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The Forgotten Bank Holding Company Act Of 1972

Law360, New York (June 12, 2012, 5:18 PM ET) -- The Bank Holding Company Act ("BHCA") was enacted by Congress to deter misconduct and compensate victims by permitting "[a]ny person who is injured in his business or property by reason of anything forbidden" in Section 1972 to bring suit. 12 U.S.C. § 1975. Congress intended the expansive BHCA to protect against the banking industry's inherent coercive and anti-competitive market power by granting a private right of action to "any person" injured by "anything forbidden" in the statute, adopting per se liability, rejecting more rigorous requirements found in antitrust law, and awarding treble damages, fees and costs.

This article is intended to provide practitioners with an overview of the BHCA and its application in today's contentious banking marketplace. After the Great Depression, Congress passed the Glass-Steagall Act requiring that commercial and investment banks be separate. Those "affiliation restrictions" were overturned in 1999 upon passage of the Gramm-Leach-Bliley Act permitting commercial and investment banks to again merge. As a result, banks often seek to bundle services providing customers with checking and savings accounts, mortgage financing, and investment advice under the rubric of serving as a "one-stop shop." This cross-selling of services to gain a competitive advantage risks a per se violation of the BHCA.

The Statute

The anti-tying provisions of the BHCA provide:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
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> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

12 U.S.C. § 1972 (1)(A)-(E).

The BHCA reflects Congress' intent to prohibit tying arrangements that might not violate general antitrust statutes. In Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 497 (1969), the plaintiff alleged an illegal tying arrangement under the Sherman Act whereby the defendant steel corporation and its wholly owned credit corporation, as a condition of providing loans from the credit corporation for the development of certain land, required the plaintiff to purchase at inflated prices prefabricated houses manufactured by the steel corporation for erection on the lots acquired with the loan proceeds.

While the U.S. Supreme Court initially held that tying arrangements under the Sherman Act were unreasonable per se when defendant had sufficient economic power with respect to the tied product, it later overruled that holding on the ground that market and economic power were inferred from the "uniqueness" of the transaction rather than having been affirmatively established by the evidence. See United States Steel Corp. v. Fortner Enters. Inc., 429 U.S. 610, 622 (1977).

In response, Congress passed the BHCA to ensure that bank tying arrangements would be subject to per se liability even in the absence of showing a bank's market and economic power. That intent is confirmed by explicit legislative history that Congress intended to provide per se liability to bank tying arrangements that might otherwise not be actionable under general antitrust principles:

> [T]he proposed new section would go beyond the Fortner decision [under antitrust law], which did not go so far as to hold tie-ins involving credit illegal per se. Thus, the proposed section would prevent the further spread of seriously anticompetitive practices which have developed in the banking and financial areas.

S. Rep. No. 1084, 91st Congress, 2d Session; H.R. 6778, at 48 (Supplementary View of Richard W. McLaren, Asst. Atty. General, Anti Trust Div.); see also Dibidale of Louisiana, Inc. v. American Bank & Trust Co., 916 F.2d 300, 305 (5th Cir. La. 1990) ("[T]he anti-tying provisions [of the BHCA] were intended to regulate conditional transactions in the extension of credit by banks more stringently than had the Supreme Court under the general antitrust statutes") (citing S. Rep. No. 1084, 1970 U.S. Code Cong. & Admin. News at 5558 (Letter of Assistant Attorney General Richard McLaren)); JST Props. v. First Nat'l Bank, 701 F. Supp. 1443, 1449 (D. Minn. 1988) ("Congress established a per se bar to tying arrangements involving banks"); Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 552 (S.D.N.Y. 1985) (same).

The preeminent authority on the BHCA — the statute's draftsman — also has emphasized that Congress intended an expansive application:

> Taken together, the important public policies of compensation and deterrence weigh conclusively in favor of an expansive interpretation of Section 1972's scope. Bank customers injured as a result of anti-competitive tying arrangements should be provided with liberal access to recovery pursuant to the federal statutory remedy embodied in Section 1972. Narrow or hyper technical construction of Section 1972 should and must be rejected.

Naegele, Timothy, "The Anti-Tying Provision: Its Potential Is Still There," 100 Banking L.J. 138, at *14 (1983) ("Naegele") (citing S. Rep. No. 1084, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5559, 5561).

Courts properly have declined to apply general antitrust principles to constrict BHCA claims. The Ninth Circuit has held that a BHCA plaintiff is not required to show it was actually coerced into accepting the unlawfully conditioned "credit, property, or service." See S & N Equip. Co. v. Casa Grande Cotton Fin. Co., 97 F.3d 337, 346 (9th Cir. 1996) ("Although some showing of coercion may be required under the Clayton Act and the Sherman Act ... it is not a requirement under the Bank Holding Company Act."), accord Dibidale, 916 F.2d at 306 (refusing to restrict the "condition or requirement" language to instances in "which a seller is literally forced to purchase or provide a tied product or service in order to obtain credit [because it] would vitiate that section's intended role …") (citing Conf. Rep. No. 1747, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 5561, 5569).

Additionally, Congress provided for treble damages in order to emphasize its intent that the BHCA deter bank misconduct at the risk of punitive sanctions, and further provided for costs and fees to promote private suits. 12 U.S.C. § 1975 ("Any person who is injured in his business or property by reason of anything forbidden in [Section 1972] may sue therefor … and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."). See also Naegele at *14 (1983) (citing S. Rep. No. 1084, 91st Cong., 2d Sess. 1, reprinted in, 1970 U.S. Code Cong. & Ad. News 5519, 5559, 5561) ("In enacting Section 1972, Congress recognized that the government has limited resources to prevent or restrain illegal tie-in arrangements. The availability of a private treble damages suit was viewed as a valuable supplement to government suits.").

In Dibidale, supra, the leading decision interpreting the BHCA, the Fifth Circuit held that an actionable tying arrangement may arise even from a customer's realization that its chances of securing a loan are improved by "volunteering" to accept additional banking services. After an exhaustive review of the act and its legislative history, the Fifth Circuit concluded:

To restrict the scope of those words to tying arrangements in which a seller is literally forced to purchase or provide a tied product or service in order to obtain credit would vitiate that section's intended role for, as Congress recognized, a tying arrangement may squelch competition whether coercive or not:

> Tie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by "volunteering" to accept [or provide] other products or services rather than seeking them in the competitive market place. In either case, competition is adversely affected, as customers no longer purchase a product or service on its own economic merit.
>
> Reciprocity, which involves the induced provision of products and services by the customer rather than his acceptance of other products and services, may also come about in these involuntary or "voluntary" manners.

Conf. Rep. No. 1747, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 5561, 5569). ...

Unlike the general marketplace where the power to coerce a consumer to accept a tying arrangement is directly related to the market power of the proposed coercer, in the banking industry the power to coerce is inherent in the banking relationship itself, regardless of an individual bank's market power. The transaction costs associated with establishing or severing a banking connection, as well as the loss of confidential financial data that can result from a banking change, dissuade frequent changes. This environment, which provides a suitable climate for the imposition of "voluntary" tying arrangements, is a far cry from the tying paradigm of the general antitrust statutes with its emphasis on market power and coercion.

Id. at 306.

It is thus not necessary for a BHCA plaintiff to show a bank's coercion, economic power, or an anti-competitive effect. In enacting the BHCA, Congress recognized the inherent economic power of the banking industry stemming from its monopolistic control over credit:

> The economic power of the banking industry stems from the aggregate control of banks over credit. In light of this unique economic role that banks play, Congress perceived conditional transactions involving credit as inherently anti-competitive, operating to the detriment of banking and non-banking competitors alike; thus the anti-tying provisions were intended to regulate conditional transactions in the extension of credit by banks more stringently than had the Supreme Court under the general antitrust statutes.

Dibidale, 916 F.2d at 305 (citing S. Rep. No. 1084, 1970 U.S. Code Cong. & Admin. News at 5558 (Letter of Assistant Attorney General Richard McLaren)). See also JST Props., 701 F. Supp. at 1449 ("even if evidence of market power and the effect on interstate commerce are insufficient to state a cause of action under the Sherman Act, a litigant can still recover under Section 1972 of the Bank Holding Company Act") (citing Naegele).

In fact, BHCA liability does not even depend upon whether the customer actually purchases the tied service: "The BHCA does not require that tying occur, only that a promise be made. The promise need not be fulfilled for liability to arise under the BHCA." Adelphia Recovery Trust, 646 F. Supp. 2d at 497; accord Amerifirst Props. Inc. v.FDIC, 880 F.2d 821, 825 (5th Cir. 1989) (same). Rather, liability attaches the instant a bank conditions the extension of credit on an additional service.

Conclusion

The act's expansive scope, liberal pleading requirements, and provision for treble damages, costs and legal fees to promote private suits to police bank misbehavior render it an attractive option for consideration in foreclosure proceedings, bankruptcies, lender liability suits, and related litigations.

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