ANTITRUST—INTERLOCKING DIRECTORATES—SECTION EIGHT OF CLAYTON ACT BARS INTERLOCKING DIRECTORATES BETWEEN BANKS THAT COMPETE WITH NON-BANKS—*United States v. Crocker National Corp.*, 656 F.2d 428 (9th Cir. 1981).

The election of individual directors with diverse business experiences to any board of directors may be viewed as a method of bringing ideas and new management into a corporation and should be encouraged. In those situations where an individual sits on the boards of two companies which compete or do business with each other, however, problems develop. A director has a duty to serve the corporation on whose board he sits to the best of his ability.[1] When that individual serves two competing corporations in the capacity of director, his duty of loyalty to one company may conflict with his duty to the other. The existence of interlocking directorates between competing firms provides opportunities for exchanges of information, foreclosure of rivals, and the coordination of policies between the firms to an extent that might adversely affect or completely eliminate competition between them.[2] Interlocking directorates may be either horizontal (linking two or more competitors) or vertical (linking two or more companies that are or can be in a buyer-seller relationship).[3]

In *United States v. Crocker National Corp.*,[4] the Ninth Circuit Court of Appeals was asked to decide whether horizontal interlocking directorates between competing banks and insurance companies violated the competing corporations clause[5] of section 8 of the Clayton

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[1] V. P. AREEDA & D. TURNER, ANTITRUST LAW ¶1300 (1980).

[2] *See id;* Travers, *Interlocks in Corporate Management and the Antitrust Laws*, 46 TEX. L. REV. 819, 840 (1968).

[3] V. P. AREEDA & D. TURNER, *supra* note 1, at ¶1300.

[4] 656 F.2d 428 (9th Cir. 1981).

[5] Section 8 of the Clayton Act, 15 U.S.C. §§ 12-27 (1976), contains five paragraphs. The first three (hereinafter referred to as banking paragraphs) relate to interlocks between bank personnel and are relevant in this Note only to the extent that they aid in explaining the fourth paragraph. The fourth paragraph (hereinafter referred to as competing corporations paragraph) reads as follows:

> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, *other than banks, banking associations, trust companies, and common carriers* subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal

Antitrust Act[6] (Clayton Act).[7] The *Crocker* action commenced when the United States filed two complaints in the United States District Court for the Northern District of California alleging that the interlocking directorates held by five individuals in three banks and four insurance companies violated the Clayton Act.[8] Although the defendants stipulated that they competed in the business of extending mortgage and real estate loans, the complaints neither contained allegations of any anti-competitive acts, nor specified any particular anticompetitive consequences flowing from the interlocks. In granting the defendant's motion for summary judgment, the district court held that section 8 of the Clayton Act did not prohibit bank/insurance company interlocks[9] or bank holding company/insurance company interlocks.[10] The court further held that the limited antitrust exemption afforded to insurance companies by the McCarran-Ferguson Act[11] did not vitiate the defendants' duty of compliance with section 8 of the Clayton Act.[12]

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year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

Id. § 19 (emphasis added).

[6] 15 U.S.C. §§ 12-27 (1976).

[7] 656 F.2d at 449.

[8] United States v. Crocker Nat'l Corp., 422 F. Supp. 686, 687 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981). The complaint in *Crocker* alleged that three individuals served simultaneously as directors of Crocker National Bank and either Metropolitan Life Insurance Company, The Equitable Life Assurance Society of America, or the Mutual Life Insurance Company of New York. It further alleged that the same individuals also served as directors of Crocker National Corporation, the parent of Crocker National Bank, while serving as directors of one of the above named insurance companies.

The second complaint alleged that two individuals served simultaneously as directors on either Bank of America National Trust & Savings Association or Bankers Trust Company, and on Prudential Insurance Company of America. The complaint further alleged that these individuals also served simultaneously as directors of one of the bank holding companies, either Bank America Corporation or Bankers Trust New York Corporation. *Id.*

[9] 656 F.2d at 702-03.

[10] *Id.* at 705.

[11] 15 U.S.C. §§ 1011-1015 (1976). The McCarran-Ferguson Act exempts the business of insurance from compliance with federal antitrust laws to the extent that it is regulated by state law specifically. Section 1012(b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012(b).

[12] United States v. Crocker Nat'l Corp., 422 F. Supp. 686, 706 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981).

On appeal, the United States Court of Appeals for the Ninth Circuit upheld the trial court's view that the McCarran-Ferguson Act does not exempt interlocks between banks and insurance companies from compliance with the Antitrust statutes.[13] The court reversed the district court on the primary issue in dispute, however, by deciding that section 8 prohibits an individual from simultaneous service as a director for a competing bank and insurance company when any agreement between them potentially violates federal antitrust laws.[14] The court held that section 8 of the Clayton Act must be interpreted as barring the challenged interlocks since the purpose of the Act was to strengthen the general federal prohibition against anticompetitive practices which the Sherman Antitrust Act[15] (Sherman Act) first codified.[16] The court of appeals similarly found interlocks between bank holding companies and insurance companies to be in violation of section 8 of the Clayton Act.[17] The court reached this result despite the fact that the bank holding companies only competed with the insurance corporations through their subsidiaries; the holding companies' complete control of their subsidiaries[18] would render any other result meaningless.[19]

The cornerstone of the court's opinion is an accurate reading of the exclusionary clause exempting banks, trust companies, and common carriers from the strictures of the competing corporations paragraph.[20] The district court held that the language of the competing corporations paragraph clearly excludes interlocking directorates from compliance with section 8 if only one of the two linked corporations is a bank.[21] The court of appeals, after an examination of the language of the statute, found that it would be just as reasonable to limit the exclusion to interlocks between banks.[22] In its examination of the language of section 8, the court of appeals recognized that antitrust laws are to be interpreted liberally and that exemptions from compli-

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[13] 656 F.2d at 452.

[14] *Id.* at 449.

[15] 15 U.S.C. §§ 1-7 (1976).

[16] 659 F.2d at 449.

[17] *Id.* at 450-51.

[18] United States v. Crocker Nat'l Corp., 422 F. Supp. 686, 688 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981). The district court had established that each of the banks were wholly-owned subsidiaries of their parent bank holding companies. The bank holding companies admitted control of their subsidiary banks through stock ownership and election of their subsidiaries' directors. *Id.*

[19] 656 F.2d at 450-451.

[20] *See* note 5 *supra*.

[21] United States v. Crocker Nat'l Corp., 422 F. Supp. 686, 690 (N.D. Cal. 1976), *rev'd*, 656 F.2d 428 (9th Cir. 1981).

[22] 656 F.2d at 434-35.

ance are to be strictly construed.[23] The court noted that the first three paragraphs of section 8 prohibit interlocks between banks with specific exceptions.[24] Therefore, reasoned the court, a "normal reading" of the entire section leads to the conclusion that only interlocks between two or more banks are excluded from coverage by the competing corporations paragraph.[25] Such a reading, the court continued, would result in an exemption of banks from coverage by the competing corporations paragraph "only to the extent necessary to permit the provision regarding interlocks between banks in the banking paragraphs to be fully effective."[26]

The court interpreted the reference to common carriers in the exclusionary clause as completely removing them from coverage by the competing corporations paragraph.[27] Nevertheless, the court did not find any legislative intent to indicate that the references to banks should likewise be interpreted as completely excluding them from coverage under the competing corporations paragraph.[28] Chief Judge Browning, writing for the majority, decided that to completely exclude banks from coverage by the competing corporations paragraph would be unnecessary[29] and would create a loophole through which bank/non-bank interlocks could avoid compliance with the antitrust laws.[30] The judges opined that such a holding would blatantly nullify the policy that exceptions to the antitrust laws are to be strictly construed.[31] Applying that policy to the facts at hand, the court concluded that the competing corporations paragraph must be liberally interpreted to bar the questioned interlocks. Moreover, the judges ruled that the antitrust laws similarly mandate a strict interpretation of the exclusionary clause, which would exempt only interlocks between two banks.[32]

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[23] *Id.* at 440-41. *See also* Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 11-12 (1976); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348 (1963).

[24] 656 F.2d at 431, 434.

[25] *Id.* at 441; *see* note 5 *supra.*

[26] 656 F.2d at 442.

[27] *Id.* at 442-43. The court noted that the reference to common carriers was included in the bill as it was reported from the House Judiciary Committee, while the reference to banks came in the final stages of the legislative process in an attempt to prevent inconsistent regulation of horizontal interlocks between banks. *Id.*

[28] *Id.*

[29] *Id.* at 442.

[30] *Id.* at 440. Such an exclusion would result in interlocks between competing banks being regulated under the banking paragraphs, and interlocks between competing corporations being covered by the competing corporations paragraph, but interlocks between competing banks and non-banks would not be reached. *Id.*

[31] *See* note 23 *supra* and accompanying text.

[32] 656 F.2d at 441.

The court of appeals recognized that statutes are to be "'construed in accordance with [their] underlying purpose,'"[33] and that in the absence of an unmistakeable directive, a court may not interpret a statute in a manner contrary "'to the broad goals which Congress intended it to effectuate.'"[34] The court therefore examined the events leading to passage of the statute in an attempt to determine whether its interpretation of the competing corporations paragraph furthered the intended goals of Congress in enacting the Clayton Act.[35]

In the years preceding the enactment of the Clayton Act, various political leaders expressed reservations about the ability of the Sherman Act to accomplish its broad goals.[36] President Wilson encouraged Congress to enact supplemental legislation to strengthen the Sherman Act by barring practices which threatened free competition. Included among these practices were interlocking directorates, which the President denounced as having the effect of concentrating control of wealth in the hands of a few and discouraging young businessmen who believed they were precluded from rising to success.[37]

The bill introduced in response to the President's mandate was sponsored by Representative Clayton and contained a section dealing with interlocking directorates.[38] The court noted that the bill as

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[33] *Id.* at 435 (quoting TRW, Inc. v. FTC, 647 F.2d 942, 946 (9th Cir. 1981)).

[34] *Id.* at 440 (quoting FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968)).

[35] *Id.* at 434-45. The court relied on the Supreme Court's instruction that in any case which revolves around the meaning of a statute, the starting point in the court's analysis must be the language of the statute itself. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210 (1979). It is only when the statutory language is ambiguous that resort to the legislative history is permitted. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

[36] 656 F.2d at 435. The purpose of the Sherman Antitrust Act was to preserve free and unfettered competition as the rule of trade. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4 (1957).

[37] 656 F.2d at 436. In his message to Congress on January 20, 1914, President Wilson denounced interlocking directorates and encouraged Congress to prohibit them. *See* H.R. REP. No. 627, 63d Cong., 2d Sess. 17-18 (1914) (part 1), *reprinted in* E. KINTER, LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1098 (1978). The preservation of competition through the prohibition of specific anticompetitive practices, including interlocking directorates, was mentioned in the platform of the Democratic Party in 1912. Travers, *supra* note 2, at 824-25.

[38] The section was numbered section 8 in the bill introduced by Representative Clayton on April 14, 1914. *See* H. R. Rep. No. 15657, 63d Cong., 2d Sess., *reprinted in* E. KINTER, *supra* note 37, at 1080. The bill was referred to the Committee on the Judiciary after its introduction. The section on interlocking directorates was renumbered as section 9 by the House Committee on the Judiciary, 63d Cong., 2d Sess. (1914), *reprinted in* E. KINTER, *supra* note 37, at 1175-76. The section number was again changed to the original section 8 by the Conference Comm. *See Report of the Conference Comm.* H.R. REP. No. 1168, 63d Cong., 2d Sess. (1914), *reprinted in* E. KINTER, *supra* note 37, at 2466. The section regarding interlocking directorates is referred to as section 8 throughout this Note.

introduced did not exclude any class of corporations from coverage by the competing corporations paragraph.[39] While an exclusion for common carriers was inserted in the bill reported by the House Judiciary Committee, the Committee emphasized that in drafting this provision they had not compromised the President's intent to prohibit interlocking directorates.[40]

The court found that the Senate's treatment of the bill evidenced concurrence with the House's conclusion that the Clayton Act's purpose was to strengthen the Sherman Act through the prohibition of anticompetitive practices, such as interlocking directorates.[41] The court noted that banks were not added to the exclusionary clause[42] until the bill emerged from the Conference Committee.[43] Chief Judge Browning held that despite the Committee's failure to provide an explanation for this addition, there was nothing in the debates leading to the approval of the bill to indicate "any retreat by Congress from the view that interlocking directorates between large competing corporations were contrary to the public interest and should be condemned."[44] The court noted that the question of the applicability of the competing corporations paragraph was never fully addressed by Congress. In fact, the court could only discover three instances during the debates leading to the passage of the Clayton Act when the provision was mentioned.[45]

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[39] 656 F.2d at 436-37.

[40] *Id.* at 437. The Committee felt the legislation dealing with interlocking directorates was of critical importance. They stated that "the concentration of wealth, money, and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions." H.R. REP. No. 627, 63d Cong., 2d Sess. 19 (1914), *reprinted in* E. KINTER, *supra* note 37, at 1099.

[41] 656 F.2d at 438-39. While the Senate made substantial changes in section 8, those changes were confined to the paragraphs covering common carriers and horizontal interlocks between banks. The provisions relating to interlocking directorates between competing corporations were left substantively unchanged by the Senate. *Id.*

[42] *See* note 20 *supra* and accompanying text.

[43] A Conference Committee was appointed because the House of Representatives did not agree with the changes made by the Senate. 656 F.2d at 439.

[44] *Id.*

[45] *Id.* at 444-46. The first instance was a statement made by Representative Cullop during debate to the effect that the competing corporations paragraph does not concern banks. The court reasoned that because the sole topic under debate was horizontal interlocks between banks, and not the extent of the reach of the competing corporations paragraph, the statement could not be relied upon to determine the meaning of the competing corporations paragraph.

The court similarly dismissed a statement by Representative Carlin to the effect that banks are to be regulated differently than corporations. The matter being discussed was whether an exception created to allow small banks to escape from the provisions of the banking paragraphs would also be applied to allow small corporations to escape regulation by the competing

The Ninth Circuit pointed out that subsequent legislation designed to clarify the applicability of section 8 to bank/non-bank interlocks had been introduced to Congress at various times but was never adopted.[46] The judges cautioned, however, against interpreting the failure to adopt such legislation as an indication that Congress did not want such interlocks to be prohibited.[47] Chief Judge Browning stated that the actions of subsequent Congresses must not be relied upon when attempting to ascertain the objectives underlying earlier legislation.[48]

Analysis of the legislative history and structure of the Clayton Act led the court to conclude that the purposes of the Act would be furthered if interlocks between competing banks and non-banks were prohibited by section 8.[49] The court reasoned that a holding which would allow bank/non-bank interlocks to escape coverage by section 8 would be contrary to Congress' desire to preserve competition.[50] Since section 8 clearly does not allow two banks or two competing non-banks to share directors, the court could find no logical reason to permit interlocks between banks and competing non-banks.[51]

The court cited with approval *In re Perpetual Federal Savings & Loan Ass'n*,[52] a proceeding brought before the Federal Trade Commission[53] to determine whether a savings and loan association violated section 5 of the Federal Trade Commission Act[54] by having on its board of directors individuals who served simultaneously as directors of competing commercial banks.[55] Perpetual contended that the

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corporations clause. The court refused to interpret a statement made in debate concerning banking exceptions in a manner that would defeat Congress' purpose of prohibiting interlocking directorates.

The third incident concerned a point of order raised by Representative Mann during debate on the Conference Committee report shortly before the Clayton Act was passed. Mr. Mann feared that the amendments by the Conference Committee exempted interlocks between banks and competing non-banks and opposed this result. Relying on the directive by the Supreme Court in NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964) (in interpreting statute, views of its opponents should not be relied upon), the court disregarded the fears expressed by Representative Mann. 656 F.2d at 444-46.

[46] 656 F.2d at 446.

[47] *Id.* at 446-57.

[48] *Id.* at 447; *see* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348-49 (1963); United States v. Wise, 370 U.S. 405, 411 (1962).

[49] 656 F.2d at 447.

[50] *Id.* at 440.

[51] *Id.* at 440-41.

[52] 90 F.T.C. 608, *vacated on other grounds*, 94 F.T.C. 401 (1979).

[53] The Federal Trade Commission may bring suit under section 5 of the Federal Trade Commission Act to suppress conduct which violates the policy of the Sherman or Clayton Acts. 90 F.T.C. at 652.

[54] 15 U.S.C. § 45 (1976).

[55] 90 F.T.C. at 648.

challenged interlocks were not prohibited by section 8 of the Clayton Act and pointed to the exclusionary clause as evidence of Congress' desire to permit such interlocks.[56] In rejecting this contention, the Federal Trade Commission found no "indication that Congress carefully considered interlocks between banks and *competing* non-banks, and made a conscious decision to immunize such arrangements while generally condemning other horizontal interlocks."[57] Thus, the Commission found that since the interlocks violated section 8 of the Clayton Act, they could also be suppressed under section 5 of the Federal Trade Commission Act.[58]

The court next considered whether the competing corporations paragraph prohibited interlocking directorates between insurance companies and bank holding companies when competition exists only between the insurance companies and the subsidiaries of the bank holding companies.[59] Chief Judge Browning held that the resolution of this question depends on whether the subsidiary bank's business can be attributed to its parent. This factor is established by the amount of control the parent exercises over the subsidiary.[60] The court held that section 8 bars interlocking directorates between bank holding companies who completely control their banking subsidiaries and non-banking corporations with whom their subsidiaries compete.[61] Since the bank holding companies in *Crocker* completely controlled their bank subsidiaries,[62] the interlocks between them and the insurance companies were prohibited by section 8 of the Clayton Act.

Finally, the court considered whether the questioned interlocks would be excluded from section 8 coverage by virtue of the McCarran-Ferguson Act, which provides an exemption from the antitrust laws for the business of insurance that is already regulated by state law.[63] The *Crocker* court found that the McCarran-Ferguson Act was not intended to completely exempt insurance companies from compliance with the antitrust laws, but was meant to ensure that

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[56] *Id.* at 655-56.

[57] *Id.* at 656 (emphasis in original).

[58] *See* note 53 *supra.*

[59] 656 F.2d at 450. The insurance companies and bank holding companies did not directly compete with each other. The competition existed solely between the insurance companies and the banking subsidiaries and involved the extension of mortgage and real estate loans. *Id.*

[60] *Id.*

[61] *Id.* at 450-51. The court also relied upon a determination by the Federal Reserve Board that in a situation where a bank holding company's principal activity is the control of its bank subsidiary, the bank and the bank holding company should be treated as a single entity for purposes of section 8 of the Clayton Act. 12 C.F.R. § 218.114 (1976).

[62] *See* note 18 *supra* and accompanying text.

[63] *See* note 11 *supra.*

regulation and taxation of the business of insurance would remain under state control.[64] The judges concluded that the McCarran-Ferguson Act would not exempt the challenged interlocks from coverage by section 8 for two reasons.[65] Since there were no existing state laws regulating interlocking directorates between insurance companies and the banks with which they compete, application of the Clayton Act would not interfere with state regulation of insurance and the court correctly held that the McCarran-Ferguson Act exemption was unavailable to the defendants.[66] The court then noted that the McCarran-Ferguson Act was intended to extend limited antitrust immunity to the insurance industry.[67] Accordingly, the judges decided that to apply the exemption here would extend it to banks which are outside the insurance industry, thereby violating the canon of strict construction of antitrust exemptions.[68]

The court cited the Supreme Court's decision in *Group Life & Health Insurance Co. v. Royal Drug Co.*,[69] wherein the Court interpreted "the business of insurance" to be the underwriting and spreading of risk, and found that this definition does not encompass all activities of insurance companies.[70] Relying on this interpretation, the *Crocker* court indicated, but did not decide, that the creation of interlocks might not constitute the "business of insurance" and that the McCarran-Ferguson exemption could, therefore, be denied.[71]

The significance of the *Crocker* decision lies in the fact that it is the first judicial expression of a definite proscription against interlocking directorates between banks and competing non-banks. As evidenced by the district court opinion and its subsequent reversal, considerable confusion existed as to the precise application of section 8 to such interlocks.

While the circuit and district courts reached opposing conclusions, each correctly approached the issue of the applicability of section 8 to these interlocks by examining the language of the statute itself.[72] The circuit court concluded that the language of the statute

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[64] 656 F.2d at 452. *See also* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 219 (1976); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 624, 639.

[65] 656 F.2d at 452-55.

[66] *Id.* at 452-53.

[67] *Id.* at 455.

[68] *Id.*

[69] 440 U.S. 205 (1978).

[70] *Id.* at 220. *See also* SEC v. National Sec. Inc., 393 U.S. 453, 459 (1969).

[71] 656 F.2d at 455.

[72] *See* note 24 supra.

was ambiguous; therefore, the court resorted to the legislative history of the Clayton Act to determine the purpose of Congress in enacting section 8.[73] In contrast, the district court stated that the language of the statute clearly led to the conclusion that interlocking directorates between banks and non-bank competitors were not prohibited by section 8.[74]

A careful examination of relevant legislative history leads to the inevitable conclusion that the circuit court was correct in its interpretation and application of section 8. Congress viewed the mere existence of interlocking directorates as a threat to competition and the legislative objective in enacting section 8 was to strictly prohibit these interlocks. Moreover, Congress was well aware of a clear method of exempting certain interlocks from the prohibitions of section 8 as evidenced by the first of the three banking paragraphs of the section.[75]

The purpose of Congress in enacting section 8 was specifically to protect against the inherent dangers of interlocking directorates. In view of the absence of a clear directive from Congress to immunize bank/non-bank interlocks, the circuit court correctly held that the bank/non-bank interlocks in question violated the Clayton Act.

By extending the coverage of section 8 to bank/non-bank interlocks, the *Crocker* decision effectuated section 8's procompetitive policies. This view necessitates an awareness that section 8 was designed to be preventative in nature.[76] Unlike section 1 of the Sherman Antitrust Act, which requires proof of conduct having an unlawful effect, section 8 of the Clayton Act does not require that a violation of the antitrust laws actually occur during the period of the interlock; it is only necessary that the interlocked companies have a relationship such that a potential agreement to eliminate competition between them would constitute a violation of the antitrust laws.[77]

The preventative nature of section 8 was emphasized in the decision in *TRW v. FTC*,[78] in which the court held that the section does not require a showing that a substantial amount of competition might be restrained. The purpose of section 8 is to prevent restraints

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[73] *See* note 24 *supra* and accompanying text.

[74] *See* note 21 *supra* and accompanying text.

[75] *See* note 5 *supra*.

[76] *See* TRW, Inc. v. FTC, 647 F.2d 942, 948 (9th Cir. 1981); *In re* Penn Cent. Sec. Litig. v. Pennsylvania Co., 367 F. Supp. 1158, 1168 (E.D. Pa. 1978); United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

[77] *In re* Penn Cent. Sec. Litig. v. Pennsylvania Co., 367 F. Supp. 1158, 1168 (E.D. Pa. 1973).

[78] 647 F.2d 942 (9th Cir. 1981).

on competition before they materialize and such a purpose cannot be implemented if proof of a high degree of competition is required.[79]

The broad application of section 8 in *Crocker* is not unprecedented. Section 8 has been interpreted to prohibit corporations from electing, and individuals from serving, as directors where an interlock between competitors would result.[80] Thus, while the competing corporations paragraph states that "no person at the same time shall be a director,"[81] corporations, as well as individuals, may be prosecuted under the section. The rationale for this proposition is that section 8 cannot be effectively enforced unless corporations are prohibited from creating interlocks which violate section 8. A corporation having no fear of sanctions may create an interlock "and, if detected, simply replace the ousted director with another interlocking board member."[82]

It is important to note that defendants accused of unlawful interlocks often claim that the interlock has been abandoned and that the issue is moot. Traditionally, courts have viewed this allegation with much skepticism due to their general disapproval of interlocking directorates. The mootness claim might arise in two ways. First, the defendant corporations could cease to be competitors. The legal standard applied to such a claim is strict.[83] The corporate defendant must demonstrate that it has both completely divested itself of all contact with the industry in which the interlock existed, and that it lacks the capacity to compete again in that industry in the reasonably foreseeable future.[84] Secondly, the individual defendant may claim that he has resigned and, thus, the illegal conduct has ceased. Mere discontinuance of the illegal conduct will not render the case moot. It is only after the defendants demonstrate there is no reasonable expectation that the wrong will be repeated that a finding of mootness will be rendered.[85] Furthermore, even though the case may be mooted, the plaintiff may proceed with a claim for injunctive relief if a real danger of recurring section 8 violations can be established.[86] Thus, the courts

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[79] *Id.* at 946-48.

[80] *Id.* at 949; SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977).

[81] 15 U.S.C. § 19; *see* note 5 *supra*.

[82] SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977).

[83] *See* United States v. Cleveland Trust Co., 392 F. Supp. 699, 709-10 (N.D. Ohio 1974).

[84] V P. AREEDA & D. TURNER, *supra* note 1, at ¶1305.

[85] *See* United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); *TRW*, 647 F.2d at 953; SCM Corp. v. FTC, 565 F.2d 807, 812 (2d Cir. 1977); United States v. Cleveland Trust Co., 392 F. Supp. 699, 706 (N.D. Ohio 1974).

[86] *See* United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); *TRW*, 647 F.2d at 954; SCM Corp. v. FTC, 565 F.2d 807, 813 (2d Cir. 1977); United States v. Cleveland Trust Co., 392 F. Supp. 699, 711 (N.D. Ohio 1974).

have demonstrated their willingness to apply section 8 not only to bring an end to existing interlocks which violate that section, but also to insure prevention of future violations through an award of injunctive relief.

The *Crocker* court's application of section 8 to the interlocks between the bank holding companies and the insurance companies was also expansionary. The language of section 8 only prohibits interlocks between competitors. In *Crocker*, the competition existed between the insurance companies and the wholly-owned and controlled subsidiaries of the bank holding companies.

The Court of Appeals for the Second Circuit, in *Kennecott Copper Corp. v. Curtiss Wright Corp.*,[87] refused to adopt a general rule prohibiting interlocking directorates between two parent companies whose only competition was through their subsidiaries; however, the court did not preclude the application of section 8 to a parent corporation that completely controlled the policies of its subsidiary.[88] By finding such an interlock to be violative of section 8, the *Crocker* court expanded the *Kennecott* holding. In so ruling, the *Crocker* court indicated an awareness that Congress enacted section 8 to prohibit the concentration of control. Consequently, the judges refused to allow this purpose to be defeated by reading section 8 with undue literalness.[89]

The holding in *Crocker* extends the prohibitions of section 8 to bank/non-bank interlocks, an area formerly treated as exempt from the competing corporations paragraph. It is a fact of business life that commercial banks today often compete with non-banks in the extension of various types of loans. Interlocks between banks and competing non-banks can have the same adverse effects on competition as interlocking directorates between any competing corporations.[90] The *Crocker* court correctly refused to interpret and apply section 8 in a manner which would defeat the purpose of furthering competition. The procompetitive effects of the *Crocker* decision are somewhat diminished, however, when one realies that corporations can lawfully achieve interlocks by sharing officers or employees with managerial functions. Accordingly, while one may not serve as a director of both a competing insurance company and a bank, the same anticompetitive result may be accomplished by serving as a director of one and a vice president of the other. To prevent this easy avoidance of the

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[87] 584 F.2d 1195 (2d Cir. 1978).

[88] *Id.* at 1205.

[89] *See* SCM Corp. v. FTC, 565 F.2d 807, 811 (2d Cir. 1977).

[90] V P. AREEDA & D. TURNER, *supra* note 1, at ¶1302d.

section, future courts will have to take the next logical step, namely, to extend the ban on interlocks to officers or employees with managerial responsibilities.

As emphasized when section 8 was being considered in 1914, "interlocking control is the vice, and it should be prevented. . . . There may be interlocking control although there are no interlocking directorates, and while it continues there will be no real competition."[91] Until Congress acts to prohibit comprehensively interlocking control of competing corporations, decisions subsequent to *Crocker* should continue to emulate the Ninth Circuit's expansionary treatment of section 8 of the Clayton Act.

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[91] H.R. REP. No. 627, 63d Cong., 2d Sess. 8 (1914) (part 3), *reprinted in* KINTER, *supra* note 37, at 1157.