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The Real Estate Brokerage Industry and Antitrust Implications

I. INTRODUCTION

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.

—Adam Smith
THE WEALTH OF NATIONS¹

The impact of the real estate industry, as a whole, upon the national economy is of major proportions. Everyone needs a place to live, and, for most people, the purchase of a home is the most significant investment they will ever make.²

Seemingly, one of the first areas to be affected by the tightening of the money supply or recessive financial trends is the construction industry.³ The consumer's inability to borrow money at affordable rates in order to purchase a new or "resale" home, often results in a decrease in demand for new housing. In contrast, relatively low interest rates result in high demand for housing. Homes purchased under the latter circumstances are often considered as both investment opportunities and family residences. The increasing mobility of our society and the general population growth have been major contributing factors in the increase of the housing demand, and consequently, in the increasing cost of housing itself. The sale or purchase of most homes involves the service of a real estate broker. Most real estate brokers operate on a commission basis, and, hence, strong incentive exists for them to work hard to maximize their profits.

Economic principles form the foundation of antitrust laws,⁴ the

1. I A. SMITH, THE WEALTH OF NATIONS, c. X (1776).

2. For example, in 1975, over 33% of total credit extended in the U.S. was for real estate loans; compare with 18.8% of credit utilized for the federal debt. HOAGLAND, STONE & BRUEGGEMAN, REAL ESTATE FINANCE 3844 (1977).

3. First quarter reports of 1980 evidenced a drop of new housing starts by 22%.

4. The federal antitrust statutes are found in three main acts: the Sherman Act, ch. 647, 26 Stat. 209; the Clayton Act, ch. 323, 38 Stat. 730 (current version at 15

objectives of which are to assure a competitive economy. "From the very beginning, antitrust . . . was considered a bulwark against arbitrary action and oppression at the hands of the economically powerful. . . ."⁵ The underlying theory is that through a truly competitive marketplace, the lowest price will be found for goods to satisfy consumer wants while, at the same time, preserving scarce resources as best as possible. Such a system suggests that the "consumer (through his willingness or refusal to buy) will decide what and how much shall be produced and that competition among producers (with the production of the highest quality product at the lowest price) will determine who will manufacture it."⁶ It would appear that this economic goal is somewhat thwarted when the providers of services who are supposed

U.S.C. §§ 12-27, 44 (1976) with particular provisions often identified themselves for the specific area of antitrust activity codified: the Robinson-Patman Act, ch. 592, §§ 1-4, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13b, 21a (1976)) (price discrimination); and the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (1976)) (corporate mergers); and the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1976 & Supp. III 1979)).

The scope of issues to be dealt with herein invoke only consideration of the Sherman Act, 15 U.S.C. § 1 (1976). Section 45(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976), states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The real estate business in California is currently under investigation by the Federal Trade Commission, presumably under the authority of 15 U.S.C. § 45(a)(1) (1976). A report was expected June, 1980. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of felony, [punishable by fines and imprisonment]

15 U.S.C. § 1 (1976). Prior to recent amendment, penalty for violation was only a misdemeanor.

Several states have enacted state antitrust statutes ("little Sherman Acts") which by case decision have been held to parallel the federal law. Thus, federal case decisions and precedents have been held to be applicable by analogy. *See* Cartwright Act § 1, CAL. BUS. & PROF. CODE § 16700 (West 1964 & Supp. 1980); Illinois Antitrust Act 1965 Ill. Laws, ILL. ANN. STAT. ch. 38, §§ 60-1 to 60-11 (Smith-Hurd 1961 & Supp. 1980); MICH. COMP. LAWS § 445.701 (1970); N.J. STAT. ANN. §§ 56:9-1 to 9-19 (West Supp. 1980). For state court cases holding federal cases interpreting the Sherman Act to be persuasive authority: *see, e.g.*, *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925, 549 P.2d 833, 835, 130 Cal. Rptr. 1, 3 (1976); *Blake v. H-F Group Multiple Listing Serv.*, 36 Ill. App. 3d 730, 738, 345 N.E.2d 18, 24 (1976); *Grempler v. Multiple Listing Bureau of Harford County, Inc.*, 258 Md. 419, 425, 266 A.2d 1, 4 (1970); *Barrows v. Grand Rapids Real Estate Bd.*, 51 Mich. App. 75, 83, 214 N.W.2d 532, 536 (1974); *Oates v. Eastern Bergen County Multiple Listing Serv., Inc.*, 113 N.J. Super. 371, 273 A.2d 795, 801 (1971); *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 212, 219 A.2d 635, 645 (1966); *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 347, 304 A.2d 493, 496, *cert. denied*, 414 U.S. 979 (1973).

5. *Blake & Jones, In Defense of Antitrust*, 65 COLUM. L. REV. 377, 384 (1965).

6. E. GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 41 (1976).

to be in competition with each other, join in a cooperative association which establishes a fixed rate of return for their services. This is especially so when consumers must frequently utilize these services in order to make their ultimate purchases. Co-operative associations have been decried as acting in violation of antitrust laws; such has been one of the charges leveled against real estate brokers and their local and national realty boards.

There are countervailing antitrust considerations under which some trade association⁷ activities are permissible without violating the law. Among them is the view that because antitrust statutes were enacted in part to help protect the independence of small competitors against potential economic pressures from producers, some producers ought to be allowed to join together in an effort to share some forms of market information. The expansion of knowledge of market conditions aids all producers to compete more effectively.

This comment will first present a general overview of the functions of real estate agents and boards of realtors.⁸ It will then examine the effects of the recent Supreme Court decision *McLain v. Real Estate Board of New Orleans, Inc.*,⁹ which held that federal jurisdiction under the Sherman Act¹⁰ may now be utilized to reach realtors and realty boards. Following an examination of the permissible roles trade associations can fulfill, this comment will discuss several of the frequently contested areas of activity in light of the antitrust law after *McLain*, including membership and exclusion policies of boards, the multiple listing service as a restraint of trade, and the effect of the multiple listing service as an information exchange and as a tool for effectuating a group boycott.

7. A trade association is an association of businesspersons selling the same product or in the same industrial operation, who chose to join together for the purpose of gathering and disseminating information useful to all members. *Sugar Inst. Inc. v. United States*, 297 U.S. 553, 598-99 (1936); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582-84 (1925). Many functions of such associations are entirely legitimate and promote competition; others have the purpose of stabilizing prices or effecting a boycott of noncomplying competitors, or other illegal ends.

8. The National Association of Realtors (NAR) has registered with the U.S. Patent Office the term and mark Realtor® as a service mark. NATIONAL ASS'N OF REALTORS, MEMBERSHIP POLICY AND PROCEDURES MANUAL 8 (1973) [hereinafter cited as NAR MANUAL]. Use of the term or mark is limited to real estate boards affiliated with NAR.

9. 444 U.S. 232 (1980).

10. See note 4 *supra*.

II. THE REAL ESTATE FRAMEWORK

A focal element of the real estate industry is the real estate board. Boards operate at the local, state, and national levels, and generally, one of the primary services they offer to their members is the multiple listing service (MLS).¹¹ While many multiple listing services operate independently of a local realty board,¹² the vast majority operate as an adjunct of a board. Certainly a connection to a strong parent organization imbues any such service with operational advantages. Most antitrust real estate cases allege illegal practices of the boards themselves or violations due to the exclusivity of the MLS or its effect as a restraint on trade.

A. *The National Association of Realtors and Member Boards: Functions and Purposes*

The National Association of Realtors (NAR)¹³ is a trade association which charters local real estate boards as "member boards," and through its constitution, by-laws, and code of ethics, establishes certain procedures and policies to which members and member boards must adhere. Local member boards operate within geographical areas and, in many states, are affiliated with a state realty board.

Generally, real estate agents are eligible for membership in the NAR, as well as local boards. The NAR is among the largest and most influential trade associations in the country,¹⁴ with 750,000 members.¹⁵ Its stated goals include "the creation of unity in the real estate profession, the compilation of relevant information concerning real estate, the protection of private ownership of real property, and the establishment of professional standards of prac-

11. See notes 26-41 *infra* and accompanying text.

12. The following cases involve examples of several independent MLS systems: *Blake v. H-F Group Multiple Listing Serv.*, 36 Ill. App. 3d 730, 345 N.E.2d 18 (1976) (only four member brokers in a locale with 60-70 other brokers and three other MLSs); *Grempler v. Multiple Listing Bureau of Harford County, Inc.*, 258 Md. 419, 266 A.2d 1 (1970) (only about 17% of those eligible to join the MLS had done so); and *Oates v. Eastern Bergen County Multiple Listing Serv., Inc.*, 113 N.J. Super. 371, 273 A.2d 795 (1971) (by a stockholder's agreement, membership was restricted to current members and their immediate families).

13. Formerly the National Association of Real Estate Boards.

14. A. RING & J. DASSO, *REAL ESTATE PRINCIPLES AND PRACTICES* 24 (8th ed. 1977). See also Comment, *Exclusion from Real Estate Multiple Listing Services as Antitrust Violations*, 14 CAL. W.L. REV. 298, 300 (1978) [hereinafter cited as *MLS Exclusion*].

15. The amazing growth of the field, and particularly of the association, is underscored when it is realized that as of January 1, 1968, membership stood at 84,583. M. UNGER, *REAL ESTATE PRINCIPLES AND PRACTICES* 423 (1969). Incidentally, one of every five members is from California. Mankin, *The War of the Realtors*, NEW WEST, Feb. 11, 1980, at 40.

tice.”¹⁶ Membership is available to two classes of real estate agents: brokers and salespeople. Brokers are the “principles, partners, corporate officers or trustees . . . engaged principally in buying, selling, exchanging, renting, or leasing . . . (r)real (e)state for others for compensation”¹⁷ A broker is required to have served as a salesperson for at least two years, to have passed a broker’s exam, and, in some states, to have met other educational requirements. The broker may employ his own sales staff or, as is often the case, rent space to sales agents and, for a certain percentage of the agent’s commissions, perform the listing and other services which salespersons are not entitled to perform.¹⁸ Salespersons cannot operate independently; they must work for or through a licensed broker. To be a real estate salesperson, one must comply with state licensing requirements, which generally include passing a real estate examination and being at least eighteen years of age.¹⁹ Each state establishes its own licensing requirements for both brokers and salespersons.

The NAR has established what is termed an “8-Point Membership Criteria” setting forth the maximum requirements which may be imposed for membership upon applicant brokers, although local boards may set lesser standards. These requirements include that the applicant possess a valid state broker’s license and be “actively engaged” in the real estate business.²⁰ In

16. NAR MANUAL, *supra* note 8, at 8.

17. Grillo v. Board of Realtors, 91 N.J. Super. 202, 207, 219 A.2d 635, 637 (1966).

18. See, e.g., CAL. BUS. & PROF. CODE § 10131 (West Supp. 1980) (detailing the responsibilities of brokers). A salesperson so employed is considered an independent contractor. NAR MANUAL, *supra* note 8, at 50.

19. See, e.g., CAL. BUS. & PROF. CODE § 10132 (West Supp. 1980) (defining real estate salesmen).

20. NAR MANUAL, *supra* note 8, at 44. “Actively engaged” requires that the licensed real estate broker

will have an office for the conduct of real estate business, that such office will be open for business during normal business hours and that such licensee shall hold himself out to the public as being actively engaged in the real estate business. It does *not* contemplate that the broker must devote all or even a majority of his time to his real estate business or derive any particular percentage of his income from such business. It does *not* contemplate that the licensee shall have no other job or occupation. It *does* contemplate that the licensee shall *actively seek* real estate business.

Id. (emphasis in original).

Additionally, the NAR requires the broker to operate a place of business within Board jurisdiction and that it comply with local zoning regulations. The applicant must establish that he or she has established a favorable business reputation in the community and has a sound credit rating. The applicant must complete the

Brown v. Indianapolis Board of Realtors,²¹ the United States District Court²² found each of the requirements to be reasonable and in the public interest.²³ The NAR has itself determined that membership is a valuable right which may be "revoked or modified for good cause and only under circumstances which afford due process." This was so because of the NAR's importance as a trade association offering specific benefits.²⁴ Among these benefits are extensive advertising, arbitration services, educational seminars,²⁵ and, of course, the multiple listing system.

B. *The Multiple Listing Service*

The NAR describes a MLS as "a means of making possible the orderly dissemination and correlation of listings information to its members so that Realtors may better serve the buying and selling public."²⁶ Basically, a MLS is a means by which all real estate brokers within a particular geographic area who are members of a given service pool their information on "exclusive listings"²⁷ and, in effect, become agents for each other in sales. Any member of the service may sell any property listed through the service. Members of the service pay a fee for listings, most of which are limited to residential properties. Occasionally commercial and investment properties are included depending upon the focus of the MLS. When a property is sold by a real estate broker other than

Board indoctrination course, signify intention to abide by the NAR Code of Ethics, and also the Constitution, By-laws, Policy, and Rules and Regulations of the local Board, the state association, and the NAR. *Id.* at 44-45.

21. [1977-1] Trades Cases (CCH) ¶ 61,435 (S.D. Ind. 1977).

22. Southern District of Indiana, Indianapolis Division.

23. [1977-1] Trade Cases (CCH) ¶ 61,435 at 71,613. In *Brown*, the plaintiff challenged the local Board's denial of his membership application. The 8-Point Membership Criteria, *see* note 18 *supra* and accompanying text, are to be the most rigorous standards a local board can apply to an applicant and no member board may apply "any arbitrary, numerical or other inequitable limitation on its membership," NAR *Manual*, *supra* note 8, Bylaws, article I, section 2, nor "adopt any rule, regulation, practice or policy inconsistent with or contrary to any policy adopted by the Board of Directors," NAR *MANUAL*, *supra* note 8, at 73, although a board is not compelled to adopt all standards. Plaintiff *Brown* was unable to provide after two applications, evidence of a favorable business reputation within the community. The court found the procedures utilized for processing applications to be fair and lawful, and that any alleged refusals to deal with plaintiff were the result of individual choice and not a concerted effort by the Board.

24. NAR *MANUAL*, *supra* note 8, at 77. *See also*, *MLS Exclusion*, *supra* note 14, at 301.

25. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 *COLUM. L. REV.* 1325, 1328 (1970).

26. NAR *MANUAL*, *supra* note 8, at 7.

27. An exclusive listing is created when a seller enters an agreement with a real estate agency that only their services will be used to sell the property for a specified period of time. The property owner agrees not to sell the property on his own.

the listing broker, the sales commission is divided between the listing and selling brokers.²⁸ If the property is sold by the listing broker, he retains the entire commission, less any service fee paid to the MLS.

The NAR has set forth certain standards for the operation of MLSs with which member boards are expected to comply. These standards provide that cooperation of MLS members with nonmembers in the sale of specific property may not be discouraged or prevented;²⁹ that every board member must be eligible to participate in the MLS;³⁰ that participation in the MLS remains op-

28. The division, at least as standard in southern California, is generally on a 50-50 basis. Further, if a salesperson sells the property, he or she will split his portion of the commission with the broker with whom he works, on a negotiated basis. Thus, on a 6% commission, the listing broker and salesperson share 3% (often negotiated as between them, 50-50) and the selling broker and selling salesperson share the other 3%. Commissions of 6% are not required, but that is the usually "accepted" rate in California. Cases which cite commissions generally range from 5-8% in other areas of the country. The party selling the property pays the commission.

The California legislature has enacted legislation, effective July, 1980, such that standard form agency agreements must include a notice that any particular raise of commission is not legally determined; that all commission rates are to be negotiated between seller and broker. CAL. A.B. 80 *as amended*.

29. NATIONAL ASSOCIATION OF REALTORS, HANDBOOK ON MULTIPLE LISTING POLICY 16 (1975) [hereinafter cited as *MLS HANDBOOK*]. By encouraging such cooperation, a board sued for exclusion of a nonmember real estate agent has a persuasive defense, especially if some instances can be cited of actual joint sales with the nonmember plaintiff. Such as the case in *Brown & Ron Brown Real Estate Inc. v. Indianapolis Bd. of Realtors*, [1977-1] Trade Cases ¶ 61,435, (S.D. Ind. 1977) at 71,613-14. There the court concluded the alleged refusals to deal could only be attributed to isolated and unilateral actions by individual board members and not to the board as a whole. There was, therefore, no violation of antitrust laws because there were some instances of other members working with Brown in the sale of a few properties.

It is, of course, useful for a member to assist a nonmember in a sale of one of the nonmember's properties. However, it appears the real benefit of encouraged co-operation is one-sided. The nonmember is unable to "co-operate" with sales by listing the member's property, since a nonmember has no access to the MLS publication and, thus, cannot "offer" those properties to his clients. The only opportunity a nonmember has in aiding the sale of member property is if members advertise widely in local newspapers or publish a "Homes"-type publication available to the public. Such a publication generally lists selected available properties by local real estate brokers and may be sponsored by the local board, an independent organization, or even a chamber of commerce or other civic group.

30. *MLS HANDBOOK*, *supra* note 29, at 22. The only requirement imposed is that the member be willing "to abide by the rules adopted and pay the required costs If one is good enough to be a member of the Board of Realtors, he is good enough to participate in [the MLS]." *Id.*

tional,³¹ that no waiting period be imposed for participation in the MLS after admission to the board;³² and that the MLS not operate at a profit.³³

Clearly, there are many advantages to participation in a MLS, whether it is independently operated or sponsored by a member board. In terms of economic analysis, a MLS operates to reduce many of the barriers brokers "must face in adjusting supply to demand." The greatest of these barriers is the frequent need of complete information regarding substantial percentages of available properties in wide-spread geographic areas,³⁴ the names of persons to contact regarding asking prices, finance details, and the commission which listing brokers are receiving. Without the MLS, a broker is limited in the selection of homes he may offer his customers for sale. With a MLS, a broker's selection and sales force are both greatly expanded. Through a MLS, a broker's listings have much wider exposure. It has been suggested that

[o]ne of the most important functions of a MLS is to provide the small real-estate office with a diversified inventory of properties which will meet the needs of all but the most highly discriminating buyers, . . . [thus providing] the small office with inventory and promotion potentials equal to those of the larger firms³⁵

Another goal of a MLS is for wide and active participation: "A MLS performs best if it controls such a large proportion of the potential market that all offices except the very large ones become members."³⁶ However, once that degree of control is gained, non-

31. *Id.* It has been suggested that without total cooperation by members, a multiple listing service will not be as effective. Austin, *supra* note 25, at 1329.

32. MLS HANDBOOK, *supra* note 29, at 22. This is apparently in response to legal challenges to MLSs which had a waiting period of up to a year after joining the real estate board. *See, e.g.,* Grillo v. Board of Realtors, 91 N.J. Super. 202, 205, 219 A.2d 635, 638 (1966).

33. MLS HANDBOOK, *supra* note 29, at 22-23. Multiples have been encouraged to not operate as an obvious profit-making device since the decision of Evanston-North Shore Bd. of Realtors v. United States, 320 F.2d 375, 377 (Ct. Cl. 1963). Any fees charged should cover only actual operating expenses of the MLS. Because the board is a trade association, its expenses should be covered primarily by dues, or else its tax-exempt status could be put in jeopardy. MLS HANDBOOK, *supra* note 29, at 25. Further, the NAR recommends that the MLS not become the primary activity of a board; rather, the NAR recommends that the MLS functions be carried out either by a committee of the board or as a wholly-owned subsidiary of the board of realtors.

34. Austin, *supra* note 25, at 1329.

35. F. CASE, REAL ESTATE MARKET BEHAVIOR IN LOS ANGELES—A STUDY OF MULTIPLE LISTING SYSTEM DATA 49 (1963). *See also*, Note, *Arbitrary Exclusion from Multiple Listing: Common-Law and Statutory Remedies*, 52 CORNELL L.Q. 570 (1967).

36. *See, e.g.,* Glendale Bd. of Realtors v. Hounsell, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977) (Hounsell chose not to become a member of the board); Pomanowski v. Monmouth County Bd. of Realtors, 152 N.J. Super. 100, 377 A.2d 791 (1977) (plaintiff terminated his board membership voluntarily prior to seeking access to the multiple). The *Hounsell* court, in granting access to the broker, ac-

members are unable to compete successfully. Such is the basis of some of the complaints filed against boards of realtors by real estate agents who have been denied admission to a board, who have voluntarily chosen to not join, or who have withdrawn from membership.³⁷

The homeowner who wishes to sell is benefited by a MLS in that he need only retain the services of one participant of a MLS in order to receive the services of all other participants of that MLS. A seller normally has three other options available to him: he may choose to sell the home on his own, which requires certain expertise most homeowners lack and a substantial financial investment to get the equivalent amount of advertising a home receives in a MLS; he can utilize an open listing,³⁸ or he can give an exclusive right to sell his property.³⁹

The buyer also enjoys comparable advantages. When his broker is a member of a MLS, the buyer has a much greater selection of properties from which to choose.⁴⁰ Indeed, the buyer need not spend much time looking at properties if his broker carefully matches the MLS listings with the buyer's requirements. Thus the benefits of participation in a MLS are well distributed among sellers, buyers, and realtors.

III. THE JURISDICTIONAL HURDLES SURMOUNTED

Traditionally, there have been three defenses to a finding of federal jurisdiction under the Sherman Act in real estate brokerage cases. First, it has been asserted that the sale of property is not a "trade" within the meaning of the Sherman Act. Second, it has been asserted that the sale of property is subject to an exemption from the coverage of the Sherman Act because of the nature of real estate brokerage as a "profession" or because of the exemption granted to labor. Finally, it has been asserted that the sale of

cepted the expert testimony of a leading Glendale realtor that if a broker is to compete effectively against fellow brokers who enjoy such access, he must be able to use the MLS also. 72 Cal. App. 3d at 213, 139 Cal. Rptr. at 832.

37. See 72 Cal. App. 2d 210, 139 Cal. Rptr. 830.

38. An open listing allows the owner to sell the property on his own, even though he has hired one or more brokers. Of course, when the property sells, that arrangement could lead to controversy as to which broker is entitled to the commission (and if entitled the amount of the commission). R. KRATOVIL & R. WERNER, REAL ESTATE LAW § 249 (7th Ed. 1979).

39. See note 26 *supra*.

40. MLS HANDBOOK, *supra* note 29, at 9.

property is of an inherently intrastate character and thus does not meet the interstate commerce requirement for federal statutory application. Many antitrust challenges to the use of a MLS, as well as other practices of real estate brokers have never been addressed on their merits because, until recently, transactions in land were never held to be within interstate commerce; hence, there could be no jurisdiction under the Sherman Act.⁴¹

A. *The "Trade" of Real Estate Brokerage*

*United States v. National Association of Real Estate Boards*⁴² involved charges of an illegal price-fixing conspiracy against the Washington Real Estate Board after the board had established standard commission rates with which members were expected to comply. The action was brought under section 3 of the Sherman Act,⁴³ which does not require a finding of interstate commerce. The activities of the Washington Board were apparently limited to the Washington, D.C. area, hence, they were within section 3 jurisdiction. The position staunchly asserted by the Government in *National Association* was that the performance of personal services, such as assisting in the buying and selling of homes, was not a "trade" within the meaning of the Sherman Act. The Court quickly laid that challenge to rest, employing a broad interpretation of the term. The Court noted that, as long ago as Justice Story's construction of the term in *The Nymph*,⁴⁴ "trade" was used as the equivalent of an occupation or business. "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."⁴⁵

The Court cited a long line of cases in which various forms of services had been found to constitute "trade" within the meaning of the Sherman Act,⁴⁶ and which specifically rejected any narrow

41. See, e.g., *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37 (9th Cir. 1978).

42. 339 U.S. 485 (1950).

43. Section 3 of the Sherman Act reads, in pertinent part:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, . . . is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, . . .

15 U.S.C. § 3 (1976). At the time of the case, however, the Sherman Act under both §§ 1 and 3 imposed only misdemeanor penalties.

44. 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388).

45. *Id.* at 507.

46. Included in the history were transportation services, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897) (*Trans-Missouri Freight* was

interpretation of "trade" that would exclude personal services under section 3.⁴⁷ Further, the Court held that members of the Washington Board were entrepreneurs; some operated independently while others operated with large staffs, but all were in business for profit.

The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of trade within the meaning of § 3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.'⁴⁸

Thus, the Court refused to carve out a "trade" exception for real estate brokers: "[t]heir activity is commercial and carried on for profit."⁴⁹ The Court left no reason to suspect that a different conclusion would be reached under section 1 of the Sherman Act.

B. *The Profession Exemption*

The leading case attempting to establish an antitrust exemption for professions was *Goldfarb v. Virginia State Bar*.⁵⁰ In *Goldfarb*, plaintiffs sought a title examination in order to obtain financing for a home they had purchased in Virginia. State law permitted only attorneys to examine title and the local county bar association had established a minimum fee schedule applicable to per-

only the second Supreme Court holding under the Sherman Act); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); the cleaning, dying, and renovation of wearing apparel, *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); the procurement of medical and hospital services, *American Medical Ass'n v. United States*, 317 U.S. 29 (1943); and the furnishing of news or advertising services, *Indiana Farmer's Guide Publ. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934); and *Associated Press v. United States*, 326 U.S. 1 (1945).

Interestingly, in *Trans-Missouri Freight*, the Court adopted the position that the intent of Congress in adopting the Sherman Act was to declare illegal all contracts in restraint of trade, not, as was argued, only those which created "unreasonable" restraints. The decision was close—five to four. The dissent, as has frequently been the case, predicted the future position of the Court, finding that even the common law of England had found some contracts of restraint to be reasonable. The shift of the Court was final in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), where it was found that all agreements and regulations affecting trade operate as restraints. The "true test of legality" was held to be whether it is such as to suppress or destroy competition. Thus, it was found the Sherman Act only declared contracts or combinations which *unreasonably* restrained trade to be illegal. 246 U.S. at 238.

47. See, e.g., *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932).

48. 339 U.S. at 490 (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940)).

49. *Id.* at 492.

50. 421 U.S. 773 (1975).

forming that service. The Virginia State Bar Association's ethical opinions instructed members "not to ignore" schedules established by county associations. Further, attorneys were instructed that one could deviate from minimum charges only in deserving cases, but to do so as standard practice or in order to promote one's own business was discouraged. The ethical opinions went so far as to suggest that a pattern of deviation would raise a presumption of misconduct. Charging *more* than the minimum fees recommended was not discouraged.⁵¹ The Court found such practices to constitute an illegal fixing of a price floor enforced by the spectre of disciplinary action by the state bar and motivated by the assurance that there would be no competition among attorneys attempting to underbid each other for services.

The reply offered in *Goldfarb* was that Congress did not intend to include the "learned professions" within the terms "trade" or "commerce" in section 1 of the Sherman Act. In asserting that Congress intended to exclude professions from section 1, the Virginia State Bar contended that competition was inconsistent with the practice of a profession because the goal of professions was to provide necessary services to the community and not to enhance profits.⁵² The Court found no legislative history to support that position nor any support in case law. Rather, it found an intent to "strike broadly" at anticompetitive practices and that to recognize a business aspect in the practice of law would not disparage the profession. The Court noted that the sale of services had not been found to be beyond the scope of section 1.⁵³ The Court cited *Associated Press v. United States*⁵⁴ which held that the nature of an occupation, alone, did not provide sanctuary from the Sherman Act,⁵⁵ and made reference to *United States v. National Association of Real Estate Boards*⁵⁶ while commenting that a "public-service aspect" of a profession is not determinative of whether a profession is included within section 1.

In *National Society of Professional Engineers v. United States*,⁵⁷ the status of a professional association was again argued to con-

51. *Id.* at 777 n.4 and 778.

52. *Id.* at 786. In fact the Court found that the Bar's evidence itself belied that position. They noted that the first line of the State Bar's 1962 Minimum Fee Schedule Report stated: "The lawyers have slowly, but surely, been committing economic suicide as a profession." *Id.* n.16. This suggested to them a less than "wholly altruistic" motive in adopting the schedule.

53. *Id.* at 787. The Court cited *American Medical Ass'n v. United States*, 317 U.S. 519 (1943) and *Radovich v. National Football League*, 352 U.S. 445 (1957) for the proposition.

54. 326 U.S. 1 (1945).

55. *Id.* at 7.

56. 421 U.S. at 787.

57. 435 U.S. 679 (1978).

stitute an exemption to the Sherman Act. The Court did not accept the argument, and society's practices were disallowed. The focus, however, was not on the professional exemption, but upon the district and appellate courts' misapplication of the rule of reason to the society's contention that the practice it adopted eliminated potential endangerment of public safety.⁵⁸

The society placed great weight on a footnote in the *Goldfarb* opinion,⁵⁹ where the Court distinguished between restraints in businesses and those within professions in determining illegality under the Sherman Act. The Court in *National Society* read this footnote, not as supporting a professional exemption, but as advocating application of the rule of reason standard to professional activities when such are alleged to be antitrust violations.

The trend clearly has been to apply the antitrust laws to the efforts of professional organizations to establish noncompetitive fee schedules.⁶⁰ A number of consent decrees have been filed, both in real estate brokerage cases as well as cases involving other professions, limiting such activities.⁶¹

58. The practice involved in *Nat'l Society of Professional Engineers* was a procedure designed to eliminate competitive bidding and requiring members to not discuss the price aspects of a job with a client until after the engineer had been selected for the job. The Court applied the rule of reason standard to the practice and found that while enforcement of competitive bidding *might* work to the detriment of public safety by encouraging engineers to use inferior quality and lower-priced materials, that was not a necessary result of competitive bidding. Under the rule of reason such potential effects are factors to be considered, but in this case it did not justify condoning the anticompetitive practice. *Id.*

59. 421 U.S. at 788 n.17. Footnote 17 reads:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id.

60. See generally, Dunfee, *Sherman Act Applicability to Real Estate Boards*, 10 AM. BUS. L.J. 139 (1972).

61. For example, consent decrees have been obtained in the case of fee schedules against architects, *United States v. Am. Inst. of Architects*, [1972] Trade Cases ¶ 73,981 (D.D.C. entered on June 19, 1972); civil engineers, *United States v. Am. Soc'y of Civil Eng'rs*, [1972] Trade Cases ¶ 73,950 (S.D.N.Y. entered June 1, 1972); and certified public accountants, *United States v. Am. Inst. of Certified Pub. Accountants Inc.*, [1972] Trade Cases ¶ 74,007 (D.D.C. entered on July 6, 1972). Examples of those decrees filed against real estate boards include *United States v.*

C. *The Labor Exemption*

The largest exemption to antitrust coverage applies to the labor market and collective bargaining agreements. If traditional antitrust analysis were applied to labor organizations, such organizations would necessarily be found to be "combinations" or "conspiracies" in restraint of trade, since much of their intent is to enter into labor agreements which necessarily limit management's ability to act in certain areas. Section 6 of the Clayton Act⁶² recognizes the special nature of human labor as a noncommodity and states that labor organizations are not to be regarded as illegal combinations in restraint of trade. This position is fortified by the National Labor Relations Act.⁶³ However, the exemption is limited to organized labor and its efforts to have a voice in the determination of terms and conditions of employment. Thus, labor unions may engage in practices which would otherwise be prohibited, as long as the union is acting in its members' best

Cleveland Real Estate Bd., [1972] Trade Cases ¶ 74,020 (N.D. Ohio entered July 17, 1972), requiring inclusion in all rules, constitution, code of ethics, regulations, contracts, and other forms, a provision that the commission rates are negotiable between broker and client; United States v. Atlanta Real Estate Bd., [1972] Trade Cases ¶ 73,787 (N.D. Ga. entered Feb. 4, 1972) prohibited board from recommending or fixing rates for members and from taking any punitive action against members not following suggested rates; and United States v. Prince George's County Bd. of Realtors, Inc., [1971] Trade Cases ¶ 73,393 (D.Md. entered Dec. 28, 1980), prohibiting board from fixing or publishing commission rates or schedules, taking any punitive action against fee cutting members, fixing a division of commission between listing and selling brokers, and required MLS and Board fees to be reasonable related to costs, and forms include provision that commissions are to be negotiated between broker and seller.

62. 15 U.S.C. § 17 (1976). Section 6 states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

63. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979)). Section 1 of the National Labor Relations Act declares in part:

It is . . . to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

self-interest and while the union is not combining with nonlabor groups to accomplish its objectives.

In *United States v. National Association of Real Estate Boards*,⁶⁴ representatives of the real estate industry argued that the sale of their services fell within the antitrust exemption carved out for labor. The Court refused to extend the definition of labor to include the services performed by brokers. It limited the reading of section 6 of the Clayton Act only to matters involving the employee-employer relationship.⁶⁵ The basic distinction is clear: the real estate agent performs individual services which directly affect commerce through the sale of property, whereas labor unions deal with the conditions under which employees will perform their services.

The California Supreme Court has announced a parallel distinction under the state's Cartwright Act.⁶⁶ In *Messner v. Journeymen Barbers, Hairdressers and Cosmetologists, International Union*,⁶⁷ it was stated that "[a]lthough human labor is not a 'commodity' under the act (§ 16703), a service consisting in the main of human labor is."⁶⁸ A test for determining whether an act is a service or labor was laid down in *Marin County Board of Realtors, Inc. v. Palsson*.⁶⁹ "The relevant question, in every case, is whether the practice in question is meant to further the interest of tradesmen as employees in a collective bargaining context, or whether it is designed to advance their interests as entrepreneurs."⁷⁰

D. Land Transactions Constitute Interests Commerce Under the Antitrust Acts

The effect of "little Sherman Acts," in the states which have enacted them as well as the common-law action for restraint of trade has been minimal. There has reportedly been a disinclination to enforce state antitrust laws in land transactions by state authorities due to both the strong political pressure exerted by real estate boards and a fear of "scaring away" revenue-producing

64. 339 U.S. 485, 489 (1950).

65. 339 U.S. at 490.

66. CAL. BUS. & PROF. CODE §§ 16700-58 (West 1964 & Supp. 1980).

67. 53 Cal. 2d 873, 351 P.2d 347, 4 Cal. Rptr. 179 (1960).

68. *Id.* at 886, 351 P.2d at 355, 4 Cal. Rptr. at 187.

69. 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976).

70. *Id.* at 927, 549 P.2d at 837, 130 Cal. Rptr. at 5.

local industries through active enforcement.⁷¹ If, in fact, activities of real estate boards were operating to restrain competition, the most effective control would have to be through the federal anti-trust law. The Supreme Court in *Gulf Oil Corp. v. Copp Paving Co.*⁷² held that the jurisdictional reach of section 1 of the Sherman Act was keyed directly to effects on interstate markets and the interstate flow of goods,⁷³ thus the federal alternative was not available until real estate transactions could be found to be within interstate commerce.⁷⁴

Although the setting of real estate sales commissions in the District of Columbia was found to be an antitrust violation in *United States v. National Association of Real Estate Boards*,⁷⁵ that case was brought under section 3 of the Sherman Act, not section 1.⁷⁶ On January 8, 1980, the United States Supreme Court in the case of *McLain v. Real Estate Board of New Orleans, Inc.*,⁷⁷ redefined the scope of section 1 to include land transactions.

McLain was a private antitrust action brought under section 1 of the Sherman Act charging member brokers of the real estate boards in the greater New Orleans area of engaging in a price-fixing conspiracy. The complaint alleged a combination and conspiracy to fix, control, raise, and stabilize prices in the sale and purchase of homes in the area through the use of fixed commission rates, widespread fee splitting between listing and selling brokers, suppression of market information which would be of value to buyers and sellers,⁷⁸ and other anticompetitive practices.⁷⁹ Petitioners argued that through fixing and maintaining commissions at artificially high and noncompetitive levels, the price of residential properties had been artificially raised. Primary reliance was placed upon the allegation that brokers aided clients in obtaining financing and title insurance, much of which was supplied by out-of-state sources to support a finding that ac-

71. Austin, *supra* note 25, at 1336.

72. 419 U.S. 186 (1974).

73. *Id.* at 194.

74. "In determining whether there has been a violation of the Sherman Act the test is whether the acts complained of substantially and adversely affect interstate commerce." *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, 578 F.2d 1326, 1328 (10th Cir. 1978) (citing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947)).

75. 339 U.S. 485 (1950).

76. Section 3 does not deal with antitrust violations in interstate commerce, but deals with such violations within any United States territory or within the District of Columbia and deals with such violations in commerce between territories and the District of Columbia.

77. 444 U.S. 232 (1980).

78. Although the opinion does not so specify, this information is presumably contained in the respective multiple listing system materials.

79. 444 U.S. at 235.

tivities were within interstate commerce. Petitioners also asserted that a finding of interstate commerce could be supported by persons moving into and out of the greater New Orleans area who utilized the respondent's broker services.⁸⁰

The district court in *McLain*⁸¹ had not been persuaded that an adequate nexus to interstate commerce had been established for federal jurisdiction and dismissed petitioner's complaint. "[B]rokerage activities are wholly intrastate in nature and, since they neither occur in nor substantially affect interstate commerce, are beyond the ambit of federal anti-trust prohibition."⁸² The court's analysis relied primarily on whether the *McLain* facts could be brought within the holding of *Goldfarb v. Virginia State Bar*.⁸³ The district court read *Goldfarb* as requiring a substantial volume of interstate commerce be involved in the overall real estate transaction and the challenged activity itself be an "essential, integral part of the transaction and inseparable from its interstate aspects."⁸⁴ The court declined to find federal jurisdiction under this view of *Goldfarb* and held the participation of the brokers in the interstate aspects of the transactions (financing, insurance, and movement of people) to be merely incidental rather than indispensable elements of a sale of property within the state.⁸⁵ The dismissal was affirmed by the Court of Appeals for the Fifth Circuit,⁸⁶ which essentially adopted the district court's interpretation of *Goldfarb*.⁸⁷

The Supreme Court in *McLain* defined two steps for a finding of federal jurisdiction under the Sherman Act which had long been recognized in more traditional antitrust cases. These are now extended to real estate brokerage transactions, and, presum-

80. *Id.*

81. 432 F. Supp. 982 (E.D. La. 1977).

82. *Id.* at 983.

83. 421 U.S. 773 (1975). For a discussion of *Goldfarb*, see notes 50-56 *supra* and accompanying text.

84. 432 F. Supp. at 984.

85. *Id.* at 985.

86. 583 F.2d 1315 (5th Cir. 1978).

87. First, the appellate court found that realty was a "quintessentially local product" and the complained of brokerage activities occurred wholly intrastate; thus, the "in commerce" test was not met. *Id.* at 1319. Second, they found that the "effect on commerce" test was not met because "unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the 'interstate aspects' of realty financing and insurance." *Id.* at 1322.

ably, to other cases where a finding of interstate commerce is uncertain.

It is well established that Congress has broad authority under the Commerce Clause⁸⁸ to control not only things actually *in* interstate commerce, but also to control local activities which substantially *affect* interstate commerce.⁸⁹ While these two requirements have generally been treated as separate, it has been suggested that they are parts of an economic continuum.⁹⁰ In terms of antitrust violations, the Supreme Court has held that the exact point at which local activities affect interstate commerce is largely irrelevant, "if the forbidden effects [flow] across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it."⁹¹ Once the economic continuum has been identified and traced, the inquiry focuses on whether or not the effect of local activity is "sufficiently substantial and adverse" to congressional policy to be declared illegal.⁹²

In *McLain*, the Court recognized that Congress had determined to preserve the two separate tests for interstate commerce in anti-trust cases. This intention was evidenced by the restricted language in the Clayton and Robinson-Patman Acts which is limited only to activities "in commerce,"⁹³ and the application of the stricter "in the flow of commerce" test to actions brought under the Clayton and Robinson-Patman Acts.⁹⁴

88. U.S. CONST. art. I, § 8, cl. 3.

89. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (operating a restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (operating a motel); *Wickard v. Filburn*, 317 U.S. 111 (1942) (growing wheat on only 11.9 acres); and *United States v. Darby*, 312 U.S. 100 (1941) (wage and hour regulation). The "substantial effect" test was set forth in *Wickard* as including local, intrastate activities which exert "a substantial economic effect on intrastate commerce." 317 U.S. at 125.

90. For a general critique of the economic continuum theory, see *Austin, supra* note 25, at 1333-34. See also *Eiger, The Commerce Element in Federal Antitrust Litigation*, 25 *FED. B.J.* 282, 286-87 (1965).

91. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948).

92. *Id.* at 234. The "extended" view marks a departure from earlier constructions of commerce. See, e.g., *Hopkins v. United States*, 171 U.S. 578, 587-92 (1898); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-15 (1895).

93. The Robinson-Patman Act, ch. 592, §§ 1-4, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13b, 21a (1976), amended the Clayton Act ch. 328, 38 Stat. 730 (current version at 15 U.S.C. §§ 12-27, 44, (1976)). Throughout the Clayton Act, the specific activities identified and prohibited are limited to those "engaged in commerce." Sections 2 and 3, for example, identify any persons engaged in commerce, and section 7 holds that "no corporation engaged in commerce shall acquire . . . [or otherwise merge with another corporation engaged also in commerce]." 15 U.S.C. § 18 (1976).

94. In finding Congress intended to broadly exercise its regulatory power under section 1 of the Sherman Anti-Trust Act, the Court in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) stated:

Determining that the "affecting commerce" test was appropriate in *McLain*,⁹⁵ the Court next required that the specific nexus between the local activity and interstate commerce be identified.⁹⁶ This did not require that the activity alleged to be unlawful must itself be shown to have had an effect on commerce, but rather that a less particularized showing of real estate brokerage activities had a demonstrable and substantial effect on interstate commerce.⁹⁷ The support for this view was found in the fact that Sherman Act liability arises with proof of either an unlawful purpose or an anticompetitive effect.⁹⁸ The Supreme Court essentially found that the lower courts has misapplied *Goldfarb* to the instant case. The activities in *Goldfarb* were found impermissible

In contrast to § 1 [of the Sherman Anti Trust Act], the distinct in commerce language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities *affect* commerce.

Id. at 195 (emphasis in original). This position was fortified in *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975), where the Court expressly denied extension to a broader "affecting commerce" test in a merger case brought under section 7 of the Clayton Act. They stated that the express language used meant the Act "was not intended to reach all corporations engaged in activities subject to the federal commerce power." 422 U.S. at 283.

The original language of the Hart-Scott-Rodino Antitrust Improvements Act included provisions to extend the commerce test of the Clayton and Robinson-Patman Acts, and thus overrule *Copp Paving* and *American Building Maintenance*. Those provisions were not enacted.

Notably, section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1976 & Supp. III 1979)), originally provided only for activities "in commerce." The Supreme Court applied the stricter test of "in commerce" as called for in *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) in a case involving local frauds. That case was overruled by Congress in the Magnuson-Moss-Warranty Federal Trade Commission Improvement Act Pub. L. 93-637, § 201, 88 Stat. 2193 (1975) (current version at 15 U.S.C. §§ 45, 46, & 52 (1976 & Supp. III 1979)) by striking out "in commerce" wherever used and substituting "in or affecting commerce."

95. Holdings for the appropriateness of either test for the Sherman Act are found in: *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974); *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949); and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-37 (1948).

96. 444 U.S. 232, 242-44 (1980).

97. See *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940).

98. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950).

under the “in commerce” test; thus there was no need to analyze the facts under an “affecting commerce” approach. The activities in *McLain* were somewhat more attenuated in their relationship to interstate commerce.

Thus, the first step set forth in *McLain* was to find activities “in” or “affecting” interstate commerce. This the Court found in both the financing and title insurance aspects of the transactions in question.⁹⁹ The second step required in order to establish jurisdiction under the Sherman Act was to find that the specific activities have a “not insubstantial effect” on the interstate commerce involved in real estate brokerage.¹⁰⁰ The distinction is subtle. The Court traced the process as such:

[T]he function of . . . real estate brokers is to bring the buyer and seller together on agreeable terms. For this service the broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, *or has an impact on the purchase price*, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents’ activities have a not insubstantial effect on interstate commerce.¹⁰¹

This case decided only that jurisdiction existed under the Sherman Act and that the district court was in error in granting respondents’ motion to dismiss. Consequently, the court never reached the merits of the allegations of fixed commissions, fee splitting, and suppression of market information. The language of the above-quoted portion of the opinion does suggest that the Court might find the activities do operate to impact upon the purchase price of properties and fix commissions in a noncompetitive manner. If price fixing were to be found, the activity would

99. The facts indicated the following: first, financing monies were raised from out-of-state investors by the local lending institutions; second, interbank loans were obtained from interstate financial institutions; third, multistate lending institutions took mortgages insured by federal agencies such as the Veteran’s Administration, which necessitated the transfer of premiums and settlements between states; fourth, mortgage obligations became financial instruments in the interstate secondary mortgage market; and fifth, all of the title insurance companies in the New Orleans area were branches or subsidiaries of other companies based outside of Louisiana. 444 U.S. at 245.

100. *Id.* at 246. See also *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 745 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 n.11 (1975); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967).

101. 444 U.S. at 246 (emphasis added). The *McLain* analysis has most recently been followed in *Western Waste Serv. Sys. v. Universal Waste Control & Waste Mgt., Inc.*, [1980-81] Trade Cases ¶ 63,213.

be *per se* violative of the Sherman Act.¹⁰² However, the lower courts, in determining whether an activity constitutes price fixing, look to the reasonableness of the practice and its effects on competition.¹⁰³

The Court in *McLain* also raised the possibility that federal jurisdiction could be based in real estate brokerage cases on the amount of interstate commerce involved in the interstate movement of people.¹⁰⁴ The extent to which out-of-state persons employ the services of local brokers in securing new homes necessarily involves interstate commerce. A newcomer's primary credit information and financing will be localized elsewhere and the transfer of the downpayment money will generally occur prior to the move of the buyer into another state.

IV. TRADE ASSOCIATIONS AND INFORMATION EXCHANGES

It has long been recognized that "nearly every trade organization imposes some restraint upon the conduct of business by its members."¹⁰⁵ In terms of determining the legality of exercised restraints, the focus is on the competitive or anticompetitive effects of individual practices.

There is a natural tendency for members of the same profession or industry to meet together to learn more about developments in the field so that each has a better basis upon which to make business judgments and to more readily respond to changing market and economic conditions. On a theoretical level, the more knowledgeable each competitor is, the more vigorous and effective will be competition in the product market as a whole. Each member will be able to most effectively utilize his resources to maximize his production and services and to reach optimum profits and output. Thus, one affect of trade associations is to encourage competition.

The concern of the Sherman Act is to maintain free and open competition. In order to achieve that end, Congress has declared contracts, combinations, or conspiracies in restraint of trade to be illegal. The obligation of the courts has thus been to determine

102. See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

103. See, e.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (1958).

104. 444 U.S. at 246.

105. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 241 (1918).

which associational activities are clearly illegal and which can be justified by promoting competition. Since 1911, in the *Standard Oil* case,¹⁰⁶ the approach has been to analyze the activities under a "rule of reason" standard. The Supreme Court in *Chicago Board of Trade v. United States*, expanded upon this position, and in terms of associational restraints, determined that the concern of the antitrust laws was only to prevent unreasonable restraints.¹⁰⁷ Factors were set forth by which to measure the reasonableness of restraints under scrutiny:

[T]he 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.¹⁰⁸

In applying these criteria to trade associations, the inevitable problem is the wide range of purposes for which members have come together and the multitude of programs and activities which they may conduct. The question is what point do some go beyond the bounds of legality, and to what extent are their illegal activities counterbalanced by other activities which promote competition.

Trade associations clearly fall within the scope of section 1 of the Sherman Act: they are combinations of competitors. They are often bound together by a constitution or by-laws, and to that extent they operate under contract. Further, practices need not be express in order to violate the Sherman Act; concerted activity may be inferred from parallel conduct, if certain other factors are present.¹⁰⁹

106. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

107. 246 U.S. at 238.

108. *Id.*

109. The Supreme Court in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), found an illegal agreement inferred from the parallel practices of distributors of first-run movies. The test used by the Court was that an unlawful activity would be found where concerted action was *contemplated and invited*, and where competitors had participated in a concerted action. In *Interstate Circuit*, a letter, suggesting a particular practice for movie distribution, had been sent by a movie exhibitor. There was strong motivation for each distributor to adopt the suggested practice in the area. The suggested practice was a significant departure from previous practice; however, there was no express agreement nor any overt communications beyond the initial letter. These factors, when taken in conjunction with the uniform action of the competing distributors involved allowed the inference of an illegal scheme. The Court found the fact that the defendants had not attempted to explain or justify their activity to be significant.

Later cases have upheld the inference of concerted activity. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (no express agreement). In *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), the Court refused to allow an injunction against film distributors who refused to show first-run movies at suburban theaters. The Court found that the refusals were not

In terms of the power of a trade association to maintain internal control over members and its consequent ability to affect external influence, three factors have been identified as determinative: "the brute totals of membership rolls, the economic resources of members, and the character of the field sought to be influenced by the association."¹¹⁰ Austin has concluded that all three factors exist within the framework of the NAR and its local member boards.¹¹¹ The total membership of the NAR and its member boards is large, a fact underscored by judicial recognition of the fact that for a nonmember broker to compete effectively, he must have access to the primary service offered by the local boards—the MLS.¹¹² The most significant factor is the nature of the field over which the realtor associations exert influence. As earlier discussed,¹¹³ private owners of property lack a great deal of the training, resources, and expertise necessary to enable them to effectively sell their own property. The service of a broker is very often required to bring together a buyer and a seller and to steer the respective parties in the direction of appropriate financing, title insurance, and other elements necessary to close a real estate transaction legally.

A. *The Concentration of Power*

As the case law has developed regarding the permissibility of trade association activities, the first step in the analysis is to determine the concentration of power in the relevant market possessed by members. The geographic markets are easily defined by the parameters allotted to the respective local boards. For example, in *American Column & Lumber Co. v. United States*,¹¹⁴ it was determined that 5% of the hardwood plants (members of the defendant association) produced one-third of the nation's hardwood supply. In another case, *United States v. Container Corp. of*

a departure from past practice and that each refusal was an independent decision based upon economic factors, not based upon an agreement among the distributors. The Court classified the situation as *interdependent* action—each competitor takes (or does not take) an action because to do otherwise would be economically unsound. This is particularly true where very standardized or uniform products are involved, such as milk.

110. Austin, *supra* note 25, at 1326.

111. *Id.* at 1326-27.

112. *See* note 37 *supra*.

113. *See* note 38 *supra* and accompanying text.

114. 257 U.S. 377 (1921).

America,¹¹⁵ eighteen firms were determined to be the suppliers of 90% of the requirements of cardboard cartons in the southeast.

Today, participation of real estate brokers in local real estate boards is admittedly high.¹¹⁶ If, for example, 75% of licensed brokers and salespersons in a given territory are members of the local real estate board, the power criterion is undoubtedly met. No arbitrary percentage ratio of members to nonmembers has been established beyond which an undue concentration of power is found; concentration of power is determined by also examining the percentage of the market controlled by the larger competing members with a trade association. The concern is for the impact upon the market resulting from actions taken by top competitors. This aspect of analysis in brokerage cases would be difficult to pursue without extensive examination of all member brokers and their volume of business. It is not an absolute barrier, however. Given the high percentage ratio of members to nonmembers in the real estate brokerage profession, the courts could reasonably require a lesser degree of proof of market competition. This would be so although a particular practice is viewed to be anticompetitive because the percentage of the market controlled by each member would likely be small. The framework of the real estate brokerage profession is somewhat unique in character as compared with the traditional trade associations examined by courts in prior antitrust cases, primarily due to the wide demand for the specialized service.

B. The Restraints Involved

The second stage of the analysis regarding the permissibility of trade associations requires an examination of the particular restraint(s) involved. In the case of real estate boards, these generally take the form of an information exchange among the membership. It is here that the purpose and effect of the restraint is examined. The courts have found certain practices to be *per se* violative of section 1 of the Sherman Act, particularly price fixing schemes, group boycotts, and territorial market allocations.¹¹⁷ However, rather than apply the *per se* standard when

115. 393 U.S. 333 (1969).

116. Contrast some earlier cases where no harm was found in denying member access because the participation in the board in the area was so low generally. See, e.g., *Brown v. Indianapolis Bd. of Realtors*, [1977-1] Trade Cases ¶ 61,435 (S.D. Ind. 1977), where the court found that of the 6,000 licensed brokers in Marion County, Indiana, only 1,000 were members of the Board. Of those, only 160 were members of the multiple listing service.

117. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (price fixing); *United States v. Container Corp. of America*, 393 U.S. 333 (1969) (price fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing); *Chicago*

such are created through a trade association, the courts apply the rule of reason, a departure rationalized perhaps only because of the recognition of the procompetitive effects such associations can have. After analyzing the nature of the restraint, it is examined in light of its effects on competition within that market. This is the stage of analysis at which "reasonableness" comes into play. Section V of this comment will examine specific charges against real estate brokerage activities in this framework, but the principles underlying the nature of information exchanges will be set forth here as developed by case law.

In *American Column & Lumber v. United States*,¹¹⁸ the trade association involved developed an "Open Competition Plan" by which members would file various daily, weekly, and monthly reports including detailed information on price lists, daily sales and shipments reports, stock-on-hand information, orders taken in and the prices quoted, and future price estimations. The information was then compiled and distributed to members with the date identifying the particular members. Prices were found to change almost uniformly and sanctions were imposed against members not complying with the filing requirements. The Court found that "[s]uch close cooperation, between many persons, firms and corporations controlling a large volume of interstate commerce, . . . is . . . inconsistent with that free and unrestricted trade which the statute contemplates shall be maintained . . ."¹¹⁹

Bd. of Trade v. United States, 246 U.S. 231 (1918) (price fixing); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycott); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 *as amended* 312 U.S. 668 (1941) (group boycott); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (group boycott); United States v. Topco Assoc., Inc., 405 U.S. 596 (1972) (market allocation); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (market allocation); National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923). Here, market allocation was *upheld* because the plan was devised to secure full and equitable employment of a short supply of skilled hand-blown window glass craftsmen among the many factories; thus, the plan was not unreasonable restraint in the circumstances. The procompetitive effect was to allow each factory to maintain some production.

The Supreme Court upheld a price-fixing agreement in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); however, this case is usually distinguished as an "anomoly," having arisen during the special circumstances of the depression.

118. 257 U.S. 377 (1921).

119. *Id.* at 409. However, several strong dissenting opinions were filed supporting the role of a trade association:

The Sherman Law does not prohibit every lessening of competition; and it certainly does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts or be denied aid in

Regarding the issue of the extent to which competitors can reveal to each other the details of their operations, it has been held that

[i]n the absence of a purpose to *monopolize* or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but *concerted action* through *combination* presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection.¹²⁰

United States v. American Linseed Oil Co., presented a “competition plan” very similar to that in *American Column*. The Court in both cases gave great weight to the coercive element toward conformity created by the device used, primarily the identification of the members and their individual actions. An oligopolistic price system results from sharing of such detailed business information, and should any member deviate, sanctions can be readily imposed. However, such a business reporting system was found not to violate the Sherman Act in *Maple Flooring Manufacturers Association v. United States*.¹²¹ In that case, the information exchange system was found to be “purely” informational. It did not identify sellers; it did not contain current price lists; there were no efforts to forecast prices and supplies; and no sanctions were imposed for failure to report or for deviation from norms. Analogizing these systems to the MLS suggests that close scrutiny is warranted; listing brokers are identified and the percent of commission to be earned is listed.¹²²

Another factor in determining whether or not an informational exchange violates the Sherman Act is the degree to which the compiled information is made available to the public or distributed only to member-competitors. In *Maple Flooring*, the Court noted that reports were supplied to the Department of Commerce and the the Federal Reserve Board. In contrast, distribution of MLS materials are expressly confined to MLS members, and in

weighing their significance. It is lawful to regulate competition in some degree.

Id. at 415 (Brandeis, J., dissenting) (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918)).

120. *United States v. American Linseed Oil Co.*, 262 U.S. 371, 390 (1923) (emphasis added).

121. 268 U.S. 563 (1925).

122. Interestingly, in the Conejo Valley, California MLS books, a new practice has recently emerged, presumably paralleled in many other areas. Frequently, only the commission to be received by the selling broker is listed, along with the selling price and other information. The prior practice was to list the commission at the relevant percentages, for example, 6%. Now, the listings only include percentages of, for example, 3% or 2.5%. It is doubtful that this change would make MLS listing practices any more or less permissible.

many areas, sanctions are imposed for a member making a listing available to a nonmember or member of the public.

*Sugar Institute, Inc. v. United States*¹²³ involved a trade association composed of members who together produced 70-80% of the nation's sugar. Adherence to prices and terms of sale were enforced by means of a reporting system. This was found to be an unreasonable restraint on the freedom of individual producers to operate. The Court, however, did find that the system would be permissible if the requirement of adherence to announced prices was eliminated, if restraints supporting that requirement were removed, and if all statistical information was made available to purchasers and distributors, as well as to producer-members. In contrast, in *Cement Manufacturers Protective Association v. United States*,¹²⁴ an information exchange system was upheld as reasonable where it was designed to achieve legitimate business purposes. One goal of this system was to prevent cement buyers from placing fraudulent orders. The data compiled made no comment on the information, nor were prices even discussed.

It appears that the factors which the courts primarily focus upon in assessing the legality of an information exchange system among trade association members include the following: price data, detail of orders and supplies, identification of the members supplying the information, use of the price information to project (or require) future prices with the resulting tendency to stabilize prices among the member-competitors, and the extent of distribution of the compiled data. These are issues to which local real estate boards should pay close attention in determining their MLS policies, now that the barriers to federal jurisdiction under section 1 of the Sherman Act have been removed in real estate brokerage cases. However, the presence or absence of these factors is not determinative. The systems must be evaluated for their effects on competition to determine if they survive scrutiny under the standard of reasonableness.

V. ALLEGED ANTITRUST VIOLATIONS IN THE REAL ESTATE BROKERAGE INDUSTRY

The background, against which antitrust allegations in the real estate brokerage industry must be assessed, was succinctly sum-

123. 297 U.S. 553 (1936).

124. 268 U.S. 588 (1925).

marized by one federal appellate judge who stated that "the cases that have considered the relationship of particular real estate brokerage activities to commerce are in hopeless disarray so far as their raw results are concerned."¹²⁵

This section will examine some of the charges of antitrust violations which have been leveled against real estate boards themselves as well as against the operations of multiple listing services under the framework of federal antitrust policy. Some of the areas of contention have already been resolved, at least in a few jurisdictions, while in others, cases are still pending. It is important to recall at this juncture, that even though some of these cases were brought under state legislation, many of those states have already held the interpretation of the federal antitrust acts as applicable.¹²⁶ The impact of *McLain*, in light of this fact, raises the possibility of expanded antitrust jurisdiction in every state. This, coupled with the precedent established in *National Association of Real Estate Boards*, should motivate local boards to carefully re-evaluate their policies and practices.

A. *Membership in Boards: A Prerequisite to Success?*

One of the primary concerns which arises in an examination of trade associations is the power such an organization can wield to the advantage of members and the corresponding unlawful disadvantages to nonmembers that may result from the exercise of such power.¹²⁷ With respect to real estate boards, it is unques-

125. *United States v. Foley*, 598 F.2d 1323, 1328 (4th Cir. 1979). For an example of the opposing positions taken by courts on the single issue of whether an adequate nexus to interstate commerce has been established, see the appellate opinion of *McLain v. Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315, 1319-20 (5th Cir. 1978).

126. See note 4 *supra*.

127. See Austin, *supra* note 25, at 1340. Austin draws a distinction between two types of associations. The first includes those associations that adopt exclusionary conduct, the objective of which is the destruction of nonmembers as viable competitors. Such a direct objective would be a *per se* violation of the Sherman Act. See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (buying power used directly to force suppliers to refuse to deal with competitors). In contrast Austin views the real estate boards as self-restricting organizations with their primary goal to bind members to uniform regulations that result in the greatest benefit to the whole. No attempt is made to directly harm outside groups and any harm that, in fact, occurs is only tangentially related to the associations' practices. "Since the primary objective is not the destruction of particular brokers or nonmember brokers as a class, the *Klor's* principle, that a group boycott designed to coerce is *per se* unlawful, should not apply. Austin, *supra* note 25, at 1341. Therefore, since a *per se* violation is not apparent, the existence of a violation of the Sherman Act by real estate boards must be determined by employing a standard of reasonableness. See note 154 *infra*.

Austin further notes that whatever the intended objective of an association may be, its overall objective is to attain certain economic benefits. He believes that the

tionable that members receive material benefits and competitive advantages that range from national and regional advertising to the use of the copyrighted term "Realtor."¹²⁸ In addition to the availability of a number of valuable services,¹²⁹ members of real estate boards are afforded the advantages of public confidence and business opportunities conferred by the prestige of membership.¹³⁰

As a result of the existence of membership advantages, however, nonmembers are necessarily subjected to corresponding disadvantages in competition.¹³¹ The competitive disadvantages of exclusion from board membership are fairly obvious,¹³² particularly with respect to MLS access. Nonmembers are denied the advantages of co-operative selling,¹³³ valuable services,¹³⁴ and the

distinguishing characteristic of trade associations in modern society is the attainment of economic and political power. Austin concludes by stating that an "important by-product of this phenomenon is that admission to, or exclusion from membership is frequently of *crucial significance* to those included, to those excluded, and to the public." Austin, *supra* note 25, at 1341 (emphasis added).

128. *Id.* at 1328. The term "Realtor®" is the copyrighted property of the National Association of Real Estate Boards which has been described as one of the most powerful and influential business organizations in the country. See P. BENSON, M. NORTH & A. RING, REAL ESTATE PRINCIPLES AND PRACTICES 18 (4th ed. 1954).

129. The advantages and benefits of memberships include the prestige of membership which carries with it public confidence and business opportunities, the availability of MLS, business information, and appraisal services, the limiting of market imperfection due to the reduction of information and communication barriers, and the extensive co-operation among a greater salesforce. See Austin, *supra* note 25, at 1328-29.

130. See note 128 *supra*. This may be seen in the fact that only National Association members are allowed to capitalize on the use of the protected title, "Realtor®."

131. See note 127 *supra*. As noted, this disadvantage may be the result of an intentioned external objective or merely tangentially related to an association's attempt to reap greater benefits for itself.

132. See Comment, *supra* note 14, at 314. The author notes several adverse effects that result in a denial of board memberships and the corresponding lack of MLS information. Without a high quantity of available properties within a given area, the broker cannot adequately serve a prospective buyer. Customers will likely seek out MLS members who can more fully meet their needs. By the same rationale, sellers will seek out MLS members to list their property in order to insure the greatest exposure. In addition, qualified salespeople will more likely seek positions with MLS members since they will then be assured of the greatest volume of potential business and, hence, a larger volume of commissions.

133. See Austin, *supra* note 25, at 1329 n.33 (citing F. CASE, REAL ESTATE 376-77 (1962)):

Cooperative selling is the best means yet developed for providing a central market place in which: (1) prices may be established on a more uniform basis; (2) property for sale may be previewed by sellers and buyers

reduction of information, communication, and geographical barriers¹³⁵ that attach to board membership. Also, nonmembers must face greater obstacles in adjusting supply to demand since less property is available for them to sell. Since members capture a larger share of the market, nonmembers suffer substantial economic and competitive disadvantages.

1. Membership Policies and Standards as Group Boycotts

Voluntary associations cannot be required to accept as members all who apply or desire to join.¹³⁶ However, when an association's activities "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,"¹³⁷ its practices and activities are subject to scrutiny under the antitrust laws.¹³⁸

With respect to the practices of real estate boards, and specifically to their membership policies and standards, the issue becomes whether or not exclusion from membership may be characterized as a group boycott¹³⁹ thereby operating as an un-

easily; and (3) the process of buying and selling may be systematized. Co-operative selling offers great promise of providing the type of central market activity which will stabilize market trends and permit buyers and sellers to act more intelligently.

Austin, *supra* note 25, at 1329 n.33 (citing F. CASE, REAL ESTATE 376-77 (1962)).

134. See note 128 *supra* and accompanying text.

135. Austin, *supra* note 25, at 1329. Austin asserts that by virtue of the benefits of multiple listing, real estate becomes a more liquid commodity.

136. See *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 937-38, 549 P.2d 833, 843-44, 130 Cal. Rptr. 1, 11-12 (1976). In *Palsson*, an incorporated association of real estate brokers sought declaratory relief adjudging that its action in denying membership to a part-time broker was a valid exclusion. The court held that although the board's practices were not unlawful, *per se*, such actions were in violation of the Cartwright Act pursuant to the "rule of reason." See notes 141, 148, 151 & 152 *infra*.

In reaching its decision, the court recognized the infeasibility of admitting all applicants as members. "[An] association cannot continue to exist if its activities are completely and unconditionally open to outside participation. It is only through its activities that an association attracts and holds membership." Bodnor, *Antitrust Restrictions on Trade Association Membership & Participation*, 54 AM. B.A.J. 27, 32 (1968). But, exclusions that unreasonably exclude must be scrutinized for their detrimental affect on free trade.

137. 16 Cal. 3d at 938, 549 P.2d at 843, 130 Cal. Rptr. at 11.

138. Thus, the court must look at the reasonableness of the board's practices. See note 141, 148 & 154 *infra*; see also 108 & 109 *supra* and text accompanying notes.

139. A group boycott may include a concerted refusal by a group of traders to deal with other traders in order to achieve some internal or external advantages. See *Klor's v. Broadway-Hales Stores, Inc.*, 359 U.S. 207, 212 (1959), where a group boycott of a retailer by another retailer, manufacturer and distributor was held to sufficiently affect the natural flow of intrastate commerce to allow a claim for treble damages under the Sherman Act.

The elements for finding a group boycott include both concert of action and com-

reasonable restraint of trade.¹⁴⁰ The crucial inquiry into board membership standards is the *reasonableness* of the exclusion, the finding of which will depend on balancing the character and extent of the benefits that accrue to members against the corresponding disadvantages to nonmembers and the industry as a whole.¹⁴¹

The balancing of economic advantages and disadvantages as a standard in determining the reasonableness of membership exclusions is set forth in *Associated Press v. United States*.¹⁴² In *Associated Press*, the bylaws of a co-operative news-gathering association with strict membership requirements prohibited members from providing news to nonmembers. In holding that the bylaws constituted an unreasonable restraint of trade,¹⁴³ the United States Supreme Court found that the economic disadvantages of exclusion restrained competition.¹⁴⁴ "[E]xclusion resulting in the *reduction of competitive opportunities* [were] deemed

bination for anticompetitive purposes. *See, e.g.*, *General Chem., Inc. v. Exxon Chem. Co., USA*, 625 F.2d 1231 (5th Cir. 1980), where a seller of polyethylene scrap was free to sell to whomever it chose so long as it was not motivated by anticompetitive purpose; *United States v. Independent Gasoline Marketers of America*, 624 F.2d 461 (4th Cir. 1980), where a combination of gasoline distributors formed for the purpose of, and with the effect of fixing gasoline prices was found to be illegal *per se*; *Sierra Wine and Liquor Co. v. Hueblein, Inc.*, 626 F.2d 129 (9th Cir. 1980), where the unilateral act of a wine manufacturer in terminating a distributorship agreement was not found to be a violation of the Sherman Act; *Morse v. Swank, Inc.*, 493 F. Supp. 110 (S.D.N.Y. 1980), where a refusal to allow plaintiff to market defendant's cigarette lighters had to have had an anticompetitive effect on the industry in order to constitute a violation of the Sherman Act; *Tim W. Koerner & Assoc., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294 (S.D. Tex. 1980), where the refusal to deal without unreasonable restraint was not held to be a Sherman Act violation.

140. *See* notes 105-07 *supra* and accompanying text.

141. This is commonly referred to as the "rule of reason." In *Palsson*, the California Supreme Court looked to the case of *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), and noted that one "must analyze the economic effects of the board's practices and then consider possible justifications for the practice." *Palsson*, 16 Cal. 3d at 935-36, 549 P.2d at 842, 130 Cal. Rptr. at 10. *See also*, *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143 (8th Cir. 1979). Although real estate information exchanges were not held to be illegal *per se*, their ultimate legality depended on their effects upon competition.

142. 326 U.S. 1 (1945).

143. The Court upheld the lower court's decision that the *Associated Press* bylaws were, on their face, restraints of trade without regard to proven past effects. The majority opinion noted that "[c]ombinations are no less lawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act . . ." *Id.* at 12.

144. The Court noted that although one individual may decide whether, and to whom, to sell or not to sell, the Sherman Act contemplates illegal associations that

sufficiently critical”¹⁴⁵ to warrant a balance in favor of nonmembers. Thus, when membership standards operate to exclude competitors and have the effect of reducing competitive opportunities to the economic disadvantage of nonmembers, the standards and exclusions may be found to be unreasonable restraints of trade.¹⁴⁶

It has been established that voluntary business organizations may lawfully adopt reasonable membership standards and thereafter restrict benefits and advantages solely to members without engaging in a boycott.¹⁴⁷ Further, where agreements made among real estate association participants are reasonably related to legitimate associational purposes, such as providing services to members and improving standards of practice, such agreements are lawful unless they substantially and directly restrain trade.¹⁴⁸

seek to destroy business rivals as a means of furthering the interests of its members. Such an objective may not justify the resulting harm. *Id.* at 15.

145. Austin, *supra* note 25, at 1343 (emphasis added). The author also notes the analogous facts to the multilisting situation. In both the bylaws of the Associated Press and those of MLS, harsh sanctions are imposed for selling listings or news to nonassociation members. *Id.*

146. See, e.g., *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir. 1977). The court held that in order to survive the challenge of the Sherman Act, a particular practice, rule or regulation of an association must serve the purpose for which the association exists, i.e., to improve its efficiency and service to the public. Those regulations which only serve to suppress competition between members and nonmembers will not withstand the challenge. *United States v. National Soc'y of Professional Eng'rs*, 533 F.2d 978 (D.C. Cir. 1977). The court of appeals held that a rule which prohibited *any* competitive bidding by professional engineers was illegal as a violation of the Sherman Act without regard to any potential or asserted benefits which might accrue from the rule. See also *Associated Press v. United States*, 326 U.S. 1 (1945) (strict rules prohibiting the sale of news to nonmembers held to be unreasonable).

147. [1977-1] Trade Cases ¶ 61,435 (S.D. Ind. 1977). See *United States v. Realty Multi-List, Inc.*, [1978-1] Trade Cases ¶ 62,091 (M.D. Ga. 1978). The district court found requirements for membership, which included a sound credit rating and good business reputation, purchase of \$1000 share, an open office, and active business during normal hours, to be reasonable. *Brown v. Indianapolis Bd. of Realtors*, [1977-1] Trade Cases ¶ 61,435 (S.D. Ind. 1977). Since the broker assumes responsibility for the action of other members in the operation of the multiple listing service, the exclusion of the plaintiff was reasonable where the board determined he had not obtained a favorable business reputation in the community. See also notes 21-23 and 116 *supra* and accompanying text.

148. The Indianapolis Board of Realtors had an 8-point membership test. The criteria were as follows:

- 1.) A valid real estate license (and actually engaged in the real estate business and its recognized branches).
- 2.) A place of business within board jurisdiction.
- 3.) A place of business in compliance with local zoning regulations.
- 4.) A favorable business reputation in the community.
- 5.) A sound credit rating.
- 6.) Completed the board indoctrination course.
- 7.) Signified his intention to abide by the National Association of Realtors Code of Ethics.
- 8.) Signified his intention to abide by the Constitution, Bylaws, Policy,

In *Marin County Board of Realtors, Inc. v. Pålsson*,¹⁴⁹ a licensed real estate salesman was denied membership in a local real estate board¹⁵⁰ because, as a part-time salesman, he did not meet the board's membership requirement that applicants be "primarily engaged in the real estate business."¹⁵¹ Denial of membership also precluded access to the board's MLS. The provision was enforced by a prohibition against members sharing offices with or employing a person who had been denied board membership.¹⁵²

The court held that voluntary associations have a right to choose their own members and cannot be required to open membership to every applicant. However, the court found that membership in the board in question was a matter of economic necessity and survival to those engaged in the sale of real estate.¹⁵³ Because of the economic necessity of membership, the

and Rules and Regulations of the local Board, the state association, and the National Association of Realtors.

[1977-1] Trade Cases ¶ 61,435 at 71,612. In balancing the interests between potential restraint on competition and the benefit of the 8-point test, the court concluded the test was reasonable since "such standards are in the public interest and should, [therefore,] be encouraged, [rather than] sanctioned." *Id.* at 71,613.

The court noted that the Board did not attempt to directly or indirectly dictate the individuals with whom its members may deal; therefore, the potential for unreasonable restraint upon trade is minimal. *Id.* In order to further its goals and protect its members, the court held the 8-point test to be reasonably related to the Board's purpose without unduly harming nonmember competition. *Id.* at 71,614.

149. 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976). See also notes 69-70 *supra* and accompanying text.

150. The Marin County Board of Realtors was an incorporated association affiliated with the California Real Estate Association and the NAR. Seventy-five percent of the residential real property brokers in Marin County were members of the board. 16 Cal. 3d at 924, 549 P.2d at 834, 130 Cal. Rptr. at 2.

151. *Id.* at 924, 549 P.2d at 835, 130 Cal. Rptr. at 3. The "primarily engaged" standard was demonstrated to pose a serious anticompetitive danger and therefore violated California's Cartwright Act, sections 16700-58 of the California Business and Professions Code. See also note 4 *supra*. In applying the reasonable test, the court found that the defendant board had failed to show "that the 'primarily engaged' rule facilitated an increase in professional or ethical competence in all or most cases." 16 Cal. 3d at 939-40, 549 P.2d at 845, 130 Cal. Rptr. at 13. It was also noted that the need for the rule was minimal due to the extensive state regulation of the real estate business. See, e.g., Cal. Bus. & Prof. Code § 10150.6 (West Supp. 1981) which provides for eligibility for real estate broker status after having been *actively*, but not primarily, engaged in the business for two years. The rule was also viewed as overly broad since it encompassed individuals who espoused all the desirable traits of a real estate broker yet pursued them on a part-time basis. 16 Cal. 3d at 940, 549 P.2d at 845, 130 Cal. Rptr. at 13.

152. 16 Cal. 3d at 924, 549 P.2d at 834, 130 Cal. Rptr. at 2. Unlike the regulations in *Brown*, the Marin County Board sought to prescribe the extent to which members could affiliate or deal with nonmembers. See note 148 *supra*.

153. 16 Cal. 3d at 938, 549 P.2d at 844, 130 Cal. Rptr. at 12 (emphasis added).

court decided that the reasonableness of the “primarily engaged” rule must be subject to judicial review¹⁵⁴ since it had great impact upon the industry as a whole.

Addressing itself to the type of standards which are reasonable, the court set forth the test to be applied when membership standards are found to pose serious anticompetitive dangers. First, it must be demonstrated that the anticompetitive practice relates to a legitimate purpose. Second, the practice must be reasonably necessary to accomplish that purpose and narrowly tailored to do so.¹⁵⁵

In *Palsson*, the board claimed that the purpose of the rule was to “further the professional and ethical competence of the real estate profession.”¹⁵⁶ However, as legitimate as this purpose may have been, the court found it to be overbroad; hence, it did not satisfy the second part of the test. The necessity for the rule was minimal due to extensive state regulation of the real estate industry.¹⁵⁷ Additionally, the board failed to meet the burden of proving that the rule facilitated the improvement of professional and ethical competence.¹⁵⁸ Therefore, if the board had truly desired to promote its stated goals, it would have to narrowly construe and direct membership standards toward the accomplishment of those goals.¹⁵⁹ Only in this way would the anticompetitive effects be minimized.

In *United States v. Realty Multi-List, Inc.*,¹⁶⁰ membership rules

154. 16 Cal. 3d at 938, 549 P.2d at 844, 130 Cal. Rptr. at 12. Relying on *Penshe v. Pacific Coast Sec. of Orthodontists*, 1 Cal. 3d 160, 165, 460 P.2d 495, 498, 81 Cal. Rptr. 623, 626 (1969), the court stated “[t]he economic benefits of membership mandate that exclusion be subject to judicial review.” The court went on to note that the availability of judicial review does not require the board to refrain from establishing reasonable standards for admission. But the type of standard for admission into membership must be rationally related to legitimate association purposes and be fairly and rationally applied in order to satisfy the “rule of reason.” 16 Cal. 3d at 938, 549 P.2d at 844, 130 Cal. Rptr. at 12.

155. 16 Cal. 3d at 939, 549 P.2d at 844, 130 Cal. Rptr. at 12. In *Union Circulation Co. v. Federal Trade Com’n*, 214 F.2d 562 (2d Cir. 1957), the court held that an agreement not to hire salesmen who had been employed by another agency during the past year went beyond what was necessary to curtail and eliminate fraudulent practices.

156. 16 Cal. 3d at 939, 549 P.2d at 844, 130 Cal. Rptr. at 13. The board felt that this would make for better educated salesmen who could devote more time to their clients.

157. *Id.* See CAL. BUS. & PROF. CODE §§ 10130-183 (West 1964). In particular, § 10150.6 requires that a real estate salesmen can become a broker only after having been actively engaged in the business of a real estate salesman for at least two years.

158. 16 Cal. 3d at 939-40, 549 P.2d at 844-5, 130 Cal. Rptr. at 13. The court observed that a part-time salesman might have a smaller clientele and, hence, be able to devote more time to self-improvement or in aiding his clients.

159. *Id.* at 940, 549 P.2d at 845, 130 Cal. Rptr. at 13.

160. [1978-1] Trade Cases ¶ 62,091 (M.D. Ga. 1978). In *Realty Multi-List*, an in-

requiring the purchase of a membership share and the maintenance of an active real estate business through an office open during normal business hours have also been upheld as reasonable. The required purchase of a \$1000 membership share was found to be reasonable on several grounds. First, membership in the service was found to be a thing of value because of the benefits accruing to members. Secondly, the requirement was reasonable in that present members had already contributed the same amount of money or more to establish and maintain the service. Thirdly, since the purchase required was that of a share of stock in the service, members would be entitled to equal distribution of the assets of the service in the event of dissolution. Finally, it was found that the cost of the share was reasonable when balanced against the benefits afforded by membership.¹⁶¹

As to the requirement that a member have an active business and maintain an office open during normal hours, the court found this to be "reasonably related to the purposes for which the organization exists."¹⁶² The objective of the organization was to pool information regarding property listings and furnish such listings to persons who were readily available for contact and negotiation. It was reasoned that if everyone holding a broker's license

dependent listing service was charged with engaging in a continuing conspiracy to restrict membership and restrain competition among real estate brokers. The organization maintained standards requiring the purchase of one share of stock for \$1000 and required applicants to have a favorable business reputation, be actively engaged in the real estate business, and maintain an office open during normal business hours.

The plaintiff sought a civil injunction against the defendant under section 4 of the Sherman Act (current version at 15 U.S.C. § 4 (1976)). The allegation was that the defendant had combined and conspired with other persons, firms, and corporations, including their own members and officers, in an unreasonable restraint of trade and commerce under section 1 of the Sherman Act (current version at 15 U.S.C. § 1 (1976)). The district court subsequently granted the defendant's motion for summary judgment.

161. [1978-1] Trade Cases ¶ 62,091 at 74,756. The court further pointed out that "such a charge would [hardly] be a serious impediment for any broker actively engaged in the real estate business in this area." *Id.* The court's reasoning appears to have been based upon the principle that the regulation was reasonable and directed toward a legitimate board purpose in protecting those who had already joined the board. Furthermore, such a regulation was not so onerous so as to prevent anyone who wished to join the board, thereby negating any anticompetitive tendencies of the regulation.

162. *Id.* at 74,757. The organization existed to serve those who were members and their clients. If part-time brokers who would be difficult to reach and might contribute little or nothing to the service were allowed to join, the purpose and very existence of the organization would be threatened.

was permitted to belong to the organization, a strong possibility would exist that those persons not meeting the above requirements would not furnish any listings to the service or be available for contact and negotiation. As the court indicated, such a situation would destroy the efficiency, effectiveness, and usefulness of the organization.¹⁶³

The court additionally concluded that the allegation that the organization was engaged in a group boycott was unjustified because there was not evidence that the defendant had ever sought to restrict the freedom of any member to engage in co-operative sales with nonmembers.¹⁶⁴ Therefore, unlike *Palsson*, the danger of anticompetitive effects was not present, and consequently, the membership requirements were deemed necessary and sufficiently narrow to accomplish the organization's legitimate purposes.¹⁶⁵

The issue of board membership policies and standards as group boycotts may appear to have been resolved at both the state and federal levels as demonstrated in *Brown*, *Palsson*, and *Realty Multi-List*. However, this conclusion is dubious in light of the dismissal of several actions, which alleged group boycotts by real estate boards, for lack of jurisdiction.¹⁶⁶

Furthermore, there has been a long-established judicial disinclination to meddle in the internal affairs of private voluntary associations.¹⁶⁷ It is also difficult to discover evidence which

163. *Id.* The court appears to have based its determination on the reasonableness of the regulation and the legitimacy of its purpose. The court also believed that no substantial burden would be placed on anyone as a result of the regulation.

164. *Id.* The absence of such evidence apparently convinced the court that the board had refrained from instituting any anticompetitive practices against nonmembers in the past.

165. In concluding, the court stated that a decree ordering the defendant to open its membership to any person holding a broker's license was not necessary in either the public interest or for the protection of an individual. This determination was based upon evidence showing that every active broker with an office in the county was a member of the defendant organization. Furthermore, the only applicant denied membership in the preceding three years was excluded for good cause, as even the excluded applicant recognized. [1978-1] Trade Cases ¶ 62,091 at 74,758. The court also believed that such a decree would serve no purpose other than to put the defendant "in an operational strait jacket and keep it under judicial supervision for years to come." *Id.*

166. For a review of jurisdictional issues in this context, see notes 42-104 *supra* and accompanying text.

167. This disinclination is attributed to the difficulty in interpreting obscure association rules and procedures, the resentment that judicial interference would likely cause, and the belief that constant judicial supervision would deter the growth of many types of organizations that are beneficial to society. Note, *Expulsion and Exclusion from Hospital Practice and Medical Societies*, 15 RUTGERS L. REV. 327, 329 (1961). See also, Note, *Exclusion From Private Associations*, 74 YALE L.J. 1313, 1314 (1965). Judicial reluctance to interfere is more pronounced where

demonstrates that real estate boards seek to restrict the freedom of members to engage in business with nonmembers. As evidenced in *Brown, Palsson*, and *Realty Multi-List*, board regulations are usually found to be justified by legitimate purposes. Additionally, local boards affiliated with the NAR are expected to adhere to that organization's requirement that the "8-Point Membership Criteria"¹⁶⁸ be the maximum standards for acceptance into board membership. The NAR has also adopted a policy of encouraging cooperation among members and nonmembers.¹⁶⁹ The preceding factors make it difficult to establish the existence of a group boycott by local boards.

However, if the finding of federal jurisdiction under the Sherman Act in the *McLain* decision¹⁷⁰ increases the number of antitrust actions involving the real estate industry, boards excluding qualified applicants from membership or prohibiting co-operation among members and nonmembers will be subject to close scrutiny under the antitrust laws.

In light of *McLain* and the decisions in *Brown, Palsson*, and *Realty Multi-List*, it is possible that violations of federal antitrust laws will be found under certain circumstances. Such violations might result if a board were to exclude applicants based upon board membership standards which economically and competitively disadvantage nonmembers, and which are not reasonably related to and necessary for the accomplishment of legitimate board purposes.¹⁷¹

2. Scheduling of Commission Fees as Price-Fixing

In *United States v. National Association of Real Estate Boards*,¹⁷² the Supreme Court established that the scheduling or maintenance of standard rates of commissions by real estate boards was *per se* an unreasonable restraint of trade.¹⁷³ In that case, the Washington Real Estate Board set standard rates of

the association's decision making process deals with specialized knowledge. *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 202, 238 A.2d 665, 671 (1968).

168. See notes 20-25 *supra* and accompanying text.

169. MLS Handbook, *supra* note 29, at 16.

170. See notes 77-104 *supra* and accompanying text.

171. See notes 149-65 *supra* and accompanying text.

172. 339 U.S. 485 (1950). See also notes 42-45 & 48-49 *supra* and accompanying text.

173. 339 U.S. at 489.

commissions to be charged by its members and adopted a provision of its code of ethics which read in part: "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates."¹⁷⁴ Members of the Washington board agreed to adhere to the code, thereby agreeing to the maintenance of the price schedule.

Justice Douglas, in writing the majority opinion, declined to consider whether or not the schedule of rates in question served an honorable or worthy end. Price-fixing is *per se* an unreasonable restraint of trade and all that is needed to prove price-fixing is "[a]n agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price"¹⁷⁵ The fact that no sanctions were imposed for departure from the price schedule was deemed to be immaterial.¹⁷⁶

There can be no doubt that the *per se* rule against price-fixing is the most absolute in antitrust law.¹⁷⁷ But despite this absolute ban and the unavailability of defenses for engaging in such conduct, plaintiffs alleging price-fixing among realtors have encountered substantial difficulties of proof,¹⁷⁸ as well as the jurisdictional hurdles presented prior to *McLain*.

The problems confronted in sustaining the burden of proof in real estate price-fixing cases is perhaps best demonstrated by an examination of two decisions addressing the issue. In *Murphy v. Alpha Realty, Inc.*,¹⁷⁹ certain real estate salesmen alleged that the defendant realty association had conspired to fix broker's commissions in the sale of residential real property. The district court found that the plaintiffs had failed to meet the burden of proof in showing that the defendants had engaged in conduct constituting an unreasonable restraint of trade or that such conduct injured plaintiffs. In so holding, the court ruled that price parallelism exhibited by a substantial uniformity in broker commission rates, combined with other circumstantial evidence,¹⁸⁰ was *insufficient*

174. *Id.* at 488. See *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 218 (1946); *United States v. Paramount Pictures*, 334 U.S. 131, 142-43 (1948).

175. 339 U.S. at 489.

176. *Id.* See *Federal Trade Com'n v. Pacific States Paper Trade Ass'n.*, 273 U.S. 52, 62 (1927); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 411 (1921); *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, 608-09 (1914).

177. Austin, note 25 *supra*, at 1339.

178. See, e.g., *In Re Montgomery Real Estate Antitrust Litigation*, [1979-2] Trade Cases ¶ 62,860 (D.Md. 1979); *Murphy v. Alpha Realty, Inc.*, [1978-2] Trade Cases ¶ 62,388 (N.D. Ill. 1978).

179. [1978-2] Trade Cases ¶ 62,388 (N.D. Ill. 1978).

180. See text accompanying note 186 *infra*. The circumstantial evidence found insufficient to support the allegation consisted of the prior existence of a recommended fee schedule, brokers' exchange of price and commission information, discrimination against brokers charging less than a 7% commission rate through

to prove the existence of an agreement or mutual consent to fix prices in violation of the Sherman Act.¹⁸¹

In *Murphy*, the plaintiffs failed to show any connection between what the court believed to be individual policies and practices of the defendant brokers and the alleged concert of action. The court further ruled that the plaintiffs had not produced any evidence proving that the alleged practices caused any injury to their business or property.¹⁸² Consequently, the defendant's motion for summary judgment was granted.¹⁸³

In the case of *In Re Montgomery Real Estate Antitrust Litigation*,¹⁸⁴ a somewhat unconventional settlement agreement between real estate brokers, held liable for price-fixing, and private litigants¹⁸⁵ was certified as fair, reasonable, and adequate. The settlement consisted of an agreement which provided that "for each property qualifying its seller for class membership," a certificate¹⁸⁶ would be issued entitling the holder to list the property with defendant brokers and willing nondefendant brokers at a cut-rate five percent brokerage fee.¹⁸⁷ The plan also provided that holders of such certificates were entitled to sell their rights through a clearinghouse established by the defendants.¹⁸⁸ The settlement was approved over the objections of a group of twenty-eight brokers who petitioned jointly to argue that the settlement

reciprocity policies among brokers, advertising restrictions, exclusion of competitors, and other limitations on the competitive activities of brokers. [1978-2] Trade Cases ¶ 62,388 at 76,310. The "other alleged limitations on the competitive activities of brokers" included the imposition of "anticompetitive restrictions prohibiting members from: (1) soliciting listings or sales personnel from other MLS members; (2) advertising listings without the permission of the listing broker; (3) presenting offers to the seller only through the listing broker." *Id.* at 76, 314.

181. [1978-2] Trade Cases ¶ 62,388 at 76,310.

182. *Id.* at 76,316.

183. *Id.*

184. [1979-2] Trade Cases ¶ 62,860 (D.Md. 1979).

185. The private litigants consisted of a class of all persons who have sold used residential real estate in Montgomery County, in whole or in part through the services of the defendants from September 1, 1974 through September 30, 1976 and who entered into brokerage agreements with any of defendants wherein they agreed and did pay a brokerage fee of 7% in connection with the sale of such used residential real estate.

Id. at 78,975.

186. "The certificates were to be negotiable in two successive assignees and to remain valid until December 31, 1985." [1979-2] Trade Cases ¶ 62,860 at 78,976.

187. [1979-2] Trade Cases ¶ 62,860 at 78,976.

188. *Id.* Under the settlement, the clearinghouse was to advertise on a regular basis and distribute a list of all certificate holders wishing to sell. *Id.*

plan would guarantee the business of the plaintiffs or their assignees to the defendants.¹⁸⁹ Additionally, the group claimed that the settlement plan would have the effect of stabilizing brokerage commission rates at five percent.¹⁹⁰

Despite argument from nonparty brokers that the plan would have an anticompetitive effect on the real estate market,¹⁹¹ the court certified the settlement because brokers remained free to negotiate rates and the plan could only affect ten percent of the market.¹⁹² In considering the strength of the plaintiffs' case, the court believed the settlement to be preferable to proceeding to trial in light of the *difficulties of proof of causation and injury* that the plaintiffs would encounter¹⁹³ and the *substantial defenses*¹⁹⁴ available to the defendants.¹⁹⁵

As demonstrated by *Murphy* and *Montgomery Real Estate*, the burden of proving price-fixing in real estate brokerage cases is not as easily achieved as the decision in the leading case of *United States v. National Association of Real Estate Boards*¹⁹⁶ would tend to indicate. It is readily apparent that, absent *substantial* and *concrete* proof of agreement, causation, and injury, plaintiffs who allege price-fixing among real estate brokers are likely to encounter material difficulties in sustaining the burden of proof required by antitrust laws.

B. MLS as Unreasonable Restraints of Trade

Where the likelihood of economic and competitive disadvantage would result from a denial of access to MLS, such denial should raise a prima facie case of an unreasonable restraint of trade.¹⁹⁷ But as previously noted,¹⁹⁸ the holdings of cases addressing the

189. *Id.* at 78,977.

190. *Id.*

191. *Id.* at 78,982.

192. *Id.*

193. Although the court believed that the plaintiffs could prove a prima facie case, "it would be extremely difficult to establish the necessary proof" of injury. *Id.* at 78,980.

194. One such possible defense would be that consumers who do not allege commercial or competitive injury have no standing to invoke section 4 of the Clayton Act providing for treble damages because they have not been "injured in [their] business or property." [1979-2] Trade Cases ¶ 62,860 at 78,980 n.11 (citing 15 U.S.C. § 15 (1976)).

195. The court also took into consideration the cost of additional litigation and the defendants' inability to satisfy a cash judgment. *Id.* The estimated amount of treble damages, with costs and fees, was \$5 million. The court determined, through examination of the defendants' financial reports, that the defendants would be unable to provide a cash settlement or satisfy a money judgment. *Id.*

196. See note 170 *supra* and text accompanying.

197. Austin, note 25 *supra*, at 1346.

198. See note 125 *supra* and text accompanying.

issue of MLS access are in "hopeless disarray."¹⁹⁹

Competitive effectiveness appears to be the determining factor in decisions requiring that MLS facilities be made available to nonmembers.²⁰⁰ As early as 1966, in *Grillo v. Board of Realtors of Plainfield Area*,²⁰¹ a New Jersey court required that MLS facilities be made available to a licensed broker who had repeatedly been rejected from board membership. The court emphasized that denial of access to listings would disadvantage nonmember brokers by reducing the "opportunity to buy or sell things in which the two groups compete."²⁰² This position was supported by the California Supreme Court in a decision holding that access to MLS information is so essential in enabling brokers to compete effectively that access must be granted to all licensed brokers.²⁰³ In 1980, a New Jersey court held that the "relevant test for an antitrust violation [in the real estate industry] is whether or not a broker without access to multiple listing(s) can successfully compete with those who do have access."²⁰⁴

In contrast, several courts have upheld exclusions from MLS participation based upon findings of the reasonableness of the ex-

199. See note 125 *supra*.

200. See, e.g., *United States v. Realty Multi-List, Inc.*, [1978-1] Trade Cases ¶ 62,091 (M.D. Ga. 1977); *Martin-Trigona v. National Ass'n of Realtors*, [1978-1] Trade Cases ¶ 61,915 (E.D. Ill. 1978); *Brown v. Indianapolis Bd. of Realtors*, [1977-1] Trade Cases ¶ 61,435 (S.D. Ind. 1977); *State of Iowa ex. rel. Miller v. Cedar Rapids Real Estate Bd.*, [1980-1] Trade Cases ¶ 63,012 (Iowa Dist. Ct. 1980); *Glendale Bd. of Realtors 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 (1977); *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 549 P.2d 833, 130 Cal. Rptr. 1 (1976); *Grillo v. Bd. of Realtors of Plainfield Area*, 91 N.J. Super. 202, 219 A.2d 635 (1966).

201. 91 N.J. Super. 202, 219 A.2d 635 (1966).

202. *Id.* at 222, 219 A.2d at 646.

203. *Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 939, 549 P.2d 833, 842 130 Cal. Rptr. 1, 12 (1976). The California Supreme Court held that while denial of MLS access to nonmembers by a board was not unlawful *per se*, this particular exclusion was not supported by the proper objective of furthering professional and ethical competence of the real estate profession. See notes 149-59 *supra* and accompanying text. Another similar California case held that a board of realtors had violated California's antitrust law since it had denied access to nonmembers and it appeared that the nonmembers could not compete effectively with board members who had access to the MLS. *Glendale Bd. of Realtors v. Hounsell*, 72 Cal. App. 3d 210, 139 Cal. Rptr. 830 (1977).

204. *Pomanowski v. Monmouth County Board of Realtors*, 175 N.J. Super. 212, 217, 417 A.2d 1119, 1124 (1980). The *Pomanowski* court found that denial of access to the MLS by board nonmembers was not justified by a nexus between the board members and the MLS.

clusion. In *Brown v. Indianapolis Board of Realtors*,²⁰⁵ a defendant board of realtors was permitted to restrict its membership and MLS participation to those realtors meeting the board's membership standards, provided the standards were reasonable. In *Brown*, the board refused MLS access to the plaintiff-broker because he had not attained the required "favorable business reputation in the community."²⁰⁶ The court reasoned that since members of the board assumed responsibility for the actions of other members, the reasonable membership requirements were clearly warranted.²⁰⁷

Relying upon *Brown*, the court in *Martin-Trigona v. National Association of Realtors*²⁰⁸ held that members of real estate boards may properly exclude nonmembers from participation in their activities because such boards are classified as voluntary trade associations.²⁰⁹

Other courts have extended the rights of real estate boards to exclude nonmembers from participation.²¹⁰ The "8 - Point Membership Criteria," as promulgated by the NAR, has recently been found to be a "free . . . open and nondiscriminatory" standard in determining eligibility for board membership.²¹¹

The decisions addressing MLS access by nonmembers of real estate boards at both state and federal levels leave unanswered the critical question of whether such exclusions constitute unreasonable restraints of trade. Some courts consider the *effect on competition* to be the determining factor in examining denials of

205. [1977-1] Trade Cases ¶ 61,435 (S.D. Ind. 1977).

206. *Id.* at 71,611.

207. *Id.* The court found that the defendant board had utilized reasonable membership standards in processing applications of the plaintiff, and that based upon information it had received, the plaintiff was properly excluded from board membership due to a failure to obtain a favorable business reputation within the community. The court also refused to substitute its judgment for that of the membership committee of the board.

208. [1978-1] Trade Cases ¶ 61,915 (E.D. Ill. 1978).

209. *Id.* The court determined that since the realtor board was a voluntary trade association, membership exclusions would not offend antitrust laws. Other counts alleging antitrust violations against the defendants were found to be rambling, incoherent, and scandalous.

210. *See, e.g.,* United States v. Realty Multi-List, Inc., [1978-1] Trade Cases ¶ 62,091 (M.D. Ga. 1977). *See also* notes 160-65 *supra* and accompanying text. In *Realty Multi-List*, a \$1,000 membership fee was found to be a thing of value which would entitle purchasers to equal distribution of the organization's assets in the event of dissolution.

211. State of Iowa ex. rel. Miller v. Cedar Rapids Real Estate Bd., [1980-1] Trade Cases ¶ 63,012 (Iowa Dist. Ct. 1980). Board membership criteria and MLS participation were found to be free and open, and to promote professionalism and competition. The court found the public to be the ultimate beneficiary of the board's operations.

MLS privileges to nonmembers,²¹² while other courts look to the reasonableness of the exclusion.²¹³ The jurisdictional differences in approaching MLS access issues indicate the need for the application of a uniform test. The appropriateness of applying a uniform test is best demonstrated in a statement of the Attorney General of the State of North Carolina which utilizes both the effect on competition factor and the reasonableness of the exclusion factor:

In analyzing requirements for participation in a multiple listing service, each case must be decided on its own facts. The competitive advantage of multiple listing service participation in the particular real estate market involved must be considered in light of the reasonableness of the requirements for participation and the extent to which such requirements restrict membership in the multiple listing service. Where the multiple listing service is operated as an adjunct of a local Board of Realtors, either as a separate corporation or as a committee of the Board, and where membership in the Board is available on reasonable and nondiscriminatory terms, there is no unreasonable restraint of trade.²¹⁴

Thus, an appropriate test to be utilized in analysis of cases involving access to MLS information could be formulated to minimize the diversified jurisdictional approaches to such issues. Because an increase in federal antitrust litigation involving real estate brokers and MLS access can be expected as a result of the *McLain* decision,²¹⁵ the development and application of a uniform test in such cases is highly desirable.

VI. CONCLUSION

Real estate boards and their ancillary services, especially the MLS, are of vital importance to society and the industry they serve. The powers and activities of real estate boards and their members exert significant influence upon the housing market.²¹⁶ However, the power to influence also carries with it the possibility of resulting violations of federal and state antitrust laws. While many practices and activities of real estate boards first appear to operate in violation of antitrust laws, such activities are often found to be reasonable restraints of trade.

The fact that many antitrust issues inherent in the real estate industry have not been addressed or resolved reflects judicial re-

212. See notes 188-92 *supra* and accompanying text.

213. See notes 193-98 *supra* and accompanying text.

214. Op. Atty. Gen. of North Carolina [1980-1] Trade Cases ¶ 63,216 (1980).

215. 444 U.S. 232 (1980).

216. See notes 36-41 *supra* and accompanying text.

luctance to exert jurisdiction over real estate boards when the defense of lack of interstate commerce in real estate sales is raised.²¹⁷ Perhaps the redefinition of the bases of federal jurisdiction under the Sherman Act in real estate cases, as set forth in *McLain*,²¹⁸ offers a solution. Given the significance of the real estate industry in modern society, and the breadth and objectives of antitrust laws to assure a competitive economy, judicial review necessarily must play an increasing role in the extent to which protection of procompetitive activities must yield to the protection of consumers.

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217. See notes 71-104 *supra* and accompanying text.

218. 444 U.S. 232 (1980).