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1966

**Monopolies--Restraint of Trade--Associations and Clubs [*Grillo v. Board of Realtors*, 219 A.2d 635 (N.J. Super. Ct. 1966)]**

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**Recommended Citation**

Lloyd D. Mazur, *Monopolies--Restraint of Trade--Associations and Clubs [*Grillo v. Board of Realtors*, 219 A.2d 635 (N.J. Super. Ct. 1966)]*, 18 W. Rsrv. L. Rev. 321 (1966)

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## *Recent Decisions*

### MONOPOLIES — RESTRAINT OF TRADE — ASSOCIATIONS AND CLUBS

*Grillo v. Board of Realtors*, 219 A.2d 635  
(N.J. Super. Ct. 1966)

Historically, the courts have refused to compel a voluntary association<sup>1</sup> to admit an individual into membership since it was felt that membership is a privilege rather than a right.<sup>2</sup> Some of the more recent cases, however, have found exceptions to the general rule;<sup>3</sup> this trend is exemplified by *Grillo v. Board of Realtors*,<sup>4</sup> in which the Superior Court of New Jersey applied the exception to a unique area of the economy.

The plaintiff, a licensed real estate broker,<sup>5</sup> sought injunctive relief against the defendant Board of Realtors, a private voluntary association, because he had been denied membership in their multiple listing system.<sup>6</sup> The plaintiff had submitted several applications for membership but was rejected each time.<sup>7</sup> The defendant Board, which was made up of a great majority of the active real estate brokers in its territory, made the multiple listings available only to members of the Board. In its decision allowing the plaintiff injunctive relief, the court held that such a system, with its prohibitions on the sale of multiple-listed property through nonmember brokers, tended to stifle competition by preventing nonmember brokers from effectively earning a livelihood and hence constituted an unreasonable and illegal restraint upon trade in violation of the common law.<sup>8</sup>

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<sup>1</sup> The word "association" is one of vague meaning, used to indicate a collection of persons who have joined together with a definite purpose in mind. A "voluntary" association is one in which membership is a matter of choice. 6 AM. JUR. 2D *Associations and Clubs* § 1 (1963).

<sup>2</sup> See *id.* § 18.

<sup>3</sup> E.g., *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

<sup>4</sup> 219 A.2d 635 (N.J. Super. Ct. 1966).

<sup>5</sup> Under New Jersey state law, a license must be obtained prior to engaging in the business of a real estate broker or salesman. N.J. STAT. ANN. § 45:15-1 (1963).

<sup>6</sup> "Multiple listing" among real estate brokers is a system of listing properties for sale by each real estate broker whereby they utilize a list which is available to all participating brokers. When the properties are sold, the commissions are usually split in agreed proportions between the brokers listing the properties and the brokers selling them. WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY (1961 ed.).

<sup>7</sup> 219 A.2d at 637.

<sup>8</sup> *Id.* at 648.

In order to reach the above decision, it was necessary for the court first to determine that it, rather than the New Jersey Real Estate Commission,<sup>9</sup> had jurisdiction. The court justified its primary jurisdiction by stating that the questions of law and findings of fact involved were of the type which did not require the specialized knowledge of the state commission.<sup>10</sup> However, it is submitted that by so doing, the court assumed a fact that really did not exist. It seems only logical that the New Jersey Real Estate Commission has a more specialized knowledge of multiple listings and their consequences than does the court. Thus, the court was obliged to decide questions with which it was unfamiliar.<sup>11</sup> It has also been argued that the courts should not interfere with such associations and boards, the rationale being that greater benefits will accrue to the community if the boards are free to determine their own policies.<sup>12</sup> This argument is akin to the doctrine of *laissez faire*.

On the other hand, the court's jurisdiction could have been justified easily by a consideration of the serious consequences of the plaintiff's exclusion.<sup>13</sup> For example, while exclusion from a secret society entails no social stigma, the skilled workman who is expelled from his trade union,<sup>14</sup> the physician who is expelled from the medical association,<sup>15</sup> or the broker who is expelled from the stock exchange<sup>16</sup> will thereafter find it very difficult to successfully earn a living. Similarly, plaintiff's exclusion from membership in the defendant Board would clearly interfere with his means of effectively practicing his profession. Therefore, it is suggested that the seriousness of the consequences alone would justify the court in exercising its jurisdiction.<sup>17</sup>

More important, however, the court was faced with the crucial issue of whether the combination constituted an *unreasonable re-*

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<sup>9</sup> This commission was established to investigate the actions of the licensed brokers and to suspend or revoke licenses upon good cause. See N.J. STAT. ANN. §§ 45:15-5, -17, -18 (1963).

<sup>10</sup> 219 A.2d at 641.

<sup>11</sup> See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1023-24 (1930).

<sup>12</sup> *Id.* at 1027.

<sup>13</sup> *Id.* at 1021-22.

<sup>14</sup> *E.g.*, Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 113 Atl. 70 (1921).

<sup>15</sup> *E.g.*, Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961).

<sup>16</sup> *E.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963).

<sup>17</sup> After deciding that it had jurisdiction, the court determined that the plaintiff was entitled to sue in his *private* capacity due to an appropriate coupling of "public and private interests in the subject matter." 219 A.2d at 643.

*straint of trade*<sup>18</sup> and was hence illegal.<sup>19</sup> The court answered this question in the affirmative, relying upon several United States Supreme Court decisions.<sup>20</sup> The reason for the use of federal precedent in this state decision is that federal antitrust law, established under the Sherman Anti-Trust Act,<sup>21</sup> serves as a useful guide in resolving state common law restraint of trade problems.<sup>22</sup>

Applying these decisions to the present factual situation, the court concluded that a commitment by a member of the Board to furnish information about property for sale only to fellow members constituted an unreasonable combination in restraint of trade. As it existed, the concerted refusal to deal with nonmembers was held to be a *per se* violation.<sup>23</sup> In addition, the danger exists that a non-member, restricted by the defendant from obtaining and using its

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<sup>18</sup> The term "restraint of trade" is used in reference to combinations, acts, or practices which suppress competition. This is accomplished by interfering with the normal production and supply of the commodities involved. The term also refers to contractual restrictions upon the right of a person to engage in a trade, business, or profession. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>19</sup> 219 A.2d at 644.

<sup>20</sup> *E.g.*, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>21</sup> 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

<sup>22</sup> Historically, there are two themes of antitrust law: the first is a prohibition of restraint of trade and the other is the "rule of reason" which limits the prohibition. These two common law principles were incorporated by the Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964). In *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911), the Court said in explicit terms that the act prohibited only contracts or acts which *unreasonably* restrained competition. With the development of this "rule of reason" many defendants tried to justify their acts by alleging that the particular acts assailed were reasonable. The courts responded to these attempts by developing the so-called "per se" violation. These are acts which because of their pernicious effect on competition are prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness. See Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964). The following agreements today are held to be "per se" violations: (1) agreements not to compete which are not ancillary to a legitimate contract, *e.g.*, *Norfolk So. Bus Corp. v. Virginia Dare Transp. Co.*, 159 F.2d 306 (4th Cir.), *cert. denied*, 331 U.S. 827 (1947); (2) collusive price fixing, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); (3) agreements among competitors to divide a market, *e.g.*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); (4) group boycotts, *e.g.*, *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); (5) tying agreements used to foreclose competitors from any substantial market, *e.g.*, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); (6) agreements for pooling of profits and losses by competitors, *e.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); (7) agreement among competitors to limit the supply of a commodity, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). For a more detailed discussion, see Loevinger, *supra*.

<sup>23</sup> 219 A.2d at 644-45.

listings, may be driven out of business.<sup>24</sup> Furthermore, the court correctly assumed that such combinations and their attendant restrictions create, in reality, an extra-governmental agency in the area of real estate which the state has already pre-empted by statutory regulation.<sup>25</sup>

Because the concerted refusal to deal with nonmembers (*i.e.*, group boycotting) is considered a per se violation,<sup>26</sup> once a court discovers the practice, the violation becomes automatic, and no inquiry into the purposes and intent of the combination is necessary. The court, as in *Grillo*, need merely examine the bare facts of the case to determine if a group boycott exists. The major criticism of this approach is that nowhere in the opinion is the practice of "group boycotting" defined and distinguished from other practices of a monopolistic nature which for some reason might be considered reasonable and hence lawful.

In all probability a majority of the other jurisdictions would agree with the opinion of the court in the *Grillo* case. However, it is suggested that there are at least eight factors concerning the question of unreasonable restraint of trade which favor the defendant's position and merit attention.

First, it can be asserted that the hypothesis upon which antitrust law is predicated is that a restraint of trade is injurious to the public. Our society has adopted the axiom that control of a market and elimination of free competition is an evil detrimental to the economy.<sup>27</sup> This reasoning is expressed in terms of protecting the public, not the competitor. Therefore, by applying the above reasoning to the facts of the subject case, the question of whether or not plaintiff is able to earn a living in the real estate business is actually of little significance in adjudicating the legality of the multiple listing system. More important is the impact of multiple listing on the public welfare. By way of conclusion, the court in the *Grillo* case stated:

There is good in the multiple listing system. It provides an effective method for selling and buying properties. The seller benefits because his property is exposed in a number of offices, hence reaches a wider market in a shorter period of time. It is also useful and convenient to the prospective buyer who is seeking a house that will suit his needs and purse.<sup>28</sup>

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<sup>24</sup> *Id.* at 646-47.

<sup>25</sup> *Id.* at 647-48.

<sup>26</sup> See note 22 *supra*.

<sup>27</sup> *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>28</sup> 219 A.2d at 644.

So with the *benefit* that multiple listing confers upon the public, there should be some recognition of the fact that multiple listing, as it existed in the *Grillo* case, is not necessarily an unreasonable restraint of trade to the *detriment* of the economy.

Second, nowhere in the court's opinion is there a definition of an appropriate or relevant market which the defendant Board allegedly monopolized. The plaintiff's chief allegation was that the multiple listing arrangement effectively controlled the vast majority of listings within the Board's *territory*.<sup>29</sup> Actually, the court assumed that the territory constituted a relevant market because of the permanent nature of the commodity involved (real estate). However, it is quite obvious that many real estate brokers who are members of the defendant Board would have listings and sales outside the geographical confines of the Board, presumably in areas serviced by other multiple listing systems. The reason for this is that a listing in one community might have little attraction to the populace of that community, while the same listing might have a greater attraction to the residents of another community. Therefore, if realtors who belong to the defendant Board have a larger geographic market, so does the plaintiff. Consequently, the Board's territory is an illusory and arbitrary market.

Third, there was an absence of any evidence tending to show that the realtors of the defendant Board proportionately had either more sales, more listings, or both as compared with nonmember realtors in the same area. Furthermore, a leading decision in the field of market monopoly held that "The percentage we have already mentioned — over ninety . . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not."<sup>30</sup> Therefore, it is suggested that although it was ascertainable it still remains unknown whether the multiple listings and sales constitute "sixty" or "thirty-three" or an even smaller percentage of the "market."

Fourth, it should also be noted that there are many incidents of direct sales taking place (from the seller to the purchaser without the use of a broker). These transactions also involve potential clients and are as important in determining market control as are customers of the listed properties. Yet there is no mention of this factor in the opinion.

Fifth, there was actually a great degree of internal competition

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<sup>29</sup> *Id.* at 640.

<sup>30</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

within the Board itself. Because the defendant Board was organized as a nonprofit corporation,<sup>31</sup> there was no sharing of profits or prospects. Rather, remuneration was dependent upon services independently rendered.<sup>32</sup> But even if one were to assume that there was no internal competition, it appears that by enjoining the Board from restricting membership and thereby permitting access to the multiple listing by every real estate broker, the court may have created a total monopoly.

Sixth, in the normal case where a restraint of trade is alleged, defendants have usually managed to control the source of the product so as to limit a competitor's ability to acquire and market it.<sup>33</sup> In the real estate brokerage business, however, the source of the product certainly cannot be controlled by the broker. The subject matter of these transactions remains in a state of flux because various persons are continually buying and selling different parcels of land. Therefore, the plaintiff and all other brokers had an equal opportunity to obtain listings. With this in mind, it would seem that the degree of success attained by each broker depends entirely upon his own initiative and resourcefulness and not upon whether he is a member of a multiple listing system.<sup>34</sup>

Seventh, multiple listing certainly has no effect upon plaintiff's ability to obtain his own listings. Due to the fact that he is dealing with the public and marketing a product supplied by the public, there is no reason why he could not freely advertise his listings and circulate them in any manner he chooses. The defendants had in no way interfered with this aspect of the plaintiff's occupation.

Eighth, the existence of the multiple listing merely offers alternative methods of service to the public. An example of one of these additional methods would be the personal exclusive listing, whereby a customer lists his property with a specific realtor who has the exclusive right, for a designated period of time, to sell the customer's property. The nature of this relationship enables the realtor to provide service to his customer with a higher degree of personal attention. Obviously, the Board's multiple listing does not preclude the use or effectiveness of other forms of service.

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<sup>31</sup> 219 A.2d at 637.

<sup>32</sup> *Id.* at 651.

<sup>33</sup> *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>34</sup> This argument can be refuted, however, by the fact that a homeowner will usually list his property with a multiple listing system, since it would provide him with a wider buying market. Also, regardless of the initiative possessed by the sole realtor, it is very difficult for him to compete with the high sales volume enjoyed by members of multiple listing arrangements.

Notwithstanding the various arguments of the defendant which are stated above and which the court seemingly ignored, it would seem that the court's decision was correct.<sup>35</sup> Moreover, it seems that the same result could have been reached on the grounds of "state action." Because the court in the *Grillo* case utilized the federal standards of the Sherman Anti-Trust Act<sup>36</sup> as a guide for its common law restraint of trade problems, it would have been logical for it to apply guidelines for "state action" as established by certain decisions of the United States Supreme Court.<sup>37</sup> Under this theory not only the defendant Board but also the state would have committed a wrongful act. Because the "due process" and "equal protection" clauses of the fourteenth amendment are directed towards state activity, state licensing of real estate brokers,<sup>38</sup> which is a sufficient connection with the state to constitute "state action,"<sup>39</sup> must conform to the dictates of that amendment. In *Lombard v. Louisiana*,<sup>40</sup> a case concerned with discrimination in a restaurant licensed by the state, Mr. Justice Douglas stated:

This restaurant needs a permit from Louisiana to operate; and during the existence of the license the State has broad powers of visitation and control. This restaurant is thus an instrumentality of the State since the State charges it with duties to the public and supervises its performance.<sup>41</sup>

Thus, by analogy, the defendant Board's dealings could be considered state action. Furthermore, the fact that the defendant Board excluded certain brokers, thereby interfering with a nonmember's opportunity to effectively earn a livelihood, amounted to a partial revocation of his license,<sup>42</sup> clearly a governmental function.<sup>43</sup> This constitutes a second factor upon which "state action" could have been based.<sup>44</sup>

<sup>35</sup> See text accompanying notes 18-25 *supra*.

<sup>36</sup> 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

<sup>37</sup> *E.g.*, *Lombard v. Louisiana*, 373 U.S. 267 (1963); *United States v. Raines*, 362 U.S. 17 (1960); *Screws v. United States*, 325 U.S. 91 (1945).

<sup>38</sup> N.J. STAT. ANN. § 45:15-1 (1963).

<sup>39</sup> See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1086 (1960).

<sup>40</sup> 373 U.S. 267 (1963).

<sup>41</sup> *Id.* at 282 (concurring opinion). (Footnotes omitted.)

<sup>42</sup> *E.g.*, *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961).

<sup>43</sup> There is an existing state statute which provides for the revocation of licenses. See N.J. STAT. ANN. §§ 45:15-17, -18 (1963).

<sup>44</sup> See *Terry v. Adams*, 345 U.S. 461 (1953) and *Marsh v. Alabama*, 326 U.S. 501 (1946) for examples of federal constitutional limitations which are applied to private groups that exercise a governmental function.