In the

# Supreme Court of the United States

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| UNITED STATES OF AMERICA, | ) | |
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| Appellant | ) | |
| | ) | |
| v | ) | No. 71-703 |
| | ) | |
| FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY | ) | |

Pages 1 thru 64

Washington, D. C.
October 16 & 17, 1972



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IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES OF AMERICA, Appellant | : | |
| v. | : | No. 71-703 |
| FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY | : | |

Washington, D.C.,
Monday, October 16, 1972

The above-entitled matter came on for argument at 2:26 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530
for the Appellant

C O N T E N T S PAGE

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Next we will hear Number 71-703, the United States against the First National Bancorporation.

I think you can proceed now, Mr. Friedman.

ORAL ARGUMENT OF

DANIEL M. FRIEDMAN, ESQ., ON BEHALF OF

UNITED STATES OF AMERICA, APPELLANT

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

This is a direct appeal from the United States District Court for the District of Colorado which, after trial, dismissed a Government anti-trust suit challenging a bank merger that is violating Section VII of the Clayton Act.

The merger involved the acquisition by the First Bancorporation of Colorado, the second largest bank-holding company in Colorado, of the First National Bank of Greeley, which is the second-largest bank in the City of Greeley.

The holding company, which I shall refer to as Bancorporation, does not through any of its subsidiaries operate in the City of Greeley, so this means that the acquiring firm and the acquired firm are not themselves direct competitors.

The theory of the Government's case was that the Bancorporation was a potential entrance into the Greeley

market and that, by acquiring the bank in Greeley, the effect was to remove the competitive effect that the presence of this potential entrance had on the outside of the market, on the theory that had it not been for the acquisition, there was a reasonable probability that this acquiring firm and holding company would either itself have entered the market through acquiring the small bank or through opening a new bank in the Greeley area.

Q Mr. Friedman, does the fact that the acquisition is made automatically make the acquiring entity potential entrance?

MR. FRIEDMAN: No, no, of course not. Of course not, Mr. Chief Justice. The thrust of our argument is that in view of all the circumstances shown here on the proper standard, in fact, this corporation was a potential entrance at the time it made the acquisition. We do not say that the mere fact it made the acquisition made it a potential entrance but we do say this, that in this kind of a situation where the firm, as I shall develop, is interested in the market, where there is an attractive market, where, as the records shows, they were interested in going into all the markets and where it was an attractive thing to prudent management, that is enough to make it, we think, a potential entrant and then the next question, of course, is whether the elimination of that potential entrance may have the effect substantially to

lessen competition in violation of Section VII.

Q A potential independent entrance or an entrance by way of footholds.

MR. FRIEDMAN: That is correct, Mr. Justice. There are claims that they were potential entrance here in both ways.

Q You are going to get, are you, to the foothold?

MR. FRIEDMAN: Oh, yes, yes.

Q Concept. It is a new one to me as I read it.

MR. FRIEDMAN: Let me explain it right now.

Q Well, I think I understand it, but I hadn't seen any -- it didn't ring any bells with me in the experiences of this Court.

MR. FRIEDMAN: Well, I think this Court has not faced it, but the concept is a very simple one which is, if you have a concentrated market where two or three firms own the major share of the business -- have the major share of the business, as is true in Greeley, if an outside firm comes in and merely succeeds to the share of the market held by one of these large firms, this merely solidifies the existing relationship. It tends to tie up the existing structure.

On the other hand, if a large firm comes into the market by acquiring a small firm in the market, this means that the only way the large firm can hope to achieve a

substantial share of the market is by engaging in and vying for this competition and also, it seems to me self-evident that a very large firm is not going to acquire a small firm in the market unless it believes and hopes that it can build it up and the theory of it is that this kind of an entry will inject into the market a new competitive force which is not present in the usual concentrated market.

Q In your view, is it even better to be a foothold entrance than an independent entrance as part of your Section VII?

MR. FRIEDMAN: We -- we -- I don't know, Mr. Justice. Both of them, we think -- both of them, we think are desirable in changing the structure of concentrated markets in a sense. In a sense, perhaps, the acquisition of a small, little firm in the market, which up to this time by definition has not been a very effective competitor, that is almost the equivalent of going in by yourself, because you start with a little one, it's as though you just started it and try to build it up and get a larger share of the market and compete vigorously in it.

Q This -- has this doctrine been developed in the courts of appeals or the district courts?

MR. FRIEDMAN: No, I think it has been merely developed by the --

Q That's not in your department?

MR. FRIEDMAN: -- Government, Mr. Justice.

Unfortunately I have to say that I have not thus far been persuasive to the district courts but we hope it will be to this Court.

Q Mr. Friedman, isn't the question that was before Judge Doyle in this case basically a factual one?

MR. FRIEDMAN: It is basically a factual one, Mr. Justice, but we think in resolving that question, Judge Doyle, we think, applied the wrong standards for determining what is a potential entity.

That is, we think that the Judge applied what we call the "subjective standard," a standard based on the expressed intent of a corporate official as compared to what they would do and we don't think that is the proper standard as I shall develop in the light of the Congressional purposes in Section VII.

Q Didn't he in his opinion also refer to consideration of objective evidence which he found led to the same conclusion as the subjective evidence?

MR. FRIEDMAN: He spoke of objective evidence, but I think, Mr. Justice, once again, what he meant by objective evidence was largely the testimony plus the fact that he was impressed, I think, by what he felt was the unlikelihood in terms of the management's stated program and plans that they are going in. He did not, it seems to us, address himself

to the standards that we think are the controlling ones here.

Now, I would like, just by way of background, to give a little bit of the history of the bank merger movement in this country. In the early and the late 1950's we had a tremendous wave of bank mergers in the major cities of this country. Competing banks joined. They formed these huge banks, the Manufacturers, Hanover, Morgan Guaranty in New York and this merger went on for awhile and finally the Government began to bring suits against these mergers and when this Court, in 1963, decided in the Philadelphia Bank case that Section VII of the Clayton Act applied to bank mergers, that basically marked the end of this aspect of the bank merger movement in this country because that case established that two large banks having a significant share of the market who were competitors could not combine.

Q When would you say that the present-day movement began, more or less?

MR. FRIEDMAN: The movement I discussed I think began in the late 1940's or the early 1950's.

The next phase of this movement, which I am coming to, I think began in the early 1960's and that was the tendency by the large banks in the big cities to move into many of the local regional markets, the smaller cities, by the acquisition of the most important banks in those areas. That is, in states which permitted branch banking, a large

bank would move into a local area by buying the first, the second, the third largest bank in the city.

In areas that did not permit branch banking, the holding company movement developed whereby a holding company was formed with a large bank as its nucleus and this holding company in turn proceeded to acquire various banks in the large cities.

This trend developed very rapidly and there is an exhibit in the record, Defendant's Exhibit 30, at page 1662, which is a table showing as of the end of 1969 the percentages of total state bank deposits held by the three largest and the five largest banks and this shows that in 17 states, one-third of the states, by 1969, 17 -- I'm sorry, the three largest banking organizations in the state had more than 50 percent of the total deposits and in 24 states it was the five largest banks that had more than that percentage of the deposits.

Now, this trend was also present in Colorado. In 1960, there was one holding company operating in Colorado that had three banks and 4.4 percent of the deposits. By 1970, there were seven holding companies operating in Colorado. They had 41 banks and while the 41 banks were less than one-fifth of the total banks in the state, they had 51 percent of the deposits in Colorado. So we see that what has been happening in Colorado is what has been happening

throughout the rest of the country in varying degrees. The large banks, the large banks in the cities, through these holding companies, have been going out and acquiring major competitors in the local market.

Now, the Greeley area itself has felt this trend. There are eight banking organizations in Greeley. Prior to this acquisition, four of them were owned by two Colorado holding companies and they had 60 percent of the deposits in the Greeley area and it is against this background, this history of a merger movement in the banking field, of the acquisition by more and more of the local banking leaders throughout the state, that the effect of this merger in the Greeley area must be based.

Now, Denver is the commercial and banking center of Colorado but in addition to this there are six other important banking centers, smaller cities in Colorado, of which Greeley is one.

The holding company was formed in 1968 by the officials of the principal bank in the system, the First National Bank, which is the second-largest bank in the City of Denver. I'd sorry. I misspoke myself. It is the largest bank in the City of Denver. It is a bank with assets of approximately $500-million.

It also has three smaller banks in the Denver suburbs which were organized by the people who are the

principals of the First National Bank of Denver prior to the time the holding companies were formed and in his deposition the president of the holding company testified that one reason his people formed this holding company was because of the trend in Colorado of other bank holding companies acquiring banks. That is shown at page 535 of the Record.

Now, in its first annual report to its stockholders, the holding company explained what its purpose was, what it was going to do. It said, and this is at page 513 of the Record, it said, "The policy of our company is to expand as rapidly and as wisely as possible through the acquisition of other banks in Colorado," and then it says, "Preferably banks which held out a ggod potential for growth and through other legal investments and activities."

Now, this thought was repeated in a deposition, again given by the president of the holding company which he said at pages 535 to 536 of the Record, "We would like to have a bank in the major cities of Colorado." They wanted a bank in major cities of Colorado and he also listed various other areas where they would like to be in and he was asked whether, in their plans, the holding company had ruled out the possibility of de novo expansion because in their report they spoke about acquiring other banks and he said, "No, we haven't ruled out that possibility."

The first step in this program of expanding into

the various local areas was the acquisition in Greeley. That was the first one. Since that time, Bancorporation has attempted to acquire five other banks in various areas of Colorado.

Two of the proposed acquisitions were the largest banks in the particular areas. Two others were the second-largest banks. They have not been successful in this endeavor. One of them they were able to accomplish. In two instances the regulatory authorities turned them down and in one instance the acquisition was approved. It was abandoned when the Government filed suit and the last one we still have a suit against it pending. But to us the significant thing is to show that the First Bancorporation was not just sitting idly by with its three or four banks and waiting. It was going out trying to acquire other banks in the area.

Now, the City of Greeley is 50 miles approximately north of Denver. The city has a population of 38,000. The Greeley area, which is certain surrounding communities which the district court held here to be the relevant market, has a population of 58,000. It has mainly been an agricultural community but in the last decade industry has come up in substantial measure.

The area has had a good, steady growth as we set out in our brief at page 9 -- we give some statistics and this is an area that is attractive to Bancorporation.

Now, our opponents suggest that there was no particular reason why this company should have gone into Greeley, that there are more attractive markets involved. But I would like to read to the Court two quotations. Unfortunately, we did not cite these in our brief from page 555 and this is the man named Adams who was the president of the First National Bank of Denver and a previous president of the Bancorporation. He was asked on his deposition why the bank was interested in acquiring the bank in Greeley and what he said was -- in the middle of the page -- "We were very anxious, as I say, to get into the Greeley area because it is one of the best towns in Northern Colorado and it has been for many, many, many years a great agricultural area and a fine area and we would very much like to have a unit up there in Greeley."

Then at the bottom of the page he repeated this thought when he said, "It is one of the growth areas of Colorado and we'd like to be in it."

Now, the Greeley market, as I indicated before, is a concentrated market. The three principal banking organizations have 92 percent of the deposits. The acquired bank, First National of Greeley, is approximately the same size as the largest bank within a tenth of one percent; percentagewise, roughly 32 percent of the market and the First National Bank is the only bank in the area -- the only

large bank in the area that is not owned by a holding company.

Now, the district court, in deciding this case, stated that the issue was whether there would be -- there would be, not there may be -- he says, "Whether there would be a substantial lessening of competition" and the court concluded that the Government had not shown that the acquisition in question has the effect substantially to lessen competition.

The court agreed with the Government that commercial banking is the relevant product market and found -- although the Government had suggested two alternatives -- found that the Greeley area was the relevant geographical market.

The district court also recognized that the elimination of a potential competitor may have the effect of substantially lessening competition in violation of Section VII. The court said, "Where the concentration is high, the merger removes the potential competitor as a restraining influence and the anti-competitive effects can be significant."

The court went on to hold, however, that this merger did not eliminate a substantial competitor -- sorry, a substantial entrant, since the court said that the evidence was uncontradicted that Bancorporation has no intention of entering the Greeley market if this acquisition is disapproved and we think primarily the district court relied on two bits of

evidence. One was the testimony of an official of Bancorporation that they would not enter the market and secondly, the testimony of the state regulatory officials, the district court interpreted it as indicating they would not charter a new bank in the Greeley area.

The court did not lease because of its because of its disposition that the Government had not shown anti-competitive effect.

The second issue under the Bank Holding Company Act, which is the same as under the Bank Merger Act whether any anti-competitive effects of the acquisition are clearly outweighed by the effect of the merger in serving the convenience and needs of the community. So that issue has not been resolved and if the court agrees with us that the wrong standards were applied and the case has to be remanded, that is an issue for district court to deal with on the remand.

The court also rejected an alternative ground on which the Government challenged the merger. That is that the effect of this merger was to foreclose to competing large banks in Colorado so-called "correspondent banking." That is the practice by which the large city banks perform various services for the country banks such as clearing checks, making loans in excess of the local banks' limit, giving them investment advice, serving as a depository for various funds

and the Government claims that by preempting the correspondent banking business of First of Greeley, the effect of the merger was to foreclose to the other banks in Colorado a significant important share of this busines and that in the light of the trend toward concentration in the Colorado banking field, this also had an anti-competitive effect.

This argument is a rather detailed and technical one. It turns on questions of defining the market, on disputes as to the relevant statistics involved; it is not particularly appropriate for oral argument and I propose to leave that discussion to the brief.

Now, as I have indicated, the district court didn't question that the elimination of the potential competition made substantially less competition and this Court has repeatedly so indicated and as I have also indicated, we think the primary issue in this case, therefore, is the standard for determining whether a firm is a potential entrant.

The 1950 amendments, the Celler-Kefauver Act, the Section VII of the Clayton Act, reflected the rising concern -- the concern, I'm sorry -- the concern of Congress over the rising trend of concentration in American industry and Congress was concerned that this trend toward concentration would result in a further weakening of normal forces of competition in the marketplace and, accordingly, Congress strengthened the prohibitions of the Clayton Act against

mergers which may have an anti-competitive effect.

The purpose of Section VII as amended was to maintain the structure of the market. Unlike Section I of the Sherman Act which is directed to conduct in the market, anti-competitive acts, we think Section VII is designed to preserve the structure, to avoid changes in the organization of the market that pose a serious danger of anti-competitive effects. As it has repeatedly been stated in Section VII, in 1950 Congress was concerned not with certainties but with probabilities. It was designed to stop these things in their incipiency.

Now, in a market where you have many sellers, a large number of sellers none of whom has any significant major share of the market, normally we know that competition plays the role of regulating the market. But when you get into these concentrated markets where a small number of sellers have the major share of the market and each one has a very large share, economic theory teaches that in that situation, what is likely to develop is not the normal competition but parallel policies, easy accommodations and, therefore, traditionally, markets that have a small number of firms with a large share are not characterized by the kind of vigorous competition normally found in traditional markets and that principle, that concentration is inimicable to the free play of competitive forces, is also applicable to banking. As

this Court stated in the Philadelphia Bank case, "There is no reason to think a concentration is less inimicable to the free play of competition in banking than inany of the other services."

Now, as I have indicated, the potential entrance standing on the outside of a concentrated market has two roles to play, two roles in preserving the competitive structure of the market.

First of all, standing outside the market inevitably plays an influence on the people inside the market. That is, the firms inside the market who have this great economic power are well-aware that if they abuse it, if they get too greedy in their practices, there is always the danger of the strong firm coming in and taking away from the firms that hold the major share of the market a section of that market and, indeed, this Court, in its Penn-Olin opinion at 378US page 174 quoted with approval from a TNEC monograph written 30 years ago which directly reflected that principle and it is also reflected in the testimony of our economic expert, Professor Welch.

Q Mr. Friedman, do I correctly have the impression that somewhere in this period, a new bank charter in Greeley was granted?

MR. FRIEDMAN: That is correct, fairly recently.

Q If Banco were acquiring that new, small, young

bank, would you be here today?

MR. FRIEDMAN: No, I would not. In fact, that is one of our major contentions is that we think that Bancorporation, instead of applying this large firm, this is one, we think, one of the proper ways for a large firm to get into a concentrated market. This firm has been chartered by a small holding company, a small holding company in Colorado. The claim is that Bancorporation couldn't have gotten a charter. That is one of the claims. They relied as I say -- the testimony by the State Banking Commission indicates that because charters had been turned down in other localities, there was no chance that charter would have been granted for another bank in Greeley.

Less than a year later, lo and behold someone did come in and seek a charter for a new bank in Greeley and it was granted and there is no reason to think that if Bancorporation, instead of proceeding to make this acquisition, had itself gone in with an application for a new charter, that it would not have been granted, too.

Q Do you feel that Greeley is underbanked and that the issuance of the charter is an indication that it is underbanked?

MR. FRIEDMAN: No. No, we don't contend it is underbanked, Mr. Justice. What we do contend is that Greeley was a growing area where there is room for additional banks

and that the creation of new competition in Greeley would tend to shake up this market which had been relatively static before that.

Now, the other role that the potential competitor plays, one role, the potential competitor sits on the outside and, in effect, inhibits anti-competitive behavior by the large firms in the market.

The other role, equally significant, is that the potential competitor enters the market. The potential competitor enters the market either by acquiring a small bank or by itself organizing a bank. This, again, tends to inject into what has been basically a not very competitive market, a new competition.

Now, of course, as long as the potential competitor remains outside, it has these salutary purposes. But once it enters by acquiring a market leader, two things happen. Whatever effect it has staying on the outside disappears and the possibility of any vigorous and new competition by creation of a new competitor disappears.

All that you have in this type of a situation is that the outside powerful firm comes in and takes over the market share of one of the major banks in the area.

Now, the significance that an outside potential entrant has on competition in the market basically depends on the relationship between this bank and the structure of the

market. That is, what kind of a market is it? What is its role on the outside? Is it a concentrated market? Are the facts such as to indicate that the bank is likely to come in?

And that, of course, it seems to me, is the kind of a question that has to be determined on the basis of the objective evidence in the case, not on the basis of the intent of the parties, of the stated intent of the firm. It seems to us that this is just not the way in which this kind of a determination should be made.

Q Mr. Friedman, are you saying that the court can't properly consider evidence of the subjective intent in making this ultimate determination?

MR. FRIEDMAN: I would not go so far as to say they cannot consider it, but certainly the court can't base it on that fact and I think it is entitled to very little weight, and let me -- if I may -- explain particularly with reference to this kind of testimony. The question basically that is asked in these cases is, had you not been permitted to make the acquisition, would you have gone in either through making a small acquisition or by organizing your own bank?

Almost invariably, as is true in this case, the answer is no, we would not.

Now, this is a question put to a witness after the witness has already made a decision to go in by the acquisition route and it is just almost psychologically

impossible for someone to give an objective evaluation as to what he would have done had there not been this situation.

Q Of course, without any new rule of law, the district court is perfectly free to disbelieve or discount the witnesses' testimony just on the grounds you suggest, isn't it? He doesn't need any new principle of law to do this?

MR. FRIEDMAN: No, we are not suggesting -- what we are suggesting, Mr. Justice, is that is just not a very reliable basis upon which to make the kind of a judgment involved in this area because it is subject to many problems.

Q This is entirely a one-way street, however, isn't it? If he had answered your question "yes, we would have. If we couldn't get in this way, we would have gone in independently." You certainly wouldn't want the court to disregard that evidence, would you?

MR. FRIEDMAN: Well, I think the strongest evidence, the strongest evidence of his intention to go in is if he would say --

Q It is subjective evidence, isn't it?

MR. FRIEDMAN: Well, but I think it is a different situation, Mr. Justice. It is a very different situation.

Q Yes, you would regard that as a motion against interests and get it in under that rule, would you?

MR. FRIEDMAN: I think the difference is this, Mr. Justice. In the one case -- in the one case, he is being

asked, in effect, a hypothetical question what he -- what they would have done had they not done what they decided to do and this, it seems to me, gets into a whole --

Q And if he said -- if he answers the question "no," it should be wholly disregarded and if he answers the question "yes," I am sure you would not say it should be disregarded.

MR. FRIEDMAN: I don't think it should be wholly disregarded, but I think it is something that cannot be dispositive or given great weight or --

Q Or if by contrast, you in pretrial discovery proceedings, had found some interoffice memorandum from one executive to the other saying, if we get turned down on this acquisition, we'll try to go in there independently, you would find that extremely helpful, I'm sure. Wouldn't you?

MR. FRIEDMAN: I'm sure we would.

Q But it would be entirely subjective. So it just isn't whether it is subjective or objective, is it?

MR. FRIEDMAN: Well, it's whether -- it's -- the test is -- let me make -- if I may make a suggestion in the hypothetical you posed in finding the document that supports our case, I think we would say that just confirms what the other evidence shows.

Q Well, in previous cases you have used it much more than on a confirmatory basis.

MR. FRIEDMAN: Well, it is -- it is obviously of some significance.

Let me explain another thing here, another reason why we think this kind of intent testimony is not terribly persuasive. One of the effects, one of the substantial impacts that the presence of an outside competitor has is on the conduct of the people in the market, the knowledge that there is an outside competitor on the wings and the people who are in the market have to make their judgment, have to influence their practices, on the basis of what they judge from the objective evidence. That is, they look and see what kind of a firm this is, what is happening in the market, whether it has the capacity to come in, whether it looks like the kind of an opportunity to be attractive to them. They don't know -- they don't know and can't make their business judgments on the basis of what may be in the minds of the officials of the outside company.

Now, I think one other bit of evidence that is quite significant in deciding how you evaluate these claims that they wouldn't go in otherwise is what has actually happened in Colorado and in other states, where bank-holding companies have sought and been denied permission to enter the market through acquiring a large share and when that was turned down and that failed, they had then gone in and tried to acquire a smaller bank.

A very interesting example is this very holding company, Bancorporation and, in addition, United Banks of Colorado,, the largest holding company in this state.

Each of them tried to acquire one of the leading banks in a large community, failed and then proceeded to try to acquire and succeeded, a much smaller bank.

Bancorporation tried to acquire the leading bank in Colorado Springs -- I'm sorry, the second-largest bank in Colorado Springs and when it, in its application to the Federal Reserve Board, it said it would be imprudent -- "imprudent" was the word it used -- to try to get into the market either by acquiring a smaller bank or by opening its own bank. The Fed approved that but the merger was abandoned when the Government filed an anti-trust suit.

The Bancorporation then turned around and applied for and got permission to acquire a bank in Colorado Springs that was one-seventh the size of the bank they originally had sought.

Q Was that evidence before the district court in the trial of this case?

MR. FRIEDMAN: I -- I don't believe it was. I don't believe that evidence was but it seems to us --

Q How can we consider it, then?

MR. FRIEDMAN: Well, it is all a matter of public record, Mr. Justice. These are reports of Government

regulatory authorities deciding these cases.

Q Well, don't we ordinarily limit ourselves, though, on a factual question like this as to what was put in the record in the district court?

MR. FRIEDMAN: Normally so, Mr. Justice, but I am just suggesting that this subsequent evidence confirms our claim that the kind of evidence that the districtcourt relied on in this case is not a reliable basis for deciding these questions.

One last point I would make is the testimony of the regulatory officials that the court relied on. Again, this is a wholly conjectural type of evidence. He was asked whether he would or would not charter a new bank and he says he had recommended he would not charter a new bank within five years so regulatory officials decided questions of whether to charter a new bank on the basis of the application that is filed. They consider all the facts. They have all sorts of detailed specifications.

All he said was that he would not recommend to his superior the control of the currency. It is the controller of the currency who makes the decision. Conditions change. Perhaps he would not have recommended the chartering of a new bank in Greeley at the time of the trial and in two years he might have. Views of regulatory officials also change.

MR CHIEF JUSTICE BURGER: We will resume at

10:00 o'clock in the morning.

(Whereupon, at 3:00 o'clock p.m., the hearing was recessed to reconvene at 10:00 a.m. the following day, Tuesday, October 17, 1972.)

IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED STATES, Appellant, | : | |
| v. | : | No. 71-703 |
| FIRST NATIONAL BANCORPORATION, INC., et al., Appellee | : | |

Washington, D. C.
Tuesday, October 17, 1972

The above-entitled matter came on for argument at 10:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., for the Appellant.

EUGENE J. METZGER, ESQ., One Farragut Square South, Washington, D. C., for the Appellee.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Friedman, you may proceed whenever you are ready. You have twelve minutes remaining.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ., (Cont'd)

ON BEHALF OF THE APPELLANT

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

I would like to turn now to one other important aspect of this case, and that is the reason why we think that Bancorporation elimination as a potential entrant was significant because Bancorporation, we believe, was one of the few firms in the State of Colorado that was likely to be an important and significant competitor.

Our opponents tell us that Bancorporation was insignificant as a potential entrant. They said anybody can organize a bank. They said it is not very difficult. A few people get together a little capital and organize a bank.

That's quite true, of course, but it's only, we think, a large bank, a bank with the resources that Bancorporation has, that does hold out any real potential for shaking up this market.

Now, there are at the present time in the State of Colorado -- there were at the time of this acquisition -- seven

holding companies, two of them already operating in the Greeley market. The third one, a very large holding company called Western Bancorporation, a multi-billion dollar concern under Federal law, is precluded from having any more banks in Colorado. So that takes care of three.

One of the other holding companies is quite small. It is no larger, basically, than the bank to be acquired. That's four.

Now of the remaining three in the State of Colorado, Bancorporation is by far the largest. In fact, it is about twice as large as the other two. So that it seems to us, that viewing this whole situation in Colorado, that Bancorporation is now the leading holding company, the biggest holding company that is not in the market and is a firm that has indicated its intentions of going into the market.

And, of course, as I mentioned before, this is not an isolated phenomenon by Bancorporation. All the holding companies in the State of Colorado are all attempting to spread out and to gain as many banks as possible.

The vigor of this action by the holding companies is not surprising because banking, unlike most other business, has very strict geographical limits.

Now, holding a bank cannot just expand around the country. A bank, by definition, under State law, can only stay in the one State. And, under Federal law, a holding

company cannot acquire a bank outside of the State where its principal activity takes place.

So that Bancorporation, we think, is the most likely entrant. This is the firm whose elimination as a potential competitor is likely to have the greatest impact in the market. We think that this trend toward concentration is continuing in the State and that permitting Bancorporation to come into this market to eliminate its potential competition and to take over the existing share of the market, this large share, approximately one-third, that is now held by the single non-bank affil -- non-holding company affiliated large bank -- is just the kind of anti-competitive probability that Congress intended to bar in Section 7 when it prohobited acquisitions whose effect may be -- I stress it may be. We are dealing once again with probabilities, not certainties -- whose effect may be substantially to lessen competition.

Now, I would like to reserve the balance of my time for rebuttal, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Metzger.

ORAL ARGUMENT OF EUGENE J. METZGER, ESQ.,

ON BEHALF OF THE APPELLEE

MR. METZGER: Mr. Chief Justice, and may it please the Court:

In the statement of the case yesterday, Mr. Friedman made reference to certain matters outside the record in this

case.

To the extent that those matters are conceded to be of any relevance by any members of this Court, appellees hasten to say that we do not accept the Government's representation as to what those facts are.

As an example of one instance in which we are in disagreement as to those facts, we respectfully direct the Court's attention to Footnote 57 on page 44 of our brief.

In answer to a question from Mr. Justice Blackmun yesterday, it was suggested that the Government would not have brought this case had we chosen an alternate means of entry into the market in question.

We had not understood it to be the law that a merger would be precluded simply because there were alternate means of entry into a particular market available.

We hasten to say that we do not agree that we would, in reasonable probability, have entered this market, absent this particular affiliation.

However, we believe that a showing that we have other methods of entering this market is a beginning and not an end to the Government's burden of proof in these matters.

What seems to appellees to have been the key passage, in the opinion of the Court below, was the following:

"We have sought to apply the standards laid down by the Supreme Court in naming Philadelphia Bank and Phillipsbur

Bank to our facts in an effort to arrive at an accurate and fair decision herein.

"The main difficulty here is the lack of cogent evidence which even suggests that there is likely to be a lessening of competition as a result of this present acquisition.

"Nothing has been presented which of itself or considered with the total circumstances serves to make any impact."

This is from 329 F.Supp. at page 1016.

It would seem then to me that we are dealing here with a simple case of failure of proof below, or a gross failure on the part of Judge Doyle to have properly assessed the facts before him.

That Judge Doyle is not unaware of the ramifications of nor unsympathetic to the goals of the amended Clayton Act must be apparent from his recent 10th Circuit opinion upholding the Federal Trade Commission's order striking down Kennecott Copper's acquisition of Peabody Coal, an opinion that appellant was so anxious for this Court to read that it cited the case in the reply briefs in both this and in the associated Narragansett Beer case.

I do not believe that appellant seriously taxes Judge Doyle with error. Rather, I believe, that appellant seeks a new per se rule in bank merger litigation, a rule

which would require us to discard the standards testing bank merger cases set down by this Court in Brown Shoe just ten years ago.

There, in determining whether a merger would in reasonable probability substantially lessen competition, this Court noted seven aspects, I quote, "varying in importance with the merger under consideration, which would properly be taken into consideration."

Those relevant to this kind of litigation, I believe, are six. Whether the industry is fragmented or concentrated, whether there has been an elimination of an undue number of competitors, whether there has been a recent trend towards concentration in a few leaders, whether there was ready entry of new competitors, whether the size of the acquiring company had been increased to the point where it threatened to develop decisive advantages vis a vis competitors, and finally, whether a substantial factor in competition had been eliminated.

Now, in the next year in Philadelphia Bank, this Court observed that in the merger between direct competitors, where the merger occasioned a significant increase in concentration, the Government was entitled to a Federal presumption that the merger would substantially have some competition.

I believe that the case law since that date has followed the lead of these two early cases.

Again, I reiterate that in my judgment I think that

the appellant here is seeking to create a per se rule: a not insubstantial share of State deposits may not acquire a not insubstantial share of local deposits.

These numbers have been as little as 12% of State share, as little as 8/10's of a percent of State share in the acquired institution, and as little as 15% of the effective market in the arena of competition served by the acquired institution.

We say it is a per se rule because appellant comes to this Court seeking authority to borrow an acquisition without having sustained its burden of proof on any of the six areas of inquiry this Court found relevant in Brown Shoe.

Rather, it was the appellees who brought on evidence on each of these six points, evidence which we believe fairly establishes the negative of each such proposition.

In truth, appellant has no evidence, nor any serious claim, that this merger will, in reasonable probability, substantially lessen competition in Greeley or anywhere else.

It is projecting a theory and I believe that theory to be: put a lid on any significant acquisitions by holding companies, or developing State-wide banks, and you will force them to seek other avenues of growth.

This ought to mean more entrants in some markets and that is desirable.

We, the appellees, deny the efficacy of this scheme. More particularly, do we deny that the Judiciary is the appropriate forum to seek the implementation of such a scheme. Social planning on this scale is a Legislative function.

As this Court noted in Brown Shoe, the Congress was interested in stopping mergers which had certain enumerated effects. If the Justice Department seeks to reach mergers which do not have those effects, let it seek appropriate authority.

I should like to review the six points and their relevance to this case, and since this Court has seen fit to set this case for argument with the Falstaff-Narragansett case, I will point out in each instance the relevant statistical analysis for the beer industry as well.

The first criterion was whether the industry is fragmented or concentrated.

In the United, States there were 13,759 banks at yearend 1971. The ten largest banks in the United States had 19% of industry capacity. The 100 largest, 49%.

Comparably, in the beer industry, we had the four largest -- there were 79 brewers at the end of 1970, the four largest having 43% of industry capacity.

Looking at the marget in Colorado -- not a market, but looking at the arena for inquiry -- there were 228 banks at yearend 1970.

In Weld County, more close to the market in question this is one of 2,810 counties in the United States with less than 100,000 in population. There are only three counties in the United States which have more banking organizations serving it than Weld County has today.

In Greeley, we now have seven banks and five banking organizations. Now, comparing Greeley to all cities of a similar size pattern, 30 to 50 thousand, we find that 99 plus percent are served by no more. Only one city in the United States has as many banking -- has more banking organizations than serve Greeley now.

But in appellant's arithmetic view of what concentration means, banking in Greeley, with 38,000 people, and five banking organizations, is just as concentrated as any other city,no matter what its size, with five banking organizations.

To appellant, the competitive factors would appear to be the same. Thus, last year, when the largest banking organization in Ohio, Bank Ohio Corporation, with $1½ billion in deposits, acquired a $250 million Akron National Bank and Sinclair and Bankshares of Cleveland with $1.1 billion acquired the American Bank of Commerce of Akron with $150 million, appellant did not sue in either case.

We do not claim that these instances violated the Clayton Act, but we do believe that they form a sound basis

for comparison on the competitive values we all ascribe to the term concentration.

In absolute size in Akron, the acquiring banking organizations were two to three times the size of Bancorporation, and the acquired banks were four to six times the size of the First National of Cleveland.

Even in relative State size, the Akron National had a greater share of State deposits than did FNB Greeley.

The decisive factor in deciding not to sue appears to have been the relative share of State deposit totals held by the acquiring institutions are between 5 and 7% in those two instances.

Appellant permitted acquisitions in the market by two of the five largest banking organizations in Ohio because it apparently viewed two 6% market shares as not limiting the universe of potential entrants too severely.

But we think that this emphasis is distorted. Akron has 250,000 people -- 275,000 people. It ought to be able to support many times the number of banks that a city of 38,000 can. A city of 275,000 and five banks is, we believe, in a competitive sense a more concentrated market than a city of 38,000 people and the same number of banks.

One would have expected a rational competitive policy to have struck at the Akron mergers first. The prospect that Greeley could support more banks, given its

size, is, we believe, remote.

Q Isn't this a little bit like the guy who is picked up for going 45 miles an hour saying, "There was another guy going 50 miles an hour."?

MR. METZGER: Well, sir, the problem is whether or not the market can responsibly carry as many -- any more institutions.

In this very case, Governor Mitchell in approving this affiliation, said overall the data suggests that an additional office of a major bank, by de novo entry, is not needed in Weld.

Similar data for comparable population suggests that a fourth unit or holding company banking office in Greeley would likely dilute the quality of banking services by restricting opportunities for achieving economies of scale because of market fragmentation.

It is our contention that -- this is from Defendant's Exhibit No. 48 in the record -- it is our contention that given a different size the smaller cities simply cannot accommodate as a matter of logic and reason any more institutions than a certain frame of reference.

You have in cities of the size of Greeley anywhere between two and five as a norm for the number of banking institutions.

I would say if you found two or three in a given

city,and the question came up: isn't acquisition there desirable or undesirable? I think it could be properly considered by the Court that other cities of similar size have been able to accommodate more banking institutions serving them.

But due to the fact that Greeley is on the upper fringes of the capability of absorbing banking institutions, given the whole United States as a sample from which to draw in examining the logical structure of banking markets, I think that the answer has to be that we have to recognize that there are business limitations upon the number of institutions we ought force into these markets. And Greeley is certainly at the upper edge of those limitations.

Let me give you some example. Akron's peers support many more banks than it does. Charlotte, North Carolina, for example, with 240,000 people, somewhat smaller than Akron, and located in what appellant has characterized to be a highly concentrated State, has fourteen banks serving it.

Similarly, with Richmond, Virginia, or Sacramento, California, all States that are characterized as highly concentrated, they have two and three times the number of banking organizations serving them as Akron.

I ask which is more concentrated in any meaningful sense, Akron or Greeley?

And further, it is only in relation to these larger cities, Akron, or perhaps even larger cities, that the words "substantial entrant" referred to by my colleague this morning takes on any real content.

If we were to enter and willing to enter a city the size of Greeley today, business requirements would limit us to a shopping center kind of entry, a lending officer and a couple of girls behind a teller's cage.

But if we were to try and enter a city the size of Akron, perhaps appropriate entry would require three or four officers,and given that, pro tanto, the word "substantiality" takes on some context, similarly to the beer industry, where your entry can be a matter of choice. You can open a brewery of a size that is directed by your own decision as to what you can and cannot do.

In banking, you can't enter a market and say, "We are going to open a $40 million bank." You must wait until you have deposits in that market against which to make loans and those loans in turn generate your income.

You enter a small market in a small way. It simply would be bad business judgement to do anything else.

The second criteria is whether there has been an elimination of an undue number of competitors.

Now, the net number of banks in the United States increased from 13,431 in 1961 to 13,759, in 1971. That's an

increase of 328 banks.

I mention that because of the opinion in Philadelphia which spoke of the loss of 700 banks in the previous decade as being significant.

To the extent that that is significant, the increment since 1961 is equally so.

By way of comparison, the number of brewers in the United States was 404 in 1947. That has dropped to 79 in 1970.

In Colorado, again you are speaking of an increase in the number of banking organizations. The number of banking organizations in the State in 1960 was 162. Today it is 198.

In Greeley, in 1960, we had three competitors. Today we have five.

The third point that this Court concedes to be relevant in assessing whether or not a merger might tend to substantiate as some competition was whether there had been a recent trend towards concentration in a few leaders.

Now, in the United States in 1940 the ten largest banks had 27% of the total deposits in 1940. That dropped to 19.9% in 1970. The 100 largest similarly dropped from 57% to 49.9%.

Now, there have been some mergers, as counsel pointed out, but banking is an industry which requires mergers. You cannot go out of business in banking simply by

packing your bags and abandoning the premises as you can in any other business or attempting to salvage them for whatever dollars you can get. The old, the halt, the infirm, the inefficient in baking must be disposed of by this route.

The question is, however, whether or not there has been a trend towards concentration, which there certainly has not. There has been in this industry and in the State a trend away from concentration.

Comparing again to the beer industry, the four national beers, Anheiser-Busch, Pabst, Schlitz and Millers, had 23% of industry capacity in 1960; 29% in 1964 and 43% in 1970.

The fourth criterion was whether there had been ready entry of new competitors.

Now, between 1960 and 1970, there were 1,763 new banks organized in the United States.

The technical and financial requirements for a new charter can be as little as a single qualified lending officer and $50,000 in capital.

By contrast, there has been one new brewer in the United States in the past 25 years, that a Canadian brewer entering the country through expansion.

The brewery size for de novo entry is a one million barrel capacity, an expenditure of $20 million for plant and equipment and another $10 or $15 million for

distribution and advertising facilities.

In Colorado, there had been 64 new banks organized between 1960 and 1970, 54 of those new banks organized by entrepreneurs not associated with any of the holding companies in the State.

Now, those banks have done just as well, and some better, than the holding company affiliates in the markets in question.

Frankly, a new bank, a small bank in a given market, will improve its market position depending upon the energy and the capability of the executive running it.

We do not have a monopoly on talent.

In addition to the 54 new entrepreneurs other than the holding companies who have opened new banks in this area, the State alone denied 45 more chartels,basically on the grounds of lack of need, and nationally, probably as many during that time.

The fifth criterion is whether the size of the acquiring company had been increased to the point where it threatened to develop decisive advantages over the competitors. And this is one of the points at which we are supposed to create a danger because of our size.

Now, as was pointed out, the Western Bancorporation is twenty times our size and it does business in Colorado in three locations. It acquired three banks there in 1956 in

the race to beat the deadline of the Bank Holding Company Act and it operates in three markets, has operated in those three markets for over 15 years.

For over 5 years, the United Bankshares, which is, again, 20% larger than our size, has operated in four markets in that State.

This gives us some predicate to assess whether or not we would likely inhibit the formation of new banks or whether our entry would be likely to increase inordinately the market shares of the bank that we acquire.

And what is the market experience in those seven markets of these organizations larger than us?

In three, the banks in question lost market share of 3% or more.

In one, it gained 1.3%.

In three, its market share changed by less than 1%.

In all of these markets, new banks were organized and have flourished since these larger institutions entered those markets.

And the sixth and final criterion, was whether a substantial factor in competition has been eliminated.

There were five banking organizations serving Greeley prior to this affiliation, if it is accomplished. There would be five after this affiliation, so that the number of entrants will not have changed but the quality will.

The First National of Greeley has been an ineffective competitor in this market for over 20 years. It has had a steady attrition of its market share. It has had a weak management in many areas of technical competence. It has had a strong imbalance in the services that it offers.

This was based upon unchallenged testimony below. There was unchallenged testimony further that Bancorporation is a tough competitor in a tough banking market, and that Greeley was an ineffective competitor in a not very competitive banking market.

I believe under those circumstances that we can only improve the quality of competitive activity in that market.

Appellant's assault on the development of Statewide banking organizations through affiliation with leading banks is bottomed on a premise that there is no qualitative difference between the order of competition obtaining in those local markets either before or after the affiliation.

Their thesis, I believe, to be that nothing would have changed in those markets save that the Statewide organizations ultimately would interface in more markets so that the effect of any agreement on their part not to compete would have reprecussions in more markets.

I believe that the premise is invalid. As I pointed out, not only in Greeley but throughout the State, something

does change when those Statewide banks enter local markets.

In most such markets, the quality of competition is improved markedly. In some, the very concept of competition is introduced where it never existed before.

There was unchallenged -- again, unchallenged testimony below from responsible experts that the smaller cities in Colorado, including Greeley, are not very competitive, but that Denver is a competitive market,and that the First National of Denver, the principal subsidiary of Bancorporation,is a competitive institution.

Thus, against the possibility that Statewide organizations in Colorado might change from the vigorously competitive practices they now follow in Denver to concert we must weigh the fact that the banks that they are assimilating are not now very competitive while they are competitive.

And this is the point of the amicus brief filed by the Commonwealth of Virginia. In 1962, Virginia adopted State laws designed to encourage the coalescence of leading local banks into Statewide systems.

It did so because it sought to improve the quality of competition in banks throughout the State, and Virginia reports to us that it has succeeded.

At the expense of governing meaningless Statewide concentration ratios and having the number of banks, Virginia has improved the quality of its banking.

Moving to what we believe to be the relevant context, local banking markets, where the bulk of us are constrained to seek our assistance, the same timespan has seen a sharp increase in the number of banking alternatives per banking market, while the local market shares of the leading banks, the true arenas of competition, have declined markedly.

North Carolina has followed an identical pattern over the same timespan.

Since this point is, I believe, critical, I would like you to bear with me for a moment while I cite some numbers. I believe they focus precisely the dispute before us today.

Between 1960 and 1970, the number of banking alternatives in all the Virginia cities of 5,000 persons or more, rose from 2.8 alternatives to 4.

Between 1960 and 1972, the number of banking alternatives in all the North Carolina cities of 4,000 or more, rose from 2.2 to 4.

Now this is not part of a general pattern in the country. Virginia and North Carolina now stand far above national norms in terms of banking alternatives per city.

In the United States as a whole, taking the various small cities categories, we have cities of 5 to 10 thousand have an average of 1.99 banking alternatives. Virginia is

21% higher. North Carolina 34%.

Ten to 15 thousand, 2.41 average, Virginia 38% higher; North Carolina, 57.

Fifteen to 30 thousand, Virginia 13% higher; North Carolina 60%.

Cities of 30 to 50 thousand, Virginia 52% higher; North Carolina the same.

I think it is undisputable that the very result that Justice fears might happen in time in Colorado, and which it claims justifies this suit, has in Virginia and North Carolina had important pro-competitive effects.

Both States are much better competitive environments than they were. Banking markets in both States have far more competitive options than they did before, and far more than other States now have.

I believe that what Justice is telling us this morning is that yes, perhaps this is good, but our way is better.

Choices between social goods are, however, I believe, a Legislative and not a Judicial function.

That their route is better arguendo, which I deny, which I believe will preserve local enclaves of monopoly far beyond their time. That their route could be better cannot transform a competitive good into a probable substantial lessening of competition, and that is the litmus

against which this Court ought test this affiliation.

Now plainly, I have been speaking to date only as to uncontested facts below. On those uncontested facts, this is not the sort of merger that Section 7 of the Clayton Act was designed to reach by standards laid down by this Court. This has been demonstrated without regard to those disputed questions as to whether we are in fact a potential entrant or not, or, if so, how important a one.

I should like now briefly to touch upon those points.

That this merger removes Bancorporation as a present or prospective competitive force is, of course, true of any merger.

That the removal of Bancorporation as a prospective competitor would, in reasonable probability, substantially lessen competition in Greeley, is a proposition which I believe appellant hopes to carry solely by repetition in the teeth of the evidence.

Bancorporation is represented to be a present competitive force in that we significantly influence the conduct of present entrants. They have, we are told, modified their competitive conduct, that is, worked harder, taken less profit, by reason of our presence on the edge of their market.

The testimony in this case was absolutely undisputed

uncracked on cross-examination, flatly that their conduct had not been affected in any way by any concept that we might enter or not enter that market.

Is appellant's *ipse dixit* to triumph over this uncontested evidential base?

Appellant believes that six competitors in Greeley would be better than five, one more is better. Any absence of the prospect of a sixth, is a substantially anti-competitive event.

Let us assume, *arguendo*, that six competitors would reduce, *pro tanto*, the prospect of anti-competitive conduct, and would be, therefore, desirable.

The same could be said of a seventh, or twentieth. Where ought a line be drawn?

We think, without attempting to delineate precise contours, no substantial lessening of competition ought be associated with any market served by the largest number of banking organizations that serve cities of similar size.

Even, however, if we assume that Greeley is in critical need of a sixth banking organization, we are not a potential *de novo* entrant into that market.

Now, it has been suggested that we should in reasonable prospect have entered this market by other means, absent this affiliation, and that any reasonable person would have done so even though we have said that we would not.

The objective evidence is said to go contrary to what we propose.

Now let's look at that objective contention from the frame of reference of a banking organization in Denver, like Bancorporation. It looks out across the State at the available alternatives to it for de novo entry. It would exclude Pueblo which is a city which has had considerable economic difficulties for a long period of time, and it looks out across the State and it sees Greeley as one of the possible alternatives. So it measures that and says, "What has been the growth of deposits in that market in the last 10 years?" And we find that the growth of deposits in Greeley is less than the average for the whole State.

That is not necessarily dispositive, however, we look to the change in the number of banking organizations serving Greeley and the rest of the State, and we find that the number of banking alternatives in Greeley, the number of banking offices in Greeley, has grown 133% over that timespan, and that the number of banking organizations serving the rest of the State has grown only 30%. This,too, suggests objectively that Greeley is one of the less attractive markets in the State for de novo entry.

We look also to the question, as we pointed out earlier, how many alternatives are available in this city, and we see there are five, and we say to ourselves is this

a desirable market to enter de novo when only one other city in the entire United States has that many alternatives, and that a special situation.

That would suggest objectively that this is not a desirable thing.

Greeley has the lowest population for commercial banking offices of any city of 20,000 or more in the State, and we had at the time of this complaint, no office in eleven of the thirteen largest.

Parenthetically, on that point, the Justice Department suggests in its reply brief that we ought disregard six of them because they are in the Denver standard metropolitan statistical area.

However, these are banking markets that are -- that we are not presently in -- they are attractive banking markets. We do not have any significant amount of business drawing from them,and the fact that they are nearer to our headquarters ought make them more desirable and not less.

We believe that in sum, objectively or subjectively, Greeley is not an attractive vehicle for de novo entry, but even assuming that Greeley is in critical need of another bank, and that it would be attractive for us to enter de novo, must we preserve Bancorporation to fill that role?

Mr. Justice Blackmun referred to a new bank organized there the other day. It was organized by the

Colorado National Bankshares, a $400 million organization. It is a shopping center bank. It is a shopping center bank because that is all, as a practical business judgment, you could have opened in that market.

A shopping center bank may be opened by anybody. It just takes $100 or $200,000 in capital and a lending officer. This is not something wherein our alleged speciality would add anything significant to the market.

Look at the growth of the 54 banking organizations in the State who are not affiliated with holding companies. They have grown as efficiently and effectively -- examine Defendant's Exhibit 2, if you will, on that question -- as any subsidiary of another holding company.

There is no special magic to a shopping center, a neighborhood bank, and that is all that the city of Greeley could afford to take on.

Distinguish this from the beer industry,where effective entry into a given market requires $35 million.

Q Mr. Metzger, let me put this question to you. If the District Court -- or if the whole situation indicated -- if the District Court would have been justified in finding that no potential entrant was likely on the basis of these economic factors. Do you think that is the end of the case?

MR. METZGER: If the fifth point that this

Court raised in Brown Shoe were at issue, no. If an acquisition of this type were so significant, or the culmination of acquisition could take place before -- we have had none prior to this one -- if the culmination of these acquisitions had brought about a situation where we threatened to become dominant in this or any other market that we were serving, no, that would not be the end of the case.

Certainly the accretion to our power is a relevant area for us to inquire. To take an extreme example of a case where even if the possibility were that little -- if New York City only had two banking organizations serving it and they were both owned by the same man, and someone came to one of the regulatory agencies and said: this has been owned by the same family for 200 years. We want to put them into a holding company and make it one organization.

I would be inclined to say you ought deny it because that situation is so critical, that market is so badly out of whack with the natural and normal structure of a market of that size that you ought preserve any opportunity to possibly be concentrated at some point in time.

Q You have fantasized a pretty easy case there.

MR. METZGER: A market, the more heavily concentrate vis a vis its ability to absorb banking institutions, the more carefully we ought look, and the more restrictive we

ought be, I think, towards the entry of these new institutions.

But we are not speaking of a market which is suffering from a considerable order of concentration. Indeed, we are not speaking of a market where our entry would simply leave alone an undesirable situation. We are taking over a bank that has been losing market shares steadily for 20 years and has not been an effective competitor, and we propose to make it one.

I conclude on this point. In amending Section 7 of the Clayton Act, Congress established certain benchmarks for assessing what mergers would transgress the bounds of this statute.

These standards were identified and amplified upon by this Court in Brown Shoe.

Of course, it is possible to conceive of anti-competitive effects of this affiliation. Any merger of companies in the same, or potentially in the same, business opens such prospects.

But it was in seeking to measure probable substantiality of effect that benchmarks were established, and measured by those standards appellant has failed to prove his case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Metzger.

Mr. Friedman, you have about nine minutes left.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

In its many merger decisions, this Court has always relied on percentage figures, on shares of the market as showing concentration, not on questions as to whether or not the market could or couldn't absorb any more firms, and not on comparisons of what might be the number of entrants of firms in similar markets.

I think the reason that the percentage figures are significant and critical in determining concentration, is because we know that the percentage figures, the share of the market that a firm has, reflects the firm's economic power in the market.

If a firm has a third of the market, it is a powerful firm in the market. And, therefore, since the emphasis in Section 7 is on acquisitions that pose anti-competitive threats and Congress is concerned with this rising trend in concentration, the way you decide whether or not a market is concentrated, it seems to us, is to look and see whether a small number of firms have an unduly large share of the market, because we know that when you have a small number of firms in a concentrated market, as this Court has recognized, what happens is, instead of the usual

competition with a small number of firms, you have an accommodation situation.

That, of course, is what Greeley is. Greeley -- more than 90% of the deposits in the whole area are concentrated in the hands of three banking organizations.

MR. CHIEF JUSTICE BURGER: Mr. Friedman, you haven't addressed yourself, at least in oral argument, to the possible distinction between banks and other types of business enterprises in the antitrust context.

MR. FRIEDMAN: Well, the only distinction that I think is a fair one, Mr. Chief Justice, is the fact that entry into the banking business is restricted.

Anybody can open a shoe factory or brewery. Not anybody can go into a banking market. And the reason, obviously, for that is that there is some restriction on the free play of competition in banking. We cannot have a large group of banks going after each other competitively and resulting in the weakening of banking structures.

But it seems to us that there is a corollary which points the other way, which is the nature of banking. The nature of banking, because of this, tends to be concentrated, that is, in most of the smaller markets in the country we do have only a small number of banks and the business tends to focus, to flow into a few of these banks.

And, it seems to us, the fact that banking tends to

be concentrated in most of these markets, is all the more reason to preserve whatever there may be in the way of possibilities of deconcentration and of improving the competitive situation in these markets.

Now, Mr. Metzger, has told the Court today repeatedly that the Greeley market is not very competitive, he says. And he says that if Bancorporation comes in they are going to make it more competitive.

Congress, it seems to us, has made a decision that if a market is not competitive the way to improve it, the way to enhance competition is not to permit a potential competitor to come in and just take it over. That makes no change, no change at all,in the basic structure of the market.

What happens,to the contrary, is that another one of these large, State-wide, organizations comes in. Instead of having what you previously had, which is two of the principal banking organizations controlled by the holding companies and the third independent one that someday, hopefully, might become more vigorous, management can change, we now have the three of them in there.

Q But doesn't it improve competition if you substitute a strong competitor for a weak one, whether it is by acquisition or by new entry?

MR. METZGER: I don't -- it may improve in that

sense, but I think it doesn't in the long run improve the competitive situation, because what you have when it is all over is the same basic market structure, three large firms, and what you have lost in this process is the fact that you have a fourth large firm standing outside the market,which is a pro-competitive effect.

Q Do you agree with Mr. Metzger that the acquired bank has been a declining competitor?

MR. METZGER: I don't say it is a declining competitor. Its share of the market has declined. But during this entire period it has still been virtually as large as any bank in the market. It has been a profitable bank. It has -- we have in Greeley, as in most cities, development of suburbs, and since a bank under Colorado law is permitted only to have one office, inevitably it may not share quite as much in the deposits in the suburban areas as the downtown banks, ...

But it seems to us if competition is to be injected into this market area, competition is to be injected into this market area, the Congressional determination in Section 7 is not that it is to be done by having a large firm take over one of the big existing firms, but preserve whatever there may be in the whole structure of the market that poses pro-competitive possibiiities. That is someone on the outside -- really that is the whole theory -- that is the

whole theory of potential competition doctrine that the Government is urging before this Court.

Mr. Metzger referred to the six standards that this Court announced in Brown Shoe and suggested we did not need any of them. Well, of course, Brown Shoe was a case involving elimination of direct competition. It was vertical foreclosure of competition, horizontal combination -- horizontal merger between competitors.

And it was in that context that the Court announced these factors. Now, these factors, it seems to us, are not the factors to decide in a potential competition case.

Now, I would just like to refer to one other thing that Mr. Metzger said.

Mr. Metzger said that there is no evidence in this record at all that the presence of Bancorporation outside had any effect whatsoever on competition in Greeley market.

That statement is based on a question that was put to each of the three presidents of the leading banks in the City of Greeley. And the question is shown at page 301, 303 and 305. It is virtually identical in all cases.

Let me just read the question. The question was put: "Has your decision to grant or deny credit to set a given rate of interest to charge or to pay ever been effected

by the prospect that you might thereby induce First National Bancorporation to apply for and secure a charter to operate a bank in Greeley?"

And the answer to each of these questions was no.

Now, we do not suggest that when a particular customer came in to make a loan and the question was: should they give them the loan; what interest rate should they charge; what the terms of the loan should be; that any of the bankers said to themselves, well, now, if I do not give them this loan, if I charge them an eighth of a percent more, that means that Bancorporation is going to try to charter a bank in Greeley.

What we do say is that the whole market situation, the presence of this important firm on the outside, was a factor that influenced the general competitive practices in the Greeley market.

That, we think, is the role of potential competition. The fact that this outside firm could come in and could shake the market up is bound to have some effect upon the firms in the market.

And, of course, as long as it is out there, it has this effect, and if it comes in through either the foothold acquisition, or through founding a small new bank, then, for the first time, you do have a real strong, vigorous

competitor in this hitherto static market.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Thank you, Mr. Metzger.

The case is submitted.

(Whereupon, at 10:49 o'clock, a.m., the case was submitted.)