Bank Mergers and the Six-Headed Monster

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"We think sensible accommodation of court and agency permits nothing less if this six-headed monster created to regulate bank mergers means anything other than senseless feuding and a colossal waste of time, effort, and money."\(^1\)

The commercial banks play a vital economic role. So essential is their part, that it is not surprising to find them the subject of extensive regulation.\(^2\) It might, in fact, surprise one that banks compete at all. Current interest rates demonstrate, however, that they do compete and virulently so. Between the maximum and minimum interest rates, fixed for practical purposes by government regulation, lies an area of considerable play. The prevailing "prime" rate, however, generally hovers a fraction of a per cent above the minimum.

The combined effects of regulation and competition force the banking industry to operate on a relatively thin margin. On the other hand, salaries, accounting services, furnishings, etc.—general operating costs—have steadily increased. The resulting "fixed-income inflation squeeze" is a phenomenon familiar to every homeowner. The obvious answer to a thinner margin of profit is increased volume. Sound banking regulation, however, limits this solution. Maximum lending limits reflecting the volume of deposits are imposed by law. The solution, then, demands an increase in deposits. While banks can bring some promotional influence to bear in this area, in large part deposits are governed by the factor of neighborhood convenience. Recognizing this factor banks "follow their deposits market into the suburbs" by opening new branches, "de novo branching." In most states, however, such branching is restricted, in some prohibited altogether.\(^3\) In all cases the solution is clumsy. Management often becomes a problem, not to mention the large initial outlay of funds.

\(^1\) Judge Lloyd MacMahon in Manufacturers Hanover, infra note 48, at 80,719. The sixheads are: The Department of Justice, the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corp., the state banking agencies, and the courts.


\(^3\) E.g., ILL. REV. STAT. ch. 16½ § 106 (1963) (prohibited); VERNON'S ANNO. MO. STATS. § 362.155 (1951), TENN. CODE § 45-211 (1964) (restricted).
Beset with these woes, banks instinctively turn to the merger device to increase lending limits and cultivate, by the branching effect, local deposits markets. Other advantages follow. Management duplication is reduced. In most cases accounting costs per dollar of deposits are reduced. Frequently a merger prevents suspension of a failing bank’s charter; in such distressed situations the “shotgun” merger benefits the entire community.

In light of all this, it is not surprising that during recent years the number of all banks consumed by mergers exceeds the number of new banks embarking on these choppy waters. The resulting concentration, however, is a banking fact-of-life onto which legal consequences have recently attached. The tale of these consequences, the subject of this Comment, begins with mention of three federal statutes: the Clayton Act, the Sherman Act, and the Bank Merger Act.

II. THE STATUTES

The Clayton Act, as passed in 1914, provided:

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce.

The act was designed to do many things that the Sherman Act had proved unable to do. Sherman required, for example, proof of an actual restraint of trade. Under it a combination of two competing dominant giants would yield. Where, however, the same resulting dominance was accomplished by a series of individually insignificant combinations, Sherman was powerless. In short, Sherman could reach the “swallow” but not the series of individual “bites.”

In response to these inadequacies Clayton was passed. Section 7 of that act

— "Shotgun merger" denotes an emergency merger of a failing or insolvent bank into a more sturdy bank, often as an alternative to greater disasters.
— On January 1, 1950, there were 14,174 commercial banks in the nation. In the 1960's 887 new banks were chartered, but 1,503 banks were absorbed by mergers and 98 other banks discontinued business for other reasons, yielding a total of 13,460 such banks on December 31, 1959. H. Rep. No. 1416, 86th Cong., 2d Sess., 1960 U. S. Code Cong. & Ad. News 1995, 1998. Since 1960 the decrease has continued until 1968; in the past two years the number of banks extant has increased somewhat. Hearings on S. 1698 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess. 20 (1965). The Supreme Court decision in Philadelphia, infra, has much to do with this otherwise inexplicable reverse in “the merger movement.”
was designed "to arrest in its incipiency,"10 "to nip... in the bud,"11 the substantial lessening of competition caused by corporate combinations. By its terms a showing that the condemned effect had in fact occurred was unnecessary; it sufficed simply to show that it might.12 "Reasonable probability" or "threat" became the test. In *duPont*,13 for example, the questioned transaction was thirty years old; the district court concluded that thirty years of non-restraint negated any reasonable probability of present or future restraint. However, the Supreme Court, reversing, held that the district court's undisputed findings of fact led to the opposite conclusion. Under Clayton it was no longer essential to pinpoint a transaction and show that it, in and of itself, constituted a restraint of trade. It was enough to show that the denounced transaction represented a piece of a larger mosaic. The provision for viewing the transaction in the context of "any section or community" and in "any line of commerce" allowed a telescoping into every meaningful economic plane. After initial hesitation the term "corporation engaged in commerce" was found applicable to banking.14

The weak link in the scheme proved to be the provision prohibiting intercorporate acquisitions of "stock or other share capital." Asset acquisitions, the ultimate goal of such stock acquisitions, were paradoxically immune. While the section might conceivably have been judicially expanded,15 it was not.

In 1950 Congress amended §7 to read:

... 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... the effect... may be..." (emphasis added)16

Did Congress intend to close one loophole by opening another? The question was to haunt the Supreme Court thirteen years later. Was a legislative

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12 The "condemned effect" had to be a substantial one. Cf. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922), where the Court pointed out that some reduction in competition always results from a horizontal merger, but that in order for the combination to be struck down the reduction had to be substantial. See, also, United States v. Manufacturers Hanover Trust Co., TRADE REG. REP. ¶ 71,408 at 60,762 (1965), where McMahon, J. pointed out that concentration had to be shown to be "undue" before the result was prohibited.
14 *Transamerica*, supra note 11.
15 H. REP. No. 1191, 81st Cong., 1st Sess. 11-12 (1949).
grant of Clayton Act immunity intended for those industries beyond the jurisdiction of the FTC? If so, why? Perhaps Congress chose distinct enforcement channels for the "regulated" and "unregulated" sectors of the economy. Perhaps, too, a more inclusive amendment could not have gained passage.17

Nevertheless, during the 1950's in terms of purely statistical results, the Sherman-Clayton Act combination was viewed as a failure in preventing a parade of bank mergers and a corresponding steady increase in concentration in the commercial banking industry. The Congressional response to this pattern was the Bank Merger Act of 1960, an act to amend § 18 (c) of the Federal Deposit Insurance Act. The 1960 Act prohibited insured banks from merging or consolidating with any other insured banks

without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation [FDIC] if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

The Act outlined substantive criteria for the granting of approval by the respective agencies:

In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital

17 An extensive memorandum was prepared by Matthew Hale, Chief of Staff, Senate Banking and Currency Committee, entitled "Legislative History of Section 7 of the Clayton Act, and Its Relation to the Bank Merger Act of 1960." It is set out on page 324 of the 1965 Hearings, infra note 77. The memorandum describes two bills in special detail: H.R. 2734, 81st Cong., 1st Sess (1949) and H.R. 5948, 84th Cong., 1st Sess. (1955). The former bill passed and became the Celler-Kefauver 1950 amendment to Clayton Act § 7. Mr. Hale presents convincing evidence that the bill was passed with the complete understanding that assets acquisitions of corporations not subject to the FTC would be immune. Mr. Hale comments:

While the record does not disclose any statement of a reason for this decision, it may well have been based on the feeling that the addition of such a provision [to include, say, banks, etc.] would have resulted in the defeat of the bill. It seems pertinent to point out that Reorganization Plan No. 1 of 1950, which would have transferred to the Secretary of the Treasury all the powers of officials in the Treasury Department, including the Comptroller of the Currency, was defeated by a vote of 65 to 13, on the ground that the Comptroller’s functions should be left vested in him (96 CONG. REC. 6891, 6898, (1950). The latter bill, H.R. 5948, introduced by Congressman Celler in 1955, would have placed bank mergers under section 7 of the Clayton Act. The bill was passed in the House on February 6, 1956, but was killed in Senate committee. When S.1062 (86th Cong., 2d Sess., the bill that became the Bank Merger Act of 1960) was debated on the House floor, Congressman Celler reluctantly supported it, stating that he would have preferred more rigorous legislation along the lines of § 7. Conceding that Congress had a "grand design" in 1950, the evidence is overwhelming that the Supreme Court in 1963 had an even "grander" one.
structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this Act. *In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition* (including any tendency toward monopoly), and *shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.* (emphasis supplied)

Unless an emergency is found to exist, the Act also requires, “in the interests of uniform standards” the approving agency to request from the Attorney General and the other two agencies reports on the competitive factors involved.

The overriding theme of the Bank Merger Act of 1960 was that existing laws were inadequate to deal with the policing of bank mergers from an antitrust standpoint.

Because 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, the act offers “little help,” in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers. Although the Sherman Act applies to asset acquisitions as well as to stock acquisitions, it has been of little use in controlling bank mergers.19

The scheme, then, provided by Congress in the Bank Merger Act of 1960 was premised first, on the conclusion that existing laws were inadequate, and second, on a conclusion that this inadequacy was due to the fact that bank mergers are accomplished by asset acquisitions rather than by stock acquisitions. The necessary middle term in the syllogism, the key term, is missing: that whatever type of asset acquisition it is by which banks merge, it is that type of asset acquisition over which Congress in 1950 imposed §7 sanctions limited strictly to corporations subject to the FTC. It is primarily on this key middle term that the Supreme Court in *United States v. Philadelphia National Bank*20 took issue with the 86th Congress’ interpretation of the intent

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18 In his Report to Congress for 1964 the Comptroller of the Currency suggested jettisoning the advisory opinions of the Attorney General and the other two banking agencies from the Bank Merger Act. They represent, he argued, a judgment on only one factor. “Nevertheless, differences between the advisory opinions and the decisions on mergers have often been falsely cited as evidence of differences in merger policy among the banking agencies. Moreover, five years of experience under the Bank Merger Act have demonstrated that the advisory opinions of the banking agencies not faced with the responsibility of the decision are ordinarily routine and rarely present facts or ideas unknown to the responsible agency. There seems to be no proper reason for continuing this procedure.” *Antitrust & Tr. Reg. Rep. No. 217, A-7* (1965).
of the 81st Congress. The Supreme Court in Philadelphia conceded that the middle term in the syllogism was, indeed, the clear inference given by the 1960 Congress. It pointed out, however, an essential fact to note here: that a 1960 Congressional gloss placed on a 1950 enactment is not legislative intent. By no means, however, does it argue to the contrary conclusion, and legislative research subsequently undertaken reveals that the 1960 Congress, beyond any reasonable doubt, had in point of fact correctly read the intent of the 1950 Congress! What should have been made clear in Philadelphia, however, was that if the evils of bank concentration were perceived by Congress in 1960, there were clearly two remedial roads open: bank regulatory legislation, the road taken, and further amendment to §7, the more obvious approach. The House Report on the Bank Merger Act of 1960 suggests a reason for the road taken:

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. . . .

. . . out of the hearings one principle emerged, on which all witnesses seemed to agree, as a starting point: Some bank mergers are in the public interest, even though they lessen competition to a degree. (emphasis supplied)

If the bill vests ultimate authority to pass on mergers in the agencies, on whom does the initial authority rest? The point needs belaboring no further.

Honesty demands, however, the admission that the legislative intent behind the Bank Merger Act, no matter how clear and convincing, is not in any way conclusive of whether Clayton Act §7 applies to banks. In 1960 Congress was working on the Federal Deposit Insurance Act. How they would have amended the Clayton Act in 1960 seems fairly apparent, but the point is the 86th Congress did not touch the Clayton Act. Why? Congress was laboring under a factual assumption the Supreme Court was about to prove untrue—that conventional antitrust laws were inapplicable to the commercial banking industry.

The bill became law, but dissatisfaction with commercial bank regulation continued. The Comptroller of the Currency revealed a permissive policy toward national bank mergers. The “merger movement” proceeded apace; the advisory report of the Attorney General became something to be noted and filed. Something, it seemed, needed to be done. Something was about to be done.


*Supra note 19, at 2022.
III. THE EIGHT CASES

Eight bank mergers have been challenged in court by the Justice Department. The cases were chosen with care—each contains its own peculiar twist, each is designed to open a new aspect. Because each is set in unique facts and since they represent an orderly logical development, it seems appropriate to consider them individually.

A. Philadelphia

Philadelphia National Bank and Girard Trust Corn Exchange Bank, second and third largest in the metropolitan area, agreed in 1960 to merge with Philadelphia’s national charter. Girard assets were to be exchanged for shares in the resulting institution (an assets acquisition). The resulting bank would be the largest in the area and would control over one-third of that banking market. The increase in concentration would be large. Advisory reports from the agencies and Attorney General were unanimously unfavorable. Nevertheless, the Comptroller, finding beneficial economic effects and adequate local banking alternatives, approved the merger. On the following day Justice instituted a Sherman §1 and Clayton §7 proceeding. Following a trial in which the government relied almost exclusively on Sherman §1, the district court held §7 inapplicable and §1, while applicable, not violated. Appeal was taken directly to the Supreme Court under the Expediting Act, where the judgment was reversed.

Justice Brennan conceded that if this consolidation were to be viewed as an asset acquisition §7 would be inapplicable. He traced, however, a line of prior decisions holding §7 inapplicable to mergers and found this frailty the setting into which the Celler-Kefauver 1950 amendment fit. The amendment was viewed as part of a grand “congressional design” to close loopholes in the antitrust laws. Thus, the asset acquisition exemption for corporations not subject to the FTC covered only “pure assets acquisitions”—i.e. “...when not accomplished by merger.”

Legislative history was found to support the view that mergers were to be viewed “basically” as stock transactions and to show a design “to place corporate mergers on the same footing”, whether resulting in stock or asset ac-

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38 In commercial banking such transactions are of virtually no commercial importance, as members of the Federal Reserve System may not hold for their own account investment securities of any one obliger in excess of 10% of the bank’s unimpaired capital and surplus. 12 U.S.C. §§ 24 “Seventh,” 935 (1964).
quisitions. Since the transaction was no longer, really, an asset acquisition, the FTC limitation was nicely avoided. Crowning this portion of the opinion was the judicial chestnut that "immunity from the antitrust laws is not lightly implied." 29

The Court concluded that the Bank Merger Act did not grant antitrust immunity to commercial banking. The conclusion is well supported. In 1960 there was nothing to grant immunity from. The banks urged the Bank Merger Act immunity argument at trial; on appeal, however, the argument was abandoned. 30 Finally, the Court found the doctrine of primary jurisdiction inapplicable. In effect this finding totally emasculated the administrative role of the banking agencies in the merger cases. This is the precise holding that seemingly flies in the face of the Bank Merger Act.

New ground was plowed in Philadelphia. In the following term the Supreme Court was prepared to take the next logical step.

B. Lexington

Here the First National Bank of Lexington and Security Trust Co., the first and fourth largest banks in the area, agreed to form by merger the largest bank in Fayette County. The resulting bank would control 54% of the local bank loan market. The merger's black-eye, however, was its effect on the local trust business. The consolidated institution would have cornered the market with control of 95% of the local trust assets. 31 The Philadelphia and Lexington mergers occurred only a few months apart. Over strongly adverse reports from the Attorney General and the other two banking agencies the Comptroller approved. Justice immediately brought a Sherman §§1,2 action. On direct appeal from a district court finding of no violation, 32 the Supreme Court reversed and held that the merger violated Sherman §1. 33

This argument is perhaps the most wobbly. Cited as authority for this "canon of construction" was California v. Federal Power Commission, 369 U.S. 482, 485 (1962), the "first El Paso" case, decided the previous term. This decision can be said to have foreshadowed Philadelphia. There a divided court held that a publicly regulated industry in which the FPC must consider competitive effects before approving mergers, etc., was not immune to § 7 of the Clayton Act. But see Comment, 62 Mich. L. Rev. 990, 996 (1964), discussing this factor. As that Comment indicates, Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963), would have provided some basis for the opposite conclusion. If a genuine basis for a factual distinction existed, as the author of that Comment believed, it was sufficiently narrow to preclude the aphoristic solution reached in Philadelphia.

There has been considerable dismay at the fact that the point was not argued or briefed at the Supreme Court level. Why was it abandoned as an argument? It is believed that the answer is a tactical one, to be found somewhere in California.

The next largest area bank in terms of trust assets was Citizens Union Bank, with 8.4% of the local business.

United States v. First National Bank of Lexington, 208 F. Supp. 457 (E.D.Ky. 1962). Only after Lexington was on appeal to the Supreme Court did the Philadelphia revolution occur. In his dissent Justice Harlan was critical of the government's attempt to back the case out of Sherman and into the rejuvenated Clayton Act. 376 U.S. 679-80.

Justice Douglas, writing a laconic majority opinion focused almost exclusively on the trust service submarket. The principal anti-competitive vice was found to be the

... 'image' of 'bigness' [which] is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and ... the multiplicity of extra services in the trust field which the new company could offer [which] tends to foreclose competition there. 34

Invoked at this point was a litany of four elderly railroad antitrust cases. 35 These four decisions were called upon to sustain the principle

where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them by merger or consolidation, itself constitutes a violation of §1 of the Sherman Act. 36

The idea was not wholly original. The government advanced the same principle, supported by the same four cases, in United States v. Columbia Steel Co. 37 In holding that acquisition not violative of §1 the Court was able to breezily dispatch the old railroad quartet:

We do not stop to examine those cases to determine whether we would now approve either their language or their holdings. The factual situation in all those cases is so dissimilar from that presented here [ ] that they furnish little guidance in determining whether the competition which will be eliminated ... is sufficient to warrant [the] ... relief requested by the government. 38

The technique used to revive the railroad quartet was equally terse: "The Columbia Steel case must be confined to its special facts." 39

After the Supreme Court ruling the agonies of divestment began. With-

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34 Id., at 669.
36 Lexington, supra note 33, at 671-2.
37 334 U.S. 495 (1948).
38 Id., at 531.
39 Lexington, supra note 33, at 672. "It is difficult to see how features peculiar to banking or indeed any other features of a particular case which, in reason, should lead to a different result, can stand up against the bludgeon with which the Court now strikes at combinations which may well have no fault except 'bigness.'" Justice Harlan, dissenting in Lexington, id. at 673, 680. Justices Brennan and White concurred in reversal, but would have turned the case directly on Columbia Steel. To a large extent the Court's lack of enthusiasm for Columbia Steel must be seen in terms of personnel changes. In Lexington the five justices voting to distinguish Columbia Steel were Justices Warren, Black, Douglas, Clark, and Goldberg. In Columbia Steel (1948) only two members of the present Court were sitting—Justices Black and Douglas. Both dissented in Columbia Steel. Hence, Lexington's summary confinement of Columbia Steel to its "special facts" might well be viewed as tacit repudiation of the case.
drawal was made particularly painful by the severe restraints Kentucky places on branching. The Eastern District of Kentucky ordered First Security to create a separate bank that would be the competitive equal of the former Security Trust Co. Later a $100 per day contempt fine was imposed on the recalcitrant bank. In April, 1965, Justice Stewart, one of the dissenters, granted a stay of the divestment order pending further appeal to the Supreme Court.

When Justice filed its complaint and moved for a preliminary injunction, the two banks, it is understood, assured the court that during the pendency of the litigation separate books would be kept in the event divestment resulted. Either the books were not kept separate or the plan proved ill-advised, for the banks were later to argue that separation was impossible. Apparently the district court on remand sympathized, in view of the form the final order took.

C. Manufacturers Hanover

In September, 1961, Manufacturers Trust Co. and The Hanover Bank agreed to merge under a New York State charter. Manufacturers, a retail bank, was the fifth largest in New York, sixth nationally, and had 120 branches. Its million-plus depositors had an average balance of $3000. The bank was formed on the ashes of several smaller banks reputedly wiped out with Morgan money. Hanover, a wholesale bank, was the eighth largest in New York, fourteenth nationally, and had ten branches. It served 44,000 pedigreed depositors with an average balance of $39,000. While the two banks did not deal in two entirely distinct, non-competing lines of banking business (Hanover gave some retail services and Manufacturers some wholesale), by and large their lines of business were fairly termed "complementary." Before this merger Manufacturers had grown in the past through lesser mergers of its own.

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44 The retail-wholesale contrast is seen in loans activity: Manufacturers had 208,000 borrowers with an average loan of $7000. Hanover had 4,500 borrowers with an average loan of $214,000. Manufacturers had total assets of $3.8 billion (8.7% of the metropolitan total and 2.7% of the national figure), deposits of $3.5 billion (9.1% of the local and 2.7% of the national figure), and loans of $1.5 billion (7.4% of the local and 2.1% of the national markets). Hanover had total assets of $2.2 billion (4.9% of the local, 1.5% of the national totals), deposits of $1.7 billion (4.6% of the local, 1.5% of the national totals), and loans of $0.9 billion (4.5% of the local, 1.4% of the national figures).
45 In 1950 Manufacturers merged with the Brooklyn Trust Co. Since 1940 it had also merged five smaller banks.
Hanover was a merger virgin. Taken into account when the merger was under consideration was the fact that the resulting institution would not only inherit the essential experienced management and personnel to conduct both retail and wholesale operations, but would also attain a significantly expanded lending limit needed to meet the particularly virulent New York City banking competition. No “shotgun” element was present in this transaction; both banks were successful, sound, with no crisis in sight.

The merged institution, The Manufacturers Hanover Trust Co., became the third largest in New York, fourth nationally. Favorable advisory reports were made by the Comptroller and the FDIC to the approving agency, the Federal Reserve Board. The Attorney General’s report contained anticompetitive objections. The merger was approved, and Justice filed its Clayton §7 and Sherman §1 complaint in the Southern District of New York. District Judge Cashin denied a temporary restraining order (Philadelphia had not yet reached the Supreme Court). Following trial, during which Philadelphia came down, the Southern District held, in an exhaustive opinion by Judge MacMahon, that approval of the merger by the FRB conferred no antitrust immunity, that the merger constituted a combination in restraint of national and local banking in violation of Sherman §1, and that there was a “reasonable probability” that the merger would “substantially lessen” competition in these same markets, in violation of Clayton §7.

Judge MacMahon reached the conclusion with anything but enthusiasm. Although Philadelphia had now precluded the argument of antitrust immunity through the Bank Merger Act, the doctrine of primary jurisdiction presented an interesting twist: In both Philadelphia and Lexington the resulting bank was to be national; hence the Comptroller was the approving agency. Because, however, Manufacturers Hanover was to be a state bank, the FRB was the approving agency. Clayton §11 vests “authority to enforce compliance [with §7] in the Federal Reserve Board where applicable to banks.” Hence the dismissal of the doctrine of primary jurisdiction in Philadelphia was distinguishable; in Manufacturers there would be no “positive repugnance” between the Bank Merger Act and Clayton §11. The Southern District seized the opportunity to hold Clayton §11 applicable and make an “ad hoc application of the doctrine of primary jurisdiction.” Nonetheless, Clayton

48 State law required the approval of the New York Superintendent of Banks. N.Y. BANKING LAW § 601-b. The approval was given.
50 United States v. Manufacturers Hanover Trust Co., TRADE REG. REP. ¶ 71, 408 p. 80, 713.
52 Manufacturers Hanover, supra note 48, at 80,717. That is, in Philadelphia the Bank Merger Act placed sole authority to approve the merger in the Comptroller, inconsistent with the § 11 administrative authority vested in the Federal Reserve Board. In Manufacturers, however, the Federal Reserve Board was the agency called upon by both enforcement schemes.
clearly provided a "dual scheme of enforcement," and, the court pointed out, going back to start "at this stage of the litigation would be little short of ridiculous." The middle ground between ad hoc primary jurisdiction and its reluctant acceptance of Philadelphia was a ruling that:

... we will accept the agencies' views about banking facts, including the nature of the business of the constituent banks, the existence and locus of effective competition for all types of accounts, and the practicable banking alternatives of particular classes of customers as persuasive and helpful evidence in our analysis of the competitive effect of this merger, ..., but the agencies conclusions of law on the antitrust questions as such, including the competitive effect of this merger, are not binding upon us in our independent application of the antitrust laws.5

Thus began the tour. The government's atomization of the commercial banking market into individual banking services was rejected. Instead, two relevant lines of commerce were found: wholesale and retail banking. If the relevant line presented difficulties, determination of the appropriate geographic market was a problem of mammoth proportions.

The position of the banking agencies and parties that some wholesale markets were partly local and partly national was rejected. Rather, two distinct geographic markets, national and local, were used. But what fit the definitions of local, national, wholesale, and retail? Here the court's discussion of ad hoc primary jurisdiction made sense. Application of the verbal tool—whether or not banks encounter effective nationwide competition for a particular kind or size of account—would have been impossible without the Federal Reserve findings, which under "our ad hoc application of ... primary jurisdiction" "may well be conclusive ..., for they were clearly based on substantial evidence."5

After establishing the structural context, the court approached its Clayton tests. Throwing up his hands at the "distorted" evidence presented, Judge MacMahon refused even to attempt a "market share" test. After invoking Gilbert and Sullivan to chasten the government for suggesting that the court "fudge" this evidentiary gap, the court passed to the "competitive effect" test. Here the quick formulas were rejected. "Bigness" was held not per se illegitimate. ("such [emotional] pleas generally mask a meritless case ...") The resulting foreclosure of a certain market share was also, in itself, inconclusive. (Otherwise, all horizontal mergers would be illegal.) Nor could “in-

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5 Supra note 48, at 80,720.

increased concentration” be deemed determinative. (Not all concentration is “undue.”)

After tens of thousands of words had been spent destroying the case, the postea was unceremoniously awarded to the government. Undue concentration was found in the local market, and a long-range trend toward further concentration was exhibited. The merger was found to eliminate a major competitor, reduce the number of potential banking alternatives, and gather “more branches [into] still fewer hands.” Clayton § 7 and Sherman § 1 were held violated in both markets.

A divestment agreement was reached between the parties. Attorney General Katzenbach announced that “for a variety of business reasons” the details would not be disclosed. The agreement, an ill-kept secret, called for the spin off of about 42 branches. As this Comment goes to press, Judge McMahon has yet to give his fiat to this bargain. In September, Congressman Todd introduced in the House H.R. 10851, a bill for the private relief of Manufacturers Trust Co. and the Hanover Bank.

Justice won another significant victory, but had been given in the process lessons on how not to handle an antitrust case before the Southern District.

D. Continental Illinois

Continental Illinois Bank & Trust Co., Chicago’s second largest bank, tenth nationally, and City National Bank & Trust Co., the city’s sixth largest, agreed to merge in September, 1961, under Continental’s national charter. At that time the Chicago banking market was more concentrated than the corresponding New York market. The four largest Chicago banks then controlled 62% of the deposits and 70% of the loans in the city. The proposed merger would increase these figures to 65% and 73%.

The Comptroller approved the merger over serious antitrust objections

Manufacturers Hanover, supra note 48, at 80,764-80,771. Major causes were the Chemical-Corn Exchange-New York Trust mergers, the Chase-Manhattan merger, the First National-National City Bank merger, and the Bankers Trust-Public National merger, all within the past decade. In 1954 the five largest banks had 63% of New York City’s 207 branches; after the merger in question they had 81%.

Id., at 80,755. “This merger offends Clayton § 7 in so many ways that to allow it to stand would be to ignore the statute altogether. It tends to create a monopoly by significantly increasing concentration and accelerating a trend toward oligopoly . . . . where there is a strong trend toward oligopoly, further trends in that direction are to be curbed in their incipience . . . .

. . . the merger substantially lessens competition and restrains trade by the permanent elimination of significant competition formerly existing between major competitors, and that in itself constitutes a violation of § 1 of the Sherman Act,’ and, a fortiorari of the Clayton Act.”

At the same time Rep. Todd introduced five other bills for private relief of other banks whose mergers have been struck down for antitrust reasons. The bills are designed to reduce the confusion of issues involved in other pending legislation. See Solutions, infra.
raised by Justice, who filed a week later its Clayton §7 and Sherman §1 action in the Northern District of Illinois. A temporary restraining order was denied and the merger was consummated. After four years the case has yet to reach the trial stage; discovery is still in process. The case contains its own twist. Should the merger be voided—and, it is submitted, a stronger case is presented here than was present in Manufacturers—the Illinois prohibition against branching will cause perplexing divestiture problems. Because spinning off branches will be impossible, the court will have to invent. It is understood that this is the factor bogging down the proceedings.

E. Crocker Citizens

Involved in this pending case is the merger of Crocker-Anglo National Bank, San Francisco, fifth largest in California (124 branches in northern California) and Citizens National Bank, Los Angeles, eighth largest (78 branches in southern California). Both banks have fed on prior mergers—Crocker, nine, and Citizens, three. Transamerica Corporation has working control of Citizens. The resulting bank, Crocker-Citizens National Bank, the state’s fourth largest, would control almost one-tenth of the state’s banking business. All California banks, however, stand in the shadow of the giant, the Bank of America, N.T. & S.A., San Francisco, the nation’s largest commercial bank (818 branches). The state’s unique geography presents a special twist. The Tehachapi Mountains form a natural barrier between northern and southern California.

Between these two sections there are marked differences in types of business, methods of doing business, kinds of industries and occupations, and there are wide differences in the mores of the people and even in the manner in which they dress.

The Comptroller granted conditional approval of the merger in September, 1963. A week later Justice filed a Clayton §7 and Sherman §1 complaint in the Northern District of California, naming both banks and Transamerica as defendants, and seeking, among other relief, a preliminary injunction. In November, 1963, the district court in a per curiam opinion denied the injunction. Philadelphia and Lexington were quickly distinguished. The geographic factor is reflected in the branching patterns of California banks. Crocker and Citizens had only a slight “lap over” in territory, Ventura and Santa Barbara counties, although both were multi-branched. United States v. Crocker-Anglo National Bank, Civil No. 41808, N.D. Cal., Nov. 1, 1963.

The condition attached was that Transamerica dispose of its controlling stock in Citizens before 1967 and limit its representation on the board of the merged bank to one member.
graphical factor weighed heavily; the court found virtually two markets, no likelihood of a substantial lessening of competition, and a fortiorari no clear Sherman violation. Justice's alternative argument that the merger constituted a territory division per se in violation of Sherman was dismissed as "a complete non sequitur." The court accepted the banks' argument that merger would effect the entry of a new member into the "statewide" banking market now controlled by the Bank of America, United California Bank, and First Western Bank, and concluded that the "present oligopoly resulting from the operations of the three statewide banks mentioned would thus be somewhat thinned by the entry of Crocker-Citizens into this field."63 The merger was consummated.

As this Comment goes to press, the government has just completed submission of its case to the trial court.

F. Calumet National

Between Chicago and Gary is the city of Hammond, Indiana. In 1963 the largest bank in the city, the Calumet National Bank of Hammond, and a close second largest, the Mercantile National Bank of Hammond, petitioned the Comptroller for approval to merge. The resulting bank would control 80% of the deposits and 81% of the loans in Hammond. If the relevant geographic market were expanded to include the far-southside of Chicago and far-south suburbs, Gary, and twelve surrounding Indiana towns, the resulting institution would be the second largest in that area and would control approximately one-fifth of the commercial banking business in that locale.64

Nonetheless, the Comptroller approved over unanimous agency and Justice Department objections. Justice immediately filed its Clayton §7 and Sherman §1 complaint in the Northern District of Indiana.65 Philadelphia had just been decided by the Supreme Court; Lexington was pending. The case more resembled Lexington. The Comptroller reconsidered and withdrew approval. Shortly thereafter a Justice Department motion to dismiss was granted. It was all over before it began.

G. Third National Bank in Nashville

In 1964 The Third National Bank in Nashville was the city's second largest (assets: $340 million). The fourth largest, Nashville Bank and Trust Co.

63 In accepting this argument the court distinguished it from that rejected in Philadelphia, that the merged banks would be better equipped to compete with the giants in the same market. Here, the merger would result in the entry of the bank into a new market.
64 Trade Reg. Rep. ¶ 45, 063 (Case 1758), at 52,554. In this expanded geographic area Calumet was fourth largest and Mercantile fifth.
Nashville Bank had been bought by an insurance syndicate. Recognizing the need for a capital transfusion but at the same time unwilling to divert the necessary funds, the owners sought a merger prospect. Third National was an available customer. Management succession was a particularly acute problem in this case. The president of Nashville Bank was ill and anxious to retire. Inadequate employee benefits and low salaries had discouraged young talent. The bank was not competitive, its future not bright.

The Comptroller and state superintendent approved the merger petition, despite adverse competitive reports issued by the FRB, the FDIC, and Justice. In August, 1964, following the approval Justice filed its Clayton §7 and Sherman §1 complaint in the Middle District of Tennessee. At the hearing for a preliminary injunction the government invoked Philadelphia and Lexington, both of which the court effortlessly distinguished. Here, the court said, the banks were not of comparable size, and both had “antitrust clean hands” (i.e. were merger virgins). Present in Lexington, the court pointed out, was “a purpose to monopolize rather than to satisfy business requirements, . . . , consumer demands, etc.” Moreover, a large quantitative distinction existed. The injunction was denied.

The Comptroller moved to intervene under Rule 24 (a) (2) of the Federal Rules of Civil Procedure, or, in the alternative, under Rule 24 (b) (2). The motion was denied. The court reasoned, first, that after Philadelphia a merger must clear “two separate and distinct hurdles,” i.e. the agencies and the courts. Because these are distinct hurdles, the agency has no fur-

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66 The bank was losing depositors to larger banks in Nashville. In the first quarter of 1964 deposits had declined about 11%. Third National, on the other hand, was a relatively large commercial bank. One-fifth of its deposits were in accounts of correspondents; its loan structure was 40% commercial and only 1% real estate. Nashville’s correspondent deposits were only 1% of its total, and its loan structure was 27% commercial and 34% real estate. United States v. Third National Bank in Nashville and Nashville Bank and Trust Co. Civil No. 3849, M.D. Tenn. Aug. 10, 1964, Memorandum Opinion Aug. 18, 1964.

67 The pertinent language of the two sections is as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . .

(2) When the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.

(b) . . .

(2) When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.
ther “interest” to “represent” after the matter has passed on to the courts. Second, the court found that Rule 24(b)(2) was clearly discretionary and that the banks’ interests could be “vigorously and adequately represented without the necessity of the Comptroller’s intervention.”

As this Comment goes to press Nashville stands at the discovery stage with a trial date tentatively set at January 10, 1966.

H. Mercantile Trust

The Mercantile Trust Co., a wholesale bank, the largest bank in Missouri, negotiates one-fifth in dollar-volume of the bank loans in metropolitan St. Louis. It agreed to merge in July, 1965, with the Security Trust Co. of St. Louis, a retail bank, seventh largest in the metropolitan area. The relation between the two was roughly the converse of the Manufacturers—Hanover relation: here, a dominant wholesale bank assumed a smaller retail institution. The merger plan contained an unusual twist—this would be a “cash merger”, a rarity among bank mergers. Under the agreement, Security shareholder interests would be satisfied, not with shares of the resulting institution, but with cash though a corresponding capital reduction on the part of Mercantile. One purpose for this move suggests itself. The arrangement, arguably, fits through the narrow hole left in Clayton §7 by Philadelphia. This is, conceivably, Justice Brennan’s “pure asset acquisition,” or a fair imitation thereof.

The Comptroller approved the merger in June, 1965, over adverse reports by both agencies and the Justice Department. He found the merger, as a pure assets acquisition, not controlled by Philadelphia. Sherman §1 was ruled out quantitatively. The opinion stressed the fact that banks receive non-bank competition (e.g. savings and loan associations, the Comptroller’s bête noire) in virtually every service rendered save demand deposits, an argument clearly rejected in Philadelphia. Justice limited the relevant geographic area to downtown St. Louis; the Comptroller’s opinion, however,

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Footnotes:

70 Of its $550 million in deposits, 18% represents correspondent accounts. Over 60% of its deposits represents accounts of over $100,000 held for nationwide customers; only 7% of its deposits represent local accounts under $10,000.

71 Disagreement between Justice and the Comptroller over the choice of relevant geographic market causes some confusion in these figures. For example, the Comptroller found Security Trust seventh largest; the government complaint places it fifth. The figures given for the individual banks are computed on the basis of the metropolitan area. (Comptroller) Below, post merger figures are stated using St. Louis proper as a base. (Justice)

72 Justice disagrees, however. It considers the case governed by both Philadelphia and Lexington. Justice is probably correct. The Supreme Court ruling in Philadelphia is not grounded in the exchange of assets for stock, as opposed to cash purchases of stock, but in the fact that a merger was involved. “So construed, the specific exemption for acquiring corporations not subject to the FTC’s jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.” Philadelphia, supra note 26.
found different geographic markets for each banking service. Thus, while the retail deposit market was confined to metropolitan St. Louis, the large-loan market was considered national.

Following the Comptroller's approval, Justice filed its standard Clayton §7 and Sherman §1 complaint in the Eastern District of Missouri. The complaint alleged that the resulting bank would have 35% of the bank deposits and 37% of the bank loans in St. Louis. It further charged an existing state of high concentration in the market, that the two largest banks in St. Louis control over half of St. Louis' bank business. The Comptroller moved to intervene as a party defendant. No doubt to his surprise, the motion was granted.

A motion for preliminary injunction was denied by Judge Harper. In an analysis similar to the court's in Crocker-Citizens the Missouri district court found that the complaint distorted the relevant market. Conceding that, on limiting the relevant geographic area to St. Louis proper, the joint 35% control of local deposits would exceed the Philadelphia 30% rule of thumb, the court held the entire metropolitan area the effective arena. The Comptroller's statistics won the first round, and the merger was consummated shortly thereafter. As in Continental Illinois the stakes here are high. In Missouri branching is highly restricted. Hence, if the merger is struck down when the dust finally settles, Mercantile will be virtually unable to use the divesting technique of "spinning-off" branches and will face agonies similar to those Continental has suffered for its sins.

As this Comment goes to press Mercantile stands at the early discovery stages.

IV. PROPOSED LEGISLATIVE SOLUTIONS

When Manufacturers was decided, we are told, the howl that went up on Wall Street was heard in every congressional district. Within a month of that decision Senator Robertson introduced S. 1698, a bill designed to undo these merger cases. The bill would add an additional sentence to the Bank Merger Act, making the approving authority vested in the three banking agencies "exclusive and plenary" and would relieve mergers so approved from the

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73 The approval of the Comptroller was drafted while the ink was still wet on the Southern District's opinion in Manufacturers Hanover. The influence of that latter decision on the Comptroller's Mercantile Trust approval is evident. For example, see Judge MacMahon's treatment of the relevant geographic markets relative to various banking services. Manufacturers, supra note 48, at 80,751.

74 Mr. Saxon disagrees: "After the merger, the resulting bank will ostensibly hold 21.4 percent of the area [?] deposits and 23.6 percent of the area loans." Antitrust & Tr. Reg. Rep. No. 209, July 6, 1965 A-11, 13.

75 The approval of the Comptroller was drafted while the ink was still wet on the Southern District's opinion in Manufacturers Hanover. The influence of that latter decision on the Comptroller's Mercantile Trust approval is evident. For example, see Judge MacMahon's treatment of the relevant geographic markets relative to various banking services. Manufacturers, supra note 48, at 80,751.
operation of the antitrust laws, prospectively and retroactively. Section 2 of
the bill would relieve federally insured banks from the threat of antitrust
suits concerning mergers approved by the appropriate federal or state bank-
ing agencies before the enactment of the Bank Merger Act. The Senate Com-
mittee on Banking and Currency requested a report on the bill from the Fed-
eral Reserve Board, whose chairman replied favorably. Noting the element
of surprise to the industry in Philadelphia and the policy behind avoiding
protracted bank merger litigation, he concluded that legislative action was
needed. He concluded his statement, however, with the suggestion:

    Should the Congress, however, be unable to agree on the approach to the prob-
lem proposed in S. 1698, it might wish to consider other, although less positive,
measures. One such possibility would be to amend the Bank Merger Act to allow
a specific time necessary for the filing of an antitrust action in court to prevent
consummation of an approved transaction, after which, in the absence of such
an action, the merger could be consummated and would be exempt from the
antitrust laws. Because the Attorney General receives ample notice of pending
mergers under the procedure in the Act for the submission of competitive fac-
tors reports, the specified period should be relatively short.\footnote{That Chairman
Martin intended this alternative suggestion as a purely secondary one is
apparent. S. 1698 was in trouble from the outset.\footnote{Opposi-
tion to the unamended bill was expected from at least four members of the
subcommittee itself,\footnote{as well as sundry lobbies, such as the Independent
Bankers Association of America. These difficulties, coupled with uncertain
White House support of the bill, prompted the alternative. In his statement,
however, Chairman Martin hastened to add:

    Such an alternative, however, would be a less positive approach than S. 1698.
Moreover, such an alternative, unfortunately, would incorporate specifically
into the Bank Merger Act two different—and logically inconsistent—standards
for bank mergers. Indeed, the Department of Justice would be obliged by the
antitrust laws to intervene to block a bank merger in the very same circumstances
in which a federal banking agency would be required by another act of Con-
gress—the Bank Merger Act—to approve the transaction. Thus, two arms of the
Government, carrying out their statutory duties, would work at cross purposes,
with banks and the communities they serve caught in the legal crossfire.}

Federal Deposit Insurance Act. The Supreme Court has not hesitated to use the terms
"merger" and "consolidation" interchangeably, when the matter in question did not hinge
on the technical distinction. \textit{Cf. Philadelphia, supra} note 26, at 332, n.7. In this Comment
the two terms are used in the same manner.

\footnote{See the report issued by the Federal Reserve Board on April 27, 1965, printed in \textit{Hear-
ings on S.1698 before the Subcommittee on Financial Institutions of the Senate Committee
on Banking and Currency, 89th Cong., 1st Sess.} (1965) 7.8. This may well be the first pub-
lished mention of what was to become the "Proxmire Amendment."}

\footnote{The opposition of Chairman Patman of the House Banking and Currency Committee
was considered a formidable obstacle at this stage.}

\footnote{Senators Douglas, Muskie, Proxmire, and Thurman.}
Clearly, this sort of conflict should be avoided, as it would be by the enactment of S. 1698.80

Because of the growing opposition and because he wanted prompt action, Senator Robertson yielded to the "Proxmire Amendment" which effectively gutted the entire bill. Senator Proxmire's new bill provided that the banking agency, on approving a merger, shall immediately notify the Attorney General of the approval, and consummation of the transaction shall be suspended for thirty days. During this interim any antitrust action instituted to enjoin the transaction will act as an injunction pendente lite. The amended bill included a "shotgun" provision,8 and gave antitrust immunity to all mergers consummated pursuant to this procedure, i.e. immunity unless Justice decided otherwise.

The bill was a clear compromise. It retained the effect of immunizing from antitrust action all past approved and consummated mergers. At the same time, however, as to future mergers Justice was placed back in business. The new overall effect of the bill with respect to future mergers was to impose a thirty-day "statute of limitations." Thus there appeared a certain disparity of treatment between past and future mergers.82 Of utmost importance, however, the bill was one the entire Senate committee could approve. On June 8, 1965, the Senate Committee on Banking and Currency unanimously reported the bill favorably.83

In a brief report the committee apologetically explained its proposed treatment of future mergers:

The committee recognizes that the bill as reported involves a substantial change from the procedures contemplated when the Bank Merger Act was adopted. At that time it was clearly expected that the decision of the responsible Federal banking authority, based on its own investigation and on reports on competitive factors from the other two banking agencies and from the Department of Justice, would be final and conclusive. The Attorney General's report was expected to be advisory only.

80Hearings, supra note 77, at 14.
81"Provided further, that when the agency finds that it must act immediately in order to prevent the probable failure of one of the banks and reports on the competitive factors involved may be dispensed with, the transaction may be consummated immediately upon approval by the agency: And provided further, That, when an emergency exists requiring expeditious action and reports on the competitive factors are requested within ten days, the transaction may not be consummated within less than five calendar days after approval by the agency."
82The Attorney General, in testimony before the House subcommittee on August 18, 1965, characterized the measure as "a private bill for the relief of parties . . . to six pending suits," a charge that has become the shibboleth of the bill's opposition. For a legislative response to the charge, see note 57, supra.
The committee recognized that the bill places in the hands of the Justice Department a considerable measure of authority which the committee expects will be used with care and discretion. The committee is aware that many banks proposing to merge under an approval by the Federal banking authorities might feel compelled to abandon their merger plans at the mere threat of a suit by the Justice Department, however insubstantial the basis for such a suit might be. The opportunity afforded to the Justice Department by the 30-day waiting period must be used with a full understanding and appreciation of the special circumstances applicable to the field of banking and with due consideration for the authority vested by the Congress in the Federal banking authorities to approve or disapprove mergers on the basis of their expert knowledge of the banking field and the judgment on which they base their decision that a merger is in the public interest.84

Having failed in its attempt to find an acceptable tool to eliminate a cause of action, the committee settled for issuing policy directives. Commentators were critical of the compromise:

The Senate Committee recognized this danger and urged the Department to file suits with "care and discretion." The mere necessity to utter this caution is the provision's own condemnation. In effect, the automatic injunction gives Justice a practical permanent veto.

Attorney General Katzenbach objects to the 30-day deadline for filing suits as an undue restraint on Justice. Bankers could object to it as an undue temptation to Justice. Might it not cause the antitrust division when in doubt and pressed for time to file an action? Better to be safe than criticized.

The banks get a bad bargain in this quid pro quo. . . .

. . . now I am convinced that, if banks . . . can't get the original Robertson proposal, they're better off with the status quo.85

The legislation in no way affects Clayton §7 or Sherman §1. Nor will it affect the Supreme Court's rulings on the Bank Merger Act and primary jurisdiction. Presumably, then, in those mergers Justice does challenge Philadelphia and Lexington will be controlling law.

The amended bill passed the Senate on June 11, 1965.

Shortly after the original Robertson bill had been introduced in the Senate, Rep. Harvey introduced in the House an identical measure as H.R. 7563. An alternative bill, H.R. 8388, was then introduced by Rep. Moorhead as something of a middleground between the original and amended Robertson bills. The provision would make agency approval final and conclusive of

84 Id., at 7-8.
antitrust laws on the happening of any of four events: (A) an agency determination of emergency situation; (B) failure of the Attorney General to indicate within seven days of publication of approval an intention to bring action; (C) failure of the Attorney General to bring the action within thirty days; (D) termination of such action by any final judgment, decree, etc., not barring the merger. The Moorhead bill also acts retroactively.

One distinction is noteworthy. Here is the introduction of the "Proxmire amendment" in a House bill. Unlike the Senate bill, however, it provides that an administrative finding of emergency insulates the proposed merger altogether. In the Senate version such a finding would allow Justice seven days in which to file the tolling complaint.

Senate hearings had been relatively brief—overly hasty, some had thought.86 By contrast the House hearings promised to be slow and protracted. The Attorney General in testimony excoriated the Senate bill; the hearings droned on; Rep. Patman announced he would not report a bill out until "a complete and thorough record had been built."

At this juncture, with the probabilities of passage before adjournment growing dim, another alternative was proposed. In mid-September Congresswoman Todd introduced a further concession. His bill, H.R. 11033, in substance the final Senate bill, extends the thirty-day limbo period and the five-day emergency period to ninety days and ten days respectively. The change answers only one—and a rather insubstantial—objection, that Justice is given insufficient time to act. As existing law requires the agencies to solicit Justice Department views prior to approval, it is highly doubtful that Justice could be taken totally by surprise. While it might be argued that the extended time provides a longer "cooling-off" period for Justice and would tend to curb a "better-litigate-than-be-criticized" policy, that it would actually achieve this result seems tenuously shown. The argument for ninety days lacks merit.

In mid-September Rep. Ashley introduced H.R. 11011. This measure would in effect repeal the Bank Merger Act and offer a substitute. The administrative approval procedure would be reinacted in substantially its present form. Such approval would be made "exclusive and plenary, and any transaction approved . . . shall be conclusively presumed to be not in violation of the [antitrust laws]." (The inflammatory word "exempt" is eliminated and in its place the approved transaction is bestowed a conclusive presumption of legitimacy.) A noticeable change is made in the administrative process. Hearings are to be held prior to approval, and any competing bank may be made a party to the proceedings.

The approving order is suspended for 31 days after publication, during which interim the Justice Department or any aggrieved party may obtain review of the order in the circuit courts of appeal by filing such an appeal within that period. The filing operates as a stay of the agency's order—unless the agency has, on a finding of emergency, specifically ruled otherwise, or unless the court itself rules otherwise. The circuit court's jurisdiction becomes exclusive on the filing of the administrative record, and the agency's findings of fact are conclusive if supported by substantial evidence. Provision is made for supplementary findings in appropriate situations. The judgment of the circuit court is made final, subject to Supreme Court review on certiorari.

The bill grants retroactive immunity to all mergers consummated and not challenged before the enactment of this act.

Indirect provision is made for the four pending cases, Continental Illinois, Crocker-Citizens, Nashville, and Mercantile. The courts are directed to apply the substantive criteria demanded of the agencies; these are the famous seven factors:

(A) the financial history and condition of each of the banks involved,
(B) the adequacy of its capital structure,
(C) its future earnings prospects,
(D) the convenience and needs of the community to be served,
(E) the effect of the transaction on competition, including any tendency toward monopoly, as reported by the Attorney General pursuant to paragraph (5),
(F) whether or not its corporate powers are consistent with the purposes of this Act,
(G) such other factors as the responsible agency may deem relevant.

The act requires the agency to determine whether, after considering all seven of these factors, the transaction is in the public interest. The provision should be held to have clearly overruled Philadelphia and Lexington with respect to these pending provisions. The Supreme Court discussed in passing, without thorough analysis, the public policy considerations behind application of Clayton §7 and Sherman §1 to banking as an industry. It made, however, no pretense of applying an overall "in-the-public-interest" test to such transactions. Indeed, the view it took of §7 and §1 positively precluded such an analysis.

As this Comment goes to press, The House Committee on Banking and Currency has not yet reported a bill, and the prospects for its doing so before adjournment of the first session of the 89th Congress appear extremely slight.

V. Conclusions

The Ashley scheme is the first proposal that makes any sense out of the six-headed monster. The current contest between the Justice Department and
the Comptroller of the Currency makes an absorbing spectator sport but a regulatory travesty. Neither is equipped to serve as a court of last resort.

*Philadelphia, Lexington, and Manufacturers Hanover*, when read together, demonstrate that, for practical purposes, a bank merger cannot now withstand an assault by the Attorney General. A court unwilling to risk summary reversal is left without choice. The case against the raw Clayton-Sherman approach is a stubbornly durable one—the industry is different. Whether a given merger harms the community or the nation is a truly delicate question, one that does not yield to the nostalgic magic of four old railroad cases.

Nor, on the other hand, is the Comptroller the answer. The case for *Lexington* and *Calumet* is a difficult one to defend. That the competitive effect of a merger is not the sole test of its validity, does not make that guideline immaterial.

With the banks and the communities they serve caught in the middle of this range war, the situation fairly "cries out loud" for a return to the doctrine of primary jurisdiction.

J. A. H.