THE SUPREME COURT, CONGRESS, AND BANK MERGERS

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Bank mergers have given rise to two landmark decisions of the United States Supreme Court construing the Sherman and Clayton acts as they apply to mergers. It was most surprising to the banking industry that this should be so. The industry had received assurances over many years that bank mergers would be judged by different standards, taking into account the special situation of the banking industry as a bellwether of economic conditions and the pyramiding consequences of bank failures or unsound banking practices.¹ Thus it was ironic that the usual antitrust laws governing mergers were applied to this industry in *United States v. Philadelphia National Bank*² and *United States v. First National Bank & Trust Company of Lexington*.³ These extraordinary decisions gave rise to an equally extraordinary legislative wrangle, from which the Bank Merger Act of 1966⁴ emerged. The Bank Merger Act of 1966 in turn was responsible for a further Supreme Court decision—more prosaic in nature—concerning the procedure to be followed in suits under that act,⁵ and promises to give rise to even more controversy with respect to the substantive changes wrought by the act. The sequence of these developments is of keen interest, and may be illuminating to persons both within and without the banking industry. The major events are treated below, with references to more detailed discussions of particular aspects of the subject for those who wish to examine the subject more fully.

I

DEVELOPMENTS THROUGH THE ACT OF 1960

A. Bank Mergers Prior to 1950

Prior to 1950 there was no effective regulation of bank mergers through the anti-trust laws. The Sherman Act,⁶ which broadly prohibits combinations in actual and unreasonable restraint of trade, had been considered inapplicable to all but the most

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¹ See, e.g., S. REP. No. 196, 86th Cong., 1st Sess. 16-21 (1959); H.R. REP. No. 1416, 86th Cong., 2d Sess. 9-12 (1960).

² 374 U.S. 321 (1963).

³ 376 U.S. 665 (1964).

⁴ 12 U.S.C. § 1828(c) (Supp. II, 1965-66).

⁵ *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967).

⁶ 15 U.S.C. §§ 1-7 (1964).

serious restraints.⁷ The Clayton Act,⁸ which had been enacted in 1914 to prohibit transactions in prospective restraint of trade as well as in actual restraint of trade, was a dead letter so far as bank mergers were concerned. Section 7 of the Clayton Act⁹ related to the acquisition of "stock or share capital" by a corporation where the effect might be to substantially lessen competition or tend to create a monopoly. This statute appeared to apply to purchases of stock of banks.¹⁰ However, the ordinary bank merger is effected through statutory merger or consolidation without an "acquisition" of "stock." For this reason the language of section 7 of the Clayton Act did not appear to reach the common means by which bank mergers were effected. Indeed, since the language of the act did not reach transactions other than acquisitions of "stock or share capital," it was regarded as not reaching acquisitions of assets,¹¹ by which a substantial number of mergers were being effected in industry generally.

B. The 1950 Amendments to the Clayton Act

This gap in coverage of section 7 of the Clayton Act was of serious concern to members of Congress who deplored a "rising tide of economic concentration" in industry in the United States. For this reason, efforts were made to amend the Clayton Act to prevent asset acquisitions as well as stock acquisitions having the prescribed anticompetitive effect.¹² These efforts culminated in the Celler-Kefauver Act of 1950,¹³ which amended section 7 by adding the language italicized below:

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.*

The inclusion of the words "subject to the jurisdiction of the Federal Trade Commission" appeared to prevent bank mergers from falling within the amended law. Since banks were not subject to the jurisdiction of the Federal Trade Commission,¹⁴ it was unnecessary to face the question whether bank mergers were to be considered

⁷ See *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), upholding under the Sherman Act the acquisition by the largest producer of rolled steel products in the United States of the largest independent steel fabricator on the West Coast. The Court found the dollar volume of competition involved not compelling, and looked rather to the percentage of business controlled, the strength of the remaining competition, the purpose of the transaction, probable industry development, consumer demand, and other market characteristics.

⁸ 15 U.S.C. §§ 12-27 (1964).

⁹ 15 U.S.C. § 18 (1964).

¹⁰ In the case of *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953), the court found the statute applicable but held that there was no violation.

¹¹ See *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *Thatcher Mfg. Co. v. FTC*, 272 U.S. 554 (1926).

¹² The legislative history is reviewed in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹³ 15 U.S.C. § 18 (1964).

¹⁴ Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(6) (1964).

as asset acquisitions subject to the amendment. Banks seemed subject to the law only with respect to stock acquisitions, as they had been previously. This understanding drew further support from the fact that the Federal Reserve Board, prior to the enactment of the amendment, had suggested that bank mergers be embraced within the amendment or otherwise provided for, but no action was taken on these suggestions.¹⁵

In light of this legislative background it was the view of enforcement authorities and legislative experts for several years that section 7 of the Clayton Act did not apply to bank mergers as customarily effected.¹⁶

C. The 1960 Bank Merger Act

For this reason, and because bank mergers appeared to be on the rise, there were renewed efforts in the years immediately following amendment of section 7 to have the law apply to asset acquisitions by banks. Testifying in support of such a proposal, Stanley N. Barnes, then Assistant Attorney General in charge of the Antitrust Division, confirmed his understanding of the coverage of the law:¹⁷

The pending proposal would plug a loophole left by present section 7's failure to cover asset acquisition by banks. On the one hand, that provision's stock acquisition bar applies to all corporations "engaged in commerce." Section 7's acquisition portion, in sharp contrast, covers only corporations "subject to the jurisdiction of the Federal Trade Commission." Further, section 11 of the Clayton Act exempts banks from Federal Trade Commission jurisdiction by specifying that "authority to enforce compliance" with section 7 "is hereby vested * * * in the Federal Reserve Board where applicable to banks, banking associations, and trust companies." On the basis of these provisions this Department has concluded that asset acquisition by banks is not covered by section 7 as amended in 1950.

Four other representatives of the Department of Justice made similar statements in testimony before Congress over the following five years,¹⁸ but the Clayton Act was not further amended.

Instead, and partly on the basis of these interpretations of the Clayton Act, Congress determined to amend and strengthen the legislation requiring administrative approval for certain mergers of federally regulated banks.¹⁹ This resulted in the

¹⁵ Letter from Chairman Eccles to Congressman Sumners, March 21, 1945, in *Hearings on S. 1698 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 329-30 (1965) [hereinafter cited as *1965 Hearings*]; Letter from Chairman Eccles to Senator O'Mahoney, April 16, 1947, in *1965 Hearings* 347-48. The Board also pointed out shortly before the amendment was enacted that under its wording § 7 "would continue to be confined to acquisitions of capital stock insofar as banks are concerned." Letter from the Board to Congressman Celler, Oct. 12, 1950, *quoted in 1965 Hearings* 325-26.

¹⁶ See Staff Memorandum on Legislative History of Section 7 of the Clayton Act, and its Relation to the Bank Merger Act of 1960, in *1965 Hearings* 324-54.

¹⁷ *Hearings on H.R. 5948 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 6 (1955).

¹⁸ See *1965 Hearings* 329.

¹⁹ See S. REP. No. 196, *supra* note 1, at 6-7. With one exception, the existing regulatory statutes set forth no standards for use in considering merger applications, and an attempt by the Federal Reserve

Bank Merger Act of 1960.²⁰ This statute provided for pre-merger approval from the Comptroller of the Currency in the case of national banks, the Federal Reserve Board in the case of state member banks, and the Federal Deposit Insurance Corporation in the case of state nonmember insured banks. Taken together, these categories covered at the time about ninety-five per cent of the banks in the United States.²¹ In determining whether to approve a merger, the regulatory agencies were directed to take into consideration the following factors:

the bank stability or "banking" factors:

- the financial history and condition of each of the banks involved;
- adequacy of capital structure;
- future earnings prospects;
- the general character of management;
- the convenience and needs of the community to be served; and
- the consistency of corporate powers with the purposes of the Federal Deposit Insurance Act.

the competitive effect or "competitive factor":

- the effect of the transaction on competition (including any tendency toward monopoly).

The legislative history makes clear that the competitive factor was not necessarily to be decisive. This was emphasized in the Senate report,²² and the House report, though not as emphatic, was in agreement: "Your committee is convinced the Senate's approach is basically sound. Where demonstrable benefits would flow from a proposed merger, these should be weighed against any adverse effect on competition."²³

To promote uniformity in administration with respect to the "competitive factor," the agency having jurisdiction over a particular application was directed to obtain advisory opinions with respect to the competitive factor from the Attorney General and from the other banking agencies. The Attorney General thus received, in connection with regulated mergers, pre-merger notification and the opportunity to render an advisory opinion.²⁴ The law did not deal specifically with the question

Board to take competitive factors into consideration had been challenged in litigation. (The exception was the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-49 (1964, Supp. II, 1965-66), which deals with bank holding companies rather than banks themselves.) In addition, the existing regulatory statutes had serious gaps in coverage with respect to mergers, so that in many cases it was within the power of the merging banks to prevent the regulatory agency from reviewing the transaction. S. REP. NO. 196, *supra* note 1, at 6-7.

²⁰ Pub. L. No. 86-463, 74 Stat. 129.

²¹ H.R. REP. NO. 1416, *supra* note 1, at 5.

²² S. REP. NO. 196, *supra* note 1, at 19-22.

²³ H.R. REP. NO. 1416, *supra* note 1, at 11. The weighing process was described in more detail in an address by George W. Mitchell, Member, Board of Governors of the Federal Reserve System, Pennsylvania Bankers Association Annual Convention, Atlantic City, N.J., May 24, 1965, in 1965 *Hearings* 241.

²⁴ Proposals to subject substantial mergers in all industries to advance notification requirements have been pending in Congress for several years. See Pewett, *Developments in Federal Antitrust Legis-*

what was to happen if the advice given by the Attorney General was not followed. It was clear that this advice was not necessarily to prevail over all other factors. But the law was silent on whether the Attorney General could make an antitrust attack if the merger were approved without, in his opinion, adequate justification. As to this point the legislative history contained a number of inconclusive statements:

1. The bill "would not in any way affect the applicability of the Sherman Act or the Clayton Act to bank mergers."²⁵
2. "Although the Sherman Act applies to asset acquisitions as well as to stock acquisitions, it has been of little use in controlling bank mergers. It has been used only once . . . against a bank merger."²⁶
3. Section 7 of the Clayton Act is "limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the Act offers little help"²⁷
4. The "strict rule of the 1950 amendment of section 7 of the Clayton Act was inappropriate to the field of banking."²⁸

lation, 28 ABA ANTITRUST SECTION 194, 198 (1965); Pewett, *What Is New on Capitol Hill*, 21 ABA ANTITRUST SECTION 224, 228 (1962). Advisory opinions on proposed mergers are available from the Federal Trade Commission, 32 Fed. Reg. 8444 (1967), and statements as to the enforcement intentions of the Department of Justice are available through its business review procedure. See 2 TRADE REG. REP. para. 8559. While substantial mergers are often discussed with the FTC or the Department of Justice in advance of consummation, recourse to the formal procedures is not a general practice with respect to mergers in other industries.

²⁵ H.R. REP. NO. 1416, *supra* note 1, at 9. See also S. REP. NO. 196, *supra* note 1, at 3.

²⁶ H.R. REP. NO. 1416, *supra* note 1, at 9. See also S. REP. NO. 196, *supra* note 1, at 3. The case referred to was *United States v. Firstamerica Corp.*, [1957-1961 Transfer Binder] TRADE REG. REP. para. 45,059, filed March 30, 1959, in the United States District Court for the Northern District of California. Firstamerica, a bank holding company, had acquired stock in a Los Angeles bank with the approval of the Federal Reserve Board, and expected to merge or consolidate the Los Angeles bank with a San Francisco bank already owned by it. The Department invoked both the Sherman Act and § 7 of the Clayton Act against the proposed transaction. The district court ruled that the approval of the Federal Reserve Board did not require dismissal of the complaint. The case was not decided on the merits. It was settled in 1961, the proposed merger being permitted and Firstamerica agreeing to divest itself of the stock and assets of the new bank. *Id.* The pendency of this case in 1959 and 1960 may have been a reason for which it was stated in the committee reports that the bill was not to affect the applicability of the Sherman or Clayton acts to bank mergers.

²⁷ H.R. REP. NO. 1416, *supra* note 1, at 9. This thought was echoed in presenting the bill to the House and the Senate. 106 CONG. REC. 7257 (1960) (remarks of Congressman Spence); *id.* at 9711 (remarks of Senator Fulbright). It was also echoed in a congratulatory statement of Senator Johnson, *id.* at 9714, recapitulating the legislative history.

²⁸ S. REP. NO. 196, *supra* note 1, at 20. The "strict rule" referred to is identified in *id.* at 5, 19, as the following passage from *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 617-18 (S.D.N.Y. 1958):

"If the merger offends the statute in any relevant market then good motives and even demonstrable benefits are irrelevant and afford no defense. . . .

"The antitrust laws articulate the policy formulated by Congress. The significance and objectives of the Clayton Act and the 1950 amendment are well documented. In approving the policy embodied in these acts, Congress rejected the alleged advantages of size in favor of the preservation of a competitive system. The consideration to be accorded to benefits of one kind or another in one section or another of the country which may flow from a merger involving a substantial lessening of competition is a matter properly to be urged upon Congress. It is outside the

5. "Because banking is a licensed and strictly supervised industry that offers problems acutely different from other types of business, the bill vests the ultimate authority to pass on mergers in the Federal bank supervisory agencies, which have a thorough knowledge of the banks, their personnel, and their types of business."²⁹

II

THE PHILADELPHIA NATIONAL BANK AND LEXINGTON CASES

Shortly after the 1960 act became effective, disagreements arose between the Department of Justice and the Comptroller of the Currency, and a number of cases attacking mergers approved by the Comptroller were filed by the Department of Justice under the antitrust laws. Two of these reached the Supreme Court in 1963 and 1964.

A. The *Philadelphia National Bank* Case

The Philadelphia National Bank agreed to merge with Girard Trust Corn Exchange Bank, a state bank. Pursuant to the Bank Merger Act of 1960, the approval of the Comptroller of the Currency was sought and obtained. The Comptroller received advisory reports on the competitive factors involved from the Federal Reserve Board, the Attorney General, and the FDIC. All three reports were adverse. The Comptroller nevertheless gave his consent on February 24, 1961, and the Department filed its complaint on the following day. The merged bank would have been the largest in the four counties composing the Philadelphia metropolitan area. It would have accounted for approximately thirty-six per cent of the deposits in this area. The four largest banks in the area, including the merged bank, would have held approximately seventy-seven per cent of the deposits in the area.

The district court held, after trial, that section 7 of the Clayton Act was not applicable to the transaction and that only section 1 of the Sherman Act was properly invoked. It also found that the transaction was not in violation of section 1 when all pertinent facts were considered. An appeal was then taken to the Supreme Court. The Supreme Court reversed the decision of the district court and remanded the case with directions to render judgment enjoining the proposed merger.³⁰ Justice Brennan's opinion covers several points and can be summarized essentially as follows:

province of the Court. The simple test under section 7 is whether or not the merger may substantially lessen competition 'in any line of commerce in any section of the country.'

"....

"Congress in seeking to halt the growing tendency to increased concentration of power in various industries was fully aware of the arguments in support of the supposed advantages of size and the claim of greater efficiency and lower cost to the ultimate consumer. It made no distinction between good mergers and bad mergers. It condemned all which came within the reach of the prohibition of section 7."

²⁹ H.R. REP. NO. 1416, *supra* note 1, at 9-10.

³⁰ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

1. Bank mergers *were* subject to section 7 of the Clayton Act, as amended in 1950. The legislative history showed a purpose to reach all forms of corporate acquisitions, whether by acquisition of stock, acquisition of assets, or statutory mergers or consolidations. So far as banks were concerned, the limited language "subject to the jurisdiction of the Federal Trade Commission" operated to confer an exclusion only with respect to asset acquisitions by banks other than through merger, which were not of practical importance. The Court reached this conclusion on these grounds:

- Any other construction would create a loophole in section 7, and its dominant purpose was to close a loophole.
- Congress had been aware of the differences between a merger and a pure purchase of assets, and had meant to cover all acquisitions.
- The purpose of the language "subject to the jurisdiction of the Federal Trade Commission" was not to limit the amalgamations to be covered by the statute but was instead to make explicit the role of the FTC in administering the section.
- As a general principle, "immunity from the antitrust laws is not lightly implied," and the history of the 1950 amendment showed no intention to create an exemption for the banking industry.
- The contrary interpretation which had been so often expressed by members of Congress and representatives of the Department of Justice was a misunderstanding.³¹

2. The Bank Merger Act of 1960 did not immunize approved bank mergers from proceedings under the antitrust laws. The law conferred no express immunity for approved mergers. Contrary to other regulatory statutes, the law conferred on the banking agencies authority neither to enforce the antitrust laws nor to grant immunity from the antitrust laws generally. The legislative history did not give a basis for concluding that enforcement of the antitrust laws would be disruptive of the regulatory structure or unnecessary because of the completeness of that structure. Bank regulation was in most respects less complete than public utility regulation. Though the banking agencies maintained "close surveillance" of the industry, their regulation was not "all-pervasive."³²

3. The proposed merger was in violation of section 7 of the Clayton Act. The appropriate product or services market was commercial banking. The appropriate geographic market was the four-county area. This was the area in which average bank customers ("neither very large nor very small") found it practicable to do their banking business. It was also an area which state law considered a meaningful banking community, since Philadelphia banks were permitted to branch within it.

³¹ *Id.* at 335-49.

³² *Id.* at 350-54.

The effect of the proposed merger would be substantially to lessen competition, in light of the market shares and trends shown to exist:

We noted in *Brown Shoe Co. [v. United States]*, 370 U.S. 294, 315 (1962) that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . .

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory. That "[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share," is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute.

The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat. Further, whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 59%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.

Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of § 7 nor the legislative history suggests that any particular percentage share was deemed critical.³³

4. The affirmative justifications offered for the proposed merger were inadequate. The merger was not necessary in order to enable the banks to follow customers to the suburbs. There was no merit to the suggestion that the increased lending limit of the resulting bank would enable it to compete with New York banks for very large loans, because the lack of adequate banking facilities was not causing hardships to businesses or individuals in the Philadelphia area. It was not enough to contend that Philadelphia needed a larger bank in order to bring business to the area and stimulate its economic development. In so holding, the Court used the following language, which later became a special subject of controversy:³⁴

³³ 374 U.S. at 355-70; the quoted material appears in *id.* at 362-65 (footnotes omitted).

³⁴ *Id.* at 371.

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

In a footnote the Court stated that because of the greater public impact of a bank failure compared with an ordinary business failure, the failing company defense to merger prosecutions might have "somewhat larger contours" as applied to bank mergers. But it also stated that it intimated no views on the question of what defenses to section 7 actions must be allowed in order to avert unsound banking conditions.³⁵

The surprise with which the *Philadelphia National Bank* decision was received can be judged from the fact that the question treated most prominently in the Court's opinion—the applicability of section 7 of the Clayton Act—had received the least attention from the parties. Both sides had placed their major emphasis on the Sherman Act. The question of the applicability of section 7 was handled as a preliminary point in the banks' brief, and as an incidental final point in the Department's brief.³⁶ Justice Harlan suggested, in dissent, that no one would be more surprised than the Government to find that the Clayton Act had "carried the day."³⁷

The further ruling that approval under the Bank Merger Act of 1960 did not foreclose a subsequent antitrust proceeding gave rise to expressions of surprise from members of Congress and industry representatives,³⁸ who had evidently considered merger control through administrative procedure as a substitute for merger control through antitrust suits. However, this point was not really in controversy in the Supreme Court. The district court had sided with the Department, holding that the

³⁵ *Id.* at 370-72.

³⁶ Brief for Appellees at 27-39, consisting of the first 12 pages of a 51-page argument; Brief for Appellant (main brief) at 73-80, consisting of the last seven pages of a 63-page argument. The subject was not argued at all in the Department's reply brief. The situation recalls the Court's earlier interpretation of the pre-1950 Clayton Act in *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), concerning du Pont's stock interest in General Motors. The Court based its decision on § 7 of the old Clayton Act, which had been widely considered not to apply to "vertical" acquisitions such as the one in suit, while the parties had concentrated their argument on the Sherman Act.

³⁷ 374 U.S. at 373 (dissenting opinion).

³⁸ See, e.g., the statements made or quoted in 1965 *Hearings* 2, 9-11, 38, 69, 94. Much of the subsequent criticism did not deal separately with the two rulings made by the Court: (1) the language of § 7 is broad enough to cover bank mergers; and (2) approval under the 1960 act did not ban an antitrust suit. Thus it was recently said by the Chairman of the Senate Banking and Currency Committee: "To the surprise of the banking and legal professions, and directly contrary to the clearly expressed intent of Congress, the Supreme Court in the 1963 *Philadelphia National Bank* case held that Section 7 of the Clayton Act applied to bank mergers." Address by Senator Sparkman, North Carolina Bankers Association 71st Annual Convention, Pinehurst, N.C., May 5, 1967, in *TARHEEL BANKER*, June 1967, at 48, 50. If the Court had decided *Philadelphia Nat'l Bank* on the basis of § 1 of the Sherman Act, which its later decision in the *Lexington* case, discussed below, suggests was entirely possible, the attention of the critics of the decision would have been focussed more squarely on the separate rulings.

1960 act did not bar an antitrust suit in the courts. The Department contended that in this respect the district court was correct.³⁹ The banks, rather than litigating the point a second time, left the Department's contention unanswered and devoted their efforts to supporting those parts of the district court's decision which were favorable to them. Accordingly, the ruling as to the effect of the Bank Merger Act of 1960, which drew so much criticism from Congressmen and the dissenting Justices, was not contested before the Supreme Court.

Actually, it may well be questioned whether all of such criticism was properly directed at the Court. A broad view of the legislative history certainly supports the position of the dissenters and other critics that Congress's overriding purpose was to provide for administrative rather than judicial control over bank mergers; to permit an antitrust suit against an approved merger obviously frustrates such a purpose. Yet the draftsmen of the legislation certainly bear some portion of the responsibility for permitting the question to arise. The draftsmen were aware of the possibility of invocation of the Sherman Act, for example. Indeed, the Chairman of the Senate Banking Committee later stated that it was assumed at the time that the Sherman Act applied to bank mergers.⁴⁰ Nothing was written in the statute, however, to prevent its application in the future. The Chairman stated that the Sherman Act was thought to have been ineffective, and was thus not given real consideration, but the legislative history nevertheless made clear that no exemption from the Sherman Act applied to bank mergers.⁴¹ Indeed, it had been said that "if banks had actually violated the antitrust laws, they could still be prosecuted under the Sherman Act."⁴² In these circumstances it was not easy to expect the courts to find immunity from antitrust proceedings for approved mergers. This could appear contrary to the expressed intent of Congress with respect to the Sherman Act, and it would have been difficult to find immunity from the Clayton Act and not from the Sherman Act. Of course the difficulty arose because of an unexpected event. A change in the interpretation of the Clayton Act made possible what had been assumed could not happen. While it cannot fairly be said that the draftsmen should have anticipated such a change in the interpretation of the law,⁴³ the appropriate solution to the problem, had it been anticipated, would have been a specific grant of immunity with a reservation permitting Sherman Act prosecution.

The language of the decision of the Supreme Court on the merits of the merger, it is submitted, is more vulnerable to criticism. First, it seems inconsistent with the caution displayed by the Court in other cases of first impression to have chosen the first bank merger case to be brought before the Court—and one which was

³⁹ Brief for Appellant (main brief) at 21-26.

⁴⁰ Letter from Senator Robertson to J. L. Robertson, Member, Board of Governors of the Federal Reserve System, July 26, 1961, in *1965 Hearings* 317.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Justice Brennan appeared to conclude that the change would have been immaterial to them. See 374 U.S. at 354-55.

presented to the Court primarily as a Sherman Act case—as the vehicle for announcing a short cut in the burden of proof required under section 7 of the Clayton Act. The test of illegality—an “undue percentage share” of thirty per cent, plus a “significant increase” in “concentration” of thirty-three per cent⁴⁴ comes perilously close to a per se rule for horizontal mergers. To bankers this must have seemed the most startling part of the decision. For if one point was clear from the history of the Bank Merger Act of 1960, it was that Congress wanted bank mergers treated as a class apart from other mergers. Otherwise it would have been much simpler to amend the Clayton Act to cover bank mergers, as had been proposed on several occasions. Therefore, against this background, for bank mergers not only to be judged by the same Clayton Act standard as other mergers but also to be the first to be judged by a procedural short cut, without painstaking individual economic analysis, could only appear bizarre. No matter what one might think of the lawfulness of the particular merger, the basis for finding it unlawful could hardly fail to cause the banking industry to feel that it was being unfairly treated.

Second, it was unfortunate in the circumstances for the Court to state that it made no difference whether the merger was beneficial in the long run, because Congress “proscribed anticompetitive mergers, the benign and malignant alike, fully aware, we must assume, that some price might have to be paid.” It is doubtful that this statement was necessary to the Court’s decision. In fact, the Court may have chosen its language primarily to guide those outside the banking industry to whom the new standard of proof under section 7 would have great importance. As applied to the banking industry, however, these words were like salt to a fresh wound. They echoed the language which was cited in the legislative history of the Bank Merger Act: “Congress . . . made no distinction between good mergers and bad mergers. It condemned all which came within the reach of the prohibition of section 7.”⁴⁵ It was precisely this language which was identified as the “strict rule” of section 7 that Congress wished to avoid with respect to bank mergers.⁴⁶ Both the language and the history of the Bank Merger Act of 1960 contemplated that an anticompetitive merger, if benign for the right reasons, should be approved by the banking agency, and it hardly makes sense to provide for such approval if the transaction was meant to be vulnerable to injunction thereafter. Legislators might normally resent the suggestion that they had sacrificed the over-all public interest to further the policy of competition—the resentment was bound to erupt into exasperation when their purpose had been to do just the opposite.

It is submitted that at this point in its opinion the Court’s preoccupation with establishing a correct general principle of interpretation of section 7 of the Clayton

⁴⁴ *Id.* at 363.

⁴⁵ *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958), *quoted in* S. REP. No. 196, *supra* note 1, at 6.

⁴⁶ See note 28 *supra*.

Act caused it to lose sight of the immediate problem before it. This was how to harmonize the application of section 7 with the objectives of the Bank Merger Act of 1960. Other alternatives besides a rigid application of section 7 were open to the Court. For example, the Court might have asked for further argument on the question whether, assuming section 7 applied, the other factors considered by the banking agencies pursuant to the Bank Merger Act must also be considered by the district court in reaching its conclusion as to whether an injunction should issue. Had the Court held that these factors must be taken into account, its interpretation would have bridged the gap between the two provisions of law. As a matter of statutory construction this interpretation would have been no more daring than the Court's interpretation of section 7 in the same opinion. Here it had bridged the gap between stock and asset acquisitions to cover statutory mergers and effectuate its understanding of the legislative intent to cover all forms of acquisition. If the Court had also been able to find a means for blending section 7 and the Bank Merger Act of 1960 together, it might have avoided the indignant outcries leading to the passage of the Bank Merger Act of 1966.

In the last analysis the Supreme Court's initial determination as to the applicability of section 7 created a situation in which a government based on separation of powers may not always be able to function efficiently. The Court decided that section 7 reached bank mergers. Right or wrong, it was the Court's responsibility to decide. But, in deciding, it destroyed a premise of the draftsmen of the Bank Merger Act, and created a question for which no answer had been given in the act. Thus the act was left without an extremely important provision. No one could know for sure what provision Congress would have inserted. Could the missing provision properly be supplied by a court which does not have legislative powers and is not elected by the voters? The ideal solution would have been to hold the litigation in abeyance until Congress had had an opportunity to close the gap. But would this have been practical? Especially in controversial matters Congress may be unable or unwilling to act, and the litigants are entitled to prompt decision. If the courts make a decision, none of the practical choices open will necessarily clearly reflect the intent of Congress. It was just such a dilemma which was posed in *Philadelphia National Bank*.

B. The *Lexington* Case

After the *Philadelphia National Bank* case, *United States v. First National Bank & Trust Company of Lexington*⁴⁷ came almost as an anticlimax. The *Lexington* case had been brought at about the same time as the *Philadelphia National Bank* case, but the complaint alleged only violations of the Sherman Act. Presumably the draftsman of the complaint saw no need to attempt to invoke the Clayton Act. Accordingly he sought to take advantage of the legislative history of the Bank Merger

⁴⁷ 376 U.S. 665 (1964).

Act, noted above, which contemplated that Sherman Act proceedings could be brought in appropriate cases.⁴⁸

In *Lexington*, the merger took the form of a consolidation. The consolidating banks held forty per cent and twelve per cent of deposits in the geographical market; and the five largest banks accounted for more than ninety per cent of deposits. The bank established by the consolidation was slightly larger than all the remaining banks combined. It also held about ninety-five per cent of the total assets held in trust by corporate fiduciaries in the area. The Comptroller of the Currency approved the consolidation, although adverse reports as to the probable competitive effects of the proposed consolidation were received from the Attorney General, the FDIC, and the Federal Reserve Board.

The Department of Justice filed suit two days after approval, on the same day as the consolidation. After trial the district court dismissed the Department's complaint, and the Department appealed to the Supreme Court. It argued that the merger violated both section 1 of the Sherman Act, relating to restraint of trade, and section 2 of the Sherman Act, relating to monopolization. The section 1 claim was based, first, on a number of railroad merger cases between 1904 and 1922, which were said to establish the proposition that the merger of "major competitive factors" in a relevant market violates the Sherman Act,⁴⁹ and, second, on *United States v. Columbia Steel Co.*,⁵⁰ the most recent decision of the Court concerning the application of the Sherman Act to mergers. The factors deemed important in *Columbia Steel*—"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"⁵¹—were said to indicate that the consolidation was unlawful. The section 2 claim was based on the assertion that the consolidation constituted a combination to monopolize corporate trust services in the geographical area.

The Supreme Court deemed it unnecessary to reach the questions posed under section 2, but agreed with the Department as to section 1 and reversed the judgment of the district court. In so doing, it placed its reliance on the "major competitive factor" theory.⁵² It put the *Columbia Steel* decision to one side, stating that it was

⁴⁸ See text accompanying notes 17-29 *supra*.

⁴⁹ *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Union Pac. R.R.*, 226 U.S. 61 (1912); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). The Department had relied on these same cases in support of its Sherman Act claim in *Philadelphia Nat'l Bank*. Since the decision was based on § 7 of the Clayton Act, the Court did not reach the Sherman Act claim in that case.

⁵⁰ 334 U.S. 495 (1948).

⁵¹ *Id.* at 527.

⁵² Justice Brennan, the author of the *Philadelphia Nat'l Bank* opinion, and Justice White would have relied on *Columbia Steel* instead. 376 U.S. at 673. Justices Harlan and Stewart, who dissented in *Philadelphia Nat'l Bank*, thought that the § 1 claim was supported neither by the railroad cases nor *Columbia Steel*. *Id.* (dissenting opinion). Accordingly, only five members of the Court subscribed to the "major competitive factor" theory. If applied to the facts of *Philadelphia Nat'l Bank*, this theory would appear to have been capable of condemning the merger as effectively as the § 7 theory used by the Court.

to be confined to its facts.⁵³

Thus there was announced in a banking case a further procedural short cut for use in merger cases generally. At the same time section 1 of the Sherman Act was made into an effective tool for general use against bank mergers, and a second premise of the draftsmen of the Bank Merger Act was destroyed.

III

THE BANK MERGER ACT OF 1966

Immediately after the decision in the *Philadelphia National Bank* case, Senator Robertson, the Chairman of the Senate Banking and Currency Committee, protested in the Senate that the decision was contrary to congressional intent. He also adverted to the uncertainty created as to bank mergers effected since the expansion of the Clayton Act in 1950.⁵⁴ There had been about 2,000 bank mergers in this period, and there was at least a remote possibility that the Department of Justice would proceed against some of these transactions.⁵⁵

More immediate was the impact of *Philadelphia National Bank* and *Lexington* on the other bank merger cases then pending before the courts. The Department of Justice had begun proceedings attacking three mergers that were consummated before the *Philadelphia National Bank* case—Manufacturers Hanover in New York, Continental Illinois in Chicago, and the *Lexington* case.⁵⁶ Other mergers consummated since *Philadelphia National Bank* had also given rise to proceedings begun by the Department.⁵⁷

To deal with this situation, Senator Robertson introduced an amendment to the Bank Merger Act of 1960. It provided essentially as follows: (1) The banking agencies would have been given "exclusive and plenary authority to approve mergers, consolidations, acquisition of stock or assets and assumptions of liabilities." (2) Banks participating in approved transactions would have been relieved from the operation of the antitrust laws, including both the Sherman and Clayton acts, with respect to such transactions. Insured banks would also have received immunity from prosecution under the antitrust laws for mergers, consolidations, or acquisitions of stock or assets and assumptions of liabilities consummated before the Bank Merger Act of 1960.⁵⁸

⁵³ *Id.* at 672.

⁵⁴ 109 CONG. REC. 11,097 (1963) (remarks of Senator Robertson).

⁵⁵ S. REP. NO. 299, 89th Cong., 1st Sess. 3 (1965). The possibility of attacking even transactions occurring several years before may have been suggested by the *du Pont-General Motors* case, discussed in note 36 *supra*, in which the stock acquisitions were challenged some thirty years after they took place.

⁵⁶ See H.R. REP. NO. 1221, 89th Cong., 2d Sess. 4 (1966).

⁵⁷ See *id.* Three proceedings are currently pending: *United States v. Crocker-Anglo Nat'l Bank*, 263 F. Supp. 125 (N.D. Cal. 1966); *United States v. Mercantile Trust Co. Nat'l Ass'n*, 263 F. Supp. 340 (E.D. Mo. 1966), *appeal docketed*, 35 U.S.L.W. 3368 (U.S. April 14, 1967) (No. 1269); *United States v. Third Nat'l Bank in Nashville*, 260 F. Supp. 869 (M.D. Tenn. 1966), *prob. juris. noted*, 35 U.S.L.W. 3429 (U.S. June 12, 1967) (No. 1259).

⁵⁸ S. 1698, 89th Cong., 1st Sess. (1965).

This proposal would have filled the gap in the 1960 Bank Merger Act with respect to the possible institution of a Clayton Act proceeding subsequent to approval. It would have withdrawn the earlier disposition to permit Sherman Act proceedings, in recognition of the fact that as a result of the *Lexington* case, such proceedings could be so readily brought as to seriously threaten the objective of administrative finality. This proposal also created immunity as to past mergers. Although it was doubtful that proceedings would be filed against such transactions in any but the most extraordinary situations, it was obviously desirable from the standpoint of the merged banks to have such a provision written into law.

The Robertson proposal had the support of the American Bankers Association and at least twenty-nine state bank associations. It also appeared to have the general support of the Federal Reserve Board and other banking agencies.

On the day hearings were to open, however, Congressman Patman, Chairman of the House Banking and Currency Committee, was quoted in the newspapers as opposed to the bill and as having stated, "If you exempt banks from anti-trust, you might as well also shoot the policeman on the corner."⁵⁹ Some elements of the banking industry were at least in partial agreement with this point of view. Not all banks, of course, will favor all bank mergers. In particular cases some banks may consider themselves injured by mergers. The Department of Justice has called competing bankers as witnesses in merger cases and elicited testimony that the merger would injure their banks. This occurred, for example, in the *Lexington* cases.

The Independent Bankers Association determined to propose amendments in the Robertson bill as introduced. It suggested that the principle of exclusive and plenary jurisdiction be abandoned and that provision be made for a proceeding by the Attorney General, if warranted, within a limited time. If no proceeding was begun within such time, the merger would become immune from antitrust attack. To achieve more support for the Robertson bill, Senator Proxmire drafted an amendment to this effect. The Robertson bill as reported to the Senate incorporated this "now or never" language.⁶⁰ Thus the first of a series of compromises was made.

In the House the compromise bill ran into tough sledding. Congressman Patman, the Chairman of the House Banking and Currency Committee, who as noted above was not convinced of the need for legislation, referred the bill to a subcommittee, which did not schedule early hearings. It appeared likely that it might not be reached in time to have any possibility of enactment. In these circumstances, an extraordinary series of parliamentary maneuvers began.

Congressman Ashley introduced a substitute bill, providing that the banking

⁵⁹ N.Y. Herald Tribune, May 19, 1965, at 32, col. 1.

⁶⁰ See S. REP. No. 299, *supra* note 55, at 9-10.

agencies would hold formal hearings on merger applications, subject to review by a court of appeals as in the case of other administrative agencies.⁶¹

The Attorney General, who had earlier indicated strong opposition to legislation legalizing mergers under attack by the Department, commented that the suggested appellate review procedure was inadvisable. One reason was that such hearings would be unnecessary in the vast majority of cases where serious antitrust problems were not presented. Another reason was that a hearing full enough for appellate review, with attendant disclosure of all pertinent financial data, was not appropriate for bank mergers.⁶² At the same time, however, he indicated no objection to a bill that would enact into law his assurance that the Department did not intend to attack past mergers under section 7 of the Clayton Act or section 1 of the Sherman Act. He also indicated no objection to a provision that would make it clear that in future antitrust proceedings the courts and banking agencies are to apply the same standards.⁶³

As a consequence of the position taken by the Attorney General, Congressmen Ashley and Ottinger revised the Ashley bill to delete the provision for appellate review and permit original antitrust suits by the Department. They provided for the same standards to be applied in such suits by court and agency. Neither court nor agency was to approve a transaction in violation of the antitrust laws. They were to consider the banking factors of the 1960 act as well as the effect on competition, however, and they were permitted to approve a transaction in which the probable adverse competitive effect was clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

This further compromise continued to encounter parliamentary difficulties. Chairman Patman did not call a committee meeting as requested by Congressman Ashley and the other members interested in passage of the revised bill. Ultimately, with the assent of a majority of the committee, Congressman Ashley convened a committee session. The Chairman was not invited. When informed of the meeting he ordered it disbanded. In defiance of his wishes the meeting continued and reported out the Ashley-Ottinger bill.⁶⁴

Chairman Patman took the position that the rump session was illegal and its action invalid. Congressman Reuss, who had attempted to disband the session, wrote the Attorney General, taking the position that the bill as reported was defective, and requested the Attorney General and the Secretary of the Treasury to comment

⁶¹ H.R. 11011 89th Cong., 2d Sess. (1966).

⁶² Letter from Attorney General Katzenbach to Chairman Patman, Sept. 24, 1965, in H.R. REP. NO. 1221, *supra* note 56, at 8.

⁶³ *Id.*

⁶⁴ See H.R. REP. NO. 1179, 89th Cong., 1st Sess. (1965); BNA ANTITRUST & TRADE REG. REP. NO. 248, April 12, 1966, at B-2; Brief for Comptroller at 10-22, *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967).

on an alternative proposal. It was apparent that a floor fight was a distinct possibility.⁶⁵

In these circumstances Congressman McCormack took steps to arrange a further compromise. The bank supervisory agencies and the Attorney General considered the Reuss proposals and commented on them. The Chairman then introduced a new bill embodying substantially the Ashley-Ottinger proposals, with some language revised as suggested by the Attorney General.⁶⁶

As so introduced, passed by both House and Senate, and approved by the President, the key language of the Bank Merger Act of 1966 is as follows:

(1) Standards.

(a) "The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."⁶⁷

(b) "In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [the Sherman Act], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."⁶⁸

(c) "In any such action, the court shall review de novo the issues presented."⁶⁹

(2) Stay of Consummation.

(a) "[T]he transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency."⁷⁰

(b) "The commencement of such an action [under the antitrust laws] shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order."⁷¹

(3) Immunity If Not Attacked.

"Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within

⁶⁵ See Brief, *supra* note 64, at 16.

⁶⁶ See H.R. REP. NO. 1221, *supra* note 56, at 8-24.

⁶⁷ 12 U.S.C. § 1828(c)(5) (Supp. II, 1965-66).

⁶⁸ 12 U.S.C. § 1828(c)(7)(B) (Supp. II, 1965-66).

⁶⁹ 12 U.S.C. § 1828(c)(7)(A) (Supp. II, 1965-66).

⁷⁰ 12 U.S.C. § 1828(c)(6) (Supp. II, 1965-66).

⁷¹ 12 U.S.C. § 1828(c)(7)(A) (Supp. II, 1965-66).

the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of [the Sherman Act]"⁷²

(4) Past Mergers.

(a) Mergers consummated prior to June 17, 1963 (the date of the *Philadelphia National Bank* case), are "conclusively presumed to have not been in violation of any antitrust laws other than section 2 of [the Sherman Act]."⁷³

(b) Mergers consummated after June 16, 1963, and not attacked at enactment may not "be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2."⁷⁴

(c) Mergers attacked after June 16, 1963, are subject to "the substantive rule of law set forth in" the law as amended.⁷⁵

The compromise represented a significant retreat. The concept of administrative finality, which had seemed to underlie the 1960 act, was gone. The "competitive factor" was no longer simply one of the considerations to be weighed along with others; it was the controlling consideration unless clearly outweighed. Banks also lost whatever advantage lay in the opportunity to merge before the Department was ready to file suit.⁷⁶

At the same time significant advances were made over the post-*Philadelphia National Bank* situation:

1. The status of past mergers was protected against changes in administrative policy—absent substantially enlarged application of section 2 of the Sherman Act.
2. The "now or never" language gave the same assurance with respect to new mergers after the expiration of the thirty-day period.
3. It was clear that in any suit brought the public interest in matters other than competition—*i.e.*, "the convenience and needs of the community to be served"—could not be dismissed as irrelevant. Any doubt on this score engendered by *Philadelphia National Bank* was removed.

Not all the questions concerning bank mergers were resolved, however, as the next round of Supreme Court litigation made clear.

⁷² 12 U.S.C. § 1828(c)(7)(C) (Supp. II, 1965-66).

⁷³ § 2(a), 80 Stat. 10.

⁷⁴ § 2(b), 80 Stat. 10.

⁷⁵ § 2(c), 80 Stat. 10.

⁷⁶ The "race to the courthouse" had been won by the banks in the *Lexington* case, for example. While the advantages of a merger may be realized pending trial in such situations, the threat of ultimate divestiture may give rise to disadvantages which can outweigh these advantages in particular cases. Examples of these disadvantages include difficulties of retention of key personnel, avoidance of substantial investment in new plant and facilities which may be subject to divestiture, and uncertainties in long-range corporate planning.

IV

THE HOUSTON AND PROVIDENT DECISION⁷⁷

After the Supreme Court's two decisions in the *Philadelphia National Bank* and *Lexington* cases, it was with understandable concern that the banking industry awaited the decision of the Supreme Court in the first cases to come to the Supreme Court under the Bank Merger Act of 1966. These were *United States v. First City National Bank of Houston* and *United States v. Provident National Bank*. The former case involved an agreement for the merger of First City National Bank of Houston and Southern National Bank of Houston, approved by the Comptroller of the Currency on September 20, 1966. The latter case arose earlier but was slower in coming to the Supreme Court. It involved an agreement for the merger of the Provident National Bank and the Central Penn National Bank of Philadelphia. It was approved on March 31, 1966, a month after the 1966 act became effective. The Department of Justice sued in federal district courts in Texas and Pennsylvania to prevent the mergers. The complaints were dismissed before trial when the Department indicated that it would not assume the full burden of proof which the district courts ruled it should carry. The cases were appealed to the Supreme Court and decided, on March 27, 1967, in a single opinion reversing the judgments of the district courts.

The setting in which these decisions arose and their significance with respect to other bank merger proceedings are discussed below.

A. Setting of the *Houston* and *Provident* Cases

The two bank mergers which were the subject of the Supreme Court's opinion raised obvious antitrust questions under the Clayton Act, as interpreted in the *Philadelphia National Bank* case. Without going into unnecessary detail, it can be noted that in the *Houston* case it was alleged that the combined market share of the merging banks was 32.4 per cent of bank deposits in Harris County, where the five largest commercial banks account for 66.3 per cent of the deposits. In the *Provident* case, the corresponding figures were fourteen per cent and seventy-one per cent respectively. In a nonbanking context, a merger of competitors in the face of such market statistics, while not necessarily unlawful, would present substantial antitrust problems.⁷⁸ The transactions were approved by the Comptroller after receiving opinions as to serious anticompetitive effect from the Federal Reserve Board and the Antitrust Division of the Department of Justice. The Comptroller's approval in each case was based upon his disagreement with the other agencies as to the existence of any substantial anticompetitive effect. He also concluded, under the Bank Merger Act of 1966, that any anticompetitive effect was clearly outweighed

⁷⁷ *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967).

⁷⁸ See, in addition to *Philadelphia Nat'l Bank*, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.⁷⁹

The Attorney General then filed suit to prevent the mergers. Under one provision of the Bank Merger Act, of 1966, consummation of the mergers was automatically stayed by commencement of a suit.⁸⁰ Under another provision, the Comptroller of the Currency, as the approving agency, was permitted to intervene.⁸¹

As was to be expected, differences developed between the parties as to matters of procedure. The differences which ultimately were presented to the Supreme Court were as follows:

1. *Burden of Proof.* It was urged in both cases that the Department should plead and prove a violation of the antitrust laws and the Bank Merger Act; the Department argued that it need plead and prove only a violation of the antitrust laws and that it was up to the defendants to plead and prove that the Bank Merger Act saved the transaction from illegality.

2. *Weight Accorded to Comptroller's Approval.* It was also urged, in the *Provident* case, that the approval of the Comptroller was entitled to carry the day unless it was shown to be an improper exercise of his discretion; the Department argued that the question decided by the Comptroller was to be decided afresh by the district court.

The district courts ruled against the Department on these points. Ordinarily in such circumstances, the parties would have proceeded to trial subject to these rulings. Since appeals on preliminary rulings are ordinarily not permitted in the federal courts,⁸² such rulings would normally have been reviewed only if the Department lost on trial and could then establish on appeal that incorrect preliminary rulings were prejudicial error. In these cases, however, there were reasons which evidently warranted departure from the ordinary course.

From the Department's point of view it was much simpler if it were required to prove affirmatively only a violation of the antitrust laws. It would be more difficult for it to prove affirmatively that the "convenience and needs" of the community did not "clearly outweigh" the anticompetitive effects. Of course the Department would have some familiarity with the facts on this subject from the merger application⁸³ and other sources. The Department would not be expected to invest the manpower necessary to file and pursue a suit unless it had some reason to believe that the

⁷⁹ Brief for Appellant at 4-8; Brief for Comptroller at 2-4. The Comptroller was supported, in the *Houston* case, by the FDIC's report.

⁸⁰ 12 U.S.C. § 1828(c)(7)(A) (Supp. II, 1965-66).

⁸¹ 12 U.S.C. § 1828(c)(7)(D) (Supp. II, 1965-66).

⁸² See 28 U.S.C. §§ 1291-92 (1964). This case was governed by the Expediting Act, 15 U.S.C. § 29 (1964), under which appeals from the final judgment of the district court in certain cases lie only to the Supreme Court.

⁸³ The *Provident* application included a 50-page economic brief. *Provident's Motion to Affirm* at 4. The *Houston* application also included "extensive evidence." *Houston's Motion to Affirm* at 1.

"convenience and needs" of the community did not justify the merger. This does not mean that the Department would be in a position to prove its point shortly after the commencement of suit. That would require a much more elaborate initial investigation. If this had to be done in all bank merger cases, a significant amount of work for the Department's staff would be involved.

Of potentially even greater importance was the related question of the degree of weight, if any, to be given to the approval of the Comptroller. This question went to the basic nature of the proceeding—that is, whether or not the Department would always be playing under the handicap of a litigant seeking to overturn an administrative finding *prima facie* entitled to respect from the courts.

In addition, there was a further question on which it was desirable to obtain a prompt ruling. That question arose after the points discussed above, when, on dismissal of the complaints, the district courts dissolved the statutory stays preventing consummation of the mergers. While further stays had been obtained pending appeal, it was possible that in future situations a stay might not be secured in time to prevent consummation. Therefore the Department wanted an answer to the question whether the stay should not automatically continue during litigation. Further, of course, any hints which the Supreme Court might give as to construction of other terms of the statute could save trial time and expense.

Thus, although the question of burden of proof was the basis for the Department's appeal, it was the remaining questions which accounted for thirty-six of the thirty-nine pages of argument in its written brief to the Court.

B. The Court's Decision

1. *Burden of Proof*

Relying on a statement of Congressman Patman and the general rule as to the burden of proving exceptions from prohibitory statutes, the Court agreed with the Department as to the burden of proof: "First is the question whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the exception of 12 U.S.C. § 1828(c)(5)(B) or whether it is on the Government. We think it plain that the banks carry the burden."⁸⁴ It is not easy to find fault with this ruling if the proceeding is considered as a new trial of the issues involved, rather than as a review of the basis for the Comptroller's decision. At the same time, however, it is easy to exaggerate the true significance of the burden of proof.

In practical effect the ruling probably means that the merging banks or the Comptroller, who has the right to intervene in such cases, must take the lead in presenting witnesses or other evidence in support of their contention that the merger will meet the convenience and needs of the community to be served to an extent sufficient to clearly outweigh any anticompetitive effects. The Department may then cross-

⁸⁴ 386 U.S. at 366.

examine or produce witnesses or other evidence disputing that the transaction will have the effects claimed or minimizing the extent of these effects. The banks and the Comptroller may reply to such evidence. The trial court may then decide that the anticompetitive effects are or are not clearly outweighed by the probable effects of the transaction in meeting the convenience and needs of the community. If the evidence is not enough to convince the court one way or the other, the decision would go against the banks for failure to carry the burden of proof.

If the Supreme Court's decision as to burden of proof had been to the contrary, the order of proof would have been reversed. The Department would have had to begin with its witnesses or other evidence, the banks and the Comptroller would have responded with theirs, and the Department would have replied. Again the court might have reached either conclusion or remained unconvinced in either direction. In the latter case decision would go against the Department.

Accordingly, if it is assumed that the Department will prepare its case thoroughly, as is to be expected, the significance of the Supreme Court's decision is confined to the order of proof and the consequences if the court is not convinced by either party. Normally neither of these considerations will be crucial. The order of proof makes some difference in the trial of a case, but is seldom of critical importance. Also, unless there is a shortage of pertinent evidence, it is unusual for a judge to be unable to form a conclusion one way or the other.

Thus, it may be doubted that the Supreme Court's decision on burden of proof will make an important difference in the results of most cases which are tried. In addition, the ruling on burden of proof may speed up trial. This is not always the desire of defendants in antitrust cases, but it might well be their desire where a stay is in force preventing realization of the advantages of the merger. The banks' attorneys, having assembled the evidence on "convenience and needs" in the course of preparation of their merger application, may well be able to proceed sooner than would the Department's attorneys, who can be expected to have less familiarity with the community and possible sources of evidence at the outset of the proceedings. Therefore the banks' lawyers may well be ready at a time when the Department's lawyers would require more time to prepare.

2. Weight Accorded to Comptroller's Decision

As to the question of weight, if any, to be given the Comptroller's decision, the Court also agreed with the Government. The opinion stated, "The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether merger is legal."⁸⁵

Conceptually, this ruling is more important than the ruling on burden of proof, and if the ruling had been to the contrary, it would have nullified one of the

⁸⁵ *Id.* at 369.

practical effects of the ruling on burden of proof. In this event, decision would have gone for the banks if the court was undecided when the evidence was in.

At the same time one may still question whether the ruling will prove to be of decisive importance in practice. The line between this result and the opposite result is a fine one. It is clear that the district court may take into consideration the reasons advanced by the Comptroller. If the Comptroller's reasons are as persuasive to the court as to the Comptroller, it makes no practical difference whether any weight is attached to the Comptroller's decision. The court will arrive at the same decision and the result will be the same as if controlling weight were given. If the court sharply disagrees with the Comptroller, the question of weight is equally unimportant for practical purposes, as the court would be apt to consider the Comptroller's decision as abuse of discretion, if it were to give any weight to the decision. Thus the question of weight is unimportant when the evidence is strongly persuasive in either direction. It is only in the limbo where the evidence leaves the court undecided or in mild disagreement with the Comptroller that the Supreme Court's ruling on weight will make a difference in the result of decided cases.

Also, on the positive side, the Supreme Court's ruling is not without possibility of advantage for the merging banks. The banks will be free to bring forward evidence of convenience and needs which was not available at the time of the submission to the Comptroller or which was not relied on by him in reaching his decision. Such newly discovered or incompletely appreciated evidence is often of substantial importance.

Thus on balance it does not appear possible to state with certainty how the Supreme Court's decision on weight will affect the result of future cases.

3. *Stay*

On the third issue considered by the Supreme Court, the decision was more clearly adverse to the banks. The Court stated, on the basis of legislative history concerning the difficulty of unscrambling consummated mergers,

Our remand will direct that the stays continue until the hearings below are completed and any appeal is had. A stay of course is not mandatory under any and all circumstances. But absent a frivolous complaint by the United States, which we presume will be infrequent, a stay is essential until the judicial remedies have been exhausted.⁸⁶

This language goes beyond the particular point in issue, which was whether the stays in the particular case should have continued pending appeal to the Supreme Court before trial. It appears broad enough to cover the question whether a stay should be continued pending trial in the ordinary case where there is no appeal before trial. It also appears to require a stay in all but the most unusual circumstances—in contrast to the usual rule, by which a preliminary injunction is granted only on a showing of

⁸⁶ *Id.* at 370.

a reasonable probability of success.⁸⁷ How the courts will interpret this language remains to be seen, however. It is quite possible, for example, that the courts may consider that the stay should not continue unless the Department sets forth some basis for doubting the sufficiency of any "convenience and needs" presentation made by the banks in their application for approval.

C. Evaluation

It appears from the foregoing discussion that the decision in the *Houston* and *Provident* cases offers little basis for predicting the ultimate impact of the Bank Merger Act of 1966 on specific transactions. The decisions as to procedure—except as to the stay—are unlikely to be of decisive significance in particular cases, and might conceivably prove to the advantage of the merging banks on some occasions. The decisions on these points do not appear to have aroused any strong opposition in Congress and indeed have won some endorsement from Congressman Moorhead, one of the members of the House Committee which was responsible for the passage of the Bank Merger Act of 1966.⁸⁸

Indeed, the main significance of the decision may be in what was not said. The Court stated that it intimated no "views on the merits of these mergers or on the justifications that are urged in their support. All questions except the procedural ones treated in the opinion are reserved."⁸⁹ The Court did not use the occasion to comment on the scope of the "convenience and needs" justification for bank mergers, although there was extensive discussion on this subject in the briefs and oral arguments presented to the Court. As the Assistant Attorney General in charge of the Antitrust Division noted after the decision, the significant questions remaining to be decided are the meaning of "convenience and needs" and when "convenience and needs" "clearly outweigh" an adverse effect on competition.⁹⁰

Accordingly it appears that the true effect of the Banker Merger Act of 1966 on bank mergers has not yet been settled by the Supreme Court.

CONCLUSION

The foregoing account of the legislative and judicial entanglements over bank mergers devotes much attention to the technical differences between the differing positions and proposals. But it should not obscure the intensity of the views held on the subject of mergers, both by bankers who see in mergers a necessary response to changing economic conditions and by others who fear that bank concentration

⁸⁷ See, e.g., *United States v. Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964).

⁸⁸ *American Banker*, June 23, 1967, at 5, cols. 3-4. Congressman Moorhead found no problem with the decision generally, but expressed some concern over the ruling with respect to the weight accorded to the decision of the head of the banking agency. He also noted that the ruling preserving the stay except where the complaint was "frivolous" seemed a narrower construction than anticipated by Congress.

⁸⁹ 386 U.S. at 369 n.1.

⁹⁰ *American Banker*, March 29, 1967, at 1, cols. 2-4.

hastens over-all economic concentration. In this situation merger approvals, though more frequent than denials, can seldom be taken for granted. It is of importance for bankers contemplating such transactions to conduct a thorough investigation of all aspects of the transaction before undertaking definite commitments. This will permit them—in the case of an economically justified merger—to submit a complete and well documented analysis in support of an application for approval. This offers the best opportunity for avoiding disapproval of the transaction, or institution of an antitrust suit, merely because the application gives rise to doubt in the agencies or the Department as to the justification for the transaction. Commitments assumed too quickly, or applications not fully documented, may expose the parties to the expenses and uncertainties of litigation.