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Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct

Joseph C. Chapelle

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With the passage of section 106(b) of the Bank Holding Company Act Amendments of 1970, codified at 12 U.S.C. section 1972,[1] Congress created a special cause of action[2] which allows private plaintiffs to recover damages against banks and bank holding companies that participate in anticompetitive tying arrangements[3] and reciprocal[4] and exclusive dealing arrangements.[5] Essentially, the purpose of section 1972 is to "prohibit anti-competitive practices which require bank customers to accept or provide some other ser-

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1 12 U.S.C. § 1972 (1982). This provision provides:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—(a) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service; (b) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company; (c) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; (d) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or (e) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.
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> The board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.

The Garn-St. Germain Depository Institutions Act of 1982 proscribes tying arrangements and reciprocal and exclusive dealing arrangements involving federally chartered savings and loan associations and federally chartered banks. Section 331, 12 U.S.C. § 1464(q) (1982), mirrors the language of § 1972. Because of the similarity in language, courts interpreting § 1464(q) will probably follow the case law which interprets § 1972. In addition, Congress seems to have intended that § 1464(q) have the same effect as § 1972. *See* S. REP. No. 536, 97th Cong., 2d Sess. 55, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3054, 3109.

2 Section 106(e) of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1975 (1982), provides for the recovery of treble damages and attorney's fees against violators of § 1972. The provision states:

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefore in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

12 U.S.C. § 1975 (1982).

3 *See* note 12 *infra* and accompanying text.

4 *See* notes 13-15 *infra* and accompanying text.

5 *See* note 16 *infra* and accompanying text.

vice or product or refrain from dealing with other parties in order to obtain the bank product or service they desire."[6] Congress enacted section 1972 partly in response to a perceived breakdown in the traditional separation of the banking industry from other areas of commerce in the economy.[7] Arguably, the unchecked participation of banks and bank holding companies in other areas of business could "lead to the formation of a relatively small number of power centers dominating the American economy."[8] By proscribing anticompetitive tying arrangements and similar conditional transactions imposed by banks and bank holding companies, Congress intended to check the growth of economic power of the money lenders, the financial institutions, in relation to the borrowers, businesses and ordinary consumers.[9] Some commentators believe that section 1972 will gain in importance as the financial industry becomes increasingly deregulated.[10]

This note first examines the policies underlying section 1972 and why the provision assists the private plaintiff in combating tying arrangements and reciprocal and exclusive dealing arrangements imposed by banks and bank holding companies. Next, this note discusses how courts have interpreted section 1972, focusing on who can be a party to a section 1972 action, what conduct falls within its prohibitions, and finally, what conduct falls outside section 1972 as being "traditional banking practices." This note concludes that two policy considerations should guide courts in interpreting section 1972: promoting competition in the economy and protecting banks' legitimate business interests in the extension of credit.

I. Policies Underlying Section 1972

Evaluating the policy concerns underlying laws making certain conditional transactions illegal is helpful to an understanding of how courts should interpret section 1972. Both section 1972 and the general antitrust laws, such as section one of the Sherman Act,[11] condemn tying arrangements, reciprocal dealing and exclu-

6 *See* S. Rep. No. 1084, 91st Cong., 2d Sess. 17, *reprinted in* 1970 U.S. Code Cong. & Ad. News, 5519, 5535.

7 *Id.* at 44, 1970 U.S. Code Cong. & Ad. News, at 5557.

8 *Id.*, 1970 U.S. Code Cong. & Ad. News, at 5557.

9 *Id.*, 1970 U.S. Code Cong. & Ad. News, at 5557.

10 *See, e.g.*, Leonard, *Unfair Competition Under Section 106 of the Bank Holding Company Act: An Economic and Legal Overview of "Conditional Transactions,"* 94 Banking L.J. 773 (1977).

11 Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), proscribes tying arrangements in a variety of industries and business:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in

sive dealing arrangements. A tie-in or tying arrangement has been defined by the courts as "an arrangement by one party to sell one product (the 'tying product'), but only on the condition that the buyer also purchase a different . . . product (the 'tied product'), or at least agree that he will not purchase that product from any other supplier."[12] In general, reciprocal dealing arrangements involve those practices in which firms buying raw materials favor those firms which purchase their finished products. In the context of financial institutions, a bank may provide a product or service to a customer, requiring that in return the customer provide a specified product or service to the bank.[13] Voluntary reciprocal dealing arrangements are legal.[14] But coercive reciprocity, where a firm purchases products from a second firm conditioned upon the otherwise unwilling second firm buying products from it, falls within the parameters of the antitrust laws.[15] Finally, exclusive dealing ar-

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

15 U.S.C. § 1 (1982).

Tie-ins can also be challenged under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982) and under § 3 of the Clayton Act, 15 U.S.C. § 14 (1982). Although significant differences in the substance and application of these provisions exist, a discussion of them is beyond the scope of this note. Simply stated, however, commentators would agree that a tying arrangement which violates § 1 of the Sherman Act also violates § 5 of the Federal Trade Commission Act. A tie-in violates § 3 of the Clayton Act when it meets the tests for illegality under § 1 of the Sherman Act and also involves a sale or lease of a commodity. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 152, at 434 (1977). Because banking tying arrangements often involve an extension of credit, which is a service, § 3 of the Clayton Act, which addresses only tie-ins involving commodities, cannot be used very often to attack tying arrangements imposed by banks. The discussion of the general antitrust laws which follows in this note generally refers to violations of § 1 of the Sherman Act which can also be violations of other antitrust laws. *See* notes 41-44 *infra* and accompanying text.

12 *See, e.g.*, Northern Pac. R.R. v. United States, 356 U.S. 1, 5-6 (1958) (tying arrangement requiring grantees and lessees of railroad property forced to ship goods over the railroad's lines held illegal under the Sherman Act).

13 Leonard, *supra* note 10, at 775.

14 *Id.* at 790.

15 Coercive reciprocity can be challenged under the Sherman, Federal Trade Commission, and Clayton Acts. *See* United States v. General Dynamics Corp., 258 F. Supp. 36, 37 (S.D.N.Y. 1966) (holding that a merger which resulted in reciprocal trading violated § 1 of the Sherman Act); 2 E. KINTNER, FEDERAL ANTITRUST LAW § 10.67 (1980).

As discussed later in this note, *see* notes 100-03 *infra* and accompanying text, § 1972 excludes from its coverage reciprocal dealing arrangements involving "traditional banking practices." Although individual banks might engage in reciprocal dealing arrangements prohibited by § 1972, their use of such illegal arrangements is restrained because the banking laws permit them to offer only a limited array of services. Thus, banks have fewer opportunities to take advantage of their economic position to impose illegal tying arrangements. Because bank holding companies often engage in a variety of businesses besides simply controlling a bank, the potential for bank holding companies to engage in rangements restrain a firm's customers from obtaining other similar goods or services from competitors.[16] Such arrangements can also violate section one of the Sherman Act.[17]

Section 1972 specifically proscribes certain anticompetitive tying arrangements and other conditional transactions involving banks and bank holding companies. As with the general antitrust laws, Congress primarily sought to promote competition in the economy.[18] In enacting section 1972, Congress was especially mindful of the case law treating anticompetitive tying arrangements under the general antitrust laws.[19] That case law identified three adverse effects of anticompetitive tying arrangements.[20] First, through such arrangements, a firm can injure its existing competitors. The provider of goods or services uses the economic advantage gained from the tying product to sell in the tied product market. Without providing cheaper or better goods or services, the firm can still capture part of the tied product market. The competitors of the seller in the tied product market are thus hampered in making sales.[21] Second, through tying arrangements, a firm can deter potential competitors from entering the tying and tied product markets.[22] To successfully compete with a firm which imposes tying arrangements on its customers, a potential competitor may have to enter both markets. Because of capital costs and risks of failure, however, a competitor may find it quite difficult to enter both markets at the same time.[23] Finally, by employing tying arrangements,

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proscribed reciprocal dealing arrangements is significantly greater. Typically, reciprocal dealing arrangements arise whenever a customer must provide a product or service to a bank or bank holding company in exchange for financial or other services. For example, a bank would be engaging in a reciprocal dealing arrangement if it awarded branch-office construction business to a firm on the condition that the firm maintain a certain balance with the bank. *See* Leonard, *supra* note 10, at 792.

16 *See* E. KINTNER, *supra* note 15, § 10.75.

17 Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964) (newspaper distributor who was allowed to distribute only the defendant's newspaper stated a claim under the Sherman Act).

18 S. REP. No. 1084, *supra* note 6, at 44, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS, at 5557.

19 *Id.* at 45, 1970 U.S. CODE CONG. & AD. NEWS, at 5558.

20 *See* Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283, 287 (1980).

21 IBM v. United States, 298 U.S. 131 (1936), exemplifies this type of conduct. In that case, the defendant agreed to lease its tabulating and sorting machines condition that the lessee agree to buy its tabulating cards. The court held that this arrangement violated § 3 of the Clayton Act.

22 Bauer, *supra* note 20, at 288.

23 United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922), illustrates this anticompetitive conduct. The defendant in that case controlled 95% of the shoe machinery market. Because it imposed a tying arrangement requiring its customers to purchase its supplies, the defendant prevented potential competitors from reaching 95% of the supplies market.

a firm can force customers to purchase goods or services which they either do not want or would purchase from another firm.[24]

As the banking industry becomes increasingly deregulated,[25] banks and bank holding companies will have more opportunities to impose anticompetitive tying arrangements. For example, during the 1970's the Federal Reserve Board allowed bank holding companies to compete in the insurance and data processing industries.[26] Trade associations in these industries alleged that bank holding companies competed unfairly in these industries because they could enforce credit tie-ins.[27] A bank holding company could require a businessman to purchase insurance from one of its affiliates before obtaining credit from a bank under its control. Under the Garn-St. Germain Depository Institutions Act of 1982,[28] Congress curtailed the types of insurance activities in which bank holding companies could participate. Despite this setback, bankers favoring deregulation have continued their efforts to persuade Congress to permit banks and bank holding companies to engage in activities such as insurance underwriting, real estate investment, and securities underwriting.[29] Some commentators suggest that banking deregulation is inevitable.[30] Bank and bank holding company deregulation will greatly enhance the significance of section 1972.

Historically, Congress has attempted to separate the business of banking and other forms of commerce.[31] Congress' rationale stems from two policy considerations: (1) maintaining bank solvency, and (2) promoting competition in the economy.[32] During the hearings on the Bank Holding Company Act of 1970, Richard W. McLaren, then Assistant Attorney General for Antitrust, suggested that allowing banks to compete in other areas of commerce poses "risks to our competitive system."[33] McLaren argued that banks enjoy a significant degree of economic power which stems

24 Bauer, *supra* note 20, at 288. Some economists, however, argue that many tying arrangements do not always harm competition and that, therefore, the per se rule against them is inappropriate. *Id.* at 291. Recent cases have addressed this. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1574 (1984) (O'Connor, J., concurring).

25 *See* note 30 *infra* and accompanying text.

26 Wilson, *Separation of Banking and Commerce Under the Bank Holding Company Act—A Statutory Objective Under Attack*, 33 CATH. U.L. REV. 163, 167 (1983).

27 Leonard, *supra* note 10, at 778.

28 12 U.S.C. § 1843(4)(c)(8) (1982).

29 Wilson, *supra* note 26, at 164.

30 *See, e.g.*, Shull, *The Separation of Banking and Commerce: Origin, Development, and Implications for Antitrust*, 28 ANTITRUST BULL. 255, 256 (1983).

31 *Id.* at 270. *See also* Wilson, *supra* note 26, at 163.

32 Shull, *supra* note 30, at 270.

33 *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 239 (1970) (statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice).

from the protection of banks through "regulation from free entry of other competitors, and therefore from the full rigors of unregulated competition."[34] Congress' protection of banks from competition reflects its concern for bank solvency. McLaren argued that "bank expansion in other areas permits the carryover of economic power into such endeavors."[35] If banks are allowed to compete in other areas of commerce, McLaren continues, "there is . . . the obvious danger of overt reciprocity or tying arrangements, as well as general favoritism of bank affiliates, particularly in times of tight money."[36] McLaren believed that the antitrust laws would not adequately prevent reduced competition in the various areas of commerce which, because of deregulation, banks might enter.[37]

Congress enacted section 1972 in part because of concern about the adverse effects of banking deregulation on competition in the economy. The Bank Holding Company Act Amendments of 1970 permits bank holding companies to engage in activities "closely related" to banking.[38] This standard allowed bank holding companies to engage in a broad range of insurance activities throughout the 1970's until Congress passed the Garn-St. Germain Act in 1982[39] which modified it. Congress may have intended to compensate for the anticompetitive consequences of deregulation by coupling section 1972 with the rest of the Bank Holding Company Act Amendments.

Presumably, Congress felt that the competitive environment surrounding financial institutions deserved special protection.[40] Section 1972 makes it easier for private plaintiffs to establish a cause of action and recover damages for anticompetitive conditional transactions than the general antitrust laws. Comparing section 1972 to the general antitrust laws demonstrates how this provision better implements congressional antitrust policies as applied to banks and bank holding companies.

The Sherman Act[41] and the general antitrust laws treat conditional transactions involving financial institutions like conditional transactions involving other industries. To establish a prima facie case for an illegal tying arrangement under the general antitrust laws a plaintiff must prove three elements. First, the plaintiff must show that two separate products are involved, with the purchase of

34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 240.
38 12 U.S.C. § 1843(4)(c)(8) (1982).
39 *Id.* *See also* note 28 *supra* and accompanying text.
40 *See* S. REP. No. 1084, *supra* note 6, at 17, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS, at 5535.
41 *See* note 11 *supra* and accompanying text.

one, the tying product, conditioned upon the purchase of another less desirable product, the tied product.[42] Second, the plaintiff must demonstrate that the defendant, the party imposing the tying arrangement, has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.[43] Hence, the plaintiff must prove the existence of the type of leverage or economic power which allows the defendant to raise prices or requires the purchaser to accept burdensome terms not ordinarily found in a completely competitive market. Third, the plaintiff must show that the tying arrangement substantially affects interstate commerce.[44]

Courts use this three step analysis to determine whether a tying arrangement is "per se" unlawful.[45] The "sufficient market power" requirement has caused courts the greatest difficulty. Two United States Supreme Court decisions illustrate this problem. In *Fortner Enterprises, Inc. v. United States Steel Corp. ("Fortner I")*,[46] United States Steel, through one of its subsidiaries, offered attractive credit services to developers who agreed to purchase prefabricated houses through another subsidiary.[47] In *Fortner I*, the Court stated:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . . . Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.[48]

In contrast to the Supreme Court's subsequent decisions,[49] *Fortner I* allowed plaintiffs to show "market power" with relative ease.[50] *Fortner I* also rejected the argument that tying arrangements involving credit should receive different treatment than tying ar-

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42 *See* note 12 *supra* and accompanying text.

43 *See* notes 45-60 *infra* and accompanying text.

44 This condition has been relatively easy to meet. In Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501-02 (1969), the Supreme Court found that a not insubstantial amount of interstate commerce was affected by a tying arrangement in which the value of the tied product actually purchased by the plaintiff was only $190,000.

45 Northern Pac. R.R. v. United States, 356 U.S. 1, 6 (1958) (Court applied this three step analysis in a Sherman § 1 case).

46 394 U.S. 495 (1969).

47 *Id.* at 497.

48 *Id.* at 502-03 (citations omitted).

49 *See* notes 57-62 *infra* and accompanying text.

50 394 U.S. at 508.

rangements involving other products.[51] The Supreme Court stated that "although advantageous credit terms may be viewed as a form of price competition in the tied product, so is the offer of any other tying product on advantageous terms."[52] While the Supreme Court remanded the case for further findings on whether an illegal tying arrangement existed, *Fortner I* established the rule that using credit to impose a tying arrangement can be illegal under the antitrust laws.[53] In examining the tie-ins involving credit, the Court stated:

> [T]he same inquiries must be made as to economic power over the tying product and substantial effect in the tied market, but where these factors are present no special treatment can be justified solely because credit, rather than some other product, is the source of the tying leverage used to restrain competition.[54]

Congress apparently considered the *Fortner I* decision in passing section 1972. Congress wanted to create a cause of action "substantially easier to establish than the one provided under the general antitrust laws" to combat anticompetitive tying arrangements involving banks. In a Senate report accompanying section 1972, Senator Edward Brooke, quoting from a letter from then Assistant Attorney General McLaren, wrote that "the proposed new section would go beyond the *Fortner* decision, which did not go so far as to hold tie-ins involving credit illegal per se."[55] The provision "would prevent the further spread of seriously anticompetitive practices which have developed in the banking and financial areas."[56]

The Supreme Court's decision in *United States Steel Corporation v. Fortner Enterprises ("Fortner II")*,[57] significantly enhanced section 1972's importance. In *Fortner II*, the Court expanded the requirements for establishing the tier's economic power.[58] The *Fortner II*

51 *Id.*

52 *Id.* at 509.

53 *Id.*. *See also* Klebaner, *Credit Tie-ins: Where Banks Stand After the* Fortner *Decision*, 95 BANKING L.J. 419 (1978); Naegele, *The Anti-tying Provision: Its Potential Is Still There*, 100 BANKING L.J. 138, 143 (1983).

54 394 U.S. at 509.

55 S. REP. No. 1084, *supra* note 6, at 45, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 5558.

56 *Id.*, 1970 U.S. CODE CONG. & AD. NEWS at 5558.

57 429 U.S. 610 (1977).

58 *Id.* at 417-22. In *Fortner I*, 394 U.S. 495, the Supreme Court held that a showing of a unique economic advantage in the tying market satisfies the economic power requirement. Under *Fortner II*, the court must examine whether the seller in the tying market has the ability to either charge a price or impose a burden that he would be able to extract in a competitive market. 429 U.S. at 620. Without demonstrating either some cost advantage on the part of the seller or a characteristic of the tying item that sufficiently differentiates the product so that no competitor could also offer it, the economic power requirement is

Court's analysis of the supposed tying arrangement perhaps indicates that allegedly unlawful tying arrangements are subject to greater "scrutiny to determine whether they truly represent the exploitation of a position of economic power in the tying product."[59] The *Fortner II* decision made it more difficult than *Fortner I* for plaintiffs to show market power in establishing a Sherman Act violation.[60] In a recent case, *Jefferson Parish Hospital District No. 2 v. Hyde*,[61] the Supreme Court again expanded the requirements for establishing the tier's economic power. The Court now seems to require plaintiffs to show market power through a detailed economic analysis of the relevant product and geographical markets.[62]

In contrast to section one of the Sherman Act, section 1972 does not require proof that the tie affects a "not insubstantial" amount of interstate commerce in the tied product market and that the defendant possesses the requisite economic power in the tying product market.[63] While it may be relatively easy to establish that a tying arrangement affects a "not insubstantial amount of commerce" under the general antitrust laws,[64] it may not be so easy to establish that the tier possesses the requisite economic power to show an unlawful tying arrangement. In fashioning section 1972, Congress recognized that proving an antitrust violation involving a financial institution could be difficult because few plaintiffs could adduce sufficient evidence of the institution's market power.[65]

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not met. *Id.* The mere fact that the tying product is attractive does not establish sufficient economic power. *Id.* at 621. *See also* E. KINTNER, *supra* note 15, § 10.56.

59 Jones, *The Two Faces of Fortner: Comment On a Recent Antitrust Opinion*, 78 COLUM. L. REV. 39, 41 (1978).

60 E. KINTNER, *supra* note 15, § 10.56.

61 104 S. Ct. 1551 (1984) (an allegedly anticompetitive tying arrangement between a hospital and a firm of anesthesiologists did not violate the Sherman Act).

62 *Id.* at 1561.

63 *See, e.g.*, Costner v. Blount Nat'l Bank, 578 F.2d 1192, 1196 (6th Cir. 1978). The Court of Appeals for the Sixth Circuit stated that even when evidence of market power of the defendant and the effect on interstate commerce of a tying arrangement are insufficient to make out a cause of action under § 1 of the Sherman Act, a plaintiff can still prevail under § 1972. *Costner* involved a tying arrangement which was created when the plaintiff, owner of 50% of the stock in an automobile dealership, obtained a $420,000 personal loan from the defendant bank to buy the remaining stock in the company.

64 *See* note 44 *supra* and accompanying text.

65 S. REP. No. 1084, *supra* note 6, at 48, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS, at 5561; Naegele, *supra* note 53, at 143. While Congress intended that § 1972 would make it easier to bring an action against a bank or bank holding company, Congress also sought to prevent overly broad judicial interpretations of § 1972. For this reason, Congress allows the Federal Reserve Board to issue regulations permitting exceptions to the prohibitions of § 1972. Section 1972 states that the "Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter." The Board's exceptions apply only to § 1972 and do not extend to actions brought under the general antitrust laws. Secton 106(h) of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1978 provides:

> Nothing contained in this chapter shall be construed as affecting in any manner

Moreover, in enacting section 1972, Congress recognized that tying arrangements by financial institutions generally do not involve the large dollar amounts that justify expensive and time-consuming antitrust litigation. In a letter to Senator Edward Brooke, Assistant Attorney General McLaren noted that the limited scope and small monetary amounts involved in bank tying cases did not justify full scale antitrust investigation and trial because the complex legal issues involved could result in decisions of little precedential value.[66] Arguably, by providing treble damage relief to private plaintiffs, Congress sought to encourage the private enforcement of section 1972.

II. Judicial Interpretation of Section 1972

Case law interpreting section 1972 is sparse.[67] The reported decisions, however, focus primarly on three aspects of section 1972: (1) who can bring an action under the statute; (2) what kinds of conduct violate the provision; and (3) what kinds of conduct fall within the exceptions to section 1972.[68]

> 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 chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action.

12 U.S.C. § 1978 (1982).

The United States Attorney General also has the responsibility of policing violations of § 1972. However, as one commentator notes, a review of the relevant case law reveals no recorded decisions in which the government has brought an action under this provision. *See* Neagele, *supra* note 53, at 144.

Section 106(c) of the Bank Holding Company Act Amendments of 1970, 12 U.S.C. § 1973, establishes the duty of the Attorney General to enforce § 1972:

> The district courts of the United States have jurisdiction to prevent and restrain violations of section 1972 of this title and it 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. The proceedings may be by way of a petition setting forth the case and praying that the violation be enjoined or otherwise prohibited. When the parties complained of have been duly notified of the petition, the court shall proceed, as soon as possible, to the hearing and determination of the case. While the petition is pending, and before final decree, the court may at any time make such temporary restraining order or prohibition as it deems just. Whenever it appears to the court that the ends of justice require that other parties be brought before it, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and subpeonas to that end may be served in in any district by the marshal thereof.

12 U.S.C. § 1973 (1982).

66 S. REP. No. 1084, *supra* note 6, at 47, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS, at 5561.

67 A search of all reported cases up to 1983 reveals not more than 20 decisions. *See* Naegele, *supra* note 53, at 144.

68 Other commentators have analyzed case law interpreting section 1972 in the same way. *See* Naegele, *supra* note 53, at 144.

A. *Who Can Bring an Action under Section 1972*

Under section 1975,[69] which establishes the standing requirements for section 1972, a plaintiff bringing a treble damage suit must allege an injury to his business or property.[70] Although the requirement seems plain on its face, some commentators believe that courts may read additional standing requirements into the statute.[71] In interpreting other antitrust provisions containing virtually the same language as section 1975, courts have held that only those plaintiffs whose injuries are a direct result of the prohibited activity have standing to sue for treble damages.[72] Indeed, one commentator has suggested that one such provision, section four of the Clayton Act,[73] has been "narrowed through standing requirements invented and elaborated upon by the courts."[74] Under section four, the plaintiff must show not only that the defendant's anticompetitive conduct was the cause in fact of the plaintiff's injury, but also that the defendant's conduct was the proximate cause of the injury.[75] Arguably, the courts may read similar requirements into section 1972.

This type of judicial gloss on section 1975's standing require-

69 12 U.S.C. § 1975 (1982).

70 In Hometowne Builders, Inc. v. Atlantic Nat'l Bank, 477 F. Supp. 717, 719 (E.D. Va. 1979), the plaintiffs, in an action brought under § 1972, claimed they were entitled to punitive damages in excess of the treble damages granted by § 1975. The court stated that the absence of any discussion of punitive damages in excess of treble damages in the legislative history of § 1972 "is a strong indication that such damages were not contemplated by Congress and were not implied in the statute."

71 *See, e.g.*, Naegele, *supra* note 53, at 145.

72 *See, e.g.*, Productive Inventions, Inc. v. Trice Prod. Corp., 224 F.2d 678, 679 (2d Cir. 1955) (in an action under § 4 of the Clayton Act, the Second Circuit stated, "those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover").

73 15 U.S.C. § 15 (1982). The statute states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id.

74 L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247, at 270 (1977). Under § 4, a competitor driven out of business by a defendant's anticompetitive tactics clearly would have standing. However, the injured competitor's suppliers, landlord, employees, and stockholders, regardless of the extent of the injury, may have no standing unless, under the particular circumstances, they could demonstrate a more immediate relation to the violation than that which is typically associated with their status. *Id.*

75 *See, e.g.*, Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 732 (8th Cir. 1964) (stating that damages claimed in a private antitrust suit must be different from those suffered by the general public).

ment runs counter to congressional intent.[76] Congress intended to encourage private plaintiffs to sue for section 1972 violations.[77] The provision was intended to supplement existing remedies for anticompetitive tying arrangements.[78] The legislative history does not mention any standing requirements other than those expressly stated in the statute. Nor does the legislative history indicate that Congress intended courts to interpret section 1972 in the same way in which similarly worded statutes are interpreted. While Congress may have known of the judicial gloss placed on other provisions worded similarly to section 1975, it clearly intended to create a cause of action which was easier to bring than actions under the general antitrust laws and thus free of their restrictive interpretations.

Two cases, *Swerdloff v. Miami National Bank*[79] and *Shulman v. Continental Bank*,[80] illustrate how courts have handled the standing issue.[81] In *Swerdloff*, the defendant, Miami National Bank, loaned money to a corporation wholly-owned by the plaintiffs. As a condition to the loans, the defendant bank required the Swerdloffs to personally guarantee the loans. In their suit against Miami National for violating section 1972, the Swerdloffs alleged that after their company became heavily dependent on the financial arrangement,

76 Naegele, *supra* note 53, at 146.

77 S. Rep. No. 1084, *supra* note 6, at 46, *reprinted in* 1970 U.S. Code Cong. & Ad. News, at 5559.

78 *Id.* at 18, 1970 U.S. Code Cong. & Ad. News, at 5536. The Senate Committee on Banking and Currency stated that "private parties are given the right to sue for injunctive relief as well as treble damages when they have sustained damages, or are threatened by loss or damage, by reason of a violation of this section's prohibitions." *Id.*

79 584 F.2d 54 (5th Cir. 1978).

80 518 F. Supp. 979 (E.D. Pa. 1981).

81 Both *Swerdloff* and *Shulman* dealt with the question of who can be a plaintiff under § 1972. Few cases have treated the question of who can be a defendant. In general, only banks and bank holding companies can be defendants. In McCoy v. Franklin Savings Ass'n, 636 F.2d 197 (7th Cir. 1980), an action was brought under § 1972 against a Chicago savings association. The question of the applicability of the provision was apparently not raised. *See* Naegele, *supra* note 53, at 139 n.5. Congress has defined a bank holding company as "any company which has control over any bank." 12 U.S.C. § 1841(a)(1) (1982). Likewise, Congress has defined a bank as "any institution organized under the laws of the United States, any State of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 841(c) (1982).

In Nesglo, Inc. v. Chase Manhattan Bank, 506 F. Supp. 254 (D.P.R. 1980), the court held that the activities of natural persons are not covered by § 1972. The court stated:

> With respect to the federal tie-in claims made against natural codefendants Zych and Fernandez, it is obvious from the text of the statutory definition of the term "bank" in 12 U.S.C. Section 1984(c), to which Section 1972 permits us, that natural persons are beyond coverage of 12 U.S.C. sections 1971-1978. We therefore additionally hold that this Court lacks jurisdiction under these federal statutes to entertain the foregoing claims against codefendants Zych and Fernandez.

Id. at 265.

the bank would no longer continue the arrangement unless the plaintiffs sold 51% of their stock to another one of Miami National's customers. The Swerdloffs refused, and consequently their company was allegedly forced out of business.[82]

In *Swerdloff*, the lower court analogized the provision to other antitrust statutes, and case law interpreting those statutes, to determine whether the plaintiffs had standing to sue under section 1972.[83] The district court held that although the Swerdloffs may have personally suffered a financial injury, their corporation was the only "person" that could seek redress for the alleged violation of section 1972.[84] The court held that the plaintiffs lacked standing required by section 1975 and dismissed the suit.[85]

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's dismissal.[86] The court of appeals held that the Swerdloffs were customers of the defendant bank within the meaning of section 1972 because the Swerdloffs had personally guaranteed Miami National's loans to their company.[87] Miami National argued that because the Swerdloffs were not actual parties to the bank's financing agreement with the Swerdloffs' corporation, the Swerdloffs were not customers.[88] The court rejected this argument noting, "the economic realities of ownership and control must be considered in determining who is a customer within the meaning of [section 1972] if the purpose of the Act is to be accomplished."[89] The court indicated the policy concerns underlying its holding:

> To decide in favor of the bank here would mean that banks throughout the country could require all manner of anticompetitive practices of the stockholders of such corporations with impunity. The law cannot be unmindful of the fact that substantial credit to such corporations is generally extended because of the credit rating of the stockholder guarantors, regardless of the credit-worthiness of the corporation itself. This credit practice recognizes that the financial fortunes of closely held corporations can turn directly upon the maneuverings of the stockholders.[90]

The court did not reach the question of whether the Swerdloffs as stockholders would still have standing under section 1975 had the

82 584 F.2d at 57.

83 408 F. Supp. 940, 942 (S.D. Fla. 1976).

84 *Id.* at 943.

85 *Id.*

86 Swerdloff v. Miami Nat'l Bank, 584 F.2d 54, 60 (5th Cir. 1978).

87 *Id.*

88 *Id.*

89 *Id.* at 58.

90 *Id.*

court held that they were not customers within the meaning of the statute.[91]

In *Shulman v. Continental Bank*,[92] the plaintiffs' complaint alleged wrongs similar to those presented in *Swerdloff*. The Shulmans, controlling shareholders, officers, and directors of Shulman Transport Enterprises, Inc., alleged that Continental Bank violated section 1972 by requiring them to provide $1.3 million in the form of a junior participation in the bank's loan to Shulman Transport Enterprises before extending further credit to their company.[93] The Shulmans contended that based on *Swerdloff* they had standing to bring the action.[94] The district court, however, distinguished *Swerdloff* "because the Swerdloffs' company, which entered into a loan agreement with the bank, was a closely held family corporation in which the Swerdloffs were the sole stockholders."[95] Shulman Transport Enterprises was a publicly held corporation and, according to the court, no close legal identity existed between the plaintiffs and the corporate borrower.[96]

The legislative intent underlying section 1972 suggests, however, that no significant difference exists between the allegations in *Shulman* and those in *Swerdloff*. By enacting section 1972, Congress intended to impose a broad prohibition of conditional transactions imposed by banks and bank holding companies. The *Shulman* court disregarded the legislative intent behind the statute and refused a remedy simply because the case involved a publicly held corporation rather than a closely held corporation as in *Swerdloff*.

B. *The Existence of a Substantive Violation*

Case law interpreting section 1972 also addresses whether a substantive violation of the provision exists. In addition to its discussion on standing, *Swerdloff* indicates the conduct that section 1972 prohibits. If the Swerdloffs could prove their substantive allegations on remand, they would likely succeed under the provision. *Costner v. Blount National Bank*[97] provides a more dramatic example of the conduct the statute proscribes. In *Costner*, the plaintiff, owner of 50% of the stock in an automobile dealership, obtained a $420,000 personal loan from the Blount National Bank to purchase the remainder of the company's outstanding stock.[98] The bank im-

91 *Id.* at 59-60.
92 513 F. Supp. 979 (E.D. Pa. 1981).
93 *Id.* at 981.
94 *Id.*
95 *Id.* at 984 n.6.
96 *Id.*
97 578 F.2d 1192 (6th Cir. 1978).
98 *Id.* at 1194.

posed several conditions in its credit agreement with Costner. These conditions included requirements that the company sell a substantial share of its retail commercial paper to the defendant and that the company employ a person designated by the bank to ensure compliance with the arrangement. The bank's credit arrangement clearly violated the Bank Holding Company Act.[99] Here a bank had clearly taken unfair advantage of its economic position to impose an unlawful conditional transaction.

Costner exemplifies the type of anticompetitive conduct which Congress has attempted to prevent by passing section 1972. The legislative history clearly indicates that Congress aimed section 1972 at anticompetitive tying arrangements. Significantly, however, the provision also prohibits exclusive and reciprocal dealing arrangements. As with tying arrangements, Congress intended to establish a blanket prohibition preventing banks and bank holding companies from engaging in the *Costner* type of conditional transactions.

C. *Exceptions to Section 1972*

Other cases interpreting section 1972 have addressed the provisional "traditional bank practice exemptions."[100] Section 1972 contains three exceptions. First, a bank may impose a tying arrangement involving a "loan, discount, deposit, or trust service" (the traditional banking services).[101] Second, a bank may impose a conditional transaction where the bank requires the customer to provide some additional credit, property, or service "related to and usually provided in connection with a loan, discount, deposit, or trust service."[102] Third, a bank may place reasonable restrictions on a borrower to protect the soundness of the credit extended by the bank.[103]

Courts are reluctant to find section 1972 violations if the financial institution's actions are designed only to protect the institution's investment or loan. In *Sterling Coal Co. v. United American Bank*,[104] for example, a federal district court granted the defendants' motion for summary judgment where the defendant bank had conditioned the extension of credit upon the bank supervising and controlling the plaintiff's checking account and other corporate affairs. This condition included a veto power over purchases and the

99 *Id.*

100 *See* S. REP. No. 1084, *supra* note 6, at 18, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS, at 5536.

101 12 U.S.C. § 1972(1)(A) (1982).

102 12 U.S.C. § 1972(1)(C) (1982).

103 12 U.S.C. § 1972(1)(E) (1982).

104 470 F. Supp. 964 (E.D. Tenn. 1979).

payment of dividends. The court stated that "the Act does not prohibit attempts by banks to protect their investments."[105] The court further indicated that it "would be surprised indeed if a bank were to loan large sums to a new, closely held corporation without obtaining control over its disbursements and without requiring a corporate guarantee of the indebtedness of its sole stockholders."[106] Accordingly, requirements designed only to protect the bank's loan are permissible under section 1972.

As *Sterling Coal* illustrates, the courts are tolerant of conditional transactions ostensibly imposed by banks to protect their credit extensions. In *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*,[107] a jury found that the defendant bank conditioned a loan to the plaintiff on two elements: first, the appointment of a local businessman to manage the plaintiff corporation, and second, the granting of an option to the businessman to purchase a controlling interest in the company in lieu of compensation. Nevertheless, the district court granted the defendant a judgment notwithstanding the verdict. The Court of Appeals for the Eleventh Circuit affirmed.[108]

The court of appeals looked to the legislative history of section 1972 and found that Congress "did not intend to prohibit attempts by banks to protect their investments where no anticompetitive practices were involved."[109] Due to financial difficulties, Parsons Steel anticipated an inability to repay its debts. The Court of Appeals for the Eleventh Circuit decided that, given the specific purposes for the enactment of section 1972, it was not sufficient to show simply that a particular method of protecting against default is not commonly used to establish a violation of the statute.[110] The court held that unless the "unusual" banking practice is an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's probitions.[111]

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105 *Id.* at 965.

106 *Id.*

107 679 F.2d 242 (11th Cir. 1982).

108 *Id.* at 246.

109 *Id.* at 245.

110 *Id.*

111 *Id.* In other cases, courts have found that unusual banking practices designed to protect bank loans do not violate § 1972 merely because they resemble tying arrangements. In B.C. Recreational Indus. v. First Nat'l Bank, 639 F.2d 828 (1st Cir. 1981), the Court held that the defendant's requirement that the plaintiff hire a financial advisor in order to obtain credit did not violate § 1972. The court stated, "in addition to there being no tie-in alleged or proved, in any event, the arrangement complained of falls within the range of appropriate traditonal banking practices permissible under the Act." *Id.* at 832. In Tose v. First Pa. Bank, 648 F.2d 879, 897 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981), the defendant conceded that it demanded that Leonard Tose, owner of the Philadelphia Eagles Football Club, relinquish financial control of his professional football team as a condition to continuing a loan. The court held "as a matter of law that this was not a demand for a 'service . . . other than

From a policy perspective, the traditional bank practice exemptions make sense. Banks generally have a duty to look after their depositors' interests. To protect those interests, a bank, for example, may condition a loan upon the borrower hiring an accounting firm to audit the borrower's business. Banks need such flexibility to protect their investments. Not only does this flexibility allow banks to better protect their loans, it may also indirectly promote competition in the economy. If banks have this flexibility, they may loan money to customers to whom they would not otherwise extend credit. These customers may need credit to stay in business. Legislation should not be interpreted as discouraging banks from employing imaginative means to protect loans that they would not otherwise make for fear of section 1972 liability.

III. Conclusion

In passing section 1972, Congress intended to crack down on the perceived ability of banks and bank holding companies to take unfair advantage of their economic power. Congress intended section 1972 as a stiff remedy, creating a private cause of action with potential treble damage awards against violators of the provision. At the same time, however, Congress did not intend to interfere with traditional banking practices. Both the statute itself and the legislative history support this conclusion. In general, the decisions interpreting section 1972 comport with congressional intent.

If a bank has a legitimate business interest to protect, it should prevail in a section 1972 case despite the anticompetitive effect of its conduct. To determine this, courts must examine the particular circumstances of each case. If a defendant bank's conduct is anticompetitive and unwarranted by any legitimate banking interest, the court should allow the plaintiff to prevail. Furthermore, Congress designed section 1972 to permit private plaintiffs to attack conditional transactions with greater ease than under the general antitrust laws. Accordingly, a section 1972 plaintiff should establish a prima facie case by merely showing the imposition of a condi-

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those related to and usually provided in connection with a loan.' " *Id.* The court continued, stating that the "imposition of financial controls over the Eagles was directly related to maintaining the security of FPB's [First Pennsylvania Bank] substantial investment, and the bank's demand cannot be considered unusual in the face of substantial evidence that it had good reasons to be concerned about the loan." *Id.*

See also Bank of Am. Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc., 595 F. Supp. 800, 803 (E.D. Pa. 1984) (court granted summary judgment in favor of defendant where defendant bank required plaintiff to engage an accounting firm to audit plaintiff as a condition to restructuring a loan agreement); Continental Bank of Pa. v. Barclay Riding Academy, Inc., 93 N.J. 153, 459 A.2d 1163 (1983) (use of a mortgage to secure a previously unsecured loan does not violate § 1972).

tional transaction which is not justified by a legitimate banking interest.

Joseph C. Chapelle