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# Trade Regulation—Concerted Refusal to Deal—Association's Exclusion of Licensed Realtor from Listing Pool.—Grillo v. Board of Realtors

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respect to the FTC.[62] In *Alkali*, the Supreme Court recognized the power of the Department of Justice to institute antitrust suits in the federal courts without initial recourse to the FTC.[63] However, this power was recognized only as an answer to Alkali's motion to dismiss a Justice Department complaint on the ground that the FTC had primary juridiction.[64] The question has yet to be answered as to who will be granted primary jurisdiction when the FTC issues a complaint at the same time that an action is instituted in a district court. *Dean* would indicate that the Supreme Court may now favor the FTC in such a conflict. Since the Court in *Dean* went out of its way in using the All Writs Act to grant to the FTC powers equal to those of the Justice Department, it would seem unreasonable to predict that the Court would place the FTC in a position inferior to the Justice Department in a primary jurisdiction fight. Furthermore, *Dean* required an implicit decision on the relative powers of the FTC and the Justice Department, since *Dean* effectively granted to the FTC full power to hear all merger cases within its jurisdiction without prior recourse to the Justice Department. This same type of decision, though in a different context, will have to be made to determine whether the FTC or the district courts have primary jurisdiction. There is no apparent reason why the Court will not again favor the FTC.

There is no doubt that the Court in *Dean* did show a favorable attitude toward the FTC. Although there was sufficient precedent for the Court to invoke the All Writs Act prior to an adjudication by a lower tribunal, the Court could have easily distinguished *Dean* from these previous cases on the basis of both *Dean*'s unique fact situation and the implications of Sections 15 and 16 of the Clayton Act. The fact that the Court did not choose to do so, but provided the FTC with more extensive power, reaffirms the strict anti-merger policy the Court has demonstrated in recent years.

JAMES A. CHAMPY

**Trade Regulation—Concerted Refusal to Deal—Association's Exclusion of Licensed Realtor from Listing Pool—*Grillo v. Board of Realtors*.**[1]—Defendants in this action are a nonprofit corporation[2] and its individual member realtors. The corporation operates a "listing pool" in the Plainfield, New Jersey area. The "listing pool" is a system whereby any residential

[62] 3 Davis, Administrative Law § 19.05, at 23-24 n.1 (1958).

[63] During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to institute antitrust suits, without prior proceedings by other agencies, became firmly established. A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may be appropriately brought, would require a clear expression of that purpose by Congress.

325 U.S. at 205-06.

[64] Id. at 198.

[1] 91 N.J. Super. 202, 219 A.2d 635 (1966).

[2] The defendant board is a member of the National Association of Real Estate Boards and is affiliated with the New Jersey Association of Real Estate Boards.

property of less than four units which is listed with a board member is listed with all member realtors. Any board member may then show the listed property and consummate its sale. When a property is sold the commission is divided: twenty per cent to the listing realtor, seventy-five per cent to the selling realtor, and five per cent to the board to cover its expenses. Participation by realtors who are not members of the board is limited to referral of prospects to members. If a sale is consummated as a result of such a referral, the selling realtor pays thirty per cent of his seventy-five per cent commission to the referring realtor. The rules prohibiting direct participation by nonmembers are actively enforced by the board.

In order to be a candidate for admission to the board, a licensed realtor must have been active in a firm in the Plainfield area for at least one year. Even a qualified candidate may be rejected by a vote of the members without a hearing or explanation. The initiation fee is one thousand dollars.[3] The plaintiff, having unsuccessfully applied for admission to the board several times over an eight-year period, sought to enjoin his continued exclusion and asked damages for the previous rejections. He contended that by excluding him from the benefits of the listing pool the board had committed a tort against his business and had acted in restraint of trade. The defendant answered that the plaintiff had not met the ethical standards that were required of a candidate and that his exclusion was, therefore, reasonable under the circumstances.[4] HELD: The exclusion of a licensed realtor from the listing pool was unreasonable because it was an attempt to enforce extra-governmental standards in a fully-regulated field. Such an exclusion is both a tort and a restraint of trade. Nine thousand dollars in damages were awarded,[5] and an injunction was issued ordering the board to change the rules of the listing pool so that any licensed broker in the Plainfield area could participate on the same basis as a board member.

The court's decision was composed of three major points. First, participation in the listing pool was necessary to compete successfully in the sale of residential real estate in the Plainfield area. Second, for that reason, the

[3] The one-year waiting period, the $1,000 initiation fee, and the exclusion of licensed brokers by secret vote were the particular restrictions on membership with which the court was concerned. 91 N.J. Super. at 211, 219 A.2d at 640. Other considerations, such as the exclusion of realtors not in the area, were not in issue on the facts. Id. at 229-30, 219 A.2d at 651.

[4] The National Association promulgates the "Realtor Code of Ethics" which is observed by the members of local boards. To show that the plaintiff did not meet their ethical standards, the defendants submitted evidence that the plaintiff had made advances upon women while in their homes in his professional capacity. Brief for Defendant, pp. 5-7. Since the court prohibited the exclusion of any licensed realtor from membership in the listing pool, it did not reach this question. 91 N.J. Super. at 225, 219 A.2d at 648.

[5] The plaintiff submitted no evidence of actual damages, but, since injury had been proven, the court awarded the average profit realized from the listing pool by board members over the years of plaintiff's exclusion. Id. at 230-32, 219 A.2d at 651-52. The basis for the award was highly speculative and probably did not represent actual loss. The plaintiff presumably concentrated on obtaining and selling his own listings and so mitigated the damages. In addition, some of the listings obtained by the plaintiff would have been sold by other board members, reducing the plaintiff's profit.

exclusion of plaintiff was prima facie a tort and a restraint of trade. Third, the exclusion could not be justified as a means of enforcing the board's ethical standards. An analysis of these points shows the danger in permitting private trade or professional associations to exclude competitors in the same field from functions which are essential to competition on an equal basis with members.

Underlying the plaintiff's cause of action against the board was the fact that it was an economic necessity for a realtor in the Plainfield area to participate in the listing pool. Unless exclusion from a private association directly affects an individual's capacity to compete with those who enjoy its benefits, the court will have no basis to intervene.[6] The right to choose one's associates is not absolute, and must give way when the collective strength of the association is such that it has gained some kind of control over a field.[7] In such a case, the courts will intervene to ensure that the benefits of that power are extended to all competitors on an equal basis and that no competitive imbalance results.[8]

Having concluded that exclusion from the benefits of the listing pool caused a diminution of the plaintiff's competitive opportunity, the court characterized this injury both as the tort of concerted refusal to deal,[9] and as a common law restraint of trade.[10] The court treated these two causes of action separately, as if they were two different forms of unlawful business conduct. It is submitted, however, that there is no difference between a cause of action based on the tort of concerted refusal to deal and one based on a common law restraint of trade. The elements of the two causes of action, and the interests to be considered, are identical.

The elements of a restraint of trade at common law are (1) a conspiracy or combination to reduce competition, which (2) injures the public (3) un-

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[6] Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920). See generally Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 990-98 (1963).

[7] Developments in the Law—Competitive Torts, 77 Harv. L. Rev. 888, 931 (1964). See Chafee, Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1022 (1930). See also Silver v. New York Stock Exch., 373 U.S. 341 (1963) (stock exchange ordering removal of wire service to nonmember dealers in unlisted securities); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (withholding association seal of approval from competing products); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961) (secondary boycott of nonmember physicians by accrediting only those hospitals which restricted their staffs to association members).

[8] Monopoly has been defined in terms of control over a field and exclusion of competitors in the exercise of that control. United States v. National Retail Lumber Dealer's Ass'n, 40 F. Supp. 448, 456 (D. Colo. 1941); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 688, 7 A.2d 176, 179 (1939).

[9] See Restatement, Torts § 765 (1939).

[10] The New Jersey antitrust statute applies solely to corporate mergers and acquisitions. N.J. Stat. Ann. § 14:3-10 (1939). Thus, the plaintiff was confined to a common law restraint of trade cause of action. For a resolution of similar problems under a statute, see Group Health Coop. v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1957). In addition, it is likely that the board is not subject to federal antitrust law. Cf. United States v. Oregon State Medical Soc'y, 343 U.S. 326, 338 (1952).

reasonably.[11] The tort consists of (1) a concerted refusal to deal with another which (2) harms his business and (3) is not justified under the circumstances.[12]

The first element, either the concerted refusal to deal or the combination or conspiracy to reduce competition, is the illegal conduct against which the court's relief is directed. Refusing to deal is a tort only when it is done by *agreement*,[13] and a common law restraint of trade is a *contract* or *conspiracy* to reduce competition.[14] Since refusing to deal with a businessman necessarily reduces his competitive capacity and restrains trade to that extent, combining to do so is conspiring to restrain trade.[15] As for the second element, the causes of action seem to diverge, because the injury of the tort is to the individual's business, while the injury of a restraint of trade is to the public. But the immediate injury to a plaintiff's business from a reduction of his competitive capacity is also an injury to the public's interest in free competition. In fact, injury to a single competitor has been held sufficient to establish a cause of action as a restraint of trade.[16] For the court to characterize the injury as both a restraint of trade and a tort is merely an acknowledgment of the fact that business competitors and the general public each have an interest requiring that a particular field be accessible on an equal basis to all qualified people. In any event, the courts' treatment of the third element of each cause of action completely eliminates any meaningful distinction between them.

The third element concerns the reasonableness of the restraint and the justification for the refusal to deal. In each action this issue is determined by a balancing of both public and private interests against the intended and actual benefits or injuries. In a tort action, the effect on competition of a refusal to deal is examined,[17] and, in restraint of trade, the courts evaluate the degree of injury to private competitors.[18] Thus, the conduct in question, the interests to be considered, and the injury to be redressed are the same no matter which theory is utilized.

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[11] 6A Corbin, Contracts § 1379, at 30 (1962). Antitrust statutes have generally been interpreted to embody the common law elements, so that statutory and common law actions are essentially interchangeable. See United States v. Southeastern Underwriter's Ass'n, 51 F. Supp. 712, 714 (N.D. Ga. 1943); Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 44, 172 P.2d 867, 873 (1946).

[12] Restatement, Torts § 765 (1939).

[13] Id. § 762(c). See Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 179, 137 N.W.2d 701, 708 (1965); Barish v. Chrysler Corp., 141 Neb. 157, 164, 3 N.W.2d 91, 95 (1942); Pfoh v. Whitney, 62 N.E.2d 744, 756 (Ohio Ct. App. 1945).

[14] See Associated Press v. United States, 326 U.S. 1, 15 (1945); United States v. Bausch & Lomb Co., 321 U.S. 707, 723 (1944); United States v. Colgate & Co., 250 U.S. 300, 307 (1919). But see Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951) (combination not required if specific intent is to establish a monopoly).

[15] American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); Eastern States Retail Lumber Dealer's Ass'n v. United States, 243 U.S. 600, 614 (1914).

[16] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

[17] Restatement, Torts § 765(2)(e) (1939). See W. E. Anderson Sons v. Local 311, Int'l Bhd. of Teamsters, 156 Ohio St. 541, 560, 104 N.E.2d 22, 33 (1952).

[18] Klor's, Inc. v. Broadway-Hale Stores, Inc., supra note 16, at 213; Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 229, 64 Atl. 1029, 1030 (1906).

The utility and necessity of the tort theory arises because of the general rule at common law that only the attorney general can seek to enjoin a restraint of trade.[19] In jurisdictions which follow this rule, the tort theory is the only basis for relief available to an injured competitor in his individual capacity. Other jurisdictions have changed the common law regarding standing, and in these jurisdictions the tort theory is merely an alternative form of relief.[20] Finally, in some jurisdictions, standing is conferred upon injured competitors by an antitrust statute, and the tort action is rendered superfluous.[21] Since the tort action adequately protects the interests of injured competitors, it is submitted that it should be used in those jurisdictions which retain the common law notion of restraint of trade. This would eliminate the necessity of straining the common law to allow standing to an individual.

The third point in the court's decision—the reasonableness of the board's conduct—involved the only real issue to be decided. This will be true in most cases of exclusion from a private association: the mere involvement of the association is proof of the combination or agreement; the refusal to deal is proven by the plaintiff's exclusion; and, although the actual damages may be difficult to prove, the existence of *some* injury is unquestionable, because the cause of action presupposes that membership is essential to the plaintiff's business. Thus, proof that the defendants have agreed to refrain from dealing with the plaintiff leaves the reasonableness of the boycott as the only issue.

A case like *Grillo* is easily reduced to the single issue of reasonableness, and this issue can be further reduced to a single question. Since the plaintiff normally attacks only his exclusion from the association and not its existence, the court need only balance the benefit expected from the exclusion with the individual's right to compete on an equal basis. And the only justification which may be seriously advanced for restricting an individual's right to compete is the prevention of incompetency, dishonesty, or generally substandard conduct.[22] The determination of these norms is ordinarily a legislative function, and therefore the question before the court should be the desirability of permitting the private association to exercise this power by economic sanctions.

On the facts of the instant case, the answer was obvious to the court. The regulation of real estate brokers in New Jersey has been entrusted by the legislature to the Real Estate Commission.[23] The commission has exclu-

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[19] Since Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598 (C.A. 1889), the general rule in England and the United States has been that a competitor who is injured by a restraint of trade has no standing to sue in the absence of malice toward his business. Palmer v. Atlantic Ice & Coal Corp., 178 Ga. 405, 415, 173 S.E. 424, 429 (1934). Cf. Downs v. Bennett, 63 Kan. 653, 660-61, 66 Pac. 623, 626 (1901).

[20] See, e.g., Group Health Coop. v. King County Medical Soc'y, supra note 10, at 658, 237 P.2d at 775. See 32 B.U.L. Rev. 227 (1952). In *Grillo*, the court had some difficulty in deciding to grant standing to the plaintiff. 91 N.J. Super. at 213-17, 219 A.2d at 641-44.

[21] E.g., Cal. Bus. & Prof. Code § 16750 (West 1964); Ohio Rev. Code Ann. § 1331.08 (Baldwin 1964); Okla. Stat. Ann. tit. 79, § 25 (1961).

[22] See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., supra note 7, at 658; Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 467 (1941).

[23] N.J. Stat. Ann. § 45:15-17 to -29.5 (1963).

sive jurisdiction over licenses and may withhold or confiscate them whenever necessary to protect the public from incompetency or unscrupulous conduct.[24] Any private economic sanctioning of licensed brokers conflicts with the commission's function and can only be unreasonable. The fact that the plaintiff may have been guilty of misconduct,[25] or that the code of ethics promulgated by the defendant board was more easily enforceable than the statute,[26] was immaterial. Any exercise of restrictive authority by the board was unreasonable in the light of the commission's exclusive authority as manifested by the comprehensive legislative scheme.

However, the court's reasoning that the exhaustive quality of the legislation indicated a policy of exclusive regulation may be equally applicable where there has been little or no legislation, for failure to legislate is often held to be indicative of an intention that an area be left relatively uncontrolled.[27] At any rate, failure to explicitly regulate should not be interpreted as a mandate for *private* regulation, enforced by *private* economic reprisals,[28] especially where the enforcer has a self-serving interest in restricting a competitor's business.[29] In addition, there are no procedural checks and no judicial review of a private group's findings[30] unless a court is willing to review individual exclusions on a case-by-case basis.[31] The conclusion suggested by *Grillo* is that no private association whose functions secure a competitive advantage for its members should be allowed to withhold these benefits from others if it thereby maintains extra-governmental standards within a field.

The impact of *Grillo* on New Jersey law can best be evaluated by reference to *Falcone v. Middlesex County Medical Soc'y*,[32] a recent case from the same jurisdiction, which concerns a similar problem. In that case, the medical society had excluded a licensed physician from membership because he had not fulfilled its unwritten requirement of four-years attendance at a medical school approved by the American Medical Association. Membership in the society was a prerequisite for acceptance to the staff of any local hospital.[33] The trial court found that membership was necessary to

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[24] N.J. Stat. Ann. § 45:15-17 (1963).

[25] See note 4 supra.

[26] Brief for Defendant, p. 8.

[27] American Medical Ass'n v. United States, 130 F.2d 233, 249-50 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).

[28] Cf. Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947). But cf. Purofied Down Prods. Corp v. National Ass'n of Bedding Mfrs., 97 N.Y.S.2d 683 (Sup. Ct. 1950). See also Note, Legal Responsibility for Extra-Legal Censure, 62 Colum. L. Rev. 475 (1962).

[29] Interest alone is a significant factor in holding the restriction of competitors unreasonable. See Associated Press v. United States, supra note 14, at 26-27.

[30] Compare N.J. Stat. Ann. § 45:15-18 (1963).

[31] New York courts have been willing to review exclusion from medical societies on such a basis. See Ried v. Medical Soc'y, 156 N.Y. Supp. 780 (Sup. Ct. 1915). But the origin of this practice lies in a statute, since repealed, which required physicians to be members of a medical society. Note, 15 Rutgers L. Rev. 327, 333 n.30 (1961). See People ex rel. Bartlett v. Medical Soc'y, 32 N.Y. (5 Tiff.) 187, 191 (1898).

[32] 34 N.J. 582, 170 A.2d 791 (1961).

[33] The County Medical Society was a member society in the AMA and adhered

effectively practice medicine, and that the exclusion had no reasonable relation to the society's legitimate attempts to promote higher standards of ethics.[34] The society was ordered to admit the plaintiff to full membership, and the state supreme court affirmed.

Although *Falcone* and *Grillo* both uphold the individual's right to membership in a private association when such membership is essential to the practice of a profession, they are significantly different in application. *Falcone* established a policy of reviewing the exclusion on the basis of its reasonableness, but the court in *Grillo* held that *no* exclusion could be reasonable—that *all* licensed realtors must be permitted to participate in the listing pool. The difference in policy shows a willingness by the court to accept private regulation, otherwise unlawful as concerted action, based upon the distinction between the nature of the professions involved.

In ordinary commercial matters there is little justification for private restrictive measures.[35] In the learned professions, however, there are important interests to be promoted, even at the occasional expense of some diminution in free competition.[36] Some ethical considerations peculiar to the individual professions are not present in ordinary commercial enterprise.[37] The promotion of new techniques and ideas requires mutual trust and understanding between professionals.[38] There is also a tradition of self-regulation and public service with which the courts hesitate to interfere.[39] Because of these extra considerations, the court in *Falcone* did not apply the ordinary business law that was later applied in *Grillo*, but held that the medical society possessed a fiduciary power of control exercisable in a reasonable manner.[40] In effect, *Falcone* transforms groups with such a power into administrative bodies, for they are allowed to determine the standards for physicians who will serve in the hospitals.[41]

There are, then, two solutions to the problems presented by *Grillo* and *Falcone*. If a court finds that legislative standards are intended to be exclusive, it will enjoin any exercise of group authority. On the other hand, if it determines that the state statute sets only minimum standards, it may

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to its standards. In order to retain AMA accreditation, a hospital is restricted to the appointment of AMA members on its staff. Id. at 587, 170 A.2d at 794.

[34] 62 N.J. Super. 184, 162 A.2d 324 (1960).

[35] See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., supra note 7; Fashion Originators' Guild of America, Inc. v. FTC, supra note 28, at 467-68.

[36] The learned professions have been excluded from the term "trade" for regulatory purposes, since ordinary commercial competition is of little concern in the regulation of the professions. Riggall v. Washington County Medical Soc'y, 249 F.2d 266, 270 (8th Cir. 1957); United States v. Oregon Medical Soc'y, 95 F. Supp. 103, 118 (D. Ore. 1950). The real estate profession, however, has been classified as "trade" for regulatory purposes. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950).

[37] Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935).

[38] See Harris v. Thomas, supra note 6, at 1077.

[39] See Note, 63 Yale L.J. 937, 949, 959-61, 970-71, 976 (1954). For example, the AMA has been instrumental in raising hospital standards. See Perr, Hospital Privileges Revisited, 9 Clev.-Mar. L. Rev. 137, 146-147 (1960).

[40] 34 N.J. at 597, 170 A.2d at 799.

[41] New Jersey has apparently accomplished judicially what New York had accomplished legislatively. See note 31 supra.

hold that "it is desirable to have a central body to improve upon those standards and to promulgate codes of practice and conduct."[42] The court's sympathy with private regulatory programs should be in proportion to its estimation of their value as applied by the particular profession involved. This, in turn, should be determined by the degree to which considerations other than control of competition motivate the learned professions to form private associations and exercise their "administrative" power.

ROBERT ZIMMERMAN

**Trade Regulation—Miller-Tydings Amendment—Redemption of Trading Stamps for Fair-Traded Goods.—*Vornado, Inc. v. Corning Glass Works.*[1]**—Corning Glass Works is a manufacturer of household goods such as the popularly known "Corning Ware." Vornado is a discount retail company, selling food items and a wide range of other merchandise. Vornado also operates its own trading stamp plan, issuing stamps on the sale of its food items, and redeeming the filled stamp books for non-food items. Corning required Vornado to execute a fair-trade agreement which included a minimum price schedule. Vornado abided by this schedule on all cash sales of Corning's products, but did not always so abide when selling them in exchange for a combination of filled stamp books and cash. The actual value of this combination was sometimes below the scheduled minimum price.[2] Corning informed Vornado that this practice constituted a violation of their fair-trade agreement, and insisted that Vornado cease such exchanges. Following the latter's refusal to comply, Corning instructed its distributors to stop supplying Corning's products to Vornado. Vornado subsequently instituted this litigation in the United States District Court for New Jersey.

Vornado contended that its ability to engage in price competition was reduced by Corning's retail price-fixing program, and that Corning's refusal, in concert with its distributors, to continue selling its products to Vornado was a conspiracy in violation of the antitrust laws. Vornado claimed that Corning's failure to subject trading stamp operations, other than Vornado's, to resale price restrictions amounted to such discrimination as to remove Corning from within the fair-trade exemption contained in the Miller-Tydings Amendment to the Sherman Act.[3] Corning has never treated trading stamp companies (*e.g.*, Sperry & Hutchinson Company, Top Value Enterprises, Inc., E. F. McDonald Stamp Company) as within the operation of its fair-trade program. Nor has Corning regulated the number of filled stamp books required to be exchanged for its products. The district court HELD: Corning's fair-trade agreement with Vornado was valid, and therefore Vornado

[42] Note, 15 Rutgers L. Rev. 327, 356 (1961).

[1] 255 F. Supp. 216 (D.N.J. 1966).

[2] For example, Vornado might offer a Corning product, having a fair-trade price of $10.95, for $4.95 in cash and one filled stamp book normally valued at $2.25. The total actual value of the stamp and cash combination would be $7.20. Id. at 222.

[3] 50 Stat. 693 (1937), as amended, 15 U.S.C. § 1 (1964).