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Enforcing the Community Reinvestment Act: The Courthouse Doors are Closed

I. INTRODUCTION

The spirit of community reinvestment has been around much longer than the twenty-year-old Community Reinvestment Act of 1977 (CRA). Because of banks' direct involvement with the government and the benefits derived from such a close relationship with the government, banks have traditionally "had an obligation to serve the public" as a cost of receiving such benefits. Congress enacted the CRA in 1977 to reinforce the importance of banks serving all members of a community equally, not just affluent residents. The CRA was adopted in response to a common but unfair bank lending practice known as "redlining," which excludes many low-income neighborhoods from credit consideration based on a somewhat arbitrary designation as an unacceptable credit risk. After Congress defined the goal of the CRA, it left the details related to achieving the goal to banking regulatory agencies. Throughout

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2. Id. at *5. Examples of such benefits include the privilege of borrowing money from the federal government through the Federal Reserve and the ability to insure deposits with federal funding. See id.


5. See id. at 252-53. The agencies are the Federal Reserve Board, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. The agencies adopted a general set of regulatory principles which banks were expected to follow, including creation and adoption of a "CRA policy" and retention of public comments about a bank's responsiveness to the needs of the neighborhoods. See id. at 252. The supervisory agencies also apply subjective tests measuring attention to community needs in lending, investment, and service to ensure compliance with the CRA. See id. at 255-56. Measurements are taken both as part of routine agency examination, and more importantly, when banks or bank holding companies file applications with regulatory agencies for approval to undertake new and different activities, such as merging two banks or acquiring a portion of the assets of another bank.
its history, the CRA’s regulations have reflected the importance of the public’s views about banking services by permitting “interested parties” to comment directly to the agencies on a bank’s service at particular times. The regulation of the CRA has been transformed over the years, both through Congressional and agency action. The

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See id. The result is a CRA rating, currently spanning from substantial noncompliance to outstanding. See id. at 256.


7. Until the last ten years, bank compliance with CRA was rarely used to force banks to meet community needs; rather, the CRA remained in a subservient role of providing encouragement to banks to comply with the Act. See Heather G. Kress, Making Community Reinvestment Work, NAT’L L.J., Aug. 30, 1993, at 21, 21. In 1989, the CRA gained strength with an amendment, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989. See 12 U.S.C. § 2906. The legislation required banking institutions to make their CRA rating and evaluations available to the public. See id. The regulatory agencies wrote companion enforcement guidelines. See, e.g., 12 C.F.R. §§ 228.28, 228.43 (defining ratings categories under the Board’s CRA compliance evaluations and specifying what information must be made available to the public). Additionally, the agencies issued a joint policy statement to encourage the public to come forward with statements about a bank’s CRA compliance, stating that CRA performance would receive substantial weight in an agency decision to approve or deny a bank’s application to undertake new and different activities. See Current Issues, supra note 3, at 255. These public disclosure and comment requirements “open[ed] the CRA process to more informed public discussion and involvement.” Citizen’s Guide, supra note 1, at *10.

In an attempt to make the CRA ratings process more objective, the regulatory agencies agreed upon numerous changes in the mechanics of administration in 1995. See David E. Teitelbaum & John M. Casanova, Regulatory Reform or Retread? The New Community Reinvestment Act Regulations, 51 BUS. LAW. 831 (1996). The new regulations took effect in July 1997. See id; see, e.g., 12 C.F.R. §§ 228.3-228.7 (effective July 1, 1997). The focus of the revised regulations was to measure the substantive activities of banks rather than merely the formal activities; measuring “dollars lent and invested, rather than meetings held.” Teitelbaum & Casanova, supra at 842. The new regulations did not change the effect of poor CRA performance on bank applications: the CRA rating remains one factor among many in the regulatory approval process. Even if the CRA rating is quantitatively below expectations, a bank’s application may still be approved if other factors outweigh the low CRA rating. See Current Issues, supra note 3, at 253.

Another recent regulatory change also affects the implementation of the CRA. Beginning in April 1997, a revision to Regulation Y allowed the banking regulatory agencies to use a less cumbersome, streamlined approval process. See Bank Holding Companies and Change in Bank Control (Regulation Y), 62 Fed. Reg. 9289, 9290 (1997) (to be codified at 12 C.F.R. pt. 225) [hereinafter Regulation Y]. The revision affected a few specific aspects of the CRA component of the agency application approval process. If a bank proposing an approval action meets certain capitalization and management requirements and maintains a CRA performance rating of “satisfactory” or better, then the bank is eligible for a streamlined approval process. See id. at 9291. The bank will be required to submit less information with its approval request. See id. The agency must also review the application more quickly for a compliant bank. The notice procedure is shortened to 15 days for banks with good management and at least satisfactory CRA ratings. See id. The agency may then process the application in 18 to 21 days, as opposed to the normal period of 30 or 60 days. See id. at 9293. The revision was an effort to reduce the increasing regulatory burden on banks, especially the burden of CRA compliance. See
role of interested parties has also changed, primarily due to the
c concerted efforts of community groups, which have turned the CRA
into a true force in banking regulation. Banks today do not dare
look beyond the CRA when asking for an agency’s approval of a
highly important activity, such as acquiring and merging with
another bank.

Bank mergers are of special concern for community groups
that represent the interests of residents in the neighborhoods where
banks do business. With federal subsidies for affordable housing
gradually shrinking, the bank merger boom has set off an alarm
among community groups in areas that are heavily dependent on the
availability of affordable housing. The concern is that mergers often
result in the elimination of community banking specialists in some
neighborhoods due to “consolidat[ion of] community development
officers into a single facility” and also result in the decreased
availability of funds due to fewer “banks vying to offer affordable
housing loans.” Community groups are feeling the pressure to
safeguard the economic protection they have secured since 1977 and
are continuing to push banks to comply with the CRA, especially
during fundamental changes in a bank’s operations. Perhaps just this
type of pressure led Inner City Press/Community on the Move (Inner
City) to try a new approach in CRA enforcement and to petition for
judicial review of a bank merger approved by the Board of
Governors of the Federal Reserve System (the Board). Much to
Inner City’s dismay, the Court of Appeals for the Second Circuit
firmly and rigidly drew a line at the courtroom door, preventing

id. at 9290. Notably, the public is still entitled to have 30 days to comment on the bank’s
proposal under both the streamlined and the normal review process, emphasizing the
agencies’ position that public comment is valuable in the approval process because the
public is the party most affected by any changes banks propose. See id. at 9291.

8. See supra note 7 and accompanying text.

9. See Dean Anason, Mergers Hurt CRA Efforts, Fed Governor Says, AM. BANKER,
Nov. 3, 1997, at 2 (summarizing comments made by Federal Reserve Board Governor
Laurence H. Meyer at a Federal Reserve Bank of Chicago conference).

10. Id.

11. Inner City is an urban community redevelopment group based in the Bronx. See
Dominic Bencivenga, Challenging Bank Deals; New Tactic Wins Review of Regulatory
See id.

12. Approval was granted in spite of an alleged history of noncompliance with the
CRA. See Lee v. Board of Govs. of the Fed. Reserve Sys., 118 F.3d 905, 909 (2d Cir.
1997).
community groups from challenging bank mergers by seeking judicial review of regulatory approval of the merger. The court ruled that community groups do not have standing under the Bank Holding Company Act (BHCA) to challenge a Board decision, thus limiting the sphere of influence of community groups to the regulatory process.

This court defeat is only a minor setback in community groups’ fight to enforce the CRA. Community groups continue to be “as vocal as ever about forcing acquiring banks to prove they have solid lending records.” These groups have made a tangible difference in some parts of the country, revitalizing inner cities and worn-out neighborhoods. A courtroom disappointment is certainly not the end of community participation in CRA enforcement.

Part II of this Note summarizes the Lee decision, discusses the background law that the Lee court relied upon, and analyzes the court’s reasoning for its holding. Part III of this piece addresses the possible effects that Lee will have on future attempts to gain access to the courtroom to enforce the CRA. Part III addresses the impact that community groups have had and will continue to have on the banking industry through involvement with the regulators. Finally, Part IV concludes that although community groups have not been successful in court, their effectiveness remains undiminished because of their diligence in the agency approval process.

13. See infra notes 41-46 and accompanying text (discussing the Lee court’s holding).
15. See infra notes 41-46 and accompanying text.
18. See infra notes 21-120 and accompanying text.
19. See infra notes 121-80 and accompanying text.
20. See infra notes 181-223 and accompanying text.
II. LEE v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

A. Case Summary

Inner City, a community group whose members are from low- and moderate-income neighborhoods in the Bronx, Matthew Lee, Inner City's executive director, and other residents filed suit against the Board and the Office of Thrift Supervision (OTS) to block two bank holding company mergers which the regulatory agencies approved. The merger approvals at issue were between Chase Manhattan Corporation (Chase) and U.S. Trust Company (UST) and also between Chase and Chemical Banking Corporation (Chemical). Inner City petitioned for judicial review of both regulatory agencies' decisions under section 9 of the BHCA. The Second Circuit combined the petitions into one decision.

Both merger actions involved sophisticated arrangements between the respective banks, including creating new bank holding companies, merging bank holding companies, and merging bank subsidiaries. Pursuant to the BHCA, the banks sought the Board’s approval before moving forward with these activities. The Board followed the normal approval procedure required by the BHCA and Board regulations.

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21. See Bencivenga, supra note 11, at 5-6. The OTS was named a defendant because one of the resulting bank holding companies needed the OTS's approval to take over a thrift subsidiary pursuant to the Home Owners' Loan Act, 12 U.S.C. § 1467(e) (1994). See Lee, 118 F.3d at 909.

22. See Lee, 118 F.3d at 908.

23. 12 U.S.C. § 1848 (1994) (authorizing petition for judicial review under the BHCA); see also Lee, 118 F.3d at 908.

24. See Lee, 118 F.3d at 908.

25. See id. at 908-09.

26. See id. In the merger between Chase and UST, Chase needed approval of the Board to seal the merger in accordance with section 3 of the BHCA, the section dealing with acquisition of bank shares and assets. See 12 U.S.C. § 1842. UST was only selling assets related to its securities operations to Chase, so UST wanted to create a new bank holding company under which the non-securities related businesses would be retained. See Lee, 118 F.3d at 908. UST sought approval from the Board to become New UST. See id.

require the Board to consider the needs of the community in the approval process. Community residents may submit written comments to the Board expressing views about banks’ service to their neighborhood. Inner City submitted numerous comments to the Board regarding the Chase mergers. Inner City commented that both Chase and UST were deficient in meeting CRA compliance standards and pointed to operating principles Inner City considered discriminatory. Despite these comments, the Board approved both merger applications.

Refusing to accept this defeat, Lee and Inner City took the issue another step. The BHCA permits judicial review of a regulatory agency’s actions. Because community groups like Inner City represent residents of neighborhoods “that will arguably be affected by a federal bank merger,” Inner City filed a petition for review of the Board’s approval of the mergers, claiming to be a party aggrieved under the BHCA. Under the Administrative Procedure Act (APA), the court of appeals has the power to declare illegal and to set aside any Board action which the court finds to be “arbitrary, capricious, [or] an abuse of discretion.”

Inner City attempted to convince the Second Circuit that setting aside the Board’s approval of the bank mergers was the appropriate course of action. As petitioner to the court, Inner City’s argument was twofold. First, Inner City attempted to establish standing in federal court to challenge the Board’s decision by claiming it was a “party aggrieved” under the BHCA. Inner City also stated that it had exhausted the available administrative remedies, that its members had been denied credit by the banks in

30. See Lee, 118 F.3d at 909.
31. See id. at 915.
32. See id. at 909.
33. See 12 U.S.C. § 1848 (“Any party aggrieved by an order of the Board . . . may obtain a review of such order in the United States Court of Appeals.”).
35. See Lee, 118 F.3d at 909-10.
36. 5 U.S.C. § 706 (1994) (describing the scope of review a court has when it is reviewing an administrative agency’s action).
37. See Lee, 118 F.3d at 910; see also 12 U.S.C. § 1848.
question in the past and were likely to be denied credit again in the future, and that as residents of low- and moderate-income neighborhoods, Inner City’s members were unlikely to receive “desired financial services” from the banks after the merger due to the banks’ poor CRA compliance. The second part of Inner City’s argument stated that the Board failed to properly consider its members’ protests during the approval process. Without proper consideration of all pertinent points of view, Inner City argued that the Board could not have made an informed, rational decision and that the approval of the merger should be set aside as “arbitrary, capricious, or an abuse of discretion.”

The Board’s argument, which ultimately convinced the court of appeals, countered each of Inner City’s arguments. First, the Board expressed doubt that Inner City and the other petitioners had standing under the BHCA, partly because some of the petitioners did not participate in the administrative proceedings and partly because none of the petitioners could show direct injury resulting from the Board’s approval of the mergers. Agreeing with the Board, the court held that Inner City did not qualify as a party aggrieved under the statute and, therefore, did not have standing to challenge the Board’s approvals. The Board also defended its actions as proper and appropriate. The court again agreed with the Board, stating that the Board thoroughly investigated Chase’s and UST’s CRA compliance and properly addressed each individual issue that Inner City brought to the Board’s attention. In sum, the court held that Inner City did not provide sufficient evidence to be granted standing, and even if Inner City did have standing, its challenge to the Board’s approval of the bank mergers was without

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38. See Lee, 118 F.3d at 910-11.
39. See id. at 915.
40. Id.
42. See Lee, 118 F.3d at 910.
43. See id.
44. See id.
45. See id. at 914-15.
merit. Inner City has not filed a writ of certiorari requesting review by the United States Supreme Court.

B. Background Law

Federal courts do not attend to every issue brought before them. The doctrine of standing defines what issues the federal courts can properly resolve. Standing imposes both constitutional limitations on the jurisdiction of federal courts and judicially self-imposed prudential limitations on exercising jurisdiction Case law through the years has refined the "cases or controversies" restriction under Article III of the United States Constitution into an "irreducible constitutional minimum" containing three elements. Plaintiffs must establish first that they have suffered an "injury in fact," which is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent." Plaintiffs must next establish that the injury can be fairly attributed to the defendant and that the defendant's actions caused the plaintiff's injury. Finally, the plaintiff must show that the injury will likely be redressed if the court finds for the plaintiff, as opposed to relief being speculative.

Courts treat organizational standing slightly differently than individual standing. An association may have standing to represent its members, even though the association cannot demonstrate injury to itself. Like an individual, however, an organization must meet

46. See id.
47. See Allen v. Wright, 468 U.S. 737, 750 (1984) (holding that petitioner was not personally denied equal treatment by the Internal Revenue Service (IRS), and thus did not have standing to challenge IRS noncompliance with established law).
49. See U.S. CONST. art. III, §§ 1, 2.
51. Id. (internal citations omitted).
52. See id.
53. See id. at 561. If a court finds relief would be "speculative," the court is generally expressing doubt as to whether its power to force an administrative agency, for example, to comply with statutory provisions would solve the plaintiff's problems. See generally, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1975) (holding that whether the Court's remedial powers would improve plaintiff's access to hospital services was speculative).
the constitutional requirements of standing. An organization must also meet a three-part test to establish standing to bring suit on behalf of its members. The organization’s members must have standing to sue on their own, the interests the organization seeks to protect must be central to its purpose, and neither the organization’s claim nor the requested relief can require the organization’s members to participate in the lawsuit.

After establishing constitutional grounds to justify a federal court’s jurisdiction, a plaintiff must address the prudential principles of standing. The courts set prudential limits upon themselves based on concerns about the proper role of the courts in government and society. Among prudential requirements is the necessity for a plaintiff’s complaint to fall “within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” Furthermore, a plaintiff must demonstrate that the interests the plaintiff seeks to protect are the plaintiff’s own, not the interests of a third party who could seek protection separately.

Congress can modify or abrogate prudential concerns through legislation. Congress may insert language into a statute that grants standing to a plaintiff who satisfies the constitutional requirements and perhaps not the prudential requirements of standing. This language allows an aggrieved plaintiff to act as a “private attorney general” and address statutory noncompliance as a private matter. The BHCA is such a statute, granting standing to challenge a banking regulatory agency’s decision to a “party aggrieved” by that

Brock, 477 U.S. 274, 281 (1985) (holding that the United Auto Workers had standing to litigate its members’ interests in unpaid unemployment benefits).

55. See id.


58. See id.

59. Id. The zone of interest test varies based on the statute at issue. See id. What will qualify a plaintiff under the zone of interest test to obtain judicial review of an agency’s actions may not qualify the same plaintiff for other types of judicial action. See id.

60. See Singleton v. Wulff, 428 U.S. 106, 113-14 (1976) (holding that third-party rights should not be adjudicated unnecessarily and that the best advocates of third-party rights are the third parties themselves).

61. See Bennett, 117 S. Ct. at 1161.

62. See Ozonoff v. Berzak, 744 F.2d 224, 228 (1st Cir. 1984).
agency's decision. A plaintiff complaining about a Board decision must still satisfy the constitutional requirements of standing, establishing that the plaintiff suffered injury in fact and that the injury is a result of the Board's decision. Additionally, a plaintiff aggrieved under the BHCA must have been a party to the supervisory agency decisions on the issue about which the plaintiff complains. Under the doctrine of exhaustion, a plaintiff must have exhausted the available administrative remedies prior to requesting a grant of standing.

Once a plaintiff has met the standing requirements, the plaintiff may request judicial review of an agency decision in the United States Court of Appeals. The court of appeals can set aside or modify an agency decision for a variety of reasons, including a finding that the agency acted arbitrarily in applying the relevant statutes, acted in excess of its statutory jurisdiction, or acted in a manner inconsistent with the evidence in the record. The court of appeals will give deference to the agency's interpretation of the statute where the statutory language is unclear or silent on the issue.

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64. See Vickars-Henry Corp. v. Board of Govs. of the Fed. Reserve Sys., 629 F.2d 629, 632 (9th Cir. 1980) (holding that a company and its shareholders, who were denied qualification as a bank holding company under the BHCA, have standing to appeal the Board's decision because they demonstrated sufficient injury in fact).
65. See Gustafson v. Board of Govs. of the Fed. Reserve Sys., 717 F.2d 244, 245 (5th Cir. 1983) (denying a petition for review because the petitioner failed to participate in administrative proceedings below, and holding that notice of the comment period was constitutionally sufficient); Blackstone Valley Nat'l Bank v. Board of Govs. of the Fed. Reserve Sys., 537 F.2d 1146, 1148 (1st Cir. 1976) (denying a bank's attempt to challenge the Board's denial of a bank acquisition because the bank did not participate in the agency proceeding below).
66. See Darby v. Cisneros, 509 U.S. 137, 153-54 (1993). Under section 10(a) of the Administrative Procedure Act, a party is entitled to judicial review of an agency's actions if the party has suffered a legal wrong due to the action of an agency, or if the party was aggrieved by the agency's actions within the meaning of the applicable statute. See id. at 146 (citing 5 U.S.C. § 702 (1987)). The BHCA allows judicial review for aggrieved parties. See 12 U.S.C. § 1848. The doctrine of exhaustion of administrative remedies only applies where the statute expressly requires this action or where an agency's rules require agency decisions to be appealed to the highest agency authority before an agency decision will be considered final and ripe for judicial review. See Darby, supra at 148.
67. See 12 U.S.C. § 1848. A party aggrieved may bring suit in the United States Court of Appeals for the circuit in which that party maintains its principle place of business or in the Court of Appeals for the District of Columbia. See id.
in dispute. As for findings of fact, the Board’s findings are conclusive as long as they are supported by substantial evidence.

Many parties have made judicial challenges to Board decisions over the years, most praying for the court of appeals to set aside a Board decision. While a few litigants have successfully established standing, most have been unable to do so. One failed attempt is particularly relevant to Lee. The petitioner in that case challenged the Board’s approval of a Florida bank merger, claiming that the bank had failed to comply with the CRA. In Kaimowitz v. Board of Governors of the Federal Reserve System, an attorney who represented several minority business owners petitioned on his own behalf for judicial review of the Board’s approval of First Union Corporation’s (First Union) application to acquire Florida National Banks of Florida, Inc. The petitioner filed protests with the federal regulators alleging that First Union had misrepresented the quality of services provided to minorities and that minorities had had difficulty obtaining loans from First Union. The petitioner claimed both of

69. See National Labor Relations Bd. v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987). With regard to agency interpretations of statutory language, a court will first try to determine the meaning of a statute by examining Congress’ intent in enacting the statute. See id. If Congress’ intent is clear, this meaning is given full effect and agency actions must be consistent with it. See id. On the other hand, if statutory language is ambiguous or silent on the issue at hand, the agency’s interpretation of the statute is accorded deference, so long as that interpretation is based on a rational construction of the statute. See id.


71. See, e.g., Jones v. Board of Govs. of the Fed. Reserve Sys., 79 F.3d 1168 (D.C. Cir. 1996) (denying judicial review of Board approval because petitioner did not qualify as someone who might be injured by discriminatory housing practices and therefore did not have standing as a party aggrieved); Gustafson v. Board of Govs. of the Fed. Reserve Sys., 717 F.2d 244, 245 (5th Cir. 1983); Blackstone Valley Nat’l Bank v. Board of Govs. of the Fed. Reserve Sys., 537 F.2d 1146, 1148 (1st Cir. 1976).

72. See Vickars-Henry Corp. v. Board of Govs. of the Fed. Reserve Sys., 629 F.2d 629, 632-33 (9th Cir. 1980) (holding that a company’s shareholders, on behalf of the company, do have standing to challenge the Board’s rejection of a company’s application; otherwise, the Board’s decisions would be unchecked by judicial review, which is not what the BHCA intended).

73. See, e.g., Gustafson, 717 F.2d at 247; Blackstone, 537 F.2d at 1148.


75. 940 F.2d 610 (11th Cir. 1991).

76. See id. at 611.

77. See id.
these actions violated the bank's mandate under CRA. Despite the
protests, the Board approved First Union's application, and the
petitioner subsequently requested judicial review of the Board's
action.

Producing the same result as in Lee, the Court of Appeals for
the Eleventh Circuit held that the attorney-petitioner in Kaimowitz
did not have standing under section 9 of the BHCA to request
judicial review. The court addressed only the constitutional aspect
of standing. The court noted that the petitioner failed to establish
standing because of a lack of evidence supporting the requisite
personal injury in fact to the party resulting directly from the Board's
actions. The fact that the petitioner participated in the
administrative proceedings below did not alone satisfy the
requirements of standing. The attorney-petitioner argued that the
Eleventh Circuit Court should follow a United States Supreme Court
case that supported enlarging the classes of people eligible to seek
judicial review of agency actions, an argument that would sweep the
petitioner into the zone of interest and meet the prudential standing
requirements. However, the court did not find the case controlling
where, as here, the constitutional standing requirement of injury in
fact had not been met. The court concluded that the petitioner did
not have standing and dismissed the petition.

Interestingly, dicta in Kaimowitz listed several hypothetical
petitioners who could potentially have sufficient actual or threatened
injury to allege "injury in fact." Such petitioners might meet the

78. See id.
79. See id.
80. See id. at 614.
81. See id. at 612-13.
82. See id. The Court found that the petitioner was asserting the rights of third parties,
business owners who he represented. See id.
83. See id. at 613. "Any person may file comments on an application that is before the
Board, regardless of whether he or she has been injured or will be injured by the outcome of
the Board's decision." Id.
84. See id. (referring to Association of Data Processing Serv. Orgs. v. Camp, 397 U.S.
150, 154 (1970)). "Where statutes are concerned, the trend is toward enlargement of the
class of people who may protest administrative action. The whole drive for enlarging
the category of aggrieved 'persons' is symptomatic of that trend." Id.
85. See id. at 613-14.
86. See id. at 614.
87. See id. at 613; see also supra note 51 and accompanying text.
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constitutional standing test and would then be able to challenge an agency decision in court. Hypothetical petitioners included members of the class of people the CRA was designed to protect, residents of housing areas which might benefit from CRA protection, and members of low- and moderate- income groups who might be better served by the bank's improved compliance with CRA guidelines. Based on the Eleventh Circuit's dicta, Lee and Inner City probably believed that they could establish standing by demonstrating that they fit into one or more of the categories listed in Kaimowitz. Had the Second Circuit agreed with Lee and followed Kaimowitz, community groups like Inner City would have been given the green light to seek judicial review of Board decisions. Because the Second Circuit disagreed with Lee's argument, it, like the Kaimowitz court, refused to grant standing to litigants who failed to demonstrate actual injury resulting from the Board's approval of a bank merger.

C. Discussion

In a thorough and extensive opinion, the Second Circuit disposed of Inner City's attempt to bring its fight against Board-approved bank mergers into the courtroom. The Lee case demonstrates the difficult task community groups will face establishing standing and gaining the ability to air their grievances in court. Furthermore, even if a community group succeeds in gaining access to the courtroom, courts are bound by guidelines of deference to the regulatory agencies and have limited authority to overturn decisions made by those agencies.

The petitioners in Lee initially claimed that as participants in the agency proceedings, they satisfied the definition of a party aggrieved under the BHCA. In agreement with Kaimowitz, the Lee court stated that while participation in administrative proceedings is a requirement of establishing personal injury under the constitutional

88. See Kaimowitz, 940 F2d at 613.
89. See Lee, 118 F.3d at 915.
90. See id.
91. See id. at 905.
92. See infra notes 170-74 and accompanying text (discussing judicial deference to agency decisions).
93. See Lee, 118 F.3d at 911; see also 12 U.S.C. § 1848 (1994).
standing doctrine, participation alone is insufficient. The category of parties allowed to participate in agency hearings is much broader than the category of parties who can claim injury in fact sufficient for a court to grant standing. In their arguments, Lee and Inner City relied heavily on the dicta in Kaimowitz that referred to parties who may be able to demonstrate sufficient injury in fact to support their standing argument. Inner City claimed that its members, who were residents of low- and moderate-income neighborhoods, were members of the class of people the CRA was designed to protect. The petitioners asserted that as members of this class, they fell into the statute's zone-of-interest, giving them the ability to enforce the statute's terms.

In the court's view, neither argument was adequate to support granting standing to the petitioners. The court believed, despite the language in Kaimowitz, that while participation in agency proceedings and membership in the class of people the CRA was designed to protect fulfilled the prudential requirements of standing, they did not fulfill the constitutional requirements. The court remained unconvinced that Inner City demonstrated actual or likely cognizable injury as a direct result of the Board's approval of the Chase mergers. The constitutional and prudential standing discussion in the Lee opinion is somewhat tangled, and this

94. See Lee, 118 F.3d at 911; see also Jones v. Board of Govs. of the Fed. Reserve Sys., 79 F.3d 1168, 1170 (D.C. Cir. 1996) (holding that to qualify as a party aggrieved under the BHCA, the party must have participated in the agency proceedings on a particular issue, but this alone is not enough to grant standing); Kaimowitz v. Board of Govs. of the Fed. Reserve Sys., 940 F.2d 610, 613 (11th Cir. 1991) (per curiam).

95. See Kaimowitz, 940 F.2d at 613.
96. See Lee, 118 F.3d at 911.
97. See id. at 912.
98. See id.
99. See id.
100. See id. The court dismissed the Kaimowitz argument outright, stating that even if the petitioners could rely on the Kaimowitz dicta (with which the court strongly disagreed), the petitioners have merely addressed the prudential component of standing which is only of concern after constitutional standing has been proven. See id.
101. See id. The court was not swayed by statements that some unnamed members of Inner City may have been subjected to unreasonable denial of credit in the past and that others who intended to apply for credit in the future would be faced with imminent harm by the bank's denial of credit at some inexact future date. See id. Without concrete evidence of the effects of past denials on Inner City members and without evidence that future harm was certain to occur, the court refused to allow Inner City's speculative and uncertain statements to be used against the Board. See id.
entanglement may be the seam through which Inner City or another community group may slip into court in a future case.  

After finding that the petitioners failed to demonstrate injury in fact, the court completed its discussion on the standing doctrine, confronting the second and third elements of the constitutional component, causation and redressibility. Causation requires proof that the party's injury was caused by the agency's acts, and redressibility requires that any remedial action taken by the court would relieve that injury. The CRA provides no specific descriptions of how noncompliance or failure to adequately enforce the statute could cause injury to a party, nor does the statute describe a remedy should such an injury occur. The petitioners did not establish that the Board's approval of the Chase mergers did or would likely harm them, nor did they establish that the CRA granted a remedy which court intervention could provide. Had the petitioners been able to establish personal injury sufficient to satisfy the court, perhaps they would have been able to convince the court that the injury resulted from the Board's actions.

Alternatively, the petitioners argued that the Chase mergers would produce business conditions in their neighborhoods that would negatively affect competition in several ways. First, Inner City claimed that an incorporated sector of the group, Inner City Community Development Loan Fund (the Fund), which purportedly issued very small loans to home buyers and small businesses in the community, would be economically injured by the Board's approval of the merger because of market dominance by Chase. The court rejected this claim because the petitioners' complaint failed to allege

102. This discussion is developed below. See infra notes 121-30 and accompanying text.
103. See Ozonoff v. Berzak, 744 F.2d 224, 227 (1st Cir. 1984).
104. The court looked to the CRA itself for guidance on causation and redressibility. The court did not find that the language of the CRA supported the petitioners' arguments. See Lee, 118 F.3d at 911. The CRA does not list specific standards of compliance, but instead was designed only to encourage banks to look deeper into the communities and to serve the credit needs of all of who reside there. See id. at 913. "The CRA is an amorphous statute...[it] is not a directive to undertake any particular program or to provide any credit to any particular individual." Id. at 911. Furthermore, the CRA is only a precatory statute that does not grant a private right of action to enforce its terms. See id.
105. Establishing injury is further discussed below. See infra notes 121-39 and accompanying text.
106. See Lee, 118 F.3d at 913.
that the Fund played a financial role in the community. Moreover, the Fund did not participate in the Board’s administrative proceedings. Even if Inner City had pursued this line of argument all the way through the agency and court proceedings, this argument would be difficult to uphold. Loaning money to a few homeowners on an ad hoc basis is a distant cousin, if related at all, to large-scale mortgage and consumer loans that are mass marketed to all banking customers, such as the loans made by Chase and Chemical.

Second, Lee and Inner City claimed to be customers of Chemical and argued that they would be harmed by less competition for services in their community. As customers of the bank which would be swallowed up in the merger, petitioners asserted that they would suffer direct injury to their property under antitrust laws. This injury would occur because the post-merger market power of Chase would force consumers to pay higher prices for the same goods in a market with less competition and fewer choices. Again, the court found the petitioners’ pleadings to be inadequate, stating that the petitioners made no factual assertions that they were customers of Chemical. Finally, sealing the envelope on the causation discussion, the court stated that establishing an antitrust violation would only allow the petitioners to seek relief under antitrust statutes, not under the CRA. An argument emphasizing anti-competitive results would be one way for community groups to seek judicial review of Board decisions, but to be effective the argument would need to be brought by other parties, with the community groups playing a secondary role. In the Lee case, the antitrust injury claims appeared to have been prepared at the last

107. See id.
108. See id. As mentioned previously, failure to participate in agency proceedings is fatal to any legal action following the proceeding. See, e.g., Kaimowitz v. Board of Govs. of the Fed. Reserve Sys., 940 F.2d 610, 613-14 (11th Cir. 1991) (per curium).
109. See Lee, 118 F.3d at 914.
110. See id. (citing Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).
111. See id.
112. See id.
113. See id.
114. Anti-competition lawsuits are discussed infra, notes 140-51 and accompanying text.
minute and were not well pled. The court rightfully rejected both of them.

The court may have seen some potential argument in favor of granting Lee and Inner City standing, however, for the court went on to discuss the merits of Inner City’s claims. The court did not agree with the petitioners’ allegations that the Board failed to address the petitioners’ concerns. The court was fully satisfied by the Board’s investigation, and the court, properly giving deference to the Board’s decision, refused to find the Board’s approval to be “arbitrary, capricious, or an abuse of discretion.” Even if the court agreed with the petitioners that the Board should have reached a different result, the court could not force the Board to reconsider the application as long as the Board supported its findings with sufficient evidence. Lacking proof that the Board acted without any consideration of Inner City’s protests, the Board’s approval of the Chase mergers was not reversible.

Much to the dismay of community groups and other interested parties, the Court of Appeals for the Second Circuit made the proper decision in Lee in regard to both the standing of community groups to seek judicial review and on the merits of the claim. The petitioners here were attempting to break new ground by seeking judicial review of a Board decision. However, the standing doctrine is well established in prior case law and, as a result, the court in Lee had little room to veer off the beaten path.

115. See Lee, 118 F.3d at 914.

116. While tenuous standing arguments may carry some weight in administrative proceedings with the Board of Governors, this court was unwilling to throw the life preserver to save Inner City’s weak antitrust causation argument when Inner City was already drowning in the well-established doctrine of standing. See id.

117. See id. at 915. Inner City claimed that the Board could not have adequately considered its argument because the Board refused to hold a hearing on the Chase merger applications. See id.

118. Id.; see also supra notes 67-70 and accompanying text (discussing judicial review of agency decisions).

119. See supra notes 68-70 and accompanying text (discussing judicial deference to agency decisions).

120. See supra notes 65-66 and accompanying text.
III. Community Groups Remain an Important Part of the Process

A. Will Community Groups Ever Get Their Day In Court?

Following the Lee decision, community groups and other third parties seeking to enforce the CRA through judicial review of banking regulatory agency decisions will probably find the doors to the courthouse closed. Establishing standing will be the first formidable challenge for community groups. The precedent set by the Lee decision, reinforcing the Kaimowitz decision, will make it difficult for individuals like Lee and groups like Inner City attempting to challenge banking regulatory agencies. These cases make it clear that parties who are unable to demonstrate personal injury do not meet the constitutional requirements of standing to challenge a Board approval of a financial institution merger.121 Unless a party can demonstrate actual or "certainly impending" personal injury,122 that the injury was caused by the agency's "allegedly unlawful regulation (or lack of regulation),"123 and that the statute or regulation relied upon provides redressibility for an injured party when the statute or regulation has not been followed, a party is not a party aggrieved with standing to challenge an agency decision.124 With two opinions decided on similar facts, both strongly opposed to granting standing, community groups will have to separate themselves from the previous decisions on the constitutional standing issue before a court will hear their arguments.

Some questions remain, however, between the dicta of the Kaimowitz decision and the outright dismissal of that dicta in the Lee opinion. The Kaimowitz dicta list examples of membership classes that could help a plaintiff prove personal injury.125 The dicta imply

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121. See Lee, 118 F.3d at 910; Kaimowitz v. Board of Govs. of the Fed. Reserve Sys., 940 F.2d 610, 611 (11th Cir. 1991) (per curium).
122. Lee, 118 F.3d at 912 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)).
123. Id. at 913 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).
124. See id.
125. See Kaimowitz, 940 F.2d at 613. The opinion suggests that a third party may be able to establish personal injury if the party can demonstrate any one of the following: "the
that membership in one of the listed groups will help prove that a
plaintiff is directly affected by an agency’s decision, which is
different than proving the plaintiff’s special interest in the matter is
affected by the agency’s decision.\textsuperscript{126} This interpretation is consistent
with \textit{Association of Data Processing Service Organizations v. Camp},\textsuperscript{127} which granted standing to a plaintiff which established that
direct economic injury to plaintiff’s members, rather than injury to
their special interest in the matter, was likely to occur following an
action by the Comptroller of the Currency allowing national banks to
engage in nonbanking activities incidental to providing banking
services. By comparison, the \textit{Lee} court determined that membership
in one of the \textit{Kaimowitz} classes was only sufficient for use in proving
how membership in the group might result in direct injury in fact.\textsuperscript{128} A discrepancy exists between these two cases in the relevance of the
dicta to the standing doctrine: \textit{Kaimowitz} specifically addressed
injury in fact, which relates to constitutional standing,\textsuperscript{129} while \textit{Lee}
is a member of the class of citizens that the CRA seeks to benefit; ... he is a member of a
minority or low- or moderate-income group that might benefit from ... improved CRA
performance; ... he resides in a minority or low- or moderate-income census tract that
might benefit under the CRA; or that he has sought or is likely to seek credit from [this]
bank ... .” \textit{Id.} No reference to the prudential principles of standing is mentioned in this
paragraph. \textit{See id.} The \textit{Lee} court analyzed Inner City’s use of \textit{Kaimowitz} in terms of
prudential standing, which seems contrary to what the \textit{Kaimowitz} court was implying.

\textsuperscript{126} See \textit{Lujan}, 504 U.S. at 563. Establishing a direct injury is an element of
constitutional standing. \textit{See id.} at 560. Injury to a cognizable interest is insufficient to meet
this requirement. \textit{See id.} at 563. A cognizable interest is something the plaintiff is
identified with or naturally concerned about. \textit{See id.}

When ... a plaintiff’s asserted injury arises from the government’s
allegedly unlawful regulation (or lack of regulation) of someone else,
much more is needed. ... The existence of one or more of the essential
elements of standing ‘depends on the unfettered choices made by
independent actors not before the courts ... .’ \textit{Id.} It becomes the burden
of the plaintiff to adduce facts showing that those choices have been or
will be made in such a manner as to produce causation and permit
redressability of injury. Thus, when the plaintiff is not himself the
object of the government action or inaction he challenges, standing is
not precluded, but it is ordinarily ‘substantially more difficult’ to
establish.

\textit{Id.} at 562 (citations omitted).

\textsuperscript{127} \textit{397 U.S.} 150, 151, 154 (1970). The Court stated that while standing may be
derived from non-economic as well as economic injuries, a party who is likely to be
financially injured is a suitable candidate for the role of “private attorney general to litigate
the issues of the public interest.” \textit{Id.}

\textsuperscript{128} \textit{See Lee}, 118 F.3d at 912.

\textsuperscript{129} \textit{See Kaimowitz}, 940 F.2d at 613.
stated unequivocally that the *Kaimowitz* dicta relate only to prudential issues.\textsuperscript{130}

Perhaps the inconsistency between the *Lee* and *Kaimowitz* decisions could be a tool for the next community group attempting to challenge a banking regulatory agency decision. In *Lee*, Inner City's greatest difficulty was establishing actual or imminent personal injury to its members following the completion of the bank merger. Inner City's failure to prove injury prevented the court from finding that the constitutional prong of standing had been met. This failure prevented Inner City from gaining access to the courtroom to challenge the Board. The key to courtroom access appears to be leaping over the constitutional standing hurdle. One potential way for a community group to make this leap and follow the case law would be to establish that the *Lee* court incorrectly categorized or misapplied *Kaimowitz*'s membership classes example as an element of the prudential standing argument. The group must demonstrate how membership in a class leads to direct injury in fact when banks fail to comply with the CRA. The group would have to document in great detail the CRA compliance problems with respect to its members, and if possible, to specific named members. Individuals willing to come forward with evidence about a bank's CRA noncompliance can be powerful weapons against a bank requesting approval of an application.\textsuperscript{131} Community groups can and should organize the use of this tactic in the agency approval process in the manner prescribed in the CRA, and individuals should be willing to provide evidence to the agency during hearings, if hearings are held. If the agency gives little regard to the group's evidence, then the group can use that same evidence in court. The group would also need to show how members of the group living in the bank's service area would stand to be hurt economically by the bank's actions as approved by the regulatory agency. If CRA compliance was not up

\textsuperscript{130} See *Lee*, 118 F.3d at 912.
\textsuperscript{131} See generally id. The court stated that *Lee* and Inner City failed to produce identifiable members of the group who had been denied credit in the past or who would be seeking credit from these specific banks in the future. See id. The petitioners alleged racial discrimination, but no individual members came forward with evidence of such treatment. See id. The court, relying on a U.S. Supreme Court case, stated that it perhaps would have been convinced by evidence of personal injury to an identified member of the group. See id. (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).
to par before the approval of the action, the group should demonstrate how CRA compliance is likely to decline further following implementation of the approved action. A community group should not rely on the inexact phrasing of *Kaimowitz* to prove injury in fact. Rather, the group must elaborate on how the categories establish direct injury to its members and must avoid the *Lee* interpretation of the categories.

Realistically, however, a circuit court that is called upon to interpret the *Lee* and *Kaimowitz* opinions may simply decide that the similar holdings provide the true precedent, rather than trudge through the swamp of semantics and implications to resolve the meaning of the dicta in *Kaimowitz*. Community groups that attempt to challenge banking regulatory agencies in court that have no more ammunition than Matthew Lee and Inner City had, will find themselves swimming upstream against the current. The outlook for community groups to meet the elements of standing in the future looks dim.

Past CRA noncompliance may be enough to establish that all members of the group will likely be financially harmed by future noncompliance. Illegal conduct in the past is not sufficient for a court to grant injunctive relief, even if that past conduct is causing continuing injury. Community groups will have to prove that future injury is imminent and certain. However, if community groups can link past or ongoing illegal activity to certain future harm by either the target or the surviving bank of a proposed merger, then they might have a strategy for alleging personal economic injury.

132. See *id.*

133. See *id.*

134. See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (discussing whether past exposure to illegal conduct is sufficient to satisfy constitutional standing requirements). Unless continual and present adverse effects accompany prior exposure to illegal conduct, a plaintiff's exposure to such conduct is not sufficient for constitutional standing. See *id.* at 102. A plaintiff must demonstrate a real and imminent threat of suffering repeated wrongs. See *id.* *Lyons* addressed whether a plaintiff who had been subdued by police using a "chokehold" on a previous occasion had standing to enjoin the police department from using the chokehold in the future. See *id.* at 97-98. The Supreme Court held that the plaintiff did not sufficiently prove real and immediate harm from police action. See *id.* at 105. The Court also set a high standard for the plaintiff to meet the constitutional standing requirements: the plaintiff would need to show either that all police officers used this tactic or that the city authorized or directed police to behave in this manner. See *id.* at 106. Were a similar burden to be placed on plaintiffs challenging regulatory agency actions (i.e.,
If the allegations are directed against the bank being taken over, the community group could allege that nothing will change after the merger and that the only change will be the name of the bank. If the allegations are directed against the surviving bank, the parties could allege that the problem will certainly continue and CRA compliance may deteriorate. The decline in CRA compliance might occur because of imminent consolidation of resources and officer personnel, closure of banking branches in certain neighborhoods, and reduced lending quality to residents of low-income neighborhoods.

Three examples of CRA deficiencies that constitute economic injury and commonly result from bank mergers are illustrative. First, bank employees sometimes make misleading statements to low-income customers, and the customers rely upon these statements when accepting home loans with high interest rates and exorbitant fees. Second, banks use inflated appraisal values of homes to make loans to residents for more than the homes are worth, making repayment of the loans by low-income residents more difficult. A third example of harm resulting from deficient CRA compliance is seen in statistics on the number of loans granted to residents of particular low-income communities. In one bank merger application, a community group opposing the merger discovered that the surviving bank made a decidedly disappointing three home loans in all of South Central Los Angeles, a predominantly black neighborhood showing that the Board authorized a bank to ignore the CRA, thereby applying allegedly discriminatory practices and harming low-income residents), plaintiffs would have a difficult time meeting the burden. Plaintiffs would be hard pressed to substantiate in agency records that an agency authorized, much less directed, a bank to behave in such a manner. Proving future harm would be a difficult task.

135. See Anason, supra note 9, at 2.
136. See Marc Levinson, More Bank Mergers: Bad Deals for the Poor?, NEWSWEEK, Jan. 22, 1996, at 48, 48. Mr. Levinson interviewed Lawrence Lindsey, who was at the time a member of the Board and the head of CRA enforcement. Mr. Lindsey gave an illustration of how lending standards affect residents of poorer neighborhoods. See id. One bank considered setting minimum down-payments on all mortgage loans at twenty percent. See id. Because high down-payments are difficult for many potential customers to pay, especially those customers in lower income brackets, the bank minimum would have in effect abolished housing lending in the low- and moderate-income sector. See id.
137. See Alex Pham, Banks' merger assessed at hearing; Fleet, Shawmut hear complaints, praise from politicians, community, BOSTON GLOBE, Aug. 27, 1995, at 32.
138. See id.
neighborhood, during one calendar year. A community group whose members have suffered this kind of discrimination might have enough evidence to convince a court that it has suffered personal injury from a bank's noncompliance with the CRA and that this type of economic injury is likely to continue or increase in the future. If it can show it has been personally injured this way, it might meet the constitutional prong of standing.

Challenges to a merger approved by the Board can be made on many different grounds, in addition to CRA noncompliance. Community groups can shift their focus to the area of antitrust litigation, especially where the anti-competitive effects of a merger would enhance allegations of noncompliance with the CRA. The antitrust concerns that bank regulators must consider in approving bank mergers overlap, at least on the surface, with CRA concerns. Regulators may not approve mergers where acquisition and consolidation would result in substantially less competition or a monopoly of services and where the proposed action would be adverse to "meeting the convenience and needs of the community." An example of a situation where community groups may choose to intervene is when a bank has been denied approval of an application to merge with another bank on antitrust grounds, and the bank seeks judicial review of the regulatory agency's denial pursuant to section 9 of the BHCA. In County National Bancorporation v. Board of Governors of the Federal Reserve System, a St. Louis bank petitioned for judicial review of a Board denial of its application to merge with another bank. The Board concluded that the merger would eliminate competition in an aggressive market, and the benefits the community would receive from the merger would not compensate for the impending resource concentration. Community groups could have stepped in on the Board's side in this case. Although the Board did not find a specific antitrust violation and

141. Id.
142. See id. § 1848 (setting forth a party's right to seek judicial review of an agency decision).
143. 654 F.2d 1253 (8th Cir. 1981).
144. See id. at 1255-56.
could have approved the merger,\textsuperscript{145} it concluded that the proposed merger did not meet the convenience and needs of the community\textsuperscript{146} and disapproved the merger application.\textsuperscript{147} The court held, however, that the Board had no authority to deny the merger on competitive grounds when it failed to find a violation of antitrust laws.\textsuperscript{148}

Community groups may get involved in antitrust cases in other ways. They can intervene on behalf of whichever party has an argument compatible with the group’s own "needs of the community" argument. Occasionally, the bank being taken over in a merger challenges a Board approval of the takeover.\textsuperscript{149} The takeover target may argue that certain lines of banking services would become concentrated with a decrease in competition, perhaps resulting from branch closures, which would potentially result in substantially fewer opportunities for low- and moderate-income customers to receive banking services tailored to their needs.\textsuperscript{150} Community groups could participate on the target bank’s side and agree that fewer service options would not benefit the community. Intervening on the side of the agency or a target bank in antitrust cases may provide a place for

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\item \textsuperscript{145} See \textit{id}. at 1256. Even if the Board had found a specific antitrust violation, it could have approved the merger under the convenience and needs of the community exception. \textit{See id}. at 1258. The convenience and needs of the community exception was created by Congress to allow a regulatory agency to approve mergers in spite of antitrust violations. \textit{See id}. The purpose of the exception was to mitigate harsh results of agency decisions on communities if antitrust laws were to be strictly applied. \textit{See id}.
\item \textsuperscript{146} \textit{See id}.
\item \textsuperscript{147} \textit{See id}. at 1256.
\item \textsuperscript{148} \textit{See id}. at 1260.
\item \textsuperscript{149} \textit{See}, e.g., Irving Bank Corp. v. Board of Govs. of the Fed. Reserve Sys., 845 F.2d 1035 (D.C. Cir. 1988) (upholding the Board’s approval of a merger after finding that substitute products, new market entrants, and customers’ power to demand more services from the surviving bank would eliminate market concerns about less competition in the banking market forwarded by the target bank). Although hostile takeovers are rare in the banking industry, they have become more common in the past few years and are expected to continue to increase in the near future. \textit{See} Jonathan D. Epstein, \textit{San Diego’s Bank of Commerce Persisting In Campaign to Buy $96M-Asset Neighbor}, AM. BANKER, June 13, 1997, at 6; Tania Padgett, \textit{Look for Increase in Hostile Takeovers}, AM. BANKER, Oct. 16, 1996, at 22 (“Virtually all mergers and acquisitions in the banking industry have been done on friendly terms, but hints are growing that hostile takeovers could be less rare in the future.”).
\item \textsuperscript{150} \textit{See} Levinson, \textit{supra} note 136, at 48. Federal Reserve Board Governor Lawrence Lindsey opined that mergers affect where a bank chooses to lend money, implying that the large banks, which are typically the banks initiating mergers with smaller neighborhood banks, do not service local communities as well as the neighborhood-based banks. \textit{See id}. “I probably share the innate prejudice that the local bank knows me and my family better.” \textit{Id}. 
\end{itemize}
community groups to voice their concerns about the effects of bank mergers in their neighborhoods.

The examples above may even provide community groups enough evidence to leap the hurdle Lee and Inner City could not surmount—establishing actual or imminent economic injury from a bank merger. Because the "needs of the community" language under the BHCA and the CRA is so similar, a community group may persuade a court to follow an argument based on antitrust concerns that turns into an argument based on injury to the community resulting from those anti-competitive effects. If the community group's agenda is solely to prevent bank mergers from harming residents, then the group may achieve the desired results by coming to the aid of another party supporting its agenda. Of course, this assumes there is another party willing to assert these arguments. If the community group believes that bringing the challenge under its own power is the only way to make its weight really count with the banks and regulators, then the groups will have to overcome the barriers that those who came before them could not.

Once actual injury has been proven, community groups will still have to establish causation and remedy. A group could argue that the CRA and the BHCA create private rights of action implicitly within the language of the statutes. Courts have occasionally

151. Compare 12 U.S.C. § 1842(c)(2) (1994) ("In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.") (emphasis added); with id. § 2901 ("Congress finds that regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business.") (emphasis added). An interesting question is whether these two provisions encompass the same meaning and cover the same concerns. Because the CRA was originated to eliminate a very specific problem (redlining), the CRA could be read very narrowly. Perhaps the needs of the community include only the needs associated with equal access to banking services regardless of where bank customers live. The BHCA, on the other hand, seems to cover a broader scope. The statutory language is general and is one of several factors the Board must consider in the application process. See id. § 1842(c). Inclusion of a needs of the community test under the BHCA in this fashion seems to indicate a broader protection of the public's interest, rather than a narrow protection against a specific type of activity. This issue may be worth pursuing, but it is beyond the scope of this Note.

152. See supra notes 52-64 and accompanying text (discussing the elements of standing).

153. See generally Thompson v. Thompson, 484 U.S. 174, 179 (1988) (describing the guidelines a court may use in determining whether a federal statute implies a private cause of action). The courts apply the implied cause of action doctrine when the language of the
implied a private right of action under other federal statutes and regulations. Finding a private right of action in the CRA would require a court to find substance in the language of the statute, the legislative history, or congressional intent sufficient to establish standards of conduct by which the court could evaluate a bank's performance. These standards would have to be sufficiently definite for a court to find that a bank's noncompliance with the standards caused the plaintiff's injury. Furthermore, having clear standards would also allow the court to use its remedial powers to redress the plaintiff's claimed injuries. The court would have a measuring stick for evaluating damages. This may, however, be a difficult argument for community groups to make. Because "[the CRA is] an amorphous statute," courts have refused to find in it an implied right of action. The statute has been interpreted to be precatory rather than directive, serving as encouragement for banks to become involved in the community rather than demanding that they do so. In fact, even Lee and Inner City conceded that the statute and the legislative history are silent or ambiguous on whether or not a private right of action exists within the statute. See id.  
154. In corporate securities regulations, private parties have been granted an implied cause of action under the Securities Exchange Act of 1934, permitting shareholders who suffer economic injury resulting from fraudulent proxy solicitations to challenge in court the proxy vote taken after distribution of the solicitations. See J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In this case, the Supreme Court interpreted the language in the statute referring to protection of investors as sufficient to imply that judicial relief was appropriate when violations of the statute caused injury to the investors and when the regulatory agencies could not provide sufficient relief. See id. at 432-34. But see Thompson, 484 U.S. at 187 (holding that the Parental Kidnapping Prevention Act of 1980 did not imply a private right of action to determine which of two conflicting state custody decisions is valid).  
155. See Thompson, 484 U.S. at 179; Lee v. Board of Govs. of the Fed. Reserve Sys., 118 F.3d 905, 913 (2d Cir. 1997). When making an inquiry in to this difficult area, the courts look to Congress' intent behind enacting a statute to determine whether or not to infer a private right of action. See Thompson, 484 U.S. at 179-80. "'[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" Id. (quoting Northwest Airlines v. Transport Workers, 451 U.S. 77, 94 (1981)).  
156. See Lee, 118 F.3d at 913. The court noted that directives to take on particular programs or requirements to provide credit to a class of people are standards it would hypothetically consider sufficiently definite. See id.  
158. Lee, 118 F.3d at 913; see also Hicks v. Resolution Trust Corp., 970 F.2d 378, 382 (7th Cir. 1992) (finding no implied right of action in the CRA).  
159. See Lee, 118 F.3d at 913.
CRA does not create a private right of action.\textsuperscript{160} Similar results have been reached under the BHCA.\textsuperscript{161} This issue has not been settled by the United States Supreme Court, however, and another party in another circuit may achieve a different result.

If the courts refuse to find an implied right of action in the BHCA or CRA, the community groups could plead their case to Congress and request that a private right of action be established by amendment to the CRA or the BHCA.\textsuperscript{162} The current trend in Congress, however, appears to favor restricting private causes of action rather than expanding those rights.\textsuperscript{163} Furthermore, Congress seems inclined to reduce the regulatory burden on banks and to speed up the application approval process by restricting the activities of individuals and community groups within that process, one which Congress apparently sees as being in need of “streamlining.”\textsuperscript{164} This inclination makes the possibility of legislative action designed to expand the activities of community groups in the judicial setting unlikely, because an expansion would undoubtedly be seen as increasing the burden on banks, rather than as improving CRA compliance.\textsuperscript{165} Unfortunately, finding sympathy in Congress to

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  \item \textsuperscript{160} See id.
  \item \textsuperscript{161} See Quaker City Nat'l Bank v. Hartley, 533 F. Supp. 126, 127 (S.D. Ohio 1981) (stating that no private cause of action can be implied from the BHCA).
  \item \textsuperscript{162} See Lee, 118 F.3d at 911. “To be sure, Congress can create new legal rights and obligations inuring to an individual and thereby confer standing on prospective litigants that otherwise would be lacking.” Id.
  \item \textsuperscript{163} See, e.g., 15 U.S.C.S. § 77z-1 (Law. Co-op. 1997). The Private Securities Litigation Reform Act of 1995 set limits on the types of class action suits that may be filed in federal courts pursuant to the Securities Exchange Act of 1934, eliminating certain classes from eligibility to bring action under the statute. See id. This legislation serves as an example of the trend to reduce the burdens of civil litigation in the federal courts.
  \item \textsuperscript{164} See Keith Bradsher, Republicans Seek a Cutback in Lending Rules for Banks, N.Y. TIMES, Mar. 31, 1995, at D1 (quoting Senator Alfonse M. D'Amato).
  \item \textsuperscript{165} For example, a bill was introduced in 1995 to amend the CRA, making compliance less burdensome and less costly for financial institutions. See Financial Institutions Regulatory Relief Act of 1995, H.R. 1362, 104th Cong. (1995). The bill came out of the House Committee on Banking and Financial Services but never traveled beyond the Union Calendar. The bill expanded the types of investments and loans that would boost a bank's CRA rating, allowed for self-certification of CRA compliance, and exempted small- and medium-sized banks from CRA compliance when submitting applications for regulatory approval. See id. subtit. B. While the bill specifically reemphasized the importance of public participation in the regulatory approval process, the bill's language made it more difficult for either community groups or the Justice Department to contest large banks. See Bradsher, supra note 164, at D1. By taking the regulatory agencies out of the certification process and removing CRA compliance from the factors to consider in an application
\end{itemize}
create a right of action, which inevitably would be more costly and burdensome to banks, seems but a distant vision at the present time.

Where no private right of action exists and the benefits of a particular federal statute or regulation are aimed at the public as a whole, such as in the antitrust statutes, the Department of Justice (DOJ) generally has standing to enforce the statute. In addition to filing antitrust actions, the DOJ initiates lawsuits filed to protect parties under the Fair Housing Act. In contrast to the banking regulatory agencies, the DOJ might prove more successful for community groups: the DOJ has had considerable success in recent years enforcing antidiscrimination laws against lending institutions. Community groups can take their complaints to the DOJ and participate in any action the government later pursues against the banks. This intervention is similar to the intervention that community groups may undertake in anti-competition lawsuits.

Finally, even if individuals and community groups like Lee and Inner City are granted standing to challenge an approval of a bank merger on CRA noncompliance grounds, an entirely separate approval, the public's view of a bank's CRA compliance necessarily would receive less attention. Now that community groups have been shut out of the courtroom by the Lee decision, the only place left for communities to have a voice is in the agency approval proceedings. Community groups will need to guard their niche carefully against further encroachment. The banking industry has new-found strength with the Republican majority in Congress, and the industry has used its influence to encourage Congress to pass legislation that will help the banking industry eliminate obstacles to strengthening its economic position. See John Atlas, Redlining Redux: A Bank-Inspired Bill to Devastate New Jersey Cities, N.Y. Times, Sept. 17, 1995, § 13NJ, at 17.

166. See, e.g., 28 C.F.R. § 0.40 (1997). The DOJ Antitrust Division is charged with protecting competition and prohibiting commercial restraints on the marketplace through civil and criminal enforcement proceedings. See id. The DOJ also furnishes reports on the effects proposed bank consolidations and mergers will have on competition. See id. subsec. (d).


168. See Vincent Di Lorenzo, Complexity and Legislative Signatures: Lending Discrimination Laws as a Test Case, 12 J.L. & Pol. 637, 652 (1997). Bank regulators have a reputation among community groups of not finding the alleged discrimination they complain about. See id. at 653. Lack of commitment is cited as one possible explanation for this problem, but a more likely possibility is that regulators are not as efficient as the DOJ at discovering how discrimination works its way into lending decisions. See id. This discrepancy was illustrated in a case where regulators gave a bank passing grades on its CRA inspection. Later, the DOJ found evidence of discrimination at that very bank, which led the bank to settle the alleged FHA violations out of court. It was the first settlement of its kind by a lending institution. See id.

issue is whether or not a court would choose to set aside or remand an agency's decision. The power granted to courts of appeal under the BHCA and the APA is very limited; the court has "jurisdiction to affirm, set aside, or modify the order of the Board" if the court finds that the order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\(^1\)\(^2\) The Board's decision is "conclusive" as long as the decision is supported by "substantial evidence."\(^1\)\(^2\) The \textit{Lee} court reviewed the Board's actions in the Chase mergers and determined that the Board had carefully considered all the evidence and had supported its decision with sufficient evidence.\(^1\)\(^3\) The barricades to setting aside or modifying an agency decision are not insurmountable, but the limitations on the ability of a court to review an agency action are clearly stated within the BHCA.\(^1\)\(^4\)

If community groups want any real effect on bank mergers, they will need to get into court as soon as the regulatory agency approves an application. The reason for this urgency is the complexity and intricacy of a merger. Once a merger has begun in earnest, "it becomes difficult, and sometimes virtually impossible, for a court to 'unscramble the eggs.'"\(^1\)\(^5\) The bank merger protested in \textit{Lee} demonstrates the enormity of these transactions. Chase's merger application indicated that Chase would be purchasing $363 million of UST's securities processing business.\(^1\)\(^6\) Thus, a community group asking a court to remand an agency's approval or set it aside altogether is asking a court to take an action it generally finds distasteful. Unless the circumstances are indeed extreme, community groups will probably not have much success in asking a court to remand an agency's decision affecting great sums of money and effort after the merger has already begun.

\(^{172}\) 12 U.S.C. § 1848.
\(^{173}\) See \textit{Lee v. Board of Govs. of the Fed. Reserve Sys.}, 118 F.3d 905, 916 (2d Cir. 1997).
\(^{174}\) \textit{See supra} notes 67-70 and accompanying text (discussing judicial review).
\(^{175}\) \textit{Sonesta Int'l Hotels Corp. v. Wellington Assocs.}, 483 F.2d 247, 250 (2d Cir. 1973) (quoting \textit{Electronic Specialty Co. v. International Controls Corp.}, 409 F.2d 937, 947 (2d Cir. 1969)).
\(^{176}\) \textit{See Bencivenga, supra} note 11, at 5.
The preferred course of action for mergers is to request preliminary injunctive relief to stay the merger. A preliminary injunction prevents the merger from beginning, at least until the regulatory agency reconsiders the application on remand. The action protects the parties on all sides, including the banks. If the agency affirms its original decision, the merger continues forward, albeit with what could be a costly interruption. If the agency reverses or modifies its original approval, then the community groups have been assured that the bank will be required to comply with the statutory requirements of the CRA before the action can continue. The bank should be offered ample opportunity to mend its problems, request re-approval, and continue with business without extinguishing the merger efforts completely. Therefore, for a court to seriously consider remanding an agency’s decision, a community

177. See Piper v. Chris-Craft Indus., 430 U.S. 1, 42 (1977); Consolidated Gold Fields v. Minorco, 871 F.2d 252, 261 (2d Cir. 1989); see also Sonesta, 483 F.2d at 250 (holding that preliminary injunctions are the best relief for challenging tender offers under federal securities laws). Preliminary injunctions are difficult to obtain. For a court to grant a preliminary injunction, the plaintiff must show that she is likely to succeed on the merits and that she will suffer irreparable harm if the injunction is not granted. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

178. Community groups will probably not succeed in getting a court to require a bank to comply with the CRA before the merger can continue. The best a group can hope for is that the court will force the Board to reconsider its own action. The community group has requested review of the Board’s actions, not review of the fact that the bank did not comply with the CRA. If a court agreed to issue a preliminary injunction, it would do so because the Board did not support its findings with sufficient evidence. See 12 U.S.C. § 1848 (1994). The Board would then be responsible for supporting its findings or reviewing its approval with regard to the bank’s CRA compliance.

Another judicial problem for requiring compliance with the CRA is that the CRA is merely a statute of encouragement without standards for compliance. See Kress, supra note 7, at 21. Courts are unlikely to require statutory compliance as a remedy when the statute itself gives no clear guidelines. Requiring statutory compliance in such a situation would implicate the standing issue of speculative relief. See supra notes 47-90 and accompanying text.

179. See Bencivenga, supra note 11, at 6. Due to securities market fluctuations and variable interest rates, delays caused by court challenges may alter the way mergers are priced. See id. Delays in closing deals can potentially be very costly. See id.

180. See generally Sonesta, 483 F.2d at 249 (granting a preliminary injunction to the target corporation, which prevented consummation of a tender offer). The facts in Sonesta refer to the interests of shareholders of a target corporation in challenging a tender offer. See id. The court held that the offeror failed to disclose material facts about the offer to the shareholders in violation of federal securities statutes. See id. The shareholders filed for a preliminary injunction in order to stop the tender offer before the process was too far along to be undone. See id. Drawing an analogy to the community groups and customers of a bank acting as “shareholders” interested in the bank’s compliance with CRA and BHCA statutory requirements seems logical.
group must be ready to act immediately to request preliminary injunctive relief. Community groups should avoid asking a court to decide whether the agency’s decision was arbitrary and capricious after a merger has already been accomplished and should avoid asking a court to choose a remedy it would most likely frown upon.

Getting into court will not be an easy task for community groups. Many options appear available, but the question becomes an issue of resource allocation. Community groups are already making a difference in how banks do business, and perhaps fighting within the judicial system is not the best way for community groups to make an impact and enforce the provisions of the CRA.

B. Community Groups Already Have an Impact on Banks

While the courtroom doors appear to be closed to community groups for the time being, the groups continue to impact banks and their communities where it matters most. Using the power granted to them by legislation and regulation, community groups are as active as ever in monitoring the lending records of merging banks.  

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<td>182. See Barbara A. Rehm &amp; Christopher Rhoads, Ahmanson Unveils Record $70 Billion Community Investment Plan Series, AM. BANKER, Mar. 21, 1997, at 9. &quot;In past megamergers, support from community activist groups has been crucial.&quot; Id.</td>
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<td>183. Matthew Lee is still pursuing court options, even following his defeat in Lee. Lee recently challenged the Board’s approval of Banc One Corporation’s merger with First USA in the D.C. Circuit, meeting the same result as in his challenge against the Chase mergers. See Inner City Press v. Board of Govs. of the Fed. Reserve Sys., 130 F.3d 1088 (D.C. Cir. 1997). Lee is pursuing similar cases in appellate courts across the country. See Appeals Court Rejects Merger Challenge, Says Activist Group Lacks Standing to Sue, 69 Banking Rep. (BNA) 917 (Dec. 22, 1997).</td>
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<td>184. See Regulation Y, supra note 7 ¶ 3, at 9291-92; see also supra note 7 and accompanying text. Despite the changes to Regulation Y, the Board expressed lasting interest in public participation in agency hearings. The result of the shortened review period appears to have little substantive effect on the role of community groups, other than</td>
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Public participation in CRA administration is founded in the language of the statute itself. Congress stated that financial institutions have a duty to meet both the depository and credit needs of the communities in which they are located. To that end, Congress requires the agencies that regulate financial institutions to use their authority to encourage financial institutions to meet community needs, including the needs of low- and moderate-income neighborhoods. Implicit in this mandate is the necessity of discovering what the community's requirements are. Regulatory agencies measure community needs in two ways. First, banks are obliged to do independent assessments of community needs, and the agencies measure a bank's success in addressing community needs through a series of performance tests. Second, the communities themselves play an important role in helping banks meet their needs. The public may comment directly to the bank on the bank's compliance with the CRA and on the services the bank provides to local neighborhoods. The bank must retain these comments in its office. The public is also invited to express opinions in writing about CRA compliance when a bank files an application for permission to do a new or different activity pursuant to one of many federal statutes.

Community groups have made their mark primarily when financial institutions seek permission from their supervisory agencies to conduct a certain type of activity or to conduct a merger. The regulatory application process is "the primary enforcement mechanism of the CRA." Public comment may support or criticize

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that the groups will need to submit their protests promptly. See Regulation Y, supra at 9294-95.

186. See id.
187. See 12 C.F.R. § 228 (1997). A good portion of Regulation BB is devoted to describing the tests and standards that the Board will use in determining CRA compliance. See id.
188. See id. § 228.43.
189. See id. § 228.29. Examples of situations when a bank must seek a regulatory agency's approval include establishing new branches to receive deposits, merging or consolidating with another financial institution, and obtaining federal deposit insurance. See id.
a financial institution's plans, and these comments become part of the official record of material the agency considers in the approval process. The comments that are of particular interest to both the regulators and the banks are those comments that are critical of the bank's application, which are commonly referred to as "CRA protests." CRA protests have become an effective tool for community groups in ensuring that the goals of the CRA are not overlooked in a bank's efforts to improve or change its business.

Calling attention to financial institutions' CRA shortcomings can be expensive when those institutions seek approval from a regulatory agency to change their business practices. In the worst case scenario for a bank, CRA noncompliance can be grounds for denying a bank's application. Denial of an application based on deficient CRA compliance is a rare occurrence, however.

Disapproval of an application is not the only way community groups make their presence felt. A contested application is slowed in the approval process due to the procedural requirements the agencies must follow. More information must be collected than for an uncontested application, hearings may be necessary to flesh out all the issues and collect evidence from all relevant parties, and the volume of information is considerably more extensive. A time delay increases the risk of a financial institution merger coming apart: when deals are struck on a per share price for the target bank's stock, any delay increases the possibility that the target stock's price will fluctuate beyond an acceptable level to maintain the terms of the deal. A bank also risks damage to its reputation when a

192. See id.
193. See 12 C.F.R. § 228.29(c). "A bank's record of performance may be the basis for denying or conditioning approval of an application . . . ." Id.
194. See Mark Fogarty, Questions Persist Over CRA, U.S. BANKER, Aug. 1996, at 68, 69 (noting that from 1989 to 1994, only three applications were denied on CRA grounds out of the 208 applications that were protested for that reason); Briefly: Banking, L.A. TIMES, Nov. 30, 1995, at D2 (stating that federal regulators refused 17 out of 41,311 total applications by banks to merge or expand, according to a General Accounting Office report).
195. See Current Issues, supra note 3, at 263.
196. See id. at 259-60.
community group alleges that the bank is insensitive to low- and moderate-income customers.\textsuperscript{198}

To avoid delays caused by contested applications, financial institutions often bargain with community groups.\textsuperscript{199} Bargaining may occur after a protest has already been filed. In some cases, the regulatory agency instructs the bank to negotiate with community groups, then restart the application process after the community groups are satisfied.\textsuperscript{200} Bargaining may also occur before the financial institution files an application, in a type of "preemptive strike" against protests.\textsuperscript{201} In return for a community group's agreement to drop a protest or to not file a protest, financial institutions will usually promise to funnel substantial sums of money into community lending and housing programs.\textsuperscript{202} Banks negotiate with community organizations because the organizations have become better "at presenting 'serious and sophisticated' arguments that the Fed must heed."\textsuperscript{203} When the Board's attention is drawn, the likelihood of delay or denial of an application increases. Because community groups are becoming more effective at putting on the pressure, and the regulatory agencies are taking notice, banks have been increasingly willing to settle with community groups to avoid delay or denial.\textsuperscript{204}

Bank mergers are of special concern for community groups. The aftershock of bank mergers on low- and moderate-income neighborhoods can be quite harmful. Bank mergers have often resulted in branch closures in these neighborhoods, thereby leading

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\textsuperscript{198} See De Leon, supra note 190.
\textsuperscript{199} See Bencivenga, supra note 11, at 6.
\textsuperscript{200} See LaVelle, supra note 197, at B2.
\textsuperscript{201} See De Leon, supra note 190.
\textsuperscript{202} See id.; see also Rehm & Rhoads, supra note 182, at 9. The Greenlining Coalition, a community group based in California, received a pledge from Home Savings of America to invest $70 billion in that market over a ten-year period. See id. Home Savings was in a hostile takeover battle with another financial institution for Great Western Financial Corporation. See id. In return for the pledge, Greenlining supported Home Savings, believing that Home Savings' rival would not make such a generous offer. See id. Most of the pledge from Home Savings lay in home and consumer loans for minorities and low- and moderate-income families. See id.
\textsuperscript{204} See De Leon, supra note 190.
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to reduced access to bank services and decreased lending to residents which in turn leads to a declining availability of affordable housing.\footnote{205} With the number of financial institution mergers increasing along with the value of assets acquired in merger activity,\footnote{206} the value of a smooth approval process will also rise.\footnote{207} Stakes are high for both the banks and the community groups in the 1990s, as all parties stand to lose a great deal.\footnote{208}

Even though a community group may succeed in persuading the Board to listen to its arguments and delay a bank’s application, the community group is not assured of stopping the proposed activity or receiving significant pledges of funding for their neighborhoods.\footnote{209} In fact, community groups often do not succeed in getting banks to promise large contributions or in getting the regulatory agency to deny an application.\footnote{210} In some instances, the regulatory agency may approve an application even when the CRA compliance record of the institution is less than satisfactory, conditioning the approval on agreements by the bank to improve CRA compliance within a given period of time.\footnote{211} The supervisory agency may also decide to

\footnotetext[205]{See LaVelle, supra note 197, at B3; John L. Douglas, Lending Institutions are Coming Under Increased Scrutiny for Their Alleged Refusal to Market Their Services in Minority Neighborhoods, NAT'L L.J., Oct. 24, 1994, at B4, B6.}

\footnotetext[206]{See Fed's Kelley, supra note 203.}

\footnotetext[207]{The bank-neighborhood partnership agreements from the late 1980s were often valued under $10 million. See Merrill Goozner, Loans to South Side Groups Ease Way for Bank Merger, CHI. TRIB., Oct. 10, 1988, at Business 4. As the size of banks and transactions have increased through the years, the negotiation period has been extended and the total amounts of the bargains have topped $100 billion. See Don Lee, B of A Pledges $140 Billion to Inner Cities, L.A. TIMES, Sept. 24, 1997, at Al.}

\footnotetext[208]{While protests to applications were infrequent in the 1980s, banks feared CRA protests because they knew that an unpleasant and treacherous road filled with public relations land mines lay ahead of them. See Douglas, supra note 205, at B6. The president of a major New York banking group was quoted as saying that private agreements reached between community groups and banks are “a form of blackmail . . . [e]very time you apply to acquire somebody, you get objections from every Tom, Dick, and Harry.” Catherine Yang et al., The “Blackmail” Making Banks Better Neighbors, BUS. WK., Aug. 15, 1988, at 101, 101. In the 1990s, the CRA protest is a common occurrence, particularly in the merger, consolidation, and acquisition arena. See Douglas, supra note 205, at B6.}

\footnotetext[209]{See Fogarty, supra note 194, at 69; Briefly: Banking, supra note 194, at D2.}

\footnotetext[210]{See Fogarty, supra note 194, at 69 (regarding low numbers of denials); Samuels, supra note 139, at D8 (demonstrating a community group’s unhappiness when Security Pacific stood by its CRA compliance record without offering a preemptive sum to the community for reinvestment).}

\footnotetext[211]{See Current Issues, supra note 3, at 260; see also Fed OK’s First Union Acquisition, Sets Tough CRA Compliance Conditions, 54 Banking Rep. (BNA) 10 (Jan. 8, 1990). Regulatory agencies tend to prefer that the applying financial institutions already}
approve the application in spite of protests or low CRA ratings if other factors weigh more heavily in favor of approving the application.\footnote{212} Once the regulatory agency approves a bank’s application, community groups have reached the end of their sphere of influence, because community groups do not have “veto power” over an agency’s decision to approve an application.\footnote{213}

Disagreement continues over whether the CRA and the actions community groups take make a difference in the neighborhoods the CRA was designed to serve. Community leaders have been quoted as saying the statute is a “farce,” while bank officers believe “the CRA is real and is going to become more fierce as time goes on.”\footnote{214} The positive results that the CRA has produced over the years are difficult to deny, however. Banking institutions nationwide have made loan commitments to low- and moderate-income borrowers of more than $175 billion since 1993.\footnote{215} Some inner city neighborhoods once plagued with crime, drugs, run-down buildings, and graffiti have been replaced with clean, low-income housing units filled with pleasant tenants.\footnote{216} Single-family homes have returned to downtown neighborhoods in areas where years ago nothing but despair could thrive.\footnote{217} Many agree that the reason the CRA has succeeded in these neighborhoods is because community groups have had the stamina to continually remind banking institutions in their neighborhoods that those institutions are serving a wide variety of customers.\footnote{218} Without the efforts of community groups, perhaps the revival of downtown areas would not be as widespread as it is today.

\footnotesize{have an established level of good CRA compliance when the application is made, rather than relying on promises from banks to make better efforts in the future. See id. at 10.}
\footnotesize{212. See Alan K. Ota, City Officials Want Promises from First Bank Before Merger, PORTLAND OREGONIAN, Apr. 11, 1997, at C1, available in 1997 WL 4162487.}
\footnotesize{213. See id.}
\footnotesize{214. Judy Nichols & William H. Carlile, Equity Laws Create Paperwork, Doubts; Complaints about Lending Practices Don’t Seem to Impede Bank Expansions, Mergers, ARIZONA REPUBLIC, July 11, 1993, at A14, available in 1993 WL 8196503. The community leader quoted was Maricopa County NAACP then-President, Charles R. Fannial, and the bank officer was Bank One Arizona then-Vice President, Gertrude Hodges-Randall. See id.}
\footnotesize{215. See 20-Year Antidote, supra note 17, at 02B.}
\footnotesize{216. See Yang, supra note 208, at 101.}
\footnotesize{217. See 20-Year Antidote, supra note 17, at 02B.}
\footnotesize{218. See, e.g., id. at 02B; Yang, supra note 208, at 101.}
Community groups should not be deterred by the Lee decision. After all, Lee himself is not discouraged. He continues to fight where he has had success before, in the regulatory approval process. Last fall, Lee targeted First Union's CRA compliance record in its quest to acquire and merge with Signet, and NationsBank's deal to acquire Barnett Banks in Florida. Both deals were successfully completed late in 1997. Lee has also attempted to enter the courtroom against other agencies like the Federal Deposit Insurance Corporation and the Comptroller of the Currency. He has, however, met with the same result as he did challenging the Board: Lee was unable to establish standing. Lee, along with other community groups, will probably keep fighting, despite his frustration with bank regulators like the Federal Reserve Board.

IV. CONCLUSION

The Lee decision dealt a blow to community groups hoping to challenge bank mergers in the courtroom. The groups now face a formidable challenge in attempting to prove that they have standing to enter the federal courts with their complaints. This setback is not a fatal blow to community groups, however. Very few people believed community groups could get into court. Lee and Inner City pushed the envelope to test their weight. The courts pressed back harder, telling the groups that they will need more ammunition if they choose to come forward again. Future community groups face significant obstacles if they plan to follow a similar path into court.


220. See Carey Gillam, NationsBank's Deal for Barnett Protested over Antitrust, Minority ending Issues, AM. BANKER, Nov. 3, 1997, at 8. "The Federal Reserve approved the deal without delay, but the OCC is still considering it. The OCC has met with Mr. Lee's group and appears to be paying attention to its concerns, Mr. Lee said." Id.


222. See id. at *2-3 ("[T]he Court finds that plaintiffs lack standing to pursue their claims").

223. See Gillam, supra note 220, at 8. Lee stated that he is not optimistic about a positive outcome for Inner City's protests against NationsBank. See id.
The fact that the courtroom doors are closed does not diminish the role community groups already play in banking regulation. Just a decade ago, banks were committing millions of dollars in investment in communities supported by organized groups. Now, banks are committing billions of dollars. The groups’ influence in banking regulation can not easily be overlooked. The Board takes the groups’ comments seriously, as do banks desiring a smooth road when dealing with the Board. Community groups have taken a statute that was arguably written with a limited purpose in mind and expanded it to cover a variety of public interests. The CRA was not written with any teeth, but community groups have helped turned the CRA into a real lion. The CRA is taken seriously by all parties involved in banking regulation, and a change in stance following Inner City’s court failure seems unlikely. Community groups have a principle role in enforcing the heart behind the CRA and will in all likelihood continue to do so.

LARA L. SPENCER