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CASE NOTES

ANTI-TRUST LAW—APPLICABILITY OF SECTION 7 OF THE CLAYTON ACT TO BANK MERGERS

A civil proceeding was brought under section 4 of the Sherman Act and section 15 of the Clayton Act to enjoin a proposed merger of the Philadelphia National Bank ("PNB") and Girard Trust Corn Exchange Bank ("Girard"). The government charged that the merger would constitute a combination in unreasonable restraint of trade in violation of section 1 of the Sherman Act and would have the effect of substantially lessening competition or of tending to create a monopoly in violation of section 7 of the Clayton Act.¹ PNB and Girard are established Philadelphia banks, ranking second and third in size among the forty-two commercial banks of that city. PNB, a national bank, has assets of over \$1,000,000,000 which makes it the twenty-first largest bank in the nation. Girard, a state bank, is a member of the Federal Reserve System and is insured by the Federal Deposit Insurance Corporation ("FDIC"). Girard has assets of about \$750,000,000. The proposed merger would result in a bank which would have approximately 36% of the total assets, 36% of deposits, and 34% of net loans in a four-county area. The district court dismissed the complaint upon the ground that no antitrust violation had been established.² No actual merger was to be effected, under the stipulation of the parties, pending determination of an appeal to the United States Supreme Court.³ The Supreme Court reversed the lower court and held that the proposed merger of the two banks would violate section 7 of the Clayton Act. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

The purpose of this case note is to examine two significant aspects of the decision: (1) section 7 of the Clayton Act is applicable to bank

¹ Section 7 of the Clayton Act provides in pertinent part: "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." 15 U.S.C. § 18 (1958). Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1958). The Supreme Court did not decide whether the proposed merger violated section 1 of the Sherman Act.

² 201 F. Supp. 348 (E.D. Penn. 1962).

³ The case was appealed under section 2 of the Expediting Act, 15 U.S.C. 587 (1934).

mergers, and (2) a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition that it will be enjoined in the absence of evidence which clearly shows that the merger is not likely to have such anticompetitive effects. This was the first case which required the United States Supreme Court to consider the application of the antitrust laws to commercial banking. The legislative history surrounding the amendment to section 7 of the Clayton Act in 1950 as well as the passage of the Bank Merger Act in 1960 do not justify the conclusion that commercial banking is subject to section 7. Under point (2) the court in effect held that 30% control of the market share in the relevant geographical market is a *per se* violation of section 7. This amounts to a quantitative substantiality test which should be rejected in the light of Congressional intent as to the proper tests of illegality under amended section 7.

When originally enacted, section 7 covered only stock acquisitions, and the courts construed it narrowly.⁴ In 1950 the section was amended to extend to acquisitions of assets, but this extension only applied to corporations "subject to the jurisdiction of the Federal Trade Commission." Banks, not being subject to the jurisdiction of the Federal Trade Commission,⁵ were therefor deemed excluded from section 7 coverage. However, by reasoning that since it was the intent of Congress to bring all forms of corporate amalgamations, including mergers, under section 7, and since a merger was neither a pure stock nor a pure assets acquisition, banks could be included without doing violence to the provision "subject to the jurisdiction of the Federal Trade Commission." It cannot be refuted that Congress intended to include mergers under amended section 7,⁶ and banks are subject to the stock-acquisition provision.⁷ But, as noted above, a merger is not a pure stock acquisition, and Congress, as well as the Department of Justice, apparently felt that bank mergers remained outside the embrace of the Clayton Act.⁸ This was a major reason for the enact-

⁴ *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587 (1934); *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

⁵ Federal Trade Commission Act, 15 U.S.C. § 45 (a) (6) (1958).

⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). See legislative history beginning on p. 311 of opinion. See also, S. REP. NO. 1775, 81st Cong., 2d Sess. (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949); *Hearings Before the Subcommittee on Corporate Mergers and Acquisitions of the Senate Committee on the Judiciary*, 81st Cong., 1st and 2d Sess.

⁷ *Transamerica Corp. v. Board of Governors of Federal Reserve System*, 206 F.2d 163 (3rd Cir. 1953).

⁸ Following the 1950 amendment, numerous bills were introduced to extend section 7 coverage to include bank mergers. For a summary of the various bills, see Funk, *Anti-trust Legislation Affecting Bank Mergers*, 75 *BANKING L. J.* 369 (1958). This conclusion

ment of the Bank Merger Act of 1960.⁹ The Supreme Court concluded there was no inconsistency between the Bank Merger Act of 1960 and the application of section 7 of the Clayton Act to bank mergers. It is submitted that in holding that bank mergers are subject to amended section 7, the Supreme Court overlooked the intent and concern of Congress in 1950. At that time, Congress was concerned with industrial concentration in broad areas such as manufacturing and merchandizing and did not consider the specialized area of commercial banking.¹⁰

After deciding that section 7 of the Clayton Act includes bank mergers, the Supreme Court held that a merger presents a threat of undue concentration when the surviving corporation controls 30% of the market share. The conclusion that a particular percentage of the market constitutes a *per se* violation is not consistent with prior antitrust decisions or the tests of illegality laid down by Congress.

In the case of *Standard Oil Company (California) v. United States*,¹¹ the test of quantitative substantiality was established. The defendant had negotiated a network of requirements contracts with some 6,000 service stations, which amounted to 6.7% of the gasoline sold in a seven-state area. The Supreme Court held that the contracts violated section 3 of

is further supported by the following: *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957*, 85th Cong., 1st Sess., pt. 2 at 1030, 1033 (1957) (Statement by Attorney General Brownell); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 2 at 13, 49, 72 (1957); H. REP. No. 1416, 86th Cong., 2d Sess. 5 (1960) (This was a Report of the House Committee on Banking and Currency which stated "The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help."); S. REP. No. 196, 86th Cong., 1st Sess. (1959), which reaches the same conclusion; and 106 CONG. REC. 7257 (1960) (Remarks of Representative Spence, Chairman of the House Committee of Banking and Currency: "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.").

⁹ 12 U.S.C. § 1828 (c) (Supp. IV, 1963). The act treats mergers and consolidations alike, and provides in pertinent part that when the acquiring, assuming, or resulting bank is to be a national bank, written consent of the Comptroller of the Currency shall be obtained prior to the merger or consolidation. The Comptroller, in granting or withholding consent, shall consider the financial history and condition of the banks, the adequacy of capital structure, future earnings prospects, general character of management, the convenience and needs of the community. In addition, the Comptroller shall consider the effect on competition, and after consideration of all these factors, he must find the transaction to be in the public interest before granting approval. Finally, the Comptroller will include a description of each transaction approved in his annual report to Congress.

¹⁰ H.R. REP. No. 1191, 81st Cong., 1st Sess. 2 (1949). See also, dissenting opinion of Mr. Justice Harlan in instant case, in which Mr. Justice Stewart joined.

¹¹ 337 U.S. 293 (1949).

the Clayton Act,¹² and the defendant was properly enjoined from enforcing them. Section 3 required a showing that the effect "may be to substantially lessen competition." This was satisfied by proof that competition had been foreclosed in a substantial share of the line of commerce affected. Unlawful foreclosure was conclusively presumed.

The *Standard Stations* case was decided two months before the report of the House Judiciary Committee on the proposed amendment to section 7.¹³ The report stated that the two tests of illegality were (1) substantially lessening competition or (2) tending to create a monopoly.¹⁴ Following the House Report, the Senate Judiciary Committee stated that it "expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition."¹⁵ No indication can be found that Congress believed a particular market percentage should be determinative.

Subsequent to the 1950 Amendment, courts broadened their inquiries into various factors making up the respective tests of illegality.¹⁶ Quantitative substantiality is not to be regarded as the sole determinative of whether a violation exists.¹⁷ Evidence of mere size and participation in a substantial share of the line of business involved is not enough, since the acquisition is a violation only if its effect may be to substantially lessen competition or to tend to create a monopoly.¹⁸ While providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular in-

¹² Section 3 of the Clayton Act, although dealing with leases and contracts of sale, incorporated the identical language of section 7, namely: "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14 (1958).

¹³ H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

¹⁴ The Committee plainly indicated that courts would have to consider various factors in applying the two tests of illegality, such as: whether a particular enterprise has been eliminated which constituted a substantial factor in competition; whether the increase in size of the acquiring corporation was such that its advantage over competitors was decisive; whether an undue reduction in the number of competing enterprises results; and whether a relationship is established which deprives rivals of a fair opportunity to compete. *Id.* at p. 8.

¹⁵ S. REP. No. 1775, 81st Cong., 2d Sess. 7 (1950).

¹⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *A. G. Spalding and Brothers, Inc. v. FTC*, 301 F.2d 585 (3rd Cir. 1962); *American Crystal Sugar Co. v. The Cuban-American Sugar Co.*, 259 F.2d 524 (2nd Cir. 1958); *Transamerica Corp. v. Board of Governors of Federal Reserve System*, 206 F.2d 163 (3rd Cir. 1953).

¹⁷ *A. G. Spalding and Brothers, Inc. v. FTC*, 301 F.2d 585 (3rd Cir. 1962).

¹⁸ *Transamerica Corp. v. Board of Governors of Federal Reserve System*, 206 F.2d 163 (3rd Cir. 1953).

dustry.¹⁹ Market share is only one of the several factors to be considered in finding a *prima facie* violation of this section. A showing that the merging corporations do a large dollar volume of business or that the corporation's share of the market would increase in a horizontal merger does not indicate a violation of this section.²⁰ The current test is not impact on competition between the corporations involved but is one of qualitative substantiality of the resulting effect on competition in the relevant market.²¹

In section 7 cases it is necessary to determine the proper "section of the country" (relevant geographical market) before appraising the probable competitive effects of the proposed merger or acquisition. The four-county area in which the appellees had offices and were permitted to do branch banking under Pennsylvania law was selected as the relevant geographical market in the instant case. The number of commercial banks in the area would be reduced to forty-one if the merger was effected. There was testimony by bankers, several of them being competitors of PNB and Girard, that the larger bank would be better able to compete with large out-of-state banks, would promote economic development in the area, and would have no adverse effect on competition. In addition it can be argued that competition among banks is not as vigorous as in other commercial and industrial areas generally, partly because of the present network of federal regulation and supervision over banking activities.²² In light of these facts, the intent of Congress in amending section 7, and prior decisions of the federal courts, the Supreme Court's holding that a merger resulting in 30% of the market share amounts to a *per se* violation appears unfounded.

¹⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

²⁰ *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177 (D.C. Mich. 1960).

²¹ *Vanadium Corp. of America v. Susquehanna Corp.*, 203 F. Supp. 686 (D.C. Del. 1962).

²² See 1 DAVIS, *ADMINISTRATIVE LAW*, § 4.04 (1958), where federal supervision of banking is referred to as one of the most successful systems of economic regulation.

ANTI-TRUST LAW—SHERMAN ACT: CONSPIRACY IN PATENT ANTI-TRUST CASES

Singer Manufacturing Company completed the design of a mechanism to be used in a household sewing machine in April, 1953 and filed an application for a United States patent thereon. Singer subsequently purchased the June 9, 1952 United States application of one Harris which covered the same mechanism. In November of 1955, Singer negotiated a cross-licensing agreement with Vigorelli, an Italian firm, to avoid inter-