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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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* 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. (Footnotes continued from Part I.)

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]

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[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).

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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

(Text continued on page 380)

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

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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*

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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

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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

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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.
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> 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]

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[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 required[73]—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-

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> 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

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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

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[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

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[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]

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[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.