No. 73-38

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, APPELLANT

v.

MARINE BANCORPORATION, INC.,
NATIONAL BANK OF COMMERCE OF SEATTLE,
WASHINGTON TRUST BANK,
AND JAMES E. SMITH, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. The government has argued that the National Bank of Commerce could enter Spokane by sponsoring a new bank and then acquiring it. The Comptroller of the Currency contends (Br., pp. 46-48, n. 34, p. 100) that this would not be a "reasonable business practice," because two recent government antitrust cases suggest that the government might challenge both the sponsorship of the bank and its subsequent acquisition as violating Section 7 of the Clayton Act and Section 1 of the Sherman Act. In those two cases[1] the United States chal-

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[1] *United States v. Trans Texas Bancorporation, Inc.*, 1972 CCH Trade Cases, paragraph 74,257 (W.D. Tex.), affirmed, 412 U.S. 946; and *United States v. Citizens and Southern National Bank*, CCH Trade Reg. Rep., paragraph 74,904 (N.D. Ga.). The government has filed a protective notice of appeal in the *Citizens and Southern* case, but the Solicitor General has not yet determined whether to appeal.

lenged the acquisition of affiliated banks operating in the same market as the acquiring bank.[2]

That is a very different situation from the government's theory in the present case, under which the sponsoring bank would be operating in an entirely different geographic market from the sponsored institution, so that the subsequent combination of the two banks would not and could not eliminate any direct competition between them. Moreover, nothing in the relationship between such banks would violate Section 1 of the Sherman Act, as long as the sponsored bank operates as a *bona fide* independent institution, *i.e.*, one which determines its banking practices unilaterally rather than jointly with its competitors.

2. The Comptroller argues (Br., pp. 42-45, 71-72, 103-107) that the National Bank of Commerce is not a potential entrant into the Spokane market because he would not grant a charter for a national bank in Spokane. He urges that his position is an insurmountable barrier to potential entry unless the government establishes that his conclusion is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (Br., p. 107). The latter is the standard which this Court announced in *Camp* v. *Pitts*, 411 U.S. 138, 142, as appropriate for direct review of decisions of the Comptroller denying authority to organize a new bank.

This argument misconceives the role of the district court in applying Section 7 to bank mergers. In deciding a government civil action under Section 7 challenging a

[2]Contrary to the Comptroller's contention (Br., p. 100), in neither of these two cases did the government challenge as violations of Section 7 or Section 1 "the very method of sponsorship and acquisition which it espouses in these cases."

bank merger, the district court does not review or evaluate the Comptroller's initial decision authorizing the merger. Rather, it must determine *de novo*(1) the probable effect of the merger upon competition and (2) if it determines that the merger would have the proscribed anti-competitive effect, whether such effect is clearly outweighed by its probable effect in meeting the convenience and needs of the community. *United States* v. *First City National Bank of Houston*, 386 U.S. 361. The conclusory testimony of the Regional Administrator of National Banks that he did not "think it is reasonable to assume that a new bank could be chartered for Spokane" (App. 1011), upon which the district court placed "great weight" (App. 1938), does not establish that the National Bank of Commerce could not enter the Spokane market by sponsoring a new bank there and then acquiring it. See our opening brief, pp. 51-52.

3. The Comptroller argues (Br. pp. 79-81, and see p. 116) that the government improperly relies upon statistics showing the concentrated character of banking in Spokane, Eastern Washington and the entire state as a basis for evaluating the anti-competitive effect of the merger. In his view, the proper inquiry is the actual competitive performance of the banking markets rather than their structural characteristics. This Court, however, has consistently recognized that, because of the congressional intent in amending the Clayton Act in 1950 to halt the rising trend toward increasing concentration in the American economy, the most appropriate measure for determining the impact of a merger upon competition is the structure of the market defined in terms of concentration.

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, this Court held that a merger between competing banks operating in the same geographic market violated Section 7 because it "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" (p. 363). The Court "reject[ed] the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anti-competitive effects of undue concentration. * * * There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical" (pp. 368-369).

Shortly after the *Philadelphia National Bank* decision and in light thereof, Congress enacted the Bank Merger Act of 1966 and amended the Bank Holding Company Act. There it adopted, as the basis for determining the anti-competitive effect of bank mergers, the traditional standards of Section 7 of the Clayton Act. In so doing, it recognized and confirmed that the proper basis for evaluating the anti-competitive effects of bank mergers is the structural data reflecting concentration. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 357-378. As this Court explained in *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, 181-182, "[w]e find in the 1966 Act, which adopted precisely that §7 Clayton Act phrase [substantially to lessen competition], as well as the 'restraint of trade' language of Sherman Act §1, no intention to adopt an 'antitrust standard' for bank cases different from that used generally in the law"; it stated that in determining anti-competitive effect "Congress intended bank mergers first to be subject to the usual antitrust analysis."

The "usual antitrust analysis," which this Court has employed in dealing with mergers in various industries, including banking, is to evaluate the anti-competitive effect of a merger on the basis of its effect upon market structure reflected in concentration ratios. In the present case, as we have shown in our main brief, the Spokane banking market is highly concentrated and the effect of the acquisition of Washington Trust Bank by National Bank of Commerce may be substantially to lessen competition because of the potential competition the merger will eliminate.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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