In the

Supreme Court of the United States

C. 1

UNITED STATES OF AMERICA,

Appellant

vs

THE CONNECTICUT NATIONAL BANK, et al.,

Appellees

Docket No. 73-767

Pages 1 thru 72

Washington, D. C.

April 23, 1974

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Appellant,	:	
v.	:	No. 73-767
THE CONNECTICUT NATIONAL BANK, et al., Appellees.	:	

Washington, D. C.,

Tuesday, April 23, 1974.

The above-entitled matter came on for argument at 11:39 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:

HOWARD E. SHAPIRO, ESQ., Department of Justice, Washington, D. C. 20530; for the Appellant.

GEORGE D. REYCRAFT, ESQ., One Wall Street, New York, New York 10005; for Appellees Connecticut National Bank, the First New Haven National Bank.

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

C O N T E N T S

[Afternoon session - pg. 19]

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-767, United States against the Connecticut National Bank.

Mr. Shapiro, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANT

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

Like the case which the Court has just heard, this case is an appeal by the United States from an adverse decision by the District Court in a suit under Section 7 of the Clayton Act, challenging ther merger of two banks.

Like the preceding case, it also raises questions concerning the application of the doctrine of potential competition to bank mergers.

The merging banks in this case are the Connecticut National Bank, headquartered in Bridgeport, Connecticut, and the First New Haven National Bank, headquartered some twenty miles away in New Haven.

The Bridgeport and New Haven metropolitan areas are beyond the New York City commuter zone, in the south-western corner of Connecticut.

What we're concerned with in this case is both the

impact of the merger on the Bridgeport and New Haven metropolitan market and its impact on the State of Connecticut as a whole.

This case, unlike the preceding case, involves, however, a question as to the line of commerce, a question as to the section of the country, questions as to competitive effects, regulatory effect, as well as convenience and needs.

I'll describe the banks first, and then I would like to briefly give an overview of the case before stating what the District Court did.

First New Haven, the New Haven bank, has assets of $333 million, deposits of $272 million, loans of $224 million. It's the eighth largest commercial bank in the State. Now, it's an important bank, it has a loan limit of $2.3 million, and it operates some 22 offices, 17 of them in the New Haven metropolitan area, three of them are really over in the Bridgeport metropolitan area.

Together -- well, the Connecticut National Bank, the acquiring bank, is the State's fourth largest commercial bank. And as of 1972 it had assets of $463 million, deposits of $412 million, loans of $253 million, and a loan limit of $2.8 million. It, too, is a big and healthy bank.

It's been expanding vigorously through the Bridgeport metropolitan area, and it's gone beyond it. It has offices as far east as New Haven, or almost to New Haven, and as far

west as Stamford.

The two banks, when they're put together, will account for about 11.7 percent of the total deposits in the State.

Now, banking in the State of Connecticut is concentrated. The State has, I think as of this moment there are some 72 banks chartered in the State, at the time of trial I think it was 61. There has been some new entry, which I will come to in a moment.

The top ten banks account for about 83 percent of all of the deposits in the State. Those top ten banks are therefore extremely significant in the development of banking in the State.

QUESTION: Mr. Shapiro, are there any standards used by the government or otherwise in determining when there is a concentration, an undue concentration of banks in a particular area?

MR. SHAPIRO: Yes, Your Honor.

QUESTION: What is the test?

MR. SHAPIRO: We have used the test of the Philadelphia Bank case. When you have a situation in which the top ten banks in a particular area, as large as the State, reach 80 percent, the top five banks reach 40 percent, why, we think that this is a serious situation from the standpoint of concentration.

QUESTION: You apply that only to the State, what would you do with --

MR. SHAPIRO: No, we would use it in the local market also. In the local markets, the concentration is equally high. In the eleven major metropolitan areas in Connecticut, the three largest banks, with the exception of Norwalk -- this is true anyway -- the three largest banks account for over 80 percent of the deposits.

QUESTION: Are there any communities in Connecticut with only one bank?

MR. SHAPIRO: There are smaller communities with one bank, yes, Your Honor.

QUESTION: What do you do about those?

MR. SHAPIRO: Well, we recognize that in the local community there may be some small communities that can't support more than one bank; but the test really is not a mecahnical one of population, but a test of threat to solvency.

Congress has, in effect, prescribed in the Bank Merger Act and in Section 7 that competition shall determine what the structure of banking should be, subject to safeguards to prevent the failure of banks, to prevent insolvency.

QUESTION: Do you consider a ratio of banking offices to population in this equation?

MR. SHAPIRO: No, Your Honor, we do not, because the test of competition is always a test of independent decision-

making entities. It's the firm, it's the bank which is the competitive measure.

Banking offices represent a convenience factor, for the community.

Let me give an example. Suppose you have a community with one bank that operates two offices or three offices. Now, that simply is not a competitive relationship, because the three offices are all owned by one bank.

On the other hand, if you have two banks in the community, each operating one office, then you do have competition. So the competitive measure is not a question of ratio of offices to population, but a ratio of banks to banks.

Now, returning then to the situation in Connecticut, I mentioned that the State's general deposit situation is highly concentrated. The ten largest banks, controlling over 80 percent.

This same concentration appears in the local markets, and it appears particularly in the markets with which we're concerned, Bridgeport and New Haven.

The merging banks here each have very large percentages in their respective markets. Connecticut National has about 40 percent of the deposits in the Bridgeport area. First New Haven has 40 percent of the deposits in the New Haven area.

And I am measuring this by deposits in the area,

because there are other banks, the two Hartford -- well, I'll come in a moment to those.

The banking structure in the State, dominated by the ten largest, as we view it, has been changing. There are two very large banks in Hartford. They have been expanding steadily in a series of foothold acquisitions and de novo office expansion. They have moved steadily, to the point where they are substantially bigger than the next eight banks.

Then you come to another breaking point in the State's banking structure, below the first ten the banks become quite -- become relatively small. So these first ten banks are probably the place where the strongest competitive potential is concentrated.

The Bridgeport and New Haven banks that are merging here have been moving toward each other's markets. In fact, they actually were in competition with each other in an area involved in this case, a so-called four-town area, a little to the north of New Haven and somewhat to the east of Bridgeport.

And that aspect of the case led us to allege that there was a diminution of actual competition, but the defendants proposed to the District Court to divest themselves of certain of those offices, and the District Court accepted that offer, so that that actual competition factor is not

itself an issue in this case. However, what that actual competition offer does show is that these two banks were coming into conflict with each other. These are not just potential entrants on some theory of having the capacity to enter the market, they are next door to each other right now, they are on the edge of each other's markets, and they are, for that reason, along with their great economic strength, the most likely entrants, we contend, into each other's markets.

The District Court rejected our arguments on a number of grounds. It found, first of all, that banking in Connecticut is -- commercial banking in Connecticut is not a line of commerce. It concluded that savings bank competition in Connecticut is so strong as to destroy the distinctiveness of commercial banking or, rather, as I shall argue, it concluded there was a broader line of commerce called banking, which included both commercial banks and savings banks.

It also concluded that the metropolitan areas in the State of Connecticut are not banking markets. The only banking market it recognized was the State as a whole. When we contended that if that is true then the standards of Philadelphia Bank should apply to the concentration that appears in the State, the court rejected this view on the ground that concentration didn't really apply here, and the

defendants now argue that, well, it doesn't mean they're in head-to-head competition, it just means the State is a banking market.

The court concluded that it would be impossible for the defendant banks to enter by any means that the government had described, and I shall come to those. It concludes that the regulatory factor showed that competition was not seriously injured by any potential competition contention of the government, and finally it sustained the convenience and needs defense.

Before I go to these many issues, I think I should at least try to make an overview of what it is the government thinks it's doing in these potential competition cases.

We start with the premise that in the Philadelphia National Bank this Court concluded that Section 7 applies to banking, and that concentration ratios are a primary index to the diminution of competition, when banks merge.

This was followed in 1966 by a thorough Congressional re-examination of the problem in the Bank Merger Act of 1966.

Out of that came a conclusion that the antitrust laws remained applicable to banking, that antitrust standards should apply in banking subject to a new defense, the convenience and needs defense, which was to apply. The Bank Merger Act of 1966 also provides that the bank regulatory agencies would be permitted to intervene as parties to defend

their own decisions.

Now, viewing this history, the government has concluded that Section 7 is extremely important in preventing a consolidation of banking among the various States, to the point where only a few institutions dominate all of the State's banking.

In Connecticut as a whole, the ten largest banks have been considering merger with each other since 1968. Since 1969 there have been four mergers approved by the regulatory authorities among the ten largest banks.

Now, the two merging banks here are the fourth and eighth largest in the State, and they're right next door to each other. They've spread to the point where they are actually competing with each other. Each is a big, strong, healthy institution, and they are well-managed. They are the dominant local banks, with 40 percent of deposits in their primary markets, in Bridgeport and New Haven. Those markets are concentrated, and each bank, therefore, can bring important new competition into the market of the other, if they will come in by independent entry.

Now, those markets are attractive, and each bank has strong incentives to expand into them. So long as the attractive and profitable merger route is open, however, large banks will not give serious consideration to alternative means of entry. Their managements, anxious to find merger

partners, will squelch any proposals for independent entry. And their managements will argue that we have to merge with other large banks because we all have to grow untill we are as big as the biggest.

And the result is, of course, that the biggest becomes the measure of the size of all of the banks, and you have a trend that cannot be stopped if this standard is the one to govern.

This Court rejected that view in Philadelphia Bank, and I think it did so rightly.

QUESTION: If you're right as to the standard, Mr. Shapiro, why has the government had such a miserable record in the District Courts with these challenges to bank mergers?

MR. SHAPIRO: Because potential competition is a doctrine, I think, that lawyers instinctively react hostilely to. It's an economist's concept.

I think part of the doctrine is very well stated, one side of the doctrine is well stated in the brief for Connecticut National Bank, where the wings aspect of the doctrine is summarized.

The other aspect, the deconcentrating aspect is really not just an economist's concept, it's a concept which is derived from Section 7 of the Clayton Act, because it's a concept which aims at Section 7's purpose,as this Court described it in Brown Shoe, to stop the rising trend toward

concentration.

So the government has taken potential competition and argued you can use that as -- you can use Section 7 through the potential competition doctrine as a device to channel the desirable expansion of banks into pro-competitive directions. Most courts simply find this novel, it's much the same with many of the other antitrust laws. In the beginning people had difficulty with them.

But it's a very American concept, Your Honor, that we should have an atmosphere of competition, and that the structure of industry should not be decided by administrative or judicial fiat. Someone saying, as the District Court here did, that there should be four or five large banks in the State.

Rather, structure is to be determined by the processes of competition, and that's what Congress decided when it made Section 7 applicable to bank mergers; not just reiterating the general view that an administrative agency must give attendance to the doctrine of -- the doctrines of antitrust, but rather making it specifically applicable.

Now, --

QUESTION: What was the genesis of potential competition? It was in the Penn-Olin case?

MR. SHAPIRO: The first statement of it was in the

Penn-Olin case.

QUESTION: And that was not a genesis in the economic fraternity, it was in this Court, it was a judicial genesis, wasn't it?

MR. SHAPIRO: I think the Court has been ahead of the economists, Your Honor.

QUESTION: Well, maybe.

MR. SHAPIRO: In this respect. Although there was in the Penn-Olin case --

QUESTION: Maybe "ahead" isn't quite the right word.

QUESTION: We're behind them.

[Laughter.]

MR. SHAPIRO: Well, in the Penn-Olin decision there actually is a reference to one of the TNAC reports, which initially summarized the doctrine. And there are traces of it in earlier cases, although it really received its first general recognition --

QUESTION: Just first really articulated in the Penn-Olin case, wasn't it?

MR. SHAPIRO: In the Penn-Olin case, yes, Your Honor.

QUESTION: That was just one part of it.

MR. SHAPIRO: That was one side of it --

QUESTION: The wings argument.

MR. SHAPIRO: -- the wings aspect.

QUESTION: That was the potential competition, and then the genesis of the perceived potential competition was in Falstaff, was it, or --

QUESTION: No, no, Penn-Olin was the perceived, wings.

QUESTION: Both.

MR. SHAPIRO: That's right, and --

QUESTION: Both the actual and the perceived?

QUESTION: No, just one.

MR. SHAPIRO: There was a general review of it in the concurring opinion in Falstaff, which sets forth the different categories and how they were recognized.

QUESTION: Unh-hunh.

MR. SHAPIRO: Well, to return just briefly to my over-all summary --

QUESTION: And then the third, which was in the previous case, but I'm not sure if it's here, the possibility of the acquiree itself expanding into the other market. That was in the Washington case. Is that reflected in any decision of this Court? In the Section 7 cases.

MR. SHAPIRO: No, that's -- that's --

QUESTION: That's a brand new doctrine, which genesis is in the Justice Department. Right?

MR. SHAPIRO: We think its genesis is in the general policy of competition.

QUESTION: Well, you think it's -- right.

MR. SHAPIRO: But what we're concerned about mainly, I mean the reason we keep finding these genesises is that Section 7 is, as we see it, something to channel this expansive force that the banks are undergoing now into pro-competitive directions. So that you will determine banking structure by the pro-competitive entry of banks.

Now, the large banks in this case claim that they have to merge because they have to meet the competition of the great banks in Hartford. They say --

QUESTION: And there's the shadow of New York City in this case, too, isn't there?

MR. SHAPIRO: And there is a shadow of New York City they contend. We have to meet that.

Well, I think the shadow of New York City is somewhat overstated, but on the competition with the Hartford banks, they say they can't really make it unless they can get bigger. That they can't enter any other markets unless they get bigger.

I would just like to point out that since this case was tried in Connecticut, there has now been eight new bank charters issued, and five of those bank charters are in the Bridgeport metropolitan area.

Now, one -- the District Court said, Well, you see, you don't have to worry about potential competition because

there will be new banks coming in all the time. But, of course, those are very small banks, and the defendants, who are very large banks, say, We can't overcome the economic barriers to get into these markets when the little banks can.

And these big banks would bring a much more important competitive contribution for the very reasons they claim that they have to meet the competition of the Hartford banks, which, over the Statewide area, have such important resources.

Now, what the effect of this merger trend in Connecticut is going to do is to increase Statewide concentration and create a danger with the systemwide pricing that's characteristic in Connecticut, that you're going to have a Statewide oligopoly. It will deny the Bridgeport and New Haven markets the competitive benefits of independent entry by these large banks, which are poised right at the doorstep. And it invites other mergers from the few remaining banks.

In fact, the fourth merger approved by a regulatory agency was approved on April 4th and it's a merger of the third largest and ninth largest bank in the State.

I don't see how, under the standards the District Court adopted here, the Antitrust Division or the regulatory agencies are going to be able to apply the antitrust laws as

they must, to stop this trend.

And now I'd like to turn specifically to the issues in the case.

MR. CHIEF JUSTICE BURGER: I think we'll resume there right after lunch.

MR. SHAPIRO: Okay, Your Honor.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Shapiro, you may continue.

MR. SHAPIRO: Thank you, Your Honor.

I was about to turn to the specifics of the case: the District Court's rulings on line of commerce in sections of the country, the problem of condition of entry, competitive effects and convenience and needs.

With respect to the line of commerce, the District Court found that there is in Connecticut a broad line of commerce called banking, consisting of the commercial banks and the mutual savings banks. We need not, for purposes of this case, contest the existence of this broad line of commerce. For, as we view the matter, under this Court's decision in United States v. Continental Can, the existence of the broader line of commerce does not preclude the existence of the more specific lines, commercial banking and other types of financial institutions.

In fact, in the Phillipsburg case, this Court recognized that there was significant competition among thrift institutions for the same kind of business that the small banks in the Phillipsburg area were competing for.

Now, the commercial banking business in Connecticut has been cutting into the province of the savings banks,

particularly with respect to competition for real estate loans. Today those -- there's no doubt that savings banks and commercial banks in the State of Connecticut compete for real estate loans. They also compete for some types of personal loans, and they compete for time and savings deposits.

But there is a significant difference of kind involved. Savings banks in Connecticut are important, there are 68 of them, and they have total deposits, I think slightly greater than the total deposits of the State's commercial banks. But Dr. Myles, the vice president of the savings bank association, explaining the role of savings banks in the State, said that they are focused primarily on service to the individual and the family; 95 percent of the business, of the loans of the savings banks are real estate loans, and only five percent is in the other category.

Sixty-four percent of the business of commercial banks is in non-real estate loans.

The big area for commercial banks, the distinctive area is of course the commercial and industrial loans. Savings banks just are not a competitive factor in this area in Connecticut. I think they loan some $26 million in what they classify as commercial and industrial loans, and this is less than one-half of one percent of their total loans.

And of course savings banks don't offer any of the special services that commercial banks do, the very special

services which the District Court in this case used under the convenience and needs defense to justify the merger.

There are no savings bank's trusts, there are no savings bank's computer services, there are no savings bank's corporate services to business. Even in the loan area, savings banks are quite limited in their function, they can only loan up to eight percent of their assets for personal expenditure loans; commercial banks are not restricted in this way.

Well, I could go on, but it boils down, really, to again a distinction between the unique capacity of commercial banks on the one hand and the -- particularly in serving commercial business, and the very useful and important competition that savings banks have in the area of serving the family and the individual and those who want to borrow on real estate or for real estate purposes.

Now, there is another important development in Connecticut that was quite significant in the District Court's opinion. The State of Connecticut adopted, subsequent to the trial in this case, a statute permitting savings banks to enter the area up to now exclusively the preserve of the commercial banks, the demand deposit.

Connecticut savings banks will be able, after 1976 -- so it's still not in effect yet -- to offer personal checking accounts. They will be able to offer these only to

individuals, however, and only for personal use, not for business purposes.

Of course, demand deposits in commercial banks are not so limited.

Moreover, experience elsewhere has indicated that checking account powers held by savings banks does not mean a mass exodus from commercial banks to savings banks, to use some of the words of Dr. Myles.

[sic]

The States of New Jersey and Connecticut both permit savings banks' checking accounts. And they also permit them on a somewhat broader scale than in Connecticut, because in those States, business savings accounts are allowed.

Nonetheless, looking at them only as -- looking at checking accounts only as a proportion of the savings banks' accounts, it's relative, it's quite low; I think it's only five or six percent.

So it's unlikely that the competition, while it's important and useful and desirable, is going to destroy the distinctive nature of commercial banking in Connecticut.

Now, we approach this case from the standpoint of Philadelphia Bank and Phillipsburg, which recognize commercial banking as a distinctive line of commerce. We did not argue that commercial banking is a line of commerce as a matter of law. If we had, we would have objected to the introduction of evidence on this issue.

We did contend that this is the starting place, we showed that commercial banks in Connecticut are just like the commercial banks in the rest of the country, and that therefore there is a sufficient basis to treat them as a distinctive line of commerce.

Now, once we were past the line of commerce problem, though, we had to consider the section of the country. We approached that as we had most other banking cases, we looked to a metropolitan area or region as being a practical compromise between very large customers and very small customers of banks. And we suggested that the proper measure was the metropolitan area in Bridgeport and the metropolitan area in New Haven, consisting of a central city, the cities of Bridgeport and New Haven respectively, and the surrounding towns, and we used a general measure, the standard metropolitan statistical area, or SMSA, which is a useful device.

It requires that there be a central city of not less than 50,000 population, the surrounding towns of not less than 15,000 population -- or not more than 15,000 population, no less.

And that there be an exchange, a commutation on a significant basis, 25 percent out from the town, in from the suburbs into the town, and 15 percent out from the town into the suburbs.

We thought this was a practical test in this area,

because in this area, metropolitan areas are small, we're not dealing with great sprawling agglomerates as in the Washington metropolitan area or New York City or even Philadelphia. It was a relatively small, close-in area.

Now, the SMSA concept is not, ipso facto, a definition of a banking market. It's just a tool, but we thought it was a practical one. So we used that as our test.

The District Court rejected it, because we didn't show what percentage of accounts from within the metropolitan area actually were in the banks in that metropolitan area. And the reason we didn't show it is because we couldn't show it. The only way you can get that kind of information is by taking a full-scale census of the SMSA, or having some wondrous computer work done by all of the banks involved, at great expense.

In fact, what we did in this case, the difficulty of what's required is demonstrated by the experience that the defendants had with the New York banks. Defendants argue the New York banks are a factor in this market. And they wanted to show the extent to which accounts from Connecticut, people in Connecticut had taken their business to the New York banks.

So they asked the New York banks for statement addresses, broken down in various ways. And the New York banks, the six leading banks in the country and possibly the world, the most modern in the world, simply couldn't do it in the time

available, at the costs involved. And we had to settle for less.

So the government, what it did do was prevail upon the defendants at least to show, by a sampling of their headquarters offices in some of the surrounding towns, just what percentage of the business arose within the SMSA in these sample offices.

And the results were not surprising, about 80 percent, to use an average, of the business was within the SMSA.

Now, we thought, therefore, that we had proved that metropolitan areas are a proper market. The District Court rejected this and said that the only market is the State at large.

Now, this is a very surprising view, because it means that you don't have local banking markets in Connecticut for any practical purpose, you just have a great big thing called the State at large.

QUESTION: Would you think there would be a difference, Mr. Shapiro, in that approach if you're in a State like Connecticut on the one hand, or a State like Alaska on the other?

MR. SHAPIRO: No, Your Honor, the size of the State, while it is a factor -- well, just doesn't mean that there aren't local banking markets.

To illustrate, the defendants in this case contend

that the Philadelphia Bank standards should not be applied to them, because -- on a Statewide basis. They say the State is the market, but Philadelphia Bank should not be applied to them, because they aren't head-to-head competitors. They're not competing with each other.

So they're really kind of denying the existence of a Statewide market in any traditional sense, and that sense, of course, is that it be a practical compromise based on the customer-supplier relationship which measures an area of effective competition among banks.

Now, the Hartford banks in Hartford do not compete with the defendants in New Haven. The Hartford banks, when they have an office in New Haven, do compete with the defendant banks in New Haven.

So it's a local market that we're talking about, not a Statewide market.

QUESTION: Suppose there -- there might be States where, of course we don't know because we don't have a case, and we don't have any record proof, but a State like Rhode Island might just be pretty much Providence and that's it, or a State like Delaware might be --

MR. SHAPIRO: Well, certainly Rhode Island comes --

QUESTION: -- Wilmington and that's it. But Rhode Island --

MR. SHAPIRO: Rhode Island would come close, although

although even there in the southern part of the State or out on that island off the coast, it might be possible to say that's distinct.

But -- well, Hartford is 42 miles away or fifty miles away by car, I think, from New Haven. And that's a little far to go for banking.

QUESTION: It's all of western Connecticut, too.

MR. SHAPIRO: And it sprawls. There are eleven metropolitan areas in the State, and they're fairly distinctive, we contend.

Now, there is the matter of the New York banks. The New York banks cast a long shadow in the banking in our country, in fact they cast a shadow not only over Connecticut but over New England, the Middle Atlantic States, and the country at large. They are big banks and they are doing business on a national basis.

It's also true that Connecticut, in its very southwest coerner, there's a little panhandle that sticks out of southwestern Connecticut kind of into New York, and that is a commuter area. It probably runs up a little beyond Stamford. And people who live in that area can get into New York City to work, and do get into New York City to work, and there are substantial -- there are undoubtedly commuter accounts in the New York banks. And a fairly reasonable number of them, a fairly high number of them.

But when the defendants brought in a report through Special Masters appointed by the District Court on the effect of the New York banks, what they found was that there are about 487 million dollars in so-called Connecticut accounts. And that's accounts from the State as a whole. Which were in the New York banks. That's roughly seven percent of the total deposits in Connecticut commercial banks, divided among the six biggest New York banks.

And then when we looked a little closer at it, we found this: the average size of those deposits was $20,000. Now, the average size of a Connecticut bank deposit was $1700. This is in Government Exhibit 130.

What this suggests is that the New York banks are really competing for the larger business accounts, that's where the bulk of the big account is coming from, that's where the bulk of that money is coming from.

Now, New York banks compete across the country. This was recognized in Philadelphia. And in Philadelphia, the court excluded the New York banks from the market, saying it would draw the market too broadly. And it also, despite the geographic proximity, excluded other States in the Philadelphia area, I think Pennsylvania and Delaware. And I think the same rule would apply here.

So, under a Philadelphia test, and the facts we show, we don't think that the New York banks are the factor that the

defendants make them.

Now, we did agree that the State is a section of the country, not a banking market in the traditional buyer-seller sense, but a section of the country in which certain distinctive competitive effects could be measured. And we argued that Philadelphia Bank would necessarily apply. It applies because what you -- there is a competitive danger when these big banks are merging, that you're going to get a Statewide oligopoly.

The defendants deny that, they say Philadelphia shouldn't apply; but they don't really explain why, if the State is a market, as they contend, it shouldn't. Except that they say we're not head-to-head competitors.

Well, there are other competitive effects besides head-to-head.

I turn now to the problem of entry, which is an important consideration here.

I think the first important thing to remember about entry in these cases is that when a merger is denied, a bank will seek an alternative way of getting into a market which it says it can't get into.

Now, that's demonstrated dramatically in this case.

Connecticut National attempted to merge with one of the big Hartford banks. The Department of Justice sued, and they abandoned the merger. They told the Comptroller of

the Currency, in Government Exhibit 125, in their application, that there was no way the Hartford bank could get into the Bridgeport market, except by merging with Connecticut National Bank.

And then, when the merger was frustrated, the Hartford bank went in and bought a little bank in Bridgeport, made a foothold entry into Bridgeport City itself, and then made a de novo branch entry into the city of -- into the town of Fairfield, which was then an open town.

So that this problem of seeking alternatives, which is demonstrated by this record in DX 125.

Now, there are three ways that we think that people could enter in Connecticut.

First, I have to explain that under Connecticut law there's a home office protection provision, which says that a bank cannot enter another bank's headquarters town. So that any town that has a bank headquartered in it is closed to de novo branching. I shouldn't say can't enter, I should say de novo branching is closed to the opening of a new branch office.

But there were towns around New Haven, there were towns around Bridgeport, which were open for de novo entry. And we contend that if you view the area as a metropolitan area, you could make effective entry into those towns and be an effective functioning competitor in the metropolitan

area.

A second method for entry was by purchasing a foothold bank. There are no foothold banks left in New Haven, because the Hartford banks picked them up two years ago. But there are foothold banks in the surrounding towns, and they did offer a means of entry.

Now, the same thing was true around Bridgeport. What's happened in Bridgeport is that there were six towns open for entry -- five towns open for -- six towns open for entry, and there has now been new banks created in those towns, Fairfield, Trumbull, some of the others, and the result is that those towns are now closed to de novo branching, because there will be a bank headquartered in them.

But those new little banks form potential foothold entrance. So there is a way of getting in by that method.

Finally, there is the use of the holding company, which is authorized under Connecticut law. Connecticut does permit holding companies. There's no reason why a holding company couldn't sponsor -- I shouldn't say sponsor; actually create a subsidiary and acquire it.

It was argued that this was of -- this might be illegal, but the Comptroller -- I'm sorry, the Commissioner of Banking in Connecticut testified that he had never been faced with this kind of request before.

The bank holding company law in Connecticut has only

been in effect since 1969. In fact, there were a couple of young vice presidents in the First New Haven Bank who suggested this route in 1969, but at that time First New Haven was looking around for a merger partner, and they weren't about to be listened to, and of course Connecticut National was also engaged in looking for a partner among the top ten. So no one was going to produce -- pursue these routes.

Finally, I'd like to say one brief word about the convenience and needs defense in this case. That defense was that there would be special banking services, of a kind which would serve particularly the interests of business; but perhaps the shortest and quickest answer to the convenience and needs defense here is that the bank examiner who went out when the application for these banks was submitted, when their merger application was submitted, the bank examiner who went out came back and said: Both of these banks are adequately serving the convenience and needs of their community.

And they are. They're good banks. And the community is well banked. There's plenty of alternative service in the Bridgeport metropolitan area and the other.

And the final point on that issue is that if you are going to engage in a balancing of competitive effects against convenience and needs, you've got to be right about the competitive effects.

Our over-all position is that the District Court here was wrong on the line of commerce, was wrong on the section of the country, was wrong on the condition of entry, failed to give -- failed to weigh adequately competitive effects, and therefore couldn't adequately measure convenience and needs.

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

Mr. Reycraft.

ORAL ARGUMENT OF GEORGE D. REYCRAFT, ESQ.,
ON BEHALF OF APPELLEE CONNECTICUT NATIONAL BANK,
AND APPELLEE FIRST NEW HAVEN NATIONAL BANK.

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

This case was decided against the government after a trial in which the District Court heard testimony from 24 witnesses, whose testimony covered more than 2500 pages, and after the District Court reviewed more than 240 exhibits.

Approximately seven months after the conclusion of the trial, the District Court made 293 findings of fact, taken in part from proposed findings submitted by the government and in part from those submitted by the defendant.

This lengthy record covered in detail, as required by Brown Shoe, the history, structure and probable future of banking in Connecticut.

The government called only three witnesses in its

case in chief. The first witness was Dr. Glantz, who testified only as to how standard metropolitan statistical areas are delineated.

He was not offered as an expert on banking markets and in fact he disclaimed any expertise in banking markets. He agreed that SMSA is determined strictly on commuting patterns, that banking is not one of the criteria used in determining SMSAs.

He said that cities and towns in the New England area are much more meaningful ways of analyzing SMSAs and building SMSAs than counties, as in other parts of the country, because of the relatively large size of counties in Connecticut.

He testified that New Haven and Bridgeport were two separate and distinct areas, that there was very little if any cross-commuting, and very little if any economic integration between the two.

He said that the population of the City of New Haven had declined by about 20 percent during the twenty-year period from 1950 to 1970, and that the population of the City of Bridegport declined by about 1.4 percent during the same period.

The second witness called by the government was Dr. Neil B. Murphy, a former staff member of the Federal Deposit Insurance Corporation, who had worked on bank mergers there.

Dr. Murphy did say that commercial banks were unique financial institutions, but he realized primarily on the demand deposit function, which he says is virtually unique to commercial banking, he said it's the most important service offered by commercial banks, which is not offered by savings banks.

Now, it's an undisputed fact, as Mr. Shapiro has said, that savings banks in the State of Connecticut do now have the power, effective January 1, 1976, to offer checking accounts and accept demand deposits in the State of Connecticut, thereby eliminating that most important distinction.

He generally agreed with the government -- that is, Dr. Murphy -- that SMSAs at the outset were at least a useful starting point for determining banking markets. But he agreed also, Dr. Murphy, that there were not use to analyze banking markets.

Dr. Murphy himself, the government's expert, said, in an article he wrote, that increasing competition among commercial banks and savings type institutions for savings type liabilities suggest that some reconsideration of the product line may be in order. And he said this is especially important if savings banks are successful in obtaining the checking account privilege, which they now have in Connecticut as of year-end 1975.

He agreed that savings banks are reasonable substitutes for commercial banks in Connecticut for personal loans. He agreed that savings banks, in fact, now treat savings deposits as withdrawable on demand, even though they do have the right to ask for a thirty-day notice before allowing withdrawals.

Dr. Murphy, the government's expert, agreed that 79 percent of Connecticut National's loan portfolio now is subject to competition from savings banks.

He agreed that a commercial banker considering a new market should take into consideration the presence of savings banks. He agreed that the fact that the population of New Haven had declined about 20 percent from 1950 to 1970 meant that it was not a very good place to put a new bank office, as far as retail business is concerned; and he said that, based on objective evidence, he would not put a bank there.

He agreed that banking in Connecticut has become more competitive between 1955 and 1971, because there are more alternatives available to consumers.

He agreed that the proposed merger would have no adverse effect on the -- at the present time on small borrowers, small depositors, or small businessmen in either New Haven or Bridgeport.

The third witness called by the government was Mr.

Benjamin Blackford, who is president of State National Bank in Bridgeport, a competitor of Connecticut National Bank. State National Bank is a wholly owned subsidiary of S&H Green Stamps; combined, State National and S&H Green Stamps have assets in the neighborhood of a billion dollars in earnings, in the neighborhood of $30 million a year, compared to 3.75 million for Connecticut National Bank.

Mr. Blackford testified that he was not familiar with the phrase "standard metropolitan area" and he did not know what made it up or what it meant.

He also testified that State National was the one-price bank, that is, it does not charge discriminatory prices and charges the same throughout its service area.

He said that State National is in competition with savings banks, with "one hand tied behind our back." He said that every bank in the area feels they compete with New York banks for trust business. He said State National has a lot of customers who work in New York. He said a few of these big mutual savings banks around here "give us all the competition we need."

And he said he takes into account savings bank competition when he considers opening a new branch, because, as he said, "you can't beat them on price, you've got to beat them on service."

Mr. Blackford was the concluding witness in the

government's case in chief.

The government called only one other witness, that was Mr. Peter Stassa, president of Lafayette Bank and Trust Company, who was called in rebuttal.

Mr. Stassa also said that he did not consider the SMSA concept one way or the other as being the market of Lafayette. He testified, "I think we have our own description of what we think our market is." And he said that the bank's market was primarily where it had its offices.

He testified also that competition -- that his competition included every other bank, and he specifically included savings banks within that competition.

The defendants and intervenor called twenty witnesses, including two economists, one Dr. Merton J. Peck, the chairman of the Economics Department of Yale University, and the other Dr. Charles Stokes, the former chairman of the Economics Department of the University of Bridgeport.

Both of these witnesses, who had detailed familiarity with the market and the area, geographic area in Connecticut, and both of whom are experts in structural competition and potential competition, testified that as economists they saw no adverse effect on the structure of potential competition or any of its parts in the proposed merger.

Dr. Peck took the government's assumption on the significance of potential competition and he applied them to

Connecticut. He assumed that commercial banking was a line of commerce, he assumed that entry into the closed towns of New Haven and Bridgeport might occur some time in the future, and he assumed that potential competition had some significance in the field of banking.

He prepared a detailed study of the structure of potential competition in Connecticut based on these three assumptions of the government, and concluded that even on these assumptions the proposed merger would have no adverse effect on the structure of potential competition in Connecticut.

He found that following the proposed merger there would be no less than four firms identified by the government as potential entrants into each of the major banking markets in Connecticut.

The District Court found, based on Dr. Peck's testimony, that no first rank potential entrant would be eliminated by the merger, and that in 21 of 40 closed towns -- there are not 48 closed towns out of 169 -- that theoretically eliminated potential entrant ranked seventh out of ten.

The court also found, based on Dr. Peck's testimony, that in 52 open towns, nine potential entrants identified by the government as having Statewide expansion capability would remain after the consolidation.

In 15 large towns in Connecticut, with over 50,000 in population, Dr. Peck testified, and the District Court found, that there are no fewer than four banks identified by the plaintiff as capable of expanding into Statewide systems, which would remain as potential entrants after the proposed consolidation.

For example, in Hartford, First New Haven ranks fifth in size among the ten largest theoretical potential commercial bank entrants.

At the present time, First New Haven would rank no better than fourth among theoretical potential entrants into Bridgeport.

Now, Mr. Shapiro has said First New Haven is the most likely entrant into Bridgeport. I simply don't understand that.

Hartford National, which has $1.7 billion of assets, is not now in the City of Bridgeport, and on the government's theory it is the most likely entrant into Bridgeport. Under the government's theories, the second most likely entrant into the City of Bridgeport is Union Trust Company, with over 700 million of assets. It is not now in Bridgeport.

Under the government's theories, the third largest potential entrant into Bridgeport is Colonial Bank and Trust Company of Waterbury, which is larger than First New Haven.

The District Court found, based on Dr. Peck's

testimony, that before the merger there were five potential entrants into New Haven, ranked by the government as capable of becoming Statewide banks. After the consolidation there would be four.

The District Court found that since five of Connecticut's largest commercial banks already operate in New Haven, they have more impact on competition there than does the possibility of potential entry by Connecticut National.

The five banks in New Haven now are Connecticut Bank and Trust Company, with --

QUESTION: Mr. Reycraft, --

MR. REYCRAFT: Yes, sir?

QUESTION: -- if there is a difference between actual potential entry and perceived potential entry, to which of these concepts is your present argument more relevant to; it's the perceived one, I suppose.

MR. REYCRAFT: Mr. Justice White, because we offered no evidence on perceived potential entry --

QUESTION: Well, that may be, but that isn't -- I'm asking what about, what you're talking about now, who is the most likely potential entrant. Is that directed to both of these concepts? Is it relevant to both or not?

MR. REYCRAFT: I understand, Mr. Justice White, that in analyzing either of these concepts the government does

look at who is the most likely, and --

QUESTION: Why is that significant when you're talking about an actual potential entrant?

MR. REYCRAFT: I deny that Connecticut National is an actual potential entrant into New Haven. The discussion of potential competition in the State of Connecticut was based on the government's assumptions; namely that --

QUESTION: Well, let's assume, though, that you have -- let's assume you have four actual potential entrants that you could -- I know you say that isn't so here; assume that there were. Would it make any -- and you could rank them, first, second, third and fourth, in terms of the likelihood of their entry.

Does it really make -- does it really have to be the most likely, the --

MR. REYCRAFT: I think the most important thing that the government needs to show, Mr. Justice White, is that the potential entrant, the claimed potential entrant would have entered the town but for the acquisition. I say, of course, that the government did not prove that. New Haven is a closed town, and Connecticut National could not enter New Haven.

QUESTION: But if the government could show that and did show it, it really wouldn't make so much difference if it was the first or the second or the third most likely entrant.

Would it?

MR. REYNCRAFT: Well, I would think so, Mr. Justice White, that --

QUESTION: Why? That's what I'm asking.

MR. REYCRAFT: I would think so, because if the -- the most likely entrant is the one who is most likely, I don't know much to add to that; and of course the question is: What is the importance of eliminating a less likely entrant? If the fourth most likely entrant is being eliminated, theoretically, then there are two or more likely.

QUESTION: That may be -- that's on the perceived side, that may be so. But if someone actually would have entered, even if he was the third most likely, actually if you can prove that he very likely would have entered, that seems like you've gone an awful long ways towards proving your case.

I agree with -- I understand you to say they haven't proved that here.

MR. REYCRAFT: Yes, Mr. Justice White, I think that if the government had proved that Connecticut National would have entered the City of New Haven by other means, then they would have advanced their cause. I agree with you, I did not --

QUESTION: And your argument about the Hartford Bank would not be so -- wouldn't be as substantial, I wouldn't

think, if the government had actually proved this other point.

MR. REYCRAFT: Well, I think that it's a question of fact as to --

QUESTION: Yes.

MR. REYCRAFT: -- as to whether they would have entered, and my conception of the evidence in this case, the government didn't make a serious attempt even to prove that they would have entered.

QUESTION: Other than just the so-called argument from objective facts, that this was a bank with the capability.

MR. REYCRAFT: Well, on objective facts, Mr. Justice White, I would say that the objective facts as to likelihood of entry would be based upon the size of the potential entrant.

QUESTION: Yes.

MR. REYCRAFT: And that the larger the entrant the more --

QUESTION: I agree with that. I agree with that. But it still wouldn't mean that the bank of New Haven wouldn't have been in position, objectively, to enter into Bridgeport.

MR. REYCRAFT: If the government is correct that New Haven banks can enter the City of Bridgeport, and if First

New Haven was eliminated as one of those firms which would have but did not, then on the reserve question, Mr. Justice White, I would say that that -- that the government would argue that that was a loss of a competitor in that area.

QUESTION: Yes. Yes. That the government would say it, and you wouldn't agree with it. Right?

MR. REYCRAFT: I would agree that six competitors generally mean more competition than five.

It's a question of substantiality, however, whether the likelihood of that elimination of that possibility would substantially lessen competition. And that is what I say the government has failed to prove.

Professor Stokes, who is on leave from the University of Bridgeport, also testified that the proposed merger would have no effect on the structure of potential competition in Connecticut.

The defendants and the intervenor called 18 other witnesses, who were bankers and businessmen in the City of New Haven, who testified generally on competition and generally agreed that commercial banks and savings banks were in very substantial competition within the State.

The structure of banking in Connecticut is highly competitive. The number of commercial banks has increased during the last eleven years. And the alternatives available to consumers has increased in the majority of Connecticut's

169 towns.

As of year-end 1963 there were 64 commercial banks in Connecticut. As of the close of the record there were also 64 commercial banks in Connecticut. Since the close of the record, as Mr. Shapiro has indicated, eight new commercial banks have been chartered; so there are now 72 commercial banks in Connecticut, compared to 64 twelve years ago.

So that this alone demonstrates that the most likely entrants into commercial banking in the city, in the State of Connecticut are investors and not other banks. There has been no occasion in the history of banking in Connecticut when any bank holding company or bank has followed the route proposed by Mr. Shapiro, which is to the so-called holding company new charter route.

The State Commissioner of Banking testified that it had never happened in the State of Connecticut. he said that if it were done, it would result in a bugle call of fury from other banks with litigation. The State of Connecticut also has a form which applicants for a new bank charter are required to fill out.

That form says: This bank is not to be organized for the purpose of selling, merging, or combining with any State bank or trust company or national bank now in existence.

So, in order to follow the procedure that the government is suggesting in this case, it would require false

statements by the applicants in order to get a State bank charter.

Now, the Comptroller of the Currency has only chartered three banks in the State of Connecticut since 1963, and two of these banks were what are called interim banks, which were formed for the purpose of facilitating the elimination of minority shareholders, and a bank holding company in Hartford.

For the State as a whole, commercial banking options for retail customers have increased in 94 of the 169 Connecticut towns, and they have decreased in only three towns between 1955 and 1971.

There are more alternatives today in Fairfield County, in 19 of 23 Fairfield County towns, than there were in 1955. And there are more alternatives in 22 of 27 New Haven County towns, than in 1955.

Among 119 towns in Connecticut, outside Fairfield and New Haveb Counties, the number of commercial banking options has increased in 53, remained unchanged in 65, and decreased in only one such town.

Even Dr. Murphy, the government's expert witness, conceded that banking in Connecticut has become more competitive since 1955.

The government has raised essentially four issues here: whether the two banks are significant potential entrants

into each other's markets; whether standard metropolitan statistical areas are really without more banking markets; whether the two banks are significant potential entrants into other local banking areas in Connecticut; and, fourth, whether existing competition from savings banks and existing competition from New York banks should be totally disregarded in determining the impact on the structure of potential competition in Connecticut.

Now, the District Court found against the government on all of these issues, which are essentially factual -- which are factual issues.

The government's argument on standard metropolitan statistical areas apparently was important to it in this case, unlike its position in the Philadelphia National Bank case, Phillipsburg, Brown Shoe, and Nashville, because it could not show that these banks were likely entrants into the home office cities of the others, because they were closed.

In order to show an entry into a banking market, it was necessary to show that entry into a suburban town somewhere near New Haven would be adequate.

The only witness that testified that SMSAs were banking markets was Dr. Murphy, who did testify that he had no familiarity with the geography or banking in Connecticut.

Dr. Peck, who was familiar with the area, who teaches at Yale University, said that the acquisition of, for

[sic]
example, a small bank in Woodbridge, Connecticut, would not be an effective entry into the New Haven area, to compete with First New Haven National Bank.

The Woodbridge Bank and Trust Company has about $8 million assets, it has about one office. It is not allowed to branch into New Haven, because that's a closed town. Of the 11 towns in the New Haven standard metropolitan statistical area, six are closed.

In the Bridgeport standard metropolitan statistical area, six out of eight of the towns are closed. So that new entry into those towns is not legally permissible at the present time.

On the question of banking markets, both the government and the defendants in this case agree that the State of Connecticut is an appropriate area to look at in appraising this particular bank merger.

The reason is because, as defendants, we applied this Court's test in Philadelphia National Bank case, which is that the relevant section of the country to look at is the area within which State law permits banks to branch or merge, and that's subject to home office protection, is the State of Connecticut.

Now, we don't say that the State of Connecticut is the banking market in which First New Haven and Connecticut National compete, as Mr. Shapiro does. He goes from the

assumption that if Connecticut is a banking market, therefore everybody in the State must compete within it. The facts are, and he concedes the facts are, that they do not. Connecticut National's primary service area is Fairfield County, where most of its offices are located. First New Haven's banking area is essentially southern New Haven County.

And there is a small area of interaction between them in the four-town area that Mr. Shapiro described; but, other than that, they are not in competition with each other.

There are smaller banks in the State which do operate strictly on a local basis. For example, the Woodbridge Bank and Trust Company that we've referred to operates strictly in Woodbridge.

The government's own exhibits show that in the town of Fairfield, Connecticut National's Fairfield office gets 77.1 percent of its business from people who have statement addressed in the town of Fairfield; that is highly localized. They show that 83.1 percent of the deposits of Connecticut National's Trumbull office originate in Trumbull.

So, for the small customer, he is limited to the area in which he lives.

For the larger customers, however, the choices increase dramatically.

New York banks, as Mr. Shapiro has conceded, obtain close to $500 million of banking business from the State of

Connecticut. Now, that's just banking business that we were able to prove, as a result of a survey done with the assistance of the Special Master. We served deposition notices and subpoenas on New York banks. And while we encountered a good deal of resistance, and it took a good deal of time, we were able to prove nearly $500 million of banking business which these banks alone got out of the State of Connecticut.

This is significant. For commuters also, between New Haven and -- between Connecticut and New York, the choices are substantial. The government's own exhibits show that there are 50,000 people who cross-commuted between Connecticut and New York. ABout 25,000 go from Connecticut to New York, and about 25,000 come back from New York to work in Connecticut.

There's substantial cross-commutation, and the government's evidence shows that it's increasing.

Now, if these commuters or these cross-commuters represented only one employed person per household of five, that would be the equivalent of the city of 250,000 people, which is larger than either the city of New Haven or the city of Bridgeport.

In Fairfield County, the combined circulation of the New York Times and the New York Daily News exceeds by six to one the circulation of the only local newspaper circulated in Bridgeport, which is the Bridgeport Post Telegram.

Television advertising by New York banks saturates the lower Connecticut area. The New York banks do advertise personal loans, retail loans, savings deposits.

Now, we say, for this reason that the government's statistics, their so-called concentration ratios, are highly suspect or highly attenuated, not only for the reason that the -- of the effect that New York banks have on Connecticut, but also because of savings bank competition.

If a bank in New Haven were considering entering the City of Birdgeport, he would have to consider the fact that when he went into Bridgeport, he would be competing with Connecticut Bank and Trust Company, with $1.3 billion of assets, Hartford National with $1.7 billion of assests, with Connecticut National, he would be competing with People's Savings Banks with over $700 million of assets. And the government's own evidence shows that over 70 percent of his business is in competition with savings banks.

So whether the Court decides that savings banks should be included in the line of commerce, or analyzes it strictly in commercial banking terms, the effect of that competition from savings banks is a real thing, a banker in New Haven thinking of entering Bridgeport would be foolish not to consider that competition for that amount of his business.

I will leave the rest of my time, Your Honor, to

Mr. Loevinger.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Loevinger.

ORAL ARGUMENT OF LEE LOEVINGER, ESQ.,

ON BEHALF OF APPELLEE COMPTROLLER OF THE CURRENCY

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

Let me first answer a question which I believe was asked by Mr. Justice Stewart as to the genesis of potential competition.

My research indicates it's been considered in six cases, of which the first was the El Paso case; the six cases are El Paso, Continental Can, Penn-Olin, which was the third case, Procter & Gamble, Ford, and Falstaff. Falstaff is the first case in which this Court gave rather plenary consideration to it.

The cases are discussed, beginning at page 76 of our brief in this case, the six cases just mentioned are summarized at pages 82 and 83.

Now, it seems to me that there has been some -- there's obviously a conflict, as there always is in cases coming before this Court, but there is a matter here that involves an apparent conflict of philosophy between government agencies.

Clearly, the banking agencies, the Comptroller of

the Currency, and the Department of Justice are in conflict, and it has occurred to me that it might be useful if I could, without really tying anybody down to anything, try to analyze the basis of this conflicting philosophy.

The Department argues in this case that if large healthy banks like Connecticut National and First New Haven are permitted to expand by merger, that the result will be a Statewide structure in which most local markets will be nominated by a few large banks.

Now, I suggest that this is a much more likely result if these banks are not permitted to expand by merger. As the Department itself admits, there is in the nature of local markets, there are relatively few banks. You can't talk about local banking markets, and banking is one of the most competitive fields in the United States, you can't talk about local banking markets as though you were talking about the national beer market, as you were in Falstaff.

In fact, a remarkable coincidence is that in Falstaff there were ten actual or potential competitors in a national beer market, whereas in a tiny little State like Connecticut, the third smallest State in the United States, they are still talking about ten competitors.

Well, when you get it down to little local markets, you don't get large numbers; and if you confine these banks by forbidding mergers, which you are going to get, are dominant

local banks. There is simply no question about this in my mind.

Let me try to illustrate it by posing two alternative concepts. These are admittedly highly hypothetical, they correspond only roughly to reality, because you can't construct a hypothetical that really corresponds to all of the aspects of reality.

But let us take a State that has 50 towns in it, each one of which has two banks, so that there is competition among each of these two banks, there are no large dominant banks, no large dominant cities. Every bank has approximately one percent of the banking business in the State.

According to the Department's theory, the State is competitive, because nobody has more than one percent. But every single banking market in the State, each town, is concentrated, because there are only two banks; and two banks have a hundred percent.

Now, let us take an alternative thing, let us say that by some miracle of legal transmutation, administrative and legal action, that there are a whole lot of mergers in this State. And that the fifty, or rather the hundred banks in the State merge into ten Statewide banks, ten much larger Statewide banks, and that as a result of this they decide to branch out, and so each of them establishes branches in a number -- not in all, but in a number of States.

So we end up with, let us say hypothetically, each town has five banks. There are 250 banking offices in the State as opposed to 100 banking offices previously.

Now the Department tells us that the difference in banking offices don't make any difference. But each town now has five banking offices, each representing a different bank.

The State, on the other hand, has only ten banks. The same number of competitors as there were nationally in Falstaff. On a State basis, they would say that there is concentration, because ten banks have a hundred percent. Indeed, there is likely to be some asymmetry, and it is likely that five banks have a little bit more than fifty percent.

So they tell us this State bank -- that this is concentrated.

On a local basis, there is less concentration certainly, because each locality has five banks; although five banks still have a hundred percent, which, according to the definitions in tests we've been given is still concentration.

And yet I submit to the Court: which way is the public being better served? Having five alternatives, five competitors available in every town to every bank customer, or having two little banks?

Now, I submit that this is the basic conflict in philosophy between the Department of Justice and the Comptroller here. That the Department says that a larger number of smaller limited-service, limited-competition banks is preferable, whereas the Comptroller, without making any arbitrary commitment as to number, says that in general a smaller number of larger full-service, fully competitive banks will better serve the public interest.

Now, reality is always far more complex than these hypotheses, but I think that what this does illustrate is that simple per se rules just don't work, and very often will in fact work to frustrate the very objective that they are thought to be serving.

Indeed, in some respects you can see this in Connecticut here. We have been given a test by Mr. Shapiro that the market is concentrated if the top ten have 80 percent or more, or if the top five have 40 percent or more of the market.

And he applies this and says we've got a concentrated market, in Connecticut.

Well, let's look at the facts.

The Connecticut National and the First New Haven, the merging banks here, their share of commercial bank deposits -- and I refer only to those because I don't think it makes -- I don't think the line of commerce makes any

difference here -- that their share of commercial bank deposits from 1959 to 1972 declined from 13.8 percent to 10.3 percent. They had a declining share of total State commercial bank deposits.

The Hartford National and Connecticut Bank and Trust, the two giant Hartford banks, had 34.5 percent in 1959, but 41.3 percent in 1972. Consequently, if you're looking for the 40 percent test of the top five, you can add any other three to the Hartford Bank and CBT and you get over 40 percent.

Now, I submit again that this simply beggars common sense, that you cannot say, because the two leaders are increasing their percentage that their competitors should be precluded from merging. If there is any sense at all to this notion of structure as a test of competitive performance, it must be that increasing concentration forecloses merger to those who are in the increasingly concentrated segment to the growing segment of the market; not to those who are in the diminishing segment.

It simply makes no sense to say that because our two big competitors are increasing their share that therefore we'll foreclose the opportunity to merge to the two smaller banks, and, indeed, this is the very hypothesis that was rejected in Brown Shoe in the quotation that I read earlier and is cited in our brief.

Justice White asked, What is the difference between the first and the second in rank and perhaps those lower in rank, among potential entrants, either from the viewpoint of a perceived or an actual future potential entrant?

I think I might answer that slightly differently than Mr. Reycraft. I think there is a difference. I think we all generally agree, or at least we assume as a matter of antitrust law, that if you have more competitors you have more competition. If you've only got one or two competitors, you are less likely to have strong competition in a market than if you have ten or fifteen, in most markets, in most circumstances at least.

However, what is true of actual competitors is not necessarily true of potential competitors. Potential competitor exerts whatever influence he exerts by virtue of the perception of those in the market. The perception of those or, in the case of the actual potential competitor, as a future possibility.

But the perception of those in the market is obviously fastened on the No. 1 possible entrant. And whether there are fifteen or twenty or thirty lined up behind him would seem to make very little difference.

Indeed, if you will look at the economic literature on the subject, it does indeed say, and there is even some recognition in the decisions of this Court that the significant

potential entrant is the most likely potential entrant, and maybe this holds true of the first or second, I don't know how far down the line you go, but after you pass one or two potential entrants, those in line behind really lose all significance.

QUESTION: I suggest you won't find that in the cases with respect -- except with respect to perceived entries. Can you suggest where it is, with respect to actual?

MR. LOEVINGER: Well, it is -- the cases refer to the most likely entrant, Mr. Justice White.

QUESTION: Well, those are cases where --

MR. LOEVINGER: And I don't --

QUESTION: -- with respect to perceived entry.

MR. LOEVINGER: This may well -- this may be the discussion in those cases, I don't recollect with that degree of sharpness, but the distinction between the actual, the perceived and the dominant potential entrants is something that really didn't emerge until your Falstaff decision.

QUESTION: Right.

MR. LOEVINGER: Consequently, these distinctions are not drawn in the earlier decisions.

And that, indeed, I am not sure that this is the case. For example, in the leading case, the El Paso case, it's perfectly obvious that the Northwest Pipeline Company was the most likely entrant, because there were in there just

trying their hardest to get into the market. There isn't any question that they were an actual potential entrant in every sense, and I think that the matter was well summarized in the words of the Court: unsuccessful bidders are competitors no less significantly than successful ones.

And this really is the genesis of the whole potential competition doctrine.

QUESTION: For the well perceived entrant.

MR. LOEVINGER: They were perceived, indeed, yes. And, as I say, I think the distinction between actual and the perceived entrant was not drawn until we came to Falstaff.

Now, it is interesting that plaintiff argues that commercial banks are significantly different than savings banks and should be excluded from the line of commerce. And yet plaintiff, or the Department also argues the importance of business financing by commercial banks is what makes them significant and makes them -- and gives them their particularly unique quality.

Yet when we come around and talk about the advantages of these mergers, when we talk about the services and the competition to be secured from these mergers, the Department tell us that, well, this is just a matter of convenience and needs and doesn't have anything to do with competition.

Now, I submit they can't have it both ways. If it

is business financing, business services that make commercial banking a unique line of commerce for the antitrust laws, which have to do with competition and competition only, then they can't turn around and say: But, when you show us that a merger gives you greater services to the business community, that's unimportant for purposes of competition.

If it's important for purposes of distinguishing the line of commerce as a line, as a competitive line of commerce, it is also important for appraising the effects of the merger upon competition, in the line of commerce as well as the section of the country.

Now, the Department also argues that competitive effect may be found in a section of the country that is not a market. I confess that there is part of this that eludes me. I've always understood from all the prior decisions of this Court, and I have searched the decisions of this Court on this subject, that section of the country and relevant geographic market were used synonymously; in some cases one is used after the other in parentheses. This Court has never differentiated, and what it said in the Philadelphia Bank case was that we were to look to the area in which the impact of the merger would be felt, in order to determine the relevant geographic market or the section of the country.

Now, that is what the court did here. The court said that in the State of Connecticut there are two dominant

Statewide banks, Hartford and CBT, and that if we permit this merger there will be another Statewide bank that will increase the number of Statewide competitors to three, therefore the impact of the merger will be felt in the State as a section of the country.

That is why it looked to this.

Now, this doesn't mean that there aren't local markets. I think that's a complete non sequitur. There may well be local markets, if two banks within New Haven or within Bridgeport were seeking to merge, I think we might well look to Bridgeport or New Haven as markets, because that's where the impact of the merger would be felt.

But simply because the impact is felt on the State level, the court properly applying the teachings of this Court in Philadelphia said that's where I look to see what impact this merger is going to have.

To conclude from this that every firm within that market is necessarily an actual competitor is again a complete non sequitur. And as in my brief, I referred to Von's Grocery, although I think it's a little easier for me to talk about the Washington metropolitan area, because I know it better.

In Washington as in Los Angeles there are half a dozen -- I don't know how many, but a certain number of grocery chains that compete throughout the metropolitan area. We're

all familiar with them. I don't need to name them. We probably buy groceries there every day.

These are competitors, and there's no doubt in my mind that the metropolitan area, as in Los Angeles, is a relevant market with respect to possible merger of these grocery chains.

This doesn't mean that a grocery store in Bethesda is a competitor of one in Alexandria or one in Silver Spring is a competitor in Bethesda or Alexandria or Falls Church or anywhere else. And yet these communities are separated no further than Bridgeport and New Haven.

To say that we have a relevant geographic market for purposes of a merger case does not mean that every firm within that market is an actual competitor, and the argument which is founded upon that attempt at logic is utterly without foundation and is a complete non sequitur.

QUESTION: Well, Mr. Loevinger, the statute talks about lessening of -- when the effect may be to lessen competition in any section of the country.

MR. LOEVINGER: Yes, sir.

QUESTION: And I would agree with your understanding that "section of the country" is equivalent of "geographic market" phrase you find in court opinions and so on. But the lessening of the competition has to be in the section of the country or the geographic market, whichever one you want to

choose, which implies that there is competition in that geographic market, and that's its relevance, isn't it?

MR. LOEVINGER: That is correct, sir. And in fact what has been admitted by the Department and what the court found here is that there is no actual competition at all between the geographic -- between the merging banks. Therefore, the court said -- in fact, the total phrase in Philadelphia, as I recall, was: we look to the area of competitive overlap and the area where the impact of the merger may be felt.

Since there is no area of competitive overlap, the court said: I look to the area where the impact of the merger may be felt.

QUESTION: Then he found the whole State.

MR. LOEVINGER: And he found the whole State.

QUESTION: And yet he certainly didn't find that there was face-to-face competition in the State, he found just the opposite, didn't he?

MR. LOEVINGER: That's correct, sir. Yes, sir.

QUESTION: Well, he found that there was some face-to-face competition, which he promptly got rid of.

QUESTION: Well, yes.

MR.LOEVINGER: No, there is none involved in the case as it comes to this Court.

QUESTION: No, I understand that, but when he looked

around he did find face-to-face competition.

MR. LOEVINGER: No, as a matter of fact, the Comptroller found that and eliminated it, sir.

QUESTION: Well, all right. But it was there.

MR. LOEVINGER: There was some that was eliminated, yes, sir.

QUESTION: It was there. And you might --

MR. LOEVINGER: It's not here now.

QUESTION: It might have been argued that if the merger hadn't been proposed, maybe in ten years there would have been more face-to-face competition in some other sections of the State.

MR. LOEVINGER: Indeed, the Department of Justice tried to argue that, and that was disproved because of the home office protection law.

This is one thing --

QUESTION: But there weren't many open towns left.

MR. LOEVINGER: There just weren't any places left where they would enter.

This is one of the interesting aspects of this case, of these two cases, as they come to this Court, and it's an aspect which altogether distinguishes both cases from Breeley, incidentally. In Breeley, there was simply no question that the holding company could have entered Breeley de novo as far as the law is concerned. I don't comment on

the economic factors. But clearly they could have entered Breeley, so far as the law is concerned.

In both of these cases there are legal barriers which would have to -- which would require to be circumvented and I respectfully suggest it is somewhat unseemly of the Department of Justice to be arguing that the banks should resort to legal strategems to circumvent the requirements of the State law, which are designed to protect State banks, and to maintain the dual banking system which has given us the tremendous amount of competition that in fact we do have now.

Indeed, as Mr. Friedman said -- Mr. Friedman said, Congress did not give the Comptroller a veto on Section 7. Let me reply that Congress certainly did not give the Department of Justice control over banking entry.

On the contrary, it specifically provided that the Department of Justice should comment only on the competitive factors involved in bank merger cases, and that the decision should be made by the courts, as I have pointed out. In Whitney, this Court said that the lower courts should not even get into this matter, that these are matters for administrative weighing before they ever come into the court.

And there are a whole series of cases cited in our brief, beginning with the Walker Bank case, decided by this Court, in which the courts have said that when any of the

banking agencies attempt to evade or circumvent the State law restrictions which are incorporated by reference by the federal law, that they are acting beyond their power and acting improperly and that the courts will prevent them from doing so.

It seems to me to be unseemly for a government agency now to be suggesting that the banking agencies or the banks themselves should be attempting to do that which this Court has strongly suggested in Walker Bank and other cases that the banking agencies should not be engaged in.

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

Mr. Shapiro, you have five minutes left.

REBUTTAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SHAPIRO: Thank you, Your Honor.

First, I'd like to address the question of the markets. Dr. Peck, whose study of potential entrants was referred to by Mr. Reycraft, conceded that his study did not undertake a study of banking markets; he simply looked at towns as geographic entities.

He also stated that he did not consider the question of the effect of actual entry. He was simply looking at potential entrants from the standpoint of the so-called perceived effect.

And finally he said, at the close of his cross-

examination, that he wasn't at all concerned with concentration, he considered it unimportant in banking.

So that I don't think that Dr. Peck's studies really focused on the market question, that he should have focused on, in trying to determine who was a potential entrant.

Now, who is a potential entrant? The government's theory was that the most significant potential entrants were in the top ten banks in the State. Of those top ten banks, two of them, the big Bridgeport bank, we said were already in the Bridgeport and New Haven areas, respectively.

QUESTION: The big Hartford banks.

MR. SHAPIRO: The big Hartford banks, I'm sorry, Your Honor.

QUESTION: Yes.

MR. SHAPIRO: Hartford National is actually in Bridgeport -- Hartford National is not in Bridgeport, but it is in Fairfield. So we say it's already in the metropolitan area, and of course the other bank is in both New Haven and Fairfield.

Now, eliminating the top two, that leaves eight, and then if you eliminate the banks that are not in New Haven or Bridgeport, you get a very small number left. And of those, we then look to see who was large and close by, and the most obvious entrants were the Bridgeport bank moving over to New Haven, and the New Haven bank moving over to Bridgeport. And

we said they are the most significant entrants.

Now, Mr. Reycraft suggested that the test should be whether the banks would have entered but for the merger. But we suggest that that test would be a test of certainty, which would not fit the purposes of Section 7. The real test is whether -- the test that would fit the purposes of Section 7, is whether if the merger route is closed, it is probable that the banks would enter, given their incentive and capacity. And this is, we think we demonstrated that they have the incentive and that they had the capacity, that means of entry did exist if they were encouraged to do it.

And we think this was demonstrated by the experience of the Connecticut National attempt to merge with the big Hartford bank. The Hartford bank which said it couldn't get into Bridgeport, did try to get into Bridgeport, and did succeed in doing so.

In fact, in this case, in addition to offering to divest themselves of the banks which were the subject of actual competition in the four-town area, the defendants, at pages 40 and 41 of the record, also said that if they were allowed to merge, they would get themselves into Hartford. They said it would be difficult legally, but they would attempt to find a way.

Again proving that if the merger route is closed, people will seek an alternative.

Now, counsel for the Comptroller has set forth what he views as the difference between the Department of Justice and his agency over banking policy.

We suggest that it's not a question of banking policy, it's a question of whether the Bank Merger Act of 1966, which makes Section 7 controlling, is going to be controlling as Congress intended.

In the Comptroller's brief, at page 54, there is a note 23, which says that he favors merger over entry by de novo methods or by new charters. He has an affirmative policy in favor of mergers.

Now, the Department of Justice, believing that Section 7 is controlling here, feels that the test is not whether there is going to be simply local oligopolies immune from competition by expanding banks, we favor the expansion of the Statewide bank, we favor its entry into local markets; that is our policy.

But the question is how it gets in. If it goes in on a small basis and has to fight in that local market, it's going to upset the status quo, it's going to bring the benefits of competition to that market. If it walks in, by buying a large share, it's going to settle down and we're going to have, in the local market, the same kind of oligopoly we've had before.

We encourage de novo entry, we encourage foothold

merger; that's why we have not challenged the expansion by the big Hartford banks, because they always were careful to stay on a small scale when they went into new markets. And to the extent that's happened in Connecticut, we have had an increase in local diversity, which we favor.

But the question is always, how the expansion is achieved.

Now, the Comptroller mentioned the Washington area as an example of how markets should be defined. Well, I suggest that the Washington area is a good analogy for considering a metropolitan area as a banking market.

In this sense: the suburban banks in Washington cannot get into the central city. The central city banks cannot get into the suburbs, and yet there is genuine competition among those banks.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:08 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -