APPLICATION OF THE SHERMAN ACT TO HOUSING SEGREGATION

DISCRIMINATORY practices by private parties have compelled the Negro to compete for a home on unequal terms with the white.[1] He is faced with substantial restrictions in both the financing and selling phases of housing. Although purely private actions do not violate any civil liberties guaranty,[2] their economic effects may bring them within the proscriptions of federal anti-trust legislation.[3] Section 1 of the Sherman Act prohibits unreasonable restraints of interstate trade.[4] Examination of current discriminatory practices

1. For general discussion of the extent and the effects of housing segregation, see WEAVER, THE NEGRO GHETTO (1948); LONG & JOHNSON, PEOPLE VS. PROPERTY (1947); AMERICAN JEWISH CONGRESS AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CIVIL RIGHTS IN THE UNITED STATES IN 1953: A BALANCE SHEET OF GROUP RELATIONS 100 *et seq.* (1954); REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 67-8 (1947); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING (1952); Comment, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948); HOUSING AND HOME FINANCE AGENCY, HOUSING OF THE NONWHITE POPULATION 1940 TO 1952).

The problem is particularly acute in urban areas due to the great influx of Negroes since 1940. The nonwhite population in these areas increased 46 percent in the years 1940 to 1950. This represented a growth of almost 3 million persons. During the same period, the entire nonwhite population increased by only 15 percent. *Id.* at 3.

2. The equal protection clause of the Fourteenth Amendment applies only to those racially discriminatory practices which involve "state action" (*i.e.* state legislation or acts done under state authority). Federal civil rights legislation must also be directed at "state action." Collins v. Hardyman, 341 U.S. 651 (1951); Civil Rights Cases, 109 U.S. 3 (1883). Thus, the recent decision in Shelley v. Kraemer, 334 U.S. 1 (1948), declaring judicial enforcement of racial restrictive covenants to be unconstitutional, has no effect on exclusively private action.

3. A recent survey of housing segregation, conducted by the Race Relations Department of Fisk University, described the existent situation in this manner: "The effect of racial policies and practices governing the distribution of housing has been the creation of a separate Negro housing market as distinguished from the general housing market. For the most part, Negroes can compete with other Negroes only within the Negro market, but they are restrained from competition with whites for housing within the general market." LONG & JOHNSON, PEOPLE VS. PROPERTY 56 (1947).

This comment will not deal with state anti-trust legislation since the statutes have, for the most part, been inefficacious. In addition, their scope is uncertain because of a lack of sufficient interpretation. See Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. OF CHI. L. REV. 175-6 (1951).

4. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946). This section has been construed to apply solely to unreasonable or undue restraints. See Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done

shows that such unreasonable restraints are often present in refusals to advance mortgage money for Negro entry into white areas and to sell homes to Negroes.

Refusal To Lend

The lender plays a crucial role in the general housing picture. His influence extends throughout the entire building process;[5] the power to extend or to withhold credit enables him to influence the volume, place, and type of construction.[6] And the purchase of a home usually involves mortgage financing.[7]

The principal lenders in the field of long-term mortgage financing are insurance companies, savings banks, commercial banks, and savings and loan associations.[8] Other groups, such as real estate brokers, mortgage brokers, and mortgage companies,[9] may do a substantial amount of initial lending. However, they quickly transfer their mortgages to large institutional lenders which alone have sufficient capital to maintain long-term investments.[10]

The vast resources of these financial institutions have not been made equally available for Negro and white housing.[11] Widespread discriminatory practices

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by any of these. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

5. Few builders have sufficient working capital to engage in construction without the benefit of mortgage loans. Housing and Home Finance Agency, Financing House Construction in the Northwest 7 (1951); Colean, American Housing 60, 117 (1944).

6. *Id.* at 119-20.

7. See notes 114 and 115 *infra*, and accompanying text.

8. There is no single kind of institution in this country which is engaged exclusively in long-term mortgage financing. The principal lenders combine mortgage activities with their other functions. Colean, American Housing 252 (1944). For the volume of mortgages held by each kind of lender as of May 31, 1951, see *Real Estate Loans of Registrants under Regulation X*, 38 Fed. Res. Bull. 621, table 1 (1952).

9. "The difference between a mortgage company, a mortgage broker, and a real estate broker is not always clear. Generally, the main activity of real estate brokers is bringing buyers and sellers of real estate together; that of mortgage brokers is bringing borrowers and lenders together; and that of mortgage companies is investing funds for their own account or for the account of others. These activities are closely related to the real estate market, and at times becomes so merged that one enterprise engages to some extent in all three activities." Fed. Res. Bull., *supra* note 8, at 623.

10. *Id.* at 620-4. See also note 46 *infra*.

11. The Fisk University study reached the following conclusion: "Interviews with fifteen large real estate investment institutions in Chicago and Cleveland showed the clear design of segregation policy. First, their concern has been, apparently, to prevent any large scale relocations of the Negro population outside the existing racial compound . . . [although] it was generally indicated . . . that where business had been done with Negroes the results were satisfactory." Long & Johnson, People vs. Property 62-3 (1947). New York civic organizations concerned with housing segregation state that a similar reluctance to lend to Negroes exists on the part of financial institutions doing business in that city. Interviews with leaders of civic organizations, real estate brokers, and home builders in the New York City area (hereinafter cited as Interviews). On February 2 of this year a bill was introduced before the state legislature seeking to pro-

have restricted competition in both the construction [12] and the purchase [13] of homes.

The Combination or Conspiracy

Section 1 of the Sherman Act proscribes only concerted action.[14] However, explicit agreement need not be shown; circumstantial evidence of agreement, either express or implied, is sufficient.[15] In recent years, this concept has been extended so that *consciously parallel* action by persons in the same business creates an inference of conspiracy. The clearest exposition of this doctrine is the Third Circuit's opinion in *Milgram v. Loew's*.[16] There, the owner of a drive-in theatre brought suit against a number of motion picture distributors who refused to license first-run features to him. In upholding a finding of conspiracy the court held a showing of uniform business practices, with each participant aware of what the others were doing, sufficient to create an inference of joint action.[17] Defendants then had the burden of going forward to overcome the inference.[18]

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hibit racial or religious discrimination in mortgage lending. SEN. REP. No. 1421, INT. No. 1340 (1954). The difficulties facing Negro veterans attempting to secure loans to finance the building of the own homes is reported in REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 68 (1947). For fuller discussion of restrictive lending practices, see WEAVER, THE NEGRO GHETTO 222-7 (1948); LONG & JOHNSON, PEOPLE VS. PROPERTY 62-7 (1947); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING 17-18 (1952). For a study of the restrictive lending policies of Manhattan savings banks in regard to properties in the Harlem area of New York, see HARLEM MORTGAGE AND IMPROVEMENT COUNCIL, HARLEM A NEGLECTED INVESTMENT OPPORTUNITY (1951).

12. See note 11 *supra*. The Department of Housing Activities of the National Urban League recently published a survey of its attempts to aid a number of large builders to secure funds for all-Negro developments in the south and open-occupancy projects in the north. The report stated: "It has been difficult to secure adequate mortgage finance in this field because in most instances minority identified properties and neighborhoods are not considered entirely on their merit. Negative factors and misinformation that have no real relationship to the actual economics of housing are too frequently included as criteria which in turn influence final consideration." JOHNSON, MORTGAGE FINANCING FOR PROPERTIES AVAILABLE TO NEGRO OCCUPANCY 1 (publication of the Department of Housing Activities, National Urban League 1954).

13. See note 11 *supra*. One well-known Negro leader contacted twenty-eight lenders before securing a loan to purchase property in a white area of a northern city. NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, *op. cit. supra* note 11, at 17.

14. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914); United States v. Morgan, 118 F. Supp. 621, 634 (S.D.N.Y. 1953).

Single traders may violate § 1 by entering into *contracts* in restraint of trade. However, this provision does not appear applicable to the instant problem.

15. Theatre Enterprises v. Paramount, 346 U.S. 537, 540 (1954); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Interstate Circuit v. United States, 306 U.S. 208 (1939); Eastern Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

16. 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952). For a discussion of earlier cases developing the "conscious parallelism" doctrine, see *id.* at 583-4.

17. *Id.* at 583.

18. *Id.* at 584.

The scope of this doctrine was considered at the present term of the Supreme Court. In *Theatre Enterprises v. Paramount*,[19] the Court held that the consciously parallel action of several motion picture producers and distributors in excluding first-run features from suburban Baltimore theatres was not enough in itself to secure *a directed verdict*.[20] The Supreme Court did indicate, however, that evidence of consciously parallel behavior is sufficient to create a jury question on the issue of conspiracy.[21] Thus, if suit were brought against a number of institutions that lend in a particular area,[22] uniform refusal to lend to Negroes or to those who construct Negro housing could create an inference of joint action. It would not be difficult to show that each lender was aware of the similar policies being followed by its competitors. In *Milgram*, such mutual awareness was established when the trial judge found that "[I]t is simply not possible that branch managers did not keep track of what their competitors were doing. . . ."[23] And evidence to support the inference thus created could often be gathered in particular cases.[24]

Among the possible defenses to a conspiracy allegation, the following are most likely to occur:

(1) Each lender exercised its independent judgment in deciding that the requests for loans involved poor risks. This is the reason generally given when requests are denied.[25] Yet suit would be brought only in a situation in which a policy of continually rejecting good risks could be shown to exist.[26]

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19. 346 U.S. 537 (1954).

20. Theatre Enterprises v. Paramount, 346 U.S. 537, 540-2 (1954).

21. This is apparent from the trial proceedings where the only evidence introduced by plaintiff was that of consciously parallel action and a decree entered against the same defendants in an earlier anti-trust case. The Supreme Court gave no indication that there would not have been a jury question without the decree. "This evidence, together with other testimony of an explanatory nature [by defendants], raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury." Theatre Enterprises v. Paramount, 346 U.S. 537, 542 (1954).

Cf. Milgram v. Loew's, 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

22. It may be desirable to bring suit against only one kind of institution (*e.g.*, savings banks or insurance companies) at a time since mutual awareness of parallel activities might be more easily shown among such firms.

23. 94 F. Supp. 416, 418 (E.D. Pa. 1950). This finding was specifically accepted by the circuit court. Milgrim v. Loew's, 192 F.2d 579, 582-3 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

24. It is reported, for example, that a New York bank has prepared maps indicating areas in the city occupied by different racial groups; these are said to have been distributed among the various institutional lenders doing business in New York. N.Y. Amsterdam News, Nov. 28, 1953, p. 5, col. 1. In a 1947 meeting of New York real estate groups, mortgage executives voiced sharp disapproval of a city anti-discrimination law applying to developments enjoying tax and condemnation benefits. They had previously met as a group to discuss the matter with the state housing commissioner. WEAVER, THE NEGRO GHETTO 314-5 (1948).

25. INTERVIEWS.

26. Discriminatory lending policies appear to be all-inclusive, touching good as well as bad risks. See LONG & JOHNSON, PEOPLE VS. PROPERTY 64-5 (1947); JOHNSON, MORTGAGE FINANCING FOR PROPERTIES AVAILABLE TO NEGRO OCCUPANCY (publication of the

(2) Each lender feared that some customers would cease to do business with it if it aided Negro occupancy in their area, and therefore each independently decided not to do so.[27] The major shortcoming of this argument lies in the element of proof, for mere voicing of such fears would not have much probative value.[28] Moreover it is doubtful that actual threats of withdrawing business could be shown.[29]

(3) Each lender acted independently to further a personal desire to keep the area involved predominantly white. Yet, if this were the case, a trier of fact might well infer that each lender had a similar interest in seeing to it that none of the others disturbed the prevailing racial makeup.[30]

In weighing the possible effectiveness of these defenses, two things must be kept in mind. The inference of concerted action created by consciously parallel business activities remains a strong factor which the judge or jury must consider. And the very use of the first two defenses may aid in proving the alleged conspiracy. For, the *Milgram* court said: "The voicing of the same invalid reasons for identical equivocal actions is of itself sufficient from which to infer guilt."[31]

The Restraint

Competition in the mortgage market is sharply curtailed by the practices of lending institutions.[32] The builder with plans for Negro occupancy is at

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Department of Housing Activities, National Urban League 1954); WEAVER, THE NEGRO GHETTO 227 (1948); HARLEM MORTGAGE AND IMPROVEMENT COUNCIL, HARLEM A NEGLECTED INVESTMENT OPPORTUNITY (1951); AMERICAN JEWISH CONGRESS AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CIVIL RIGHTS IN THE UNITED STATES IN 1953: A BALANCE SHEET OF GROUP RELATIONS 100-101 (1954); Cooper, *Harlem Progress Checked as Banks Shun Loans There*, N.Y. Times, April 2, 1950, § 8, p. R1, col. 8.

27. See LONG & JOHNSON, PEOPLE VS. PROPERTY 63 (1947).

28. Defendants would have to introduce evidence from which reasonable men could conclude that lenders who financed Negro occupancy would probably lose other customers. Otherwise, it is doubtful that the trier of fact would find that they had followed the same policy independently.

29. INTERVIEWS. Furthermore, if lenders were able to show that certain large customers had made such threats, the latter might be joined as co-conspirators.

30. *Cf.* United States v. Reading Co., 226 U.S. 324, 365 (1912): "The necessary control could only come about through concerted action. If one of the several independent groups of defendants, or two, or any number less than all, had sought to obtain control, it would have been resisted by those not included. Therefore, it is plain that [if the goal was to be achieved], it must be brought about through the concerted action of the defendants."

Concerted action may violate the Sherman Act although the underlying motive is not economic. See Council of Defense v. International Magazine Co., 267 Fed. 390 (8th Cir. 1920) (suit successfully brought against State Council of Defense of New Mexico for urging newsdealers and citizens not to sell or to read Hearst publications because of their "disloyal and pro-German sentiments"). See also Greenspun v. McCarran, 105 F. Supp. 662 (D. Nev. 1952).

31. Milgram v. Loew's, 192 F.2d 579, 585 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

32. Open occupancy builders and Negro home purchasers may be able to secure

a severe disadvantage in the competition to secure financing for construction plans; the Negro home purchaser cannot keep pace with the white in his efforts to secure mortgage loans. Consequently, the Negro finds it difficult to secure adequate housing, and he is forced to pay more than whites do for comparable dwellings.[33]

The concerted refusal of lending institutions to deal with open-occupancy builders and Negro home purchasers constitutes a boycott.[34] This kind of

limited mortgage money from some lenders; this, however, does not remove the restrictive practices of the others from the Sherman Act's scope. See Associated Press v. United States, 326 U.S. 1 (1945), where by-laws of the Associated Press, which sharply restricted membership and forbade members to furnish news to outsiders, were held to constitute illegal restraints of trade. In the course of its opinion the Court said: "It is further contended that since there are other news agencies which sell news, it is not a violation of the Act for an overwhelming majority of the American publishers to combine to decline to sell their news to the minority. But the fact that an agreement to restrain trade does not inhibit competition in all the objects of that restraint cannot save it from the condemnation of the Sherman Act. It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals." *Id.* at 17.

33. 1940 census figures for selected cities show that in any given rental or sales bracket a greater proportion of nonwhites than whites lives in substandard dwellings. *E.g.*, 20.9% of all nonwhites who paid a monthly rental of $30-39, or whose homes had that estimated rental value, lived in substandard dwellings; only 7.7% of whites in the $30-39 range occupied substandard units. The ratio of nonwhites to whites in all price brackets for substandard tenant and owner-occupied units is 3 to 1. See Robinson, *Relationship Between Condition of Dwellings and Rentals, By Race*, 22 J. LAND & P.U. ECON. 296 (1946). For additional discussion, see WEAVER, THE NEGRO GHETTO 261-6 (1948).

Price differences between comparable white and nonwhite homes in two San Francisco areas were the subject of a recent study. The homes were carefully selected so that at last one in each area had almost identical characteristics with one or more in the other area. A significant entry of nonwhites had taken place in the "test area" since 1940, prior to which it had been all white. No nonwhites lived in the second or "control area." The sales prices of comparable homes which had been sold in each area from 1949 to 1951 were examined. In 77.4% of the cases where nonwhites bought homes in the test area, they paid more than whites did in the control area. The mean difference in price for each house was $335. Laurenti, *Effects of Nonwhite Purchases on Market Prices of Residences*, THE APPRAISAL J. 314 (1952). For further discussion, see WEAVER, *op. cit. supra* at 36, 119, 250, 291-2; LONG & JOHNSON, PEOPLE VS. PROPERTY 3-6, 37-8 (1947); MYRDAL, AN AMERICAN DILEMMA 379 (1944); WOOFTER, NEGRO PROBLEMS IN CITIES 121-35 (1928); HOUSING AND HOME FINANCE AGENCY, HOUSING OF THE NONWHITE POPULATION 1940 TO 1950 2 (1952); Morgan, *Values in Transition Areas: Some New Concepts*, Rev. Soc'y Residential Appraisers, March 1952, p. 5. See also discussion and sources cited in Brief for Petitioners, pp. 47-50, Hurd v. Hodge, 334 U.S. 24 (1948). Uncontroverted testimony was presented in the case to the effect that homes in certain areas could be sold for 30% more to Negroes than whites; similar testimony concerned excessive rentals. *Id.* at 61-2.

Federal court opinions dealing with restrictive covenants in specific areas have accepted the fact that Negroes paid higher housing prices than whites. See Gospel Spreading Association v. Bennetts, 147 F.2d 878, 879 (D.C. Cir. 1945); Hundley v. Gorewitz, 132 F.2d 23, 24 (D.C. Cir. 1942). *See* Mays v. Burgess, 147 F.2d 869, 873, 874 (D.C. Cir.) (dissenting opinion of Edgerton, J.), *cert. denied*, 325 U.S. 868 (1945).

34. A primary boycott is "a combination . . . to refrain from dealing with [another]." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466 (1921).

activity has been declared illegal with such consistency as to suggest its *per se* illegality.[35] However, assuming that the "rule of reason" is to be applied to such activities, proof of economic justification is admissible to show that the restraint is not an undue or an unreasonable one.[36]

A defense of economic justification by lenders may include: (1) a claim that extensive lending for Negro housing will result in a protest withdrawal of business by many customers,[37] and (2) the argument that allowing Negroes to move into white areas will depreciate property values and endanger certain of the lenders' investments there. In most situations, however, it does not seem that these defenses would vindicate the practices involved. Fear of a loss of customers appears unfounded in actual experience.[38] And it has been shown that the movement of Negroes into white neighborhoods has no generally depressing effect on prices; in some instances there is a decline in prices at first, but this is usually followed by a return to the previous price level, if not to a higher one.[39]

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35. See, *e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20 (1912). And see discussion and cases cited in Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 302, 387 (1942); Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1138-40 (1949).

36. There is indication that one type of boycott, a refusal to deal with someone as a means of preventing him from dealing with a third party, is illegal *per se*. See Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); United States v. Waltham Watch Co., 47 F. Supp. 524 (S.D.N.Y. 1942). *See* also United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948). Some writers believe that the *per se* rule extends beyond this and encompasses "every commercial boycott which affects the relations between an outsider and a member of the combination or others. . . ." Kirkpatrick, *supra* note 35, at 306. One commentator states that it reaches all "boycotts growing out of joint action among competitors. . . ." Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 YALE L.J. 348, 349 (1954). The Supreme Court, however, has never clearly decided any boycott case on the basis of a *per se* violation approach; the law on the subject, therefore, is still uncertain. See Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1138-40 (1949). Consequently, this comment will assume that evidence of economic necessity may still be introduced to justify a boycott. But see note 40 *infra*.

37. This defense was previously considered only with respect to whether or not joint action was present. See p. xxx *supra*.

38. INTERVIEWS.

39. One observer, a former deputy chief appraiser of the Federal Housing Administration, says, "Actually whether prices rise or fall depends upon the extent of the demand and the ability of the market to bid up prices, and has nothing to do whatsoever with racial characteristics." Morgan, *Values in Transition Areas: Some New Concepts*, Rev. Soc'y Residential Appraisers, March, 1952, p. 5, col. 1.

Most observers, however, seem to agree that initial Negro entry into an all white area may depress prices for a while. When this does occur, it is usually because of a "panic" effect on the part of some whites; the latter, feeling that the value of the property will go down, rush to sell it and thus themselves cause it to depreciate in value. In instances where this does happen, however, the price decline is usually only temporary. See WEAVER, THE NEGRO GHETTO 279-301; LONG & JOHNSON, PEOPLE VS. PROPERTY 5-6

Moreover, these defenses are not of the kind which is likely to succeed even under a "rule of reason" approach to boycotts.[40] The Sherman Act looks primarily to the *effects* of particular practices on competition and less to motive or intent.[41] Therefore, unless lenders can show that the net effect of their restrictive practices is to promote rather than to suppress competition, their defenses will be unavailing.[42]

Interstate Commerce

A refusal to lend for the construction or the purchase of homes for Negroes may be shown to involve a restraint on interstate commerce within the meaning of the Sherman Act. For mortgage lending itself is largely an interstate activity. And, furthermore, where there is a refusal to lend for construction purposes, the resultant decrease in the interstate flow of building materials also satisfies the interstate commerce requirement.

Mortgage Lending as an Interstate Activity. Objection may be raised that mortgage lending is an intrastate business because the object of the restraint, the mortgage contract, is of a wholly local nature. This objection was answered by the Supreme Court in *United States v. South-Eastern Underwriters Ass'n.*[43] Nearly 200 fire insurance companies were charged with having violate § 1 by conspiring to fix premium rates and agents' commissions. In reversing a dismissal of the indictment, the Court held that although the insur-

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(1947); Abrams, *The New "Gresham's Law of Neighborhoods"—Fact or Fiction*, 19 APPRAISAL JOURNAL 324 (1951). AMERICAN JEWISH CONGRESS AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CIVIL RIGHTS IN THE UNITED STATES IN 1953: A BALANCE SHEET OF GROUP RELATIONS 103-104 (1954). See also text at note 111 *infra.*

40. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). See also Standard Oil Co. v. United States, 221 U.S. 1, 59-64 (1911); United States v. American Tobacco Co., 221 U.S. 106, 178-80 (1911); American Federation of Tobacco Growers v. Neal, 183 F.2d 869, 872 (4th Cir. 1950). Restrictions on competition are not actually justified under the rule of reason. Rather, practices which on their face appear to be restrictions on competition are shown to promote competition upon analysis of the actual operation of a particular market.

41. "[A] specific intent, or good motive, for that matter, is not material when we deal with Section 1 of the Sherman Act, or Section 3 of the Clayton Act. The determining consideration is the effect of a particular practice on interstate trade or commerce. Other considerations, *such as economic necessity,* do not, and should not enter into our inquiry whether the practices here involved violate either statute." (Court's emphasis). United States v. Richfield Oil Corp., 99 F. Supp. 280, 286-7 (S.D. Cal. 1951), *aff'd,* 343 U.S. 922 (1952). See also Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930) and cases collected at 1 CCH TRADE REG. REP. (9th ed.) ¶ 1,0121, pp. 1054-7 (1952). Parties are held to have intended the necessary and direct consequences of their acts. See, *e.g.,* United States v. Griffith, 334 U.S. 100, 105 (1948); United States v. Patten, 226 U.S. 525, 543 (1913).

42. See note 40 *supra.*

43. 322 U.S. 533 (1944).

ance contract itself was local in nature the entire transaction ". . . constituted a single continuous chain of events, many of which were multistate in character."[44] These multistate events were the movement of checks, drafts, and other commercial paper from the home offices of the member companies to their various out-of-state branches.[45]

Mortgage lending today necessarily involves such interstate movements. These arise as a result of the heavy volume of interstate lending done by financial institutions[46] and the large percentage of loan insurance undertaken

44. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 537 (1944).

45. *Id.* at 541. It may be contended that mortgage contracts cannot be considered "commodities" within the meaning of the Sherman Act. This argument was used by defendants in the *South-Eastern* case in regard to insurance contracts. Justice Black, however, speaking for the majority, ruled that the Supreme Court had continually held that "Congress can regulate traffic though it consist of intangibles." *Id.* at 546.

46. Though no comprehensive survey of the interstate connections of the mortgage business has ever been made, the material that does exist indicates that a considerable percentage of the mortgage money in a given area is of out-of-state origin. Lending institutions may secure interstate mortgage holdings through the establishment of branch offices in various cities, as a result of direct contact with their home office staffs, by the purchase of already-negotiated mortgages from independent non-institutional lenders, and through the employment of other non-institutional lenders known as "correspondents" who act as local agents of the large firms. SAULNIER, URBAN MORTGAGE LENDING BY LIFE INSURANCE COMPANIES 30-1 (1950). The non-institutional lenders deal primarily with out-of-state institutions and are active mainly when local funds are inadequate to meet financing demand. The "correspondents" and "independents" are usually mortgage companies, mortgage brokers or real estate brokers. They are primarily servicers of loans, rather than holders for their own account. Thus, areas in which they play a major part in the lending process will depend mainly on out-of-state mortgage funds.

Two recent studies have examined the participation of loan servicers in mortgage markets throughout the nation. Schechter, *National and Local Mortgage Market Structures*, Housing and Home Finance Agency, Housing Research, Oct. 1952, p. 9; *Real Estate Loans of Registrants Under Regulation X*, 38 FED. RES. BULL. 620 (1952). The Schechter study concerned itself largely with the mortgage structures of fifteen metropolitan areas. By noting the volume of lending activity of mortgage companies in these areas, it was able to conclude that six of them (Miami, Dallas, Denver, Detroit, Pittsburgh, and Washington, D.C.) were probably heavily dependent on outside financing. The pattern of lending in Boston and New York-northeastern New Jersey, however, suggested highly self-sufficient mortgage markets. Cleveland and San Francisco were found to rely primarily on local funds, with outside lenders exerting "a significant marginal influence." Figures for the five other areas (Atlanta, Chicago, Los Angeles, Philadelphia, and Seattle) indicated that the importance of out-of-state financing was somewhere in between that found in the first six cities and the Boston and New York-northeastern New Jersey areas. Schechter, *supra* at 10, 15-6.

Mr. Schechter's view of the importance of out-of-state financing for home purchase is: "Primary financing of the purchase of homes is undertaken by financial institutions outside of the state in which the property is located in significant volume, particularly by large life insurance companies and savings banks." Communication to the YALE LAW JOURNAL from Henry B. Schechter, financial economist of the Housing Branch of the Housing and Home Finance Agency, dated Oct. 28, 1953, in Yale Law Library.

The second study of interstate mortgage financing was undertaken by the Division of Research and Statistics of the Federal Reserve System, and was centered on informa-

by the Federal Housing Administration and the Veterans' Administration.[47] Since the home offices of the latter two organizations are in the District of Columbia, their mortgage activities involve the flow of commercial paper referred to in the *South-Eastern* case.

To bring suit under the Sherman Act, however, one cannot merely group as co-conspirators a number of lenders who do business in more than one state. It is necessary to delineate the market in which the alleged restraint of trade exists.[48] Potential defendants are those lenders which compete in this market. In many areas of the country, these will be mainly out-of-state firms;[49] here,

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tion filed by 44,000 lenders in response to a new registration requirement of the Board of Governors. Conclusions were based on an analysis of the participation of loan servicers in lending activities in the federal reserve districts. Noting that the information obtained permitted only broad geographic comparisons, the study stated: "The data nevertheless suggest that an appreciable part of the funds for financing real estate in the Richmond, Atlanta, St. Louis, Kansas City, and Dallas Districts comes from the financial districts such as Boston and New York, and from Chicago and San Francisco. . . . The movement of funds from one part of the country to another has been encouraged by investors seeking outlets for large amounts of funds. . . . Both institutional and noninstitutional registrants participate in this movement of funds. Insurance companies and other institutional lenders hold large amounts of loans on real estate located at a distance and in many instances have them serviced by noninstitutional lenders close to the properties." FED. RES. BULL., *supra* at 620, 627, 621.

This study showed that of the total amount of loans held by large firms which had registered ($53.3 billion), more than one-fourth ($13.4 billion) had been initially secured by regular servicers. An additional 4½% was serviced for large firms by other institutional lenders. (Although the non-institutional lenders also held some mortgages on their own account [$3.3 billion], it is doubtful that any significant amount of this had been serviced for them.) *Id.* at 621. Some of the loan servicing was undoubtedly done for large lenders located in the same state as the servicer. Still, the figures probably largely understate the total volume of interstate lending; they do not take into account loans *directly* secured by large firms on out-of-state property. See note 54 *infra*.

Insurance companies engage in an especially large volume of out-of-state lending. The Schechter study indicates that even in San Francisco and Hagerstown, Maryland, a small self-sufficient area, out-of-state insurance loans were significant. In San Francisco, 13% of the 1950 recorded mortgages of under $20,000 came from outside insurance companies; 17% of the 1950 Hagerstown mortgages were also of this nature. Schechter, *supra* at 13. For indication of the national scope of insurance company mortgage lending, see SAULNIER, *supra* at 38-9.

47. A loan guaranty by one of these agencies assures the lending institution that in the event of a borrower's default a certain percentage of the loan will be made good.

As of May 31, 1951, 47.6% of all mortgages on residential properties held by institutional lenders were FHA insured or VA guaranteed. 39.2% of the residential property mortgages of non-institutional lenders were similarly backed by these agencies. The breakdown for the separate institutional lenders is as follows: commercial banks, 54.5%; mutual savings banks, 47.7%; savings and loan associations, 27.6%; insurance companies, 61.4%. In the non-institutional lender group, 55.1% of the residential property mortgages of the combined holdings of mortgage companies, mortgage brokers, and real estate brokers were FHA insured or VA guaranteed. See FED. RES. BULL., *supra* note 46, at 626.

48. See, *e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 610-11 (1953).

49. See note 46 *supra*.

the involvement of interstate commerce is apparent. This kind of lending situation is especially likely to exist outside of the major financial centers.[50]

A variation of this situation is often found in these areas. The mortgage may initially be procured from a small local firm doing business on its own account. Unable to participate in long-term financing, however, the firm will then sell the mortgage to a large out-of-state financial institution.[51] This is known as secondary financing.[52] If a refusal to lend for Negro housing were found to exist in such an area, suit would be directed against those firms which do the initial lending; they select the mortgagees. Although these defendants are not themselves interstate lenders, their business of necessity affects interstate activities. Numerous cases have held that a business need not be *in* interstate commerce to satisfy the requirements of the Sherman Act —it is sufficient that it *affects* such commerce.[53]

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50. This is due to the heavy concentration of mortgage capital in certain sections of the United States (primarily the northeast) and the paucity of lending funds available in other parts. See Schechter, *supra* note 46, at 9; FED. RES. BULL., *supra* note 46, at 627-8.

51. This situation differs from that in which a "correspondent" first secures the mortgage; there the initial purchaser acts as an agent for the large-scale lender. Here he buys on his own account, later seeking a permanent holder. See FED. RES BULL., *supra* note 46, at 620-1; SAULNIER, *supra* note 46, at 30-1.

52. A detailed study of one such area, Jacksonville, Florida, was recently undertaken by the Housing and Home Finance Agency. Examining mortgage lending in that city for the first six months of 1950, the study disclosed that of $21 million of loans made, $16.6 million, or nearly 80%, came from outside of the state; $15.2 million was bought on the secondary market. Approximately one-half of the outside funds came from the Federal National Mortgage Association, a federal agency which purchases mortgages from independent servicing firms. Most of the remaining half came from lenders in New York, Massachusetts, New Jersey, and Pennsylvania. HOUSING AND HOME FINANCE AGENCY, RESIDENTIAL MORTGAGE FINANCING, JACKSONVILLE, FLORIDA, FIRST SIX MONTHS OF 1950 (1952).

53. "The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464 (1949) (combination of Boston stitching contractors to force jobbers to employ only members of their association held to affect the influx of cloth to Massachusetts and the outgo of finished garments). See also, United States v. Employing Plasterers' Ass'n, 347 U.S. 186 (1954) (complaint alleging that conspiracy to suppress competition among Chicago plastering contractors affected flow of plastering materials into Illinois held to state cause of action); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1947) (combination to fix prices of California beet sugar held to affect subsequent interstate sale of the refined product); United States v. Chrysler Corporation, 180 F.2d 557 (9th Cir. 1950) (complaint alleging that conspiracy to fix retail prices of Chrysler replacement parts and engines in Washington affected interstate movement of such materials held to state cause of action).

In other cases where the source of the restraint is local, the courts may talk of a continuous flow of commerce rather than adopt the "affect" approach. See, *e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (local radio station's receipt of news, musical recordings and advertising from outside of state held restrained by withdrawal

Suit may also be brought in the large financial centers themselves. Even here out-of-state funds are often used to finance construction and home purchase; it has been stated that over one-fourth of the mortgage financing in New York City originates from out-of-state firms.[54] In other sections within the financial centers a greater percentage of competing lenders may come from within the state. But given concerted action, they may be joined as defendants with the out-of-state firms; for one conspirator is liable for every act of another done in furtherance of the conspiracy.[55] Furthermore, the mortgage lending activities of these local firms affect interstate commerce in another way. Every long-term lender handles a large volume of FHA and VA insured loans;[56] by refusing to advance mortgage money to the Negro market, many transactions that would otherwise be consummated with the FHA and VA do not take place.[57]

Effect on Building Materials. In all states the amount of building materials coming from out-of-state sources is substantial.[58] The decreased flow of such materials stemming from a refusal to lend to builders meets the Sherman Act's

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of local advertising); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (cab transportation of passengers from one railroad station in Chicago to another held to be part of the stream of interstate commerce); Swift and Co. v. United States, 196 U.S. 375, 399 (1905) (purchase of cattle in local stockyards held to be part of interstate transit of cattle to the yards); Greater New York Live Poultry Chamber of Commerce v. United States, 47 F.2d 156 (2d Cir. 1931) (sale of poultry by New York receivers to New York wholesalers held to be part of interstate movement of the poultry). The initial securing of mortgages by small firms would appear susceptible of similar treatment as part of a single flow of commerce.

For a comprehensive discussion of the "affect" and "flow" theories, see Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954). See notes 117-119 *infra*, and accompanying text.

54. Complaint, p. 6, ¶ 9, United States v. Mortgage Conference of New York, Civil No. 37-247, S.D.N.Y., August 6, 1946. The conclusions of the mortgage studies, see note 46 *supra*, as to the localized structure of the New York-northeastern New Jersey lending market, were based on the small amount of loan servicing done in that area. This, however, did not preclude the possibility that out-of-state institutions might make *direct* loans there; and the complaint in the *Mortgage Conference* case states that approximately 25% of the mortgage money in New York City originated in this fashion. The entry of additional out-of-state funds was alleged to result from the activities of mortgage correspondents of outside firms. Complaint, *supra* at p. 6, ¶ 9.

55. "[O]ne may conspire with others to restrain interstate commerce though he may not himself be engaged in that commerce." United States v. General Motors Corp., 2 F.R.D. 346 (N.D. Ill. 1942). See also Federal Trade Commission v. Cement Institute, 333 U.S. 683, 696 (1948); American Tobacco Co. v. United States, 147 F.2d 93, 115 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); United States v. American Column & Lumber Co., 263 Fed. 147 (W.D. Tenn. 1920), *aff'd*, 257 U.S. 377 (1921). Local lenders could similarly be joined as co-conspirators in areas outside of the financial centers.

56. See note 47 *supra*.

57. *Cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). And see discussion at notes 117-119 *infra*, and accompanying text.

58. See ABRAMS, REVOLUTION IN LAND 27, 49 (1939). It has been estimated that in the years just before the last war more than 80% of the materials used in the construction of new homes in New York City came from outside the state. Complaint, p. 9, ¶ 13,

interstate commerce requirement. A recent Supreme Court decision clearly shows that interference with the flow of building materials across state lines constitutes a burden on interstate commerce. In *NLRB v. Denver Building & Construction Trades Council*,[59] it was held that the commerce clause gave the NLRB jurisdiction over a dispute in the building trade because the disagreement might have prevented building materials from crossing state lines.[60] This case did not involve the Sherman Act. However, courts have stated many times that in passing the Act Congress intended to use the full scope of its regulatory powers under the commerce clause.[61] Thus, cases passing on the breadth of that clause with respect to other statutes have been held applicable to Sherman Act litigation.[62]

The generally broad interpretations given the commerce clause lend additional support to the showing of interstate commerce. Courts have usually been ready to find the requisite burden on such commerce in cases which otherwise satisfy statutory requirements. Thus, they have found that interstate commerce is burdened by the activities of janitors in a building where some of the offices did interstate work,[63] by the labor practices of a newspaper with an out-of-state circulation of ½ of 1%,[64] and by the price of milk which is produced and sold intrastate but which competes with milk shipped from outside the state.[65]

Prior Litigation

The Sherman Act has been invoked to attack housing segregation in one case. A refusal to lend was involved. In *United States v. Mortgage Conference of New York*,[66] the federal government charged 39 banks, insurance

United States v. Mortgage Conference of New York, Civil No. 37-247, S.D.N.Y., August 6, 1946.

59. 341 U.S. 675 (1951).

60. See also United States v. Employing Plasterers Ass'n of Chicago, 347 U.S. 186 (1954) (Sherman Act case); United States v. Employing Lathers Ass'n of Chicago, 347 U.S. 198 (1954) (same).

61. United States v. South-Eastern Underwriters Association, 322 U.S. 533, 558 (1944); Atlantic Cleaners and Dyers v. United States, 286 U.S. 427, 435 (1932); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739 (9th Cir. 1954); United States v. Chrysler Corp., 180 F.2d 557, 559 (9th Cir. 1950).

62. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); United States v. South-Eastern Underwriters Association, 322 U.S. 533, 549 (1944); opinion of Frank, J., and cases cited therein, in Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949).

63. NLRB v. Tri-State Casualty Insurance Co., 188 F.2d 50 (10th Cir. 1951) (Labor Management Relations Act of 1947).

64. Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act of 1938).

65. United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (Agricultural Marketing Agreement Act of 1937).

66. United States v. Mortgage Conference of New York, 1948-49 CCH TRADE CASES 62,616. See also, Complaint, United States v. Mortgage Conference of New York, Civil No. 37-247, S.D.N.Y., August 6, 1946.

companies and trust companies engaged in mortgage lending in New York with a violation of § 1. The refusal to lend was only one of a number of charges; other allegations concerned fixing of minimum interest rates on loans, uniform appraisal procedures, and other restrictive practices.[67] A consent decree was entered ordering the dissolution of the Conference and enjoining defendants from continuing alleged illegal practices.

In dealing with the segregation question, the government claimed the following:

(1) Defendants, who initiated more than 60% of the mortgage loans made in New York City,[68] had prepared maps indicating blocks in which Negroes and Spanish-speaking peoples lived, and refused to lend mortgage money to persons in those areas.[69]

(2) As a result of these practices, individuals in the designated areas were deprived of the benefits of normal competition [70] and were forced to pay higher prices for comparable dwellings in other parts of the city.[71]

(3) The restraint involved interstate commerce because of its effect upon the flow of applications, letters, drafts, and other communications across state lines,[72] and upon the quantity of building materials entering New York from other states.[73]

Because these discriminatory practices furnished only one of a number of separate charges in the complaint, it is difficult to ascertain their importance in securing the ultimate consent decree. One conclusion that can be drawn, however, is that defendants apparently believed the government's showing of interstate commerce to be adequate; the two alleged effects on interstate commerce were common to all the restraints listed in the complaint.[74]

Refusal To Sell

Negro community leaders state that it is so difficult for the Negro to purchase [75] a home in a white area that he feels it almost hopeless to try.[76] When

67. Complaint, p. 10, ¶ 15, United States v. Mortgage Conference of New York, Civil No. 37-247, S.D.N.Y., August 6, 1946.

68. *Id.* at 6, ¶ 8.

69. *Id.* at 11, ¶ 16(i).

70. *Id.* at 12, ¶ 17(a)-(c).

71. *Id.* at 12, ¶ 17(d).

72. *Id.* at 12, ¶ 17(g).

73. *Id.* at 12, ¶ 17(h).

74. *Id.* at 12, ¶ 17.

75. This comment will not deal with the possibility of using § 1 against a refusal to rent to Negroes; the activities involved here appear to be entirely local in nature. Section 3 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 3 (1946), however, can be used to attack restrictive rental policies in the District of Columbia. This section contains the same provisions as § 1 with the absence of the interstate commerce requirement, Congress having exercised its plenary power over the nation's capital.

Anti-trust litigation in the District would be of significance in bringing more competitive conditions to the housing market, this area being one of the most highly segre-

he does make the attempt, he is met with rejections.[77] This near elimination of the Negro as a competitive factor in most sales markets has generally confined him to small congested districts with homes of inferior quality.[78] Here, despite any ability to pay for his own home, he must often content himself with a rental unit to be shared with other families.[79] And the price for this type of dwelling is usually high.[80]

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gated in the nation. For discussion of discriminatory practices there, see REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 91-2 (1947); Brief for Petitioners, Hurd v. Hodge, 334 U.S. 24 (1948). *See* Hurd v. Hodge, 162 F.2d 233, 235, 243-4 (D.C. Cir. 1947) (dissenting opinion of Edgerton, J.), *rev'd*, Hurd v. Hodge, 334 U.S. 24 (1948). The arguments to bring a refusal to rent within the Sherman Act are essentially the same as for a refusal to sell. The landlord-defendant may be a large builder constructing rental units, in which case he may be held to have conspired with his subsidiaries. See note 84 *infra*, and accompanying text. In other cases a group of neighborhood landlords might be joined as co-conspirators, their consciously parallel actions creating an inference of combination.

76. INTERVIEWS.

77. See pp. xxxx-xxxx *infra*. Conditions sometimes become so intolerable that the Negro is led to employ some subterfuge in order to secure adequate housing. Thus, he may have a friend buy a home in a white area and then convey the deed to him. INTERVIEWS. See also WEAVER, THE NEGRO GHETTO 104 (1948).

78. The 1950 Bureau of Census housing figures reveal that overcrowding among nonwhites in residential dwellings is four times as great as among whites. HOUSING AND HOME FINANCE AGENCY, HOUSING OF THE NONWHITE POPULATION 1940 TO 1950 1-2 (1952). The proportion of dilapidated residential homes among nonwhites is five times as high as among whites (*27%* to 5.4%). *Id.* at 2. It has been estimated that even before the wartime increase, the Harlem area in New York was so heavily populated that "[a]t the same rate of density the entire population of the United States would live in one-half the geographic area of New York City." NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING 6 n.* (1952). For further discussion and statistics, see HOUSING AND HOME FINANCE AGENCY, *supra* at 8, 10, 12, 34-7; WEAVER, THE NEGRO GHETTO 99-124 (1948); LONG & JOHNSON, PEOPLE VS. PROPERTY 2-4 (1947); WOOFTER, NEGRO PROBLEMS IN CITIES 78-95 (1928); Morgan, *Values in Transition Areas: Some New Concepts*, Rev. Soc'y Residential Appraisers, March 1952, pp. 5-6; N.Y. Times, April 17, 1953, p. 27, col. 5. *See* also Fairchild v. Raines, 24 Cal.2d 818, 831, 151 P.2d 260, 267 1944) (concurring opinion).

79. "Doubling up" is one of the most serious problems of Negro housing. "In 1950, there were 339,000 nonwhite families living doubled up with other [nonwhite] families, at a doubling rate of 15 percent or nearly three times that for white families. . . . Of significance is the fact that between 1940 and 1950 doubling had decreased proportionately for whites in all areas of residence, but among nonwhites it had actually increased both numerically and proportionately. . . ." HOUSING AND HOME FINANCE AGENCY, *supra* note 78, at 10.

In early 1953, New York State Housing Commissioner Herman Stichman conducted a "block-by-block" survey of Harlem tenements. He found apartments partitioned off so that a different family could occupy each room and even different parts of the same room. N.Y. Times, April 17, 1953, p. 27, col. 5. In one house, twelve families occupied two seven room flats; the landlord derived a monthly income of $300 from them. N.Y. Post, April 17, 1953, p. 5, col. 1. For additional discussion see LONG & JOHNSON, PEOPLE VS. PROPERTY 33-5 (1947); WEAVER, THE NEGRO GHETTO 104 n.* (1948); WOOFTER, NEGRO PROBLEMS IN CITIES 78-95 (1928); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, *supra* note 78 at 6; Velie, *Housing: Detroit's Time Bomb*, Collier's, Nov. 23, 1946, p. 14.

The Combination or Conspiracy

Combinations to refuse to sell to the Negro home buyer are principally of three kinds. They may involve: operative builders of new projects, real estate brokers, or individual home owners.

Operative Builders.[81] The large-scale or operative builder sells the homes which he himself constructs.[82] His new projects open a large volume of housing in a given area at one time; they thus offer a significant opportunity to widen the area of permissible Negro competition. Yet restrictive policies are almost invariably adopted.[83] In suits against such a builder, the conspiracy

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See also Second Grand Jury Presentment in Investigation of Enforcement of Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, County Court, Kings County, New York, March 3, 1953.

80. See sources cited notes 33, 78 and 79 *supra*.

81. Restrictive practices by large-scale builders must be considered refusals to sell rather than refusals to build, since usually there is no refusal to build as such. The builder has decided on the site, type of construction and other details on his own initiative, and the houses will go up no matter to whom he sells; exclusionary practices enter only when the units are offered for sale.

There is, however, one situation in which the restrictive policy of a large-scale builder may be regarded as a refusal to build. This is where the builder has stated in advance that he will not construct a particular project unless Negroes are to be excluded. One example arose in the days before the construction of the huge Stuyvestant Town project in New York. The builder, Metropolitan Life Insurance Company, had indicated to city authorities that it would accept their proposal to undertake private construction only if Negroes were excluded. For the factual background, see Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 529, 87 N.E.2d 541, 547 (1949). In this kind of situation a builder could be charged with conspiring with its subsidiaries. See note 84 *infra*, and accompanying text. And his practices would clearly affect the flow of building materials across state lines.

82. See COLEAN, AMERICAN HOUSING 222 (1944); HOUSING AND HOME FINANCE AGENCY, FINANCING HOUSE CONSTRUCTION IN THE NORTHWEST 11 (1951).

83. One of the more notorious recent examples of discriminatory policies of large builders is that adopted in the Levittown project in Long Island, New York. Consisting of 17,544 units, approximately 15,000 of which are owner-occupied, the project has been closed to Negroes since the first homes were opened in October, 1947. The builder of the project, William Levitt, published a statement in the community newspaper in 1949 declaring that his admissions policy would remain unaltered despite the then recent *Shelley* case. ". . . Levittown has been and is now progressing as a private enterprise job, and it is entirely in the discretion and judgment of Levitt and Sons as to whom it will rent or sell." Levittown Tribune, June 2, 1949, p. 1, col. 3. Commenting on general builder practices, he said: "The policy that has prevailed in the past from the very inception of Levittown is . . . the same policy that all builders in this area have adopted. . . ." *Id.* at 1, col. 3; 23, col. 5. No more than two Negro families have ever lived in Levittown at the same time. See LIELL, LEVITTOWN (unpublished thesis of Prof. John Liell, Dep't of Sociology, Yale University, in Yale University Library 1952). Last year, Levitt sold his remaining holdings in the project. The new owner, Henry Epstein, has announced that all existing rental homes are to be converted into sales units. Levittown Eagle, March 26, 1953, p. 1, col. 5.

The National Association for the Advancement of Colored People lists the Bucks County Project in Pennsylvania and the Park Forest Project in Illinois as other large developments from which Negro home purchasers are excluded. NATIONAL ASSOCIATION

requirement can usually be satisfied because a corporation may be held to have conspired with its subsidiaries.[84] Most large builders are incorporated[85] and have one or more subsidiaries to handle various aspects of the building process;[86] also, a new development corporation is usually chartered to handle each new large job.[87]

In some instances it might be feasible to join lending institutions and builders as co-conspirators. Their interdependence in the housing enterprise is substantial.[88] A further possibility is that of joining a selling agent whom the builder may have hired to dispose of his units.[89] And sometimes those who have already purchased homes in the development might be joined as co-conspirators.[90]

Real Estate Brokers. The function of the real estate broker is to get buyer and seller together in the housing market and to adjust demand to supply.[91] The scattered supply of housing in any particular area[92] makes his coordinating function an important one.

The exclusionary practices of real estate brokers clearly involve consciously parallel action. In a given area no broker will sell to Negroes;[93] mutual awareness of these activities results from the circulation of written information and from the acquaintance brokers generally have with the housing market in

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FOR THE ADVANCEMENT OF COLORED PEOPLE, RACIAL DISCRIMINATION IN HOUSING—A SURVEY OF POSSIBLE BASES FOR LEGAL ATTACK UPON RACIAL DISCRIMINATION AND SEGREGATION IN HOUSING, PROVIDED, AIDED, OR SUPPORTED BY FEDERAL GOVERNMENT ACTION (unpublished study in New York offices of NAACP, April 17, 1953). For indication of the discriminatory policies of private builders in the Queens, Nassau and Suffolk County areas in New York, see communication to the YALE LAW JOURNAL from Hugo R. Heydorn, real estate broker in Jamaica, New York, dated April 23, 1953, in Yale Law Library.

Before Shelley v. Kraemer, restrictive covenants were very often imposed on properties by the original builder. Comment, *Race Discrimination in Housing*, 57 YALE L.J. 426, 430 (1948).

84. Schine Chain Theaters v. United States, 334 U.S. 110 (1948); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941). See Comment, *Intra-Enterprise Conspiracy under the Sherman Act*, 63 YALE L.J. 372 (1953).

85. See MAISEL, HOUSEBUILDING IN TRANSITION 99 (1953); HOUSING AND HOME FINANCE AGENCY, FINANCING HOUSE CONSTRUCTION IN THE NORTHWEST 33 (1951).

86. MAISEL, *op. cit. supra* note 85.

87. HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 85.

88. See notes 5 and 6 *supra* and accompanying text.

89. "During the last decade, some of the large operative builders have set up their own sales organizations, with salesmen paid on a salary basis or receiving a fixed fee. . . ." COLEAN, AMERICAN HOUSING 222 (1944).

90. This would appear to be the case where the builder and purchaser have clearly entered into agreements not to sell to Negroes.

91. See COLEAN, AMERICAN HOUSING 217-21 (1944).

92. *Id.* at 208.

93. The refusal of real estate brokers to admit Negroes into white neighborhoods has been described as almost universal in both northern and southern urban centers with large Negro populations. LONG & JOHNSON, PEOPLE VS. PROPERTY 57 (1947). At times brokers will discourage lending institutions from granting mortgages to Negroes

which they operate.[94] Furthermore, evidentiary factors supporting an allegation of conspiracy may be found in past policy formulations of real estate boards. Before *Shelley v. Kraemer*,[95] the Code of Ethics of the National Association of Real Estate Boards [96] called for the preservation of existing racial patterns in each neighborhood.[97] The Code is part of the regulations of every member board.[98] Although this provision has since been stricken from the Code,[99] it may serve to highlight the original purpose of a continuing conspiracy.[100]

In some areas an express conspiracy on the part of real estate brokers can probably be made out. There is evidence that real estate boards and their member brokers have taken a lead in organizing restricted neighborhoods.[101]

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on properties bought in white neighborhoods. WEAVER, THE NEGRO GHETTO 215 (1948). For a comprehensive survey of the restrictive practices of brokers, see LONG & JOHNSON, PEOPLE VS. PROPERTY 56-72 (1947). See also, WEAVER, THE NEGRO GHETTO 215-17 (1948); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUITY IN HOUSING 15-17 (1952).

94. Brokers have made wide use of the "multiple listing system" in selling homes. Local real estate boards establish bureaus with which member brokers may file listings of all the homes they have been asked to sell; in exchange, they obtain the listings of all other participating members. When a broker sells a home originally placed with another, he gives the latter a percentage of the sales commission. MCMICHAEL, SELLING REAL ESTATE 86 (1940). Often, the seller will make use of an "open listing," whereby a number of brokers are simultaneously employed. The commission goes to the one making the sale. WEIMER & HOYT, PRINCIPLES OF URBAN REAL ESTATE 226 (1939). Even in instances where neither of these listing systems is employed, it is the business of the broker thoroughly to familiarize himself with sales factors in his neighborhood. See MCMICHAEL, *op. cit. supra* at 85, 432.

95. 334 U.S. 1 (1948).

96. This organization consists of more than 460 member boards and 15,000 individual members. It is the central control body in the real estate field and sets basic policy for all its members. LONG & JOHNSON, PEOPLE VS. PROPERTY 57-8 (1947).

97. See the provisions of the Code set out in WEAVER, THE NEGRO GHETTO 217 (1948). A 1943 publication of the National Association cautioned member brokers against the following: "The prospective buyer might be a bootlegger who would cause considerable annoyance to his neighbors, a madam who has a number of Call Girls on her string, a gangster who want a screen for his activities by living in a better neighborhood, a colored man of means who was giving his children a college education and thought they were entitled to live among whites. . . . No matter what the motive or character of the would-be purchaser, if the deal would instigate a form of blight, then certainly the well-meaning broker must work against its consummation." Quoted in NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING 15-16 (1952).

98. WEAVER, THE NEGRO GHETTO 217 (1948).

99. The deletion of the provision, however, did not cause the abandonment of restrictive practices. See Communication to the YALE LAW JOURNAL from Robert C. Weaver, author of THE NEGRO GHETTO, dated March 15, 1954, in Yale Law Library; Ming, *Racial Restrictions and the Fourteenth Amendment: the Restrictive Covenant Cases*, 16 U. OF CH. L. REV. 203, 228 (1949).

100. See Federal Trade Commission v. Cement Institute, 333 U.S. 683, 704-5 (1948).

101. See LONG & JOHNSON, PEOPLE VS. PROPERTY 67-9 (1947); FORSTER & EPSTEIN, THE TROUBLE-MAKERS 261 (1952); Note, 37 CAL. L. REV. 493 (1949).

Agreements not to sell to Negroes have been exacted from neighborhood home owners,[102] and in at least one area maps were drawn up by the local boards dividing the area into restricted and unrestricted sections.[103]

Home Owners. Although *Shelley* prohibited judicial enforcement of restrictive covenants, it is probable that home owners have continued the use of this device to exclude Negroes from their neighborhoods.[104] Such agreements have been entered into and privately enforced by formal groups known as neighborhood improvement associations.[105] Although organized for diverse purposes, a primary function of such an association in numerous instances is to perpetuate the existing racial makeup of a neighborhood.[106] In addition to the use of covenants, various other methods are employed to exclude Negroes.[107] These more overt exclusionary practices can readily form the basis for a finding of combined action.

The Restraint

A boycott of the Negro purchaser is involved here.[108] The principal argument that would probably be used to justify this restraint is that the admission of Negroes into a neighborhood will diminish the property value of homes

102. See sources cited note 101 *supra.* The Urban League of Cleveland reports that "there have been instances where pressure was brought to bear [by realtors] on individual home owners who did attempt to sell [to Negroes]." Communication to the YALE LAW JOURNAL from Arnold B. Walker, Executive Secretary of the Urban League of Cleveland, dated March 24, 1954, in Yale Law Library.

103. LONG & JOHNSON, PEOPLE VS. PROPERTY 60-1 (1947).

104. See Communication to YALE LAW JOURNAL from Frances Levenson, Research Director, National Committee Against Discrimination in Housing, dated May 27, 1954, in Yale Law Library.

105. For a detailed study of the activities of these groups, see LONG & JOHNSON, PEOPLE VS. PROPERTY 39-55 (1947). An indication of the importance of the associations can be gathered from their size. In Chicago, for example, they have a combined membership of 15,529, the medium size being 266; in Detroit there are 6,210 members, with a median size of 333. *Id.* at 42-3.

106. *Id.* at 40.

107. Their activities include: meetings at which common policies are adopted; the formation of home owner "clubs" whose officers must approve all new purchasers in the area; the use of the Van Sweringen Covenant (in Cleveland) requiring that the original owner approve the sale of a home; placing title to the land in a central body which then determines to whom it will lease if the present occupier decides to move; and even overt intimidation and violence. See, generally, LONG & JOHNSON, PEOPLE VS. PROPERTY 39-55, 73-7 (1947); FORSTER & EPSTEIN, THE TROUBLE-MAKERS 258-60 (1952); WEAVER, THE NEGRO GHETTO 240-1, 249-53 (1948); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING 12-15 (1952); Marcus, *Civil Rights and the Anti-Trust Laws,* 18 U. OF CHI. L. REV. 171, 209-10, 212 (1951); Ming, *Racial Restrictions on the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. OF CHI. L. REV. 203, 216-26 (1949); Note, 37 CAL. L. REV. 493 (1949). For discussion of the Van Sweringen covenants, see NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, *op. cit. supra* at 12-3; Communication to YALE LAW JOURNAL from Arnold B. Walker, Executive Secretary of the Urban League of Cleveland, dated March 24, 1954, in Yale Law Library.

108. See note 34 *supra.*

there. But such an assertion is basically unsound;[109] in those cases where property values do decline initially, there is substantial authority to the effect that this is only the result of the panic of the whites in the neighborhood.[110] And this panic effect is often started or aided by real estate operators who hope to buy cheaply and then resell to Negroes at a substantial profit.[111] Moreover, this is not the kind of defense which will justify a boycott even under the "rule of reason."[112]

Interstate Commerce

The sale of a house seldom involves an interstate transaction.[113] But the purchase of almost all newly-constructed homes is financed by mortgage loans,[114] and most transfers of existing homes, are similarly backed by mortgages.[115] Thus, such sales are usually dependent upon and directly affect other transactions, interstate in nature. The Sherman Act does not require that a particular activity be in interstate commerce in order to come within its scope; it is enough that it affects such commerce.[116]

The restraint is not as directly related to interstate commerce here as it is in refusal to lend situations. Cases have held that the effect on such commerce may be too "remote," "insubstantial," "indirect," or "fortuitous" to violate § 1. Many of these have been labor cases, however, where a policy of

109. See note 39 *supra*, and accompanying text.

110. *Ibid.*

111. See WEAVER, THE NEGRO GHETTO 272-3 (1948); NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, *op. cit. supra* note 106, at 16-17; Velie, *Housing: Detroit's Time Bomb*, Collier's, Nov. 23, 1946, p. 76, col. 4. The real estate operator, as distinguished from the broker, buys and then himself resells homes. COLEAN, AMERICAN HOUSING 221 (1944).

See also communication to Yale Law Journal from Bernard G. Walpin, real estate broker and attorney in Forest Hills, New York, dated June 7, 1954, in Yale Law Library. Mr. Walpin states that the real estate broker too will often profit by the difficulties the Negro faces in gaining entry into a white area. If he decides to place a Negro in a changing neighborhood, he will frequently secure a larger commission than normally.

112. See notes 40-2 *supra*, and accompanying text.

113. See COLEAN, AMERICAN HOUSING 179-80 (1944).

114. A Bureau of Labor Statistics survey of 15 metropolitan areas shows that for July-December 1949 at least 91% of the purchases of new homes were backed by mortgages in all but one of the areas. In the latter area, Seattle, 87% of such purchases were mortgage financed. *New Home Financing and Characteristics in 15 Metropolitan Areas*, Construction (joint publication of the Department of Labor and Bureau of Labor Statistics) Feb. 1951, p. 26, table 17.

115. See Communication to YALE LAW JOURNAL from Henry B. Schechter, financial economist of the Housing and Home Finance Agency, dated May 12, 1954, in Yale Law Library.

116. See note 53 *supra*. In those areas in which a buyer's market exists, the requirement may be met by showing the effect of refusals to sell on the interstate flow of building materials. This would be the case where an agreement between an operative builder and prior purchasers prevents the former from building and selling to Negroes and whites in greater volume than to whites alone.

judicial forbearance exists.[117] Other decisions are in conflict with broader interpretations of the Act;[118] and the liberal constructions are dominant today.[119]

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117. "[W]e have two declared Congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competetive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. . . . Thus, these Congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition." Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806, 811 (1945). A similar policy prevails as to legitimate labor activities of employers. See United States v. Detroit Sheet Metal and Roofing Contractors Ass'n, 116 F. Supp. 81, 90 (E.D. Mich. 1953); United States v. San Francisco Electrical Contractors Ass'n, 57 F. Supp. 57, 62 (N.D. Cal. 1944). Combinations between unions and non-labor groups, however, have been condemned. Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, *supra*; United States v. New York Electrical Contractors Ass'n, 42 F. Supp. 789 (S.D.N.Y. 1941).

In dealing with labor cases courts have looked primarily to the nature of the restraint. If legitimate employer or employee activities are involved, any interference with the free flow of interstate commerce has been held only remote or incidental *to the primary purpose of the activities.* See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). In discussing an earlier labor case, the Court said, "It was thus made apparent that in saying that 'indirect obstructions' to commerce were not condemned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' it meant no more than that the conspiracy or combination must be directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy." *Id.* at 511.

Labor cases in which the courts have not found the requisite burden on interstate commerce include Levering and Garrigues v. Norrin, 289 U.S. 103 (1933); Industrial Ass'n of San Francisco v. United States, 268 U.S. 64 (1925); United Leather Workers v. Herkert, 265 U.S. 457 (1924); United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), *aff'd sub nom.* United States v. Int'l Hod Carriers & Common Laborers' District Council, 313 U.S. 539 (1941); Consolidated Terminal Corp. v. Drivers, Chauffeurs and Helpers Local Union, 33 F. Supp. 645 (D.D.C. 1940); United States v. Needle Trades Workers Industrial Union, 10 F. Supp. 201 (S.D.N.Y. 1935). *Cf.* Fehr Baking Co. v. Bakers' Union, 20 F. Supp. 691, 697 (W.D. La. 1937). The first three cases, often cited by counsel contending that a particular restraint exerts only an indirect effect on interstate commerce, are distinguished in United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945) and United States v. Detroit Sheet Metal and Roofing Ass'n, 116 F. Supp. 81, 90 (E.D. Mich. 1953).

118. *Compare* United States v. Greater Kansas City Chapter, National Electrical Contractors Ass'n, 82 F. Supp. 147 (W.D. Mo. 1949) and United States v. San Francisco Electrical Contractors Ass'n, 57 F. Supp. 57 (N.D. Cal. 1944), *with* United States v. Northeast Texas Chapter, National Electrical Contractors Ass'n, 181 F.2d 30, 33-4

Even in those areas where most mortgage financing is intrastate, case law indicates that the interstate commerce requirement may be satisfied. For the

(5th Cir. 1950), United States v. Minneapolis Electrical Contractors Ass'n, 99 F. Supp. 75 (D. Minn. 1951), and United States v. New York Electrical Contractors Ass'n, 42 F. Supp. 789 (S.D.N.Y. 1941); also *compare* United States v. French Bauer, 48 F. Supp. 260 (S.D. Ohio 1942), *with* Universal Milk Bottle Service v. United States, 188 F.2d 959 (6th Cir. 1951) and United States v. Sheffield Farms Co., 43 F. Supp. 1 (S.D.N.Y. 1942); also *compare* Albrecht v. Kinsella, 119 F.2d 1009 (7th Cir. 1941), *with* United States v. Employing Plasterers' Ass'n, 347 U.S. 186 (1954).

119. In tracing the development of the commerce clause, the Supreme Court has given as specific a statement as possible of the present-day status of that clause as regards the Sherman Act: "In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence." Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).

The Supreme Court has held the effect on interstate commerce to be too insubstantial or too remote in only two modern cases; and in both the failure to affect such commerce was clearly evident. United States v. Oregon State Medical Society, 343 U.S. 326 (1952) (defendants, charged with monpolizing and restraining the business of prepaid medical care in Oregon, "made a number of payments to out-of-state doctors and hospitals, presumably for treatment of policy holders who happened to remove or temporarily to be away from Oregon when need for service arose"); United States v. Yellow Cab Co., 332 U.S. 218 (1947) (cab passengers, transported from their homes or offices to railroad stations where they embarked on interstate journeys).

For modern cases in which the courts have found local activities to be part of a continuous flow of interstate commerce or to affect such commerce, see Standard Oil Co. of California v. United States, 337 U.S. 293, 314-5 (1949); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954); Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n of Philadelphia, 155 F.2d 799 (3d Cir. 1946); United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 974 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1944); United States v. General Motors Corp., 121 F.2d 376, 401-2 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); United States v. Detroit Sheet Metal and Roofing Contractors Ass'n, 116 F. Supp. 81 (E.D. Mich. 1953); United States v. Greater Kansas City Retail Coal Merchants Ass'n, 85 F. Supp. 503, 510 (W.D. Mo. 1949); United States v. National Retail Lumber Dealers Ass'n, 40 F. Supp. 448 (D. Colo. 1941); United States v. Mountain States Lumber Dealers Ass'n, 40 F. Supp. 460 (D. Colo. 1941); United States v. Heating, Piping & Air Conditioning Contractors Ass'n of Southern California, 33 F. Supp. 978 (S.D. Cal. 1940); Fehr Baking Co. v. Bakers' Union, 20 F. Supp. 691 (W.D. La. 1937). See also United States v. Frankfort Distilleries, 324 U.S. 293 (1945), and cases cited notes 53 and 118 *supra*. *But cf.* the following modern cases in which the courts held that only local activities were involved: Spears Free Clinic & Hospital for Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952); Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Boro Hall Corp. v. General Motors Corp., 124 F.2d 822, 823-4 (1942), *cert. denied*, 317 U.S. 695 (1943); Abouaf v. J.D. & A.B. Spreckels Co., 26 F. Supp. 830 (N.D. Cal. 1939). See also cases cited note 118 *supra*.

amount of interstate commerce affected by a particular restraint has been held to be of little consequence.[120]

The Remedies

An action under the Sherman Act may be instituted by either the federal government or a private party. Section 4 authorizes United States district attorneys to institute equity proceedings to "restrain and prevent" violations of the Act.[121] Suit by a private party may be for similar injunctive relief [122] or for treble damages under § 4 of the Clayton Act.[123]

Possible damage actions may be for increased rental or sales prices.[124] Precise proof of damages is not necessary. In *Bigelow v. RKO* [125] a motion picture theatre owner was granted treble damages against a number of film distributors and exhibitors which had refused to lease him first-run features. The Supreme Court held that a jury may estimate probable damages where defendants' tortious acts precluded more precise ascertainment.[126]

One of the methods of proving damages accepted in *Bigelow* was a comparison of plaintiff's earnings over a five year period with those of a comparable theatre of defendants.[127] Thus, it would seem that private parties in a housing segregation case could introduce evidence of the differences in rental and sales prices between comparable white and Negro dwellings.

Under the Federal Rules of Civil Procedure, individual complainants may join in a common suit. Rule 20 provides for permissive joinder of plaintiffs whose right to relief arises out of the same "transaction, occurrence, or series of transactions or occurrences."[128] More applicable to housing segregation, however, may be Rule 23(a). This permits actions by one or more members of a particular class on behalf of the others, where they are "so numerous as to make it impracticable to bring them all before the court."[129] Thus, repre-

120. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); Apex Hosiery Company v. Leader, 310 U.S. 469, 485 (1940); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

121. 26 Stat. 209 (1890), 15 U.S.C. § 4 (1946).

122. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1946).

123. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1946). Recovery for costs and for a reasonable attorney's fee is also authorized.

124. See note 33 *supra*.

125. 327 U.S. 251 (1946).

126. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO, 327 U.S. 251, 265 (1946). See also Loew's v. Cinema Amusements, 210 F.2d 86 (10th Cir. 1954).

127. Bigelow v. RKO, 327 U.S. 251, 257-8 (1946). See also Loew's v. Cinema Amusements, 210 F.2d 86, 91-2 (10th Cir. 1954).

128. Fed. R. Civ. P. 20. See, generally, Comment, *Antitrust Enforcement By Private Parties*, 61 Yale L.J. 1010, 1036-7 (1952).

129. Fed. R. Civ. P. 23(a). Both Rules 20 and 23(a) require that a common question of law or fact exist. See, generally, Comment, *Antitrust Enforcement By Private Parties*, 61 Yale L.J. 1010, 1036-7 (1952).

sentatives of all Negroes who have been harmed by restrictive practices in a particular area could bring damage actions in the name of all.

CONCLUSION

The Sherman Act cannot be invoked to attack housing segregation wherever it exists. In many fact situations all the statutory requirements cannot be met. It appears likely, however, that they can be satisfied in numerous areas in which restrictive practices have been adopted.

It seems highly desirable to attempt to employ the Sherman Act in this field. The elimination of restrictive practices on the part of private parties will serve to further the meritorious approach adopted in *Shelley v. Kraemer*.[130] More effective competition will be brought to the housing market, and the Negro will no longer be forced to content himself with the "left-overs" of so vital an incident to individual well-being.

130. Shelley v. Kraemer, 334 U.S. 1 (1948). See also the recent Supreme Court decision barring segregation in the public school systems. Brown v. Board of Education of Topeka, 74 Sup. Ct. 686 (1954).