REVENGE OF THE REALTORS: THE PROCOMPETITIVE CASE FOR CONSOLIDATING MULTIPLE LISTING SERVICES

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To say residential real estate is an important part of our nation's economy is an understatement. Home ownership is either an asset or an aspiration for millions of Americans, and one needs only rewind the clock a decade for evidence of the financial ruin possible from buying and selling homes. But residential real estate transactions do not materialize out of thin air. Rather, the parties involved in a typical sale—buyers, sellers, agents, brokerages, online portals—all rely on critical infrastructure known as a multiple listing service (MLS) to get deals done. Simply put, an MLS is a platform that serves as a comprehensive database for information about the residential properties for sale within a specific geographic market at any given time. MLSs exist to facilitate connections between folks on opposite sides of the transaction by increasing listing exposure for sellers and by reducing search costs for buyers.

While MLSs have existed for over a hundred years, they are currently undergoing a swift transformation in form, if not function. Where, as recently as fifteen years ago, there were more than one thousand MLSs across the country, there are now fewer than 650. But individual MLSs are not going away. No, they are being consolidated—merging with one another to expand territorial footprints, create operational efficiencies, and achieve the scale necessary to bargain effectively with disruptive new entrants. In our age of mega-

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mergers, these MLS consolidations may appear insignificant, but where there is consolidation there is the possibility of competitive harm under federal antitrust laws. Given the importance of MLSs to the market for residential real estate, any anticompetitive practices that attend a merger of MLSs could have devastating consequences. This Comment addresses that concern head-on. It contends that MLS mergers, on balance, enhance competition in the residential real estate industry and should survive the searching scrutiny of antitrust regulators.

INTRODUCTION

Buying a home is the most important financial decision many millions of Americans will ever make. Residential real estate is not just an expensive asset—where somebody lives affects her entire life. It determines which schools her children may attend, the job market she has access to, the very community she is a part of. (Location, location, location indeed.) With so much depending upon the decision, prospective home buyers are sure to do their research. In decades past, this might have meant contacting whichever real estate agent was advertising on the nearest park bench. Today, chances are good that a prospective home buyer begins her search for a home by using the internet, regardless of whether she ultimately decides to work with a real estate agent.[1]

Increasing internet usage and the ubiquity of smartphones over the past eleven-or-so years[2] has fundamentally altered the ways in which many people interact with each other and conduct business. From brick-and-mortar retail to taxi services and hotel rooms, the story of our modern economy is one of technology-enabled challengers disrupting entrenched incumbents. No market appears to be safe from this phenomenon as venture capitalists invest untold amounts of money in ambitious founders and their companies, hoping to add the next "unicorn" to their portfolios.[3]

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1. NAT'L ASS'N OF REALTORS, REAL ESTATE IN A DIGITAL AGE 2017 REPORT 7 (2017), https://www.nar.realtor/sites/default/files/reports/2017/2017-real-estate-in-a-digital-age-03-10-2017.pdf [https://perma.cc/W4EP-KLW3].

2. Like many others, I recognize Apple's release of its first iPhone model in June 2007 as a significant inflection point in this respect. *See, e.g.*, Rani Molla, *How Apple's iPhone Changed the World: 10 Years in 10 Charts*, RECODE (June 26, 2017, 11:24 AM), https://www.recode.net/2017/6/26/15821652/iphone-apple-10-year-anniversary-launch-mobile-stats-smart-phone-steve-jobs [https://perma.cc/M3WE-FDXY].

3. A "unicorn" is a private company valued at at least $1 billion. *See, e.g.*, Erin Griffith, *Unicorns Are Rare. This Study Suggests They Should Be Even Rarer*, WIRED (Feb. 5, 2018, 7:00 AM), https://www.wired.com/story/unicorns-are-rare-study-suggests-they-should-be-even-rarer [perma.cc/344Y-SXXP]. Top venture

Count the residential real estate industry among those experiencing an overhaul. Where before the National Association of Realtors (NAR) had a stranglehold on the production and use of residential real estate data through local multiple listing services (MLSs), upstarts with national reach such as Zillow, Trulia,[4] and Redfin have supplemented MLS data with user-friendly interfaces to become indispensable tools for many house-hunting consumers.[5] In the process, those local agents and brokerages who compose MLSs[6] have ceded considerable power to the upstarts and must fight back in order to stay relevant. Here, fighting back means joining forces. In 2005 there were approximately one thousand different MLSs operating in the United States.[7] By March 2011 there were 883,[8] come October 2016 that number had been slashed to 719,[9] and a white paper released in June 2018 identifies 634 MLSs currently in existence.[10] There are no signs that the trend toward consolidation is slowing,[11] with some in the industry clamoring for a na-

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capital firms such as Andreessen Horowitz and Sequoia Capital have stables full of unicorns. *Portfolio*, ANDREESSEN HOROWITZ, https://a16z.com/portfolio [https://perma.cc/344Y-SXXP]; *Companies*, SEQUOIA CAPITAL, https://www.sequoiacap.com/companies [https://perma.cc/9AA9-5H9E].

4. Note that Zillow purchased Trulia in 2014 and now both services operate under the Zillow Group umbrella. *See* Michael J. de la Merced, *Zillow to Buy Trulia for $3.5 Billion in All-Stock Deal*, N.Y. TIMES: DEALBOOK (July 28, 2014, 8:31 AM), https://dealbook.nytimes.com/2014/07/28/zillow-to-buy-trulia-for-3-5-billion [https://perma.cc/8F5N-T5RZ].

5. For example, more than 187 million unique users visited an app or website of a Zillow Group brand in July 2017. Press Release, Zillow Group, Inc., Zillow Group Third Quarter 2017 Revenue Increased 25% Year-Over-Year (Nov. 7, 2017), http://investors.zillowgroup.com/releasedetail.cfm?ReleaseID=1047609 [https://perma.cc/932R-6JVA].

6. *See infra* Section I.A.

7. James R. Hagerty, *Discount Real-Estate Brokers Spark a War Over Commissions*, WALL ST. J. (Oct. 12, 2005, 12:01 AM), https://www.wsj.com/articles/SB112908036452466246 [https://perma.cc/WB24-EPD8].

8. Cameron Paine, *MLS: Yes to Consolidation*, REALTOR MAG. (Mar. 1, 2011), http://realtormag.realtor.org/news-and-commentary/commentary/article/2011/03/mls-yes-consolidation [https://perma.cc/UFQ9-2P9Q].

9. T3SIXTY, SWANEPOEL TRENDS REPORT 2017: THE MLS CONSOLIDATION SHIFT 157 (2017), https://www.nar.realtor/sites/default/files/documents/2017-Swanepoel-Trends-Report-Chapter-2-MLS-Consolidation.pdf [https://perma.cc/JAS8-JX82].

10. COUNCIL OF MULTIPLE LISTING SERVICES, DATA AND CHOICES BREED COMPETITION 1 (2018), https://cdn.ymaws.com/members.councilofmls.org/resource/resmgr/files/resources/CMLS_Competition_Whitepaper_.pdf [https://perma.cc/YH5N-3JJX].

11. *See, e.g.*, Shay Castle, *Warring Real Estate Data Firms to Merge*, BOULDER DAILY CAMERA, Nov. 11, 2017, at 11A (concerning the merger of the two

tional system comprised of a dozen or fewer MLSs.[12]

While these mergers may seem like small potatoes compared to headline-hogging deals such as Amazon's acquisition of Whole Foods[13] or AT&T's drawn-out and intensely litigated purchase of Time Warner,[14] the antitrust teams at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are surely paying attention.[15] MLS-related antitrust litigation has been happening for the better part of the past fifty years,[16] and both the Antitrust Division of the DOJ and the FTC keep a close eye on competition in the real estate industry.[17] So what are we—and more importantly, government regulators—to make of MLS consolidation?

This Comment advances the following positions: MLS consolidations are virtually inevitable, benefit consumers, and are

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largest MLSs in Colorado).

12. *See, e.g.*, Sam Debord, *MLS Without Borders: The Consolidation Endgame?*, The NOTORIOUS R.O.B. (Jan. 31, 2017), http://www.notorious-rob.com/2017/01/mls-without-borders-the-consolidation-endgame [https://perma.cc/7PKQ-5RJB].

13. *See* Laura Stevens & Annie Gasparro, *Amazon to Buy Whole Foods for $13.7 Billion*, WALL ST. J. (June 16, 2017, 7:34 PM), https://www.wsj.com/articles/amazon-to-buy-whole-foods-for-13-7-billion-1497618446 [https://perma.cc/45BF-CKUH].

14. *See* Thomas Gryta et al., *AT&T Reaches Deal to Buy Time Warner for $85.4 Billion*, WALL ST. J. (Oct. 22, 2016, 11:06 PM), https://www.wsj.com/articles/at-t-reaches-deal-to-buy-time-warner-for-more-than-80-billion-1477157084 [https://perma.cc/LV76-EP4Z]; Brent Kendall & Drew FitzGerald, *AT&T Beats U.S. in Antitrust Fight Over Time Warner*, WALL ST. J. (June 12, 2018, 8:39 PM), https://www.wsj.com/articles/judge-is-set-to-decide-whether-at-t-and-time-warner-can-merge-1528832942 [https://perma.cc/XQ2F-465A]. *But see* Brent Kendall & Drew FitzGerald, *Justice Department Appeals Ruling Allowing AT&T-Time Warner Merger*, WALL ST. J. (July 12, 2018, 8:29 PM), https://www.wsj.com/articles/justice-department-to-appeal-court-ruling-allowing-at-t-time-warner-merger-1531427031 [https://perma.cc/TJU6-NC5N].

15. For evidence, look no further than a joint public workshop that the antitrust regulators co-hosted on the subject of real estate brokerage competition in early June 2018. *What's New in Residential Real Estate Brokerage Competition: An FTC-DOJ Workshop*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj (last visited June 10, 2018) [https://perma.cc/PR9Q-U2Q2]. This was the first such workshop since October 2005.

16. *MLS Access Litigation Summary*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/law-and-ethics/mls-access-litigation-summary (last visited Nov. 13, 2017) [https://perma.cc/P8LN-JT4D]. For an overview, see generally *infra* Section I.B.

17. *Competition and Real Estate*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/competition-and-real-estate-0 (last updated Jan. 12, 2016) [https://perma.cc/D8GW-BCUK]; *Real Estate Competition*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/media-resources/mergers-competition/real-estate-competition (last visited Nov. 13, 2017) [https://perma.cc/7SFU-J28L].

legal under federal antitrust law. Part I provides context by explaining what MLSs are, why access to real estate data has historically been subject to scrutiny by antitrust regulators, and how innovation has already prompted significant consolidation in the industry and inspired calls for even more. Part II makes explicit the operative antitrust principles and policies governing mergers. Those principles and policies are applied to MLS consolidation in Parts III and IV. Part III begins the merger inquiry by defining the market for real estate data. Part IV completes the merger inquiry by considering the effects that consolidation in the broader real estate data industry might have on competition and consumers. This Comment concludes with a call for regulators to permit MLS mergers to occur and to focus their efforts on the real threats to competition in the residential real estate industry moving forward.

I. FRAMING THE MLS ISSUE

Before we become immersed in analyzing the hairy antitrust considerations of MLS consolidation, it is important to establish a baseline understanding of the market for residential real estate. This Part serves that purpose. It opens with an explanation of the problem that MLSs solve for the residential real estate industry and outlines the basic mechanics of how they operate. Then, it walks through the once-heated history of federal antitrust litigation that forged today's MLS landscape. Next, it discusses the dynamic current state of the industry by highlighting disruptive companies and new business models, and finally sketches the arguments for and against MLS consolidation.

A. *What is a Multiple Listing Service?*

The vast majority of home sales in America are conducted with real estate agents representing parties on both the buying[18] and selling[19] sides of the transaction.[20] An MLS is

18. *Quick Real Estate Statistics*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics (last visited June 10, 2018) [https://perma.cc/ATE5-MKME] (noting that 87 percent of home buyers purchased their homes through a real estate agent or broker).

19. *Id.* (noting that 89 percent of home sellers are likewise assisted by a real estate agent).

essentially a platform that matches agents representing home buyers with agents representing home sellers.[21] Technically speaking, an MLS is a local or regional joint venture by a group of real estate brokers who cooperate to pool and disseminate information about homes available for sale in their particular geographic territories.[22]

Imagine the world looks as it does when you are playing your favorite property-trading board game: There are a total of twenty-two properties divided into eight different neighborhoods, and property prices depend upon the neighborhood each property is a part of.[23] You want to purchase one of the properties, but first you want to know how many are available for sale and at what prices. This is where an MLS comes in. Even if all of the properties for sale are listed by different real estate brokerages, so long as there is a common MLS in which every brokerage participates, you as a prospective buyer can feel confident knowing that you have complete information about the market and can act accordingly.

Using MLSs to organize a market for residential real estate is a uniquely American practice,[24] but it is not new. In fact, multiple listing dates back to the late nineteenth century when real estate brokers gathered in person to exchange

20. For a simplified overview of a residential real estate agent's role in a typical transaction, see *The Realtor's Role in a Residential Real Estate Transaction*, DUMMIES, http://www.dummies.com/careers/career-planning/changing-careers/the-realtors-role-in-a-residential-real-estate-transaction (last visited June 10, 2018) [https://perma.cc/DY8Q-MGYK]. For a funnier—if not entirely accurate—depiction of a real estate agent's role, consider watching a clip from a John Mulaney stand-up special. JOHN MULANEY: THE COMEBACK KID 19:12–22:12 (NETFLIX 2015).

21. In economic terms, an MLS is a quintessential "two-sided market" or "two-sided platform." *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280 (2018) (defining a "two-sided platform" as one that "offers different products or services to two different groups who both depend on the platform to intermediate between them").

22. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY: A REPORT BY THE FEDERAL TRADE COMMISSION AND THE U.S. DEPARTMENT OF JUSTICE 10 (2007) [hereinafter DOJ & FTC REPORT], https://www.justice.gov/sites/default/files/atr/legacy/2007/05/08/223094.pdf [https://perma.cc/TV5V-SW7L].

23. Improbably, however, even the most expensive neighborhood is located right near a railroad.

24. Kathleen Peddicord, *How To Shop For Real Estate in a Country with No MLS*, HUFFPOST (Apr. 9, 2014, 6:44 AM), https://www.huffingtonpost.com/kathleen-peddicord/real-estate-mls_b_5070389.html [https://perma.cc/3974-2CFJ].

information about their properties.[25] These first MLSs were based on a simple, foundational principle that persists to this day: "Help me sell my inventory, and I'll help you sell yours."[26] The practice proliferated in the 1920s,[27] and by 1977, 93 percent of real estate firms belonged to at least one MLS.[28] Today, with the notable exception of New York City,[29] America is blanketed by MLSs.[30]

Each MLS combines information about its members' home listings into a single database that is made available to all dues-paying brokers and agents who are members of that MLS.[31] Although the specific data available about properties vary across different MLSs, listings typically include a detailed description of the home for sale, the asking price, and the name of the listing broker.[32] As such, an MLS facilitates transactions for brokers and agents on both sides of the deal. For parties representing sellers, an MLS allows them to market properties to a large audience of potential buyers. For cooperating parties representing buyers, an MLS is a rich source of information

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25. NAT'L ASS'N OF REALTORS, HANDBOOK ON MULTIPLE LISTING POLICY 138 (30th ed. 2018) [hereinafter NAR MLS HANDBOOK], https://www.nar.realtor/sites/default/files/documents/2018-HMLP-v1.pdf [https://perma.cc/KLW4-G27A].

26. *Multiple Listing Service (MLS): What Is It*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/nar-doj-settlement/multiple-listing-service-mls-what-is-it (last visited Nov. 15, 2017) [https://perma.cc/3J5U-ZXNH].

27. NAR MLS HANDBOOK, *supra* note 25, at 138.

28. FED. TRADE COMM'N, THE RESIDENTIAL REAL ESTATE AND BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT AND THE BUTTERS REPORT 109 (1983).

29. *See* S. Jhoanna Robledo, *Search and Destroy: A Centralized Site for Apartment-Shopping on the Web? Sounds Great—to Everyone Outside the Business*, N.Y. MAG.: REAL ESTATE (Nov. 14, 2005), http://nymag.com/nymetro/realestate/columns/realestate/14981 [https://perma.cc/6W93-4MJ7]; *see also* Katherine Clarke, *How an MLS Slipped Through NYC's Cracks*, THE REAL DEAL (Apr. 1, 2017, 9:53 PM), https://therealdeal.com/issues_articles/how-an-mls-slipped-through-nycs-cracks [https://perma.cc/RP88-D527]. Most accounts suggest that New York City does not have an MLS or MLS-like central database at this point because of how lucrative the properties in that market can be for brokerages. It seems that the largest brokerages met and decided the creation of an MLS was not in their best interests—if true, this might be worthy of antitrust review in its own right.

30. For a map depicting nationwide MLS coverage, see Map of MLS Locations, Realtors Property Resource, http://blog.narrpr.com/map-3 (last visited July 8, 2018) [https://perma.cc/2L34-XZWW].

31. DOJ & FTC REPORT, *supra* note 22, at 10. For a simplified depiction of the data flows involved with MLSs, see FTC (@FTC), TWITTER (June 5, 2018, 6:48 AM), https://twitter.com/FTC/status/1003997082850603010 [https://perma.cc/VU2T-7MFE].

32. DOJ & FTC REPORT, *supra* note 22, at 10.

about properties that can be matched against the criteria of individual clients. Compared to getting in the car and trawling neighborhoods for "for sale" signs, using an MLS to search for available properties—particularly since the data became widely available online—is far more efficient.[33]

Since MLSs are the primary source of home listings, providing access to them is one of the most important services that real estate brokerages provide for their clients.[34] MLSs are so critical to the operation of the American residential real estate market that, as a practical matter, any broker who wants to compete must participate in the local MLS.[35] Accordingly, it is appropriate to think about MLSs as the "infrastructure" of the residential real estate industry.[36] In addition to using an MLS to match sellers with buyers, brokers are able to further reduce transaction costs by using an MLS to state up front how much compensation is being offered for cooperating brokers who find a suitable buyer.[37] These are merely some of the more obvious benefits of MLSs. The efficiencies associated with the use of MLSs are well-documented in real estate, legal, and economic literature.[38] But what some view as a force for eco-

33. *See* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1140 (9th Cir. 2003) ("Long gone are the days when agents trawled the neighborhood on horseback in search of telltale 'For Sale' signs. We're now in the era of the [MLS], which lets agents share information about properties on the market with the help of a computerized database.").

34. According to the NAR, 90 percent of sellers listed their homes on an MLS during the most recent year for which data are available. NAT'L ASS'N OF REALTORS, 2017 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS 7 (2017).

35. *See* United States v. Realty Multi-List, 629 F.2d 1351, 1370 (5th Cir. 1980) ("[M]embership in the listing service becomes essential to a broker's ability to compete effectively."). Given the essentially independent operation of each MLS, there is no universal membership fee, but as an illustration of the costs associated with accessing MLS data, note that a real estate agent in Phoenix, Arizona, would need to pay a minimum annual subscription fee of $324 to access the data in his market. *Billing / Pay Fees*, ARIZONA REGIONAL MULTIPLE LISTING SERVICE, INC., http://armls.com/billing-pay-fees (last visited Aug. 26, 2018) [https://perma.cc/2GTJ-ZLYT]. This is on top of annual NAR dues that, for the years 2017 and 2018, ran $120 per person. *Dues Information*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/narfininfo.nsf/pages/DuesTransmittalInfo (last visited Feb. 4, 2018) [https://perma.cc/3GEE-X9GB].

36. To analogize: MLSs are to residential real estate what tracks are to railroads or overhead lines are to pre-cellular telephony. The half-awake antitrust scholar will appreciate the history of anticompetitive abuses in those two industries and why MLSs, in turn, deserve close scrutiny.

37. DOJ & FTC REPORT, *supra* note 22, at 12.

38. *See, e.g.*, Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV.

nomic progress, others see as anticompetitive.

B. A Brief History of MLS-Focused Antitrust Litigation

Under typical market forces (supply, demand, etc.), anticompetitive behavior has a way of manifesting itself in powerful actors. With approximately 1,200 local associations and more than a million members, the NAR is nothing if not a powerful actor.[39] Founded in 1908 as the National Association of Real Estate Exchanges,[40] the NAR has played an outsized role in shaping our country's residential real estate industry for over a century.[41] Not least among the NAR's contributions has been its continued investment in, and oversight of, MLSs. In particular, the NAR sets the standards for its affiliated MLSs.[42] While MLSs need not be affiliated with the NAR, approximately 80 percent are,[43] which means that NAR standards dominate the industry. Historically, these standards have sometimes favored NAR members at the expense of non-NAR members, while at other times they have allowed for individual MLSs to set unreasonable membership requirements. As a result, there is a significant history of both state and federal antitrust litigation involving the NAR and MLSs across the country.[44]

Given the importance of MLS data to the competitive operation of residential real estate markets, most MLS-related anti-

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L. REV. 1521, 1567 (1982) (noting that MLSs provide "a market-perfecting and hence socially efficient function").

39. *About NAR*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar (last visited Nov. 15, 2017) [https://perma.cc/P9Y9-VE3B]. In fact, the NAR is the largest trade association in the country. *Id.*

40. *History*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar/history (last visited Nov. 15, 2017) [https://perma.cc/A4QD-5CKH].

41. And not always for the better. Most troubling is the NAR's record on civil rights and racial segregation in housing as evidenced by its vocal opposition to passage of the Fair Housing Act in 1968. *See* Jonathan Zasloff, *Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968–1978*, 61 HOW. L. J. 69 (2017) (detailing a history of the NAR's intransigence in accepting what many real estate agents called "forced housing").

42. NAR MLS HANDBOOK, *supra* note 25; *see also id.* at 7, 8 for the NAR's official "MLS Antitrust Compliance Policy."

43. Amended Complaint at 5, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. Oct. 4, 2005).

44. *MLS Access Litigation Summary*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/law-and-ethics/mls-access-litigation-summary (last visited July 20, 2018) [https://perma.cc/F3NE-W6C8].

trust lawsuits have focused on practices by MLSs that limit access to the data for non-members.[45] Though none of the following cases explicitly analyze whether MLS *mergers* are anticompetitive, they give color to regulatory concerns that such mergers might invite the bad behavior that was previously proscribed. What follows is a condensed discussion of notable federal cases.[46] The first case, *United States v. Realty Multi-List, Inc.*, concerns an MLS that enforced unreasonable membership criteria against would-be members.[47] The next two cases, *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors* and *Thompson v. Metropolitan Multi-List, Inc.*, represent a circuit split as to whether NAR-affiliated MLSs can force NAR membership on those who wish to join the MLS.[48] Especially relevant to this Comment, *Freeman v. San Diego Ass'n of Realtors* highlights what can go wrong when a newly merged MLS tries to set subscriber fees.[49] The most recent line of cases discussed below introduces the internet into this already complicated dynamic.

In *United States v. Realty Multi-List, Inc.*, the DOJ alleged that a Georgia MLS was engaging in a conspiracy to unreasonably restrict membership in the MLS by requiring applicants to maintain an active real estate office inside the MLS's territory, to possess a favorable credit report and business reputation, and to purchase a $1,000 share of stock[50] in the MLS.[51] Keying in on the stock requirement, the Fifth Circuit ultimately found

45. More often than not, there is an additional in-group/out-group dynamic where the MLS members are also members of the NAR and the non-members are not members of the NAR. *See id.*

46. The following discussion is by no means an exhaustive account of federal case law concerning MLSs and antitrust. The discussion primarily serves to support the proposition that antitrust inquiries into the policies and practices of MLSs are not uncommon. Further, it highlights that the specific issue this Comment addresses, *i.e.*, the antitrust considerations of MLS consolidation, has received little attention by courts. If you would prefer to brush up on antitrust basics before continuing, see Part II, *infra*.

47. 629 F.2d 1351 (5th Cir. 1980).

48. 850 F.2d 803 (1st Cir. 1988); 934 F.2d 1566 (11th Cir. 1991).

49. 322 F.3d 1133 (9th Cir. 2003).

50. Adjusted for inflation, this is equivalent to $3,906.81 in June 2018. *CPI Inflation Calculator*, BUREAU LAB. STATS., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1%2C000.00&year1=197805&year2=201806 (last visited July 20, 2018) [https://perma.cc/R26B-DCF9].

51. 629 F.2d at 1359. Initially, applicants were also required to receive an affirmative vote of 85 percent of the members of the MLS, but by the time the case reached trial the voting requirement had been reduced to a simple majority and then abolished altogether. *Id.* at 1358.

for the DOJ, agreeing that "the unrestricted power to set an entrance fee which is unrelated to either the cost of the service provided or the cost of maintaining the service . . . is the power to exclude, and hence to destroy competition."[52] While *Realty Multi-List* dealt with rather clear anticompetitive behavior, the next two cases lie on opposite sides of a contentious issue: whether NAR-affiliated MLSs can restrict MLS membership to NAR members.

In the requiring-NAR-membership-is-fine camp, we have *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*.[53] In *Wells Real Estate*, a Massachusetts broker sued his local real estate board. The broker alleged that access to the board-operated MLS should not have been conditioned on joining the board, adhering to the rules established by the board, or accepting the conditions of sales and commissions required by the board.[54] The First Circuit found in favor of the defendants, holding that access to the MLS was merely "one of the advantages gained by joining that trade organization" and that conditioning MLS access on board membership was not anticompetitive.[55]

As applied to NAR-affiliated MLSs, the outcome of *Wells Real Estate* is the standard.[56] The standard, that is, outside of the Eleventh Circuit. In *Thompson v. Metropolitan Multi-List, Inc.*,[57] two plaintiffs challenged their local MLS's requirement that access to the MLS was for Realtors only.[58] In defense of its policy, the MLS said that NAR membership was required because the NAR's Realtor Code of Ethics included rules that encouraged cooperation between brokers who listed their

52. *Id.* at 1385–86.

53. 850 F.2d 803 (1st Cir. 1988).

54. *Id.* at 807. The principal argument advanced by the plaintiff was that purchasing undesirable board membership was illegally "tied" to purchasing desirable MLS access. *Id.* at 806.

55. *Id.* at 815.

56. *See, e.g.*, Pope v. Miss. Real Estate Comm'n, 872 F.2d 127 (5th Cir. 1989); O'Riordan v. Long Island Bd. of Realtors, 707 F. Supp. 111 (E.D.N.Y. 1989); Venture Res. Grp., Inc. v. Greater N. J. Reg'l Multiple Listing Serv., Inc., 1995 WL 866841 (D.N.J. Aug. 24, 1995); Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors, 410 F. Supp. 2d 574 (E.D. Ky. 2006), *aff'd*, 198 F. App'x 485 (6th Cir. 2006); Prencipe v. Spokane Bd. of Realtors, 2006 WL 1310402 (E.D. Wash. May 12, 2006); Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312 (7th Cir. 2006).

57. 934 F.2d 1566 (11th Cir. 1991).

58. *Id.* at 1570.

properties on the MLS.[59] The MLS argued that these rules encouraged brokers to join the MLS which, in turn, increased market efficiency (the legitimate, procompetitive goal).[60] The court determined that while encouraging MLS membership was indeed procompetitive, demanding NAR affiliation from its members was not a sufficiently narrowly tailored way for the MLS to achieve this goal, and found in favor of the plaintiffs.[61]

Fast-forward a dozen years, and a new theory of competitive harm relating to MLSs had found its way to a federal appellate court: price fixing.[62] In *Freeman v. San Diego Ass'n of Realtors*,[63] the Ninth Circuit analyzed a claim of price fixing brought by two California real estate agents.[64] The agents belonged to a large MLS that had been formed through the consolidation of eleven smaller MLSs.[65] Before consolidation, each of the smaller MLSs had different costs to support MLS services, ranging from $10 per subscriber per month for the largest of the eleven to almost $50 per subscriber per month for the smallest.[66] After consolidation, the MLS decided to basically split the difference and set the support fee for subscribers at $25 per subscriber per month.[67] The court found that this fee was plainly anticompetitive, as it "was fixed at a level more than twice what it costs the most efficient association to provide [support services]."[68] Like the above cases, *Freeman* is, at its core, concerned with MLS access. Even if most MLS subscribers could have stomached the extra $180 in annual fees,[69] surely some would have been deterred from joining the MLS,

59. *Id.* at 1581.

60. *Id.*

61. *Id.* at 1581–82.

62. All you really need to know about price fixing is that it occurs when competitors agree with each other to set the price of a given product, thereby usurping the role of consumers in a free market. *See Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited July 21, 2018) [https://perma.cc/6NR5-MQ9W]. Price fixing is one of the few trade practices that is almost always illegal under federal antitrust law. *Id.*

63. 322 F.3d 1133 (9th Cir. 2003).

64. *Id.* at 1141–42.

65. *Id.* at 1140.

66. *Id.* at 1141.

67. *Id.*

68. *Id.* at 1145.

69. Assuming that the competitive price for MLS support fees was $10 per subscriber per month, the fixed price of $25 per subscriber per month represented an extra cost to subscribers of $15 per month, or $180 per year.

and the result would have been fewer competitors in the relevant residential real estate market.

The early 2000s also saw renewed attention from antitrust regulators brought on by changes in technology. As more and more home buyers started using the internet, some entrepreneurial brokers began to make innovative use of MLS data in the form of virtual office websites (or VOWs).[70] Basically, with VOWs, home buyers are able to access MLS data without relying on agents to act as gatekeepers.[71] These efficiencies threatened the incumbent brokerage industry by cutting commission rates. Consequently, the NAR adopted an official VOW policy in 2003 that impaired the ability of entrepreneurial brokers to rely on VOWs as a central part of their services and allowed incumbent brokers to opt-out and remove their listings from VOWs.[72] Again, it seemed the NAR was flexing its muscles to limit access to MLS data.

Enter the DOJ. In September 2005, the Antitrust Division filed a suit against the NAR[73] alleging, among other concerns, that the opt-out right was fundamentally anticompetitive and harmful to consumers because the effect of the policy was to deny entrepreneurial brokers the same benefits of MLS membership available to their competitor brokers, suppress technological innovation, discourage competition on price and quality, and raise barriers to entry.[74] The DOJ and the NAR settled the lawsuit in 2008, with the latter agreeing that its affiliated MLSs could not discriminate against the use of VOWs to

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70. Eric Lichtblau, *Realtors Agree to Stop Blocking Web Listings*, N.Y. TIMES (May 28, 2008), http://www.nytimes.com/2008/05/28/business/28realty.html [https://perma.cc/2UDG-JR4W].

71. David Kully, *Will the Real Estate Industry Go Back to the Dark Ages After 2018?*, INMAN (Nov. 17, 2017), https://www.inman.com/2017/11/17/will-the-real-estate-industry-go-back-the-dark-ages-after-2018 [https://perma.cc/YLB9-WXWH].

72. *Id.* For more information about the 2003 VOW policy, see *Proposed Policy on VOWs (Virtual Office Websites)*, REALTOR MAG., May 2003, https://www.nar.realtor/rmomag.nsf/files/VOWs.pdf/$FILE/VOWs.pdf [https://perma.cc/TX29-8UGJ].

73. For a timeline of the litigation, see United States v. National Association of Realtors, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/case/us-v-national-association-realtors (last visited Nov. 14, 2017) [https://perma.cc/U8CG-XXJB]; for a contemporary account of the impact of VOWs on traditional brokerages, see Damon Darlin, *The Last Stand of the 6-Percenters?*, N.Y. TIMES (Sept. 3, 2006), http://www.nytimes.com/2006/09/03/business/yourmoney/03real.html [https://perma.cc/MLE5-5RUC].

74. Amended Complaint at 4, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. Oct. 4, 2005).

deliver brokerage services.[75] The consent decree will expire in November 2018, at which point the NAR will no longer be compelled to support VOW-based business models.[76]

How the expiration of the consent decree will affect companies that rely on MLS access protected under the agreement remains to be seen.[77] Opinions on the looming expiration vary, and industry participants have a palpable sense of unease,[78] but the consensus seems to be that not much will change with respect to the availability of listing data—at least not anytime soon. As one commentator suggested, this is because consumers and brokers have "become accustomed to widespread dissemination of listings information as a market reality."[79] Another put it bluntly: "[the NAR] learned their lesson."[80] Even if the expiration of the consent decree changes little moving forward, there is no denying that the decree created a fertile environment for the development of innovative business models that rely on MLS data.

C. *Redfin, Zillow, Opendoor, and the New Frontier of Organized Real Estate*

In the wake of the 2008 settlement, internet-based real estate expanded rapidly,[81] with startup companies, such as Redfin, Zillow, and Opendoor becoming major players and well-recognized brands.[82] These, and other, companies have added

75. Final Judgment at 5, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. Nov. 18, 2008); *see also* NAR MLS HANDBOOK, *supra* note 25, at 7–8.

76. Final Judgment at 11, United States v. Nat'l Ass'n of Realtors, No. 05C-5140 (N.D. Ill. Nov. 18, 2008).

77. Kully, *supra* note 71.

78. *See e.g.*, Jennifer Walpole, *NAR's Settlement with the DOJ Expires this Year—What's Next?*, THE AMERICAN GENIUS (Feb. 12, 2018), https://theamericangenius.com/housing/board-associations/nar-settlement/ [https://perma.cc/V86T-5XB4]; Andrea Riquier, *Realtors Will Soon Be Free of a 10-Year-Old Justice Department Decree—So What Happens to Housing Now?*, MARKETWATCH (Mar. 21, 2018, 11:14 AM), https://www.marketwatch.com/story/realtors-will-soon-be-free-of-10-year-old-justice-department-decree-so-what-happens-to-housing-now-2018-02-06 [https://perma.cc/FXF8-4WPE].

79. Kully, *supra* note 71.

80. Riquier, *supra* note 78.

81. Of course, internet-based *everything* has exploded within the past decade, so to attribute similar growth in the residential real estate industry solely—or even principally—to the 2008 settlement would be improper.

82. If you have not yet heard of Opendoor, you likely will soon. *See* Matthew Lynley, *Opendoor Raises $325M to Make Buying and Selling Homes a Near-*

to the legacy model of traditional brokerages a variety of business models that now form a robust menu of choices for consumers to buy and sell homes. Because each model might be differently affected by MLS consolidation, each is considered in turn. The universe of consumer residential real estate can be divided into four categories: "traditional brokerages," like RE/MAX, Century 21, Sotheby's; "hybrid brokerages," like Redfin; "portals," like Zillow, Trulia, and Realtor.com;[83] and "iBuyers," like Opendoor. First, let's take a look at how traditional brokerages function.

1. Traditional Brokerages

A traditional brokerage offers customers a full suite of services, from listing to closing and everything in between.[84] These brokerages are often franchises that operate out of brick-and-mortar buildings and employ agents as independent contractors who receive a portion of the commission charged to customers for the brokerage's services.[85] Traditional brokerages are known for having high overhead costs such as rent, advertising, and agent training but are able to offer their clients significant personal attention and expertise about local

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Instant Process, TECHCRUNCH (June 13, 2018), https://techcrunch.com/2018/06/13/opendoor-raises-325m-to-make-buying-and-selling-homes-a-near-instant-process [https://perma.cc/DBY6-ELXL]. Still, for all the publicity these companies receive, it remains unclear just how much of an impact they are having on the market as a whole. Consider that Redfin has a less-than-one-percent market share of existing U.S. home sales by value. *Redfin First-Quarter 2018 Revenue up 33% Year-over-Year to $79.9 Million*, REDFIN (May 10, 2018), http://investors.redfin.com/news-releases/news-release-details/redfin-first-quarter-2018-revenue-33-year-over-year-799-million [https://perma.cc/2AKN-4FCD].

83. Note, Realtor.com is not owned by the NAR but rather is a product of Move, Inc., which is a subsidiary of News Corp. that licenses the "Realtor" trademark. *Operating Companies: Brands*, NEWS CORP., https://newscorp.com/business/move-inc (last visited July 29, 2018) [https://perma.cc/85RE-A27W].

84. William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 182 (1981) ("Typical full service includes the following: (1) assisting the seller in establishing the asking price for his home; (2) furnishing the seller with a 'For Sale' yard sign; (3) entering the listing for the home into the multiple listing service; (4) 'qualifying' potential buyers by determining their purchasing ability; and (5) acting as an intermediary between the seller and buyer in negotiating the sale.").

85. By law, real estate agents need to work under a broker's license that is itself subject to state regulation. *See, e.g.*, COLO. REV. STAT. § 12-61-102 (2017).

markets.[86] Traditional brokerages are power users of MLS data and depend on it for learning about local markets and for informing their clients (just like those late nineteenth-century brokerages). But as the industry modernizes—moving away from fax machines and toward artificial intelligence[87]—full-service, traditional brokerages are no longer the only option for buying and selling homes.

2. Hybrid Brokerages Like Redfin

Since Redfin, as a hybrid brokerage,[88] functions similarly to traditional brokerages, it is an ideal company to think about as we bridge the gap between old and new models. First launched in Seattle in 2006,[89] Redfin employs real estate agents and has agreements with MLSs that allow the company to display real-time property listings just like traditional brokerages do.[90] Unlike most traditional brokerages, however, Redfin displays listings from for-sale-by-owner (FSBO) properties, was founded by "technologists," is backed by venture capital, and cuts commissions dramatically.[91] While a typical transaction with a traditional brokerage nets a total commission of 5–6 percent that is split evenly by the buying agent and the selling agent, Redfin refunds buyers who use a Redfin agent a generous portion of the commission the agent received

86. Though slightly dated, a 2007 case study of the brokerage Keller Williams offers a comprehensive look at traditional brokerages. Brian Tayan & James N. Baron, Keller Williams Realty (Mar. 26, 2007) (unpublished case study, Stanford Graduate School of Business), http://agentslaunch.com/wp-content/uploads/2016/10/Stanford-University-2007.pdf [https://perma.cc/46BL-RDLA].

87. *See* Tigh Loughhead, *What the Rise of Machine Learning Means for Real Estate Sales*, INMAN (Dec. 14, 2016), https://www.inman.com/2016/12/14/rise-machine-learning-means-real-estate-sales [https://perma.cc/BH58-YWA2].

88. *A Hybrid Broker Success Story: Redfin*, INMAN (July 16, 2015), https://www.inman.com/2015/07/16/a-hybrid-broker-success-story-redfin [https://perma.cc/K4FM-MPW5].

89. *Company Timeline*, REDFIN, http://press.redfin.com/phoenix.zhtml?c=252734&p=irol-corporatetimeline (last visited June 11, 2018) [https://perma.cc/8E6C-35D4].

90. *Redfins's Dedication to Data Quality*, REDFIN, https://www.redfin.com/about/data-quality-on-redfin (last visited Aug. 14, 2018) [https://perma.cc/NWH7-HVN3].

91. *Understanding Redfin: Next Gen Real Estate Brokerage*, GOODWATER CAP. (July 26, 2017), http://www.goodwatercap.com/thesis/understanding-redfin [https://perma.cc/R2DN-UXV8]; *see also FAQ*, REDFIN, http://press.redfin.com/phoenix.zhtml?c=252734&p=irol-faq (last visited Aug. 14, 2018) [https://perma.cc/3RTR-5A54].

and charges sellers a commission of only 1–1.5 percent.[92] Further, while most brokerages pay agents out of commissions alone, Redfin pays its agents a yearly salary with benefits.[93] To the end consumer, working with a hybrid brokerage often means taking an à la carte approach: consulting with an agent for big stuff like touring houses and closing the deal, while taking responsibility for other things like neighborhood and property research.

3. Zillow and the Portals

By contrast, Redfin's neighbor from the Pacific Northwest, Zillow,[94] does not focus its efforts on being a brokerage. Instead, it positions itself as a media company that makes money by selling advertisements to real estate agents.[95] Zillow initially gained traffic[96] because of its algorithm-based home values called "Zestimates," which allowed curious people to see what their neighbors' homes were worth.[97] The company built upon that traffic by recruiting FSBOs and partnering with brokers and MLSs to get their data feeds.[98] Zillow's popularity has turned the site into a significant source of lead generation[99] for

92. *Id.* As explained below, commission rates are possibly the most important competitive concern of antitrust regulators looking at the residential real estate industry.

93. Megan Sanks, *Redfin (RDFN) vs. Zillow (ZG): What's the Difference?*, NASDAQ (Aug. 11, 2017, 6:00 PM), http://www.nasdaq.com/article/redfin-rdfn-vs-zillow-zg-whats-the-difference-cm831222 [https://perma.cc/5ADD-ZGZM].

94. Like Redfin, Zillow also began—and continues to be headquartered—in Seattle. *About Us*, ZILLOW, https://www.zillow.com/corp/About.htm (last visited Aug. 14, 2018) [https://perma.cc/6LL8-B9AW].

95. Matt Rosoff, *Zillow Chief: Here's Why We Can Be a Billion-Dollar Company*, BUS. INSIDER (Apr. 26, 2012, 7:02 PM), http://www.businessinsider.com/zillow-chief-heres-why-we-can-be-a-billion-dollar-company-2012-4 [https://perma.cc/7VKV-PA66].

96. Shana Lebowitz & Alyson Shontell, *People Nearly Crashed Zillow's Site on Launch Day Thanks to a Genius Product Feature – Now It's a $7 Billion Company*, BUS. INSIDER (Nov. 2, 2017, 8:31 AM), http://www.businessinsider.com/zillow-zestimate-feature-2017-10 [https://perma.cc/3GCV-4UP4].

97. *Zestimate*, ZILLOW, https://www.zillow.com/zestimate (last visited Nov. 18, 2017).

98. *How Does Zillow Get Listings?*, ZILLOW, https://zillow.zendesk.com/hc/en-us/articles/227960468-How-does-Zillow-get-listings (last visited Nov. 18, 2017) [https://perma.cc/ASR6-G8E].

99. Lead generation is the process of gaining the interest of potential customers. *See What Is Lead Generation?*, SALESFORCE, https://www.salesforce.com/eu/learning-centre/marketing/what-is-lead-generation (last visited July 8, 2018) [https://perma.cc/SE5M-58XX].

real estate agents. One Texas Realtor laid bare the concern: "Zillow 'steals' listing information from MLS agreements, repackages that information on their fancy site, and then sells that information back to the agents who owned it in the first place while charging the agents expensive advertising costs."[100]

As Zillow begins to creep into the brokerage and iBuyer space,[101] the arm's-length relationship between the company and real estate brokerages and agents will be put to the test.[102] Even if few brokerages and agents admit it openly, the existential threat that portals like Zillow and Trulia pose to their business model is clear: as middlemen, once they lose control over data, why will consumers need them? As commonplace as real estate agents are today, if Zillow becomes the go-to platform for a critical mass of residential real estate transactions, then home sellers could still reach a broad audience simply by uploading their own home-listing data. Then, home buyers could browse listings without first requiring an agent to provide MLS access.[103]

4. iBuyers Such as Opendoor

An even more radical break from the traditional brokerage model are so-called "iBuyers" that do not rely on agents and collapse the transaction by instantly buying a house based on a

100. Brian E. Adams, *The War Between Zillow and Realtors*, HOOD HOMES BLOG (Dec. 20, 2015), https://www.hoodhomesblog.com/real-estate-industry/blog/the-total-war-between-zillow-and-realtors [https://perma.cc/F9XB-Z726].

101. Zillow is experimenting with an Opendoor-like service called "Instant Offers." *See* Caroline Feeney, *Everything You Need to Know About Zillow Instant Offers*, INMAN (May 26, 2017), https://www.inman.com/2017/05/26/everything-you-need-to-know-about-zillow-instant-offers [https://perma.cc/3A88-S8ZA]; *see also* Brad Inman, *Zillow's War Chest is Ready for Acquisitions: What's Next?*, INMAN (July 12, 2018), https://www.inman.com/2018/07/12/zillows-war-chest-is-ready-for-acquisitions-whats-next/? [https://perma.cc/E6AL-HXJ4].

102. Consider the potential for influential players like real estate franchise giant Realogy (owner of such national brokerages as Century 21, Coldwell Banker, and Sotheby's) to play hardball with Zillow and pull their listings. Brad Inman, *The Inman Files: Should Realogy Pull a Disney and Take Back Its Listings?*, INMAN (Nov. 14, 2017), https://www.inman.com/2017/11/14/the-inman-files-should-realogy-pull-a-disney-and-take-back-its-listings [https://perma.cc/A9K7-GF5Z].

103. Such a proliferation of FSBOs would likely invite an entire cottage industry to sprout for the marketing of such properties, much like the industry that has developed surrounding listings on Airbnb. *See* Nathan Heller, *Is the Gig Economy Working?*, THE NEW YORKER (May 15, 2017), https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working [https://perma.cc/JN25-68YA].

pricing algorithm, taking a fixed percentage as a fee, and then reselling the house at a price set by the algorithm.[104] A leading source of real estate news recently declared that iBuyers are "the most revolutionary change in how homes are sold since the advent of the MLS."[105] One such iBuyer is the San Francisco-based Opendoor, which was founded in 2014.[106] Opendoor relies on MLSs only to market and sell the homes they have already acquired via the initial, algorithmic purchase.[107] iBuyers are more like brokerages than portals in that they actually participate in purchasing and flipping homes instead of sitting on the sidelines and simply providing information for consumers and other companies to act upon.[108] For people who opt to sell their homes this way, transacting with an algorithm may feel cold and impersonal, but with so much investment in the model, iBuying may well prove to be a fundamental disruption.

D. *Industry Arguments for and Against Consolidation*

With or without the competitive challenges that new market entrants pose to the legacy model of buying and selling homes, there are impassioned arguments both for and against consolidating MLSs.[109] The debate is almost always framed from the perspective of real estate professionals and not consumers,[110] as it is the professionals who will drive and make

104. *See* Amy Feldman, *Silicon Valley Upstart Opendoor Is Changing the Way Americans Buy and Sell Their Homes*, FORBES (Nov. 30, 2016, 6:00 AM), https://www.forbes.com/sites/amyfeldman/2016/11/30/home-shopping-networkers-opendoor-is-upending-the-way-americans-buy-and-sell-homes/#37a65f24430c [https://perma.cc/9KLK-ED82].

105. *Introducing the 2017 Inman Person of the Year*, INMAN (Dec. 21, 2017), https://www.inman.com/2017/12/21/introducing-the-2017-inman-person-of-the-year [https://perma.cc/EV8K-NSBY].

106. *About Us*, OPENDOOR, https://www.opendoor.com/w/about (last visited July 15, 2018) [https://perma.cc/Q7XY-BYUP]. As of this writing, Opendoor operates in ten cities.

107. Mike Delprete, *Inside Opendoor: What 2 Years of Transactions Tell Us*, INMAN (Dec. 15, 2016), https://www.inman.com/2016/12/15/inside-opendoor-two-years-transactions-tell-us [https://perma.cc/HV89-T437].

108. *How Is Opendoor Different from Zillow, Trulia, and Realtor.com?*, OPENDOOR, https://www.opendoor.com/w/faq/how-is-opendoor-different-from-zillow-and-others (last visited July 15, 2018) [https://perma.cc/DS7B-CBPJ].

109. For a sample of perspectives both for and against consolidation, see *One MLS? Comments*, PAC. SOUTHWEST ASS'N OF REALTORS, http://www.psar.org/onemlscomments (last visited Aug. 14, 2018) [https://perma.cc/57KN-7JEJ].

110. Though it is consumer behavior that real estate professionals are

the decisions whether to consolidate.

Generally, arguments in favor of consolidation focus on improving the consumer experience while also reducing administrative burdens for brokerages and agents.[111] Such advantages of consolidation include ensuring the availability and accuracy of listings data, reducing the need for agents to have memberships in multiple MLSs, decreasing the number of data feeds for which an agent is responsible, cutting costs by reducing the number of MLSs to which an agent subscribes, providing greater efficiencies for governance, providing data that are more uniform, and providing wider listing exposure for sellers.[112] Antitrust regulators should hope for consolidation as well, if only for the fact that policing the behavior of MLSs and keeping tabs on compliance is made easier the fewer MLSs they need to review.

Arguments against consolidation include, most forcefully, the notion that local agents understand the local market best and that consolidation will just open the door for carpetbaggers with no connection to the community to swoop in;[113] and the critique that data sharing agreements between MLSs, short of an actual merger, are sufficient to achieve the same ends as consolidation.[114] However, most other arguments against consolidation (redundant employees losing jobs, office politics, the allegedly unique identity of an individual MLS) strike some commentators as little more than excuses for inaction.[115]

Despite this pushback, the trend is decidedly in favor of

responding to with calls for consolidation, I suspect that average consumers know little about the dynamics of the residential real estate industry and would require education on the issue before they would be able to form a meaningful opinion.

111. *See, e.g.*, Jay Kalinski, *Why You Should Care About Local MLS Consolidation*, BIZWEST (Oct. 9, 2017), https://bizwest.com/2017/10/09/care-local-mls-consolidation [https://perma.cc/2M5R-QLEC].

112. Matt Cohen, *If Brokers Don't Push for MLSs to Consolidate, Business Will Suffer, as Will Consumers*, THE REAL DAILY (Feb. 8, 2016), https://therealdaily.com/editorials/mls-condolidation [https://perma.cc/39L3-ELZW].

113. *Id.*; *see also* Dionna Hall, *Consolidation is a Powerful Word*, MLS ROUNDTABLE (Oct. 12, 2017), https://mlsroundtable.com/mls-roundtable/2017/10/11/consolidation-is-a-powerful-word [https://perma.cc/J6FT-9QYN].

114. *CAR's Statewide MLS Initiative: Its Past, Present and Future*, CAL. ASS'N OF REALTORS (Mar. 2015), https://www.car.org/mlspro/statewidemls [https://perma.cc/XC9D-24TD].

115. Cohen *supra* note 112; *see also Challenges and Obstacles*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar/policies/mls-consolidation-resources/challenges-and-obstacles (last visited July 15, 2018) [https://perma.cc/ZQM9-7K5L].

consolidation.[116] This trend is evident on the West Coast, where, in 2010, three MLSs and thirty-five associations consolidated to create the California Regional MLS (CRMLS), which today serves 81,000 real estate professionals.[117] Not to be outdone, in 2015, MLSs on the East Coast began combining into Bright MLS, which now covers much, if not all, of the states of Delaware, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia, as well as Washington, D.C.[118] Though larger than the average MLS merger, the CRMLS and Bright MLS mergers offer an excellent opportunity for inquiry into the concrete economic effects of MLS consolidation.[119]

Critical to the continued push for MLS consolidation has been the support of the NAR. As NAR CEO Bob Goldberg summarized the issue: "[MLS] consolidation in practice makes the system far more efficient while lowering costs for our members."[120] Consequently, the NAR released a set of MLS consolidation resources in early November 2017 and has actively sought to encourage its member-owned MLSs to merge.[121] Though we should be wary of the positions that powerful actors take with respect to the industries they are a part of, MLS consolidation is a good thing for competition.[122] The remainder of

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116. *See* Sam Debord, *Decoding the Broker/MLS Cold War on Consolidation*, INMAN (Jan. 22, 2018), https://www.inman.com/2018/01/22/decoding-the-broker-mls-cold-war-on-consolidation [https://perma.cc/4RM3-57U6].

117. *CRMLS*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar/policies/mls-consolidation-resources/crmls (last visited Aug. 26, 2018) [https://perma.cc/83YX-XDST].

118. Andrea V. Brambila, *Bright MLS Reveals Giant Six-State Service Area*, INMAN (Jan. 12, 2017), https://www.inman.com/2017/01/12/bright-mls-reveals-giant-six-state-service-area [https://perma.cc/T27H-64UK].

119. Regrettably, I am unable to conduct that study here.

120. National Association of REALTORS, *NAR CEO Bob Goldberg Keynote* at 16:22–16:30, YOUTUBE (Aug. 28, 2017), https://www.youtube.com/watch?v=NfShMRQlx3o.

121. *MLS Consolidation Resources*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar/policies/mls-consolidation-resources (last visited Nov. 15, 2017) [https://perma.cc/352P-G7DR].

122. Some questions to keep in the back of your mind as we move forward: Even if consolidation makes good business sense for the NAR and other actors, does it actually encourage competition in the residential real estate industry? Do the new business models described above reduce or eliminate the utility of a system for organizing data that goes back more than a century? Has the antitrust litigation described above led to an ecosystem that sufficiently encourages new entrants? Are the Redfins, Zillows, and Opendoors of the world dramatically improving the home buying and selling experiences for consumers, or are they merely recycling a tried-and-true concept? I don't pretend to have answers to each of these questions, but they should not be discounted.

this Comment makes that case.

II. COMPETITION POLICY AND HORIZONTAL MERGERS, GENERALLY[123]

At base, antitrust law is concerned with maximizing the welfare of consumers[124] and promoting economic competition.[125] Traditional economic theory posits that competition leads competing firms to reduce prices and to innovate, both of which add value to downstream consumers.[126] This Comment will consider what competition looks like in the residential real estate data industry and will identify the relevant consumers. Before we get there, however, it is essential to understand the pragmatic underpinnings of antitrust law, the regulatory framework in place to deal with competitive harms, and the special problem of horizontal mergers. This Part begins by introducing the principles that motivate antitrust regulation and the federal statutes that permit it. This Part concludes with a discussion of horizontal mergers.

A. Aims of Antitrust Law and the Federal Framework

"Maximize consumer welfare" and "promote competition" may be worthwhile catchphrases, but predicting *how* a given merger will affect consumers and determining *when* it will harm competition can be a complicated business. As the following Subsections describe, antitrust analysis depends heavily upon economic theory and its careful application to a comprehensive-but-opaque set of statutes that have been the

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123. The structure of this Part is derived, in part, from chapters one, two, three, six, and ten of a leading antitrust casebook. A. DOUGLAS MELAMED, RANDAL C. PICKER, PHILIP J. WEISER & DIANE P. WOOD, ANTITRUST LAW AND TRADE REGULATION 1 (7th ed. 2018) [hereinafter CASEBOOK].

124. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978) (declaring this "[t]he only legitimate goal of American antitrust law").

125. *See* RICHARD A. POSNER, ANTITRUST LAW 28 (2nd ed. 2001); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100 (4th ed. 2013); E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 (6th ed. 2014) [hereinafter UNDERSTANDING].

126. *See generally* Richard J. Gilbert, *Competition and Innovation*, *in* THE SELECTED WORKS OF RICHARD J GILBERT (2006), https://cloudfront.escholarship.org/dist/prd/content/qt9xh5p5p9/qt9xh5p5p9.pdf [http://perma.cc/6RU2-L5UV].

foundation of antitrust law for over a hundred years.

1. Principles

More than any other body of law, antitrust has come to rely on economic analysis. This is because, as Richard A. Posner—one of the loudest voices of the "Chicago School"[127]—writes, "[o]ne thing that has long been clear . . . is that antitrust deals with what are at root economic phenomena."[128] Chief among those phenomena is that of monopoly. Simply put, a monopolist is a seller who has the ability to change the price at which his products will sell in the market by changing the quantity that he sells.[129] By reducing his output, the monopolist raises prices for consumers above what the prices would be in a competitive market.[130] This is the primary problem with monopolies and what makes the exercise of monopoly power antithetical to the notion of a free and fair economy.

Without resorting to graphs from introductory economics texts, it is helpful to think about the economic concern of monopolies as reducing the size of an overall societal pie.[131] In the absence of monopolistic firms, price and output are at a competitive level and net consumer and societal benefit is at its maximum. When monopolists begin exercising power over price and quantity, fewer consumers are willing and able to buy a given product than they were in a completely competitive market.[132] The monopolist is happy because, although there are fewer consumers, he is reaping more profits under monopolistic conditions than he would if he had to compete with other firms.[133]

Increased prices and reduced output can cause harm to consumers in any discrete market, but the amount of harm can be staggering when the affected market supplies an essential input for an industry with millions of consumers, and those consumers are stuck without alternative avenues to buy the

127. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

128. POSNER, *supra* note 125, at 1.

129. *Id.* at 9.

130. *Id.*

131. In economic terms, the reduction is called a "deadweight loss." *See* BORK, *supra* note 124, at 108.

132. CASEBOOK, *supra* note 123, at 66.

133. *Id.*

same or a substitute product.[134] Think Standard Oil.[135] Think railroads.[136] Think AT&T.[137] Think that political cartoon depicting obese, larger-than-life men in top hats lording over legislators.[138] What these companies had in common was that *they* were able to generate fabulous wealth[139] by controlling the price and output of critical products—oil, rail transportation, telecommunications—at everyone else's expense.

But the story of American antitrust law is not the rote tracking of wealth transfers between consumers and dominant firms. No, the story of American antitrust law is the conceptually paradoxical tale of a government imposing restrictions on its free market economy to make it freer.

2. Statutes

The federal framework for dealing with anticompetitive behavior sprung from a concern that the dominant firms of post-Civil War America were abusing their powers and negatively affecting the national economy by fixing prices and dividing markets as well as engaging in boycotts and anticompetitive distribution practices.[140] In response to these abuses by the trusts of the late nineteenth and early twentieth centuries, Congress enacted the nation's first antitrust laws: the Sherman Act in 1890 followed by the FTC and Clayton Acts in 1914.[141] Despite major economic development since their enactments, these laws have proven remarkably durable. As Justice Thurgood Marshall put it: "Antitrust laws in general, and the

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134. *Id.* at 62–66.

135. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

136. *E.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

137. *See* Kevin Granville & Tiffany Hsu, *AT&T Has Had Many Run-Ins with the Government*, N.Y. TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/business/dealbook/att-antitrust.html [https://perma.cc/5WNG-Y9G7].

138. Joseph Keppler, *The Bosses of the Senate*, PUCK, Jan. 23, 1889, https://www.senate.gov/artandhistory/art/artifact/Ga_Cartoon/Ga_cartoon_38_00392.htm [https://perma.cc/M4VP-P5MB].

139. For a riveting account of how Standard Oil's monopoly power generated the first billionaire in American history, I highly recommend the John D. Rockefeller biography by Ron Chernow. RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998).

140. CASEBOOK, *supra* note 123, at 1. These are all bad things as far as economic competition is concerned. For an in-depth look at the legislative history of the Sherman Act, *see* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221 (1956).

141. CASEBOOK, *supra* note 123, at 6, 45.

Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[142] These laws remain the foundation for modern litigation[143] and are administered and enforced by the DOJ and the FTC.[144] Government enforcers have a lot of discretion in what cases they bring, and they are constantly studying and investigating industries for anticompetitive harm.[145]

This Comment primarily concerns sections 1 and 2 of the Sherman Act and the merger implications of section 7 of the Clayton Act. In pertinent part, section 1 of the Sherman Act says that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is hereby declared to be illegal."[146] While a broad reading of this language would likely proscribe every agreement ever, courts have not given section 1 that effect. Over the decades, courts have recognized that identifying truly anticompetitive practices is difficult because determining whether a violation of section 1 has occurred usually requires a significant fact-finding process.[147] Instead of *all* restraints of trade, regulators spend their time looking for only those restraints that are *unreasonable*.[148] Further, section 2 of the Sherman Act says that "[e]very person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be guilty of a felony."[149]

The extent to which antitrust laws are rooted in purely economic concerns about allocative efficiency, or whether they also incorporate populist concerns about the distribution of

142. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

143. As Bork wrote in 1978, "[t]he years 1890 to 1914 witnessed the origin of every major theory that drives and directs the evolution of antitrust doctrine to this day." BORK, *supra* note 124, at 15.

144. They may also be enforced by state attorneys general and even private parties. CASEBOOK, *supra* note 123, at 1133.

145. *Id.* at 1135.

146. 15 U.S.C. § 1 (2012).

147. CASEBOOK, *supra* note 123, at 118–19.

148. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984) ("In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.").

149. 15 U.S.C. § 2 (2012).

wealth, is a debate unlikely to be resolved soon.[150] However, there is broad agreement today that the antitrust laws exist to promote competition through restraints on monopoly power and cartel behavior.[151] The Clayton Act reflects this goal by directing that

> no person . . . shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[152]

The law as it is articulated in these excerpts sounds straightforward enough, but applying the statutes in practice is so fact-dependent that much of antitrust law is judge-made precedent developed from decades upon decades of cases that have come before the Supreme Court and inferior federal courts.[153] Many of these cases have concerned horizontal mergers, the subject of the next Section.

B. Regulating Horizontal Mergers

It is axiomatic that in order to effect monopoly harm, a company must be sufficiently powerful, either by itself or in

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150. UNDERSTANDING, *supra* note 125, at 4; *see also* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100b (4th ed. 2013); Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, THE ATLANTIC (July/Aug. 2018), https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743 [https://perma.cc/R9RM-VBKS].

151. UNDERSTANDING, *supra* note 125, at 4–5. This goal is evidenced by Senator John Sherman's opining about the harms of monopoly power during the legislative debates concerning his proposed bill:

> The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer.

1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 103 (4th ed. 2013) (quoting 21 Cong. Rec. at 2457 (1890)).

152. 15 U.S.C. § 18 (2012).

153. POSNER, *supra* note 125, at 1.

concert with other firms, to set prices.[154] In this context, "powerful" means possessing the ability to control a significant portion of the relevant market.[155] There are many ways firms can gain market power[156] short of merging, but that discussion falls outside the scope of this Comment. Instead, the focus of this Section is how courts have dealt with the difficult problem of mergers, specifically, horizontal—as opposed to vertical—mergers.

A horizontal merger occurs when two or more competitors in a given market combine.[157] Technically speaking, a horizontal merger is "the acquisition by a producer of the stock or assets of a firm producing an identical product or close substitute and selling it in the same geographic market."[158] Antitrust law concerns itself with horizontal mergers because they eliminate competition between the merging parties and can lessen competition between the post-merger firm and other market rivals.[159] While it is natural, then, for regulators to view mergers between competitors with skepticism, Phillip E. Areeda and Herbert Hovenkamp note:

> Competing firms typically merge for reasons entirely unrelated to effects on market-wide output or price—for example, to achieve economies of scale or integration, to achieve synergies in the production or distribution of complementary goods, to put inefficiently run assets into the hands of superior management, to resolve management succession for an individually owned enterprise, or for tax or other reasons.[160]

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154. *Id.* at 118.

155. For a discussion of market definition, see *infra* Section III.B.

156. "Market power" is appropriately defined as "the power to price profitably above competitive levels." Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 253 (1987); *see also* 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 501 (4th ed. 2014) (defining "market power" as "the ability to raise price profitably by restricting output").

157. CASEBOOK, *supra* note 123, at 635.

158. 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 900 (4th ed. 2014).

159. *Id.* ¶ 901.

160. *Id.*

Accordingly, when courts and regulators deal with mergers, they do not rely solely on an analysis of market shares, but also assess effects of the merger on competition as a whole.[161] Therefore, a slogan for merger review might be: Big is not always bad, but bad is usually big. With the exception of blatantly anticompetitive practices, such as price fixing, that are *per se* illegal, regulators and courts seek to provide a comprehensive review of mergers under what's known as the "rule of reason" rubric.[162]

The rule of reason recognizes that some horizontal mergers may enhance competition by, among other things, increasing efficiencies and producing economies of scale. Therefore, courts and regulators reviewing a merger perform a fact-specific inquiry to determine if it passes muster under the antitrust laws.[163] In light of the common law development of section 7 of the Clayton Act, a sketch of the doctrine's contours is in order. First, consider a trio of cases from the 1960s.

In 1962, the Supreme Court decided *Brown Shoe Co. v. United States*[164] and consequently established a multifaceted rule of reason under section 7 for evaluating horizontal mergers.[165] In *Brown Shoe*, the Court invalidated a merger between two shoe companies because, in part, the shoe industry had exhibited a trend toward consolidation in the years leading up to the merger.[166] In its holding, the Court articulated factors

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161. *Id.*

162. CASEBOOK*, supra* note 123, at 231.

163. Writing for the Supreme Court in 1918, Justice Louis Brandeis articulated the rule of reason test as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). Hovenkamp criticizes this test for its lack of utility. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 132 (2018) ("A test that makes everything relevant provides nothing useful, because it gives no calculus for weighing or even identifying the important factors.").

164. 370 U.S. 294 (1962).

165. UNDERSTANDING*, supra* note 125, at 366.

166. *Id.*

that it would use to judge the validity of mergers moving forward: (1) market share data, (2) concentration percentages, (3) industry trends, and (4) entry barrier evidence.[167] Importantly, the Court found that section 7 gave them the authority to stop trends toward consolidation in their incipiency.[168]

A year after *Brown Shoe*, the Court decided *United States v. Philadelphia National Bank*,[169] where it invalidated a merger between two large banks in the same geographic market. *Philadelphia National Bank* is an important case because it set the standard for reviewing mergers in concentrated markets. Specifically, the Court established that a rebuttable presumption of illegality exists for horizontal mergers in concentrated markets when, as a result of a merger, the post-merger firm controls an "undue market share" and market concentration significantly increases.[170] However, this presumption may be rebutted by evidence that the merger is not anticompetitive.[171]

Next, in *United States v. Von's Grocery*,[172] the Court invalidated a merger between two grocery companies in Los Angeles even though their combined sales only accounted for 7.5 percent of the total sales in the city.[173] As in *Brown Shoe* and *Philadelphia National Bank*, the Court's concern was that the relevant market showed signs of concentration and the instant merger would eliminate a competitor.[174] The state of the law after *Von's Grocery* appears to have been very hostile toward mergers in concentrated markets, but a major shift in section 7 interpretation occurred less than a decade later.

In 1974, the Court decided *United States v. General Dynamics Corp.*[175] In *General Dynamics*, the Court was tasked with determining the fate of a merger between two of the top ten coal producers in the United States.[176] Even though the Court again recognized trends toward consolidation in the relevant market, it permitted the merger, relying, in part, on a footnote from *Brown Shoe* that "cautioned that statistics

167. *Id.*
168. *Id.*
169. 374 U.S. 321 (1963).
170. UNDERSTANDING, *supra* note 125, at 367.
171. *Id.*
172. 384 U.S. 270 (1966).
173. UNDERSTANDING, *supra* note 125, at 368.
174. *Id.*
175. 415 U.S. 486 (1974).
176. UNDERSTANDING, *supra* note 125, at 369.

concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects."[177]

This functional approach was ratified by the Court in *United States v. Citizens & Southern National Bank*,[178] when the Court permitted a merger between a large Atlanta bank holding company and some of its de facto branches. Though the acquisition of these branches would increase Southern's market shares in a highly concentrated market, Southern was able to rebut the presumption of illegality by showing that the acquisition was procompetitive.[179]

The takeaway from these cases is that the basic burden-shifting approach from *Philadelphia National Bank* "remain[s] alive and well."[180] Statistical evidence of increased concentration in a relevant market is important evidence for merger review, but such evidence can be rebutted by procompetitive justifications.[181] When procompetitive justifications are produced, a reviewing court will weigh the harms and benefits of the merger.[182]

To help agency personnel and judges—who may not be expert economists—figure out if a given horizontal merger runs afoul of antitrust law, federal regulators developed the Horizontal Merger Guidelines (Guidelines) in 1968,[183] and the DOJ and FTC have revised them over time, the most recent update coming in 2010.[184] This latest version of the Guidelines is

177. *Id.* (discussing United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (citing to Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962)).

178. 422 U.S. 86 (1975).

179. UNDERSTANDING, *supra* note 125, at 370.

180. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1997 (2018).

181. UNDERSTANDING, *supra* note 125, at 371.

182. *Id.*

183. *See* U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf [https://perma.cc/3GGE-7PTX].

184. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter GUIDELINES], https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf. It is important to highlight that the Guidelines are not binding authority and merely represent one—albeit one significant—perspective on the antitrust laws. In addition to guiding government actors, the Guidelines give businesses contemplating a merger a tool to gauge the likelihood of government intervention. As a rule of thumb, if your merger survives scrutiny under the Guidelines, you are most likely safe. But falling outside of the Guidelines does not necessarily mean that the government will try to block the

the one I use as a device for evaluating MLS consolidation. First critical step under the Guidelines? Market definition.

III. DEFINING THE MARKET FOR RESIDENTIAL REAL ESTATE DATA

"Defining a market" means identifying those producers who provide customers with alternative sources for a given product or service. For example, Colgate toothpaste is in the same market as Crest toothpaste because one is effectively interchangeable with the other.[185] Unlike a traditional market, the market for real estate data does not lend itself to a straightforward analysis. Actually, as illustrated below, market definition is almost irrelevant in the MLS consolidation context because the traditional tools for merger review, e.g., the Guidelines, assume we are dealing with conventional products like toothpaste and not intangible products like property listings. But while our tools fail us to a certain degree, reason can still guide us to a just result.

The market for real estate data is different from traditional markets because each MLS effectively has a monopoly over the collection of data within its jurisdiction; direct competition from another MLS seemingly occurs only on the fringes of the jurisdiction, so there is no real substitute for any single MLS. This fringe competition occurs when a real estate agent who wants to conduct business across MLS jurisdictions becomes a member of each MLS in which he wants to operate. While there may be varying degrees of customer service and different membership fees in the neighboring MLSs, it is not fair to say that an agent in this scenario has a meaningful choice between the MLSs—either he becomes a member of each MLS and receives access to all of the listings information for each MLS territory, or he refuses to subscribe to one of the MLSs and gets no data from that MLS's jurisdiction.

Compared to our ideal markets for conventional consumer goods, this all-or-nothing dynamic is odd and seems terribly anticompetitive. But "competition" looks different in the market for real estate data. Helpfully, at least one federal court has defined competition in this market as the ability to "compete in

contemplated merger.

185. AREEDA & HOVENKAMP, *supra* note 158, ¶ 530a.

the innovation and implementation of these products and services."[186] Keep this idea in mind as we move forward. This Part begins making sense of how the Guidelines do and do not apply to the market for residential real estate data. First, consistent with the Guidelines, it addresses who the targeted customers of the data are. Second, it analyzes the appropriate product and geographic markets for the data.

A. *Targeted Customers and Price Discrimination*

As explained in Part II, the Sherman and Clayton Acts exist to effect and enforce competitive markets. Under the Guidelines, the logical starting place for evaluating potential mergers is determining whether the producer being evaluated (here, individual MLSs) can target customers such that the producer can profitably charge different prices to different customers for the same product.[187]

Even though end consumers (home buyers and sellers) use MLS data, the relevant customers of MLS data for antitrust analysis are real estate professionals (brokerages and agents) and online portals because *they* have the incentive to make innovative and commercial uses of the data. While, one might argue, buying and selling decisions are ultimately made by the clients of the portals or professionals, the average buyer or seller engages in the market only long enough to complete her one-time transaction and is unlikely to be in the market but a few times in her life.[188] Therefore, this Comment treats portals and brokerages as the relevant customers for real estate data, while being mindful that downstream effects on home buyers and sellers are a primary concern for the Agencies.[189]

When looking at the potential adverse effects of a merger,

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186. Greater San Diego Ass'n of Realtors, Inc. v. Sandicor Inc, No. 16CV96-MMA (KSC), 2016 WL 4597536, at *2 (S.D. Cal. May 25, 2016) (internal quotation marks omitted).

187. GUIDELINES, *supra* note 184, at 6.

188. Although the average person is expected to move about eleven times in her life, it stands to reason that a good number of those relocations involve renting rather than buying. Mona Chalabi, *How Many Times Does the Average Person Move?*, FIVETHIRTYEIGHT (Jan. 25, 2015, 7:00 AM), https://fivethirtyeight.com/features/how-many-times-the-average-person-moves [https://perma.cc/XMN9-M9VB].

189. For the sake of efficiency and consistency with the Guidelines, this Comment will use "Agencies" to refer interchangeably to either or both the DOJ and the FTC.

the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products.[190] These differential impacts can happen when sellers have the ability to discriminate against some customers but not others.[191] Price discrimination typically occurs when two conditions are met. The first is differential pricing, in which suppliers can sell the same product to different customers at different prices.[192] The second is limited arbitrage,[193] in which those customers targeted to pay higher prices must not be able to defeat the price increase by purchasing the product through other customers who are not subject to higher prices.

Concerns about price discrimination are well-founded in the case of real estate data. For the sake of argument, assume that all MLSs are NAR affiliates and Zillow is the dominant online portal. Clearly, the NAR would prefer that Zillow not exist.[194] With enough coordination, a sufficiently large MLS could target Zillow by either cutting off its stream of data or charging the company a major premium to use it. Targeting would become more likely as an MLS grew in size because its negotiating power would increase accordingly. For the same reason, MLS consolidation also reduces the possibility of arbitrage. Currently, individual brokerages are glad to have access to Zillow's audience and feel compelled to give their data to the portal.[195] With larger MLSs there would be increased incentive for the MLSs to hoard data and wait for heavy investment in a Realtor-friendly Zillow competitor. As it stands, with so many small MLSs,[196] each one is unlikely to invest in a "Zillow killer"

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190. GUIDELINES, *supra* note 184, at 6.

191. *Id.*

192. *Id.* For example, identical prescription drugs often cost more in the United States than they do in other countries. *See* Sarah Kliff, *The True Story of America's Sky-High Prescription Drug Prices*, VOX (May 10, 2018, 9:19 AM), https://www.vox.com/science-and-health/2016/11/30/12945756/prescription-drug-prices-explained [https://perma.cc/XDF2-U8SF].

193. *Id.* In economics, the term "arbitrage" is defined as "the simultaneous purchase and sale of an asset to profit from a difference in the price." *Arbitrage*, INVESTOPEDIA, https://www.investopedia.com/terms/a/arbitrage.asp (last visited Feb. 4, 2018) [https://perma.cc/3DBM-6K7V].

194. *See generally supra* Section I.C.

195. *See* Paul Hagey, *Local MLS Takes Charge of Flow of Listings to Zillow, Trulia, Homes.com*, INMAN (Oct. 25, 2013), https://www.inman.com/2013/10/25/north-alabama-mls-pioneers-new-platform-to-take-control-of-syndication-of-listings-to-zillow-trulia-homes-com [https://perma.cc/7MRX-73CN].

196. For example, one Colorado MLS comprises only Grand County, which is home to a grand total of approximately 15,000 residents. *QuickFacts: Grand*

due to a lack of capital and free rider concerns. It appears that MLSs have the power to set prices consistent with monopoly power, but whether such tactics would invite scorn from antitrust regulators depends, in part, on how the Agencies and courts might define the market for residential real estate data.

To reiterate: the relevant customers of MLS data are both real estate professionals and online portals, and price discrimination appears possible.

B. Elements of Market Definition

Market definition is a critical step in determining antitrust violations because it is essential to determining if an economic actor has market power. When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles.[197] First, market definition helps the Agencies specify the line of commerce and the geographic location of the competitive concern.[198] Second, it allows the Agencies to identify market participants and measure market shares and concentration.[199] As the Guidelines suggest, market definition focuses principally on the ability of customers to substitute away from a product in response to a price increase or a non-price change such as a reduction in quality or service.[200] Markets may be defined narrowly or broadly, but—properly defined—they will often exclude at least some substitutes.[201] Meaningful for our discussion, markets have both product and geographic dimensions.[202] The following Subsections apply the Guidelines to analyze how these two dimensions manifest in the market for residential real estate data.

County, Colorado, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/grandcountycolorado/PST045217 (last visited Aug. 26, 2018) [https://perma.cc/5PQG-ZRK9].

197. GUIDELINES, *supra* note 184, at 7.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 8. "Substitute" goods are goods that can be used for the same purpose, and, accordingly, purchasing one substitute good will reduce demand for another. For example, if I buy store brand peanut butter, it will reduce my demand for name brand peanut butter. Contrast substitute goods with "complementary" goods—such as peanut butter and jelly—that are often used together such that the price of one complementary good affects demand for another.

202. *Id.*

1. Product Market Definition

When a product ("P") sold by one merging firm competes against a product sold by the other merging firm (imagine, say, the parent companies of Colgate and Crest toothpastes were the merging firms), the Agencies define the market around P to include P as well as substitute products.[203] The market is then put to the hypothetical monopolist test,[204] which asks whether "a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of [P] likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on [P]."[205] The hypothetical monopolist test is implemented by evaluating the extent to which customers would likely substitute away from P in response to price increases.[206]

Like other fundamental tools for merger review, the hypothetical monopolist test does little to explain the market for residential real estate data because there is nothing hypothetical about the monopoly power that MLSs have. From the beginning, individual MLSs have existed as nearly pure monopolies,[207] yet the Agencies have allowed them to persist because of the efficiencies they create.[208] When MLSs merge, the merged MLS's P—listings data—is going to be nearly identical, and those who deal with the data will not be getting anything different for their money.[209] Sure, the exact data for each specific home listing (i.e., this house has four bedrooms, two-and-a-half bathrooms, and a finished basement) is different, but not in kind. For the relevant customers of MLS data, a

203. *Id.*
204. *Id.*
205. *Id.* at 9.
206. *Id.* at 11.
207. *See e.g.*, Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1352 (1970); *see also* Marc. D. Murr, *The Professionalization of Real Estate Brokerage and the Problem of Multiple Listing Service Exclusion: A Sherman Act Analysis*, 59 TEX. L. REV. 125, 149 (1980). To be sure, the fringes of individual MLS territories usually overlap a bit with those of adjacent MLS territories. However, for the purposes of this Comment, it is fair to conceptualize each MLS as its own exclusive jurisdiction like, say, a judicial district.
208. *See generally supra* Section I.A.
209. *See* Kenneth Jenny, *Let's Get Rid of the MLS*, INMAN (July 28, 2016), https://www.inman.com/2016/07/28/lets-get-rid-of-the-mls [https://perma.cc/259N-RSDK].

property is a property. Assuming the worst-case scenario of MLSs targeting online portals and refusing them data, it's not like the NAR-affiliated professionals will magically gain access to *better* data.[210]

2. Geographic Market Definition

In addition to defining the product market, market definition also depends on the geographic scope of the market. Some markets are geographically sensitive while others are not. The Agencies consider markets to be geographically sensitive to a merger if the geography affects the willingness or ability of customers to substitute P and the willingness or ability of some suppliers to serve P to customers (continuing our toothpaste analogy, picture the lone general store in a remote town that carries only Colgate and Crest).[211] Unlike other industries that deal with data, the residential real estate industry is especially sensitive to geography (recall the first rule of real estate).[212] In theory, data about homes for sale in the Boise market could be valuable to a brokerage in Atlanta, but it probably is not, and it definitely is not valuable in the same way that data about homes for sale in the Atlanta market would be.

The hypothetical monopolist test, when used to analyze the behavior of firms in a geographically conscious way, looks at whether merging firms are able to impose an SSNIP from at least one geographic location.[213] Further, when the hypothetical monopolist could discriminate based on customer location, the test considers whether the merging firms could impose an SSNIP on at least some customers in that region.[214] Geographic market definition is important for MLS consolidation analysis, but here the monopolistic nature of the data actually favors consolidation because consolidation expands the territorial

210. This is a strange dynamic. But just as the hypothetical monopolist test is rendered toothless in the MLS context, analyzing the market is further complicated because, as others have recognized, antitrust law lacks a coherent framework for dealing with data monopolists. *See* Zachary Abrahamson, Comment, *Essential Data*, 124 YALE L.J. 867, 867 (2014); *see also* Thomas A. Piraino, Jr., *An Antitrust Remedy or Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1, 1 (1998).

211. GUIDELINES, *supra* note 184, at 13.

212. *See supra* Introduction.

213. GUIDELINES, *supra* note 184, at 13.

214. *Id.* at 14.

reach of real estate professionals.[215] Absent consolidation, markets are less competitive because brokerages and agents are discouraged from expanding their services outside of their nearest MLS jurisdiction.[216]

The above Sections illustrate that when antitrust regulators sit down and think about the market for MLS data, they cannot rely on analogies to many—if any—other products in the American economy. MLS data are essential to the efficient operation of our residential real estate market; there are no competitors that generate the same product, there are no substitutes, and the products are highly sensitive to geography. Suffice it to say, if regulators choose to intervene in MLS mergers and use the traditional tools of antitrust analysis, they will have a real mess on their hands. The remainder of this Comment attempts to offer a bit of clarity.

IV. ANALYZING THE EFFECTS OF MLS CONSOLIDATION

Once a product market is defined, the Agencies turn their attention to forecasting the competitive effects of a merger. This is where the action really happens. On one hand, if the proposed merger appears to substantially lessen competition, then the Agencies will intervene.[217] On the other hand, if the merger appears to do no worse than barely lessen competition, the Agencies will not take any action.[218] Typically the Agencies identify the market participants, these participants' respective shares in the market, and their market concentration as calculated using a tool called the Herfindahl-Hirschman Index (HHI).[219] Again, however, the monopoly power of MLSs[220]

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215. It stands to reason that if a brokerage or agent gains access to listings data from new neighborhoods as a result of consolidation, then they might choose to conduct business in those new neighborhoods, thereby increasing competition between real estate professionals in the new neighborhood.

216. MLS fees are charged on a recurring basis, and for brokerages to subscribe each of their agents to a new MLS could mean expenditures in the hundreds—if not thousands—of dollars every month. *See, e.g.*, *Residential Dues Structures Sheet*, MIAMI REALTORS (July 2018), http://www.miamirealtors.com/membership/applications/dues-structures [perma.cc/8WAP-6W2T].

217. GUIDELINES, *supra* note 184, at 2.

218. *Id.*

219. *Id.* at 15–19. An HHI is calculated by summing the squares of individual firms' market shares. For example, a market of four equal firms (25 percent share each) represents an HHI of 2,500, and a pure monopoly (100 percent market share) represents an HHI of 10,000. The Agencies generally classify markets into

makes an HHI analysis futile. Rather, the challenge for us is to figure out how these government-sanctioned monopolies would change their behavior at scale relative to their behavior today.

Continuing this Comment's march through the Guidelines, this Part begins with an analysis of the so-called "unilateral effects" of MLS consolidation, reasoning through (1) the ability of post-merger MLSs to change the price of accessing their data, (2) the likelihood that post-merger MLS customers would be harmed by an inability to bargain with competing MLSs, (3) the ability of post-merger MLSs to suppress the output of their product, and (4) whether the merging of MLSs would dampen innovation. This Part then analyzes the potential "coordinated effects" of MLS consolidation—comparing the opportunities for post-merger MLSs to nefariously unify their actions against rivals with the efficiencies gained from consolidation. Last, this Part offers food for thought about threats to competition in the residential real estate industry moving forward.

A. *Unilateral Effects*

Behavioral changes that result from the elimination of competition between firms can produce unilateral effects along different competitive fronts.[221] There are four common unilateral effects that the Agencies recognize, which I address in turn.[222] First, this Section looks at the possibility that MLS mergers might change prices. Second, the change in bargaining power that consolidation would facilitate. Third, the potential that dominant MLSs would reduce their output or capacity. Finally, the incentives that would remain for innovation after a merger. Each unilateral effect is important to consider when analyzing the residential real estate industry.

1. Product Pricing

The Agencies state that substantial increases in the post-

three types: "unconcentrated" (HHI below 1,500), "moderately concentrated" (HHI between 1,500 and 2,500), and "highly concentrated" (HHI above 2,500).

220. Assuming the NAR is correct that 90 percent of residential real estate listings are on an MLS, then the HHI (above 8,100) is already well above what qualifies as "highly concentrated."

221. GUIDELINES, *supra* note 184, at 20.

222. *Id.*

merger price for a product sold by one of the merging firms normally require that a significant portion of the customers purchasing that product view the products formerly sold as their next-best choice.[223] Although with MLS data there is no alternative product, the Agencies could still detect anticompetitive price fluctuations. Consider the following. Imagine MLS A and MLS B merge to form MLS C. If access to MLS C costs more than access did to either of the previous MLSs, then brokerages, as "customers," would need to articulate whether or not the price increase accurately reflects the value of the new MLS. If enough brokerages thought the price increase was not commensurate with the added utility that MLS C offered, then regulators could have cause to step in; if brokerages found that MLS C provided adequate bang for its buck, then regulators should not get involved.

If the Agencies did decide to intervene, then there are many possible remedies. One solution is to require MLS C to defend their price and then to demand adjustments if its defense is insufficient. Another solution may be to require product diversification that appreciates the data manipulation possible in a digital era. Before MLS data transitioned to computers, it came in books.[224] Producing custom books tailored to individual real estate agents within a single MLS never would have been cost-efficient. But digital data are different, and modern MLSs are not stuck with the analog practice of charging one price to each subscriber for access to their entire dataset. If MLS C's expanded geographic footprint is driving the price increase and is unnecessary for some agents, then why not offer the ability for those agents to purchase access to a smaller, relevant dataset? Think of it as the "satellite/cable TV model"[225]—agents can get data for the market they actually work within (in this analogy, ESPN) without needing to pay for data they have no occasion to use (the Hallmark Channel).[226] Alternatively, why not offer agents the

223. *Id.* at 20–21.

224. *See, e.g.*, Chris Eckert, *What's an MLS Book?*, MID S.F. PENINSULA REAL ESTATE: CHRIS ECKERT'S BLOG (Feb. 26, 2011, 5:31 AM), http://activerain.com/blogsview/2158989/what-s-an-mls-book—-or-real-estate-old-school [https://perma.cc/EDV5-2VTY].

225. The irony of attempting to contextualize proposed innovations in the MLS space by referring to pre-streaming entertainment options is not lost on me.

226. *See, e.g.*, Press Release, DISH Network L.L.C., Finally, a Skinny Bundle! 'Don't Watch, Don't Pay' with DISH's New Flex Pack (Aug. 4, 2016), http://about.

ability to pay for the amount of data they use? Think of it as the "cell phone model" where heavy users are charged more than casual ones. This structure might even yield increased revenue for an MLS depending on the makeup of its user base.

2. Bargaining Power

For a normal product or service—say, reams of paper or flights—consumers can extract better prices by negotiating with more than one seller and sometimes pitting rival producers against one another.[227] This dynamic creates a strong incentive for competing firms to merge because the elimination of a competitor reduces the pressure on the remaining firm to offer a more favorable price to consumers.[228] This effect is likely to be proportional to the frequency with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business.[229] Further, the effects are likely to vary depending on the number of total competitors in the relevant market.[230]

When the product is residential real estate data, the conception of bargaining power predicated on the number of producers in the market does not make sense as a metric because there are no other producers of the same data. Let's assume a home at 123 Main Street is being sold by a real estate agent. The data about that home will only be entered by that agent or that agent's brokerage and will only be entered into his affiliate MLS. Nobody else is going to generate the data, so nobody else can compete with the MLS to distribute it. If the MLS with the listing for 123 Main Street merges with another MLS, an online portal or other company that wants to gain access to the data for 123 Main Street may experience a slight reduction in bargaining power for the data, but not because the two MLSs were ever "competing" for the 123 Main Street listing. Instead, any increase in bargaining power a post-merger

dish.com/press-release/programming/finally-skinny-bundle-dont-watch-dont-pay-dishs-new-flex-pack [https://perma.cc/LW2M-U384]. I'm sure the Hallmark Channel offers high-quality programming.

227. At least those comparatively powerful consumers—such as Fortune 500 companies—that buy in bulk. For the sake of argument, I assume there are no monopsony concerns here.

228. GUIDELINES, *supra* note 184, at 22.

229. *Id.*

230. *Id.*

MLS experiences is going to be tied to its increased territorial footprint and the increase in the number of listings it distributes.

3. Capacity and Output

Another unilateral effect that deserves a close look is the potential impact on the capacity and output of residential real estate data if MLSs merge. The corresponding section of the Guidelines was written with physical goods in mind, but its explanation of this concept is helpful for thinking about an intangible good like intellectual property or residential real estate data. It instructs that the Agencies may look at firm behavior such as leaving capacity idle, refraining from obtaining the capacity it would have had before the merger, or eliminating preexisting production capabilities as evidence of anticompetitive behavior (returning once more to our Colgate and Crest hypothetical, think about the post-merger firm immediately cutting its total production of toothpaste in half).[231]

Conceptualizing a firm's capacity to produce and distribute data is more difficult because it is very easy to create and deliver perfect copies of the product at the click of a mouse. Consider the listing for 123 Main Street again. Sure, there is initial labor required to input the property data into the MLS, but once the data is in the system, it can be instantly shared to whomever has access to the MLS. A curious thing about residential real estate data is that, in order to maximize the exposure of properties on the market, the data will almost always be created and entered into at least one MLS no matter how many mergers take place. Whichever MLS 123 Main Street falls within will list the property, so there should not be any concerns about "idle capacity." The question of post-merger output is more interesting.

Since the marginal cost for duplicating and transmitting 123 Main Street's MLS data is effectively zero, the argument goes that MLSs should try to sell access to it as widely as possible and at a rate that generates the most economic profit.[232] But what if they do not want to? What if, instead, a post-merger MLS wants to engage in price discrimination by setting

231. *Id.*
232. *See supra* Section II.A.

the price differently for different users or even shutting off the flow of information to one company altogether? Surely this would be anticompetitive if it happened, but this is exactly the type of behavior that the Agencies have successfully litigated against the NAR and MLSs in the past,[233] so there is little reason to think that MLSs would try their luck after merging or that the Agencies would have trouble enjoining the MLSs if they did.[234]

4. Innovation

"Innovation" has become an omnipresent buzzword in recent years and is described by some as "the 'secret sauce' of business success."[235] But whatever the word means to you, the Agencies want to make sure that mergers do not significantly reduce it. As the Guidelines explain, it is a red flag if a merger is likely to reduce the incentive of the merged firm to continue with an existing product-development effort or to develop new products at all.[236] This should be an acute concern of antitrust regulators examining MLS mergers because, arguably, data is today's most valuable resource and it is no doubt a challenge for competition policy.[237] Of course, given how critical good

233. *See supra* Section I.B.

234. As Redfin CEO Glenn Kelman said during the June 2018 FTC-DOJ workshop,

> whether the DOJ and the FTC need to regulate the MLSs again, um, I'm not sure, I just haven't seen any bad behavior in *years*, *years*, and I'm now in the room where it happens, where I see some rinky-dink little broker who's trying to charge a lower fee, apply for data access, and get it—get *all* of it. When they have one listing they get 100,000 listings in return. And nobody bats an eye.

What's New in Residential Real Estate Brokerage Competition – Part 1 at 1:17:28–1:18:02, FTC (June 6, 2018), https://www.ftc.gov/news-events/audio-video/video/whats-new-residential-real-estate-brokerage-competition-part-1 [https://perma.cc/7U8B-G6PQ].

235. Jeffrey H. Dyer, Hal Gregersen & Clayton M. Christensen, *The Innovator's DNA*, HARV. BUS. REV. (Dec. 2009), https://hbr.org/2009/12/the-innovators-dna [https://perma.cc/47MS-JHGL].

236. GUIDELINES, *supra* note 184, at 23.

237. *See The World's Most Valuable Resource is No Longer Oil, but Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource [https://perma.cc/65RP-EKNB] (highlighting the difficulties of antitrust regulation in the data-centric age of Google, Amazon, Facebook, etc.); *see also Data is Giving Rise to a New Economy*, THE ECONOMIST (May 6, 2017), https://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy [https://

MLS data are to the efficient operation of the housing market, it would be ideal if we could know whether a proposed merger would reduce or increase innovation (however it's measured). But the same could be said about any industry, and without a crystal ball, the fact is that it's impossible to know for sure which way the innovation argument cuts.

B. Coordinated Effects

Even at a rate of fifty mergers per year, there will still be many hundreds of MLSs for years to come. Up until the point where there is a single MLS,[238] the most dangerous and potentially anticompetitive consequences stemming from mergers will most likely occur because of coordination among MLSs. If the worst-case scenario for competition is that an MLS stops its flow of data to popular online portals that house-buying consumers like to use, then a handful of small MLSs will not be able to substantially injure the portals' bottom lines (which reflect operations across the entire country). A small number of large MLSs—or a large number of small MLSs—working in concert, however, would dramatically improve the bargaining position of an MLS relative to oligopolistic online portals. But while coordination may prove harmful, it is not absolutely bad. In fact, The Sixth Circuit emphasized both sides of the argument in the 2011 case *Realcomp II, Ltd. v. FTC*.[239]

In *Realcomp*, a Michigan association of NAR-affiliated real estate brokers who operated an MLS petitioned the court for review of an FTC decision finding that the association's data publishing policies violated federal antitrust law.[240] Analyzing

perma.cc/JT5B-TQ7K].

238. As I see it, there are three possible futures with respect to MLS consolidation. First, in the Fragmented Future, the market looks a lot like it does today, with hundreds of MLSs that exist primarily to service online portals. Second, in the Partially Consolidated Future, the market looks similar, albeit with fewer MLSs and possibly regional competitors to the online portals where MLSs are large enough to attract investment in new technologies. Third, in the Completely Consolidated Future—which may be the most interesting—there is either one national MLS or enough coordination among regional MLSs that the industry functions as if it were one. Here, the MLSs are in a dominant negotiating position relative to rival online portals and probably have control over their own.

239. 635 F.3d 815 (6th Cir. 2011).

240. *Id.* at 822–23. Much like the VOW policies that were nixed by the consent decree discussed *supra* Section I.B., the specific anticompetitive practice at issue in *Realcomp* was that the MLS limited the publication and marketing of

the competitive effects of MLS collaboration under the rule of reason rubric, the Sixth Circuit observed that when horizontal collaboration among MLSs allows for "'the exclusion of nascent threats such as . . . consumer access to online listings [such conduct] 'is reasonably capable of contributing significantly' to anticompetitive effects."[241] The court was concerned with the inability of certain prospective home buyers to see a full panoply of home listings because of restrictions placed on the data by the MLS.[242]

The court emphasized that the MLS could still prevail by "demonstrating 'some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.'"[243] In *Realcomp*, the petitioner MLS was unable to show that its website policy about a discrete class of listings enhanced competition meaningfully enough to offset the evidence of competitive harm.[244] But when it comes to procompetitive justifications, a website policy pales in comparison to the efficiencies gained by combining many disparate MLSs into one, unified enterprise.[245]

C. *Threats to Competition Moving Forward*

Earlier this year, the DOJ and FTC convened their first public workshop on competition in the residential real estate brokerage industry in over a decade.[246] During the workshop,

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nontraditional listings from limited-service brokers that "exert[ed] competitive pressure on the traditional model for brokerage services." *Id.* at 820–22.

241. *Id.* at 830 (quoting United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001)).

242. *Id.* As always, the court's concern was *access* to MLS data. It is not difficult to see parallels between the motivations that prompted the data restrictions in *Realcomp* and the potential motivations for today's MLSs to enforce similar data restrictions against Zillow or other competitors.

243. *Id.* at 834 (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986)).

244. *Id.* at 835–36.

245. Despite the outcome of *Realcomp*, the court was practically sanguine about the benefits of MLSs, noting: "The development of the Internet and MLS databases, the increase in the number of broker websites, and data feeds provided from the local MLS to public websites have enhanced the ability of brokers to share real-estate information and of the public to access it." *Id.* at 822.

246. *Supra* note 15. In addition to watching video recordings of the workshop panels available on the FTC's website, those interested in the workshop might read the following reports of the day's events: Patrick Kearns, *Redfin CEO*

scarcely a word was mentioned about MLS consolidation. Still, access to listings data was—and is—very much at the forefront of the conversation.[247] The public comments submitted to regulators in conjunction with the workshop are illuminating in this respect.[248]

In its comments, the NAR asserted its position that because brokers and agents are the ones who invest resources into obtaining property listings, brokers and agents have an intellectual property-based right to prevent portals like Zillow and Trulia from accessing the resulting listing data.[249] Quoting economist Frederick Flyer, the NAR wrote that portals such as Zillow and Trulia "are not in the business of providing brokerage services hence limiting these sites' access to proprietary MLS data does not harm consumers of brokerage services nor does it limit their access to information. These sites are not even essential to consumers who use actual real estate brokerages . . . ."[250]

Echoing this point, the Council of Multiple Listing Services wrote that not only is listing data the valuable intellectual property of brokers and agents, but that forced distribution of listing data "is comparable to saying that music publishers,

Tangles with Zillow and Realtor.com at D.C. Competition Workshop, INMAN (June 5, 2018), https://www.inman.com/2018/06/05/redfin-ceo-tangles-with-zillow-and-realtor-dot-com-at-competition-workshop [https://perma.cc/BA72-J75K]; Andrea V Brambila, *Trelora CEO Tells Regulators: We've Been Egged and Harassed for Our Innovation*, INMAN (June 5, 2018), https://www.inman.com/2018/06/05/trelora-tells-regulators-weve-been-egged-and-harassed-for-our-innovation [https://perma.cc/8Y2G-GSKY]; Patrick Kearns, *D.C. Workshop Panelists Spar over What Real Estate Consumers Need to Know*, INMAN (June 5, 2018), https://www.inman.com/2018/06/05/d-c-workshop-panelists-spar-over-what-real-estate-consumers-need-to-know [https://perma.cc/2BRR-T3N4].

247. *See, e.g.*, Alexei Alexis, *Antitrust Cops Turn Attention to Real Estate Data Zillow Needs*, BLOOMBERG LAW (June 5, 2018), https://biglawbusiness.com/antitrust-cops-turn-attention-to-real-estate-data-zillow-needs [https://perma.cc/D32K-YJMS]; *see also* Andrea V. Brambila, *Zillow Bashes Upstream and CAR in Public Regulator Comments*, INMAN (Aug. 3, 2018), https://www.inman.com/2018/08/03/zillow-strikes-back-bashing-upstream-and-car-in-regulators-comments [https://perma.cc/SZC6-8CQY].

248. A complete collection of the comments may be found on the FTC's website. *#747: FTC, Department of Justice to Hold Workshop on Competition in Real Estate Brokerage*, FED. TRADE COMM'N, https://www.ftc.gov/policy/public-comments/2018/04/initiative-747 (last visited Aug. 27, 2018) [https://perma.cc/BQ5Y-MNNP].

249. National Association of Realtors, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 2 (July 31, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/07/00060-147651.pdf [https://perma.cc/3DBF-R7GH].

250. *Id.*

who are in the music distribution business, should have to give their music to Spotify for free to lower barriers to entry into the music distribution business."[251] In its comments, the MLS Roundtable (a consortium of eight MLS CEOs) highlighted that its member MLSs enabled customers to choose where listing data was shared, but emphasized the efforts its member MLSs had undertaken over the past decade to improve MLS data and distribute it more widely.[252]

In contrast, the Center for Data Innovation, a think tank, recounted in its comments the history of anticompetitive practices that have plagued MLSs and called for antitrust regulators to "insist" that MLSs and brokers ensure that their listing data are shared widely to increase "competition enabled by emerging digital services."[253] These comments square with a white paper the Center for Data Innovation released in November 2017 calling for policymakers to "require brokers to provide open access to their real estate listings."[254]

For its part, Redfin attempted to stay out of the data access debate, writing that

> [w]ithout [MLSs] as clearinghouses for all listing data, the real estate market would become much less competitive and efficient. . . . We think the continued success and stability of the industry requires the continued success of the MLSs, as well as incentives for listing agents to continue to contribute their listings.[255]

251. Council of MLS, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 7 (June 1, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/06/00030-147377.pdf [https://perma.cc/C2DS-85XC].

252. MLS Roundtable, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 1–2 (June 13, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/06/00040-147412.pdf [https://perma.cc/L4PX-MD6Y].

253. Center for Data Innovation, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 2–3, 8 (July 31, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/07/00062-147653.pdf [https://perma.cc/AH6W-C8U5].

254. CENTER FOR DATA INNOVATION, BLOCKED: WHY SOME COMPANIES RESTRICT DATA ACCESS TO REDUCE COMPETITION AND HOW OPEN APIS CAN HELP 9 (2017), http://www2.datainnovation.org/2017-open-apis.pdf [https://perma.cc/NQ34-F2FJ].

255. Redfin Corporation, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 2 (July 31, 2018), https://www.ftc.gov/

More in line with the Center for Data Innovation's position and opposed to that of the NAR, Zillow commented that it "does not believe listing data needs to be nor should be treated as a public utility."[256] But its comments left no doubt that the company is on the side of maximizing data distribution: "Zillow does not believe there should be any artificial obstacles to the free flow of data to consumers, and we are greatly concerned by any proposals [such as the Upstream project supported by the NAR] that would restrict or impede the continuing democratization of data."[257]

Not to bury the lede, when it comes to competition in the residential real estate industry, antitrust regulators have their eyes trained on one elusive goal above all others: reducing the commission rates that home sellers pay for the services of real estate agents.[258] Despite the glut of agents nationwide and significant technological advances, the average commission hovers around 5–6 percent and has changed little over the past few decades.[259] Though they are the central concern of this Comment, MLS consolidations are hardly the entire ballgame when it comes to the dynamics of commission rates. Nor, for that matter, is consolidation the only interesting antitrust angle when it comes to MLSs. Very briefly, consider two topics that may prove quite important in the months and years ahead—pocket listings and the possibility of a dominant portal with market power.

"Pocket listing" is another name for a listing that is not on an MLS (the idea being that an agent keeps a listing *in his pocket* rather than disseminating the information via an MLS).[260] Pocket listings are harmful to competition because

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system/files/documents/public_comments/2018/07/00055-147657.pdf [https://perma.cc/MUK5-92FB].

256. Zillow Group, Comment Letter in Response to Request for Comments "Real Estate Workshop," at 1–2 (July 31, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/07/00061-147652.pdf [https://perma.cc/DA6Y-69YL].

257. *Id.*

258. *See* sources cited *supra* note 17.

259. *See* Kenneth R. Harney, *Realty Agents' Average Commission for Home Sales Heads Down Toward 5 Percent*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/realestate/average-commission-rate-for-home-sales-heads-down-toward-5-percent/2017/01/09/4ee3f048-d6a8-11e6-b8b2-cb5164beba6b [https://perma.cc/6XG3-PHHT] (noting that the average commission in 2015 was 5.26 percent).

260. Lisa Johnson Mandell, *What Is a Pocket Listing? A Sneaky Way to Sell Your Home*, REALTOR.COM (Dec. 6, 2016), https://www.realtor.com/advice/sell/

they undermine the transparency that MLSs provide for home buyers. Whenever a listing is kept off an MLS—as they routinely are in "hot" markets such as Boston and San Francisco—commissions are inflated because consumers end up paying for a real estate agent's "insider info" as opposed to his or her services.[261] Apparently, pocket listings are an active concern of antitrust regulators,[262] and renewed attention was paid to them during the public workshop,[263] but only time will tell whether any concrete steps will be taken to address them.

While pocket listings pose an interesting competitive concern, the greatest threat to competition in the residential real estate industry moving forward is likely neither MLS consolidation nor a proliferation of pocket listings, but instead may well be the specter of a dominant online portal with market power over search. The argument goes something like this: if the vast majority of home buyers rely on a dominant portal to search for homes, and real estate agents rely on the site for lead generation, then the portal can charge the real estate agents who advertise on the site supracompetitive rates that get passed along to consumers. At the moment, this harm appears to be unrealized, but one report from mid-2016 put

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what-is-a-pocket-listing-2 [https://perma.cc/4UHS-E9CR]. "Pocket Listing" is also, apparent-ly, the name of a widely-panned movie about a real estate agent selling an off-MLS listing where "[e]very scene manages to play like the dramatic lead into an adult film, only with less production value." Katie Walsh, *'Pocket Listing' Can't Make the Sale with Its Strange Design and Poor Taste*, L.A. TIMES (Dec. 1, 2016), http://www.latimes.com/entertainment/movies/la-et-mn-mini-pocket-listing-review-20161128-story.html [https://perma.cc/4NNF-BPHW].

261. While some may consider an agent's access to off-market listings a part of his or her "services," to accept such a position is to accept a prisoner's dilemma that harms consumers. If no listings are kept from an MLS, then consumers can be confident they are seeing everything for sale no matter who their agent is; if a handful of agents "defect" and have pocket listings while other agents do not, then those with the pocket listings can claim access to a greater selection of properties than the other agents and charge a higher price for their services. Anyone familiar with game theory will understand that the logical outcome—the Nash equilibrium—will be abundant pocket listings and eroded MLSs. *See What Is the Nash Equilibrium and Why Does It Matter?*, THE ECONOMIST (Sept. 7, 2016), https://www.economist.com/the-economist-explains/2016/09/06/what-is-the-nash-equilibrium-and-why-does-it-matter [https://perma.cc/Q8F4-NX6V].

262. Andrea V. Brambila, *The Government Wants to Know What's Up with Real Estate Pocket Listings*, INMAN (May 16, 2018), https://www.inman.com/2018/05/16/doj-and-ftc-may-scrutinize-pocket-listings-and-state-regulations [https://perma.cc/74G7-4MWV].

263. Patrick Kearns, *Why Is Everyone Talking about Pocket Listings?*, INMAN (June 15, 2018), https://www.inman.com/2018/06/15/why-is-everyone-talking-about-pocket-listings [https://perma.cc/VTG7-ZY7Z].

Zillow Group's share of real estate web consumer traffic at 64 percent.[264] One of Zillow's successes has been its layering of additional data on top of MLS data in order to personalize the search process for prospective buyers. But what if companies like Amazon, Google, or Facebook decide *they* want to get in the residential real estate game? How dominating could one of those companies be if they applied their willpower and, more importantly, their vast quantities of personal data[265] to the problem?

CONCLUSION

"To inflict injury in return for," to "retaliat[e] in kind or degree"; "revenge" is not a word that antitrust regulators use to describe desirable conduct in a market economy.[266] Whatever the motivations any individual MLS might have to merge with another—good, or evil—this Comment has articulated why MLS consolidations themselves are procompetitive. In Part I, we saw how multiple listing originated as a way to increase exposure for homes on the market, how the courts have routinely kept MLSs in line, and how important reliable data are to the operation of today's residential real estate industry. In Part II, we examined antitrust principles that make clear that increases in price and decreases in output are the primary harms of market power and the metrics by which conduct is gauged. In Parts III and IV, we applied the essential tool of horizontal merger review, the Guidelines, to assess MLS consolidations and concluded that such consolidations create efficiencies that should get passed along to the folks buying and selling homes. In sum, we learned that MLS consolidations are virtually inevitable, benefit consumers, and are legal under federal antitrust law. Revenge? Sounds like good, old-fashioned competition to me.

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264. Caroline Feeney, *Zillow Snags More Market Share Than Ever*, INMAN (May 19, 2016), https://www.inman.com/2016/05/19/zillow-snags-internet-market-share-ever [https://perma.cc/2HER-Q3NK].

265. *See, e.g.*, Brian X. Chen, *I Downloaded the Information That Facebook Has on Me. Yikes.*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/personaltech/i-downloaded-the-information-that-facebook-has-on-me-yikes.html [https://perma.cc/W2JB-SMZN].

266. *Revenge*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/revenge [https://perma.cc/9VWU-3NZN].