1975

Antitrust: The Supreme Court Recognizes Economic Realities in the Banking Industry

Minn. L. Rev. Editorial Board

Case Comments

Antitrust: The Supreme Court Recognizes "Economic Realities" in the Banking Industry

National Bank of Commerce (NBC), a large Seattle-based bank,[1] sought to expand its operations into Spokane. Because of Washington's strict statutory restraints on the geographic expansion of banks,[2] NBC determined that the only manner in which it could enter the Spokane-area market would be through merger with an existing Spokane bank. Thus, an agreement was reached with a medium-sized, state-chartered Spokane bank[3] to merge that bank into NBC. Pursuant to the Bank Merger Act of 1966, application was made to the Comptroller of the Currency for approval of the merger.[4] As required by that Act,[5] the

1. NBC is a wholly owned subsidiary of a bank holding company, Marine Bancorporation, Inc., and in terms of assets, deposits, and loans is the second largest banking organization with headquarters in the state of Washington. At the end of 1971, NBC had assets of $1.8 billion, deposits of $1.6 billion, and loans of $881.3 million. It operated 107 branch banking offices throughout the state, including 59 in the Seattle metropolitan area and 31 in less developed sections of eastern Washington.

2. There are basically three Washington statutes which restrict geographic expansion by banks. WASH. REV. CODE § 30.40.020 (1950) prohibits a state-chartered bank from establishing or operating a branch in any city or town, outside of its "home office" community, in which another bank is regularly transacting business. Moreover, should an existing bank be acquired, the acquiring bank is not allowed to branch from the acquired bank. WASH. REV. CODE § 30.08.020(7) (1950) requires that banks incorporating in Washington include in their articles of incorporation a clause forbidding for at least 10 years a merger with or the acquisition of their assets by another bank without the consent of the state supervisor of banking. WASH. REV. CODE § 30.04.230 (1950) prohibits the formation of multibank holding companies.

The National Bank Act, 12 U.S.C. § 36(c) (1970), subjects nationally chartered banks to the branching limitations imposed on their state counterparts. *See* First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969); First Nat'l Bank v. Walker Bank, 385 U.S. 252 (1966).

3. At the time of the proposed merger, the acquired firm, Washington Trust Bank, was the eighth largest banking organization with headquarters in Washington. At the end of 1971, it had assets of $112 million, deposits of $95.6 million, and loans of $57.6 million. It operated seven branch offices, six in the city of Spokane and one in a Spokane suburb, thus controlling 17.4 percent of the 46 commercial banking offices in the Spokane metropolitan area. It was one of 12 medium-sized banks (banks with assets from $30 million to $250 million) in Washington.

4. 12 U.S.C. § 1828(c)(2)(A) (1970).

5. *Id.*

Comptroller requested the Attorney General, the Federal Deposit Insurance Corporation, and the Federal Reserve Board to evaluate the competitive factors involved in the proposed merger. The unanimous response was that the proposed merger would have an anticompetitive effect on banking in the Spokane-area market. Nevertheless, the Comptroller approved the merger on the basis of his conclusion that the merger would contribute to the "convenience and needs" of the Spokane-area customers by providing them with services not then available from the Spokane bank.[6]

Subsequently, the Antitrust Division of the Justice Department challenged the legality of the merger under section 7 of the Clayton Act,[7] basing its case entirely on the doctrine of po-

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6. The [Comptroller of the Currency] shall not approve—

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> . . . any other proposed merger transaction whose effect in any section of the country may be to substantially 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.

Id. § 1828 (c) (5).

7. Section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), 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 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.

Prior to the decision in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), bank mergers had been considered to be largely out of the reach of the antitrust laws. It was thought that because authority had been granted to the Federal Reserve Board by section 11 of the Clayton Act to enforce compliance with those sections of the Act which were "applicable to banks, banking associations, and trust companies," 15 U.S.C. § 21(a) (1970), banks were therefore exempt from Federal Trade Commission (FTC) jurisdiction. In *Philadelphia Bank,* however, the Court found in the legislative history of section 7 of the Clayton Act a congressional desire to include bank mergers within the purview of the section even though the exemption of banks from FTC jurisdiction and the apparent limitation of the section to "stock acquisitions" had been regarded as preventing its application to the typical bank merger. The Court also ruled that the Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129, did not preclude application of the antitrust laws.

In reaction to this decision, Congress enacted the Bank Merger Act of 1966, Pub. L. No. 89-356, § 1, 80 Stat. 7 (codified at 12 U.S.C. § 1828 (c) (1970)), which was designed to re-establish the primary authority of the bank regulatory agencies and to limit significantly that of the Justice Department. The Supreme Court made it very clear in subsequent cases, however, that the primary standard to be applied in judging the legality tential competition.[8] The district court dismissed the Government's complaint because it found that the merger would have "no inherent anticompetitive effect" and that it would, in fact, "substantially" increase competition among commercial banks in the Spokane metropolitan area.[9] On direct appeal,[10] the Supreme Court affirmed, *holding* that in the absence of extraordinary circumstances[11] the potential competition doctrine will not bar geographic extension mergers by banks in states with strict statutory restraints on de novo entry and on expansion following entry into a new geographic market. *United States v. Marine Bancorporation*, 94 S. Ct. 2856 (1974).[12]

It is well established that a "necessary predicate" to deciding whether a merger contravenes section 7 of the Clayton Act is the determination of the relevant product and geographic markets.[13] In *Marine Bancorporation*, there was no disagreement that the relevant product market "within which the competitive effect of the merger [was] to be judged" was the "business of commercial banking (and the cluster of products and services

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of a bank merger was still that found in section 7. United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First Nat'l City Bank, 386 U.S. 361 (1967). *See* Klebaner, *Bank Merger Policy and the Third National Bank Decision*, 22 VAND. L. REV. 531 (1969).

8. For a discussion of the potential competition doctrine, see notes 29-46 *infra* and accompanying text.

9. United States v. Marine Bancorporation, 1973 Trade Cas. ¶ 74,496, at 94,244 (W.D. Wash. 1973).

10. *See* 15 U.S.C. § 29 (1970).

11. *See* Justice Department Merger Guidelines ¶ 20, 1 TRADE REG. REP. ¶ 4510, at 6888-89 (1968):

> The Department will ordinarily investigate the possibility of anticompetitive consequences and may in particular circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market.

12. Justice Powell wrote the opinion for the Court. Justices White, Brennan, and Marshall dissented, and Justice Douglas did not participate.

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> The statutory phrase "in any line of commerce in any section of the country" refers to a relevant market which has both *product* and *geographic* boundaries. Determination of this market is the threshold issue and a "necessary predicate" to a finding of a violation of Section 7 of the Clayton Act.
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> . . . The relevant market generally is defined as the "area of effective competition" within which one or both of the participating firms conduct their business. The "area of effective competition" is determined by reference to both a product market—the "line of commerce"—and a geographic market—the "section of the country."

3 J. VON KALINOWSKI, ANTI-TRUST LAWS AND TRADE REGULATION § 18.01 (1971) (footnotes omitted). *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); United States v. du Pont & Co., 353 U.S. 586, 593 (1957).

denoted thereby) . . . ."[14] At issue in the case was the relevant geographic market.

Prior to *Marine Bancorporation*, the Court had consistently held that the "relevant geographic market" to be considered in evaluating the legality of bank mergers was the "local" banking market.[15] It adhered to this position in *Marine Bancorporation* by rejecting the Government's argument that the increasingly anticompetitive structure of the banking industry commanded a broader reading of the statutory phrase "section of the country" in order to effectuate the underlying purposes of section 7.[16]

While the Government agreed that the Spokane metropolitan area was "*a* relevant geographic market,"[17] it argued that a broader reading of "section of the country" was necessary because the statewide banking market was becoming "dominated by only a handful of banks or bank holding companies . . . ."[18] Asserting that "state boundaries delineate a distinct area within which banks are legally insulated from competition by foreign banking institutions,"[19] the Government maintained that banks

14. 94 S. Ct. at 2868. The authority of this proposition was underscored in United States v. Connecticut Nat'l Bank, 94 S. Ct. 2788 (1974), decided on the same day as *Marine Bancorporation*. In that case the Court rejected the district court's finding that there was sufficient competitive overlap between savings banks and commercial banks to include them in the same product market. While recognizing the increasing degree of direct competition between the two types of institutions, the Court adhered to its position that the "unique cluster of services provided by commercial banks" sets them apart for purposes of section 7. *Id.* at 2794. *See* United States v. Phillipsburgh Nat'l Bank, 399 U.S. 350, 359-62 (1970); United States v. Third Nat'l Bank, 390 U.S. 171, 182 n.5 (1968); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356-57 (1963). *See also* United States v. Aluminum Co. of America, 377 U.S. 271, 275 n.3 (1964); United States v. First Nat'l Bank, 376 U.S. 665, 667 (1964).

15. *E.g.*, United States v. Phillipsburgh Nat'l Bank, 399 U.S. 350, 362-65 (1970) (the area in which banks offer the major part of their services and to which local customers can practicably turn for alternatives). Similarly, the market has been defined as the area where "the effect of the merger on competition will be direct and immediate." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963).

The Court's commitment to the concept of localized banking markets was also underscored in *Connecticut Nat'l Bank*:

> As indicated by our opinion today in *Marine Bancorporation*, the relevant geographic market of the acquired bank is the localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank. This area must be defined in accordance with this Court's precedents in prior bank merger cases.

94 S. Ct. at 2795.

16. Brief for Appellant at 33.

17. *Id.* at 54 (emphasis added). *See id.* at 54-65.

18. *Id.* at 32-33.

19. *Id.* at 33-34.

operating within a particular state are consequently required to confine their geographic expansion within the state boundaries, resulting in a "statewide network of linked oligopolies" and the concentration of control of the banking industry in a limited number of financially powerful banks and bank holding companies.[20] Thus, it was argued that where such statewide domination of local markets develops, the preservation of strong, independent banks in local markets, especially in the medium-sized range, would serve to mitigate the adverse effects of the oligopolistic behavior among the state's leading banks and might very well be the only means of achieving such a result.[21]

As support for its "statewide" approach to "section of the country," the Government relied primarily on *United States v.*

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20. *Id.* at 33-35. The basic premise of the theory is that through mergers and acquisitions the same few large institutions will face each other in most of the major local banking markets and that as a result competition may be substantially lessened within the state as a whole—a "section of the country" larger than the narrowly drawn local banking markets which have consistently been held to satisfy that statutory requirement. The Government is particularly concerned with the prospect of major statewide banks acquiring those local banks with sufficient financial capability to challenge the large banks either on their "home ground" or by expanding their operations into other communities. Very simply, the Government envisions a continuing trend of oligopolistic behavior in local banking markets unrestrained by the threat of de novo entry or "toehold" acquisition by those financially strong, smaller banks. Moreover, it contends that once the same few banking institutions have purchased large market shares in most of the local banking markets in the state, the resulting local oligopolies could become "linked." In that event, the statewide institutions would engage in more standardized, less competitive business behavior throughout the state; if one major bank were to attempt to improve its position in a particular local market at the expense of the other major banks, the retaliatory actions of the others in the remaining local markets would harm the economic interests of the entire group. *Id. See* Baker, *Potential Competition in Banking: After Greeley, What?*, 90 BANKING L.J. 362 (1973); Solomon, *Bank Merger Policy and Problems: A Linkage Theory of Oligopoly*, 89 BANKING L.J. 116 (1972).

The Government has been notably unsuccessful in urging this theory on the district courts. *See* United States v. Connecticut Nat'l Bank, 362 F. Supp. 240 (D. Conn. 1973), *vacated and remanded*, 94 S. Ct. 2788 (1974): United States v. Marine Bancorporation, 1973 Trade Cas. ¶ 74,496 (W.D. Wash. 1973), *aff'd*, 94 S. Ct. 2856 (1974); United States v. Trans Texas Bancorporation, 1972 Trade Cas. ¶ 74,257 (W.D. Tex. 1972), *aff'd mem.*, 412 U.S. 946 (1973); United States v. First Nat'l Bancorporation, 329 F. Supp. 1003 (D. Colo. 1971), *aff'd by equally divided Court*, 410 U.S. 577 (1973); United States v. Idaho First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

21. Brief for Appellant at 35.

Pabst Brewing Co.,[22] a 1966 case in which the Court had held section 7 to be violated by a merger which substantially reduced competition in a single state, in a three-state area, and in the nation as a whole. The Court, however, rejected[23] the Government's argument that *Pabst* required only the identification of an "economically differentiated" region of the country within which a merger may "substantially lessen competition,"[24] holding that to so broaden the meaning of "section of the country" would be a total departure from its established connotation as the "area in which the acquired firm is an actual, direct competitor."[25] In addition, the Government simply failed to satisfy the Court that the "linked oligopoly" theory supported the conclusion that the resulting market structure was less than competitive.[26] Citing the observation in *Brown Shoe Co. v. United States*[27] that section 7 deals in "probabilities" and not "ephemeral possibilities," the Court commented that

> [t]he Government's underlying concern for a linkage or network of statewide oligopolistic banking markets is, on [the record presented] at least, considerably closer to "ephemeral possibilities" than to "probabilities." To assume, on the basis of essentially no evidence, that the challenged merger will tend to produce a statewide linkage of oligopolies is to espouse a *per se* rule against geographic market extension mergers . . . .[28]

Because of the Government's primary reliance on the potential competition argument, the Court's ruling on this point was fatal to the Government's case. With the "linked oligopoly" theory unavailable, the case was left to turn entirely on the alleged anticompetitive effects of the merger in the narrowly

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22. 384 U.S. 546 (1966).

23. Some of the Court's language in *Pabst* suggests that the Government may challenge a merger under § 7 without establishing any relevant geographic market . . . . But *Pabst* in reality held that the Government had established three relevant markets in which the acquired firm *actually marketed its products*—a single State, a multi-state area, and the Nation as a whole. . . . And in that case the acquiring firm was an actual competitor of the acquired firm in all three relevant geographic markets. . . . Thus while *Pabst* stands for the proposition that there may be more than one relevant geographic market it did not abandon the traditional view that for purposes of § 7 *"section of the country" means "relevant geographic market" and the latter concept means the area in which the relevant product is in fact marketed by the acquired firm.*

94 S. Ct. at 2869-70 n.20 (emphasis added). *See* United States v. Connecticut Nat'l Bank, 94 S. Ct. 2788, 2796 (1974).

24. Brief for Appellant at 33.

25. 94 S. Ct. at 2870.

26. *Id.*

27. 370 U.S. 294, 323 (1962).

28. 94 S. Ct. at 2870.

drawn local banking market. Under these circumstances, it proved impossible to convince the Court that the potential competition doctrine was applicable within the context of the stringent governmental regulation of the banking industry in the state.

Notwithstanding the result in *Marine Bancorporation*, the potential competition doctrine has become an effective weapon in the Government's assault on the anticompetitive effects of both product and geographic extension mergers.[29] Its theoretical underpinnings are found in *Brown Shoe*, wherein the Supreme Court recognized that the antitrust laws could be used to challenge the anticompetitive effects of oligopoly.[30] The basic economic defect of an oligopolistic market is considered to be the tendency of the limited number of firms in such a market to agree, tacitly or explicitly, on prices for their goods or services that maximize the long-run profits of all;[31] the greater the number of competitors in a given market the less likely it is that they will act in concert.[32] Aggressive enforcement of section 7 was expected both to encourage additional competitors to enter a given market, either by de novo expansion or by a "toehold" acquisition of a small firm, and to encourage increasingly vigorous competition among existing firms in the market.

The first actual reference to the concept of potential competition appeared in *United States v. El Paso Natural Gas Co.*[33] A foreign pipeline company had secured a tentative purchase commitment from a major local utility. After cutting its price to a level low enough to secure the contract for itself, the only local pipeline company successfully effected a merger with the foreign company. The Supreme Court ruled that section 7 was violated by the acquisition of a firm not actually present in the local market but considered to be the only likely market entrant. Specifically, the Court viewed the acquisition as foreclosing the

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29. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); Ford Motor Co. v. United States, 405 U.S. 562 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). *See also* Robinson, *Antitrust Developments: 1973*, 74 COLUM. L. REV. 163, 180 (1974); Note, *United States v. Falstaff Brewing Corp.: Potential Competition Re-examined*, 72 MICH. L. REV. 837 (1974).

30. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

31. P. SAMUELSON, ECONOMICS 496-97 (8th ed. 1970).

32. *Id.*

33. 376 U.S. 651 (1964). *See* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967); Hale & Hale, *Potential Competition Under Section 7: The Supreme Court's Crystal Ball*, 1964 SUP. CT. REV. 171.

procompetitive effects which would have resulted from the acquiring local firm's having to gauge its market behavior with an eye toward the foreign firm's status as a potential competitor.

While *El Paso* was arguably an actual competition case,[34] the Court later in the same term left no doubt as to its recognition of the doctrine of potential competition. In *United States v. Continental Can Co.*,[35] the Court held that section 7 was violated by the acquisition of a major manufacturer of glass containers by a major manufacturer of metal containers because of the potentially adverse effects on the large area of competitive overlap. Of particular concern to the Court was the possibility that the acquiring firm was seeking to insulate itself from the potential competition of the acquired firm in the production of containers for the same "end uses." Similarly, in *United States v. Penn-Olin Chemical Co.*,[36] it was held that a joint venture by two companies, each of which had the capability to act individually, would have violated section 7. The decision turned on what the Court regarded as the unacceptable elimination of the potential competition of the company that might have remained at the edge of the market continually threatening to enter. In *FTC v. Proctor & Gamble Co.*,[37] the Court took the next logical step in the development of the doctrine, ruling that the acquisition of an existing firm by a firm that undeniably would have been the most probable de novo entrant were it not for the merger was a violation of section 7.[38]

Finally, in *United States v. Falstaff Brewing Corp.*,[39] after an extended discussion of the potential competition doctrine, the Court held that a proper assessment of Falstaff as a potential competitor required separate consideration of "whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market."[40] Because this issue

34. Before it would allow the construction of new pipelines, the state required that the pipeline company secure contracts for the purchase of transported natural gas. 376 U.S. at 659-60. Thus, by attempting to secure such a contract from the local utility, the foreign pipeline company was arguably in actual competition with the local company even though it was not "present" in the sense of transporting natural gas in the local market.

35. 378 U.S. 441 (1964).

36. 378 U.S. 158 (1964).

37. 386 U.S. 568 (1967).

38. *Accord*, Ford Motor Co. v. United States, 405 U.S. 562 (1972).

39. 410 U.S. 526 (1973).

40. *Id.* at 532-33.

was remanded to the district court, the Court did not address the Government's argument that entry by merger when de novo or "toehold" entry are arguably viable alternatives encourages continued concentration of the market, with diminished potential for vigorous competition in the future. Thus, the Court expressly left open the question whether section 7 would be violated by a merger which, under the circumstances, would have no effect on the *current* level of competition in the relevant market.[41]

Analysis of these cases reveals the development of at least two parallel but separate theories of potential competition. The first of these is the "probable actual entrant" theory,[42] which is applied to bar a merger when a preponderance of objective evidence indicates that the acquiring firm would enter the market de novo or by "toehold" acquisition were it not permitted to merge with an established firm. The underlying assumption of the theory is that if the merger does not take place, an additional significant competitor in the marketplace would discourage oligopolistic behavior.

The second theory focuses on the "perceived potential entrant" and is based on the economic theory of limit pricing.[43] While the "probable actual entrant" theory requires proof that a firm has the economic incentive and financial capability to actually enter a given market without merger, the "perceived potential entrant" theory broadens the ambit of the potential competition doctrine by requiring proof only that the firms already in the relevant market perceive the noncompetitor as a significant enough threat to their oligopoly to compel maintenance of prices at a sufficiently low level to discourage actual entry by the noncompetitor.

The *Falstaff* argument that the merger should be prohibited so that the would-be acquiring firm would remain a "possible future entrant" into the relevant geographic market might be characterized as an attempt by the Government to secure recog-

41. *Id.* at 537.

42. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 586 (1967) (Harlan J., concurring); Haywood, *Potential Competition and Bank Mergers*, 42 ANTITRUST L.J. 725, 725-26 (1973); Robinson, *supra* note 29, at 183-84; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1384 (1965).

43. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964); Haywood, *supra* note 42; Note, *supra* note 29, at 841-53.

nition of yet a third potential competition theory.[44] If not an entirely distinct theory, it is at least an attempt to moderate the standard of proof required under the "probable actual entrant" theory. Prior to *Falstaff*, the only judicial discussion of the "possible future entrant" theory had been in a series of unsuccessful district court bank merger cases.[45] While affording a new, broader base for attacking allegedly anticompetitive mergers, the theory is, in effect, the logical extension of the two established theories. It simply reflects the argument that, because of the trend toward increasing concentration in a given market, if objectively measurable market data indicate that an acquiring firm has both the financial capability and the economic incentive to enter that market other than by merger with an established firm, it should be compelled to remain a possible future de novo or "toehold" entrant despite its claims that a merger would be the only method by which it would in fact enter.[46]

In *Marine Bancorporation*, the legality of the proposed merger was evaluated solely in traditional terms of its effect on the narrowly drawn local banking market. The Court reached the undeniably logical conclusion that because of the strict statutory restraints on de novo or "toehold" entry into the particular local banking market, a challenge to the merger based on the potential competition doctrine could not be sustained.[47] With this decision, the Government again failed to obtain a definitive ruling on the open question of whether section 7 embraces the "possible future entrant" theory of potential competition. Nevertheless, the Court did discuss "two preconditions" that must be satisfied before it would rule whether this theory does in fact evince a section 7 violation.[48] Specifically, the Court stated that it must be determined whether alternative means of entering a given geographic market are available and whether those means would offer a substantial likelihood of ultimately producing deconcentration or other procompetitive effects in that market.[49]

44. Brief for Appellant at 27-36, United States v. Marine Bancorporation, 94 S. Ct. 2856 (1974). *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 538 (1973) (Douglas, J., concurring); *id.* at 545 (Marshall, J., concurring); Robinson, *supra* note 29, at 185-90; Note, *supra* note 29, at 854-61.

45. *See* cases cited in note 20 *supra*.

46. *See generally* Turner, *supra* note 42, at 1379-86.

47. 94 S. Ct. at 2879.

48. *Id.* at 2875-78. In his dissent to the *Connecticut National Bank* decision, Justice White maintained that the "deconcentration" theory was in fact recognized by the Court in *Marine Bancorporation.* United States v. Connecticut Nat'l Bank, 94 S. Ct. 2788, 2799 (1974).

49. 94 S. Ct. at 2875.

The Government's failure to satisfy these preconditions in *Marine Bancorporation* was attributable in large measure to the Court's rejection of the "linked oligopoly" theory. By limiting analysis of the anticompetitive effects of the merger to the Spokane metropolitan area, the restrictive Washington banking laws[50] became determinative. Within this limited purview, the Court was justified in concluding that even if it were assumed that NBC could conceivably have entered Spokane de novo or by "toehold" acquisition, the Government had failed to establish that the ultimate result would be significantly improved competition in the Spokane-area market.[51]

Unquestionably, the antitrust attitude of the Court has changed.[52] The Government's chances for successful application of the potential competition doctrine in its effort to check the trend toward increasing concentration in the commercial banking industry have been diminished.[53] However, notwithstanding this immediate rebuff, it is noteworthy that the Court expressly recognized that by "introducing evidence of concentration ratios of the magnitude [found in the Spokane-area market] the Government established a prima facie case that [that] market was a candidate for the potential competition doctrine."[54] The broad sweep of this significant observation was limited only by the Court's statement that the "same factor that usually renders [banking] markets concentrated and theoretical prospects for potential competition § 7 cases—regulatory barriers to new entry—will also make it difficult to establish that the doctrine invalidates a particular geographic extension merger."[55] Thus it would be erroneous to conclude that the potential competition doctrine has been generally rejected;[56] it would be more appro-

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50. *See* note 2 *supra*.
51. 94 S. Ct. at 2878.
52. In one of the other major section 7 cases of the 1973 term, Justice Douglas suggested, in dissent, that by affirming the legality of a deep mining coal producer's acquisition of a strip mining producer the Court was reflecting a "deep-seated judicial bias against § 7 of the Clayton Act." United States v. General Dynamics Corp., 415 U.S. 486, 527 (1974). *See Supreme Court: Emergence of a New Antitrust Majority Highlights Business Regulation Decisions in 1973-74 Term*, BNA DAILY REPORT FOR EXECUTIVES, Aug. 20, 1974, at C-1; *New Direction for Mergers* (pt. 1), 676 BNA ANTITRUST TRADE REG. REP. B-1 (1974); *id.* (pt. 2), 677 BNA ANTITRUST TRADE REG. REP. B-1 (1974).
53. To some commentators, this development is hardly regrettable. *See, e.g.*, Wu & Connell, *Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers*, 59 VA. L. REV. 860 (1973).
54. 94 S. Ct. at 2874.
55. *Id.* at 2875.
56. The Court, in fact, recently summarily affirmed a potential com-

priate to expect that *Marine Bancorporation* will be limited to its facts. Since an underlying principle of the potential competition doctrine is relative ease of entry into a given market, the Court, confronted with a situation wherein this flexibility was significantly limited by statute, made a most logical decision. Within the context of a narrowly drawn local banking market, statutory restrictions on geographic expansion rebut, for all practical purposes, conjectural market analyses of the "possible future entrant" theory.[57]

Coupled with the Court's suggestions in earlier cases that section 7 may, in fact, require the preservation of possible future entrants into a given market as a means of insuring effective long-run competition,[58] the extensive discussion in *Marine Bancorporation* of the "two preconditions" should provide substantial encouragement to the Antitrust Division as it charts its future section 7 strategy. The starting point for its efforts might be to satisfy the "preconditions" by concentrating on objectionable mergers in industries not characterized by heavy govern-

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petition case in the nonbank area. Phillips Petroleum Co. v. United States, 94 S. Ct. 3199 (1974).

57. The three dissenting Justices maintained that the majority had afforded determinative weight to what, in effect, were erroneous conclusions as to the impact of the Washington banking laws. This division of opinion is largely attributable to disagreement over the facts and is best reflected by the dissent's claim that "there were no impenetrable legal or economic barriers to [NBC's entering the Spokane market other than by merger with the Spokane bank]; and it is sufficiently plain from the record that absent merger with [the Spokane bank], NBC could and would either have made a toehold entry or been instrumental in establishing a sponsored bank in Spokane." 94 S. Ct. at 2881. This analysis is clearly based on a repudiation of the higher standard of proof required of the Government, undeniably a key factor in the Court's decision, and on an underlying belief that such a rigorous standard unacceptably frustrates the purpose of section 7 to "bar mergers which may contribute to further concentration in the structure of American business." *Id.* at 2885.

While the dissent vigorously disagreed with the higher standard of proof applied by the majority in its analysis of the facts (a standard which the dissent believed altered the basic elements of the potential competition doctrine by requiring proof not only of likelihood of entry, but of long-run success after entry), it, too, focused only on the Spokane-area market. A more comprehensive dissent—entirely consistent with the belief of the actual dissenters that a lower standard of proof should be accepted in order to effect the underlying purposes of section 7—would have urged acceptance of the economically sound, albeit empirically deficient, "linked oligopoly" theory.

58. United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973), citing Ford Motor Co. v. United States, 405 U.S. 562, 587 (1972), FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967), and United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964).

mental regulation. Equally important to its litigation strategy is the careful attention that it must give to the Court's firm commitment to "economic realities"—the common ground of the three major section 7 decisions of the 1973 term.[59] It is quite apparent from these decisions that if the Court is to be satisfied that the Government is adhering to the *Brown Shoe* standard of "probabilities, not . . . ephemeral possibilities,"[60] it will require substantial evidentiary support for the microeconomic theories and the competitive realities upon which section 7 actions have been based.[61] By prosecuting those cases that would clearly satisfy the *Marine Bancorporation* preconditions, the Government would be virtually assured that the Court would render a definitive ruling on the "possible future entrant" theory. An affirmative decision could reasonably be expected in light of the Court's encouraging suggestions[62] and its oft-repeated dedication to the proposition that section 7 is designed to arrest mergers "at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency."[63]

As to the applicability of the potential competition doctrine to the particular problem of bank mergers, the Government is left with three alternatives. The first is to continue to argue that de novo and "toehold" entry are viable alternatives to entry

59. United States v. Marine Bancorporation, 94 S. Ct. 2856 (1974); United States v. Connecticut Nat'l Bank, 94 S. Ct. 2788 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

60. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

61. The Court's position on this matter was made very clear in United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974), when it rejected the Government's assertion that coal production statistics alone were indicative of an impermissibly concentrated market. While such statistics would presumably have been sufficient to make out a prima facie section 7 case under United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court focused instead on the availability of coal reserves as the key factor in determining whether the acquired company could be considered a potential competitor. For support, it cited *Brown Shoe*:

> Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but *only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.*

415 U.S. at 498, quoting Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962) (emphasis added).

62. *See* cases cited in note 58 *supra.*

63. United States v. Marine Bancorporation, 94 S. Ct. 2856, 2870 (1974), quoting Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962). *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

by merger in a traditional local banking market. This alternative might offer some possibility for success if applied to challenged bank mergers in states with less stringent statutory regulation of the banking industry. The second alternative is to continue to urge acceptance of the "linked oligopoly" theory through a broadened reading of "section of the country." Although that theory is based on sound economic analysis,[64] it is clear from *Marine Bancorporation* that analysis unsupported by empirical data will stand little chance of acceptance by the Court. The Government's remaining alternative is to seek specific legislation to curtail the "expansion by acquisition" activity of major statewide and nationwide banks and bank holding companies. This third alternative would seem to afford the most comprehensive and consistently successful long-run solution to the problem.[65]

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64. *See* note 20 *supra.*

65. Speaking at a seminar on merger law at the annual convention of the Federal Bar Association, Peter Ward, Assistant Director of the Federal Trade Commission, Bureau of Competition, argued that since the Supreme Court will likely continue to decide cases brought against conglomerates strictly on economic grounds as provided by section 7, Congress should amend the Clayton Act to require consideration of social and political consequences when determining the propriety of conglomerate mergers. BNA DAILY REPORT FOR EXECUTIVES, Sept. 5, 1974, at A-15. On the other hand, Bruce B. Wilson, Deputy Assistant Attorney General in the Antitrust Division, maintained that incorporating social philosophy into the Clayton Act would be a useless exercise because such abstract matters cannot be measured quantitatively. While agreeing that the Justice Department and the FTC will have to prepare more detailed and elaborate economic proof of injury if anticompetitive conglomerate mergers are to be blocked successfully, Wilson argued that vigorous enforcement of merger law, based upon sound determinations of the economic consequences of an extension acquisition, would solve any attendant social and political problems. *Id.* The most effective solution in the bank merger area would seem to lie somewhere between these two viewpoints —most likely in narrowly drawn legislation designed specifically to curtail the anticompetitive activities of banks and bank holding companies.