The Sixth Circuit's Application of the Rule of Reason in *Realcomp II*—Less About the Rule's Reasonableness Than the Reason for the Rule

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The Federal Trade Commission scored a significant victory when the Sixth Circuit applied the rule of reason to uphold the FTC's order in the *Realcomp II* case.[1] The FTC had found that a real estate multiple listing service (MLS) violated Section 1 of the Sherman Act by adopting and enforcing a "website policy" that allegedly restricted the dissemination of certain kinds of MLS content via third-party websites.

The decision offers some important lessons about the way courts approach rule of reason analysis, particularly because it is one of relatively few recent decisions reaching the merits in a rule of reason challenge.[2] One key lesson is that the lack of a cognizable procompetitive justification—or evidence of actual procompetitive benefits—will tend to lower the burden plaintiffs bear in making a threshold showing (often called a prima facie case) of unreasonableness. The Sixth Circuit's decision is also noteworthy for the question it did not reach—namely, whether the FTC properly applied its "inherently suspect" variant of the quick-look doctrine to the restraint at issue in the case.

How We Got Here

In 2006, the FTC sued the Realcomp II MLS, alleging that several of its policies were anticompetitive. The thrust of the complaint was that the challenged policies hindered the ability of real estate brokers to adopt nontraditional business models, such as offering home sellers a limited slate of brokerage services for a flat fee, instead of the traditional model that entailed offering a full array of services in exchange for a 5, 6, or 7 percent commission.[3]

The case ended up focusing on Realcomp's "Website Policy," which governed the scope of MLS data that could be disseminated to third-party websites capable of being accessed by potential home buyers. The challenged Website Policy distinguished between two types of listings: "exclusive right to sell" (ERTS) listings, favored by traditional brokers, and "exclusive agency" (EA) listings, preferred by nontraditional brokers, sometimes referred to as "discount" brokers. An ERTS listing guarantees that the listing agent will receive a commission no matter how the seller happens to arrange a buyer for her property. An EA listing allows the seller to avoid paying a percentage commission to the listing agent by selling the property herself, while taking advantage of the services the listing agent has provided, especially the placement of the listing

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[1] Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16).

[2] Many such cases are resolved against plaintiffs on other grounds, among them the plaintiff's lack of standing or antitrust injury or its failure to plead or prove a proper antitrust market in which the defendant possesses market power.

[3] A copy of the FTC's Complaint is available at http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf.

in the MLS database. Under either scenario, the MLS listing typically includes an offer of compensation (often 3 percent) to an agent who delivers a successful buyer.

Realcomp's Website Policy allowed ERTS listings to be disseminated to numerous third-party websites that Realcomp authorized to display MLS listings, but did not allow the dissemination of EA listings as part of that MLS data feed. An EA listing posted by a nontraditional broker on the MLS thus could reach other agents who had access to the MLS itself, and in turn buyers represented by those agents, but it would not be disseminated by Realcomp to any third-party public websites accessible directly by buyers. The FTC challenged this Policy as unreasonably hampering competition by nontraditional brokers and limiting consumer choice.

After an administrative trial, the FTC's Administrative Law Judge (ALJ) rejected the FTC's claim, finding both that "the evidence [did] not establish that the nature of the restraint is such that it likely precluded discount brokers from competition or eliminated consumer choice"[4] and also that "Complaint Counsel ha[d] not presented reliable evidence that demonstrates actual adverse harm to competition as a result of the Realcomp Website Policy."[5] The ALJ concluded instead that the Website Policy had at most de minimis effects on the ability of nontraditional brokers to offer EA listings.[6] He also credited Realcomp's proferred justifications for the policy, the core of which was that EA listings were appropriately treated less favorably because they allowed home sellers to bypass the services of the brokers who had established the MLS in the first place, thereby "free riding" on the venture.[7]

Complaint Counsel appealed to the full Commission,[8] which reversed the ALJ and found that the Website Policy violated Section 1 of the Sherman Act under three separate theories.[9] First, the policy was deemed "inherently suspect" on its face and thus condemned when Realcomp failed to present a cognizable justification for the policy.[10] The Commission's application of the "inherently suspect" framework departed (perhaps controversially)[11] from Complaint Counsel's own theory of the case[12] and thereby dispensed with the need for the FTC to prove market power or actu-

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[4] Realcomp II Ltd., FTC Docket No. 9320, 2007 FTC LEXIS 200, at *228 (Dec. 10, 2007) (Initial Decision), *rev'd*, 2009 FTC LEXIS 250 (Oct. 30, 2009), *review denied sub nom.* Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16). A copy of the ALJ's Initial Decision is available at http://www.ftc.gov/os/adjpro/d9320/071213decision.pdf.

[5] *Realcomp II*, 2007 FTC LEXIS 200, at *237.

[6] *Id.* at *289–91.

[7] *Id.* at *303–04. As Realcomp would explain, rules limiting how EA listings could make use of MLS tools were appropriate: the MLS "was not created to help property owners who wish to procure their own buyers." Answering Brief of Respondent at 56, Realcomp II Ltd., FTC Docket No. 9320 (filed Feb. 29, 2008), *available at* http://www.ftc.gov/os/adjpro/d9320/080229realcompansweringbrief.pdf.

[8] Although we generally use the acronym "FTC" to refer to the Commission, we use "Commission" to refer to the agency in its adjudicative capacity with respect to the decision reviewed by the Sixth Circuit.

[9] Realcomp II Ltd., FTC Docket No. 9320, 2009 FTC LEXIS 250 (Oct. 30, 2009) (Opinion of the Commission), *review denied sub nom.* Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16). A copy of the Commission's opinion is publicly available at http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf.

[10] *Realcomp II*, 2009 FTC LEXIS 250, at *52–89.

[11] The author has previously noted that the Commission's decision marked a meaningful potential expansion of the inherently suspect rubric to condemn restraints farther afield from the sort of horizontal restraints typically condemned as per se unlawful in past cases. *See* David L. Meyer, *The FTC's New "Rule of Reason":* Realcomp *and the Expanding Scope of "Inherently Suspect" Analysis*, ANTITRUST, Spring 2010, at 47.

[12] *See Realcomp II*, 2009 FTC LEXIS 250, at *53–55. According to the Commission, Complaint Counsel at oral argument "disclaimed reliance on this mode of analysis, on the basis that courts have not had much experience with the particular restraint at issue here, albeit acknowledging that they have had a great deal of experience with closely analogous restraints." *Id.* at *54. The Commission said that Complaint Counsel was "mistaken in this regard." *Id.*

al anticompetitive effects. Second, under the rule of reason, the Commission condemned the Website Policy because Realcomp was found to have market power in the market for the "supply of residential real estate brokerage services" in southeastern Michigan as well as the separate market for "multiple listing services,"[13] and the Website Policy posed a significant potential threat to competition.[14] That threat carried the day in the absence of any showing of valid procompetitive benefits.[15] Finally, the Commission found evidence of actual anticompetitive effects, which again were not offset by any countervailing procompetitive benefits.[16]

With all of these options, the Sixth Circuit took the path of least resistance, affirming the Commission's decision "on the basis of the more extended rule of reason analysis, without reaching the question of whether to apply quick-look analysis" in the form of the Commission's inherently suspect framework.

The Commission rejected Realcomp's justifications for the Policy, concluding, *inter alia*, that there could be no free riding because nontraditional brokers who posted EA listings also paid fees to participate in the MLS in accordance with MLS rules.[17] The Commission also rejected Realcomp's suggestion that traditional brokers ought to be entitled to preserve their separate stream of revenues from commissions paid to brokers assisting homebuyers, viewing this argument as a frontal attack on competition itself.[18]

Realcomp appealed the Commission's ruling. In defending the decision on appeal, the FTC hedged its bets, arguing that Realcomp's conduct was anticompetitive "under any variation of the rule of reason," including the inherently suspect approach as well as the full rule of reason.[19]

The Sixth Circuit's Opinion

With all of these options, the Sixth Circuit took the path of least resistance, affirming the Commission's decision "on the basis of the more extended rule of reason analysis, without reaching the question of whether to apply quick-look analysis"[20] in the form of the Commission's inherently suspect framework. The court described the Website Policy as "an internal rule within an MLS regarding its distribution of certain types of real-estate listings to the public," and commented that it "need not and [did] not decide whether this policy is sufficiently analogous to practices already deemed by courts to be anticompetitive for it to qualify as a facially anticompetitive restraint."[21]

The court of appeals had no difficulty agreeing with the Commission's application of the full rule of reason in this case. It concluded that there was sufficient evidence supporting all of the Commission's key findings: (a) the MLS had market power, (b) its Website Policy had a tendency to harm competition, (c) the Policy had actual anticompetitive effects, and (d) the MLS's proferred "justifications were insufficient."[22]

The Sixth Circuit's conclusion that Realcomp's Website Policy ran afoul of the rule of reason was unsurprising once the court agreed with the Commission's findings that the Policy produced actu-

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[13] *Id.* at *28–29; *see id.* at *90–92.

[14] *Id.* at *114–15.

[15] *Id.* at *89–116.

[16] *Id.* at *116–27.

[17] *See id.* at *77–78.

[18] *See id.* at *81–84. Particularly telling was the Commission's quotation from *Premier Electrical Construction Co. v. National Electrical Contractors Association*, 814 F.2d 358 (7th Cir. 1987), in which the Seventh Circuit observed: "A group of firms trying to extract a supra-competitive price therefore hardly can turn around and try to squelch lower prices—as the Association may have done—by branding the lower prices 'free riding'!" *Id.* at 370 (quoted in *Realcomp II*, 2009 FTC LEXIS 250, at *83).

[19] *See* Brief of Respondent Federal Trade Commission at 20–54, Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

[20] Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16).

[21] *Id.* at 827.

[22] *Id.* at 836; *see also id.* ("Realcomp offers no meritorious procompetitive justification . . . .").

al anticompetitive effects but had no cognizable procompetitive benefits. When the score at the end of the game is "Harm One, Benefits Zero," the plaintiff ought to win. Nonetheless, four features of the court's analysis stand out as noteworthy.

The "Potential" for Harm Arising from the Combination of Market Power and the Anticompetitive Nature of the Restraint—How Much "Potential" Is Enough? The decision is perhaps most noteworthy for its explicit holding that a plaintiff in a rule of reason case need not prove that "actual anticompetitive effects" resulted from the defendants' conduct, or even that any particular quantum of concrete harm was "likely." According to the Sixth Circuit, it is instead sufficient if the nature of the alleged restraint, viewed in the context of the defendants' market power, makes it "likely" that the conduct would have some "adverse impact on competition."[23] The court described the FTC's burden as one of showing only that there was an "adverse potential" flowing from a finding of "market power and the anticompetitive tendencies of [Realcomp's] policy."[24]

As applied by the Sixth Circuit, satisfying this "adverse potential" test was not a high bar. The market power finding was rather uncontroversial and not contested on appeal (although this may have been a missed opportunity for defendants, for reasons discussed below). The test for determining whether the Website Policy had a sufficient "adverse potential," however, was somewhat more ineffable and was not spelled out with clarity by the court of appeals. The *nature* of the anticompetitive potential is easy to glean from the court's discussion: the Website Policy "limited access to internet marketing and imposed additional costs on the marketing of discount listings," listings which "exert price pressure on the full-service brokerage model."[25]

But what of the magnitude of this potential? The court's analysis suggests that a mere scintilla—some tiny chance of reduced price pressure—may be enough. The court credited the fact, as found by the ALJ, that nontraditional brokers could reach 90 percent of potential buyers by placing EA listings on the MLS itself (as MLS rules allowed) and by posting the same listings on a single website, Realtor.com. Nonetheless, the court observed that a reduction of only 10 percent in the number of home buyers exposed to EA listings could make the restraint unreasonable.[26] Why? The "emerging competitive impact" of the discounted brokerage model posed a "'nascent threat[],'" the exclusion of which was "'reasonably capable of contributing significantly' to anticompetitive effects.'"[27]

The court's opinion does not offer any further explanation of how a 10 percent reduction in potential audience "excludes" this nascent threat (and even that 10 percent no doubt overstates degree of foreclosure, since it ignores all other potential distribution channels available to discount brokers). All that we learn from the opinion is that the Website Policy places "limits" or "restrictions"

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[23] *Id.* at 831. To be sure, there was precedent for this approach, especially in the context of real estate MLS services. *See* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1370–76 (5th Cir. 1980). But few courts have allowed plaintiffs to make the requisite showing of anticompetitive harm in a rule of reason case based on a showing of mere tendencies or potential. Instead, they require plaintiffs to show how and to what extent the competitive process has been harmed, or likely would be harmed, by the restraint. In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), for example, in applying a rule of reason sort of analysis under Section 2 of the Sherman Act, the court spoke of the plaintiff's need to demonstrate anticompetitive harm that could be weighed against potential procompetitive benefits, *see id.* at 58–59 (though the court conducted no actual weighing), and found such effects demonstrated only where there was in fact substantial foreclosure from primary channels of distribution that materially impeded rivals, *see id.* at 61, 70–72, 75–76.

[24] *Realcomp II*, 635 F.3d at 834.

[25] *Id.* at 830.

[26] *See id.*

[27] *Id.* (quoting *Microsoft*, 253 F.3d at 79).

on—and perhaps adds some unquantified costs to—the dissemination of discount listings.[28] This potential is unreasonable, one must infer, because it risks disrupting price competition posed by discount brokerage services that are held in such high esteem.

Policymakers may well regard such a conclusion as reflecting sound competition policy when applied to the "nascent" efforts of some brokers to challenge the long-standing orthodoxy of the full-service, full-commission, real estate brokerage model, for which consumers can easily spend tens of thousands of dollars in exchange for seemingly modest amounts of effort.[29] But is there a limiting principle? Surely this rule cannot apply to every agreement on the part of a firm with market power that excludes rivals (even price-cutting rivals) from 10 percent or more of some market. Such a holding would be squarely inconsistent with well-settled principles applicable to exclusive dealing arrangements in both the Section 1 and Section 2 setting.[30]

Although the Sixth Circuit does not say so, its rule is implicitly limited to horizontal combinations of competitors that purport to act collectively to resist procompetitive forces of change.

Although the Sixth Circuit does not say so, its rule is implicitly limited to horizontal combinations of competitors that purport to act collectively to resist procompetitive forces of change. Such a limitation is consistent with the thrust of the FTC's case, as well as the principal precedents relied upon by the court, including *Northwest Wholesale Stationers*[31] and *Realty Multi-List*.[32]

Actual Anticompetitive Effects—Are We So Sure? The Sixth Circuit opinion's discussion of the Commission's findings of actual anticompetitive effects is also informative.[33] The Commission found such effects based on two key sets of conclusions reached by Complaint Counsel's economist. First, he presented a cross-sectional analysis showing that the Detroit area, where Realcomp operates, had a relatively lower percentage of EA listings (the sort allegedly discouraged by Realcomp's policy) than a few comparable cities where MLSs imposed no similar restrictions.[34] The FTC's economist also presented closely related regression analyses that purported to identify an inverse correlation between restrictive listing policies and the share of EA listings in a market, controlling for various factors.[35] Second, the FTC's economist presented a time-series analysis showing that the number of EA listings declined after the Website Policy was adopted.[36]

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[28] *See id.* at 830–31.

[29] *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, Competition in the Real Estate Brokerage Industry (2007), *available at* http://www.justice.gov/atr/public/reports/223094.pdf.

[30] The Supreme Court has held that exclusive dealing arrangements are not unlawful under the antitrust laws unless they "foreclose competition in a substantial share of the line of commerce affected." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). Some more recent cases have suggested that the degree of foreclosure required for exclusive dealing to run afoul of Section 2 may be less than that required to violate Section 1, but those cases do not support liability even under Section 2 when the arrangements affect only a small minority of available distribution outlets. *See, e.g.*, B&H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266–67 (6th Cir. 2008) (affirming summary judgment dismissing exclusive dealing claims where suppliers accounted for only 12.5% of relevant sales; noting that foreclosure below 40% unlikely to raise competitive issues); United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc) (exclusive contracts may violate Section 2 where they "foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation").

[31] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). *See Realcomp II*, 635 F.3d at 830 (citing *Northwest Wholesale Stationers*, 472 U.S. at 295 n.6).

[32] United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980). *See Realcomp II*, 635 F.3d at 826–27, 830–31 (citing *Realty Multi-List*, 629 F.2d at 1388–89).

[33] *See Realcomp II*, 635 F.3d at 831–34.

[34] Realcomp II Ltd., FTC Docket No. 9320, 2009 FTC LEXIS 250, at *121–26 (Oct. 30, 2009), *review denied sub nom.* Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16).

[35] *Id.* at *93, *118–19.

[36] *Id.* at *93, *119–20.

Realcomp vigorously disputed the FTC's evidence on these issues, and the ALJ sided with Realcomp in concluding that the economic evidence was insufficient.

In contrast, the court of appeals found the FTC's economic evidence to be adequate. The court first observed that the time-series analysis showing a drop in EA listings could not "rule out the influence of other economic factors that might have caused the decline," but then found support in "other evidence" for the "conclusion that the drop was at least in part caused by Realcomp's restrictive policies."[37] This other evidence consisted of the FTC expert's cross-sectional and regression analyses. The expert selected six cities with MLSs that did not impose restrictive policies on EA listings and three cities (in addition to Detroit) with MLSs that did have such policies, and then compared the degree of EA penetration.[38] Despite an obvious concern that this analysis might have involved cherry-picking of markets, the court of appeals did not hesitate to find it persuasive.[39] The court also held that the expert's regression analyses provided support for a finding that restrictive policies lead to fewer EA listings, rejecting Realcomp's vigorous arguments that the analyses left out important variables, which the FTC's ALJ had credited.[40]

Among the avenues the court did not explore—perhaps because Realcomp had no good story to tell—was the potential explanation that the differences in EA penetration might have resulted from procompetitive aspects of the Website Policy. If Realcomp's policies allowed traditional brokers to provide better service, or otherwise distinguish themselves in some positive way (rather than by impeding EA brokers), one would expect to see the same lower EA penetration rates as found by the expert's various statistical analyses, but with procompetitive rather than anticompetitive implications.

Perhaps of equal significance, the supposed evidence of "actual effects" did not amount to much more than evidence of anticompetitive *tendencies*. The court did not demand any *quantification* of consumer harm or harm to the competitive process other than to note that Realcomp's Website Policy inhibited the penetration of EA listings, which tended to put downward competitive pressure on commissions. In accepting the FTC's cross-sectional evidence, for example, the court acknowledged the tiny magnitude of the difference in EA penetration between Detroit and Dayton, the "Control" market that was otherwise "most statistically similar" to Detroit—the gap was only 0.23 percentage points.[41] Ultimately, the most that the court could say about the magnitude of the harm was that there likely would have been some additional EA listings absent the restrictive Website Policy and in turn that if one *assumed* that "EA listings save home sellers half of the typical 6% commission," home sellers would save substantial money if there were more EA listings, and spend more if EA listings were inhibited.[42]

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[37] *Realcomp II*, 635 F.3d at 832.

[38] Specifically, the economist compared the "Control MSAs" in which MLSs had non-restrictive policies—namely, Charlotte, North Carolina; Dayton, Ohio; Denver, Colorado; Memphis, Tennessee; Toledo, Ohio; and Wichita, Kansas—with Detroit and three other "Restriction MSAs"—Williamsburg, Virginia; Green Bay/Appleton, Wisconsin; and Boulder, Colorado—where MLSs applied restrictive policies. *Realcomp II*, 2009 FTC LEXIS 250, at *120–21 & nn.46–47.

[39] *See Realcomp II*, 635 F.3d at 832–33. The court's solicitude for the FTC evidence on this score was also reflected in the court's tolerance of shortcomings in the expert's methodologies, one of which was brushed aside with the observation that there was no evidence that correcting the errors would yield different results. *Id.* at 832 n.11.

[40] *Id.* at 833–34.

[41] *Id.* The 0.23 percentage point gap between Detroit and Dayton was based on EA listings having achieved 1.24% penetration in Dayton but only 1.01% in Detroit. *Id.* The court emphasized that this was a 22.7% difference, *id.*, but without information on the number of EA listings in these markets, it is impossible to say whether this percentage difference is at all meaningful.

[42] *Id.* at 832–33 & n.9.

The Lack of Any Redeeming Procompetitive Virtues. Having found that the FTC had established a prima facie case under the rule of reason, the Sixth Circuit next considered whether "Realcomp might still prevail . . . by demonstrating 'some countervailing procompetitive virtue.'"[43] The court agreed with the Commission that none of the justifications proffered by Realcomp was "meritorious," and as a result those justifications could not overcome the "prima facie case of adverse impact."[44]

The court hewed closely to the Commission's reasoning, in essence concluding that all of Realcomp's supposed justifications reflected a deliberate effort to "protect[] established commissions and prevent[] the reduction in the cost of selling a home."[45] First, there was no free riding on MLS services because all brokers—including nontraditional brokers posting EA listings—paid fees for access to the MLS.[46] Second, the court rejected Realcomp's argument that the Policy addressed free riding by home sellers on the efforts of MLS member brokers. As Realcomp had explained, MLS fees were not designed to compensate the MLS's participants for the "additional benefits" of using the MLS to "compet[e] with member cooperating brokers" (i.e., those representing buyers).[47] The court observed, however, that EA sellers in fact usually *did* contract with cooperating brokers, and the cooperating brokers were compensated in those cases. The court also observed that when buyers were unrepresented, no compensation would be paid to a cooperating broker regardless of whether the listing was of an EA or ERTS variety. The court did not care that under a discount EA listing, no listing broker would receive a percentage commission—in this scenario "'listing brokers are not losing money through free riding; they are losing money through competition.'"[48]

The* Realcomp II *case highlights a scenario that is especially tricky for joint venturers. A "restraint" that is initially uncontroversial can come to be seen as protecting stodgy, well-heeled incumbents against transformational change in the marketplace.

The court also evaluated and found wanting Realcomp's "bidding disadvantage" argument, which posited that homebuyers represented by brokers faced a disadvantage when bidding against unrepresented buyers in EA transactions. Again, in the court's view, this justification was no more than a plea for insulation from the effects of price competition.[49]

The *Realcomp II* case highlights a scenario that is especially tricky for joint venturers. A "restraint" that is initially uncontroversial can come to be seen as protecting stodgy, well-heeled incumbents against transformational change in the marketplace. Consider a group of retailers who come together to build a warehouse that allows them to benefit from distributional economies. Reflecting the era when the venture is formed, all of these retailers sell to the public from actual "brick and mortar" stores with physical addresses. Are they justified in adopting a membership or other rule that limits use of the warehouse to shipments destined for physical store locations? When conceived, such a rule likely would be seen as unremarkable and presumptively valid, since the whole purpose of the venture would be seen as making more efficient the warehousing of product destined for sale in retail stores. Conversely, such a requirement would not be perceived merely as a mechanism for preserving the members' retail profits. After all, the members presumably would be competing against one another at retail from their various stores.

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[43] *Id.* at 834 (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986)).

[44] *Id.* at 836.

[45] *Id.*

[46] *Id.* at 835.

[47] Reply Brief of Petitioner at 8, Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

[48] *Realcomp II*, 635 F.3d at 835 n.16 (quoting Realcomp II Ltd., FTC Docket No. 9320, 2009 FTC LEXIS 250, at *82 (Oct. 30, 2009), *review denied sub nom.* Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011), *petition for cert. filed* (U.S. June 28, 2011) (No. 11-16)).

[49] *Id.* at 835–36.

But what if the venture continues to enforce the rule in the face of requests for access to the warehouse by Internet mail-order retailers—perhaps even "discount" affiliates of some of the venture's traditional members who wish to drop-ship directly to consumers, bypassing retail stores? Does the legitimacy of the original restriction disappear just because there is now a new, nontraditional source of competition to which access is denied?

Realcomp II suggests that rules grounded in the character of the original venturers and perhaps justified based on then-existing business realities or market conditions may come to be viewed skeptically as market conditions evolve. But at the same time, there are ways that venturers can improve their chances of overcoming such skepticism. In the hypothetical warehouse venture, one approach would be to point to practical limitations on the warehouse's capacity, and the congestion or other problems that would be caused by admitting new members, or allowing new kinds of uses, especially if the new needs would require costly changes in business patterns or additional investments by the venturers. Such a path likely was unavailable to the venturers in *Realcomp II*, since there is no reason to think (much less evidence) the MLS could not easily have accommodated electronic feeds of EA listing data to public websites.

Another approach may be for the hypothetical warehouse venturers to set up their warehouse with explicit up-front limits on its functionality, leaving for later any decisions about whether to expand that functionality to accommodate new forms of distribution. The subsequent failure of the venturers to agree to add functionality to accommodate Internet distribution likely would not pose nearly the degree of antitrust risk as the enforcement of a collective rule prohibiting it. In the *Realcomp II* setting, such an approach might have involved the MLS venturers refraining from authorizing the MLS to make *any* electronic dissemination of MLS data, leaving any aggregation of listing data for these purposes to some separate agreement among the venturers. In such a scenario, one possible (and perhaps likely) outcome would have been that MLS members would have recognized he benefits of Internet dissemination and thus agreed to contribute their data for that purpose but only in exchange for economic consideration that compensated them for the commission revenues that would be lost once listings were made widely available to unrepresented home buyers.

An array of other strategies may be available if joint venturers pay careful attention to the likely evolution of their relationship well into the future. On the other hand, they should not hold out much hope if their story sounds like a plea for protection from competition.

The Court Sidestepped Any "Balancing," Much Less Any Consideration of How the Analysis Would Have Proceeded Had There Been "Some" Redeeming Virtue. Although the court described its approach as a "full rule-of-reason analysis"[50]—and at least one commentator has dubbed it the "Full Monty"[51]—the Sixth Circuit's analysis is not nearly so complete. Because the procompetitive justifications were rejected outright, the court never carried out any balancing of benefits against harms, and indeed never scrutinized carefully the quantum of harm caused by the Policy.

The court of appeals confirmed that it did not complete a rule of reason analysis when it referred to its conclusion as flowing from Realcomp's failure to rebut the FTC's prima facie case.[52]

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[50] *Id.* at 819.

[51] *See* Ken Glazer, *FTC Victory in Rule of Reason MLS Case*, ABA Section of Antitrust Law and Social Media blog (Apr. 12, 2011) (quoting Stephen Calkins), http://abasal.tumblr.com/post/4557857097/ftc-victory-in-rule-of-reason-mls-case. The use of this term in the antitrust context originates with Stephen Calkins, California Dental Association*: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000).

[52] *See Realcomp II*, 635 F.3d at 836.

This burden-shifting approach harkens back to the D.C. Circuit's seminal ruling in *Microsoft*, which analogized the showing required to establish anticompetitive conduct under Section 2 to the rule of reason inquiry under Section 1. That court divided the inquiry into three steps: (1) the plaintiff's burden to come forward with a showing of anticompetitive effects; (2) the defendant's burden to "proffer a 'procompetitive justification' for its conduct"; and (3) the plaintiff's ultimate burden to prove, "if the . . . procompetitive justification stands unrebutted . . . that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[53] Here, the Sixth Circuit, like the D.C. Circuit before it, never got to the third step.

Because it never reached that step, the court did not need to explain, among other things, how a balancing of harms and benefits might have been attempted. Had the court relied on the anticompetitive "potential" of Realcomp's Website Policy, how would it have weighed some magnitude of cognizable efficiencies against the mere "potential" of harm? Would that assessment have involved a probabilistic comparison of expected net present values, and if so, what would be the source of the estimate of the quantum of harm that "potentially" might be incurred? With respect to the findings of "actual effects," where would the court have found a quantification of the harm to consumers or the competitive process to use in this balance where the Commission's decision contains no such measure? The Sixth Circuit's decision does not begin to answer these questions.

Practical Implications

The Sixth Circuit's decision in *Realcomp II* demonstrates that it is possible for a plaintiff to win a rule of reason challenge to joint conduct, even in the Sixth Circuit.[54] The decision also suggests that, in the right circumstances, precious little evidence may suffice to establish the anticompetitive tendencies or effects needed to condemn joint conduct under the rule of reason. But it would be wrong to interpret the case as declaring open season on joint venture conduct. Instead, the outcome teaches three key lessons regarding the ingredients for a successful rule of reason challenge, and in turn three related lessons for venturers seeking to avoid adverse antitrust outcomes.

The first lesson is that when the issues involve tendencies, effects, and purposes, the Commission's findings and analysis will receive substantial deference on a petition for review. The Sixth Circuit emphasized that its review was limited to determining whether the Commission's "'informed judgment'" was "supported by substantial evidence."[55] And the court took seriously the limited nature of its review. In its ready acceptance of the Commission's analysis and factual findings,

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[53] United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc).

[54] Antitrust plaintiffs alleging Section 1 claims have fared rather poorly in the Sixth Circuit over the past few decades. Among the notable decisions rejecting such claims (on a wide variety of grounds): In 2009, the court affirmed dismissal of claims that airlines had conspired to reduce, cap, and eventually eliminate the payment of base commissions to travel agents in a concerted effort to drive plaintiffs out of business. *In re* Travel Agent Commission Antitrust Litig., 583 F.3d 896 (6th Cir. 2009). The same year, it affirmed dismissal of a Section 1 claim that NASCAR had conspired with International Speedway Corp., the owner of racetracks, to deny Kentucky Speedway access to a Sprint Cup race. Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908 (6th Cir. 2009). In 2007, the en banc court affirmed dismissal of exclusive dealing claims despite the defendant having entered such arrangements with a majority of large distributors, on the ground that plaintiff could have competed for comparable contracts. NicSand, Inc., v. 3M Co., 507 F.3d 442 (6th Cir. 2007) (en banc). In 2004, the court reversed a district court decision enjoining an NCAA rule restricting men's basketball teams to two certified tournaments over four years because the plaintiff failed to allege a proper market definition. Worldwide Basketball & Sports Tours, Inc. v. NCAA, 388 F.3d 955 (6th Cir. 2004). And in 2003, the court affirmed dismissal of a Section 1 challenge to rules of the Ontario Hockey League. NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712 (6th Cir. 2003). To be sure, plaintiffs have also occasionally won Section 1 cases in the Sixth Circuit, including *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), where the court deemed the alleged agreement to be per se unlawful.

[55] *Realcomp II*, 635 F.3d at 823 (quoting FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986)).

the court's opinion at times reads more like one rejecting a petition for review of an agency's plenary rulemaking under the Administrative Procedure Act than an appeal from an administrative adjudication.

It is of course impossible to know how the court would have reacted to a comparable decision rendered by a federal district court. But it does not seem a stretch to think that a district court's reasoning along these lines would have been met with much greater skepticism, and its reliance on rather paltry evidence of anticompetitive tendencies would have been scrutinized more thoroughly. In antitrust cases, district court conclusions are often treated as involving "mixed questions" and thus afforded substantially less deference than the Commission received in *Realcomp II*.[56] This means that parties facing FTC investigations of joint ventures and other joint conduct should regard the FTC as a potentially formidable adversary if litigation ensures, and thus devote considerable attention to persuading the agency's decision makers why, as a policy matter, they should not want to commence such litigation.

When venturers are heard to say that they wanted to make life harder for the competition or wanted to protect high prices, and then defend their actions by arguing about the lack of any real impact, they will probably lose.

A second lesson is that the absence of any compelling (or cognizable) procompetitive justification is crippling. It is fair to read every step in the Sixth Circuit's analysis as having been influenced (or one might say infected) by the court's perception that there was a complete absence of any valid procompetitive justification for—much less quantified benefits from—the Website Policy. Against that backdrop, it is not so hard to understand why any anticompetitive tendency, or any risk of disadvantaging nascent rivals, would weigh heavily against overturning the Commission's decision. When venturers are heard to say that they wanted to make life harder for the competition or wanted to protect high prices, and then defend their actions by arguing about the lack of any real impact, they will probably lose.

The corresponding lesson for joint venturers is that the rationale for the restraint can often be even more important than the actual benefits that result. Careful attention to the procompetitive story needs to be paid at the very outset of the venture's formation, and the participants should think far ahead to whether that story will remain valid once the venture achieves its hoped-for success in the marketplace.

Finally, *Realcomp II* shows that the deck is stacked against joint ventures that are the "only game in town." The outcome likely turned, to a considerable extent, not merely on Realcomp's "market power"—a malleable concept that has been found to exist even when firms have market shares as low as 35 percent—but on the fact that there was no other MLS serving Detroit. Had there instead been three—each with a one-third share—it seems likely the case would have come out much differently. Competition from listings on other MLSs likely would have transformed the court's (and the agency's) perception of any rules established by the "traditional" MLS from "anti-

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[56] Had a district court granted summary judgment to plaintiff on its Section 1 claims, of course, the court of appeals would have reviewed that decision de novo, giving no deference to the lower court's findings. *E.g.*, Plona v. UPS, Inc., 558 F.3d 478 (6th Cir. 2009). Had the lower court entered judgment for plaintiff after trial, or let stand a jury verdict, the standard of appellate review would have been somewhat closer to the "substantial evidence" standard that applied to review of the Commission's decision in *Realcomp II*. The Sixth Circuit "reviews a district court's findings of fact for clear error." Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 420 (6th Cir. 2006), *rev'd on other grounds*, 551 U.S. 291 (2007). But it is not quite so simple: "conclusions of law, questions of mixed law and fact, and 'findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations' are all subject to *de novo* review." *Id.* (citation omitted). Likewise, a district court's decision to grant a permanent injunction is reviewed on an "abuse of discretion" standard. *See* CSX Transp., Inc. v. Tenn. State Bd. of Equalization, 964 F.2d 548, 553 (6th Cir. 1992). "A district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law." Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc., 270 F.3d 298, 317 (6th Cir. 2001) (citing Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1356 (6th Cir. 1985)).

competitive restraints" into measures likely aimed at differentiating their services and attracting consumers who valued what those brokers offered—or else merely hastening that MLS's extinction in the face of marketplace change.

Ironically, perhaps, the FTC succeeded in making the case about the MLS's overwhelming market power even though the alleged effects had little to do directly with the MLS's own power, but instead with the extra costs entailed in placing EA listings on both the MLS and third-party websites. To be sure, EA brokers needed access to the MLS in order to survive, but they got it: recall that Realcomp allowed EA listings to be disseminated *via the MLS itself*. The nub of the harm was the impact on distribution via channels other than the MLS, yet there was no evidence suggesting that the MLS had any market power vis-à-vis these other channels. And indeed, had the MLS not existed and given access to EA listings, EA brokers' costs of distribution would have been astronomically higher. It is thus fair to ask whether the "market power" finding was misdirected. Nonetheless, having perceived the MLS as the only game in town, the court's evaluation of the venture's rules—like the analysis carried out by the Commission—gave short shrift to arguments that there were other ways for nontraditional brokers to compete effectively with MLS members. ●