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## The Banking Conglomerate

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# THE BANKING CONGLOMERATE

EUGENE J. METZGER\*

A bank is not free to engage in general business activity. National banks are restricted to banking and, either directly or through subsidiaries, to financially related activities.<sup>1</sup> Multiple or registered bank holding companies have been similarly restricted since the enactment of the Bank Holding Company Act in 1956.<sup>2</sup> But corporations which list only one bank among their subsidiaries are not now subject to such restraints.<sup>3</sup> In 1955 there were 117 one-bank holding companies.<sup>4</sup> Many were ordinary banks restructured solely to take advantage of local tax anomalies. Some were business or labor organizations which perchance numbered a bank among their ventures — including, for example, Goodyear, Macy's Corn Products, and the United Mine Workers. Others were banks which found business advantage in separately incorporating certain of the bank's activities, usually to emphasize to customers and subsidiary management the independence of the activity.

With the pinching-off of the registered bank holding company as a device for corporate joinder of diverse banking and business activity in 1956, and with the growing interest in conglomerate or "multiple profit-center" business, the number of one-bank holding companies had jumped to 550 in 1965 and to 783 by the end of 1968, "including those either created or planned."<sup>5</sup> Although only 5 percent of all banks (by number) are controlled by one-bank holding companies, they include a substantial portion of the larger banks.<sup>6</sup> Not unexpectedly the Department of Justice has scrutinized activity in this area very closely. In 1965 the Department sued to block the proposed acquisition of Carte Blanche by First National City Bank,<sup>7</sup> and in 1969, delays in Justice rulings on a proposed merger between the

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<sup>1</sup> The Comptroller of the Currency defines the problem in § 7.10 of his Regulations: When determining whether or not a particular function or activity of a national bank, including ownership of controlling stock in a corporation carrying on such function or activity, is within the business of banking, this Office cannot close its mind to the well-known fact that business, in general, is everchanging and growing and that the banking business has developed rapidly during recent years to meet the requirements of business.

<sup>2</sup> 12 C.F.R. § 7.10(c)(1) (1970).

<sup>3</sup> 12 U.S.C. § 1843 (1964).

<sup>4</sup> *Id.* See also 115 CONG. REC. 10567 (daily ed. Nov. 5, 1969).

<sup>5</sup> 115 CONG. REC. 10495 (daily ed. Nov. 4, 1969) (remarks of Representative Bennett).

<sup>6</sup> *Id.* at 10496 (remarks of Representative Patman).

<sup>7</sup> "Possibly as much as 40 percent of all commercial bank deposits in the entire United States are now held by one-bank holding companies." *Id.* (remarks of Representative Patman).

<sup>8</sup> *United States v. First Nat'l City Bank*, 5 TRADE REG. REP. ¶ 45,065, at 52,611 (S.D.N.Y. Dec. 30, 1965).

mortgage servicing company, Lomas and Nettleton Financial Corporation and the First National Bank of Dallas was the cited reason for cancelling the merger.<sup>8</sup> Similarly, when the Department announced on Friday, June 13, 1969, that it would sue if First National City Bank merged with Chubb Corporation, a very large insurance company, the merger was cancelled on Monday, June 16.<sup>9</sup> Despite this clear evidence of an executive capacity and intent to move under current antitrust laws in the area of one-bank holding companies, Congress is presently contemplating special legislation. Representative Wright Patman, the Torquemada of the banking industry, has determined that whatever resolution the question of conglomerates may have in other industries, banking shall be purified of the evil in one grand *auto-da-fé*. H.R. 6778,<sup>10</sup> which passed the House on November 5, 1969, and will be considered by the Senate in the spring of 1970, would preclude all purely conglomerate subsidiaries of one-bank holding companies, and would further bar one-bank holding companies from having a long list of subsidiaries in related, *i.e.*, congeneric, financial activities,<sup>11</sup> regardless of whether competitive consequences would be bad or good in the particular instance. Subsidiaries of the proscribed degree acquired after May 9, 1956<sup>12</sup> must be divested. And although the oratory was directed against alleged conceptual misuse of inherent credit powers, rejection of a proposed limitation by Representative Bennett to one-bank holding companies larger than \$30 million in gross assets<sup>13</sup> clearly marked the animal as the target and not the claw.

#### WHAT IS A CONGLOMERATE?

I should like to define a horizontal merger as one between companies making products which, within reasonable price variances, may serve for the same end use. On the other hand, a vertical merger is one between companies which are or could be, again within reasonable price variances, in a supplier-user chain. And a conglomerate merger is one between companies whose products or services fall into neither of the previous categories. Much needless confusion is created by injecting the competitive concept into the functional one. For example, two gasoline refiners do not make for a "conglomerate" merger even though they sell in different parts of the country. Similarly, cans and bottles compete in price and function for

<sup>8</sup> AMERICAN BANKER, May 7, 1969, at 6, col. 1.

<sup>9</sup> Wall Street Journal, June 16, 1969, at 2, col. 3.

<sup>10</sup> H.R. REP. NO. 6778 (amending the Bank Holding Company Act of 1956), 115 CONG. REC. 10544-75 (daily ed. Nov. 5, 1969).

<sup>11</sup> These include (a) Underwriting or selling stocks, bonds, mutual funds, Keough plans in competition with insurance companies; (b) generally acting as an insurer or insurance agent; (c) travel agencies; (d) selling accounting or auditing services; (e) computer time or servicing sales (with minor limitations); (f) leasing generally. H.R. REP. NO. 387, 91st Con., 1st Sess. (1969).

<sup>12</sup> Date of enactment of the Bank Holding Company Act. 12 U.S.C. §§ 1841-49 (1964).

<sup>13</sup> 115 CONG. REC. 10550 (daily ed. Nov. 5, 1969) (remarks of Representative Bennett).

most end uses — therefore, the merger of a can manufacturer and a bottle manufacturer is horizontal. Of course, there are situations in which labels detract rather than add, and in such cases they should be avoided.

### *What is Wrong with Conglomeration?*

In 1945 one of our great jurists, Learned Hand, wrote:

Throughout the history of [the antitrust] statutes it has been consistently assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.<sup>14</sup>

In 1969, Chief Judge Timbers of the Connecticut District Court held that:

A merger which has the effect of increasing economic concentration, even substantially . . . does not necessarily lessen competition substantially; and evidence that a merger may increase economic concentration, without more, is not sufficient to halt a merger under Section 7 without a specific showing that it may have anti-competitive effects.

The alleged adverse effects of economic concentration brought about by merger activity, especially merger activity of large diversified corporations . . . arguably may be such that, as a matter of social and economic policy, the standard by which the legality of a merger should be measured under the antitrust laws is the degree to which it may increase economic concentration — not merely the degree to which it may lessen competition. If the standard is to be changed, however, in the opinion of this Court it is fundamental under our system of government that that determination be made by the Congress and not by the courts.<sup>15</sup>

Judge Timbers was largely echoing the views of Donald F. Turner, a lawyer-economist who had interrupted his teaching career at Harvard Law School to head the Antitrust Division of the Department of Justice for several years. Professor Turner had concluded that Congress did not mandate “the commission or the courts to campaign against super-concentration in the absence of any evidence of harm to competition.”<sup>16</sup> However, Richard W.

<sup>14</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

<sup>15</sup> *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766, (D. Conn. 1969); see also *United States v. Northwest Industries, Inc.*, 301 F. Supp. 1066, 1096 (N.D. Ill. 1969).

<sup>16</sup> Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1395 (1965). But clearly Professor Turner is wrong here. As the Supreme Court noted in its first decision under the Celler-Kefauver Amendments to the Clayton Act: “The dominant theme pervading congressional consideration of the 1950 Amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) (emphasis added).

This observation is supported by the legislative history:

Measured by practically any method and compared to practically any standard, the level of economic concentration in the American economy is high. The Temporary National Economic Committee found that, if an individual product is picked at random, there is a one-to-one chance that the four largest producers of that product will account for 75 percent or more of its output.

Moreover, the long-term trend of concentration has been steadily upward. Although comparable postwar data are not as yet available, the National Resources Committee found that while the 200 largest nonbanking corporations owned about one-third of all corporation assets in 1909, by 1928 they owned 48 percent of the

McLaren, Professor Turner's successor and the present Assistant Attorney General, Antitrust Division, is of the opposite school. He has said:

total, and by the early thirties the proportion had increased to 54 percent. This long-term trend is confirmed by another series prepared by an analyst of Moody's Investment Service, which shows that 316 large manufacturing corporations increased their proportion of the total working capital of all manufacturing corporations from 35 percent in 1926 to 47 percent in 1938.

This long-term rise in concentration is due in considerable part to the external expansion of business through mergers, acquisitions, and consolidations. Thus, in the case of the steel industry, mergers and acquisitions of other companies accounted for one-third of the long-term growth (1915-45) of the Bethlehem Steel Corp.; and two-thirds of the growth of Republic Steel. And in the case of the industry's largest firm, the original formation of the United States Steel Corp. represented the greatest consolidation in history, with more than 170 formerly independent concerns having been brought together at one fell swoop. Much the same situation is true of the copper industry, in which no less than 70 percent of the long-term growth (1915-45) of the three largest companies, Anaconda, Kennecott, and Phelps-Dodge, has been due to external expansion through acquisitions and mergers.

The importance of mergers and acquisitions as a cause of economic concentration has increased rapidly during recent years with the acceleration of the merger movement. During the period, 1940-47 some 2,500 formerly independent manufacturing and mining companies disappeared as a result of mergers and acquisitions. This is a minimum estimate, since it is based upon a sample drawn principally from reports of acquisitions of the larger corporations as published in the leading financial manuals.

That the current merger movement has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time.

Apart from this general effect, the current movement has had the result of raising the level of economic concentration in a number of very specific ways. In the first place, recent merger activity has been of outstanding importance in several of the traditionally "small business" industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly "small business" fields—than in any other industries. Furthermore, in certain other industries which have traditionally been considered as "small business" fields (such as steel drums, tight cooperage, and wines) nearly all of the industry has been taken over by very large corporations. Finally, the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals. More than 70 percent of the total number of firms acquired during 1940-47 have been absorbed by larger corporations with assets of over \$5,000,000. In contrast, fully 93 percent of all the firms bought out held assets of less than \$1,000,000. Some 33 of the Nation's 200 largest industrial corporations have bought out an average of 5 companies each, and 13 have purchased more than 10 concerns each.

Such in general outline is the broad economic problem of high and increasing concentration with which this legislation is concerned.

H.R. REP. No. 1191, 81st Cong., 1st Sess. 2-3 (1949) (footnotes omitted).

The purpose of the proposed bill, H.R. 2734, is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. . . .

While there may exist many differences of opinion as to other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high.

S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950).

The Congress plainly felt that "superconcentration" was itself an occasion for an instance of "harm to competition." Assuming Professor Turner was familiar with the legislative history of the statute, we must conclude that his real meaning was "Congress should not have mandated the Commission or the courts to campaign against superconcentration."

I [am] not persuaded that Section 7 will not reach purer types of conglomerate mergers than have been dealt with by the courts thus far. . .

[While] I am by no means opposed to amendatory legislation, . . . I feel that the matter is too pressing to wait, and we are willing to risk losing some cases to find out how far Section 7 will take us in halting the current accelerated trend toward concentration by merger and — as I see it — the severe economic and social dislocations attendant thereon.<sup>17</sup>

Attempts to reconcile disputes so fundamental must almost invariably fail. Such assertions generally reflect not conscious decisions, rationally derived, but rather expressions of the essence of the man. They rise from his philosophy, and are not the distillation of pure mental processes.

General agreement can be found only among anguished conglomerators and Presidential Commissions. The *Neal Report* of the Johnson Administration concluded:

Although the number of conglomerate mergers has increased sharply in recent years, there is only a *moderate* tendency toward increase in the overall concentration of manufacturing assets in American industry. Nor does the present merger movement threaten to reduce the aggregate number and proportion of smaller firms. Remedial measures based on size alone would constitute a radical innovation in our antitrust policy and no rationale is available for determining the appropriate upper limit on the size to which a single firm may grow.<sup>18</sup>

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tration in the absence of *what my school of economics conceives to be* any evidence of harm to competition."

Although the data are not strictly comparable, the following table from the Bureau of Economics, Federal Trade Commission, demonstrates the continuity of the concentration trend.

SHARE OF MANUFACTURING CORPORATION ASSETS HELD BY  
THE 200 LARGEST CORPORATIONS 1948-1967

Year	100 Largest	200 Largest
1948	40.1	48.1
1950	39.6	48.6
1955	43.8	52.5
1960	46.0	55.8
1965	46.2	56.3
1967	47.6	58.7

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BUREAU OF ECONOMICS, FTC STAT. REP. NO. 4, LARGE MERGERS IN MANUFACTURING AND MINING (1948-1968) (1969).

<sup>17</sup> Address by Assistant Att'y Gen. McLaren, in *Hearings on Tax Reform Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. (1969).

<sup>18</sup> 1968 PRESIDENTIAL TASK FORCE REPORT ON ANTITRUST, 115 CONG. REC. 5642 (daily ed. May 27, 1969) (emphasis added).

Some economists might conclude that the concentration increases set forth in note 16 *supra* were "alarming." Whatever adjective one might choose, an increase by the 200 largest from 48 percent to 58 percent in 20 years is at least substantial.

Various economists have suggested mechanical tests for *prima facie* unlawfulness in concentration, either horizontal, vertical or conglomerate. See, e.g., C. KAYSAN & D. TURNER, ANTITRUST POLICY (1959); Bok, *Section 7 of the Clayton Act and the Merging of Law and*

President Nixon's *Stigler Report*, concluding that further investigation was necessary, recommended the establishment of a committee to expand upon our present knowledge of the conglomerate phenomenon.

We seriously doubt that the Antitrust Division should embark upon an active program of challenging conglomerate enterprises on the basis of nebulous fears about size and economic power. These fears should be either confirmed or dissipated, and an important contribution would be made to this resolution by an early conference on the subject. If there is a genuine securities market problem, probably new legislation is necessary. If there is a real political threat in giant mergers, then the critical dimension should be estimated. If there is no threat, the fears entertained by critics of the conglomerate enterprises should be allayed. Vigorous action on the basis of our present knowledge is not defensible.<sup>19</sup>

I suspect that a committee made up of Professor Stigler's conferees would give cold comfort to the trustbusters.

#### *What Conglomerate Mergers Violate the Clayton Act?*

If a merger has or could reasonably be expected to have the effect of conferring upon the resulting firm market advantages which do not reflect efficiencies of scale,<sup>20</sup> and which advantages are substantial, the merger<sup>21</sup> probably would be rejected. Mergers between dominant firms in oligopolistic industries might raise entry barriers or discourage growth by the smaller companies. Moreover substantial business could be diverted from competitors of one of the merging companies because customers or suppliers of the other partner to the merger might feel it to their advantage to deal with the new affiliate — although if the view of Judge Timbers is to prevail, this last will be almost impossible to prove:

Defendants . . . have introduced considerable evidence to the effect that, even if the merger were to create an opportunity for reciprocal dealing, they would not avail themselves of such opportunity; and that reciprocity effect is unlikely. Defendants' uncontroverted evidence shows

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*Economics*, 74 HARV. L. REV. 226 (1960); Markham, *Merger Policy under the New Section 7*, 43 VA. L. REV. 489 (1957); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955). See also U.S. DEPT. OF JUSTICE, MERGER GUIDELINES, A.B.A. ANTITRUST DEVELOPMENTS 1955-1968 311 (1968).

<sup>19</sup> 1969 PRESIDENTIAL TASK FORCE REPORT ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6472, 6476 (daily ed. June 16, 1969).

<sup>20</sup> A merger of a cigarette and a candy manufacturer could result in many different kinds of reductions in operating costs. For example, the new company would move more products through virtually identical channels of distribution. Substantial cost reductions could result. The much higher volume might give the new firm sufficient leverage to force wholesaler's margins down. Important reductions in advertising charges are offered to the bulk purchaser. The cost of renting money can drop substantially. Different commentators would take widely divergent views as to which of these cost reductions are socially desirable.

<sup>21</sup> In antitrust circles, the very word "merger" has substantial pejorative connotations. The view is that growth by exchange of paper is not evidence of superior merit as is, presumptively, the generation of sufficient reserves to enter the field or broaden one's markets alone.

that ITT has a written policy against reciprocity which has been disseminated to its purchasing and sales personnel; and that ITT does not collect purchasing and sales data necessary to identify reciprocal purchasing opportunities.

Furthermore, defendants have adduced evidence that the "profit center" concept, around which ITT is organized, is not conducive to reciprocity. Under this concept each division and subsidiary has its own separate decentralized purchasing and sales department. The compensation and promotion of the individuals who manage each profit center is determined by the performance of their own profit center, not by the performance of ITT as a whole. Affidavits by Mr. Geneen, President of ITT, and Mr. Backman, an economist, bear this out: that the management of each profit center would resist reciprocal dealing arrangements because they would only increase the volume and profits of other profit centers and often would result in purchases of more expensive and poorer quality goods by the profit center which engaged in such reciprocity.

Finally, defendants point out that reciprocity effect is unlikely, given ITT's anti-reciprocity policy, implemented by the withholding of purchasing and sales data and the organization of ITT around the profit center concept; and that, even if ITT suppliers on their own initiative were to purchase sprinkler systems and pipe hangers from Grinnell without pressure from ITT in an effort to gain favor with ITT and to obtain reciprocal sales, such suppliers would find that their purchases would not have the desired effect for the reasons just stated, and they would soon discontinue such abortive efforts.

The substantial, credible evidence introduced by defendants to the effect that reciprocal dealing is unlikely, even if the proposed merger were to create the opportunity for such dealing, precludes any finding based on what amounts to an inference suggested by the government that reciprocal dealing will occur.<sup>22</sup>

As a final note to the general concept of antitrust and the conglomerate, I should like to suggest that insofar as conglomeration tends to insulate the manager of a business from the direct effects of his decisions, it is, pro tanto, undesirable. Further, even setting aside *United States v. Aluminum Co. of America*,<sup>23</sup> where parts of a business are temporarily utilized to whipsaw

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<sup>22</sup> 306 F. Supp. at —. While it is heartening to know that, in these times of cynicism and despair, there are still those who hold fast to the tooth fairy and the little people, it is to be expected that a more sophisticated view of the problem will endure.

The case law in these questions is still sparse and inconsistent: see *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), cert. denied, — U.S. — (1970); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), cert. denied, 391 U.S. 919 (1968); *United States v. Ingersol-Rand Co.*, 320 F.2d 509 (3d Cir. 1963); *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966); *United States v. Penick & Ford, Ltd.*, 242 F. Supp. 518 (N.D. Ill. 1965). Aside from the three ITT cases now pending (Canteen, Grinnell and Hartford), the Antitrust Division presently has one other, relatively pure, conglomerate case — Northwest Industries' acquisition of Goodrich. LTV's takeover of Jones and Laughlin was recently settled by consent decree. *United States v. Ling-Temco-Vought*, 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,105 (W.D. Pa. 1970).

<sup>23</sup> 148 F.2d 416 (2d Cir. 1945).

would-be activists, the managers of conglomerate subsidiaries tend to emphasize the balance sheet at the expense of product. With top executive mobility much higher than in independent business, and go-go stock manipulation prevalent, the pressure is for high numbers now and the devil with tomorrow. Yet, the capitalist concept demands the maximum number of competitors in a market commensurate with the larger economies of scale. If a natural selective process is to be effective, there *must* be casualties and their place must be available to a free stream of new entrants. It is the root anomaly of antitrust as an economic philosophy that it works only if a company is free by dint of superior performance to achieve complete dominion and antitrust fails of its purpose if any company succeeds in achieving that goal.

#### CONGLOMERATION BY BANKS

We have seen that merger statutes were designed to reach trends towards concentration, and that conglomerate mergers posed their most severe threat in industries dominated by one or a few competitors. It is interesting to note then, that in 1940, there were 14,385 commercial banks in the United States, while at the end of 1968, there were 13,698.<sup>24</sup> Also, the share of deposits held by the 10 and hundred largest banks in 1940 was 26.4 percent and 56.7 percent respectively; and at the end of 1968 they were 22.4 percent and 50.3 percent respectively.<sup>25</sup> Additionally, in summing up its analysis of market changes in banking, the Federal Deposit Insurance Corporation in its 1960 Annual Report was constrained to remark:

However defined, the banking "giants" competing on a nationwide basis appear to be sufficiently numerous to maintain active competition among themselves. Banking is perhaps the only industry in which attempts to demonstrate a decline in competition invoke the size of the 100 largest—or 50 or 25 or 10 largest—units in the industry in the nation. In any other industry—say automobile, steel or electronics—this many "giants" would be taken as *prima facie* evidence of a high degree of competition.<sup>26</sup>

The facts support a conclusion that the industry is neither concentrated nor tending in that direction. But if banks were to move *de novo* into a concentrated industry, such as insurance,<sup>27</sup> this could *decrease* concentration in the second industry. Representative Patman would bar this development. Yet,

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<sup>24</sup> RESEARCH MARKET UNIT, DIVISION OF RESEARCH AND STATISTICS, FEDERAL RESERVE BOARD, NUMBER OF BANK AND BANKING OFFICES (1968). *Id.* (1941).

A slight downward drift was arrested in 1961 at 13,431 and since that time the number of banks has drifted slightly upward. *Id.* (1961).

<sup>25</sup> These percentages were garnered by coordinating the 100 LARGEST BANKS IN THE UNITED STATES (compiled annually). BANKING J. OF THE AM. BANKERS ASS'N and the F.D.I.C. ANN. REP. for the years 1940 and 1968 respectively.

<sup>26</sup> 1960 F.D.I.C. ANN. REP. 60.

<sup>27</sup> More than half the life insurance in force in the United States in 1968 was issued by the 10 largest companies (compare banks 23 percent).

if banks were to move into other lines in a way which threatened to substantially lessen competition, the Justice Department has shown no hesitancy in offering battle.<sup>28</sup>

It appears at least to this writer that many of the proponents of special legislation against banks were simply expressing old-fashioned, 19th Century populist views. For instance Mr. Patman observed at one point:

Banking is a rather lucrative franchise. There is no reason now why they should step out and have a sort of "boarding house reach" to pick up nonrelated companies. It is not right. It should not be done. Keep the banks in the banking business. Give the small businessman an opportunity to survive and to expand, to exist. That is all we are asking.<sup>29</sup>

Mrs. Sullivan stated:

Small service businesses, such as travel agencies, insurance agencies, data processing companies, and equipment leasing companies, which must rely to a large extent on bank credit to compete and grow, should not be subjected to unfair competition from their major source of credit, the banks. Their argument that the very livelihood of hundreds of thousands of small businesses is at stake, is a valid one. This country should protect and foster the opportunities that small, independent businesses offer the young, ambitious businessmen and women of this country. By permitting large bank-holding companies to dominate these fields by grabbing off the large, very profitable customers, these kinds of companies as independent businesses will probably disappear.<sup>30</sup>

Mr. Matsunaga, stated his belief that it was "manifestly unfair and unreasonable to allow an ever-increasing number of these bank holding companies to encroach upon the fields of the travel agent and the public accountant."<sup>31</sup> Questioning how "a travel agent operating as a proprietorship or as a small firm, with limited assets, [could] even begin to compete with a colossal national bank's travel department,"<sup>32</sup> he noted that "there has been no clear demonstration of public need for banks to engage in these nonbanking functions. To permit them to do so would constitute an invitation for the banks to expand into other nonbanking areas."<sup>33</sup> And similarly, Mr. Gibbons, stated: "The question that worries me, perhaps because I am a purist, is that banks should be in the banking business and nothing else."<sup>34</sup>

The genius of our economic system has been that the regulation of business and limitations upon its freedom of action have been kept to a minimum commensurate with an orderly society. We have deviated

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<sup>28</sup> See notes 7-9 and accompanying text *supra*.

<sup>29</sup> 115 CONG. REC. 10,554-55 (daily ed. Nov. 5, 1969).

<sup>30</sup> *Id.* at 10,556.

<sup>31</sup> *Id.* at 10,558.

<sup>32</sup> *Id.* It is not clear whether the speaker was referring to Thos. Cook & Sons, Ltd., American Express, or another similar small firm.

<sup>33</sup> 115 CONG. REC. 10,558 (daily ed. Nov. 5, 1969).

<sup>34</sup> *Id.* at 10,550.

from this pattern rarely, and almost invariably to our sorrow (*e.g.*, railroads, trucking, shipping and labor relations). The fears expressed by the congressional proponents of H.R. 6778 might equally be raised against any formidable business venture (and many affected banks are quite modest in size); yet Congress has been content to see what can be accomplished under present law before rushing in with general conglomerate merger legislation. There has been advanced no evidence that banks possess some power which renders their conglomeration more odious than most. Indeed, H.R. 6778 is special legislation, shaped for the peculiar benefit of the insurance industry, and floated thus far by reason of a prodigious public relations campaign. Like the "Fair Trade" of price-fixing legislation,<sup>35</sup> the "unfair competition" of banks against insurance companies is sheer effrontery. In 1944, the Anti-trust Division of the Department of Justice exploded the myth that insurance was not commerce in a price-fixing conviction of numerous insurers and their agents.<sup>36</sup> Within months, the industry persuaded Congress to exempt its price-fixing practices from the antitrust laws.<sup>37</sup> Now the industry once again seeks congressional intervention lest it be compelled to find custom in free and open competition. The irony is that the spurious justification for protecting this enclave of monopoly is postulated anticompetitive conduct. And, although the Bill would protect a number of businesses from bank competition, it seems probable that the insurance industry will be the principal beneficiary in two other protected areas.

The simplest explanation of the curious language utilized in the Bill's leasing provision<sup>38</sup> is the commercial airplane. Unique among chattels, it retains nearly all of its acquisition value throughout a long life. Through its early involvement in airline lending in the 1950's, the insurance industry has become the dominant force in that industry. And, as the final piece in the puzzle, just within the past few years, commercial banks have become interested in airplane financing. The advent of the super jets will exacerbate the airlines' need for financing at the same time Representative Patman is cutting them off from an important source of funds.

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<sup>35</sup> Act of Aug. 17, 1937 (the "Miller-Tydings Resale Price Maintenance Act") ch. 690, 50 Stat. 693; Act of July 14, 1952, ch. 745, 66 Stat. 631.

<sup>36</sup> *United States v. South Eastern Underwriters Ass'ns*, 322 U.S. 533 (1944). The Supreme Court noted the unchallenged allegations of the indictment:

No states authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.

*Id.* at 562.

<sup>37</sup> See 15 U.S.C. § 1012 (1964).

<sup>38</sup> (6) Engaging in the business of leasing property except under arrangements whereby the lessee is;

(A) Obligated to pay over the term of the lease not less than the entire cost of the property, and;

(B) Entitled to ownership of the property at the end of the term of the lease either for a nominal consideration or for no consideration.

H.R. REP. NO. 6778 (amending the Bank Holding Company Act of 1956) 115 CONG. REC. 10554 (daily ed. Nov. 5, 1969).

Similarly, the insurance company is presently the primary source of Keough retirement plans.<sup>39</sup> If banks are barred from security activity by the Congress, another important and growing line of business will become the private domain of the insurance industry, free to charge what prices it will by grace of legislative fiat, doubly endowed.

The One Bank Holding Company Act is special legislation. Despite the fact that many people who should have known better were stampeded into announcing a need for some sort of bill, no convincing case has been made that the Antitrust Division's conglomerate merger program cannot cope with any competitive problems which may arise in banking conglomeration. But a very real case can be made that the insurance industry needs no further legislative insulation. Indeed, Congress has already been overly generous in protecting this industry to the great cost of the citizenry.

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<sup>39</sup> Self-employed Individuals Retirement Act of 1962 (Keough Act), 26 USC §§ 37, 62, 72, 101, 104, 105, 172, 401-05, 503, 805, 1361, 2039, 2517, 3306, 3401, 6047, 7207 (1964).