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The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part I

*Timothy D. Naegele**

In 1970, Congress enacted the anti-tying provision of the Bank Holding Company Act, which is the only American law that was adopted expressly to prevent predatory tying arrangements by banks and other financial institutions, and that established per se illegality. In the ensuing years, courts have wrestled with the exact meaning of its terms; litigants have sparred over the breadth of its coverage; and the federal regulatory agencies have labored to define its scope. In this two-part article, the author discusses the anti-tying provision and provides a sense of what might be expected in the years to come as this area of economic regulation continues to evolve. This first part of the article introduces the topic and discusses judicial decisions interpreting the anti-tying provision, particularly case law interpreting the existence of a tying arrangement. The second part of this article, which will appear in an upcoming issue of The Banking Law Journal, will discuss the traditional banking exemption, miscellaneous issues, and will offer conclusions. In the final analysis, the author asks and answers the questions: has the anti-tying provision reduced bank misconduct, and have consumers of financial services truly benefited? Also, discussed is whether the judiciary has defied the will of Congress, legislated from the bench, thwarted efforts to enforce the anti-tying provision, and emasculated the law? Lastly, as dramatic changes take place in American and global banking, will domestic and foreign entities ignore the anti-tying provision and operate on the wrong side of the law, and engage in the “pushy model of banking” to skirt this vital U.S. law?

Having lived with an American law for almost 50 years—since its inception as an idea, to its fruition as a relatively mature federal statute—is a fascinating, wonderful and, at times, frustrating experience. It is like giving birth to a child, and then watching it grow to adulthood, through the twists and turns and vicissitudes of Life. This two-part article is the third in a series of articles for *The Banking Law Journal* on the anti-tying provision of the Bank Holding

* Timothy D. Naegele served as counsel to the U.S. Senate Committee on Banking, Housing, and Urban Affairs (and as counsel to Senator Edward W. Brooke of Massachusetts), 1969–1971. He authored the anti-tying provision, known as Section 106 of the Bank Holding Company Act Amendments of 1970. Mr. Naegele, currently managing partner of Timothy D. Naegele & Associates, may be reached at tdnaegele.associates@gmail.com.

Company Act.¹ Readers of this article are encouraged to review the two earlier articles, *inter alia*, because they contain information that is not repeated here. All three set forth comprehensive analyses of the statute, and discuss the cases that have interpreted it—in the articles’ texts and extensive footnotes—and its future.

Indeed, one commenter has noted:

As banks learn more and more about their customers and begin to build new products and packaged offerings, [the anti-tying provision] will become increasingly dangerous. Institutions that can successfully navigate this law will be able to offer new, data-driven services, making mortgage offers to consumers who’ve just begun looking, or offering financial advice to households that may not even realize they’re in trouble yet.

Banks which are not careful, however, can very easily find themselves offering packaged deals that will bring the [regulators and litigators] calling.

Technology is about to change the way retail banking works, as long as they can stay on the right side of the law.²

¹ See Timothy D. Naegele, *The Anti-Tying Provision: Its Potential Is Still There*, 100 BANKING L. J. 138 (1983) (“Naegele 1983”) (<http://www.naegele.com/articles/antitying.pdf>), and Timothy D. Naegele, *The Bank Holding Company Act’s Anti-Tying Provision: 35 Years Later*, 122 BANKING L. J. 195 (“Naegele 2005”) (http://www.naegele.com/documents/antitying_3.pdf). See also Timothy D. Naegele, *Are All Bank Tie-Ins Illegal?* 154 BANKERS MAGAZINE 46 (1971) (Naegele 1971) (<http://www.naegele.com/articles/banktieins.pdf>).

This article is dedicated to the memory of Senator Brooke—for whom the author wrote the anti-tying provision, and who was its Senate sponsor—and to the memories of Senator Wallace F. Bennett of Utah and his chief of staff on the Senate Banking Committee, John R. Evans (later a Commissioner of the Securities and Exchange Commission (“SEC”)), who were able adversaries on the Senate floor and in the Senate-House Conference that accepted it. See Naegele 2005 at 218–219 n.6.

² See Eric Reed, *How to Make the Most Money From Your Bank in 2018*, THE STREET (<https://www.thestreet.com/story/14489253/1/how-to-make-the-most-money-from-your-bank-in-2018.html>) (“The way you bank is about to change Thanks to a combination of technological changes and consumer demand, the banking industry is on the edge of a revolution in how it does business. Consumers who pay attention to this shift will be in a position to get much better deals as a result. The first casualty in this process, say industry experts, will be the branches themselves. ‘Consumers [will] gravitate more and more toward the digital arena for their banking needs both online and mobile,’ said Greg McBride, chief financial analyst for Bankrate. ‘There’ll be continued consolidation of bank branches. They’re not going to go away, but what they will be is optimized. The branch is going to look a lot different in the sense that it’s going to be more of a consultation center and less of a transaction center,’ McBride continued. ‘In other

words, it will be where people go to talk to their banker, or someone with the bank, about wealth management or their mortgage. Less and less will it be about cashing a check.’ The truth is that technology can do most, if not all, of the job that a teller once did. With the ubiquity and security that modern apps and websites have to offer, and with only one-third of transactions conducted in cash anymore, few consumers need a physical interaction. Websites can offer the kind of convenience that no teller could offer short of round-the-clock concierge service, allowing today’s consumer to open and manage almost any kind of account from an online interface. The result will mean more than just convenience. It will open the doors to financial products across the country, allowing consumers to shop for better deals and accounts regardless of physical location. Consumers without a bank nearby, such as many rural or urban residents, will be able to open checking accounts without traveling for miles. Others will be able to comparison shop for better loan terms and deals than the ones offered by their local branch. Consumers demand the shift to an online model and banks have begun to respond. The . . . purpose of these increasingly consolidated branches will be to provide in-person consultations for loans, wealth management and financial products In the same way that Amazon tries to anticipate a shopper’s needs based on past purchases, banks will begin trying to build financial profiles out of their new wealth of digital information. The result, according to members of the industry, will be an increasingly broad array of financial products customized to individual consumers. It will mean a more proactive (some might say *pushy*) *model of banking*, but it will also create opportunities for a savvy shopper to find financial products that fit their needs much better than a generic model ever could. . . . The success of this new model of banking will depend on how financiers navigate the regulatory landscape. Digital access has opened up an entirely [new] way of retail banking. Many institutions can contemplate a future completely free of physical locations, seeing no difference between a consumer in Southern California and one in the Michigan Upper Peninsula. Yet such a project would have to contend with the Riegle-Neal Interstate Banking and Branching Efficiency Act, which ties a bank’s ability to collect deposits from around the country with its willingness to make credit available to those same communities. In essence, a consumer bank can’t open online checking accounts in upstate Michigan unless it also has the infrastructure to help that population get a mortgage. Meanwhile, bankers looking at a wealth of new products have their eye on Section 106 of the Bank Holding Company Act Amendments of 1970, otherwise known as the Anti-Tying provision. This law bars a bank from providing or pricing one financial product on the condition that a customer commit to another, unrelated product. For example, a retail bank can’t give someone a point off their mortgage on the condition that the borrower take out a credit card from that same institution. As banks learn more and more about their customers and begin to build new products and packaged offerings, anti-tying laws will become increasingly dangerous. Institutions that can successfully navigate this law will be able to offer new, data-driven services, making mortgage offers to consumers who’ve just begun looking, or offering financial advice to households that may not even realize they’re in trouble yet. Banks which are not careful, however, can very easily find themselves offering packaged deals that will bring the SEC calling. Technology is about to change the way retail banking works, as long as they can stay on the right side of the law”) (emphasis added).

This article is timely. However, it is not the SEC that will “come calling,” but the bank regulatory agencies such as the primary regulators—the Fed and Federal Deposit Insurance Corporation (“FDIC”)—along with private litigants who will sue for treble damages and other financial rewards. Also, foreign entities are likely to enter U.S. markets and engage full bore in the “pushy model of banking,” and do everything imaginable to escape the reach of American

In recent years, the Antitrust Division of the U.S. Department of Justice (“DOJ”) tried to kill the anti-tying provision; those within the Federal Reserve System (“Fed”) tried to weaken it with a proposed “interpretation”;³ and it is arguable that America’s judiciary has gone a considerable distance to achieve such results *de facto*, by circumscribing and undermining its intended effect. In doing so, there is no question that the judiciary has defied the will of Congress, legislated from the bench, thwarted efforts to enforce the anti-tying provision, and emasculated the law⁴—unlike “plaintiff-friendly” cases.⁵

laws such as the anti-tying provision. This has been happening already. And at least one prominent U.S. District Court has looked the other way, with respect to (1) a California plaintiff, (2) a bank incorporated under the laws of Australia that maintained representative offices in Houston, (3) where “decisions” were made ostensibly in London. *See infra* notes 79–92 in Part II of this article.

See also <https://www.wsj.com/articles/why-amazon-and-google-havent-attacked-banks-1524758594> (“Why Amazon and Google Haven’t Attacked Banks”—“For years, banks had resisted moving sensitive data or processes to the cloud, citing the security concerns of allowing data outside of their leased or owned data centers,” which remain legitimate concerns). One reason why Amazon, Google and Microsoft are not entering banking—and thus increasing competition—is that they have reached a *détente* with the banks to keep out of each others’ business sectors. This has potential antitrust implications *vis-à-vis* American and global consumers of financial services. The practical problem, of course, is that the cost of fighting all of them (e.g., with a class action lawsuit) would be staggering, unless for example the EU brought such an action.

³ *See* Timothy D. Naegele, *Fed Plan Would Simply Gut Enforcement of Ban on Tying*, AMERICAN BANKER (January 21, 2005) (http://www.naegele.com/documents/antitying_2.pdf); *see also* <http://www.naegele.com/documents/NaegelesubmissiontoFed.pdf> (letter sent by the author to each member of the Federal Reserve Board (March 16, 2005)) and <https://www.federalreserve.gov/boarddocs/press/bcreg/2003/20030825/attachment.pdf> (“Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, ‘Proposed interpretation and supervisory guidance with request for public comment’”). It is noteworthy that the Fed never adopted the proposed interpretation, and wisely so.

⁴ The following cases have been decided in recent years: *Davis v. Wells Fargo*, 824 F.3d 333, 343–344 (3rd Cir. 2016) (Third Circuit found that Davis could have asserted his claims against Wells Fargo for violation of the anti-tying provision in his 2012 action; however, because he failed to do so, claim preclusion barred him from asserting them in this action, and the Court affirmed the District Court’s dismissal of those claims) (*see also* *Davis v. Wells Fargo U.S. Bank Nat. Ass’n*, 2015 U.S. Dist. WL 3555301, *6 (E.D.Pa. June 8, 2015) (“Davis did not allege claims against Wells Fargo for . . . violation of the anti-tying provisions of the Bank Holding Company Act in the prior action. Because those claims could have been asserted in the prior action, Davis is barred from asserting them in this action under the doctrine of *res judicata* or claim preclusion”)); *Thibault v. TD Bank, N.A.*, 2016 U.S. Dist. WL 490281, *5 (Superior Court of Connecticut, Judicial District of Hartford, Jan. 12, 2016) (Plaintiff alleged, *inter alia*, that the Defendants used high pressure tactics of multiple uninvited visits that pressured the Plaintiff to apply for a loan in violation of 12 U.S.C. § 1972, which the Court did not address); *Heritage Bank USA, Inc. v. Johnson*, 2015 U.S. Dist. WL 9274964, *4 n.2 (M.D.Tenn. Dec. 17,

2015) (Plaintiff Heritage filed a Motion for Summary Judgment, which the Court granted, even though Johnson claimed that Heritage violated 12 U.S.C. § 1972 *et seq.*, by illegally conditioning its agreement to make the Warren County Loan on Ms. Johnson's agreement to purchase from Heritage property in Lawrence County then owed by Heritage); *Simmons First National Bank v. Lehman*, 2015 U.S. Dist. WL 1737879, *4 (N.D.Cal. April 10, 2015) (Plaintiff Simmons First National Bank brought an action for judicial foreclosure against real property owned by Defendants Richard C. Lehman and Michele D. Koo; Simmons moved to strike twelve of Defendants' affirmative defenses; Defendants' eighteenth affirmative defense alleged that the note, guaranty and Deed of Trust constituted an illegal tying arrangement in violation of 12 U.S.C. § 1972 *et seq.*, namely that Hayes "forced Bonhomme and Lehman to obtain the tied products (to wit, the Note, the Guarantee and any other loan documents entered into in connection with the Note) in order to obtain the desired product (to wit, the Bancorp Common Stock)"; and the Court ruled that this allegation was duplicative of Defendants' second and third affirmative defenses of fraud in the factum and fraud in the inducement, which the court held were barred by [12 U.S.C. § 1823(e) and the *D'Oench, Dubme* doctrine that "prohibit unwritten, undocumented claims and defenses against the FDIC or an assignee bank"], and therefore this defense was barred by the law of the case); *Stewart v. DeMott*, 2014 U.S. Dist. WL 6984151, *1, 2 (W.D.Ark. Dec. 10, 2014) ("The crux of Plaintiffs' complaint is that Defendants allegedly conspired together to deprive Plaintiffs of their security interests in the property by tricking them into subordinating their security interests in the property to a mortgage in favor of Malvern National Bank. Plaintiffs have sued for violations of the anti-tying provisions of the Bank Holding Act, 12 U.S.C. § 1972 . . . Defendants argue that all of Plaintiffs' claims are barred by the applicable statutes of limitations . . . All of the Bank's acts in that regard had to have occurred on or before July 31, 2006, when Plaintiffs signed the most recent subordination agreements. Plaintiffs, however, did not file their complaint until April 17, 2012, more than five years later. Thus, Plaintiffs' claim pursuant to 12 U.S.C. § 1972 is barred by the statute of limitations") (*see also* Naegele 2005, *supra* note 1, at 197 ["The statute of limitations under the provision is 4 years, but the statute can be tolled for fraudulent concealment"]; *Structural Maintenance & Contracting Co., Inc. v. Jayce Enterprises, Inc.*, 2010 U.S. Dist. WL 4159517, *8 (S.D.N.Y. Oct. 12, 2010) [The Court opined: "The statute of limitations for a claim arising under 12 U.S.C. § 1971 *et seq.*, including Plaintiffs' claim under 12 U.S.C. § 1972(1)(C) and 12 U.S.C. § 1975, is four years . . . Here, the loan that allegedly serves as the condition for the establishment or continuation of the checking account at Community Capital Bank was issued in late 1998 . . . Even assuming this cause of action did not accrue until the loan was repaid in April 2002, the statute of limitations for the claim expired, at latest, in April 2006. Because this action was filed in September 2009, Plaintiffs' tying claim is time-barred"]; *Kabealo v. Huntington Nat. Bank*, 17 F.3d 822, 828, certiorari denied 513 U.S. 812, 115 S.Ct. 64, 130 L.Ed.2d 21 (6th Cir. 1994) ["It is immaterial that the plaintiffs did not execute the documents which formally transferred control of Buckeye to White and Moorehead until November 7, 1984. The Act is concerned with injurious actions of banks that violate its anti-tying provisions. The proscribed injury occurred when the bank made the allegedly unlawful demand on the plaintiffs, not when the plaintiffs complied"]; *In re Settlers' Housing Service, Inc.*, 514 B.R. 258, 267 (Bkrtcy.N.D. Ill. June 30, 2014) (U.S. Bankruptcy Court for the Northern District of Illinois ruled that *D'Oench, Dubme* doctrine prevented mortgage borrower from asserting tying claim under the Bank Holding Company Act, or from asserting unconscionability, civil conspiracy, breach of fiduciary duty, and other claims against the FDIC or its successors, based

upon alleged scheme undertaken by failed predecessor bank that was not reflected in bank's records, citing Federal Deposit Insurance Act, § 2[13], 12 U.S.C.A. § 1823(e); 12 U.S.C.A. § 1972)); *Hampton Island, LLC v. Asset Holding Co. 5, LLC*, 740 S.E.2d 859, 865 (Ga.App. March 28, 2013) (“[A]ll of the facts presented by appellants which are contended to create material issues of fact precluding the grant of summary judgment relate to acts committed in 2008 in connection with the 2008 transaction. As far as they are contended to create a cause of action pursuant to the federal anti-tying act, 12 USC § 1972, they are all acts committed by or allegedly on behalf of [United Community Bank (UCB)], who is no longer a party to this case. Also, AHC5 is not a ‘bank’ subject to that act. Further, even assuming, without deciding, that such an act of ‘tying’ had been committed by UCB, that is no defense to the underlying obligation on the promissory notes at issue here even if UCB were still party to the litigation. The anti-tying act enables an injured party to bring an action for treble damages to recover its losses due to the violation. ‘[A]n obligation to pay back a loan[, however,] is not an injury”); *Quintana v. American General Home Equity, Inc.*, 2012 U.S. Dist. WL 423370, *1 (S.D.Ind. Feb. 8, 2012) (The Court found that the Plaintiff had not made any allegation that, at the time the Plaintiff entered into the mortgage agreement, Defendants conditioned the agreement on the purchase of some other product. Consequently, Plaintiff failed to state a claim under 12 U.S.C. § 1972); *Hunt v. Branch Banking & Trust Co.*, 2011 U.S. Dist. WL 1101050, *6–7 (D. South Carolina March 23, 2011) (The Court decided that Plaintiff’s conclusory allegations that her POD account was “tied illegally” to other accounts was insufficient to allege cause of action under the anti-tying provision. “There are no allegations in the Second Amended Complaint that Defendant BB & T required any customer to obtain or provide any type of additional credit, property or service for that customer to acquire some sort of credit, property or service from the bank. Plaintiff’s Second Amended Complaint does not contain sufficient factual matter to state a claim under 12 U.S.C. § 1972 that is plausible on its face. Therefore, Plaintiff’s ninth cause of action is subject to dismissal”); *Professional Title LLC v. FDIC*, 2011 U.S. Dist. WL 855338, *2 (N.D.Fla. March 9, 2011) (The Court determined that although the Plaintiffs alleged that the Defendant conditioned the extension of credit on customers not using Professional Title’s services, they had not alleged that Professional Title or any other Plaintiff was a competitor of the Defendant. “From the facts as presented by Plaintiffs, it is not plausible that a Defendant who was engaged in the business of banking was also engaged in the title insurance or farming industries. The competitor requirement of Section 1972(E) is not met”); *East of Cascades, Inc. v. Federal Deposit Ins. Corp.*, 2011 U.S. Dist. WL 647704, *1, 6 (W.D.Wash. Feb. 18, 2011) (Plaintiffs filed a Complaint for Wrongful Disallowance of Claims against Defendant FDIC in its capacity as receiver for Westsound Bank. Plaintiffs alleged that the provision in the Commitment Letter that prohibited Plaintiffs from displaying the signage of other financial institutions violated the anti-tying provision. Plaintiffs also alleged that Westsound conditioned Plaintiffs’ loan on the provision of “landlord services” by virtue of Westsound’s leasehold interest in Plaintiffs’ building, conveyed three months prior to issuing the loan. The Court found that Plaintiffs’ allegations failed to state a claim upon which relief could be granted. “Plaintiffs have failed to allege that the Commitment Letter was approved by the board or was an official document of the bank. Absent these allegations, or evidence that the same conditions were included in official bank documents, the Court cannot sustain its claim against the FDIC” (citing the *D’Oench, Duhme* doctrine and 12 U.S.C. § 1823(e)). The Court added: “Plaintiffs fail to allege that the practice of restricting competitors’ signage was unusual. Further, to state a claim under § 1972(1)(D), [] Plaintiffs must show that the bank required that [] they ‘provide some

additional credit, property, or service to a bank holding company.’ Plaintiffs have made no such allegations”); *Byrd v. GMAC Mortgage LLC*, 2011 U.S. Dist. WL 13214304, *5 (C.D.Cal. Jan. 6, 2011) (Plaintiff’s seventh claim was for violation of 12 U.S.C. § 1972, brought against Defendant MERS and Defendant People’s Choice Home Loans. The Court determined that the “only moving Defendant that Plaintiff brings this claim against is MERS. Section 1972 prohibits certain anti-competitive practices by banks. This claim fails because MERS is not a ‘bank’ as defined under the Bank Holding Company Act. 12 U.S.C. §§ 1972, 1841(c). Defendants’ Motion to dismiss the seventh claim is GRANTED as to Defendant MERS without leave to amend”); *Gray v. Preferred Bank*, 2010 U.S. Dist. WL 3895188, *5 note 3 (S.D.Cal. Sept. 30, 2010) (Plaintiffs argued in their Opposition that Defendants’ actions are in violation of 12 U.S.C. § 1972, “a claim not raised in the SAC.” Plaintiffs asserted that the Court had jurisdiction over this federal question, and requested leave to file a third amended complaint containing a claim for relief under the BHCA. However, the Court decided: “[A]s it appears clear that Plaintiffs could not allege a plausible claim for relief under this statute, their request for leave to amend on this basis is denied. As to the claims for relief alleged in the SAC, Plaintiffs have had ample opportunity to plead a case and have failed to do so. Accordingly, Plaintiffs are not granted leave to amend”); *Rosario v. Bank of New York*, 2010 U.S. Dist. WL 11434973, *1 (C.D.Cal. Sept. 24, 2010) (“In order for MERS to be held liable under [the anti-tying provision], it must be a ‘bank.’ A bank is an institution that (1) ‘accepts demand deposits or deposits that the depositor may withdraw’ and (2) ‘is engaged in the business of making commercial loans.’ 12 U.S.C. § 1841(c). Plaintiff has not alleged facts showing that Defendant MERS or the Mortgage Store Financial is a bank within the meaning of § 1841(c). The Court dismisses the Bank Tying Act claims”); *Mendez Internet Management Services, Inc. v. Banco Santander de Puerto Rico*, 621 F.3d 10, 16 (1st Cir. (Puerto Rico) Sept. 22, 2010) (The Court found that the complaint failed to state a claim under the BHCA. “The act provides in relevant part that a ‘bank shall not in any manner . . . furnish any service . . . on the condition or requirement . . . that the customer shall not obtain some other credit, property, or service from a competitor of such bank.’ 12 U.S.C. § 1972(1)(E). Seemingly, the charge is that the banks are refusing to give Mendez accounts in order to suppress competition between the banks and an unidentified entity or entities that supply Mendez with dinars to resell. But yet again there is no allegation that banks supply dinars to anyone or that they have sought to replace the unnamed entities and become the suppliers of dinars to Mendez or anyone else. It would be a different matter if the complaint alleged that the banks had offered to give Mendez accounts so long as he bought his dinars from the banks rather than his current suppliers; but there is no allegation to this effect, let alone evidence that the banks want to become Mendez’ suppliers of dinars. As such, Mendez has not offered sufficient supporting facts to plead his BHCA claim”); *Tate v. Indy Mac Bank FSB*, 2010 U.S. Dist. WL 3489181, *3 (C.D.Cal. Sept. 3, 2010) (“In dismissing this claim in its November 30, 2009 Order, the Court noted that Plaintiff has not alleged facts showing that Defendant MERS or MortgageIT are banks within the meaning of § 1841(c). . . . Plaintiff has failed to cure this deficiency in the instant Complaint. Accordingly, the Court dismisses Plaintiff’s claim pursuant to the Bank Tying Act with prejudice”); *Byrd v. GMAC Mortgage*, 2010 U.S. Dist. WL 11549867, *4–5 (C.D.Cal. Aug. 2, 2010) (“This claim fails because MERS is not a ‘bank’ as defined under the Bank Holding Company Act. 12 U.S.C. §§ 1972, 1841(c). Plaintiff argues that MERS acted in the capacity of a lender because the deed of trust assigned MERS the right to ‘exercise any or all of those interests, including . . . the right to foreclose and sell the Property. . . .’ According to Plaintiff, this assignment of rights meant that MERS was imputed

with the Section 1972 obligations of a bank. This argument fails because an assignment of interests from a bank to a mortgage lender or servicer does not mean the [] assignee becomes a 'bank' under Section 1972. . . . Defendants' Motion is GRANTED as to the seventh claim"); *Lee v. Aurora Loan Services*, 2010 U.S. Dist. WL 1999590, *5 (N.D.Cal. May 18, 2010) ("MERS is not a bank, nor has Lee alleged facts demonstrating that MERS is an 'institution-affiliated party' within the meaning of the statute. Accordingly, the seventh claim will be dismissed with leave to amend"); *In re Royal Car Rental Inc.*, 2010 U.S. Dist. WL 1657379, *1, 4 (Bkrcty.D.Puerto Rico April 23, 2010) ("Debtor Royal Car Rental is a corporation organized and existing under the laws of Puerto Rico devoted to leasing motor vehicles for profit On or about May 10, 2007, Debtor and Westernbank entered into a Line of Credit Agreement. Through the line of credit, Westernbank provided to Debtor certain revolving credit facilities up to the amount of \$1,000,000.00 to obtain new and/or used motor vehicles Factual underpinnings are missing from the complaint and from the record of this case concerning conditions or requirements which would enable this court to reach the conclusion that the bank was departing from traditional banking practices in its dealings with Debtor. It is this Court's finding that the BHCA was not intended to interfere with conduct stemming from such traditional banking practices as were exercised by Westernbank The Court rules that Westernbank is not liable to Debtor neither for breach of contract, nor for violations under the Bank Holding Company Act. The Clerk shall enter judgment dismissing the complaint"); *Shipp v. Donaher*, 2010 U.S. Dist. WL 1257972, *8-9 (E.D.Pa. April 1, 2010) ("Defendants correctly argue that plaintiffs have not alleged an injury caused by the tie Plaintiffs' BHCA allegations are limited to the allegations that (1) '[d]efendants illegally require that its SBA borrowers provide vigilante bailout services upon PNC's decision to confess judgment, whereby the debtor is made the collections enforcer against third parties who are unprepared and unprotected from such attack,' and (2) 'PNC does not properly screen these debt collection recruits nor train them adequately, leaving defaulting debtors free to wreak havoc on the marketplace.' . . . These allegations are bereft of any suggestion that the alleged tie between SBA loans and 'vigilante bailout services' harmed plaintiffs"); *Midwest Agency Services, Inc. v. JP Morgan Chase Bank, N.A.*, 2010 U.S. Dist. WL 935450, *7 (E.D.Ky. March 11, 2010) ("[T]he Defendants did not extend any credit or provide a service. The Defendants purchased Credit Transactions that had already been completed between the car dealer and the car buyer. Accordingly, the Defendants' purchase of the Credit Transaction from the car dealers does not constitute an extension of credit or provision of a banking service to satisfy the first element of a BHCA claim. In addition . . . , Midwest cannot demonstrate that a tying arrangement existed. While the standard for a tying arrangement under a BHCA claim does not require coercion, the statutory language prohibits the 'extension of credit' based on a 'condition or requirement' of additional actions. See 12 U.S.C. § 1972(1) (2010). Accordingly, Midwest must establish that the Defendants required car dealers to purchase certain gap insurance products in order for the Defendants to purchase the Credit Transactions. See *Highland Capital, Inc.*, 350 F.3d at 567-68 (noting that demonstrating that borrowers purchased additional products because it pleased the lender did not establish that the purchase was a requirement for purposes of establishing a claim). Even assuming that the purchase of the Credit Transaction constitutes an extension of credit for the purposes of the BHCA claim, the Defendants did not require car dealers to include any gap insurance products in the Credit Transactions they purchased. Rather, the Defendants required that if a gap insurance product was included in the Credit Transaction, it must be from a vendor on the Approved List. Because the Defendants would purchase Credit Transactions without a gap

insurance product, the purchase was not conditioned on the inclusion of CIA gap insurance products”); *Ronald Lee v. U.S. Bank National Association*, 2010 U.S. Dist. WL 11519605, *7 (C.D.Cal. Feb. 8, 2010) (“Section 1972 regulates a bank’s extension of credit in certain respects, including by disallowing certain conditions and requirements for that activity. Movants argue that the ‘conditions’ Plaintiff identifies in his section 1972 claim are only conclusorily alleged to violate section 1972, *i.e.* are ones ‘other than those related to and usually provided in connection with a loan.’ Movants also argue that ‘MERS was only the nominee for the lender and the beneficiary of the Deed of Trust. Plaintiff responds that he has alleged that MERS acted in the capacity of a lender ‘with all the powers and rights of [BNC], was imputed with the same statutory obligations as [BNC] under 12 USCS § 1972.’ This allegation, however, is conclusory, and cannot withstand analysis under *Twombly* and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Plaintiff also directs the Court to a statement in the Deed of Trust that MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.’ . . . However, while that language indicates that MERS ‘has the right . . . to take any action required of Lender,’ it does not indicate that MERS has the ‘obligation’ to do so. As such, resting MERS’s section 1972 liability on this allegation will not suffice. Moreover, contrary to Plaintiff’s argument, MERS never ‘acted as a lender’ in connection with the acts of a lender that section 1972 seeks to regulate—in other words, it (unlike BNC) never extended a loan to Plaintiff. Unless Plaintiff offers some reason to believe that he can validly amend this claim as against MERS, Movants’ motion with respect to this claim will be granted, without leave to amend”); *Collins v. First Horizon Home Loan Corporation*, 2009 U.S. Dist. WL 10672984, *4 (C.D.Cal. Dec. 3, 2009) (“The Complaint does not allege that MERS is a bank or an ‘institution-affiliated party’ for purposes of the Bank Tying Act Plaintiffs’ argument that MERS may be liable under the Bank Tying Act on an agency or related theory is unsupported As a result, the Complaint does not state a claim against MERS for violation of the Bank Tying Act. The Complaint also fails to allege facts that state a claim under the Bank Tying Act. Plaintiffs either fail to allege facts showing that the practices complained of are anti-competitive in nature or unusual in the banking industry, or do so in a conclusory manner that fails to state a claim As a result, the Complaint fails to state a claim against Defendants for violation of the Bank Tying Act and Defendants’ Motion to Dismiss the eighth cause of action is granted, with leave to amend”); *Kristick v. First Franklin Loan Services, Inc.*, 2009 U.S. Dist. WL 3682587, *4–5 (D.Ariz. Nov. 3, 2009) (“In Count 8, Kristick alleges MERS and FFFC violated 12 U.S.C. § 1972, which prohibits certain tying arrangements by banks. Neither MERS nor the FFFC is named as a Defendant in this action Further, Kristick does not allege that FFFC engaged in anticompetitive tying arrangements prohibited by § 1972 Kristick alleges Defendants engaged in illegal tying by varying the consideration in the form of (1) decreasing the loan margin associated with the Note on the Property on the condition that Kristick agree to a prepayment penalty and (2) providing a ‘broker kickback’ or other illegal compensation to third parties on the condition that Kristick agree to pay ‘additional fees in the form of hidden increased points and interest.’ Kristick further alleges Defendants engaged in illegal tying by requiring him to agree to allow MERS to act as Nominee and Beneficiary on the Note and Deed of Trust as a condition of the loan. Assuming the allegations to be true, none allege that FFFC required Kristick to obtain or provide additional credit, property, or service as a condition for obtaining a loan. Moreover, to establish a violation of § 1972, a plaintiff must show not only an

anticompetitive tying arrangement existed, but also that the banking practice in question was unusual in the banking industry and the practice benefitted the bank . . . Kristick alleges that 'Defendant's acts and omissions were driven by greed and lax underwriting' and 'have clearly contributed to the recent and devastating economic crises and the millions of foreclosures, evictions and job losses that are occurring across the country.' He does not allege that FFFC's practices were either anticompetitive or unusual in the banking industry"); *Nguyen v. LaSalle Bank Nat. Ass'n*, 2009 U.S. Dist. WL 3297269, *9 (C.D.Cal. Oct. 13, 2009) ("Plaintiffs allege MERS is in violation of the Bank Tying Act. The Bank Tying Act applies to banks and certain entities associated with the lending industry . . . 'In order to state a cause of action under the anti-tying provision of the BHCA, Plaintiff must prove three elements: (1) the Bank has engaged in an unusual practice; (2) that the Bank's actions were anti-competitive; and (3) that the actions were to the benefit of the Bank.' . . . 'Section 1972 is not a general regulatory provision designed to insure fair interest rates, collateral requirements, and other loan agreement terms. It has a narrow target; it is 'intended to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices.' . . . Plaintiffs contend that Bankerswest caused Plaintiff to agree to purportedly onerous loan terms and paid broker kickbacks. However, these allegations do not implicate MERS because Plaintiffs have not alleged MERS is a bank or an 'institution affiliated party.' 12 USC § 1972(2)(f). Institution affiliated parties include directors, officers, employees, or controlling stockholders of, or an agent for, an insured depository institution, as well as shareholders or independent contractors. 12 U.S.C. § 1972(2)(f) (citing to 12 U.S.C. § 1813(u)). Therefore, Defendants' motion to dismiss Plaintiffs' eighth cause of action is GRANTED"); *Méndez Internet Management Services, Inc. v. Banco Santander de Puerto Rico*, 2009 U.S. Dist. WL 1392189, *5 (D.Puerto Rico May 15, 2009) ("Plaintiffs argue that Defendants violated the BHCA by tying their provision of banking services to Plaintiffs' ceasing to deal with the MSBs that distribute the dinars that Plaintiffs sell . . . Defendants assert that Plaintiffs have failed to state a claim for violation of the BHCA because they have not alleged the existence of an explicit tying arrangement . . . The BHCA provides that a bank shall not extend credit or vary the consideration of credit, on the condition that the customer shall not obtain some other credit or service from that bank's competitor. 12 U.S.C. § 1972(1). To state a claim under § 1972, a plaintiff must allege that (1) 'the bank imposed an anticompetitive tying arrangement;' (2) the arrangement was unusual in the banking industry; and (3) the practice benefitted the bank. . . . Plaintiffs do not assert that the Financial Institution Defendants conveyed their intention to close the account unless Plaintiffs stopped dealing in dinars . . . Some of the Financial Institution Defendants gave no reason for the closures, cited administrative reasons, or stated that the closures were due to the high volume of transactions on Méndez accounts . . . BPPR stated that it 'did not want that type of account'; DB indicated that 'it did not want to engage in business with foreign currency traders'; and WPR closed the account citing 'a change in policy to discontinue service to [MSBs].' . . . While these statements demonstrate a reluctance to engage in business with Plaintiffs, none of the Financial Institution Defendants told Méndez he could keep his accounts open on the condition that Plaintiffs stop doing business with a particular competitor. Thus, Plaintiffs have not satisfied the first element of a BHCA claim, namely, they have not alleged that any of the Financial Institution Defendants actually imposed a tying arrangement . . . We, accordingly, dismiss Plaintiffs' BHCA claim"); *Ticket Center, Inc. v. Banco Popular de Puerto Rico*, 613 F.Supp.2d 162, 177 (D.Puerto Rico Oct. 31, 2008) ("Courts have viewed the BHCA as an extension of the Sherman Act's prohibition of anticompetitive tying to the field of commercial

banking, without requiring the plaintiff to prove anticompetitive effect or market power. *Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1346 (11th Cir.1997). Other courts have included some reference to 'anti-competitive' effect in the elements: (1) the bank imposed an anti-competitive tying arrangement; (2) the arrangement was not usual or traditional in the banking industry; and (3) the practice conferred a benefit on the bank. *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F. 3d 558, 565 (6th Cir.2003). See also *Mamot Feed Lot & Trucking v. Hobson*, 539 F.3d 898, 904 (8th Cir.2008) (substantially identical elements). In either case, Ticket Center's BHCA claims fail because the record contains no genuine dispute that any tying arrangements existed. [T]he undisputed facts and evidence on this motion demonstrate that, for each of the business arrangements alleged in the complaint, Banco Popular did not tie its provision of financial services or sponsorship services to the use of TicketPop ticketing services. Ticket Center has failed to provide contrary evidence sufficient to satisfy its burden on summary judgment. Ticket Center's BHCA claims therefore warrant summary judgment, and summary judgment on the first, second, and third causes of action is granted for Banco Popular"); *Mamot Feed Lot and Trucking v. Hobson*, 539 F.3d 898, 903-904 (8th Cir. (Neb.) Aug. 26, 2008) (Rehearing and Rehearing En Banc Denied Oct. 3, 2008) ("Although the first amended complaint cited to [tying claims based on §§ 1972 and 1975] in the jurisdictional section of the complaint, it provided absolutely no facts to support an illegal tying claim. To state an antitying claim, '[t]he plaintiff . . . must show that the bank imposed a tie, that the practice was unusual in the banking industry, that it resulted in an anticompetitive arrangement, and that it benefitted the bank.' . . . Nowhere does the complaint allege that the Bank illegally tied any of the plaintiffs' loans to other products or services, that any of its practices were unusual in the banking business, or that any tying activity benefitted the Bank. The district court properly dismissed the antitying claim for failure to state a claim"); *Rice v. North Georgia National Bank*, 2008 U.S. Dist. WL 11320049, *2-3 (N.D.Ga. April 11, 2008) ("First, Plaintiffs have failed to demonstrate that Defendant North Georgia National Bank engaged in an unusual practice. Although Plaintiffs' Complaint is certainly not a model of clarity, Plaintiffs appear to complain that Defendant North Georgia National Bank required Plaintiffs to provide a certificate of deposit as collateral for a loan. This collateral is, by the plain terms of the statute, 'related to and usually provided in connection with' such a loan. In any event, requiring additional collateral is not unusual conduct in the banking industry Second, Plaintiffs have failed to allege an anti-competitive practice. 'Courts repeatedly have held that a bank's conduct in conditioning the further extension of credit on the debtor's providing additional security for the loan is not actionable under the BHCA.' . . . Indeed, '[c]onditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices, and is not the kind of unusual or anti-competitive practice that gives rise to a BHCA cause of action.' . . . Indeed, Plaintiffs' Complaint does not allege that Defendant North Georgia National Bank's actions 'lessened competition in any way or increased the Bank's economic power.' . . . To state a valid claim under the BHCA, Plaintiffs 'not only must allege that the Bank engaged in an unusual banking practice, but must also allege that the unusual banking practice was an anti-competitive tying arrangement benefitting the bank.' . . . 'For such an anti-competitive tying arrangement to exist, Plaintiff[s] must show the existence of anti-competitive practices which required Plaintiff[s] to provide another service or product in order to obtain the product or service [they] desired.' . . . Plaintiffs have failed to present such allegations here For the above reasons, Plaintiffs have failed to state a claim under the BHCA. The Court therefore grants Defendants' Motion to Dismiss as to that claim") (see also *Rice v. North Georgia National Bank North Georgia Community*

Financial Partners, Inc., 2008 U.S. Dist. WL 11320036, *2–3 (N.D.Ga. March 4, 2008)); *First and Beck, a Nevada LLC v. Bank of Southwest*, 267 Fed.Appx. 499, 501 (9th Cir. (Ariz.) Dec. 17, 2007) (“[T]he district court properly determined that it did not have federal question jurisdiction, 28 U.S.C. § 1331, over F&B’s asserted federal causes of action pled under 12 U.S.C. §§ . . . 1972. Those causes of action completely lacked merit”); *Mamot Feed Lot v. Hobson*, 2007 U.S. Dist. WL 2462611, *3 (D.Neb. Aug. 28, 2007) (“The plaintiffs have alleged no facts that trigger liability under the federal anti-tying statutes despite plaintiffs’ citation to that law. See 12 U.S.C. §§ 1972 and 1975. Those statutes prohibit tying one bank product or service to another, and provide a right of action to recover three times the amount of damages sustained, the cost of suit and attorney fees. To make a sufficient allegation under these sections, the plaintiff ‘must show that the bank imposed a tie, that the practice was unusual in the banking industry, that it resulted in an anticompetitive arrangement, and that it benefitted the bank.’ . . . Yet faced with a motion to dismiss, the best the plaintiffs can do is assert that discovery may uncover such illegality in the future. That is not enough”); *K3C Inc. v. Bank of America, N.A.*, 204 Fed.Appx. 455, 465–466 (5th Cir. (Tex.) Nov. 6, 2006) (“Appellants argue that the district court erred in finding that BOA’s actions did not violate the Bank Holding Company Act. The 1970 amendments to the Bank Holding Company Act, 12 U.S.C. § 1972, were directed at tying arrangements by banks that require bank customers to accept or provide some other service or product or to refrain from dealing with other parties in order to obtain the bank product or service they desire. *Swerdloff v. Miami Nat’l Bank*, 584 F.2d 54, 57–58 (5th Cir.1978). To state a claim under § 1972, a plaintiff must show that (1) the banking practice in question was unusual in the banking industry, (2) an anti-competitive tying arrangement existed, and (3) the practice benefits the bank. *Bieber v. State Bank of Terry*, 928 F.2d 328, 330 (9th Cir.1991). The record supports the district court’s conclusion that BOA committed no violation of the Bank Holding Company Act. Appellants point to no evidence that BOA conditioned the extension of credit or another service on the Companies’ agreeing to an interest rate swap. The Companies’ alleged inability to obtain an interest rate swap from another bank was not the result of anti-competitive or unusual business practices by BOA. Rather, it is the natural result of the Companies’ decision to borrow substantial sums from BOA, requiring that a significant portion of the Companies’ assets be pledged as collateral”); *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 882 (6th Cir. (Ky.) April 18, 2006) (Rehearing and Rehearing en Banc Denied Sept. 15, 2006) (“The Barretts also claim that the district court erred in declining to allow them to amend their pleadings to add claims under the Antitying Act, 12 U.S.C. § 1972. In view of the need to remand the case to the district court, we think that it makes considerable sense to allow the Barretts to renew their motion and to give the district court an opportunity, should it still choose to deny the motion, to explain why it should not be granted”); *Nemo Development Inc. v. Community Nat’l. Bank*, 2006 U.S. Dist. WL 839449, *7–8 (D.Kan. Jan. 4, 2006) (“Plaintiff claims in Count VII (second) that defendants CNB, Altman, and McPherson imposed unlawful tying requirements on plaintiff in violation of 12 U.S.C. § 1972. Specifically, plaintiff claims that in return for procuring loans from CNB, defendants Altman and McPherson required plaintiff to provide construction materials and/or construction services for other personal homes. Plaintiff fails to state a claim for several reasons: First, the Bank Holding Company Act, 12 U.S.C. § 1972 *et seq.*, cannot be asserted against individual bank officials. *Bieber v. State Bank of Terry*, 928 F.2d 328, 331 (9th Cir.1991). Second, plaintiff alleges that defendants Altman and McPherson sought *personal* favors. An anti-tying arrangement must consist of conduct which reflects a benefit to the bank. *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir.1984). Finally, the complaint fails to allege

a 'tying' arrangement, which requires two distinct products: a tying product in the market for which defendant has economic power, and a tied product, which defendant forces on consumers wishing to purchase the tying product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984); *Alpine Elec. Co. v. Union Bank*, 979 F.2d 133, 135 (8th Cir.1992). The complaint alleges only a loan and a personal benefit, not two bank products which are tied. Count VII (second is dismissed"); *Rosemont Gardens Funeral Chapel-Cemetery, Inc. v. Trustmark Nat. Bank*, 330 F.Supp.2d 801, 805-807 (S.D.Miss. May 24, 2004) ("Plaintiffs argue that Trustmark's imposition of a 'take-it-or-leave-it condition upon its agreement to reduce Rosemont's loan payments,' the beneficiary of which condition was 'Trustmark and Gulf-Trustmark's partner and affiliate,' constituted a violation of the anti-tying provisions of the BHCA. According to plaintiffs, 'Trustmark conditioned the extension of credit to Rosemont upon Rosemont's agreement to provide property (common stock) for the sole benefit of the bank and its affiliate, Gulf.' They argue that the fact that Trustmark 'imposed the conversion requirement as a condition to its extension of credit' in and of itself establishes a violation of the BHCA. However, there is not sufficient evidence in support of plaintiffs' position to create a triable issue on this putative claim. . . . To have an actionable claim under this anti-tying provision of the BHCA, plaintiffs must prove that a benefit was conferred by the challenged arrangement to a holding company of the bank or a subsidiary of a bank holding company. Although plaintiffs repeatedly describe Gulf Holdings as a 'partner' and 'affiliate' of Trustmark, and declare that Trustmark's conditioning of a reduction in Rosemont's monthly payments on the conversion provision was for the 'sole benefit of the bank and its affiliate,' the proof establishes without challenge that neither Gulf Holdings, nor any O'Keefe affiliate, was a bank holding company or subsidiary of a bank holding company, but rather was an independent company that merely purchased a participating interest in plaintiffs' loan. Thus, even if plaintiffs could show that Trustmark imposed some requirement on plaintiffs for the benefit of Gulf Holdings, this would not constitute a violation of the BHCA because no holding company or subsidiary benefited thereby. In their brief, plaintiffs also argue that Trustmark violated the BHCA by requiring that Robinson liquidate certain stocks and bonds through Trustmark's investment brokerage facility as a condition of reducing Rosemont's monthly payments. This is also identified in their briefs as a basis for plaintiffs' charge that Trustmark breached its duty of good faith and fair dealing. The court notes, though, that the factual allegations in both the complaint and plaintiffs' Anti-Tying Memorandum relate solely to defendants' having proposed the conversion of interest due from plaintiffs into shares of Rosemont in favor of Gulf Holdings. There is not the slightest hint of any claim relating to plaintiffs' current charge that Trustmark required Robinson to liquidate his securities through its brokerage department and thereby violated the BHCA's anti-tying provisions or its duty of good faith and fair dealing. It would seem unnecessary, therefore, to assess whether summary judgment would be in order as to such claims, since no such claims have been pled in the case. The court does note, however, that notwithstanding Robinson's assertion in his affidavit that the securities were sold through Trustmark's brokerage department as required by Trustmark as a condition for its agreement to reduce Rosemont's monthly payments, it appears from the evidence that the securities were not sold through Trustmark's brokerage department but rather were sold through an outside firm and the proceeds applied to the Rosemont loan. Accordingly, there is no basis for a potential BHCA claim. Moreover, assuming for the sake of argument that Trustmark did actually agree that it would reduce Rosemont's monthly payments if Robinson would liquidate his securities and apply the proceeds of the sale to the loan, as a matter of law, that would not constitute a breach of

Trustmark's alleged duty of good faith and fair dealing. First . . . , not only did Trustmark have no duty to negotiate with Robinson and Rosemont toward restructuring the loans, but if it chose to negotiate with them, it would not have been unreasonable or unfair to propose that the borrowers pay down the loan by liquidating other assets as a condition to lowering the borrowers' payments"); *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 565-568 (6th Cir.2003) ("[A] plaintiff need not establish a bank's economic power or an anti-competitive effect to make out a claim under 12 U.S.C. § 1972. 'The language of the [Act] makes clear that the availability to a potential customer of any credit, property, or service of a bank may not be conditioned upon that customer's use of any other credit, property, or service offered by the bank The purpose of this provision is to prohibit anti-competitive practices [that] require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.' S. Rep. 91-1084 (1970), reprinted in 1970 U.S.C.C.A.N. 5519, 5535. Nonetheless, Section 1972 'was not intended to interfere with the conduct of appropriate traditional banking practices,' *McCoy v. Franklin Sav. Ass'n* 636 F.2d 172, 175 (7th Cir.1980) (quoting *Clark v. United Bank of Denver Nat'l Assn.*, 480 F.2d 235, 238 (10th Cir.), cert. denied, 414 U.S. 1004, 94 S.Ct. 360, 38 L.Ed.2d 240 (1973)), or to prohibit banks from protecting their investments. *Parsons Steel, Inc.*, 679 F.2d at 245. To make out a claim under Section 1972, therefore, the plaintiff must prove that (1) the bank imposed an anti-competitive tying arrangement, that is, it conditioned the extension of credit upon the borrower's obtaining or offering additional credit, property or services to or from the bank or its holding company; (2) the arrangement was not usual or traditional in the banking industry; and (3) the practice conferred a benefit on the bank. See *Kenty*, 92 F.3d at 394 (quoting *Sanders v. First Nat'l Bank & Trust Co.*, 936 F.2d 273, 278 (6th Cir.1991)). The district court based its summary judgment for the defendant in part on the ground that the plaintiff failed to offer evidence of the Bank's 'appreciable economic power in the loan market to impose [the] tying arrangement.' . . . This was error. The plaintiff was not required to prove that the Bank had sufficient strength in the credit market to enable it to impose the tying arrangement. See *Costner v. Blount Nat'l. Bank*, 578 F.2d 1192, 1196 (6th Cir. 1978) (observing that '[t]he bank was also sued under the Bank Holding Company Act, which establishes a Per se [sic] rule and provides the same penalties for tying arrangements as the Sherman Act, but without the necessity of proving any economic power in the market for the tying product'). The plaintiff could satisfy the first element required of a claim under Section 1972 merely by showing that the Bank demanded that Highland obtain other property (the bank holding company stock) or furnish other property (the payment for the stock) as a condition or requirement of obtaining the \$610,000 loan. We agree with the district court, however, that the plaintiff failed to establish a factual issue on the existence of a tying arrangement. In its motion for summary judgment, the defendant pointed out the absence of evidence on this element, and came forward with direct evidence to prove the contrary proposition, in the form of affidavits from everyone involved in seeking and making the loan, who each said that the stock purchase was *not* a condition or requirement for the extension of credit. See *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. Under our summary judgment jurisprudence, the plaintiff was obligated at that point to come forward with facts that proved, or from which a fact finder reasonably could infer, that the Bank required Highland to buy its holding company stock as a condition of receiving the loan. See *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505. To meet that burden, the plaintiff imported the allegations from the lawsuit by Pressman against the Bank and others that Morriss and Inman were engaged in a conspiracy to cheat Morriss' partners in a real estate development venture, testimony that the

stock purchase was filled from Inman's personal holdings through Inman's son-in-law, proof that the loan did not adhere to the Bank's normal lending policies, and the opinion of a banking expert that the loan should not have been made in the normal course of banking business. This offering falls considerably short of the proof that this Circuit requires to establish a successful Section 1972 claim. The plaintiff argues that the circumstantial evidence points to the conclusion that Morriss caused Highland to buy the Bank's holding company stock specifically in order to influence the Bank's decision on Highland's loan request. That argument suggests that a statutory claim can be established without actually proving 'coercion' on the part of the Bank. Indeed, in *Dibidale of La., Inc., v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir.1990), the court held that the anti-tying provision of the BHCA 'does not include a coercion element.' *Id.* at 302. In that case, the plaintiff sought a construction loan from the defendant bank and agreed to hire the bank's preferred choice as construction manager. The loan was made, but the construction manager turned out to be incompetent and caused considerable loss to the plaintiff. The plaintiff admitted that hiring the construction manager was never an explicit condition of receiving the loan, although the bank had made it clear that it would feel 'comfortable' with that choice, and that he went along with it out of deference to the bank. In reversing the lower court's dismissal of the Section 1972 claim, the Fifth Circuit construed the 'condition or requirement' language of the statute quite broadly, reasoning that '[t]o restrict the scope of those words to tying arrangements in which a seller is literally forced to purchase or provide a tied product or service in order to obtain credit would vitiate that section's intended role, for as Congress recognized, a tying arrangement may squelch competition whether coercive or not.' *Id.* at 306. Likewise, in *S&N Equip. Co. v. Casa Grande Cotton Fin. Co.*, 97 F.3d 337 (9th Cir.1996), the Ninth Circuit rejected the argument that Section 1972 requires a claimant to show 'some modicum of coercion' and, instead, held that '[a]lthough some showing of coercion may be required under the Clayton Act and the Sherman Act, . . . it is not a requirement under the Bank Holding Company Act.' *Id.* at 346 n. 18. A contrary view, however, was expressed by the Eleventh Circuit in *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143, 1150-51 (11th Cir.1993), construing the identical language found in the Home Owners' Loan Act, 12 U.S.C. § 1464(q). That court held that 'to establish a tying in violation of HOLA, a plaintiff must prove that the thrift forced or coerced the plaintiff into purchasing the tied product.' *Id.* at 1151. Although we do not subscribe to the view set forth by the Fifth Circuit, because it disregards the plain language of the statute, we likewise believe that emphasizing the notion of 'coercion' creates a requirement that is not contained in the statute. Section 1972 does not require proof of 'force or coercion,' particularly as those terms are used in the economic sense in antitrust jurisprudence. The terms employed in the statute are 'condition or requirement.' A 'condition' is "[s]omething demanded or required as a prerequisite to the granting or performance of something else." Oxford English Dictionary 309 (2d ed. 1989). A 'requirement' is "that which is called for or demanded; a condition which must be complied with." *Id.* at 1565. Giving those terms their ordinary meanings as used in Section 1972, we conclude that a statutory violation is established by proof that a bank conveyed an intention to withhold credit unless the borrower fulfilled a 'prerequisite' of purchasing or furnishing some other product or service. The borrower may readily agree with the tying condition demanded by the bank; that is, the whole notion of force or involuntary submission may be absent. Nonetheless, proof of a statutory violation will be made out by evidence that taking or furnishing another service or product is a condition that must be fulfilled before the bank will agree to extend credit. In this case, Morriss agreed to purchase the Bank's holding company stock on behalf of Highland, and the buy order was reported to the loan committee in

the first version of the Loan Officer's Report. This evidence may establish that the Bank looked more favorably upon Highland because of the stock purchase. It is not enough, however, merely to bring forth evidence that the borrower purchased another bank product or service to curry favor with the lender, or that the lender was positively impressed by such conduct, or even that the other transaction was a factor in the bank's decision to extend credit. According to the plain language of the statute, a claimant must prove that the purchase of the tied product or service was a mandatory condition or requirement of obtaining a loan from the lender. The borrower must be prevailed upon to agree to the additional product or service, lest credit be denied. This element of a Section 1972 claim may be established by circumstantial evidence. However, the plaintiff in this case failed to offer admissible evidence from which an inference of a tying arrangement could be drawn. The procedure that led to the loan's approval, although perhaps out of the ordinary, did not demonstrate that a tying condition was imposed. A reasonable person would not conclude that a bank's decision to lend \$610,000 to an established bank customer, without a loan application or personal guarantee, when the loan was secured by property appraised at \$800,000 plus additional property valued at \$90,000, was unusual or prompted by an ulterior motive. The evidence of the shadowy dealings between Morriss and Bank Chairman Inman may be relevant to the other litigation involving Morriss' former business partners, but it has little to do with any connection between the loan and the stock purchase. To the contrary, the inference that emerges from this evidence is that the original and subsequent loans were made to further another conspiratorial objective allowing Morriss to usurp a business opportunity from his real estate venture, not as consideration for the purchase of FFC stock. Inman's private dealings with other Bank customers does nothing to further the inference of a tying arrangement involving the Bank, Morriss, and the plaintiff. Finally, the plaintiff's banking expert, who testified that "[t]here is no direct evidence, whatsoever, that there is—there was a requirement, as a condition of the loan, that he buy the stock' . . . does not furnish the necessary link that supports an inference of a tying arrangement. The plaintiff's argument that the Bank's \$610,000 loan was illegally tied to Highland's purchase of FFC stock does not rise above the level of speculation or conjecture. Constructing a circumstantial case in the face of overwhelming, contrary, direct evidence was a daunting burden that, we believe, ultimately proved insurmountable for the plaintiff. The plaintiff failed to establish a genuine issue for trial on an essential element of its claim. We therefore affirm the district court's summary judgment in favor of the defendant").

⁵ Among the notable exceptions—and “plaintiff-friendly” cases that have been decided in recent years—are *Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *3–6 (D. Utah July 8, 2016) (see discussion *infra* notes 42–48); *Florida Street Holdings, LLC v. U.S. Bank National Association*, 2016 U.S. Dist. WL 3746527 (M.D.La. March 18, 2016) (see discussion *infra* notes 49–51); *Seay v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. WL 9463174, *1 (S.D.Ga. Dec. 28, 2015) ([A]t the time of removal, Plaintiffs' complaint contained . . . an alleged violation of the Anti-Tying Provision of the Bank Holding Company Act, 12 U.S.C. § 1972 *et seq.* . . . Because of the presence of these federal claims, this Court had federal question jurisdiction over Plaintiffs' original complaint. The subsequent omission of these federal claims by Plaintiffs in the Amended Complaint does not impact the Court's ability to exercise supplemental jurisdiction over the state law claims"); *Halifax Center, LLC et al v. PBI Bank, Inc.*, 2014 U.S. Dist. WL 626753, *3–4 (W.D. Kentucky February 18, 2014) (see *infra* notes 22–26) (denial of motion by PBI Bank, Inc., for judgment on the pleadings, by a federal district judge in Kentucky in a case that was settled soon after the court's decision) (The Court opined: “In order to establish an unlawful tying arrangement claim under the BHCA, a plaintiff must prove that ‘(1) the bank imposed an

anti-competitive tying arrangement, that is, it conditioned the extension of credit upon the borrower's obtaining or offering additional credit, property or services to or from the bank or its holding company; (2) the arrangement was not usual or traditional in the banking industry; and (3) the practice conferred a benefit on the bank.' [*Highland Capital, Inc. v. Franklin Nat. Bank*, 350 F.3d 558, 565 (6th Cir. 2003)]; *Sanders v. First Nat'l Bank & Trust Co.*, 936 F.2d 273, 278 (6th Cir. 1991); *Midwest Agency Services, Inc. v. JP Morgan Chase Bank, N.A.*, 2010 WL 935450, *7 (E.D. Ky. March 11, 2010). 'Section 1972 was not intended to interfere with the conduct of appropriate traditional banking practices, or to prohibit banks from protecting their investments.' *Parsons v. First Nat'l Bank & Trust*, 243 Fed. Appx. 116, 117 (6th Cir. 2007) (quoting *Highland Capital*, 350 F.3d at 565). First, the Plaintiffs have satisfied the first element required of a claim under Section 1972 by alleging that PBI demanded that Chandler 'take over and service the bad loan PBI had made to the Halifax Property's former owner' and to purchase the Halifax property as condition or requirement of obtaining the \$6,000,000 loan for the HUD Note purchase. . . . The record reflects that PBI's written credit memorandum for the HUD loan expressly states that the purchase of the Halifax Property is a condition of that loan. . . . In support of its motion for judgment on the pleadings, PBI argues that since the Plaintiffs actually purchased the Halifax property from a third-party, PBI's role in that transaction was simply being the provider of another loan for the purchase price of the property to Plaintiffs. See *Exchange Nat. Bank of Chicago v. Daniels*, 768 F.2d 140, 143-44 (7th Cir. 1985). However, Plaintiffs allege that PBI extended credit to Chandler on the requirement that he purchase an unrelated piece of property on which the bank had a mortgage that was currently in default. 'Conditioning the extension of credit to a bank customer on the requirement that the customer participate in the bank's bad loans to an unrelated customer surely is an anticompetitive practice proscribed by § 1972.' *Palermo v. First Nat. Bank & Trust Co.*, 894 F.2d 363, 369 (10th Cir. 1990) (citing *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 557 (S.D.N.Y. 1985)). See also *Libby v. Firststar Bank*, 47 F. Supp. 2d 135, 140-141 (D. Mass. 1999); *Johnstone v. First Bank Nat. Ass'n*, 1998 WL 565193, *6 (N.D. Ill. Aug. 31, 1998) ("[A] loan arrangement which conditioned 'the extension of credit to a bank customer on the requirement that the customer participate in the bank's bad loans to an unrelated customer' would certainly be a blatant violation of the Act."); *Hammond v. Comptroller of Currency*, 878 F. Supp. 1438, 1449 (D. Kan. March 3, 1995) ("[C]onditioning a loan on the purchase of an unrelated piece of property upon which the bank has a mortgage. . . is sufficient to constitute a finding that the practice is anti-competitive."). Thus, courts that have examined this issue have held that such conduct is an anticompetitive practice under the BCHA. Second, Plaintiffs have likewise pled facts to support the second element required in a claim under Section 1972. Plaintiffs allege that PBI's extension of credit to them on the condition that they take over or purchase the Halifax Property on which PBI held a mortgage that was currently in default is not usual or traditional in the banking industry. Plaintiffs' argument is supported by the case law. For example, in both *Palermo*, 894 F.2d at 368 and *Quintana v. First Nat'l Bank*, 125 F.3d 862, 1997 WL 618640, *3 (10th Cir. Oct. 6, 1997), the Tenth Circuit held that "[I]t is not an unusual banking practice for a lender to 'evaluate its entire existing relationship' with a customer, including the 'customer's related loans,' when deciding whether to renew existing credit or extend new credit. *Id.* at 369-70. Nor is it an unusual practice, we held, for a bank to require a customer to guarantee affiliated debt before extending further credit. However, we held, this exemption does not extend to a situation where the lender conditions the extension of credit to a customer 'on the requirement that the customer participate in the bank's bad loans to an unrelated customer.' *Id.* at 369." *Quintana*, 1997 WL

618640, *3 (citing *Palermo*, 894 F.2d at 368–370). See also *Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n*, 908 F.2d 578, 584–585 (10th Cir. 1990) (Allegations that savings and loan conditioned loan to plaintiff upon plaintiff's assumption of 'other nonperforming loans to unrelated or incidentally related customers' is sufficient to state a claim for relief under anti-tying provision of TIRA and BHCA). Third, Plaintiffs have sufficiently alleged that the tying arrangement benefited PBI. By requiring Plaintiffs to purchase the Halifax property from an unrelated customer, Plaintiffs allege that PBI eliminated a bad loan to the prior owner of the Halifax property, avoided the expense of bringing a foreclosure action against the prior owner of the property, and avoided taking title to the Halifax property and having to carry that property. Additionally, Plaintiffs maintain that by essentially setting the purchase price of the property for the amount owed to the bank on the bad loan, PBI caused Plaintiffs to pay substantially more for the Halifax Property than it was worth, while the overpayment resulted in PBI being fully repaid for the bad loan made to the former property owner. Thus, for the reasons set forth above, Plaintiffs have satisfied their obligation to plead sufficient facts for the Court to infer a cause of action under to 12 U.S.C. § 1972"); *Williams v. Porter Bancorp, Inc.*, *infra* notes 27–33; *Southwynd, LLC v. PBI Bank, Inc.*, 2014 U.S. Dist. WL 2575410, *3 (W.D.Ky. June 9, 2014) (The parties' briefs are sparse as to this [anti-tying provision] contention, with neither analyzing whether the statute properly applies to Porter. Porter's motion to dismiss this count will be denied"); *Gordon v. Chase Home Finance, LLC*, 2013 U.S. Dist. WL 436445, *1–2 (M.D.Fla. Feb. 5, 2013) (Plaintiffs refinanced their home with a mortgage from Washington Mutual Bank in 2003, and the loan was later assigned to JPMorgan Chase Bank, N.A., with servicing delegated to Chase Home Finance, LLC. Defendant, a residential mortgage lender and loan servicer, required borrowers to maintain acceptable flood and hazard insurance on residential property securing Defendant's loans. When borrowers did not obtain such insurance, Defendant purchased insurance for the borrower, which was known as "force-placement." Plaintiffs sought class certification, which was denied by the Court because "[t]he class definitions are silent on the issues of tying and unusual bank practices," and "individual issues would predominate the litigation with respect to such claims. This is because an individual analysis of each mortgage holder's relationship with Defendant would be required in order to assess whether a violation of the Act occurred"); *Gordon v. Chase Home Finance, LLC*, 2013 U.S. Dist. WL 256743, *1, 5–7 (M.D.Fla. Jan. 23, 2013) (Plaintiffs contended that the following sentence in the Mortgage violated the Bank Holding Company Act: Lender "may purchase such insurance from or through any company acceptable to Lender including, without limitation, an affiliate of Lender, and Borrower acknowledges and agrees that Lender's affiliate may receive consideration for such purchase." In their Second Amended Complaint, Plaintiffs indicated, "The provision . . . violates [] the Bank Holding Company Act . . . because the condition that the lender be allowed to force-place flood insurance by or through its holding company's subsidiary, and charge the borrower for it, is a condition on the extension of credit." Plaintiffs requested a declaratory judgment that such provision in their Mortgage was void as against public policy. The Court concluded that the Plaintiffs "alleged specific conduct, which, if proven, could substantiate Plaintiffs' requests for declaratory relief and damages pursuant to the Bank Holding Company Act and corresponding Florida statute. Thus, the Court denies the Motion to Dismiss"); *Gordon v. Chase Home Finance, LLC*, 2012 U.S. Dist. WL 750608, *1, 6–8 (M.D.Fla. March 7, 2012) (In 2011, when Plaintiffs' loan balance was \$108,018.48, Chase decided they needed \$250,000 in flood insurance coverage. Plaintiffs bought the \$250,000 policy after Chase force-placed them into a high-premium policy with American Security Insurance Company (ASIC) in June 2011.

Plaintiffs abandoned their first theory, that Defendants tied the extension of credit in the mortgage to the purchase of force-placed insurance sold by ASIC. Plaintiffs narrowed their tying allegation as follows: “Chase conditioned its ‘service’ of purchasing insurance on Chase Insurance, a wholly owned subsidiary of Defendants’ holding company, receiving a commission for each force-placed insurance policy.” In response to the Motion to Dismiss, Plaintiffs urged the Court to allow them to amend in order to streamline their allegations. The Court granted the Motion to Dismiss as to count five, under the Bank Holding Company Act, without prejudice and with leave to amend); *Frohn v. PCNB Corp.*, 2010 U.S. Dist. WL 1416186, *1–3 (S.D.Miss. April 7, 2010) (“Defendant’s primary contention in the present motion is that Plaintiff was not its ‘competitor’ and therefore cannot establish liability under the Act Ultimately, the Court declines to dismiss this case on the pleadings, but reservations exist. While some of Defendant’s legal arguments appear to be incorrect on their face, others present closer questions but are not supported by authority or adequate analysis. Given the dearth of relevant authority presented in the briefs, and based on the Court’s independent research, it appears that a far more intricate analysis will be required. That review will likely include application of the rules of construction as to whether Plaintiff, as an agent of State Farm, was a ‘competitor’ as contemplated by the Act and whether an anti-competitive tying agreement has been established. Such analysis might include legislative history and cases involving analogous anti-tying provisions. In any event, the Court concludes that it would be a poor use of judicial resources, and perhaps unfair to the parties, to undertake that expansive review sua sponte Accordingly, Defendant’s motion [for judgment on the pleadings] is rejected without prejudice”); *McCune v. National City Bank*, 701 F.Supp.2d 797, 800-805 (at 802 note 3, the Court cites Naegele 2005, *supra* note 1) (E.D.Va. March 24, 2010) (“The Court concludes that the challenged Subordination Policy is subject to review under the BHCA, and Section 1972(1) in particular. Under the Subordination Policy, Plaintiffs’ request to subordinate its existing loan to Plaintiffs’ refinanced loan necessarily placed in National City’s hands the opportunity to exercise economic leverage and engage in anti-competitive practices. Moreover, National City’s disposition of Plaintiffs’ request necessarily involved a decision pertaining to Plaintiffs’ credit. In short, the Subordination Policy involved National City and the Plaintiffs in a credit based interaction under circumstances that the BHCA is intended to regulate The Plaintiffs have properly alleged an anti-competitive tying arrangement under Section 1972(1)(E). The Complaint alleges two distinct negatively tied products, National City’s agreement to subordinate (product or service number 1), and restrictions on borrowings with a competitor, without National City’s consent (product or service number 2) Unlike other subsections of Section 1972(1), Subsection E expressly exempts ‘a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.’ That language provides a limited safe harbor for certain ‘negative’ tying arrangements. In order to provide a comparable safe harbor for the ‘traditional banking products’ exemption under Subsections A and C, courts have adopted the ‘unusual banking practice’ language to describe practices outside of the exemption. See *Nesglo, Inc. v. Chase Manhattan Bank, N.A.*, 506 F.Supp. 254, 261 (D.P.R.1980) (explaining the legislative history of the BHCA, and that the purpose behind the ‘traditional bank products exception’ is a ‘concern for protection of the soundness of the credit extended’). For these reasons, it would be duplicative to read the ‘unusual banking practices’ requirement into Subsection E, which, by its express language, already protects reasonable practices that assure the soundness of credit. It would also inject possible confusion and complications in harmonizing the two different formulations of essentially the same exemption. The Fourth Circuit has not spoken to this specific issue; and the

From a historical perspective, in 1970, Congress enacted section 106 of the Bank Holding Company Act Amendments of 1970 (“BHCA” or “Act”), the anti-tying provision, which is codified at 12 U.S.C. § 1972. Simply stated, a tying arrangement has been defined as “an agreement by a party to sell one product [the ‘tying product’] but only on condition that the buyer also

Court concludes with respect to this open issue that the Plaintiffs are not required to prove that the Subordination Policy is an ‘unusual banking practice’ under Section 1972(1)(E). With respect to the express exemption in Subsection E, a more extensive factual record will be necessary to determine whether the Subordination Policy is a condition or requirement National City may ‘reasonably impose to assure sound credit.’ On this point, National City concedes that ‘the reasonableness of its actions regarding the soundness of its credit would implicate facts outside the record.’ Rebuttal Brief in Support of Defendant’s Motion to Dismiss Plaintiff’s Complaint For the above reasons, the Court finds that Plaintiffs have adequately alleged a violation of Section 1972(1)(E) of the BHCA”); *Flying J Inc. v. TA Operating Corp.*, 2008 U.S. Dist. WL 371147, *1 (D.Utah Feb. 8, 2008) (“Plaintiffs . . . object to Pilot Travel’s Request No. 6 to the extent it purports to seek privileged communications between TAB representatives and TAB’s counsel concerning the applicability or requirements of Section 106 of the Bank Holding Company Act Amendments of 1970. Plaintiffs hereby designate the following documents as privileged under the attorney-client privilege and not subject to production in response to Pilot Travel’s Request No. 6: ‘All communications between any employee of TAB and any in-house counsel advising TAB, or outside counsel for TAB, seeking or providing legal advice concerning the requirements of, or TAB’s compliance with, Section 106 of the Bank Holding Company Act Amendments of 1970.’ Pilot objects to this general claim of privilege and asks for ‘document by document’ designation. Plaintiffs claim the general objection is sufficient and point to a Note to Rule 26(b)(5) in the 1993 Amendments to the Federal Rules of Civil Procedure: ‘The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be, privileged or protected, particularly if the items can be described by categories.’ Because Plaintiffs failed to respond completely to Requests 1–5, it is hard to tell if this case is one in which categorical identification could have been appropriate at the outset. But at this stage, after the dispute has arisen on Requests 1–5 and this Request No. 6, the court will require a privilege log with a document by document identification. IT IS HEREBY ORDERED that Pilot’s motion to compel is GRANTED”); *Ticket Center, Inc. v. Banco Popular de Puerto Rico*, 2006 U.S. Dist. WL 1047028, *1–2 (D.Puerto Rico April 13, 2006) (“The complaint in the present case includes information on the relevant product market (TPM); information of the type of market power Banco Popular allegedly enjoyed; information on promoters and events where suspected tying arrangements were made; allegations of suspect pricing practices; and instances of alleged attempts to eliminate participants from the ticketing industry in Puerto Rico. . . . Given that plaintiffs are only required to provide defendants with sufficient notice through their complaint, these allegations are clearly sufficient to surpass a motion to dismiss. Finally, antitrust actions should rarely be dismissed via 12(b)(6) motions, nor prior to giving the plaintiff ample opportunity for discovery”).

purchases a different (or tied) product, or at least agrees that he [or she] will not purchase that product from any other supplier.”⁶

The statute was designed to prevent banks, whether large or small, state or federal, from imposing anticompetitive conditions on their customers. The purpose of the provision, as stated in the accompanying Senate Report, was “to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.”⁷ Tying, of course, is an antitrust violation, but the Sherman and Clayton Acts did not adequately protect borrowers from being required to accept conditions to loans issued by banks. Section 106 was specifically designed to apply to and remedy such bank misconduct.

A threshold overview of the two previous articles is useful. First, the history of the statute and its practical effect have been addressed.⁸ Second, the articles examined the language or terms of the statute, and how various courts have interpreted them.⁹ Third, a guide was presented with respect to how to make a claim under the statute; and such issues as standing, elements that must be proven, and proper pleading were discussed.¹⁰ Fourth, the bank regulatory agencies that administer the provision, as well as their interrelationship, were discussed.¹¹ Fifth, the case law interpreting the statute was analyzed; and those acts by a bank that are deemed to be illegal tying arrangements were distinguished from those acts that are not.¹²

Sixth, the articles viewed recovery and the various remedies that are available.¹³ Seventh, the anti-tying provision was compared with other statutes that prohibit tying arrangements; and alternative causes of action to the anti-tying provision were discussed.¹⁴ Finally, the articles looked to the future use of the anti-tying provision, how courts may decide issues that arise under the statute, and whether the anti-tying provision continues to be an effective

⁶ *Northern P. R. Co. v. United States*, 356 U.S. 1, 5–6 (1958).

⁷ S. Rep. No. 1084, 91st Cong., 2d Sess. 17 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5535.

⁸ See, e.g., Naegele 1983, *supra* note 1, at 138–144; Naegele 2005, *supra* note 1, at 196–197.

⁹ See, e.g., Naegele 1983, *supra* note 1, at 144–159; Naegele 2005, *supra* note 1, at 197–200.

¹⁰ See, e.g., Naegele 2005, *supra* note 1, at 200–206.

¹¹ See, e.g., Naegele 2005, *supra* note 1, at 206–208.

¹² See, e.g., Naegele 1983, *supra* note 1, at 144–159; Naegele 2005, *supra* note 1, at 208–211.

¹³ See, e.g., Naegele 2005, *supra* note 1, at 211–212.

¹⁴ See, e.g., Naegele 2005, *supra* note 1, at 212–216.

means of protecting consumers of financial services.¹⁵ Where appropriate, in this article, each of these eight areas of discussion have been updated vis-à-vis the two previous articles.

At the outset, it must be noted that while bank tie-in arrangements are numerous and take a variety of forms, for years even the most astute bankers seldom questioned their legitimacy. However, as the anti-tying provision gained prominence and attention, the judiciary thwarted those bankers who recognized illegal tying arrangements and balked at implementing them, or who have reported them—a group of courageous whistleblowers. Several cases are illustrative of the problems.¹⁶ In these instances and others, their complaints fell on deaf ears; and when they sought justice, they were met with endless obstacles thrown in their paths, to prevent the truth from shining forth.

JUDICIAL DECISIONS INTERPRETING THE ANTI-TYING PROVISION

Case law interpreting Section 1972 has in the main centered on two issues: (1) the existence of a tying arrangement; and (2) the applicability of the so-called traditional banking exemption.

The Tying Arrangement

In *Lucken et al. v. Heritage Bank National Association et al.*,¹⁷ a wealthy Iowa investor—the Plaintiff, John Lucken—and his family sought to help a long-time local auto dealership stay afloat, without seeking personal gains. After the dealership failed, a lawsuit was filed against the dealership’s bank, Heritage, with respect to the return of Lucken monies. The U.S. District Court for the Northern District of Iowa dealt with two “tying arrangements” asserted by the Plaintiffs under the ant-tying provision, section 1972(1)(C):¹⁸

(1) Heritage Bank’s promise of a floor plan loan to Dirks Motor

¹⁵ See, e.g., Naegele 1983, *supra* note 1, at 162–163; Naegele 2005, *supra* note 1, at 216–217.

¹⁶ See, e.g., (1) *Bray v. Bank of America*, *infra* notes 34–36; and (2) *Wiersum v. U.S. Bank, N.A.*, *infra* notes 37–39 ff.

¹⁷ See *Lucken et al. v. Heritage Bank National Association et al.* (N.D.Iowa. Jan. 23, 2018), CASE #: 15:16-cv-04005-MWB, PACER Docket Sheet entry 116.

¹⁸ 12 U.S.C. § 1972(1)(C) states:

(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—

. . .

(C) that the customer provide some additional credit, property, or service to such bank,

conditioned on Lucken providing Heritage Bank with the property and/or service of wiring Heritage Bank \$250,000 so that Heritage Bank could pay off Ford Credit; and (2) Heritage Bank's promise, on January 19, 2012, to provide floor plan financing to Dirks Motor conditioned upon the additional requirement that Lucken execute the "Lucken line of credit" and other contemporaneous documents, which Lucken believed pledged his CD as "backup collateral" for the promised floor plan loan.¹⁹

With respect to the first theory of recovery, the Court denied the Plaintiffs' Motion for Reconsideration of the Court's grant of Summary Judgment to the Defendants. As the Defendants argued, if Ford Credit was not paid, then the floor plan financing was irrelevant, because Dirks Motor would be liquidated. Thus, they asserted that the payment to Ford Credit was not a condition forced by the bank, but a condition imposed on anyone, including Lucken, who wanted to offer financing to Dirks Motor.²⁰ The Court denied the Defendants' Motion For Summary Judgment based on the second "tying arrangement," concluding that the Plaintiffs "pointed to sufficient evidence from which a rational trier of fact could find for them on the part of their § 1972(1)(C) claim."²¹

other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

¹⁹ See *id.* at p. 2. The Court added: "The plaintiffs contend that they have also generated genuine issues of material fact on the other elements of their 'bank tying' claim." *Id.*

²⁰ See *id.* at 2. The Court stated:

There was no "clear" or "manifest" error in my conclusion that the plaintiffs had failed to generate any genuine issue of material fact as to that alleged "tie," because there is no genuine issue of material fact that Ford Credit required payment to prevent it from carrying through with its threatened liquidation of Dirks Motor. *Id.*

²¹ *Id.* at 6.

The bank sought the District Court's dismissal of the Lucken anti-tying provision claim and the lawsuit, on statute of limitations grounds. Specifically, a Colorado-based lawyer and business partner of John Lucken—who advised him with respect to this litigation *ab initio*, and initiated it—sought relief first from the bank's regulator, the Office of the Comptroller of the Currency (OCC), which proved to be a waste of time and effort.

After numerous filings with that regulator occurred, with *zero* relief, the OCC efforts were abandoned and the District Court lawsuit was filed. The doctrine of "excusable neglect" might have been asserted to address any statute of limitations problems (e.g., arguably to toll the four-year statute of limitations). However, this was not necessary because the Court ruled:

I now add that the plaintiffs have also pointed to sufficient evidence from which a rational trier of fact could conclude that the last overt act of the defendants in imposing the second alleged "tying arrangement" was within the statute of limitations period. See *Kabealo v.*

In *Halifax Center, LLC et al v. PBI Bank, Inc.*,²² PBI moved for judgment on the pleadings, which was denied by the U.S. District Court for the Western District of Kentucky. With respect to the anti-tying provision claim, the Court found that the Plaintiffs satisfied the first element required of a claim under Section 1972 by alleging that PBI demanded that the Plaintiff, David G. Chandler, “take over and service the bad loan PBI had made to the Halifax Property’s former owner” and purchase the Halifax property as condition or requirement of obtaining a \$6,000,000 loan for a HUD Note purchase. PBI’s written credit memorandum for the HUD loan stated expressly that the purchase of the Halifax Property was a condition of that loan.²³

The Court found that “[c]onditioning the extension of credit to a bank customer on the requirement that the customer participate in the bank’s bad loans to an unrelated customer surely is an anticompetitive practice proscribed by § 1972.”²⁴ Similarly, the Court found that Plaintiffs properly alleged that PBI’s extension of credit to them on the condition that they take over or purchase the Halifax Property on which PBI held a mortgage, which was currently in default, was not usual or traditional in the banking industry.²⁵

Also, the Court found that the Plaintiffs had sufficiently alleged that the tying arrangement benefited PBI:

By requiring Plaintiffs to purchase the Halifax property from an unrelated customer, Plaintiffs allege that PBI eliminated a bad loan to the prior owner of the Halifax property, avoided the expense of

Huntington National Bank, 17 F.3d 822, 828 (6th Cir. 1994) (stating, in a case relied on by both parties, here, that it is “the last overt act of the defendant, not any act of the plaintiff, that triggers the statute of limitations.”).

See PACER Docket Sheet entry 119, March 1, 2018; see also *supra* note 4 (discussion of *Kabealo*).

On April 12, 2018, a jury rendered a verdict in favor of the Lucken Plaintiffs, in the amount of \$4,545,000 (i.e., \$500,000 as compensatory damages for fraudulent misrepresentation; \$45,000 as compensatory damages for unlawful tying; and \$4 million in punitive damages). See PACER Docket Sheet entry 150, April 12, 2018; see also *id.* at 153 (Judgment). This result was a well-deserved victory and vindication for John Lucken personally, and his family.

As expected, the bank sought relief.

²² See *Halifax Center, LLC et al v. PBI Bank, Inc.*, 2014 U.S. Dist. WL 626753 (W.D.Ky. Feb. 18, 2014); see also *supra* note 5 (discussion of *Halifax*). Subsequently, PBI Bank’s name was changed to Limestone Bank. See <https://www.businesswire.com/news/home/20180119005516/en/PBI-Bank-Changing-Limestone-Bank-Reinvigorate-Roots>.

²³ See *id.* at *3.

²⁴ See *id.* at *3 (citations omitted).

²⁵ See *id.* (citations omitted).

bringing a foreclosure action against the prior owner of the property, and avoided taking title to the Halifax property and having to carry that property. Additionally, Plaintiffs maintain that by essentially setting the purchase price of the property for the amount owed to the bank on the bad loan, PBI caused Plaintiffs to pay substantially more for the Halifax Property than it was worth, while the overpayment resulted in PBI being fully repaid for the bad loan made to the former property owner. Thus, for the reasons set forth above, Plaintiffs have satisfied their obligation to plead sufficient facts for the Court to infer a cause of action under to 12 U.S.C. § 1972.²⁶

In a companion case involving PBI's holding company, *Williams v. Porter Bancorp, Inc.*,²⁷ the U.S. District Court for the Western District of Kentucky began by mistakenly stating: "The purpose of [the anti-tying provision] is 'to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking.'"²⁸ Quite to the contrary, as noted previously:

Tying, of course, is an antitrust violation, but the Sherman and Clayton Acts did not adequately protect borrowers from being required to accept conditions to loans issued by banks; and section 106 [the anti-tying provision] was specifically designed to apply to and remedy such bank misconduct.²⁹

Next, the Court stated:

Porter Bancorp first argues that, by its express terms, Section 1972 prohibits only conduct by a "bank." Indeed, the language of Section 1972 indicates that only the actions of banks are covered:

(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 . . .

12 U.S.C. § 1972(1) (emphasis added). That very provision refers to bank holding companies separately. For example, "on the condition or requirement (D) that the customer provide some additional credit,

²⁶ See *id.* at *4.

²⁷ See *Williams v. Porter Bancorp, Inc.*, 41 F.Supp.3d 676, 676 (W.D.Ky. Aug. 22, 2014).

²⁸ *Id.* at 679 (citations omitted).

²⁹ See Naegele 2005, *supra* note 1, at 195, 204 ("Congress would not have enacted a statute to prohibit bank tying arrangements if such conduct was addressed already, much less addressed adequately by other antitrust statutes").

property, or service to a bank holding company of such bank” *Id.* Courts agree that § 1972 applies only to the conduct of banks.

. . . .

Indeed, the Sixth Circuit’s formulation of the requirements to make out a Section 1972 claim incorporate this distinction:

To make out a claim under Section 1972, . . . the plaintiff must prove that (1) *the bank* imposed an anti-competitive tying arrangement, that is, *it* conditioned the extension of credit upon the borrower’s obtaining or offering additional credit, property or services to or from *the bank or its holding company*; (2) the arrangement was not usual or traditional in the banking industry; and (3) the practice conferred a benefit on the bank. *Highland Capital, Inc. v. Franklin Nat’l Bank*, 350 F.3d 558, 565 (6th Cir.2003) (citing *Kenty*, 92 F.3d at 394) (emphasis added).

For these reasons, the Court finds that a bank holding company cannot be held liable for illegal tying under 12 U.S.C. § 1972.³⁰

The Court found that Porter Bancorp was not a bank and accordingly dismissed the Plaintiffs’ Section 1972 claim against it.³¹

However, as stated previously:

[R]ecent decisions can be of little solace to a bank engaging in implicit or explicit tying arrangements, involving its holding company or a subsidiary of the holding company. The [traditional banking practices] exemption provided for intrabank tying does not apply. Thus, even if requiring a customer to maintain an account with the bank as a condition of making a loan does not violate Section 1972 (and this has not been established clearly in the case law), requiring the “deposit” to be made with the bank holding company or a sister subsidiary would be a violation.³²

Indeed, the anti-tying provision’s sponsor, Senator Edward W. Brooke, stated:

[Section 106] represents a worthwhile addition to our antitrust laws and establishes per se illegality where a bank, a subsidiary of a bank, a bank holding company or a subsidiary of a bank holding company

³⁰ See *Williams v. Porter Bancorp, Inc.*, 41 F.Supp.3d at 679–680 (citations omitted).

³¹ *Id.* at 681.

³² See Naegele 2005, *supra* note 1, at 229 note 62 (citing Naegele 1983, *supra* note 1, at 159–60) (citations omitted).

engages in express or implied tying.³³

In *Bray v. Bank of America*,³⁴ the U.S. District Court for the Eastern District of Missouri set forth the following facts:

Bray was an independent financial advisor in St. Petersburg, Florida. Beginning in 2004, one of Bray's clients was IntelliSpend Prepaid Solutions, for whom he managed a portfolio of initially \$45 million and eventually up to \$70 million. The IntelliSpend account represented a significant portion of Bray's book of business.

In March 2010, IntelliSpend decided to partner with Bank of America, N.A. (BoA) to manage its assets. IntelliSpend arranged for Bray to continue managing its assets by securing him a position with BoA. From March 2010 until October 2011, Bray worked for BoA and its corporate cousin, Merrill Lynch, as a financial advisor. BoA was the lead lender for IntelliSpend's parent company, Maritz, LLC, and acted as Maritz's administrative agent for a six-bank lending syndicate line of credit. When he began his employment with Merrill Lynch, the company provided Bray with a loan secured by a promissory note in the amount of \$395,805.

Bray's relationship with BoA and Merrill Lynch deteriorated over time, culminating in his decision to resign in October 2011. After Bray left BoA he hoped that Maritz would move its assets from Merrill Lynch and allow him to continue to manage those funds. However, Maritz chose to keep its assets with BoA and Merrill Lynch instead. In Count I of the complaint, Bray alleges that Maritz chose not to move its assets because BoA threatened to put its loans in default if Maritz withdrew those funds. Bray was never employed by Maritz, nor was he ever an

³³ See Naegele 2005, *supra* note 1, at 240 note 85 (citing 116 CONG. REC. 42431 (Dec. 18, 1970)).

³⁴ See *Bray v. Bank of America*, 2014 U.S. Dist. WL 5783039, *6 (E.D. Missouri 2014); see also *Bray v. Bank of America*, 2016 U.S. Dist. WL 687818, *5 (E.D. Missouri 2016) (February 19, 2016) (“[T]he allegations of the complaint are insufficient to establish that the alleged § 1972(1) violation was a but-for cause of plaintiff's injuries, and plaintiff lacks Article III standing to pursue that claim”); *Bray v. Bank of America*, 611 Fed.Appx. 888, 889 (8th Cir. 2015) (Bray appealed the district court's orders dismissing his claim against Bank of America based on the anti-tying provision; and the Eighth Circuit reversed the dismissal and remanded for the district court to consider whether Bray had standing in light of *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ___, 134 S.Ct. 1377, 1391–92, 188 L.Ed.2d 392 (2014) (holding injured party who was not direct competitor of defendant may have statutory standing to bring unfair competition claim)); *Bray v. Bank of America, N.A.*, U.S. District Court for the Middle District of Florida (Tampa), CASE #: 8:17-cv-00075-MSS-AAS).

owner, shareholder, or otherwise connected to Maritz, except through his management of some of Maritz's assets via his relationship with IntelliSpend. In addition, Bray was never a direct competitor with BoA, nor was he ever a customer of BoA.³⁵

The Court sought to distinguish *Halifax* as follows:

The case Bray relies on does not support his claim of standing under § 1972. *See Halifax Ctr., LLC v. PBI Bank, Inc.*, 1:13-CV-00071-JHM, 2014 WL 626753 (W.D.Ky. Feb. 18, 2014) (discussing whether a *customer* was injured by a bank's alleged tying scheme). Bray cites to no case in which a court has ruled that a person in such a position has standing to sue a bank for violations of § 1972, and the Court has found none. The Court is persuaded that a plaintiff who is not a customer, a putative customer, a shareholder of a customer, or a competitor of a defendant bank lacks standing and cannot maintain a cause of action for alleged violations of § 1972.

Here, Bray was not a customer of BoA, nor was he in the process of applying for an allegedly tied product to become a customer. He was not a shareholder of either Maritz or IntelliSpend, the real victims of the alleged tying scheme. While Bray was employed by Merrill Lynch he was, obviously, not competing with BoA, Merrill Lynch's corporate cousin.

Likewise, Bray does not allege in the complaint that he competed with BoA after he left Merrill Lynch. In Bray's response to BoA's motion to dismiss, however, Bray says that he competed with BoA, but he never explains how. At most, he suggests that he competed with Merrill Lynch, not BoA, for management over IntelliSpend's and Maritz's assets. But Merrill Lynch is not a defendant here and though Merrill Lynch and BoA are related corporations, they are not the same. Because Bray was not a customer, a putative customer, a shareholder of a customer, or a competitor of BoA, he has no standing to sue for BoA's alleged tying scheme under § 1972. Accordingly, Count I of the complaint will be dismissed.³⁶

In *Wiersum v. U.S. Bank, N.A.*,³⁷ the Eleventh Circuit set out the following facts of a complicated case:

³⁵ *See Bray v. Bank of America*, 2014 U.S. Dist. WL 5783039, at *1.

³⁶ *See id.* at *6 (footnote omitted).

³⁷ *See Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483, 485 (11th Cir. 2015); *see also Marc Wiersum v. U.S. Bank, N.A.*, 2014 U.S. Dist. WL 2085344, at *1, 2-3 (S.D. Fla. May 15, 2014)

U.S. Bank, N.A., a federally chartered bank headquartered in Minnesota, hired Wiersum, a resident of Miami-Dade County, Florida, as a Vice President and Wealth Management Consultant for its Naples office. During his brief employment, Wiersum alleged he witnessed U.S. Bank condition credit upon asset management, in violation of 12 U.S.C. § 1972. He objected to certain activities he believed were “unlawful tying arrangement(s)” and refused to participate in them Following his objections, Wiersum alleged U.S. Bank treated him adversely by terminating his employment on May 31, 2013, in retaliation.

Wiersum filed a single-count complaint against U.S. Bank in the Southern District of Florida on diversity jurisdiction and alleged a violation of the [Florida Whistleblower Act (“FWA”)].³⁸

The Court held that “the at-pleasure provision of the [National Bank Act] preempts Wiersum’s claim under the FWA for wrongful discharge under Florida law, because the FWA is in direct conflict with the NBA, as the district judge decided.”³⁹ In hindsight, *Wiersum* might have sought relief under the anti-tying provision, and not couched it in terms of a State-law claim alone—or the federal courts should not have exalted “form over substance,” and should have recognized that Wiersum’s claim was an anti-tying provision claim after all. Indeed, relief was denied to an aggrieved whistleblower who was acting, *arguendo*, in the public interest.

In *Akiki v. Bank of America, N.A.*,⁴⁰ the Plaintiffs argued that Defendants forced an illegal tying arrangement on them when the Defendants insisted on and ultimately created an escrow account for the payment of real estate taxes, even though the Plaintiffs had previously paid those taxes on their own and the Plaintiffs were not otherwise in default on their loan obligations. However, the U.S. Court of Appeals for the Eleventh Circuit noted that the Plaintiffs did not

(Defendant’s motion to dismiss Plaintiff’s complaint was granted; the at-pleasure provision of the National Bank Act preempted state law claims for wrongful discharge; and no amendment to Plaintiff’s state law claim could cure this defect).

³⁸ See *Wiersum v. U.S. Bank, N.A.*, 785 F.3d at 485; see also FWA, Fla. Stat. § 448.102(3).

³⁹ *Id.* at 490–491.

⁴⁰ See *Akiki v. Bank of Am., N.A.*, 632 Fed.Appx. 965 (11th Cir. 2015). See also *Akiki v. Greentree Servicing, LLC*, 2014 U.S. Dist. WL 12461365, *3 (S.D.Fla. July 30, 2014) (“Plaintiffs have not alleged sufficient facts to assume that the arrangement alluded to in the Amended Complaint was unusual or anticompetitive; Plaintiffs merely offer the conclusory allegation that Defendants’ ‘undertakings were illegal tying arrangements.’ The law is clear that courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’ Thus, Plaintiffs’ claim under the Bank Holding Company Act merits dismissal”) (citations omitted).

allege that the Defendants *conditioned* the grant of a loan to them in 2008 on the creation of an escrow account four years later, and for that reason they failed to state a claim for an illegal tying arrangement in violation of the anti-tying provision.⁴¹

In *Morales v. UBS Bank USA*,⁴² the Plaintiffs alleged that UBS Bank violated the anti-tying provision by conditioning Plaintiffs' receipt of loans on Plaintiffs' agreement to use the loan proceeds to purchase shares in a closed-end mutual fund ("CEF"). UBS Bank advanced four arguments in support of its claim that the Plaintiffs failed to satisfy the pleading requirements for an anticompetitive tying condition:

- (A) evidence of a tying condition was barred by the parol evidence rule;
- (B) the existence of a tying condition was implausible because it was contrary to the parties' contractual agreements and description of the transaction;
- (C) Plaintiffs failed to allege coercion; and
- (D) Plaintiffs lacked standing.⁴³

With respect to the parol evidence rule, the Court concluded that the suit did "not involve interpretation of the Credit Line Agreements. Rather, Plaintiffs' BHCA claim was for a statutory violation, a cause of action that depended on the parties' conduct surrounding their transaction, not on the meaning of the Credit Line Agreements."⁴⁴ Regarding the implausibility of Plaintiffs' BHCA allegations—namely, that the Plaintiffs' BHCA claim must be dismissed because Plaintiffs' allegations of an illegal tying condition were "wholly conclusory, containing no detail whatsoever"—the Court ruled the Plaintiffs alleged sufficient facts showing "that the purchase of the tied product or service was a mandatory condition or requirement of obtaining a loan from the lender."⁴⁵

Next, with regard to the element of coercion, the Court decided correctly that UBS Bank relied on the proposed interpretation of the BHCA issued by

⁴¹ See *id.* at *968 (citation omitted) and discussion *ff.* The better view is that "force" and coercion are not required; and "attempted tying" may give rise to an anti-tying provision violation. See, *e.g.*, *infra* notes 52–55.

⁴² See *Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *3–6 (D. Utah July 8, 2016).

⁴³ See *id.* at *3.

⁴⁴ See *id.* at *3.

⁴⁵ See *id.* at *4–5.

the Federal Reserve System,⁴⁶ but the interpretation had not been adopted by the courts. Indeed, the Court added: “[S]ince the proposed interpretation was issued, no circuit court has held that a BHCA claim requires proof of coercion.”⁴⁷ With respect to standing, the Court ruled correctly that “a customer of a bank has standing to sue for BHCA violations.”⁴⁸

In *Florida Street Holdings, LLC v. U.S. Bank National Association*,⁴⁹ the Plaintiff purchased an office building in Baton Rouge, Louisiana, which it financed by obtaining a loan from one of the building’s largest tenants, J.P. Morgan Chase Bank (“Chase”). The loan required that the Plaintiff begin making “not less than \$66,000” in monthly deposits to an escrow account on or before October 1, 2014, which were to continue until the escrow account equaled or exceeded \$1,508,000.00. When the Plaintiff failed to make the monthly deposits, the Defendant U.S. Bank National Association, as Trustee (“U.S. Bank”), as successor in interest to Chase, threatened to foreclose on the building.

Plaintiff responded by filing the lawsuit and asserting, *inter alia*, that: (1) U.S. Bank may not be “the true owner and holder of” the loan documents upon which it threatened to foreclose, and (2) even if it was the true owner and holder of the loan documents, the “Chase Second Termination Option”

⁴⁶ See *supra* note 2.

⁴⁷ See *Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *5 & n.4 (citing, *inter alia*, *Akiki v. Bank of Am., N.A.*, 632 Fed.Appx. 965, 968-970 (11th Cir. 2015) (“[T]he Eleventh Circuit did not require evidence of force or coercion in the BHCA context in a subsequent case, *Akiki v. Bank of Am., N.A.*, 632 Fed.Appx. 965 (11th Cir. 2015)”); see also *supra* note 3; Naegele 2005, *supra* note 1, at 204.

As stated previously:

To restrict the scope of those words [“condition or requirement”] to tying arrangements in which a customer is literally forced to buy or provide a tied product or service in order to get credit would vitiate that section’s intended role for, as Congress recognized, a tying arrangement may squelch competition whether coercive or not:

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

See Naegele 2005, *supra* note 1, at 234 note 77 (emphasis in original; citation omitted).

⁴⁸ See *Morales v. UBS Bank USA*, 2016 U.S. Dist. WL 3746527, *6; see also Naegele 2005, *supra* note 1, at 200–202.

⁴⁹ See *Florida Street Holdings, LLC v. U.S. Bank National Association*, 2016 U.S. Dist. WL 3746527 (M.D.La. 2016) (CIVIL ACTION NO.: 15-00714-BAJ-EWD) (March 18, 2016).

constituted a prohibited tying arrangement.⁵⁰ The District Court denied U.S. Bank's Motion to Dismiss with respect to the tying claim, and stated correctly that "a plaintiff claiming an unlawful tie-in or reciprocal dealing requirement under section 1972 may recover *without* demonstrating the tying bank's market power or the anti-competitive effect of the alleged arrangement."⁵¹

In *Yaffa v. SunSouth Bank*,⁵² the Plaintiffs argued that there was evidence from which a fact finder could find "attempted tying" because SunSouth's loan officer admitted that he linked services that he offered to the Plaintiffs. But the U.S. District Court for the Northern District of Florida found that the undesirable services were never purchased. Plaintiffs argued that SunSouth misinterpreted the law to mean that the undesirable tied product must have been purchased before the buyer has a claim, relying on former Fifth Circuit cases suggesting that a bank need not literally force the purchase of the undesirable product to be liable. The Court stated:

[F]or a tie to exist, the desirable product must be withheld unless the buyer also selects the undesirable product. Because the undisputed record shows that Plaintiffs were not in fact forced into purchasing an undesirable product in order to receive the loan or services they desired, the tying claim must fail. Therefore, SunSouth is entitled to dismissal of Count VI with prejudice.⁵³

However, as stated previously:

In *Amerifirst Properties, Inc. v. FDIC*, the court addressed whether an agreement to loan money could fall within the statute if the loan was never actually made. The court held that such an agreement was within the scope of the statute, relying on case law and legislative history. The court focused on the language of the Senate Report, specifically use of the word "availability." Since the statute governed the availability of credit, it should not matter whether the loan was consummated.⁵⁴

⁵⁰ See *id.* at *1.

⁵¹ See *id.* at *4 (citing *Dibidale of La., Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990)), *5 n.9. See also Naegele 2005, *supra* note 1, at 204, 240–241 n.87.

⁵² See *Yaffa v. SunSouth Bank*, 2015 U.S. Dist. WL 1485010 (N.D.Fla. March 31, 2015).

⁵³ See *id.* at *2.

⁵⁴ See Naegele 2005, *supra* note 1, at 199 (citations omitted). Also, it was noted:

This is the correct view. The court went on to state: "We note that the tie was never consummated in *Swerdloff* to refute the Bank's argument that Amerifirst has failed to state a claim because Amerifirst was never injured since the tie in the present case was never consummated." *Id.* at 824 n.5 (citing *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54 (5th Cir.

Thus, an “attempted tying” may give rise to an anti-tying provision violation.

It warrants repeating:

Inasmuch as the government is ill equipped to ferret out tying abuses, just as it is unable to uncover and prevent other abuses, that fact must be recognized by regulators and reinforced by Congress. In the case of those companies that swindle the government, Congress enacted the False Claims Act (31 U.S.C. §§ 3729–3733), which gives whistleblowers a reward. Since its inception, it has been reported that the act has generated \$12 billion for the federal treasury and more than \$1 billion for hundreds of whistleblowers Comparable enforcement of [the anti-tying provision] might be achieved if highly-motivated private litigants and able counsel were not constrained by court-or regulator-fashioned impediments to treble-damage recoveries.⁵⁵

In *Adelphia Recovery Trust v. Bank of America, N.A.*,⁵⁶ the U.S. District Court for the Southern District of New York dealt with a recovery trust (“ART”) for a bankruptcy debtor that brought an action against Agent Banks, alleging that they violated the anti-tying provision by extending credit and/or furnishing services on the condition that the debtor obtain some additional credit and/or service from banks’ subsidiaries. Five agent banks filed motions to dismiss, and the Court held that

(1) the trust was not required to allege that the banks had affiliated investment banks to state a claim for violation of the anti-tying provision;⁵⁷

(2) the trust failed to allege tying with sufficient specificity to state a claim as against banks without affiliated investment banks;⁵⁸

1978)). See also *Tri-Crown, Inc.*, 908 F.2d at 584–85 (Tenth Circuit reversed district court’s dismissal of plaintiffs’ TIRA claims, and held that (1) plaintiffs adequately stated claim under 12 U.S.C. § 1464(q)(1), where defendant savings and loan denied additional financing upon plaintiffs’ refusal to assume defendant’s non-performing loans, and (2) “a loan need not be actually consummated in order for there to be an ‘extension of credit’ under the TIRA”).

See *id.* at 225 note 29.

⁵⁵ See Naegele 2005, *supra* note 1, at 268 note 232.

⁵⁶ See *Adelphia Recovery Trust v. Bank of America, N.A.*, 646 F.Supp.2d 489 (S.D.N.Y. July 29, 2009).

⁵⁷ See *id.* at 494.

⁵⁸ See *id.* at 494–495 (“ART must identify some specific tying in which Rabobank and Fuji engaged. Lumping together all the Agent Banks without identifying specific tying arrangements, an underwriting agreement or an email fails to meet the pleading requirements of Fed.R.Civ.P.

(3) a finance company was not a “bank” within the meaning of the anti-tying provision;⁵⁹

(4) the trust alleged tying on the part of a bank with sufficient particularity to state a claim against that bank for violation of the anti-tying provision;⁶⁰

8(a) . . . ‘While legal conclusions can provide the complaint’s framework, they must be supported by factual allegations.’ . . . ART fails to provide any factual allegations supporting its claim that Fuji and Rabobank participated in impermissible tying in violation of the BHCA”).

⁵⁹ See *id.* at 495–496 (“TD Texas alleges that it is not a Bank within the definition of the Bank Holding Company Act. Further, TD Texas alleges that because it falls outside the definition of a Bank under the BHCA this Court must find it not liable of coercive tying TD Texas argues it is neither an ‘insured bank’, an institution that accepts demand deposits, or is engaged in the business of making commercial loans Merely because TD Texas is affiliated with entities that may accept deposits or maintain FDIC insurance does not make TD Texas a ‘bank’ for purposes of the BHCA ART’s sole response to TD Texas is that this argument is premature on a motion to dismiss. ART argues it should have the opportunity to test the factual assertions made by TD Texas in discovery and/or challenge their relevance and import at trial. However, a Court may take judicial notice of public records such as those cited by TD Texas to determine a 12(b)(6) motion to dismiss This court takes judicial notice of the records cited by TD Texas and holds that TD Texas is not a bank within the meaning of the BHCA and accordingly the claim is dismissed against TD Texas”).

⁶⁰ See *id.* at 496–497 (“RBS alleges that ART’s pleading fails to satisfy the requirements of Fed.R.Civ.P. 8(a) because the pleadings do not make any specific allegations against RBS. RBS argues Claim 32 must be dismissed as to RBS because of ‘ART’s inconsistent BHCA pleading—alleging some details as to many banks, but none as against RBS . . .’ . . . Despite the assertions in RBS’s papers the Second Amended Complaint contains specific allegations against RBS and dismissal of Claim 32 would be inappropriate at this time. There are two independent bases for finding sufficient pleadings. First, Adelphia identifies underwriting transactions and approval of a specific Co-Borrowing Facility as evidence of coercive tying. The Amended Complaint lists RBS as underwriting Adelphia’s October 2001 offering of senior notes In addition, RBS acted as an Agent Bank in the Olympus Co-Borrowing Facility It is plausible that RBS might have anticipated further investment banking business from Adelphia but Adelphia’s bankruptcy in June of 2002 precluded further purchases of investment banking services The Amended Complaint alleges coercive tying generally by all the Agent Banks. ‘Adelphia and the Agent Banks both understood that the Agent Banks’ agreement to participate in the CCH Co-Borrowing Facility, among others, was tied to Adelphia’s assurance that their affiliated Investment Banks would garner substantial fees.’ . . . This paragraph coupled with the identification of underwriting of the Olympus Co-Borrowing Facility raises the tying allegations in the Second Amended Complaint above mere legal conclusions and provides ‘factual allegations.’ . . . Second, an internal RBS email which is attached as an exhibit to the Second Amended Complaint makes the allegations of tying against RBS rise to more than conclusory statements. ART in its opposition brief cites a RBS Corporate Credit Memorandum to support its claim of illegal tying. ‘Additionally the return is acceptable and the [Relationship Manager] is confident that additional remunerative business can be earned on the back of the proposed participation. On this basis, facilities are recommended as proposed.’ . . . RBS alleges this

- (5) the trust was not required to allege tying in some minimum amount to state a claim for violation of the anti-tying provision;⁶¹
- (6) the trust sufficiently alleged that tying was initiated by the banks;⁶² and
- (7) the trust alleged specific tying transactions between a bank and debtor, as required to state a claim for violation of the anti-tying provision against that bank.⁶³

Memorandum prepared by RBS Senior Credit Manager Bali Nerwan from September 5, 2001 suggests that RBS did not compel Adelpia to accept more 'lucrative' investment banking services from RBS in exchange for its participation in the Olympus facility. RBS Reply However, on a motion to dismiss all reasonable inferences are to be drawn in favor of the non moving party The RBS email when viewed in favor of ART raises the Complaint's allegations of coercive tying above mere legal conclusions by providing context in which to view the transactions and actions of RBS. This Court when considering RBS's motion for dismissal will take into account the RBS email, "the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." . . . The Second Amended Complaint has sufficient particularity that dismissal of Claim 32 is inappropriate at this time").

⁶¹ See *id.* at 497.

⁶² See *id.* at 497–498 ("ML Capital alleges the tying was initiated by the Rigas Family and not the Agent Bank Defendants. The Defendants further allege that if the tying was initiated by the Rigas Family and not the Banks then ML Capital and the other Bank Defendants (who have joined in this motion) would not be liable under the Bank Holding Company Act. As a general rule a Bank will only be liable under the BHCA if it was the party which initiated the tying arrangement This Court requested in its January 17, 2008 Memorandum and Order that Claim 32 be replead to clarify whether the coercion was coming from the Rigas Family or the Banks Repled Claim 32 (as it appears in the Second Amended Complaint) meets the requirement of alleging that the Banks initiated the tying. Coercive tying by the Agent Banks does not preclude the Rigases from also insisting on coercive tying. This Court's January 17, 2008 order did not foreclose the possibility that both the Rigases and the Agent Banks sought coercive tying arrangements simultaneously and for different purposes Multiple parties could simultaneously conduct coercive tying. 12 U.S.C. § 1971. ML Capital's argument that the Second Amended Complaint continues to be ambiguous as to whether the Banks instigated coercive tying is inapposite. The Second Amended Complaint alleges clearly 'Adelpia and the Agent Banks both understood that the Agent Banks' agreement to participate in the CCH Co-Borrowing Facility, among others, was tied to Adelpia's assurance that their affiliated Investment Banks would garner substantial fees.' . . . Allegations against the Agent Banks are not ambiguous or self contradictory because other sections of the Amended Complaint allege the Rigas Family pursued coercive tying arrangements. Both groups could have simultaneously been attempting coercive tying").

⁶³ See *id.* at 498–499 ("ML Capital alleges the Second Amended Complaint fails to allege specific tying between Adelpia and ML Capital 'The complete absence of any factual detail concerning ML Capital speaks volumes about the inadequacy of the claim against ML Capital.' . . . ML Capital argues Claim 32 should be dismissed for this failure to allege specific

With respect to issue (5), the Court stated:

RBS alleges any investment banking services which were purchased were de minimis in value and thus it is not liable for a violation of the BHCA. RBS is alleged to have only participated in one securities offering and that its participation was limited to being an underwriter of “a mere \$1000 of Adelphia’s \$500 million senior notes offering—representing 0.0002% of the total offering.”

The amount of money at stake is not determinative of liability under the BHCA. An amount of 1000 dollars or a promise of the future purchase of services (even if the purchase were never consummated) will qualify for liability under the BHCA. Case law supports the contention that a customer need not purchase tied services. A customer need only be induced by a bank to purchase services. “Arguably, if the bank had premised the Defendants’ early funding on the provision of future services, then the bank would have violated the statute.”

The plain language of the statute requires only that future services be tied and does not require a minimum amount. “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 . . .” The BHCA does not require that tying occur, only that a promise be made. The promise need not be fulfilled for liability to arise under the BHCA. The claim against RBS will not

factual allegations. This Court holds the Second Amended Complaint contains allegations of specific transactions between ML Capital and Adelphia of tying in violation of the BHCA. The Complaint alleges two tied transactions. In October 1999, ML & Co. participated in an underwriting In April 2000, ML Capital is alleged to have approved the CCH Co-Borrowing Facility ML Capital alleges nothing in the brief indicates that ML Capital initiated the purported tying arrangement However, ART identifies specific transactions in its Second Amended Complaint (approval of the CCH Co-Borrowing Facility and underwriting six months earlier). This places ML Capital in a different position than Fuji or Rabobank as to which specific transactions are not identified. ART pled that ML Capital as well as other Agent Banks initiated coercive tying The general allegations of tying by the category of Agent Banks together with the identification of specific transactions which ML Capital participated in raises the allegations when taken as true above mere legal conclusions and into the realm of plausibility. Dismissal of Claim 32 against ML Capital would be inappropriate at this time ML Capital alleges that the order in which the transactions occurs makes coercive tying implausible. The approval of the CCH Co-Borrowing Facility occurred 6 months after the alleged underwriting and it is not possible that ML Capital was coercing investment banks fees However, liability under the BHCA does not hinge on the order of tying. Tying can be contemporaneous or occur separated by time The position of ML Capital is different than that of Fuji or Rabobank in which a pair of transactions were not alleged”).

be dismissed under Fed.R.Civ.P. 12(b)(6).⁶⁴

⁶⁴ See *id.* (citations omitted).

In the final analysis, the Court ruled: “Claim 32 is dismissed against Fuji, Rabobank and TD Texas. Leave to replead is granted as to the allegations against Fuji and Rabobank if the parties can identify specific evidence of tying arrangements in violation of the BHCA. The ML Capital and RBS motions for dismissal are DENIED.” *Id.* at 499.

See also *Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 64, 71–73 (S.D.N.Y. Jan. 17, 2008) (“Claim 32 alleges that the Agent Banks . . . and the Investment Banks violated the Bank Holding Company Act, in that: ‘At various times herein, the Agent Banks conditioned their extensions of credit to the Debtors, and/or fixed or varied the consideration thereof, and/or otherwise required the Debtors in conjunction with the foregoing to obtain some additional credit, property, or service from a bank holding company of such bank or from, among other entities, the Investment Banks.’ . . . [W]hile the Complaint alleges that the Agent Banks come within the definition [of a bank], it does not make the same allegation as to the Investment Banks. While it may be that there is no precedent directly in point . . . , that is beside the point. The Investment banks very plainly do not come within the definition, nor has plaintiff come forward with any authority for reading the definition to mean anything other than its plain meaning A second issue is raised by the Agent Banks and the Investment Banks [T]hey argue that plaintiff alleges that it was Adelphia, or the Rigas Family, that dictated the tie of loans and investment services Plaintiff does not dispute that it must allege that the banks coerced the Debtors to accept investment services as a condition of obtaining loans, but it argues that it has in fact so alleged The net result of the paragraphs of the Complaint cited by defendants and those cited by plaintiff in the one Complaint is a degree of ambiguity that should be corrected Accordingly, Claim 32 is dismissed but with leave to replead, to resolve this ambiguity Defendants further argue that plaintiff has not adequately alleged injury as a result of the alleged tying. Plaintiff does allege that ‘[a]s a result of the [tying] activities of the Agent Banks, the Debtors have suffered damage.’ . . . Defendants have not cited binding authority that would require more at this stage. Citibank raises another pleading issue, that plaintiff has failed to allege an anti-competitive practice. That argument, however, is premised on the assumption that plaintiffs are alleging the violation of the Bank Holding Company Act because ‘Adelphia and/or the Rigases, and not the banks, demanded the alleged ties’ . . . , the banks thus being in ‘significant competition for Adelphia’s business.’ . . . However, as found above, that is not plaintiff[’]s underlying allegation in Claim 32, and the argument is thus not persuasive”); *Adelphia Communs. Corp. v. Bank of Am., N.A. (In re Adelphia Communs. Corp.)*, 365 B.R. 24, 75–78 (Bkrtcy.S.D.N.Y. June 11, 2007) (“Claim 32 of the Creditors’ Committee complaint charges the Agent Banks and the Investment Banks with violation of the Bank Holding Company Act (‘BHCA’), 12 U.S.C. § 1972. As explained in the Creditors’ Committee’s brief, the essence of the claims is that the Agent Banks and Investment Banks violated the ‘anti-tying’ provisions of the BHCA by expressly conditioning the Agent Banks’ extensions of credit on Adelphia’s use of the Agent Banks’ Investment Bank affiliates in securities offerings. Claims of this character are conceptually similar to those for ‘tie-ins’ under the antitrust laws; in each case, an entity allegedly uses its muscle with respect to one product or service (here, loans) to extract benefits from its delivery of a second product or service (here, investment banking services). The BHCA prohibits banking institutions from conditioning the extension of credit on the purchase by a customer of some other services offered by the bank or one of its affiliates The BHCA does not prohibit routine banking measures by a bank to maximize the bank’s ability

to be repaid. The anti-tying provisions were not intended to interfere with or impede appropriate traditional banking activities through which banks safeguard the value of their investment. As the Creditors' Committee concedes, a violation of section 1972 is not a defense to the duty to repay a loan. But other damages proximately caused by the tie may be recovered. The Defendants move to dismiss Claim 32 on a number of grounds. Some assert that the loans and other products or services that were allegedly tied are not sufficiently described, and that the Debtors that used such services are not specifically identified. The Court cannot agree. The pleading more than sufficiently meets the requirements of Fed.R.Civ.P. 8(a) requiring a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Although the Court's view of the nature of the BHCA claim (and the evidence that would be used to support and oppose it) necessarily is shaped in part by evidence as to this claim that was submitted by both sides . . . , it is very clear to this Court what this claim is all about. There will undoubtedly be issues of fact as to whether the Agent Banks and Investment Banks were conditioning their delivery of commercial banking services on investment banking services opportunities, on the one hand, or the Rigases were using the link as an enticement to the Agent Banks, on the other. But such issues are, of course, inappropriate for disposition on a 12(b)(6) motion. Some Defendants argue that allegations are lacking in the required showing that the practice be unusual, or argue, as a factual matter, that 'one-stop shopping' is 'not uncommon in the banking industry,' or that upholding these claims would be inconsistent with the repeal by Congress of the Glass-Steagall Act. The suggestion seems to be that if a tying practice prohibited under the plain words of the statute is common enough, it becomes acceptable. The Court cannot agree, especially on a motion under 12(b)(6). The requirement that the practice be 'unusual' in the banking industry distinguishes prohibited practices from 'appropriate traditional banking practices' that constitute legitimate means of maximizing a lender's chances of getting repaid. The key questions are whether the challenged practice requires a service reasonably employed to assure that the bank will be repaid, or has a purpose different from that—and whether the customer's use of supplemental services was merely *suggested*, or was *required* to get the underlying financing. Thus a bank's requirement that loan collateral be insured would at least seemingly be entirely lawful; requiring the use of an affiliate's investment banking services might not be Similarly, the Court does not understand the Creditors' Committee to be arguing that merely *providing* other services (such as investment banking services), or even pointing out the advantages of affiliates providing related services, would be unlawful; the violation would result from the *conditioning* of the receipt of one on the receipt of the other. Offering 'one-stop shopping' as a matter of convenience might be entirely innocuous, but *requiring* it would be a different matter. At least under the facts of this case, telling the difference between permitted requirements and prohibited ones (or, indeed, determining the extent to which anything was required in the first place) will require factual scrutiny. Several Defendants also argue that the Creditors' Committee complaint is deficient for failure to plead that the banking practice in question was anti-competitive. Once more the Court disagrees. '[M]erely proving the existence of the condition or requirement is sufficient to state a claim.' Unlike the Sherman Act, the BHCA does not require that the plaintiff demonstrate either (1) specific adverse effects on competition; (2) any dominance or control by the defendant over the tying product or service; or (3) any effect on commerce The BHCA does not require a plaintiff to prove that the arrangement in question had an anticompetitive effect. Instead the BHCA establishes a *per se* rule. Another argument that is made—by Citibank, in particular—is that there are no specific allegations in the Creditors' Committee complaint linking the acts of that Defendant as a *facility decision maker* with a tie-in to business with that Defendant's affiliated

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The second part of this article, which will appear in an upcoming issue of *The Banking Law Journal*, will discuss the traditional banking exemption, miscellaneous issues, and offer conclusions.

Investment Bank. The premise is correct. The Creditors' Committee complaint does not provide that level of detail. But the relevant conduct is better analyzed with a factual record, given the variety of roles that Defendant Banks played in this case—as administrative agents, as agents with lesser responsibilities, as original syndicate members and lenders, and/or as later acquirors of bank debt. Thus, for example, Citibank may turn out to be right when it asserts that when it acted as administrative agent for the Century-TCI facility, it did not then condition its willingness to serve as such (or to lend money under that facility) on business for its affiliate Salomon Smith Barney. But participation in facilities in which a defendant bank lender acted in different roles (as, for example in connection with the Arahova bridge loan, or the Olympus facility) might have been so conditioned, and determining whether there is liability when defendants were acting in different roles would require scrutiny of the relevant facts. Chase's point that no valid BHCA claims could be asserted vis-à-vis the FrontierVision facility, as FrontierVision was not owned by Adelphia when that facility was structured, is well taken. As with respect to other claims, discussed above, BHCA claims against Chase must be dismissed insofar as they are based on its acts as agent for the FrontierVision facility. To the extent they are based on other Chase conduct, they are not susceptible to dismissal on a 12(b)(6) motion, and must await development of their particular facts").

See also Capital Solutions, LLC v. Konica Minolta Business Solutions U.S.A., Inc., 2009 U.S. Dist. WL 1635894, *7 (D.Kan. June 11, 2009) ("The Court . . . agrees that Capital Solutions should be denied leave to assert in proposed Paragraph 74 that throughout the parties' relationship, Bank of Oklahoma 'has continually tied the two loans together.' This is an allegation relevant only to Capital Solutions' claim for violation of the anti-tying provisions of 12 U.S.C. § 1972, which the Court dismissed in its August 11, 2008 Order"); *Capital Solutions, LLC v. Konica Minolta Business Solutions USA, Inc.*, 2008 U.S. Dist. WL 3538968, *5–6 (D.Kan. Aug. 11, 2008) ("The bank moved to dismiss [the anti-tying provision] claim on the ground that plaintiff 'has not made any minimal factual allegations on the material elements.' In Capital Solutions' response brief, it explains that its theory of recovery for the bank's alleged violation of this statute is based on its allegation that the bank used its funds to pay the obligations of Southwinds without being authorized to do so. The sum total of plaintiff's argument is one brief paragraph, most of which is a block quote from *Gage v. First Federal Sav. & Loan Asso.*, 717 F.Supp. 745 (D.Kan.1989), which involved a claim under the anti-tying provisions of the Home Owners Loan Act, not the BCHA. Plaintiff has neither alleged nor discussed how its theory correlates with the required elements of a § 1972 claim. Specifically, plaintiff has not explained how this practice is anti-competitive . . . And, aside from the conclusory allegation in plaintiff's complaint that the practice is unusual in the banking industry, plaintiff has not explained why this is so where the parties involved (such as plaintiff and Southwinds in this case) share an identity of members . . . In the absence of any meaningful discussion or analysis relating to the material elements of this claim, plaintiff has not established that the factual allegations state a claim that is plausible on its face by raising the right to relief above a speculative level. Accordingly, the bank's motion [to dismiss] is granted with respect to this claim").

The Bank Holding Company Act's Anti-Tying Provision: Almost 50 Years Later—Part II

*Timothy D. Naegele**

In 1970, Congress enacted the anti-tying provision of the Bank Holding Company Act, which is the only American law that was adopted expressly to prevent predatory tying arrangements by banks and other financial institutions, and that established per se illegality. In the ensuing years, courts have wrestled with the exact meaning of its terms; litigants have sparred over the breadth of its coverage; and the federal regulatory agencies have labored to define its scope. In this two-part article, the author discusses the anti-tying provision and provides a sense of what might be expected in the years to come as this area of economic regulation continues to evolve. The first part of the article, which appeared in the June 2018 issue of The Banking Law Journal, introduced the topic and discussed judicial decisions interpreting the anti-tying provision, particularly case law interpreting the existence of a tying arrangement. This second part of the article discusses the traditional banking exemption, miscellaneous issues, and will offer conclusions. In the final analysis, the author asks and answers the questions: has the anti-tying provision reduced bank misconduct, and have consumers of financial services truly benefited? Also, discussed is whether the judiciary has defied the will of Congress, legislated from the bench, thwarted efforts to enforce the anti-tying provision, and emasculated the law? Lastly, as dramatic changes take place in American and global banking, will domestic and foreign entities ignore the anti-tying provision and operate on the wrong side of the law, and engage in the “pushy model of banking” to skirt this vital U.S. law?

This is the second part of a two-part article discussing the Bank Holding Company Act's anti-tying provision.

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THE TRADITIONAL BANKING EXEMPTION

In *Lee v. Ridgestone Bank*,⁶⁵ the U.S. District Court for the Eastern District of Wisconsin ruled against the Plaintiffs, and stated:

[T]heir BHCA claim runs headlong into controlling Seventh Circuit case law. In *McCoy*,⁶⁶ for example, the court held that “the practice of conditioning mortgage loan commitments upon completion of improvements to the mortgaged property is ‘a traditional banking practice founded on genuine business need’ and therefore exempt from the prohibitions of Section 1972 by virtue of the exception clause in Section 1972(1)(C). . . .”⁶⁷

The Court added:

Section 1972 “was not intended to interfere with the conduct of appropriate traditional banking practices,” *McCoy* at 175, nor was it meant to “prohibit banks from protecting their investments.” *Highland Capital*, 350 F.3d at 565.⁶⁸ Here, Ridgestone Bank was protecting its investment by requiring improvements to the collateral in exchange for forbearance. Plaintiffs’ status as current customers, not prospective customers, is irrelevant.⁶⁹

⁶⁵ See *Lee v. Ridgestone Bank*, 2015 U.S. Dist. WL 3776479 (E.D.Wis. June 16, 2015).

⁶⁶ See *McCoy v. Franklin Sav. Ass’n*, 636 F.2d 172, 175 (7th Cir.1980).

⁶⁷ See *Lee v. Ridgestone Bank*, 2015 U.S. Dist. WL 3776479, *2 (citing *McCoy*, 636 F.3d at 175).

⁶⁸ *Highland Capital, Inc. v. Franklin Nat’l Bank*, 350 F.3d 558, 565 (6th Cir.2003).

⁶⁹ See *Lee v. Ridgestone Bank*, 2015 U.S. Dist. WL 3776479, *2. The Court added:

“[T]he law requires a showing of two distinct products: a tying product, in the market for which defendant has economic power, and a tied product, which defendant forces on consumers wishing to purchase the tying product.” *McGee v. First Fed. Sav. & Loan Assoc.*, 761 F. 2d 647, 648 (11th Cir.1985). According to plaintiffs, the “tied product” was the Bank’s “continued cooperation” in not calling due the loans, and the “tying product” was the loan extension. As should be apparent, these aren’t two separate products. A loan extension and a decision not to call due on that loan are one in the same. Thus there was no anti-competitive tying arrangement.

Id. Also, the Court stated:

Finally, plaintiffs’ allegation that [Daniel Trost, an officer for the Bank] contracted with [plaintiff] Le Realty to improve property owned by Trost cannot form the basis of a BHCA claim because this arrangement inured to the benefit of Trost personally, not Ridgestone Bank. *Highland Capital*, 350 F.3d at 565. Moreover, plaintiffs cannot state a tying claim against Trost because Section 1972 does not cover natural persons. *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir.1984).

Id. at *3. See also *Lane v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. WL 5587942, *2 (N.D.Cal. Oct. 10, 2013) (The amended complaint alleged that Wells Fargo was furnishing a service on the condition that the borrower shall obtain an additional service from Wells Fargo Insurance, Inc., which is a subsidiary of Wells Fargo's holding company, Wells Fargo & Company; to wit, "[t]he 'tied product' in this arrangement is WFI's 'service' of acting as an insurance agent for forced-placed insurance." The District Judge in California ruled: "The dismissal is with prejudice because, although plaintiff was given opportunity at the hearing to explain how there were distinct products or services provided by the bank, plaintiff failed to do so"); *Lane v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. WL 1758878, *4–6 (N.D.Cal. April 24, 2013) (Plaintiffs brought a claim under the Bank Holding Company Act, specifically, 12 U.S.C.1972(1)(B); Defendant contended that plaintiffs could not show a tying arrangement that was both anti-competitive and unusual; Defendant claimed that the tying product—force-placing insurance—was not a service to the borrower, with which the Court disagreed ("[P]urchasing insurance also protects the borrower. . . . For purposes of a motion to dismiss, plaintiffs have shown that the commissions to [Wells Fargo Insurance (WFI)] are a tied product. . . . [D]etermining whether two products are actually one is a fact-heavy inquiry. As such, it is inappropriate to determine whether the two products are separate on a motion to dismiss. . . . [P]laintiffs need not show the tying arrangement is unlawful [or anti-competitive]. . . . Whether a practice is unusual or not is a factual inquiry. At this stage in the pleadings, the amended complaint's allegations are sufficient. Accordingly, defendant's motion to dismiss plaintiffs' claim under the Bank Holding Company Act is DENIED." (citations omitted)); *Cannon v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. WL 3388222, *2–4 (N.D.Cal. July 5, 2013) (In their complaint, Plaintiffs maintained that Wells Fargo was furnishing a service on the condition that the borrower shall obtain an additional service from Wells Fargo Insurance, Inc., which is a subsidiary of Wells Fargo's holding company, Wells Fargo & Company; to wit, "[t]he 'tying product' is Wells Fargo's service of purchasing insurance on borrowers' behalf." The Court dismissed the Plaintiffs' claim, stating: "The dismissal is with prejudice because, although the Court gave Plaintiffs multiple opportunities at the hearing to explain how there were distinct products or services provided by the bank holding company or subsidiary thereof, Plaintiffs failed to do so"); *Lane v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. WL 3187410, *5 (N.D.Cal. June 21, 2013) ("The Court is aware that defendant has filed a motion to dismiss a claim under the Bank Company Holding Act in a similar force-placed insurance case proceeding before Judge Edward Chen (*Cannon v. Wells Fargo Bank, N.A.*, No. 12–1376 (N.D.Cal.2012)). Because plaintiffs' claim raises novel issues, and given the significance of certifying any nationwide class on such a claim, the motion for class certification of this claim will be held in abeyance pending Judge Chen's ruling on the motion to dismiss. Following Judge Chen's order, a briefing schedule will be set herein to allow the parties to address both Judge Chen and the undersigned's earlier orders on this issue. Accordingly, plaintiffs' motion to certify a nationwide class on the Bank Holding Company Act claim is held in abeyance"); *Lane v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. WL 1164859, *3–4 (N.D.Cal. March 20, 2013) ("[T]he proposed amended complaint adds a claim under the Bank Holding Company Act, 12 U.S.C.1972(1)(B). . . . Plaintiffs allege that they have good cause to modify the scheduling order to add the Bank Holding Act claim because their delay was due to defendant's delaying tactics in discovery. Plaintiffs contend that discovery was necessary to plead the Bank Holding Act claim and that they were diligent in obtaining discovery from defendant. Plaintiffs made an early document production request. When defendant did not respond, plaintiffs filed a discovery letter four days later. Upon receiving the documents, plaintiffs filed the proposed amended

complaint less than a week later. This order finds that plaintiffs have shown good cause to add the Bank Holding Act claim. Once plaintiffs knew that defendant would not produce the requested discovery, they diligently pursued discovery. In all, plaintiffs are less than a month late in adding the Bank Holding Act claim. . . . Accordingly, plaintiffs may add the Bank Holding Act claim”); *Bank of Nova Scotia v. Roy*, 2013 U.S. Dist. WL 684452, *11 (D.Virgin Islands Feb. 25, 2013) (Bonita Roy asserted that Scotiabank violated the Bank Holding Company Act, 12 U.S.C. § 1972(1), by employing an unlawful tying arrangement with respect to the extension of credit. . . . “The requirement to provide collateral or guarantees as a condition of obtaining a loan is well within the scope of the traditional-banking-practices exception to section 1972. Thus, Scotiabank has satisfied its burden to show that there is no genuine issue of material fact as to Bonita Roy’s first counterclaim.” The burden shifted to Roy to establish specific facts showing that there was a triable issue. In her affidavit, Bonita Roy stated: “[A]ffiant never would have signed the subject mortgages and notes that allows for my marital interest in property to be wiped out or diluted by [Scotiabank].” The Court ruled that “[t]his statement alone does not indicate or suggest that Scotiabank at any time required Bonita Roy to purchase or provide any ‘additional credit, property, or service’ in exchange for the loans at issue. Without more, Bonita Roy cannot show that there is a genuine dispute of material fact as to whether Scotiabank violated section 1972(1)”; *Dunhill Asset Services III, LLC v. Tinberg*, 2012 U.S. Dist. WL 3028334, *6 (N.D.Ill. July 23, 2012) (Plaintiff Dunhill was successor to Bank of America, N.A., which was successor to LaSalle Bank National Association. Defendants argued that the 2006 Notes were invalid because they created illegal tying arrangements in violation of 12 U.S.C. § 1972. Defendants pleaded the argument as an affirmative defense. The Court found that the tying defense failed on the merits, because “BOA was only attempting to protect its investment and ensure adequate security for its loans” [citing Doc. 65, pp. 8-10]); *Citibank, N.A. v. Silverman*, 85 A.D.3d 463, 465, 925 N.Y.S.2d 442, 444 (Supreme Court, Appellate Division, First Department, New York June 9, 2011) (The Court found that to demand additional collateral from a debtor who was in default in exchange for extending that debtor’s letter of credit was within traditional banking practices, and therefore the lender could not be held liable for such action under the BHCA. Additionally, the demand for additional collateral concerning the property of other family members did not take it out of the realm of traditional banking practices); *Parsons v. First Nat. Bank & Trust*, 243 Fed.Appx. 116, 116–118 (6th Cir. (Ky.) July 3, 2007) (“In their complaint, the plaintiffs asserted, in part, that defendant First National Bank & Trust violated the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972(1), by improperly applying or seeking to apply various assets belonging to the plaintiffs to their outstanding loan liabilities. . . . The plaintiffs’ brief on appeal identifies multiple issues for our consideration. In reality, however, all three allegations of error can be distilled into a single assertion that actions undertaken by the defendant bank were not traditional banking practices directed toward securing loans made by First National to the plaintiffs but, rather, were thinly-veiled efforts to extort additional fees, services, and payments to the bank’s benefit from a grieving widow. Even accepting all the plaintiffs’ factual allegations as true, however, the district court concluded that ‘the Plaintiffs have failed to allege facts indicating that [First National] tied a loan to any other product, service, or benefit.’ The court thus dismissed the federal claim pursuant to the provisions of Rule 12(b)(6) and declined to exercise supplemental jurisdiction over a remaining state law cause of action. We agree that the bank’s acts highlighted by the plaintiffs—asking that James Parsons make a death-bed assignment of a life insurance policy to the bank, directing Lola Parsons to file suit against purchasers of the plaintiffs’ property in order to obtain additional funds, and asking that

she sign over certain certificates of deposit—were demands directed towards protection of the bank's investments with the plaintiffs. Neither party has cited to us, nor have we been able to find, a case suggesting that such a request for further collateralization is an unusual banking practice. More importantly, the plaintiffs have failed to allege that any of the purportedly improper requests were in any manner 'tied' to efforts to obtain 'additional credit, property, or service . . . other than those related to and usually provided in connection with a loan. . . .' Nor is the plaintiffs' position strengthened by their citation to the three-decade-old, Fifth Circuit decision in *Swerdloff v. Miami National Bank*, 584 F.2d 54 (5th Cir.1978). In that case, the Swerdloffs contended that the defendant bank required, *as a condition of extension of further credit*, that the owners of an indebted corporation sell the majority of its stock to another customer of the bank. *See id.* at 56. Clearly, however, such a scenario involves not only a tying of *credit extension* to performance of an act that does not fall within traditional banking activities but also, by implication, an improper conferral of a financial benefit on the bank itself. *See id.* at 59. By contrast, the plaintiffs in this case do not allege that the provision of any further services by the bank was tied to unusual, improper conditions. Thus, even granting the plaintiffs the benefit of all reasonable inferences to be drawn from their complaint, we conclude that they have not properly alleged the elements of a § 1972 claim in this matter. Consequently, we AFFIRM the judgment of the district court dismissing the plaintiffs' federal claims with prejudice and dismissing their state law claim without prejudice"); *Gold Bank v. Post Hill Greens, L.L.C.*, 2006 U.S. Dist. WL 2883262, *3-5 (W.D.Mo. Oct. 6, 2006) ("In Count IV of the Counterclaim, Barth alleges that Gold Bank violated the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1972 and 1975 in the following ways: 1) requiring Barth to transfer his membership interest in the Renaissance North entities to Degenhardt as a condition to secure financing from Gold Bank to PHG; 2) Providing Barth with a line of credit for \$750,000; and after providing the line of credit, 3) Making three unauthorized withdrawals from the line of credit to pay PHG indebtedness. These withdrawals include: a) \$250,000 on November 26, 2002; b) \$117,608.43 on April 30, 2003 and c) \$34,505.32 on June 26, 2003. In the previous Order, the Court determined that Gold Bank did not require Barth to transfer his membership interest in Renaissance North to Degenhardt. The Court also determined that Gold Bank did not provide Barth with a \$750,000 line of credit. The Court however determined that there was disputed testimony regarding whether the transfers from the Renaissance North accounts to PHG's account were done with the knowledge and consent of Barth and whether these actions were usual in the banking industry and benefitted Gold Bank. Gold Bank argues that it did not enter into any kind of tying arrangement with Barth. Gold Bank states that the Act prohibits a Bank from extending credit or performing a service in exchange for an impermissible condition or requirement. Gold Bank states that Barth merely alleges that Gold Bank transferred funds from his line of credit without this authorization. Gold Bank states that Barth does not allege nor is there any evidence of the existence of an arrangement tied with another arrangement. In response, Barth alleges that there is no dispute that 1) monies were transferred from the Prospect North Entities for the benefit of PHG and 2) Gold Bank recognized that this required some form of approval from Barth. Thus, Barth argues that as a result, genuine issues of fact exist as to whether there was a 'tying' arrangement created by Gold Bank's actions in this case. Barth also argues that there are genuine issues of material fact as to whether Gold Bank's conduct benefitted the bank. Barth states that if it is assumed that he did not authorize any transfers which 'tied' the Prospect North entities to PHG, then the transfers had to have been made for the benefit of Gold Bank. In *Doe v. Northwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1304 (8th Cir.1997), *overruled*

on other grounds by *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), the Court stated, '[t]he plaintiff in a action under this section must show that the bank imposed a tie, that the practice was unusual in the banking industry, that it resulted in an anticompetitive arrangement, and that it benefitted the bank.' In the instant case, Barth alleges that the tie which the bank imposed was that monies from the Prospect North entities had to be transferred to the PHG accounts. However, the Court does not find that this constitutes a tying arrangement. In *Palermo v. First Nat. Bank and Trust Co. of Oklahoma City*, 894 F.2d 363 (10th Cir.1990), the bank conditioned the renewal of the current loans to the plaintiff on an agreement that he would guarantee past debts of a company for whom the plaintiff was a main shareholder. The Court in that case found that the bank's actions constituted a traditional banking practice that was imposed to protect the bank's security and that it did not violate the Bank Tying Act. The Court in *Palermo* stated: '[t]he bank in this case did no more than evaluate its entire existing relationship with the plaintiffs when it conditioned renewal of Palermo's credit upon obtaining a guarantee of the Cup Exploration indebtedness. We emphasize what this case is *not* about—a bank requiring one customer to guarantee the debt of another *unrelated or incidentally related customer*. To the contrary, Palermo, an oil and gas operator and horse breeder, was involved in several commercial activities which required funds. The fact that Palermo did not exercise day-to-day control over all of these activities is insufficient to withstand summary judgment.' *Id.* at 370. Similarly, in *New England Company v. Bank of Gwinnett County*, 891 F.Supp. 1569, 1575 (N.D.Ga.1995), the Court observed: 'Courts repeatedly have held that a bank's conduct in conditioning the further extension of credit on the debtor's providing additional security for the loan is not actionable under the BHCA [Bank Holding Company Act]. . . . Conditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices, and is not the kind of unusual or anti-competitive practice that gives rise to a BHCA cause of action.' *Id.* at 1575 (internal citations omitted). In the instant case, Barth was a one-third shareholder in PHG. Gold Bank loaned money to PHG, and Barth provided a personal guarantee to Gold Bank. Barth was also the managing member of Prospect North, which had previously obtained a loan from Gold Bank, which Barth had also guaranteed. The Court finds that even if Gold Bank required Barth to transfer money from the Prospect North accounts to pay off interest on the PHG's loans, this is not an improper tying arrangement. Rather, this was an effort by Gold Bank to protect its investment. As noted above, 'courts have upheld a wide range of conditions placed upon debtors to protect the investment of the creditor-bank.' *New England Company*, 891 F.Supp. at 1575. Accordingly, the Court hereby GRANTS Gold Bank's Supplemental Motion for Summary Judgment on Count IV of Barth's Counterclaim. As the Court noted in its previous Order, Gold Bank's claims-Count I (Breach of Contract by PHG) and Count II (Breach of Guaranty by Barth) are the same claims which compromised Barth's counterclaims. As the Court has now determined that Barth cannot recover on any of his Counterclaims, the Court hereby GRANTS Gold Bank's Motion for Summary Judgment on Counts I and II against PHG and Barth"); *Parsons v. First Nat. Bank & Trust*, 2006 U.S. Dist. WL 2037402, *2-6 (E.D.Ky. July 18, 2006) ("The Plaintiffs allege in their Amended Complaint that FNB violated the provisions of Title 12 of the United States Code, Section 1972(1), 'by varying the consideration of the Parsons Loans, including, without limitation, hastening default under some, paying a portion of others, and unilaterally deciding to allow others to continue to accrue interest, on the condition or requirement': (a) 'that Mr. Parsons make an unconditional death bed assignment of the proceeds of Mr. Parsons' life insurance policy, which allowed FNB to pay itself from the proceeds without regard to the terms of the

Parson Loans and/or the best interests of the Parsons and the Parsons Businesses'; (b) 'that after Mr. Parsons' death, Mrs. Parsons or the Parsons Businesses not participate in any decision on the allocation of the proceeds'; and (2) 'by threatening to commence foreclosure on real property owned or controlled by Mrs. Parson, on the condition or requirement that Mrs. Parson agree to bring suit against Parsons 4E for the Parsons Loans. . . . Section 1972 of the Bank Holding Company Act . . . was not intended to interfere with the conduct of appropriate traditional banking practices. . . . Thus, to state a claim under Section 1972, the Plaintiff must allege that: (1) the bank imposed an anti-competitive tying arrangement; (2) the arrangement was not usual or traditional in the banking industry; and (3) the practice conferred a benefit on the bank. . . . The Plaintiffs contend that they have properly alleged all three elements required for a claim under the anti-tying provisions of the Bank Holding Company Act. Specifically, the Plaintiffs argue that the Amended Complaint 'clearly articulates the actions of FNB upon which Plaintiffs' (sic) base its (sic) demand for relief, which thereby gives FNB fair notice of what the [Plaintiffs] claim is and the grounds upon which it rests.' . . . FNB concedes that the Plaintiffs have provided it with sufficient notice that they are alleging violations under the anti-tying provisions of the Bank Holding Company Act. However, it contends that the Plaintiffs have not plead [sic] any set of facts that constitute a violation of 12 U.S.C. § 1972. FNB asserts that merely 'giving notice' and simply 'parroting the language of the Bank Act' is not sufficient to state claim for relief. . . . According to FNB, even if the Plaintiffs' allegations are true that FNB: (1) obtained a death bed assignment of life insurance proceeds from Mr. Parsons; (2) prevented Mrs. Parsons and the Parsons' Businesses from participating in the allocation of life insurance proceeds to the Parsons' loans; and (3) requested that Mrs. Parsons agree to sue Parsons 4E for the Parsons' loans, these acts do not constitute anti-competitive activities by FNB falling within the scope of the Bank Holding Company Act. Rather, FNB argues that it was simply trying to obtain additional collateral for its loans and/or trying to protect its ability to collect on its loans with the Plaintiffs. FNB has cited a litany of cases in which courts have consistently held that banks are entitled to engage in activities to protect their investments so long as such acts are not conditioned upon, or tied to, some anti-competitive tying arrangement. Thus, this Court must determine whether the Plaintiffs have alleged facts from which the existence of a tying arrangement could be inferred. . . . In the present case, the Plaintiffs have failed to allege facts indicating that FNB tied a loan to any other product, service, or benefit. Although the Plaintiffs' allegations clearly evidence that FNB was attempting to obtain additional protection for its existing loans, the facts, as alleged by the Plaintiffs, lack an anti-competitive tie. . . . Relying on the Fifth Circuit's decision in *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54 (5th Cir.1978), the Plaintiffs argue that by simply demanding that they perform 'an act not related nor usually provided in connection with a loan,' FNB violated the anti-tying provisions of the Bank Act. In *Swerdloff*, the bank allegedly required the owners of an indebted corporation (Standard Container & Paper Co.) to sell 51% of the company stock to a competitor (Arrow Paper & Chemical Co., Inc.), which was also a customer of the bank. The issue before the court was whether the demand by the bank that its borrower sell its stock to a third party constituted a 'tying arrangement' under the Bank Act. The court held that the complaint adequately alleged a 'tying arrangement' because the allegations were that the bank imposed a requirement that the business be sold as a condition of granting further credit. *Swerdloff* is distinguishable from the instant case. In *Swerdloff*, the bank was attempting to use its leverage to force its borrower to comply with an unusual demand, which would directly benefit one of the bank's other customers. Specifically, the bank conditioned the *granting of further credit* upon the transfer of the borrower's stock to one of the bank's other

customers. Here, the Plaintiff has alleged that FNB violated the anti-tying provisions of the Bank Act by: (1) demanding that Mrs. Parsons assign control of CDs to FNB; (2) demanding that Mrs. Parsons sue [P]arsons 4E for the sum of the Parsons' loans; (3) threatening to foreclose on Mrs. Parsons' real property if she did not comply with these demands. The Plaintiffs, however, have not alleged that FNB conditioned the extension of future credit upon the Plaintiff complying with these alleged demands of the bank. In addition, unlike this case, the bank's alleged demands in *Swerdloff* had the [e]ffect of benefitting another customer. Practically speaking, these demands were anti-competitive in nature. Presumably, the bank was attempting to induce Arrow Paper to do additional business with the bank by making demands on Standard Container that would benefit Arrow Paper. Here, there is no indication that FNB's alleged demand would have the [e]ffect of benefitting any of its other customers. Moreover, there is no evidence that the bank would benefit in any way other than by getting additional protection for its investments with the Plaintiffs (*i.e.*, its existing loans with the Plaintiffs). This is not an alleged tying arrangement. The allegations contained in the Plaintiffs' Amended Complaint fail to state a claim under Section 1972. Rather, these allegations merely demonstrate that the demands of the bank were attempts to protect its existing investments with the Plaintiffs. As correctly noted by FNB, courts have repeatedly held that taking measures to protect a bank's investment is within traditional banking practices and is not the kind of anti-competitive practice that gives rise to a cause of action under Section 1972. In fact, courts have upheld a wide range of conditions placed upon debtors in efforts to protect the investment of the creditor-bank. *Alpine Elec. Co. v. Union Bank*, 979 F.2d 133 (8th Cir.1992) (finding that act of bank in using money in depositor's checking account to reduce debt of related corporation not actionable); *Bieber v. State Bank of Terry*, 928 F.2d 328 (9th Cir.1991) (bank required officers of corporation to personally guaranty loan of corporation); *Palermo v. First Nat'l Bank & Trust Co.*, 894 F.2d 363 (10th Cir.1990) (required officers to personally guaranty loan of corporation); *Davis v. First Nat'l Bank of Westville*, 868 F.2d 206 (7th Cir.1989) (bank required debtor to provide a business liquidation service); *Parsons Steel*, 679 F.2d 242 (11th Cir.1982) (required change in management); *Tose v. First Penn. Bank*, 648 F.2d 879 (3rd Cir.) (required change in CEO), *cert. denied*, 454 U.S. (1981). In short, it is not an unusual banking practice for a bank to request additional security, even when a loan is current. Banks constantly re-examine loan portfolios and re-evaluate the risks and security needs of their loans. The Plaintiffs also have no claim under the Section 1972 because FNB's actions were not anti-competitive. As noted above, the Plaintiffs' Amended Complaint does not allege that the FNB's actions lessened competition in any way or increased the bank's economic power. Additionally, the Plaintiffs' Amended Complaint does not allege that FNB engaged in any anti-competitive act. In order to state a valid claim under the Section 1972, the Plaintiffs not only must allege that FNB engaged in an unusual banking practice, but also must allege that the unusual banking practice was an anti-competitive tying arrangement benefitting the bank. *Parsons Steel*, 679 F.2d at 245. For such an anti-competitive tying arrangement to exist, the Plaintiffs must show the existence of anti-competitive practices which required them to provide another service or product in order to obtain the product or service from the bank that they desired. *Id.* The Plaintiffs have failed to allege any such conduct. . . . As outlined above, the Plaintiffs have failed to state a claim under the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972. Therefore, the Court will dismiss this claim with prejudice").

As stated previously: “The anti-tying provision has been mistakenly interpreted to apply only to banks and not to individual defendants, arguably making it unproductive to sue natural persons for violations.”⁷⁰

Miscellaneous Issues

As noted before, some courts mistakenly believe a showing of “anticompetitive effects” is necessary under the BHCA:⁷¹

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

The language of the BHCA does not make reference to any requirement of anticompetitive effects; and indeed, such a requirement was not included even though some senators wanted to insert inclusive language. Courts have recognized this and have held that a showing of anticompetitive effects is not necessary, which is the better view.⁷²

⁷⁰ See Naegele 2005, *supra* note 1, at 211 & note 175. See also *Bank of America, N.A. v. GREC Homes IX, LLC*, 2014 U.S. Dist. WL 351962, *16 (S.D.Fla. Jan. 23, 2014) (“[N]othing in the BHCA’s anti-tying provisions prevents a bank from protecting its investments by engaging in traditional banking practices. . . . Counter-Plaintiffs have not satisfied their obligation to plead sufficient facts for the Court to infer the alleged tying agreement was anti-competitive”); see also *Nemo Development Inc. v. Community Nat’l. Bank*, 2006 U.S. Dist. WL 839449, *7–8 (D.Kan. Jan. 4, 2006), and *supra* note 4.

⁷¹ See Naegele 2005, *supra* note 1, at 204–205 & n.83; see also *McGarry & McGarry, LLC v. Rabobank, N.A.*, 847 F.3d 404, 406 (7th Cir. 2017) (citing *Exchange Nat’ Bank of Chicago v. Daniels*, 768 F.2d 140, 143 (7th Cir. 1985), which misstated that the anti-tying provision is “the banking equivalent of § 3 of the Clayton Act” that expressly requires an anticompetitive effect); *Kerr v. Bank of America, N.A.*, 2016 U.S. Dist. WL 5107069, *3 (D. Nevada 2016).

⁷² See Naegele 2005, *supra* note 1, at 204–205 (citations omitted).

In *Akiki v. Greentree Servicing, LLC*, 2014 U.S. Dist. WL 11352898, the U.S. District Court for the Southern District of Florida found:

There is no indication that Defendants’ alleged practice is an anticompetitive tying arrangement in contravention of 12 U.S.C. § 1972. Cf. *Bank of Am., N.A. v. GREC Homes IX, LLC*, 2014 WL 2777145 (S.D. Fla. June 19, 2014) (holding that requiring additional

Also, while a showing of “unusual” may be required⁷³—namely, that “the arrangement does not involve so-called ‘traditional banking practices’ (and nothing more), which would be exempt from section 1972”—such a require-

entities to be named as borrowers on a loan essentially locked plaintiffs into future deals and were therefore, by their very nature, anticompetitive).⁵ Accordingly, Count I for violation of the BHCA is dismissed.

Id. at *3 (note 4 omitted). In footnote 5, the Court added:

There appears to exist some confusion as to whether a plaintiff must plead that the tying arrangement was anticompetitive in nature. Compare *GREC Homes IX, LLC*, 2014 WL 351962, at *16 (dismissing BHCA claim where plaintiff had failed to plead sufficient facts to infer that the alleged tying agreement was anti-competitive) with *Stefiuk v. First Union Nat. Bank of Florida*, 61 F.Supp.2d 1294, 1297–98 (S.D.Fla. 1999) (stating that “a plaintiff bringing a claim under Section 1972 need not show . . . anti-competitive effect”); see also *Baggett*, 117 F.3d at 1346 (“[T]he plaintiff must still complain of a practice that is anti-competitive.”). In *Stefiuk*, the Court noted that a plaintiff “need only allege: (1) two separate products, a ‘tying’ or ‘desirable’ product and a ‘tied’ or ‘undesirable’ product; and (2) that the buyer was in fact forced to buy the tied product to get the tying product; that is, a ‘tying.’” 61 F.Supp.2d at 1298 (internal quotation omitted). However, even under this standard, Plaintiffs’ allegations fail. As noted, Plaintiffs were not forced to accept an escrow account *in order to* obtain the [Initial] Loan and the HELOC Loan; both loans had already been obtained *years* before any alleged coercion.

See *id.* at *3 note 5.

However, a plaintiff claiming an unlawful tie-in under section 1972 may recover *without* demonstrating the tying bank’s or holding company’s market power or the anti-competitive effect of the alleged arrangement. For example, in *Bank of America, N.A. v. GREC Homes IX, LLC*, there was no requirement for showing “the anti-competitive effect of the alleged arrangement,” nor does the anti-tying provision itself or its legislative history contain such a requirement.

The Court in *Akiki v. Greentree Servicing, LLC* was mistaken to imply such a requirement. See *Bank of America, N.A. v. GREC Homes IX, LLC*, 2014 U.S. Dist. WL 2777145, *8 (S.D.Fla. June 19, 2014) (“Unlike the earlier BHCA claim, Counter-Plaintiffs now plead sufficient facts for the Court to infer the alleged tying agreement was anticompetitive. The very nature of the creation of the Phantom GREC Entities is alleged to have locked Herran and the Phantom GREC Entities into future real estate developments deals. According to Counter-Plaintiffs, the granting of the loan in the first instance was conditioned upon the Phantom GREC Entities being formed and included as borrowers on the Promissory Note—an act alleged to be unusual and anticompetitive. Consequently, Count IX states a claim pursuant to 12 U.S.C. section 1972”). See also *Bank of America, N.A. v. GREC Homes IX, LLC*, 2014 U.S. Dist. WL 351962, *16 (S.D.Fla. Jan. 23, 2014) (“[N]othing in the BHCA’s anti-tying provisions prevents a bank from protecting its investments by engaging in traditional banking practices. . . . Counter-Plaintiffs have not satisfied their obligation to plead sufficient facts for the Court to infer the alleged tying agreement was anti-competitive”).

⁷³ See Naegele 2005, *supra* note 1, at 202, 203; see also *Kerr v. Bank of America, N.A.*, 2016 U.S. Dist. WL 5107069, *3 (D. Nevada 2016).

ment is *not* contained in section 106.⁷⁴ Similarly, some courts require a plaintiff who brings suit under the anti-tying provision to show that a benefit accrued to the bank;⁷⁵ others do not, and a benefit to the bank is implied.⁷⁶

As stated previously:

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

For example, if a bank or other financial institution fails, it may be taken over by a federal regulatory agency such as the FDIC. Once that agency is in control, it has the power to distribute the assets of the institution, and a judgment resulting from an anti-tying provision lawsuit may or may not have priority over other creditors.⁷⁷

Next, with respect to foreign financial entities operating in the United States, the U.S. District Court for the Central District of California's decision in *Signal Hill Service, Inc. v. Macquarie Bank Limited*⁷⁸ must be noted, albeit its analysis is lengthy and the Court ultimately reached the wrong conclusion. Signal Hill's seventh cause of action alleged that MBL—"MACQUARIE BANK LIMITED, a bank incorporated under the laws of Australia"—engaged in an illegal tying arrangement that violated the anti-tying provision by requiring that it enter into the May 2009 pre-loan hedges, the June 2009 pre-loan hedges, and the final hedges as a pre-condition to loaning Signal Hill \$13.6 million. MBL argued that Signal Hill could not assert an illegal tying claim because it was not subject to the act's anti-tying provision. The Court stated correctly: "The act also applies to 'any foreign bank that maintains a branch or agency in a State,' or

⁷⁴ See *id.*

⁷⁵ See, *e.g.*, Naegele 2005, *supra* note 1, at 202, 203–204; see also *Kerr v. Bank of America, N.A.*, 2016 U.S. Dist. WL 5107069, *3 (D. Nevada 2016).

⁷⁶ See, *e.g.*, Naegele 2005, *supra* note 1, at 202, 203–204.

⁷⁷ See Naegele 2005, *supra* note 1, at 255 note 175. *But see Leon v. RG Premier Bank of Puerto Rico*, 2013 U.S. Dist. WL 12234676, *2 (D.Puerto Rico Sept. 5, 2013) (The Court ruled that Plaintiffs' claims must be dismissed as a matter of law for two main reasons. First, the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1821(d)(9)(A), prohibited the assertion of claims against the FDIC and any assignees, based on alleged unwritten agreements. Second, "the Bank Holding Company Act's anti-tie-in provision creates a private cause of action only against 'banks,' and not against bank officers").

⁷⁸ See *Signal Hill Service, Inc. v. Macquarie Bank Limited*, 2013 U.S. Dist. WL 12244056, *22–26 (C.D.Cal. June 12, 2013).

‘any foreign bank or foreign company controlling a foreign bank that controls a commercial lending company organized under State law.’”

In turn, MBL argued that it did not fall under the statute because it did not maintain a branch or agency in the United States, but had only “representative offices.” Signal Hill argued that MBL’s Houston office exceeded the authority given to it as a representative office. It contended that MBL’s office “took the lead role on behalf of MBL regarding (1) negotiating with Signal Hill; (2) making credit decisions regarding the transaction; (3) executing and delivering agreements related to collateral; (4) managing disbursement of funds; and (5) approving and/or rejecting expenditures proposed by Signal Hill.” As a result, Signal Hill asserted that the Court should conclude that MBL maintained an agency in Texas and was subject to the BHCA.⁷⁹

MBL countered that the dealings its Houston office had with Signal Hill did not exceed the restrictions contained in the Federal Reserve’s 2003 approval of its representative office. It contended that under the statute, an “agency” is “any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States.” MBL argued that its representative office did not meet this definition.

Signal Hill countered that the Houston representative office was a location at which “money is lent” because of the office’s “(i) substantial participation negotiating, organizing and consummating [] a loan transaction between Signal Hill and MBL, (ii) active participation in making credit decisions with respect to Signal Hill and (iii) domestic execution of the Intercreditor Agreement and the Security Agreement.”⁸⁰ MBL responded that Federal Reserve regulations state a representative office may engage in:

Representational and administrative functions in connection with the banking activities of the foreign bank, which may include soliciting new business for the foreign bank; conducting research; acting as liaison between the foreign bank’s head office and customers in the United States; performing preliminary and servicing steps in connection with lending; or performing back-office functions; but shall not include contracting for any deposit or deposit-like liability, lending money, or engaging in any other banking activity for the foreign bank.
12 C.F.R. § 211.24(d)(1).

⁷⁹ See *id.* at *23.

⁸⁰ See *id.* at *23 (footnotes omitted).

The regulations define what activities constitute the lending of money: Accordingly, the Board considers that the following activities, individually or collectively, do not constitute the lending of money within the meaning of section 5155 of the revised statutes: Soliciting loans on behalf of a bank (or a branch thereof), assembling credit information, making property inspections and appraisals, securing title information, preparing applications for loans (including making recommendations with respect to action thereon), soliciting investors to purchase loans from the bank, seeking to have such investors contract with the bank for the servicing of such loans, and other similar agent-type activities. When loans are approved and funds disbursed solely at the main office or a branch of the bank, an office at which only preliminary and servicing steps are taken is not a place where money [is] lent. Because preliminary and servicing steps of the kinds described do not constitute the performance of significant banking functions of the type that Congress contemplated should be performed only at governmentally approved offices, such office is accordingly not a branch.” 12 C.F.R. § 250.141(h).⁸¹

MBL offered evidence that the May 2009 swap was approved by an MBL employee at the company’s office in London. Xavier Eyraud, a senior manager in the credit division of MBL’s risk management group in London, stated that “Duncan McCay, a Division Director at MBL, who was also resident in MBL’s London office in 2009, made the decision on behalf of MBL’s Credit Division to provide credit approval for MBL to enter into the May 2009 swap transaction with Signal Hill.” Additionally, MBL witnesses testified that offshore credit approval was obtained for all of MBL’s transactions with Signal Hill.⁸²

In turn, Signal Hill produced evidence that David Lazarus, then an employee at MBL’s Houston office, was heavily involved in proposing and negotiating the terms of the May 2009 swap to Signal Hill. Lazarus testified that his primary job was to originate transactions for the energy markets division and shepherd transactions through the bank’s internal processes to get them approved. Lazarus also stated that he was responsible for “collecting and organizing the information that would be required from the bank’s credit department to make

⁸¹ See *id.* at *23–24 (footnote omitted).

⁸² See *id.* at *24.

an analysis of the transaction and its merits.” Lazarus signed an intercreditor agreement and security agreement that were part of the May 2009 transaction.⁸³

Federal Reserve regulations prohibit representative offices from lending money or engaging in “other banking activity” for a foreign bank, and permit them to perform only “preliminary and servicing steps in connection with lending.”⁸⁴ In other words, the Court stated, a representative office is permitted to promote the bank’s services to customers and take preliminary steps to connect a customer to the bank, but it cannot act as the functional equivalent of the bank. The Court opined: “Drawing all reasonable inferences from the evidence in Signal Hill’s favor, a jury could conclude that MBL’s Houston office exceeded this intermediary role and was substantively involved in negotiating the May swaps with Signal Hill.”⁸⁵

MBL argued, however, that even if there were triable issues as to whether its representative office exceeded the scope of permissible activities in negotiating with Signal Hill, MBL would still not be subject to the BHCA because a single departure from permissible functions would not turn the office into an agency. In their original and supplemental briefing, the Court found that neither party cited any provision in the statute or any case law that clearly indicated when the activities of a representative office would subject a foreign bank to the BHCA, and the Court itself found none. MBL noted, however, that the BHCA applies when a foreign bank “*maintains* a branch or agency in a State.”⁸⁶ This language, it asserted, indicated that whether the act applies “is not determined on a transaction-by-transaction basis.” The Court noted that Signal Hill conceded at the hearing that its allegation that MBL’s Houston representatives had exceeded the bank’s license to operate a representative office was limited to the transactions at issue in this litigation. It stated that Signal Hill did not argue that the office more generally acted outside the scope of its authorized activities.⁸⁷

The Court stated: “Nothing in the statutory scheme suggests that a representative office can transform into an agency through its conduct, particularly its conduct in a single transaction or series of transactions. Nor does anything in the statute indicate that an isolated departure from the limited

⁸³ See *id.* at *25.

⁸⁴ 12 C.F.R. § 211.24(d)(1).

⁸⁵ See *Signal Hill Service, Inc.*, at *25.

⁸⁶ 12 U.S.C. § 3106(a) (emphasis added).

⁸⁷ See *Signal Hill Service, Inc.*, at *25.

functions of a representative office permanently subjects a foreign bank to the BHCA. Instead, the statute suggests that the designation of ‘agency’ or ‘representative office’ is constant.”⁸⁸

The Court noted that the International Banking Act provides: “No foreign bank may establish a branch or an agency, or acquire ownership or control of a commercial lending company, without the prior approval of the Board [of Governors of the Federal Reserve System].”⁸⁹ Thus, the Court opined: “[N]o foreign bank may establish a representative office without the prior app[r]oval of the Board.”⁹⁰ And it added: “The Board is also authorized to order a foreign bank to terminate the operation of a branch, agency, or representative office if it finds that the foreign bank has violated the law and that the continuing operation of the branch, agency, or representative office is not consistent with the BHCA.”⁹¹

The Court noted that the statutory scheme suggests a foreign bank’s office in the United States becomes an agency through government authorization, not because it performs the functions that agencies are authorized to do. “A representative office that exceeds the scope of its authorized activities might be subject to government sanction, even termination. But it would be anomalous if, in a scheme so heavily dependent on authorization and supervision by regulators, a representative office could, in effect, become an agency through conduct. This is especially true in the case of conduct on a single transaction or series of transactions.”⁹²

The Court also agreed with MBL that it was improbable Congress meant to craft a regulatory scheme that left foreign banks with substantial uncertainty about whether their U.S. offices qualify as an agency, a designation which (under Signal Hill’s reading of the statute) could change from transaction to transaction. As MBL argued:

To establish necessary rules and procedures and adopt appropriate compliance oversight, a foreign bank must know whether the BHCA applies to its activities in the United States. The applicability of that statute cannot turn on the facts of individual transactions, with some transactions subject to the BHCA and others not. As a result, whether a foreign bank is subject to the BHCA is a question for the Federal

⁸⁸ *See id.*

⁸⁹ 12 U.S.C. § 3105(d).

⁹⁰ 12 U.S.C. § 3107(a)(1).

⁹¹ *See Signal Hill Service, Inc.*, at *26.

⁹² *See id.*

Reserve based on its overall operations. It is not a jury question to be analyzed retroactively based on an examination of the activities of the foreign bank's representative office in connection with individual transactions.⁹³

It is undisputed that the transactions at issue in this case involved MBL's Houston office, which the Federal Reserve Board designated as a representative office. While there was evidence that MBL's office exceeded its authorized role in the transactions with Signal Hill, the Court concluded that such conduct did not convert the office into an agency, and consequently did not subject MBL to the BHCA. As a result, the Court mistakenly exalted form over substance, and granted MBL's motion for summary judgment with respect to Signal Hill's BHCA claim.⁹⁴

The proper analysis from a public policy standpoint should have been whether MBL structured its activities in the United States to avoid regulation pursuant to the anti-tying provision and other American laws. If so, such activities must be brought under the BHCA, at the very least. Foreign entities like MBL, which operate on a multi-national basis, must not be permitted to escape U.S. laws; and no American court must be allowed to permit this. Congress never meant to craft a regulatory scheme that left foreign banks free to mock American laws that govern U.S. financial institutions.⁹⁵

CONCLUSION

Notwithstanding these and other court decisions, the anti-tying provision remains an effective statutory remedy for predatory conduct on the part of banks and other financial institutions—which may become even more important in the future. There are reasons to believe that the law has reduced bank

⁹³ *See id.*

⁹⁴ *See id.* at *22–26. *See also Signal Hill Service, Inc. v. Macquarie Bank Limited*, 2011 WL 13220305, *16–18 (C.D.Cal. June 29, 2011) (Signal Hill contended that MBL violated 12 U.S.C. § 1972(1), by imposing illegal “tying” arrangements on Signal Hill, and that these tying arrangements rendered the Agreement unenforceable and entitled it to injunctive relief. The Court ruled that because Signal Hill adduced evidence in its reply, in response to MBL's assertion that it is not subject to the Bank Holding Company Act, MBL did not have an opportunity to answer Signal Hill's arguments or present contrary evidence. Because, however, MBL argued only that it was not subject to the Bank Holding Company Act, and because Signal Hill proffered some evidence to refute “this suggestion,” the Court concluded that Signal Hill had at least raised serious questions going to the merits of its anti-tying claims).

⁹⁵ *See supra* note 2.

misconduct, and that consumers of financial services have truly benefited, albeit not to the full extent that was contemplated by the Congress when the statute was enacted.

Indeed, it warrants repeating:

[Because] the government is ill equipped to ferret out tying abuses, just as it is unable to uncover and prevent other abuses, that fact must be recognized by regulators and reinforced by Congress. In the case of those companies that swindle the government, Congress enacted the False Claims Act (31 U.S.C. §§ 3729-3733), which gives whistleblowers a reward. Since its inception, it has been reported that the act has generated \$12 billion for the federal treasury and more than \$1 billion for hundreds of whistleblowers. . . . Comparable enforcement of [the anti-tying provision] might be achieved if highly-motivated private litigants and able counsel were not constrained by court- or regulator-fashioned impediments to treble-damage recoveries.⁹⁶

⁹⁶ See Naegele 2005, *supra* note 1, at 268 note 232; *see also* Timothy D. Naegele, “The Bank Holding Company Act’s Anti-Tying Provision: Almost 50 Years Later—Part I,” 135 BANKING L. J. 315 (June 2018) (Naegele 2018, Part I) at 347.