U.S. DEVELOPMENTS

The FTC's New "Rule of Reason": *Realcomp* and the Expanding Scope of "Inherently Suspect" Analysis

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THE FEDERAL TRADE COMMISSION'S recent decision in *Realcomp*[1] confirms that the Commission has fully embraced the "inherently suspect" framework of analysis it developed and applied in the *PolyGram Holdings* and *North Texas Specialty Physicians* cases.[2] The *Realcomp* decision also marks a significant expansion in the scope of practices potentially deemed "inherently suspect" and a constriction in the scope of permissible "justifications" for such practices sufficient to compel an analysis of market power and actual effects. Unlike *PolyGram* and *North Texas*, the *Realcomp* case is about a legitimate joint venture's policies limiting who may access venture-provided facilities and for what purpose, rather than explicit limitations on how the venturers may compete among themselves.

The FTC did not have to apply the inherently suspect framework to condemn the rules at issue in *Realcomp*. Its decision explains at length that the venture had substantial market power, and in light of that power its rules had actual anticompetitive effects in the relevant market. For observers of the Commission's jurisprudence, however, these facts should not obscure the broader lessons. The Commission held that decisions by venturers to impose limitations on access to venture-created benefits may, if the venturers fail to come forward with a cognizable justification, violate Section 1 of the Sherman Act even if the venture has no market power whatsoever.

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By applying the inherently suspect framework, *Realcomp* upsets some settled expectations about how the antitrust laws will apply to decisions by collaborating competitors to limit participation in otherwise procompetitive ventures. Participants in competitor collaborations who wish to establish criteria for participation in the fruits of their venture may no longer take comfort in the venture's lack of market power when evaluating antitrust risks. Nor may they presume that justifications rooted in the desire to preserve the venture's benefits for those who formed and invested in the venture—sometimes thought of as "free-rider" justifications—will save such rules from antitrust condemnation, especially if the venture already has in place some compensation mechanism.

The FTC's analysis confirms that the "inherently suspect" framework allows for condemnation of myriad "suspect" practices untethered to any realistic likelihood of actual competitive harm. From a more practical perspective, however, the FTC's decision underscores the need for collaborators (participants in joint ventures, trade associations, and their antitrust advisors) to devote more attention to potential antitrust risks and to be prepared to provide the FTC—and antitrust courts that may be influenced by the FTC's reasoning—with cognizable "justifications" for rules and practices that limit participation by third-party rivals.

The Expanding Scope of the Inherently Suspect Framework

The *PolyGram/North Texas* framework allows the Commission to label as "inherently suspect" business practices that fall outside the narrow categories of conduct treated as "per se unlawful," and thereby to condemn those practices if the parties cannot come forward with cognizable justifications without ever inquiring whether they caused actual anticompetitive harm or even whether the parties engaging in them possess sufficient market power to make such harm a realistic possibility. The courts have upheld this framework as an application of Section 1 of the Sherman Act consistent with the Supreme Court's teaching that in appropriate cases the rule of reason may be applied in a "truncated" fashion, without a full-blown inquiry into market effects.[3] As a result, the framework may also apply in Section 1 cases brought by private parties, to the extent courts find the FTC's reasoning persuasive.

The "inherently suspect" framework poses challenges for antitrust lawyers counseling businesses participating in competitor collaborations. To stay out of harm's way, venturers cannot assume that avoiding conduct that might be regarded as "per se" unlawful will as a practical matter end the antitrust inquiry. In particular, they must resist the expectation that enforcers and courts will apply a "market power" screen—of the sort Judge Bork wrote about in *Rothery*[4]—as a prerequisite to proceeding to trial on a rule-of-reason claim, and they must not assume they will be out of the woods just because there is no evidence suggesting higher prices, reduced output or other kinds of actual anticompetitive harm.

Until *Realcomp*, however, the need to worry about the "inherently suspect" framework (and other iterations of truncated rule-of-reason analysis) has been confined in ways that facilitated counseling and compliance. *PolyGram*, *North Texas*, and the truncated rule-of-reason cases from which they evolved all addressed agreements among competitors regarding the terms of their competition *with one another*—in other words, horizontal restraints that are within or at least near the penumbra of the known per se rules applicable to price fixing, market allocation, and other naked output-reducing agreements.[5] The courts that upheld the FTC's application of its framework describe the class of restraints capable of being viewed as "inherently suspect" as those bearing a "close family resemblance" to conduct traditionally thought to warrant per se condemnation.[6]

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From a compliance perspective, this scope made dealing with the practical consequences of the doctrine fairly straightforward: if a restraint is close to the per se line, participants should recognize the desirability of developing a compelling story (along with supporting evidence) demonstrating the cognizable precompetitive justifications for their restraint. In principle, this strategy is little different than that employed by prudent collaborators whose agreements contain price-related provisions or bear superficial resemblance to conduct traditionally treated as "per se illegal;" they proceed cautiously and put themselves in a position to demonstrate that their agreement does not involve price fixing at all, but instead should be analyzed under the rule of reason, as in cases like *BMI*.[7] Perhaps confirming that the inherently suspect framework was conceived as operating in the penumbra of the per se rules, the Commission in *North Texas* emphasized that "a per se analysis and an inherently suspect analysis are close neighbors."[8]

However, *Realcomp* and other signals emanating from the Commission (and others) reveal interest in pushing this framework well beyond the boundaries of the per se penumbra. Some of those signals are merely aspirational. One FTC Commissioner recently spoke about something akin to a unified field theory of antitrust: a structured rule-of-reason framework hinging on the "inherently suspect" nature of the practice that would apply "regardless of the real world market, firm or customer behavior that is at issue, and . . . whether the challenge is made under the Sherman Act or under Section 7 of the Clayton Act."[9] He suggested that such a framework properly could be applied to attack not just horizontal agreements, but oligopolistic interdependence, unilateral exclusionary conduct, and perhaps even mergers.[10] The state attorneys general have suggested applying the same framework in vertical cases, arguing that, in the wake of *Leegin*'s command that minimum resale price maintenance agreements no longer be treated as per se unlawful, such agreements be treated instead as "inherently suspect."[11] And the Antitrust Division now contends that certain settlements of patent litigation—those involving consideration flowing from patentholder to patent challenger that delay the challenger's entry beyond the pre-settlement expectations of the parties—should be treated as "presumptively unlawful," requiring the defendants to provide concrete justifications for their agreement.[12]

The FTC's decision in *Realcomp*, on the other hand, is not aspirational. Fairly read, it *already* expands the application of the inherently suspect framework into a new area: joint decisions by venturers regarding the criteria for admission to their venture and access to venture resources.

The *Realcomp* Decision

Realcomp is a case about the rules established by real estate brokers participating in a local real-estate multiple listing service (MLS)—a central repository for information about listings of homes offered for sale in a particular geographic area. Because MLSs are typically established as joint ventures of the competing real estate brokers operating in a community, there is a long (and continuing) history of antitrust scrutiny for the rules governing participation in the MLS. That history has established that MLSs generate extensive efficiencies by centralizing access to listing information and thereby facilitating the matching of home buyers with properties for sale, but it also recognizes that MLSs often have market power and that MLS-related rules accordingly have the potential to harm competition. There have been many cases applying rule-of-reason analysis to find that particular MLS rules violate Section 1 of the Sherman Act.[13]

Armed with this authority, the FTC's Complaint Counsel proceeded against certain of Realcomp's policies by alleging that they had actual anticompetitive effects and thus violated Section 1 under the rule of reason. The FTC's Administrative Law Judge disagreed, and Complaint Counsel appealed to the full Commission. The Commission reversed. That result was perhaps unsurprising, given that the ALJ's findings of fact allowed the Commission to conclude both that Realcomp possessed market power and that the challenged policies had actual anticompetitive effects. But despite having an entirely conventional basis for finding a Section 1 violation—and despite Complaint Counsel's assertion that the inherently suspect framework was not applicable in the case[14]—the Commission went out of its way to apply the framework to hold that Realcomp's practices violated Section 1 without regard to Realcomp's market power or the policies' actual effects.

Realcomp's "Website Policy." In *Realcomp*, as in several other recent enforcement actions against real estate MLSs, the basic thrust of the government's allegations was straightforward: Realcomp was controlled by traditional "full service" real estate brokers, whose position in the market was threatened by innovative brokers using new communication tools —especially the Internet—and offering to assist home sellers at lower cost. Such nontraditional brokers, sometimes known as "limited-service" or "discount" brokers, often would offer their customers a limited slate of services—one key element of which was the ability to list the seller's home in the MLS database—in exchange for a flat fee that would be a small fraction of a traditional listing broker's percentage-based commission in the event of a successful sale. The FTC alleged that the traditional brokers used their control of Realcomp's MLS to establish and enforce MLS policies that made it more difficult for limited-service brokers and their customers to communicate limited-service listings to potential homebuyers.

By the time the full Commission considered the case, the principal focus was Realcomp's "Website Policy."[15] That policy distinguished between (a) "exclusive-right-to-sell" (or ERTS) listing agreements, which reflect the traditional relationship between a home seller and a real estate broker and require the seller to pay the broker (usually at an agreed percentage of the sales price) no matter whose efforts (including the homeowner's) lead to a sale, and (b) so-called "exclusive agency" (or EA) listings, which reserve to the homeowner the ability to sell his home using his own efforts without providing further compensation to the listing broker, and which require the seller to pay a cooperating broker only if that broker—rather than the owner's own efforts—delivers a successful buyer. As one would expect, traditional brokers favor ERTS listings because they assure that some broker or combination of brokers will receive a full commission on every listing that leads to a sale.[16]

Realcomp's Website Policy allowed the dissemination of traditional ERTS listings directly from the MLS database (via an electronic IDX fed) to "public websites"—including the "realtor.com" site operated by the National Association of Realtors as well as "websites operated by the local MLS association itself, and member broker and agent websites." However, the Policy did not allow EA listings to be transmitted directly to public Web sites from the MDL database.[17]

In the portion of its opinion that evaluated Realcomp's conduct under a "more fulsome rule of reason analysis"[18] the FTC concluded that this Policy had real anticompetitive effects.[19] The MLS had substantial market power in the provision of MLS services, and was in fact indispensable for the efficient dissemination of information about a home for sale in the MLS's territory. As a result, the restrictions on the dissemination of EA listings via the Internet meant that sellers using nontraditional brokers would reach a much more limited audience via the MLS, consisting only of those potential buyers who were given MLS listings by real estate agents they were working with, rather than via the public Web-based access provided for traditional listings. The FTC was able to conclude—again, applying a more traditional rule-of-reason analysis—that in light of Realcomp's market power its policy of keeping EA listings off of Realcomp's public Web sites inhibited consumers' access to the listings posted by nontraditional brokers and thereby reduced the pricing pressure that such brokers exerted on traditional full-service brokers.[20]

Why Should a "Market-Powerless" Joint Venturer Care? Had the FTC based its decision in *Realcomp* solely on its "fulsome" rule-of-reason analysis, the case would be of limited interest outside the real estate field. It is not so often that firms find themselves—in league with a group of their competitors—controlling a facility that is essential to competition in the market, and then also use that control to thwart competitive threats posed by new, arguably more efficient ways of doing business. When they have such power, the law has long been skeptical, and often overtly hostile, to rules that limit access to venture-controlled resources or services in order to resist market change and protect the privileged incumbents. In a case also about real-estate MLSs, for example, the Fifth Circuit long ago explained that "there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from its pooled resources."[21]

Likewise the enforcement agencies' own policy statements emphasize that denials of access might conceivably be a problem when—but only when—the venture has market power. In the context of health care provider networks, for example, the agencies are concerned about "exclusion or referral policies" only where "providers or classes of providers are unable to compete effectively without access to the network, and competition is thereby harmed."[22] And in the intellectual property context, the agencies emphasize that "exclusion from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market."[23] Taken to an extreme, an unjustified access denial can rise to the level of a group boycott, which the Supreme Court has instructed may be per se unlawful, but again only when the participants have market power.[24]

But, of course, Realcomp's market power and the effects of its policies on limited-service brokers were not part of the equation when the FTC analyzed Realcomp's "exclusion" policies under the inherently suspect framework. The FTC took pains to make this clear, explaining that the framework "eschews the requirement of market power" and demands only an assessment of the "nature of the restraint" in order to shift the burden to the defendants to justify their conduct.[25] At least in principle, therefore, the framework would apply equally to restraints imposed by joint ventures that have zero market power, and that accordingly could not possibly impede new forms of competition.

The key to understanding and addressing the implications of *Realcomp*, then, lies in deciphering what caused the FTC to view Realcomp's Website Policy as "inherently suspect" and why it rejected Realcomp's justifications. Importantly, we must conduct this inquiry while ignoring the fact that Realcomp's MLS had substantial market power, since the FTC's inherently suspect analysis could in theory have been applied the same way even if Realcomp's database of home listings had been merely one among a dozen similar databases, any one of which could be used by limited-service brokers and their customers to publicize the characteristics of homes to potential buyers (just as in *PolyGram* the framework would have applied even if the FTC and the court had viewed Warner and PolyGram's competing Three Tenors albums as just two among dozens and dozens of operatic recordings in a properly defined market).

The Inherently Suspect "Nature" of Realcomp's Policy: Coordination or Exclusion? Viewed through this lens, what about the "nature" of Realcomp's MLS Website Policy was inherently suspect? The Commission's decision suggests that the anticompetitive character of the Policy should be "intuitively obvious" because, by denying access to the efficiencies available through the MLS database as a means of placing EA listings on public Web sites, it "hinder[ed] the ability of some competitors to advertise, and disseminate information about, their service offerings."[26]

The Commission identified two factors that supported treating this access denial as suspect: "market context" and intent. First, the Policy was enforced in a "market context" where change threatened to upset the status quo—the traditional, commission-based system of real estate brokerage.[27] Second, the Commission regarded it as troublesome that traditional brokers acted through Realcomp with the *intent*—the "evident aim"—to make it harder for limited-service brokers to compete and thereby to "retard[] the emergence of a new business model."[28]

The Commission's discussion of these factors leaves much to the imagination, suggesting an ad hoc character to the inherently suspect designation. At times it appears that the Commission's reliance on context and intent incorporates, sub silentio, an assessment of whether the restraints might in fact have had—or been capable of having—real and serious anticompetitive effects in the marketplace. Stated another way, the MLS's limitations on dissemination of EA listings might have been considered bad because of how vital the MLS was to competition in the marketplace. Indeed, the Commission at one point expressly noted that the "aims" of the parties' rules underscore[d] the "exclusionary impact of those policies."[29]

At the same time, however, the Commission repeatedly reminds us that market power is *not* a relevant factor in discerning the "nature" of a restraint; just as a price-fixing agreement among two wheat farmers in Nebraska would be per se unlawful, so we are to understand that rules like those adopted by Realcomp are "inherently suspect" regardless of Realcomp's market power. Otherwise, of course, the Commission's analysis would be essentially indistinguishable from the very rule-of-reason analysis the Commission eschewed. On the face of the Commission's reasoning in *Realcomp*, then, it simply was not relevant whether competing nontraditional brokers could have disseminated their listings as efficiently and as effectively without making any use of the MLS at all.

Unfortunately, market context and intent are not particularly helpful as limiting principles. In vibrant competitive markets, the prospect of technological or other change threatening to erode the position of existing market participants is more likely the norm than an exceptional circumstance. Likewise, firms that decide to make efficient joint investments typically do so to improve their position in the marketplace, an aim that necessarily entails making life more difficult for their rivals—or at least getting an edge on them—whatever business model those rivals might choose.

It is thus tempting to seek other explanations for the Commission's treatment of Realcomp's rules as inherently suspect. One attractive candidate is the fact that Realcomp's policies singled out limited-service brokers and, by extension, their "discounting behavior." This might be seen not merely as part of the competitive "context" in which Realcomp acted, but also as implying an agreement among the traditional brokers who controlled Realcomp that they would not themselves compete via nontraditional means, whether using MLS resources or otherwise. In the context of an MLS with substantial market power, this perspective is quite appealing: since all brokers must as a practical matter participate in the MLS in order to compete effectively, the MLS's rules on dissemination of EA listings are tantamount to an agreement not to pursue such listings.

Two cases cited in *Realcomp* as support for treating the MLS's rules as inherently suspect in fact did involve agreements among rivals to limit their own competition. In *Denny's Marina*,[30] the Seventh Circuit treated as per se unlawful price fixing an agreement among boat dealers and the operator of two regional boat shows to deny a place in the shows to a boat dealer who had engaged in vigorous price competition at prior shows, all so that the remaining boat dealers could charge higher prices during the shows. A key feature allowing this agreement to be treated as price fixing was the agreement among the independent dealers—who had made no investments in any legitimate joint venture—that price cutting at the shows was undesirable, which they then implemented by enlisting the help of the show operator to exclude the price-cutter. Similarly, in *Detroit Auto Dealers*,[31] the Sixth Circuit upheld an FTC decision condemning rules adopted by an association of competitors without regard to the members' market power where the rules limited members' hours of operation, thereby restricting how members could compete with one another.

Confining the "inherently suspect" label to situations where venturers manifest an agreement not to compete against one another in nontraditional ways (e.g., by singling out particular business models for exclusion) would narrow the circumstances in which venturers must worry about potential antitrust attack. Unfortunately, precisely because the *Realcomp* decision insists on analyzing the "nature" of the restraint outside of the context in which it was imposed, it does not provide strong support for this limitation. Instead, the Commission appears to have gone out of its way to emphasize that the salient feature of concern was the denial of access to nontraditional brokers, and not the tendency of Realcomp's policies to coordinate how traditional brokers compete with one another. In analogizing the *Detroit Dealers* ruling to the circumstances in *Realcomp*, for example, the FTC underscored that the similarity between the policies at issue in the two cases—and thus the suspect feature of Realcomp's policies—stemmed from their effect of "limiting the availability of competitively relevant information to consumers or raising the costs of obtaining that information." In *Realcomp* there was no doubt that the FTC viewed this limitation as achieved by keeping nontraditional brokers and their EA listings out of the venture (or, more precisely, out of the IDX feed to public Web sites), thereby raising costs for those nontraditional rivals and denying them access to the MLSs' own efficient distribution mechanism. The fact that the policies may also have reflected an understanding among the traditional brokers that they would not offer EA listings—as the restrictions in *Detroit Dealers* kept car dealers from staying open late—was not the stated basis for concern.[32]

Realcomp's Free-Riding Justification. The Commission next considered and rejected Realcomp's justifications for its Website Policy. Of particular interest beyond the real estate context was the FTC's treatment of Realcomp's argument that the Policy addressed a "free-rider" problem.[33] Realcomp explained that EA listings allowed nontraditional brokers and their customers to bypass the principal source of compensation flowing to Realcomp's traditional broker members—the commissions paid to listing and cooperating brokers upon the sale of a home. Under an EA listing, the homeowner could pay her broker a flat fee for the listing, then locate a buyer on her own and complete a sale without any further compensation to any broker. Realcomp complained that this was unfair and thus the legitimate target of a rule limiting how EA listings could make use of MLS tools: the MLS "was not created to help property owners who wish to procure their own buyers."[34]

The FTC rejected this justification outright. It concluded that there could not have been any free riding because in *Realcomp*—the entity whose benefits were allegedly being free-ridden upon—in fact did receive compensation in the case of EA listings: the membership dues paid by nontraditional brokers who placed EA listings on the MLS on behalf of their customers.[35] In the FTC's view, moreover, the fact that traditional brokers may suffer reduced commissions as a result of brokers using the MLS for EA listings flowed from competition with those nontraditional brokers, not the nontraditional brokers' uncompensated use of MLS services.[36] The FTC also noted that, to the extent Realcomp sought to avoid cooperating brokers being cut out of commissions when sellers locate their own buyers, it was significant that even under Realcomp's rules applicable to ERTS listings no cooperating broker would be compensated in such cases because the entire commission would be retained by the listing broker.[37]

Realcomp calls for all venturers who have jointly invested in facilities or services that rivals might opportunistically wish to exploit to reevaluate the antitrust risks associated with rules governing access to and permissible uses of venture benefits.

In the context of a joint venture with considerable market power, participation in which is essential for effective competition by upstart rivals, it makes a good deal of sense for the FTC to have rejected Realcomp's justifications as merely reflecting traditional brokers' desire to insulate themselves from competition. This is especially so given that Realcomp had largely opened its MLS to participation by all licensed brokers in its service territory.[38] The FTC's reasoning, however, seems less well suited to the evaluation of justifications put forward by venturers without market power who, compensated or not, do not wish to share their venture's efficient facilities and services with rivals who would steal business from them in the marketplace. To be sure, the FTC presumably would give greater credence to free-rider justifications for rules barring the wholly uncompensated use of venture facilities. But venturers should not be disabled from relying on such justifications just because they have put in place some compensation scheme to govern their own use of venture facilities, or perhaps even limited use by outsiders. The chosen compensation scheme may well not have been designed to compensate for uses that are different in kind or intensity than those of the venturers themselves. Likewise, it may reimburse out-of-pocket variable costs but not provide any recovery of the investments that established the venture in the first place. And even if that scheme would recover all costs associated with a particular use of venture facilities, the venturers who invested in the facilities might nonetheless reasonably conclude that they do not wish to support competition using their own facilities, and so as a matter of principle do not wish their facilities being used by competitors at any price.

The Practical Implications

The practical implications of *Realcomp* extend well beyond the real estate MLS setting in which the case arose. Because *Realcomp* teaches that the inherently suspect framework applies even where access to a venture is not essential to effective competition, *Realcomp* calls for all venturers who have jointly invested in facilities or services that rivals might opportunistically wish to exploit to reevaluate the antitrust risks associated with rules governing access to and permissible uses of venture benefits.

Consider the plight of two local widget manufacturers who invest in a warehouse in a metropolitan area where there is ample warehousing capacity and no barriers to new warehouse construction. Need they allow other widget manufacturers in the door? And if they share their facilities with some (widget manufacturers or others) for a small fee, must they allow those tenants to use the facilities to help build their nascent Internet-only widget distribution business? And must they welcome another rival who comes calling, seeking to use the warehouse to distribute a new-technology widget that threatens to displace the warehouse-owners from the market entirely? Absent market power, the likely answer to all these questions would be "no," as the agencies' own policy statements confirm.[39]

Read literally, *Realcomp* makes these questions harder to answer. Fortunately, however, it does not leave joint venturers entirely without practical approaches for reducing their potential antitrust exposure.

Should Realcomp Be Taken Literally? A threshold practical question is whether the *Realcomp* decision really should be taken quite this literally. Do venturers without any market power—like the widget manufacturers in the example above—really have to worry that their access restrictions will be deemed "inherently suspect"? This is a fair question, and the partial answer no doubt is that there is less need to worry about such a characterization the clearer it is that competition could not possibly be harmed by the conduct at issue.

But it would be imprudent to write the decision off as limited to its particular facts or even to situations where market power is lurking in the background. First, had the Commission thought that market power was relevant, it would have had no difficulty on the record before it finding that Realcomp had such power—as it in fact did when it analyzed Realcomp's rules under the "more fulsome" rule of reason. A cynical view may be that market power is still important, but the Commission desired to arm itself with the tools necessary to avoid difficult proof problems that might arise in future cases that present greater evidentiary challenges than *Realcomp* on issues like market definition and market power. This view, however, is hard to square with the Commission's express statements that market power is not relevant in discerning a restraint's nature. The inherently suspect framework would itself be inherently suspect were it applied so disingenuously.

Second, whatever the Commission's enforcement policy intentions, it would be unwise to underestimate the creativity of private litigants who might wish to apply the Commission's approach in their own Section 1 challenges to exclusionary joint venture rules. It is not hard to imagine parties excluded from sharing in venture benefits opportunistically labeling that exclusion as "inherently suspect," and arguing that "by its nature" it increases the plaintiff's costs or reduces consumer choice—even if the higher costs merely reflect investments to duplicate venture capabilities and the reduced choice merely stems from consumers' inability to procure the plaintiffs' services in combination with some venture-related attribute.

Stay Out of the FTC's Sights. That said, the most effective strategy for avoiding condemnation under an inherently suspect framework is to avoid creating a target as attractive to the FTC as the practices at issue in *Realcomp*. Although the decision purports to apply Section 1 of the Sherman Act, which private litigants can use to seek treble damages in antitrust courts, the principal beneficiary of a more expansive inherently suspect framework is likely to remain the FTC itself. Courts adjudicating private Section 1 claims likely will be more reluctant than the FTC to apply this framework outside the penumbra of the traditional per se rules.[40]

Moreover, private plaintiffs seeking to apply the framework when they have been denied access to venture facilities lacking in market power may well have difficulty establishing their own antitrust standing, or may face dismissal on grounds that they cannot allege facts plausibly establishing injury to competition.[41] Even if a plaintiff might adequately allege conduct that would properly be deemed "inherently suspect" under the Commission's framework, it is by no means certain that a court would accept allegations of the plaintiff's own access-denial as flowing from conduct that harms market-wide competition.[42]

As a result, a key objective of any joint venture that has policies excluding certain competitors or groups of competitors from access to the venture should be to avoid the attention of the FTC. On that score, the fact that Realcomp had market power and used its MLS rules to protect that power by hindering emerging forms of competition undoubtedly *was* important. It is hard to imagine the FTC expending significant enforcement resources to attack Realcomp had FTC staff thought that nontraditional brokers had numerous equally effective options for disseminating their listings efficiently to homebuyers, and merely wanted access to the MLS simply to avoid making their own investments in a distribution network.

Indeed, the thrust of the FTC's decision mirrors the thrust of the enforcement approach both federal agencies have taken in industry sectors where market incumbents take collective action to resist innovative new forms of competition.[43] The long history of agency enforcement in the health care sector when HMOs and other innovative forms of health care delivery were starting to emerge serves as a reminder that the agencies will pay close attention when incumbents band together to resist change rather than responding with their own, more vigorous competitive offerings.

Collaborators acting against a backdrop of emerging forms of competition should thus take special care to avoid creating the impression that they have acted collectively to inhibit the emergence of new forms of competition. It is precisely when groups of incumbent competitors perceive the need to adjust to threatening changes in their business environment that they should pay closest attention to potential antitrust enforcement risks as well.

Focus on the "Justification." One unfortunate practical lesson of the *Realcomp* decision is that the perception of a practice—by the FTC or a court—as "inherently suspect" may be in the eye of the beholder, and not confined by crisp or clear lines allowing companies to know for sure whether their arrangements with competitors fall outside the zone of potential condemnation. As a result, attention to the "justification" for access-limiting rules may be the most productive means of reducing antitrust risk.

Realcomp teaches that free-rider justifications may not be accepted if arrangements are in place for compensating the venture (or its participants) for use of joint venture facilities or services. This conclusion, however, leaves ample room for venturers to point to a wide variety of other reasons why admitting a rival or groups of rivals—or allowing them to interact with the venture in novel ways—would interfere with the venture's efficiencies and legitimate procompetitive aims. Venturers imposing access limitations should evaluate whether they have sound arguments—well supported with facts—that their limitations are reasonably aimed at addressing practical problems for the venture's efficient operation. Perhaps access to the venture would tax the venture's capacity, causing congestion or interfering with access by the incumbents. Perhaps such access would impose additional costs on the venture by requiring additional management efforts. Perhaps it would raise safety concerns calling for additional costly monitoring or other protective measures. Or perhaps it would jeopardize the venture's own reputation, or alter its "identity" in the marketplace in ways that would diminish its value to venture participants.

These and countless other potential practical justifications will in many cases allow venturers to take comfort that, if venture rules are challenged, they will be able to escape condemnation under the inherently suspect framework and thereby shift the focus to their lack of market power. But that comfort will be available only if the facts (as evidenced by documents and the testimony venturers would supply) will support that the venture acted on those justifications, and did not merely point to them in a post hoc effort to defend restrictions aimed at impeding competition from particular rivals or business models.[44]

Importantly, attention should be paid at the time of formation to concerns that might emerge during the venture's operation. Waiting until later to impose new restrictions, when changes in the marketplace put stresses on the ability of the venturers to recoup their investments, may be too easy to mistake for a collective effort to blunt emerging competitive threats.

Consider How Users of Venture Facilities Will Compensate the Venture. *Realcomp* also leaves room for venturers to justify limitations placed on venture access based on the failure of those seeking access to compensate the venture for the services it provides. Realcomp's free-rider argument failed not because of any principle that rivals should be entitled to free access to venture facilities, but because Realcomp already had in place a compensation structure that did not differentiate among the uses made of MLS facilities. Had Realcomp been able to point to ways in which dues paid by brokers using EA listings did not compensate Realcomp for some set of extra costs associated with such listings, that justification may well have been accepted (in the sense of requiring assessment of the Policy's actual effects). Alternatively, a free-rider justification might have been more successful had Realcomp been able to identify significant past investments by the brokers who established the MLS in the first instance, and which would have been recovered if at all only through the brokers' own competition in the marketplace rather than via dues charged by the venture.

Venturers who wish to keep the fruits of their joint investments to themselves should therefore consider carefully how to structure the recovery of investments in the venture and the ongoing costs of venture operation. *Realcomp* suggests that establishing a set of uniform charges imposed on anyone who might make use of the venture will make it difficult to argue that limitations on access to the venture are justified based on the failure of some set of users to bear their fair share of joint venture burdens.[45]

Be Especially Cautious of Rules Singling Out Particular Competitors or Groups of Competitors. *Realcomp* reinforces the common sense observation that singling out particular groups of rivals, especially those who compete in some unusually threatening way, elevates the risk of venture rules being treated harshly. The fact that Realcomp's rules singled out for exclusion the EA listing tool used most frequently by limited-service brokers was a central feature of the Commission's reasoning. Had membership in Realcomp's MLS instead been limited to some small number of traditional brokers in Southeastern Michigan, who then chose not to admit any new members (traditional and nontraditional alike), it is hard to imagine such a decision being regarded as inherently suspect. Likewise, had the boat show operator in *Denny's Marina* acted to limit the number of participants to avoid overcrowding and so turned away a variety of applicants, without singling out a known price-cutter, the result in that case likely would have been different as well. Accordingly, the need to document the justifications for access-limiting rules is particularly acute when they do not apply even-handedly to all potential participants and all manners of competition.

Competitors setting up a venture may want to consider whether limitations that are built into the venture's organic design up-front might offer a better way of limiting access than rules that channel how the venture facilities, once established, can be used to compete. If the venture's facilities or services are customized to a particular type of product, or manner of application, rules limiting who can have access or how they are allowed to use the facilities might be unnecessary altogether. To be sure, decisions about how to design the venture would be reviewable by antitrust enforcers and courts, but decisions about how jointly owned facilities will work—especially if the venturers can point to savings (in cost, time or other resources) or other legitimate reasons for investing in facilities with reduced functionality—would be hard to characterize as inherently suspect.[46] Consider, for example, how Realcomp might have fared had it adopted no rule limiting the transmission of EA listings to public Web sites, but instead had invested in an IDX feed that—for hypothetical technical reasons—had been incapable of accommodating such listings without additional investments that MLS members chose not to make.

Consider Whether Complete Exclusion Is Safer Than Regulated Inclusion. A corollary to this principle is that it may well be safer to exclude participants from the venture entirely than allowing them in under rules regulating their competitive activity. Depending on the circumstances, the decision to exclude entirely may be less susceptible to an interpretation that it was aimed at restricting a particular form of competition (price-cutting, for example) than a set of rules overtly restricting certain kinds of behavior.

Do Not Act with "Intent" to Impede Rivals. Perhaps revealing a certain circularity in the characteristics that make a restraint "suspect" and those that make it "unjustified," the Commission in *Realcomp* implies that access-limiting practices might not be treated as suspect if they are not imposed with an "intent" to impede rivals. This proposition underscores the importance of documenting the procompetitive justifications for particular access-limiting rules, since that evidence will provide the best way of demonstrating to the Commission or a court that the true aim of the venture was to achieve those benefits rather than to exclude rivals and resist competition.

More generally, however, venturers should take care to avoid creating evidence from which the FTC (or a court) might misperceive the venture's objectives. They should avoid any discussion of joint efforts to blunt the competitive opportunities of rivals, and likewise avoid any discussion of how each of them will respond to competitive threats outside the venture. That does not mean they must refrain from communication about potential competitive threats, but those communications should be managed with extreme caution and confined to ways in which collaboration can make the participants' offerings (their own, or the joint venture product itself) more attractive in the marketplace.

Conclusion

Whether *Realcomp* marks a sea change in the range of conduct that courts and enforcers are willing to condemn under Section 1 of the Sherman Act without inquiry into market power or actual effects remains to be seen. But it very clearly demonstrates that creative antitrust plaintiffs looking to attack practices they perceive as "unjustified" can sometimes avoid the burdens of a full rule-of-reason inquiry. In this environment, collaborators must pay more attention than ever to the ways in which they would justify their rules if called upon to do so, for it is no longer enough for venturers without market power to ask only whether their agreement would be treated as per se unlawful. ■

1 *Realcomp II Ltd.*, FTC Docket No. 9320, op. (Oct. 30, 2009), *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf.

2 PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005) (affirming *PolyGram Holding, Inc.*, FTC Docket No. 9298 (2003)); *see also* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008) (affirming *N. Tex. Specialty Physicians*, FTC Docket No. 9312 (2005)).

3 Although the Commission proceeds under Section 5 of the FTC Act in these cases, it has done so (thus far) by applying Section 1 principles. *See PolyGram*, 416 F.3d at 32 (FTC "observ[ed] (correctly) that the analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act"); *Realcomp*, op. at 2 (finding that "association's acts and practices unreasonably restrain trade in violation of Section 1 of the Sherman Act").

4 Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986) (where venture lacks market power, there is "no possibility that the restraints [ancillary to the venture] can suppress market competition and so decrease output").

5 *PolyGram* addressed an agreement between two competing record companies to suspend the promotion of certain of their individually-marketed albums for a period of time around their release of a jointly-produced album. 416 F.3d at 31–32. *North Texas* addressed agreements among independent physicians to establish through their association a fee schedule and grant the association a power of attorney to respond jointly on their behalf to offers from health care networks. 528 F.3d at 352–53. The judicial decisions that the FTC and its reviewing courts have offered as support for the "inherently suspect" approach likewise involved agreements restricting the manner in which horizontal competitors participants would compete among themselves. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 760 (1999) (vacating appellate court decisions upholding FTC challenge to code of ethics prohibiting dentists from "advertis[ing] or solicit[ing] patients in any form of communication in a manner that is false or misleading in any material respect"); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (conspiracy among dentists to refuse to submit x rays to dental insurers); NCAA v. Bd. of Regents, 468 U. S. 85 (1984) (NCAA "television plan" limiting "the total amount of televised intercollegiate football and the number of games that any one college may televise" and prohibiting any member from "mak[ing] any sale of television rights except in accordance with the basic plan").

6 *PolyGram*, 416 F.3d at 37; *see also North Texas Specialty Physicians*, 528 F.3d at 362 ("we agree that some of NTSP's practices bear a very close resemblance to horizontal price-fixing, generally deemed a *per se* violation").

7 Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979).

8 N. Tex. Specialty Physicians, FTC Docket No. 9312, op. at 3 (Nov. 29, 2005), *available at* http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf.

9 *See* J. Thomas Rosch, Commissioner, Fed.Trade Comm'n, Antitrust Law Enforcement: What to Do About the Current Economics Cacophony?," Remarks Before the Bates White Antitrust Conference 12 (June 1, 2009), *available at* http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf.

10 *Id.* at 15–17.

11 Nine West Group Inc., FTC Docket No. C-3937, Amended States' Comments Urging Denial of Nine West's Petition (Jan. 17, 2008). The states are not alone in suggesting the appropriateness of such an approach. The Assistant Attorney General for Antitrust has expressed similar views. *See* Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009) (proposing application of structured rule of reason for RPM, in which certain factors would allow a plaintiff "to establish a prima facie showing [and] shift the burden to Defendants"), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf.

12 Ark. Carpenters Health and Welfare Fund v. Bayer, AG, No. 05-2851-cv(L), Brief for the United States in Response to the Court's Invitation (2d Cir. filed July 6, 2009), *available at* http://www.justice.gov/atr/cases/f247700/247708.pdf. Unlike the approach advocated by the FTC for "inherently suspect" conduct, however, the DOJ's position would appear to allow the parties to negate the presumption by demonstrating that they lacked market power. *Id.* at 17 n.4 & 27 n.11.

13 *See, e.g.*, United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (membership restrictions may be illegal where MLS has market power); Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991) (unjustified exclusion from membership may be illegal if market power present); Austin Bd. of Realtors v. E-Realty, Inc., No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000) (substantial likelihood of success on rule-of-reason claim against rules prohibiting distribution of MLS data via Web sites. *See generally* 13 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 2220 (2006).

14 *Realcomp*, op. at 20. 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." The Commissioner said that Complaint Counsel was "mistaken in this regard." *Id.*

15 Until 2007 Realcomp had two other policies that the FTC challenged—a "Minimum Service Requirement," which "compelled brokers to provide full brokerage services in order to have their listing included in data feeds to public" and a "Search Function Policy" "excluding EA listings and other non-traditional listings from the default search setting in the Realcomp MLS." Realcomp eliminated these policies after the FTC issued its complaint challenging them. *Realcomp*, op. at 3, 10.

16 *Id.* at 6. For a general discussion of the various types of real estate listing agreements and the business models employed by brokers, see U.S. Dep't of Justice & Fed. Trade Comm'n, *Report, Competition in the Real Estate Brokerage Industry* 4–21 (Apr. 2007), *available at* http://www.ftc.gov/reports/realestate/V050015.pdf.

17 *Realcomp*, op. at 8, 10.

18 *Id.* at 34.

19 *Id.* at 37–45. The FTC, however, did not regard evidence of actual effects as vital even under a rule-of-reason analysis. Rather, it would have been enough merely to find that Realcomp possessed market power and that its policies were facially restrictive in nature. *Id.* at 36–37.

20 *Id.* at 42.

21 *Realty Multi-List*, 629 F.2d at 1370; *see also* United States v. Terminal RR. Ass'n, 224 U.S. 383 (1912) ("But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies through the means and with the object we have stated, of dominating commerce among the states, carried on by other railroads entering or seeking to enter the City of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the proprietary companies. . . . Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it—a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities.").

22 U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, Statement No. 9, at 155–56 (Aug. 1996), *available at* http://www.justice.gov/atr/public/guidelines/0000.pdf.

23 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property 28–29 (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

24 *See* Nw. Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985) ("When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.").

25 *See Realcomp*, op. at 8 n.21 ("*Realty Multi-List* relied on both the nature of the restraints at issue and the market power of the MLS, under what the court of appeals termed a 'facial reasonableness' standard. As the *Polygram* 'inherently suspect' framework we apply here eschews the requirement of market power, we cite that decision here only inasmuch as it discusses the nature of restraints that aim at punishing the discounting behavior of rivals in the real estate brokerage services market.").

26 *Realcomp*, op. at 21, 23.

27 *Id.* at 23–24.

28 *Id.* at 24–25. Antitrust jurisprudence is somewhat unsettled on the role of "anticompetitive intent" in establishing the unreasonableness of a restraint under Section 1 of the Sherman Act. The Supreme Court has frequently stated that an "unlawful purpose" may render a restraint unreasonable, e.g., McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980), but it has also emphasized that reasonableness is to be measured by the net anticompetitive *effects* of a restraint, with evidence of intent potentially "help[ing] the court to interpret facts and to predict consequences." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The thrust of recent cases is to view "intent" merely as one category of evidence potentially relevant to the competitive consequences of challenged conduct. *See, e.g.*, Cal. Dental Ass'n v. FTC, 224 F.3d 942, 948 (9th Cir. 2000).

29 *Realcomp*, op. at 25.

30 Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217 (7th Cir. 1993).

31 Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457 (6th Cir. 1992).

32 *See also Realcomp*, op. at 28 ("incumbent providers are restricting such dissemination of information so as to *impede the marketplace participation by relatively new entrants* offering low-cost or discounted products or services") (emphasis added).

33 The Commission also rejected Realcomp's argument that the policy was justified as a means of overcoming the "bidding disadvantage" homebuyers represented by brokers would have in bidding on the purchase of a home against unrepresented buyers. In the Commission's view, this bidding was nothing less than "competition," and efforts to eliminate the brokers' "disadvantage" merely reflected an aim to prop up the traditional full-commission compensation scheme favored by traditional brokers. *Realcomp*, op. at 32–33.

34 *Realcomp*, Answering Brief of Respondent at 56 (Feb. 29, 2008), *available at* http://www.ftc.gov/os/adjpro/d9320/080229realcompansweringbrief.pdf.

35 The Commission cited *Chicago Professional Sports Limited Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992), for the proposition that there is no cognizable free-riding concern when "payment is possible" because "the 'ride' is not free."

36 The Commission found support in *Premier Electric Construction Co. v. National Electric Contractors Ass'n*, 814 F.2d 358, 370 (7th Cir. 1987),

which 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'!"

37 The Commission noted but did not emphasize other problems with this justification that may have influenced how it was perceived. First, the Commission regarded the justification as a post hoc rationalization that was not relied upon by the MLS's decision makers when the challenged policies were adopted. *Realcomp*, op. at 29 & n.23. Second, and perhaps more compelling, the MLS had long since been established, and was up and running successfully, by the time the new policies restricting dissemination of EA listings were implemented, thereby undermining any suggestion that they were needed to recoup past investments in the MLS.

38 Even in this context, however, the Commission's treatment of Realcomp's free-rider justification seems unduly crabbed and insufficiently confined to the facts of *Realcomp* itself. The Commission examined the manner in which traditional brokers, offering ERTS listings, might lose out to brokers posting EA listings on the MLS, and observed: "[T]he listing broker who insists upon an ERTS contract and loses a listing as a result provides no services at all, and by definition cannot be free-ridden upon. . . . [Such a broker is] not losing money through free-riding; [it is] losing money through competition." However, this analysis seems to ignore the possibility that the brokers who formed the MLS in the first place made investments that they chose to recoup (if at all) through their own successes in the marketplace (i.e., compensation earned through successful listings) rather than through user fees associated with MLS access. Were that the case, non-investing rivals who used the venture to win business from the MLS founders would very certainly be free riding on those investments, precisely *because* they were using the MLS to compete for and win listings.

39 *See supra* text accompanying notes 22–24.

40 *See, e.g.*, Lie v. St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567, 570 (6th Cir. 1992) (declining to apply *Indiana Federation of Dentists* to allow plaintiff to avoid proof of market power in a claim challenging his denial of hospital staff privileges, holding that plaintiff "has not pled or suggested that he can show a naked restraint or an actual detrimental effect on competition flowing from the suspension of his staff privileges").

41 One example is the Fifth Circuit's decision in *Patel v. Midland Memorial Hospital & Medical Center*, 298 F.3d 333, 346 (5th Cir. 2002), which affirmed the grant of summary judgment against plaintiff's challenge to his denial of hospital staff privileges on the ground that, having failed to offer evidence that the plaintiff was eliminated from the market, he could not have suffered antitrust injury. Cases like this have been criticized for incorrectly mistaking antitrust injury for an element of liability, see Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 730 (2003), and other cases have attempted to clarify the proper role of antitrust injury in such cases. *See, e.g.*, Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268 (3d Cir. 1999). But plaintiffs continue to face antitrust injury-based challenges when the lack of market-wide impact is apparent on the face of the complaint. *See, e.g.*, Perry v. Rado, 504 F. Supp. 2d 1043 (E.D. Wash. 2007) (dismissing complaint for failure to allege sufficient facts establishing harm to market-wide competition).

42 As noted above, many courts confuse issues of antitrust standing with the underlying merits of an antitrust claim, such as the need in most cases to prove harm to market-wide competition. Courts that treat "injury to competition" as a prerequisite to standing may well be inclined to require such allegations even when the nature of the conduct itself suffices to establish liability, as is the case even for per se unlawful conduct. *See In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 909 n.15 (6th Cir. 2003) ("Our conclusion that the Agreement was a *per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury.").

43 Indeed, one of the early examples of truncated rule-of-reason treatment arose from the FTC's challenge to collective efforts by health care providers to resist new business models. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

44 As noted, the Commission criticized Realcomp's proferred justifications on precisely this basis, noting that they were not mentioned in Realcomp's pertinent board resolutions or known to the board members who voted for the policies. *Realcomp*, op. at 29 & n.23.

45 If the venture has market power, increasing dues to discourage access may itself be a risky strategy. In the context of MLSs with market power, the federal antitrust agencies have sought to reduce barriers to access imposed by dues set at levels well above the incremental costs of adding new members. *See* United States' Motion to Enforce the Final Judgment & Memorandum in Support, *United States v. Consol. Multiple Listing Serv., Inc.*, Case No. 3:08-CV-01786-SB (D.S.C. filed Jan. 8, 2010) (seeking to enforce consent decree provision prohibiting MLS charging initiation fee that "exceed[s] the reasonably estimated cost incurred by CMLS in adding a new Member."), *available at* http://www.justice.gov/atr/cases/f253900/253946.pdf.

46 A different inference may well attach to decisions to bear extra expense solely for the purposes of limiting competition.

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2010 Student Writing Competition Winner

THE WINNER OF THE SECTION OF ANTITRUST LAW'S *Annual Law Student Writing Competition* is **Theresa R. Stadheim**, a third-year student at the University of Minnesota Law School. Her interests include antitrust law, intellectual property law, and the intersection between these two areas. She serves as a Research Assistant for Francesco Parisi, applying law and economics techniques to issues in antitrust and other areas of law.

Ms. Stadheim won the Writing Competition Award for her article, "*Rambus*, *N-Data*, and the FTC: Creating Efficient Incentives in Patent Holders and Optimizing Consumer Welfare in Standards-Setting Organizations," 19 ALB. L.J. SCI. & TECH. 483 (2009). She also has experience in patent prosecution and was an electrical and software engineer before enrolling in law school. Ms. Stadheim hopes to practice in the area of IP or antitrust after graduation.

As the prize winner in the competition, Ms. Stadheim receives an all-expenses-paid trip to Washington, D.C. for the ABA Section of Antitrust Law's Spring Meeting.