offer non-traditional brokers only "adverse splits," i.e., less than a 50-50 split or even nothing at all[180] or refuse to show homes to clients of non-traditional brokers.[181] Again, their fiduciary duties should not permit such tactics.

"If buyers want one-stop access to an aggregated and easily searchable set of available homes of all kinds, then brokers should compete to offer that."

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173 *Id.* at 1067. *See also* Nadel, *Selection Process, supra* note 80, at 212-13.

174 *But see* Janis Mara, *Craigslist to Oodle: Stop Using Our Classified Ads,* Inman News, Oct. 18, 2005. Meanwhile, Bay is now encouraging such dissemination. *See* Bob Tedeschi, *More Data for Online Shoppers, and Plenty of Pictures Too,* N.Y. Times, Aug. 14, 2006, at C6.

175 *See* Nadel, *Selection Process, supra* note 80, at 216-17; Jessica Swesey, *Home Search Goes Vertical,* Inman News, Apr. 4, 2006; *see also infra* notes 255-257 and accompanying text.

176 Then again, listing agents could argue that this right is a second component of their fee. That is, absent this ancillary benefit, they would charge slightly higher commissions.

177 *See* David Charron, et al, Strengthening the Foundation: The Real Estate Listing Content Copyright FAQ and An Updated Program to Administer, Secure and Enhance the Value of Real Estate Listing Content (April 2006) at www.mris.com/news/papers/index.cfm; *Who Owns the Real Estate Data,* Inman News, Feb 21 & 22, 2005 (4 part series); Blanche Evans, *DOJ Doesn't Have a Case Says MLS Attorney,* Realty Times, Mar. 14, 2006.

178 *See* Feist Publications, Inc., v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991) (facts are not subject to copyright, despite the effort required to compile them).

179 *See supra* note 155, and accompanying text (sellers' interests); Glenn Roberts, Jr., *Real Estate Search Sites Hit Data Control Sore Spot,* Inman News, Jan. 23, 2006.

180 *See* Re/Max International v. Realty One, 173 F.3d 995, 1000-01, 1003 (6th Cir. 1999) (defendants offered plaintiff's agents only a 70-30 or 75-25 split instead of the standard 50-50 split); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985); Wilson, *supra* note 65, at 91-92; FTC 1983 Report, *supra* note 14, at 160; Trombetta, *supra* note 20, at 146-47; Roberts, *supra* note 110; Glenn Roberts, Jr., *Brokerage Heavyweight Protests Commission-Cutters,* Inman News, June 10, 2005; Glenn Roberts, Jr., *N.Y. Realtor Group Cautions Members on Rate Setting*, Inman News, Nov. 17, 2005; Jim Bourgoin, Buyers Advantage, Comment, Nov. 28, 2005 http://www.usdoj.gov/atr/public/workshops/rewcom/213405.htm. The NAR handbook recommended that splits be designed to "encourage cooperation," as opposed to competition, FTC 1983 Report, *supra* note 14, at 139, and it permits brokers to send a letter to particular brokers to inform them that the broker will not pay them the split indicated in the MLS listing, but rather a specific alternative fee. But this cannot be retaliation. *See* Blanche Evans, *Industry Questions Adverse Splits,* Realty Times, Feb. 24, 2003; NJ State ruling, http://www.state.nj.us/dobi/acrobat/recadvisory051220.pdf.(prohibiting adverse splits as retaliation); Glenn Roberts, Jr., *Real Estate Regulator Advises Fair Play in Discounter Commission Splits,* Inman News, Dec. 20, 2005. *See also* Valerie Cotsalas, *Brokers Who Represent Buyers,* N.Y. Times, Apr. 16, 2006, §11, at 12 ("many listing agents offer no commission to buyer's agents.").

181 *See* Damon Darlin, *The Last Stand of the 6-Percenters?*, N.Y. Times, Sept. 3, 2006, §3, at 1.

3. Bundling Inhibits Price Competition on Individual Selling Services

As reviewed in section VII, both selling and buying a home involve many relatively separate and distinct tasks and different agents will perform some better than others. Those best at negotiating when more than two parties are participating, might be below average in "staging" (decorating a home to sell well) or vice versa. The traditional rate structure, however, deters the emergence of specialized providers of these distinct services by requiring sellers to purchase the full bundle of services offered by traditional brokers. That is, sellers who feel compelled to use a traditional broker to avoid being shunned by other traditional agents will be forced to pay a full service fee. At that point, sellers will rarely find it advantageous to pay an additional fee to specialists unless the specialists charge less than the *incremental value* they add above and beyond what the traditional agent is already providing. This dramatically reduces the demand for individuals with expertise in only one task desired by a seller and who might well be able to provide a clearly superior level of service for that task at a lower, competitive price.

Many expected the Internet to drastically change the situation. By permitting home sellers to post a detailed description, including photos, of their home on a website easily available to home buyers, the Internet triggered predictions that the level of FSBOs would rise dramatically to as much as 40 percent of all homes sold.[182] In an effort to offer brokers an option for earning income from FSBOs rather than losing their business altogether, one highly respected real estate educator/broker wrote a book proposing that real estate agents transition into consultants, offering à la carte services for reasonable fees,[183] as discussed in detail in section VII, below. By early 2006, however, the NAR's fear of a great rise of FSBOs appeared to disappear.[184] Recently, traditional brokers have sought to protect their business model by raising entry barriers through the adoption of the minimum service requirements discussed above.[185] Those rules force brokers willing to place a listing in the MLS for a flat fee to either offer all of the required services – and raise their prices accordingly[186] – or go out of business.

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182 Gomez Research predicted that, aided by the Internet, over 40 percent of homes would be sold FSBO. *See* Gerri Willis, *Minimizing the Stress of Selling Your Home,* SmartMoney.com, Mar. 18, 2003, http://www.realestatejournal.com/buysell/agentsandbrokers/20030318-smartmoney.html; Garton-Good, *supra* note 9, at 17. *See also* Lynnket Browning, *The Sweet and the Sour of 'For Sale by Owner,* N.Y. Times, June 6, 2004, §3 at 5 (in October 2003, the NAR predicted that 25 percent of home sales could soon be FSBOs); Garton-Good, *supra* at xi (Gomez analyst estimates that the non-traditional segment of residential real estate brokerage could represent as much as 75 percent of total sales by 2005); John S. Baen & Randall S. Guttery, *The Coming Downsizing of Real Estate: Implications of Technology,* 3 J. Real Est. Portfolio Mgmt. 1 (1997). *But see infra* note 184. For actual figures and more predictions, *see supra* note 143.

183 Garton-Good, *supra* note 9. *See also* 2003 NAR Report, *supra* note 5, at 39-41 (describing unbundled service offerings); Mollie Wasserman, *Is the Commission System Unfair?,* Realty Times, June 8, 2000.

184 The NAR now reports that FSBO rates recently peaked at 18 percent in 1997, before stabilizing at 13-14 percent. The all-time peak recorded by NAR was 20 percent in 1987. Press Release, Jan. 17, 2006, http://www.realtor.org/PublicAffairsWeb.nsf/Pages/HmBuyerSellerSurvey06?OpenDocument. These statistics, however, do not appear to count a listing as a FSBO if the sellers uses a broker to place a listing in the local MLS. For other estimates of current FSBO rates, *see* note 143 and accompanying text.

185 *See supra* notes 138-141 and accompanying text.

186 *See* Roberts, *Amerisell, supra* note 150. This may also greatly raise broker costs by exposing them to the high cost of litigation. *See* Ross, *supra* note 49, at 37. *See also* Shelly Bucksot, *Real Estate Rumble,* June 2006 http://www.angieslist.com/AngiesList/membermenu/publication/Stories/2006/rumble.asp

V. Uniformity of Rates Irrespective of Expertise of Provider or Difficulty of Specific Task

A. Generally and Application to Broker Fees

In most markets buyers have options ranging from higher-priced, higher quality to lower cost, lower quality. Prices also generally reflect the estimated difficulty of performing a task. In some cases, however, retailers or service providers choose to set a single price for all options offered. The additional revenues from charging more for some options might be offset by the administrative costs of a more complicated pricing mechanism. Hence, many cafeteria-style food "bars" charge a single price per pound for all choices and low-priced hair cutters generally do not charge more for best workers or less to those, like the author, with few hairs to cut.[187] Uniform prices may also emerge for services that are sufficiently routine that excellent quality can be provided with relatively little experience. This category may include the preparation of 1) uncontested divorces for childless couples with no significant assets or 2) federal income tax returns for single filers with solely payroll income, no dependents, and nothing else unusual.

Given the size of the fees paid to brokers, it would seem just as practical to price each broker's services or the price of a project based on the brokers' skill level and experience or the perceived difficulty of the task as it is for lawyers and accountants to do so.[188] Rates appear to vary based on a task's difficulty in Sweden, Finland, Ireland, Mexico, and Belarus,[189] and for at least some brokers in the U.S.[190] Although levels vary among regions and somewhat from cold to hot markets,[191] "the shrewd, entrepreneurial, risk-taking broker willing to base commissions directly on his or her own estimate of the difficulty of selling a particular property appears to be absent from all geographic markets."[192]

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187 Differentiated prices do arise in these settings when higher prices make them administratively practical to offer, as for seats to sporting events, Broadway shows, most concerts, and at high-priced hair salons, where the price may include the tip necessary to ensure access to the stylist one wants on one's next visit.

188 *See, e.g.,* Jim Gillespie, *Are You Really a Top Agent, or Just a Commodity?,* Realty Times, Apr. 15, 2005. *But see supra* note 57 (reporting that personal injury attorneys rarely vary their contingent fee based on risk levels).

189 *See* Delcoure & Miller, *supra* note 28, at 29. *See also* Wachter, *supra* note 60, at 200 (finding considerable rate diversity among commercial real estate firms).

190 *See* Craig Venezia, *Roll the Dice on Commissions – That's No Hard 6,* S.F. Chron., May 6, 2007, at K7 (reporting that the percentage rate Jimmy Wanninger, in Mill Valley, charges "depends upon how quickly he believes the house will sell"); 1972 Forbes Cover Story, *supra* note 17, at 38 (discussing, Andrew Barr's sliding scale of two percent for easy, six percent for difficult); G. Christian Hill, *As Home Prices Rise, More Sellers are Using Reduced Rate Agents,* Wall St. J., June 26, 1979, at 1 (discussing Los Angeles agent Barney Feldman, who charged one percent for a listing if the home sold within one month, two percent if it sold within two months, and three percent if it sold in three or more months).

191 *See* GAO 2005 Rep., *supra* note 1, at 9-10; FTC 1983 Report, *supra* note 14, at 11 ("commission rates in all markets do tend to be roughly uniform from sale to sale."). Some regions with lower-priced housing, like the South, have higher average commissions, e.g., 7 percent. *See* Baylis, *supra* note 5 (quoting Leonard V. Zumpano, director of the Alabama Real Estate Research and Education Center). Also, when the defense industry contracted in Southern California and a recession hit the Northeast around 1990, creating a severe buyer's market, some sellers were offering real estate brokers commissions of eight to ten percent to successfully sell their homes. *See* Motoko Rich, *Nest Egg or One-Armed Bandit,* Sept. 15, 2005, at F1.

192 FTC 1983 Report, *supra* note 14, at 54

Given the substantial incremental financial and other value that superior agents can provide, one would expect superior negotiators and those with exceptionally detailed knowledge about a community to charge two, three, or more times more than novices. Nevertheless, U.S. residential brokerage firms do not advertise different rates for different agents based on their expertise the way other professional firms do.[193] This suggests that brokers are pricing their best agents too low or, more likely, their novice agents too high, to discourage price competition.

B. Harms

Uniform rates hinder buyers' chances to secure superior or lower-price services by offering to pay more or less than the standard fee. The fee framework encourages the most capable agents to seek those clients desiring higher-priced properties, even where the clients have no need for the agents' special skills. After all, assisting a family seeking a multi-million dollar home, but requiring little assistance could pay an implicit fee of even $10,000 per hour.[194] While there is normally nothing wrong with the highest bidder getting the services of the best agent,[195] here a family willing to pay $600 per hour for an agent with special expertise about schools for children with special needs, may, if they are seeking a home priced at the median of the community, lose out to a buyer with no desire or intention to outbid them.[196] A similar problem would arise if the legal fees for a divorce were based on the size of a couple's joint estate rather than on the quantity or complexity of the legal services desired.

VI. Prohibition Against Rebates

Although policymakers try to prohibit rebates that represent hidden kickbacks, which disguise conflicts of interest, agreements not to offer discounts are ordinarily *per se* violations of antitrust law.[197] Most of the state anti-rebate laws concerning broker

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193 *See, e.g., supra* note 191 and text accompanying n.21. This is not to deny that some new agents may charge less. *See, e.g., infra* note 273 and accompanying text.

194 If the agent described in Hagerty, *supra* note 10, seeking half of the $620,000 commission for aiding the buyer in finding the $15.5 million property is successful and that broker spent only 30 hours helping the buyer choose the home (though no time for closing, etc.) (*see* Garton-Good, *supra* note 9, at 96; *infra* note 216, the fee would represent more than $10,000 per hour). *See also* Hagerty, *supra* note 151 (reporting that a discount broker in Lancaster, PA, ran an ad estimating that traditional agents might earn $1,000 an hour for selling a $300,000 home).

195 In fact, Norm Miller has found that most top agents work about 50-70 hours per week and tend to specialize in listings rather than selling. *See* Miller, *supra* note 25, at slide 8 and oral presentation.

196 Levmore, *supra* note 6, at 507 recognized that the traditional uniform commission rate hindered the ability of those with more difficult needs to secure the desired agent's attention.

197 *See* Sherman Act, section 1. Catalano, Inc. v. Target Sales, 446 U.S. 643 (1980) (per curium).

fees[198] appear to have been designed to prohibit socially harmful payments.[199] Rebates by brokers, however, permit socially desirable price competition over broker fees.[200] Prohibiting them denies home buyers a chance to obtain a lower broker fee,[201] merely to protect the revenues of traditional brokers, who support it.[202]

Firms that offer such rebates aid buyers who do not realize that they can obtain reduced fees from their "free" brokers. These firms include retailers like Costco, which secure "affiliate" discounts for their members, and "lead generation" entities, like LendingTree and HomeGain, which negotiate a "referral fee" of as much as 45 percent of the buyer agent's broker's fee and then seek to attract buyers by offering them a share of that referral fee as a rebate.[203] An increasing number of brokers are also voluntarily offering rebates of a portion of the commission that listing brokers pay them, particularly when asked to match a competitor.

Meanwhile, a number of firms are offering substantially larger rebates based on business models that substantially reduce their costs of serving buyers. Seattle-based Redfin, Chicago-based BuySide Realty, and Mid-Atlantic-based IHS Realty, all offer buyers rebates of about 67% or more of the commissions they receive from listing brokers, where not illegal, although all leave it to buyers to drive themselves around to identify the home they want to purchase.[204] Buyer brokers who set flat fees or hourly rates agree to rebate any additional amount paid by the seller.

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198 Three states expressly prohibit rebates. *See* Ala. Code § 34-27-36(a)(12); Kan. Stat. Ann. § 58-3062(a)(4)(Supp. 2002); Miss. Code Ann. § 73-35-21(j)(2000), Miss. Reg. 50.025.001 (IV)(A)(5), PHH Real Estate Services Corp. v. Mississippi Real Estate Comm'n, unpublished fed. Dist. Ct. (S.D. Miss. 1997). Six or seven others base their prohibitions against rebates on laws prohibiting the sharing of real estate commissions with anyone but a licensed agent. *See* Alaska Stat. §08.88.401(d)(1)(Michie 2002); La. Rev. Stat. Ann. § 37:1446 (A) & (B)(West 2000); NJ Stat. Rev. Ann. §45:15-17(k)(West 1995 & Supp. 2003); N.D. Cent. Code § 43-23-11.1(l); Ok. Stat. Ann. 59 § 858-312(21)(West Supp. 2004); Or. Rev. Stat. §696.290(1)(West 2003). Missouri bases it on a statute prohibiting inducements. *See* Mo. Rev. Stat. 339.100(13), 339.150(2). Finally, Iowa prohibits rebates when the consumer uses two different brokers. *See* Iowa Code § 543B.60A(3)(b) (West Supp. 2003). (Amended 2005 by House File 882). New Hampshire has declined to enforce N.H. Rev. Stat Ann. §331-A:26(XXIV); .

199 *See* Mariwyn Evans, *Consumer Rebates,* Realtor Magazine, Jan. 1, 2006, http://www.realtor.org/rmo-print.nsf/pages/lawjan06 (referencing Sandy Taraszki, executive director of the Worldwide Employee Relocation Coalition).

200 *See* DOJ/FTC 2005 Workshop Transcript *supra* note 112, at 157-59 (Lending Tree attorney Philip Henderson).

201 As noted above, the DOJ, FTC, and editorial board of the *Wall Street Journal* are among the many who have expressed their strong opposition to such anti-competitive prohibitions. *See supra* note 140.

202 Although the NAR takes no official position on anti-rebate laws, the laws appear to result from NAR state affiliates, and the NAR's general counsel published an April 22, 2005 memo that observes that even anti-competitive state laws are generally exempt from the federal antitrust laws. *See* Blanche Evans, *Steel Magnolia v. The Men in Black,* Realty Times, Apr. 26, 2005.

203 LendingTree offers buyers gift cards from Home Depot or American Express of up to thousands of dollars, based on a home's sale price. *See* James R. Hagerty, *It Pays to Negotiate Your Agent's Commission,* RealEstate Journal.com, June 22, 2004, http://www.realestatejournal.com/buysell/agentsandbrokers/20040622-hagerty.html. *See also* realestate.com.

204 *See, e.g.,* James R. Hagerty, *Real Estate Brokers Step Up Rebates,* Wall St. J., Apr. 5, 2006, at D1; Jessica Swesey, *Internet Stock Brokerage Pioneers Enter Online Real Estate,* Inman News, Apr. 6, 2006; IHS, *supra* note 150. Redfin, however, offers to show buyer homes for an extra charge, *see infra* note 317; it also sets a minimum fee of $2,000. http://www.redfin.com. ZipRealty, one of the first in this niche, in California, offers a 20 percent rebate of its share of any commission it receives while providing full service. *See, e.g.,* James R. Hagerty, *Fat Rebates are the Key to this Agent's Success,* RealEstateJournal.com, July 12, 2004, http://www.realestatejournal.com/buysell/agentsandbrokers/20040712-hagerty.html.

VII. A Fee-for-Service, à la Carte Rate Structure

Instead of the traditional rate structure, with its serious drawbacks and lack of economic justification, consumers would be substantially better off if residential brokers used fee structures similar to those used by professionals in other advisory/consulting service fields, such as law, and accounting. Some brokers already bill for their services at hourly rates based on their expertise or at flat fees for a specific task or bundle of tasks.[205] In fact, unbundled services have been supported by commentators and offered by some brokers since at least as early as the 1970s.[206] Agents could also be offered bonuses in the form of a share of the incremental value they generated.

A good model for this approach was presented in 2001 by highly respected educator/broker Julie Garton-Good[207] in *Real Estate à la Carte: Selecting the Services You Need, Paying What They're Worth*. That book offered brokers a strategy for responding to predictions that FSBOs could grow to as much as 40 percent of the market[208] by offering services to FSBO sellers. And its relevance should grow as the Internet continues to spawn services likely to lead large numbers of home buyers and sellers to handle some of the tasks involved in home purchases and sales themselves and to seek corresponding fee

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205 *See, e.g.* IHS, *supra* note 150; Bailey, *supra* note 150 (discussing multiple firm); Eileen Tefft, LTD Real Estate, Custom Services, www.ltdre.com/SellerSystemCustom.aspx; Hazard, *supra* note 150 (Help-U-Sell offers many options with a minimum of about $2500); Ryan & Associates Realty, Fees for Services, http://www.sfproperties.net/ bin/web/real_estate/AR72746/ACTIVATE_FRAMES/ ABOUT/ San+Francisco/1158077484.html (Ryan); Jares, *supra* note 150 (Netoffer.com offers a la carte pricing starting at $99 and negotiations for $150 per hour); Rawls, *supra* note 150 (Gallery of Homes charged $349 for contract negotiations, $149 for contract preparation, and $249 for attending the closing); Stephen J. Dubner & Steven D. Levitt, *Endangered Species,* N.Y. Times, Mar. 5, 2006 §6 (Magazine), at 24 (Cary and Barbara Chubin charge $750 for an MLS listing, $50 per hour for showing the home, and $250 for negotiations and closing); www.RealEstateCafe.com ($100/hour for buyers).

206 *See* Boris W. Becker, Economic Aspects of Real Estate 106-07 (1972); 1972 Forbes Cover Story, *supra* note 17, at 36 (Jackson O. Wells, VP in the Beverly Hills office of Coldwell Banker advocated a fee for service model); Hill, *supra* note 190 (Hal Firestone, President of the non-traditional Home Sellers Center). *See also* William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel,* 56 Wash. L. Rev. 179, 208-11 (1980-81); Crockett, *supra* note 20, at 224; Braswell & Poe, *supra* note 121, at 327-29 (separate fees for separate services, commission only for finding a buyer); John E. Featherston, *The Future – It's Not Just a Job, It's an Adventure,* Nat'l Relocation & Real Estate, Mar./Apr. (#2), 1997, at 80, 81 (quoting John Tuccillo, NAR's chief economist, "the next major revolution in real estate will be the spread of fee-based services"); Arthur D. Little, 2005 Scenario Project (1999) (for the Nat'l Assoc. of Realtors), Exec. Summary at 27-28; G. Donald Jud & Stephen Roulac, *The Future of the Residential Real Estate Brokerage Industry,* 26 Real Estate Issues 22, 26-29 (2001); Maylone, *supra* note 62 (practices in early 1980s). Some consider it inevitable that flat fees for itemized services will gradually replace the traditional bundling of all services in a package for a fee based on a percentage-of-sales-price commission. *See* Wilson, *supra* note 65, at 26, 210; Glen Justice, *Lobbying to Sell Your House,* N.Y. Times, Jan. 12, 2006, at C1 (reporting that Dave Liniger, chairman and co-founder of Re/Max expects à la carte models to continue to rise as part of the evolution of the industry).

207 The NAR twice included Garton-Good on their annual list of twenty-five most influential people in the industry. *See* Blanche Evans, *Julie Garton-Good: A Profile of Personal Courage,* Realty Times, April 20, 2005.

208 *See supra* note 182. Although the NAR states that it no longer expects growth in FSBOs, *see supra* note 184, others disagree. One real estate brokerage consulting firm has observed that FutureNet Realty Technologies has developed and will soon be marketing the first "listing to close" technology enabled process, and that Zillow.com may become a platform for FSBOs. *See* Jeremy Conaway, A Fresh Approach for 2006, Dec. 12, 2005, http://www.reconis.com/recon/docs/A%20Fresh%20Approach%20for%202006%2012-09-05.pdf at 4; Walter S. Mossberg & Katherine Boehret, *A New Web Site for Real-Estate Voyeurs,* Wall St. J., Feb. 8, 2006, at D1.

reductions. In 2006, six years after Garton-Good had formed the National Association of Real Estate Consultants (NAREC),[209] the American Real Estate Broker Alliance (AREBA) was formed to promote flat-fee, limited service options.

A. For Sellers

Some agents justify their value to sellers by offering evidence that the seller can expect that the net sale price (after subtracting the broker fees) will be higher than the amount which the seller or any competitors would have obtained for the home.[210] Academic studies, however, have failed to find evidence of such net price increases.[211] On the other hand, there is no question that good listing brokers can 1) speed up the sale of a property (where desired), 2) permit sellers to avoid much of the time and grunt work involved in the sale, and 3) minimize the stress to sellers.

Although the concept of "full service" is generally left conveniently vague by those who contend that their lower-priced competitors offer much less,[212] it presumably includes all of the major tasks described in this section (VII.A) and in the many books on selling one's home.[213] On the other hand, it rarely includes the costs of extensive staging, (e.g., major renovations, landscaping) or extraordinary marketing efforts.[214] Interestingly, one Dallas firm asks customers to specify which of 25 distinct services they desire and then places the "job" out for auction to the broker offering the lowest commission.[215] Providing full service appears to require real estate agents to spend an average of about 40 hours per sale, although that figure can vary widely based on the state of the market and a client's personality.[216]

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209 *See* Blanche Evans, *Fee-for-Service Organization Gains Momentum,* Realty Times, June 17, 2004.

210 *See* Ross, *supra* note 49, at 169-79, 194; 2005 NAR Survey, *supra* note 95, at 68 (noting that the median selling price of a home represented by a broker was $230,000 while it was only $198,000 for a home sold directly by an owner, and claiming that the broker added $18,200 in net value ($32,000 – (6 percent of $230,000)).

211 *See* Miller, *supra* note 25, at slide 12 (stating that there is no solid academic evidence showing that agents can secure higher prices than FSBOs, except on their own homes); Frew & Jud, *supra* note 89, at 185 (finding that the use of a listing broker raised home prices by 2.2 to 3.1 percent although the commissions were 6 percent); Jud & Frew, *supra* note 89; Leonard V. Zumpano, et al, *Buying a House and the Decision to Use a Real Estate Broker,* 13 J. Real Est. Fin. & Econ. 169 (1996) (finding that the real estate broker has no appreciable, independent influence on selling price).

212 *See* Miller, *supra* note 25, at slide 9 and oral presentation. Vagueness may also allow brokers to omit important, expected services. *See supra* note 142 and accompanying text. *See also infra* note 367 and accompanying texts.

213 *See, e.g.,* William Effros, How to Sell Your Home in 5 Days (1998); Garton-Good, *supra* note 9; Ilyce R. Glink, 50 Simple Steps You Can Take to Sell Your Home Faster and for More Money in Any Market (2003); Irwin, *supra* note 114; Piper Nichole, The For Sale by Owner Handbook (2005); Tyson & Brown, *supra* note 118; Jeff Wuorio et al, The Complete Idiot's Guide to Selling Your Home (2005).

214 Extensive staging is discussed *infra* section VII.A.5. Extraordinary marketing could include extensive full motion video tours and color photo ads in local and regional publications.

215 *See* Jares, *supra* note 150 (Dallas's Realty Baron). Other sites also use auctions, *see* Glenn Roberts, Jr., *Bidding for Real Estate Commissions,* Inman News, Mar. 14, 2005; *Real Estate Commission-Bidding Site Now Targets Buyers,* Inman News, Oct. 3, 2006 (*Commission-Bidding*).

216 Julie Garton-Good's 2000 survey of 100 experts estimated that it takes an average of about 83 hours to sell a home. Garton-Good, *supra* note 9, at 96. On the other hand, 1982 and 2002 surveys by the California Assn. of Realtors (CAR) found that the time required to serve sellers has dropped from about 40 hours to about 20 hours. *See* Barry, *supra* note 25, at 60-61. *See also* Ryan, *supra* note 205 (68-80 hours). The CAR figure, however, is probably due, at least in part, to consumer use of the Internet, *see supra* note 145, and a very hot market. *See also* Larry A. Whited, *Close and Consolidate: The New Reality of Real Estate,* Inman News, Mar. 1, 2006 (40 hours).

A sampling of non-traditional brokers finds that they offer "full service" at flat prices that vary from about $2,500 to $4,500.[217] Yet if these figures reflect the fewer hours required for sales during the sellers' market that persisted through mid-2005, one would expect them to rise during a more balanced period or in a buyer's market, where more time is required to sell a home. On the other hand, much of the extra time involved might simply be time spent waiting, during which agents could be handling other properties or working on other tasks.

In addition to the many sellers who will prefer full service, even FSBO sellers are likely to find it cost effective to use real estate professionals for at least some tasks involved in selling a home:[218]

1. Listing the home in the local MLS
2. Making an offer to finishing closing
3. Setting both an optimal selling price and an optimal time to sell
4. Advertising beyond the MLS, i.e., newspapers, online, alternative MLSs
5. Staging a home: interior decorating, cleaning, repairs, etc.
6. Visits by potential buyers, including open houses, and securing bona fide offers
7. Negotiations
8. Other services

1. Only an MLS Listing

Because about 86 percent of home buyers work with an agent at some point during their search,[219] and agents generally rely on the approximately 1,000 local MLSs[220] as their primary sources of available homes, listing a home in the relevant local MLS appears essential to obtaining the highest purchase price. Even those home shoppers who do not use brokers are likely to consult the NAR's realtor.com—with its two million listings[221] —or at least one of the other websites that are populated from local MLSs, like those at WallStreetJournal.com or aol.com.[222] Thus, placing a listing in the local MLS appears to be the à la carte offering most desired by sellers.

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217 *See Real Estate Company Refers Flat-Fee Listings to Realtor Network,* Inman News, Feb. 9, 2006; ($2,500 by Progressive Homesellers, which refers sellers to agents at brokerages such as Coldwell Banker, Century 21, and Prudential); Caverly, *supra* note 68 (Assist-2-Sell charges $2,995); Elbert David, *Flat-fee Brokers Compete for Sales,* Des Moines Register, Apr. 23, 2005, at 1 (Equisave charges $3295 and Next Generations charges $4490, although neither posts the listing in the MLS); Gomes, *supra* note 231 ($3500); Glenn Roberts, Jr., *Home Sellers Test Alternative Realty Shops,* Inman News, Feb. 23, 2005 (SellSmart Real Estate, based in San Diego, offers listings as low as $2,950 plus $1,000 for each $100,000 a home's price exceeds $300,000); Rawls, *supra* note 150 ($2995); Hazard, *supra* note 150 (Help-U-Sell offers many options with a minimum of about $2950 (but excludes showing home). One licensed agent in Northern Virginia with eighteen years of experience was offering "full service" for $1299 on craigslist.com in February 2006.

218 For a more comprehensive list of the services that may be offered by real estate agents, *see* The Critical Role of the Realtor in the Real Estate Transaction, http://www.orlrealtor.com/Files/PDF/Value_of_a_REALTOR.pdf.

219 The 2003 National Association of Realtors Profile of Home Buyers and Sellers, summary of buyers at 4.

220 *See* DOJ 2005 Amended Complaint, *supra* note 18, at ¶ 13. These 1,000 include all major metropolitan areas, except New York City. Approximately 900 MLSs are affiliated with the NAR, and by 2003 more than 800 were posting on realtor.com. *See* GAO 2005 Rep., *supra* note 1, at 6; 2003 NAR Report, *supra* note 5, at 18.

221 *See* GAO 2005 Rep., *supra* note 1, at 18.

222 *See* Bernice Ross, *Simple Strategies for Online Real Estate Exposure*, Inman News, Feb. 24, 2006. Then again, some listings are not passed on the realtor.com et al, see *supra* note 151.

Brokers in some localities offer to post an MLS listing for as little as $99, although $400 appears to be more typical for this Listing Entry Only (LEO) service.[223] Some believe that fixed-price access to MLSs is inevitable,[224] and it certainly appears comparable to placing a "for sale" real estate ad in a local newspaper. The NAR and its supporters, however, are adamant in refusing to permit the MLS to be treated as a public utility,[225] which would facilitate price competition.

As discussed in section III.C.1, above, listings in the MLS are generally much less valuable if they do not offer the buyer's broker a commission at the "going rate." Still, where the local MLS passes all its listings on to realtor.com and other such websites,[226] the listing can attract buyers without brokers. If MLSs continue to be operated to favor brokers over consumers,[227] then a new entity, like Google, may displace the current, NAR-affiliates with a more inclusive MLS.[228]

2. Closing – Handling Everything After a Buyer Has Been Selected

One generally hires a listing broker primarily to find a buyer,[229] but with so many tasks involved in completing a sale even after a seller accepts an offer, hiring a real estate professional (whether broker, lawyer, or other) is probably cost efficient.[230] Assist-2-Sell franchisees typically offer to handle closing for about $2,000 to $2,500,[231] Redfin charges $2,000 and also places the listing in the local MLS, and others charge even less.[232] Garton-Good estimated a median time-frame of ten hours for the negotiating between a FSBO and a qualified buyer and monitoring the sale to a successful sale and, she suggests a fee of $150 per hour capped at $1500.[233]

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223 *See supra* note 150. The charge appears to vary based on what changes sellers can make to a listing, the fees that agents must pay to access the MLS, the costs of operating MLSs, and the volume of users in each particular market.

224 *See, e.g.,* Braswell & Poe, *supra* note 121, at 328; Yavas & Colwell, *supra* note 48, at 271.

225 *See* Thomas M. Stevens, *MLS: The Essential Difference,* Inman News, Sept. 5, 2006; Evans, *supra* notes 169 & 171. *See also supra* note 138; *infra* section VIII.D.

226 Some MLSs have refused to pass exclusive agency listings on to realtor.com et al. *See supra* note 151.

227 *See infra* section VIII.D.

228 *See infra* notes 255-258 and accompanying text.

229 *See* Robert J. Bruss, *Fix-up Home Seller Shouldn't Expect Top Dollar,* Inman News, Feb. 21, 2006 (once you've found a buyer "you don't need a professional agent."); Gillespie, *supra* note 134. *But see* Ross, *supra* note 49, at 277, 291, 294 ("Any experienced agent knows that 80 to 90 percent of the work occurs in closing the transaction, especially in resolving appraisal problems, title problems, credit reports, inspections,…. [there is a] misconception that the agent earns their [sic.] money primarily for marketing the property . . .").

230 *See* Garton-Good, *supra* note 9, at 91-93; Ross, *supra* note 229.

231 *See* Andrew Gomes, *Selling Your Home Sans the High Fees,* Honolulu Advertiser, Oct. 9, 2005, at 1 ($2495 for the paperwork only option). On its website Iowa-based DealYourOwn.com indicates that it charges $1,000 for negotiations and closings. *See How Much Does This Cost?,* at http://www.dealyourown.com/listproperty.asp.

232 *See* Darlin, *supra* note 181. One Wisconsin real estate lawyer charges $600 for handling all of the legal issues involved for FSBO sellers, *see* Bailey, *supra* note 150; a Florida firm charges $249 to attend the closing, *see* Rawls, *supra* note 150 (Gallery of Homes, Florida); a Texas agent charges $1995 for full closing services, *see* Presentation of Aaron Farmer, Texas Discount Realty, Oct. 15, 2005, at slide 3, http://www.usdoj.gov/atr/public/workshops/ rewcom/213243.htm; another broker is willing to handle closing for a one percent commission. *See* Glenn Roberts, Jr., *Consumers Unzip Variety of Real Estate Businesses,* Inman News, Feb. 22, 2005.

233 *See* Julie Garton-Good, Consult and Grow Rich: Why Be a Real Estate Consultant? 9 (2001). *See also*

3. Setting an Optimal Asking Price & When to Sell

To obtain the best price for their home, sellers usually need to set an appropriate initial asking price, although much depends on whether they are in a sellers' or a buyers' market.[234] In a hot or sellers' market—where sellers asking a reasonable price for a typical home expect to receive multiple offers on the first weekend a home is listed —there would seem to be little need to pay a broker to predict the highest attainable price for a property.[235] Sellers could estimate their home's market value aided by an automated comparative market analysis (CMA),[236,237] or even CMAs from agents.[238] That price, or one a bit less, should attract all potential buyers and, if managed well, stimulate competitive bidding and lead to an excellent sale price.[239]

In a buyer's market, setting an appropriate asking price is more difficult and important.[240] A price too low will not necessarily be corrected by competitive bidding, and one too high has multiple drawbacks: First, it is likely to increase the time it takes to sell the home[241] Second, the longer the home remains unsold the more buyers are apt to

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Ryan, *supra* note 205 (estimating between 13 and 20 hours at $100 per hour).

234 A market is generally considered "balanced" if there are approximately equal numbers of buyers and sellers and the inventory of homes represents about six months of average monthly sales. If inventory is less than a six month supply of homes, it is considered a seller's market; more than a six month supply is considered a buyer's market. Standards are not precise. *Compare Survey: Home-Buyer Demand, Seller Supply Nearly Balanced,* Inman News, Apr. 6, 2006 to Ross, *supra* note 49, at 236.

235 Even defenders of full service agents concede this. *See* Kelly Sweeney, *Why Traditional Real Estate Brokerage is Alive and Well,* Inman News, Nov. 10, 2005.

236 *See* Marilyn Lewis, *Putting Home-Value Tools to the Test,* MSN Money, undated, http://moneycentral.msn.com/content/Banking/Homefinancing/P150627.asp?GT1=8176; John M. Clapp, *A Semiparametric Method for Valuing Residential Locations: Application to Automated Valuation*, 27 J. Real Est. Fin. & Econ. 303 (2003) (discussing an economic model that predicts lot values based on longitude and latitude); Blanche Evans, *Zillow Gets FTCillowed,* Realty Times, Oct. 27, 2006.

237 After identifying a few of the best matches, a CMA then adjusts the value of each of the comparables by subtracting an estimated value for significant features it has that the home being priced lacks, and adding the estimated value of features that the latter includes, but the comparable lacks. *See* Tyson & Brown, *supra* note 118, at 169-77. Each comparable will produce an estimate and the estimates are averaged.

238 Many agents offer estimates to FSBO sellers because the agents know that many of the sellers will eventually hire brokers. *See* Robert J. Bruss, *How to Correctly List Your Home for Sale,* Inman News, Mar. 10, 2006.

239 *See* Darlin, *supra* note 114. While some might consider it misleading to list a home at a price that is less than one would accept for it, the practice is not illegal and is widespread. *See* Robert J. Bruss, *Home Buyers Fall Victim to Listing Agent's Dirty Trick,* Inman News, Aug. 10, 2005. Lower initial prices, i.e., entry barriers, generally attract more buyers who then invest time and effort evaluating the property and the increased popularity competition that often stimulates buyers to make bids that exceed pre-set maximums. *See,* Gillian Ku et al, *Starting Low but Ending High: A Reversal of the Anchoring Effect in Auctions,* 90 J. Personality & Soc. Psychol. 975 (2006); Kimberly Blanton, *Going Once . . . in Echo of '90s Bust, Auction Set for 34 Unsold Luxury Condos in Hub,* Bost. Globe, Sept. 6, 2006, at A1. In fact a 2005 *Wall St. J.* Online/ Harris Poll found that almost twenty percent of home buyers exceeded their maximums. *See Wall St. J.* Personal Finance column in mid-Sept. http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-16-2005/0004109184&EDATE=.

240 Then again, a small number of home sellers avoid the issue by selling their homes in an auction, *see* Glenn Roberts, Jr., *Real Estate Industry Sets Sights on the Auction Block,* Inman News, Aug. 14, 2006; Kimberly Blanton, *Sellers Literally Put Homes on the Block,* Bost. Globe, Mar. 14, 2006, at D1, although the buyers willing to pay most for a home might not participate.

241 *See* Paul M. Anglin et al, *The Trade-off Between the Selling Price of Residential Properties and Time-on-the-Market: The Impact of Price Setting,,* 26 J. Real Est. Fin. & Econ. 95 (2003). Starting with a price too high also appears to lead to a reduced final sales price. *See* John R. Knight, *Listing Price, Time on*

suspect that there is a serious defect.[242] Third, an excessive price may discourage some buyers from even visiting the home.[243]

Thus, it may be useful to employ an expert and more sophisticated CMA to set the price.[244] Still, sellers must be on guard against agents trying to "buy a listing,"[245] by overestimating the home's fair market value. Listings are valued by brokers because they permit open houses and visits, which can serve as bait for attracting potential home buyer clients.[246] Sellers should seek an expert who feels no pressure to give excessively high[247] or conservative assessments.[248] Garton-Good estimates that this might take an expert a few hours plus the time for a consultation,[249] although that might be low. Expert appraisals appear to be available for a fee on the order of $350.[250] In volatile markets, sellers might also want an expert to reevaluate their asking price fairly frequently.[251]

4. Advertising Beyond the MLS: Newspapers, Online, Etc.

In addition to the dominant, traditional MLS, there are many other websites that can be used to reach potential buyers, often free of charge, like Craigslist, Google,

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Market, and Ultimate Selling Price: Causes and Effects of Listing Price Changes, 30 Real Est. Econ. 213 (2002).

242 Buyers tend to devalue "stale" listings. *See* Curtis R. Taylor, *Time-on-the-Market as a Sign of Quality,* 66 Rev. Econ. Stud. 555 (1999) (noting this effect when past prices are not observable, but that buyers' suspicions can be allayed if they are aware of higher initial price); Garber, *supra* note 78, at 14. Thus, once a listing is perceived as stale, it may be wise to delist it and relist it later as a "fresh" listing. *See* Irwin, *supra* note 114, at 7.

243 *See* John Knight et al, *List Price Signaling and Buyer Behavior in the Housing Market,* 9 J. Real Est. Fin. & Econ. 177 (1994).

244 The process of estimating the value of the features that differ between the homes is probably as much art as science. *See* Barry G. Gilbertson, *Appraisal or Valuation: An Art or Science?,* Real Est. Issues, Fall 2001, at 86; Wilson, *supra* note 65, at 122-30; Bernice Ross, *Real Estate Values Need Human Interpretation,* Inman News, Mar. 17, 2006. *See also* G. Donald Jud and Dan T. Winkler, *The Dynamics of Metropolitan Housing Prices*, 23 J. Real Est. Res. 29 (2002) (predicting home price appreciation based on changes in population, real income, construction costs, stock market appreciation, and interest rates).

245 *See* Wilson, *supra* note 65, at 126-28; FTC 1983 Report, *supra* note 14, at 152 n.444.

246 *See supra* note 159. Such agents might plan to advise a price reduction as soon as the seller became impatient, but until then the agent could meet buyers seeking homes in that price range and use it to prime other buyers before showing them better priced homes. *See* Tyson & Brown, *supra* note 118, at 192. *See also infra* section V.A.7.

247 *See* Sarah Max, *Appraisal Fraud: Your Home at Risk,* CNN/Money, June 2, 2005 at http://money.cnn.com/2005/05/23/real_estate/financing/appraisalfraud/index.htm (reporting that the Appraisal Institute recently told Congress that appraisers are under increasing pressure from mortgage bankers and agents to confirm sale prices so that deals can go through); Blanche Evans, *October Research to Survey Appraisers About Pressured Home Values,* Realty Times, Mar. 1, 2006.

248 Some criticize current appraisers for banks of giving low appraisals. *See* Roy T. Black et al, *Behavioral Research in Real Estate: A Search for the Boundaries,* 6 J. Real Est. Prac. & Educ. 85, 88-90 (2003); *supra* note 247. *But see* Ray Wilson, Basic Advice to Sellers: Appraiser, Yes! CMA, No!, 2001 *available at* http://www.ired.com/buymyself/agency/cma-no.htm.

249 *See* Garton-Good, *supra* note 9, at 69-71, 129.

250 *See* Irwin, *supra* note 114, at 36 (REPs with either an MAI or SREA designation).

251 This is one of the many valuable consulting services that has been offered by the RealEstateCafe.com. *See also* http://www.realnegotiate.com/PriceAnalysisService.htm.

Trulia,[252] and including those maintained especially for FSBO homes.[253] Moreover, listings online, with their capacity to include photos and extensive lists of features, if not video tours, at relatively lower costs, are gradually displacing printed classified ads in the local newspaper.[254] In response, however, many local newspapers are storing their real estate ads in databases that permit readers to search them as if they were MLSs. If local newspapers enhance those databases and listings, they could maintain quasi-MLSs, open to all sellers for a non-discriminatory fee[255] and available for free, advertiser-supported searching by buyers.[256] Alternatively, Craigslist, Google, Zillow, or offerings of the Open MLS Institute, or the like might well dominate this market niche,[257] particularly if economies of scale favor a single, national database.[258] The Orbitz airline website offers a variation on this model. Sellers might also want help monitoring any databases of bona fide buyers that arise.[259]

Some sellers might want an agent conversant in the flirty and seductive terminology of real estate to prepare a verbal description of their homes,[260] and most would likely want experts to take photographs and produce video tours, as well posting these, floor plans, and other relevant data on a website,[261] although top quality outcomes might cost

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252 *See* Ross, *supra* note 155; James R. Hagery & Kevin J. Delaney, *Google, Craigslist Expand into Real Estate,* Wall St. J., Apr. 6, 2006, at D1. And some brokers are using them to help sellers. *See* Glenn Roberts, Jr., *Houston MLS Puts Real Estate Listings on Google Base,* Inman News, Dec. 11, 2006. There are also tools for automatically feeding such sites. *See* Glenn Roberts, Jr., *Classified Listings Tool Pumps Real Estate Ads to Many Sites,* Inman News, Apr. 7, 2006; Roger Noujeim, *Letter*, Inman News, Apr. 10, 2006. Also emerging are a new set of real estate-related blogs, such as Chicago's yochicago.com. *See* Glenn Roberts, Jr., *Community Real Estate Sites Taking Off,* Inman News, Feb. 28, 2006.

253 These include nationwide websites, like owners.com and foresalebyowner.com, *see* Patton, *supra* note 162; Sambrotto, *supra* note 143, at 4, and local websites, like fsbomadison.com and buyerowner.com, *see*-Bailey, *supra* note 150; Rawls, *supra* note 150.

254 *See,* Jessica Swesey, *Print Struggles for Share in Online Real Estate,* Inman News, June 5, 2006; Colby Atwood et al, 2006 Update: Online Real Estate Advertising (Borrell Associates, July 2006) at 3-4 (reporting that at the end of 2005, the Internet became the most-used method of selling a home and that Borrell predicts that Internet real estate advertising will surpass newspapers in terms of advertising market share by 2010). Then again, newspapers can enhance their classified ad listings by using easily searchable online databases and partnering with others. *See* Jessica Swesey, *Fragmented Ad Market Opens New Possibilities,* Inman News, June 6, 2006.

255 *See* Jessica Swesey, *Next Generation of Real Estate Classifieds,* Inman News, June 7, 2006. The Tribune Company recently acquired forsalebyowner.com. *Cf. supra* note 224.

256 Local brokers might threaten retaliation, but it is not clear that their clients would be willing to support any efforts they made to withhold real estate ads from the local newspaper.

257 *See* Hagerty & Delaney, *supra* note 252; Glenn Roberts, Jr., *Move Inc. Leader Sees 'Ferocious' Battle for Real Estate Consumers,* Inman News, May 23, 2006; Glenn Roberts, Jr., *Zillow's Listings Offering Meets Metered Optimism,* Inman News, Dec. 7, 2006; Blanche Evans, *RE/MAX's Website Adds Another Giant to Lead Generation Resources,* Realty Times, Apr. 12, 2006; Bob Tedeschi, *Providing Free Real Estate Listings from a Broader Market,* N.Y. Times, May 1, 2006, at C6 (discussing Move.com); Glenn Roberts, Jr., *MLS Ballot Initiative is 'Ill Conceived,' Says Realtor Lawyer,* Inman News, Dec. 22, 2005; Glenn Roberts, Jr., *Industry Think-Tank Deliberates MLS Future,* Inman News, May 4, 2006; Brendan King, *What a National Real Estate MLS Might Look Like,* Inman News, April 24, 2006; http://www.openmlsinstitute.org.

258 For one traditional-broker-centric view of this *see* Brendan King, *What a National Real Estate MLS Might Look Like,* Inman News, Apr. 24, 2006.

259 Glenn Roberts, Jr., *Sellers Do the Searching at BuyerHunt.com,* Inman News, Nov. 21, 2006.

260 Other sellers might handle this themselves. *See* Garton-Good, *supra* note 9, at 66-69, 74-75; Blanche Evans, *Create an Incredible Feature Sheet for Your Listings,* Realty Times, July 5, 2005.

261 *See* Vivian S. Toy, *Making Every Pixel Count,* N.Y. Times, Feb. 11, 2007, §11 at 1; Matt Carter, *Com-*

thousands of dollars. Agents might also consider research to see whether any previous owners of older homes or homes on the same street later became famous, giving the homes additional psychic value to some buyers.

5. Staging a Home: Interior Decorating, Cleaning & Repairs

One doesn't get a second chance to make a first impression, so it is important to prepare a home to highlight its strengths, including its superficial "curb appeal," while not discouraging any suitable buyer.[262] Suggestions are available free on television shows about staging, including A&E's *Sell This House* and HGTV's *Designed to Sell*,[263] as well as books, magazines, web pages, and from visiting other homes.[264] Still, some sellers might find it profitable to consult one of the half-million real estate professionals and interior decorators who have been trained in the concept of "staging."[265] This includes, at a minimum, the "3 Cs:" cleanliness, clutter reduction, and color, and may also involve landscaping, wall papering, and filling a home with rented furniture.[266] Expert stagers charge fees of $30 to $150 per hour or more and require an average of about three hours;[267] although elaborate stagings can run far more.[268] Sellers might even offer experts most of any price increase obtained after staging expenses paid by the expert.

"One doesn't get a second chance to make a first impression, so it is important to prepare a home to highlight its strengths, including its superficial "curb appeal," while not discouraging any suitable buyer."

6. Visits by Potential Buyers, Open Houses, and Other Contacts

Many experts believe that a seller's presence at an open house may inhibit a buyer's ability to fantasize about a home[269] or ask important questions, and it can be dangerous for a seller to show a home alone to a stranger.[270] Therefore, sellers might want to use

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panies, Agents Break into Real Estate Video, Inman News, Apr. 25, 2007; Matt Carter, *Video is King of User-Generated Content,* Inman News, Oct. 4, 2006; Glenn Roberts, Jr., *Mapping at the Micro Level,* Inman News, Nov. 22, 2006.

262 For example, one expert warns that "prospective buyers will overlook many things, but a dirty house is not one of them." *See* Garton-Good, *supra* note 9, at 61.

263 *See* Teresa Wiltz, *TV's Hot Properties: Real Estate Reality Shows,* Wash. Post, Dec. 28, 2005, at C01; J.N. Sbranti, *Creating Appeal: In Languid Market, Houses Must be Set Apart from the Rest,* Modesto Bee, Aug. 4, 2006, at D1.

264 *See, e.g.,* Tyson & Brown, *supra* note 118, at 150-55; Ross, *supra* note 49, at 156-60; Kiplinger Staff, *supra* note 66, at 288-94; Garton-Good, *supra* note 9, at 64-65; Vivian Marino, *Sold at First Sights,* N.Y. Times, July 30, 2006, §11 at 1; Andrew LePage, *Staging the Sale,* Sacramento Bee, Feb. 19, 2006, at D1.

265 *See* Barb Schwarz, Home Staging (2006). West Coast realtor Barb Schwarz is credited with inventing staging in 1972. *See* http://www.stagedhomes.com/public/history.php; Julie Janovsky, *Staging Smarts in a Competitive Market,* Newsday, May 31, 2006, at C12. *See also* Marino, *supra* note 264. Most professional providers are members of the International Association of Home Staging Professionals (www.iahsp.com) or the Interior Arrangement Design Association (www.interiorarrangement.org). *See* Marino, *supra*.

266 *See* Schwarz, *supra* note 265, at 16; Janovsky, *supra* note 265. Efforts to seduce buyers can also include ensuring an attractive scent in the home, although this can backfire. Even when sellers do not want to make major repairs, cost estimates can aid a buyer during negotiations in case a buyer overestimates the cost. *See* Dian Hymer, *What Work Should be Put into a House for Sale?,* Inman News, Mar. 6, 2006.

267 *See* Marino, *supra* note 264 (reporting that an average homeowner can expect to spend around $1,500, that a base consultation offering suggestions runs $150 to $300, and that fees can be upward of $100,000).

268 For example, one decorating firm that offers to glamorize a development explains that "we write a script, just like for a movie" to give the home a personality, and its charges can approach 20-30 percent of the home's selling price. *See* Garber, *supra* note 78, at 21 & n.29, citing Ruth Simon, *Hit the Prospect at Every Emotional Level*, Forbes, Jan. 9, 1989, at 310. *See also* Janis Mara, *New Real Estate Staging Tactic: Happy Family,* Inman News, June 7, 2006.

269 *See* Garber, *supra* note 78, at 9-10.

270 *See* Garton-Good, *supra* note 9, at 82; Marlow Harris, *End of 6%,* 360 Digest, Sept. 3, 2006, http://

agents to handle this. Meanwhile, agents may well be willing to handle at least one open house at minimal charge, given that data indicate that open houses may be more effective for generating new buyer clients for brokers[271] than purchasers of the home opened.[272] In fact, the chance to gain new clients led one agent to accept a fee of only $1 to sell one $2.7 million home, and one expert suggested that listing brokers consider cutting their fee to the seller every time that marketing the seller's home brings them a new buyer client.[273] In buyer markets it may be desirable to employ agents to follow-up with all visitors who appeared to be interested[274] and to handle all calls from buyers.[275] Traditionally, buyers working with agents rely on the latter to accompany them on visits to the home except for open houses. Buyers without their own brokers might want the seller's broker to show them the home at no charge, but if the seller's broker is asked to handle this traditional task of a buyer's broker, the seller's broker is apt to seek the full buyer broker co-op fee.[276]

7. Negotiations

Even sellers who are skilled negotiators may want an established agent or brokerage firm to aid in negotiations because of their special access to timely data, such as the most recent offers (accepted and rejected), the number of sellers preparing to place their homes on the market and the state of mind of current buyers and sellers. They may also be able to discover any relevant data about a buyer, such as time, financial, and other constraints and how much they love the home. In addition, buyers and agents aiding them are likely to view agents as more credible than an individual seller who will often soon exit the area. Good agents will also know the local customs, twists, and intricacies of bidding, including the use of exploding bids in competitive bidding,[277] and dividing closing costs. In fact, a buyer uncertain between two homes may well favor the one associated with a more highly respected agent. In other instances, a reputable local lawyer specializing in residential real estate transactions may be sufficient,[278] particularly

360digest.com/2006/09/03/end-of-6/. Some brokers even suggest that showings be limited to buyers who have been pre-approved for a sufficient loan to purchase the home. *See* Blanche Evans, *Should You Show Your Listing to Buyers Who Aren't Preapproved?,* Realty Times, Sept. 29, 2005.

271 *See* Hagerty, *supra* note 9; *supra* note 159.

272 Data indicate that not even one percent of home owners found their home through an open house. *See* 2005 NAR Survey, *supra* note 95, at 29. *But see* Ardell DellaLoggia, *Should You Have an Open House,* Seattle's Rain City Real Estate Guide, Apr. 3, 2006, at http://www.raincityguide.com/2006/04/03/should-you-have-an-open-house/ (challenging this claim). Also, 87 percent of buyers found open houses to be very or somewhat useful. Id. at 31.

273 *See* Hagerty, *supra* note 9 ($1 fee); DellaLoggia, *supra* note 113 (fee discounts rewards).

274 *See* Garton-Good, *supra* note 9, at 83. Sellers might also want agents to confirm that buyers are qualified to purchase the home.

275 Since it appears that many such calls fail to provide a call back number or any message at all, using an agent with 800 call capture technology may be wise. *See* Ross, *supra* note 49, at 77-82, 80, 246 (stating that over 90 percent of leads are lost because the agent answering the phone does not obtain the caller's phone number).

276 Where sellers place listings in MLSs that promise full co-op commissions to brokers who are the "procuring cause" for finding the buyer, the listing broker is apt to claim that fee too if his or her agent shows the buyer the home. *But see infra* note 317, and accompanying text.

277 *See supra* note 239 and accompanying text.

278 Some commentator suggests that the real estate agents should unbundle their services into representation (negotiation) and the provision of information. *See* Thomas J. Miceli, Katherine A. Pancak & C.F. Sirmans, *Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis,* 20 J. Real Est. Res. 31 (2000).

since a broker's interests may differ from those of the seller.[279] When the seller is either a couple preparing to divorce or simply one with very different goals, employing an agent with some skill in therapy may pay large dividends.[280]

8. Other Services

A few other, less commonly available services might also be sought by home sellers. Those happy with their present location but simply desiring a somewhat different layout can already view the proliferation of "home makeover" television shows[281] and related material as well as advice about which improvements are likely to be recouped when the home is sold.[282] Still, hiring an expert—knowledgeable about local contractors and the likelihood of recovery of investments in different upgrades—to address one's own personal issues most quickly and effectively is likely to be a good investment. Sellers may also want to consider leasing their home with an option to buy or turning it into a rental unit.[283] An hourly fee or flat fee for such an assessment would appear most appropriate.

B. For Buyers

Real estate professionals may provide home shoppers with value in many ways. While academic research has found little evidence that buyers gain any benefit in terms of lower home prices by hiring "buyers' agents,"[284] good agents can provide tremendous value by speeding up the search, enabling buyers to focus their scarce free time on other projects (quantifiable as their opportunity cost), and helping the buyers to find a better fit for their needs and desires.

Buyers who desire full service—which appears to require about 40 hours,[285] at least for buyers who do a lot of looking first on their own[286]— may employ full service brokers, paid indirectly by the listing broker or seller. Increasingly, however, as discussed in VI, above, buyers aided by the bargaining power of third parties, can get rebates from the commissions that listing brokers offer to buyer brokers. Home shoppers armed with knowledge of this practice can demand a discount, e.g., one percent rebate, directly

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279 *See* text following note 43, *supra.*

280 *See* Garton-Good, *supra* note 9, at 201-02.

281 *See supra* note 263.

282 *See* Tyson & Brown, *supra* note 118, at 155; Garton-Good, *supra* note 9, at 205-07; Irwin, *supra* note 114, at 18-21; Sal Alfano, *2004 Cost v. Value Report*, Remodeling, Nov. 1, 2004, http://www.remodeling.hw.net/industry-news.asp?articleID=79166&sectionID=173 www.remodelingmagazine.com; Wells Fargo's Home Improvement Calculator, *available at* http://www.wellsfargo.com/per/home_equity/tools/home_improve.jhtml.

283 *See* Irwin, *supra* note 114, at 119-33.

284 *See* Zietz & Newsome, *supra* note 76, at 186 (segregated data based on the size of the home found that "a typical buyer of a small to mid-sized property that is not represented by a buyer's agent is likely to pay about 2 percent more for a property"); Elder, et al, *supra* note 76, at 360-61 (finding no evidence that buyer agents are able to negotiate lower purchase prices, but finding that they appear to be more effective at reducing search time, although noting that their value may be less than their cost to the buyer, if the buyer must pay that cost); Roy T. Black & Hugh O. Nourse, *The Effects of Different Brokerage Modes on Closing Costs and House Prices,* 10 J. Real Est. Res. 87 (1995) (finding no evidence that use of a broker with a fiduciary duty to the buyer reduces the buyer's purchase price).

285 *See* Garton-Good, *supra* note 9, at 142-43 (69 hours) circa 2000. On the other hand, 1982 and 2002 surveys by the California Assn. of Realtors found that the time required to serve buyers has dropped from about 30 hours to about 20 hours. *See* Barry, *supra* note 25, at 60-61.

286 *See infra* note 304.

from a buyer broker to match the "referral fee" the broker would otherwise pay.[287] A few brokers, like the Real Estate Cafe, will serve buyers for $100/hour or a flat fee plus $100/hour for time beyond a set amount.[288] Bloodhound Realty in Arizona offers full service for a flat $5,000, and others offer it for even less.[289]

While many buyers may want to handle some of the tasks involved in buying a home themselves, most will want an expert's help them with at least some of the following:[290]

1. Handling closing—everything after the seller has agreed to sell to the buyer
2. Formulating a search profile
3. Visiting Homes: what's available, retrieving the most suitable, modifying one's criteria
4. Negotiations
5. Securing a mortgage & referrals for closing and other services

1. Drafting a Purchase Agreement and Handling the Deal through Closing

Many buyers who feel competent to find a home on their own[291] still desire the assistance of a real estate expert for handling the many tasks involved in closing the deal.[292] Using an agent to draft and deliver a purchase agreement may be particularly important in a sellers' market, when speed and credibility may be critical.[293] One survey estimated that making an offer took about two hours and troubleshooting a purchase to closing requires about 10 more.[294] As mentioned in VI, above, some firms are offering rebates of up to 75 percent of the commissions they receive from listing brokers for buyers who find a home themselves, and only want help with the rest.[295]

"Using an agent to draft and deliver a purchase agreement may be particularly important in a sellers' market, when speed and credibility may be critical."

2. Assistance Formulating a Search Profile

All home shoppers must use some criteria to narrow the set of available homes to those of most interest. Ideally they would construct a "search profile" that gave appropriate "weight" to each factor they most desired or abhorred and enabled them

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287 *See Competitive-Bidding, supra* note 215.

288 *See* RealEstateCafe.com.

289 *See* Greg Swann, *Why a flat fee for buyer representation? Because the money is in the meter drop*, Oct. 7, 2006, http://www.bloodhoundrealty.com/BloodhoundBlog/?p=520.; Todd Tarson, *I'm Offering a Flat Fee Service for Buyers*, Nov. 17, 2006, http://mocoreal.blogspot.com/2006/11/im-offering-flat-fee-service-for-buyers.html ($4,000).

290 For a more comprehensive list of services, *see supra* note 218.

291 Only about one-third of buyers say they first learned about the house they purchased from an agent. *See* 2005 NAR Survey, *supra* note 95, at 29.

292 Id. at 39 [2005 NAR Survey, *supra* note 95] *See supra* section VII.A.2.

293 In fact, it appears that more than 70 percent of buyers want help presenting an offer. *See* Bill Wendel survey.

294 *See* Garton-Good, *supra* note 9, at 138-43. About two or three more hours may be required for handling an offer. Id. at 134-38. The 1983 FTC study found that agents spent an average of 1.75 hours closing the sale and 2.75 hours in post sale follow-up. FTC 1983 Report, *supra* note 14, at 27 n.12. *But see* Ross, *supra* note 229.

295 Redfin cut its costs by automating the paperwork of making a bid and then rebates to the buyer two-thirds of the commission allocated to the buyer's broker. *See* Damon Darlin, *2 Web Sites Push Further Into Services Real Estate Agents Offer,* N.Y. Times, Feb. 8, 2006, at C3.

to rate each home, but that is rarely, if ever, practical.[296] In fact, there are many home buyer books and most real estate broker websites offer checklists of features to consider, but there are good reasons why shoppers may want to pay experts to help them hone their search profiles. To begin, many buyers may find agents better than books or websites at helping them to compute how high a mortgage they will both qualify for and be comfortable with.[297] Agents can also counsel buyers to give less weight to factors that former buyers came to realize that they had overrated when shopping, and which contributes to the common real estate industry credo "buyers are liars."[298] Their experience can also help them advise buyers about relative values and tradeoffs among features.[299]

Furthermore, while it is not unreasonable to want to fall in love with a home and a lack of such feeling may be cause for concern,[300] experienced agents can help buyers avoid purchases based on mere infatuation[301] or other apparent errors. An experienced and perceptive observer of home shoppers, familiar with patterns of reactions and their likely causes may be able to clarify tastes over multiple visits.[302] One survey suggests that this process may take about eight hours,[303] and perceptive experts in this area might be worth $500 per hour or more for consultations. In the future, agents might well employ virtual reality software to enable potential buyers to view and consider dozens of different home styles, layouts, etc., quickly and easily under the direction of an experienced broker, so that the buyer might implicitly reveal preferences that they might not have been aware, but which an experienced agent suspects. The process might resemble those now conducted by optometrists to identify the optimal dimensions of a patient's lenses.

3. Identifying the Homes to Visit

While home shoppers are visiting more homes on their own,[304] agents can often offer valuable assistance in at least two ways: 1) sharing data about all available homes, including those not yet listed and 2) having efficient tools for retrieving homes that best

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296 *See* Nadel, *Selection Process, supra* note 80, at 246-61.

297 *See* WILSON, *supra* note 65, at 106-08. An agent may be particularly helpful if they understand the impact of the federal alternative minimum tax (AMT) on income and on the possibility that Congress will soon transform the current mortgage deduction to a more limited tax credit. *See* Roger Lowenstein, *Who Needs the Mortgage Interest Deduction,* N.Y. TIMES, Mar. 5, 2006, §6 (Magazine) at 78.

298 *See* WILSON, *supra* note 65, at 119; GARBER, *supra* note 78, at 7-8; Swartz, *supra* note 53; Teri Karush Rogers, *My Broker, My Therapist,* N.Y. TIMES, May 14, 2006, §11 at 1; Alison Rogers, *Buyers are Liars,* INMAN NEWS, July 7, 2006; Letters, *Buyers Aren't Liars, They Just Don't Know What They Want,* INMAN NEWS, July 10, 2006.

299 Buyer agents can use a buyer market analysis (BMA) to try to quantify the price of different attributes of a home. *See* WILSON, *supra* note 65, at 128-30.

300 *See* GARBER, *supra* note 78, at 25-47. One commentator observes that "[p]eople don't buy logically. They buy emotionally." Tom Hopkins, How to Master the Art of Listing and Selling Real Estate 6 (1991), *cited in* WILSON, *supra* note 65, at 132.

301 *See* GARBER, *supra* note 78, at 26-27.

302 *See* WILSON, *supra* note 65, at 130-32.

303 *See* GARTON-GOOD, *supra* note 9, at 107-12.

304 In fact, a survey by Reconis found that home buyers generally begin their search with about 14 months of looking before contacting an agent. *See* John E. Ansbach, Jan. 26, 2006 powerpoint presentation at 32. www.reconis.com/recon/docs/Generations%20201%20Broker%20Training_Client%20Edition%201.26.06.pdf

meet a buyer's search profile. One survey estimated that buyers require about 25 hours of visiting before finding the one they will buy,[305] but as just noted, many now handle much of this themselves and online.

a. Identifying the Full Domain of Available Homes

While home shoppers may be able to identify available homes by consulting the listings in local newspapers and on relevant websites,[306] as well as material from new builders[307] (whose homes represent about 20 percent of annual home sales), compiling an aggregated list like this may be quite time consuming. It may well become available in the near future,[308] but until then, local agents may be worthwhile due to their presumed familiarity with all of the relevant forums. Even after aggregate lists are available, agents will still be valued for their early knowledge about homes about to be listed, particularly agents who monitor local news about divorces, retirements, and relocations, and are even willing to contact owners of homes that may be ideal for a buyer even though they are not for sale.[309] Buyers might also specify their specific desires in a database of potential buyers, which sellers might use to search and contact them.[310]

b. Efficiently Identifying the Most Suitable Choices

Those new to an area are apt to desire information about neighborhoods—the quality of schools, crime rates, high home appreciation rates, etc. —before they consider individual homes. While much data relevant to these matters is now available online,[311] a real estate professional can aggregate that data into a useable form,[312] particularly less quantitative future trends, like changing demographics; plans for new retailers

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305 *See* Garton-Good, *supra* note 9, at 121-26. *See also* Patton, *supra* note 162, at R43 (reporting that, circa 1999, agents typically spent 40 to 60 percent of their time finding homes for buyers to consider).

306 *See supra* notes 252 & 253, and accompanying text.

307 Some homebuilders list their new properties in the MLS databases; others rely primarily on ads in print publications and the Internet. The national website homebuilder.com includes many new home developments and local sites, like newhomesguide.com for the Washington, DC Metropolitan area, can also be important sources.

308 *See supra* notes 255-258 and accompanying text. They may even include listings of rental units since a rental might, surprisingly, make sense in many circumstances. *See* Motoko Rich & David Leonhardt, *In the Long Run, Sleep at Home and Invest in the Stock Market,* N.Y. Times, Aug. 19, 2005, at A1; Motoko Rich, *Betting on Rent Over Mortgages,* N.Y. Times, Feb. 19, 2004, at F1.

309 *See, e.g.,* Tom Kelly, *Give Me Your House, I'll Pay Top Dollar!,* Inman News, Nov. 1, 2006; Swartz, *supra* note 53; Brian Larson, *An Alternative to Interbroker Compensation,* Inman News, Aug. 16, 2006 (agent in St. Paul, MN); Glenn Roberts, Jr., *Real Estate for Sale—or Not,* Inman News, Aug. 18, 2006.

310 *See* Roberts, *supra* note 259.

311 For example, www.greatschools.net provides information about schools, and local media may supplement the statistics tabulated by national media. *See also Alain Pinel Offers School, Community Info with Real Estate Searches,* Inman News, May 22, 2006; *2005 Challenge Index*, Wash. Post, Dec. 2005, http://www.washingtonpost.com/wp-dyn/content/education/special/5/index.html. New websites are permitting browsing with a map as the MLS interface. *See* Glenn Roberts, Jr., *Real Estate Agent Puts MLS Listings on Google Earth,* Inman News, April 28, 2006 and providing user-friendly access to an integrated data set. *See* Sridnar Pappu, *If Houses Could Talk,* N.Y. Times, (Key Magazine Fall 2006), Sept. 10, 2006, at 108 (discussing propertyshark.com).

312 *See, e.g.,* Max Kummerow & Joëlle Chan Lun, *Information and Communication Technology in the Real Estate Industry: Productivity, Industry Structure and Market Efficiency,* 29 Telecomm. Pol'y 173, 187 (2005). Even after finding the best websites for data, it may take significant practice to search the sites effectively. Moreover, agents may have tools unavailable to individuals. *See* Matt Carter, *Software Helps Convince Consumers They Can't Do it All,* Inman News, Sept. 19, 2006.

and roads; reasons to expect a school district to change (e.g., budget issues or a new superintendent), and traffic congestion.

Agents specializing in a few small communities may be especially valuable if they have compiled community data (from public sources, gossip, and all credible sources) into searchable databases.[313] Although most agents duck questions about ethnicity and religious faiths,[314] better informed ones can help buyers find the community that they seek.[315] The most valuable agents may even know which streets include friendly police officers, potential babysitters, or pediatricians, or, on the other hand, convicted sex offenders or those known for the loud, wild parties. New mapping software is also likely to permit agents to allow buyers to set maximum distances from key locations, such as a train station or job site, possibly in both miles and driving time (during rush hour). Employing an agent with an exceptional database of this kind of data might well be worth even $500 plus per hour.

Buyers selecting homes to visit on their own and preferring not to pay for a broker until they have selected a home to bid on, may still need the assistance of brokers to unlock the door of a home and answer questions (risking lawsuits) at times other than an open house.[316] If they call the listing broker for this service, that broker may claim the full buyer broker fee by claiming to be the "procuring cause" if the buyer actually buys the home. Therefore, some non-traditional brokers have offered to host buyer visits for a flat fee or hourly rate.[317]

4. Negotiations

Buyers can generally gain the same benefits from agents as sellers may, as discussed in VII.A.8, above, particularly access to the most timely data and possibly discover any time, financial, and other constraints faced by the seller,[318] as well as a true measure of how long a home has been on the market.[319] An expert can also help one confirm that

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313 *See* Swartz, *supra* note 53. This is beyond the current practice of brokers who now only aggregate data from different MLSs into a single, more easily searched internal database. *See* Sharon Simonson, *Regional MLS Merger at Hand,* Silicon Valley/San Jose Bus. J., Jan. 8, 2006, http://www.msnbc.msn.com/id/10771336/from/RL.4/.

314 Because HUD has strict rules against steering buyers based on race or ethnicity, 24 C.F.R. §100.70(a), most agents try to avoid the risk of even false charges of discrimination by refusing to reveal even factual information about the racial or religious character of a neighborhood.

315 In fact, the Fair Housing Act regulations actually permit agents to accommodate client requests to view homes in locales of a specific ethnic group, *see* http://www.fairhousing.com/index.cfm?method=page.display&pagename= HUD_resources_buyers_agent (discussing a letter from HUD, Assist. Sec. for Fair Housing, Elizabeth Julian, to Jill Levine, Oct. 2, 1996), or with significant diversity.

316 *See, e.g.,* Greg Swann, Remarks from Redfin.com Broker Glen Kelman, Sept. 4, 2006, http://www.bloodhoundrealty.com/BloodhoundBlog/?p=285.

317 For example, Redfin offers to give buyers home tours as follows: the first tour of up to three hours is free. Subsequent tours are $125 per home or $250 for a three-hour tour. Three Ways to See a Property, http://www.redfin.com/stingray/do/home-tours?direct-section=buy&rt=dcbif2-thl#redfin. Bloodhound Realty offers to show buyers homes for $50 per home. Swann, *supra* note 87, at comment 3.

318 *But compare* Robert J. Bruss, *Reason for Selling is None of Buyer's Business*, Inman News, Jan. 15, 2007 to *Letters to the Editor: Too Much Information Can Hurt Sellers*, Inman News, Jan. 15, 2007. Buyers can often easily discover what a seller paid for a home online. This data is increasingly available free from the state or local entities that maintain tax assessment records, deed registries, etc. *see* fhttp://sdatcert3.resiusa.org/rp_rewrite/, or entities, like zillow.com, that attempt to aggregate it.

319 MLS data can mislead. *See* Glenn Roberts, Jr., *MLSs Attack For-Sale Home 'Relisting' Practices,* Inman News, Sept. 21, 2006; Kimberly Blanton, *Home Won't Sell? Some Cancel and Relist,* Bost. Globe, July 22, 2005, at A1.

a low price is a bona fide bargain[320] and that waiving an inspection to compete with another bidder[321] is reasonable given a builder's reputation or how much should be allocated to pay local contractors to make the repairs or upgrades a buyer requires. A broker's reputation can give the buyer's bid added credibility. Negotiations for buyers appear to require about five to six hours, on average.[322]

5. Securing a Mortgage & Referrals for Closing and Other Services

With the proliferation of new mortgage products,[323] buyers may seek a real estate agent's help identifying the best mortgage deal, as well as pre-approval (which permits a buyer to make a quick, solid bid[324]) particularly since the Real Estate Settlement Procedures Act of 1974 (RESPA §8) forbids kickbacks to brokers making referrals.[325] One study estimated eight hours for this task.[326] Buyers often greatly value recommendations from agents about the best title insurers, attorneys, engineering and termite inspectors, etc., as well as about other local service providers.[327] Instead of charging nothing for this advice, hoping to earn good will that might yield future business, brokers might charge for it or a bundle of related services.[328]

VIII. Why Has the Standard Rate Structure (and Rate Levels) Remained Dominant?

If the à la carte rate structure discussed above is so beneficial to consumers, why isn't it more popular?[329] This is similar to the question underlying the 1983 FTC Report: why isn't there more price competition among local real estate brokers? This section attempts to update and enhance the FTC Report, reviewing the many tactics that

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320 *See* Robert J. Bruss, *Best Ways to Cash in on a Buyer's Market,* Inman News, Oct. 6, 2006; Jayson Blair, *Apartment Hunt Goes Virtual*: *Buying a Place Sight Unseen, Other Than Online*, N.Y. Times, May 1, 2000, at B1 ("A computer can't tell you that this is a . . . listing . . . that is going to last 20 minutes.").

321 *See* Garton-Good, *supra* note 9, at 190-91.

322 *See* Garton-Good, *supra* note 9, at 134-38 (8 hours) minus two hours for making an offer. *See supra* note 294.

323 *See* Allen J. Fishbein & Patrick Woodall, Exotic or Toxic?: An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders (2006) http://www.consumerfed.org/pdfs/Exotic_Toxic_Mortgage_Report0506.pdf.

324 *See* Garton-Good, *supra* note 9, at 112-13.

325 *See* 12 U.S.C. §§ 2601 et seq.; 24 C.F.R. §§ 3500 et seq.; *But see* Jack Guttentag, *Why RESPA Has Failed to Prevent Real Estate Kickbacks,* Inman News, Feb. 13, 2006.

326 *See* Garton-Good, *supra* note 9, at 112-21. *See also* FTC 1983 Report, *supra* note 14, at 27 n.12 (3.5 hours).

327 2003 NAR Report, *supra* note 5, at 30; Heather Timmons, *Shaking Up Real Estate, on Both Sides of the Ocean,* N.Y. Times, July 27, 2003, §3 at 4 (the sales staff provides referrals to whatever clients need). They may also advise buyers on home warranty plans, zoning issues, tax assessment issues, financing improvements or refinancing a mortgage. *See* Garton-Good, *supra* note 9, at 199, 203-04, 207-14. One pair of brokers even attempts to act as matchmakers. *See* Alison Gregor, *The Perfect Match,* N.Y. Times, Jan. 1, 2006, §11, at 1. Then again, much of this information is now available free of charge (advertiser supported) online. *See* http://www.angieslist.com/AngiesList.

328 *See, e.g.,* Stefan Swanepoel, et al, Real Estate Confronts Bundled Services 2005, available at www.realsure.com.

329 The market share of non-traditional brokers is only between about 10 and 17 percent. *See supra* note 147.

traditional real estate brokers have used to maintain their existing rate structure and price levels despite the emergence of new entities offering significantly lower-priced, non-traditionally structured, real estate services.

A. Brokers Recognize the Enormous Cost of a Price War & the Power of the NAR

Three conditions indicate that the commissions traditional real estate brokers now charge often greatly exceed fees that they would charge if there was price competition in the market. First, many former employees of traditional brokers are now willing to provide full-service for flat fees of less than $5,000.[330] Second, traditional brokers are willing to provide full service for the sale of a $150,000 home for their half of a $9,000 (six percent) fee, and the costs to agents of handling the sale of homes priced at multiples of that level appear be very similar although the commissions they now charge are multiples of that $9,000.[331] Third, brokers in other nations now charge much lower fees for providing similar services.[332] The commissions paid on the purchase and sale of the highest-priced homes are particularly vulnerable. Vigorous price competition could very possibly reduce total revenues for brokers precipitously, by $30 billion or more annually.[333] This gives traditional brokers a strong interest in resisting this result. As an agent for a large, national, traditional brokerage firm explained in a September 2006 email to a friend who had just listed her home with a flat rate broker:[334]

I love you guys but why would I want to sell your property? Most full-service agents in ___ County want to remain full-service agents and I am one of them. Why would any full-service agent want to help a flat rate broker? None of us do. We don't want to become flat rate agents and if flat-rate agents become successful then we would all have to become flat-rate agents. They have a VERY small % of the business out there. We want to keep it that way. If I can avoid showing Help U Sell properties or Assist to Sell properties I also will not show them. When you list with a full-service agency then you have the co-operation of most of the agents in ___ County. A 3% commission with a bonus is not enough incentive to put a nail in the coffin of our industry. . .

With about 1.3 million members, [335] the NAR is the largest trade association in the nation.[336] Its members' presence in every voting district of every state legislature and large campaign contributions make it one of the most powerful lobbyists in the nation,[337]

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330 *See supra* note 217.

331 *See* text accompanying notes 7-10 and 65-74 *supra.*

332 Residential agents in other developed nations like England, Ireland, Australia, etc., charge only two to three percent commissions. *See* Miller, *supra* note 25, at slide 3; Delcoure & Miller, *supra* note 28, at 16-17, 37.

333 *See supra* note 28. Brokers recognize that lowering their fees would not likely increase demand for their services, but would primarily reduce their revenues, possibly a lot. *See* FTC 1983 Report, *supra* note 14, at 40.

334 On file with the author. *See also* Michael Crowley, *Real Estate Ripoff,* Reader's Digest, Feb. 2007 at _; Cohen, *supra* note 46 (discussing emails received by Della Neely).

335 *See supra* note 25.

336 *See* Glenn Roberts, Jr., *A Leading Lobbyist for a Powerful Lobby,* Inman News, Nov. 2, 2004 (first in a five part series); Justice, *supra* note 205.

337 *See* Justice, *supra* note 205 (the association spends about $94 million annually); Center for Responsive Politics, Top Industries Giving to Congress 2006 Cycle, available at http://www.opensecrets.org/industries/mems.asp (finding that the real estate industry's contributions of $19.9 million placed them third out of 50

and led one state official to note "virtually no proposed legislation relating to real estate has a chance of passage unless it is approved by the state association of realtors."[338] The NAR, which collects about $100 million annually in dues from agents,[339] also benefits from the excess number of agents produced by the current fee structure.[340]

B. Historically Rates Were Fixed and then Recommended Rates Prevailed

In 1950, the NAR's code of ethics stated that "'every Realtor . . . should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.'"[341] Although, a 1950 Supreme Court decision found the brokers guilty of price-fixing in violation of antitrust laws, this holding did not end such price fixing. Many brokers argued, rather, that the federal antitrust laws only applied to Washington, D.C. brokers in that case, and not to brokers in the states.[342] It wasn't until 1971 that the NAR officially adopted a policy of "hands off" regarding commission rates.[343] Furthermore, the DOJ had to bring antitrust actions to end "suggested fee" schedules,[344] which, the FTC noted, continued to have a lingering effect.

C. State Real Estate Commissions Protect Traditional Business Models

Most regulation of real estate brokerage is a result of state law and state real estate commissions created by state legislatures. Although the laws and commissions are presumed to be intended to protect consumers, a 2006 Consumer Federation of America (CFA) survey of real estate regulatory agencies in 47 of the 50 states found that more than 70 percent of commissioners were real estate brokers or salespeople.[345] Given the

industries listed); FTC 1983 Report, *supra* note 14, at Vol. II, App. C, at 5-7; Virginia Gray, On the Political Power of the ® in Realtors ®: The Lobbying Resources of Full-Service Real Estate Brokers, in American Antitrust Institute Real Estate Project: Symposium on Competition in the Residential Real Estate Brokerage Industry, Nov. 8, 2005; Roberts, *supra* note 336; David E. Rosenbaum, *In a Test of Lobbying Muscle, Realtors Prevail,* N.Y. Times, July 13, 2003, §1 at 14.

338 FTC 1983 Report, *supra* note 14, at 98.

339 *See* Woodall & Brobeck, *supra* note 109, at 9 & n.11.

340 *See supra* note, and accompanying text.

341 U.S. v. Nat'l Assn of Real Estate Boards, 339 U.S. 485, 488, 494-95 (1950). Realtors justified this as necessary to protect the public against excessive rates. *See* US v. NAREB, 84 F.Supp. 802, 803 (D.D.C. 1949), rev'd, 339 U.S. 485 (1950).

342 *See* Norman G. Miller & Peter J. Shedd, *Do Antitrust Laws Apply to the Real Estate Brokerage Industry?*, 17 Amer. Bus. L.J. 313 (1979). It wasn't until McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) that that issue was laid to rest. *See also* Becker, *supra* note 206, at 104-06 (discussing real estate broker textbooks).

343 The NAR issued its "Fourteen Points" multiple listing policy statement. *See* FTC 1983 Report, *supra* note 14, at 133-35 n. 354.

344 *See* FTC 1983 Report, *supra* note 14, at 195-99 (offering a short history of fee schedules and listing DOJ cases). *See also* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 228 (9th Cir. 1974); Barry, *supra* note 25, at 46-49; United States v. Foley 598 F.2d 1323 (4th Cir. 1979) (finding explicit price fixing).

345 *See* Patrick Woodall & Stephen Brobeck, Consumer Federation of America, State Real Estate Regulation: Industry Dominance and its Consumer Costs 4 (2006) http://www.consumerfed.org/pdfs/CFA_Real_Estate_Commissioner_Report.pdf. This is similar to the environment the FTC found for state regulators in the funeral industry. *See* Funeral Industry Practices, 47 Fed. Reg. 42260, 42289 (1982). The Association of Real Estate License Law Officials (ARELLLO) responds that a majority of occupational licensing boards are generally from the industry, *See* ARELLO, *supra* note 124, although this does not dispute widespread "regulatory capture."

presence of real estate agents in every state legislative district and the availability of state affiliates of the NAR to manage industry lobbying and campaign contributions, it is not surprising that states have generally protected traditional brokers from entrants with new business models. Many state bodies enforce prohibitions against rebates to home buyers and many require sellers to purchase a minimum bundle of services that many sellers do not desire.[346] The California Department of Real Estate tried to prohibit unlicensed firms from offering sellers the opportunity to describe, i.e., "list," their homes on the firms' websites.[347] When an Internet-based firm attempted to introduce an efficiency-enhancing MLS-like database for New York City, New York State acted to revoke the firm's real estate license.[348] An Oklahoma State commission fined a broker for accurately warning home buyers that traditional agents, with a legal duty to serve sellers, cannot offer buyers the "full" representation provided by an agent hired solely to work for the buyer.[349]

D. MLS's, Local Boards & Local Media Can Discipline Non-Traditional Brokers

One way that traditional brokers have discouraged entry by brokers with business models that threatened to introduce price competition is to limit their ability to use the critically important MLSs.[350] In fact, an explicit purpose of establishing MLSs in the 1920s was to "replace[] the old spirit of competition for one of cooperation..."[351] Local real estate boards have not been hesitant to alter rules governing the use of the local MLS so as to frustrate those who ignore the "social norm" against price competition.[352] For example, as noted above, the MLS rules in Austin and other locales, denied brokers offering certain lower-priced, limited service options the chance to place their listings on realtor.com, although that should be ending.[353] Also as noted, the NAR's restrictions

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346 *See supra* sections IV.B.1 and VI.

347 The California state body contended that such a marketing service represented the practice of real estate brokerage, requiring state licensing. *See* ForSalebyOwner.com v. Zinnemann, 347 F.Supp.2d 868, 871-72 (E.D. Cal. 2004). The judge, however, threw out the state's case, after noting that the state permitted "newspapers of general circulation" to post real estate ads online without a real estate license. Id. at 877-79. A similar New Hampshire law is also being challenged. *See* http://www.ij.org/first_amendment/nh_free_speech/3_14_07pr.html.

348 *See* Lala Wang, How Can Internet and Other New Business Models Affect Competition?, presented at the AAI, Nov. 8, 2005, at 8-9, http://www.antitrustinstitute.org/recent2/464h.pdf. *See also New York Real Estate Under Microscope,* INMAN NEWS, Oct. 3, 2005.

349 *See* Snider v. Oklahoma Real Estate Comm'n, 987 P.2d 1204, 1209 ¶17 (Sup. Ct. Okla 1999).

350 *See* Braswell & Poe, *supra* note 121, at 307-11. The NAR has long taken a protectionist position of its members' interests. *See* Elizabeth Lesly, *The Stupidity of Free-Market Chic ... in Real Estate*, WASH. MONTHLY, Nov. 1990, at 34, and the NAR's Internet use policies are only the latest efforts to deter price competition. *See* DOJ 2005 Amended Complaint, *supra* note 18, at ¶ 42.

351 *See, e.g.,* FTC 1983 Report, *supra* note 14, at 111 (citing H. Nightingale, California Real Estate April 1924, at 12). *See also* Id. at 114-16.

352 *See, e.g.,* Lawrence Minard, *Real Estate,* FORBES, Sept. 4, 1978, at 43, 44 [ck]. One article suggested that traditional agents may have adopted a "social norm" against price competition, *see* Hsieh & Moretti, *supra* note 26, at 1086 n.16, and it could be based on their need for long-term self preservation. As the FTC observed, "a stigma still seems to attach to competition in commission rates." FTC 1983 Report, *supra* note 14, at 15, 167 n.495, 201. Those who ignore this social norm are subject to different forms of retaliation, such as steering. *See* FTC 1983 Report, *supra* note 14, at 160-62. Brokers also handle MLS grievances themselves. *See* Hagerty, *supra* note 7.

353 *See supra* note 151. *But see supra* note 152 and accompanying text. Tom Early, a long-time member

on the display of MLS listings online triggered a 2005 DOJ antitrust lawsuit.[354]

Courts have found a number of MLS rules to be anticompetitive constraints.[355] For example, when the Austin Board of Realtors® amended its MLS rules in 2000 to frustrate eRealty's efforts to use the Internet to provide its clients with more efficient access to relevant listings, a court granted a preliminary injunction against the rule.[356] In addition, the FTC acted to prevent that same board from a different form of discrimination in 2006.[357] Still, by requiring listings to include the fee offered to the buyer's broker, the MLS facilitates the practices discussed in III.C.1 where agents working with buyers may intentionally fail to inform a client of an attractive offering, because other listings will yield the agent a much higher commission. Of course, the power of traditional brokers to use the MLS to discriminate against non-traditional firms will disappear if Google or others offer an MLS-like online, easily-searchable database that displaces current MLSs or MLSs change to compete with Google et al.[358] Finally, some traditional realtors appear to pressure local advertising media to restrict access by non-traditional brokers.[359]

E. Consumers are Ignorant of the Many Options That They Could Reasonably Demand

Around 1980, undoubtedly due to the long history of fixed rates in the industry (as just discussed in section B, above), about half of all sellers believed that commission rates were fixed and non-negotiable and that the fixing was done either by law or by "the Board of Realtors."[360] And the 1996 Kiplinger's "Guide to Buying & Selling a Home" stated that commissions run typically at 6 to 7 percent and that "[a]s a practical matter, you won't get very far negotiating a lower rate unless you have special circumstances that make your property more economical to sell than others."[361] Some brokers and industry commentators continue to recommend that sellers not try to negotiate a listing broker's commission before signing a contract, and this aids others who will not reduce

"Of course, the power of traditional brokers to use the MLS to discriminate against non-traditional firms will disappear if Google or others offer an MLS-like online, easily-searchable database that displaces current MLSs or MLSs change to compete with Google et al."

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of the NAR, states that he faced such discrimination by his Ohio real estate board when he chose to become an exclusive buyer's agent. Comment at AAI workshop, Nov. 8, 2005.

354 *See supra* note 164, at accompanying text.

355 Courts have recognized that MLS rules may not impose unnecessary anticompetitive constraints on competition, such as excessive fees on users or rules that distort competition between the NAR and entities that compete with it. *See, e.g.,* Reifert v. So. Cental Wisconsin MLS Corp., 450 F.3d 312, 323 (7th Cir. 2006) (Wood, concurring); Thompson v. Metro. Multi-List, 934 F.2d 1566, 1582 (11th Cir. 1991); Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127 (5th Cir. 1989); Wells Real Estate, Inc., v. Greater Lowell Bd. Of Realtors, 850 F.2d 803, 815 (1st Cir. 1988) cert. denied, 488 U.S. 955 (1988); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1368 (5th Cir. 1980); Buyer's Corner Realty v. No. Kentucky Ass'n of Realtors, et al, 410 F.Supp.2d 574 (E.D. Ky. 2006); Venture Resources Group, Inc. v. Greater New Jersey Regional Multiple Listing Service, Inc., 1996-1 Trade Cases ¶ 71,397, 1995 WL 866841, at *2-4 (D.N.J. 1995) and cases cited therein; O'Riordan v. Long Island Bd. Of Realtors, 707 F. Supp. 111, 116 (E.D.N.Y. 1988). *See generally,* Robert D. Butters, *Let Brokers Put Their Data Wherever They See Fit,* Inman News, May 26, 2006.

356 *See* Austin Board of Realtors v. E-Realty, Inc., 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000).

357 *See supra* note 152, and accompanying text.

358 *See supra* notes 255-258 and accompanying text.

359 *See* Woodall & Brobeck, *supra* note 109, at 14.

360 FTC 1983 Report, *supra* note 14, at 66-69. Furthermore, 85 percent of the sellers were quoted a commission rate of either 6 or 7 percent by the broker they used and ultimately, 78 percent paid either 6 or 7 percent. Id. at 45-53. The FTC's survey found that only 35 percent of sellers were aware of discount brokers, only 12 percent contacted them, and only 2.6 percent listed their homes with one. Id. at 151.

361 *See* Kiplinger Staff, *supra* note 66, at 316.

their fee below six percent unless the client asks.[362]

Against this background and recognizing how infrequently most people buy or sell homes, it is not surprising that many may be unaware of the availability of lower-priced, non-traditional brokers.[363] Still, increased marketing by Internet-based realty firms and articles in the *New York Times*, *Wall Street Journal*, and other major media, have raised public awareness that lower prices are available.[364] Yet, traditional brokers have responded effectively, as discussed next.

F. Traditional Brokers Have Successfully Portrayed Discount Brokers as Inferior

To defend themselves against lower priced new entrants, traditional brokers have heralded the old adage: "you get what you pay for."[365] They imply that brokers with lower prices *must* be skimping on quality and/or services[366] compared to the "full service" offered by traditional brokers, although conveniently they fail to define full service.[367] Although there is a simple refutation to this insinuation, few buyers or sellers hear it, because there is no entity with the funding and mandate to effectively counter the NAR's marketing. If there was, it could point out that if a listing broker who charges $18,000 on a $300,000 home can afford to provide full service, then a broker charging *only* a 4.5 percent commission on a $1 million home ($45,000) can too. Yet when media firms criticize protectionist tactics of traditional brokers or praise new firms, vocal brokers

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362 *See* Robert J. Bruss, *Don't Negotiate Listing Agent's Commission Up Front,* Inman News, May 24, 2006; Aleksandra Todorova, *More Real Estate Brokers are Reducing their 6% Fees,* SmartMoney.com, Apr. 2, 2007 (quoting realtors Diane Saatchi and Susan Moock)

363 *See* Bruce Owen, *Kickbacks, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 Stan. L. Rev. 931, 935 (1977).

364 *See* Glenn Roberts, Jr. & Janis Mara, *Hot Market Fuels Fire for Lower Commissions,* Inman News, Apr. 12, 2005 (observing that "consumers are increasingly aware that fees paid for real estate agents are negotiable. 'We (in the industry) all knew they were, but the public didn't know they were.'" (quoting owner-broker Matt Williams)).

365 *See* Kelly A. Spors, *What You Need to Know About Commission Rates,* Wall St. J. Online, Sept. 20, 2004 (quoting Steve Cook, a spokesperson for the NAR: "Most people want a full-service agency to help them. In the end, you get what you pay for."); Gomes, *supra* note 231 (reporting a Coldwell Banker ad stating "'What's that saying – you get what you pay for?"); Donald Bruce & Rudy Santore, *On Optimal Real Estate Commissions*, 15 J. Housing Econ. 156, 163 (2006) ("a home seller does not necessarily prefer a lower rate to a higher one since agents exert less effort at lower rates"); Hill, *supra* note 190 (quoting NAR General Counsel, William North, that "you get what you pay for").

366 Irwin warns to beware of agents who offer to accept a lower commission; they may fail to disclose that they expect to do less work, e.g., merely list the property in the MLS. Irwin, *supra* note 114, at 52. The FTC circa 1980 survey found that 22 percent of sellers rejected non-traditional agents because they provided less service, although most of them offered "full service." FTC 1983 Report, *supra* note 14, at 154, 164. *See also* FTC 1983 Report, *supra* note 14, at 41-42, 142 (disparagement of non-traditional brokers is neither new nor ineffective); Glenn Roberts, *Lawsuit Alleges Real Estate Commission-Fixing in Illinois,* Inman News, Dec. 20, 2006 (claiming disparagement). The FTC's survey found that 83 percent of non-traditional brokers indicated that they had experienced lost or cancelled listings due to disparagement. Id. at 159. Article 15 [then Article 23] of the Realtors' Code of Ethics discourages such actions against other realtors, but apparently not against non-traditional agents. Id. at 41.

367 *See* Miller, *supra* note 25, at slide 9 and oral presentation. The main response to the observation that residential real estate agents in other developed nations like England, Ireland, Australia, etc., charge only two to three percent commissions is that brokers in these countries do not offer full service. Miller's research, however, finds that the only significant difference between the services provided and costs incurred is that agents in the U.S. generally find it necessary to protect themselves against lawsuits by buying liability insurance. Id. at slide 3 and oral presentation.

accuse the media of being misinformed and biased.[368] Meanwhile, it appears that other businesses, like Cox Cable's 24-hour property listings channel, discriminate against non-traditional brokers due to ignorance, if not pressure for traditional brokers.[369]

Yet because the purchase or sale of a home is such a major transaction to most home buyers' and sellers', merely planting seeds of doubt about the quality of non-traditional brokers is often enough for traditional firms to scare buyers and sellers from using such new entrants and sticking with traditional brokers. This has led some to strongly recommend that policymakers act to permit national banks, with their trustworthy reputations, to enter the real estate brokerage market in the hopes that they will embrace disruptive, non-traditional, lower-priced business models.[370] Other trusted national brands that might fill this niche, include Yahoo, Google, or other firms with a reputation for low prices, but quality goods, like Costco and Walmart.[371]

G. Social Norms and Large Gains Discourage Consumer Haggling Over Broker Rates

Many consumers are also uncomfortable attempting to negotiate a fee lower than the standard commission advertised by a broker, particularly when they work with agents who are friends, or at least acquaintances.[372] Consumers understand that in some markets haggling or negotiating is the norm: the purchase of a car, particularly a used car, a home, and the salary at a new job.[373] In other markets, including those providing accounting and legal services, and real estate services, however, the reigning social norm is for consumers to rely on competition to force sellers to voluntarily offer lower, competitive rates. Many consumers feel that negotiating for a lower fee with an agent or broker may be insulting to the agent and make themselves appear cheap.[374] This is particularly true because the broker's fee is so small compared to the price of a home and many sellers are able to secure sale prices much greater than they had ever hoped for. Many feel so fortunate that they are willing to share their new found wealth with those who help them to collect it.[375] Then again, many consumers who do request lower

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368 *See* Blanche Evans, *Are Banks, Newspapers Behind Recent Real Estate Industry Rants?,* Realty Times, June 21, 2006; Blanche Evans, *Rotten Media Spin on Realtors Begins Anew,* Realty Times, Sept. 12, 2005; Blanche Evans, *Vitriolic Washington Post Attack Confirms Conspiracy of Disinformation,* Realty Times, May 19, 2005.

369 *See* Richard Mize, *A-La-Carte Brokerages Locked Out of Cable Advertising Venue*, NewsOK.com, Oct. 14, 2006, http://www.newsok.com/article/2955714/ (discussing Cox Communications's GoScout venture).

370 *See* Hahn et al, *supra* note 16, at 110-11; White, *supra* note 29, at 28-29; Comments of Robert Litan, AAI presentation, Washington, DC, Nov. 8, 2005. *See also* Harrison K. Bishop, *Note, Expanded Powers Under Glba: The Great Turf War of the New Millennium: Can Banks Engage in Real Estate Brokerage and Management Activities?,* 6 N.C. Banking Inst. 391, 397-401 (2002); Barta, *supra* note 9; Sichelman, *supra* note 9.

371 *See supra* notes 255-258 and accompanying text.

372 *See Consumer Rep. supra* note 17, at 461-62 (noting that more than one third of survey respondents chose their agent because he or she was a relative, friend, or neighbor and quoting the president of the NAR as telling his agents to "get incensed [if someone asks to cut the commission]. Our rule is that we don't. You wouldn't do that to your doctor or lawyer, would you?").

373 Vendors in some open air markets are actually insulted if consumers do not attempt to bargain with them over prices. *See* Eric Schmitt, *A Man Does Not Ask a Man About His Wife,* N.Y. Times, Jan. 8, 2006, § 4 at 7.

374 *See* Ross, *supra* note 49, at 90 (encouraging agents to make it "look tawdry to ask for a discount").

375 The situation appears to resemble that of wealthy patrons who are happy to leave large tips. *See supra*

rates are successful,[376] and increasing numbers appear to be seeking reductions.[377]

H. The General Need for Two Agents to Make a Deal Empowers Traditional Brokers to Hinder New Entrants

In addition to motive, as discussed in VIII.A., traditional agents also have opportunity. One reason why it is so easy for traditional brokers to deter new entrants and price competition is that most real estate sales require agents to rely on other agents – what the FTC's 1983 Report recognized as "interdependence."[378] In fact, the FTC hypothesized that the ability of brokers to steer their customers to homes associated with agents charging the going commission rate and split "is the most important factor explaining the general uniformity of commission rates in most local markets."[379] And an agent generally needs other agents to cooperate with them in many ways, including timely responses to questions and requests for material, quick access to new listings or prices, and credibility concerning promises like "I'll be there in 45 minutes" or "The repair will be done by Monday." In addition, agents aiding buyers also want a reasonable fee for their services; and sellers' brokers need agents to inform buyers about their homes.

Traditional agents have also had little reason to worry that their actions to frustrate non-traditional entrants would cause them harm. As the *Wall Street Journal* recognized, sanctions for breach of ethics due to such practices have been non-existent.[380] As for prosecutions under the antitrust laws, absent concerted activity, courts have tolerated unilateral refusals to deal because such actions by those lacking monopoly power are not recognized as violating the antitrust laws.[381] And the biggest problem with prosecutions is that improper agent practices may be passive, subtle, and difficult to prove.[382] It can be difficult to prove that an agent intentionally failed to make or return a call until it was too late[383] over the defense that it was merely an unintended consequence of giving higher priority to other actions. Moreover, agents can frequently defend their neglect of one potential deal by contending that they did not view it as attractive as it might appear, for the reasons discussed above.[384]

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note 63.

376 *See* Wilson, *supra* note 65, at 99-100; *Consumer Rep.*, *supra* note 17, at 461 (about half the respondents in a 1990 *Consumer Reports* who made an effort to negotiate a lower price were successful).

377 *See* Inman Commissions 2006, *supra* note 5, at 6, 45-46. Yet, this may be due to higher prices. *See supra* note 17.

378 The FTC's 1983 report recognized that the tremendous interdependence among agents facilitated efforts to discourage price competition. FTC 1983 Report, *supra* note 14, at 2, 11, 32-42.

379 FTC 1983 Report, *supra* note 14, at 12, 55.

380 *See supra* note 124.

381 *See supra* note 121.

382 *See* Wachter, *supra* note 60, at 195 ("Passive non-cooperation and disparagement may take subtle forms that either are difficult to police or are perfectly legal."). For example, one would generally expect agents to return the calls and fulfill the requests of "friends" and favored colleagues before others.

383 Id. at 195, 204 ("The full rate firm may claim 'difficulty' in getting in touch with or arranging to view the discount broker's listings. . . . Full rate brokers may procrastinate in returning phone calls from discount brokers or in informing their listing customer of a potential buyer who is represented by a discount broker."). *But see* Roberts, *supra* note 366 (lawsuits charges broker with refusing to present offers to the seller).

384 *See supra* notes 118-119, and accompanying text.

IX. Four Questions that Should Stimulate Price Competition

The obstacles discussed in section VIII (inhibiting the availability of non-traditional pricing structures) could be overcome, for the most part, if home buyers and sellers demand answers from agents to four simple questions *before* hiring them.[385] Before reviewing these questions, it is important to consider how to ensure that consumers receive suitable responses. Even if the political clout of traditional brokers could be overcome to mandate additional, legally-required disclosures, they would probably be ineffective. Brokers would likely simply add a few more clauses to the long, legalistic disclosure statements that already overwhelm the consumers asked to sign them. A better option would be a combination of efforts by consumer advocates, including *Consumer Reports*, media consumer reporters, and enlightened government agencies, like the DOJ and FTC, to use a few, short, sound-bite sized messages to prompt consumers to ask the questions themselves. Home buyers and sellers should be willing to devote a few minutes to credible recommendation for how they could possibly save thousands of dollars when that information was provided by a credible source.[386] It would also help if state departments of consumer protection and attorneys general made a greater effort to investigate and prosecute cases where agents working with buyers clearly violated their fiduciary duties to clients.[387]

"Even if the political clout of traditional brokers could be overcome to mandate additional, legally-required disclosures, they would probably be ineffective."

A. Buyers Should Ask: Might You Fail to Show Me a Home Ideal for Me Due to the Seller's Choice of Broker or the Fee Offered to You?

Although, most buyers relying on traditional agents assume that their agent is scouring the entire market and showing them all homes that meet their search criteria, regardless of what fee is offered to the broker or which broker a seller is using, as discussed in section III.C.1, above, many buyer brokers fail to show the buyer some homes they would want to see due to the latter considerations. Such buyers deserve to learn this before hiring the broker so they can seek truly "full service" from a broker loyal to them, possibly an exclusive buyer's broker.

If most buyers became aware of such current broker practices, traditional agents might feel compelled to alter their policies and routinely inform buyers of all relevant options, i.e., provide full service. This would make it easier for non-traditional brokers with different rate structures to represent sellers more successfully and make them more attractive to sellers. Alternatively, if buyer brokers explicitly lied to buyers about their practices, it should make it that much easier for state consumer protection officials to

385 *See* Braswell & Poe, *supra* note 121, at 293-94; Swann, *supra* note 87. Correcting home sellers' and buyers' misconception after they have contracted with or shared confidential information with their agent is too late. *See* Thomas A. Early, Competition Policy and the Real Estate Industry, presented at DOJ/FTC workshop, Oct. 25, 2005, at 2-3, http://www.usdoj.gov/atr/public/workshops/rewcom/213172.pdf.

386 As the NAR recognizes, consumer demand will be the key driver of reform. See NAR Catalyst, supra note 19, at 1. If there were still "home economics" courses in secondary schools they could review the economics of buying a home. In their absence, however, consumer groups, including the nationwide network of government-supported housing counseling agencies, should help those writing math textbooks and math curricula to include information about home purchases and sales so that high school graduates will have a better appreciation for the economics of different real estate broker rate structures, including highlighting the four pieces of information mentioned here.

387 *See supra* note 124.

prosecute them for clear violations of their fiduciary duty. It would also be likely to dramatically increase buyer demand for the independently operated MLSs – directly assessable by buyers – discussed above.[388]

B. Buyers Should Ask: What Dollar Amount Do You Expect to be Paid for Helping Me Buy and Close on a Home and for How Many Hours of Work?

As observed above, many home buyers believe that the agents working with them cost them nothing.[389] Accordingly, they have no reason to consider hiring a broker willing to charge them a flat fee or an hourly rate that would often be less than what a traditional broker would cost. To enable such non-traditional brokers to compete effectively, buyers should ask the dollar amount their broker is likely to receive and an estimate of the total hours of service they are likely to require (on average given market conditions).[390] This data should encourage buyers preferring to handle some of the tasks themselves to discuss a lower fee or an hourly rate with brokers.[391]

C. Sellers Should Ask: Can I Direct Some or All of the Fee Offered to a Buyer's Agent to the Buyer, Instead, if the Buyer Has Made Alternative Arrangements?

As discussed in section III.C.1, above, even many lower-priced discount brokers tell sellers that they must offer co-op fees at the prevailing rate, typically three percent if they want to attract buyer brokers.[392] Yet about 20 percent of the time,[393] buyers may choose to act without a broker and demand a three percent price discount to reflect the avoided cost of a buyer's broker. Other buyers may insist on discounts where their brokers are willing to charge less than the co-op fee offered by the listing, but their states ban rebates.[394] Meanwhile, where listing brokers have indicated that they will pay lower commissions or none at all to some brokers,[395] buyers represented by such brokers may demand a price reduction to permit them to also finance the full fee they agree to pay their broker themselves.

Unless the listing contract gives the seller such options, the listing broker might refuse to reduce the typical, e.g., six percent, commission in these cases or only agree to pass on a portion of the costs avoided to the seller. To be fair to listing brokers, the listing agreement should provide such brokers with a reasonable additional amount if the buyer has not made his or her own arrangements to handle all of the tasks that are normally handled by the buyer's broker, if the listing broker will be expected to handle

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388 *See supra* notes 255-258 and accompanying text.

389 *See supra* notes 87-90, and accompanying text.

390 The time spent by an agent may vary widely. Despite estimates of 20 to 69 hours as the average, *see supra* note 285, at 143, those appear to be on the high side.

391 *See, e.g.,* Greg Swann, *Home Buyers: How to Horsewhip Your Buyer's Agent to Get to a Reasonable Fee,* Oct. 26, 2006, http://www.bloodhoundrealty.com/BloodhoundBlog/?p=569. *See also* Greg Swann, *Repeat After Me: Mr. Realtor, What Do You Charge?,* Sept. 29, 2006, http://www.bloodhoundrealty.com/BloodhoundBlog/?p=485.

392 *See supra* section III.C.1.

393 *See supra* note 144.

394 *See supra* note 198.

395 *See supra* note 109.

them.[396] Otherwise, though, the seller should be free to pass on any costs the buyer can avoid to the buyer.

D. Sellers Should Ask: Will They Limit Dissemination of Listing Information?

As discussed above, most sellers desire and expect their brokers to seek maximum exposure for their home[397] by encouraging their listing to be spread far and wide as part of full service. Accordingly, as part of a general disclosure of what specific services they will receive, sellers deserve a "listing exposure disclosure:"[398] to know if their broker intends to prevent competing brokers from displaying information about the seller's home so that sellers can choose to avoid such brokers.

X. Conclusion

The traditional, straight percentage-of-sale-price residential real estate brokerage commission does not serve the interests of either home buyers or sellers. Fees are unrelated to the quantity or quality of service provided by brokers and their agents. The rate structure creates little incentive for agents to provide the value-added services of which many are capable, and also produces some serious harms to buyers and sellers. These harms include buyers not being alerted about available homes meeting their search criteria because the listing broker or seller has not offered an attractive fee to the buyer's broker; and providing sellers' agents little incentive to invest the effort to raise the net sale price of a home. The traditional commission rate structure has become structurally unsound and should be rebuilt.

The foundation of a new fee structure should have buyers' brokers setting their own fees or negotiating with buyers;[399] not relying on standard, default commissions set by sellers' brokers in the MLS. The traditional practice of sellers' brokers specifying the fees that buyers' brokers charge to the latter's own clients, should be recognized by appropriate governmental bodies as at least an attempt to fix market prices. Antitrust law should be interpreted to prohibit one firm from attempting to set the price that its competitors charge for a competing service.

The situation today is very different from what it was prior to the 1980s: when sellers' brokers noted their co-op fee offer in their MLS listing because they were making an offer to the agents working with buyers to join the seller's broker in serving the interests of the seller. There was nothing anticompetitive about posting an offer seeking to engage a subagent. Today, however, most buyer brokers commit to serve buyers' interests, and their fiduciary duty is to buyers. There is no longer any reason to permit

396 *See* Lew Sichelman, *Can I Ask My Agent to Accept a Lower Real-Estate Commission?,* REALESTATEJOURNAL. COM, Sept. 1, 2006, http://www.realestatejournal.com/buysell/agentsandbrokers/20060901-sichelman.html; Swann, *supra* note 86, including comments 23 & 24. In 1994, the Consumer Federation of America suggested that sellers negotiate to reduce the commission they pay to brokers to between 2.5 and 4 percent (in areas with typical 6 percent rates) if there is no other agent involved in the transaction. *See* STEPHEN BROBECK, CHANGES IN REAL ESTATE AGENT REPRESENTATION: IMPLICATIONS FOR CONSUMERS 4 (1994). *See also* Vizard, *supra* note 67 (suggesting a 4 percent commission in that situation). The FTC found that some non-traditional brokers varied their commissions so that the seller did not have to pay a buyer's agent's commission if the buyer had no agent. *See* FTC 1983 Report, *supra* note 14, at 171.

397 *See supra* note 155, and accompanying text.

398 This phrase was offered by Bill Wendel.

399 *See supra* note 98.

listing brokers to set the default prices that these competing buyers' brokers charge to serve their own customers.

The NAR claims that the elimination of interbroker compensation would destroy the MLS,[400] but that prediction is simply not true, as explained in detail by one lawyer who has long represented many MLSs.[401] The NAR's real fear about this approach, however, is understandable. The elimination of interbroker compensation would diminish the ability of traditional brokers to frustrate vigorous price competition, and thus likely lead to a dramatic fall in broker revenues.[402]

Therefore, policymakers eager to aid consumers and foster economic efficiency through competition should support this separation of fee setting. It would also eliminate the harm now caused to competition by state anti-rebate laws and disputes over which broker was entitled to the buyer broker fee as the "procuring cause" of the buyer's offer. Policymakers should also act to ensure that consumers have the same chance to amortize their broker costs as part of their mortgages, whether or not the seller agrees to include that fee in the sale price of the home.[403]

Brokers should remain free to set their fees as percentage commissions, but for routine brokerage tasks, effective competition would almost certainly lead consumers to prefer brokers who set flat fees, hourly rates, or some combination of the two, as discussed in VII. Consumers will probably continue to prefer brokerage agreements that defer any payment until the relevant transaction was completed, but broker contracts should allow brokers to receive some reasonable minimum level of compensation in the event that the client terminates the relationship after receiving valuable service, but before a purchase or sale.[404]

Percentage-based fees should not disappear, but they should be used solely to motivate real estate agents to generate incremental value. Sellers should offer their brokers' agents (alone, without any splits with others) a substantial share, e.g., 20 to 50 percent, of any increase the agent can secure in the selling price above some agreed upon benchmark. In volatile markets, however, benchmarks should include variable elements pegged to the most recent sales of comparables or inventory levels. Buyers,

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400 *See, e.g.,* Stevens, *supra* note 225, and accompanying text.

401 *See* Larson, *supra* note 98.

402 *See supra* section VIII.A.

403 Although mortgage lenders should not care whether a buyer's broker is paid directly by the buyer or by the listing broker, current practices discriminate against the former arrangement by, apparently, using a definition of "sale price" that is based on the assumption that the buyer's broker is a sub-agent of the listing broker and paid by the latter. That is, "sale price" – which sets a maximum level for a standard mortgage – appears to be defined as the fee the buyer pays to the seller – including any amount paid to the buyer's broker through the listing broker – but not including the amount paid to the buyer's broker directly by the buyer, even though the fee to the buyer's broker is listed the same way on the HUD-1 form used to record commissions and closing costs. *See* Wilson, *supra* note 65, at 146-47; Marcie Geffner, *Home Sale Commission Financing Would Benefit All,* Inman News, July 21, 2006; Larson, *supra* note 309; {Letters to the Editor, *Industry Pros Weigh in on Splitting Commissions,* Inman News, Mar. 22, 2006; *Letters to the Editor, It's Up to the Secondary Market to Change Commission Structure,* Inman News, July 3, 2006; conversation with Barry Miller, founder of Real Estate Buyer Agent Council, Aug. 26, 2006.

404 Most broker agreements already grant the broker the right to a fee if the client later buys a home that the agent had shown to them or to a buyer the agent had negotiated with, at least for some reasonable period of time.

meanwhile, once they selected a home, should offer their brokers' agents a substantial share of any price reduction the agent is able to secure. Both buyers and sellers might also offer bonuses for quick results to agents who met designated deadlines.

Reaching this result will be difficult, given the understandable resistance from traditional brokers to a reform that could cost them $30 billion in annual revenues. Still, pressure from declining home prices could be a catalyst for change. Also, superior agents should recognize that the new environment would lead to a mass exodus of the least qualified agents. This would enable them to increase their billable time and spend less time prospecting for clients. In fact, one might expect that the best agents would earn higher incomes, while consumers would receive higher quality service at lower prices. Yet given the $30 billion at stake, NAR's state affiliates are likely to be able to continue pressuring state legislatures to protect the traditional system. Consumer success will require effective work by consumer advocates. The consumer media and housing counseling agencies must prompt consumers to ask agents/brokers the four questions discussed in detail in Section IX, which should ensure that they pay only competitive prices for only the valuable real estate brokerage services they need or desire.