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Anti-trust Commercial Baking-Product Test for Restraint of Trade and Attempt to Monopolize Under the Sherman Act

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nominally safety regulations, by a dubious interpretation of an arbitration award passed by a board with doubtful national power is really laying bare the health of the federal system to the evils of a wide-open Pandora's Box. If settlement of controversies involving labor and interstate commerce does require such arbitration awards to be omnipotent, let us wait until Congress speaks with more "drastic clarity."

J. Kendrick Wells

ANTI-TRUST COMMERCIAL BANKING-PRODUCT TEST FOR RESTRAINT OF TRADE AND ATTEMPT TO MONOPOLIZE UNDER THE SHERMAN ACT.—The government charged that a proposed merger between the first and fourth largest commercial banks in an isolated market, which would result in a merged bank having over one-half of the total assets, loans and deposits of all commercial banks within the area, would violate sections 1 and 2 of the Sherman Act. The district court held that no violation of either sections 1 or 2 was shown. *Held*: Reversed. When merging corporations are major competitors in a relevant market, as denoted by the percentage share of the market, the elimination of this competition constitutes a violation of section 1. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964).

Recently, two important decisions have brought within the scope of anti-trust laws a new and distinct "line of commerce"—commercial banking.[1] Because of the long run historical movement of concentration in this field, this would appear to be a future fertile field of federal litigation. Accordingly, it would appear beneficial to examine what the Supreme Court considers the product market to be and whether this definition would result in a realistic test of competition in a majority of cases.

Several necessary assumptions have been made in order to narrow this discussion to the single problem of denoting the Court's definition and examining its general validity. These assumptions are that the federal courts have jurisdiction, that a reduction of competition in this field is an evil that should be prohibited, that concentration figures give a realistic picture of competition, and that the product market of commercial banking can be examined in the same way as that of any manufacturing industry.[2]

[1] United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1963); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[2] The writer does not pass upon the economic validity of these assumptions, but it is believed that all are implicit in the Court's consideration of the problem.

In the *Philadelphia Bank* case, the Court stated: "[W]e have no difficulty in determining the 'line of commerce' . . . in which to appraise the probable competitive effects of Appellee's proposed merger" and continued by describing it as: "[T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking'. . . ."[3] This was justified by the Court in pointing out three distinct products and services that have a competitive edge over any similar ones. Those mentioned were demand deposits, inherent to commercial banks; short term personal credit, insulated because the banks themselves supply their competitors with funds; and time deposits which although competitive enjoy a settled consumer preference.[4]

Evidently these three products are so important and inseparable from other commodities of commercial banks that the Court deals with concentration ratios of total assets, loans and deposits of commercial banks within the relevant geographical area.[5] This same process is repeated in the *First Nat'l Bank* case.[6]

To check the validity of this approach, let us examine these denoted products for competition on a national scale and also whether or not they are so inclusive as to justify the use of ratios for total assets, loans and deposits.

Obviously, other than coin and currency, there are no substitutes for demand deposits. They make up the majority of our money supply, and no financial institution other than commercial banks offers any product with such a high degree of liquidity.[7]

Time deposits, on the other hand, are subject to competition from other institutions usually called saving institutions.[8] These usually include mutual savings banks, saving and loan associations and life insurance companies. The Court pointed to this competition but concluded that time deposits were insulated by consumer preference. This may be true in certain local areas, but it appears difficult to justify on a general or national scale. In 1961, the year in which the complaint was filed in the *First Nat'l Bank* case, time deposits of commercial banks accounted for approximately one-third of the total saving services provided by these four types of financial institutions.[9] Excluding life insurance companies from computations increases com-

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[3] 374 U.S. at 356.
[4] *Id.* at 356-57.
[5] *Id.* at 331, 364.
[6] 376 U.S. at 668-69.
[7] Steiner, Shapiro & Solomon, Money and Banking 41, 75 (4th ed. 1958).
[8] *Id.* at 75.
[9] 50 Fed. Reserve Bull. 1554-67 (1964).

mercial banks' share to slightly more than one-half of the total. Therefore, as a general proposition, consumer preference may be somewhat overstated.

Personal credit would appear to denote consumer credit loans and loans to individuals which are usually of short duration. This area of short term credit is usually accepted as being dominated by commercial banks due to their pressing need for a high degree of liquidity.[10]

From this base, the Court concludes that the most effective test of competition among commercial banks in a given area is to use concentration ratios of all commercial banks' assets, loans and deposits. Although this test considers the effect of a merger upon both borrowers and depositors, it includes some products which are heavily competitive with offerings of saving institutions and others which are not even available to the general public. Using the classifications of the federal reserve, it is apparent that some of these categories, if included without their close substitutes, could result in large overstatements of market power.[11] Three of the more important of these are real estate credit, agricultural loans, and loans to financial institutions. In 1961, commercial banks held only eighteen per cent of the total amount of real estate credit held by all financial institutions.[12] This type of loan, however, accounted for more than one-fourth of total commercial bank loans.[13] Agricultural loans are also subject to much outside competition from lending agencies of the federal government.[14] Finally, loans to financial institutions, although not competitive, fail to reflect a category available to the general public and in the vast majority of banks are of little significance.[15] These three types account for thirty-eight per cent of total loans of all commercial banks, and it is apparent that their inclusion without accompanying competitive data from other financial institutions and governmental agencies, if present, may well lead to exaggerated concentration ratios. In the *First Nat'l Bank* case, the exclusion of only one type of saving institution, saving and loan associations, from the computations of total assets and deposits resulted in a twelve per cent increase in the merging bank's share.[16] Compounding this problem is the fact that

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[10] Steiner, *op. cit. supra* note 7, at 139-43.
[11] 50 Fed. Reserve Bull. 1558 (1964).
[12] *Id.* at 1579.
[13] *Id.* at 1558.
[14] *Johnson, The Credit Programs Supervised by the Farm Credit Administration*, in Federal Credit Agencies 259, 266-67 (1963); Steiner, *op. cit. supra* note 7, at 140.
[15] 50 Fed. Reserve Bull. 1558 (1964) (country banks).
[16] Record, p. 887, United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1963).

data for all types of outside competition may be impossible or impractical to obtain.

Since difficulties may arise when total asset, loan and deposit ratios are used, perhaps a better test may be constructed by utilizing an inherent requirement of commercial banks—liquidity. Because of the nature of the liabilities of commercial banks, their loans are, for the most part, of a short term nature. In addition, this type is subject to less outside competition.[17] Again utilizing the broad categories provided by the federal reserve, most of the short term type would appear to be contained in commercial and industrial loans, loans for securities, and loans to individuals.[18] These three account for over sixty per cent of total commercial bank loans, and coupled with competitive-free demand deposits would result in an asset/liability test, considering both borrower and depositor, that would generally yield a more accurate measurement of competition between inherent functions of commercial banks. This in turn would provide a much more realistic picture of concentration among commercial banks. Although this test would not lead to ratios with the high degree of consistency now enjoyed, it would appear reasonable to expect some type of correlation between the loan and deposit sectors because of the similarity in the degree of liquidity. Even with this drawback, this test, in the majority of cases, would appear more likely to test competition among commercial banks, which, after all, is the essence of the problem.

Stephen H. Johnson

CONSTITUTIONAL LAW—POLICE POWER—AESTHETIC NUISANCE.—Appellants challenged the constitutionality of the Billboard Act.[1] With minor exceptions, the act prohibits the erection of any "advertising device" within 660 feet of the right-of-way of any interstate highway, limited access highway, or turnpike. *Held*: The act is a constitutional exercise of the state police power. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964).

Appellants contended there was a procedural error in the refusal of the circuit court to admit evidence indicating no relationship exists

[17] Steiner, *op. cit. supra* note 7, at 139-43.
[18] *Ibid.;* 50 Fed. Reserve Bull. 1558 (1964).

[1] Ky. Rev. Stat. 177.830-.990 (1960) [hereinafter cited as KRS].