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Arbitrary Exclusion from Multiple Listing Comon-Law and Statutory Remedies

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NOTES

ARBITRARY EXCLUSION FROM MULTIPLE LISTING: COMMON-LAW AND STATUTORY REMEDIES

Grillo v. Board of Realtors*

The Practice of Multiple Listing

Multiple listing is defined as "an arrangement among real estate board . . . members whereby each broker brings his listings to the attention of other members so that if a sale results, the commission is divided between the . . . [listing broker and the selling broker], with a small percentage going to the board."[1] To effectuate the arrangement, multiple listing agreements are obtained with property owners, giving to all board members jointly the exclusive right to sell the listed property. Once obtained, the agreement must be filed with the board within a specified number of days. Information concerning the property is then relayed to all members, after which any member may offer the property to a prospective buyer.

(1) *Benefits and Drawbacks.* By exposing the listings of each member to the sales efforts of every other member, multiple listing benefits both sellers and buyers. Sellers have their property offered in a number of offices, thus reaching a wider market in a shorter period of time, while buyers are provided with a convenient means of selecting property to fit individual needs without having to shop from office to office. Competition as well as efficiency can be enhanced by multiple listing. "[O]ne of the most important functions of a MLS [multiple listing system] 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 firms . . . ."[2]

There are, on the other hand, certain disadvantages inherent in the practice. As Adam Smith observed in 1776: "People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."[3] More recently, it has been stated that: "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."[4] Thus, a goal of multiple listing systems is to strive for market control in order to assure maximum performance. Once such domination is established, however, a board can reap the spoils of its market control more profitably by excluding any remaining nonmembers from participation. Excluded brokers cannot compete successfully with members and could ultimately be forced out of business, leaving the spectre of price-fixing by the board in their wake.

(2) *Scope of the Practice.* In most instances the local board is a member

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

1 Unger, Real Estate Principles and Practices 434 (1959).

2 Case, Real Estate Market Behavior in Los Angeles—A Study of Multiple Listing System Data 49 (1963).

3 1 Smith, Wealth of Nations 170 (4th ed. 1789).

4 Case, supra note 2.

of the National Association of Real Estate Boards (NAREB). The NAREB has promulgated By-Laws and a Code of Ethics, both of which are theoretically embraced within the rules of its member boards. These By-Laws include recommendations for operating multiple listing services, the most significant of which is contained in Article 1, section 2: "The Member Board shall not apply any arbitrary numeric or other inequitable limitation on its members."[5] The Official Interpretations by the NAREB Board of Directors dealing with this section, while not mandatory, serve as useful guides toward understanding what are deemed "inequitable limitations." The following have been described as areas of inequitable limitation: mandatory participation in multiple listing, initiation fees exceeding the recommended figure of three times annual dues, ineligibility of branch offices for membership, mandatory commission fee schedules, and period-in-business limitations on membership.[6]

In addition to this recommended scheme of operation, rules are drawn up by the individual boards for regulating their membership and the multiple listing system. It thus becomes essential to determine whether the recommended standards enunciated by the NAREB are sufficient to safeguard against monopolistic tendencies, whether they are met by the local boards in the practice of multiple listing, and if not, whether the deviations are significant enough to render the practice followed vulnerable to attack on restraint of trade or business tort grounds.

Grillo v. Board of Realtors—Multiple Listing Practice Declared Illegal

Plaintiff, Rudolph Grillo, was a real estate broker licensed by the State of New Jersey[7] and operating his own brokerage business in Plainfield. Defendant Board was a private association comprising the great majority of active real estate brokers and salesmen in Plainfield and the surrounding area and was a member of the NAREB. The rules of defendant Board prohibited the sale of multiple-listed property by nonmembers and seriously hampered any cooperation between "Realtors"[8] and nonmembers.[9] During the eight-year period from 1958 to 1966, Grillo, prompted by a desire to share in the economic advantages of its multiple listing system, unsuccessfully sought membership in defendant Board on four different occasions. Following these futile efforts, he brought suit alleging that the defendant Board constituted an unlawful combination in

[5] The By-Laws also provide that each member board shall adopt the Code of Ethics of the NAREB as a part of its rules and regulations. See United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 494 (1950).

[6] Letter from Harold Klingerman, national representative of the NAREB, to President Lavenhar of the Plainfield Area Board of Realtors, cited in Brief and Summation for Plaintiff, p. 13, Grillo v. Board of Realtors, 91 N.J. Super. 202, 219 A.2d 635 (Ch. 1966).

[7] N.J. Stat. Ann. §§ 45:15-9, 45:15-10 (1963, Supp. 1966) provides for such licensing.

[8] "The term 'Realtor' was . . . presented to and adopted by the NAREB in 1916. The term is owned and controlled by NAREB. . . . [A]nyone not duly authorized by the NAREB is not entitled to designate himself a Realtor in any manner." Unger, supra note 1, at 16.

[9] Although a nonmember could refer his prospective buyers to members and, in the event a sale was consummated, receive 30% of the net commission received by the selling Realtor, this was not a particularly favorable concession. Under the rules of defendant Board, commissions on the sale or rental of multiple listings were divided as follows: listing Realtor 20%, selling Realtor 75%, and listing service 5%. A nonmember referring a prospect to a member could thus receive only 22.5% of the commission realized from his prospect. A member, on the other hand, could make the sale to his own prospect and receive the full 75% selling-broker share.

restraint of trade. He did not demand a judgment compelling his admission to the Board, but rather sought compensatory and punitive damages and an injunction against continuation of the multiple listing system as practiced.

The New Jersey Superior Court held that the combined activity of defendants, causing harm to plaintiff, was an unreasonable and illegal restraint upon trade in violation of the common law. Alternatively, defendants' concerted refusal to allow plaintiff to participate in benefits of multiple listing was held to be tortious. Defendants were held jointly and severally liable to plaintiff for $9,000 damages for probable lost sales commissions, and operation of the multiple listing system in its existing form was enjoined. It was ordered that, before resumption of the operation, defendant Board was to modify its rules to enable nonmembers to participate in multiple listing. Specifically, the court directed (*1*) that listing information be made available to nonmembers on the same basis as members; (*2*) that both members and nonmembers comply with Board regulations which required that all property listings, with specified exceptions, be multiple listed; (*3*) that listings secured by nonmembers be distributed on the same basis as those obtained by members; and (*4*) that the listing service receive a percentage of the commission whether sale of listed property is consummated by a member or nonmember.[10]

Court Recognition of a Nonmember's Claim: Overcoming Jurisdictional Problems

(1) *Doctrines of Exclusive and Primary Jurisdiction.* In effect, the real-estate brokerage business is a regulated industry, subject to statutory licensing provisions and administrative agency control in most states.[11] The jurisdiction of such an administrative agency is exclusive when the remedy which it is empowered to grant is the only relief available in a given situation.[12] The argument may be made, as it was by the defendant in *Grillo*, that the state real-estate commission has exclusive jurisdiction over the subject matter of claims by nonmember brokers against other brokers operating a multiple listing system. The defendant in *Grillo* argued that the legislature, in enacting statutory licensing controls, had indicated that the real estate brokerage business can best serve the public interest if not permitted to operate in a freely competitive market. Further, defendant argued that the licensing statute, in derogation of all common-law restraint of trade principles, indicated a legislative choice not to permit the brokerage business to be controlled by case law. The New Jersey court rejected this contention, finding no legislative intent to displace common-law actions. It stressed the fact that plaintiff had "two avenues available to him: one by complaint . . . in the administrative forum under the statute,[13] and the other in the court under the common law."[14]

Realizing that, by its acknowledgment that plaintiff had two avenues available, it had invited an argument for application of the doctrine of primary jurisdiction,

[10] Grillo v. Board of Realtors, 91 N.J. Super. 202, 229, 219 A.2d 635, 650 (Ch. Div. 1966).

[11] See, e.g., Cal. Bus. & Prof. Code §§ 10000-11709 (West 1962); Mich. Comp. Laws §§ 451.201-451.219 (1948); N.Y. Real Prop. Law §§ 440-442 (McKinney 1945).

[12] Grillo v. Board of Realtors, supra note 10, at 212, 219 A.2d at 640.

[13] The court noted the concluding language of N.J. Stat. Ann. § 45:15-17 (1963): "The commission is expressly vested with the power and authority to make, prescribe and enforce any and all rules and regulations for the conduct of the real estate brokerage business consistent with the provisions of the act."

[14] Grillo v. Board of Realtors, supra note 10, at 212, 219 A.2d at 640.

the court quickly rejected that doctrine's applicability as well. As explained in *Marnell v. United Parcel Service*,[15] "the doctrine of primary jurisdiction is mainly intended to apply to cases in which the Court has jurisdiction to grant a remedy . . . but the issues are such as also fall within the special competence—the 'expertise'—of an administrative agency in some field wherein uniformity of statute policy or interpretation is desirable."[16] The court in *Grillo* based its rejection of the doctrine on two grounds. *First*, it noted that the language of the New Jersey statute which defined the Real Estate Commission's power[17] "cannot be construed as a grant of power to inquire into and make decisions concerning legal liability of licensees . . . ."[18] The logic of this ground for rejection of the primary jurisdiction argument is more clearly presented in the *Marnell* case, where the district court pointed out that, because the administrative agency could not determine the legal liability of defendant, it lacked any concern with the issue presented by the action. Any determination, it reasoned, "would be made, not in the light of the antitrust laws, but only in light of the . . . policies declared by the regulatory acts . . . ."[19] *Second*, the *Grillo* court concluded that the purposes of the primary jurisdiction doctrine would not be promoted by dismissing on that ground, because the questions presented were not ones requiring the expertise of the commission.[20]

As appears from the above, the common-law rights sought to be enforced in a state court action against brokers operating a multiple listing system are not properly subject to either the exclusive or primary jurisdiction of the state real-estate commission. It is equally clear from *Marnell* that, in an action under the federal antitrust laws, a contention for exclusive or primary jurisdiction in the real-estate commission must fail.[21] It thus seems that there should be little difficulty in establishing jurisdiction despite the regulated industry factor. One qualification might be added, however. In an action based on common-law restraint of trade, a court might consider the real-estate commission's evaluation of multiple listing helpful even though made in light of policies emanating from the regulatory act. This follows from the fact that common-law restraint principles are said to emphasize public harm,[22] a proper concern of the real-estate commission.

(2) *Justiciability*. Assuming the court finds that it has jurisdiction and that the primary jurisdiction doctrine is inapplicable, the problem of justiciability may still confront a nonmember asserting a cause of action against an association

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[15] 5 CCH Trade Reg. Rep. ¶ 71,913 (N.D. Cal. Nov. 1, 1966).
[16] Id. at 83,210.
[17] See note 13 supra.
[18] Grillo v. Board of Realtors, 91 N.J. Super. 202, 212, 219 A.2d 635, 641 (Ch. Div. 1966).
[19] Marnell v. United Parcel Service, supra note 15, at 83,210.
[20] Grillo v. Board of Realtors, supra note 18, at 212-13, 219 A.2d at 641. This ground would appear questionable unless intended in the sense that, as urged in Marnell, the commission's concern with the defendants' business practices was only in terms of the "public" interest as declared in the regulatory act, and therefore any "expertise" would be misapplied. If, on the other hand, the commission did have concern for the "private" rights of the parties, as hypothesized by the court in Grillo, it could be strongly argued that its evaluation of the multiple listing system should be obtained.
[21] Marnell v. United Parcel Service, 5 CCH Trade Reg. Rep. ¶ 71,913, at 83,204-07, 83,209-11 (N.D. Cal. Nov. 1, 1966).
[22] See Grillo v. Board of Realtors, supra note 18, at 225, 219 A.2d at 648. See also text accompanying notes 34-36 infra.

of licensees practicing multiple listing. There is a recognized hesitancy on the part of courts to interfere with the internal affairs of private associations.[23] Generally, the granting of membership in a private, voluntary association will not be judicially compelled regardless of how arbitrary or unjust the rejection might have been.[24] Recent decisions such as the New Jersey case of *Falcone v. Middlesex County Medical Soc'y*[25] have, however, established a major exception to this general rule.[26]

In *Falcone*, an action in lieu of mandamus was brought by a licensed physician excluded from defendant medical society and thus precluded from using hospital facilities. A decree compelling admission was affirmed by the New Jersey Supreme Court, on the ground that the society assumed the nature of an involuntary association because membership was an "economic necessity."[27] The *Grillo* court, while noting that the *Falcone* case similarly involved the right of a private association to exclude a licensed individual from membership, thus restricting his privilege of practicing a profession, distinguished the justiciability questions presented on the ground that compelled admission was sought in *Falcone* rather than injunctive relief and damages as in the instant case.

Nevertheless, the injunction issued in *Grillo* amounted to a mandate that the Board either allow plaintiff to participate in multiple listing or discontinue the system altogether. In effect, the court decreed that plaintiff be raised to the status of a member, thus undermining the distinction drawn between the instant suit and one demanding compelled admission. The court in *Grillo*, therefore, should not have ignored the justiciability issue simply because the plaintiff had not sought admission. Rather, it should have made clear that this case fell within the exception outlined in *Falcone*, and hence that judicial cognizance was proper, despite the variance in relief demanded.

Theories of Recovery

A nonmember harmed by exclusion from a multiple listing arrangement might base his action upon common-law restraint of trade, or he might bring it under the Sherman Act or a state antimonopoly statute. The legal principles involved

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[23] Medical Soc'y of Mobile County v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944); Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal. App. 2d 241, 253-54, 293 P.2d 862, 869 (Dist. Ct. App. 1956); Dawkins v. Antrobus, 17 Ch. D. 615 (1881). See generally Annot., 137 A.L.R. 311 (1942); Developments in the Law, "Judicial Control of Actions of Private Associations," 76 Harv. L. Rev. 983 (1963); Comment, 52 Cornell L.Q. 104, 109-15 (1966).

[24] E.g., Kronen v. Pacific Coast Soc'y of Orthodontists, 237 Cal. App. 2d 289, 301, 46 Cal. Rptr. 808, 816 (Dist. Ct. App. 1965), cert. denied, 384 U.S. 905 (1966); Gold Knob Outdoor Advertising Co. v. Outdoor Advertising Ass'n, 225 S.W.2d 645, 646 (Tex. Civ. App. 1949); Annot., 89 A.L.R.2d 964, 966-68, 971-74 (1963).

[25] 34 N.J. 582, 170 A.2d 791 (1961).

[26] See also James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944); Kurk v. Medical Soc'y of County of Queens, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. Queens County), rev'd on other grounds, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (2d Dep't 1965). See also Developments in the Law, supra note 23, at 993-94, 1040.

[27] Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 592, 170 A.2d 791, 796-97 (1961). Various formulations of this "economic necessity" notion may be found, but most often emphasis is placed upon the existence of a virtual monopoly over some source of supply or over the use of some facility, thereby giving rise to corresponding obligations in regard to membership selection; see, e.g., James v. Marinship Corp., supra note 26, at 731-32, 155 P.2d at 335; Kurk v. Medical Soc'y of County of Queens, supra note 26, at 798, 260 N.Y.S.2d at 527.

in all three are similar, since the federal and many of the state antitrust statutes have been held to incorporate the common law on restraints of trade.[28] Alternatively, the nonmember may choose to bring his action in tort, the possible theories being interference with prospective advantage, concerted refusal to deal, and prima facie tort. The choice of a particular theory requires consideration both of its adaptability to an action for relief against exclusion from multiple listing and of the problems inherent in its use.

(1) *Common-Law Restraint of Trade.* Common-law restraint of trade should offer a suitable theory in most jurisdictions. "Restraint of trade" embraces "acts, contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition . . . ."[29] While "every agreement concerning trade . . . restrains,"[30] it is only the unreasonable combination in restraint of trade that is unlawful.[31] Moreover, under some circumstances a combination in restraint of trade may be justified and therefore legal.[32]

As in *Grillo*, the threshold question is whether a nonmember can assert a cause of action for affirmative relief under common-law restraint principles. Traditionally, courts applying these principles did not grant affirmative relief to private parties injured by the prohibited practices, but merely refused to enforce all contracts involved as against public policy.[33] Emphasis thus came to be laid upon a showing of public harm, with one court holding that a suit brought by the attorney general "on behalf of the state in the interest of the public" would not be barred by the traditional rule of "mere unenforceability."[34] *Grillo* rejected these common-law limitations on the availability of affirmative relief. Relying on *Group Health Co-op. v. King County Medical Soc'y*,[35] the court found that under modern common-law restraint of trade principles, injured third-party competitors may be afforded affirmative relief upon a showing of public harm accompanied by only "slight additional private interest as justification for seeking the remedial services of the court."[36] No specific finding of harm to the public was

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[28] Standard Oil Co. v. United States, 221 U.S. 1, 49 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911) (holding that Sherman Act incorporates common law of restraints of trade); American Medical Ass'n v. United States, 130 F.2d 233, 235 (D.C. Cir. 1942); Group Health Co-op. v. King County Medical Soc'y, 39 Wash. 2d 586, 638, 237 P.2d 737, 763 (1951) (holding that state constitutional provision encompasses common law of restraints of trade).

[29] Pulp Wood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 405, 170 N.W. 230, 232 (1919).

[30] Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[31] United States v. Associated Press, 52 F. Supp. 362, 368 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

[32] Grillo v. Board of Realtors, 91 N.J. Super. 202, 223, 219 A.2d 635, 647 (Ch. Div. 1966), citing Board of Trade v. United States, supra note 30.

[33] Downes v. Bennett, 63 Kan. 653, 66 Pac. 623 (1901); Park & Sons Co. v. National Wholesale Druggists' Ass'n, 175 N.Y. 1, 67 N.E. 136 (1903) (dictum); Macauley Bros. v. Tierney, 19 R.I. 255, 33 Atl. 1 (1895); Mogul S.S. Co. v. McGregor, Gow & Co., 23 Q.B.D. 598 (Ct. App. 1889), aff'd, [1892] A.C. 25 (1891) (dictum).

[34] McCarter v. Firemen's Ins. Co., 74 N.J. Eq. 372, 387-88, 73 Atl. 80, 86 (1909).

[35] 39 Wash. 2d 586, 237 P.2d 737 (1951). The court in Group Health pointed out that the rule of "mere unenforceability" originated when contracts in restraint of trade were characterized by agreements between parties, relinquishing rights to carry on trade, and was probably merely an application of the doctrine of pari delicto. Now that concepts of restraint of trade encompass combinations to restrain competition to the detriment of third parties, the basis for the rule no longer justifies its application. Id. at 654-55, 237 P.2d at 773-74.

[36] Grillo v. Board of Realtors, supra note 32, at 215-16, 219 A.2d at 643, citing Terwilliger v. Graceland Memorial Park Ass'n, 35 N.J. 259, 268, 173 A.2d 33, 38 (1961).

made; rather, the injury to plaintiff was equated with public harm by reason of the diminution of competition.[37] Plaintiff's status as a competitor was deemed sufficient private interest to establish standing to sue.

It is apparent that under this conception of common-law restraint principles, emphasis on public, as distinguished from private, harm is illusory, and common-law restraint of trade is therefore a serviceable theory for injured competitors. Nevertheless, though the weight of authority today seemingly favors affirmative relief,[38] some jurisdictions continue to adhere to the view that business restraints are merely unenforceable[39] and do not recognize a right of action in third-party competitors under a common-law restraint theory.[40]

Although the requirement of specific harm to the public has been de-emphasized to the extent that most courts do not look for it in determining whether a cause of action exists,[41] the subsequent decision on the merits still rests largely on considerations of public harm. The element of public harm is there reinserted in terms of "unreasonableness," since the common-law theory condemns only that conduct which constitutes an *unreasonable* restraint. In *Grillo*, as elsewhere,[42] resort was had to federal antitrust experience under the Sherman Act[43] in determining the question of unreasonableness. Though the court drew an analogy between the case at bar and federal court cases holding concerted refusals to deal to be unreasonable per se,[44] it chose not to utilize the conclusive presumption of illegality but to determine the reasonableness of defendants' conduct for itself. The determination which ensued, however, may have been inadequately supported. In *United States v. Trenton Potteries Co.*,[45] the United States Supreme Court noted that "whether . . . [a] restraint is reasonable or not must be judged in part at least in the light of its effect on competition . . . ."[46] *United States v. Times-Picayune Pub. Co.*[47] indicated that competitors must be foreclosed from a substantial market or part of a market in order for there to be restraint under the Sherman Act.[48] If such a substantial impact on competition must be shown,

[37] "[D]efendant Board's method of conducting its multiple listing service tends to stifle . . . competition. I find also that plaintiff has suffered diminution of profits . . . as a result of the restraints thus imposed . . . ." Grillo v. Board of Realtors, supra note 32, at 223, 219 A.2d at 647.

[38] See 36 Am. Jur. "Monopolies" §§ 204, 214 (1941).

[39] See Annot., 92 A.L.R. 185 (1934).

[40] If such courts were to grant affirmative relief, the public harm element, as in Grillo, would probably be satisfied by equating injury to a competitor with public harm in the form of decreased competition.

[41] The Sherman Act, like Grillo, seems to equate harm to a competitor with public harm in giving a cause of action for treble damages to third-party competitors; see note 60 infra.

[42] The Washington Supreme Court in Group Health had utilized federal antitrust experience as well; see Group Health Co-op. v. King County Medical Soc'y, 39 Wash.2d 586, 237 P.2d 737 (1951).

[43] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

[44] E.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (information available by direct wire service); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (appliances).

[45] 273 U.S. 392 (1927).

[46] Id. at 397.

[47] 105 F. Supp. 670 (E.D. La. 1952).

[48] Id. at 679. The court reasoned that "for the restraint to be unreasonable it is not necessary that it eliminate all or substantially all competition. If this were not true, only total monopolization would be unlawful under the Act." Ibid. Yet the court based its holding of illegality on a finding that competition in a substantial part of the market was restrained.

it would seem to necessitate the determination of a relevant geographic market[49] in order that the effect on competition therein may be realistically appraised.[50] Consequently, although the *Grillo* court apparently reached the right conclusion by using a standard based upon a "tendency toward preventing competition,"[51] this standard seems too vague for practical application absent an accompanying determination of the relevant market.[52] Since the court obviously disliked blanket application of the presumption of illegality attached to concerted refusals to deal by federal courts applying federal antitrust laws, it seems inconsistent that its own determination of unreasonableness did not include a finding of a relevant geographical market by which attention might have been focused on the particular fact situation.

Although the defense of justification has some applicability under common-law restraint principles, the court in *Grillo* rejected defendants' contention that its practices were justified as an attempt to protect the public from unethical or incompetent brokerage services. The court found that, in view of the comprehensive scheme of regulation, defendants were "proceeding as an extra-governmental body in a pre-empted field."[53] In states without such comprehensive regulation, a legitimate ethical motivation, as opposed to one strictly commercial in nature,[54] might serve to justify the imposition of some standards restricting

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[49] "Relevant market" is the term most used to indicate the geographic market and product line affected by an alleged violation of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1964). United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

The product market defines the relevant market in terms of cross-elasticity of the demand for products. The geographic market defines the relevant market in terms of the cross-elasticity of the supply of products. United States v. Aluminum Co. of America, 377 U.S. 271, 283 (1964) (dissenting opinion); see Note, 52 Cornell L.Q. 600, 600 nn.2-6 and accompanying text (1967). A relevant market determination has also been held to be a predicate to liability under § 2 of the Sherman Act, United States v. Grinnell Corp., 384 U.S. 563, 570 (1966), and has been defined under that provision in much the same way as for Clayton Act purposes. Id. at 573.

[50] In United States v. Columbia Steel Co., 74 F. Supp. 671 (D. Del. 1947), the district court recognized that such a relevant market determination was essential to a finding of monopolization under § 2 of the Sherman Act. At the same time, it was intimated that, though the standards of unreasonableness under § 1 of the act are less strict, some determination of a relevant geographic market should be made there also. Id. at 673.

[51] Grillo v. Board of Realtors, 91 N.J. Super. 202, 218, 219 A.2d 635, 644 (Ch. Div. 1966).

[52] The defendant in Grillo contested the determination of unreasonableness made without a prior finding of a relevant market. It argued that the Board's territory did not necessarily constitute a relevant market because the commodity involved, being immovable, had a value largely dependent upon its location. A listing within the Board's territory might have little attraction to the public while a comparable listing outside the territory of the Board might have a great attraction. Many of the Realtors testified that a substantial portion of their listings and sales were outside the geographical confines of the Plainfield Board, presumably in areas serviced by other multiple listing systems. Therefore, defendants argued, since the Realtors have a larger geographic market, so too does plaintiff. And in those areas, outside the Plainfield Board's jurisdiction, he could not profess restraint of trade by them. Brief and Summation for Defendant, pp. 23-24, Grillo v. Board of Realtors, supra note 51.

[53] Grillo v. Board of Realtors, supra note 51, at 225, 219 A.2d at 648; see Mogelefsky v. Schoem, 90 N.J. Super. 49, 59, 216 A.2d 236, 241 (App. Div. 1966); State v. Stockl, 85 N.J. Super. 591, 599, 205 A.2d 478, 483 (Law Div. 1964).

[54] The court in Grillo no doubt laid great stress on the arbitrary restrictions found to have been imposed on membership by defendant Board. A prohibitive initiation fee of $1,000 was cited as offering "a strong inference that the amount . . . [had] been set as a barrier against applications which could otherwise be filed." Grillo v. Board of Realtors, supra note 51, at 211, 219 A.2d at 640. Moreover, the period-in-business limitation on membership was viewed by the court as a hurdle "placed . . . in the way of newcomers." Ibid.

membership and participation in multiple listing. Nevertheless, the use of the defense of justification in this area has obvious limitations. As was pointed out in *Sugar Institute v. United States*:[55]

> The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a coöperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.[56]

It becomes apparent that the so-called "defense" of justification is actually directed at the element of unreasonableness and has ceased to constitute a separate defense. Thus certain forms of cooperative action may produce justifiable results,[57] but once an unreasonable restraint is found despite possible justifying conditions, there is no "defense" of justification available.[58]

(2) *Federal Antitrust Statutes.* Of major concern to nonmembers seeking relief against exclusion from multiple listing arrangements is the question whether an action would lie under the Sherman Act,[59] thus entitling a successful plaintiff to treble damages.[60] In expressly providing that the word "person" shall be deemed to include associations existing under the laws of any state,[61] the act clearly established the amenability of private associations, such as local realtor boards, to suits thereunder.[62] It might, therefore, be available in situations such as that presented in *Grillo*.

The Sherman Act, like common-law restraint, prohibits only unreasonable restraints of trade or competition. But it goes beyond common-law restraint in calling for both a stricter definition of "trade" and the involvement of interstate commerce. Sherman Act precedents classify certain activities in combination as "illegal per se," without inquiry into the harm they cause or the business excuse for their use.[63] A concerted refusal to deal, the theory used in *Grillo* to find common-law liability, is within this category,[64] thus obviating the need for a separate determination of unreasonableness.[65] But, the Sherman Act prerequisites of finding the practice to be a "trade" and of showing the involvement of interstate commerce remain. The former should be satisfied by reference to *United States v. National Ass'n of Real Estate Boards*,[66] in which it was held that real-estate brokers and salesmen are not exempted by Section 6 of the Clayton Act[67]

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55 297 U.S. 553 (1936).
56 Id. at 599.
57 See, e.g., Appalachian Coals v. United States, 288 U.S. 344, 373-74 (1933); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-83 (1925). Board of Trade v. United States, 246 U.S. 231 (1918).
58 See United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898). This opinion contains an exhaustive review of the cases dealing with common-law restraint of trade.
59 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).
60 Sherman Act § 7, 26 Stat. 210 (1890), as amended, 15 U.S.C. § 15 (1964).
61 Sherman Act § 8, 26 Stat. 210 (1890), 15 U.S.C. § 7 (1964).
62 See, e.g., United States v. Connecticut Package Stores Ass'n, 205 F. Supp. 789 (D. Conn. 1962); United States v. Greater N.Y. Live Poultry Chamber of Commerce, 30 F.2d 939 (S.D.N.Y. 1928).
63 See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
64 See cases cited in note 44 supra.
65 Ibid.
66 339 U.S. 485 (1950).
67 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

(providing that the labor of a human being is not a commodity or article of commerce) from the meaning of the word "trade" in the Sherman Act.[68]

The second requirement—involvement of interstate commerce—poses the greatest problem facing a nonmember relying on the Sherman Act. No direct decision has been rendered on the question of whether real-estate brokerage services can constitute interstate commerce.[69] The Supreme Court was not presented with this question in the *Real Estate Boards* case, since it involved activities in the District of Columbia.[70]

The word "commerce" was originally construed to relate to a flow of goods or commodities.[71] The concept was later broadened to include, as Mr. Justice Black concluded in *United States v. South-Eastern Underwriters Ass'n*,[72] "transactions . . . though non-commercial; . . . though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."[73] While it is clear that, in the instant case, the property listed cannot constitute any sort of flow of goods, it is actually the brokerage services and information essential to those services which are being restrained. It would logically seem to follow from the Supreme Court's holdings that "services" constitute trade,[74] that, if those services affect interstate commerce, the property to which the services relate need not also flow among the states in order for interstate commerce to be involved.[75] The fact that information vital to the services here being restrained flows among the states should be sufficient to satisfy the interstate commerce requirement. In *Associated Press v. United States*,[76] the requirement of interstate commerce was satisfied by the interstate dissemination of news,[77] an item equated with listings by the court in *Grillo*.[78] If it could be shown that listings were accepted on properties outside the state and used by buyers within the board's own state, or that listings on property within the board's state were used by out-of-state buyers, an analogy to the dissemination in the *Associated Press* case could be drawn to establish interstate commerce.

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[68] United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 491-92 (1950).

[69] In United States v. National Ass'n of Real Estate Boards, 80 F. Supp. 350, 351 (D.D.C. 1948), there was dictum to the effect that agreements relating to charges in transactions in real estate do not impose restraints upon interstate commerce since the charges do not directly affect the sale of real estate itself. This dictum may lend itself to the argument that, where restraint of competition for sales is complained of, this does relate to real-estate transactions, and such transactions do constitute interstate commerce.

[70] Section 3 of the Sherman Act, applicable to the District of Columbia, does not require that interstate commerce be involved for a violation to exist since Congress has plenary power of supervision in the District.

[71] Gibbons v. Ogden, 6 U.S. (9 Wheat.) 1, 189 (1824); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868).

[72] 322 U.S. 533 (1944).

[73] Id. at 549-50.

[74] E.g., American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897).

[75] Hopkins v. United States, 171 U.S. 578 (1898) and Anderson v. United States, 171 U.S. 604 (1898) do not dictate otherwise. Both cases involved situations in which goods to which commission services related did move across state lines, but the services were performed wholly within one state, thus negativing the involvement of interstate commerce. Here it may be possible to show that the services, or information and funds directly related to the services, do "cross" states lines though the related property does not.

[76] 326 U.S. 1 (1945).

[77] Id. at 14.

[78] Grillo v. Board of Realtors, 91 N.J. Super. 202, 222, 219 A.2d 635, 646 (Ch. Div. 1966).

If, as posited, buyers from other states came into the board's territory to purchase property and made use of multiple listing, interstate commerce might arguably exist on the same basis as was used by Congress in Title II of the Civil Rights Act of 1964 to define restaurants covered by the act.[79] While the meaning ascribed to "interstate commerce" by Congress in passing the Civil Rights Act cannot be used to determine the intent of Congress in passing the Sherman Act,[80] *Katzenbach v. McClung*,[81] in which the validity of part of the Civil Rights Act was established, shows that the Supreme Court has sanctioned the use of the commerce power to reach restaurants which serve interstate travelers or which serve, in large part, food which has moved in interstate commerce.[82] An analogy could thus be made that multiple-listed property sold to out-of-state buyers, like food sold to interstate travelers, is encompassed within the regulatory power of Congress under the commerce clause. Two facts weaken the analogy, however. *First*, it must be remembered that in Title II Congress was using the commerce power for civil rights purposes, and it cannot be conclusively presumed that the scope of that power, though verbally defined in each instance in terms of "affecting interstate commerce," will be held to be as broad when used for restraint of trade purposes. *Second*, in Title II Congress created a category within which restaurants are conclusively presumed to affect interstate commerce.[83] It may be more difficult to argue on a case-by-case basis that interstate commerce is affected where out-of-state buyers make use of multiple listing. The first-mentioned weakness may prove fictitious when viewed in light of the ease with which interstate commerce has been found to be involved in past Sherman Act cases.[84] These decisions indicate that, in the Sherman Act, the commerce power has been utilized to its fullest potential.[85] Hence, the use of the commerce power for Sherman Act purposes must necessarily be at least as broad as its use in any other context, such as civil rights. In sum, interstate commerce should be able to be shown in multiple listing sales and the Sherman Act should be available in suits against local real-estate boards.[86]

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79 78 Stat. 243 (1964) 42 U.S.C. § 2000a(b)(2) (1964).

80 One situation in which the Supreme Court has given two separate statutes an "interlaced" reading was presented in United States v. Hutcheson, 312 U.S. 219 (1941). There, however, the Court was determining congressional policy with regard to labor and the antitrust laws.

81 379 U.S. 294 (1964). Insofar as Katzenbach v. McClung upholds the validity of § 201(c)(2), of Title II of the Civil Rights Act, bringing restaurants which serve interstate travelers within the category required to refrain from discriminatory practices, it represents a Supreme Court holding on the scope of the commerce power which is likely to be followed. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

82 Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

83 Id. at 302-03.

84 See, e.g., United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). See also Wickard v. Filburn, 317 U.S. 111 (1942).

85 See United States v. South-Eastern Underwriters Ass'n, supra note 84, in which the Supreme Court, in determining whether the Sherman Act was applicable to the insurance industry, reasoned that "the real answer . . . is to be found in the Commerce Clause itself and in some of the great cases which interpret it." Id. at 549. The Court went on to conclude that Congress, vested with the commerce power, "available to be exercised for the national welfare as Congress shall deem necessary," had no intention of excluding insurance when it passed the Sherman Act in 1890. Id. at 552-53. The implication then would seem to be that Congress intended to utilize its full commerce power in the Sherman Act.

86 In the Grillo situation, the argument showing interstate commerce would have been much stronger had the defendant Board not exempted commercial properties from those which "must" be multiple listed, since sales of such properties would be more likely to

(3) *State Antitrust Statutes.* State antimonopoly laws or constitutional provisions may provide an additional vehicle for seeking relief against detrimental exclusion from multiple listing and would be extremely important if interstate commerce could not be shown. The Washington Supreme Court case of *Group Health Co-op. v. King County Medical Soc'y*,[87] cited in *Grillo* as general authority for allowing affirmative relief in a suit based on common-law principles of restraint of trade, was actually brought under a constitutional antimonopoly provision.[88] The provision was construed to incorporate common-law restraint, and strong reasons were set forth for eliminating the common-law restrictions on availability of affirmative relief under this theory.[89]

With special regard to the justiciability problem involved in suits against private associations such as realtor boards, it should be observed that, though *Group Health* offers a sound solution to problems in this branch of the law,[90] some states do not have antimonopoly laws. Neither can it be assumed that all states would construe existing statutes as including all of the common law of restraints of trade, as did the Washington court in *Group Health.* Moreover, even under such a broad construction, there is no assurance that the statute will apply to the real-estate business and multiple listing. Certain of the laws are expressly self-limiting, such as the New Jersey antitrust provision which affects solely corporate mergers and acquisitions.[91] Others have been judicially construed as not applying to the real-estate business.[92]

(4) *Tort of Interference With Prospective Advantage.* This tort theory developed from actions forbidding the use or threat of physical violence as a means of interfering with another's trade.[93] As the law grew in economic sophistication and emphasis shifted to concern for the fair and efficient operation of the competitive system, interference with prospective advantage came to include not only the use of violence but also the misuse of such ordinary techniques of competition as unilateral refusals to deal.[94] Even then, this tort was generally applied only where there had been interference with a particular transaction, making possible a showing of actual loss.

The interference represented by the exclusion of a broker from participation in multiple listing and the refusal to furnish him with information concerning listed properties is thus one step removed from the usual subject matter of the tort. In an exclusion case, only potential sales have been lost as a result of the members' action, and only probable losses can be shown. Although the court in *Grillo* relied

involve significant interstate contacts; see note 110 infra. Yet a large number of commercial properties may still have been multiple listed, since members had discretion to choose to list commercial properties with the Board.

87 39 Wash. 2d 586, 237 P.2d 737 (1951).

88 Wash. Const. art. XII, § 22.

89 See note 35 supra.

90 Group Health first employed injunctive relief and damages to remedy the harm resulting from exclusion from a private association, conduct held to constitute a restraint of trade violation.

91 N.J. Stat. Ann. § 14:3-10 (1939).

92 See, e.g., Nasman v. Bank of New York, 49 N.Y.S.2d 181, 183 (Sup. Ct. New York County 1944), construing N.Y. Gen. Bus. Law § 340 as not applying to realty (purchase and sale). By implication, brokerage services related to the purchase and sale of realty would also be excluded from the purview of this antimonopoly section.

93 Developments in the Law, "Competitive Torts," 77 Harv. L. Rev. 888, 890 (1964); see, e.g., Garret v. Taylor, 18 Cro. Jac. 567, 79 Eng. Rep. 485 (K.B. 1621).

94 Ibid.; see, e.g., Martell v. White, 185 Mass. 255, 69 N.E. 1085 (1904).

on authority establishing the right to be protected from unjustified interference with a particular transaction,[95] it indicated in no uncertain terms that an extension of the tort of interference with prospective advantage to cover exclusion from multiple listing was proper. Hence, potential economic advantage from relations which would probably arise was held equally deserving of protection. While the court based its reasoning in part on the characterization of defendants' conduct as a concerted refusal to deal,[96] the basic test set forth for determining unjustified interference is also applicable to the theory of interference with prospective advantage. The test employed the inquiry "whether the conduct was 'both injurious and transgressive of generally accepted standards of common morality or of law.' "[97] Defendants' refusal to allow nonmember participation in multiple listing was held to fall outside the "rules of the game."[98] Such unjustified interference would be similarly condemned under the theory of interference with prospective advantage.

(5) *Tort of Concerted Refusal To Deal.* The *Grillo* court's characterization of defendants' conduct in refusing to allow plaintiff to participate in multiple listing brought into play the tort of concerted refusal to deal.[99] Under this theory, plaintiff must prove that the conspiracy has an unlawful purpose or that the participants use unlawful means.[100] These elements could be demonstrated by defendants' purpose to benefit themselves at plaintiff's expense by means of concerted action, "a presumptively . . . suspect form of conduct . . . ."[101] A commitment by members not to furnish information concerning listed properties to nonmembers fits readily into the framework of a concerted refusal. It has been observed, however, that a "full analysis of a concerted refusal to deal usually requires consideration of the likelihood of public as well as private injury," and "reference to the public's economic interest helps to resolve the conflict between the plaintiff's and defendants' private interests."[102] This may represent a factor detracting from the appeal of the concerted refusal to deal theory as an alternative to an action under common-law restraint of trade principles, since emphasis would not be significantly shifted away from any requirement of public harm remaining in the latter theory.[103]

(6) *Prima Facie Tort.* The principle of the prima facie tort is basically that "prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading,

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95 Louis Schlesinger Co. v. Rice, 4 N.J. 169, 180, 72 A.2d 197, 203 (1950); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 586, 175 Atl. 62, 66, (Ct. Err. & App. 1934).

96 Grillo v. Board of Realtors, 91 N.J. Super. 202, 225-26, 219 A.2d 635, 648 (Ch. Div. 1966).

97 Sustick v. Slatina, 48 N.J. Super. 134, 144, 137 A.2d 54, 60 (App. Div. 1957).

98 The "rules of the game" formulation was taken from 1 Harper & James, Torts, § 6.11, at 510 (1956).

99 See generally Fort Wayne Cleaners & Dyers Ass'n v. Price, 127 Ind. App. 13, 137 N.E.2d 738 (1956); Purofied Down Prods. Corp. v. National Ass'n of Bedding Mfrs., 201 Misc. 149, 105 N.Y.S.2d 132 (Sup. Ct. Kings County 1951); Restatement, Torts § 765, at 42 (1939).

100 Harding v. Ohio Cas. Ins. Co., 230 Minn. 327, 41 N.W.2d 818, 824 (1950).

101 Developments in the Law, supra note 93, at 929. However phrased, the question of liability here, as under the prima facie tort theory, centers on whether defendant's conduct was justified, thus adding little to the latter doctrine (see text accompanying note 104 infra). Even where the prima facie tort has been accepted, however, concerted refusal principles remain useful in emphasizing the presumptive illegality of concerted refusals. Ibid.

102 Id. at 930.

103 See text accompanying notes 33-41 supra.

requires a justification if the defendant is to escape."[104] The doctrine has received varied reception among courts and writers, and the conflict as to its usefulness continues.[105]

As with the unlawful purpose necessary under concerted refusal to deal concepts, the requisite intent could be satisfied by defendants' purpose to benefit themselves at the expense of plaintiff.[106] *Grillo* was a case of first impression in New Jersey, and future actions by nonmembers will similarly present novel claims in other jurisdictions. For this reason, the prima facie tort doctrine, offering a useful approach to the solution of new problems, might prove appealing to the courts. By bringing to the surface the competing interests involved, the doctrine suggests as an analytical technique a "balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with . . . ."[107] It has also been noted that the doctrine of prima facie tort "seems particularly useful in dealing with cases involving injury by the act of a private association since such groups frequently possess power to injure individuals through conduct not encompassed within conventional concepts."[108] This would appear to be precisely the approach necessary to an evaluation of the "temporal damage" resulting from the exclusion of nonmembers from participation in multiple listing. The prima facie tort doctrine, in its capacity of supplementing the traditional torts, would be of particular value in those jurisdictions which have not sufficiently developed the area of competitive tort law to provide a suitable theory upon which an excluded broker could bring suit.

Remedies

(1) *Injunction.* The injunctive relief fashioned by the court in *Grillo* appears to provide an effective remedy in an action for exclusion by a nonmember. Because multiple listing can perform a valuable service to the public, it is desirable to allow its continuance once the harm to plaintiff and others similarly situated has been eliminated. The injunction issued in *Grillo*, requiring changes in the practices of the listing service, represents an attempt to effectuate that goal. Nevertheless, a close scrutiny of the proposed changes reveals some shortcomings which a future court may want to correct. One apparent inadequacy is in the provision for the continuance of mandatory participation in multiple listing in order to secure any advantages of the system.[109] The court ordered that, if the operation were to be resumed, both members and nonmembers desiring to partici-

[104] Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

[105] See generally Brown, "The Rise and Threatened Demise of the Prima Facie Tort Principle," 54 Nw. U.L. Rev. 563 (1959); Forkosch, "An Analysis of the 'Prima Facie Tort' Cause of Action," 42 Cornell L.Q. 465 (1957); Hale, "Prima Facie Torts, Combination, and Non-Feasance," 46 Colum. L. Rev. 196 (1946); Developments in the Law, "Judicial Control of Actions of Private Associations," 76 Harv. L. Rev. 983, 1005, 1041 (1963); Note, 52 Colum. L. Rev. 503 (1952).

[106] E.g., Fitt v. Schneidewind Realty Corp., 81 N.J. Super. 497, 504, 196 A.2d 26, 30 (Law Div. 1963). "The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants . . . ." Holmes, "Privilege, Malice, and Intent," 8 Harv. L. Rev. 1, 8 (1894).

[107] Masoni v. Board of Trade, 119 Cal. App. 2d 738, 742, 260 P.2d 205, 208 (1953).

[108] Developments in the Law, supra note 105, at 1041.

[109] See text accompanying note 10 supra. It is interesting to note that the NAREB had cited the mandatory participation requirement as a vulnerable area of defendant Board's system; see text accompanying note 6 supra.

pate in multiple listing must comply with Board regulations requiring all property listings obtained by them, with specified exceptions, to be multiple listed.[110] The court thus authorizes the continued use of this regulation and includes nonmembers within its purview.

A possible justification for the court's approach might be found in a desire to maintain the efficiency of the multiple listing system by forced participation.[111] Yet, arguably, the public interest in competition demands a different approach. Sellers who desire an exclusive listing arrangement, and whose property does not come within a category exempted from mandatory participation in multiple listing, will be prejudiced by the continued use of the regulation. Under continued mandatory participation, both member and nonmember brokers will have to choose between (*1*) offering a multiple listing arrangement, thus accepting mandatory participation with no discretion to serve the above-mentioned sellers on an exclusive basis, or (*2*) serving all sellers on an exclusive listing basis, thus securing no benefits from multiple listing. A preferable solution would be to enjoin mandatory participation in multiple listing and allow members and nonmembers alike to secure exclusive listings if such be the seller's selection. Since the court is making provision for the resumption of multiple listing in order that the benefit to the public not be lost altogether, it could require that any regulation detracting from that benefit be modified or deleted.

(*2*) *Damages.* In addition to injunctive relief, compensatory damages are recoverable under all the theories reviewed above. As pointed out in *Grillo*, though the measure of damages be uncertain, the right of recovery is not precluded.[112] Relevant evidence which may be adduced to determine damages includes: (*1*) annual multiple listing income of defendant boards; (*2*) commission fee applied; (*3*) board regulations concerning division of commissions; (*4*) number of board members; and (*5*) average net profit realized by brokers on gross commissions earned.

Certain assumptions must be made by a court in utilizing the evidence to ascertain plaintiff's damages. In *Grillo* the assumption was made that the appropriate measure of probable sale losses which should be attributed to plaintiff was the average of the multiple-listing sales of all the member brokers. This measure was chosen despite evidence introduced by plaintiff showing that by far the greatest proportion of multiple-listing sales were made by three-fifths of the members, representing those who had concentrated on the use of multiple listing.[113] Plaintiff had argued that the sales level attained by the brokers in this group should be attributed to him, on the assumption that he could have done as well as they did. Another court might be willing to accept such a contention, and the damages awarded would accordingly be increased.

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[110] Grillo v. Board of Realtors, 91 N.J. Super. 202, 229, 219 A.2d 635, 650 (Ch. Div. 1966). The rules of defendant Board provide that a member is given discretion to choose between a multiple listing and an exclusive one only if the property involved is a real estate development consisting of five or more individual dwelling units, a single structure containing five or more dwelling units, or a commercial, industrial, or "management" property. No properties other than these exceptions could be exclusively listed without permission. Id. at 209, 219 A.2d at 639.

[111] See text accompanying note 4 supra.

[112] Grillo v. Board of Realtors, supra note 110, at 230, 219 A.2d at 651.

[113] See Brief and Summation for Plaintiff, pp. 26-31, Grillo v. Board of Realtors, supra note 110.

A more basic assumption appears necessary with regard to allowance or disallowance of recovery for "listing" commissions.[114] In *Grillo* the assumption was made, without discussion, that no allowance should be made for the portion of commissions allocated to the listing member.[115] Arguably, under the rules of defendant Board, such a recovery would not reflect plaintiff's true loss. Board members, subjected to mandatory participation in multiple listing, could not accept exclusive listings except on certain exempted properties.[116] On the other hand, plaintiff's main source of income was from exclusive listings in which he did not compete with defendants on equal footing but rather had a corner on the market. Indeed, plaintiff had enjoyed considerable success in the brokerage business even during those years in which he was forced to compete with defendants. To allow plaintiff to keep the profits realized through exclusive listings, and at the same time recover for losses resulting from failure to receive a listing commission on the self-same property, might therefore amount to a double recovery.[117]

A counter-argument might be advanced that by excluding listing commissions from recoverable damages plaintiff is prejudiced. Since plaintiff was not responsible for the fact that he was excluded and was thus able to obtain exclusive listings, the latter circumstance should not be considered in estimating damages. Furthermore, evidence was introduced in *Grillo* showing that earnings from multiple-listing sales amounted to only about half of the total earnings of members, much of the remainder being realized on exempted property. There is no reason to assume that plaintiff's earnings for the period in question were not also substantially from sources exempted from mandatory multiple listing, thus greatly removing the inequity of allowing him to keep those earnings and also recover for listing commissions. In addition, plaintiff would have had more properties available for possible listing if he had been offering a multiple listing arrangement. By limiting any recovery for listing commissions to the difference between the twenty per cent listing commission on the additional properties which it is assumed plaintiff would have had, and the net profit realized by plaintiff from the exclusive listings which he obtained on that half of the properties which would otherwise have had to be multiple listed, a double recovery can be avoided.[118] It

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114 See note 9 supra.

115 Absent such an assumption, the court's failure to include any such amount in the computation of damages would have to be attributed to a "studied inadvertence," since plaintiff had offered evidence in support of recovery of listing commissions.

116 See note 110 supra.

117 Had plaintiff listed properties with the Board, thus becoming entitled to a 20% listing-broker share of the commission, he would have lost the opportunity of an exclusive listing with the realization of 100% of the commission on a consummated sale. But see counter-argument accompanying note 118 infra.

118 It is not unrealistic that the 20% listing commission on additional properties would exceed the profits from that half of plaintiff's actual sales. It was found by the court in Grillo that brokers' net profit on gross commissions received approximated 20-30%, the remainder going to pay overhead, particularly commissions for salesmen. But if additional properties obtained by plaintiff were multiple listed, it is conceivable that few of these costs would be incurred. Plaintiff could list the property with the board and make no further sales efforts, merely waiting to receive the listing-broker's share in the event a sale is consummated. A double recovery could thus be avoided by calculating damages as the difference between a 20% listing commission share on additional properties and 20-30% of the commissions received on half of plaintiff's sales, rather than deducting 100% of the latter. Algebraically, the proposed computation would appear as follows: Y = additional properties available for listing purposes; X = plaintiff's actual sales while competing with defendants; R = recovery to be allowed for lost listing commissions. $R = 20\% Y - 30\% (\frac{1}{2} X)$.