The Bank Holding Company and the Sherman Act: The Validity of Cooperation Among Commonly Held Banks

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Almost from its inception the banking industry has been subject to pervasive state and federal regulation.[1] Other industries have been required to let open competition determine the success or failure of the various enterprises involved.[2] In banking, however, the federal government has long believed that forcing financial institutions into a vigorous-

1. *See* G. Dunne, *The Acts and Regulations—A Summary*, in THE BANK HOLDING COMPANY, 1973, at 15, 18 (Johnson ed. 1973).

Banking is subject to a plethora of state and federal regulations which govern almost every aspect of its activity. *See* 5 C. TOULMIN, ANTITRUST LAWS 67 (1950). *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 329-30 (1963). Formation of a banking association is subject to examination by state or federal examiners whose approval must be obtained before the bank can open. *See* 12 U.S.C. §§ 26-27 (1970). The state or federal agencies will examine the adequacy of capital, *see id.* § 51, the financial ability and integrity of the proposed management, *see id.* § 1816, and the need for additional banking facilities in the area in which the bank has determined to locate. *See id. See also* ARIZ. REV. STAT. ANN. §§ 6-201 to -204 (1974).

Day-to-day operations of banks are controlled in two ways. Certain activities which are normally available to a corporation are prohibited or restricted. For example, investment in securities, *see* 12 U.S.C. § 378 (1970), and real property, *see id.* § 29, are limited. Lending is limited as to total amount, *see id.* § 462, and amount to any individual. *See id.* § 84. *See also* ARIZ. REV. STAT. ANN. §§ 6-271, -352 (1974). Maximum interest rates are also imposed. *See* 12 U.S.C. § 85 (1970); ARIZ. REV. STAT. ANN. § 6-622 (1974). Further, the Federal Reserve System through its open market operations, control of the rediscount rates, and power to modify reserve requirements has the power to influence prime lending rates. *See* 12 U.S.C. §§ 353-359, 462 (1970). *See also* United States v. Philadelphia Nat'l Bank, *supra* at 327-28. In addition, the regulatory agencies have the power to conduct periodic examination of all the affairs of a bank which is a member of the Federal Reserve System or a nonmember bank which is insured by the Federal Deposit Insurance Corp. [FDIC]. *See* 12 U.S.C. § 1820(b) (1970). The examiners may impose a variety of sanctions for unsound banking practices. *See id.* §§ 325, 481, 483. *See also* ARIZ. REV. STAT. ANN. § 6-121 (1974). Banks seeking to merge, consolidate, or acquire the assets of another bank must obtain prior approval of the applicable regulatory agency. *See* 12 U.S.C. § 1828(c) (1970). Expansion by establishing branch banks is likewise subject to the control of state law and the federal regulatory agencies. *See id.* § 36(c).

2. *See, e.g.*, Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).

ly competitive mold would be contrary to the public interest because of the severe public impact of bank failure.[3] Promotion of bank stability has led to a variety of somewhat anticompetitive regulations, notably state-imposed restrictions on the establishment of branch offices.[4] Such restrictions placed on the stronger, more aggressive institutions were viewed as promoting the stability of smaller banks.[5]

For a time the abundance of regulations was thought to be so pervasive that compliance with the antitrust laws was unnecessary.[6] In 1963, however, the banking community was startled to learn that the antitrust laws were fully applicable to its activities.[7] There followed a decade of vigorous enforcement against banks of the antitrust laws,[8] generally aimed at the prevention of anticompetitive mergers which were violative of either section 7 of the Clayton Act,[9] or section 1 of the Sherman Act.[10] Recently, the United States Supreme Court has begun to incorporate an analysis of the regulatory restraints placed upon the banking industry into its antitrust analysis, to some extent shielding the industry from the full impact of the antitrust laws.[11] This analysis emerges as part of a pattern of antitrust cases in all industries in which the court has attempted to view the challenged activity functionally,

3. *See generally* 5 C. TOULMIN, *supra* note 1, at 72; Gruis, *Antitrust Laws and Their Application to Banking*, 73 BANKING L.J. 793, 807-08 (1956).

4. Haywood, *Structural and Competitive Objectives*, in THE BANK HOLDING COMPANY, 1973, *supra* note 1, at 66-67. State-imposed restrictions on branching usually take one of three forms. Some states prohibit branching entirely. *See* FLA. STAT. ANN. § 659.06 (Supp. 1976-77) (after 1977, establishment of up to two branches per calendar year will be permitted with state approval); ILL. ANN. STAT. ch. 16½, § 105(12)(c) (Smith-Hurd 1972). Others permit branching, but limit the area in which a bank can establish a branch to either the city or county in which the home office is located, *see* GA. CODE ANN. § 13-203(c) (Cum. Supp. 1975); OHIO REV. CODE ANN. § 1111.03 (Page 1968), or specify a maximum distance from the home office beyond which a branch may not be established. *See* WIS. STAT. ANN. § 221.04(1)(j) (Supp. 1975-76). Finally, branching methodology rather than geography may be limited. Several states prohibit de novo establishment of branches, but permit a bank to acquire existing independent banks by merger or purchase. *See* N.J. STAT. ANN. § 17:9A-19 (Supp. 1975); VA. CODE ANN. § 6.1-39 (Cum. Supp. 1975).

5. *See* 5 C. TOULMIN, *supra* note 1, at 72; Gruis, *supra* note 3; Smith & Greenspun, *Structural Limitations on Bank Competition*, 32 LAW & CONTEMP. PROB. 40, 50-52 (1967).

6. *See* Dunne, *supra* note 1, at 18. Until 1963, the consensus of most bankers and antitrust lawyers was that while banking was not specifically exempt from the antitrust laws, the economic necessity of a healthy commercial banking system demanded that the application of the antitrust laws to banks differ from their application to private industry. The prevailing view thus accorded competition a limited role in determining the legality of an activity; instead the dominant consideration was whether the activity tended to strengthen the banking system and made failure less likely. *See* Gruis, *supra* note 3. *But see* United States v. The Mortgage Conference of New York, 1948-49 Trade Cas. ¶ 62,273 (S.D.N.Y. 1948).

7. In that year the Supreme Court specifically held the antitrust laws applicable to banks. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

8. *See, e.g.*, United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

9. 15 U.S.C. § 18 (1970).

10. *Id.* § 1.

11. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

examining the way in which the putative restraint actually operates in light of conditions in the industry.[12] This functional approach has resulted in judicial approval of various activities which under the more mechanical tests of the sixties[13] would have been found illegal without any reference to actual competitive impact in the particular industry.[14] The Court in granting latitude to banks charged with violation of the antitrust laws has relied heavily on the pervasive regulation of banking as a factor in its functional analysis.[15]

In 1975 the Supreme Court had occasion to decide for the first time a case in which cooperation among banks owned by a multibank holding company was challenged as a violation of section 1 of the Sherman Act. In *United States v. Citizens & Southern National Bank*,[16] the Court found cooperation and information exchanges by affiliated banks to be permissible under the circumstances of that case, even though the practical effect of the combination was to foreclose any meaningful competition between them.[17]

This Note will examine the extent to which banks affiliated by common holding company ownership may cooperate with each other and yet remain within the limits of permissibility under the Sherman Act. Primary emphasis will be placed upon cooperative activity which completely eliminates competition between the banking subsidiaries of the holding company. Specific devices by which holding company

12. *See generally* Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 321-45 (1975).

13. During the 1960's the Court generally limited its analysis to mechanical application of mathematical percentages of market share and concentration to determine compliance with antitrust standards. *See, e.g.*, United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

14. *Compare* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974), *and* United States v. General Dynamics, Inc., 415 U.S. 486 (1974), *with* United States v. Von's Grocery Co., 384 U.S. 270 (1966), *and* United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

In *General Dynamics*, for example, the Court permitted a merger which on paper would substantially increase concentration in the coal mining industry. United States v. General Dynamics, Inc., *supra* at 494-96. Under more traditional standards this fact would have been sufficient reason for divestiture. *See id.* at 497-98. The Court, however, found that the reserves of one defendant were almost completely committed to existing long term contracts and that its acquisition of new reserves was improbable. This finding, plus recognition that the only area of competition in the industry was the contending for new long term contracts, allowed the Court to state that elimination of the acquired firm would have no adverse impact on competition despite the apparent increase in concentration. Thus, the case was based on an analysis of competition in the specific industry and of the position of the particular defendants in that industry. *See also* Knapp, *General Dynamics, Mirage or Oasis?*, 26 MERCER L. REV. 577 (1975); Shenefield, *supra* note 12; Note, *Antitrust Law—Banks—Legal Barriers to Market Entry Mean No Elimination of Potential Competition*, 26 MERCER L. REV. 975 (1975).

15. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118-20 (1975); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 635-41 (1974).

16. 422 U.S. 86 (1975).

17. *Id.* at 121.

subsidiaries may foreclose competition among themselves will be evaluated in terms of the per se violations of the Sherman Act. Finally, the interplay between state prohibitions of branching and cooperation of subsidiaries under the rule of reason will be examined.

BANK HOLDING COMPANIES AND INTERBANK COOPERATION

The economic development of the United States since the turn of the century has placed considerable pressure on the banking industry to seek a multioffice format.[18] The transition from an agrarian to industrial economy led to rapid urbanization, creating in the new nonfarm household a tremendously desirable new source of funds for commercial banking.[19] These nonfarm households ultimately concentrated in suburban communities that were difficult to serve from a single office in the inner city.[20] The inability to reach this potentially profitable market from the inner city office induced banks to follow their customers to the suburbs.[21] In states having no significant restrictions on branch banking, the response on the part of the banks was simply to establish suburban branches.[22] In states where branching was prohibited or severely restricted, on the other hand, the pressure was relieved by the formation of bank holding companies.[23]

18. *See* R. GOLDSMITH, FINANCIAL INTERMEDIARIES IN THE AMERICAN ECONOMY SINCE 1900, at 159 (1958).

19. *See id.*

20. Several factors have been suggested to account for this difficulty. First, urbanization rapidly increased the size as well as the population of cities. Second, the population growth of cities entailed a concomitant growth in urban traffic congestion. Both of these factors increased the inconvenience of banking in the inner city. G. FISCHER, AMERICAN BANKING STRUCTURE 34, 39 (1968). It is a well-accepted fact that banks generally have a very localized business, especially where small customers are involved. *See* United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 362-63 (1970).

21. G. FISCHER, *supra* note 20, at 38-39.

22. *Id.* at 35.

23. *See* Haywood, *supra* note 4; Phillips, *Bank Merger, Branch Banking and Bank Holding Companies in Pennsylvania,* 115 U. PA. L. REV. 560, 578 (1967); *cf.* Comment, *The Bank Holding Company Act of 1956,* 9 STAN. L. REV. 333, 336 (1957).

Bank holding companies first came to prominence in the 1880's and expanded rapidly during the next 40 years. By 1929 there were more than 330 bank holding companies controlling more than 2,000 banks. *See* Haywood, *supra.* Since the depression both totals have fluctuated substantially, reflecting at once the relaxation of antibranching strictures in some states and the increasing pressure for expansion in states where antibranching statutes were still extant. In 1970 there were 121 bank holding companies controlling 12 percent of all bank offices and 16 percent of total deposits. *See id.*

There are, of course, reasons in addition to avoidance of antibranching statutes for selection of the holding company as the structural format of a group banking endeavor. Some bankers and economists argue, for example, that since local autonomy is important to banking, the holding company format is superior to a branch system in that each bank in the system as a separate enterprise can be entirely local from the board of directors down. It is argued also that since branch banking is limited at best to a single state, unified direction of banks operating in an economic region comprising several states is possible only through a holding company. *See* M. NADLER & J. BOGEN, THE BANK HOLDING COMPANY 5 (1959); Haywood, *supra* at 69. These reasons, however, do not appear to be compelling. It is only where there are state-imposed restrictions on branch

A bank holding company is a corporation which holds the stock of several separately incorporated banks.[24] The chief characteristics of the bank holding company are the separate incorporation of each member bank[25] and of the holding company itself,[26] with the holding company owning part or all of the stock of each member bank.[27] Control of the subsidiary banks in terms of stock ownership may vary widely, depending on state law;[28] it ranges from complete ownership to a small minority interest.[29] Similarly, control measured in terms of involvement in the day-to-day operation of the banks is of a variable degree. While many holding companies limit their role to that of a shareholder,[30] others have centralized certain banking functions so that their operations resemble branch systems in many respects.[31]

Attempts to circumvent antibranching statutes by means of holding company formation have been varied in approach. An example is provided by the Citizens & Southern National Bank [C&S National]

banking that bank holding companies have flourished. *See* M. NADLER & J. BOGEN, *supra* at 10; Darnell, *Bank Holding Companies and Competition: The First National Bancorporation Case,* 89 BANKING L.J. 291, 292-93 (1972); Haywood, *supra* at 67. *See also* United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971). While bank holding companies have certain advantages, they are less efficient and more costly than a branch system. A variety of services which can be handled centrally in a branch system must be handled by each bank controlled by a holding company. Thus, expenses are duplicated. *See* Phillips, *supra.*

24. In order to be classified as a bank holding company, it is not technically required that an entity hold the stock of more than one bank. In 1970 the Bank Holding Company Act was amended to include within the definition of a bank holding company those companies having control over both a bank and some other corporate entity. *See* 12 U.S.C. § 1841 (1970), *as amended,* (Supp. V, 1975). Likewise, it is unnecessary for the holding company to own all of the stock of any of its affiliated banks. *See* M. NADLER & J. BOGEN, *supra* note 23. The Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1850 (1970), *as amended,* (Supp. V, 1975), defines a holding company as a company which directly or indirectly owns, controls or can vote 25 percent or more of the voting shares of a bank, or has the power, regardless of its shareholding, to control the selection of a majority of the directors, or exercises a controlling influence over the management or policy of the bank. 12 U.S.C. § 1841(a)(2) (1970).

State statutes may restrict the ownership of bank stock by bank holding companies. For example, Georgia permits a maximum of 5 percent to be held by a bank holding company. *See* GA. CODE ANN. § 13-207(a)(2) (Cum. Supp. 1975).

25. Each such bank has its own board of directors and officers. *See* M. NADLER & J. BOGEN, *supra* note 23. *But see* discussion note 26 *infra.*

26. The holding company, like each member bank, has its own board and officers. *See* M. NADLER & J. BOGEN, *supra* note 23. In the bank holding company context, however, interlocking directorates are acceptable. Thus, it is the board itself that must be distinct, not the members of the board. While section 8 of the Clayton Act forbids an officer, director, or employee of a bank to hold similar office in another bank, the Federal Reserve Board has made section 8 inapplicable to the bank holding company. 15 U.S.C. § 19 (1970); 12 C.F.R. § 212.102 (1976).

27. G. FISCHER, *supra* note 20, at 72-73; M. NADLER & J. BOGEN, *supra* note 23.

28. M. NADLER & J. BOGEN, *supra* note 23.

29. *Id.*

30. *Id.* Indeed, in most cases even the holding company's role as shareholder is limited in that its stock often is voted by a proxy designated by the subsidiary bank rather than by the holding company. *See id.* at 21.

31. G. FISCHER, *supra* note 20, at 99-100. While a majority of services often may be centralized, many decisions are left to the individual banks. Generally the holding company will not set interest rates or service charges for the banks primarily because of fear that in so doing they will run afoul of the antitrust laws. *See id.* at 100-01.

operation. C&S National found the use of a holding company to be the only way open to it to meet the economic pressure for expansion into the suburban Atlanta market since Georgia law prohibited branch banking except in the county in which the home office of the branching bank was located.[32] To circumvent the statute, C&S National formed a holding company [C&S Holding] and through it either acquired control of existing banks or founded new banks in areas where representation was desired. Beginning in 1956 Georgia statutes limited the holding company's ownership interest in such banks first to 15 percent and then to 5 percent.[33]

C&S Holding took an active interest in the day-to-day affairs of its affiliates and its involvement therein was substantial. The holding company selected the location of new banks, and directed their course through the charter process. It placed the stock interest which could not be owned by the holding company with officers, directors, and good customers of C&S National.[34] Once a member bank was formed, C&S Holding assured it of full financial support, selected its chief executive officer, provided advisory directors—who were treated by all concerned as actual directors, and permitted the use by the affiliate of the Citizens & Southern logogram.[35] The subsidiary banks, which C&S National termed "correspondent-associates,"[36] became an integral part of the Citizens & Southern system [C&S system] and functioned as de facto branches. As part of the C&S system, they regularly received information regarding interest rates and service charges in force at C&S National, as did C&S National de jure branches.[37] The correspondent-asso-

32. Subsequent to the establishment of Citizens & Southern National Bank's [C&S National's] home office in Savannah, the primary area of economic growth in Georgia became the Atlanta area. C&S National founded several branches in Atlanta during a period prior to the passage of Georgia's antibranching law. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 91 (1975).

33. During the time that C&S National was expanding by use of the holding company, Georgia law fluctuated significantly with regard to the maximum permissible interest which a bank holding company could have in its subsidiary banks. Between 1927, when C&S Holding was founded, and 1956 no restrictions were imposed. In 1956 Georgia altered its statute to limit a bank holding company's interest in a bank to 15 percent and amended the statute again in 1960 reducing the maximum ownership level to 5 percent. GA. CODE ANN. § 13-207(a)(2) (Cum. Supp. 1975); *see* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 91 (1975).

34. 422 U.S. at 92.

35. *Id.*

36. In banking terminology a correspondent relationship is one in which a small, often rural, bank referred to as the respondent bank obtains access to services offered by a larger city bank called the correspondent. Carr, *Pricing Correspondent Banking Services*, 150 BANKER'S MAG., Summer 1967, at 65. The correspondent banks are able to provide services to the customers of the respondent bank which the latter would otherwise be unable to provide; thus, the respondent banks are enabled to remain competitive with their larger rivals. *See* Austin & Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. PA. L. REV. 366 (1973).

37. De jure branches are those which are authorized as such by the laws of a state. They are distinguished from de facto branches, such as the Citizens & Southern affiliates,

ciates were expected to and did seek advice of C&S National on every significant decision.[38] C&S National monitored the performance of the affiliated banks and was instrumental in replacing any member of the management who did not measure up to the level of performance desired by C&S National.[39] The result of this close relationship was the complete elimination of all competition among the affiliates and between those banks and C&S National.[40]

Another device for circumvention of state antibranching laws was utilized by the TransTexas Bancorporation. Two individuals and a group of their business associates owned a majority of the voting stock of El Paso National Bank, the largest bank in El Paso.[41] Since branch banking is not permitted in Texas, expansion by this method was unavailable to the bank.[42] In lieu of de jure branching, this controlling group of El Paso National Bank shareholders created and organized three other banks, retaining control of each of them.[43] These individuals owned 75 to 86 percent of the stock of each of the smaller affiliates.[44] The shareholders controlled the election of the boards of directors of each of the banks and effected such a similarity of policy that there was no significant competition between the banks.[45]

Holding company arrangements need not always arise as a response to antibranching statutes. For example, one large bank holding company, Western Bancorporation, has acquired majority stock ownership of a number of banks, some of which have their own branch systems, in several western states where branching is permitted.[46] Western Bancorporation's involvement in the day-to-day affairs of each of its subsidiaries is relatively minor, with policy decisions being made largely at the subsidiary level.[47] To the extent that these subsidiaries operate in the same service area, they function as separate competitors.[48] Thus, the legal effect of this type of holding company system seemingly would be different from that of a holding company carrying on a de jure branching operation.

in that a de facto branch, while operating in the same manner as a de jure branch, lacks legal recognition of its branch status.

38. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 131-32 (1975) (Brennan, J., dissenting).

39. *Id.* at 132.

40. *Id. See also* M. NADLER & J. BOGEN, *supra* note 23, at 27, 29.

41. United States v. TransTexas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257, at 93,207, 93,213 (W.D. Tex. 1972), *aff'd per curiam*, 412 U.S. 946 (1973).

42. TEX. REV. CIV. STAT. art. 342-903 (Supp. 1975).

43. United States v. TransTexas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257, at 93,213 (W.D. Tex. 1972), *aff'd per curiam*, 412 U.S. 946 (1973).

44. *Id.* at 93,210.

45. *Id.* at 93,213.

46. Interview with David Johannsen, Senior Research Analyst, First National Bank of Arizona, in Phoenix, Ariz., June 21, 1976.

47. *Id.*

48. *Id.*

Cooperation among banks, even if they are affiliated by common ownership, gives the appearance of a combination in restraint of trade. The precise reach of the Sherman Act, particularly in light of the Supreme Court's new functional approach, necessitates an inquiry into a variety of questions. Such an inquiry must begin by determining whether commonly owned banks are sufficiently independent that they are capable of the substantive act of combination in restraint of trade.

BANK HOLDING COMPANIES AND THE INTRAENTERPRISE CONSPIRACY DOCTRINE

Banks in a holding company are separately incorporated enterprises affiliated by common ownership. Cooperation among such banks, if it tends to suppress competition among them, is likely to raise an issue as to the propriety of their conduct in light of the Sherman Act prohibition of contracts, combinations, and conspiracies in restraint of trade.[49] The threshold inquiry in determining whether conduct violates section 1 of the Sherman Act requires proof of the existence of a cooperative restraining activity,[50] thus suggesting the need for an association between several legally distinct entities.[51]

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49. 15 U.S.C. § 1 (1970). Contract, combination, and conspiracy are not mutually exclusive terms. Courts often define them in terms of each other and frequently find that a given activity will fall within more than one category. *See, e.g.*, Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938); United States v. American Column & Lumber Co., 263 F. 147 (W.D. Tenn. 1920), *aff'd*, 257 U.S. 377 (1921); United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953). The inclusion of all three words in the statute appears to be a congressional attempt to cover all cases where independent entities band together to restrain trade. *See* United States v. Quaker Oats Co., 232 F. 499, 500-01 (N.D. Ill. 1916), *appeal dismissed*, 253 U.S. 499 (1920).

50. *See, e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). *See also* Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117, 126 (1973). Unlike section 2 of the Act, which forbids the substantive act of monopolization or the attempt to monopolize, section 1 condemns the vehicle of restraint rather than the restraint itself. *See* REPORT OF THE ATT'Y GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 30 (1955) [hereinafter cited as ATT'Y GEN. REP.].

51. Legally distinct entities are persons or organizations whose existence is not so inextricably tied to the existence of the other party that action by one would necessarily mean action by the other. *See* Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952). Separate competitors are, of course, legally distinct entities. Even a parent corporation and its incorporated subsidiaries are legally distinct entities, the fact of separate incorporation giving them a separate legal status. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947). On the other hand, a corporation and officers of a corporation are not legally distinct. Action taken by the corporation is possible only by virtue of its officers' acting in that capacity. Thus, it has been held that a corporation and officers of the corporation acting in their capacity as such cannot combine or conspire. The corporation and its agents are adjudged a single entity incapable of combination. *See* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Nelson Radio & Supply Co. v. Motorola, Inc., *supra* at 914. If the law were otherwise, most corporate actions would be illegal conspiracies. *See* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke &

Whether the threshold requirement of a plurality of actors is satisfied becomes a close question when corporate parties to an alleged combination are commonly owned or parent-subsidiary.[52] Nevertheless, common ownership does not, in itself, justify an attempt by legally distinct corporations to combine or conspire to restrain trade; an intraenterprise conspiracy is not immune from the strictures of section 1 of the Sherman Act.[53] This point has been decided and reaffirmed by the Supreme Court in a series of cases beginning in 1947.

In *United States v. Yellow Cab Co.*[54] the government sought to enjoin violation of the Sherman Act by three corporations under common majority ownership.[55] These corporations conceded an attempt to restrain the trade of the entire taxicab market, but defended on the ground that the corporations were a single vertically integrated enterprise that could not conspire or combine with itself.[56] It was commonly believed at that time that two corporations with common ownership were incapable of combination since they were parts of a single enterprise; indeed, the district court so held in *Yellow Cab.*[57] The Supreme Court, however, rejected this defense, noting that a restraint of trade can result from a combination of commonly owned enterprises.[58] Thus, where parties to a combination choose to avail themselves of the privilege of doing business as separate legal entities, they must conduct their dealings with each other within the ambit of the antitrust laws.[59]

A parent-subsidiary relationship presents an analogous situation, in which the fact that one party to a combination is a wholly owned subsidiary of another party does not prevent the finding of a combination by legally distinct entities.[60] This situation was at issue in *Timken Roller Bearing Co. v. United States*,[61] involving a market division-price

Liquors, Ltd., *supra* at 84. *See also* Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 CALIF. L. REV. 182 (1969); Note, *A Return to the Rule of Reason in Group Boycott Cases?*, 42 U. COLO. L. REV. 467 (1971).

52. *See, e.g.*, Perma-Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

53. *See* ATT'Y GEN. REP., *supra* note 50, at 31-33.

54. 332 U.S. 218 (1947).

55. The majority of the stock in each corporation was held by one man or by companies owned by him. *Id.* at 221-22.

56. *Id.* at 227.

57. United States v. Yellow Cab Co., 69 F. Supp. 170, 174 (N.D. Ill. 1946), *rev'd*, 332 U.S. 218 (1947).

58. 322 U.S. at 227. The test to be applied, according to the Court, is whether there has been in fact a restraint of trade. As long as the parties to the restraint are legally distinct, the fact that they are commonly owned is not a defense. *Id.*

59. *See* Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974). *See also* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); P. AREEDA, ANTITRUST ANALYSIS 321 (2d ed. 1974); ATT'Y GEN. REP., *supra* note 50, at 36.

60. See discussion note 51 *supra*.

61. 341 U.S. 593 (1951).

fixing scheme between American Timken, British Timken, and French Timken,[62] designed to restrain competition both among these companies and between them and other competitors.[63] American Timken had a 54 percent interest in British Timken and a 100 percent interest in French Timken.[64] The Court held that even as to the wholly owned subsidiary the combination was violative of section 1 of the Sherman Act.[65] In the Court's view, any other conclusion would permit the parties to an otherwise illegal combination to protect themselves simply by the artifice of stock transfers,[66] resulting in wholesale violation of the Sherman Act.[67]

The Supreme Court found an additional factor to be relevant to the intraenterprise conspiracy inquiry in *Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc.*[68] There, evidence supported the conclusion that

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62. The three corporations had entered into business agreements whereby each was allocated a specific territory in which to operate. While crossover sales in the territories of the other firms were permitted, prices at which such sales could be made were fixed in the contracts. The parties likewise cooperated with one another to protect the market positions of each and to eliminate outside competition. Further, they participated in cartels to control prices by restricting the flow of imports to and exports from the United States. *Id.* at 596.

63. *Id.* at 597-98.

64. *Id.* at 601 n.10. At the time the government brought suit, American Timken owned 30 percent of the stock of British Timken, and one Dewar owned an additional 24 percent. American Timken and Dewar owned all of the outstanding shares of French Timken. American Timken had a contractual right to purchase Dewar's holdings in British and French Timken upon his death, which occurred prior to the Supreme Court's disposition of the case. *Id.*

65. *Id.* at 598. American Timken attempted to assert that the arrangement was legitimized because it was a joint venture. The Supreme Court rejected this argument, noting that there is no authority for the proposition that an attempt to restrain trade in an entire industry can be justified by merely labelling it a joint venture. The Court observed that if this defense were viable, most combinations in restraint of trade could be characterized as joint ventures. *Id.*

66. If common ownership barred an action for violation of the Sherman Act, each of the parties to the combination could simply acquire a stock interest in the other parties. This would allow them to be treated as a unitary enterprise incapable of the legal act of combination.

67. *See id.* at 601-02 (Reed, J., concurring). In a vigorous dissent, Mr. Justice Jackson suggested that the *Timken* decision made the use of a separately incorporated subsidiary an untenable option, since any cooperation between the two corporations would necessarily run afoul of the Sherman Act. *Id.* at 606-07 (Jackson, J., dissenting).

Justice Jackson's dissent graphically illustrates the impracticality of a broad reading of the *Timken* decision. To forbid all cooperative activity between parent and subsidiary corporations effectively forecloses the use of a multicorporate format despite the fact that it is often a procompetitive form of enterprise organization. To the extent that the components of the enterprise cannot cooperate, any advantage to be obtained from organizing in this way is offset. *See* ATT'Y GEN. REP., *supra* note 50, at 36; text accompanying notes 79-81 *infra*. On the other hand, to permit common ownership or the parent-subsidiary relationship to constitute a defense to any section 1 attack would allow serious incursions on competition to avoid liability, an equally undesirable alternative.

The conflict between the majority and dissenting Justices in the *Timken* case suggests that permitting the form of corporate organization to control the result is a misplacing of the emphasis. It is, rather, the substantive nature of the restraint that should be scrutinized. *See* text & notes 82-86 *infra*. *But see* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 358 (reprint ed. 1974).

68. 340 U.S. 211 (1951).

House of Seagram and Calvert, two subsidiaries of the respondent, had conspired to fix maximum prices on retail liquor.[69] The respondents argued that their status as "mere instrumentalities of a single manufacturing-merchandizing unit" made it impossible for them to conspire in a forbidden manner.[70] The Court found the argument unpersuasive, noting that where the individual corporations are held out as competitors, their common ownership does not shield them from the impact of the antitrust laws.[71] Thus, if the parties to the combination cast themselves in a competitive role and hold themselves out to outsiders as competitors, the Court will simply give effect to that characterization and treat them as separate entities capable of conspiracy. In contrast, the Supreme Court in *Sunkist v. Winckler & Smith Co.*,[72] declined to find a conspiracy in the tripartite agricultural cooperative, relying in large part on the refusal of the cooperative's three segments to hold themselves out as distinct entities and the failure of outsiders to treat them as distinct.[73]

Use of separately incorporated subsidiaries or a multicorporate format, therefore, can expose the enterprise to potential liability under section 1 from which a unitary corporate structure, engaged in the same activity, is immune. The extent of this exposure is a function of the scope given to these Supreme Court decisions. A broad reading of the cases would suggest that any reduction in competition between the commonly owned parties contravenes the policy of the Sherman Act. Such an interpretation, however, exalts form over substance as the determinative aspect. While the form of the enterprise is important, the Sherman Act is more concerned with the substantive nature of the arrangement.[74] A narrower interpretation of the cases, emphasizing substance, suggests that an intraenterprise combination becomes violative of the Sherman Act only when it is intended to or does have an anticompetitive impact outside the corporate family.[75] In *Yellow Cab*, *Timken*, and *Kiefer-Stewart* the controlling factor was not the elimination of competition among the various components which comprised the

69. *Id.* at 213.
70. *Id.* at 215.
71. *Id.*
72. 370 U.S. 19 (1961).
73. *Id.* at 29.
74. "The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. The statute is aimed at substance rather than form." United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); *see* Syracuse Broadcasting Co. v. Newhouse, 319 F.2d 683 (2d Cir. 1963). In *Newhouse* the court suggests that it is the substance of the restraint which controls in determining the applicability of the Sherman Act. Thus, where a combination merely effected a redistribution of corporate profits, rather than being directly anticompetitive, the combination was lawful even though it had the ancillary effect of making the position of the defendant's competitor less tenable. *Id.* at 687.
75. ATT'Y GEN. REP., *supra* note 50, at 34; *see* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 45-48 (1968).

enterprise, but the effect which that cooperation had on external competitors. In *Yellow Cab* the substance of the violation was the attempt to eliminate competition on an industry-wide basis.[76] Similarly, in *Timken* the objection was directed primarily at the use of market allocation and pricing arrangements as implements for suppression of competition in the international market as a whole, and the preservation of a monopoly for each of the affiliated corporations in a portion of that market; the violation occurred in the effect of the arrangement on the market and external competitors.[77] In *Kiefer-Stewart* the objection to the pricing agreement was not the effect on the Seagram subsidiaries *inter se*, but the use of the common front by apparent competitors to coerce their customers' pricing decisions.[78] What the Court found objectionable about the activities of the defendants in these cases in fact appears to have been the impact which they had on strangers to the corporate family. Accordingly, from these cases could be extracted the rule that activities performed in an intracorporate context are not proscribed if, viewed in light of their external effect, they are not anticompetitive.

This narrow interpretation, placing emphasis on the extracorporate effect of the affiliated companies' cooperative efforts, permits the Sherman Act to deal with actual attempts to restrain trade but still maintains the viability of a multicorporate format. Generally, when a corporation chooses to establish subsidiaries, it does so for business reasons wholly unrelated to market considerations.[79] Under such circumstances it is unreasonable to demand that the subsidiaries compete actively with each other and with the parent corporation.[80] To insist that they compete

76. *See* United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); text accompanying note 56 *supra*.

77. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951); text accompanying notes 62-63 *supra*.

78. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); text accompanying note 71 *supra*.

79. ATT'Y GEN. REP., *supra* note 50, at 34. The most common reason for resorting to the use of subsidiaries is to avail the enterprise of certain tax advantages applicable only where a parent-subsidiary organizational scheme is used. Willis & Pitofsky, *supra* note 75, at 26-27; *see* Hale, *The Sherman Act: Sections 1 and 2*, in CONFERENCE ON THE ANTITRUST LAWS AND THE ATTORNEY GENERAL'S COMMITTEE REPORT 33, 35-36 (1955); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955).

80. *Compare* Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), *with* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The irony of requiring competition by subsidiaries *inter se* is exemplified by these cases. After the Supreme Court had ruled in *Kiefer-Stewart* that the actions of the separately incorporated entities within the Seagram family had been an illegal conspiracy, the subsidiaries were dissolved and made unincorporated divisions of the parent. Thereafter, Hawaiian Oke & Liquors, Ltd. brought suit charging a conspiracy grounded on facts similar to those in *Kiefer-Stewart*. The Ninth Circuit ruled that as unincorporated divisions of one corporation, they were incapable of conspiracy. The substance of both cases was essentially identical; only the form of corporate organization was changed. To permit activities under one organiza-

vigorously with each other because a particular organizational scheme has been selected satisfies no legitimate social objective.[81]

Rejection of the broad interpretation of the intraenterprise conspiracy doctrine does not, however, imply that no limitation is placed on the activities of commonly held corporations. After reviewing the *Yellow Cab, Kiefer-Stewart,* and *Timken* cases, the Attorney General's Committee determined that anticompetitive activities among affiliates should be challenged only where the restraint was implemented for the purpose of suppressing competition with strangers to the corporate family, when it does in fact suppress such competition, or where the subsidiaries are held out as competitors of each other.[82] Should any of these elements be found, the organizational structure is more than a matter of administrative or economic convenience to the corporation and the Sherman Act demands that the anticompetitive practice be ended.[83] The decisions of lower courts for the most part are compatible with this approach.[84] Thus, when affiliated firms hold themselves out as competitors[85] or intend to or in fact do restrain the trade of firms outside

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tional form which are denied under another, particularly when the form was selected for reasons unrelated to competition, fails to further the intent of the Sherman Act.

81. Hale, *supra* note 79. *See also* E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS 28 (1974).

82. *See* ATT'Y GEN. REP., *supra* note 50, at 34. Even where the conspiracy to restrain competition between the affiliated corporations adversely affects the trade of other corporations, it has become the policy of the Justice Department to exempt from the scope of a consent decree a restraint of trade between the affiliates to the extent that it is market neutral. *See* Willis & Pitofsky, *supra* note 75, at 30.

83. *See* United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951); Keifer-Stewart v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

84. *See, e.g.,* Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963); Alpha Distrib. Co., Inc., v. Jack Daniel's Distillery, Inc., 207 F. Supp. 136 (N.D. Cal. 1961); United States v. Arkansas Fuel Corp., 1960 Trade Cas. ¶ 69,619 (N.D. Okla. 1960). *See generally* Willis & Pitofsky, *supra* note 75, at 32-33. The bulk of the lower court decisions indicate that while common ownership will not save an enterprise from scrutiny under the Sherman Act, it does serve to justify activities which are not specifically designed to restrain trade except among the parties to the agreement. This interpretation of the intraenterprise conspiracy doctrine has been applied to the elimination of competition between affiliated banks. *See* United States v. TransTexas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257 (W.D. Tex. 1972), *aff'd per curiam,* 412 U.S. 946 (1973) (indicating that legality of purpose is the distinction between valid and invalid combinations. *Id.* at 93,214). *But see* United States v. First Nat'l Bank, 1964 Trade Cas. ¶ 71,021 (D. Minn. 1964); United States v. Northwestern Nat'l Bank, 1964 Trade Cas. ¶ 71,020 (D. Minn. 1964).

It has been suggested that invocation of the intraenterprise conspiracy doctrine should be limited further to include only cases in which the corporate components are held out as competitors or the purpose of the enterprise is to restrain the trade of strangers. This approach, unlike that followed by the Justice Department, excludes from liability those combinations which unintentionally cause a restraint of the trade of businesses outside the corporate family. The rationale behind this suggested exclusion is that in such cases the activity would probably be violative of either section 2 of the Sherman Act or section 3 of the Clayton Act as activity tending to create a monopoly. The additional coverage of section 1 of the Sherman Act is unnecessary. Willis & Pitofsky, *supra* note 75, at 48.

85. *See* Sunkist v. Winkler & Smith Co., 370 U.S. 19, 29 (1962); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Minnesota Bearing Co. v.

the corporate family,[86] there should be liability under the Sherman Act.

While common controlling ownership may constitute a defense to a charge of restraining intraenterprise competition, it does not shield similar activity when ownership of the participating corporations is less than controlling. In such circumstances separate incorporation is more than a formality.[87] The dividing line between situations in which common ownership will justify a reduction of competition and those in which it will not turns on the matter of control resulting in substantial identity of the corporations, as measured by majority stock ownership.[88] If the common ownership of the parties to the combination or the interest which one party holds in the other is less than controlling, the relationship of the parties will not justify a reduction of competition between them.[89]

Under the principles developed above, bank holding company arrangements restricting competition between affiliates will in some cases be shielded from the finding of a section 1 violation. When the holding company owns all or a controlling interest in the voting stock of the member banks, a showing either that the banks are represented to be competitors or that the arrangement substantially affects or is intended to affect the competitive position of a bank outside the holding company will be necessary to demonstrate a violation of section 1.[90]

White Motor Corp., 470 F.2d 1323, 1328 (8th Cir. 1973); Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683, 687 (2d Cir. 1963); Alpha Distrib. Co., Inc. v. Jack Daniel's Distillery, Inc., 207 F. Supp. 136, 138 (N.D. Cal. 1961); United States v. Arkansas Fuel Corp., 1960 Trade Cas. ¶ 69,619 (N.D. Okla. 1960).

86. *See* Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 44-45 (5th Cir. 1974); Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323, 1328 (8th Cir. 1973).

87. P. AREEDA, *supra* note 59.

88. *See* United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949). In *Timken* the Court found that although American Timken held an interest in British and French Timken, the latter retained their corporate independence and guarded it in dealing with American Timken. American Timken's subsequent acquisition of the controlling interest in both was ruled to have flowed from the illegal combination and would not insulate them from prosecution for past violations. *Id.* at 311-12; *cf.* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (successful Justice Department challenge under section 7 of the Clayton Act to defendant's commanding position as a supplier of General Motors' finishes and fabrics, achieved in part by the acquisition of a 23 percent stock interest in General Motors). *See also* P. AREEDA, *supra* note 59; Willis & Pitofsky, *supra* note 75, at 22.

89. Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Thomas J. O'Connell, General Counsel, Board of Governors of the Federal Reserve System, Feb. 22, 1971, 5 CCH TRADE REG. REP. ¶ 50,122 (1972) [hereinafter cited as McLaren Letter].

90. *See* United States v. TransTexas Bancorporation, 1972 Trade Cas. ¶ 72,257 (W.D. Tex. 1972), *aff'd per curiam*, 412 U.S. 946 (1973); McLaren Letter, *supra* note 89; *cf.* Alpha Distrib. Co. Inc., v. Jack Daniel's Distillery, Inc., 207 F. Supp. 136, 138 (N.D. Cal. 1961).

The Justice Department has had occasion to indicate a general view with regard to legality of price information exchanges among affiliated banks under common holding company ownership. In United States v. Northwestern Nat'l Bank, 1964 Trade Cas. ¶ 71,020 (D. Minn. 1964), and United States v. First Nat'l Bank, 1964 Trade Cas. ¶ 71,021 (D. Minn. 1964), consent judgments enjoined exchange of price information between various banks in the Minneapolis-St. Paul area. While "transactions or commu-

When a holding company is utilized as a mechanism to circumvent antibranching laws, the motivation for the formation of the holding company is unrelated to the restraint of trade; it is simply a response to normal pressure for internal expansion which has been thwarted by state law.[91] The decrease in competition occasioned by such an operation is no greater than that of the branching system for which it substitutes. Where de jure branching is permitted, there is generally no competition between branch offices. Moreover a de facto branch system under holding company ownership does not generally meet the intraenterprise conspiracy criteria set forth above. A foreclosure of competition between affiliated banks, without more, is not likely to have a serious adverse impact on the competitive position of nonholding company banks operating in the same area.[92] The presence of an affiliated bank operated as a de facto branch, normally would not be more noticeable than that of a new independent competitor. Empirical investigation does not support the thesis that the proximity of a branch of a powerful bank damages smaller banks.[93] Thus, the elimination of competition between a holding company's de facto branch affiliates ordinarily will not suppress the competition of banks outside the corporate family.[94] Nor are such bank holding companies likely to bring the Act into play by holding their subsidiary banks out as competitors. In fact, it is manifestly against their interest to do so, since one major purpose of their formation of a multioffice system is to identify the various components of the system as a unity, thus attracting customers through the convenience of the bank's numerous branches.[95] Hence, absent some unusual activity by the holding company and its majority-owned mem-

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nications solely between a registered bank holding company under the Bank Holding Company Act of 1956, or any servicing subsidiary of such bank holding company, and subsidaries of such bank holding company recognized as such under the Act" were excepted from the *First Nat'l Bank* decree, transactions or communications between subsidiary banks themselves were not excepted. United States v. First Nat'l Bank, *supra* at 79,051. Advice was sought as to the impact of the consent decree on the exchange of information exclusively among the subsidiaries of a holding company. The Justice Department indicated that despite the apparent proscription of all communication between defendant banks, the decree did not apply to information exchanges among holding company affiliates, or between the holding company and its affiliates. However, this was said to be true only where the holding company owned a substantial majority of the stock of its affiliates. McLaren Letter, *supra* note 89; *see* G. FISCHER, *supra* note 20, at 259-63.

91. *See* Smith & Greenspun, *supra* note 5; Comment, *Bank Charter, Branching, Holding Company and Merger Law: Competition Frustrated*, 71 YALE L.J. 502, 515-16 (1962). See discussion note 23 *supra*.

92. The original impetus for state-imposed restrictions on branching was the belief that the cost advantage realized in the multioffice systems would make untenable the competitive position of the unit bank because of its higher costs. *See* D. ALHADEFF, MONOPOLY AND COMPETITION IN BANKING 107 (1954).

93. *See* COMMISSION ON MONEY AND CREDIT, MONEY AND CREDIT 165 (1961); Comment, *supra* note 91, at 515.

94. *See* Comment, *supra* note 91, at 515.

95. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 93 (1975).

ber banks, such an organization operating essentially in the branch format should not be subject to challenge under section 1 of the Sherman Act.

However, restraints on competition among affiliated banks will not be protected from the strictures of the Sherman Act simply because a holding company happens to hold a small amount of stock in each of them. Under such circumstances there is insufficient identity of the parties to characterize them as a single enterprise.[96] Accordingly, it is improper to judge the applicability of the Sherman Act to cooperation between the banks by the criterion of anticompetitive intent or effect outside the system.[97] Where the banks in a holding system are not so closely identified as to be considered a single enterprise or where the criteria of Sherman Act applicability are met, the problem is determining whether the elimination of competition among the banks within the system is a violation of section 1. That issue may only be resolved by application of the substantive requirements of the Act.

BANK HOLDING COMPANIES AND PER SE VIOLATIONS OF THE SHERMAN ACT

A finding that a restraint of competition between affiliated banks is not insulated from Sherman Act scrutiny by their common ownership does not mean that such a restriction is always invalid. It merely requires that the restraint be substantively analyzed for reasonableness, using established Sherman Act concepts.[98] While section 1 of the Sherman Act on its face forbids all restraints of trade, it has been construed as applying only to those which are unreasonable.[99] The test

96. McLaren Letter, *supra* note 89; *see* Hudson Sales Corp. v. Waldrip, 211 F.2d 268, 272-73 (5th Cir. 1954); Alpha Distrib. Co. v. Jack Daniel's Distillery Inc., 207 F. Supp. 136, 137-38 (N.D. Cal. 1961).

97. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 89 (1975); cases cited note 96 *supra.*

98. *See, e.g.,* Cement Mfg. Protective Ass'n v. United States, 268 U.S. 588 (1925); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); McCann v. New York Stock Exch., 107 F.2d 908 (2d Cir. 1939).

99. *E.g.* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 54-55 (1911). *See also* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775, 783 (1965); Note, *supra* note 50, at 129.

The Sherman Act amounts to a congressional mandate that is to be the goal of federal regulation of business, a goal which would not be furthered, and indeed might be impeded, by the prohibition of reasonable business practices which might be deemed restraints. The limitation of Sherman Act applicability to unreasonable restraints was first enunciated in 1911 in the *Standard Oil* decision. Perhaps the classic interpretive statement of the rule of reason is found in *Northern Pacific*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political

of reasonableness, or the rule of reason as it has come to be called, focuses on the purpose of the restraint and its impact on the market. If a plan of commercial activity is adopted primarily for the purpose of reducing the level of competition or if it actually effects a lessening of competition, it is unreasonable.[100] On the other hand, activities which appear to reduce competition between the participants, but which in so doing increase competition on an industry-wide basis can be found reasonable.[101] The legality of the activity is evaluated functionally in light of the surrounding circumstances.[102] Should those circumstances reveal that the restraining activity serves a legitimate purpose and produces a beneficial result which on balance outweighs the detrimental effects of the reduction of competition, the activity will be upheld.

Some types of activities, however, are not given a full evaluation in light of their purposes and effects; rather, they are conclusively presumed to be unreasonable without reference to the circumstances.[103] The Supreme Court has recognized that certain types of restraints are so inherently liable to abuse that they cannot be tolerated even if, under the circumstances, they might be market neutral or beneficial.[104] Thus, they have been held to be illegal per se.[105]

Price fixing has long been held to be an inherently dangerous restraint subject to the per se illegality standard.[106] Because of the

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> and social institutions. But even were that premise open to question, the policy laid down is competition. And to this end it prohibits "Every contract, combination . . . and conspiracy in restraint of trade or commerce among the several states." Although this prohibition is literally all encompassing, the courts have construed it as prohibiting only those contracts or combinations which "unreasonably" restrain competition.

Northern Pac. Ry. Co. v. United States, *supra* at 4-5.

100. *See, e.g.,* United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940).

101. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

102. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 606-07 (1972). *Compare* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), *with* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). *See generally* Note, *supra* note 50, at 129.

103. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967); United States v. Sealy, Inc., 388 U.S. 350, 356-57 (1967). *See also* C. KAYSEN & D. TURNER, ANTITRUST POLICY 142-43 (1965); Bork, *supra* note 99, at 780-93.

104. United States v. Topco Associates, Inc., 405 U.S. 596, 607 (1972) (horizontal territorial division); United States v. Container Corp. of America, 393 U.S. 333, 337-38 (1969) (horizontal price fixing); United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (vertical price fixing); International Salt Co. v. United States, 356 U.S. 1 (1947) (tying arrangements). Group boycotts also may be a per se violation. *See* White Motor Co. v. United States, 372 U.S. 253, 259-60 (1963); Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941). *See generally* C. KAYSEN & D. TURNER, *supra* note 103, at 144-48.

105. United States v. Topco Associates, Inc., 405 U.S. 596, 607 (1972); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); C. KAYSEN & D. TURNER, *supra* note 103, at 142-48; A. NEALE, *supra* note 67, at 32-40.

106. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

enormous potential for abuse in a price fixing scheme, the Supreme Court has found it unnecessary that an adverse effect on the market, such as an increase in prices, be demonstrated.[107] The Court has observed:

> [I]t does not follow that agreements to fix or maintain prices are reasonable and therefore permitted by statute merely because the prices themselves are reasonable. . . . The aim of every price fixing agreement, if effective, is the elimination of competition. The power to fix prices, whether reasonable or not, involves the power to control the market and fix arbitrary and unreasonable prices.[108]

Nor does a legitimate purpose constitute a defense to a charge of price fixing.[109] It is the nature of the restraint that is unreasonable, not the effect when it is implemented.[110] In view of this rule, open attempts to fix prices are very rare. However, to avoid open agreements is not necessarily to avoid liability since price-fixing arrangements will be struck down regardless of their form.[111] Even in the absence of a direct attempt to fix prices, an activity which causes price stability and uniformity is subject to proscription.[112] Thus, an express agreement to fix interest rates and service charges between commonly held banks subject to the Act would be invalid as a per se violation of the Sherman Act, regardless of any justification for the activity.

The applicability of price fixing or other per se Sherman Act liability to bank holding company operations perhaps can be best understood by examining the Supreme Court's recent decision in *United States v. Citizens & Southern National Bank.*[113] In that case the government

107. United States v. Trenton Potteries Co., 273 U.S. 392, 396-97 (1927); ABA, ANTITRUST LAW DEVELOPMENTS 2 (1975). The restriction extends not only to agreements to fix minimum prices but also to agreements to fix maximum prices. Despite the apparent advantage to the consumer, whom the Act was presumably designed to protect, the Court apparently feels that the reduction in competition inherent in any price-fixing arrangement is inimical to the purpose of the Sherman Act. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). The Court's position is that Congress has declared its intent and absent some contrary congressional statement, it is the responsibility of the courts to strike down all price-fixing arrangements regardless of their apparent justification. Further, the courts view prices as being too sensitive to allow any direct control. *See* United States v. Container Corp. of America, 393 U.S. 333, 338 (1969).

108. United States v. Trenton Potteries Co., 273 U.S. 392, 396-97 (1927).

109. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

110. *See* C. KAYSEN & D. TURNER, *supra* note 103, at 144-45; A. NEALE, *supra* note 67, at 39.

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

112. *Id.*

113. 422 U.S. 86 (1975). This case dealt with C&S National's de facto branching system as outlined in text accompanying notes 32-40 *supra*. C&S Holding owned only 5 percent of the outstanding stock of each affiliated bank, an alliance not close enough that they could be considered one enterprise. Thus the propriety of their failure to compete with each other was subject to section 1 scrutiny. See text accompanying notes 87-89 *supra*.

When Georgia ultimately relaxed its antibranching statute to permit branching attempted to prove that the cooperative efforts of the C&S system were illegal per se by charging that implicit in the relationship of the banks was a tacit agreement to fix prices.[114] Implementation of the agreement was said to occur through C&S Holding's providing each of the affiliates with information on the interest rates and service charges in force at C&S National and the other subsidiary banks. The question thus raised concerned the potentially anticompetitive impact the provision of this information had on the actual pricing decisions made by the C&S affiliates. While the affiliates had been admonished by C&S Holding to use their own discretion in determining prices and were counseled that the antitrust laws required that they set their own prices,[115] the government charged that a tacit agreement to fix prices was implicit in the exchange of price information.

The price information which was disseminated throughout the C&S system was part of a program in which C&S National made available to its affiliates a large quantity of information covering virtually all aspects of its operation.[116] Such agreements to exchange business information are themselves contracts or combinations which are subject to section 1 scrutiny.[117] However, because they often serve legitimate—indeed procompetitive—functions, they are not unlawful per se.[118] Rather, ar-

within any county where either the home office or a branch of a bank was located, GA. CODE ANN. §§ 13-201.1(b), -203.1(a) (Cum. Supp. 1974), the way was opened for C&S National to merge with its 5 percent affiliates and operate them as de jure branches. C&S National thereupon filed an application with the Federal Deposit Insurance Corporation [FDIC] for permission to merge its affiliates into its branch system. *See* 12 U.S.C. § 1828(c)(2)(C) (1970). The Justice Department, however, brought an action to prevent the merger and to enjoin the continued cooperation of the affiliated banks as a violation of section 1 of the Sherman Act. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 96 (1975). The basis for the Justice Department's attack was that the merger would tend to lessen competition in the Atlanta market. While the Department conceded that there had been no competition between the merging banks, it argued that the lack of competition was the result of an illegal scheme of cooperation that reduced competition artificially. United States v. Citizens & S. Nat'l Bank, 372 F. Supp. 616, 623 (N.D. Ga. 1974), *aff'd*, 422 U.S. 86 (1975). The free flow of information between the banks was characterized as a tacit agreement to fix prices. *Id.* In addition to the merger challenge, the Justice Department sought injunctive relief against future Sherman Act violations in the event that the challenged merger was barred. 422 U.S. at 96.

114. 422 U.S. at 112.

115. *Id.* at 113.

116. *Id.* at 93.

117. United States v. Container Corp. of America, 393 U.S. 333, 338-39 (1969) (Fortas, J., concurring); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); *see* P. AREEDA, *supra* note 59, at 322.

118. *See* United States v. Container Corp. of America, 393 U.S. 333, 338-39 (1969) (Fortas, J., concurring); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Wall Prods. Co. v. Nat'l Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971); United States v. Ward Baking Co., 243 F. Supp. 713 (E.D. Pa. 1965). There are several reasons for allowing the exchange of information among competing firms. It is legitimate for businesses to seek to be well informed about market conditions. *See* A. NEALE, *supra* note 67, at 41. For the "invisible hand" to function properly in a perfectly competitive market, all buyers and sellers must have perfect and instantaneous knowledge of all transactions in the market. *Id.* Particularly in industries where small firms are involved, free exchange of information also may promote efficiency by aiding the cost

rangements to exchange basic business information are subject to the rule of reason, and therefore are evaluated in terms of the purpose for which they are inaugurated and their actual effect on the market.[119] Despite this general reasonableness approach to information exchanges, however, those exchanges involving price information are regarded as highly suspect by the Supreme Court, and they will be considered per se illegal price-fixing schemes if price stability or uniformity appears to result from them.[120] In such cases the issue of actual market impact is never reached, unreasonableness not being at issue.[121]

The rules governing the exchange of price information among competitors developed in a series of decisions involving trade associations which had made available to their membership information regarding the price and production levels of each member. The exchange of information among members of a trade association is analogous to the exchange of information among affiliated banks operating in the same area. In both cases the practical effect is that the decisions of the dominant parties to the arrangement are made available to the general membership and can influence the decisions of the smaller firms.[122] The standards established in the trade association cases, therefore, have significant application to exchanges of information among affiliated banks.

The validity of price information exchanges turns on the impact which the exchange has on the price structure of the industry. If prices exhibit stability or uniformity following the inauguration of an information exchange, inquiry must be made as to the cause. Only if a tacit agreement to fix prices can be shown, however, will price stability

accounting of the small firm. *Id.* Likewise, exchange of information may facilitate compliance with the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), by providing purchasers with the information necessary to guarantee that price discrimination is not occurring in the industry. Wall Prods. Co. v. Nat'l Gypsum Co., *supra* at 315-31; *cf.* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).

119. *See, e.g.*, Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 578 (1925); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 208-09 (9th Cir. 1974); Belliston v. Texaco, Inc., 455 F.2d 175, 181-82 (10th Cir. 1972). This standard, as it is applied in situations where common ownership is less than controlling, is similar to the standards used in evaluating arrangements where common ownership is total. *See* text accompanying notes 84-89 *supra*. The focus of the test, however, is different. If the activity is to be justified, the primary purpose of the information exchange must be something other than reduction of competition between the parties to it, and it must not actually reduce competition.

120. *See* United States v. Container Corp. of America, 393 U.S. 333, 339 (1969) (Fortas, J., concurring). *See also* C. KAYSEN & D. TURNER, *supra* note 103, at 150-51; Hale, *Communication Among Competitors*, 14 ANTITRUST BULL. 63 (1969).

121. *Compare* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 93 (1975), *with* American Column & Lumber Co. v. United States, 257 U.S. 377, 394-96 (1921). *See also* E. ROCKEFELLER, *supra* note 81, at 75-79.

122. In a trade association context the effects include the additional knowledge which the dominant firms gain about the operation of the other dominant firms. This knowledge may enable the dominant firms to combine tacitly to restrain trade. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969).

caused by the exchange of price information lead to proscription of the exchange.[123] Simple price uniformity or stability is an insufficient basis for such an inference.[124] Nevertheless, the parties to an exchange are held to have intended the natural and probable consequences of their actions; thus, when a price information exchange produces uniformity or stability and the circumstances surrounding the exchange indicate that it will probably result in price conformity, the establishment of the information exchange is held to be a tacit agreement to fix prices.[125]

The principles governing information exchanges have been developed in a series of Supreme Court cases beginning with *American Column & Lumber Co. v. United States*,[126] ruling on the legitimacy of a clearinghouse for industry pricing information formed by several competitors. Participation was optional and required no agreement to conform to pricing norms. One of the inducements to join the association, however, was the knowledge that with the information provided by the association, the members would be able to keep prices at a stable and normal level.[127] Participants were to furnish a daily sales report identifying the customer and all details of the sale, a monthly report on production, and a list of prices in effect at the beginning of each month. They were further required to notify the clearinghouse of any change in price. The association would furnish a weekly report of sales, prices, and buyers, and a monthly summary of the production of each member and of all members' inventories and prices.[128] In addition, members of the association met frequently to discuss the current state of the market including price and production levels and the impact which increased production or price reductions would have on the market.[129] The Supreme Court ruled that all of the essential elements of a price-fixing combination were present in the arrangement. Because there was no express agreement to fix prices, however, it was necessary for the Court to determine whether the price stability in the industry was intended by the parties to the exchange of information.

The Court thus had to decide whether a tacit agreement to suppress price competition was inferable from the facts. A tacit agreement could be found in the association's plan to make available to the entire group the current price decisions of the largest firms,[130] and the natural disposition in the smaller competitor to act in harmony with the deci-

123. *See* text & notes 148-51 *infra*.
124. Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).
125. *See* text & notes 126-47 *infra*.
126. 257 U.S. 377 (1921).
127. *Id.* at 393-94.
128. *Id.* at 394-96.
129. *Id.* at 397.
130. *Id.* at 393.

sions of the larger competitors.[131] Moreover, the Court perceived an inherently coercive element in the nature of the association. Any production or price change would have been discovered immediately by all of the member's associates, who might have regarded the action as bad faith. The Court found this to be a form of subtle, but effective, coercion.[132] As a result of the exchange of current prices, the natural deference of the smaller producers, and the coercive nature of the association, the exchange of information contained both opportunity and inducement to act uniformly. From such evidence it could be inferred that the information exchange was a combination of independent firms to fix prices and that this tacit agreement had caused prices to stabilize.[133] The arrangement was, accordingly, illegal per se under section 1.

Several years later the Court found a similar association to be valid. In *Maple Flooring Manufacturers Association v. United States*,[134] the trade association was charged with price fixing because it disseminated price and production information.[135] The association's reports showed production costs and volume, the stock on hand, and the prices at which the sales had been made.[136] Unlike the association's programs in *American Column*, however, the Maple Flooring Association's program apparently was not intended to and did not create price uniformity. Current prices were not disclosed, nor were future prices discussed at the association's meetings. The evidence did not show any price uniformity.[137] Stating that there was no agreement to fix prices and that the activities of the association were not unlawful, the Supreme Court held that no unreasonable restraint of trade was present.[138]

The feature distinguishing these two decisions appears to be the presence of a tacit agreement to fix prices and resulting price uniformity in *American Column*. That decision indicates that the tacit agreement is to be inferred from the exchange of current price information which gives the group the ability to bring about price uniformity, combined

131. *Id.* at 399.
132. *Id.*
133. *Id.* at 409-11.
134. 268 U.S. 563 (1925).
135. *Id.* at 568.
136. *Id.* at 567.
137. *Id.* at 575.
138. *Id.* at 586. It is of significance that the Maple Flooring Association did not discuss contemplated or current prices. Nor did they discuss future production plans. The information available to the members of the association allowed them to plan their own future pricing and production policies based upon an accurate pricture of what the market was like at the time, without the suggestion by the association or the dominant firms in the industry as to what those policies should be. Such arrangements are generally procompetitive in that they permit the small firms with limited ability to assess the condition of the market to compete more effectively. *See* A. NEALE, *supra* note 67, at 41.

with either deference to the decisions of industry leaders or some other form of coercive power which provides an incentive for conformity.[139] When there is sufficient factual basis for finding a tacit agreement, resulting price uniformity brings the arrangement squarely within section 1's proscription of price fixing. What constitutes a sufficient factual basis for the finding of a tacit agreement is suggested by *American Column* and *United States v. Container Corp. of America*.[140] Under the facts of *Container Corp.*, a group of corrugated cardboard producers developed a plan by which each member of the group made available to any other member on request the most recent price charged or quoted, whenever it was unavailable from another source.[141] Following the inauguration of this reciprocal price information exchange, prices tended to stabilize.[142] The Supreme Court, noting that the exchange involved current pricing information and that prices were stabilized, concluded that this agreement restrained the vigor of price competition and therefore held the activity unlawful per se.[143] What made the price information exchange a tacit agreement in *Container Corp.*, and thereby provided the element of intent, was the nature of the industry itself. The Court specifically found that the features which had formed the basis for its finding of tacit agreement in earlier cases such as *American Column* were not present here.[144] Rather, it drew its inference of agreement from the prevalent market conditions and the effect thereon of the exchange. The corrugated container industry was found to be highly concentrated, with the primary area of competition being price.[145] In such an industry the mere possession of complete knowledge of the price levels of competitors leads not to intelligent

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139. American Column & Lumber Co. v. United States, 257 U.S. 377, 399 (1921); *see* C. KAYSEN & D. TURNER, *supra* note 103, at 150; A. NEALE, *supra* note 67, at 41, 43; E. ROCKEFELLER, *supra* note 81, at 75-76. *See also* Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972).

140. 393 U.S. 333 (1969).

141. *Id.* at 335.

142. *Id.* at 336.

143. *Id.* at 337.

Justice Fortas concurred in the result and in the opinion of the Court, but declined to view the Court's opinion as being a declaration that information exchanges are illegal per se.

> Absent *per se* violation, proof is essential that the practice resulted in an unreasonable restraint of trade. There is no single test to determine when the record adequately shows an "unreasonable restraint of trade"; but a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions.

Id. at 339 (Fortas, J., concurring). See text accompanying note 117 *supra*. Fortas' view of the majority opinion is reconcilable with it, in that it was not until after the Court had found actual price stabilization in the market that it ruled the arrangement illegal per se.

144. 393 U.S. at 337 n.3; *see* United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

145. 393 U.S. at 336-37.

competition,[146] but rather to a form of group price decisionmaking which permits industry-wide profit maximization.[147] The possession of current price information by firms possessing market power, therefore, was sufficient to lead to the inference of a tacit agreement which manifested itself in the market by stabilizing prices.

The limits placed upon price information exchanges by the Sherman Act emerge from an examination of the *Container Corp.* decision. First, there must be an agreement to exchange current price information.[148] Additionally, a tacit agreement to fix prices must be inferable from the concentration of the industry, deference to the decisions of industry leaders, some form of coercion, or another condition which makes price uniformity the natural consequence of the exchange.[149] Finally, the exchange must have a stabilizing effect on prices.[150] Moreover, the necessity for the two latter elements—the effect on prices and the existence of a tacit agreement—implies that a causal relationship between the two also must be demonstrated. The mere existence of price uniformity should not raise a presumption that the exchange of information led to the uniformity, particularly where the industry has demonstrated uniformity of price prior to the information exchange.[151]

The exchange of price information in the banking industry, such as that engaged in by C&S, may give rise to inferences supporting a finding of per se illegal price fixing. Information regarding current interest rates and service charges was regularly circulated by C&S National among its affiliates.[152] C&S National did not challenge the assertion that the extensive cooperation between the banks, including the distribution of C&S National's prices, had resulted in price uniformity.[153] This

146. See discussion note 118 *supra*.

147. *See* 393 U.S. at 337; C. KAYSEN & D. TURNER, *supra* note 103, at 150 (suggesting that in an oligopoly situation some ignorance of market conditions is essential to prevent the oligopolists from making the calculated decisions necessary to maximize industry profits, and that while in a competitive industry perfect market knowledge is procompetitive, the possession of extensive business information by firms having substantial economic power in a closed market is pernicious).

148. *See* Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 208-09 (9th Cir. 1974); Gray v. Shell Oil Co., 469 F.2d 742, 746-47 (9th Cir. 1972); *cf.* United States v. Wohl Shoe Co., 369 F. Supp. 386 (D.N.M. 1974). In Belliston v. Texaco, Inc., 455 F.2d 175, 182 (10th Cir. 1972), the court alludes to the fact that in *Container Corp.* the prices provided upon request were prices which were unobtainable from other sources. Thus, when prices are readily available because they are made public by publication or a similar device, *Container Corp.* apparently does not control. *Id.* at 181. *See also* Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

149. *See* Gray v. Shell Oil Co., 469 F.2d 742, 746-47 (9th Cir. 1972); A. NEALE, *supra* note 67, at 46; discussion note 147 *supra*.

150. *See* Belliston v. Texaco, Inc., 455 F.2d 175, 182 (10th Cir. 1972); Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

151. Causation is not always readily susceptible to proof, and the government bears the burden of proving it affirmatively. Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949); C. KAYSEN & D. TURNER, *supra* note 103, at 145.

152. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 122-30 (1975).

153. *Id.* at 113.

admission satisfied the requirement of price stabilization and the implied requirement that it be causally related to the information exchange.[154] The remaining element, the existence of a tacit agreement to bring about price uniformity thus became the decisive element.

C&S National marked its price releases "For Information Only" and counseled the affiliates that the antitrust laws required that they set their own prices.[155] Nevertheless, the officers in charge of setting prices at the affiliated banks knew that their performance was being monitored by C&S National and that they were subject to dismissal if the parent firm became displeased with their performance. At least arguably, deference resulting from this somewhat coercive situation was the sort of conduct found violative in the Supreme Court's data dissemination cases. Natural deference absent a systematized program of information exchange may well be permissible,[156] but the same sort of natural deference may form the final link in an illegal price-fixing combination where it occurs in the context of an exchange of information regarding current prices.[157] Moreover, the presence of extensive information

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154. This causation element may present a severe problem of proof for the party challenging information exchange activities of a bank holding company. The Federal Reserve Board, through its open market activities, can fix the prime interest rate, a rate below which it is generally unprofitable to deal. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 327-28 (1963). *See also* 12 U.S.C. §§ 353-359, 462 (1970). Additionally, state usury statutes fix the maximum rate which banks can legally charge for the use of funds. *See id.* § 85. These limitations circumscribe a relatively narrow price area in which banks may operate legally and profitably. As a result, prices among banks in a given state will tend to be quite similar, and establishing that the similarity is due to collusion rather than parallel observance of these restrictions may be difficult.

Further, in the highly concentrated banking industry, price leadership by a dominant firm is not uncommon. *See* Comment, *supra* note 91, at 503. This phenomenon, which is not in itself violative of the antitrust laws, is characterized by the establishment of a price by a large firm in the industry with other firms following its lead and setting a similar price. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954); A. NEALE, *supra* note 67, at 50-51. Where competitors are of unequal power in an oligopolistic market, this form of price uniformity may well arise without collusion since other firms in the market may decide that it would be imprudent to challenge the price set by a dominant firm. To the extent that there is no agreement among the firms to follow the pricing decisions of the dominant firm, price leadership is lawful. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., *supra*; United States v. International Harvester, 274 U.S. 693, 708-09 (1927) ("the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer does not establish any suppression of competition or show any sinister domination."). *See also* A. NEALE, *supra* at 51. Thus, the natural price limitations involved in the banking industry, plus its inherently oligopolistic nature, tend to produce price similarities and make deliberate collusion to set prices difficult to establish to the extent that proof of a causal relationship between some concerted act and subsequent price uniformity is a necessary element.

155. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975). This pattern is typical of bank holding company advice to affiliates. Fearful of violating the antitrust laws, holding companies are generally reticent to take an active hand in the establishment of interest rates and service charges. *See* G. FISCHER, *supra* note 20, at 100-01.

156. See discussion note 154 *supra*.

157. *See* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969); American Column & Lumber Co. v. United States, 257 U.S. 377, 398-99 (1921). Price leadership is condoned by the courts not because it is competitive, but because it does not constitute a conspiracy. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.,

about other firms in an organized group, together with the ability of the group to coerce uniform performance has been sufficient to permit the inference of a tacit agreement to bring about uniformity.[158] C&S Holding had this ability by virtue of its personnel power over the affiliates' officers. The natural deference of the affiliates plus the spectre of dismissal for inadequate performance are precisely the elements from which the existence of a tacit agreement may be inferred.[159] To the extent that a tacit agreement can be shown, the rule of reason is suspended and the arrangement becomes illegal per se.

The Supreme Court ignored these factors, however, contending that since the banks were justified in cooperating and consulting with one another, due to the anticompetitive nature of the state banking laws,[160] their actions did not constitute price fixing. Thus, the Court, evaluating the arrangement between the banks in light of the state antibranching statute, permitted the interposition of the relationship between the banks in the holding company system as a justification of what would otherwise be an illegal price-fixing conspiracy.[161] Such a conclusion appears to be a fundamental departure from prior law which would not permit justification to be a defense to price fixing.[162] The decision artfully avoided recognizing such a defense, however, by refusing to find a price-fixing combination, but acknowledging that under normal conditions this sort of cooperation would amount to a conspiracy.[163] Thus, within the rubric of restrictive state law, otherwise violative cooperation in a bank holding company context apparently is permissible if it produces beneficial effects in the market.[164]

In a de facto branching situation, then, extensive cooperation apparently is allowed to the extent that the overall effect of the arrange-

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346 U.S. 537, 541 (1954) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy, but conscious parallelism has not yet read conspiracy out of the Sherman Act entirely."). The distinction between price leadership and a combination in restraint of trade thus lies in whether the pricing decisions of the various firms are the result of independent decisionmaking or the result of a tacit agreement. *Id.* at 540. To show a tacit agreement, however, it is necessary to show only that the parties contemplate uniformity and that they actually conform. *See* Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965).

158. See text accompanying note 149 *supra.*

159. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

160. See text accompanying notes 179-201 *infra.*

161. "Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy to affect prices." United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113-14 (1975).

162. See text accompanying notes 140-50 *supra.*

163. *See* 422 U.S. at 113-14.

164. *Id.* at 118-19.

ment, when judged under the rule of reason,[165] is not anticompetitive. This conclusion holds true whether the de facto branch system is developed under the auspices of a dominant bank or is developed by a group of stockholders of a number of banks.[166] In either case the validating element is the same: the development of additional banking options, in the face of state restrictions on internal expansion, is viewed by the Court as procompetitive.[167] However, the arrangement, even if procompetitive, will be invalid if there is a clear violation of a per se rule, suspending a factual evaluation of the actual operation of the restraint, and rendering the activity illegal because of its nature.[168] Thus, it would be unlawful to enter into express agreements to fix prices, divide markets, or engage in some other activity regarded as illegal per se. This is so not because the activity would be more anticompetitive under the circumstances, but simply because an analysis of its competitive effects would never be reached.

THE RULE OF REASON AND BANK HOLDING COMPANIES

Even if cooperation among affiliated banks does not constitute a per se violation and is therefore not conclusively presumed to be unreasonable, this does not mean that the activity escapes the strictures of the antitrust laws. It merely indicates that the nature of the activity must be scrutinized under the rule of reason to determine whether the restraint is reasonable under the circumstances. Such a determination requires a decision regarding justifications for cooperation under the rule of reason.[169]

The modern formulation of the rule of reason is derived from *Chicago Board of Trade v. United States*,[170] where the Supreme Court distinguished restraints which were unreasonable by their inherently anticompetitive nature from restraints which were unreasonable be-

165. See text & notes 169-215 *infra*.
166. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118 (1975); United States v. TransTexas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257, at 93,214 (W.D. Tex. 1972), *aff'd per curiam*, 412 U.S. 946 (1973).
167. *See* cases cited note 166 *supra*.
168. See text & notes 103-10 *supra*.
169. *See* Bork, *supra* note 99, at 804. The rule of reason is the general rule of construction in all Sherman Act cases and simply implements the broad public policy favoring competition. *See* ATT'Y GEN. REP., *supra* note 50, at 11. If the effect of the restraint is an impact on the level of competition in an industry, it is violative of the public policy which the Sherman Act mandates. Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Supreme Court also has been willing to infer probable ill effects from an aggressive or malevolent purpose alone, regardless of the actual effect. *See* American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); A. NEALE, *supra* note 67, at 21, 25. A restraint of trade that has no impact on the public is not violative of section 1 unless it was intended to have an impact but was unsuccessful. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).
170. 246 U.S. 231 (1918).

cause of their anticompetitive consequences, actual or probable, under the circumstances of the case.[171] Probable effects were to be inferred largely from the purpose of the restraint,[172] and in subsequent cases the determination of probable effect has evolved into an analysis simply of the purpose itself.[173] In cases where the purpose is anticompetitive or serves no constructive end, therefore, the restraint is found illegal,[174] but if the restraint is simply an inevitable result of the creation of new efficiencies or economies, such benefits outweighing the resulting restraint, it is reasonable.[175] If the purpose of the restraint does not itself render the conduct illegal, then an actual rather than probable anticompetitive effect must be demonstrated in order to render the restraint unreasonable and thus violative of section 1. This requires proof of a palpable injury to the market,[176] necessitating an examination of the level of competition in the industry before and after the inauguration of the restraint.[177]

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171. *Id.* at 238-40.

172. *Id.* at 238. In *Chicago Board of Trade*, the Court noted:

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. Purpose in that case played the mediate role of an indicator of probable effects.

173. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 541 (E.D. Mich. 1974). In *Klor's* a large chain store employed its purchasing power as a weapon to obtain agreements from manufacturers and distributors to boycott Klor's, one of its competitors. The chain store was not hopeful of reducing competition, but had other reasons for wishing to eliminate Klor's.

Overseas Motors, Inc. v. Import Motors Ltd., *supra*, also gave consideration to the purpose of the defendant as a conclusive factor in itself. "Plaintiff has not shown any anticompetitive motive behind defendant's conduct, and this case therefore does not fall within the class of cases that condemns 'bad actors' with obviously predatory motives even where there is little evidence of anticompetitive effect." 375 F. Supp. at 341.

174. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); discussion note 173 *supra*.

175. *See* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). *See also* Bork, *supra* note 99, at 820-21.

176. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622-24 (1953). In *Times-Picayune* the Court, failing to find a malevolent purpose in the requirement that advertisers buy equal amounts of space in both the morning and evening papers published by the appellants, held that in the absence of evidence demonstrating an impact on competition, there was no unreasonable restraint. *Id.* at 623-24. *See also* United States v. Columbia Steel Co., 334 U.S. 495 (1948).

177. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 624 (1953). The issue in the application of the rule of reason is essentially a factual one. The Court begins with the assumption that any direct restraint of trade between competitors which is not entered into to produce a legitimate result will be unlawful. *See* A. NEALE, *supra* note 67, at 439. A factual inquiry is conducted in order to determine what the restraint is designed to accomplish and what it in fact does accomplish. *See id.* It is in the determination of the factual setting that the complexity of the antitrust laws arises. *See id.* Once the facts have been determined, evaluation of reasonableness is generally a matter of determining whether the level of competition in the industry after the restraint is substantially less than that existing prior to the restraint. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975); United States v. First Nat'l Bank & Trust, 376 U.S. 665, 672-73 (1964); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 624 (1953); A. NEALE, *supra* note 67, at 439.

The elimination of competition between affiliated banks without regard to surrounding circumstances would appear to be anticompetitive. For instance, in a de facto branching system some restriction of competition *inter se* results from the dominant member bank's input into the policy decisions of the smaller affiliates. Under the rule of reason, however, restraints are not analyzed in a vacuum;[178] rather, their purpose and effects in the context of conditions affecting the industry must be evaluated to determine whether competitive benefits offset the anticompetitive aspects of the arrangement.

When a bank holding company is formed to circumvent a state antibranching statute, and the affiliated banks cooperate in such a way as to completely restrain competition among themselves, two factors are relevant to the determination of the reasonableness of the restraint. First, the court must decide whether the state antibranching statute constitutes an anticompetitive restraint of trade,[179] circumvention of which could be viewed as thus imbued with a procompetitive purpose.[180] Second, the court must determine if the creation of a de facto branch system under the auspices of a holding company has sufficient procompetitive features to justify the actual operation of the restraint between the affiliates.[181] In *Citizens & Southern* the Supreme Court concluded that state antibranching statutes are anticompetitive and that formation of de facto branch systems have sufficient procompetitive effects to validate their existence.[182]

State antibranching statutes do appear to have decidedly anticompetitive effects despite the fact that prohibition of branching, where

178. See text & notes 11-15 *supra*.

179. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 626-40 (1974). In conducting this inquiry the Court exposes itself to attack for interjecting itself into an essentially legislative realm. The state legislature seemingly has made a determination that the interest of competition is best served by the maintenance of a number of small independent competitors and feels that this end is best served by granting them insulation from the rigors of regional competition. When the Supreme Court declares this decision to be patently anticompetitive, it could be viewed as superimposing its own judgment of the situation and interjecting itself into the realm of legislative hegemony.

Certainly the decisions of a state legislature cannot be challenged under the antitrust laws. Parker v. Brown, 317 U.S. 341 (1943). Indeed, even if those decisions are in fact anticompetitive, they are nevertheless valid. *Id.* However, that legislative determination does not prevent a court, called upon to evaluate substantively the competitive effect of an effort to circumvent the legislature's decision, from making an independent examination of the operation in the market place of that decision. When a holding company is formed legitimately under the laws of a state and embarks upon a program which legally circumvents that legislative determination, the legislature's decision is not the central core of the inquiry. Rather, its operation in the market and the actual impact of the circumvention in the market are of primary concern. An adequate assessment of the reasonableness of a particular activity requires a factual determination of the competitive effects of all relevant market factors. See discussion note 202 *infra*. Where a state law constitutes such a factor, the court must evaluate the challenged restraint in the context of that law.

180. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118-19 (1975).

181. *Id.* at 119-20.

182. *Id.* at 118-20.

enacted, has generally been motivated by the belief that the prohibition would have beneficial competitive results.[183] The argument usually given in support of the competitive benefit to be derived from restrictions on branching is that permitting free branching would increase concentration and thus reduce competition.[184] Since branch systems have the capacity to realize economies of scale[185] that unit banks are incapable of realizing, the argument goes, direct competition between branch and unit banks would tend to drive the unit competitor out of the market.[186] The result would necessarily be the reduction of competition over a period of time[187] and an increase in concentration, placing greater market power in the hands of fewer firms.[188] These claims, if accurate, would create a substantial competitive justification for branching restrictions.

As a practical matter, however, the claims are not borne out in fact.[189] On the contrary, branch banking has not driven unit competitors out of the market, nor has an increase in concentration produced an anticompetitive result.[190] While it may be true that concentration has increased on a regional level, the concentration of the local market has been reduced. When a unit bank is protected from regional competition its profits tend to some extent to exhibit monopoly power;[191] its price levels and profits are generally higher than those of an unopposed branch bank.[192] Thus, the result of antibranching statutes is the creation of a number of local monopolies with attendant market power.[193] When unit banks face direct competition by branch banks, their profits do tend to diminish somewhat.[194] However, on balance the record indicates that they are quite capable of competing effectively in terms of

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183. See discussion note 92 *supra.*

184. *See* Gilbert & Longbrake, *The Effects of Branching By Financial Institutions on Competition, Productive Efficiency and Stability: An Examination of the Evidence,* 4 J. BANK RESEARCH 154, 156 (1973).

185. Economies of scale are simply a reflection of the reduction in unit cost realized as fixed costs are spread over a large number of units. *Id.*

186. *See* D. ALHADEFF, *supra* note 92, at 107. The claim that local autonomy is lost in a branch system has likewise been raised in support of exclusively unit banking. This suggestion, however, has never carried a great deal of weight. *See* G. FISCHER, *supra* note 20, at 28.

187. *See* G. FISCHER, *supra* note 20, at 28.

188. Comment, *supra* note 91, at 515.

189. *See* COMMISSION ON MONEY & CREDIT, *supra* note 93, at 165; *cf.* M. NADLER & J. BOGEN, *supra* note 23, at 40.

190. G. FISCHER, *supra* note 20, at 29; Comment, *supra* note 91, at 515. See discussion note 92 *supra.*

191. Gilbert & Longbrake, *The Effects of Branching by Financial Institutions on Competition, Productive Efficiency and Stability: An Examination of the Evidence,* 4 J. BANK RESEARCH 298, 304 (1974).

192. *Id.*

193. *See* Gilbert & Longbrake, *supra* note 191, at 307; Gilbert & Longbrake, *supra* note 184, at 161.

194. Gilbert & Longbrake, *supra* note 191, at 307.

production costs and profits.[195] Consequently, there is no empirical justification for affording unit banks protection from branch system competition.[196]

The lack of substantial procompetitive justification for prohibition of branching is compounded by the anticompetitive effect of the denial of that option. By denying banks the capacity to branch, the state creates in effect a horizontal market division,[197] insulating unit banks from regional competition.[198] Horizontal market divisions, if brought about by cooperation between competitors, have been declared illegal per se in that they tend unreasonably to create monopolistic power in an enterprise's exclusive trade area.[199] The practical effect of such divisions is to decrease competitive options while institutionalizing inefficiency and higher costs of the insulated competitor.[200] The considerations indicate, therefore, that the *Citizens & Southern* Court's classification of antibranching statutes as anticompetitive[201] is justified.

The second step in the rule of reason analysis requires an examination of the competitive impact of the cooperation of the new bank offices under the auspices of the holding company. Initially, it should be observed that if banks which have been competing against one another become affiliated by virtue of common holding company ownership, the initiation of cooperative efforts among them will have anticompetitive impact.[202] If, for example, a holding company were to acquire several

195. *Id.*
196. *Id.*
197. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118-19 (1975).
198. *See* PRESIDENT'S COMMISSION ON FINANCIAL STRUCTURE AND REGULATION, REPORT 59-63 (1971). *See also* Smith & Greenspun, *supra* note 5, at 45-46.
199. *See* United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972); United States v. Sealy, Inc., 388 U.S. 350, 357-58 (1967). *See generally* Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971).
200. "The restrictions on the various approaches to market extension have . . . probably imposed on our economy a burden of maintaining a large number of small, inefficient banks and have limited the banking structure's ability to adapt to the changing needs and growing demands of industrial expansion." Smith & Greenspun, *supra* note 5, at 45; *see* G. FISCHER, *supra* note 20, at 29; Comment, *supra* note 91, at 515. *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (because of the predominantly local nature of banking, denial of local banking options is a significant blow to competition at its most meaningful level).
201. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118 (1975). *See also* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 629-31 (1974). The Supreme Court's finding that the state statute is anticompetitive in effect does not, of course, give it the power to strike the statute down. Under the long standing rule of Parker v. Brown, 317 U.S. 341 (1943), state involvement in a restraint of trade is judicially exempted from the federal antitrust laws. *See* Note, *Federal Antitrust Policy v. State Anticompetitive Regulation: A Means Scrutiny Limit for Parker v. Brown*, 1975 UTAH L. REV. 179. See discussion note 179 *supra*.
202. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 94 (1975). The *Citizens & Southern* Court observed that the FDIC had refused to approve outright acquisition by C&S National of the C&S Bank of Tucker because the FDIC had found that the Tucker affiliation had been anticompetitive in its origin and should not be ratified by acquisition. *Id.* at 94-95. The Tucker bank had an independent existence prior to being converted by C&S Holding into an affiliate, a fact which formed the basis for the FDIC finding. The Supreme Court, however, allowed the acquisition after an

previously existing banks operating in a common service area, elimination of competition between those banks clearly would be anticompetitive.[203] The competitive benefits which may give validity to cooperation among affiliates of a holding company thus depend on a lack of prior competition among those banks.

The situation is different, however, when new banks are founded under the sponsorship of the holding company, particularly in a state having an antibranching statute. No existing banks are eliminated as competitors. Further, the introduction of a new banking office into an area has a decidedly procompetitive effect on the market as a whole. In an urban area, the bulk of the competition which exists between a small unit bank, and an affiliate of a bank holding company occurs within the primary service area, a region which comprises only a few square miles.[204] To found a new holding company affiliate in the primary service area of an independent bank has decided stimulating impact on the level of competition in the service area and on the level of competitive activity by the established bank.[205]

Moreover, even if the holding company banks do not compete against each other in the sense of offering different interest rate or service packages, establishment of new holding company banks can be regarded as enhancing the level of nonprice competition in the banking market generally and even in the holding company system itself. This increase in competition is felt most strongly in the marginal risk lending situation. Competition for the business of the marginal risk borrower is not an element of price competition. Rather, it is a function of willingness to lend, based upon an individual risk appraisal. Risk appraisal is

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intricate and somewhat bizarre analysis of the grandfather clause of the Bank Holding Company Act. *Id.* at 108-11; *see* 12 U.S.C. § 1849(b) (1970). The remaining 5 percent affiliates had been founded de novo under the sponsorship of C&S Holding, and thus had not been in competition with C&S National or with each other at any time during their existence.

A similar lack of competition prior to acquisition can be found in the situation where a bank holding company acquires an existing bank in an area of the state in which it has no other affiliate. Because of the primarily local nature of banking, the prospects for reducing preexisting competition are remote. Likewise, if the state imposes restrictions on de novo branching, there is little threat that the acquisition will foreclose competition which potentially might develop. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. United Virginia Bankshares, Inc., 347 F. Supp. 891 (E.D. Va. 1972); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971).

203. *See* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

204. Interview with David Johannsen, *supra* note 46.

205. M. NADLER & J. BOGEN, *supra* note 23, at 40-41; interview with David Johannsen, *supra* note 46. Nadler and Bogen suggest that the introduction of a holding company affiliate into the primary service area of a unit bank which has either been incapable or unwilling to adopt a vigorously competitive posture has a positive impact on the unit bank's competitive fervor. *See also* G. FISCHER, *supra* note 20, at 29; Smith & Greenspun, *supra* note 5, at 45.

a relatively subjective evaluation by the individual lending officer at the financial institution, and is quite likely to differ from lender to lender with regard to the credit worthiness of any particular borrower.[206] Thus, the availability of a new source of credit can be a significant competitive benefit.[207]

Likewise, a de facto branch by virtue of its holding company affiliation is capable of making available a wider variety of services than an unopposed unit bank, offering such services as special checking accounts, trust services, revolving lines of credit, and payroll services.[208] The competition of a holding company affiliate is likely to force a unit bank competitor to acquire such services for its customers by means of correspondent services,[209] thus increasing the scope of competition and the services available to consumers.

Although some of the same competitive advantages might be realized by the establishment of unaffiliated banking offices, the enlargement of the range of services is nearly always a function of the affiliation of a new bank with a holding company having sufficient capital and expertise to provide the service. Additionally, in many instances a new bank could not be formed at all without the aid of a holding company. Due to the capital and profitability required of banks in the chartering process, it is often impossible to secure approval of a bank apart from sponsorship by a proven financial institution.[210] Capital and management expertise can be drawn from the parent holding company or a sponsoring bank in the holding company system.[211] Moreover, holding company affiliates have demonstrated an ability to show profits in areas

206. *See* FEDERAL RESERVE BOARD, FINANCING SMALL BUSINESS 411 (1958).

207. *See* Comment, *supra* note 91, at 503. The Supreme Court has recognized the necessity for a variety of credit sources. In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court, in enjoining a bank merger, argued that the small businessman is confined to his locality in seeking to satisfy his credit needs and any reduction of available credit options increases the possibility that his credit needs will go unsatisfied. *Id.* at 369-70. Additionally, the availability of additional credit options enhances the likelihood that the marginal risk borrower will be able to satisfy his credit needs, leading to a general improvement in the level of competition in the rest of the economy. *Id.* at 370. Small businesses are generally marginal risk borrowers, *see* FEDERAL RESERVE BOARD, *supra* note 206, at 402-03, but often need loans to enhance their competitive ability in their own markets. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963); Comment, *supra* note 91, at 503.

208. Gilbert & Longbrake, *supra* note 184, at 163. *See also* Horwitz & Shull, *The Impact of Branching Banking on Bank Performance*, 2 THE NAT'L BANKING REV. 143, 161 (1964).

209. Gilbert & Longbrake, *supra* note 184, at 163.

210. *See* 12 U.S.C. § 51 (1970); Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 BANKING L.J. 921 (1957). In *Citizens & Southern* the record indicated that other banking organizations had been unsuccessful in attempting to launch new banks in the areas served by the affiliates. It was only through the assurance of the managerial and financial backing of the C&S system that state and federal agencies had agreed to charter the affiliates. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 111 (1975).

211. *See* 422 U.S. at 119.

where a unit bank would not be a profitable venture.[212] Under such circumstances, a holding company affiliate may be the only realistic way of obtaining the benefits of augmented banking options.

In *Citizens & Southern* the Supreme Court found that the creation of new banks in the Atlanta suburbs by C&S Holding had operated to improve competition in those areas.[213] While noting that the mere sponsorship of an independently owned entity could not be considered a justification for restraining trade between the two firms, it held that in the face of a rigid antibranching statute with its attendant anticompetitive effects, the overall impact of the C&S system's procedure had increased the level of competition.[214] In applying the rule of reason to the facts of the case, the Court found that the purpose of the activity, to circumvent an anticompetitive law, was legitimate and that the effect was to increase competition in the banking industry in Atlanta. It thus constituted a reasonable restraint within the meaning of the Sherman Act.[215]

Similarly, if a group of shareholders established a new bank to act as a branch of a bank which they already controlled, the same competitive benefits of de facto branching are realized,[216] and the result should

212. This phenomenon is due in part to the holding company affiliate's ability to rely on the other banks in the system to provide needed services which a unit bank would have to purchase from a correspondent. *See* M. NADLER & J. BOGEN, *supra* note 23, at 39. More importantly, the holding company framework guarantees the productive use of available deposit funds by providing for participation by the affiliate in the loans of other banks in the system. This generally operates to create higher loan to deposit ratios in holding company affiliates than in unit banks. Interview with David Johannsen, *supra* note 46. *See also* Smith & Greenspun, *supra* note 5, at 42.

213. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 119 (1975).

214. *Id.* The government argued that to require the banks in the C&S system to reduce the scope of their cooperative efforts to that of a normal correspondent bank relationship would have been just as procompetitive and would have actually fostered additional competition in that the banks would have competed among themselves. *See id.* The Court found this contention unpersuasive, finding rather that the inducement to organize the affiliates came from the desire to absorb them when Georgia law permitted it. The Court implied that C&S National would not have chosen to establish these affiliates if the only prospect was the creation of additional competitors from whom it could only obtain fees for correspondent services. See discussion note 36 *supra*. As a practical matter, this argument defies proof, relying as it does on the testimony of the officers of the holding company as to their perception of the profitable allocation of their resources. However, the rule of reason does not require demonstration that the restraint is the least restrictive alternative where the actual method used promotes competition. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622-23 (1953). All that is required is that the combination have a legitimate purpose and have a net positive impact on the level of competition. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). Since the public benefit produced by the activity of a holding company outweighs the anticompetitive effect of the restraint of competition between the banks, the rule of reason was satisfied in *Citizens & Southern*. Further, since the ability of the holding company to direct the course of the affiliates is the inducement that leads to its formation, a more procompetitive operation probably could not be realized. See text accompanying notes 169-77 *supra*.

215. See text accompanying notes 169-77 *supra*.

216. *See* United States v. TransTexas Bancorporation, Inc., 1972 Trade Cas. ¶ 74,257 (W.D. Tex. 1972), *aff'd per curiam*, 412 U.S. 946 (1973). See text accompanying notes 41-45 *supra*.

be the same. Quite a different situation is presented, however, by a holding company system such as that of Western Bancorporation, in which several multibranch banks operating in the same market are owned and controlled by the holding company, particularly where such banks are held out as competitors.[217] In such a situation, cooperation between the affiliates does reduce competition without apparent competitive benefits, and thus may be found unreasonable.

The factors that justify extensive interbank cooperation under the rule of reason are the presence of an antibranching statute and the creation of new banks under the auspices of the holding company. When these two conditions are met, it is justifiable to restrain substantially the competition that might otherwise exist between the newly formed bank and the other affiliates of the holding company. Forcing an increase in the vigor of the competition of the banks already operating in the service area of the new bank and providing additional sources of credit combine to make the net effect of the establishment of the new bank procompetitive, which is all the rule of reason requires.

CONCLUSION

The Supreme Court's emerging view that the objective of the antitrust laws is not served by a mechanical application of mathematical formulas and catch phrases is bringing about a new approach to antitrust enforcement. The Court now looks at a cooperative activity in the context of the industry involved, and closely examines its impact on that industry and on the market. Antitrust evaluation in the banking industry cannot be divorced realistically from the consideration of federal and state regulation. Under the rule of reason, an attempt to circumvent a state antibranching statute will justify the creation of de facto branch systems to the extent that a competitive benefit can be shown. In light of the anticompetitive nature of bank regulation, this does not contravene the policy of the Sherman Act. Rather, it offers an inducement to all components of the banking industry to compete more vigorously in the regional market. The net result is an increase in competition and a benefit to the consumer.

217. See text accompanying notes 46-48 *supra*.