UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

STROMAN REALTY, INC.,	§	
	§	
Plaintiff,	§	
versus	§	CIVIL ACTION H-98-283
	§	
JIM ANTT, JR., *et al.*,	§	
	§	
Defendants.	§	

Opinion on Summary Judgment

1. *Introduction.*

A real-estate brokerage company sued two state officials for interfering with its ability to sell timeshares. They imposed the states' licensing requirements and fee restrictions on it, and it claims that this unconstitutionally interferes with interstate commerce. Both sides have moved for summary judgment. The broker will prevail.

2. *Timeshares.*

A timeshare – also called a vacation ownership – is the right to enjoy a property for a limited period, usually weekly. Some timeshares are owned by individuals; others are owned by resorts. Vacationers may pay a fee to the owner or exchange time at one resort for an interval at another. In 1997, approximately two million people owned timeshares in the United States. They owned 64,000 timeshares located in 1,200 resorts among 45 states. Florida has the largest number of resorts with 24% of them. California is second with 8%.

Timeshares may be bought from two sources. People may acquire directly from the developers, or they buy them from an earlier owner in the secondary market. An individual who owns a timeshare that he wants to sell faces hurdles. First, reselling individuals must compete with new properties. Second, owners often live far from their vacation sites, making it impractical for them actively to show the unit to potential

buyers. Third, the low unit price makes many marketing tactics uneconomical. Finally, resellers lack the economies of scale for promotion that developers may use to reach a wide market.

A timeshare is an interest in land about halfway between a condominium and a hotel room – a variable time, exchangeable location sub-lease. In California, Texas, and Florida, timeshare owners have the same technical estate in property as a hotel guest – a limited privilege to enjoy the land of another person, a license.[1]

Apart from the resorts that have been developed for timeshare use and those resorts that have been re-developed in that form, people who own houses and apartments in attractive places compete with the institutional resorts. They market their properties for temporary use by others through brokers and themselves directly. Management companies offer timeshares in houses owned by individuals as part of a system of alternative properties within which owners may exchange occupancies or members may use particular sites. Also, companies accept members who may select one of its owned or managed properties for an interval in exchange for a fee.

All these forms of shared ownership in vacation properties must compete with direct individual ownership and hotel-room rentals. The concept of timeshares as a way to increase the utility of real estate is not distinct in principle from other uses. Similarly, the individuals and businesses that own and deal in them are not distinct from the people in the competing forms of recreational land use. All forms of exploitation and marketing compete with the others.

People at every level of sophistication employ others who specialize in a field – like brokers – to help them. Because the resale market for timeshare is both competitive and dispersed, it is especially suited to the efficiency of intermediaries. Reselling owners often employ a real-estate broker – one in that region, one affiliated with the resort's developer, or one active nationally like Stroman. The developers themselves use third-party brokers, too, and brokers use each other.

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[1] CAL. BUS. & PROF. §§11212 (West 2005); FLA. STAT. ANN. §§ 721.05 (West 2005); TEX. PROP. CODE § 221.002 (VERNON 2005).

3. *Stroman Realty.*

Stroman is among the largest real-estate brokers specializing in the resale of timeshares for individuals. Founded in 1979, its only office is in Conroe, Texas, a town just north of Houston. Each of its agents is licensed in Texas as a real-estate agent or broker. Under the Texas scheme, a broker may sell independently, but an agent must work under the supervision of a broker. Stroman has brokered deals with buyers and sellers from 50 states and 86 countries. It has sold properties located at 1,250 resorts, in 47 states, and 29 countries. It is also affiliated with Electronic Realty Associates, Inc. – an international network of brokers.

Through Stroman and similar brokers, people may shop the world without the expense of traveling or pressure of a sales talk. It reaches potential customers through direct mail, telephone, the Internet, and national and local newspapers. In 1997, it spent about $3 million on promotion. In addition to general advertisements, Stroman shows individual properties on its website. It has a computer system – costing over $450,000 each year – that matches buyers and sellers. It supports over 160 toll-fee numbers.

Stroman collects (a) a fee for listing a property and (b) a brokerage commission on sales. When a seller contacts Stroman, he pays $499 to list his timeshare in its database. These fees are 94% of Stroman's income. Commissions are Stroman's other source of income. After Stroman matches a buyer with one of its registrants, if they conclude a sale, it takes a commission – the greater of $750 or 10% of the sale price. Because the average sale price is below $7,500, Stroman usually receives the flat-fee minimum. The small value of the transactions suggests the difficulty of an owner's economically marketing the timeshare himself and the importance of broad-based alternatives for the owner.

4. *Licensure & Disclosure.*

Richard T. Farrell, Secretary of the Department of Business and Professional Regulation for the State of Florida, and Jim Antt, Jr., Commissioner of the Department of Real Estate for the State of California, are trying to force Stroman to comply with their licensing fee, disclosure, escrow, and advertising rules when it deals with buyers or sellers who are their residents. They say that they are required to regulate the timeshare

resales to protect their citizens. Specifically, they posit that they must protect their residents from abusive business practices and fraudulent brokers.

Both California and Florida have retreated from their original position that the location of the timeshare in their state – without more – allows them to regulate every business everywhere that in any way deals with it or its owners. The states now say that Stroman must be licensed and must follow its rules when Stroman contacts – or is contacted by – a seller or buyer in their states. California real-estate rules must be followed when a man in California calls Stroman in Texas to list a property in Kansas to sell to a woman in Minnesota, according to Antt.

California has sent orders to stop dealing with its land and citizens to Stroman in Texas. It has also written the Texas Real-Estate Commission, attacking Stroman. Florida has sued Stroman in its state court to enjoin it from violating Florida's equally broad regulations.

5. *Regulations.*

The officials are not trying to apply statutes that structure the nature of land interests or establish procedures for the preservation of those interests through deed registrars and similar practices. These laws are not about land titles. They are trade regulations in the narrow sense. Their legitimacy derives from their effect in protecting consumers from bad brokers or brokers from unscrupulous competition – without burdening the national market. Simply put, these are regulations intended to establish a guild of real-estate brokers. Guilds can be a vehicle for establishing standards or for monopolizing a trade.

The states say that they must block outsiders to protect their consumers. Market isolation is not allowed. Necessity is not an argument for avoiding the Constitution's limits on governmental authority; it is, as William Pitt observed, "the plea for every infringement of human freedom."[2] Applying the local rules to out-of-state brokers is not necessary in fact because (a) their substance has already been imposed on the business

[2] William Pitt, Address to the House of Commons (Nov. 18, 1783).

by a sister state, (b) they bear no rational relation to the claimed protection, and (c) they are preceded by an extensive, fully adequate system of laws.

6. *Rules: Texas.*

Stroman's agents are licensed in Texas. Texas salesmen must complete 12 semester hours – or 180 classroom hours – of college courses, including six hours in real estate. Texas brokers must complete 60 semester hours of approved courses. The original license fee is $70 for salesmen and $300 for brokers. To maintain the license, salesmen must pay a renewal fee of $72 each year and brokers must pay $499 every two years. They both must also attend continuing education courses.

Texas law allows brokers to collect listing fees, and it does not regulate their advertising.

7. *Rules: Florida*

In Florida, contracts with Florida residents that are procured through agents unlicensed in Florida are void. Florida originally claimed that Stroman and each of its agents who deal with Florida residents have to be licensed in Florida. It later conceded that if the company had a license – and registered with the secretary of state – individual brokers would not need licenses, unless they physically entered the state. These abandonments illustrate that, when it used its regulatory apparatus against Stroman, Florida exceeded its authority to impose itself on interstate commerce; worse, in Florida's state case, it continues to demand individual licensing.

To obtain a Florida license, an agent must complete 63 hours of classroom study and then pay a $185 real estate exam application fee. The licenses must be renewed yearly by completing additional courses and paying $80. Applicants for a broker's license have the same fee requirement, but they must have had 72 classroom hours. Including fees, travel, and lost time, compliance with Florida's examination requirements would cost Stroman over $160,000.

In addition to the licensure requirement, Florida has other restrictions on the timeshare market. Brokers may not collect listing fees from Florida residents. Florida requires that a disclaimer be included in non-Florida brokers' solicitations and

agreements when they serve or seek to serve as a broker for Florida residents. An out-of-state broker must be approved by the secretary of state, file annual reports, and consent to service of process in Florida.

8. *Rules: California.*

In California, a person must obtain a California real-estate license to act, advise, or "assume to act" in California as a real-estate salesman. An applicant must pay a $60 examination fee, a $190 licensing fee, and complete a three-semester course in real-estate principles, a course of study one-half of the Texas requirements. Salesmen must take 45 hours of continuing education in the four-year license cycle.

In California, advance fees are allowed only if they are held in a trust account in California until they are spent for the principal's benefit. Brokers must account quarterly to their customers for the fees and send a final accounting. Additionally, materials soliciting fees must be approved by the state before publication.

California permits only its licensees to serve its residents. Specifically, in advertisements, California requires that brokers disclose that what they are doing requires a license. Although advertisements in "newspapers of general circulation" do not require this disclaimer, the state says that if a Californian responds to the national advertisement, only a California licensee may help him.[3]

California has discovered the Internet. Because Californian consumers can read sites posted by foreign brokers, the state says that "someone offering real-estate services on the Internet without a California license could avoid California regulation if they put barriers in place to avoid doing brokerage business with Californians, including a web page legend that their services are unavailable to Californians."[4] That says that a national broker cannot deal with Californians. Imagine the usefulness – to brokers and consumers – of a web page or newspaper advertisement that had disclaimers and rights notices from 50 states, District of Columbia, and Puerto Rico. At least now the Canal Zone can be omitted.

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[3] *See* CAL. BUS. & PROF. CODE § 10140.6 (West 2005).

[4] *See* CAL. CODE REGS. tit. 10 § 2770 (2005).

California has one significant, additional requirement. A licensed broker must conduct all his work from an office in California. This makes the brokers obtain a certificate of qualification, consent to service of process, and file annual statements. Stroman estimates that the start-up costs alone would exceed $130,000.

9. *The Exception.*

Both Florida and California permit "co-brokering;" they allow their brokers to pay a commission to brokers of another state. To reverse the language, California and Florida allow out-of-state brokers to work a sale in their states as long as they *split their commissions* with local brokers.

10. *Constitution.*

The Constitution confides to the national government the authority over commerce among the states.[5] This responsibility often conflicts with the efforts of states exercising their residual power. When a conflict arises, the question is whether the state's enactment – in effect – implicates the interest in a national, unitary economy. The Constitution created – constituted – the states into an economic union as well as a political one.

In addition to the Commerce Clause, the Constitution addresses other matters of trade. It has provisions that confide to the national government bankruptcy, currency, weights and measures, and patents; other clauses ban the states from impairing contracts, imposing duties, and charging inspection fees in excess of cost.[6]

Under the Constitution's establishment of an economic union – in the absence of Congressional preemption or withdrawal – state regulation is impermissible where:

(a) in its terms or effect, it prefers local to interstate commerce;

(b) it has more than an incidental, trivial effect on trade among states;

(c) it does not effectuate a legitimate local purpose;

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[5] U.S. CONST., art. I, § 8, cl. 3.

[6] U.S. CONST., art. I, § 8, cl. 4-8; U.S. CONST., art. I, § 10, cl. 1-2.

(d) it could achieve the local purpose with alternative means that do not include the discrimination against or burden on interstate commerce;

(e) it has a local benefit that does not exceed the costs to trade; or

(f) it risks that other localities may adopt conflicting similar rules.

11. *Interstate Transactions & Burdens.*

Land is inherently local; it is some place. Its owners, investors, developers, brokers, advertisers, and occupiers are not local; they are Americans and, of course, non-Americans, too. The business of advertising land is at least regional and often national. Timeshares are not local – resale transactions may involve four states. A share of a resort on a Florida beach may be owned by a Arizonian who listed it with a Texas broker who found a buyer in California. The resale business in general and Stroman's business in particular are unquestionably "Commerce . . . among the several states," in James Madison's phrase.[7]

The national government has neither acted to regulate real-estate brokers nor ceded its authority over this aspect of commerce to the states as it did with insurance.[8]

On this record, the traffic in these real-estate interests is national. Timeshares are a component of the vacation-leisure industry. California and Florida are the two leading states for vacation travel.[9] In Florida, 86.1% of owners of timeshares in its resorts live outside of Florida.

California's market is substantially local with 77% of its timeshares owned by Californians. The 23% of outsiders who own California timeshares affect intra-California prices by (a) buying the properties and, thus, keeping the supply tighter and (b) enlarging the market–lowering developer costs through economies of scale. Prices in California affect prices in other states. In 1997, about one-half of Stroman's sales to

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[7] U.S. CONST., art. I, § 8, cl. 3.

[8] McCarran Act of 1945, 15 U.S.C. § 1011 (1984).

[9] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, 784 (123rd ed. 2003).

Californians involved three states: California, the seller's residence, and the location of the property. Obviously, the effects of outsiders on the Florida market are the same.

California inferentially confessed the fact of national market and national marketing by its attempt to restrict advertising from the rest of the country.

Information specialists in the real-estate industry – brokers – are a national phenomenon. Start small. Lake Tahoe real estate does not sell based on whether it is in Nevada or California, except that the price will be affected by the states' differential real-estate taxes and other complications. Amelia Island, Florida, competes directly with Jekyll Island, Georgia. They compete with each other for the consumers in Ohio. They also compete with alternative resorts in Colorado and Maine.

Based on the effects on the market, including costs to intermediaries, these regulations substantially impede the flow of goods and services among the states. By the states' positions, a man in Sutter Creek cannot use a broker in Dallas to sell a share in Telluride to a woman in Saint Augustine without the brokers complying with the regulations of California, Texas, and Florida. The barriers fail the first test; they burden a national market and interstate transactions in ways that are indisputably non-trivial.

12. *Local Means & Ends.*

If the weight of the barriers the states have imposed were not sufficient, other aspects of their regulations would cause them to fail.

In trade regulation, the term *protectionism* refers to isolating markets through barriers like tariffs, arbitrary inspections, state monopolies, licensing, and outright local preferences. *Consumer protection*, on the other hand, refers to things like ensuring honest weights and measures. The states enjoy the responsibility to administer generally to their populations as long as the restrictions in the Constitution are observed. Even a small burden on trade will not be allowed where the burden does not have a real-world, discernable, and positive effect on the local interest that clearly exceeds the costs of the barrier to outsiders.

A state's describing its regulatory schemes for businesses as consumer protection does not mean that consumers are benefitted in the actual operation or that an illegal end

is not accomplished. Intentions do not matter. Labels are not substance. The American Constitution does not depend on the legislators' press releases.

Frequently, the reality of who is protected turns out to be an interest other than the ordinary consumer. To protect consumers local governments have compelled these acts to be done locally: cantaloupe packaging,[10] milk pasteurization,[11] shrimp heading,[12] lawyers' residences,[13] and trust company ownership.[14] They have banned the export of minnows[15] and the import of garbage[16] and wine.[17] All of these things were done in the name of health, safety, honesty, and the little children, but none had any congruence with its goal, and each means selected had the effect of removing a market from interstate competition. It is the same story here.

Even assuming that the California and Florida regulations materially helped consumers and did not materially hinder national trade, the risk of inconsistent requirements for a single transaction or a single broker would still make them impermissible.[18] The states' schemes are substantially similar, but Stroman would have to comply with 50 sets of rules, a non-trivial administrative burden. There are over 87,000 units of local government in America; trade barriers and burdens quickly

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[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[11] *Dean Milk v. City of Madison*, 340 U.S. 349 (1951).

[12] *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

[13] *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[14] *Lewis v. BT Inv. Managers, Inc.* 447 U.S. 28 (1980)("this [Florida] statute is 'parochial' in the sense that it overtly prevents foreign enterprises from competing in local markets."), *See also J. R. Brooks & Son, Inc., v. Reagan*, Civ. C-71-1311 SC (N.D. Calif. 1973)("[California] arbitrarily and unreasonably burdens interstate commerce in Florida avocados by imposing a standard which is irrational. . . .").

[15] *Hughes*, 441 U.S. 322 (1979).

[16] *C&A Carbone, Inc v Clarkstown*, 511 U.S. 383 (1994).

[17] *Granholm v Heald*, 125 S.Ct. 1885 (2005).

[18] *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

aggregate.[19] What cannot be done directly by express local preferences cannot be done indirectly by paperwork and fees.

13. *Consumers & Protection.*

The regulations address two aspects of brokerage. First, fairness in some sense is sought by screening advertising and banning advance fees. Second, availability is sought for enforcement. In their aggregate, the regulation of out-of-state brokers' contact with people in Florida and California serves, the states say, to protect those people from fraud. Land fraud is as old as this country. Both the national and regional governments have long been busy in working to reduce it. The problem is that these restrictions do not diminish fraud.

14. *Advance Fees.*

The states say that brokers like Stroman collect fraudulent fees. An owner pays the broker – $499 for Stroman – to induce him to list the timeshare. If the unit is sold through the broker's efforts, he collects a commission in addition to the listing fee. The arrangements between an owner and a broker could take a wide variety of forms, but this is the business model that Stroman and many others have adopted.

Intrinsically, listing fees are unexceptional. Even Florida's attorney general concedes that, "most resale companies require . . . a $300 - $500 advance listing fee before the sale of [a] timeshare can take place."[20] California and Florida say, however, that in practice the consumer's benefit obtained from the listing fee is wholly illusory. This claim is based on the rate of sales from the paid listings. In 1997, Stroman collected over 18,000 fees and sold 680 timeshares – a 3.7% sales rate. Both states say that this low rate proves that brokers who collect fees have no incentive to sell, cheating the owner. This is statist-populist nonsense. The states have no example of a broker who guarantees a

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[19] U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, 2002 CENSUS OF GOV'T 1 (2004).

[20] Charlie Crist, Office of the Attorney General of Florida, (posted Aug. 8, 2004) <http://myfloridalegal.com/newsbrie.nsf/OnlineAlerts/982958C27868055685257 03C006A0739>.

sale – at the asking price or at all. This modest number of sales – if the average price is $7,500 – equals over $5 million.

The advance fee serves two useful economic functions. First, Stroman charges a fee plus a 10% commission. Others charge no fee and a 25-30% commission. Each system of compensating brokers is designed in the hope that it covers both their costs and a profit. Advance fees are no more intrinsically unfair than high commissions; both must in practice satisfy the broker and consumer. If advance fees are unreasonable to the consumers, they will shift to high-commission brokers.

Second, advance fees serve as a screen. Payment of a fee to initiate the promotion requires the seller to decide that he is serious about selling, asking a practical price, and offering a property that may likely be attractive to buyers. These are things that Stroman cannot investigate economically and that the selling consumer has within his knowledge.

Stroman's clients are not being duped. Sellers who pay the $499 fee are told that it is non-refundable. They are also told that there is no guarantee when, if, or for how much the timeshare will sell. The fee is then applied, in part, to (a) local advertising, (b) national advertising, (c) direct mail, and (d) listing in Stroman's on-line data base. This is, in fact, done for the people who pay the fee.

The states have no reliable information that those services were not valuable to the owners. They have a lot of data, but it is neither reliable nor cogent. For example, Florida relies on a study that represents that one-half of resales are by owner. The problem with the study is that the population of respondents was 16. Eight of 16 respondents is correctly stated as: the percentage of timeshares resold by owner is 50%, plus or minus 25%. For resales through a newspaper advertisement, the statistic is 6%, plus or minus 12%, in round numbers. While the study's arithmetic is correct, it has no application in the real world.

Each segment of a large, diverse market like real estate will develop techniques that address the needs of the buyers and sellers if people are left free. Full-service brokers, discount brokers, on-line brokers, and others succeed or fail based on the attractiveness of their services to the consumers. Rather than accuse Stroman of dishonest sloth, the states should consider the nature of the competitive resale market. Most important, they should consider the increase in costs to the consumers – local and

foreign – from their restrictive regulations. Limiting Florida timeshare owners to Florida brokers is an attempt to capture the Florida market for local brokers. The consumers are "protected" by a reduced opportunity to market their units, lowering prices and increasing costs.

Over one-half of the timeshare resorts do not offer a program to help owners resell their units. Additionally, about one-quarter of all resorts are actively selling new properties in direct competition with their reselling owners. The developers have resources for marketing and economies of scale. Reselling owners need alternatives.

Resales are a tough market – on or off site. Owners often are not allowed to post for-sale signs on their units. Local resellers have the advantage of showing the unit offered for resale. They can also engage in high-pressure sales talks to close a deal. To Stroman's offsite brokers, these are unavailable tactics. It has compensated with a valuable tool: its diverse client base. The only way to reach buyers and sellers across the world is with advertising.

Florida says that it does not prohibit brokers from collecting fees to cover marketing costs, just that the broker must do it on closing the sale. Collecting the fee post-sale eliminates its usefulness to the broker. Banning the advance fee as abusive is factually unsupported as a matter of law. Florida may be able to keep its residents from charging Floridians advance fees, but it has no authority to bar them for the whole country.

15. *Enforcement: Substance.*

The states must have identified a substantive evil and found a remedy that is narrowly crafted to limit speech as little as possible and to disrupt commerce as little as possible while actually achieving its purpose.[21] They did not.

What they did say, once they finished their sales-ratio argument, is that out-of-state brokers may be dishonest or incompetent. In principle that is true; it is also true of brokers in California and Florida. The states say that that possibility creates a necessity for intrusion. Both states, as well as the other 48, have laws against actual

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[21] *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)

dishonesty and remedies for sub-standard performance. Every state regulates real-estate brokers. The regulations are remarkably similar. California has already had government-to-government contact with Texas authorities.

Even if Stroman did take advantage of its clients, the states need not impose regulations on brokers everywhere to protect their citizens because they already have laws in place. Stroman and its sales force have Texas real-estate licenses. The states and their consumers have a Texas forum for claims under Texas law or theirs.

Exhibiting parochialism, the states argue that Texas has no interest or resources to protect consumers across the nation. That argument is disingenuous. The nation's consumers are not the concern of any particular state, including Florida and California. Texas routinely enforces claims by outsiders against Texans in its courts. More important, the Founders thought of this hypothetical problem; they included the Full Faith and Credit Clause and diversity jurisdiction in the Constitution.[22]

Californians and Floridians have the option of choosing their own states in the forum clause of the contract. Stroman's form contracts say that they are to be governed by the law of the location of the escrow agent. It lists a Texas agent, but the seller may use a different agent if he chooses.

Consumers have national protection through the Federal Trade Commission and local protection through their attorney general's office. The states themselves offer consumer information web-sites. The Better Business Bureau and the American Association of Retired People also furnish warnings. A prudent consumer has the benefit of knowledge.

Finally, Californians and Floridians may exercise their liberty not to deal with brokers in remote places. Keep in mind that "remote" and "different state" are not synonymous. Pensacola is closer to Houston than it is to Miami. Palm Springs is closer to El Paso than it is to Eureka.

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[22] *See* U.S. CONST., art. IV, § 1.

16. *Enforcement: Jurisdiction.*

Florida and California insist that they must be able to exercise jurisdiction over Stroman in their states. They may be able to sue him, depending on the facts of the case, irrespective of his licensure.[23] Without submitting to their licensing laws, Stroman consents to jurisdiction in states where it conducts continuous and systematic business; where it does occasional, episodic, modest business, jurisdiction would depend.[24] These states want to have jurisdiction over out-of-state businesses automatically, gratuitously as a *price of admission* to their markets – an interstate tariff that costs outsiders their rights.

17. *Advertisements & Marketing.*

California and Florida say that Stroman's "targeted" direct mail overwhelms their residents, justifying their intervention. The states say the campaign is aggressive and frenzied. Low-key marketing may well be a contradiction.

California offers nothing to indicate to a rational mind that the mail Stroman sends to California is worse in any sense than that routinely sent among Californians or from Californians to other states. The same with Florida. Junk mail is not fraud. Obnoxious, garish mail is not fraud. The advertisements among a consumer's mail are information. That information may be valuable or trash, elegant or rude, political or commercial, religious or recreational. The consumer has a remedy, the recycling bin. Commercial solicitations are important to consumers, for they are learning about goods and services and prices and trends. Floridians and Californians are more capable than their governments think. Stroman's direct-mail pieces cannot compel or abuse anyone. "Targeted" is a meaningless slogan; Stroman, like everyone else, wants to send its mail to people who are likely to want its service. The bulk of it is directed by a program that uses zip codes as its selection criteria. Stroman uses public records to locate timeshare owners; this is not illegal, it is marketing.

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[23] FL STAT ch. 48 193 (1996); CAL CIV CODE § 410.10 (West 2005)

[24] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Helecopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984).

California's regulation of advertising seems excessive even in this day of courts' supinely ignoring the Constitution's text in favor of the regulatory state. Prior restraint even offended the British Constitution before our Revolution.[25] Assuming the screening requirement and content requirements to be facially constitutional, the states' extension of those restraints to the commerce in information among the states contravenes the national commerce authority and imposes a burden on the free flow of information among the states.

California and Florida insist that their regulations do not discriminate against outsiders because the rules also apply to insiders. Fortunately, that is not the question. If a state wants to treat it residents to extensive regulation – whether the rules are sound policy or "partial measures," in another phrase of James Madison's – that is an internal policy choice of the state.[26] For instance, although Florida could ban the existence of real- estate brokers within its borders, it may not disrupt the opportunity of its citizens to seek the services they need from people in other states. In asserting nationwide control over people who deal with Californians, the state is imposing its local rules on the nationwide brokerage business and timeshare market.

The arbitrariness of borders and the proximity of people to other states offer the best illustrations. An advertisement in the *Chicago Tribune* is likely to be read by consumers in Illinois, Indiana, Wisconsin, and Michigan. The Memphis *Commercial Appeal* will cover parts of Tennessee, Arkansas, and Mississippi. Neither the advertising itself nor the people offering their services may be compelled to comply with all three states' rules.

Proximity is not a condition, however. Wyoming may restrict admission to the practice of accountancy, but it may not keep a resident of Sheridan from getting his tax advice from an accountant in Ashville, North Carolina. Wyoming may not ban from its borders information about goods and services available in the other 49 states.[27] Requiring

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[25] 4 WILLIAM BLACKSTONE, COMMENTARIES, *152 (William Draper Lewis ed., Philadelphia, Rees, Welsh & Co., 1898).

[26] THE FEDERALIST, No. 58, at 397 (James Madison, contribution by Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[27] *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

that an advertisement carry disclaimers is a form of banning; it erodes the value of the advertisement by increasing cost though bureaucratic clutter. What a state may not do directly, it may not do indirectly through throwing sand in the gears.

18. *Conclusion.*

State regulations that protect consumers cannot constitutionally stand if they work by burdening interstate commerce. Florida and California persist in arguing that the laws are neutral between locals and outsiders because they apply to resident and non-resident brokers alike. They miss the point, willfully. By permitting only Floridians to serve Floridians and Californians to serve Californians, they are partitioning the interstate market. They thwart Texans, Nebraskans, Rhode Islanders, and American commerce.

The local protections are illusory. Residence requirements are suspect. Where a broker sleeps has nothing to do with his competence.[28] Residence requirements for escrow accounts are equally arbitrary. It is true that every broker in Oklahoma is free to move to California, at least since its law against poor immigrants was voided by the Supreme Court.[29]

The states are free to adopt consumer protection laws that hurt them and help real-estate brokers; that is a policy choice. If the states choose a means that impedes commerce among the states, they will be obliged to find another technique. Since these regulatory burdens do not accomplish their stated purpose, their imposition appears irrational, but because they have the direct consequence of isolating the local markets from trade from other states, the rules are not irrational – just illegal.

These regulations substantially restrict access to consumers from brokers in other states; their effect is to reserve the California and Florida consumers for California and Florida brokers. States cannot horde their minnows or their vacationers.

Because the requirements are comparable across the country, there is no material benefit to multi-state licensing; on the other hand, the cumulative administrative cost and

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[28] *See Supreme Court of New Hampshire*, 470 U.S. 274 (1985).

[29] *Edwards v. California*, 314 U.S. 160 (1941).

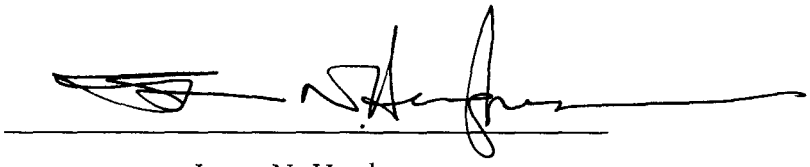
risk of inconsistent regulations makes the imposition of them conflict with the principle of a national economic union, even if there were substantial local non-protectionist gains. The existence of alternatives that accomplish the legitimate local interest without impinging trade among the states implies protectionism.

Because a timeshare is a license in the technicalities of land law, they are the equivalent estate of a hotel room. Requiring a national hotel chain to take reservations from Californians only with an agent in California is beggar-thy-neighbor protectionism. The effect is not better brokers; it is richer, uncompetitive local brokers and poorer consumers through the balkanization of the American market for vacation properties.

That Stroman is guilty of sharp practices is a theme in the states' papers, but no facts support it. Shorn of its pretenses, the states' position is reduced to asserting the *necessity* of regulation because Stroman – like others of his kind – "had the defective moral quality of being a stranger."[30]

On Stroman's re-urging of its motion for summary judgment, the imposition of local licensing requirements on Stroman by these officials of California and Florida will be enjoined.

Signed July 28, 2005, at Houston, Texas.



Lynn N. Hughes
United States District Judge

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[30] BRET HARTE, TALES OF THE ARGONAUTS (1872), *reprinted in* 2 THE WRITINGS OF BRET HARTE 1, 210 (Houghton, Mifflin & Co. 1903).