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THE BANK HOLDING COMPANY ACT'S ANTI-TYING PROVISION: 35 YEARS LATER

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During the 35 years since Congress enacted the anti-tying provision of the Bank Holding Company Act, courts have wrestled with the exact meaning of its terms; litigants have sparred over the breadth of its coverage; law review commentators have written about it extensively; and the federal regulatory agencies have labored to define its scope, including the latest "Interpretation" by the Federal Reserve. The anti-tying provision's author discusses these issues and more, and provides a sense of what might be expected in the years to come as this highly-sensitive sector of economic regulation continues to evolve. In the final analysis, he asks and answers the questions: has the anti-tying provision reduced bank misconduct, and have consumers of financial services truly benefited?

In 1970, Congress enacted section 106 of the Bank Holding Company Act Amendments of 1970 ("BHCA" or "Act"), the anti-tying provision, which is codified at 12 U.S.C. § 1972. The statute was designed to prevent banks, whether large or small, state or federal, from imposing anticompetitive conditions on their customers. Tying, of course, is an antitrust violation, but the Sherman and Clayton Acts did not adequately protect borrowers from being required to accept conditions to loans issued by banks; and section 106 was specifically designed to apply to and remedy such bank misconduct. Although this legislation is still relatively new, there are some clear guidelines as to how much protection the statute affords to bank customers, and how one must proceed in order to prevail.

This article[1] includes a comprehensive analysis of the statute and discusses the cases that have interpreted it — in both this article's text and its

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extensive footnotes. First, the history of the statute and its practical effect are addressed. Second, the article examines the language of the statute and how various courts have interpreted that language. Third, a guide is presented with respect to how to make a claim under the statute; and such issues as standing, elements that must be proven, and proper pleading are discussed. Fourth, the bank regulatory agencies that administer the provision, as well as their interrelationship, are discussed. Fifth, the case law interpreting the statute is analyzed, and those acts by a bank that are deemed to be illegal tying arrangements are distinguished from those acts that are not. Sixth, the article looks at recovery and the various remedies that are available. Seventh, the anti-tying provision is compared with other statutes that prohibit tying arrangements, and alternative causes of action to the anti-tying provision are discussed. Finally, the article looks to the future use of the anti-tying provision, how courts may decide issues that arise under the statute, and whether the anti-tying provision continues to be an effective means of protecting consumers of financial services.

HISTORY OF THE STATUTE AND ITS PRACTICAL EFFECT

In 1956, Congress passed the Bank Holding Company Act, which governed the formation and powers of bank holding companies. Congress' goal was to "prevent a small number of powerful banks from dominating com-

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merce and to ensure a separation of economic power between banking and commerce."[2] Amendments to the statute were enacted in 1970, including section 106, the anti-tying provision.[3] Other general antitrust statutes prohibited tying arrangements, but they did not adequately address anticompetitive conduct by banks. As the United States Supreme Court has long recognized, "[t]ying agreements serve hardly any purpose beyond the suppression of competition."[4] Thus, the anti-tying provision reaches all banks, including the smaller ones, which may try to exert economic power over individuals and businesses because of their control of credit.[5]

Of course, banks are allowed to take measures to protect their loans and to safeguard the value of their investments, such as requiring security or guaranties from borrowers. The statute exempts so-called "traditional banking practices" from its *per se* illegality, and thus its purpose is not so much to limit banks' lending practices, as it is to ensure that the practices used are fair and competitive.[6] As discussed below, a majority of claims brought under the BHCA are denied. Banks still have quite a bit of leeway in fashioning loan agreements, but when a bank clearly steps over the bounds of propriety, the plaintiff is compensated with treble damages.[7]

The BHCA is designed to apply broadly to tying arrangements. Although it does not apply retroactively,[8] state courts were given concurrent jurisdiction with federal courts,[9] and the prohibitions apply to improper tying arrangements in all of their various manifestations.[10] The statute of limitations under the provision is 4 years,[11] but the statute can be tolled for fraudulent concealment.[12]

TERMS OF STATUTE

The basic anti-tying provision of 12 U.S.C. § 1972 reads as follows:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.
>
> The [Federal Reserve] Board may by regulation or order permit such exceptions to the foregoing prohibition and the prohibitions of section 1843(f)(9) and 1843(h)(2) of this title as it considers will not be contrary to the purposes of this chapter.[13]

Although the language of the provision may seem clear, there have been many cases seeking to interpret exactly what some of its terms mean.

"Bank"

A "bank" within the meaning of the statute is defined as any national bank, State bank, District bank, and any Federal branch and insured branch, and includes former savings associations.[14] The statute generally requires that the institution both accept demand deposits and make commercial loans.[15] Thus, it does not apply to mortgage companies that do not accept demand deposits;[16] and it does not apply to foreign banks *per se*.[17] Finally, the reach of the statute does not extend to existing savings associations, which are subject to parallel regulation.[18]

"Extend Credit"

The statute prohibits a bank from "extending credit" on certain conditions, but the question arises: what constitutes an extension of credit?

Clearly, making a loan qualifies as an extension of credit, but later transactions with a borrower may fall within the scope of the statute as well. In *Nordic Bank PLC v. Trend Group, Ltd.*,[19] the court found that a bank's forbearance from collecting on an outstanding loan constituted an extension of credit within the meaning of the statute.[20] The court noted that neither the language of the statute nor the legislative history defines "extension of credit."[21]

The court decided that, from a policy standpoint, "[a] particular practice should be considered an 'extension of credit' if it manifests the improper use of economic leverage that the Act seeks to prevent. A bank's forbearance on the collection of a loan is such a practice."[22] Also, since the bank is granting the customer more time to pay an amount of money, a forbearance is an extension of credit in the technical sense.[23]

In *Amerifirst Properties, Inc. v. FDIC*,[24] the court addressed whether an agreement to loan money could fall within the statute if the loan was never actually made.[25] The court held that such an agreement was within the scope of the statute, relying on case law[26] and legislative history.[27] The court focused on the language of the Senate Report, specifically use of the word "availability."[28] Since the statute governed the availability of credit, it should not matter whether the loan was consummated.[29]

"Service"

The term "service" is subject to much discussion. For example, in *Tose v. First Penn. Bank*,[30] the court acknowledged that the relinquishment of control of a corporation was a service, even though it was not a violation of section 1972 since it was for security purposes.[31] In *Swerdloff v. Miami Nat'l Bank*, the transfer of stock was deemed a service, and the bank was found to have violated section 1972(1)(C) "simply by demanding" the stock transfer.[32]

On the other hand, it has been held that employment is not a "service" within the statute. In *Hargus v. First Nat'l Bank in Port Lavaca,*[33] the court examined whether a bank violated the anti-tying provision when it fired an employee for securing a home loan from the bank's competitor.[34] Hargus brought suit under 12 U.S.C. § 1972(1)(E), which prohibits a bank from extending credit or furnishing *any service* on the condition or requirement that "the customer shall not obtain some other credit, property, or service from a competitor of such bank…."[35] The court refused to find that employing Hargus constituted furnishing a service to her:

> Banking services would normally include acts performed in connection with such things as "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt;…receiving deposits;…buying and selling exchange, coin, and bullion;…loaning money on personal security; and…obtaining, issuing, and circulating notes."…It would strain common understanding to the breaking point to hold that employing the Plaintiff constituted the furnishing of a "service" to her by the bank.[36]

The court also tried to draw a distinction between employees as customers and employees as employees, as a basis for denying relief to the plaintiff.[37]

REQUIREMENTS TO SUE

Standing/Injury

In order to bring a claim under the BHCA, a plaintiff must have standing. Section 1975 provides that anyone injured under section 1972 may sue, but the language is sufficiently broad that plaintiffs and courts are not always certain as to when a suit may be brought. There are two principal issues involved with a standing argument: whether the plaintiff was, or is required to be, a "customer" of the bank; and whether the plaintiff suffered a "direct injury" from the bank's tying arrangement.

Section 1975 states:

> *Any person who is injured in his business or his property* by reason of anything forbidden in 1972 of this Title may sue therefor in any district

> court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of damages sustained by him and the cost of suit including a reasonable attorney's fee.[38]

As the court opined in *Amerifirst Properties, Inc.*:

> [*Campbell v. Wells Fargo Bank, N.A.*]…addressed the issue of whether *non-customers* of a bank have standing to sue a bank for tying violations. We concluded in *Campbell* that although non-customers do not lack standing to sue per se, the plaintiff's injuries in *Campbell* were not a direct consequence of the tying arrangement and that, therefore, the plaintiff lacked standing. *Campbell*, however, does *not* hold that bank *customers* must show that a "direct consequence" exists between its injury and the tying arrangement.[39]

The Fifth Circuit is correct; a plaintiff will have standing to sue if he is a customer of the bank; and non-customers may bring suit as well, as a plain reading of the statute makes clear.

1. What is a customer?

A "customer" is one who deals directly with the bank,[40] perhaps is in privity of contract with the bank, or contracts for a loan.[41] As a practical matter, shareholders of a corporation may be "customers" if they guarantee a loan, even though they maintain no accounts at the bank and the loan is not taken out in their names.[42] However, sureties or guarantors, who are not shareholders, cannot rely on the anti-tying provision as "customers."[43]

2. What is a direct injury?

The more troublesome question is what is a direct injury and when is it required.[44] At a minimum, there must be some sort of injury or loss to the plaintiff other than just being subject to an illegal arrangement.[45] For example, it was enough that a plaintiff alleged loss or harm when his building became unmarketable due to a financing condition that the plaintiff sell a portion of his building to the bank.[46]

In many cases though, courts have found that the injury to the plaintiff was too "derivative" and not direct enough to permit recovery. One court opined that a direct injury is "one that is so integral an aspect of the alleged activity that there is no doubt but that the plaintiffs' loss was precisely 'the type of loss that the claimed violations…would be likely to cause.'"[47]

Most commonly, an investor will bring suit alleging that it lost an investment due to an illegal tying arrangement. However, courts have rejected such claims, holding that the loss is not sufficiently direct.[48] Claims for lost commissions have also been held too derivative to recover.[49] Courts find that there is a "point at which the wrongdoer should not be held liable," and thus a court must "evaluate the plaintiffs' harm, the alleged wrongdoing by the defendants, and the relationship between them."[50] One court, however, found that a shareholder of a corporation suffered an independent and direct injury when the sale of his stock was for less than the fair market value due to an illegal tying arrangement.[51] This is the better view.

The Fifth Circuit has most fully developed the standing issue, and has granted standing to a plaintiff who is *either* a customer or has suffered direct injury as a result of the bank's actions.[52] The Seventh Circuit, however, seems to require a direct injury, regardless of whether the plaintiff was a customer, making the customer inquiry irrelevant.[53] The better view is that of the Fifth Circuit, since it is in accord with the purpose and history of the anti-tying provision. Anyone who deals with a bank will be subject to its economic power, and thus stands a chance of being the victim of abuses of that power.

General Elements

A plaintiff who brings suit under the anti-tying provision has the burden of showing three things: first, that there was an actual tying arrangement; second, that the practice is "unusual" in the banking industry (a requirement that is *not* contained in section 106); and third, that a benefit accrued to the bank.[54] The plaintiff does not need to show that the bank enjoyed economic power, which sets the anti-tying provision apart from other antitrust statutes.[55]

1. Actual tying arrangement

To state a claim under 12 U.S.C. § 1972, there must be an illegal tying arrangement.[56] This requires that a bank condition its extension of credit, lease or sale of property, or the furnishing of any service, on some other credit, property, or service being obtained or provided by the customer, or that the bank require the customer not to do business with a competitor.[57] In other words, the bank's conduct must fall within the description of what is proscribed in section 1972(1)(A), (B), (C), (D), or (E).[58] An arrangement may be inferred from the totality of the circumstances.[59]

The plaintiff must show the actual imposition of a tying arrangement, but the tie does not need to be consummated nor does the bank ever have to make the loan.[60] Mere negotiation that suggests a tying arrangement does not constitute a violation,[61] but once the bank's conduct moves beyond negotiation and becomes more concrete, it may be liable for treble damages.

2. Unusual

The "unusual" requirement basically means that the arrangement does not involve so-called "traditional banking practices" (and nothing more), which would be exempt from section 1972.[62] Traditional banking practices are those practices that are normally and customarily undertaken by banks to protect their loans and to safeguard the value of their investments, or those practices specifically exempted in section 1972(1).[63] For example, in *Gulf States Land & Dev., Inc. v. Premier Bank, N.A.,*[64] the court held that requiring a debtor to restructure prior debts was not an unusual banking practice.[65] Likewise, in *Bieber v. State Bank of Terry,*[66] the court found that requiring personal guaranties for a loan was not an unusual banking practice.[67]

Courts appear to be tolerant of conditions imposed in order to protect credit,[68] perhaps overly so. Also, the Federal Reserve Board ("Fed" or "Board") has the power by regulation or order to permit such exceptions to the prohibitions of the anti-tying provision "as it considers will not be contrary to the purposes of [the statute]."[69] Regrettably, the Fed ignored the statutory language and legislative history of the anti-tying provision recently, and used its regulatory authority to extend the exception to include "traditional bank products" offered by an affiliate of the bank.[70]

3. Benefit to the bank

The bank must receive some benefit from the transaction in order for it to be liable. Generally, though, a benefit to the bank is implied.[71] Since bank tying arrangements are anticompetitive by nature,[72] the bank receives a benefit in that it has an unfair advantage over its competition.

Is Coercion Required?

Under the BHCA, coercion is not an element. Other antitrust statutes, however, do require a showing of coercion,[73] and thus may lead to some confusion.[74]

In *Dibidale of La., Inc. v. American Bank & Trust Co.*,[75] the majority held that coercion was not an element of a tying claim under 12 U.S.C. § 1972.[76] The court examined the "condition or requirement" language of the statute and decided that it did not entail coercion.[77] *Dibidale* was decided correctly, especially in view of Congress' concern with the abuse of banks' powers, whether overt or not.[78]

The Fed, however, disagrees with the outcome in *Dibidale*.[79] It admits that the "[p]rohibited coercive actions may be explicit or implicit," but argues that if a customer voluntarily seeks and obtains multiple products, then the resulting arrangement does not constitute illegal tying.[80] Certainly, any requirement of coercion is inconsistent with and more stringent than what Congress intended, and must be rejected.

"Anticompetitive Effects"

There is a dispute as to whether a plaintiff must show "anticompetitive effects." Some courts have analogized the anti-tying provision to other antitrust statutes, such as the Sherman Act[81] and the Clayton Act.[82] Under those statutes, a plaintiff must show anticompetitive effects, and thus some courts mistakenly believe it is necessary under the BHCA.[83] However, the anti-tying provision is unique and unlike other antitrust statutes.[84] Most notably, it applies specifically to banks and bank misconduct; and therefore, it should be treated differently, as Congress intended. In fact, Congress would not have enacted a statute to prohibit bank tying arrangements if such conduct was addressed already, much less addressed adequately by other antitrust statutes.[85]

The language of the BHCA does not make reference to any requirement of anticompetitive effects; and indeed, such a requirement was not included even though some senators wanted to insert inclusive language.[86] Courts have recognized this and have held that a showing of anticompetitive effects is not necessary, which is the better view.[87]

It may be that some courts have confused the issues of "traditional banking practices" and security with the question of whether anticompetitive effects must be shown.[88] For example, as the court in *Davis v. First Nat'l Bank of Westville* stated, "condemnation of banking practices that have no anticompetitive effect but are aimed at protecting the bank's investment would run directly contrary to section 1972's legislative purpose and would render coincidental the statute's concern with arrangements traditionally targeted by the antitrust laws."[89]

Such language seems to indicate a belief that conduct is not anticompetitive, and thus not prohibited, if it helps a bank protect its investments.[90] This reasoning is not sound because, by definition, a tying arrangement will help the bank but may be patently unfair to its customer. The issue of whether the bank has created a valid security measure is distinct from the question of whether it is anticompetitive, and the latter requirement is irrelevant as far as Congress is concerned. It is inherently anticompetitive.

Proper Pleading

When drafting the complaint, a plaintiff must allege enough facts that, if true, would prove the three elements of the anti-tying claim.[91] The issue that arises is how detailed the factual allegations must be.

In *Swerdloff,*[92] the defendant bank argued that dismissal of the complaint should be affirmed, "because there was no allegation that the Swerdloffs were required to furnish *the bank* with a service not related to or usually provided in connection with a loan.…[T]he failure of plaintiffs to make any allegation that sale of 51% of the shares of Standard Container to Arrow Paper would benefit the bank renders the complaint fatally defective."[93]

The court held, however, that "such a specific allegation at the pleading stage of the case [was] unnecessary."[94] The court properly emphasized a concern with substance rather than form in upholding the complaint so that the purposes of the Act would be fulfilled.

However, the court in *Nesglo, Inc. v. Chase Manhattan Bank, N.A.*[95] required specific factual allegations. The court dismissed plaintiff's BHCA claims because the pleadings did not "state facts sufficient to fit within the prohibited conduct in section 1972."[96] The complaint included allegations that the bank required the plaintiff to refrain from doing business with other banks and that it hold deposits with Chase, but such conduct was deemed customary, and thus not in violation of the BHCA.[97] Other allegations of "illegal or outrageous conduct" were insufficient to maintain the suit.[98]

REGULATORY AGENCIES

At least four regulatory agencies including the Fed oversee the activities of banks, their holding companies, and other related depository institutions. While each type of depository institution has a "primary regulator," the nation's "dual banking" system[99] allows concurrent jurisdiction among the different regulatory agencies.[100]

With respect to the anti-tying provision, the Fed takes the preeminent role in relation to the other financial institution regulatory agencies, which reflects that fact that it was considered the least biased (in favor of banks) of the regulatory agencies when section 106 was enacted. Also, the Fed fulfills the role of "umbrella supervisor" and focuses mainly on the goal of "safety and soundness" in the banking industry.[101] In addition to directly supervising Fed-member banks[102] and bank holding companies,[103] the Fed also retains the legal authority to supervise banks overall,[104] including financial holding companies created under the Gramm-Leach-Bliley Act of 1999.[105]

Such general management is not intended to replicate the efforts of other bank regulatory agencies, *inter alia*, because the "clear expectation is that the Federal Reserve will rely on the work of the FDIC and OCC with regard to the banks they supervise."[106] The Fed also directs the promulgation and application of various statutes controlling banks and their activities, including interpretations of the BHCA.[107] Owing to the fact that the Fed was considered to be the least biased (in favor of banks) of the regulatory agencies, it was given discretion to grant such exceptions to the anti-tying provision "as it considers will not be contrary to the purposes of [the statute]."[108] However, Congress never envisioned that the Fed would use such authority to emasculate the anti-tying provision's potency.

The Board may terminate any granted exception if it later finds that the arrangement is resulting in "anti-competitive practices," which in effect amount to an illegal tying arrangement.[109] The Fed's interpretations and regulatory pronouncements generally entail the concurrence of the Treasury Department and the other regulatory agencies;[110] and the Fed only has limited authority to take action against a "functionally regulated subsidiary" of a bank holding company.[111] Finally, pursuant their far-reaching powers, the Fed and its sister agencies may institute cease-and-desist proceedings with respect to violations of the anti-tying provision, and seek civil money and criminal penalties.[112]

The Office of the Comptroller of the Currency ("OCC") is the administrator of and responsible for supervising national banks and their subsidiaries.[113] As a general regulatory matter, the OCC has the same authority to regulate and supervise national banks within its jurisdiction, as the Office of Thrift Supervision ("OTS") has to manage and control savings associations; and both are offices in the Department of the Treasury.[114] The OCC ensures that national banks do not engage in illegal tying arrangements and other similar activities;[115] it issues "OCC Bulletins" and interpretive letters as to the validity of such actions; and it participates with the Fed and the other agencies in promulgating rules and regulations, including those relating to the BHCA.[116]

The Federal Deposit Insurance Corporation ("FDIC") has both regulatory and insurance functions; and it oversees State nonmember banks, savings banks, and mutual savings banks.[117] Also, the FDIC was established "to insure…the deposits of all banks and savings associations."[118] Courts have characterized the FDIC as a "mutual insurance company set up by the government, to be supported by assessments levied upon insured banks."[119] A Board of Directors, including the Comptroller of the Currency and the Director of the OTS, manages the FDIC.[120] While it generally insures deposits in all banks and savings associations,[121] the FDIC is limited to the supervision and regulation of State nonmember banks in the anti-tying context, in cooperation with the other regulatory agencies.[122]

The OTS is the primary regulator of savings associations, the deposits of which are insured by the FDIC.[123] The OTS regulates the conduct of such savings associations, including Federal and State savings associations as well as non-bank corporations closely resembling savings associations.[124] As noted above, parallel to the OCC's authority over national banks, the OTS supervises and promulgates regulations pertaining to the operations of insured savings associations,[125] and it enforces and interprets the provisions of the Home Owners' Loan Act, the savings association analogue to the BHCA.[126]

CASES INTERPRETING SECTION 1972

Many lawsuits have been brought under the BHCA, but the majority of transactions are not considered illegal tying arrangements.[127]

Acts Held Not To Be Tying

The anti-tying provision does not prohibit all conditions made in connection with loans. "Traditional banking practices" are permitted, as are reasonable means of securing a bank's investments. The traditional banking practice must be a "loan, discount, deposit, or trust service."[128] For example, being required to pay back a loan that violates section 1972 does not give rise to an injury that is actionable.[129] Similarly, it is not a violation to require a debtor to replace its original debt with a new loan from another bank owned by the same parent company.[130] Excluding certain deposits from a combined-balance discount program likewise does not violate section 1972.[131]

General security measures, such as requiring new collateral or letters of credit, are not prohibited.[132] Other conditions which have been permitted include: requiring the debtor to maintain deposits with the lender;[133] requiring the alteration of certain obligations from partial to full recourse, and the provision of releases;[134] requiring debts to be restructured;[135] requiring debtors to waive certain defenses;[136] requiring an increase in the interest rate, maintenance of balances, the payment of a fee based on a bank's prime rate shortfall, or increased finance charges;[137] and requiring personal guaranties.[138]

Measures that further the productive use of a business or property may be required without violating section 1972. For example, a bank may require a borrower to present proof of his intended use of the loan and to take steps toward achieving such purpose.[139] Banks may also require a borrower to complete improvements on the mortgaged property.[140] A lending bank may control business debt management,[141] and banks may require participation agreements.[142]

Courts have also allowed banks to require borrowers to relinquish control to or take advice from third parties. In *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*,[143] *Nordic Bank PLC,*[144] and *Tose,*[145] the borrowers were required to place financial control of their businesses in new hands; and in each case, the courts upheld such a requirement.[146] Likewise, courts have allowed banks to require debtors to hire outside business advisors and accountants.[147] One court even let the bank control the debtor's checking account and other corporate affairs, including a veto power over spending.[148] If the services required by the bank are provided free of charge, courts have held that they are not prohibited by section 1972, since there is no loss to the borrower.[149]

Other conditions imposed by banks that have been held to be permissible include: requiring employees to do all their banking with the employer bank;[150] requiring a debtor to execute an option to buy property;[151] and requiring the debtor to pay legal and consulting fees.[152] Also, courts have not found violations of section 1972 when the evidence was insufficient to support claims for tying.[153]

Acts Held To Be Tying

While there are a limited number of cases where conduct has been held to violate the anti-tying provision, the list of "plaintiff-friendly" cases that have been decided is growing.[154]

It is uncertain, however, whether the relative paucity of favorable decisions for plaintiffs is due to:

(1) a bias in favor of banks and other financial institutions on the part of their regulators as well as the courts;

(2) unsubstantiated claims;

(3) unreported settlements between the litigants;

(4) the lack of *written* documentary evidence of orally-negotiated tying con-

ditions, as well as a general reluctance to sue owing to the lack of such evidence;

(5) uncertainty over the legality of the transactions;

(6) the potentially adverse consequences of suing, for a company's access to credit and for the careers of its management; or

(7) a combination of these and other factors.[155]

In *Nordic Bank PLC*,[156] the bank conditioned the extension of credit on the requirement that the borrower guarantee several loans for which it was not already responsible. The court found that a claim had been stated under the anti-tying provision.[157] In *Sharkey v. Security Bank & Trust Co.,*[158] the court held that section 1972 was violated when the bank required a borrower to buy real estate owned by the bank.[159]

In *Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n,*[160] the plaintiff was not a party to an allegedly illegal loan, but successor in interest to a mortgagee that also lent money to the debtor. Plaintiff contended that the defendant violated the anti-tying provision's analogue for tying arrangements involving savings associations, when it required the debtor to improve a parcel of real estate by constructing two motels on it and to convey them to the savings and loan free of all encumbrances.

The issue on appeal was whether the plaintiff had standing, and the court held that it alleged sufficient facts to state a claim for injunctive relief but not to recover damages, because its injury was not a direct consequence of the tie-in violation.[161] One may infer that the court believed the savings and loan's conduct was in fact an illegal tying arrangement because otherwise it would have dismissed the tying claims in their entirety.[162]

An illegal tying arrangement may be found to exist where a borrower is required to accept a loan from a related bank before the bank will grant its loan;[163] a borrower is required to hire a contractor, which is a borrower from a bank affiliated with the lending bank, as a condition to the extension of credit;[164] a bank denies additional financing upon a borrower's refusal to assume the bank's non-performing loan;[165] a bank refuses to provide further financing unless the borrower agrees to buy bank property, after allowing one or more draws on the loan;[166] a bank conditions a loan extension upon the transfer of a principal payment on one loan to pay interest on another loan, and on participation in the loan by other lenders;[167] and a bank refuses to extend additional funds unless shareholders-guarantors of the bank's loan sell all or a portion of the corporation's stock to another customer of the bank.[168]

Also, an illegal tying arrangement may be found where a bank makes a loan to permit a borrower to purchase stock in a business, but requires the business to sell a substantial share of its commercial paper to the bank, and to employ a person designated by the bank to ensure compliance with the tying arrangement;[169] a bank requires a borrower to participate in the bank's bad loans to an unrelated customer (e.g., by requiring him to assist in the repossession of property securing those loans);[170] a bank requires that a borrower's family member settle an unrelated lawsuit against the bank as a prerequisite to lending the borrower money to purchase the bank's property;[171] a bank informs a borrower that unless he conducts all of his banking through the bank, it will refuse to renew an outstanding loan and will demand repayment, and it employs "oppressive" lending tactics to force the borrower to conduct his banking business exclusively through the bank, including freezing previously available credit facilities when the borrower transfers some of his banking business to a competitor;[172] a bank conditions financing on the borrower's agreement to grant an option to purchase an ownership interest in property that the borrower is purchasing;[173] and a bank conditions a loan on the borrower's purchase of bank property.[174]

RECOVERY AND THE AVAILABLE REMEDIES

Persons Liable

The anti-tying provision has been mistakenly interpreted to apply only to banks and not to individual defendants, arguably making it unproductive to sue natural persons for violations. For example, the court in *Tose* stated: "[Section] 1972(2)(F) expressly forbids certain individual conduct, which leads us to infer that Congress deliberately limited section 1972(1) to banks."[175] Nowhere in the statute's original legislative history is there any basis for such an inference.

A natural person may be liable for civil money penalties if he falls within the definition of an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u).[176] The civil money penalties, though, are an enforcement tool of the government;[177] private parties cannot seek such penalties from defendants.

Punitive Damages

In *Hometowne Builders, Inc. v. Atlantic Nat'l Bank,*[178] a court addressed the issue of whether punitive damages were recoverable under 12 U.S.C. § 1972. It held that there was no implied right to punitive damages, finding that "[t]he combination of treble damages and punitive damages is necessarily duplicative as a punitive element is inherent in the trebling of actual damages."[179]

It remains to be seen whether this decision will influence other courts when faced with the issue; however, the anti-tying provision's legislative history does not preclude the awarding of both punitive and treble damages. Also, punitive damages may further public policy goals inherent in the statute, such as thwarting abusive tying arrangements.

Injunctions

Although most plaintiffs seek treble damages, a plaintiff may also seek injunctive relief to prevent a tying violation.[180] As the court in *Sundance Land Corp.* stated, "[p]arties who cannot recover damages may nevertheless obtain injunctive relief," because the standing requirements are less stringent.[181] The difficulty with getting an injunction, however, is that the plaintiff must show that denial of the relief would cause immediate, irreparable injury.[182] Often, a bank's illegal conduct is in the past and the plaintiff just wants to collect damages; and thus, injunctions can be effectively used only in a limited number of situations.[183]

ALTERNATIVE REMEDIES

Antitrust Statutes

The anti-tying provision was specially designed to address Congress' concerns with the banking industry, but there are other antitrust statutes that can be used against banks and other commercial enterprises.[184]

The Sherman Act was enacted in 1890 to prevent all types of antitrust violations, from monopolies to price-fixing to tying. Section 1, which prohibits all contracts, combinations and conspiracies in restraint of trade or commerce, is codified at 15 U.S.C. § 1.[185] Section 3 of the Clayton Act (15 U.S.C. § 14), enacted in 1914, also prohibits tying arrangements; however, it applies only to the sale or lease of goods, not services.[186] The Federal Trade Commission Act, section 5 (15 U.S.C. § 45), also enacted in 1914, has been used against antitrust violators,[187] but it is much broader, encompassing all forms of unfair competition.[188]

These antitrust statutes are related to the BHCA, although they are different in many ways.[189] Nonetheless, they can be used in conjunction with the anti-tying provision to address antitrust violations by banks and other financial institutions.

To establish a *per se* illegal tying arrangement under the Sherman Act, a plaintiff must demonstrate (1) two separate products or services, with the sale of one (the tying product) conditioned on the purchase of the other (the tied product); (2) a seller having sufficient economic power with respect to the tying product to appreciably restrain competition in the market for the tied product; and (3) a tie-in affecting a "not insubstantial" amount of interstate commerce.[190] There are circumstances, however, when two products may be sold together; for example, when there is a business justification for doing so, such as quality control.[191]

While the other antitrust statutes can be used against banks, it is easier to prevail on an anti-tying provision claim because there are fewer elements to prove.[192] A plaintiff could lose under one or more statutes though, for different reasons. In both *Clark v. United Bank of Denver Nat'l Ass'n*[193] and *Pappas v. NCNB Nat'l Bank of N. Carolina,*[194] the plaintiffs lost on Sherman Act claims for failing to prove sufficient market power of the defendants, and lost on BHCA claims because the conduct fell within the scope of "appropriate traditional banking practices."[195]

While these statutes can be pled in the alternative, a plaintiff must be able to prove the elements of each claim asserted.

HOLA

The Home Owners' Loan Act of 1933,[196] as amended by the Garn-St Germain Depository Institutions Act of 1982, contains an anti-tying provision that is essentially the same as that in the BHCA.[197]

A difference between the BHCA and the HOLA is that, in section 1972(1), the paragraphs are connected by the word "or"; whereas, in HOLA, they are connected by "and."[198] In *Bruce v. First Fed. Sav. & Loan Ass'n. of Conroe, Inc.,*[199] the court carefully examined whether the HOLA provision should be read in the conjunctive or the disjunctive.[200] The court held that it should be read in the disjunctive, like the BHCA provision, in order to effectuate Congress' intent;[201] and this is the proper interpretation of the statute.

The other difference is that the BHCA applies to banks, and HOLA applies to savings associations.[202] Both statutes would not be used in the same case unless there were two types of defendants; however, courts properly look to precedents under one statute to interpret the other. For example, in *Sundance Land Corp.*,[203] the court was faced with the question of whether the plaintiff had standing to bring a claim under HOLA, and looked to cases interpreting the standing requirements under the BHCA in making its decision.[204] Likewise, courts have looked to BHCA cases to determine the elements required for a HOLA claim.[205]

RICO

Plaintiffs have alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[206] in conjunction with violations of the anti-tying provision, both of which were enacted in 1970. To establish a RICO violation, the plaintiff must prove: (1) the defendant (a person defined in 18 U.S.C. § 1961(3)), (2) through the commission of two or more acts, (3) constituting a "pattern" (4) of "racketeering activity," (5) directly or indirectly invested in, or maintained an interest in, or participated in (6) an "enterprise," (7) the activities of which affected interstate or foreign commerce, (8) and resulted in injury to the plaintiff's business or property by reason of a violation of 18 U.S.C. § 1962.[207]

Generally, RICO claims made in conjunction with BHCA claims have not succeeded. In some cases, the claims fail because the pleadings are insufficient or defective.[208] In other instances, they fail because the plaintiff cannot prove all of the requisite elements. For example, in *Pappas*[209] and *Iden v. Adrian Buckhannon Bank*,[210] the courts held that the plaintiffs did not show a pattern of racketeering activity.[211] To do so, a plaintiff must show that the defendant committed two or more "predicate acts" in furtherance of its scheme.[212] Banks that do not regularly engage in illegal acts, therefore, may not be liable under RICO because no pattern of racketeering activity can be established.

When the defendant is a bank, another element that raises potential problems is the requirement of a distinct person and an enterprise. In *Rae v. Union Bank*,[213] the court affirmed the dismissal of a RICO claim because the defendant bank was also alleged to be the "enterprise."[214] Generally, the enterprise must be "different from, not the same as or part of, the person whose behavior the [A]ct was designed to prohibit."[215] In *Pappas*, however, the court found that such a requirement was fulfilled because the bank and the holding company were "separate and distinct for the purposes of the RICO Act."[216]

In *Sundance Land Corp.*,[217] the court held that because the plaintiff had not alleged a law relating to usury, its RICO claim was without merit.[218] The court added: "[T]he legislative history of RICO strongly suggests that section 1962 was not directed toward banking institutions."[219] Other cases, however, suggest that RICO may be used in conjunction with the BHCA. In *Nordic Bank PLC*,[220] the court "deem[ed] withdrawn the defendants' motion to dismiss" the plaintiffs' RICO claim, but the court did not reach the merits of such a claim.[221] Thus, it is unclear whether RICO is an effective means of recovering for bank misconduct.

Common Law Causes of Action

Even if a plaintiff cannot state a claim under the anti-tying provision or other antitrust statutes, he may be able to prevail under a common law cause of action, such as fraud, breach of contract, or unfair competition.

For example, in *State Nat'l Bank of El Paso v. Farah Manufacturing Co.,* *Inc.*,[222] the plaintiff sued to recover damages caused when three banks and an insurance company assumed control of plaintiff's business. The plaintiff based its claims on fraud, economic duress, and tortious interference with business relations, and was awarded significant damages.[223]

CONCLUSION

It is debatable whether the anti-tying provision has been an effective tool for preventing bank misconduct and lived up to its sponsors' expectations.[224] Few cases have been decided in favor of plaintiffs, although there may be explanations for that.[225] The conduct alleged in some lawsuits may not be the type that some believe Congress intended to prohibit.[226] In cases where banks clearly impose anticompetitive tying arrangements, however, the anti-tying provision gives relief to plaintiffs who would not have been able to recover under the Sherman and Clayton Acts for failure to prove sufficient market power.[227]

An analysis of the cases allows one to conclude that many courts have been prone to find that the conditions imposed by banks fall into the traditional banking practices exemption, and therefore are acceptable.[228] Shifts in or uncertainty about the national economy in the future may make it harder for some borrowers to obtain loans, and banks may be more willing to impose anticompetitive conditions.[229] If so, courts might decide to hold these requirements to be tying violations.[230]

It is very disappointing that the anti-tying provision's avowed purpose, to protect customers and the public against anticompetitive practices and abuses by financial institutions, has not been championed vigorously by the regulatory agencies, notably the Federal Reserve and the OCC, which arguably have done the bidding of their constituent financial institutions instead of fostering the public good.[231] Regrettably, the recent GAO Report with respect to section 106 effectively constituted a "whitewash" of agency actions.[232] Similarly, many courts have chosen to rewrite the law instead of confining themselves to applying the statute as written.

Most disturbing, however, is the recent position taken by the Department of Justice's Antitrust Division, which is entrusted with enforcing the federal antitrust laws (including section 106)[233] and which advocated that the Fed interpret section 106 "to be consistent with, and not broader than, the federal antitrust laws," if necessary by expanding the "range of exemptions."[234] Not only do such views constitute a complete reversal of policies enunciated by the Division when section 106 was enacted, but in essence the Division has advocated that the Fed rewrite the law, which only Congress has the power to do.[235] Surely, customers of financial institutions and the public deserve something better from those who have been entrusted with safeguarding the public interest and charged with enforcing section 106.

While other statutes and causes of action can be used in conjunction with or in place of the anti-tying provision to prevent predatory conduct by financial institutions,[236] it is clear that such conduct must be strictly proscribed to strengthen competition and protect the public. Section 106 will continue to play an important role in achieving laudable public policy goals, especially if regulators and the judiciary promote rather than thwart the rights of private litigants to police tying abuses.[237] Only then will it be possible to answer two questions in the affirmative: whether the anti-tying provision has reduced bank misconduct, and whether its intended beneficiaries — consumers of financial services — have truly benefited.

The anti-tying provision's potential is still there, albeit not fully realized yet, 35 years after its enactment.

NOTES

[1] This is the author's third article on this topic. *See* Timothy D. Naegele, *Are All Bank Tie-Ins Illegal?* 154 BANKERS MAGAZINE 46 (1971) ("Naegele 1971"), and *The Anti-Tying Provision: Its Potential Is Still There,* 100 BANKING L. J. 138 (1983) ("Naegele 1983").

[2] *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, 244 (11th Cir. 1982) (citing S. Rep. No. 91-1084 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5519, 5520). The 1956 Act regulated the activities and acquisitions of companies controlling 25 percent or more of the stock of two or more banks. S. Rep. No. 91-1084, *reprinted in* 1970 U.S.C.C.A.N. 5519, 5520.

[3] *See infra* text of statute accompanying note 13; *see also* Naegele 1971, *supra* note 1, at 50 ("Even though it may not be said that all bank tie-in arrangements are illegal, it is fair to say that they are all suspect under the new law").

[4] *Standard Oil Co. of Cal. v. United States,* 337 U.S. 293, 305-06 (1949). *See* Naegele 1983, *supra* note 1, at 142 & n.20. *See also infra* notes 184-95 and accompanying text. Tying arrangements have been disfavored because of their adverse effects on competition: a firm can injure its existing competitors by using the tying product to gain an advantage in the market for the tied product; a firm can deter new competition because of control over the two products; or a firm can force customers to purchase goods or services they do not want or would purchase from another firm. Joseph C. Chapelle, *Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct,* 60 NOTRE DAME L. REV. 706, 709-10 (1985).

[5] *Parsons Steel, Inc.,* 679 F.2d at 244-45. *Nesglo, Inc. v. Chase Manhattan Bank, N.A.,* 506 F. Supp. 254, 261 (D. P.R. 1980) (opining that the purpose of the anti-tying provision "was to protect small businessmen from unfair and predatory conduct by banks"). The economic power of the banking industry derives from the control of banks over credit. *Dibidale of La., Inc. v. American Bank & Trust Co.,* 916 F.2d 300, 305 (5th Cir. 1990).

> Unlike the general marketplace where the power to coerce a consumer to accept a tying arrangement is directly related to the market power of the proposed coercer, in the banking industry the power to coerce is inherent in the banking relationship itself, regardless of an individual bank's market power. The transaction costs associated with establishing or severing a banking connection, as well as the loss of confidential financial data that can result from a banking change, dissuade frequent changes.

Id. at 306 (citation omitted). *See also* Naegele 1971, *supra* note 1, at 47 ("[W]hile bank tie-in arrangements are numerous and take a variety of forms, their legitimacy is seldom challenged by even the most astute banking leaders").

[6] The original language of the provision was broader, and it was amended to exempt so-called "traditional banking practices." *Nesglo*, 506 F. Supp. at 262. Senator Wallace F. Bennett argued to exempt these banking practices as follows:

> The Amendment which I am proposing is to…the provision containing restrictions on anticompetitive tie-in exclusive dealing arrangements that may arise when banks and bank holding companies offer services functionally related to banking but not part of the traditional bank services.
>
> This amendment…is designed to eliminate from the restrictions of [the provision] traditional banking practices competitive effects [sic] and which in many cases are vital to the conduct of sound banking. Under the bill, the Federal Reserve Board would be authorized to grant specific exemptions for those traditional banking practices, since they have no serious anticompetitive effects.

> However, it seems much better legislative procedure for the Congress not to forbid practices which it wishes to permit….
>
> * * *
>
> Instead, where we are satisfied that a practice is not anticompetitive and should be continued, let us say so in the law, and leave the Board only the task of exempting further activities of the same sort which it may determine to be desirable in the best interest of sound banking practices.

116 CONG. REC. 32125 (1970); *Nesglo*, 506 F. Supp. at 262 (quoting 116 CONG. REC. 32125 (1970)). Senator Bennett went on to list the types of activities that he believed should be excluded. *See id.* For a further discussion of so-called "traditional banking practices" *see infra* notes 62-69, 128-53 and accompanying text.

As Senator Edward W. Brooke, the sponsor of section 106, stated about the anti-tying provision: "[I]t is not the intention of the committee that it cover traditional banking arrangements which at least i*n some situations* have no significant anticompetitive effects." S. Rep. No. 91-1084 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5519, 5558 (emphasis added). The Federal Reserve and its sister agencies, however, were not given a blank check. Indeed, many of the banking practices that have been deemed to be "traditional" and "not anticompetitive" may in fact have the opposite effect, and should be discontinued or certainly reined in to prevent abuses that are anticompetitive.

Because the banking lobbies are so strong — which deal with the committees of Congress, and with the bank regulatory agencies whose responsibilities are to protect the public in this regard — it is questionable whether existing regulation will become more stringent anytime soon. It may be necessary for the courts to rein in abusive and anticompetitive practices; however, even there it can be argued that too little has been done to date.

The exemption for "traditional banking practices," which should have been very narrow in its effect, has become what is tantamount to the eye of a needle through which "herds of camels" have been driven. That was not Congress' intent, and it does not serve the public interest. *See, e.g., infra* note 70 and accompanying text; s*ee also* Naegele 1983, *supra* note 1, at 155-59 (the so-called traditional banking practices exemption must be construed narrowly).

[7] *See* 12 U.S.C. § 1975; *see also infra* note 38 and accompanying text.

[8] *Bass v. Boston Five Cent Sav. Bank,* 478 F. Supp. 741, 746-47 (D. Mass. 1979) ("There is no indication of any such intent in the legislative history of § 1972 or in the act itself"). Statutes have prospective effect unless the legislature clearly manifests its intention that the statute act retrospectively. *Id.*

[9] *Diversified Foods, Inc. v. First Nat'l Bank of Boston,* 785 F. Supp. 8, 9-10 (D. Me.

1992), *aff'd*, 985 F.2d 27, 29-30 (1st Cir. 1993). It is presumed that state courts have "concurrent jurisdiction with federal courts over federal claims unless Congress has divested the states of jurisdiction through 'explicit statutory directive' or by 'unmistakable implication from legislative history,' or because there exists a 'clear incompatibility between state-court jurisdiction and federal interests.'" *Id.* at 9.

12 U.S.C. § 1973 deals with the jurisdiction of courts vis-à-vis the anti-tying provision, and provides that the "district courts of the United States have jurisdiction to prevent and restrain violations of section 1972…." While the statute speaks in terms of the district courts, other federal courts (e.g., bankruptcy courts) and state courts may attempt to assert jurisdiction over anti-tying claims. Indeed, the anti-tying provision's analogue involving savings associations states: "Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties…." *See* 12 U.S.C. § 1464(q)(2)(A); *see also infra* note 13; 12 U.S.C. § 1464(q)(3).

[10] *Nordic Bank PLC v. Trend Group, Ltd.,* 619 F. Supp. 542, 553-55 (S.D.N.Y. 1985) (holding that anti-tying provisions apply not only when the original loan is made, but also when bank forbears from collecting on an existing loan).

[11] *See* 12 U.S.C. § 1977(1); *see also Information Exchange Systems, Inc. v. First Bank Nat'l Assoc.,* 994 F.2d 478, 486 (8th Cir. 1993) (cause of action accrues when the bank commits the unlawful act); *Lancianese v. Bank of Mount Hope,* 783 F.2d 467, 469-70 (4th Cir. 1986) (statute of limitations began to run no later than date on which bank's alleged violations ended, and fact that bank customers did not suffer final harm until two years later was of no consequence); *Jackson v. Union Nat'l Bank of Macomb,* 715 F. Supp. 892, 894-95 (C.D. Ill. 1989). Whenever the United States institutes an enforcement action with respect to any matter that is or could be the subject of a private right of action, the statute of limitations applicable to every private right of action is tolled during the pendency of the enforcement action and for one year thereafter. *See* 12 U.S.C. § 1977(2); *see also* Naegele 1971, *supra* note 1, at 47; 12 U.S.C. § 1464(q)(3), *infra* note 13.

[12] *See Info. Exch. Sys., Inc.,* 994 F.2d at 486; *Lancianese*, 783 F.2d at 469-70; *Jackson*, 715 F. Supp. at 896 ("The failure of an injured party to discover the existence of a cause of action within the limitations period does not toll the statute"); *Lancianese*, 783 F.2d at 470 ("[E]ach time a plaintiff is injured by a defendant's act in a continuing conspiracy to violate the antitrust laws, a cause of action accrues…" (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971))).

[13] 12 U.S.C. § 1972(1). *See* Naegele 1971, *supra* note 1, at 47 ("Stated briefly, Section 106…prohibits a bank from extending credit, leasing or selling property, or furnishing any service on the condition or requirement that the customer obtain something else in the process; provide something else; or refrain from obtaining some-

thing else from a competitor of a bank. Thus, tie-ins — whether they be express or implied — are specifically prohibited by [Section 106] unless they fall within certain carefully delineated exemptions or the Federal Reserve Board grants an 'exception' to the practices in question."). *See also* Naegele 1983, *supra* note 1, at 152-55 (discussion of the terms "some additional [or 'other'] credit, property, or service").

The GAO has noted:

> Section 106 also prohibits reciprocity and exclusive dealing arrangements. Reciprocity arrangements are arrangements that require a customer to provide some credit, property, or service to the bank or one of its affiliates as a condition of the bank providing another product to the customer. Exclusive dealing arrangements are arrangements that require a customer not to obtain some other credit, property, or service from a competitor of the bank or its affiliate as a condition of the bank providing another product to the customer.

See United States General Accounting Office Report, Bank Tying: Additional Steps Needed to Ensure Effective Enforcement of Tying Prohibitions (including letter from Richard Hillman, Director, Financial Markets and Community Investment, GAO, to Congressmen Michael G. Oxley and Barney Frank) (GAO-04-4, Oct. 2003) ("GAO Report"), p. 9 n.7. *See also* 12 U.S.C. § 1464(q) (the analogue for tying arrangements involving savings associations):

(q) Tying arrangements

(1) A savings association may not in any manner extend credit, lease, or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —

(A) that the customer shall obtain additional credit, property, or service from such savings association, or from any service corporation or affiliate of such association, other than a loan, discount, deposit, or trust service;

(B) that the customer provide additional credit, property, or service to such association, or to any service corporation or affiliate of such association, other than those related to and usually provided in connection with a similar loan, discount, deposit, or trust service; and

(C) that the customer shall not obtain some other credit, property, or service from a competitor of such association, or from a competitor of any service corporation or affiliate of such association, other than a condition or requirement that such association shall reasonably impose in connection with credit transactions to assure the soundness of credit.

(2)(A) Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of paragraph (1), under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings.

(B) Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

(3) Any person injured by a violation of paragraph (1) may bring an action in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, or in any other court of competent jurisdiction, and shall be entitled to recover three times the amount of the damages sustained, and the cost of suit, including a reasonable attorney's fee. Any such action shall be brought within 4 years from the date of the occurrence of the violation.

(4) Nothing contained in this subsection affects in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this subsection. No regulation or order issued by the Director under this subsection shall in any manner constitute a defense to such action.

(5) For purposes of this subsection, the term ''loan" includes obligations and extensions or advances of credit.

(6) Exceptions

The Director may, by regulation or order, permit such exceptions to the prohibitions of this subsection as the Director considers will not be contrary to the purposes of this subsection and which conform to exceptions granted by the Board of Governors of the Federal Reserve System pursuant to section 1972 of this title.

See e.g., Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, Inc., 837 F.2d 712 (5th Cir. 1988); *Cordova v. Banco Bilbao Vizcaya de Puerto Rico,* 73 F. Supp.2d 133 (D. P.R. 1999); *Gage v. First Fed. Sav. & Loan Ass'n of Hutchinson, Kan.,* 717 F. Supp. 745 (D. Kan. 1989); *Tri-Crown, Inc. v. Amer. Fed. Sav. & Loan Ass'n,* 908 F.2d 578 (10th Cir. 1990); *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n,* 932 F. Supp. 859 (E.D.

Tex. 1996). *See infra* notes 196-205 and accompanying text.

[14] *See* 12 U.S.C. §§ 1971 ("[T]he terms 'bank', 'bank holding company', 'subsidiary', and 'Board' have the meaning ascribed to such terms in [12 U.S.C. § 1841]"), 1841(c) (The term "bank" includes an insured bank as defined in 12 U.S.C. § 1813(h), and an institution organized under the laws of the United States, which both accepts demand deposits and is engaged in the business of making commercial loans) & 1813 (1813(h) defines "insured bank" to mean "any bank (including a foreign bank having an insured branch) the deposits of which are insured"; 1813(a)(1) defines "bank" to mean "any national bank, State Bank, and District bank, and any Federal branch and insured branch," and includes any former savings association that converted from a savings association charter and whose deposits are insured by the Savings Association Insurance Fund). *See also* Naegele 1983, *supra* note 1, at 151 (discussion of tying arrangements imposed by nonbanking affiliate of bank); *infra* note 108; Federal Reserve System, Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, Proposed interpretation and supervisory guidance with request for public comment (Docket No. OP-1158) (Aug. 29, 2003) ("Proposed Interpretation"), 68 Fed. Reg. 52,024, 52,033 ("[V]irtually every type of institution that is chartered as a bank, including every 'insured bank' (as defined in section 3 of the Federal Deposit Insurance Act), is subject to section 106").

[15] 12 U.S.C. § 1841(c)(1)(B).

[16] *Flintridge Station Associates v. Am. Fletcher Mortgage Co.,* 761 F.2d 434, 437-38 (7th Cir. 1985). Demand deposits are deposits that may be withdrawn on demand, regardless of the means of withdrawal. *S&N Equip. Co. v. Casa Grande Cotton Finance Co.,* 97 F.3d 337, 344 (9th Cir. 1996).

[17] *See* 12 U.S.C. § 1841(c)(2)(A); *see also Nordic Bank PLC,* 619 F. Supp. at 557-58. *But see* 12 U.S.C. § 3106(d); *United States v. Koh,* 199 F.3d 632, 639 (2d Cir. 1999) (stating "all branches and agencies of foreign banks operating in the United States are subject to the [BHCA]"); *infra* note 69 (safe harbor for foreign transactions); Proposed Interpretation, 68 Fed. Reg. at 52,033 ("Section 106…applies to any U.S. branch, agency, or commercial lending company of a foreign bank (as those terms are defined in section 8 of the International Banking Act)" (citing 12 U.S.C. § 3106)).

[18] *See* 12 U.S.C. § 1841(c)(2)(B) & 1841(j); Federal Reserve Board Order, Neworld Bancorp., Inc., 73 Fed. Res. Bull. 357 (March 13, 1987); *see also* 12 U.S.C. § 1464(q), *infra* note 13.

Also, credit unions are not included within the definition of a "bank." *See* 12 U.S.C. § 1841(c)(2)(E); *see also infra* note 100.

[19] 619 F. Supp. 542 (S.D.N.Y. 1985).

[20] *Id.* at 553-55; *see also Freidco of Wilmington, Del., Ltd. v. Farmers Bank of the State of Del.,* 499 F. Supp. 995, 1001 (D. Del. 1980) (deferring payment found to be an extension of credit).
[21] *Nordic Bank PLC,* 619 F. Supp. at 554.
[22] *Id.*
[23] "Forbearance constitutes an extension of credit in a technical sense as well. By staying its demand for repayment, a bank continues to provide credit for the period of the stay." *Id.*
[24] 880 F.2d 821 (5th Cir. 1989).
[25] *Id.* at 825 (holding that the extension of credit requirement is satisfied by alleging an oral agreement to extend or refinance a loan (citing *Bruce*, 837 F.2d at 718), and that "the bank's agreement, regardless of its actual performance concerning the agreement, was enough to satisfy the requirement that a bank 'extend credit'"). For further discussion of this issue, *see infra* notes 60-61 and accompanying text (regarding *Tri-Crown, Inc.,* 908 F.2d at 584, and *Clark v. United Bank of Denver Nat'l Ass'n*, 480 F.2d 235, 238 (10th Cir. 1973)).

In *Bruce*, the court found that an oral agreement to loan money constituted an extension of credit within the Thrift Institutions Restructuring Act (or "TIRA"). *See Bruce,* 837 F.2d at 718. TIRA is the savings association equivalent of the Bank Holding Company Act. *See Amerifirst,* 880 F.2d at 824 n.7, 825 ("The language in *Bruce* indicates that an *offer* of a tied loan satisfies the term 'extension of credit' and is not dependent upon the fate of the actual loan itself") (emphasis in original); *see also infra* notes 196-205 and accompanying text.
[26] The court quoted *Nordic*: "A particular practice should be considered an 'extension of credit' if it manifests the improper use of economic leverage that the Act seeks to prevent." *Amerifirst*, 880 F.2d at 823-24 (quoting *Nordic*, 619 F. Supp. at 554). "Clearly, the conditioning of a loan upon Amerifirst's purchase of the Bank's ORE was an 'improper use of economic leverage that the Act seeks to prevent,' and the ultimate non-funding of the loan by the Bank did not alleviate this economic leverage." *Id.* at 824 (citation omitted).

Also, the court stated that an "*offer* to refinance the loan if a participating lender could be found may constitute an extension of credit." *Id.* at 825 (quoting *Bruce*, 837 F.2d at 719) (emphasis in original).
[27] *Id.* at 823-25.
[28] *Amerifirst,* 880 F.2d at 823.

> "The language of the bill makes clear that the *availability* to a potential customer of any credit, property, or service of a bank may not be conditioned upon that customer's use of any other credit, property, or service offered by the bank …." The word availability in the legislative history certainly indicates that

> Congress intended the term "extend credit" to include loan commitments in which the loan was eventually never funded.

Id. (citations omitted) (emphasis in original).

[29] *Id.* This is the correct view. The court went on to state: "We note that the tie was never consummated in *Swerdloff* to refute the Bank's argument that Amerifirst has failed to state a claim because Amerifirst was never injured since the tie in the present case was never consummated." *Id.* at 824 n.5 (citing *Swerdloff v. Miami Nat'l Bank,* 584 F.2d 54 (5th Cir. 1978)). *See also Tri-Crown, Inc.,* 908 F.2d at 584-85 (Tenth Circuit reversed district court's dismissal of plaintiffs' TIRA claims, and held that (1) plaintiffs adequately stated claim under 12 U.S.C. § 1464(q)(1), where defendant savings and loan denied additional financing upon plaintiffs' refusal to assume defendant's non-performing loans, and (2) "a loan need not be actually consummated in order for there to be an 'extension of credit' under the TIRA").

[30] 648 F.2d 879 (3d Cir. 1981).

[31] *Id.* at 897; *see also* Naegele 1983, *supra* note 1, at 156-57 (discussion of *Tose*). *But see B.C. Recreational Industries v. First Nat'l Bank of Boston*, 639 F.2d 828, 832 (1st Cir. 1981) (finding the requirement that borrower hire a business advisor was not an additional service); Naegele 1983, *supra* note 1, at 153-54 (discussion of *B.C. Recreational Industries*); *Batten v. Bank One, N.A.,* No. 00 C 1837, 2000 U.S. Dist. WL 1364408, at *2 (N.D. Ill. 2000) (finding that three-dollar fee charged to non-customers for cashing Bank One checks was not a service, but a fee); *Sterling Coal Co., Inc. v. United Am. Bank in Knoxville,* 470 F. Supp. 964, 965 (E.D. Tenn. 1979) (finding that bank's control over company's spending and other corporate affairs was a security measure); Naegele 1983, *supra* note 1, at 153 (discussion of *Sterling Coal Co., Inc.*).

[32] 584 F.2d 54, 58-60 (5th Cir. 1978). The court refers to section 1972(3) (*see id.* at 60), which became section 1972(1)(C) in 1978 when Pub. L. 95-630 (92 Stat. 3690) designated existing provisions as paragraph (1) and, as so designated, redesignated former paragraphs (1) to (5) as subparagraphs (A) to (E), and added paragraph (2).

[33] 666 F. Supp. 111 (S.D. Tex. 1987), *aff'd,* 835 F.2d 286 (5th Cir. 1987).

[34] The bank, in a two-bank small town, had a policy requiring employees to bank solely at First National unless there were special circumstances preventing the bank from meeting their banking needs. *Hargus*, 666 F. Supp. at 112. Hargus, a First National employee, sought to finance a home she was about to build. The interest rate at the competing bank was 2 percent lower than at First National, and she secured both interim and permanent financing at the lower rate, and she was fired from her job by the bank president. *Id.*

[35] 12 U.S.C. § 1972(1)(E). *See supra* note 13 and accompanying text.

[36] *Hargus*, 666 F. Supp. at 113 (citations omitted).

[37] "The statute prohibits the bank from imposing certain conditions on customers qua customers. The statute simply does not speak to conditions which a bank may impose on its employees.…First NB told Plaintiff that as a *condition* of *employment*, she could not bank elsewhere. The condition imposed upon Plaintiff by First NB affected her as a employee, not as a bank customer." *Hargus*, 666 F. Supp. at 112 (emphasis in original). The court accepted that a bank employee could also be a customer, but reasoned that the condition in this case was a condition of employment, not a condition on granting a loan to a customer.

[38] 12 U.S.C. § 1975 (emphasis added). *See* Naegele 1983, *supra* note 1, at 145-50 (discussion of standing requirement); *id.* at 150 ("Given the stated purpose behind Section 1972, it is submitted that *any* person who is injured in his business or property by reason of an illegal tying arrangement should have standing to sue") (emphasis in original).

[39] *Amerifirst Properties, Inc.,* 880 F.2d at 825 n.8 (emphasis in original). *See also id.* at 880 F.2d at 825-26; *Campbell v. Wells Fargo Bank, N.A.,* 781 F.2d 440, 442 (5th Cir. 1986); *Swerdloff*, 584 F.2d at 58-59; *infra* notes 44-53 and accompanying text (discussing the impact of "direct injury" on standing to sue). However, one court stated that the injury must occur in one's capacity as a customer. *See Hargus,* 666 F. Supp. at 112.

[40] *Campbell*, 781 F.2d at 442.

[41] *Amerifirst*, 880 F.2d at 825-26 ((1)"If Amerifirst is a customer, then Amerifirst has standing to sue under section 1975…"; (2) "[A] corporation which contracts with a bank for a loan, such as Amerifirst did, is a customer"; (3) "'Where, as here, there has been a direct relationship between the bank and purported customer, as well as privity of contract with the bank, it is reasonable to conclude that a customer relationship exists'"(quoting *Swerdloff*, 584 F.2d at 59)).

[42] *Swerdloff*, 584 F.2d at 58-59:

> The economic realities of ownership and control must be considered in determining who is a "customer" within the meaning of this section if the purpose of the Act is to be accomplished….The law cannot be unmindful of the fact that substantial credit to [closely-held corporations] is generally extended because of the credit rating of the stockholder guarantors, regardless of the credit-worthiness of the corporation itself.
>
> * * *
>
> We hold that the owners of 100% of the stock of a corporation who have been required individually to guarantee the corporation's loan must be considered just

> as much "customers" of the bank as the corporation through which they do business for the purposes of these provisions of the Bank Holding Company Act.

The court added:

> Even if the Swerdloffs had sold their stock, the bank had continued the loan, and the corporation had prospered, the plaintiffs might still have had a cause of action under § 1975 for any damages they incurred. Any injury to the Swerdloffs, the bank's customers, could be redressed under § 1975, whether or not there had been damage to the corporation.

Id. at 60; *see also Cont'l Illinois Nat'l Bank & Trust Co. of Chicago v. Stanley,* 585 F. Supp. 1385, 1388 (N.D. Ill. 1984) (holding stockholder-guarantor to have standing); Naegele 1983, *supra* note 1, at 146-47, 152 (discussion of *Swerdloff*).

[43] *Delta Diversified, Inc. v. Citizens & Southern Nat'l Bank,* 320 S.E.2d 767, 769-70 (Ga. App. 1984). In *Delta*, the wives of the debtor-corporation's shareholders were required to sign as sureties of notes issued to the corporation. When the bank sought to recover on the notes, the wives tried to defend on the ground that the bank violated the anti-tying provision by conditioning the extension of credit on the wives' guaranties. The court, however, did not address the issue of whether such a condition was a violation, holding that the wives did not have standing to make a claim under the anti-tying provision since they "owned no stock in Delta and were not 'customers' under 12 U.S.C. § 1972…." *Id.* at 770

[44] *See* Naegele 1983, *supra* note 1, at 145-50.

[45] *Sterling Coal Co., Inc.,* 470 F. Supp. at 965 (denying plaintiff's claim where he "failed to allege or show any damages flowing from [the condition]"). *See also* Naegele 1983, *supra* note 1, at 153 (discussion of *Sterling Coal Co., Inc.*).

[46] *Gage*, 717 F. Supp. at 755-56 ("Plaintiff has alleged loss or harm by reason of the violation: First Federal's allegedly illegal condition caused plaintiff to sell a portion of the building to it. Resulting directly therefrom are: First Federal's failure to construct a party wall; its failure to split the utilities and heating and cooling systems; and a potential loss of tenants or purchasers. Plaintiff alleges that these problems have made the building unmarketable…").

[47] *Omega Homes, Inc. v. Citicorp Acceptance Co.,* 656 F. Supp. 393, 401 (W.D. Va. 1987). The court added: "Plaintiff argues that an allegation of injury is sufficient for BHCA standing. While this statement may be true when a plaintiff alleges that it is a customer of the defendant banking institution, the court is not persuaded that a middleman who alleges injury automatically has BHCA standing." *Id.* at 403 (citations omitted).

[48] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago,* 877 F.2d 1333, 1334-37 (7th Cir. 1989) (court discusses the distinction between direct and derivative

injury); *Campbell*, 781 F.2d at 443 ("we hold that the plaintiff's injuries were not a direct consequence of the defendants' activities"). In *Mid-State*, the court noted that the plaintiffs were also guarantors, but stated, "direct *dealing* is not the same as direct *injury*." *Mid-State Fertilizer Co.,* 877 F.2d at 1336 (emphasis in original). *Accord Delta Diversified, Inc.,* 320 S.E.2d at 770. *See also Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n,* 840 F.2d 653, 656-64 (9th Cir. 1988) (holding that plaintiff successor in interest to mortgagee that had lent money to the debtor had standing to obtain injunctive relief but not to recover damages).

[49] *Omega Homes, Inc.,* 656 F. Supp. at 402.

[50] *Campbell*, 781 F.2d at 443 (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 534-35 (1983)).

[51] *Costner v. Blount Nat'l Bank of Maryville, Tenn.,* 578 F.2d 1192, 1194-95 (6th Cir. 1978) (citing a jury instruction that stated: "The injury to the stockholder must be direct and not merely consequential or derivative through the corporation"). *See also* Naegele *1*983, *supra* note 1, at 147-49, 150 (discussion of *Costner*).

[52] *See Amerifirst,* 880 F.2d at 825-26; *Campbell*, 781 F.2d at 442-43; *Swerdloff*, 584 F.2d at 59-60. *See also* Naegele 1983, *supra* note 1, at 146 ("Given the decisional morass that presently exists in the antitrust laws over the standing issue, reading the antitrust standing doctrine into the BHCA would serve no salutary purpose. Indeed, this doctrine is antithetical to Congress' intent that Section 1972 is to have broad applicability to bank tying arrangements, since the general antitrust standing requirement restricts the scope of a defendant's liability and a plaintiff's right to recovery.") (citation omitted).

[53] *See Mid-State Fertilizer Co.,* 877 F.2d at 1334-37.

[54] *Bieber v. State Bank of Terry,* 928 F.2d 328, 330 (9th Cir. 1991) (quoting *Rae v. Union Bank,* 725 F.2d 478, 480 (9th Cir. 1984), which in turn followed *Parsons Steel, Inc.,* 679 F.2d at 245); *Sanders v. First Nat'l Bank & Trust Co. in Great Bend,* 936 F.2d 273, 278 (6th Cir. 1991) (following *Rae*); *Alpine Electric Co. v. Union Bank,* 776 F. Supp. 486, 489 (W.D. Mo. 1991) (following *Sanders*), *aff'd,* 979 F.2d 133, 135-36 (8th Cir. 1992); *Gage*, 717 F. Supp. at 754 (following *Rae*); *Pappas v. NCNB Nat'l Bank of N. Carolina,* 653 F. Supp. 699, 705 (M.D. N.C. 1987) (following *Rae*); *Central Tex. Hardware, Inc. v. First City. Tex.—Bryan, N.A.,* 810 S.W.2d 234, 238 (Tex. App. 1991) (following *Rae*).

[55] *Dibidale of La., Inc.,* 916 F.2d at 304-07; *Campbell*, 781 F.2d at 443 (citing *Parsons Steel, Inc.,* 679 F.2d at 245). The Sherman Act and the Clayton Act require proof of market power of a defendant in order to prevail on a tying claim. *See infra* notes 184-95 and accompanying text. *See also* Naegele 1983, *supra* note 1, at 154-55 (discussion of *Parsons Steel, Inc.)*.

[56] A tying arrangement has been defined as "an arrangement by a party to sell one

product [the "tying product"] but only on condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. R.R. v. United States,* 356 U.S. 1, 5-6 (1958). *See also Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12 (1984) ("the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms").

[57] *See* Proposed Interpretation, 68 Fed. Reg. at 52,028 (stating that "[a]bsent a requirement that the customer obtain a separate product from, or provide a separate product to, the bank or an affiliate, there is no 'tie' between the customer's desired product and another product."); *but see* notes 79-80 and accompanying text.

[58] *See supra* text accompanying note 13. *See also* Naegele 1983, *supra* note 1, at 151 (discussion of tying arrangements imposed by nonbanking affiliate of bank); *id.* at 151-55 (discussion of elements of prohibited tie-in).

[59] Naegele 1983, *supra* note 1, at 144.

[60] *Tri-Crown, Inc.,* 908 F.2d at 584; *Amerifirst*, 880 F.2d at 823-25.

[61] *Clark*, 480 F.2d at 238.

[62] *See* Naegele 1983, *supra* note 1, at 155-59 (the so-called traditional banking practices exemption must be narrowly construed); *see also infra* note 63. One court suggests that the "unusual" requirement applies only to suits brought under § 1972(1)(C). *Dibidale of La., Inc.,* 916 F.2d at 304 n.2. If such a requirement applies at all, it would apply to both sections 1972(1)(A) & (C), which contain the terms "loan, discount, deposit, or trust service." *See also supra* note 6; *infra* notes 128-53 and accompanying text; Naegele 1983, *supra* note 1, at 159-60 ("[R]ecent decisions can be of little solace to a bank engaging in implicit or explicit tying arrangements, involving its holding company or a subsidiary of the holding company. The [traditional banking practices] exemption provided for intrabank tying does not apply. Thus, even if requiring a customer to maintain an account with the bank as a condition of making a loan does not violate Section 1972 (and this has not been established clearly in the case law), requiring the 'deposit' to be made with the bank holding company or a sister subsidiary would be a violation") (citations omitted).

[63] Section 1972 allows a *bank* to impose: (1) a tying arrangement involving a "loan, discount, deposit, or trust service"; (2) a condition whereby the customer must provide some additional credit, property, or service to the bank "related to and usually provided in connection with a loan, discount, deposit, or trust service"; or (3) a condition that the customer not obtain some other credit, property, or service from a competitor, which requirement the bank shall reasonably impose in a credit transaction to assure the soundness of the credit. 12 U.S.C. § 1972 (1). *See* Naegele 1983,

supra note 1, at 141:

> Congress provided a limited exemption in Section 1972 for transactions exclusively involving four so-called traditional banking services — specifically, loans, discounts, deposits, or trust services. This exemption only applies, however, where all of the components of a particular transaction fall into one or more of the four enumerated categories. If any of these so-called traditional banking services are tied to another service offered by the bank, the exemption does not apply. Finally, even within the four exempted bank service categories, the bank is still subject to treble damage actions under the antitrust laws.

Citations omitted. *See also id.* at 155-59. One court has described "unusual" as "prohibiting a bank, when it makes a loan, from requiring in return some business or service to the bank other than the usual obligations directly related to ensuring timely repayment of the loan." *Costner*, 578 F.2d at 1194.

See also Naegele 1983, *supra* note 1, at 156:

> [B]ank tie-in arrangements exclusively involving so-called traditional banking services — *i.e.*, "a loan, discount, deposit, or trust service" — are not considered to be per se illegal under Section 1972, where only a bank is involved. In addition, a credit transaction involving only a bank does not give rise to a cause of action under the BHCA where the only credit, property, or service required of the customer is related to the loan and is of a character commonly provided in connection with a loan. Finally, restrictions on outside borrowing by a customer-debtor are permissible so long as the condition or requirement imposed is reasonable and for the purpose of assuring the soundness of the credit extended by the bank.

Citations omitted. *See also supra* note 62.

[64] 956 F.2d 502 (5th Cir. 1992).

[65] *Id.* at 507 ("[T]he restructuring arrangement entered into by the parties in this case does not constitute an unusual banking practice.…[T]he Bank acted within traditional banking practices in requiring the debtors…to restructure their other troubled debts…").

[66] 928 F.2d 328 (9th Cir. 1991).

[67] *Id.* at 330-31. *See also McClain v. South Carolina Nat'l Bank,* 105 F.3d 898, 902 (4th Cir. 1997) (*citing Kenty v. Bank One, Columbus, N.A.,* 92 F.3d 384, 394-95 (6th Cir. 1996), and finding loan agreement authorizing bank to buy insurance for truck on borrower's behalf to be a traditional banking practice); *Tri-Crown, Inc.,* 908 F.2d at 580-85 (Tenth Circuit reversed district court's dismissal of plaintiffs' tying claims, and held that (1) plaintiffs adequately stated claim under 12 U.S.C. § 1464(q)(1), where defendant savings and loan denied additional financing upon plaintiffs' refusal

to assume defendant's non-performing loans, and (2) plaintiffs stated sufficient facts to show that the conditions constituted an unusual banking practice); *Cont'l Ill. Nat'l Bank & Trust Co. v. Windham,* 668 F. Supp. 578, 585 (E.D. Tex. 1987) (finding personal guaranty to be "appropriate" traditional banking practice and dismissing BHCA claim).

[68] *See, e.g., Stefiuk v. First Union Nat'l Bank of Fla.,* 61 F. Supp.2d 1294, 1298 (S.D. Fla. 1999) (requiring plaintiff to open account with the bank to cash payroll checks free of charge is a traditional banking practice); *Sterling Coal Co., Inc.,* 470 F. Supp. at 965 (finding no violation where loan was conditioned on requirement that bank supervise checking account and other corporate affairs); Naegele 1983, *supra* note 1, at 153 (discussion of *Sterling Coal Co., Inc.*).

[69] 12 U.S.C. § 1972(1); *see also supra* note 13. The Fed has exercised its authority by granting exceptions to the anti-tying restrictions of section 106, which are in addition to the so-called "traditional banking practices" exemption contained in the statute itself, and they read in pertinent part as follows:

(b) *Exceptions to statute.* Subject to the limitations of paragraph (c) of this section, a bank may:

(1) *Extension to affiliates of statutory exceptions preserving traditional banking relationships.* Extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement that a customer:

(i) Obtain a loan, discount, deposit, or trust service from an affiliate of the bank; or

(ii) Provide to an affiliate of the bank some additional credit, property, or service that the bank could require to be provided to itself pursuant to section 106(b)(1)(C) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(1)(C)).

(2) *Safe harbor for combined-balance discounts.* Vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the bank (eligible products), if:

(i) The bank offers deposits, and all such deposits are eligible products; and

(ii) Balances in deposits count at least as much as nondeposit products toward the minimum balance.

(3) *Safe harbor for foreign transactions.* Engage in any transaction with a customer if that customer is:

(i) A corporation, business, or other person (other than an individual) that:

(A) Is incorporated, chartered, or otherwise organized outside the United States; and

(B) Has its principal place of business outside the United States; or

(ii) An individual who is a citizen of a foreign country and is not resident in the United States.

(c) *Limitations on exceptions.* Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a bank to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

(d) *Extension of statute to electronic benefit transfer services.* A bank holding company or nonbank subsidiary of a bank holding company that provides electronic benefit transfer services shall be subject to the anti-tying restrictions applicable to such services set forth in section 7(i)(11) of the Food Stamp Act of 1977 (7 U.S.C. 2016(i)(11)).

(e) For purposes of this section, *bank* has the meaning given that term in section 106(a) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971), but shall also include a United States branch, agency, or commercial lending company subsidiary of a foreign bank that is subject to section 106 pursuant to section 8(d) of the International Banking Act of 1978 (12 U.S.C. 3106(d)), and any company made subject to section 106 by section 4(f)(9) or 4(h) of the BHC Act.

See 12 C.F.R. § 225.7 (emphasis in original); *see also infra* note 108.

In addition, the Fed has proposed a rule that contains another exception to the anti-tying restrictions of section 106. Specifically, the Board proposes to amend 12 C.F.R. § 225.7, *inter alia,* (1) by revising the introductory sentence of paragraph (b); by redesignating paragraphs (c) through (e) as paragraphs (d) through (f), respectively; and (3) by adding a new paragraph (c). Paragraphs (b) and (c) would then read as follows:

(b) Exceptions to statute. Subject to the limitations of paragraph (d) of this section, a bank may —

* * *

(c) *Financial subsidiaries of state banks.* A financial subsidiary of a state member bank held in accordance with section 9 of the Federal Reserve Act (12 U.S.C. 335) and a financial subsidiary of a state nonmember bank held in accordance with section 46 of the Federal Deposit Insurance Act (12 U.S.C. 1831w) shall be deemed to be a subsidiary of a bank holding company of the bank and an affiliate of the bank, and not a subsidiary of the bank, for purposes of section 106 and this section.

Bank Holding Companies and Change in Bank Control: Exception to Anti-Tying Restrictions (Regulation Y; Docket No. R-1159) ("Proposed Rule"), 68 Fed. Reg. 51,938, 51,939 (Aug. 29, 2003); *see also infra* note 70.

[70] 12 C.F.C. § 225.7(b)(1) (2003); *supra* note 69; *see also infra* note 231; GAO Report, *supra* note 13, at 9 n.8 ("Section 106 provides this exception *only* with respect to traditional bank products offered by the bank, but the Board has extended the exception to include traditional bank products offered by an affiliate of the bank") (emphasis added).

The GAO adds:

> Under section 106, it would be unlawful for a bank to provide credit (or to vary the terms for credit) on the condition or requirement that the customer obtain some other product from the bank *or an affiliate,* unless that other product was a traditional bank product. Thus, it would be unlawful for a bank to condition the availability or pricing of new or renewal credit on the condition that the borrower purchase a nontraditional bank product from the bank or an affiliate.
>
> * * *
>
> For example,…it would be unlawful for a bank to deny credit because the customer failed to purchase underwriting services from the bank's affiliate.

See GAO Report, *supra* note 13, at 9 (emphasis added) (citation omitted); *see also infra* note 108.

As the Fed has observed:

> The anti-tying restrictions of section 106 generally apply to subsidiaries, but not affiliates, of banks. Financial subsidiaries of national and state member banks already are treated as affiliates (and not subsidiaries) of the parent bank for purposes of section 106.

See Proposed Rule, 68 Fed. Reg. at 51,938; *see also* 12 C.F.R. 208.73(e); Proposed Interpretation, 68 Fed. Reg. at 52,024 ("Section 106 does not apply to the nonbank affiliates of a bank or other nonbank entities"). Regrettably, the treatment of financial "subsidiaries" as "affiliates (and not subsidiaries)" represents another regulatory "loophole," which is inconsistent with the statute's legislative history. As Senator

Edward W. Brooke stated:

> [Section 106] represents a worthwhile addition to our antitrust laws and establishes per se illegality where a bank, a subsidiary of a bank, a bank holding company or a subsidiary of a bank holding company engages in express or implied tying.

See 116 CONG. REC. 42431 (Dec. 18, 1970); *see also infra* note 108; *but see* Proposed Interpretation, 68 Fed. Reg. at 52,033.

[71] *Swerdloff*, 584 F.2d at 59 ("That there is a benefit to the bank will be implied for pleading purposes"). *But see infra* note 96 regarding contrary view (demonstrating how *Rae* requires showing of benefit); Naegele 1983, *supra* note 1, at 154-55 (discussion of *Parsons Steel, Inc.*).

[72] *JST Properties v. First Nat'l Bank of Glencoe,* 701 F. Supp. 1443, 1448-50 (D. Minn. 1988) (quoting Naegele 1983, *supra* note 1, at 143-44); S. Rep. No. 91-1084 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5519, 5558. *See also Dibidale of La., Inc.,* 916 F.2d at 305.

[73] *See Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 12-14; *Bob Maxfield, Inc. v. Amer. Motors Corp.,* 637 F.2d 1033, 1037 (5th Cir. 1981).

[74] In *Dibidale*, there was a difference between the majority opinion and a dissent concerning whether coercion was required. *Compare Dibidale of La., Inc.,* 916 F.2d at 304-07 *with id.* at 308-11 (Jones, J., dissenting).

[75] 916 F.2d 300 (5th Cir. 1990).

[76] *Id.* at 306; *see supra* note 5. *See also S&N Equip. Co.,* 97 F.3d at 346 n.18 (quoting *Dibidale of La., Inc.,* 916 F.2d at 306); *Logsdon v. Nat'l City Bank,* 601 N.E.2d 262, 269 (Ohio Com. Pl. 1991) (citing *Dibidale of La., Inc.,* 916 F.2d at 305-07, and stating that coercion "is not an element of a claim made pursuant to [the anti-tying provision]").

[77] *Dibidale of La., Inc.,* 916 F.2d at 306. To restrict the scope of those words to tying arrangements in which a customer is literally forced to buy or provide a tied product or service in order to get credit would vitiate that section's intended role for, as Congress recognized, a tying arrangement may squelch competition whether coercive or not:

> Tie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by "volunteering" to accept [or provide] other products or services rather than seeking them in the competitive market place. *In either case, competition is adversely affected, as customers no longer purchase a product or service on its own economic merit.*

Id. at 306 (emphasis in original) (quoting CONF. REP. NO. 91-1747, *reprinted in*

1970 U.S.C.C.A.N. 5561, 5569). *See also Logsdon v. Nat'l City Bank,* 601 N.E.2d 262, 269 (Ohio Com. Pl. 1991) (court rejected bank's assertion that each class member must prove coercion, holding that coercion is not an element of a section 1972 claim).

The anti-tying provision of the Home Owners' Loan Act ("HOLA") (12 U.S.C. § 1461 *et seq.)* (*see supra* note 13; *see also infra* notes 196-205 and accompanying text) has the same language, but one court found that coercion was an element of a claim under HOLA's provision. *Integon Life Ins. Corp. v. Browning,* 989 F.2d 1143, 1150-51 (11th Cir. 1993) (citing *Tic-X-Press, Inc. v. Omni Promotions Co.,* 815 F.2d 1407, 1415 (11th Cir. 1987)). This view is mistaken.

[78] The anti-tying provision prohibits both overt tying and "voluntary tying." Naegele 1971, *supra* note 1, at 49.

> [A] customer may be induced to act in a certain manner because of his recognition of the bank's market power, rather than because of any overt coercion by the bank. Thus, a loan applicant might offer to place his insurance or travel business with a bank, hoping that this would improve his chances of obtaining a commercial or mortgage loan.

Id. To avoid liability, at the least banks should "*adequately* inform customers of their right to obtain one service without obtaining others." *Id.* (emphasis added). *See also infra* note 184.

The GAO states:

> [O]fficials from large commercial banks, federal banking and securities regulators, and investment bankers observe that ties between credit and other banking products are often customer-initiated, and thus exempt from the laws governing tying.

GAO Report, *supra* note 13, at 2; *see also infra* note 127.

First, there is nothing in the section 106 that exempts (or excepts) such ties. Second, the Department of Justice's Antitrust Division stated in recent comments to the Fed: "The Division believes it is very important that the Guide retains the clear understanding that only coercive ties forced on a customer by a bank, and not voluntary ties, may violate section 106." *See* Letter from R. Hewitt Pate, Assistant Attorney General, Antitrust Division, Department of Justice (hereinafter cited as "Division"), to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, "Comments On the Federal Reserve Bank's [sic] Interpretative and Compliance Guide to the Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, Docket No. R-1159" (November 7, 2003) ("Antitrust Division Comments"), p. 2. It is unfortunate that the regulators are willing to do the bidding of those they are charged with regulating, especially in light of the pernicious effects of tying arrangements. *See also infra* note 85.

[79] Proposed Interpretation, 68 Fed. Reg. at 52,029 n.36 (disagreeing with *Dibidale* and asserting that "the better interpretation of section 106 is that a violation may exist only if a bank forces or coerces a customer to obtain (or provide) the tied product as a condition to obtaining the customer's desired product").

[80] *Id.* at 52,029. Even though it recognizes that the statute's legislative history characterizes "voluntary tying" as being undesirable, the Board has expressly prohibited only coercive tying arrangements. *Id* at 52,029 n.35; *see also Mercantile Bancorporation, Inc.,* 66 Fed. Res. Bull. 799, 800 (1980); *Barnett Banks, Inc.,* 61 Fed. Res. Bull. 678, 684, 1975 WL 31416, at *6 (F.R.B.) (October 1975).

See also Naegele 1971, *supra* note 1, at 49:

> Section 106 prohibits not only express or overt tying, but also voluntary tying (or "tying effect"), as well. The latter term is used to describe a situation where the economic effect of the arrangements is just as serious as overt tying.
>
> For example, a customer may be induced to act in a certain manner because of his recognition of the bank's market power, rather than because of any overt coercion by the bank. Thus, a loan applicant might offer to place his insurance or travel business with a bank, hoping that this would improve his chances of obtaining a commercial or mortgage loan.

Perhaps the Board's position may be understood by the fact that it is consistent with the way that each of the financial institution regulatory agencies often views its "constituency"; namely, as those institutions that they regulate, rather than the customers of such financial institutions or the American public at large. By fashioning increasingly stringent requirements and more difficult hurdles to surmount in alleging and proving tying claims, the regulators serve their perceived constituencies well. *See also infra* note 231.

[81] 15 U.S.C. § 1. The statute reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. (emphasis added).

[82] 15 U.S.C. § 14. The statute reads:

> It shall be unlawful for any person engaged in commerce, in the course of such

> commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to s*ubstantially lessen competition or tend to create a monopoly* in any line of commerce.

Id. (emphasis added).

[83] *See Doe v. Norwest Bank Minn., N.A.,* 107 F.3d 1297, 1305 (8th Cir. 1997) ("Unlike a Sherman Act plaintiff, a plaintiff in a § 1972 action need not show that a tie has anti-competitive effects. But a § 1972 plaintiff is required to show an anticompetitive *practice*, that is, 'that the practice results in unfair competition or *could lessen competition*'") (emphasis in original); *Davis v. First Nat'l Bank of Westville,* 868 F.2d 206, 208 (7th Cir. 1989) (stating that plaintiff "must still complain of a practice that is anticompetitive"); *Exchange Nat'l Bank of Chicago v. Daniels,* 768 F.2d 140, 143 (7th Cir. 1985) (stating that the anti-tying provision is "the banking equivalent of § 3 of the Clayton Act," which expressly requires an anticompetitive effect); *FDIC v. Linn,* 671 F. Supp. 547, 561-62 (N.D. Ill. 1987). *See also* Kevin S. Krejci, *The Requirement of an "Anticompetitive Effect" in the Anti-Tying Provisions of the Bank Holding Company Act and Thrift Institutions Restructuring Act,* 33 Ariz. L. Rev. 199, 220 (1991) ("There is no support for the…conclusion that the BHCA and the TIRA require a plaintiff to prove an anticompetitive effect….[S]ome courts have chosen to rewrite the law, substituting their own economic and business judgment for Congress'….[U]ntil Congress changes the anti-tying provisions of the BHCA and the TIRA, the courts should confine themselves to applying the statutes as written."); *infra* notes 196-205 and accompanying text.

[84] One basic difference is the language of the statutes themselves. *See supra* notes 81 & 82, with respect to the Sherman Act § 1 (codified at 15 U.S.C. § 1) and the Clayton Act § 3 (codified at 15 U.S.C. § 14). The Federal Trade Commission Act § 5 (codified at 15 U.S.C. § 45) is also used to prevent antitrust violations, and states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* at § 45(a)(1). By comparison, the language of the anti-tying provision is com-

pletely unique. *See supra* note 13 and accompanying text; *see also infra* note 184 (the Fifth Circuit has provided a good discussion of the various antitrust statutes' interrelationships).

The anti-tying provision, however, originally contained the language "condition, agreement, or understanding," as the Clayton Act does, but was changed by the Bennett Amendment. *Dibidale of La., Inc.,* 916 F.2d at 306 (quoting 116 Cong. Rec. 32124, 32125). As Senator Bennett stated in introducing his amendment that provided the exemption for "traditional banking practices," the Fed was left "only the task of exempting [or "excepting"] further activities of the same sort which it may determine to be desirable in the best interest of sound banking practices." *Id.* Clearly the Fed's authority was limited, and at no time was the Board given authority to rewrite section 106, as the Department of Justice's Antitrust Division now recommends. *See, e.g., infra* notes 85, 235.

[85] Congress' concern was that even small banks could misuse their economic power to the detriment of bank customers. Such conduct is inherently anticompetitive, even if there is little or no effect on the market. *JST Properties,* 701 F. Supp. at 1449. *See also* Naegele 1983, *supra* note 1, at 143-44 (discussing Congress' concerns with the difficulty of proving the market power of a bank). Thus, a unique statute for banking was required due to the special nature of bank power. *See Dibidale of La., Inc.,* 916 F.2d at 305; *see also infra* note 184.

In a letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, Department of Justice, to Senator Edward W. Brooke (June 26, 1970), *reprinted in* 1970 U.S.C.C.A.N. 5519, 5561, McLaren stated: "While we believe that the antitrust laws are applicable in this area, a serious question remains as to the extent to which they can practically eliminate [tying] practices in view of our limited enforcement resources. As a practical matter, many tie-in arrangements involving banks are so limited in their scope or involve such small amounts that they do not seem to justify the expensive and time-consuming efforts of full scale antitrust investigation and trial, particularly in view of the fact that the complex legal issues involved may result in decisions of limited precedential value."

McLaren's words ring true to this day, which is why constraints fashioned by the financial institution regulatory agencies and the courts that impede the policing by private litigants of predatory conduct by financial institutions are unwarranted and unwise from a public policy standpoint.

Perhaps most disturbing is that the Antitrust Division has done an about-face with respect to its views concerning section 106, as reflected in recent comments to the Fed. Specifically, the comments conclude:

> The Division…recommends that the Guide interpret Section 106 to be consistent with, and not broader than, the federal antitrust laws. In the event the

> Board determines that court precedent precludes such an interpretation, the Division recommends that the Board exercise its statutory right to expand the range of exemptions to section 106.

See Antitrust Division Comments, p. 1. Aside from constituting a complete reversal of the Division's policy when section 106 was enacted, what the Division has advocated is illegal. "Court precedent" would preclude such an interpretation; however, most importantly, it is totally inconsistent with the legislative history surrounding the enactment of section 106 — legislative history that includes the Division's own comments.

What has been advocated would bring about a complete "gutting" of the anti-tying provision — and the Division has suggested to the Fed that this might be accomplished by means of exceptions (not "exemptions") to section 106 (*see* 12 U.S.C. § 1972(1)). While the Fed has the power to grant exceptions, it does not have statutory authority to rewrite the anti-tying provision or any other laws. That is not what Congress ever intended or authorized (*see, e.g., supra* note 84); and it is irresponsible of the Division to suggest such wholesale defiance of congressional intent and the rewriting of a law that has been on the books for 35 years.

There is no doubt that if the Fed adopted the Antitrust Division's recommendations, and "legislated by exception," such actions would be illegal and subject to being struck down by the judiciary, and rightly so.

Undaunted, the Division opines: "The Division is…concerned that application of section 106 only to banks lessens competition in markets with bank and nonbank providers thus harming consumers." *See* Antitrust Division Comments, p. 2. Also, the Division endeavors to turn section 106 on its head by asserting: "Section 106 has the Potential to Chill Competition." *Id.* at 3. It must be recognized, however, that in the 35 years since the anti-tying provision's enactment, there have been no cases where the Division has brought an action against a bank pursuant to its authority under 12 U.S.C. §§ 1973-74, even though the Justice Department was charged with doing so. *See infra* note 177.

Any suggestion that section 106 has "chilled competition" is unfounded. Also, section 106 was intended to protect customers of financial institutions and the public, *not* protect banks from nonbanking competitors or enhance the ability of banks to compete with such competitors — as the Division seems to be advocating now. There is no question that customers of financial institutions and the public at large deserve something better from those who have been entrusted with safeguarding the public interest.

Even more mystifying are the Division's comments:

> The courts have interpreted section 106 as imposing significantly more strin-

> gent prohibitions than the general prohibitions on tying found in the Sherman and Clayton Acts. In fact, the U.S. courts have largely interpreted section 106 as a strict *per se* rule….

See id. (footnote omitted). Perhaps the Division's comments were prepared without the benefit of reviewing section 106's legislative history, which makes it clear that the anti-tying provision establishes strict *per se* illegality as well as more stringent prohibitions than those on tying found in the Sherman and Clayton Acts. *See also infra* notes 184, 192 & 235. As the Fed has recognized, "section 106's prohibitions exceeded applicable antitrust standards and imposed a *per se* prohibition against tie-ins involving credit." *See* 55 Fed. Reg. at 26,454 (June 28, 1990).

Also, the Fed recognized with respect to the enactment of section 106:

> In commenting on the effects of section 106, the Justice Department noted that "the proposed new section would go beyond [*Fortner Enterprises, Inc. v. United States Steel Corp.* 394 U.S. 495 (1969)], which did not go so far as to hold tie-ins involving credit illegal *per se*." [S. Rep. No. 1084, 91st Cong., 2d Sess. 17 (1970)] at 48. Accordingly, it has been held that impermissible tying arrangements under section 106 are unlawful even without a showing of adverse effects on competition or the degree of bank control over the tying product.

Id. n.4 (citations omitted).

As Senator Edward W. Brooke stated:

> [Section 106] represents a worthwhile addition to our antitrust laws and establishes per se illegality where a bank, a subsidiary of a bank, a bank holding company or a subsidiary of a bank holding company engages in express or implied tying.

See 116 CONG. REC. 42431 (Dec. 18, 1970).

The Division's recent views and its failure to enforce section 106, even though Congress charged it with doing so (*see infra* note 177), are irresponsible.

[86] Some senators argued in favor of amending the bill to prohibit only conduct where there is an anticompetitive effect. *See* S. Rep. No. 91-1084 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5519, 5546. They recognized that the bill prohibited "all tying arrangements involving any bank without any reference to possible adverse effects on competition or other restraints of trade…." *Id.* at 5547. Congress noted, as the Supreme Court had in *Standard Oil Co. of Cal. v. United States,* 337 U.S. 293, 305-06 (1949), that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." 1970 U.S.C.C.A.N. 5558. Because of their inherent anticompetitive effects, bank tying arrangements "are made unlawful by [12 U.S.C. § 1972] without any showing of specific adverse effects on competition…." *Id.*

[87] *See Dibidale of La., Inc.,* 916 F.2d at 305-06 ("Central to this more stringent

regulation of the banking industry was Congress's decision to exclude from the bank anti-tying provisions the market share and anti-competitiveness requirements which were the cornerstone of tying claims under the general antitrust statutes"); *Bruce*, 837 F.2d at 718; *Campbell*, 781 F.2d at 443; *Parsons Steel, Inc.,* 679 F.2d at 245; *Costner*, 578 F.2d at 1196; *Libby v. Firststar Bank of Sheboygan, N.A.,* 47 F. Supp.2d 135, 141 (D. Mass. 1999); *Gage*, 717 F. Supp. at 752; *JST Properties,* 701 F. Supp. at 1449-50; *Sharkey v. Security Bank & Trust Co.,* 651 F. Supp. 1231, 1232 (D. Minn. 1987) ("Thus, under section 1972, a successful plaintiff need only show that a bank (1) extended credit; (2) on the condition or requirement; (3) that the plaintiff obtain some additional property, other than a loan, discount, deposit, or trust service, from the bank; the plaintiff need not make any showing of anti-competitive effects."); *Nordic Bank PLC,* 619 F. Supp. at 556 n.9 (quoting Naegele 1983, *supra* note 1, at 143); *see also Gulf States Land & Dev., Inc.,* 956 F.2d at 506-07 n.1; Naegele 1983, *supra* note 1, at 142 ("[T]ying arrangements are illegal in and of themselves and do not require any specific showing of unreasonable anticompetitive effect").

[88] *Davis*, 868 F.2d 206, 208 (7th Cir. 1989); s*ee also Cont'l Bank of Penn. v. Barclay Riding Academy,* 459 A.2d 1163 (N.J. 1983). In *Continental Bank,* the court noted that there was no prohibition against a bank taking security measures to protect its investment, and went on to say that such practices were not anticompetitive. *Cont'l Bank,* 459 A.2d at 1170-71. The court stated that the bank was not trying to "corner the lending market." *Id.* at 1171. And the court found in favor of the bank because there was no proof that the "alleged reciprocity produced adverse market consequences." *Id.* at 1171 n.8.

[89] *Davis*, 868 F.2d at 208. Such confusion probably resulted from ambiguous language in prior cases. For example, one court stated, "[s]ection 1972 was intended only to 'prohibit anti-competitive practices….'…It 'was not intended to interfere with the conduct of appropriate traditional banking practices'." *McCoy v. Franklin Sav. Ass'n,* 636 F.2d 172, 175 (7th Cir. 1980) (citations omitted). Another court stated, "[u]nless the 'unusual' banking practice is shown to be an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's prohibitions." *Parsons Steel, Inc.,* 679 F.2d at 245. However, the same court also stated, "the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, *without requiring plaintiffs to establish* the economic power of a bank and *specific anticompetitive effects* of tying arrangements." *Id.* (emphasis added).

Thus, the *Parsons* court specifically denied that such a showing was required under the Act. The language from *Parsons*, though, has been appropriated for the proposition that anticompetitiveness is required to state a claim under § 1972. *See* Krejci, *supra* note 83, at 210.

[90] The language also shows how courts analogize the BHCA to other antitrust statutes, whether the comparison is correct or not.

[91] *See* text accompanying *supra* note 54 for discussion of three elements. Since most BHCA claims are brought in federal court, the Federal Rules of Civil Procedure apply. Rule 8 sets forth the general rules of pleading a federal claim, and states in pertinent part:

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief…shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends…, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

* * *

(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 8(a) & (e).

If the plaintiff also alleges fraud, the factual allegations must be pled with "particularity." FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."). *See also* FED. R. CIV. P. 8(b), (c) & (d) ("Defenses; Form of Denials"; "Affirmative Defenses"; and "Effect Of Failure To Deny").

[92] 584 F.2d 54 (5th Cir. 1978).

[93] *Id.* at 59 (emphasis in original).

[94] *Id.* "It is sufficient to allege that the bank required a customer to do an act not related to nor usually provided in connection with a loan. That there is a benefit to the bank will be implied for pleading purposes." *Id. But see Rae,* 725 F.2d at 480 (requiring allegation that bank benefited, and other allegations); *see infra* note 96 for discussion of *Rae*.

[95] 506 F. Supp. 254 (D. P.R. 1980).

[96] *Id.* at 264-65. The complaint contained "many ultimate conclusory statements to the effect that Chase imposed certain conditions for extensions of credit to Nesglo …[b]ut the factual underpinnings of the conditions or requirements…are lacking." *Id. See also Rae,* 725 F.2d at 480, where the court stated:

> Here, the anti-tying claim of Rae's complaint alleges only that "Defendants' actions as recited above constituted a tying arrangement prohibited by 12 U.S.C. Section 1972(1)(A) and (C)." Various references to loan conditions and extensions of credit accompanied by provisions designed to protect the bank's security are all that is "recited above." That is simply not enough to state a claim. There is no factual allegation in the complaint that the bank tied a loan to any other product, service, or benefit. Moreover, there is no factual allegation that the bank would benefit in any other way than by getting additional protection for its loans. There is not even an allegation that the banking practice was unusual. Finally, no tying claim can be stated against the individual defendants. Section 1972 does not cover natural persons.

Rae, 725 F.2d at 480. Plaintiff had been given leave to amend once already. *Id.*

[97] *Nesglo*, 506 F. Supp. at 264. Such conditions are often imposed and not found to be illegal tie-ins. *See supra* notes 62-69 and accompanying text.

[98] *Id.* at 265. "Conclusory statements such as 'illegal or outrageous conduct' will not suffice, for the grant by Congress to entertain this type of suit was quite carefully delineated." *Id.* The *Nesglo* court put great emphasis on the legislative history of the Act and the situations to which it was intended to apply. *See id.* at 261-65 (discussing the Act and its history extensively).

[99] "[T]he banking industry consists of two parallel systems of banks and thrifts — those that operate under federal charters, and those that operate under state charters. Under this 'dual banking system,' depository institutions can choose to be chartered and primarily regulated either by the federal government or by a state government." Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation, 8*8 Minn. L. Rev. 518, 541 (2004).

[100] *Id.* at 541-42 ("The choice of one primary regulator does not, however, wholly insulate a depository institution from the jurisdiction of [the others]"); *see also* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking*

System, 73 CORNELL L. REV. 677 (1988) (discussing the dual banking system).

Notably America's credit unions are not subject to the anti-tying provision or comparable legislation. Perhaps Congress has not legislated in this area because it is thought that the "common bond" among credit union members militates against the likelihood of tying abuses and protects such members. Or maybe the absence of legislation and regulation merely reflects the fact that the industry's lobbying efforts have been quite effective, and credit union regulators often serve their constituent institutions. Surely credit union members, though, deserve the same protections afforded by the anti-tying provision and its savings association analogue. *See also* Naegele *1*983, *supra* note 1, at 161 n.136.

[101] *See* Heidi Mandanis Schooner, *The Role of Central Banks in Bank Supervision in the United States and the United Kingdom,* 28 Brooklyn J. Int'l L. 411, 427 (2003); *see also* CONF. REP. NO. 106-434 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 246.

[102] A "member bank" is "any national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks." 12 U.S.C. § 221; *see also* 12 U.S.C. § 1813(q)(2).

[103] *Id.*; 12 U.S.C. § 1841(a). *See also* Richard K. Kim, *The Federal Reserve's Proposed Interpretation Regarding the Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970,* 8 N.C. BANKING INST. 1, 2 (2004) ("The Federal Reserve is the regulator charged with the responsibility of enforcing the tying rules and examining bank holding companies for compliance with them."). While the Fed does have jurisdiction over the subsidiary banks in a bank holding company (*see CBC, Inc. v. Bd. of Governors of the Federal Reserve System,* 855 F.2d 688, 691 (10th Cir. 1988)), the Fed's authority does not extend to the subsidiaries of bank holding companies' bank subsidiaries (*see Citicorp v. Bd. of Governors of the Federal Reserve System,* 936 F.2d 66 (2d Cir. 1991)). *See also* 12 U.S.C. § 1813(q)(2)(F) (The Fed is the "appropriate Federal banking agency" in the case of "any bank holding company and any subsidiary of a bank holding company (*other than a bank*)") (emphasis added).

[104] *See Schooner, supra* note 101, at 423-27, 438-39 (describing the Fed's regulatory role in the post-Gramm-Leach-Bliley Act era).

[105] *See* 12 U.S.C. §§ 1841(p) & 1843(l)(1); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999); *see also* CONF. REP. NO. 106-434 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245; 12 C.F.R. § 225.81 *et seq.*

The GAO summarized the Fed's regulatory role as follows:

> The Federal Reserve has primary supervisory and regulatory responsibilities for bank holding companies and their nonbank and foreign subsidiaries and for state-chartered banks that are members of the Federal Reserve System and their

> foreign branches and subsidiaries. The Federal Reserve also has regulatory responsibilities for transactions between member banks and their affiliates.

GAO Report, *supra* note 13, at 8.

[106] *See Schooner, supra* note 101, at 438.

[107] 12 C.F.R. § 225.101 *et seq.*

[108] 12 U.S.C. § 1972(1); 12 C.F.R. § 225.7; *see supra* notes 13, 69, 70 and accompanying text. *See, e.g.,* 1996 Fed. Res. Interp. Ltr. LEXIS 103 (Dec. 6, 1996) (approving an exception for a combined-balance discount program proposed by Citicorp that would not include all deposits held by Citicorp's depository subsidiaries, but reserving right to revoke exception); Fed. Res. Interp. Ltr. 4-710, 1982 Fed. Res. Interp. Ltr. LEXIS 1 (Dec. 17, 1982) (Fed correctly decided that Congress did not inadvertently include tying arrangements between subsidiary banks of a holding company system, United Jersey Banks, within the prohibitions of the anti-tying provision and that exercise of the Board's exception authority was not warranted).

The GAO noted:

> Section 106 authorizes the Federal Reserve to make exceptions that are not contrary to the purposes of the tying prohibitions. The Federal Reserve has used this authority to allow banks to offer broader categories of packaging arrangements, where it has determined that these arrangements benefit customers and do not impair competition. In 1971, the Federal Reserve adopted a regulation that extended antitying rules to bank holding companies and their nonbank affiliates and approved a number of nonbanking activities that these entities could engage in under the Bank Holding Company Act. Citing the competitive vitality of the markets in which nonbanking companies generally operate, in February 1997, the Federal Reserve rescinded this regulatory extension. At the same time, the Federal Reserve expanded the traditional bank products exception to include traditional bank products offered by nonbank affiliates.

GAO Report, *supra* note 13, at 10 (citing 83 Fed. Res. Bull. 275 (April 1997), at end of fourth sentence); *see also* Proposed Interpretation, 68 Fed. Reg. at 52,024 n.5 (citing 62 Fed. Reg. 9290 (Feb. 28, 1997)); *supra* note 70. The Fed's biases in favor of banks and their affiliates are reflected in its rescission of the regulatory extension, and its expansion of the exception.

The GAO added:

> In the mid-1990s, the Board also added two regulatory safe harbors. First, the Board granted a regulatory safe harbor for combined-balance discount packages, which allowed a bank to vary the consideration for a product or package of products — based on a customer's maintaining a combined minimum balance

> in certain products — as long as the bank offers deposits, the deposits are counted toward the combined-balance, and the deposits count at least as much as nondeposit products toward the minimum balance. Furthermore, according to the Board, under the combined-balance safe harbor, the products included in the combined balance program may be offered by either the bank or an affiliate, provided that the bank specifies the products and the package is structured in a way that does not, as a practical matter, obligate a customer to purchase nontraditional bank products to obtain the discount. Second, the Board granted a regulatory safe harbor for foreign transactions. This safe harbor provides that the antitying prohibitions of section 106 do not apply to transactions between a bank and a customer if the customer is a company that is incorporated, chartered, or otherwise organized outside of the United States, and has its principal place of business outside of the United States, or if the customer is an individual who is a citizen of a country other than the United States and is not resident in the United States.

Id. at 10-11 (citing 83 Fed. Res. Bull. 275, at end of second and last sentences). Again, the Fed's biases in favor of banks and their affiliates (or "subsidiaries") undergird these exceptions. *See* 12 C.F.R. § 225.7; *see also supra* notes 69-70.

In the case of "mixed-product arrangements," the Fed asserts:

> Allowing a bank to offer the customer the *option* of satisfying a condition by purchasing either traditional bank products *or* non-traditional products can provide benefits to the customer (by increasing the choices available to the customer) *without* requiring the customer to purchase any non-traditional product from the bank or an affiliate in violation of section 106.

See Proposed Interpretation, 68 Fed. Reg. at 52,030 (emphasis in original).

The Fed adds:

> If…the customer does not have a meaningful option to satisfy the bank's condition solely through the purchase of the traditional bank products included in the arrangement, then the arrangement violates section 106 because the arrangement effectively requires the customer to purchase one or more non-traditional products in order to obtain the customer's desired product or a discount on the desired product. A mixed-product arrangement also would violate section 106 if the facts indicate that the bank did not provide the customer the freedom to choose to satisfy the bank's condition solely through the purchase of one or more of the traditional bank products included in the mixed-product arrangement.

Id. at 52,031.

First, section 106 provides an exemption only for traditional banking practices, *not* for a combination of traditional and non-traditional services. Second, despite the appearance of reasonableness in the Fed's arguments, any notion of a customer's "choices" or "options" or "freedom to choose" represents a disregard of the true issues involved, given the fact that "the power to coerce is inherent in the banking relationship itself, regardless of an individual bank's market power" (*Dibidale of La., Inc.,* 916 F.2d at 306). *See supra* note 5.

[109] 12 C.F.R. § 225.7(c); *see also supra* note 69. *See, e.g.,* 1996 Fed. Res. Interp. Ltr. LEXIS 103 (Dec. 6, 1996) (approving an exception for a combined-balance discount program proposed by Citicorp that would not include all deposits held by Citicorp's depository subsidiaries, but reserving right to revoke exception).

[110] *See, e.g.*, Martin E. Lybecker, *Financial Holding Companies and New Financial Activities Provisions of the Gramm-Leach-Bliley Act,* SH060 ALI-ABA 113, 118-19 (2003) (detailing the Fed's responsibility to consult with the Treasury Department regarding whether an activity is "financial in nature"). Additionally, some commentators have argued that the Fed's role in examining only a limited number of banks is inconsistent with its position as the nation's central bank, in theory warranting a more integrated model akin to that in other countries. *See* Schooner, *supra* note 101, at 443.

[111] *See* 12 U.S.C. § 1848a(a)-(b); *see also* 12 U.S.C. § 1844(c)(5).

[112] 12 U.S.C. 1818(b) & 1818(i)-(j). *See, e.g.,* William J. Sweet, Jr. & Stacie E. McGinn, *Financial Holding Company Regulation,* 1206 CORP. L. & PRAC. 465, 499 (2000).

[113] *See Schiltz, supra* note 99, at 541; *see also* 12 U.S.C. §§ 26-27, 93a; David R. Kinman, Comment, *Tying: Enhancing Competition Through the Bank Holding Company,* 8 N.C. BANKING INST. 215, 234-35 (2004).

The GAO summarized the OCC's regulatory role as follows:

> OCC has primary supervisory and regulatory responsibilities for the domestic and foreign activities of national banks and their subsidiaries. OCC also has responsibility for administering and enforcing standards governing transactions between national banks and their affiliates.

GAO Report, *supra* note 13, at 8.

[114] *See* 12 U.S.C. § 1; *see also infra* notes 123-26 and accompanying text; 12 U.S.C. § 1462a(a) & (b)(3).

[115] *See Kinman*, *supra* note 113, at 235. *See also* 12 U.S.C. 1818(b) & 1818(i)-(j).

[116] *See, e.g.,* OCC Bull. 95-20, Tying Restrictions ("Guidance on Tying" to CEOs of all national banks) (April 14, 1995). OCC Bulletin 95-20 states in pertinent part:

> The [Fed] has issued 12 CFR 225.7, which includes the following exceptions:
>
> Traditional bank products. A bank holding company or any bank or non-

> bank subsidiary may vary the price charged for a traditional bank product on the condition or requirement that a customer also obtain a traditional bank product from an affiliate.
>
> Securities brokerage services. A bank holding company or any bank or nonbank subsidiary thereof may vary the price charged for securities brokerage services on the condition or requirement that a customer also obtain a traditional bank product from that bank holding company, bank, nonbank subsidiary, or any affiliate of such company or subsidiary.
>
> Discounts on tie-in arrangements not involving banks. A bank holding company or any nonbank subsidiary thereof may vary the price for any extension of credit, lease or sale of property of any kind, or service, on the condition or requirement that the customer obtain some additional credit, property, or service from itself or a nonbank affiliate.

The exceptions in 12 CFR 225.7 apply only if all products involved in the tying arrangement are separately available for purchase. For purposes of the regulation, "traditional bank product" means a loan, discount, deposit, or trust service.

National banks, operating subsidiaries of national banks, and federal branches and agencies of foreign banks must comply with the antitying provisions [of 12 U.S.C. § 1972(1)]. Tying arrangements may violate other laws, including the federal antitrust laws, in addition to the antitying provisions.

PERMISSIBLE ARRANGEMENTS

The following are examples of arrangements that would be allowed under the antitying provisions.

> A bank may cross-sell or cross-market products or services. A bank cross-sells when it informs a customer that other products or services are available from the bank or its affiliates.
>
> A bank may require, as a condition to extending credit, that the customer obtain financial advisory services from an unrelated third party in an effort to improve the customer's financial condition.
>
> A bank may reduce charges for credit for customers who obtain trust services from an affiliate.
>
> A bank may reduce the price of securities brokerage services obtained from a broker-dealer affiliate for customers who obtain credit from the bank.

PROHIBITED TYING ARRANGEMENTS

The following are examples of tying arrangements that are prohibited by the antitying provisions, unless exempted by the Board.

> A bank may not condition the extension of credit or the reduction of the price of credit on the customer purchasing credit-related insurance from the bank.
>
> A bank may not condition the extension of credit on the customer obtaining securities underwriting services from the bank's "Section 20" affiliate.
>
> A bank may not condition the extension of credit on the customer purchasing securities using a broker-dealer affiliate.
>
> A bank may not condition the extension of credit on the customer purchasing other real estate owned ("OREO") from the bank.

See also 12 U.S.C. § 1828b.

[117] *See, e.g.,* 12 U.S.C. § 248(a)(2)(B)(i) (describing the jurisdiction of the FDIC vis-à-vis reports to the Fed). The terms "State nonmember bank," "savings bank," and "mutual savings bank" are defined in 12 U.S.C. § 1813.

[118] 12 U.S.C. § 1811(a). *See also Gunter v. Hutcheson,* 674 F.2d 862, 870 (11th Cir. 1982) (stating that the FDIC was created to promote the stability of and confidence in the nation's banking system); *Weir v. United States,* 92 F.2d 634, 636 (7th Cir. 1937) ("Congress has created, as an agency of the government, the Federal Deposit Insurance Corporation to promote the soundness of banking and aid the government in the discharge of its fiscal transactions. Its obvious intent was, by insuring deposits, to prevent runs on banks by depositors, to preserve solvency of insured banks, and thus to keep open the channels of trade and commercial exchange").

[119] *Hewitt v. United States,* 110 F.2d 1, 5 (8th Cir. 1940).

[120] 12 U.S.C. § 1812(a).

[121] 12 U.S.C. § 1811(a).

[122] *See generally* 12 U.S.C. § 1820 (prescribing the administration of the FDIC); *see also* 12 U.S.C. 1818(b) & 1818(i)-(j).

[123] 12 U.S.C. § 1462a. *See also* 12 U.S.C. § 1462(4).

[124] 12 U.S.C. § 1813(b)(1). Sections 1813(b)(2) and (3) further distinguish federal from State savings associations. A Federal savings association is a "Federal savings association or Federal savings bank which is chartered under [12 U.S.C. § 1464, or section 5 of the Home Owners' Loan Act]." 12 U.S.C. § 1813(b)(2). On the other hand, a State savings association includes savings and loan associations as well as cooperative banks organized under state law. 12 U.S.C. § 1813(b)(3).

[125] 12 U.S.C. § 1463(a). *See also Security Sav. & Loan v. Director, Office of Thrift*

Supervision, 960 F.2d 1318, 1323 (5th Cir. 1992) (describing the OTS' "broad power" to regulate savings associations).

[126] *See supra* note 13; *see also infra* notes 196-205; 12 U.S.C. § 1828b(a) (requiring interagency data sharing with respect to antitrust issues).

[127] *See* GAO Report, *supra* note 13; *see also Gage,* 717 F. Supp. at 754-55 (discussing cases with respect to what constitutes, and does not constitute, unlawful tying arrangements).

[128] 12 U.S.C. § 1972(1)(A) & (C); *see also* 12 U.S.C. § 1464(q)(1)(A)-(B). The Fed has issued a non-exhaustive list of "*defined* traditional bank products," which includes:

> All types of extensions of credit, including loans, lines of credit, and backup lines of credit; Letters of credit and financial guarantees; Lease transactions that are the functional equivalent of an extension of credit; Credit derivatives where the bank or affiliate is the seller of credit protection; Acquiring, brokering, arranging, syndicating and servicing loans or other extensions of credit; All forms of deposit accounts, including demand, negotiable order of withdrawal ("NOW"), savings and time deposit accounts; Safe deposit box services; Escrow services; Payment and settlement services, including check clearing, check guaranty, ACH, wire transfer, and debit card services; Payroll services; Traveler's check and money order services; Cash management services; Services provided as trustee or guardian, or as executor or administrator of an estate; Discretionary asset management services provided as fiduciary; Custody services (including securities lending services); and Paying agent, transfer agent and registrar services.

Proposed Interpretation, 68 Fed. Reg. at 52,030. *See supra* note 6; *see also supra* notes 62-69 and accompanying text. *See* Naegele 1983, *supra* note 1, at 155-59 (the so-called traditional banking practices exemption must be construed narrowly).

[129] *Exchange Nat'l Bank of Chicago,* 768 F.2d at 144 ("[T]he statute…does not say that any actual loan in violation of its terms is unenforceable. Section 1975 permits a treble damages action by an injured party, but an obligation to pay back a loan actually made is not an injury") (citations omitted).

[130] *Nordic Bank PLC,* 619 F. Supp. at 556.

[131] 1996 Fed. Res. Interp. Ltr. LEXIS 103 (Dec. 6, 1996) (approving an exception for a combined-balance discount program proposed by Citicorp that would not include all deposits held by Citicorp's depository subsidiaries, but reserving right to revoke exception).

[132] *Sanders*, 936 F.2d at 278; *Palermo v. First Nat'l Bank & Trust Co.,* 894 F.2d 363, 369 (10th Cir. 1990); *Quintana v. First Nat'l Bank of Santa Fe,* 851 F. Supp. 407,

411 (D. N.M. 1994), rev'd, 64 F.3d 670 (10th Cir. 1995); *Alpine Elec. Co.,* 776 F. Supp. at 489-91; *Iden v. Adrian Buckhannon Bank,* 661 F. Supp. 234, 240 (N.D. W.V. 1987); *Nordic PLC,* 619 F. Supp. at 557; *Cont'l Bank of Penn.,* 459 A.2d at 1170.

[133] *Clark*, 480 F.2d at 238; *Nordic PLC,* 619 F. Supp. at 556-57.

[134] *Nordic*, 619 F. Supp. at 556.

[135] *Gulf States Land & Dev., Inc.,* 956 F.2d at 507.

[136] *FDIC v. Linn,* 671 F. Supp. at 561-63.

[137] *Pappas*, 653 F. Supp. at 705; *Peterson v. Wells Fargo Bank,* 556 F. Supp. 1100, 1107 (N.D. Cal. 1981).

[138] *Bieber*, 928 F.2d at 330; *Cont'l Ill. Nat'l Bank & Trust Co.,* 668 F. Supp. at 585.

[139] *Gulf States Land & Dev., Inc.,* 956 F.2d at 507-08.

[140] *McCoy*, 636 F.2d at 175.

[141] *Davis*, 868 F.2d at 209 (requiring borrowers to liquidate business and pay off existing debts before obtaining new funds); *Dannhausen v. First Nat'l Bank of Sturgeon Bay,* 538 F. Supp. 551, 563-64 (E.D. Wis. 1982) (requiring borrower to assume debts of corporation when buying business from corporation).

[142] *Shulman v. Cont'l Bank,* 513 F. Supp. 979, 984-85 (E.D. Pa. 1981). *See also* Naegele 1983, *supra* note 1, at 149-50, 152 (discussion of *Shulman*).

[143] 679 F.2d 242 (11th Cir. 1982).

[144] 619 F. Supp. 542 (S.D. N.Y. 1985).

[145] 648 F.2d 879 (3d Cir. 1981). *See also* Naegele 1983, *supra* note 1, at 156-57 (discussion of *Tose*).

[146] *Parsons Steel, Inc.,* 679 F.2d at 244; *Tose*, 648 F.2d at 897; *Nordic PLC,* 619 F. Supp. at 556-57. *See also* Naegele 1983, *supra* note 1, at 154-55 (discussion of *Parsons Steel, Inc.*).

[147] *B.C. Recreational Indus.,* 639 F.2d at 832; *Nordic PLC,* 619 F. Supp. at 556; *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Associates,* 595 F. Supp. 800, 803 (E.D. Pa. 1984).

[148] *Sterling Coal Co., Inc.*, 470 F. Supp. at 965. *See also* Naegele 1983, *supra* note 1, at 153 (discussion of *Sterling Coal Co., Inc.*).

[149] *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co. of Chicago,* 927 F.2d 988, 991 (7th Cir. 1991).

[150] *Hargus*, 666 F. Supp. at 112-13. *See also supra* notes 33-37 and accompanying text.

[151] *Nordic PLC,* 619 F. Supp. at 553.

[152] *Id.* at 556.

[153] *See, e.g., Duryea v. Third Northwestern Nat'l Bank of Minneapolis,* 606 F.2d 823, 825-26 (8th Cir. 1979); *Boulevard Bank Nat'l Ass'n v. Adams Newspapers, Inc.,* 787 F.

Supp. 122, 125 (E.D. Mich. 1992); *FDIC v. Eagle Properties, Ltd.,* 664 F. Supp. 1027, 1054 (W.D. Tex. 1985); *Freidco of Wilmington, Del., Ltd.,* 499 F. Supp. at 1001-03.

[154] *See infra* note 230 ("plaintiff-friendly" cases that have been decided in recent years); *see generally* GAO Report.

The Fed, in an effort to help banks and customers better understand the anti-tying prohibition of the BHCA, lists some examples of conduct that it considers to be illegal:

> [S]ection 106 prohibits a bank from imposing a condition on a prospective borrower that requires the borrower to do any of the following in order to obtain a loan from the bank — Purchase an insurance product from the bank or an affiliate of the bank (a prohibited tie); Obtain corporate debt or equity underwriting services from an affiliate of the bank (a prohibited tie); Sell the bank or an affiliate of the bank a piece of real estate unrelated to the requested loan (a prohibited reciprocity arrangement); or Refrain from obtaining insurance products or securities underwriting services from a competitor of the bank or from a competitor of an affiliate of the bank (a prohibited exclusive dealing arrangement).

See Proposed Interpretation, 68 Fed. Reg. at 52,026; *see also id.* at 52,027 ("Section 106 prohibits a bank from requiring that the customer purchase homeowners insurance (the tied product) from the bank or an affiliate of the bank as a condition to granting the customer the mortgage loan or a discount on the loan"); *id.* at 52,028 ("[A] bank would violate section 106 if the bank informs a customer seeking only a loan from the bank that the bank will make the loan only if the customer commits to hire the bank's securities affiliate to underwrite an upcoming bond offering for the customer"); *id.* at 52,028-52,029 ("[B]ank actions that go beyond cross-marketing or cross-selling and that indicate that the bank will not provide the customer the desired product unless the customer obtains (or provides) another product from (or to) the bank or an affiliate do raise issues under section 106"); *id.* at 52,030 ("A bank …may *not* require a customer seeking an auto loan from the bank to purchase automobile insurance from the bank or from an insurance agency affiliate of the bank. Although the desired product (an auto loan) in this case is a traditional bank product, the tied product (automobile insurance) is not and, accordingly, the traditional bank product exceptions are not available for this transaction") (emphasis in original); Fed. Res. Interp. Ltr. 4-710, 1982 Fed. Res. Interp. Ltr. LEXIS 1 (Dec. 17, 1982) (Fed correctly decided that Congress did not inadvertently include tying arrangements between subsidiary banks of a holding company system, United Jersey Banks, within the prohibitions of the anti-tying provision and that exercise of the

Board's exception authority was not warranted); Naegele 1971, *supra* note 1, at 48-49 ("Even though traditional banking practices are involved, a bank may nevertheless be liable. The exemptions involving loans, discounts, deposits, or trust services contained in Section 106 apply only where intra-bank tying is involved — that is, where the tying involves specific functions *within* a bank which have been traditionally tied together — and does not apply to extra-bank tying where tying exists between the bank and other holding company subsidiaries, or between those subsidiaries."). *See also supra* note 116 for examples from the OCC with respect to national banks, as set forth in OCC Bulletin 95-20 (April 14, 1995); Fed. Res. Interp. Ltr. 4-650, 1981 Fed. Res. Interp. Ltr. LEXIS 5 (Mar. 26, 1981) (stating that section 106 would prohibit a bank from extending credit subject to a condition that the borrower obtain an appraisal from the bank holding company or affiliate); Fed. Res. Interp. Ltr. 4-288, 1976 Fed. Res. Interp. Ltr. LEXIS 1 (May 17, 1976) (finding that a bank's requirement that a borrower use the bank's property management services as a condition to obtaining financing, "depending upon all of the circumstances, may be construed as a tie-in arrangement prohibited by section 106").

[155] *See also* GAO Report, *supra* note 13, at 4 & 17 ("Borrowers also noted that a fear of adverse consequences on their companies' future access to credit or on their individual careers contributed to some borrowers' reluctance to file formal complaints").

[156] 619 F. Supp. 542 (S.D. N.Y. 1985).

[157] *Id.* at 557 (citing *Costner*, 578 F.2d 1192) ("The alleged requirement that Trend guarantee several loans for which it was not already responsible constituted a similar imposition on Trend unrelated to [the bank's] extension of credit. *Costner* supports our current view that the plaintiffs have stated a BHCA claim"). It is acceptable to require a borrower to guarantee his loans, but a bank may not require a guaranty of unrelated loans. *Id. See also, Wisdom v. First Midwest Bank, of Poplar Bluff,* 167 F.3d 402, 409 (8th Cir. 1999) (stating that by requiring borrowers to accept a loan from related bank before the bank would grant its loan, such facts may support a claim under the BHCA); *Tri-Crown, Inc.,* 908 F.2d 585 ("Conditioning the extension of credit to a bank customer on the requirement that the customer participate in the bank's bad loans to an unrelated customer surely is an anticompetitive practice proscribed by § 1972" (quoting *Palermo*, 894 F.2d at 369)).

[158] 651 F. Supp. 1231 (D. Minn. 1987).

[159] *Id.* at 1232-33. *See also Arthur v. Liberty Bank & Trust Co.,* Civ. A. No. 95-3170, 1996 WL 449557, at *3 (E.D. La. Aug. 7, 1996) (district court denied defendant bank's motion to dismiss, finding that bank's requirement that plaintiff's son settle an unrelated lawsuit against bank as a prerequisite to lending her money to purchase bank's property was an illegal tying arrangement in violation of section 1972(1)(C)); *Gumowitz v. Citibank, N.A.,* 91 Civ. 5399, 1993 U.S. Dist. LEXIS 12632, at *3-4

(S.D. N.Y. Sept. 13, 1993) (district court denied defendant bank group's motion to dismiss, or in the alternative for summary judgment, and found that plaintiffs-developers adequately pled the elements of a BHCA claim where Citibank allegedly (1) informed plaintiffs that unless they conducted all of their banking through Citibank, Citibank would refuse to renew loans and would demand repayment, and (2) employed "oppressive lending tactics in order to force plaintiffs to conduct their banking business exclusively through Citibank," including freezing "previously available credit facilities" when plaintiffs transferred some of their banking business to a competitor, mandating that "plaintiffs dedicate additional collateral to existing loans, order[ing] [plaintiffs] to record a second mortgage on certain property that they owned, and improperly and incorrectly inform[ing] other lenders that [plaintiffs] were experiencing financial difficulties").

[160] 840 F.2d 653, 656-64 (9th Cir. 1988). *See supra* note 13; *see also infra* notes 196-205 and accompanying text.

[161] *Id.* at 656-64. The court also found that plaintiff's loss was the proximate result of the tying violation. *Id.* at 662-63.

Because the defendant was a savings and loan, the suit was brought under 12 U.S.C. § 1464(q). *See supra* note 13; *see also infra* notes 196-205 and accompanying text. Rather than addressing the statute in the context of the anti-tying provision, the court went through a lengthy discussion and application of other antitrust laws, instead of simply recognizing that 12 U.S.C. § 1464(q) is the anti-tying provision's analogue, and that a direct injury should not be required. *See supra* notes 44-53 and accompanying text; *see also supra* notes 81-85 and accompanying text (as the anti-tying provision's analogue, 12 U.S.C. § 1464(q) is unique and unlike other antitrust statutes).

[162] Similar reasoning can be applied to *Swerdloff*; namely, the court held that "sufficient facts might possibly be shown…to permit recovery and defendant was not entitled to judgment as a matter of law at the pleading stage of the proceeding." 584 F.2d. at 60. *See supra* notes 32, 92-94; *see also infra* note 230.

The Sixth Circuit affirmed a district court decision that found an illegal tying arrangement under similar circumstances. *Costner*, 578 F.2d at 1194-96 (finding violation of anti-tying provision when bank made loan to permit plaintiff to purchase stock in auto dealership, but required dealership to sell a substantial share of its commercial paper to the bank).

[163] *Wisdom*, 167 F.3d at 409.

[164] *Dibidale of La., Inc.,* 916 F.2d at 304-08.

[165] *Tri-Crown, Inc.*, 908 F.2d at 580-85.

[166] *Amerifirst Properties, Inc.,* 880 F.2d at 823-26.

[167] *Bruce*, 837 F.2d at 713-19.

[168] *Swerdloff*, 584 F.2d at 58-60.
[169] *Costner*, 578 F.2d at 1194-95.
[170] *Libby*, 47 F. Supp. 2d at 136-141.
[171] *Art*hur, 1996 WL 449557, at *3.
[172] *Gumowitz*, 1993 U.S. Dist. LEXIS 12632, at *3-4.
[173] *Gage*, 717 F. Supp. at 752-56.
[174] *JST Properties,* 701 F. Supp. at 1447-51.
[175] *Tose*, 648 F.2d at 898 n.23. *See* Naegele 1983, *supra* note 1, at 156-57 (discussion of *Tose*); *Dibidale of La., Inc.,* 916 F.2d at 303, 308; *Rae,* 725 F.2d at 480; *Blue Line Coal Co., Inc. v. Equibank,* 683 F. Supp. 493, 495 (E.D. Pa. 1988); *Nesglo, Inc.,* 506 F. Supp. at 265. *See also* Chapelle*, supra* note 4, at 717 n.81.

Under certain circumstances, it may be unproductive to sue the bank, yet recovery against bank directors, officers, employees, attorneys, appraisers, accountants or others may be warranted from a public policy standpoint (*e.g.,* to police tying abuses).

For example, if a bank or other financial institution fails, it may be taken over by a federal regulatory agency such as the FDIC. Once that agency is in control, it has the power to distribute the assets of the institution, and a judgment resulting from an anti-tying provision lawsuit may or may not have priority over other creditors.

[176] An institution-affiliated party is defined as:

(1) any director, officer, employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

(2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency…;

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution; and

(4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimum financial loss to, or a significant adverse effect on, the insured depository institution.

12 U.S.C. § 1813(u); 12 U.S.C. § 1972(2)(F). S*ee also* Naegele 1983, *supra* note 1, at 151 (discussing who may be liable under § 1972).

[177] Section 106 provides that the United States Attorneys, under the direction of the Attorney General, shall institute proceedings to prevent and restrain violations of section 106. *See* 12 U.S.C. §§ 1973-74 (12 U.S.C. §§ 1973: "[I]t is the *duty* of the United States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations") (emphasis added); *see also,* Fed. Res. Interp. Ltr. 4-288, 1976 Fed. Res. Interp. Ltr. LEXIS 1 (May 17, 1976). However, to date, there have been no cases where the government has brought such an action against a bank. Naegele 1983, *supra* note 1, at 144. This is not surprising given the present views of the Department of Justice's Antitrust Division. *See, e.g., supra* note 85.

On Aug. 27, 2003, the Federal Reserve Board announced that WestLB AG, a German bank, and its New York affiliate, consented to the issuance of a Combined Order for anti-tying violations. Press Release, Federal Reserve Board, (Aug. 27, 2003) (*see* http://www.federalreserve.gov/boarddocs/press/enforcement/2003/20030827/default.htm). WestLB agreed to pay $3 million in civil money penalties and change its procedures. *Id.* Specifically, the Federal Reserve alleged that WestLB "conditioned the availability or price of credit to corporate customers on the corporate customer's appointment of WestLB as an underwriter for issuances of debt securities." *Id.*

[178] 477 F. Supp. 717 (E.D. Va. 1979).

[179] *Id.* at 720.

[180] 12 U.S.C. § 1976 states:

> Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of section 1972 of this title, under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

See also 12 U.S.C. § 1464(q)(2); *supra* note 13.

[181] *Sundance Land Corp.,* 840 F.2d at 661. The court added: "The injunction provision of the BHCA, 12 U.S.C. § 1976, which utilizes language identical to section 1464(q)(2)(A) of HOLA….has not yet been interpreted by the courts, and so cannot provide us with any guidance." *Sundance Land Corp.,* 840 F.2d at 661 n.11. In fact, taken together, 12 U.S.C. § 1464(q)(2)(A) & (B) are identical to 12 U.S.C. § 1976. *Compare supra* note 180 *with supra* note 13.

[182] *Sundance Land Corp.,* 840 F.2d at 661.

[183] In *Sundance Land Corp.,* the plaintiff alleged that it would lose valuable, unique real estate if the savings and loan foreclosed; and the court found that the plaintiff's remedy at law was inadequate, and that it had met the equitable criteria for stating a cause of action for injunctive relief. *Id.* at 661-62.

[184] The anti-tying provision has been described as "a new weapon to add to [both the Justice Department's and private litigants'] antitrust arsenals," which can be used in addition to other antitrust statutes. Naegele 1971, *supra* note 1, at 49.

In a good discussion of the antitrust statutes' interrelationships, the Fifth Circuit opines in part as follows:

> Each of the general antitrust statutes contains a provision that prohibits certain conditional transactions, or tying arrangements, in which the seller of one product (the tying product) conditions the sale of that product on the consumer's purchase or provision of another (the tied product). 15 U.S.C. § 1 (Sherman Act section 1); 15 U.S.C. § 14 (Clayton Act section 3); 15 U.S.C. § 45 (Federal Trade Commission Act section 5). Although the scope of these provisions encompasses the banking industry as well as commerce in general, their applicability in the banking context is problematic. First, Clayton Act section 3 regulates only the sale or lease of goods, not services. Second, recent case law imposing stricter evidentiary burdens on Sherman and Clayton Act plaintiffs renders successful tying claims under these statutes difficult to attain. Third, the unique nature of the banking industry renders it more important to prohibit conditional transactions in that context than in other less sensitive sectors of the economy.
>
> Congress enacted the anti-tying provisions of the BHCA "to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices." The economic power of the banking industry stems from the aggregate control of banks over credit. In light of this unique economic role that banks play, Congress perceived conditional transactions involving credit as inherently anti-competitive, operating to the detriment of banking and nonbanking competitors alike; thus the anti-tying provisions were intended to regulate conditional transactions in the extension of credit by banks more stringently than had the Supreme Court under the general antitrust statutes.
>
> Central to this more stringent regulation of the banking industry was Congress's decision to exclude from the bank anti-tying provisions the market share and anti-competitiveness requirements which were the cornerstone of tying claims under the general antitrust statutes.

See Dibidale of La., Inc., 916 F.2d at 305 (citations omitted). *See also supra* notes 81-84.

[185] *See supra* note 81 for text of statute.
[186] *See supra* note 82 for text of statute.
[187] *See, e.g., FTC v. Texaco Inc.,* 393 U.S. 223 (1968) (describing how FTC sued Texaco for making agreement with Goodrich to promote the sale of Goodrich products to Texaco's dealers).
[188] *See supra* note 84 for text of statute.
[189] *See supra* notes 81-90 and accompanying text; *see also supra* note 184.
[190] *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495, 499 (1969) ("Fortner I"). *See also* Naegele 1971, supra note 1, at 48; Naegele 1983, *supra* note 1, at 142-43; *Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 9-18; *Mozart Co. v. Mercedes-Benz of N.A., Inc.,* 593 F. Supp. 1506, 1512-13 (N.D. Cal. 1984). For a good discussion of the first element (two distinct products), *see Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 18-25.
[191] *See Mozart,* 593 F. Supp. at 1520-23.
[192] *See Parsons Steel, Inc.,* 679 F.2d at 245 ("the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act….without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements"); *Costner v. Blount Nat'l Bank of Maryville,* 578 F.2d 1192, 1196 (6th Cir. 1978) (finding that plaintiff could prevail on BHCA claim even though evidence of market power and effect on interstate commerce were insufficient to prevail under Sherman Act). *See also* Naegele 1971, *supra* note 1, at 48; Chapelle, *supra* note 4, at 711-15.

As a general rule, banks are almost never liable under the Sherman Act. "Absent unique and unusual financing terms which are unavailable from competing financial institutions, a financial institution lending in the commercial money market does not have sufficient economic power to give rise to a claim under the Sherman Act." *Pappas*, 653 F. Supp. 699, 706 (M.D. N.C. 1987) (citing *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610 (1977) ("Fortner II")).
[193] 480 F.2d 235 (10th Cir. 1973).
[194] 653 F. Supp. 699 (M.D. N.C. 1987).
[195] *See Clark,* 480 F.2d at 238; *Pappas*, 653 F. Supp. at 705-06.
[196] 12 U.S.C. § 1461 *et seq.*
[197] *See supra* note 13 and accompanying text.

Section 331 of Garn-St German is the anti-tying provision. *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stats. 1469, 1503 (codified at 12 U.S.C. § 1464(q) (1982)), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3071 ("Under Section 331 of the bill, federal thrift institutions are made subject to anti-tying restrictions generally comparable to those applicable to bank holding companies"). Title III of Garn-St Germain, which contains section 331, is entitled the

"Thrift Institutions Restructuring Act" (or "TIRA"), and the courts often refer to it as such.

The Fed considers the restrictions to be "virtually identical." *See* Proposed Interpretation, 68 Fed. Reg. at 52,027 ("Savings associations are subject to anti-tying restrictions under the Home Owner's Loan Act (HOLA) that are virtually identical to those applicable to banks under section 106"). Also, Courts consider the BHCA and HOLA to be the same. *See Integon Life Ins. Corp.,* 989 F.2d at 1150 ("[T]he 1982 amendments to HOLA extended the anti-tying provisions of the BHCA to federal thrifts. HOLA now contains the same statutory language of the BHCA anti-tying provisions, and the purpose of the two sections is the same"); *Tri-Crown, Inc.*, 908 F.2d at 582 ("Since the antitying provisions of the TIRA are based on those of the [BHCA],…we may look to cases concerning the antitying provisions of the BHCA, as well as that act's legislative history, for guidance"); *Amerifirst Properties, Inc.,* 880 F.2d at 824 n.7 ("The TIRA is the [BHCA's] equivalent for savings and loan associations. The antitying provision of the TIRA parallels the antitying provision of the [BHCA]"); *Sundance Land Corp.,* 840 F.2d at 659 ("Congress intended to extend the anti-tie-in restrictions of the BHCA to HOLA when it enacted section 1464(q)(1)"); *Bruce*, 837 F.2d at 716, 718 ("Not only are the provisions parallel, but TIRA's legislative history ties it closely to the BHCA….Congress intended to treat claims under section 1464(q)(1) in the same basic manner as claims under section 1972(1)"); *Gage*, 717 F. Supp. at 752. "Section 1464 (q)(1)(A) parallels section 1972(1)(A) & (B), section 1464(q)(1)(B) parallels section 1972(1)(C) & (D)[,] and section 1464(q)(1)(C) parallels section 1972(1)(E)." *Bruce*, 837 F.2d at 716 n.7. Prior to the adoption of TIRA, savings associations were subject to section 1972(1). *Id.* at 715, 716 n.6.

Note, however, that the OTS may only grant anti-tying exceptions that "conform to exceptions granted by the Board of Governors of the Federal Reserve System pursuant to section 1972 of this title." 12 U.S.C. § 1464(q)(6).

[198] *Compare* 12 U.S.C. § 1464(q)(1) *with* 12 U.S.C. § 1972(1), *supra* note 13 and accompanying text.

[199] 837 F.2d 712 (5th Cir. 1988).

[200] *See id.* at 714-17.

[201] *Id.* at 717.

> To give conjunctive meaning to the word "and" in section 1464(q)(1) would be to create an altogether different prohibition from section 1972(1)….Congressional discussion never deviated from the understanding that TIRA basically incorporated [the] BHCA's antitying provision. "At no time did anyone dispute an intended identity between the two statutes in this regard, or reflect a conscious comprehension of a significant difference."

> Aside from the wording of the statute, we have found no evidence that Congress intended to switch from the disjunctive in [the] BHCA to the conjunctive in TIRA. Indeed, all of the evidence reveals that Congress specifically did not intend such a departure.
>
> * * *
>
> The proscriptive force of the statute would wither if an association could be held to violate section 1464(q)(1) only in the unlikely circumstance it imposed three distinct types of conditions amounting to three distinct types of tying arrangements.

Id. (footnotes and citations omitted). *Accord Tri-Crown, Inc.,* 908 F.2d at 580; Gage, 717 F. Supp. at 752.

[202] *Bruce*, 837 F.2d at 715, 716 n.6.

[203] 840 F.2d 653 (9th Cir. 1988).

[204] *Id.* at 659. *See also id.* at 658-64; *supra* note 160.

[205] *See, e.g., Sundance Land Corp.,* 840 F.2d at 658-59. In *Integon Life Ins. Corp.,* the court looked to BHCA cases to determine the elements of a claim under HOLA, but mistakenly decided that coercion was a necessary element. 989 F.2d at 1150-52. *See supra* notes 73-80 and accompanying text regarding coercion as an element.

[206] RICO is Title IX of the Organized Crime Control Act of 1970. *See* Organized Crime Control Act of 1970, Pub. L. 91-452 (codified at 18 U.S.C. § 1961 *et seq.* (1970)), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4010, 4032-36. Section 1962 lists what is proscribed, while § 1964 provides for civil remedies including treble damages.

[207] *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 495 (1985); *see also Moss v. Morgan Stanley Inc., 7*19 F.2d 5, 17 (2nd Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984); *Pappas*, 653 F. Supp. at 701-02.

[208] *See Graue Mill Dev. Corp.,* 927 F.2d at 992-93 (finding plaintiff's complaint to be deficient because the predicate acts of fraud were not pled with "sufficient particularity"); Rae, 725 F.2d at 480-81; *Nordic Bank PLC,* 619 F. Supp. at 563 (finding that plaintiff's fraud claims were pled "in an incorrect manner").

[209] 653 F. Supp. 699 (M.D. N.C. 1987).

[210] 661 F. Supp. 234 (N.D. W.V. 1987).

[211] *Iden*, 661 F. Supp. at 239; Pappas, 653 F. Supp. at 703-05.

[212] 18 U.S.C. § 1961(5); *Rae*, 725 F.2d at 481; *Pappas*, 653 F. Supp. at 704; *Nordic PLC,* 619 F. Supp. at 563. The most commonly pled predicate acts are mail fraud and wire fraud. *See, e.g., Iden,* 661 F. Supp. at 239; *Pappas*, 653 F. Supp. at 703-04; *Nordic PLC,* 619 F. Supp. at 563.

The *Iden* court opined, “”[t]o allow a ‘pattern of racketeering’ to flow from a single, limited scheme such as this one would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities….The present case does not involve a 'pattern of racketeering,' but ordinary claims of fraud best left to 'the state common law of frauds'….''" *Iden*, 661 F. Supp. at 239 (citation omitted).

[213] 725 F.2d 478 (9th Cir. 1984).

[214] *Id.* at 481.

[215] *Id.; Pappas*, 653 F. Supp. at 702.

[216] *Pappas*, 653 F. Supp. at 702. The court stated:

> [T]he Bank and its parent holding corporation are two separate legal entities. If the Bank and its parent holding corporation are never distinct by virtue of its legal structure, then it creates a *de facto* exemption for banks and their holding companies under the RICO Act. If Congress had intended to exempt banks and their holding companies from the Act, it would have provided such an exemption.
>
> * * *
>
> Thus, the parent holding corporation and the Bank are separate and distinct for the purposes of the RICO Act.

Id.

[217] 840 F.2d 653 (9th Cir. 1988).

[218] *Id.* at 666-67

[219] *Id.* at 667 n.19.

[220] 619 F. Supp. 542 (S.D. N.Y. 1985).

[221] *Id.* at 552. The court stated, however, "the plaintiffs appear to have stated a claim under RICO as it has been interpreted recently by the Supreme Court." *Id.* at 552 n.3; *see also id.* at 552 n.4 ("The resuscitation of the RICO claims…"). *See also Blue Line Coal Co., Inc.,* 683 F. Supp. at 497-98 (district court denied defendant bank's motion to dismiss plaintiffs' RICO claim that bank fraudulently induced plaintiffs to enter workout agreement to give bank control over plaintiffs' operations, and held that plaintiffs would be allowed to conduct discovery before being required to plead fraud in RICO count with particularity)

[222] 678 S.W.2d 661 (Tex. App.—El Paso 1984). *See also Farah Manufacturing Co. v. State Nat'l Bank of El Paso,* No. 78-4465 (D. El Paso County, Tex. Jan. 13, 1982), the trial court decision that is discussed in Naegele 1983, *supra* note 1, at 160-61.

[223] *Farah*, 678 S.W.2d at 699. The facts of *Farah* were nearly identical to those in *B.C. Recreational Industries*, 639 F.2d 828 (1st Cir. 1981); and if the plaintiff in the latter case had sued under state law causes of action, it might have prevailed. Naegele 1983, *supra* note 1, at 161; *see also id.* at 153-54; *infra* note 230.

[224] *See supra* note 6.

[225] *See supra* note 155 and accompanying text; *see also supra* note 230 and accompa-

nying text.

[226] *See supra* notes 128-53 and accompanying text.

[227] *See supra* notes 81-90.

[228] *See supra* notes 62-69, 128-53, and accompanying text.

[229] In the 1970s, it was noted:

> During the recent tight money period, few borrowers or bank officers questioned the right of banks to require compensating balances in conjunction with the granting of a loan. Even fewer questioned the right of a bank to impose restrictions on the ability of borrowers to obtain loans from other institutions while loans were outstanding with the bank in question.

Naegele 1971, *supra* note 1, at 47.

In fact, during Senate hearings on the BHCA, the Assistant Attorney General in charge of the Department of Justice's Antitrust Division argued that there is an "obvious danger of overt reciprocity or tying arrangements, as well as general favoritism of bank affiliates, *particularly in times of tight money*." *Hearings before the Sen. Comm. on Banking and Currency,* 91st Cong., 2d Sess., 239 (1970) (statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice) (emphasis added).

[230] The following "plaintiff-friendly" cases have been decided in recent years: *Wisdom v. First Midwest Bank, of Poplar Bluff,* 167 F.3d 402, 409 (8th Cir. 1999) (Eighth Circuit stated that by requiring borrowers to accept a loan from related bank before the bank would grant its loan, such facts may support a claim under the BHCA); *Dibidale of La., Inc. v. American Bank & Trust Co.,* 916 F.2d 300, 304-08 (5th Cir. 1990) (Fifth Circuit found summary judgment for defendant bank improper where hiring contractor, which was a borrower from bank affiliated with the lending bank, was an "apparent and implicit" condition to extension of credit, and holding that the anti-tying provision does not require showing of coercion); *Tri-Crown, Inc. v. Amer. Fed. Sav. & Loan Ass'n, 9*08 F.2d 578, 580-85 (10th Cir. 1990) (Tenth Circuit reversed district court's dismissal of plaintiffs' TIRA claims, and held that (1) plaintiffs adequately stated claim under 12 U.S.C. § 1464(q)(1), where defendant savings and loan denied additional financing upon plaintiffs' refusal to assume defendant's non-performing loans, (2) "a loan need not be actually consummated in order for there to be an 'extension of credit' under the TIRA," and (3) plaintiffs stated sufficient facts to show that the conditions constituted an unusual banking practice proscribed by the TIRA); *Amerifirst Properties, Inc. v. FDIC,* 880 F.2d 821, 823-26 (5th Cir. 1989) (Fifth Circuit held that (1) bank's agreement to fund loan, regardless of whether it was actually funded, constituted "extending credit" under 12 U.S.C. § 1972(1)(A), (2) bank's refusal to provide further financing unless plaintiff agreed to

buy bank property, after allowing a "first draw" on loan, constituted an actionable claim under section 1972, (3) plaintiff had a direct relationship and privity of contract with bank, and hence was a "customer" with standing to sue, and (4) no showing of "anticompetitive effects" is required to state a BHCA tying claim); *Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, Inc.,* 837 F.2d 712, 713-19 (5th Cir. 1988) (Fifth Circuit reversed district court's decision dismissing loan guarantor's complaint, where savings and loan conditioned loan extension upon transfer of principal payment on one loan to pay interest on another loan and on participation in the loan by other lenders, and (1) held that the word "and" in § 1464(q)(1) should be given a disjunctive rather than a conjunctive meaning, (2) analogized anti-tying provisions of TIRA to those under BHCA, (3) held that plaintiff satisfied the "extension of credit" requirement of § 1464(q)(1)(B) by alleging that savings and loan "orally agreed" to extend or refinance the loan, and that (4) plaintiff adequately pled anti-tying violation even absent allegations of anticompetitive effects); *Swerdloff v. Miami Nat'l Bank,* 584 F.2d 54, 58-60 (5th Cir. 1978) (Fifth Circuit, now the Eleventh Circuit, reversed district court's grant of defendant bank's motion for judgment on the pleadings because (1) plaintiff stockholders of a bankrupt corporation were "customers" as guarantors of the bank's loan, even though they maintained no accounts at the bank, (2) they had standing to sue for violation of the anti-tying provision when bank refused to extend additional funds unless they sold 51% of the corporation's stock to another customer of the bank, (3) the bank violated section 1972(1)(C) "simply by demanding" the stock transfer, (4) "benefit" to the bank will be implied for pleading purposes, and (5) the complaint adequately alleged the tying arrangement); *Costner v. Blount Nat'l Bank of Maryville, Tenn.,* 578 F.2d 1192, 1194-95 (6th Cir. 1978) (Sixth Circuit upheld jury verdict against bank and found that plaintiff had standing to sue where bank made loan to permit plaintiff to purchase stock in auto dealership, but required dealership (1) to sell a substantial share of its commercial paper to the bank, and (2) to "employ a person designated by the bank to ensure compliance with the tying arrangement"); *Libby v. Firststar Bank of Sheboygan, N.A.,* 47 F. Supp. 2d 135, 136-141 (D. Mass. 1999) (district court denied bank's motion for summary judgment and found (1) bank agreed to make loan to plaintiff-independent trucker, even though no loan documents were executed, on the condition that trucker locate vehicles held by defaulted bank borrower, (2) plaintiff alleged violation of section 1972(1)(C), (3) banking practice need not be anticompetitive to violate anti-tying provision, and (4) genuine issue of material fact precluded summary judgment where bank required plaintiff to "'participate in the bank's bad loans to an unrelated customer' by requiring him to assist in the repossession of property securing those bad loans"); *Arthur v. Liberty Bank & Trust Co.,* Civ. A. No. 95-3170, 1996 WL 449557, at *3 (E.D. La. Aug. 7, 1996) (district court denied defendant bank's motion to dismiss, finding that bank's requirement that plaintiff's son settle an unrelated lawsuit against bank as a prerequisite to lending her money to purchase bank's property was an illegal tying arrangement in violation of section 1972(1)(C)); *Gumowitz v. Citibank, N.A.,* 91 Civ. 5399, 1993 U.S. Dist. LEXIS 12632, at *3-4 (S.D. N.Y. Sept. 13, 1993) (district court denied defendant bank group's motion to dismiss, or in the alternative for summary judgment, and found that plaintiffs-developers adequately pled the elements of a BHCA claim where Citibank allegedly (1) informed plaintiffs that unless they conducted all of their banking through Citibank, Citibank would refuse to renew loans and would demand repayment, and (2) employed "oppressive lending tactics in order to force plaintiffs to conduct their banking business exclusively through Citibank," including freezing "previously available credit facilities" when plaintiffs transferred some of their banking business to a competitor, mandating that "plaintiffs dedicate additional collateral to existing loans, order[ing] [plaintiffs] to record a second mortgage on certain property that they owned, and improperly and incorrectly inform[ing] other lenders that [plaintiffs] were experiencing financial difficulties"); *Gage v. First Fed. Sav. & Loan Ass'n,* 717 F. Supp. 745, 752-56 (D. Kan. 1989) (district court granted injunction under section 1464(q)(2)(A) to halt foreclosure where (1) plaintiff alleged that defendant bank conditioned financing on plaintiff's agreement to grant an option to purchase, at plaintiff's cost, 27% of the property that plaintiff was purchasing, in violation of section 1464(q)(1)(B), and (2) the court found that the practice involved was unusual in the banking industry); *JST Properties v. First Nat'l Bank of Glencoe,* 701 F. Supp. 1443, 1447-51 (D. Minn. 1988) (district court denied defendant bank's motion for summary judgment on section 1972(1)(A) claim that bank conditioned loan on purchase of bank property, finding that (1) proof of "anticompetitive effect" was not required because tying arrangements involving banks are *per se* unlawful, and (2) genuine issues of fact existed regarding whether the arrangement was an unusual practice that benefited the bank); *Blue Line Coal Co., Inc. v. Equibank,* 683 F. Supp. 493, 495-98 (E.D. Pa. 1988) (district court denied defendant bank's motion to dismiss (1) plaintiffs' section 1972(1)(C) claim, which alleged bank demanded additional security and collateral in restructuring loan after default, and held that the "plaintiffs should be given an opportunity to support, through discovery, their contention that [defendant bank's] workout agreement is an anti-competitive tying agreement," and (2) plaintiffs' RICO claim that bank fraudulently induced plaintiffs to enter workout agreement to give bank control over plaintiffs' operations, and held that plaintiffs would be allowed to conduct discovery before being required to plead fraud in RICO count with particularity); *Sharkey v. Security Bank & Trust Co.,* 651 F. Supp. 1231, 1232-33 (D. Minn. 1987) (district court granted plaintiff's cross-motion for summary judgment with respect to defendant bank's liability under section 1972(1)(A), having alleged that bank required plaintiff to purchase real estate as condition to obtaining loan, and held that (1) bank's requirement constituted *per se* violation of anti-tying provision, and (2) no showing of anticompetitive effects was required); *Logsdon v. Nat'l City Bank,* 601 N.E.2d 262, 269 (Ohio Com. Pl. 1991) (court granted plaintiff's motion for class certification in suit against defendant bank, alleging that plaintiff and others who financed their automobiles through bank were "forced-placed" in collateral insurance program and that bank had illegally required coverage from a bank-specified insurance carrier to cover the bank's collateral interest in the vehicles, and court rejected bank's assertion that each class member must prove coercion, holding that coercion is not an element of a section 1972 claim). *See also Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n,* 840 F.2d 653, 656-667 (9th Cir. 1988) (Ninth Circuit held that plaintiff alleged facts sufficient to state a claim for injunctive relief under HOLA, but not for damages under that Act or RICO); *State Nat'l Bank of El Paso v. Farah Manufacturing Co., Inc.,* 678 S.W.2d 661, 699 (Tex. App.—El Paso 1984) (Texas Court of Appeals affirmed district court judgment for debtor, establishing fraud, duress, interference with debtor's business relations, actionable civil conspiracy, and awarded debtor judgment in the amount of $18,647,243.77).

[231] In the final analysis, the Fed can be faulted for (1) ignoring the statutory language and legislative history of the anti-tying provision, *inter alia*, by using its regulatory authority recently to extend Section 106's exemption to include "traditional bank products" offered by an affiliate of the bank (*see supra* notes 69-70 and accompanying text); (2) seeking to "reverse" the outcome in *Dibidale* (*see supra* notes 79-80 and accompanying text), thereby adding a requirement of "coercion" that is inconsistent with and more stringent than what Congress intended; (3) attempting, in both subtle and blatant ways, to emasculate the anti-tying provision's potency by misusing the authority that Congress gave it to grant exceptions; (4) acting in ways that evidence favoritism toward banks and related institutions that is no less biased than the other regulatory agencies, thereby breaching the trust that Congress vested in the Fed when it was given authority pursuant to Section 106 (*see, e.g., supra* note 108 and accompanying text; *infra* note 232 and accompanying text); and (5) not promoting the rights of private litigants to police tying abuses, especially when it is clear that the Fed and its sister agencies are incapable or unwilling to do so.

[232] The GAO Report contained timid recommendations:

> Because documentary evidence of an unlawful tying arrangement generally is not available in bank files, GAO recommends that the Federal Reserve and OCC *consider* additional steps to enforce section 106. Additional steps could include publication of specific contact points within the agencies to answer questions from banks and bank customers about the guidance in general and its

> application to specific transactions, as well as to accept complaints from bank customers who believe that they have been subjected to unlawful tying.

See GAO Report, *supra* note 13 ("GAO Highlights," "What GAO Recommends") (emphasis added). Clearly, the Fed and the OCC — as well as the Department of Justice's Antitrust Division (*see, e.g., supra* notes 85, 177) — have had 35 years to strictly enforce section 106 and encourage private litigants; however, they have failed to do so, and their collective actions have often mirrored the wishes and interests of their perceived constituents, namely the financial institutions that they regulate. To expect anything more in the years to come is unrealistic.

The GAO Report continued:

> Some corporate customers and officials from an investment bank not affiliated with a commercial bank have alleged that commercial banks illegally tie the availability or terms, including price, of credit to customers' purchase of other services. However, with few exceptions, formal complaints have not been brought to the attention of the regulatory agencies and little documentary evidence surrounding these allegations exists, in part, because credit negotiations are conducted orally.

Id. ("GAO Highlights," "What GAO Found"); *see also* GAO Report, p. 15. Given the biases in favor of banks and other financial institutions on the part of their regulators, it is hardly surprising that formal complaints have not been lodged with such regulators. To do so could be counterproductive, since "retaliation" by the financial institutions involved might be expected. *See supra* note 155. The GAO Report adds:

> Although customer information could have an important role in helping regulators enforce section 106, regulators generally have not solicited information from corporate bank customers.

Id. This too is not surprising given agency biases. Indeed, it is highly unlikely that anything other than significant section 106 treble-damage recoveries by private litigants will effectively police and curb abusive tying practices. Also, the GAO stated:

> Some unaffiliated investment banks (investment banks) and some corporate borrowers contend that commercial banks have facilitated investment affiliates' increased market share of debt underwriting by unlawfully tying the availability of bank credit to debt underwriting by the bank's affiliate, a violation of section 106. In addition, some investment bankers assert that large commercial banks engage in unlawful tying by offering reduced rates for corporate credit only if the borrower also purchases debt underwriting services from the bank's investment affiliate. If such a reduced rate were conditioned only on the borrower's purchase of debt underwriting services from the commercial bank's investment affiliate, the arrangement would constitute unlawful tying.

GAO Report, *supra* note 13, at 1-2. Again, this is not surprising. Banks have engaged in predatory conduct for decades, and it is likely that the effects on small customers are even more dramatic; however, the cost and uncertainties of litigation dissuade many potential litigants from challenging bank actions.

The GAO noted: "In our review of possible unlawful tying practices by large commercial banks, we focused on wholesale corporate lending and did not address retail banking." *Id.* at 3. Had the GAO conducted an in-depth study of all commercial banks, savings banks, savings associations, and even credit unions, with respect to their retail operations, the results might have been striking. However, studies by the GAO or the regulators themselves are not apt to shed light on tying abuses like highly-motivated private litigants and able counsel can do, unfettered by court- or regulator-fashioned impediments to treble-damage recoveries. Because of their perceived biases — and lack of action by the Division — the regulators are ill suited to ferret out and prevent tying abuses.

As the GAO noted:

> Federal Reserve officials told us…that if an examiner had tying-related concerns about a transaction that the bank's internal or external legal counsel had reviewed, examiners *deferred* to the bank's legal analysis and verified that the bank took any appropriate corrective actions.

Id. at 18 (emphasis added). The GAO added: "Regular bank examinations in recent years have not identified *any* instances of unlawful tying that led to enforcement actions." *Id.* at 5 (emphasis added). Again, this is not surprising.

With respect to frequent allegations about tying practices, the GAO added:

> [T]he examiners generally would not contact customers as part of the examinations and thus would have only limited access to information about transactions or the practices that banks employ in managing their relationships with customers.

Id. at 19.

Similarly, in commenting on a joint review of anti-tying policies and practices at several large commercial banks and their holding companies that was conducted by the Fed and OCC, the GAO noted:

> Although customer information could have an important role in helping the regulators enforce section 106, regulators did not analyze a broadly based selection of transactions or contact a broad selection of customers as part of their review.

Id. at 5.

Also, the GAO found:

> Attorneys on the [Fed and OCC] exam teams reviewed documents regarding lawsuits alleging unlawful tying, but they found that none of the suits contained

> allegations that warranted any follow-up. For example, they found that some of the suits involved customers who were asserting violations of section 106 as a defense to the bank's efforts to collect on loans….

Id. at 20. Yet, such defenses might have been meritorious and worthy of careful follow-up by the regulators.

Next, the GAO noted:

> Federal Reserve and OCC officials noted that it would be unusual to find a provision in a loan contract or other loan documentation containing an unlawful tie. Some corporate borrowers said that there is no documentary evidence because banks only communicate such conditions on loans orally. According to members of the review team, they did not sample transactions during the review because past reviews suggested that this would probably not produce any instances of unlawful tying practices.

Id. Unfortunately, there is ample evidence that the regulation of banks and other financial institutions too often reflects the regulators' biases in favor of the regulated, which is not a climate in which tying abuses are likely to be uncovered, much less dealt with effectively in a responsible manner that will produce a "chilling effect" with respect to the wrongdoers and those who might contemplate similar misconduct.

Also, the GAO noted:

> [E]xaminers were concerned that certain arrangements might cause customer confusion when dealing with employees who work for both the bank and its investment affiliate. In those cases, it could be difficult to determine whether the "dual" employee was representing the bank or its affiliate for specific parts of a transaction. However, the examiners noted that in the legal analysis of one banking organization, the use of such dual employees was not necessarily problematic, given that the tie was created by the investment affiliate, rather than the bank, and that section 106 addresses the legal entity involved in a transaction and not the employment status of the individuals involved.

Id. at 21.

Inasmuch as the government is ill equipped to ferret out tying abuses, just as it is unable to uncover and prevent other abuses, that fact must be recognized by regulators and reinforced by Congress. In the case of those companies that swindle the government, Congress enacted the False Claims Act (31 U.S.C. §§ 3729-3733), which gives whistleblowers a reward. Since its inception, it has been reported that the act has generated $12 billion for the federal treasury and more than $1 billion for hundreds of whistleblowers. *See, e.g.,* http://www.usatoday.com/news/washington/2004-11-27-whistleblowers_x.htm. Comparable enforcement of section 106 might be achieved if highly-motivated private litigants and able counsel were not constrained by court- or regulator-fashioned impediments to treble-damage recoveries.

In its conclusions, the GAO noted: "[T]he tying prohibitions of section 106…remains a complex provision to enforce." See GAO Report, p. 39. Clearly, despite its congressionally-mandated duty to enforce section 106, the Division has done nothing and now proposes to "gut" it entirely. The regulators have taken actions to weaken the anti-tying provision as well. Thus, the only realistic enforcement is apt to come from private litigants and their counsel who are motivated by treble-damage recoveries.

[233] *See supra* note 177.

[234] *See supra* note 85

[235] *Id.*

[236] *See supra* notes 184-223 and accompanying text.

[237] *See* Naegele 1971, *supra* note 1, at 47 ("[Section 106] provides private litigants with the prospect of treble damage relief as an inducement to police this area of potential abuse"), 48 ("By enacting Section 106, Congress recognized that the antitrust enforcement capabilities of the Justice Department were limited and that effective oversight by that department and by private litigants required additional remedies"); *see also supra* notes 6, 80, 85, 177.

As Senator Brooke stated:

> The premise upon which remedies for private litigants are founded was set forth in the following statement by Assistant Attorney General McLaren of the Antitrust Division of the Justice Department:
>
> "While we believe that the antitrust laws are applicable…, a serious question remains as to the extent to which they can practically eliminate [tie-ins]…in view of our limited enforcement resources. As a practical matters, many tie-in arrangements involving banks are so limited in their scope and involve such small amounts that they do not seem to justify the expensive and time-consuming efforts of full scale antitrust investigations."
>
> Thus, this provision is designed to afford private litigants rights of action based on express or implied tying practices which heretofore involved little likelihood of redress.

See 116 CONG. REC. 42,432 (Dec. 18, 1970). Because it is clear that the Division has done nothing in recent years to discharge its congressionally-mandated duty to enforce section 106 (*see supra* note 177), and the regulatory agencies have participated in the weakening of its provisions, private litigants must be recognized as having essentially unfettered rights to police tying abuses pursuant to the anti-tying provision.