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ANTI-TRUST

Bank Mergers

The United States sued to enjoin a proposed merger of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank, Philadelphia's second and third largest banks. As required by the Bank Merger Act (as amended 1960)[1] the Comptroller of Currency had approved the merger, despite reports of the Attorney General, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation that the merger would have substantial anti-competitive effects.

The suit charged that the proposed merger was in violation of section 1 of the Sherman Act[2] and section 7 of the Clayton Act.[3] The injunction was denied by the District Court which held that "section 7 of the Clayton Act was inapplicable to bank mergers because banks are not corporations subject to the jurisdiction of the Federal Trade Commission; . . . and that since the merger did not violate section 7 of the Clayton Act, a fortiori it did not violate section 1 of the Sherman Act." [4] The case upon appeal went to the Supreme Court of the United States under

[1] 74 Stat. 129 (1960). The Bank Merger Act of 1960 amended the amendment of 1950, 64 Stat. 892, section 18, subsection (c) to the Federal Deposit Insurance Act. The 1960 amendment provided that the Comptroller of Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation, whichever agency is required to make the approval of a particular merger or consolidation "shall take into consideration the effect of the transaction on competition including any tendency toward monopoly," and shall acquire an advisory report of the Attorney General and the other two banking agencies on the competitive factors involved, "and shall not approve the transaction unless after considering such factors, it finds the transaction to be in the public interest."

[2] 26 Stat. 209 (1890). Section 1 of the Sherman Act provides in relevant portion that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with a foreign, is hereby declared to be illegal."

[3] 64 Stat. 1125 (1950), amending 38 Stat. 731 (1914). Section 7 provides that "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 in any section of the country, where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[4] United States v. Philadelphia National Bank, 374 U.S. 321, 335.

the Expediting Act.[5] In a magnificent exhibition of hair-splitting the Court reversed the decision of the District Court, but only on the basis of quite unforseen reasoning.

In 1950 the Cellar-Kefauver Anti-Merger Act was passed amending the ineffective section 7 of the Clayton Act. The Clayton Act as passed in 1914 had disregarded mergers which might be accomplished by asset acquisition, and referred only to stock acquisition mergers.[6] The Court reasoned that by this amendment "Congress intended to close the loopholes in the original section by extending its scope to the entire range of corporate amalgamations from pure stock acquisitions to pure asset acquisitions, and that it did not intend to exclude bank mergers." [7]

The Court rejected the appellee's contention that the Bank Merger Act of 1960 superseded section 7 of the Clayton Act, reasoning that the regulatory method provided for by the Bank Merger Act was not so comprehensive as to make the anti-trust law and its competive policy inapplicable, and that the doctrine of primary jurisdiction could not properly be applied here.[8] The Court rationalized that Congress in drafting the Act provided for consideration of competitive conditions by banking agencies before approving mergers, but that Congress did not intend to confer a special dispensation upon the banking industry by excluding its mergers from the purview of the federal anti-trust laws.[9] The Court stated that "It is settled law that 'immunity from anti-trust law is not lightly implied.' " [10]

Having decided that section 7 of the Clayton Act applied, the Court decided to test whether the effect of the merger would be to substantially lessen competition. Here the recently advocated process of extensive market analysis as found in *Brown Shoe Co. v. United States*[11] and in the Federal Trade Commission

[5] 15 U.S.C. 29 (1958). "In every civil action brought in any District Court of the United States under any of the said Acts, wherein the United States is the complainant, an appeal will lie only in the Supreme Court."

[6] *Supra* note 4, at 337.

[7] *Supra* note 4, at 321.

[8] *Supra* note 4, at 352 and 353.

[9] *Supra* note 4, at 350. See also California v. Federal Power Commission, 369 U.S. 482.

[10] *Supra* note 4, at 348.

[11] Brown Shoe Co. v. United States, 370 U.S. 294.

opinion in *The Matter of Pillsbury Mills, Inc.*,[12] was supplanted by the highly subjective reasoning found in *Standard Oil Company v. United States*.[13]

The Court was now prepared to deal with the issue concerning the area of the market: whether the relevant market was the Philadelphia area or whether it extended to the large loan markets dominated by the New York Banks. The Philadelphia area was found to be the relevant market on the grounds that the merger if permitted would result in an undue lessening of competition in this market and that the benefit or harm resulting in other markets was "a value choice of such magnitude as to be beyond the ordinary limits of judicial competence." [14] The Court concluded that: "A merger which produces a firm controlling an undue percentage 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 anti-competitive effects." [15]

Justices Harlan and Stewart dissented, stating that everyone including the banking industry, the Congress, and the bar had assumed that the Clayton Act as amended in 1950 did not apply to bank mergers, and by the enactment of remedial legislation, the Bank Merger Act of 1960, Congress emphatically rejected the remedy brought to life by the Court.[16]

In a separate memorandum, Mr. Justice Goldberg stated that he concurred in the dissent, that section 7 of the Clayton Act had no application to bank mergers, but that in his opinion there was a "substantial Sherman Act issue." [17] But the Court did not consider the issue of the Sherman Act. Perhaps had the Court applied the Sherman Act's rule of reason it could have retained its

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[12] The Matter of Pillsbury Mills, FTC Dkt. 6000, 50 F.T.C. 555, (1953).

[13] *Supra* note 4, at 362. Standard Oil Co. v. United States, 337 U.S. 293, (1948). Here the Court decided that the contract violated section 7 of the Clayton Act by substantially lessening competition simply because a substantial amount of commerce was affected.

[14] *Supra* note 4, at 371.

[15] *Supra* note 4, at 363.

[16] *Supra* note 4, at 384.

[17] *Supra* note 4, at 395.

judicial control over such cases, and the same time—by holding that section 7 of the Clayton Act was superseded by the Bank Merger Act—avoided what will be the subject of considerable debate in the future.

H. C. W.