Notes

THE REQUIREMENT OF AN "ANTICOMPETITIVE EFFECT" IN THE ANTI-TYING PROVISIONS OF THE BANK HOLDING COMPANY ACT AND THRIFT INSTITUTIONS RESTRUCTURING ACT

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With the enactment of the Sherman Act in 1890, tying arrangements became a potential target of the federal antitrust laws.[1] A classic tying arrangement or "tie-in" involves the sale of a good or service on the condition that the buyer purchase another good or service from the seller.[2] The buyer may not want the second good or service, the "tied" product, but is forced to buy it because of the seller's "power" in the market. For example, a bank might condition a home loan on the customer's purchase of the home from a builder affiliated with the bank.[3] The possible negative economic effects of tying include the use of monopoly power in one market as leverage to gain monopoly power in another market, the creation of barriers against new entrants to a market in which a seller has a monopoly, avoidance of price regulations, and the facilitation of predatory pricing.[4] These negative economic effects are "anticompetitive effects" because they decrease competition.

The original Sherman Act left the courts to decide the substantive questions regarding what conduct should be illegal[5] and what elements must be

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1. *See generally* Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013 (1985).

2. E. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 185 (1988).

3. For a similar situation, see Fortner Enterprises v. United States Steel, 394 U.S. 495 (1969) (credit extension conditioned on purchase of home from a home division of parent corporation).

4. *See* E. SULLIVAN & J. HARRISON, *supra* note 2, at 185-86. *See also* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 214-46 (1985) (discussion on "tie-ins, reciprocity, exclusive dealing and the franchise contract"). In some situations the alleged anticompetitive effects of tie-ins are subject to debate among economists. E. SULLIVAN & J. HARRISON, *supra* note 2, at 185-88; H. HOVENKAMP, *supra*, at 222-32. The economic analysis of each particular alleged anticompetitive effect, which varies depending on factors specific to the alleged effect, is discussed in detail in these treatises.

5. E. SULLIVAN & J. HARRISON, *supra* note 2, at 6.

proved.[6] Congress, however, has not always found such decisions to its liking. One of the major Supreme Court decisions regarding the Sherman Act that Congress found unacceptable was the Court's failure to attack tying arrangements.[7] Congress' concern with the "anticompetitive character of tying arrangements,"[8] led it to enact the Clayton Act, which specifically reaches tying arrangements involving goods.[9]

Banks traditionally have been viewed as an important and special part of the economy.[10] Banks serve as intermediaries in the allocation of financial resources at the national, regional, and local levels.[11] Unregulated, the financial power of banks may become concentrated, allowing banks to control other segments of the economy.[12] Congress perceived such potential anticompetitive effects in tying arrangements perpetrated by banks owned by holding companies, and by banks in general, and enacted the anti-tying provisions of the Bank Holding Company Act (BHCA) in 1970.[13] The BHCA, and the anti-tying provisions of the Thrift Institutions Restructuring Act (TIRA) of 1982, regulate tie-ins and similar arrangements by banks and federal thrift institutions.

Legal practitioners largely overlooked the anti-tying provisions of the BHCA during its first fifteen years.[14] Since 1985, however, more attention has been paid to both the BHCA and the TIRA.[15] This may be due to an increased number of unconventional loan conditions[16] or to increased borrower awareness of their rights under the Acts.[17]

Borrowers in financial difficulties may use the Acts in attempts to avoid their debts.[18] Customers of banks or thrifts might also plead the Acts to claim

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6. Hovenkamp uses a five-part test, which requires a plaintiff under the Sherman Act to prove (1) separate tying and tied products, (2) a buyer forced by the seller to accept the tied product, (3) a showing that the seller had sufficient economic power in the tying product market to coerce the buyer to buy the tied product, (4) an anticompetitive effect or injury, and (5) involvement of a not insubstantial amount of commerce in the market for the tied product. H. HOVENKAMP, *supra* note 4, at 215.

7. Kramer, *supra* note 1, at 1019-20.

8. Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 10-11 (1984).

9. *Id.*

10. Smith & Greenspun, *Structural Limitations on Bank Competition*, in CURRENT ISSUES IN BANKING 184 (C. Havighurst ed. 1969) ("The banking system is affected with the public interest to a much greater extent than most industries.").

11. *Id.* at 185.

12. *Id.*

13. *See infra* notes 29-46 and accompanying text. As to the debate over the possible anticompetitive effects of tie-ins specifically regarding banks, see Fischel, Rosenfield & Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 329 (1987) ("highly unlikely that banks have market power over the availability of credit or in the provision of other banking services").

14. Cotham & Cotham, *The Bank Tying Act: An Underutilized Tool in Seeking Redress Against Abuse By Financial Institutions*, 49 TEX. B.J. 110, 120 n.9 (Feb. 1986).

15. During the last five years, the federal appeals courts have heard roughly the same number of BHCA and TIRA antitying cases as during the prior fifteen years.

16. Cotham & Cotham, *supra* note 14, at 110.

17. *Id.*

18. For example, the holder of a promissory note may sue a defaulting debtor, and the debtor may allege that the note is void because it was part of a tie-in that is illegal under the Acts.

treble damages remedies[19] or to add a federal question to their complaint.[20] Although primarily private litigants seek redress under the Acts, the United States Attorney General may enforce the BHCA[21] and the Director of the Office of Thrift Supervision may enforce the TIRA.[22] Because of the potential for litigation under the Acts,[23] it is important to know whether a claimant asserting the BHCA or the TIRA must prove that the allegedly prohibited tying by the bank or S&L has an "anticompetitive effect."[24]

Under other antitrust laws, such as the Sherman Act, proving an "anticompetitive effect" is not easy. The claimant must identify the relevant market for the tied product and show that the tying prevented merit-based competition for the tied product.[25] This type of economic analysis may give courts some difficulty.[26] It may also be difficult for plaintiffs to show that the alleged arrangement lessened competition.[27] Thus, an anticompetitive effect requirement adds to the uncertainty and expense of litigation under the BHCA and the TIRA.

This Note examines the BHCA and the TIRA, their legislative histories, and the subsequent interpretations of both by the federal courts of appeal, in an effort to establish whether proof of an anticompetitive effect is a necessary element of an anti-tying claim. This examination is prompted by a recent case involving the anti-tying provisions of the BHCA, *Davis v. First National Bank of Westville*,[28] which focused on the anticompetitive effect requirement. Although the *Davis* court forcefully argued that the plaintiff must prove an anticompetitive effect to prevail under either the BHCA or TIRA, there is little support for such a requirement in the language of the Acts, the policy underlying the Acts, their legislative histories, or other courts' decisions.

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19. For example, other creditors of a bankrupt debtor might urge the debtor to bring an action against a lender to collect treble damages which would benefit them. Cotham & Cotham, *supra* note 14, at 114. As these two practitioners observe, the treble damages provisions of the BHCA and the TIRA are very important, because the provisions not only provide "a bigger pot of gold for those successfully traversing the rainbow, [they] also confer leverage in settlement negotiations, a significant concern in the context of workout situations." *Id.* at 114. *See also* treble damages provisions of the BHCA, 12 U.S.C. § 1975, and the TIRA, 12 U.S.C. § 1464(q)(3).

20. Cotham & Cotham, *supra* note 14, at 114. *See also* jurisdiction and amount in controversy provisions of the BHCA, 12 U.S.C. § 1975, and of the TIRA, 12 U.S.C. § 1464(q)(3).

21. 12 U.S.C. § 1974 (1988).

22. 12 U.S.C.A. § 1464(d) (West Supp. 1990).

23. Litigation has seldom been successful, however. *See, e.g.*, Swart, *Survey of Litigation Under the 1970 Anti-Tying Amendment to the Bank Holding Company Act*, 52 TEX. B.J. 522 (1989).

24. Requiring an anticompetitive effect would very significantly reduce the applicability of the Acts, which otherwise provide a plaintiff with "a relatively simple and 'clean' case." Cotham & Cotham, *supra* note 14, at 119.

25. E. SULLIVAN & J. HARRISON, *supra* note 2, at 196.

26. *Id.* at 181 (citing Standard Oil Co. v. United States (Standard Stations), 377 U.S. 293, 308-12 (1949)).

27. *Id.*

28. 868 F.2d 206 (7th Cir.), *cert. denied*, 110 S. Ct. 68 (1989).

THE LAWS AND THEIR LEGISLATIVE HISTORIES

BHCA Amendments of 1970

In 1969, both Congress and the President feared that, if unregulated, bank subsidiaries of one-bank holding companies could cause the traditional separation of banking and industry to break down. The resulting financial power centers might dominate the economy to the detriment of free competition.[29] Congress responded to the real and feared uses of market power by banks, in 1970, by passing several amendments to the Bank Holding Company Act of 1956.[30] These amendments primarily addressed Congress' fear that

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29. *See* CONF. REP. NO. 1747, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5561. In their General Statement, the Managers on the Part of the House state:

> This wave of one bank holding company creations alarmed many people on Capitol Hill, in the Administration, at the Federal Reserve Board and significant professional observers of the American economic system. Indeed, President Nixon stated on March 24, 1969, that:
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> > Legislation in this area is important because there has been a disturbing trend in the past year toward erosion of the traditional separation of powers between the suppliers of money — the banks — and the users of money — commerce and industry.
> >
> > Left unchecked, the trend toward the combining of banking and business could lead to the formation of a relatively small number of power centers dominating the American economy. This must not be permitted to happen; it would be bad for banking, bad for business, and bad for borrowers and consumers.
> >
> > The strength of our economic system is rooted in diversity and free competition; the strength of our banking system depends largely on its independence. Banking must not dominate commerce or be dominated by it.

Id. at 5562.

30. Bank Holding Company Act Amendments of 1970, Pub. L. 91-607, 84 Stat. 1760 (1970). The anti-tying provision of the BHCA Amendments is codified at 12 U.S.C. §§ 1971-1978 (1988). The sections pertinent to this discussion are:

> § 1972. Certain tying arrangements prohibited; correspondent accounts
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> (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 —
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> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
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> (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;
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> (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 or such bank, or to any other subsidiary of such bank holding company;
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, 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.

unregulated bank holding companies would abuse their banking power by granting credit more readily to customers of affiliated businesses (reciprocity), refusing credit to persons patronizing non-affiliated businesses (tying), or conditioning credit on a customer's agreement not to patronize non-affiliated businesses (exclusive dealing).[31] The Senate Banking and Currency Committee report described the amendments as a continuation of Congress' "long-standing policy of separating banking from commerce."[32] As a part of the new law, Congress prohibited banks from using several conditional transactions, including tying,[33] reciprocity,[34] and exclusive dealing[35] arrangements.

Arguably, the Sherman Act already prohibited banks from engaging in some tying arrangements with regard to extensions of credit.[36] Under the BHCA, however, when a bank is involved, Congress apparently intended to eliminate most of the burdens imposed on a plaintiff by the judicial interpretations of the Sherman Act. These burdens include the requirements to prove adverse effects on competition, to show a degree of bank dominance or control over the tying product, and to show that a not insubstantial amount of interstate commerce was involved.[37] A plaintiff need only show that the bank imposed one of the specified conditional transactions and that it was not justified by a legitimate practice.[38]

> The [Federal Reserve] Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter [Chapter 22 — Tying Arrangements].
> § 1975. Civil actions by persons injured; jurisdiction and venue; amount of recovery
> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of the suit, including a reasonable attorney's fee.

12 U.S.C. §§ 1972, 1975 (1988).

31. S. REP. NO. 1084, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5519, 5521-22. *See also* Legislation Note, *The Bank Holding Co. Act Amendments of 1970*, 39 GEO. WASH. L. REV. 1200, 1224 (1971) (discussion of the anti-tying provision of the BHCA amendment shortly after passage).

32. S. REP. NO. 1084, *supra* note 31, at 5522.

33. 12 U.S.C. §§ 1972(1)(A), (B) (1988).

34. 12 U.S.C. §§ 1972(1)(C), (D) (1988).

35. 12 U.S.C. § 1972(1)(E) (1988).

36. Fortner Enterprises v. United States Steel, 394 U.S. 495 (1969) (applying Sherman Act to extension of credit).

37. S. REP. NO. 1084, *supra* note 31, at 5558. *See also* Note, *Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct*, 60 NOTRE DAME L. REV. 706, 717 (1985) ("Congress . . . clearly intended to create a cause of action which was easier to bring than actions under the general antitrust laws and thus free of their restrictive interpretations.").

In the parlance of the Supreme Court's interpretations of the Sherman Act and section 3 of the Clayton Act, Congress made the conditional transactions of section 1972 "illegal per se." This means that "evidence about the actual procompetitive or efficiency effects of a particular arrangement [is] irrelevant." H. HOVENKAMP, *supra* note 4, at 217. With regard to the Sherman Act, the "illegal per se" standard is under attack in the Supreme Court, with several justices arguing that the effects on competition should always be considered. *See infra* notes 113-20 and accompanying text.

38. Note, *supra* note 37, at 722-23.

The Committee report accompanying the Senate bill states that the bill arose from the need to "provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition. . . ."[39] According to the Report, the bill's language made "clear" that banks "may not" engage in tying, reciprocity, or exclusive dealing arrangements; such being "anticompetitive 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."[40] It was the bill's purpose to prohibit them.[41]

Although the final version of the bill differed from the version reported to the Senate floor by the Banking and Currency Committee,[42] the basic language and intent remained the same.[43] Despite the concerns of some senators that the bill should include a requirement of "anticompetitive effect," the final law makes no mention of such a requirement.[44] Congress apparently included

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> The provision approved by the committee is intended to provide *specific statutory assurance* that the use of the *economic power of a bank* will not lead to a lessening of competition or unfair competitive practices. Thus, the provision is intended to affirm in statutory language the principles of fair competition. The committee does not intend, however, that this provision interfere with the conduct of appropriate traditional banking practices.
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> The language of the bill makes clear that the availability to a potential customer of any credit, property, or service of a bank may not be conditioned upon that customer's use of any other credit, property, or service offered by the bank, the bank holding company or its subsidiary or by a business operated by one or more of the persons controlling the bank; upon the provision by such customer of any other credit, property, or service to the bank, the bank holding company or its subsidiary or to a business operated by one or more persons controlling the bank; or that the potential customer shall not obtain some other credit, property, or service from a competitor of the bank, the bank holding company or any other subsidiary, or from a competitor of a business operated by one or more of the individuals controlling the bank.
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> 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.

S. REP. NO. 1084, *supra* note 31, at 5535 (emphasis added).

40. *Id.*

41. *Id.*

42. The "traditional banking services" exemption was added. CONF. REP. NO. 1747, *supra* note 29, at 5580.

43. 116 CONG. REC. 42,426 (1970) (statement of Sen. Sparkman describing the final bill before Senate approval of conference report on Dec. 18, 1970: "Although the [1970] amendment [to the BHCA] was modified during the debate in the Senate, the modification was made in order to conform the language of the amendment to the explanation in the Senate report. Therefore that explanation should continue to be the basis for interpretation of the amendment.").

44. *See* text of section 1972, *supra* note 30. *See also* S. REP. NO. 1084, *supra* note 31, at 5546-48 (Supplementary Views of Senators Bennett, Tower, Percy & Packwood):

> [The committee bill language] would make certain bank practices, which exist for completely legitimate reasons and which increase competition among banks, per se violations of antitrust law whether there is any anticompetitive effect or not. . . .
>
> An amendment is in order to show that the purpose of this section is to prohibit only those tying arrangements whose effect may be to lessen competition or tend to create a monopoly in any type of credit or property transactions or in any type of services and which is engaged in by a bank, a bank holding company,

no such requirement because it believed that the specifically prohibited arrangements were, by their nature, anticompetitive when forced on customers by a bank:

> The committee has concluded, as the Supreme Court has recognized, that "tying agreements serve hardly any purpose beyond the suppression of competition." *Because of their inherent anticompetitive effects*, which may operate to the detriment of bank customers as well as banking and nonbanking competitors, *tying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition* or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.[45]

Indeed, the academic literature at the time the law was passed accepted the per se nature of the anti-tying provisions, as does more recent academic literature.[46]

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or any subsidiary of a bank holding company. Such a statement of purpose would give meaning to the exemptive power granted in the section to the Federal Reserve Board.

45. S. REP. NO. 1084, *supra* note 31, at 5558 (emphasis added). Federal Appeals Court decisions frequently quote the Supplementary Views of Senator E.W. Brooke, who also explained that the purpose of the antitying provision "is to eliminate anticompetitive 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." S. REP. NO. 1084, *supra* note 31, at 5558 (emphasis added). *See also* Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Sen. Brooke, June 26, 1970:

> The proposed new section addresses many of the antitrust problems that could arise as a result of bank holding company activity in other fields. *It would make tie-in arrangements unlawful, thereby eliminating the burden of proving specific adverse impacts on competition* or restraints of trade. In so doing, the proposed new section would go beyond the Fortner decision, which did not go so far as to hold tie-ins involving credit illegal per se. Thus, the proposed section would prevent the further spread of seriously anticompetitive practices which have developed in the banking and financial areas.
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> By authorizing the Federal Reserve Board to permit exceptions to the tying prohibitions, the proposed section apparently seeks to lessen the danger of overly broad interpretations of the prohibitory language. We would not oppose this provision, as it is possible that certain practices which could arguably fall within the language of the section might not be [sic] present serious anticompetitive effects.

S. REP. NO. 1084, *supra* note 31, at 5560-61 (emphasis added).

46. *See, e.g.*, C. BLAINE, FEDERAL REGULATION OF BANK HOLDING COMPANIES §§ 12-1, 2 (1973) ("In reality [Section 1972] is a broad antitrust statute which makes illegal per se . . . tying, reciprocity, and exclusive-dealing transactions"); S. HUBER, BANK OFFICER'S HANDBOOK OF GOVERNMENT REGULATION 14-34 (2d ed. 1989) ("bank tying practices are prohibited without regard to economic effect"); Kintner & Bauer, *Competition at the Teller's Window*, 35 U. KAN. L. REV. 657, 691 (1987) (plaintiff may show a violation of § 1972 or § 1464(q) by merely proving the bare existence of the described conditional transaction); Klebaner, *Credit Tie-Ins: Where Banks Stand After the* Fortner *Decisions*, 95 BANKING L.J. 419, 434 (1978) (*Fortner* made credit a tying product, but did not make credit tie-ins illegal per se; section 1972 made credit tie-ins illegal per se); Note, *Crossover Activity by Banks and Bank Holding Companies*, 33 N.Y.L. SCH. L. REV. 47, 66 (1988) (engaging in any of the proscribed activities constitutes a per se violation of the BHCA).

TIRA of 1982

In 1982, Congress passed the Garn-St. Germain Depository Institutions Act, containing the Thrift Institutions Restructuring Act (TIRA).[47] TIRA's anti-tying restrictions are similar to the BHCA's in prohibiting tying,[48] reciprocity,[49] and exclusive dealing[50] arrangements. The intent of the Senate Banking, Housing, and Urban Affairs Committee in passing the TIRA anti-tying provision was to subject "federal thrift institutions . . . to anti-tying restrictions generally comparable to those applicable to bank holding companies."[51] The

47. Pub. L. No. 97-320, 96 Stat. 1469 (1982). The pertinent portion is codified at 12 U.S.C. § 1464(q) (1988):

> (q) Tying arrangements; civil remedies; . . .; civil suits for damages: jurisdiction, amount, costs and attorney's fees, limitations; . . .
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> (1) An association 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 additional credit, property, or service from such association, or from any service corporation or affiliate of such association, other than a loan, discount, deposit, or trust service;
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> (B) that the customer provide additional credit, property or service to such association, or to any service corporation or affiliate of such association, other than those related to and usually provided in connection with a similar loan, discount, deposit, or trust service; and
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> (C) that the customer shall not obtain some other credit, property, or service from a competitor of such association, or from a competitor of any service corporation or affiliate of such association, other than a condition or requirement that such association shall reasonably impose in connection with credit transactions to assure the soundness of credit.
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> (3) [A]ny person who is injured in his business or property by reason of anything forbidden in paragraph (1) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, or may sue therefor in any other court of competent jurisdiction, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of the suit, including a reasonable attorney's fee. Any such suit shall be brought within four years from the date of the occurrence of the violation.

48. 12 U.S.C. § 1464(q)(1)(A) (1988).

49. 12 U.S.C. § 1464(q)(1)(B) (1988).

50. 12 U.S.C. § 1464(q)(1)(C) (1988).

51. S. REP. NO. 536, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3071. The Report explained:

> In sum, this provision is intended by the Committee to preclude anti-competitive practices where customers are required to accept or provide another service or product or to refrain from dealing with other parties in order to obtain the product or service that they want from the association.
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> Associations . . . have been given the power to engage in real estate development, but should not use their financial power over credit to eliminate or undermine their competition in real estate development, for example, through lending made contingent upon a thrift institution's financial or investment interest.
>
> It is the intention of the Committee to prohibit the linkage of the provision of credit to requirements that the credit applicant establish a relationship with the association's service corporations, or with a business being operated within the association, or with an organization which controls the association. The Committee does not intend to interfere with appropriate traditional lending practices. Nor does the language prevent customers from freely negotiating the terms of services based on the entire relationship between the customer and the association.

Fifth Circuit Court of Appeals determined that the anti-tying restrictions of the BHCA and the TIRA are identical.[52] Thus, an analysis of pre-TIRA BHCA decisions should also apply to the TIRA's anti-tying provisions.

THE ROAD TO THE ANTICOMPETITIVE EFFECT: THE BHCA, THE TIRA, AND THEIR GENERAL ANTITRUST PROGENITORS IN FEDERAL COURTS OF APPEAL

When interpreting the BHCA's 1970 amendment, the federal appeals courts often compared or analogized it to its antitrust progenitors, the Sherman Antitrust Act[53] and the Clayton Act.[54] For example, in *Costner v. Blount National Bank of Maryville, TN*,[55] an early BHCA case, the Sixth Circuit upheld a jury verdict against a defendant bank under both the Sherman Antitrust Act and the BHCA. The bank acknowledged that it violated the BHCA by requiring an automobile dealership to sell a substantial share of its retail commercial paper to it, but argued that its actions did not sufficiently affect interstate commerce to state a claim under the Sherman Act.[56] The court observed that although the BHCA and the Sherman Act were similar, they differed in at least one important respect. The BHCA, the court noted, "establishes a *per se* rule and provides the same penalties for tying arrangements as the Sherman Act, but without the necessity of proving any economic power in the tying product."[57] The appeals court refused to find reversible error in the trial court's failure to direct a verdict on the Sherman Act claim because the verdict and award would have been the same under the BHCA allegation alone.[58]

Id. See also id. at 3109: "This provision applies the anti-tying restrictions to Federal thrifts in a manner generally comparable to the anti-tie-in provision applicable to bank holding companies under the Bank Holding Company Act of 1956, as amended."

52. Bruce v. First Fed. Sav. & Loan Assoc. of Conroe, Inc., 837 F.2d 712, 718 (5th Cir. 1988). The other circuits have not, as yet, considered whether the BHCA and TIRA anti-tying restrictions are identical.

53. 15 U.S.C. § 1 (1988). The Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

54. The pertinent portion of the Clayton Act is codified at 15 U.S.C. § 14 (1988), and states in part:

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

55. 578 F.2d 1192 (6th Cir. 1978).

56. *Id.* at 1194.

57. *Id.* at 1196.

58. *Id.*

> Although the evidence on the bank's leverage was therefore weak, we are reluctant to conclude that it was insufficient as a matter of law to warrant submission to the jury. However, a definitive resolution of this question is unnecessary because we are unable to see how the bank was prejudiced even if submission of

In *Swerdloff v. Miami National Bank*,[59] the Fifth Circuit consulted the Clayton Act to determine the meaning of the term "customer" as used in 12 U.S.C. § 1972(1)(C) of the BHCA.[60] The plaintiffs guaranteed a loan from the bank to a corporation in which the plaintiffs were the sole stockholders.[61] The plaintiffs complained that the bank illegally tied its honoring of the loan agreement to the plaintiffs' transfer of a fifty-one percent stock interest in the corporation to another of the bank's customers.[62] The defendant bank contended that the Swerdloffs, as stockholders of the corporation which was the victim of the alleged tying, were not "customers" within the meaning of the statute and thus failed to a state a claim under the BHCA.[63] The district court granted a judgment on the pleadings, agreeing with the bank that the stockholders were not the bank's "customers" under the statute; only the corporation was.[64] The Fifth Circuit reversed, holding that the stockholder-plaintiffs were customers under the BHCA.[65] The appellate court based its analysis on the prior antitrust laws, specifically the Clayton Act.[66] The court found that prior cases under the Clayton Act avoided a narrow interpretation of the term "customer," and looked beyond "privity" to the issue of how much control the seller maintained over the transaction.[67] The court then held that section 1972(1)(C) should not be interpreted narrowly and that the Swerdloffs, as sole shareholders of the corporation, were customers of the bank.[68]

Although the prior Acts serve similar antitrust purposes as the BHCA amendment,[69] this practice of consulting the prior Acts began to obscure the context of the BHCA's specific application to the banking industry.[70] This ultimately resulted in the imposition, in *Davis*, of an "anticompetitive effect" requirement for cases arising under the BHCA.

Along the road to an "anticompetitive effect" requirement, many courts quoted the language in the Act's legislative history that its purpose "is to pro-

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> the Sherman Act claim to the jury was incorrect. The bank was also sued under the Bank Holding Company Act, which establishes a per se rule and provides the same penalities for tying arrangements as the Sherman Act, but without the necessity of proving any economic power in the market for the tying product. . . .

Id. The court quoted Sen. Brooke's views on the subject of the requirements for a case under the BHCA as support for its holding. *See supra* note 45.

59. 584 F.2d 54 (5th Cir. 1978).

60. The opinion refers to this section as 12 U.S.C.A. § 1972(3). The term "customer" is not defined in the BHCA.

61. *Swerdloff*, 584 F.2d at 57.

62. *Id.*

63. *Id.* at 57-58. *See* 12 U.S.C. § 1972(1)(C).

64. *Id.* at 57.

65. *Id.* at 59.

66. The Act, the court said, provided "a helpful analogy"; and the court noted that "reference to the antitrust statutes [is] 'most pertinent' in view of the substantial similarity of the Acts." *Id.* at 58-59.

67. *Id.* at 59.

68. *Id.*

69. *See* Duryea v. Third Northwestern Nat'l Bank of Minneapolis, 606 F.2d 823, 825 (8th Cir. 1979). There the court commented, "[the BHCA's intent and purpose] are very similar to those of the antitrust laws."

70. The BHCA prohibits "certain types of tying arrangements within the banking industry. . . ." *Id. See also supra* notes 29-46 and accompanying text.

hibit anti-competitive practices. . . ."[71] *Tose v. First Pennsylvania Bank, N.A.*,[72] however, was the first case to explicitly consider the potentially anti-competitive effect of the defendant bank's alleged conduct. In *Tose*, the bank required the Philadelphia Eagles football team to install a new chief executive officer as a condition to extending an existing loan or granting an additional loan.[73] The plaintiff claimed that this requirement by the defendant bank violated section 1972.[74] The Third Circuit did not consider this to be an unusual demand unrelated to the loan, a finding required to establish a violation under the statute,[75] and affirmed the entry of summary judgment by the district court.[76] Noting the purpose of section 1972, the *Tose* court stated that it could "find nothing *anticompetitive*" in the bank's demand.[77] Although brief and secondary, the *Tose* court's explicit consideration of the competitive effect of the alleged tying clearly implied that an anticompetitive effect was an additional element of a section 1972 claim.

The following year, the Eleventh Circuit gave substance to the anticompetitive effect requirement in *Parsons Steel, Inc. v. First Alabama Bank Of Montgomery, N.A.*[78] Parsons Steel alleged that First Alabama Bank of Montgomery (Bank) attempted to illegally tie the refinancing of its debts and the extension of new credit to Parsons Steel's acceptance of new management for its Montgomery subsidiary.[79] The new management would receive an option to acquire a controlling interest in the subsidiary in lieu of compensation.[80] The Bank denied any agreement to extend credit or any requirement that Parsons grant the new management a controlling stock option.[81] A jury found that the Bank had conditioned the loan as alleged and therefore violated section 1972 of the BHCA.[82] The district court judge, however, granted the Bank's motion for judgment n.o.v.[83] The Eleventh Circuit affirmed the district court judgment, holding that the Bank's actions were necessary to protect its investment and, in the absence of a "'tying' arrangement," did not constitute a violation of section 1972.[84]

The *Parsons* court relied heavily on the legislative history of the 1970 amendments to the BHCA. The court denied that the statute established a "*per se*" rule which prohibits any attempts by banks to condition grants of credit

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71. S. REP. NO. 1084, *supra* note 31. *See, e.g.*, B.C. Recreational Industries v. First Nat'l Bank of Boston, 639 F.2d 828, 831-32 (1st Cir. 1981); McCoy v. Franklin Sav. Ass'n, 636 F.2d 172, 175 (7th Cir. 1980); *Swerdloff*, 584 F.2d at 58.
72. 648 F.2d 879 (3rd Cir. 1981), *cert. denied*, 454 U.S. 893 (1981).
73. *Id.* at 897.
74. 12 U.S.C. § 1972(1)(C) (1988).
75. *Tose*, 648 F.2d at 897.
76. *Id.*
77. *Id.* at 897-98 (emphasis added): "We find nothing anticompetitive in a requirement that a debtor put its financial house in order by replacing its chief financial officer with a responsible official designated by the bank" (footnote omitted).
78. 679 F.2d 242 (11th Cir. 1982).
79. *Id.* at 244.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

upon the customer's purchase of additional bank services.[85] The statute's purpose, according to the court, was to apply the principles of the Sherman Antitrust Act to the field of commercial banking. Any allegedly unusual banking practice, therefore, must be shown to be an "anticompetitive tying arrangement which benefits the bank."[86] The *Parsons* court held that the plaintiffs failed to show such a tying arrangement.[87] The court claimed that its decision was consistent with *Swerdloff*, and in accord with *Tose*.[88]

Parsons introduced the term "anticompetitive tying arrangement" to the judicial lexicon of the BHCA. Other courts subsequently relied heavily on the *Parsons* decision and its terminology. The Ninth Circuit, for example, derived from *Parsons* that an "anticompetitive tying arrangement" is one of three things that a plaintiff "must plead and prove . . . to recover under the anti-tying provision" of the BHCA.[89] The Fifth Circuit cited *Parsons'* observation that the purpose of section 1972 "is to apply general principles of the Sherman Antitrust Act to the field of commercial banking" in a case considering a party's standing to bring suit under the BHCA.[90] The Seventh Circuit also cited to *Parsons* in *Davis v. First National Bank of Westville*, for its recognition that Congress intended the BHCA to apply the general principles of the Sherman Act to banks, with some modifications; and for justifying a requirement of proof that a banking practice has an "anticompetitive effect" before the plaintiff may prevail under the BHCA's anti-tying provision.[91]

A few months prior to *Davis*, the Fifth Circuit reached the opposite conclusion. In *Bruce v. First Federal Savings & Loan Association of Conroe*,

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85. *Id.* at 245. "Congress did not intend to 'interfere with the conduct of appropriate traditional banking practices,' and did not intend to prohibit attempts by banks to protect their investments where no anticompetitive practices were involved." *Id.* (citation omitted).

86. *Id.* The court stated that

> the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements . . . [g]iven the specific purposes for which the statute was enacted, it is not sufficient in order to establish a violation of the Act to show simply that a particular method of protecting against default is not commonly used. Unless the "unusual" banking practice is shown to be an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's prohibitions.

In support of its conclusions, the court quoted from the supplementary views of Sen. Brooke, quoted *supra* note 45. *See also* Exchange Nat'l Bank of Chicago v. Daniels, 768 F.2d 140, 143 (7th Cir. 1985) ("§ 1972 . . . is similar to other anti-tying laws meant to preserve competition among rival businesses. We treat it, in other words, as the banking equivalent of § 3 of the Clayton Act, 15 U.S.C. § 14.").

87. *Parsons*, 679 F.2d at 246.

88. *Id.* at 245-46. The *Parsons* court also stated "§ 1972 is intended to prohibit anticompetitive tying arrangements" and not "other uses of a bank's economic power to protect its investments." The court asserted that this was in accord with *B.C. Recreational Industries*, 639 F.2d 828; *McCoy*, 636 F.2d 172; *Duryea*, 606 F.2d 823; *Costner*, 578 F.2d 1192; Clark v. United Bank of Denver, 480 F.2d 235 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

89. Rae v. Union Bank, 725 F.2d 478, 480 (9th Cir. 1985). The Ninth Circuit also required a plaintiff to prove that the "banking practice in question was unusual in the banking industry" and "that the practice benefits the bank." *Id.*

90. Campbell v. Wells Fargo Bank, N.A., 781 F.2d 440, 443 (5th Cir. 1986).

91. *Davis*, 868 F.2d at 208. A full discussion of the *Davis* case appears *infra*, in the text accompanying notes 122-43.

Inc.,[92] the plaintiff alleged that a savings and loan association violated the anti-tying provisions of the TIRA by forcing his partnership to retroactively apply a principal payment made on one loan to an interest payment due on another loan as a condition for extending the other loan.[93] The appeals court reversed the district court and held that the complaint stated a claim under the TIRA, despite the plaintiff's failure to plead an anticompetitive effect.[94] The *Bruce* court directly addressed the issue of whether the TIRA requires an anticompetitive effect.[95] The court first noted that the anti-tying provision of the TIRA is essentially identical to the BHCA's, as Congress intended.[96] The court then expressed its concern that the district court went beyond the language of the TIRA's section 1464(q)(1) when it cited *Parsons* and required a showing that the alleged act was anticompetitive.[97] The court compared the elements required to show a *per se* violation of the Sherman Act with those for a BHCA claim and concluded that the BHCA does not require the same showing as the Sherman Act.[98] Finally, the court held that the district court may not dismiss a TIRA tying claim simply because a defendant's actions do not appear "anti-competitive."[99]

In comparing the Sherman Act with the BHCA and the TIRA, the *Bruce* court cited *Jefferson Parish Hospital District v. Hyde*,[100] a 1984 United States Supreme Court decision interpreting the Sherman Act's effect on tying. In *Hyde*, an anesthesiologist claimed that a contract between the East Jefferson Parish Hospital and a group of anesthesiologists, Roux & Associates, was a per se violation of section 1 of the Sherman Act.[101] The contract limited the hospital to using only the anesthesiologists of Roux during the contract period.[102] The hospital thus tied a patient's use of a hospital operating room to the use of a particular association of anesthesiologists.[103] The majority opinion, authored by Justice Stevens and joined by Justices Brennan, White, Marshall, and Blackmun, stated that "the essential characteristic of an invalid tying arrangement" under the Sherman Act is the "forcing" of a reluctant buyer into the purchase of a tied product through the seller's control over the market in the tying product.[104] The Court condemned these tying arrangements in which

92. 837 F.2d 712 (5th Cir. 1988).
93. *Id.* at 713.
94. *Id.* at 717-18.
95. *Id.*
96. *Id.* at 716, 718. The court stated that the TIRA and the BHCA "prohibit essentially the same three types of arrangements," that "the provisions [are] parallel," and that "TIRA's legislative history ties it closely to the BHCA."
97. *Id.* at 718 ("Our concern is that the district court may have reached outside the language of section 1464(q)(1) for its requirement of anticompetitiveness.").
98. *Id.* at 718 (citing *Hyde*, 466 U.S. 2). The court stated that the BHCA does not require a showing "(1) that the defendant possesses market power over the tying product to force purchase of the tied product and (2) that 'a substantial amount of commerce is foreclosed thereby.'" The Sherman Act requires these two showings. *Id.*
99. *Id.*
100. 466 U.S. 2 (1984).
101. *Id.* at 4-5.
102. *Id.* at 6.
103. *Id.* at 7-8.
104. *Id.* at 12. The majority stated:

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the pur-

a purchaser is coerced to do something she would not do in a competitive market.[105] Stevens stated that "per se condemnation — condemnation without inquiry into actual market conditions," is appropriate only when coercion is probable, but that even actual coercion may not restrict competition enough if only a single purchaser is involved.[106] If it is not immediately obvious that a seller has the market power to coerce purchasers, then "an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market."[107]

The Court held that Hyde made an insufficient showing of the hospital's market power to force patients to "buy" the services of Roux & Associates when the patients otherwise would not.[108] Thus, Hyde could not prevail on a theory of a per se violation of the Sherman Act.[109] Since there was no showing of unreasonable restraint on competition, the case was remanded.[110]

Despite Hyde's failure, Stevens stated that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'"[111] He pointed out that such a rule "reflects congressional policies underlying the antitrust laws."[112] Thus, in cases in which the seller has sufficient power to coerce an unwilling buyer, there is a presumption that an anticompetitive effect results from a tying arrangement.

Justice O'Connor's concurrence, joined by Chief Justice Burger and Justices Powell and Rehnquist, condemned the *per se* approach to tie-ins under the Sherman Act.[113] Justice O'Connor observed that the Court had previously declared that "tying arrangements serve 'hardly any purpose beyond the suppression of competition,'" but usually had not taken the declaration

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chase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

105. "[W]e have condemned tying arrangements when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market. When forcing occurs, our cases have found the tying arrangement to be unlawful." *Id.* at 13-14 (footnote and citations omitted).

106. *Id.* at 15-16. In footnote 25, Justice Stevens states:

> The rationale for per se rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.

107. *Id.* at 17-18. Evidence of an unreasonable restraint on competition in the relevant market is not easy to obtain. In this case, for example, the burden "involves an inquiry into the *actual* effect of the exclusive contract on competition among anesthesiologists." *Id.* at 29 (emphasis added). Hyde would need to define the market, it could be "statewide or merely local," and he would likely need to show how the "arrangement affected consumer demand for separate arrangements with a specific anesthesiologist," i.e., demonstrate empirically the effect of the arrangement on price and quality which presumably would affect consumer demand. *Id.* at 29-30.

108. *Id.* at 26-29.

109. *Id.* at 31-32.

110. *Id.*

111. *Id.* at 9 (footnote omitted).

112. *Id.* at 10.

113. *Id.* at 32-47 (O'Connor, J., concurring).

literally.[114] She argued that even the "'per se' doctrine in tying cases has . . . always required an elaborate inquiry into the economic effects of the tying arrangement."[115] A tie-in, she asserted, "should be condemned only when its anticompetitive impact outweighs its contribution to efficiency."[116]

Applying her standards to Hyde's case, Justice O'Connor first assumed that the East Jefferson Parish Hospital exercised market power in an appropriately defined local market.[117] She next granted that, in light of this power, there was a substantial threat that the hospital could acquire market power over the provision of anesthesiological services in its market.[118] But Justice O'Connor found no "sound economic reason" for condemning the tying.[119] The tying of surgical and anesthesiological services, "which has little anticompetitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn."[120]

Hyde stands for the continuing possibility of a *per se* approach in certain antitrust cases under the Sherman and Clayton Acts. Justice O'Connor's concurring opinion in *Hyde*, together with *Tose* and *Parsons*, however, created a deceptively smooth and firm surface which the *Davis* court rode to reach its anticompetitive effect requirement under the BHCA amendments ("BHCAA").[121] Beginning with analogies to other antitrust laws and continuing with a limited review of the BHCA's legislative history, the *Davis* court rejected a per se approach to banking tie-ins and required a showing of anticompetitive effect.

THE ANTICOMPETITIVE EFFECT IN *DAVIS*

In *Davis v. First National Bank of Westville*, the Seventh Circuit fully embraces the requirement that a plaintiff show an anticompetitive effect before recovering for an alleged tying arrangement.[122] The *Davis* plaintiffs borrowed substantially from the defendants for about eight years.[123] The plaintiffs had a number of notes outstanding when they determined that they needed $200,000

114. *Id.* at 34 (O'Connor, J., concurring) (quoting Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306 (1949)).
115. *Id.* (footnote omitted).
116. *Id.* at 42 (O'Connor, J., concurring).
117. *Id.*
118. *Id.*
119. *Id.* at 43 (O'Connor, J., concurring).
120. *Id.* at 44 (O'Connor, J., concurring) (footnote omitted).
121. *See generally* 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). The author of this annotation, which was occasioned by the *Rae* opinion, lists five elements of a violation of 12 U.S.C. § 1972(1): an unusual practice, a benefit to the bank, a tying arrangement, damage to the customer, and an anticompetitive practice. *Id.* at 579. As to the anticompetitive practice requirement, the author lists several cases, including *Swerdloff*, *Tose*, and *Parsons*, in support of his "view that a tying arrangement must be shown to be anticompetitive" as an element of a violation of § 1972. *Id.* at 590-91. Unfortunately, the annotation author's discussion of an anticompetitive effect requirement is inadequate. This Note's analysis of the support for the *Davis* case is equally applicable to the annotation's 1985 list of cases. *See infra* text accompanying notes 144-70.
122. 868 F.2d 206.
123. *Id.* at 206-07.

to continue operating their business.[124] The defendants would only lend the plaintiffs additional monies on the condition that the plaintiffs sell their business within two months.[125] The plaintiffs executed an agreement to that effect, but did not meet the deadline for sale, and the defendants then forced the plaintiffs to liquidate.[126] The plaintiffs sued, alleging violation of the BHCA's anti-tying provision, section 1972(1)(C).[127] The plaintiffs claimed that the sale of their business was a service to the bank not usually related to or provided in connection with a loan.[128] The district court granted the defendants' motion for summary judgment on the grounds that the sale requirement was not an "anticompetitive practice," and that the requirement was a traditional banking practice to protect the banks' investment.[129]

The panel[130] reviewed the legislative history, the text of the law, and previous federal appeals court decisions.[131] The court quoted *McCoy v.*

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124. *Id.* at 207.
125. *Id.*
126. *Id.*
127. *Id.*
128. The plaintiffs alleged that the "loan agreement with the banks violated an anti-tying provision of the 1970 amendments to the BHCA, 12 U.S.C. § 1972(1)(C), because it required [them] to provide the banks with a service not usually related to or provided in connection with a loan — the liquidation of their business." *Id.*
129. *Id.*
130. The *Davis* panel consisted of Bauer, Chief Judge; Posner, Circuit Judge; and Will, Senior District Judge (sitting by designation).
131.

> Adopted in 1970, Chapter 22 of the BHCA, codified at 12 U.S.C. §§ 1971-1978, proscribes certain conditional transactions where their effect would be to increase the economic power of banks and to lessen competition. 1970 U.S.Code Cong. & Admin.News, pp. 5519, 5535. It was intended "only to 'prohibit *anticompetitive* 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.'" *McCoy v. Franklin Savings Ass'n*, 636 F.2d 172, 175 (7th Cir.1980) (quoting Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in U.S.Code Cong. & Admin.News, pp. 5519, 5535) (emphasis added); *Swerdloff v. Miami National Bank*, 584 F.2d 54, 58 (5th Cir.1978); *Duryea v. Third Northwestern National Bank*, 606 F.2d 823, 825 (8th Cir.1979); *Tose v. First Pennsylvannia Bank, N.A.*, 648 F.2d 879, 897 (3d Cir.1981). It "was *not* intended to interfere with the conduct of appropriate traditional banking practices." *McCoy*, 636 F.2d at 175 (emphasis added); *Clark v. United Bank of Denver National Ass'n*, 480 F.2d 235, 238 (10th Cir.1973); *B.C. Recreational Industries v. The First National Bank of Boston*, 639 F.2d 828, 831 (1st Cir.1981). Nor was it intended to prohibit attempts by banks to protect their investments. *McCoy*, 636 F.2d at 175; *Tose*, 648 F.2d at 897.
>
> To that end, the BHCA's anti-tying provision, 12 U.S.C. § 1972, states
>
> (1) A bank shall not in any manner extend credit . . . 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;

Franklin Savings Association, for the proposition that the anti-tying amendments prohibit only *anticompetitive* practices,[132] a proposition originating in the language of the Senate report.[133] The court also noted that the statute targets traditional concerns of antitrust laws, including tying, reciprocity, and exclusive dealing arrangements.[134] Drawing from a 1958 Supreme Court decision, the court defined a "tie-in" as "'an arrangement by one party to sell one product (the "tying product"), but only on the condition that the buyer also purchase a different . . . product (the "tied product"), or at least agree that he will not purchase that product from another supplier.'"[135] The court then illustrated the anticompetitive possibilities of tie-ins and reciprocity agreements; for example, when a bank agrees to loan money to a manufacturer only on condition that the manufacturer discounts the products it sells the bank.[136]

The *Davis* court agreed with *Parsons* that Sherman Antitrust Act principles may be applied in BHCA cases "'*without* requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements.'"[137] It also relied on the oft-quoted supplementary views of Sen. Brooke that section 1972 does not require any showing of "specific adverse effects on competition. . . ."[138] The court thus concluded that there is a "'relaxed'" *per se* standard under the BHCA.[139]

> (D) that the customer provide some additional credit, property, or service to a bank holding company or 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, 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. at 207-08.

132. *Id.* at 207.

133. *See supra* note 39.

134.

> Thus, to achieve its purpose of checking the economic power of banks, section 1972 proscribes tying (subsections (1)(A) and (B)), reciprocity (subsections (1)(C) and (D)), and exclusive dealing (subsection (1)(E)) arrangements that traditionally have been the targets of the antitrust laws because of their potentially anticompetitive effects. *Bruce v. First Federal Savings and Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir.1988).

Davis, 868 F.2d at 208.

135. *Id.* (quoting Northern Pacific Railroad v. United States, 356 U.S. 1, 5-6 (1958)).

136.

> A tie-in lessens competition when it enables an economically powerful seller of the tying product to coerce customers of that product into buying an additional product they do not want or would rather buy elsewhere. A reciprocity arrangement can take more than one form. ... An economically powerful bank, for example, may agree to loan money to a pen manufacturer only if the manufacturer agrees to sell pens to the bank and its affiliates at a discount.

Id.

137. *Id.* (emphasis added). The court also cited with approval *Daniels*, 768 F.2d at 143 (§ 1972, the banking equivalent of § 3 of the Clayton Act, is meant to preserve competition among rival businesses). *Id.*

138. *Id.* (quoting S. REP. NO. 1084, *supra* note 31, at 5558).

139. *Id.* In support of this assertion, the *Davis* opinion cites to *Parsons*, 679 F.2d at 245; *B.C. Recreational Industries*, 639 F.2d at 832; Clark v. United Bank of Denver Nat'l Ass'n, 480 F.2d 235, 238 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *Duryea*, 606 F.2d at

The court nevertheless held that the plaintiff must still claim an "anticompetitive effect" to prevail in a summary judgment motion under section 1972.[140] The court stated that "condemnation of banking practices that have no anticompetitive effect but are aimed at protecting the bank's investment would run directly contrary to section 1972's legislative purpose and would render coincidental the statute's concern with arrangements traditionally targeted by the antitrust laws."[141] The *Davis* holding, however, did not rely primarily on the plaintiff's failure to show an anticompetitive effect. The court held that forced provision of a "business liquidation 'service'" to the bank was not an "'additional service' [tied to the loan within the meaning of] section 1972(1)(C)."[142] The court thus held that the allegation was insufficient under the terms of the statute. The court also explicitly held that, even if the "service" did constitute an "additional service" within the statute's terms, the arrangement alleged was not "anticompetitive and therefore not the concern of section 1972."[143]

THE END OF THE ROAD: NO REQUIREMENT OF AN ANTICOMPETITIVE EFFECT

Despite the *Davis* court's opinion, the better view is that the anti-tying provisions of the BHCA or the TIRA do not require an anticompetitive effect. The language of the statute itself contains no anticompetitive effect requirement.[144] Indeed, four senators, concerned with the reach of the statute's literal language, specifically pointed this out and called for an amendment containing appropriate language "to show that the purpose of this section is to prohibit only those tying arrangements whose effect may be to lessen competition or tend to create a monopoly."[145] Although the senators did not make direct reference to an anticompetitive effect, this is the same language Congress previously used in the Clayton Act, which prohibits tying arrangements by "any

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825; and *Tose*, 648 F.2d at 897; but it acknowledges the contrary view of *Bruce*, 837 F.2d at 718.

140. *Davis*, 868 F.2d at 208-09.

141. *Id.* at 208.

142. *Id.* at 209. The court stated:

> [The plaintiffs] allege that the banks violated section 1972(C)(1)—the provision dealing with reciprocity arrangements—by granting their request for credit only on the condition that the Davises [the plaintiffs] provide a business liquidation "service" to the banks. The Davises do not allege that the defendant banks attempted to prevent the Davises from dealing with other banks. Nor can they possibly claim that the defendant banks were attempting to use their market power over credit to secure business liquidation services at better-than-market terms. Indeed, we find it difficult to characterize the banks' requirement that the Davises' liquidate their business in order to obtain the credit they sought as an "additional service" under section 1972(1)(C). The Davises seem to want to avoid calling a credit term a credit term; if so, they are not really alleging a reciprocity arrangement.

Id.

143. *Id.* "Even if [the plaintiffs] are alleging such an arrangement [a reciprocity arrangement], it is not anticompetitive and therefore not the concern of section 1972, which was enacted to prevent banks from using their economic power to *lessen competition*." *Id.* (emphasis in original).

144. *See, e.g.*, Randall v. Loftsgaarden, 478 U.S. 647, 656 (1986) ("Here, as in other contexts, the starting point in construing a statute is the language of the statute itself.").

person engaged in commerce . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[146] But Congress added no such language to the BHCA or the TIRA.[147] This Congressional "failure" directly contradicts the *Davis* court's finding of an implied anticompetitive effect requirement.[148]

Assuming that the language of the statutes requires consideration of the legislative history, the *Davis* court, like many courts before it, nevertheless misconstrued that legislative history.[149] It concluded, from the oft-quoted purpose of the BHCA "to prohibit anti-competitive practices," that tying arrangements which would otherwise be prima facie violations must also be shown to have an anticompetitive effect.[150] That statement of purpose was not made in isolation in the Senate report. This "purpose" appears in the legislative history right after the paragraph which clearly describes all the things that a bank may not do in extending credit.[151] This descriptive paragraph delineates the practices that the Congress had *already* determined to have anticompetitive effects *when engaged in by a bank* and which Congress intended to prohibit by the law.[152] The Senate banking committee stated that the provision was "intended to provide *specific statutory* assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices," and further that "the provision is intended to affirm in *statutory* language the principles of fair competition."[153] In context, then, the

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145. S. REP. NO. 1084, *supra* note 31, at 5547-48.

146. *See* pertinent text of Clayton Act, *supra* note 54. The Sherman Act contains different language referring to restraining "trade." 15 U.S.C. § 1 (1988).

147. *Cf. Bruce*, 837 F.2d at 718, where the court expressed its concern "that the district court may have reached outside the language of TIRA section 1464(q)(1) for its requirement of anticompetitiveness."

148. The Seventh Circuit, although following *Davis*, recently noted the absent language:

> The practices at hand — tying and reciprocity — are familiar in antitrust law. Section 3 of the Clayton Act, 15 U.S.C. § 14, which explicitly addresses tying, contains a limitation *missing* in the banking statutes: under the Clayton Act a tie-in sale is unlawful only if the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1338 (7th Cir. 1989) (emphasis added).

149. For example, the *Davis* court quotes *McCoy*, 636 F.2d at 175, that the intent of the BHCA was "only to 'prohibit *anticompetitive* practices. . . .'" 868 F.2d at 207 (emphasis in original). *McCoy*, in turn, was quoting from the Senate Committee Report, see *supra* note 39, regarding the purpose of the BHCA. The words "only to" which precede the quote from the Report, however, were added by the *McCoy* court. These two words, added by *McCoy* and relied on by *Davis*, significantly alter the meaning of the Senate's statement of the BHCA's purpose.

150. "[C]ondemnation of banking practices that have no anticompetitive effect but are aimed at protecting the bank's investment would run directly contrary to section 1972's stated legislative purpose and would render coincidental the statute's concern with arrangements traditionally targeted by the antitrust laws." 868 F.2d at 208.

151. S. REP. NO. 1084, *supra* note 31. Later, the conference report, made after the bill was amended, noted the same list of prohibited arrangements, but with an exemption for "transactions exclusively involving two or more of four specified traditional banking services — loans, discounts, deposits, or trust services." CONF. REP. NO. 1747, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5561, 5579. This exemption did not change the context of the statement of purpose found in the earlier Senate report. *See* S. REP. NO. 1084, *supra* note 31, at 5580.

152. *See supra* notes 29-46 and accompanying text.

153. S. REP. NO. 1084, *supra* note 31, at 5535 (emphasis added).

term "anti-competitive practices" as used in the Senate Report refers to the practices that Congress prohibited, based on the assumption of a bank's economic power, and not to any requirements not specifically in the statute. When the *Davis* court emphasized the term "anticompetitive" in the legislative history, it removed the term from its proper context. "Anti-competitive practices," as used in the legislative history, was simply a shorthand way to describe all the conditional transactions which section 1972(1)(A)-(E) prohibits.[154]

The *Davis* court's analogy to prior antitrust cases, such as *Hyde*, also does not support its finding of an anticompetitive effect requirement. The primary difficulty is that the Supreme Court, in *Hyde*, was not talking about the same statute at all. The Sherman Act is fundamentally different from both the BHCA and the TIRA.[155] While the BHCA and the TIRA go to great lengths to specify the illicit tying behavior they are trying to reach, "the Sherman Act," as the *Hyde* majority observed, "does not prohibit 'tying'; it prohibits 'contract[s] . . . in restraint of trade.'"[156] Similarly, the concurring opinion, which called for an inquiry into anticompetitive effects in all antitrust cases, criticized only the Court's previous interpretations of the Sherman Act. The BHCA and the TIRA, which were "intended to provide *specific* statutory assurance that the use of the economic power of a bank [or thrift] will not lead to a lessening of competition or unfair competitive practices,"[157] do not allow the courts the same freedom to construe what is or is not a violation that the Sherman Act allows.[158]

The only similar general antitrust statute from which to analogize is section 3 of the Clayton Act,[159] which the *Davis* court acknowledges parenthetically.[160] But this statute also lends little support to *Davis*. As the Supreme Court noted in *Hyde*, Congress passed the Clayton Act because of its "great concern about the anticompetitive character of tying arrangements. . . . [T]he congressional finding made therein concerning the competitive consequences of tying . . . must be respected."[161] Just as the Clayton Act was enacted to reach tying arrangements which the Sherman Act might miss, Congress enacted the BHCA and the TIRA in response to its belief that tying by banks and thrifts is inherently anticompetitive.[162] The Supreme Court's dicta in *Hyde* suggests that courts should respect that finding.

Another crucial difference, between the BHCA and the Sherman Act, is where the responsibility for policymaking lies. With the Sherman Act, it lies

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154. The confusion is the same regarding the synonym for anticompetitive practices: "anticompetitive tying arrangements." *See, e.g., Parsons*, 679 F.2d at 245: "It appears, therefore, that the purpose and effect of § 1972 is to . . . [prohibit] anticompetitive tying arrangements."

155. *See* 15 U.S.C. § 1. *Cf.* 12 U.S.C. § 1972; 12 U.S.C. § 1464(q).

156. *Hyde*, 466 U.S. at 21 n.34.

157. S. REP. NO. 1084, *supra* note 31, at 5535 (emphasis added).

158. *See supra* notes 5-6 and accompanying text.

159. *See* pertinent text of Clayton Act, *supra* note 54. *Cf.* 12 U.S.C. § 1972; 12 U.S.C. § 1464(q).

160. *Davis*, 868 F.2d at 208 (citing Exchange Nat'l Bank of Chicago v. Daniels, 768 F.2d 140, 143 (7th Cir. 1985)).

161. *Hyde*, 466 U.S. at 10-11 (citations and footnotes omitted).

162. *See supra* notes 29-46 and accompanying text.

with the courts. In the BHCA,[163] however, the power to create exceptions to the statute is specifically vested by Congress in the Federal Reserve Board.[164] *Davis* makes the point that the requirement of an anticompetitive effect is necessary to allow banks to devise new methods to protect themselves against default.[165] But, while exceptions may be necessary, Congress decided that the Federal Reserve Board should make them.[166]

The court's reasoning in *Davis* is flawed for several reasons. It injects an additional element of proof to the BHCA and the TIRA that is not present in the text of either.[167] It confuses a shorthand term used to describe the anticipated effect of the statute with an element of the statute itself.[168] Finally, *Davis* draws a flawed analogy to antitrust cousins of the BHCA and the TIRA.[169]

Following these faulty directions, *Davis* takes a road that leads to the requirement of anticompetitive effect and strays from Congress' intent to declare that violations of the prima facie terms of the BHCA and the TIRA are by their nature anticompetitive.[170]

CONCLUSION

The BHCA and the TIRA were passed by Congress because it feared that banks and thrifts, assumed to possess special economic power, might tie needed bank or thrift services to the provision or acceptance of undesired services, either to the bank or thrift or to a subsidiary of the bank's or thrift's holding company.[171] The legislative history clearly indicates that the arrangements in 12 U.S.C. §§ 1972(1)(A)-(E) and 12 U.S.C. § 1464(q), when entered into at the insistence of a bank or thrift, are anticompetitive.[172] There is no explicitly stated requirement in either statute that a plaintiff must prove an anticompetitive effect to prevail against a defendant bank.

Two diametrically opposed lines of judicial interpretation of the statutes have since developed, represented by the opinions in *Bruce* and *Davis*. *Bruce* held that there is no requirement of an anticompetitive effect in the anti-tying

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163. The TIRA does not allocate an exemption-granting function which might suggest that the courts may assume that role. However, insofar as Congress intended to apply the BHCA to savings and loans with the TIRA, *supra* note 51 and accompanying text, the better argument would appear to be that the exemptions the Federal Reserve Board chooses to apply to banks should apply to S&Ls.

164. 12 U.S.C. § 1972(1) (1988).

165. 868 F.2d at 208.

166. CONF. REP. NO. 1747, *supra* note 29, at 5580 ("[The law] authorizes the Board to provide exceptions to the prohibition . . .").

167. *See supra* notes 30, 47, 144-48 and accompanying text.

168. *See supra* notes 89-91, 149-54 and accompanying text.

169. *See supra* notes 5-13, 155-66 and accompanying text.

170. In Swart, *supra* note 23, at 524 (emphasis in original), the author states: "Although courts do not require proof of anti-competitive *effect*, it may be argued that the banking practice at issue must be anti-competitive *in nature*." This still would appear to require an inquiry, at some point, into what practices are anticompetitive in nature, which would appear to require an inquiry into what practices have an anticompetitive effect. The author also did not have the benefit of the *Davis* opinion.

171. *See* notes 10-13, 29-35 and accompanying text.

172. *See* notes 29-46 and accompanying text.

provisions of the BHCA or the TIRA; *Davis* held that there is.[173] The *Davis* decision is based on the court's flawed analysis of the provisions' legislative history and on erroneous analogy to prior antitrust laws. There is no support for the *Davis* court's conclusion that the BHCA and the TIRA require a plaintiff to prove an anticompetitive effect.

Even though the Supreme Court recently denied a writ of certiorari in *Davis*,[174] the majority opinion in *Hyde* continues to stand for the possibility that some tie-ins are anticompetitive by nature and that Congress' concern with tying arrangements will be respected. In light of the legislative history of the BHCA and the TIRA, and the differences between their statutory texts and the texts of other antitrust laws, the Supreme Court should find that there is no requirement of a showing of an anticompetitive effect under either the BHCA or the TIRA.

At bottom, then, the circuits disagree about whether the judicial branch or the legislative branch should decide the legal framework in which banks and thrifts should act. Perhaps, as a matter of present-day economic reality, the anti-tying provisions should require a showing of an anticompetitive effect. The BHCA and the TIRA, however, do not require this showing. Nevertheless, some courts have chosen to rewrite the law, substituting their own economic and business judgment for Congress'. Judicial activism is no more desirable to accommodate alleged economic and business realities than for other reasons. Thus, until Congress changes the anti-tying provisions of the BHCA and the TIRA, the courts should confine themselves to applying the statutes as written.

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173. Since *Bruce* and *Davis*, both circuits have decided cases citing their predecessors with approval. *Compare* Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1338 (7th Cir. 1989) ("*Davis* clarified the congruence of bank-tying law with its antitrust cousin") with Amerifirst Properties, Inc. v. FDIC, 880 F.2d 821, 826 (5th Cir. 1989) (the court held, citing to *Bruce*, that "[b]ased on the legislative history of the BHCA, . . . and on case authority, we conclude that Amerifirst does not have to make a showing of anticompetitive effects in order to state a tying claim under the BHCAA"). *See also* Palermo v. First Nat'l Bank and Trust Co., 894 F.2d 363, 368 (10th Cir. 1990), which attempts to distinguish between anticompetitive effects and anticompetitive practices, but defines an anticompetitive practice as a practice that "results in unfair competition or could lessen competition," a definition which is almost identical to the accepted meaning of anticompetitive effects.

174. 110 S. Ct. 68 (1989).