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Multiple Listing Services and the Sherman Act: Fifth Circuit Applies "Facial" Rule of Reason Analysis

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Multiple Listing Services and the Sherman Act: Fifth Circuit Applies "Facial" Rule of Reason Analysis

In *United States v. Realty Multi-List, Inc.*,[1] the Fifth Circuit Court of Appeals became the first federal appellate court[2] to address the issue of whether the use of certain membership criteria by a real estate multiple listing service violates antitrust law. Judge Goldberg enunciated a three stage framework of analysis that allows for justification of a challenged practice, and requires proof of only potential, not actual, anticompetitive effects. Applying this test, the court held that the defendant multiple listing service's membership criteria, although not per se illegal,[3] were facially unreasonable,[4] and that the use of these criteria led to a group boycott of nonmember brokers in violation of section 1 of the Sherman Act.[5] The court's holding was contingent upon whether plaintiff, on remand, could prove defendant possessed sufficient market power and interstate commerce connections.[6]

Realty Multi-List, Inc. (RML) is a corporation in Muscogee County, Georgia whose purpose is to provide a multiple listing service (MLS) for its members, all of whom are state-licensed real estate brokers.[7] Members obtain exclusive listings of property from sellers and pool these listings through RML.[8] All member listings are printed in a listing book, and member brokers may show and sell any property listed. RML's rules pro-

1. 629 F.2d 1351 (5th Cir. 1980).

2. *Id.* at 1354 n.2.

3. *Id.* at 1367.

4. *Id.* at 1383, 1385, 1387, 1389.

5. 15 U.S.C. § 1 (1973). This section provides, in relevant part: "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 hereby declared to be illegal."

The court also held that rules abandoned by defendant under threat of suit were still subject to antitrust analysis on remand. 629 F.2d at 1389.

6. 629 F.2d at 1389.

7. *Id.* at 1355.

8. *Id.* When a seller agrees to list only with one broker, this is considered an "exclusive listing." Even if another broker eventually secures a buyer, the listing broker still divides the commission with the selling broker. When a seller agrees to an "open listing," only the selling broker receives the commission, and any broker may list and sell the property. *Id.* at 1355 & n.5, 1356.

hibit nonmembers from having access to the listing book or from obtaining information from the RML office or members.[9] RML was organized in 1967, and by 1976, when this suit was filed, RML's membership consisted of the majority of real estate brokers in Muscogee County.[10] It is the only MLS in the county.[11]

In 1976, the United States filed suit against RML and requested a declaration that RML's use of certain membership criteria constituted an illegal group boycott[12] in violation of section 1 of the Sherman Act. The challenged criteria were requirements that, in order to be a member of RML, a broker must: (1) have a favorable credit report and good reputation, (2) maintain an office and keep it open during customary business hours, and (3) purchase $1,000 worth of stock in RML.[13]

In the district court, both RML and the United States moved for summary judgment.[14] The district court held that the challenged membership criteria were reasonable, and granted RML's motion.[15] The Fifth Circuit Court of Appeals reversed the summary judgment for RML, although it refused to grant summary judgment for the United States.[16] The court remanded the case for a further determination of RML's market power and connection with interstate commerce.[17]

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9. *Id.* at 1357. A nonmember can obtain information concerning a piece of property only by directly contacting the listing member broker.

10. *Id.* Over 45 firms with approximately 400 sales associates were members. Listings totaled over 4,300, and sales were over $50 million.

11. *Id.* A competing MLS was discontinued in 1975 when most of its members joined RML. *Id.* at 1357 & n.7.

12. *Id.* at 1357-58. The United States also sought an injunction to prohibit further use of these criteria. *Id.* at 1359 & n.17.

13. *Id.* at 1358. The United States also contended that the rules RML had agreed to abandon during negotiations prior to trial were still actionable. These rules (1) prohibited an unsuccessful applicant from reapplying for six months after being rejected, (2) prohibited members from joining another MLS or from advertising open listings, (3) imposed a moratorium on new membership, (4) required a vote of 85% of RML's active members to admit a new member, and (5) required a new member to purchase $3,000 worth of stock. *Id.* at 1358-59. The district court held that questions concerning these rules were moot. United States v. Realty Multi-List, Inc., 1978-1 Trade Cas. ¶ 62,091, at 74,756 (M.D. Ga. 1978). The Fifth Circuit held that these rules were still subject to antitrust analysis on remand, and argued that "in a suit for injunctive relief the voluntary cessation of allegedly illegal practices in an attempt to avoid suit does not moot the controversy they present." 629 F.2d at 1387-88. The court of appeals cited Allee v. Medrano, 416 U.S. 802, 810-11 (1974); NLRB v. Raytheon Co., 398 U.S. 25, 27 (1970); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); and Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 824-25 (5th Cir. 1980), in support of this argument.

14. 1978-1 Trade Cas. ¶ 62,091, at 74,756.

15. *Id.* at 74,758.

16. 629 F.2d at 1389.

17. *Id.*

Section 1 of the Sherman Act is broadly worded, and if courts interpreted it literally, almost every contract or agreement might be in violation of this section, because "[e]very agreement concerning trade, every regulation of trade, restrains."[18] To avoid the results of such a broad interpretation, the courts have had to develop various limiting frameworks of analysis in order to harmonize the goal of unrestrained competition with the desire of maintaining the beneficial aspects of some types of business restraints.[19]

The Supreme Court established the "rule of reason" test in *Standard Oil Co. v. United States*.[20] This test requires a careful consideration of the facts of each case in order to determine, as Justice Brandeis stated in *Chicago Board of Trade v. United States*,[21] "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."[22]

Over the years, the court developed another form of analysis known as

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

19. 1 E. KINTER, FEDERAL ANTITRUST LAW § 8.1, at 340 (1980). For a legislative history of the Sherman Act, *see id.* §§ 4.1-.18, at 125-238. The Supreme Court has often enunciated the Act's goals. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 433 U.S. 679, 695 (1978); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

20. 221 U.S. 1, 59-60 (1911). In *Standard Oil*, the Court recognized that § 1 only invalidates those practices that place "undue restraint" on competition. *Id.* at 59. Under the *Standard Oil* "pure" rule of reason analysis, a court balances those aspects of a practice that tend to enhance competition against those that tend to restrain competition, and if the balance tips in favor of the latter, the court will declare the practice illegal. The court will not consider arguments that use of the restraining practice better serves the public or the industry. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 65, at 173-74 (1977); *accord*, 1 E. KINTER, *supra* note 19, § 8.2 at 357-58; *see* 221 U.S. at 65.

21. 246 U.S. at 231.

22. *Id.* at 238. In deciding the legality of certain practices, a court, using the rule of reason, should

> consider the facts peculiar to the business of which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. This language in *Chicago Bd. of Trade* helped advance the "pure" rule of reason analysis enunciated in *Standard Oil* by indicating the types of factors to which a court should look in applying the analysis. Yet, commentators have argued that the holding in *Chicago Bd. of Trade* conflicts with "pure" rule of reason analysis because, in reaching its holding, the Court considered the social benefits of the illegal practice in question. The commentators argue that "pure" rule of reason analysis precludes consideration of social benefits and benefits to the particular industry that possibly offset anticompetitive effects; the courts may only balance competitive and anticompetitive effects. 1 E. KINTER, *supra* note 19, § 8.2, at 355, 357-58, 361-62; L. SULLIVAN, *supra* note 20, § 66, at 175, 177-79. This case may represent "an alternative model for the rule of reason." L. SULLIVAN, *supra* note 20, § 66, at 175.

the "per se rule."[23] After much experience applying the rule of reason, the court began to identify certain types of agreements that it would conclusively presume to be invalid without further inquiry "as to the precise harm they have caused or the business excuse for their use."[24] The Court had consistently found that these types of agreements had a "pernicious effect on competition and lack[ed] . . . any redeeming virtue,"[25] and therefore the Court saw no need to apply the full detailed analysis of the rule of reason. Declaring an agreement per se illegal eliminated the need for a prolonged trial and volumes of proof.

One type of agreement the Court has presumed invalid is the concerted refusal to deal or group boycott.[26] The Court has found the following three kinds of refusals to deal to be illegal per se:[27] attempts by "horizontal combinations" of traders at one level of distribution to eliminate direct rivals from the market,[28] attempts by "vertical combinations" of traders at different levels of distribution to eliminate direct rivals of some members of the combination,[29] and attempts by combinations of traders to coercively influence the trade practices of rivals.[30]

The similarity between these three kinds of refusals to deal is the coercive and deliberately predatory nature of the actions taken. Some com-

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23. In United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) and Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Supreme Court enunciated what Sullivan has termed "an embryonic per se doctrine." L. SULLIVAN, *supra* note 20, § 64, at 169, § 65, at 172, § 67, at 182. Later, in United States v. Trenton Potteries Co., 273 U.S. 392 (1927) and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Supreme Court fully expressed the per se rule.

24. Northern Pac. Ry. v. United States, 356 U.S. at 5.

25. *Id.*

26. Other types of agreements the Court has found to be illegal per se are horizontal market divisions, *see, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972); tying arrangements, *see, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. at 1; and price fixing, *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. at 150.

27. In E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), Judge Thornberry summarized concerted refusal to deal cases by placing them in one of these three categories.

28. For example, in Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), a combination of retail lumber dealers attempted to eliminate competition by black-listing rival lumber wholesalers. The Court held this combination per se illegal. *Id.* at 612-13.

29. In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959), the Supreme Court held per se illegal the attempt by Broadway-Hale, a large appliance dealer, to eliminate a rival dealer, Klor's, from the market. Broadway-Hale had induced wholesalers and manufacturers to sell to Klor's only at discriminating prices.

30. In Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457, 467-68 (1941), designers argued that they were attempting to eliminate "style piracy" by refusing to sell their original creations to retailers who sold copies of those creations. The court still held this scheme per se illegal because of its coercive influence.

mentators have distinguished these types of refusals to deal, which have a direct anticompetitive purpose, from those that have only an indirect effect on competition.[31] They have argued that courts should apply the per se rule to the former, and the rule of reason to the latter.

The practices of trade associations represent one type of collective action that has only an indirect effect on competition. Trade associations often have stringent membership requirements and prohibit members from dealing with nonmembers. The purpose of these restrictions is not to eliminate or coerce competitors directly, but to impose internal restraints in order to promote efficiency in an industry that may not function properly without some cooperation among competitors.[32] When restrictive practices severely impede nonmembers of an association in competing with members, however, the courts will scrutinize those practices to determine whether antitrust law has been violated. In considering noncoercive restrictive practices of associations, courts have usually applied the rule of reason test.[33] In applying this test, courts will consider the market power of an association in order to determine whether a person denied the association's benefits would be unable to compete effectively.[34] In *Associated Press v. United States*,[35] the Associated Press (AP), an association engaged in gathering and distributing news, prohibited nonmembers from obtaining access to AP Services. The Supreme Court, using the rule of reason test, and noting AP's dominance of the news-gathering field,[36] invalidated this practice. AP's actions were not de-

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31. *See, e.g.*, Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1341 (1970); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876 (1955); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 U. VA. L. REV. 1165, 1172 (1959); Comment, *Exclusion from Real Estate Multiple Listing Services as Antitrust Violations*, 14 CAL. W.L. REV. 298, 308 (1978). The court in Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976), also recognized this distinction.

32. Barber, *supra* note 31, at 876; Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1488 (1966).

33. *See* Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d at 932, 549 P.2d at 840, 130 Cal. Rptr. at 8. For cases in which courts have applied the rule of reason test to practices of associations, *see, e.g.*, Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966); Marjorie Webster Jr. College, Inc. v. Middle States Ass'n, 302 F. Supp. 459 (D.D.C. 1969), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir. 1970); Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961); and United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960).

34. "[T]he greater the dominance by an association over a field, the greater the likelihood that competitive survival is dependent upon access to its facilities." Austin, *supra* note 31, at 1346. Also, large associations with market power can effectively create barriers to entry by use of their exclusionary practices. *Id.* at 1351-52.

35. 326 U.S. 1 (1945).

36. The Court noted that the Associated Press was the largest news-gathering agency in

liberately predatory. Yet, because of AP's market predominance, its exclusionary practices effectively eliminated competitors who were denied access to AP's services.[37]

Multiple listing services, like the Associated Press and other trade associations, often set strict membership requirements and rules that deny nonmembers access to their services. These practices are not deliberately coercive and predatory; they are designed "to impose internal, not external, restraints."[38] The only way a MLS can function is by cooperation among competing real estate brokers, who agree to pool their listings. The buyers and sellers of real estate, the real estate industry, and the individual brokers all benefit from this arrangement. Also, a MLS helps reduce the numerous market imperfections in the real estate industry:

> A critical imperfection arises from the immobility of the product. . . . This insurmountable geographical imperfection magnifies the importance of communicating useful sales data. Unfortunately, because of the limitations of local media . . . effective sales promotion is difficult. Moreover, most homeowners do not possess the necessary experience in the specialized field of effectively presenting to the public essential and enlightening information about property offered for sale. Imperfections also arise from the lack of knowledge by both buyer and seller regarding property values and available sources and methods of financing. . . . Operating as a knowledgeable middleman, the real estate broker can reduce the level and impact of these imperfections. He cannot, however, completely eliminate them; even with the facilities he has, the broker is still confronted with a sizeable communication imperfection. One method of achieving a further reduction of imperfections is by resort to the trade exchange format of the multiple listing service.[39]

With a centralized MLS, buyers and sellers can be brought together through the efforts of one broker, who has access to the listings of all members. In order to cooperate effectively and sell their service, member brokers must have assurance that their fellow members are competent and responsible.[40] Therefore, they may attempt to screen potential members by setting strict membership requirements and by not allowing unscreened nonmembers to use the service. This type of cooperation and selective exclusion, however, has the appearance of a concerted refusal to deal. When membership in a MLS is small, and the MLS has relatively

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the United States. *Id.* at 13.

37. *See also* Silver v. New York Stock Exch., 373 U.S. 341 (1963).

38. Austin, *supra* note 31, at 1340.

39. *Id.* at 1353-54. It should be noted that real estate boards often are responsible for running multiple listing services. Often, the services are run independently.

40. *See* Brown v. Indianapolis Bd. of Realtors, 1977-1 Trade Cas. ¶ 61,435, at 71,614 (S.D. Ind. 1977).

little market power, exclusion from membership and denial of access to the service may not harm a nonmember. When a large number of realtors belong to a MLS, however, and the MLS dominates the relevant market, nonaccess to the MLS could render a nonmember helpless to compete and could force him out of the market. Access to the MLS in this instance would be a necessary business requirement. Yet, even though nonmembers may be "foreclosed from market opportunities, these consequences are ancillary and incidental products of internal restraints."[41] The exclusionary practices of multiple listing services result in "indirect" group boycotts, which commentators have argued should be examined under rule of reason analysis.[42]

In fact, courts usually have applied the rule of reason when faced with determining the legality of MLS practices under antitrust law. These antitrust considerations can be found primarily only in state court decisions[43] because, until 1980, there was no clear decision as to whether multiple listing services were sufficiently engaged in interstate commerce to allow Sherman Act jurisdiction.[44] Whether applying common law or state antitrust law, the courts in these cases[45] have relied on federal antitrust analysis to reach a decision.

In each of these cases either independent multiple listing services or real estate boards that operated multiple listing services[46] established

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41. Austin, *supra* note 31, at 1341.

42. *See* note 31 *supra* and accompanying text.

43. There are also two district court decisions: Brown v. Indianapolis Bd. of Realtors, 1977-1 Trade Cas. ¶ 61,435 (S.D. Ind. 1977) and Oglesby & Barclift, Inc. v. Metro MLS, Inc., 1976-2 Trade Cas. ¶ 61,064 (E.D. Va. 1976).

44. *See* Annot., 44 A.L.R. Fed. 743 (1979). In 1980, the Supreme Court, in McLain v. Real Estate Bd., Inc., 444 U.S. 232 (1980), held that MLS activities were within interstate commerce. *See* Stoppello, *Sherman Act Extends to Activities of Real Estate Brokers: Federal Regulation of Real Estate Brokers May be on the Way*, 9 REAL EST. L.J. 151 (1980).

45. The cases are as follows: Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d at 920, 549 P.2d at 833, 130 Cal. Rptr. at 1; Glendale Bd. of Realtors v. Hounsell, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (2d Dist. 1977); Blake v. H-F Group Multiple Listing Serv., Inc., 36 Ill. App. 3d 730, 345 N.E.2d 18 (1976); Miller v. Cedar Rapids Real Estate Bd., 1980-1 Trade Cas. ¶ 63,021 (Iowa Dist. Ct. 1979); Grempler v. Multiple Listing Bureau, Inc., 258 Md. 419, 266 A.2d 1 (1970); Barrows v. Grand Rapids Real Estate Bd., 51 Mich. App. 75, 214 N.W.2d 532 (1974); Pomanowski v. Monmouth County Bd. of Realtors, 175 N.J. Super. 242, 399 A.2d 990 (1980); Pomanowski v. Monmouth County Bd. of Realtors, 166 N.J. Super. 269, 399 A.2d 990 (1979), *rev'g* 152 N.J. Super. 100, 377 A.2d 791 (1977); Oates v. Eastern Bergen County Multiple Listing Serv., Inc., 113 N.J. Super. 371, 273 A.2d 795 (1971); Grillo v. Bd. of Realtors, 91 N.J. Super. 292, 219 A.2d 635 (1966); Guadagno v. Mount Pleasant Listing Exchange Inc., 1976-2 Trade Cas. ¶ 61,065 (N.Y. Sup. Ct. 1976); Suburban Fair Housing, Inc. v. Delaware County Bd. of Realtors, 463 Pa. 175, 344 A.2d 481 (1975); Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A.2d 493, *cert. denied*, 414 U.S. 979 (1973). *See* Annot., 45 A.L.R. 3d 190 (1972).

46. In *Blake, Grempler, Oates,* and *Guadagno,* independent multiple listing services

strict membership requirements and denied nonmembers access to MLS information. Arguing that these practices constituted illegal restraints of trade, nonmembers sued the real estate boards or multiple listing services.

In only two of these cases, *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*[47] and *Collins v. Main Line Board of Realtors,*[48] did the courts apply per se analysis, and in *Oates,* the Court also applied rule of reason analysis as an alternative ground for its decision. Both courts found the restrictive practices in question[49] illegal.[50]

The rest of the courts, noting the benefits of the MLS system, applied rule of reason analysis, with mixed results. To determine the legality or illegality of the practices in question, courts looked to whether a broker without access to the multiple listing service could compete successfully in the relevant market. Market power was thus the key determinative factor in these cases.[51]

In both *Grempler v. Multiple Listing Bureau, Inc.*[52] and *Barrows v. Grand Rapids Real Estate Board,*[53] the courts, applying rule of reason analysis, found the practices in question[54] legal because defendants lacked significant market power. In *Grempler,* only twelve out of seventy-two licensed brokers in Harford County were associated with defendant.[55] In

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were the defendants. In all other cases, real estate boards that operated multiple listing services were the defendants.

47. 113 N.J. Super. at 371, 273 A.2d at 795.

48. 452 Pa. at 342, 304 A.2d at 493.

49. In *Oates,* an independent MLS only admitted new members pursuant to an elaborate "Stockholder's Agreement", which essentially limited membership to "the original stockholders, members of their immediate families, and former associates . . . ." 113 N.J. Super. at ___, 273 A.2d at 797-98. In *Collins,* a real estate board restricted use of its MLS to members and required a "two year waiting period for eligibility to participate" in this service. 452 Pa. at ___, 304 A.2d at 495.

50. 113 N.J. Super. at ___, 273 A.2d at 805, 807, 452 Pa. at ___, 304 A.2d at 496.

51. Even in *Oates,* under the court's alternative rule of reason analysis, Judge Lynch found that defendant's practices resulted in a "substantial" restraint of trade because plaintiff, a nonmember of defendant, was denied "access to approximately 20% of the dollar volume of sales produced in the area per year. . . ." 113 N.J. Super. at ___, 273 A.2d at 806. In *Collins,* a dissenter, using rule of reason analysis, argued that the questioned practice was legal because defendant lacked sufficient market power. 452 Pa. at ___, 304 A.2d at 500-01. (Jones, J., dissenting).

52. 258 Md. at 419, 266 A.2d at 1.

53. 51 Mich. App. at 75, 214 N.W.2d at 532.

54. In *Grempler,* defendant's bylaw required that a new member have a main office in the county. 258 Md. at ___, 266 A.2d at 3. In *Barrows,* only members of defendant real estate board were allowed to use the MLS. Plaintiff argued that he should have been allowed to use the MLS even though he was not a member of the board. 51 Mich. App. at ___, 214 N.W.2d at 534.

55. 258 Md. at ___, 266 A.2d at 6 & n.3.

Barrows, the court noted that "a majority of the sales of real estate (in the area covered by the Board) [were] made without the assistance of members of defendant Board or [were] sales of properties not listed under the multiple listing system."[56] Plaintiff's competitive opportunities were not restricted in either case.

On the other hand, in *Marin County Board of Realtors, Inc. v. Palsson*,[57] the Supreme Court of California, applying rule of reason analysis, and noting defendant's dominance of the relevant market, held defendant's restrictive practices illegal.[58] Although the court considered the benefits of the MLS system and defendant's justifications for the restrictive rules in question,[59] Judge Mosk argued that: "An association's freedom to exclude nonmembers from activities is not absolute. It must yield to antitrust laws when . . . the association has the power to shape and influence the economic environment of its particular market."[60] In this case, three-fourths of the brokers in Marin County were members of defendant Board, and it operated the only MLS in the county.[61] Membership in the Board was "a practical economic necessity for real estate salesmen."[62]

Judge Mosk enunciated the requirements of the rule of reason test: if the questioned practice posed "serious anticompetitive dangers," then the defendant must prove that "the anticompetitive practice relates to a legitimate purpose, . . . is reasonably necessary to accomplish that purpose and [is] narrowly tailored . . . ."[63] The defendant in *Marin* did not meet this burden of proof. The court in *Marin*, in order to reach its decision, not only relied on the fact that defendant's dominance of the market severely limited nonmembers' competitive opportunities, but also relied on the application of an expanded rule of reason analysis.

In *United States v. Realty Multi-List, Inc.*,[64] the Fifth Circuit enunciated an analytical framework that incorporated the expanded rule of reason test applied in *Marin*. The court first determined that the "concerted

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56. 51 Mich. App. at ___, 214 N.W.2d at 538.

57. 16 Cal. 3d at 920, 549 P.2d at 833, 130 Cal. Rptr. at 1.

58. 16 Cal. 3d at 940, 549 P.2d at 845, 130 Cal. Rptr. at 13.

59. Defendant's bylaws provided that a member must be "primarily engaged in the real estate business." Members could not employ nonmembers of the board. *Id.* at 924, 549 P.2d at 835, 130 Cal. Rptr. at 3. Defendant argued that the rule operated "to further the professional and ethical competence of the real estate profession." *Id.* at 939, 549 P.2d at 844, 130 Cal. Rptr. at 12.

60. *Id.* at 937, 549 P.2d at 843, 130 Cal. Rptr. at 11. *See* Austin, *supra* note 31, at 1345-46.

61. *Id.* at 924, 549 P.2d at 834, 130 Cal. Rptr. at 2.

62. *Id.* at 938, 349 P.2d at 844, 130 Cal. Rptr. at 12.

63. *Id.* at 939, 549 P.2d at 844, 130 Cal. Rptr. at 12.

64. 629 F.2d at 1351.

denial of access to RML's listing service, when RML members have agreed to share and pool their listings, amount[ed] to a group boycott of . . . nonmembers."[65] The court compared the situation in RML to that in *Silver v. New York Stock Exchange*,[66] in which the Supreme Court held that defendant's practice of denying nonmembers access to its wire service was a group boycott because plaintiffs, nonmembers of the stock exchange, were deprived of "a valuable business service which they needed in order to compete effectively."[67]

Having characterized RML's practices as a group boycott, the court then decided that RML's membership criteria and access rules could not be analyzed under the per se rule.[68] In reaching this conclusion, the court first re-enunciated the per se rule, calling it "the trump card of antitrust law."[69] The court noted, however, that application of the rule "must be limited to those situations which fairly fall within its rationale."[70]

The court proceeded to outline its formulated three stage framework of "facial" analysis. In the first stage, if the rule or practice in question has no other apparent purpose than exclusion or coercion of competitors, then the court will condemn it as "per se" illegal. The court, however, will first inquire whether the rule or practice "is at least potentially reasonably ancillary to joint, efficiency-creating economic activities."[71] If defendant proves that its rule or practice has some beneficial purpose, then the court will not condemn the rule or practice outright, but will instead proceed to the second stage—facial rule of reason analysis.

Under facial rule of reason analysis, plaintiff must first prove that defendant's rule or practices potentially pose significant competitive harms, and that the defendant possesses significant market power to produce these harms.[72] If plaintiff meets its burden in the second stage, then in the third stage, defendant must prove that its rule or practices are justified by its legitimate competitive needs, and that the rule or practices are reasonably necessary and "narrowly tailored" to meet those needs.[73] If defendant fails to meet its burden in the third stage, then the court will

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65. *Id.* at 1361.
66. 373 U.S. at 341.
67. 629 F.2d at 1361 (quoting 373 U.S. at 347).
68. 629 F.2d at 1367, 1369.
69. *Id.* at 1362-63.
70. *Id.* at 1363. The court cited recent Supreme Court cases in which the Court refused to hold certain practices per se illegal without reviewing the competitive effects of those practices. The cases cited were Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) (blanket licensing) and Continental TV, Inc. v. GTE Sylvania, Inc. 433 U.S. 36 (1977) (vertical market division).
71. 629 F.2d at 1367.
72. *Id.* at 1370-74.
73. *Id.* at 1374-75.

condemn the rule or practice "on its face, without proof of past effect."[74] If defendant meets its burden, then, in a fourth stage, the court will apply full rule of reason analysis and will require plaintiff to prove actual harm.[75]

The court systematically followed this step-by-step analysis to reach its decision. In the first stage of analysis, the court determined that, although RML's practices constituted a group boycott, and although courts generally held group boycotts per se illegal,[76] there was "good in the multiple listing system,"[77] and, therefore, the court would apply the facial rule of reason analysis.[78]

Quoting extensively from the Austin article,[79] the court noted that the MLS system reduces market imperfections and benefits buyers, sellers, and brokers "[b]y serving as a central processing and distributing point for listing of real estate."[80] The communication and geographical barriers between buyers and sellers are reduced because a buyer, through a single broker, has access to a large selection of property, and a seller can deal exclusively with one agent and yet rely on the full membership of RML to sell a piece of property. The broker "gains a larger inventory to sell and gains a broader exposure for his own listings."[81] Fees help recoup the costs of operation, and membership requirements help assure that the brokers who act through the MLS are "responsible and competent."[82] Without this assurance "it is possible that neither brokers nor the public will utilize the service, thus forfeiting the benefits it may yield to all."[83]

After considering these potential advantages of the MLS system, the court, in the second stage of analysis, noted that there also existed "the potential for significant competitve harms when the [MLS] . . . assumes the power to exclude other competitors from access to its pooled resources."[84] A broker excluded from the MLS may be unable to compete effectively because he is limited in the number of listings he can personally procure and the number of contacts with buyers he can make. The court stated that "one does not need an advanced degree in economics to

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74. *Id.* at 1375.

75. *Id.* at 1360.

76. *Id.* at 1366. *See* notes 27-30 *supra* and accompanying text.

77. *Id.* at 1367 (quoting Grillo v. Board of Realtors, 91 N.J. Super. at ___, 219 A.2d at 644).

78. *See* 629 F.2d at 1367, 1369.

79. Austin, *supra* at note 31.

80. 629 F.2d at 1368. The court quoted Austin, *supra* at note 31, at 1353-54.

81. *Id.*

82. *Id.* at 1369.

83. *Id.*

84. *Id.* at 1370.

predict whose services a buyer or seller of a house is likely to engage."[85]

The court then inferred from the facts that RML possessed sufficient market power to potentially produce these competitive harms.[86] The court based this inference on the following important factors: the number of brokers who were members of RML, RML's volume of listings and sales, the importance of RML membership, and RML's lack of competition from another MLS.[87]

In the third stage of analysis, the court considered RML's justifications for each of the challenged membership criteria, and then determined whether these criteria were reasonably necessary and narrowly tailored to meet the legitimate needs of RML. RML's justification for its requirement that prospective members have a favorable credit report and good business reputation was that it needed some type of membership criteria that would help assure that prospective members were competent.[88] The court agreed that this justification had merit, and that RML could require all prospective members to possess a current broker's license from the State. However, the court held that the favorable credit report and good business reputation requirement was not necessary to meet RML's need for assurance of the competency of its new members because the State of Georgia extensively regulated real estate brokers.[89] RML could only set its own professional standards if it proved that it required "protection in excess of that provided by the state or [if it proved that] the state [did] not adequately enforce its own regulations."[90] RML failed to prove its need for excess regulation, and the court held that, even if RML could prove that the state did not enforce its own regulations,[91] RML's membership requirement was still invalid because it was not narrowly tailored. These criteria called for "a subjective evaluation of an applicant's fitness for membership,"[92] which allowed RML to "exclude brokers from

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85. *Id.* at 1371 (quoting Marin County Board of Realtors, Inc. v. Palsson, 16 Cal. 3d at 936, 549 P.2d at 842, 130 Cal. Rptr. at 10). In terms of economic theory, a MLS has the advantages of economies of scale. 629 F.2d at 1371 n.37.

86. *Id.* at 1374. The court noted that it did not consider "whether the record established this point conclusively." Neither party had focused on this issue, and it was therefore left open on remand. *Id.* at 1374 n.45.

87. *Id.* at 1373-74. *See* notes 11 & 12 *supra* and accompanying text. The court determined that the relevant product market was the market for real estate brokerage services, and that the relevant geographic market was Muscogee County. *Id.* at 1372 n.39.

88. *Id.* at 1377.

89. *Id.* at 1377-80 & nn.54-59.

90. *Id.* at 1380.

91. *Id.* at 1381. The issue of whether Georgia enforced its regulations was left open on remand.

92. *Id.* at 1382. The court quoted from depositions of members of RML, who admitted that the standards were very subjective. One member stated: "I want to be sure, before I vote for [a prospective member] that he is a fellow that I don't mind coming into my

membership on grounds not justified by . . . competitive needs."[93]

RML defended its requirement that an applicant have an office "open during customary hours of business" by arguing that this rule was needed to ensure that a member broker would be able to contribute to listings and would be available for negotiations.[94] In rejecting these defenses, the court noted that although RML could require that a member be "actively engaged" in the brokerage business,[95] that requirement was a "far cry" from RML's requirement that a member maintain an office during customary business hours. The court argued that part-time brokers, whom this rule excluded from membership, might "fulfill a genuine market demand,"[96] and the court refused to conclude that a part-time broker would not be reasonably available to carry out all his duties.[97] The court held that this requirement was also overly broad and therefore invalid because it excluded "an entire class of brokers from membership."[98]

In analyzing RML's requirement that a member purchase $1,000 worth of stock, the court recognized that RML could charge fees that would allow it to "recoup its costs of operation" including "the start-up costs involved in serving a new member."[99] RML could also require each new member to contribute pro rata toward maintenance and development.[100] RML's membership fee, however, bore no relationship to RML's cost needs. In holding this fee invalid, the court relied on *United States v. St. Louis Terminal Railroad Association*,[101] in which the Supreme Court held that the fee charged by a terminal association consisting of railroads was an unreasonable restraint of trade.[102] The Supreme Court required that the association reform its rules to include only reasonable fee payments related to the costs of service.[103] Similarly, the court in *Realty*

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house." *Id.* at 1382 n.64.

93. *Id.* at 1383.

94. *Id.* RML also argued that the rule was not applied to exclude part-time brokers or brokers who could not afford to keep an office open during customary business hours.

95. *Id.* at 1384.

96. *Id.*

97. *Id.*

98. *Id.* The court noted that RML, in order to assure that members were available for negotiations, could adopt less restrictive rules like requiring members to leave numbers where they could be reached. *Id.* at 1384 n.72.

99. *Id.* at 1386.

100. *Id.* This would include the accumulation of reasonable reserves. Members who did not contribute pro rata would not be allowed to share equally in the distribution of assets upon dissolution. *Id.* at 1386, 1387 n.84.

101. 224 U.S. 383 (1912).

102. *Id.* at 409. The association had acquired all available means of access across the Mississippi River at St. Louis, and only allowed nonmember railroads to use these facilities after they paid a use fee and obtained the unanimous consent of all owners. *Id.* at 398-401.

103. *Id.* at 411.

Multi-List required that RML set its fee at a level that was not greater than RML's legitimate cost needs.[104]

Having found all of RML's challenged membership criteria invalid under facial rule of reason analysis, the court reversed the district court's summary judgment for RML.[105] The case was remanded for further determinations of whether RML had sufficient market power and whether its activities affected interstate commerce.[106]

In *Realty Multi-List*, the Fifth Circuit provided a realistic framework for antitrust analysis.[107] Real markets are generally not very similar to economists' pure models. The real estate market is a prime example of a market in which numerous imperfections exist and in which cooperation among competitors may produce greater efficiency in the industry. The court's emphasis on industry efficiency and justification for business conduct follows the expanded *Chicago Board of Trade* rule of reason analysis rather than the narrow *Standard Oil* analysis, which had allowed a court to consider only competitive and anticompetitive effects of a practice, and not business justifications.[108] The court's "facial" analysis incorporates the following factors expressed in *Chicago Board of Trade:* "the facts peculiar to the business" and "its condition before and after the restraint was imposed" (stage one); the "restraint and its effect, actual or probable" and "the evil believed to exist" (stage two); and "the reasons for adopting the particular remedy" and the purpose or end sought to be attained" (stage three).[109] Because the court is only looking for *potential* anticompetitive effect under "facial" analysis, it perhaps is more willing to allow defendant to justify its practices.

This analysis covers the middle ground between perfunctory per se analysis and voluminous full rule of reason analysis. It allows the court to weigh realistic business needs and pure competition policy. Query whether the court, after enunciating its "facial" analysis, really viewed the goal of the Sherman Act to be the promotion of pure competition, or the promotion of efficiency in industry by the least anticompetitive means possible. The court, presuming that on remand plaintiff could prove defendant possessed the necessary degree of market power, held that the defendant's membership criteria violated antitrust law. This decision, coupled with the Supreme Court's decision in *McLain v. Real Estate Board, Inc.*, could be the beginning of wide-spread litigation concerning

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104. 629 F.2d at 1387.

105. *Id.* at 1389.

106. The court cited McLain v. Real Estate Bd., Inc. 444 U.S. 232 (1980) as a guide for the district court to use in determining RML's effect on interstate commerce.

107. The court also clearly enunciated each party's burden of proof.

108. *See generally* notes 20 and 22, *supra.*

109. *Compare* 246 U.S. at 238 with 629 F.2d at 1367, 1370, 1374-75.

multiple listing services. Real estate multiple listing services can be found throughout the country; some counties have more than one. Counsel for a multiple listing service should note the different types of proof required at each stage of analysis and the type of case the government will probably present.[110] Stage one should present no problem. In stage two, the key will be market power. As one commentator stated: "It is the successful trade association . . . that really must concern itself about its membership requirements."[111] In stage three, even if defendant can successfully prove a legitimate competitive need for its rules or criteria and can prove its rules or criteria are reasonably related to the need, defendant can still lose if the court finds the rules or criteria are not "narrowly tailored." Within its opinion, the court of appeals hinted at what might be appropriate "narrowly tailored" rules and criteria for a multiple listing service to set in order to avoid an antitrust violation. For example, the court noted that the National Association of Realtor's Rules might serve as a possible guideline.[112]

The Fifth Circuit Court of Appeals in *Realty Multi-List,* by enunicating and applying its "facial" framework of analysis, successfully completed its attempt to "harmonize the sometimes discordant strains that sound in the background of this case and to reach a result in accord with the policies embodied in the Sherman Act."[113] In reaching this result, the court also exposed another industry to federal antitrust scrutiny.

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110. *See generally* 629 F.2d at 1360.

111. Bodner, *Antitrust Restrictions on Trade Association Membership and Participation,* 54 AM. B.A.J. 27, 28 (1968).

112. *See* 629 F.2d at 1382 n.65, 1386 n.79.

113. *Id.* at 1355.