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# Real Estate Multiple Listing Service as Restraint of Trade

# CASE COMMENTS

## REAL ESTATE MULTIPLE LISTING SERVICE AS RESTRAINT OF TRADE

Local real estate boards often operate multiple listing services.[1] By this means the real estate listings of each participating broker are made available to every other participating broker.[2] Participation in the multiple listing service is ordinarily limited to members of the board. Therefore, exclusion from board membership prevents a broker from dealing in multiple-listed properties.

The legality of excluding competing real estate brokers from participation in a multiple listing service was questioned for the first time in *Grillo v. Board of Realtors*.[3] The Board's bylaws provided that all licensed brokers located for at least one year within the Board's territory and engaged primarily in the real estate business were eligible for membership. An applicant was required to pay a $1,000 initiation fee and to submit personal information. After an investigation and personal interview membership was granted only upon majority vote of the Board members. Although the plaintiff met the basic membership requirements, his application for Board membership had been rejected several times. By suit in equity he sought to have the Board's operation of the multiple listing service enjoined as an unlawful combination in restraint of trade[4] at common law.[5] The trial court held the

[1]In 1958 there were more than 500 real estate boards conducting multiple listing services in some form or another as a part of their program. Dep't of Bd. Services, National Ass'n of Real Estate Bds., MULTIPLE LISTING HANDBOOK 5 (n.d.).

[2]Under one method of operation the submission of information is optional with the participant, but this method has little appeal. *Id.* at 6.

[3]91 N.J. Super. 202, 219 A.2d 635 (Ch. 1966).

[4]The court was not asked to compel his admission to membership in the Board. *Cf.* Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); see generally Editorial Note, 15 RUTGERS L. REV. 327 (1961); Note, 75 HARV. L. REV. 1186 (1962).

[5]The New Jersey antitrust statutes apply solely to corporate acquisitions and mergers. N.J. STAT. ANN. § 14:3-10 (1939). Some states by statute have made combinations and monopolies in restraint of trade unlawful and expressly have given to third parties injured thereby the right to relief. See, *e.g.*, CAL. BUS. & PROF. CODE § 16750; IDAHO CODE ANN. § 48-114 (1948); IND. ANN. STAT. § 23-122 (Repl. Vol. 1964); MO. REV. STAT. § 416.090 (Cum. Supp. 1965); NEB. REV. STAT. § 59-821 (Reissue Vol. 1952); N.C. GEN. STAT. § 75-16 (Repl. Vol. 1965); OHIO REV. CODE ANN. § 1331.08 (Baldwin 1964).

It is generally thought the common law prohibition against restraint of trade made certain agreements unenforceable but provides no basis for affirmative relief. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940); United States

commitment of Board members to furnish only to fellow members information about properties for sale to be an unreasonable restraint of trade. An injunction was issued against continued operation of the service so as to exclude nonmember brokers.[6]

In the absence of a monopoly or conspiracy, an individual has an absolute right to refuse to deal with anyone for any reason.[7] A seller may refuse to sell except to those buyers who will deal only in his products[8] or except to a certain class of buyers.[9] Similarly, a buyer may

v. Addyston Pipe & Steel Co., 85 Fed. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Where the contract or combination is entered into merely for the purpose of promoting self-interest without any specific intent to coerce or injure a third party, no right to affirmative relief exists. Palmer v. Atlantic Ice & Coal Corp., 178 Ga. 405, 173 S.E. 424 (1934); Downs v. Bennett, 63 Kan. 653, 66 Pac. 623 (1901); Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25. However, where the purpose of the agreement is to coerce third parties or to remove them from competition, relief is available. Atlanta Ass'n of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822 (1935); Carlson v. Carpenter Contractors' Ass'n, 305 Ill. 331, 137 N.E. 222 (1922); Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029 (1906); Walsh v. Association of Master Plumbers, 97 Mo. App. 280, 71 S.W. 455 (1902); Schwartz v. Laundry & Linen Supply Drivers' Union, 339 Pa. 353, 14 A.2d 438 (1940); Brown v. American Freehold Land Mortg. Co., 97 Tex. 599, 80 S.W. 985 (1904); Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N.W. 472 (1901); Pratt v. British Medical Ass'n, [1919] 1 K.B. 244. *But see* Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893); Macauley Bros. v. Tierney, 19 R.I. 255, 33 Atl. 1 (1895).

In the instant case the New Jersey court held that the specific public interest in real estate business, evidenced by a scheme of statutory regulation, N.J. STAT. ANN. §§ 45:15-1 to 45:15A-12 (1963), coupled with harm to the plaintiff as a direct competitor established his right to seek affirmative relief, even though the purpose of the combination was not malicious. 219 A.2d at 643. The court relied strongly on cases involving the activities of quasi-public service institutions. See, *e.g.*, Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791, 799 (1961); Terwilliger v. Graceland Memorial Park Ass'n, 35 N.J. 259, 173 A.2d 33, 36 (1961).

[6]Modification of Board rules and regulations to enable nonmember brokers within Board territory to participate in the service was left open to the Board, but the court said its injunction required, among other things: (1) making available multiple listing information to licensed nonmember brokers, and (2) forwarding listings obtained by participating nonmembers to the Board for distribution to all participants. 219 A.2d at 650.

[7]FTC v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924); see Carew v. Rutherford, 106 Mass. 1, 14 (1870); Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119, 1121 (1893); Wesley v. Native Lumber Co., 97 Miss. 814, 53 So. 346 (1910). "It is part of a man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern." 2 COOLEY, TORTS § 224, at 178 (4th ed. 1932). *But see* Civil Rights Act § 201(a), 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1964).

[8]Leo J. Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (9th Cir.), *cert. denied*, 348 U.S. 875 (1954); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); Brosios v. Pepsi-Cola

refuse to buy except on certain conditions.[10] However, what is lawful when done by an individual in his own interest is not necessarily lawful when done by a combination of individuals. Concerted action is suspect, and a lawful refusal by an individual may become unlawful when made in concert with others.[11]

Only those agreements which impose an unreasonable restraint on trade are unlawful at common law.[12] This rule of reason has been held to have been incorporated into the Sherman Act,[13] thus making the test of legality of restraint of trade the same under federal statute and common law.[14] Concerted refusals to deal have had a confusing history under the Sherman Act.[15] Early decisions of the Supreme Court held some concerted refusals to be reasonable restraints,[16] but later opinions indicate that all concerted refusals to deal are per se unlawful,[17] that is, conclusively presumed to be an unreasonable restraint.[18]

Co., 155 F.2d 99 (3d Cir. 1946); United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[9]Green v. Electric Vacuum Cleaner Co., 132 F.2d 312 (6th Cir. 1942), *cert. dismissed*, 319 U.S. 777 (1943); Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (2d Cir. 1915).

[10]FTC v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924).

[11]Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 54 (1927); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600, 614 (1914); Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029, 1032 (1906); Cornellier v. Haverhill Shoe Mfrs.' Ass'n, 221 Mass. 554, 109 N.E. 643, 645 (1915); Wesley v. Native Lumber Co., 97 Miss. 814, 53 So. 346, 347 (1910).

[12]Standard Oil Co. v. United States, 221 U.S. 1, 55 (1911); Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

[13]26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1, 2 (1964). Standard Oil Co. v. United States, 221 U.S. 1 (1911); see United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

[14]The court in *Grillo* looked to federal antitrust experience in determining what was reasonable or unreasonable restraint at common law. For other instances where federal law has provided more than ordinary persuasive guidance see People *ex rel.* Mosk v. National Research Co., 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (Dist. Ct. App. 1962); Ronnie's Bar, Inc. v. Pennsylvania Labor Relations Bd., 411 Pa. 459, 192 A.2d 664 (1963).

[15]See 1961 Duke L.J. 606, 608-09.

[16]See Anderson v. United States, 171 U.S. 604 (1898); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[17]See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953) (dictum); United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948) (dictum); *but see* United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960). In *Klor's* the Court held that a complaint alleging a combination of several major suppliers together with a retailer to refuse to sell products to the retailer's competitor established a per se unlawful refusal to deal. Although no purpose or motive for the combination was alleged, the fact that the combination was between a competitor of the boycotted retailer and his suppliers is strong indication that the purpose was to eliminate the retailer from competition. Therefore, *Klor's* seems to

Whatever the status of concerted refusals to deal under the Sherman Act, the per se doctrine is not a common law development and the legality of a restraint on trade under common law must be determined by application of the rule of reason in all cases.

In assessing the reasonableness of concerted refusals to deal, it is important to distinguish between "refusals designed to coerce or exclude third parties . . . and refusals which stem from contractual obligations or joint ventures which affect third parties only indirectly." [19] Where an agreement among competitors is aimed directly at coercing third parties to conform to a certain pattern of conduct or at excluding them from competition, courts have had little difficulty in finding unreasonable restraints of trade.[20] However, refusals to deal affecting third parties only indirectly but having neither an element of coercion nor a purpose of eliminating competition[21] raise more difficult questions of re-

involve the evil of coercive action against third parties long condemned as an unreasonable restraint. See note 20 *infra* and accompanying text.

[18]The per se doctrine is an "exception" to the rule of reason. Certain business practices, by their nature and character, are considered so inimical to competition and without justification that the reasonableness of the restraint does not need to be considered. The doctrine was first established by the Supreme Court in United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing), and later extended in International Salt Co. v. United States, 332 U.S. 392 (1947) (tying agreements). See generally Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1148-56 (1952).

[19]Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 872 (1955).

[20]United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553 (1902); Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 64 Atl. 1029 (1906); Ertz v. Produce Exch., 79 Minn. 140, 81 N.W. 737 (1900); Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S.W. 428 (1894); Hawarden v. Youghiogheny & L. Coal Co., 111 Wis. 545, 87 N.W. 472 (1901). In *Eastern States Retail Lumber Dealers' Ass'n* an association of retail lumber dealers, in a scheme to deter direct sales by wholesalers to members' customers, circulated among its members a list of wholesalers who were engaged in that practice. The effect of the circulation of the list was to cause retailers to refuse to buy from the "blacklisted" wholesalers. In holding the scheme to be an unreasonable restraint on trade, the Court found that it not only tended to prevent wholesalers from competing with retailers but also tended to deter nonmember retailers from dealing with offending wholesalers. Agreements among competitors even though aimed directly at third parties might be justified, hence not unlawful. See, *e.g.*, United States v. American Livestock Comm'n, 279 U.S. 435, 437-38 (1929); Butterick Pub. Co. v FTC, 85 F.2d 522, 526-27 (2d Cir. 1936). However, the legitimate area of coercive practices is apparently very narrow. See Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[21]See Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1172 (1959).

straint. "There are many 'normal and usual agreements in aid of trade and commerce' . . . which involve the acceptance by the parties of limitations on their freedom individually to deal with others." [22] Such agreements are nonetheless refusals to deal with third parties and foreclose a part of the market to them. To the extent that there is foreclosure there is restraint of trade,[23] and the decisive question is whether the restraint is unreasonable.

A concerted refusal is not an unreasonable restraint merely because it operates to the prejudice of excluded parties.[24] If formal association offers benefits to members not otherwise available, nonmembers are automatically prejudiced to the extent they are denied those benefits. Therefore, if the absence of prejudice to others were the only test of legality, no association could be organized that would protect and promote the interest of its members.[25] "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." [26]

It has been held repeatedly that major exchanges with limited membership could refuse their services to nonmembers.[27] Likewise, an exchange rule limiting freedom of participants to deal with outside traders was held not an unreasonable restraint on trade.[28] Cases at common law involving refusals to deal which only indirectly affect third parties are few.[29] In one instance,[30] an insurance agents' association

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22Barber, *supra* note 19, at 876-77.

23The words of Mr. Justice Brandeis warn against hasty judgments as to the legality of this kind of restraint: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence . . . ." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

24Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co., 88 F.2d 979, 983 (7th Cir.), *cert. denied*, 301 U.S. 696 (1937); Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 301 (S.D.N.Y. 1954), *aff'd*, 225 F.2d 289 (2d Cir. 1955); Booker & Kinnaird v. Louisville Bd. of Fire Underwriters, 188 Ky. 771, 224 S.W. 451, 455 (1920).

25Booker & Kinnaird v. Louisville Bd. of Fire Underwriters, 188 Ky. 771, 224 S.W. 451, 455 (1920).

26Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

27Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Hunt v. New York Cotton Exch., 205 U.S. 322 (1907); Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905); Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926).

28Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

29Generally at common law affirmative relief can be obtained only where the refusal was intended to coerce or injure third parties. See note 5 *supra*.

30Booker & Kinnaird v. Louisville Bd. of Fire Underwriters, 188 Ky. 771, 224 S.W. 451 (1920).

bylaw prohibiting members from dealing with nonmember agents or with companies not represented by association members was upheld.

Where a refusal to deal is not designed to coerce or exclude but affects third parties only indirectly, no certain standard of reasonableness can be identified by examining the denial of services. Instead, the reasonableness of the restraint depends on the basis for denying membership in the refusing group. Associated Press bylaws granting each member power to block its nonmember competitor from membership, placing financial assessments on an existing member's competitor when admitted, and forbidding AP members to sell news to nonmembers were held unlawful in *Associated Press v. United States*.[31] By definition the bylaw restricting the sale of news to members was a concerted refusal to deal. But the Court affirmed the lower court's ruling that the refusal to deal was unlawful only "when taken in connection with the restrictive membership" [32] bylaws. Judge Learned Hand, for the three-judge district court, had found that the commitments to sell news only to AP members "taken by themselves, and apart from the restrictions upon membership . . . would be valid" [33] as essential to the main purpose of the AP. If a group refusal to deal were unlawful merely because it was a refusal, regardless of the manner of selecting members, it follows that all individuals seeking to deal with the group would be entitled to do so. The decree in *Associated Press* did not direct AP to make its news services available to all for the asking; it went no further than to strike down competition with an AP member as a basis for denying membership.[34] Thus, in relying on cases dealing with refusals aimed directly at third parties[35] and in referring to the AP organization as "designed to stifle competition," [36] the Court was analyzing not the refusal to sell news to nonmembers but the restrictions on membership for competitors of AP members. In upholding noncoercive refusals as reasonable restraints, courts have emphasized the absence of unreasonable restrictions on obtaining membership,[37] hence recognizing requirements for membership as the critical test of legality of the group's action.

A working standard of reasonableness can be identified by examining

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[31]326 U.S. 1 (1945).

[32]Associated Press v. United States, 326 U.S. 1, 22 (1945).

[33]United States v. Associated Press, 52 F. Supp. 362, 374 (S.D.N.Y. 1943).

[34]Associated Press v. United States, 326 U.S. 1, 22 (1945).

[35]*Id.* at 19.

[36]*Ibid.*

[37]See, *e.g.*, Anderson v. United States, 171 U.S. 604, 614, 619 (1898); Booker & Kinnaird v. Louisville Bd. of Fire Underwriters, 188 Ky. 771, 224 S.W. 451, 455 (1920).

membership requirements and selection. Clearly denial of membership solely because the applicant is a competitor of association members is an unreasonable restraint of trade;[38] the purpose of such exclusion could only be to stifle or destroy competition.[39] However, membership requirements might well be established for purposes other than pure economic self-interest. One such purpose common to business groups is that of advancing and maintaining standards of a trade or profession.[40] The advancement of professional skills and conduct is in the public interest;[41] therefore, denial of membership to one who would detract from this purpose might be justified.[42] In any case, determination of the reasonableness of the restraint requires a consideration of the value of the group's purpose to the public and the appropriateness of the particular group as a vehicle for effectuating that purpose in light of the extent to which trade is affected. Furthermore, the reasonableness of the restraint might depend on circumstances surrounding denial of membership. Certainly an association should not be permitted to exclude applicants "arbitrarily or, where factual accuracy is relevant, erroneously." [43] Where the consequences of exclusion are severe to an individual, a right of appeal to the association might be required.[44]

[38]Associated Press v. United States, 326 U.S. 1 (1945); United States v. Charg-It of Baltimore, Inc., 1960 Trade Cas. ¶ 69,870 (D. Md. 1960); United States v. Florists' Tel. Delivery Ass'n, 1956 Trade Cas. ¶ 68,367 (E.D. Mich. 1956); United States v. Nationwide Trailer Rental System, Inc., 1955 Trade Cas. ¶ 68,101 (D. Kan. 1955).

[39]See note 20 *supra*.

[40]*Developments in the Law—Judicial Control of Private Associations*, 76 HARV. L. REV. 983, 1046-49 (1963).

[41]See United States v. American Medical Ass'n, 110 F.2d 703, 712 (D.C. Cir. 1940).

[42]See Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966); *cf.* Appalachian Power Co. v. American Institute of Certified Pub. Accountants, 177 F. Supp. 345 (S.D.N.Y.), *aff'd per curiam*, 268 F.2d 844 (2d Cir.), *cert. denied*, 361 U.S. 887 (1959).

[43]*Developments in the Law, supra* note 40, at 1053. See United States v. New York Produce Exch., 1959 Trade Cas. ¶ 69,395 (S.D.N.Y. 1959) (consent decree ordering the exchange to issue its "petroleum inspector" licenses on basis of "uniform, reasonable and nondiscriminatory standards").

[44]Silver v. New York Stock Exch., 373 U.S. 341 (1963). The exchange ordered member firms to terminate their private wire connections with a nonmember over-the-counter dealer. The termination was ordered after an investigation revealed objectionable elements in the nonmember's background, but no hearing was held nor were the reasons for termination directly communicated to the nonmember. Without deciding whether the exchange would have been justified if proper procedures had been observed, its action was held an unreasonable restraint on trade. The Court did not deny that the exchange had a legitimate interest to protect in limiting the availability of its services but concluded that its procedure in refusing the service was unreasonable.