

## NOTES

### JURISDICTION UNDER THE SHERMAN ACT: THE "INTERSTATE COMMERCE" ELEMENT AND THE ACTIVITIES OF LOCAL REAL ESTATE BOARDS AND BROKERS

Membership in a local board is perhaps the most important affiliation a real estate broker can have, since it affords members substantial competitive advantages over nonmembers.<sup>1</sup> However, the activities of local real estate boards, like other professional and trade associations, are often subject to challenge under the Sherman Act<sup>2</sup> as being unreasonably anticompetitive. In particular, such challenges usually involve either price fixing or exclusion from board membership.<sup>3</sup> As with any other Sherman Act complaint, the first problem to be addressed is

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#### THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970) [hereinafter cited as Austin];

Graybeal, *Antitrust Violations in Real Estate Transactions*, 60 ILL. B.J. 856 (1972) [hereinafter cited as Graybeal];

Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 721 (1976) [hereinafter cited as *Confusing World*].

1. Graybeal 857. Chief among these advantages is participation in the board-run "Multiple Listing Service" (MLS). The MLS substantially expands the size of the market in which a broker can operate. *Id.* The system functions by requiring member brokers to pool their exclusive listings, allowing each member broker complete freedom to sell property listed by other members. See B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME* 112 (1978); Austin 1328-30. The advantage to such a service is obvious. Each broker acquires a virtual "catalogue" of properties over which his customers may browse. As evidence of the huge inventory of property an MLS broker is likely to have, a study done in California indicated that over 80% of all residential purchases involved an MLS member. Owen, *Kickbacks, Specialization, Price Fixing and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 948 (1977).

2. 15 U.S.C. §§ 1-7 (1976).

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony . . ." *Id.* § 2.

3. Graybeal 857. There is at least some debate as to whether antitrust enforcement in these cases is beneficial or not. Compare Owen, *supra* note 1, at 956 (lack of competition among member brokers is the cause of excessively high prices for brokerage services) with Barasch, *How Antitrust Actions Have Affected Real Estate Brokers' Commissions*, 3 REAL EST. L.J. 227, 228 (1975) (the threat or institution of lawsuits to enjoin use of fee schedules has increased commission rates).

whether the court has subject matter jurisdiction under the Act.<sup>4</sup>

There are two jurisdictional prerequisites under the Sherman Act. First, some form of "trade" must be involved. Second, the alleged restraint must be interstate.<sup>5</sup> That the first requirement is satisfied where real estate activities are involved can no longer be seriously questioned.<sup>6</sup> This Note will concern itself with the latter requirement.<sup>7</sup>

The Sherman Act was passed pursuant to Congress' commerce power,<sup>8</sup> and as the judicial construction of that power has expanded in this century, so has the reach of the Act.<sup>9</sup> However, while it is often stated that Congress exerted its "utmost power" under the commerce clause in passing the Sherman Act,<sup>10</sup> the courts have uniformly refused to give the Sherman Act the kind of broad and sweeping interpretation accorded other commerce clause statutes.<sup>11</sup> In fact, this disparity in treatment is not without justification. Under other pieces of commerce clause legislation, Congress had already made the factual determination that particular types of conduct adversely affected interstate commerce. With the Sherman Act, Congress left to the judiciary the determination of what factual situations would invoke the proscriptions

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4. Of course, federal law is not the only possible antitrust remedy. Many states provide their own "little Sherman Acts." However, state enforcement may be, for one reason or another, unavailable or undesirable. For example, due to the political power of local boards, states may ignore antitrust violations on the part of real estate brokers. Austin 1336.

5. See Austin 1331.

6. See *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); Austin 1331-32.

7. Some analysts have summarily concluded that jurisdiction under the Act is "clearly met" with regard to the activities of local boards. Graybeal 857. A quick glance at the case law, however, demonstrates that the courts have not found the issue quite so easy to resolve.

8. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. 1, § 8, cl. 3.

9. *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

"It is now clear that the federal commerce power is as broad as the need that evokes it and encompasses not only the regulation of interstate commerce itself, but all measures necessary and proper to that end including purely intrastate activities, if necessary, to protect and foster interstate commerce." *Evans v. S.S. Kresge Co.*, 394 F. Supp. 817, 828 (W.D. Pa. 1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

10. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944)). See also *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir.), *cert. denied*, 393 U.S. 1093 (1969); *Confusing World* 726.

11. Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323, 325 (1974); see Furgeson, *The Commerce Test for Jurisdiction Under the Sherman Act*, 12 Hous. L. REV. 1052, 1053 (1975).

For examples of the broad application given other commerce clause statutes, see, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

of the Act.<sup>12</sup> It is, therefore, up to the courts to decide, in the first instance, whether the facts permit the exercise of jurisdiction under the commerce clause.<sup>13</sup>

This Note will discuss first the traditional tests of Sherman Act jurisdiction, particularly in light of the landmark decision of the Supreme Court in *Goldfarb v. Virginia State Bar*.<sup>14</sup> After examining the case-by-case application of each test to real estate brokerage and local board activities, the Note will conclude that Sherman Act jurisdiction should be sustained in most cases involving charges of either price fixing or unreasonable exclusion from board membership.

## I. BACKGROUND: THE TRADITIONAL TESTS FOR SHERMAN ACT JURISDICTION

### A. "In Commerce" versus "Affecting Commerce."

The courts have developed two major standards to determine whether the requisite nexus exists between the complained-of activity and interstate commerce: the *in commerce* and the *affecting commerce* tests.<sup>15</sup> Under the *in commerce* test, the court is required to find that the alleged restraint of trade occurred within the flow of interstate commerce.<sup>16</sup> The *affecting commerce* test requires that the complained-of activity, though wholly intrastate in nature, be found to have affected interstate commerce substantially.<sup>17</sup>

12. *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 524 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). Where Congress has made such a determination, only a rational basis for the finding is necessary to support it. 472 F.2d at 524. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 154 (1978).

13. *Rasmussen v. American Dairy Ass'n*, 472 F.2d at 524.

14. 421 U.S. 773 (1975).

15. A plaintiff may rely on either test to sustain jurisdiction. The modern statement of these tests first appeared in *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954); *see Eiger, The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282, 286 (1965); *Confusing World* 728.

16. This is the narrower of the two tests, since the "flow of commerce" notion has been rather restrictively interpreted by the courts. *See Eiger, supra* note 15, at 287.

17. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d at 739.

In application, it is often unclear just which standard is being employed. *See* text accompanying notes 44-61 *infra*. Indeed, it has been suggested that there is no historical basis or need for requiring two alternative grounds for establishing the interstate commerce element under the Sherman Act:

The entire distinction between an "in" commerce and "affect" commerce situation is apparently dependent upon when the interstate journey begins and ceases. A violation which occurs before the interstate [movement] begins or after it has halted is covered by the Act only if it "affects" commerce. But, by stretching the length of the interstate movement, one can bring an "affect" transaction on either end of the journey into the flow of commerce as an "in" commerce offense. Thus, the distinction depends not upon the locale of the violation, but upon how far the court is willing to expand the conceptual entity known as the flow of commerce.

Under both the *in commerce* and the *affecting commerce* tests, it is necessary to show some adverse impact on interstate commerce.<sup>18</sup> Thus, a two-step approach should be utilized in analyzing jurisdiction under either test. The conduct complained of should first be characterized as either *in* or *affecting* commerce. Second, the analysis should address the adverseness of the alleged impact. The test for demonstrating this adverseness is qualitative. Once the nature of the impact is shown to be detrimental to commerce, the adverseness requirement is met regardless of the amount of interstate commerce the complained-of conduct actually involved.<sup>19</sup>

Characterization of conduct as “in commerce” and a qualitative finding of adverseness are sufficient to establish Sherman Act jurisdiction under the *in commerce* test. However, an additional finding is required for conduct characterized as merely “affecting commerce.” In that situation, the substantiality of the conduct must also be judged *quantitatively*. That is, the court must initially find that a substantial amount of interstate commerce is affected by the admittedly intrastate activity;<sup>20</sup> the court then will make a determination as to the qualitative impact or effect of the acts.

One may logically question whether there is any practical distinction between the two tests.<sup>21</sup> The difference between an *in commerce* and an *affecting commerce* categorization, however, may be crucial in some cases, especially those involving so called per se violations of the antitrust laws. If a per se violation, like price fixing, is alleged, an adverse effect upon commerce will be presumed as a matter of law.<sup>22</sup> If this violation can be said to have occurred within the flow of interstate commerce, the plaintiff<sup>23</sup> need go no further in carrying his jurisdic-

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Eiger, *supra* note 15, at 286-87. The author goes on to state that if the *Las Vegas* dichotomy has any validity, it is in those cases in which the object of the violation has never moved in interstate commerce, but the impact of the violation affects the flow of commerce in another related product. These would be the only true “affect” situations. *Id.* 287. Whatever the historical justification, it is clear that the overwhelming majority of courts continue to utilize this dual approach to jurisdiction.

18. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d at 739 n.3.

A plaintiff cannot establish jurisdiction under the Sherman Act simply by demonstrating that the acts complained of affect a *business* that is engaged in interstate commerce. Rather, the plaintiff must show that the complained-of conduct adversely affects the *interstate commerce* of that business. *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

19. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d at 739 n.3.

20. See text accompanying notes 31-35 & 120-23 *infra*.

21. See note 17 *supra*.

22. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d at 748 n.9; see, e.g., *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1190-93 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

23. The term “plaintiff” as used here is interchangeable with “government” where the Justice Department has initiated the action. The interstate commerce element of jurisdiction is applicable

tional burden.<sup>24</sup> However, if the complained-of activity is purely local in nature and merely *affects* interstate commerce, the plaintiff will first be required to demonstrate that the conduct affects a substantial amount of interstate commerce.<sup>25</sup>

The case of *Las Vegas Merchant Plumbers Association v. United States*<sup>26</sup> illustrates this distinction. The government argued that price fixing at any level of commerce necessarily had a substantial adverse impact on interstate commerce, and that the law presumed such an impact. In response to the argument, the court stated:

Assuming an "in commerce" situation, we can agree. But when the "affect" on commerce theory is presented, it is clearly a question of fact whether wholly intrastate activities affect interstate commerce in a manner proscribed by the Sherman Act. After this question is decided, then the *per se* doctrine may well apply.<sup>27</sup>

The court went on to point out that, under the *in commerce* theory, the question of "substantiality" need not even be presented to the jury.<sup>28</sup>

This method of analysis applies as well to violations that do not fall under a *per se* rule. If the plaintiff is relying on the *affecting commerce* standard, he first must answer the threshold question of whether the complained-of conduct has substantially affected interstate commerce.<sup>29</sup> Only then can he address himself to the adverseness of that effect.<sup>30</sup>

Determining just how much interstate commerce must be affected before the effect can be deemed substantial is likely to be a critical point of inquiry under the *affecting commerce* test.<sup>31</sup> Some courts and

in either case. See, e.g., *United States v. Jack Foley Realty, Inc.*, [1977-2] Trade Cas. ¶ 61,679, at 72,786-87 (D.C. Md.).

24. "If a *per se* violation is involved and if the restraint does occur within the flow of interstate commerce, then the test is qualitative . . . and there need be no evidentiary showing of a *substantial* effect . . ." *Cook v. Ralston Purina Co.*, 366 F. Supp. 999, 1010 (M.D. Ga. 1973) (emphasis in original).

25. *But see* Austin 1335.

26. 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

27. 210 F.2d at 748.

28. *Id.*

29. "The *per se* doctrine only establishes the unreasonable nature of the restraint; it does not establish that the restraint has substantial interstate impact." *Evans v. S.S. Kresge Co.*, 394 F. Supp. 817, 829 (W.D. Pa. 1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

30. Once it is shown that wholly intrastate activities substantially affect the flow of interstate commerce, the court then determines whether that impact is adverse by applying the same analysis as that used under the *in commerce* test. Similarly, the test is "qualitative"; once any detrimental effect is shown, it is unnecessary to show the degree of harm involved. See text accompanying note 19 *supra*.

31. The question of substantiality as it relates to real estate brokerage activities will be discussed in detail later in this Note. See text accompanying notes 120-23 *infra*. It may be helpful, however, to point out here that an "effect can be 'substantial' under the Sherman Act even if its

commentators have asserted that the quantity of interstate commerce affected is irrelevant in demonstrating the substantiality of the impact of purely local activities on interstate commerce.<sup>32</sup> Much of the case law, however, emphasizes the importance of cumulating the amounts of commerce involved when the *affecting commerce* doctrine is utilized.<sup>33</sup> Indeed, if a qualitative test is employed to demonstrate the substantiality of an effect, it is difficult to understand why courts continue to distinguish between the *in commerce* and *affecting commerce* tests. It would appear in such a case, for example, that any per se offense would violate the Sherman Act, no matter how local the scope of the activity involved.<sup>34</sup> Few courts would be willing to go that far.<sup>35</sup>

Under either test, the courts disregard the distinction between conduct that is "purposely directed" toward interstate commerce and conduct that only "indirectly" affects such commerce.<sup>36</sup> If the defendant's conduct has an impact upon interstate commerce in a manner proscribed by the Sherman Act, jurisdiction will be upheld, whether that impact was by design or not.<sup>37</sup>

A particularly perplexing issue is presented in determining at what point during the litigation the courts should apply the jurisdictional tests. The Sherman Act refers to monopolies and restraints of trade "among the several states."<sup>38</sup> This language both sets the jurisdictional range of the statute and defines the prohibited conduct.<sup>39</sup> Since a burden on interstate commerce is a prerequisite for jurisdiction and an element of the substantive offense, the usually preliminary question of subject matter jurisdiction becomes intermingled with questions on the merits. Some courts have stated that if the complained-of activities *might* have a detrimental effect on interstate commerce (and either the *in commerce* or *affecting commerce* standard is otherwise satisfied), the court will accept jurisdiction.<sup>40</sup> This approach, however, has been

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impact on interstate commerce falls far short of causing enterprises to fold or affecting market price." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 745 (1976).

32. See Austin 1334 and citations listed therein.

33. See, e.g., *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1188-90 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); see text accompanying notes 54-59 & 120-23 *infra*.

34. See text accompanying notes 22-28 *supra*.

35. *But see* *Bryan v. Stillwater Bd. of Realtors*, [1978-1] Trade Cas. ¶ 62,078, at 74,684 (10th Cir. 1977) ("We observe that a price-fixing conspiracy is violative of § 1 of the Sherman Act whether the activity is interstate or intrastate . . .").

36. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. at 744.

37. *Contra*, *Spears Free Clinic & Hosp. v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952) (restraint must be "direct" and not "merely incidental").

38. See note 2 *supra*.

39. *Confusing World* 72A.

40. See, e.g., *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484

much criticized.<sup>41</sup> One court has stated, "[i]t is the rule that in pleading the requisite anticompetitive effect in a federal antitrust suit, there must be some allegation of ultimate facts sufficient to show restraint on interstate commerce."<sup>42</sup> The latter position is more in line with traditional views of the primacy of a court's power to adjudicate.<sup>43</sup>

### B. *Goldfarb v. Virginia State Bar: A Fundamental Change in the Jurisdictional Tests?*

The Supreme Court's opinion in *Goldfarb v. Virginia State Bar*<sup>44</sup> is subject to at least three different interpretations. The Court could have been applying one of the two traditional jurisdictional tests, or it may have adopted "a more ad hoc approach, combining elements from both standards in reviewing the findings of the trial court."<sup>45</sup> Clearly, the Court in *Goldfarb* did not identify the jurisdictional theory being employed. Yet, it appears unlikely that the Court's decision marked any significant departure from the traditional jurisdictional tests.

In *Goldfarb*, the issue was whether the Fairfax County Bar Association's minimum fee schedule for real estate title examinations<sup>46</sup> violated section one of the Sherman Act. Defendants argued that their activities were wholly local and had no substantial effect on interstate commerce. The Court accepted jurisdiction on the ground that the title searches were an "integral part" of a larger *interstate* transaction, that of financing local home purchases.<sup>47</sup> As evidence of the interstate nature of real estate financing, the Court pointed out that "significant portions" of funds for purchases of homes in Fairfax County came from other states, and that many loans on these homes were guaranteed by the Veterans Administration or the Department of Housing and Urban Development.<sup>48</sup>

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F.2d 751, 758 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974); *Gateway Assoc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089, 1093 (N.D. Ill. 1974).

41. "The law of this Circuit now seems to require the district courts to try antitrust cases on the merits before they may determine whether they even have the jurisdiction or power to do so. Obviously, this makes little sense and adds to the burgeoning caseload of the district courts." *Gateway Assoc. v. Essex-Costello, Inc.*, 380 F. Supp. at 1094.

42. *Bryan v. Stillwater Bd. of Realtors*, [1978-1] Trade Cas. ¶ 62,078, at 74,684 (10th Cir. 1977).

43. "The jurisdiction of a court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and determine it at all." 1 W. BAILEY, *THE LAW OF JURISDICTION* 2 (1899).

44. 421 U.S. 773 (1975).

45. *Confusing World* 742.

46. According to Virginia law, the title exams could be performed only by members of the Virginia State Bar. 421 U.S. at 775.

47. *Id.* at 784.

48. *Id.* at 783.

*Goldfarb* can be interpreted as an *in commerce* case, holding that Virginia lawyers provided services in the flow of commerce. Such an interpretation may seem conceptually awkward, since services are intangible and the tendency is to think only in terms of "goods" moving in commerce.<sup>49</sup> However, there is nothing innovative in the notion that intangibles like services are capable of moving and being restrained in the flow of interstate commerce.<sup>50</sup> In *Associated Press v. United States*,<sup>51</sup> for example, it was successfully argued that the interstate movement of "news" had been restrained as a result of the defendant's anticompetitive conduct. Indeed, in its antitrust complaints against state bar associations, the Justice Department has adopted the view that the services of lawyers are in interstate commerce.<sup>52</sup>

The *Goldfarb* decision is also susceptible to an *affecting commerce* interpretation. This analysis places heavy stress on the Court's statements that the title searches performed by attorneys were "an integral part" of an underlying interstate transaction.<sup>53</sup> Thus, the legal services could be viewed as entirely intrastate, but with substantial impact upon interstate commerce.

One commentator has declared that under an *affecting commerce* interpretation, "the requirement of a proven substantial quantitative effect . . . is no longer significant. . . . After *Goldfarb*, interstate commerce need scarcely *feel* the 'pinch' to trigger jurisdiction."<sup>54</sup> This argument may confuse the requirement that the complained-of activities affect a substantial amount of interstate commerce with the further requirement that the local activities be shown to have had an adverse effect on commerce.<sup>55</sup> The test for the latter requirement is qualitative,<sup>56</sup> and was satisfied in *Goldfarb* by the mere fact that the alleged

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49. Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164, 1181.

50. See Austin 1334 n.62 and citations therein.

51. 326 U.S. 1 (1945).

52. See Comment, *supra* note 49, at 1182-83, where the author refers to one such complaint filed against the Oregon State Bar in which the Justice Department urged that the activities of the bar and its members were "within the flow of interstate commerce." The author goes on to say, however, that "the assumption that legal services are not in the flow of commerce is probably a sound one." *Id.* 1182.

53. See text accompanying note 47 *supra*.

54. Note, *The Shifting Jurisdiction of the Antitrust Laws*, 33 WASH. & LEE L. REV. 181, 192 (1976) (emphasis in original). The author was obviously referring to the often quoted remark from *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949): "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 464.

55. See text accompanying notes 22-35 *supra*.

56. See text accompanying note 19 *supra*.



misconduct was price fixing, a per se violation.<sup>57</sup> The Court had already gone through the analysis of finding a substantial quantitative impact on interstate commerce. The presence of "significant portions" of out-of-state mortgage funds and federal loan guarantees,<sup>58</sup> along with the "substantial volume of commerce involved,"<sup>59</sup> had satisfied this quantitative test.

A third possible interpretation of *Goldfarb* suggests that the showing of an adverse effect on commerce arising from the alleged misconduct is no longer required. "[I]f *Goldfarb* is considered an 'affecting commerce' case, the Court has apparently decided to define the words 'affecting commerce' to mean 'have a connection with commerce.' Under this interpretation, the only allegation required . . . would be a connection with a substantial amount of interstate commerce."<sup>60</sup> While the Court may have intended to abolish the "adverse impact" requirement, it is difficult to see how *Goldfarb* can be cited in support of such a proposition, since, as already stated, *Goldfarb* involved a per se violation in which the adverse effect would be presumed.<sup>61</sup>

Thus, though the Supreme Court may have been somewhat lenient in applying the traditional tests to the factual setting in *Goldfarb*, it was not necessarily ignoring the tests altogether or even significantly altering them. The remainder of this Note is based on the assumption that the *Goldfarb* decision left the existing jurisdictional standards relatively intact.

## II. THE ACTIVITIES OF LOCAL BOARDS UNDER THE "IN COMMERCE" THEORY

Courts have traditionally viewed real estate brokerage as a purely local activity.<sup>62</sup> This view was supported by the propositions that land is an immobile resource that restricts the range of the broker's activities, that brokers are licensed under state laws to perform only intra-state services, and that the real estate sale itself must be consummated according to the law of the situs of the property.<sup>63</sup> These arguments can be countered with the assertion that real estate brokers do not sell

57. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782-83 (1975) (the Court stressed this was a "classic illustration of price fixing"). See note 29 *supra* and accompanying text.

58. See text accompanying note 48 *supra*.

59. 421 U.S. at 785.

60. *Confusing World* 744 (footnote omitted).

61. See text accompanying notes 55-57 *supra*.

62. As one court pointed out in 1964, no case could be cited at that time holding that dealing in real estate was commerce among the states. *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850, 854 (E.D. Mich. 1964).

63. Austin 1332. "Real property is itself the quintessential local product." *McLain v. Real*

“real estate” as such—rather, they sell a service that “utilizes interstate media and facilitates interstate movement.”<sup>64</sup>

The Supreme Court’s landmark decision in *Goldfarb v. Virginia State Bar*<sup>65</sup> has caused a number of courts to reevaluate the traditional position of real estate brokerage under the *in commerce* theory of Sherman Act jurisdiction.<sup>66</sup> Given the significant interstate aspects of modern real estate brokerage, this reevaluation is justified.

Certainly, the Court in *Goldfarb* never indicated expressly that real estate *brokerage* activities are within the flow of commerce, though it did make reference to the “interstate aspects of real estate transactions.”<sup>67</sup> Instead, the thrust of the Court’s holding was that real estate *financing* is interstate in nature.<sup>68</sup> Nonetheless, some courts appear to have read *Goldfarb* as implying that real estate brokerage is in interstate commerce.<sup>69</sup>

In *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*,<sup>70</sup> plaintiffs claimed that their unreasonable exclusion from membership in the local board was a violation of the Sherman Act. They based their case entirely on the assertion that the board’s activities were *in* interstate commerce, and presented no evidence that the defendant’s activities had a substantial effect on interstate commerce. The court dismissed for lack of jurisdiction, but was careful to point

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Estate Bd. of New Orleans, Inc., 583 F.2d 1315, 1319 (5th Cir. 1978), *cert. granted*, 99 S. Ct. 2159 (1979).

64. Graybeal 858.

65. 421 U.S. 773 (1975). See text accompanying notes 44-52 *supra* for a discussion of the *Goldfarb* jurisdictional test.

66. Note that at least one pre-*Goldfarb* case can be cited in which a federal court held real estate brokerage activities to be within the flow of interstate commerce. In *Mazur v. Behrens*, [1974-1] Trade Cas. ¶ 75,070, at 96,787 (N.D. Ill. 1972), the court ruled that members of a local board had “voluntarily entered interstate commerce and are subject to the laws governing such activities.” *Id.* at 96,788. The court cited as evidence of the interstate nature of the defendants’ business activities the fact that 40% or more of the sales of some defendants were to out-of-staters, and many defendants advertised and solicited customers outside Illinois. *Id.* (the plaintiffs were relying upon the *per se* rule to establish the requisite detrimental effect on interstate commerce; see text accompanying notes 22-28 *supra*).

67. 421 U.S. at 785.

68. See text accompanying notes 47-48 *supra*. The real estate broker’s primary function is to place buyer and seller in contact with one another in an effort to consummate a sale. Thus, the actual financing of the purchase may be considered outside the broker’s responsibility. However, brokers often serve as essential informational and referral conduits to lenders.

69. These courts appear to have analogized the position of the lawyers in *Goldfarb* to that of real estate brokers. Brokerage may also be an “integral part” of an interstate transaction. However, that still does not mean that real estate brokerage is necessarily *in* commerce. Under this analogy, *Goldfarb* may stand for the proposition that brokerage merely affects an interstate transaction. One can speculate, however, that *Goldfarb*’s reference to an “integral part” of an interstate transaction was an application of the “flow of commerce” standard.

70. 521 F.2d 1343 (8th Cir. 1975).

out the "limited nature" of its holding.<sup>71</sup> It stressed that the plaintiffs' only evidence as to the interstate character of the board's services consisted of a showing that five out-of-state persons (out of a survey of sixteen percent of the board's listings over a three-year period) bought property through the board's Multiple Listing Service (MLS).<sup>72</sup> The court then stated:

In the instant case, the plaintiffs offered no evidence such as that in *Goldfarb* that a "significant portion" (or indeed *any*) of the funds underlying these real estate transactions came from outside Iowa. Whereas in *Goldfarb* the federal government had guaranteed many of the loans made in Virginia, the plaintiffs in this case produced no evidence showing any guarantee of these loans by an out-of-state agency. Furthermore, plaintiffs introduced no evidence of any other interstate commercial aspect to these transactions, such as interstate advertising.<sup>73</sup>

The court concluded with the statement that brokerage services might, depending upon the evidence presented, constitute interstate activities.<sup>74</sup>

The court in *Oglesby & Barclift, Inc. v. Metro MLS, Inc.*<sup>75</sup> also arguably read *Goldfarb* as indicating that real estate brokerage is an interstate activity. It is not clear, however, whether the *Oglesby* court was citing *Goldfarb* for its *in commerce* or for its *affecting commerce* implications. The court stated that the business of the MLS, which was run by the local board, "clearly involved interstate commerce."<sup>76</sup> The court then went on to cite the factors that were instrumental in the finding of this interstate "involvement." Among these were the *Goldfarb* factors concerning federally insured loans and out-of-state mortgage funding, along with evidence of interstate advertising, membership in national referral organizations,<sup>77</sup> and sales to a "substantial number" of out-of-staters.<sup>78</sup> Whether or not the court was relying on *Goldfarb* to support its finding, it is clear that the court felt the activities of the MLS and its members "were within the flow of interstate commerce and had a sub-

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71. *Id.* at 1347.

72. *Id.* at 1345. See note 1 *supra* and accompanying text for a discussion of the functioning of the MLS.

73. 521 F.2d at 1346-47 (emphasis in original). Note that the same kind of evidence that a plaintiff would rely on to demonstrate a "substantial effect" on commerce was cited by this court as evidence under the "in commerce" test.

74. *Id.* at 1347.

75. [1976-2] Trade Cas. ¶ 61,064, at 69,795 (E.D. Va.).

76. *Id.* at 69,797 (emphasis added).

77. See notes 85-86 *infra* and accompanying text for a discussion of the functioning of national referral systems.

78. [1976-2] Trade Cas. ¶ 61,064, at 69,797 (E.D. Va.).

stantial effect upon interstate commerce.”<sup>79</sup>

On the other hand, some courts have steadfastly refused to read *Goldfarb* as indicating that real estate brokerage is an interstate transaction.<sup>80</sup> The district court in *McLain v. Real Estate Board of New Orleans, Inc.*<sup>81</sup> rejected the arguments that national relocation service activities and interstate financing of home purchases either place real estate brokerage *in* interstate commerce or substantially *affect* such commerce.<sup>82</sup> It distinguished the holding in *Goldfarb* by asserting that “the actual financing process involves only the lender and borrower and the brokerage service is in no way an integral aspect thereof.”<sup>83</sup>

On balance, the sounder view is that real estate brokerage is an interstate activity, at least where brokers engage in sales to nonresidents, secure FHA-VA loans for their customers, advertise nationally, and participate in national referral systems.<sup>84</sup> National advertising and referral system activities, in particular, should inject local real estate brokers into the flow of interstate commerce. It is patently unreasonable for a local broker to solicit business nationwide and then complain because his activities have been subjected to regulation under the commerce power. National referral systems operate by allowing a local broker to participate in the sale of real property hundreds or thousands

79. *Id.*

80. See Note, *supra* note 54, at 188-89, where the author states that *Goldfarb* made the *affecting commerce* doctrine applicable to “the entire real estate purchase.” See also Comment, *supra* note 49, at 1182, where the author asserts that *Goldfarb* probably did not stand for the notion that legal services are *in commerce*. (The analogy between the positions of attorneys and real estate brokers is discussed in the text accompanying notes 109-10 *infra* and at note 69 *supra*.)

81. 432 F. Supp. 982 (E.D. La. 1977), *appeal dismissed*, 583 F.2d 1315 (5th Cir. 1978), *cert. granted*, 99 S. Ct. 2159 (1979). Plaintiffs in *McLain* alleged that board members had conspired to fix prices, a per se violation.

82. 432 F. Supp. at 983 n.3. See text accompanying notes 114-19 *infra* for a discussion of *McLain* and the *affecting commerce* doctrine.

83. 432 F. Supp. at 984. The court found practically no significance in the national relocation service affiliations of member brokers. *Id.* at 983 n.3.

The court in *United States v. Greater Syracuse Bd. of Realtors, Inc.*, 449 F. Supp. 887, 897 (N.D.N.Y. 1978), directly challenged the holding in *McLain*, although it declined to discuss the price-fixing allegations under the *in commerce* theory, having already established jurisdiction under the *affecting commerce* standard. The court clearly implied, nonetheless, that a good case could be made for the assertion that brokerage activities are *in* interstate commerce. (For example, the court acknowledged that the Supreme Court in *Goldfarb* had “regarded the underlying real estate transactions as being frequently interstate in nature.” *Id.* at 891.) Interestingly, the Justice Department in *Syracuse* made no allegations of any interstate advertising or financing activities. *Id.* at 897-98. The lack of these factors may have prompted the court to rely on the *affecting commerce* theory alone.

For a critique of the *McLain* court’s analysis of the broker’s role in the financing process see text accompanying notes 87-88 *infra*.

84. These factors will usually be available to a plaintiff who wishes to allege that sales by members of a local board are *in commerce*. Graybeal 858.

of miles away. This is accomplished by having one broker refer a client who is moving out-of-state to a broker in the destination area. The destination broker consummates the sale, but the referring broker shares in the commission.<sup>85</sup> These relocation or referral systems are often as farflung nationally as the most successful fast food chain.<sup>86</sup> It seems ridiculous to deny their interstate character.

Further, the approach taken by the *McLain* court, attempting to separate the broker's function in bringing the buyer and seller together from his function as an informational source for his clients on financing and related matters, serves only to ignore the broker's full role in the purchasing process. "Because brokers are the primary contact with the real estate market for most home buyers, their clients often rely on them to provide other information about the home buying process."<sup>87</sup> The broker is often responsible for referring purchasers to particular lenders. His role in the sales transaction is not essentially complete until the purchaser closes his loan and the broker receives his commission check.<sup>88</sup>

One authority has summed up the whole *in commerce* dilemma as it relates to real estate brokerage as follows:

The issue involves an interesting dichotomy. The object of the transaction, the land itself, is clearly within intrastate commerce; yet the transaction by which the interest in the object is conveyed clearly has interstate dimensions. . . . Focusing on the transaction rather than its object is more consistent with expanded Sherman Act applicability and such an approach has in fact been the basis of the government's complaints filed against the various real estate boards.<sup>89</sup>

The trend in favor of finding real estate boards subject to the Sherman Act under either of the traditional jurisdictional theories is perhaps best exemplified by the large number of consent decrees entered in these cases.<sup>90</sup> Indeed, it has been stated that it "has almost [been]

85. See *United States v. Greater Syracuse Bd. of Realtors, Inc.*, 449 F. Supp. 887, 895 (N.D.N.Y. 1978) for a discussion of the mechanics and significance of these relocation systems.

86. REVIEW, November 1978, at 24 (advertisement stating that a "nationwide computerized relocation service" has "1100 coast to coast offices").

87. Owen, *supra* note 1, at 944.

88. *Contra*, *McLain v. Real Estate Bd. of New Orleans, Inc.*, 432 F. Supp. at 985. It should be noted that on appeal the Fifth Circuit did take notice of the broker's "informational" role in the financing process, although it accepted the district court's characterization of this role as merely "incidental" to interstate commerce. 583 F.2d at 1322-23.

89. Dunfee, *Sherman Act Applicability to Real Estate Boards*, 10 AM. BUS. L.J. 139, 142 (1972).

90. See, e.g., *United States v. MLS*, [1972] Trade Cas. ¶ 74,221 (D. Ore.); *United States v. Long Island Bd. of Realtors, Inc.*, [1972] Trade Cas. ¶ 74,068 (E.D.N.Y.); *United States v. Cleveland Real Estate Bd.*, [1972] Trade Cas. ¶ 74,020 (N.D. Ohio); *United States v. Atlanta Real Estate Bd.*, [1972] Trade Cas. ¶ 73,787 (N.D. Ga.); *United States v. Prince George's County Bd. of Realtors, Inc.*, [1971] Trade Cas. ¶ 73,393 (D. Md. 1970).

established through consent decrees that the activities of real estate boards are in commerce or trade and that these activities are substantial . . . ."<sup>91</sup>

Despite such broad pronouncements, a mere finding that the complained-of conduct occurred *in commerce* will not alone sustain jurisdiction. The plaintiff must still demonstrate that the defendant's activities adversely affected interstate commerce.<sup>92</sup> A court may reject Sherman Act jurisdiction on this latter ground whether or not it admits the interstate nature of the activities involved.<sup>93</sup>

*Cotillion Club, Inc. v. Detroit Real Estate Board*<sup>94</sup> dealt with allegations that the defendant brokers had conspired to exclude Negro brokers from membership in the local board and to segregate neighborhoods by race. As evidence of the interstate nature of the defendant's conduct, the plaintiffs pointed out that members of the board had made sales to purchasers obtaining FHA and VA loans, that the members had filed the necessary forms with federal agencies to secure these loans, and that members had made sales to out-of-state buyers. Although the court indicated that a number of defects were present in the plaintiffs' complaint, the principal difficulty appeared to be that no adverse effect was demonstrated. "The critical question is whether the alleged restraints are operative in interstate commerce, and not whether the defendants' members engage, in the overall conduct of their business, in incidental activities across state lines."<sup>95</sup>

It will often be difficult to establish a connection between the defendant's activities and some injury to interstate commerce, especially where no per se violation has been alleged. However, the reasoning of

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91. Epley & Parsons, *Real Estate Transactions and the Sherman Act: How to Approach an Antitrust Suit*, 5 REAL EST. L.J. 3, 6 (1976).

92. See note 18 *supra* and text accompanying notes 18-19 *supra*. The consent decrees cited in note 90 *supra* all involved price-fixing allegations, thereby obviating any need to make a showing of adverseness. Complaints brought against local boards by the Justice Department almost always attack rate fixing. Private plaintiffs, on the other hand, usually claim unreasonable exclusion from board membership. Graybeal 858-59.

See text accompanying notes 22-28 *supra* for a discussion of price fixing allegations and the adverseness requirement.

93. See, e.g., *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, [1978-1] Trade Cas. ¶ 62,079 (10th Cir.); *Bryan v. Stillwater Bd. of Realtors*, [1978-1] Trade Cas. ¶ 62,078 (10th Cir. 1977); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 432 F. Supp. 982 (E.D. La. 1977), *appeal dismissed*, 583 F.2d 1315 (5th Cir. 1978), *cert. granted*, 99 S. Ct. 2159 (1979); *Marston v. Ann Arbor Property Managers Ass'n*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970).

94. 303 F. Supp. 850 (E.D. Mich. 1964).

95. *Id.* at 853. However, even if the plaintiff had been able to demonstrate a connection between the alleged activities of the brokers and some harm to interstate commerce, the court was unwilling to consider the brokers' activities *in commerce*. The court felt that "except for incidentals, the activities are local and intrastate." *Id.* at 854.

the court in *Cotillion Club* that no such connection existed may have little present significance, at least with regard to the charges that the defendant brokers had conspired to segregate housing patterns by race. The congressional determination that racial segregation in the distribution of services to the public has a detrimental impact on interstate commerce has become clear since the *Cotillion Club* decision was handed down.<sup>96</sup> Though the court is the factfinder in determining whether interstate commerce has been sufficiently affected for Sherman Act purposes,<sup>97</sup> there appears to be no valid reason for ignoring the very strong expression of congressional purpose contained in other commerce clause legislation.<sup>98</sup>

The court in *Bryan v. Stillwater Board of Realtors*<sup>99</sup> followed the *Cotillion Club* analysis. In *Bryan*, the plaintiff had also been excluded from membership in the board, though not for any racially motivated reason. He cited the same factors concerning the board's interstate activities that other Sherman Act plaintiffs have relied upon in these cases. The court sustained a dismissal for lack of subject matter jurisdiction on the grounds that "nothing contained in Bryan's complaint does other than indicate that the acts complained of affect a business engaged in interstate commerce."<sup>100</sup> The court indicated that had price fixing been alleged it would have upheld jurisdiction.<sup>101</sup>

The *Bryan* case was relied upon in the most recent Sherman Act case involving brokerage activities, *Income Realty & Mortgage v. Denver Board of Realtors*.<sup>102</sup> The plaintiff's complaint accused board members of trying to undermine his real estate business. The plaintiff's evidence relating to the interstate nature of the defendant's conduct was limited to the conclusory statement that they were "engaged in the interstate brokerage of real estate."<sup>103</sup> However, the trial court dis-

96. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

97. See text accompanying note 12 *supra*.

98. Indeed, the 1968 Civil Rights Act, 42 U.S.C. § 3606 (1976), is itself a possible remedy for exclusion from board membership on account of race. Austin 1330 n.41.

99. [1978-1] Trade Cas. ¶ 62,078, at 74,681 (10th Cir. 1977).

100. *Id.* at 74,686.

101. *Id.* at 74,684.

The *Bryan* case is especially interesting for its unusual interpretation of *Goldfarb*. The court stated:

We observe that a price-fixing conspiracy is violative of § 1 of the Sherman Act whether the activity is interstate or intrastate in character. Significantly, in *Goldfarb v. Virginia State Bar* the Supreme Court held that § 1 of the Sherman Act was violated by the strictly intrastate activity of the State Bar . . . because it constituted a classic example of price fixing.

*Id.* at 74,684 (emphasis added) (citations omitted).

102. [1978-1] Trade Cas. ¶ 62,079, at 74,686 (10th Cir.).

103. *Id.* at 74,688 (quoting plaintiff's complaint).

missed the complaint without leave to amend. Under the Federal Rules such a dismissal must be regarded as a finding by the court that the complaint, even if well pleaded, would not state a valid claim under the Sherman Act.<sup>104</sup> The court clearly felt that the plaintiff would be unable to show any "adverse effect or impact" on interstate commerce arising from the defendant's conduct.<sup>105</sup>

Thus, in most cases the plaintiff should be able to establish that real estate brokerage is *in* interstate commerce, at least as carried on in the more sophisticated marketing areas. However, in non-per se violation cases the plaintiff often will have a difficult burden to carry in demonstrating that the brokers' activities in interstate commerce had some adverse effect on that commerce. This problem of demonstrating an adverse effect will be further developed in the discussion that follows on the *affecting commerce* doctrine.<sup>106</sup>

### III. THE ACTIVITIES OF LOCAL BOARDS UNDER THE "AFFECTING COMMERCE" THEORY

The fact that purely intrastate activities can be reached by the proscriptions of the Sherman Act differentiates the Act from other federal antitrust statutes.<sup>107</sup> "The jurisdictional reach [of the Sherman Act] . . . is keyed directly to *effects* on interstate markets and the interstate flow of goods."<sup>108</sup>

Some courts have seized upon *Goldfarb* to support the view that the activities of real estate brokers may *substantially affect* interstate commerce. For example, in *United States v. Greater Syracuse Board of Realtors, Inc.*,<sup>109</sup> the court analogized the position of the defendant real estate brokers to that of the attorneys in *Goldfarb*. "[I]n both cases, the services of an attorney (*Goldfarb*) or a real estate broker (the present case) are necessary for the movement of certain monies in interstate

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104. *Id.* (Logan, C.J., concurring and dissenting). See FED. R. CIV. P. 12(b)(6).

105. [1978-1] Trade Cas. ¶ 62,079, at 74,688. The court also felt that the activities of the defendants were purely local in nature. *Id.* As noted above, this view is difficult to support after *Goldfarb*. See text accompanying notes 84-93 *supra*.

106. See text accompanying notes 127-37 *infra*.

107. "The Sherman Act is commonly referred to as an 'effect' commerce statute, as opposed to federal legislation such as the Clayton Act which operates upon actions and events which occur 'in' commerce." Eiger, *supra* note 15, at 282.

108. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (emphasis added). "Congress apparently wishes to emphasize the effect-on-commerce test, at least in another antitrust area, because it recently extended the jurisdiction of the Federal Trade Commission from matters 'in commerce' to matters 'in or affecting commerce.'" Furgeson, *supra* note 11, at 1068 (citing the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201, 88 Stat. 2183 (1975) (amending 15 U.S.C. §§ 45, 46(a)(b), 52 (1970))).

109. 449 F. Supp. 887 (N.D.N.Y. 1978). See note 83 *supra*.



commerce."<sup>110</sup> The court went on to say that the alleged price fixing would, "to some extent," also affect the interstate movement of people and federally guaranteed mortgages.<sup>111</sup>

One commentator has stated, "[t]he Court [in *Goldfarb*] ruled that the interstate origin of the investment capital and the federal mortgage guarantees placed the entire real estate purchase within the bounds of the 'affecting commerce' doctrine."<sup>112</sup> If such be the case, then the doctrine is applicable to nearly every real estate board in the country.<sup>113</sup>

Not every court has been willing to apply this interpretation of *Goldfarb* to real estate brokerage, however. In *McLain v. Real Estate Board of New Orleans, Inc.*,<sup>114</sup> a price-fixing case, the court not only refused to read *Goldfarb* as indicating that brokerage was *in commerce*, but also refused to recognize any *affecting commerce* implications from the case.<sup>115</sup> By contrast, the court in *Greater Syracuse Board of Realtors, Inc.*<sup>116</sup> sustained jurisdiction in a case where the government's jurisdictional averments did not include any allegations of interstate mortgage funding or advertising.<sup>117</sup> The court felt that "the interstate movement of a substantial amount of money in the form of referral commissions and relocation service commissions [was] . . . particularly significant in establishing a sufficiently substantial effect upon interstate commerce . . . ."<sup>118</sup> The *McLain* court had rejected this same argument.<sup>119</sup>

The *Syracuse* case demonstrates that the quantity of interstate commerce that the defendant's conduct has affected is crucial in determining whether or not the *substantial effect* test has been met. Courts often go through a process of adding up effects in order to meet the test.

110. 449 F. Supp. at 896.

111. *Id.* However, the court felt that these latter factors, standing alone, would not show sufficient nexus with interstate commerce to sustain jurisdiction.

112. Note, *supra* note 54, at 188-89.

113. As evidence of the pervasive use of federal loan programs, it is noted that of the total mortgages outstanding in the United States in 1964, some 35% were government underwritten. S. MAISEL, FINANCING REAL ESTATE 98 (1965).

114. 432 F. Supp. 982 (E.D. La. 1977), *appeal dismissed*, 583 F.2d 1315 (5th Cir. 1978), *cert. granted*, 99 S. Ct. 2159 (1979). See text accompanying notes 80-88 *supra*.

115. For a discussion of the court's rather narrow basis for distinguishing *Goldfarb*, see note 83 *supra* and accompanying text.

116. 449 F. Supp. 887 (N.D.N.Y. 1978).

117. The government's allegations in support of jurisdiction included only one of the *Goldfarb* factors, that concerning government-insured loans. Other allegations referred to sales to residents of other states and participation in national referral services. *Id.* at 894. No explanation was given for the government's failure to allege the presence of interstate mortgage funding or advertising. It seems likely that such allegations would have been available in a prosecution involving an urban board.

118. *Id.* at 895.

119. 432 F. Supp. at 983 n.3.

In *Oglesby & Barclift, Inc. v. Metro MLS, Inc.*,<sup>120</sup> a case in which jurisdiction was upheld under both tests, the court based its decision on the fact that twenty-five to thirty percent of the financing obtained on member brokers' sales was insured under the VA and FHA programs, that "significant amounts" of mortgage loan sources came from out-of-state, that members' sales were affected "to a significant degree" by referrals from national relocation services, that twenty to twenty-five percent of the sales made by local brokers were to members of the armed forces moving into or out of the state, and that members "advertised in media circulated widely" outside the state.<sup>121</sup>

How much effect on interstate commerce must be demonstrated before the effect will be deemed substantial can be determined only on a case-by-case basis.<sup>122</sup>

The concept of interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Therefore, the courts have eschewed the use of abstract mechanistic formulae in determining whether a particular course of conduct substantially affects interstate commerce.<sup>123</sup>

It would seem safe to say, nonetheless, that real estate board activities, especially in metropolitan areas, do sufficiently affect interstate commerce so that they "cannot be classified as immune from all anti-trust claims."<sup>124</sup> The real estate business in urban areas has become so sophisticated that involvement in interstate commerce can hardly be avoided. As the court in *United States v. Jack Foley Realty, Inc.*<sup>125</sup> noted: "This is not a case in which two real estate brokers in a small rural community, who advertise only in a local newspaper, who do not belong to any national or regional listing services, and who leave arrangements of financing to lending institutions are charged with fixing commission rates."<sup>126</sup>

120. [1976-2] Trade Cas. ¶ 61,064 (E.D. Va.). See text accompanying notes 75-79 *supra*.

121. [1976-2] Trade Cas. ¶ 61,064, at 69,797.

An obvious preoccupation with quantity was also exhibited in *United States v. Jack Foley Realty, Inc.*, [1977-2] Trade Cas. ¶ 61,678 (D. Md.). There, the government charged that six real estate brokerage companies and three individuals had conspired to fix commission rates in violation of the Sherman Act. The court found that the defendant's activities had substantially affected interstate commerce in that their combined real estate sales were "valued in the millions of dollars during a twenty-two month period [and] . . . a substantial number of purchasers were persons moving in or out . . . [of Maryland]." *Id.* at 72,790.

122. *Confusing World* 729.

123. *Evans v. S.S. Kresge Co.*, 394 F. Supp. 817, 830 (W.D. Pa. 1975), *aff'd*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

124. *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, [1978-1] Trade Cas. ¶ 62,079, at 74,689 (10th Cir.) (Logan, C.J., concurring and dissenting).

125. [1977-2] Trade Cas. ¶ 61,678, at 72,785 (D. Md.).

126. *Id.* at 72,791.

However, merely establishing that a defendant's activities have a substantial impact on interstate commerce will not suffice to carry the plaintiff's jurisdictional burden. The plaintiff next faces the same hurdle that is presented in the *in commerce* situation. That is, he must demonstrate that the complained-of activity adversely affects interstate commerce.<sup>127</sup> It has been stated that the finding of this adverse impact is "the focal point of the antitrust laws."<sup>128</sup>

Very few non-per se cases can be cited in which the plaintiff has been able to sustain his burden of proof on the adverseness issue. In *Bratcher v. Akron Area Board of Realtors*,<sup>129</sup> the court held that a complaint charging local board members with conspiring to segregate neighborhoods by race stated a valid claim under the Sherman Act. Unfortunately, the court did not elaborate on the nature of the adverse impact on interstate commerce that it had unearthed.<sup>130</sup>

The court in *Brett v. First Federal Savings & Loan Association*<sup>131</sup> offered considerably more guidance. In that case, a class of mortgagors alleged that the defendant savings and loan associations had violated the Sherman Act by conspiring to enforce illegal "due on sale" clauses in deeds of trust and by requiring new purchasers to agree to renegotiate interest rates on loans before existing mortgages could be assumed. The district court dismissed the complaint without leave to amend. The appellate court reversed, stating:

Although inadequately plead, plaintiffs . . . urge on this appeal at least three adverse effects upon interstate commerce: (1) that interstate movement is unreasonably obstructed by agreements restricting the transfer of equity in property; (2) that one or more of defendants are subsidiaries of multi-state associations; and (3) that defendants' activities affect rental costs of lessees who are only temporarily in the state.<sup>132</sup>

It is not clear whether the approach taken by the court in *Brett* has any application to real estate brokerage, although it has been argued that the exclusion of nonmembers from participating in a local board's MLS program unduly restricts the housing market available to buyers and sellers who choose to deal with nonmember brokers:

The "substantial effect" occurs either when buyers and sellers who

127. See note 18 *supra* and text accompanying notes 18-19 *supra*.

128. Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236, 257.

129. 381 F.2d 723 (6th Cir. 1967).

130. An adverse impact is, of course, necessary under either test. *Cf. Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964) (without explicitly applying either test, the court required a substantial effect on interstate commerce to invoke Sherman Act jurisdiction). See text accompanying notes 114-18 *supra*.

131. 461 F.2d 1155 (5th Cir. 1972).

132. *Id.* at 1157.

intend to cross state lines or have done so use nonmember brokers and as a result are denied the opportunity to purchase property in a market free of artificial imperfections, or when they use member brokers and as a result are foreclosed from the greater sales services available from nonmember brokers.<sup>133</sup>

Under this analysis, the Sherman Act would be violated any time a nonmember was unreasonably excluded from participation in a metropolitan board's MLS. It is doubtful that most courts would accept that position, although several consent decrees have approached such a standard.<sup>134</sup>

Exclusion from participation in the MLS is analogous to the imposition of a boycott against the excluded broker, since in a practical sense he will be precluded from dealing on a regular basis with member brokers.<sup>135</sup> Boycotts are regarded as per se violations of the Sherman Act.<sup>136</sup> Thus, under this analysis, an unreasonable exclusion from participation in a board-run activity, like the MLS, might be considered a per se violation of the antitrust laws. Such a result fits well within the ordinary application of antitrust policy to trade and professional associations. According to usual antitrust principles, "not only must an association open its membership to all competitors in the covered industry, in many cases it must also make association services available to competitors who are not members."<sup>137</sup>

#### IV. CONCLUSION

The courts generally have been reluctant to extend jurisdiction under the Sherman Act to cover the activities of local real estate boards and their members. It is urged in this Note that an understanding of the nature of modern real estate brokerage and due regard for recent developments in the case law would condemn this reluctance.

Real estate brokerage activities, at least as carried on in urban areas, should fall within the ambit of either the *affecting commerce* or the *in commerce* test. The sale of real estate in urban areas has become so

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133. Austin 1334.

134. At least two consent decrees have required that MLS membership be offered to all licensed brokers under nonarbitrary and reasonable membership requirements. See *United States v. MLS*, [1972] Trade Cas. ¶ 74,221 (D. Ore.); *United States v. Long Island Bd. of Realtors, Inc.*, [1972] Trade Cas. ¶ 74,068 (E.D.N.Y.).

135. Even if member brokers are in the habit of "cooperating" with nonmembers by allowing them to sell their MLS-listed properties, the nonmember's denial of access to pertinent sales information on the properties makes such cooperation largely meaningless.

136. M. MACARTHUR, *ASSOCIATIONS AND THE ANTITRUST LAWS* 5 (1976). The analogy offered here seems reasonable when the term boycott is defined as "nothing more than an agreement by two or more parties . . . not to deal with a third party." *Id.* 6.

137. *Id.* 36-37.

sophisticated that substantial interstate activity is essential to a successful brokerage enterprise. Such brokers often rely upon interstate advertising and national relocation service affiliation to establish their contacts with out-of-state buyers and sellers. Even in essentially rural areas, a large percentage of sales made by local brokers involve federally insured and out-of-state mortgage funding. Any attempt to separate the broker's purely marketing activities from his role in aiding the purchaser in acquiring the necessary financing and insurance serves only to ignore the local broker's full impact on the real estate sale. The selling agent, through his role as "advisor" to the purchaser, often will be as much a part of the financing transaction as the mortgage broker or the lender.

Having established the necessary connections between the broker's activities and interstate commerce, the plaintiff must deal with the more fundamental problem of connecting the complained-of conduct with some adverse impact on that commerce. The Supreme Court's decision in *Goldfarb* left this latter requirement intact with regard to both of the traditional tests.

This Note urges that the connection between the complained-of activity and an adverse impact on commerce should be sufficiently established any time the alleged misconduct involves either price fixing or unreasonable exclusion from membership in the local real estate board. Price fixing has long been regarded as a per se antitrust offense, in which an adverse effect on commerce is presumed. Unreasonable exclusion from board membership, at least in those cases in which such membership is necessary for participation in the local Multiple Listing Service, is tantamount to the imposition of a boycott against the excluded broker. Since such an exclusion restricts the real estate market available to purchasers who choose to deal with the nonmember broker, the impact of the boycotting activity should be presumed. It is toward such denials to the public of the benefits of free competition that the Sherman Act is directed.

Reasons for the judicial refusal to extend Sherman Act jurisdiction in the manner suggested in this Note range from the fear that federal antitrust enforcement will become too pervasive<sup>138</sup> to the notion that unnecessary preemption of state antitrust laws should be avoided.<sup>139</sup> However, if the sweep of the Sherman Act has indeed become too

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138. See Dunfee, *supra* note 89, at 144 (fear of a "vastly expanded Antitrust Division or highly selective enforcement—an inherently unjust option"); Furgeson, *supra* note 11, at 1053 n.8 (author desires "some limit on the intrusiveness of Sherman Act regulation").

139. See *Marston v. Ann Arbor Property Managers Ass'n*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970).

broad in our highly mobile society, then Congress, and not the courts, should undertake to limit the Act's jurisdiction.

*Happy Ray Perkins*