

Trade Regulations: The Applicability of Section 7 of the Clayton Act to Bank Mergers

James B. Young

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Some authorities have felt that the result of these decisions will be a serious impairment of police effectiveness to solve crimes which could have been solved with a few hours of police interrogation.²⁸ Those who argue in support of the Court's position feel that the sacrifice in police efficiency is a necessary evil which must be endured if individual freedom and liberty are to be protected against police tyranny.²⁹ It would seem desirable that a complete clarification of the law be forthcoming from the Court so that there would be a definite uniform standard which could be followed throughout the states.

AARON TWERSKI

Trade Regulations: The Applicability of Section 7 of the Clayton Act to Bank Mergers—In *United States v. Philadelphia National Bank*,¹ the Supreme Court held, in a case of first impression, that section 7 of the Clayton Act is applicable to bank mergers. The Philadelphia National Bank and the Girard Trust Corn Exchange Bank, the second and third largest commercial banks with main offices in the metropolitan area of Philadelphia, sought to merge into one consolidated bank. If such a merger had succeeded, the resulting bank would have been the largest in the immediate Philadelphia area. However, as soon as the banks had secured approval of such merger from the Comptroller of the Currency,² the government brought suit under section 1 of the Sherman Act³ and section 7 of the Clayton Act.⁴ The Court then enjoined the proposed merger agreement, holding that section 7 of the Clayton Act applied to bank mergers, and that the anti-competitive effects of the proposed merger violated its provisions.⁵

²⁸ *Symposium—Law and Police Practice; Inbau, Restrictions in the Law of Interrogation and Confessions*, 52 Nw. U. L. REV. 77 (1957). Professor Inbau also criticizes the Court for usurping a function which does not belong to them—that of passing over proper police practices. That in truth, this is what the Court is doing can be seen from the majority decision in the *Haynes* case where Mr. Justice Goldberg said that the Court was passing on proper and permissible police tactics.

²⁹ *Symposium—Law and Police Practice; Liebowitz, Safeguards in the Law of Interrogation and Confession*, 52 Nw. U. L. REV. 86 (1957).

¹—U.S.—, 83 Sup. Ct. 1715 (1963).

² The Comptroller's approval of such agreement is required under 73 STAT. 462 (1959), 12 U.S.C. §215 (Supp. 1963). Such approval in turn may not be given under the BANK MERGER ACT of 1960, 74 STAT. 129 (1960), 12 U.S.C. 1823(C) (Supp. 1960), until the Comptroller has received reports from the Attorney General, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, on the probable effects of the proposed transaction on competition.

³ 26 STAT. 209 (1890), as amended, 15 U.S.C. §1 (Supp. 1960).

⁴ 38 STAT. 731 (1914), as amended, 15 U.S.C. §18 (1958).

⁵ The Sherman Act issue was never reached in this case, due to the fact that the majority based its decision on §7 of the Clayton Act. It should be noted, however, that in *dicta* the Court considered §1 of the Sherman Act to be applicable to bank mergers, and that Justice Goldberg, in his dissent, felt that there was a strong Sherman Act issue in the case. See Note, 75 HARV. L. REV. 757, 759 (1962) for a discussion of this question.

In reaching its decision, the Court was faced first with the question of whether the consolidation or merger came within the language of section 7 of the Clayton Act.⁶ Literally, section 7 reaches "stock and share capital" acquisitions, as well as "asset" acquisitions made by corporations "subject to the jurisdiction of the Federal Trade Commission." The Court noted that a merger did not fit neatly under any of these terms and deemed it necessary to look at the Congressional design and history behind section 7, in order to determine the proper status of a merger thereunder.⁷

In doing this, the court referred to the fact that prior to the amendment of section 7 in 1950, the courts had found mergers to be beyond the act's reach. Justice Brennan, writing for the majority, went on to say that with this background in mind in 1950, Congress amended section 7 to include an asset acquisition provision. On these premises and by deductive reasoning, which somewhat stretches the imagination, the Court then concluded that even though the 1950 amendment did not expressly refer to mergers, Congress intended to close the merger loophole of the act by this amendment. The Court stated that:

. . . the stock-acquisition and asset acquisition-provisions, *read together*, reach mergers which fit neither category perfectly but lie somewhere between the two ends of the spectrum. . . .⁸

The Court also noted that:

So construed, the specific exception for acquiring corporations not subject to the F.T.C.'s jurisdiction excludes from the coverage of §7 only asset acquisitions when not accomplished by merger.⁹

Having held that section 7 of the Clayton Act was applicable to mergers, the Court turned to the problem of determining if "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." The Court found that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking" composed a

⁶ Note 4 *supra*. The act reads as follows:

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 where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly

⁷ It is interesting to note that if the Court had found that the proposed agreement was a pure asset acquisition, §7 would have been inapplicable. The reason for this is due to the fact that the F.T.C. has no jurisdiction over banks. F.T.C. ACT, §5, 38 STAT. 719 (1914), 15 U.S.C. §45(a) (6) (1958).

⁸ Note 1 *supra*, at 1730.

⁹ *Ibid*.

distinct line of commerce, that the four-county area in which the banks' offices were located was the section of the country within which the proposed merger's competitive effect should be considered, and that the merger of the two banks would result in a single bank controlling at least 30% of the commercial banking business in the relevant area, which might substantially lessen competition. The Court concluded that the defendant banks had offered no satisfactory evidence to rebut these findings and that, therefore, the proposed agreement should not be allowed.

The *Philadelphia National Bank* decision will justly incur much concern and criticism in and by the banking world.¹⁰ The remainder of this article will be devoted to two particular portions of the Court's opinion which merit disfavor: the Court's ineptly-reasoned determination that Congress intended in 1950 to include bank mergers within the purview of section 7 of the Clayton Act, and the lack of clarity by the Court in defining just what it will consider to be an enjoinable merger in the future.

As has already been indicated, the Court, in holding that bank mergers were subject to section 7, laid great stress on the fact that prior to its 1950 amendment, section 7, by judicial fiat, had been held not to apply to such mergers. The main basis of the Court's rationale was that if a liberal construction were not given to section 7, it would still contain a merger loophole, placing industries, such as banking, at least partially beyond the scope of the anti-trust laws. This, the majority felt, was not the Legislature's intention, or else Congress would have exempted banking from the stock acquisition as well as the asset-acquisition provision of section 7.¹¹

While the majority's somewhat negative approach is not wholly devoid of logic, it does not stand up well when viewed in light of our federal law-makers' positive and explicit handling of commercial banking. Presently, this field is governed by a number of highly specialized agencies and individuals, all created or empowered by act of Congress.¹² They include the Board of Governors of the Federal Reserve Sys-

¹⁰ One of the first persons to criticize the Court's decision has been Senator A. Willis Robertson, Chairman of the Senate Banking and Currency Committee. A day after the Court rendered its decision he stated:

I was shocked to hear of the Supreme Court's decision in the Philadelphia bank merger case. This is one of the most incredible cases of judicial legislation which the Court has handed down.

I was shocked both at the result—and at the Court's casual disregard for Congressional intent and purpose.

Report To The Members of the Banking Committee (June 21, 1963).

¹¹ It should be noted that under such rationale, the Court might now hold that acquisitions (similar to the one in the present case) by "common" and "air carriers," also come within the purview of §7. "Common" and "air carriers," like "banks," are not subject to the jurisdiction of the F.T.C., *supra* note 7.

¹² See Klebaner, *Federal Control of Commercial Bank Mergers*, 37 *IND. L. J.* 287 (1962) and Comment, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 *YALE L. J.* 502 (1962).

tem,¹³ the Federal Deposit Insurance Corporation,¹⁴ and the Comptroller of the Currency.¹⁵ Surely, Congress must have been cognizant of these specialists when it amended section 7 in 1950, as well as in later years, when it rejected bills especially designed to include bank mergers within section 7.¹⁶ If Congress felt that these agencies and individuals were inadequate, or that commercial bank mergers should be governed by the less capable hands of the Justice Department and the courts, then why didn't it amend section 7 to include bank mergers as was proposed?

Congress also empowered these agencies and individuals in 1960 to govern bank mergers, under the Bank Merger Act. With such an explicit grant of authority, it is difficult to see how the Court could decide as it has, for why should Congress create this act if it felt that such transactions were already governed by section 7? The fact of the matter is that the *Philadelphia National Bank* case has undone much of the work of Congress by taking away a substantial portion of the power it had given its specialized agencies and agents under the Bank Merger Act and placing it in the hands of the courts and Justice Department. As a result, these administrators are presently left with little more than an initial veto power under the Act. Now, if the courts see fit, a bank merger, approved under the Bank Merger Act, may still be prevented or delayed by the courts at the insistence of the Justice Department. Thus, the banker is left in the unenviable position of not being able to rely on the fact that his proposed business transactions have been approved by federal agencies, which approval the law requires him to secure.¹⁷

As Justice Harlan pointed out in his dissent, even the Justice Department, seven years after section 7 was amended, maintained that asset acquisitions by banks were not covered by section 7.¹⁸ Harlan goes on to state that the 1950 amendment was aimed at ordinary commercial¹⁹ and industrial²⁰ fields rather than at the specialized field of banking:

¹³ 49 STAT. 705 (1935), 12 U.S.C. §263 (1942).

¹⁴ 64 STAT. 873 (1950), 12 U.S.C. §§1815, 1816 (1950).

¹⁵ Note 2 *supra*.

¹⁶ H. R. REP. No. 5948, 84th Cong., 1st Sess. (1955); S. REP. No. 198, 85th Cong., 1st Sess. (1957); S. REP. No. 722, 85th Cong., 1st Sess. (1957).

¹⁷ Under the Bank Merger Act of 1960, the Justice Department could merely render an advisory opinion on the anticompetitive effects of the proposed merger, which could be disregarded by the Comptroller of the Currency in making his final decision. Now, an unfavorable opinion by the Justice Department, in effect, has almost the force of law.

¹⁸ Note 1 *supra*, at 1749. Citing, *Hearings on the Financial Institutions Act of 1957 Before a Subcommittee of the Senate Committee on Banking and Currency*, 85th Cong., 1st Sess., pt. 2, at 1030 (1957).

¹⁹ Note 1 *supra*, at 1757. Citing, among others, *Hearings on H.R. 2737 before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st and 2d Sess., 5-6, 17, 57-59 (1950).

²⁰ *Id.* citing, S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950); H. R. REP. No. 1191, 81st Cong., Sess. 2-3 (1949).

. . . the absence of any banks in the legislative history of the 1950 amendment, viewed in light of the prior congressional treatment of banking as a distinctive area with specialized characteristics and needs, compels the conclusion that bank mergers were simply not then regarded as part of the loophole to be plugged.²¹

Therefore, it is evident that the majority's "loophole plugging" philosophy is certainly not founded on a strong basis of congressional intent. Congress has expressly evinced its desires to the contrary. It has seen fit to treat commercial banking as a specialized industry, and has rejected proposals to place such industry within the confines of section 7.

Perhaps the greatest problem created by the *Philadelphia National Bank* case, however, is due to what the Court did not say. The Court stated that bank asset acquisitions, completed in a manner other than by merger, are still not within the scope of section 7, but vaguely defined just what it will now consider to be an enjoined merger.

The Court did say that an agreement (such as the one in issue) involving the creation of "an entity different from either of the constituent banks," though technically a consolidation, would be considered a merger for purposes of section 7.²² A consolidation is distinguished from a merger as follows:

A consolidation is the dissolution of the corporation previously existing, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of existence. It is, in effect, the surrender of the old charters. [PNB's was not so surrendered] the acceptance thereof by the Legislature, and the formation of a new company out of such portions of the old as enter into the new.

On a consolidation of the two corporations, a new corporation comes into being, while by a merger one is continued and another is merely merged into it.²³

Thus, in effect, both bank consolidations and mergers are now subject to section 7 of the Clayton Act.

As to what other types of agreements the courts may strike down, however, it is far from certain. The Court defined what it would, henceforth, consider to be a merger as any "*clearly evasive transaction . . . tantamount in its effects to a merger.*"²⁴ (Emphasis added.) To arrive at an exact meaning of such words is no easy task.

An example of a transaction which does not fall within the Court's literal definition of a merger or a consolidation is the acquisition of a portion of another bank's assets or liabilities to pay deposits, wherein there is a dissolution of neither bank nor the creation of a new entity.

²¹ Note 1 *supra*, at 1758.

²² Note 1 *supra*, at 1724 n.7.

²³ 1 ZOLLMAN, BANKS AND BANKING, §151, at 103 (rev. ed. 1936).

²⁴ Note 22 *supra*.

Such a transaction is distinguished from a merger or a consolidation under the terms of the Bank Merger Act.²⁵ But while the Court speaks of this type of transaction, its language does little to clear up its status. This and other possible agreements, therefore, must await definition through further litigation, at the expense of the banking industry.

In summary, the *Philadelphia National Bank* case places bank mergers within the confines of section 7 of the Clayton Act. To reach such a conclusion, the Supreme Court has read the history of the Clayton Act much more with an end in sight than with the proper means of getting there. As to what type of transaction will be considered an enjoined merger in the future is, as yet, uncertain. There is one result of this case which is apparent, however, that being its future unpopularity with the commercial banking world.

JAMES B. YOUNG

²⁵ Note 2 *supra*.