No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

THE PHILADELPHIA NATIONAL BANK AND GIRARD TRUST CORN EXCHANGE BANK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 3629) is reported at 201 F. Supp. 348.

JURISDICTION

The judgment of the district court was entered on January 15, 1962 (R. 3669) and the notice of appeal was filed on February 26, 1962 (R. 3671). This Court noted probable jurisdiction on May 21, 1962 (R. 3673; 369 U.S. 883).

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the agreement to merge The Philadelphia National Bank and Girard Trust Corn Exchange Bank involves a combination in unreasonable restraint of trade prohibited by Section 1 of the Sherman Act.

2. Whether the proposed merger violates Section 7 of the Clayton Act because its effect may be substantially to lessen competition or to tend to create a monopoly.

The following subsidiary questions are also presented:

3. Whether the anti-competitive effects of the merger are to be measured by its effects in Philadelphia and the three contiguous counties, which is not only the area in which all of the defendants' offices are located but also the area for which their banking services are preponderantly rendered.

4. Whether the proposed merger is subject to Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> SEC. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> *   *   *   *   *

Section 18(c) of the Federal Deposit Insurance Act is set forth in the Appendix, *infra*, pp. 83–84.

STATEMENT

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. 4, 25, to enjoin a proposed merger of The Philadelphia National Bank ("PNB") and Girard Trust Corn Exchange Bank ("Girard"). The government charged that the defendants had entered into an agreement to merge which constitutes a combination in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, and that the merger, if carried out, might have the effect of substantially lessening competition or tending to create a monopoly, in violation of Section 7 of the Clayton Act. The suit was instituted immediately following consent to the proposed merger by the Comptroller of the Currency.[1]

Following trial of the issues, the district court dismissed the complaint upon the ground that no antitrust violation had been established. No actual merger has as yet been effected nor, under the stipulation of the parties, will there be any merger pending determination of the present appeal.

DEFENDANTS' LEADING POSITION AND THEIR GROWTH BY MERGER

PNB and Girard are old, established Philadelphia banks, and today rank second and third in size among the banks of that city (Fdgs. 7, 12, 394, R. 3326, 3327–8, 3416).[2] At the end of June 1960 PNB's total assets were over $1,000,000,000, and those of Girard over $740,000,000 (Fdg. 93a, R. 3501). Their combined assets constitute more than 39 percent of the total

[1] Under Section 18(c) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act of 1960 (Appendix, *infra* p. 83) no bank insured under the Act may merge or consolidate with another insured bank (where the continuing bank is to be a national bank) without prior consent by the Comptroller.

[2] The findings of fact requested by the Government were numbered 1 to 600 (R. 3325–3478), and those requested by the defendants were numbered 1 to 207 (R. 3489–3518). The district court affirmed, by number, certain of the findings so requested (R. 3664–5). To distinguish affirmed Government-requested findings from affirmed defense-requested findings, as to the latter the letter "a" will follow the finding number. *E.g.*, Fdg. 1 refers to the finding numbered 1 in the Government's request and Fdg. 1a to the finding numbered 1 in the defendants' request.

GX will be used to designate Government exhibits, and DX to designate defense exhibits.

assets of all Philadelphia commercial banks (GX 8, R. 2362). Both have excellent management (R. 843) and are in a strong financial condition (Fdgs. 11, 15, R. 3327, 3328). They render, and compete with each other in rendering, all recognized types of banking service.[3]

Each bank has been a party to numerous mergers, which have enabled each vastly to increase its resources, to build up many aspects of its banking service, and to acquire many new branches and thereby comprehensively cover the four-county area outside of which a bank having Philadelphia headquarters is not permitted to operate.[4]

The defendants' merger history, as set forth in their application to the Comptroller for approval of their merger (GX 57, R. 2423), is, in brief outline, as follows:

In 1926 the fourth largest bank in Philadelphia merged with PNB, then "much the largest bank" in the city (R. 2440). There followed two years later a

[3] These include granting both secured and unsecured loans to corporations and individuals; handling demand deposits, time deposits, and savings accounts; administering trusts for both individuals and corporations (including pension and profit sharing funds); acting as correspondent for out-of-city banks; acting for corporations as fiscal agent, stock transfer agent, bond and coupon paying agent, etc. (Fdgs. 316–372, R. 3401–10).

[4] The district court correctly stated that Pennsylvania law permits a commercial bank to have offices only in the political community (county) in which its main office is situated and any county contiguous thereto (R. 3652). The counties to which a Philadelphia bank is thus confined are Philadelphia (coterminous with the city of Philadelphia), Bucks, Delaware and Montgomery (*ibid.*).

merger with another bank (itself the product of a recent merger), the merging banks being Philadelphia's "two biggest national banks" (R. 2441). During the years 1951–1958 PNB merged with nine additional banks, two of which had Philadelphia headquarters and the other seven, headquarters in one or the other of the three contiguous counties (R. 2441–4).

Girard's first significant merger came in 1951 and involved a Philadelphia bank which was ahead of Girard in total assets, in deposits, and in loans, and which also had 12 strategically located city offices (R. 2445–6). The merger path was resumed in 1953, again in 1954, and was further pursued in 1957 and 1958 (R. 2446–8). Thereby there came into the Girard fold two Philadelphia banks, two banks with offices in Montgomery County, and one bank with offices in Delaware County (R. 2446; Fdgs. 452, 456, R. 3440, 3442).

Most of the growth of each defendant since the early 1950's has been the result of mergers, that is, of the absorption of competitors. Thus, at the time the present action was commenced PNB had 27 offices, 18 of which, or two-thirds, had been acquired by merger (Fdgs. 7–8, R. 3326). Of Girard's 38 present offices, 32, or 84 percent, came to it by way of merger (Fdgs. 12–13, R. 3328). The showing as to assets is similar. For the 10-year period 1950–1959 inclusive, mergers contributed 59 percent of PNB's growth and 85 percent of Girard's growth (GX 197, R. 2904).[5]

[5] PNB: Total growth, $321,547,000; growth by merger, $189,-840,000. Girard: Total growth, $515,919,000; growth by merger, $438,597,000 (R. 2904).

Coincident with the foregoing merger-attributable growth on the part of the defendants, there has been a steep, almost spectacular, decline in the number of commercial banks (1) in Philadelphia and (2) in the overlapping four-county area. There were 33 commercial banks with Philadelphia headquarters in 1950, 20 in 1955 and only 14 in 1960, a 58 percent decline in this 10-year period (GX 183, R. 2878). The number of commercial banks with headquarters in the four-county area fell from 108 in 1947 to 42 in 1960, a 61 percent decline (GX 184, GX 185, R. 2879).

THE PROPOSED MERGER AND THE ACTION TAKEN THEREON

The defendants had discussed a merger of their banks "seriously and at great length" early in 1956 (GX 57, R. 2437), following a 1955 merger of two other Philadelphia banks which ousted PNB from its position as the largest bank in Philadelphia (R. 843). The discussions were discontinued because in the opinion of both bank managements a further "shake-down period" was necessary for a sound evaluation of the respective banks' potential earning power, and to work out minor operating problems, following prior mergers to which both banks had been parties (GX 57, R. 2437–8).

Merger negotiations were resumed in April 1960 and eventuated in agreement (Fdgs. 20–21, R. 3331). The basic agreement was that the banks merge or consolidate under the charter of PNB, that PNB shares remain outstanding as shares of the merged bank, and that each Girard share be converted into 1.2875 shares of the merged bank (GX 117, R. 2717; GX 119, R. 2719, 2721–2). The merger proposal thus negotiated was presented to and approved by the boards of directors on November 15, 1960, and application for consent of the Comptroller of the Currency was filed in Washington on the same day (Fdg. 22, R. 3331).

The Bank Merger Act (Appendix, *infra*, p. 83), makes bank mergers illegal without consent thereto by the Comptroller, the Federal Reserve Board, or the Federal Deposit Insurance Corporation ("FDIC"),[6] and requires the banking agency authorized to grant or withhold consent to take into consideration, in addition to certain specified banking factors,[7] "the effect of the transaction on competition (including any tendency toward monopoly)." Furthermore, the Act provides that "[i]n the interests of uniform standards," the agency whose consent is sought shall, before acting on a proposed merger, request a report on "the competitive factors involved" from the other two banking agencies empowered to pass on bank mergers and the Attorney General.

[6] Where, as here, the resulting bank is to be a national bank the consent which is requisite is that of the Comptroller. About one-third of the banks in the United States are national banks. Mergers where the resulting bank is under state charter are subject to the consent of the Federal Reserve Board (if the resulting bank is a member of the Federal Reserve system) or of the Federal Deposit Insurance Co. (if the resulting bank is a nonmember insured bank).

[7] These factors are similar to those governing the issuance of certificates set forth in Section 6 of the Federal Deposit Insurance Act, 12 U.S.C. 1816. See S. Rep. 196, 86th Cong., 1st Sess., p. 2.

Since the Comptroller did not order a public hearing on the PNB-Girard application,[8] the facts and considerations which he had before him were those presented *ex parte* by the applicants, such further facts and views as his staff may have developed and presented, and the reports on competitive effect submitted by the Federal Reserve Board, FDIC, and the Attorney General.

The report of the Federal Reserve Board is GX 161 (R. 2822). The Board stated that the competitive effect of the proposed merger was to be judged with reference to competitive impact in the four-county Philadelphia area (R. 2823–4, 2828–30). It said that PNB and First Pennsylvania Banking & Trust are at present "fairly close to being equal in competitive power", and that the next three banks "are not so far behind as to be unable to furnish them with strong competition", but that on consummation of the proposed merger "this situation would change sharply," and the resulting bank "would be far ahead of any other bank" (R. 2831–3). The extent to which the present relatively balanced competitive situation would be altered should the merger be effected was illustrated, the Board said, by taking the total de-

[8] While the Bank Merger Act does not require a hearing on applications for consent to a merger, the Federal Reserve Board has ordered public hearings on certain applications involving interests of considerable magnitude (comparable to the PNB-Girard application), on the ground that it was in the public interest to afford interested persons an opportunity to express their views and opinions in a public hearing before the Board. Subsequent to the PNB-Girard merger, the Comptroller's office also has held public hearings on some important merger applications.

posits of the bank with the largest deposits as 100 and comparing them percentagewise, before and after merger, with the deposits of the nearest competitors. The comparison thus made showed (R. 2833):

	Before Merger	*After Merger*
Bank No. 1	100	100
Bank No. 2	97	62
Bank No. 3	65	28
Bank No. 4	45	26
Bank No. 5	42	15

The Board's conclusion was that the proposed merger "would substantially lessen both existing and potential competition", and that the resulting bank "would obtain a dominant position, with attending competitive advantages, strongly adverse to the preservation of effective competition" (R. 2834).

The FDIC report (GX 163, R. 2845), while recognizing that the defendant banks serve the "Delaware Valley" area to some extent, stated that for the purpose of scheduling "competing banks" only those in the four-county Philadelphia area were to be included (R. 2848). The report noted that in the 10-year period, 1950–1959, inclusive, the number of banks in that area had fallen more than 50 percent and that the seven largest banks had increased their share of the area's total commercial bank resources from about 61 percent to about 90 percent (R. 2850). It concluded that merger of the second and third largest Philadelphia banks would "contribute further" to this "trend in concentration" and resulting "lessening of competition," and would "adversely affect competition to a significant degree" (R. 2857).

The Attorney General in his report (GX 162, R. 2834) reached the following conclusions concerning the competitive effect of the proposed merger in the four-county Philadelphia area: (1) The proposed new bank would obtain important competitive advantages over smaller banks and its creation would probably lead to further realignments by way of merger. (2) There would be a substantial increase in banking concentration and tendency toward monopoly. (3) An important alternative source of banking services would be eliminated. (4) The substantial existing competition between the applicant banks would be eliminated (R. 2844–2845).

The Comptroller gave his consent to the proposed merger on February 24, 1961, despite the adverse reports of the other agencies, and the United States filed its complaint the following day (Fdgs. 27–28, R. 3334). The Comptroller's statement of the basis for his approval of the merger, incorporated in his annual report to Congress, shows that he concluded that, in view of the "beneficial" effects of the merger upon international and national competition, "the over-all effect upon competition would not be unfavorable" (GX 164, R. 2861).[9] In this statement he fur-

[9] The Bank Merger Act requires each of the banking agencies authorized to act thereunder to set forth in its annual report to Congress the mergers to which it has given its consent, together with a "statement * * * of the basis for its approval" (App., *infra*, p. 84). We refer above to the Comptroller's "statement" concerning his PNB-Girard merger ruling, included in his annual report to Congress, because this statement furnishes the only information as to the grounds for the ruling. At the time the ruling was made it was not the

ther said that the bank created by merging Philadelphia's second and third largest banks "would be in the first rank of American financial institutions," and "would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry" (*ibid.*).

THE DISTRICT COURT'S DECISION

After a two-months trial commencing on June 5, 1961, the district court on January 15, 1962, filed an opinion holding that no antitrust violation had been established.

The court held, with respect to the applicability of the antitrust laws, (1) the Comptroller's consent to the merger of the defendants, as required by the Bank Merger Act, did not exempt the merger from the antitrust laws (R. 3638–42); and (2) the prohibitions of Section 7 of the Clayton Act do not run, as to banks, against asset acquisitions; the proposed merger involved an asset acquisition; and it therefore was not within Section 7 (R. 3642–6). Although the latter holding left open only the issue of violation of section 1 of the Sherman Act, the court stated that, in the interest of a final determination of all antitrust violations charged in the complaint, it would rule on these

practice of the banking agencies to file any formal opinion or report in support of rulings on merger applications, and the letter notifying PNB of the Comptroller's favorable ruling merely stated that, after considering the various factors referred to in the Bank Merger Act, he had found that the merger "will be in the public interest" (DX 14, R. 3049).

charges on the *arguendo* assumption that the Clayton Act "is applicable in all respects" (R. 3646).

The court agreed with the government that commercial banking was a relevant product market, but rejected the government's contention that the relevant geographic market was the four-county Philadelphia area, and indicated that the market "at the very least" comprised five Pennsylvania and three New Jersey counties, "or the ten-county area referred to by the defendants [10] and definitely New York City"; and probably encompassed "the greater part of the northeastern United States" (R. 3653–4). The remainder of the court's decision was based on the *arguendo* assumption that the Philadelphia four-county area was the relevant geographic market (*ibid.*).

The court discussed what it considered to be the "relevant factors" under Section 7 of the Clayton Act (R. 3655–3661) and concluded that the merger would not violate Section 7 because:

> In summary, it can be said that although the merger will increase concentration to the percentage figures given,[11] the merged bank would have no power to control the price and supply of credit, nor could it dominate the market in any manner. And, although a direct substantial competitor will be eliminated, the only competent testimony upon the subject estab-

[10] This ten-county area comprised the four-county Philadelphia area and "portions" of six out-of-state counties, five in New Jersey and one in Delaware (GX 57, R. 2487).

[11] The reference is to the court's findings, at R. 3657, that the merged bank would have 37 percent of all the assets, 34 percent of all the loans, and 36 percent of all the deposits of all commercial banks with head offices in the four-county area.

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> lishes that competition will be more vigorous after the merger. Also, although the commercial banking field is not an easy one to enter, it cannot be concluded that a new bank will not be established in the four-county area in the future. Finally, although the defendants have engaged in prior mergers, these mergers have had valid business purposes as the motivating force.

The court summarily disposed of the Sherman Act charge by saying that a merger which does not violate the former statute "can hardly be held to violate the more stringent standards" of the latter (R. 3662). In addition, the court held that any restraint of trade resulting from the merger met the "reasonable" test of the Sherman Act (R. 3663) under the standards set forth in *United States* v. *Columbia Steel Co.*, 334 U.S. 495.

SUMMARY OF ARGUMENT

I

In the absence of immunity, banking is subject to the antitrust laws, like any other form of interstate and foreign commerce. No such immunity was provided in the Bank Merger Act. Congress imposed an additional check on banking concentration, by requiring consent of designated federal agencies for mergers, but made clear that this "would not in any way affect the applicability" of the antitrust laws. S. Rep. 196, 86th Cong., 1st Sess., p. 3. No implied exemption arises from the mere existence of regulatory approval of mergers. See *California* v. *Federal Power Commission*, 369 U.S. 482. Moreover, contrary to the belief of the district court, the force of the antitrust laws as to mergers is not limited by the existence of regulatory control over some other aspects of banking.

II

Preliminary to determining whether the merger of Philadelphia National and Girard violates the antitrust laws, it is necessary to determine the area of effective competition—both as to the product market and the geographic market.

A. The district court correctly held that, in this case, commercial banking is the most relevant "product" market. PNB and Girard compete with each other in every aspect of their commercial banking business. From the standpoint of customers, commercial banking provides unique services which pervade its functions and no other financial institution is reasonably interchangeable with it.

B. Contrary to the decision below, the Philadelphia four-county area—in which defendants primarily operate—is the most relevant geographic market in which to consider the effects of the merger on competition. All of defendants' banking offices are located within the four-county area (as required by law), and by far the greater part of their deposits, loans and trust accounts originate within it. Defendants' justifications of their prior expansion by mergers demonstrate that banking customers need and deal generally with local banks. And in their reports on this merger, the Federal Reserve Board and the Federal Deposit Insurance Corp. stressed that the principal competitive impact would fall within the four-county area.

Since the great majority of banking customers in the four-county area can turn only to banks in this area for the services they need, the four-county area is the relevant market.

III

The proposed merger of the second and third largest banks in the market, which together control more than one-third the business, violates Section 1 of the Sherman Act.

A. The proposal to merge PNB and Girard would unite two huge, thriving banks which actively compete with each other for a vast volume of business. All of this competition, which embraces every aspect of defendants' business, would be completely eliminated by the merger. The record dramatizes this fact by showing the present vigorous competition between PNB and Girard and the adverse impact upon their customers from eliminating it.

The guiding principles under the Sherman Act are set out in a series of decisions from *Northern Securities Co.* v. *United States,* 193 U.S. 197, to *United States* v. *Southern Pacific Co.,* 259 U.S. 214, in which the Court invalidated mergers of major railroads because of the elimination of the merging companies' *inter sese* competition, without reference to the scope and strength of remaining competition. These authorities are determinative of illegality here.

The controlling force of the railroad merger cases is not diminished by the more recent decision in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, upholding an acquisition by U.S. Steel of a western steel fabricator. In dealing with the horizontal effects of that transaction, the Court did not hold that elimination of *inter sese* competition by merger can never of itself violate Section 1. Stressing the uncertainty and lack of significance of the government's showing as to the companies' market shares, the Court indicated various factors bearing upon the substantiality of competition which were to be considered. In these circumstances, the Court held that the factual situations in the railroad cases were too "dissimilar" to furnish guidance on whether "the competition which will be eliminated" in the case before it was "sufficient". Here, in contrast, there is no question that very substantial competition is being eliminated in the merger of PNB and Girard and this in itself is sufficient to establish the violation.

B. Moreover, even if *Columbia Steel* requires examination of other market factors, such examination confirms the conclusion that the proposed merger is unlawful. The merger would accelerate a dangerous trend towards concentration in banking. In ten years (1950–1960), mergers have reduced by 61 percent the number of commercial banks with head offices in the Philadelphia four-county area. If this merger of the second and third largest banks in the area is valid, the Sherman Act is no bar to elimination of all but a few firms.

The immediate dominance of the merged PNB-Girard is striking in absolute and relative terms. The merged bank would have 36 percent of all deposits, 34 percent of all net loans, and 37 percent of all banking assets. While 41 banks would remain in the area after this merger, by far the greater number of these are much smaller institutions and emergence of such a dominant firm would be to the detriment of banking customers and to the smaller competing banks. Finally, no mitigating factors justify the restraint on competition. Even if such factors were relevant, which we deny, the evidence refutes defendants' contentions that the merger will significantly increase competition for very large loans (above $8,000,000) or will substantially benefit Philadelphia by bringing new business to the area. Defendants' hypothetical benefits cannot outweigh the restraint to competition, and the injury to existing customers, which would clearly result from the merger.

IV

A. Section 7 of the Clayton Act applies to this merger. As amended in 1950, Section 7 prohibits stock and asset acquisitions having the proscribed anticompetitive effects, but the clause covering asset acquisitions is limited to corporations under the jurisdiction of the Federal Trade Commission and, therefore, does not extend to banks. The congressional purpose in 1950 to check the tide of mergers precludes treating a statutory merger as an "assets" acquisition since this would exempt banks and other important economic interests from the antimerger prohibitions contained in Section 7. Moreover, statutory mergers are very different from asset acquisitions. A merger provides for the bringing together of two going concerns by the exchange of stock; in essential elements, it closely resembles stock acquisitions. A merger similar to the one here was treated by this Court as a stock acquisition for Section 7 purposes in *Brown Shoe Co.* v. *United States,* 370 U.S. 294.

B. In *Brown Shoe Co.,* this Court formulated the criteria governing the lawfulness of mergers under Section 7. Applying these tests, the proposed merger plainly violates Section 7.

ARGUMENT

I

BANK MERGERS, LIKE ANY OTHER MERGERS AFFECTING INTERSTATE COMMERCE, ARE SUBJECT TO THE PROHIBITIONS OF THE ANTITRUST LAWS

It is well settled that, in the absence of immunity, banking as well as every other form of interstate and foreign trade is subject to the antitrust laws. In *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533, 553, the Court said in describing the Sherman Act:

> Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.
>
> A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. * * *

Finding no conclusive evidence that Congress "specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act" (p. 560), the Court held that they were subject to that Act because (p. 561):

> Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this court.

This precept is as applicable to banking as it is to insurance. It is also as true of the Clayton Act as it is of the Sherman Act. In *Transamerica Corp.* v. *Board of Governors of Federal Reserve System,* 206 F. 2d 163, 166 (C.A. 3), certiorari denied, 346 U.S. 901, in rejecting the claim that Congress did not intend the Clayton Act to apply to banks, the court said:

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements" * * * the supplemental general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

A. THE BANK MERGER ACT, WHICH PROHIBITS BANK MERGERS UNLESS A DESIGNATED FEDERAL BANKING AGENCY HAS CONSENTED THERETO, DOES NOT EXEMPT FROM THE ANTITRUST LAWS MERGERS FOR WHICH THE REQUIRED CONSENT HAS BEEN GIVEN

1. The court below properly held that its jurisdiction under the antitrust laws was not impaired by passage of the Bank Merger Act of 1960. In so holding, the court relied primarily on the statements, contained in both the House and Senate Committee Reports on the bill, that the Act would not affect "in any way" the application of the antitrust laws to bank mergers; these statements, the court thought, were "much too explicit to be ignored or explained away" (201 F. Supp. at 357). We submit that the district court's decision, in this respect, was entirely correct.

The legislative history of the Bank Merger Act shows plainly that Congress considered the two sets of statutes to be complementary rather than repugnant. The Bank Merger Act was enacted because Congress was deeply concerned over the unchecked tide of bank mergers and because it was dissatisfied both with the liberality of the banking agencies in approving mergers and with the failure of the Department of Justice to attack bank mergers under the antitrust laws. Thus, the Senate Report (S. Rep. No. 196, 86th Cong., 1st Sess., 1959) stated:

> Bank mergers are generally considered to be covered by the restrictions of the Sherman Antitrust Act, but up to this year, no proceeding under the Sherman Antitrust Act had been instituted which involved a bank merger or consolidation. * * * [p. 1]

> In short, at the present time many, perhaps most, bank mergers can proceed with little or no consideration of competitive factors. [p. 2]
>
> * * * * *
>
> The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the maintenance of vigorous competition in the banking system and in the industry and commerce served by the banking system. [p. 8]

Motivated by a purpose of imposing an *additional* check on the processes of concentration in the banking industry, Congress was careful to make it clear that the new act would not defeat the application of the most significant existing check, the antitrust laws. Thus, Senator Robertson, sponsor of the Bank Merger Act and Chairman of the Senate Committee on Banking and Currency, which reported the bill, stated:

> The bill seeks to make mergers of banks more difficult. As I have previously said, the bill does not affect in any way the present antitrust laws. [105 Cong. Rec. 8131.]

For these reasons both the Senate and House Committee Reports on the bill stated in virtually identical language that "S. 1062 would not in any way affect the applicability" of the antitrust laws to bank mergers. Senate Report, *supra,* at p. 3; H. Rep. No. 1416, 86th Cong., 2d Sess., 1960, p. 9.

In sum, the Bank Merger Act was addressed to the agencies with regulatory powers over banks, not to the courts in antitrust cases. Congress plainly contemplated that particular mergers might pass muster under the Bank Merger Act and nevertheless be invalidated under the antitrust laws. Accordingly, there is no room for the argument that the antitrust laws were displaced in whole or part by the Bank Merger Act.[12]

2. Even if the legislative history of the Bank Merger Act were less clear, there would be no basis for the appellees' contention below that, despite the lack of a specific exemption, the Act impliedly exempted approved mergers from the antitrust laws because antitrust standards must be deemed to be

[12] Defendants also argued below that an intention to grant exemption could be inferred from the defeat of a proposed amendment to the Bank Merger Act which would have added an antitrust "savings" clause. Neither the debate on that clause nor its outcome establishes any such intention on the part of Congress. Indeed, Congressman Celler, the author of that proposal, specifically stated:

> In these circumstances, I suggest—*solely for the purpose of clarification*—an "antitrust savings" clause identical with that contained in section 11 of the Bank Holding Company Act and providing that nothing in the bill supersedes any provision of the antitrust laws.
>
> *While such a provision would not add to the bill from a substantive standpoint*, it would avoid needless controversy and possible litigation involving the contention that the strictures of the Sherman and Clayton Acts had been nullified by the provisions of the pending bill. [Hearings on S. 1062 before Subcommittee No. 2, House Committee on Banking and Currency, 86th Cong., 2d Sess., 1960, pp. 146–147; emphasis added.]

See also, Hearings on S. 1062 before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 1959, p. 86. Compare this Court's treatment of the repeal of a previously enacted savings clause in *United States* v. *R.C.A.*, 358 U.S. 334, 344–345.

repugnant with the "public interest" standard under which the Comptroller grants or withholds approval. That contention is foreclosed by the decision in *California* v. *Federal Power Commission,* 369 U.S. 482, where the Court pointed to the heavy burden imposed upon those who seek to spell out antitrust exemptions by implication (369 U.S. at 485–486):

> Immunity from the antitrust laws is not lightly implied. * * * "When there are two acts upon the same subject, the rule is to give effect to both if possible." [Citing *United States* v. *Borden Co.,* 308 U.S. 188, 198.] * * * Here, as in *United States* v. *R.C.A.,* 358 U.S. 334, while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" (*id.,* at 351), there is no "pervasive regulatory scheme" (*ibid.*) including the antitrust laws that has been entrusted to the Commission. And see *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 223. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5(11) of that Act specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust laws * * *." See *McLean Trucking Co.* v. *United States,* 321 U.S. 67.
>
> There is no comparable provision under the Natural Gas Act. * * *

Finding no necessary conflict between the antitrust laws and the "public interest" standard under which the Commission, like the Comptroller here, was to pass on a proposed merger application, the Court held that no antitrust exemption arises from the mere circumstance that the transaction was approved by an administrative agency under a "public interest" standard. The same result would follow in the present case even in the absence of the clear legislative history supporting that conclusion.

B. BANK MERGERS ARE SUBJECT TO THE ANTITRUST LAWS ALTHOUGH VARIOUS ASPECTS OF THE OPERATIONS OF BANKS ARE REGULATED BY STATE OR FEDERAL LAW

A number of findings proposed by the defendants and approved by the district court appear intended to attach particular significance to the fact that certain commercial banking practices are regulated by law (Fdgs. 28a–39a, R. 3492–3).[13] But neither the existence of regulation of aspects of the banking business nor the effects of regulation upon competition in the areas in which it applies can serve to limit the general applicability to banks of the antitrust laws.

1. The district court was of the opinion that the broad principles of law enunciated in antitrust cases involving commercial and industrial organizations do not apply with the same force and effect to a "regulated" industry as to one in the so-called "free enterprise" field (R. 3635). However, in dealing with industries subject to broad regulation, this Court has frequently considered the question whether the regulatory legislation conferred exemption from the antitrust laws, and in these decisions it has always

[13] Commercial banks are not permitted to pay interest on demand deposits and the maximum interest which they may pay on time and savings deposits is prescribed (Fdg. 13a, R. 3490). The banks are also subject to supervision and regulation designed to assure the safety and liquidity of their assets and investments (Fdgs. 22a–23a, R. 3491).

applied the antitrust laws with full force and effect to conduct not specifically exempted.[14]

The district court's view was, we believe, properly laid to rest in the numerous cases in which this Court held that the application of the Sherman Act to railroads is in nowise limited by reason of the fact that many aspects of the railroads' business are strictly regulated (see, *e.g.*, *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61; *United States* v. *Southern Pacific Co.*, 259 U.S. 214) and the early rate-fixing cases (*United States* v. *Freight Association*, 166 U.S. 290; *United States* v. *Joint Traffic Association*, 171 U.S. 505). For example, in *United States* v. *Southern Pacific Co.*, 259 U.S. 214, this Court held a merger of railroads within Sherman Act prohibitions notwithstanding extensive federal regulation of railroad rates and practices. The Act makes unlawful, the Court said, merger of competitive rail systems when the effect is "to suppress or materially reduce the free and normal flow of competition," and in the case before it the Court found this effect because the merger would suppress competition as to significant elements thereof which were outside the sphere of regulatory control (259 U.S. at 230–231). The Court said (*id.* at 231):

> While many practices, formerly in vogue, are eliminated by the legislation of Congress regu-

[14] *United States* v. *Borden Co.*, 308 U.S. 188; *Milk Producers Assn.* v. *United States*, 362 U.S. 458 (milk distribution case); *United States* v. *R.C.A.*, 358 U.S. 334 (television stations); *California* v. *Federal Power Comm.*, 369 U.S. 482 (distribution of natural gas). See also *Far East Conference* v. *United States*, 342 U.S. 570 (water transportation).

> lating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control.

See, also, *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 456–457.

2. There is even less basis for a contention that, because of the regulation of various banking practices, competition among banks is either absent, unnecessary, or undesirable. A great portion of the business of banking, including some of its most important aspects, is not regulated and Congress in enacting the Bank Merger Act expressly recognized and declared (a) that commercial banks compete in their banking services, (b) that maintenance of this competition is of public importance, and (c) that bank mergers threaten seriously to impair maintenance of this competition.

The Senate and House Committee reports described the competition among banks as follows (S. Rep. 196, 86th Cong., 1st Sess., p. 16; H. Rep. 1416, 86th Cong., 2d Sess., p. 3):

> Competition in banking takes many forms—competition for deposits by individuals and corporations and by personal and business depositors; competition for individual, business, and governmental loans; competition for services of various sorts. * * *

Both reports declared the importance of this competition (*ibid.*):

> Vigorous competition between strong, aggressive, and sound banks is highly desirable. * * * Competition for deposits increases the amounts available for loans for the development and growth of the Nation's industry and commerce. Competition for loans gives the borrowers better terms and better service and furthers the development of industry and commerce. * * *

And, as we have noted above, both reports also declared that bank mergers have been and are a serious threat to maintenance of competition (S. Rep. 196, 86th Cong., 1st Sess., p. 8; H. Rep. 1416, 86th Cong., 2d Sess., p. 5):

> The large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers, all give rise to concern for the maintenance of vigorous competition in the banking system. * * * The reduction in the number of banks and the loss of competition between merged banks also give rise to concern. * * *

II

COMMERCIAL BANKING IS THE MOST RELEVANT PRODUCT MARKET, AND THE PHILADELPHIA FOUR-COUNTY AREA IS THE MOST RELEVANT GEOGRAPHIC MARKET, FOR MEASURING THE TRADE-RESTRAINING AND ANTI-COMPETITIVE EFFECTS OF THE PROPOSED MERGER

Where, as here, the issue is whether the acquisition of one competitor by another violates the antitrust laws, it is necessary to determine the "area of effective competition," that is, the trade as to which the two have been substantially competitive. This inquiry, in turn, involves ascertaining what products both sell (sometimes called the relevant product market) and what areas or regions both serve with the same or substantially the same product (sometimes called the relevant geographic market). These determinations, which enable the court to ascertain the extent and seriousness of the trade-restraining effects of the acquisition, see *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324, are as important to a determination under Section 1 of the Sherman Act as to a decision under Section 7 of the Clayton Act. See *United States* v. *Columbia Steel Co.,* 334 U.S. 495. We shall, therefore, discuss the appropriate product and geographic markets in the present case before considering the legality of the merger under the distinct provisions of the Sherman and Clayton Acts.

The court below held that the relevant product market is commercial banking and that the relevant geographic market is an area wider than the Philadelphia four-county area (but how much wider the court was unwilling definitely to find). The government believes that the holding concerning the relevant product market is correct, and while it does not anticipate that appellees will contend otherwise, we undertake to show the validity of the holding. The holding respecting the relevant geographic market we vigorously contest.

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A. COMMERCIAL BANKING IS THE MOST RELEVANT PRODUCT MARKET

A large company ordinarily sells a wide variety of goods and services, and frequently a considerable portion of these are designed to serve particular needs. If such a company combines with another by merger or otherwise, it is necessary to determine which of its products or services are truly competitive with the products and services of the company with which it is combining and which of these are competitive with the products of other remaining competitors. The words "relevant product market" are a short-cut designation of the area of effective "product" competition.

There is no difficulty in the present case in identifying the area of effective competition between the combining companies. All commercial banks, at least all those of substantial size, perform the same functions and render the same services. Since they are competitive with each other in every aspect of their business, the starting point for a determination of the relevant "product" market necessarily is the entire business in which they are engaged, in short, commercial banking.

This is not, however, the end of the process of defining a product market. From the standpoint of anti-competitive effects of the merger on the customers served or potentially served by the two banks whose independent existence the merger would bring to an end, it may be necessary to consider whether there are other institutions to which the customer might turn to obtain the substantial equivalent of what he loses by being denied, because of the merger, an important alternative source of commercial banking service. As to this question, we submit that the record conclusively establishes that no other financial institution could fill the gap caused by the narrowing of the available suppliers of commercial banking service.

The most important elements of the service of commercial banks are supplied only by them. The district court found: that "[c]ommercial banks are the only financial institution in the United States authorized to receive demand deposits" (Fdg. 49, R. 3338); that "[o]nly commercial banks provide checking account services" (Fdg. 57, R. 3340); and that "[u]nsecured, short-term commercial loans are readily available to Philadelphia businessmen only from commercial banks" (Fdg. 72, R. 3342). The banks, accordingly, supply services ("products") which not only are not reasonably interchangeable with the services of others, but are, in fact, unique. It is therefore clear that in this case commercial banking, as such, is not only a relevant product market but it is the most relevant market for appraising the validity of the merger. Moreover, the numerous federal and State statutes applicable solely to commercial banks[15] represent implicit recognition of the separate and distinct character of their business and functions, both by Congress and State legislative bodies.

In *Brown Shoe* this Court emphasized the importance of a realistic determination of the relevant

[15] For Federal legislation, see in general 12 U.S.C. 1–548, 1811–1848.

product market. 370 U.S. at 326. On this issue the ruling below was entirely realistic and, we submit, clearly correct. The court said (R. 3651–2):

> It is the conglomeration of all the various services and functions that sets the commercial bank off from other financial institutions. Each item is an integral part of the whole, almost every one of which is dependent upon and would not exist but for the other. The Court can perceive no useful purpose here in going any further than designating commercial banking a separate and distinct line of commerce within the meaning of the statute. It is undoubtedly true that some services of a commercial bank overlap, to some degree, with those of certain other institutions. Nevertheless, the Court feels quite confident in holding that commercial banking, viewed collectively, has sufficient peculiar characteristics which negate reasonable interchangeability.

Within the "outer boundaries" of a product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe* at 325. In some commercial bank mergers it may be necessary to examine the merger's effect on a particular segment of the business of the merging parties, to determine whether that segment of their business is a sufficiently distinct and economically significant submarket so that, as to this submarket, the merger unreasonably restrains or monopolizes trade or otherwise has competitive effects prohibited by the antitrust laws. But such an examination need not be made where, as here, the facts establish that the merger's effect throughout the general product market, commercial banking, violates the antitrust laws.

B. THE PHILADELPHIA FOUR-COUNTY AREA IS THE RELEVANT GEOGRAPHIC MARKET

The record in this case plainly indicates that the great majority of banking customers in the four-county area surrounding Philadelphia must obtain the banking services they need locally, in the four-county area itself. This area is therefore the relevant geographic market for assessing the effects of the PNB-Girard merger.

In *Brown Shoe,* this Court held that a horizontal merger violates Section 7 of the Clayton Act if it has effects of the kind prohibited by that section in "any" relevant geographic market (370 U.S. at 337). It is no less firmly established that the Sherman Act's prohibitions apply to restraints and monopolizations of trade which are operative in any significant geographic area. This Court has declared that the prohibitions of the Act "have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole * * *." *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U.S. 268, 279; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 226. In *United States* v. *Columbia Steel,* 334 U.S. 495, the Court said (p. 519) that "we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area", and it held (pp. 520, 527) this to be the rule for both vertical and horizontal combinations.

A geographic market, to be relevant for antitrust purposes, must correspond to the "commercial realities" of the industry and be "economically significant". *Brown Shoe, supra,* 336–337. We submit that here the Philadelphia four-county area unquestionably is, under these tests, not only a relevant geographic market, but far and away the most relevant market. It is beyond dispute that the defendants directly and substantially compete with each other in that area, that this is the primary area of their banking operations and *inter sese* competition, and that the business which they draw from this area dwarfs in size and importance that drawn from without. This is confirmed by the following considerations.

(1) All of the defendants' banking offices are located, as by law they must be, within this area.

(2) By far the greater part of the deposits they receive, the loans they make, and the trusts they administer represents business done with customers in the four-county area. For the two banks combined, customers in the four-county area represent the following percentages of the total amounts of the various categories of deposits and loans, and of the total number of trusts:

	Percentages	Record Ref.
Demand deposits of individuals	89	Fdg. 275, R. 3389
Demand deposits of partnerships and corporations	71	Fdg. 275, R. 3392
Time and savings deposits	88	Fdg. 269, R. 3385
IPC deposits (time and demand)	79	Fdg. 280, R. 3393
Loans to individuals	72	Fdgs. 260, 261, R. 3379
Commercial and industrial loans	57	Fdg. 259, R. 3377
Personal trusts (by number of accounts)	[16] 77	Fdg. 268, R. 3383

[16] This percentage is computed from figures given in the table preceding this finding (R. 3382).

The amount of business done by the two banks in the additional six counties of the 10-county Delaware Valley area suggested by defendants (Fdg. 50a, R. 3494) is minute in comparison to their business in the four-county area. The additional six counties together account for only 2 percent of the combined banks' individual demand deposits (1/44th of the total the two banks received from customers in the four-county area); 4 percent of demand deposits of partnerships and corporations (1/18th of their total from customers in the four-county area); 7 percent of loans to individuals (1/10th of their four-county total); 7 percent of commercial and industrial loans (1/8th of their four-county total); 2 percent of savings deposits (1/48th of their four-county total); and 4 percent of business time deposits (1/17th of their four-county total).[17] These figures show that the geographic area within which PNB and Girard are effective competitors for banking business can most realistically be defined as the four-county area. They also indicate that banking customers within a given area do not readily use the services of comparatively distant banks.

(3) The court below repeatedly recognized the great importance to a bank, in its competition for business, of proximity to those needing banking services. In condonative explanation of defendants' prior mergers, the court said that "mergers with existing banks in the suburbs of Philadelphia were, in many cases, the only feasible way for larger banks to follow the mi-

[17] Fdgs. 275, 260, 258, 272; R. 3389, 3392, 3379, 3376, 3388. Figures are not available for the amounts of other categories of business done in the six additional counties.

gration of many of their customers into these areas." (R. 3661; see also Fdg. 99a, R. 3502). It found that "PNB and Girard have opened new branch offices in the four-county area to serve existing customers and to participate in the growth of new communities" (Fdg. 100a, R. 3502); that the "Philadelphia banks compete to acquire desirable branch sites" (Fdg. 293, R. 3396); and that in order "to maintain its competitive position Girard believes it must keep a strategic branch system" (Fdg. 294, R. 3397). The "need to have a convenient location" in order "to serve more efficiently and conveniently the customers" each bank had in particular areas so as "to protect and retain existing business" was found to be the motivation for the establishment or purchase of a number of branch offices by both PNB and Girard (Fdgs. 296, 299, 454, R. 3397, 3398, 3441; see also Fdg. 315, R. 3400).[18] Since their offices are limited to the four counties, the foregoing considerations ensure that this is the area in which the two banks will do most of their business.

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[18] Compare the similar finding of the Federal Reserve Board in another proceeding, quoted in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 167–8:

> Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer. Very large concerns with national credit standing have access to credit from banks in many parts of the country and may also maintain accounts in widely scattered banks. This does not apply, however, to the great multitude of the customers of commercial banks. The

(4) Both of the banking agencies which submitted reports to the Comptroller on the merger application found the four-county area to be the relevant geographic market. The Federal Reserve Board stated that the four-county Philadelphia area is the area where "the principal competitive impact of the proposal will fall," and that bank examiners in confidential sections of their bank examination reports had expressed the view in all cases involving Philadelphia, Camden, Trenton, and Wilmington banks, that the "primary competition" of these banks is represented by the banks in the city of the particular bank's location (GX 161, R. 2824). Similarly, the report of the Federal Deposit Insurance Corporation listed as "competing" banks only banks in the four-county area, and it dealt with the competitive effects of the merger on the basis of its effects in that area (GX 163, R. 2845–2857).

In sum, it is clear that the four-county area is the relevant geographic market for banking services. Both the fact that the great bulk of the business of Girard and PNB arises from sources within the four-county area and the fact that the banks have recognized and emphasized the importance of maintaining offices near to their customers, show conclusively that banking customers need and deal primarily with

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smaller concerns, local business enterprises, and ordinary citizens must depend upon their local commercial bank or banks for the financial services peculiar to such banks; for all these customers there is no alternative or substitute, because distantly located banks do not serve or supply their needs.

nearby banks. The few largest customers of PNB and Girard may have available to them banking sources from outside the four-county area. But the great multitude of banking customers can turn only to local banks for the services they desire and are significantly affected by an elimination of competition in the four-county area. Since the four-county area is the only market in which by far the greater part of banking customers in the area deal, it is plainly the relevant market for assessing the effects of the PNB-Girard merger.

III

THE PROPOSED MERGER VIOLATES SECTION 1 OF THE SHERMAN ACT

The illegality of the proposed merger between the second and third largest banks in the Philadelphia area can be demonstrated in either of two ways. We submit, first, that the elimination of all competition between two sound firms, the second and third largest in the most relevant market, which do 35 percent of all the business, is itself sufficient to invalidate the merger without further inquiry. This position is squarely supported by the railroad merger cases, whose authority, we submit, was not impaired by *United States* v. *Columbia Steel Co.*, 334 U.S. 495.

Second, even if the *Columbia Steel* case requires a broader framework of inquiry, the proposed merger is unlawful. For, judged upon the elements there held relevant, the proposed merger would be in unreasonable restraint of trade.

A. THE MERGER BETWEEN PNB AND GIRARD WOULD VIOLATE SECTION 1 BECAUSE IT ELIMINATES ALL COMPETITION BETWEEN TWO MAJOR FIRMS IN THE MOST RELEVANT MARKET

1. The proposal to merge PNB and Girard involves these salient facts: The merger would unite banks which respectively have deposits of $924,000,000 and $651,000,000, loans of $524,000,000 and $399,000,000 and assets in the trusts administered of $400,000,000 and $2,500,000,000.[19] The two banks actively compete with each other as to this vast volume of business, and their competition embraces every aspect of the business in which they are engaged.[20] All of this competition the merger would "completely" eliminate.[21] There was no business necessity for the merger on the part of either bank; each was in good financial condition and under sound and able management.[22] The merging companies together control approximately 36 percent of the deposits, 34 percent of the net loans, and 37 percent of the assets of all commercial banks in the four-county area (R. 3656–7). See also Statement *supra*, pp. 4–12.

The immediate effects of the elimination of competition between PNB and Girard are also shown in the record by nonstatistical evidence. That the forces of competition operate, and operate strongly in the business of commercial banking is demonstrated by the testimony of officers of the defendant banks and defense witnesses.

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[19] Fdg. 93a, R. 3501; Fdg. 338, R. 3405.

[20] Fdgs. 292 (R. 3396), 316 (R. 3401), 337 (R. 3405), 348 (R. 3406), 355 (R. 3408), 363, 365, 368–371 (R. 3409–11).

[21] Fdg. 373, R. 3410.

[22] Fdgs. 11, 15, R. 3327, 3328.

A vice president of PNB stated that a bank's superiority in service is perhaps the most important factor in obtaining a customer of another bank as a depositor (R. 1733). An assistant vice president of PNB testified that differences between banks in their service charges on checking accounts are a factor in acquiring and retaining business (R. 813). A defense witness, a former treasurer and a long time director of a large chemical company, expressed the opinion that any company financial officer wishing to arrange a loan from a bank would like to be able to deal with two or three banks "so that he can play one against the other," and that there is "no substitute" for this ability to bargain as to terms (R. 2098, 2106). Another defense witness, an officer of a large public utility company, testified that competition between banks "produces better services," that in loans to small business banks compete with each other as to their lending service, and that in loans running into millions they compete as to the rate of interest to be charged (R. 2204).[23]

Girard, the district court found, "is an active and alert competitor of PNB throughout the area in which PNB has banking offices."[24] Each of 11 Girard offices, which together had a total of $348,138,000 in

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[23] A government witness, formerly the president of a New York commercial bank, testified that in borrowing from a bank the rate of interest is always negotiated competitively unless the borrower already has a bank loan at the prime rate, and that in that situation there is "a whole variety of collateral services in which banks may compete with each other" (R. 757, 780–1, 783).

[24] Fdg. 287 (R. 3395).

IPC deposits,[25] was located within two miles of one or more of 17 PNB offices, which together had total IPC deposits of $352,608,000. By far the greater portion of this business was conducted by offices of one of the merging banks located within one mile of one or more offices of the other bank.[26] As to personal loans, a vice president of the consumer credit department of Girard testified that branches of Girard within five miles of a branch of PNB compete to make such loans,[27] and loans of individuals, partnerships, and corporations amounting to $409,613,000 are held by offices of one of the two banks located within two miles of an office of the other, again by far the greater part involving an office of one of the two banks within one mile of an office of the other.[28] Hundreds of millions of dollars in deposits and tens of millions in loans were even shown to involve customers who not only had both banks available to them but used both extensively[29] and thus could be expected readily to shift funds and loans between banks in response to competitively offered benefits.

One is not left entirely to speculation in assessing the effects of eliminating this substantial competition between PNB and Girard. The average interest rate

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[25] IPC deposits are deposits (either demand or time) of individuals, partnerships and corporations as distinguished from deposits of governmental agencies and banks. "The largest part of a bank's earnings are derived from its deposits, without which it could not conduct its business" (Fdg. 27a, R. 3492).

[26] Fdg. 308 (R. 3399).

[27] Fdg. 315 (R. 3400).

[28] Fdg. 308 (R. 3399).

[29] Fdg. 290 (R. 3396).

charged by each of the two banks on the same categories of loans was markedly different.[30] For example, the interest rates charged by Girard on equipment loans were higher than those charged by PNB.[31]

> The recommendation of the equipment loans task force committee composed of officers of both defendants was that Girard's higher consumer credit interest rates be utilized by the resulting bank rather than the simple interest rate on which PNB makes equipment loans. The committee believed that competition would be such that the merged bank could obtain the higher rate [Fdg. 328, R. 3403].

The merger would, of course, also affect the rate of interest paid by the banks on time deposits. Again the effect of the complete elimination of competition between them is indicated by the trial court's findings. "On February 1, 1961, officers of the defendants compared seven existing practices of Girard with the practices of PNB in paying interest and assessing charges on savings accounts. In every instance the practice followed by Girard was more favorable to the bank than the practice of PNB. In every instance it was recommended that the Girard practice or one even more lucrative for the resulting bank be adopted. It was estimated that these practices had resulted in a saving of $138,000 in the interest Girard paid its savings depositors in 1960" (Fdg. 349, R. 3407). Since the merged bank plans to follow these practices, it is evident that a substantial reduction

[30] Fdg. 317 (R. 3401).

[31] Fdg. 327 (R. 3403).

of income to savings depositors of PNB will result from the combination of these competing banks.

2. Such a merger between two leading firms in the same market, which control a large portion of the business—here a little more than one-third—violates Section 1 of the Sherman Act. Nothing more need be proved. The merger automatically puts to an end all competition between PNB and Girard. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 335. Where, as here, the companies are leaders in the trade and commerce common to both, the merger by its own force eliminates substantial competition and significantly narrows the number of major units competing in the market. Moreover, the competition is suppressed, not for the uncertain duration of a consensual agreement which the parties themselves may at any time abrogate or breach, but forever. Section 1 was manifestly intended to reach restraints achieved by combining into a single enterprise, subject to common control, companies which were formerly independent. In the last quarter of the nineteenth century trusts had frequently been employed to obtain control over former independents and thereby suppress all competition among the controlled companies.[32] It is thus significant that the prohibition of Section 1 of the Act runs against "[e]very contract, combination *in*

[32] In that era, many State corporation laws did not permit a corporation to own stock of another corporation, and the trust device—vesting in trustees legal title to and voting rights in stock of the companies brought into the combination—was frequently used as the means for exercising control over two or more corporations. Use of the trust device is shown in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 33-41.

the form of trust or otherwise, or conspiracy" (emphasis added) in restraint of interstate trade.

This interpretation is squarely supported by a series of decisions of this Court under Section 1 invalidating horizontal mergers between competitors when all that appeared was that two major firms in the same market had, without business necessity, combined and thereby suppressed competition between themselves. The starting point[33] is *Northern Securities Co.* v. *United States*, 193 U.S. 197. A holding company had been formed to acquire controlling stock in two railroads operating parallel lines across the northwestern tier of States. The government's sole complaint was that the merging companies had, by "repressing free competition between them," combined in illegal restraint of interstate commerce (193 U.S. at 335). The Court held that the combination

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[33] Three of the Court's early horizontal merger decisions have little pertinency here. The ground of decision in *United States* v. *E. C. Knight Co.*, 156 U.S. 1, was that acquisition of the stock of nearly all the companies engaged in refining sugar constituted a monopolization of restraint of manufacture, not of interstate commerce, a view long since repudiated. While *Standard Oil Co.* v. *United States*, 221 U.S. 1, and *United States* v. *American Tobacco Co.*, 221 U.S. 106, are well known, important cases, the opinions are not very illuminating as to issues in the instant case. In the words of a prominent student of and commentator on the antitrust laws, the *Standard Oil* opinion "is more concerned with the profundities of the rule of reason than with an explicit statement of the grounds of decision," and the government's case was of such strength that it is "difficult to appraise the legal significance" of the numerous facts which the Court reviewed. Handler, *A Study of the Construction and Enforcement of the Federal Antitrust Laws*, TNEC Monograph No. 38, Senate Committee Print, 76th Cong., 3d sess., p. 51. These comments equally apply to the *American Tobacco* opinion.

constituted "a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected" (193 U.S. 327). The Court's holding was made without reference to or determination of the extent to which the traffic of the railroads brought under one control was subject to the competition of other railroads, that is, the strength of the remaining competition. In fact, only a minor part of the business for which the two roads competed was free from the competition of other carriers. Handler, op. cit. *supra*, fn. 33, at pp. 48–49.

In *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, the Court unanimously held that acquisition by Union Pacific of a controlling stock interest in Southern Pacific violated the Sherman Act. The lines of the two railroads were widely separated, that of the Union Pacific running from Kansas City, Missouri, via Ogden, Utah, to Portland, Oregon, and that of the Southern Pacific from New Orleans via El Paso to Los Angeles and then up the coast to San Francisco and Portland (226 U.S. at p. 80). The Court recognized that the business for which the two railroads were in competition was "a comparatively small part" of their total traffic, but the Court found violation of the Sherman Act because traffic for which they did compete with each other amounted to "many millions of dollars," and because the acquisition could be expected to eliminate competition as to this traffic (226 U.S. pp. 88–89). As in the *Northern Securities* case, the combination was declared unlawful because of the elimination of the merging companies' *inter* *sese* competition without reference to the strength or weakness of the remaining competition.[34]

In *United States* v. *Reading Co.,* 253 U.S. 26,[35] the Court vigorously reaffirmed the principles of the *Union Pacific* and *Northern Securities* cases. It held that the fact that the combination in issue brought

[34] The Court's decision in *United States* v. *Winslow*, 227 U.S. 202, during the same term as *Union Pacific*, was plainly not in conflict with *Union Pacific*. The issue before the Court in *Winslow* was whether a Sherman Act indictment, which alleged a merger of several companies engaged in making and selling machines for the manufacture of shoes, charged an offense under the Act. The Court, accepting the view that the indictment charged a merger of companies which "did not compete with one another" (227 U.S. at 217), held that the Act was not violated by bringing about, by merger, a vertical integration of the shoe machinery business. In *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, the same merger was attacked in a civil proceeding. The Court concluded that the evidence adequately supported the finding below that the defendant companies were "not in competition" at the time of their merger (247 U.S. at 41) and held, adhering to its reasoning in *Winslow*, that in the circumstances shown the merger of companies making complementary, not competitive, machines did not violate the Sherman Act (see 247 U.S. at 45).

[35] Two months earlier, in *United States* v. *United States Steel Corporation*, 251 U.S. 417, a four-justice majority of this Court refused to order dissolution of the Steel Corporation, which had been organized in 1901 to acquire and hold stock of twelve previously independent steel manufacturers, because it found weighty "countervailing considerations" which made it inappropriate to order dissolution (251 U.S. at 452). The nub of these countervailing considerations was that dissolution, if enforced against the merger consummated nineteen years earlier, would drastically and retroactively unsettle vast property interests and materially disturb the nation's foreign trade.

As Justice Day pointed out in dissent (*id.* at 463), the Court declined to grant relief against a "plain violation" of the Act on the ground of "public policy" considerations.

under unified control "two great competing coal companies" and "two great competing interstate carriers" was enough "to bring it, without more, within the condemnation of the Anti-Trust Act" (253 U.S. at 59). The shipments of anthracite coal falling into common hands by the combination amounted, the Court noted, to over one-third of the total for the country. See also, *United States* v. *Lehigh Valley Railroad Co.*, 254 U.S. 255.

The *Reading, Union Pacific* and *Northern Securities* decisions were reaffirmed in *United States* v. *Southern Pacific Co.*, 259 U.S. 214, where the Court held that the acquisition by the Southern Pacific of stock of the Central Pacific, which formed a connecting link for transcontinental shipments by a competitor of the Southern Pacific, violated the Sherman Act because the control could be utilized to divert transcontinental traffic to the Southern Pacific's line.

There is no reason to read the foregoing decisions as if they barred every merger between competing companies, and then to condemn them as impossibly restrictive, or to confine them to railroad mergers. Each of the cases must, of course, be read in the light of the facts concerning the merging companies which were obvious to the Court, even if not mentioned in the opinion. The merging companies, in each case, were major competitive factors in the relevant market, and they were strong companies in no danger of failure absent merger.[36] The cases therefore stand for the proposition that, where merging companies

[36] Cf. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291.

are major competitive factors in a relevant market, the elimination of competition between them, by merger, itself constitutes a violation of the Sherman Act.

Applying that principle to the facts of this case, we find present all the basic elements determinative of illegality. What the defendant banks' proposed merger basically involves is acquisition by PNB of the substantial share of the market held by Girard and consequent elimination of the substantial competition of another concern which was a major factor in the market. No showing was made that this combination represents, in the words of the Court in *United States* v. *Reading Co.*, 253 U.S. 26, 57, "normal expansion to meet the demands of a business growing as a result of superior and enterprising management." Rather it was "deliberate, calculated purchase for control" of Girard's share of the market (*ibid.*).

There is, moreover, similarity in a fundamental and crucial sense between the restraints of trade held illegal in this Court's railroad merger decisions and the restraints which would result from merger of the defendant banks. Transportation and banking, each in its own way, performs a function vital to all trade and commerce, and might properly be called nerve centers for the country's trade and industry. Transportation is indispensable to trade and commerce of every variety. Similarly, commercial banks are today an indispensable source of the money and credit vital to every form of trade and industry. In the instant case the district court said: "It is the commercial bank, even though strictly regulated, which comprises the backbone of the monetary system of the United States" (R. 3635). The Senate and House Committee reports on the bill which became the Bank Merger Act quoted the following from an article on banking by a well-known law professor: "Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system."[37] In this field, as in the field of transportation, the protection of competition is the defense of all commerce, and not merely a segment, from the harms which led to the passage of the anti-trust acts; the ultimate adverse effects of the concentration of banking power, through merger, are likely to extend to other industries.

3. There is nothing inconsistent with these conclusions from the earlier railroad merger cases in *United States* v. *Columbia Steel Co.*, 334 U.S. 495.[38] In that

[37] Berle, *Banking Under the Anti-Trust Laws*, 49 Col. L. Rev. 589, 592 (quoted in S. Rep. 196, 86th Cong., 1st Sess., p. 18; H. Rep. 1416, 86th Cong., 2d Sess., p. 9).

[38] *United States* v. *International Harvester Co.*, 274 U.S. 693, decided in the period between the railroad cases and *Columbia Steel*, is at times discussed in connection with the Sherman Act merger cases, but did not rule upon the question of illegal restraint of trade resulting from merger of competing companies. The defendant corporation had been formed in 1902 to acquire the assets and business of five manufacturers of harvesting machinery. A consent decree entered in 1918 in a Government proceeding seeking dissolution of the merger required the defendant to divest itself of part of its harvesting machinery business and placed certain limitations on its sales activity. The decree also entitled the United States to apply for further

case the government attacked as a violation of the Sherman Act the acquisition of the physical assets of Consolidated Steel Corporation ("Consolidated") by United States Steel Corporation ("U.S. Steel").[39] At the time of the acquisition U.S. Steel and Consolidated both made fabricated structural steeel products, the former selling these products on a nation-wide basis and the latter selling them in 11 states (referred to as the Consolidated market).[40] The government charged, among other things, that the acquisition would illegally restrain trade in that it would eliminate competition between U.S. Steel and Consolidated in the sale of these products.

Before beginning its analysis of the horizontal effects of the transaction before it, the Court noted that the standards for assessing the merger should be analogous to or at least determined in light of the standards of Section 7 of the Clayton Act even though the

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relief at the expiration of 18 months after termination of the war if at that time the decree had not brought about a competitive situation "in harmony with law" (see 274 U.S. at 697). The government sought additional relief pursuant to this provision, and on appeal from dismissal of its petition this Court held that the consent decree precluded the government from seeking any relief by way of dissolution beyond that given by the consent decree (*id.*, at 702–703).

[39] When we refer to U.S. Steel, the reference includes the acts and business of its various subsidiaries.

[40] U.S. Steel's fabricating plants were in the East while Consolidated had one plant at Los Angeles and one at Orange, Texas (334 U.S. 501).

Both companies also made, and sold on a nation-wide scale, pipe for oil and gas pipelines, but, because the government's stronger case and thus the more important portions of the Court's opinion involved structural steel products, we shall limit our discussion to these.

particular transaction did not fall under the Clayton Act.[41] "It must be assumed," the Court said (334 U.S. at 507 n. 7), "that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints."

Turning to the case before it, the Court listed the factors it thought relevant, at once emphasizing the importance of the share of the business controlled by the merging parties and yet refusing to draw a sharp numerical line of illegality for all market contexts in terms of the amount of business brought under a single control (334 U.S. at 527–28):

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

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[41] The Clayton Act was amended to include asset acquisitions two and one-half years after the decision in *Columbia Steel.*

The importance attached to the first of these factors was made particularly clear when the Court applied them to the proposed acquisition (334 U.S. at 529):

> * * * If we make the doubtful assumption that United States Steel could be expected in the future to sell 13% of the total of structural steel products in the Consolidated trade area and that Consolidated could be expected to sell 11%, we conclude that where we have the present unusual conditions of the western steel industry and in view of the facts of this case as developed at pages 512 to 516, of this opinion, it can not be said there would be an unreasonable restraint of trade. * * *

The "unusual conditions" and particular facts which are set out at pages 512 to 516 and which, in the Court's view, removed this combination of a 13 percent seller and an 11 percent seller from the prohibition of combinations in Section 1 were, in essence, that as a result of wartime developments, western sources of supply were developing for western steel fabricators and eastern fabricators such as U.S. Steel had lost the freight rate advantages previously enjoyed.[42] As a result, the Court said, the government's prewar statistics were "of little relevance" (p. 514). The Court also indicated (p. 513) that the government's figures negated the regional market area on which the

[42] In addition, before the war, rolled steel had been sold on the West Coast at a price computed on eastern basing points. It was contemplated that a change in the basing point for postwar prices to Geneva, Utah, would so reduce prices as to affect substantially the competitive position of eastern sources (*id.*, 502–504).

government had relied; and (p. 515) that the government had failed to establish that the two companies had actually produced similar products.[43]

Columbia Steel plainly did not hold that the elimination of *inter sese* competition between merging companies in a market which remains competitive after the merger can never in itself violate Section 1, and the opinion indeed suggests that a merger of an 11 percent seller with a 13 percent seller might, if these shares were firmly established, raise serious doubts under the Sherman Act. Faced with a narrowing of competition by combination that was both far less certain and less significant than in the railroad merger cases, the Court held only: (1) that these precedents were too "dissimilar" on their facts to determine "whether the competition which will be eliminated through the [combination] * * * is sufficient to warrant injunctive relief" (334 U.S. at 531), and (2) that in these circumstances a number of other factors bearing on the substantiality of the competition being eliminated must also be considered.

In contrast to *Columbia Steel,* here there is no question as to the substantiality of the competition being eliminated in a merger of PNB and Girard. They are the second and third largest firms in the relevant market. Between them they control 35 percent of the business, not the "doubtful" 24 percent in *Columbia*

[43] The two companies submitted bids for the same project "in a very small number of instances," and the government introduced "very little evidence" to show that "the types of structural steel products sold by Consolidated are similar to those sold by United States Steel" (*id.*, 499, 515).

Steel. Nor is there anything analogous to the "unusual conditions" of the western steel industry which undermined the significance of the "doubtful" market share percentages in that case (334 U.S. at 529).

We believe, therefore, that under the decisions of this Court, the elimination of the substantial competition which has existed between these two major banking enterprises in the four-county Philadelphia area, is itself sufficient to establish that the merger violates Section 1 of the Sherman Act. But even if the *Columbia Steel* case requires examination of other market factors, the same conclusion follows. For the examination of those factors confirms the conclusion that the merger would result in unreasonable restraint of trade.

B. THE UNLAWFULNESS OF THE MERGER BETWEEN PNB AND GIRARD IS CONFIRMED BY CONSIDERATION OF THE FACTORS DEEMED RELEVANT IN *COLUMBIA STEEL*

1. *The proposed merger would eliminate all competition between two major firms in the most relevant market.*

We have shown already that the proposed merger would combine the second and third largest banks in the four-county Philadelphia area. It would eliminate all competition between them and give a single firm 35 percent of the market. These are the salient facts in appraising the over-all effect of the combine. The other factors pertinent under *Columbia Steel* (see p. 51, *supra*) may conveniently be grouped under three heads: the trend towards concentration of banking power; the effect of the merger upon remaining competition; and the presence or absence of business justification.

2. *The proposed merger would accelerate a dangerous trend towards concentration of banking power.*

The Senate and House Reports on the Bank Merger Act (S. Rep. 196, 86th Cong., 1st Sess., p. 8; H. Rep. 1416, 86th Cong., 2d Sess., p. 5) both expressed "concern for the maintenance of vigorous competition in the banking system" in light of the "large numbers of mergers in recent years, the vast resources involved in these mergers, and the increases in the size of the largest banks, particularly those which have grown through mergers * * *." Competition, the reports indicated, was threatened not only by "the loss of competition between merged banks" but also by the "reduction in the number of banks" (*ibid.*).

Philadelphia has been no stranger to these processes of concentration. There were 33 commercial banks with Philadelphia headquarters in 1950, 20 in 1955, and only 14 in 1960, a 58 percent decline in this 10-year period (GX 183, R. 2878). The number of commercial banks with headquarters in the four-county area fell from 108 in 1947 to 42 in 1960, a 61 percent decline (GX 184, GX 185, R. 2879). During this 10-year period the seven largest banks in the four-county area have increased their combined share of the area's total commercial bank resources from about 61 percent to about 90 percent (R. 2850; see, also, Fdg. 388, R. 3415).

Girard and PNB played leading roles in the process of concentration even prior to the instant merger.

During the 10-year period 1950–1960 PNB acquired nine banks and 18 of its present 27 offices (Fdgs. 7–8, R. 3326). During the same period Girard engaged in six mergers acquiring 32 of its 38 offices. For the 10-year period mergers contributed 63 percent of PNB's growth in deposits and 91 percent of Girard's growth (Fdg. 432, R. 3434). The district court's findings indicate, with one possible exception, that all the banks acquired by either PNB or Girard during this period were in competition with the acquiring bank (Fdgs. 435, 436, 440–445, 457; R. 3435–3436, 3437–3438, 3442).

The merger between PNB and Girard would bring together banks having assets of over $1,000,000,000 and $740,000,000, respectively, or, in combination, more than 35 percent of the total assets of all commercial banks in the four-county area (GX 8, R. 2362). The combined bank would, as we have seen, control 34 percent of all loans and 36 percent of the deposits of all banks in the four-county area (R. 3657). Moreover, 24 of the 40 banks remaining after the merger are located outside Philadelphia (GX 184, R. 2878, 3656), and their activities are directed toward serving local residents and businesses. The merger would reduce to seven the number of commercial banks in the four-county area with legal lending limits of up to $1,000,000. It would reduce to four and three, respectively, the number of competitors for loans up to $2,500,000 and $5,000,000 (Fdg. 158a, R. 3510). The fact, therefore, is that after merger of the defendant banks there would remain a mere handful of banks capable of providing the varied banking services (some of them directly dependent upon size of resources or capital) which PNB and Girard now independently offer. An important and substantial alternative choice of banking service, and the competition arising from the availability of this choice, would be eliminated by the merger.

Finally, there is on the present record only the most remote possibility of entry of a new competitor to offset the competition eliminated by the merger of Philadelphia's second and third largest banks. In the period 1951–1961, inclusive, only one new bank started operations in the Philadelphia four-county area (while during this period many of the area's banks went out of existence), and the deposits of this bank, ten years after it opened its doors, were only ⅓ of 1 percent of the deposits held by the area's commercial banks.[44] Furthermore, no existing area bank can in the foreseeable future fill the competitive gap, or correct the competitive imbalance in the banking structure, resulting from merger of PNB and Girard.[45]

The increase in concentration resulting from the merger of these two banks alone cannot be considered in isolation from the rule it establishes. In deter-

[44] The bank referred to, Bank of Old York Road, was organized on April 1, 1951 (R. 2250) and in 1961 its deposits were only about $15,400,000 (R. 2251), whereas in October 1960 the deposits held by all commercial banks located in the four-county areas amounted to approximately $4,623,000,000 (GX 161, R. 2829). Of these total deposits, PNB has 21.3 percent, Girard 14.5 percent, and the two combined would have 35.8 percent (*ibid.*).

[45] The significance of this competitive imbalance is discussed *infra*, pp. 59–65.

mining whether merger of the defendant banks would violate the Sherman Act, this Court must take into consideration, we submit, what would be implicit in a holding sanctioning the merger. In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 343–344, this Court noted that

> If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered * * *

If the Act permits merger of the banks presently the second and third largest in the Philadelphia four-county area, then it equally permits merger of the banks now ranking first and fourth.[46] Nor would the Act be a bar if the probable next step occurred and the remaining area banks merged (other than perhaps some very small banks providing for a limited number of customers banking service of a limited type). The claim would be that this last step was permissible because the banks other than the top two were so unequal to them in resources and service capability that, without merger, the smaller banks would be unable to survive. See *Brown Shoe,* 370 U.S. at 346.

The belief that merger would thus beget merger has solid support in experience. The history of bank

[46] The district court found that PNB utilizes and sells its stature and lending limit (a function of its size) as an instrument of competition (Fdg. 289, R. 3395–3396). Subsequent experience has shown that the impetus of such a rule would not be restricted to the area's largest banks. See the application of Liberty Real Estate Bank and Trust Co. for consent to merger, discussed *infra*, p. 65.

mergers has been one of competition in size. The district court found (Fdg. 438, R. 3437):

> PNB used the aggressive expansion programs of its nearest rivals, the Pennsylvania Company for Banking & Trusts (now the First Pennsylvania Banking & Trust Co.) and Girard, to justify in part its acquisition in 1953 of the National Bank of Conshohocken when discussing this acquisition with an official representative of the Comptroller of the Currency.

3. The proposed merger would increase the domination of the market by a few large banks.

The effects upon a market of a single firm of dominant size are subtle. It can become a price leader, although it does not have power of a monopolist to raise prices without losing substantial business. Its superiority of resources makes plain to any who would cut prices that the dominant firm can tolerate a price war for longer than its competitors. In every area of competition overwhelming size and resources on the part of a dominant firm constitute a concentration of power which, whether rationally or irrationally, overhangs a market, dampening if not stifling the enthusiasm of those who would otherwise more actively compete.

These effects have been well described in an article by Professor Bok:

> The willingness of small firms to be dominated by a large rival rests in the end upon a psychological state of mind about which economists know very little. To some extent, the smaller firms may simply wish to enjoy

> the stability or the higher profit margins that may result from following the lead of a single member of the industry. On the other hand, the willingness to defer to the leader can also be attributed in part to a recognition—real or imagined, demonstrated or assumed—that the financial strength or the lower costs of the leader will allow him to get the better of any firm which competes too rigorously, persistently cuts prices, or tries in other ways to dispute his leadership.[47]

The district court appears to have concluded that the suppression of competition resulting from merging Philadelphia's second and third largest banks would be of little consequence because there would remain 41 commercial banks in the four-county area (assuming a highly improbable termination of the long-continued merger trend in the area). We submit that this mere counting of noses leaves out of sight the point of real significance, namely, the size and capacity for competition of the remaining banks.

If the merger were carried out, the next largest bank in the area would be about 60 percent as large as the merger-created bank, each of the two next largest a little over 25 percent of its size, and the fourth largest about 15 percent (*supra,* p. 10). The remaining 37 banks would together have only 17.7 percent of the area's commercial bank deposits (GX 161, R. 2829), or an average for the 37 of 45/100 of 1 percent of the total, as against the merged banks' 35.8

[47] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 275.

percent, a ratio of 1 to 80. After the merger the two largest banks in the area would together control well over 50 percent of the bank assets in the four counties.

The increase in dominance of the largest area bank caused by the merger is no less significant in assessing the validity of the merger than is the absolute dominance of the merged company.[48] The increase in dominance of the largest area bank resulting from the merger can be shown by taking the total deposits of the bank with the largest deposits as 100 and comparing them, before and after the merger, with the deposits of the nearest competitor. Using this procedure the Federal Reserve Board showed that the merger would result in the following very sharp increase in the dominance of the largest area bank, *i.e.* of the merged bank (R. 2833):

	Before Merger	*After Merger*
Bank No. 1	100	100
Bank No. 2	97	62
Bank No. 3	65	28
Bank No. 4	45	26
Bank No. 5	42	15

A bank comparable in size and strength to the proposed merger-created bank might be formed by merg-

[48] Compare Bok, op. cit. *supra*, n. 47, at p. 281:

In view of what has just been said, the better course would be to adopt a rule based upon increases in the spread between the market shares of the first firm and its nearest competitor. Such a standard would conceivably extend not only to mergers by the largest firm but also to substantial mergers by lesser-ranked firms which lifted those firms to the top of the heap with a larger margin of superiority than the spread enjoyed by the erstwhile leader.

ing two or more of the principal remaining area banks, but this would further intensify imbalance in the banking structure—it would mean that there would be in the area two giants and an uncertain number of small banks which were not effective competitors of the giants as to many important banking functions and services.

The primary harm caused by the emergence of a single dominant firm is not necessarily to its competitors, who may even prosper under the shelter of its leadership, but to the customers of all these banks who suffer from the inevitable stifling of competition. But the dominance of PNB-Girard will also, we submit, affect the position of the other banks in the four-county area.

The defendants proposed a finding, which the district court approved, that the merger "would have no adverse effect on other Philadelphia banks" (Fdg. 145a, R. 3509). This is contrary to the plain implications of the district court's finding that PNB competes by "selling * * * the bank's stature or lending limit" (Fdg. 289, R. 3395–3396) and its findings indicating that, on at least one occasion, the aggressive expansion program of PNB's competitors, which were "threatening its claim to being the largest bank in Philadelphia," motivated an earlier merger (Fdgs. 437–438, R. 3436). The latter findings recognize the obvious fact that disparity in size between banks is a potent weapon in the competitive struggle to retain or attract business. The merger will unquestionably increase to a dramatic extent the gap between the merging banks and their smaller competitors (see pp. 60–61, *supra*) and to that extent will jeopardize the ability of smaller banks to retain or attract business. The Federal Reserve Board also recognized that fact in its report to the Comptroller on the proposed merger. The Board said that "it seems reasonable to believe the proposal would give the resulting bank a substantial lead in the big account category and place it in a strong position to expand that lead considerably," and that the resulting bank "would obtain a dominant position, with attending competitive advantages, strongly adverse to the preservation of effective competition" (GX 161, R. 2833, 2834).

On other occasions, as well, the Federal Reserve Board, the administrative agency charged with the duty of enforcing Section 7 of the Clayton Act insofar as banks are concerned,[49] has found that the aggrandizement of one bank by merger with another is a material and serious threat to small banks operating in the same area. On April 30, 1962, the Board denied two merger applications, each seeking consent to merger of a bank in Nassau County, New York, with a large New York City bank (*The Chase Manhattan Bank Application,* 48 Fed. Res. Bull. 544; *Chemical Bank New York Trust Company Application,* 48 Fed. Res. Bull. 548). In the former ruling the Board said (*id.* 547) that "smaller banks, competing in the retail field, would almost necessarily encounter difficulty in maintaining their position against

[49] The Board instituted and pursued to the end a Section 7 proceeding involving interests of great magnitude. See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C.A. 3), certiorari denied, 346 U.S. 901.

the increased competitive impact which would result *from*" the proposed merger. In the latter ruling the Board said (*id.* 553–554):

> The merger would eliminate a prosperous and sound alternative source of banking services, and would substitute for it a large and powerful institution which would, in competing with other such institutions, diminish the prospects of smaller banks in the County.

On May 4, 1962, the Board denied an application filed under the Bank Company Holding Act of 1956, 12 U.S.C. 1841 *et seq.*, for approval of the formation of a bank-holding company (*Morgan New York State Corporation Application,* 48 Fed. Res. Bull. 567). In this ruling the Board said (*id.* 577) that approval of the application "would necessarily tend toward" excessive imbalance in the competitive positions of the banks in the areas effected—"that is, away from the balance in which healthy competition is preserved."

In concluding that "previous mergers have not hindered the growth of the smaller banks," the district court relied in part upon the rate of growth of the four-county area's small commercial banks (R. 3659). For reasons stated below, there is no basis for reassurance in the defense exhibit undertaking to show the growth rate of banks in the four-county area.[60] The court also rested its statement on testi-

[60] The exhibit (see Fdg. 110a, R. 3504) is DX 18 (R. 3060). It charts the percentage growth of deposits, 1951–1960, of the banks having their main office in Philadelphia County, in Bucks County, in Delaware County, and in Montgomery County, compared in each case with the like percentage growth of PNB and Girard. But growth in terms of percentage

mony of representatives of four Philadelphia banks, none of them among the city's seven largest banks. We believe it is significant that the largest of the banks (Liberty Real Estate Bank and Trust Company) whose representatives testified for the defendants later filed an application for consent to its merger with another four-county area bank, and the application stated that "the smaller banks must combine so as to remain effective in their area" (Application, p. 4–A, on file with F.D.I.C.). It would thus appear that, even under the present degree of banking concentration, small banks in the four-county area do not easily survive.

4. No business factors justify the restraint of competition.

Here, as in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346, we believe that the merging companies have failed to make a convincing showing that the

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has little practical significance. A bank having $2,000,000 of deposits at the end of 1949 and $5,000,000 ten years later would have an increase of 150 percent, while PNB, with some $745,000,000 in deposits in 1951 (GX 57, R. 2441) and some $986,000,000 in 1960 (GX 161, R. 2829), would have an increase of only 32 percent, but the dollar amount of the latter's increase would be over 90 times that of the small bank. In addition, banks in the three suburban counties contiguous to Philadelphia County, naturally had a greater growth rate than PNB and Girard because of the more rapid growth in population, trade and industry in these counties than in the city of Philadelphia. Cf. the statement by the Federal Reserve Board in *Morgan New York State Corporation Application*, 48 Fed. Res. Bull. 567, 578 that "smaller banks tend to be found in faster-growing areas while larger institutions tend to be found in older, more settled urban areas" and thus "the growth rates of smaller banks may sometimes compare favorably with those of larger banks * * *."

merger should be evaluated in light of any such mitigating factors "as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position" or "a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets." The absence of the first factor is undisputed and was found by the district court. Nor can it be argued that the merger was necessary "to enable small companies to enter into a more meaningful competition with those dominating" commercial banking in the Philadelphia area. However, the district court's opinion indicates that it felt another mitigating factor might help to justify the merger—an increase in competition in a product "submarket" offsetting any loss in competition in the main product market.

The district court indicated its belief that the "larger bank * * * will be able to compete on better terms and in a better atmosphere with the banks of other cities" in making very large loans and that this improved position of a Philadelphia bank "will benefit the city and area" (R. 3667). We submit (*a*) that neither conclusion is legally relevant to the antitrust issues before this Court,[51] and (*b*) that, in any event, neither conclusion is supported by evidence convincing enough to be given weight in a case involving a clear and pronounced threat to competition in the four-county area.

[51] The district court itself commented that it did not consider the asserted advantages to the Philadelphia community "particularly relevant" (R. 3656).

The legality of the merger is to be judged from the standpoint of the Sherman Act's objectives, not by whether the merger would bring some additional banking business to Philadelphia or induce some additional business to locate there. In terms of the Sherman Act's objectives, there is no basis for concluding that any increase in competition in the product "submarket" of very large loans can offset the harm to competition in the broader product market for commercial banking services. See *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30, 44.

It is true that the merger would create a bank with a legal lending limit considerably larger than that of any existing Philadelphia bank.[52] It may also be true that this would tend to increase not only the number of competitors but also the amount of competition in the submarket for loans over $8,000,000 (which PNB can itself now lend to a single customer). However, this increase in competition in the submarkets for very large loans—at the expense of a reduction in competition in the market for all other loans—results from every bank merger. To recognize such an increase in competition in a limited submarket as a justification for a reduction in competition in a much larger

[52] The legal lending limit is the maximum which a bank can lend to any single customer. In the case of a national bank this is 10 percent of the bank's total capital and surplus exclusive of undivided profits.

The lending limit of the merger-created bank would be $15,000,000 (Fdg. 193a, R. 3517), while at present the four leading Philadelphia banks have the following lending limits: PNB, $8,000,000; First Pennsylvania Banking and Trust Company, $7,704,850; Girard, $6,000,000; Provident Tradesmens Bank and Trust Company, $5,000,000 (DX 15, R. 3052).

product market, without any showing of the greater importance of competition in the newly reached field of larger loans, would be to sustain every bank merger simply because every merger results in a larger bank.

The evidence totally fails to show either that a significant increase in competition in loans over $8,000,000 would result from the merger or that a bank with a higher lending limit would substantially benefit Philadelphia by leading to the location of additional manufacturing enterprises in the Philadelphia area. The market for very large loans can be accommodated by the Philadelphia banks through a joint participation in the loan (Fdgs. 88–90, R. 3346). Defendants attempted to counter by showing, and the district court found, that there was banking business which would be attracted by the merged bank from outside the Philadelphia area—"business which might well be and perhaps probably should be handled here, and which cannot be handled under present circumstances"—resulting in benefit to the area (R. 3667; Fdgs. 198a, 205a, R. 3517, 3518). Reliance was placed by defendants upon the testimony of officers of six companies engaged in large operations conducted in part in the Philadelphia area or nearby. But their testimony pertinent to this point, which we summarize below, falls far short of supporting defendants' claim.

Atlantic Refining. It regularly maintains deposits of $2,000,000 to $3,000,000 in three New York banks, which have petroleum engineers and economists extremely helpful in any kind of oil financing and which have contacts and information of great value in connection with foreign undertakings (R. 2065–6). For the foreseeable future the company would rely on the New York banks for this type of advice and help, which a Philadelphia bank could not provide "under any circumstance" (R. 2071–2, 2074). Even if all Philadelphia banks should merge, New York will continue to be the center of international finance (R. 2074).

Rohm & Haas. No Philadelphia bank can supply service related to foreign operations "remotely approaching" that supplied by banks in other cities, and it takes one or two generations to set up a foreign banking system (R. 2112–3). The company has had unusual growth, which has not been adversely affected by the maximum loan limit of Philadelphia banks (R. 2108). Its $20,000,000 line of credit with Philadelphia banks is more than sufficient to cover its borrowing needs (R. 2092, 2110).

Triangle Publications. It had in the past borrowed $10,000,000 from a Chicago bank. Its reason for having wished to borrow from one bank rather than a participation loan was that the company, which is closely held (R. 2116), did not want to divulge information concerning its business to more people than necessary (R. 2117).

Bankers Securities Corporation. A Boston bank was the lead bank in a $10,000,000 loan, with PNB, Girard and a third Philadelphia bank each having a $2,500,000 participation (R. 2127). It would continue its banking relationship with the Boston bank irrespective of a PNB–Girard merger (R. 2134–5).

Sun Oil. It has had since 1948 a line of credit with a group of banks but until 1956 made little use of this credit (R. 2141). A New York bank had originally been the lead bank but in a 1956 credit agreement PNB was made the lead bank (R. 2142–3). A subsidiary obtained a $10,000,000 loan (originally expected to be $7,000,000) from a New York bank because the desired loan was thought to be too close to PNB's loan limit (R. 2144).

Pennsylvania Power and Light. The lead banks in its bank borrowings have been New York banks, the relationship with these having started in 1920 when the Power Company was organized (R. 2167–2171). The advantage to the company of its New York bank connections is that these banks, in addition to their larger lending limits, have departments offering valuable specialized services for public utility companies (R. 2171–2).

Girard's president testified that there were five companies whose deposits or additional deposits might be obtained by a bank larger in size than Girard now is, but his testimony disclosed that, with one possible exception (Lehigh Portland Cement), this result was mere hope or surmise (R. 2222–4).[53]

The evidence not only fails to establish that the higher lending limit of the merged bank would bring new enterprises to the Philadelphia area, but the most pertinent testimony is to the contrary. Defense witness Graves, executive vice president

[53] Atlantic Refining and Sun Oil were two of the companies named, and their situation is covered by the testimony given by their officers.

of a non-profit corporation set up jointly by the City Government and Chamber of Commerce of Philadelphia, knew of no instance in which a plant had failed to locate in Philadelphia because of inadequate commercial banking facilities there, and no instance in which a plant had left the Philadelphia area because of inadequacy in its commercial banking facilities (R. 2285–6). Similarly, Girard's president knew of no business which would come to the Philadelphia area as a result of a PNB-Girard merger, and no business which had failed to come to Philadelphia because of the small size of its banks (R. 2224–2225).

This case can be summarized in a few words. The merger admittedly will unite two of the principal banking institutions in Philadelphia—already the second and third largest—into a single huge concern with total deposits of more than $1,600,000,000, total loans of more than $950,000,000 and total trusts with assets of nearly $2,900,000,000. It will completely eliminate active competition between the merging banks. It will give the merged bank a commanding position in the relevant market, with 36 percent of all deposits, 34 percent of all net loans, and 37 percent of all assets of all commercial banks in the four-county Philadelphia area. It will further increase the too-rapid trend towards concentration of banking power—an increase in which the previous mergers of each of these banks have played a significant role. Against this, the banks offer no serious business justification. They are in excellent economic condition. The only advantage they suggest is that a few big concerns *might*—it was not shown that they *would*—find it an advantage to do business with a Philadelphia bank having a higher lending limit. This narrow advantage to some hypothetical big borrower would not justify the injury to thousands of existing customers resulting from the restraint of competition which this merger would plainly cause.

IV

THE PROPOSED MERGER VIOLATES SECTION 7 OF THE CLAYTON ACT

If the Court agrees with our analysis in Point III that the merger violates Section 1 of the Sherman Act, there is no occasion to consider whether it violates Section 7 of the Clayton Act. The complaint in this case, however, also alleged violation of the latter section, and we now show briefly that the merger contravenes its provisions.

We recognize that when the bill which became the Bank Merger Act of 1960 was under consideration in Congress, both the Department of Justice and the Banking and Currency Committees of the House and Senate were of the opinion that bank mergers were asset acquisitions and not within Section 7 of the Clayton Act.[54] However, these views, on a matter not directly involved in the Bank Merger Act, are not decisive. See *United States* v. *duPont & Co.,* 353 U.S. 586, 590. The decisive considerations, we believe, demonstrate that Section 7 does cover bank mergers.

[54] See Girard Motion to Affirm, 10-12.

A. SECTION 7 IS APPLICABLE TO THE MERGER

The question whether Section 7 applies at all to this merger arises out of the following circumstances:

Prior to 1950, Section 7 covered only stock acquisitions. Its failure also to reach asset acquisitions made it manifestly inadequate to deal effectively with many corporate combinations which posed a serious anticompetitive threat.[55] It was this gap in the statutory scheme, which prohibited anticompetitive corporate combinations accomplished by stock acquisitions, but permitted identical combinations when achieved by asset acquisitions, or it seemed,[56] statutory merger,

[55] See *Brown Shoe*, *supra*, 370 U.S. at 312–316; Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 Col. L. Rev. 629, 652–653.

[56] *In Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 595, the Court said that Section 7 does not forbid "the merger of corporations pursuant to state laws," but we believe this statement is limited by its context. The critical facts in that case were: The controlling stockholders of two companies, desiring to bring them under common control, formed a holding company, which exchanged its stock for all the common stock of the two manufacturing companies. After the Commission had issued a Section 7 complaint against the holding company, steps were taken to escape the Commission's jurisdiction. Two new holding companies were formed, each acquired all the common stock of one of the manufacturing companies in exchange for its own stock, and each issued its stock directly to the stockholders of the original holding company. This company thereupon dissolved and the two new holding companies and their respective manufacturing subsidiaries merged into one corporation. The Commission, after issuing a supplemental complaint against the corporation thus created, ordered it to divest itself of the stock of one of the manufacturing companies and to include in the divestment the company's manufacturing properties and facilities.

The Commission contended that, in issuing an order requiring stock divestment, it might validly disregard steps taken to dewhich led to the Celler-Kefauver Anti-Merger Act of 1950. The basic purpose of the 1950 statute was to plug this loophole and to "make clear" that the substantive provisions of Section 7 applied to "all types of mergers and acquisitions, vertical and conglomerate as well as horizontal" (H. Rep. 1191, 81st Cong., 1st Sess., p. 11).

The 1950 statute extended the prohibitions of Section 7 to cover asset acquisitions by any corporation subject to the jurisdiction of the Federal Trade Commission. There is no indication in the legislative history why the prohibition on asset acquisitions was limited to such corporations, and was not made coextensive with the broader ban on stock acquisitions.

Banks are not subject to the jurisdiction of the Federal Trade Commission, and it is thus clear that an asset acquisition by a bank would not be covered by Section 7. But a statutory merger or consolidation, such as is here involved, is neither a pure asset nor a pure stock acquisition. It is, rather, a hybrid form of corporate combination which partakes of and has the characteristics of both.

1. Since the anticompetitive effect of a statutory merger or consolidation is just as great as that of a

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feat the Commission's jurisdiction. But this Court said that each of the manufacturing companies had preferred stock which was outstanding in the hands of the public prior to the merger, that the merger required consent by the preferred stockholders, and that the Commission was therefore not entitled to act upon the basis that the existing, merger-created corporation was a mere creature or *alter ego* of the offending original holding company. See 291 U.S. at 597–598. The Court further held that the Commission, unlike a court of equity, did not have the power to grant relief beyond that specificially authorized by statute (pp. 598–599).

stock acquisition, effectuation of the policies of the 1950 Act requires that this form of corporate consolidation should not be treated as an asset acquisition—and hence not covered by Section 7 if made by a corporation not subject to the jurisdiction of the Federal Trade Commission—unless it plainly and unequivocally is one. The question, therefore, is whether—in light of the legislative intent in the 1950 Act to erect "a barrier to what Congress saw was the rising tide of economic concentration" and "to create an effective tool for preventing all mergers having demonstrable anticompetitive effects" (*Brown Shoe, supra,* 370 U.S. at 317, 319)—statutory mergers of corporations not subject to the jurisdiction of the Federal Trade Commission shall be deemed outside the prohibitions of Section 7. The legislative history shows that Congress intended the prohibitions of Section 7 to cover "all types of mergers and acquisitions" that had the proscribed anticompetitive effect; this history nowhere suggests that Congress intended an exception for such an important area of the economy as bank combinations, which are traditionally accomplished through statutory mergers and consolidations rather than through acquisitions of assets or stock. Moreover, statutory mergers, far from being plainly and unequivocally asset acquisitions, are very different from the ordinary purchase of assets.

A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests. Shareholders of merging corporations surrender their interests in those corporations in exchange for their very different rights in the resulting corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights, powers, franchises, liabilities, and fiduciary rights and obligations of the merging firms. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel. Finally, a merger, like a stock acquisition, necessarily involves the acquisition by one corporation of an immediate voice in the management of the business of another corporation; no voice in the decisions of another corporation is acquired by purchase of some part of its assets. Plainly, a statutory merger is quite unlike the typical acquisition of assets, such as was involved in *Columbia Steel,* the case which provided the impetus for the 1950 Act.

Among the many differences mentioned above is one distinction which is of central importance to the purposes of Section 7. Mergers, like stock acquisitions, necessarily involve the acquisition by the corporation of an immediate voice in the management of another business. Indeed, it was this expansion of power over corporate decisions affecting competition which must have appeared the primary threat to competition when the first Section 7 was passed in 1914. In contrast, no voice in the decisions of a different business is necessarily acquired when a corporation purchases some part of the assets of that business.

From the standpoint of the evils Section 7 was designed to prevent—threat of substantial lessening of competition or tendency to monopoly resulting from bringing the economic power of independent corporations under single control—agreement between two corporations and their respective stockholders to effectuate a merger and the direct acquisition of stock of another corporation are both essentially different from—and inherently more dangerous than—the ordinary purchase of some part of the assets of another corporation, as to which purchase the scope of the 1950 Act is limited to corporations subject to the jurisdiction of the Federal Trade Commission. In this respect a merger, even more than a stock acquisition, stands in sharp contrast to the ordinary purchase of assets. It is this contrast which, we submit, best explains the statute's otherwise-wholly-irrational distinction between asset acquisitions, as to which its scope is limited, and all other prohibited combinations.

2. In its essential elements, the PNB-Girard merger more closely resembles a stock acquisition than an asset acquisition.

The merger agreement provided that Girard be consolidated with PNB pursuant to Section 20 of the national banking laws, 12 U.S.C. (Supp. II) 215, under the charter of PNB, that all of PNB's stock remain outstanding as shares of the merged bank, that each share of Girard be converted into 1.2875 shares of the merged bank, that the merged bank be subject to all the liabilities of PNB and Girard, and that all of their property and property rights be vested in it

(GX 117, R. 2717; GX 119, R. 2718–20). This agreement provided, in substance, for an exchange of Girard stock for PNB stock.

The essence of the transaction was that the outstanding stock of two banks, presently under separate and different ownership, would be brought under common ownership by exchange of Girard stock for stock of a bank operating under the name and charter of PNB and possessed of PNB's assets and business (plus those of Girard). The carrying out of this transaction would have exactly the same effect as an exchange of all of Girard's stock for PNB stock, followed by dissolution of Girard (then a 100 percent subsidiary of PNB). The basic objective of the transaction was the joining together of two going corporate organizations and a commingling of the interests of their shareholders. Certainly from the standpoint of the stockholders of the two banks the heart of the transaction was the agreed basis for exchange of stock—1.2875 shares of PNB for each share of Girard.

In completing the analogy to an acquisition of stock in Girard by PNB, one final point deserves mention. In the case of bank mergers, as with most statutory mergers, the surviving corporation would be obligated by statute to pay to any shareholder of the acquired corporation who dissented from the plan of merger the value of the shares he held at the date of merger. The surviving bank is, in short, required by statute to purchase at least some of the shares of stock of the acquired corporation, assuming that less than all of the latter's shareholders agreed to the merger. 12 U.S.C. (Supp. II) 215(b); 12 U.S.C. (Supp. II) 215a(b).

Recognition of these similarities of a statutory merger to a stock acquisition—as well as an awareness of the differences from an asset acquisition (see *supra,* pp. 75–77)—may have led this Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, to treat the Brown-Kinney merger as a stock, not an asset, acquisition, although the merger was effectuated pursuant to statutory provisions similar, in all material respects, to those involved here.[57] At the outset of its opinion it said that the action brought by the United States alleged that "a contemplated merger" between Kinney and Brown, "through an exchange of Kinney for Brown stock," would violate Section 7 of the Clayton Act. 370 U.S. at 296. The Court then said (*ibid.*):

> The Act, as amended, provides in pertinent part:
>
> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * 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."

In the Court's view it was apparently the stock acquisition prohibition of Section 7 which was controlling, and the asset acquisition prohibition, represented by asterisks in the Court's quotation of the section, was not considered pertinent.

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[57] Compare §§ 86, 89 of the New York Stock Corporation Law with 12 U.S.C. (Supp. II) 215.

The question of whether the Brown-Kinney merger was a stock or asset acquisition was not raised or argued in *Brown Shoe, supra.*

B. THE PROPOSED MERGER VIOLATES SECTION 7

At the 1961 term this Court fully and carefully considered the circumstances under which a horizontal merger violates Section 7 of the Clayton Act.

The Court, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, first recognized that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy" and that a "keystone in the erection of a barrier" to this tide was "provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (370 U.S. 315, 317). In establishing standards of illegality to effectuate these purposes of Congress, the Court held that, while "the market share which companies may control by merging is one of the most important factors to be considered" (370 U.S. 343) and is a factor to be considered in light of the effects of approving all industry mergers of this size and not merely the effects of the one before the Court (370 U.S. 343–344), Congress indicated plainly that a "merger had to be functionally viewed, in the context of its particular industry" (370 U.S. 321–322).

Congress, the Court noted, had indicated that the courts should consider, among others, such factors as whether "a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated" and whether "the relative size of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be 'decisive'" (370 U.S. 321, n. 36). To these considerations the Court added: the degree of concentration of the industry in which the merger was to take place, the trend of the industry towards concentration and dominance by a few firms, the ease of entry of new firms, and the presence of such mitigating factors as the business failure of one of the parties or the need of two small firms to merge if they are to become meaningful competitors in the market (370 U.S. 322, 345–346).

In our discussion of the validity of the PNB-Girard merger under Section 1 of the Sherman Act we have developed in detail the relevant facts bearing upon the factors discussed in *Brown Shoe.* We therefore believe it sufficient to indicate in summary fashion, that in terms of these factors, there is here far greater danger and probability of a substantial lessening of competition than in *Brown Shoe.* Here, the share of the relevant market which the merger would bring under the control of the merging parties, 36 percent,[58] would incontestably be far greater than in *Brown Shoe,* and this increase in concentration would occur in an industry in which there is every reason to believe that approval of this merger would require the court "to approve future merger efforts * * * by * * * competitors seeking similar market shares" (370 U.S. 344).[59] The whole of the competitive activity of an enterprise, which had been a substantial factor in competition, would be eliminated.[60] These changes would take place in an indus-

[58] See *supra*, p. 39.

[59] See *supra*, pp. 58–59.

[60] See *supra*, pp. 39–43.

try which has, in the last decade, been characterized by an alarming rush towards concentration[61] and by surprisingly few new entries to replace the disappearing competitors.[62] The result of the merger would be to create in the relevant market a dominant giant which would dwarf the comparative position of the Brown-Kinney combine.[63] There are, as in *Brown Shoe*, no substantial mitigating factors.[64]

In sum, we submit that under the tests of illegality applied in *Brown Shoe* and under the holding in that case, the merger of PNB and Girard very plainly violates Section 7 of the Clayton Act.

CONCLUSION

The judgment of the district court should be reversed, and the cause should be remanded to that court to enter judgment enjoining the proposed merger.

Respectfully submitted.

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[61] See *supra*, pp. 55-56.
[62] See *supra*, p. 57.
[63] See *supra*, pp. 60-62.
[64] See *supra*, pp. 65-71.

APPENDIX

Section 18(c) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act of May 13, 1960, 74 Stat. 129, 12 U.S.C. (Supp. II) 1828(c), provides in pertinent part:

> * * * No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). * * * In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monop-

oly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency * * * shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection * * *. The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: * * * a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval. * * *

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