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Antitrust - Bank Mergers by Assets Acquisitions Prohibited under Section 7 of Clayton Act

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RECENT DEVELOPMENTS

ANTITRUST—BANK MERGERS BY ASSETS ACQUISITIONS PROHIBITED UNDER SECTION 7 OF CLAYTON ACT.

United States v. Philadelphia Nat'l Bank (U.S. 1963)

In November 1960, the Philadelphia National Bank (hereinafter PNB), a national bank, and Girard Trust Corn Exchange Bank (hereinafter Girard), a state bank, the second and third largest respectively of the forty-two commercial banks in the four-county Philadelphia area, agreed to consolidate under the PNB charter.[1] The merger was to be accomplished by the purchase of Girard's assets with the stock of the consolidated bank. It was felt that the resulting increase in the lending limit would afford a better basis for competition with the giant New York banks, would attract new business to the area, and would aid Philadelphia economic development.[2] Pursuant to the statute on bank mergers, the approval of the Comptroller of the Currency was sought[3] and acquired.[4] The Justice Department immediately commenced this action.[5] The district

1. This corporate amalgamation is a consolidation in that both banks would be dissolved, and a new bank formed under the PNB charter. However, since the law for mergers and consolidations is essentially the same, the term mergers will be used. *Compare* 73 Stat. 460 (1959), 12 U.S.C. § 215 (Supp. IV, 1963) *with* 73 Stat. 463 (1959), 12 U.S.C. § 215a (Supp. IV, 1959).

2. At the time the parties agreed to merge, PNB had assets in excess of one billion dollars and Girard had about $750,000,000. The present strength of both banks is due in large part to prior mergers, and the one proposed here would make the consolidated bank the largest commercial bank in the Philadelphia area. Since 1950, PNB has acquired nine independent banks, and Girard has acquired six. These mergers account for 59% and 85% of the respective banks' asset growth, 63% and 91% of their deposit growth and 12% and 37% of their loan growth. After the proposed merger, the consolidated bank and First Pennsylvania Bank and Trust Company (presently the largest Philadelphia bank) would control 59% of the total area assets, 38% of the total deposits, and 58% of the net loans.

3. 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (Supp. IV, 1963). Approval cannot be given until the Comptroller has received a report from the other two banking agencies (FRS and FDIC) and the Attorney General as to the probable anticompetitive effects of the merger.

4. The reports on the merger were all unfavorable, but the Comptroller approved it due to its probable favorable effect on national and international banking.

5. United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348 (E.D. Pa. 1962). At the trial the government, aided by statistical data and the testimony of economists and bankers, argued that despite governmental regulation there was a strong competitive force in the banking world and that the proposed merger was inimical to that free competition; that since the principal effect of this restraint on competition would be felt in the four county Philadelphia area—the situs of the banks' offices—this was the relevant geographical market, and that commercial banking was the relevant product market. But it is interesting to note that the area bankers testified they did not foresee any lessening of competition and were generally in favor of the merger.

court upheld the merger,[6] and the government appealed to the Supreme Court under section 2 of the Expediting Act.[7] The Supreme Court, reversing the district court, *held* the proposed merger to be a violation of section 7 of the Clayton Act. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 83 S.Ct. 1715 (1963).

This is the first bank merger by assets acquisition to be considered under both the amended section 7 and the Bank Merger Act of 1960.[8] The question confronting the Court was whether such mergers were governed by the antitrust laws *and* the Bank Merger Act, or whether Congress desired to treat commercial banking as a regulated industry not subject to the Clayton Act and governed solely by the banking agencies under the Bank Merger Act. As both the application of amended section 7 to bank mergers by assets acquisition, and the regulation of such mergers by a banking agency acting independently of the antitrust laws present serious difficulties, it is the examination of these statutes, the peculiar problem presented by bank mergers, and the ultimate decision of the Court on the application of the statutes to which this note is directed.

Section 7 of the Clayton Act was enacted in 1914 to restrain monopoly in the incipient stages by preventing one corporation from acquiring the stock of a competitor corporation.[9] Because the act was primarily aimed at the large holding companies, which through secret stock purchases were controlling and monopolizing various industries, the act contained no provision covering assets acquisitions.[10] This omission resulted in a

6. The specific rulings of the District Court were: (1) the Bank Merger Act of 1960 did not impliedly repeal the antitrust laws where applicable to bank mergers, (2) § 7 of the Clayton Act is inapplicable since banks are not corporations subject to the jurisdiction of the Federal Trade Commission, but even if § 7 is applicable, (3) the metropolitan area is not the relevant geographical market, for both banks prior to the merger actively competed throughout the northeastern states for commercial banking business, but even if § 7 is applicable and the metropolitan area is the relevant geographical market, (4) there is no reasonable probability of a substantial lessening of competition in the area due to the merger, (5) since there is no violation of the Clayton Act, a fortiori there is no violation of the Sherman Act, (6) the merger will be commercially beneficial to the area, (7) commercial banking is sufficiently peculiar to constitute in its entirety a separate line of commerce.

7. 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958).

8. The Justice Department has filed several complaints against bank mergers since § 7 was amended, but the cases involved stock acquisitions by bank holding companies which were prohibited even under the original Act. Transamerica Corporation v. Board of Directors of FRS, 206 F.2d 163 (3rd Cir. 1953) (dismissed for lack of proof), *cert. denied,* 346 U.S. 901, 74 S.Ct. 229 (1953); United States v. Transamerica Corp., Civil Action No. 38139, N.D. Cal., March 30, 1959 (settled by consent decree).

9. United States v. E.I. DuPont DeNemours & Co., 353 U.S. 586, 77 S.Ct. 872 (1957); Arrow-Hart & Hegeman Elec. Co. v. FTC, 65 F.2d 336 (2d Cir. 1933), *rev'd on other grounds,* 291 U.S. 587, 54 S.Ct. 532 (1934); Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D. Del. 1962); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (E.D. Mich. 1960).

10. 38 Stat. 731 (1914), which read in the pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

sharp increase in mergers by assets acquisition during the twenties and the post-war period. The trend was further cultivated by the Supreme Court holding that the Federal Trade Commission could not issue a stock divesture order[11] unless it acted before an otherwise unlawful stock acquisition was converted into an assets acquisition.[12] This decision crippled the effectiveness of the Clayton Act, and many bills were introduced in Congress in order to close the loophole.[13] Finally in 1950, the Clayton Act was amended to include an assets acquisition provision.[14] The amended section 7 now forbids a corporation subject to the jurisdiction of the Federal Trade Commission to "acquire the whole or any part of the assets of another corporation . . . 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."[15]

As the instant bank merger involved an acquisition of assets, the government charged that the merger was in violation of section 7. The banks contended, however, that section 7 was inapplicable to the merger because, as the amendment is worded, it applies to assets acquisitions only when the acquiring corporation is subject to the jurisdiction of the FTC, and banks are expressly excluded from the jurisdiction of the FTC by statute.[16] The government, however, asserted that a merger is crucially distinct from a pure assets acquisition, falling somewhere between a stock purchase and an assets acquisition.[17] The banks countered that the distinction between a merger by assets acquisition and a stock acquisition was too great to allow them to be considered alike under the statute.[18]

The Court stated that although both these contentions had merit, the distinction was not essential for a resolution of this issue, since under the new amendment the stock and assets acquisitions provisions, when

11. Provision for such an order was made in 38 Stat. 734 (1914).

12. This circumvention of the Clayton Act was accomplished by one corporation purchasing the stock of another corporation. The two corporations would quickly merge by transferring all the assets to the newly-formed corporation. The other corporations were then dissolved. This device was upheld in Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 54 S.Ct. 532 (1934); Thatcher Mfg. Co. v. FTC, 272 U.S. 554, 47 S.Ct. 175 (1926).

13. For comments on, and review of the legislative history of the amendment to § 7 of the Clayton Act, see Note, 52 COLUM. L. REV. 766 (1952); Comment, 46 ILL. L. REV. 444 (1951). See generally Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 233-38 (1960); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act,* 61 COLUM. L. REV. 629, 652-74 (1961). For an analysis of the amendment finally adopted, see Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502 (1962).

14. Congressman Celler, the sponsor of H.R. 2734, 81st Cong., 2d Sess. (1950), which became the adopted amendment, argued before the House: "[T]his bill seeks to plug a loophole in the present antitrust laws. . . . It is time to stop, look, and listen and to call a halt to the merger movement that is going on in this country." 95 Cong. Rec. 11485 (1950).

15. 64 Stat. 1125 (1950), as amended 15 U.S.C. § 18 (1958).

16. 73 Stat. 243 (1958), 15 U.S.C. § 21 (Supp. IV, 1963).

17. Brief for the United States, pp. 75-76.

18. Brief for Appellees, pp. 30-31.

read together, are sufficiently extensive to embrace all forms of corporate amalgamation. The present merger, even though it was to be accomplished by the purchase of Girard's assets,[19] was held to be prohibited under the stock acquisition clause.[20]

This provision, even though re-enacted in its original language, has been given an entirely new meaning by the Court. In no other case has the stock acquisition clause been applied to mergers by assets acquisition. The Court reasoned that such a metamorphic construction must be given in order to advance the intent of Congress to prevent mergers by assets acquisition. The original section 7 prohibited corporate acquisition only by stock purchases, and yet a merger by assets acquisition is equally as detrimental to competition for corporate control is also affected, and a competitor is absorbed. In order to preserve competition, therefore, a merger must be deemed the equivalent of a stock acquisition and condemned as such under the stock acquisition provision of section 7. The new provision was intended to carry the amendment further and prohibit the purchase of assets by a corporation engaged in commerce and subject to the FTC even where a merger does not result.[21] Thus section 7 now prohibits stock acquisitions and mergers by assets acquisition, and also pure assets acquisitions when the acquiring corporation is subject to FTC jurisdiction. Furthermore, the provision that "no corporation subject to the jurisdiction of the Federal Trade Commission" in section 7 was intended to confirm explicitly the power of the FTC to administer the amendment, and not to define or limit the type of merger prohibited by the act.[22] Finally, the Court reasoned that as the canon of construction

19. Because of the nature of the assets involved, bank mergers are rarely transacted in cash, and thus a transfer of stock is almost a necessity. In the instant case each Girard stockholder was to receive 1.2875 shares of the consolidated bank stock for every share held in Girard, and the stockholders of PNB were to retain their stock as the equivalent of one share of the consolidated bank's stock.

20. This interpretation conflicts with prior statutory construction by the Supreme Court. When Congress re-enacts a statute or any part thereof in its original language, the Court has always deemed this as a Congressional adoption of the judicial interpretation previously given to that language. ICC v. Parker, 326 U.S. 60, 65 S.Ct. 1490 (1945); Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797 (1904); United States v. Mooney, 116 U.S. 104, 6 S.Ct. 304 (1885). However, no court prior to this decision has ever held that § 7 was applicable to an assets merger simply because the stock of the acquired corporation passed to the acquiring corporation as a part of the assets, or because the assets acquisition was paid with the stock of the consolidated corporation. United States v. Celanese Corp. of America, 91 F. Supp. 14 (S.D.N.Y. 1950). See also Irvine, *The Uncertainties of Section 7 of the Clayton Act*, 14 CORNELL L.Q. 28 (1929).

21. The court noted that there is a distinction between mergers and simple assets acquisitions. *Hearings Before a Subcommittee on the Judiciary on Corporate Mergers and Acquisitions*, 81st Cong., 1st & 2d Sess. 176 (1950); see also *id.*, at 100, 139, 320-25; H.R. REP. No. 1191, 81st Cong., 1st Sess. 8-9 (1950).

22. See Irvine, *supra* note 19. See also *Hearing Before Subcommittee No. 3 on the Judiciary on Amending Sections Nos. 7 and 11 of the Clayton Act*, 81st Cong., 1st Sess. § 10 at 28 (1950), where Assistant Attorney General Bergson asserted: "If it [§ 7] is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." 95 Cong. Rec. 11504 (1950), where Representative Byrne said: "The suggested amendment to sections 7 and 11 of the Clayton Act

applicable to the antitrust laws is to construe most strongly against special preferences for a particular industry, in the absence of a clear congressional intent to exclude the banking industry, the antitrust laws must be held applicable.[23]

The Court prefaced its decision with the statement that it interpreted the amendment in the manner best suited to the Congressional intent of preventing mergers from destroying competition, and it is clear that the interpretation given is capable of achieving that purpose. However, as Mr. Justice Harlan's dissent indicates, Congress may never have intended that bank mergers by assets acquisition be subject to section 7. The dissent catalogues many post-amendment statements of Congressmen and Justice Department officials to the effect that section 7 was inapplicable to bank mergers.[24] The passage of the Bank Merger Act, Justice Harlan argues, was conditioned on the belief that section 7 was inapplicable and that banking, as a regulated industry, would be best governed by the administrative banking agencies already in existence.[25] The majority opinion refused to permit these statements to control its interpretation—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[26] Whereas this might be true as a general statement, it is doubtful whether it applies in this case, for even Congressman Celler, sponsor of the 1950 amendment, attempted to amend section 7 in 1956

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would merely give the [Federal Trade] Commission the same power in regard to assets acquisitions that it already possesses over acquisitions of stock. This would close the loophole and restore meaning to the statutes."; see also 96 Cong. Rec. 16437, 16452-53 (1951); 1948 FTC ANN. REP. 11-22; 1940 FTC ANN. REP. 12-13; 1928 FTC ANN. REP. 18-19.

23. California v. FPC, 369 U.S. 482, 82 S.Ct. 901 (1962); United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182 (1939); United States v. Southern Pac. Co., 259 U.S. 214, 42 S.Ct. 496 (1922).

24. The following materials contain an extensive consideration of the question, and they reached the same conclusion—§ 7 was inapplicable to bank mergers by assets acquisitions. Gruis, *Antitrust Laws and Their Application to Banking,* 24 GEO. WASH. L. REV. 89, 96 (1955); Klebaner, *Federal Control of Commercial Bank Mergers,* 37 IND. L.J. 287, 290, n.17 (1962); Note, *Federal Regulation of Bank Mergers,* 75 HARV. L. REV. 756, 758 (1962); Note, *The Applicability of the Antitrust Laws to Combinations Approved Under the Bank Merger Act, Federal Power Act and Natural Gas Act,* 37 N.Y.U.L. REV. 735, 741 (1962). For Congressional concurrence in this view, see also STAFF OF SUBCOMMITTEE NO. 5, THE HOUSE COMMITTEE ON THE JUDICIARY, 82nd Cong., 2d Sess., BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES III (1952); 102 Cong. Rec. 2108-09 (1956); *Hearings Before a Subcommittee on Banking and Currency on the Financial Institutions Act of 1957,* 85th Cong., 1st Sess., pt. 2, at 1030 (1957), testimony of Attorney General Brownell on bank mergers: "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that assets acquisitions by banks are not covered by section 7 [of the Clayton Act] as amended in 1950."

25. See 106 Cong. Rec. 7257 (1960), the remarks of Representative Spence: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." See also *supra* note 24; S. REP. No. 196, 86th Cong., 1st Sess. 1-2 (1959); H.R. REP. No. 1416, 86th Cong., 2d Sess. 5 (1960); 106 Cong. Rec. 9711 (1960); 105 Cong. Rec. 8076 (1959).

26. United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332 (1960); Rainwater v. United States, 356 U.S. 590, 593, 78 S.Ct. 946, 949 (1958).

so as to expressly include bank mergers.[27] This in itself reflects some degree of Congressional uncertainty as to whether the section 7 amendments were ever intended to reach bank mergers. Moreover, the dissenters believe the view of the Congress which enacted the Bank Merger Act was quite clear—section 7 is not applicable to bank mergers—and because of their control over the banking industry, it is the banking agencies that should decide whether any such merger is in the public interest and not adverse to competition.

The banks urged that the passage of the act[28] was proof of the Congressional intent that bank mergers should be controlled by the decision of the banking agencies rather than the Clayton Act. Therefore, the Bank Merger Act gave the agencies primary jurisdiction so that their approval of a merger was conclusive and immunized the merger from the antitrust laws. The Court nevertheless thought that even though the banking agencies may have primary jurisdiction under the act, this would not bar a subsequent antitrust action. Primary jurisdiction is defined as a "judicial doctrine requiring that questions within the special competence of an administrative agency be passed upon by the agency before the courts consider them."[29] Thus primary jurisdiction does not pre-empt the Court's jurisdiction, but only postpones it;[30] in the instant case the agency had already given its decision before this action was commenced.[31] Moreover,

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27. In 1956, Representative Celler again introduced an amendment to § 7, explaining that the new bill (H.R. 5948) was necessary to plug a loophole in the amended § 7 because it prohibited bank mergers only when they were accomplished by stock acquisition. 102 Cong. Rec. 2109 (1956). The bill read in the pertinent part: "[N]o bank . . . shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce. . . ." *Ibid.*

28. 74 Stat. 129, 12 U.S.C. § 1828(c) (Supp. IV, 1963). The act reads in the pertinent part:

> No insured bank [by FDIC] shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume any liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank . . . , or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a state member bank . . . , or (iii) of the [Federal Deposit Insurance] Corporation if the acquiring, assuming, or resulting bank is to be a non-member insured bank. . . . In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition [including any tendency toward monopoly], and shall not approve of the transaction unless . . . it finds the transaction to be in the public interest. In the interest of uniform standards, before acting . . . under this subsection, the agency . . . shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies.

29. Note, *Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 689-90 (1958). See also Jaffe, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 U. PA. L. REV. 577 (1954); Latta, *Primary Jurisdiction in the Regulated Industries and the Antitrust Laws*, 30 U. CINC. L. REV. 261 (1961).

30. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 78 S.Ct. 851 (1958); General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 60 S.Ct. 325 (1940).

31. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 83 S.Ct. 1461 (1963); United States v. Western Pac. R.R. Co., 352 U.S. 59, 77 S.Ct. 161 (1956).

as the act is regulatory in nature, it was held not to immunize from the antitrust laws those mergers approved by the banking agencies.[32] No express immunity was given by the act, and *pro tanto* repeals of the antitrust laws by implication have been upheld only when there is a direct and obvious repugnancy between the regulatory provisions and the antitrust laws[33] and when the agency has remedial as well as regulatory powers.[34] In the case of *California v. FPC*,[35] a regulatory agency approved a merger after considering the anticompetitive effects. It was held that the approval conferred no immunity in a contemporaneous action brought by the Justice Department for an antitrust violation. The Court held that this decision controlled the instant case, for the Comptroller was not obliged to give the anticompetitive factors any special weight, nor was it the intention of Congress that banking was such a well-regulated industry that enforcement of the antitrust laws was not necessary. The result is that the banking agencies have only an initial veto as to bank mergers, and their decision on the anticompetitive effects is only perfunctory, for it offers no insurance against a subsequent antitrust action. Henceforth, the legality of all mergers will be considered under the provisions of section 7 regardless of the banking agencies' decision.

From the legislative history and the clear provisions of the Bank Merger Act, it is obvious that Congress intended no such subordinate role for the agencies. Yet this result may be necessary for another reason. Assuming that the Court had ruled differently—that bank mergers were not subject to section 7, but were controlled by the Bank Merger Act—all proposed mergers would have to be approved by the appropriate banking agency. Then, no matter what foreseeable effect the merger might have on competition, and regardless of Justice Department opposition, as long as the merger was in the public interest approval could be granted by the agency. Since most functions of the banking agencies are presently conducted informally and without court review,[36] and the Bank Merger Act (unlike other regulatory statutes)[37] does not provide for judicial review, the decision of an agency on a proposed merger would be con-

32. The district court rejected this argument, and it was abandoned on appeal, but the Court considered it because of its importance to the final settlement of the dispute over bank mergers.

33. Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476 (1963).

34. See Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476 (1963); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 43 S.Ct. 47 (1922); Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350 (1907).

35. 369 U.S. 482, 82 S.Ct. 901 (1962).

36. 1 DAVIS, ADMINISTRATIVE LAW, § 4.04 (1958).

37. Bank Holding Company Act § 39, 72 Stat. 951 (1958), 12 U.S.C. § 1848 (1958); Natural Gas Act § 19, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 71(r) (1958); Federal Power Act § 313, 49 Stat. 860 (1935), as amended, 16 U.S.C. § 825(*l*) (1958); Interstate Commerce Act § 17(9), 54 Stat. 916 (1940), 49 U.S.C. § 17(9) (1958).

clusive and unassailable. Unless an agency clearly exceeded its jurisdiction, a Court holding that section 7 was not applicable to bank mergers would isolate from judicial scrutiny all control over the preservation of competition in the banking industry.[38]

The dilemma was clear. If it had held section 7 were applicable to mergers by assets acquisition in accordance with the contemporaneous views of the Congress that enacted the amendment, the Court would have had to resort to a strained interpretation of the amendment in order to reach bank mergers, thereby relegating the banking agencies to a function so limited that the Bank Merger Act would perform no useful function. In the alternative, by accepting the amendment as it was written, the Court could have held section 7 inapplicable to bank mergers, thus vesting absolute control over bank mergers, and ultimately all competition within the banking industry, in the agencies established under the Bank Merger Act. The first alternative required that the Court completely disregard the post-amendment Congressional statements as to the application of the amended section 7 and the role Congress intended for the Bank Merger Act. The other solution required the Court to bypass the intent of Congress when it enacted the amendment to section 7. In addition, the Court would have had to vest the agencies with exclusive control over bank mergers, a power Congress may have never intended to grant the agencies when it enacted the Bank Merger Act.

In view of the fact that Congress amended section 7 to prevent mergers, the interpretation is both logical and effective. The rejection of the subsequent Congressional views that section 7 was not intended to prevent such mergers is consistent with sound principles of statutory construction previously adopted by the Supreme Court. The strong tradition against special exemptions or repeals of the antitrust laws for the benefit of a particular industry also supports the decision. Thus if a merger is now proposed, the appropriate banking agency must consider the financial status of the banks, the public need, and the probable anticompetitive effects concerning which the opinion of the Attorney General and the other two banking agencies must be solicited. The agency can then either permit or reject the merger. If the merger is approved and the Justice Department believes it violates section 7, an antitrust action can be commenced. The decision reconciles two apparently inconsistent statutes and holds them both applicable to bank mergers.

Another solution to the dilemma was suggested in the dissenting opinion of Mr. Justice Goldberg. In his opinion section 7 was inapplicable to bank mergers, as the Bank Merger Act alone governed bank mergers,

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38. For an excellent discussion of judicial review of agency decisions see Note, *Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice*, 75 HARV. L. REV. 756, 762-63 (1962); Comment, *The Applicability of the Antitrust Laws to Combinations Approved Under the Bank Merger Act, Federal Power Act and the Natural Gas Act*, 37 N.Y.U.L. REV. 735, 750, n.95 (1962).

but any merger approved under the act which in effect created a monopoly or restraint on trade could be attacked under the Sherman Act which has always been held applicable to the banking industry. As the restraint on competition must occur before action can be taken, this remedy would be a retrogression to the pre-Clayton Act problems. It is doubtful whether the preservation of the integrity of the Bank Merger Act warrants such a withdrawal, and whether such a retreat is desirable or even necessary in view of the effective remedy afforded by the majority decision.

This case has cleared away the underbrush of uncertainty enveloping section 7 and the Bank Merger Act, and it has laid the legal foundation for all future bank mergers. Section 7 of the Clayton Act is now directly applicable to all corporate mergers including bank mergers, and only pure assets acquisitions of a corporation not subject to the jurisdiction of the FTC are excluded from its provisions. It is settled that the Bank Merger Act was not intended to immunize bank mergers from antitrust prosecutions, and an approval of a merger by a banking agency is not a bar to a subsequent antitrust suit.[39]

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39. Having determined that the proposed merger was subject to § 7, the Court then considered whether this particular merger constituted a violation of that section. In any § 7 action the relevant product market and the relevant geographical market must be determined. United States v. E.I. DuPont DeNemours & Co., 353 U.S. 586, 593-94, 77 S.Ct. 872, 877-78 (1957); United States v. E.I. DuPont DeNemours & Co., 351 U.S. 377, 404, 76 S.Ct. 994, 1012 (1956); Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 804 (9th Cir. 1961). The Court decided that in a merger of commercial banks the relevant product market is the aggregate commercial banking services; the relevant geographical market is that area where the merging banks are substantial market competitors and thus where the merger will result in an appreciable decrease in competition. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 595-96 (S.D.N.Y. 1958); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 397-98 (S.D.N.Y. 1957). For an explanation of how the relevant geographical market is determined for antitrust purposes, see Note, 68 YALE L.J. 1627, 1630-36 (1959). The court, in analyzing a merger in the light of § 7, must also decide whether the particular merger tends "substantially" to affect competition. The question of substantiality is not readily subjected to mathematical computation, although some economists have suggested that a percentage scale could be set up to gauge possible violations. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 308-16, 328 (1960). The Court did not decide the minimum limit of substantiality, but determined that in any given industry there existed a certain percentage of market share which is prima facie unlawful, and thus the merger must be prohibited. The result of the PNB merger would be that PNB would control 30% of the total banking business alone, and combined with First Pennsylvania, the two banks would control 59% of the total business within the relevant geographical market. This was held to be prima facie unlawful. Smaller percentages of market share have previously been condemned: Standard Oil Co. v. United States, 337 U.S. 293, 69 S.Ct. 1051 (1949) (appellant controlled 23% and the six major firms controlled 65%); FTC v. Motion Picture Advertising Service Co., 334 U.S. 392, 73 S.Ct. 361 (1953), where the defendant had 20% of the market, and with three other firms, they controlled 75% of the total market. In Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502 (1962), the defendant after the merger would have controlled only 7.2% of the national shoe store sales and only 2.3% of the national shoe outlet sales, yet this was held to violate § 7 of the Clayton Act.