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Bank Mergers and the Antitrust Laws: The Case For Dual State And Federal Enforcement

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BANK MERGERS AND THE ANTITRUST LAWS: THE CASE FOR DUAL STATE AND FEDERAL ENFORCEMENT

ROBERT F. ROACH*

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I. INTRODUCTION

In recent years, the banking industry has experienced a marked trend toward concentration, with a substantial increase in the number of mergers and acquisitions.¹ Commentators project that this trend will continue for the foreseeable future.² Although interstate mergers³ have resulted in a greater number of national and super-regional banks,⁴ the business of banking

1. According to a 1992 Congressional Staff Report, "The greatest wave of bank mergers in the history of the United States, both in-market and interstate, is sweeping the banking industry." STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 102D CONG., 2D SESS., ANALYSIS OF BANKING INDUSTRY CONSOLIDATION ISSUES 1 (Comm. Print 1992) [hereinafter CONSOLIDATION ISSUES]. A Federal Reserve Board study reports that the number of bank mergers and acquisitions increased from 144 mergers and acquisitions in 1978 involving \$5.5 billion in assets to 710 mergers and acquisitions in 1987 involving \$131.4 billion in assets. *Bank Mergers: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 1st Sess. 190 (1991) [hereinafter *Bank Merger Hearings*] (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve System). According to the Board, during the 1980s, there were almost 5000 bank mergers and acquisitions involving almost \$650 billion in assets. *Id.* The average annual rate of bank mergers and acquisitions for the 1980s was double the rate of the 1970s and triple the rate for the 1960s. Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 961 (1992).

2. *Bank Merger Hearings*, *supra* note 1, at 278 (statement of Professor Lawrence J. White, Stern School of Business, New York University); see also Timothy H. Hannan & Stephen A. Rhoades, *Future U.S. Banking Structure: 1990 to 2010*, 37 ANTITRUST BULL. 737, 764-770 (1992). Using current rates of consolidation, Hannan and Rhoades project that the number of banking organizations may decrease from 9908 in 1989 to as few as 5031 in 2010. *Id.* at 768.

3. The term "mergers" as used herein refers to all types of mergers, acquisitions, and consolidations.

4. See Geoffrey P. Miller, *Legal Restrictions On Bank Consolidation: An Economic*

remains substantially local in nature.⁵ Accordingly, banking remains a subject of significant state interest and regulation.⁶

Given the potential impact on local economies resulting from the consolidation trend,⁷ state attorneys general have become increasingly active in merger analysis.⁸ Indeed, since 1990, state attorneys general have matched the United States Department of Justice in reported challenges to proposed bank mergers.⁹ Despite the recent success of state attorneys general in

Analysis, 77 IOWA L. REV. 1083, 1087-88 (1992).

5. See, e.g., Gregory E. Elliehausen & John D. Wolken, *Banking Markets and the Use of Financial Services by Households*, 78 FED. RESERVE BULL. 169 (1992) [hereinafter Elliehausen & Wolken, *Households*] (stating that consumers cluster their purchases of banking products at local institutions); Gregory E. Elliehausen & John D. Wolken, *Banking Markets and the Use of Financial Services by Small and Medium-Sized Businesses*, 76 FED. RESERVE BULL. 801 (1990) [hereinafter Elliehausen & Wolken, *Small Businesses*] (stating that empirical evidence suggests that small businesses generally conduct their banking within a five mile radius); Hannan & Rhoades, *supra* note 2, at 744-45; see also *infra* notes 74-92 and accompanying text.

6. See *infra* notes 129-44 and accompanying text.

7. See *infra* notes 74-92 and accompanying text.

8. *Bank Merger Experts Offer Tips on Murky Scene for Acquisitions*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1629 at 294 (Aug. 26, 1993) (comments of Charles James, former Acting Chief, Antitrust Division, United States Department of Justice, to the American Bar Association).

9. The antitrust enforcement program of the United States Department of Justice during the 1980s has been criticized as lax. See, e.g., *Antitrust Implications of Bank Mergers and the Role of Several States in Evaluating Recent Mergers: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 2d Sess. 1 (1992) [hereinafter *Antitrust Implications*] (statement of Rep. Gonzalez, Committee Chairman); SOUTHERN FINANCE PROJECT, *THE BIGGER THEY COME: MEGAMERGERS AND THEIR IMPACT ON BANKING MARKETS* 2 (1991) [hereinafter *THE BIGGER THEY COME*]. Between fiscal years 1986 and 1990, the United States Department of Justice did not file a single antitrust suit related to a combination of depository institutions, despite reviewing over 9000 bank merger applications during that time period. *Id.* at 8. Since 1990, the Department of Justice has become much more aggressive, successfully challenging five proposed bank mergers. See *United States v. Texas Commerce Bancshares*, 1993-2 Trade Cas. (CCH) ¶ 70,326 (N.D. Tex. 1993) (Texas Commerce Bancshares' merger with Texas Commerce Bank, Midland, N.A. and Texas Commerce Bank, Beaumont, N.A.); *United States v. Texas Commerce Bancshares*, 1993-2 Trade Cas. (CCH) ¶ 70,363 (N.D. Tex. 1993) (same); *United States v. Society Corp.*, 1992-2 Trade Cas. (CCH) ¶ 69,892 (N.D. Ohio 1992) (Society Corp.'s merger with Ameritrust Corp.); *United States v. Fleet/Norstar Fin. Group*, 1991-2 Trade Cas. (CCH) ¶ 69,646 (D. Me. 1991) (Fleet/Norstar's merger with New Maine National Bank); *BankAmerica Corp.* 78 FED. RESERVE BULL. 338 (1992) (BankAmerica's merger with Security Pacific); *United States v. First Hawaiian, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,457 (D. Haw. 1991) (First Hawaiian, Inc.'s merger with First Interstate

challenging anticompetitive bank mergers, or perhaps because of it, the legitimacy of their activities in this area has been questioned publicly.¹⁰ Opponents contend that the proper role for state law enforcement is one of participation within the federally initiated merger review process. They argue that passage of the federal laws governing bank mergers altered the applicability of the Clayton Act in favor of a uniform system of merger review governed by federal banking regulators.¹¹

According to this argument, neither the Bank Merger Act¹² (BMA), nor the Bank Holding Company Act¹³ (BHCA), confers a private right of action on individuals or state enforcement officials. Instead, state attorneys general are limited to administrative challenges to the completed review process in federal court.¹⁴

In addition, critics question the validity of applying state antitrust provisions to bank mergers. Under this argument, state law is preempted by both the statutory language of the

of Hawaii, Inc.).

Partially in response to the lax federal regulation in the 1980s, state attorneys general significantly increased their enforcement of state and federal antitrust laws. Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163 (1990); Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 954-55 (1985); Stanley M. Lipnick & Janis M. Gibbs, *An Overview of the Last Decade of State Antitrust Law*, 16 U. TOL. L. REV. 929, 930 (1985). Since 1990, state attorneys general have successfully challenged five proposed bank mergers. See BankAmerica, 78 FED. RES. BULL. 338 (1992) (Washington, California, and Arizona challenging merger of BankAmerica and Security Pacific); Fleet Bank of Maine, 77 FED. RES. BULL. 750, 752 (1991) (Maine challenging Fleet/Norstar's merger with New Maine National Bank. For a discussion of Maine's challenge to this merger, see *Antitrust Implications*, *supra*, at 8-9.); *Maine v. Key Bank*, 1991-2 Trade Cas. (CCH) ¶ 69,649 (D. Me. 1991) (Maine challenging Key Bank of Maine's merger with Casco Northern Bank, N.A.); First Bank Sys., Inc., 79 FED. RES. BULL. 50 (1993) (Minnesota challenging merger of First Bank Systems, Inc. and Bank Shares, Inc.); *Bank Acquisitions—New York*, 258 Trade Reg. Rep. (CCH) 5 (1993) (New York challenging Fleet Bank of New York's acquisition of 32 branches of Chemical Bank).

10. See, e.g., Peter E. Greene & Gary A. MacDonald, *The Jurisdiction of State Attorneys General To Challenge Bank Mergers Under the Antitrust Laws*, 110 BANKING L.J. 500 (1993); Robert B. Cox, *1st Bank Cuts Size of Deal as Antitrust Issue Lingers*, AM. BANKER, Oct. 26, 1992, at 15.

11. Greene & MacDonald, *supra* note 10, at 514-15.

12. 12 U.S.C. § 1828(c) (1988).

13. 12 U.S.C. §§ 1841-1843, 1849, 1850, 1971-1978 (1988).

14. Greene & MacDonald, *supra* note 10, at 502.

BHCA and the complete occupation of the field by the regulations of federal banking agencies.¹⁵ To date, no court has directly addressed these arguments.

In Part II below, this Article concludes that state attorneys general may legitimately analyze and challenge proposed anticompetitive bank mergers. As a matter of fundamental public policy, states historically have sought to protect competition and local economies by enforcing state and federal antitrust laws. Federal courts have consistently upheld this enforcement policy, rejecting Supremacy Clause¹⁶ challenges. Because banking is an integral part of a state's economy, the same public policy requires state intervention when proposed bank mergers appear anticompetitive. Moreover, federal regulation of banking through the BMA and the BHCA neither preempts state antitrust law nor removes state attorneys general *parens patriae* standing to enforce federal antitrust law. To the contrary, these two laws create new opportunities and enhanced remedies for attorneys general who represent the interests of the states in federal forums.

II. STATE ATTORNEYS GENERAL MAY CHALLENGE ANTICOMPETITIVE BANK MERGERS

A. *State Attorney General Antitrust Enforcement*

For over one-hundred years, states have been enforcing laws designed to protect competition.¹⁷ For individual states, competition is vital to their local economies, and protecting competition is a public policy of the first magnitude.¹⁸ Federal courts

15. *Id.* at 514-16.

16. U.S. CONST. art. VI, cl. 2 (stating that the United States Constitution and laws pursuant to it are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding").

17. See James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93 (1990); Folsom, *supra* note 9, at 942-43.

18. See, e.g., *Columbia Gas v. New York State Elec. & Gas*, 268 N.E.2d 790 (N.Y. 1971). According to New York's highest court, the state's antitrust statute, the Donnelly Act, N.Y. GEN. BUS. LAW § 340, reflects a "strong public policy in favor of free competition for New York and represents a public policy of the first magnitude."

have respected and supported this public policy and have rejected Supremacy Clause attacks on state antitrust laws.¹⁹ The federal courts, as well as the executive and legislative branches of the federal government, also have fostered the enforcement of federal antitrust laws by state attorneys general.²⁰ In addition to challenges to bank mergers, states have effectively used state and federal antitrust laws to challenge proposed anticompetitive mergers in such diverse areas as manufacturing, processing, distribution, and retailing.²¹

1. *State Antitrust Laws Are Presumed Valid Against Supremacy Clause Challenges*

The first antitrust law of general application was not the Sherman Act,²² but a state statute passed in Kansas in 1889.²³ Indeed, at least twelve states had various forms of antitrust legislation before Congress approved the Sherman Act in 1890.²⁴ States were very active in the early years of antitrust enforcement,²⁵ and fundamental policies of federal antitrust law, such as the *per se* rule against price fixing, were based, at least in part, on principles developed in state courts enforcing state antitrust laws.²⁶

Columbia Gas, 268 N.E.2d at 796; see also *Burch v. Goodyear Tire & Rubber*, 420 F. Supp. 82, 89 (D. Md. 1976), *aff'd* 554 F.2d 633 (4th Cir. 1977) (observing that "[t]he economy of a state . . . is certainly one of the major concerns of state government" and that this interest is "only slightly less urgent than public health and safety" in the eyes of a state).

19. See *infra* notes 35-43 and accompanying text.

20. See *infra* notes 53-59 and accompanying text.

21. See *infra* notes 60-67 and accompanying text.

22. Sherman Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

23. Act of Mar. 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389 (current version at KAN. STAT. ANN. §§ 50.112-120 (1983 & Supp. 1993)).

24. See David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141 (1990); Stephen Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 657 (1974). By 1890, an additional fourteen states had adopted constitutional provisions prohibiting monopolies, trusts and similar anticompetitive conduct. See James May, *Antitrust Practice and Procedure in the Formative Era, The Constitutional and Conceptual Reach of State Antitrust Law: 1880-1918*, 135 U. PA. L. REV. 495 (1987); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1954).

25. May, *supra* note 17, at 98.

26. See *United States v. Trenton Potteries*, 273 U.S. 392 (1927). In *Trenton Potter-*

While enforcement of antitrust laws in many states became dormant after the early 1900s,²⁷ the late 1970s and the early 1980s witnessed a substantial revitalization of state antitrust power.²⁸ During this period, many states passed new antitrust laws or amended existing ones.²⁹ At present, Pennsylvania and Vermont are the only states without antitrust statutes of general application.³⁰

Renewed and invigorated antitrust enforcement efforts by the states generated debate over whether state antitrust enforcement violated principles of federalism.³¹ However, the United

ies, the Court, partially relying on prior state case law, held that price fixing among competitors was illegal without regard to the reasonableness of the price. *Id.* at 400. Senator Sherman saw federal antitrust law as a complimentary supplement to existing state antitrust law, not a replacement. 21 CONG. REC. 2456, 2457 (1890) (statement of Sen. Sherman).

27. See May, *supra* note 17, at 97 (describing the "comparatively quiescent period" of antitrust enforcement from the close of the First World War to the 1970s).

28. *Id.* at 99.

29. Since 1970, nine states have adopted new antitrust laws: ALASKA STAT. § 45.50.562-.596 (1986 & Supp. 1993); COLO. REV. STAT. § 6-4 (1993); CONN. GEN. STAT. § 35-24-45 (1987 & Supp. 1992); DEL. CODE ANN. tit. 6, §§ 2101-2114 (1993); MD. CODE ANN., COM. LAW II §§ 11-201 to -213 (1990); NEV. REV. STAT. § 598A.010-280 (1994); R.I. GEN. LAWS § 6-36 (1992); VA. CODE ANN. §§ 59.1-9.1 to -9.17 (Michie 1992); W. VA. CODE §§ 47-18-1 to -23 (1992).

30. Vermont has a "Little FTC Act," VT. STAT. ANN. tit. 9, § 2453(a) (1993), that prohibits unfair methods of competition, comparable with § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988). See *State v. Heritage Realty*, 407 A.2d 509 (Vt. 1979). Seventeen other states have adopted statutes with prohibitions comparable to § 5 of the Federal Trade Commission Act. ALASKA STAT. § 45.50.471 (1986); CAL. BUS. & PROF. CODE § 17200 (West 1987 & Supp. 1994); CONN. GEN. STAT. ANN. § 42-110(b) (West 1992); FLA. STAT. ANN. § 510.204 (1988); HAW. REV. STAT. § 480-2 (Supp. 1992); ILL. ANN. STAT. ch. 740 para. 10/1-14 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 51:1405 (West 1987); ME. REV. STAT. ANN. tit. 5, § 207 (West 1989); MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1984); MONT. CODE ANN. § 30-14 (1993); NEB. REV. STAT. § 59-1602 (1988); N.C. GEN. STAT. § 75-1.1 (1988); S.C. CODE ANN. § 39-5-20 (Law. Co-op. 1985); UTAH CODE ANN. § 13-5-2.5 (1992); WASH. REV. CODE § 19.86.020 (1989); W. VA. CODE § 47-18-1-23 (1992); WIS. STAT. ANN. § 100.20 (West 1988).

Pennsylvania has an Antibid-Rigging Act that applies to government contracts and subcontracts and provides for civil penalties, criminal penalties, government recovery of treble damages, and suspension or disbarment sanctions. PA. STAT. ANN. tit. 73 §§ 1611-1620 (1993).

31. See, e.g., Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163 (1989); Malcolm R. Pfunder, *Constitutional Limitations on State Antitrust Enforcement*, 58 ANTITRUST L.J. 207 (1989); Daniel Oliver, *Federal and State Antitrust Enforcement: Constitutional Principles and Policy Considerations*, 9 CARDOZO L. REV.

States Supreme Court, which showed increased reluctance to preempt state laws, generally supported increased activism by states on a variety of legal fronts in the 1970s and 1980s.³² Concepts of states' rights and federalism espoused by the Supreme Court, beginning with the Burger Court, were characterized by a strong presumption that state law was valid against Supremacy Clause attacks.³³

In preemption challenges over the years, the Supreme Court has repeatedly shown its reluctance to preempt state antitrust laws.³⁴ Most recently, the Court reestablished its support for state antitrust enforcement in *California v. ARC America Corp.*³⁵ In *ARC America*, the states of Alabama, Arizona, California and Minnesota sought damages for price fixing as indirect purchasers of concrete block.³⁶ Because federal antitrust law prohibits indirect purchasers from collecting damages, the states sought damages under their own state antitrust laws.³⁷ The defendants argued that the federal antitrust rule against indi-

1245 (1988).

32. See William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) (describing the Court's "considerable receptivity to maintaining the diversity of state and local institutions and interests").

33. See *Hillsborough v. Automated Medical Lab., Inc.*, 471 U.S. 707, 716 (1985) (upholding local regulation of blood plasma centers, in part due to the presumption that local regulation can constitutionally co-exist with federal regulation).

34. See *Watson v. Buck*, 313 U.S. 387, 403-04 (1941). According to the Court, "nothing either in the language of the [Federal] copyright laws or in the history of their enactment . . . indicate[s] any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Id.* at 404; see also *Puerto Rico v. Shell Co.*, 302 U.S. 253, 259-60, 263 (1937) (holding that the Sherman Act does not preempt Puerto Rico's anti-trust statute); cf. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133-34 (1978) (holding that a Maryland statute regulating price reductions made by petroleum producers to retail gas stations was not preempted by the Sherman Act or the Robinson Patman Act).

35. 490 U.S. 93 (1989).

36. *Id.* at 97. Indirect purchasers do not deal directly with price fixers or others who engage in anticompetitive activity but are injured when the costs of the illegal activity are passed down the distribution chain. See Elmer J. Schaeffer, *Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 914 (1975) (explaining that indirect purchasers have a greater incentive to bring suit because they cannot pass on price increases).

37. *ARC Am. Corp.* 490 U.S. at 97-98.

rect purchaser claims preempted state antitrust law.³⁸ A unanimous Supreme Court ruled in favor of state enforcement.³⁹ The Court reaffirmed the strong presumption against finding preemption of state law in areas traditionally regulated by the states.⁴⁰ Recognizing "the long history of state common-law and statutory remedies against monopolies and unfair business practices,"⁴¹ the Court concluded that Congress had not preempted the field of antitrust law.⁴² Accordingly, the Court held that state antitrust remedies remain valid, even where "they impose liability over and above that authorized by federal law."⁴³

2. *State Attorneys General May Use Federal Antitrust Laws To Enforce Public Policy*

State attorneys general are not limited to enforcing only state antitrust laws when faced with anticompetitive conduct impacting their states; rather, they have *parens patriae* standing to enforce federal antitrust laws. *Parens patriae* gained acceptance early as a basis for antitrust suits by state attorneys general.⁴⁴

38. *Id.* at 102.

39. *Id.* at 105.

40. *Id.* at 101.

41. *Id.* (footnote omitted).

42. *Id.*

43. *Id.* at 105; see also *Texas v. Coca-Cola Bottling Co.*, 697 S.W.2d 677 (Tex. Ct. App. 1985), *appeal dismissed*, 478 U.S. 1029 (1986). Texas challenged acquisition of assets by Coca-Cola from Dr. Pepper under state antitrust law. *Id.* at 678. Texas' intermediate appellate court ruled that there is no preemption and no conflict between state and federal antitrust law. *Id.* at 680.

44. In general, to maintain an action *parens patriae*, "the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest." *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592, 607 (1982). This interest can fall into two categories. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607.

In establishing the interest in the health and well-being of its citizens, the state must allege more than injury to an identifiable group. *Id.* at 607. "[T]he indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *Id.* Although the limits are not clear, *Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th

In *Georgia v. Pennsylvania R.R.*,⁴⁵ Georgia brought an antitrust suit in its quasi-sovereign capacity as protector of its people against injury.⁴⁶ The State alleged a price fixing conspiracy among a large number of railroad companies⁴⁷ and that this conspiracy injured its general economy.⁴⁸ The Court recognized that a state, in its *parens patriae* role, may bring a civil suit under federal antitrust laws, and that such a suit is not limited to protecting the state's proprietary interests.⁴⁹ The Court found that the alleged price fixing conspiracy could stifle old industries, impede the establishment of new ones, arrest development of the state, and put the state at a disadvantage in competitive markets.⁵⁰ The Court held that these potential economic setbacks were of "grave public concern"⁵¹ and were the type of injury that clearly gave the state standing under the antitrust laws.⁵² Lower courts consistently apply the principles articulated in *Georgia v. Pennsylvania R.R.* and grant states standing

Cir. 1989), a state generally does not have standing as *parens patriae* to sue the federal government. *Snapp & Sons*, 458 U.S. at 610, n.16.

45. 324 U.S. 439 (1945).

46. *Id.* at 443.

47. *Id.*

48. *Id.* at 444.

49. *Id.* at 447. The Court did not consider whether § 4 of the Clayton Act authorizes damages for an injury to a state's general economy. The Supreme Court answered this question in the negative in *Hawaii v. Standard Oil*, 405 U.S. 251 (1972). Hawaii alleged that four oil companies violated § 1 of the Sherman Act "by entering into unlawful contracts; by conspiring and combining to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products; and by attempting to monopolize and actually monopolizing trade and commerce." *Id.* at 253 (footnote omitted). The Court distinguished between damages relief under § 4 and injunctive relief under § 16 and agreed that the state had the right to sue as *parens patriae* for injunctive relief against injury to the state's general economy, *Id.* at 261-62, but could not recover damages, as *parens patriae*, for such an injury. *Id.* at 262-64. The state could only recover damages in its proprietary capacity for injury to its "business or property," which the Court interpreted to mean the state's commercial interests or enterprises. *Id.* at 264. The Ninth Circuit extended this reasoning by ruling that a state, as *parens patriae*, cannot recover damages on behalf of its citizens for injuries sustained through violations of federal antitrust laws, *California v. Frito-Lay*, 474 F.2d 774, 775 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), but invited Congress to correct this situation through legislation. *Id.* at 777. Congress accepted this invitation. See *infra* notes 54-56 and accompanying text.

50. *Pennsylvania R.R.*, 324 U.S. at 450.

51. *Id.* at 449.

52. *Id.* at 450.

under federal law to challenge anticompetitive conduct affecting their economy or people.⁵³

Congress and the Executive Branch also support the enforcement of federal antitrust laws by state attorneys general.⁵⁴ For example, by passing Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976⁵⁵ (Rodino Act), Congress formally cod-

53. With respect to injunctions, "[a]llegations of injury to the general economy of the State . . . are sufficient to confer standing upon the [State] Attorney General . . . in a *parens patriae* capacity where the Attorney General seeks to sue on behalf of the citizens of [the state]. . . ." *Burch v. Goodyear Tire & Rubber*, 554 F.2d 633, 634-35 (4th Cir. 1977) (citations omitted); see *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592, 592; *People v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (citing *Snapp & Sons* in dicta); see also *In re Montgomery County Real Estate*, 452 F. Supp. 54, 59 (D. Md. 1978) ("Congress intended to allow state attorneys general to sue on behalf of the state's injured consumer regardless of the existence or non-existence of injury to the general economy."). See generally *Pennsylvania v. Mid-Atlantic Toyota Dist.*, 704 F.2d 125, 131 n.13 (4th Cir. 1983) ("A state may well have a 'public interest' in maintaining an action without having a 'quasi-sovereign' interest sufficient to support original jurisdiction in the Supreme Court.").

Most recently, a federal district court rejected a challenge to a state's *parens patriae* standing in an antitrust challenge to a proposed merger. *Pennsylvania v. Russell Stover Candies*, 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993). The defendants read *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986), to overrule *Georgia v. Pennsylvania R.R.* as it applies to state *parens patriae* actions seeking an injunction under federal antitrust laws. *Russell Stover*, 1993-1 Trade Cas. at ¶ 70,088. They claimed that it would be "anomalous" to allow the state to seek an injunction to prevent harm when it could not recover damages if the threatened injury to its general economy happened. *Id.* The district court rejected this argument for a number of reasons. First, the question of *parens patriae* was not before the Court in *Cargill*. *Id.* ¶ 70,089. Second, *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), upon which the defendants also relied, "did not suggest that [the] lack of availability of damages affected the availability of injunctive relief." *Russell Stover*, 1993-1 Trade Cas. at ¶ 70,089 (citing *Standard Oil*). Finally, and most importantly, the court recognized that:

The contours of antitrust standing as it relates to a state in its *parens patriae* capacity are perhaps different from antitrust standing as it applies to other private parties. Precedent involving standing of individual private parties may not control the issue of *parens patriae* standing as those cases do not implicate quasi-sovereign interests. Although the state is considered a private party, to some extent, when it brings an action *parens patriae*, [there are] possible nuances between an individual and a state which are relevant to the issue of antitrust standing.

Id.

54. See *Folsom*, *supra* note 9, at 951-53.

55. 15 U.S.C. § 15(c) (1988). This Act reads in part:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in

ified the states' ability to bring Sherman antitrust suits as *parens patriae*.⁵⁶ Other legislative actions provided grants to state attorneys general to develop antitrust expertise⁵⁷ and enhanced the states' ability to collect civil damages following federal criminal convictions under the Sherman Act.⁵⁸ The Executive Branch has supported state attorneys general in antitrust enforcement through a "web of interdependent projects" encompassing an "extraordinary range of activities" including information sharing, cross-designation of assistant attorneys general, joint investigations, coordinated litigation, and *amicus curiae* support.⁵⁹

3. State Attorneys General Have Standing To Challenge Anticompetitive Mergers

States have used their authority to bring antitrust actions under state and federal law to challenge proposed mergers with anticompetitive consequences. Some states have statutes specifically prohibiting anticompetitive mergers⁶⁰ and have used these

such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

Id.

56. The House of Representatives, in its report on its version of the bill, stated that "[t]he *parens patriae* doctrine already applies to antitrust injunction cases. [This bill] extends the doctrine to permit States to protect their citizens by suing for damages when they are injured by antitrust violations." H.R. REP. NO. 499, 94th Cong., 2d Sess. 9 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2578.

57. Act of Oct. 15, 1976, Pub. L. No. 94-503, § 116, 90 Stat. 2407, 2415 (this section was omitted on renewal, Act of Dec. 27, 1979 Pub. L. No. 96-157, 93 Stat. 1179); see Note, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 591-594 (1979) (discussing the procedure of implementing grants and their state by state effects on antitrust enforcement budgets).

58. Section 4F of the Clayton Act, adopted in 1976, requires the United States Department of Justice to share its investigative files with state attorneys general. 15 U.S.C. § 15f(b). In 1980, Congress amended § 5(a) of the Clayton Act specifically to allow parties seeking federal antitrust damages to argue that a conclusive presumption of a violation follows a final Justice Department judgement or decree. 15 U.S.C. § 16(a).

59. 60 Minutes With Robert M. Langer, Chair, National Association of Attorneys General Multistate Antitrust Task Force, 61 ANTITRUST L.J. 211, 212 (1991).

60. ALASKA STAT. § 45.50.566 (1986); HAW. REV. STAT. § 480-7 (1985); ME. REV. STAT. ANN. tit. 10, § 1102-A (West Supp. 1993); MISS. CODE ANN. § 75-21-13 (1972);

state antitrust laws to challenge such mergers.⁶¹ The states have repeatedly used their *parens patriae* enforcement authority to oppose anticompetitive mergers.⁶² Recently, in *California v. American Stores*,⁶³ the United States Supreme Court approved the states' right to seek divestiture under section 16 of the Clayton Act⁶⁴ as a proper form of injunctive relief. In addition to actions by individual states, state attorneys general coordinate activities through the National Association of Attorneys General (NAAG).⁶⁵ NAAG has promulgated Horizontal Merger Guidelines,⁶⁶ and the state attorneys general have entered into a

NEB. REV. STAT. § 59-1606 (1988); N.J. REV. STAT. ANN. § 56:9-4.c (1989); OHIO REV. CODE ANN. § 1331.02 (Baldwin 1988); TEX. BUS. & COM. CODE ANN. § 15.05(d) (West 1987); WASH. REV. CODE ANN. § 19.86.060 (West 1989). Prior to 1968, the Oklahoma Constitution contained an antimerger provision comparable to § 7 of the Clayton Act, 15 U.S.C. § 18 (1988). OKLA. CONST. art. 9, § 41 (1961). The Oklahoma Constitution was amended in 1968 to limit the application of § 41 to the business of banking. See ABA ANTITRUST LAW SECTION, STATE ANTITRUST PRACTICE AND STATUTES § 38-12 (1990). The territory of Puerto Rico also has a statute comparable to § 7 of the Clayton Act. See P.R. LAWS ANN. tit. 10, § 261 (1976). Moreover, because § 1 of the Sherman Act also prohibits anticompetitive mergers, states with § 1 analogs may also be able to challenge anticompetitive mergers under state law. See *United States v. First Nat'l Bank of Lexington*, 376 U.S. 665, 671-672 (1964); Folsom, *supra* note 9, at 969. But see *California ex. rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385 (Cal. 1988) (holding that state antitrust statute does not apply to mergers).

61. See, e.g., *Massachusetts, Maine & New Hampshire v. Campeau Corp.*, 1988-1 Trade Cas. (CCH) ¶ 68,093 (D. Mass. 1988); *Texas v. Coca-Cola Bottling Co.*, 697 S.W.2d 677 (Tex. Ct. App. 1985), *appeal dismissed*, 478 U.S. 1029 (1986); see also *Canadian Based Firm Resolves Maine's Concerns About Merger*, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1384 at 524 (1988).

62. *California v. American Stores*, 495 U.S. 271 (1990); *Washington v. Texaco Mktg. & Ref., Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,345 (W.D. Wash. 1991); *Connecticut ex. rel. Riddle v. Wyco New Haven, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 69,024 (D. Conn. 1990); *City of Pittsburgh v. May Dep't Stores*, 1986-2 Trade Cas. (CCH) ¶ 67,304 (W.D. Pa. 1986).

63. 495 U.S. 271 (1990).

64. 15 U.S.C. § 26 (1988).

65. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS & RESPONSIBILITIES 233-36 (Lynne M. Ross ed., 1990). NAAG's standing Antitrust Committee is comprised of seven attorneys general. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT *i* (1989). NAAG's Antitrust Taskforce is composed of the chief antitrust attorney from each state attorney general's office. *Id.* The Taskforce coordinates multistate antitrust investigation, litigation, and *amicus curiae* briefs. *Id.* The taskforce also develops proposed legislation, legislative commentary and policy positions for the NAAG Antitrust Committee and for NAAG as a whole. *Id.*

66. *Horizontal Merger Guidelines of the National Association of Attorneys General*

compact to receive and share premerger data provided voluntarily by companies contemplating mergers.⁶⁷

B. Public Policy and Federalism in State Bank Merger Analysis

The public policy articulated above, which encourages state intervention to prevent anticompetitive conduct that adversely affects a state's economy or people, is particularly applicable to anticompetitive bank mergers. Economic research consistently demonstrates that the most significant impact of banking activities is on local communities.⁶⁸ Additionally, concepts of federalism support state intervention to oppose anticompetitive bank mergers.⁶⁹

1. Bank Mergers and State Economies

According to the Supreme Court, a proposed merger will be considered anticompetitive if the merger may substantially lessen competition "in any line of commerce in any section of the country."⁷⁰ In 1963, the Court held in *United States v. Philadelphia National Bank*⁷¹ that the impact of mergers in the "line of commerce" known as commercial banking,⁷² was essentially

64 Antitrust & Trade Reg. Rep. (BNA) No. 1608 Special Supp. at 357 (April 1, 1993).

67. NAAG's *Voluntary Pre-Merger Disclosure Compact* 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345 at 943 (1987).

68. See *infra* notes 74-92 and accompanying text.

69. See *infra* notes 95-115 and accompanying text.

70. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963) (quoting Clayton Act § 7, 15 U.S.C. § 18). According to the Court:

[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. at 363.

71. 374 U.S. 321 (1963).

72. In *Philadelphia National Bank*, the Court held that the "cluster of products" offered by commercial banks was unique and, therefore, constituted "a distinct line of commerce." *Id.* at 356. Because of changes in banking regulations and practices, some commentators have challenged this definition. See, e.g., Note, *The Line of Commerce for Commercial Bank Mergers: A Product-Oriented Redefinition*, 96 HARV. L. REV. 907 (1983); William F. Jung, Note, *Banking Mergers and "Line Of Commerce"*

local in nature.⁷³ Since *Philadelphia National Bank*, economic studies have repeatedly confirmed that the business of banking remains local in nature.⁷⁴ For example, a 1990 study by Gregory E. Elliehausen and John D. Wolken, economists for the Board of Governors of the Federal Reserve System, confirms the conclusion of the Supreme Court in *Philadelphia National Bank* that local commercial banks were the primary source of financial products and services for small and medium sized businesses.⁷⁵ Despite the significant changes that have occurred in financial services markets since 1963,⁷⁶ Elliehausen and Wolken found

After the Monetary Control Act: A Submarket Approach, 1982 U. ILL. L. REV. 731; Lee B. David, Comment, *Banking—Mergers—Is Commercial Banking Still a Distinct Line of Commerce?*, 57 TUL. L. REV. 958 (1983). However, recent empirical research indicates that many banking customers still cluster their purchases of banking products and services. See, e.g., Elliehausen & Wolken, *Small Businesses*, *supra* note 5, at 180 (observing that small and medium sized businesses cluster their purchases of financial products and services at local commercial banks); Elliehausen & Wolken, *Households*, *supra* note 5, at 180 (noting that consumers cluster their purchases of banking products at local institutions); Hannan & Rhoades, *supra* note 2, at 744-45. Federal courts reject a submarket approach and adhere to commercial banking as the appropriate product market when analyzing bank mergers. See *United States v. Central State Bank*, 817 F.2d 22 (6th Cir. 1987).

73. *Philadelphia Nat'l Bank*, 374 U.S. at 358-60. According to the Court, when determining the appropriate section of the country, the "proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Id.* at 357. The Court noted that in banking, convenience of location was essential to effective competition. *Id.* at 358. Accordingly, the Court found that individuals and corporations conferred the bulk of their patronage on banks in their local communities. *Id.* Since *Philadelphia National Bank*, federal courts have been concerned primarily with the potential anticompetitive effects of proposed bank mergers on local communities. See, e.g., *United States v. Phillipsburg Nat'l Bank*, 399 U.S. 350, 362-65 (1970); *United States v. County Nat'l Bank of Bennington*, 339 F. Supp. 85, 89 (D. Vt. 1972); *Washington Mut. Sav. Bank v. FDIC*, 347 F. Supp. 790, 798 (W.D. Wash. 1972). Individuals and businesses typically do most of their business with banks in their local community because it is impractical to work at a distance. *Id.*; see also discussion *infra* notes 74-80 and accompanying text. Small depositors and borrowers, especially small businesses, therefore often rely upon local banks for banking services. *Philadelphia Nat'l Bank*, 321 U.S. at 359 n.36, 369; see *Phillipsburg Nat'l Bank*, 399 U.S. at 363-64; *County Nat'l Bank*, 339 F. Supp. at 89.

74. See, e.g., Stephen A. Rhoades, *Local vs. National Banking Markets: Evidence From an Analysis of Mortgage Loan Rates in 20 Cities*, Mimeo (Board of Governors of The Federal Reserve System, 1991). See generally Elliehausen & Wolken, *Small Businesses*, *supra* note 5; Elliehausen & Wolken, *Households*, *supra* note 5.

75. Elliehausen & Wolken, *Small Businesses*, *supra* note 5, at 815.

76. Since the 1963 decision in *Philadelphia National Bank*, substantial changes

that "[f]irms use local suppliers to a remarkable extent."⁷⁷ For small and medium sized businesses, "local commercial banks are the dominant suppliers of virtually every financial service considered."⁷⁸

In 1992, Elliehausen and Wolken tested whether *Philadelphia National Bank's* conclusions regarding local markets were applicable to consumers and reached similar results.⁷⁹ According to the authors, "[l]ocal depository institutions, especially local commercial banks, are still the main suppliers for most of the financial services used by households."⁸⁰

As a result of localized demand, banking institutions are able to discriminate between local communities when setting their fees on products such as mortgage loans, based at least in part on the level of local competition.⁸¹ Studies also show that banks in concentrated markets may extract excess profits⁸² through higher interest rates on loans,⁸³ less favorable loan terms and conditions to borrowers,⁸⁴ and lower interest payments on deposits.⁸⁵ Accordingly, bank mergers that substantially increase concentration in local markets could have significant impact on

have occurred in the banking industry. These changes include the emergence of (1) more nationwide lending institutions, (2) regional and national electronic banking services such as telephone banking and ATMs, and (3) national markets for loans originated by local institutions. See Rhoades, *supra* note 74, at 2-3. These changes sparked questions as to the validity of the Supreme Court's characterization of banking as local in nature. See *id.* Recent economic studies, however, affirm the continuing vitality of the Supreme Court's conclusions. See *infra* notes 77-80 and accompanying text.

77. Elliehausen & Wolken, *Small Businesses*, *supra* note 5, at 810.

78. *Id.* at 808.

79. Elliehausen & Wolken, *Households*, *supra* note 5, at 180.

80. *Id.*

81. Rhoades, *supra* note 74.

82. See Allan N. Berger & Timothy H. Hannon, *The Price-Concentration Relationship in Banking*, 71 REV. ECON. & STAT. 291, 291 (1989).

83. Timothy H. Hannon, *The Functional Relationship Between Prices and Market Concentration: The Case of the Banking Industry*, in EMPIRICAL STUDIES IN INDUSTRIAL ORGANIZATION, ESSAYS IN HONOR OF LEONARD WEISS 35 (David B. Audretsch & John J. Siegfried eds., 1992); Timothy H. Hannon, *Bank Commercial Loan Markets and the Role of Market Structure: Evidence from Surveys of Commercial Lending*, 15 J. BANKING & FIN. 133-49 (1991); Rhoades, *supra* note 74, at 15.

84. Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1113-14 (1979).

85. Berger & Hannon, *supra* note 82, at 298-299.

local economies.

Moreover, the combined impact of increased concentration in several individual local banking markets may have statewide implications. For example, banking in California is dominated by only a few banks such as Bank of America, Wells Fargo, and First Interstate.⁸⁶ California banks pay interest rates on transaction account deposits that are substantially lower than both the national average and the average in metropolitan areas outside California.⁸⁷ California banks also charge interest rates on loans that are significantly higher than the national average and rates charged by banks in out-of-state areas.⁸⁸ This disparity has been attributed to highly concentrated and less competitive banking markets.⁸⁹

Mergers may also adversely impact state economies by allowing national and regional banks to drain funds from local communities to support nonlocal lending.⁹⁰ Research indicates that in the 1980s, Texas banks withdrew funds from local communities to fund projects elsewhere.⁹¹ Also, a congressional study of the fifteen largest financial institutions in the United States that have satellite operations in other states reported that forty percent of the satellite operations drained funds from their host state.⁹²

When increased concentration in local markets permits banks to extract higher interest rates on loans, impose less favorable terms on borrowers, pay less interest on deposits, and drain funds from local economies, the effects will be at least as harmful as the increased railroad rates addressed by the Supreme

86. Wilmarth, *supra* note 1, at 1022-23 n.307; see also Randall J. Pozdena, *Structure and Performance, Some Evidence from California Banking*, ECON. REV. 5 (Winter 1986).

87. Wilmarth, *supra* note 1, at 1022.

88. *Id.*

89. Pozdena, *supra* note 86, at 14-15.

90. Wilmarth, *supra* note 1, at 1044-48.

91. *Id.*; PETER S. ROSE, *THE INTERSTATE BANKING REVOLUTION* 184 (1989) ("In order to shore up their lead money-center banks, some holding companies in the Southwest found themselves borrowing huge amounts from their smaller affiliated banks in satellite communities.").

92. CONSOLIDATION ISSUES, *supra* note 1, at 6.

Court in *Georgia v. Pennsylvania R.R.*:⁹³

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have suffered seriously as the result of this alleged conspiracy. Discriminatory [higher local] rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets.⁹⁴

Public policy, therefore, demands that states be permitted to use state and federal antitrust laws to challenge bank mergers which substantially increase concentration. Modern concepts of federalism are well served by this public policy.

2. *State Antitrust Enforcement and Federalism*

American federalism embodies more than a redundant system of state and federal law enforcement.⁹⁵ It involves a system of vertical checks and balances between state and federal government that is as vital to our political system as the horizontal system of checks and balances between the three branches of the federal government.⁹⁶ Commentators have noted that the federal government cannot be relied upon to uniformly enforce anti-trust laws.⁹⁷ Over time, federal antitrust enforcement swings between generally liberal and generally conservative policies, depending largely upon the economic philosophy of the White House.⁹⁸ These enforcement swings are obvious even when com-

93. 324 U.S. 439 (1945).

94. *Id.* at 450; see *supra* notes 44-53 and accompanying text.

95. Lloyd Constantine, *The Mission and Agenda for State Antitrust Enforcement*, 36 ANTITRUST BULL. 835, 838 (1991).

96. *Id.* at 838-39.

97. *Id.* at 839; John Kincaid, *Commentary: State Antitrust Law in the Context of a New Intergovernmental and International Environment*, 29 WASHBURN L.J. 188, 190-91 (1990).

98. Kincaid, *supra* note 97, at 190-91.

paring the antitrust enforcement activities of the two recent Republican administrations of Reagan and Bush.⁹⁹ Moreover, at any given time, the federal government may not be capable of enforcing antitrust laws evenly throughout the states.¹⁰⁰ Active, competent state enforcement of antitrust laws fulfills a vital role within the federal system of ensuring the uniform application of the law over time and place.¹⁰¹

Congress has recognized the need to supplement federal antitrust enforcement. It adopted the private right of action embodied in section 16 of the Clayton Act in large part because of its dissatisfaction with the results of early merger enforcement activities of the federal government under the Sherman Act.¹⁰² The funding of state antitrust enforcement by Congress, along with other cooperative federal-state efforts, also reflects the need for state antitrust enforcement as an integral part of the federal system.¹⁰³

With respect to bank mergers, congressional leaders have explicitly approved state enforcement of federal antitrust laws as an important tool for ensuring the fulfillment of congressional intent.¹⁰⁴ Recently, the House Banking Committee convened hearings as a result of congressional dissatisfaction with the failure of federal authorities to challenge anticompetitive bank mergers.¹⁰⁵ At those hearings, Congressman Henry Gonzalez, Chairman of the committee, questioned Carol Smith, chief of the antitrust division in the State of Washington:

THE CHAIRMAN. Well, what do you think can be done on our level to make the [Board of Governors of the] Federal Reserve a little more responsive and do more than just what I described as rubber stamping [approval of bank mergers]? We are asking for your opinion because, clearly, we are in

99. *Id.*; see also *supra* note 9.

100. See Kincaid, *supra* note 97, at 191-92.

101. Constantine, *supra* note 95, at 840; Kincaid, *supra* note 97, at 190-92.

102. See *California v. American Stores*, 495 U.S. 271, 285-89 (1990); 33 CONG. REC. app. at 329-30 (1900) (statement of Rep. Clayton); EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 996 (1978).

103. See *supra* notes 54-59 and accompanying text.

104. See 15 U.S.C. § 15(c) (1988).

105. *Antitrust Implications*, *supra* note 9, at 1 (statement of Rep. Gonzalez).

need of some guidance here, and if you have any suggestions we would like to hear them.

MS. SMITH. I don't personally have any specific suggestions. I guess all I can say is that to the extent that the Federal Reserve Board does not take the competitive aspects of an acquisition into account, the States will do so.

THE CHAIRMAN. OK. Well, that is the good news.¹⁰⁶

Moreover, state attorneys general are uniquely qualified to fulfill the congressional purposes behind the federal antitrust laws. Two of the main purposes of federal antitrust laws are the protection of consumers¹⁰⁷ and the protection of small businesses.¹⁰⁸ State attorneys general have been referred to as the

106. *Id.* at 13.

107. The protection of consumers is an important goal of the antitrust laws' prohibitions on anticompetitive behavior. See H.R. REP. NO. 499, *supra* note 56, at 4, reprinted in 1976 U.S.C.C.A.N. at 2573 ("Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws."); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). With respect to mergers, the goal of slowing the trend toward more concentration was to preserve consumer choice. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 367 (1963)). By preventing anticompetitive actions, Congress and the courts intend to protect small businesses and consumers from a lack of choice in product and price. See *United States v. First Nat'l Bank of Sunbury*, 311 F. Supp. 374, 378 (M.D. Pa. 1970) ("The intent of the Congress in its enactment of the Clayton Act was for the protection of the small businessman and the consumer through the arrest of mergers which may have a potentially anti-competitive effect.").

108. One major goal underlying the procompetitive design of federal antitrust law is a wide dispersal of economic power. *Mercantile Tex Corp. v. Board of Governors of Fed. Reserve Sys.*, 638 F.2d 1255, 1271 (5th Cir. 1981); see *United States v. Von's Grocery*, 384 U.S. 270, 274-78 (1966); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); see also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). Consumers and small businesses are two of the most important groups that antitrust policy is intended to protect. The vitality of small businesses is crucial to this policy. Accordingly, the primary aim of the Celler-Kefauver Act, Anti-Merger Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (1988)), was to "aid in preserving small business as an important competitive factor in the American economy" by dealing with monopolistic tendencies in their incipency before Sherman Act proceedings become necessary. S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950), reprinted in 1950 U.S.C.C.A.N. 4295. The courts have repeatedly supported this goal. See, e.g., *Von's Grocery*, 384 U.S. at 277 (stating that "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipency"); *John Wright & Assocs. v. Ullrich*, 328 F.2d 474, 480 (8th Cir. 1964) (stating that "[t]he very raison d'être of the

"people's lawyers" because the vast majority are popularly elected by the citizens of their states.¹⁰⁹ The responsiveness and proximity of state attorneys general to the people and businesses located within their states place them in a unique position to assess the actual workings of the marketplace and the needs of the people, thereby enabling them to fulfill the purposes behind the antitrust laws.¹¹⁰ When analyzing bank mergers, this proximity gives state attorneys general a distinct advantage over federal banking and antitrust enforcement agencies.¹¹¹

Finally, in passing federal antitrust laws Congress only intended to supplement state antitrust enforcement.¹¹² Because protecting local and state economies is of significant importance to the states, and because federal officials may not uniformly enforce federal antitrust laws, state attorneys general must be free to enforce state antitrust laws as a fundamental principle of federalism.¹¹³ Likewise, Congress has repeatedly recognized the need for a dual state-federal banking system and the equally important need for the states to play a role in protecting the integrity of this system.¹¹⁴ The BMA and the BHCA and their legislative histories suggest that Congress intended to continue this significant feature of our federal system.¹¹⁵

Sherman Act was to secure equality of opportunity for the small businessman"); *Aluminum Co. of America*, 148 F.2d at 425-26, 429 (noting that a monopolist can control smaller competitors' entry into market, and that the goal of Congress is to preserve and strengthen the competitive position of small business); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16 (1962); *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 946-47 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). One of the main goals of federal antitrust law, therefore, is the restraint of anticompetitive activity in order to allow small businesses to compete.

109. Kincaid, *supra* note 97, at 190. Forty-three states popularly elect attorneys general. *Id.*

110. Constantine, *supra* note 95, at 839-40; Kincaid, *supra* note 97, at 190-92.

111. *Antitrust Implications*, *supra* note 9, at 8 (statement of Maine Deputy Attorney General Stephen L. Wessler).

112. 21 CONG. REC. 2456-57 (1890) (statement of Sen. Sherman); see *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989); see also *Puerto Rico v. Shell Co.*, 302 U.S. 253, 259-60, 263 (1937) (holding that the Sherman Act did not preclude enactment of a local antitrust act).

113. See *ARC Am. Corp.*, 490 U.S. at 102-06; *Puerto Rico*, 302 U.S. at 262-63.

114. See *infra* notes 183-93 and accompanying text.

115. See *infra* notes 185-93 and accompanying text.

C. *The Bank Merger Act and the Bank Holding Company Act Do Not Preempt State Antitrust Enforcement*

Although public policy and federalism support state intervention to prevent anticompetitive bank mergers, critics contend that the BMA and the BHCA preempt state antitrust laws, remove state *parens patriae* standing to enforce federal antitrust laws, and create a partial immunity for banks from private and state enforcement of the antitrust laws.¹¹⁶

Courts are reluctant, however, to infer federal preemption of state law absent an express statement by Congress.¹¹⁷ Because Congress did not expressly preempt state antitrust enforcement in either the BMA or the BHCA, critics of state enforcement bear a substantial burden when arguing for preemption.¹¹⁸ This burden is greater when the area of law traditionally has been regulated by the states. In such cases there is a presumption against finding preemption.¹¹⁹ According to the Supreme Court, when Congress legislates in a field traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹²⁰

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹²¹

116. See Greene & MacDonald, *supra* note 10, at 507-09, 514-16.

117. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130, 132 (1978), *ARC Am. Corp.*, 490 U.S. at 93, 100-01.

118. *ARC Am. Corp.*, 490 U.S. at 100-01.

119. *Id.* at 101.

120. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

121. *ARC Am. Corp.*, 490 U.S. at 100-01 (citations omitted).

Both antitrust¹²² and banking¹²³ are areas traditionally regulated by the states. The language of the BMA and BHCA, along with their legislative histories, establish that it was *not* the clear and manifest purpose of Congress to preempt state antitrust enforcement in the area of bank mergers.¹²⁴ The BMA and BHCA allow traditional state antitrust enforcement to continue within the dual state-federal banking system.¹²⁵

Opponents of state use of federal antitrust laws to challenge bank mergers also face a heavy burden when they argue that the BMA and BHCA grant implied immunity to banks and effect an implied repeal of the *parens patriae* right of state attorneys general to enforce federal antitrust laws. "[I]mmunity from the antitrust laws is not lightly implied,"¹²⁶ and, accordingly, the Supreme Court has held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored[], and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."¹²⁷ In applying these principles, the Court found no such repugnancy between the BMA, the BHCA, and the federal antitrust laws.¹²⁸ Nor do the BMA and BHCA reflect a regulatory scheme that is plainly repugnant to state antitrust enforcement of the federal antitrust laws.

1. *The Dual State and Federal Banking System*

From the earliest period of this country's history, the federal government and the states have shared responsibility for the regulation of banking.¹²⁹ The nation's first federal bank, the

122. See *supra* notes 18-43 and accompanying text.

123. See *infra* notes 129-37 and accompanying text.

124. See *infra* notes 180-220 and accompanying text.

125. See *infra* notes 180-258 and accompanying text.

126. *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963).

127. *Philadelphia Nat'l Bank*, 374 U.S. at 350-51.

128. *Id.* at 350-52; see also *First City Nat'l Bank*, 386 U.S. at 363-64 (holding that an action challenging a bank merger is brought under the antitrust laws, not the BMA).

129. Arthur E. Wilmarth, Jr., *The Expansion of State Banking Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 *FORDHAM L.*

Bank of North America, received a federal charter in 1781 and a state charter in 1782 because of doubts about the validity of the federal charter.¹³⁰ During the same period, states were chartering and regulating their own state banks through special legislative acts.¹³¹

In the mid-1800s, after the destruction of the First (1791-1811) and Second (1816-1836) Banks of the United States, states began to enact "free banking" laws which permitted any person to obtain a bank charter upon the satisfaction of specified conditions.¹³² When Congress reinstituted the national bank system in 1863, it chose to follow the state free banking model.¹³³ These new laws facilitated the development of a decentralized, dual state and federal banking system.¹³⁴

In this century, Congress has repeatedly acted to preserve the dual state-federal banking system, which allowed significant state control, to ensure decentralization and to prevent concentration of economic power.¹³⁵ State involvement in banking regulation remains important. According to the Supreme Court:

REV. 1133, 1152-55 (1990).

130. *Id.* at 1153.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1153-54; see also *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) ("Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863.").

135. For example, Congress cited the need for state control over bank branching and interstate bank acquisitions, the need for a decentralized banking system, and the prevention of concentrated financial power as reasons for adopting and amending the McFadden Act, ch. 191, § 7, 44 Stat. 1224, in 1927 and 1933, and in passing the Douglas Amendment in 1956. See *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 413 (1987) (Stevens, J., concurring) (quoting 66 CONG. REC. 4437-38 (1925) (statement of Sen. Reed)); S. REP. NO. 584, 72d Cong., 1st Sess. (pt. II) 3-5 (1932) (minority views); 102 CONG. REC. 6857 (1956) (statement of Sen. Douglas); see also Wilmarth, *supra* note 129, at 1154 n.86. The McFadden Act of 1927, codified as amended at 12 U.S.C. § 36 (1988), prohibits national banks from branching across state lines and allows national banks to open branches within their home states only to the extent that state statutes expressly authorize competing state banks to branch. The Douglas Amendment, § 3(d) of the BHCA and codified at 12 U.S.C. § 1842(d) (1988), prohibits bank holding companies from acquiring banks outside of the state in which the holding company's principal operations are located unless the acquisition is authorized by state statute in the bank's home state.

[B]oth as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have . . . actively regulated [banking] activities."¹³⁶

It should be noted, however, that the dual state-federal system of banking is not a mutually exclusive system. Rather, it is a symbiotic system with state regulatory control over federal banks as well as federal regulatory control over state banks. For example, in *Philadelphia National Bank*,¹³⁷ the Supreme Court noted that "[s]tate member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks."¹³⁸ Alternatively, the Court noted that federal banks are subject to state control in such areas as usury, interest rates,¹³⁹ and branching.¹⁴⁰ The Court also recognized areas of joint state and federal regulation, such as entry into a market and acquisitions of other banks.¹⁴¹

Lower courts have reiterated congressional and Supreme Court support for a symbiotic, dual state-federal banking sys-

136. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980).

137. 374 U.S. 321 (1963).

138. *Id.* at 327.

139. *Id.* at 328.

140. The Court stated that "[f]urthermore, national banks appear to be subject to state geographical limitations on branching." *Id.*; see also *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 610 (1974) ("[F]ederal law subjects nationally chartered banks to the branching limitations imposed on their state counterparts."); *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) ("National bank branching is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.'"); *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 325 F. Supp. 523 (M.D.N.C. 1971) (reversing Comptroller of the Currency decision to permit federal bank to branch where Comptroller failed to follow all state laws in branching).

141. *Philadelphia Nat'l Bank*, 374 U.S. at 328; see 12 U.S.C. § 1842(d) (1988); see also *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) (noting that "[t]his Court has often pointed out that national banks are subject to state laws unless those laws infringe the national bank laws or impose an undue burden on the performance of the banks' functions").

tem. For example, in *National State Bank v. Long*¹⁴² the Third Circuit Court of Appeals noted that "National Banks . . . 'are governed in the daily course of business far more by the laws of the State than of the nation.'"¹⁴³ Likewise, the D.C. Circuit Court of Appeals has held that "federal law does not preempt state banking law in such vital areas as branching, interest rates, and mergers."¹⁴⁴

The BMA and the BHCA continue the traditional congressional respect for the dual banking system and the role of the states in regulating bank mergers.

2. *Federal Regulation of Bank Mergers—The Bank Merger Act and Bank Holding Company Act*

When Congress passed the BMA in 1960,¹⁴⁵ it was concerned about an increasing number of bank mergers¹⁴⁶ and believed that the existing controls over bank mergers were incomplete and confusing, particularly with respect to the competitive factors involved.¹⁴⁷ Although section 1 of the Sherman Act was fully applicable to the banking industry, Congress concluded that it was "of little use in controlling bank mergers."¹⁴⁸ Congress also found that section 7 of the Clayton Act was limited, insofar as banks were concerned, to cases where a merger was accomplished through stock acquisition.¹⁴⁹ Accordingly, Con-

142. 630 F.2d 981 (3d Cir. 1980).

143. *Id.* at 985 (quoting *McClellan v. Chipman*, 164 U.S. 347, 356 (1896)).

144. *Independent Bankers Ass'n v. Smith*, 534 F.2d 921, 932 (D.C. Cir. 1976); see *United Jersey Banks v. Parell*, 783 F.2d 360, 368-69 (3d Cir. 1986) (explaining that the law with respect to bank mergers is not exclusively federal and the nature and operation of the federal and state laws must be examined to determine if they can operate compatibly); see also 12 U.S.C. § 215 (1988).

145. Pub. L. No. 86-463, 74 Stat. 129 (1960).

146. H.R. REP. NO. 1416, 86th Cong., 2d Sess. 5 (1960), reprinted in 1960 U.S.C.C.A.N. 1995, 1996.

147. *Id.*, reprinted in 1960 U.S.C.C.A.N. at 1998; see *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 461 (9th Cir. 1973) (noting that "[t]here was no effective regulation of bank mergers through the antitrust laws prior to 1950").

148. H.R. REP. NO. 1416, *supra* note 146, at 9, reprinted in 1960 U.S.C.C.A.N. at 2002; see also S. REP. NO. 196, 86th Cong., 1st Sess. 7-8 (1959). Prior to the enactment of the BMA, the only case challenging a bank merger under the Sherman Act was brought by the Department of Justice in *United States v. Firstamerica Corp.*, C.A. No. 38139 (N.D. Cal. March 30, 1959).

149. H.R. REP. NO. 1416, *supra* note 146, at 9, reprinted in 1960 U.S.C.C.A.N. at

gress passed the BMA in 1960 to help assure vigorous competition in banking.¹⁵⁰

The BMA divided the authority to grant consent to bank mergers between the Comptroller of the Currency (national banks), the Federal Reserve Board (state member banks), and the Federal Deposit Insurance Corporation (non-member, state-insured banks).¹⁵¹ The federal banking agency with jurisdiction over a merger was required to consult with the other banking agencies and the United States Attorney General.¹⁵² Vital control over state banks by appropriate state authorities was also anticipated.¹⁵³

The BMA also required the federal banking agencies to consider several factors when deciding whether to allow a merger, including the financial condition of the banks involved, the effect of the proposed transaction on competition, and the convenience and needs of the community.¹⁵⁴ Although the BMA of 1960 required the agencies to consider the effects of the merger on competition, Congress did not intend the Act to affect the applicability of the Sherman Act to bank mergers.¹⁵⁵

In 1963, in *Philadelphia National Bank*,¹⁵⁶ the Supreme Court first considered the applicability of section 7 of the Clayton Act to a bank merger approved by a federal agency under the BMA.¹⁵⁷ The United States Department of Justice had challenged a consolidation of the Philadelphia National Bank

2002.

150. *Id.* at 3, reprinted in 1960 U.S.C.C.A.N. at 1996.

151. S. REP. NO. 196, *supra* note 148, at 22.

152. H.R. REP. NO. 1416, *supra* note 146, at 12-13, reprinted in 1960 U.S.C.C.A.N. at 2005-07.

153. S. REP. NO. 196, *supra* note 148, at 24; H.R. REP. NO. 1416, *supra* note 146, at 15, reprinted in 1960 U.S.C.C.A.N. at 2008; see *infra* notes 184-93 and accompanying text.

154. H.R. REP. NO. 1416, *supra* note 146, at 9-11, reprinted in 1960 U.S.C.C.A.N. at 2002-04. Under the BMA of 1960, there were seven factors for the agencies to consider: "the financial history and conditions of each bank, adequacy of capital structure, future earnings prospects, general character of management, convenience and needs of the community to be served, consistency of a bank's corporate powers with the purposes of the [FDIC] Act," and the effect of the transaction on competition. *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 462 (9th Cir. 1973).

155. S. REP. NO. 196, *supra* note 148, at 3.

156. 374 U.S. 321 (1963).

157. *Id.* at 335-49.

and the Girard Trust Corn Exchange Bank, which had been approved pursuant to the BMA by the Comptroller of the Currency.¹⁵⁸ The district court had held that section 7 of the Clayton Act did not apply to bank mergers or consolidations and approved the merger.¹⁵⁹ The Supreme Court reversed.¹⁶⁰

The Court determined that by amending the Clayton Act in 1950, Congress intended to reach "the entire range of corporate amalgamations,"¹⁶¹ including the banking industry.¹⁶² The Court also rejected the argument that the BMA, "by directing the banking agencies to consider competitive factors before approving mergers, immunize[d] approved mergers from challenge under the federal antitrust laws."¹⁶³ In reaching this conclusion, the Court noted that the BMA did not confer express immunity to approved mergers. The Court also strongly disfavored implied repeal of the antitrust laws.¹⁶⁴ In passing the BMA, Congress did not embrace the view "that federal regulation of banking [was] so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure."¹⁶⁵ To the contrary, the Court indicated that the legislative history did not reflect any suggestion that the "applicability of the antitrust laws was to be affected."¹⁶⁶

Philadelphia National Bank was followed by *United States v. First National Bank & Trust Co.*,¹⁶⁷ in which the Court held that section 1 of the Sherman Act could be used to challenge anticompetitive bank mergers.¹⁶⁸ As a result of these two cases, Congress became concerned that all prior bank mergers would now be susceptible to challenge under the antitrust laws because no statute of limitations had been set.¹⁶⁹ Accordingly,

158. *Id.* at 330-34.

159. *Id.* at 334-35.

160. *Id.* at 323.

161. *Id.* at 342.

162. *Id.* at 348.

163. *Id.* at 350 (citation omitted).

164. *Id.* at 350-51.

165. *Id.* at 352.

166. *Id.*

167. 376 U.S. 665 (1964).

168. *Id.* at 672-73.

169. S. REP. NO. 299, 89th Cong., 1st Sess. 3 (1965) ("The uncertainty created by

Congress amended the BMA in 1966 to provide for a statute of limitations. Under the 1966 amendments, all bank mergers consummated before June 17, 1963, would become exempt from attack under the antitrust laws, except for an action pursuant to section 2 of the Sherman Act.¹⁷⁰

The 1966 amendments to the BMA also reflected a compromise between those who favored exempting the banking industry from antitrust laws and those who favored not granting the banking industry any special consideration whatsoever.¹⁷¹ According to the House Report on the 1966 amendments, the "intended legal effect" of the amendments was to modify the BMA in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantial anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.¹⁷²

The 1966 amendments do not change the respective duties of the federal agencies involved in merger review.¹⁷³ The authori-

[the absence of a statute of limitations] is harmful to the banking industry and to its customers."); see *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 622-23 (1957) (Burton, J., dissenting) (questioning the propriety of a suit filed in 1949 alleging Clayton Act violations based on stock acquisitions from 1917 to 1919).

170. H.R. REP. NO. 1221, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. (80 Stat.) 1860, 1860-61.

171. *Id.* at 2, *reprinted in* 1966 U.S.C.C.A.N. at 1861.

172. *Id.* at 3-4, *reprinted in* 1966 U.S.C.C.A.N. at 1862.

173. *Id.* at 5, *reprinted in* 1966 U.S.C.C.A.N. at 1864.

ty to grant consent to bank mergers continues to be divided between the Comptroller of the Currency (national banks), the Federal Reserve Board (state member banks), and the Federal Deposit Insurance Corporation (non-member, state-insured banks).¹⁷⁴ The federal banking agency with jurisdiction over a merger must consult with the other banking agencies and the United States Attorney General.¹⁷⁵

In contrast to the BMA of 1960, however, the effect of the proposed merger on competition is now the preeminent consideration.¹⁷⁶ Under the BMA of 1966, the responsible agency must use the standards set forth in section 7 of the Clayton Act in determining whether the merger will substantially lessen competition.¹⁷⁷ Any antitrust action challenging a bank merger

174. *Id.*, reprinted in 1966 U.S.C.C.A.N. at 1864. The BMA was amended to include the Office of Thrift Supervision in the merger review process. Act of Aug. 9, 1989, Pub. L. No. 101-73, tit. II, § 221, 103 Stat. 183, 266-67 (1989). 12 U.S.C. § 1828(c)(2) now provides:

No insured depository institution shall merge or consolidate with any other insured depository institution or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured depository institution except with the prior written approval of the responsible agency, which shall be—

(A) the Comptroller of the Currency if the acquiring, assuming or resulting bank is to be a national bank or a District bank;

(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District Bank);

(C) the Corporation if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank (except a District bank or a savings bank supervised by the Director of the Office of Thrift Supervision);

(D) the Director of the Office of Thrift Supervision if the acquiring, assuming, or resulting institution is to be a savings association.

Id.

175. H.R. REP. NO. 1221, *supra* note 170, at 6, reprinted in 1966 U.S.C.C.A.N. at 1864. Under the BHCA, the appropriate "State supervisory authority" must also be consulted. 12 U.S.C. §§ 1842(b), 1849(b).

176. *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 463 (9th Cir. 1973).

177. 12 U.S.C. § 1828(c)(5). This section provides in pertinent part:

The responsible agency shall not approve—

(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 attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend

must be brought within thirty days of agency approval, and the court is to determine the legality of the merger *de novo*.¹⁷⁸ Congress also amended the BHCA in 1966 to apply the procedures of the BMA to bank holding companies.¹⁷⁹

to create a monopoly, or to 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.

Id.; see also *United States v. Third Nat'l Bank*, 390 U.S. 171, 181-82 (1968); *Washington Mut. Sav. Bank*, 482 F.2d at 463 ("The exact language of the principle anti-trust laws was incorporated into the 1966 Act, not by coincidence, but to draw on the seventy-five year history of their judicial construction.").

178. H.R. REP. NO. 1221, *supra* note 170, at 6, *reprinted in* 1966 U.S.C.C.A.N. at 1865. The amended statute now provides:

Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review *de novo* the issues presented.

12 U.S.C. § 1828(c)(7)(A).

179. S. REP. NO. 1179, 89th Cong., 2d Sess. 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. (80 Stat.) 2385, 2394; 12 U.S.C. § 1842(c). The BMA of 1966 and the BHCA as amended are construed to be *in pari materia* and are interpreted and applied consistently with each other. *First Midland Bank & Trust Co. v. Chemical Fin. Corp.*, 441 F. Supp. 414, 421 (W.D. Mich. 1977). The BHCA provides in pertinent part:

The Board shall not approve-

(A) any acquisition or merger or consolidation under this section 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

(B) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint or (sic) 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.

12 U.S.C. § 1842(c)(1).

3. *State Antitrust Enforcement and Preemption Under the BMA and BHCA*

When the standards for preemption announced by the Supreme Court are applied to the regulation of bank mergers under the BMA and BHCA, clearly Congress did not intend to preempt state antitrust enforcement—particularly with respect to state control over state banks. The BMA and BHCA also do not preempt state antitrust laws with respect to federal bank mergers; rather, they include state antitrust laws in the federal enforcement scheme.

a. State Antitrust Enforcement and State Banks

Neither the BMA nor the BHCA contains an express statement by Congress that it intended to preempt state law.¹⁸⁰ Nor do the statutes or their legislative histories reflect a clear and manifest congressional intent to implement exclusive federal control over the field of regulation of state bank mergers. To the contrary, by specific statutory language¹⁸¹ and through statements in the legislative histories of the national banking laws,¹⁸² Congress clearly expressed its intention not to interfere with the traditional powers of the states to control mergers of state banks.

Historically, Congress has supported a dual state-federal banking system and deferred to state law in mergers affecting state banks. For example, under the national banking laws, which were passed prior to the BMA and BHCA, Congress forbade national banks from merging or consolidating with state banks if the action violated state law.¹⁸³

180. See 12 U.S.C. §§ 1828(c), 1841-1844, 1846-1849.

181. 12 U.S.C. § 1846 (1988); see *infra* note 188 and accompanying text.

182. See *infra* note 183 and accompanying text.

183. See Act of Aug. 17, 1950, Pub. L. No. 81-706, 64 Stat. 455 (codified as amended at 12 U.S.C. §§ 214, 215 (1988)). Section 214(c) provides in pertinent part that "[n]o conversion of a national banking association into a State bank or its merger or consolidation with a State bank shall take place under this subchapter and section 321 of this title in contravention of the law of the State in which the national banking association is located." 12 U.S.C. § 214(c). Section 215(d) provides that "no such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 12 U.S.C. 215(d); see also *Ex parte Worcester County Nat'l*

Likewise, when the BHCA was first passed in 1956,¹⁸⁴ it allowed states to restrict federal bank holding company acquisitions.¹⁸⁵ The BHCA reflected congressional intent that states be permitted to restrain bank holding companies from gaining undue control over the banking industry within their own states.¹⁸⁶ Therefore, by specific statutory language, Congress assured that the states retained their traditional power to regulate the formation or operation of bank holding companies within their borders. According to the Senate report on the BHCA:

In any event, another provision of this bill expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards States' rights as to bank holding companies.¹⁸⁷

Thus, section 7 of the BHCA provides: "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof."¹⁸⁸

The legislative history of the BMA also reflects a congressional intent to reserve to the states their traditional role in regulating state bank mergers. In passing the BMA in 1960, Con-

Bank, 279 U.S. 347, 359 (1929) ("It is very clear to us that Congress in the enactment of § 3 of the Act of February 25, 1927, was anxious even to the point of repetition to show that it wished to avoid any provision in contravention of the law of the State in which the state trust company and the national bank to be consolidated were located.").

184. Act of May 9, 1956, ch. 240, § 2, 70 Stat. 133.

185. S. REP. NO. 1095, 84th Cong., 2d Sess. 11 (1955), *reprinted in* 1956 U.S.C.C.A.N. 2482, 2492.

186. *Id.*, *reprinted in* 1956 U.S.C.C.A.N. at 2492.

187. *Id.*, *reprinted in* 1956 U.S.C.C.A.N. at 2492.

188. 12 U.S.C. § 1846.

gress recognized that the states regulated the merger of state banks and considered the effects on competition of a proposed merger.¹⁸⁹ Congress explicitly stated that it expected states to bar some state bank mergers before the mergers were even presented to federal authorities for review.¹⁹⁰ According to the report of the Senate Committee on Banking and Currency, when passing the BMA:

In the case of every merger where the absorbing or result bank will be a State bank, approval by the appropriate State supervisor or other banking authority will have to be obtained, in accordance with the applicable State law, before the Federal Reserve Board or the FDIC will have an opportunity to review an application under this bill.

If the State supervisor refuses his approval of the merger, no application to the Federal Reserve Board or the FDIC would even be considered. There is, therefore, no possibility that the Board or the FDIC would approve a merger which the appropriate State authorities had finally rejected.¹⁹¹

Alternatively, where state banks merge, Congress intended to permit federal authorities to eject the surviving state bank from the Federal Reserve System and the federal deposit insurance system if the appropriate federal authorities did not approve the competitive aspects of the merger.¹⁹² According to the legislative history:

The only possibility of conflict is that the Board or the FDIC might deny an application for a merger which the State supervisor had approved. This kind of conflict is not new under

189. H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 1993. In addition to antitrust enforcement by state attorneys general, some states require their bank regulatory agencies to consider the competitive effects of a proposed merger in the regulatory review process. *See, e.g.*, CAL. FIN. CODE §§ 700-711 (West 1989); N.Y. BANKING LAW §§ 142, 143-b, 601-b (Consol. 1982 & Supp. 1993); PA. STAT. ANN. tit. 7, § 1604 (1967 & Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 342-401(a) (West Supp. 1994).

190. H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 2008.

191. S. REP. NO. 196, *supra* note 148, at 24; *accord* H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 2008.

192. S. REP. NO. 196, *supra* note 148, at 24; *accord* H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 2008.

the dual system of banking, however regrettable any specific instance may be. Under the Board's or the FDIC's standards, the Board may always deny membership, and the FDIC may always deny insurance, to a State bank chartered by the appropriate State authority. The bank may still proceed to operate as a State-chartered bank, without membership or without FDIC insurance, so long as the State supervisor authorizes it to do so.¹⁹³

The explicit statutory language of the national banking laws and the BHCA, the legislative history of these laws, and the legislative history of the BMA of 1960, establish conclusively that federal law does not exercise exclusive control over the field of state bank merger regulation. Rather, the panoply of federal banking laws shows a clear legislative intent to permit states to control important aspects of the state banking system and, where appropriate, to be *more* restrictive than federal authorities in regulating their own state banking systems. Nothing in the 1966 amendments to the BMA or the BHCA or their legislative histories suggests that Congress intended to change this fundamental characteristic of the dual state-federal banking system. The Third Circuit's decision in *United Jersey Banks v. Parell*¹⁹⁴ supports this conclusion.

In *United Jersey Banks*, the plaintiff challenged the merger of a federal bank with a bank holding company under state anti-trust law in state court.¹⁹⁵ The case was removed to federal court, but the Third Circuit ordered the case remanded to the

193. H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 2008; S. REP. NO. 196, *supra* note 148, at 24. Whether the state bank would be permitted to function in the state banking system may also be a function of the nature of the disagreement between the state and federal authorities. If the bank was the result of an anticompetitive bank merger, the merger would be barred. In *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), New Jersey state law permitted the formation of a bank holding company that resulted in monopolization prohibited by the Sherman Act. *Id.* at 327. The Court held that the state could not authorize a restraint of trade prohibited by Congress. *Id.* at 346. This result is consistent with the above analysis that permits *more* restrictive restraints on anticompetitive conduct.

194. 783 F.2d 360 (3d Cir.), *cert. denied sub nom.* First Fidelity Bancorporation v. Parell, 476 U.S. 1170 (1986).

195. *Id.* at 362-63.

state court system.¹⁹⁶ The Third Circuit held that Congress allowed the states considerable authority to legislate in the area of antitrust, and, with respect to bank mergers, federal law did not exclusively occupy the field.¹⁹⁷ According to the court, state laws must operate compatibly with federal law,¹⁹⁸ a determination that it deemed the responsibility of the state court system to make.¹⁹⁹

Under the standard set forth in *United Jersey Banks*, states can and should play a role in regulating bank mergers. State antitrust enforcement operates compatibly with the BMA and BHCA and does not "stand[] as an obstacle to the accomplishment and execution of the full purposes of Congress."²⁰⁰ Rather, state enforcement helps fulfill the congressional goals embodied in the BMA and BHCA by (1) controlling undue concentration in the banking industry, (2) preserving the dual state-federal banking system, and (3) allowing uniform application of antitrust principles to mergers of banks in the federal banking system.

State antitrust enforcement helps fulfill the intent of Congress because state enforcement and the BMA and BHCA have the same principal goal—preventing anticompetitive bank mergers from unduly concentrating the banking industry.²⁰¹ With respect to this goal of limiting undue concentration, Congress and the courts have always permitted the states to enforce antitrust laws against activities affecting their own states without preemption. The Supreme Court's holding in *Puerto Rico v. Shell Co.*²⁰² reflects the rationale for this policy. According to the Court, "[n]o matter how interested the National Government may be in prosecuting such [antitrust] offenses, instances might occur where the latter would pass unnoticed, or where, for some reason or other, such officers might not display the same activity

196. *Id.* at 370.

197. *Id.* at 368-69.

198. *Id.*

199. *Id.* at 369.

200. *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

201. See *supra* note 186 and accompanying text.

202. 302 U.S. 253 (1937).

and interest that is to be expected from local officials.”²⁰³

Even when state antitrust laws are more restrictive than federal antitrust laws, federal courts have consistently held that federal law does not preempt state antitrust laws because they do not represent an obstacle to the accomplishment of the federal antitrust goal of preserving competition.²⁰⁴ The courts permit this result because “the fact that the Sherman Act tolerates certain conduct does not mean that there is an affirmative federal policy encouraging such conduct.”²⁰⁵ It is appropriate to apply this principle to state bank mergers because federal antitrust laws do not encourage state bank mergers that are illegal under state law.

Additionally, state antitrust enforcement with respect to state bank mergers helps fulfill the congressional policy of respecting and preserving the dual state-federal banking system. States have traditionally regulated state banks and enforced antitrust laws. Accordingly, Congress anticipated that the appropriate state authorities might well reject proposed state bank mergers as anticompetitive.²⁰⁶ Congress could not have intended to forbid national banks to merge in violation of state law but permit state banks to do so. Nor is it plausible that in passing the BMA or the BHCA Congress intended to force states to accept into the state banking system banks that state authorities had concluded were anticompetitive and illegal under state law. Such a result would destroy an essential element of the dual state-federal banking system that Congress has carefully sought to preserve. Rather, permitting state antitrust enforcement in state bank merger cases is most consistent with the dual state-federal banking system and the principles of federalism which that system embodies.

203. *Id.* at 264-65.

204. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132-33 (1978); *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1480-82 (6th Cir.), *cert. denied sub nom.* *Pinney Dock & Transp. Co. v. Norfolk & W. Ry.*, 488 U.S. 880 (1988); *Shell Oil Co. v. Younger*, 587 F.2d 34, 36 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *W.J. Seufert Land Co. v. National Restaurant Supply Co.*, 511 P.2d 363, 368-69 (Or. 1973).

205. PHILLIP AREEDA, *ANTITRUST ANALYSIS* 126 (3d ed. 1981).

206. S. REP. NO. 196, *supra* note 148, at 24; accord H.R. REP. NO. 1416, *supra* note 146, at 15, *reprinted in* 1960 U.S.C.C.A.N. at 2008.

Finally, state antitrust enforcement is not an obstacle to the congressional purpose of achieving uniform antitrust standards with respect to the federal banking system—including state member banks. The vast majority of state antitrust laws are interpreted and enforced in harmony with federal antitrust laws.²⁰⁷ Moreover, state antitrust enforcement will never require the federal banking system, including the Federal Reserve Board and the FDIC, to accept a state bank merger that the appropriate federal agencies believed was anticompetitive.²⁰⁸

b. State Antitrust Enforcement and Federal Banks

Under the BMA of 1966, Congress did not preempt enforcement of state antitrust laws in bank mergers involving federal banks. Rather, it included state antitrust laws in the federal enforcement scheme. The BMA of 1966 authorizes actions under the “antitrust laws” to challenge bank mergers approved by federal agencies.²⁰⁹ The statute also defines the “antitrust laws” that authorize such actions: “For the purposes of this subsection, the term ‘antitrust laws’ means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts *in pari materia*.”²¹⁰

Statutes are considered *in pari materia* when they have the same purpose or relate to the same subject matter.²¹¹ State an-

207. See *infra* notes 211-13 and accompanying text.

208. In a number of reported decisions, the federal courts forbade federal agencies responsible for reviewing proposed bank mergers from applying standards that were more restrictive than the federal antitrust laws. See, e.g., *Mercantile Texas Corp. v. Board of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255, 1261 (5th Cir. 1981); *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 465 (9th Cir. 1973). Arguably, these cases may indicate that state law would be preempted to the extent it applied a standard more restrictive than federal antitrust law. Cf. *Vial v. First Commerce Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,692, at 69,535-36, *supplemented*, 564 F. Supp. 650 (E.D. La. 1983). Such a holding would be contrary to the general principles articulated by the courts, which permit state antitrust laws to be more restrictive than federal antitrust laws without preemption. See *supra* notes 34-43 and accompanying text. However, such a rule would not generally cause preemption of state antitrust laws because the vast majority of state antitrust laws are interpreted in harmony with federal antitrust laws. See *infra* notes 211-13 and accompanying text.

209. 12 U.S.C. § 1828(c)(7)(A) (1988).

210. 12 U.S.C. § 1828(c)(8) (1988) (emphasis added).

211. See, e.g., *Linguist v. Bowen*, 813 F.2d 884, 888-89 (8th Cir. 1987); *In re John-*

titrust statutes are *in pari materia* with the Sherman and Clayton Acts because they have the same purpose and subject matter—the restriction of anticompetitive conduct. Indeed, the vast majority of state antitrust laws must be interpreted consistently and in harmony with federal court interpretations of the Sherman and Clayton Acts, either by state statute²¹² or by case law.²¹³ Accordingly, actions under state antitrust law may be brought under the BMA so long as the state law is consistent with federal antitrust law.

The court took this approach in *Vial v. First Commere Corp.*,²¹⁴ a state court action in which a private plaintiff chal-

son, 787 F.2d 1179, 1181 (7th Cir. 1986).

212. See ARIZ. REV. STAT. ANN. § 44-1412 (1987); DEL. CODE ANN. tit. 6, § 2113 (1993); D.C. CODE ANN. § 28-4515 (1991); FLA. STAT. ANN. § 542.32 (West 1988); HAW. REV. STAT. § 480-3 (Supp. 1992); ILL. ANN. STAT. ch. 740, para. 10/11 (Smith-Hurd 1993); IOWA CODE ANN. § 553.2 (West 1987); MD. CODE ANN. COM. LAW II § 11-202(a)(2) (1990); MASS. GEN. LAWS ANN. ch. 93, § 1 (West Supp. 1993); MICH. COMP. LAWS ANN. § 445.784(2) (West 1989); MO. ANN. STAT. § 416.141 (Vernon 1990); NEB. REV. STAT. § 59-829 (1988); N.H. REV. STAT. ANN. § 356:14 (1984); N.J. STAT. ANN. § 56:9-18 (West 1989); N.M. STAT. ANN. § 57-1-15 (Michie 1987); OR. REV. STAT. § 646.715(2) (1988); R.I. GEN. LAWS § 6-36-2(2)(b) (1992); S.D. COD. LAWS § 37-1-22 (1986); TEX. BUS. & COM. CODE ANN. § 15.04 (West 1987); UTAH CODE ANN. § 76-10-926 (1990); VA. CODE ANN. § 59.1-9.17 (Michie 1992); WASH. REV. CODE ANN. § 19.86.920 (West 1989); W. VA. CODE § 47-18-16 (1992).

213. See *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 721 n.27 (7th Cir. 1979) (interpreting Indiana statute), *cert. denied*, 445 U.S. 917 (1980); *Steuer & Latham v. National Medical Enter., Inc.*, 672 F. Supp. 1489, 1521 (D.S.C. 1987) (interpreting South Carolina statute), *aff'd*, 846 F.2d 70 (4th Cir. 1988); *Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301, 302 (S.D. Ind. 1977) (interpreting Indiana statute); *Ex parte Rice*, 67 So. 2d 825, 829 (Ala. 1953); *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10, 14 (Alaska 1981); *People ex rel. Woodard v. Colorado Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1061 (Colo. 1984); *People v. North Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1293 n.3 (Colo. 1982); *Elida, Inc. v. Harmor Realty Corp.*, 413 A.2d 1226, 1230 (Conn. 1979); *Pope v. Intramountain Gas Co.*, 646 P.2d 988, 994 n.11 (Idaho 1982); *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987); *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982); *Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988); *State v. Mobile Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976); *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 530 (N.C. 1973); *C.K. & J.K., Inc. v. Fairview Shopping Ctr.*, 407 N.E.2d 507, 509 (Ohio 1980); *Teleco, Inc. v. Ford Indus., Inc.*, 587 P.2d 1360, 1362 (Okla. 1978); *Tennessee ex rel. Leech v. Levi Strauss & Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,558, 76,972 n.2 (Tenn. Ch. Ct. 1980); *Grams v. Boss*, 294 N.W.2d 473, 480 (Wis. 1980).

214. 1983-2 Trade Cas. (CCH) ¶ 65,692, *supplemented*, 564 F. Supp. 650 (E.D. La. 1983).

lenged a merger between the Bank of New Orleans & Trust Co., a state bank, and First National Bank of Commerce, a national bank.²¹⁵ Plaintiff alleged violations of Louisiana's antitrust laws.²¹⁶ The case had been removed to federal court, and plaintiff filed a motion to remand.²¹⁷ The court held that although the BMA of 1966 applied to the proceeding, it did not require the state antitrust action to be dismissed on the grounds of preemption. Rather, according to the court, "state courts which are asked to review a proposed merger under state antitrust laws are required to apply the federal standards set forth in the 1966 Act."²¹⁸ The court reached this conclusion because the BMA explicitly permits antitrust actions based on antitrust laws other than the Clayton Act or the Sherman Act, but which are "*in pari materia*."²¹⁹ In a subsequent opinion, the court stated that the plaintiff was entitled to proceed with his challenge to the merger, and if he succeeded, he could cause divestiture of the acquired bank.²²⁰

4. *State Attorney General (Parens Patriae) Enforcement of the Federal Antitrust Laws Under the BMA and BHCA*

State attorneys general may use their *parens patriae* authority to challenge anticompetitive mergers using federal antitrust laws because the BMA of 1966 did not impliedly repeal this

215. *Id.* at 69,532-33.

216. *Id.* at 69,533.

217. *Id.* at 69,535-36.

218. *Id.* at 69,535.

219. *Id.* at 69,636. Although the court recognized the right of private plaintiffs to challenge federal mergers in state court, it also held that such actions ultimately present federal questions and may be removed to federal court. *Id.* at 69,535-36. *But see* *United Jersey Banks v. Parell*, 783 F.2d 360 (3d Cir.) (holding that antitrust challenges under state law involving federal bank and bank holding company may not be removed to federal court and any question of preemption must be decided by the state court), *cert. denied sub nom.* *First Fidelity Bancorporation v. Parell*, 476 U.S. 1170 (1986).

220. In the subsequent opinion, the court denied the plaintiffs right to an automatic stay under the BMA of 1966, but nevertheless held that the plaintiff was entitled to proceed with his antitrust claim, stating, "[o]n the other hand, without a stay, plaintiffs interests are not irreparably harmed. He still has the right to proceed with his suit, and if he prevails, to cause divestiture of the merger." *Vial v. First Commerce Corp.*, 564 F. Supp. 650, 667-68 (E.D. La. 1983).

right. The Supreme Court has held that "[r]epeals of the antitrust laws . . . are strongly disfavored, [sic] and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."²²¹ The BMA of 1966 leaves antitrust laws unchanged, and enforcement of these laws by state attorneys general is not repugnant to the BMA. Rather, the plain language of the BMA of 1966, the legislative history of the Act, subsequent Supreme Court and district court decisions, and public policy support both a private right of action and state antitrust enforcement after the BMA of 1966.

Initially, the plain language of the BMA suggests that a private right of action remains intact:²²²

*Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) [providing a maximum of thirty days after agency approval of the merger] at which a merger transaction approved under paragraph (5) [a merger which might result in a monopoly or substantially lessen competition] might be consummated.*²²³

Because the statute does not specify any particular plaintiffs, and because it refers to "any action brought under the antitrust laws," the plain language of the BMA suggests that there is no implied repeal of either a private right of action or the right of state attorneys general to enforce the antitrust laws.²²⁴

Second, the legislative history of the BMA of 1966 suggests that Congress did not intend to amend or repeal the antitrust laws themselves. According to Representative Paul H. Todd, Jr.:

The majority report states: "(1) The bill would establish a single set of standards for the consideration of future mergers . . . under the antitrust laws . . .," and in the section 2(d)

221. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963) (footnote omitted).

222. According to the Supreme Court, the sole function of the courts is to enforce a statute according to its terms when the statute's language is plain. Plain language is not to be expanded or contracted by statements of individual legislators or committee reports. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

223. 12 U.S.C. § 1828(c)(7)(A) (1988) (emphasis added).

224. See Comment, *The 1966 Amendment to the Bank Merger Act*, 66 COLUM. L. REV. 764, 786 (1966).

H.R. 12173 defines the antitrust laws as those now in existence. Thus, there is a clear implication that the antitrust provisions have not been changed.²²⁵

Subsequent Supreme Court decisions have confirmed Representative Todd's interpretation of legislative intent behind the BMA of 1966.²²⁶ For example, in *United States v. First City National Bank*,²²⁷ the Justice Department brought its action under the antitrust laws and failed to even mention the BMA in its complaint.²²⁸ The defendants argued that the Supreme Court should remand the case and require the Justice Department to allege a claim under the BMA rather than the antitrust laws.²²⁹ The Court rejected this argument,²³⁰ holding that "an action challenging a bank merger on the ground of its

225. H.R. REP. NO. 1221, *supra* note 170, at 21, *reprinted in* 1966 U.S.C.C.A.N. at 1884 (statement of Rep. Todd) (citation omitted). Examples in the legislative history of the BMA of possible future actions by the Justice Department demonstrate the way in which Congress envisioned the BMA would operate under the 1966 amendments. *See, e.g., id.* at 1, *reprinted in* 1966 U.S.C.C.A.N. at 1860. Critics of state antitrust enforcement use these examples to argue that Congress intended to repeal impliedly private and state standing to enforce the antitrust laws and intended to permit only the Justice Department to challenge bank mergers. Greene & MacDonald, *supra* note 10, at 507-09. This argument ignores the historical context of congressional action to amend the BMA. In 1960, when the BMA was passed and in 1966, when it was amended, the Department of Justice was the only party that had ever challenged a bank merger under the antitrust laws, and at the time of the 1966 amendments, it was actively pursuing several bank merger challenges. *See, e.g.,* H.R. REP. NO. 1221, *supra* note 170, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 1863; S. REP. NO. 299, *supra* note 169, at 2; S. REP. NO. 196, *supra* note 148, at 3. Naturally, in this historical context, Congress would assume that the Justice Department would be the most likely party in future bank merger challenges and, therefore, would use the Justice Department in any examples of how it expected the BMA to operate. From these examples, however, one cannot simply assume that Congress intended to repeal impliedly private and state rights of action under the antitrust laws. Indeed, even Greene & MacDonald concede that the BMA's sponsor, Rep. Patman, made the only reference to private rights of action in the legislative history when suggesting that private rights of action would continue. *See* Greene & MacDonald, *supra* note 10, at 508 n.38.

226. *See* *United States v. Third Nat'l Bank*, 390 U.S. 171, 182 (1968); *United States v. First City Nat'l Bank*, 386 U.S. 361, 363-64 (1967).

227. 386 U.S. 361 (1967).

228. *Id.* at 363.

229. *Id.*

230. *Id.* at 363-64.

anticompetitive effects is brought under the antitrust laws²³¹ and, therefore, the plaintiff need make no reference to the BMA.²³² According to the Court, "there is no indication [in the statute or its legislative history] that an action challenging a merger on the ground of its anticompetitive effects is bottomed on the Bank Merger Act rather than on the antitrust laws."²³³ Rather, the Court determined that the BMA simply provided defendants with the affirmative defense that the convenience and needs of the community required the approval of an otherwise anticompetitive merger.²³⁴ According to the Court, this defense under the BMA must be pleaded and proved by the defendants.²³⁵

In *United States v. Third National Bank*,²³⁶ the Court reaffirmed the full applicability of the antitrust laws to bank mergers:

We find in the 1966 Act, which adopted precisely that § 7 Clayton Act phrase ["substantially to lessen competition"], as well as the "restraint of trade" language of Sherman Act § 1, no intention to adopt an "antitrust standard" for bank cases different from that used generally in the law. Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: Congress intended bank mergers first to be subject to the usual antitrust analysis.²³⁷

Consistent with the Supreme Court holdings that the antitrust laws remain unchanged by the BMA of 1966 and the clear language of the BMA itself, lower courts have permitted private rights of action under federal antitrust laws challenging bank mergers. In *First Midland Bank & Trust Co. v. Chemical Financial Corp.*,²³⁸ a Michigan banking corporation challenged an

231. *Id.* at 363.

232. *Id.* at 363-64.

233. *Id.* at 364.

234. *Id.*

235. *Id.*

236. 390 U.S. 171 (1968).

237. *Id.* at 181-82 (citation omitted).

238. 441 F. Supp. 414 (W.D. Mich. 1977).

acquisition by Chemical Financial, a bank holding company.²³⁹ Although the court denied an automatic stay of the planned merger, it permitted the plaintiff to proceed with an action under the antitrust laws.²⁴⁰ According to the court:

A decision that a private lawsuit does not invoke the automatic stay, however, does not foreclose a private action; it merely means that such an action is not conducted under shelter of an automatic stay Lifting the automatic stay, however, does not mean that plaintiff cannot thereafter seek preliminary injunctive relief. As circumstances change, the anticompetitive impact of the proposed merger or acquisition may become more apparent, and the resulting injury to competitors may warrant judicial intervention. Certainly, should the impact of the merger be such as to threaten plaintiff's ability to continue to maintain the suit, this Court, provided the other requirements for injunctive relief were met, would not hesitate to order divestiture pending the outcome of litigation.²⁴¹

Alternatively, in *Southwest Mississippi Bank v. FDIC*²⁴² two banks, which were *denied* the right to merge by the FDIC on the grounds that the merger was anticompetitive, challenged that agency's decision in a declaratory judgment action in federal court.²⁴³ The district court held that because the sole issue before the court was an antitrust claim, the Administrative Procedure Act did not apply, the FDIC's decision was entitled to no presumptive weight, and the plaintiffs were entitled to full *de novo* review of the antitrust issues.²⁴⁴ The court held that *de*

239. *Id.* at 417-20.

240. *Id.* at 422-23.

241. *Id.*; see also *Vial v. First Commerce Corp.*, 564 F. Supp. 650, 667-68 (E.D. La. 1983).

242. 499 F. Supp. 1 (S.D. Miss. 1979).

243. *Id.* at 2-3.

244. *Id.* at 5-7. This holding is consistent with *United States v. First City Nat'l Bank*, 386 U.S. 361, 367 (1967), in which the Supreme Court stated:

Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. We have found no indication that Congress designed judicial review differently under the 1966 Act than had earlier obtained.

novo review was appropriate under the BMA for antitrust challenges to agency approval of a merger because, "[n]othing in the language of the Act or its legislative history persuades this Court that a different standard should apply or that the scope of review should be different depending upon who loses or wins before the administrative agency, where, as here, the antitrust issue is the only issue."²⁴⁵

Finally, state antitrust enforcement is not "plainly repugnant" to the congressional purposes behind the BMA of 1966, but rather helps to ensure that these purposes are achieved. As noted above, a fundamental purpose of the BMA and BHCA is to prevent undue concentration in the banking industry.²⁴⁶ Indeed, the 1966 amendments to the BMA and BHCA intended to make preserving competition in the banking industry the preeminent goal of government enforcement and regulation.²⁴⁷ Historically, Congress has sought the assistance of state attorneys general in achieving its antitrust enforcement goals.²⁴⁸ Antitrust enforcement efforts by state attorneys general thus help to ensure that the congressional goal of effective antitrust enforcement reflected in the BMA and BHCA is achieved,²⁴⁹ and are certainly not "plainly repugnant" to this congressional purpose.

A second goal of Congress in passing the 1966 amendments to the BMA and BHCA was to achieve uniform standards in antitrust enforcement involving the federal banking system.²⁵⁰ Antitrust enforcement by state attorneys general is essential to achieving this goal. The regulatory system devised by Congress requires the federal banking agencies, the Department of Justice, and the appropriate state supervisory authority to confer in an attempt to achieve uniform enforcement standards.²⁵¹ However, Congress gave the courts the ultimate authority to assure uniformity through *de novo* review of agency decisions regarding

Id. (citations omitted).

245. *Southwest Mississippi Bank*, 499 F. Supp. at 6.

246. *See supra* notes 146, 186 and accompanying text.

247. *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 463 (9th Cir. 1973).

248. *See supra* notes 54-60 and accompanying text.

249. *See supra* notes 176, 186 and accompanying text.

250. *See supra* note 173 and accompanying text.

251. 12 U.S.C. §§ 1828(c)(4), 1842(b), 1849(b).

proposed bank mergers.²⁵²

In practice, the federal agencies have often disagreed with each other²⁵³ and with the courts²⁵⁴ on the proper antitrust methodology for analyzing bank mergers. Where such disagreements result in enforcement action by the Department of Justice, the courts can properly fulfill their role of assuring uniformity.²⁵⁵ However, when federal agencies fail to enforce the antitrust laws properly, or when policy changes in federal agencies or the executive branch result in "rubber stamping" of proposed mergers, courts are powerless on their own to fulfill their role of ensuring uniformity over time.²⁵⁶ Antitrust actions brought by state attorneys general ensure that courts may fulfill their congressionally mandated role to enforce uniform antitrust standards in bank merger cases where federal agencies' departure from these standards results in no enforcement action.²⁵⁷

Finally, in passing the amendments to the BMA and BHCA, Congress intended to grant the banking industry a partial immunity from the antitrust laws if the merging parties could establish that an otherwise anticompetitive merger nonetheless served the "convenience and needs of the community."²⁵⁸ Because banks that defend antitrust actions brought by state attorneys general are free to raise the "convenience and needs of the community" defense in the same way and to the same extent as in an action brought by the Department of Justice, state antitrust enforcement is not "clearly repugnant" to this congressional purpose.

252. 12 U.S.C. §§ 1828(c)(7), 1849(b).

253. See, e.g., *United States v. Third Nat'l Bank*, 390 U.S. 171, 179 (1968) (Comptroller of the Currency disagreed with Federal Reserve Board and Department of Justice); *United States v. First City Nat'l Bank*, 386 U.S. 361, 364 (1967) (same).

254. See, e.g., *United States v. Central State Bank*, 817 F.2d 22, 23-24 (6th Cir. 1987) (court disagreed with Department of Justice); *Mercantile Texas Corp. v. Board of Governors of the Fed. Reserve Sys.*, 638 F.2d 1251, 1261 (5th Cir. 1981) (court disagreed with Federal Reserve Board); *Washington Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 465 (9th Cir. 1973) (court disagreed with FDIC).

255. See *supra* notes 252-53 and accompanying text.

256. See *supra* notes 105-06 and accompanying text.

257. See *supra* note 173 and accompanying text.

258. *United States v. First City Nat'l Bank*, 386 U.S. 361, 363-64 (1967).

D. The BMA and BHCA Create New Opportunities and Remedies for States

The provisions of the BMA and the BHCA create new remedies and enforcement opportunities for state attorneys general who oppose proposed anticompetitive bank mergers. Among the provisions utilized are those permitting the automatic stay of proposed mergers, state intervention in federal enforcement actions, and comment requirements in both statutes.

1. Automatic Stay Provisions of the BMA

The legislative history of the BMA of 1966 establishes that when Congress passed the amendments it was deeply concerned that successful antitrust enforcement might cause the unscrambling of two or more banks after their merger.²⁵⁹ Congress believed that such a process would be difficult and would create serious problems for the banks' customers and the community.²⁶⁰ Therefore, it provided for an automatic stay of any merger approved by an agency under the BMA upon the filing of an antitrust action.²⁶¹ According to the BMA:

*Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.*²⁶²

Despite the plain language of the statute, courts have consistently denied automatic stays to private plaintiffs.²⁶³ The courts have held that Congress intended the automatic stay provision to apply to the United States Justice Department

259. *Id.* at 370-71 (discussing the legislative history of the automatic stay provisions of the BMA of 1966).

260. *Id.*

261. 12 U.S.C. § 1828(c)(7)(A) (1988).

262. *Id.* (emphasis added).

263. *See, e.g.,* Vial v. First Commerce Corp., 564 F. Supp. 650, 666-67 (E.D. La. 1983); First Midland Bank & Trust Co. v. Chemical Fin. Corp., 441 F. Supp. 414, 421-22 (W.D. Mich. 1977).

because the provision could be used to stop "any merger, good or bad"²⁶⁴ and such power should be limited to an "agency committed to acting in the public good."²⁶⁵ The courts reasoned that private plaintiffs did not always act in the public interest and that any "man on the street" could not be the intended beneficiary of the extraordinary relief provided in the statute.²⁶⁶ Moreover, the courts concluded that because there is no bond requirement as a condition of an automatic stay under the BMA, Congress could not have intended such a provision to apply to private parties.²⁶⁷

Although the courts' conclusions are not unjustified with respect to private parties, their reasoning does not apply to state attorneys general. To the contrary, granting state attorneys general the right to an automatic stay not only comports with the plain language of the statute but better fulfills the intent of Congress.

Unlike private plaintiffs, Congress has recognized that state attorneys general act in the public interest when instituting antitrust actions. According to a Senate report:

[A] State attorney general is an effective and ideal spokesman for the public in antitrust cases. A primary duty of the state is to protect the health and welfare of its citizens; and a State attorney general is normally an elected and accountable and responsible public officer whose duty it is to promote the public interest.²⁶⁸

Thus, state attorneys general are different from private plaintiffs for standing purposes when seeking relief under the antitrust laws.²⁶⁹ Moreover, unlike private parties, when public

264. *Vial*, 564 F. Supp. at 666.

265. *Id.* at 667; see also *First Midland Bank*, 441 F. Supp. at 421-22.

266. *Vial*, 564 F. Supp. at 666-67; see also *First Midland Bank*, 441 F. Supp. at 421-22.

267. *Vial*, 564 F. Supp. at 667.

268. S. REP. NO. 803, 94th Cong., 2d Sess. 39 n.1 (1976) (discussing the Hart-Scott-Rodino Act provisions, codified at 15 U.S.C. § 15(c) (1988), granting state attorneys general *parens patriae* authority to seek damages for state residents caused by anti-trust violations).

269. See *Pennsylvania v. Russell Stover Candies, Inc.*, 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993).

The contours of antitrust standing as it relates to a state in its

bodies seek injunctions in the actions on behalf of the public good, courts may waive bonds or set bonds of nominal amounts.²⁷⁰ Finally, the automatic stay provisions of the BMA of 1966 were passed because Congress "abhorred" the unscrambling of banks after divestiture and feared the potential adverse effects divestiture might have on the community.²⁷¹ Granting state attorneys general this relief would better fulfill the intent of Congress but would not create the problems associated with granting this relief to private individuals.

2. Intervention in Pending Antitrust Challenges to Bank Mergers

Under the BMA, state attorneys general may intervene as of right in any antitrust action challenging a bank merger, whether brought by a private party or the government.²⁷² The BMA provides in pertinent part:

In any action brought under the antitrust laws arising out of [a merger transaction] approved by [a federal supervisory agency pursuant to this subsection] . . . any State banking supervisory agency having jurisdiction within the state involved, may appear as a party of its own motion and as of right, and be represented by counsel.²⁷³

The BMA does not define "State banking supervisory agency" and there are no court decisions interpreting this provision. However, state attorneys general customarily represent state agencies in most states and in some states they are authorized

parens patriae capacity are perhaps different from antitrust standing as it applies to other private parties. Precedent involving standing of individual private parties may not control the issue of *parens patriae* standing as those cases do not implicate quasi-sovereign interests. Although the state is considered a private party, to some extent, when it brings an action *parens patriae*, [there are] possible nuances between an individual and a state which are relevant to the issue of antitrust standing.

Id. at 70,089.

270. H. Chester Horn, Jr., *California v. American Stores: Some Thoughts About The Future For State Merger Enforcement Programs*, 18 NAAAG Antitrust Rep. 1, 12-17 (April/May 1991).

271. *United States v. First City Nat'l Bank*, 386 U.S. 361, 370-71 (1967).

272. 12 U.S.C. § 1849(c) (1988).

273. *Id.*

by statute or common law to act as unitary plaintiffs representing all government agencies.²⁷⁴

This provision clearly benefits the states. There are some instances where a state may not have the need or ability to bring its own action to challenge a proposed merger except when the state's interests diverge from the Department of Justice or a private plaintiff. For example, states often agree with federal agencies that a particular merger as structured is anticompetitive but disagree on the nature and extent of divestitures needed to make the proposed merger acceptable under the antitrust laws.²⁷⁵ With a right to intervene, states can adequately protect their special needs and interests without expending the resources to challenge the merger on their own.²⁷⁶

3. Regulatory Comments

Under the BMA and BHCA, the responsible federal agency must give notice of a proposed merger and request comments from interested parties²⁷⁷ and, under the BHCA, must notify the "appropriate State supervisory authority" as well.²⁷⁸ These

274. See, e.g., *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981); *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir.), cert. denied sub nom. *California v. Florida ex rel. Shevin*, 425 U.S. 930 (1976).

275. See *Antitrust Implications*, supra note 9 (testimony of Maine Assistant Attorney General Steve Wessler).

276. Critics suggest that if state attorneys general had a private right of action, then the intervention provisions of the BMA and BHCA would be meaningless. Greene & MacDonald, supra note 10, at 507. However, states may not have the resources, ability or need to challenge every anticompetitive bank merger that affects them. For example, as noted above, a state may decide not to bring an action because the merger was being challenged by the Department of Justice. However, the Department may seek divestitures with which the state disagrees, and the state may seek intervention solely for the purpose of challenging the proposed divestitures. Prior to the BMA of 1966, states did not have the right to intervene under such circumstances. In *United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330 (D. Utah 1965), the court denied the State of California the right to intervene for this very purpose. The states' right to intervene was not clearly established until after the BMA of 1966, when the Supreme Court reversed *El Paso Natural Gas*, sub nom. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

277. 12 U.S.C. §§ 1828(c)(3), 1842(b) (1988); see also *Martin-Trigona v. Board of Governors of the Fed. Reserve Sys.*, 509 F.2d 363, 365 (D.C. Cir. 1974).

278. 12 U.S.C. §§ 1842(b), 1849(b) (1988).

provisions provide state attorneys general with an additional opportunity to oppose an anticompetitive merger. State attorneys general have used these procedures successfully to block anticompetitive aspects of a number of proposed mergers,²⁷⁹ without the need for litigation in state or federal court.²⁸⁰

III. CONCLUSION

Ongoing bank mergers and the related increase in concentration in the banking industry substantially impact states' economies, businesses, and people. Traditional antitrust enforcement by state attorneys general protects states' vital interests and is consistent with long established principles of federalism. Accordingly, the BMA and BHCA do not preempt state antitrust enforcement and do not impliedly repeal the right of state attorneys general to enforce *parens patriae* federal antitrust laws.

279. See *supra* note 9.

280. The Administrative Procedure Act does not apply to an antitrust action challenging a proposed bank merger, and the district court decides all such challenges *de novo*. See, e.g., *United States v. First City Nat'l Bank*, 386 U.S. 361, 367-69 (1967); *Southwest Miss. Bank v. FDIC*, 499 F. Supp. 1, 5-8 (S.D. Miss. 1979).