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Bank Mergers and Potential Competition

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COMMENTS

BANK MERGERS AND POTENTIAL COMPETITION

I. INTRODUCTION

In 1966, Justice Stewart commented: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[1] This statement aptly described the result of any government action brought under section 7 of the Clayton Act[2] to forestall horizontal mergers by, *inter alia*, banking institutions.[3] Since 1963, when the Justice Department brought its first section 7 action to prevent the merger of two banking institutions, the government has triumphed repeatedly.[4] Although changes to the banking law have been enacted in an attempt to restrict the scope of previous Supreme Court decisions,[5] the Justice Department, in turn, has been attempting to broaden the application of section 7 by invoking the concept of potential competition as a vehicle to limit geographic market extension mergers.[6] However, the Supreme Court, in *United States v. Marine Bancorporation,*[7] recently inflicted a major defeat on the Antitrust Division of the Justice Department. This Comment will examine the application of section 7 to the banking industry, the development of the doctrine of potential competition and its possible utilization in the banking field, and the implications of the recent Supreme Court decision.

II. THE BANKING INDUSTRY AND ANTITRUST

A. *Structure and Regulation Prior to 1960*

Commercial banks[8] are subject to regulation by both the federal and state governments. Federal law prohibits banks (or bank holding companies) from

1. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

2. 15 U.S.C. § 18 (1970). Section 7 provides in pertinent part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . 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."

3. "A horizontal merger commonly is defined as a merger between firms previously in competition with one another." 16A J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation § 17.01, at 17-2 (1971).

4. See, e.g., United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First City Nat'l Bank, 386 U.S. 361 (1967); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

5. Bank Merger Act of 1966, 12 U.S.C. § 1828(c) (1970); see notes 43-50 infra and accompanying text.

6. "An acquisition or merger is described as geographic market extension where one firm merges with or acquires another firm that manufactures or sells the same products but in different geographical areas." 16A J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation § 17.05, at 17-23 (1971).

7. 418 U.S. 602 (1974).

8. A commercial bank accepts demand deposits and furnishes short-term business loans. See

operating in more than one state,[9] but since the McFadden Act of 1927,[10] the federal government has yielded to the states on the question of geographic expansion of banking facilities. State regulatory schemes on bank expansion fall into three categories: those permitting statewide branching with few or no restrictions on de novo entry, those permitting limited branching,[11] and those prohibiting branching (thereby allowing only unit banking).[12] Most of these banking laws were passed during the period of the depression when safety rather than efficiency or competition was the goal.[13] During the 1920s and 1930s approximately 15,000 banks failed[14] and the various legislative formulations were designed to prevent "overbanking" which many felt had been the cause of previous failures.[15]

These banking laws, however, contained relatively few restrictions on the merger of banking institutions, and during the 1950s banks began to merge at an unprecedented rate. Between 1950 and 1959, there were approximately 1500 mergers.[16] Even more significant was the degree of concentration that became prevalent, especially in the major cities. At the end of the decade, "the four largest banks in each of the sixteen most important financial centers

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United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 326-27 (1963). These characteristics distinguish commercial banks from other financial institutions such as savings and loan associations. See Alcorn, Phillipsburg and Beyond—Developing Trends in Substantive Standards for Bank Mergers, 9 Houston L. Rev. 417, 418 (1972).

9. 12 U.S.C. §§ 36(c), 1842(d) (1970). However, there are a few "grandfather" exceptions. See id. § 36(a).

10. Id. § 36. See also First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 257-58 (1966).

11. An example of limited branching is presented by Oregon Rev. Stat. § 714.050 (1974), which prohibits branching except through merger in any community with a population less than fifty thousand where there is an existing bank regularly transacting business. For a discussion of the various devices that are used to limit branching, see Baker, Bank Expansion: Geographic Barriers, 91 Banking L.J. 707 (1974) [hereinafter cited as Baker, Geographic Barriers].

12. "At the end of 1970, nineteen states permitted statewide branch banking, sixteen permitted limited branching, and fifteen had unit banking." Gup, A Review of State Laws on Branch Banking, 88 Banking L.J. 675 (1971).

13. Baker, Geographic Barriers 710. Donald Baker, who is Deputy Assistant Attorney General of the Antitrust Division of the Department of Justice, has described the resulting situation as follows: "The shadow of the Great Depression darkens the landscape, as ancient swords rattle against each other in the gloom." Id. at 709.

14. Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bull. 859, 863 (1971).

15. Comment, Bank Branching in Washington: A Need for Reappraisal, 48 Wash. L. Rev. 611, 616 (1973). Branching restrictions are motivated also by the fear of smaller banks that they cannot compete with large city-oriented banks. Id.

16. Reid, "The Bank Merger Act of 1960: A Decade After": Comment, 18 Antitrust Bull. 449, 450 (1973). The mergers in the 1950s included some of the giants in the field. For example, Chase National Bank ($5.7 billion in assets) acquired Manhattan Bank ($1.7 billion); Bankers Trust Co. ($2.3 billion) acquired Public National Bank (over $500 million); National City Bank (over $6 billion) acquired First National Bank ($715 million); and Crocker National Bank ($1.5 billion) combined with Anglo National Bank (close to $1 billion). Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bull. 859, 870 (1971).

of the country controlled sixty percent of all bank assets in those centers."[17] Perhaps more surprising was that many of these mergers required no federal approval despite their profound effect on the national economy.[18] Some antitrust experts considered banking exempt from the antitrust laws because of its regulated status,[19] and even the Justice Department concurred in this belief.[20] However, a general feeling arose that some type of action was necessary to forestall the ever-increasing concentration in the banking industry.

B. *The Bank Merger Act of 1960*

Congressional reaction to this growing concentration,[21] coupled with the fear that its continuance would lead to a severe restriction of competition in the banking industry, led to the passage of the Bank Merger Act of 1960.[22] The Act established a procedure whereby federal regulatory authorities would review any proposed merger by banks under their supervision. Review would be conducted by the Comptroller of the Currency if the acquiring bank was nationally chartered, by the Board of Governors of the Federal Reserve System (FRS) if the acquiring bank was a member of the system but state chartered, and by the Federal Deposit Insurance Corporation (FDIC) if the acquiring bank was a non-member of the FRS but was insured by FDIC.[23] The Act also outlined a number of banking factors to guide the regulatory agencies and emphasized that their evaluation should include "the effect of the transaction on competition."[24] However, despite this reference to the effect of the merger on competition, many Congressmen felt that banks were still immune from the antitrust laws.[25]

17. Kintner & Hansen, A Review of the Law of Bank Mergers, 14 B.C. Ind. & Com. L. Rev. 213, 221 (1972) [hereinafter cited as Kintner & Hansen]; see 105 Cong. Rec. 8114 (1959) (remarks of Senator O'Mahoney).

18. Kintner & Hansen 221; see Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind. L.J. 287, 298 (1962).

19. See, e.g., C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 42 (1959).

20. A representative of the Justice Department stated: " 'After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act.' " United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 377 (1963) (Harlan, J., dissenting), quoting Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3, at 2141 (1955).

21. 105 Cong. Rec. 8114 (1959) (remarks of Senator O'Mahoney).

22. Pub. L. No. 86-463, 74 Stat. 129 (1960), as amended 12 U.S.C. § 1828 (1970). For a discussion of the Act and events leading to its passage, see Kintner & Hansen 221-25; Lifland, The Supreme Court, Congress, and Bank Mergers, 32 Law & Contemp. Prob. 15, 17-20 (1967); Wu & Connell, Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers, 59 Va. L. Rev. 860, 862-63 (1973).

23. Pub. L. No. 86-463, 74 Stat. 129 (1960), as amended 12 U.S.C. § 1828 (1970).

24. Id. The banking factors to be used in the evaluation included the financial history and condition of the banks, adequacy of capital structure, future earnings prospects, character of management, and the convenience and needs of the community. Id.

25. See, for example, the views of the then Senator Lyndon Johnson who, when referring to the Act, stated: "It provides for a thorough review . . . of the bank mergers . . . which are now

C. Philadelphia *and Its Aftermath*

By the early 1960s, however, the Justice Department no longer agreed that banks were immune from antitrust attack. When two of the three largest banks in the Philadelphia area attempted to merge, the Justice Department brought its first antitrust suit against banking institutions. In *United States v. Philadelphia National Bank,*[26] the Justice Department alleged that the proposed merger violated not only section 7 of the Clayton Act,[27] but also section 1 of the Sherman Act.[28] To the surprise of many in the banking field, the Supreme Court sustained the government's section 7 claim.

In addressing the section 7 violation, the Court set about defining "the line of commerce" and the "section of the country" in order to determine whether the effect of the merger "may be substantially to lessen competition" therein.[29] The question presented in the line of commerce analysis was whether the services provided by commercial banks constituted a distinct product market, or whether the market also included similar services provided by other financial institutions. The Court chose the former, declaring that the commercial bank's "cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) . . . composes a distinct line of commerce."[30]

The question in defining the geographic market was whether to accept a broad regional market as advocated by the banks[31] or the more restricted area

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and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act." 106 Cong. Rec. 9715 (1960).

26. 374 U.S. 321 (1963). The Philadelphia National Bank, the second largest bank in the Philadelphia metropolitan area, with assets over $1 billion sought to acquire the Girard Trust Corn Exchange Bank with assets over $750 million. The resulting bank would control 36% of all desposits in the area and the four largest banks would control 77% of deposits. Despite reports from the Attorney General, the Board of Governors of the FRS, and the FDIC that the merger would have substantial anticompetitive effects, the Comptroller of the Currency had approved the merger. Id. at 330-33.

27. 15 U.S.C. § 18 (1970), quoted in part in note 2 supra.

28. 15 U.S.C. § 1 (1970); see note 37 infra.

29. 374 U.S. at 355.

30. Id. at 356. The definition of the product market can have a significant effect on the outcome of an antitrust suit. See, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966). Some commentators feel that the market should be broader than that drawn in Philadelphia and should include all types of financial institutions, especially if they succeed in broadening their powers (e.g., savings and loan associations, which are attempting to establish the equivalent of checking accounts through negotiable orders of withdrawal). See Noble, Antitrust Considerations Affecting Bank Growth: Greeley and Beyond, 90 Banking L.J. 381, 389 (1973); Smith, Measures of Banking Structure and Competition, 51 Fed. Res. Bull. 1212, 1218-19 (1965). Others have suggested an approach including analysis of the submarkets for each type of service provided by commercial banks and evaluation of the competition furnished by non-bank institutions in each of these areas. Via, Antitrust and the Amended Bank Merger and Holding Company Acts: The Search for Standards, 53 Va. L. Rev. 1115, 1120 (1967).

31. The banks argued that the geographic market should be large enough so as to encompass large banks in New York and elsewhere which presently solicited large scale borrowers and depositors in the Philadelphia market. 374 U.S. at 360 n.37.

suggested by the government.[32] The Court held that the test in defining the geographic market was to include only that area where "the effect of the merger on competition will be direct and immediate."[33] After concluding that banking is essentially local in nature, the Court determined that the appropriate geographic market was the Philadelphia metropolitan area where the merging banks were in direct competition.[34]

After defining the relevant markets, the Court proceeded to the ultimate question of whether the merger violated section 7. In doing so, it utilized an analysis which Justice Harlan was to later call the "numbers game."[35] The Court looked at two basic factors: the percentage of the market which the new bank would possess and the over-all concentration of the market. After determining that the market share would increase to well over 30 percent and the concentration ratio by over a third the Court concluded "that these percentages raise an inference that the effect of the contemplated merger . . . may be substantially to lessen competition" and that this inference had not been rebutted.[36] In addition, the Court specifically rejected the proposition that banks were immune from the antitrust laws either because of the high degree of governmental regulation or because of the Bank Merger Act of 1960.[37]

The *Philadelphia* decision was criticized on a variety of grounds.[38] The most significant was the Court's reliance on market share and concentration percentages in lieu of the thorough market analysis previously prescribed by *Brown Shoe Co. v. United States.*[39] In that case, the Court had held that each merger must be "functionally viewed, in the context of its particular industry," taking into consideration a wide range of economic variables.[40] The reliance on market share and concentration percentages significantly

32. Id. at 361. "Theoretically, the market area would include the location of all economic units reacting to the same set of competitive forces on either the supply or the demand side." Schweitzer, The Definition of Banking Markets, 90 Banking L.J. 745, 749 (1973). On geographic market delineation in general, see Elzinga & Hogarty, The Problem of Geographic Market Delineation in Antimerger Suits, 18 Antitrust Bull. 45 (1973).

33. 374 U.S. at 357.

34. Id. at 361.

35. United States v. Third Nat'l Bank, 390 U.S. 171, 193 (1968) (Harlan J., concurring & dissenting).

36. 374 U.S. at 365; see id. at 364-66.

37. Id. at 350-51, 368. The Court did not address the Sherman Act violation in Philadelphia, but it did so in the next year in United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964). The Court held that a similar merger would result in an elimination of competition to such a degree that it constituted "an unreasonable restraint of trade in violation of § 1 of the Sherman Act." Id. at 669-70. Justice Harlan described this case as "a Clayton Act case masquerading in the garb of the Sherman Act." Id. at 679 (Harlan, J., dissenting). Justice Harlan's observation appears to have been borne out by subsequent litigation on bank mergers—all of which has been on Clayton Act grounds.

38. 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. 79, 159-63 (1963).

39. 370 U.S. 294 (1962).

40. Id. at 321-22.

eased the burden of proving the anticompetitive effects of a proposed merger. *Philadelphia* was similarly criticized for disregarding the complex regulatory scheme to which banks are subject[41] and for ignoring the banking factors which had been included in the Merger Act of 1960 as a means of balancing the effects of a reduction of competition.[42] More significantly, the decision prompted a legislative attempt to override the gist of the decision.

D. *The Bank Merger Act of 1966*

Congressional consideration of the impact of *Philadelphia* began in the Senate where Senator Robertson proposed a bill exempting the banking industry from the antitrust laws[43] and giving the regulatory agencies exclusive and plenary authority over mergers.[44] He also wanted other financial institutions to be considered in determining the product market whenever there was a question of the competitive effects of a merger.[45] These proposals were supported by the American Bankers Association and by at least twenty-nine state banking associations.[46]

Opposition quickly developed, however.[47] Eventually, after extensive hearings, a compromise bill was passed that was far different from Senator Robertson's original proposals.[48] The bill created what is known as the "convenience and needs" defense, which permits approval of an anticompeti-

41. One commentator recently stated that the Court in Philadelphia "ventured off on a frolic of its own, disregarding the thrust of the arguments in the case and making a great effort to avoid recognizing the fact of the industry's regulation." Shenefield, Annual Survey of Antitrust Developments—The Year of the Regulated Industry, 31 Wash. & Lee L. Rev. 1, 25 (1974).

42. Whitesell & Kamens, Bank Expansion: The Politics of Supreme Court Decisions, 91 Banking L.J. 748, 754-55 (1974). On the banking factors, see note 24 supra.

43. Certain statutes do provide express immunity or exemption from the antitrust laws for regulated industries. See, e.g., 47 U.S.C. § 221(a) (1970) (telephone companies); 47 U.S.C.A. § 222(c)(1) (Supp., Feb. 1975) (telegraph carriers); 46 U.S.C. § 814 (1970), as amended, (Supp. II, 1972) (common carriers by water). Such statutes are under review. Address by Joe Sims, Special Ass't to the Ass't Att'y Gen. Antitrust Div., Exec. Seminar, Feb. 28, 1975.

44. Lifland, The Supreme Court, Congress, and Bank Mergers, 32 Law & Contemp. Prob. 15, 28 (1967), discussing S. 1698, 89th Cong., 1st Sess. (1965).

45. On this question, Senator Robertson stated: "Such financial institutions [as savings and loan associations, credit unions, insurance companies, mutual savings banks, and small loan companies] compete with commercial banks and the effect of this competition must be considered by the agencies and by the courts when a proposed merger of commercial banks is being questioned." 112 Cong. Rec. 2664 (1966).

46. Lifland, The Supreme Court, Congress, and Bank Mergers, 32 Law & Contemp. Prob. 15, 29 (1967).

47. For example, Representative Wright Patman, who has recently been described as "a classic, visceral, prairie populist," (N.Y. Times, Jan. 23, 1975, at 24, col. 6) and who was then Chairman of the House Banking and Currency Committee, commented on the immunity proposal in the following manner: " 'If you exempt banks from antitrust, you might as well also shoot the policeman at the corner.' " Kintner & Hansen 234, quoting N.Y. Herald Trib., May 19, 1965, at 32, col. 1.

48. For a fuller discussion of the Act, see Carter, Bank Mergers: The New Law and Renewed Litigation, 12 Antitrust Bull. 109 (1967); Kintner & Hansen 233-38; Comment, The 1966 Amendment to the Bank Merger Act, 66 Colum. L. Rev. 764 (1966).

tive merger if "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."[49] Except for this defense, the antitrust laws were still to apply.[50]

E. *The Supreme Court's View of the Bank Merger Act of 1966*

The efficacy of the convenience and needs defense provided by the Bank Merger Act of 1966 was soon restricted by a series of Supreme Court rulings. The substantive aspects[51] of the defense were treated in *United States v. Third National Bank,*[52] a section 7 action brought by the Justice Department. It was claimed that the Nashville Bank & Trust Company, the acquired bank, was "a stagnant and floundering" entity and that the convenience and needs of the community would have been met by permitting it to merge with the viable Third National Bank.[53] The Court stated at the outset that Nashville Trust regularly made a profit and was in no way a "failing" company.[54] The Court found that most of the bank's problems "were primarily rooted in unsatisfactory and backward management."[55] Although the merger might solve these problems, the Court nevertheless held that the merger violated section 7.

> [W]e think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank

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49. 12 U.S.C. § 1828(c)(5)(B) (1970).

50. See 112 Cong. Rec. 2441, 2444-45 (1966) (remarks of Representative Patman and Representative Reuss). Representative Reuss has recently replaced Representative Patman as Chairman of the House Banking and Currency Committee. N.Y. Times, Jan. 23, 1975, at 1, col. 8. Representative Reuss has been described as "a less unyielding enemy of banks" than Representative Patman. Id. at 24, col. 5.

51. In a previous decision, United States v. First City Nat'l Bank, 386 U.S. 361 (1967), the Court had decided the procedural issues dealing with the 1966 Act. The Court held that an action challenging a bank merger on the ground of its anticompetitive effects is brought under the antitrust laws and not under the 1966 Act which merely provided a new defense. The Court also ruled that even if the regulatory agencies found that the convenience and needs of the community were met by the merger, the courts could review the issue de novo and the burden of proving the defense was upon the banks. Id. at 363-66; see Kintner & Hansen 238-41; Williams, Bank Mergers and the Antitrust Laws: Recent Developments, 12 Antitrust Bull. 427 (1967).

52. 390 U.S. 171 (1968).

53. Id. at 175, 179. The resulting bank would have controlled more than 38% of the deposits in the Nashville market and the concentration ratio of the three largest banks would have increased to 97.9%. Id. at 174.

54. Id. at 183; see International Shoe Co. v. FTC, 280 U.S. 291 (1930), which established the failing company doctrine as a defense to a section 7 action. The doctrine applies when no other purchasers are available and the acquired company "face[s] the grave probability of a business failure." Id. at 302. See also Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960). For a recent review of the history of the doctrine and a description of an economic model designed to help predict business failure, see Blum, The Failing Company Doctrine, 16 B.C. Ind. & Com. L. Rev. 75 (1974).

55. 390 U.S. at 188.

short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed.[56]

Rejecting a broad interpretation of the convenience and needs defense which would permit relatively minor problems to overcome a section 7 action, the Court required that "a showing be made that the gain expected from the merger cannot reasonably be expected through other means."[57] In a subsequent case[58] involving the merger of two relatively small banks in New Jersey, the Court similarly rejected a claim that the proposed merger, which would have resulted in greater efficiency, a better competitive position, and expanded service facilities, should be permitted in order to advance the convenience and needs of the community.[59] Again, the Court required a showing that such benefits could be effected only through the particular merger.[60]

After the New Jersey bank case,[61] it was said that

> as long as the Court continues to examine the antitrust effects of a merger under antitrust laws prior to the evaluation of convenience and needs under BMA-66, the former will always overrule the latter whenever any significant reduction of competition is found.[62]

In the seven years that had elapsed since *Philadelphia,* despite the congressional attempt to intervene, the Justice Department had "succeeded in establishing the proposition that most mergers of banks which are significant institutions in a single market can be prevented by invocation of the Clayton Act."[63]

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56. Id. at 189.

57. Id. at 190. The Court pointed out that Nashville Trust recently had been acquired by a group that had agreed to the merger. The Court felt that rather than find solutions to the bank's problems, the group preferred to merge, "a step which produced a profit of $750,000 on a two-month investment of $3,800,000." Id. at 192. One commentator indicated that the Nashville decision did not really establish the elements of a convenience and needs defense, but merely limited the failing company doctrine. Whitesell & Kamens, Bank Expansion: The Politics of Supreme Court Decisions, 91 Banking L.J. 748, 760 (1974).

58. United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); see Darnell, The Phillipsburg National Bank Case, 16 Antitrust Bull. 33 (1971); Note, U.S. v. Phillipsburg National Bank: A Consideration of Commercial Banking as the Relevant Line of Commerce in Small Bank Situations, 46 Ind. L.J. 348 (1971); Note, Antitrust and Bank Mergers, 25 Sw. L.J. 317 (1971).

59. 399 U.S. at 367, 372.

60. Id. at 372.

61. Justice Harlan pointed out that, after the merger, Phillipsburg National Bank would rank 1,323 out of the approximately 3,100 banks in the country and queried: "With tigers still at large in our competitive jungle, why should the [Justice] Department be taking aim at such small game?" Id. at 374 (Harlan, J., concurring & dissenting).

62. Whitesell & Kamens, Bank Expansion: The Politics of Supreme Court Decisions, 91 Banking L.J. 748, 761 (1974).

63. Noble, Antitrust Considerations Affecting Bank Growth: Greeley and Beyond, 90 Banking L.J. 381, 393 (1973). As a result, the regulatory agencies began using the same antitrust standards in evaluating mergers. Kintner & Hansen 249.

III. Potential Competition and Banking

The successes of the Justice Department to this point had concerned horizontal mergers—mergers between companies in direct competition with each other in the same relevant market.[64] The government next sought to extend section 7 enforcement to geographic market extension mergers by banking institutions. A geographic market extension merger is defined as "the acquisition of a firm located in a different geographic market but engaged in the same line of commerce as the acquiring firm."[65] Utilization of section 7 against such mergers required invocation of the theory of potential competition.[66]

A. *Theory of Potential Competition*

The anticompetitive effects of a geographic market extension merger are less clearly evident than are those of a horizontal merger, since the acquisition by one bank of another in a separate market does not create an immediate change in the local market share, concentration ratio, or number of banking alternatives.[67] One active participant has simply been replaced by an outsider. Here, the theory of potential competition comes into play, and its application has been described as "one of the most elusive exercises in antitrust."[68]

The potential competition concept has developed from a series of cases which can be divided into three basic categories that occasionally overlap.[69] The first of these deals with what can be classified as the "dominant entrant." In that situation, a merger results in "the substitution of [a] powerful acquiring firm for [a] smaller, but already dominant, firm"[70] in an oligopoly market. The resources and capabilities of the acquiring organization, when coupled with the dominant market position of the acquired firm, will produce

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64. Reycraft, Bank Merger Compliance with the Antitrust Laws, 12 Antitrust Bull. 445, 448, 455-64 (1967).

65. Hansen, Greeley Bank: Some Speculations, 90 Banking L.J. 578, 579 (1973). Market extension mergers may be of two types—the geographic market extension (described in the accompanying text), which is most pertinent to banking, or the product extension whereby a company, through merger, acquires a new product line. On this last point, see text accompanying notes 76-79 infra.

66. For the development of the theory of potential competition and its underlying rationale, see Berger & Peterson, Conglomerate Mergers and Criteria for Defining Potential Entrants, 15 Antitrust Bull. 489 (1970); Hale & Hale, Potential Competition Under Section 7: The Supreme Court's Crystal Ball, 1964 Sup. Ct. Rev. 171; Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 180-90 (1974); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1362-86 (1965); Note, United States v. Falstaff Brewing Corporation: Potential Competition Re-examined, 72 Mich. L. Rev. 837 (1974).

67. Solomon, Bank Merger Policy and Problems: A Linkage Theory of Oligopoly, 89 Banking L.J. 116 (1972).

68. Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 180 (1974).

69. For an excellent summary of these categories, see Justice Marshall's opinion in United States v. Falstaff Brewing Corp., 410 U.S. 526, 558-62 (1973) (Marshall, J., concurring).

70. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

a situation whereby the resulting firm will be in a position to dominate the market.[71] This process, also known as "entrenchment,"[72] results in the aggravation of the oligopolistic character of the market[73] by raising barriers to entry[74] and by discouraging aggressive competition by smaller firms in the market.[75]

FTC v. Procter & Gamble Co.[76] is an example of the use of potential competition to forestall a product extension merger by a dominant entrant. Procter & Gamble, a large, highly diversified producer of household products, attempted to acquire Clorox Chemical Company, a producer of household bleach, in order to enter the bleach product market. The market was highly concentrated with the top six firms controlling 80 percent and Clorox, the only national producer, having almost 49 percent of national sales.[77] The Court found that approval of the merger would raise barriers to entry since "a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox."[78] Approval of the merger would also result in anticompetitive effects within the market since "smaller firms would become more cautious in competing due to their fear of retaliation by Procter."[79]

The second type of potential competition is based on what is known as the "perceived potential entrant" theory.[80] This concept was recognized in *United States v. Penn-Olin Chemical Co.*,[81] wherein the Supreme Court held that

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71. United States v. Marine Bancorporation, 418 U.S. 602, 623 n.23 (1974).

72. Id.

73. Ford Motor Co. v. United States, 405 U.S. 562, 570 (1972). In this case, Ford, the nation's second largest automobile manufacturer, attempted to acquire Electric Autolite Co., a manufacturer of spark plugs and other automotive equipment. The spark plug market was highly oligopolistic, with the three major producers controlling 95% of the market, and Autolite, the third largest, controlling 15%. Id. at 565-66.

74. United States v. Falstaff Brewing Corp., 410 U.S. 526, 558 (1973) (Marshall, J., concurring); FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967).

75. FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).

76. 386 U.S. 568 (1967); see Comment, FTC v. Procter & Gamble—Are All Mergers Illegal?, 5 Houston L. Rev. 100 (1967).

77. 386 U.S. at 570-72.

78. Id. at 579.

79. Id. at 578.

80. The following have been suggested as prerequisites to the application of the doctrine of potential competition under this theory: "1. The market concerned must be an oligopoly market: the number of actual sellers must be sufficiently small for them to be able collectively, though not necessarily collusively, to maintain prices above competitive levels. 2. The merging firm at the edge of the market must be recognized by those in the market as the most likely entrant or one of a very few likely entrants, with barriers to entry by new companies or by other established firms being significantly higher. 3. The barrier to entry by the firm in question must not be so high that the price it must expect to obtain before it would come in is above the price that would maximize the profits of the existing sellers." Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1363 (1965).

81. 378 U.S. 158 (1964) (joint venture wherein either party may have entered market independently held illegal).

"[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition . . ."[82] within the market. The perceived potential entrant, by its presence "on the fringe" of the market, exerts a present procompetitive effect on the market. It does so because the oligopolists already in the market have the power to increase present prices to a higher than competitive level, but refrain from doing so because such higher prices will result in a rate of return that will encourage entry by the perceived potential entrant.[83] If such a company enters through merger, this present procompetitive effect on the market is lost "with no offsetting gain through an increase in the number of companies seeking a share of the relevant market."[84] It is not necessary that the perceived potential entrant actually intended to enter but merely that it be perceived as intending to enter. Thus, the focus of inquiry should not be on the entrant's conduct or intentions, but rather upon the activities of those currently in the market.[85]

The third theory upon which the potential competition doctrine is based involves an "actual potential entrant."[86] Its basic premise is that but for the merger the actual potential entrant eventually would have entered the market de novo through internal expansion, thus producing future procompetitive effects. An entry by merger, however, "eliminates the possibility that such [effects] will take place in the future."[87] Factors to be included in an analysis of whether a company is an actual potential entrant are the competitive nature of the market, the geographical proximity of the acquired company, and the ability and desire of that company to enter the market.[88] Unlike the perceived potential entrant theory, which emphasizes the present procompeti-

82. Id. at 174.

83. The limit pricing theory is discussed in Procter & Gamble Co., 63 F.T.C. 1465, 1551-52 (1963); Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 186 (1974). For a decision applying the perceived potential entrant theory to a non-oligopolistic market, see Kennecott Copper Corp. v. FTC, 467 F.2d 67, 75-79 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974), criticized in 86 Harv. L. Rev. 772 (1973). See also Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), cert. denied, 419 U.S. 883 (1974), noted in 43 Fordham L. Rev. 484 (1974), wherein the Second Circuit rejected an apparent attempt to use the perceived potential entrant and the dominant entrant theories of the potential competition doctrine to forestall an acquisition of the target company.

84. United States v. Falstaff Brewing Corp., 410 U.S. 526, 559 (1973) (Marshall, J., concurring).

85. Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 186 (1974).

86. See id. at 183-85; Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1379-84 (1965).

87. United States v. Falstaff Brewing Corp., 410 U.S. 526, 561 (1973) (Marshall, J., concurring). In Penn-Olin, the Court also addressed this factor when it held that the "joint venture may well foreclose any prospect of competition between Olin and Pennsalt . . . ." 378 U.S. at 173.

88. See United States v. El Paso Natural Gas Co., 376 U.S. 651, 660-62 (1964). See also United States v. Penn-Olin Co., 378 U.S. 158, 168-77 (1964); Whitesell, Potential Competition and Bank Mergers, 88 Banking L.J. 387, 393-94 (1971).

tive effects in the target market, the actual potential entrant theory focuses on the entrant's desires and capability and the possible future competitive effects of its action. Since the aim of the theory is to produce future procompetitive effects, its ultimate goal can be described as future deconcentration of the market.[89]

The Supreme Court has never utilized the actual potential entrant theory as the exclusive basis for prohibiting a merger. In *United States v. El Paso Natural Gas Co.*,[90] the Court addressed the fact that the acquired organization would most likely attempt to enter the target market in the future, thus producing future procompetitive effects.[91] But the *El Paso* Court also relied on the present procompetitive effects that were generated by the unsuccessful attempt made by the competitor to enter the market.[92] In *Penn-Olin*, the Court similarly addressed future anticompetitive effects when it noted that the joint venture "may well foreclose any *prospect* of competition between Olin and Pennsalt . . . ."[93] However, the Court also emphasized the present procompetitive effects that would be generated by the presence of "an aggressive, well equipped and well financed corporation" on the fringe of the market.[94] Nevertheless, in the field of banking, the government has relied primarily on the actual potential entrant theory.[95]

B. First National Bancorporation

By 1973, the government had filed over twenty actions on the basis of potential competition.[96] The Justice Department filed suit when three basic conditions were met:

(1) The acquiring organization [was] one of but a small number of large, capable, potential entrants legally eligible to enter a local banking market; (2) the acquired bank [was] a leader in a concentrated local market; and (3) the acquiror [had] some alternative means of entry—in other words, either the market [was] growing fast

89. See United States v. Marine Bancorporation, 418 U.S. 602, 632-33 (1974); Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 183-84 (1974).

90. 376 U.S. 651 (1964).

91. Id. at 661.

92. Id. at 659. Pacific Northwest, the acquired company in El Paso, was an actual competitor in the target market since it had unsuccessfully bid directly against El Paso in an attempt to obtain one of El Paso's customers. Id. at 654-55.

93. 378 U.S. at 173 (emphasis added).

94. Id. at 174; see notes 81-83 supra and accompanying text. See also Judge Friendly's remarks on this point in Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 861 & n.16 (2d Cir.), cert. denied, 419 U.S. 883 (1974).

95. See, e.g., United States v. First Nat'l Bancorporation, 329 F. Supp. 1003, 1014 (D. Colo. 1971), aff'd by an equally divided Court, 410 U.S. 577 (1973); see notes 99-108 infra and accompanying text.

96. See, e.g., United States v. United Virginia Bankshares Inc., 347 F. Supp. 891 (E.D. Va. 1972); United States v. Idaho First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

enough to support additional de novo banks at some time in the future, or a small competitor [was] present in the market as an entry vehicle.[97]

Despite numerous suits in various district courts, the government repeatedly lost. However, the Justice Department refused to appeal any of the decisions, preferring to wait for what they considered a strong potential competition case.[98]

The government apparently felt that it had found such a case in *United States v. First National Bancorporation.*[99] First National Bancorporation, a statewide holding company, had sought to acquire the First National Bank of Greeley, the largest bank in Greeley, Colorado. The government claimed a violation of section 7 because the acquisition would eliminate potential competition.[100] Bancorporation was the second largest holding company in Colorado with 12.9 percent of statewide deposits, but the company had no holdings in the Greeley area, which was a highly concentrated market with First National and two bank holding companies controlling 93.7 percent of the market.[101] (First National, the only significant independent bank, possessed 31.8 percent of the market.)[102] The government's primary argument was that Bancorporation was an actual potential entrant, and that if the acquisition were disapproved Bancorporation would enter the market in the future either de novo or through a toehold acquisition (*i.e.*, acquisition of a small firm which could be developed into a significant competitor), thereby promoting future competition.[103] The district court refused to accept the argument, relying on statements by Bancorporation that it would not enter Greeley except for the acquisition, and letters from state and federal regulatory authorities stating that no charters would be issued for de novo entry.[104] The court similarly rejected the proposition that Bancorporation was a

97. Baker, Potential Competition in Banking: After Greeley, What?, 90 Banking L.J. 362, 367 (1973).

98. Id. at 370.

99. 329 F. Supp. 1003 (D. Colo. 1971), aff'd by an equally divided Court, 410 U.S. 577 (1973). This case is discussed in Darnell, Bank Holding Companies and Competition: The First National Bancorporation Case, 89 Banking L.J. 291 (1972); Noble, Antitrust Considerations Affecting Bank Growth: Greeley and Beyond, 90 Banking L.J. 381 (1973).

100. 329 F. Supp. at 1010. The Justice Department also claimed that the acquisition would lessen competition in correspondent banking in Colorado, but the district court did not decide this issue. Id. at 1016-18. On this point, see Austin & Solomon, A New Antitrust Problem: Vertical Integration in Correspondent Banking, 122 U. Pa. L. Rev. 366 (1973).

101. 329 F. Supp. at 1008-09. The court ruled that the relevant geographic market should include surrounding satellite communities. Id. at 1014.

102. Id. at 1008.

103. Id. at 1014.

104. Id. at 1015. Although discounting its significance, the court appeared to give some weight to the fact that First National, in recent years, had encountered problems in maintaining its competitive position in the Greeley market and intimated that the acquisition by Bancorporation might well improve its competitiveness. Id. at 1014. This thinking runs counter to the opinion of the Supreme Court in Nashville. See notes 52-57 supra and accompanying text.

perceived potential entrant exerting present procompetitive effects on the market holding that: "[I]ts presence in the wings . . . is not apparent."[105]

Despite a statement by Judge Doyle to the effect that this was one of the weakest potential competition cases prosecuted by the Government,[106] the Justice Department decided to appeal to the Supreme Court.[107] The government and the banking community eagerly awaited an opinion that would clarify the issue, but instead were presented with a memorandum decision whereby an equally divided Supreme Court affirmed the judgment of the district court.[108] On the same day, however, the Court decided another potential competition case that was not just another potential competition case.

C. Falstaff—*Four Views of Potential Competition*

United States v. Falstaff Brewing Corp.[109] involved a section 7 action based on potential competition. Falstaff, the fourth largest brewer in the United States, had attempted to extend its operations into New England by the acquisition of the Narragansett Brewing Company, the largest producer of beer in that area.[110] New England was considered a concentrated market with the four largest producers controlling 61.3 percent of the market.[111] The government asserted that the acquisition would result in a lessening of competition "because Falstaff was a potential entrant and because the acquisition eliminated competition that would have existed had Falstaff entered the market *de novo* or by acquisition and expansion of a smaller firm, a so-called 'toe-hold' acquisition."[112] The district court, relying on statements by Falstaff that it would not enter the market except through the acquisition, eliminated Falstaff as an actual potential entrant and concluded that the acquisition would have no adverse effect on competition.[113]

105. 329 F. Supp. at 1015.

106. Id. at 1015-16.

107. Pursuant to the Expediting Act, 15 U.S.C. § 29 (1970), as amended Pub. L. No. 93-528, § 5 (Dec. 21, 1974) (reproduced at 43 U.S.L.W. 147 (Jan. 21, 1975)), the government brought a direct appeal to the Supreme Court.

108. 410 U.S. 577 (1973) (4-4 decision) (Powell, J., not participating).

109. 410 U.S. 526 (1973). For a general discussion of Falstaff, see Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 180-90 (1974); Note, United States v. Falstaff Brewing Corporation: Potential Competition Re-examined, 72 Mich. L. Rev. 837 (1974).

110. 410 U.S. at 527-28. Even though Falstaff was the fourth largest brewer in the United States, it was considered a regional brewer since it did not sell in all national markets. Its acquisition of Narragansett, which had 20% of the New England market, was looked upon as part of an attempt to become a national brewer. Id. at 528-29.

111. Id. at 527-28.

112. Id. at 529-30. The government's use of the toehold alternative to de novo entry was apparently an attempt to get around the problem of proving that an actual potential entrant will eventually enter the market in the future. By providing such an alternative means of entry that will not produce the anticompetitive effects of the proposed merger, the proof that the acquiring firm is an actual potential entrant can theoretically be based on a more objective standard than that provided by the professed intentions of company officials.

113. See id. at 532.

The seven Justices of the Supreme Court who participated in the decision issued four opinions.[114] Justice White, with whom Chief Justice Burger and Justice Blackmun joined, held that the district court had erred as a matter of law in dismissing the potential competition issue simply because Falstaff was not an actual potential competitor—that is, a company which would have entered the market de novo but for the acquisition. They felt the court below should have given separate consideration to whether Falstaff was a perceived potential entrant—that is a potential competitor "on the edge" of the market who exerts a present "beneficial influence on competitive conditions in that market."[115] *Falstaff* was therefore remanded to the district court for a determination of whether Falstaff was a perceived potential entrant.[116]

However, part II of Justice White's opinion contained what is probably the most significant language on the possible effectiveness of potential competition as a vehicle to inhibit geographic market extension mergers by banking institutions. Justice White stated:

> We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner.[117]

Justice White stated that although there were "traces of this view" in previous decisions, the Court had never "squarely faced the question."[118]

Thus, Justice White's opinion accepted the perceived potential entrant theory of potential competition and remanded on that basis, but the reservation in part II cast doubt on the independent viability of the actual potential entrant basis of the doctrine.

Justice Douglas, who concurred in part I of the opinion, disagreed with the

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114. Justice White delivered the opinion of the Court in which Chief Justice Burger and Justice Blackmun joined. Justice Douglas filed an opinion concurring in part while Justice Marshall filed an opinion concurring in the result. Justice Rehnquist filed a dissenting opinion in which Justice Stewart joined. Justices Brennan and Powell took no part in the decision. One commentator pointed out that "the beer company must have been amazed to find that it was potentially so many different things to so many different judges." Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 180 (1974).

115. 410 U.S. at 532-33. For a general discussion of actual and recognized (perceived) potential entrants, see Robinson, Antitrust Developments: 1973, 74 Colum. L. Rev. 163, 183-86 (1974). See also the comments of Justice Marshall. 410 U.S. at 559-62.

116. 410 U.S. at 533-34, 537. On remand, the district court found that there was no evidence that the New England market, prior to the acquisition, was anything but vigorously competitive or that Falstaff exerted any beneficial influence on other sellers from the wings. United States v. Falstaff Brewing Corp., 383 F. Supp. 1020, 1023 (D.R.I. 1974). The court also determined that rational brewers in the market, relying on objective economic criteria, would not have concluded that Falstaff would have entered the market. Id. at 1024. The court reinforced its findings by using post-acquisition evidence which indicated that competition had actually increased in the market after Falstaff entered. Id. at 1027.

117. 410 U.S. at 537.

118. Id.

appropriateness of this reservation since "it was [not] a prerequisite to the Government's case to prove that the acquisition had marked immediate, i.e., present, anticompetitive effects."[119] Justice Marshall agreed, stating that the elimination of future competition was sufficient to violate section 7. He concurred in the remand, however, not on the perceived potential entrant basis—which was not argued by the government[120]—but on the grounds that Falstaff was an actual potential entrant.[121] Justices Rehnquist and Stewart agreed on this last point but voted to dismiss on the basis of the district court's determination of the issue.[122]

In *Falstaff*, the Supreme Court for the first time clearly distinguished the actual and perceived potential entrant bases of potential competition. It accepted the perceived potential entrant theory and defined its various elements.[123] However, there was a serious division of opinion on the actual potential entrant theory. Three Justices, while reserving the question, indicated that there were serious doubts as to its viability. The four remaining Justices accepted the theory, but differed on the acceptable level and burden of proof. These differences raised serious questions in the banking industry,

119. Id. at 538-39 (Douglas, J., concurring). Justice Douglas indicated that section 7 does not require " 'merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . . .' " Id. at 539 (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963)). The requirements of section 7 " 'are satisfied when a "tendency" toward monopoly or the "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown.' " 410 U.S. at 539 (quoting United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71 (1964)). Justice Douglas was inclined to reverse and direct judgment for the government on the basis that Falstaff was an actual potential entrant, but since the Court reserved judgment on this question, he concurred in the remand. 410 U.S. at 544-45.

120. The government's complaint alleged only that the merger violated section 7 because it eliminated potential competition. Justice White, however, stated that "since potential competition may stimulate a present procompetitive influence, the allegation certainly encompassed the 'on-the-fringe influence' that the District Court failed to consider, and the Government was not required to be more specific in its allegation." 410 U.S. at 534 n.13.

121. Id. at 563-72 (Marshall, J., concurring). Justice Marshall felt that the trial court had used an erroneous standard in determining that Falstaff was not an actual potential entrant. Rather than using the "subjective" testimony of Falstaff's management to determine whether Falstaff was an actual potential entrant, the trial court should have relied on "objective" economic facts. Id. See also United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1242-47 (C.D. Cal. 1973), aff'd mem., 418 U.S. 906 (1974), in which the district court emphasized the need to rely on objective factors in determining whether a company is a perceived potential entrant.

122. 410 U.S. at 575-76 (Rehnquist, J., dissenting). Justice Rehnquist, with whom Justice Stewart joined, rejected Justice Marshall's distinction between subjective and objective evidence as "largely illusory." Id. at 575.

123. According to Justice White, the following factors should have been considered in determining Falstaff's on-the-fringe effect: Falstaff was in the relevant line of commerce, was admittedly interested in entering the concentrated Northeastern market, this interest was known by those already in the market, and Falstaff had the capability to enter. 410 U.S. at 534-35 n.13. For an analysis challenging some of the presumptions of such factors, see Note, United States v. Falstaff Brewing Corporation: Potential Competition Re-examined, 72 Mich. L. Rev. 837 (1974).

since the actual potential entrant theory was generally the primary basis upon which the Justice Department hoped to halt geographic market extension mergers by banks.[124]

D. Marine Bancorporation—*An Unequivocal "No"*

The answers came in *United States v. Marine Bancorporation,*[125] wherein the Justice Department challenged the proposed merger of two commercial banks in the State of Washington. The acquiring organization, the National Bank of Commerce, was the second largest bank in the state with almost 20 percent of the statewide market.[126] It had 107 branches in Seattle and lesser developed areas of Washington. However, it had no offices in Spokane, where it hoped to acquire the Washington Trust Bank which controlled approximately 19 percent of the local market.[127] The Spokane market was concentrated, with the three largest banking organizations controlling 92 percent of the market.[128]

The relevant product market was commercial banking, and the geographic market was metropolitan Spokane since that was the only market where the acquired bank was an active participant.[129] There was no dispute on these points. However, the government argued that the statewide banking structure should also have been considered in determining the anticompetitive effects of the proposed merger. Relying on a recently developed Justice Department theory of linkage of oligopolies,[130] the government contended that the entire state was also an appropriate "section of the country" for section 7 purposes even though it was not the relevant geographic banking market. The government asserted that state law and state boundaries insulated Washington banks from out of state competition[131] and that mergers of the type at issue would

> lead eventually to the domination of all banking in the State by a few large banks, facing each other in a network of local, oligopolistic banking markets. This . . . , it [was] argued, will enhance statewide the possibility of parallel, standardized, anticompetitive behavior.[132]

The Court recognized that it had previously "acknowledged the existence of

124. See, e.g., United States v. First Nat'l Bancorporation, 329 F. Supp. 1003, 1011 (D. Colo. 1971), aff'd by an equally divided Court, 410 U.S. 577 (1973). See also notes 99-108 supra and accompanying text.

125. 418 U.S. 602 (1974); see The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 251-58 (1974).

126. 418 U.S. at 643 (App.).

127. Id. at 606-07.

128. Id. at 609. The state banking structure was also concentrated, with the two largest organizations controlling 51% of the market and the five largest, 74%. Id. at 643 (App.).

129. Id. at 618-19.

130. See Baker, Potential Competition in Banking: After Greeley, What?, 90 Banking L.J. 362 (1973); Solomon, Bank Merger Policy and Problems: A Linkage Theory of Oligopoly, 89 Banking L.J. 116 (1972).

131. 418 U.S. at 620; see text accompanying notes 8-12 supra.

132. 418 U.S. at 620.

more than one relevant geographic market," but it had never measured the effects of a merger "on areas where the acquired firm is not a direct competitor."[133] It rejected the government's contention, holding that "the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor."[134] To accept the government's theory of a linkage of oligopolies without evidence of resulting anticompetitive effects would be "to espouse a *per se* rule against geographic market extension mergers."[135]

The remainder of the government's case was based on potential competition. The Justice Department first treated the National Bank of Commerce as an actual potential entrant which, by entering de novo or through a toehold acquisition, "would assist in deconcentrating that market over the long run."[136] Additionally, the government claimed that Commerce was a perceived potential entrant whose presence on the fringe of the market generated present procompetitive effects.[137] Finally, the government introduced a novel theory which could be considered an additional basis for potential competition. It contended that the merger would eliminate the possibility that the acquired bank would eventually expand "into a regional or ultimately statewide counterweight to the market power of the State's largest banks."[138]

The Court initially addressed the question of the applicability of potential competition to the banking industry by holding that commercial banks must pass muster under the doctrine.[139] However, the Court further held "that the application of the doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce."[140] "Such limitations often significantly reduce, *if they do not eliminate*, the likelihood that the acquiring bank is either a perceived potential *de novo* entrant or a source of future competitive benefits through *de novo* or foothold entry."[141]

The Court then addressed the question reserved in *Falstaff*—whether section 7 prohibits a merger based on the actual potential entrant theory when

133. Id. at 621.

134. Id. at 622. In a companion case, United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974), the district court had defined the entire state as the relevant geographic market. The Supreme Court overruled that holding, pointing out that if the state was the relevant market, the merger should be analyzed in terms of direct competition and not potential competition. However, since the banks concerned were not statewide banks and did not do business or compete on that basis, they could not be considered direct competitors in a statewide market. Id. at 666-67.

135. 418 U.S. at 623. The Court did exclude those cases such as FTC v. Procter & Gamble Co., 386 U.S. 568 (1967), "where an acquiring firm's market power, existing capabilities, and proposed merger partner are such that the merger would produce an enterprise likely to dominate the target market (a concept known as entrenchment)." 418 U.S. at 623 n.23.

136. 418 U.S. at 615.

137. Id.

138. Id.

139. Id. at 627.

140. Id.

141. Id. at 630 (emphasis added).

the merger has no present anticompetitive effect in the market, but may forestall future procompetitive effects which would be generated by de novo or toehold entry.[142] However, before resolving the question, the Court required that "[t]wo essential preconditions" be met: that there exist "available feasible means" for entering the market and that "those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[143]

Imposition of these two preconditions was fatal to the government's case. Washington permitted only limited branching and forbade branching by a bank into any city or town where another bank was located, other than in the branching bank's own principal place of business.[144] Since numerous banks were located in Spokane, the National Bank of Commerce could not enter de novo. The government presented two alternatives. The first was that Commerce sponsor a new bank in Spokane, insure that the stock was in "friendly hands," and eventually acquire the bank.[145] Without ruling on the legality of this plan, the Court rejected it on the grounds that Commerce would be prohibited from branching from this sponsored bank after it was acquired.[146] Without the ability to branch, there was "no reasonable likelihood of developing a significant share" of the market and thereby deconcentrating it.[147] The government's second alternative, the acquisition of either of two smaller banks in Spokane, was similarly rejected since Commerce would not be permitted to branch from either of these.[148] Since the government failed to meet the preconditions to a resolution of the *Falstaff* reservation, the Court did not reach the question.[149]

After rejecting the government's initial contention, the Court quickly disposed of the final two arguments. As to the perceived potential entrant argument, the Court assumed that "[r]ational commercial bankers in Spokane" were aware of the regulatory barriers that rendered Commerce "an unlikely or an insignificant potential entrant," and since that was the case, Commerce could not have exerted "any meaningful procompetitive influence" while it was on the fringe of the market.[150] The Court curtly dismissed the final contention that the merger would preclude the acquired bank from

142. Id. at 632; see notes 117-24 supra and accompanying text.

143. 418 U.S. at 633.

144. Wash. Rev. Code Ann. § 30.40.020 (Supp. 1974).

145. 418 U.S. at 633-34. Washington prohibits the acquisition of a newly-chartered bank for a period of ten years except with the approval of the state supervisor of banking. Wash. Rev. Code Ann. § 30.08.020(7) (Supp. 1974).

146. Wash. Rev. Code Ann. § 30.40.020 (Supp. 1974).

147. 418 U.S. at 636. The Court once again emphasized the controlling aspect of the state and federal regulatory restraints by stating: "In sum, it blinks reality to conclude that the opportunity for entry through sponsorship, assuming its availability, is comparable to the entry alternatives open to unregulated industries such as those involved in this Court's prior potential-competition cases or would be likely to produce the competitive effects of a truly unfettered method of entry." Id. at 637 (footnote omitted).

148. Id. at 637-38.

149. Id. at 639.

150. Id. at 639-40.

becoming a statewide banking power by pointing out that there was no evidence that Washington Trust Bank (the acquired bank) had ever entertained ideas of expanding beyond Spokane.[151]

The Court concluded that potential competition would seldom bar a merger in states containing such stringent regulatory barriers as existed in Washington. It went further by pointing out that even in states which permit liberal branching or multibank holding companies, "great weight" should be given to the testimony of regulatory officials on the feasibility of the issuance of new charters.[152]

Justice White, dissenting, decried what he called "the Court's new antitrust majority" for redefining the elements of potential competition and escalating the burden of proving a section 7 violation.[153] He felt that both methods of entry suggested by the government would have been sufficient to establish a "prima facie" case that Commerce was an actual potential competitor.[154] Justice White referred to several small banks in Washington that had succeeded in gaining significant competitive positions in their local markets and pointed out that Commerce, a major financial institution with a full range of services, could be equally successful in Spokane.[155] After the majority ruling, it would no longer be sufficient to show that a potential entrant had the capability and willingness to enter a market and could do so as a profitable concern, but it would also be necessary to show "that the new entrant will appropriate for itself a substantial part of the business of the major competitors in the market."[156] Justice White concluded that since the case turned on barriers to "effective competition" rather than on barriers to entry, it would not be "easily limited to regulated industries."[157]

IV. POSTSCRIPT TO *Marine Bancorporation*

The doctrine of potential competition is somewhat amorphous and the burden of proving its various elements often a difficult task. *Falstaff* and *Marine Bancorporation*, while clarifying some of the elements of the potential competition theory, have raised certain questions concerning the various concepts upon which it is based.[158]

A. *The Reservation in* Falstaff

The Court's reservation in *Falstaff* of the question whether an actual potential entrant must also have present procompetitive effects in the target

151. Id. at 640-41. Washington Trust had seven branches within Spokane. Id. at 607.

152. Id. at 641.

153. Id. at 642 (White, J., dissenting). Justices Brennan and Marshall joined in the dissent. Justice Douglas took no part in the decision, but he did join the dissenters in the similar case, United States v. Connecticut Nat'l Bank, 418 U.S. 656, 673 (1974). Justice White also referred to United States v. General Dynamics Corp., 415 U.S. 486 (1974), wherein the new majority "sustained the failing-company defense in a new guise." 418 U.S. at 642 (White, J., dissenting).

154. 418 U.S. at 646.

155. Id. at 649 & n.3.

156. Id. at 654.

157. Id. at 654 n.5.

158. The following discussion will be limited in scope and will deal only with the effect of the decisions on the banking industry.

market, was left unanswered in *Marine Bancorporation.*[159] The Justice Department evidently felt that the actual potential entrant theory was sufficient to establish a section 7 violation since it was the government's primary argument in both cases.[160] Justices Douglas and Marshall believed that the concept had been previously accepted by the Court,[161] but the majority opinions in both cases leave the question open. Whether the new antitrust majority, which Justice White criticized in his dissent,[162] will go so far as to reject the actual potential entrant theory remains to be seen, but the imposition of the two preconditions to a resolution of the question has certainly increased the government's task in attempting to utilize potential competition as a vehicle to forestall geographic market extension mergers by banking institutions.

B. *The Preconditions and the Emphasis on Regulatory Restraints*

Prior to *Marine Bancorporation,* it was generally assumed that it was sufficient for the government to prove that an alternative feasible means of entry was available.[163] In addition to severely restricting what could be considered a feasible means of entry, the *Marine Bancorporation* Court imposed the additional requirement that, at least in the banking context, these alternative means be sufficient to create a substantial likelihood that the market would become deconcentrated.[164] The emphasis given by the Court to regulatory restraints means that it is now almost impossible to prove that alternative means of entry are available in the 60 percent of our states which either prohibit or limit branching by devices similar to those used in Washington.[165] These statutory restrictions will generally prohibit de novo branching into any significant market. The second precondition—requiring a reasonable possibility of deconcentration—will foreclose requiring use of a toehold acquisition as an alternative means of entry unless branching is permitted from the toehold. In those states that permit statewide branching, the Court indicated that "great weight" should be given to the statements of regulatory officials on the feasibility of de novo entry. Thus, a mere statement by a local regulatory official that de novo entry will not be permitted may be determinative of the issue.[166] This priority given to bank regulators in a potential competition case is far different from that shown in the horizontal bank merger cases; there, the regulatory status of the industry has been given little or no weight.[167] It is unclear whether this reflects the Court's dislike of

159. 418 U.S. at 639.

160. Id. at 626; United States v. Falstaff Brewing Corp., 410 U.S. 526, 534 n.13 (1973).

161. See notes 119-20 supra and accompanying text.

162. See note 153 supra and accompanying text.

163. See 418 U.S. at 646 (White, J., dissenting).

164. See notes 143-49 supra and accompanying text.

165. See note 12 supra and accompanying text.

166. See notes 87-89 infra and accompanying text.

167. See, e.g., United States v. First City Nat'l Bank, 386 U.S. 361, 363-64 (1967) (the competitive effects of a merger are determined on the basis of the antitrust laws and not bank regulatory statutes); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 368 (1963) (banks

the potential competition doctrine generally or the feeling that it is inappropriate in a highly regulated industry where barriers to entry are traditionally high.

C. *Rejection of Linkage Theory*

The Court's rejection of the government's theory of a statewide linkage of oligopolies[168] might well be the coup de grace to the Justice Department's attempts to halt statewide concentration of banking. The Court basically refused to look upon the state as a market.[169] The Court apparently would recognize a statewide market only when there is direct competition on a statewide basis—both banks competing for customers and providing services on a statewide basis. In *United States v. Connecticut National Bank,*[170] Connecticut law permitted branching except into towns where other banks were headquartered.[171] This resulted in a "checkerboard" pattern of open and closed towns throughout the state. In *Connecticut*, the Court instructed the district court to determine the relevant market by considering only those areas where either of the merger partners had offices, excluding any "gaps" where neither were represented.[172] Thus, to have a statewide market, a bank must evidently be represented in almost every significant market in the state.

A persuasive argument can be made for the Court's rejection of the linkage of oligopoly theory which was argued by the government in *Marine Bancorporation.* In effect, the government was asking the Court to accept a geographic market on the basis of what might occur in the future—namely, a statewide system of individual oligopolies whereby a few large banks control the major share of all significant local markets. This argument could have validity when significant movement in that direction has already taken place, but in Washington, that was obviously not the case.

The inapplicability of the linkage of oligopoly argument and the stringent state statutory barriers to entry placed the government in an untenable position. To support its argument that alternative means of entry were available, the government could rely only on de novo entry or a toehold acquisition, but both were highly doubtful methods under the circumstances. The imposition of the two preconditions and the statutory prohibition of branching were, therefore, determinative of the outcome since they enabled the Court to eliminate both alternative methods of entry.

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were not immune from the antitrust laws because of the high degree of regulation to which they were subject).

168. See notes 130-35 supra and accompanying text.

169. One commentator felt that the Court's rejection of the multimarket theory was correct because such "invocation of section seven based on the bare possibility of collusion would result in the prohibition of many innocent mergers." The Supreme Court, 1973 Term, 88 Harv. L. Rev. 13, 256 (1974).

170. 418 U.S. 656 (1974).

171. Conn. Gen. Stat. Ann. § 36-59 (Supp. 1975).

172. 418 U.S. at 669.

D. *The Future*

After almost a decade of conflict with the Justice Department, the banking industry has attained its first significant victory at the Supreme Court level.[173] The industry looked upon its merger activity as motivated by economic necessity,[174] which included the need to increase assets so as to attract and service large industrial clients, to diversify services, and to attain economies of scale.[175] It viewed the bank regulatory agencies as far more qualified to judge the impact of mergers than the Justice Department, which was "not equipped either by temperament or staffing to carry out the role . . . ."[176] Since it was highly regulated, the industry saw no reason why it should not be exempt from the antitrust laws, as were other regulated industries.[177]

The Justice Department, on the other hand, looked upon competition as "a basic national economic policy, and the cornerstone of national economic strength."[178] The Department felt that its role was to demonstrate a "healthy skepticism" toward abandoning competition in favor of a regulatory scheme and it looked upon itself "as an advocate for a national economic policy" and not of some "particular vested interest" as do some regulatory agencies.[179]

In the field of banking, the Department has proceeded on the basis that banks, like other industrial organizations, will engage in anticompetitive and sometimes even predatory practices if a viable competitive market is eliminated.[180] For this reason, the government took its first steps to halt the

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173. The Supreme Court has actually reversed roles. One commentator has described previous antitrust battles as "distilling the pervasive theme of confrontation between the banking industry, its regulators and Congress on one side, and the Antitrust Division of the Department of Justice, frequently abetted and sometimes even led by the Supreme Court of the United States on the other." Shenefield, Annual Survey of Antitrust Developments—The Year of the Regulated Industry, 31 Wash. & Lee L. Rev. 1, 23 (1974).

174. See Hale & Hale, Concentration as a Factor in Antimerger Litigation, 28 Ohio St. L.J. 599, 609 (1967).

175. See Casson & Burrus, Federal Regulation of Bank Mergers, 18 Am. U.L. Rev. 677, 679-81 (1969); Kintner & Hansen, supra note 17, at 216-17; Wu & Connell, Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers, 59 Va. L. Rev. 860, 878-80 (1973).

176. Reycraft, Antitrust Problems in Banking—1971, 16 Antitrust Bull. 817, 817-18 (1971). See Comment, The 1966 Amendment to the Bank Merger Act, 66 Colum. L. Rev. 764, 789 (1966).

177. Wu & Connell, Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers, 59 Va. L. Rev. 860, 883-84 (1973). The authors referred to the statutory exemption provided transportation companies. See id. at 883-84 & n.119, citing Seaboard Air Line R.R. v. United States, 382 U.S. 154 (1965); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963); Minneapolis & St. L.R.R. v. United States, 361 U.S. 173 (1959).

178. Baker, The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries, 11 B.C. Ind. & Com. L. Rev. 571, 591 (1970).

179. Id. at 593.

180. Although various aspects of banking are regulated by state and federal authorities, there are areas where anticompetitive practices may take place. These include required compensatory deposit balances on loans, loan interest rates, loan availability to different customer classes, rates paid on time deposits, service charges, and, generally, banking innovation and efficiency. Also

increasing wave of bank mergers.[181] Section 7 proved to be effective in halting horizontal mergers, but when the government attempted to utilize potential competition to halt statewide concentration of banking, it met with repeated defeats at the district court level and ultimately in the Supreme Court.

In *Marine Bancorporation,* the Justice Department found its linkage of oligopoly argument rejected and the actual potential entrant concept of potential competition severely restricted. Whether the Court eventually will accept the latter theory remains to be seen. The result is that the government will be forced to rely on the perceived potential entrant basis of potential competition. *Falstaff* outlined conditions necessary to utilize this theory.[182] Basically, the acquiring organization must have both the desire and capability to enter an oligopolistic market and this must be known by those already in the market who, theoretically, modify their behavior on the basis of this perception.[183] The problem with this theory in a regulated field such as banking was demonstrated in *Marine Bancorporation* where the regulatory scheme created a significant barrier to entry.[184] With such barriers present, the Court was realistic in its conclusion that bankers in the target market would hardly modify their behavior when the possibility for market entry was so tenuous.[185] Except for the relatively few states which have minimal restrictions on entry and subsequent branching, it appears that the doctrine of potential competition will have minimal future effects in the field of banking.[186]

Although credible arguments could be made for these facets of the *Marine Bancorporation* holding, the Court's emphasis on regulatory controls is far more questionable. During the 1960s, over sixteen hundred bank mergers took place and many of these were subject to only cursory review by the regulatory authorities.[187] In the aggregate, the three federal regulatory agencies approved 97.7 percent of these mergers whereas the Justice Department

significant is the degree of flexibility on loans during cyclical economic downswings, since large banks give priority to large customers while smaller banks have a more local orientation. Solomon, Bank Merger Policy and Problems: A Linkage Theory of Oligopoly, 89 Banking L.J. 116, 123, 129 (1972). On predatory practices in general, see Shull, Bank Expansion: The New Competition and the Old Predatory Practices, 91 Banking L.J. 726 (1974). On the "odor" of compensatory deposit balances on loans, see Cohen, The Antitrust Laws Applied to Bank Mergers, Reciprocity and Tie-in Arrangements, 26 Bus. Law. 1, 6 (1970).

181. See notes 16-17 supra and accompanying text.

182. See note 123 supra.

183. For a recent decision using similar factors to determine whether a company was a perceived potential entrant, see United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), aff'd mem., 418 U.S. 906 (1974).

184. See notes 144-49 supra and accompanying text.

185. See note 150 supra and accompanying text.

186. The dominant entrant theory might be available even in a regulated field such as banking where there is a danger of entrenchment. See United States v. Marine Bancorporation, 418 U.S. 602, 623 n.23 (1974). See also notes 70-75 supra and accompanying text.

187. Whitesell & Kamens, Bank Expansion: The Politics of Supreme Court Decisions, 91 Banking L.J. 748, 750 (1974).

found adverse competitive impact in 59.8 percent of the cases.[188] It is clear that the regulatory agencies do not have the same view of competitive impact as the Justice Department. Although the Court may be relying on the regulatory agencies as an objective source of impartial testimony, their record should cast doubt on that assumption.[189]

Similarly, statements by industry officials should not be given the weight the Court appears willing to give them.[190] Here again is the problem demonstrated in *Falstaff*, the acceptability of subjective versus objective evidence. The *Greeley* case provides a pertinent example of the pitfalls of overreliance on subjective information. Bancorporation, in addition to attempting to acquire a large bank in Greeley, also attempted to do the same in Colorado Springs and Pueblo. However, when Justice Department action prevented the latter two acquisitions, Bancorporation entered both markets by toehold acquisitions.[191] Although objective evidence is often difficult to develop in complex antitrust actions, basing decisions primarily on subjective testimony, which "is obviously biased and self-serving,"[192] cannot be justified.[193]

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188. Reid, "The Bank Merger Act of 1960: A Decade After": Comment, 18 Antitrust Bull. 449, 458-59 (1973).

189. In Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971), the court stated: "Parenthetically, and by way of expressing our agreement with the Supreme Court's policy of strictly limiting all antitrust exemptions in deference to regulatory bodies, we also note that the history of United States regulatory agencies in general seems usually to record an ever growing absence of the spirit required for vigorous enforcement of the antitrust laws. Rather, it seems to demonstrate that shortly following the establishment of administrative procedures, the regulatory agency usually becomes dominated by the industry which it was created to regulate." Id. at 273.

The statements of state regulatory officials should also be looked upon with some degree of skepticism. For example, in First National Bancorporation, testimony of state and federal regulatory officials indicated that no new charters would be issued to Bancorporation, thus foreclosing de novo entry as an alternative means of entry. 329 F. Supp. 1003, 1015 (D. Colo. 1971), aff'd by an equally divided Court, 410 U.S. 577 (1973). Yet the Colorado State Banking Commission subsequently granted an application to another holding company permitting it to enter Greeley de novo. Baker, Potential Competition in Banking: After Greeley, What?, 90 Banking L.J. 362, 373 (1973). One might also question whether federal antitrust policies should be based on subjective findings by state authorities. In Wachovia Bank & Trust Co., 54 Fed. Res. Bull. 639, 641 (1968) (dissenting opinion), three Federal Reserve Governors stated that "[t]he effectiveness of the Bank Merger Act should not be blunted by capitulation to the anticompetitive policies of State authorities; the State policies may well be changed, particularly if they are not reinforced by the actions of Federal authorities."

190. See United States v. Falstaff Brewing Corp., 410 U.S. 526, 534-36 (1973) (the testimony of company officials on the feasibility of de novo entry was not "irrelevant" nor "to be looked upon with suspicion").

191. Baker, Banking Competition in the Age of the Computer, 90 Banking L.J. 193, 202 (1973); Baker, Potential Competition in Banking: After Greeley, What?, 90 Banking L.J. 362, 372-73 (1973).

192. United States v. Falstaff Brewing Corp., 410 U.S. 526, 565 (1973) (Marshall, J., concurring).

193. Id. at 569-70.

The Court's new antitrust majority has taken a skeptical view of potential competition at least as concerns regulated industries.[194] The emphasis on regulatory schemes, the rejection of multimarkets, and the establishment of preconditions to a finding that a bank is an actual potential entrant all point to the doctrine's inability to halt statewide concentration of banking. The liberalization of state banking statutes by removing restraints on de novo entry may help to alleviate the problem.[195] However, the other precondition to invocation of the potential competition doctrine leads to the conclusion that potential competition as a viable weapon in the field of banking has been severely undermined.[196]

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194. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 13, 252 (1974).

195. See, e.g., N.J. Stat. Ann. § 17:9A-19 (Supp. 1974); N.Y. Banking Law § 105 (McKinney Supp. 1974). One commentator described banking legislation in the following manner: "Legislative deliberations over these laws tend to be special-interest battles between contending industry factions. The consumers of financial services—the people with the ultimate interest—seem to have been overwhelmed by the complexities of the field and have left the matter to the banks and the politicians." Baker, Geographic Barriers, supra note 11, at 712.

196. See Horsley, Marine Bancorporation, Connecticut National Bank and Potential Competition: A Critique, 55 B.U.L. Rev. 1, 23 (1975).