

## Newsstand

Restrictive Website Rules Found to Be Anticompetitive  
*Antitrust, Competition & Trade Regulation Alert*

by [Scott M. Mendel](#), [Michelle S. TAYLON](#) . April 18, 2011

In *Realcomp II, Ltd. v. FTC*, No. 09-4596 (6th Cir. April 6, 2011), the Sixth Circuit upheld the Federal Trade Commission's ("FTC" or "Commission") conclusion that Realcomp, a Detroit area multiple listing service, violated Section 5 of the Federal Trade Commission Act ("FTC Act") by adopting rules restricting the ability of its broker members to advertise discounted brokerage services. Specifically, Realcomp adopted three new policies directed at discounted brokerage services: (1) it prohibited the distribution of information regarding discounted brokerage services to public real estate advertising websites; (2) it excluded discount brokerage service listings from the default search setting on its website; and (3) it established minimum service requirements for full-service brokerage services that would be eligible for the data feeds to public websites and inclusion in the default search setting. Thus, none of these restrictions eliminated discount brokerage services or information regarding such services, but they made such information less accessible and more costly to obtain.

The Sixth Circuit analyzed the website restrictions under a full blown rule of reason analysis. The Court held that a rule of reason violation can be shown either by establishing that Realcomp had market power and the restrictions had anticompetitive potential or by showing an actual anticompetitive effect. The Court affirmed the Commission's findings that the relevant market was the supply of multiple listing services in Southeastern Michigan, Realcomp had market power in that market, and there were barriers to entry. The Court also held that the Commission properly concluded that Realcomp's rules had anticompetitive potential because they restricted the distribution of information about discounted brokerage services and made the distribution of such information more expensive.

Further, the Court affirmed the Commission's conclusion that the restrictive policies had an actual anticompetitive effect. This finding was based on the fact that after the website policies were initiated, the share of discounted brokerage listings fell from 1.5% of total listings to .75%. While the absolute decline in market share was small, the Court found that the 50% decline was enough to show an actual anticompetitive effect. The Court stated that "exclusion of nascent threats such as discount brokerage services . . . is reasonably capable of contributing significantly to anticompetitive effects." Finally, the Court agreed with the Commission that Realcomp did not provide sufficient support for its pro-competitive justification for its website rules, namely, the prevention of free riding by discount brokers.

*Realcomp* represents one of the few instances where the party challenging a restraint succeeded in establishing an antitrust violation under a full blown rule of reason analysis. Arguably this may be due, at least in part, to the fact that under Section 5 of the FTC Act, the FTC is only required to show that the challenged practice *may* adversely affect competition. While the Court made no distinction between the standards under Section 5 of the FTC Act and Section 1 of the Sherman Act, a defendant facing a challenge from a private plaintiff could argue that the private plaintiff must prove an actual anticompetitive effect. It is also noteworthy that the challenged policies were subtle. They did not eliminate the dissemination of information regarding discounted brokerage services. They simply made such information less accessible and more costly to obtain.

The *Realcomp* decision can have significant implications for businesses, especially joint ventures, considering rules that restrict the information that can be disseminated over their websites. Rules that prevent, restrict, or make more costly the dissemination of information relating to discounted services must be reviewed carefully to determine their potential for anticompetitive effects. As *Realcomp* demonstrates, the threshold for finding that such rules violate the antitrust laws can be quite low, even under a rule of reason analysis. *Realcomp* also demonstrates that any pro-competitive justifications must be more than theoretical; they must be supported by persuasive evidence tying the restrictions directly to the claimed pro-competitive need for the restriction.

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