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U.S. DEVELOPMENTS

Of Tenors, Real Estate Brokers And Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis

BY GEOFFREY D. OLIVER

THE FEDERAL TRADE COMMISSION'S recent decision in *Realcomp II*[1] has refocused attention on the issue of truncated rule of reason analysis in Section 1 cases. In *Realcomp*, the FTC challenged practices by a Michigan multiple listing service that limited user access to the listings of discount real estate brokers. Labeling the practices "inherently suspect," the Commission's decision stated that, in the absence of a procompetitive justification, the practices could be condemned without the need of showing market power or actual anticompetitive effects. After considering and rejecting the procompetitive justification proffered by Realcomp, the Commission determined that Realcomp's practices violated Section 1 of the Sherman Act and Section 5 of the FTC Act. Realcomp has announced its decision to appeal the Commission's decision to the U.S. Sixth Circuit Court of Appeals.

To better understand the issues involved in the Commission's decision and the likely future appeal, it is worth considering the development and current state of truncated rule of reason analysis as applied by the courts and the agencies.

What Is Truncated Rule of Reason Analysis?

Truncated analysis refers to a framework under which a plaintiff can establish a violation of Section 1 of the Sherman Act without having to prove all of the elements that would be required under a full rule of reason analysis. Most commonly, if a plaintiff can establish that a particular restraint is "inherently suspect" because it is of a type that always or almost always tends to harm competition, a truncated analysis permits the plaintiff to satisfy its initial burden of production without presenting evidence that the defendant's challenged conduct caused or is likely to cause actual harm to competition. The burden of production then shifts to the defendant to rebut the plaintiff's showing. It may do so by demonstrating that the restraint has a plausible procompetitive justification. If the defendant does so, a full rule of reason analysis must be undertaken.

As discussed below, it is unclear whether truncated analysis permits a defendant to rebut a plaintiff's initial showing by presenting evidence that the restraint in question does not cause harm to competition. In other words, it is unsettled whether truncated analysis permits a plaintiff to avoid altogether consideration of the actual effects of the challenged conduct in the market at issue or, instead, if it shifts to the defendant the burden of presenting evidence on this issue but leaves with the plaintiff the ultimate burden of proving anticompetitive effects.

How Has Truncated Analysis Evolved?

Almost 100 years ago, the Supreme Court ruled that the Sherman Act prohibits only those agreements that unreasonably restrain trade. Thereafter, although Section 1 analysis continued to evolve, for most of the 20th century courts distinguished between two methods of determining whether a practice unreasonably restrained trade. Certain practices were identified as so likely to have a "pernicious effect on competition and lack any redeeming virtue" that they were conclusively presumed to be unreasonable and were subject to per se condemnation.[2] Such practices included naked price fixing and market allocation between horizontal competitors, bid rigging, and certain types of boycotts. A practice not condemned as per se unlawful violated the Sherman Act only if a plaintiff was able to prove, under a "full" rule of reason analysis, that the practice in question caused or was likely to cause harm to competition that outweighed any procompetitive justification.

This dichotomy remained generally accepted throughout most of the 20th century. It proved to be a pragmatic approach that permitted courts to balance the desire to condemn quickly and efficiently those practices without redeeming value against the benefit of more careful consideration of practices for which the net effect was less apparent or less well understood. This dichotomy concealed certain tensions, however.

Beginning in the late 1970s, a series of Supreme Court cases began to erode the sharp distinction between per se condemnation and rule of reason analysis. In *GTE Sylvania*, the Supreme Court provided a hint that the categories of per se and rule of reason might not be permanently fixed but rather

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might involve some degree of flexibility. The Court stated that any "departure from the [usual] rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[3] The following year, the Court heard *National Society of Professional Engineers*, which involved allegations that the professional association's code of ethics contained an absolute ban on competitive bidding. The code of ethics operated in a manner analogous to, although it was not precisely identical to, agreements among horizontal competitors not to compete that had been found unlawful per se by the courts. Although the Court stated that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," it nevertheless did not find the practice unlawful without first considering NSPE's proffered justification.[4]

In 1979, the Court heard *BMI*, which involved a music licensing organization's blanket copyright licenses to music held in its library. The court of appeals had considered the licenses to be per se unlawful agreements to fix prices. The Supreme Court refused to base its decision solely on how the conduct was categorized, however, stating that "easy labels do not always supply ready answers" and that the blanket license in question "cannot be wholly equated with a simple horizontal arrangement among competitors."[5] Rather, the Court considered whether the blanket license appeared to be a practice that would "always or almost always tend to restrict competition and decrease output."[6] It considered BMI's proffered efficiency justification and concluded that the blanket licenses were necessary to achieve the efficiencies of integration of sales, monitoring and enforcement against copyright infringement. Thus, the Court held that application of the rule of reason was appropriate.[7]

Five years later, in *NCAA*, the Court reviewed allegations that the NCAA's restrictions on television rights to its games should be considered unlawful per se as a form of horizontal price fixing and agreements restricting output. The Court rejected a strict division between per se and rule of reason approaches, stating that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[8] As in *BMI*, the Court considered justifications advanced by the NCAA. Upon rejection of the NCAA's proffered justifications, however, the Court held that the broadcast restrictions could be condemned without further analysis.[9]

In 1986, the Court heard *Indiana Federation of Dentists*, involving allegations of an agreement among independent dentists to withhold from insurers x-rays used to verify reimbursement claims. The Court stated that "no elaborate industry analysis is required to demonstrate the anticompetitive nature" of the agreement; finding that it was "obviously anticompetitive," the Court focused on whether there was an offsetting procompetitive justification for the practice.[10] Finding none, the Court held that the practice could be condemned without further analysis.[11] In 1990, the Court decided both *Superior Court Trial Lawyers Association*[12] and *Palmer v. BRG*[13] based on application of per se rules, raising questions as to the scope and applicability of *BMI*, *NCAA*, and *IFD*.

In 1999, however, the Court decided *California Dental Association*, involving a challenge to a dental association's ethical rules prohibiting price advertising. Following an approach similar to that of *IFD*, the Court stated that evaluation under Section 1 calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" in order to reach "a confident conclusion about the principal tendency of a restriction."[14] The Court rejected the quick look analysis applied by the Ninth Circuit as too abbreviated but explicitly acknowledged that its prior precedents support an abbreviated rule of reason analysis. The Court further recognized that advertising restrictions generally harm competition and consumers and usually may be condemned without detailed evidence of actual effects. The Court questioned whether the effects expected in a market setting would apply to professional advertising, however, and held that an abbreviated analysis would be inappropriate in the absence of empirical economic evidence supporting a presumption of anticompetitive effects.[15]

Abbreviated rule of reason analysis has received a mixed reception in lower courts. Generally, U.S. courts of appeal have acknowledged that a quick look analysis permits condemnation of certain practices without extensive evidence of actual anticompetitive effects but sometimes have been reluctant to apply an abbreviated analysis to the specific cases before them.[16] Even in cases in which appellate courts have affirmed application of an abbreviated analysis, they often have been vague as to the requirements of such a test. As a result, there is surprisingly little precedent with respect to the elements of proof and available defenses in an abbreviated Section 1 analysis.

The U.S. Department of Justice and Federal Trade Commission have supported truncated Section 1 analysis, although the instances in which they have applied it remain fairly limited. In their Collaboration Guidelines, the agencies stated:

> Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. . . . [W]here the likelihood of anticompetitive harm is evident from the nature of the agreement . . . then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.[17]

The Department of Justice articulated a "step-wise analysis" in the 1990s, but with the notable exception of *United States v. Brown University*, that test has rarely been applied in litigation.[18] In recent years, the FTC has been the main proponent of an abbreviated rule of reason analysis with respect to practices that it deems to be "inherently suspect." In 1992, in *Detroit Auto Dealers*, the Sixth Circuit rejected the FTC's application of a truncated analysis, although it upheld the result based on a full rule-of-reason analysis.[19] In 2005, how-

ever, following the Supreme Court's decision in *California Dental*, the D.C. Circuit upheld the FTC's truncated analysis in *PolyGram*.[20] In affirming the FTC's approach, the D.C. Circuit acknowledged that courts in recent years have "backed away from any reliance upon fixed categories" and instead embraced a "continuum" in which the extent of analysis depends not only on the nature of the restraint but also on the circumstances in which it arises.[21] Three years later, the Fifth Circuit upheld the FTC's inherently suspect analysis in *North Texas Specialty Physicians*. The FTC also has applied an abbreviated analysis in certain consent agreements, including *Dick's Sporting Goods* in 2008.[22]

When Does Truncated Analysis Apply?

Courts have not been clear or consistent in identifying when application of a truncated analysis is appropriate. The Supreme Court stated that an abbreviated analysis may be used if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets" or if "the great likelihood of anticompetitive effects can easily be ascertained."[23] The purpose, said the Court, is "to see whether the experience of the market has been so clear . . . that a confident conclusion about the principal tendency of a restriction will follow" from a quick look.[24]

Applying these principles, however, is not always straightforward. Courts generally have focused on the nature of the restraint or the conduct at issue and asked whether it is closely related to a practice that courts consistently have found to be per se unlawful. As stated by the D.C. Circuit, "[a] rebuttable presumption of illegality arises not necessarily 'inherent' in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."[25] Thus, much depends, first, on classifying or describing the nature of the agreement at issue, and second, on analogizing that agreement to other conduct with which courts have had substantial experience. Unfortunately, it is almost impossible to draw any concrete conclusions from prior precedent as to how this should be done.

Truncated analysis (in common with the per se rule) assumes a substantial degree of abstraction in defining or describing a "suspect practice."[26] Of necessity, specific facts, details and surrounding circumstances are set aside, and the practice is described in a single, short-hand phrase. The difficulty, of course, is ensuring that determinative facts are not ignored and that the resulting description does not oversimplify the practice in question. Thus, as noted above, the Supreme Court in *BMI* held, for example, that blanket licenses to a library of potentially competing copyrighted musical compositions could not accurately be described as price-fixing because of the importance of additional facts relating to the circumstances in which the arrangements arose.[27]

Conversely, in *NCAA v. Board of Regents*, the Supreme Court held that a plan adopted by the NCAA pursuant to which ABC and CBS were authorized to broadcast fourteen college football games each per year, in accordance with a detailed set of "ground rules" and subject to payment of a minimum total amount of compensation per year but in accordance with terms and conditions to be negotiated directly with the member schools concerned, could properly be characterized as a "limitation on output."[28] In *North Texas Specialty Physicians*, NTSP had engaged in a series of actions, including entering into agreements with physicians, obtaining powers of attorneys from physicians, polling physicians with respect to rates they would find acceptable, calculating and circulating to physicians the results, engaging in negotiations with insurers, sometimes (but not always) circulating offers from insurers to physicians, and concluding contracts covering reimbursement rates. The Fifth Circuit accepted the FTC characterization of this course of conduct as "horizontal price-fixing" and "concerted withdrawals and refusals to deal."[29]

Once the conduct in question has been properly identified and described, an additional difficulty nevertheless may arise relating to the nature of the comparison of that conduct to prior precedent. How close must be the "family resemblance"[30] between the practice at issue and prior precedent or experience to permit a court to reach "a confident conclusion about the principal tendency of a restriction"[31] and thus application of an abbreviated analysis? The result sometimes seems to be in the eye of the beholder. In *Brown University*, the Third Circuit held that an agreement among nine universities to distribute financial aid to students with multiple acceptance offers solely on the basis of financial need was "a price fixing mechanism impeding the ordinary functioning of the free market."[32] With very little explanation, however, the court stated that while the agreement "may be said to involve price-fixing in 'a literal sense,' . . . [that] does not mean that it automatically qualifies as per se illegal price-fixing."[33] While rejecting application of the per se rule, the court held that the district court was correct to apply an abbreviated approach and require the defendants to present a procompetitive justification even in the absence of any findings regarding market power or anticompetitive effects.

Where the conduct in question is unusual or defies easy categorization, courts generally have been reluctant to rely on analogies with precedent involving more traditional per se conduct. Thus, in *Detroit Auto Dealers*, for example, the Sixth Circuit found that a series of agreements among automotive dealers in the Detroit area limiting the hours when showrooms would be open for business was "not quite the same thing as a limit upon production or output" and held that application of an abbreviated analysis was inappropriate.[34] Similarly, in *Continental Airlines*, the Fourth Circuit overturned a district court holding that an agreement among airlines to install baggage templates to x-ray machines so as to restrict the size of carry-on luggage was analogous to a restriction on output that would justify application of a quick look analysis.[35]

The Commission's decision in *Realcomp* illustrates the difficulty sometimes inherent in categorizing the conduct and analogizing it to appropriate prior experience. Realcomp, a multiple listing service in the Detroit area, permitted all licensed real estate brokers who paid a membership fee and agreed to observe certain MLS rules to list properties for sale in the MLS database. Realcomp set its internal default search setting to exclude certain forms of discount listings from search results, however. Realcomp similarly excluded discount listings from the listing information it provided to various publicly accessible Web sites and thus from the listings that the public were able to search.

FTC complaint counsel (staff attorneys responsible for prosecuting the FTC complaint against Realcomp) considered that Realcomp's restraints had the effect of excluding discount brokers from important benefits of the MLS. It argued that this conduct was analogous to conduct in prior cases, such as *Realty Multi-List*,[36] in which courts, pursuant to an abbreviated analysis, had condemned rules of multiple listing services with market power that excluded discount brokers. The Commission disagreed and instead described the conduct as "restraints on discounters' advertising and on the dissemination of information to consumers regarding discounted services."[37] It further concluded that, "[a]lthough not exactly the same conduct," the MLS's exclusion of discount listings from its default search results and from listing information supplied to publicly accessible Web sites was analogous to music companies' "[r]estrictions on truthful and nondeceptive advertising," dentists' refusal to provide insurers information about patient x-rays, marine dealers' exclusion of a rival from two annual trade shows, and an agreement among automobile dealers to restrict their showrooms' hours of operation.[38] The Commission provided little explanation, however, of how courts' prior experience with respect to these agreements would permit the Commission to draw confident conclusions regarding the likely economic impact of Realcomp's restrictions on access to and dissemination of discount listings in a real estate multiple listing service.

What Is the Role of Economics in a Truncated Analysis?

How is a court to apply the Supreme Court's statement in *California Dental* that a quick look analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect" on customers and markets?[39] Can economic analysis assist in determining whether "the experience of the market has been so clear . . . that [a court can draw] a confident conclusion about the principal tendency of a restriction" without conducting a detailed market analysis?[40]

One example was provided by the Commission's decision in *PolyGram*. That case involved an agreement not to discount and not to advertise between PolyGram and Warner

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Music with respect to products outside the scope of their joint venture in competition with a new product launched by the joint venture. In finding that the conduct in question was inherently suspect and applying an abbreviated analysis, the Commission relied not just on prior legal precedent, but on seventeen empirical economic studies demonstrating a correlation between various types of restrictions on advertising and higher prices to consumers.[41] On appeal, the D.C. Circuit affirmed, finding that the agreement "looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as per se unlawful."[42] The D.C. Circuit did not specifically refer to these studies but appeared to accept the Commission's reliance on empirical economic studies when it approved application of a truncated analysis in instances in which, "based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition" and "judicial experience and economic learning have shown [the type of practice] to be likely to harm consumers."[43]

The *PolyGram* decision was highly unusual, however, in relying on empirical evidence of this type. Absent relevant empirical economic studies, courts have relied more heavily on labeling and categorization. As noted by the Fifth Circuit in *North Texas Specialty Physicians*, absence of objective empirical economic evidence requires the court to rely instead on a theoretical analysis and the perceived similarity of the practice in question to practices at issue in prior cases.[44] This was sufficient for the court to condemn the particular form of price fixing at issue in that case. But as certain of the cases discussed above illustrate, such an approach risks devolving into a crude, and potentially subjective, exercise in finding an appropriate pigeonhole to which a practice can be assigned.[45] Thus, failure to rely upon empirical economic work risks creating questionable results in more complicated cases.[46]

What Must a Plaintiff Prove in a Truncated Analysis?

Courts have not always been clear in stating what a plaintiff must prove to satisfy its initial burden of production in an abbreviated analysis. In the majority of cases, courts have permitted the plaintiff to sustain its initial burden of pro-

duction based primarily on factual evidence relating to the conduct in question, combined with legal precedent or other authority establishing that that conduct warrants summary condemnation. In these cases, the plaintiff's initial proof has focused on the existence of an agreement among the defendants and the nature or elements of that agreement.

Depending on the nature of the conduct in question, however, proof of additional elements may be necessary. In *Worldwide Basketball and Sport Tours*, for example, the court held that an abbreviated or quick look analysis "may only be done where the contours of the market . . . are sufficiently well-known or defined to permit the court to ascertain . . . whether the challenged practice impairs competition."[47] While the court's meaning is not entirely clear, this statement makes sense as a reminder that, to prove the existence of a horizontal agreement, for example, a plaintiff may have to establish the contours of a market sufficiently to permit a determination that the parties to the agreement are in fact horizontal competitors.

In some cases, proof of additional elements may be required. The Supreme Court stated that Section 1 analysis calls for "an enquiry meet for the case."[48] This implies that the elements that a plaintiff must prove to satisfy its initial burden of production will vary depending on the nature of the practice at issue. A practice that bears a close family resemblance to tying, for example, presumably would require a showing of the same degree of market power as that required for proof of unlawful tying.

This issue arose in connection with *Realcomp*. Because complaint counsel analyzed the practices at issue in that case as analogous to conduct in earlier cases in which courts applied an abbreviated analysis to the exclusion of discount brokers from multiple listing services with market power,[49] complaint counsel presented proof of Realcomp's market power as part of its case in chief. The Commission rejected complaint counsel's position, instead analogizing Realcomp's practices to a restraint on advertising, among other practices. On the basis of this reasoning, the Commission concluded that proof of Realcomp's conduct alone was sufficient to establish a prima facie case without the need to prove market power.[50]

What Defenses Are Permitted in a Truncated Analysis?

A defendant may, of course, contest application of the "inherently suspect" label to the conduct in question. If successful, the matter would be reviewed under a full rule of reason analysis.

If the conduct in question is appropriately designated "inherently suspect," once a plaintiff satisfies its burden of production, courts appear to be in agreement that the burden of production shifts to the defendant. A defendant may defeat the presumption of anticompetitive effects (or at least shift the burden of production back to the plaintiff) if it establishes a plausible justification such that the practice in question on balance may be procompetitive or competitively neutral.[51] Indeed, most cases applying an abbreviated analysis have involved relatively little dispute with respect to the underlying facts, but many have turned on analysis of the asserted procompetitive benefits of the conduct in question.

The critical question is whether a defendant may rebut a plaintiff's initial showing with evidence that the practice in question did not, in fact, cause any anticompetitive effects. Framed differently, the issue is whether the presumption of anticompetitive harm that flows from the plaintiff's initial proof is rebuttable or irrebuttable. If the presumption is rebuttable, truncated analysis is simply a means of ordering the presentation of evidence. Depending on the nature of the conduct at issue, it may permit a plaintiff to skip proof of market definition and/or actual harm to competition as part of its prima facie case but would still permit (indeed, require) full analysis of these issues if a defendant presented evidence that the practice in question did not harm competition. On the other hand, if the presumption is irrebuttable, an abbreviated analysis would prevent a court from considering whether the conduct at issue actually caused harm in a specific case. Under this view, the method of analysis could be outcome-determinative.

Courts have not been clear on this issue. A number of decisions state that, in an abbreviated analysis, a defendant may rebut a prima facie case with evidence of a procompetitive efficiency. Less clear is whether a defendant is limited to this evidence in rebuttal.[52] In *California Dental*, the Supreme Court hinted that it might consider the presumption to be rebuttable. The Court stated that "the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review" applied by the Ninth Circuit.[53] The Court did not specify, however, whether the defendant's competing claims relate to the likelihood of the practice causing harm in general or the absence of concrete harm in a specific case.

This issue was addressed most directly by the D.C. Circuit in *PolyGram*. The court affirmed the Commission's application of an abbreviated analysis and the outcome of the case. The court adopted a somewhat different test than did the Commission, however, stating that the appropriate analysis consists of shifting the burden to the defendant to establish that *either* "the restraint in fact does not harm consumers or has 'procompetitive virtues' that outweigh its burden upon consumers."[54] The court confirmed three paragraphs later that, "in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."[55]

The approach of the D.C. Circuit would appear to make eminent sense. The possibility that a defendant can rebut the presumption of anticompetitive harm acts as a sort of safety check and helps to prevent the method of analysis from dictating the outcome. Indeed, under this view, if a defendant presents persuasive evidence that the practice in question is

unlikely to harm competition in the specific circumstances of the case at issue, the court likely would apply a full rule of reason analysis.

Although its position has not been absolutely clear, the Commission appears not to have accepted the method of analysis articulated by the D.C. Circuit in *PolyGram*. In its *Realcomp* decision, the Commission continued to assert its own framework for an inherently suspect analysis from its *PolyGram* decision, permitting a defendant to overcome the presumption of anticompetitive harm based only on an asserted procompetitive justification.[56] The Commission did not appear to acknowledge that the D.C. Circuit implicitly rejected this position.

In the FTC's litigated cases to date, this has not been an issue. In both *Polygram* and *Realcomp*, complaint counsel presented evidence sufficient to satisfy a full rule of reason analysis, and the Commission found actual harm to competition as an alternative basis for its decision in each case.[57] In its recent consent agreement in *Dick's Sporting Goods*, however, the Commission's application of its framework, rather than that of the D.C. Circuit, might have affected the outcome. That matter involved two agreements between Golf Galaxy, a subsidiary of Dick's that operates a chain of golf retail stores in the United States, and Golf Town Canada, which sought to launch a line of golf stores in Canada. In 1998, Golf Galaxy entered into a consulting agreement with Golf Town that, among other provisions, barred Golf Town from operating any retail store in the United States for the term of the agreement plus five years. The parties terminated the agreement in 2004. At the time of termination, the parties entered into a further agreement that, among other provisions, barred Golf Town from operating any retail store in the United States until 2013, four years later than was permitted under the first agreement. In its analysis of its consent agreement, the Commission described this restraint as an inherently suspect agreement between competitors to divide markets (although it appears that the parties were at most potential competitors, having never competed in the same geographic market) and concluded that the restraint was not necessary for the formation or efficient operation of any collaborative activity between the parties. Had the parties been permitted to offer affirmative evidence that the agreement did not harm competition, one wonders whether the evidence would have supported the consent agreement. Although the consent agreement provides no indication, it appears unlikely that the agreement could have had any measurable anticompetitive effect on the retailing and sales of golf equipment in the United States.

What Are the Implications for Parties to Joint Ventures?

As is evident from the discussion above, many cases applying a truncated analysis involve some form of collaborative activity with potential procompetitive benefits. It is not surprising, therefore, that an abbreviated rule of reason analysis has particular implications for parties to joint ventures and other cooperative arrangements. On the one hand, an abbreviated analysis ensures that parties to such arrangements will be permitted to present procompetitive justifications in response to any accusations of anticompetitive conduct. Even if the conduct of which they are accused might traditionally be condemned as unlawful per se, courts have demonstrated that they will not condemn such practices without considering possible efficiency defenses.

On the other hand, because an abbreviated analysis focuses initial scrutiny on the conduct at issue (indeed, sometimes on only a small aspect of the conduct at issue), an abbreviated approach sometimes raises the risk that the surrounding circumstances and potential justifications may not receive the full attention they deserve. As a result, parties planning a joint venture or other collaboration should expect that, under an abbreviated analysis, they may be forced to present the potential justifications for each individual restraint in isolation rather than in the context of the collaboration as a whole. Moreover, unless a court were to follow the approach of the D.C. Circuit in *PolyGram*, a defendant may not be permitted to present affirmative evidence that the specific practice in question did not affect competition.[58] Thus, parties to a collaboration may be well advised to consider carefully the individual justifications for any restraint that could trigger application of an abbreviated rule of reason analysis.

Conclusion

As this discussion makes clear, prior court precedent has left unresolved many issues relating to abbreviated rule of reason analysis. The anticipated appeal of the Commission's *Realcomp* decision will present an opportunity for another court to weigh in with respect to certain of these issues. The econometric evidence presented in the *Realcomp* matter and the Commission's resulting findings of actual harm to competition mean that the outcome of the appeal will not depend solely on the court's review of the Commission's inherently suspect analysis. Nevertheless, the *Realcomp* appeal promises to be interesting. ■

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1 Realcomp II, Ltd., FTC Docket No. 9320, File No. 061-0088, Op. of the Comm'n (Oct. 30, 2009), *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf.

2 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

3 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

4 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692–96 (1978).

5 Broad. Music, Inc. v. CBS, 441 U.S. 1, 8, 23 (1979) (*BMI*).

6 *Id.* at 19–20.

7 *Id.* at 8-9, 19–24.

8 NCAA v. Bd. of Regents, 468 U.S. 85, 104 (1984).

9 *Id.* at 100.

10 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986).

11 *Id.* at 465–66.

[12] FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).

[13] Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990).

[14] California Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

[15] *Id.* at 771–78.

[16] *Compare* Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674 (7th Cir. 1992) (applying a "'quick look' version of the Rule of Reason" to an agreement among owners of NBA teams limiting broadcast rights to NBA games); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (affirming application of a "quick look" rule of reason analysis); *with* Worldwide Basketball & Sports Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004) ("extensive market and cross-elasticity analysis is not necessarily required" under an abbreviated analysis but refusing to apply an abbreviated analysis because of lack of experience with the product market in question); Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002) (refusing to apply an abbreviated analysis where the defendant advanced plausible procompetitive justifications); Brookins v. Int'l Motor Contest Ass'n, 219 F.3d 849 (8th Cir. 2000) (refusing to apply abbreviated analysis to the association's change of rules, which had the effect of excluding a rival supplier).

[17] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 1.2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[18] In *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), the Third Circuit rejected the DOJ's argument that an agreement among universities to distribute financial aid solely on the basis of need was unlawful per se but upheld application of an abbreviated rule of reason analysis. DOJ's stepwise approach has been discussed in a past edition of this magazine. *See* William J. Kolasky, Jr., *Counterpoint: The Department of Justice's 'Stepwise' Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 41.

[19] Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 470 (6th Cir. 1992).

[20] PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[21] *Id.* at 35.

[22] *Dick's Sporting Goods, Inc.*, FTC Docket No. C-4240, File No. 071-0196, Dec. & Order (Nov. 18, 2008), *available at* http://www.ftc.gov/os/caselist/0710196/0081121dsgdo.pdf.

[23] *California Dental*, 526 U.S. at 770.

[24] *Id.* at 781.

[25] *PolyGram*, 416 F.3d at 37.

[26] *See, e.g.*, *BMI*, 441 U.S. at 8 ("Per se rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices.").

[27] *Id.*

[28] *NCAA*, 468 U.S. at 99.

[29] N. Texas Specialty Physicians v. FTC, 528 F.3d 346, 366-67, 370 (5th Cir. 2008).

[30] *PolyGram*, 416 F.3d at 37.

[31] *California Dental*, 526 U.S. at 781.

[32] *Brown University*, 5 F.3d at 674 (holding that the agreement was not unlawful per se but was appropriately scrutinized pursuant to an abbreviated rule of reason analysis).

[33] *Id.* at 670.

[34] *Detroit Auto Dealers*, 955 F.2d at 470.

[35] *Continental Airlines*, 277 F.3d at 502.

[36] United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980) (a flexible application of the rule of reason "allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power" if the rule lacks competitive justification).

[37] *Realcomp*, FTC Docket No. 9320, Op. of the Comm'n at 20–21.

[38] *Id.* at 25–26.

[39] *California Dental*, 526 U.S. at 770.

[40] *Id.* at 781.

[41] *See* PolyGram Holding Inc., 136 F.T.C. 310, 358, n.52 (2003).

[42] *PolyGram*, 416 F.3d at 37.

[43] *Id.* at 36–37.

[44] *North Texas Specialty Physicians*, 528 F.3d at 362 ("In the case before us, the FTC did not rely on empirical evidence . . .. It relied on [a] theoretical basis . . . and the similarity of [the] practices [at issue] to conduct that would be a per se violation of the FTC Act.").

[45] As explained below, the record in *Realcomp* contained extensive econometric evidence with respect to the practices at issue. In contrast to *PolyGram*, however, the Commission did not rely in part on the economic evidence to justify application of an abbreviated analysis. Rather, the Commission cited to the economic evidence in support of an alternative analysis based on application of the full rule of reason.

[46] Of course, reliance on econometric studies does not eliminate issues associated with categorization and labeling of conduct. It is still necessary to distill a potentially complex factual situation down to a fairly simple label or category that can then be assessed in light of a short-hand summary of the results of a selected body econometric work. Nevertheless, because a set of econometric studies must be selected for the specific purpose of informing a court about the likely effects of a particular practice, the court may be more likely to consider carefully the extent to which the selected studies in fact do so.

[47] *North Texas Specialty Physicians*, 528 F.3d at 362.

[48] *California Dental*, 526 U.S. at 781.

[49] *See, e.g.*, *Realty Multi-List*, 629 F.2d at 1351; *see also* Nw. Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 296 (1985) (the conclusion that exclusion of a member from a cooperative is almost always likely to have anticompetitive effects is not warranted "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition").

[50] *Realcomp*, FTC Docket No. 9320, Op. of the Comm'n at 20–21. Because Realcomp conceded that it has market power, the issue would not affect the outcome of that case.

[51] *PolyGram*, 416 F.3d at 36 (a defendant may offset the presumption by establishing that the restraint "has 'procompetitive virtues' that outweigh its burden upon consumers"); *Brown University*, 5 F.3d at 674, 678 (although the agreement on distribution of financial aid was a "price fixing mechanism," the district court was "obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT").

[52] One exception is *Brown University*, which holds that under an abbreviated analysis, a defendant may not rebut a prima facie case with evidence of absence of economic effects. *Brown University*, 5 F.3d at 674 ("the absence or inconclusivity of a finding of actual adverse effects does not mitigate MIT's burden to justify price fixing with some procompetitive virtue").

[53] *California Dental*, 526 U.S. at 778.

[54] *PolyGram*, 416 F.3d at 36.

[55] *Id.*

[56] *Realcomp*, FTC Docket No. 9320, Op. of the Comm'n at 21–22, 28–29.

[57] *PolyGram*, 136 F.T.C. at 369–74 ("The extensive factual record . . . establishes that the harm to competition not only is inferrable from the nature of the conduct but is established as a matter of fact."); *Realcomp*, slip op. at 34–47 ("under this fuller rule of reason analysis, we find ample support in the record for a conclusion that Realcomp's policies are anticompetitive").

[58] Even if a defendant is permitted to introduce evidence of absence of anticompetitive effect, the shifting of the burden of production inherent in an abbreviated analysis may affect the outcome. In *Brown University*, 5 F.3d at 674, for example, the district court did not find any output effect and "expressed doubt as to whether price effects could be determined to a reasonable degree of economic certainty." In such circumstances, shifting the burden of production to defendants under an abbreviated analysis can alter the outcome.