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BANKING PRACTICES AND THE ANTITRUST LAWS

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Mention of the application of the antitrust laws to banking immediately calls to mind the series of antitrust proceedings against bank mergers resulting in the passage of the Bank Merger Act of 1966.[1] Although much has been written on the issues involved in those proceedings, there has been little discussion of the application of the antitrust laws to everyday banking operations. This raises equally important issues, and it is the purpose of this article to survey them briefly. Because of the limited scope of this survey, no attempt is made to consider all the possible technical defenses and qualifications applicable in particular situations or to consider the additional issues that may be generated by the application of state laws.

I. General Application of Federal Antitrust Laws to Banking Practices

A. *Federal Statutes*

1. The Sherman Act

There seems to be very little doubt that the Sherman Act applies to commercial banking practices. For some years there was reason to believe that banking was not "trade or commerce" within the meaning of the Sherman Act.[2] Since 1944, however, when the fire insurance business was held to be "trade or commerce,"[3] there has been a strong likelihood that banking would also be held to be "trade or commerce." In 1963 the Supreme Court noted in the *Philadelphia Nat'l Bank*[4] case that an argument that banking was not "trade or commerce" "would have no merit."[5] By 1966 the Bank Merger Act amendments made it apparent that Congress believed that antitrust considerations should play a part in banking regulation. It is improbable, therefore, that the Sherman Act will be held inapplicable to commercial banking, or that Congress will enact any sweeping exemption of commercial banking from the scope of the antitrust laws. Although the Sherman Act may be a favorite target for some magazine and editorial writers, it has substantial support in Congress. A great number of people sincerely believe that without the antitrust laws as a brake on excessive cooperation or overaggressive conduct in business, free enterprise, as we know it, could not survive.

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1 80 Stat. 236 (1966), 12 U.S.C.A. § 1828(c) (Supp. 1966).

2 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1964). Professor Gerald C. Fischer of Indiana University has compiled an excellent account of the background of the application of the Sherman Act to commercial banking. It is scheduled to appear as chapter seven of his book, THE CHANGING STRUCTURE OF COMMERCIAL BANKING. See Berle, *Banking Under the Anti-Trust Laws,* 49 COLUM. L. REV. 589 (1949).

3 United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 (1944).

4 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

5 *Id.* at 336 n.12.

2. The Clayton Act

Federal antitrust law is by no means limited to the Sherman Act, and other statutory provisions, perhaps the best known of which are sections 2 and 3 of the Clayton Act,[6] must be considered. Section 2 of the Clayton Act is generally referred to as the Robinson-Patman Act; it relates to unlawful discrimination and brokerage. Section 3 relates primarily to exclusive dealing and tying agreements. These provisions apply only to transactions involving "commodities," and there is a good argument that banking services are not "commodities."[7] That particular question, however, has not been decided by the Supreme Court, and it should be noted that some of the same practices covered by the Clayton Act have been held to be within the broader coverage of the Sherman Act.[8] The difference between Sherman Act coverage and Robinson-Patman or Clayton Act coverage rests primarily in the higher degree of proof as to effect on competition required under the Sherman Act. Although it may be very important in litigated cases, this difference is often disregarded in planning a bank's day-to-day activities because the exact effect of a particular practice on competition is usually not ascertainable. Therefore, it is best to assume, for planning purposes, that discrimination, exclusive dealing, and tying agreements may raise antitrust problems for commercial banks.

B. Possibility of Antitrust Immunity Resulting From Regulatory Statutes

It is frequently said that since banking is a thoroughly regulated industry, there is no justification for the application of the antitrust laws to banking.[9] However, the mere existence of a regulatory system has generally not been held to exclude the application of the antitrust laws.[10] For example, the gas-pipeline industry, the communications industry, and the transportation industry have all, to some extent, had antitrust problems along with their regulatory problems. In general, except where conferred in considerable specificity, it is not safe to count upon immunity.[11]

1. State Regulation

The relationship between the federal and state governments presents some

6 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 13-14 (1964).

7 See Tri-State Broadcasting Co. v. United Press Int'l, Inc., 369 F.2d 268 (5th Cir. 1966); Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), *cert. denied,* 369 U.S. 812 (1962); United States v. Investors Diversified Servs., Inc., 102 F. Supp. 645 (D. Minn. 1951). See also Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683, 689 (2d Cir. 1963); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile, 219 F. Supp. 400 (W.D. Pa. 1963); PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 33 (1963); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 59-61 (1962).

8 For examples of application of the Sherman Act to such practices in other industries, see United States v. Loews, Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). See United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 673 (1964) (dissenting opinion), with respect to overlapping of the Sherman Act by § 7 of the Clayton Act.

9 *E.g.,* Abramson, *The Philadelphia National Bank Case: A Reply,* in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURE 39 (U.S. Treasury — The Adm'r of Nat'l Banks ed. 1966).

10 *E.g.,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962); Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

11 See, *e.g.,* Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414 (1952); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

difficult legal problems. Some are constitutional in nature, for example, where Congress' regulatory power is derived solely from the commerce clause and interstate commerce may not be directly involved. The problems may also be statutory, for example, where the question is whether Congress intended to override or restrain state action where it had power to do so. In *Parker v. Brown*,[12] the Supreme Court held that the Sherman Act was not to be construed as invalidating a state-imposed agricultural marketing program. At the same time, it was made clear that the state could not authorize a conspiracy among individuals and excuse it from the Sherman Act. In this extremely difficult area, it is impossible to generalize confidently to what degree, if any, bank conduct may be exempted from the operation of the federal antitrust laws by state action. To a large extent, any determination will depend on the particular subject of state regulation, the nature of the conduct authorized or required, and the type and extent of participation in such conduct by state authorities.

In considering exemptions from the antitrust laws, it is useful to examine the experience of the insurance industry regarding the effect of state regulation. After the Supreme Court held that fire insurance was "commerce" within the meaning of the Sherman Act, Congress enacted a moratorium statute, the McCarran-Ferguson Act.[13] This act provided a period of time, which was set to embrace two rounds of state legislative sessions, during which the federal antitrust laws would be inapplicable to insurance except in certain aggravated cases and would thereafter be applicable to the extent that insurance was not regulated by state law.

The McCarran-Ferguson Act confirmed the power of the states to regulate insurance and seemed an invitation to greater regulation. Many states accepted the invitation.[14] As a result, the insurance industry may have expected that the federal antitrust laws would not be applied to the industry to any significant extent. Those who had such expectations were disappointed. After the expiration of the moratorium, there were a number of applications of the antitrust laws to the insurance industry because the state legislatures had not acted in all areas, they could not effectively act in all areas, or the conduct attacked was of the aggravated character reserved for application of the federal laws.[15] Thus, although Congress expressly deferred to the states, the antitrust laws continued to be applied much as before. It is therefore difficult to forecast that banks will acquire any sweeping immunity from the federal antitrust laws merely because some banks are regulated by the states. Any immunity acquired is likely to be of a limited nature. Deciding whether it attaches in particular cases will raise questions such as the extent to which state action is authorized

12 317 U.S. 341 (1943).
13 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-15 (1964).
14 See, *e.g.*, LA. REV. STAT. §§ 22:1-1734 (1959); NEB. REV. STAT. §§ 44-1501 to -1520 (1960).
15 *E.g.*, FTC v. Travelers Health Ass'n 362 U.S. 293 (1960); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963); United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N.D. Ill. 1965); United States v. New Orleans Ins. Exch., 148 F. Supp. 915 (D. La.), *aff'd per curiam*, 355 U.S. 22 (1957).

without conflict with federal legislation and the degree to which states can and do regulate practices covered by federal antitrust laws.

2. Federal Regulation

When considering the possibility of immunity from the antitrust laws through federal laws or regulations affecting banking, the issue can be broadly stated to be what type of accommodation and adjustment is needed to avoid conflict between the authorities enforcing the antitrust laws and those administering the regulatory statutes.[16] The Supreme Court has frequently indicated, and it repeated in *United States v. Philadelphia Nat'l Bank*,[17] that immunity from the antitrust laws is not easily implied. It follows that under the present trend of decisions, if adjustments are required to harmonize the antitrust and bank-regulatory policies, many of them will be made in the regulatory policies. There will probably be collaboration among the various federal authorities in order to avoid subjecting banks to conflicting rulings, but such collaboration cannot be taken for granted. It is possible for the authorities to disagree and present their disagreement to a court, as has frequently happened in the bank merger cases.[18] Even an agreement among the federal authorities that as to particular subjects the antitrust laws should yield to the regulatory laws may not fully protect the banks. Private parties may still institute treble-damage suits, attacking under the antitrust laws conduct sanctioned by the regulatory authorities.[19] Without an explicit statutory grant of immunity, there is always some possibility that a bank, although acting in good faith, may be held to have violated the antitrust laws.

3. Overall Effect of Regulation

In summary, bank regulation may not result in exemption from the antitrust laws. Indeed, it may have precisely the opposite effect. With regulatory authorities periodically looking into the records of banks, if any antitrust problems are present, they will probably be readily detected and acted upon. Ever since *United States v. Hunterdon County Trust Co.*,[20] national bank examiners have been instructed to look for evidence of joint action by banks in setting service charges. *Hunterdon County Trust* concerned a number of banks that were accused of unlawfully fixing service charges. The case was instituted as a result of the disclosure by one of the banks, in seeking the permission of the Comptroller of the Currency to merge, of a joint schedule of service charges which had been agreed upon with one of the other banks. Such agreements are discussed in the next section.

16 See, *e.g.*, Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); California v. FPC, 369 U.S. 482 (1962).

17 374 U.S. 321, 350-51 (1963).

18 *E.g.*, United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, *supra* note 17; United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

19 In Kaplan v. Lehman Bros., Trade Reg. Rep. (1967 Trade Cas.) ¶ 71967 (7th Cir. 1967), the plaintiff argued unsuccessfully that the New York Stock Exchange could not lawfully fix commission rates on security transactions, although the SEC has the power to review such rates.

20 1962 Trade Cas. ¶ 70263 (D.N.J. 1962).

II. Interbank Agreements

A. Agreements Enjoined

Turning to the subject of bank agreements that may raise antitrust questions, set out below is a list of the principal agreements enjoined in consent decrees in the *Hunterdon County Trust* case and in three subsequent cases brought in the federal district court in Minnesota.

These were agreements:

1. to set service charges (including charges asserted against checking accounts for failure to maintain minimum balances, charges for deposits to such accounts, charges for checks issued, charges for collections made for a customer, certification and stop-payment charges, charges for blank and imprinted checks, and "late charges" to customers of any kind);[21]
2. to publish schedules giving service charges;[22]
3. to restrict competition for the account of any depositor with respect to charges asserted against checking accounts;[23]
4. to fix or stabilize service charges;[24]
5. to exchange cost or other data relating to service charges;[25]
6. to restrict competition in interest rates paid on deposits, installment loans on automobiles, charges against checking accounts;[26]
7. to restrict advertising of, or to fix, interest rates, terms of automobile installment loans or mortgages, or charges against checking accounts;[27]
8. to restrict solicitation of business relations with any correspondent banks;[28]
9. to furnish or not to furnish bank supplies or other gifts to third persons;[29]
10. to restrict absorption for third persons of exchange charges for any third person;[30]
11. to restrict absorption for third persons of losses on securities;[31]
12. to fix the terms of loans by any bank, including particularly loans to personnel of correspondent banks;[32]
13. to fix the terms of livestock loans or the rebates or commissions paid to banks originating or servicing such loans.[33]

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21 United States v. Duluth Clearing House Ass'n, 1964 Trade Cas. ¶ 71022, at 79053 (D. Minn. 1964); United States v. First Nat'l Bank, 1964 Trade Cas. ¶ 71021, at 79051 (D. Minn. 1964); United States v. Northwestern Nat'l Bank, 1964 Trade Cas. ¶ 71020, at 79049 (D. Minn. 1964); United States v. Hunterdon County Trust Co., 1962 Trade Cas. ¶ 70263, at 76021 (D.N.J. 1962).

22 United States v. Hunterdon County Trust Co., *supra* note 21, at 76021.

23 *Ibid.*

24 Cases cited note 21 *supra.*

25 United States v. Duluth Clearing House Ass'n, 1964 Trade Cas. ¶ 71022, at 79054 (D. Minn. 1964); United States v. First Nat'l Bank, 1964 Trade Cas. ¶ 71021, at 79051 (D. Minn. 1964); United States v. Hunterdon County Trust Co., 1962 Trade Cas. ¶ 70263, at 76021 (D.N.J. 1962).

26 United States v. Duluth Clearing House Ass'n, *supra* note 25, at 79053-54.

27 *Ibid.*

28 *Id.* at 79054; United States v. First Nat'l Bank, 1964 Trade Cas. ¶ 71021, at 79051 (D. Minn. 1964); United States v. Northwestern Nat'l Bank, 1964 Trade Cas. ¶ 71020, at 79049 (D. Minn. 1964).

29 United States v. Northwestern Nat'l Bank, *supra* note 28, at 79049.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *Ibid.* See also United States v. Mortgage Conference, 1948-49 Trade Cas. ¶ 62273 (S.D.N.Y. 1948).

It should be emphasized that the decrees in these cases were entered upon consent. As consent decrees, they do not necessarily indicate either that the banks engaged in the practices enjoined or that the practices were illegal. There are many reasons for accepting a consent decree; one reason may be simply to avoid the expense, time, and publicity of litigation. Another reason may be that the party accepting the decree is already in compliance and believes that no substantial disadvantage will result from continuing to comply. However, consent decrees are usually read rather carefully by practitioners in the field, because the Department of Justice does not normally request injunctions against practices unless it believes the practices are illegal of themselves or that it is necessary to enjoin them in order to prevent evasion of the law.

Service charges to depositors are referred to several times in the foregoing list. Such charges may be examined in a number of ways. It can be argued that they are merely a means of limiting a bank's cost for what it sells. Alternatively, since banks are essentially in the business of providing various banking services to different classes of customers, including depositors, it can be argued that such service charges are the counterparts of prices charged by industrial companies. From the antitrust point of view, it does not make much difference whether service charges are considered to relate to input or output. If service charges were analogized to the price an industrial company might receive for its products, an agreement fixing service charges would be regarded as an ordinary price-fixing agreement. If service charges were regarded instead as a cost-limiting device, an agreement setting service charges would be analogous to an agreement among industrial companies as to the maximum price they would pay for supplies. In either case the Department of Justice would consider that the agreement falls within the proscriptions of the Sherman Act. The Department views agreements "setting" service charges, "stabilizing" these charges, "restricting competition" with respect to such charges, and "restricting advertising" of such charges as illegal agreements in unreasonable restraint of trade.

It is apparent from the above list of agreements that were enjoined that service charges are not the only area of cooperation the Department considers to be beyond the scope of lawful agreement between competing banks. The agreements enjoined in those consent decrees relate to many more areas, including conditions for selecting and dealing with customers. They do not, of course, include all possible types of unlawful horizontal agreements, since *any* restraint of competition by agreement among competitors raises an antitrust issue.

B. Agreements Without Restraints on Competition

Although the breadth of the prohibitions against agreements between competitors means that all agreements between competing banks must be examined with care, it does not mean that banks are precluded entirely from agreeing with each other. There are numerous areas in which banks can reach agreement without restraining competition. For example, banks may agree to run jointly financed advertisements urging the public to save regularly, and banks may agree to exchange credit information. Such agreements do not restrain competition.

But even with these seemingly innocent agreements, qualifications are necessary to implement the agreement lawfully. For example, if a joint advertisement were to mention the amount of the interest paid by the advertising banks, it might be regarded by the Department of Justice as tending to stabilize interest rates. Similarly, in exchanging credit information, it is easy to imagine junior credit officers advising each other against extending credit to a particular loan applicant. The Department might conclude that an agreement had been reached to refuse credit to a particular applicant. Recently the Department obtained an indictment against fuel oil dealers who allegedly refused to sell fuel oil to any customer delinquent in his account with any of them.[34] Therefore, an agreement to refuse credit would presumably be considered illegal by the Department.

The point of this qualification is that the bank lawyer's job does not stop with approving an agreement apparently lawful on its face; he must be sure it is lawful in practice, since that is the standard by which the agreement will be tested in litigation.

C. Agreements Imposing Reasonable Restraints on Competition

The contrast between agreements setting service charges, which are considered unreasonably restrictive, and agreements to exchange credit information, where there is no restrictive agreement at all, is the black and white of the antitrust laws as applied to banking operations. There is a considerable gray area, consisting of possibly reasonable restraints on trade.

The restraints necessary for the proper operation of a clearing house[35] or for the formation of a syndicate to make large loans[36] are examples of reasonable restraints that may well be upheld if litigated. There undoubtedly are others as well.[37] Nevertheless, one must be prepared to be asked whether a particular restraint is necessary. The Assistant Attorney General in charge of the Antitrust Division recently stated:

> Let me now ask my favorite question in the context of joint ventures, an area of the law in which rules have hardly been decisively defined. The question, "Is this more restrictive than necessary," applies to the joint venture itself, particularly where participants are actual or potential competitors. If there are no apparent extraordinary risks, if each venturer has or could readily get all of the resources necessary for the new operation, surely it is not unreasonable to suspect anticompetitive motivations and consequences. And even if we concluded that the joint venture itself is beyond reproach, it is certainly appropriate to make sure that any agreements entered into by the parents in connection therewith are no more restrictive than necessary to the launching and operation of the venture.[38]

34 U.S. Dep't of Justice, Press Release, Jan. 26, 1967.
35 *Cf.* Board of Trade v. United States, 246 U.S. 231 (1918).
36 *Cf.* United States v. Morgan, 118 F. Supp. 621, 684-91 (S.D.N.Y. 1953).
37 *E.g.,* banks may also be justified in collectively seeking restraining legislative or administrative action from the Government. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).
38 Turner, *Some Reflections on Antitrust,* 1966 CCH Antitrust Law Symposium 7.

It is wise not to make the assumption that merely because a restraint seems to be in the public interest generally, it will be considered "necessary" and thus reasonable. The restraint should also serve the public interest *in competition,* that is, it should serve to create or preserve competition.

III. Single-Bank Practices

There are certain areas in which practices of a single bank may be objectionable under the antitrust laws, even in the absence of any agreement with another bank. Generally speaking, these practices can be characterized as overly aggressive or tending toward monopoly. It is easy for a banker to believe he is outside this category. Probably no bankers consider themselves monopolists; they are all acutely aware of their competitors. Some of the competition the businessman encounters, however, may not be considered sufficiently close to save him from accusations of monopolizing within the meaning of the antitrust laws. In banking cases, only competition in limited areas or among certain types of lenders may be considered.[39] Moreover, even if a banker is not accused of monopolizing, he may be accused of attempting to monopolize. The Sherman Act proscribes attempts to monopolize as well as actual monopolization.[40] It also applies to certain overly aggressive practices, such as "tying" agreements, where not even an attempt to monopolize is alleged.[41] Hence, very few banks can afford to ignore the laws relating to overly aggressive practices, which laws have special relevance to banks anticipating growth. Once a company has achieved a commanding position in its field, an important question in deciding whether it is a monopolist for antitrust purposes is how it got there. Did the others fall by the wayside, or were they tripped as they were going by?

A. Prepayment Penalties and Compensatory Balances

Of the many practices that can be examined from this point of view, provisions in loan agreements for prepayment penalties and compensatory balances are everyday examples. It would be rare indeed for such provisions to be drafted to exclude competition rather than to serve a proper banking purpose. In particular cases, however, this allegation might be made. Consequently, some banking lawyers have advised their clients that prepayment penalties should bear a reasonable relation to the lost profits or additional expenses caused the lender by refinancing. Particular danger arises when the prepayment penalty is imposed only where the loan is refinanced and not where the borrower acquires the funds by other means, such as inheritance. If the penalty appears excessive, an adversary may seek to draw the inference that the intent in imposing the penalty was not really to compensate the bank for its expenses and lost earnings, but to exclude compe-

39 United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

40 26 Stat. 209 (1890), 15 U.S.C. § 2 (1964).

41 Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953). See Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947).

tition by other banks. Such an exclusionary intent, if found, could be used to support a charge of unlawful monopolization or attempt to monopolize.

In the case of compensatory balances, there are additional risks as well. Although compensatory balances have been traditionally considered by bankers as additional remuneration — and in some cases the sole remuneration — for the services they perform, provisions in loan agreements requiring such balances bear an uncomfortable resemblance to practices under attack in other industries.

One of the Department of Justice's current interests is so-called "business reciprocity," where one party says to the other, "I will buy from you only if you will buy from me."[42] The courts have invalidated a number of agreements involving "tying" arrangements where one party says to the other, "I will sell Product X to you only if you will buy Product Y from me."[43] Such arrangements have been stated to serve hardly any purpose beyond the suppression of competition and have been held illegal where the seller has "sufficient economic power to impose an appreciable restraint on free competition in the tied product."[44]

The practice of requiring compensatory balances in loan agreements may be analogized to unlawful reciprocity or tying. Whether the analogy is apt, however, is yet unanswered. The practice may well be defended as a proper measure for obtaining security or increasing the banker's compensation, and the chances of successful defense are enhanced if the provision is drawn so as not to exceed reasonable requirements for these purposes. Furthermore, the courts might accept an argument distinguishing tying arrangements on the ground that only a single "product," money, is involved.[45] One thing, however, is clear. No matter how resourcefully the lawyers defend such a case, their efforts will be thwarted if the evidence shows that a significant purpose of requiring a compensatory balance was to restrict competition.

B. Other Preemption of Banking Opportunities

More generally, any practices that have the effect of preempting banking opportunities may be challenged as exceeding the limits of fair competition and reflecting an intent to monopolize. Obviously, in this situation much depends upon whether a small bank is attempting to win a place in the sun beside its larger rivals, or the larger rivals are trying to keep that place to themselves. Particularly in the case of a larger bank, it is desirable to avoid situations suggesting that the bank's intent is to preempt banking opportunities.

Prolonged below-cost selling, particularly when supported by profitable operations in other areas, suggests the possibility of such an intent to preempt. In other industries, such conduct has been viewed as evidence of intent to monopolize.[46] Therefore, whenever a banker provides a service unprofitably,

42 See, *e.g.*, United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 552 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

43 See, *e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1943).

44 Northern Pac. Ry. v. United States, *supra* note 43, at 11.

45 See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953).

46 See United States v. National Dairy Prods. Corp., 372 U.S. 29, 34 (1963).

he would be well-advised to have a record of the reasons for his conduct. Perhaps he is the victim of circumstances, which may be an adequate explanation. The important point is that he must be prepared to rebut the allegation that his purpose was to prevent a newcomer from achieving a position in his area.

Another example of a practice often attacked as unlawful is the insistence by a large concern that customers not deal with its competitors. The Department of Justice recently sued the Bank of Virginia, alleging that the bank required that merchants subscribing to its charge-card plan not deal with competing charge-card plans. The bank, while denying illegality, accepted a consent decree banning the practice.[47]

In considering preemption of banking opportunities, *Bank of Utah, Inc. v. Commercial Security Bank, Inc.*[48] should be examined. In that case a bank offered to provide customers with a payroll service plan. Instead of following normal payroll procedures, the customer was invited to deposit the total amount of the payroll and provide a journal entry showing how the total was to be disbursed. Using its accounting machines, the bank would then open accounts for all employees and send each employee a combination deposit receipt and payroll record. Other banks in the area objected to the plan, stating that the bank was rendering free services to the employer in order to obtain the bank accounts of large blocks of employees.

The district court upheld the plan on the basis that employees were provided two escape hatches through which they could withdraw their pay from the defendant bank.[49] There was a provision for automatic transfer to another bank if the employee wished, and there was also a provision for two free checks per month to each employee.[50] The court noted that by using one of these checks an employee could, in effect, write his own paycheck and deposit it in another bank, even though "large blocks"[51] of employees did not take the trouble to do so.

The court of appeals affirmed,[52] holding that the restraints inherent in the plan were reasonable. Competition was not foreclosed because other banks could compete to offer similar plans and to obtain accounts of employees. Furthermore, and perhaps of greatest importance, the court found there was no intent to destroy competition or create a monopoly.[53] If the plan had been used by a dominant bank as a means of foreclosing competition from smaller banks, serious issues would have been raised. Of itself, the plan might not have been unlawful, but it could have been strongly asserted that it was being used as a means to achieve or preserve a monopoly position.

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47 United States v. Bank of Virginia, TRADE REG. REP. (1966 Trade Cas.) ¶ 71947 (E.D. Va. 1966).

48 Bank of Utah, Inc. v. Commercial Security Bank, Inc., 1965 Trade Cas. ¶ 71540 (D. Utah 1965), *aff'd*, TRADE REG. REP. (1966 Trade Cas.) ¶ 71930 (10th Cir. 1966).

49 Bank of Utah, Inc. v. Commercial Security Bank, Inc., 1965 Trade Cas. ¶ 71540, at 81403 (D. Utah 1965).

50 *Ibid.*

51 *Ibid.*

52 TRADE REG. REP. (1966 Trade Cas.) ¶ 71930 (10th Cir. 1966).

53 *Id.* at 83275.

C. *Refusals To Deal*

Refusals to deal also deserve special note. The issues raised by such refusals pursuant to agreements between banks have already been discussed.[54] Refusal to deal as the result of an agreement with another customer will also raise serious antitrust issues.[55]

There is, accordingly, a fine but very important line between two situations. The first is a lawful, unilateral refusal to deal with a loan applicant, where, for example, his credit is bad or the bank has funds committed to another applicant and deems it to the bank's advantage not to assist a competing business. The second is a refusal to deal with an applicant by agreement with another customer and at the latter's request.

It is generally a good idea whenever such a request is received to advise the customer that the bank has a policy, for its customers' protection as well as its own, of not acting on any such request and of not even referring it to the loan officer concerned. Instead, the loan officer should be permitted to make his decision with complete independence. It may turn out that the applicant's rating does not measure up to the bank's standards, thereby solving the problem. Of course, it is otherwise if it turns out that the bank is making and continues to make loans to other applicants with less favorable credit ratings. If the applicant were turned down in such circumstances, it would be advisable for the loan officer to make a memorandum indicating why, acting independently, he decided to refuse the loan.

IV. Avoiding Antitrust Problems

A. *Obtaining Management's Cooperation*

The most important part of a compliance project is convincing bank management that it is important enough to put management's weight behind it. Usually, when the considerations are fully understood, management will agree. However, there are a number of attitudes sometimes encountered that reflect some misunderstanding of the problem.

1. "It's always been done this way."

The attitude summarized in the words, "It's always been done this way," is, to a large extent, untrue. For many years banks have been soliciting and obtaining antitrust advice. In fact, it was over twenty years ago that the General Counsel of the American Bar Association advised that it was safer practice not to attempt to establish uniform service charges in clearing house agreements.[56] Regardless of what banks have done in the past, however, a progressive management will realize that the success of a bank depends upon its ability to adapt to changing circumstances. This includes, of course, not only changing

54 See text accompanying note 34 *supra*.
55 See United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
56 PATTON, DIGEST, Clearing Houses § 2 (Supp. 1946).

commercial patterns and changing technological possibilities, but also changing legal environments.

2. "They wouldn't dare."

A second attitude sometimes encountered is that suit is not to be expected. This is summed up in the words, "They wouldn't dare." Frequently this conviction is based upon the political judgment of the speaker. Experience has proved that even the keenest political observers are on shaky ground if they try to predict, on political grounds, how the antitrust laws will be enforced. In the first place, there is usually a substantial gap between the time a practice is undertaken and the time the antitrust laws are applied to it. Sometimes the gap is several years, and in this interval many changes can take place on the political scene. Perhaps more important, it is a serious miscalculation to assume that it is only the Government that enforces the antitrust laws. Much if not most of the antitrust litigation now in the courts was instituted by private parties,[57] and their decision to sue was obviously not controlled by political considerations. Although it may be generally true that there is a certain reluctance among businessmen to sue banks, and perhaps an even greater reluctance among banks to sue each other, the record shows that such suits have occurred. The *Bank of Utah* case is an example.[58]

Often antitrust issues come into a case by the back door. They are pleaded as a matter of defense or as a matter of counterclaim. *Hazeltine Research, Inc. v. Zenith Radio Corp.*[59] is an excellent example. Hazeltine sued Zenith for patent infringement, and Zenith counterclaimed, alleging violations of the antitrust laws. Before long the tail was wagging the dog. Judgment was entered against Hazeltine, the plaintiff, in an amount in excess of $30,000,000. Banks, of course, are also frequently required to use the courts to enforce their rights and can expect that antitrust issues will be raised wherever possible by resourceful defense attorneys.

3. "They have the burden of proof."

The attitude summed up in the words, "They have the burden of proof," is one about which businessmen are frequently badly informed. Many of them think that "proof" means proof positive, whereas violations of the antitrust laws, as well as other legal claims, are frequently proved from relatively thin and equivocal evidence. The courts recognize that illegal action is frequently not reduced to writing, and they accordingly give considerable weight to fragmentary evidence. Therefore, offhand or colorful remarks in memoranda, sometimes even inaccurate remarks, can be taken as indicating monopolistic or conspiratorial intentions, often the most crucial fact in an antitrust case. Documents merely indicating meetings of competitors can be put together with additional evidence sufficient for a court to infer that subsequent price increases were agreed upon at the meeting.

57 See Current Case Table, TRADE REG. REP. (1967 Trade Cas.).
58 See notes 48-53 *supra* and accompanying text.
59 1965 Trade Cas. ¶ 71355 (N.D. Ill. 1965).

From a practical point of view, it is just as important to avoid the appearance of illegality as it is to avoid the illegality itself. The well-advised client will keep a record or make a report justifying the legality of his conduct rather than relying upon his adversary's inability to prove his case. After all, what bank does not keep records to protect itself against even the miniscule claims of suppliers or depositors? Why should it not keep records to protect itself against antitrust claims that are certain to involve far more substantial sums?

4. "Let them sue."

The attitude summed up in the words, "Let them sue" is not common among businessmen with prior experience in antitrust litigation. The expense, publicity, and disruption of business, even if the defense is successful, is enough to justify some effort to reduce one's exposure to such suits. Obviously, the consequences of an unsuccessful defense can be even more serious.

B. *Appraising Restrictive Provisions*

Once management is convinced of the desirability of a compliance program, the operation of the program presents few difficulties. There is an initial hurdle in reviewing outstanding agreements and practices, but after this is done the operation of the compliance program can be absorbed into a current schedule.

The first task is to review the interbank agreements and the policies of the bank in dealing with its customers. There are three rules-of-thumb that are useful in this connection.

The most important is to ask, when a restraint of trade is found, whether the restraint is truly necessary. Restraints often have been incorporated in agreements due to an abundance of caution, although they are really unnecessary. In fact, when a bank yields on another point to obtain such a restraint in its contract, it may be paying for something it does not need. In such situations, the simplest way of dealing with the problem is to remove or waive the restraint. In quite a number of cases, adopting this approach will constitute a good business as well as a good antitrust practice.

Where the restraint is necessary, the second rule-of-thumb is to ask whether the restraint goes further than is required to serve a lawful purpose. For example, it is frequently possible to cut down a restraint's scope in time or subject matter and still preserve the parties' basic objectives. The lawyer's surgery on overly broad restraints may even result in clarifying the basic objectives of the parties, thereby producing a more effective agreement.

Finally, as a third rule-of-thumb, one should require more than oral explanations of the reasonableness of restraints. It is much better to obtain documentation for the bank's files and refer to or incorporate it into the agreement imposing the restraint. Here the purpose is threefold: first, when the lawyer obtains the evidence, he can see if it adequately supports his client's position; second, unless he obtains the evidence, the witnesses and the documentation may not be available later when needed; third, it is generally unwise to include an unexplained restraint in an agreement. If the restraint is explained and made to appear reasonable by references to the evidence justifying it, it is less likely that the agreement will seem unreasonably restrictive to an outsider, thereby reducing the likelihood that it will be attacked as invalid.

C. Keeping up-to-date

No compliance program is any better than the procedure followed for keeping it up-to-date. Periodic briefing sessions are necessary to orient new operating personnel. Such sessions are useful also in answering questions and updating the knowledge of personnel previously briefed and can be worked into other staff meetings. To supplement these sessions, spot checks, particularly of files, are useful in ascertaining whether operating personnel have fully understood the material covered. A program for reporting unusually sensitive occurrences, such as meetings with competitors or refusals to deal in spite of acceptable credit, is often of great help in enabling counsel to protect his client's interest before the plot thickens sufficiently to cause embarrassment to the client or other parties who may be involved.

V. Conclusion

In summary, the application of the antitrust laws to everyday practices may be expected to become a subject of great importance to banks. Enough has been done by the Department of Justice to make the banking community realize that failure to comply may have criminal, as well as civil, consequences. No comfort can realistically be taken from the dearth of cases on point. Although the laws present some uncertainties, other businesses have been able to adjust to them successfully. A positive program for compliance with these laws may prove to be a sound and practical investment for bank management.