Federal Banking Law Reporter Cases (1945 to present), Independent Bankers Association of America v. C.T. Conover., ¶86,178, (Feb. 15, 1985)

Federal Banking Law Reporter Cases (1945 to present)
No. 84-1403-CIV-J-12.
Federal Banking Law Reporter Cases (1945 to present) ¶86,178

Click to open document in a browser

¶86,178.

Independent Bankers Association of America v. C.T. Conover.

United States District Court, Middle District of Florida, Jacksonville Division. No. 84-1403-CIV-J-12. February 15, 1985.

Headnote

National Banks: Holding Company Affiliates: Nonbank Banks: Preliminary Injunction.–
A preliminary injunction restraining the Comptroller of the Currency from granting final approvals for nonbank bank charters has been issued since it appears that the Comptroller is without power to charter a national association which does not have the power both to accept demand deposits and to make commercial loans. Irreparable injury exists since plaintiffs will not have a remedy at law in the form of a money judgment because of the Comptroller's sovereign immunity. Further, it would be virtually impossible to quantify the losses plaintiffs will suffer due to competition from nonbank banks. Resolving the substantive legal issue of the Comptroller's authority to issue nonbank bank charters before final approval is in the best interest of the applicants as well as the plaintiffs to avoid the potential for harm to the applicants if they were permitted to open for business and were later forced to close down. The public interest is served by maintaining public confidence which would be undermined if chartered national banks were allowed to open and later were forced to close. However, the Comptroller was not enjoined from issuing preliminary approvals because plaintiffs will not be injured since applicants cannot begin operation until they obtain approvals from the Federal Reserve Board or final approval by the Comptroller.

Opinion of Melton, District Judge.

MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, Independent Bankers Association of America, Florida Bankers Association, Community Bankers of Florida, Barnett Bank of Jacksonville, N.A. and Barnett Bank of Martin County, N.A., have brought this action for declaratory and injunctive relief against defendant, C. Todd Conover, as Comptroller of the Currency of the United States. The action challenges the Comptroller's issuance of national bank charters for so-called "nonbank" banks on the ground that nonbank banks are not eligible for national bank charters. The case is now before the court on defendant's motion to dismiss and plaintiffs' motion for a preliminary injunction. Having considered the memoranda submitted by the parties and heard oral argument, the court denies the motion to dismiss and grants plaintiffs' motion for a preliminary injunction enjoining defendant from issuing charters to nonbank banks. Plaintiffs' motion is denied to the extent it seeks an injunction preventing the Comptroller from giving preliminary approvals of nonbank bank applications.

I

Background

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

The issue in this case is whether the Comptroller has power to issue national bank charters to associations that cannot either accept demand deposits or make commercial loans. Plaintiffs contend that associations that lack the power to engage in both of these activities cannot be in the business of banking within the meaning of the National Bank Act, 12 U.S.C. §21 et seq. ("NBA"). Although the issue in this case involves only the NBA, the motivation for creating entities that do not have both powers grows out of the Bank Holding Company Act, 12 U.S.C. §§1841-49 ("BHCA"). Section 2(c) of the BHCA as amended in 1970, defines the term "bank" for purposes of that act as "any institution ... which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." This definition creates what seems, at least superficially, to be an unintended loop-hole that enables bank-type organizations to structure themselves so that they can escape regulation under the BHCA. If such an organization gives up its power either to accept demand deposits or make commercial loans but retains all of its other powers, it is arguably not a "bank" within the meaning of the BHCA [1] . In current parlance, entities that have given up one of these powers are referred to as "nonbank banks". If a nonbank bank is not a "bank" within the meaning of BHCA, it may be owned by a company that is not a "bank holding company" under the act, and its parent company is not subject (because of its ownership of the nonbank bank) to the provisions of the BHCA, including those which prevent nonbanking businesses from owning banks. Moreover, if a nonbank bank is not a bank under the BHCA, the Douglas Amendment (Section 3(d) of the BHCA, 12 U.S.C. §1842(d)) which restricts interstate acquisition of banks by bank holding companies, does not apply. Therefore, bank holding companies that desire to expand across state lines can use nonbank banks as a vehicle to do so. The possibility of avoiding regulation under the BHCA has created an incentive to organize nonbank banks. While use of state chartered nonbank banks may make it possible for companies that own them to avoid regulation under the BHCA, most states, like Florida, refuse to charter nonbank banks. Thus, persons wishing to organize nonbank banks have to seek national bank charters.

Nonbank banks first began to appear in 1980. The first nonbank bank that came to the Comptroller's attention was Fidelity National Bank of Concord, California. Fidelity had a full national bank charter and had been engaged, among other things, in making commercial loans and accepting demand deposits. In 1980, Gulf &Western Industries proposed to acquire Fidelity. In order to avoid regulation under the BHCA, which would have made the acquisition unlawful, Gulf &Western proposed to divest Fidelity of its commercial loan portfolio and terminate its commercial loan activities. Under the Change in Bank Control Act, 12 U.S.C. §1817(j), Gulf &Western was required to notify the Comptroller of the proposed acquisition. Because Gulf &Western did not want to strip Fidelity of its status as a fully chartered national bank, the Comptroller was forced to decide whether to actively disapprove the change in control or to permit it to go forward. On August 12, 1980, the Comptroller issued a notice of intent not to disapprove the acquisition.

Thereafter, the Comptroller allowed other nonbank banks to be acquired by organizations that were not bank holding companies. He also granted new national bank charters to nonbank banks that were goinig to be owned or acquired by nonbanking organizations, i.e., organizations that were not bank holding companies.

On August 10, 1983, the Comptroller was presented with an application filed by U.S. Trust Company of Florida, N.A., an existing national association formed under Section 27(a) of the National Bank Act ("NBA"), 12 U.S.C. §27, the powers of which had been limited to those of a trust company. U.S. Trust Company of Florida proposed that its authority be expanded to give it all of the powers of a national bank except the power to make commercial loans. The Comptroller approved the application, but because U.S. Trust Company of Florida was owned by U.S. Trust Corporation, a bank holding company, the approval was made subject to approval by the Federal Reserve Board. The Federal Reserve Board reluctantly approved the application on March 23, 1984. 70 Fed. Res. Bull. 371 (1984). On the same day, the Comptroller issued a national bank charter to the U.S. Trust Company of Florida, N.A. The charter contained a condition prohibiting U.S. Trust Company of Florida from making commercial loans. The Florida Bankers Association, one of the plaintiffs in this case, has petitioned for review of the Board's order. *Florida Bankers Ass'n v. Board of Governors,* Case No. 84-3270, *appeal docketed,* (11th Cir. April 23, 1983).

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

Jul 25, 2017 from Cheetah™

The Federal Reserve Board's U.S. Trust decision gave rise to many applications for new national bank charters for nonbank banks. Because of the number of applications and the interest expressed in this phenomenon by Congress, the Comptroller voluntarily imposed moratoria lasting a total of 18 months on processing the applications. The first moratorium was announced on April 5, 1983. It remained in effect until January 1, 1984. The Comptroller publicly stated that the purpose of the moratorium was to give Congress time to consider new legislation dealing with nonbank banks. In a letter dated April 5, 1983, to Representative St. Germain, Chairman of the House Committee on Banking, the Comptroller wrote:

I want to reaffirm that all nonbank bank charters issued to date by this Office have been in full compliance with all applicable laws. I believe they also represent good public policy. However, I recognize that important, broad policy issues are raised by these charters, as well as other marketplace innovations, that the Congress may wish to debate. I look forward to working with Congress during this moratorium to examine the full range of changes in the financial services industry, including changes in the savings and loan industry, changes in state laws that affect geographic and product restrictions for state chartered banks, and technological developments that make new financial products and delivery systems possible. I hope that this examination will result in legislation to establish a framework for broad financial services deregulations.

The moratorium was twice extended and continued through March, 1984. Then, after taking preliminary and final action on a number of pending nonbank bank applications, the Comptroller voluntarily imposed another moratorium, this time on processing applications accepted for filing after March 31, 1984. The last moratorium remained in effect until October 15, 1984, shortly after the 98th Congress adjourned without enacting any banking legislation.

On October 15, 1984, the Comptroller announced the end of the moratorium. He pointed out that as of October 10, 1984, he had 329 pending nonbank bank applications, all but one of which involved nonbank banks that were to be acquired by bank holding companies and therefore required prior approval from the Federal Reserve Board.

II

Nature of This Action

Plaintiffs filed this suit on December 14, 1984. They challenge the authority of the Comptroller to grant national bank charters to nonbank banks. In their complaint, plaintiffs specifically refer to the Comptroller's grant of preliminary approval for ten nonbank banks on May 9, 1984, and his preliminary approval of 29 more nonbank banks on November 1, 1984.

Plaintiffs allege they will suffer economic injury if national charters are issued to the 39 nonbank banks named in the complaint and to other unnamed nonbank banks that may be approved later. *Complaint,* at ¶¶18-20. Of the 39 nonbank banks named in the complaint, 33 are owned or will be acquired by bank holding companies and will need approval from the Federal Reserve Board before the Comptroller can issue charters. Of the remaining six nonbank banks, two will be located in Florida. One of these will be in direct competition with one of the plaintiff banks. These nonbank banks, as well as all of the other named nonbank banks that are to be located in Florida, propose to accept demand deposits but not to make commercial loans.

Along with their complaint, plaintiffs filed a motion for preliminary injunction. A hearing on the motion was initially scheduled for January 3, 1985. However, in order to give the Comptroller adequate time to respond, the parties entered into an agreement, approved by the court, continuing the hearing until January 30, 1985. At the conclusion of the hearing, the Comptroller voluntarily agreed not to grant final approval to any pending applications for charters to nonbank banks through February 15, 1985.

III.

Subject Matter Jurisdiction

The first issue the court must consider is defendants' contention that the court lacks subject matter jurisdiction. The Comptroller makes two arguments. He contends, first, that the jurisdictional doctrine in *Whitney National*

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

Jul 25, 2017 from Cheetah™

Bank in Jefferson Parrish v. Bank of New Orleans and Trust Co., 379 U.S. 411 (1965), bars this action; and second, that the matter is not ripe for judicial review. In order to aid in understanding these issues, the steps involved in chartering a national bank to be owned by a bank holding company should be explained.

A number of steps lead to the Comptroller's issuance of a charter authorizing an association to carry on "the business of banking" as a national bank. First, the association must draw up and file with the Comptroller articles of association specifying the object for which the association is formed. The association must also file an organization certificate that sets forth the association's name and proposed location and provides information about its capital stock and shareholders. 12 U.S.C. §§21, 22. To facilitate evaluation of the application, the Comptroller requires considerable additional information on the proposed ownership, management and policies of the new association. Once the required papers are filed, the association becomes a corporate body and is vested with the powers of a national bank, but it cannot yet engage in the business of banking.

If the Comptroller finds that the papers are in order and that the applicant is qualified for a national bank charter, he issues a preliminary approval. This approval is conditioned upon completion of organizational formalities such as payment for the association's capital stock, and, in the case of an association that is to be acquired by a bank holding company, upon approval by the Federal Reserve Board of the bank holding company's proposed acquisition of the bank.

After the Federal Bank Reserve Board has approved and the association has completed its organization formalities, the association files a certificate notifying the Comptroller that all of its capital stock has been paid in and that it has complied with all relevant provisions of the National Bank Act. The Comptroller then conducts an examination. 12 U.S.C. §26. As part of the examination he obtains a statement of facts by responsible representatives of the association to enable him to determine if the association is lawfully entitled to commence the business of banking. 12 U.S.C. §26.

If it appears from the examination and from other relevant facts that the association is lawfully entitled to commence the business of banking, the Comptroller gives the "association a certificate ... that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business." 12 U.S.C. §27. This certificate is commonly referred to as a charter. The Comptroller "may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter." 12 U.S.C. §27.

Having briefly reviewed the process of chartering national banks, the court now turns to the defendant's argument that the court lacks subject matter jurisdiction under *Whitney National Bank in Jefferson Parrish v. Bank of New Orleans and Trust Co.,* 379 U.S. 411 (1965). In *Whitney,* the Whitney National Bank of New Orleans ("Whitney-New Orleans") desired to extend its banking business beyond the borders of Orleans Parish, its home parish. It could not open branches beyond the parish line because of a Louisiana law (made applicable to national banks by the McFadden Act) that restricted branch banking. To avoid the restrictions on branching, Whitney-New Orleans decided to form a holding company which would in effect acquire Whitney-New Orleans and, in addition, organize a new national bank to be located in Jefferson Parish ("Whitney-Jefferson"). After the Comptroller and the Federal Reserve Board had both approved the proposed transactions, several competitor banks sought review of the Board's decision by the United States Court of Appeals for the Fifth Circuit. In addition, the competitors filed an action in the district court in Washington, D.C., seeking an injunction against the Comptroller on the ground that Whitney-Jefferson was in reality an illegal branch office of Whitney-New Orleans. *Id.* at 415-417. The district court granted the injunction, and the United States Court of Appeals for the District of Columbia affirmed. The Supreme Court granted certiorari to determine the jurisdictional issues.

The Court began its opinion by observing that the thrust of the complaint went "to the organization of Whitney-Jefferson [the new national bank] *by the holding company* rather than merely the issuance of authority to Whitney-Jefferson to do business." It wrote:

But this would not follow simply by virtue of the issuance of authority for the opening of the new bank. Such a situation would occur, if at all, when the Board approved the holding company plan including the organization of

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

Whitney-Jefferson as its subsidiary. Thus, it is the *plan of organization by the holding company* which lies at the heart of respondents' argument.

Id. at 418 (emphasis added). The Court held that "Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." *Id.* at 419. Issues relating to the acquisition of a new bank by a bank holding company were the "exclusive function" of the Board, over which the Comptroller lacked a veto. *Id.* at 419-20.

The Court carefully circumscribed its holding:

As we have said, it is the ownership of Whitney-Jefferson by the holding company that is at the heart of the project, *not the permission to open for business which is acted upon routinely by the Comptroller* once the authority to organize is given by the Board.

We do not say that under no circumstances may the Comptroller be restrained in equity from issuing a certificate to a new bank. We do hold, however, that where a bank holding company seeks to open a new bank pursuant to a plan of organization the propriety of which must, under the Bank Holding Company Act, be determined by the Board, the Statutory review procedure set out in the Act must be utilized by those dissatisfied with the Board's ruling despite the fact that the Comptroller's certificate is a necessary prerequisite to the opening of the bank. Otherwise the commands of the Congress would be completely frustrated.

Id. at 423 (emphasis added).

The United States Courts of Appeals have interpreted *Whitney* in this limited manner. In *American Bank of Tulsa v. Smith,* 503 F.2d 784, 788 (l0th Cir. 1974), the Tenth Circuit observed that the "Supreme Court noted that the real issue in the case was not the Comptroller's issuance of authority to do business but, rather, the creation of a new bank by the holding company." The District Court for the District of Columbia has made the same observation, noting that the "Supreme Court found that the plaintiffs were in reality attempting to challenge the Board's decision, and held that plaintiff banks' complaint tendered issues *cognizable only by the Board 1977) ...." First National Bank of Homestead v. Watson,* 363 F.Supp. 466, 471 (D. D.C. 1973) (emphasis added) (citation omitted). Recently, the Seventh Circuit construed *Whitney* as holding "that when the legality of a bank holding company's action is involved, any challenge must be brought initially before the Board." *Marshall &Ilsley Corp. v. Heimann,* 652 F.2d 685, 701 (7th Cir. 1981). In a footnote, the Seventh Circuit quoted from *Whitney:* "[P]laintiff's 'quarrel is in actuality not merely with the opening of the bank, but rather with its opening as a subsidiary of [the bank holding company].' 379 U.S. at 418." *Id.* at 701 n.25.

District courts have allowed a number of challenges to the Comptroller's actions even though the banks in question were to be acquired by bank holding companies. In *Central State Bank v. Bloom,* 440 F.Supp. 782, 785 (D. D.C. 1977), *vacated on other grounds,* 598 F.2d 264 (D.C. Cir. 1979), the district court held that it had jurisdiction to rule on a due process challenge to the Comptroller's handling of an application for a national bank that was to be controlled by a bank holding company. The court found it did "have jurisdiction to review decisions of the Comptroller under the National Banking Act." It noted that, if the "determinative issue" had been the relationship of the bank within the holding company structure, it would have lacked jurisdiction. *Id.* In *Nehring v. First DeKalb Bancshares, Inc.,* 692 F.2d 1138, 1141 (7th Cir. 1982), the Seventh Circuit, in dicta, observed that the Comptroller, not the Board, has the authority to determine whether a merger agreement complies with the requirements of the National Bank Act, even when a holding company is indirectly involved. In *First National Bank of Homestead v. Watson,* 363 F.Supp. 466, 471 (D. D.C. 1973), the district court held that *Whitney* did not bar an action against the Comptroller alleging that the Comptroller violated the National Environmental Policy Act in giving preliminary approval to a national bank, even when a holding company was to later control the bank. The district court found that NEPA imposed duties on both the Board and the Comptroller; consequently, it had jurisdiction.

Finally, in *Plaza Bank of West Port, St. Louis v. Board of Governors of the Federal Reserve System,* 575 F.2d 1248 (8th Cir. 1978), the Eighth Circuit, in ruling on a challenge to the Board's approval of a holding company's acquisition of a state bank, found that the Board had no duty to pass on the validity of a state-issued charter.

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

Id. at 1252. The state comptroller alone had jurisdiction to determine the legality of the bank charter. The court recognized that "approval of the application by the Board constituted an approval of Applicant's acquisition of shares of Bank, not approval of the chartering of Bank." *Id.* at 1251 (quoting order of Board denying rehearing).

In summary, *Whitney* bars an action against the Comptroller only when the relationship of the bank to a holding company is the real issue to be determined. In this case, plaintiffs contend that the Comptroller lacks power to grant national bank charters to nonbank banks, regardless of who owns them. Thus, plaintiffs' cause of action goes to the issue of whether the Comptroller has authority to charter nonbank banks, not to the role of the nonbank banks as subsidiaries of holding companies. This issue is not one within the Board's jurisdiction. It can be raised only in an action against the Comptroller brought in district court.

Finally, some of the nonbank banks, such as Wilmington Trust of Florida, N.A., are not controlled by bank holding companies. The Comptroller is the only federal banking authority involved in chartering them.

The Comptroller's ripeness argument is more easily disposed of. The plaintiffs' allegations of imminent competitive injury are sufficient. *Saxon v. Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d 1010, 1017 &n.6 (5th Cir. 1968) (collecting cases); *see Marshall &Ilsley Corp. v. Heimann,* 652 F.2d 685, 690-98 (7th Cir. 1981); *National State Bank of Elizabeth v. Smith,* 591 F.2d 223, 228 (3d Cir. 1979); cf *Nehring v. First DeKalb Bancshares, Inc.,* 692 F.2d 1138, 1142 (7th Cir. 1982); *Deerbrook State Bank v. Conover,* 568 F.Supp. 696, 698 (N.D. Ill. 1983). *See also Sterling National Bank v. Camp,* 431 F.2d 514, 515 (5th Cir. 1970), *cert. denied,* 401 U.S. 925 (1971); *Pineland State Bank v. Proposed First National Bank of Bricktown,* 335 F.Supp. 1376 (D. N.J. 1971).

For the foregoing reasons, the court concludes that it has subject matter jurisdiction to consider the issues raised by the complaint.

IV

The Preliminary Injunction Standard

In order to prevail on their motion for a preliminary injunction, plaintiffs must carry the burden of persuading the court on each of four factors. In *Johnson v. United States Department of Agriculture,* 734 2d 774, 781 (11th Cir. 1984), the United States Court of Appeals for the Eleventh Circuit recently restated them. The court must find that: (1) a substantial likelihood exists that plaintiff will prevail on the merits; (2) plaintiff will suffer irreparable injury if the injunction is not issued; (3) the threatened injury to plaintiff will outweigh the harm the defendant will suffer if an injunction is issued, and (4) issuing a preliminary injunction will not disserve the public interest.

V

A

Likelihood of Success

Plaintiffs contend that under the NBA, the Comptroller is without power to charter a national association which does not have the power both to accept demand deposits and to make commercial loans, because an institution that does not have these powers is not engaged in the "business of banking" within the meaning of the NBA. In addition, plaintiffs argue that the Comptroller has abused his discretion in issuing national bank charters to nonbank banks because he knows that the charters are being sought for other than one of the "legitimate objects" of Title 12 of the United States Code, namely to evade regulation under the BHCA. Finally, plaintiffs assert that nonbank banks that cannot make commercial loans cannot possibly comply with the requirements of the Community Reinvestment Act, 12 U.S.C. 2901, and, therefore, granting charters to them is an abuse of discretion.

At the outset, the Comptroller argues that nonbank banks have the power to perform each of the powers listed in the seventh paragraph of Section 24 of Title 12. Therefore, nonbank banks have all of the powers required by the NBA. He asserts that they can accept deposits, albeit not demand deposits, and they can make loans, albeit not commercial loans [2] . Plaintiffs contend, on the other hand, that in determining what constitutes the business of banking, the court must take into account not only the powers enumerated in Section 24 (Seventh)

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

Jul 25, 2017 from Cheetah™

but also the history of banking, the long-standing practices of banks and the case law. Their contend that these demonstrate that the “business of banking” and “commercial banking” have always been synonymous. Other activities such as accepting time deposits and making mortgage and consumer loans have become part of the business of banking only recently. They are not core activities.

National banks may be formed only to carry on the business of banking. Section 24 (Seventh) of Title 12 of the United States Code provides that national banks “shall have power ... [to exercise] ... all such incidental powers as shall be necessary to carry out the business of banking ....” Section 26 of Title 12 empowers the Comptroller to examine an application by representatives of an association to determine whether the association is entitled to commence the “business of banking.” Section 27, in turn, provides that the Comptroller may grant a certificate to commence the “business of banking”.

The NBA contains no definition of the term “business of banking,” but it does list a number of powers that are necessary to carry on the “business of banking.” They include discounting and negotiating notes and drafts, receiving deposits and loaning money on personal security. To determine the meaning of the term “business of banking” and whether a national bank must be able to accept demand deposits and make commercial loans, the court must look to the historical understanding in law and custom. [3]

Historically, all banks were commercial banks. Their business was limited to the acceptance of demand deposits and the making of short term commercial loans. A brief discussion of the evolution of banking appears in one of the leading textbooks on money and banking:

While we have used the term “commercial banks” in several instances, we have yet to describe what a commercial bank is. Since there are a variety of kinds of “banks”--investment banks, mutual savings banks, and even blood banks--the key is clearly meant to be the word “commercial”. In this context, the word is a legacy of the so-called “commercial-loan theory” of banking. This theory, which originated in the early days of banking, held that, aside from cash, bank assets should consist of short-term loans to businesses to finance the transportation of goods and the holding of inventories. As industry developed, this theory was modified to admit the propriety of short-term loans to cover production costs, but it continued to exclude long-term loans such as those used for financing machinery, factories, and other real estate.

For a number of reasons, the phrase “commercial banking” is no longer particularly satisfactory. For one, even from the start commercial banks did not confine themselves to short-term loans. And with the passage of time they have increasingly acquired longer-term assets. Secondly, there are now many institutions for financing short-term business needs, so that the exclusivity implied by the phrase “commercial banking” is somewhat misleading.

What, in fact, differentiates commercial banks from other financial intermediaries is not the assets they hold but, rather, their liabilities. In particular, with minor exceptions only commercial banks can issue demand deposits, the primary component of the money supply. They thus have the power to create and destroy money, a feature that accounts for our close focus on commercial banking.

S.M. Goldfeld and L.V. Chandler, *The Economics of Money and Banking,* 87-88 (8th Ed. 1981).

Courts have long recognized that the power to accept demand deposits and make commercial loans is at the core of the “business of banking.” In *Mercantile National Bank v. Mayor,* 121 U.S. 139, 30 L.Ed. 895 (1887), the Supreme Court defined the “business of banking” in the following language:

The business of banking, as defined by law and custom, consists in the *issue of notes payable on demand,* intended to circulate as money where the banks are banks of issue; *in receiving deposits payable on demand;* in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute “moneyed capital.”

30 L.Ed. at 902 (emphasis added). After reviewing the powers of New York trust companies, the Court held that:

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce.

30 L.Ed. at 903.

More recently in *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963), the Supreme Court defined the traditional business of banking:

Commercial banks are unique among financial institutions in that they alone are permitted by law to *accept demand deposits.* This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply. Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds. *The banks' use of these funds is conditioned by the fact that their working capital consists very largely of demand deposits,* which makes liquidity the guiding principle of bank lending and investing policies; *thus it is that banks are the chief source of the country's short-term business credit.*

Banking operations are varied and complex; "commercial banking" describes a congeries of services and credit devises. But among them the creation of additional money and credit, *the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important.*

Id. at 326-27 (footnote omitted) (emphasis added).

Until the first nonbank bank was formed, all national banks were commercial banks that accepted demand deposits and made commercial loans. Plaintiffs have represented to the court that at the present time, all of the 4,913 nationally chartered banks (other than the recently created nonbank banks) accept deposits and make commercial loans. Thus, nonbank banks are clearly an anomaly. They constitute a new kind of financial institution which is really a consumer bank. *See* Lobell, *Nonbank Banks: Controversy Over a New Form of Commercial Bank,* 39 Bus. Law 1193 (1983).

Among the various types of federally chartered financial institutions, the power to accept demand deposits and make commercial loans was, until 1982 [4] , exclusively reserved to national banks. For example, federally chartered savings and loans and credit unions were denied the power to perform either of these banking functions. *See American Bankers Association v. Connell,* 686 F.2d 953 (D.C. Cir.).

Banks alone had the power to accept demand deposits and make commercial loans. [5] Beginning in 1982, Congress enacted legislation which has broadened the powers of financial institutions and their holding companies. [6] *See* Garn-St. Germain Depository Institutions Act of 1982, P.L. No. 97-320, 96 Stat. 1469. These changes, however, have not affected the core functions of national banks.

The case law takes for granted that the core of the business of banking as defined by law and custom is accepting demand deposits and making commercial loans. In fact, most of the litigation has been over whether banks have gone beyond their authorized powers and over whether other types of financial institutions were invading functions which have traditionally been reserved exclusively to banks. *E.g., Investment Company Institute v. Camp,* 401 U.S. 617 (1971); *American Bankers Association v. Connell,* 686 F.2d 953; *Saxon v. Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d 1010 (5th Cir. 1968).

The Comptroller has presented no authority to rebut plaintiffs' argument that the essence of "business of banking," as defined by law and custom, includes taking demand deposits and making business loans. The Comptroller does point out, however, that the BHCA specifically defines the term "bank" to mean an institution that both accepts demand deposits and makes commercial loans. The Comptroller argues that Congress did not intend this definition of "bank", which appears in a statute passed some 93 years after the NBA was enacted, to apply universally to all banking laws, including the NBA. The Comptroller's argument is attractive but it misses the point made by plaintiffs. They do not contend that the definition of "bank" in the 1970 amendment to the

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

Jul 25, 2017 from Cheetah™

BHCA amended the NBA, but rather that it represents a recognition by Congress that the acceptance of demand deposits and the making of commercial loans constitute the historic core activities of banks and the essence of the business of banking.

The Comptroller argues further that the original definition of the term “bank” in the BHCA expressly included national banks by name and that amendments passed in 1966 and 1970 show an intention to adopt a narrower definition than that contended for by plaintiffs. The Comptroller implies that Congress intended that the amendments would remove some kinds of national banks from the operation of the BHCA. This argument is unpersuasive. As the Comptroller has admitted, the first nonbank national bank was approved in 1980, more than ten years after the definition of “bank” in the BHCA was last amended. It is highly unlikely that Congress intended to remove nonbank banks from the provisions of the BHCA by an amendment passed at a time when nonbank banks did not exist and had not been conceived of. It is far more likely that Congress saw no need to expressly include national banks, a specific institutional name, in an amended definition that sought to define the financial institutions to which the BHCA applies by describing the nature of their activities. Since the national banks were engaged in the “business of banking” which meant accepting demand deposits and making commercial loans, it was assumed that the definition covered them and that including national banks in the definition by name would be redundant. Thus, the definition of “bank” in the BHCA supports rather than takes away from plaintiffs’ argument. Courts should favor statutory construction which enables statutes to complement one another. Where possible, statutes dealing with the same general subject and the same general purpose should be construed together to give effect to a joint regulatory scheme. *See First Midland Bank and Trust Company v. Chemical Financial Corporation,* 441 F.Supp. 414, 419 (W.D. Mich. 1977) (certain provisions of the FDIC Act and BHCA should be construed *in pari materia*); *cf. Occidental Life Insurance Co. of North Carolina v. Pat Ryan &Associates, Inc.,* 496 F.2d 1255, 1266-67 (4th Cir. 1974) (the Securities Act of 1933 and the Securities Exchange Act of 1934 construed *in pari materia*). The court concludes that the definition of “bank” in the BHCA reflects the understanding of Congress that the two activities mentioned in the definition were at the core of the banking business.

Thus, the historical use of the term “business of banking” in the industry and in case law strongly suggests that its essential elements are the acceptance of demand deposits and the making of commercial loans, and that a financial institution that is legally unable to engage in both activities cannot engage in the “business of banking” within the meaning of the NBA.

Plaintiffs have presented another argument that the Comptroller has essentially left unanswered. They have pointed out that since 1864 there have only been four types of national associations and that three of these have come into existence only in the last five years. The first type of national association is the traditional national bank engaged in the business of banking, namely accepting demand deposits and making commercial loans. The second type of national association is a trust company that does not engage in the business of banking. The third type of association is the bankers’ bank which also does not engage in the business of banking. The fourth type of association is the nonbank bank.

Congress has expressly authorized the Comptroller to charter trust companies and bankers’ banks. 12 U.S.C. §§27(a), 27(b)(1). Congress did so at the Comptroller’s request. In fact, when the Comptroller attempted to charter a trust company which did not also engage in the business of banking, he was enjoined by the United States District Court for the District of New Jersey in *National State Bank of Elizabeth v. Smith,* No. 76-1479 (D.N.J. September 16, 1977), *rev’d on other grounds,* 591 F.2d 223 (3d in 1979). While the case was on appeal, the Comptroller sought and obtained a very limited expansion of his chartering power. Congress did not enact legislation giving the Comptroller broad power to determine what types of financial organizations could be chartered as national associations. Nor did Congress change the meaning of the term “business of banking”. Instead, it carefully limited the addition to the Comptroller’s chartering powers. The amendment to 12 U.S.C. §27(a) provides that “a national bank association, to which the Comptroller [issues a charter] is not illegally constituted solely because its operations are or have been required by the Comptroller to be limited to those of a trust company....” The trust company amendment to Section 27 was followed in 1982 by the bankers’ bank

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

amendment which was again a narrow addition of the Comptroller's chartering authority. In its legislative history, Congress referred to trust companies and bankers' banks as "limited charter institutions", thus distinguishing them from national banks engaged in the business of banking. *See* S. Rep. No. 97-536, 97th Cong. 2d Sess. 27-28, *reprinted in,* 1982 U.S. Code, Cong. &Admin. News 3054, 3081-82.

It is clear that when Congress has wanted to expand the authority of the Comptroller to charter national associations that are not to be engaged in the business of banking, it has done so through specific amendments. If Congress had intended that the Comptroller have broad chartering authority over various types of financial institutions, there would have been no need for the trust company and bankers' bank amendments, and those amendments would not have been narrowly drawn.

The Comptroller's argument that plaintiffs are asking the court to substitute its judgment for a matter that should be determined by Congress is therefore misplaced. Congress' intent to confer limited chartering authority on the Comptroller is relatively clear. It is the Comptroller, not the plaintiffs, who should seek Congressional authority before imposing his personal policy preferences relating to interstate banking on the banking structure of the United States. *See supra* at 6-7.

Having concluded that the power to accept demand deposits and make commercial loans is essential to the existence of a national bank not formed under one of the two exceptions contained in Section 217 of the NBA, the court takes up the Comptroller's contentions that he has in fact issued full charters to nonbank banks and that the nonbanks have done no more than voluntarily agree not to exercise their powers. The Comptroller contends that, even if associations must have the power to accept demand deposits and make commercial loans, the charters he is issuing to nonbank banks qualify fully. They are full charters, and he has placed no conditions on them. If the nonbank banks have relinquished any of their powers, they have done so through voluntary agreement with the Federal Reserve Board, not with the Comptroller. These contentions emphasize the form of the charters issued by the Comptroller and ignore the context in which nonbank bank charters are issued.

Before the second moratorium, which ended on November 1, 1984, was imposed, the Comptroller expressly conditioned his approvals of nonbank banks upon the applicants' inclusion in their bylaws of provisions prohibiting them from either accepting demand deposits or making commercial loans. In fact, in his early preliminary approvals, the Comptroller went so far as to refer to the associations as "nonbank banks". Although the Comptroller has not so conditioned his preliminary approvals since November 1, 1984, he has required each association applying for approval to furnish an opinion of counsel describing how it proposed to avoid the interstate banking prohibitions contained in the Douglas Amendment to the BHCA. Thus, the Comptroller is well aware when he issues charters to nonbank banks that they will not legally be able both to accept demand deposits and make commercial loans. In fact, he has prepared a separate status listing of nonbank bank applications, showing which ones will not make commercial loans and which will not accept demand deposits. Even if the court were to accept the Comptroller's argument that the preliminary approvals he has recently granted are unrestricted, it is clear that when nonbank bank applicants that are subject to Federal Reserve Board approval seek final approval from the Comptroller, they have legally given up one of the two powers. Therefore, the Comptroller will issue their charters with the knowledge that they cannot exercise one of the powers that is essential to the business of banking. The substantive effect is the same as if the charters contained terms limiting them.

For the foregoing reasons, the Court concludes that the plaintiffs have met their burden of persuasion on the likelihood of ultimate success on the merits. [7]

B

Threat of Irreparable Injury

The next factor which plaintiffs must show is that there is "a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted." *Johnson v. United States Department of Agriculture,* 734 F.2d at 781.

© 2017 CCH Incorporated and its affiliates and licensors. All rights reserved.

Jul 25, 2017 from Cheetah™

Through affidavits and their verified complaint the plaintiffs have alleged direct competitive injury for which they have no remedy at law.

The Comptroller contends that plaintiffs have not shown the requisite irreparable injury because his issuance of preliminary approvals will not injure them. The Comptroller points out that, in the case of nonbank banks organized by bank holding companies, plaintiffs will not be injured by preliminary approvals because applicants cannot begin operation until they obtain approvals from the Federal Reserve Board. Moreover, plaintiffs cannot be harmed by the Comptroller's preliminary approval of other nonbank banks because the nonbank banks cannot begin business until the Comptroller gives his final approval. Plaintiffs have not successfully overcome this argument; therefore, the Court finds that plaintiffs will not suffer irreparable injury on account of the Comptroller's issuance of preliminary approvals.

The Comptroller next contends that the injury plaintiffs will suffer when he issues final approval is only competitive injury and results only in monetary loss. The Comptroller has cited cases holding that mere monetary loss is not irreparable injury.

However, the reason lost revenues do not ordinarily constitute irreparable harm is that a plaintiff has a remedy at law in the form of a money judgment. It is hornbook law that if a plaintiff has an adequate remedy at law, injunctive relief will be denied. The cases cited by the Comptroller stand for this basic principle. *See Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197 (9th Cir. 1980) and *Johnson v. United States Department of Agriculture,* 734 F.2d 774 (11th Cir. 1984).

Here plaintiffs contend they cannot recoup their losses through a money judgment. They say that the revenues they will lose on account of illegal competition from nonbank banks will be lost forever because of the Comptroller's sovereign immunity. In *Johnson v. United States,* the United States Court of Appeals for the Eleventh Circuit reversed a district court's refusal to issue a preliminary injunction to protect a class of mortgagors who had challenged the Department of Agriculture's farm foreclosure procedures. Addressing the issue of irreparable damage the court said:

The district court found that plaintiffs would suffer no irreparable injury because the government could respond in damages. *United States v. Perry,* 706 F.2d 278 (8th Cir. 1983), held that an abuse of process action of monetary damages against the FmHA is barred by sovereign immunity. Thus there is at least a serious question of the FmHA's ability to respond in damages. This issue was apparently not raised or considered by the district court.

734 F.2d at 789. And in *Ohio Oil Co. v. E. A. Conway,* 279 U.S. 813 (1929), a case challenging a state tax, the Supreme Court recognized that a claim of sovereign immunity which prevented recovery of monetary damages required issuance of a preliminary injunction. *See also Placid Oil Co. v. United States Dept. of the Interior,* 491 F.Supp. 895, 906 (N.D. Tex. 1980); *National Aviation v. City of Hayward, California,* 418 F.Supp. 417, 420 (N.D. Cal. 1976); *AMOCO Oil Co. v. Zarb,* 402 F.Supp. 1001, 1007 (D.D.C. 1975). Thus, where a defendant has sovereign immunity, monetary loss constitutes irreparable injury.

Irreparable injury is also present when there is an "impossibility of ascertaining with any accuracy the extent of the loss" alleged to result from the activity sought to be enjoined. *See Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Co.,* 550 F.2d 189, 197 (4th Cir. 1977); *Pollgreen v. Morris,* 496 F.Supp. 1042, 1057 (S.D. Fla. 1980). It would be virtually impossible to quantify the losses plaintiff banks and the other banks represented by the association plaintiffs will suffer due to illegal competition from nonbank banks. Therefore, even if a monetary remedy were technically available, plaintiffs would still suffer irreparable injury sufficient to support issuance of a preliminary injunction.

The Comptroller urges that the threat of injury to plaintiffs is not immediate. He implies that it may be some time before he issues any final approvals. The record does not support this conclusion. As of December 31, 1984, 14 nonbank banks were already in operation and at least 139 others had received preliminary charter approvals from the Comptroller and were awaiting Board approval. Of that 139, 37 had been accepted for processing by the Board as of December 14, 1984. The Board must approve these applications within sixty days after the applications are finally accepted for processing. 12 CFR §225.23(e)(2). In fact, between the

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

date of this court's hearing on January 30, 1985 and February 5, 1985 the Board approved 12 nonbank bank applications. The Comptroller gave final approval to U.S. Trust Company of Florida on the same day as the Federal Reserve Board issued its approval. Thus, there is reason to believe that unless he is restrained by a preliminary injunction, the Comptroller will begin issuing final approvals of these nonbank banks, as well as those that do not require Board approval, shortly after February 15, 1985 (the date on which the stipulated "stay" expires). The nonbank banks so approved may open for business immediately after final approval is issued.

C

Balancing of Hardships

The third factor to consider is the relative hardship to plaintiff if the injunction is not issued as compared to the hardship to defendant if an injunction is issued.

The Comptroller has submitted no opposing affidavits on the issue of relative hardships. Nevertheless, he argues that, although he would suffer no harm personally if a preliminary injunction were issued, the issuance of an injunction would cause the same type of economic harm to the nonbank bank applicants as plaintiff banks would suffer if the injunction were not issued. Presumably this harm would come from the inability of nonbank banks to open for business immediately.

However, the greatest potential for harm to the nonbank bank applicants would come about if they were permitted to open for business and encouraged to invest substantial sums in doing so and were later forced to close down. In *Investment Company Institute v. Camp, 401* U.S. 617, the Supreme Court warned an earlier Comptroller of the Currency against taking action until "he is satisfied that the exercise of his authority will not violate the intent of the banking laws". *Id.* at 628. That warning seems appropriate here. In the long run, it is in the best interest of the nonbank bank applicants, as well as plaintiffs, for the substantive legal issue of the Comptroller's authority to issue nonbank bank charters to be resolved before any nonbank bank charters are finally approved.

A preliminary injunction will not work any hardship on the Comptroller and no significant hardship on nonbank banks. No one will be harmed by giving the Comptroller the benefit of judicial review before he issues any more charters to nonbank banks.

D

Public Interest

Finally, the court must consider the effect of issuing a preliminary injunction on the public interest. Maintenance of public confidence in the banking system is essential. That confidence could easily be undermined if chartered national banks were allowed to open and later were forced to close. *See Independent Bankers Association of America v. Smith,* 534 F.2d 921, 951 (D.C. Cir.), *cert. denied,* 429 U.S. 862 (1976) ("The public interest is best promoted by the orderly continuance of a sound dual banking system ").

The public interest is also served by maintaining the integrity of the system of regulation that was established by Congress when it enacted the NBA and BHCA. The Federal Reserve Board has expressed concern about the proliferation of nonbank banks. In its order on the U.S. Trust Corporation acquisition of the U.S. Trust Company of Florida, the Board wrote:

If the nonbank bank concept, particularly as expanded by the interpretation of demand deposit adopted by the Tenth Circuit, becomes broadly generalized, a bank holding company or commercial or industrial company, through exploitation of an unintended loophole, could operate "banks" that offer NOW accounts and make commercial loans in every state, thus defeating Congressional policies on commingling of banking and commerce, conflicts of interest, concentration of resources and excessive risk, or with respect to limitations on interstate banking.

70 Fed. Res. Bull. 371 (1984).

The Comptroller does not serve the public interest by issuing charters to nonbank banks when their only conceivable purpose is to enable their parent companies to escape regulation under the BHCA. It is clearly in the

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

Jul 25, 2017 from Cheetah™

public interest to enjoin issuance of nonbank bank charters until the validity of giving national bank charters to nonbank banks can be finally determined.

VI

Conclusion

The court finds that the plaintiffs have satisfied their burden of persuasion on each of the four prerequisites to issuance of a preliminary injunction against final approvals for nonbank bank charters. However for the reasons set forth, *supra* at 35, the court finds that the Comptroller should not be restrained from processing applications for nonbank banks and issuing preliminary approvals pending final resolution of this matter. In the event plaintiffs are ultimately unsuccessful on the merits, the adverse effects of the preliminary injunction will be lessened if the Comptroller is enjoined only from granting final approvals.

It is therefore ORDERED and ADJUDGED that:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is DENIED.

2. Plaintiff's motion for a preliminary injunction enjoining the Comptroller from issuing preliminary approvals for nonbank banks is DENIED.

3. Plaintiffs' motion for a preliminary injunction enjoining the Comptroller from issuing final approvals or charters for nonbank banks is GRANTED.

Footnotes

1 The issue of whether such an entity is a "bank" within the meaning of BHCA is the principal issue to be decided in a case now pending in the United States Court of Appeals for the Eleventh Circuit. *See infra* at 6.

2 The Comptroller cites *Arnold Tours, Inc. v. Camp,* 472 F.2d 427, 431 (1st Cir. 1972), and *M &M Leasing Corp. v. Seattle First National Bank* 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) for the proposition that in determining whether a particular activity is incidental to the "business of banking", the courts typically have inquired whether it relates to "one or another" of the express powers listed in 12 U.S.C. §24. However, these cases and others referred to by the parties were involved with defining the outer boundaries of the "business of banking".

3 In *Dimension Financial Corp. v. Board of Governors,* 744 F.2d 1402 (10th Cir. 1984), Dimension petitioned for a review of Regulation Y, which had been adopted by the Federal Reserve Board for the purpose of defining the term "commercial loans" as it is used in the definition of "bank" in Section 2(c) of the BHCA. The court ruled that the regulation was invalid because it departed from the common understanding of the term as it existed at the time the amendment to Section 2(c) was enacted, and because the Board had adopted the regulation for the purpose of enabling it to regulate nonbank banks. The Court's reasoning applies equally to the issues in this case. It is clear that when the NBA was enacted, all banks were commercial banks, accepting demand deposits and making commercial loans. In the 125 years since then, banks have gained additional powers, but these activities have remained at the heart of their business. There is no economic justification for creating banks with limited powers. The only reason for limiting their powers is to permit them to escape regulation. The Comptroller's decision to charter them is similar to the Federal Reserve Board's decision adopting Regulation Y, i.e., to facilitate avoidance of a statute which expresses a policy that the agency disagrees with, namely, interstate banking.

4 In 1982, Congress granted limited commercial lending power to federally chartered savings and loan associations and savings banks. *See* 12 U.S.C. §1464(c)(1)(R).

5 This has been the basis for the Supreme Court's line of cases in the antitrust area holding that the relevant line of commerce (product market) for national and state banks is "commercial banking", which does not include savings and loans or other types of financial intermediaries. *See United States v. Connecticut Nat'l Bank,* 418 U.S. 656 (1974); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963).

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

Jul 25, 2017 from Cheetah™

6 Earlier in this century when Congress broadened the loan making powers of national banks, it did so by amendment to the National Bank Act. Prior to 1916 they were not permitted to make real estate mortgage loans except on certain farm lands. In that year the Congress authorized the banks to make residential loans for a term of not over a year and to the extent of 50% of the value of the mortgaged property. This term was first enlarged in 1927 to five years and then to 10 years in 1935. In 1934, national banks were authorized to purchase F.H.A. guaranteed mortgages. Ten years later that authority was enlarged to include V.A. loans which the Comptroller of the Currency by decision found to be in the same category as F.H.A. mortgages. It was not until this time that national banks became any significant factor in the residential mortgage field. *Michigan Nat'l Bank v. Michigan,* 365 U.S. 467, 471 (1961).

7 Because the court has found that plaintiffs have met their burden with regard to the meaning of the term "business of banking" in the National Bank Act, it is not necessary to address the issues of whether nonbank banks have been formed for other than a legitimate object of Title 12 and whether the Comptroller abused his discretion under the Community Reinvestment Act.

© 2017 CCH Incorporated and its affiliates and licensors.
All rights reserved.

Jul 25, 2017 from Cheetah™