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A REVIEW OF THE LAW OF BANK MERGERS*

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Former Supreme Court Justice Abe Fortas once said that "[a]ntitrust is as deeply embedded in the American scene as baseball, bourbon whiskey, and aspirin."[1] While many people would agree with this statement, it is perhaps least true when applied to banking. This is evidenced by the bitter reaction to the application of the antitrust laws to bank mergers in the last two decades. This article will explore that reaction as well as the rather strange development of bank merger regulation and its effect on both bank mergers and bank holding company mergers. First we shall take a brief look at the relationship of banks and competition to help explain the policy struggle that came to a climax in the 1960's.

I. BANKING AND COMPETITION

There has always been a dichotomy of views on the value of competition in banking. This dichotomy was evidenced in the struggles of Jefferson and Hamilton, Jackson and Biddle, and much later, Carter Glass and Huey Long.[2] After the defeat of the Second Bank of the

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1 Fortas, Portents for New Antitrust Policy, 10 Antitrust Bull. 41, 42 (1965).

2 See Hale, Mergers of Financial Institutions, 21 Bus. Law. 211, 212 (1965). In each of these struggles there were other issues besides competition. Jefferson and Hamilton disputed the very power of the federal government to create such a national bank. Also the opponents of Hamilton's programs were afraid that such a bank would induce the mercantile class to identify their interest with, and support, a strong central govern-

United States, the proponents of free competition dominated the scene. Andrew Jackson expressed the view of many when, in vetoing the renewal of the Second Bank of the United States, he stated: "It is easy to conceive that great evils to our country and its institutions might flow from such a concentration of power in the hands of a few men."[3] President Tyler vetoed the charter for a Third Bank for much the same reason.[4] On the local level many states imposed strict branching regulations in order to restrict banking concentration, while both federal and state laws allowed easy entry into banking.[5] This legislation permitted the growth of many local banks and reflected the desire that banking should not be limited to the privileged and rich.[6] However, "free banking" led to situations in some states where anyone could open his own bank and even issue his own bank notes without any form of security or supervision.[7] A compromise bill to resolve the differences between the monopolistic Bank of the United States and the financial insecurity of free banking was introduced by Senator Sherman—whose name was later put on another act—in 1863.[8] It sought to establish a

ment. 1 L. Pollack (ed.), The Constitution and the Supreme Court 201-02 (1966). Jackson was concerned with the basic states rights questions as well as the fact that he thought the Bank was an instrument of aristocratic privilege and manipulation. Id. at 209-11. But in addition to these issues was always the fear of a small minority with monopolistic control over the money supply of the country and the power that follows any monopoly, but especially one of this kind.

[3] 2 J. Richardson, A Compilation of the Messages and Papers of the Presidents 580-81 (1905). The author of the address was Jackson's Secretary of the Treasury, a Maryland lawyer named Roger B. Taney. Four years later Jackson named him Chief Justice of the United States.

Interestingly enough, it has been suggested that the real force behind the demise of the Second Bank was the New York financial community, represented by Martin Van Buren, a close adviser to Jackson. Rather than stopping "such a concentration of power in the hands of a few men," they merely wanted to shift the power from Philadelphia to New York. Ironically, they were only half successful since a Bank of the United States was never reestablished in New York. See Hammond, Banking before the Civil War, in Banking and Monetary Studies 13 (D. Carson ed. 1963).

[4] The veto message is contained in 4 J. Richardson, A Compilation of the Messages and Papers of the President 63-72 (1905). While Tyler vetoed the bill for the Third Bank, he had earlier supported a resolution censuring Jackson for his activities against the Second Bank. See J. Kennedy, Profiles in Courage 228-29 (1961).

[5] See Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bull. 859, 862 (1971).

[6] Hammond, Banking Before the Civil War, in Banking and Monetary Studies 7ff. (D. Carson ed. 1963).

[7] Hale, supra note 2, at 212.

[8] Years later Sherman recalled the reason for his bill:

> The issue of circulating notes by state banks had been the fruitful cause of loss, contention and bankruptcy, not only of the banks issuing them, but of all business men depending upon them for financial aid. Inflation and apparent prosperity were often followed by the closing of one bank and distrust of all others. The notes of a broken bank were rarely paid, the assets of such bank being generally applied to the payment of other liabilities, leaving the loss to fall on the holders of the notes, mostly innocent persons of limited means.

"National Bank System."[9] The subsequent creation of this national bank system and the strengthening of the state bank system resulted in the dual banking system we have today.

The Depression had a strong effect on the banking industry. In the early 1930's over 9,000 banks failed and 2,300 more were absorbed by mergers.[10] This bank instability led to the Bank Holiday of March 1933, the Emergency Banking Act of 1933 and the Banking Act of 1935.[11] As a result of these and other laws entry into banking became much more difficult. However, even before the impact of the Depression the banking industry had been undergoing changes. Improvement of transportation facilities decreased the need for local banks, since customers were now more mobile; industrial growth precipitated the demand for larger, more centralized banks with greater assets. More banks merged, and others failed from natural causes as the banking market became more concentrated. From 1921 to 1933 over 15,000 banks failed, and the total number of banking offices decreased from 31,000 to 17,000.[12] Then, in the middle 1930's, as a result of the federal legislation, the banking situation stabilized and the next fifteen years even saw a slow retreat from banking concentration.[13] However, the traumatic years of bank failures and bankruptcies were not forgotten; many would have agreed with the 1959 Senate report that found the banking failures to have been "the result of too much competition."[14]

In the 1950's a tremendous resurgence in mergers resulted in further banking concentration. This consolidation once again brought into conflict the two opposing philosophies. The question this time was whether the antitrust laws should be applicable to bank mergers. One side felt, in the words of the Attorney General, that "because of the central role of banks in relation to other businesses, the traditional antitrust goal of prevention of undue concentration is as important in banking as in any other field."[15] The other side countered with the argument

1 J. Sherman, Recollections of Forty Years in the House, Senate and Cabinet 282-83 (1895).

9 Sherman recognized that the basic objections to the "monopolistic" U. S. Bank "did not lie against the organization of a system of national banks extending over the country, which required every dollar of notes issued to be secured by a larger amount of bonds of the United States, to be deposited in the treasury of the United States, thus saving the note holder from all possibility of loss." Id. at 283.

10 S. Rep. No. 196, 86th Cong., 1st Sess. 17 (1959).

11 See Shull & Horvitz, supra note 5, at 864.

12 Id. at 863.

13 Id. at 878.

14 S. Rep. No. 196, 86th Cong., 1st Sess. 17 (1959). See also 105 Cong. Rec. 8076 (1959) (remarks of Senator Robertson). See generally Kent, Dual Banking between the Two World Wars in Carson, supra note 3, at 43ff.

15 Hearings on S. 1698 Before a Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 89th Cong., 1st Sess. 170 (1965) (testimony of Att'y Gen. Katzenbach).

that "to permit unregulated and unrestricted competition to become the business philosophy of banking could only have dire consequences for the general public which prefers a stable financial structure" and that increased concentration results in stronger institutions and "therefore serves as a safeguard against failure."[16]

For five years bills that sought to check banking concentration were introduced. Finally, in 1960, the Bank Merger Act[17] was passed. This act can be viewed as something of a compromise between the two philosophies since it recognized the unique nature of banking and also —to a lesser degree—the need for competition. Yet it did not resolve the conflict. Rather, it marked only the first round of a policy struggle that was to match Congress against the Supreme Court and one government agency against another. Some have characterized this struggle as a breakdown in the normal separation of powers doctrine which guides the legislature and the judiciary. Whether this contention is true or not, these events did cast doubt on the ability of Congress to regulate economic activity and at the same time provided one of the most interesting chapters in American antitrust history.

A. *Why Do Banks Merge?*

Before we discuss the substantive development of bank merger regulation it would be wise to examine some of the reasons which motivate banks to merge.[18] The principal motivation is the desire to expand the capital assets of the bank. There are federal limitations on the amount a bank can lend, based upon a percentage of its capital stock and surplus.[19] A bank might fear that its present assets are insufficient to permit it to service its growing industrial clients or to compete for larger industrial clients. This was one of the reasons for the Philadelphia National Bank merger[20] and was one of the reasons frequently noted by the Comptroller of the Currency in his approvals of mergers.[21]

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[16] Casson & Burrus, Federal Regulation of Bank Mergers, 18 Am. U. L. Rev. 677, 678 (1969). See generally Hearings on S. 1698 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 1st Sess. (1965).

[17] 74 Stat. 129 (1960), 12 U.S.C. § 1828 (1964), as amended, 12 U.S.C. § 1828(c) (Supp. 1971).

[18] See generally Casson & Burrus, supra note 16, at 679.

[19] 12 U.S.C. § 84 (1964), as amended, 12 U.S.C. § 84 (Supp. 1972).

[20] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963). See text at notes 88-106 infra.

[21] See, e.g., 1965-66 Comp. Curr. Ann. Rep. 52:

> As regards lending limits, in 1963, the applicants as a group placed or shared only two loans which exceeded the lending limit of the originating bank. However, it is expected that the merger will have a beneficial impact on the county's economy through stimulating the creation of larger business and agricultural units and attracting new industry to the area which will need larger loans.

Id.

Another motivation is the desire to realize economies of scale.[22] Many banks suffer from a lack of depth in management[23] and, when two banks merge, the best personnel of the banks can be used to manage and develop the larger assets of the combined bank. Furthermore, the larger size of the bank and larger salaries that it can afford can be used to attract new talent.[24] Because banks compete with the glamor conglomerates for management personnel, they cannot afford to be considered small back-waters or retirement farms. This factor was important in the Phillipsburg Bank merger[25] and is another reason the Comptroller has often cited when approving mergers.[26]

A third reason is "the desire for competitive diversification of deposits and services."[27] By merging, a bank can increase the number of its branches or its ability to branch in the future. It can also combine its specialty with that of another bank. For example, one bank might have abundant trust funds while the other has a good investment counseling service, and a merger would allow for the maximum efficient use of both. Sometimes, too, the sheer size of a large bank will force potential competitors to merge in order to meet the challenge. Such was the case in the Crocker-Anglo National Bank merger which was part of an effort to compete with the mammoth Bank of America in California.[28]

While these considerations are not the only motivations for banks to merge they are certainly the dominant ones; in almost any merger one can see a variation of them. Yet while these considerations may provide ample justification for the banks' stockholders and the Comptroller, they may not, as we shall see, withstand the test of judicial review.

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22 Casson & Burrus, supra note 16, at 680.

23 See Hearings on S. 1698 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 1st Sess. 59-60 (1965).

24 Bigness has been considered a psychological advantage in attracting new personnel. See Reed, Primer for a President, 1 Mergers & Acquisitions 21 (1965).

25 As will be seen later, such importance is not necessarily enough to justify a merger. The Supreme Court in the *Phillipsburg* case instructed the district court on remand to consider in concrete detail the adequacy of the merging banks' attempts "to overcome their loan, trust, and personnel difficulties by methods short of their own merger." United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 372 (1970). See text at notes 163-79 infra.

26 See, e.g., 1965-66 Comp. Curr. Ann. Rep. 49.

27 Casson & Burrus, supra note 16, at 681. For a general discussion of motivations under this category see Gruis, Antitrust Laws and Their Application to Banking, 24 Geo. Wash. L. Rev. 89 (1959); Administrator of Nat'l Banks, A Statement of Policy, in Studies in Banking Competition and the Banking Structure 401, 406 (1966).

28 See United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 149 (N.D. Cal. 1967).

B. *Bank Mergers and the Antitrust Laws*

For many years bank mergers were considered out of the reach of the antitrust laws.[29] Section 7 of the Clayton Act contained a large loophole which in effect exempted asset acquisitions from the scope of the Act. Historically, banks have almost always combined through such asset acquisitions or through some form of statutory merger or consolidation with assumption of liabilities or exchanges of stock.[30] Consequently, the Clayton Act had as little effect on bank mergers as it did on other industrial mergers.

The Sherman Act applied to bank mergers but in over seventy years only one action was filed and that was not until 1959.[31] The problem with the Sherman Act was that the Government had to prove that the merger had, in fact, already restrained trade unreasonably. This burden of proof was very difficult to sustain, especially after the *Columbia Steel* decision in which the Supreme Court established a broad rule of reason test for mergers.[32]

There are two other statutes that could have been used to apply antitrust principles to bank mergers: the National Bank Consolidation Act of 1918[33] and the Federal Deposit Insurance Corporation Act.[34] Although each provided for banking agency review of mergers, neither established standards as to the competitive nature or results of the combinations. Furthermore, since neither the Comptroller of the Currency nor the FDIC had had much experience in the merger area, and since neither was particularly equipped to give adequate consideration to it, promotion of competition was never a strong factor in the public interest standard applied by these agencies.[35]

Finally, the Federal Reserve Board, in Section 11 of the Clayton Act, was given authority to enforce compliance with those sections of the Act which were "applicable to banks, banking associations, and trust companies."[36] The first time the Board used that power in connection with mergers was in 1948, when it filed a complaint charging Transamerica Corporation with a violation of section 7 for its systematic

[29] See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 378 (1963) (dissenting opinion).

[30] S. Rep. No. 196, 86th Cong., 1st Sess. (1959); Casson & Burrus, supra note 16, at 682. One of the reasons for this is that federal law generally prohibits member banks of the Federal Reserve System from directly purchasing corporate stock of affiliates. 12 U.S.C. § 371c (1970).

[31] United States v. Firstamerica Corp., Civil No. 38139 (N.D. Cal. 1959), cert. denied, 361 U.S. 928 (1960).

[32] United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[33] 12 U.S.C. §§ 215-15b (Supp. 1972).

[34] 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

[35] See S. Rep. No. 196, 86th Cong., 1st Sess. 6-7 (1959); Casson & Burrus, supra note 16, at 682.

[36] 15 U.S.C. § 21(a) (1970).

acquisition of independent banks over a five-state area. In 1952 the Board entered an order requiring substantial divestiture. On appeal, the Board was reversed.[37] However, an important point of the decision was that the appellate court rejected Transamerica's argument that section 7 was not applicable to banks. Transamerica argued that Congress had always used special banking legislation to regulate banks and that it did not mean to depart from this practice with the Clayton Act. The court held that section 7 did apply even though it was "doubtless true that the members of Congress in enacting Section 7 of the Clayton Act in 1914 did not specifically contemplate that 'corporations engaged in commerce' would include banks."[38] Although Transamerica's bank acquisitions were upheld, the court's reasoning on the applicability of section 7 was an omen of things to come.

1. *The Effect of the Celler-Kefauver Amendment*

In the late 1940's Congress became concerned about the growing trend toward industrial concentration in general and amended the Clayton Act in 1950 to read:

> No corporation engaged in commerce shall acquire, directly, or indirectly, the whole or any part of the stock or other share capital and no corporation *subject to the jurisdiction of the Federal Trade Commission* shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[39]

At the time it was generally thought that the phrase "subject to the jurisdiction of the Federal Trade Commission" exempted banks from application of the asset provision, since Section 11 of the Act specifically gave jurisdiction over banks to the Federal Reserve Board. Legislators, the banking agencies and even the Attorney General and heads of the Antitrust Division of the Department of Justice subscribed to this theory.[40] The well-known Kaysen and Turner book, *Antitrust Policy*,[41] written in 1959, included banks in its list of industries exempt from the antitrust laws. Furthermore, the *Report of the Attorney Gen-*

[37] Transamerica Corp. v. FRB, 206 F.2d 163 (3d Cir.), cert. denied, 346 U.S. 901 (1953).

[38] 206 F.2d at 166.

[39] 15 U.S.C. § 18 (1970) (emphasis added).

[40] Hearings on S. 3911 Before a Subcomm. of the Senate Comm. on Banking and Currency, 84th Cong., 2d Sess. 60-61, 84 (1956); Hearings on S. 1062 Before the Senate Comm. on Banking and Currency, 86th Cong., 1st Sess. 9 (1959).

[41] C. Kaysen & D. Turner, Antitrust Policy—An Economic and Legal Analysis 42 (1959).

eral's Committee to Study the Antitrust Laws,[42] an authoritative review of the scope of the antitrust laws, gave no special attention to bank mergers. The position of most observers before 1960 was summarized by the Assistant Attorney General in charge of the Antitrust Division, Stanley Barnes, in his testimony on a proposal before Congress to amend Section 7 of the Clayton Act to apply to banks. Barnes testified:

> The pending proposal would plug a loophole left by present section 7's failure to cover asset acquisition by banks. On the one hand, that provision's stock acquisition bar applies to all corporations "engaged in commerce." Section 7's acquisition portion, in sharp contrast, covers only corporations "subject to the jurisdiction of the Federal Trade Commission." Further, section 11 of the Clayton Act exempts banks from Federal Trade Commission jurisdiction by specifying that "authority to enforce compliance" with section 7 "is hereby vested . . . in the Federal Reserve Board where applicable to banks, banking associations and trust companies." On the basis of these provisions this Department has concluded that asset acquisition by banks is not covered by section 7 as amended in 1950.[43]

2. *Bank Merger Trend*

As mentioned above, a strong bank merger trend developed in the early 1950's and became especially strong after 1954.[44] From 1950 to 1958, 1,300 bank combinations involving over 26 billion dollars occurred.[45] Yet even more alarming than the total number of mergers were the dramatic combinations of nationally known banks. In 1955 the Chase National Bank, with assets of 5.7 billion dollars, merged with both the Bank of Manhattan Company, with assets of 1.6 billion dollars, and the Bronx County Trust Company, with assets of 76 million dollars. The Antitrust Division made an investigation of this merger but concluded "that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act."[46] Then Bankers Trust,

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[42] Report of the Attorney General's National Committee to Study the Antitrust Laws (1955). This may be attributed to the lack of case law on the application of the antitrust laws to bank mergers. See Section on Antitrust of ABA, Antitrust Developments 1955-1968, at 90-91 n.4 (1968).

[43] Hearings on H.R. 5948 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 6 (1955).

[44] Shull & Horvitz, supra note 5, at 868.

[45] Hearings on S. 1062 Before the Senate Comm. on Banking and Currency, 86th Cong., 1st Sess. 138 (1959).

[46] Hearings on Current Antitrust Problems Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 2141 (1955); see also Interim Re-

with 2.3 billion dollars in assets, acquired Public National with over 500 million dollars in assets; and National City Bank, with over 6 billion dollars in assets, acquired First National with 715 million dollars in assets. In 1956, the West Coast picked up the trend as the Crocker National Bank, with assets of 1.5 billion dollars, acquired the Anglo National Bank with 1 billion dollars in assets. By 1960, the four largest banks in each of the sixteen most important financial centers of the country controlled sixty percent of all bank assets in those centers.[47] The most startling fact subsequently discovered by Congress was that most of these mergers needed no federal approval whatsoever.[48] It was even possible for banks to avoid review by any of the three banking agencies.[49] For instance, the Federal Reserve Board could review a merger only if it would create a member bank with a smaller capital or surplus than the combined capital or surplus of the banks involved in the transaction, and it would be an unusual merger that produced such a result.[50] Similarly the FDIC could not review mergers of FDIC-insured state banks that were not members of the Federal Reserve System unless the total capital stock or surplus of the resulting or assuming bank was less than the aggregate capital stock or aggregate surplus, respectively, of all the merging or consolidating banks or all of the parties to the assumptions of the liabilities.[51] Finally, if a national bank purchased assets and assumed liabilities of another bank, the Comptroller's approval was not directly required unless the capital stock or surplus of the assuming bank would be less than the aggregate capital stock or surplus of the combining banks.[52] Thus it became apparent that something had to be done.

II. Bank Merger Act of 1960

A. *Legislative History*

Legislation to deal with these combinations was proposed in Congress throughout the 1950's. In 1956 seven different proposals were introduced.[53] Four bills sought to bring acquisitions of businesses not

port of the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 1st Sess. 34 (1955).

47 105 Cong. Rec. 8114 (1959).

48 See Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind. L. J. 287, 298 (1962).

49 See Waxberg & Robinson, Chaos in Federal Regulation of Bank Mergers: A Need for Legislative Revision, 82 Banking L. J. 377, 385 (1965).

50 H.R. Rep. No. 1416, 86th Cong., 2d Sess. 7 (1960).

51 Id. at 8.

52 Id. at 6.

53 Mogel, Bank Mergers and the Antitrust Laws, 17 Am. U.L. Rev. 57, 58 (1967). See also Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L.J. 369, 372-74 (1958).

subject to the jurisdiction of the FTC—a category which everyone at that time thought included banks—within the scope of section 7;[54] two would have prevented bank acquisitions that would "reduce competition substantially";[55] and one would have set up standards for judging whether the merger was in the public interest.[56] This last bill was introduced by Senator Robertson and might be considered the parent of the Bank Merger Act of 1960.[57] It required the banking agencies to consider six noncompetitive or banking factors as well as "whether the effect thereof (of the merger) may be to lessen competition unduly or to tend unduly to create a monopoly . . . ." The "unduly" qualification was criticized on the ground that it would allow the banking agencies too much discretion and, as Senator Douglas argued, there is a "tendency for regulatory agencies to be more or less taken over . . . by the industries which they are supposed to regulate."[58] Senator Robertson's bill died along with the others but was introduced in 1957; it passed the Senate but never reached the floor of the House.[59] In 1959 the bill, fortified with a provision for a Justice Department opinion on the competitive effects of the proposed merger, again passed the Senate.[60] The next year the House passed a similar version which eventually became the Bank Merger Act of 1960.[61]

B. *The Provisions of the Bank Merger Act*

The Bank Merger Act of 1960 gave the three banking agencies approval rights over mergers among banks in their jurisdiction: the Federal Reserve Board was given authority over the state member banks, the FDIC over the state nonmember banks, and the Comptroller of the Currency over the national banks. This meant that approximately ninety-five percent of the banks in the United States were required to seek federal approval if they wished to merge.[62] The regulatory agencies had to consider two sets of factors, competitive and banking. The banking factors were (1) the financial history and condition of each of the banks involved; (2) the adequacy of its structure; (3) its future earning prospects; (4) the general character of its management; (5) the

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[54] S. 3341, S. 3424, 84th Cong., 2d Sess. (1956); H.R. 5948, 84th Cong., 1st Sess. (1955); and H.R. 9424, 84th Cong., 2d Sess. (1956).

[55] H.R. 2115, H.R. 6405, 84th Cong., 1st Sess. (1955).

[56] S. 3911, 84th Cong., 2d Sess. (1956).

[57] Mogel, supra note 53, at 58.

[58] 103 Cong. Rec. 3706 (1957).

[59] S. 3911, 85th Cong., 1st Sess. (1957).

[60] S. 1062, 86th Cong., 1st Sess. (1959).

[61] 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (1964), as amended, 12 U.S.C. § 1828(c) (Supp. 1971).

[62] H.R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960); S. Rep. No. 196, 86th Cong., 1st Sess. 21 (1959).

convenience and needs of the community to be served; and (6) whether or not the bank's corporate powers were consistent with the purpose of this Act. The competitive factor was simply defined as the effect of the transaction on competition including any tendency toward monopoly.[63] The original Robertson bill's term "unduly" had been dropped along the way.[64] The agency was not to approve the transaction unless, considering all of such factors, it found a transaction to be in the public interest.[65] Although this standard provided more guidance concerning merger approval than had ever before been given the banking agencies, it still did not spell out the weight that was to be given to each factor, and the legislative history on this point was confused and not very instructive. However, it can safely be said that most legislators agreed with the sentiment of the House Report on the bill that concluded "[s]ome bank mergers are in the public interest, even though they lessen competition to a degree."[66]

As a result of this ambiguity, the three banking agencies developed different policies in applying the criteria set up in the statute.[67] The Comptroller of the Currency followed a "balanced banking structure" policy.[68] This stressed the range of bank size. It was thought that each market should have a range of small, medium and large banks. The FDIC stressed a "strengthening of competition" concept.[69] According to this criterion, disparity in bank sizes was to be avoided. Finally, the Federal Reserve Board followed a "variety of banking services" doctrine.[70] The Board felt that a broad range of banking services should be available to the public and was less concerned than the FDIC about the size of the banks in the particular market.[71]

It is interesting to note that although the agencies differed in their criteria for approval, they reached the same result: overwhelming approval of bank mergers. In the five-year period from 1960 to 1965, almost nine hundred bank merger applications were reviewed by the three banking agencies and only thirty-one were denied.[72] A survey of the applications for 1963 revealed that more than two-thirds of the proposed mergers were deemed by the Department of Justice to have

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63 12 U.S.C. § 1828(c)(5)(B) (1970).

64 Id.

65 Id.

66 H.R. Rep. No. 1416, 86th Cong., 2d Sess. 10 (1960). See Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bull. 859, 867 (1971).

67 Mogel, supra note 53, at 60-61.

68 G. Hall & C. Phillips, Bank Mergers & the Regulatory Agencies—Application of the Bank Merger Act of 1960, at 37 (1964).

69 Id. at 51.

70 Id. at 63.

71 Id.

72 See Cohen, The Antitrust Laws Applied to Bank Mergers, Reciprocity and Tie-in Arrangements, 26 Bus. Law. 1, 2 (1970).

anticompetitive effects.[73] It became obvious that the Department of Justice and the banking agencies were speaking two different languages. The Department was using straight antitrust principles which emphasized the protection of competition over the protection of competitors, while the banking agencies were concerned with and attuned to the problems of the banks or the "competitors" themselves.

While it is understandable that the agencies did not reach the same results as the Department, one might ask whether the extraordinary rate of bank merger approval reached by the agencies was the result Congress had intended when it passed the Bank Merger Act of 1960. The impetus for the Act had been congressional concern over the reduction in the number of banks, which had caused an increase in the concentration of banking assets in numerous markets. There was also fear that financing would become unavailable to small business, arising from the assumption that larger banks would be less inclined to deal sympathetically with small borrowers,[74] many of whom rely on reputation in the community for credit. It is doubtful, then, that anyone in Congress had anticipated the agencies' wholesale approval of bank merger applications. As one critic from within the industry put it, "[I]n the years since the Bank Merger Act of 1960 became operative the bank supervisory agencies, especially the Comptroller of the Currency, have demonstrated that they are merger happy. They almost never see a bad merger."[75]

He was not the only one concerned with the bank agency situation. Citing "a lack of coordination of action and procedures among the Federal agencies charged with responsibility for the regulation of banks," President Johnson in 1964 directed the Secretary of the Treasury "to establish procedures which will insure that every effort is made by these agencies to act in concert and compose their differences."[76] The Comptroller himself complained that "with the administrative approach to bank mergers in such a state of conflict, it is virtually impossible for a reasonably prudent banker to plan intelligently for future expansion."[77] As a result, the Secretary of the Treasury and the Attorney General created an Interdepartmental Committee on Bank Mergers in which all four agencies were represented.[78] By this time, though, the Department of Justice had filed its own suits to enjoin

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[73] Waxberg & Robinson, supra note 49, at 384.

[74] See Shull & Horvitz, supra note 66, at 865.

[75] The President of the Independent Bankers Assn., Philadelphia Bulletin, September 23, 1965, at 28, col. 1.

[76] BNA Daily Report for Executives, Mar. 19, 1964, at A7-A8.

[77] 1963 Comp. Curr. Ann. Rep. 187.

[78] BNA Antitrust & Trade Reg. Rep. No. 143, Apr. 7, 1964, at A-12.

mergers that had been approved by the banking agencies, and the Comptroller in turn was seeking to intervene to oppose the Department of Justice.[79] It was apparent that the system was not healthy.

The Justice Department suits brought before the courts many questions concerning the Bank Merger Act of 1960. The first was whether the Act precluded the Department from suing under the antitrust laws. There had been references in both Houses to the fact that the bill "would not affect in any way the applicability of the Sherman Act to bank mergers or consolidations."[80] This statement was not much of a concession, though, since the 1948 Supreme Court decision in *Columbia Steel*[81] was considered to have emasculated the Sherman Act insofar as capacity to deal with mergers was concerned. Furthermore, as noted above, most people felt that the Clayton Act had little significance with respect to bank mergers since it was thought to apply only to stock acquisition, a method of merging which could easily be avoided by banks. In fact, the idea of the Justice Department's attacking bank mergers was probably not seriously considered by any of the drafters of the Act and, as mentioned earlier, the idea was rejected by the Justice Department itself for a long time.[82]

The unscrambling of the regulatory scheme, therefore, was left to the courts. This situation is not unusual. Many times the legislative process produces ambiguities that force the courts to define the law.[83] In these circumstances there may not be any "true intent" to a bill, and the court will be forced to choose from among a number of practical alternatives. Since courts are called upon to resolve actual disputes, it is generally less easy for them to avoid difficult questions by resorting to ambiguous draftsmanship; the result which a court may reach in interpreting an ambiguous statute may, of course, be one which was entirely unforeseen by the legislature. It should be noted, however, that the Supreme Court, in its opinions on bank mergers, did not seem to find the choices as difficult to make as they were for Congress and bankers to accept.

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79 Before the Bank Merger Act of 1966, the Comptroller had consistently been denied the right to intervene. See, e.g., United States v. Crocker-Anglo Nat'l Bank, Civil No. 41808 (N.D. Cal.), order denying Comptroller's motion to intervene, March 23, 1964.

80 S. Rep. No. 196, 86th Cong., 1st Sess. 3 (1959). See also H.R. Rep. No. 1416, 86th Cong., 2d Sess. (1960).

81 United States v. Columbia Steel Co., 334 U.S. 495 (1948).

82 See text at note 40 supra.

83 Judicial recognition of this principle can be found in Justice Douglas' opinion in United States v. First City Nat'l Bank, 386 U.S. 361, 367 (1967): "The 1966 [Bank Merger] Act was the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversies that finally abated in Congress to be finally resolved in the courts."

III. Round One: The Court and Bank Mergers

While the decision in *Transamerica Corporation*[84] gave notice that Section 7 of the Clayton Act applied to banks, the decision in the first Justice Department bank merger suit, *United States v. Firstamerica Corp.*,[85] gave notice that the Department of Justice and the courts were not going to defer to the jurisdiction of banking agencies in approval of bank mergers. Justice filed suit in March 1959, charging that the acquisition of California Bank by Firstamerica, the bank holding company, violated both Section 1 of the Sherman Act and Section 7 of the Clayton Act. The defendants moved to dismiss on the grounds that the Federal Reserve Board had already approved the merger and that it had exclusive jurisdiction under Section 11 of the Clayton Act. The court denied the motion[86] and the Supreme Court denied a petition for certiorari. This rejection of the concept that banking agencies had exclusive or primary jurisdiction over bank mergers was to set the theme for government suits and subsequent court decisions during the year that followed the passage of the Bank Merger Act of 1960.

A. *Philadelphia National Bank*

After the Bank Merger Act of 1960 was signed into law, the Justice Department quickly dispelled any doubt about its intention of continuing to sue under the antitrust laws. It filed five bank merger suits in 1961,[87] the first of which was *United States v. Philadelphia Nat'l Bank*.

The Comptroller of the Currency had approved this merger after receiving the three reports required by the Bank Merger Act of 1960 from the FDIC, the Federal Reserve Board and the Department of Justice.[88] All three reports found that the merger would have anti-competitive effects. The Comptroller, however, reasoned that "since there will remain an adequate number of alternative sources of banking services in Philadelphia, and in view of the beneficial effects of this

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[84] Transamerica Corp. v. FRB, 206 F.2d 163 (3d Cir.), cert. denied, 346 U.S. 901 (1953). See text at note 37 supra.

[85] United States v. Firstamerica Corp., Civil No. 38139 (N.D. Cal. 1959), cert. denied, 361 U.S. 928 (1960).

[86] Id.

[87] United States v. Manufacturers Hanover Trust Co., Civil No. 61-C-3194 (S.D.N.Y., filed Sept. 8, 1961); United States v. Continental Ill. Nat'l Bank & Trust Co., Civil No. 61-C-1441 (N.D. Ill., filed Aug. 29, 1961); United States v. Bank Stock Corp., Civil No. 61-C-54 (E.D. Wis., filed Mar. 2, 1961); United States v. First Nat'l Bank & Trust Co., Civil No. Lex. 1424 (E.D. Ky., filed Mar. 1, 1961), United States v. Philadelphia Nat'l Bank, Civil No. 29287 (E.D. Pa., filed Feb. 25, 1961).

[88] The purpose of these reports was to give uniformity to the judgments of the banking agencies, although such interagency agreement rarely occurred. See text at notes 67-79 supra.

consolidation upon international and national competition it was concluded that the overall effect upon competition would not be unfavorable."[89] He concluded that the new bank "would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry."[90] The day after the Comptroller had approved the merger the Justice Department filed suit in the United States District Court for the Eastern District of Pennsylvania, charging violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

The district court agreed with the Justice Department that it was entitled to sue under the antitrust laws, holding that the Bank Merger Act of 1960 did not repeal by implication the antitrust laws insofar as they applied to bank mergers. It also agreed that the product market or "line of commerce" involved was "commercial banking." After that, however, the court and the Justice Department parted company. The court held section 7 inapplicable to bank mergers accomplished through acquisition of assets on the ground that banks are not subject to the jurisdiction of the Federal Trade Commission. Even assuming that section 7 was applicable, the court found that the four-county Philadelphia metropolitan area delineated by the Government was not the proper geographic market; moreover, even assuming that it was, there still was no reasonable probability that competition among commercial banks in the area would be substantially lessened as a result of the merger. As to the Sherman Act charge, the court found that since the merger did not violate the Clayton Act, a fortiori it did not violate Section 1 of the Sherman Act.

On appeal the defendants did not contest the adverse findings of the district court regarding the line of commerce and the right of Justice to sue under antitrust laws, but concentrated on supporting those rulings favorable to it.[91] Both parties emphasized the alleged Sherman Act violation and paid little attention to the section 7 case.[92] Ironically, however, the Supreme Court did not reach the question of violation of the Sherman Act, since in a decision that stunned the banking community it found that the "merger of appellees is forbidden by § 7 of the Clayton Act and so must be enjoined . . . ."[93] Justice Brennan's opinion was a tour de force for which very few lawyers, congressmen or, for that matter, anyone was prepared. The main points made in the

[89] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 333 (1963).

[90] Id.

[91] Lifland, The Supreme Court, Congress, and Bank Mergers, 32 Law & Contemp. Prob. 15, 24 (1967).

[92] Id. The Government did not even discuss the section 7 charge in its reply brief.

[93] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 323-24 (1963).

decision, together with a summary of the Court's reasoning on each point, are as follows:

1. *Bank mergers through asset acquisitions are subject to Section 7 of the Clayton Act.*—The Court found a congressional desire to embrace bank mergers in the legislative history of the statute. It reasoned that the Celler-Kefauver Amendment was designed to close the loopholes that had allowed mergers. In order to close these loopholes, Congress contemplated that the 1950 amendment would give section 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure asset acquisitions, within the scope of section 7. To reach this conclusion the Court read together the stock acquisition and asset acquisition portions of section 7. Approached in this manner, section 7 would apply to mergers "which fit neither category perfectly but lie somewhere between the two ends of the spectrum."[94] This interpretation then limited the application of the qualifying phrase "subject to the jurisdiction of the Federal Trade Commission," which had previously been thought to exclude bank mergers, to straight asset acquisitions when not accomplished by merger. The Court went on to give reasons why this construction was the only possible interpretation of the section: (1) any other interpretation would create a large loophole in a statute designed to close loopholes; (2) Congress was aware of the difference between a merger and a pure purchase of assets, and its intent was to cover mergers; (3) the phrase "subject to the jurisdiction of the Federal Trade Commission" was meant to make explicit the role of the FTC in administering the section and was not meant to undercut the dominant purpose of eliminating the difference in treatment accorded stock acquisitions and mergers by the original section 7 as construed; and (4) immunity from the antitrust laws is not lightly to be implied.

The Court realized that its construction of the amended section 7 was different from that voiced by some members of Congress and, for a time, the Justice Department. Yet it noted that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[95] It stressed also that there were no Supreme Court opinions upon which these subsequent views were based and which therefore might bind the Court in this opinion. It concluded: "[t]he design fashioned in the Bank Merger Act was predicated upon uncertainties to the scope of § 7, and we do no violence to that design by dispelling the uncertainty."[96]

2. *The Bank Merger Act of 1960 did not preclude application of*

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[94] Id. at 342.

[95] Id. at 348-49, citing United States v. Price, 361 U.S. 304, 313 (1960).

[96] 374 U.S. at 349.

the antitrust laws.—The Court noted that no express immunity was conferred by the Act and, as mentioned above, repeals of the antitrust laws by implications are strongly disfavored. Furthermore, it found that Congress did not embrace the view that the banking regulation was so pervasive that the enforcement of the antitrust laws would be unnecessary or disruptive. It noted that the primary jurisdiction of the banking agency, if there were any, would not bar jurisdiction of the courts but would only postpone it. But here primary jurisdiction was not a problem, since the appropriate agency had already acted. The Court went on to state that it would be anomalous to conclude that Congress, while intending that the Sherman Act remain fully applicable to bank mergers and that section 7 apply to pure stock acquisitions by banks, nevertheless intended section 7 to be completely inapplicable to bank mergers.

3. *The merger is in violation of Section 7 of the Clayton Act.*—The Court had "no difficulty" in finding that the "line of commerce" or product market was the "cluster of products and services" or "commercial banking," and that the "section of the country" or geographic market was the four-county area advocated by the Justice Department. It declared that the standard for determining a geographic market was "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[97] The Court noted that the four-county area was a market "which state law apparently recognizes as a meaningful banking community . . . and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business . . . ."[98] As to the standard for determining the probable competitive effects of a bank merger, the Court stated, "[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in the significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[99] To the Court, Philadelphia National Bank's market share of thirty percent clearly presented a threat of undue concentration. It also noted that the increase of thirty-three percent in the concentration of the market as a result of the merger was significant. Finally, it defended its conclusion that Philadelphia National Bank's percentage share raised an inference of anticompetitive effects even though neither the terms of Section 7 nor the legislative history of the Act suggested

[97] Id. at 357.
[98] Id. at 361.
[99] Id. at 363.

that any particular percentage share was deemed critical by Congress.

4. *Affirmative Defenses.*—The Court rejected all three of the defendant's affirmative defenses:

a. *The only way to follow customers to the suburbs is by branching through mergers.* The Court made short shrift of this argument by indicating the alternative is de novo branching and that "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."[100]

b. *Enlarged lending limits as a result of the merger would allow the bank to compete with large out-of-state banks.* The Court rejected this "application of 'countervailing power,'" stating that "if anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."[101] In the city of Philadelphia the result would be that only one bank would remain, since all the banks combined would still be smaller than the largest bank in New York City.

c. *Philadelphia needs a bank larger than it now has in order to bring industry to the area and to stimulate economic development.* The Court responded to this contention with a straight antitrust analysis:

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial . . . . Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[102]

This argument proved more disturbing than any other to critics of the decision and the banking industry, since it had been thought that the Bank Merger Act of 1960, if it did nothing else, provided the modest concession that some mergers were to be allowed even if they had anticompetitive effects.[103]

Undoubtedly Justice Brennan's opinion was an example of ingenious and skillful reasoning. Yet, as two critics observed, "The Court's

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100 Id. at 370.

101 Id.

102 Id. at 371.

103 See note 66 supra and accompanying text.

legal analysis was designed to justify an overriding policy decision, not to aid in determining the appropriate result."[104]

After the initial shock, there followed a virtual flood of criticism attacking the opinion,[105] much of it foreshadowed in Justice Harlan's well-reasoned dissenting opinion. However, there is no need to go into those criticisms here. The point to remember is that the Supreme Court served notice that the antitrust laws were to be applied to bank mergers and that this industry was not going to be treated differently from any other, notwithstanding the Bank Merger Act of 1960. Justice Harlan was not exaggerating when he said that the result of *Philadelphia Bank* was "that the Bank Merger Act is almost completely nullified."[106]

B. *Lexington Bank*

The *Lexington Bank*[107] case was filed one month after the *Philadelphia Bank* case. For some reason the Justice Department did not include a section 7 count, but relied solely on the Sherman Act in its complaint. Had it done otherwise, the Supreme Court might never have decided the applicability of the Sherman Act, since this case, like *Philadelphia Bank*, could have been won or lost on the easier section 7 standard.

The merger in a question was a consolidation of two commercial banks based in Lexington, Kentucky. The two banks were ranked first and fourth in total assets, deposits and loans among the commercial banks in the geographic market, which was determined to be Fayette County, Kentucky. The two banks also held ninety-four percent of all trust assets, ninety-two percent of all trust earnings and seventy-nine percent of all trust accounts in that county. After consolidation, the bank was bigger than all the remaining commercial banks in a market where the five largest banks together held ninety-nine percent of the total deposits. The Comptroller of the Currency, as in *Philadelphia Bank*, received adverse reports on the competitive effects from the FDIC, the Federal Reserve Board and the Justice Department. Nevertheless, he approved the merger. The Justice Department filed suit two days after the Comptroller's approval, on the same day that the merger was effected.

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[104] Searls & Reasoner, The Bank Merger Act of 1966—Its Strange and Fruitless Odyssey, 25 Bus. Law. 133, 137 (1969).

[105] See, e.g., Handler, Recent Antitrust Developments, 112 U. Pa. L. Rev. 159, 173-78 (1963); The Supreme Court, 1962 Term, 77 Harv. L. Rev. 62, 159-63 (1963); Comment, 62 Mich. L. Rev. 990 (1964); Note, 42 Texas L. Rev. 99 (1963).

[106] 374 U.S. at 384 (dissenting opinion).

[107] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

The district court, after a trial on the matter, dismissed the Government's suit, holding that no violation of either Section 1 or Section 2 of the Sherman Act had been shown.[108] The Supreme Court reversed the lower court on the section 1 count and never reached the section 2 monopolization charge.

The principal significance of the case was that the Court brushed aside its *Columbia Steel* criteria and relied on a "major competitive factor" theory. In *Columbia Steel* the Court had said:

> In determining what constitutes unreasonable restraint, we do not think the dollar value is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.[109]

Justice Douglas, speaking for the Court, declared that "The *Columbia Steel* case must be confined to its special facts."[110] Yet he noted that even if the *Columbia Steel* criteria were considered in the instant case, they would urge the conclusion that the merger was unlawful. Douglas concluded: "where, as here, the merging companies are *major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act.*"[111] In support of this proposition he did not provide any independent reasoning but relied solely upon four railroad merger cases decided at the turn of the century. He found that the "major competitive factor" standard derived from those cases was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.

Justice Brennan and Justice White concurred in the result but would have relied solely on the conclusion that the factors relied on in *Columbia Steel* clearly compelled the reversal. Justice Harlan, joined by Justice Stewart, dissented, declaring that the opinion amounted "to an invocation of formulas of antitrust numerology and a presumption

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108 United States v. First Nat'l Bank & Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962).
109 United States v. Columbia Steel Corp., 334 U.S. 495, 527-28 (1950).
110 376 U.S. at 672.
111 Id. at 672-73 (emphasis added).

that in the antitrust field good things come usually, if not always, in small packages."[112]

After *Lexington Bank*, it was almost as easy to enjoin a merger under the Sherman Act as under Section 7 of the Clayton Act. Although it may be true that, as Justice Harlan predicted, this case was "doomed to be a novelty in the reports,"[113] it nevertheless is a significant decision because, as one observer noted, it demonstrated "not merely that the Court does not accept, but that apparently it is actually hostile to, any attempted construction of banking statutes which would tend to inhibit the application of the antitrust laws to banking."[114]

IV. Round Two: Congress and the Bank Merger Act of 1966

A. *Legislative History*[115]

The *Philadelphia Bank* decision, as discussed above, caused considerable concern both in Congress and in the banking industry.[116] Senator Robertson, Chairman of the Senate Banking and Currency Committee, who had been one of the principal authors of the Bank Merger Act of 1960, was among the first to complain that the decision did not come close to reflecting congressional intent.[117] Bankers were upset because it not only presented problems for future bank mergers but also threatened the legality of approximately two thousand bank mergers[118] that had occurred since the 1950 amendment of the Clayton Act.[119] Furthermore, two bank merger litigations, which had commenced before the *Philadelphia Bank* decision, were going to be seriously affected.[120] Needless to say, these banks also had lobbyists pushing for legislative relief.

To resolve these problems, Senator Robertson introduced a bill to amend the Bank Merger Act of 1960 and radically alter the *Philadelphia*

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[112] Id. at 673-74 (dissenting opinion).

[113] Id. at 673.

[114] Seeley, Banks and Antitrust, 21 Bus. Law. 917, 921 (1966).

[115] For discussions of the legislative history of the Bank Merger Act of 1966, see Lifland, supra note 91, at 28-31; Searls & Reasoner, supra note 104, at 139-41.

[116] As mentioned above, criticism was not limited to bankers and legislators. See note 105 supra and accompanying text. The Comptroller of the Currency's Office also produced papers critical of the decision. See Motter, Comments on the Philadelphia-Girard Decision, 1 Nat'l Banking Rev. 89 (1963). (The National Banking Review was a quarterly journal published by the Comptroller's office and was discontinued in 1967.)

[117] See 109 Cong. Rec. 11,097 (1963).

[118] S. Rep. No. 299, 89th Cong., 1st Sess. 3 (1965).

[119] The threat to these mergers was not imaginary since the Justice Department, in United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957), filed suit 30 years after the particular acquisition was made.

[120] United States v. Manufacturers Hanover Trust Co., Civil No. (S.D.N.Y., filed Sept. 8, 1961); United States v. Continental Ill. Bank & Trust Co., 1961 Trade Cas. ¶ 70,110 (N.D. Ill. 1961).

Bank result.[121] It would (1) give the banking agencies "exclusive and plenary authority to approve mergers, consolidations, acquisitions of stock or assets and assumptions of liabilities" and would immunize approved transactions from suits under the antitrust laws; and (2) give immunity from future prosecution under the antitrust laws to insured banks which had merged before the passage of the Bank Merger Act of 1960.[122] This bill was supported by the American Bankers Association and the majority of state banking associations. The banking agencies also appeared to be in favor of it. However, the Independent Bankers Association, which did not believe in the proposition that all bank mergers were for the good, wanted a provision inserted that would allow the Justice Department to sue within a limited period of time after the merger had been approved by a federal banking agency. Accordingly, Senator Proxmire introduced a "now or never" amendment, a major compromise, which was accepted.[123]

When the bill went over to the House it ran into a formidable roadblock in the person of Congressman Wright Patman, Chairman of the House Banking and Currency Committee. An indication of the fight the banking interests would face was his first reaction to the bill: "If you exempt banks from antitrust, you might as well also shoot the policeman at the corner."[124] He sought to delay hearings on the bill in order to drum up opposition to it. Meanwhile, Congressman Ashley introduced another measure that would require bank agency hearings with court of appeals review.[125] The Department of Justice objected to this proposal as unnecessary, since in the vast majority of applications there were no serious antitrust problems and, when there were such problems, the public disclosure of pertinent financial data would not be appropriate for review of bank mergers.[126] Congressman Ashley, with Congressman Ottinger, then revised the bill to allow for suits by the Justice Department at any time. However, the revision also provided that a merger which would violate the antitrust laws was to be approved if its adverse competitive effect would be clearly outweighed by its ability to meet the convenience and needs of the community involved.

Although compromises were being made to gain support for the bill, Chairman Patman was not interested. He did not envision a need for any bank merger bill and was not interested in furthering the progress of the two before him. He delayed so long in holding hearings

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121 S. 1698, 89th Cong., 1st Sess. (1965). See Lifland, supra note 91, at 28-29.

122 S. 1698, 89th Cong., 1st Sess. (1965).

123 See S. Rep. No. 299, 89th Cong., 1st Sess. 9-10 (1965).

124 New York Herald Tribune, May 19, 1965, at 32, col. 1.

125 H.R. 11,011, 89th Cong., 2d Sess. (1966).

126 H.R. Rep. No. 1221, 89th Cong., 2d Sess. 8-10 (1966) (letter from Attorney General Nicholas Katzenbach to Rep. Wright Patman, Sept. 24, 1965).

that Congressman Ashley, with a majority of the Banking Committee, convened a session of the Committee without informing him. He was furious when he learned of the meeting and ordered it disbanded. The majority rebuffed him and reported out the Ashley-Ottinger Bill.[127]

Immediately both Congressman Patman and Congressman Reuss, another key committee member, took the position that the meeting was a rump session held without sanction and that therefore the bill was defective.[128] Congressman Reuss then requested both the Attorney General and the Secretary of the Treasury to comment on proposals he was going to submit.[129] He adopted these comments into his amendment, and it appeared that a floor fight might result between the Reuss and Ashley-Ottinger proposals. To avoid such a fight, the proponents of the Ashley-Ottinger bill agreed to further compromises, and Congressman Patman, who was against the bill "as a matter of principle,"[130] agreed to introduce it. It was passed in toto by the House and Senate and was signed by the President.

B. *Bank Merger Act—Main Provisions*

The important provisions of the Act, all in Section 1828(c),[131] may be summarized as follows:

> (1) Subsection 1 provides that no insured bank may merge or consolidate in any manner without the approval of the banking agency having jurisdiction over it.
>
> (2) Subsection 4 requires that reports on the competitive factors be sought from the Attorney General and the other two banking agencies unless the agency feels that it must act immediately in order to prevent the probable failure of one of the banks.
>
> (3) Subsection 5 establishes standards for agency approval. An agency may not approve—
>
> (A) any proposed merger or transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States, or
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> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to

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127 See Lifland, supra note 91, at 30; H.R. Rep. No. 1179, 89th Cong., 1st Sess. (1965); BNA Antitrust & Trade Reg. Rep. No. 248, Apr. 12, 1966, at B-2.

128 Brief for Comptroller, app. B (Press Release of Rep. Patman, Oct. 21, 1966), United States v. First City Nat'l Bank, 386 U.S. 361 (1967).

129 H.R. Rep. No. 1221, 89th Cong., 2d Sess. 11-12 (1966).

130 112 Cong. Rec. 2464 (1966).

131 12 U.S.C. § 1828(c) (1970).

> lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> (4) Under subsection 6, a merger may not be consummated before the thirtieth calendar day after the date of the approval by the agency, except in emergencies.
>
> (5) Subsection 7 establishes that—
>
> (A) a suit filed under the antitrust laws before the legal date for consummation of the merger will stay the effectiveness of the agency approval unless the court shall otherwise specificially order. In a suit under the antitrust laws the court shall review de novo the issues presented.
>
> (B) in antitrust suits other than those under Section 2 of the Sherman Act, the standards applied by the court shall be identical with those that the banking agencies are directed to apply.
>
> (C) upon termination of an antitrust suit, or upon expiration of the period in which antitrust suits may be filed, the merger will be exempt from further antitrust suits except those proceedings based on the theory that the merger alone and of itself constituted a violation of Section 2 of the Sherman Act.
>
> (D) any state or federal banking agency that has jurisdiction over the bank has a right to appear as a party of its own motion and as of right in any antitrust suit that attacked a bank merger approved by a federal banking agency.

The Act raised almost as many questions as it answered. Two weeks before the Act became effective, The Wall Street Journal remarked:

> And now, after months of comic parliamentary pratfalls and fishwifely invective, the bank merger bill is about to pass. Sure enough, it reasserts Congressional authority over the subject. But that reassertion is so vaguely worded that the Supreme Court inevitably will be asked to define what Congress really meant, and the honorable justices will have considerable leeway again to make their own law.
>
> The incredible history of the bank merger bill demon-

strates again just how hard it is for Congress to shape business regulatory policy.[132]

The Act left the following questions for the Supreme Court's ultimate decision:

(1) Whether the standards in section (5)(B) were to be pleaded by the plaintiff to state a cause of action or established an affirmative defense to a suit under the antitrust laws.

(2) What was the effect of the omission of the phrase "in any line of commerce" in paragraph (5)(B)? Was it omitted in order to eliminate the "commercial banking" line of commerce established in *Philadelphia Bank*?

(3) Section (7)(A), which stated that an antitrust action shall stay the approval of the merger "unless the court shall otherwise specifically order," raised the obvious question of what standard the court should use in determining whether to dissolve the stay.

(4) What was the meaning of the phrase in section (7)(A) providing that "the court shall review de novo the issues presented"? "Review de novo" had no precedent in federal administrative statutes; the usual expression was "try de novo." What, then, was the scope of judicial review of federal banking agency approval?

(5) How were the agency and the court to apply the standards set up in section (5)(B), and what weight was to be given to the "convenience and needs of the community" in offsetting the anticompetitive effects of a merger?

The Act did resolve some points that had bothered both banks and Congress. Mergers consummated prior to June 17, 1963, the date of the *Philadelphia Bank* decision, were "conclusively presumed to have not been in violation of any antitrust laws other than Section 2 [of the Sherman Act]."[133] This gave immunity to those two thousand mergers as well as to the Manufacturers-Hanover, Continental-Illinois and Lexington Bank mergers. Mergers consummated after June 16, 1963 and not attacked by the time the Act went into effect, unless attacked on a section 2 charge, were also immune.[134] For mergers consummated after *Philadelphia Bank* but before the Act went into effect, the courts were to apply the standards set forth in the Act. The Proxmire "now or never" provision summarized above gave banks immunity from suits thirty days after agency approval. Furthermore, under the standards of

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[132] Wall Street Journal, Feb. 8, 1966, at 16, col. 4.

[133] Pub. L. No. 89-356, § 2(a), 80 Stat. 7 (1966), amending 12 U.S.C. § 1828(c) (1964).

[134] Pub. L. No. 89-356, § 2(b), 80 Stat. 7 (1966), amending 12 U.S.C. § 1828(c) (1964).

subsection 5(b), it was now impossible for the courts to ignore the "convenience and needs" provisions of the Act; they could never say again, as had Justice Brennan in *Philadelphia Bank*, that Congress proscribed anticompetitive mergers, the "benign and the malignant alike."[135]

Because of the series of compromises made to gain support for the bill, the banks did lose significant benefits provided in Senator Robertson's original bill. There was no longer a provision for exclusive jurisdiction in the banking agencies. Also, because of the automatic stay provision, the banks could not slip a merger by an overworked Justice Department. Finally, the competitive factor was elevated to the rank of prime factor rather than being one factor among many, as it had been under the Bank Merger Act of 1960. However, this change was an improvement upon the *Philadelphia Bank* result that established competition as the only factor in determining the legality of the merger.

V. Round Three: The Courts Take Over

Six lower court opinions were issued before the Supreme Court had an opportunity to rule on the Bank Merger Act of 1966.[136] These six are interesting for the fact that of the eight judges that heard these cases—a three-judge panel sat on the *Crocker-Anglo* case—not one came close to the interpretation of the Act eventually reached by the Supreme Court.[137]

A. *The* Houston and Provident *Decision*[138]

The first Supreme Court review of the 1966 Act decided two bank merger cases in one opinion. Banks in Texas and Pennsylvania applied to the Comptroller of the Currency for approval of bank mergers. In what was a familiar scenario, the Federal Reserve Board and the Attorney General both submitted adverse reports and the Comptroller went ahead and approved the mergers. The United States filed civil suits under Section 7 of the Clayton Act in both Texas and Pennsylvania; the Comptroller intervened, under the authority of the Bank Merger Act of 1966, and moved to dismiss the suits. The district courts

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[135] 374 U.S. at 371.

[136] United States v. First City Nat'l Bank, 1967 Trade Cas. ¶ 71,970 (S.D. Tex. 1966), rev'd, 386 U.S. 361 (1967); United States v. Crocker-Anglo Nat'l Bank, 263 F. Supp. 125 (N.D. Cal. 1966); United States v. First Nat'l Bank, 257 F. Supp. 591 (D. Hawaii 1966); United States v. Mercantile Trust Co. Nat'l Ass'n, 263 F. Supp. 340 (E.D. Mo. 1966), rev'd per curiam, 389 U.S. 27 (1967); United States v. Provident Nat'l Bank, 262 F. Supp. 397 (E.D. Pa. 1966), rev'd sub. nom. United States v. First City Nat'l Bank, 386 U.S. 361 (1967); United States v. Third Nat'l Bank, 260 F. Supp. 869 (M.D. Tenn. 1966), rev'd, 390 U.S. 171 (1968).

[137] See Searls & Reasoner, supra note 104, at 147.

[138] United States v. First City Nat'l Bank, 386 U.S. 361 (1967).

dismissed the complaints,[139] and the Government appealed to the Supreme Court.

The Supreme Court opinion discussed four major questions concerning the Act: (1) the burden of pleading; (2) the burden of proof; (3) the scope of review; and (4) the standards for determining whether to lift the statutory stay. It was a rare Supreme Court bank merger opinion for two reasons. The first was that it was unanimous; in fact, it has thus far proved to be the only unanimous Supreme Court bank merger decision. The second was that it provoked little criticism.

The four procedural issues are of sufficient importance to justify a brief summary of the Court's rulings:

(1) Pleading.—Defendants had contended that the complaints were defective since they did not mention the Bank Merger Act of 1966 but cited only Section 7 of the Clayton Act. The Justice Department left out reference to the 1966 Act in order to place on the defendants the burden of pleading and proof of the "convenience and needs" issue.[140] Quoting the language of the Act, the Court held that Congress intended that an action challenging a bank merger on the grounds of its anticompetitive effects should be brought under the antitrust laws and not under the Bank Merger Act of 1966. The Court stated:

> There is no indication that an action challenging a merger . . . is bottomed on the Bank Merger Act rather than on the antitrust laws. What is apparent is that Congress intended that a defense or justification be available once it had been determined that a transaction would have anticompetitive effects, as judged by the standards normally applied in antitrust actions.[141]

(2) Burden of Proof.—Concerning the question of whether the burden of proof was on the defendant banks or on the Government to establish that an anticompetitive merger fell within the "convenience and needs of the community" exception of 12 U.S.C. § 1828(c)(5)(B), the Court found it "plain that the banks carry the burden. That is the general rule where one claims the benefits of an exception to the prohibition of a statute."[142] In addition to this general rule argument, Justice Douglas quoted from a statement Congressman Patman had made when he introduced the bill, which would seem questionable support, since it

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[139] United States v. Provident Nat'l Bank, 262 F. Supp. 397 (E.D. Pa. 1966); the lower court opinion in the *Houston* case was unreported. See 386 U.S. at 363.

[140] Otherwise the initial government investigation would have to be much more thorough and the government would have to delay the filing of the suit or the trial date in order to prepare to plead and prove this issue in its case in chief.

[141] Id. at 364.

[142] Id. at 366.

was acknowledged by everyone, including Congressman Patman, that he was a bitter enemy of the bill.[143]

(3) Scope of Review.—The Court found no congressional intent to change the administrative procedure spelled out in *Philadelphia Bank*. In support of this finding the Court noted that Congress had traditionally given antitrust suits different treatment from that generally accorded other administrative review procedures. Furthermore, the Act itself stated that the standards for the agency and the court review should be the same. Its provision was not the conventional judicial administrative review standard, which looks only to whether or not the agency's decision is supported by the evidence. It appeared that the phrase "review de novo" was an example of unfortunate draftmanship.[144] In any case the Court focused on the words "de novo" and "issues presented" rather than on the ambiguous term "review."[145] It found that these two phrases indicated that an independent judicial determination was desired by Congress. Furthermore, the Court noted that the Comptroller's proceedings were informal and that no hearings in the customary sense were held, since the 1966 Act did not require the Comptroller to hold formal hearings. Therefore, to hold that there should be only a conventional judicial review of the agency proceedings would force the Court "to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even

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[143] See text at note 130 supra. It has been argued that this burden will not be harmful to the banks. The argument is that any bank, having thoroughly prepared the bank merger application, should be ready to go forward with this type of evidence and only if the evidence is evenly divided (which is rare) will the banks be hurt by this burden. Furthermore, this will tend to speed the trial since the banks will be ready sooner than the Government would if it had the burden. One might question whether a speedy trial helps an antitrust defendant; normally it would not, but in a bank case there will probably be an automatic stay already in effect and therefore any time saved will be to the benefit of both the banks and the government. See Lifland, supra note 91, at 35-36.

[144] See Searls & Reasoner, supra note 104, at 151. The phrase originated with the Department of Justice. An exchange between Mr. Justice Fortas and the then Assistant Attorney General in charge of the Antitrust Division during the oral argument of the case is instructive.

Mr. Justice Fortas: It may have been that these were words of legislative diplomacy rather than words of legality.

Mr. Turner: I am afraid, Mr. Justice Fortas, it wasn't even that. If it were held that the use of these words were decisive, I must say from our standpoint it would have been one of the greatest inadvertencies in history.

Mr. Justice Fortas: Maybe it was.

Transcript of Oral Argument in United States v. Provident Bank, No. 972, at 73-74 (Feb. 21, 1967).

[145] 386 U.S. at 368.

though no hearing had been held and no record in the customary sense created."[146]

The Court rejected the constitutional argument that to have the Court judge the factors enumerated in the Bank Merger Act of 1966 would force the court to perform nonjudicial tasks. It noted the long prevalent "rule of reason" approach in antitrust law in which appraisal of competitive factors had always been "grist for the antitrust mill."[147] Consequently it held that no special weight should be given to the agency approval and that "it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal."[148]

(4) Standards on Dissolving the Automatic Stay.—The Court was very firm on the point that a stay should not be dissolved except under extraordinary conditions: "[A]bsent a frivolous complaint by the United States, which we presume will be infrequent, a stay is essential until the judicial remedies have been exhausted."[149] The Court noted that the caption of the Act stated that it was designed "to establish a procedure . . . to eliminate the necessity for the dissolution of merged banks."[150] Furthermore, it found the legislative history was "replete with references to the difficulty of unscrambling two or more banks *after* their merger."[151] Therefore "the normal procedure should be maintenance of the *status quo* until the antitrust litigation has run its course, lest consummation take place and the unscrambling process that Congress abhorred *in the case of banks* be necessary."[152]

The *Provident-Houston* decision provoked little adverse reaction and even some congressional endorsement.[153] One of the reasons for this calm reception may have been that after the *Philadelphia Bank* and *Lexington Bank* decisions most observers had prepared themselves for the worst, or at least for a reaffirmation of the policies behind those opinions. The *Provident-Houston* appeal had been concerned solely with procedural issues; consequently the Court offered no views on the merits of the mergers or on the justifications submitted in their support. The very important questions concerning the meaning of the "convenience and needs" defense and the circumstances under which it would outweigh the anticompetitive effects of a merger were left for later opinions to spell out.

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146 Id.
147 Id. at 369.
148 Id.
149 Id. at 370.
150 Id.
151 Id. (emphasis in original).
152 Id. at 370-71 (emphasis in original).
153 See Lifland, supra note 91, at 38; American Banker, June 23, 1967, at 5, cols. 3-4.

B. *Nashville Bank*

United States v. Third Nat'l Bank[154] (hereinafter *Nashville Bank*) was decided during the next Supreme Court term. The district court had upheld the merger on the grounds that it would not tend to lessen competition substantially, and, even assuming there were anticompetitive effects, that they would be outweighed by the benefit to the convenience and needs of the community. The district court also found that as a result of the Bank Merger Act of 1966, the *Philadelphia Bank* criteria for judging the anticompetitive effect of a merger were no longer applicable, and it adopted the *Columbia Steel* standard.[155]

The Supreme Court reversed and remanded. It reiterated that *Columbia Steel* had been confined to its facts in *Lexington Bank*, and that the Bank Merger Act of 1966 had not changed this restriction. Therefore the straight antitrust *Philadelphia Bank* standard *was* to be used in judging the anticompetitive effects of a merger. Judging the proposed merger by that standard, the Court unanimously concluded that the *Nashville Bank* merger was anticompetitive. The larger bank had forty percent of the city's banking business, and the smaller bank, which was not a failing concern, had previously been an important competitive element in certain facets of city banking.

The most important point of the decision concerned the "convenience and needs" defense. The Court set up a two-step process for establishing this defense. The trial court would have to decide that the benefit to "convenience and needs of the community" clearly outweighed the anticompetitive effect, but first it must find that the banks had made a reasonable effort to solve the problems which they claimed justified the merger, or at least find that such efforts would not have been likely to succeed. In other words, the trial court in the first step

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[154] 390 U.S. 171 (1968).

[155] United States v. Third Nat'l Bank, 260 F. Supp. 869, 877 (M.D. Tenn. 1966). The district court relied heavily on Justice Harlan's dissent in *Lexington Bank*, which expressed the view that Congress in the Bank Merger Act of 1960 had plainly indicated that bank mergers should not be measured solely by the antitrust considerations which are applied in the other industries and that the *Columbia Steel* standard "would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress." 376 U.S. at 680. The court went on to state that it was persuaded that

> the accommodation to which Mr. Justice Harlan referred is the fundamental purpose and effect of the 1966 amendment in providing that anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration should be given in every case to the qualitative banking factors specifically enumerated. These factors are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria, but also to require an even broader scope of inquiry and analysis with respect to antitrust issues.

260 F. Supp. at 877.

must "sufficiently or reliably establish the unavailability of alternative solutions."[156]

Finally, the Court determined that since the district court had not correctly analyzed the anticompetive effects of the merger, it could not have properly weighed the countervailing benefits to the community. Therefore the case was remanded for a new balancing of the competitive and "convenience and needs" factors to determine whether the merger was in the public interest.

C. *Impact of* Provident-Houston *and* Nashville Bank

Little remained of the Bank Merger Act of 1966 after these two Supreme Court decisions. Although Justice White in *Nashville Bank* had recognized that Congress "wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging those mergers,"[157] the result of both decisions was that the straight antitrust standard was still king.

The end result of the years of legislative activity that produced the Bank Merger Act of 1966 can be briefly summarized:[158] (1) the two thousand bank mergers consummated before *Philadelphia Bank* and after the Celler-Kefauver Amendment were immunized; (2) three bank mergers attacked by the Justice Department were saved from divestiture; (3) the Justice Department was given a thirty-day period in which to decide whether to sue; (4) Justice was also given an automatic stay of the merger approval once it filed suit; and (5) the "convenience and needs of the community" defense was established. In retrospect, it appears that the Justice Department and the three banks were the real winners. The convenience and needs defense was severely limited by *Nashville Bank*, and it appeared that the Justice Department had little objection to the immunization of those two thousand or more consummated but unattacked mergers. The availability of an automatic stay was a substantial aid to the Government, since preliminary injunctions are never easy to obtain and the denial of a preliminary injunction motion is not appealable to what the Government and others might consider a more sympathetic Supreme Court.

The value of this stay provision was illustrated in a recent case, *United States v. United Banks of Colorado, Inc.*[159] The defendants argued that the stay should be lifted because (1) if it were not lifted the contractual arrangements undertaken to acquire the bank in question

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156 390 U.S. at 190.

157 Id. at 177.

158 See Searls & Reasoner, supra note 104, at 152-53.

159 1971 Trade Cas. ¶ 73,421 (D. Col. 1970). This case involved a bank holding company merger but the "automatic stay" language in the Bank Holding Company Act of 1966 is identical to that in the Bank Merger Act of 1966.

would expire and the Government might thus be able to defeat the merger without reaching the merits of the case; (2) there was substantial doubt that the Government would prevail on the merits since the case presented a novel, experimental and untried extension of antitrust theory; and (3) the Government did not need a stay since the bank holding company would maintain the bank as a separate entity and would agree to any reasonable "hold separate" order. The district court concluded that, while there may have been some equity to defendants' claim, they had failed to prove the narrow issue of whether the government's complaint was "frivolous" under the *Provident-Houston* standard.[160] Therefore the defendants "failed to establish their burden to overturn the statutory stay."[161] If more courts construe the standard as strictly as this one did, it may be presumed that no defendant will be able to get the stay lifted, for whatever one might say about the Antitrust Division's complaints, they certainly are not "frivolous."[162]

It is safe to assume that the opinions in *Provident-Houston* and *Nashville Bank* have served to nip many prospective mergers in the bud. There is little point in banks going through the complicated preparations for a merger if it becomes obvious that there is more than an excellent chance the merger will be killed in the courts—even if it would have been approved by the banking agencies. This prophylactic effect was greatly enhanced by the next Supreme Court opinion, *United States v. Phillipsburg Nat'l Bank & Trust Co.*,[163] a significant decision for a number of reasons, one of which was that the banks involved were small. Previously the Government had attacked mergers that would have resulted in banks with total assets ranging from $6 billion[164] to

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160 Id. at 89,714.

161 Id.

162 In a later case, a district court ordered a dissolution of the stay after the defendants agreed upon a plan of divestiture that was approved by the Comptroller of the Currency and which the court found would "enable divestiture to be orderly and to be readily and effectively obtainable and would protect the rights of all parties should divestiture be the final judgment . . . ." United States v. United Virginia Bankshares, Inc., 1971 Trade Cas. ¶ 73,466 (E.D. Va. 1971). This optimism seems to differ with the testimony of various banking officials in the hearings that preceded the Bank Merger Act of 1966. The Chairman of the Federal Reserve System had testified that "no matter how one may feel about whether the merger should have taken place in the first instance, there is no turning back. To unscramble the resulting bank clearly poses serious problems not only for the bank but for its customers and the community." Hearings on S. 1698 and Related Bills Before the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 89th Cong., 1st Sess. 11 (1965). And the president of the American Bankers Association declared that "'unmerging' a bank is not a simple matter but, rather, can be a problem nightmarish in its complexities." Id. at 51.

163 399 U.S. 350 (1970).

164 United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

$389 million.[165] The *Phillipsburg* merger, on the other hand, would have produced a bank with $41 million in assets. *Phillipsburg*, then, signified that the time had come for the small banks to look up and pay attention to those opinions being handed down in Washington.

D. *Phillipsburg Nat'l Bank*

Phillipsburg involved the proposed merger of two of three small competing commercial banks located in Phillipsburg, New Jersey. The district court, while recognizing "commercial banking" as a relevant product market, looked to certain submarkets that involved competition with other financial institutions. It rejected the geographic market concept that had been recognized by the FDIC, the Federal Reserve Board and the Department of Justice in their determinations that the merger would have significantly harmful effects upon competition in that area. Finally, the district court dismissed the complaint, holding that there was no showing of probable anticompetitive effect and that even were there any possibility of anticompetitive effect in the geographic market—an argument utilized by the Government—it would be outweighed by the benefit to the "convenience and needs" of the residents of Phillipsburg.

The Supreme Court reversed and found error in each of these holdings. From Justice Brennan's opinion we can derive certain guidelines[166] that will be of assistance in the planning of future bank mergers, both large and small. The first is that "commercial banking" is the product market in which every horizontal bank merger will be judged. If there are other submarkets, all well and good, but a bank will not be able to justify a merger in terms of competition with other financial institutions in these submarkets.

The second guideline is that the size of the bank is not going to deter the application of the antitrust laws. The Court had this to say about antitrust and small banks:

> Mergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities, are subject to scrutiny under these standards. Indeed, competitive commercial banks, with their cluster of products and services, play a particularly significant role in a small community unable to support a large variety of alternative financial institutions. Thus, if anything, it is even more true in the small town than in the large city that "if the busi-

[165] United States v. First Nat'l Bank of Hawaii, Civil No. 2540, (D. Hawaii, filed Nov. 17, 1969).

[166] See Darnell, The Phillipsburg National Bank Case, 16 Antitrust Bull. 33, 46-49 (1971).

> nessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ."[167]

Nor would it be advisable for banks to depend on the defense that the relevant geographic market is too small to be "an economically significant 'section' of the country" under the *Brown Shoe*[168] standard. Defendants made this argument on appeal and the Court rejected it, noting that even in the *Brown Shoe* opinion it had recognized relevant geographic markets in cities "with a population exceeding 10,000 and their environs."[169] Phillipsburg and its immediate environs had a population of almost 90,000. In fact, it would be rare to find a market with a population of less than 10,000, and even then the Court might find it to be an economically significant section of the country if enough banks were competing for those 10,000 customers.

However, merely because the Justice Department *can* sue does not mean that it will do so in every instance. In 1966 it failed to oppose a merger of two of the only three banks in a relevant market when those two banks had a sixty-seven percent share of the market.[170] Furthermore, the two were "nearly equal in size and competition between them [was] keen."[171] On the other hand, they had deposits of only $9,327,000 and $8,993,000 respectively, and the population of the county was only 25,000. It must be remembered that this particular merger occurred over four years before *Phillipsburg* and may no longer be indicative of Justice policy today, and it must be admitted that it may then have been indicative only of an overworked staff. In the same year, however, the Department did file suit against two banks which had deposits of $21,000,000 and $16,000,000 respectively,[172] and which also had a market share of eighty-five percent of all deposits and eighty-four percent of all loans. If there is a Justice Department de minimis policy, then, it is inapplicable to all but the smallest banks.[173]

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[167] 399 U.S. at 358 (citation omitted).

[168] See Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[169] Id. at 339.

[170] See Reycraft, Bank Merger Compliance with the Antitrust Laws, 12 Antitrust Bull. 445, 460 (1967).

[171] Report of the Federal Reserve Board to the Comptroller of the Currency, January 18, 1967.

[172] United States v. First Nat'l Bank of State College, Civil No. 9433 (M.D. Pa., filed June 17, 1966).

[173] In a more recent example, the Justice Department filed suit and a district court granted summary judgment, thereby blocking the merger of two small Vermont banks. The court rejected the argument that the "section of the country" was too small to be

The third guideline established in the *Phillipsburg* decision is that when estimating the anticompetitive effects of a proposed merger, one should use a narrow geographic market. This is especially true if the customers are small borrowers, depositors or businessmen. On this point the Court said:

> The localization of business typical of the banking industry is particularly pronounced when small customers are involved. We stated in *Philadelphia Bank* . . . that "in banking the relevant geographical market is a function of each separate customer's economic scale"—that "the smaller the customer, the smaller is his banking market geographically," . . . . Small depositors have little reason to deal with a bank other than the one most geographically convenient to them.[174]

The fourth guideline is that in balancing the benefits to the convenience and needs of the community against the anticompetitive effects of a merger, one must use the same geographical market for both evaluations. While this might seem an obvious requirement, the Supreme Court found, despite appellee's argument to the contrary, that the district court in *Phillipsburg* had judged the anticompetitive effect of the merger in terms of Phillipsburg and its environs, including Easton, Pennsylvania, while it had judged the benefit to the community with respect to Phillipsburg only. The Court noted that the result of this kind of balancing would be:

> [a]pproval of a merger that, though it has anticompetitive effects throughout the market, has countervailing beneficial impact in only part of the market . . . [and] such a result would unfairly deny the benefits of the merger to some of those who sustain its direct and immediate anticompetitive effects.[175]

Finally, the fifth lesson we can derive from *Phillipsburg* is found in the Court's reminder to the district court that in judging the convenience and needs of the community on remand, it must consider the convenience and needs of all the customers of the bank, large and small, and not restrict itself to those seeking larger loans or specialized services.[176] The Court reiterated its ruling in *Nashville Bank* that before this examination is made, the court must first determine whether there

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within the purview of section 7. United States v. County Nat'l Bank of Bennington, Civil No. 6088 (D. Vt., filed Jan. 1, 1972). For a discussion of this case, see text at notes 189-92 infra.

[174] 399 U.S. at 363 (citations omitted).

[175] Id. at 371-72.

[176] Id. at 372.

existed alternative solutions that could have solved the bank's problems and thus benefited the community without a merger.[177]

Justice Harlan's dissent in *Phillipsburg* questioned the Government's filing suit in the first place. "With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?"[178] Harlan acknowledged, however, that from the Justice Department's point of view, the result of the decision fully justified the effort, since "[a]fter today's opinion the legality of every merger of two directly competing banks—no matter how small—is placed in doubt if a court, through what has become an exercise in 'antitrust numerology,' concludes that the merger 'produces a firm controlling an undue percentage share of the relevant market.' "[179] The Department's effort did indeed save both it and the federal banking agencies much work, since it can be safely assumed that, following the *Phillipsburg* decision, a considerable number of mergers between small and medium size banks that might have been attempted before that decision would not be undertaken.

VI. Was It Worth It?

We have already discussed the purpose of the Bank Merger Act of 1960. Congress intended to check the growing bank concentration resulting from mergers which would prove detrimental to the general economy and, possibly, to the small bank customer trying to obtain credit.[180] Did the ten years of effort by the Justice Department, the federal banking agencies and the courts, and the additional effort of Congress in passing the Bank Merger Act of 1966, produce a result concomitant with that original congressional purpose? A recent empirical study by two economists has concluded that it did.[181] They analyzed various standard metropolitan statistical areas and found that in the 1960's concentration had declined or leveled off from the concentration ratios of the 1950's. Furthermore, the phenomenon that dramatized the need for legislation, the big bank merger, had disappeared: "Clearly, combinations of major banks in the same city appear now to be a thing of the past."[182] They also computed the concentration ratio of

[177] Id.

[178] Id. at 374.

[179] Id. (citations omitted).

[180] It was feared that the larger banks resulting from the merger trend would be less sympathetic with small borrowers. See Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bull. 859, 865 (1971).

[181] See id. passim. As the authors point out, while it might be argued that part of the congressional purpose was to establish that banking was "different" and warranted special treatment, it nevertheless can be safely stated that Congress intended to stop a merger trend it considered undesirable. Therefore it is fair to appraise the results on this basis. Id. at 868.

[182] Id. at 888.

the three largest banks in several large cities and what the increased ratio would have been if some of the proposed mergers in those cities had not been denied.[183] However, as the authors pointed out, "it is clear that this is a minimal measure of the impact of the Bank Merger Act. Without application of antitrust standards to banking, it is certain that additional mergers would have been proposed."[184]

Has the small bank customer benefited? As we saw in *Phillipsburg*, both the Government and the Supreme Court were very concerned with guaranteeing the small customer the protection of the antitrust laws. The Court had said: "The effect [of ruling in favor of defendants] would likely be to deny customers of small banks—and thus residents of many small towns—the antitrust protection to which they are no less entitled that customers of large city banks."[185] Moreover, the recent case of *United States v. County Nat'l Bank*,[186] discussed below, indicates that this concern is not being ignored by the district courts.

Another procompetitive change has taken place since the passage of the 1960 Act. The federal banking agencies, which at first seemed to resent the intrusion of competitive principles in merger approvals, have adjusted to the overriding purpose of the Act and are now applying antitrust standards in the same manner as have the courts. The actions of the Federal Reserve Board have exemplified this trend; in fact, the Board has been complimented by the Justice Department for its efforts in this area.[187] The FDIC has also been applying these standards. For instance, following the *Phillipsburg* decision the Chairman of the FDIC announced that the new critical point in weighing the antitrust aspects of a merger would be whether fifteen percent of the total banking assets in the market were being concentrated.[188]

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[183] SMSA | Percent 3-Bank Concentration Ratio | Concentration Ratio If All Mergers Approved

Atlanta	62.1	70.1
Baltimore	64.2	81.0
Houston	44.8	53.2
Louisville	69.1	82.1
New York	44.3	49.9
Philadelphia	46.3	61.6

Id. at 882.

[184] Id. at 881.

[185] 399 U.S. at 361-62.

[186] United States v. County Nat'l Bank of Bennington, Civil No. 6088 (D. Vt., filed Jan. 1, 1972). See notes 189-92 infra and accompanying text.

[187] See Statement of Richard W. McLaren, Ass't Att'y Gen'l, Antitrust Div., Hearings on S. 1052 et al. Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 244 (1970) (hereinafter cited as McLaren Statement).

[188] See Darnell, supra note 166, at 50-51. In a speech made nine months after *Phillipsburg*, Chairman Wille of the FDIC stated that "it is unlikely that many mergers of viable banks already competing in the same market can be justified [under *Phillips-*

In contrast to this trend, however, the Comptroller of the Currency recently approved a merger in Bennington, Vermont, which if consummated—the Comptroller conceded—would tend to lessen competition substantially and to create a commercial banking monopoly in the geographic market.[189] He justified the decision by the fact that the market was simply too insignificant to be regarded as a "section of the country" within the meaning of the Act. The Justice Department filed suit and the Comptroller intervened on behalf of the defendants.[190] It should be recalled that the Comptroller intervened in *Phillipsburg*, two years prior to *Bennington*, after having approved the merger, and a similar argument, based on the "insignificance" of the market, had been rejected by the Supreme Court. The district court,[191] granting summary judgment for the Government, cited *Phillipsburg* and concluded that the position of the Comptroller was "contrary to that adopted in decisions by the Supreme Court and belies the manifestations of congressional intent indicating that the particular product involved is of substantial importance in determining an area constituting a section of the country for purpose of the Clayton Act."[192]

VII. The Value of the Bank Merger Act of 1960

One might ask whether the Bank Merger Act of 1960 was very instrumental in achieving these procompetitive results; after all, it had been apparent after the *Firstamerica* decision that the Justice Department was going to sue under the antitrust laws with or without the Act.[193] This fact, however, should not be allowed to obscure the principal significance of the Bank Merger Act of 1960, which lies not in its application of the antitrust laws to bank mergers—an accomplishment of *Philadelphia Bank*—but rather in its requirement that a federal agency approve with the advice of the Justice Department every proposed bank merger. This requirement is a marked improvement upon the hit-or-miss approach that results when the Antitrust Division is forced to discover and evaluate every merger in all industries and then

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burg]." Address by Wille, The Bank Merger Act Revisited, Washington, D.C., March 26, 1971.

189 The Comptroller had previously criticized the *Nashville-Phillipsburg* approach as "too inflexible," in that it unduly limited his discretion in approving mergers he thought advantageous. Address by the Comptroller, Financial Competition in a Regulated Environment, Washington, D.C., March 16, 1971.

190 United States v. County Nat'l Bank of Bennington, Civil No. 6088 (D. Vt., filed Jan. 1, 1972).

191 Circuit Judge Waterman was sitting by designation.

192 Mr. Camp has also been criticized for not requiring banks to seek alternative methods of solving their problems before approving their merger using the *Phillipsburg* standard. See Baker, Competition's Role in the Regulation of Banking, 154 The Bankers Magazine 75, 80 (No. 3, 1971).

193 See text at note 85 supra.

prepare a case in time to file a motion for a preliminary injunction. The Antitrust Division obviously does not have the manpower to attack every merger, and without the notification and stay provisions of the 1960 Act it would not be able to prevent the consummation of those it did attack. Its burden is further lightened by the fact that the banking agencies are now applying for the most part the same criteria as the Antitrust Division in judging proposed bank mergers.[194]

The 1960 Act has also had an effect on related areas in banking. This effect has been discussed in another study[195] and although the details of that study are not within the scope of this article its conclusion is of interest:

> In a more general sense, the introduction of effective constraints on bank conbinations in the 1960's may be viewed as part of the process of dismantling the pervasive controls which were erected in the early part of the 20th century to stabilize individual commercial banks, and which invariably suppressed competition. The Bank Merger Act of 1960 is a principal element in the reintroduction of competition and competitive ethics to an industry which had, since the mid-1930's, withdrawn into regulated and cooperative methods of doing business.[196]

Finally, the ten years of application of antitrust laws to bank mergers have had another procompetitive effect. The Justice Department has been so successful in blocking horizontal mergers that a shift of interest to market and product extension mergers has occurred. Both of these types of mergers have potential for increasing competition and in that respect are more valuable than horizontal mergers, which have little or no capacity to accomplish that result. The remainder of this article will explore these two types of mergers, along with the growth of bank holding companies and the legislation that has been passed to regulate them.

VIII. Market Extension Mergers

A market extension merger is a form of conglomerate merger. It is the acquisition of a firm located in a different geographic market but engaged in the same line of commerce as the acquiring firm; in banking, such a merger would be accomplished by a bank or bank holding company acquiring another bank in a geographic area in which the former had not competed. A market extension bank merger is dealt with in the

194 See text at notes 187-88 supra.
195 See text at notes 180-84 supra.
196 Shull & Horvitz, supra note 180, at 889.

same manner as a conglomerate merger in any industry. However, the Justice Department has had very little success in its attempts to block market extension bank mergers. Of all the bank mergers of any kind attacked by the Department since 1963, the year of the *Philadelphia Bank* decision, only five were eventually effected, all of which were market extension mergers.[197] In its effort to present a suitable case for initial Supreme Court review, the Department passed over the first four in this group, and finally filed an appeal in *United States v. First Nat'l Bancorp.*,[198] which will be heard in the Court's October 1972 term.

A. *The Potential Competition Theory*

The three principal theories used to attack conglomerate mergers, and hence applicable in suits attempting to block bank market extension mergers, are potential competition, entrenchment and reciprocity. The first of these is firmly embedded in the antitrust laws and has frequently been used in suits involving mergers in other industries. The anti-competitive effect standard, which is the crux of the potential competition theory, really involves double incipiency—a merger which *may tend* to eliminate *potential* competition is unlawful.[199] Potential competition serves both as a supplement to and as a substitute for actual competition. If a firm is aware that there are other firms on the "periphery" of its market with the ability and interest to enter the market, it will be motivated in much the same manner as though the peripheral firms were already competing with it. Potential competition plays its biggest role in concentrated markets which have what is termed "imperfect competition."[200] Therefore it is particularly applicable to the banking industry.

Thus far, however, the theory has not proved useful to the government in its unsuccessful attempts to block market extension mergers by banks, despite its considerable success in opposing such mergers in other industries. Moreover, the Federal Reserve Board has blocked bank holding company mergers on the basis of a probable lessening of potential competition.[201] What, therefore, is the reason for the

[197] United States v. First Nat'l Bancorp., 329 F. Supp. 1003 (D. Col. 1971); United States v. Idaho First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank of Maryland, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank of Jackson, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

[198] 329 F. Supp. 1003 (D. Col. 1971), probable jurisdiction noted, 405 U.S. 915 (1972).

[199] See Cohen, The Antitrust Laws Applied to Bank Mergers, Reciprocity and Tie-in Arrangements, 26 Bus. Law. 1, 4 (1970).

[200] "Imperfect competition" may be defined as "competition among sellers of inhomogeneous products in which the sellers are sufficiently few in number so that each exerts an influence upon the market." Webster's Third Int'l Dictionary 1133 (1961).

[201] See, e.g., Statement of Fed. Reserve Bd. on Application of BT New York Corp.,

Government's lack of success in the banking field? It has been suggested that it can be attributed to the district courts' reliance on issues that do not involve potential competition, such as the "convenience and needs" defense.[202] Another possibility is that the Justice Department has chosen the wrong mergers to attack. Whether or not either of these hypotheses is true, it is apparent that there is at least one "potential competition" problem that is peculiar to bank mergers and that might explain why the theory has not been efficacious in blocking such mergers. This is that banks need regulatory approval to enter new markets. In four out of five Government "defeats," the court relied to some extent on a finding that the appropriate federal banking agency would not have allowed de novo entry by the acquiring bank into the relevant market, and hence the only method by which the bank in question could enter the desired market was through merging with a pre-existing bank.[203] The Government will undoubtedly seek a Supreme Court ruling on the propriety of this contention, but until such a ruling is made, it appears that the banking agency's determination will continue to carry weight.

So far as other aspects of the potential competition issue are concerned, however, the Supreme Court has already provided ample guidance. Three of the more important opinions are the *Procter & Gamble*,[204] *Penn-Olin*,[205] and *El Paso Natural Gas*[206] decisions, which have established the criteria for determining who potential competitors are. These criteria are, of course, applicable to bank mergers, since it was established in *Philadelphia Bank* and re-established in *Provident-Houston* that those mergers are within the scope of the antitrust laws.[207] Once the potential entrants into the relevant market have been identified, one must ascertain, as in all merger cases, the relevant product line or

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May 4, 1967; Statement of Fed. Reserve Bd. on Application of Allied Bankshares Corp., April 18, 1967.

[202] Whitesell, Potential Competition and Bank Mergers, 88 Banking L.J. 387, 393 (1971):

> Superficially, it seems that district courts have been reluctant to assign a very great weight to potential competition in commercial banking cases. Examination in detail of each of these cases, however, leads to a contrary solution—that is, the decisions have turned on factors other than potential competition . . . .

[203] The exception is United States v. First Nat'l Bank of Maryland, 310 F. Supp. 157 (D. Md. 1970). All five cases are listed in note 197 supra.

[204] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[205] United States v. Penn-Olin Chemical Co., 389 U.S. 308 (1967).

[206] United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

[207] In this regard, it is interesting to note that the Court has scheduled the *Bancorp.* case to be argued in conjunction with the Falstaff-Narragansett beer merger case, United States v. Falstaff Brewing Corp., 332 F. Supp. 970 (D.R.I. 1971), probable jurisdiction noted, 405 U.S. 952 (1972). This is perhaps an indication that the Court plans to treat the application of the potential competition issue to bank mergers in the same manner as in other industries.

"line of commerce" and the geographic market or "section of the country." It appears from the emphasis in *Phillipsburg* that the product market in potential competition cases will be the same as in the direct competition cases—that is, "commercial banking."[208] However, the *Philadelphia Bank* doctrine that the market varies with the type of customer—small, medium and large—is always applicable in all cases, as is *Phillipsburg*'s lesson that the localized nature of banking markets, and in particular the concept of the smaller market for banks with small customers, must be respected.

There are several criteria to be used in determining whether a potential competitor is likely to enter the market. At the outset it should be remembered that this is an objective and not a subjective test. Specific questions to be asked are: (1) What are the present and future growth prospects of the market? (2) What are the barriers to entry, including the possibility of disapproval by the Comptroller? (3) What is the financial and managerial capacity of the firm? and (4) What is the bank's past history of mergers and branching?

Once the relevant market and the most likely entrants have been identified, there still remains the question of what factors will prompt the Justice Department to challenge a prospective merger. The Department's Merger Guidelines provide some help here,[209] but they are very general and, since there is an absence of controlling legal precedent —the federal district court opinions carry little precedential weight without Supreme Court consideration of these issues—we will have

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[208] Of the five market extension cases, only the court in *Bancorp.* used this product market exclusively. *Phillipsburg*, by the way, seems to have negated the three-judge panel ruling in *Crocker-Anglo* that the omission of the words "line of commerce" from the Bank Merger Act of 1966 made it proper to consider the competitive effect of other financial institutions, thereby diluting the "commercial banking" market. United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-63 (1970).

[209] The appropriate provision reads:

> . . . the Department will ordinarily challenge the merger between one of the most likely entrants into the market and:
>
> (i) any firm with approximately 25 percent or more of the market;
>
> (ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50 percent or more;
>
> (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75 percent or more, provided the merging firm's share of the market amounts to approximately 10 percent or more; or
>
> (iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75 percent or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market or (B) the merging firm is a rapidly growing firm.

Dep't of Justice Merger Guidelines 22, reprinted in 1 Trade Reg. Rep. ¶ 4430 (May 30, 1968).

to wait, as was the case with horizontal bank mergers and with antitrust law in general, for the Supreme Court to establish further guidelines.

B. *The Entrenchment Theory*

The entrenchment theory, used when a large firm or "giant" enters a market of smaller firms through a merger, argues that the large firm with its resources will scare off any potential entrants into the market and will also intimidate the firms already there.[210] The *Procter & Gamble* case cited in the discussion of potential competition, is the principal authority for this theory, and the Department of Justice has dealt with entrenchment in its Merger Guidelines.[211] Despite the existence of these authorities, however, the entrenchment theory at this point is not as thoroughly established as other tests, such as potential competition. Furthermore, use of the theory is likely to be successful only in suits against very large bank holding companies and banks which have vast resources and marketing know-how; it is hardly applicable in those suits involving middle-sized and less sophisticated banks.

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[210] In only one of the five bank cases mentioned at note 197 supra was this an issue. The court in *Bank of Jackson* found that the "[p]laintiff wholly failed to convince this Court of the validity of this contention because of a complete lack of credible factual evidence." United States v. First Nat'l Bank, 301 F. Supp. 1161, 1206-07 (S.D. Miss. 1969).

[211] See FTC v. Procter & Gamble Co., 386 U.S. 568, 578-79 (1967). Regarding "Mergers Which Entrench Market Power and Other Conglomerate Mergers," the Merger Guidelines provide:

> The Department will ordinarily investigate the possibility of anticompetitive consequences, and may in particular circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market. Examples of this type of merger include: (i) a merger which produces a very large disparity in absolute size between the merged firm and the largest remaining firms in the relevant markets, (ii) a merger of firms producing related products which may induce purchasers, concerned about the merged firm's possible use of leverage, to buy products of the merged firm rather than those of competitors, and (iii) a merger which may enhance the ability of the merged firm to increase product differentiation in relevant markets.

Dep't of Justice Merger Guidelines 25, reprinted in 1 Trade Reg. Rep. ¶ 4430 (May 30, 1968).

These guidelines are obviously very general and create more questions than they answer. For example, how large is a "very large disparity"? When are products sufficiently related to induce purchasers to be concerned about the possible use of leverage? And what are the criteria for judging the ability of a merged firm to "increase product differentiation in the relevant markets"? These and other questions will have to be answered by the courts and will probably require more than one opinion of the Supreme Court. See Reycraft, Antitrust Problems in Banking—1971, 16 Antitrust Bull. 817, 829 (1971).

C. *Reciprocity*

Reciprocity, the third ground for attracting a conglomerate merger, was first established in *FTC v. Consolidated Foods Corp.*,[212] a 1965 decision. In effect, the doctrine of reciprocity prohibits trade practices of the "you scratch my back and I'll scratch yours" variety, whether such practices are entered into willingly or through coercion. It is most applicable to a bank holding company in an instance where banking customers might be encouraged or coerced into using the non-banking services of the company. As word of such practices gets around, overt coercion and explicit mutual agreements may become less common. However, customers of the bank may voluntarily seek non-banking services of the holding company in order to "score points" with the bank. This practice, called the "reciprocity effect," is impossible to attack under the Sherman Act because it entails no conspiracy in restraint of trade, but merely arises from the efforts of a customer who is looking out for what he considers his economic self-interest without any encouragement from the bank. It is therefore a problem inherent in the market structure and can be prevented only by blocking the merger. It will be discussed more fully below in the section on bank holding companies.[213]

The competitive evil of both reciprocity and the "reciprocity effect" is that they virtually take a particular product or service out of the marketplace. The individual merits of the product or service are no longer at issue, but rather what advantage can be gained in another transaction. The Government has been successful in pressing this claim and has obtained quite a number of consent judgments.[214] Reciprocity, however, has not been at issue in any of the five market extension bank mergers so far lost by the Government.[215]

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[212] 380 U.S. 592 (1965). The theory was later expanded in United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966). See Cohen, supra note 199, at 5.

[213] See text following note 225 infra.

[214] See, e.g., United States v. H. K. Porter Co., Civil No. 72-285 (W.D. Pa., filed April 12, 1972), judgment entered May 17, 1972; United States v. Bethlehem Steel Corp., Civil No. 70-3102 (E.D. Pa., filed Nov. 10, 1970), judgment entered Dec. 11, 1970; United States v. General Tire & Rubber Co., Civil No. C-67155 (N.D. Ohio, filed March 2, 1967), judgment entered Oct. 21, 1970.

[215] The close sister of reciprocity is the "tie-in." This was proscribed as a *per se* violation of the antitrust laws in Northern Pacific Ry. v. United States, 356 U.S. 1 (1958). A much more recent case, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), has raised serious tie-in questions for banks. However, since these questions are concerned more with the banking services than with bank mergers they will not be discussed here other than to point out that consideration of tie-in problems would be relevant when contemplating a product extension merger and the possible objections the Antitrust Division might have to that merger.

IX. Product Extension Mergers

A product extension merger is also a form of conglomerate merger. It occurs when a firm acquires another firm that is in a similar market but engaged in a different line of commerce: for example, when a bank holding company acquires a credit card company. The Federal Trade Commission described this type of merger in *Procter & Gamble* as an entry into "a market which adjoins, as it were, those markets in which [a company] is already established, and which is virtually indistinguishable from them insofar as problems and techniques of marketing the product to the ultimate consumer are concerned."[216] The same theories that are used against market extension bank mergers can be used against product extension bank mergers.

There have not been many product extension bank merger suits. In 1965 the Antitrust Division filed one against the First National City Bank for its acquisition of Carte Blanche.[217] It was eventually settled by a consent decree in which First National City sold Carte Blanche and agreed not to reacquire it.[218] In 1969 the Division intended to file another suit against First National City for its proposed acquisition of Chubb & Sons, a large casualty insurance firm. The Government feared that the acquisition would create the classic opportunity for tying insurance to loans and vice versa. When First National City learned of the Government's opposition, it abandoned the transaction before the complaint was filed.[219] Recently the Department filed a suit against Wachovia Corporation,[220] the parent of the largest commercial bank in the Southeast, opposing its proposed acquisition of American Credit, a $400 million institution operating in sales and consumer financing, factoring and insurance. The complaint alleged elimination of actual and potential competition as well as the possibility of reciprocity, tying and tying effect. This action is presently stayed, pending proceedings before the Federal Reserve Board.

The rules regarding product extension mergers were changed recently. New bank holding company legislation was passed which will restrict some of the freedom which one-bank holding companies have had in acquiring non-banking firms and will give more leeway to multi-bank holding companies which have been subject to the Bank Holding Company Act of 1956. This legislation will be discussed below.

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216 386 U.S. at 577-78, quoting 63 F.T.C. 1465, 1545 (1963).

217 United States v. First Nat'l City Bank, Civil No. 65-3963, (S.D.N.Y., filed Dec. 30, 1965).

218 Id., consent judgment entered April 10, 1968.

219 See McLaren Statement, supra note 187, at 240.

220 United States v. Wachovia Corp., Civil No. 2656 (W.D.N.C. 1972).

X. Bank Holding Companies

This country has had a traditional policy of separating commercial banking from other areas of economic activity. There are three principal considerations behind this policy:[221] (1) the desire to insure the solvency of the banks; (2) the fear that affiliation of banks and non-banking businesses would create unfair competitive advantages; and (3) the general concern over economic concentration throughout the economy. This policy is represented in the Glass-Stegall Act of 1932,[222] which prohibited banks from engaging in the securities business in order to avoid repetition of the abuses of 1920's. One might also say that the antithesis of that policy is in effect in countries such as Japan where banks have become the centers of huge industrial-commercial groups.

The first and third considerations behind this national policy are not novel and have been discussed elsewhere; hence we will not discuss them further here. It might be helpful, however, to explore briefly the second consideration—the fear that affiliation of banks and non-banking business would create unfair competitive advantages.

As has been noted, banks usually compete in concentrated markets of a local nature. Since the public is usually faced with limited banking alternatives, the banks have thus been able to exercise considerable market power. Furthermore, as the Supreme Court noted in *Philadelphia Bank* and *Phillipsburg*, bank customers, excluding the huge national ones, tend to patronize their local bank even if they could travel to another bank for a better interest rate. Unlike firms in other industries, banks do not have to worry about competitors freely coming in and deconcentrating their markets because branch banking is closely regulated by state banking agencies and is forbidden outright in one-third of the states.[223]

Banks probably exercise their economic power most strongly in the credit area. Traditionally, bank-customer relationships are not of the short-lived, high-turnover type, but the credit relationships between bank and customer tends to be even more long-lasting; in other words, one usually does not shop around for credit. Obtaining credit can require the disclosure of highly personal or sensitive competitive information. Moreover, some borrowers depend on local reputation for credit and cannot afford to jeopardize their good standing with the bank that has acknowledged this reputation. A long-term relationship, with a proper showing of loyalty by the customer, may help in times of tight

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221 See McLaren Statement, supra note 187, at 238.

222 47 Stat. 56, 12 U.S.C. §§ 347a,b, 412, as amended, 12 U.S.C. §§ 347a,b, 412 (1945).

223 See Shull & Horvitz, supra note 180, at 883.

money if the bank decides to look after its own—an informal method of credit rationing.

An additional consideration is the fact that the bank customer often does not possess the same degree of financial sophistication—or, just as importantly, *feels* he does not—as the bank officers. One can see that this reliance on the supposed expertise of banks gives the banks economic power even if, as one Assistant Attorney General of the Antitrust Division has said, "it is the subconscious exercise of economic power."[224]

When a bank expands into a non-banking market this economic power does not disappear; on the contrary, it can strongly influence the competitive make-up of the non-banking market. There is the marked danger of reciprocity, tying[225] and the reciprocity effect. The last factor is the most important from the Antitrust Division's point of view, and the Division appears unable to prevent its occurrence. For example, if First National City Bank had acquired Chubb & Sons, a casualty insurance firm, and if a potential loan applicant of First National City had placed all of his casualty insurance business with Chubb in the hopes, however unfounded, that it would help him secure a loan or obtain more favorable terms, competition in the casualty insurance market would have been damaged whether or not the customer's actions eventually had any effect on his loan. The problem, then, is one of market structure and can be checked only by blocking the merger. This is what the Antitrust Division decided to do, and in this particular situation, as mentioned above, First National City abandoned the transaction after it learned of the Department's opposition.

It can be seen, therefore, that the fear that affiliation of banks with non-banking businesses will create unfair competitive advantages is very well-founded, especially when one considers that the structure of financial markets tends to be an enduring one and that divestitures tend to be difficult.

A. *The Genesis of the Bank Holding Company*

The period after World War II saw tremendous growth in all sections of the American economy. The banking public demanded more and new kinds of services. By the 1960's, as a result both of these demands and of changes in technology, especially the development of the computer, it was hard to discern what was and what was not banking. Yet the industry was still regulated by laws based on concepts of banking developed in the 1930's. The banks resented these laws, which they

224 McLaren Statement, supra note 187, at 239.

225 See note 215 supra.

considered anachronistic, and they did not want to be left out of the mainstream of the nation's economic growth. They sought ways to expand both geographically and functionally, following the example of corporate conglomerates. In other words, they were looking for a piece of the action. It was the development of the bank holding company, particularly the one-bank holding company, which gave it to them.

The bank holding company structure enabled banks to go into non-banking fields and also enabled corporate conglomerates to go into banking. This concept was a novel one and Congress soon moved to impose the traditional banking limitations on the activities it entailed. In 1956 it passed the Bank Holding Company Act,[226] whose two principal purposes were to control the acquisition of banks by holding companies and to restrict the non-banking activities of the holding companies. It performed these functions simply by limiting the kinds of non-banking activities in which they could invest and by limiting the activities of the holding companies themselves.[227] However, there was one important exception: the Act did not regulate the activities of one-bank holding companies. In 1956 there was little concern with such companies, which for the most part were small and local in nature, formed for the convenience of small investors. They had no real effect on the national economy and, although some conglomerates had made single bank acquisitions, they had done so largely for investment purposes. Moreover, the banks were usually kept separate from the other activities of the conglomerate.[228]

B. *The Growth of One-Bank Holding Companies*

In 1956 there were only 117 one-bank holding companies, which controlled 11.6 billion dollars in commercial bank deposits.[229] By 1965 the number had grown to 550, controlling 15 billion dollars in deposits, or four and a half percent of all the commercial bank deposits in the country.[230] By the first part of 1968 the amount of bank deposits controlled had grown to 18 billion dollars.[231] Then on July 3, 1968, First National City Bank announced that it intended to take the one-bank holding company route to expand its activities outside the banking field.[232] A new gold rush had begun; by the end of 1969 there were 890

226 70 Stat. 133 (1956), 12 U.S.C. §§ 1841 et seq. (1964), as amended, 12 U.S.C. §§ 1841-43, 1849 (1970).

227 See Blaine, Registered Bank Holding Companies and the One-Bank Holding Company, 26 Bus. Law. 9, 11 (1970).

228 Id. at 10.

229 Id.

230 Id.

231 McLaren Statement, supra note 187, at 245.

232 Id.

one-bank holding companies with 181 billion dollars of commercial banking deposits or forty-three percent of all bank deposits in the country.[233] This unbelievable growth and overnight concentration of the nation's banking assets caused considerable concern. Among the first to act was Congressman Patman, who in 1969 introduced legislation to control one-bank holding companies.

C. *Bank Holding Company Legislation: The Background of the Bank Holding Company Act Amendments of 1970*

The legislation initiated by Congressman Patman, which eventually would be enacted as the Bank Holding Company Amendments of 1970, should be viewed against its background: various industry lobbies were pushing to confine banking to its own backyard; the banking lobby was trying to break down those backyard fences; and others, including the Antitrust Division and the Treasury Department, sought to establish flexible boundaries that would do the most for competition regardless of the industry involved. Through it all ran the question, What is banking?

Congressman Patman's bill[234] was changed in the House Banking and Currency Committee and reported out through a parliamentary maneuver of the minority Republicans and five Democrats.[235] When it reached the floor it was significantly changed as a result of lobbying as well as considerable anti-bank sentiment,[236] and a stricter bill was passed and went to the Senate.

The Senate was faced with three legislative proposals: the House bill, an Administration bill and a bill introduced by Senator Proxmire.[237] All three were intended to close the "one-bank holding company" loophole in the Bank Holding Company Act of 1956. Both the Administration bill and the House bill changed provisions of the 1956 Act dealing with non-banking activities of bank holding companies. While the language in each was different, the overall concept was the same. The Administration proposal retained supervision in the three banking agencies, in much the same fashion as did the Bank Merger Act of 1960, while the House bill gave sole supervision to the Federal Reserve Board. The House bill would also have completely proscribed bank expansion into certain non-banking activities; this feature was a testament to the strength of the lobbies in the industries concerned. The Antitrust

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233 Blaine, supra note 227, at 10.

234 H.R. 6778, 91st Cong., 2d Sess. (1970).

235 Blaine, supra note 227, at 10-11.

236 As one bank holding company representative remarked, "all the venom and frustration against interest rates, banking, conglomerates and all the rest of it came out and the Bill was completely rewritten . . . ." Id. at 11.

237 H.R. 6778, S. 1664, S. 1052, 91st Cong., 2d Sess. (1970).

Division opposed this "negative laundry list" of proscribed industries because it had not been demonstrated that banking expansion would be harmful to competition in these industries, and the absolute exclusion of banking would immediately wipe out the effect of banking as a potential competitor in those industries.[238] Senator Proxmire's bill was essentially a stop-gap measure that would have made the Bank Holding Company Act of 1956 applicable to one-bank holding companies pending further study by a newly-created Presidential Commission on Banking. All three bills would have left intact all existing antitrust remedies.

D. *The Bank Holding Company Act Amendments of 1970*[239]

The 1970 Act Amendments have been called "the most important piece of banking legislation in at least a generation."[240] They reflected the traditional policy towards banking discussed above, but also recognized that the distinction between banking and other financial activities had been blurred and that the entry of banking into other financial fields, though potentially dangerous to competition, could be procompetitive.

1. *Administration*

The principal section for our concern is section 4(c)(8),[241] which deals with the affiliation of banks with non-banking firms. The House version giving approval authority solely to the Federal Reserve Board was enacted. This method seems preferable for two main reasons: it is simpler, and conflicting interpretations by different agencies, which often emerged under the Bank Merger Act of 1960, are entirely precluded. Single-agency approval forecloses the possibility of "forum shopping," i.e., the possibility that a holding company would alter the character of a bank affiliate in order that it might fall within the jurisdiction of the agency whose interpretation would be most desirable for that particular transaction. The fact that the Administration bill would have required unanimous approval by all three agencies would not have completely prevented this situation, while at the same time it would have made administration of the section more complex.

If one-agency approval is best, why was the Federal Reserve Board granted this authority? The answer is that the Board already had had experience under the old Section 4(c)(8) of the Bank Holding Company

238 See McLaren Statement, supra note 187, at 243.

239 12 U.S.C. §§ 1841 et seq. (1964), as amended, 12 U.S.C. §§ 1841-43, 1849 (1970).

240 Address by Donald Baker, The Brand New Ball Game—Bank Holding Company Competition in the 1970's, at 1, Before the Regional Conference of the American Bankers Ass'n, Denver, Colo., November 16, 1971.

241 12 U.S.C. § 1843(c)(8) (1970).

Act of 1956, which regulated multi-bank holding company expansion. Furthermore, the Board's members traditionally include distinguished professional economists who are well-qualified to make the decisions involved. And, as a past head of the Antitrust Division testified in the hearings on the Amendments:

> [I]n our view, the Board has done a generally sound and responsible job of handling bank acquisitions under the competitive tests established under the Bank Holding Company Acts of 1956 and 1966 and the Bank Merger Acts of 1960 and 1966. There is no reason to believe it would not carry forward such experience and policy and capability in applying the new competitive tests for nonbanking acquisitions . . . .[242]

Finally, the Board was given the power to approve subsequent *bank* acquisitions by all bank holding companies. Had a three-agency approval system been enacted, then, the banking and non-banking activities of a bank holding company could have been regulated by two different agencies. This state of affairs would have caused duplication and waste of agency expertise, and would have created uncertainty in bank holding company planning and operations.

2. *Substantive Standards*

Under the 1970 Amendments, the Federal Reserve Board can permit bank holding companies, both single and multi-bank, to acquire companies, "the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto."[243] Therefore, as a first step in determining whether approval is to be granted, the Board must determine whether the activities of the company to be acquired are "closely related to banking." Consequently, under no circumstances will a bank holding company be engaged in making automobiles, refrigerators or popcorn. The Board has already issued Regulation Y[244] classifying certain activities as fitting the statutory standard.

As a second step the 1970 Amendments require the Board to determine whether the acquisition will be in the "public interest," or more specifically:

> [W]hether [performance of the activity proposed by the holding company, under the particular circumstances involved] can reasonably be expected to produce benefits to the public,

[242] McLaren Statement, supra note 187, at 244.
[243] 12 U.S.C. § 1843(c)(8) (1970).
[244] 12 C.F.R. §§ 225.1 et seq. (1972).

> such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.[245]

The Amendments authorize the Board to distinguish between de novo activities and acquisitions—a recognition that de novo entry is prima facie procompetitive. Regulation Y provides that if the bank holding company engages in any of the listed activities de novo, such activity will be deemed in the public interest and will be approved unless the applicant is notified to the contrary within forty-five days.[246] Both Congress and the Board, then, are markedly concerned with effects on competition. As one veteran antitrust observer noted, although the Amendments set out more banking factors than competitive factors, "[i]t nevertheless seems clear that 'increased competition' and 'undue concentration of resources' will be the paramount standards to be applied."[247]

After much hard fighting, the "negative laundry list" was excluded from the 1970 Amendments. Although objected to by those industries who would have been protected from banking competition, this exclusion seems to be for the best. While the exclusion does not mean that expansion will be allowed into all of those industries, it does mean that the Board has flexibility in this area and, after further experience under the Act, may change its mind if it appears banking expansion will serve the public interest. In other words, Congress, recognizing that there is little or no evidence justifying absolute exclusion of banking entry into a given field—with the exception of the securities industry—has wisely left the final decision to an expert banking agency while supplying public interest standards to be applied by the agency.[248]

It should not be forgotten that even after gaining Board approval an acquisition may be attacked under the antitrust laws. A by-product of litigation attacking bank holding companies' acquisitions of non-banking firms under the Act will be further guidelines on product extension bank mergers.

The final success or failure of the 1970 Amendments will not be measured by how well they were drafted but in their application. Bank holding company legislation is vitally important to the economic well-

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245 12 U.S.C. § 1843(c)(8) (1970).

246 36 Fed. Reg. 21666 (1971).

247 Reycraft, Antitrust Problems in Banking—1971, 16 Antitrust Bull. 817, 839 (1971).

248 Pursuant to these standards, the Federal Reserve Board recently announced that it would allow its twelve regional reserve banks to approve applications from one-bank holding companies, provided certain guidelines are met. See New York Times, Oct. 31, 1972, at 65, cols. 1-2.

being of this country. The Bank Holding Company Act Amendments of 1970 are a good, equitable approach to the problem, but as one Antitrust Division official has said, "the enactment of the statute is—in Churchill's phrase—'not the end. It is not even the beginning of the end. But it is perhaps, the end of the beginning.' "[240]

[240] Baker, supra note 240, at 1.