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ATM SURCHARGES VIOLATE THE PUBLIC POLICIES THAT UNDERLIE THE ANTITRUST LAWS

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There can be no doubt that the Congress felt that the ultimate beneficiary in this whole process [of enacting the antitrust laws] was the consumer, enjoying a continuous increase in production and commodity quality at progressively lowered prices. The immediate beneficiary legislators had in mind, however, was in all probability the small business proprietor or tradesman whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business that seemed so strange, gigantic, ruthless and awe-inspiring.[1]

I. INTRODUCTION

Automated teller machines, or "ATMs," have become a way of life for consumers. They can do almost anything a teller can do,[2] and they enable bank account holders to access their money at any time and from any place, including such locations as grocery stores, gas stations, shopping malls, casinos, cruise ships and night clubs.[3] Indeed, many consumers can hardly recall a time ***218** when their ability to perform financial transactions was limited by their bank branches' hours and locations.[4]

Over the past several years, ATMs have become a convenient source of cash for banks as well. Since 1996, banks that own ATMs have been free to impose surcharges on nondepositors who use their machines.[5] What this development means to a consumer is that every time she withdraws cash from an ATM that is owned by a bank other than the one in which she keeps her money, an extra $1.50[6] goes straight from her account into that bank's coffers; what it means to a surcharging bank is an immense amount of profit.

Economists define a competitive market as one in which "the number of firms selling a homogeneous commodity is so large, and each individual firm's share of the market is so small, that no individual firm finds itself able to influence appreciably the commodity's price ...."[7] The United States has a strong public policy of protecting competitiveness in markets, and for over a century it has implemented that policy through the enforcement of a series of antitrust laws.[8] As one court has stated, "competition's basic goals [are] lower prices, better products, and more efficient production methods[,]"[9] and American antitrust laws forbid unreasonable restraints on competition so that the consuming public can enjoy the benefits of those goals.[10]

This Note argues that ATM-owning banks' practice of surcharging non-account holders for using their ATMs constitutes a violation of the public policies that underlie the antitrust statutes and therefore should be prohibited.[11] Part II will describe ***219** the evolution of the practice of surcharging, from a time when banks refrained from imposing any fees at all on their customers, to the present time in which 94% of ATM owners charge nondepositors for using their machines.[12] Part III will provide an overview of the public policy values that underlie the antitrust laws and will posit that surcharging banks contravene those values by unfairly extracting wealth from consumers and facilitating the concentration of the financial services market. Finally, Part IV will discuss Iowa's unique electronic funds transfer system and will argue that whereas surcharging violates the policies behind the antitrust laws, Iowa's system promotes them and therefore should be emulated by other states.

II. THE DEVELOPMENT OF ATM SURCHARGES

This Part chronicles the significant events in the development of surcharges. First, it will explain the reasons why commercial banks introduced the retail banking product and subsequently invested in ATM technology. Next, it will analyze the ATM fee system and describe how banks secured the ability to add the surcharge to that system. Finally, it will discuss how this additional fee may have benefited consumers and certainly has benefited surcharging banks.

A. THE BIRTH OF RETAIL BANKING

A commercial bank is a financial institution that offers its customers a variety of deposit accounts, such as checking and savings, and extends loans to individuals and businesses.[13] From the time of their inception until the 1950s, commercial banks ***220** concentrated on providing accounts to corporate entities.[14] Those accounts often did not accrue interest, however, and many companies eventually elected to move their money to institutions that offered interest-bearing accounts.[15] To remedy the resulting drain on their major source of lendable funds,[16] commercial banks shifted their focus to individual consumers[17] and designed a combination of services that would cater to the needs of this new pool of potential depositors.[18] "Retail banking," as this product came to be known, featured consumer-friendly amenities such as expanded physical facilities, "special" checking accounts to encourage the use of checks in paying household bills, low-minimum balance personal accounts and individual loans with attractive terms.[19]

For a long time, banks' profits derived from net interest income from deposits and loans.[20] The Federal Reserve Board had the authority to, and did, limit the rate of return that banks could offer their depositors,[21] so institutions refrained from charging customers any fees for fear of losing business.[22] In 1980, however, the Board lost that authority,[23] and banks began imposing fees with the expectation that higher interest rates would enable them to retain existing accounts.[24] Customer fees then became banks' primary source of revenue, and from 1987 to 1997, net interest income grew 75% while fee income grew ***221** 152%.[25]

B. THE DEVELOPMENT OF ATMS

Banks' desire to attract consumer accounts motivated them to invest in technology that they hoped would enhance their ability to meet customers' needs. Their investment produced such innovations as automated check processing,[26] credit cards,[27] and electronic fund transfers (EFT) systems,[28] including the automated teller machine, or ATM. An ATM is an electronic terminal through which a bank account holder can conduct a variety of transactions.[29] The account holder gains access to her account by inserting into the terminal a plastic, magnetic-strip card issued by her bank, and then entering her personal identification number on a keypad.[30] In 1969, when ATMs first appeared in the United States,[31] the machines only dispensed cash,[32] but by 1976, they were accepting deposits, transferring funds, and recording payments for mortgages, loans, utilities, and credit cards.[33] Innovative efforts continue to improve the capabilities of ATMs, and today's newest machines count, verify and record cash deposits on the spot, recognize a user by her face, voice, fingerprints or eyes, and provide sports scores, local weather and other news.[34]

Banks invested in the development of ATMs for four main reasons. First, they believed that consumers would be attracted to the unique convenience that ATMs afford, so deploying the machines would enable them to increase their market share by enhancing their ability to compete for retail accounts.[35] Second, ***222** they planned to use ATMs to test new areas in which they were considering opening branches and to cross-sell their other services like loans and credit cards by advertising them on the ATM screen during a customer's transaction.[36] Third, banks wanted to diminish their operating expenses by replacing costly tellers, low-performance branches and weekend branch hours[37] with far less expensive ATMs.[38]

The fourth reason for banks' investment in ATM technology was that they anticipated that ATM deployment would increase their revenues.[39] Banks hoped that the ease with which small revolving credit loans could be secured through an ATM would increase the popularity of those loans, generating interest income.[40] They also expected customers to deposit larger portions of their paychecks, since ATM service would assure them easy access to their money if the need for it arose.[41] Banks could have raised additional revenues by imposing fees for the convenience of using ATMs,[42] but their initial reluctance to do so indicates that they chose instead to pass the expected savings along to their customers so as to encourage them to use the machines.[43]

The "ATM experiment" that began in 1969 has proven highly successful.[44] Within ten years of their introduction, nearly 14,000 ATMs operated in the U.S.,[45] and today there are more than 800,000 worldwide.[46] ATM services have grown so popular among consumers that institutions see offering them as a requirement for remaining viable in the modern banking market.[47] In the year 2000, 89% of banks provided their account holders with electronic access to their money via automated teller machines.[48]

*223 C. THE FORMATION OF ATM NETWORKS

With the first ATMs, a given machine only allowed customers of the bank that deployed it to access their funds.[49] During the 1970s and 1980s, however, the competitive urge to seek innovative ways to serve consumers' needs drove banks to develop a system of shared networks that enabled customers to access their accounts via ATMs owned by other institutions.[50]

A network is a joint venture in which a group of participating or "member" banks makes a combined investment in equipment that electronically links the members' ATMs.[51] A network facilitates a cash withdrawal by an account holder of a member bank from an ATM owned by another member bank by "switching" or electronically transferring the transaction information between the two banks via dial-up telephone lines and centralized computers.[52] For example, suppose Bank A and Bank B are both members of Network X. "Consumer," who holds an account at Bank A, may find herself in need of cash at a time or place at which she is unable to access one of her bank's branches or ATMs. Since Bank A is a member of Network X, Consumer can withdraw money from her Bank A account through any ATM that is owned by another member of Network X. She knows that Bank A is a member of Network X because Network X's logo appears on the ATM card that Bank A issued her. Likewise, she will know that a given ATM is owned by a member of Network X because it too will display the Network X logo.[53]

Now suppose that Bank B is also a member of Network X, and an ATM owned by Bank B is readily accessible to Consumer in her moment of need. Consumer can insert her Bank A ATM card into Bank B's ATM and request, by pressing a series of buttons, to withdraw a certain amount of cash from her Bank A account. Network X will switch Consumer's request from Bank B's ATM ***224** to Bank A, and then switch the necessary information regarding Consumer's account from Bank A back to Bank B's ATM. Finally, assuming Consumer has sufficient funds in her Bank A account to cover the amount she has requested to withdraw, Bank B's ATM will dispense to her the appropriate amount of cash and print out a receipt to verify the transaction.

Regional networks link the ATMs of participating banks within a given territory,[54] and their membership can range from a few banks in a relevant market to all of the banks in a state or metropolitan area.[55] By 1991, 90% of all ATMs belonged to regional networks.[56] As the U.S. population became increasingly mobile,[57] banks sought to accommodate consumers' changing needs by developing national networks through which accounts would be accessible from across the country.[58] The two largest national networks are Plus and Cirrus,[59] and in 1991, 75% of U.S. ATMs could be accessed by cards that displayed either Plus or Cirrus logos.[60] Today, thanks to national networks' aggressive worldwide expansion,[61] consumers can use their U.S. bank cards to obtain local currency from ATMs in other countries.[62]

Networks were originally established as not-for-profit enterprises with governance shared by a large number of participating financial institutions.[63] This structure, however, is rapidly eroding.[64] Most networks have converted to for-profit status, and ownership and control has grown increasingly concentrated among a limited number of large banks.[65] ATM networks, like ***225** the rest of the banking industry,[66] have undergone massive consolidation, declining in number from more than 150 in the mid-1980s to about forty in 1999.[67] Nationally, the top ten networks now account for 79% of switched transactions,[68] and this consolidation is expected to continue until just a few networks control nearly all electronic interchanges.[69] Network monopolies have already been realized in some places. In the mid-Atlantic region, for example, the MAC system, owned by five of the nation's largest banks, processes about 90% of Pennsylvania's interchange transactions and has a commanding share in surrounding states.[70]

D. THE ATM FEE SYSTEM

When banks first deployed ATMs, most refrained from charging account holders any fees for their use.[71] They seem to have

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adopted this strategy in hopes of encouraging the migration of transactions from expensive human- and paper-based services to less costly electronic services and thereby enjoying an increase in profits.[72] However, once consumers came to rely on the convenience of ATMs, the banks began imposing fees.[73] Most fees associated with ATM service fall into two categories:[74] "wholesale ***226** fees" set by networks and paid by banks, and "retail fees" set by banks and paid by consumers.[75]

Networks set two types of wholesale fees.[76] First, they require a card-issuing member bank to pay an ATM-owning member bank an "interchange fee" each time its account holder uses the ATM owner's machine.[77] The interchange fee is specifically designed to compensate ATM owners for the costs of handling network transactions,[78] and currently ranges from $0.35 to $0.75.[79] Networks also set a "switch fee" that member banks pay directly to the networks to cover the cost of routing transactions through the networks' computer-switching systems.[80] The switch fee is currently about $0.10 per transaction.[81]

Most banks charge consumers two types of retail fees:[82] a "foreign" fee and a "surcharge." A foreign fee[83] is imposed by a bank on its own account holder each time she uses an ATM owned by another member of her bank's network,[84] or in other words, makes a "foreign" transaction. The purpose of the foreign fee is for the ATM user's bank to recoup the costs it incurs in paying the wholesale fees to the ATM-owning bank and to the network.[85] In 2001, 84% of all banks imposed a foreign fee,[86] which ranges from $0.25 to $2.50[87] and averages $1.39.[88] A surcharge ***227** [89] is imposed by an ATM-owning bank directly on a non-account holder who uses its ATM.[90] The ATM-owning bank withdraws the amount of the surcharge from the user's account at the time of the transaction,[91] and this additional withdrawal is reflected on her receipt.[92] For example, if a user withdraws $20 from a machine owned by a bank that imposes a surcharge of $1.50, her receipt will indicate a total withdrawal of $21.50: $20 to her and $1.50 to the ATM-owning bank.[93] Surcharging banks claim that this fee is necessary to cover the costs of allowing non-account holders to use their machines.[94] However, they collect it in addition to the interchange fee that is specifically designed to cover those very same costs.[95]

E. THE ORIGIN OF ATM SURCHARGES

When shared networks first developed, many of them, including Plus and Cirrus, prohibited their ATM-owning members from imposing surcharges upon non-account holders.[96] The networks believed that the interchange fee, which they required the ATM user's bank to pay the ATM-owning bank, rendered the surcharge unnecessary, since that interchange fee was designed to compensate ATM owners for the use of their ATMs by other banks' customers.[97] The banks responded to these regulations with costly, complex antitrust litigation in which they accused the networks of combining and conspiring to fix the price for ***228** ATM services by restraining member banks from surcharging for their use.[98] Eventually the legal costs of protecting consumers from surcharges became too great for the networks,[99] and on April 1, 1996, Plus and Cirrus repealed their no-surcharge rules.[100]

The surcharging trend spread quickly. Whereas in 1996 only 15% of banks surcharged,[101] by 1997 that proportion had grown to 45%.[102] In 1998, it reached 71%;[103] in 1999, 93%;[104] and by 2001, it was up to 94%.[105] The fees themselves have grown as well. Two years after the ban was lifted, the average surcharge was $1.23.[106] By 1999, it had grown to $1.37,[107] and in 2001, it was $1.47.[108]

How do these surcharges affect the consumer? To revisit our previous example,[109] suppose Consumer withdraws cash from her Bank A account through an ATM owned by Bank B. Bank A will pay a switch fee of $0.10[110] to Network X for the cost of routing the transaction through the network's computer system. Bank A will also pay an interchange fee of about $0.50[111] to Bank B, as required by Network X, to cover Bank B's costs for making its ATM available to Consumer. Bank A will probably recoup this total cost of $0.60, and then some,[112] by charging Consumer a foreign fee of $1.40.[113] In addition, Bank B is likely to assess ***229** Consumer a $1.50 surcharge[114] for using its machine. In all, Consumer pays a total of nearly $3.00 for her transaction: a $1.40 foreign fee to her own bank plus a $1.50 surcharge to the ATM-owning bank. Likewise, the ATM-owning bank collects an interchange fee of $0.50 from Consumer's bank plus a surcharge of $1.50 from Consumer herself, for a total gain of about $2.00. More than 85% of that gain may be pure profit for Bank B,[115] because the entire transaction cost it only $0.27.[116]

F. THE BENEFIT OF SURCHARGES

Financial services consumers have benefited from the deployment of ATMs, and perhaps from the imposition of surcharges

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as well.[117] ATMs have liberated them from the hassles of "old-fashioned" banking such as waiting in line for a teller, making transactions only during "bankers' hours," and withdrawing enough cash on a Friday to last the entire weekend,[118] and networks have provided them with virtually unlimited access to their funds.[119] Surcharges appear to have expanded the availability of these conveniences. Within one year after the surcharging ban was lifted, the number of ATMs increased by 18.5%,[120] including substantial growth in the number of off-site machines[121] in locations where consumers spend both time and money but are often far from their own banks' branches or ATMs.

For banks, ATMs have generated a great deal of profit.[122] The growing popularity of the machines has facilitated significant cost savings because as the number of electronic transactions has increased, the number of teller-performed transactions has dropped,[123] reducing banks' staffing expenses.[124] From 1983 to ***230** 1998, the number of human tellers decreased by 8%,[125] with about 22,000 positions eliminated between 1989 and 1992 alone.[126] Banks save more than just those tellers' salaries; as Connecticut Attorney General Richard Blumenthal has pointed out, ATMs "don't take vacations. They don't get benefits. They don't get sick. They don't get retirement."[127] While the average human teller transaction costs a bank $2.93, the average ATM transaction costs it only $0.27.[128]

Surcharges have also increased banks' income. As of January 1996, when the networks' "no-surcharge" rule was still in effect, the few banks that did impose the additional fee took in an extra $269 million per annum as a result.[129] Today, the vast number of banks that impose the fees collect an estimated $2.2 billion each year in surcharge income alone,[130] in addition to the $1 billion they collect in the interchange fees[131] that are designed to cover the costs of allowing noncustomers to use their machines. Of course, much of this income finances necessary overhead expenses. Banks point out that "ATMs are a high-cost delivery channel"[132] for which "[o]ngoing operating costs ... and amortized investment costs ... are substantial."[133] They argue that without surcharges, the cost of deploying ATMs at the off-site locations that consumers find most convenient is too high to be covered by the amount of revenue those machines generate.[134]

The profits that banks have collected as a result of the reduced costs plus the increased income have been staggering. In 1999, banks enjoyed their ninth straight record year, earning at total of $71.7 billion.[135] Forty-four percent of that figure was ***231** non-interest revenue,[136] reflecting what the FDIC calls the "continued strength in ... fee income ...."[137] Thus while the entire banking industry has prospered since the introduction of ATMs, those banks that impose surcharges appear to have fared particularly well.[138]

Several factors point to an even brighter financial future for surcharging banks. As ATM technology continues to improve,[139] institutions are likely to generate even more electronic volume, further reducing the costs of providing EFT services.[140] Furthermore, as the consuming public ages, the incidence of surchargeable ATM use is likely to increase. Younger people not only use the machines more frequently than older people,[141] but, as "heavier" users who visit the ATM five or more times per month,[142] they may also be more likely to perform transactions through ATMs deployed by banks other than their own.[143] Finally, if past experience is any indication,[144] the average amount of the surcharge will probably continue to grow. When all of these factors are considered, it becomes apparent that the record profits banks have enjoyed over the past decade may be only a hint of the fortunes that are yet to come.

III. ATM SURCHARGES VIOLATE THE PUBLIC POLICIES THAT UNDERLIE THE ANTITRUST LAWS

[I]t may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought ***232** would flow from the undue limitation on competitive conditions ... led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions ....[145]

The promotion and encouragement of a free competitive market "is a basic public policy, deep-rooted in our economy and respected by the courts, resting on the assumption that social welfare is best advanced by free competition."[146] On the premise that competition is the rule of the marketplace that best advances consumer welfare,[147] Congress enacted a series of antitrust laws[148] that prohibit unlawful restraints and monopolies[149] so as to facilitate vigorous competition among firms for consumers' business.[150] Congress' expectation was that firms' aggressive efforts to outperform their competitors would ultimately result in the availability of high quality goods and services at affordable prices.[151] The first section of this Part provides an overview of the public policy values that underlie the antitrust laws, and the second section explains why ATM-owning banks' imposition of surcharges on non-account holders who use their machines constitutes a violation of that policy.

A. THE PUBLIC POLICY BEHIND THE ANTITRUST LAWS

[T]he purpose of [antitrust] analysis ... is not to decide ***233** whether a policy favoring competition is in the public interest ... [T]hat policy decision has been made by the Congress.[152]

The grandfather of American antitrust laws is the Sherman Anti-Trust Act, which prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce[,]"[153] as well as "monopoliz[ing], or attempt[ing] to monopolize ... any part of the trade or commerce ...."[154] The Act was passed in 1890 in response to the vast expansion of many businesses that was sparked by the proliferation of railroads and steamships and innovations in technology and management.[155] Congress recognized that these new entities might be more efficient than traditional, smaller companies, but nonetheless imposed limitations on them so as to prevent abuses of economic power and to ensure fairness in interactions among big business, small business, and the consumer.[156] The prohibitions of the Sherman Act were grounded in Congress' "legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services .... [A]ll elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[157] In other words, the public policy that underlies the antitrust laws is that effective competition should be preserved so that consumers can enjoy the material benefits that result from it.

The legislative debates behind the Sherman Act indicate that the 1890 Congress equated protection of competition with protection of consumers.[158] Legislators condemned trusts and monopolies because their market power enabled them to raise prices and ***234** unfairly extract wealth from consumers.[159] Senator Sherman himself called monopolistic overcharges "extortion which makes the people poor,"[160] and Representative Heard declared that trusts have "stolen untold millions from the people."[161] Senator Hoar defined monopolistic pricing as "a transaction the direct purpose of which is to extort from the community ... wealth which ought to be generally diffused over the whole community."[162]

The Supreme Court's interpretations of the Sherman Act also demonstrate that a primary goal of the antitrust laws is to preserve competition for the benefit of consumers. In *Standard Oil Co. of New Jersey v. United States*,[163] in which the Rockefeller oil trust was held to violate the Act, the Court explained that "injury *to the public* by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest ...."[164] In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[165] as part of its analysis of a multi-facility operator's discontinuation of a joint ticket arrangement with a single facility in the same ski area, the Court thought it "relevant to consider [the decision's] impact on consumers,"[166] and ultimately held that it unlawfully restricted competition in the downhill skiing market. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[167] although the Court found that an exclusive contract between a hospital and an anesthesiology firm did not constitute a Sherman violation, it nonetheless reaffirmed that it is indeed the consumer "whose interests the statute was especially intended to serve ...."[168]

Leading antitrust scholars and practitioners also support the idea that the antitrust statutes embody Congress' consumer protection goals. They have written that "[t]here can be no doubt that the Congress felt that the ultimate beneficiary in this whole ***235** process [of passing the Sherman Act] was the consumer,"[169] and that a competitive market would "allow consumers to purchase their goods at competitive prices without sacrificing other consumer interests such as optimal product quality."[170] They have further posited that "[t]he antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers,"[171] and that "the laws' main thrust was to give consumers, not cartels or monopolies, the fruits of competitive capitalism."[172] Finally, former United States Department of Justice Antitrust Division Chief Joel Klein recently "lamented that most people do not understand that 'everything we do in antitrust — whether we get it right or wrong — is consumer driven'; that 'our interest is to protect what the economists call consumer welfare.'"[173]

B. HOW SURCHARGING VIOLATES THE POLICIES THAT UNDERLIE THE ANTITRUST LAWS

Banks' practice of surcharging nondepositors who use their ATMs violates the public policies behind the antitrust laws in two ways. First, the imposition of surcharges constitutes the unfair extraction of wealth from consumers. Second, surcharging facilitates the concentration of the financial services market.

1. ***Surcharging Banks Unfairly Extract Wealth from Consumers***

Banks that impose surcharges do exactly what the legislators who passed the Sherman Act were trying to stop: they "extort from the community ... wealth which ought to be generally diffused over the whole community[,]"[174] and steal "untold millions from the people."[175] Extraction of wealth from consumers via surcharges is unfair because the banks' proffered justification for ***236** it — that it is necessary to facilitate the ATM availability that consumers desire — is largely indefensible.

Surcharging banks use the deceptively small size of the fee to mislead consumers into thinking that they are not being harmed. As the director of the Center for Information Technology and Privacy Law at the John Marshall Law School explains, "The banks are coming off their best year ever and they still charge these fees, figuring we won't miss a dollar here, a dollar there — the death by a thousand cuts."[176] One dollar and forty-seven cents[177] may seem like a small price to pay for the convenience of ATM access, but suppose, for example, that Consumer performs six transactions per month[178] at ATMs owned by banks other than the one at which she holds an account. If those banks assess surcharges, Consumer will lose about nine dollars per month,[179] or more than $100 per year.[180] Given the high degree of reliance that many consumers place on ATMs and the limited financial resources of more than a few of them, the burden these surcharges impose on small depositors can ultimately be quite high.

Banks defend the surcharge as a necessary encumbrance that consumers must bear if they want the deployment of off-site ATMs to continue to increase.[181] Evidence indicates, however, that deployment growth would be economically feasible even without surcharge income. First, the surcharge is an unnecessary second fee for the same transaction.[182] Networks, well-aware of the costs banks incur for making their ATMs available to non-account holders, require card-issuing members to pay ATM owners an interchange fee specifically designed to reimburse those costs. Second, ATM use has already achieved sufficient popularity ***237** to render surcharge-free off-site deployment feasible. Banks claim that "[e]ven with [a surcharge], a typical ATM must generate over a thousand transactions a month to be economically viable."[183] Even in 1987, however, the average ATM was handling nearly 5000 transactions a month,[184] and today many ATMs average over 20,000 monthly transactions.[185] Third, any additional deployment that surcharging has facilitated has been relatively insignificant. While it is true that ATMs' growth rate has risen since the imposition of surcharges, reaching 19.3% annually between 1995 and 1998,[186] that rate had been as high as 12% a year even before surcharges were commonplace.[187] Finally, the only state in which surcharging is currently prohibited provides clear evidence that the fee is unnecessary: Although Iowa has never permitted surcharging, it has the same number of ATMs per capita as the national average.[188] Banks' defense of surcharges as an inevitable consequence of consumers' ever-increasing demand for convenience is largely unjustified, and may in fact hide a deeper motive to maximize profit at the expense of consumers who rely on the availability of electronic access to their funds. ATM-owning banks that impose surcharges on non-account holders are therefore unfairly extracting wealth from consumers in violation of the public policy behind the antitrust laws.

2. ***Surcharging Facilitates the Concentration of the Financial Services Market***

In banking ... a concentrated market enables dominant banks to avoid cutting interest rates, offering new services or extending credit to all but the safest credit risks, secure in the knowledge that their customers cannot go to a competitor and get better service.[189]

A concentrated market is one in which a small number of ***238** firms account for most of the sales of a particular product and are thereby able to exercise market power.[190] Market power consists of the ability to maintain high prices and lessen competition on product quality, service, and innovation.[191] Market concentration enables a small number of providers to exercise market power; hence it obstructs the achievement of the free market's basic goals of lower prices, better products, and more efficient production methods.[192] Congress enacted the antitrust laws to prevent the harm of market concentration in order to ensure that the American consuming public would reap the benefits of competition.

Our nation is currently in the midst of a concentration trend,[193] and the financial services industry is no exception.[194] Since 1980, some 7000 bank mergers have taken place, reducing the number of banks in the United States from 14,000 to just over

9000.[195] In his opening statement at the House of Representatives' Judiciary Committee hearing on the "Effects of Consolidation on the State of Competition in the Financial Services Industry," Ranking Minority Member John Conyers, Jr., warned of the dangers this situation poses:

> Studies of these [bank] mergers reveal some causes for concern, including higher fees for consumers at the larger banks, fewer loans to small business and those who are not economically privileged in communities .... And there is a concern now that the mergers could lead to monopolistic powers in ... ATM financial services.[196]

(a) How Surcharging Facilitates Market Concentration

Before surcharges were permitted, ATM networks such as Plus and Cirrus served to enhance competition among banks of ***239** all sizes.[197] Whereas large banks already had sufficient resources to pay for deployment of ATMs far beyond their branches, small banks were financially incapable of doing more than supplying terminals at their office locations.[198] The sharing of ATM facilities via networks enabled small banks to compete more effectively for accounts. By participating in networks, small banks could offer consumers the same convenient access to cash that the largest banks could offer[199] while focusing their efforts on providing superior interest rates, customer service, and small business loans.[200] The growing practice of surcharging non-account holders, however, has made it financially burdensome for patrons of smaller banks, which can only deploy a limited number of machines, to take advantage of the convenience that networks provide.[201] In the long run, surcharges may drive small bank customers to sacrifice the superior services they value in order to free themselves of that burden.

The proliferation of surcharging means that when a consumer who has chosen an account at a small local bank finds herself in need of cash but far from her own bank's branches or ATMs, she is caught between the rock of paying a surcharge to access a convenient ATM, and the hard place of going out of her way in order to get to her money. Faced with this dilemma, the consumer has three options. First, she can choose convenience and pay the surcharge; however, as this Note has demonstrated,[202] she will lose a significant amount of money if she frequently finds herself in such a situation. Second, she can choose to avoid the surcharge by traveling to her own bank's ATM,[203] a strategy that has already been adopted by many consumers: One year after the surcharge ban was lifted, the volume of foreign transactions dropped 10%,[204] and as of 1998, over 80% of consumers had begun ***240** limiting their transactions to their own banks' machines.[205] This trend, however, is contrary to the networks' original goal of providing consumers with convenient, low-cost banking.[206] There is nothing convenient about making an extra trip, and the consumer must incur a "search cost" for the time she spends and the inconvenience she endures.[207]

The consumer's third option is to "vote with [her] feet,"[208] or avoid the surcharge by moving her account to a large institution for which widespread ATM deployment is economically feasible.[209] Not surprisingly, large banks have encouraged this strategy. *Burke v. Fleet National Bank*[210] was an action brought by the Connecticut Banking Commission to prohibit the imposition of surcharges on nondepositors. The action failed, but the dissenting opinion cited an example of a large bank's appeal to small bank customers: "[Fleet] advised ATM users ... that non-depositor customers could avoid [surcharges] by becoming Fleet depositors .... [Such advice] could put pressure on [ATM] users to become Fleet depositors to the detriment of banks with smaller ATM networks."[211] In fact, many consumers may be succumbing to that pressure: One-third of small bank cardholders in Massachusetts, for instance, have indicated that they were considering defecting to the dominant banks to obtain relief from the fees.[212]

In the short run, a small bank depositor's decision to move her account to a large bank that can afford massive ATM deployment is a sensible one, because it assures convenient, surcharge-free access to her funds. As more customers of smaller banks make that decision, however, the already handicapped financial condition of those banks will grow even worse, and they will become more vulnerable to acquisition by their large, powerful ***241** rivals.[213] Surcharging thus enables large banks to gradually squeeze smaller banks out of the financial services market until a limited number of large banks provide most of the consumer accounts. As this trend continues, the financial services market will become more and more concentrated until the few remaining banks will have the ability to exercise market power.[214]

(b) How Market Concentration Will Harm Banking Consumers

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The market concentration facilitated by surcharging is likely to harm consumers in at least two ways: (1) by leading to the extinction of financial services products that are favorable to consumers; and (2) by depriving consumers of the benefits of technological innovation.

i. Reduced Availability of Products Favorable to Consumers

Is there a basis for according special attention to small business? The answer is an emphatic yes .... Small businesses and other small players are the first to suffer from stifled competition, and that injury inevitably reaches consumers.[215]

Small financial services providers exert more influence on the nature of the banking market than their size may suggest.[216] As one antitrust expert has noted, "[s]mall firms ... are the actual and potential rivals of [large] firms. They provide direct head-to-head competition that can inject new ideas and new competitive vigor in the system."[217] Lacking the name recognition and resources that big banks enjoy, smaller banks attempt to attract consumer accounts by offering high interest rates, low fees, and friendly, efficient service.[218] The availability of the superior product offered at small banks creates an incentive for big banks ***242** to accommodate the desires of the consuming public so as to attract their patronage.

Even in the face of this competition, however, big banks offer a financial services product that is less favorable to consumers than the product offered by smaller banks. Big banks impose ATM fees more frequently and at higher rates than small banks. 97.4% of big banks impose a foreign fee that averages $1.30,[219] whereas only 68.2% of small banks impose a foreign fee that averages $1.09.[220] A surcharge is equally likely to be imposed by both big and small banks,[221] but big banks' average surcharge ($1.35)[222] is higher than small banks' ($1.23).[223] Big banks also impose higher fees for stop-payment orders, bounced checks, and overdrafts,[224] and they offer inferior terms on checking and savings accounts.[225]

***243** During the legislative debates over the Sherman Act, Senator Sherman warned that if a combination of firms "can control the market, raise or lower prices, as will best promote its selfish interests ... [t]he law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer."[226] Competition from smaller, more consumer-oriented banks inhibits big banks from ignoring small depositors' demands for favorable terms. If big banks' control of the financial services market goes unchecked by that competition, however, they are likely to disregard the interests of consumers and offer products designed solely to enhance their own profits. Because it facilitates market concentration that is likely to lead to the extinction of financial services products that effectively meet consumers' needs, surcharging brings about the consequences of selfishness that our antitrust laws aim to prevent.

ii. Decreased Innovation

Innovation in the broad sense is driven by competition .... One need only review the dismal innovation record of countries lacking strong competition to be convinced of this fact.[227]

One reason why our laws favor a competitive system is that it is conducive to "progressiveness," or the development of new and better ways of doing things.[228] A provider that has to compete for patronage will actively pursue innovations so as to outperform its competitors and win the "prize" of consumer dollars. Firms that are not subject to competition, on the other hand, will be slow to implement new and more efficient equipment and production techniques.[229]

The primary force behind the original development of ATMs and ATM networks was commercial banks' competitive ***244** impetus.[230] Faced with decreasing profits as big business depositors moved their money to institutions that would pay interest,[231] banks were forced to compete for individual consumer accounts in order to replenish the drain on their lendable funds.[232] They invested in the technology that ultimately produced the ATM in an effort to attract consumers' patronage by effectively meeting their convenience needs.[233]

In a notable antitrust decision, Judge Learned Hand made the following observation:

> [P]ossession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the

spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.[234]

Although these words predate the birth of retail banking, they apply to the problem discussed in this Note. Banks' rivalry for consumers' business stimulated the technological progess that led to ATMs and ATM networks. Surcharging, however, facilitates the concentration of the financial services market, which will place unchallenged economic power in the hands of big banks. The initiative to improve service to meet consumers' needs will be deadened, as large banks will be "secure in the knowledge that their customers cannot go to a competitor and get better service."[235] Since the market concentration it facilitates deprives financial services consumers of the technological benefits that competitive conditions induce, surcharging is the type of anti-competitive "narcotic" to which Learned Hand was referring and at which our antitrust laws are aimed.

*245 IV. STATES SHOULD REPLICATE IOWA'S ELECTRONIC FUNDS TRANSFER SYSTEM[236]

This Note recommends that states emulate the electronic funds transfer system currently in place in Iowa, the only state in the nation where surcharges are prohibited.[237] The first section of this Part explains the legal basis for Iowa's surcharge ban, and the second section discusses why Iowa's ban should be replicated in other states.

A. THE LEGAL BASIS FOR IOWA'S SURCHARGE BAN

Iowa Code Chapter 527 ("ICC 527," or "Electronic Funds Transfer Law") mandates that "[a] satellite terminal shall be available for use on a nondiscriminatory basis by any other financial institution ... within this state, and by all customers [of those other institutions] who have been provided with an access device ...."[238] Furthermore, it requires all "[s]atellite terminals located in this state [to] be directly connected to ... [a] central routing unit approved" by the state government,[239] and that "[t]he charges required to be paid by any financial institution which utilizes the satellite terminal ... shall not exceed a pro rata portion of the costs ... of establishing, operating and maintaining the satellite terminal, plus a reasonable return on these costs to the owner of the satellite terminal."[240]

Iowa's Department of Commerce has interpreted ICC 527 to prohibit the imposition of surcharges on individual users of satellite ***246** terminals.[241] First, it notes that charges to individuals are not provided for in the statute; the only charges referenced therein are interchange fees imposed upon financial institutions.[242] Thus, the statute authorizes ATM-owning banks to collect interchange fees from card-issuing banks, but does not authorize them to collect surcharges from the individual customers of those banks.[243] Second, it believes that surcharging is inconsistent with the statute's requirement for "nondiscriminatory" service.[244] The Department of Commerce argues that "[t]he effect of surcharging would be to render the cost of electronic transfer services variable[,]"[245] and would result in a situation not intended by the Iowa legislature in which "[t]he cost of a transaction to a consumer in Red Oak [would] be substantially different than the cost of a transaction in Cedar Rapids."[246]

Iowa's Electronic Funds Transfer Law is grounded in the state Legislature's belief "[t]hat electronic funds transfer systems are essential facilities in the channels of commerce."[247] The Iowa General Assembly modeled the statute on policies that require commercial networks like telephone and electric power lines to be made available to all users at equal rates[248] under the "essential facility" doctrine.[249] A facility is considered "essential" if it "can [not] be reasonably or practically duplicated"[250] for such reasons as financial cost,[251] time constraints,[252] or geographic restrictions,[253] thus would-be competitors are unable to contend with the entity that controls the facility unless they are granted ***247** access to it.[254] According to the doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it[,]"[255] and liability is imposed "when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."[256]

The essential facility doctrine traces back to the 1911 case of *United States v. Terminal Railroad Association*.[257] That case involved a group of railroad companies that combined to purchase all of the terminal facilities of St. Louis, "where many railroad systems center ...."[258] "[T]he geographical and topographical situation"[259] of St. Louis required all trains traveling in and out of it to pass through the terminals owned by the association,[260] creating an opportunity for it to use its monopoly to exclude or otherwise disadvantage nonmember companies.[261] The Supreme Court ultimately held that the association's "control and possession constitute [d] such a grip upon the commerce ... as to be both an illegal restraint and an attempt to

monopolize[,]"[262] and ordered it to admit competitors that desired to join its ranks "upon a plane of equality ... with the present proprietary companies."[263]

Iowa bases its regulation of its electronic funds transfer system on the doctrine set forth in *Terminal Railroad*. It believes that convenient ATM access is an essential facility,[264] therefore banks must make that access available to competitors' customers "upon a plane of equality" with their own.[265] In other words, Iowan banks that own ATMs may not impose surcharges upon ***248** non-account holders who use them.

B. OTHER STATES SHOULD EMULATE IOWA'S EFT SYSTEM

This section discusses why Iowa's surcharge ban and ATM network system should be emulated by other states' governments. The first subsection explains why the essential facility doctrine is applicable to ATM access. The second subsection demonstrates that whereas surcharging violates the public policy goals that underlie our antitrust laws, Iowa's EFT system promotes them.

1. *Convenient Electronic Access to Cash is an Essential Facility*

In *Terminal Railroad*, geographic circumstances required all railroad companies desiring to cross the Mississippi River to pass through the terminals owned by the association.[266] Since it was financially infeasible for any one railroad to acquire adequate terminal facilities for itself,[267] nonmembers were compelled to use those controlled by the association. As even the defendant railroads admitted, "compulsion" was "inherent" in that situation.[268]

Compulsion is similarly inherent in the ATM access situation. Modern consumers of financial services expect unlimited electronic access to their accounts. To provide that access, banks can install ATMs in all of the locations that their customers deem convenient. However, the high cost of extensive deployment renders it virtually impossible for small banks, which have limited resources by definition, to operate more than a few ATMs on their own.[269] Therefore smaller banks, in order to survive, are compelled to offer their customers access to their accounts via other banks' ATMs.

***249** In *Terminal Railroad*, the Supreme Court held that

[t]he 'physical or topographical condition peculiar to the locality []' ... constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities.[270]

The condition peculiar to the financial services industry is consumers' need for convenient, round-the-clock access to their funds. Like the topography of St. Louis, this condition constitutes an obvious reason why ATM-owning banks must be impartial towards all consumers compelled to use their facilities. Banks' practice of surcharging non-account holders for use of their ATMs is inconsistent with the Supreme Court's requirement that controllers of essential facilities treat all users equally.

Explication of the essential facility doctrine set forth in other cases further demonstrates that ATM access should be regarded as an essential facility. In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*,[271] the Seventh Circuit stated in dicta that the doctrine would apply to a market in which smaller competitors, "like the specialized common carriers in the long-distance telephone market, depended on the owner of the local exchanges [the larger competitor] to complete [their] service."[272] Applying this scenario to the financial services market, smaller banks depend on the owners of other ATMs, often large banks, to provide customers with convenient electronic access to cash. Viewed in this context, ATM service is an essential facility, and terminal owners should be required to provide it to all consumers on a surcharge-free basis.

In *United States v. American Telephone & Telegraph*,[273] the District of Columbia District Court explained that "[a]ny company which controls an 'essential facility' ... violates the antitrust laws if it fails to make access to that facility available to its ***250** competitors on fair and reasonable terms that do not disadvantage them."[274] ATM owners control the essential facility of convenient electronic access to cash. Since the costs of providing that access to nondepositors are adequately covered by the interchange fee, surcharges constitute unfair and unreasonable terms of access that disadvantage smaller

institutions who cannot afford to provide such convenience. Furthermore, as described above, the practice of surcharging will ultimately lead to the concentration of the financial services market to the detriment of consumers. By failing to make access to their ATMs available to all consumers on fair, reasonable, non-disadvantageous terms, surcharging banks violate our antitrust policy, and the practice of imposing the unnecessary additional fee should be banned.

2. *Iowa's System Promotes the Public Policies Behind the Antitrust Laws*

Whereas surcharging violates the policies that underlie the antitrust laws, Iowa's electronic funds transfer system promotes them. Its ban on surcharging creates a level playing field on which all banks, large and small, can compete on the merits of the financial services they provide,[275] and its network structure fosters competitive conditions in the state's financial services market.

In a market that allows surcharges, financial services consumers are forced to choose between the high interest rates, low fees, and superior service that small banks offer and the free access to cash that big banks can provide. In a surcharge-free market like Iowa's, however, all banks can furnish free electronic access to accounts, and competition on the other merits of their products affords consumers a broader array of banking options.[276] Since "all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers[,]" ***251** [277] Iowa's ban on surcharges promotes the public policy of consumer welfare that underlies our antitrust laws.

ICC 527 also prevents the concentration of Iowa's financial services market. Smaller banks face the most significant threat of losing customers to bigger banks in markets in which ATM deployment is dominated by a few very large firms.[278] In San Francisco, for example, in 1999, Wells Fargo and Bank of America together owned 86% of the ATMs,[279] and in Boston, Fleet and BankBoston owned 70% of the ATMs.[280] In concentrated markets such as these, small bank customers stand almost no chance of avoiding a surcharge, so they are vulnerable to an anomalous form of price competition:[281] "[A] bank that has the largest market share of deployed ATMs may effectively entice its competitors' depositors to switch banks merely by imposing a high surcharge .... *Thus it appears that the bank with the most ATMs may increase its market share by raising prices*!"[282]

In Iowa, on the other hand, the four largest banks control fewer than 20% of the state's ATMs.[283] Iowa's success in maintaining such an unconcentrated market is due in large part to the network system required by law. All transactions that originate at Iowa ATMs and draw funds from Iowa financial institutions must be routed directly through a central switch approved by the state.[284] The current approved router is Shazam, Inc., a network of more than one thousand member banks[285] that, unlike most other networks, is still a nonprofit corporation,[286] and has a board that includes several state-appointed directors who represent the public interest.[287]

Most networks are owned and controlled by a limited number ***252** of large banks.[288] Small banks can join them in order to offer their customers the use of other banks' ATMs, but their membership generally includes no decisionmaking authority.[289] Like the railroads that owned the terminals at St. Louis,[290] big banks that own both the network and the bulk of a region's ATMs possess the power to dictate the price of convenient access to cash and can use that power to place their smaller rivals at a competitive disadvantage.[291] In Iowa, on the other hand, small banks are on equal footing with their larger counterparts. None of the banks are permitted to surcharge, each member of Shazam gets one vote on network policies regardless of size, and bank-to-bank interchange fees are determined by a committee of members representing both ATM owners and card issuers and both large and small institutions.[292] On this level field that Iowa has established, smaller banks can thwart larger competitors' attempts to squeeze them out of the market. This system promotes the consumer welfare goals of the antitrust laws in that all banks can compete effectively on all of the merits of their products, and consumers can enjoy the resultant improvements in price, quality and service.

Evidence indicates that Iowa's strategy of approaching ATM service as an essential facility is a viable one. Over its twenty-year history, Iowa's system has proven highly efficient, ranking as one of the lowest cost ATM networks in the nation.[293] Furthermore, Iowa is clear proof of the weakness of banks' claims that the end of surcharging will mean the end of increased ATM deployment, as it has the same number of ATMs per capita as the national average, despite having never permitted a bank to collect a surcharge within its borders.[294]

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In their discussion of the scope of antitrust policy, antitrust experts Carl Kaysen and Donald F. Turner explain that to reduce big business power, one avenue available to government is to "place limitations on the conduct of large businesses, especially on conduct viewed as having a competitive impact on small ***253** businesses."[295] ATM networks tried to limit such conduct by prohibiting the imposition of surcharges. Unfortunately, the debilitating costs of defending the ban against banks' antitrust litigation forced the networks to repeal it. States have an opportunity to pick up where the networks left off in the fight for a competitive banking market. They should follow Iowa's lead and adopt an essential facility perspective on ATMs, which they can use to outlaw surcharges and mandate a network system in which all participants' interests are represented. States that do so will be taking a great stride toward the achievement of the public policy goals that underlie our antitrust laws.

V. CONCLUSION

This Note has not attempted to argue that ATM-deploying banks should be required to provide non-account holders with electronic access to their funds without compensation. Rather, it has argued that the surcharges are unnecessary because those banks are already adequately compensated via the interchange fee that networks require card-issuing banks to pay ATM-owning banks for allowing the card-issuers' account holders to enjoy the convenience of ATM-owners' machines. This Note takes the position, therefore, that surcharges are a pure profit mechanism, and that by imposing them, ATM-owning banks violate the rules of "fair play or sporting behavior, which in the market context may be translated as not using market power where it exists, and in general seeking reasonable rather than maximum returns."[296]

Klor's, Inc. v. Broadway-Hale Stores, Inc.[297] was a case in which a small retail store brought an antitrust action against a neighboring department store, alleging that the department store's conspiracy with manufacturers and distributors to sell to the small store only at discriminatory prices and unfavorable terms "seriously handicapped its ability to compete ...."[298] In his decision, Justice Black noted that although the conspiracy did not constitute a total monopoly, it clearly had,

***254** by its "nature" and "character," a "monopolistic tendency." ... Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,"' whether "the tendency is a creeping one" or "one that proceeds at a full gallop."[299]

Although it is not likely that a single bank will ever achieve a complete monopoly of the financial services industry, ATM owners that surcharge non-account holders nonetheless exhibit a monopolistic tendency. The unnecessary additional fee that they assess is likely to force consumers who would otherwise prefer to patronize small banks to move their accounts to large banks so as to avoid losing money to ATM surcharges. The ultimate effect of this practice will be to squeeze smaller banks out of the financial services market until all of the economic power rests with a few large institutions. Our antitrust laws were enacted to prevent just such a situation; the fact that surcharging facilitates it is clear proof that that the practice violates the consumer welfare policies that underlie those laws. Accordingly, ATM surcharges should be prohibited.

Footnotes

[a1] Managing Editor, Colum. J.L. & Soc. Probs., 2001-2002. The Author wishes to thank the *Journal* board and staff for their fabulous help, especially James N. Bowen, Jonathan R. Werner and Katie B. Feiock. She dedicates this Note to her family, J. Kirby, Carolyn and Kate Coughlin, in gratitude for all of their love and support.

[1] Hans B. Thorelli, *The Federal Antitrust Policy* 227 (1955). Thorelli's work has been cited by the Supreme Court as an authority on the intent behind the Sherman Act. *E.g.*, Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 688 (1978).

[2] *See infra* notes 33-34 and accompanying text.

[3] *See* Bankrate.com, *ATM & debit card basics: Convenience — and confusion, at* http://www.bankrate.com/brm/green/atm/atm1a.asp [hereinafter *Convenience — and confusion*].

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[4] *See id.* ("Some of us wonder how we ever lived without them.").

[5] On April 1, 1996, the two largest national ATM networks, Plus and Cirrus, repealed their bylaws prohibiting member banks from imposing surcharges on non-account holders. U.S. Pub. Interest Research Group, *Double ATM Fees, Triple Trouble: A Fifth PIRG National Survey of ATM Surcharging Rates, April 1, 2001 — The Fifth Anniversary of ATM Surcharging* 1 (2001), http://www.stopatmfees.com/report01/report01.pdf [hereinafter *PIRG 2001*].

[6] In 2001, the average surcharge was $1.47. *PIRG 2001, supra* note 5, at 1.

[7] F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 16 (1990).

[8] The major antitrust laws are the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. *E.g.*, John H. Shenefield & Irwin M. Stelzer, *The Antitrust Laws: A Primer* 1, 15-23 (2001).

[9] Town of Concord v. Boston Edison Co., 915 F.2d 17, 21-22 (1st Cir. 1990).

[10] *See* Thorelli, *supra* note 1, at 227.

[11] This Note does not address ATMs owned by non-financial institutions such as convenience stores. It argues that one of the ways in which surcharging violates the policies that underlie the antitrust laws is that it facilitates the concentration of the financial services market by driving small banks' customers to move their accounts to large banks that can afford massive ATM deployment. Non-financial institutions that deploy ATMs will not be addressed here because they do not contribute to this concentration: As one consumer advocacy organization has noted, "[b]ecause these businesses only dispense cash and do not otherwise engage in banking services, surcharges at their ATMs do not pose an anti-competitive threat to small financial institutions." New Rules, *ATM Surcharge Fact Sheet, at* www.newrules.org/resources/atmfact.html #QuestionOne [hereinafter *New Rules Fact Sheet*].

[12] *PIRG 2001, supra* note 5, at 3. U.S. PIRG surveyed 333 banks in twenty-four states and the District of Columbia.

[13] Federal Reserve Bank of San Francisco, *Glossary of Economic Terms, at* http://www.frbsf.org/tools/glossary/glossReg.html#C.

[14] Donald I.Baker & Roland E. Brandel, *The Law of Electronic Fund Transfer Systems: Legal and Strategic Planning* ¶ 1.01, at 1-1 (2001).

[15] *Id.* at ¶ 1.02[1], at 1-2.

[16] *Id.*

[17] *Id.* at ¶ 1.01, at 1-1.

[18] *See id.* at ¶ 1.02[1], at 1-2 to -3.

[19] *Id.* at ¶ 1.02[1], at 1-2.

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[20] Anne C. Pidgeon, Note, *Show Me the Money — But Don't Make Me Pay For It: An Analysis of Why Legislation Banning ATM Surcharges is Inappropriate and Unwarranted*, 3 NYU J. LEGIS. & PUB. POL'Y 393, 397 (2000).

[21] *See* Banking Act of 1933, ch. 89, § 11(b), 48 Stat. 162, 182 (amended Aug. 23, 1935, to allow Federal Reserve Board to cap interest rates) (current version at 12 U.S.C. § 371b (2001)). The implementing regulation, Regulation Q, was found at 12 C.F.R. § 217. For a discussion of Regulation Q, see Carl Felsenfeld, *Banking Regulation in the United States* 35-36 (2001), and Pidgeon, *supra* note 20, at 397.

[22] Pidgeon, *supra* note 20, at 397.

[23] *See* 12 U.S.C. § 371b (2001) (amended 1980, Pub.L. 96-221, to strike out provisions regarding payment of interest on deposits and prescribing of limitations by the Board). On the repeal of Regulation Q, see Felsenfeld, *supra* note 21, at 47-48, and Pidgeon, *supra* note 20, at 397.

[24] *See* Pidgeon, *supra* note 20, at 397.

[25] *Id.*

[26] Baker & Brandel, *supra* note 14, at ¶ 1.02[1], at 1-3.

[27] *Id.*

[28] *Id.* at ¶ 1.01, at 1-1. EFT systems also include automated clearing houses, point-of-sale systems, check guarantee and debit and credit authorization systems, and home banking services. *Id.*

[29] *Id.* at ¶ 1.03[4], at 1-23.

[30] *See Convenience — and confusion, supra* note 3.

[31] Baker & Brandel, *supra* note 14, at ¶ 6.04, at 6-42.

[32] *See id.* at ¶ 1.03[4], at 1-24.

[33] *Id.* at ¶ 6.04, at 6-42.

[34] Bankrate.com, *ATMs — Looking ahead, at* http:// www.bankrate.com/brm/green/atmatm9a.asp. Iris-reading technology has been introduced at some machines in Texas; however, instant cash deposit processing and current events information can currently be enjoyed only in the Asia-Pacific and European markets. *Id.*

[35] Baker & Brandel, *supra* note 14, at ¶ 6.04[2][a], at 6-47 to -48.

[36] *See id.* at ¶ 6.04[2][d], at 6-70.

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37 *See id.* at ¶ 6.04[2][c], at 6-69.

38 *See id.* at ¶ 6.04[2][c], at 6-67.

39 *Id.* at ¶ 6.04[2][b], at 6-49.

40 *See* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b], at 6-49.

41 *Id.*

42 *Id.* at ¶ 6.04[2][b], at 6-49 to -50.

43 *See id.* at ¶ 6.04[2][b][i], at 6-50.

44 *Id.* at ¶ 1.03[4], at 1-23; *id.* at ¶ 6.04, at 6-42.

45 Baker & Brandel, *supra* note 14, at ¶ 1.03[4], at 1-24.

46 *Convenience — and confusion, supra* note 3.

47 Baker & Brandel, *supra* note 13, at ¶ 1.03[4], at 1-24.

48 Bd. of Governors of the Fed. Reserve Sys., *Annual Report to the Congress on Retail Fees and Services of Depository Institutions* 5 (2001), http://www.federalreserve.gov/boarddocs/RptCongress/2001fees.pdf [hereinafter *Federal Reserve 2001*].

49 Baker & Brandel, *supra* note 14, at ¶ 24.03[1], at 24-15. These systems were known as "proprietary." *Id.*

50 *See generally id.* at ¶ 24.03[1], 24-15 to -19 (discussing the history of card-based electronic networks).

51 *See id.* at ¶ 6.04[3], at 6-72 to -75.

52 James J. McAndrews, *ATM Surcharges*, 4 CURRENT ISSUES IN ECONS. AND FIN., April 1998, at 1, 1, http://www.ny.frb.org/rmaghome/curr_iss/ci4-4.pdf.

53 *See* Martha Vestal Clarke, *The Impact of Emerging Payment Systems and Products on Banking Competition and the Competitive Analysis of Bank Mergers and Acquisitions*, 16 ANN. REV. OF BANKING L. 161, 185 (1997).

54 Baker & Brandel, *supra* note 14, at ¶ 24.03[1], at 24-16. The first multibank network was Washington state's "The Exchange." *Id.* at ¶ 24.03[1], at 24-15. Other examples of regional networks are Metroteller (New York), STAR SYSTEM (California), Alert (Alabama), and Shazam (Iowa). *See id.* at ¶ 6.04 [3][a], at 6-78.

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55 *Id.* at ¶ 24.03[1][a], at 24-16.

56 *Id.* at ¶ 6.04[3][a], at 6-77.

57 Clarke, *supra* note 53, at 186.

58 *See* Baker & Brandel, *supra* note 14, at ¶ 24.03[1][b], at 24-17.

59 McAndrews, *supra* note 52, at 1. Other examples of national networks are Express Cash, MasterTeller, Nationet, and Citishare. Baker & Brandel, *supra* note 14, at ¶ 6.04[3][b], at 6-81.

60 Baker & Brandel, *supra* note 14, at ¶ 6.04[3][b], at 6-81.

61 *Id.*; Clarke, *supra* note 53, at 186.

62 Baker & Brandel, *supra* note 14, at ¶ 6.04[3][b], at 6-82.

63 Stacy Mitchell, *The National Bank Robbery*, THE NEW RULES, Winter 1999, at 3, 3, http://www.newrules.org/journal/nrwin99.pdf.

64 *Id.*

65 *Id.*

66 *See infra* text accompanying notes 193-196.

67 Mitchell, *supra* note 63, at 3.

68 *Id.; see also* Baker & Brandel, *supra* note 14, at ¶ 24.03[1][a], at 24-17.

69 *See* Mitchell, *supra* note 63, at 3. Industry observers predict that by 2004, just five networks will control 90% of switched transaction volume. *Id.* For a discussion of the endurance of concentration in markets generally, see Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, 2 ANTITRUST LAW & ECON. REV., Winter 1968-69, at 11, 28 ("[E]conomic forces have not brought about significant erosion of existing concentration. The problem is not one which will disappear with time.").

70 Mitchell, *supra* note 63, at 4.

71 Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][i], at 6-50.

72 *See id.* at ¶ 6.04[2][b], at 6-50.

73 *See id.*

74 There are several other relatively uncommon types of fees associated with ATM use that will not be discussed in this Note but of which ATM users should be aware. In 2000, about 6% of banks charged a one-time card issuing fee that averaged about $6.50, and another 6% charged their own account holders a fee for using their ATMs that averaged about $0.70. *Federal Reserve 2001, supra* note 48, at 6. About 13% of banks charged an annual fee for ATM services that averaged about $10.25; these numbers represent increases from 1999 of 5% in the number of banks that charge the annual fee and of nearly $3.00 in the amount of the fee itself. *Id.* Still other fees that some banks impose include a charge for exceeding a certain number of debit transactions (between $0.25 and $1.00 for each transaction over the limit), for obtaining a printout of recent bank transactions (about $1.00), and to get a cash advance on a credit card (about $1.50). Bankrate.com, *ATM & debit card basics: ATM fees, at* http://www.bankrate.com/brm/green/atm/atm3a.asp?prodtypeWchk.

75 McAndrews, *supra* note 52, at 1.

76 *See id.* at 2. ATM networks are self-regulated private sector industries, so they set their own pricing and operating rules. *Effects of Consolidation on the State of Competition in the Financial Services Industry: Hearing Before the Comm. on the Judiciary*, 105th Cong. 70 (1998) [hereinafter *Hearing*] (statement of William L. McQuillan, President, Independent Bankers Association of America).

77 McAndrews, *supra* note 52, at 2.

78 *See id.*

79 *PIRG 2001, supra* note 5, at 4.

80 McAndrews, *supra* note 52, at 2.

81 *PIRG 2001, supra* note 5, at 4.

82 Many smaller institutions absorb the costs of the interchange and switch fees rather than impose retail fees. Mitchell, *supra* note 63, at 4.

83 Other terms for this fee is "on others" fee, *e.g., Federal Reserve 2001, supra* note 48, at 4, and "user" fee. *E.g.*, McAndrews, *supra* note 52, at 2.

84 McAndrews, *supra* note 52, at 2.

85 The State PIRGs, *White Paper: ATM Fee Backlash: Local Rebellions Against Unfair Surcharge Spread* (2000), http://www.stopatmfees.com/whitepaper.htm [hereinafter *White Paper*].

86 *PIRG 2001, supra* note 5, at 4.

87 McAndrews, *supra* note 52, at 2.

88 *PIRG 2001, supra* note 5, at 1. Since the interchange fees that the foreign fee is intended to cover total less than one dollar, the average foreign fee of $1.39 clearly includes “a little profit thrown in” for the bank that imposes it. Mitchell, *supra* note 62, at 4.

89 Banks prefer to call the surcharge an “access” or “convenience” fee. *White Paper, supra* note 84; *see also* Coalition for ATM Choice, *Fact Sheet: Local Initiatives to Ban ATM Access Fees, at* http:// www.atmchoice.com/factsheet.html (last visited Feb. 3, 2001) [hereinafter *Coalition*] (sponsored by the California Bankers Association).

90 Bankrate.com, *Definitions of ATM and checking terms, at* http:// www.bankrate.com/brm/green/define/atmdef.asp.

91 *New Rules Fact Sheet, supra* note 11.

92 New Rules, *ATM Surcharge Bans, at* http:// www.newrules.org/finance/atm.html.

93 *See id.*

94 *See* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][ii], at 6-53.

95 *See White Paper, supra* note 85.

96 David Balto, *Regulatory, Competitive, and Antitrust Challenges of ATM Surcharges*, 71 BNA’S BANKING REPORT 82, 82-83 (July 13, 1998). For example, paragraph 2.3(1) of the Plus Operating Regulations provided: “[A]ll Qualified ATMs must ... [n]ot permit a transaction fee to be added to the amount of the transaction, unless ... it is a Local Transaction [the customer holds an account with the bank that owns the ATM] ....” *Quoted in* SouthTrust Corp. v. Plus Sys., Inc., 913 F. Supp. 1517, 1520 (N.D. Ala. 1995).

97 *See* Balto, *supra* note 96, at 82.

98 *E.g., SouthTrust*, 913 F. Supp. 1517; Valley Bank of Nev. v. Plus Sys., Inc., 749 F. Supp. 223 (D. Nev. 1989), aff’d, 914 F.2d 1186 (9th Cir. 1990); *see also* Balto, *supra* note 95, at 82 (noting that “[a]ntitrust litigation is costly and complex”).

99 Balto, *supra* note 96, at 83. In addition to defense costs, networks would have faced treble damages if liability was found. *See* 15 U.S.C. § 15(a) (1997).

100 *PIRG 2001, supra* note 5, at 1.

101 *White Paper, supra* note 85. This figure probably reflects banks that belonged to networks that permitted surcharging. *See* Bankrate.com, *ATM & debit card basics: How to avoid those costly ATM surcharges, at* http:// www.bankrate.com/brm/green/atm/chkgla.asp (noting that regional networks permitted surcharges before Plus’ and Cirrus’ bans were lifted).

102 *White Paper, supra* note 85.

103 *Id.*

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[104] *Id.*

[105] *PIRG 2001, supra* note 5, at 3.

[106] *White Paper, supra* note 85.

[107] *Id.*

[108] *PIRG 2001, supra* note 5, at 3.

[109] *See supra* Part II.C.

[110] *PIRG 2001, supra* note 5, at 4.

[111] Interchange fees range from $0.30 to $0.75. *Id.*

[112] *See* Mitchell, *supra* note 63, at 4 (noting that foreign fees generally include "a little profit thrown in" for the banks that impose them).

[113] The 2001 average foreign fee was $1.39. *PIRG 2001, supra* note 5, at 1.

[114] The 2001 average surcharge was $1.47. *Id.*

[115] $1.73, the difference between the $2.00 collected by the ATM-owning bank and the $0.27 it pays for the transaction, is 86.5% of the $2.00 total.

[116] *See White Paper, supra* note 85.

[117] *See* McAndrews, *supra* note 52, at 2-3 (discussing the pros and cons of ATM surcharges).

[118] Pidgeon, *supra* note 20, at 399.

[119] *See* Baker & Brandel, *supra* note 14, at ¶ 24.03[1], at 24-15.

[120] McAndrews, *supra* note 52, at 3.

[121] *Id.*

[122] *White Paper, supra* note 85.

[123] *See* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][c], at 6-70.

[124] *See id.* at ¶ 6.04[2][c], at 6-67.

[125] Pidgeon, *supra* note 20, at 398.

[126] Baker & Brandel, *supra* note 14, at ¶ 6.04[2][c], at 6-70.

[127] *Quoted in* Troy Stark, *Consumer News: Debate Raging Over ATM Fees*, 12 LOY. CONSUMER L. REV. 169, 171 (2000).

[128] *White Paper, supra* note 85 (citing a 1997 study by the Federal Office of Thrift Supervision).

[129] *ATM Fees: Antitrust Law Change Suggested as Possible Answer to Spreading ATM Fees*, 69 BNA's Banking Report News 198, 199 (Aug. 4, 1997).

[130] Laura Bruce, *ATMs: Convenience keeps rising in price, at* www.bankrate.com/brm/news/chk/20010928c.asp? (Sept. 28, 2001); *see also PIRG 2001, supra* note 5, at 7.

[131] Balto, *supra* note 96, at 83.

[132] *Coalition, supra* note 89.

[133] *Id.*

[134] Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][ii], at 6-53; *see also Coalition, supra* note 89.

[135] *PIRG 2001, supra* note 5, at 7. This string was narrowly broken in 2000, when bank profits suffered a tiny decline of about $300 million from the previous record, but were still the second highest ever. *Id.* Banks bounced back in 2001, however, breaking their 1999 record with $74.6 billion in earnings. American Bankers Association, *ABA Daily Newsbytes: A Record Year, But ..., at* www.aba.com/default.htm (Mar. 2, 2002).

[136] *White Paper, supra* note 85.

[137] *PIRG 2001, supra* note 5, at 7 (quoting FDIC).

[138] *See generally* Balto, *supra* note 96, at 83 ("A preliminary picture of the world of surcharges shows that banks, especially large banks, are the main beneficiary of surcharges.").

[139] *See supra* note 34 and accompanying text.

[140] Baker & Brandel, *supra* note 14, at ¶ 1.03[4], at 1-24; *see also* Balto, *supra* note 96, at 85 (noting that "the costs of ATM deployment — communications costs, ATM terminal costs, etc. — have decreased over the past decade").

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141 Baker & Brandel, *supra* note 14, at ¶ 6.04[1], at 6-46 to -47.

142 *Id.* at ¶ 6.04[1], at 6-45.

143 *See id.*

144 *See* Balto, *supra* note 96, at 83 ("Surcharges have consistently increased. And there is little evidence of any bank competing by 'reducing' the amount of its surcharge ....").

145 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1910).

146 Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F.2d 955, 958 (2d Cir. 1943).

147 Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 126 (1982) [hereinafter Lande I]. The term "consumer welfare" has been ascribed different meanings. Robert Bork has defined it as the inevitable result of business efficiency, which "necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered ...." Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 7 (1993). This Note, however, adopts the view of former United States Department of Justice Antitrust Division Chief Joel Klein, who "define[s] 'consumer welfare' in a manner quite different from that sponsored by Robert Bork and his crowd 25 years earlier: 'the more people chasing after the consumer, to serve him or her better, to get lower prices, to get new innovations, to create new opportunities — the more of that juice that goes through the system, the better.'" Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where it has Been, Where it is Now, Where it will be in its Third Century*, 9 CORNELL J.L. & PUB. POL'Y, 239, 264 (1999) (citation omitted).

148 *See supra* note 8 and accompanying text.

149 15 U.S.C.A. § 1-7 (1997).

150 *See* Lande I, *supra* note 147, at 103-04.

151 *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

152 *Prof'l Eng'rs*, 435 U.S. at 692.

153 15 U.S.C.A. § 1 (1997).

154 15 U.S.C.A. § 2 (1997).

155 Scherer & Ross, *supra* note 7, at 12; *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1910) ("[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is ... the enormous development of corporate organization ... and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.").

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156 Scherer & Ross. *supra* note 7, at 12.

157 *Prof'l Eng'rs*, 435 U.S. at 695.

158 *See* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1035 (1987).

159 Lande I, *supra* note 147, at 93.

160 *Quoted in id.* at 94.

161 *Quoted in id.* at 95.

162 *Quoted in id.*

163 221 U.S. 1 (1910).

164 *Id.* at 78 (emphasis supplied).

165 472 U.S. 585 (1985).

166 *Id.* at 605.

167 466 U.S. 2 (1984).

168 *Id.* at 15.

169 Thorelli, *supra* note 1, at 227.

170 Lande I, *supra* note 147, at 113 (footnote omitted) (discussing the intent behind the Federal Trade Commission Act).

171 Neil W. Averitt and Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 44 (1998).

172 Robert H. Lande, *Beyond Chicago: will activist antitrust rise again*?, 39 ANTITRUST BULL. 1, 5 (1994) [hereinafter Lande II].

173 Skitol, *supra* note 147, at 263.

174 Lande I, *supra* note 147, at 95 (quoting Senator Hoar's statement during Sherman Act debate).

[175] *Id.* (quoting Representative Heard's statement during Sherman Act debate).

[176] *Quoted in* Jay McDonald, *ATM surcharge battle: banks win Round 2, at* http://www.bankrate.com/brm/news/atm/19991117.asp (Nov. 17, 1999).

[177] Average surcharge in 2001. *PIRG 2001, supra* note 5, at 1.

[178] This example may be modest. In 1991, ATM cardholders averaged 6.7 transactions monthly. Baker & Brandel, *supra* note 14, at ¶ 6.04[1], at 6-43. Only six years prior, the monthly average was 4.7 transactions. *Id.* It is likely that in the past ten years, as the number of ATMs has continued to increase, *see id.*, the average number of monthly transactions has grown as well.

[179] $1.47 average surcharge times six transactions equals $8.82.

[180] $8.82 total monthly surcharges times twelve months equals $105.84.

[181] *See, e.g.*, Donald G. Ogilvie, *ABA Statement on U.S. District Court Blocking Ban on ATM Access Fees*, http://www.aba.com/Press+Releases/PR_ 111699ATMFeesBan.htm (Nov. 16, 1999).

[182] *See New Rules Fact Sheet, supra* note 11.

[183] *Coalition, supra* note 89.

[184] The 1987 average was 4930 transactions per ATM per month. Baker & Brandel, *supra* note 14, at ¶ 6.04[1], at 6-43.

[185] *Id.*

[186] *Id.* at ¶ 6.04[1], at 6-42.

[187] The deployment of ATMs grew at an annual rate of 9.8% from 1989 to 1995, *id.*; however, from 1988 to 1991, that rate was about 12% per year. *Id.* at ¶ 6.04[1], at 6-44.

[188] *New Rules Fact Sheet, supra* note 11.

[189] Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys., 638 F.2d 1255, 1264 (5th Cir. 1981).

[190] *See* U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (1997).

[191] *See id.* at n.6.

[192] *See Town of Concord*, 915 F.2d at 21-22 (noting that anticompetitive practices obstruct the achievement of the goals of competition).

193 *Hearing, supra* note 76, at 3 (statement of John Conyers, Jr.) ("There is a merger situation going on, unprecedented in American history").

194 *Id.*

195 *Id.* at 7 (Prepared Statement of Hon. Laurence H. Meyer, Governor, Federal Reserve System).

196 *Id.* at 3.

197 This Note adopts the Federal Reserve Board's size classifications: "large" institutions have assets of more than $1 billion; "medium-sized," from $100 million to $1 billion; and "small," less than $100 million. *Federal Reserve 2001, supra* note 48, at 2 n.4. This Note uses the terms "big" and "large" and the terms "small" and "smaller" interchangeably.

198 Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][v], at 6-66.

199 Clarke, *supra* note 53, at 186.

200 *See* Balto, *supra* note 96, at 82, 84.

201 *See* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][v], at 6-66 to -67.

202 *See supra* text accompanying notes 177-180.

203 *Coalition, supra* note 89.

204 McAndrews, *supra* note 52, at 3.

205 Balto, *supra* note 96, at 83.

206 *See* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][ii], at 6-55 ("The big banks that surcharge have been viewed by many to have betrayed the original promise made to consumers that ATMs ... would provide for lower cost and more convenient banks."); *see also* Balto, *supra* note 96, at 82-83.

207 *See* Balto, *supra* note 96, at 82; *see also* Lande II, *supra* note 172, at 3 ("firms can raise consumers' search costs ... in a manner that can be anticompetitive").

208 Ogilvie, *supra* note 181.

209 Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][v], at 6-66.

210 742 A.2d 293 (Conn. 1999).

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[211] *Id.* at 308 (Berdon, J., dissenting) (quoting Connecticut Banking Commissioner's statement at trial).

[212] Balto, *supra* note 96, at 86.

[213] *See id.* at 84.

[214] *See generally* Clarke, *supra* note 53, at 168 ("the cost of rapidly changing technology might ... lead to increased market power for incumbent banks").

[215] Warren S. Grimes, *Antitrust and the Systemic Bias Against Small Business: Kodak, Strategic Conduct, and Leverage Theory*, 52 CASE W. RES. L. REV. 231, 236, 237 (2001).

[216] Balto, *supra* note 96, at 84.

[217] Grimes, *supra* note 215, at 236-37.

[218] *See* Balto, *supra* note 96, at 84.

[219] *Federal Reserve 2001, supra* note 48, at 13 (Table B.5.1).

[220] *Id.* (Table B.5.3).

[221] Surcharges are imposed by 68.9% of both big and small banks. *Id.* (Tables B.5.1 and B.5.3).

[222] *Id.* (Table B.5.1).

[223] *Id.* (Table B.5.3).

[224] For stop-payment orders, big banks charge an average of $21.99, *id.* at 12 (Table B.4.1), compared to small banks' $15.83. *Federal Reserve 2001, supra* note 48, at 12 (Table B.4.3). For bounced checks, big banks charge an average of $24.75, *id.* (Table B.4.1), compared to small banks' $18.90. *Id.* (Table B.4.3) For overdrafts, the average fee imposed by big banks is $25.01, *id.* (Table B.4.1), versus $18.24 imposed by small banks. *Id.* (Table B.4.3). A fee is assessed for deposit items returned by 98.5% of big banks, in an average amount of $8.29, *id.* (Table B.4.1); such a fee is assessed by only 62.2% of small banks, who charge an average of $6.71. *Federal Reserve 2001, supra* note 48, at 12 (Table B.4.3).

[225] William McQuillan, President of the Independent Bankers Association of America, points out that "none of the top 50 banks in the U.S. offer the least expensive checking accounts. In fact, those offering the most expensive checking accounts are banks involving the latest megamergers .... The lowest pricing deals are offered by smaller regional and community banks." *Hearing, supra* note 76, at 66. The Federal Reserve Board's 2001 Report supports Mr. McQuillan's statement. In 2000, for non-interest checking accounts, big banks required an average minimum balance of $726 to avoid an average fee of $7.49, *Federal Reserve 2001, supra* note 48, at 9 (Table B.1.1), whereas small banks, on average, required a minimum balance of $438.58 to avoid a fee of $6.66. *Id.* at 10 (Table B.1.3). For interest-bearing checking (NOW) accounts, big banks required an average minimum balance of $1489.85 to avoid an average fee of $8.05, *id.* (Table B.2.1); small banks required an average balance of $967.84 to avoid a slightly higher average fee of $8.16. *Id.* at 11 (Table B.2.3). Holders of simple savings accounts at big banks incurred an average fee of $2.72 if their balance dropped below an average level of $280.83, *id.* (Table B.3.1); savings account holders at small banks, on the other

hand, incurred an average fee of $2.33 if their balance dropped below an average level of $176.37. *Id.* at 12 (Table B.3.3). Furthermore, there is evidence that following bank mergers, resultant larger banks have lowered interest rates paid on deposits, regardless of the amount of competition in the market. *Hearing, supra* note 76, at 66 (statement of William McQuillan, citing a Boston Federal Reserve study).

226 Thorelli, *supra* note 1, at 180 (quoting Senator Sherman).

227 Michael E. Porter, *Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures, in* ABA Section of Antitrust Law, *Perspectives on Fundamental Antitrust Theory* 124, 132 (2001), http://www.abanet.org/ftp/fundamentaltheory.pdf.

228 *See* Sam D. Johnson & Michael A. Ferrill, *Defining Competition: Economic Analysis and Antitrust Decisionmaking*, 36 BAYLOR L. REV. 583, 591 (1984).

229 *Id.* at 593.

230 *See generally* Baker & Brandel, *supra* note 14, at ¶ 1.01, at 1-1 to -2.

231 *See id.* at ¶ 1.02[1], at 1-2.

232 *See id.* at ¶ 1.01, at 1-1.

233 *See id.* at ¶ 6.04[2][a], at 6-47 to -48.

234 United States v. Alcoa, 148 F.2d 416, 427 (2d Cir. 1945).

235 Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys., 638 F.2d 1255, 1264 (5th Cir. 1981).

236 Iowa's Electronic Funds Transfer Law is currently the subject of litigation. Five national banks have sued Iowa under a 1996 amendment to the National Bank Act, 12 U.S.C.A. § 36(j) (2001), that says ATMs are not considered bank branches. Although the Act authorizes states to regulate national banks that operate branches within their borders, the banks contend that because their ATMs are not branches, Iowa lacks authority to regulate them. Iowa's Attorney General, however, argues that the controlling statute is not the National Bank Act, but rather the federal Electronic Funds Transfer Act, 15 U.S.C.A. §§ 1693-1693r (1998), which expressly authorizes states to regulate ATMs. 15 U.S.C.A. § 1693a(6) (1998). In August 2001, a United States District Judge ruled that the suit may proceed. Metrobank, Nat'l Ass'n v. Foster, 178 F. Supp. 2d 987 (S.D. Iowa 2001); *see also* New Rules, *The ATM Surcharge e-bulletin December 2001, at* http:// www.newrules.org/misc/atm1201.htm [hereinafter *e-bulletin*].

237 *See e-bulletin, supra* note 236.

238 Iowa Code § 527.5(2)(a) (2001)

239 § 527.5(8)(a)

240 § 527.5(6)

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241 Iowa Banking Commissioner's No ATM Surcharge Order (April 22, 1992) (letter from Banking Superintendent Richard H. Buenneke to James W. Jorgensen, Vice President for Communications and Special Projects, ITS, Inc., responding to Mr. Jorgensen's request for Banking Division's opinion regarding surcharging at satellite terminals), http://www.newrules.org/finance/atmIA.html #iowa [hereinafter *Commissioner's Order*].

242 *Id.; see* § 527.5(6).

243 *See Commissioner's Order, supra* note 241.

244 *Id.; see* § 527.5(2)(a).

245 *Commissioner's Order, supra* note 241.

246 *Id.*

247 § 527.1(3)

248 Mitchell, *supra* note 63, at 5.

249 The "essential facility" doctrine has also been called the "bottleneck" doctrine. *E.g.*, Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

250 City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992).

251 *E.g.*, United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 397 (1911).

252 *E.g., Aspen*, 738 F.2d at 1521.

253 *E.g., Terminal R.R.*, 224 U.S. at 398.

254 *See* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986).

255 *Aspen*, 738 F.2d at 1519 (quoting Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir. 1980)).

256 Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991).

257 224 U.S. 383 (1911); *see also S. Cal. Edison*, 955 F.2d at 1379; Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989) (both noting that the essential facility doctrine's history has been traced back to *Terminal Railroad*).

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[258] *Terminal R.R.*, 224 U.S. at 394.

[259] *Id.* at 397.

[260] *Id.*

[261] *See id.* at 398.

[262] *Id.* at 410.

[263] *Id.* at 411.

[264] *See* Mitchell, *supra* note 63, at 5.

[265] *See Terminal R.R.*, 224 U.S. at 411.

[266] *Id.* at 397.

[267] *See id.*

[268] *Id.* (quoting defendants' brief).

[269] Mitchell, *supra* note 63, at 3; *see also* Baker & Brandel, *supra* note 14, at ¶ 6.04[2][b][v], at 6-66; Clarke, *supra* note 53, at 169-70 ("Because the fixed costs necessary to establish a network of secure electronic transactions are substantial, some observers warn that a few financial service providers with sufficient financial resources may eventually dominate the payments system.").

[270] *Terminal R.R.*, 224 U.S. at 405.

[271] 797 F.2d 370 (7th Cir. 1986).

[272] Id. at 376-77.

[273] 524 F. Supp. 1336 (D.D.C. 1981).

[274] *Id.* at 1352-53.

[275] *See generally* Balto, *supra* note 96, at 82 (positing that networks' prohibition of surcharging created a "level playing field" on which small and large banks could compete for retail deposits).

[276] *See generally* Averitt & Lande, *supra* note 171, at 44 ("The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers ....").

[277] *Prof'l Eng'rs*, 435 U.S. at 695.

[278] *See* Balto, *supra* note 96, at 84; *see also* Recent Cases, *State Banking Law — Connecticut Supreme Court Holds That Statute Does Not Prohibit ATM Surcharge Fees*, 113 HARV. L. REV. 2122, 2126 (2000) [hereinafter *Recent Cases*].

[279] *White Paper, supra* note 85.

[280] *Recent Cases, supra* note 278, at n.33.

[281] Balto, *supra* note 96, at 84; *see also Recent Cases, supra* note 278, at 2127.

[282] *Burke*, 742 A.2d at 311 (Berdon, J., dissenting) (quoting Barkley, Clark, Shook, Hardy & Bacon, LLP, *ATM Surcharges: Here Today, Gone Tomorrow*?, 5 CLARKS' BANK DEPOSITS & PAYMENTS MONTHLY 1, 3 (Feb. 1997)).

[283] *e-bulletin, supra* note 236.

[284] Iowa Code § 527.5(8)(a)(1) (2001); *see also* Mitchell, *supra* note 63, at 5.

[285] Mitchell, *supra* note 63, at 5.

[286] *Id.* at 5-6.

[287] *Id.* The inclusion of those state-appointed directors is a prerequisite for government approval. *See id.* at 6.

[288] *Id.* at 3.

[289] *Id.* at 4.

[290] *See* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1911).

[291] Mitchell, *supra* note 63, at 4.

[292] *Id.* at 5-6.

[293] *e-bulletin, supra* note 236.

[294] *See New Rules Fact Sheet, supra* note 11.

[295] Carl Kaysen & Donald F. Turner, *Antitrust Policy: An Economic and Legal Analysis* 18 (1959).

[296] *Id.* at 16.

[297] 359 U.S. 207 (1959).

[298] *Id.* at 209.

[299] *Id.* at 213-14 (quoting Internat'l Salt Co. v. United States, 332 U.S. 392, 396 (1947)).

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