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A Consideration of Commercial Banking as the Relevant Line of Commerce in Small Bank Situations: U.S. v. Phillipsburg National Bank

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U.S. v. PHILLIPSBURG NATIONAL BANK: A CONSIDERATION OF COMMERCIAL BANKING AS THE RELEVANT LINE OF COMMERCE IN SMALL BANK SITUATIONS

In December 1967, the Comptroller of the Currency, acting under authority of the Bank Merger Act of 1966,¹ approved the merger of two direct competitors:² the Phillipsburg National Bank and Trust Company³ and the Second National Bank of Phillipsburg.⁴ Linked by a bridge, Phillipsburg, New Jersey, and its neighbor, Easton, New Jersey, constitute "one town"⁵ with a total population of 88,500. This "one town" has seven commercial banks, four in Easton and three in Phillipsburg, with a total of sixteen locations.⁶ These seven banks fall within the category of small banks,⁷ their 1967 assets ranging from \$13,200,000 to \$75,600,000.⁸ PNB and SNB were, respectively, the third and fifth largest commercial banks in the "one town" and, upon merger, would have produced a bank with assets of \$41,100,000, second in size of the remaining six commercial banks.⁹

Following the Comptroller's approval of the application, the Justice Department brought suit under § 7 of the Clayton Act¹⁰ to enjoin the merger. The federal district court, in *United States v. Phillipsburg*

1. 12 U.S.C. § 18(c)(7)(D) (1966). The Bank Merger Act of 1966 gives the Comptroller of the Currency the power and responsibility of reviewing, denying, or approving merger applications of any federally insured bank if the acquiring, assuming, or resulting bank is to be a national bank.

2. Where direct competitors are involved a question of horizontal mergers is presented. Such combinations, due to their actual elimination of competition are the most inherently dangerous of all mergers. See Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 300 (Ja. 1967). The following discussion shall be limited to the question of horizontal bank mergers.

3. Hereinafter cited as PNB.

4. Hereinafter cited as SNB.

5. *United States v. Phillipsburg National Bank*, 399 U.S. 350, 353 (1970).

It is interesting to note that in *Phillipsburg* alone there were three banks and a population of 18,500. This figure increases to 28,500 when bordering suburbs are included.

6. *Id.* The sixteen locations constitute main offices and local branches.

7. *Id.* The Supreme Court gives no basis for this categorization of banks.

8. *Id.*

9. *Id.*

10. 15 U.S.C. § 18 (1964). Section 7, as amended, by the 1950 Celler-Kefauver Anti-merger Act provides that:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or share capital, and no corporation subject to the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

National Bank,¹¹ dismissed the complaint. On direct appeal,¹² the Supreme Court reversed and remanded,¹³ finding error in the district court's determination that the relevant line of commerce included financial institutions other than commercial banks. In addition, the Court found the relevant geographic market to be Phillipsburg-Easton proper rather than the much larger Lehigh Valley area as determined by the district court.¹⁴ The Supreme Court rested its decision upon standards developed in *United States v. Philadelphia National Bank*,¹⁵ the leading case approving judicial application of § 7 of the Clayton Act to horizontal bank mergers.¹⁶

Prior to *Philadelphia Bank* it had been thought that bank mergers were exempt from application of the Clayton Act.¹⁷ In response to

11. 306 F. Supp. 645 (D.N.J. 1969). The District Court found inadequacy of loan and trust service available in the community. The court held that even if there were de minimis anticompetitive effects of the merger in the narrowly drawn market proposed by the government, this was clearly outweighed by the convenience and needs of the community to be served by the merged bank. The court in analyzing the competition held that attention must be directed to different groupings within the line of commerce. These groupings separate those products and services where absence of competition might be significant from those in which competition from many sources was so widespread that no question of significant diminution of competition by merger could be raised. Competition in many of the services and products offered was so extensive and effective that the merger created a larger bank, but did not create any possible detrimental effect upon present competition, much less the imminent potential of ever increasing competition.

12. This appeal was taken under the Expediting Act, 15 U.S.C., § 29 (1903).

13. 399 U.S. at 373.

14. The area chosen by the District Court was approximately four times as large as Phillipsburg-Easton. The Lehigh Valley area had a 1960 population of 216,000 and included 18 banks, whereas the Phillipsburg-Easton area had a population of only 90,000 served by seven banks.

15. 374 U.S. 321 (1963).

16. Many cases have relied upon *Philadelphia Bank*. See, e.g., *United States v. First City Nat. Bank*, 386 U.S. 361 (1967); *United States v. First Nat. Bank*, 376 U.S. 665 (1964); *United States v. Third Nat. Bank*, 390 U.S. 171 (1968).

17. Prior to the 1950 Celler-Kefauver Amendment, the language of the Clayton Act had referred only to stock acquisitions. Since the majority of bank mergers did not involve such acquisitions of stock, they did not fall within the control of the Act. The 1950 Celler-Kefauver Amendment to the Clayton Act extended the coverage of that act to acquisitions of assets. However, that amendment was limited to acquisitions of corporations under the control of the Federal Trade Commission. Since commercial banks are under the control of the Federal Reserve Board and not the F.T.C., it was assumed that banks were still exempt from prosecution under the Clayton Act. The Bank Merger Act of 1960 was designed to establish an element of control over bank mergers. That Act provided that before a merger could be consummated, it had to be approved by a specified agency of the Federal government. It was assumed, however, that this approval, once given, was to be final, and approved bank mergers would retain their exempt status as to Section 7 prosecution. The Court in *Philadelphia Bank* effectively held that even agency approved mergers were subject to judicial scrutiny and the agency's determination was not conclusive if the Court found the merger to be violative of the anti-trust laws.

In reaching this decision, the Court held that a bank merger was neither a pure stock acquisition, as stipulated in the original language of the Clayton Act, nor a pure asset acquisition, as stipulated in the 1950 Amendment. By reasoning that bank mergers fell

Philadelphia Bank's denial of that exemption, Congress enacted the Bank Merger Act of 1966.¹⁸ This Act prescribed standards and procedures which federal agencies and courts were to apply in reviewing bank merger applications. In addition, it established a "convenience and needs" limitation to the Court's sweeping disapproval of mergers between directly competing banks.¹⁹ In subsequent cases, however, the Supreme Court has continued to rely upon *Philadelphia Bank*, thereby diluting the "convenience and needs" limitation.²⁰

Prior to *Phillipsburg Bank*, ten horizontal bank mergers had been

somewhere between these two standards and therefore were covered by their overlap, and that the 1960 Bank Merger Act set standards by which bank mergers were to be judged, thereby indicating a Congressional intent that they be so judged, the Court justified their decision and their assumption of final determination which had previously been thought to reside with the Federal agencies.

18. 12 U.S.C. § 18(c) (5) (1966). The essence of the 1966 Act is found in section 5: . . . (5) The responsible agency shall not approve:

(A) any proposed merger which would result in a monopoly or which would be in furtherance of any combination or conspiracy to monopolize the business of banking in any part of the United States, or

(B) any proposed merger transaction whose effect may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect.

19. *Id.* para. B.

20. The leading case interpreting the 1966 Bank Merger Act is *United States v. Third National Bank of Nashville*, 390 U.S. 171 (1968). In that case, the Court rejected the argument that the 1966 Bank Merger Act had modified the usual anti-trust analysis. The actual language of the 1966 Act omitted the phrase "any line of commerce." Line of commerce considerations had been important in Clayton Act suits since the Court had interpreted the phrase to mean that potential anti-trust violations were to be measured in light of the specific type of commerce which the concerned corporation participated in. This interpretation effectively narrowed the relevant field of competitors and magnified any anti-competitive effects due to the lessened number of individuals who could supply effective competition. The omission from the 1966 Act raised speculation whether Congress intended to expand the Supreme Court's definition of line of commerce in bank merger cases. The *Philadelphia Bank* case had held that commercial banking was the relevant "line of commerce" and that no other non-bank financial institutions were to be considered in the Court's determination of the anti-competitive effects of any proposed merger. In the *Nashville Bank* case, the Court held that the sole function of the Act was to excuse bank mergers which violate the anti-trust laws where the merging banks prove that the benefits of the merger clearly outweigh the ill-effects of lessened competition. The Court further stated, in a footnote, that they found no legislative intent to alter the traditional methods of defining relevant markets. This seems to suggest that commercial banking would still constitute a distinct line of commerce. The Court apparently determined that the omission of "any line of commerce" from the 1966 Bank Merger Act was irrelevant.

In determining what would satisfy the convenience and needs limitation, the Court in *Nashville* held that for an otherwise anti-competitive merger to be approved it had to be shown that the merger was essential to gain the benefits for the "convenience and needs" of the public. If these benefits could be gained in any other way, the merger was not to be approved.

contested under § 7 of the Clayton Act.²¹ The total assets of the proposed banks in these cases ranged from a maximum of \$6,001,888,000 to a minimum of \$389,700,000.²² The combined assets of PNB and SNB would have been approximately one tenth the size of the smallest bank merger previously contested. The *Phillipsburg Bank* decision raises questions as to the suitability of the Court's line of commerce determinations in small bank mergers.

Relevant Line of Commerce and Oligopoly Theory

The decisions in both *Philadelphia Bank* and *Phillipsburg Bank* turned upon the selection of commercial banking as the relevant line of commerce.²³ Having narrowly drawn the market in both cases, the Court applied oligopoly theory²⁴ in determining that the mergers violated § 7 of the Clayton Act.

An analysis based upon oligopoly theory recognizes that oligopoly power is inherently evil. Since concentrated market structure is the evil rather than some particular conduct, any merger which might tend to increase market concentration, and hence oligopoly power, is presumed to be illegal.²⁵ Defining the relevant line of commerce thus becomes crucial.

21. Contested section 7 bank merger cases: assets of resulting banks

Case	Millions
1. <i>Manufacturers Hanover</i>	\$6,001.8
2. <i>Continental Illinois</i>	3,248.3
3. <i>Crocker-Citizens</i>	3,217.4
4. <i>California Bank-First Western</i>	2,421.2
5. <i>Philadelphia National Bank</i>	1,805.3
6. <i>Provident-Central Penn</i>	1,069.1
7. <i>First City-Southern National (Houston)</i>	1,042.9
8. <i>Mercantile Trust-Security Trust</i>	1,040.4
9. <i>Third National-Nashville Bank and Trust</i>	428.2
10. <i>First National-Cooke Trust Company</i>	389.7
11. <i>Phillipsburg National-Second National</i>	41.1
22. See note 21 <i>supra</i> .	

23. As a market is more narrowly drawn, the share of each competitor remaining therein increases because of the decline in the total number of competitors. Therefore, a merger will cause a greater increase in concentration within a narrowly drawn market than in one more loosely drawn.

24. See generally Brodley, *supra* note 2.

25. *Id.* at 350. The Court in *Philadelphia Bank* recognized this theory of presumptive illegality by stating:

we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be adjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.

374 U.S. at 363.

Justice White in *United States v. Von's Grocery*, 384 U.S. 270, 280 (1965), found that a presumption of illegality arose when a proposed merger, (1) followed a pattern of increasing competition; (2) eliminated a substantial competitor from the market; (3) caused a significant percentage increase as a result of the merger; (4) was

If it is defined such that the number of competitors is significantly reduced, the possibility that a merger in that market will result in an increase in concentration sufficient to fall within the presumptive illegality of oligopoly theory is greatly enhanced.²⁶

Moreover, utilization of oligopoly theory and the application of a narrowly drawn line of commerce in *Phillipsburg* made the question of the relevant geographic market insignificant. Had the Supreme Court accepted the geographic market as defined by the district court, while limiting the line of commerce to commercial banking, it is probable that the merger would still have been enjoined. Within the geographic market as determined by the lower court, the merged banks would have held 6.76% of the area's total commercial bank assets.²⁷ This figure, though relatively small when compared with the 36% in *Philadelphia Bank*²⁸ and the 19.3% found in the Supreme Court's Phillipsburg-Easton²⁹ market, is well within the range of presumptive illegality under oligopoly theory. In *Brown Shoe v. United States*³⁰ a market share of 5% was declared to be presumptively illegal and in *United States v. Von's Grocery*³¹ a 7.5% share was similarly proscribed. Furthermore, under theories focusing upon total market concentration, the market structure within the district court's relevant geographic area would also have been proscribed. In light of the Bain theory,³² the 73.85%³³ of the pre-merger

in an already oligopolistic market. Where there is such a situation, a merger involving firms holding only relatively small market shares and resulting in only a slight increase in market concentration is presumed illegal.

It can readily be seen that *Philadelphia Bank* phrases such as "undue percentage share" and "significant increase" are readily adaptable to Justice White's requirements for presumptive illegality.

See Brodley, *supra* note 2, at 309-310. Under such an oligopoly concentration approach, the many persuasive defenses offered could have been rejected on the ground that present evidence of market competitiveness is no basis for permitting conversion of a market into an oligopoly. Present competitiveness provides no guarantee of future competitiveness under more concentrated market conditions.

26. See notes 36 and 38 *infra*.

27. 306 F. Supp. at 659.

28. 374 U.S. at 331.

29. 399 U.S. at 355.

30. 370 U.S. 294, 343 (1961). While market percentages in *Brown Shoe* varied between sub-markets across the country, in 47 communities their share was 5% or less which the Court held to constitute presumptive illegality.

31. 384 U.S. 270, 280 (1965).

32. See J. BAIN, *INDUSTRIAL ORGANIZATION* 530-31 (1959). A study by Professor Bain has shown a strong positive correlation between concentrated oligopoly markets and high profits. That study, covering profits in forty-two manufacturing industries over a five-year period, indicated that where the largest eight firms in an industry supplied seventy percent or more of the industry output, profits much higher than average resulted. This pattern did not hold in less concentrated markets, thus suggesting that there is a critical point at which a market becomes sufficiently concentrated to lead to excess profits. Furthermore, where high entry barriers (as in a regulated industry)

assets held by the eight largest banks reflects prima facie illegality. Similarly, the 86.8% held by the twelve largest pre-merger firms³⁴ is within the "loose oligopoly" considered likely to threaten competition under the Kaysen-Turner theory.³⁵

In summary, the Court's acceptance of oligopoly theory as a mode of analysis in situations similar to *Phillipsburg* renders the relevant line of commerce determinative. Since the theory presumes slight increases in market concentration to be illegal, it is essential that all effective competitors be included in the market.

*Credibility of Commercial Banking as Relevant Line
of Commerce in Small Bank Situations*

In *Phillipsburg Bank*, as in *Philadelphia Bank*, the Supreme Court held that commercial banking constituted the relevant line of commerce, and refused to include varying degrees of competition from other types of financial institutions.³⁶ The Court in *Phillipsburg Bank* reiterated the reasons given in *Philadelphia Bank* for its refusal to expand the line of commerce beyond commercial banking. Justification for this refusal centered upon two specific characteristics of commercial banking which the Court deemed crucial in the determination of the relevant line of commerce. First, the Court placed reliance upon its finding that commercial banks offer certain unique services, particularly demand deposits,

were added to high seller-concentration, the profit rate tended to become even more excessive.

33. 306 F. Supp. at 657.

34. *Id.*

35. C. KAYSEN and D. F. TURNER, ANTITRUST POLICY 72 (1959). A tight oligopoly is defined as a market in which eight or fewer firms supply 50% or more of the market with the largest firm having 20% or more; a loose oligopoly, as a market in which fewer than twenty firms control 75% of the market. The largest firm in the district court's area controlled 18.96% of the total assets therein. See note 8 *supra*, at 656. Consequently, this market would appear to be very close to a tight oligopoly and definitely constitutes a loose one.

36. *United States v. Phillipsburg National Bank*, 399 U.S. at 360; *United States v. Philadelphia National Bank*, 374 U.S. at 356. The district court in *Phillipsburg Bank*, 306 F. Supp. 645, 647, 650, agreed that the term "commercial banking" may be used as a general description of a line of commerce in bank merger cases. However, the court there selected only those products and services, as the line of commerce, in which the impact of the merger, if any, is likely to be felt. According to the district court:

. . . while the term 'commercial banking' may be used to designate the general line of commerce embracing all bank services, attention must be given in analysis of competition to different groupings within the line of commerce separating those products and services where absence of competition may be significant from those in which competition from many sources is so widespread that no question of significant diminution of competition by the merger could be raised.

for which they have no competition.³⁷ Secondly, the Court found that the "cluster of services"³⁸ offered by commercial banks establishes a decided customer preference for such banks.³⁹

It is questionable whether the unique services argument, as a basis for limiting the relevant line of commerce to commercial banking, is justifiable in small bank situations. Although it is generally true that no other institution offers a service which can be considered an all inclusive substitute for the checking account, there are an increasing number of alternative means of performing the same financial function.⁴⁰ Technology, especially in the form of electronics and computers, is providing new means for settling account balances, making payments, and carrying out money transfers.⁴¹ The effect of such innovations upon the demand deposit may be illustrated by the fact that statistical data, reflecting a decline in the percentage of total bank assets derived from those deposits, indicates a reduction in the value of offering this service.⁴² As a consequence, the growth of demand deposits in commercial banks has been less than half the growth rate of the gross national product for almost any time segment during the post-World War II period.⁴³ Analyzing the sources and uses of commercial bank funds during the 1956-1965 period, one study shows that demand deposits accounted for only 20% of the source of bank funds during the decade.⁴⁴ In fact, demand deposits held in the name of non-financial corporations⁴⁵ declined during the decade by \$4.3 billions.⁴⁶ This low growth rate of demand deposits is characteristic of a market declining as a result of product substitution.⁴⁷

37. 399 U.S. at 360, 374 U.S. at 356. "Demand deposits" here refers to checking accounts.

38. 374 U.S. at 356. "Cluster of services" refers to the bank's offering a wide range of services and products. It is argued that because banks offer all these services at one location they enjoy a decided consumer preference.

39. *Id.* at 357.

40. Watson and Hoskins, "*Line of Commerce*" and *Commercial Banking*, 42 S. CAL. L. REV. 225, 230 (1968-69).

41. Kramer and Livingston, *Cashing in on the Checkless Society*, 45 HARV. BUS. REV. 141 (Sept.-Oct. 1967). Watson and Hoskins, *supra* note 40, at 230. These innovations range from telegraphic transfers and lock-box procedures to computer utilities, the initial use of which has given rise to the prediction of a "checkless society." These technological advantages have provided new ways of settling account balances.

42. See R. W. GOLDSMITH, FINANCIAL INSTITUTIONS 79 (1968); Watson and Hoskins, note 40 *supra*, at 230.

43. *Id.*

44. *Id.*

45. "Non-financial corporations" denotes corporations concerned with and participating in any business activity other than the financial market. This term excludes financial institutions such as commercial banks, savings banks, savings and loan associations, finance companies, etc.

46. See note 42 *supra*.

47. Watson and Hoskins, *supra* note 40, at 230.

The inappropriateness of the unique services rationale as a factor in the line of commerce determination is reinforced by the nature of the market in *Phillipsburg* when compared to that in *Philadelphia Bank*. First, while in *Philadelphia Bank* the majority of the banks' business was in products and services "unique" to commercial banking, such "unique" services accounted for only a minority of the banks' business⁴⁸ in *Phillipsburg Bank*.⁴⁸ Thus, the Court has placed special emphasis upon demand deposits, but has failed to consider that in *Phillipsburg Bank* the percentage of demand deposits to total deposits was much lower than in *Philadelphia Bank*.⁴⁹ Second, the Court failed to consider that in the Phillipsburg-Easton market financial institutions other than commercial banks did, in fact, accept demand deposits. For example, in *Hudson County National Bank v. Provident Institution for Savings*⁵⁰ the New Jersey Supreme Court found that it had been the "usual custom of savings banks" to maintain checking accounts, and that they could continue to do so.⁵¹ Finally, the Court's assertion, that the trust departments and large commercial and industrial loans available at commercial banks constitute unique services,⁵² is not relevant to the Phillipsburg-Easton market. The trust services offered by the banks in question are neither efficient⁵³ nor unique.⁵⁴ With respect to the large commercial and

48. 306 F. Supp. at 649.

Time and Savings Deposits, Deposits and Demand Deposits
As Percentage of Total Deposits

	Time & Saving	Demand
PNB	71%	29%
SNB	72%	28%
Girard (<i>Philadelphia Bank</i>)	41%	59%
Large Bank Average	45%	55%

Percentage of Commercial and Industrial Loans of Total Loans

Girard	
PNB	16.2%
SNB	12.3%

Real Estate Loans and Personal Loans as Percentage of Total Loans

	Real Estate	Personal	Combined
Large Bank Average	14%	8%	22%
PNB	54%	28%	82%
SNB	72%	14%	86%

In addition, under 10% of PNB's assets were in industrial and commercial loans and under 8% of SNB's as compared with 19.6% for all banks in the nation. On the other hand, 33% of PNB's loans and 44% of SNB's loans were for real estate or mortgages as compared with only 13% in the nation.

49. See note 48 *supra*.

50. 44 N.J. 282, 208 A.2d 409 (1965).

51. *Id.* at 284, 208 A.2d at 410.

52. 374 U.S. at 356.

53. 306 F. Supp. at 648.

54. The trust services offered by the Howard Savings Bank and others are some of the best in the State of New Jersey and rival those offered by com-

industrial loans, the banks in question, because of their small percentage of demand deposits, are unable to generate potential for expansion of such long term loans.⁵⁵ Therefore, it would appear that the "uniqueness" of these services and the competitive advantage to be gained therefrom is at best illusory in the Phillipsburg-Easton area.

As additional support for the "unique services" argument, the Court in *Philadelphia Bank* and *Phillipsburg Bank* stated that certain commercial banking products and services enjoy "such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions."⁵⁶ Emphasizing the lending market, the Court stated that commercial banks were at a competitive advantage because the lending capital of non-bank institutions consists "in substantial part of bank loans."⁵⁷ If this were the case, commercial banks could effectively control their competition through interest rates on loans to these other types of financial institutions. However, it has been shown that, in fact, bank loans comprise, on the average, only 16% of the lending capital of such institutions.⁵⁸ While a higher interest rate may be required on these funds, it is doubtful whether the remaining 84% of the lending capital of non-bank financial institutions would be similarly affected. Another reason given for the competitive advantage of commercial banks was that "only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits."⁵⁹ Yet, in *Phillipsburg Bank*, the merging banks obtained only 29% and 28% of their working capital, respectively, from demand deposits.⁶⁰ This does not constitute the "bulk of their working capital." Furthermore, a recent study of all finance

mercial banks in the area. Brief for appellee at 30-31, *United States v. Phillipsburg National Bank*, 399 U.S. 350 (1970).

55. 306 F. Supp. at 648. The capacity of a commercial bank to generate credit to meet the business needs of the community varies according to its demand deposits. It seems that a high percentage of demand deposits and a high percentage of commercial and industrial loans go hand in hand. The higher the volume of demand deposits, the greater is the potential for expansion of credit in the form of commercial and industrial loans. Accordingly, the quantity of funds that can be pumped back to meet the current credit needs of the business community is dependent upon the volume of demand deposits which a bank holds.

56. *United States v. Philadelphia National Bank*, 374 U.S. at 356; *United States v. Phillipsburg National Bank*, 399 U.S. at 361 n.4.

57. 374 U.S. at 356.

58. See *Watson and Hoskins*, *supra* note 40, at 231. The larger sales finance companies, having the greatest access to the commercial paper market, as of the end of 1965 obtained only 12% of their financing through bank loans. Personal finance companies raised only 20% through commercial bank loans, while business finance companies raised only 24% of their funds from this source.

59. 374 U.S. at 356 n.33.

60. See note 48 *supra*.

companies revealed that personal finance companies obtained, on the average, 21% of their funds without having to pay interest charges thereon, and all finance companies obtained, on the average, 15% of their funds from interest free sources.⁶¹ Thus, the interest-free capital obtained by banks does not appear to give them the competitive advantage indicated by the Court.

In excluding other financial institutions from the relevant line of commerce, the Court has failed to consider recent undertakings by these institutions which indicate that they are attempting to compete with commercial banks. For example, savings and loan associations now advertise interest rates to attract prospective customers. Finance companies have also established branches in retail outlets for greater consumer convenience and in order to compete with branch banking.⁶² The effectiveness of this innovative competition is reflected in the substantial growth rates and market shares of non-bank financial institutions when compared to commercial banks. From 1955 to 1965, commercial banks grew at a 5.8% compound rate, finance companies at an 8.5% rate and savings and loan associations at a 13.1% rate. In 1966-1967, financial institutions other than commercial banks accounted for over 50% of the total volume of consumer credit outstanding, and 57.6% of the home mortgage loans. In terms of the total assets of financial intermediaries, the holdings of commercial banks declined from 35.4% in 1955 to 31.1% in 1965.⁶³ These statistics indicate that the offering of "unique" services by commercial banks has not prevented effective competition from other financial institutions.⁶⁴

The other factor which the Court found material to the definition of the relevant line of commerce was the "cluster of services" offered by commercial banks. According to the Court, this feature establishes a decided customer preference for commercial banks. In *Philadelphia Bank* the Court stated that as a result of offering a "cluster of services," commercial banks enjoyed a settled consumer preference as to savings deposits, thereby insulating them from competition in that field.⁶⁵ Although commercial banks in 1966 did hold 60% of all savings deposits,

61. See R. W. GOLDSMITH, *supra* note 42, at 95, Table 3.10.

62. See Watson and Hoskins, *supra* note 40, at 233.

63. *Id.* at 238.

64. Furthermore, while these institutions may currently charge higher interest rates than commercial banks, their financial structures in no way compel them to charge such rates. Therefore, they are in no way prevented from lowering their rates if they should so desire or circumstances should so motivate. Thus, they also provide even more effective potential competition in the lending market.

65. 374 U.S. at 357.

66. See R. W. GOLDSMITH, *supra* note 42, at 89, Table 3.8.

this is in large part attributable to the fact that they had three times as many offices as savings and loan associations and mutual savings banks.⁶⁶ In addition, when the percentage of savings deposits held by commercial banks is compared to the interest rate offered on such deposits it appears that the current competitive position and market share of commercial banks is more the function of competitive interest rates than of any "settled consumer preference." In 1956 commercial banks held only 30% of such deposits.⁶⁷ At that time, the interest rate paid by commercial banks was less than 50% of that paid by savings institutions.⁶⁸ By 1966, when commercial banks held 60% of all savings deposits, the rate paid by commercial banks had tripled and was 90% of that paid by savings institutions.⁶⁹ Rather than enjoying a settled consumer preference, commercial banks have been forced to actively compete with non-bank institutions in the savings market.

The soundness of the "cluster of services" rationale is further weakened by several important differences between the "cluster" offered in *Philadelphia Bank* and that available in *Phillipsburg Bank*. Whereas the majority of the "cluster" in *Philadelphia Bank* was made up of "unique" services, that in *Phillipsburg Bank* was made up primarily of non-unique services.⁷⁰ Furthermore, several of the "unique" services relied upon by the Court in *Philadelphia Bank* were either not available in Phillipsburg-Easton or were not unique to commercial banks in that market.⁷¹

Such dissimilar conditions render questionable the Court's reliance upon its findings in *Philadelphia Bank* as a basis for finding that the "cluster of services" offered in *Phillipsburg Bank* creates a consumer preference for commercial banks. One of the foundations of the Court's "cluster of services" argument in *Philadelphia Bank* was the determination that consumers, who were forced to patronize commercial banks in order to utilize their unique services, were likely, as a matter of convenience, to utilize all of the banks' services. Since no unique services were offered by the banks in *Phillipsburg*, there is little justification for limiting the line of commerce on this basis. Even assuming that some consumer preference does exist, the fact that there are no unique services to compel a consumer to patronize a commercial bank would indicate that less weight should be given the "cluster" argument than was accorded it in *Philadelphia Bank*.

67. *Id.*

68. *Id.* at 88.

69. *Id.* at 90.

70. See note 48 *supra* and accompanying text.

71. See notes 50 and 54 *supra*.

Because of the lack of "unique" services and the different nature of the "cluster of services" in *Phillipsburg Bank*, the merger of PNB and SNB would have affected the same services, whether bank or non-bank institutions were considered. Thus, any anti-competitive effects upon rival commercial banks would have been felt to the same extent by non-bank financial institutions. As a result, there is no reason to limit the relevant line of commerce to commercial banking in similar small bank situations.

The importance of a realistic line of commerce determination is enhanced when considered in light of the Court's holdings as to the "convenience and needs" limitation of the Bank Merger Act of 1966. The Act provides a means whereby an anti-competitive merger may be permitted if the benefits derived therefrom, in terms of the "convenience and needs" of the community, clearly outweigh the anti-competitive effects.⁷² However, the Supreme Court's interpretation of this limitation has made it difficult to meet. In *United States v. Third National Bank of Nashville*,⁷³ the Court held that proof was required that the "merger was essential to secure this net gain to the public interest."⁷⁴ If any other means were available, without regard to their effectiveness or plausibility, they must be pursued as far as possible before a merger could be approved.⁷⁵ In *Phillipsburg Bank*, the Court held that the benefits must accrue to the entire market. The fact that there would be clear and substantial benefits to one segment thereof was insufficient.⁷⁶

These standards virtually foreclose access to the "convenience and needs" limitation. Therefore, once a merger is found to have substantial anti-competitive effects, it will be prohibited. As a consequence, the relevant line of commerce determination becomes the crucial issue.

Line of Commerce: An Ad Hoc Approach

The purpose of a line of commerce determination is to delineate the group of competitors which may be adversely affected by a merger and the products for which there are no effective substitutes. Just as Phillipsburg-Easton differed from Philadelphia, each market situation will vary

72. Bank Merger Act, 12 U.S.C. § 18(c)(5)(B) (1966). Section 18(c)(5)(B) provides that a proposed merger whose effect may be to substantially lessen competition may still be approved if

The anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

73. 390 U.S. 171 (1968).

74. *Id.* at 189.

75. *Id.*

76. 399 U.S. at 370-72.

with location, services offered, size of banks, non-bank competitors, and existing technology. Thus, line of commerce determinations should be made on an ad hoc basis, utilizing a rule of reason approach.⁷⁷ The problems inherent in forecasting competitive effects, which led to the Court's adopting current oligopoly theory, are not present in line of commerce determinations. An ad hoc approach to the relevant line of commerce would be based upon readily available data pertaining to past events and trends. It would involve no forecasting or involved economic theory beyond the expertise of courts. Rather, the Court would focus upon the actual market situation and the effective competitor therein. Under such an approach the line of commerce in *Phillipsburg Bank* should not have been limited to commercial banks but should have included those non-bank institutions with which the banks in question actually competed. By restricting the line of commerce to commercial banks, the Court ignored the reality of such banking in Phillipsburg-Easton. By focusing on theoretical, though locally non-existent, characteristics of commercial banking, and excluding from the line of commerce institutions which provide totally effective competition, the Court ignored the congressional concern which it noted in *Brown Shoe*.⁷⁸ That congressional concern, in enacting § 7 of the Clayton Act, was the protection of competition, not competitors.⁷⁹

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77. Such an approach calls for a case by case study and individual determinations made for each different situation depending upon the nature of the particular market involved. This rule of reason approach is the traditional method in Sherman Act cases.

78. 370 U.S. 294 (1962).

79. *Id.* at 320.