ANTITRUST AND BANK REGULATION: WAS THE CLAYTON ACT ON HOLD DURING A TIME OF CRISIS?

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INTRODUCTION

In the early months of 2008, the United States financial industry went through a wave of consolidation unlike any before.[1] Left and right, some of the largest banks and securities firms were facing imminent collapse.[2] In order to prevent a systemic crash and enable the

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1. *See* Miles Weiss, *Roubini Says 2008 Bank Deals Created 'Too Bigger to Fail' Risk*, http://www.bloomberg.com/news/2010-10-01/roubini-says-2008-bank-mergers-created-too-bigger-to-fail-risk-for-u-s-.html (Sept. 30, 2010); *see also* Mark Anderson, *Big Changes Ahead for Region's Five Largest Banks*, Sacramento Bus. J., http://www.bizjournals.com/sacramento/stories/2008/11/10/focus2.html?page=all (last modified Nov. 12, 2008).

2. Louise Story & Edmund L. Andrews, *A Sense That Wall St.'s Boom Times Are Over*, http://www.nytimes.com/2008/09/16/business/16future.html?pagewanted=all (Sept. 15, 2008).

financial industry to stand back up on its feet, mergers and acquisitions were being approved between these giants of the banking world, seemingly, with no regard for any anticompetitive consequences.[3]

With the threat of a large financial meltdown looming, the Federal Reserve (hereinafter referred to as the "Fed") and the Department of Justice (hereinafter referred to as the "DOJ") began approving these, "quick-fix" mergers.[4] Bank of America purchased the failing Merrill Lynch and Countrywide Financial; JP Morgan Chase purchased Bear Stearns and Washington Mutual; and Wachovia is now a part of Wells Fargo.[5] With the number of mergers and acquisitions between the largest banks in the country, a sincere concern for anticompetitive risk was sure to surface.[6]

Recently, the concepts of "too big to fail," and "systemic risk" have become all too common topics in the financial world. However, one cannot help to ask whether, by approving the "quick-fix" mergers, the United States government added to the "too big to fail" phenomena.[7] By enabling the largest banks in the country to merge into even larger institutions, did the government cast aside the provisions of the Clayton Act[8] and the Bank Merger Act[9] that would have prevented such a phenomenon to occur?[10] And what could the antitrust laws, or the more bank specific regulations, if strictly enforced, have done to pre-

3. Zephyr Teachout & Shawn Bayern, *Time for a New Antitrust?*, http://www.huffingtonpost.com/zephyr-teachout/time-for-a-new-antitrust_b_189600.html (Apr. 21, 2009).

4. Bank of America, *Bank of America Receives Federal Reserve Approval of Merrill Lynch Purchase*, http://phx.corporate-ir.net/phoenix.zhtml?c=71595&p=irol-newsArticle&ID=1230615&highlight= (accessed Dec. 2, 2011).

5. Albert A. Foer, *Preserving Competition After the Banking Meltdown*, GCP Mag. (Dec. 2008), http://www.antitrustinstitute.org/files/bank%20meltdown%20article%2012-16-08_121520082145.pdf.

6. Teachout & Bayern, *supra* n. 3.

7. The Federal Reserve Bank of Minneapolis, *Special Studies: Too Big to Fail*, http://www.minneapolisfed.org/publications_papers/studies/tbtf/ (accessed Dec. 3, 2011) ("The government's response to the 2007-08 financial turmoil, although justified, expanded the safety net normally reserved for large banks and exacerbated the existing too big to fail (TBTF) problem.").

8. 15 U.S.C. §§ 12-27 (2006).

9. 12 U.S.C. § 1828 (2006).

10. Robert P. Zora, *The Bank Failure Crisis: Challenges in Enforcing Antitrust Regulation*, 55 Wayne L. Rev. 1175, 1176 (2009).

vent these anticompetitive concerns from arising?[11] More importantly, what can they do now?

The first section of this Comment will look at the major antitrust laws in the United States and their common themes; specifically the Sherman Antitrust Act[12] and the Clayton Act. Additionally, the first section will discuss the interplay between antitrust laws and the banking industry. In order to develop a clear understanding of what the antitrust laws have done to influence the enforcement of anticompetitive behavior in the banking industry, the Bank Merger Act of 1960, its amendments of 1966, and, *U.S. v. Philadelphia National Bank* will be discussed. Then, the bank merger review process will be examined to shed light on the level at which bank mergers are scrutinized.

The second part of this Comment will discuss whether the antitrust laws were "relaxed" so a failing industry could be remedied. Specifically, an analysis of the potential anticompetitive concerns the "too big to fail" phenomena has evoked will be highlighted. Additionally, part two of this Comment will discuss what, if anything, antitrust laws can do now and in the future to prevent such concerns from surfacing. New theories and congressional action will be examined as possible solutions to aid in antitrust enforcement of these banks that are even more than ever, "too big to fail."

I. *Background*

A. *The Sherman Antitrust Act*

During the late 19th century, the Nation was witnessing the development of large business conglomerates, or, trusts.[13] As these trusts became larger, so did the public's perception of the amount of power and influence these trusts could have on prices and the stifling of competition.[14] Because of the fear that monopolies were beginning to dominate America's free market economy, Congress passed the Sherman Antitrust Act (hereinafter referred to as the "Sherman Act") in 1890.[15] The purpose of the Sherman Act was not to protect businesses from the market; rather, it was to protect the public from failure

11. *Id.*
12. 15 U.S.C. §§ 1-7 (2006).
13. Sharon E. Foster, *Systemic Financial-Service Institutions and Monopoly Power*, 60 Cath. U. L. Rev. 357, 362-63 (2011).
14. *Id.* at 361-62.
15. *Id.* at 363.

of the market.[16] The Sherman Act "directs itself . . . against conduct which unfairly tends to destroy competition itself."[17] At its core, the Sherman Act looks to protect the public interest and quash anticompetitive tactics that might seek to harm that interest.[18]

The objectives of the Sherman Act are achieved through two substantive sections of broad coverage. Section 1 delineates and prohibits certain means of anticompetitive behavior.[19] The more pertinent section, for purposes of this Comment, is section 2. Section 2 deals strictly with the idea of monopolization and the prohibition of any acts, or conspiracies to monopolize. Section 2 states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .[20]

As noted above, monopolies were one of the driving concerns that lead to enactment and subsequent enforcement of the Sherman Act.[21] In one of the first cases to be brought under the Sherman Act, the United States Supreme Court explained the "evils which led to the public outcry against monopolies and to the final denial of the power to make them."[22] The Court described these evils as:

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16. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

17. *Id.*

18. *Id.* The Sherman Act's basic existence has been described as protection for the public:

> The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

19. Specifically, the Sherman Act states:

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

15 U.S.C. § 1.

20. *Id.* at § 2.

21. *See Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 52 (1911).

22. *Id.*

> (1) The power . . . to fix the price and thereby injure the public; (2) The power . . . of enabling a limitation on production [sic]; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.[23]

In a leading antitrust treatise it was explained, "[w]e worry about monopoly because of its generally evil result or potentialities: reduced output and higher prices, diminished incentives for innovation, and fewer alternatives for suppliers and customers."[24] The fight against collusion has been considered "the core of federal antitrust enforcement"[25] largely because "[c]oncerted activity inherently is fraught with anticompetitive risk."[26]

B. *The Clayton Act Section 7*[27]

The Clayton Act was enacted in 1914 as an effort to strengthen the antitrust laws as it was believed the Supreme Court had been too lenient on large corporations.[28] Section 7 of the Clayton Act (hereinafter referred to as "Section 7") is different from the Sherman Act in that it "is not intended to prohibit current anticompetitive behavior but instead is designed to preserve and promote market structures conducive to future competition by enabling judges to arrest monopoly or oligopoly in its incipiency."[29] This means regulators must promote competition by assessing and preventing particular mergers before any anticompetitive violations actually occur.[30] In fact, "even mergers

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23. *Id.*
24. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 3, ¶ 631, 48 (2d ed., Aspen Publishers 2002).
25. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 415 (2003).
26. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984).
27. 15 U.S.C. § 18.
28. Herbert Hovenkamp, *Clayton Act (1914)*, in *Major Acts of Congress* (Macmillan Ref. USA 2004) (available at http://www.encyclopedia.com/topic/Clayton_Antitrust_Act.aspx).
29. Dan W. Schneider, *Evolving Proof Standards Under Section 7 and Mergers in Transitional Markets: The Securities Industry Example*, 1981 Wis. L. Rev. 1, 6-7 (1981).
30. *Id.* at 7.

involving firms with relatively modest market shares have been enjoined when part of a growing trend toward concentration."[31]

The DOJ and the Federal Trade Commission (hereinafter referred to as the "FTC") jointly share the public responsibility to enforce the anti-merger law.[32] They enforce Section 7 through litigation in federal courts, or, through agency adjudication at the FTC, thus making the courts and the FTC the primary location where decisions regarding the competitive impact of mergers are made.[33] Because of the joint responsibility to enforce Section 7, it has been applied directly to mergers of firms in unregulated industries as well as those mergers involving regulated firms, including financial institutions.[34]

Like the Sherman Act, the Clayton Act prohibits particular anti-competitive conduct. Section 7 states:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[35]

To illustrate, Section 7 prohibits Corporation A from acquiring the stock of Corporation B, where such acquisition would result in a substantial lessening of competition between the acquiring firm, Corporation A, and the acquired company, Corporation B, or tend to create a monopoly in any line of commerce.[36] As the Court noted in *Brown Shoe Co. v. U.S.*, the Clayton Act did not explicitly bar the acquisition by one corporation of the assets of another.[37] It also did not appear to preclude the acquisition of stock in any corporation other than a direct

31. *Id.*
32. *Id.*
33. *Id.*
34. Schneider, *supra* n. 31, at 7; *see also infra* pt. I.B. discussing U*.S. v. Phila. Nat'l Bank*, 374 U.S. 321 (1963), discussed *infra*; *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).
35. 15 U.S.C. § 18.
36. *Brown Shoe*, 370 U.S. at 312-13.
37. *Id.*

competitor.[38] In order to circumvent the Clayton Act, companies would target the assets of their rivals. The Clayton Act was aimed at the development of holding companies and at the "secret acquisition of competitors" through purchase of all or parts of such competitors' stock.[39]

In 1950, the Clayton Act was amended in response to the rising fear of economic concentration in the economy.[40] Moreover, Congress was determined to eliminate the loophole that existed in the Clayton Act. Considerations also included Congress' desire to retain "local control" over industry, and the protection of small businesses.[41] Another important change was the inclusion of the coverage of the acquisition of assets so that acquisitions of both stock and assets could fall within the purview of the Clayton Act.[42]

C. *The Bank Merger Act of 1960 and 1966*[43]

The Bank Merger Act (hereinafter referred to as the "BMA") was passed in 1960, expressing similar goals as the Clayton Act, but was particular to bank mergers.[44] Congress passed the BMA after considering the competitive effects or possible antitrust implications of bank mergers.[45] In general, the BMA establishes a set of banking factors as well as a competition factor to be evaluated in merger cases.[46] The BMA required prior approval from an agency prior to merger approval. However, prior approval authority was divided among the three bank regulatory agencies: the Office of the Comptroller of the Currency (hereinafter referred to as the "OCC"), the Fed, and the Federal Deposit Insurance Company (hereinafter referred to as the "FDIC"), in accordance with the regulatory status of the resulting institution.[47]

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38. *Id.*
39. *Id.* at 314.
40. *Id.* at 315.
41. *Brown Shoe*, 370 U.S. at 315-16.
42. *Id.* at 316.
43. 12 U.S.C. § 1828.
44. Zora, *supra* n. 10, at 1178.
45. Bernard Shull & Gerald A. Hanweck, *Bank Mergers in a Deregulated Environment: Promise and Peril* 87 (Quorum Books 2001).
46. *Id.*
47. *Id.* The OCC has jurisdiction in cases where the resulting bank is to be a national bank. The Fed, however, has jurisdiction when the resulting bank is to be a state member bank. The FDIC has jurisdiction whenever the resulting bank is a

In each bank merger case, the appropriate agency was to request advisory opinions on competition issues from the other two agencies as well as the DOJ.[48]

After the BMA was enacted, several Supreme Court cases established a legal framework that was considered "impractical."[49] As it stood, a bank merger could be approved by a federal banking agency under BMA standards, consummated, and then challenged by the DOJ under antitrust standards.[50] This issue led to the 1966 amendments to the BMA.[51] The amendments prohibited the banking agencies from approving mergers that violated section 2 of the Sherman Act, as well as prohibiting mergers "whose effect may be to substantially lessen competition" or "which would be in restraint of trade."[52] The amended BMA also gave the DOJ the authority to obtain an automatic injunction to stay an approved merger if it entered suit after the appropriate banking agency made the initial approval.[53]

The relevant section of the BMA states:

> The responsible agency shall not approve - -
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> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
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> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[54]

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state-insured commercial bank, a mutual savings bank, or whenever the proposed acquired bank is an uninsured institution. *See* 15 U.S.C. § 1607(1)(A)-(C).

48. Shull & Hanweck, *supra* n. 47, at 87.
49. *Id.* at 90.
50. *Id.*
51. *Id.*
52. *Id.*
53. Shull & Hanweck, *supra* n. 47, at 91.
54. 12 U.S.C. § 1828(c)(5)(A)-(B).

D. *United States v. Philadelphia National Bank*[55]

In 1963, the Supreme Court decided the first case requiring the Court to consider the application of antitrust laws to the commercial banking industry.[56] Two major decisions were made in the case that would change the shape of antitrust law as it applied to the banking industry. First, the Court would for the first time, construe Section 7 to include mergers by banks. Second, the Court would clarify the interplay between the Clayton Act and the BMA.[57]

In the case, the Court analyzed the legality of a proposed merger between Philadelphia National Bank (hereinafter referred to as "PNB") and Girard Trust Corn Exchange Bank (hereinafter referred to as "Girard").[58] At the time of the proposed merger, PNB and Girard were the second and third largest banks of the 42 commercial banks located in the Philadelphia metropolitan area.[59] If the proposed merger were to be approved, the newly formed bank would be the largest in the Philadelphia metropolitan area with approximately "36% of the area banks' total assets, 36% of deposits, and 34% of net loans."[60]

The Court explained that Section 7 reaches acquisitions of corporate stock or share capital of any corporation engaged in commerce.[61] But, it only reaches those acquisitions of corporate assets by corporations subject to the jurisdiction of the FTC.[62] Therefore, the Court explained, if the proposed merger were deemed an assets acquisition, it would not fall within Section 7.[63] The court noted that when Section 7 was first enacted, it referred only to corporate acquisitions of stock and share capital, and said nothing regarding asset acquisitions, mergers, or consolidations.[64]

Prior to 1963, courts had found time and time again that mergers were beyond the reach of Section 7, even when mergers were used in

55. *Phila. Nat'l Bank*, 374 U.S. 321.

56. *Id.* at 324.

57. *Id.* at 350-356.

58. *Id.* at 330.

59. *Id*. (defining the Philadelphia metropolitan area as the City of Philadelphia and its three contiguous counties in Pennsylvania).

60. *Phila. Nat'l Bank*, 374 U.S. at 331.

61. *Id.* at 335-36.

62. *Id.* at 336. The provision of the Clayton Act specifying commissions and boards authorized to enforce compliance does not confer jurisdiction over banks upon the FTC. *See* 15 U.S.C. § 1521.

63. *Phila. Nat'l Bank*, 374 U.S. at 336.

64. *Id.* at 337.

place of a pure stock acquisition.[65] Because of the apparent loophole in Section 7, Congress in 1950 amended Section 7 to include an assets-acquisition provision.[66] The Court examined the legislative history and found that Congress primarily sought to bring mergers within Section 7 to close the loophole.[67] The Court determined that Congress intended to give Section 7 a reach that would bring all forms of "corporate amalgamations" within the scope of Section 7; from pure stock acquisitions to pure assets acquisitions.[68] The Court concluded that the stock-acquisition and assets-acquisition provisions, when read together, reach mergers.[69] As such, they went on to say that the specific exception for acquiring corporations not subject to the FTC's jurisdiction "excludes from the coverage of [Section] 7 only assets acquisitions by such corporations when *not* accomplished by merger."[70]

The Court noted that any other construction of Section 7 would be "illogical and disrespectful of the plain congressional purpose in amending [Section] 7, because it would create a large loophole in a statute designed to close a loophole."[71] The Court stated, "[i]t is unquestioned that the stock-acquisition provision of [Section] 7 embraces every corporation engaged in commerce, including banks."[72] The court also emphasized that the stock-acquisition provision encompassed all methods of direct and indirect acquisitions, including mergers and consolidations, and that the FTC did have jurisdiction over such acquisitions.[73] The Court applied Section 7 and, thereby dis-

65. *Id.* at 338-39.

66. *Id.* at 340.

67. *Id.* at 341. The Court noted that the legislative history was silent as to why the amendment made no specific mention of mergers, or why assets acquisitions by corporations not subject to FTC jurisdiction were not included. *Id.* But, the Court noted that the clear Congressional design emerged and those questions could be answered. *Id.*

68. *Phila. Nat'l Bank*, 374 U.S. at 342.

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.* at 343.

72. *Id.*

73. *Phila. Nat'l Bank*, 374 U.S. at 346-48. "[I]t is plain that Congress, in amending [Section] 7, considered a distinction for antitrust purposes between acquisitions of corporate control by purchase of stock and acquisition by merger unsupportable in reason . . . . If, therefore, mergers in industries outside the FTC's jurisdiction were deemed beyond the reach of [Section] 7, the result would be precisely that difference in treatment which Congress rejected." *Id.* at 343-44.

missed the argument that Section 7 does not include bank mergers in its stock-acquisition provision.[74]

The Court also discussed the interplay between the Clayton Act and the BMA.[75] First, the Court noted that PNB and Girard argued that the BMA directed banking agencies to consider competitive factors before a merger was to be approved, thereby immunizing approved mergers from challenges under federal antitrust laws.[76] The Court rejected this notion stating that there is no express immunity prescribed by the BMA.[77] Further, the Court clarified that the BMA did not preclude the application of Section 7 to bank mergers.[78] But, they noted, their application of the Clayton Act did nothing to diminish the power of the BMA. The Court further explained that the BMA and the Clayton Act are complimentary to one another, and one does not need to be applied over the other.[79]

The Court proceeded to apply Section 7, examining the relevant market of the banks in order to determine if there was indeed a competitive overlap, and if the overlap would have an effect on competition in the market.[80] The Court pointed out that an examination of anti-competitive effects of a merger "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended [Section] 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[81] The Court therefore determined that bank mergers fell directly under the purview of Section 7; to prevent possible anticompetitive effects at the time the merger is proposed, and in considering any future ramifications.[82]

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74. *Id.* at 343.
75. *Id.* at 350-56.
76. *Id.* at 350.
77. *Id.*
78. *Phila. Nat'l Bank*, 374 U.S. at 354.
79. *Id.* at 354-55. "Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. . . . If, in addition, bank mergers are subject to [Section] 7, we do not see how the objectives of the 1960 Act are thereby thwarted." *Id.* at 354.
80. *Id.* at 357.
81. *Id.* at 362.
82. *Id.* at 363.

E. *The Bank Merger Review Process*

Much like the merger process in other industries, bank merger proposals are submitted to relevant agencies; usually the FTC or the Fed, and the Antitrust Division (hereinafter referred to as the "Division") of the DOJ.[83] The DOJ, along with the agencies, screen the proposed mergers to categorize the mergers as those that need further scrutiny, or those that do not require further inquiry into anticompetitive effects.[84] The agencies employ a system that recognizes and analyzes relevant geographical market areas.[85]

Once a relevant market is determined, the remaining analysis contains five steps. First, the Division and the federal banking agencies begin by "determin[ing] whether or not a proposed merger would significantly increase concentration in the relevant market and result in a high level of concentration in that market."[86] Second, the Division and the federal banking agencies assess whether the merger raises concerns about potential anticompetitive effects "resulting from increased concentration or other factors."[87] Third, an assessment is made as to whether other firms would be likely to enter the market to compete with the "survivor of the merger and prevent supracompetitive price increases."[88] Fourth, the Division and the federal banking agencies assess any gains in efficiency that might result from the merger.[89] Fifth, and finally, a consideration is made regarding the possibility that the merger may be necessary to prevent the failure of one of the parties.[90]

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83. Zora, *supra* n. 10, at 1180; *see also* United States Department of Justice, *Bank Merger Competitive Review – Introduction and Overview (1995)*, http://www.justice.gov/atr/public/guidelines/6472.htm (accessed Dec. 2, 2011).

84. Zora, *supra* n. 10, at 1180. Further scrutiny requires the investigation to other information related to the proposed merger. "Such information may include: evidence that the merging parties do not significantly compete with one another; evidence that rapid economic change has lead to an outdated geographic market definition, and that an alternate market is more appropriate; evidence that market shares are not an adequate indicator of the extent of competition in the market . . . ." *Id.*

85. *Id.* at 1181.

86. Tim McCarthy, *Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 Duke L.J. 865, 871 (1997).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

II. *Analysis*

A. *Was the Clayton Act "Relaxed," Exacerbating the "Too Big To Fail" Concern?*

It has been theorized that the antitrust laws were not strictly enforced during the financial collapse of 2008, thereby adding to the "too big to fail" concern.[91] With the quick-fix mergers being approved between very large financial institutions, the concern is that the federal government only added to the problem instead of addressing the issue of systemic risk in the financial industry.[92]

The antitrust laws seek to deter anticompetitive conduct, either through monopolistic activity, or through mergers that could lessen competition in the marketplace. The Clayton Act seeks to curtail corporate mergers or acquisitions that could lead to significant anticompetitive effects.[93] There is, however, no regulation on the size of particular institutions.[94] Without such regulation, the antitrust laws are limited in what they can do to deter the "too big to fail" issue.

But, it has been argued, the Nation's banks were already at the point where they were "too big to fail."[95] So, even if antitrust laws were relaxed so that certain mergers and acquisitions could be made, the institutions involved had already evolved to the point where they were too large and powerful.[96] Moreover, because of the size of the banks involved, they were so heavily rooted in the industry, the threat of systemic risk was already an issue.

The fact that some institutions were already at the point of "too big to fail" was evidenced by the Treasury Department's Troubled Asset Relief Program.[97] The Treasury bailed out some of these large, powerful banks with a seven-hundred billion dollar bailout plan. In doing so, the government publicly conceded that some of these institutions

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91. *See* Zora, *supra* n. 10, at 1176.

92. *Id.*

93. 15 U.S.C. § 18.

94. *See* Lawrence J. White, *Financial Regulation and the Current Crisis: A Guide for the Antitrust Community* (June 9, 2009) (available at http://webdocs.stern.nyu.edu/old_web/economics/docs/workingpapers/2009/fin%20reg%20and%20antitrust%20revised%206-9-09.pdf).

95. Dave Lindorff, *'Too Big to Fail' Has an Easy Answer: Anti-Trust or Public Control or Ownership*, http://www.opednews.com/articles/-Too-Big-to-Fail-Has-an-E-by-Dave-Lindorff-081111-592.html (Nov. 11, 2008).

96. *Id.*

97. 12 U.S.C. § 5211-5241 (2006).

were indeed "too big to fail," and needed government funding in order to remain operational.[98]

Moreover, mergers were approved with the hope that by combining a failing bank with a large, powerful bank, systemic risk could be averted.[99] However, some of these mergers were viewed as only adding to the existing problem.[100] Nouriel Roubini, chairman of Roubini Global Economics has stated that, "[t]he too big to fail problem has become an even too bigger to fail problem."[101] He has made the prediction that the mergers made during the recession raise the risk that the government will have to bail out even larger financial institutions in the future.[102]

Another glaring concern regarding bank consolidation in 2008 is the concern for the effect on the consumer.[103] With such an extraordinary rate of mergers and acquisitions among the Nation's leading financial institutions, one wonders what the impact will be on the consumer and their choice in products. The fear is that small and medium-sized banks will either be swallowed by the competition from the newly formed mega banks. Additionally, there is concern that small and medium-sized banks will be pressured by the federal government or the FDIC to secure their deposits by agreeing to be purchased by one of the larger banks.[104] If events like this were to occur, customers could face less choice in the marketplace and the potential for higher fees for products offered.[105]

Results that cause a negative impact on the consumer are precisely what the antitrust laws were designed to prevent. The concern for the consumer has always been the primary focus in preventing monopolistic or anticompetitive behavior. If such extreme consolidation wipes out small or medium-sized banks from the field of choices to the consumer, the larger banks, with their newly acquired market share, can take advantage by increasing the price of the products they offer.

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98. Zora, *supra* n. 10, at 1188.

99. Foer, *supra* n. 5, at 7.

100. Weiss, *supra* n. 1.

101. *Id.* (internal quotations omitted). Roubini is a professor at New York University's Stern School of Business, and, the chairman of Roubini Global Economics. *Id.* He is also widely credited with predicting the economic crisis of 2008. *Id.*

102. *Id.* (stating "that is what happens when you do mergers that don't make any sense").

103. Zora, *supra* n. 10, at 1186.

104. *Id.*

105. *Id.*

Despite theories that the antitrust laws were circumvented to prevent a catastrophic financial disaster, the law in fact allows for such actions to take place. Such an idea was alluded to by Justice Brennan in *U.S. v. Philadelphia National Bank*.[106]

Justice Brennan, in rejecting the argument that the application of the precompetitive policy of Section 7 to the banking industry would have dire consequences, noted that Section 7 does not mandate "cutthroat competition in the banking industry."[107] Instead, he noted Section 7 does not exclude defenses based on dangers to liquidity or solvency, "if to avert them a merger is necessary."[108] Justice Brennan went on to note, the failing-company defense that emerged in *International Shoe Co. v. Federal Trade Commission*[109] might have greater contours as applied to bank mergers.[110] Because there is greater public impact of a bank failure, as opposed to an ordinary business failure, the necessity of a proposed bank merger with a failing bank could potentially override any anticompetitive consequences of the merger.[111] This same concept is embodied in section 1828(c)(5)(b) of the BMA.[112]

Under section 1828(c)(5)(b), proposed mergers are approved if there are overarching public policy concerns surrounding the merger.[113] Mergers, under the BMA, are not to be approved if the effect, in any section of the country, may substantially lessen competition.[114] However, if the anticompetitive effects of the transaction are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served," the merger may be approved.[115] In fact, section 1828(c)(6) allows regulators to act swiftly in order to prevent the probable failure of one of the institutions involved in the proposed merger.[116]

The BMA specifically delineates that if the prevailing public interest outweighs any possibility of anticompetitive effects as a result of the merger, the merger is not only allowed to be approved, but, it

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106. *Phila. Nat'l Bank*, 374 U.S. at 371-72.
107. *Id.* at 371.
108. *Id.* at 371-72.
109. *Int'l Shoe Co. v. Fed. Trade Comm'n*, 280 U.S. 291 (1930).
110. *Phila. Nat'l Bank*, 374 U.S. at 372 n. 46.
111. *Id.*
112. 12 U.S.C. § 1828(c)(5)(b).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at § 1828(c)(6).

should be done in an expedited manner.[117] By enabling regulators to make immediate moves to approve a proposed merger when one party to the transaction is a failing bank, the BMA appears to allow for a limited, curt, antitrust analysis of the proposed merger.

Arguments have been made that the federal government relaxed the antitrust laws so that these mergers could take place.[118] But, when the law allows for approval of such mergers, specifically bank mergers, can the government be blamed for utilizing a measure that has clearly been spelled out? At a time when the biggest banks in the nation were facing imminent demise, was there such need for an in depth antitrust analysis or bank merger review?

According to the BMA, the answer is clearly no.[119] The failing company defense sets out the basic idea that there may be times when, in order to save a failing company, a merger is necessary despite the anticompetitive consequences such a merger may have.[120] However, when the same concept is applied to the banking industry, the necessity of the merger becomes more apparent when the public policy concerns are analyzed. As the nation saw in the financial collapse of 2008, there was an unprecedented need to save some of the largest financial institutions in the industry. The BMA enabled regulators to circumvent the normal antitrust analysis in order to expedite mergers that were deemed necessary in light of the prevailing public interest.

B. *What Can Antitrust Do Now?*

After looking at the antitrust laws and the issues related to the financial collapse of 2008, we must begin looking towards the future. How can antitrust laws, if at all, help aid in deterring big banks from reaching a point where they are "too big to fail?"

The first theory that has been suggested is to amend the antitrust laws to account for the risk of a "too big to fail" scenario.[121] One would assume that antitrust law is directly tied to limiting the size of

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117. § 1828(c)(5)(b).

118. *See generally* Zora, *supra* n. 10.

119. 12 U.S.C. § 1828(c)(5)(b) (stating that mergers can be approved when the anticompetitive effects are outweighed by the prevailing public interest and needs); *see also* § 1828(c)(6) (outlining the importance of expediting the merger process).

120. *See* 12 U.S.C. § 1828(c)(5)(b); *see also Phila. Nat'l Bank*, 374 U.S. at 372 n. 46.

121. Interview by Bob Moon with Zephyr Teachout, Associate Professor of Law, Fordham University School of Law (Apr. 21, 2009).

an organization. However, modern antitrust is really not about the size of an institution; rather, it is based on competition and market share.[122] It has been suggested that by enforcing some variation of a "size cap" on the nation's biggest banks through antitrust laws, this could limit the impact and "systemic risk" one large bank could have on the entire economy.[123] A size cap would not only limit the risk that a bank is simply too large, and most likely "too big to fail," but it would also add another step in the bank merger review process.

By establishing at the outset that a particular proposed merger or acquisition would make an institution "too big to fail," it would prevent the mergers from being approved in the first place.[124] Albert Foer, the President of the American Antitrust Institute has even proposed amending the Clayton Act to permit federal regulators to include such an analysis into their merger review process.[125] According to Foer, the antitrust laws had not been empowered to "stop mergers on the basis of either the absolute size of the resulting institution or a calculation of the systemic consequences of their eventual failure."[126]

Size caps on banks were imposed by the banking reforms of the 1930's in response to the Great Depression.[127] There were efforts to maintain such restrictions in the Riegle-Neal Act of 1994[128], but, according to Simon Johnson, these limitations fell by the wayside during the "wholesale deregulation" of the past 15 years.[129] Considering the events of the past few years, size caps could alter the way in which antitrust laws can be applied to the banking industry.

Such a theory makes sense in light of the social, political, and legislative history of the antitrust laws. By limiting the size and power a

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122. *See* White, *supra* n. 96.

123. Simon Johnson, Economix, *An Antitrust Investigation of the Banks?*, http://economix.blogs.nytimes.com/2010/01/21/an-antitrust-investigation-of-the-banks/ (Jan. 21, 2010, 7:17 a.m. ET).

124. Zora, *supra* n. 10, at 1193.

125. Foer, *supra* n. 5, at 12.

126. H.R. Subcomm. on Cts. and Competition Policy of the Comm. on the Jud., *'Too Big to Fail?': The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry,* 111th Cong. 7 (Mar. 17, 2009) (Statement of Albert A. Foer, President of the American Antitrust Institute) [hereinafter *Statement of Albert A. Foer*].

127. Simon Johnson, *A Roosevelt Moment for America's Megabanks?*, http://www.project-syndicate.org/commentary/johnson10/English (July 14, 2010).

128. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994).

129. *Id.*

single institution carries, not only will the economy be protected, but consumers and the marketplace will as well. By limiting the size and power through a "too big to fail" analysis, not only will the risk of a failing mega-bank be quashed, but, so will any potential anticompetitive behavior.[130] If these large bank mergers continue to happen, there is severe risk that the result will "substantially lessen competition."[131]

Another important step towards adding a solution to the problem has already been implemented in the Dodd-Frank Wall Street Reform and Consumer Protection Act[132] (hereinafter referred to as "Dodd-Frank"). Section 121 of Dodd-Frank (or what has been referred to as the Kanjorski Amendment) (hereinafter referred to as "Section 121") looks to give a regulating body the power to limit the size of banking institutions.[133]

Section 121 outlines specific steps the Board of Governors of the Fed may take when a bank holding company with $50,000,000,000 or more of consolidated assets, or, a nonbank financial company, poses a "grave threat to the financial stability of the United States."[134] Section 121 creates a Financial Stability Oversight Council that will have authority over the Board of Governors in implementing the sanctions outlined in Section 121. When a specific institution poses a threat to the financial stability of the country, the Board of Governors may take four steps to limit its power.[135]

First, the Board of Governors may limit the ability of the company to merge, acquire, consolidate, or otherwise become affiliated with another company. Second, they can restrict the ability of the company to offer financial products or products.[136] Third, they can require a company to terminate one or more of its activities.[137] Fourth, they may impose conditions on the manner in which the company conducts one or more of its activities.[138] Finally, the most drastic step can be

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130. Simon Johnson, The Baseline Scenario, *Bring in the Antitrust Division (On Banking)*, http://baselinescenario.com/2009/04/16/bring-in-the-antitrust-division-on-banking/ (Apr. 16, 2009).
131. 15 U.S.C. § 18.
132. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
133. 124 Stat. at 1410.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. 124 Stat. at 1410.

taken: if the Board of Governors determines the actions taken in the first four steps are inadequate to mitigate the threat to the financial stability of the country, it may require the company "to sell or otherwise transfer assets or off-balance-sheet items to unaffiliated entities."[139]

Section 121 has been touted as a "new form of antitrust."[140] This new amendment gives regulators the responsibility to limit the scope of big banks, and, if necessary, break them up when they pose a grave risk to financial stability.[141] By empowering regulators with the ability to break up big banks when necessary, the hope is that no bank will ever become "too big to fail" again.

Although not rooted in antitrust law, Section 121 attempts to address concerns similar to those that existed at the time of the Clayton Act's enactment. By limiting the actions of the megabanks, and with the ability to break them up, the amendment addresses the newest antitrust concern – the size of an institution. These giant banks are so heavily rooted in the financial system that the collapse of one, as evidenced by the collapse of 2008, sends shockwaves throughout the entire industry. Section 121 attempts to address the systemic risk that poses a constant threat to the industry.

However, it has been argued that Section 121 will not be the key to complete prevention of future crises. Arguments have been made that the amendment would not really aid in identifying problems in a particular institution until after "trouble erupts."[142] It has been argued that by the time serious concerns about an institution surface, it will be too late for the Council to do anything drastic enough to alter the effect it may have on the industry.[143] But, there are still those who believe the amendment will do precisely what it is intended to do.

One last suggestion has been that the federal government needs to enforce strict adherence to the antitrust laws.[144] Since many mergers have been approved and expedited, it has been argued that there should be a fallout period for any mergers or acquisitions in the finan-

139. *Id*.
140. Johnson, *supra* n. 129.
141. *Id.*
142. Charles Schillinger, *Kanjorski Amendment Praised by Top Economist*, The Times Tribune, July 10, 2010 (available at http://thetimes-tribune.com/kanjorski-amendment-praised-by-top-economist-1.884332#axzz1fD7kW2rK).
143. *Id.*
144. Zora, *supra* n. 10, at 1192.

cial industry.[145] The hope is to adhere to strict antitrust compliance as the large banks divest assets in the post-merger/post-crisis time period. It would allow the large banks to decrease in size, and would prohibit mergers and acquisitions for s significant period of time.

With strict antitrust enforcement, the regulators have an opportunity to prevent the large banks from continuing on a growth trend. By limiting the movement they can make in the market, not only is there an emphasis on controlling the size of the organizations, but there is also an emphasis on controlling anticompetitive behavior. The market shares have all changed in light of large banks that did not survive the crisis. With strict antitrust enforcement, there can be a closer watch on the market share of large banks. Further, regulators can ensure that with the new gain in market share, the newly formed, bigger banks are limited in their anticompetitive behavior.

Additionally, it has been suggested that in light of the new layout of the financial institutions, since the changes during the financial crisis of 2008, the Antitrust Division of the DOJ needs to investigate how the change has affected the industry.[146] Investigations should be made into the increasing market share of major banks, the anticompetitive practices of some market leaders, and, the broader increase in economic power of the biggest banks and its potential effect on the consumer.[147]

While it may cost time and energy, it is necessary that we evaluate how the industry has changed from a competition standpoint. Bear Stearns and Lehman Brothers are no longer players in the industry. In addition, other major changes occurred that have changed the face of competition and market share in the banking industry. Some insight into the changes and how they have affected, or may affect the consumer is necessary to gauge how strict adherence to antitrust laws can aid in limiting any negative impact these changes may have had.

CONCLUSION

The antitrust laws play an important part in protecting the consumer. They also play an important role in protecting the marketplace for competitors to have a fair and equal field. The Sherman Act and the Clayton Act have ensured that anticompetitive behavior is wiped from

145. *Id.*
146. Johnson, *supra* n. 132.
147. *Id.*

the market and that free enterprise can last among growing titans of industry. As they have become integrated into the banking industry, the laws have changed themselves to cover the specificities of a regulated industry.

The financial crisis of 2008 proved a trying time for regulators and law-makers alike. With the looming threat of financial collapse, measures were needed to protect the economy and ensure that our financial system could last through the storm. The federal government took steps they deemed necessary to try to rescue banks that no one ever imagined could fail. These measures have proved controversial and many arguments have been made for and against whether they should have been implemented.

From what has been discussed in this Comment, it becomes clear that antirust regulation would not have prevented the financial crisis of 2008; specifically, the "too big to fail" issue. The antitrust laws were not armed with the tools necessary to prevent such a scenario from happening.[148] Further, modern antitrust laws are not in place to regulate the size of institutions. Instead, they are enforced to prohibit anticompetitive behavior, monopolistic activities, and prevent mergers and acquisitions when the result would substantially lessen competition.[149]

The "quick-fix" mergers approved by the DOJ and the Fed set a dangerous precedent for our regulatory agencies in regards to a response to imminent financial collapse. Although the process may have been necessary, it also exacerbated the "too big to fail" issue that was plaguing the economy at the time of the collapse. Allowing an institution like Bank of America to purchase two failing entities, only creates a larger, more powerful financial organization that is even more deeply rooted in the economy.

Now, it might be possible for legislation to come to the rescue. With Dodd-Frank, Congress hopes a more regulated financial industry will promote stabilization and transparency as well as putting an end to the "too big to fail" concern. Specifically, Section 121 provides regulators with the right and responsibility to prevent mergers and acquisitions of large financial institutions. Further, it provides the opportunity to break up institutions deemed liable to pose a significant threat to the financial stability of the United States. Although not spe-

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148. *Statement of Albert A. Foer*, *supra* n. 128.
149. *See* 15 U.S.C. §§ 1-2, 18.

cifically and antitrust regulation, it echoes the common themes of the Clayton Act by preventing, in one way or another, potential anticompetitive practices at their incipiency.

However, the question still remains: "is it possible to rid the financial industry of systemic risk?" After looking at the actions that were taken by the regulatory agencies in the wake of the financial crisis, the answer is no. Mergers were being approved that allowed large banks to acquire other large banks. In doing so, they became even more deeply rooted into the economy. If the risk is a contemporaneous failure of a substantial number of financial institutions, or, a financial market controlling a significant portion of financial resources, then allowing large powerful banks to become even more deeply rooted in the economy is not the solution that is needed.

The precedent that was set by the federal government and the Fed appears to be a dangerous one. The "too big to fail" concern seems to have only gotten worse in light of the mergers that took place. If large banks continue to grow and merge without serious consideration for the antitrust laws, the problem of "too big to fail" will never truly be erased. In addition, the possibility for anticompetitive results will only continue to grow. Mergers need to be strictly scrutinized under both the Clayton Act and the BMA. With a strict, two-layered approach to the merger approval process, there is potential for strict limitation on the size that these large banks can become.