Washington and Lee Law Review

Volume 29 | Issue 1 Article 6

Spring 3-1-1972

Sherman Act Implications of Major Tenant Veto Powers in Regional Shopping Centers

SHERMAN ACT IMPLICATIONS OF MAJOR TENANT VETO POWERS IN REGIONAL SHOPPING CENTERS

One of the most significant developments in retailing is the planned shopping center.[1] In 1970, shopping centers accounted for one-third of all retail sales in the United States.[2] Their phenomenal rate of growth is reflected by a comparison of 1970 with 1965 when they accounted for less than one-quarter,[3] and it is estimated that by 1980 shopping center retail sales will reach approximately $200 billion as compared with $118 billion in 1970.[4] The shopping center approach to retailing differs from the uncoordinated collection of stores in downtown areas because the center is conceived and developed as a single, integrated retail community by the developer-landlord. A regional shopping center[5] consisting of tenants all vending the same line of merchandise, side by side, would obviously not be viable. To be of service to anyone, whether developer, retailer or consumer, the center must present a balanced assemblage of stores and services to consumers coming to the center. Accordingly, the developer seeks a blend of tenants that will offer this and thus provide him with the highest return on his investment.[6]

The leasing of retail space in shopping centers presents many unique problems.[7] One of the most difficult of these is the restrictive covenant affecting competition, or the so-called "exclusive", which is the single

---

[1]D. WARNER, MARKETING AND DISTRIBUTION—AN OVERVIEW 336 (1969).

[2]BUS. WEEK, Sept. 4, 1971, at 34.

[3]*Id.*

[4]FTC Proposed Complaint, *In re* Tysons Corner Regional Shopping Center, § 7.

[5]The Urban Land Institute defines a regional shopping center as follows:

> *The Regional Center* provides a variety and depth of 'shopping goods' comparable to a central business district, including general merchandise, apparel, and home furnishings, as well as a variety of services, and may include recreational facilities. At least one major department store of generally not less than 100,000 square feet is the principal tenant in this type of center, which is usually located on a site of 30 acres or more.

URBAN LAND INSTITUTE, THE DOLLARS AND CENTS OF SHOPPING CENTERS 187 (1966).

[6]See Kranzdorf, *Shopping Centers—Problems of the Developer*, 1965 U. ILL. L.F. 173.

[7]In addition to restrictive covenants, which will be the focus of this article, other problems encountered in shopping center leasing programs include the right to use common

lease provision most frequently requested by the shopping center tenant.[8] These are covenants which typically require the developer-landlord to refrain from leasing space in the same shopping center to competing enterprises.[9] However, these covenants may vary in both form and competitive effect. For example, they may only limit the developer to renting space to two other similar stores, or three, or five, depending on what the tenant and developer agree upon. An example of a more extreme situation is found in a recently proposed complaint by the Federal Trade Commission, alleging that restrictive lease provisions at a regional shopping center in the metropolitan Washington, D.C. area have enabled three major tenants[10] to exclude competitors, fix retail prices, eliminate discount selling, limit the floor space available to smaller tenants, and otherwise restrain trade.[11]

One of the challenged lease provisions is the so-called "veto power", whereby one or more of the major tenants has the power to disapprove the leases of smaller prospective tenants and thereby deny their entrance into the shopping center.[12] An FTC spokesman has indicated that similar leasing practices are prevalent everywhere,[13] and although the FTC is

---

areas, customer parking arrangements, merchant association membership, signs and appearance of the stores, uniform operating hours, just to name a few. *See generally* PRACTISING LAW INSTITUTE, BUSINESS AND LEGAL PROBLEMS OF SHOPPING CENTERS-2D (Real Estate Law and Transcript Series, No. 10, 1970); PRACTISING LAW INSTITUTE, BUSINESS AND LEGAL PROBLEMS OF SHOPPING CENTERS (Real Estate Transcript Series, No. 2, 1968); Pollack, *Shopping Center Leases*, 9 U. KAN. L. REV. 379 (1961).

[8]Krandzdorf, *Shopping Centers—Problems of the Developer*, 1965 U. ILL. L.F. 173, 190. *See also* Baum, *Shopping Centers—Lessors' Covenants Restricting Competition*, 1965 U. ILL. L.F. 228; Colbourn, *A Guide to Problems in Shopping Center Leases*, 29 B'KLYN L. REV. 56 (1962).

[9]2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 242 at 372.29 (1971). *See also* Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963), *aff'g* 203 F. Supp. 529 (D. Md. 1962).

It should be pointed out here that there are actually two types of covenants that can affect competition. The other is the so-called "radius" clause, whereby a party covenants that he will not engage in a similar or competing enterprise within a certain radius of the shopping center. For an example of a clause in which the tenant covenants this, see Section 6.03 of the International Council of Shopping Centers, Inc. Recommended Form of Shopping Center Lease, reproduced in PRACTISING LAW INSTITUTE, BUSINESS AND LEGAL PROBLEMS OF SHOPPING CENTERS—2D (Real Estate Law and Transcript Series, No. 10, 1970).

[10]A major tenant is defined as a full-line department store providing primary drawing power for a regional shopping center. FTC Proposed Complaint, *In re* Tysons Corner Regional Shopping Center, § 1(b).

[11]*Federal Trade Commission News*, July 21, 1971.

[12]*Id.*

[13]The Washington Post, July 22, 1971, at B2, col. 1.

proceeding pursuant to section 5 of the Federal Trade Commission Act,[14] it appears that the veto power presents significant issues under section one of the Sherman Act.[15]

Apparently, only one case has considered the validity of the veto power under the Sherman Act, and, although the challenge was unsuccessful, the case is significant for its facts and their treatment. In *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center,*[16] Dalmo[17] alleged that certain leasing practices engaged in by the defendants constituted a group boycott and violated sections one and two of the Sherman Act. The facts reveal that three large chain department stores, Hecht Co., Lansburgh's, and Woodward & Lothrop, had negotiated 30 year leases with the shopping center, granting them the power to veto the entrance into the shopping center of prospective tenants who did not appear on a list of 465 names attached to the lease.[18] Dalmo was not on the list and was denied entrance into the center through the exercise of this veto power by Hecht Co. and Woodward.[19] Dalmo claimed that the disapproval was based on its policy of discount advertising and pricing.

The justification offered for the disapproval by the tenants was that a representative of Hecht Co. had visited Dalmo stores and " 'found them dirty, the salesmen were dirty, the 'signing' in the windows [was] huge and [that he] could not envision this kind of operation on the mall at Tysons

---

[14]15 U.S.C. § 45 (1970), *formerly* ch. 11, § 5, 38 Stat. 719 (1914). This is not the first time that the FTC has considered shopping center leases under Section 5 of the FTC Act. *See* FEDERAL TRADE COMMISSION ADVISORY OPINION DIGESTS, Advisory Opinion Digest No. 136 at 127. However, the issues presented by the veto power were left unanswered.

[15]15 U.S.C. § 1 (1970), *formerly* ch. 647, § 1, 26 Stat. 209 (1890). Section one provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

The FTC can use Section 5 of the FTC Act to proceed against conduct violative of the Sherman Act or constituting an "incipient" Sherman Act violation. *See* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 621-37 (3d ed. 1968).

[16]429 F.2d 206 (D.C. Cir.), *aff'g* 308 F. Supp. 988 (D.D.C. 1970). This is the same shopping center that is involved in the FTC action previously mentioned.

[17]Dalmo is a collective name for six affiliated corporations which own and operate retail stores in the District of Columbia, Virginia, and Maryland, and a seventh corporation called Tyco Appliance and T.V. Inc. 308 F. Supp. at 989.

[18]Section 31.3 of the Hecht Co. and Woodward & Lothrop leases provides in part:

> *[a]ll Center Leases entered into for the occupancy of thirty thousand (30,000) square feet or less of floor area shall be subject to the previous approval of Tenant of the identity of Person(s).* . . . Tenant approves the identity of the Person(s) enumerated in Part I of Exhibit M hereof.

308 F. Supp. at 990.

[19]The developers of Tysons Corner had actually requested approval of Dalmo. Lansburgh's did not respond, which was, by the terms of the lease, automatic approval. However, the disapproval of any one store was regarded by the developers as sufficient to preclude entrance. 308 F. Supp. at 992-93.

Corner.' "[20] Woodward also felt that Dalmo was "not in keeping with the . . . Center."[21] This was apparently so because of the "fashion image" that the center was allegedly trying to promote.[22] Dalmo, however, was willing to eliminate all reference to discount selling at sale or bargain prices throughout all of its stores in the metropolitan area under that name; if it operated under a different name at the center, it was willing to exclude all reference to the Tysons Corner store in any discount advertising for its other stores under the Dalmo name.[23]

Dalmo proffered evidence purporting to show that Hecht Co. and Woodward had executed leases in three other Washington area shopping centers which, by their terms, prevented the landlord from leasing to discount stores or houses.[24] Further, Dalmo's evidence showed four more leases into which either Woodward and/or Hecht Co. had entered not containing restrictions barring discount houses, but containing instead tenant approval rights similar to those embodied in the Tysons Corner leases.[25] All seven of these leases were still in effect.

Nevertheless, the district court did not find that anticompetitive motives were significantly involved, apparently because a restaurant had previously been excluded for similar reasons and because the three department stores themselves engaged in discount pricing, although it was not indicated that this was of a continuous nature. This evidence would tend to show that the exclusionary criteria were not selectively applied and that a discount house did not necessarily represent a competitor selling at uniformly lower prices. The court further held that Dalmo had failed to establish an intent to monopolize by the defendants or the existence of monopoly power in the relevant market and denied Dalmo's request for a preliminary injunction on the basis of a failure to show a "substantial likelihood or, at least, a reasonable probability" that it would prevail on the merits at trial.[26] On appeal, this was affirmed as being within the discretion of the lower court.[27]

Despite the decision in *Dalmo*, it seems possible that the veto power is a collective boycott, per se violative of section one of the Sherman Act.[28] Boycotts can be defined as collective efforts intended to effect the exclu-

---

[20]This was reported to the developers following their requested approval. *Id.* at 992.

[21]*Id.*

[22]*Id.* at 993.

[23]*Id.* at 992 n.3.

[24]*Id.* at 993.

[25]As a matter of fact, one or more of the three department stores is located in each of ten metropolitan area regional shopping centers. FTC Proposed Complaint *In re* Tysons Corner Regional Shopping Center, §§ 3-5.

[26]308 F. Supp. at 993.

[27]429 F.2d at 209.

[28]*E.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

sion of a party from a market,[29] and insofar as they are illegal per se, there can be no issues raised as to their justification.[30] Defenses to the effect that they were not intended to injure, or did not result in harm, are answered by the general presumption that they are a significant impairment of competition and therefore constitute a restraint of trade within the meaning of the Sherman Act.[31] The definition, however, is deceptively simple, for as a matter of practical application it involves the establishment of several difficult facts in the veto power situation.

The initial problem is to establish the relationship of the respective parties. In the shopping center scheme the developer-landlord is at one level and the prospective tenants are at another. This relationship is essential, for boycotts generally involve the cooperation of parties at different levels.[32] What is needed to bring the arrangement within the per se prohibition of collective boycotts, however, is an agreement among or a combination of parties, at one of the levels, working to effect the exclusion of another party on the same level.[33] For example, a manufacturer may refuse to deal with one or more retailers at the inducement of a competing retailer. This is not a collective boycott by definition because it lacks a combination of parties acting in agreement at either the inducing or responding level. On the other hand, if several retailers concertedly induced the manufacturer not to deal with a competing retailer, or conversely, if several manufacturers agreed at the inducement of one retailer not to deal with a competing retailer, there would be collective boycotts at the inducing and responding levels, respectively.[34] In the shopping center situation, this entire arrangement assumes a peculiar form and requires careful analysis.

If all the department stores in the metropolitan Washington, D.C. area were to gather together and agree not to enter any regional shopping center in which the developer would not grant them the veto power,[35] and

---

[29]Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 Mich. L. Rev. 671 (1966) [hereinafter cited as Buxbaum].

[30]*E.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 27 (2d ed. 1970).

[31]*Id.*

[32]Buxbaum at 674-75. *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

[33]Buxbaum at 674-75.

[34]For an example of a collective boycott at the inducing level, see Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); for one at the responding level, see Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959).

[35]As a practical matter, the department stores would probably not do this but it would be possible for them to do so because it is apparently uncontested that large department stores dominate the regional shopping center industry; without them developers do not have the makings of a regional shopping center. In *Dalmo*, this fact was explicitly recognized by the court. 308 F. Supp. at 990. *See also* BUS. WEEK, Sept. 4, 1971, at 34.

several of them were subsequently to enter a shopping center after the successful negotiation of the veto power into the lease, they would not yet have induced or prevented the developer from dealing with anyone as long as this power remained wholly unexercised. What the arrangement lacks that all collective boycotts seem to have is a victim. There is no object of the boycott, no victim, until the power is exercised. It would seem that although the department stores have separated the time of the inducement and the time of the result, this should not make the arrangement any less a boycott. There are two bases for this conclusion, either of which condemns such a veto power as a collective boycott.

First, it can be argued that the agreement among the department stores to collectively induce developers to grant the veto power is as far as the examination need extend. The argument would be that the emphasis in collective boycott cases is on examination of means and not on evaluation of results,[36] thus the collective inducement qualifies as a conspiracy to restrain trade and, as such, is illegal. This approach assumes that even though as a practical matter a victim is usually found before the conspiracy is discovered, the existence of a victim is not necessary.

The alternative basis for the conclusion is unfolded by a counter to the argument that a boycott must by definition have a victim, and that without one, there can be no restraint of trade imposed, the restraint being a function of harm to the victim. Thus, a conspiracy to boycott nothing is not a conspiracy in restraint of trade. Even admitting the validity of this argument, it is clear that all the veto power does is hold in abeyance the victim's identification. Once exercised, the result of the department stores' action would be no different than had they collectively induced the developer not to deal with an identified retailer in the first instance. Although it would appear that in collective boycott situations inducement is generally more or less contemporaneous with result, the foregoing demonstrates that the distinction should be without significance if the per se illegality of collective boycotts is to have any rational basis for preventing a particular pattern of conduct presumed to be harmful. A contrary result would seem to exalt artifice above reality.

This approach raises a point that could possibly be misleading in the analysis, that is, the fact that the veto power can be effectively exercised by only one department store. It would seem, however, that this should have no effect on the character of the veto power as a collective boycott. How the victim is identified, and whether he is identified by all or by one seems to bear little relation to the fact that the power to do so arose as a

[36]For an extended discussion of why the emphasis is and should be upon the joint action of the inducing or responding parties, *see generally* Buxbaum.

result of the collective agreement not to negotiate leases without the veto power. Thus, mere technicalities of identification would not appear to be redeeming.

The problem for the vetoed retailer at this point beomes one of proving what has thus far been assumed. It must be shown that there was an agreement among the department stores to refuse to negotiate leases not containing the veto power, thereby applying their collective pressure in order to obtain it. This is essential to proving that a collective boycott exists, for without this agreement at the inducing level, the "combination" or "agreement" prerequisite of section one of the Sherman Act is not fulfilled.[37]

In *Dalmo* the evidence showing an agreement was present, although not used for these purposes. Not only did the court find identical veto power provisions in both the Hecht Co. and Woodward leases,[38] it further found that the leases were negotiated by the two together, as a bloc, with Tysons Corner, and that final approval by Hecht Co. of its lease was conditioned upon execution of an identical lease with Woodward.[39] Thus there is no doubt as to the agreement existing between at least two of the veto power holders at Tysons Corner. Turning to the proffered evidence by Dalmo that similar lease provisions were in existence in four other shopping centers wherein either Woodward or Hecht Co. were located,[40] it would seem to be a permissible inference that similar agreements may exist on a widespread basis.

What seems to have been the situation in *Dalmo* serves to emphasize the fact that a vetoed retailer must necessarily prove a combination in order to establish a collective boycott claim. The behavior of the department stores in bargaining for the veto power must be proven to stem from an agreement and not from independent decisions. What makes the arrangement a collective boycott is not that the department stores will not deal with the retailer, but that the developer is prevented from doing so as a result of the collective action of the department stores. Accordingly, the defense to the action might be twofold. First, it may be argued that there was no agreement among the department stores to bargain for the veto power. Since department stores must make heavy financial commitments to locate in the shopping center, it is only natural that each will bargain for as much of a voice as possible in the conduct and character of the center in order to protect that investment. A second but allied

[37]See text accompanying notes 15 & 33 *supra.*

[38]See text accompanying note 18 *supra.*

[39]308 F. Supp. at 990.

[40]See text accompanying notes 24 & 25 *supra.*

argument is that the shopping center is a joint venture on the part of tenant and landlord; that since it is in the interest of all members of the shopping center venture to present a balanced array of stores and services to the public, the veto power is merely a voice in the joint venture and does not presuppose the predatory exclusion of competitors, but only helps to effect the desirable tenant mix of the center.

Dealing with the defenses individually, the first may be overcome by inference. It is clear that there may exist an "agreement" within the meaning of section one of the Sherman Act even though it is tacit, since conspiracy may be inferred from a course of conduct.[41] However, it is equally clear that a mere showing of parallelism will not be enough to establish conspiracy, and such a showing assumes whatever significance it has from additional facts.[42] There must be other evidence showing that the decisions of the department stores to bargain for the veto power were somehow interdependent, and that if truly independent decisions had been made, they might have been different.[43]

One of the essential ingredients of conscious parallelism is mutual awareness.[44] Insofar as the veto power is apparently a prevalent provision[45] among a relatively small group, this would not seem difficult to establish. The next problem is to show that bargaining for the veto power is not a similar but unrelated response to the same conditions.[46] Given the fact that the developer must negotiate with department stores in order to develop

[41]*E.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

[42]Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962) [hereinafter cited as Turner].

[43]See Turner at 658. Professor Turner finds the notion of interdependency an appealing way to define "agreement" for Sherman Act purposes; it supplies the requisite addition to mere conscious parallelism, yet does not impose an impracticable standard which might frustrate enforcement of the Act. *Id.* at 683. However, it is also shown that interdependency may create inferences of varying strength, depending upon the challenged conduct. For example, oligopoly price behavior can be described as individual behavior as well as that of agreement:

> [I]n refraining from price competition [each seller] is not agreeing with his competitors but simply throwing their probable decisions into his price calculus as impersonal market facts. . . .
>
> Second, it seems questionable to call the behavior of oligopolists in setting their prices unlawful when the behavior in essence is identical to that of sellers in a competitive industry.

Id. at 666. Thus, interdependency in that context would not imply a "meeting of the minds" sufficient to condemn the price behavior as stemming from an agreement.

[44]*E.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939).

[45]See text accompanying note 13 *supra*.

[46]*E.g.*, Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537

a regional shopping center,[47] he has limited alternatives since the number of tenants who can fulfill this description are few. The question then becomes one of why the developer should agree to such a provision, and this, in turn, involves a consideration of his alternatives. If he could find a department store willing to enter the shopping center without the veto power, there would be no reason for granting it. In effect, he would be parting with a right recognized and protected by law.[48] It would seem beyond credibility to suggest that he has such high esteem for the department stores' judgment regarding tenant mix and integration that he would part with this right in toto, for he could always obtain the benefit of their opinion through consultation. The veto power preempts him to a substantial degree from deciding who will do what on his property, yet the fact remains that the veto power is granted. The inference which can be drawn is that the developer cannot find a department store, or at least enough of them, willing to enter the shopping center without it. This suggests that the decision by department stores to bargain for the veto power may be contingent upon other prospective major tenants doing the same.

There is another consideration that suggests that in the absence of this unanimity a department store would not insist upon the veto power. If the developer had an alternative, and was confronted with a department store insisting upon the veto power, it would be reasonable to assume that he would prefer to deal with his alternative. Thus, a truly independent decision to insist upon the veto power might jeopardize a department store's prospects for tenancy while a tacit agreement among all to do so would not. Although this is certainly not conclusive, the inference of tacit agreement is strengthened because the elements of mutual awareness and cooperation are bolstered by these considerations of self-interest.

If the foregoing hypotheses about the negotiation of the veto power are sound, the element of independent response is obviated insofar as the decisions are dependent upon those made by others, cooperation being essential to the successful negotiation of the veto power. Although mere

(1954). Justice Clark stated the problem in the following manner:

> To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.

Id. at 540-41 (footnote omitted).

[47]See note 35 *supra.*

[48]United States v. Colgate & Co., 250 U.S. 300 (1919).

knowledge of what another is doing might not imply conspiracy,[49] adoption of similar practices in order to impose restrictions creates a strong inference that there is at least a tacit agreement and common adherence to a plan.[50] Nevertheless, it remains a question for the trier of fact to decide, and even though this may not compel the conclusion of tacit agreement it would seem to permit it. Aside from evidence showing mutual awareness, interdependence, and cooperation in a particular shopping center, evidence relating to practices in other shopping centers would seem to be eminently suggestive, and direct examination at the trial level could very possibly demonstrate the existence of a tacit agreement.

The joint venture defense poses fewer problems. This defense would be that the entire shopping center should be viewed as a single unit, requiring the cooperative efforts of both tenant and landlord for its establishment because no single party possesses sufficient resources to create an enterprise offering such a wide, yet balanced, array of merchandise in a single location. The object of the joint venture is the dissemination of goods and services through an integrated retail facility which would otherwise be unavailable to both consumers and retailers. Therefore, it may be argued, the exclusion is not a collective boycott at the inducing level, but a refusal to deal by the joint venture.[51] It could be asserted that while this may technically be a boycott it should not be considered per se illegal because the concerted activity of the group is the only feasible way to engage in the enterprise, and that the group did not come together for the purpose of excluding someone from the relevant market.[52] In summary, the argument would be that the veto power reflects a refusal to deal on the part of the joint venture as a single entity.

The defense has a certain appeal because it is undeniable that retailers and developer do coalesce into a cooperative enterprise and work together to promote the success of the shopping center.[53] It will be noticed that the

---

[49]Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954).

[50]*E.g.*, American Tobacco Co. v. United States, 328 U.S. 781 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[51]For examples of competitors coming together in joint ventures to maintain common facilities see United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Gamco, Inc. v. Providence Fruit & Produce Bldg. Inc., 194 F.2d 484 (1st Cir. 1952). Although the cases primarily concern monopolization, it is clear that competitors can be viewed as joint venturers in such enterprises.

[52]For a discussion of the antitrust distinctions between joint ventures and economically unproductive groups, and why refusals to deal by joint ventures should not be treated as per se illegal collective boycotts, see Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536-41 (1958).

[53]This is especially true in areas of advertising and promotional campaigns. Such considerations have led others to characterize the shopping center as a cooperative venture. *See* Report of the Committee of Leases, *Drafting Shopping Center Leases*, 2 REAL PROPERTY, PROBATE AND TRUST J. 222 (1967).

defense seeks only to move the veto power past per se illegality and thereby subject it to an evaluation of whether it results in an unreasonable restraint under the rule of reason.[54] However, it would seem to fail because it is an attempt to evade the basic issue presented.

Even admitting that the shopping center is a joint venture, it would appear that the most that could be said is that the collective efforts of the department stores have prevented the vetoed retailer from dealing with the joint venture instead of the developer. Their status as part of the joint venture would not seem to have any bearing on the fact that their collective efforts have excluded the vetoed retailer, because even instrumentalities of a single manufacturing-merchandising unit are capable of conspiring in a manner forbidden by the Sherman Act.[55] Thus, making the shopping center a single unit by calling it a joint venture should not shift the examination away from the collective action to an examination of the justification offered for the exclusion of the vetoed retailer. Because the two are so closely related it would not seem difficult to equate them as presenting the same issue, but it is clear that they do not. As long as the emphasis remains on the collective action effecting the exclusion, the characterization of the shopping center as a joint venture would seem to be an unsuccessful attempt to change the focus of the examination.[56]

Although the veto power has thus far been examined as constituting a collective boycott, there is another approach that can be taken. This approach abandons the per se contentions and offers the veto power to the rule of reason[57] by making it the result of a single department store's individual bargaining, and not the result of an agreement or collective action.

The basic presupposition is that although the right to choose one's business associates is not denied by law,[58] this is clearly not a fiat that one can under all circumstances deal with, or not deal with, whomever he chooses.[59] An example of a situation in which one competitor prevents a

---

[54]*See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[55]Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

[56]Although the joint venture defense was never explicitly formulated, the justification for Dalmo's exclusion seems to have been the area of the court's preoccupation in *Dalmo.*

[57]Application of the rule of reason, as stated by Chief Justice White in Standard Oil Co. v. United States, 221 U.S. 1 (1911), involves an evaluation of the inherent nature, purpose, and effect of the agreement or restraint, and a determination of whether or not an unreasonable restraint of trade exists. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* Part I, 74 YALE L. J. 775, 805 (1965).

[58]United States v. Colgate & Co., 250 U.S. 300 (1919); *cf.* United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[59]*E.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945). That these

third party from dealing with his competition was presented in *Packard Motor Car Co. v. Webster Motor Car Co.*[60] In that case, Packard had three dealers in Baltimore until 1953, when the largest of the three told Packard that it would terminate its dealership unless Packard gave it the exclusive contract for that area. Packard agreed and told the other two, one of whom was the plaintiff, that their contracts would not be renewed. The arrangement was held not to constitute a violation of section one of the Sherman Act, the court reasoning that "[s]ince the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it,"[61] and that the elimination of another dealer does not make the agreement illegal even if it was his competitor who asked for the arrangement.[62] It is to be noted that unlike collective boycotts, the emphasis in this context is not on the act of inducement or the means, but upon the result, or the legitimacy of the end. This conclusion finds support in Justice Brennan's concurring opinion in *White Motor Co. v. United States*,[63] where he pointed out that the doctrine of *Packard* is necessarily limited in scope because it involved a smaller manufacturer in a position of declining market share, competing with the "big three".[64] Thus, a refusal to deal at the inducement of another is permissible to the extent that it is justifiable under the surrounding circumstances.[65] In this context, the veto power presents an interesting case for evaluation.

Using *Dalmo* as an example, it will be recalled that the justification offered for Dalmo's exclusion was that it had dirty stores, dirty salesmen and huge signing in the windows.[66] The veto provision would therefore seem to be an overkill because either the merchant association of the

---

two cases are section two violations serves to demonstrate what is perhaps the major weakness of this approach. Unless some intent to monopolize or monopoly power in the relevant market can be shown, the veto power will have to be established as a section one violation. Consequently, it must be shown to create an unreasonable restraint, and in the absence of a specific unlawful end, this must be premised on its general pernicious character.

[60]243 F.2d 418 (D.C. Cir. 1957).

[61]*Id.* at 421.

[62]*Id.* at 420-21.

[63]372 U.S. 253, 264 (1963) (Brennan, J., concurring).

[64]*Id.* at 269 n.8.

[65]REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 136 (1955), indicates:

> In conclusion, the decisions have placed and evaluated refusals to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their market context in the light of the broader business policies of which they are part.

[66]See text accompanying note 20 *supra*.

shopping center,[67] or the landlord via lease provisions, could establish certain standards of cleanliness and window display. The availability of less restrictive alternatives is a consideration in the evaluation of a particular practice or arrangement,[68] and it would seem to be an especially pertinent and telling inquiry in the veto power situation. Because it is far broader than the need it purports to serve, the veto power seems to lack any justification as a necessary provision.

A significant difference between the veto power and the situation found in *Packard* is that the veto power is of seemingly unbounded scope and inherent uncertainty. The developer has no way of knowing with whom he can or cannot deal, nor do others who would deal with him. Indeed, the only party with any knowledge or control over the situation is the department store with the veto power. Whereas the *Packard* situation offered an exclusive right to sell a particular line of merchandise, the veto power offers the right to continuing control over the competitive structure of the shopping center.

A lease provision permitting the exclusion of a competitor, exercisable solely in the holder's self-interest, can hardly be characterized as reasonable. Such a consideration prompted Judge Learned Hand to condemn a by-law of the Associated Press whereby members could exclude competitors at their unfettered discretion,[69] and that portion of his opinion was quoted with approval by Justice Frankfurter on appeal of the same case.[70] Although they were concerned with the first amendment implications of the by-law, it would seem that the same consideration would be applicable when evaluating the veto power in the shopping center situation. Its manifest capacity for abuse and lack of any credible justification expose it as an unreasonable provision not to be sanctioned by section one of the Sherman Act. It allows its holders to effectively control the level and type of competition within the shopping center, and when considering the current nature and volume of shopping center sales, especially in suburban areas, it offers no appeal to the rule of reason or the underlying policies of a competitive system.

In conclusion, there are some previously unmentioned external considerations that lend support to the contention that the veto power potentially involves more than the foreclosure of just one location to the vetoed

[67]It is apparently standard practice to require membership of tenants in the shopping center's merchant association. Section 18.03 of the International Council of Shopping Centers, Inc. Recommended Form of Shopping Center Lease provides that the tenant must join the association. See note 9 *supra*.

[68]White Motor Co. v. United States, 372 U.S. 253, 271 (1963).

[69]United States v. Associated Press, 52 F. Supp. 362, 370-71 (S.D.N.Y. 1943).

[70]Associated Press v. United States, 326 U.S. 1, 27 (1945) (Frankfurter, J., concurring).