In the

Supreme Court of the United States

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UNITED STATES OF AMERICA, Appellant	)	
vs	)	Docket No. 73-38
MARINE BANCORPORATION, INC., et al., Appellees	)	

Pages 1 thru 69

Washington, D. C.

April 23, 1974

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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UNITED STATES, Appellant,	:	
v.	:	No. 73-38
MARINE BANCORPORATION, INC., et al., Appellees.	:	

Washington, D. C.,

Tuesday, April 23, 1974.

The above-entitled matter came on for argument at 10:08 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., 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.

R. A. MOEN, ESQ., Graham, McCord, Dunn, Moen, Johnston & Rosenquist, 3900 1001 Fourth Avenue, Seattle, Washington 98154; for Appellees Marine Bancorporation, The National Bank of Commerce of Seattle, and Washington Trusk Bank.

APPEARANCES [Cont'd]:

LEE LOEVINGER, ESQ., Hogan & Hartson, 815 Connecticut Avenue, N. W., Washington, D. C.; for Appellee Comptroller of the Currency.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in 73-38, United States against Marine Bancorporation.

Mr. Friedman, you may proceed whenever you're ready.

STATEMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is a direct appeal from a judgment of the United States District Court for the Western District of Washington, dismissing, after trial, a government civil anti-trust suit challenging a bank merger under Section 7 of the Clayton Act.

The acquiring bank, tne National Bank of Commerce of Seattle, is both the second largest bank in the State of Washington and the second largest bank in the City of Seattle.

The Acquired bank, the Washington Trust Bank is the third largest bank in the City of Spokane. It is conceded that the two banks are not in competition with each other, because the National Bank of Commerce does not operate in the city of Spokane, that is, in the metropolitan area of Spokane, which the District Court held to be the relevant geographic market in this case.

The theory upon which the government challenged

this merger was that the National Bank of Commerce was a significant potential entrant into the City of Spokane, and that by going in through acquiring a major firm in Spokane, the effectiveness may be substantially to lessen competition by eliminating an important potential competitor.

The Court had a similar question before it last term in the Greeley Bank case of Colorado, in which, by an equally divided court, it affirmed the District Court's judgment in that case, dismissing the government's complaint.

And the United States has brought this case here and brought the question back to the Court because a major effort of the Department of Justice in recent years has been attempting to stop what we consider a very serious trend in the banking industry under which large banks headquartered in the major cities of the State are acquiring market leaders in local and regional markets.

Now, this is a relatively new phenomenon in banking. In the Fifties we had a great wave of bank mergers, in which banks in the same city who were competitors would combine; that trend basically stopped after this Court's decision in the Philadelphia Bank case.

And what has been happening in recent years is that more and more throughout the country banks, the major banks have been around the State acquiring a large number of significant banks.

The effect of this trend is to bring more and more of a State's banking resources under the control of a small number of banks.

In the State of Washington itself, for example, 75 percent of all the deposits are now controlled by five banking organizations, even though there's some 90 different banking organizations in the State.

In some States it's even more concentrated, a smalle number of banking organizations hold a larger percentage of the shares of the market.

And the government believes that if this trend is permitted to continue, the inevitable result will be a significant and serious diminution of competition in the banking industry.

Since 1968 the government has brought twenty cases in which it has challenged bank acquisitions on the theory that it eliminated the potential competition which the acquired bank was likely to supply,in our view, in the market where it made the acquisition.

Now, let me just briefly refer to the --

QUESTION: You mean the acquiring bank?

MR. FRIEDMAN: The acquiring bank.

QUESTION: Right.

MR. FRIEDMAN: That the acquiring bank is the substantial competitor, --

QUESTION: Right.

MR. FRIEDMAN: -- and it eliminates potential competition which it would supply in the market into which it goes through the acquisition.

QUESTION: Right.

MR. FRIEDMAN: Now, let me just briefly refer to the facts.

The National Bank of Commerce is a very large bank. As I've indicated, it's the second largest bank in both the State of Washington and in the City of Seattle. It has net assets of $1.8 billion, and its deposits are more than $1.6 billion. It has approximately 22 percent of all the bank deposits in the State. It operates 107 branch offices.

The acquired bank, the Washington Trust Bank, is the third largest in the City of Spokane, it has total assets of $112 million, deposits of $95 million, and has eight offices in the City of Spokane; so it, itself, is a very substantial bank. It is a prosperous bank. In the five-year period from 1966 to 1971, its total deposits increased 60 percent, its total loans increased 70 percent.

It is concededly a well-managed bank, it pays very high salaries. The Spokane area, in which the bank operates, is itself a prosperous and growing area, although, admittedly, not growing as fast as other areas of the State of Washington.

The District Court found, and the parties are in

agreement, that commercial banking is the relevant product market in this case. Commercial banking in the State of Washington is extremely concentrated. As I indicated, the five largest banks have 75 percent of all the deposits, and additionally have 60 percent of the banking offices.

The two largest banks, one of which is the National Bank of Commerce, and the other is the Seattle First National Bank, together have approximately half of all deposits and more than one-third of all the banking offices.

This pattern of concentration is repeated throughout the State, but, not surprising, when you get into smaller cities, it becomes even more concentrated; and in Spokane the three leading banks have 92 percent of all the deposits and loans, and there's almost as high a concentration in the eastern part of the State of Washington, which is geographically separated from the western part of the State by a very high mountain range.

Now, in 1971, the two banks submitted to the Comptroller an application to merge the Washington Trust Bank, the bank in Spokane, into National Bank of Commerce, the Seattle bank and the second largest bank in the State.

In accordance with the requirements of the statute, the views were sought of the two bank regulatory agencies and the Department of Justice, all three of these groups advised the Comptroller that in their view the merger would sub-

stantially lessen competition primarily because of its tendency to increase concentration in the State.

The Comptroller, however, approved the merger and the government filed this suit, which had the effect of staying the merger.

After a lengthy trial, the District Court, from the bench, gave a brief opinion in which he announced that he was holding against the government on all of its claims and would dismiss the suit.

Following this, in accordance with his request, the defendant submitted detailed proposed findings, which the District Court adopted without any change.

The theory of the government's case was that the National Bank of Commerce could enter Spokane by alternative means, specifically, either by making a so-called toe-hold entry of a smaller bank, or by in effect opening a branch through a procedure that I will discuss shortly, known as sponsoring a bank, and subsequently then acquiring it.

The District Court made the following rulings, in rejecting our case:

First, the District Court held that although there's a high level of concentration in Spokane, nevertheless, the market is competitive. This is on the basis of expert testimony that in fact there's a great deal of competition in the market because of the large number of sizable banking

organizations.

Then the District Court held that there was no reasonable likelihood that the National Bank of Commerce would enter Spokane either by sponsoring a bank or by making a toe-hold acquisition, and that this merger was the only way the bank could get in.

Then the Court held that there was no reasonable likelihood that the Washington Trust Bank itself might expand outside of the Spokane region. This was another theory on which we urged that the merger would substantially lessen competition by eliminating potential competition, or that the bank would join other banks in forming a new holding company, a smaller holding company that might compete against the large banks in the State.

And finally the Court held that even if this merger had, as the Court described it, some aura of the anti-competitive effects, which the government alleged, nevertheless, those effects were clearly outweighed by the effect of the merger in meeting the convenience and needs of the Spokane community.

I will discuss these four grounds in the course of my argument.

Now, last term, in the Falstaff case, this Court left open the question, as it phrased it, whether a merger would violate Section 7 on the ground that the acquiring

company, and I now quote, "could, but did not, enter de novo or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner."

We think this case presents that question, and we urge that the Court should answer it affirmatively and then, on the principle, it should hold that this merger does violate Section 7.

QUESTION: Excuse me. At some point, I take it, you will discuss the relationship between this transaction in the Falstaff case, an unregulated business, and banking, a national bank which is regulated.

MR. FRIEDMAN: Well, let me deal with that right now, Mr. Chief Justice.

QUESTION: All right.

MR. FRIEDMAN: It's true there is regulation of banking, but this Court, in the Philadelphia Bank case, has indicated its view that it thinks that the basic principles governing Section 7, particularly the stress on market structure and concentration, are equally applicable to banking, even though it is a regulated industry.

The fact that there is regulation means there's not quite the same ease of entry into the market as in an unregulated industry, but, nevertheless, we still think it's important to preserve -- to preserve -- these alternative

sources of competition. And we don't think that the fact that the Comptroller has indicated that he doesn't think he would approve a merger on the basis of what he now knows, without any application, or, in this case, that his assistant, the Regional Administrator, testified that he didn't think there was any reasonable likelihood that a new charter would be granted.

We don't think that that is enough to overcome the significant effects, the significant effects upon concentration in banking that exists, and for which we think that this kind of entry poses the only possibility of some help.

The same argument, of course, was as equally applicable in the Philadelphia Bank case and the Phillipsburg case, where again you had to have regulatory approval before the merger would take place.

Now, --

QUESTION: Was there a legislative change after the Philadelphia Bank case?

MR. FRIEDMAN: There was a legislative change, Mr. Justice, to this extent, that after the Philadelphia Bank case, Congress, in the 1966 Bank Merger Act, added the convenience and needs defense, but, at the same time, -- at the same time -- Congress indicated that it wished bank mergers to be tested under the standards that had hitherto been applied

under the antitrust laws, under Section 7. And we think that what Congress did in the 1966 amendments was to say that you continue to evaluate competitive effect the same as it's always been evaluated. And I will mention in a minute this Court has always stressed the structure of the market, based on concentration ratios.

But then said, if it turns out that a merger has the prohibitive anti-competitive effect, then and only then is the Court to consider whether this otherwise illegal merger is saved.

QUESTION: By convenience and necessity.

MR. FRIEDMAN: By convenience and necessity, yes. Convenience and needs, I'm sorry.

QUESTION: Mr. Friedman, if you lose on the question which you said was left open in Falstaff, is that the end of the case as far as you're concerned? You said this case poses that question.

MR. FRIEDMAN: Yes. That --

QUESTION: If you lose on that question, should the judgment be affirmed?

MR. FRIEDMAN: No, Mr. Justice, we think that --

QUESTION: All right. That's all I want to know.

MR. FRIEDMAN: We've discussed this in our brief, but we also claim that this was a perceived entry; but the major thrust of this case in the District Court was on this

theory. We're not conceding that if we lose on this theory, we lose the case. But this is the theory upon which was the major focus in this case.

QUESTION: Well, there are two aspects. There's the actual potential entry and then there's the perceived entry, is that right?

MR. FRIEDMAN: That's right. And the question which --

QUESTION: And they're separate.

MR. FRIEDMAN: -- the Court opened in Falstaff was the former.

QUESTION: Unh-hunh.

MR. FRIEDMAN: But we do not concede that if the Court should reject that theory that we lose this case; because, as we have indicated in our brief, we do think there was evidence showing that this bank was a perceived entrant.

And we also have the other point, which I'll just mention, I've alluded to previously, that if this, the effect of this merger, by making Washington Trust a part of the National Bank of Commerce, would be to eliminate whatever potential Washington Trust has as a large significant independent bank in the Spokane market, of expanding beyond that area and perhaps combining.

Now, the reason we think that the question left open in the Falstaff case should be resolved in favor of the

United States' position is the whole intent of Congress, when it amended Section 7 in 1950to strengthen it, that what Congress was concerned about was what it viewed as the rising increase in concentration in the American economy.

Congress recognized that more and more portions of the economy were being brought under the control of a small number of large firms. And Congress, when it strengthened the statute in 1950, was concerned about the long-range prospects of the American economy. It wasn't not looking, unlike the Sherman Act, to the immediate effect, whether a particular transaction restrained commerce, it was looking to the long-range effects. It wanted to, basically to channel business growth into pro-comeptitive channels, to stop the practices by which American business was gradually taking more, bringing more and more of the economy under control.

As this Court stated in the Philadelphia Bank case, that one premise of Section 7 was that "corporate growth by internal expansion is socially preferable to growth by acuisition".

Now, when a market becomes concentrated, what happens, according to the economists, is that the vigor of competition tends to diminish. You have a small number of firms in the market, you have accommodation, narrow practices begin to develop.

And the only real hope, frequently, for either deconcentrating the market or shaking it up, so that there will be more competition in the market, is if someone new comes in. And someone new comes in in a way that is going to force this new firm to compete vigorously by what, in antitrust jargon, is called de novo entry. That is, they come in anew, either by themselves starting the branch of the business or, alternatively, by making a toe-hold acquisition, getting a small segment of the market which enables them to get into the market and from that base, by vigorous competition, growing and expanding.

But it is essential to stress that in that situation you have a new firm, a new firm coming into the market. And when a firm that is on the outside and is a likely entrant by one of these two methods, comes in by acquiring a large share of the market, 22 percent in this case, you've not only eliminated the potential for bringing some competition and, hopefully, eventual deconcentration into this market, but all you have done is substitute one for the other. So you've not only lost an additional competitor in this process, but you've eliminated the potential for improving the competitive situation in the market.

Now, as I've indicated in my response to the Chief Justice, we think that these principles are equally applicable --

QUESTION: You haven't eliminated the competitor in the market?

MR. FRIEDMAN: No, you've eliminated the potential of equally --

QUESTION: Well, you've only done one thing; you've just eliminated the potential of a new entry.

MR. FRIEDMAN: Of a new entry.

QUESTION: You just have a different competitor in the market.

MR. FRIEDMAN: You have a different competitor in the market, you have no new competitor --

QUESTION: You haven't eliminated one.

MR. FRIEDMAN: You've eliminated, Mr. Justice, the potential.

QUESTION: It may be a different -- he may act differently, but for your purposes you assume that he will be exactly the same.

MR. FRIEDMAN: We say basically there's been no change in the structure of this market.

QUESTION: Yes.

MR. FRIEDMAN: It's the same as it was before, with four or five or whatever number it is.

QUESTION: Yes.

MR. FRIEDMAN: But, although the structure of the market hasn't changed, the structure surrounding the market

has changed, because the one on the outside who may come in has been eliminated.

QUESTION: Mr. Friedman, the new competitor would be a stronger bank. What is the government's position as to whether or not competition with the new bank in there would be more effective than it is at present?

MR. FRIEDMAN: Well, Mr. Justice, we think that Congress, in Section 7, has made the judgment that you cannot justify an acquisition coming into a market in the normal situation on the claim that you will be able to compete more effectively against the large bank. We think if at all --if at all -- the claim that the new bank, that the new bank will be a more effective competitor in the market is what Congress intended to be studied under the convenience and needs defense, so that is, we think, not a relevant factor in determining the initial threshold question whether there has been anti-competitive effect.

And, as we develop in our brief, and I hope to get to, we think in this case that the so-called benefits -- the so-called benefits -- which the District Court found this merger would bring to the City of Spokane, those benefits we do not think constitute the kind, the kind of benefit that Congress intended to recognize.

QUESTION: You lose me a little bit when you say that the essence of your position is that the government is

interested in improving competitive conditions and yet if a stronger competitor enters the market, you don't lose a competitor, you obtain a stronger one, how is the public adversely affected by that?

MR. FRIEDMAN: Well, I think, Mr. Justice, because the stress of Section 7s is on the long-term picture, on the long-term picture initially, initially it may well be that a bank coming in, substituting itself for a somewhat weaker bank may produce an immediate flurry of competition; a little more competitive.

But, in the long run, in the long run we think it's anti-competitive, because it still is a concentrate market, and you have lost one of the significant potentials for deconcentration.

I may add in this case, this is not a case of the acquiring bank coming in because the acquired bank is weak or floundering. This is a successful, very prosperous, good bank. It's a large bank. It's a bank of roughly $100 million.

The claim here is that by the larger bank coming in, it will enable the new bank to provide certain specialized service which, because of its smaller size, it's not been able to provide. Services which, I might add, are available, are available in Spokane through other banks already in the market.

And we think that that kind of benefit -- that kind of benefit -- is not enough to justify this merger; that the whole purpose of Section 7 -- the whole purpose of Section 7 is to try to stop the increases in concentration, to try to stop these, what Congress believed to be deleterious trends in the economy. And banking itself, unfortunately, tends to be concentrated. Banking is, tends to be concentrated in most cities, except perhaps for a city like New York, where you have a large number of banks, you find that banking is concentrated.

And thus, it seems to us, it's all the more important in banking to preserve the possibility of deconcentration resulting from the entrant of a potential competitor of a strong,significant, powerful firm that seeks to get into the market.

We think that's the whole purpose, that's the whole purpose that Congress had when it amended Section 7 in 1950 in order to strengthen it.

QUESTION: Mr. Friedman, you commented earlier about the government's view of the desirability of de novo entry. What has been the history, or does the record show over the past several decades, of de novo entry into the banking market in Spokane?

MR. FRIEDMAN: Not in Spokane, Mr. Justice, but let me explain --

QUESTION: Well, what -- does the record show anything about the history of de novo entry into the banking market in Spokane?

MR. FRIEDMAN: No, Mr. Justice, for the reason, for the reason that under State law a bank that has its headquarters in one city is not permitted to branch outside of either that city or the county where its headquarters is or into an unincorporated -- an incorporated village that does not have a bank. We do not have in the City of Spokane any history of de novo branching. We have one bank that was founded in 1955.

But what we do have, Mr. Justice, what we do have is a history in the State of Washington of a practice by banks of sponsoring banks, assisting in their organization, helping them get started, and then subsequently acquiring. We do have that practice. We do have --

QUESTION: Is that concededly legal under the laws of Washington?

MR. FRIEDMAN: There's a dispute to that. The appellees contend that the practice is illegal. We think it is legal.

Let me just briefly -- I would come to it later, but let me just briefly refer to what the practice has been and what the record shows.

One of the banks in Washington, the fifth largest

bank, the Old National Bank itself has assisted in the organization of five banks which it subsequently acquired. And according to the deposition of a Mr. Witherspoon, who is the chairman of the board of the Old National Bank, they assisted and sponsored these banks,and I quote, "with the hope and belief that we would be able to acquire them in the future and make branches of the Old National there."

That's at page 608 of the record.

He also stated in his deposition that they had informed the Comptroller of what they intended to do, the way he described it, as inform the Comptroller of their efforts to establish branches by this means -- that's at page 610, and when he was asked did the Comptroller object to this, he said, on the contrary, in one instance it was the Comptroller, that is, rather, the Assistant Comptroller, in the presence of the Comptroller, who suggested that they follow this practice.

And in approving, subsequently approving the mergers of banks in the State of Washington, between the sponsoring bank and the sponsored bank, the Comptroller has recognized that the bank did play this role.

Now, the acquiring bank in this case, the National Bank of Commerce itself on one occasion sponsored a bank in the so-called Columbia Shopping Center.

The claim is that they had no intention of ever

acquiring it. Well, this record shows that for months on end a number of important officials of the National Bank of Commerce were concerned with all the details, all the details of this bank. They aided in -- they helped find a manager for the bank, on one occasion the board of directors of the National Bank of Commerce personally selected a man who subsequently declined the post to be the president of this new bank.

And, as they say, they said: Well, we hope to be able to acquire the bank. And it seems to us, in the light of this, it's much more than they hoped. They obviously anticipated that they would be able to do that.

On another occasion there's an internal memorandum in which, in 1971, the director of marketing research for the National Bank of Commerce suggested to an assistant vice president of the bank that perhaps it might -- to quote the word he used -- "sponsor" a bank in another small city in Oregon, Pullman. That's shown in the record.

QUESTION: Mr. Friedman, did CNB acquire this bank that you say was sponsored by it?

MR. FRIEDMAN: That has not yet come to pass.

QUESTION: What does it require in terms of waiting period?

MR. FRIEDMAN: There's no waiting period with respect to federally chartered banks; with respect to State

chartered banks, there's a requirement that except for the consent of the State Superintendent of Banking, no bank can sell any of its shares, a controlling interest, for ten years from the time of acquisition.

But the normal theory of this is that we concede, we concede, that you could not, under State law, form and sponsor a bank solely for the purpose of acquiring it, or with an express intention -- express understanding or agreement -- to do so.

The way it's done is the bank is sponsored, it has to be on its own two feet, it has to get going, and at that point, then the acquisition takes place.

QUESTION: Does that conceal your intentions?

MR. FRIEDMAN: Well, I wouldn't say conceal. I wouldn't say conceal, Mr. Justice. What I sould suggest is that this is a recognized technique in the State of Washington by which banks get into markets where they are not directly permitted, --

QUESTION: What's the total number of banks that have been established as sponsored banks and later acquired by other banks?

MR. FRIEDMAN: I could not tell you -- I couldn't tell you exactly that. The record shows, I think, that between 1960 and 1967 there were, I believe, fourteen banks acquired in the State of Washington. I don't know that the record

shows which of those were sponsored and subsequently acquired.

We do know -- we do know, Mr. Justice, however, that at least five banks there were sponsored by the Old National Bank were subsequently acquired by that bank in the State of Washington.

QUESTION: Well, Mr. Friedman, even if the acquisition doesn't take place, the fact of organization of the new bank by the efforts of an established organization is undisputed?

MR. FRIEDMAN: I'm sorry, I'm not -- your question is, you mean, there's no question that the existing organization does organize the bank. Oh, yes, there's no question about that.

QUESTION: Which is a substantial benefit in itself, in terms of --

MR. FRIEDMAN: In the organization of bringing a new --

QUESTION: -- in terms of correspondent advantages, and things like that. At least it goes on all the time, the organization of other units by an existing bank.

MR. FRIEDMAN: Yes.

QUESTION: Whether it's later acquired or not.

MR. FRIEDMAN: There's no question of that, yes.

QUESTION: Which makes your point just as well, doesn't it?

MR. FRIEDMAN: I'm not certain, Mr. Justice.

QUESTION: Well, if it's a new bank, if it's going to be a new entry.

MR. FRIEDMAN: It provides -- it provides --

QUESTION: Mr. Justice Rehnquist ask you about de novo entry, which is much broader question than an entry by an existing organization.

MR. FRIEDMAN: Yes, sir.

QUESTION: How many new banks have been organized in Spokane in the last ten years, any?

MR. FRIEDMAN: One new bank that I know of.

QUESTION: Has been organized, started from scratch?

MR. FRIEDMAN: Started from scratch. This is something called the American Commercial Bank, and this is --

QUESTION: That was in the 1950's.

MR. FRIEDMAN: 1955. And this is one of the banks, as I will come to, that we think was available as a toe-hold entry by this bank.

QUESTION: Unh-hunh.

QUESTION: But there's no particular legal barriers to new entries in the Spokane area by just new banking organizations?

MR. FRIEDMAN: By just -- no, this new banking organization -- in fact, this new banking organization now has four branches; since it started with the single one, it's

grown and now has four branches, which is only three fewer than the National -- the Washington Trust Bank.

QUESTION: Now, why do you say, Mr. Friedman, that your point isn't made as well, whether or not the newly organized unit is later acquired?

MR. FRIEDMAN: Well, I think if the -- if the newly organized unit is not later acquired, you don't --and it may be more difficult to say that the punitive acquiring bank is eliminated as a substantial competitor. That is, what I'm suggesting is if --

QUESTION: Well, if he's eliminated, he certainly is eliminated as a possible source of the impetus and energy and perhaps support to organize a new bank?

MR. FRIEDMAN: Well, if the new bank -- if the new bank is -- once the new bank has been organized and once the new bank is in the market, that --

QUESTION: And it's a competitor, yes.

MR. FRIEDMAN: -- that is a competitor. Now, that fact itself of course does not necessarily eliminate the sponsoring bank as an entrant to the market, although --

QUESTION: Well, it isn't about to organize another one to compete with its new bank.

MR. FRIEDMAN: Well, the problem there, I suppose, is whether the market would stand two additional banks. In other words, it may, depending again on -- its relationship, ordin-

arily the relationship, as one would expect, between the sponsoring and the sponsored bank is very close. They normally have their correspondent relationship, and so on.

But the fact is that, of course, this does inject a new -- a new -- bank into the market. But the question really, it seems to me, is whether, fairly viewed, if the acquiring bank --

QUESTION: I doubt if -- I doubt if the bank, the NBC, is going -- if it acquires the bank in Spokane, which it has or wants to, is about to turn around and organize another bank in --

MR. FRIEDMAN: Surely not.

QUESTION: Whether it ever acquired it or not.

MR. FRIEDMAN: Surely not.

QUESTION: Mr. Friedman, I had understood that the government, in effect, conceded that it has no case under the theory of potential competition, unless it is legally feasible and economically justifiable to enter the Spokane market. That is, for NBC to enter that market. Is that correct?

MR. FRIEDMAN: I think that is correct, Mr. Justice. The question we pose: On what basis is the trial court to decide those questions?

QUESTION: Right. Well, you suggested two methods of entry, and you've been talking so far about the sponsored

method, and your other suggested method is that you acquire some smaller bank.

MR. FRIEDMAN: That's right. And we think there are two banks in the market that it could have acquired. One of them is the American Commercial Bank, which we've been discussing, that was organized in 1965 -- I'm sorry if I said 1955. It was organized in 1965, which is a bank with 15 million in deposits, four branches in the City of Spokane, roughly three percent of the market.

Now, the reason that the District Court held and the defendants contend this would not be a suitable candidate for acquisition is that under the ten-year limitation under State law, and this of course is a State organized bank, this bank would not be available for acquisition until 1975.

Again, my answer to that is we're dealing here with very long-term trends. The question is whether, if the National Bank of Commerce would not be permitted to go into the market through this merger, is it a rasonable likelihood that they would have found some other way to go in?

Now, in addition to this other bank, there's another bank, the Farmers and Merchants Bank, which is a little smaller, it has three offices; these, of course, are offices in the suburbs, and the interest of the National Bank of Washington in this bank, I think, is shown by the fact that shortly before the merger they were discussing a possible

acquisition.

QUESTION: Mr. Friedman, supposing that the National Bank of Washington had decided to absorb the '65 formed bank, the American Commerce Bank in Spokane, you say it has only three fewer branches than Washington Trust. Wouldn't the government probably have challenged that merger, too, as having been anti-competitive?

MR. FRIEDMAN: No, Mr. Justice. No, Mr. Justice. Our position is that the -- we do not oppose, we do not oppose the entry by large Statewide banks into local and regional banking markets. But we say those -- that entry should take place in the least anti-competitive way. And we think an entry, if they had acquired, attempted to acquire this bank, with only three percent of the market, we would have viewed that as a so-called permissible toe-hold acquisition.

QUESTION: Well, then it just becomes a question of degree, doesn't it? And the District Court has got to have some latitude in making a finding one way or the other, I would think.

MR. FRIEDMAN: Well, but the District Court did not find, Mr. Justice, the District Court did not find that this was no different than a toe-hold acquisition. The District Court did not -- and I think that at some point the matter of degree becomes a matter of quality. It's not just quantity, because when they acquire a bank with 22 percent

of the market, that, to us, is a very different thing from acquiring a bank with three percent of the market. If they acquire a bank with three percent of the market, they're not going to be satisfied, it seems to me, a bank like the National Bank of Commerce, with coming into Spokane with three percent of the market and sitting there with three percent of the market. They are going to compete as vigorously as possible, and attempt to get into that market and to expand their share of the market.

Whereas, if all they do is acquire this 22 percent share, they're in the typical situation where you have a small number, three in this case, of the banks with 92 percent of the market.

What you have is you have the same basic structure inside the market, and you don't have the same kind of incentive to compete, to inject some new vigor into the market to possible deconcentrate the market, that you would have if they came in by acquiring a small bank, a bank with a very small share, which would be the basis for growing.

Now, let me turn to something else, which is -- we've been discussing how they get in, I think it's important to find out is is it the sort of thing that they are likely to do; do they want to get in to Spokane, how important was it to this bank to get into Spokane.

So that if they were unable, if they were unable to

get in by making this large acquisition, they would do everything they could to get in by some other method.

We think there's no question about that, that this is one of the things that the National Bank of Commerce has wanted to do for a long, long time.

To begin with, although the National Bank of Commerce is the second largest bank in the State, it's the only one bank that is represented in only one of the four largest cities, it is represented only in Seattle; it is not represented in Spokane, the second largest, Tacoma or Everett, the next three largest cities in the State.

The parties to this case stipulated that representation in Spokane has been a long-sought goal of NBC. That's at 367 of the record.

The former president of the National Bank of Commerce, who is now the president of Marine Bancorporation, which is the bank holding company that has all of the stock of the bank, stated that his bank has been interested in getting into Spokane for a long, long time. He said, since prior to 1933; roughly more than forty years.

He explained in a deposition that it was important for the National Bank of Spokane to get in there, because all the other major banks are represented there; and he says, "We feel there is business available to us in Spokane if we are represented there." That's at page 139 of the record.

And similarly in its 1970 report to stockholders, the holding company, in commenting on this merger, said that this finally brought the National Bank of Commerce, quote, "within sight of one of its long-sought goals, representation in the City of Spokane." That's at page 1270 of the record.

And, indeed, in a brief filed with the Comptroller in support of this merger, a so-called economic brief, discussing the economics of the area and probably the economics of the merger itself, what the bank said was, and I quote again from page 1743, that "If Commerce is to maintain its present relative position with its competitors and maintain the business of its major national customers, Commerce must have representation in Spokane" -- "must" was the word they used, not that they'd like to, not that they thought it was so, they must have representation in Spokane.

QUESTION: Well, if they've been wanting this for 35 years, Mr. Friedman, that means they've been keeping their eyes open for opportunities, I would assume, does it not?

MR. FRIEDMAN: Yes. And one example, I suppose, Mr. Justice, one example was their attempt shortly before this merger took place, to purchase the stock of the American Commercial --

QUESTION: But you don't suggest there's anything per se wrong or questionable about their wanting to get into that market?

MR. FRIEDMAN: No, no, no, no. I'm sorry, Mr. Justice, I'm sorry, I didn't make myself clear.

QUESTION: Well, --

MR. FRIEDMAN: We're not suggesting there is anything wrong, in fact it's quite understandable and quite appropriate for this bank to want to get into the Spokane market. What we are arguing is the fact that this bank was so anxious and felt it so important to get into Spokane is clear indication, and shows that it would have done everything it could to try to get in by these alternative means, if it were nto permitted to go in by acquiring this large bank in the market now.

And I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Friedman.

Mr. Moen.

ORAL ARGUMENT OF R. A. MOEN, ESQ.,

ON BEHALF OF APPELLEE MARINE BANCORPORATION

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

There isn't any question about the desire of the National Bank of Commerce to get into the Spokane market. But if -- the question is whether or not they would be willing to go in in any manner other than this one, of this particular merger.

There are four principal banking markets in the

State of Washington: Seattle, Everett, Tacoma, and Spokane.

At the present time the National Bank of Commerce has all of its offices in the Seattle market. It does not ha any representation in any of the other three markets. But of course if some acceptable means of entry were to be developed they would be very happy to go into that market.

Mr. Friedman referred to the trends, and although there's no specific finding on the subject, the evidence in this case shows that there is no discernible trend in the State of Washington toward concentration of banking.

As a matter of fact, the number of banks have increased. In 1960 there were 87 banks; today there are 92.

In 1960 there were 378 banking offices in Washingto today there are 681.

If you want to look at the share of the market. During the past ten years the share of the market, which Commerce has picked up, has increased, from 18.9 in 1960 to 19.1 today.

So that the share of the market is practically constant.

So whether you look at the number of banks, or you look at the number of branches, or whether you look at the share of the market, there is no discernible trend in the State of Washington towards concentration.

Now, Justice is really asserting in three ways in

this merger in which, if consummated, will lessen competition so as to violate Section 7 of the Clayton Act.

First, they contend that but for this merger these two banks will some day be in direct competition. Now, of course this can happen only in the event that the two banks get offices in the same market. Either Commerce will have to move into the Spokane market, or the Washington Trust Bank is going to have to move out and into some market where Commerce is doing business.

They make a second contention as to the violation of the Act, in that they argue that Commerce is now on the fringe of the market, and exerts some competitive influence on the competitors that are in the market.

The argument upon which they lay the greatest stress is that, but this merger, these two banks will become direct competitors; and if the merger is enjoined, Commerce will enter Spokane by establishing a branch of its bank de novo, or what they call tantamount to de novo, that's this sponsored bank procedure, or by foothold entry.

Now, the Court has asked some questions with respect to foothold entry.

The trial court made a finding that there is no bank in Spokane today which could serve as a foothold entrant. There are only two banks in the City of Spokane which are smaller than Washington Trust Bank. One is the American

Commercial Bank, the State bank to which Mr. Friedman alluded. That bank was formed in 1965, but it has in its charter a prohibition against its merger or its sale or combination with any other bank for a period of ten years.

QUESTION: That's required by law, isn't it?

MR. MOEN: That's required by a statute of the State of Washington.

QUESTION: Right.

MR. MOEN: Well, that period will expire in 1975. But, of course, the National Bank of Commerce or no one else has any knowledge or information at this time that that bank will be for sale at the end of the ten-year period. And even if it were for sale, of course there's no assurance that National Bank of Commerce would be the successful purchaser.

These banks, like any other product, are sold to whoever makes the highest bid. And if this bank were for sale, which we have no reason to believe it would be, it would undoubtedly go to the highest bidder, which might be the Bank of Commerce or it might be one of its competitors.

They have also argued --

QUESTION: Then there's the other, the other small bank.

MR. MOEN: The Farmers and Merchants Bank. But the Farmers and Merchants Bank is not within the City of Spokane.

QUESTION: It's in the suburbs.

MR. MOEN: The Farmers and Merchants Bank has a branch in a shopping center about five or six miles east of the center of downtown Spokane.

So we contend that even giving in to -- if we were to acquire the Farmers and Merchants Bank, it would not be entry into Spokane.

All of the witnesses concede that you can't service downtown Spokane or be a part of the Spokane market if your only branch is out in the suburbs.

QUESTION: Once you were there, would the law forbid coming in --

MR. MOEN: Once you're there, you still can't get into the City of Spokane.

QUESTION: Is it the same county, or what's the problem?

MR. MOEN: It's in the same county. But you can't go into the city. The only banks in the city that can get a branch in the city are the banks that have their head office in the city.

QUESTION: Unh-hunh.

QUESTION: If you acquire a bank by a merger, that becomes a branch of the acquiring bank from which no other branches can be put out under Washington law.

MR. MOEN: That is correct. The branches that -- or the bank that you may acquire, such as Washington Trust

Bank, can go out and establish new branches in the City of Spokane. But once the National Bank of Commerce acquires the Washington Trust Bank, then it cannot -- can no longer branch in the City of Spokane, or in the county.

It can branch only in the city where it has its principal place of business, and in the county where it has its principal place of business.

QUESTION: You made a pass at acquiring -- what -- Farmers and Merchants?

MR. MOEN: There were negotiations for the purchase of the Farmers and Merchants Bank. They didn't even get close in price. I think the record here shows that Commerce had a price in mind of somewhere, maybe, one and a half or two million dollars; and the lowest asking price was somewheres in the area of five million dollars.

The negotiations didn't even get to the point where the amount of money which Commerce was willing to pay was even transmitted to the Farmers and Merchants people.

QUESTION: And how long before this present acquisition did those negotiations occur?

MR. MOEN: I would say maybe a year or two. Just a very short time.

But I would like to impress upon the Court the fact that acquisition of Farmers and Merchants does not put you into the City of Spokane.

QUESTION: So that the National Bank's acquisition of Farmers and Merchants Bank, if it had come about, would not have been a realization of their desire to get into the City of Spokane?

MR. MOEN: It would not have given them entrance into the City of Spokane.

Now, our defense to this case is not only legal but actual. We think that this case primarily is a factual case. And the trial court rejected all three of the arguments of the Justice Department, and assigned a factual basis for all of them.

The trial court found that even in the absence of these statutes the bank, the National Bank of Commerce, would not go into downtown Spokane if they had to go in by de novo entry or by the acquisition of a small toe-hold bank.

The court found that it wouldn't be compatible with prudent business practice in commercial banking for a major full-service bank, such as Commerce, to enter a major metropolitan area such as Spokane with a limited-service bank, or a small bank which would be compatible with the amount of deposits that they might reasonably expect to obtain.

As we've just mentioned, if they did go in they couldn't branch, and branching in Washington is almost essential to effective competition in a metropolitan area such as Spokane.

There happens to be a very good example in the City of Spokane of the imprudence of attempting to go in with a small branch.

The Pacific National Bank is a subsidiary of Western Bancorporation, the largest bank holding company west of the Mississippi. It's the third largest bank in the State of Washington.

Now, ten years ago, in 1964, it did in fact go in to the City of Spokane by a toe-hold entry, by acquiring a small branch, or a small bank which had two branches, one in downtown Spokane and one out on Whitworth College campus. Since that time, in ten years, they have not been able to increase their share of the market. Today they are the smallest bank in Spokane, measured by Spokane deposits, and there's really no reason to believe that if Commerce attempted to go in by foothold that they could do any better than Pacific National Bank has done.

The growth in Spokane during the last ten years has been slow. The lower court found that there has been some growth in the last ten years. I think the town has in fact lost 10,000 population, and the county has grown about three percent.

Now, this compares with other markets, where Commerce isn't now located, such as Everett, which has increased 10,000 during the period that Spokane has lost

10,000; and the county in which Everett is located has increased in population almost 35 percent.

The City of Tacoma, which is another market in which Commerce isn't -- doesn't presently have offices, has actually increased about 15,000.

Now, the importance of this is simply that if Commerce did decide that they wanted to go into one of these other markets, they wanted to spend their capital for that purpose, the chances are that they would go into Everett or Tacoma much sooner than they would go into Spokane. And this was just another reason that the court assigned as to his finding as to why it was not likely that Commerce would go into Spokane if they had to go in by de novo entry.

The Regional Administrator of National Banks in Washington took the stand and testified that in his opinion it was not likely that there would be any future charters for banks granted in Spokane in the reasonably foreseeable future. He based this on the population growth of the city, and such other factors as the Comptroller considers in passing on new bank applications.

Now, as I said, we have these factual findings. What the court really found was that there just wasn't sufficient economic incentive to put Commerce into Spokane, if they had to go in on a de novo basis. And of course, in addition to that, we have these statutory barriers that Mr.

Friedman alluded to.

The statute which prohibits branching in Washington is found in Remington's Code of Washington 30.40.020. It's reproduced as pages 4 and 5 of our brief, and I would like to call the Court's particular attention to the last paragraph of the statute, which appears on page 4.

Now, this statute provides, just as plainly as it can provide, in so far as it's pertinent to this case, that Commerce cannot go into Spokane with a de novo branch.

Justice argues that the statute may be evaded or circumvented, and entry tantamount to de novo entry may be achieved by a so-called sponsored bank procedure.

I would also like to tell the Court this, that this word "sponsor" has been a very misleading word in this case, because practically all new banks in Washington are sponsored in one way or another when they're formed. And the Comptroller of course encourages this, because it's beneficial both to the sponsoring bank as well as to the sponsored bank.

But that does not mean that they have control of the bank or that they can branch when they want to.

For example, Commerce, which has 107 branches, testified that they don't have one singlebranch that was ever a sponsored bank -- I mean a bank that they sponsored. It's true that they assist these banks in various ways, but Columbia Center was brought up here. There's -- both the

chairmen of Columbia Center testified that they're not obligated to sell their bank to Commerce at any time, either the assets of the bank or the stock.

And the officers of Marine Bancorporation testified that they have no agreement, either oral or written, to acquire the bank at any time. Now, it's true that they --

QUESTION: Mr. Moen, I'm have a little trouble with -- you say you can help the bank and assist the new bank, but you don't sponsor it. What do you mean by sponsor?

MR. MOEN: The word "sponsor", as we've used it, means to aid or assist. I think the word "sponsor", as Justice has referred to it, means to have control of it, so that they can force the sale of the bank.

QUESTION: Well, which one are you talking about? You said there's not a single one of your branch banks that you sponsored, but you did assist them. Now, where is the line in your book?

MR. MOEN: Well, the sponsored bank procedure, as referred to by the Justice Department, means to have control of it. What I'm saying is that Commerce has never acquired any bank in which they even assisted. And of course the only bank that I could say that they ever sponsored was Columbia Center.

I would concede that they sponsored that bank; but even there they sponsored it in the sense that they went out

and they helped it get management, they helped it get directors. What really happened here was that the --

QUESTION: And it was just the interest of building up competition?

MR. MOEN: No, they do it to satisfy a commercial customer. The Allied Stores were putting a shopping center into central Washington, and of course they wanted a banking service there.

QUESTION: Is this the suburban bank that was referred to?

MR. MOEN: No, it isn't, we referred to the bank of Farmers and Merchants.

QUESTION: This is in the City of Spokane?

MR. MOEN: No, I think what Mr. Justice Marshall is referring to is a bank in central Washington.

QUESTION: Columbia.

MR. MOEN: Yes, Columbia Center. Yes.

Now, it's true that in that bank, in that particular case, in order to bring banking service into the community, Commerce did, I would say, sponsor a bank, in the sense that they went out and helped them get management, they furnished him with about three directors out of seven. But the important thing, to me, is the purpose for which this was done.

This is not a case where Commerce, deciding they wanted to get into the bank and sent out people to -- or stock-

holders to organize a bank. What really happened was that the business people of the city applied for a bank and they were turned down, by the Regional Administrator, for the reason that they did not have anyone in their organization that had any particular knowledge of banking. And so they came to the National Bank of Commerce and sought that assistance, and they obtained it.

But here again, as I say, that doesn't give Commerce any assurance that they are ever going to acquire that bank.

And the only thing that's important with respect to this procedure is whether or not it affords the Commerce some method of getting into the city. What we are talking about here is means of entry. We contend we don't have any means of entry into Spokane, that we're barred by our statutes.

They come back and say we can get into Spokane, and they can get in in this particular manner which they call the sponsored bank method. And we deny that.

Now, what I'm saying is that so far as Columbia Center is concerned, that that does not afford to us a means of entry into Spokane.

Now, let me mention these five branches, which Mr. Witherspoon contended that the Old National Bank picked up. They apparently did, on two occasions they actually sent someone out to attempt to organize the bank and obviously, or

Mr. Witherspoon said, for the purpose of actually acquiring the bank.

Now, the record isn't entirely clear, as to just what they did. But what I contend is that it really doesn't make much difference. One of these arrangements was made in 1959, two of them were made in 1962, and two of them were made in 1964.

And since that time, so far as this record shows, there hasn't been any such acquisitions or any such means of entry by any other bank.

My co-counsel here has given me a note to make it clear that Columbia Center is not in Spokane. But I think I answered that question, that it's down in central Washington.

QUESTION: Is it down on the Columbia River?

MR. MOEN: It's down in Kennewick, or in the Richland area, which is near the Columbia River area.

Now, as I've said, that this statute which prevents us from branching in Washington is one statute which we're concerned with.

There's a second statute, a holding company statute, which prohibits any bank holding company in Washington from owning or controlling more than 25 percent of the capital stock of another bank. Now, I point that out to show that we're not only stopped from branching, but we're also stopped from holding company expansion; because the holding company

can't possibly own more than 25 percent of the stock of a bank, and of course you cannot control either the sale of the bank or the purchaser of the bank, if you only have a 25 percent control.

In Washington you have to have 67 percent of the stock of the bank, you have to have the consent of 67 percent of the shareholders before you can sell.

So that on this holding company statute, we have neither -- we don't have the power to expand in that way.

The penalty for violating the statute is forfeiture of the holding company charter.

So no prudent person is going to attempt to expand in that manner.

Now, with respect to the so-called wing theory. Justice is also contending that Commerce, by reason of its position in the wings, exerts a beneficial pro-competitive influence on the competitors in the market.

Justice concedes, on page 27 of their brief, that this was not the primary basis upon which they tried the case; but it is in the pleadings, and it was mentioned by two or three witnesses.

But I'd like to point out that in this respect all they showed was the proximity to the market, and there's utterly no evidence in the record to show that they had any effect upon the competitors in the market. So that the mere

physical proximity, of course, without any showing of an effect on the competitors in the market doesn't show, or can't develop into any lessening of competition.

There were four witnesses for the bank, two bank officers and two economists, who testified that Commerce, prior to the announcement of the merger, exerted no influence at all on the Spokane market.

With respect to the Washington State Bank moving out into other areas, I just want to point out that Justice did not try to prove what banking markets or what sections they might move out into, they simply argue that the bank has the capability of expanding and therefore its elimination would be a lessening of competition under Section 7.

Now, in conclusion, I want to point out that both parties in the case are urging what they consider to be pro-competitive action. What the Justice Department's case really boils down to is simply that they're saying that it's pro-competitive to save Commerce for some future entrance into the market.

We contend that if we move into the market right now, a bigger bank, a much stronger bank, that that is also pro-competitive. It's -- the trial court found that the Spokane banking market actually needs another competitor of the size of Seattle First, and I think that the real issue for this Court is: Which is the more pro-competitive? Is it to save us,

the bank, that they might enter the Spokane market ten years from now, and then maybe spend another ten years in attempting to build their deposits to a point where they can actually compete, or wouldn't it be more pro-competitive for them to go in immediately?

I'd also like to say in conclusion --

MR. CHIEF JUSTICE BURGER: You're now moving into Mr. Loevinger's time, Mr. Moen.

MR. MOEN: Yes, I'm afraid I am.

I'll bring my argument to a close. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Loevinger.

ORAL ARGUMENT OF LEE LOEVINGER, ESQ.,

ON BEHALF OF APPELLEE COMPTROLLER OF THE CURRENCY

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

I appear for the Comptroller of the Currency and, as such, I believe I speak for the government.

Normally, of course, the Department of Justice speaks for the government. The Comptroller, however, is an older agency than either the Solicitor General or the Antitrust Division, and indeed older than the antitrust laws themselves.

However, that is not the basis on which I assert this. The important point is that the Department of Justice in these cases is interested only in protecting a single

element, the competitive element, in enforcing the antitrust laws.

QUESTION: What is the authority of the --

MR. LOEVINGER: Sir?

QUESTION: What is the authority of the Comptroller of the Currency to represent himself in this Court?

MR. LOEVINGER: Statutory, Your Honor.

QUESTION: What does it say?

MR. LOEVINGER: I don't have the statute at hand, Mr. Justice; but it is -- there is a statutory authority of the Comptroller to appear in these cases, and, as such, he represents the interest of the government embodied in both the banking and the antitrust laws.

As I shall hope to demonstrate, the Comptroller is interested not simply in banking interests but also in competitive interests, and therefore represents the entire public interest which I believe is the viewpoint of the government.

QUESTION: So I should ask the Department of Justice what their authority is, I suppose.

MR. LOEVINGER: In any event, I have six substantive points that I hope to make. I shall appear twice, and I hope to be able to get to them, I will tell youwhat they are, and then proceed to them.

First, the plaintiff's argument is basically

circular and question-begging, because it assumes that Section 7 requires the banking agencies to permit de novo entry.

Second, Section 7 does not supersede the federal banking statutes, as plaintiff somewhat explicitly and certainly implicitly contends.

Third, potential competition does not have the same application to banking as to unregulated industries.

Fourth, the plaintiff's sponsorship scheme is not only illegal dubious means of -- legally dubious means of circumventing State law, but is actually anti-competitive in its effect, as I shall demonstrate.

Five, Section 7 does not forbid a merger which lessens potential competition, but increases actual competition in the relevant market, which is somewhat different than the question left open in Falstaff.

And finally, the plaintiff would rewrite Section 7 so that potentiality attentuates substantiality to triviality.

Now, first, the plaintiff's argument is basically circular and question-begging, because although plaintiff has the burden of proving the violation of Section 7, that depends upon proving that the merger would probably lessen competition.

Plaintiff admits there's no actual competition,

therefore the theory of plaintiff entirely is that absent a merger the acquiring bank here would enter the market de novo. This, however, requires the permission of the banking authorities.

There is objective evidence that this permission would not be given. Plaintiff attempts to surmount this barrier by assuming that administrative permission is required, thus, in the brief in this case, at page 51, plaintiff says, "it must be assumed that the regulatory decision will reflect the national policy in favor of market extensions by internal expansion rather than by acquisition."

There is a similar statement in plaintiff's Connecticut brief at page 53.

Thus, plaintiff's entire argument is based upon the assumption that Section 7 requires the permission of the administrative authorities for de novo entry, and once you eliminate that assumption, plaintiff does not have an argument on potential competition. But that assumption is the very matter to be proved. It's the very question in issue before this Court.

Therefore, it's an entirely circular and question-begging argument.

Second, plaintiff in effect asserts that Section 7 supersedes the federal banking statutes. Plaintiff clearly argues that in a bank merger case involving potential competi-

tion, that Section 7 standards must be applied. At page 52 of the brief in this case, plaintiff asserts --

QUESTION: Mr. Loevinger.

MR. LOEVINGER: Yes, sir?

QUESTION: You keep saying "plaintiff", who is the plaintiff?

MR. LOEVINGER: The plaintiff is the Antitrust Division in the Department of Justice, represented by the Solicitor General.

QUESTION: Well, I know, but your brief says "The United States of America".

MR. LOEVINGER: That is a formality, Your Honor. In a sense --

[Laughter.]

MR. LOEVINGER: -- the Court is the United States of America. I believe this Court represents the United States, as I do and as Mr. Friedman does.

QUESTION: And your brief says -- your brief -- says your brief is for the Comptroller of the Currency.

MR. LOEVINGER: Yes, sir. And the Comptroller of the Currency is an agent of --

QUESTION: So here we have the United States of America is the appellant. But you keep arguing about plaintiff, you don't mean the United States of America?

MR. LOEVINGER: I mean the interest represented

by Mr. Friedman and the Antitrust Division, sir.

I don't really wish to quarrel with the Court about this. I don't point out it is an important substantive point. I think it is somewhat of a formality, but I think it helps keep the matters --

QUESTION: I think it's more than a formality, because usually the question uppermost in my mind is who represents, quote, "The United States of America", end quote.

MR. LOEVINGER: Well, sir, the Comptroller has been representing the United States of America since about 1863, which is long before the Sherman Act was passed, so, as I say, I don't --

QUESTION: How many times has the Comptroller of the Currency argued in this Court? In all of those hundreds of millions of years?

MR. LOEVINGER: I'm sorry, Your Honor. I'm sorry, Mr. Justice, I can't argue that -- I can't discuss that question.

I would, if you will permit me, sir, --

QUESTION: I don't know, as of now, what the position of the government is.

MR. LOEVINGER: Well, may I proceed with my argument, Mr. Justice?

QUESTION: Why, of course!

[Laughter.]

MR. LOEVINGER: I would like to point out that the Department's position is that Section 7 in effect supersedes the federal banking statutes. Thus, at page 52 of the Washington brief, it says "Only if new entry might threaten the stability of existing banks could the Comptroller properly refuse to permit new competition."

Now, and again this is repeated in other briefs, and in the plaintiff's reply brief in Connecticut, it argues that the appropriate number of banks is not to be determined by administrative or judicial fiat, but by the market, through the processes of competition.

One wonders if the same statement would be made about the ICC, the CAB and the FCC.

But, in any event, this is not the law. In the Philadelphia National Bank case, this Court, speaking through Mr. Justice Brennan, said, and I quote, "A charter for a new bank, State or national, will not be granted unless the invested capital and management of the applicant and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure."

Now, there's no such policy embodied in the anti-trust laws. That is strictly a banking standard. This role was not changed by the Bank Merger Act of 1966, and in the Third National Bank in Nashville, this Court said: The purpose

of the Bank Merger Act of '66 was to permit certain bank mergers, even though they tended to lessen competition.

Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger, even though the merger lessened competition.

QUESTION: But that statement was about the defensive part of the -- that was added in 1966, was it not, the basic competitive analysis?

MR. LOEVINGER: The Court said that the basic competitive analysis was to made first, and then the public interest was to be determined on the basis of the competitive analysis as balanced against the other interest.

However, as I shall point out, what happens in a potential merger case is to merge; that you don't have the cleancut kind of dichotomy that you do in an actual competition case, where first you see that competition is being extinguished. And the reason for that is very simple; is that in a potential competition case, which you are talking about, is potential entry.

But there is no potential entry unless there is a community need, and service to the community convenience by that entry.

Therefore, before there can be a potential entry or a probable entry, as this Court has held, there must be a

showing of the convenience and needs argument.

Consequently, in a potential competition case, it seems to me as a matter of logic that the Department has the burden of meeting both sides of the equation. They have to show both that there is a -- well, they don't even get to competition until they have dealt with community need. Because without community need and probable entry, there is no potential competition.

QUESTION: But that would be true just of a nationally chartered bank, wouldn't it?

MR. LOEVINGER: No, sir. That would be true of both national and State banks, as was pointed out in the Philadelphia case, because the standards are essentially similar.

There are some differences.

Now, potential -- and this is the reason why I say that potential competition theory does not have the same application to banking as to unregulated industries.

The purpose of regulating and limiting the entry into the banking field is to protect the public interest in bank functioning and bank solvency. As the Ninth Circuit has said, a bank failure is a community disaster.

We cite data in our brief from Mr. Paul Samuelson, the noted economist, about bank failures. Bank failures are not altogether a thing of the past, although they have been

largely minimized.

Only last October one of the largest bank failures in the history of the country occurred, the U. S. National Bank in San Diego, a billion-dollar bank failure.

There have been some bank closings every year since 1934, there have been 635 bank closings because of financial difficulty. The FDIC now has 156 banks on its problems list.

The entry into banking requires a showing of community need, of prospective profitability, and of other factors subject to judgment by administrative expertise.

Furthermore, even the perceived entry, as distinguishe from the actual entry, which Mr. Justice Marshall distinguished in his concurring opinion in Falstaff, is different in banking. Because, in an ordinary industry, the contending and competing units must look at those standing on the fringes to see whether economic factors are likely to move them into the market.

However, in banking, if one of those standing on the fringes wants to enter the market, he must make application to an administrative agency, without exceptions, State or national, and the banks in the market have an opportunity to go in and to be heard and to oppose the entry of the new entrant.

Consequently, there is no unperceived entry. There is no unperceived potential entrant in banking, as there may

be in other cases.

Furthermore, the determination of the propriety of the organization of a new bank and its entry into the market, this Court has said is specifically a matter for determination by the banking agencies; and, therefore, I submit, it is not appropriate for determination in a case such as the present one.

In the Whitney National Bank, a New Orleans case, which is a very complicated case, explained at page 55 of the Marine Banc brief, basically in order to avoid the restrictions of State laws, the branch in Whitney formed a bank holding company, as the Department would have the defendant banks do here, and it organized a new bank.

There was litigation below which resulted in an injunction against the bank charter being issued.

When the case came to this Court, this Court held that the lower courts have no jurisdiction to pass upon that question and remanded the matter to the Federal Reserve Board, the banking agency in that case, saying: We have concluded, the District Court, that it is the exclusive function of the Federal Reserve Board to act in such cases. In cases raising issues of facts, not within the conventional experience of judges, or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.

Therefore, we submit that this Court should not, by engrafting the potential competition theory onto Section 7 and then applying that to banking, pass over the expertise of the banking agencies as to who and when there should be entry into the banking field, which is what potential competition means, potential entry.

Now, let me say a word about the sponsorship scheme proposed by the Department.

It is true, as my colleague, Mr. Moen, has said, that there is a good deal of ambiguity about the use of this term "sponsorship".

In fact, there is evidence that banking executives, like others in other businesses sometimes help new institutions, that they give advice, old lawyers do this to young lawyers, this is not an unknown procedure. However, sponsorship, as used in this case by the Department of Justice, means, and I think must mean if it is to have significance, the contribution of capital and the holding of some sort of a significant legal interest in a bank.

If it doesn't mean this, it means nothing. Anybody can go and get a franchise -- I suppose I could go down and ask my friendly banker how I go about organizing a bank. However, in the first place, this method, if approved by this Court, would be available only to national banks. There is no contention, and Mr. Friedman has conceded, it wouldn't be

available to State banks.

This immediately would destroy the competitive equality between national and State banks, which Congress clearly intended, as this Court has often said in cases cited in our brief.

In the second place, this would undermine the dual banking system and handicap the State banks by giving the federal banks a technique not available to State banks. Two-thirds of all the commercial banks in the country today are State banks. Only one-third are national. They happen to be the larger banks, but this would give the advantage to the national banks.

Further, at best, this scheme is expensive, difficult and risky, and thus available not only not to all banks but only to the larger banks. It is clear from the records here that the cost of forming a holding company and organizing a bank is upwards of two million dollars. The statutory minimum is a million and a half dollars.

However, of all the commercial banks in the United States, 25 percent are under five million in deposits, 48 percent under ten million, and 78 percent under 25 million; both State and federal.

And I submit that as a practical matter, this is a method that would be available really only to the top five percent of the banks in the United States.

Furthermore, this scheme would endanger new and small banks by offering and threatening undue competition. This appears in the record in the present case, at page 1034. The Court asked the Department of Justice counsel, and I quote:

"Your theory is that if a new bank went in there" -- Spokane -- "they would take some deposits from the other banks, and therefore the other banks wouldn't make as much money as they are, and therefore it would increase competition. Is that your theory?"

And the Department counsel said: "Yes, sir."

In other words, new and small banks are likely to be the victim of this procedure. These are the ones that are owned by small business and by the minority groups that are struggling for recognition today. These are the ones that are protected by the bank regulatory agencies.

Under plaintiff's theory there would be no protection.

Consequently, if plaintiff's sponsorship scheme were approved by this Court, this would insure growth by the largest banks, it would insure the foreclosure of markets to small and medium-sized banks, and it would probably lead to the failure of small banks and thus ultimately to the much greater concentration of banking business in the United States.

Now, fifth, Section 7 does not forbid a merger which

lessens potential competition, but increases actual competition in the relevant market.

I trust I need not point out to the Court that in Falstaff, that the Court's opinion said that the question left open was whether a new entry that neither helped nor hurt competition was illegal merely because it, the acquiring company could but did not enter de novo.

That question is not reached here, because in both cases there is evidence that here the entry will make the market more competitive.

The Court found in this case this merger will make the Spokane market even more competitive, as it will replace a bank with a limited competitive ability with one with greater capacity to provide loans and it will remove its competitive disadvantage.

Now, plaintiff in effect answers this by saying that, to the extent the Court relied on the theory the merger would replace Washington Trust with a bank able to compete more effectively, that these are factors to be considered on the community needs and convenience defense and not in asserting the competitive impact of the merger.

If I may be disrespectful, I say nonsense. To say that an increase in competition cannot be considered in appraising the competitive impact simply doesn't make sense under the antitrust laws or under any other laws.

In fact, Justice Marshall, in concurring in Falstaff, said that if a company would have remained outside the market but for the possibility of entry by acquisition, and if it is exerting no influence as a perceived potential entrant, there will then normally be no competitive loss when it enters by acquisition.

Indeed, there may even be a competitive gain, to the extent that strengthens the market position of the acquired firm, which is exactly the case here.

Furthermore, in Brown Shoe, this Court said: Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act was expressed, supporters of the amendment indicated it would not impede, for example, a merger between two small companies to enable the competition to compete more effectively with larger corporations dominating the relevant market.

Here, admittedly, there's no change in market structure or concentration. There is only a strengthening of one competitor, which has already stimulated new competition in Spokane, as we point out at page 53 of our brief, and this does not lessen competition, but it increases competition, which is the purpose of Section 7.

Finally, let me come to my last point, last formal point, and then I will either now or later answer some points of the Department, that the plaintiff would rewrite Section 7,

so that potentiality really reduces substantiality to triviality.

There has been some talk as to what potentiality means and Mr. Friedman has candidly said they're looking at very long-range effects.

As a matter of fact, this was confirmed by a speech by the Acting Deputy Assistant Attorney General of the Antitrust Division, made the day after we filed our brief, and published in ATRR April 16th, 1974. It's No. 699, at pages D-1 to 5. In which he said: The Department's concern for preserving competition is premised upon the belief that existing market structures are not immutable over time. Changes in law, technology, business philosophy and the imperatives of the marketplace may result in future market entry with attendant increase in competition, in a manner which would not have been predicted at an earlier time.

The Department's efforts, he candidly states, are aimed at these market extension cases, which involve theories of potential competition.

Now, I submit that to say the potential competition, which the Department of Justice is now protecting, is the possibility of future market entry in some presently unpredictable or unforeseeable manner is to say that we are dealing with something that is improbable. The law simply cannot deal with the unpredictable or the unforeseeable.

The essence of legal probability is foreseeability. Thus the plaintiff is seeking to have the standard of proof in Section 7 cases reduced from probability and substantiality to possibility and triviality.

Plaintiff asks the Court to forbid any merger which might foreclose any unforeseeable future possibility of competition. But it is impossible to do because the unforeseeable we cannot deal with. This is unreasonable, unworkable, unprecedented and, I submit, a formula for stagnation not competition.

Furthermore, in my brief I have submitted to the Court that I believe that this standard, if it becomes established in the law, is a formula that will threaten civil liberties. The brief was filed April 8th. I suggested that potential enemies in authoritarian countries are prosecuted as the Department would go after potential competitors here.

On April 15th, the week after we filed our brief, the Washington Star-New published a little item saying that Aleksandr Solzhenitsyn, the well-known Russian author, had been exiled because, it was said by a leading Russian spokesman, he was guilty of making, I quote, "potentially dangerous proposals." It is said that he was accused of writing Utopian and potentially dangerous ideas.

Now, if this is the language of authoritarianism,

this is the doctrine which the Department of Justice would have this Court accept and which I submit, if accepted in these cases, cannot be confined to these cases.

If potentiality, in the sense of unforeseeability, unpredictability, that which cannot really be met by present proof, cannot be dealt with on the basis of the contemporary record, then there are simply no standards. There is no way that we can deal with the data presented with the evidence if the Court is going to permit this kind of proof.

My time is up, thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Friedman, you have about four minutes left.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,
ON BEHALF OF THE APPELLANT

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

There's been some reference by Mr. Moen to the testimony of the president of the Columbia Bank, the bank that was sponsored, and we refer to the Columbia Bank, not that that's a way of getting into Spokane, but to show, to show that this is a method by which banks do enter markets, where they are not permitted directly to branch.

I'd like to invite the Court's attention to two documents in the record. The first is at page 1514 of the record. It's a letter from Mr. Buck, who is the senior vice

president of the National Bank of Commerce to a Mr. Loney. Mr. Loney was an attorney in the area where the Columbia Bank was being formed, who became -- he had done some work for the branch of the National Bank of Commerce in this area, and he ultimately became the chairman of the board of the new bank. So he was a man who was intimately concerned in the formation of the bank and understanding what was happening.

Now, two paragraphs I'd like to refer to. The first is in the middle of that page, at 1514, he said that there's been no -- Mr. Buck said there has been no written or oral agreement or understanding with respect to acquisition of the proposed bank. "Upon advice of counsel we have been extremely (perhaps excessively) cautious to avoid this."

"It is true, nevertheless, that our bank has inspired submission of the application and is hopeful that at an appropriate future time it will be possible to acquire the bank for incorporation within its present system."

And then at the bottom of the page he pointed out that the way the bank was being arranged, "The majority stock will be in hands friendly to the National Bank of Commerce in order to insure as much as possible its future as a branch of that bank, yet avoid certain legal problems which could arise if it were not to agree or contract with respect to its acquisition."

Then at page 1573 is a letter from Mr. Loney back to

Mr. Buck, written a few months later. And these letters were all contemporaneously written at the time the Columbia Bank was being organized.

What Mr. Loney said to Mr, Buck, at the bottom of page 1573 is, quote: "We need a clear definition and understanding of the management responsibilities as between the directors of the unit bank and the management of the National Bank of Commerce."

That's between the bank that was sponsoring and the bank that was sponsored.

"For example, many of the steps taken initially will have a bearing on the long range operation of the bank many years after it has changed from a unit bank to a branch bank."

This seems to us to indicate very clearly that the whole purpose of this arrangement was ultimately to permit the National Bank of Commerce to acquire it.

Now, Mr. Loevinger has suggested that because the authorization of the regulatory authorities is needed before a bank can enter the market, if the regulatory authorities suggest, they would not charter a new bank; that's kind of the end of the thing.

Well, to begin with, I just point out that that argument of course has no application to the possibility of entry by making a foothold acquisition. But more fundamentally

it seems to us this is basically not the scheme of Section 7. This is not -- what Congress did not intend to give the Comptroller of the Currency the authority to veto, the authority to veto the enforcement of Section 7 of the Clayton Act.

When the Comptroller says that he does not think it's likely that he would charter a new bank. To begin with, of course, his testimony is given in defense of a merger that he has already approved; but, more importantly, of course the Regional Comptroller only makes the recommendation, but a Regional official may think today he's not going to charter it, tomorrow or next week changes may occur.

And we do believe that in this situation the Comptroller's view that he would not permit a new bank to be chartered cannot be dispositive on this question.

Thank you.

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

The case is submitted.

[Whereupon, at 11:38 o'clock, a.m., the case in the above-entitled matter was submitted.]

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