Redlining: Potential Civil Rights and Sherman Act Violations Raised by Lending Policies

I. Introduction

Redlining is the policy of lending institutions either to exclude certain geographic areas from consideration for home mortgages and rehabilitation loans or to vary the terms and conditions of such loans.[1] This policy can be implemented by various methods[2] and may be a violation of the loan applicant's civil rights if the affected neighborhoods are inhabited primarily by minority group members.[3] Redlining may also be a violation of

---

[1]U.S. Comm'n on Civil Rights, Understanding Fair Housing (1973). In this brochure, redlining is defined as "the refusal to make any loan in a particular area." *Id.* at 14. *See also* U.S. Comm'n on Civil Rights, Federal Civil Rights Enforcement Effort—A Reassessment (1973). The report states: "'Redlining' is generally defined as a lending policy which excludes certain areas or neighborhoods from consideration in the making of mortgage or home rehabilitation loans." *Id.* at 168 n.13.

The Commissioner of the Illinois Savings and Loan Association on January 1, 1974, amended Article II of his Association's regulations pursuant to the Illinois Savings and Loan Act. Ill. Ann. Stat. ch. 32, §§ 805, 841.2 (1970). Section 9 of the regulations contains the following definition:

> "Redlining" is the practice of arbitrary varying the terms or application procedures or refusing to grant a mortgage loan within a specific geographical area on the grounds that the specific parcel of real estate proposed as collateral for the loan is located within said specific geographical area.

[2]The Housing Training and Information Center, 4207 West Division Street, Chicago, Illinois, 60651, has released a list containing eleven methods of redlining by financial institutions, which include requiring higher down payments than are usually required for financing comparable property, fixing higher interest rates or closing costs, fixing earlier maturity dates, fixing minimum dollar amounts for loans and thereby excluding lower priced properties, stalling on appraisals, setting appraisals below actual market value, applying more rigid appraisal standards, refusing to lend on the basis of "presumed economic obsolescence" no matter what the condition of the older property may be, and charging discount points to discourage financing.

[3]Relevant data suggests that redlining policies most often affect central city, minority group neighborhoods. For example, the Federal Home Loan Bank Board (FHLBB) in March, 1972, released a small sampling of member savings and loan associations with 74 respondents out of 100 surveyed. The responses to the sampling showed that thirty percent of the respondents disqualified some neighborhoods from lending because they were inhabited primarily by low-income or minority group members, and thirty-five answered "yes" to an inquiry as to whether or not redlining is a problem in the savings and loan industry.

On April 25, 1972, the United States Department of Housing and Urban Development (HUD) released a preliminary report of a survey made in co-section 1 of the Sherman Act.[4] In this Note, the discussion will focus upon (1) violations of relevant civil rights laws by financial institutions pursuing a policy of redlining,[5] (2) violations of section 1 of the Sherman Act as a result of redlining, (3) prob-

---

operation with all the federal financial regulatory agencies. Of the 582 savings and loan associations—from the 50 cities with the largest minority population—responding, seventeen percent stated that the racial or ethnic characteristics of the neighborhoods were considered in evaluating loan applications, and twenty percent stated that income levels of neighborhood residents were considered. Also, eighteen percent of the savings and loan associations responded that they refused to make loans in one or more areas with high concentrations of minority group members.

The National Committee Against Discrimination in Housing (NCDH), 1425 H Street, N.W., Washington, D.C., 20005, released a report in February, 1972, entitled "Patterns and Practices of Discrimination in Lending in Oakland, California." Documenting the lending record of three major savings and loan associations in the Oakland area, NCDH's study showed great differentials in the number of loans, depending upon the percent of blacks in given census tracts of the city.

The City of Indianapolis Department of Metropolitan Development in December, 1972, published "The Housing Component, A Staff Report for Community Review of the Unified Planning Program; 1970-1976 for the Indianapolis-Marion County Metropolitan Area." It is noted in the report that:

> Low-income households are not generally regarded as "good credit risks" when they attempt to take advantage of opportunities to get better quarters. In addition—*and often of even greater importance*—their residence in older close-in neighborhoods effectively shuts them off from access to standard credit channels, and if they can get financing at all, it is often at excessive rates and on burdensome terms. The long time "blacklisting" of neighborhoods by the Federal Housing Administration (FHA), now officially outlawed, meant an absolute curtailment of insured mortgage funds. Conventional financing institutions and insuring companies have followed the same practices.

Id. at 10-11 (emphasis added).

See also G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT (1973). The authors observe that in Newark:

> Primary lenders in urban areas—commercial and mutual savings banks, savings and loan associations, insurance companies, and even individuals—are getting out of the inner city mortgage lending business.

Id. at 6. *See generally* M. STEGMAN, HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE (1972). Among many other related topics, the author discusses the unavailability of conventional financing for residents of Baltimore's inner city desiring home ownership.

[4]15 U.S.C. § 1 (1970).

[5]Two suits were filed last year charging defendants with racially discriminatory lending practices. Both complaints alleged that defendants—a savings and loan association in one case and a mortgage company in the other—engaged in acts and practices "which discriminate against property owners and potential home buyers because of the racial composition of the neighborhoods in which they live or intend to live." Complaint at 1, Harrison v. Heinzeroth Mortgage Co., No. C74390 (N.D. Ohio, filed Sept. 21, 1974).

lems in establishing the right to a legal remedy under both the civil rights laws and the Sherman Act, and (4) remedial approaches to redlining other than litigation.

II. Redlining As a Violation of the Loan Applicant's Civil Rights

A. *The 1968 Fair Housing Act*

The 1968 Fair Housing Act[6] (hereinafter referred to as Title VIII), through section 3605, proscribes the denial of a loan by any corporation, association, firm, or enterprise engaged in the business of making commercial real estate loans to any applicant because of the applicant's race, color, religion, or national origin.[7] A lending institution making residential mortgages and rehabilitation loans violates section 3605 if it pursues a policy of redlining minority group neighborhoods.[8] This is true even in the ab-

---

The other suit is Laufman v. Oakley Bldg. & Loan Co., No. C174-153 (S.D. Ohio, filed Apr. 29, 1974).

[6]42 U.S.C. §§ 3601 *et seq.* (1970).

[7]*Id.* § 3605 provides:

> *Discrimination in the Financing of Housing*
>
> After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided,* That nothing contained in this section shall impair the scope or effectiveness of the exception in section 3603(b) of this title.

[8]Though shown to have violated section 3605, a lending institution may avoid liability if it establishes a business justification for redlining in minority group areas and shows that there was no less discriminatory way to accomplish its business goals. See note 84 *infra* & accompanying text.

Section 3604(a) of Title VIII, 42 U.S.C. § 3604(a) (1970), also appears to be violated by the redlining of minority group neighborhoods, which makes housing unavailable to potential borrowers. This section provides, in pertinent part, that it shall be unlawful "to refuse to sell or rent . . . *or otherwise make unavailable or deny* . . . a dwelling to any person because of race, color, religion, sex or national origin." *Id.* (emphasis added). Thus, section 3604(a) not only prohibits conduct constituting a refusal to sell or rent but also prohibits sence of a showing that racial discrimination was intended, since practices that have a disparate racial impact constitute violations of Title VIII regardless of a party's intent.[9]

For example, in *United States v. Grooms*,[10] a federal district

---

conduct that otherwise makes dwellings unavailable. The "otherwise make unavailable" language of the section has been given a broad reading by the courts. *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); United States v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973); Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1973). This language has also been applied to a variety of discriminatory conduct having nothing to do with a refusal to sell or rent. *See* United States v. City of Black Jack, United States v. City of Parma, and Zuch v. Hussey, *supra*.

In *Black Jack*, a zoning ordinance prohibiting the construction of any new multi-family dwellings was held to violate section 3604(a) when shown to have the effect of making housing unavailable to blacks because of race. Similarly, in *Zuch* any action or word by a real estate broker or salesman used to influence the choice of a prospective homebuyer on a racial basis was held to violate section 3604(a). Outlining the prohibitions of section 3604(a), the court in *Zuch* noted:

> [S]ection [3604(a)] makes it unlawful to "otherwise make unavailable" housing or to deny housing because of race. The foregoing phraseology appears to be as broad as Congress could have made it, and all practices which have the effect of making dwellings unavailable on the basis of race are therefore unlawful.

366 F. Supp. at 557.

The redlining of minority group areas, though not conduct involving a refusal to rent or sell, clearly is conduct which makes dwellings unavailable on the basis of race when a buyer is unable to purchase a dwelling because of his inability to obtain a mortgage loan. Therefore, the redlining of minority group areas which makes dwellings unavailable should be a violation of section 3604(a).

[9]United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972); United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972); Banks v. Perks, 341 F. Supp. 1175, 1179 (N.D. Ohio 1972).

See also "The Applicability of the Board's Nondiscrimination Regulation to the Practice of 'Redlining' by FHL Bank Member Institutions," Inter-Office Communication from Charles E. Allen, General Counsel of the Federal Home Loan Bank Board, to Richard Platt, Jr., Mar. 21, 1974, on file at the office of the *Indiana Law Review*. In this inter-office memo, Mr. Allen discusses the cases cited *supra* and states that "practices which are discriminatory in effect are unlawful . . . under Title VIII." *Id.* at 4. Mr. Allen uses these cases to support his main argument:

> [T]he practice by member institutions of refusing to extend credit, and the practice of extending credit on terms which are less favorable than those usually offered, to borrowers whose security property is located within a predetermined geographic area or areas, because of the location of the property, violates section 528.2(d) if such practices have a discriminatory effect against members of racial, ethnic or religious groups.

Id. at 2, referring to 12 C.F.R. § 528(a) (1975) (previously § 528(d)).

[10]348 F. Supp. 1130 (M.D. Fla. 1972).

court, in setting a standard to determine the existence of a pattern or practice of discrimination under Title VIII, stated:

> Any course of conduct or way of doing business which actually or predictably results in different treatment of whites and blacks is a discriminatory pattern or practice, irrespective of motivation.[11]

In *Grooms* a trailer court operator required both white and black applicants to present three references from current tenants of the park. Such references were not easily obtained by black applicants since most did not know any of the current tenants, all of whom were white. As a result of their failure to obtain the references, blacks were not admitted as tenants. Applying the standard noted above, the court held that the reference requirement was unlawful under Title VIII, emphasizing that Title VIII, like other civil rights laws, "prohibits conduct with discriminatory consequences as well as discriminatorily motivated practices."[12]

As suggested by the district court in *Grooms*, practices facially neutral which have a discriminatory effect violate civil rights laws other than Title VIII.[13] Thus, the United States Supreme Court in *Griggs v. Duke Power Co.*[14] declared unlawful an employer's promotion system that required an employee to have a high school diploma and to pass intelligence and aptitude tests in order to be eligible for promotion. Although it was not shown that the system was initiated for a discriminatory purpose, the Court held that the requirements violated Title VII of the Civil Rights Act of 1964.[15]

Title VII, like section 3605 of Title VIII, prohibits discrimination based on race, color, religion, or national origin.[16] Interpreting this prohibition, the Supreme Court in *Griggs* found that the "Act proscribes not only overt discrimination but also prac-

---

[11]*Id.* at 1133.

[12]*Id.* at 1133-34.

[13]Two cases held that practices of a state which are fair in form but discriminatory in operation violate applicable provisions of the United States Constitution. Lane v. Wilson, 307 U.S. 268 (1939) (violation of the fifteenth amendment); Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (violation of the fourteenth amendment).

[14]401 U.S. 424 (1971).

[15]*Id.* at 432.

[16]For example, 42 U.S.C. § 2000e-2(a) (1970) provides:

> It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

tices that are fair in form, but discriminatory in operation."[17]

In sum, a practice of redlining which has a disparate impact on minorities violates section 3605 even if the practice is based solely on the *location* of a residence and not on the race of either the applicant or inhabitants of the neighborhood. However, lending institutions that redline a minority group area may avoid liability under section 3605 if they can establish a legitimate business reason for such a policy and show that there is no less discriminatory way to accomplish this policy.[18]

B. *Section 1982 of the 1866 Civil Rights Act*

A policy of redlining may also violate section 1982 of the Civil Rights Act of 1866.[19] Section 1982 provides: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[20]

In the landmark case of *Jones v. Alfred H. Mayer Co.*,[21] the United States Supreme Court held that the scope of section 1982 extended to private acts of discrimination in the sale or rental of property and that the statute thus construed was a valid exercise of Congress' power to enforce the thirteenth amendment.[22] In upholding the constitutionality of section 1982 under the thirteenth amendment, the Court in *Jones* viewed that amendment to be a promise of freedom to black citizens which would be " 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."[23] This language suggests that redlining which has a disparate impact on black borrowers and interferes with the right to purchase a home would be proscribed by section 1982, since, because of such redlining, money in the hands of black person would not be able to purchase property that could be purchased by money in the hands of a white person.[24]

---

[17]401 U.S. at 431.

[18]See note 84 *infra* & accompanying text.

[19]42 U.S.C. § 1982 (1970).

[20]*Id.*

[21]392 U.S. 409 (1968).

[22]*Id.* at 413.

[23]*Id.* at 443.

[24]The argument that section 1982 should be given a broad interpretation with focus on the *effect* of racial discrimination on the victim, rather than the act of the discriminator, is made in Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The* Contract Buyers League *Case*, 80 YALE L.J. 516 (1971). The author states:

> Just as the courts have come to acknowledge that Section 1982 does not specify possible violators [and thus is not limited to pro-

Similarly, redlining with a disparate impact on blacks which interferes with the right to rehabilitate a home should also be actionable under section 1982. This proposition is supported by the decision in *Jones* wherein the Court stated that section 1982 prohibits "all racial discrimination . . . with respect to the rights enumerated therein—including the right to purchase or lease property."[25] The denial of a rehabilitation loan to a black person would clearly interfere with that person's right to "hold" property, a right enumerated within section 1982.[26]

The proposition that section 1982 would bar racially discriminatory redlining in the extension of credit required to purchase or rehabilitate a home finds further support in the recent decision of the Seventh Circuit Court of Appeals in *Clark v. Universal Builders, Inc.*[27] The plaintiffs in *Clark* had alleged that, because of the lack of supply in the black housing market in Chicago, they were exploited by the defendants, who sold them houses for prices and on terms far in excess of those whites paid for comparable housing.[28] The Seventh Circuit, in support of its holding that plaintiffs' exploitation theory of discrimination was actionable

---

> scribing discrimination committed by state action], they must soon see that the statute does not specify prohibited *acts* of discrimination, traditionally defined or otherwise. As the offspring of the Thirteenth Amendment, as well as by its own terms, Section 1982 guarantees equal property rights between the races *in fact.* The statute is addressed to whether the present status of the black man's property rights is the same as that enjoyed by white—it is oriented toward the situation of the victim of discrimination, not the acts of the discriminator. . . .

Id. at 559-60.

[25]392 U.S. at 436.

[26]The Supreme Court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969), called for a broad interpretation of section 1982. In *Sullivan,* the defendant-corporation had refused to assign a membership share in playground facilities and a community park to Freeman, who was black. Under the corporation's bylaws, a shareholder could assign his membership share in the recreational facilities to a tenant when he rented his house, subject to approval by the board of directors. The Court found defendant's refusal to approve the attempted assignment an interference with Freeman's right to lease and, therefore, a violation of section 1982. The principle which can be drawn from *Sullivan,* then, is that the interference with the property rights guaranteed by section 1982 need not be so great that such rights are precluded from being exercised at all. Thus, a policy of redlining which has a discriminatory impact on black persons should still be actionable even if alternative, albeit more expensive, means of financing the purchase or rehabilitation of a home are available.

[27]501 F.2d 324 (7th Cir. 1974).

[28]*Id.* at 334. The Seventh Circuit found that the housing market in Chicago was racially segregated. Therefore, in reality there were two housing markets, one for whites and a separate one for blacks. In the black housing market, it was shown that the demand for housing exceeded the supply,

under section 1982,[29] noted that the Supreme Court in *Jones* "viewed section 1982 as a broad based instrument to be utilized in eliminating all discrimination and the effects thereof in the ownership of property."[30]

This interpretation of section 1982 emphasizes the effects of discrimination on the property rights of a black person. Applying the interpretation to redlining which has a disparate impact on blacks, it is clear that section 1982 should bar such a policy, since its *effect* is to preclude black citizens from exercising "the same right as is enjoyed by white persons" in "purchasing" and "holding" property.

C. *Regulations of the Federal Home Loan Bank Board*

Though it placed the primary responsibility for administering Title VIII with the Secretary of the Department of Housing and Urban Development (HUD),[31] Congress called upon all executive agencies and departments to cooperate in administering the Act by mandating affirmative action in the administration of "programs and activities relating to housing and urban development."[32] The Federal Home Loan Bank Board (FHLBB), which regulates nearly all savings and loan associations,[33] is such an

---

thereby creating the situation in which the defendant-sellers in *Clark* were able to exploit the plaintiff-buyers.

[29] *Id.*

[30] *Id.* at 330.

[31] 42 U.S.C. § 3608 (1970).

[32] *Id.* § 3608(c) provides:

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes.

[33] Approximately eighty percent of the nation's savings and loan association are FHLBS members. FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT, *supra* note 1, at 518. In addition, FHLBS members in 1973 held 97.7% of the assets of the savings and loan business. 1974 SAVINGS AND LOAN FACT BOOK 112 (U.S. League of Sav. Ass'ns publ. 1974). Furthermore, savings and loan associations are the major source of residential credit:

> At year-end 1973, loan portfolios of associations accounted for 48.4% of all the one-to-four family loans [loans on residential structures housing one to four families] outstanding and 26.8% of all the loans secured by multifamily units. . . . This brought associations' share of all residential mortgages to a total of 44.3%.

Id. at 34.

The loan portfolios of commercial banks account for 17.4% of all the one-to-four family loans outstanding in the United States, placing commercial banks second to FHLBS members in the area of residential financing. *Id.* at 38, chart 17.

agency and therefore has the duty to take affirmative action to further the purposes of Title VIII.

On April 27, 1972, the FHLBB issued "Nondiscrimination Requirements" for member institutions.[34] Section 528.2(a) of these requirements proscribes the denial of a residential mortgage or improvement loan, or the placement of discriminatory terms and conditions on these loans, because of the race of the applicant or the race of the occupants of residences located in the vicinity of the applicant's security.[35] Section 528.2(a) is based on Title VIII and sections 1981 and 1982 of the 1866 Civil Rights Act.[36] More specifically, however, the language of section 528.2(a) closely resembles the language of section 3605 of Title VIII, which prohibits discrimination in the financing of housing.[37] Therefore, in addition to proscribing a policy of redlining which has a disparate impact on blacks,[38] section 528.2(a) arguably represents a reasonable administrative interpretation of section 3605, and, as such, it should be given great deference by a court construing section 3605.[39]

III. Redlining As a Violation of Section 1 of the Sherman Act

A. *Elements of a Cause of Action Under Section 1*

Section 1 of the Sherman Act prohibits a combination or conspiracy in restraint of trade or commerce among the several

---

[34] 12 C.F.R. § 528 (1975).

[35] *Id.* § 528.2(a) provides:

> No member institution shall deny a loan or other service rendered by the member institution for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or discriminate in the fixing of the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or other service because of the race, color, religion, sex, or national origin of . . . (4) The present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity of the dwelling or dwellings in relation to which such loan or other service is to be made or given.

[36] "The Applicability of the Board's Nondiscrimination Regulations to the Practice of 'Redlining' by FHL Bank Member Institutions," *supra* note 9, at 4, states:

> Section 528.2 [recodified as 528.2(a)] is based on title VIII of the Civil Rights Act of 1968 . . . and certain provisions of the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) intended to ensure that all persons have an equal opportunity to rent, purchase or finance housing without regard to race, color, religion or national origin.

[37] See note 7 *supra*.

[38] See notes 9-13 *supra* & accompanying text.

[39] See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v.

states.[40] A common and conscious pattern of business behavior among competitors (conscious parallelism) by itself is insufficient to permit an inference of a combination or conspiracy.[41] It is not clear what more is required to allow an inference that a conspiracy exists.[42] The Supreme Court, however, in a 1969 decision found a tacit agreement sufficient to establish a combination or conspiracy under section 1, concluding that each defendant gave information to the other defendants "with the *expectation* that it would be furnished *reciprocal* information when it wanted it."[43] Thus, even a small amount of contact between defendants may suffice. In any event, it is well-established that an explicit agreement is not required to allow the inference that a combination exists.[44]

A restraint on trade or commerce[45] can be shown by proving the anti-competitive effect of the disputed conduct.[46] The anti-

City of Chicago, 400 U.S. 8, 10 (1970); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[40]15 U.S.C. § 1 (1970) provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

[41]Theatre Enterprises v. Paramount, 346 U.S. 537, 541 (1954). *See also* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). Turner notes that

> conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.

Id. at 658 (emphasis in original).

[42]*See generally* Saliterman, *Some Antitrust Problems in Government Insured/Guaranteed Mortgage Lending*, 23 BUFF. L. REV. 119 (1973).

[43]United States v. Container Corp. of America, 393 U.S. 333, 335 (1969) (emphasis added). In *Container Corp.*, the defendants had exchanged information about the most recent price each was charging specific customers. Although the Court noted the "infrequency and irregularity" of these exchanges between the defendants and acknowledged that often the data exchanged was "available from the records of the defendants or from the customers themselves," it distinguished this behavior from conscious parallelism on the basis that each defendant expected "reciprocal information when it wanted it." *Id.*

[44]United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966); United States v. Parke, Davis & Co., 362 U.S. 29, 38-44 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922).

[45]Intangibles such as mortgage or rehabilitation loans have been found to be items of "trade or commerce" within the scope of section 1. United

competitive effect of a concerted policy of redlining could be shown in at least two ways: (1) by data showing the unusually small number of residential loans granted to a redlined area vis-à-vis other areas serviced by financial institutions, or (2) by data showing onerous terms and conditions on residential loans granted in a redlined area.

Finally, the restraint on trade or commerce must have an effect on interstate commerce to be actionable under section 1. A local activity, for example, the practice of redlining in a community, which has a substantial effect on interstate commerce will satisfy this requirement.[47]

B. Section 1 Issues

Three issues under section 1 of the Sherman Act are raised by a concerted refusal to grant mortgages or rehabilitation loans in a particular area or by a concerted refusal to grant such loans without onerous terms and conditions.[48]

States v. South Eastern Underwriters Ass'n, 332 U.S. 533, 560-61 (1943); Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723, 724 (6th Cir. 1967); Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969).

[46]Standard Oil Co. v. United States, 221 U.S. 1, 56-68 (1911); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972).

[47]For the principle that a purely local activity which has a substantial effect on interstate commerce is sufficient to show a "restraint on trade or commerce among the several States," *see* Burke v. Ford, 389 U.S. 320 (1967); Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 124-25 (N.D. Cal. 1970); Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969).

[48]In Saliterman, *supra* note 42, the author discusses two residential areas of New York City which underwent rapid deterioration—eastern Brooklyn and southern Queens. The combination of a decreasing flow of conventional mortgage money into these areas and corrupt and exploitative practices by mortgage companies, real estate brokers, and the FHA in handling guaranteed government loans, often the only source of mortgages available, caused a flood of foreclosures. The foreclosures resulted in abandoned houses subject to vandalism, which in turn led to an overall decline in the quality of the neighborhoods. The author suggests four antitrust issues arising under section 1 of the Sherman Act as a result of the anti-competitive mortgage market in eastern Brooklyn and southern Queens: (1) price-fixing, (2) territory customer allocation, (3) boycotting third parties (or concerted refusals to deal), and (4) tying arrangements. A discussion of "territory customer allocation" is beyond the scope of this Note, because the data shaping this author's bias does not suggest that such a practice is necessarily connected with redlining as that policy is defined herein. It is suggested that the reader refer to the above-cited article for a discussion of the application of "territory customer allocation" to corruption-riddled lending policies of the federal government in areas where private lenders are no longer extending credit.

First, illegal price-fixing may be the result of concerted redlining policies if the price of credit in redlined neighborhoods is tampered with by horizontal price-fixing arrangements among financial institutions. A party alleging a price-fixing scheme in violation of section 1 need not show the existence of a price list or detailed verbal communication exchanges[49] or that the price levels were unreasonable, since an "intereference with the setting of price by free market forces is unlawful *per se.*"[50]

Second, group boycotts or combined refusals to deal with third parties, or dealing only on onerous terms, have been held actionable under section 1 of the Sherman Act.[51] Redlining by definition involves the refusal to deal with loan applicants whose residences are located in certain areas or dealing with applicants from redlined areas on onerous terms and conditions. Therefore, a concerted policy of redlining would necessarily involve a refusal to deal which would be actionable under section 1.[52] The ultimate success in such litigation would depend on the reasonableness of the practice.[53]

---

[49]United States v. Container Corp. of America, 393 U.S. 333 (1969).

[50]*Id.* at 337. *See also* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1926).

[51]Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 612-14 (1914); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert denied,* 396 U.S. 1062 (1970); Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723, 724 (6th Cir. 1967); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972).

[52]It is well-established that individual refusals to deal in the absence of a combination are not subject to section 1 of the Sherman Act. For recent cases on point, *see* Adolph Coors Co. v. FTC, 497 F.2d 1178, 1185 (10th Cir. 1974); Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 640 (10th Cir. 1973); Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 367 F. Supp. 868, 872 (E.D. Tex. 1973).

[53]E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972).

In *America's Best,* the district court utilized the "reasonable test" previously employed by the Ninth Circuit to determine whether a concerted refusal to deal violated section 1 of the Sherman Act, stating:

> The critical inquiry in a refusal to deal action . . . is "whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive in purpose and effect, or both, as to be an unreasonable restraint of trade."

Id., quoting from Alpha Distributing Co. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972).

Third, tying arrangements in extending loans to redlined areas would violate section 1 if done in concert by financial institutions.[54] Tying arrangements involve an unwillingness to sell unless the buyer purchases a second, different product:

> In order for a marketing situation to be declared an illegal tying arrangement, it is usually necessary for the seller to possess very substantial power in the "tying" or "tie-in" product. The seller then must refuse to deal with the buyer unless the buyer also purchases a second, different product, the "tied" product.[55]

The product "tied" to a mortgage extended in a redlined area may include discriminatory interest rates, high down payment requirements, or a relatively short loan life.[56]

C. *Relief Available: Problems of Standing*

Monetary relief, including treble damages, and injunctive relief are the two major remedies available to claimants injured by violations of the antitrust laws. The former remedy, while perhaps the most desirable, can have a devastating impact on a defendant. Injunctive relief, on the other hand, does not involve the prospect of a "ruinous recovery." The following discussion of these two remedies accents the difference in the standing requirements of each and suggests that injunctive relief would be more readily available to those injured by a concerted policy of redlining.

---

[54]For decisions of the Supreme Court holding tying arrangements illegal under section 1 of the Sherman Act, *see* Fortner Enterprises, Inc. v. United States Steel, 394 U.S. 495 (1969); United States v. Loews, Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[55]Saliterman, *supra* note 42, at 128.

[56]The United States Supreme Court recognized credit as a tying *product* in Fortner Enterprises, Inc. v. United States Steel, 394 U.S. 495 (1969). Supporting this result the Court stated:

> The potential harm is . . . essentially the same when the tying product is credit. The buyer may have the choice of buying the tangible commodity separately [in this case, housing], but as in other cases the seller can use his power over the tying product to win customers that would otherwise have constituted a market available to competing producers of the tied product.

Id. at 508.

High interest rates, substantial down payment requirements, and shortened loan lives may all be attached to loans in redlined neighborhoods. It would be consistent with the *Fortner* holding for a court to view these loan terms as "products" because the potential harm—a stifling of competition in the setting of loan terms—is essentially the same as it would be if the tied products were more traditional in nature. Also, a logical extension of the recognition of credit as a product is the recognition of the terms and conditions of credit as products for purposes of insuring competition in a portion of the home financing market.

Section 4 of the Clayton Act[57] provides for monetary relief for any person injured by a violation of section 1 of the Sherman Act.

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee.[58]

On its face, section 4 is a broad provision which encourages an individual injured by a violation of the Sherman Act to file suit. It provides for treble damages, jurisdiction in federal court regardless of the amount in controversy, and recovery of the cost of litigation including an attorney's fee. Since its enactment in 1914, however, standing to sue under section 4 has been interpreted narrowly by courts because of a fear of "ruinous recovery" and a multitude of specious and ill-founded claims.[59] For example, the phrase "by reason of" has been interpreted to require a direct injury—the plaintiff must show a direct relationship or privity of contract with a defendant in order to have standing to sue for section 4 remedies.[60]

The Seventh Circuit Court of Appeals applied the "direct injury" test in 1963.[61] Other circuits, however, have abandoned

---

[57]15 U.S.C. § 15 (1970).

[58]*Id.*

[59]*See* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 COLUM. L. REV. 570 (1964); 5 LOYOLA U.L.J. 655 (1974); 35 OHIO ST. L.J. 723 (1974). The restrictive view which courts have traditionally taken toward standing to sue for treble damages is questioned as to its virtue today, because, in taking a restrictive view, courts

> may have substantially thwarted the accomplishment of the policy goals underlying the creation of the treble damage action. . . . Moreover, judicial doctrines which are well-conceived at inception may diminish in reasonableness with the passage of time. Thus, in an era of massive concentration of economic power in the hands of "mega corporations," it may be that the potential incidence of grievous harm from anticompetitive activity warrants the extension of treble damage standing beyond its traditional, judicially-created bounds.

Id. at 734-35.

[60]Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Co., 382 F.2d 925 (10th Cir. 1967); Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam,* 242 F.2d 758 (1st Cir.), *cert. denied,* 355 U.S. 828 (1957).

[61]Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564,

this test, adopting the "target area" approach whereby plaintiff must prove that he is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[62] Although it did not rule directly on the issue, the United States Supreme Court may have indicated its preference for the "target area" approach.[63]

A second requirement of standing under section 4 is the showing of an injury to "business or property." In 1972 the Supreme Court considered the meaning of these words in *Hawaii v. Standard Oil Co.*[64] Holding that the State of Hawaii did not have standing under section 4 to recover for injuries to its general economy, the Court found that "the words 'business or property' . . . refer to *commercial* interests or enterprises."[65]

In addition, lower federal courts have held that a claimant lacks standing under section 4 if he is unable to show an injury to an *existing* business or property right.[66] This view was adopted

---

567 (7th Cir.), *cert. denied,* 375 U.S. 834 (1963). In a later appeal in the same litigation, Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (7th Cir. 1964), the Seventh Circuit noted that its prior application of the direct injury test shielded defendants from the risk of multiple liability.

[62]Midway Enterprises, Inc. v. Petroleum Mkt'g Corp., 375 F. Supp. 1339, 1344 (D. Md. 1974). The "target area" test has been adopted by the Fourth, Eighth, and Ninth Circuits. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

[63]Perkins v. Standard Oil Co., 395 U.S. 642, 647 (1969). In the *Perkins* case, the appellate court held that no causal connection existed between the supplier's price discrimination and the business of a customer which was four steps removed in the distributive chain. Reversing this decision, the Supreme Court stated that the "'fourth level' limitation is wholly an artificial one and is completely unwarranted by the language or the purpose of the Act." *Id.* Although section 4 of the Clayton Act was not involved (the complaint alleged price discrimination in violation of section 2(a) of the Clayton Act), the Supreme Court's decision could be argued by analogy against a "direct injury" analysis in a section 4 claim for relief.

Perkins has been cited by two federal courts for the proposition that the Supreme Court has implicitly rejected the "direct injury" test for standing under section 4 of the Clayton Act. *See In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert denied,* 414 U.S. 1045, *rehearing denied,* 414 U.S. 1148 (1973); Midway Enterprises, Inc. v. Petroleum Mkt'g Corp., 375 F. Supp. 1339, 1344 (D. Md. 1974).

[64]405 U.S. 251 (1972).

[65]*Id.* at 264 (emphasis added).

[66]Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir. 1966); Peller v. International Boxing Club, 227 F.2d 593 (7th Cir. 1955); Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964); Brownlee v. Melco Theatres, Inc., 99 F. Supp. 312 (W.D. Ark. 1951). *See also* Note, *Standing*

by the Seventh Circuit in *Peller v. International Boxing Club*.[67] The plaintiff in *Peller* sued for treble damages, claiming that his property interests were injured when the defendants blocked his plans for the promotion of a championship boxing match. The Seventh Circuit affirmed the grant of summary judgment for the defendants and held that injury to an anticipated property right of the plaintiff could not be the basis for recovery, "inasmuch as no property rights could accrue to him . . . until and unless he succeeded in obtaining the several contractual relationships for which he was negotiating."[68]

To summarize, a plaintiff[69] seeking treble damages for a concerted policy of redlining may have to overcome three obstacles of standing to maintain his suit. First, an injury to a *commercial* interest or enterprise must be shown. Second, to claim an injury to a property interest, a claimant may be required to show that an existing property interest was injured by defendants' actions. Finally, if the suit is brought in a jurisdiction which applies the "direct-injury" test, a claimant must show that there were no intermediate actors between himself and the defendants.[70]

The prospect of showing standing to sue for injunctive relief for Sherman Act violations caused by a concerted redlining policy, however, is more promising. Section 16 of the Clayton Act[71] provides injunctive relief for those injured or about to be injured by antitrust violations:

---

to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 COLUM L. REV. 570 (1964), in which the author criticizes the court-imposed requirement of a consummated contract before a party is allowed to sue for any injury to rights to be created by a contract.

> Nor is it meaningful to draw the line at consummation of a contract or a sale. . . . The evil accomplished is the same whether the transactions were consummated or would have been but for the illegal acts. That the law of torts and of property recognize interference with such prospective economic advantage as actionable belies the proposition that recognition in this context would encourage spurious suits. Whether it would unduly expand liability is another problem, but one better solved by applying the principles of risk than by manipulating labels.

Id. at 586.

[67]227 F.2d 593, 596 (7th Cir. 1955).

[68]*Id.*

[69]Three separate classes of plaintiffs could be involved in a redlining suit: (1) borrowers injured by the practice, (2) home-owners, attempting to sell, injured by redlining, and (3) real estate brokers and salesmen acting as agents for the home-owners and buyers.

[70]It is arguable, however, that the Supreme Court has implicitly overruled the "direct injury" test. See note 63 *supra*.

[71]15 U.S.C. § 26 (1970).

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .[72]

The "business or property" requirement of section 4 of the Clayton Act is not included in section 16. The United States Supreme Court in *Hawaii v. Standard Oil Co.*[73] dealt with this distinction. The State of Hawaii had brought suit seeking treble damages under section 4 for injuries to its general economy by defendant's alleged Sherman Act violation. Distinguishing section 4 from section 16, the Court found that the "most likely explanation" that the latter section did not require an injury to "business or property" was the essential difference between the two remedies—one hundred injunctions would have no more impact on a defendant than one, but one suit for damages could have a tremendous impact.[74]

The Court in *Hawaii* did not decide whether the State of Hawaii would have had standing under section 16, since the issue was not presented. Building on the distinction drawn by the Supreme Court in *Hawaii,* however, the Ninth Circuit Court of Appeals recently held in *In Re Multidistrict Vehicle Air Pollution*[75] that: "Unlike standing under section 4, standing under section 16 does not require an injury to 'commercial interests' but only an injury cognizable in equity."[76] Like the Supreme Court in *Hawaii,* the Ninth Circuit pointed out that the rationale for the restrictive view of standing which has been adopted in construing section 4[77] was absent in claims for injunctive relief under section 16. Section 16 does not involve the potential for "ruinous recovery," and generally attorneys' fees are not recoverable.[78]

---

[72] *Id.*

[73] 405 U.S. 251, 261 (1972).

[74] *Id.* at 261-62.

[75] 481 F.2d 122, 126-31 (9th Cir. 1973).

[76] *Id.* at 130. Though not ruling specifically on different standing requirements for section 4 and section 16, a federal district court in 1969 found from the legislative history of each section that "the equitable remedy of § 16 is in no way 'predicated upon', incidental to or derived from the legal right of § 4." International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 296 F. Supp. 920, 923 (D. Hawaii 1969).

[77] *See* notes 58-69 *supra* & accompanying text.

[78] Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 428 (2d Cir. 1928); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482 (S.D.N.Y. 1970) (dictum), *modified on other grounds,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 491 (D. Mass 1963) (dictum), *vacated on other grounds,* 333 F.2d 798 (1st Cir.), *cert. denied,*

Also, the threat of potential duplicative recoveries is absent under section 16.

The two groups of plaintiffs who were allowed standing in *Multidistrict* to seek injunctive relief under section 16 alleged that the defendants had conspired to eliminate all competition in the research and development of motor vehicle air pollution equipment. The farmers alleged injuries to their crop yield; the states alleged injuries to their economies.

Similar monetary injury could be shown by plaintiffs alleging anti-trust violations as a result of concerted redlining by financial institutions. For example, a class of plaintiffs denied conventional mortgages could show the added costs of alternative means of financing. A class of plaintiffs who were unable to sell their homes because of concerted redlining could show their resulting economic losses. Likewise, real estate brokers or salesmen retained by the frustrated buyers or sellers could show their loss of profits. Finally, a potential fourth class of plaintiffs could show that they suffered economically by having to abide by onerous mortgage terms to exercise their right to purchase a home in a redlined area. Therefore, because each of these potential classes of plainitffs could show monetary injury, with the two classes of borrowers in addition being able to show either the inability to live where they desire or the payment of a penalty to exercise this right, they should be able to show standing to sue for section 16 injunctive relief.

IV. Problems in Obtaining the Legal Remedies

A. *Problems of Proof*

Title VIII of the 1968 Civil Rights Act, section 528.2(a) of the Federal Home Loan Bank Board's regulations, and possibly section 1982 of the 1866 Civil Rights Act prohibit racial discrimination in residential lending.[79] Furthermore, it is well-established that laws prohibiting racial discrimination may be violated by practices which have a discriminatory impact, even though not motivated by racial considerations.[80] In proceedings under the civil rights laws, statistical data could be utilized to show a disparate impact on minority group persons by a financial institution's lending policies. The use of statistical data to show disparate impact has been accepted by courts in cases involving allegations of racial discrimination in employment and housing, and, in these cases, when the data establishes a prima facie case

379 U.S. 931 (1964); Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899-900 (S.D.N.Y. 1948). *But cf.* Hall v. Cole, 412 U.S. 1 (1973) (dictum).

[79]*See* section II *supra.*

[80]See notes 9, 12-17 *supra* & accompanying text.

of a violation, the burden is placed on the defendant to come forward with evidence of non-discrimination.[81]

Thus, records of the loans granted by a financial institution, which records could be obtained through the discovery process, would enable a plaintiff to show that almost no loans were made in the minority group area where the applicant resides or intends to reside.[82] However, financial institutions may attempt to justify the denials of loans, or the inclusion of burdensome terms and conditions, as reflections of sound business judgment. Thus, an *expanded* use of statistics is advisable to eliminate or minimize the possibility that a financial institution would succeed on the de-

---

[81]Statistical data has been used extensively in employment discrimination cases brought under Title VII of the 1964 Civil Rights Act. For the principle that a prima facie case is established which shifts the burden of persuasion to the defendant to show an absence of discrimination when a substantial disparity is shown between the percentage of minority persons employed by the defendant and the percentage of minority persons in the local population, *see* United States v. Chesapeake & O. Ry., 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Wood, Wire & Metal Lathers Int'l Union, 471 F.2d 408, 414 n.11 (2d Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348, 357-58 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

Statistical evidence has also been relied on in cases arising under Title VIII to determine whether a given practice is discriminatory. *See* United States v. Reddoch, P-H 1972 EQUAL OPP'TY IN HOUSING ¶ 13,569 (S.D. Ala.), *aff'd per curiam*, 467 F.2d 897 (5th Cir. 1972). In *Reddoch*, the district court took notice of the fact that defendant's apartment units had been rented to 330 families, none of whom were black, although the population of the surrounding area was thirty-five percent black. The court found that the defendants were engaged in a pattern or practice of discrimination and stated that "in cases of racial discrimination, statistics often tell much and courts listen." *See also* United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972) (establishment of prima facie case of discrimination shifts burden of going forward to defendants to show nondiscrimination); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio 1968) (court took judicial notice of absence of sales to blacks in a resort area when there was a substantial number of blacks in the population surrounding the resort development).

See also Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 268-81 (1971); Montlack, *Using Statistical Evidence to Enforce the Laws Against Discrimination*, 22 CLEV. ST. L. REV. 259 (1973). Montlack in his article notes that

> in decisions rendered under Title VII of the 1964 Civil Rights Act, the weight accorded to statistical data generally reflects (1) the degree of disparity revealed, (2) the relevance of the statistical data to the issues, and (3) the sufficiency of the employer's explanations of such disparities.

Id. at 268.

[82]See note 81 *supra*.

fense of business necessity.[83]

The business necessity defense has been recognized in cases alleging racial discrimination in housing and employment[84] and most assuredly would be recognized in a suit alleging racially discriminatory redlining practices. Financial institutions are in business to make a profit and must evaluate the chance of losing on their investment when they consider granting a loan.[85]

---

[83]The expanded statistical presentation suggested obviously would not be necessary if a financial institution, faced with a prima facie case of racial discrimination, did not come forward with a business justification for their lending policy. Therefore, its use should be restricted to rebutting a "business necessity" defense.

[84]For the recognition of "business necessity" as an affirmative defense in employment discrimination cases, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); United States v. St. Louis - S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). For its recognition in housing discrimination cases, see Haythe v. Decker Realty Co., 468 F.2d 336, 338 (7th Cir. 1972); Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969).

In addition, the FHLBB has issued supplementary guidelines intended "to aid member institutions in developing and implementing non-discriminatory lending policies." 12 C.F.R. § 531.8 (1975). The FHLBB has also established loan underwriting standards:

> The use of lending standards which have no ecomonic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper *if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.*

Id. § 531.8(b) (emphasis added).

An important question concerning the defense of "business necessity" is whether the business justification required to be shown for a discriminatory practice must be only "reasonable" or "compelling," *i.e.*, must a financial institution show that no less discriminatory means of achieving the conceded legitimate business goal existed. The FHLBB's guidelines, quoted above in part, indicate that the standard would require a "compelling" business justification. This position, adopted in both United States v. St. Louis - S.F. Ry and United States v. Bethlehem Steel Corp., *supra,* is supported by analogy in equal protection cases which hold that a state must adopt a "less restrictive means of discriminating by classification" when a fundamental constitutional right is being interfered with or when the classification is suspect. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[85]W. Smith, Housing: The Social and Economic Elements 300-03 (1970). Smith identifies two main factors of "risk" — the probability that a lending institution will never get its entire investment returned by the borrower or his security — that a mortgage lender considers in deciding whether to extend credit. First, the lender considers the borrower's credit; second, he considers the value of the property offered as collateral. Smith also points out that "Beyond some risk level . . . the lender may feel it

Furthermore, such institutions have a duty to protect the interests of their stockholders and depositors, and it would be unreasonable to hold these institutions liable for a policy of refusing to make "bad risk" loans or, likewise, a policy of requiring a greater return on such loans by including above-average terms and conditions. In a letter to the Senate Subcommittee on Housing and Urban Affairs, which held public hearings on Title VIII of the Fair Housing Act of 1967 before its enactment,[86] Charles R. McNeill, representing the American Bankers Association, commented on business considerations or factors of risk which affect lending policies. Mr. McNeill listed a number of considerations, including the demand for various types of loans, the ability of the borrower to repay the loan, and the assurance that the security is of sufficient value to cover potential losses in the case of default by the debtor.[87] These risk factors would be the elements of a lending institution's attempt to establish an affirmative defense of "business necessity."

Thus, the plaintiff alleging racially discriminatory redlining practices would be wise to expand his statistical presentation to show more than a substantial disparity in the number and amount of loans between white residential areas and black residential areas. A suggested goal of the plaintiff's statistical inquiry would be to show that the area where the plaintiff resides or wishes to reside is comparable to an area inhabited primarily by white persons in which the institution is making mortgages and rehabilitation loans.[88] Statistical data necessary to reach this goal would include information on the income level of the two areas, the age and structural soundness of housing in each area, the ability of residents in each area to get home-owner's insurance, and any other ascertainable factors which would negate the suggestion that redlining is the result of sound business judgment.[89]

In proceedings under the Sherman Act, the plaintiff is faced with the problem of establishing standing to sue for damages.[90]

---

necessary to require progressively higher yields [by adjusting loan terms and conditions accordingly] to compensate for additional risk. . . ." *Id.* at 301.

[86] *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967).

[87] *Id.* at 484.

[88] An analogous use of statistical data has been approved by courts in housing and employment discrimination cases. *See* note 81 *supra*. *See also* Clark v. Universal Builders, Inc., 501 F.2d 324, 337-38 (7th Cir. 1974).

[89] As is noted earlier in this Note, the lender is concerned with the borrower's credit and ability to repay the loan. A plaintiff in a redlining suit therefore would also want data available for rebuttal showing an ability to repay the loan comparable to the ability of those granted loans.

[90] See section III *supra*.

If injunctive relief is sought, the plaintiff must prove that a Sherman Act violation has been or is about to be committed.[91] Business necessity, an affirmative defense in a civil rights action, has also been recognized as an affirmative defense to practices otherwise illegal under the Sherman Act.[92] Thus, similar problems of proof may arise in a civil rights proceeding and in a Sherman Act proceeding.

B. Practical Considerations

In addition to the suggested problems of proof, litigation contesting the practice of redlining poses difficult collateral issues.[93] First, inasmuch as the Sherman Act and the civil rights laws have never been applied to redlining activities, litigation would involve the formulation and resolution of novel questions of law and fact, and success would be difficult to predict.

Second, although preliminary injunctive relief may often be available and the mere initiation of a lawsuit may have a positive remedial influence, the claimant or claimants may need an abundance of patience and money, since it could take years for a final decision to emerge from the appellate process. This factor is particularly important, since the defendant in a redlining suit would likely be able to afford the best counsel, who would be formidable opponents in a lengthy and complex suit.

Finally, neither the civil rights laws nor the Sherman Act provide wholly satisfactory relief against redlining. The civil

---

[91]15 U.S.C. § 26 (1973).

[92]E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

The Fifth Circuit in *McQuade* was presented with the issue of whether defendant's refusal to deal with the plaintiff was reasonable. The court found that it was, after reviewing defendant's reasons, and stated: "These interests all represent legitimate business objectives of . . . [the defendant]. There is not the slighted suggestion that the rules of the road were meant to serve any but the objectives stated." 467 F.2d at 188.

[93]The remedies available to a successful party under section 3605 of Title VIII are listed at 42 U.S.C. § 3612(c) (1970). They include injunctive relief, "actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees." For remedies available to the successful litigant under section 1982 of the 1866 Civil Rights Act, see Sullivan v. Little Hunting Park Inc., 396 U.S. 229, 238-40 (1969). In *Sullivan* the Supreme Court held that discriminators are liable to victims for monetary damages for injuries caused by their illegal conduct under section 1982. *See also*, Note, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 295-98 (1973); Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The* Contract Buyers League *Case*, 80 YALE L.J. 516 (1972); 50 TEXAS L. REV. 204 (1971).

rights laws apply only in cases of racial discrimination; the Sherman Act applies only when a conspiracy or combination can be proved. The practice of redlining might not involve either of these two elements.

V. Some Alternative Remedial Approaches

A. Action by the Attorney General

Section 3613 of Title VIII authorizes the Attorney General to initiate suits in two different factual settings. First, he may bring an action if he has "reasonable cause to believe" that a person or group of persons is engaged in a "pattern or practice" of resistance to the terms of Title VIII. Second, he may bring suit when any group of persons has been denied any rights granted by Title VIII and when "such a denial raises an issue of general public importance."[94]

The redlining of black areas, actionable under section 3605 of Title VIII, fits well into either factual setting. The evidently widespread nature of the practice appears to qualify redlining as "an issue of general public importance"—a determination which the courts usually leave to the discretion of the Attorney General.[95] Also, whether practiced individually or by a combination of financial institutions, redlining involves a "pattern" of resistance to the terms of section 3605 of Title VIII.

In light of the expense and the complexity of the issues involved in an action contesting a practice of redlining, the advantages of a suit by the Justice Department vis-à-vis litigation by private claimants are obvious. It should also be noted that section 3613 authorizes the Attorney General to seek such protective

---

[94]42 U.S.C. § 3613 (1970) provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

[95]United States v. Northside Realty Associaties, Inc., 474 F.2d 1164, 1168 (5th Cir. 1973); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 125 n.14 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); Cornelius v. City of Parma, 374 F. Supp. 730, 744 n.18 (N.D. Ohio 1974). *But see* United States v. Hunter, 459 F.2d 205, 217 (4th Cir. 1972).

relief—including a permanent or temporary injunction or restraining order—"as he deems necessary to insure the full enjoyment of the rights granted" by Title VIII.[96]

B. Legislation

The City Council of the City of Chicago passed a unique ordinance on June 10, 1974.[97] This ordinance requires banks and savings and loan associations to supply "residential lending information" with annual bids that they submit to the City Controller for interest upon public funds of the City.[98] Section 7-34

---

[96]See note 94 *supra.*

[97]CHICAGO, ILL., CODE §§ 7-30 to 7-35 (1974).

[98]Similar legislation has recently been introduced in the United States Senate by Senators Proxmire, Brooks, and Stevenson. S. 1281, 94th Cong., 1st Sess. (1975). The bill would require disclosure by each financial institution in the business of making federally related mortgage loans which has a home or branch office located within a standard metropolitan statistical area (SMSA). As of this writing S. 1281 has been passed by the Senate and is under consideration in the House. Features of S. 1281 include:

> (1) a finding by Congress that "depository institutions have sometimes failed to provide adequate home financing on a nondiscriminatory basis for all neighborhoods within the communities and neighborhoods from which those institutions receive deposits;"
>
> (2) a requirement that the affected institutions compile annually *for public inspection and copying at each office of the affected institutions,* the number and total dollar amount of mortgage loans, by census tract, for borrowers under mortgage loans secured by property located within and outside the relevant SMSA;
>
> (3) authority, to be vested in the Board of Governors of the Federal Reserve System, to "prescribe such regulations as may be necessary to carry out the purposes of this Act;"
>
> (4) enforcement powers, to be vested in the four federal financial regulatory agencies and the FTC, to insure compliance with the requirements imposed under S. 1281;
>
> (5) authorization of a study by the Board of Governors of the Federal Reserve System and the Secretary of HUD to determine (a) the feasibility of requiring "depository institutions" located outside a SMSA to make disclosures comparable to those required by S. 1281; (b) the feasibility, cost, and usefulness of requiring all institutions covered by S. 1281 "to disclose by geographical location the source of savings deposits;" (c) "the feasibility and usefulness of requiring disclosure of other types of lending data, such as small business and home improvement loans;" and (d) "the practicality of requiring disclosure of the average terms and downpayment ratios of mortgage loans by geographical location."

S. 1281 does not require as detailed a disclosure as the Chicago ordinance, although the feasibility of requiring disclosure on home improvement loans and savings deposits by amount and area is to be studied, as noted above. The advantage of S. 1281 is that it applies to *all* financial institutions within a given SMSA making federally related mortgage loans. Thus, it requires in-generally sets forth the information to be submitted by each bidder, which consists of the number and total amount of all residential loans, and the weighted average interest rate and down payment thereon, made within the City of Chicago and the six-county Chicago Standard Metropolitan Area.

Section 7-34(a)(vi) of the ordinance requires more specific information, including the number, total amount, and terms and conditions of conventional and FHA-VA real estate loans made in each census tract within Chicago. Parts (vii) and (viii) of section 7-34 require bidders to report the number and total amount of all construction and home improvement or rehabilitation loans made on residential properties within each census tract of Chicago.[99]

---

voluntary disclosures whereas the Chicago ordinance requires disclosures of only those institutions submitting bids on city and school funds.

[99] CHICAGO, ILL., CODE § 7-34 (1974) provides:

> With each bid for interest upon City and school funds, the Comptroller shall obtain, in a form prescribed by him from each bidder, the lending and deposit information for its home office and for each branch office or facility the following information:
>
> a) Residential lending information: The following information to be reported on residential loans shall be classified separately for property containing (1) dwelling units for not more than four families and condominium and cooperative units; and (2) dwelling units for more than four families in the aggregate. Only loans closed within the previous calendar year shall be reported.
>
> i) The number and total amount of all loans made on residential property within the City of Chicago.
>
> ii) The number and total amount of all loans made on residential property outside the City of Chicago, but located in the six county Chicago Standard Metropolitan Statistical Area (SMSA), which includes DuPage, Kane, Will, McHenry and Lake.
>
> iii) The weighted average effective interest rate for all loans made on residential property within the City of Chicago.
>
> iv) The weighted average effective interest rate for all loans made on residential property outside the City of Chicago, but located in the six county Chicago SMSA.
>
> v) The weighted average down payment as a percent of all loan amounts made (1) within the City of Chicago as classified by census tract; and (2) outside the City of Chicago, but limited to the six county Chicago SMSA.
>
> vi) The following data on conventional and FHA-VA residential loans shall be reported for each census tract within the City of Chicago:
>
> a) The number of:
> —conventional real estate loans
> —FHA/VA real estate loans
>
> b) The total original amount of:
> —conventional real estate loans
> —FHA/VA real estate loans

The information required by section 7-34 of this ordinance will provide the City Controller with data that could aid in documenting a pattern of redlining within Chicago by a bidder. However, the ordinance does not require further investigation by the City Controller (or any other city agency or official) in cases where the "residential lending information" submitted suggests that a bidder is redlining certain areas of Chicago; nor does it contain sanctions against any bidder shown to be engaged in redlining.

The Commissioner of the Illinois Savings and Loan Association, on January 17, 1974, announced amendments to existing

---

c) The weighted average down payment as a percentage of:
—conventional real estate loans
—FHA/VA real estate loans

d) The average amount of:
—conventional real estate loans
—FHA/VA real estate loans

e) The weighted average effective interest rate for:
—conventional real estate loans
—FHA/VA real estate loans

f) The weighted average term in years for:
—conventional real estate loans
—FHA/VA real estate loans

vii) The number and total amount of all construction loans made on residential properties within each census tract in the City of Chicago.

viii) The number and total amounts of all home improvements or rehabilitation loans made on residential properties within each census tract in the City of Chicago.

b) Consumer lending information:

i) The number and total amount of all consumer loans made within the City of Chicago.

ii) The number and total amount of all consumer loans made within each census tract in the City of Chicago.

iii) The number and total amount of all consumer loans made outside Chicago but limited to the six county SMSA.

c) Commercial lending information:

i) The number and total amount of all commercial loans made within the City of Chicago.

ii) The number and total amount of all commercial loans made within each census tract in the City of Chicago.

iii) The number and total amount of all commercial loans made outside Chicago but limited to the six county SMSA.

d) Savings and checking account information:
The number of savings accounts and checking accounts and the total dollar balances in the savings and checking accounts, stated separately, as of December 31 for each census tract within the City of Chicago.

e) OPTIONAL—Each bidder may submit such additional material that is deemed relevant to consideration of his bid. For example, such additional material may include specific information as to regulations of his agency, in which it is announced that discrimination and redlining are prohibited.[100] The new regulations require the retention of records of each proposed borrower's application and provide that each association member "shall maintain each loan application rejected and the information in support thereof, for a period of twenty-four (24) months following such rejection."[101]

---

the activity during the preceding calendar year of the bidder and its corporate affiliates in:

i) The interim financing of low and middle-income housing in the City of Chicago.

ii) The purchase of City of Chicago, Board of Education, and Public Building Commission bonds and Board of Education tax notes and warrants.

The approach suggested by the Chicago ordinance to mitigate the practice of redlining by banks and trust companies in Indiana could be utilized by amending existing state law. The Depositary Act of 1937, IND. CODE §§ 5-12-1-1 *et seq.* (Burns 1974), controls the designation of depositories for the public funds of the state and municipalities in Indiana. This statute requires any bank or trust company to file "proposals" with the local County Board of Finance for municipal funds and with the State Board of Finance for state funds.

These "proposals" are simple forms which require only the most basic information from the bank or trust company, such as the location of the bank's offiices and total resources of the bank. Any recommendation that they be revised to include residential lending information like that required by the Chicago ordinance would have to be congruent with the purpose of the Depository Act. *See* IND. CODE § 5-12-1-15(b) (Burns 1974). Since the Act contains no reference to the lending practices of depositories wishing to receive public funds of either the state or municipalities, a recommendation that "proposals" include residential lending information would not be congruent with the Act as it is presently written.

[100]These amendments revised regulations issued pursuant to the Illinois Savings and Loan Act, ILL. ANN. STAT. ch. 32, §§ 805, 841.2 (1970):

Article IV, § 3(b). Record retention:

(1) Each association shall determine the financial ability of every proposed borrower or other person to become personally liable to the association before issuing its commitment, and thereafter each association shall maintain all loan applications and the supporting documentation as part of the records of the association.

(2) Each association, that has been so directed by the Commissioner, pursuant to Section 2 of Article IV of the Rules and Regulations shall maintain each loan application rejected and the information in support thereof, for a period of twenty-four (24) months following such rejection.

. . . .

Article VI. §2. Discrimination and Redlining Prohibited.

(a) It shall be considered discriminatory to refuse to grant mortgage loans, to arbitrarily vary the terms of those loans or the application procedures for those loans because of: in the case of the proposed borrower, his race, color, religion, national origin, age, sex, marital status; in the case of the proposed collateral, its geographic location.

[101]*Id.* Art. IV, § 3(b)(2).

C. *Federal Financial Regulatory Agencies*

Four federal financial regulatory agencies—the Federal Home Loan Bank Board (FHLBB), the Board of Governors of the Federal Reserve System (FRB), the Comptroller of the Currency (COC), and the Federal Deposit Insurance Corporation (FDIC)—together regulate almost all the nation's banks and savings and loan associations.[102] HUD, in a March 1974 publication, stated that these regulatory agencies should improve their processes of examining member institutions. Two means of achieving improvement are suggested by HUD. First, HUD suggests that racial and ethnic data on loan applications should be kept by lenders because, "[w]ithout this data, an examiner's efforts [to uncover discriminatory lending practices] can be little more than educated guesswork."[103] Second, HUD proposes that "[e]xaminer training programs . . . be strengthened to prepare examiners to monitor adequately the more subtle forms of discrimination, such as 'redlining' and unfair application of credit standards."[104]

Closer regulatory supervision to insure compliance with section 3605 of Title VIII and legislation proscribing redlining per se would complement the remedial approach to redlining offered by litigation. Closer supervision may provide the most effective means of deterring redlining, since it would involve an on-going scrutiny of the regulated institutions' lending practices. Legislation would outlaw redlining practiced in predominantly white neighborhoods.

VII. Conclusion

Redlining is a controversial and complex issue. Those who condemn the practice point to neighborhood deterioration and decay as its end product.[105] Lending institutions, while denying that such a practice exists, generally are unwilling to substantiate their denials by data concerning their lending habits.[106] This

---

[102]Federal Civil Rights Enforcement Effort — A Reassessment, *supra* note 1, at 160.

[103]U.S. Dept of Housing and Urban Development, Housing and Urban Development Trends 159 (1974).

[104]*Id.*

[105]"Coalition to End Neighborhood Deterioration, Why Do Neighborhoods Deteriorate? Redlining in Indianapolis" (1974). This report contains information on the lack of conventional mortgage money in central city neighborhoods in Indianapolis and the cycle of deterioration that results therefrom.

[106]*See* Note, *Redlining—The Fight Against Discrimination in Mortgage Lending*, 6 Loyola U.L.J. 71 (1975); Indianapolis News, Feb. 20, 1975, at 22, col. 3; Indianapolis News, May 3, 1974, at 37, col. 1; Indianapolis Star, Apr. 11, 1974, at 53, col. 1; Wall Street Journal, Apr. 5, 1974, at 1, col. 1; Indianapolis News, Mar. 26, 1974 at 34, col. 2.

unwillingness has created a situation comparable to the proverbial Catch 22.

Although the discovery process in any redlining litigation could provide the claimants with data to document the practice, litigation would be expensive and time consuming with unpredictable results. Legislation requiring disclosure and at the same time prohibiting redlining is certainly desirable. The Chicago ordinance or the regulation issued by the Illinois Savings and Loan Commissioner could serve as models for such legislation.

Finally, financial institutions, which enjoy privileges and rights unavailable to other institutions by virtue of state or federal charters, should provide for a ventilation of the facts by publicly disclosing residential lending information similar to that required by the recently enacted Chicago ordinance. Confidentiality of the records could be provided for by proper arrangements. If financial institutions are not redlining, such a disclosure could be used to rebut erroneous attacks on their lending practices. However, if disclosure revealed that some institutions were not investing or investing very little in certain neighborhoods, an explanation to the public for such a disparity would be warranted.

THOMAS C. DOEHRMAN