ANTITRUST IMPLICATIONS OF TENANT SELECTION PRACTICES IN REGIONAL SHOPPING CENTERS: *DALMO SALES CO. v. TYSONS CORNER REGIONAL SHOPPING CENTER*

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Justice Oliver Wendell Holmes, speaking for the Massachusetts Supreme Judicial Court in 1885, held that under common law concepts of the invalidity of trade restraints, a covenant contained in a real property deed could not be enforced against the property holder, where the only benefit to the covenantee was in the elimination of the covenantor's competition.[1] Societal changes since then have resulted in the application of this principle on the federal level in the Sherman[2] and Clayton[3] Acts, while profoundly altering the economic framework within which the principle operates. Leasehold arrangements and joint venture contracts have taken over the shaping of many business relationships which were formerly created and controlled by deed restrictions in a common building scheme. The need to resolve conflicts between "freedom to contract," and "freedom to trade," however, persists.

The population shift toward suburban areas that has marked the twenty-five years since World War II, coupled with the population's increasing dependence upon the automobile as the principal mode of transportation, have provided the impetus for the development of the "regional shopping center" as a new marketing facility. A regional shopping center consists of a considerable number of small and medium-size specialty shops (often referred to as "satellite stores") clustered around one or more department stores. It is the department store which provides the principal drawing power for the center and which distinguishes it from the smaller "community" or "neighborhood" centers. The first regional centers were large, and they have tended in recent years to become even larger, more complex, and invariably more expensive to develop.

The principal sources of financing for these centers have been the large life insurance companies. Because of the size and duration of the long-term financing commitments, such lenders have generally

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1 Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885).

2 15 U.S.C. §§ 1-7 (1964).

3 15 U.S.C. §§ 12-27 (1964).

declined to finance a project unless at least a minimum number of long-term lease commitments have been obtained from "blue chip" tenants such as department stores.[4] The principal tenants, when making such long-term commitments to the center, in turn, often seek to obtain and exercise some control over the character of the center, the activities and even the selection of other tenants. The acquisition and exercise of such control over the admission of potential tenants raises important antitrust questions. The department stores stock so many varied product lines that most prospective tenants are their competitors to some degree, with the result that a decision to deny them access to the center can be characterized as the exclusion of competitors from a market.

I. THE *Dalmo* CASE

The interest of the department stores in controlling the character of a large regional shopping center to which they have made a long-term commitment, and the interest of the tenant, anxious to break into the marketing opportunities presented by the center, recently clashed in the case of *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*.[5] Dalmo, a multi-store "discount" retailer of televisions and appliances in the Washington metropolitan area (and therefore a significant competitor of the department stores) sought in 1968 and 1969 to lease space for a store in Tysons Corner, a giant regional shopping center then nearing completion in Virginia, close to Washington, D.C.

In the initial negotiations, Tysons Corner, a partnership owning and operating the center, insisted on lease provisions prohibiting operation as a "discount store," including discount advertising or similar in-store promotions, both in the proposed Tysons Corner store and in connection with the other Dalmo stores throughout the Washington metropolitan area. Ultimately, a lease was agreed upon which provided that Dalmo would cease any discount advertising or promotion for any stores or that it would name its Tysons Corner store "Tyco," and refrain from advertising any connection between Tyco and Dalmo.[6] However, the two department stores which were the major tenants, Hecht Company and Woodward & Lothrop, had jointly negotiated tenant-approval rights in their leases and they each proceeded, apparently independently, to veto the Dalmo tenancy. Dalmo sued, claiming that its exclusion was based on its reputation as an agressive discount-type competitor, and argued that the exclusion was anticompetitively

[4] Parker v. Lewis Grocer Co., 246 Miss. 873, 898, 153 So. 2d 261, 272 (1963).

[5] 308 F. Supp. 988 (D.D.C. 1970), aff'd, Civil No. 23,951 (D.C. Cir. June 8, 1970).

[6] 308 F. Supp. at 991 & n.1.

motivated. Dalmo sought injunctive relief and damages under the antitrust laws.

The United States District Court for the District of Columbia granted a temporary restraining order prohibiting Tysons Corner from leasing space desired by Dalmo.[7] After the hearing on the request for a preliminary injunction, the district court found probability of irreparable injury but denied the application for the injunction on the ground that Dalmo had not demonstrated the requisite probability that it would prevail on the merits.[8]

The denial of the injunction was appealed and affirmed without change or substantial discussion by the United States Court of Appeals for the District of Columbia.[9] The nature of the issues in the case suggest that the decision may have significant impact on the future development of regional shopping centers, as well as shed some light on the legal treatment to be accorded group exclusionary practices under the antitrust laws.

A. *Rationale of the District Court*

Because it was largely limited to an evaluation of the plaintiff's chances of prevailing on the merits, for preliminary injunction purposes, the district court's legal analysis is somewhat cryptic. The court found that there was an evidentiary conflict "as to the motive and purpose" of the department stores in excluding Dalmo. The defendants contended that the exclusion was not based on Dalmo's discount pricing practices, but rather on its failure to fit into the "fashion image" envisioned for Tysons Corner stores.[10] In support of this, the defendants showed that other satellite stores in the shopping center did sell at discount prices (as did the department stores themselves), and that Hecht Company's president found the Dalmo premises to be "dirty." From this the Court concluded that there were indications that discount pricing alone was not a controlling consideration.

The court then reasoned that no group boycott constituting a per se violation of the antitrust laws, that is, a violation not susceptible of justification on grounds of reasonableness, had been shown.[11] The basis for this conclusion was that unless there is a showing of "significant anticompetitive motives," a group boycott is subject to the rule of reason.[12] The court noted that the rule of reason may apply where

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[7] Id. at 990.

[8] Id. at 993-95.

[9] Civil No. 23,951 (D.C. Cir. June 8, 1970).

[10] 308 F. Supp. at 994.

[11] Id.

[12] Id. The district court did concede, however, that Silver v. New York Stock Exch. 373 U.S. 341 (1963), may be a per se group boycott case not involving anticompetitive motives.

the motives for exclusion are not "directly profit related."[13] Having articulated this basic "motives" test, the court outlined the economic reasons behind the desire of the center and the department stores to select tenants who would contribute to the future success of the center. The court asserted that the center could legally grant to a tenant the exclusive right to conduct a particular kind of business, and then reasoned that the center's decision to "share" its rights with the department stores "may very well be deemed to be a reasonable one under the antitrust laws.[14] Finally, the court stated without discussion that the intent to monopolize or the existence of monopoly power had not been shown.[15]

1. The Motives Test

The district court distinguished *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[16] a landmark Supreme Court case involving a retailer who induced a group of manufacturers and distributors to boycott one of his competitors, on the ground that *Klor's* "involved significant anticompetitive motives" and was therefore a per se case.[17] Dalmo, on the other hand, in its brief to the court of appeals argued vigorously that the case was governed by *Klor's* and therefore a per se case.[18] Neither view, however, may be correct. Reference to "significant anticompetitive motives" does not appear in either the Supreme Court or court of appeals decision in *Klors.*[19] In fact, when the United States, as Amicus Curiae in *Klor's*, suggested that it was "consistent with the uncontradicted allegations of the complaint that petitioner was boycotted because he was the leading recognized price-cutter among San Francisco stores of the products covered by the complaint,"[20] the defendants sharply responded that there was absolutely no support for such a suggestion.[21] As the *Klor's* case is stated, it is conceivable (though hardly likely) that the defendants' actions were motivated by some personal or political disagreement. Nonetheless, the group boycott was held to be unlawful per se. Thus, the *Dalmo* court's attempt to distinguish *Klor's* on an "anticompetitive motives" basis is unsatisfactory.

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13 Id.

14 Id.

15 Id. In fact, the motion for preliminary injunction was grounded solely on the asserted violations of § 1 of the Sherman Act, so the conclusion as to § 2 was not necessary.

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

17 308 F. Supp. at 994.

18 Brief for Appellant at — F.2d — (D.C. Cir. 1970).

19 225 F.2d 214 (9th Cir. 1958).

20 Brief for United States as Amicus Curiae at 9, Klor's Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).

21 Brief for Respondents at 12, Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

There is a valid basis for holding that the tenants' veto of *Dalmo* did not constitute a per se violation under the *Klor's* rule. *Dalmo* may be distinguishable from *Klor's* on what seems to be an accepted, but generally unarticulated, principle applicable to "exclusion" cases; that is, that while cases where the single objective of the boycott is to injure the competitor are per se illegal under the Sherman Act, cases where the exclusion is also based upon the necessity of maintaining some control over a joint venture by the promoters or members may not be per se illegal. The implications of this principle provide the focus for this article.

II. THE "SINGLE-OBJECT BOYCOTT" CASES

The *Klor's* case came to the Supreme Court as the result of the dismissal of the complaint. Thus it provided a record devoid of any evidence of other motivation. Nevertheless, the mere fact of the combination was enough to constitute a per se violation. The "wide combination" which was attacked, however, was an arrangement among the defendants which had as its object the imposition of restraints upon *Klor's* freedom to trade. It may be assumed that the defendants, having formed a combination the sole apparent function of which was to injure the competitor, would not have been permitted to prove that they did so only because *Klor's* store was "dirty." Thus, the strict holding in *Klor's* only condemns combinations having no real function other than to inflict injury on competitors.

Another per se boycott case which illustrates this rationale is *United States v. General Motors Corp.*,[22] where the defendants, an automobile manufacturer and a group of automobile dealers, were charged with having combined to boycott automobile "discounters"[23] who previously had been dealing with the defendant dealers. This was held to be a per se violation. The only function of the combination was to prevent the discounters access to their suppliers. Having intended to cut off the discounter-competitors, the defendants were not allowed to contend that the combination constructed for this single purpose was well motivated, that is, that it was designed to avoid the dangers of disorderly marketing. Similarly, in *Fashion Originators' Guild of America, Inc. v. FTC*,[24] a group of dress designer-manufacturers were charged with combining to boycott retailers who dealt with "style pirates" competing with the defendants. This was held to be a per se violation,[25] as was a lumber retailers' practice of blacklisting wholesalers who sold directly to consumers, in *Eastern States Lumber Deal-*

[22] 384 U.S. 127 (1960).
[23] Apparently, discounters present a recurring problem to full service marketers.
[24] 312 U.S. 457 (1941).
[25] Id. at 468.

ers' Ass'n v. United States.[26] The sole object of both boycotts was imposition of an artificial restraint upon the victims' freedom to trade, thus making the matter of motive irrelevant.

Silver v. New York Stock Exch.[27] seems to have troubled the district court because it appeared to be a boycott case not ostensibly evidencing anticompetitive motives, yet a per se violation was found. However, the case is distinguishable since it involved joint action by a regulated exchange and its members to terminate the furnishing of certain wire services to an over-the-counter securities dealer. This raised issues as to possible exemption of the defendants from the antitrust laws by operation of the Securities Exchange Act of 1934, and as to the "due process" implications of the peremptory manner in which the termination was accomplished.[28] The discussion of the per se doctrine dealt primarily with the question of the plaintiff's absolute dependence on the service.[29] The combination attacked, however, was an agreement that a group of competitors would deny a vital service to a competitor. Thus, all that the agreement accomplished was injury to a competitor. Motive was therefore held to be irrelevant.[30]

All of these single object cases may be characterized as involving "concerted refusals to deal," wherein the sole and necessary function of the combination or agreement was the inflicting of injury on competitors by denying them access to suppliers or marketing outlets. Given these essential characteristics, the Supreme Court has not found it necessary to inquire into the motives underlying the refusals to deal.

III. Exclusions From Joint Activities

The economic facts of the *Dalmo* case, however, may be distinguished from the single object boycott cases involving "concerted refusals to deal." The two department stores began negotiating for participation in the shopping center almost from its inception.[31] Their commitment to participation was considered to be a prerequisite to the obtaining of outside financing and to the obtaining of commitments from smaller stores.[32] The leases were to last for 30 years at a minimum rental of $500,000 per year. Thus, it seems accurate to describe the "combination," consisting of the various financial arrangements,

26 234 U.S. 600 (1914).
27 373 U.S. 341 (1963).
28 Id. at 361
29 Id. at 347-49.
30 Id. at 344 n.2. The defendants in the lower courts suggested a number of reasons for the termination relating to the integrity of the plaintiff, but failed to offer proof as to these reasons. 196 F. Supp. 209, 216, 217, 225-27 (S.D.N.Y. 1961); 302 F.2d 714, 716 (2d Cir. 1962). There was no showing of anticompetitive motive.
31 308 F. Supp. at 990.
32 Id.

lease commitments, approval rights and so on, as a joint venture, and the "boycott" of Dalmo not as a concerted refusal to deal, but rather as a joint venture from which Dalmo was excluded. The shopping center was a joint marketing enterprise in which a number of competitors and non-competitors benefitted from a volume of customer traffic which would not be available to them singly. Moreover, this joint marketing enterprise created a "new competitive force"[33] in the merchandising of consumer goods in the Virginia suburbs of Washington.

Once it has been concluded that the Tysons's Corner Center was a joint venture, and that the complained of action was simply of refusal to admit Dalmo to the joint venture, it is submitted that the application of the per se doctrine must be somewhat relaxed, perhaps by utilizing the doctrine of ancillary restraints, under which a trade restraint which standing alone would appear to be illegal may be lawfully imposed if it is a reasonable and necessary aid to an otherwise lawful arrangement. A classic instance would be the typical pattern of self-imposed regulation for the operation of a produce exchange.[34]

The Supreme Court has tacitly recognized that not all exclusions are per se violations. In the *Associated Press* case,[35] an association composed of 1,200 newspapers functioned as a cooperative news collection and distributing service. The by-laws prohibited providing news service to non-members and, although the association provided easy admission procedures for newspapers not in competition with present members, the procedures for the admission of newspapers which competed with present members were quite stringent. A present member could make extemely difficult the application of any competitor seeking access to the association's service, but he could not similarly obstruct a non-competitor. The district court found that this arrangement was "plainly designed in the interest of preventing competition"[36] and therefore unlawful.

The Supreme Court agreed, stating that these admission standards, keyed to the single test of whether the applicant was a competitor of a present member, were "on their face. . .restraints of trade,"[37] but endorsed the district court's rule of reason approach.[38] The Supreme Court also agreed with the district court that the by-law restricting Associated Press news services to members did not constitute a violation, "standing alone."[39] Thus, in *Associated Press* exclusion

[33] United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964).
[34] See Chicago Board of Trade v. United States, 246 U.S. 231 (1918).
[35] Associated Press v. United States, 326 U.S. 1 (1944).
[36] 52 F. Supp. 362, 371, (S.D.N.Y. 1943).
[37] 326 U.S. 1, 12. (1944).
[38] Id. at 14.
[39] Id.

itself was not a per se violation, but the Court implied that it may be condemned as unreasonable if the exclusion-mechanism operated only to exclude competitors.

A case factually similar to *Dalmo, Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*,[40] involved a produce market, strategically located for shipping, storage and wholesale, which was controlled by a large number of local wholesalers who rented portions of the market's facilities. The plaintiff was a competing wholesaler who had rented a portion of the building for its business. The other wholesalers, who controlled the market's board of directors, caused the market to refuse renewal of the plaintiff's lease, thus putting the plaintiff at a substantial competitive disadvantage. The court held the exclusion to be unlawful but reached its decision by the rule of reason approach. Adverting to the "finite limitations" of the building, the court stated that "reasonable criteria of selection, therefore, such as lack of available space, financial unsoundness, or possibly low business or ethical standards, would not violate the standards of the Sherman Antitrust Act"[41] The only basis for exclusion offered by the defendants was a suggestion that the plaintiff was financially unsound. This, the court stated, was "hollow" in view of the evidence; the exclusion from the joint enterprise was therefore held to be unreasonable.[42]

Similarly, in *United States v. United States Trotting Ass'n*,[43] it was held that the defendant association's exercise of control over admission to membership did not constitute a per se violation of the Sherman Act, even though the criteria for rejection went so far as to include "that the applicant's membership in the Association would not be in the best interests of the sport of harness racing or would be detrimental to or reflect adversely or unfavorably upon harness racing or the Association."[44] The court distinguished *Klor's* on the ground that it involved a "commercial" boycott.[45]

Recognition by the FTC of the special legal status accorded admission requirements for joint enterprise seems implicit in the consent

40 194 F.2d 484 (1st Cir. 1952), cert. denied, 344 U.S. 817 (1952).

41 Id. at 487.

42 Id. at 488. As will be discussed below, the court was influenced by the virtual indispensability of access to the building and therefore placed a heavy burden on the defendants to justify the exclusion.

43 1960 Trade Cas. ¶ 69,761, at 76,954 (S.D. Ohio May 18, 1960).

44 Id. at 76,959-60.

45 Id. at 76,955-56. The *Dalmo* opinion also seems to suggest that the exclusion of Dalmo should be subject to the rule of reason because the "motives for exclusion are not directly profit related." 308 F. Supp. at 944. It is difficult to harmonize this characterization with the court's conclusion that the veto may be justified as having been necessary to protect the department stores' heavy financial stake." Id. Obviously, this case cannot be equated with those involving boycotts based on political motives. The most that could be said is that the exclusion was commercially, but not anti-competitively, motivated.

decree in *United States v. United States Aviation Underwriters, Inc.*,[46] which modified the admission requirements of an insurance underwriting "pool" composed of a number of competing insurers. The decree provided that new members be admitted upon approval by a majority of present members (as opposed to the previous requirement of unanimity), and that in deciding whether to approve an applicant the members were to be "guided" by certain reasonably objective criteria.[47] The decree thus comported with a FTC Advisory Opinion concerning the effect of an industry association's code of ethics which stated: "[i]f association membership is an important competitive factor, arbitrary or discriminatory refusal of membership to a qualified applicant. . .would raise serious questions . . . ."[48]

The approach taken by these decisions indicates that there is an exception to the blanket per se prohibition of boycotts. Once a group exists, its exercise of control over the inclusion of additional participants in a joint enterprise is recognized as being a matter entirely distinct from the "concerted refusals to deal" involved in *Klor's* and *General Motors*.[49] Exercise of such control may more properly be termed "exclusion of associates," and seems, under the cases, to be subject to a rule of reason test.

IV. Reasonableness of the Exclusion in *Dalmo*

Application of the rule of reason test to exclusion of associates cases has generally resulted in findings of unreasonableness. The courts place a heavy burden upon the excluding parties to justify their actions:

> Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of

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46 1968 Trade Cas. ¶ 72,571 (S.D.N.Y. Oct. 17, 1968).

47 Id. at 85,984. A similar disposition had earlier been made with respect to a companion suit brought against the other major domestic aviation insurance pool. United States v. Associated Aviation Underwriters, 1967 Trade Cas. ¶ 72,260 (S.D.N.Y. Dec. 1, 1967). Much the same approach can be seen in the liberalization of admission provisions in the consent decree in United States v. National Wrestling Alliance, 1956 Trade Cas. ¶ 68,507 (S.D. Iowa 1956).

48 FTC Advisory Op. No. 119, 3 Trade Reg. Rep. ¶ 17,907, at 20,302 (April 6, 1967).

49 Support for this approach may also be found in Judge Cooper's recent opinion in connection with Curt Flood's antitrust challenge to baseball's reserve clause:

> Concerted refusals to deal have frequently been held per se violations of the Sherman Act. We are impressed by defendants' argument that the rule of reason should govern here, however, since it is generally conceded that some form of reserve system is essential to the very maintenance of the "joint venture" of organized professional baseball.

Flood v. Kuhn, 309 F. Supp. 793, 801 n.26 (S.D.N.Y. 1970).

> his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize.[50]

Despite this heavy burden, it may be argued that the Tysons Corner exclusion of Dalmo is not a per se violation within the *Associated Press* rule. The department stores' veto power was not confined to the exclusion of competitors, as was true in *Associated Press*. In fact, the only other veto exercised was directed at a prospective restaurant tenant, which could hardly be regarded as a competitor of the department stores.[51] Consequently, since exercise of the veto power was not dependent upon showing that the excluded party was a competitor, and since the veto power was actually invoked to block a noncompetitor, it does not appear that a violation within the meaning of *Associated Press* was shown.

Assuming that the exclusion was not a per se violation, the first point to be considered in determining whether it was reasonable is the identity of the excluded party.[52] The court found that Dalmo and the department stores were in direct competition in a number of lines of merchandise.[53] However, had Dalmo been a discount movie theater, the department stores' "temptation to exploit their natural advantage against competitors," referred to in *Gamco*, would not have been present. The defendants would then have had a far lighter burden to establish that Dalmo was excluded because it was not a quality tenant whose presence would benefit the shopping center. On the other hand, a department store is by its nature a competitor of the vast majority of the satellite stores in the shopping center. Accepting the principle that the department stores, by reason of their financial control over who their associates in the enterprise shall be, it would be inconsistent to then prohibit exercise of the power against any competitor. Such a right would be illusory at best. Circumscribing the right to control admissions to the joint enterprise in such a way would be the practical

50 Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 488 (1st Cir. 1952).

51 308 F. Supp. at 991. Another "discounter," Sun Radio, was accepted as a tenant, although on conditions not as flexible as those to which Dalmo was willing to agree. Id. at 993.

52 For the sake of brevity, our inquiry will focus on what actually was before the district court—exclusion of Dalmo even after it acquiesced with respect to certain restrictive conditions. Thus, the question of the reasonableness of these conditions proposed at various stages must be bypassed. As to the legality of the imposition of competition restrictions as a condition of membership, see Bale v. Glasgow Tobacco Board of Trade, 339 F.2d 281 (6th Cir. 1964).

53 308 F. Supp. at 993.

equivalent of adopting a per se rule. Consequently, although the fact that the excluded store is a competitor of the stores excercising the veto power should be regarded as significant in evaluating the legitimacy of the exclusion,[54] this does not seem sufficient, standing alone, to support a finding of unreasonableness.

It may be argued that *Gamco* and *Associated Press*, where competitors were barred from access to essential facilities,[55] involved unique or monopoly situations, and that the burden of justifying exclusion should be relaxed considerably when there are numerous alternative facilities, such as shopping centers, available. However, consideration must be given to the implications of the Supreme Court's opinion in *Fortner Enterprises, Inc. v. United States Steel Corp.*,[56] where in the context of a challenged tying arrangement, the Supreme Court sounded an apparent warning to those who may rely too heavily on the absence of monopoly power as a defense to allegations of antitrust violations:

> The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance . . . .[57]

The implication of this language is that one who withholds something of discernible value, either conditionally, (as with the tie-in) or absolutely (as with the exclusion) may not defend an antitrust violation on the ground that the victim of the withholding could possibly find the equivalent thing elsewhere. Every geographical location is unique; the law has long recognized this by permitting suits to compel specific performance of contracts for the sale of land without any special showing of uniqueness.[58] Moreover, there seems to be no basis for believing that a competing regional shopping center may arise in the immediate geographical vicinity of an existing center.[59] Thus, the

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[54] United States v. Columbia Pictures Corp., 189 F. Supp. 153, 178 (S.D.N.Y. 1960). See also Note, Concerted Refusals to Deal Under the Federal Antitrust Laws, 71 Harv. L. Rev. 1531, 1540 (1958).

[55] See, e.g., Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952); Associated Press v. United States, 326 U.S. 1 (1944).

[56] 394 U.S. 495 (1969).

[57] Id. at 502-03.

[58] Restatement of Contracts § 360 (1932). The value of participating in this particular center is further emphasized by the fact that Lansburgh's, another department store, actually brought suit to obtain specific performance of an option to lease space in the center. 308 F. Supp. at 990.

[59] The prospect of obtaining financing for such a project, when it would be competing with an established center, would seem remote see p. 899-900 supra.

Dalmo facts appear to support the contention that the center possesses what amounts to a "geographical" monopoly.

Recognizing that the burden of justification borne by the excluding party is substantial, it must be determined whether the department stores succeeded in justifying the exclusion by demonstrating that the veto power was exercised because of factors unrelated to competition. One suggested basis, that a Dalmo store seemed "dirty"[60] to Hecht Company's president, appears on its face to be highly questionable. It seems to be an excessive penalty for the center to exclude completely a store whose alleged defect is "extra-territorial dirt." A well-recognized principle governing the validity of ancillary restraints not condemned as per se violations is that they be "of no broader scope than reasonably necessary."[61] A regional shopping center normally has a merchants association composed of tenants who collectively regulate the practices of tenants. Tysons Corner has such an association and it would seem that the task of ensuring cleanliness could be effectively accomplished by the association's regulation of a tenant, rather than by the complete exclusion of a potential tenant.

It must be conceded, on the other hand, that total exclusion is administratively far simpler than continuing surveillance of an already admitted tenant. This is particularly true if the would-be tenant already has a number of other stores in the metropolitan area, because conditions at any one store might tend to tarnish the image of the store at the center, thus lowering the "tone" of the entire center. In such a case, if the demands of off-site policing would be beyond the capability of the center's merchants association, then total exclusion might be justifiable as the only feasible protective device, a device no broader than reasonably necessary. Such a determination, however, necessarily involves a weighing of the contemplated harm to present tenants (for example, a diminution of customer traffic in the center), against the certain harm to the excluded party (foreclosure from a significant outlet for its goods). However, this theory could only be applied if the district court concluded that: 1) Dalmo's other stores were irremediably dirty; and 2) there was a substantial probability that conditions in Dalmo's other stores would have an appreciable adverse impact on the shopping center.[62] Absent such a showing, the

[60] One of the two possibilities under the form of lease accepted by Dalmo (but vetoed by the department stores) contemplated a strict separation in the minds of the public between the existing Dalmo stores and the "Tyco" store to be run by Dalmo in Tysons Corner. 308 F. Supp. at 991-92. This would presumably have prevented any harm to the center from the conditions existing in Dalmo's other stores.

[61] See, e.g., United States v. United States Aviation Underwriters, Inc. 1968 Trade Cas. ¶ 72,571 (S.D.N.Y. Oct. 17, 1968).

[62] United States v. New Orleans Ins. Exch., 148 F. Supp. 915, 920 (E.D. La. 1957).

"dirtiness" justification for exclusion would seem both excessive and unsupportable.

In trying to justify exclusion, the department stores placed considerable reliance on Dalmo's failure to fit into the "fashion image" concept of the shopping center. However, the elements of this standard are not readily apparent. Because the exclusionary provisions which have suvrived the test of reasonableness seem to be those incorporating relatively objective criteria for admission, and in view of the general disfavor with which exclusions of competitors are viewed, the "fashion image" criterion may be too subjective a test[63] and therefore too susceptible to abuse.[64]

The Court in the *Silver* case noted that the arbitrary "star-chamber" nature of the exclusionary procedure was one basis for finding it unlawful:

> [I]t is clear that no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position.[65]

Although the Court's decision was limited to the self-regulation of a securities exchange, its language nevertheless strongly suggests that if an exclusion is to be justified there should be some opportunity for the excluded party to be apprised of the basis for the exclusion, and to either refute the charges or to demonstrate compliance with the joint enterprise's requirements.[66] In the *Dalmo* case, it may be argued that during the course of the lease negotiations notice and opportunity to achieve compliance were afforded as to discounting and advertising practices, but as to the "fashion image" objection, apparently no mention of it was made before the veto. Even if notice had been given, it is difficult to see how notice of this vague objection would have provided Dalmo with any guidance as to how to demonstrate or achieve compliance with the center's requirements. Thus, it would be advisable to establish a requirement that the excluded party be told the reason for his exclusion and given an opportunity to debate the point. More-

[63] The *United States Trotting Ass'n* criteria, quoted at p. 906 supra, appear quite subjective but approval of these criteria may have been influenced by the fact that no applicant had been rejected in 5 years.

[64] Dalmo asserts that, "'fashion image' was a mere euphemism for the exclusion of discounters." Brief for Appellants at 29.

[65] 373 U.S. 341, 361 (1963).

[66] Although the analogy is imperfect, federal agencies are subject to similar notice and opportunity for hearing requirements under the Administrative Procedure Act, 5 U.S.C. § 1001 et. seq. (1964). Prohibition of a particular business because of its "type" is similar to private zoning restrictions, and perhaps on this basis alone should be subject to some form of procedural due process requirement.

over, the basis of the exclusion should be reasonable and not merely a fabrication or frivolous.

Dalmo's assertions that the exclusion was motivated by a desire to avoid price competition from a discount store, rather than by any objection to Dalmo's image, may be challenged. Under the form of lease to which Dalmo agreed, at least the *appearance* of discount price competition would have been eliminated, so that the department stores vetoed Dalmo even though it had agreed to moderate what is certainly its most significant competitive practice, the promotion and advertising of discount selling. Thus, the causal relation between Dalmo's discount-style operation and the exclusion is not as clear as might at first appear.

There are evidentiary facts in the *Dalmo* record, however, which tend to support Dalmo's theory regarding the basis for the exclusion. For example, the originally proffered form lease would have absolutely prohibited Dalmo from operating or conducting in the center "a type of business currently known in the commercial field as a 'discount store'," or from conducting a "business continuously selling. . . merchandise or services at 'discount' or 'bargain' prices."[67]

It is, of course, questionable whether the department stores should bear responsibility for originally proposing this lease, but since the record indicates the existence of a pattern whereby the department stores, in negotiating leases for other centers, usually included a specific prohibition against the leasing of space by the centers to discount stores, or in the alternative had a veto power of the type involved here, Dalmo's theory of the true motive for exclusion cannot be characterized as unreasonable. Thus, although Dalmo's identification with discounting practices must be accorded evidentiary weight in determining the legitimacy of the "fashion image" basis for the exclusion, it is clear that reasonable arguments exists on both sides of the issue.[68]

Another aspect of the justification problem which bears further consideration is the ability of a single member store to exercise a one-man veto over the admission of new stores. In *Dalmo* each department store had the power, acting alone, to veto any applicant. Although this veto power was not to be exercised "unreasonably,"[69] under the terms of the department store leases, this limitation would not appear to create any third party beneficiary contract right in favor of rejected tenants. Neither does it seem that rejected tenants could take much

[67] 308 F. Supp. at 991 n.1.

[68] The argument that Dalmo's agreement to forego discount advertising and promotion negates any inference of anti-discount motivation is also weakened somewhat by the physical proximity of tenants in the center, tending to promote comparison shopping even in the absence of any discount advertising.

[69] 308 F. Supp. at 991.

comfort from the fact that the principal lender for the center had a specific damage remedy against any store that unreasonably withheld its approval.[70]

The *United States Aviation Underwriters* consent decree[71] does reflect concern over the adoption of a single-veto, rather than a majority-vote, admission procedure. The single-veto problem is similar to the "due process" argument exemplified by *Silver*. Since there is no requirement to convene a meeting of tenants and to obtain a vote of a majority for rejection of an applicant, there is no exchange of opinion among the tenants and there is none of the moderating effect on arbitrary action assumed to flow from such communication and compromise. Thus, arbitrary and unjustifiable action would be more likely where an objection does not have to survive the scrutiny of, and be adopted by, the objector's co-tenants. The practical significance, however, of the one-man veto would seem minimal. Even if a meeting and majority vote were required to reject an applicant, each tenant would certainly be conscious of the possibility that he might some day be the objector, and would very likely be influenced to respect his cotenant's objections. "Log-rolling" of this type would probably produce the same results as retaining single-vetoes.

Conclusion

The facts surrounding the exclusion of Dalmo plainly present an intriguing laboratory example of the clash between the interests of the shopping center's principal tenants in protecting their substantial investments and the legitimate desire of other merchants to participate —a clash intimately related to the public's overriding interest in free and open competition. The legal context in which the facts in *Dalmo* arose, however, makes it inappropriate to project any firm judgments as to the correctness of the district court's ruling, for the court was merely determining the narrow question whether there was a reasonable probability that the plaintiff would succeed on the merits.

Business realities suggest, and case law appears to confirm that those involved in a joint marketing enterprise such as a regional shopping center have so large a financial stake in the enterprise that their exercise of control over the identity of additional participants ought not to be subjected to any rigid or narrow per se test under the antitrust laws which would forbid fair and reasonable control over the

[70] The lender's damage remedy is discussed in Appellant's Brief to the court of appeals. Brief for Appellant at 53-54, — F.2d — (D.C. Cir. 1970). In the case of Tysons Corner, the financing was a straight loan. If the financing had taken the form of a loan plus equity participation (a growing trend in life insurance company financings) perhaps the lender's role in the center would be more active, and the lender would be more likely to exert pressure to prevent misuse of the veto power.

[71] 1968 Trade Cas. ¶ 72,571 (S.D.N.Y. Oct. 17, 1968).

admission of tenants. Where the excluded party is to any substantial degree a competitor of those effecting the exclusion, and where the denial of admission may have a significant adverse impact on the competitor, the burden should at least be shifted to the excluding parties to justify their actions on some basis other than a desire to insulate themselves from competition. In evaluating whether such justification has been demonstrated, primary consideration should be given to: (1) whether the objections to the excluded party justify total exclusion, or whether imposing conditions upon admission may achieve the same protective effect; and (2) whether the criteria for exclusion are sufficiently objective in character to give the excluded party some opportunity to demonstrate or achieve compliance with the criteria, and guard against the possibility that invocation of some vague exclusionary standard may be used to camouflage anti-competitive action.

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