The Sherman Act and Land: The Interstate Commerce Requirement

It has been demonstrated historically and is true in many countries today that those who control the land end up controlling the country.

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I. INTRODUCTION

Environmental problems often are rooted in the concentrated ownership of land. The concentration of large tracts of land in the hands of a few landholders results in patterns of resource exploitation which have serious ecological implications, yet the concentrated ownership of land has never been subjected to direct legal challenge under the antitrust laws.

The right to own land is deeply embedded in our constitution[2] and hinges on the ability to buy and sell land freely. One commentator has noted "the right to move throughout the country and to buy and sell land in the process is an essential element in the mobility and flexibility our society needs to adjust to the rapid changes of our times."[3]

1. *Hearings on The Effects of Corporation Farming on Small Business Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 199 (1968); *see* Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D.L. REV. 475, 486 (1975).

2. U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."; U.S. CONST. amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *See* Edwards v. California, 314 U.S. 160 (1941); United States v. Guest, 383 U.S. 745 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969) (where the constitutional right to travel was interpreted to mean the right to reside anywhere in the United States).

3. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 315 (1971) [hereinafter cited as BOSSELMAN & CALLIES]. *See also* P. DAVIES, REAL ESTATE IN AMERICAN HISTORY 1-2 (1958):

> Accessibility of land ownership to practically every citizen was a major factor in what brought man to America and what the Revolution was fought for. It determined social conditions in the nation's formative years. It was the biggest single internal economic fact of the time and it necessarily colored political forces.

Undeveloped land is growing scarcer, and people are increasingly aware that the supply of land is limited. Industries now see the scarcity of land as a limiting factor. Wilderness lovers for many years have seen the undisturbed regions gradually shrinking. Inner-city dwellers who wish to leave the city are finding themselves trapped because of the high price of suburban and rural land. Middle-class Americans who want to live in the country and once had a wide choice of location now find the supply of land limited.[4] The scarcity of undeveloped land in many rural areas has resulted in the cities becoming increasingly overcrowded, causing grave environmental problems from people pollution.[5]

At the same time that undeveloped land is growing scarcer, ownership is becoming concentrated in fewer landholders. This growing concentration is reflected in the area of farming. Between 1930 and 1975 the average farm size increased from 151 to 387 acres.[6] In 1930, 30.5 million farmers operated 6.5 million farms,[7] while in 1975 only 8.8 million farmers remained[8] and the total number of farms had dwindled to 2.8 million.[9] This trend apparently will continue, for the Department of Agriculture predicts the number of farms will decline to 1.9 million by 1980.[10]

The problem of the concentration of land ownership has been one of the most written and talked about problems in United States and world history. *See* T. PAINE, *Agrarian Justice*, in 10 THE LIFE AND WORKS OF TOM PAINE 8, 14-15 (VanderWeyde ed. 1925):

> Cultivation is at least one of the greatest natural improvements ever made by human invention. . . . But the landed monopoly that began with it has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, an indemnification for that loss, and has thereby created a species of poverty and wretchedness that did not exist before.

See also GEARY, LAND TENURE AND UNEMPLOYMENT (1925), who contended in 1910 that the cause of unemployment in Britain was labor's inability to get access to land because of land monopoly; H. GEORGE, *Our Land and Land Policy*, in 8 THE COMPLETE WORKS OF HENRY GEORGE (1911); W. CHURCHILL, LIBERALISM AND THE SOCIAL PROBLEM 319 (1909).

4. *See* BOSSELMAN & CALLIES, *supra* note 3, at 315.

5. *See* 118 CONG. REC. 17885 (1972) (statement by Senator Fred Harris at Public Hearing on Land and Resource Monopoly, Los Angeles, California, March 9, 1972).

6. STATISTICAL ABSTRACT OF THE UNITED STATES 1976 at 632, Table No. 1065 (1976).

7. *Id.* at 631-32, Tables No. 1062 & 1065.

8. *Id.* Table No. 1063.

9. *Id.* Table No. 1065.

10. *Hearings on H.R. 11654 Before the Antitrust Subcomm. of the House Comm.*

The resulting mass migration from rural areas is described by a farmers' union official: "The exodus of our farm people . . . has produced economic and social decay in small towns and cities throughout the nation. You can drive almost anywhere in the rural areas and see the results of our failure to weigh social consequences in determining our economic objectives: the weathered, abandoned farmhouse, a curtain flapping through a broken window; the soaped-up plate glass of the store front with the 'closed' sign taped to the door; the weeds standing tall around the vacant service station, and the growing ratio of older people on our main streets. . . ."[11]

on the Judiciary, 92d Cong., 2d Sess., ser. 28, at 40 (1972) (statement of J. Phil Campbell, Under Secretary of Agriculture). In response to this increase in corporate farming and resulting concentration of farm lands, Senators Gaylord Nelson of Wisconsin and James Abourezk of South Dakota twice introduced a bill into Congress entitled the Family Farm Antitrust Act, S. 950, 93d Cong., 1st Sess. (1973) and S. 1458, 94th Cong., 1st Sess. (1975), which would have prohibited persons, *i.e.*, corporations with non-farming business assets of more then $3,000,000, from engaging in farming. *See* 119 CONG. REC. 4819 (1973). One of the stated purposes of this bill was "to provide for the continued existence of the family farm, by protecting family farms against the monopolization of the agricultural industry." S. 1458, 94th Cong., 1st Sess. § 2(a)(1) (1975); *see generally* Abourezk, *Agricultural, Antitrust and Agribusiness: A Proposal For Federal Action,* 20 S.D.L. REV. 499 (1975). Five states, Kansas, KAN. STAT. § 17-5901 (1974); Minnesota, MINN. STAT. ANN. § 500.24 (West Supp. 1977); Oklahoma, OKLA. STAT. ANN. tit. 18, § 953 (West Supp. 1976); North Dakota, N.D. CENT. CODE § 10-06-01 (1960); and South Dakota, S.D. COMPILED LAWS ANN. § 47-9A-1 (Supp. 1976) have enacted statutes that either ban or drastically curtail corporate farming within these states by limiting or prohibiting the amount of farm land a corporation can acquire within the state. North Dakota's statute was enacted in 1933 and absolutely prohibits corporations from engaging in farming. It also required all corporations that held rural real estate prior to 1932 to dispose of it within ten years. The constitutionality of the statute was upheld by the United States Supreme Court in Asbury Hospital v. Cass County, 326 U.S. 207 (1945); *see generally* Comment, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?* 20 S.D.L. REV. 575 (1975); Ridenour, *Kansas Farm Corporations: Some Observations and Recommendations,* 44 J. KAN. B. ASS'N 241 (1975).

11. *Hearings on the Effects of Corporation Farming on Small Business Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business,* 90th Cong., 2d Sess. 21 (1968) (statement of Ben H. Radcliffe, President of the South Dakota Farmer's Union). *See also* the famous comparison study by Professor Walter Goldschmidt of two farming communities, Arvin and Dinuba, California, one of which was made up of small farmers and the other was dominated by large corporate landholders. Goldschmidt found, among other dramatic differences, that the small farm community supported 62 separate business establishments as compared to 35 in the large farm community; people in the small farm community had a better average standard of living than those living in the community of large farms; less than one-

In certain parts of the country for many years land has been concentrated in the hands of a few owners. In California twenty-five landholders own approximately 8 million acres, 16.2 percent of the privately-owned land.[12] In Maine sixteen paper and timber companies own 7.5 million acres,[13] 32 percent of the land.[14] In Hawaii approximately seventy-two landholders own nearly one-half of the total land area, approximately 90 percent of the privately owned land.[15]

One of the problems caused by the concentrated land ownership in Hawaii is the extraordinarily high cost of land.[16] Although several other factors such as above-average rate of population growth and a significant proportion of unusable land in the state have contributed to the high cost of land, the concentrated ownership has made the land market noncompetitive because a buyer cannot play the prospective sellers of property against each other to drive the price down.[17] As one commentator has stated in a report to the Governor of Hawaii: "Large landholdings by the private owners and the federal government; and restrictive disposition policies

third of the breadwinners in the small-farm community were agricultural wage laborers, while almost two-thirds were wage laborers in the large farm community. W. GOLDSCHMIDT, SMALL BUSINESS AND THE COMMUNITY: A STUDY IN CENTRAL VALLEY OF CALIFORNIA ON EFFECTS OF SCALE OF FARM OPERATIONS, REPORT OF THE SPECIAL COMMITTEE TO STUDY PROBLEMS OF AMERICAN SMALL BUSINESS, 79th Cong., 2d Sess. (Sen. Comm. Print 1946).

12. R. FELLMETH, POLITICS OF LAND, RALPH NADER'S STUDY GROUP REPORT ON LAND USE IN CALIFORNIA 10 (1973) [hereinafter cited as FELLMETH].

13. The ownership of this land is being contested in litigation brought by an American Indian group.

14. W. OSBORN, THE PAPER PLANTATION, RALPH NADER'S STUDY GROUP REPORT ON THE PULP AND PAPER INDUSTRY IN MAINE 1 (1974) [hereinafter cited as OSBORN].

15. Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?* 8 HAWAII B.J. 5, 7 (1971) [hereinafter cited as Kemper]; HORWITZ & MELLER, LAND AND POLITICS IN HAWAII 12, 13 (1966); BOSSELMAN & CALLIES, *supra* note 3, at 13. Railroads own over 94 million acres of land mostly in the western and southwestern states which they acquired through land grants by the federal government. PUBLIC LAND STATISTICS 1974, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Table 6, at 9 (1974); *see generally* Rowen, *Land Empires*, NEW REPUBLIC, January 15, 1972, at 17; Baker, *The Kingdom of the Railroads*, NATION, March 12, 1973, at 34. Judith Strasser in *Grapes of Wrath: 1977*, NEW TIMES, April 1, 1977, at 43, 44, has stated: "Twenty four corporations—energy companies, timber companies and railroads—own or control mineral rights to over 122 million acres, or about 1 out of every 16 acres in the continental U.S."

16. Kemper, *supra* note 15, at 5.

17. *Id.* at 8.

have made the raw land market largely noncompetitive on the supply side. Such a situation invites monopoly pricing."[18]

Another problem which such concentration causes is concomitant control of other natural resources. Senator Fred Harris has spoken about this problem in California: "Closely associated with the monopolization of land is the monopolization of water. Because of the state's dry climate, most land in California has little value unless it is irrigated or receives water for residential and industrial use. The state and federal governments have spent billions of dollars building dams and canals to bring water to land that would otherwise be arid and worthless. Who gets the benefit of these water deliveries that the tax payers so generously subsidize? Once again, it is primarily a handful of large corporations and wealthy individuals."[19]

Perhaps the most significant problem is the correlation between the concentrated ownership of land and the economic and political power which many of these large landowners wield. This economic and political power can control towns, counties, and even states.[20] Such power can be used to influence legislation and make it more responsive to the interests of the large landholders. As one commentator has noted: "Power follows property. . . ."[21]

Thus, a Ralph Nader study group found in California that

18. R. RATCLIFF, STATE ECONOMIC GOALS AND FEDERAL LAND HOLDINGS IN HAWAII 84 (1962).

19. 118 CONG. REC. 17885 (1972) (Public Hearings on Land and Resource Monopoly in Los Angeles, California, March 9, 1972). *See generally* Wayman, *The Propriety of Water as an Antitrust Commodity*, 5 NAT. RESOURCES LAW. 389 (1972). The National Reclamation Act of 1902 provided that: "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner. . . ." 43 U.S.C. § 431 (1970). The avowed purpose of the Act was to prevent land monopoly in the western United States. Congressman Francis G. Newlands stated that "the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country." 35 CONG. REC. 6734 (1902). Loopholes in the bill later allowed large landholders in the west to get exemptions to change the effect of the bill. *See* Taylor, *supra* note 1; Strasser, *The Grapes of Wrath: 1977*, THE NEW TIMES, April 1, 1977, at 43.

20. *See* 118 CONG. REC. 17947 (1972) (statement by Professor Walter Goldschmidt, Public Hearing on Land and Resource Monopoly, Los Angeles, California, March 9, 1972). *See generally* OSBORN, *supra* note 14; FELLMETH, *supra* note 12.

21. H. WALLICH, THE COST OF FREEDOM 137 (1960). *See* Cohen, *Power and Sovereignty*, 13 CORNELL L.Q. 8, 13: "[W]e must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings."

"[a]lmost by definition, highly concentrated ownership and control of land mean more political and economic power and greater ability to oppose contrary interests than do widely diffused ownership or control. Large landholders direct a greater portion of their earnings toward political ends than do smaller holders. And the large owner's landuse decisions have greater public impact, thus giving him greater bargaining power with officials."[22]

Additionally, it is much easier for landholders to unite in a common cause and engage in collusive activity when the land is concentrated rather than dispersed among a multitude of smaller owners. For example, the Nader group found that "there are increasing interconnections between the many parties with interests in land use. . . . They include the lending of money from one institution to another, holding company relations, trade associations, and interlocking directorates."[23]

Large landholders have used this political and economic power to the detriment of environmental interests.[24] In Maine another Ralph Nader group found that since the goal of the paper companies was "the maximum profitable extraction of pulp wood,"[25] the companies polluted the air and water without any attempt to clean up. Because of their political power which resulted from their concentrated ownership of forest land, "the environment laws

22. FELLMETH, *supra* note 12, at 14, 16. *See* 118 CONG. REC. 17885 (1972) (Public Hearings on Land and Resource Monopoly, Los Angeles, California, March 9, 1972); Barnes, *The Great American Land Grab*, THE NEW REPUBLIC, June 5, 1971, at 19; *The Vanishing Small Farmer*, THE NEW REPUBLIC, June 12, 1971, at 21; *The Case for Redistribution*, THE NEW REPUBLIC, June 19, 1971, at 14. The control of land by the paper and timber companies in Maine has prompted another Nader group to describe that state as a "paper plantation." *See* OSBORN, *supra* note 14; *see also* Faux, *Colonial New England*, THE NEW REPUBLIC, November 25, 1972, at 16. Two professors at The University of Hawaii have described the relationship between power and land in regards to the attempt at land reform in that state:

> The disputed principles underlying the land issue were fundamental, and the protagonists rightly understood that while land laws of one kind are compatible with a plantation economy with its concentrated political power and extreme differences in wealth and status, land laws of another kind can promote the development of varied economic enterprises, a more egalitarian division of wealth, and broader participation in government.

HORWITZ & MELLER, *supra* note 15, at 49.

23. FELLMETH, *supra* note 12, at 20.

24. *See generally* OSBORN, *supra* note 14; FELLMETH, *supra* note 12. *But see* BOSSELMAN & CALLIES, *supra* note 3, at 6, where they contend that the large landowners were a major force behind Hawaii's modern land use policy.

25. OSBORN, *supra* note 14, at ix.

are full of industry sponsored loopholes."[26] As Ralph Nader stated: "Maine is poor. Maine is a corporate country—a land of seven giant pulp and paper companies [which own 6.5 million acres of land][27] imposing a one-crop economy with a one-crop politics which exploits the water, air, soil, and people of a beautiful state."[28]

II. THE SHERMAN ACT AS A POSSIBLE SOLUTION

Environmental and public interest groups may be able to alleviate the problems caused by the concentrated ownership of land by the use of antitrust suits. Section one of the Sherman Act[29] could be used to end collusive activity by landowners, land developers, and real estate operators to control the price of land or withhold it from the market. Section two of the Sherman Act[30] could be used to end control by a single owner of a dominant share of land in a specific geographic area such as a county, city, or town.[31]

Despite possible problems with the interstate commerce requirement of the Sherman Act, environmental and public interest groups should use the federal antitrust laws rather than state laws.[32] Many state antitrust laws have only recently been enacted;

26. *Id.* at 234.

27. *Id.* at 2.

28. *Id.* at ix.

29. 15 U.S.C. § 1 (1970): "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. . . ."

30. 15 U.S.C. § 2 (1970): "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 deemed guilty. . . ."

31. Geographic market definitions in antitrust laws are essential for determining the area in which competition is being hindered illegally. The Supreme Court has defined geographic market definitions as narrow as the City and County of Los Angeles, United States v. Von's Grocery Co., 384 U.S. 270 (1966), and Raleigh, North Carolina, Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976); *see also* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), where the Fifth Circuit found the geographic market to be a 4,000 acre natural gas field.

32. *But see* Kemper, *supra* note 15, at 9, who suggests that the Hawaii rather than the federal antitrust laws should be used because of the interstate commerce requirement; Marston v. Ann Arbor Property Managers (Management) Ass'n, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir. 1970), *cert. denied*, 399 U.S. 929 (1970) where the district court judge suggested that the

and in states in which antitrust laws have been on the books for a longer period of time, they have often not been enforced.[33]

Furthermore, environmental and public interest groups may be reluctant to bring an antitrust suit because of the expense involved and the difficulty they will have establishing standing by proof of actual injury.[34] Instead the groups may wish to send a complaint to the government seeking to instigate legal action. Because many large landowners wield political power in their states, many state governments may be reluctant to bring suit. The Federal Trade Commission and the Department of Justice, on the other hand, are more removed from the sources of this political power and also have the necessary expertise and financial resources to undertake a protracted antitrust suit. The federal antitrust laws have also been more thoroughly interpreted by the courts than have state laws; thus, it may be easier to find precedent and well-reasoned decisions applicable to a given situation.[35]

In order to apply the Sherman Act, it must first be determined whether the Act is applicable to land ownership and other activities involving the leasing and selling of land. The threshold question[36] is whether the leasing and selling of land is "trade or commerce"

plaintiffs should use Michigan antitrust law rather than federal antitrust law because of the interstate commerce requirement.

33. Even in the most exuberant formative years of American antitrust policy, few state laws were vigorously enforced. And since before World War I, most of them have been virtually dead. In fact, they have been so dead that it may be wondered whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them. They certainly have been ignored in fact.

Rahl, *Toward Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753 (1961). Recently, there have been signs of a revival of state antitrust laws. *See* Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653 (1974).

34. 15 U.S.C. § 15 (1970) requires that a person bringing a private action under the antitrust laws be "injured in his business or property by reason of [something] forbidden in the antitrust laws." *See* Daffron v. Rousseau Assocs., Inc., [1976-2] Trade Cas. ¶ 61,219 (N.D. Ind. 1976).

35. This would seem to be an implicit reason behind the enactment of the Parens Patriae Bill. 15 U.S.C.A. § 15(c) (West Supp. 1976), which allows a State Attorney General to bring a class action on behalf of the residents in the state for a Sherman Act violation.

36. Another problem in applying the antitrust laws to land is the exemption for agricultural cooperatives formed under the Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1970), from the federal antitrust laws under the Clayton Act, 15 U.S.C. § 17 (1970). *See generally* Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341 (1975).

within the meaning of the Act. The second question is whether these activities meet the interstate commerce requirement, *i.e.*, "commerce among the several states or with foreign countries."[37]

A. *Land Activities as "Trade or Commerce"*

The answer to the first question[38] may depend upon whether land can be considered "in commerce" within the meaning of the Sherman Act. Like many other commodities which are "in commerce," land is a form of capital. Much of the great wealth in the country has come from land. Andrew Carnegie said: "More money has been made in real estate than in all industrial investments combined."[39]

But land is different from other commodities. First, unlike manufactured goods or agricultural products, land is finite. In the words of Will Rogers: "Buy land. They ain't makin' any more of it."[40] However, other finite natural resources, such as natural gas,[41] oil,[42] and coal,[43] have been found to be "in commerce."

Second, land has always been considered unique in that it is not fungible. Every piece of land is different from every other piece of land. Thus, specific performance is available as a remedy for a contract involving real estate.[44] Because of this uniqueness, the federal district court in *Northern Pacific Ralway Co. v. United States*[45] stated: "Unrestricted fee simple title to land vests in the owner absolute domination of the market in such land."[46] In *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*,[47] the Sixth Circuit applied the Sherman Act to an exclusive lease of a location at which liquor was sold to travelers irrevocably committed to crossing the Canadian border. The court held that "a corporation with control

37. 15 U.S.C. § 1 (1970).

38. The business of real estate brokers has been held to be a "trade" within the meaning of the Sherman Act. United States v. National Assoc. of Real Estate Bds., 339 U.S. 485 (1949).

39. Whalen, *Who Owns America?*, SATURDAY EVENING POST, December 30, 1967, at 19.

40. TIME, October 1, 1973, at 80.

41. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

42. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

43. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

44. R. POSNER, ECONOMIC ANALYSIS OF LAW 61 (1973).

45. 142 F. Supp. 679 (W.D. Wash. 1956), *aff'd*, 365 U.S. 1 (1958).

46. *Id.* at 684.

47. 426 F.2d 251 (6th Cir. 1970).

over a unique location essential to the conduct of a certain kind of business can lease a part of that location to one entity and thereby give it an effective monopoly without violating the Sherman Act."[48]

Finally, the primary difference between land and other commodities is its immobility; it cannot be moved in commerce. However, even if land is immobile, a person who buys land does not physically acquire the land; he acquires title, a bundle of rights to control the land.[49] It is the exchange of title for money that constitutes a real estate transaction. Thus, although the land is immobile, the rights of the owner to the land in relation to other people are the elements which move in commerce.

The right to control land is an intangible right, but this does not place it beyond the reach of the antitrust laws. In *United States v. South-Eastern Underwriters Association*,[50] the Supreme Court held that the insurance business was within the jurisdiction of the Sherman Act. The Court answered the insurance companies' argument that insurance contracts are not commodities which are shipped from one state to another by saying that "Congress can regulate traffic though it consist [*sic*] of intangibles."[51] The Court went on to

48. *Id.* at 252; *see also* Gamco, Inc. v. Providence Fruit & Produce Building, 194 F.2d 484 (1st Cir. 1952), involving the ouster of a tenant from a building which was located next to a railroad spur and which enclosed the entire fresh fruit and vegetable wholesale market in Providence, Rhode Island. The First Circuit found that although "the finite limitations of the building itself thrust monopoly power upon the defendants," they nevertheless violated the Sherman Act because they had foreclosed the plaintiffs from the entire fruit and vegetable market in Providence. *Id.* at 487.

49. Anyone who frees himself from the crudest materialism readily recognizes that as a legal term property denotes not material things but certain rights. . . .

Further reflection shows that a property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things.

Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-21 (1927). *See also* Eaton v. B.C. & M.R.R. Co., 51 N.H. 504, 511 (1872), cited with approval in W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 28, 29:

In a strict legal sense, land is not "property," but the subject of property. The term "property" although in common parlance frequently applied to a tract of land or chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing."

50. 322 U.S. 533 (1944).

51. *Id.* at 546 (footnote omitted).

state that the commerce clause gives Congress "the power to legislate concerning *transactions* which, reaching across state boundaries, affect the people of more states than one."[52]

In *Goldfarb v. Virginia State Bar*,[53] a case concerning a Sherman Act violation for the fixing of attorneys' fees for title examinations of land involved in real estate transactions, the Supreme Court held that real estate transactions, to wit, the exchange of the rights to land for money, can be in interstate commerce. Since real estate transactions can be in commerce, the rights to land can be in commerce. Thus the Sherman Act can be applied to transactions and activities involving land provided they meet the interstate commerce requirement.

B. *The Sherman Act and General Commerce Clause Jurisprudence*

In determining whether land transactions and activities meet the interstate commerce requirement, it should first be noted that the jurisdictional language of the Sherman Act, "trade or commerce among the several states or with foreign nations,"[54] is almost identical to the language of the Constitution, "Commerce with foreign Nations and among the several States."[55] Thus, Congress apparently intended to extend the coverage of the Act as far as its constitutional power would allow.[56]

Furthermore, one commentator has compared Sherman Act jurisdiction to an accordion which is "expanded or contracted in accordance with the prevailing view of the scope of the commerce clause."[57] This analogy is consistent with Justice Marshall's statement in *Hospital Building Co. v. Trustees of Rex Hospital*.[58] "When Congress passed the Sherman Act in 1890, it took a very narrow

52. *Id.* at 552 (emphasis added).

53. 421 U.S. 773 (1975).

54. 15 U.S.C. § 1 (1970).

55. U.S. CONST. art. 1, § 8, cl. 3.

56. *See* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 248, where the Supreme Court stated that Congress in legislating the Sherman Act "left no area of its constitutional power unoccupied; it exercised all the power it possessed." *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

57. A. Levander, *Commerce Clause Jurisprudence under the Sherman Act*, 5 (1976) (unpublished note in The Columbia Law Review Office).

58. 425 U.S. 738 (1976).

view of its power under the Commerce Clause. . . . Subsequent decisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power."[59] Thus, if Congress has the power to regulate certain activity or conduct under the commerce clause, then the Sherman Act also reaches that conduct or activity.[60]

C. *Activities Involving Land as Local Commerce*

Activities involving land have traditionally been considered local in nature, to be regulated by the states in which the land is located. Thus, in *Livingston v. Jefferson*[61] Chief Justice Marshall, of the Supreme Court, who was riding circuit, and District Judge Tyler in separate opinions held for the Circuit Court of Virginia that in a dispute involving the title to land, the action was local and must be brought in the jurisdiction where the land was located. This rule became known as the "local action" rule.[62]

The Court based its decision on English common law precedent which had, in turn, been based on the fact that common law juries were composed of people who lived in the area and knew the local problems and boundaries of the land itself. As Justice Tyler stated: "[A]nd who is so proper to decide on them [title and bounds of the land] as one's neighbors who are much better acquainted with each other's [boundary] lines and everything else which may lead to a fair decision."[63]

Although this "local matters" approach appears outdated in an era in which large corporations own extensive tracts of land scattered throughout the country, it is nevertheless reflected in modern

59. *Id.* at 743.

60. *See* Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973); In Re Western Asphalt Cases, 487 F.2d 202 (9th Cir. 1973), *rev'd on other grounds sub nom.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974). *See generally* Note, *Antitrust Law—"Incidental Effect" and Jurisdiction under the Sherman Act*, 21 WAYNE L. REV. 965, 975 (1975); Furgeson, *The Commerce Test for Jurisdiction under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975); Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 82 (1965); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L. REV. 323 (1974).

61. 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411).

62. The rule of Livingston v. Jefferson has been severely criticized as "an example of stare decisis in its worst aspect—namely blind adherence to precedents." 3 BEALE, CONFLICT OF LAWS 1657; *see* Fox v. Warner Bros. Pictures, 95 F. Supp. 360 (D. Del. 1950).

63. 15 F. Cas. at 662.

decisions. In a 1969 case involving an alleged violation of section one of the Sherman Act for the price fixing of apartment rentals, one federal district court stated:[64] "It is clear from the complaint that the restraints alleged relate only to the rental of real estate in the Ann Arbor area. This is local commerce as the competition restrained and interfered with is local in nature."[65]

But in *Wickard v. Filburn*[66] the Supreme Court held that Congress, under the Agricultural Adjustment Act, a commerce clause statute which limited wheat acreage as a means of supporting the wheat market, could penalize a farmer in Ohio who exceeded the limit when he grew 23 acres of wheat instead of the alloted 11 acres even though the excess was for his own personal consumption. The Court reasoned that although the farmer's "own contribution to the demand for wheat may be trivial by itself [it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated is far from trivial."[67]

The production of wheat for personal consumption would seem to be a perfect example of "local commerce." If Congress by the use of the commerce power can reach a farmer in Ohio who grew wheat for his own personal consumption, then the Sherman Act, which is coextensive with the commerce clause, should reach land transactions and activities which have a sufficient effect on interstate commerce even if this is considered "local commerce."

III. LAND AND THE SHERMAN ACT'S RELATIONSHIP TO OTHER COMMERCE CLAUSE STATUTES

Since the Sherman Act's jurisdictional reach is coextensive with the Constitution, a land transaction or activity which comes within the scope of another federal statute in which jurisdiction is based on the commerce clause should also meet the interstate commerce tests of the Sherman Act. Under the Sherman Act there are two alternative tests for determining interstate commerce jurisdiction.[68]

64. Marston v. Ann Arbor Property Managers (Management) Ass'n, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

65. *Id.* at 1279.

66. 317 U.S. 111 (1942).

67. *Id.* at 127-28.

68. Furgeson, *The Commerce Test for Jurisdiction under the Sherman Act*, 12

The first is the "in commerce" test: whether the violative act occurs within the flow of interstate commerce. The second is the "substantial effect" test:[69] whether the "local" act(s) substantially affect interstate commerce. In order to determine the entire jurisdictional reach of the Sherman Act, other federal antitrust laws and the recently enacted Interstate Land Sales Full Disclosure Act, which base their jurisdiction on the commerce clause, can profitably be examined.

A. *Clayton Act*

In contrast to the Sherman Act, the Clayton Act is generally considered to be an "in commerce" statute.[70] For example, section three of the Clayton Act[71] requires that the defendants be "engaged in commerce" and the violation of its provisions take place "in the course of such commerce."

The Supreme Court in *United States v. American Building Maintenance Industries*[72] held that the "in commerce" language of section seven of the Clayton Act[73] is not coextensive with the commerce clause and is thus not to be equated with section one of the Sherman Act which also reaches intrastate activities that sub-

HOUS. L. REV. 1052, 1053 (1975); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1333 (1970).

69. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948).

70. Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282, 282 (1965).

71. 15 U.S.C. § 14 (1970), states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such a price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of the competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

72. 422 U.S. 271 (1975).

73. 15 U.S.C. § 18 (1970) provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

stantially affect interstate commerce. Therefore, activities involving land are covered by the Clayton Act only if they are in interstate commerce, and proof that they substantially affect interstate commerce is insufficient.

In *United States v. Philadelphia National Bank*,[74] a case involving a merger between two commercial banks in violation of section seven of the Clayton Act, the Supreme Court rejected the argument "that commercial banking . . . because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anticompetitive effects of undue concentration."[75] Even though interstate real estate transactions involve the exchange of the intangible rights of ownership for money, they would, therefore, still be subject to the provisions of the Clayton Act.[76] Thus, if real estate transactions satisfy the strict interstate commerce requirements of the Clayton Act, they should also meet the requirements of the Sherman Act.[77] Since the Clayton Act is an "in commerce" statute, it is difficult to compare it to the Sherman Act. In contrast, the Federal Trade Commission Act has been recently amended by Congress to cover effects on interstate commerce.

74. 374 U.S. 321 (1963).

75. *Id.* at 368.

76. *See* ICM Realty v. Cabot, Cabot, & Forbes Land Trust, 378 F. Supp. 918, 925 (S.D.N.Y. 1974), where a federal district court held in effect that a proposed merger of two real estate investment trusts, REITS, involved in real estate financing was not a violation of section 1 of the Sherman Act or section 7 of the Clayton Act. Citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the court in a footnote stated that there was no dispute that real estate investment trusts were subject to section 1 of the Sherman Act, and it assumed "without deciding" that REITS were also subject to the provisions of section 7 of the Clayton Act. *Id.* at 925 n.7. As for the commerce requirement of the Clayton Act, *see generally* Note, *Antitrust—United States v. American Building Maintenance Industries: A Narrow Construction of Section 7 of the Clayton Act*, 54 N.C.L. REV. 189 (1976); Note, *The "In Commerce" Requirements of Clayton* § 7, 51 NOTRE DAME LAW. 522 (1976); Note, *Antitrust—Clayton Act—Section 7 Does Not Apply to Corporations "Affecting" Commerce—United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), 44 U. CIN. L. REV. 844 (1975); Note, *The Commerce Requirements of the Clayton Act*, 36 LA. L. REV. 1040 (1976).

77. Courts have held that land is not a commodity "of like grade and quality" within the meaning of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970). Thus, because land is unique, it is not subject to the jurisdiction of the Act. *See* Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400 (W.D. Pa. 1963); Plum Tree, Inc. v. W.K. Winston Corp., 351 F. Supp. 80 (S.D.N.Y. 1972).

B. *Federal Trade Commission Act*

Originally, the Federal Trade Commission Act[78] (FTC Act) was limited to "unfair methods of competition in commerce."[79] In 1941 the Supreme Court held in *FTC v. Bunte Brothers*[80] that the "in commerce" standard of the FTC Act did not mean "affecting commerce" and therefore did not go to the constitutional limit. Congress amended the FTC Act in 1975 to state: "unfair methods of competition *in or affecting commerce* . . . are unlawful."[81]

Even before the 1975 Amendment, the Federal Trade Commission was using the "in commerce" standard of the Act to prevent the misrepresentation of real estate through interstate advertising in newspapers or on television.[82] In one case, *In re GAC Corporation*,[83] the Federal Trade Commission decided that by the use of the United States mail and other instrumentalities of commerce, the defendants were offering for sale or selling land and other real property to consumers "in commerce as commerce is defined in the Federal Trade Commission Act."[84]

Although the definition of commerce within the context of the Federal Trade Commission Act may be different from that of the Sherman Act, prior to 1975 the FTC Act was more restrictive in its interstate commerce requirements than the Sherman Act. Yet the Federal Trade Commission believed that if land developers or real estate operators advertised interstate or used "the instrumentalities of commerce" to offer land for sale, they met the "in commerce" standard of the FTC Act.[85] Thus, the FTC must have believed that these land developers or real estate operators were engaged in in-

78. 15 U.S.C.A. § 45(a)(1) (West Supp. 1976) states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

79. 15 U.S.C. § 45 (1970) (amended 1975).

80. 312 U.S. 349 (1941).

81. Federal Trade Commission Amendments of 1973, Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (amending 15 U.S.C. § 45(a) (1970)) (emphasis added).

82. Urban Redevelopment, Inc., 83 F.T.C. 692 (1973); Turkey Mountain Estates, Inc., 84 F.T.C. 698 (1974).

83. 84 F.T.C. 163 (1974); *see also* Gimbel Bros., Inc., 83 F.T.C. 1320 (1974); Tysons Corner Regional Shopping Center, 83 F.T.C. 1598 (1974).

84. 84 F.T.C. at 182.

85. The cases cited in notes 83 and 84 *supra* were all decided by the Federal Trade Commission and were settled by consent decrees with no appeal. The consent decree arguably indicates that defendants agreed with the FTC view on jurisdiction, or else they would have appealed to the courts.

terstate real estate operations.

The FTC Act and the Sherman Act, of course, are different statutory frameworks and the FTC Act can only be used by the Federal Trade Commission and not by a private litigant. However, since land developers or real estate operators that advertise or use "the instrumentalities of commerce" to sell land are engaged in interstate real estate operations under the FTC Act, they must fall within the scope of the Sherman Act.

C. *Interstate Land Sales Full Disclosure Act*

Another example of a commerce clause statute pertinent to the relationship of the Sherman Act to land is the recently enacted Interstate Land Sales Full Disclosure Act.[86] The Act makes it unlawful "for any [land] developer or [real estate] agent, directly or indirectly, to . . . use . . . any means or instruments of transportation or communication in interstate commerce, or of the mails" to sell or lease any real estate in any subdivision unless a report[87] has been filed with the Secretary of Housing and Urban Development and a copy has been given to the purchaser before he or she signs a contract to lease or buy land. The Act also makes it unlawful to use the instrumentalities of transportation or communication or of the mails to misrepresent land or to defraud the general public. Thus, any land developer or real estate agent that uses the instrumentalities of interstate commerce, *e.g.*, a telephone, a letter,

86. 15 U.S.C. §§ 1701-1720 (1970). Section 1703(a) of the Act states:

> It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect . . . and a printed property report . . . is furnished to the purchaser in advance of the signing of any contract . . . and (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—(A) to employ any device, scheme, or artifice to defraud, or (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the . . . property report . . . and upon which the purchaser relies, or (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

See generally Interstate Land Sales Regulation: The Case for an Expanded Federal Role, 6 U. MICH. J.L. REF. 511 (1973); PRACTICING LAW INSTITUTE, INTERSTATE LAND SALES (L. Ratner ed. 1970).

87. 15 U.S.C. § 1705 (1970) requires that the report include among other things a general description of the land, conditions relating to the noise or safety which affect the land, the present condition of access to the land, a statement of the condition of the title, and a copy of the deed.

or a motor vehicle, to sell or lease land is within the power of the Act and ipso facto within the power of the commerce clause.

Assuming the Interstate Land Sales Full Disclosure Act is constitutional,[88] a land developer or real estate agent who uses the instrumentalities of commerce to sell or lease land is within the reach of the commerce clause and thus within the jurisdiction of the Sherman Act.

D. *Is Jurisdiction Under Another Commerce Clause Statute Conclusive Evidence of Sherman Act Jurisdiction?*

It has not been conclusively resolved whether activities which fall within the scope of other commerce clause statutes are subject to the jurisdiction of the Sherman Act. In dicta in one case, the Supreme Court may have implied that jurisdiction under one commerce clause statute is not jurisdiction under the Sherman Act.

The Court held in *Gulf Oil Co. v. Copp Paving Co.*,[89] that although employees who worked for manufacturers of road materials met the interstate commerce jurisdiction of the Fair Labor Standards Act because they were engaged in the construction of interstate highways, this did not justify the application of the Clayton Act and the Robinson-Patman Act to the manufacturers of road materials because the Fair Labor Standards Act was a different statutory framework than the antitrust laws and because of the restrictive "in commerce" language of the Clayton and Robinson-Patman Acts. In a footnote[90] the Court stated that a jurisdictional inquiry under the Clayton, the Robinson-Patman, and the Sherman Acts requires a judicial determination which depends on the facts of each case and thus "differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulations."[91]

Although the purpose of the Sherman Act was not specifically to regulate land developers as was that of the Interstate Land Sales

88. There has been considerable litigation involving the Act and no question has been raised about its constitutionality. *See* Happy Inv. Group v. Lakeworld Properties, Inc., 396 F. Supp. 175 (N.D. Cal. 1975), involving interstate commerce jurisdiction under the Act; Rockefeller v. High Sky, Inc., 394 F. Supp. 303 (E.D. Pa. 1975); Zachery v. Treasure Lake of Georgia, Inc., 374 F. Supp. 251 (N.D. Ga. 1974).

89. 419 U.S. 186 (1974).

90. *Id.* at 197 n.12.

91. *Id.*

Full Disclosure Act, it was the intention of Congress to extend the Sherman Act as far as its constitutional power would allow in order to promote the national interest in a competitive economy. Therefore, although other commerce clause statutes were enacted for different congressional purposes, they also delineate activities which are covered by the commerce power and therefore should be covered by the Sherman Act so long as these activities interfere with a competitive economy.

In agreeing to hear *Gulf Oil Co. v. Copp Paving Co.*, the Supreme Court granted certiorari only for questions involving the Clayton and Robinson-Patman Acts;[92] it allowed the decision of the Ninth Circuit to stand with respect to the Sherman Act. The Ninth Circuit stated in its opinion: "Thus, every Sherman Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely a holding that conduct is within the reach of Congress' constitutional power for some other purpose is *entitled to great weight* in a Sherman Act case."[93]

In addition, the Supreme Court has also compared the interstate commerce language of different antitrust laws in order to determine the scope of jurisdiction under the Clayton Act. In *United States v. American Building Maintenance Industries*,[94] the Court found that the language of the Federal Trade Commission Act was particularly relevant to the proper interpretation of the "in commerce" language of the Clayton Act, since both sections were enacted by the same Congress to deal with closely related aspects of the same problems—the protection of competition in the nation's market place.[95] Thus, jurisdiction under other commerce clause statutes, especially antitrust statutes, is persuasive, if not conclusive, evidence of Sherman Act jurisdiction.

92. *Id.* at 193.

93. In Re Western Asphalt Cases, 487 F.2d 202, 204 (9th Cir. 1973), *rev'd on other grounds sub nom.* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) (emphasis added); *see also* Rasmussan v. American Dairy Ass'n, 472 F.2d 517, 522-23 n.13 (9th Cir.), *cert. denied*, 412 U.S. 950 (1972); City of Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871, 872 (5th Cir. 1964); A.B.T. Sightseeing Tours, Inc. v. Greyline New York Tours Corp., 242 F. Supp. 365, 368 (S.D.N.Y. 1965) (a sightseeing business which affected interstate commerce for the purpose of the National Labor Relations Act also affected interstate commerce for the purposes of the Sherman and Clayton Acts).

94. 422 U.S. 271 (1975).

95. *Id.* at 277.

IV. Land and the Interstate Commerce Requirement Under the Sherman Act

In order to apply the Sherman Act to land, the criteria for meeting the interstate commerce requirement must be determined by looking at the two tests for Sherman Act jurisdiction:[96] the "in commerce" test, whether the violative act occurs within the flow of interstate commerce, and the "substantial effect" test,[97] whether the local act(s) substantially affect interstate commerce.

Until recently, interstate activities involving land have been considered incidental to the local commerce of purchasing and selling real estate and therefore could not meet either of the two interstate commerce tests. In *Cotillion Club, Inc. v. Detroit Real Estate Boards*,[98] black real estate agents, brokers, and salesmen brought a class action against several real estate corporations alleging a conspiracy to exclude black brokers from realty boards in violation of section one of the Sherman Act. The plaintiffs also alleged that the defendants had conspired to establish racial zones within the City of Detroit and to deny the plaintiffs access to federal mortgage insurance contracts and loans covering housing within these racial zones. The plaintiffs argued that some of the defendants were engaged in interstate commerce because they sent real estate listings out of state, filed applications in out-of-state federal offices, and appraised federally financed or insured real estate in Michigan and sent the appraisals out of state. After finding that real estate activities are local and intrastate in nature, the district court held that the defendant's activities were incidental to the local commerce of financing and selling real estate and therefore did not substantially affect interstate commerce. "The effect on interstate commerce must be direct and not remote . . . and any conspiracy which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of the [Sherman Act]."[99]

96. *See* note 59 and accompanying text *supra*.

97. *See* note 60 and accompanying text *supra*.

98. 303 F. Supp. 850 (E.D. Mich. 1964); *see also* Marston v. Ann Arbor Property Managers (Management) Ass'n, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970), *cert. denied*, 399 U.S. 929 (1970).

99. 303 F. Supp. at 854. *But see* Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967), in which another group of black citizens and real estate brokers brought an action to enjoin a group of realty boards from violating section 1 by conspiring to prevent blacks from owning or renting property in the white neighborhoods of Akron, Ohio. The Sixth Circuit found that interstate commerce had been

Recently however, courts have been moving away from the local commerce and "incidental" theories, and are beginning to recognize that activities involving land can meet at least one of the two tests for jurisdiction under the Act.

A. *The "In Commerce" Test*

Because land itself cannot move in interstate commerce, in order to meet the "in commerce" test, there must be a transaction involving land. A real estate transaction will be considered "in commerce" if there has been interstate financing. In 1974 in *Goldfarb v. Virginia State Bar*[100] the Supreme Court for the first time held that real estate transactions could be "in interstate commerce." When Mr. and Mrs. Goldfarb sought financing for a new house in Fairfax County, Virginia, the mortgagee insisted that they procure title insurance, which required a title examination by a member of the Virginia State Bar. The Goldfarbs found that no Fairfax County lawyer would charge less than the fee prescribed in the minimum fee schedule published by the County Bar and enforced by the Virginia State Bar. In response, the plaintiffs brought a class action on behalf of home buyers within Fairfax County against the County and State Bar Associations. The Goldfarbs charged that the minimum fee schedule as applied to legal services within Fairfax County constituted price fixing in violation of section one of the Sherman Act.

The Supreme Court held that since a substantial amount of the financing for homes in Fairfax County came from out of state or were federal loans, these were interstate real estate transactions. Because the title examinations were integral parts of such transactions, interstate commerce had been sufficiently affected. Thus, the Court concluded: "Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected."[101]

substantially affected because the movement of persons, building materials and mortgage financing had been impeded. *See also* Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.* Baker v. F & F Inv., 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970).

100. 421 U.S. 773 (1975), *rev'g* 497 F.2d 1 (4th Cir. 1974), *aff'g and rev'g* 355 F. Supp. 491 (E.D. Va. 1973).

101. 421 U.S. at 785.

It is not entirely clear whether the Court based its finding that the real estate transactions were interstate on interstate financing alone or on a combination of factors including the involvement of out-of-state parties. The words "interstate aspects" indicate that the Supreme Court did not wish to limit interstate real estate transactions to just those involving out-of-state financing, but instead recognized the interstate nature of today's real estate market. Furthermore, the word "transactions" is another word for exchange, the exchange of the rights to control land in relationship to other people, as embodied in the deed, for money. Thus, if an out-of-state party, such as a multistate corporation, buys land and obtains financing within the state in which the land is located, the real estate transactions should still be considered in interstate commerce.

If there are interstate real estate transactions present and there has been a per se antitrust violation, such as price fixing,[102] in interstate commerce, many courts hold there is no need to determine the quantity of interstate commerce involved; a sufficient effect upon interstate commerce is conclusively presumed as a matter of law.[103] In *United States v. Bensinger Co.*[104] the Eighth Circuit held that a conspiracy to fix the price of one dishwasher met the interstate commerce requirement of the Sherman Act. However, the court also stated that it was not enough that a party was engaged "in interstate commerce" but "the interstate commerce itself of

102. The Supreme Court stated in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958), that per se violations of the Sherman Act are "certain agreements or practices which because of their pernicious effect on competition are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused."

103. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970) (one washing machine); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1259 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 748-49 (9th Cir. 1954). *But see* Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973), where Judge Browning contended that the jurisdictional issue and the substantive issue of whether a defendant's conduct is the kind prohibited under the Sherman Act are distinctly different issues. "Thus, although both the substantive and jurisdictional issues are often confusingly described in terms of the "effect" of particular conduct upon commerce, as if a common question were presented . . . the substance of the two inquiries is quite different." *Id.*

104. 430 F.2d 584 (8th Cir. 1970).

that party must be involved."[105] The court concluded that since the dishwasher which was "the subject of the conspiracy" moved in interstate commerce from Ohio to Missouri, the per se violation took place in the flow of commerce.[106]

Land, of course, does not move in interstate commerce. However, the rights to land, which are the essence of the real estate transactions and the subjects of the controversy, can and do move in interstate commerce. Therefore, if there is a per se violation involving interstate real estate transactions, it should be presumed that the interstate commerce requirement has been met. This is especially true if there has been interstate financing.

The "in commerce" test is also met if the defendant is engaged in interstate commerce, to wit, interstate real estate operations.[107] Factors relevant to this finding include advertising out of state, soliciting out-of-state customers, sending legal instruments out of state, representing out-of-state buyers and sellers, assisting in securing out-of-state financing and insurance, and finally, participating in a multiple listing service which facilitates the sale of real estate by out-of-state brokers.[108]

105. *Id.* at 588; *see* Page v. Work, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

106. 430 F.2d at 588-89; *see also* Yellow Cab Co. of Nevada v. Cab Employers, Automotive & Warehousemen Local 881, 457 F.2d 1032, 1035 (9th Cir. 1972). For a discussion of the two approaches to finding Sherman Act jurisdiction if there is a per se violation, *see* United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir.), *cert. denied,* 423 U.S. 893 (1975).

107. The Supreme Court has held that the real estate brokerage business is "trade" within the meaning of the Sherman Act. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

108. *See* Oglesby & Barclift, Inc. v. Metro MLS, Inc., [1976-2] Trade Cas. (CCH) ¶ 61,064 (E.D. Va. 1976), where a district court held that because there were so many interstate contacts, the business of broker-members of the real estate board "clearly involved interstate commerce." The court concluded "[t]he activities of Metro MLS, Inc., and its members so acting in combination, were *within the flow of interstate commerce and had a substantial effect upon interstate commerce.*" Thus, the court combined the two interstate commerce tests in order to find that the interstate commerce requirement was met. Prior to *Goldfarb* courts were reluctant to find that the interstate activities of a real estate board could be in interstate commerce. Thus in Gateway Assocs. v. Essex Costello, Inc., 380 F. Supp. 1089 (N.D. Ill. 1924), after reciting several interstate contacts, a district court concluded that the activities of the real estate board had *a substantial effect* on interstate commerce. *See also* United States v. Atlanta Real Estate Bds., [1972] Trade Cas. (CCH) ¶ 73,825 at 91,482 (N.D. Ga. 1971). Since *Goldfarb*, however, courts appear to be leaning towards the conclusion that the interstate activities of the real estate board can be in

In 1969 the Justice Department filed a complaint[109] against a real estate board in Prince George's County, Maryland, alleging that agents were fixing commission rates in violation of section one. The Justice Department supported its contention that the board was engaged in interstate commerce by alleging that: first, thousands of real estate parcels were sold in the county each year totalling $39,000,000 in 1968; second, a substantial number of the customers were from out of state; third, the board advertised in out-of-state newspapers; and fourth, members of the board assisted their clients in securing financing and insurance from out of state. This complaint was the first of a series of complaints filed by the Justice Department, most of which were terminated by consent decrees.[110]

In *United States v. Metro MLS, Inc.*,[111] a case involving an alleged conspiracy by real estate brokers to fix commission fees, the Justice Department alleged that the defendants were advertising out of state; they were assisting their clients in procuring out-of-state insurance; and there was out-of-state financing for the real

interstate commerce. Before the *Goldfarb* case, several commentators argued that because land could not move, real estate brokers were really selling a service, and it was the service that moved interstate. *See* Graybeal, *Antitrust Violations in Real Estate Transactions*, 60 Ill. B.J. 856, 858 (1972); Austin, *Real Estate Boards and Multiple Listing Systems As Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970). However, in *Goldfarb* the lawyers' services did not move in interstate commerce; it was the real estate transactions, themselves, that were interstate. *See generally Antitrust: An Emerging Problem For Florida Realtors*, 24 U. FLA. L. REV. 266, 272 (1972); Barasch, *How Antitrust Actions Have Affected Real Estate Brokers' Commissions*, 3 REAL EST. L.J. 227 (1974).

109. United States v. Prince George's County Bd. of Realtors, Inc., 5 TRADE REG. REP. (CCH) ¶ 45,069 (Case 2078) at 52,741, [1971] Trade Cas. (CCH) ¶ 73,393 (D. Md. 1970) (consent decree).

110. *See* United States v. Multiple Listing Service [1972] Trade Cas. (CCH), ¶ 74,221 (D. Or. 1972); United States v. Long Island Bd. of Realtors, [1972] Trade Cas. (CCH) ¶ 74,068 (E.D.N.Y. 1972); United States v. Cleveland Real Est. Bd., [1972] Trade Cas. (CCH) ¶ 74,020 (N.D. Ohio 1972); United States v. Memphis Bd. of Realtors, [1972] Trade Cas. (CCH) ¶ 74,056 (W.D. Tenn. 1972); United States v. Real Est. Bd. of Metropolitan St. Louis, [1973-2] Trade Cas. (CCH) ¶ 74,744 (E.D. Mo. 1973); United States v. Greater Pittsburgh Bd. of Realtors, [1973-1] Trade Cas. (CCH) ¶ 74,454 (W.D. Pa. 1973); United States v. Multiple Listing Service, Realtors of Portland, Washington County Bd. of Realtors and Clackamas County Bd. of Realtors, [1973-1] Trade Cas. (CCH) ¶ 74,515 (C.D. Or. 1973); United States v. Real Est. Bd. of New York, [1974-2] Trade Cas. (CCH) ¶ 75,350 (S.D.N.Y. 1974); United States v. Real Est. Bd. of Rochester, New York, Inc., [1974-2] Trade Cas. (CCH) ¶ 75,355 (W.D.N.Y. 1974).

111. [1974-2] Trade Cas. (CCH) ¶ 75,311 (E.D. Va. 1973).

estate. The court dismissed the defendants' motion for summary judgment by stating: "A business of which the ultimate object is the operation of intrastate activities may make such a substantial utilization of the channels of interstate trade and commerce that it assumes an interstate character."[112]

In a case brought by private plaintiffs, *Mazur v. Behrens*,[113] a district court found that real estate brokers were "clearly engaged in interstate commerce"[114] where they represented buyers and sellers from out of state in 40 percent or more of their transactions, and many of the defendants solicited and advertised for buyers and sellers from out of state.

This decision raises the question of what percentage of a real estate broker's business must be involved before he will be considered "engaged in interstate commerce." In *Yellow Cab Company of Nevada v. CAB Employers, Automotive & Warehousemen Local 881*,[115] the Ninth Circuit held that although .5 percent of the Yellow Cab's overall business was interstate, the operations were "miniscule"[116] in relation to its overall business enterprise and therefore the restraint of trade was directed at the intrastate business of the plaintiff and not interstate commerce. Thus, there was no jurisdiction under the Sherman Act. The exact percentage of a real estate broker's or land developer's business which must be interstate in order to justify Sherman Act jurisdiction is unclear, but it must be more than a "miniscule" amount.

The Ninth Circuit also has held in *Gough v. Rossmoor Corp.*[117] that the sole jurisdictional question presented is did the activity of the defendants have "a sufficient relationship to interstate commerce to be within Congress' power to regulate and hence to come within the Sherman Act?"[118] Thus, if the activity has a sufficient relationship to interstate commerce to be within Congress' power to regulate under the commerce clause, the exact percentage of interstate business should not matter. Congress has determined by the Interstate Land Sales Full Disclosure Act that a real estate agent or

112. *Id.* at 97,998; *see* [1974-2] Trade Cas. (CCH) ¶ 75,137 (E.D. Va. 1974) (consent decree).
113. [1974-1] Trade Cas. (CCH) ¶ 75,070 (N.D. Ill. 1972).
114. *Id.* at 96,788.
115. 457 F.2d 1032 (9th Cir. 1972).
116. *Id.* at 1035.
117. 487 F.2d 323 (9th Cir. 1973).
118. *Id.* at 376.

developer that uses "any means or instruments of transportation, or communication in interstate commerce or of the mails"[119] is subject to the jurisdiction of the Act. Thus so long as a real estate agent or developer uses any instrument of commerce to sell land, he exhibits a sufficient relationship with interstate commerce to be subject to congressional regulation and is therefore within the scope of the Sherman Act.

B. The "Substantial Effect" Test

Even if a real estate transaction is purely or predominantly an intrastate transaction or if there is no transaction involved, activities involving land can fall under the Sherman Act, if they substantially affect interstate commerce. The "substantial effect" test was articulated by Justice Jackson in *United States v. Women's Sportswear Manufacturers Association:*[120] "[T]he source of the restraint may be intrastate as the making of a contract or a combination usually is . . . [but] [i]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze."[121]

In order to substantially affect interstate commerce, the first requirement of a purely intrastate transaction or antitrust violation is that it be substantial. This alone may be sufficient to find an effect on interstate commerce. In *Kinee v. Abraham Lincoln Federal Savings & Loan Association*[122] the plaintiffs brought an action under section one against 177 lending institutions in eastern Pennsylvania for a conspiracy to require plaintiffs as part of a residential mortgage agreement to prepay part of the annual property taxes and other liabilities against the property. In replying to the defendants' argument that the residential mortgage business is local commerce, the court stated that it was "not persuaded that a conspiracy of the economic magnitude of the one alleged [could] possibly be sufficiently local in its impact to escape the scrutiny of the Federal

119. 15 U.S.C. § 1703 (1970).

120. 336 U.S. 460 (1949).

121. *Id.* at 464; *see* Standard Oil Co. v. United States, 337 U.S. 293 (1949), *aff'g* 78 F. Supp. 850 (S.D. Cal. 1948).

122. 365 F. Supp. 975 (E.D. Pa. 1973); *see* Umdenstock v. American Mortgage & Inv. Co., 495 F.2d 589 (10th Cir. 1974); *see generally* Comment, *The Improper Use of Tax and Insurance Escrow Payments by Mortgagees*, 25 CATH. U.L. REV. 102 (1975).

antitrust laws."[123] Thus, the economic magnitude of the antitrust violation involving land, alone, may lead to a determination that interstate commerce has been substantially affected.

Therefore, the mere ownership of vast tracts of land can be subject to the prohibition of the Sherman Act. If landowners who own large tracts of land within a given geographic area conspire together to fix the price of land or to withhold it from the market or if one landowner who owns a large amount of land within a given geographic area possesses monopoly power, then they can be subject to the Sherman Act without any interstate contacts because the economic magnitude of the violation will inevitably affect interstate commerce.

Furthermore, if a single landowner or the participants in a conspiracy possess sufficient market power to affect the price of land in a large geographic market, then the antitrust violation should be of sufficient economic magnitude to constitute a substantial effect on interstate commerce. As one commentator put it, "[t]he fact that the activity is seemingly local should be irrelevant if its consequences are of sufficient concern to the national well-being and if it prompts ripples of effects across state lines."[124]

If intrastate transactions are involved, a court may also find a substantial effect on commerce if the assets or profits involved in those transactions find their way into interstate commerce. In *Stavrides v. Mellon National Bank & Trust Co.*[125] the plaintiffs brought a class action against approximately 250 lending institutions in Pittsburgh, Pennsylvania, which had written approximately $75,000,000 per year of residential mortgage loans. The plaintiffs charged that the defendants had conspired to force plaintiffs to establish escrow accounts in the defendants' banks as conditions to securing home mortgage loans, an illegal tying arrangement under section one. The defendants argued that the mortgage practices were local in nature and the interstate commerce present was insignificant be-

123. 365 F. Supp. at 981. *See* Scranton Construction Co. v Litton Indus. Leasing Corp., [1974-1] Trade Cas. ¶ 75,087 (5th Cir. 1974), where the Fifth Circuit found Sherman Act jurisdiction because of the magnitude of an intrastate sale and its close nexus to the construction of a shipyard, a massive instrumentality of foreign and interstate commerce.

124. Austin, *Real Estate Boards and Multiple Listing Systems As Restraints of Trade*, 70 COLUM. L. REV. 1325, 1335 (1970).

125. 353 F. Supp. 1072 (W.D. Pa. 1973), *aff'd*, 487 F.2d 953 (3rd Cir. 1973).

cause of "the banking transactions involved and . . . the local character of real estate."[126] The district court denied a motion for summary judgment by finding a possible substantial effect on interstate commerce; although the banks' involvement with residential mortgage loans might be intrastate, the plaintiffs should have the opportunity to prove that the defendants "receive some increase in assets or profits as a result of their residential mortgage business and that these increased assets and/or profits . . . make their way through the normal course of the banking business into interstate commerce."[127]

In a business involving intrastate real estate transactions, if the profits or money from those transactions find their way into interstate commerce, the "substantial effect" test may be satisfied. Furthermore, if the defendant is a multistate corporation, then the profits would certainly flow into interstate commerce.

If there has been no transaction, a substantial effect may be found if the restraints involving land affect the flow of products or commodities in interstate commerce to or away from the land. In *Northern Pacific Railway Co. v. United States*[128] a railroad, through preferential routing agreements inserted in deeds and leases to several million acres of land in the northwest, compelled buyers and lessees to ship all the commodities grown on the land over the railroad. In deciding that the defendants had violated section one of the Sherman Act for a tying arrangement, the Supreme Court found that the interstate commerce requirement had been met be-

126. *Id.* at 1075.

127. *Id.*

128. 356 U.S. 1 (1958); *see* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), where sugar beet growers brought an action for price fixing against three sugar refiners in California. The Supreme Court found jurisdiction although the beets were changed to sugar in California and then entered the flow of interstate commerce; Farmer Reservoir and Irrigation Co. v. McComb, 337 U.S. 755 (1949), where the Supreme Court found that an irrigation company was subject to the interstate commerce requirement of the Fair Labor Standards Act because although it operated wholly within the state, it distributed water to farmers who shipped agricultural commodities in interstate commerce; Godwin v. Occupational Safety & Health Review Comm'n, 540 F.2d 1013 (9th Cir. 1976), where the clearing of land for the purpose of growing grapes for shipment in interstate commerce was "business affecting commerce" and therefore the employer was subject to the Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-678, which, like the Sherman Act, incorporates the words of the constitution itself; *see also* Hodgson v. Ewing, 451 F.2d 526 (5th Cir. 1971).

cause the agricultural products produced on the land were shipped on the defendant's railroad in interstate commerce, thus affecting the interstate flow of commerce in agricultural produce. The Fifth Circuit found in *Woods Exploration and Producing Co. v. Aluminum Co. of America*[129] that an attempt by defendants to monopolize a 4,000 acre natural gas field had a substantial effect on interstate commerce because the natural gas from the field entered into the flow of interstate commerce. Thus, if landowners grow agricutural commodities or extract natural resources from the land and ship them in interstate commerce, the activity involving the land will be found to have a substantial effect on interstate commerce.

If a restraint involving land has a substantial effect on goods, commodities, or other natural resources which are in the flow of commerce moving to the general geographic area in which the land is located, the interstate commerce requirement will have been met. In *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*,[130] the Court of Appeals for the District of Columbia dismissed

129. 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

130. 429 F.2d 206 (D.C. Cir. 1970), *aff'g* 308 F. Supp. 988 (D.D.C. 1970); *see* Pay Less Drug Stores v. City Products Corp., [1975-2] Trade Cas. (CCH) ¶ 60,385 (D. Or. 1975). *See also* cases in which Sherman Act jurisdiction was assumed, Borman's Inc. v. Great Scott Super Markets, Inc., [1975-1] Trade Cas. (CCH) ¶ 60,321 (E.D. Mich. 1975); Dart Drug Corp. v. Peoples Drug Stores, Inc., 5 TRADE REG. REP. (CCH) ¶ 61,281 (D.D.C. 1977); Plum Tree, Inc. v. N.K. Winston Corp., 351 F. Supp. 80 (S.D.N.Y. 1972). For cases that have held that shopping centers do not come within Sherman Act jurisdiction, *see* Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045, 1048 (D. Minn. 1970), where a federal district court stated "the incidental flow of supplies in interstate commerce does not in itself transform an essentially intrastate activity into an interstate enterprise"; Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 203 F. Supp. 529 (D. Md. 1962), *aff'd*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963). *But see* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973). In this article, citing *Dalmo Sales Co.*, Professor Goldschmid states, in regard to restrictive covenants in shopping center leases:

> Finally, in cases of any consequence, the "interstate commerce" requirement should not be of concern. "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question"; the Act reaches as far as the commerce clause will allow. It is doubtful, for example, that where lease provisions for a large shopping center are involved or a company-wide deferred compensation plan is in effect, any meaningful interstate commerce issue could be raised.

Id. at 1206 (footnotes omitted). *See generally* Comment, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973); Tysons Corner Regional Shopping Center, 83 F.T.C. 1598 (1974); Gimbel Bros., Inc., 83 F.T.C. 1320 (1974).

a case involving an alleged Sherman Act violation for a restrictive covenant in a shopping center lease on the merits after concluding that there was a substantial effect on interstate commerce because the conduct of the plaintiffs' business "involves the receipt of goods in interstate commerce."[131]

In *Gough v. Rossmoor Corp.*[132] the Ninth Circuit held that the defendants' anticompetitive conduct directed against plaintiff's retail carpet business had a substantial economic effect on the interstate flow of commerce of carpets:

> [I]t is clear that defendants' anticompetitive conduct in connection with such sales necessarily had the "substantial economic effect" upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. . . .[T]he retail transactions affected by the defendants' conduct were essential to the continued movement of a substantial volume of carpeting from the states of manufacture to the Walnut Creek, California, area. . . . By restricting plaintiff's participation in these retail transactions, and eventually excluding plaintiff entirely from this trade, defendants diverted interstate shipments of carpeting from plaintiff to themselves thus "interfering with the natural flow of interstate commerce."[133]

Thus, if landowners or land developers fix the price of land or withhold it from the market within a large enough geographic area, such actions may have a substantial effect on the flow of interstate commerce in other commodities such as building materials or other natural resources and therefore be subject to the jurisdiction of the Sherman Act. However, the Sixth Circuit held in *Marston v. Ann Arbor Property Managers (Management) Association*,[134] a case involving a group of tenants who brought a class action under section one against landlords in Ann Arbor, Michigan for the price fixing of apartment rentals, that a local restraint involving land did not have a substantial effect on the movement of students and building ma-

131. 429 F.2d at 207.

132. 487 F.2d 373 (9th Cir. 1973).

133. *Id.* at 378; *contra* Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 203 F. Supp. 529 (D. Md. 1962), *aff'd*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963) (retail sale of gas is local commerce); Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045, 1048 (D. Minn. 1970) (retail sale of goods is local commerce). *But see* Detroit City Dairy, Inc. v. Kowalski Sausage Co., 393 F. Supp. 453 (E.D. Mich. 1975).

134. 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

terials in interstate commerce since these activities were incidental to the defendants' rental of real estate, which was "local in nature."[135] Thus, the court refused to take into account the interstate effects of the local restraint.

The decision in *Goldfarb v. Virginia State Bar*[136] that real estate transactions could be in interstate commerce has undermined this holding. In addition, other opinions have found the movement of building materials to be one of a number of factors that contributed to a substantial effect on interstate commerce.[137] In *United States v. Finis P. Ernest, Inc.*[138] the Seventh Circuit held that contractors who rigged bids for a city sewer project sufficiently affected interstate commerce because the restraint potentially reduced competition in the interstate market for building materials.

The notion that an intrastate restraint involving land cannot have a substantial effect on the flow of persons in interstate commerce appears to be inconsistent with decisions of the Supreme Court. For instance, in *Edwards v. California*[139] the Supreme Court held that the transportation of persons from one state to another is interstate commerce and that there is a constitutional right based on the commerce clause to travel and reside in any state in the United States. Thus an intrastate restraint involving either the leasing or selling of land which impedes the movement in interstate commerce of persons who wish to travel and reside in another part of the country has a substantial effect on interstate commerce and therefore is within the scope of the Sherman Act.

C. *The Right Combination of Factors*

In attempting to meet the interstate commerce requirement of the Sherman Act, neither interstate commerce test should be overlooked. Several cases may have been dismissed because of inade-

135. 302 F. Supp. at 1279.

136. 421 U.S. 773 (1974), *rev'g* 497 F.2d 1 (4th Cir.), 355 F. Supp. 491 (E.D. Va. 1973). Note that in holding that the interstate financing did not meet the interstate commerce requirement, the Court of Appeals relied on the *Marston* holding, 497 F.2d 1, 17 n.53 (4th Cir. 1974).

137. *See* Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967); United States v. Atlanta Real Estate Bds., [1972] Trade Cas. (CCH) ¶ 73,825 (N.D. Ga. 1971).

138. 509 F.2d 1256 (7th Cir.), *cert. denied*, 423 U.S. 874 (1975).

139. 314 U.S. 160 (1941); *see also* United States v. Guest, 383 U.S. 745, 757 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969).

quate pleading.[140]

Although after *Goldfarb* interstate financing appears to be the most important factor in meeting the "in commerce" test with respect to land, all the aspects of real estate transactions must be alleged. Even if there is a strong case that the "in commerce" test has been met, a "substantial effect" case should also be made. In pleading a substantial effect case, no interstate factors or contacts should be omitted. Thus, in *Hospital Building Co. v. Trustees of Rex Hospital*,[141] plaintiffs alleged a conspiracy by a hospital, two of its officers, and a city health planner to monopolize the business of hospital services in Raleigh, North Carolina, by blocking the relocation and expansion of the plaintiff's hospital. In order to meet the interstate commerce requirement, the plaintiffs alleged that a substantial portion of its medicines and supplies came from out-of-state sellers; a substantial number of its patients came from out of state; a large portion of its revenue came from out-of-state insurance companies or from the federal government; it paid a management service fee to its parent, an out-of-state company; and the planned expansion would be largely financed by out-of-state lenders.[142]

Speaking for the Court Justice Marshall stated: "[T]his combination of factors is certainly sufficient to establish a 'substantial effect' on interstate commerce under the Act."[143] It was all the factors combined, not one factor alone, that led to the finding of a substantial effect on interstate commerce. Thus, in making out a complaint under the Sherman Act, the plaintiff should allege as many interstate contacts as possible in order to meet the interstate commerce test.

V. The Recent Cases

The *Goldfarb* decision in 1974 established a more lenient standard for applying the interstate commmerce requirement to cases

140. *See* Diversified Brokerage Servs., Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343 (8th Cir. 1975), where plaintiff failed to allege facts making out a substantial effect on interstate commerce; Marston v. Ann Arbor Managers (Management) Ass'n, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd, per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970), where plaintiffs may have failed to allege interstate financing.

141. 425 U.S. 738 (1976).

142. *Id.* at 741.

143. *Id.* at 744.

involving land; however, some lower federal courts still apply the local commerce approach to interstate transactions involving land.

Prior to *Goldfarb*, in *Diversified Brokerage Services v. Neil Adamson Co.*,[144] a case involving a boycott by a local real estate board and its member brokers, a per se violation of section one of the Sherman Act,[145] a federal district court in Iowa held that although the distribution of information through a multiple listing service concerning the sale of real estate was no doubt in interstate commerce, "such information passed in interstate channels takes on a purely local viability despite the mode of transmission."[146] The court concluded that there was no direct or substantial effect on interstate commerce.

The court based its findings on the fact that in a sixteen percent sample from the total listings on file with the board's multiple listing service, only five transactions involved citizens or residents of different states. However, the district court also found that a "not unsubstantial" portion of the defendants' fees came from people moving into or leaving Iowa.

Considering the case after *Goldfarb*, the Eighth Circuit affirmed[147] the decision, holding that since only a few out-of-state persons had been parties to the real estate transactions, the local real estate board was not engaged in interstate commerce. The court also stated that the mere movement of the board's clients from one state to another did not bring the service within the jurisdiction of the Sherman Act. Furthermore, the court distinguished the facts from those of *Goldfarb* in that, despite the substantial amount of commerce involved, to wit, $58,000,000,[148]

144. Diversified Brokerage Servs., Inc. v. Neil Adamson Co., [1974-2] Trade Cas. (CCH) ¶ 75,362 (S.D. Iowa 1974), *aff'd sub nom.* Diversified Brokerage Servs., Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343 (8th Cir. 1975).

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

146. [1974-2] Trade Cas. (CCH) at 98,173. The court went on to state:

> The crucial aspect of such dissemination is that its effect is at best indirect and insubstantial. The sale of real estate is a local venture. The effect of its sale and transfer is purely local. The court is not convinced that whether real estate is sold or not such action can be found to have a direct and substantial effect on interstate commerce. The fact the components of the real estate sales utilize forms of interstate commerce is not persuasive on the court to take jurisdiction in this matter under the Sherman Act.

147. Diversified Brokerage Servs., Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343 (8th Cir. 1975).

148. *Id.* at 1345.

these were not interstate real estate transactions because there was no evidence that a significant portion of the funds underlying the transactions came from out of state or that the loans were guaranteed by the federal government.[149]

By affirming the district court's decision, the Eighth Circuit appears to curtail the reach of the *Goldfarb* decision by limiting it to interstate real estate transactions involving only out-of-state financing. However, the court ignored the fact that out-of-state buyers and sellers were involved in these real estate transactions, and therefore, the rights to the land embodied in the deed were moving out of state. The court also ignored the fact that a substantial portion of the brokerage fees came from out of state and, in addition, that by using the channels of information the defendants, in fact, were soliciting out-of-state customers. These factors appear to constitute "interstate aspects of real estate transactions."[150] In addition, a boycott is a per se violation of the Sherman Act and since the aspects of the real estate transactions indicate that at least some of the transactions were interstate, a sufficient effect on interstate commerce is presumed without an inquiry into the amount of commerce involved.[151]

The court's holding also implies that the defendants' conduct did not have a sufficient relationship to interstate commerce to be subject to congressional regulation.[152] However, this is inconsistent with the Interstate Land Sales Full Disclosure Act,[153] which brings a real estate operator who uses any means or instrument of commerce, including a multiple listing service, to lease or sell land within the jurisdiction of the Act. Thus, a holding that the real estate board comes within the interstate commerce requirement of the Sherman Act would be more consistent with the power of the

149. The Eighth Circuit refused a request by the plaintiffs to remand the case subsequent to the *Goldfarb* decision in order to amend their complaint to include further evidence of other interstate aspects of defendant's business. The court also noted that there were no other interstate aspects to the transactions such as interstate advertising and that defendant had failed to plead a "substantial effect" case. *Id.* at 1347 n.3.

150. Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1974). *See* notes 100-01 and accompanying text *supra*.

151. *See* notes 102-03 and accompanying text *supra*.

152. Gough v. Rossmoor Co., 487 F.2d 373, 376 (9th Cir. 1973).

153. 15 U.S.C. § 1703 (1970). *See* notes 86-88 and accompanying text *supra*.

commerce clause as embodied in the Interstate Land Sales Full Disclosure Act.

In a recent shopping center case, *Sapp v. Jacobs*,[154] another federal district court interpreted the *Goldfarb* decision narrowly. The plaintiffs, the owners of a beneficial interest in a real estate trust, brought an action against two local developers and two out-of-state corporations, Sears and Macys, before the defendants had built their shopping center. The plaintiffs charged that the defendants had violated section one of the Sherman Act by conspiring to prevent the plaintiffs from erecting their own shopping center. The court held that the solicitation of out-of-state tenants for a proposed shopping center did not place the transaction in interstate commerce. The court also held that there was no substantial effect on interstate commerce because the plaintiffs had been restrained only in their desire to sell or lease real estate in the local area, and that there was no adverse effect on the interstate flow of goods or building materials to the plaintiffs' center because it had not yet been built.

In holding that the solicitation of out-of-state customers did not meet the "in commerce" requirement of the Sherman Act, the court stated that the *Goldfarb* decision "held that the transactions were 'in interstate commerce' only because of the substantial volume of interstate financing."[155] However, nowhere did the Supreme Court state in *Goldfarb*[156] that interstate real estate transactions were limited to cases involving interstate financing. The phrase "interstate aspects of real estate transactions" implies that the Supreme Court was looking at the totality of the real estate transactions—the fact that out-of-state parties were involved as well as money.

Furthermore, the *Sapp* court noted that no case had been found holding that negotiations between citizens from different states for a contractual agreement which would be performed intrastate, without more, is a transaction which is either "in" or "substantially affects" interstate commerce. The court noted that a necessary result of this argument would be the conclusion "that every contract between citizens of different states is protected by the Sherman

154. 408 F. Supp. 119 (S.D. Ill. 1976).
155. *Id.* at 127.
156. 421 U.S. 773, 783-85 (1974).

Act,[157] a conclusion which would have to come from a higher court.

The district court appears to have disregarded the famous Supreme Court case, *Gibbons v. Ogden*,[158] where Justice Marshall stated "commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches . . . [commerce is interstate when it] concerns more states than one."[159]

Because the Sherman Act is coextensive with the commerce clause power, a conclusion that the solicitation of out-of-state parties does not have a sufficient effect on interstate commerce under the Sherman Act is a holding that Congress does not have the constitutional power to regulate this activity. The Interstate Land Sales Full Disclosure Act indicates that Congress thinks otherwise.

Furthermore, the solicitation of out-of-state parties must have involved the use of an instrument of commerce such as a telephone or a letter, and since the Congress has the power to regulate this activity under the commerce clause power as embodied in the Interstate Land Sales Full Disclosure Act, these activities should have met the "in commerce" test of the Sherman Act.[160]

The other argument of the *Sapp* court that there is no substantial effect on the interstate flow of commerce in goods and building materials because the shopping center had not yet been built appears inconsistent with the Supreme Court's decision in *Hospital Building Co. v. Trustees of Rex Hospital*.[161] One of the factors which influenced the decision that interstate commerce was substantially affected was that out-of-state funds would be used for the expansion of the hospital.[162] The Supreme Court never raised the point that the hospital's expansion had to be finished before there

157. 408 F. Supp. 119, 127 (S.D. Ill. 1976).

158. 22 U.S. (9 Wheat) 1 (1824).

159. *Id.* at 189, 194. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 552 (1942), where the Supreme Court stated that Sherman Act jurisdiction covers "*transactions* which, reaching across state boundaries, affect the people of more states than one."

160. *See* Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), where the court held section 10b-5 of the SEC Act, a commerce clause statute, applicable to an *intrastate telephone call* because the same wires carried interstate messages and hence there was a use of interstate commerce.

161. 425 U.S. 738 (1976).

162. *Id.* at 741. In contrast to *Diversified Brokerage Services* and Sapp v. Jacobs, *see* Miller v. Granados, 529 F.2d 393 (5th Cir. 1976), involving an alleged violation for a tying arrangement in which condominium rooms were tied to recreational

could be a substantial effect on commerce. Since the interstate flow of goods and building materials would be substantially affected, the "substantial effect" test was met. Therefore, since both the "in commerce" test and the "substantial effect" test were met, interstate commerce was sufficiently affected.

VI. CONCLUSION

In applying the Sherman Act to land, courts should first remember that the Sherman Act's jurisdictional reach is coextensive with the commerce clause; if a court holds that an activity is not within Sherman Act jurisdiction, it has decided that defendant's conduct does not have "a sufficient relationship to interstate commerce to be subject to regulation by Congress."[163]

The "in commerce" test must then be considered. A court should determine whether there are interstate real estate transactions involved by looking at the combination of factors that make up the transaction. If there are interstate real estate transactions involved, it is necessary to decide whether there has been a per se violation justifying the presumption that interstate commerce has been sufficiently affected.

If there is no per se violation, a court must then determine whether a defendant is engaged in interstate real estate operations and if so, what percentage of the business is engaged in interstate operations. If it is more than *de minimis*, the defendant's conduct should sufficiently affect interstate commerce.

If there are neither interstate real estate operations nor interstate transactions involved, the "substantial effect" test must then be examined. First, a finding must be made as to whether the effect of the intrastate act(s) or transaction(s) on interstate commerce is substantial. The economic magnitude of the violation must be determined, *i.e.*, the geographic area and the monetary value involved. If the magnitude of the violation alone will not sufficiently affect interstate commerce and if intrastate transactions are involved, Sherman Act jurisdiction should still be found if the profits and/or assets from those transactions flow into interstate commerce. If there are no intrastate transactions involved, a finding

facilities. The court found Sherman Act jurisdiction on an instrumentalities of commerce theory.

163. Gough v. Rossmoor Co., 487 F.2d 373, 376 (9th Cir. 1973).

that the intrastate act(s) have had or will have a substantial effect on the interstate flow of commerce in goods, agricultural produce, other natural resources, building materials and/or persons will confer jurisdiction.

Finally, where no single factor has established jurisdiction, the court should examine the combination of interstate factors including the interstate effects of the local acts, and then determine whether there has been a substantial effect on the interstate flow of commerce.

In applying the two tests for jurisdiction over land, a court should keep in mind the underlying philosophy of the Sherman Act. As two well-known antitrust professors have stated: "[C]ompetitive markets are fundamental to the American system not simply because they encourage economic efficiency and material progress, but because they advance several extremely important objectives . . . . [A]ntitrust operates to forestall concentrations of economic power which if allowed to develop unhindered, would call for much more intrusive government supervision of the economy."[164]

The dangerous economic effect of continued indifference to concentrated land holdings has been articulated by Sir Winston Churchill: "[L]and monopoly is not the only monopoly . . . but it is by far the greatest of the monopolies; it is a perpetual monopoly, and it is the mother of all other forms of monopoly."[165] Thus, unless the antitrust laws are applied, large landowners will continue to wield inordinate amounts of political power and dominate land use policy, and the average American may be deprived of one of the most fundamental commodities—land.

William E. Perry

164. Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-83 (1965).

165. W. CHURCHILL, LIBERALISM AND THE SOCIAL PROBLEM, 319 (1909).