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The Antitrust Aspects of Bank Mergers - Introduction

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SYMPOSIUM

THE ANTITRUST ASPECTS OF BANK MERGERS

INTRODUCTION

*Carl Felsenfeld*¹

The subject matter of this Conference—Banking and the Antitrust Laws—has received insufficient attention in the legal literature. This is in curious contrast to the quantity of federal statutes that treat the subject: principally, we have the standard antitrust laws led by the Sherman and Clayton Antitrust Acts; the Bank Merger Act of 1960; and section 2 of the Bank Holding Company Act of 1956. These establish similar, but not identical, antitrust standards for the bank transactions to which they apply.

Furthermore, there has been no shortage of bank mergers and acquisitions since September 29, 1994, the date on which the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle-Neal”) was enacted. I highlight that event because it marked a definitive change in American bank philosophy from the attitude that existed before Riegle-Neal—the best banks are the small banks—to the post-Riegle-Neal dominant position that big banks are all right, too. As the date of Riegle-Neal indicates, the preference for small banks existed for some two hundred years of our history, going back to the agrarian views of Thomas Jefferson whose gift with words did not extend to economics.

Before September 1994, national banks were absolutely prohibited from branching interstate, thereby ensuring their small size. State banks could branch interstate, but only if their home and host states consented. Banks could spread by the acquisition of other banks through a holding company system, but this was awkward and required the specific statutory approval of the host states. Admittedly, by 1994 a not inconsequential interstate bank holding company system had developed, although growth had been gradual since 1954 and largely contrary to public sentiment.

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The major contribution of Rieggle-Neal was that it allowed banks—national and state—to merge on an interstate basis without restriction, except for the antitrust laws already in force and for some lesser qualifications not relevant here. Large bank mergers became the order of the day. The mammoth bank agglomerations spanning many states rapidly came into existence.

Each bank merger had to satisfy the antitrust laws. The regulatory approvals that were required before a merger could go forward regularly referred to those laws and their effects upon the various transactions at issue. In measuring banks against the relevant antitrust laws, the test laid down by the Supreme Court in *United States v. Philadelphia National Bank et al.*² controlled. The case, while deciding that section 7 of the Clayton Act applied to banking, held that the relevant geographic area which defined a bank market was local in nature. The market that was tested to establish whether a bank merger violated the Clayton Act was four counties in the Philadelphia metropolitan area.

The holding of *Philadelphia National Bank* applies today. The number three bank in the country can merge with the number five bank. The resulting bank can cover twenty-five states and involve billions of dollars. Whether the merger violates the antitrust laws, however, is a question that can ultimately turn on the situation in a half-dozen counties in suburban Wichita (or whatever). There is something wrong with this standard.

No bank merger since 1994 has been derailed by an antitrust standard. Occasionally, local branches will overlap in an undesirable manner. The solution is to sell off a few bank branches and, thereby, resolve the problem. The antitrust laws are a bug to be brushed off, not a fundamental protection to our economic liberties.

One sees the process continuing. Entities like Citibank and JPMorgan Chase are gradually becoming the rule. How far we will go in the reduction of bank numbers and the growth in bank size is anybody's guess. Also unknown is the effect that this trend will have upon bank services including credit cards, real estate mortgages, and business financings.

This Conference brings together some of the leading thinkers in banking and antitrust law and policy. We at Fordham hope that the attention this generates will spark some new thinking. Perhaps there is

2. 374 U.S. 321 (1963).

no problem and current law is good. That is, however, difficult to believe.

ADDENDUM

This Introduction is being written as Treasury Secretary Paulson is presenting a grand new design for the bank regulatory system.³ I have not seen reference in any of the preliminary materials to an antitrust issue. It is fair to say that months will go by before the legislation required to effect a change of this magnitude will be enacted. It would be unfortunate to lose this opportunity for constructive thinking.

3. DEP'T OF THE TREASURY, THE DEPARTMENT OF THE TREASURY BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008), *available at* <http://www.treas.gov/press/releases/reports/Blueprint.pdf>.