NOTES

CROSSOVER ACTIVITY BY BANKS AND BANK HOLDING COMPANIES: DO CURRENT FEDERAL STATUTES ADDRESS THE PROBLEM ADEQUATELY?

I. Introduction

A principal goal of the Bank Holding Company Act Amendments of 1970[1] is to inhibit banks and bank holding companies from "crossing over" into business activities not "closely related" to the banking industry.[2] Congress enacted the amendments as a response to the perceived threat that a bank could use its power to extend or to deny credit as a means of taking advantage of unrelated markets.[3] The statutes contain mechanisms which are designed to enforce the prohibition against bank engagement in unrelated activity.[4] Like the Sherman[5] and Clayton[6] Antitrust Acts (hereinafter "Sherman Act" and "Clayton Act"), which are statutes of earlier origin currently applicable to banking activity, the Bank Holding Company Act Amendments provide for

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1. 12 U.S.C. §§ 1841-1850, 1971-1978 (1982).
2. *See* Austin & Solomon, *A New Antitrust Problem: Vertical Integration In Correspondent Banking*, 122 U. PA. L. REV. 366, 390 (1973). The Bank Holding Company Act imposes sanctions and restrictions upon "any company which has control over any bank or over any company that is or becomes a holding company . . . ." 12 U.S.C. § 1841(a)(1) (1982). The Act includes provisions concerning such possible bank holding company activities as *inter alia:* acquistion of bank shares or assets, interests in nonbanking organizations, and acquisitions of subsidiaries. *See generally* 12 U.S.C. §§ 1841-1850 (1982). The Bank Holding Company Act Amendments of 1970 added provisions prohibiting certain tying arrangements. 12 U.S.C. § 1850 (1982). One type of prohibited arrangement was "[agreements] by a party to sell one product but only on the condition that the buyer also [purchase] a different (or tied) product, or at least [agree] that he will not purchase that product from any other supplier." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). *See* 12 U.S.C. §§ 1972-1978 (1982) (prohibiting certain tying arrangements).
3. Austin & Solomon, *supra* note 2, at 389-90.
4. *See* 12 U.S.C. § 1843(c)(8) (1982), which restricts banks' entrance into activities which are not "closely related to banking or managing or controlling banks . . . ." The Federal Reserve Board listed eleven areas considered "closely related to banking, most of which involve loans, trusts, fiduciary responsibilities, or insurance." Austin & Solomon, *supra* note 2, at 390 n.110.
5. Sherman Act, 15 U.S.C. §§ 1-7 (1982).
6. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986)).

sanctions against banking industry violators.[7]

An evaluation of the current federal statutes designed to restrict banking crossover activity requires an explanation of the methods banks may use to engage in such activity and the existing sanctions imposed by Congress to deter the activity. Such an evaluation will demonstrate the flaws in the current statutory scheme regarding deterrence of crossover activity by banks.

If there were no federal statutes curtailing crossover activity, how could banks and bank holding companies engage in unfair competition in unrelated commercial areas? Without federal sanctions, banks would have the ability to condition the extension of credit or the availability of other banking services to a customer involved in an unrelated commercial activity upon the fulfillment of another "condition or requirement" by the customer, such as the purchase of another banking service, or the surrender of a property or service to the bank by the customer.[8] The compulsory linkage of extension of credit or other banking service to such a "condition or requirement" is known as a tying arrangement.[9]

What mechanisms have been established by Congress to deter and to punish those banks which engage in crossover activity? The statutes which may be applied to such activity include the Sherman Act,[10] the Clayton Act,[11] and the Bank Holding Company Act.[12] These three acts contain a system of criminal sanctions (in the form of monetary fines and jail sentences) and civil damages which may be imposed upon violators.

The Sherman Act,[13] the oldest of the three applicable laws, prohibits any "combination . . . or conspiracy, in restraint of [interstate] trade or commerce . . . . "[14] The current version of section 1 imposes

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7. For a discussion of the civil and criminal sanctions imposed by the Sherman, Clayton, and Bank Holding Company Acts, see *infra* text accompanying notes 15-25.

8. *See* Austin & Solomon, *supra* note 2, at 391; *see also* Swerdloff v. Miami Nat'l Bank, 584 F.2d 54 (5th Cir. 1978) (a requirement that a corporate borrower, in order to receive a loan from a bank, sell 51% of its shares to another bank customer constituted a tying arrangement).

9. *See* 12 U.S.C. § 1972(1) (1982); *see also* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958) (defining "tying agreement"); Annotation, *What Constitutes Violation of Provisions of Bank Holding Company Act Prohibiting Tying Arrangements (12 U.S.C. § 1972(1))*, 74 A.L.R. FED. 578 (1985).

10. 15 U.S.C. §§ 1-7 (1982).

11. 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986).

12. 12 U.S.C. §§ 1841-1850, 1972-1978 (1982). While touching upon all these statutes, this Note will focus upon the provisions of the Bank Holding Company Act prohibiting tying arrangements. *Id.* §§ 1850, 1971-1978.

13. 15 U.S.C. §§ 1-7 (1982). For a discussion of the origin, legislative history, and judicial interpretation of the Sherman Act, see *infra* text accompanying notes 26-92.

14. 15 U.S.C. § 1 (1982) ("[e]very contract, combination in the form of trust or other-

a criminal fine of up to $100,000 upon violators other than corporations, and a maximum fine of $1,000,000 upon corporations.[15] Section 2 of the Sherman Act imposes similar maximum fines upon corporations who "monopolize, or attempt to monopolize . . . any part of [interstate] trade or commerce . . . ."[16] In an effort to further deter violations of sections 1 and 2 of the Sherman Act, Congress passed the Clayton Act,[17] which provides private parties, "injured in [their] business or property," with a civil cause of action which, if successful, would enable recovery of treble damages and litigation costs from violators.[18] Also, tying arrangements imposed by banks in pursuit of a conspiracy to restrain trade or to monopolize are under the jurisdiction of the Sherman and Clayton Acts.[19]

The problem of tying arrangements is addressed more directly by a portion of the Bank Holding Company Act Amendments of 1970.[20] Unlike the Sherman and Clayton Acts, the Bank Holding Company Act, as it pertains to tying arrangements, imposes only civil sanctions.[21]

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wise, or conspiracy, in restraint of trade or commerce, is declared illegal.").

15. *Id.* Section 1 also imposes a possible penalty of up to three years imprisonment upon individual violators, or both fine and imprisonment at the court's discretion. *Id.* Prior to the 1974 amendment, a violation of the Sherman Act was considered "a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year." Sherman Act, ch. 690, tit. VII, 50 Stat. 693 (1937) (current version at 15 U.S.C. § 1 (1982)).

16. 15 U.S.C. § 2 (1982) ("[e]very 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 of a felony . . . .").

17. 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986).

18. 15 U.S.C. § 15(a) (1982). "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [the Sherman Act, 15 U.S.C. §§ 1-2 (1982)] may sue therefor . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.* Another section permits the United States to recover actual damages, not treble, and litigation costs if "injured in its business or property" by a violator. 15 U.S.C. § 15a (1982). Also, the Sherman Act provides for an "award . . . [of] simple interest on actual damages" to both private plaintiffs and the United States. 15 U.S.C. §§ 15(a), 15a (1982).

19. For a discussion of the applicability of Sherman and Clayton Act provisions to tying arrangements, see *infra* text accompanying notes 182-222.

20. 12 U.S.C. § 1972(1) (1982). This section prohibits a bank from extending credit, furnishing any service, or from leasing or selling property on the condition that a customer "obtain some additional credit, property, or service from such bank," from a holding company of the bank, or any other of the bank's subsidiaries. It also prohibits a bank from requiring a customer to provide "additional credit, property, or service" to the bank in exchange for an extension of credit. In addition, it precludes a bank from prohibiting a customer from obtaining credit from another bank, except if the bank would "reasonably impose [such a prohibition] in a credit transaction to assure the soundness of the credit." 12 U.S.C. §§ 1972(12) (A)-(E) (1982).

21. *Compare* the Sherman Act, 15 U.S.C. §§ 1-2 (1982) *with* the Bank Holding Company Act, 12 U.S.C. § 1975 (1982). In the absence of the enactment of enabling legisla-

Like the older acts, however, the Bank Holding Company Act permits injured private parties to recover treble damages and litigation costs from banks and bank holding companies which caused the injury by employing tying arrangements.[22] In its provisions concerning tying arrangements, the Bank Holding Company Act is designed primarily as a self-enforcing statute, using the prospect of a treble damage award as an incentive for injured parties to initiate private causes of action against offending banks.[23]

Given the availability of civil and criminal sanctions against crossover activity by banks, why must the deterrent and punitive effectiveness of the sanctions be reexamined? The importance of a critical analysis of the impact of existing sanctions is premised upon the proposition that interference by banks and bank holding companies in unrelated commercial activity is undesirable as a matter of public policy.[24] Accepting this premise, one must then examine the flaws that exist in the current system of civil and criminal sanctions. Two major criticisms of the current statutory scheme can be made: one focuses upon the effectiveness of the civil sanctions, while the other is directed at the adequacy of the criminal fines and penalties.

First, the number of private parties who can seek recovery of treble damages and litigation costs is limited. A private party whose financial position is severely damaged by bank crossover activity may find itself without the funds necessary to seek competent counsel in pursuing a civil remedy. This limit on accessibility to civil remedies restricts the effectiveness of the "self-enforcing" mechanisms of the three acts.

In addition, existing criminal fines imposed for illegal crossover activity are limited to an amount that renders their deterrent and puni-

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tion by Congress, the Justice Department cannot prosecute banks or bank holding companies which allegedly engage in illegal tying arrangements. At present, the options of the Justice Department are limited to prosecuting alleged offenders for a Sherman Act violation as codified in 15 U.S.C. §§ 1-2, or seeking injunctive relief pursuant to 12 U.S.C. § 1976. Of course, the judiciary cannot interpret statutes which do not exist, nor can it impose sentences without statutory authorization. The judiciary is limited to working with whatever statutes are invoked by Justice Department attorneys or by injured private parties, and, in that sense, the limitations of the executive become the limitations of the judiciary. Only Congress can initiate the change necessary to broaden the options employed by the other two branches of government in deterring crossover activity.

22. Bank Holding Company Act, 12 U.S.C. §§ 1971-1978 (1982); *see also supra* note 18 (treble damage provisions of the Clayton and Sherman Acts).

23. For a discussion of the legislative intent to design a self-enforcing mechanism within the anti-tying arrangement provisions of the Bank Holding Company Act, see *infra* text accompanying notes 175-76.

24. For a discussion of why tying arrangements by banks are considered injurious to the public at large, see *infra* text accompanying notes 166-169.

tive impact upon some potential offenders questionable.[25]

A discussion of the ineffectiveness of current federal statutes in deterring bank crossover activity and punishing those who perpetrate such activity must begin with an examination of the development and passage of the oldest of the applicable federal statutes, the Sherman Act.

II. THE SHERMAN ANTITRUST ACT

The Sherman Act was enacted during a period in which the political climate was hostile to large business organizations.[26] The protective tariff policy of the post-Civil War period led to the rising hostility of many American farmers and laborers toward the growth of big business.[27] The growth of American commercial activity was inevitable and, confronted with a desire for expansion, businesses sought a form of organization large enough to allow for the amassing of great amounts of capital, while remaining relatively free of regulation and interference.[28] While the increasingly popular corporate form of organization had the advantages of managerial control, the ability to accumulate large amounts of capital, and the advantage of limited personal liability, it was nevertheless subject to state regulation.[29] Another possible form of organization was the pool, which was an informal agreement among competing entities to take segments of a given market and to

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25. In the current banking industry, for the larger institutions individually possessing assets starting in the multimillion dollar range, criminal fines and penalties for antitrust violations are not substantial enough to achieve a deterrent effect. For example, banks and bank holding companies successfully prosecuted under the Sherman Act as corporations cannot be fined more than $1,000,000, and for institutions not accorded corporate status, the applicable fine is a maximum of $100,000. *See* 15 U.S.C. §§ 1-2 (1982) (both setting a "fine not exceeding one million dollars for a corporation, or, if any other person, one hundred thousand dollars").

26. 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 12 (E. Kinter ed. 1978) [hereinafter LEGISLATIVE HISTORY].

27. *Id.* The unrest of the American farmer led to eventual passage of the Interstate Commerce Act of 1887 and to the creation of various political movements including the Grangers, the Greenbackers, and the Populist Party. The emergence of the labor movement, with its enmity toward big business, added to the pressure for business regulation, leading to the nearly unanimous approval of the Sherman Act by both Democratic and Republican members of Congress. *Id.*

The existing American policy of high tariffs on imported goods was intended to protect domestic commerce from undue intrusion. Large segments of the public saw the tariffs as strengthening the hand of large business organizations, which were unpopular with many Americans because of reported incidents of corruption, fraud, and other questionable business practices. *Id.* at 11.

28. *See id.* at 10.

29. *Id.* One problem was that a given state, which chartered a corporation, also had the power to restrict corporate activities and to revoke a charter. *Id.*

share profits.[30] A pool, which could operate to the detriment of competitors not included in the agreement, was also not entirely advantageous to its participants, because it was based upon a voluntary, unenforceable arrangement.[31]

Alternatively, the trust was more appealing to large business enterprises as a form of organization, because it preserved both the advantages of economic power found in a pool and the greater control and stability characteristic of incorporation, while remaining relatively free of state regulation. Further, the trust was founded upon a legally binding agreement.[32] A trust typically consisted of two or more corporations whose shareholders "would transfer their shares to a single trustee or board of trustees" in exchange for trust certificates.[33] The trustee or trustees would also manage the trust, whose profits would be divided proportionally among the shareholders.[34] The potential for vast accumulation of capital and control in the trust which, unlike a corporation, was not susceptible to regulation, enabled such trusts as the Standard Oil Company to dominate an entire industry.[35]

Disaffection with the trusts became so widespread among the American people that, in 1888, both major party platforms contained planks opposing trusts.[36] This public outcry for antitrust legislation precipitated the introduction of the first version of the Sherman Act by Senator John Sherman of Ohio on December 4, 1889.[37] Entitled "A bill to declare unlawful, trusts and combinations in restraint of trade and production," the original bill reflected concern about a perceived threat: the power of trusts to dominate and to control large segments of the economy to the detriment of smaller competitors and the public at large.[38] Other versions of the bill were introduced shortly after the introduction of the original bill.[39]

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 13.
37. A. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 1-2 (1910).
38. S. 1, 51st Cong., 1st Sess. 21 CONG. REC. 96 (1889) (initial introduction of S. 1 was made December 4), *cited in* A. WALKER, *supra* note 37, at 2.
39. A later version of the Sherman bill, offered by Senator John M. Reagan of Texas, defined a trust as follows:

> [A] trust is a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons, or of any two or more of them for either, any or all of the following purposes:
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> First. To create or carry out any restrictions in trade.
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> Second. To limit or reduce the production, or to increase or reduce the price

During a debate on various versions of the Sherman bill before the Senate on March 21, 1890, Senator Sherman stated that the first section of the original bill was intended to be construed liberally by the courts.[40] He also stated that "trusts and combinations are great wrongs to the people" in that "[t]hey aggregate to themselves great enormous wealth by extortion, which makes the people poor."[41] Emphasizing that trusts were able to and frequently did increase costs and regulate prices,[42] Sherman reasoned that Congress' power to enact the legislation was based upon the Commerce Clause.[43]

A later version of the bill expanded the type of entity which was subject to the legislation by adding the phrase: "combination[s] in the form of trust or otherwise."[44] Other major changes to the bill included a criminal provision and a new section 2 prohibiting monopolization, attempted monopolization, and conspiracy to monopolize.[45] Monopolies were described by Senator George F. Hoar of Massachusetts, as "an . . . injury to the comfort of ordinary life" and "a menace to repub-

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> of merchandise or commodities.
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> Third. To prevent competition in the manufacture, making, purchase, sale or transportation of merchandise, produce or commodities.
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> Fourth. To fix a standard or figure whereby the price to the public shall be in any manner controlled or established of any article, commodity, merchandise, produce or commerce intended for sale, use or consumption.
>
> Fifth. To create a monopoly in the making, manufacture, purchase, sale or transportation of any merchandise, article, produce or commodity.
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> Sixth. To make, or enter into, or execute, or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or shall have bound themselves not to manufacture, sell, dispose of or to transport any article or commodity, or article of trade, use, merchandise or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between themselves or between themselves and others, so as to preclude free and unrestrained competition among themselves and others in the sale and transportation of any such article or commodity, or by which they shall agree to pool, combine or unite in any interest they may have in connection with the sale or transportation of any such article or commodity, that its price may in any manner be so affected.

S. 62, 51st Cong., 1st Sess., 21 CONG. REC. 2455 (1890), *quoted in* A. WALKER, *supra* note 37, at 11-12.

40. *Id.* at 14.

41. *Id.* at 14-15.

42. *Id.*

43. *Id.* at 15; *see also* U.S. CONST. art. I, § 8.

44. S. 1, 51st Cong., 1st Sess. (1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 275-77 (altered applicability of the bill to "every contract, combination . . . or conspiracy, in restraint of commerce").

45. *See id.*

lican institutions themselves."[46]

On April 8, 1890, the revised bill, including the new anti-monopoly section, was passed overwhelmingly by the Senate by a vote of 52-1, with 29 Senators not voting.[47]

Thereafter, the bill was submitted for deliberations before the House. The House Judiciary Committee report defined the objective of the bill as the protection of trade and commerce among the several states, other United States jurisdictions, and foreign nations.[48] Monopoly was included among the practices the bill was designed to curtail.[49] During the ensuing House debates, the author of the House Judiciary Committee report on the bill, Representative David B. Culberson of Texas, noted that it would be difficult to tell what types of agreements would be covered by the proposed law until the courts had an opportunity to interpret it.[50] Two other Representatives, William L. Wilson of West Virginia and Richard P. Bland of Missouri, viewed the proposed legislation as experimental, but supported it nonetheless.[51] The final version of the bill passed both houses and was signed by President Benjamin Harrison on July 2, 1890.[52] Throughout the actions leading to final passage of the Sherman Act, the theme of liberal interpretation and the experimental nature of the act were prevalent.[53] The modern version of the Sherman Act has retained the character of the original version passed in 1890 in both its broad applicability and its separate treatment of "restraint of trade" violations and "monopolization" violations.[54]

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46. 21 CONG. REC. 3146 (1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 282.

47. *Id.* at 24-25.

48. REPORT OF THE HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 1707, 51st Cong., 1st Sess. 2 (1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 295.

49. *Id.*

50. 21 CONG. REC. 4090 (1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 300. This reflected the original intent of Senator Sherman that the bill be liberally construed by the courts. *See* 21 CONG. REC. 2456 (1890) (statement of Senator Sherman), *quoted in* A. WALKER, *supra* note 37, at 14.

51. *See* 21 CONG. REC. 4099 (1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 26, at 306, 299.

52. LEGISLATIVE HISTORY, *supra* note 26, at 28-30.

53. *See* 21 CONG. REC. 2456 (1890) (statement by Senator Sherman that he anticipated liberal construction of his version of the Act by the courts), *quoted in* A. WALKER, *supra* note 37, at 14; *see also* 21 CONG. REC. 4089 (1890) (statement by Representative Culberson that he did "not know . . . just what contracts will be embraced by this . . . bill until the courts determine" [its coverage]),
reprinted in LEGISLATIVE HISTORY, *supra* note 26, at 300.

54. The modern version of sections 1 and 2 of the Sherman Act read as follows:

> 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. Every person who shall make any contract or

The restriction of the Sherman Act depends upon the definition of the word "person" in both section 1 and section 2. Section 8 of the Sherman Act states that "person" or "persons" includes domestic and foreign corporations and associations.[55] The Supreme Court has held that the inclusion of corporations and associations within the definition of "person" does not exclude individuals or other entities from the reach of the Sherman Act.[56] Other associations, including labor unions, unincorporated associations, and joint ventures, have also been held by the courts to be covered by the Sherman Act.[57]

Throughout much of the history of the Sherman Act, however, banks were not included among the entities thought to be within its scope.[58] The rationale for the exclusion of banks from the scope of the Sherman Act, and later antitrust laws, was based upon the existence of other statutes regulating the banking industry.[59] The de facto exclu-

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> engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> 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 of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §§ 1-2 (1982). The principal change from the original version in sections 1 and 2 of the Act is the increase in the maximum criminal fine for violation of either section from the original figure of $5,000. *See* Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (current version at 15 U.S.C. §§ 1-2 (1982)).

55. 15 U.S.C. § 7 (1982).

56. United States v. Wise, 370 U.S. 405 (1962). In *Wise*, a corporate officer and the corporation for which he worked was indicted for restraint of trade in connection with a scheme to eliminate price competition in the Kansas City milk market. *Id.* at 406. On appeal to the Supreme Court, the officer argued, *inter alia*, that section 8 of the Sherman Act, which included corporations and associations in the definition of "person," did not include individual corporate officers acting in their representative capacities. *Id.* at 408. The Court rejected this argument, stating that the "specific inclusion" of particular entities within "the definition of 'persons' " does not signify exclusion of individuals. *Id.* at 409.

57. *See, e.g.*, United States v. Greater New York Live Poultry Chamber of Commerce, 30 F.2d 939 (S.D.N.Y. 1928) (unincorporated associations), *cert. denied*, 283 U.S. 837 (1931); United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922) (labor unions); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963) (joint ventures).

58. *See* J. White, Teaching Materials on Banking Law 563, 619 (1976).

59. For arguments that the heavily regulated nature of the banking industry justifies the exclusion of banks from susceptibility to the antitrust laws, see Abramson, *Private*

sion of banks continued long after the passage of the Sherman Act and its companion legislation, the Clayton Act.[60]

III. Post-Sherman Act Developments

Despite the potential breadth of application of Sherman Act principles, the Act did not prove to be the desired panacea for change envisioned by the Fifty-first Congress.[61] Prior to 1914, problems surrounding the implementation of the Sherman Act included lack of enforcement by the courts and the government, the increasing popularity of the holding company as a business organization form, and the Supreme Court's articulation of the "rule of reason."[62]

The initial lack of enthusiasm of the courts and the government toward the new law has been attributed to the widespread antipathy of both the judicial and executive branches of the federal government to policies which appeared contradictory to the then prevailing laissez-faire economic theory.[63] The concept of governmental intervention in private business matters was new and virtually untried in American governmental history. This, coupled with the lack of legal precedent in antitrust law, resulted in the initiation of no more than twenty-three antitrust actions in the first thirteen years of the Sherman Act's existence.[64] Despite the availability of treble damages for private parties who were successful in bringing an action against Sherman Act violators, no more than thirty-four private actions had been litigated under the Sherman Act by 1903.[65]

Competition and Public Regulation, in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURE 15, 15-17 (National Banking Review 1966), *reprinted in* J. WHITE, *supra* note 58, at 564; *see also* Brief for Appellees at 36-37, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), *reprinted in* 13 KURLAND & CASPER, ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENT OF THE SUPREME COURT OF THE UNITED STATES, 1955 TERM-1975 TERM 205, 240-41 (1979).

60. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986)). The Clayton Act was enacted by Congress and signed into law by President Wilson in 1914. *See* 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 2.03[3], at 2-63 (1986).

61. *See* J. VON KALINOWSKI, *supra* note 60, § 2.03[1], at 2-45.

62. *Id.* For a discussion of the "rule of reason," see *infra* text accompanying notes 84-88.

63. *See* J. VON KALINOWSKI, *supra* note 60, § 2.03[1], at 2-46. No sign of change in the anti-regulatory mood of either the judicial or executive branch of the government appears to have taken place until the accession of Theodore Roosevelt to the presidency in 1901. *Id.*

64. *Id.* at 2-46 to 2-49.

65. *Id.* at 2-48 to 2-49 & n.13. The provision for treble damages, which was formerly section 7 of the Sherman Act, is now codified as 15 U.S.C. § 15 (1982). The intent of this provision was to place a "self-enforcement" mechanism into the Act, with the possibility of collection of treble damages as an incentive. *See id.* at 2-48 & n.13 (*citing* H. THORELLI, THE FEDERAL ANTITRUST POLICY 225 (1955)).

Another phenomenon which created problems in Sherman Act enforcement, was the rise in prominence of the holding company during the early post-enactment period. A holding company limits its activities to owning stock in, and supervising management of, other companies. Holding companies usually own a controlling interest in the companies whose stock they hold.[66] Recognizing the hostile political and legislative climate with respect to trusts, large business interests often converted to this form of business organization. Under some state holding company statutes, the first of which was enacted in New Jersey in 1889,[67] one corporation was permitted to purchase the stock of, and acquire voting rights in, another corporation.[68] As similar legislation quickly was enacted in other states, large business interests used this form of organization to exercise control and management powers in corporations engaged in diverse business activities.[69] The holding company was chosen as a vehicle by many corporations primarily as a means to avoid the possibility of civil or criminal liability under the Sherman Act, whose scope was thought not to extend to this type of entity.[70] This viewpoint prevailed until the Supreme Court explicitly stated in 1904 that holding companies "formed in restraint of interstate commerce" were within the ambit of the Sherman Act.[71]

The third influence undermining effective implementation of the Sherman Act was the Supreme Court itself. For the first twenty years after the enactment of the Sherman Act, the Court narrowly construed the language in the Act. In the first Sherman Act case to reach the Supreme Court, *United States v. E.C. Knight Co.*,[72] the defendants, members of a sugar trust whose ownership of stock in several Philadelphia, Pennsylvania, sugar refineries amounted to a virtual monopoly of the sugar refining industry, were found to be beyond the reach of the Sherman Act.[73] The Court reasoned that the scope of the Sherman Act was limited to the extent of Congress' power to regulate interstate

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66. BLACK'S LAW DICTIONARY 658 (5th ed. 1979).

67. *See* J. VON KALINOWSKI, *supra* note 60, § 2.03[1], at 2-50.

68. *Id.*

69. *Id.* at 2-50 to 2-51.

70. *Id.*

71. Northern Sec. Co. v. United States, 193 U.S. 197, 346 (1904) ("Congress may prevent [a] company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce"). Justice Harlan's plurality opinion focused upon the Northern Securities Company's practice of distributing its earnings, not upon the basis of the earnings of its constituent companies, but upon the number of shares of stock of the holding company. Justice Harlan viewed this scheme as one which suppressed competition among the constituent companies, and, therefore, was anti-competitive. *Id.* at 327.

72. 156 U.S. 1 (1894).

73. *Id.* at 16-18.

commerce under the Commerce Clause.[74] The Court distinguished the manufacture of refined sugar in one state (Pennsylvania) from interstate commerce, and, while conceding that "in order to dispose of the [sugar], the instrumentality of commerce was necessarily invoked," there was, according to the Court, "nothing . . . to indicate any intention to put a restraint upon trade or commerce," nor was the possibility that interstate commerce might be "indirectly affected" sufficient to bring the defendants' activities within the scope of the Commerce Clause.[75] The Court suggested that violations involving interstate shipments of goods would have fallen within the scope of the Commerce Clause, but the activities engaged in by the defendants did not.[76]

Later cases, notably *Swift & Co. v. United States*,[77] expanded the reach of the Commerce Clause to activities which directly affect interstate commerce. This has come to be called the "flow of commerce" test.[78]

The Court's more expansive view of the applicability of the Sherman Act was expressed in *Addyston Pipe & Steel Co. v. United States*.[79] Justice Peckham, writing for the Court, construed the Sherman Act as applicable to any "agreement or combination [which] directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States."[80] In a much later case, *Gulf Oil Corp. v. Copp Paving Co.*,[81] the Court emphasized that the "flow of commerce" test was applicable "however local its immediate object, [to any] 'contract, combination . . . or conspiracy'" adversely affecting interstate commerce.[82] The Court has since determined that the Sherman Act does not apply to any activity which does not directly affect interstate commerce, meaning that the Act has broad, but not universal, applicability over business activities which restrain trade or monopolize.[83]

74. *Id.* at 16-17; *see also* U.S. CONST. art. I, § 8.
75. *E.C. Knight*, 156 U.S. at 17.
76. *Id.*
77. 196 U.S. 375 (1905).
78. *Id.* at 396-97; *see also* LEGISLATIVE HISTORY, *supra* note 26, at 368.
79. 175 U.S. 211 (1899).
80. *Id.* at 241.
81. 419 U.S. 186 (1974).
82. *Id.* at 195.
83. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 785-88 (1975) (the Court stated that exclusion of the legal profession from the sweep of the Sherman Act would be inconsistent with the breadth of applicability intended by Congress). *But cf.* Yellow Cab of Nev. v. Cab Employers, Automotive & Warehousemen, Local No. 881, 457 F.2d 1032, 1035 (9th Cir. 1972) (transportation of passengers between California and Nevada, which involved small percentage of cab company's sales volume, did not satisfy the "in commerce test"); Goldschmidt v. Patchett, 686 F.2d 582, 584-85 (7th Cir. 1982) (divorce attorney's suit alleging a Sherman Act violation for conspiracy to prevent him from using

A greater limitation upon the applicability of the Sherman Act arose from the case of *Standard Oil Co. v. United States.*[84] In *Standard Oil,* the Court shifted even further from its original rigid, textualist approach by holding that in order for a restraint of trade to be violative of the Sherman Act, it must be an "undue restraint."[85] This rationale came to be known as the "rule of reason."[86] The Court based the new standard upon its reading of the Sherman Act in light of the common law tradition and history which preceded its passage and concluded that, at the time the Sherman Act was debated in Congress, there was a legislative intent to prevent only "undue restraint" of trade.[87] This new standard was greeted with alarm by large segments of the public, some of whom feared that a conservative judiciary would abuse the flexibility of the case-by-case rule, thus severely limiting the applicability of the Sherman Act.[88] Other members of the public felt that decisions concerning the propriety of many business activities would be guided by the "social and economic theories of individual judges."[89] A demand for new statutes which would specify the types of activities proscribed by federal antitrust law soon followed.[90] While the need for new legislation was clear, disagreement as to the form and content of the new statutes was difficult for Congress to resolve.[91] Nevertheless, new legislation was passed and signed into law by President

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newspaper advertisements to solicit business dismissed for lack of jurisdiction, because plaintiff did not allege any "nexus" between defendants' actions and interstate commerce).

84. 221 U.S. 1 (1911).

85. *Id.* at 60.

86. For a discussion of the narrowing effect of the "rule of reason" on Sherman Act applicability, see J. von Kalinowski, *supra* note 60, § 2.03[1][c], at 2-51 to 2-52; *see also* Legislative History, *supra* note 26, at 365.

87. *Standard Oil,* 221 U.S. at 59-60.

88. *See* J. von Kalinowski, *supra* note 60, § 2.03[1][c], at 2-53. The "rule of reason" did not replace the per se standard as the exclusive standard to be used in Sherman Act analysis. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218-24 (1940) (any agreements to fix prices of gasoline are per se violations of section 1 of the Sherman Act). Recent cases in which the Supreme Court held that a "rule of reason" analysis must be used rather than a per se standard include Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 7-25 (1979) (the issuance of blanket licenses for copyrighted musical compositions do not constitute price fixing or a naked restraint of trade, and are not per se violations of section 1 of the Sherman Act, but should be subjected to a discriminating examination under the "rule of reason"), and National Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98-120 (1984) (contract with television networks specifying what college football games are to be broadcast and prices to be paid to schools for each broadcast held violative of section 1 of the Sherman Act under a "rule of reason" analysis).

89. *See* J. von Kalinowski, *supra* note 60, § 2.03[1][c], at 2-53.

90. *Id.*

91. *Id.* § 2.03[2], at 2-56.

Woodrow Wilson in 1914.[92] Existing federal antitrust law was now supplemented by two acts: the Federal Trade Commission Act[93] and the Clayton Act.[94]

The Federal Trade Commission Act created a new federal regulatory commission whose purpose was to prohibit "unfair methods of competition" and "deceptive business practices."[95] The Clayton Act addressed the need for legislation to enumerate the kinds of business or commercial activities which were considered antitrust violations. Among these were price discrimination—charging different prices to different buyers of the same product, or over-pricing of one product as opposed to another[96]—tying arrangements—conditioning the provision of a product or service upon the purchase or provision by a customer of another product or service[97]—and stock acquisition mergers resulting in substantial anti-competitive effects on a given market (the merger of two or more corporations by means of the purchase or acquisition of stock of one or more corporations by another corporation).[98]

These two Acts are interrelated in that the Clayton Act grants powers to the Federal Trade Commission to enforce certain provisions of the Clayton Act.[99] The Federal Trade Commission Act accordingly prohibits violations of both the Sherman and Clayton Acts.[100] Therefore, the Federal Trade Commission is empowered to enforce the Federal Trade Commission Act and the Clayton Act, while the United States Department of Justice is empowered to enforce both the Sherman Act and the Clayton Act.[101] With this legislation, Congress intended to benefit the public by providing several deterrent mechanisms, for instance: (1) private action under the Sherman Act and/or Clayton Act, which provide for treble damages[102] or injunctive relief[103]

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92. *Id.* § 2.03[3], at 2-63.

93. 15 U.S.C. §§ 41-58 (1982 & Supp. III 1985); *see also* J. VON KALINOWSKI, *supra* note 60, § 2.03[3], at 2-64. Technically, the Federal Trade Commission Act is not an antitrust law, but is, instead, a statute of origination of a commission. *Id.*

94. 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986).

95. 15 U.S.C. § 45 (a)(1) (1982); *see also* J. VON KALINOWSKI, *supra* note 60, § 2.03[3], at 2-64.

96. M. DUGGAN, ANTITRUST AND THE U.S. SUPREME COURT 1829-1980, at 300-11 (2d ed. 1981).

97. For a further definition of tying arrangements, see *supra* notes 8-9 and accompanying text.

98. *See* W. HOLMES, 1987 ANTITRUST LAW HANDBOOK § 5.02, at 229-30 (1987) (discussion of definition of stock acquisition merger and pertinent decisions); J. VON KALINOWSKI, *supra* note 60, § 2.03[3][b], at 2-64 (listing of examples of antitrust violations addressed by the Clayton Act).

99. 15 U.S.C. § 21 (1982 & Supp. IV 1986).

100. 15 U.S.C. § 45 (1982 & Supp. IV 1986).

101. J. VON KALINOWSKI, *supra* note 60, § 2.03[3], at 2-66.1 to 2-66.2.

102. 15 U.S.C. § 15 (1982) (treble damages for those injured in business or property by violators of the antitrust laws).

to a successful litigant; (2) criminal action brought by the Department of Justice under the Sherman and/or the Clayton Act, under which criminal fines and/or imprisonment are possible sanctions;[104] or (3) an administrative hearing or criminal enforcement action initiated by the Federal Trade Commission under the Federal Trade Commission Act or the Clayton Act, under which criminal fines and sanctions are available.[105]

Although the passage of the two new acts appeared to give the federal government sweeping power to deter unfair competitive practices and centralization of economic power, the weaknesses in the legislation became evident in the years following enactment.[106] These weaknesses are illustrated by the impact of antitrust laws and the Federal Trade Commission Act on the banking industry. As will be seen, while banks represented large aggregations of capital and had the potential to restrain trade, they remained immune from the scope of the antitrust laws for many years.

IV. Federal Antitrust Law and the Banks

Section 7 of the Clayton Act[107] was enacted by Congress to curb anti-competitive mergers which would otherwise facilitate the undue concentration of economic power or the creation of a monopoly.[108] As currently written, section 7 prohibits the direct or indirect acquisition by a corporation of "the whole or any part of the stock or other share capital" of another corporation if both are engaged in commerce and if the effect would be "to lessen competition or to tend to create a monopoly."[109] This section was designed to curtail concentration of economic power before the activity could reach the level of a Sherman Act violation.[110] The problem with the section is that it does not proscribe mergers accomplished by asset acquisition.[111] Because most bank merg-

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103. 15 U.S.C. § 26 (1982) (injunctive relief for any person, firm or corporation against threatened loss or damage due to conduct in violation of antitrust laws).

104. 15 U.S.C. §§ 1-2 (1982) (sections 1 and 2 provide for Justice Department initiated actions which penalize violators up to $1 million, if a corporation, and $100,000 for any other person; imprisonment is also possible.).

105. 15 U.S.C. § 21 (1982 & Supp. IV 1986) (section 21 empowers the Federal Trade Commission to initiate proceedings which provide a civil penalty of up to $5,000 for each violation of the Commission's orders pursuant to the section's provisions; continuing violators can be liable up to $5,000 per day); *see also* J. von Kalinowski, *supra* note 60, § 2.03[3], at 2-66 ("[t]here is no private right of action under the [Federal Trade Commission] Act").

106. *See* J. von Kalinowski, *supra* note 60, § 2.03[4], at 2-69 to 2-89.

107. 15 U.S.C. § 18 (1982 & Supp. IV 1986).

108. *See* J. von Kalinowski, *supra* note 60, § 2.03[4], at 2-69 to 2-89.

109. 15 U.S.C. § 18 (1982 & Supp. IV 1986).

110. J. von Kalinowski, *supra* note 60, § 2.03[4], at 2-68.

111. *See* J. White, *supra* note 58, at 563. The stock acquisition method involves

ers were accomplished using this method, banks were effectively excluded from section 7.[112]

Section 7 was amended in 1950 by the Celler-Kefauver Act,[113] which eliminated the exemption for merger by asset acquisition, but also inserted new language which limited the proscription concerning asset acquisition mergers to corporations "subject to the jurisdiction of the Federal Trade Commission."[114] Section 5(a)(2) of the Federal Trade Commission Act specifically excludes banks from the jurisdiction of the Federal Trade Commission.[115] The question of the applicability of the Clayton Act to bank mergers attracted greater attention as a result of the increasing bank merger activity in the United States during the 1950s and early 1960s.[116] It was against this background that the Supreme Court heard its first bank merger case.[117]

In *United States v. Philadelphia National Bank*,[118] the Supreme Court addressed the issue of the applicability of section 7 of the Clayton Act to a proposed merger of two banks, the effect of which would be to lessen substantially competition in the Philadelphia metropolitan area.[119] *Philadelphia National Bank* involved the merger of what were the second and third largest banks in the Philadelphia metropolitan area into one entity, which would have been the largest bank in the Philadelphia metropolitan area.[120] It was estimated that after such a merger took place, the four largest banks in the Philadelphia area would control at least seventy-nine percent of total assets, deposits, and net loans of all the banks in the area.[121] The proposed merger of

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transfer of shares of stock from one party to another. The transfer of assets from one party to another during a merger is known as the asset acquisition method. *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 335-49 (1963) (the Court found bank merger carried out through stock conversion to be covered by the provisions of Clayton Act).

112. *See* J. WHITE, *supra* note 58, at 563.

113. Celler-Kefauver Act, ch. 1184, § 1, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18 (1982 & Supp. IV 1986)).

114. *Id.*

115. 15 U.S.C. § 45(a)(2) (1982) ("The commission is empowered and directed to prevent persons, partnerships and corporations, except banks, savings and loan institutions . . . from using unfair methods of competition . . . .").

116. J. WHITE, *supra* note 58, at 563.

117. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 337 (1963) ("The question appears to be one of first impression; we have been directed to no previous case in which a merger or consolidation was challenged under § 7 of the Clayton Act, as amended, when the acquiring corporation [Philadelphia National Bank] was not subject to the FTC's jurisdiction.").

118. 374 U.S. 321 (1963).

119. *Id.* at 324-34.

120. *Id.* at 331. The resulting bank would have had approximately "36% of the area banks' total assets, 36% of deposits, and 34% net loans." *Id.*

121. *Id.*

two competitors, a "horizontal" merger, was to be accomplished by an exchange of shares held by the shareholders of the Girard Trust Corn Exchange Bank for shares of the consolidated bank, which was to retain the name of Philadelphia National Bank.[122]

An agreement to this effect was approved by the boards of directors of both banks in November 1960.[123] This type of merger, which was subject to the approval of the Comptroller of the Currency,[124] could not have taken place without reports assessing the competitive implications of the merger from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the United States Attorney General, as required under the Bank Merger Act of 1960.[125] Despite the fact that all three agencies reported that the bank consolidation at issue would have "substantial anticompetitive effects in the Philadelphia metropolitan area," the Comptroller granted the requisite consent on February 24, 1961.[126] He reasoned that a sufficient variety of choices for banking service would remain in the Philadelphia area despite the consolidation. Further, he deemed that the overall impact on competition would not be adverse once the beneficial effect on international and national banking was considered.[127] In the

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122. *Id.* at 330-32; *see also* United States v. First Nat'l Bank of Jackson, 301 F. Supp. 1161 (S.D. Miss. 1969). There, the Court stated:

> There are five types of mergers recognized today. The first is the "horizontal merger" which is a merger between two firms who are in direct competition . . . . The second is the "vertical merger" which is a merger between two firms that have a buyer-seller relationship . . . . The third is the "product extension merger" which is a merger between two firms that are not direct rivals but each produces a product that is functionally related either in marketing or in production to the other. The fourth is a "geographic market extension merger" which is a merger between two firms that produce the same product line but do so in separate geographic markets and are not direct rivals. The fifth is a "pure conglomerate merger" which is a residual category in which all mergers are placed that do not fit anywhere else . . . .

Id. at 1190.

123. *Philadelphia Nat'l Bank,* 374 U.S. at 371.

124. *Id.* at 332.

125. *Id.* Necessity for multi-agency approval of bank mergers such as the one at issue in *Philadelphia National Bank* has led to criticism of the concept of applying antitrust laws to the banking industry on the ground that such additional regulation is superfluous. J. WHITE, *supra* note 58, at 565. It should be noted that, in the first 10 years of the Bank Merger Act, 98% of bank merger applications were approved by the three agencies whose approval is required. Reid, *"The Bank Merger Act of 1960: A Decade After,"* 18 ANTITRUST BULL. 449, 459 (1973).

126. *Philadelphia Nat'l Bank,* 374 U.S. at 332-33.

127. *Id.* at 333. The Court noted that, as of 1959, Philadelphia National Bank was the twenty-first largest bank in the nation. Presumably, the comptroller of the Currency was persuaded by the reasoning that a larger bank was needed to service large Philadelphia clients who conducted much of their business outside of the state where larger banks could more efficiently service their needs.

course of his analysis, the Comptroller created a significant defense for banks charged with antitrust violations when he said that "[t]he consolidated bank 'would be far better able to serve *the convenience and needs of its community* by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry.' "[128]

The day after the Comptroller's approval was granted, the government filed a civil action in federal district court,[129] alleging violations of section 1 of the Sherman Act—forbidding combinations in restraint of trade[130]—and section 7 of the Clayton Act—prohibiting all stock acquisition mergers and certain asset acquisition mergers by corporations "engaged in commerce resulting in lessening of competition or a tendency to create a monopoly."[131] The remedy sought was an injunction restraining consummation of the proposed merger.[132] The federal district court agreed with defendants' argument that enactment of the Bank Merger Act removed banks from the purview of the Sherman or Clayton Acts, but, nonetheless, assumed *arguendo* that the Clayton Act was applicable.[133] The court then determined that the correct test for a violation of section 7 of the Clayton Act involved a finding of "a reasonable probability of a significant reduction in the vigor of competition."[134] Applying this standard, the court found that the plaintiff

128. *Id.* (emphasis added). The phrase "convenience and needs of the community" is taken from the language of the Bank Merger Act as it read in 1960. 12 U.S.C. § 1828(c) (Supp. IV 1958) *quoted in Philidelphia Nat'l Bank*, 374 U.S. at 332-33 n.8. One of the factors to be considered by the Comptroller in deciding upon granting or withholding approval of a merger, the "convenience and needs of the community" factor, became a defense used in antitrust litigation involving bank mergers. *Id.; see* J. WHITE, *supra* note 58, at 565-66.

129. *Philadelphia Nat'l Bank*, 201 F. Supp. 348 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963).

130. *Philadelphia Nat'l Bank*, 374 U.S. at 323.

131. *Id.*

132. *Id.*

133. *Philadelphia Nat'l Bank*, 201 F. Supp. at 360. The court examined the intent of Congress in its deliberations over the Celler-Kefauver Anti-Merger Act, ch. 1184, 64 Stat. 1725 (1950) (current version at 15 U.S.C. § 18 (1982 & Supp. IV 1986)), which incorporated a prohibition of asset acquisition mergers resulting in lessened competition or tending to create a monopoly into section 7 of the Clayton Act. *Philadelphia Nat'l Bank*, 201 F. Supp. at 360. A loophole excluding most banks, which merge using the asset acquisition method, from the applicability of section 7 would have been closed were it not for the addition of new language into section 7 limiting the applicability of the asset acquisition section to entities covered by the Federal Trade Commission. *Id.* at 358. As the federal district court viewed it, the new language added by the Celler-Kefauver Act did not lift the exemption of most banks from the applicability of section 7, because banks are not subject to the jurisdiction of the Federal Trade Commission. *Id.* at 357-60. A bank remains outside the jurisdiction of the Federal Trade Commission. 15 U.S.C. § 45(a)(2) (1982).

134. *Philadelphia Nat'l Bank*, 201 F. Supp. at 365.

failed to establish that a "reasonable probability" existed, and therefore held that the defendants had not violated the Clayton Act.[135] Turning to the alleged Sherman Act violation, the court concluded that the "more stringent standards" of the Sherman Act could not have been violated if defendants' activity did not reach the level of a Clayton Act violation.[136] Having failed to prove that the merger "constitute[d] an unreasonable restraint of trade or commerce,"[137] the government's action was dismissed with prejudice by the court.[138]

The federal district court ruling was appealed directly to the Supreme Court.[139] The Court reversed the judgment of the district court, based upon a different interpretation of section 7 of the Clayton Act.[140] The Court examined the language of section 7 of the Clayton Act as amended in 1950, considering both appellant's contention that the merger in question was not a pure asset acquisition and appellees' allegation that the transaction was not a pure stock acquisition.[141] Conceding that the Federal Trade Commission does not have jurisdiction over banks, and that banks engaged in a pure asset acquisition are not within the reach of section 7 of the Clayton Act, the Court determined that a merger cannot be classified neatly as either a pure asset or a pure stock acquisition type of consolidation.[142] An examination of the legislative history of the Celler-Kefauver Act revealed no reason why mergers were not specifically mentioned in the Act.[143] The Court viewed the overall language of section 7 as encompassing a spectrum of transactions from pure stock acquisition to pure asset acquisition, not all of which are mergers.[144] According to the Court, mergers were within the two extreme categories specifically mentioned by section 7, because they are neither a pure stock acquisition nor pure asset acquisition.[145] Because "pure" asset acquisition was the only category to which the exception of "corporations not subject to the FTC's jurisdic-

135. *Id.* at 368-69.

136. *Id.* at 369.

137. *Id.*

138. *Id.* at 372.

139. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). Direct appeal to the Supreme Court is available in a civil action if the United States was the complainant and the judgment appealed from was a final judgment of a federal district court. 15 U.S.C. § 29 (1982). This provision was amended in 1974 to add, *inter alia*, procedures and time limits on the process of direct appeal. *See* 15 U.S.C. § 29 (1982).

140. *See Philadelphia Nat'l Bank*, 374 U.S. at 334-49.

141. *Id.* at 336-37. A pure stock acquisition would entail the transfer of shares of stock only. A pure asset acquisition would involve the transfer of non-stock assets only. *See id.*

142. *Id.*

143. *Id.* at 340-41.

144. *Id.* at 342.

145. *Id.*

tion" applied, bank mergers, which were not "pure" asset acquisitions, were not covered by the exception, and section 7 of the Clayton Act was applicable to such mergers.[146]

The Court agreed with the federal district court's determination that the Bank Merger Act did not exempt approved bank mergers from the antitrust laws.[147] Viewing the implications of the proposed merger, the Court rejected the view of the district court that there was insufficient evidence to show that the effect of the merger may have been "substantially to lessen commerce . . . in any line of commerce in any section of the country."[148] Applying this test, the Court looked primarily at the high percentage of banking business the consolidated bank would control in the Philadelphia metropolitan area were the merger to take place and concluded that the effect would indeed be a substantial lessening of competition in the region.[149]

The Court, in finding a violation of section 7 of the Clayton Act by the appellee banks, saw no reason to reach a conclusion regarding the alleged Sherman Act violation.[150] Instead, it reversed the district court judgment and remanded the case to the district court with a direction to issue an injunction restraining the merger.[151]

The decision in *Philadelphia National Bank* prompted amendments to the Bank Merger Act and the Bank Holding Company Act of 1956.[152] The Bank Holding Company Act was originally intended "to prevent undue concentration of control of banking by bank holding

146. *Id.* The Court appears to regard bank mergers as outside the category of pure assets acquisition because, in a pure assets acquisition, the principals of the disappearing entity retain no interest in the resulting entity and no interest in the transferred assets. *See id.* at 336-37 n.13.

147. *Id.* at 350.

148. *Id.* at 355 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323-24 (1962)).

149. *Id.* at 355, 364-65. The Court also rejected the district court's reliance upon bank officers' testimony to the effect that competition among Philadelphia banks would continue to be "vigorous" even after the merger had taken place, terming the district court's reliance on the testimony "misplaced." *Id.* at 367.

150. *Id.* at 324.

151. *Id.* at 372. Justice Brennan wrote the opinon of the Court; Justice White took no part in considering or deciding the case. *Id.* at 372-73. A dissent by Justice Harlan, joined by Justice Stewart, took the view that Congress, by passing the Bank Merger Act and other legislation, intended to exclude commercial banking from the scope of section 7 of the Clayton Act. *Id.* at 373 (Harlan, J., dissenting). A memorandum by Justice Goldberg stated his concurrence with the judgment of the Court on grounds other than those stated by the majority. *Id.* at 396-97 (Memorandum of Goldberg, J.). Agreeing with the dissenters that section 7 of the Clayton Act is applicable to bank mergers, he nonetheless viewed the Sherman Act as "fully applicable to the commercial banking business." *Id.* In light of the possibility of a Sherman Act violation, he did not disagree with the Court's judgment. *Id.*

152. J. WHITE, *supra* note 58, at 565; *see also* Bank Holding Company Act, 12 U.S.C. § 1842(c) (1982 & Supp. IV 1986).

companies, and to prevent bank holding companies from controlling at the same time both banks and nonbanking enterprises."[153] The Bank Holding Company Act defines a bank as "any institution . . . which (1) accepts deposits . . . and (2) engages in the business of making commercial loans."[154] The general definition of a "bank holding company" within the meaning of the Act is "any company which has control over any bank or over any company that is or becomes a bank holding company . . . ."[155] The 1966 amendments to the Bank Merger Act and the Bank Holding Company Act acknowledged that antitrust principles are applicable to the banking industry by incorporating language similar to that found in the Sherman and Clayton Acts into the Bank Merger and Bank Holding Company Acts.[156] In the case of the Bank Holding Company Act, the antitrust principles of the 1966 amendment were developed into criteria by which the Board of Governors of the Federal Reserve System was to assess the propriety of granting the legally mandated approval with respect to any transaction resulting in the creation of a bank holding company.[157] Among the factors giving rise to mandatory denial are transactions resulting in a monopoly or which would "substantially . . . lessen competition."[158]

In 1970, the Bank Holding Company Act was amended to add provisions prohibiting certain tying arrangements.[159] The enactment of these amendments is viewed as an attempt by Congress to prohibit banks from using their economic power to "cross over" into unrelated markets.[160] In order to effectuate this asserted purpose, Congress developed a listing of the prohibited activities and categorized them as

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153. STAFF OF HOUSE COMM. ON BANKING AND CURRENCY 91ST CONG., 1ST SESS., THE GROWTH OF UNREGISTERED BANK HOLDING COMPANIES PROBLEMS AND PROSPECTS 1 (COMM. PRINT 1969), *reprinted in* H. POTTER, BANK HOLDING COMPANIES 7 (1970).

154. 12 U.S.C. § 1841(c) (1982).

155. 12 U.S.C. § 1841(a)(1) (1982). The Act defines the term "control" as follows:

> (2) Any company has control over a bank or over any company if —
>
> (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
>
> (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

Id.

156. *See* J. WHITE, *supra* note 58, at 565-67; *see also* 12 U.S.C. §§ 1828(c), 1841-1850 (1982).

157. *See* 12 U.S.C. § 1842(a), (c) (1982).

158. 12 U.S.C. § 1842(c) (1982).

159. Bank Holding Company Act Amendments of 1970, 12 U.S.C. §§ 1843, 1850, 1971-1978 (1982).

160. *See* Austin & Solomon, *supra* note 2, at 390.

unlawful tying arrangements.[161] Any engagement in the proscribed activities constitutes a per se violation of the Bank Holding Company Act.[162] Violation of the proscribed activities does not subject the violator to criminal sanctions, but to liability for treble damages should an injured party sue.[163] A tying arrangement is an agreement that the sale of a product to, or performance of a service for, a customer be conditioned upon the sale of another product to, or performance of another service by or for, a customer.[164] The proscribed tying arrangements include the conditioning of extension of credit or furnishing of service upon: (1) obtaining of additional credit or service from a bank; (2) obtaining property or services from a subsidiary of the lending institution; (3) providing a service to a bank; (4) providing a service to a bank holding company or subsidiary; and (5) forbearing from dealing with a bank's competitor.[165]

One reason that the anti-tying arrangement provisions of the Bank Holding Company Act Amendments of 1970 were enacted was to curtail detrimental effect on small businesses of the predatory business

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161. *See* 12 U.S.C. §§ 1972-1978 (1982).

162. Austin & Solomon, *supra* note 2, at 391; *see also* 12 U.S.C. §§ 1972-1978 (1982).

163. 12 U.S.C. § 1975 (1982). For a discussion of the intent of Congress that the anti-tying arrangement provisions are self-enforcing by means of private civil actions, see *infra* text accompanying notes 175-76.

164. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *see also supra* note 9 and accompanying text.

165. 12 U.S.C. § 1972(1) (1982). The proscribed tying arrangements are described in the Bank Holding Company Act as follows:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

Id. This section also permits the Board of Governors of the Federal Reserve System to make exceptions to the proscription of the conduct described in the rest of the section. *Id.*

practices by banks.[166] Another reason stated for inclusion of the provisions was to provide "adequate safeguards against the possibility of misuse of the economic power of a bank" which could "lead to a lessening of competition or unfair competitive practices."[167] Stated more specifically, the purpose is described in a Senate Report as follows: "The purpose of this provision is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire."[168] The same report also states that a problem the overall legislation is designed to address is "the combination, . . . under a single control, of banking and nonbanking enterprises."[169]

The portion of the Bank Holding Company Act Amendments of 1970 dealing with tying arrangements differs from the rest of the amended Bank Holding Company Act in that its provisions apply to all banks regardless of possible affiliation with a bank holding company.[170] Another difference is that in contrast to the rest of the Act, neither criminal penalties nor civil penalties assessable by the Comptroller of the Currency for violations of anti-tying provisions are available.[171] With the exception of a provision permitting United States attorneys to seek injunctive relief for anti-tying arrangement violations, there is no role that the United States Department of Justice can play in enforcement of the anti-tying arrangement provisions.[172] However, as in the Sherman and Clayton Acts,[173] a private right of action is available to a plaintiff seeking treble damages or injunctive relief against a

166. *See* H.R. CONF. REP. No. 1747, 91st Cong., 2d Sess. 29, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5561, 5580 (House conferees apparently felt that conditioning a loan or other banking service to small business customers upon purchase or provision by the customer of another product or service was predatory because such an arrangement could work economic hardship on small businesses).

167. S. REP. No. 1084, 91st Cong., 2d Sess. 16, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5535 (Senate Banking and Currency Committee felt that tying arrangements were a "misuse" of a bank's economic power because they could "lead to a lessening of competition or unfair competitive practices").

168. *Id.*

169. *Id.* at 5520.

170. *See* 12 U.S.C. § 1972(1) (1982). For a definition of the term "bank" as used in the statute, see *supra* text accompanying note 154.

171. *Compare* 12 U.S.C. §§ 1973, 1975-1976 (1982) (remedies available for violations of anti-tying provisions) *with* 12 U.S.C. § 1847 (1982) (criminal and civil penalties relating to, *inter alia,* acquisition of bank shares or assets, or certain relationships with nonbanking organizations) *and* 12 U.S.C. § 1972(2)(F)(i) (Supp. 1982) (civil penalties with respect to certain correspondent accounts).

172. *See* 12 U.S.C. § 1973 (1982).

173. *See* 15 U.S.C. § 15 (1982) (allowing any person injured by antitrust violations to recover treble damages and costs, including reasonable attorney costs).

violator.[174]

For reasons alluded to in a letter written by Assistant Attorney General Richard W. McLaren of the Antitrust Division of the U.S. Department of Justice to Senator Edward W. Brooke, the anti-tying arrangement provisions were designed to be primarily self-executing in nature.[175] In his letter, Mr. McLaren refers to the "limited enforcement resources" of his division and to the idea that many bank tying arrangements are limited in nature or "involve such small amounts [of money] that they do not seem to justify the expensive and time-consuming efforts of full scale antitrust investigation."[176]

One other important innovation in the Bank Holding Company Act's treatment of tying arrangements, which differs from the previous analysis of tying arrangements under existing antitrust laws, is that the legislation treats the proscribed conduct as a per se violation of the Act.[177] The impact of the imposition of a per se standard is that the plaintiff must only prove that the alleged anticompetitive practice occurred in order for the practice to be construed as a violation of section 1 of the Sherman Act.[178] The lesser burden of proof is justified by the plainly anticompetitive nature of the alleged activity.[179] The only tying arrangements described in the Act which do not constitute per se violations are those for which exceptions have been granted by the Board of Governors of the Federal Reserve System.[180] An explanation of the per se rule and the Supreme Court's action concerning tying arrangements reveals the innovative aspects of the anti-tying arrangement portion of the Act.

174. 12 U.S.C. §§ 1975-1976 (1982).

175. *See* S. REP. No. 1084, 91st Cong., 2d Sess. 48, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5560-61 (letter dated June 26, 1970, from Assistant Attorney General Richard W. McLaren to Senator Edward W. Brooke); *see also id.* at 5559 (supplementary views of Assistant Attorney General McLaren).

176. *Id.* at 5561; *see also id.* at 5559. Mr. McLaren also viewed the legislation as "a more valuable supplement to existing remedies against anticompetitive tying arrangements." *Id.* at 5561.

177. *See id.* at 5560-61 (McLaren letter dated June 26, 1970, stating that the new legislation goes beyond prior law, which had not deemed tying arrangements illegal per se).

178. W. HOLMES, *supra* note 98, § 1.04[1], at 55.

179. *Id.*

180. *See* 12 U.S.C. § 1972(1) (1982). This provision, authorizing the Federal Reserve Board to make exceptions to the otherwise per se rule contained in the legislation, was intended to ensure that no interference with "appropriate traditional banking practices" would result. *See* S. REP. No. 1084, 91st Cong., 2d Sess. 16, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5535. Traditional correspondent relationships by banks are among the "appropriate traditional banking practices" which are exempted. Clark v. United Bank of Denver Nat'l Ass'n, 480 F.2d 235 (10th Cir.), *cert. denied,* 414 U.S. 1004 (1973).

In 1958, forty-seven years after *Standard Oil's* "rule of reason,"[181] the Court articulated a new rule applicable to certain "pernicious" anticompetitive practices in *Northern Pacific Railway Co. v. United States.*[182] In *Northern Pacific,* "preferential routing" agreements, which compelled grantees and lessees of land of which a railroad was the grantor or lessor to ship all commodities produced or manufactured on the land on prescribed railroad routes, were held to be illegal tying arrangements.[183] The Court stated that, "[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . ."[184] Among the practices in this category were tying arrangements.[185] The Court concluded that the "preferential routing" agreements violated section 1 of the Sherman Act, because their pernicious effect on competition constituted an undue restraint on trade by denying competitors equal access to the market.[186]

In *Fortner Enterprises v. United States Steel Corp.* ("Fortner I"),[187] the Court again confronted the issue of what constitutes an illegal tying arrangement.[188] *Fortner I* concerned the extension of credit to the plaintiff by a subsidiary of the defendant.[189] The plaintiff, who was

181. For a discussion of *Standard Oil* and the "rule of reason," see *supra* text accompanying notes 84-88.

182. 356 U.S. 1, 5 (1958).

183. *Id.* at 2-3, 7-8.

184. *Id.* at 5.

185. *Id.* at 5-6. The Court cited International Salt Co. v. United States, 332 U.S. 392 (1947), as another example of the applicability of a per se rule to tying arrangements. In *International Salt,* the Court held that an agreement by a lessee of salt dispensing machines to buy all the salt it used from the lessor was a tying arrangement, and an "unreasonable, per se" violation of section 1 of the Sherman Act. *See International Salt,* 332 U.S. at 396. The *Northern Pacific* Court also cited Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), in which the Court held that the unit system of advertising in two local newspapers did not fall within the rule of per se unreasonableness. *Times-Picayune,* 345 U.S. at 627-28; *see also Northern Pacific,* 356 U.S. at 10-11. In *Northern Pacific,* the Court distinguished *Times-Picayune* by stating that its holding requires no "more than sufficient economic power to impose an appreciable restraint on free competition in the tied product." *Northern Pacific,* 356 U.S. at 11. In addition, the Court stated that " 'a not insubstantial' amount of interstate commerce [must be] affected" and it is not necessary for a monopoly to exist in order to apply a per se standard. *Id.*

186. *Northern Pacific,* 356 U.S. at 7, 12. Justice Black wrote the opinion of the Court and Justice Clark took no part in the case. *Id.* at 2, 12. A dissent by Justice Harlan, joined by Justices Frankfurter and Whitaker, stressed that *Times-Picayune* required proof by the plaintiff of the defendant's economic dominance over the market in question before the per se rule could apply. *Id.* at 13, 14 (Harlan, J., dissenting).

187. 394 U.S. 495 (1969).

188. *Id.* at 498.

189. *Id.* at 496-97.

in need of capital to purchase and develop certain land, was extended credit on the condition that the plaintiff purchase prefabricated houses manufactured by the defendant steel corporation.[190] The plaintiff sued, alleging that the conditioned loan agreement constituted an illegal tying arrangement in violation of sections 1 and 2 of the Sherman Act.[191] The Court determined that the requirement of purchasing prefabricated homes—the tied product—as a condition for the use of credit—the tying product—constituted a tying arrangement.[192]

The Court in *Fortner I* then proceeded to articulate a standard of "per se illegality."[193] The *Fortner I* per se standard was conditioned by threshold requirements originally articulated in *International Salt Co. v. United States*.[194] These prerequisites are that "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."[195] While the Court stated that the above criteria must be met in order to apply the doctrine of per se illegality, failure to meet the burden of proving both conditions does not necessarily preclude a plaintiff from prevailing in a Sherman Act civil action if a showing of an unreasonable restraint of trade or monopolization of a market by the defendant is made.[196]

The Court expressed satisfaction that, based upon the questions of fact presented in *Fortner I*, the doctrine of per se illegality would apply if the questions were resolved in the plaintiff's favor.[197] It held that the district court erred in granting defendant's motion for summary judgment, based not upon the two criteria the district court utilized in arriving at its conclusion, but rather upon the factors the district court assessed in concluding that the two requirements had not been met.[198] The Court rejected the district court's contention that an assessment of the scope of the relevant market is essential to demonstrate whether a "not insubstantial" amount of commerce is involved, stating that

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190. *Id.*

191. *Id.*

192. *Id.* at 498.

193. *Id.* at 498-500.

194. 332 U.S. 392 (1947).

195. *Fortner I*, 394 U.S. at 499 (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)). The Court supported its reasoning with the principle asserted in *International Salt*, that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Id.* at 501 (quoting *International Salt*, 332 U.S. at 396).

196. *Fortner I*, 394 U.S. at 499-500.

197. *Id.* at 500-01.

198. *Id.* at 501-04; *see also* Fortner Enter., Inc. v. United States Steel Corp., 293 F. Supp. 762, 767-69 (W.D. Ky. 1966), *aff'd*, 404 F.2d 936 (6th Cir. 1968), *rev'd*, 394 U.S. 495 (1969).

anything above a de minimis amount of business on the part of the defendant is sufficient to meet this threshold.[199] The district court's ruling that a showing of a monopoly or dominant position by the defendant in the tying product's market is necessary to meet the "sufficient economic power" criterion was also rejected by the Court in *Fortner I.*[200]

Economic power, according to *Fortner I,* "may be inferred from the tying product's desirability to consumers or [the] uniqueness in its attributes."[201] Tying arrangements were thought by the Court to be lacking in legitimate business purpose, and therefore, could be invalidated if they caused any appreciable restraint on competition.[202] Finally, the Court in *Fortner I* dismissed the defendant's argument that credit is not a product or service within the traditional context of a tying arrangement, asserting that the same harmful effects upon competition can result when credit is used as a tying product as are possible when other goods or services are used.[203] In *Fortner I,* the Court reversed the judgment of the United States Court of Appeals for the Sixth Circuit,[204] which had affirmed the district court's ruling without opinion, and remanded the case to the district court with instructions.[205]

Interestingly, the same case returned to the Supreme Court in 1977 as *United States Steel Corp. v. Fortner Enterprises, Inc. ("Fort-*

199. *Fortner I,* 394 U.S. at 501; *see also* 293 F. Supp. at 768.

200. *Fortner I,* 394 U.S. at 502-03; *see also* 293 F. Supp. at 767.

201. *Fortner I,* 394 U.S. at 503 (quoting United States v. Loew's Inc., 371 U.S. 38, 45 (1962)).

202. *Id.*

203. *Id.* at 508-09.

204. Fortner Enter., Inc. v. United States Steel Corp., 404 F.2d 936 (6th Cir. 1968), *rev'd,* 394 U.S. 495 (1969).

205. The majority opinion in *Fortner I* was written by Justice Black. 394 U.S. at 496. A dissent by Justice White, with whom Justice Harlan joined, set forth the view that the majority's position, by relaxing the burden of proof that governs the showing of market power in the tying product, effectively eliminates the requirement of such a showing under the per se doctrine. Justice White's dissent also stated that a ruling of per se unreasonableness of a tying arrangement should not be applied to sellers furnishing credit in the absence of a showing of power in the credit market. *Id.* at 510-20 (White, J., dissenting).

A separate dissent by Justice Fortas, with whom Justice Stewart joined, went beyond that of Justice White, while indicating general agreement with Justice White's view. *Id.* at 520 (Fortas, J., dissenting). Justice Fortas did not believe that the arrangement at issue constituted a tying arrangement at all, but merely a sale of a product with an ancillary financing agreement. *Id.* at 522, 525 (Fortas, J., dissenting). According to Justice Fortas, combinations of sales and credit may be violative of antitrust laws, but should not be included under the per se doctrine as applied to tying arrangements. Finally, Justice Fortas believed that the Court's decision could have a destructive effect upon the common economic practice of extending credit or providing ancillary services in connection with general sales transactions. *Id.* at 520-25 (Fortas, J., dissenting).

ner II").[206] The case had been remanded to the district court, which held that the defendants' actions affected a "not insubstantial amount of commerce in the tied product and . . . [an] 'appreciable economic power' in the market for the tying product."[207] The United States Court of Appeals for the Sixth Circuit affirmed.[208] The Court in *Fortner II* accepted the lower court's conclusion that the agreement "affected a 'not insubstantial' amount of commerce in the tied product,"[209] but found that the plaintiffs had not met the required burden of proof in establishing that the defendants had "appreciable economic power" in the credit market—the market of the tying product.[210]

The Court in *Fortner II* held that none of the following were sufficient to establish "appreciable economic power" in the credit market: (1) the defendant was one of the largest corporations in the United States; (2) the defendant had entered into similar tying arrangements with other customers; (3) the plaintiff was charged an exorbitant and noncompetitive price for prefabricated houses; and (4) the financing was "unique" in that it covered all of plaintiff's land acquisition and development costs and was a high-risk loan at a low interest rate.[211] The Court appeared to apply a different view to the "uniqueness" of the tying product than did the Court in *Fortner I*, holding that uniqueness of the product indicates economic power in a given market only if the seller can offer the product under advantageous terms that cannot be matched at the election of the seller's competitors.[212] Therefore, the Court in *Fortner II* concluded that the plaintiff had failed to meet the requisite burden of proof, and reversed the lower court's judgment.[213]

After *Fortner II*, plaintiff's burden of proof for demonstrating that a tying arrangement constituted a per se violation of section 1 of the Sherman Act increased.[214] Plaintiffs would have to prove that the arrangement affected a "not insubstantial" amount of commerce in the

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206. 429 U.S. 610 (1977).

207. *Id.* at 611.

208. Fortner Enter., Inc. v. United States Steel Corp., 523 F.2d 961 (6th Cir. 1975), *rev'd*, 429 U.S. 610 (1977).

209. *Fortner II*, 429 U.S. at 611.

210. *Id.* at 611-13.

211. *Id.* at 614-15.

212. *Id.* at 620-22.

213. *Id.* at 622. The Court in *Fortner II* appears to have ignored the possibility that the plaintiff could prevail under the Sherman Act by utilizing a theory other than per se illegality. *Fortner I* explicitly set forth this possibility. *See* Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 499-500 (1969).

A concurrence by Chief Justice Burger, joined by Justice Rehnquist, expressed the view that the peculiar tying arrangement at issue in *Fortner II* is not comparable to "ordinary credit sales of only a single product" and should not be used to place "the legality of credit financing" in question. 429 U.S. at 622-23 (Burger, C.J., concurring).

214. *See Fortner II*, 429 U.S. at 620-22.

tied product based upon the value of the sales of the product to the customer.[215] The other element to be proven by plaintiffs is that the sellers had "appreciable economic power" in the market of the tying product.[216] Economic power would be established by showing that the tying product could be offered by the seller under terms that could not be matched by the seller's competitors even if those competitors desired to offer comparable terms, thereby establishing that the seller has a competitive advantage.[217] Thus, in order to prevail under the per se standard, a plaintiff must prove both elements to the satisfaction of the trier of fact.

Historical application of the per se rule to tying arrangements in traditional antitrust practice demonstrates that certain rigid requirements must nevertheless be met before the rule can be applied.[218] As pointed out in Assistant Attorney General McLaren's letter to Senator Brooke, the unconditional anti-tying arrangement provisions of the Bank Holding Company Act Amendments of 1970 differ from the conditional per se rule expounded in recent case law concerning tying arrangements.[219] The per se applicability of these provisions eases the burden of proof upon injured plaintiffs seeking to recover treble damages as a result of a successful private action against a violating bank or banks.[220] Similarly, an action initiated by the United States Department of Justice, or by a private party, seeking injunctive relief in light of an illegal tying arrangement, would be aided by the per se applicability of the provisions.[221] The anti-tying arrangement provisions, however, do not provide for Sherman Act-type criminal fines and penalties, and thus the enforcement power granted to the United States Department of Justice is limited to injunctive relief.[222]

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215. *Fortner I*, 394 U.S. at 501-02.

216. *Fortner II*, 429 U.S. at 614.

217. *Id.* at 620-22.

218. *See, e.g., Fortner I*, 394 U.S. at 499 (citing International Salt Co. v. United States, 332 U.S. 392, 396 (1947)).

219. *See* S. REP., No. 91st Cong., 2d Sess. 47-48, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5560-61; *see also* 12 U.S.C. § 1972(1) (1982).

220. For a discussion of Assistant Attorney General McLaren's letter, see *supra* notes 175-77 and accompanying text. *See* 12 U.S.C. § 1975 (1982).

221. *See* 12 U.S.C. §§ 1973, 1975 (1982).

222. *Compare* 15 U.S.C. §§ 1-2 (1982) (includes criminal fines for Sherman Act violations) *with* 12 U.S.C. §§ 1971-1978 (1982) (no provision for criminal fines or penalties with respect to violation of anti-tying arrangement provisions). Another difference between the two Acts is that the Bank Holding Company Act contains no explicit provision permitting the United States to recover civil penalties for violations of anti-tying provisions, while 15 U.S.C. § 15a (1982) permits the United States to recover actual damages and the cost of suit in a civil action under the Sherman or Clayton Act. For a further comparison of the remedies available under the Bank Holding Company Act Amendments of 1970 and the Sherman and Clayton Acts, see *supra* notes 170-74 and accompanying text.

The examination of a fact pattern involving an alleged combination and conspiracy of banks to restrain trade and to monopolize, which employs a possible tying arrangement as a method to obtain its illegal ends, reveals the ineffectiveness of the Sherman Act and the anti-tying arrangement provisions of the Bank Holding Company Act Amendments of 1970 in achieving the policy goals of unrestrained competition in a given market and the elimination of undue interference in a substantial amount of interstate commerce. The following fact pattern was taken from the complaint in an action that, at the time of this writing, was pending before the United States District Court for the Northern District of Texas.[223] For the purposes of this examination, we shall assume that all the facts stated in the complaint are true.

V. PENROD, THE SHERMAN ACT AND THE BANK HOLDING COMPANY ACT

The plaintiffs are Penrod Oil Drilling Company, a leading company in the offshore oil and gas drilling industry, and Placid Oil Company, an oil company whose shareholders are the same trust estates which are equal partners in Penrod.[224] The defendants are Manufacturers Hanover Trust Company, Bankers Trust Company, Citibank, and twenty other banks chartered nationally or in Texas which have extended credit to Penrod and its competitors.[225] The offshore drilling business is essentially interstate and international in character, and depends upon contracts with oil companies for income.[226] Offshore drilling companies lease their rigs to oil companies, which also contract with the drilling companies for drilling services.[227]

Recently, a fall in oil prices has thrown the offshore drilling industry into a crisis which the plaintiffs describe as "temporary."[228] The rates charged for use of drilling rigs and crews and a reduction in the resale value of rigs to well below the level of the debt obligation incurred when the rig was initially purchased have created a cash-flow crisis for the drilling company and its competitors.[229]

Aware of the temporary nature of the crisis, the defendant banks formulated a plan to exploit the situation.[230] Their plan was to seek

223. First Amended and Consolidated Complaint, Hunt v. Bankers Trust Co., 646 F. Supp. 59 (N.D. Tex. 1986) [hereinafter *Complaint*].

224. *Complaint* at 3.

225. *Id.* at 4-7.

226. *Id.* at 20.

227. *Id.*

228. *Id.* at 21.

229. *Id.*

230. *Id.*

control and management of the entire offshore oil drilling industry.[231] The plan would have enabled the banks not only to secure repayment of their loans to the industry, but also to profit from competition with their own borrowers.[232] Foreclosure of the loans in default, which due to the sagging fortunes of the oil drilling industry were under-collateralized, would have resulted in tremendous losses to the banks.[233]

The banks' plan was designed to restructure the entire industry by creating a new company which would control "a managed worldwide supply" of drilling rigs.[234] The banks would combine and, using their economic leverage, drive all but a small number of competitors out of the oil drilling industry.[235] The small group of companies remaining would be controlled by the conspiring banks, which would in turn control a consolidated group of rigs.[236] The controlled companies would have available to them the benefits of favorable bank financing terms, worldwide competitive reach, and accessibility to a controlled inventory of rigs.[237] Non-complying companies, which would not have access to the banks' favorable financing terms and controlled inventory, would be forced out of the market.[238] The banks proposed implementation of their plan through the formation of a new holding company.[239]

Fearing that Penrod's presence in the industry would thwart the banks' plan, representatives of the banks approached Penrod in an attempt to convince the company to participate in the scheme.[240] The banks offered to restructure Penrod's debt in return for a grant to the banks of a "controlling interest" in a "new company" which would be used in implementing the banks' plan.[241] Penrod claims that it refused the defendants' proposal, but a representative of the banks again approached Penrod and asked it to "reconsider" the banks' proposal.[242] Penrod stated that it refused the proposal a second time, resulting in the banks' offering of favorable debt restructuring agreements to Penrod's competitors, thereby placing financial pressure upon Penrod.[243]

Penrod and Placid filed suit in federal district court, alleging vio-

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231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 23.
235. *Id.*
236. *Id.*
237. *Id.* at 23-24.
238. *See id.* at 23.
239. *Id.* at 23-25.
240. *Id.* at 25.
241. *Id.*
242. *Id.*
243. *Id.* at 25-26. Because the trusts which comprise the Penrod partnership also own the stock of Placid, and because Placid was Penrod's largest customer, Placid also was placed under financial pressure. *Id.* at 26.

lations of sections 1 and 2 of the Sherman Act.[244] They charged that the defendants' plan constituted an unlawful combination and conspiracy to restrain trade because of the banks' discriminatory restrictions upon extension of credit to Penrod and Placid.[245] Further, they alleged that the banks' action also constituted an unlawful combination and conspiracy to monopolize the oil drilling industry.[246] Penrod and Placid asked for treble damages, attorney's fees, and litigation costs.[247]

Under the Sherman Act analysis sought by Penrod and Placid, the court would be called upon to determine whether the "rule of reason" or a per se rule is the appropriate standard.[248] If the "rule of reason" were applied, the plaintiffs would have to demonstrate to the court's satisfaction that an unreasonable restraint of trade had taken place.[249] Otherwise, if the per se rule could be utilized under a tying arrangement theory, the plaintiffs would have to satisfy the criteria relied upon by the Supreme Court in *Fortner II*.[250] Assuming that each of Penrod's allegations is true, once these are proved at trial Penrod and Placid should prevail. However, the burden of proof placed upon plaintiffs is formidable.

If Penrod and Placid had already been so overburdened financially that they could not bring an action in federal court, another method of deterrence of unlawful banking activity is provided under the Sherman Act. While the United States Department of Justice has the authority to bring a criminal action against the defendants for the same violations alleged by the plaintiffs in the fact pattern, the criminal penalties, limited to no more than $1,000,000 per bank, would not be as "punitive" in nature to large banks as would the "penalty" of treble damages awarded to a successful private plaintiff.[251] This anomaly provokes speculation as to the sufficiency of existing criminal penalties and strongly suggests that reform of the Sherman Act is desirable.

In addition, parties injured by unlawful tying arrangements would be entitled to treble damages under an alternative theory of legal action.[252] If the banks' offer to restructure the plaintiffs' debt in exchange for equity is characterized as a "tying arrangement," an action for violation of the Bank Holding Company Act's anti-tying arrange-

244. *Id.* at 2, 34-35.

245. *Id.* at 34.

246. *Id.*

247. *Id.* at 35. Under § 4 of the Clayton Act, 15 U.S.C. § 15 (1982), the plaintiff may recover treble damages, attorney's fees and litigation costs.

248. *See* LEGISLATIVE HISTORY, *supra* note 26, at 374-75.

249. *See id.* at 370-74.

250. *See supra* text accompanying notes 211-13.

251. *See* 15 U.S.C. §§ 1-2, (1982) (penalties under the Sherman Act); 15 U.S.C. § 15 (1982) (penalties under the Clayton Act).

252. *See* 12 U.S.C. §§ 1972(1)(C), 1975 (1982).

ment provisions could be brought.[253] The anti-tying arrangement provisions of the Bank Holding Company Act provide in relevant part that:

> (1) A bank shall not in any manner extend credit . . . or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
>
> . . . .
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan . . . .[254]

Arguably, the banks' proposal does not constitute an extension of credit or the furnishing of a service to Penrod because the latter never accepted the banks' offer.[255] Despite the refusal, the offer varies the consideration for the extension of credit, or debt restructuring, on the condition or requirement that the customer Penrod provide some additional property—stock in a "new company"—or service to defendant banks, other than those related to and usually provided in connection with a loan.[256] While it is not unusual for a bank to hold stock as collateral for a loan, it would be unusual for a bank to have a controlling equity as well as a management interest in a borrower. Thus, the proposal made to the plaintiff is a tying arrangement, because it varies the consideration for the extension of credit in an unusual manner.[257] Absent the unlikely event that the Federal Reserve System would grant an exception for the banks, the proposal is a violation of the Bank Holding Company Act.[258]

If the elements outlined above are proven to the satisfaction of the court, the defendant's actions would constitute a per se violation of the anti-tying arrangement provisions, and the plaintiffs would be entitled to treble damages, attorney's fees, costs of suit, and an injunction.[259] Such remedies would be available to successful private parties who can absorb the expense of costly litigation or can hire legal assistance on a contingency basis. Such remedies, however, are not available to injured

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253. *See Complaint, supra* note 223, at 35-36; *see also* 12 U.S.C. § 1972(1) (1982). While Penrod and Placid allege violations of the Bank Holding Company Act, their amended complaint does not employ the analysis set forth in this Note. *See Complaint, supra* note 223, at 35-36.

254. 12 U.S.C. § 1972(1)(C) (1982).

255. *See Complaint, supra* note 223, at 25.

256. *See* 12 U.S.C. § 1972(1)(C) (1982).

257. *Id.*

258. *See* 12 U.S.C. § 1972(1) (1982) ("The Board may by regulation or order permit such exceptions to the . . . prohibition as it considers will not be contrary to the purposes of this chapter.").

259. 12 U.S.C. § 1975-1976 (1982).

parties who are unable to secure legal assistance on a contingency basis and have been so economically damaged by a violator that the pursuit of a court action against a violator is not feasible. Thus, the formidable burden of proof plaintiffs would have to meet in establishing a Sherman Act violation, and the economic limitations upon some injured parties who have a valid cause of action under the Sherman Act or the Bank Holding Company Act, restricts the effectiveness of both Acts as instruments of deterrence and punishment of banks engaging in tying arrangements. If private parties cannot effectively avail themselves of the "self-enforcing" mechanisms of these statutes, it is left to the government to effectuate the legislative intent of both Acts, which is to deter and to punish bank crossover activity.[260]

Under existing legislation, how would the government proceed to enforce the policy against significant bank crossovers into unrelated commercial activities? The first option that the United States Department of Justice could pursue is to seek a permanent injunction restraining the illegal tying arrangement.[261] If properly enforced, the injunction would end the illegal activity. Limited in nature, this remedy is problematic, because the Bank Holding Company Act fails to provide criminal penalties for illegal tying arrangements fashioned by banks under the Bank Holding Company Act. Therefore, the deterrent value of the United States Department of Justice's limited power under the Act is negligible, especially when the impact on banks other than a defendant is considered. The ability of the courts to enforce such injunctions is also questionable because enforcement would require frequent monitoring by the court of the behavior of banks and bank holding companies to ensure compliance with the injunctions.

The alternative for the United States Department of Justice would be to pursue a criminal action against an offending bank or banks for Sherman Act violations.[262] While it has become possible to prosecute banks for antitrust violations since the time of *United States v. Philadelphia National Bank*,[263] the limitations on the amounts of criminal fines forfeitable by a defendant renders enforcement of the Sherman Act impractical in a criminal context. Because most banks are not corporations, most offending banks would be subject to fines not in excess of $100,000.[264] Even if the maximum criminal fine applicable to corpo-

260. For a discussion of the legislative history of the Sherman Act, see *supra* notes 36-54 and accompanying text; for discussion of the legislative history of the Bank Holding Company Act, see *supra* note 153 and accompanying text.

261. 12 U.S.C. § 1973 (1982).

262. 15 U.S.C. §§ 1-2 (1982).

263. 374 U.S. 321 (1963). For a discussion of *Philadelphia National*, see *supra* notes 118-51 and accompanying text.

264. *See supra* text accompanying note 15.

rations, $1,000,000,[265] were applicable to a bank, the punitive and deterrent effects of such a penalty on a large banking institution would be negligible.

VI. Conclusion

It should now be evident that existing legislation is not reasonably tailored to deter and to punish banks which expand into areas of commerce unrelated to the banking industry. The defects in the existing statutory scheme can only be cured by a combination of legislative reform and rigorous enforcement of the statutes. Several reforms are needed in order to perfect the deterrent and punitive value of the Sherman, Clayton, and Bank Holding Company Acts.

Criminal sanctions under the present Sherman Act will not punish or deter large banks and bank holding companies from unwarranted crossover activity which results in a restraint of trade or monopolization. An increase in the maximum amount of the fine imposed for Sherman Act violations should deter banks which contemplate engaging in expansion into unrelated areas of commerce. Courts would still retain discretion in the amounts of the actual fines imposed, in order to avoid exacting harsh penalties from violators who have fewer assets.

At present, no criminal sanctions exist for engagement in illegal tying arrangements under the Bank Holding Company Act. The theory that the anti-tying arrangement provisions of the Bank Holding Company Act can be effective, self-enforcing provisions has failed. Imposition of criminal fines upon violating banks and jail sentences upon violating bank officers would effectively deter and punish offenders.

Enactment of new legislation imposing criminal sanctions upon anti-tying arrangement provision violators would have another beneficial effect. Under present law, some parties injured by unlawful tying arrangements would be denied access to the courts because of the financial inability to seek legal assistance, unless such assistance is procured on a contingency fee basis. Successful prosecution of a bank engaging in an illegal tying arrangement, under the Bank Holding Company Act, would lead to greater willingness on the part of lawyers to assist, on a contingency fee basis, parties economically injured by these tying arrangements. Thus, imposition of criminal sanctions would also increase the effectiveness of the civil remedies already set forth in the statute.

The result of such legislative reform would be that injured parties would not be subjected to the formidable burden of proof imposed by pursuing a civil action under a Sherman Act theory. More important, bank crossover activity would be effectively deterred and punished.

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265. *Id.*

One important ingredient in the success of a reformed statutory scheme, however, cannot be imposed by Congress. That ingredient is the willingness of the United States Justice Department to initiate criminal actions against violators. As has been shown, the vigorous enforcement of the criminal aspects of the statutes not only deters and punishes violators effectively, but also enhances the effectiveness of the civil aspects of the legislation.

Thus, amendments to the current Sherman and Bank Holding Company Acts are needed to deter and to punish effectively bank crossover activity. Such amendments would be consistent with one of the original purposes of the Bank Holding Company Act, which is to prevent "the combination . . . under a single control, of banking and nonbanking enterprises."[266] To the extent banks engage in unrelated interstate and international activities, the amendments would also, in keeping with the original intent of the Sherman Act, deter any banking activity which restrains trade or commerce or tends to monopolize a market.[267]

Christopher H. Benbow

266. S. REP. No. 1084, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5520.

267. *See* A. WALKER, *supra* note 37, at 12-13.