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SUPREME COURT, U. S.

In the

# Supreme Court of the United States

UNITED STATES,

Appellant,

v.

CITIZENS AND SOUTHERN NATIONAL BANK, et al.,

Appellees.

No. 73-1933





Washington, D. C.
March 19, 1975

Pages 1 thru 68



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| UNITED STATES, Appellant, | : | |
| v. | : | No. 73-1933 |
| CITIZENS AND SOUTHERN NATIONAL BANK, et al., Appellees. | : | |

Washington, D. C.,

Wednesday, March 19, 1975.

The above-entitled matter came on for argument at 10:58 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellant.

DANIEL B. HODGSON, ESQ., Alston, Miller & Gaines, 1200 Citizens and Southern National Bank Building, 35 Broad Street, Atlanta, Georgia 30303; on behalf of the Appellees.

# C O N T E N T S



[Afternoon Session - pg. 49]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-1933, United States against Citizens and Southern National Bank.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

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

The appellee, the Citizens and Southern National Bank is the largest banking organization in the city of Atlanta, Georgia.

There are six banks located in the suburbs of Georgia, in each of which C&S, as I shall refer to it, has a five percent stock interest. Each of these banks is an independent corporation, with its own offices and its own board of directors. But virtually since the organization of these banks, C&S has treated them and operated them as though they were de facto branches of C&S.

This is an appeal from a judgment of the United States District Court for the Northern District of Georgia, which, after trial, dismissed a government civil antitrust suit challenging the relationship between these five-percent banks and C&S.

The questions presented are:

First, whether the arrangements between C&S and the banks, which virtually eliminated all competition between them, constitutes an unreasonable restraint of trade in violation of section 1 of the Sherman Act.

The second question is whether, as the district court held, the questions respecting the legality of the relationship between C&S and the five-percent banks is a matter committed to the exclusive primary jurisdiction of the Federal Reserve Board of Governors.

The third question is whether the acquisition by C&S of these five-percent banks, thus making permanent this existing relationship which depended largely on the inter-adjustments between them and the five-percent stock interest, whether that acquisition of the complete interest in the five-percent banks violated section 7 of the Clayton Act.

Now, with respect to the Clayton Act issue, it involves only five rather than six of the five-percent banks, because with respect to the sixth bank, the Bank of Tucker, the Federal Deposit Insurance Corporation, which has jurisdiction over these mergers, rejected that merger. So the Bank of Tucker is involved only in the Sherman Act aspect of the case, not in the Clayton Act aspect.

QUESTION: Does the FDIC state reasons, Mr. Friedman, for rejecting as to the sixth bank?

MR. FRIEDMAN: Yes. What it said was that with

respect to the Bank of Tucker, which was founded in 1919, there they said the initial acquisition by C&S in the 1960's of an interest and the development of this relationship was itself anticompetitive, because prior to that time Tucker and C&S had been fully independent and competitors, whereas it distinguished the other five situations, and there it said there was no competition between them from the outset.

Now, at the end of the 1950's and in the 1960's, Georgia law had two limitations upon it which affected the ability of C&S to expand into the suburbs of Atlanta.

First, it prohibited C&S from opening branches beyond the city of Atlanta; and, secondly, it prohibited a bank from acquiring more than five percent of the stock in another bank.

In this period the Atlanta suburbs, like the suburbs of many metropolitan areas, were expanding rapidly and C&S devised a method by which it hoped to avoid the State law limitations on branching.

What it did was to assist in the organization of these suburban banks; acquired a five percent interest in eachof these banks, which was the maximum permitted under State law, and then played a role in the operation of these banks, in supervising them and advising them and managing them, that made them virtually a branch of C&S.

QUESTION: Does the government here have the burden of showing that the situation would be different after the

acquisition than it was under the five-percent arrangement?

MR. FRIEDMAN: Well, I would -- may I answer the question this way, Mr. Chief Justice: Our position is that the acquisition is bade because, were it not for the five-percent arrangement, the acquisition would violate the standards that this Court has announced, and our position is that you cannot rely on what we believe to be the illegal situation that led to the initial elimination of competition to justify the claim that the acquisition now does not substantially lessen competition.

I add one other factor, which I adverted to earlier, that the effect of the acquisition is to make permanent -- to make permanent a situation that hitherto has existed as a result of relationships. There are two instances, one relating to C&S, another one relating to the Trust Company of Georgia, in which banks in the situation of the five-percent banks broke away -- broke away and became independent banks.

Once, of course, C&S acquires these banks, that's the end of it. They are part of the C&S system. Thereafter, I assume, they will be operated as branches in fact rather than the de facto branches under which they are now.

So I think to that extent we do show that there is a different situation, because it becomes permanent, it's cemented together, there would be a different situation after the acquisition than exists now.

But our other answer is, a more fundamental answer is that they cannot justify, they cannot justify these acquisitions by the claim that there is no lessening of competition because there was no competition, where the result of the lack of competition itself, we believe, violated and flowed from a violation of section 1.

QUESTION: Then what does the language "lessening competition" mean?

MR. FRIEDMAN: May be substantially to lessen competition.

QUESTION: Yes.

MR. FRIEDMAN: What we think, Mr. Justice, the whole policy, the whole policy of section 7 of the Clayton Act, the purpose there of preserving competition, of awaiting restraints and their insipiency, in order to avoid things before they develop into full violations of the Sherman Act.

We think that policy would be subverted, would not be effectuated if we would say that because they had previously eliminated the competition, therefore they can now rely on that as a justification -- and the words "substantially lessen competition" we think we do come within that standard, because, as we discuss in our brief, looking at the concentration figures in the Atlanta market, which this Court has indicated are sufficient to establish a prima facie case of violation, the effect of this acquisition would be significantly

to increase the already concentrated Atlanta bank market.

So we think within the literal terms of the statute, we have established our burden.

The only question is whether it can be offered as a defense, an answer to this increase in concentration, where really the increase is insignificant here because as a result of our prior violation -- as a result of our prior violation, we have eliminated the very competition that section 7 is intended to promote.

QUESTION: Let me see if I understand what you're saying there by puttig it into a hypothetical case, Mr. Friedman.

Are you suggesting that one of these five-percent banks might conceivably be located in an area that experienced a sudden growth and a great deal of business, and finally concluded, its directors concluded that it could stand on its own feet, independent of any relationship or guidance or help from the "home office", and then they would regard themselves as emancipated?

MR. FRIEDMAN: It could --

QUESTION: Even though the Atlanta bank owned five percent?

MR. FRIEDMAN: It could well, and as I have indicated --

QUESTION: Is that the kind of situation you're

talking about that you think the antitrust law must reach this in its insipiency?

MR. FRIEDMAN: Yes, Mr. Justice -- well, what I was suggesting was something else, Mr. Justice. What I was suggesting was that section 7 is intended to reach anti-competitive acquisitions in order to prevent the development of a situation where there would be the actual elimination of competition as distinguished from the potential for eliminating competition that section 1 is designed to reach.

That's what I was trying to suggest in speaking about reaching them in their insipiency, but we have two instances in this record: one, a C&S bank; another a different bank which did break away for various reasons. And these banks are now independent and are now growing. It may well be that if these markets develop, some of these other banks would decide to break away from the control.

Now, let me just refer briefly to the kind of control that C&S exercised here, both in the organization of the banks and in their operations.

QUESTION: Mr. Friedman, before you go into that -- you said a few moments ago that so far as the Sherman Act was concerned, there was an initial violation in the formation, as I understand it, of these five-percent banks.

MR. FRIEDMAN: I'm sorry, Mr. Justice, perhaps I misspoke myself. The violation was not in the formation of

these banks, the violation that we're challenging is the operating relationships between C&S and the five-percent banks, which stemmed from the way in which they organized them, but was developed as time went on when they assumed virtual control over all the operations of the bank.

It's not just the organization. We're not challenging the organization of the bank itself. We don't say when they applied five percent this is violated section 1. What we say is the whole relationship, starting with the five-percent acquisitions, then the other thing they did in organizing the bank, and then the way that they operated with the bank. It's that whole series of relationships, we say, violates section 1, because it amounts to an elimination of all competition between C&S and these independent banks. That's our theory; not just the initial bank.

QUESTION: Right. Well, may I ask you a question on the basis of that theory: If Georgia law had been different, and these five branches had been organized as branches, would that have been any violation of the Sherman Act?

MR. FRIEDMAN: No, no, of course not, Mr. Justice.

QUESTION: Well, what is the economic difference, then?

MR. FRIEDMAN: Well, I think the difference, Mr. Justice, the difference is that the thrust of Section 1 of the Sherman Act is against restraints upon competition created by

independent entities which combine -- there are many things that an individual firm can do, if it's a single entity, that two independent firms can't do.

To give a simple example, if there are two -- if the firm has a western division and an eastern division, it can obviously direct that the western division will sell in the west and the eastern division will sell in the east. But --

QUESTION: I understand that, but, historically I've also understood that it was a policy of the antitrust division to encourage banks to open branches which stimulate competition. So my question directed to you related to the economic injury. In other words, what interest is the government protecting here that would not be involved or implicated if Georgia law had been different, as indeed it should have been perhaps, until now, to follow their customers into the suburbs as they move to the suburbs?

What is the economic injury?

MR. FRIEDMAN: Well, I think, Mr. Justice, the economic interest here is the whole basic concept that under the Sherman Act you cannot use -- make arrangements between independent entities which eliminates competition. It would have been a very different case if Georgia law had permitted it, and we would have no objection -- we would have no objection at all if these banks were merely sponsored and assisted, if C&S had treated these banks the way it treats

many banks which it has sponsored, with whom it has correspondent relationships, there would be no problem.

Our problem in this case is that while they purported to be creating independent competing entities, independent entities, that are supposed to operate independently, in fact they weren't independent, and we think this Court's decisions -- we've cited some of them in our brief -- have recognized that once you use the vehicle of separate corporations, for whatever reason -- for whatever reason -- once you use the vehicle of separate corporations, you've got to treat them as separate entities. You can't combine them together and say, Well, they're separate entities for various purposes, but in terms of seeing whether what these entities are doing with each other, whether that's permissible under the Sherman Act, we shall ignore the separate entities and treat them as a single entity.

This Court, many years ago, in the Schenley case, an interstate commerce case, recognized the situation. There it was a situation, the question was whether a wholly owned subsidiary of a distiller was engaging in private carriage, as it held, as it contended, or in contract carriage as the Interstate Commerce Commission had held.

And the argument was: Well, ignore the separate corporate entities. It's true, maybe it seems to be contract carriage, but we're doing it for our parent and therefore it

should be treated as private carriage. And this Court said no. This Court said: When you elect to operate as separate corporations, you have to comply with the requirements that the law imposes on separate corporations.

Now, --

QUESTION: Mr. Friedman, suppose -- this is not hypothetical but it involves a projection -- suppose you had not taken an appeal here at all, and five years from now the fears which you have expressed, or the concerns about lessening competition were demonstrable in the view of the Antitrust Division, would you be in the position to move in at that time and seek a divestiture?

MR. FRIEDMAN: If we hadn't appealed, I very much doubt it, Mr. Justice. I don't know. I don't know of a case like that that has happened, but if it was held that the acquisitions were valid, I would think we would be hard-pressed to turn around later on and say, Now you should hold that they were invalid.

I mean, we might conceivably, if C&S reached the point where it began to assume monopoly power in the Atlanta markets, we might proceed against them under section 2. But I find it very difficult to see how we could, in effect, re-litigate the issue of the validity of the acquisitions under section 7 of the Clayton Act, once they had been consummated.

I would say it would be comparable, for example, Mr. Justice, if -- Mr. Chief Justice, I'm sorry -- if we had never brought this suit after the Federal Deposit Insurance Corporation had permitted the merger; if we had never brought the suit and, under the statute, if we don't challenge it within thirty days, the order becomes final. I don't suppose if, five years later, things go much worse we could then turn around and challenge these acquisitions.

I assume we would be told: You're five years too late.

And I would think the same thing would apply in this situation.

Now, what C&S did in the organization of these banks was about as follows:

First, they helped them obtain a charter. That's a normal situation when they're sponsoring a bank.

They helped them select a site. That's a normal situation.

They helped them sell stock. That, perhaps, gets a little more.

They, in effect, selected the directors. This get a little more serious.

And then, in each case, of each one of these five-percent banks, they provide the chief operating officer.

Beginning in 1965, all of these five-percent banks

started using the C&S name.

QUESTION: May I say, what you told us up to now you do not contend is a violation of the antitrust law?

MR. FRIEDMAN: No, of course not. But I'm just trying to give the background --

QUESTION: You're giving us the history, but I just wondered --

MR. FRIEDMAN: -- just setting the background, in the light of which, what they did thereafter --

QUESTION: Right. But all of this sponsorship and creation and everything that went with it, that you told us about so far, you do not submit is a violation of the Act.

MR. FRIEDMAN: No, we don't -- may I make something very clear, Mr. Justice, in light of what our opponents say, we don't claim that any particular individual thing itself is a violation; what we claim is that the whole relationship under which all competition was eliminated --

QUESTION: But all of these components, the whole totality that you've told us about up to now, you would not say was a violation.

MR. FRIEDMAN: No, not -- but the last thing that I -- the two last things that I come to are beginning to develop and reach into.

QUESTION: All right.

MR. FRIEDMAN: One is the selection and the placing

as chief operating officers of the banks of officials of C&S. And the record shows that officials were shifted back and forth. In every instance the chief operating officer of the bank, one of these five-percent banks, was a C&S official. And in several instances when C&S was displeased with the way the officials were performing, they selected a new official.

QUESTION: It would seem to me, if I may think out loud, that your case would be -- is stronger if you do not rely on the sponsorship and creation of these banks, but rather analogize them to banks that were independently sponsored --

MR. FRIEDMAN: Well, they purported -- they purported to be independently sponsored.

QUESTION: Right.

MR. FRIEDMAN: But -- but things began to develop.

Starting in 1965, each bank used the C&S name. That is, instead of it being the First National Bank of Sandy Springs, it was the C&S National Bank of Sandy Springs.

QUESTION: You have some pictures here showing that.

MR. FRIEDMAN: There's some pictures showing that, and they also used the logogram, which is this lollipop-like thing, with the distinctive letters C&S". So when the public passed by these banks, they see it to be C&S banks.

Now, one rather interesting thing I've mentioned previously is that the bank -- the first bank that they

organized was something called the Bank of Stone Mountain, and the Bank of Stone Mountain, which was the first one in this group, was the first one out. Stone Mountain is no longer a member of the C&S team.

And the -- what happened was when they came around to these various banks after Georgia law had been changed in 1970, permitting banks to expand beyond the city limits of Atlanta, they wanted to merge with Stone Mountain, and Stone Mountain didn't want to merge with them, and the result was C&S sold its interest in the bank and Stone Mountain is now an independent functioning bank.

And it's rather revealing, I think, that the former president of C&S, a man named Mills Lane, testified that they had a very unhappy relationship with Stone Mountain. He said the board of directors of Stone Mountain was very different from the boards of directors of the other five-percent banks.

The reason was --

QUESTION: Didn't that -- Mr. Friedman.

MR. FRIEDMAN: -- that the board of directrs of Stone Mountain wanted --

QUESTION: Mr. Friedman.

MR. FRIEDMAN: Yes?

QUESTION: Excuse me for interrupting you, but I wonder whether Stone Mountain, as I recollect, is fairly

comparable. Wasn't there a stockholder who owned more than fifty percent of that bank?

MR. FRIEDMAN: I believe thirty percent.

QUESTION: Thirty percent?

MR. FRIEDMAN: I believe it was thirty percent, Mr. Justice.

QUESTION: Of course, for SEC purposes, that's more than abundant for control.

MR. FRIEDMAN: Yes.

QUESTION: In any event, the stockholders of the other five-percent banks, as I recall, were, for the most part, employees, officers and directors and stockholders of C&S.

MR. FRIEDMAN: I'm not sure for the most part, there was a substantial number. There's figures in the record, and it varies from bank to bank; but I don't believe -- there may have been one or two; I don't believe in most part that even the employees, officers of C&S or C&S affiliates were majority stockholders of any of these five-percent banks.

C&S general policy was not to go into a situation unless their five percent block was the largest.

But Stone Mountain, it's true -- Stone Mountain was operated up to this point as one of these five-percent C&S banks. It had the name, C&S Bank of Stone Mountain.

QUESTION: Right.

MR. FRIEDMAN: And the complaint was -- the complaint

that Mr. Mills had was the board of directors of Stone Mountain wanted to tell him, the president of the bank, what to do and did so. In other words, they disconnected, they disaffiliated with Stone Mountain because they couldn't control Stone Mountain.

Stone Mountain was an independent bank and had the effrontery to try to be an independent bank, and they didn't like that.

Now, the district court spelled out in its findings, at pages 50a to 55a of the Appendix to our Jurisdictional Statement, and while these findings are made in connection with the Section 7 discussion of the district court, they facts they set forth are equally applicable to the Section 1 issue, exactly what it is that C&S does in its relationship between these banks.

As I indicated, the officials move around from bank to bank, for purposes of the C&S pension and profit-sharing plans, service with the C&S bank is considered the same as service with one of the five-percent banks.

C&S people review, after they have made certain loans, made by the subsidiary banks, a C&S official sits on the board of directors of every one of these banks as an advisory director. C&S has an organization called the Branch Supervisory Department, and it supervises these allegedly independent banks. Now, the customers of the banks have

available at any one of the five-percent branches all the services rendered and made available to customers of C&S. And particularly significant, the officers and officials of the five-percent banks receive and rely upon the manuals, directives, instructions that C&S puts out.

And these include specific instructions and advice with respect to their pricing practices.

Now, a number of these instructions show at the bottom of the instruction that a copy goes to the president of the five-percent bank, which C&S describes as a correspondent associate, for information only. That's what it says.

But I think when you look at the text of these things, it's quite clear that these copies for information only were just not sent out in order to keep the officials of these five-percent banks informed as to what C&S was doing or what C&S was thinking. They leave no doubt, we think, that C&S intended them to be followed.

Let me just cite three examples.

QUESTION: To what point now do you direct these examples, Mr. Friedman?

MR. FRIEDMAN: This is to show --

QUESTION: You're speaking of the past situation, aren't you?

MR. FRIEDMAN: Well, they're not that far --

QUESTION: The five-percent arrangement?

MR. FRIEDMAN: The five-percent arrangement.

QUESTION: Yes.

MR. FRIEDMAN: This is directed to show that in fact this wasn't just a situation in which C&S gave out some ideas and these banks voluntarily said: This sounds like a good thing to do, we'll independently follow it.

This is all designed to show that in fact, in fact what you had in this situation was an agreement in violation of Section 1 of the Sherman Act between C&S and the five-percent banks, that they were to eliminate competition, in everything including price; and one of the purposes of these examples is to show that C&S was in effect telling the five-percent banks what to charge, what practices to follow.

Let me just --

QUESTION: Does that also suggest -- doesn't that lessen the distinction that you were previously making between the situation as it was and the situation as it will be after the acquisition?

MR. FRIEDMAN: No, now it --

QUESTION: It seems to me you're narrowing the gap when you press that point.

MR. FRIEDMAN: Well, Mr. Justice, obviously if, as we say and as they concede, in effect, there's no competition, barring the acquisitions will not directly increase competition; what it will do, though, is to keep alive the potential

for possible deconcentration of these concentrated banking markets, which this Court has recognized repeatedly is one of the functions under Section 7.

But, in addition to that, coming back to what I said before, just to repeat it, that we don't think they can rely on the violations of Section 1 -- on violations of Section 1 -- as a justification for a merger that is prima facie in violation of Section 7.

Now, these, if I may refer to these, a couple of these things. The first one is E-140.

And I should mention that this record is paginated that the Exhibit volumes are separately paginated beginning with E-1.

Now, this is a note which goes not just to the C&S officials with an information copy, but this is directly written, typed out, to the Presidents of the Correspondent Associates, which are the five-percent banks:

"Effective November 12 the C&S National Bank" -- that's the lead bank -- "lowered its prime rate to 7-1/4 percent. For the time being this will affect only those rates that are tied to the prime. All other rates will remain the same until further notice. If you should have any questions, please give me a call."

This is from the Assistant Vice President of the Division of Branch Superintendent.

Then at E-145, is to all of the Managers and the Affiliates with, again, Information Copy to the President of the five-percent banks:

"Enclosed is a memorandum and revised rate chart from Gordon Trulock. As always, the chart reflects the minimum rate which should be charged."

And then at the bottom of the paragraph:

"Loans to local corporations should carry a rate of at least 10 percent."

And finally at page E-147, a 1969 memorandum saying:

"Rates on all L & D loans except prime customers should be adjusted to 8 percent."

And then it goes on at the bottom of that page and says:

"We are still not making speculative real estate and development loans."

QUESTION: Mr. Friedman, you say this supports -- would support a finding of an agreement not to compete?

MR. FRIEDMAN: We would -- I'd go stronger than that; I'd go stronger than that, Mr. Justice. This, we think, compels -- compels the conclusion that what was done here was the result of an agreement of a combination of a concerted action. But this --

QUESTION: Did the government submit proposed findings to the district court to this effect?

MR. FRIEDMAN: Yes, yes, we did.

QUESTION: And the district court refused to make this finding.

MR. FRIEDMAN: The district court -- what the district court found -- the district court found in this case that this was not the result of any agreement because, as it put it, this -- it denied that the service or information received by these banks from C&S was the result of any tacit or explicit combinations, rather than the natural deference of the recipient to information from one with greater expertise or better sources. But --

QUESTION: So the government upset the district court's conclusion as to say that it's clearly erroneous?

MR. FRIEDMAN: We think -- we think the ultimate finding, the ultimate finding of no agreement in this case is clearly erroneous. It's clearly erroneous because we think it fails to recognize the many decisions of this court defining what constitutes an agreement for purposes of section 1 of the Sherman Act.

Under Section 1 you don't have to have an explicit agreement, it's rare that you have that. It's a course of conduct and you look at the entire course of conduct to determine whether what happened was the result of wholly independent business judgment or whether it was the result of some tacit understanding.

Now, I suggest that it's difficult to believe that wholly independent banks, that wholly independent banks, with their own offices, with their own boards of directors, responsible to all of the stockholders, would permit a five-percent stockholder to have an advisory director sitting with them at all the board meetings, to have a five-percent bank stockholder review their loans, would follow all of these instructions, raising prices, changing prices, failing to change prices when C&S objected; that they would have done that without there being some tacit understanding that this is how the banks were going to operate.

We think it is very clear from the whole record in this case that it was understood, it was understood that this is how it was going to operate, and this is the way it operated.

Let me give one very --

QUESTION: And plus the name on the front, on the front of the building.

MR. FRIEDMAN: Plus the name. Thank you, Mr. Justice.

Normally, an independent bank without some understanding wouldn't permit its business to be operated under the name of someone else. And wouldn't permit its customers to have available at it all the services that are supplied to five-percent stockholders.

Let me just give one very illuminating example, I think, of the kind of relationship and control you had in this case, which is something we cited in our reply brief. The president of the Bank of Chamblee, one of the five Citizens and Southern Bank of Chamblee, wanted to raise his interest rates on deposits from three and a half to four percent. Because he felt he needed this to compete with another local bank in the area.

But before he undertook this step, he felt it necessary to write to C&S and find out if they had any objection to it. So he so wrote, and he then had a discussion with a C&S official who objected, and the result of it was the president of Chamblee did not raise his interest rates to four percent.

We had another example, described in our main brief at pages 11 in a lengthy footnote, footnote 2, that C&S put out an announcement that it was changing and increasing its service rates on checking accounts. It didn't state the date. This was in February 1970.

Many of the five-percent banks had different service rates. But on the 1st of April all of a sudden all of them, all of them, every one of them suddenly adopted uniform rates on not only the special checking accounts but the regular checking accounts, rates that were uniform with those that C&S had adopted.

Now, the argument is made, to which Mr. Justice Powell alluded earlier, that this is perfectly all right because if it hadn't been for the restrictions of the Georgia banking law the banks would have been organized initially as branches of C&S, and if they had been branches of C&S, everything that we challenge would have been permissible.

Now, these banks, as I want to repeat again because I think it's at the crux of our case, these banks are separate entities. These banks are separate entities. And as separate entities, and as separate entities, these banks have to operate the way the Sherman Act requires for separate entities. They cannot themselves eliminate and restrain competition between them.

Let me, if I may, read two sentences from the Court's opinion in the Perma Life Muffler case, in 392 U.S., where -- that was a private case, and the Court of Appeals had dismissed the Sherman Act claim on the theory that the two respondents, Midas and its parent which owned all of the stock International, were a single entity and therefore incapable of conspiracy.

And the Court rejected that argument. What it said was: But since the respondents, Midas and International, avail themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on

separate entities.

That was a case where they were wholly owned subsidiaries. This is a case where they are only five-percent subsidiaries.

Now, the -- let me turn to one other aspect of this case. The district court said, as an alternative ground of dismissing the complaint, that this was a matter that lay wholly within the exclusive primary jurisdiction of the Federal Reserve Board.

It's a rather technical argument, it turns on the language of the Banking Holding Company Act. We have, I believe, fully covered it in our brief. I just summarize in a sentence or two that the Bank Holding Act authorizes the Board to approve acquisitions, mergers or consolidations, or acquisitions of control.

And that's the only thing it gives the Board jurisdiction over.

Our challenge, as I have indicated, is not to the acquisition or to the control as such, but to the way in which they exercised it. And there's a specific provision in the Bank Holding Company Act which we have set forth at page 47 of our brief that says: nothing in this in any way prevents the liability under the antitrust laws.

And we think that whatever one may think of the role of the Federal Reserve Board in dealing with this situation,

quite clearly it is covered by this exemption.

Now, the district court in this case assumed, for purposes of discussion under the Section 7 issue, the markets that the government had posited, it didn't define the markets. And if we are correct in our submission to this Court, the case must be remanded for the district court to define the relevant markets.

And it also set forth in considerable detail the increases in concentration that would result in the event this merger took place, but then it said: all of this really is beside the point because, as a result of what has previously happened, there is no competition now between C&S and the five-percent banks.

In other words, what they're saying is that the defendants can overcome the prima facie illegality of this merger under the settled standards, because of their own violations of Section 1.

We think, as we've said in our brief, this would just stand Section 7 on its head. The purpose of Section 7 is to prevent these restraints at the outset, in their insipiency, before they develop into full-blown violations of Section 1.

Now the claim is that the full-blown violation of Section 1 somehow saves from illegality a merger which, had it not been for that violation under this Court's standards, would be illegal. And we don't think that is the way Section

7 can be read, and we think that under this Court's decisions, this merger -- the arrangements violate Section 1 and the merger cannot pass muster under Section 7.

QUESTION: Well, are you saying that each one of these five-percent situations was a violation, or only that taken all together, against this whole background, that that would violate it?

MR. FRIEDMAN: I would say each one was -- I would say each one, Mr. Justice, was; because in each case, each five-percent bank was an independent entity, and in each instance what you had was the complete elimination of competition between C&S and the five-percent banks.

Indeed, in one case, in the Bank of Tucker, that I mentioned earlier, for from 1919 to 1965, Tucker was a wholly independent bank, and then C&S acquired a five percent interest in Tucker, changed its name to the Bank of Tucker and proceeded to treat it as though it were a branch.

I think this is the clearest example; but the others never had even a chance to develop its independent entities. From the outset, C&S stifled their competitive potential.

QUESTION: Mr. Friedman, do you think we need any market analysis in the case at all, on the Sherman Act part?

MR. FRIEDMAN: I don't believe so, Mr. Justice.

QUESTION: Well, just tell me, what is the per se violation?

MR. FRIEDMAN: That they --

QUESTION: Just an agreement not to compete? Is that what you say?

MR. FRIEDMAN: An agreement and understanding not to compete at all, in any way; not just fixing prices, but not to compete in any way.

QUESTION: So if a price-fixing agreement is per se, this is a fortiori?

MR. FRIEDMAN: That's correct. That is our position.

QUESTION: Yes.

QUESTION: Well, what if a bank in Birmingham agreed with a bank in Atlanta not to compete, and in fact there was no real realistic possibility of competition between them, would that be a violation of the Sherman Act?

MR. FRIEDMAN: If there was no realistic possibility at all, if they were completely independent, I doubt it very much. But that's not this case. That's not this case, Mr. Justice.

Because C&S itself had three subsidiaries in which it owned 90 percent or more of the stock, which, conceivably, might have been competing with these banks. We don't know. But this --

QUESTION: But don't you have to know something about the market, then, in order to answer Justice White's question?

MR. FRIEDMAN: Well, I think we -- I interpreted --

QUESTION: Well, you know that much; you know that much.

MR. FRIEDMAN: Yes. I interpreted Justice White's question as meaning whether it would be necessary to define a market in the way that it's normally defined for Section 7 purposes. My answer is no, not under Section 1.

But this is all the Atlanta -- this is in the Atlanta area and these are suburban banks and there is -- there is, for example, the record shows that not infrequently people may want to -- there's a question whether you want a bank where you live out in the suburbs or whether you're going to bank in town. If it's an independent bank, you may decide to bank in the suburbs and not bank in town.

So there could have been, we think, very real competitive potential between C&S and truly independent banks in the suburbs, independent banks that were not operated by C&S as branches.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Hodgson.

ORAL ARGUMENT OF DANIEL B. HODGSON, ESQ.,

ON BEHALF OF THE APPELLEES

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

We would like to approach our argument today this way:

First, we would like to touch on some of the facts that we believe should have emphasis in order to lend importance to our responses to the government's grave charges.

Secondly, we would like to make our argument that because C&S and its associated five-percent banks have been so closely related from the very beginning without change, no lessening of competition would result from the acquisitions.

And then we would like to answer the Department's charges that these relationships are in violation of the Sherman Act. In some instances it appears to be claimed per se by virtue of the entire association between these banks, and then again it appears to be per se basically on the price information memoranda that have been discussed this morning.

Then we would like to discuss what is perhaps the most important charge, whether or not the association amounts to an unreasonable restraint, absent a per se finding.

And then we would like to conclude with our thesis that an affirmance by this Court would bring only beneficial

competitive results.

Now, the Department has very lightly and selectively touched upon some of the facts, although it has surely not misrepresented them.

I think it's important for us to place ourselves in the environment in which all of this conduct took place.

The city of Metropolitan Atlanta has exploded in the last two decade, or a decade and a half. There are no geographical barriers or restrictions to this growth, and it has been heavy. But the political response to this growth has not been comparable.

The city of Atlanta has been restrained since 1952 to a bare city limits of a mean radius of seven miles, and there seems to be no hope to get that remedied.

It is surrounded by numerous small towns and villages and small cities.

At the time the case was tried, the standard metropolitan statistical area encompassed five counties, with a rough radius of 25 miles, much larger; and today the same area is fifteen counties, with a rough radius of 40 miles.

Now, as these political restrictions on city limits are clear, it is also clear that the limitations on internal extension and expansion by banks in the State of Georgia has been seriously restricted. Because, beginning as early as 1927, no branching has been allowed in the State of Georgia,

except within the city limits where the bank is located. And until 1960 they could not expand even where they had only branches. Only 13 States continue so basolutely to restrain internal bank expansion. None of Georgia's neighbors does.

The C&S system is expansive-minded, it is aggressive. In 1928 it met these barriers by forming a holding company, which, over a period of the next twenty-odd years, formed eight majority owned affiliates throughout the State, three of which are in metropolitan Atlanta.

But in 1956 a barrier was put up again, and today no bank, no bank holding company may expand through the holding company affiliation route in the State of Georgia.

The legislative forces supported by the protectionist demands of the unit bankers in the State, as we see it, have drawn hard barriers against competitive expansion or market extension, barriers drawn sharply at the city limits.

Now, the purpose of this historic exercise is to demonstrate why this was done. There was no purpose here to do anything in violation of antitrust laws. It's simply that there was developed an innovative and entirely pro-competitive expansion procedure, which had to observe the requirements, the restrictions on stock ownership required by the State Bank Holding Company law.

So here is what was done:

Let's leave out Tucker for a moment.

With respect to the five banks which are before this Court today on the Section 7 charge, it, C&S, organized these new banks; it didn't participate with others in doing so, it organized them in areas where banks had never been before, and beyond the city limits of Atlanta, where C&S could not go and could not compete. And could not, until the law was changed, allowing these applications for merger.

Second, it did so in instances where other local interests had tried and failed -- and this is in the record -- had tried and failed because of absence of significant financial footings and banking know-how.

It was done in every instance with the expectation of everyone involved, all of the shareholders -- and the record is replete with this -- the neighbors, the competitors all knew that it was formed this way, under C&S sponsorship, to be managed by C&S so far as law permitted, ultimately to merge into C&S.

And this procedure was supported by the responsible bank regulators, State and federal, realizing that the strength of C&S financial and managerial support would be behind these new little banks and thus would insure their solvency and their success, and serve the convenience and needs of these communities, which otherwise were not being served. And the record is clear that others had tried.

These historic organizational factors are unique, and they were complete from the beginning. They did not change. The Department said this was competitively insignificant when made; the district court found there were no changes in this respect and the burden was on the government to prove it if it were so from the time they were formed until the time this case was tried.

I would not mention the Stone Mountain Bank except that it's been brought up here, because the record is so clear, so clear. C&S did not organize that bank, it had been in existence two years before any affiliation occurred. C&S was asked by the Stone Mountain incorporators: Do you have anyone who can help us?

They said, Yes, sir, there's a fellow named Arthur Drew who used to work for C&S, he's retired, he might help you.

He was the motivating force there. It is clear that the McCurdy family owned 35 percent of the stock of that bank. It is also clear that there was continued resistance to support and advice from C&S to that bank, and the district court found that it was not a comparable circumstance. Just as it did with the Peachtree Bank and Trust Company, the trust company's affiliate in the Chamblee area, which likewise had serious distinguishing characteristics which do not appear in this case. They are not appropriate for

argument that these banks would break away, would become independent competitive forces; and the district court found that as a fact, also.

Now, during the decade of the Sixties, all six of these little banks, including Tucker for this purpose, retained the following important characteristics which further distinguished them:

The ownership of shares, stock shares, over and above that held by the holding company, the five percent permitted by State law was spread among many individuals, there were no blocks.

Any concentration being in the chief executive officer of the five-percent associated bank, and many officers, directors and friends of C&S generally, who were aware of the purpose and intent of this program to supply these services in these areas.

These five-percenters were authorized to use the C&S name and share in joint identification with C&S services, advising the public they were competing as C&S banks.

Now, the point is made -- this happened later --

QUESTION: This was in no way a violation of State law to use the C&S name?

MR. HODGSON: No, sir, if Your Honor please, it is not, as long as you get consent from the Commissioner of Banking Finance, then Superintendent of Banks, it is perfectly all

right. Just as it is for the Coca-Cola Company to authorize the Coca-Cola Bottling Company of Thomasville, the Coca-Cola Bottling Company of Albany, and so forth.

QUESTION: Well, those are franchisees.

MR. HODGSON: Very similar, if Your Honor please, in an area where, at this point in time, C&S could not go. Could not have its own direct operation.

QUESTION: Yes. Right.

MR. HODGSON: Let me say, something has been made of the fact that the name was not part of the original package. Well, for most it was, the later ones. And the earlier ones, it was no surprise to anyone. The record is complete, that all knew these were C&S banks. The Citizens Bank of Sandy Springs, for example, had its lollipop, C for Citizens and S for Sandy Springs. There was no doubt in anyone's mind that these were C&S banks, owned by the -- by other stockholders because this was required; but operated by C&S in order to supply these services there.

A third critical distinction is that full C&S services and advice were regularly and systematically supplied, and no one offended the requirements of corporate law and the fiduciary duties imposed upon the directors and officers to serve their shareholders; but this information expertly was supplied by C&S to these little banks, including categories of services that were not routinely furnished to

correspondents. There were no secrets about these services, none whatsoever. Anyone can see any of them they want to see.

Most importantly, these services were expected and relied upon by these little banks. Otherwise, the regulators would not have issued charters in the first place. And, as I suggested, there was the express intent and expectation to merge just as soon as State law, the restrictive branching law or the restrictive holding company law, permitted this to be done de jure.

May we observe at this point that when the General Assembly of Georgia allowed branch expansion into the counties, which isn't much, immediately, indeed foreseeing this in January 1, '71, these applications were filed. And they were described in the application, a copy of which went to the Department of Justice, as being virtually operated and directed as de facto branches. There was no secret about it then, as there had never been.

This was the very language which the Department used before this Court four years later in the Marine case, to describe what it called a sanctioned procompetitive procedure in instances where de novo branching, de jure branching was denied.

The regulators knew it, and all of the competitors of C&S and these banks were precisely interviewed by the Commissioner of Banking Finance, to see whether or not they

had objection, and they had none. Why? Because they were C&S banks from the beginning.

And then the Department filed this suit, which stayed the acquisitions, charged for the first time, the first news we had, that these were charges of having engaged in violation of Section 1 of the Sherman Act.

We argue, of course, that because C&S and its associated banks have been so closely related from the beginning, that no lessening of competition could possibly result from these acquisitions.

The Department relies on market statistics. You heard the argument this morning.

But the Department neglected to present any evidence relating those statistics to the circumstances of this case, so far as Sherman 7 is concerned.

Most importantly, its own economic expert, Dr. Skogstad, testified that he did not take into account the relationship between C&S and its associated banks when he was examining the economic consequences of the proposed transactions. That which he did not take into account is at the heart of this case.

Our case is C&S market shares, for purposes of applying the standards of the Bank Merger Act or of Section 7 of the Clayton Act, have always included the market shares of its associates. Since the five-percent banks have never

competed as anything but C&S banks.

They were created de novo by C&S for that very purpose. They are part of a single enterprise in fact and in substance, though they take the separate corporate form only to avoid violation of the State Bank Holding Company law.

And without that organization, the evidence is clear that the separate competitive forces in DeKalb County and beyond the city limits of Atlanta would not be in the marketplace today.

Put another way: at the very time that these small banks were organized, a de facto merger took place. De facto by open and notorious behavior and declared intent not de jure because of restrictive State law. The form being used only in order to allow market extension without violation of that law.

The substance was to produce de facto branches, and for purposes of applying the antitrust laws which deal with competitive and anticompetitive purpose and effect, the teachings of this Court tell us to look to substance and not form. Indeed, the Department's own authorities take us this way; and indeed this is the very procedure the Department sanctioned in Marine.

This is what it said: Banks in the State of Washington have achieved de novo entry into areas foreclosed to de novo branching by sponsoring the organization of an affiliate bank

and later acquiring the bank.

Since the associates were created by and have always competed as C&S banks through this entire history, for every intent and purpose, there is no possibility that a formal corporate reorganization will produce anything but the same corporate substance and the same competitive statistics.

The Department said that when the original sponsorship of the new banks and C&S commitment to the chartering authorities was made, this did not violate the Act. The obligation on the part of C&S and the expectation of these little banks that C&S would supply them full management counsel and advice, the Department declared was competitively insignificant.

The district court found later the government has not carried its burden of demonstrating any substantial increase in the degree of control or change in quantity of competition between the date of initial acquisitions and the date of trial.

If competitively insignificant when created, and if all that's happened since that time has been the carrying out of the original obligations, openly declared and known, the perpetuation of an association must likewise be competitively insignificant where no change has occurred.

The district court so found.

The only thing that would prompt any further

argument before this Court today is the charge made by the Department that the relationships that are involved here violate the Sherman Act, and so we turn to those charges.

As we do so, we ask the Court carefully to notice the Department's total failure to prove a nexus between the alleged Section 1 violations that are so broadly and vaguely talked about here today, and the Section 7 complaint.

The Department assumes -- take away the behavior which it's hard to describe, it charges violates Section 1 and the cement holding the association will break apart, and C&S and its associated banks will compete aggressively with one another.

The assumptions are not proved anywhere in this record, and they are not logical. The name and the public identification would not be removed; the associated operations would remain; the expectation of being merged and the realization of being part of the C&S system would remain; the nature of the competitive posture in the marketplace would not change. They would continue to function as C&S banks, and the public and the competitors would continue so to see them as they always have, and to use them that way. a single competitive force in separate markets, as they have always been.

Even if the issuance of these memos, that so much is made of, or the obtaining of the information from C&S related to pricing and hours were condemned, even though it's used only

as a part of a large bit of information, that these small banks exercised to determine their own competitive strategy, that would not affect the relationships, not because the conduct is in this case trivial, which it is, but because the associate bank officers would continue to determine their charges and their rates independently with their boards, as they have testified they now do.

Finally --

QUESTION: They would be capable of this emancipation that I discussed with Mr. Friedman, would they not?

MR. HODGSON: Oh, Mr. Chief Justice, indeed they would be capable of this emancipation, as they always have been. As I believe in almost any similar circumstances; but the evidence is clear from all parties in their polls, and their testimony was broad spread, and comprehensive shareholders, directors, officers, employees, everyone alike, that there was no probability of this.

Before the FDIC, this question was raised, that's a very tough agency over there, and they raised this question, the prbability of disaffiliation, and we supplied tremendous amounts of information to demonstrate that this was, though possible, was absolutely improbable, which is the standard that this Court must apply. This same procedure was followed through in the district court.

Surely, the possibility is there. But this is no

Stone Mountain situation. This is no Peachtree Bank situation. No one wants them to break apart. They all like it like it is. These are C&S banks. They are C&S banks just as much as a branch would have been, had it been allowed to go out there from the beginning.

There is absolutely no difference, so far as the laws under which this case has been tried are concerned.

The district court -- sir?

QUESTION: Do you know -- does the record show whether there were restrictions on the transfer of the bank stock?

MR. HODGSON: Restrictions on transfer of bank stock?

QUESTION: Internally, when the bank -- when the stock was issued to certain people, --

MR. HODGSON: Oh, no, sir.

QUESTION: -- were there any buy-and-sell arrangements or not?

MR. HODGSON: There is no evidence to that effect, and I can assure Your Honor, so far as I know, there are none.

QUESTION: So they thought it could be freely transferred?

MR. HODGSON: Oh, yes, sir. Yes, sir.

QUESTION: Unh-hunh.

MR. HODGSON: Freely transferable stock, no limitations, and not --

QUESTION: So when people -- and people sometimes need money, they sell their stock, and sometimes they die, and so the stock may not be in the same hands forever.

MR. HODGSON: Yes, sir. But I believe that such could have been the case in Trans-Texas, of course, which really proves another point. Stock ownership alone may not be so strong a cement; in our judgment it's not nearly so strong a cement as the circumstances of this case.

QUESTION: The economics of it.

MR. HODGSON: But the -- sir?

QUESTION: The economics.

MR. HODGSON: Yes, sir, the economics of it.

In this case, I should say, though, that the record is clear that there is very little movement -- there was very little movement in sales of this stock in the period of --

QUESTION: What about the hypothetical bank that Mr. Justice Rehnquist, I think, asked you about, the bank over in Birmingham; suppose they set out on a plan to buy up all of the stock that got available in any one of these five banks, against the possibility that one day they might want to enter that market?

MR. HODGSON: I don't believe much would be sold, if Your Honor please, but it's totally hypothetical. There's a series of affidavits in the file in this case, that we got up for FDIC, we went around and solicited all the shareholders,

and they all affirmed that they liked it with C&S and they weren't interested in selling, and they know C&S management and they know the success of C&S in the State of Georgia. They know C&S knows its business.

I really believe they would not be inclined to sell. It's kind of hard to round up that kind of stock.

Most importantly, we --

QUESTION: I suppose it's also very difficult, that hypothetical question, for you to answer or to meet. Because it is possible, isn't it?

MR. HODGSON: Oh, if Your Honor please, of course it's possible. And I could not responsibly stand here and argue to the other -- to the opposite, as much as I would be inclined to believe.

QUESTION: It is also a fact, an economic fact, in some localities that when banks of this kind are organized the stockholders look down the road to the day when laws will permit mergers, and then they will acquire the stock of the C&S bank.

MR. HODGSON: If Your Honor please, there is express evidence in this record to that effect. These are the affidavits of these shareholders that we obtained, at the suggestion of FDIC. And they were so put before the Court.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch.

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

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AFTERNOON SESSION

[1:00 p.m.]

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

ORAL ARGUMENT OF DANIEL B. HODGSON, ESQ.,

ON BEHALF OF THE APPELLEES -- Resumed

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

May we conclude our argument with respect to the Section 7 charges by reminding the Court that the district court's finding, just like that of the corporation before it, foresaw no probability of a change in the relationship, which is a finding exactly like that of the district court in General Dynamics, we submit, where the Court foresaw no new co-reserves being found. And likewise that finding, unless it's charged as being clearly erroneous, which it has not, should be affirmed by this Court.

Turning to the Sherman Act charges, let me say that it's our strong view at the outset that this is just not a Sherman Act case. And we believe that through our briefs and argument we can satisfy the Court that it's nothing more than

a means the Department would use in this case to frustrate these mergers.

Now, let us look at the charges that the Department makes as being violations.

First, sort of a two-headed charge, the best we can determine it, of a per se violation.

Now, preliminarily, may I say one other thing? We are not asking this Court for any exemption or pardon from any Sherman Act violations.

But we do urge this Court not to extend its per se doctrine to the totality of the procompetitive and beneficial behavior that the record discloses in this case. And we ask this Court to restrict the application of the per se doctrine to such pertinent issues conduct as real price fixing, real market allocation, and real boycotts.

Otherwise, to so extend it, it occurs to us, would require that a merger agreement itself would become a per se violation, and obviously that cannot be the case.

Now, we would think that a real per se violation is glaringly evident to anyone, especially to the public officers charged with enforcing those laws and to the competitors of the charged defenders. We all know that is where they are first ascertained.

They were and they are glaringly and immediately evident in all of the cases cited by the Department to prove

conspiracy in the absence of an express agreement.

Why?

Because the behavior reflected in the records in those cases so clearly reflect a clear, flagrant, naked and offensive purpose and effect, either to fix prices to restrain trade, allocate markets or customers, or eliminate competition. There is none such here.

Much less a combination of separate firms to maintain prices above a competitive figure. A class definition of a cartel.

Now, if a per se violation exists by virtue of the totality of behavior that was openly involved in the associations of this case, well known to the regulators and the public alike, why did not the Department see it, and at least call attention to it when it participated in 1968, now, in the Federal Reserve Board hearing?

It can only be because it was not perceived as such. It simply wasn't recognized as such.

And we cannot perceive it as such today.

It was to this very argument I make that the district court found the Department of Justice acquiescence in the 1968 in an understanding involving the more substantial elements of what it now claims to be Section 1 violations, is indicative to at least a small degree that such practices were not so violently anticompetitive as to constitute per se violations.

Inaction, the district court said, by the Department of Justice, with such knowledge, would have been a violation of its public duty and the court does not impute such negligent inaction to it, nor do we.

The very same associations, the very same transactions involved in this case, with these five banks, was involved in 1969 with the acquisition of a small bank called the C&S Belvedere Bank. What did the Department perceive then? Sherman Act violations? Not a one.

And yet we must concede that none were perceived because the factors were the same. And the Department noted that the Citizens and Southern Holding Company has had full management control of Belvedere Bank since its inception. Going on to say, the situation is not unlike de novo branch banking in those States where such activity is lawful.

The Department noted no violations in its first competitive report in this case, when it noted the reorganizations were essentially internal and the parties had never represented independent competitive forces. A competitive posture, the Department now says that C&S and its associates, in separate markets, must take toward each other, just for one reason only: just because they are organized in the form of separate corporate bodies.

And even when the Department reversed its competitive position letter in February of '71, it did so not on the grounds

that the relationship and the behavior between the persons violated the Sherman Act; because of the very opposite: it concluded that the associated banks were not necessarily controlled by C&S.

Now, we have never understood the consistency of the Department's position with respect to our transactions, but that's really beside the point. We want to make it clear today that we do not charge the Department with bad faith. On the contrary -- and we surely do not claim an estoppel. I doubt it would be available.

But we cite these instances to clearly and unequivocally demonstrate that no Sherman Act violations were apparent, even to the expert eye, in the sponsorship and managerial relationships that are part of these associations; much less per se violations.

If not then, not now.

Indeed, the first time that Sherman was charged was in the complaint, denominated vaguely a close working relationship. In the Jurisdictional Statement to this Court, the charge became: interchanges of information, personnel and other resources, leading to lack of competition.

We say there never was any. You could not lead to it if there never was any.

The ingredients of a per se charge did not even then appear, and the nature of the restraint did not appear.

Only in the brief before this Court did we first hear that we were charged with a per se violation.

The brief says in one place: not merely the exchange of past price information which affects current pricing practices -- that's contained in its progeny -- but a mutual understanding to fix actual current prices, a classic per se offense.

Citing Socony-Vacuum and Parke Davis.

Not even the most biased reading of the evidence in this case will reflect a single factual circumstance similar to Socony-Vacuum and Parke Davis, or any of the other per se cases cited, Masonite, Bausch & Lomb, Kiefer-Stewart, General Motors, Singer, and Perma Life. they are all flagrant violations. Clearly so.

In every one of the sets of circumstances in those cases, the sole purpose and the overwhelming effect was to fix prices, really fix them, to maintain markets, allocate customers. It strains reason to suggest that the relationships here between C&S and its associated banks that it formed, many of these services at the heart of the correspondent bank relationship, many of them essential to franchise dealings, many of them the focal point of management consultation services, indeed anyone's imagination familiar with the commercial world can come up with many similarities to these sorts of relationships.

All of them in this case calculated to supply new competitive forces to new markets, and if it's followed by such advice as to make the successful operation of these little banks as associated competitors in their separate markets, it strains reason to suggest that such relationships could possibly be found to be conspiracies in restraint of trade, much less of such predatory and unconscionable character, so lacking in redeeming virtue as to allow no inquiry into the purpose or effect or the reasonableness of the association, a conclusion entirely necessary for their being categorized per se.

Take the entire relationship as an onion, peel back the layers of explicit behavior. Even the Department admitted here today that each layer, standing alone, is no violation; possibly the pricing memoranda which we will come to.

Yet somehow the whole onion, taken together, becomes a cartel.

Use of the common name is no violation. This Court has allowed this in Topco. Loose common ownership over the bulk of the stock is no violation; Trans-Texas and many others.

Nonstabilizing furnishing of price information is not a per se violation, container and progeny.

Surely the supply of personnel, operation, security, accounting, and all of the other services cannot be violations

of the Sherman Act. Anyone with the time -- and this Court hasn't the time, I fear -- but anyone with the time, going through two volumes of the Joint Appendix, the Consumer Credit Guide that inadvertently got in the record, but I'm glad it's there now, if you have time to thumb through two volumes, being just the Consumer Credit Guide, look at the multitude of information that has to be available to a young bank, a small bank, in order to compete in today's complex, highly regulated market.

How can this be a per se violation?

The district court found it nonviolative and should be affirmed. But now the Department charges that certain memoranda, circulated to five-percent banks -- and, incidentally, everyone else in the system -- relating to rates, charges and hours, were conclusive evidence of price-fixing and therefore a per se violation.

Now, if it were the law -- <u>if</u> it were the law that the existence of such memoranda, standing alone, creates an irrebutable presumption of price-fixing, in violation of the Sherman Act, then, coupled with authorities holding that a per se violation is such a violation as can have no redeeming virtues, the district court would summarily have found that this particular behavior was unlawful and he would have enjoined it.

He found to the contrary.

We know of no law or decision, further, that says that

such memoranda, standing alone, create an irrebutable presumption that a conspiracy to fix prices exists, or that any other per se violation has been proved.

Further, it is clear from the record that these memoranda alone are but a small and unimportant aspect of the entire relationship between C&S and its associates, much more important to the branch banks to which they went. And their prohibition would in no way, if you would eliminate them all, affect the closeness of the relationships or the propriety of the acquisitions.

What rational purpose could have been served by C&S and these associated banks making an agreement or having a tacit understanding to fix prices in these separate markets? The Department has suggested none, and we can conceive of none. We can only believe that it would be harmful.

There was no evidence whatever that the occasional transmissions of this information relative to price in any way resulted in stabilization.

Now, C&S in its system has always been extremely conservative and cautious about the Sherman Act, and although one could well make an argument that this being a single enterprise, sorts of conduct that are generally prosecutable under this Act couldn't occur.

But to be doubly cautious, memoranda have been consistently going out, and they are in this record, obliging

separate entities to make their pricing and their charging decisions separately and independently. All were reminded frequently of the criminal illegality of agreements between banks relating to prices.

And everyone whose testimony was taken in this case, without exception, the testimony of every principal officer of the five-percent banks, of directors of the five-percent banks, said that out of an abundance of caution we set our own pricing standards and our own charges. Sure, we use the C&S information, it was handy, and they are pretty good, too; and we took that into account. But we also probed the competition. We took the various financial journals. We knew what was going on at the Fed, and we knew what was going on particularly with respect to our competitors. And then we set our prices.

Furthermore, a close look at the evidence discloses that while the government points an accusatory finger at these memos which, standing alone, might have been a circumstance that could lead to a determination that you had a violation, it neglects to note that these memoranda were but the smallest part of the whole continuing advisory service to all branches, affiliates and associates.

It fails to note that the information contained in these memos was only a portion of the marketing information obtained by the associate banks in setting their prices. It fails to note that there is a multitude of evidence that all of

these men well knew what the service charges deposed on deposit accounts, and the interest paid on savings accounts were among all of the competition. And changes of such rates and changes of such deposit charges are typically announced in full-page newspaper ads and on radio and TV spots. They are no secret.

The Department fails to observe that the evidence is clear in this case that shows extreme variations of rates charged on loans, and substantial variations on service charges and interest paid, as between the C&S and its associates.

Now, Mr. Friedman has argued about Mr. Harris' testimony about consulting downtown about something. Allow me, if I may, to give you some other of his evidence, and the best way I know to do is to put this to you this way -- and, if you have time, to read the depositions of each of the bank officers of these little banks. It will be extremely profitable. You will see that this is a charge without substance.

Question to Mr. Harris:

"How did you decide on the initial service charges on checking accounts when the bank opened?

"We took those that were used by every bank in Atlanta." Canvassed the market.

Question: "Before making a change in service

charges on checking accounts, would you also review that with C&S?

"Yes. We would, but we have to review more with the area generally than with just C&S because I can't have a charge out there that's varies too widely from the other banks because people will move their account from one bank. After all, all the banks have offices around there, and I've got to stay pretty close to what the downtown banks charge."

"I used C&S every way possible to help in making decisions. I conferred with them on many points. Then we'd discuss it with the directors and we'd try to get all the information from whatever source we could. We took every banking magazine, periodical, trying to stay abreast of what was going on. So that with many of these things it was just part of the movement in the money market, and you had to follow it."

This testimony is not just an earnest denial of no violation or no unlawful conduct, it's an honest report of telling it like it is.

Information obtained from C&S along with information obtained from many other sources, competitors, the market generally, and publications, was used to arrive at independently established rates, charges and hours.

I would not have mentioned this, but Mr. Friedman makes much of what we thought we had put to rest in our brief this morning.

The change by all of these banks suddenly to a lower service charge.

He didn't mention it was lower, but it was.

Now, the testimony is clear and it's specifically referred to in our brief, that here's what happened:

The Trust Company of Georgia, a major competitor, came out with full-page ads one day that said: We are reducing the service charge on our deposit accounts from a minimum of 500 to a minimum of 250.

Well now, what do you think everyone did when they saw that?

They said: Good Lord, they're going to take all our accounts; we've got to find out about this.

And they all scurried around and found out what happened.

What did C&S do? Now, C&S has a more significant research department than do the five-percent banks. It determined that this could be done without a significant threat to the profitability of the operation of these deposit accounts, and it so advised everybody.

So what did they do? They met the competition of the lower service charge.

Now, that's what happened in this case, if you really examine the record.

I do not believe that that is the sort of thing

that this Court is going to condemn as a per se violation of the Sherman Act.

The Department has cited no authority that requires this behavior, either the entire associate relationship or the furnishing of these memos be found a violation of the Sherman Act, much less per se.

Nor do the facts permit such a conclusion, had the district court been so inclined. We would have been here on te appellant's side.

But, instead, the district court found these activities, however, do not amount to collusive price-fixing.

If there is no per se violation, then the question becomes: Have the parties so combined as to produce an unreasonable restraint?

The Department argues, just because apparently -- just because they are incorporated separately, they are obligated to compete vigorously, or at least that C&S should abandon its sponsored banks.

No authorities are cited for this proposition. And totally ignores the single reason for the choice of the separate corporate form, which turns out to be a nuisance.

That is, to avoid the restrictive State branching laws that prevented C&S from competing.

The only response the Department produces to fill the void of any legal mandate for C&S to compete with its own

associates consists of cases holding, first, that the corporate relationships are not determinative of the applicability of the Act -- that suits us -- or, second, where corporately related entities combine to enter into express agreements to commit naked per se violations of the Sherman Act by fixing prices and allocate territories and markets, while holding themselves out to be competitors with one another, they will not be allowed to defend behind t-e veil of corporate separateness.

It would not well serve antitrust principles to leap from authorities which condemn flagrant and clear violations which were defended only by a plea of common ownership -- that was the only defense -- to a condemnation of the entirely beneficial and procompetitive associations of this case, because the entities are separate in form.

The Department asked this Court to pronounce an unreasonable commitment to form over substance, an area traditionally devoted to substance over form. A totally novel doctrine that would require one company and its de facto subsidiaries, held out to the public to be a subsidiary, with the same name, aggressively to compete with one another.

Is it being asked to beat its little protogee's brains out with vigorous competition? Confusing the public, delighting the competition, and amazing them somewhat, infuriating the regulators who had depended upon C&S to furnish

this service, betraying the shareholders, officers, and employees of the sponsored bank and destroying the bank.

Of what purpose would this sponsorship be under those circumstances? What would be left with which ultimately to merge?

Or should it be supported and competed with at the same time?

Or should there be, maybe, just a little bit of competition, enough to keep the wolf from the door?

There is no element of reality in this position. What rational, expansive-minded but well-managed, bank or holding company would follow such a course? How would it ever develop that this bank could be merged?

We urge this Court also to recognize that no floodgate of adverse circumstances would occur if this Court affirms; this plan, this unique plan, no precedent or anything else would take place.

And, finally, this can't ordinarily happen again. If someone wants to go this procedure again, they've got to go to the Fed under Section 382, and after making application, get approval for the formation of subsidiaries, with the Department notified, who can come in and participate; if they don't like it, they can file a petition for review to the nearest circuit court.

No floodgates will be opened, only beneficial results

will occur here. And this unique little case will take its place on the dusty shelves of this Court, and I dare say never be looked at again.

Thank you, Your Honors.

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

Mr. Friedman, do you have anything further?

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FRIEDMAN: Yes, Mr. Chief Justice.

I'd like to just answer two or three -- say two or three things.

First, we are not of course suggesting that there should be any court decree ordering these banks to compete. All we're asking is that a court decree stop these restraints upon competition that have been imposed through this relationship.

The reason we didn't challenge this relationship in 1968, when the Federal Reserve Board staff had an investigation, was we didn't know all the facts at that time. Indeed, Mr. Lane told the Federal Reserve Board hearing that they had always followed the philosophy of influencing but not controlling these banks.

It wasn't until we really began to investigate this case, after we received notice from the FDIC, that these applications for merger had been filed, that we discovered all

of the facts.

Now, I also want to make it very clear that we have no objection to the organization of these banks, to their assistance in organizing those banks. And, indeed, in the Marine Bank Corporation case, to which reference has been made, there our argument was this was a permissible method of a bank entering into a new market by sponsoring a new bank and ultimately perhaps acquiring it.

But sponsoring a bank, enjoying a normal correspondent relationship with it, is a far cry from what C&S has done in this case.

Now, the argument that's been suggested, that this whole thing is an exercise in futility, because if we were to prevail there's no reason to think that the C&S five-percent banks would disassociate from C&S, things would be continued in their previous manner; I think the answer to that is if we are correct in our argument that this arrangement violates the Sherman Act, steps will have to be taken to terminate this kind of a relationship. They are not going to continue in the same way despite a holding that the arrangement violates the Sherman Act.

They are undoubtedly going to have to stop using the name, they're going to have to stop reviewing their loans, they're going to have to stop having a director sitting as an advisory man on the board of directors. There are going to be

some changes in the relationship.

And once these changes have taken place, it may well be that some of these five-percent banks that are so satisfied with the present relationship may take another look at it, they may then decide that without this crutch, without this controlled operation by C&S, maybe they'd be better off in an independent basis.

Now, whatever the reasons there may be for C&S wanting these banks not to compete, the question was put: Why on earth would C&S want to stop these banks from competing?

The fact is, for whatever reason, that's exactly what they have done. They have an arrangement between them under which the banks don't compete, and they, in effect, tell the banks how to compete.

This is a -- we challenge the basic underlying arrangement. You can't segmentize an arrangement eliminating competition by saying, Well, this memo didn't do it, and that piece of paper doesn't do it. I think you've got to look at the totality of the relationship.

And when you look at the totality of the relationship, I think the fact that the five-percent banks are independent banks, that they are not branches of C&S, they were started originally as independent banks, they have always -- C&S has always claimed that they are independent banks. C&S

says, We don't control these banks; they're independent banks.

But when you look to see how they behave, in the light of their understanding with C&S, we see they're not independent banks at all. C&S treats them as though they were branches. They're not branches, they're independent entities, with independent duties and responsibilities, and as independent entities they cannot understand and agree with C&S to eliminate all competition between them.

Thank you.

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

Thank you, Mr. Hodgson.

The case is submitted.

[Whereupon, at 1:26 o'clock, p.m., the case in the above-entitled matter was submitted.]

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