# Senate Enrolled Act No. 1: A New Era of Banking Expansion in Indiana

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In its 1985 session, the Indiana General Assembly passed, and on April 18, 1985, the Governor of Indiana signed into law, Senate Enrolled Act No. 1 of 1985[1] (hereinafter the "Act") to reform Indiana banking law. The adoption of this Act promises to usher Indiana banks and bank holding companies into a new era of banking and bank expansion. The Act was divided into five major sections, each offering new opportunities for Indiana banks: (1) bankers' banks,[2] (2) intra-county branching,[3] (3) cross-county branching,[4] (4) multi-bank holding companies,[5] and (5) regional bank holding companies.[6] In addition, it included an unusual provision which permitted banks and bank holding companies to choose whether or not to participate in bank expansion activities.

First, this Article will summarize those five provisions and the opt-out portion of the Act and examine certain controversial issues related to the Act that have arisen since its passage. Second, this Article will examine the federal response to regional reciprocity. Finally, it will conclude with a discussion of the reciprocity problems posed by the Act.

## I. ANALYSIS OF THE INDIANA ACT

### A. Bankers' Banks

As a result of the Act, both state and national banks located in Indiana can participate as shareholders in state chartered "bankers' banks,"[7] subject to the approval of the Indiana Department of Financial Institutions (hereinafter the "DFI").[8] A bankers' bank must be owned exclusively by other banks[9] and be organized solely for the purpose of

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[1]Pub. L. No. 265, 1985 Ind. Acts 1.

[2]IND. CODE § 28-1-11-4(e) (Supp. 1985).

[3]*Id.* § 28-2-13-19.

[4]*Id.* § 28-2-13-20.

[5]*Id.* §§ 28-2-14-10 to -13.

[6]*Id.* §§ 28-2-15-16 to -20, -26.

[7]IND. CODE § 28-1-11-4(e) (Supp. 1985).

[8]*Id.* § 28-1-4-7.

[9]*Id.* § 28-1-11-4(e)(1).

providing services to other banks and their officers, directors, and employees.[10] The formation of these entities permits banks to engage in collective operations, and thus affords small and medium-sized banks economies of scale and provides an opportunity to render services in a larger geographic area. By limiting each bank's investment in a bankers' bank to no more than ten percent of the investing bank's capital and surplus, and by limiting each bank's ownership to no more than five percent of any class of voting securities of the bankers' bank, the Act closely parallels limitations imposed upon national banks under federal law.[11]

### *B. Intra-County Branch Banking*

The Act repealed Indiana's long-standing restrictive branching laws for state banks, substituting new provisions governing intra-county branching[12] and authorizing, for the first time, branching across county lines.[13] With written approval of the DFI,[14] and subject to the limitations upon total deposits set forth below, a state bank is now allowed to establish[15] or acquire, for each $200,000 of capital and surplus, a branch bank anywhere in the county of its principal office.[16]

Branches cannot be acquired, however, if, as a result of the acquisition, the acquiring bank[17] and its Indiana affiliates[18] will hold a percentage of total deposits in all Indiana banks larger than ten percent prior to July 1, 1986; eleven percent after June 30, 1986 but prior to July 1, 1987; and twelve percent after June 30, 1987.[19] The Act defines "deposits" as the sum of total demand deposits and total time and

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[10] *Id.* § 28-1-11-4(e)(2).

[11] *Compare* Ind. Code § 28-1-11-4(e) (Supp. 1985) *with* 12 U.S.C. § 24 (Supp. 1985).

[12] Ind. Code § 28-2-13-19 (Supp. 1985).

[13] *Id.* § 28-2-13-20. *See infra* notes 22-42 and accompanying text.

[14] Before the DFI approves an application for an intra-county branch, "it shall determine to its satifaction that (1) the public convenience and advantage will be served and promoted by the establishment of a branch in the location of the proposed branch; and (2) the applicant state bank has satisfied the capital and surplus requirment specified. . . ." *Id.* § 28-2-13-19(b).

[15] A branch established by means other than by acquisition is referred to as a "branch de novo." The Indiana Code defines "branch de novo" as a branch established by the opening of a new branch and includes, with some exceptions, a branch acquired from another bank without acquiring substantially all of the assets of the other bank. *Id.* § 28-2-13-9.

[16] Id. § 28-2-13-19. This section contains virtually all of the operative intra-county branching provisions.

[17] *See id.* § 28-2-13-2 for a definition of "acquiring bank."

[18] *See id.* § 28-2-13-3 for a definition of "affiliate," and § 28-2-13-16, which defines "Indiana affiliate." Both provisions focus on the ownership of two separate banks by the same bank holding company.

[19] *Id.* § 28-2-13-19(d)-(e).

savings deposits of a particular bank as shown in its consolidated report of condition as of December 31, 1984.[20] For purposes of applying the deposit limitation, "deposits" are to be determined by reference to the acquiring bank's most recently filed consolidated report of condition in the possession of the appropriate regulatory agency.[21]

### *C. Cross-County Branch Banking*

The Act also authorizes limited cross-county branching by permitting a state bank[22] and, by application of federal law,[23] a national bank to establish branches either de novo[24] or by acquisition[25] in counties contiguous[26] to the county of its principal office.[27] The establishment of cross-county branches is subject to several limitations, which will be referred to as: (1) the "Percentage-of-Deposits Limitation";[28] (2) the "Five-Year Existence and Continuous Operation Limitation";[29] (3) the "Once-Per-Period Limitation";[30] and (4) the "First Bank Limitation."[31]

The Percentage-of-Deposits Limitation provides that the establishment of a branch by acquisition in contiguous counties will not be permitted if, after the acquisition, the acquiring bank and its Indiana affiliates will have a percentage of all Indiana deposits greater than the percentages allowed in intra-county branching.[32]

The Five-Year Existence and Continuous Operation Limitation precludes the establishment of a branch by acquisition if either the acquiring bank or the acquired bank has not been in existence and continuously operated as a bank for more than five years.[33] This requirement is met if a bank was formed from a consolidation of banks each of which

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[20] *Id.* § 28-2-13-14.

[21] *Id.* § 28-2-13-19(d).

[22] *Id.* § 28-2-13-18, which defines "state bank" as a bank that has been organized or reorganized under Indiana law.

[23] 12 U.S.C. § 36(c) (1982). This provision authorizes national banks to establish and operate branch banks in the same manner and to the same extent that state banks are so authorized. Thus, the Indiana Act may be viewed as applying to both state and federally chartered banks.

[24] *See supra* note 15.

[25] See IND. CODE § 28-2-13-8 (Supp. 1985), which defines a "branch by acquisition" as a branch acquired by merger, consolidation, or purchase of all or substantially all of its assets by the acquiring bank.

[26] *Id.* § 28-2-13-11.

[27] *Id.* § 28-2-13-20.

[28] *Id.* § 28-2-13-20(c).

[29] *Id.* § 28-2-13-20(d).

[30] *Id.* § 28-2-13-20(g).

[31] *Id.* § 28-2-13-20(i)(2).

[32] *Id.* § 28-2-13-20(c); *see also supra* note 19 and accompanying text.

[33] *See id.* § 28-2-13-20(d).

satisfies the five-year requirement[34] or if the bank was a "phantom" bank that survived a merger with a bank which satisfies the five-year requirement.[35] Although these two exceptions to this limitation are sensible, one consequence of the entire requirement is that, if literally read, it would require a new bank less than five years old that formed a one-bank holding company by merging into a phantom bank to wait an additional five years after the merger to qualify for cross-county branching.

The Once-Per-Period Limitation establishes a five-year period, beginning July 1, 1985, and ending June 30, 1990, during which the number of branches a bank can establish de novo or by acquisition outside its home county is limited.[36] The limitations based on the total deposits of the bank including its Indiana affiliates are as follows: (1) Banks with deposits[37] of $200,000,000 or less can establish one out-of-county branch per year,[38] (2) banks with deposits greater than $200,000,000 but not greater than $400,000,000 can establish one out-of-county branch in each twenty-four month period ending June 30, 1987, and June 30, 1989, and another branch in the twelve month period ending June 30, 1990,[39] and (3) banks with deposits exceeding $400,000,000 can establish one out-of-county branch in each thirty-month period ending December 31, 1987, and June 30, 1990.[40] Following any cross-county acquisition, the total deposits of the acquiring and acquired banks, including their affiliates, will be combined to determine the category into which the acquiring bank will fall for purposes of the Once-Per-Period Limitation.[41] Under this provision, banks can lay the groundwork for acquiring future branches by making noncontrolling investments in target institutions with arrangements to consummate the acquisition at the beginning of the next available "period."

The First Bank Limitation provides that, until June 30, 1990, only the *first* Indiana bank controlled by a bank holding company is permitted to establish out-of-county branches.[42] If a bank holding company simultaneously gains control of more than one bank during that period, then the bank that first established an out-of-county branch will be the only one to have cross-county branching rights.

The First Bank Limitation could create a problem for individuals who because of their stock ownership in a certain bank or bank holding

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[34]Ind. Code § 28-2-13-20(d)(1) (Supp. 1985).

[35]*Id.* § 28-2-13-20(d)(2).

[36]*Id.* § 28-2-13-20(g).

[37]Deposits are defined as of December 31, 1984. *Id.* § 28-2-13-14.

[38]*Id.* § 28-2-13-20(g)(1).

[39]*Id.* § 28-2-13-20(g)(2).

[40]*Id.* § 28-2-13-20(g)(3).

[41]*Id.* § 28-2-13-20(h).

[42]*Id.* § 28-2-13-20(i)(2).

company are deemed to "control" that entity.[43] Depending on how the limitation and certain related definitions are interpreted, the growth opportunity for banks "controlled" by such individuals could be severely restricted.

As previously noted, the First Bank Limitation states that "[a]mong affiliates, the only bank that has branching rights under this section is the first Indiana bank *controlled* by the bank holding company. . . ."[44] Several definitions must be reviewed to understand fully the potential consequences of this provision to "controlling" shareholders. Under the Act, "control" means:

> [D]irectly or indirectly (1) to own, control, or hold, with power to vote, twenty-five percent or more of the voting shares of a bank or *company*; (2) to control in any manner the election of a majority of the directors or trustees of a bank or company; or (3) to exercise controlling influence over the management or policies of a bank or company. . . ."[45]

"Bank holding company" is defined as "any *company* that has or acquires control over: (1) any bank; or (2) any company that has or acquires control over any bank,"[46] subject to certain exceptions provided under the statute. "Company" means "any corporation, partnership, joint-stock company, business trust, voting trust, *joint venture, association, or similar organization*, domestic or foreign."[47] The possibility of a group being characterized as a company depends largely upon how "joint venture" and "association" are defined. If those terms are defined broadly, it is possible that a group of persons that owns or controls the stock of several banks or bank holding companies might be deemed to constitute a company, and consequently, a bank holding company for purposes of enforcing the First Bank Limitation. In that event, only the *first* bank controlled by the group would have branching rights.[48]

Two Indiana cases focus on the definition of "joint venture." In both *State ex rel. Uebelhor v. Armstrong*[49] and *Kochert v. Wiseman*,[50] the courts concluded that the collaborative actions of the respective groups caused them to be characterized as joint ventures for purposes of the Indiana Bank Holding Company Act.[51] In *Uebelhor*, a group of individuals came together to buy part of the outstanding stock of a

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[43] *Id.* § 28-2-13-12.

[44] *Id.* § 28-2-13-20(h)(2) (emphasis added).

[45] *Id.* § 28-2-13-12 (emphasis added).

[46] *Id.* § 28-2-13-6 (emphasis added).

[47] *Id.* § 28-1-13-10 (emphasis added).

[48] *See id.* § 28-2-14-20.

[49] 252 Ind. 351, 248 N.E.2d 32 (1969).

[50] 148 Ind. App. 613, 269 N.E.2d 12 (1971).

[51] Ind. Code §§ 28-8-2-1 to -4 (1982).

target bank. They jointly borrowed $160,000 to purchase the stock and then divided the stock up among the group. The group held a number of meetings to discuss how to divide the stock and appointed a treasurer who opened a special checking account for the group. The court held that, given the circumstances, a joint venture did exist.[52]

In *Kochert*, a group of individuals took action to purchase voting control of a target bank. The court held that the existence of a profit motive and the division of the acquired stock among the group, as well as the filing of a joint application with the Indiana Department of Financial Institutions requesting permission to acquire voting control of the targeted bank, constituted sufficient evidence of concerted activity.[53] However, because the factual record could be decided either way, the court remanded the case to determine whether the group was acting as a joint venture.[54]

In both cases, the courts closely scrutinized the existence of facts and circumstances which demonstrated concerted actions on the part of each group and their apparent intent to act as a group. A group of shareholders that controls two or more banks or bank holding companies should, therefore, focus on the extent to which its members' actions in acquiring control reflect actions taken in concert with one another pursuant to a group plan.

Indiana case law fails to provide a definition of the term "association" in a context that is relevant to a group's control of a bank for purposes of enforcing the First Bank Limitation. However, a Federal Reserve Board Ruling under Regulation Y[55] of the Federal Reserve Regulations provides some assistance in defining that term. This ruling generally requires the presence of a formalized or structured relationship among individuals, evidenced by agreement of some kind, before an "association" will be found to exist.[56]

In summary, in light of the definitions discussed above, any group that owns or plans to acquire control of several banks should examine carefully the extent to which they risk being characterized as a joint venture or association. In the event they are characterized as such, they will be deemed to be a company within the provisions of the Act. Consequently, only the first bank controlled by the group will be deemed to have cross-county branching rights.

The Act also includes a provision that "grandfathers" previously established out-of-county branches of an acquired bank by allowing such

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[52]252 Ind. at 358, 248 N.E.2d at 36.

[53]148 Ind. App. at 625, 269 N.E.2d at 17-18.

[54]*Id.* at 626, 269 N.E.2d at 20.

[55]12 C.F.R. § 225 (1985).

[56]*"Company" - Individual Shareholders Not Constituting "Association,"* FED. BANKING L. REP. (CCH) No. 4-420, at ¶ 33258 (Sept. 13, 1977).

branches to remain in operation in their current location,[57] and it also exempts acquisitions of troubled banks[58] from the above four limitations.[59] However, the growth in deposits resulting from any such acquisition will be considered in connection with future branching by acquisition.[60] Finally, the Act permits state banks[61] to establish automated teller machines at any location in the state, provided notice is given to the DFI prior to establishing or relocating any such machine.[62]

### *D. Indiana Multi-Bank Holding Companies*

Under the Act, a bank holding company[63] with its principal office in Indiana is for the first time permitted to control two or more banks or bank holding companies,[64] subject to the Percentage of Deposits Limitation[65] and the Five-Year Existence and Continuous Operation Limitation.[66] The Percentage of Deposits Limitation provides that the acquisition by an Indiana bank holding company of an Indiana bank or Indiana bank holding company is not permitted if all Indiana banks within the holding company group will control more than the maximum allowable percentage of deposits for a given period.[67] These percentages per period are the same as those applied to intra-country and cross-county branches.[68] In addition, under the Five-Year and Continuous Operation Limitation, an acquisition by an Indiana bank holding company of another bank or bank holding company is not permitted if the target bank or a bank subsidiary of the target bank holding company has not been in "existence and continuously operated" for five or more years.[69]

If a company[70] or bank holding company desires to acquire control[71] of another bank or bank holding company, it is required to file an

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[57]*Id.* 28-2-13-20(f). An out-of-county branch is one located in a county that is not in the county in which the principal office of the acquiring bank is located or contiguous to the county in which the principal office of the acquiring bank is located. *Id.*

[58]*Id.* § 28-1-7.2-3(i).

[59]*See supra* notes 28-31 and accompanying text.

[60]Ind. Code § 28-2-13-21 (Supp. 1985).

[61]By application of federal law, national banks are also permitted to establish automated teller machines. *See supra* note 23.

[62]Ind. Code § 28-2-13-22 (Supp. 1985).

[63]*Id.* § 28-2-14-3.

[64]*Id.* § 28-2-14-10.

[65]*Id.* § 28-2-14-11(a)-(b).

[66]*Id.* § 28-2-14-11(c).

[67]*Id.* § 28-2-14-11(a)-(b).

[68]*See supra* notes 19, 32 and accompanying text.

[69]Ind. Code § 28-2-14-11(c) (Supp. 1985).

[70]*Id.* § 28-2-14-5.

[71]*Id.* § 28-2-14-6.

application for approval with the DFI.[72] As part of its application, an applicant can request that the DFI hold a "fairness hearing" on the terms and conditions of the proposed transaction.[73] Such a hearing is available only if the DFI in its discretion[74] decides to grant the hearing and if the consideration given in the transaction includes "stock" issued by the acquiring company.[75] Accordingly, a fairness hearing may not be available for a transaction that involves debt or "hybrid" securities such as convertible debentures. If the DFI conducts a fairness hearing *and* rules favorably, the acquiring company can qualify for an exemption[76] from the registration requirements of the Federal Securities Act of 1933[77] and the Indiana Securities Act.[78]

The use of a fairness hearing to gain an exemption from securities registration requirements, although not uncommon in routine corporate transactions, is of questionable utility in multi-bank holding company transactions. The possible complexities of multi-bank holding company transactions can involve the DFI in lengthy administrative hearings, possibly culminating in litigation. In short, in many cases, it may be more advantageous for the applicant and the DFI to leave the resolution of fairness questions to the application of various disclosure requirements of the securities laws and other mechanisms available under general corporate law.

### *E. The Opt-Out Provision and the Business Judgment Rule*

A provision unique to the Act permitted a board of directors[79] of an Indiana bank or bank holding company to adopt resolutions prior to July 1, 1985, which exempted the institution from the regional bank holding company or the multi-bank holding company provisions of the

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[72]The DFI application must be accepted by the DFI for processing within ten days of receipt, assuming it is informationally sufficient as filed. The DFI is then required to review the proposed acquistion for compliance with the Percentage of Deposits and Five-Year Existence and Continuous Operation Limitations and to investigate the condition of the applicant and the party to be acquired. The DFI, at its option, can hold public hearings on the proposed acquisition at any time after thirty days following the acceptance of the application. The DFI is required to approve or disapprove the application within either (1) forty-five days after acceptance of the application (if the DFI elects not to hold a public hearing on the application) or (2) thirty days after a public hearing is held. *See* Ind. Code § 28-2-14-12 (Supp. 1985).

[73]Ind. Code § 28-2-14-13 (Supp. 1985).

[74]The existence of the DFI's discretion is inferred by the use of permissive language in Ind. Code § 28-2-14-13(a).

[75]*Id.* § 28-2-14-13(a).

[76]*Id.* § 28-2-14-13(c).

[77]Securities Act of 1933, § 77(f), 15 U.S.C. § 77 (1982).

[78]Ind. Code § 23-2-1-3 (1982).

[79]Pub. L. No. 265, 1985 Ind. Acts 37, § 9(a).

Act until July 1, 1987.[80] The adoption and filing of the latter resolution also precluded the bank from cross-county branching by acquisition until July 1, 1987.[81] However, the bank is still permitted to establish de novo branches on a cross-county basis.[82]

Because of the unusual nature of this opt-out provision, it is far from clear at this writing what its overall import will be. Among other implications, it raises the questions of whether a board of directors properly exercises its fiduciary duties when by its action or inaction its institution participates or fails to participate in banking expansion. The existence of the option also raises the question (at least until the expiration of the "opt-out" period on July 1, 1987) whether the laws of other states that *do not* include similar opt-out provisions will be deemed to be "reciprocal" by the respective state regulators for the purpose of regional banking expansion.[83]

The extent to which a board of directors exercises its duty of care in determining whether or not to opt out of regional or regional and state bank expansion activity remains to be tested in the Indiana courts. Such litigation might arise where an otherwise desired or profitable disposition of stock is precluded by a board's previous decision to opt out of expansion activity or, conversely, where a board's decision to participate in bank expansion produces unwanted or unprofitable takeovers or costly efforts to resist unwanted takeover attempts. As courts begin to address this issue, they should carefully scrutinize a director's actions and apply the protection of the business judgment rule to the director's decisions.

Although the business judgment rule has not yet been codified in Indiana nor adopted by Indiana courts, statutory duties of due care and loyalty do exist.[84] In addition, the Indiana courts have applied general concepts of fiduciary duty to a director's decisions which affect the general well being of the corporation.[85] Courts generally presume that a director exercises due care when making decisions in good faith,[86] regardless of whether the courts analyze the case under the business judgment rule, concepts of fiduciary duty, or statutes similar to both.

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[80]*Id.* § 9(b)-(c).

[81]*Id.* § 9(c).

[82]*Id.* "This subsection does not apply to the establishment of a branch de novo under IC 28-2-13 or IC 28-6-2.1, whichever is applicable."

[83]*See infra* notes 146-77 and accompanying text.

[84]IND. CODE § 23-1-2-11 (Supp. 1985).

[85]Yerke v. Batman, 176 Ind. App. 672, 376 N.E.2d 1211 (1978); Epperly v. E. & P. Brake Bonding, Inc., 169 Ind. App. 224, 348 N.E.2d 75 (1976); Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 301 N.E.2d 240 (1973).

[86]*See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 293 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

The plaintiff has the burden of rebutting this presumption by establishing that a director's decisions were guided by improper motives.[87] Unfortunately, given the unique nature of the "opt-out" provision, the Indiana audience has little authority by which to predict the manner in which this standard will be applied or the outcome of any such application. However, some guidance can be found in case law dealing with corporate control contests.

In control contest cases, the issue is often raised of whether a director who advocates anti-takeover measures, which serve a function very similar to the opt-out provisions, has acted in good faith. Although a director's interest in retaining control nearly always operates in control contests, most courts have retained the traditional presumption in favor of the action of the director, unless the director's primary purpose in adopting the anti-takeover measure was self-interest.[88] In fact, where an anti-takeover attempt has proven adverse to the corporation's interest, a director has had an affirmative duty to resist it.[89] Nevertheless, at least one court has held that the mere presence of self-interest shifts the burden to the director to show that his actions are fair and reasonable to the bank or bank holding company.[90] If Indiana courts follow this authority, they will presume that a director who voted to opt out of regional or regional and state expansion exercised due care *unless* evidence is presented that the director's primary motive for opting out was self-interest. In applying this presumption, regardless of whether or not a decision to opt out of expansion activity was made, the procedure by which a board of directors made their decision and the extent to which they documented the decision-making process, especially those considerations in favor of the final determination, will become most critical.

To establish that self-interest *was not* its primary motivation, a board will be expected to demonstrate its objectivity in reaching its decision. This objectivity can be demonstrated in several ways. For example, the delegation of the opt-out decision to a committee of outside directors will heighten the presumption of objectivity in favor of the directors.[91] The employment of independent advisors such as accountants, investment advisors, and attorneys to help evaluate the bank or bank holding company's best interests will also benefit the board of directors.[92] Most

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[87] *See infra* note 88.

[88] *See, e.g.*, Treco, Inc. v. Land of Lincoln Savings & Loan, 749 F.2d 374 (7th Cir. 1984); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), *cert denied*, 454 U.S. 1092 (1981); Johnson v. Trueblood, 629 F.2d 287 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

[89] Treco, Inc. v. Land of Lincoln Savings & Loan, 749 F.2d at 378.

[90] Heit v. Baird, 567 F.2d 1157 (1st Cir. 1977).

[91] Panter v. Marshall Field & Co., 646 F.2d at 294.

[92] *Id.*

important, however, will be the extent to which the board has carefully documented the facts and reasoning underlying the decision to opt out or to opt in. The board should retain detailed minutes of the meetings at which these decisions were considered.

A recent Delaware Supreme Court decision[93] provides an alarming example of what can result from a board of directors' failure to adhere to any form of procedure before or during its deliberations and to document completely the actual decision-making process. In *Smith v. Van Gorkom*, the board of directors of Trans Union Corporation, consisting of five inside directors and five sophisticated outside directors, approved a merger transaction that on its face presented very favorable terms to Trans Union's shareholders.[94] The board's decision to approve the proposed cash-out merger occurred at a meeting where the majority of the directors and counsel had had no notice of the matter to be considered. Additionally, there was no written summary of the terms of the merger or other documentation to support the adequacy of the sale price-per-share which had been offered and accepted. The directors conducted no discussion of the method by which the proposed sale price-per-share had been obtained. Rather, they acted entirely in reliance upon a summary presentation by Trans Union's chairman and chief executive officer.

The Delaware Supreme Court held that Trans Union board had failed to exercise its duty of care in that it lacked valuation information adequate to reach an informed business decision with respect to the fairness of the price offered.[95] Although the fifty-five dollar price-per-share agreed upon appeared to be a "good deal," and despite the lack of evidence of self-dealing or self-interest, the simple fact remained that the board failed to make an informed decision. Thus, the court stated that the protection of the business judgment rule was not available.[96] In its decision, the court indicated that boards of directors must act carefully, methodically, deliberately, and cautiously to be certain that their decision will later receive the protection of the business judgment rule.

To summarize, it is likely that Indiana courts will presume that a board of directors acted with due care when deciding whether to opt out or participate in banking expansion in the absence of evidence of self-dealing and acting primarily in the board's own self-interest. In addition, if the recent Delaware case is evidence of any trend, an uninformed decision, even in a favorable transaction, might result in the refusal by a court to adhere to the business judgment rule. Although

[93] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
[94] *Id.* at 869.
[95] *Id.* at 893.
[96] *Id.* at 872.

a board of directors can do little about its decision now, it should keep these principles in mind as it considers opportunities to acquire and to be acquired by other banks and bank holding companies.

### *F. Regional Bank Holding Companies*

Subject to the DFI's approval, the Act permits a regional bank holding company to acquire one or more Indiana banks or Indiana bank holding companies,[97] commencing January 1, 1986.[98] This legislation defines a regional bank holding company as a bank holding company, other than an Indiana bank holding company, that

> (1) has its principal place of business in Ohio, Kentucky, Illinois or Michigan;
> (2) has more than eighty percent (80%) of the total deposits of its bank subsidiaries held by regional banks located within the region (which includes Indiana, Ohio, Kentucky, Illinois or Michigan); and
> (3) is not controlled by a bank holding company other than a regional bank holding company.[99]

This last requirement is designed to prevent the ultimate control of Indiana banks by bank holding companies located outside the five state region. The acquisition of an Indiana bank[100] or Indiana bank holding company[101] by a regional bank holding company is subject to the "Percentage-of-Deposits Limitation"[102] and the "Five-Year Existence and Continuous Operation Limitation."[103] With the exception of the Percentage-Of-Deposits Limitation, the above limitations applicable to regional bank holding companies do not apply to the merger of a troubled bank or savings bank with a qualified banking institution.[104]

If a regional bank holding company that has obtained control of Indiana institutions ceases to be a regional bank holding company as a result of acquiring a bank in another state that is not contiguous to Indiana, it will be required within two years to divest itself of all Indiana banks and Indiana bank holding companies, subject to certain narrow and technical exceptions.[105]

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[97] IND. CODE § 28-2-15-17 (Supp. 1985).
[98] Pub. L. No. 265, 1985 Ind. Acts 38, § 10.
[99] IND. CODE § 28-2-15-16 (Supp. 1985).
[100] *Id.* § 28-2-15-10.
[101] *Id.* § 28-2-15-11.
[102] *Id.* § 28-2-15-18(a)-(b).
[103] *Id.* § 28-2-15-18(c).
[104] *Id.* § 28-2-15-18(d).
[105] *Id.* § 28-2-15-22(b).

The Act also contains a reciprocity provision that must be met before a regional bank holding company is entitled to acquire an Indiana bank or an Indiana bank holding company.[106] This provision states that the laws of the state in which the regional bank holding company has its principal place of business must permit Indiana bank holding companies to acquire banks and bank holding companies in that state.[107] Additionally, the laws of the state in which the regional bank holding company has its principal place of business must permit the regional bank holding company to be acquired by the Indiana bank holding company or bank sought to be acquired.[108]

Before acquiring an Indiana bank or bank holding company, a regional bank holding company must file an application for approval with the DFI.[109] The DFI will conduct the same type of investigation that it would conduct with an Indiana multi-bank holding company application.[110] In addition, the applicant can request a "fairness hearing"[111] on the terms and conditions of the proposed transaction, thus raising the possibility of an exemption from securities laws registration requirements.[112]

Interestingly, the Act contains a somewhat unusual severability clause that would automatically eliminate the regional holding company provisions of the Act in the event a court authorizes the acquisition of an Indiana institution by an out-of-state, nonregional bank or bank holding company.[113] The theory of this provision appears to be that, without such a clause, the reciprocity limitation could be declared unconstitutional, thus exposing Indiana banks to acquisitions by bank holding companies from any state in the nation. This severability clause prevents the Act from becoming a multi-bank holding company bill without reciprocity. Given the recent Supreme Court decision in *Northeast Bancorp v. Board of Governors*,[114] however, the likelihood of Indiana's needing to rely on this severability provision to protect portions of the Act is small. The Court in *Northeast Bancorp* upheld regional reciprocity legislation against constitutional attack.[115]

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[106]*Id.* § 28-2-15-18(e).

[107]*Id.* § 28-2-15-18(e)(1).

[108]*Id.* § 28-2-15-18(e)(2).

[109]*Id.* § 28-2-15-19.

[110]*Id.* *See also supra* note 72.

[111]IND. CODE § 28-2-15-20 (Supp. 1985).

[112]*Id.* The applicant could be exempted from Indiana registration requirements under IND. CODE § 23-2-1-3 (1982) and from federal registration requirements under the Securities Act of 1933, § 77(f), 15 U.S.C. § 77 (1982).

[113]IND. CODE § 28-2-15-26.

[114]105 S. Ct. 2545 (1985).

[115]*Id.*

## II. The Federal Response to Regional Banking

Until recently, states have been reluctant to open their doors to out-of-state banking organizations. Congress has acquiesced to the states' wishes by passing the Douglas Amendment,[116] which ties the geographic expansion of national banks and bank holding companies to that expansion permitted state-chartered banks and bank holding companies under state law. The Douglas Amendment to the Bank Holding Company Act of 1956 prohibits bank holding companies from acquiring out-of-state subsidiary banks unless the law of the state where the subsidiary bank is located expressly allows the acquisition.[117]

In the past few years, however, many states have adopted legislation allowing reciprocal regional expansion, thereby creating networks of de facto banking regions. Massachusetts,[118] Connecticut,[119] Rhode Island[120] and Maine,[121] for example, comprise part of a New England banking region, and North Carolina,[122] South Carolina,[123] Georgia,[124] and Florida[125] comprise part of a southern region. These statutes allow banking organizations from specified states to acquire in-state banking organizations, provided that the target's state law allows similar acquisition privileges to banking organizations in the acquirer's state.

### A. *The* Northeast Bancorp *Case*

Prior to June 10, 1985, much speculation existed as to the constitutionality of regional banking statutes and as to whether the United States Supreme Court or the United States Congress would be the first to addresss the regional reciprocity issue. On June 10, 1985, the Supreme Court upheld the constitutionality of regional reciprocity legislation in *Northeast Bancorp v. Board of Governors*.[126] In that case, three bank holding companies, New England Corporation, Hartford National Corporation, and Bank of Boston Corporation, had received approval from the Board of Governors of the Federal Reserve System to acquire out-

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[116]12 U.S.C. § 1842(d) (1982). Congress has also acquiesced in the states' wishes in the McFadden Act, 12 U.S.C. § 36(c) (1982), which limits the branching rights of national banks to those permitted state-chartered banks in the state where the national bank has its principal office.

[117]12 U.S.C. § 1842(d) (1982).

[118]Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1984).

[119]Conn. Gen. Stat. Ann. §§ 36-552 to -563 (West Supp. 1985).

[120]R.I. Gen. Laws § 19-30-1 (Supp. 1984).

[121]Me. Rev. Stat. Ann. tit. 9B, §§ 1011-1019 (1980 & Supp. 1985).

[122]N.C. Gen. Stat. §§ 53-209 to -218 (Supp. 1985).

[123]S.C. Code Ann. §§ 34-24-10 to -100 (Supp. 1984).

[124]Ga. Code §§ 7-1-620 to -625 (Supp. 1985).

[125]Fla. Stat. § 658.295 (1984).

[126]105 S. Ct. 2545 (1985). The decision was unanimous (8-0). Justice Powell did not participate.

of-state banking institutions pursuant to the regional reciprocity statutes of Massachusetts and Connecticut. Northeast Bancorp, Inc., Union Trust Company, and Citicorp opposed those acquisitions and appealed the Board's ruling, arguing that the Douglas Amendment did not authorize state regional reciprocity legislation and that such legislation violated the Commerce Clause,[127] the Compact Clause,[128] and the Equal Protection Clause[129] of the United States Constitution.

Justice Rehnquist, writing for the Court, first engaged in an extensive analysis of the legislative history of the Douglas Amendment. He concluded that the Massachusetts and Connecticut statutes, which allow acquisition of in-state banking organizations only by bank holding companies from states in the New England region, serve well the policy underlying the Douglas Amendment of preserving local control over banking.[130]

Secondly, Justice Rehnquist addressed the petitioners' argument that regional banking statutes burden the flow of interstate commerce between regional and nonregional states. "There can be little dispute," he wrote, "that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject."[131] Congress had not remained silent, however, because it had enacted the Douglas Amendment. Justice Rehnquist thereby implied that, by tying interstate expansion of bank holding companies to state law, Congress specifically authorized states to limit the flow of banking commerce across their borders and, therefore, made regional banking statutes invulnerable to Commerce Clause attacks.

Justice Rehnquist next addressed the petitioners' challenge that the Massachusetts and Connecticut statutes constitute a compact in violation of the Compact Clause. Even though legislators in Massachusetts and Connecticut collaborated in promoting the acts at issue and the two acts resemble each other by imposing reciprocity and a regional limitation, Justice Rehnquist found the "classic indicia" of a compact to be absent.[132] He noted that the states did not form a body to establish or regulate regional banking, that they did not condition their actions upon that of the other states nor restrict the other states' ability to modify or repeal their laws, and that they did not make the regional limitation a requirement of reciprocity.[133] A statute that contained such "classic

[127] U.S. CONST. art. I, § 8, cl. 3.

[128] *Id.* art. I, § 10, cl. 3.

[129] *Id.* amend. XIV, § 1.

[130] 105 S. Ct. at 2553.

[131] *Id.* at 2553-54.

[132] *Id.* at 2554.

[133] *Id.*

indicia,'' in other words, would satisfy the definition of a compact, but the Massachusetts and Connecticut statutes did not do so. Even if the two statutes had created a compact, however, the Court found that such a compact is not forbidden by the Compact Clause.[134] Only those agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States'' violate the Compact Clause.[135] Such an effect, Justice Rehnquist wrote, does not exist in regional banking, particularly in light of the Douglas Amendment.[136]

Finally, the Court addressed the petitioners' argument that regional banking statutes violate the Equal Protection Clause. Applying the rational basis test, the Court admitted that such statutes discriminate between regional and nonregional states but found a rational basis for the discrimination.[137] Justice Rehnquist emphasized the fact that "our country traditionally has favored widely dispersed control of banking,''[138] as indicated by the typically local ownership of commercial banks. Because regional statutes preserve this tradition by allowing growth while retaining relatively local control of banking, Justice Rehnquist concluded that a rational basis exists for distinguishing between regional and nonregional states.[139] In her concurrence, Justice O'Connor, without granting tradition the same importance, agreed with Justice Rehnquist that the need exists for close ties between banks and communities.[140] In addition, she pointed out the "longstanding doctrine'' which provides that the "Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are—in ways relevant to the proper goals of the State.''[141] In other words, regional banks better serve state needs than do nonregional banks.

### *B. The House Banking Bill*

Just two days after the Supreme Court's decision in *Northeast Bancorp*, the House Banking Committee approved a bill[142] providing a trigger for nationwide banking. The bill would force states with regional banking statutes to allow acquisition by bank or thrift holding companies from nonregional states on July 1, 1990, or two years after the effective

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[134] *Id.*
[135] *Id.* (quoting Virginia v. Tennessee, 148 U.S. 503 (1893)).
[136] 105 S. Ct. at 2554.
[137] *Id.* at 2555-56.
[138] *Id.* at 2555.
[139] *Id.* at 2556.
[140] *Id.* (O'Connor, J., concurring).
[141] *Id.* at 2557.
[142] H.R. 2707, 99th Cong., 1st Sess. (1985).

date of the regional statute, whichever is later.[143] States could retain their reciprocity requirements under the bill, however, and could even escape the national trigger altogether by repealing their regional statutes, provided that no regional acquisition had occurred pursuant to them.[144] The imminent enactment of such a national trigger appears unlikely, but an eventual response by Congress to regional banking seems inevitable.

Indiana regional banking, then, no longer runs the risk of being held unconstitutional, but it nevertheless could be profoundly affected by Congress' future response to *Northeast Bancorp*. If Congress adopts the bill as approved by the House Banking Committee, Indiana would be forced to allow acquisitions by nonregional holding companies, except for the severability clause of the Act.[145] That clause invalidates the provision allowing regional bank holding companies to acquire Indiana banks and bank holding companies if an Indiana or federal court construes the statute to allow the acquisition of Indiana banks and bank holding companies by nonregional bank holding companies. Thus, Indiana's regional banking provision would be effectively repealed, and as long as no regional acquisition had occurred pursuant to Indiana's law, Indiana would effectively escape the national trigger.

## III. Reciprocity Problems Posed by the Regional Bank Holding Company Provision of the Indiana Act

The regional bank holding company provision of the Act permits a regional bank holding company, defined as a company with its principal place of business in Ohio, Kentucky, Illinois, or Michigan, to acquire one or more Indiana banks or bank holding companies if various requirements are met.[146] Among those requirements is a mandate that two reciprocity tests be satisfied.[147] First, the law of the acquirer's state must permit Indiana bank holding companies to acquire banks and bank holding companies located in the acquirer's state.[148] Second, the acquirer's state law must allow the target, if it were a bank holding company attempting to do so, to acquire the acquirer.[149] In addition, the Indiana Act requires the DFI to subject the acquisition by a regional holding company to any requirements that would apply to the acquisition of a bank holding company in the acquirer's state.[150]

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[143] *Id.*

[144] *Id.*

[145] Ind. Code § 28-2-15-26 (Supp. 1985). *See supra* notes 113-15 and accompanying text.

[146] Ind. Code § 28-2-15-16 (Supp. 1985).

[147] *Id.* § 28-2-15-18(e).

[148] *Id.* § 28-2-15-18(e)(1).

[149] *Id.* § 28-2-15-18(e)(2).

[150] *Id.* § 28-2-15-19(f).

In order to determine whether reciprocity exists between two states, an examination must be made of the reciprocity tests provided by both statutes. If one of the states fails the other's test, then no reciprocity exists. Because this subject is so new and unexplored, predicting how banking authorities and courts will interpret and apply the reciprocity provisions is nearly impossible. Those bodies should remain cognizant in making their decision that the legislatures of Indiana, Ohio, and Kentucky in enacting their regional banking provisions believed that they were introducing regional banking to their states and desired to do so. To defeat that desire should require a clear failure of reciprocity.

Of the five states that the Indiana Act specifies as belonging to Indiana's region,[151] only Ohio[152] and Kentucky[153] have enacted regional banking statutes. Michigan will probably enact a regional banking statute in the future. The future of regional banking in Illinois is less certain. The following discussion reviews the Ohio and Kentucky regional banking provisions and discusses the likelihood of finding reciprocity between Indiana and the above states.[154]

### A. *Reciprocity with Ohio*

The Indiana Act, if myopically applied, would not pass the Ohio reciprocity test. If reasonably applied with due regard for legislative intent, however, the Indiana Act should pass the Ohio reciprocity test. Such an application would ensure a ruling that the Ohio Act passes the Indiana reciprocity test.

The Ohio law[155] provides that a bank holding company with its principal place of business in states contiguous to Ohio as well as in Delaware, the District of Columbia, Illinois, Maryland, Missouri, New Jersey, Tennessee, Virginia, and Wisconsin may acquire a bank or bank holding company in Ohio, provided that the Superintendent of Banks "in his discretion" determines that the law of the acquirer's home state would permit an Ohio bank or bank holding company to acquire a bank or bank holding company in the acquirer's state on "terms that, on the whole, are substantially no more restrictive than those established under [the Ohio Act]."[156] After three years, the Ohio Act extends to all states in the nation that can satisfy this reciprocity test.[157]

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[151]*Id.* § 28-2-15-14.

[152]House Bill No. 102, 1985 Ohio Laws 1 (to be codified as amended at OHIO REV. CODE ANN. §§ 1101.05-051).

[153]KY. REV. STAT. §§ 287.900-.990 (Supp. 1985).

[154]Prior to the publication of this Article, both Michigan and Illinois passed bills providing for regional banking with reciprocity provisions.

[155]House Bill No. 102, 1985 Ohio Laws 1.

[156]*Id.* at 2, § 1 (to be codified as amended at OHIO REV. CODE ANN. § 1101.05(B)).

[157]*Id.*

Unlike the Indiana Act, the Ohio Act also allows regional banks, as opposed to bank holding companies, to establish operations in Ohio by entry de novo as well as by acquisition so long as the target's state offers a reciprocal method of entry.[158] In other words, the Ohio Act would allow an Indiana bank holding company to establish as well as acquire a bank subsidiary in Ohio if the Indiana Act allowed the same method of entry for Ohio bank holding companies. Indiana does not, however, allow entry de novo, only entry by acquisition.[159]

The Indiana Act also places other limitations on regional acquisitions not found in the Ohio Act. The Indiana Act places the following three limitations on acquisitions by regional bank holding companies of Indiana banks and bank holding companies. First, immediately following the acquisition, the regional bank holding company cannot control more than ten percent of the total deposits in Indiana banks until July 1, 1986; eleven percent from July 1, 1986 through June 30, 1987; and twelve percent after June 30, 1987.[160] Second, either the Indiana target or its bank subsidiaries must have existed for five years.[161] Third, more than twenty percent of the deposits held by the acquirer's bank subidiaries cannot be located outside of the region both at the time of the acquisition and thereafter.[162] Ohio's sole restriction is that, immediately after the acquisition, the acquirer of an Ohio bank or bank holding company cannot control over twenty percent of the total deposits held by all banks and thrifts in Ohio.[163] Thus, an Indiana bank holding company could acquire a percentage of deposits in Ohio (twenty percent of deposits in both banks and thrifts) that is more than twice the percentage of deposits that an Ohio bank holding company could acquire in Indiana (ten percent to twelve percent of deposits in just banks). Moreover, the Ohio law does not require that the target have been in existence for five years, nor does it require that a bank or bank holding company with its principal place of business in the region maintain any percentage of its deposits in the region. The latter "anti-leap-frogging" provision under the Indiana Act could significantly restrict the expansion of out-of-state bank holding companies into Indiana's region.[164]

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[158]*Id.*

[159]*See supra* notes 97-115 and accompanying text.

[160]IND. CODE § 28-2-15-18(b).

[161]*Id.* § 28-2-15-18(c). This section contains special provisions for determining whether the five years have elapsed for banks which are products of consolidation and for phantom banks created solely to facilitate acquisitions.

[162]*Id.* § 28-2-15-11.

[163]House Bill No. 102 1985 Ohio Laws at 4, § 1 (to be codified as amended at OHIO REV. CODE ANN. § 1101.05(E)).

[164]By requiring a bank with its principal place of business in Indiana's five state region to maintain more than eighty percent of its total deposits of its bank subsidiaries

In spite of the above differences, the Ohio Superintendent of Banks should find that the Indiana Act and the Ohio Act are reciprocal in that Indiana's provisions "are substantially no more restrictive than those established under [the Ohio Act]."[165] Both acts allow regional bank holding companies to acquire in-state institutions with few limitations. The limitations that do exist under the two Acts are similar, though not identical, both restricting the percentage of deposits held by an out-of-state institution.

The similarity of the Ohio and Indiana Acts is further evident when contrasted with the Illinois statute. The Illinois statute[166] provides that out-of-state bank holding companies may acquire Illinois institutions only if they are failing. As such, it is not expansive enough to promote regional banking or to afford many out-of-state bank holding companies significant opportunities to expand into Illinois.

The Indiana and Ohio Acts, however, do promote regional banking and do afford significant opportunities for expansion into their respective states. The regulatory agencies and the courts that will decide whether the Indiana and Ohio Acts are reciprocal, therefore, should honor legislative intent and refrain from interfering with regional banking expansion. If the Ohio Superintendent of Banks refuses to approve acquisitions of Ohio banks and bank holding companies by Indiana bank holding companies, and the courts affirm that decision on appeal by holding that Indiana's Act is substantially more restrictive than Ohio's Act, then the Ohio Act will fail the first requirement of Indiana's reciprocity test. That test states that the law of the acquirer's state must permit Indiana bank holding companies to acquire banks and bank holding companies located in the acquirer's state.[167] Absent such a ruling, however, the Ohio Act would pass the Indiana reciprocity test.

Assuming that the Indiana Act is not ruled unreciprocal to the Ohio Act, the Ohio Act satisfies the first requirement of the Indiana reciprocity test because the Ohio Act specifically provides that Indiana bank holding companies may acquire Ohio banks and bank holding companies.[168] Additionally, the second requirement of the Indiana reciprocity test, which requires that the particular Indiana target at issue be permitted to acquire the particular Ohio bank holding company at issue, would probably be met. In practical terms, the Ohio requirement that out-of-state bank holding companies possess no more than twenty percent of the total deposits in Ohio banks and thrifts would allow virtually all

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within the region, Indiana's Act effectively precludes an out of state bank from "leap-frogging" into Indiana's region.

[165] *See supra* note 156 and accompanying text.

[166] ILL. ANN. STAT. ch. 17, § 2510 (Smith-Hurd Supp. 1984).

[167] IND. CODE § 28-2-15-18(e) (Supp. 1985).

[168] *See supra* note 156 and accompanying text.

acquisitions of Ohio banks and bank holding companies by Indiana banks and bank holding companies. In summary, in light of the legislative intent of both Indiana and Ohio to promote regional banking expansion, reviewing bodies should determine that the Acts are reciprocal.

### *B. Reciprocity with Kentucky*

The Kentucky reciprocity test is essentially the same as the Ohio reciprocity test. The Kentucky Act[169] provides that a bank holding company with its principal place of business in a contiguous state may acquire control over a Kentucky bank or bank holding company, provided that the acquirer's state law allows the acquisition of an in-state bank or bank holding company by a Kentucky bank holding company "under conditions substantially no more restrictive" than those imposed under the Kentucky Act.[170] Like the Ohio Act, the Kentucky Act extends this provision to nonregional states after two years.[171]

The Kentucky Act contains three basic limitations. First, a bank holding company may not acquire control over a Kentucky bank or bank holding company if, immediately thereafter, it would control banks holding over fifteen percent of the deposits in all Kentucky banks.[172] Second, for five years after July 13, 1984, a bank holding company may not acquire control over a Kentucky bank or bank holding company if, immediately thereafter, it would control more than three banks in the state during any twelve-month period.[173] Third, a bank holding company may not acquire direct or indirect control of a Kentucky bank chartered after July 13, 1984, unless the target bank has been in existence for five years.[174]

Although a finding of reciprocity between Indiana and Kentucky is more likely than between Indiana and Ohio, it is not certain. The Kentucky Act allows Indiana bank holding companies to acquire a larger percentage of deposits in Kentucky (fifteen percent of all banks deposits) than the Indiana Act allows Kentucky bank holding companies to acquire in Indiana (ten percent to twelve percent of all bank deposits). The difference between these percentages, however, is arguably offset by the Kentucky Act's limitation of multi-bank holding companies to control of only three Kentucky banks for the first five years that the Act is effective.[175] Indiana lacks a comparable provision. Indiana and Kentucky

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[169]Ky. Rev. Stat. §§ 287.900-.990 (Supp. 1984).
[170]*Id.* § 287.900(6)(a).
[171]*Id.* § 287.990(6)(b).
[172]*Id.* § 287.990(3).
[173]*Id.* § 287.990(4).
[174]*Id.* § 287.990(2).
[175]*See supra* note 173 and accompanying text.
[176]*See supra* notes 103, 174 and accompanying text.

also have similar provisions requiring target banks to be in existence five years prior to their acquisition by out-of-state holding companies.[176] Finally, the Indiana Act provides that no more than twenty percent of the deposits held by the acquirer's subsidiaries may even be located outside of the region.[177] This provision may so restrict expansion by Kentucky bank holding companies that it could cause the Indiana Act to fail the Kentucky reciprocity test.

If the Kentucky commissioner determines that the Indiana Act is not reciprocal with the Kentucky Act and that Indiana bank holding companies cannot acquire Kentucky banks and bank holding companies, then the Kentucky law will fail the first requirement of the Indiana reciprocity test. But for that fact, the Kentucky law would pass the Indiana test. The Kentucky Act satisfies the first requirement of the Indiana test by specifying that bank holding companies with their principal places of business in states contiguous to Kentucky may acquire Kentucky banks and bank holding companies. Additionally, the second requirement of the Indiana reciprocity test would probably be met, as in Ohio, in nearly all cases. It is highly unlikely that an acquisition of a Kentucky bank or bank holding company by an Indiana bank would cause the latter to hold over fifteen percent of the deposits in all Kentucky banks. Thus, the Indiana and Kentucky Acts should be deemed to be reciprocal.

It is not altogether clear whether Senate Enrolled Act No. 1 has brought interstate banking to Indiana. The reciprocity provisions of the Indiana, Ohio, and Kentucky Acts remain to be interpreted, initially by state banking officials and then by the courts. Those bodies should recognize that the Indiana, Ohio, and Kentucky Acts are reciprocal in that they are all expansive enough to promote regional banking and to afford significant opportunities for expansion within their defined regions, subject to similar, though not identical, deposit restrictions.

## IV. Conclusion

Senate Enrolled Act No. 1 has truly ushered in a new era for banking expansion in Indiana by providing for bankers' banks, intra-county branching, cross-county branching, multi-bank holding companies, and regional bank holding companies. The Act has also raised new issues in Indiana law by including an opt-out provision, which permitted the board of directors of an Indiana bank or bank holding company to exempt its institution from various provisions of the Act. This provision raises the issue of whether a director properly exercises his fiduciary duties by exempting or failing to exempt his institution from various bank expansion opportunities. Various other issues, such as whether

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[177] *See supra* note 99 and accompanying text.

Indiana's Act will be deemed to be reciprocal with the Ohio and Kentucky Acts for the purpose of regional banking expansion, will continue to engage the attention of banks, state regulatory agencies, and the courts.

Finally, the fate of Senate Enrolled Act No. 1 and other acts like it has been and will continue to be affected by the federal response to regional banking. In *Northeast Bancorp v. Board of Governors*,[178] the Supreme Court upheld the constitutionality of regional reciprocity legislation. A House banking committee has also responded to banking expansion by approving a bill that would provide a trigger for nationwide banking. This bill is not likely to win congressional approval, but it is probably a harbinger of future action which will surely affect the implementation of Indiana's Senate Enrolled Act No. 1.

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[178]105 S. Ct. 2545 (1985).