THE MLS ACCESS ISSUE: A RULE OF REASON ANALYSIS

*William L. Trombetta**

I. INTRODUCTION

Buying a home is likely to be the most significant purchase that the majority of consumers will ever make. Unfortunately, several widely used practices in the real estate industry throughout much of the country do not appear to work in the consumer's best interest. For example, rules and regulations of various Realtor[1] boards and multiple listing services (MLS) may unnecessarily hamper brokers in attempting to serve the public and deprive consumers of the right to contract with whomever they choose.

The MLS is a mechanism akin to a clearinghouse that brokers use to compile and disseminate home listings and offerings to the public.[2] Although some MLS' are independent, most are controlled by committees of local boards of Realtors.[3] In theory, an MLS can reduce market imperfections and lower the cost of the home purchase to the consumer by expanding the size of the market in which any one broker or homeowner operates.

In practice, however, each MLS operates in a separate territorial jurisdiction with its own "data bank." From an economist's perspective, such data banks of housing inventory can be considered as natural monopolies with concomitant advantages and efficiencies as long as their monopoly characteristics are regulated. These advantages, however, are likely to be offset by the exclusionary practices often found in an MLS, particularly a Realtor board-controlled MLS. The vast majority of the brokerage firms and brokers in a trade area participate in the MLS and it quickly assumes a dominant role in the marketing of residential real estate.[4] A broker (and particularly a

* B.S., St. Joseph's University; M.B.A. Temple University; Ph.D., Ohio State University; J.D., Cleveland State University School of Law; Deputy Attorney General, Antitrust Section/Division of Criminal Justice, State of New Jersey.

[1] The word "Realtor" is a registered trademark.

[2] HANDBOOK IN MULTIPLE LISTING POLICY, CHICAGO: NATIONAL ASSOCIATION OF REALTORS 7 (1975).

[3] Approximately 925 MLS' are run by local Realtor boards while only about 200 are run independently of Realtor boards. *See* Brooks, *Ruling Eases Access to Multiple Listings*, N.Y. Times, July 6, 1980 at 86.

[4] For example, 400 Realtor agencies in Bergen County, New Jersey, recently agreed "not to engage in racial steering or other discriminatory tactics in housing transactions with black customers." Hanley, *Realty Agencies in Bergen Settle Suit on Steering*, N.Y. Times, Aug. 1, 1980, at 82. The four MLS' involved accounted for approximately 85% of the housing in the trade area.

newly licensed salesperson) experiences difficulty in pursuing his occupation unless he can participate in the MLS. Unfortunately, where the MLS is a committee of the local board of Realtors, access to the MLS is conditioned on mandatory, and in many cases, very expensive, membership in the local Realtor board, the state association of Realtors, and the National Associations of Realtors.[5]

The justification proffered for conditioning MLS access upon Realtor board membership often takes the form of a concern for high standards and professionalism of the trade group. Realtors portray restrictions on MLS access as a necessary step in their endeavor to strive for high standards and to assure competent, qualified, and honest practitioners.[6] While one cannot quarrel with efforts by trade associations to upgrade their standards, it is necessary to keep in mind that trade associations have been known to cross over the thin line that separates reasonable efforts at upgrading the occupation from imposing unreasonable restraints.[7] Moreover, it is not clear that such efforts to improve standards really are necessary since virtually all states regulate the practice of real estate to some extent.[8]

Under the antitrust laws, it is only unreasonable restraints of trade which are prohibited.[9] Generally, any combination or agreement which operates to restrain trade will therefore be analyzed under the "rule of reason" standard.[10] Nevertheless, "there are

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[5] Trombetta, *Using Antitrust Law to Control Anticompetitive Real Estate Industry Practices*, 14 J. CONSUMER AFF. 142, 143 (Summer 1980).

[6] For an excellent discussion of the demythification of Realtor "sub-agency" fiction, see Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

[7] Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 549 P. 2d 833, 130 Cal. Rptr. 1 (1976); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); Grillo v. Board of Realtors of Plainfield Area, 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966); Comment, *Restraint of Trade—Private Associations—Exclusive Multiple Listing Service As a Concerted Refusal to Deal and a Tortious Interference with Nonmember Brokers' Rights to Practice His Profession*, 21 RUTGERS L. REV. 547 (1967).

[8] For an example of state statutes which regulate the real estate industry, see N.J. STAT. ANN. §§ 45:15-5 & :15-17 (West 1978 & Cum. Supp. 1980-1981).

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

[10] In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), Justice Brandeis outlined the contours of the rule of reason analysis:

> 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; 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. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 244.

certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm" caused or business justification for the imposition of the restraint.[11] If it is determined that the restraint falls within this prohibited class, the application of the *per se* rule ends the antitrust inquiry in a finding of illegality.

Included among *per se* violations is the group boycott or concerted refusal to deal.[12] In a number of reported decisions, MLS access restrictions have been characterized as group boycotts because the listing members concertedly agreed to withhold information on and access to the pool of available listings.[13] Yet in the context of a trade association providing benefits to its members, application of the *per se* standard to assess alleged antitrust violations has often been deemed unwarranted so as to avoid the "conclusion that an association which provides any economic benefit to its members would be compelled to provide that same benefit to nonmembers."[14] Furthermore, the indirect boycott created by the imposition of membership restrictions incidental to the carrying out of the goals of a trade association has been recognized as distinguishable from naked restraints designed to coerce parties to engage in anti-competitive practices.[15] Thus, in cases involving trade association members entering into an agreement not directly coercive or involving predatory conduct aimed at the elimination of competition, the rule of reason standard has often been applied rather than the door-closing *per se* approach.[16]

This limitation on the application of the *per se* rule is particularly warranted in a situation where a trade association opens its membership, and thus access to its competitive benefits, to all those who "voluntarily" choose to join. Recently, courts and commentators have begun to deal with the MLS access issue in this pristine form: does

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[11] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[12] *E.g.*, Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941).

[13] *See, e.g.*, Grillo v. Board of Realtors of Plainfield Area, 91 N.J. Super. 202, 219 A.2d 635 (App. Div. 1966); Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A.2d 493 (1973).

[14] Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 839, 130 Cal. Rptr. 1, 7 (1976).

[15] *See* Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 932-34, 549 P.2d 833, 840-41, 130 Cal. Rptr. 1, 8-9 (1976); Austin, *Real Estate Board and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1341 (1970).

[16] *See, e.g.*, United States v. Realty Multi-List, Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624 (5th Cir. 1980); Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976).

the conditioning of MLS access upon Realtor board membership in and of itself unreasonably restrain trade and, consequently, violate the antitrust laws?[17]

This article will attempt to provide an empirical approach to the MLS access issue within a rule of reason context. A number of issues are apparent: first, does a Realtor board's requirement of membership as a precondition to access to a board owned and operated MLS restrain competition within the meaning of section 56:9-3 of the New Jersey Statutes Annotated[18] or section one of the Sherman Act;[19] what is the relevant market; what portion of the local market is controlled by the MLS; assuming the MLS does control a significant market share, what is the impact of such control upon competition; given that conditioning MLS access upon Realtor board membership restrains competition, is the restraint unreasonable?

First, this article will examine the most significant cases addressing MLS access restrictions. In the following section, the rule of reason as a framework for analysis of the MLS access issue will be examined in detail, including the significance of defining and determining the relevant market and consideration of less restrictive alternatives to Realtor board membership as a condition to MLS access. Finally, the recent decision of *Pomanowski v. Monmouth County Board of Realtors*[20] will be evaluated as an example of an empirical approach to the MLS access issue.

II. JUDICIAL TREATMENT OF THE MLS ACCESS ISSUE

Until very recently, the courts have not dealt with the MLS access issue in its most fundamental aspect, namely, whether conditioning MLS access upon Realtor board membership in and of itself unreasonably restrains trade. The early cases on MLS access involved outright exclusion on the part of the Realtor defendants. For example, in the leading case of *Grillo v. Board of Realtors of Plainfield Area*,[21] a licensed real estate broker brought an action against the

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[17] Iowa *ex rel.* Miller v. Cedar Rapids Real Estate Bd., [1979] TRADE REG. REP. (CCH) ¶ 63,012 (D. Iowa 1979); Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976); Glendale Bd. of Realtors, Inc. v. Hounsell, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977); Pomanowski v. Monmouth County Bd. of Realtors, 175 N.J. Super. 212, 417 A.2d 1119 (Ch. Div. 1980); Kaechele, *Exclusion From Real Estate MLS as Antitrust Violations*, 14 CALIF. L. REV. 298 (1978); Miller & Shedd, *Do Antitrust Laws Apply to Real Estate Brokerage Industry?* 17 AM. BUS. L.J. 313 (1979).

[18] N.J. STAT. ANN. § 56:9-3 (West Cum. Supp. 1979-1980).

[19] 15 U.S.C. § 1 (1976).

[20] 175 N.J. Super. 212, 417 A.2d 1119 (Ch. Div. 1980).

[21] 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966).

defendant Realtor board for relief against his exclusion from the board's MLS. Over a period of eight years, the plaintiff had submitted numerous applications, being rejected each time.[22] The court noted several restrictions to admission to the board which, in effect, precluded his access to the MLS since one had to join the Realtor board as a condition to participate in the MLS.[23] While acknowledging that an MLS provides an effective method for conducting real estate transactions, the court characterized the board's MLS rules and regulations requiring members to restrict information about properties for sale only to other members as a group boycott or a concerted refusal to deal.[24] Although group boycotts fall into a *per se* category, the case was one of first impression leading the court to examine the restraint under the rule of reason.[25]

The *Grillo* court listed in detail the anti-competitive effects of non-MLS access. Nonmembers of the board, who are consequently precluded from the MLS, are at a competitive disadvantage because they "may lose the listings of [homeowners] who are interested in displaying their property to the widest possible audience."[26] Prospective buyers interested in a broad selection will most likely patronize a board member with MLS access "who can offer all the properties listed with other board members in the area."[27] The nonmember broker is precluded from access to a significant percentage of the properties for sale in the board's chartered territory because many of these properties will simply be unknown to the nonmember broker. The court likened the MLS to an inventory of goods without which a businessman cannot survive. Accordingly, the court held that the board's MLS tended to "stifle rather than promote competition"[28] and was not justified in light of the comprehensive scheme of public regulation.[29]

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[22] *Id.* at 206, 219 A.2d at 637.

[23] *Id.* at 211, 219 A.2d at 640. The court listed the restrictions upon membership as follows:

> Several applications for membership, in addition to that of plaintiff, have been voted down; one, I am sure, because the applicant was a Negro. There is also the very substantial initiaton fee of $1,000. There is a strong inference that the amount has been set as a barrier against applications which would otherwise be filed. No showing was made by the Board that such a fee bears any reasonable relation to the cost of admitting a new member. Hurdles are placed, too, in the way of newcomers. Art. III, § 2 of the Board's constitution fixes a waiting period of one year for the licensee who comes from elsewhere, opens his own office in the area and desires to apply for active membership.

Id.

[24] *Id.* at 218-19, 219 A.2d at 644.

[25] *Id.* at 219, 219 A.2d at 645.

[26] *Id.* at 222, 219 A.2d at 646.

[27] *Id.*

[28] *Id.* at 223, 219 A.2d at 647.

[29] *Id.* at 222-23, 219 A.2d at 646-47.

Similarly, in *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*,[30] a real estate broker brought an action to compel the MLS to admit him as a member. Quoting from *Grillo*, the *Oates* court reinforced the adverse impact of the denial of MLS access.[31] In light of the application of antitrust principles in *Grillo*, the court invoked the concept of *per se* illegality, holding that the MLS's exclusion of the plaintiff restrained competition and that the members of the MLS had engaged in a classic concerted refusal to deal;[32] yet even though the *Oates* court deemed the *per se* approach warranted, it decided to analyze the defendant's contentions under the rule of reason as an alternative ground for its decision.[33]

The court characterized the defendant's membership restrictions limiting MLS access to board shareholders as an absolute bar to the admission of new members, going beyond *Grillo* where, theoretically at least, the membership requirements were capable of fulfillment. The requirements in *Oates* amounted to a club totally closed to outsiders.[34]

Oates was also noteworthy for its view in regard to what constitutes a more than *de minimis* restraint of trade. The defendant had argued that it is neither a monopoly nor a "near-monopoly," and that therefore the antitrust laws do not apply in such a situation. With MLS members comprising as little as 16% of all brokerage firms and only 20% of dollar volume in the area, the court found the illegality of the defendant's operation in its tendency to destroy competition, rather than its mere size or market share.[35] Furthermore, the court

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[30] 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971).

[31] *Id.* at 374-77, 380-82, 273 A.2d at 796-97, 800.

[32] *Id.* at 382-84, 273 A.2d at 796-97.

[33] *Id.* at 389, 273 A.2d at 805. In a subsequent Pennsylvania decision, Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A.2d 493 (1973), the court adhered to its initial characterization of MLS restrictions as *per se* illegal, finding that the exclusion of nonmembers was a naked common law restraint of trade. After three membership applications and subsequent denials, the plaintiff sought an injunction against the Main Line Board's restriction of MLS access to board members. The exclusionary nature of the case is demonstrated in the defendant's reasons for denying the plaintiff membership. *Id.* at 346, 304 A.2d at 494-95. The plaintiff had earlier brought charges against the defendant board, charging it with discrimination before the Pennsylvania State Human Relations Commission. Although the charge was dismissed by the Commission, the board was characterized by the court as feeling that the plaintiff had maligned its reputation by bringing the charge. The court would not allow the defendant to retaliate against the plaintiff for assisting a client in an attempt to assert his constitutional right to petition the government. *Id.* Without relying on either *Grillo* or *Oates*, the *Collins* court nevertheless came to the same conclusion that the effect of non-access to the MLS resulted in a nonmember's inability to compete in the buying and selling of real estate for clients as effectively as a member of the MLS. *Id.*

[34] 113 N.J. Super. at 392, 273 A.2d at 806.

[35] *Id.*

found these figures in and of themselves "substantial" and held that even if "substantiality" of impact were necessary to establish illegality, 20% of dollar volume (some $20,000,000 plus) was sufficient to satisfy that criterion.[36]

As outright exclusion cases, *Grillo* and *Oates* do not reflect the MLS access issue in the form that it has appeared in recent cases and consent decrees:[37] whether allowing all comers to participate in an MLS as long as all comers "voluntarily" choose Realtor board membership as a condition precedent to participate in the MLS unreasonably restrains trade. This precise issue was addressed in *Marin County Board of Realtors v. Palsson*.[38]

In *Palsson*, the Realtor board brought an action seeking a declaratory judgment that its denial of membership to a part-time broker was valid. Since three-fourths of the active brokers in the area were board members, this "primarily engaged" rule resulted in Palsson's preclusion from 75% of the market in terms of employment.[39] In addition to contesting the part-time work restriction, Palsson sought, as a completely separate issue, injunctive relief allowing him MLS access without having to join the Realtor board.[40]

The *Palsson* court was aware of the inappropriateness of applying the *per se* standard of review to the access rule because it could

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[36] *Id.*

[37] Although lacking significant precedential value, consent decrees ordering MLS access to any licensed real estate person regardless of Realtor board membership are of interest because they indicate the availability of less restrictive alternatives under a rule of reason analysis to a blanket refusal to permit MLS access to all licensed non-Realtor real estate agents. For example, in United States v. Multiple Listing Serv., Portland Bd. of Realtors, [1972] TRADE REG. REP. (CCH) ¶ 74,221 (D. Ore. 1972), the consent decree prohibited conditioning access to the MLS on Realtor board membership. The decree specifically prohibited requiring membership in any local, state, or national Realtor board or trade association as a condition for participating in the MLS. *Id.* at 93,022. In Westhampton Real Estate Bd., Inc., 944 ANTITRUST & TRADE REG. REP. (BNA), at D-2 (Dec. 20, 1979), the New York Attorney General charged that the defendant Realtor board unreasonably restricted access to its MLS by confining it to Realtor board members only, established unlawful "territorial restrictions on membership, imposed unreasonable fees and dues requirements to create unreasonable barriers to enter the MLS, and establish unreasonable restrictions on a member's conduct of its business in taking property listings." *Id.* In order to avoid litigation that would also have involved allegations of price-fixing, the Realtor board agreed, among other things, not to confine the use of the MLS to Realtor board members only. *Id.*

[38] 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976).

[39] *Id.* at 924-25, 549 P.2d 834-35, 130 Cal. Rptr. at 2-3.

[40] The additional relief sought by Palsson clearly required the court to deal with the issue whether conditioning access on Realtor board membership unreasonably restrains trade. This is evident from the contention made by the defendant board that since the "primarily engaged" rule was abandoned while the case was pending appeal, the issue before the court was therefore moot. The court rejected this contention, citing Palsson's alternative basis for relief as a justiciable controversy. *Id.* at 928-29, 549 P.2d at 837, 130 Cal. Rptr. at 5.

result in a situation where a trade association "which provides any economic benefit to its members would be compelled to provide that same economic benefit to nonmembers."[41] Apparently, there was something especially significant about the role of the MLS in the hierarchy of benefits offered by the board and its value as a competitive vehicle that in the opinion of the court warranted special consideration of the MLS access issue standing alone under the rule of reason.

The court then set forth the test for a rule of reason analysis: 1) examine the economic effects of the restraint in conjunction with 2) consideration of possible justifications for the restraint.[42] According to the *Palsson* court, "the antitrust laws are designed primarily to aid the consumer."[43] This objective manifests itself in a number of pro-competitive purposes. Competition will yield the optimal allocation of economic resources, the lowest prices, and the highest quality goods and services.[44] The Realtor board thus would be able to meet its burden of justifying its restrictions by demonstrating that the restraint results in such pro-competitive effects as either lower prices and/or superior performance in terms of quality of service than an MLS which operates without conditioning access on Realtor board membership. These pro-competitive effects, if indeed they exist, would then be weighed against the adverse impact on competition flowing from the restraint: 1) preclusion from 75% of the employing brokers who are board members giving them MLS access, 2) the preclusion from 35% of all real property in Marin County, and 3) what has become a standard recognition of the harmful effects of nonaccess to MLS as seen in *Grillo* and *Oates*.[45]

Viewed in light of this model, the Realtor board fell short of its burden. The possible justification of making trade association membership desirable by providing attractive benefits, previously acknowledged as proper by the court, did not lead to an absolute right to exclude nonmembers from all the benefits an association may offer. When an association's activities "begin to correspond directly with and touch upon the business activities of its members, and . . . the association has the power to shape and influence the economic environment of its particular market," it subjects itself to antitrust scrutiny.[46] With 75% of employability affected and 35% of all real

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[41] *Id.* at 931, 549 P.2d at 839, 130 Cal. Rptr. at 7.

[42] *Id.* at 934-35, 549 P.2d at 842, 130 Cal. Rptr. at 10.

[43] *Id.*

[44] *Id.* The court cited the Supreme Court's decision in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) to substantiate this proposition.

[45] 16 Cal. 3d at 934-35, 549 P.2d at 839, 130 Cal. Rptr. at 10.

[46] *Id.* at 937, 549 P.2d at 843, 130 Cal. Rptr. at 11.

property unavailable to nonmembers, the *Palsson* court had no difficulty in finding that the defendant Realtor board had the "ability to shape the economic environment of the Marin County residential brokerage market" in a substantial manner.[47] Repeating its acknowledgement that the board had the right to restrict some of its benefits to members only, the court held that MLS access was so essential to a broker to be able to effectively compete that all licensed salespersons who choose to use the service must be granted access.[48]

In elaborating on the application of a rule of reason standard, the court noted that the rule requires not only a demonstration that a restraint of trade "relates to a legitimate purpose, but also that it is reasonably necessary to accomplish that purpose and narrowly tailored to do so."[49] One of the board's proposed justifications for the restraints on MLS access was that such restraints are designed to foster the professional and ethical competence of real estate brokers and salespersons. While the court accepted the legitimacy of such a laudable goal, it also noted that the need for such oversight was minimal given California's pervasive state regulation of the real estate industry.[50] Furthermore, the board failed to demonstrate that its restraints on MLS access actually served to enhance professional or ethical competence to any significant degree. Finally, the restrictions were so broadly drawn that they failed to take into account that no matter how competent, ethical or professional a practitioner was, he was still swept into an all or nothing blanket preclusion.[51] In light of the anti-competitive effects previously noted, both restraints, the "primarily engaged" rule and conditioning MLS access on Realtor board membership, could not withstand rule of reason scrutiny.[52]

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[47] *Id.* at 938, 549 P.2d at 844, 130 Cal. Rptr. at 12.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 939, 549 P.2d at 845, 130 Cal. Rptr. at 12-13.

[51] *Id. See* State v. San Diego Bd. of Realtors, No. 375,827 (Super. Ct., San Diego County, May 23, 1978) (court weighed justifications for MLS access restrictions geared toward ensuring the upgrading of professional standards and found them insufficient to insulate their anticompetitive effects); notes 146-60 *infra* and accompanying text.

[52] A California Court of Appeals decision further clarified *Palsson*, holding that conditioning MLS access on Realtor board membership in and of itself violates the state antitrust laws. In Glendale Bd. of Realtors v. Hounsell, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977), the plaintiff, a licensed real estate broker in California, voluntarily chose not to join the local, state, and national Realtor trade associations. The Glendale Board of Realtors argued that *Palsson* stood for the proposition that only where the joint presence of the two anti-competitive practices (the "primarily engaged" rule *and* conditioning MLS access on Realtor board membership) existed were the antitrust laws violated; since *Glendale* lacked the "primarily engaged" problem, *Palsson* was not applicable. *Id.* at 212, 139 Cal. Rptr. at 832. The appellate court rejected this argument holding that *Palsson* considered separately under the rule of reason standard the

Grillo, Oates, and *Palsson* are representative of the decisions which have struck down MLS access conditions as unwarranted restraints of trade in violation of the antitrust laws. A number of courts interpreting state and federal antitrust provisions, however, have arrived at a contrary conclusion. Although a significant number of the decisions upholding membership restrictions appear to have been principally premised upon a finding that the MLS possessed an insufficient market power to subject the service to antitrust liability,[53] MLS access restrictions have been determined to be valid restraints which survive rule of reason scrutiny. Two cases arriving at this conclusion, *Barrows v. Grand Rapids Real Estate Board*[54] and *Iowa ex rel. Miller v. Cedar Rapids Real Estate Board,*[55] deserve mention.

In *Barrows,* exclusion of a nonmember was held to be reasonable where the nonmember was able to compete effectively and the majority of sales were made outside the MLS.[56] The court rejected the *per se* rule holding that *per se* illegality applies only in situations which exhibit severe restraints of trade and have little or no public benefit.[57] Although denied Realtor board membership, the plaintiff in *Barrows* never questioned why he was rejected nor did he attack the board's membership requirements as unreasonable. The plaintiff instead argued that he should be permitted access to the MLS without having to join a private trade association because any requirements imposed which are more exacting than state licensure provisions would violate the antitrust law.[58] The court found this argument unpersuasive.

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anti-competitive effect of each of these practices and concluded that each violated the state antitrust law. *Id.* The only issue in *Glendale* then was whether the MLS access condition had economic effects similar to those found in *Palsson*. *Id.* at 212-13, 139 Cal. Rptr. at 832. The *Glendale* court found the anti-competitive effects of non-access to the MLS to be substantial and not outweighed by any pro-competitive effects. Moreover, the court placed significant weight on the testimony of a leading Glendale Realtor that a broker practicing his livelihood in the Glendale board's territory must have access to its MLS in order to compete effectively with brokers with MLS access. *Id.*

[53] *See, e.g.*, Brown v. Indianapolis Bd. of Realtors, [1977-1] TRADE REG. REP. (CCH) ¶ 61,435, at 71,612 (S.D. Ind. 1977) (only one-sixth of brokers and salespeople in trade area were board members and only one-sixth of board members participated in MLS); Grempler v. Multiple Listing Bureau, Inc., 258 Md. 419, 266 A.2d 1 (Md. Ct. App. 1970) (plaintiff operated branch office in county where MLS not dominant factor in marketplace as evidenced by small percentage of eligible brokers who participated; of 72 licensed brokers, only 12 were associated with MLS).

[54] 51 Mich. App. 75, 214 N.W.2d 532 (1974).

[55] [1979] TRADE REG. REP. (CCH) ¶ 63,012 (D. Iowa 1979).

[56] 51 Mich. App. 75, 93, 214 N.W.2d 532, 540 (1974).

[57] *Id.* at 94-95, 214 N.W.2d at 542.

[58] *Id.* at 80, 214 N.W.2d at 534. *See also* Kaechele, *Exclusion From Real Estate MLS As Antitrust Violations,* 14 CAL. W. L. REV. 298, 311-12 (1978).

Moreover, under a rule of reason analysis, the court determined that the restraints did not violate the antitrust laws. The court viewed the restraints as valid because: there was no monopoly; there was substantial competition between board members using the MLS; there was no specific claim of discrimination concerning board membership; there was no intent nor purpose to injure nonmember competitors.[59] In sum, without any empirical substantiation of the Realtors' position, the court nevertheless concluded that the experience and full-time commitment requirements for Board membership were "reasonably designed to assure that new members will be professionally competent and will generate their share of listings."[60]

The decision by the United States District Court for the District of Iowa in *Iowa ex rel Miller v. Cedar Rapids Real Estate Board*[61] offers the most direct support for the proposition that MLS access conditioned upon Realtor board membership in and of itself does not violate the antitrust laws unencumbered by complicating attendant circumstances. Unfortunately, the *Cedar Rapids* opinion is marred by inconsistency and incompleteness. The most glaring omission in the *Cedar Rapids* opinion is the court's total lack of consideration, even recognition of, *Palsson* which dealt with the identical issue before the court. Nor did the Iowa court consider *National Society of Professional Engineers v. United States*[62] which established impact on competition as the key criterion, even overriding alleged ethical concerns, in a restraint of trade situation examined under a rule of reason standard.[63]

In *Cedar Rapids,* much was made of the contention that if non-Realtors were allowed access to the MLS without a corresponding obligation to devote volunteer time to the board, it would be doubtful that the board could continue to generate the amount of volunteer time on which the operation of the board and MLS depends.[64] While this may be true with reference to that board, such a view completely

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[59] 51 Mich. App. at 94-95, 214 N.W.2d at 542.

[60] *Id.*

[61] [1979] TRADE REG. REP. (CCH) ¶ 63,012 (D. Iowa 1979).

[62] 435 U.S. 679 (1978). For a discussion of the importance of the holding in *Professional Engineers,* see notes 150-54 *infra* and accompanying text.

[63] The court's determination that the requirement of board membership did not substantially interfere with competition may have been decidedly influenced by the fact that only a small percentage of real estate in the area was handled by the MLS. [1979] TRADE REG. REP. (CCH) ¶ 63,012, at 77,042. Indeed, one court has referred to this decision as representative of cases where the court had upheld the restrictions because the MLS lacked sufficient market power. United States v. Realty Multi-List, Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624, at 77,310 n.40 (5th Cir. 1980). *See* note 53 *supra* and accompanying text.

[64] [1979] TRADE REG. REP. (CCH) ¶ 63,012, at 77,043.

ignored the fact that in California, Oregon and New York such an unsupported conclusion does not apply to the MLS.[65]

The *Cedar Rapids* opinion stated that "[u]nless MLS participants and the public are assured that the board's Code of Ethics apply, and recourse to the board's grievance and arbitration committees is available, neither brokers, nor the public, are likely to use the MLS."[66] Yet the court failed to reveal its basis for accepting a conclusion that the public relies upon or is even aware of a Realtor "Code of Ethics" in deciding with whom to deal in the real estate transaction process.[67] It is more probable that consumers have come to perceive the word "Realtor" as generic in that the term merely designates anyone licensed to practice real estate brokerage. Furthermore, Realtor board grievance and arbitration procedures rarely deal with consumer complainants; rather, boards overwhelmingly oversee disputes among brokers with the vast majority of such grievances and arbitrations involving commission disputes between brokers.[68]

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[65] *See, e.g.*, United States v. Multiple Listing Serv., Portland Bd. of Realtors, [1972] TRADE REG. REP. (CCH) ¶ 74,221, at 93,021 (D. Ore. 1972); Marin County Bd. of Realtors v. Palsson, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976); Glendale Bd. of Realtors v. Hounsell, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1976); State v. San Diego Bd. of Realtors, No. 375,827 (Super. Ct., San Diego County, May 23, 1978); *In re* Westhampton Real Estate Bd., Inc., 944 ANTITRUST & TRADE REG. REP. (BNA) at D-2 (Dec. 20, 1979). It should be noted that at least 10 MLS' in New Jersey currently allow any licensed real estate person to have MLS access regardless of Realtor board membership. *See* note 157 *infra*.

[66] [1979] TRADE REG. REP. (CCH) ¶ 63,012, at 77,042.

[67] The Realtor Code of Ethics does little to improve on state rules, regulations and statutes dealing with the licensure and practice of real estate. *See* N.J. STAT. ANN. § 45:15-6 & 15-7 (West 1976); N.J. ADMIN. CODE § 11:15-1.1 to 1.32. Such duplication accounts for courts' concerns over a private trademark group's power to control an industry through the leverage applied to MLS access via acceptance of a code of ethics. This is the preemption argument by which numerous courts have recognized that state real estate commissions are the proper vehicles for deciding, in effect, who should practice real estate. *See generally* Grillo, 91 N.J. Super. 202, 219 A.2d 635; Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A.2d 493 (1973). Realtor ethics differ from state rules and regulations in one important respect: although the Realtor Code of Ethics adds virtually nothing to the body of agency, contract, and tort law that forms the basis for the legal underpinnings of real estate practice, the Code includes numerous anti-competitive provisions. For example, the Code prohibits negotiation by other than the listing broker, regardless of the will of the seller. It prohibits brokers from soliciting an employing or independent contractor of another Realtor. It forbids Realtors from soliciting a listing which is currently listed exclusively with another broker. A member of a Realtor board binds himself to mandatory arbitration of disputes where Realtors monitor practitioner behavior. Such a situation permits a private trademark group with its clear economic self-interest to control matters in dispute which often results in overzealous and overbroad prohibition of conduct that is not clearly undesirable. *See* Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 199. For further analysis of the importance of adherence to the Realtor Code of Ethics as a justification for MLS access, see notes 146-60 *infra* and accompanying text.

[68] *Arbitration, A Service of a Board of Realtors*, 21 N.J. REALTOR 1 (Oct. 1979).

The *Cedar Rapids* court expressed concern that the public, as well as brokers, would foresake the MLS without the Realtor Code of Ethics standing behind it. Yet the court accepted a 26% market share for the MLS (all real estate, not just residential). Consequently, with 74% of all real estate sold in Linn County, Iowa, bypassing the MLS, there appears to be an inherently contradictory perception by the court of "assurance" and "confidence" on the part of "brokers and the public" in the Realtors' operation of the MLS.[69]

Summing up the judicial treatment of MLS access in general and conditioning MLS access on Realtor board membership in and of itself in particular, the more recent decisions seem to support the position that 1) where market control in the form of market share is evident, 2) non-access to the MLS results in anti-competitive effects and 3) the private trade association can offer no more justification for conditioning MLS access on Realtor board membership beyond trade association puffery and propaganda, the condition precedent is likely to be held an unreasonable restraint of trade.

III. THE RULE OF REASON: A FRAMEWORK FOR ANALYSIS OF THE MLS ACCESS ISSUE

In examining the requirement that one must join a Realtor board in order to gain access to an MLS, the rule of reason provides the framework necessary to analyze such a restraint's impact on competition. Section one[70] of the Sherman Act and section 56:9-3 of the New Jersey Statutes Annotated[71] both proscribe agreements or combinations in restraint of trade. Competition is the touchstone of the Sherman Act and it reaches all unreasonable restraints on competition.[72] To determine whether conduct unreasonably restrains competition, courts apply a balancing test in considering a number of factors integral to the application of the rule of reason.[73]

Under a rule of reason analysis, the burden of proof is on the plaintiff to show that the conduct complained of is anti-competitive, that less restrictive alternatives are available, and that the restraint is

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[69] [1979] TRADE REG. REP. (CCH) ¶ 63,012, at 77,043.

[70] 15 U.S.C. § 1 (1976).

[71] N.J. STAT. ANN. § 56:9-3 (West Cum. Supp. 1979-1980).

[72] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58-59 (1911); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628, 637 (D.D.C. 1979); Grillo v. Board of Realtors of Plainfield Area, 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966).

[73] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

therefore unreasonable.[74] In order to gauge the competitive impact of the restraint, a court must first evaluate the market power of the defendant and the overall structure of the market.[75] An evaluation of the alleged justifications for the agreement and whether the restraints imposed are necessary to attain the goal sought to be achieved through the agreement is then undertaken. Consideration of less restrictive alternatives is thus an important factor to be evaluated. These factors, integral to a rule of reason analysis of the MLS access issue, will be individually examined in the following sections.

A. The Relevant Market

In order to assess the market power of a particular MLS, and its potential for causing anti-competitive harm, the definition of the relevant market is, of necessity, the threshold determination. In the context of the MLS access issue, there are clear market delineations to be had for antitrust purposes.[76] The party challenging the restraint should have no greater burden than to demonstrate the existence of a market which provides a clear and substantial commercial advantage to its participants to the exclusion of nonparticipants.[77] Furthermore,

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[74] DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1344 (9th Cir. 1980); Cowley v. Braden Indus., Inc., No. 77-3272 (9th Cir. Jan. 8, 1980); Continental T.V., Inc. v. GTE Sylvania, Inc., No. 79-4131 (9th Cir. Jan. 7, 1980); Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977).

[75] United States v. Columbia Steel, 334 U.S. 495, 527 (1948); Harold Friedman, Inc. v. Thorofare Mkts., 587 F.2d 127, 143 (3d Cir. 1978); II P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 500, at 321 (1978).

[76] Interestingly, few of the reported decisions to date appear to have had to grapple in detail with the relevant market as an issue. *But see* Pomanowski v. Monmouth County Bd. of Realtors, 175 N.J. Super. 212, 417 A.2d 1119 (Ch. Div. 1980) discussed in text accompanying notes 190-218 *infra*. For example, in *Oates* the court had a clear concept of the scope of the geographic market—the chartered territory in the form of assigned municipalties or towns covered by the defendant MLS. Oates, 113 N.J. Super. at 375, 273 A.2d at 797. In *Palsson*, the California Supreme Court, apparently with no issue taken by either side, considered as relevant the residential housing market in Marin County. Palsson, 16 Cal. 3d at 935, 549 P.2d at 842, 130 Cal. Rptr. at 10. The court in *State v. San Diego Bd. of Realtors* characterized the residential housing market as one in which large numbers of listings are necessary in order for a typical broker to compete effectively. The court perceived that a residential buyer will seek a broker who has access to as many listings as possible and went on to state that no evidence has been presented that such a situation prevails in the investment or commercial market. State v. San Diego Bd. of Realtors, No. 375,827, slip op. at 9 (Super. Ct., San Diego County, May 23, 1978). The court concluded that clients of investment or commercial property brokers rely much more upon the expertise and experience of the broker than upon his inventory of listings or access to an MLS. *Id. See also* United States v. Realty Multi-List, Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624 at, 77,309 (5th Cir. 1980) (undisputed that relevant product market was residential real estate brokerage services and that relevant geographic market was county in which service operated).

[77] L. SULLIVAN, ANTITRUST 64 (1977).

although for every product or service substitutes exist, a relevant market cannot encompass such an infinite range; the scope of the market must be drawn narrowly to exclude any other product or service to which, within reason, only a limited or incidental number of buyers will turn.[78] Within these parameters then, the relevant market issue must be examined in two respects: the scope of the product market and the geographic market.

1. Product Market

The *Brown Shoe, Inc. v. United States*[79] decision serves as the landmark for providing criteria to isolate and define the relevant product market. In that case the Supreme Court recognized the economically significant submarkets of a product in order to determine the relevant anti-competitive effects of a challenged restraint.[80] "The boundaries of such . . . submarket[s] may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's [or service's] peculiar characteristics and uses, unique facilities, distinct customers and vendors and their respective specialized needs."[81] Within a broad market such as real estate, distinct submarkets or market segments exist which constitute separate markets for antitrust purposes, the most significant of which is the distinction between the consumer and commercial/industrial submarkets.

From a marketing perspective, one of the most fundamental ways of segmenting an overall product or service market[82] is to divide it into consumer and industrial/commercial submarkets.[83] These two

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[78] Times Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

[79] 370 U.S. 294 (1962).

[80] *Id.* at 325-26. The court defined three distinct submarkets of shoes: men's, women's and children's shoes. Although these three products were combined in some retail outlets, they were nevertheless determined to constitute three distinct relevant product submarkets for purposes of the antitrust implications of the merger of two shoe companies. *Id.*

[81] *Id.* at 325. Fleer Corp. v. Topps Chewing Gum, Inc., [1980-2] TRADE REG. REP. (CCH) ¶ 96,160 (E.D. Pa. 1980); United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1103 (C.D. Cal. 1979).

[82] Market segmentation is the process of dividing a large heterogenous market (such as real estate) into several smaller segments which exhibit common characteristics. Each segment requires a special marketing program tailored to its unique market orientation. W. STANTON, FUNDAMENTALS OF MARKETING 50 (4th ed. 1975). The residential real estate industry is presently using marketing research to help define the needs of various consumer segments so that new home construction will be coordinated with readily ascertainable consumer demands, thereby boosting housing sales. *Marketing Research Rescues Depressed Housing Industry*, 13 MARKETING NEWS 4 (Feb. 8, 1980).

[83] W. STANTON, *supra* note 82, at 50.

segments are distinct primarily because of the different buyer behavior characteristic of each.[84] While consumers buy products for their own personal or household use, industrial or commercial buyers representing business organizations purchase in accordance with functional considerations dictated by their commercial needs.[85] Consequently, a seller's marketing program will differ depending upon whether he is selling to the consumer or to the industrial/commercial market.[86]

Real estate trade association data and trade literature reveal a recognition of these distinct relevant submarkets in the real estate industry.[87] Within the industrial/commercial market, factors important to purchase decisions include capitalization rates, internal rates of return, pay-back scheduling, amortization, cash flow, and present value analysis—terminology that is alien to the average consumer.[88] On the other hand, a buyer in the consumer/residential market relies on substantially different criteria in selecting a house. Whereas buyers in the industrial/commercial market tend to focus on the rational and functional, the consumer/residential buyer is motivated by psychological, emotional, status, and life style needs.[89] Sales factors will therefore vary depending on the purchaser's characteristics and circumstances. Real estate brokers realize this and aim their sales techniques at satisfying these particular desires.[90] If the needs of the market segments were the same there would be no need for such specialized Realtor designations as Certified Residential Specialist, Certified Commercial/Investment Member and Certified Real Estate Broker Manager.[91]

Usually, a broker specializing in consumer/residential sales is not experienced enough to service the unique needs of an industrial/commercial purchaser.[92] For example, since 1963, Denver has had a

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[84] *Id.* at 52.

[85] *Id.* at 50.

[86] *Id.*

[87] Published trade materials are admissable evidence in federal courts. FED. R. EVID. 803(17). Courts presiding over antitrust cases have consistently acknowledged the importance of such "practical indicia" to determine industry recognition of relevant markets. *E.g.*, Brown Shoe, 370 U.S. at 325.

[88] *See* Lyon, *ABC's of Investment Analysis*, 13 REAL ESTATE TODAY 20 (Feb. 1980) (discussion of commercial buyer's use of property as an investment and corresponding approach a broker should take to make sale).

[89] *See* Hull, *A Complete Guide to Qualifying*, 13 REAL ESTATE TODAY 39 (Feb. 1980). For example, economy minded home buyers will want energy efficient homes, while status oriented purchasers will seek a prestigious location. *Id.* at 41.

[90] *See* Lyon, *supra* note 88; Hull, *supra* note 89.

[91] *See* Craig, *A Network of Knowledge*, 13 REAL ESTATE TODAY 29-30 (Sept. 1980).

[92] *See* Faraci, *Business Seminars: An Exciting Marketing Approach*, 13 REAL ESTATE TODAY 45 (Feb. 1980).

separate commercial listing service. The industrial/commercial brokerage firms that were part of the primarily residential MLS needed something more useful to the commercial salesperson.[93] The firms doing the greatest proportion of business in industrial/commercial sales did not use the existing MLS because it was not specialized enough for their use.[94]

Such an example of the specialized vendor criterion is often significant in delineating the relevant product market. In the recent case of *Photovest v. Fotomat*,[95] the Court of Appeals for the Seventh Circuit, after closely analyzing the film processing services offered by the various retail outlets, concluded that although the end product of the "drive-thru-kiosk" and the conventional method is virtually identical, the total service is quite different.[96] In particular, the court noted that the Fotomat vendor is more of a specialist than the salespersons in drug stores, supermarkets and discount stores that offer film processing.[97] Not only did the industry itself perceive the "drive thru" market as a separate entity,[98] but consumers also perceived the various film processing outlets as distinct.[99]

Case law subsequent to the *Brown Shoe* decision has bolstered the proposition that consumer's perceptions and characteristics are important factors in the market definition process. Relying on the Supreme Court's guidelines, the court in *L.G. Balfour Co. v. Federal Trade Commission*[100] reasoned that college students buying fraternity emblematic jewelry had characteristics that differentiated them from purchasers of other types of jewelry, and thereby composed a submarket of the jewelry market.[101] Further, the Court of Appeals for the Seventh Circuit held, in *United States v. Household Finance Corp.*,[102] that finance companies make up a distinct market segment of the personal loan industry because they offer unique

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[93] Saros, *Is There a Future For a Commercial MLS?*, 13 REAL ESTATE TODAY 14 (June 1980).

[94] *Id.*

[95] [1979-2] TRADE REG. REP. (CCH) ¶ 62,869, at 79,019 (7th Cir. 1979).

[96] *Id.* at 79,026. The court relied upon the *Brown Shoe* criteria, *see* text accompanying notes 79-81 *supra*, to examine the extent of the relevant market. *Id.* at 79,025.

[97] *Id.* at 79,026.

[98] *Id.*

[99] *Id.*

[100] 442 F.2d 1 (7th Cir. 1971).

[101] *Id.* at 9-11. The court refused to consider alternative sources of supply because such an examination ignores the behavior of consumers. *Id.* at 11.

[102] 602 F.2d 1255 (7th Cir. 1979).

services to a class of high risk customers not serviced by other loan institutions.[103]

Additionally, where products or services appear on the surface to be part of the same market, but differ in terms of price, the difference can scope the relevant market. The *Photovest* court focused on distinctive pricing to suggest the existence of a separate submarket.[104] In another vein, based on the differences of average ticket prices, professional hockey has been held to constitute a market separate from amateur hockey.[105] Taking price as well as customer characteristics into consideration, the Supreme Court has found the promotion of championship boxing events to constitute a separate submarket of the entire professional boxing industry.[106] Since the commission charged for commercial property differs by as much as 50% from the commission charged for existing residential housing, such a price differential further supports the separation of the consumer and industrial/commercial markets in the real estate industry.

To claim that the relevant product market within which the conditioning of MLS access on Realtor board membership is examined should encompass all real property—land, commercial, industrial, investment—therefore does not square with economic realities and existing case law. There is no question that the overwhelming type of real estate that passes through an MLS is residential with some smattering of land, commercial and industrial.[107] Furthermore, Realtor trade literature recognizes that residential consumers behave differently in terms of purchasing decisions than commercial/industrial purchasers and that service providers to these separate market segments differ in knowledge, ability, and undestanding of each separate

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[103] *Id.* Similarly, in Affiliated Music Enterprises, Inc. v. Sesac, Inc., 260 F.2d 13 (2d Cir.), *cert. denied*, 361 U.S. 831 (1959), the court held that gospel music was a distinct submarket of the music industry since gospel music appealed to a distinct market segment which did not recognize any substitutes for their choice of music.

[104] [1979-2] TRADE REG. REP. (CCH) ¶ 62,869, at 79,026 (7th Cir. 1979) Fotomat's pricing for film processing was found to be approximately 20% or more higher than conventional retail outlets and 50% higher than those of most drug stores and discount outlets. *Id.* at 79,024. While this price disparity alone was insufficient to establish a relevant market, the fact that higher prices did not hinder Fotomat's growth as a company was evidence that it was able to offer the public a unique service. *Id.* at 79,026. *See also* Avnet, Inc. v. Federal Trade Comm'n, 511 F.2d 70 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975) (price differential of 25% to 50% significant factor in court's determination of distinct submarkets for new and rebuilt alternators and generators).

[105] Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

[106] International Boxing Club Inc. v. United States, 358 U.S. 242 (1959).

[107] *See, e.g.*, Pomanowski v. Monmouth County Bd. of Realtors, 166 N.J. Super. 269, 399 A.2d 990 (App. Div. 1979).

market.[108] Finally, price or commission charged for Realtor's services varies as a function of whether the property involved is residential or commercial/industrial—a key variable in delineating market segments.[109]

2. *Geographic Market*

An important factor in scoping the proper geographic market in cases assessing Realtor Board membership requirements for access to an MLS is that Realtor Boards have chartered jurisdiction territories with assignments made by the National Association of Realtors. Although Realtor boards do not attempt to dictate to MLS participants the areas in which they may solicit listings through airtight exclusive territories, the relatively miniscule number of listings coming from outside a board's chartered territory in conjunction with such barriers to entry as nonresident Realtor status[110] serve to effectively scope and protect one board's territorial enclave from another. The granting of the right to use the term "Realtor" in a specified geographic area is analogous to territorial geographic allocations long used by distributors and franchisors to protect turf and allocate specific markets among franchisees and customers. Incidental and peripheral sales outside the chartered territorial jurisdiction of an MLS do not diminish the forcefulness of protective mechanisms surrounding each board MLS's geographic allocation.[111] Nonresident Realtor status requires a broker who is already a Realtor in his "home turf" to become a Realtor twice, three times, *etc.*, or as many times that it takes to do business in a different board's MLS territory with all the concomitant dues, fees, and costs. The Realtor-Associate program penalizes an already existing Realtor by attaching a capitation fee per sales associate of the Realtor which would certainly temper the expansion-minded Realtor from straying beyond his own well-protected enclave.[112]

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[108] *See* notes 87-91 *supra* and accompanying text.

[109] *See* notes 104-06 *supra* and accompanying text.

[110] Nonresident Realtor status requires a broker who is a Realtor in one board's chartered territorial jurisdiction to join additional boards. An expansion-minded Realtor-Broker may join as many MLS units and Realtor Boards as he wishes, if he can afford to.

[111] Airtight horizontal territorial allocations would be *per se* illegal. *See, e.g.*, Professional Engineers, 435 U.S. at 692.

[112] To provide just one example of the protective effectiveness of such barriers to entry, the author is aware of a Realtor in the Plainfield Board territory (obviously a Realtor already since Plainfield requires board membership for MLS access) who would like to enter the Monmouth County and Somerset County markets through their respective MLS'. To do so would require an outlay of $2,600.00 just for board membership costs, part of which expenditures will recur on an annual basis, exclusive of MLS costs, for access to the three territories. Although a licensed broker, this Realtor cannot afford to enter the other two markets.

But for the protective barriers erected around each chartered territory[113] it is difficult to fathom the purpose behind such requirements. If one is already a Realtor presumably adhering to the Code of Ethics in his home turf, one would not expect him to become immoral, unethical, and deceptive if he takes or sells a listing in another board's MLS territory. Also, he presumably has Realtor seminars and education programs available to him in his own territory. If a need should arise to patronize a program in another board territory, it is not clear why this nonresident Realtor could not simply be assessed the cost to participate in the program since this would not diminish his ability to compete anywhere in the state.

In the majority of cases, the relevant geographic market is consequently defined by the chartered jurisdiction of the MLS;[114] yet one of the complicating factors in delineating the geographic market in an MLS access case is the weight assigned to marginal sales that occur outside of the chartered territorial jurisdiction. If any and all sales that pass through the MLS are considered as part of the relevant market, the MLS would not likely account for significant portion of the sales activity in the market as so defined. Any minimal sales activity outside of the allocated territory of the MLS would automatically result in an infinite geographic market since even one sale or listing from any extremity within a state could conceivably

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[113] Such devices resemble territorial protection mechanisms such as profit pass-overs and areas of primary responsibility. *See generally* Evans, *Area of Primary Responsibility Clauses and the Anti-Trust Laws*, 35 U. PITT L. REV. 671, 681-84 (1974); Schildkraut, *Responsibility and Other Territorial Restrictions in Channels of Distribution Under the Antitrust Laws: A Legal and Economic Analysis*, 11 COLUM. J.L. & SOCIAL PROBLEMS 509 (1975); Trombetta, *Distribution Practices Meet A Revitalized Sherman Act, reprinted in* R. LUSCH, CONTEMPORARY ISSUES IN MARKETING CHANNELS 113 (1979). The case of Superior Bedding v. Serta Ass'n, 353 F. Supp. 1143 (N.D. Ill. 1972), illustrates the concept of primary responsibility. Serta was primarily a licensor of patents, trademarks and trade names for bedding products. *Id.* at 1145. Prior to 1968, Serta granted to Superior Bedding and other licensees the exclusive right to manufacture and sell Serta products in prescribed territories. *Id.* After a consent agreement in which the territorial allocations were declared unlawful, the licensees still held on to their former territories changed to "areas of primary responsibility." *Id.* at 1147. The difference was that the licensees were no longer absolutely restricted to their own territories. The area of primary responsibility secured each licensee from excessive encroachment. This territorial protection was accomplished through a "profit pass-over" plan. *Id.* at 1150. Expansion-minded licensees were penalized for their territorial intrusions by being required to "pass-over" a percentage of gross sales to compensate the "invaded" licensee for loss of advertising expenditures, sales effort and "goodwill." *Id.* Similarly, non-Resident Realtor status and the Realtor-Associate program can be used as surrogate profit pass-over and area of primary responsibility devices to temper enthusiasm for Realtors seeking to penetrate a chartered territorial jurisdiction other than their own "home turf."

[114] *See, e.g.*, United States v. Realty Multi-List, Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624, at 77,310 n.39 (5th Cir. 1980); Palsson, 16 Cal. 3d at 935, 549 P.2d at 842, 130 Cal. Rptr. at 10; Oates, 113 N.J. Super. at 375, 273 A.2d at 797.

wind up in any MLS. This complication, however, should be resolved by looking at sales percentages and the economic realities of the marketplace.

The impact of incidental and peripheral sales outside the relevant geographic area was evaluated in *Battle v. Liberty National Life Insurance Co.*[115] In that case, the Court of Appeals for the Fifth Circuit found that an attempt to monopolize claim was adequately stated in spite of mere conclusory allegations establishing a relevant geographic market.[116] In language particularly suited to the MLS access issue the court acknowledged that while "there might be some limited excursions outside the territorial boundaries . . . the perimeters of the 'exact spot' of a relevant market need not be outlined. It is enough to show a relevant area in which the defendants might exclude competition."[117]

Even with 20% of sales outside the market area, the relevant market was still held to be where the bulk of sales were made in *Donald B. Rice Tire Co. v. Michelin Tire Corp.*[118] In *Rice Tire*, a dealer sued a tire manufacturer alleging that termination of his dealership constituted an unreasonable restraint of trade in violation of the Sherman Act.[119] The evidence indicated that in 1972 the plaintiff competed almost exclusively within a 150 mile radius of Frederick, Maryland. By 1977, however, approximately 20% of his sales occurred outside of this area.[120] In assessing the competitive consequences of the restraint, the district court nevertheless defined the relevant geographic market as the Frederick area since it was within this area that the "great bulk" of the local distributor's business was conducted.[121]

The test applied in *Rice Tire* would serve to limit the relevant geographic market for MLS access cases. Instead of woodenly expanding the market to include a distant area merely because a single

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[115] 493 F.2d 39 (5th Cir. 1974), *rehearing denied*, 503 F.2d 567 (1975).

[116] *Id.* at 45-46.

[117] *Id. See also* United States v. Pabst Brewing Co., 233 F. Supp. 475, 487-88, 495 (E.D. Wis. 1964), *rev'd*, 384 U.S. 546 (1966).

[118] 483 F. Supp. 750(D. Md. 1980).

[119] *Id.* at 751.

[120] *Id.* at 752.

[121] *Id.* at 756. The court also cited professors Areeda and Turner for the proposition that "two areas are ordinarily separate markets where there are no or only episodic sales between them." II "P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 523, at 358 (1978). *See* United States v. Yellow Cab Co., 332 U.S. 218, 225-26 (1947); United States v. National City Lines, 186 F.2d 562, 567-68 (7th Cir. 1951). A relevant geographic market could even be as small or narrow as a section of a city—a downtown theatre district was held to be a relevant geographic submarket in William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948).

listed property comes from that area, the geographic market would be confined to the territory representing the "bulk" of the business of the MLS.

Entry barriers may also assist in scoping a relevant geographic market.[122] For example, where large promotional and advertising costs are necessary to introduce a product into a new territory, these costs may create significant barriers to entry into that territory, thereby scoping the territory as a distinct geographic market.[123] Analogous to the burdensome cost barriers to product marketing are the barriers which are imposed upon Realtors who participate in one MLS and seek access to a second chartered MLS jurisdiction. Generally, nonresident Realtor status and Realtor-Associate standing are prerequisites for Realtors and Realtor Associates to gain access to any additional MLS markets regardless of the fact that they apparently already adhere to the Realtor Code of Ethics and can partake of Realtor board benefits and services offered by their own local boards. These barriers to entry therefore suggest an attempt to protect territories from outside competition while not going as far as establishing airtight horizontal territorial allocations which would result in a *per se* violation and potential criminal liability. While a Realtor board controlled MLS may accept a marginal amount of listings outside its chartered territorial jurisdiction, clearly the board has the capacity to act anti-competitively on its home ground. Local Realtor boards effectively assure that the bulk of listings and sales in an MLS territory do pass through the "home" MLS with minimal interference from outsiders. It is therefore apparent that the chartered territorial jurisdiction of an MLS is the appropriate geographic market in which to assess the effect on competition.

B. Effect of Non-Access: Survival or Significant Competitive Advantage?

Under a rule of reason standard, it is important to recognize how significant the business advantage in the relevant market must be in order to invoke the antitrust laws, particularly within the context of a

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[122] Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973). Certain barriers to entry in a market area require that such an area be designated the relevant geographic market, even though the product or service is actually distributed or offered more widely. Brown, *Relevant Geographic Market Delineation: The Interchangeability Standard in Cases Arising in Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 1979 DUKE L.J. 1152, 1159.

[123] In United States v. Mrs. Smith's Pie Co., 440 F. Supp. 221 (E.D. Pa. 1976), the district court found cost barriers to be a significant factor in its definition of a relevant geographic market. *Id.* at 229. *See generally* Elzinga & Hogarty, *supra* note 122, at 61.

trade association claiming that nonmembers seeking access to its advantages do not do so out of any desperate need to survive. In the context of the MLS access issue, the nature of the competitive advantage is important since the established board members may claim that nonmembers seeking access to its resources do not have a legitimate business need for these services and are not injured by the membership restriction. Several noteworthy cases, however, demonstrate that it is the existence of a significant competitive advantage, rather than merely the inability to survive without membership, that is the key criterion for antitrust purposes.

In a leading Supreme Court decision, *Silver v. New York Stock Exchange*,[124] the New York Stock Exchange denied the plaintiff nonmembers of the Exchange the right to have a direct wire phone connection with members. The Supreme Court determined that an arrangement which deprived the plaintiffs of a valuable business service which they needed in order to compete effectively was violative of the Sherman Act.[125]

Courts addressing the MLS access issue have directly considered the nature of the competitive advantage required to invoke the antitrust laws. In *Palsson*, the California Supreme Court found that a rule which conditioned MLS access upon Realtor membership seriously hampered the competitive effectiveness of non-Realtor licensed brokers and salespersons.[126] In keeping with the antagonism toward restraints which work a competitive disadvantage, the *Palsson* court held that a trade association's freedom to exclude competitors from access to significant competitive benefits is limited by the antitrust laws when "its activities begin to correspond directly with and touch upon the business activities of its members" and where "the association has the power to shape and influence the economic environment of its particular market."[127] Because access to the Realtor Board is important to nonmembers' ability to compete effectively, the court concluded that such access could not be denied to salesmen simply because they operated on a part time basis.[128]

Similarly, in *Collins v. Main Line Board of Realtors*,[129] the court characterized the test of the impact of MLS nonaccess as follows: "In effect, a nonmember [of MLS] cannot compete in the buying and

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[124] 373 U.S. 341 (1963).
[125] *Id.* at 347.
[126] Palsson, 16 Cal. 3d at 935, 549 P.2d at 842, 130 Cal. Rptr. at 10.
[127] *Id.* at 937, 549 P.2d at 843, 130 Cal. Rptr. at 11.
[128] *Id.* at 940, 549 P.2d at 845, 130 Cal. Rptr. at 13.
[129] 452 Pa. 342, 304 A.2d 493 (1973).

selling of real estate for clients as effectively as a member of the appellee corporation."[130] In short, the test of access to a competitive vehicle has never been whether an entity could survive without membership, but whether membership constitutes a significant business advantage.

C. The Anti-Competitive Impact of Non-Access to the MLS

As noted, a key factor under a rule of reason analysis is to ascertain whether the restraint has an anti-competitive impact.[131] Whether a licensed real estate broker or salesperson is not participating in an MLS either as a result of an arbitrary exclusion or voluntary choice, the anti-competitive impact of such nonaccess is clear and has been recognized by the courts.[132] Where it is established that the MLS controls sufficient market share to make non-access economically disadvantageous, the anti-competitive impact is tantamount to judicial notice. For example, in *Oates*, the court found a tendency to destroy competition with as little as 20% of the dollar volume of sales produced in the area per year (approximately $20 million) precluded to the plaintiff.[133]

Requiring brokers to join the board in order to obtain access to the MLS effectively limits a homeowner in his selection of a listing broker. If the homeowner prefers broker X but broker X is not a member of the board, thereby precluding him from MLS, the homeowner must deal with a broker who is a board member or else forego advantages of MLS exposure. The advantages of MLS access are described in *Grillo*:

> Plaintiff and others who are nonmembers of defendant Board are placed at a competitive disadvantage as a result of the defendants' action in combination. Nonmember brokers, unable to provide the advantages of the multiple listing system, may lose the listings of sellers who are interested in displaying their property to the widest possible audience. The prospective buyer who is interested in a broad selection will most likely go to a Board member who

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[130] 452 Pa. at 348, 304 A.2d at 496.

[131] *See* text accompanying notes 72-75 *supra*. *See also* note 149 *infra*.

[132] Palsson, 16 Cal. 3d at 935-36, 549 P.2d at 842, 130 Cal. Rptr. at 10; Glendale Bd. of Realtors v. Hounsell, 72 Cal. App. 3d at 212-13, 139 Cal. Rptr. at 832; Oates, 113 N.J. Super. at 381-82, 273 A.2d at 800-01; Grillo, 91 N.J. Super. at 222-23, 219 A.2d at 646-47; Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1331 (1970); Kaechele, *Exclusion from Real Estate Multiple Listing Services as Antitrust Violations*, 14 CAL. W. L. REV. 314-15 (1978).

[133] Oates, 113 N.J. Super. at 391-92, 273 A.2d at 806.

> can offer him all the properties listed with other Board members in the area. The nonmember broker will not be able to serve effectively the prospective buyers who do come to him. He is precluded from offering for sale a high percentage of the properties which are for sale in the Board's area. Many of the properties for sale will be unknown to the nonmember broker—although the Board member has easy access to this same information. If the non-member broker does learn of a property which has been multiple listed, and finds a buyer for it, he will not be able to make the sale. The selling owner, already committed to pay a commission to a Board member, cannot afford to sell through the nonmember broker and pay another commission to him.[134]

Brokers and salespersons are barred from MLS access unless they pay substantial sums to the local board, state, and national trade associations which eventually must be recovered in the commission charged to consumers. These monies have nothing to do with operation of the MLS itself, and are at least partially used for political lobbying or other activities which many brokers and salespersons would not otherwise financially support.

In 1973, the Realtor-Associate program was adopted by the National Association of Realtors (NAR), entitling licensed salespersons to membership in the NAR. On the surface, it appeared that this program allowed any salesperson, if he so desired, to be a member of a local board and a state association. In practice, however, this program forces licensed salespersons to join the trade association; if they do not "voluntarily" choose to join, the brokers they are affiliated with are assessed dues on a per salesperson basis. In effect, Realtor brokers reduce their dues by the amount of the dues paid by the Realtor-Associate salespersons affiliated with them.[135] The significance and correlation of the money involved and Realtor lobby power suggest at least another motive for conditioning MLS access on Realtor board membership other than a concern for competence and ethics.

For example, in Monmouth County,[136] fees to join the Realtor board include $250 for application, $200 per year for a membership fee, a $500 service registration fee charge, and a $360 annual broker subscription fee; charges to use the MLS are extra.[137] With the

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[134] Grillo, 91 N.J. Super. at 222, 219 A.2d at 646.

[135] North, *The Law: How it Affects Realtors and Member Boards*, NAR at 27-33 (1974).

[136] Monmouth County was the setting for the *Pomanowski* decision. *See* notes 190-218 *infra* and accompanying text.

[137] Ellis, *Appeal Expected in MLS Case*, The Sunday Record, July 20, 1980, § D, at 1 col. 4.

membership in the Monmouth County Board broken down into approximately 200 brokers and 1,700 salespersons (who are assessed $40 per capita) the Monmouth County Board brings into the trade association's coffers about $330,000 a year. Multiply this figure by 20 more counties in New Jersey and then by 50 states and one can gain an appreciation for Realtor fear of losing the hundreds of millions of dollars generated by this "voluntary" program.[138]

Furthermore, the correlation with the Realtor Political Action Committee (RPAC) is also unmistakably clear. Current figures indicate that RPAC has surpassed other large organizations in political contributions. Not only is RPAC the largest political action committee, but as of January 31, 1979, Realtors are the largest contributor to national candidates' campaigns.[139] In 1978, for the first time, RPAC contributed more than one million dollars to candidates for federal office throughout the country. Such an awesome display of contributory largesse has been accomplished by only one other organization—the American Medical Association.[140]

The effect of conditioning MLS access on Realtor membership is to foreclose both sources of supply and potential customers to the nonmember. Thus, the greater the market share and market power of the Realtors in controlling the MLS, the greater will be the foreclosure of the market to the nonmember and the greater the impact of the Realtor boards' anti-competitive conduct.

D. The Rule of Reason: Promote Competition More Than Suppress It—But Does It Include Price Competition?

In the decisions which have held conditioning MLS access on Realtor board membership to be a reasonable restraint of trade, the courts appear to have concluded without proof or analysis that the condition promotes competition or benefits the consumer.[141] As a basic tenet of antitrust law, however, there is no question that price competition is in the consumer's interest. Yet, throughout the nation

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[138] Compare these figures with the decline in American Medical Association membership, partially attributable to the doubling of annual dues to $250, not a small sum to young doctors. Reinhold, *AMA Under Pressure*, N.Y. Times, July 25, 1980, § A1, at 11.

[139] *The Year Ahead: An Interview with Ralph W. Pritchard*, 13 REAL ESTATE TODAY 11-12 (Jan. 1980).

[140] Wasinger, *Winning in the Washington Hardball League*, 13 REAL ESTATE TODAY 18 (July 1980).

[141] *See, e.g.*, Iowa *ex rel.* Miller v. Cedar Rapids Real Estate Bd., Inc., [1979] TRADE REG. REP. (CCH) ¶ 63,012 (D. Iowa 1979) (court summarily concluded that board's denial of MLS access to non-members did not limit customers' choice of real estate brokers); Brown v. Indianapolis Bd. of Realtors, [1977-1] TRADE REG. REP. (CCH) ¶ 61,435 (S.D. Ind. 1977) (court failed to discuss competitive impact of membership restriction).

as well as in New Jersey, Realtor commissions are set, with remarkable uniformity, at either 6 or 7%, regardless of the skill of the broker or the difficulty of selling a particular home.[142]

The *Palsson* court was particularly astute in appreciating the interrelationship among control of access and organizational structure, codes of ethics, mandatory arbitration, subtle peer group pressure, and inherent trade association power and the way these structural components can permeate broker behavior thereby influencing commission rates:

> This narrowing of choice may have an effect on the commissions a consumer must pay for brokerage service. Although no evidence has been offered on this issue, a nonmember, particularly a part-time broker not entirely dependent on real estate for his income, may be willing to accept a fee lower than the prevailing commission. Moreover, he may be less subject to the informal and often unspoken peer group pressure that some commentators indicate is responsible for maintaining standard prices in many industries. In short, the regulations imposed by the board have a deleterious effect both on competitors and consumers.[143]

The Sherman Act reflects a legislative judgment that competition ultimately will produce lower prices. In a now famous passage, Justice Black wrote that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[144]

Competition is the most desirable method of quality control, pricing, and resource allocation; the consumer has the final say, while providers compete for his favor in terms of price as well as quality.[145] It would therefore seem that the fostering of price competition should

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[142] Minard, *Why George Babbitt Should be Smiling in His Grave*, FORBES, Sept. 4, 1978, at 4.

[143] Palsson, 16 Cal. 3d at 937, 549 P.2d at 843, 130 Cal. Rptr. at 11.

[144] Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (emphasis added).

[145] In a recent speech delivered before the New England Antitrust Conference, former Attorney General Benjamin Civiletti stated that competition "is a process that works to meet the needs of consumers by leaving choices about price, manner of distribution and innovation to the competitors themselves." B. CIVILETTI, LEGAL TIMES OF WASHINGTON 18 (Nov. 26, 1979).

be a key variable in examining a Realtor board's anti-competitive conduct under a rule of reason standard. Unfortunately, other than the *Palsson* court, no court has delved into the question of whether conditioning MLS access on Realtor membership promotes price competition.

E. Analysis of the Justification for Conditioning MLS Access on Realtor Board Membership

Once it has been ascertained that an agreement which restrains trade has in fact been executed, an evaluation of the proferred justifications for the agreement will be undertaken. Proponents of MLS access restrictions have argued that they may properly strive to establish and improve standards for their occupation.[146] By restricting an MLS to board members and subjecting them to the Realtor Code of Ethics, Realtors seek to assure buyers and sellers entrusting their property to Realtor efforts that their affairs will be handled by allegedly competent, qualified, and honest salespeople. Realtors also claim that Realtor board member brokers should not be compelled to cooperate on sales with brokers who are not forced to adhere to the Code of Ethics since such persons are allegedly not as trustworthy nor as competent as Realtors.

There is nothing wrong with seeking to promote professionalism or to prevent deception or fraud. The important issue here, however, is only whether conditioning MLS access on Realtor board membership promotes competition in the market for residential real estate brokerage and, if so, whether that positive impact, if any, on competition outweighs the anti-competitive aspects of the restraint.[147] Since the purpose of the Sherman Act and the New Jersey Antitrust Act is to promote competition,[148] the courts are not likely to accept alleged justifications that restrain competition on non-economic grounds. The inquiry mandated by the rule of reason is simply whether the challenged agreement is one that promotes competition or one that suppresses competition.[149]

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[146] 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966).

[147] See Mardirosian v. American Inst. of Architects, 474 F. Supp. 627, 649-50 (D.D.C. 1979) for the proposition that the antitrust laws do not prohibit trade associations from seeking to prevent incompetence or unethical conduct; however, the antitrust laws do mandate that significantly anti-competitive restraints imposed by such groups cannot be justified by reference to social goals other than competition. *Id. See also* notes 150-54 *infra* and accompanying text.

[148] *See* note 72 *supra* & note 149 *infra*.

[149] National Soc'y of Professional Eng'rs, 435 U.S. at 691-92; Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Palsson, 16 Cal. 3d at 934-35, 549 P.2d at 842, 130 Cal. Rptr. at 10. Professor Sullivan also recognizes the criterion of competition as the key variable under a rule of reason analysis:

The Supreme Court's recent refusal to accept a "worthy purpose" defense for a professional ethic barring competitive bidding by consulting engineers clearly establishes that the rule of reason's key concern is with the enhancement of competition. In *National Society of Professional Engineers v. United States*,[150] the trade association contended that their ethical ban on competitive bidding was reasonable since price competition among professional engineers would be contrary to the public interest. According to the trade association, competition would cause engineers to bid low with a view toward taking economic shortcuts that would adversely affect the quality of their work; the Society asserted that the public health, safety, and welfare would therefore be endangered.[151] In explaining the purpose of a rule of reason analysis, the Supreme Court made clear that if vested interest groups were dissatisfied with the quality of oversight in an industry, policy changes are not to be made by such groups but rather by Congress.[152] Underscoring that competition is the key criterion, the Court held that even the risk to safety was not sufficient to permit the Court to contradict congressional policy in favor of competition.[153] Accordingly, ethical or societal considerations were deemed irrelevant under a rule of reason analysis unless these considerations were incidental to the pro-competitive or market perfecting aims of the association.[154]

> But it is fair to say that the dominant modern conception of the rule is infused with that exquisite simplicity drawn from the past which indentifies impact on competition as the sole variable to be measured in applying the rule. Flexibility in the attainment of the statutory objective is provided, but not flexibility for the courts to choose what kind of economy we are to have. In sum, this tradition reads the rule of reason as condemning every contract, combination or conspiracy which in purpose or likely effect will significantly restrict competition. The rule of reason is a standard which calls on courts to judge shades and gradations of competitive impact, a difficult enough inquiry. But the rule does not call on a court to judge whether a restraint of this or that precise degree is justified by its complementary tendency toward some transcendent good.

L. SULLIVAN, ANTITRUST § 68 (1977).

[150] 435 U.S. 679 (1978).

[151] *Id.* at 693.

[152] *Id.* at 689-90.

[153] *Id.* at 693.

[154] *Id.* at 692; Mardirosian v. American Inst. of Architects, 474 F. Supp. 627 (D.D.C. 1979) (irrelevant that canons of professional association serves societal goals other than enhancement of competition if rules, in effect, limited competition among association's members). *See* Union Circulation Co. v. Federal Trade Comm'n, 241 F.2d 652 (2d Cir. 1957) (association's adoption of standards to improve reputation of door-to-door magazine solicitation insufficient to justify diminished competition among subscription firms to the advantage of entrenched agencies); United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960) (trade association cannot promote its economic beliefs through self-regulatory plan which has significant anti-competitive impact).

The sweeping nature of the MLS access condition bears a remarkable similarity to the justification proffered for the competitive bidding restraint at issue in *Professional Engineers*. Nevertheless, the requirement that certain professional and ethical norms be satisfied has on occasion "been justified as necessary to induce individuals in a given business to join the association, and thus necessary to make the association's pro-competitive goals a realistic possibility." [155] In other words, it has been alleged that persons seeking access to the MLS may require some assurance that the members with whom they enter into the listing sharing agreement satisfy professional and ethical norms so as not to endanger the business reputation of participating brokers or subject them to liability for unlawful practices.[156]

An empirical analysis of the justification for conditioning MLS access on Realtor board membership, however, reveals that this position is untenable. The Antitrust Section of the Division of Criminal Justice within the State of New Jersey's Department of Law and Public Safety has been conducting an empirical analysis of complaints filed with the New Jersey Real Estate Commission (REC) focusing on the year 1977. The empirical analysis was designed to determine

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Also noted in the *Professional Engineers* decision was the overbroad nature of the restraint. The ethical canon applied no matter how simple and repetitive the work or how expert the parties involved in a project might be. 435 U.S. at 692. Similarly, no matter how flawless in terms of ethical behavior a broker or salesperson seeking MLS access might be, the sweeping nature of the restraint of conditioning MLS access on Realtor Board membership precludes a nonmember from MLS participation unless the condition precedent is satisfied. For further analysis of the effect of less restrictive alternatives under a rule of reason analysis, see notes 161-89 *infra* and accompanying text.

[155] United States v. Realty Multi-List Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624, at 77,313 (5th Cir. 1980). *See* E.A. McGuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[156] United States v. Realty Multi-List Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624, at 77,313 (5th Cir. 1980). The court in *Realty Multi-List* noted, however, that where a state extensively regulates the real estate industry, the additional requirements imposed by the MLS are often unnecessary. The court concluded that:

> when a multiple listing service seeks to establish the reasonable necessity of membership criteria regulating areas already covered by state regulation, it must make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not adequately enforce its own regulations.

Id. at 77,317 (footnote omitted).

Also, it must be re-emphasized that where such alleged improvements in professional performance and ethical behavior cannot be empirically substantiated, such hyberbole must be afforded little, if any, evidentiary weight. Furthermore, it must be kept in mind that the empirical evidence submitted must demonstrate that the restraint imposed is necessarily ancillary to the market perfecting goals of the MLS. As stated by the Supreme Court in Continental T.V. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 53 n.21 (1979), "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Id.*

whether services which predicate MLS access upon Realtor board membership (Board MLS) generate fewer complaints than those which do not condition MLS access on Realtor membership (Independent MLS).[157]

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[157] There were 29 Board MLS' and 10 Independent MLS' in existence in New Jersey in 1977. The research was conducted approximately from May 1979 through October 1979 for the time period of calendar year 1977. Such research was in line with the scope of the State's overall investigation into anti-competitive practices in the real estate industry in New Jersey. A total of 1,236 complaints were on file with the State REC for 1977.

From the total, 798 files were removed for numerous reasons:

—many files involved rentals;

—the complainee did not belong to any MLS;

—the file dealt with an inquiry, not a complaint;

—many complaints involved tenant/landlord disputes;

—numerous complaints involved builder/buyer disputes on new homes;

—124 files are still open or are in process with a Real Estate Commission investigator assigned to the case.

For the remaining 438 complaints, phone numbers and addresses were obtained and attempts were made to contact these complainees to determine whether they were members of a multiple listing service in 1977 and, if so, with which type of MLS they did most of their business—Board or Independent MLS. It could therefore be determined what type of MLS was involved in the complaint. From the nature of the complaint as supplied by the REC investigator the complaints were broken down into the following categories: commission disputes, return of deposit disputes, release from listing disputes, misrepresentations, fraud, unethical conduct, and incompetency. The last four categories were then collapsed into an overall category of conduct labelled as "offensive to the consumer." Frequently, research is undertaken in which one is interested in the number of objects, items or characteristics which fall into various categories. The researcher may wish to compare a distribution of observed frequencies with a theoretical distribution generated on the basis of some hypothesis which is independent of the data at hand. If there is a category and the expected number, this gives evidence for the rejection of the hypothesis which gave rise to the theoretical frequencies. Using the following formula

$$X^2 = \sum_{i=1}^{k} \frac{(O_i - e_i)\,2}{E_i}$$

the Chi-square is calculated by finding the difference between the observed frequencies (O_i) and the expected frequencies (E_i) for that category. Finally, sum across all categories. For an explanation of and the rationale behind Chi-square, see S. SIEGEL, NON-PARAMETRIC STATISTICS (1956).

Sampling was not necessary to the Antitrust Section's research since the entire population of complaints filed with the REC in 1977 was examined; however, the following illustration is helpful in understanding how the sampling technique is integrated into the Chi-square formula. First, assume that the complaints filed with the REC are broken down into three categories: misrepresentation, unethical conduct, and incompetency and that the total number of relevant complaints is 5000. A sample of 20% would produce a sample size of 1000 complaints. Furthermore, assume that Realtor Board MLS' account for 60% of all residential dollar sales volume that passed through all MLS' in the state in a given year and that Independent MLS' account for the remaining 40% of residential dollar sales volume. It follows then that one would expect the percentage breakdown of complaints emanating out of Board MLS' to be far less than 60% and far greater than 40% for Independent MLS'. Because of the requirement that Realtors are

The statistical approach employed was frequency tabulation which used MLS dollar volume sales as the control variable. The concept or rationale underlying the non-parametric statistical technique of Chi-square was applied in that Chi-square suggests a methodology by which one is able to compare an *observed* with an *expected* group of frequencies.[158]

Since Board MLS' claim that their Realtors adhere to a higher code of ethics, one would expect that board members would demonstrate superior ethical behavior, competence, and knowledge when compared with an Independent MLS. As noted in Exhibit 1, Board MLS' accounted for 74.7% of the total residential real estate dollar volume as compared to 25.3% for Independent MLS'. It follows conceptually then, according to the Chi-square rationale, that one would expect the percentage breakdown of complaints emanating out of Board MLS' to be far less than 74.7% and far greater than 25.3% for Independent MLS'.

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supposed to adhere to a Code of Ethics, one would *expect* superior performance in terms of competence, honesty and ethics from Realtors associated with Board MLS' *vis-à-vis* Independent MLS'.

The effect of Realtor Board MLS status *vis-à-vis* Independent MLS status can be tested by analyzing the results of complaints filed emanating out of Board MLS' compared with complaints emanating out of Independent MLS' for a given time period. The null hypothesis can be stated accordingly: There is no statistically significant difference in the expected number of complaints filed emanating out of Board MLS' v. Independent MLS' and any observed difference is merely a chance variation to be expected in a sample from the population. Since we are comparing the data from one sample with a presumed population, a one-sample test is appropriate. Chi-square is particularly appropriate because the hypothesis under consideration concerns a comparison of observed and expected frequencies in discrete categories. Fitting the Chi-square formula to the illustrative data might show the following results:

	OBSERVED COMPLAINTS			EXPECTED COMPLAINTS	
Categories of Conduct	I Realtor Bd.	II Independent	III Totals	Realtor Bd. Col. III x 60%	Indep. Col. III x 40%
Misrepresentation	200	100	300	180	120
Ethics	200	100	300	180	120
Incompetency	300	100	400	240	160
Total	700	300	1000	600	400

With a 99% confidence level and two degrees of freedom, the calculated Chi-square of 13.3 is greater than the 9.21 Chi-square found in a table for Chi-square distribution indicating that there is a statistically significant difference between Board MLS' and Independent MLS' in terms of ethics, honesty and competency. In other words one could say there is only a 1% chance that one would not be wrong in concluding that Board MLS' are not superior to Independent MLS' in terms of ethics, competence and honesty, given the above distribution of data.

[158] W. MENDENHALL & G. REINMUTH, STATISTICS FOR MANAGEMENT AND ECONOMICS 634-36 (1978).

EXHIBIT 1

ANALYSIS OF TOTAL DOLLAR SALES VOLUME FOR RESIDENTIAL PROPERTY SOLD THROUGH BOARD RELATED AND ALSO INDEPENDENT MLS' CALENDAR YEAR 1977

RECAP	DOLLAR VOLUME	%
TOTALS	$2,916,558,558	
LESS NON-RESIDENTIAL	87,724,704	
NET RESIDENTIAL	$2,828,863,854	100.0
BY:		
BOARD MLS	$2,113,587,039	74.7
INDEPENDENT MLS	715,276,815	25.3
	$2,828,863,854	100.0

SOURCE: Civil Investigative Demands served upon Board and Independent MLS' in New Jersey, June-August 1979.

The data in Exhibit 2, however, reveal that in only two of the seven complaint categories do Board MLS' exhibit the *expected* direction whereas in five of the seven categories what is observed is markedly different from what is expected if adherence to some Code of Ethics is supposed to result in superior performance by Board MLS'. More importantly, the two complaint categories where Board MLS' data observations match expected frequencies, release from listing and commission disputes, are not issues as crucial to consumers as are unethical conduct, incompetency, misrepresentation, and fraud. This is clearly established when these four cells are collapsed into an "offensive to consumer" category:[159] Board MLS' then account for 80% of the complaints which can be characterized as offensive to the consumer which were filed with the New Jersey Real Estate Commission in 1977. This is far greater than their proportionate 74.7% share of residential real estate volume. Thus, it is reasonable to conclude that there is little, if any, correlation between Realtor board membership and exemplary professional behavior.[160]

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[159] *See* note 157 *supra*.

[160] A word is in order concerning the value of empirical documentation in general and the use of complaints filed in particular in antitrust cases. In past cases dealing with the access issue in

EXHIBIT 2

TOTAL OF COMPLAINTS	1,236
TOTAL REMOVED	798
TOTAL OF COMPLAINTS USED	438

LIST OF COMPLAINT CATEGORIES

	BOARD			INDEPENDENT	
	TOTAL	NUMBER	%	NUMBER	%
UNETHICAL	92	72	78	20	22
INCOMPETENCY	57	45	79	12	21
MISREPRESENTATION	77	64	83	13	17
FRAUD	3	3	100	0	100
	229	184	80	45	20
RELEASE FROM LISTING	13	8	62	5	38
COMMISSION DISPUTE	94	68	72	26	28
REFUND OF DEPOSIT	102	81	79	21	21
	209	157	75	52	25
TOTALS	438	341	78	97	22

general, much testimony was theoretical rather than empirical. Evidence tended to appear in the form of a qualitative assessment without the benefit of empirical support. The trend, however, is away from unsubstantiated opinion and toward empirical analysis. Heiss & LoCascio, *Computers Can Aid Litigation*, 2 NAT'L L.J. 29 (Oct. 8, 1979). The rule of reason permits proof of assertions concerning competitive impact by meaningful evidence rather than verbal ritual. Empirical analysis, or its absence, in a rule of reason case is consequential.

For example, in a case where user endorsements were employed in an attempt to substantiate claims of effectiveness for a product, a petitioner produced empirical evidence to demonstrate that there was no benefit associated with the product. Citing Vacu-Matic Carburator Co. v. Federal Trade Comm'n, 157 F.2d 711 (7th Cir. 1946), the Federal Trade Commission (FTC) held that empirical analysis overrides any reliance on user testimonials. Brown Auto Stabilizer Co., [1973-2] TRADE REG. REP. (CCH) ¶ 20,150 (FTC Dkt. 8863) (5th Cir. 1972). *See also* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (court observed that statistics often demonstrate more than testimony of many witnesses).

Unsubstantiated allegations were also tested in *Oates*, where the defendant tried to justify non-access to its MLS with the "business reason" of "administrative convenience" wherein one of the defendant's officers opined that a membership number of "somewheres around 40" was ideal. 113 N.J. Super. at 392, 273 A.2d at 806. The *Oates* court determined that

> [o]ther than this *naked opinion* . . . there is no support in the record which demonstrates that the limitation in number of members is necessary or even beneficial. . . . It may be that there ought to be some limitation in numbers with respect to the proper administration of a multiple listing service. But there is *no proof* in this record to establish any such standard.

Id. at 393, 273 A.2d at 806-07 (emphasis added). Similarly, in *Palsson* the defendant Realtor board's claim that a non-access restraint on part-time licensed real estate sales agents furthered professional competence was rejected. The California Supreme Court noted that the Marin County Board of Realtors failed to establish that the restraint facilitated an increase in profes-

As part and parcel of the Realtor Code of Ethics, Realtors imply, if not attempt to induce reliance on the part of consumers, that they

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sional competence in all or even most cases. The court concluded that the MLS non-access rule of the Board was too broadly drawn in light of its anti-competitive effects. 16 Cal. 3d at 939-40, 549 P.2d at 845, 130 Cal. Rptr. at 13.

In Group Health Corp. v. King County Medical Soc'y, 39 Wash. 2d 586, 614, 237 P.2d 737, 748-54 (1951), the court noted the absence of any evidence to support the defendant medical society's claim that the Health Maintenance Organization (HMO) provided substandard services and found that the society had acted in restraint of trade by excluding HMO doctors. Similarly, the court in Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977), determined that unless the Dental Association could show benefit to the public in the form of improved service which resulted from its condition requiring dentists to be members of the American Dental Association in order to gain membership in the Arizona Dental Association, the professional group would be in violation of the Sherman Act.

It is clear from the above that empirical analysis has a place in complex antitrust litigation. More specifically, exclusionary conduct in a real estate context under the guise of a Code of Ethics can make use of complaints filed associated with practitioner segments as an appropriate input for rule of reason analysis.

For example, in a nationwide study of the number and significance of price-fixing conspiracies, Professor John Kuhlman developed data taken from indictments and complaints issued by the Department of Justice during the period from 1965 to 1969. According to Dr. Kuhlman, the complaints filed reflected evidence of an association between anti-competitive conduct and industry characteristics. Kuhlman, *Nature and Significance and Price-Fixing Rings*, 2 ANTITRUST L. & ECON. REV. 74 (Spring 1969). In a study of illegal corporate behavior conducted by Marshall Clinard, an expert on white-collar crime, under the auspices of the Law Enforcement Assistance Administration, law enforcement actions brought by 24 federal agencies against 582 corporations during 1975 and 1976 were examined. The focus of the study was whether a company had any kind of action filed against it. *Repetitive Government Enforcers*, 943 ANTITRUST & TRADE REG. REP. (BNA) at A-9, 10 (Dec. 13, 1979).

In United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975), the USDI, a private educational facility offering graduate courses in orthodontia to practicing dentists, alleged that the defendant trade association had engaged in a group boycott by refusing to recognize its programs in order to preserve the AAO monopoly in the practice of orthodontia. The trade association responded to these charges by contending that its actions were designed to protect dentists from the substandard education provided by USDI. The court found that the activities described should not be exempted from Sherman Act compliance and denied the defendants' motion to dismiss for failure to state a claim. 396 F. Supp. at 581.

In analyzing the USDI case Mr. Dickey suggests that in order for the AAO to win on the merits, they would have to prove that the courses offered by the USDI were *in fact* inadequate when compared with the generally established standards of the orthodontic profession. Mr. Dickey opines that the AAO should have substantiated its claim by introducing correspondence referring to USDI and by listing complaints filed against the Institute. Dickey, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 J. L. REF. 403 (1978).

Finally, from a marketing perspective, studies of consumer satisfaction/dissatisfaction with services have dealt largely with describing the frequency of complaints about various types of services. Bearden, Durand, Mason, & Teel, *Dimensions of Consumer Satisfaction/Dissatisfaction with Services: The Case of Electrical Utilities*, 6 J. ACAD. MARKETING SCIENCE 278 (Fall 1978). In a speech before the American Marketing Association, Robert Reich, Director, Office of Policy Planning, FTC, stated that consumer complaints are one of the most important business assets available. They serve as early warning devices and should play a prominent role in terms of marketing strategy. *U.S. Firms, FTC Should Work Together to Market Good Products*, MARKETING NEWS 1, 7 (July 11, 1980).

are superior in terms of the price/quality relationship compared to non-Realtor licensees. This logic is carried forth to suggest that absent the Board membership requirement, an insufficient number of Realtors would be willing to participate in an MLS in order to effectively serve the pro-competitive goals of a service for the pooling of listings. Yet if a Board MLS seeks to justify its Realtor Board membership criterion as a necessary condition to serve its pro-competitive purpose, it is only reasonable to require that the proponents of the MLS access restrictions empirically substantiate the factual basis for those restrictions. As the above analysis reveals, the proponents' conclusory allegations do not reflect an accurate picture of consumer complaints and perceptions.

F. Less Restrictive Alternatives

Among the elements to be considered in the examination of the reasonableness of the restraint imposed is whether other less restrictive means could be employed to achieve the same desired ends.[161] Courts are entitled to consider evidence of the existence of viable alternatives to conditioning MLS access upon Realtor Board membership to achieve such objectives as upgrading professional development and preventing fraud and deception. For example, in *Murphy Tugboat v. Shipowners & Merchants Towboat*,[162] the defendants had a policy of not working on towing jobs with competitors. The defendants claimed "that this policy was a reasonable measure to assure that jobs would be performed safely and competently and to minimize their exposure to claims and litigation."[163] The court held that the jury was entitled to weigh this alleged justification against the evidence that neither the defendants' own operations in other markets nor other firms followed such a policy.[164] Similarly, the existence of MLS' which do not condition access upon Realtor Board membership provides a viable, less restrictive alternative to those proponents who claim that MLS' can only operate effectively under Realtor Board domination.[165]

As noted in the previous section, if Realtors truly believe that licensing standards are too low, resulting in unethical or incompetent

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[161] Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1129 (E.D.N.Y. 1979) (quoting Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1153 (5th Cir. 1977)); Allison, *Ambiguous Price-Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 769-70 (1979).

[162] 467 F. Supp. 841 (N.D. Cal. 1979).

[163] *Id.* at 850.

[164] *Id.*

[165] *See* notes 212-13 *infra* and accompanying text.

practitioners, their awesome lobbying power and vast financial resources could be directed toward upgrading licensing and entry requirements.[166] The MLS itself could establish programs for professional development and supervision of practitioner behavior without the additional onus of Realtor membership which apparently results in nothing more than an increased cost of doing business to licensed brokers and salespersons. The MLS may impose reasonable rules for the operation of the service, including rules concerning ethics and arbitration procedures insofar as such procedures apply to MLS transactions.

Realtor trade promotion provides a marketplace basis for a less restrictive alternative to conditioning MLS access on Board membership. Realtors assert that the MLS access condition protects homeowners who seek to deal only with highly qualified professionals such as Realtors. Since at least 1978 Realtors have claimed that the public has come to associate competency, fairness, and high integrity in business relations with Realtors.[167] Since such a claim, related to the most significant transaction that the vast majority of consumers will ever make, is the kind of a claim that a consumer would materially rely on, it would logically have to follow that he would voluntarily choose a Realtor over a non-Realtor practitioner, thereby obviating the need for the more restrictive MLS access condition barring *all* brokers and salespersons who refuse to comply with trade association membership.

Also, there are certain traditional and well developed alternatives to protect consumers in real estate transactions. Agency law provides a remedy for a principal when the broker's conduct breaches his duty as agent to his client. Tort law offers a remedy to any person suffering damage as a result of wrongful conduct or omission by a broker. These legal remedies serve to minimize any risks in dealing with a non-Realtor broker.[168]

When entry into a trade or practice is publicly regulated and criteria for licensure are established by law, the burden of justifying additional self-regulation based on subjective impressions of integrity, ethical conduct, or private notions of competency increases.[169] The

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[166] *See* notes 135-40 *supra* and accompanying text.

[167] *Realtor Review*, July, 1978 at 24 (Comment of Harlan Williams, Chairman of Professional Standards Committee of NAR).

[168] Romero, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767 (1978).

[169] Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1349 (1970). In United States v. Realty Multi-List, Inc., [1980] TRADE REG. REP. (CCH) ¶ 63,624 at 77,317 (5th Cir. 1980), the court addressed the effect of state

New Jersey REC is a regulatory agency and instrument of the State of New Jersey within the Department of Insurance. Among the duties and responsibilities of the REC is the licensing of real estate applicants. By precluding brokers and licensed salespersons from the multiple listing service unless they become members of a board of Realtors, a private trade association, in effect, preempts the Real Estate Commission's duties and responsibilities in regard to who practices real estate, thereby precluding qualified licensees from a substantial share of the market. The Real Estate License Act is designed to protect the public from fraud, incompetence, misrepresentation, and unconscionable practice.[170] The pre-eminence of state regulation in the real estate industry has been recognized by the courts.[171] In fact, Realtors themselves are on record in acknowledging the competency of the State REC.[172] Since Realtors acknowledge the valuable and effective role of state real estate commissions in policing the conduct of brokers and salespersons, there would appear to be no need for the more restrictive MLS access condition.

Another area of contention with respect to the less restrictive alternative element of the rule of reason standard arises under the proposition that those seeking MLS access without Board membership can simply start their own MLS. Conversely, Realtors argue that they have an absolute right of association and do not have to

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regulation of areas sought to be governed by trade association requirements as a precondition to access to a multiple listing service, concluding as follows:

> When a multiple listing service seeks to establish the reasonable necessity of membership criteria regulating areas already generally covered by state regulation, it must make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not automatically enforce its own regulation.

Id. (footnote omitted).

[170] Zaid v. Island House Condominium Ass'n, 197 N.J. Super. 206, 209-10, 406 A.2d 196, 198 (Ch. Div. 1979); Boise Cascade Homes v. New Jersey Real Estate Div., 121 N.J. Super. 228, 240, 296 A.2d 545, 551 (Ch. Div. 1972).

[171] Grillo, 91 N.J. Super. at 212, 219 A.2d at 640; Collins, 452 Pa. at 351, 304 A.2d at 497.

[172] Mr. Charles Cavanaugh, First Vice-President of the New Jersey Association of Realtors, appearing before a public hearing on possible changes in structure and administration of the New Jersey REC had this to say about the effectiveness of the present regulatory system:

> the existing system has worked well since its inception in 1921 and should not be changed 'for change sake' . . . only those individuals of the highest reputation and integrity on a bipartisan basis have been named to the [N.J.] real estate commission . . . . The voices of the well intended but misguided individuals who feel the [N.J.] real estate commission must conform to their perception of what a regulatory body is should be made to cite specifics where the existing structure has not carried out the Legislature's mandate. We oppose the interjection of a new concept which cannot assure an improvement in the existing system and a benefit to the general public.

make their assets available to anyone who rejects the tripartite trade association package as a condition for access to benefits and services offered by the Board.

In regard to the first contention, an MLS is nothing more than an inventory or central clearinghouse that brokers use to compile and disseminate home listings and offerings to the public. In theory, an MLS can reduce market imperfections and lower the cost of the home purchase to the consumer by expanding the size of the market in which any one broker operates. As a result, the homeowner's property is brought to the attention of all members of an MLS and all listings in the MLS become available to prospective purchasers. From an economic perspective, such clearinghouses or data banks are analogous to natural monopolies with concomitant advantages and efficiencies.[173]

Hence, it would appear that the MLS is a rational way to bring order to a fragmented, atomistic marketplace. In practice, however, each MLS operates in a separate geographic jurisdiction, chartered by the national trade association. The splintering of MLS' or additional MLS' in the same trade area would therefore defeat the very purpose and rationale behind the MLS concept, namely, the largest possible pooling of residential inventory to achieve efficiency and economies of scale.

It is also very questionable whether practitioners seek or even recognize any benefits or services offered by Realtor boards, at least to the same degree as the acknowledged acceptance of the MLS as the *sine qua non* of practicing real estate.[174] One would usually associate benefits to the public with confidence in the industry on the part of the public. But studies of the industry suggest otherwise.[175]

Zarate, *Realtors Assail Plan to Change the Rules*, Newark Star-Ledger, Dec. 19, 1979, at 15.

[173] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 369-70 (1973); United States v. Terminal R.R. Ass'n, 224 U.S. 383, 397 (1912); Trombetta, *Using Antitrust Law to Control Anticompetitive Real Estate Industry Practices*, 14 J. CONSUMER AFF. 142, 143 (Summer 1980).

[174] Palsson, 16 Cal. 3d at 938, 540 P.2d at 844, 130 Cal. Rptr. at 12. The *Palsson* court stated that

> [w]hile the Marin County Board . . . may permissibly provide some exclusive benefits to its members, access to the MLS is so essential to nonmembers if they are to compete effectively that such access must be granted to all licensed salesmen and brokers who choose to use the service.

Id. See also Oates, 91 N.J. Super. at 222-23, 219 A.2d at 646.

[175] Homeowners and purchasers "have little brand loyalty when it comes to choosing among the country's 125,000 realty brokers." *Painless Moving*, SALES & MARKET MANAGEMENT, July 9, 1979 at 9. A low index of brand loyalty reflects dissatisfaction with practice in the industry, not gratitude for benefits received. In a recent survey conducted by the Long Beach, California real estate firm of Coast Equities, respondents ranked real estate agents next to last on a scale

As far as services offered by Realtor boards that are claimed to benefit the public, arbitration and grievance procedures deal overwhelmingly with commission disputes between Realtors. The statewide investigation conducted by the New Jersey Antitrust Section of the Division of Criminal Justice discovered that a consumer complaining against Realtors through Realtor Board grievance and arbitration mechanisms is a rare phenomenon. In New Jersey, there are no non-Realtor practitioners or laymen that participate in these mechanisms.

Realtor seminars and their impact on the public interest are debatable. As seminars in general proliferate, so do complaints increase about the number of "shoddy, worthless presentations."[176] As the number of those who enroll in workshops and seminars increases, so do questions about what one gets for his money.[177] Even where seminars and education programs are *mandatorily required* for professional relicensing, their rigor and effectiveness have been called into question. For example, where doctors are subject to state legislation requiring continuing medical education, some states allow credit for classes in "dating and mating," office management and estate planning. Ohio gives credit for reading medical journals or appearing on television shows. California has only recently begun to crack down on such frivolous courses.[178]

Empirical substantiation measuring the effectiveness of Realtors who take such programs *vis-à-vis* Realtors or non-Realtors who serve the public without participating in them might be gleaned from objective data. For example, indicators might be consumer satisfaction/dissatisfaction, or more objective measures such as lower commission, degree of variance between asking price and receiving price on a home, and length of time the home is on the market.[179]

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measuring professional ethics—only car dealers received a lower score. Hill, *Bargain Brokers—As Home Prices Rise, More Sellers Are Using Reduced-Rate Agents*, Wall St.J., June 26, 1979, at 32, col. 3. In a poll conducted by the California REC in 1977, "only one-fourth of the home buyers interviewed and one-third of the sellers described their brokers as 'honest.' " *Id.*

[176] Rout, *More Courses Provoke Gripes as High Profits Draw in Promoters*, Wall St.J., Dec. 27, 1979, at 1, col. 1.

[177] Hymowitz, *Sisterhood Inc.—Business is Booming For Those Who Help Women in Business*, Wall St.J., Aug. 31, 1979, at 1, col. 1.

[178] *Few Doctors Suffer Under Burgeoning State Relicensing Laws*, Wall St.J., Apr. 29, 1980, at 1.

[179] *See, e.g.*, Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case For Legal Clinics*, 1979 AM. B. RESEARCH FOUNDATION J. 179-207 (authors compared legal clinics to traditional law firms using similar criteria as measures of performance).

Finally, in regard to the last contention that private trade associations have an absolute right to bar nonmembers from their benefits and services, the courts have long recognized that the rights of association are not absolute. A private trade association does not have an unqualified right to select its members or to deny nonmembers its benefits: "Antitrust principles have been applied to prevent trade associations from excluding certain individuals from membership and from precluding non-members from participation in association activities when the effect would have been to deprive the non-members of a competitive advantage."[180] A trade association may not hoard a significant competitive benefit for a select group in an industry for whatever reason, without subjecting itself to antitrust scrutiny.[181] "Not only must an association open its membership to all competitors in the covered industry, in many cases it must also make association services available to competitors who are not members."[182] For example, in *Maple Flooring Manufacturers Association v. United States*,[183] a trade association gathered data on past transactions, among other valuable services; these data were given wide publicity, a fact which the Supreme Court considered highly significant.[184] Thus, by making this service available to all who might need it to compete effectively—buyers, sellers, members and nonmembers—the association was able to avoid Sherman Act liability.

Similar to the position taken by proponents of the Realtor board membership precondition to MLS access, the defendants in *Associated Press v. United States*[185] argued that their anti-competitive restraint was beyond the prohibition of the Sherman Act because an association has the right to choose its members

> and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell. . . . The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups

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[180] Bodner, *Antitrust Restrictions on Trade Association Membership and Participation: Recent Developments*, 24 N.Y.L. SCH. L. REV. 907 (1979). *See also* Palsson, 16 Cal. 3d at 938, 540 P.2d at 844, 130 Cal. Rptr. at 12.

[181] Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A.J. 30 (1968); Kaechele, *Exclusion from Real Estate Multiple Listing Services as Antitrust Violations*, 14 CAL. W. L. REV. 310 (1978).

[182] M. MACARTHUR, ASSOCIATIONS AND THE ANTITRUST LAWS 36-37 (1976).

[183] 268 U.S. 563 (1912).

[184] *Id.* at 573.

[185] 326 U.S. 1 (1945).

> compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity;" such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination.[186]

It takes little "enterprise," "sagacity," or "ingenuity" to lock up listings in what is essentially nothing more than a clearinghouse mechanism. The MLS access condition locks up those things in which the groups compete—listings. It is at least arguable that "enterprise," "sagacity" and "ingenuity" would be better reflected in superior management, finance, and marketing rather than a blanket non-access rule that monopolizes not those things that work toward the consumer interest but the basic goods (listings) that provide the ingredients for competition to take place.

The federal policy toward access to significant trade association benefits would appear to be contrary to the MLS access condition. In an address in Washington, D.C. in 1979, Mr. Richard Favretto, Deputy Director of Operations, Antitrust Division, emphasized that access to significant business advantages flowing from trade association membership is a crucial concern of the Division. By making access to key association services available to non-association members, a trade association is likely to avoid any antitrust problems flowing from membership restrictions.[187]

The New Jersey Real Estate Commission's position on conditioning MLS access on Realtor membership would seem to be in harmony with the federal Antitrust Division's views. In the mid-1970's, Century 21, the largest real estate franchise company in the country, tried to limit membership to Realtors only; however, the REC required that franchises be made available to anyone with a real estate license. The Commission considered the "Realtor only" provision to be discriminatory.[188] Consequently, given that MLS' are much more dominant than any realty franchise company, requiring Realtor membership as a condition for MLS access should logically be anathema to the State Real Estate Commission.

As one commentator recognized long ago in placing trade association benefits and services in their proper perspective:

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[186] *Id.* at 13-15.

[187] 377 ANTITRUST & TRADE REG. REP. (BNA) 9 (Mar. 20, 1979).

[188] Rescigno, *Century 21 Wins Clearance to Do Business in New Jersey*, Bergen Record, Jan. 24, 1975, § B, at 16.

> It [the trade association] does not order, it advises. It does not coerce, it persuades. It does not issue mandates or even instructions. It uses only the moving eloquence of a reasoned appeal to the self-interest of its members. It does not tell its members what they must do. It tells them what, if influenced by a decent regard for their own interest, they will be glad to do.[189]

IV. POMANOWSKI v. MONMOUTH COUNTY BOARD OF REALTORS[190]

The *Pomanowski* case was a recent New Jersey decision in which the anti-competitiveness of conditioning MLS access on Realtor Board membership was assessed.[191] The case is significant in that it addresses many of the issues raised in this article. In particular, the court examined the relevant market question in detail and devoted extensive treatment to a rule of reason analysis of the restraint imposed on MLS access.

In *Pomanowski* the plaintiff, a licensed real estate broker in New Jersey, had been a member of the Monmouth County Board of Realtors (MCBR) as well as its MLS since 1972.[192] Due to a basic disagreement with the policies and practices of the board,[193] he decided to terminate his board membership by failing to pay the 1977 dues for himself and his salespersons.[194] At the same time, however, Pomanowski sought to continue his participation in the MLS, chal-

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[189] T. MEADE, LAWFUL RESTRAINT OF TRADE THROUGH EDUCATION, THE ANALYST 252 (1929).

[190] 175 N.J. Super. 212, 417 A.2d 1119 (Ch. Div. 1980).

[191] Pomanowski originally brought suit in 1977 pursuant to N.J. STAT. ANN. § 56:9-1 (West Cum. Supp. 1980-1981) against the defendants Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service. Pomanowski v. Monmouth County Bd. of Realtors, 152 N.J. Super. 100, 377 A.2d 791 (Ch. Div. 1977). The defendants moved for summary judgment. After considering the pleadings, affidavits, briefs, exhibits and oral arguments, the court granted judgment in favor of the plaintiff. The defendants appealed. Pomanowski v. Monmouth County Bd. of Realtors, 166 N.J. Super. 269, 399 A.2d 990 (App. Div. 1979). The appellate division, while agreeing with the trial court's decision as to the proper standard for review, remanded the matter for a plenary hearing. *Id.* The plaintiff filed a petition for certification to the New Jersey supreme court and the defendants filed a cross petition for certification. The supreme court denied certification and the matter was returned to the trial court for proceedings. The trial commenced on February 20, 1980.

[192] 152 N.J. Super. at 104, 377 A.2d at 793.

[193] Among the reasons enumerated by Pomanowski why he no longer wished to be a member of the board were: (1) his belief that the practices of the board were contrary to the public interest, (2) his conviction that the Realtor Ethics Committee's decisions were made in an arbitrary manner and tended to stifle competition, (3) the requirement that all his salespersons had to join the tripartite trade association package. 152 N.J. Super. at 104-05, 377 A.2d at 793-94.

[194] 152 N.J. Super. at 104, 377 A.2d at 793. In addition to the dues payable to the MCBR, membership dues were also assessed for the National Association of Realtors and the New Jersey Association of Realtors. *Id.*

lenging the board membership precondition under New Jersey antitrust provisions.[195]

To begin its analysis, the court very carefully articulated the standard under which the rule of reason was to be applied to the MLS access condition. The court emphasized that the objective of the examination was to measure competitive significance and " 'not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.' "[196] Against this effect on competition, the court would weigh possible justifications for the restraints urged by the defendants.

In order to assess the effect on competition, the court first deemed it necessary to define the relevant geographic and product markets.[197] Similar to the position taken in this article, the *Pomanowski* court determined the relevant geographic market to be the chartered territorial jurisdiction of the MCBR.[198] Although the MLS did process some incidental listings outside the chartered territory, this amounted to no more than 15% of the MLS's listings and was therefore deemed insufficient to extend the boundaries of the market.[199]

In addition, the court limited the relevant product market solely to residential sales. Relying on expert testimony, the court found that significant differences existed between the residential and nonresidential real estate markets, particularly with respect to the differing purchasing characteristics and needs of the public.[200] Moreover, the 1978 MLS Activity Report indicated that residential listings accounted for 90% of the total listings.[201] Finally, the court

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[195] N.J. STAT. ANN. § 56:9-1 to 56:9-18 (West Cum. Supp. 1980-1981).

[196] 175 N.J. Super. at 214, 417 A.2d at 1120 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[197] 175 N.J. Super. at 215, 417 A.2d at 1121.

[198] *Id.* *See* notes 110-23 *supra* and accompanying text.

[199] 175 N.J. Super. at 21-16, 417 A.2d at 1120-21. The court excluded the nine municipalities which comprise the chartered territorial jurisdiction of the Southern Monmouth County Board of Realtors because that board had its own MLS and the defendants "offered no proof to indicate that this area had any impact on the MCBR's territory." *Id.* at 215, 417 A.2d at 1121.

In addition, it is worth noting that even the Monmouth County MLS rules and regulations recognize the chartered jurisdictional territory assigned to the board as the relevant geographic market:

> Exclusive listings of properties of the following types located within the County of Monmouth, must be taken by participants on an exclusive right to sell form and shall be delivered to the MLS office within 24 hours after all necessary signatures of sellers have been obtained except as provided for in Section 1.3.

Monmouth County Multiple Listing Service Rules and Regulations § 1 (Jan. 1971).

[200] 175 N.J. Super. at 216, 417 A.2d at 1121. *See* notes 82-103 *supra* and accompanying text.

[201] 175 N.J. Super. at 216, 417 A.2d at 1121.

determined that "intra-firm" sales (property sold by the listing brokers) should be included in determining the market share of the MLS. The court stated that although "such property was sold by the listing broker, it was nevertheless multiple listed and, as such, available to other brokers. It [was] the fact of listing and sale of residential property through MLS"[202] that the court found significant.

Employing the definition of the relevant market, the court concluded that the Monmouth County MLS commanded a minimum fifty percent share of the market.[203] Furthermore, the court calculated that 84% of the brokers within this relevant market were MLS members.[204] The meaning of this percentage is that a licensed salesperson or broker would be precluded from 84% of the firms in Monmouth County if he chose not to join the board and thus be denied access to a substantial number of listings.[205] In light of these factors, the court viewed the impact of the Monmouth County MLS on the market as substantial.[206]

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[202] *Id.*

[203] *Id.* at 217, 417 A.2d at 1121. Statistics indicated that in 1977 the dollar volume of residential sales totaled $319 million. Of this total, $223 million represented sales of MLS listed property, or 70% of the Monmouth County residential property market. This percentage figure was reduced by the dollar value of "non-usables" in categories where brokers may participate, the latter dollar value figure was added to the denominator for all residential sales in the assigned territorial jurisdiction of the MCMLS. "Non-usables" are 27 categories of real estate transactions that are not used in determining assessment-sales ratios pursuant to N.J. STAT. ANN. § 54:1-35.1 (West 1960); N.J. ADMIN. CODE § 18:12-1 (1979). With relevant non-usable categories added to the 1977 denominator of $319 million, the new figure becomes $376 million for the denominator; factoring out 15% of the $223 million numerator for 1977 to account for properties listed in the MCMLS outside the board's chartered territorial jurisdiction, the approximate 50% figure the court used is ascertained. This 50% figure, however, may well have been understated. If certain non-usable categories are appropriately recognized as categories of real estate transactions where brokers were very unlikely to be involved, $9 million at least can be subtracted from the denominator, leaving $367 million. Furthermore, recognizing that a minimum 10% of all houses are sold by the owner himself, *see* C. JANIK SELLING YOUR HOME: A GUIDE TO GETTING THE BEST PRICE WITH OR WITHOUT A BROKER 142 (1980), the denominator is reduced to $330 million and the true minimal market control of the Monmouth County MLS approaches 60% plus.

[204] The court relied upon a study conducted by the state Attorney General's office wherein the 1978 Monmouth County Yellow Pages were used to analyze the number of brokerage firms that were MLS members. Out of a possible 260 firms, 40 firms were immediately removed from the analysis because they specifically advertised themselves as specialists in areas other than residential real estate sales. Information obtained from the Bluebook of the Monmouth County Board of Realtors revealed that 172 of the remaining firms were MLS members. After calling the other 48 firms it was determined that an additional 14 of these were also members of the MLS. The court relied on this analysis to establish that 84% of the residential real estate firms in Monmouth County were MLS members. 175 N.J. Super. at 217, 417 A.2d at 1121.

[205] It is significant to note that the *Palsson* court struck down the "primarily engaged" MLS access restriction when the plaintiff was precluded from only 75% of the firms. Palsson, 16 Cal. 3d at 930-32, 549 P.2d at 842-44, 130 Cal. Rptr. at 10-12. *See* notes 45-48 *supra* and accompanying text.

[206] 175 N.J. Super. at 221, 417 A.2d at 1123.

After making its findings of "substantial" control, the court examined the defendant's proferred justifications for the restraint. The defendants urged that the MLS access condition was justified by a "nexus" existing between the Monmouth County Board of Realtors and the MLS.[207] The defendants listed numerous activities sponsored by the board that were alleged to have an integral relationship with the operation of the MLS. It was testified, for example, that Realtors "volunteer countless hours to the MLS Committee and that the Board's arbitration and grievance services provide mediation between MLS participants and aggrieved members of the public."[208] While the court acknowledged some interrelationship among the various board committees, it ruled that the anti-competitive effects of the condition outweighed the importance of any purported nexus.[209]

The court discounted the dire consequences of lost membership predicted by the defendants if the MLS were available to any licensed real estate person. In the court's opinion, such a position would indicate that the MLS is nothing more than a drawing card for the board, reinforcing the suspicion surrounding the true motivation behind the board's conditioning MLS access upon Realtor membership.[210]

In fact, testimony from Robert Ferguson, Executive Vice-President of the New Jersey Association of Realtors, confirmed the lack of criticality in the alleged board-MLS nexus. Mr. Ferguson testified to the reluctance on the part of local boards initially to accept multiple listing; it was only after numerous campaigns were waged stressing the benefits of such a service that it became popular. Hence, the court did not accept the defendant's version of impending apocalypse were the MLS to be available to all licensed real estate agents.[211]

The court also relied on the testimony of Harry Gerlach, a Realtor and Executive Officer of the MLS of Northern New Jersey. Mr. Gerlach demonstrated that an independent MLS can function efficiently although it is not part of a Realtor organization.[212] Any grievances may be addressed to the State Real Estate Commission. Moreover, Gerlach testified that his independent organization is totally self-supporting, thus obviating the need for volunteers in addition

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[207] *Id.* at 218, 417 A.2d at 1122.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 219, 417 A.2d at 1123.
[211] *Id.* at 218, 417 A.2d at 1122.
[212] *Id.* at 219, 417 A.2d at 1123.

to those participating in the service. Furthermore, Mr. Gerlach stated that the information he acquired as a Realtor and other attributes of membership on the board had little, if any, effect on the operation of his MLS.[213]

Another alleged justification proffered by defendants for conditioning MLS access on Realtor board membership was that by virtue of the MCBR's Code of Ethics and the educational programs provided by the local and national boards, Realtor board members adhered to higher professional standards.[214] This argument was also rejected by the court as unsupported by any evidence offered by defendants.

The court's analysis suggests numerous alternatives to the more restrictive Realtor approach. The basic alternative is to acknowledge that consumers will act in their own best interests if only they are allowed a choice and that the best means to this end is to open the clearinghouse of listings rather than to close it. If the consumer can effectively choose between Realtors and non-Realtors in the marketplace for real estate brokerage service, nothing prevents Realtors from offering their own assertedly superior service and contrasting it to that of the non-Realtor competition. Realtors can still achieve their objectives since the Realtor board would be free to require whatever professional standards and criteria it wishes of its truly voluntary members including the development of "committees on arbitration, education, or affirmative action."[215]

Virtually all of the testimony presented by the defendants in *Pomanowski* took the form of unsupported conclusions and self-serving opinions with no analytical support.[216] It is apparent that this may have considerably diminished the strength of the defendants' case. The total absence of any research on the need to impose the MLS access condition raises suspicion about the true motive of the defendants. Business decisions are made after detailed market

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[213] *Id.*

[214] *Id.* at 219-20, 417 A.2d at 1123.

[215] *Id.* at 219, 417 A.2d at 1122.

[216] For example, in arguing that the Realtor Code of Ethics and the numerous educational programs provided by Realtor boards benefit consumers who deal with Realtor board MLS', the court referred to *Palsson* where the California Supreme Court rejected this alleged justification, noting that the Realtor board defendant had failed to demonstrate any increase in professional or ethical competence. 175 N.J. Super. at 220, 417 A.2d at 1123. *See* notes 50-52 *supra* and accompanying text. Similarly, the *Pomanowski* court emphasized that the defendants had no data to support their contention that the public readily associates the Realtor trademark with "knowledgeable, efficient and honest handling of real estate transactions." 175 N.J. Super. at 220, 417 A.2d at 1123. There was nothing in the record to suggest that non-Realtors do not adhere to the same principles espoused by the Realtor Code of Ethics.

analysis so that the ramifications of a given course of conduct can be carefully considered.[217] The inexplicable failure to allow MLS access to brokers and salespersons with spotless records without the burden of board membership, combined with the fact that no applicant was ever rejected for board membership as long as he was willing to pay dues to three different trade associations and subject himself to non-resident Realtor status, raise at the very least a strong inference that the true motive behind the MLS access condition is to restrain trade.

V. CONCLUSION

When Realtor boards restrict MLS access to only those licensees who agree to accept board membership a private trade association, in effect, decides who and under what conditions real estate brokerage will be practiced. To gain access to an MLS, it should be sufficient that a licensee has fulfilled all state requirements. To join a private trade association, the group may well set additional critiera. A licensee, however, should not have to bear the additional burden of having to conform to a private group's particular notion of a code of ethics in order to participate in what is nothing more than a centralized clearinghouse for listings which, nonetheless, is necessary for him to compete effectively.

Realtor boards and MLS' should be treated as any trade association. They should be given the benefit of the doubt since much of what they provide may benefit both consumers and the real estate industry and because the restraints used are not necessarily set to drive anyone out of business. Nevertheless, such associations may carry to excess their concerns for internal control, qualifications, and overzealous efforts at professionalization. When they do, they expose themselves to anti-trust liability.

The overriding objective of the antitrust law's confrontation with Realtors on MLS non-access is to change a private trademark group from being a virtual total arbiter of the features of the structure, delivery, and access system for buying and selling homes, into mere advocates whose point of view must compete with others in the "marketplace of ideas" as well as the economic marketplace. As Justice Holmes put it, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[218] A market structure wherein non-Realtors can compete effectively against

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[217] United States v. United States Gypsum, 438 U.S. 422, 445-46 (1976).

[218] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Realtors would provide a greater variety of brokerage services to the consumer. Consumers dissatisfied with one group could choose brokers from the other. The right and ability to choose not to join a private trade association can be an effective limitation on its power. As the *Grillo* court observed:

> It has been recognized that effective or workable competition requires the presence in the market of several sellers, each of them possessing the capacity to survive and grow, and the preservation of conditions which keep alive the threat of potential competition from others.[219]

Realtors' interest in attempting to upgrade standards coincides with the public interest; however, the public has an equal interest in affording qualified brokers and licensees access to the opportunities inherent in such a significantly competitive vehicle as an MLS.

The influence and voice of Realtors will gain greater respect among brokers and the public, not by compelling all qualified licensees to become Realtors, but rather by attempting to develop programs and leadership that attract supporters and by promoting, not restricting, the widest possible access to the MLS. To the extent that any alleged evils alluded to herein may exist, it is preferable that they be addressed by the legislature, an appropriate regulatory body, and/or the courts since these less restrictive alternatives are less likely to be influenced by the narrower concerns of the industry when they diverge from the interest of the public at large. It would be regrettable if all qualified real estate licensees were forced to participate in one private trade association. If membership in a Realtor board merits broker participation, they will participate; if it does not, brokers should have the option of seeking to satisfy their professional interests elsewhere. There is no reason why Realtors, any more than any other trade association, should be assured permanency and a substantial annual income through enforced membership.

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[219] Grillo, 91 N.J. Super. at 222-23, 219 A.2d at 647.