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Antitrust and the Real Estate Industry: Looking Backwards and Forwards

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Looking Backwards and Forwards

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Oh how times have changed. Two years ago, when one of us last sat down to write about antitrust and the residential real estate industry, housing prices were rising around the United States.[1] Some cracks had begun to appear. In particular, default rates on newly issued sub-prime mortgages seemed unusually high. But most observers expected the run-up to continue, and the likes of Merrill Lynch, Bank of America, and Wachovia had just revealed or would soon reveal deals seemingly predicated on the continued expansion of the business.

Today, of course, the U.S. residential real estate industry is in a tailspin. Prices for existing homes declined over ten percent nationwide between January 2007 and January 2008.[2] Construction of new homes has sunk to levels not seen since Ronald Reagan was President.[3] The value of the loans, CDOs, and securities written on the assumption that U.S. housing prices would continue to increase has been wiped out. The swift and sudden

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[1] Thomas P. Brown & Kevin L. Yingling, *Antitrust and Real Estate: A Two-Sided Approach*, 3(1) COMPETITION POL'Y INT'L 225 (Spring 2007).

[2] Press Release, Standard & Poor's, Record Declines in Home Prices Continued in 2008 According to the S&P/Case-Shiller Home Price Indices (Mar. 25, 2008), *available at* http://www2.standardandpoors.com/spf/pdf/index/CSHomePrice_Release_032544.pdf.

[3] Floyd Norris, *Horrid Housing Starts*, NYTIMES.COM, Jun. 17, 2008, *available at* http://norris.blogs.nytimes.com/2008/06/17/horrid-housing-starts/.

decline in housing prices has toppled one once formidable investment bank and pushed the likes of Citibank to travel the world in search of capital. The ripples from this unprecedented decline in U.S. housing prices (at least for those who forgot what happened to housing prices during the Great Depression) have pushed the U.S. economy, perhaps even the global economy, to the brink of recession.

Through the good times and the bad, the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") have pushed an antitrust enforcement agenda designed to reform the industry. In 2005, the DOJ's Antitrust Division ("Antitrust Division") sued the National Association of Realtors ("NAR"). The FTC followed suit in 2006 by issuing a series of complaints against a number of real estate groups. Although they challenged slightly different policies, both agencies claimed that they were suing to protect new types of competition that had been stoked by the distribution of real estate listings over the Internet.[4]

With the passage of time, the cases have progressed. The DOJ's Antitrust Division has announced a settlement with the NAR that gives it most of what it sought when it filed suit. The FTC, on the other hand, has suffered a setback. It lost the first round of litigation before an administrative law judge. These outcomes, even if the full FTC eventually reverses the initial decision, provide an opportunity to take another look at antitrust and the residential real estate industry in the United States and to see whether the current enforcement agenda seems likely to achieve the stated goal of reducing the

[4] *See* Press Release, U.S. Federal Trade Commission, FTC Charges Real-estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real-estate Services (Oct. 12, 2006), *available at* http://www.ftc.gov/ops/2006/10/realestatesweep.htm.

prices that consumers pay for real estate brokerage services in the United States. We are skeptical.

I. REAL ESTATE, THE INTERNET, AND COMPETITION POLICY

The defining feature of the U.S. residential real estate industry remains what is generally described with the three-letter abbreviation "MLS," which stands for "Multiple Listing Service." The phrase captures the obvious and, in many ways, most important aspect of an MLS: the presentation of listings from multiple brokers. Historically speaking, this attribute of MLSs was backed by a reciprocal commitment made by all of the brokers that participated in a particular MLS. By joining an MLS, a broker gave all other participating brokers access to its listings in exchange for access to their listings.

But shared listings do not explain why the industry has received so much antitrust attention for the last several decades. Two attributes of MLSs explain the near-constant antitrust scrutiny. MLSs are run on a cooperative basis by groups of local brokers, and only one MLS operates in any particular geography. MLSs combine under a single roof the two things that most excite competition lawyers: coordinated activity and, assuming it makes sense to define real estate markets on the basis of local geography, monopoly.

History suggests that competition law should pay attention to the real estate industry. Brokers have used MLSs to do things that seem offensive from the standpoint of competition policy. Until the U.S. Supreme Court held the practice illegal in 1950, many MLSs fixed brokerage rates for all of their member brokers (i.e., all real estate brokers in a particular area).[5] Brokers have also used MLS membership criteria to limit

[5] *See* U.S. v. National Association of Real Estate Boards, 339 U.S. 485 (1950). *See also* Robert W. Hahn et al., *Bringing More Competition To Real Estate Brokerage*, 35 REAL EST. L.J. 86, 96 (2006).

the dimensions along which brokers compete with one another. And these policies, like the policies prohibiting competition on commissions, have been appropriately struck down.[6]

The current cases did not arise from anything so patently offensive. Rather, the cases grew out of the awkward relationship between the residential real estate business and the Internet. Buyers and sellers of all kinds of things have used the Internet to bypass the intermediaries that once brought them together, and real estate brokers have worried for more than a decade that it would do to them what it did to travel agents, comic book stores, and local classified ads.

When the Internet opened to commercial traffic, technically savvy brokers began experimenting with how to use the Internet. Some limited themselves to distributing their own listings, but others set up websites that gave consumers direct access to listing information pulled from an MLS. MLSs also began to build their own websites to distribute listing information to consumers. Recognizing that buyers had begun to use the Internet to search for homes, some brokers began to offer sellers the ability to appeal directly to buyers without having to pay a commission by offering flat-fee listing agreements.

II. THE NEW WAVE OF ANTITRUST SCRUTINY FOR THE REAL ESTATE INDUSTRY

These practices represented fairly significant departures from the way residential real estate had been sold in the United States until then. Large brokers, in particular,

[6] *See* U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

objected to the wholesale distribution of their listings over the Internet.[7] When the industry finally formulated a response, the response was implemented, on a collective basis, through an MLS. These responses attracted the attention of the DOJ's Antitrust Division and FTC.

A. *United States of America v. National Association of Realtors*

In September 2005, the DOJ's Antitrust Division sued the National Association of Realtors.[8] According to the Antitrust Division's complaint, the NAR had suppressed competition by these Internet-savvy brokers by cutting off their access to listings.[9] In September 2003, the NAR had adopted a policy that enabled one broker to prevent another broker from displaying its listings on the other broker's website.[10] The initial iteration of the policy contained two opt-out provisions: a blanket opt out and a selective opt-out.[11] Brokers that exercised the blanket opt-out would block the display of their listings on any other broker's website.[12] By invoking the selective opt-out, a broker would prevent a particular broker from displaying its listings.[13]

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[7] *See* Hahn (2006), *supra* note 5, at 103, n. 59 (quoting NAR spokesman Steve Cook discussing objections of Cendant and Re/MAX).

[8] *Id.*; *See also* Complaint, U.S. v. National Association of Realtors, No. 05C-5140 (N.D. Ill. Sep. 8, 2005), *available at* http://www.usdoj.gov/atr/cases/f211000/211009.htm.

[9] *Id.*

[10] Competitive Impact Statement, U.S. v. National Association of Realtors, No. 05C-5140 (N.D. Ill. Jun. 12, 2008), at 2, *available at* http://www.usdoj.gov/atr/cases/f234000/234013.htm.

[11] *Id.* at 10-11.

[12] *Id.* at 11.

[13] *Id.*

On the day that the Antitrust Division filed its complaint challenging the policy, the NAR modified its policy.[14] Under the amended policy, no broker could display listings secured by another broker absent the permission of the originating broker.[15] The NAR also amended its definition of membership to prohibit brokers from operating purely on a referral basis.[16] Some of the brokers that had used the Internet to broadcast listings to customers had actually stopped hosting open houses or taking buyers on tours. When a particular customer asked for services beyond access to MLS listings, the broker would refer the potential buyer or seller to another broker, typically in exchange for a share of the commission on the sale.

In May 2008, the Antitrust Division and the NAR announced a settlement that appears to give the Antitrust Division some, but not all, of what it wanted.[17] The NAR agreed to drop the modified Internet-listing policy. Under the new policy, a broker that chooses to distribute MLS listings over the Internet does not need the permission of the broker that secured the listing.[18] The right to distribute listings over the Internet is not unqualified. Sellers have the right to block either the display of their listings on the Internet in whole or in part. A broker that wants to distribute listings via the Internet must "establish a lawful consumer-broker relationship, including completion of all actions

[14] *Id.* at 2.

[15] *Id.* at 11.

[16] *Id.*

[17] *See* Press Release, U.S. Department of Justice, Justice Department Announces Settlement with the National Association of Realtors (May 27, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/May/08-at-467.html.

[18] *See* [Proposed] Final Judgment, Exhibit A: Policy governing use of MLS data in connection with Internet brokerage services offered by MLS participants, U.S. v. National Association of Realtors, No. 05C-5140 (N.D. Ill. May 27, 2005) [hereinafter "Revised Policy"], *available at* http://www.justice.gov/atr/cases/f233600/233607.pdf.

required by state law in connection with providing real estate brokerage services to clients and customers."[19] According to the modified policy attached to the proposed Final Judgment, this includes, but is not limited to, "satisfying all applicable agency, non-agency and other disclosure obligations, and execution of any required agreements."[20] In addition, a broker seeking to distribute MLS listing information over the Internet must comply with a fairly long list of technical requirements. A broker must, for example, collect the name of the customer seeking the information and assign that customer a unique username and password.[21] The unique username and password must have a predetermined expiration date, and the broker must keep records associated with the account for no less than 180 days after the expiration of any valid password.[22]

The Antirust Division appears to have made some concessions on the membership issue. Prior to the adoption of the modified membership policy in 2005, the NAR had allowed anyone with a "current, valid real estate broker's license" who was "capable of offering and accepting cooperation and compensation" from other NAR members to have access to MLS listing information.[23] The revised policy replaced the "capable of offering and accepting" phrase with the words "offer or accept."[24] Under the literal language of the new membership policy, only licensed brokers that help clients close transactions are

[19] *Id.* at 1–2.

[20] *Id.*

[21] *Id.* at 2.

[22] *Id.*

[23] *See* [Proposed] Final Judgment, Exhibit B, U.S. v. National Association of Realtors, No. 05C-5140 (N.D. Ill. May 27, 2005) (demonstrating modifications to the MLS member policy), *available at* http://www.justice.gov/atr/cases/f233600/233607.pdf.

[24] *Id.*

eligible to receive listing information. As the "interpretative note" accompanying the revised membership definition explains, the modified policy is not intended to prevent participation by brokers that operate "on a part-time, seasonal, or similarly time-limited basis."[25] But the policy does limit access to MLS listings to those brokers that "actively endeavor[] to make or accept offers of cooperation with respect to properties of the type that are listed on the MLS in which participation is sought."[26] Put slightly differently, although the new policy does not bar membership to brokers that provide referrals, it does allow an MLS to block access to a broker whose business consists solely of referrals.

B. *Federal Trade Commission v. Realcomp II Ltd.*

The FTC's case against Realcomp also involved the distribution of MLS listings over the Internet, though the underlying facts are more involved than the facts on which the Antitrust Division had brought its case.[27] Most people who sell houses through real estate brokers sign what are usually labeled as "Exclusive Right to Sell" agreements. Under an Exclusive Right to Sell agreement, the listing broker, as the industry shorthand suggests, has the exclusive right to sell the house and is promised a commission, regardless of whether the broker actually does anything to generate a sale. Sellers can sign another type of agreement known in the industry as an "Exclusive Agency"

[25] *Id.*

[26] *Id.*

[27] *See* Press Release, U.S. Federal Trade Commission, FTC Charges Real-estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real-estate Services (Oct. 12, 2006), *available at* http://www.ftc.gov/ops/2006/10/realestatesweep.htm; *see also* Complaint, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Oct. 12, 2006), *available at* http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf.

agreement. Under an Exclusive Agency agreement, the listing broker is paid upfront to sponsor the listing, and the agreement promises to compensate any agent, including the listing agent, who produces a buyer for the property.

The actual differences between the types of agency agreements are relatively subtle, but they grow larger when brokers post the listing agreements on an MLS. When a broker posts a house being listed under an Exclusive Right to Sell agreement on an MLS, the broker offers a split of the commission provided by the listing agreement. Generally, the selling and buying brokers split the commission equally. If the listing broker also producers the seller, he or she will keep the entire commission. By contrast, there is no commission split under an Exclusive Agency agreement. Only the agent that produces the buyer receives a commission, and if an unrepresented buyer finds the listing and buys the house, no broker receives a commission. As one would expect given the differences in the promise of compensation, the agreements tend to be used in different ways. Sellers frequently use Exclusive Agency listing agreements when they want, for whatever reason, to handle most aspects of the sale themselves. In many (though not all) instances, the listing broker in an Exclusive Agency deal does only one thing: posts the listing on an MLS. The seller does the rest (e.g., advertise the house in the newspaper, host open houses, and negotiate the final sale).

The FTC's case against Realcomp had three dimensions. Realcomp had adopted a website policy under which Realcomp only transmitted Exclusive Right to Sell listings to the websites that display MLS listings.[28] Realcomp had also drawn a distinction between

[28] Initial Decision, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Dec. 10, 2007), at 58, *available at* http://www.ftc.gov/os/adjpro/d9320/071210initialdecisiontextversion.pdf.

the agreements for purposes of running computerized searches of its database. Realcomp had set up the default settings in such a way that a broker running a search using the default settings would find only Exclusive Right to Sell listings. [29] Although brokers using the Realcomp system could find Exclusive Agency listings, they needed to change the search criteria to include such listings by clicking a small box in the dialog window that defined the search criteria.[30] Realcomp had also defined Exclusive Right to Sell agreements as full-service brokerage agreements.[31] If a seller wanted its house to be broadcast to websites that displayed Realcomp's listings, then the seller had to agree that the broker would handle all aspects of the sale.

Based on this characterization of Realcomp's practices, the FTC issued an administrative complaint. The complaint claimed that these policies, which it defined as the "Web Site Policy," the " Search Function Policy," and the "Minimum Services Requirement," violated the Federal Trade Commission Act.[32] The case was tried before an administrative law judge ("ALJ"), the Honorable Stephen J. McGuire. After the trial, but before the ALJ issued its decision, the FTC and Realcomp reached a settlement regarding the Search Function Policy and Minimum Service Requirement aspects of the case.[33] Realcomp, without admitting any wrong doing with regard to those policies,

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 48.

[32] Complaint, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Oct. 12, 2006), at 4, *available at* http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf; *See also* Initial Decision, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Dec. 10, 2007), at 9, *available at* http://www.ftc.gov/os/adjpro/d9320/071210initialdecisiontextversion.pdf.

[33] *See also* Initial Decision, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Dec. 10, 2007), at 3, *available at* http://www.ftc.gov/os/adjpro/d9320/071210initialdecisiontextversion.pdf.

agreed that it would stop drawing a distinction between Exclusive Right to Sell listings and Exclusive Agency listings for purposes of searches of its website. Realcomp also agreed to stop equating Exclusive Right to Sell agreements with full-service brokerage agreements. The settlement did not, however, affect the analysis of Realcomp's Web Site Policy.[34]

The ALJ rejected the case. The ALJ found much to fault in the Complaint Counsel's case (i.e., the case of the FTC attorneys who represent the FTC before the ALJ) and held that Complaint Counsel "ha[d] not, upon full review of the accepted empirical evidence and [Realcomp's] procompetitive justifications, demonstrated that [Realcomp's website policy] actually culminated in anticompetitive effects or actionable consumer harm."[35] The ALJ's 129-page opinion lays out the perceived gaps in the case in considerable detail, but the ALJ's analysis, and thus the disagreement with Complaint Counsel, turned on two fundamental points. Complaint Counsel argued that the ALJ should presume harm to competition on the basis of three essentially undisputed facts:

1. that Realcomp, like all MLSs, is run on a cooperative basis;
2. that Realcomp has market power in well-defined product and geographic markets; and
3. that the policies at issue were facially discriminatory (i.e., exclusive agency listings were not treated the same as Exclusive Right to Sell listings).[36]

[34] *Id.*

[35] *Id.* at 2.

[36] *See, e.g.*, Complaint Counsel's Post-Trial Brief, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Aug. 3, 2007) *available at* http://www.ftc.gov/os/adjpro/d9320/070803ccposttrialbrief.pdf.

Complaint Counsel also argued that the ALJ should find proof of harm to competition in the fact that the share of Exclusive Agency listings was lower than it would otherwise have been and that the policies had suppressed competition by discount brokers.

The ALJ rejected both arguments. With regard to the argument that harm to competition should be presumed, the ALJ held that facts identified by Complaint Counsel did not stand alone and did not provide "a solid theoretical basis for concluding that the challenged practices have anticompetitive consequences."[37] As the ALJ explained, Realcomp's practices, although potentially anticompetitive, are not the kind of practices that are facially anticompetitive. Drawing a contrast with policies litigated in the distant past, the ALJ pointed out that Realcomp had "not den[ied] membership in its MLS to brokers who use exclusive agency contracts, nor does it preclude brokers from placing such listings on the Realcomp MLS."[38]

Having rejected Complaint Counsel's argument that harm to consumers should be presumed, the ALJ then addressed the proof of harm to consumers. Complaint Counsel argued that harm to competition could be established by proof that the share of such listings was low relative to MLSs that had not adopted policies similar to Realcomp's, controlling for differences between the local real estate markets.[39] Complaint Counsel also argued that the policies had effectively suppressed competition by discount brokers who, according to Complaint Counsel, typically relied on Exclusive Agency listings to

[37] Initial Decision, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Dec. 10, 2007), at 87, *available at* http://www.ftc.gov/os/adjpro/d9320/071210initialdecisiontextversion.pdf.

[38] *Id.* at 88.

[39] Complaint Counsel's Post-Trial Brief, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Aug. 3, 2007), at 64, *available at* http://www.ftc.gov/os/adjpro/d9320/070803ccposttrialbrief.pdf.

sell the discount brokerage services.[40] The ALJ found Complaint Counsel's case unpersuasive. The ALJ refused to accept that the share of Exclusive Agency listings actually served a proxy for the price paid by sellers to list their homes and found, notwithstanding Complaint Counsel's arguments, no evidence that the policies had actually suppressed competition from discount brokers.[41]

III. TAKING A STEP BACK

The split decision in these two cases seems unlikely to stand. The FTC has already decided once that Realcomp's policies posed a threat to competition. Although the FTC does not win every case at the ALJ level, few such defeats are upheld following appeal back to the FTC's Commissioners. The *Realcomp* case may join the small number of exceptions that prove the rule, but history suggests that Exclusive Agency listings on Realcomp will soon be allowed full distribution over the Internet.

The long-term consequence of these cases is less clear, however. Competition policy plays along a narrow margin. Intervention may benefit consumers in one instance, but in order for enforcement to produce net benefits to consumers, those benefits have to outweigh the administrative costs associated with the action, and the intervention must not distort future behavior. When analyzed in this context, competition enforcement has a checkered history outside the areas of cartel enforcement, merger review, and the abuse of government process to protect or collect rents.[42] Put simply, it is very difficult to

[40] *Id.* at 65-66.

[41] Initial Decision, In the Matter of Realcomp II Ltd., No. 9320 (F.T.C. Dec. 10, 2007), at 129, *available at* http://www.ftc.gov/os/adjpro/d9320/071210initialdecisiontextversion.pdf.

[42] *See* Tim Muris, Chairman, Fed. Trade Comm'n, State Intervention/State Action — A U.S. Perspective, Remarks at the Fordham Annual Conference on Int'l Antitrust Law & Policy, New York, NY (Oct. 24, 2003), *available at* http://www.ftc.gov/speeches/muris/fordham031024.pdf.

identify instances of antitrust enforcement in the areas of unilateral conduct, vertical restraints, and legitimate joint ventures that unambiguously benefited consumers.

Many examples of misguided enforcement come to mind,[43] but one recent case seems particularly instructive. A little less than a decade ago, the DOJ's Antitrust Division brought a case against two well-known cooperatives—Visa and MasterCard.[44] The Antitrust Division challenged rules that the two associations, as they were then organized, had adopted. The rules prevented the members of the respective associations from issuing cards on the American Express and Discover networks.[45] The Antitrust Division claimed that the rules harmed consumers by suppressing innovation.[46] In the press release announcing the deal and in its Complaint, the Division claimed that absent the rules, financial institutions would have joined forces with American Express to issue "relationship cards" that combined the features of credit cards and debit cards on a single piece of plastic.[47]

The Antitrust Division advanced a largely theoretical and formalistic case. The Antitrust Division did not attempt to show that the rules affected any of the many prices charged to the various participants in the industry such as interest rates or annual fees to

[43] Richard A. Epstein, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE (AEI Press, March 2007).

[44] *See* Complaint, U.S. Department of Justice, U.S. v. Visa U.S.A. Inc., Visa Int'l Corp., and MasterCard Int'l Inc. (S.D.N.Y. Oct. 7, 1998), *available at* http://www.usdoj.gov/atr/cases/f1900/1973.htm.

[45] *Id.* at 2.

[46] *Id.* at 2-3.

[47] *See* Press Release, U.S. Department of Justice, Justice Department Files Antitrust Suit Against Visa and MasterCard for Limiting Competition in Credit Card Network Market (Oct. 7, 1998), *available at* http://www.usdoj.gov/opa/pr/1998/October/464at.htm; *see also* Complaint, U.S. Department of Justice, U.S. v. Visa U.S.A. Inc., Visa Int'l Corp., and MasterCard Int'l Inc. (S.D.N.Y. Oct. 7, 1998), at 38, *available at* http://www.usdoj.gov/atr/cases/f1900/1973.htm.

consumers, discount rates to merchants, or processing fees to financial institutions. Admittedly, such an empirical analysis would have been difficult, but the fact that rules did not exist outside the United States should have created the opportunity for some analysis of price effects of the policies.

The Antitrust Division focused its energies on collecting anecdotes from the two industry participants that claimed to have been disadvantaged by the rules: Discover and American Express. It used those anecdotes to support its claim that absent the rules, there would have been more effective competition in the industry. Seizing on the associations' cooperative form, the Antitrust Division shifted the burden to the networks to prove that their rules had actually benefited consumers. The Antitrust Division prevailed when the trial and appellate courts found the justifications unpersuasive in light of the fact that it had been adopted and enforced by otherwise competing financial institutions. As the Second Circuit so memorably put it, "[t]he restrictive provision is a horizontal restraint adopted by 20,000 members."[48]

Almost four years have passed since the Supreme Court ratified those decisions by failing to grant certiorari and the challenged rules were eliminated.[49] The follow-on effects have been decidedly ambiguous, at least from the standpoint of consumer welfare. A handful of financial institutions that belonged to the Visa and MasterCard systems have begun to issue American Express cards. Aside from the number sequence and the branding, bank-issued American Express cards are indistinguishable from the Visa, MasterCard, and American Express cards that have existed for years. American Express

[48] *See* U.S. v. Visa U.S.A. Inc., 344 F.3d 229, 242 (2d. Cir. 2003).

[49] *See* Visa U.S.A. Inc. v. U.S., 543 U.S. 811 (2004), *cert. denied*.

collected almost US$4 billion from the card companies and their member financial institutions in its follow-on suit for damages.[50] The "relationship card" hailed by the Antitrust Division a decade ago still has not been seen.

The Antitrust Division's successful civil prosecution of the networks had other, less direct effects, as well. The demise of the rules apparently prompted the networks to raise at least some of the fees that some merchants pay to accept payment cards. Visa and MasterCard also decided to abandon the association model that they had adopted more than three decades ago. As MasterCard explained in the prospectus announcing the sale of its stock, the antitrust concerns that had bedeviled the association form and of which the Antitrust Division case was emblematic largely motivated the decision.[51]

This experience raises some relevant concerns for the real estate industry. Theoretical objections to how an industry works are a good starting point for an antitrust investigation, but the agencies should not use those objections plus the underlying form (e.g., association or cooperative) as a basis for enforcement. Neither the Antitrust Division nor the FTC, from what we can observe in the public record of these proceedings, attempted to show that the real estate industry's challenged MLS practices actually made consumers worse off. One might have expected the agencies to try to show that the policies had actually decreased the return enjoyed by people selling their houses. Levitt and Syverson have shown that realtors enjoy a better return on the sale of their

[50] Press Release, American Express, American Express Settles Antitrust Claims Against MasterCard For $1.8 Billion: Agreement Would Bring Total Payments From MasterCard And Visa To $4 Billion (Jun. 25, 2008), *available at* http://home3.americanexpress.com/corp/pc/2008/mcs.asp.

[51] MASTERCARD, PROSPECTUS, SECURITIES AND EXCHANGE COMMISSION S-1/A FILING (Dec. 6, 2005).

own houses than do their clients (at some opportunity cost in time).[52] Their work suggests that it should be possible to evaluate whether the type of listing agreement affects the price at which a house sells or how long it stays on the market. If, as the agencies suggested, different MLSs had different policies on these issues, then the agencies could have used cross-MLS comparisons to see whether the policies themselves affected either price or days on market.

The simple point is that the consequences of antitrust enforcement do not run in a single, predictable direction. Before unleashing these unpredictable effects on the marketplace, the case for intervention should be firmly rooted in proof of harm to consumers. The real estate industry in the United States has some interesting characteristics. But there is, as the ALJ in *Realcomp* ultimately concluded, no reason to believe that the practices challenged in these cases actually posed any threat to consumers. We suspect that the FTC will see things differently when it reviews the ALJ's decision, but this strikes us as unfortunate.

[52] STEVEN D. LEVITT & CHAD SYVERSON, MARKET DISTORTIONS WHEN AGENTS ARE BETTER INFORMED: THE VALUE OF INFORMATION IN REAL ESTATE TRANSACTIONS (Nat'l Bureau of Econ. Research, Working Paper No. 11053, Jan. 2005).